

## Reflections on the Declaration of 1789

1. Last week in Budapest I discussed the debates that led up to the adoption of the Declaration of the Rights of Man and the Citizen in 1789. I also tried to spell out the internal structure of the document. Today I shall present some reflections on the Declaration. These will include observations and criticism by contemporaries, as well as comparisons between the Declaration and similar documents. I shall conclude with some comments from my own normative perspective.
2. In 1789, France had important colonies in the West Indies based on slavery. Art. 1 of the Declaration is starkly inconsistent with the existence of slavery. The French framers were as fully aware of this fact as their American counterparts were of the contradiction between the assertion in the Declaration of Independence that all men are created equal and the existence of slavery on American soil. Yet in both countries the economic benefits from slavery induced all sorts of intellectual contortions and hypocritical attempts to hide the facts behind verbal camouflage.
3. In France, the colonists and merchants succeeded in blocking any discussion of the slave trade and the subventions during the whole tenure of the assembly. As a slaveowning member of the Committee of the Colonies wrote to his constituents, “the almost general intention of the Assembly is to find a turn of phrase which does not put the Assembly into obvious contradiction with its principles”. The

reason for these maneuvers was that with few exceptions the constituants saw the maintenance of slavery as a necessary evil. Because it was necessary, it couldn't be criticized; because it was evil, it couldn't be defended. It could not even be asserted. In 1791, Robespierre successfully insisted on the replacement of the word "slave" by "unfree person" in one of the laws adopted by the Assembly.

4. In his newsletter Le Courier de Provence Mirabeau drew attention to this inconsistency from the very beginning. He ridiculed the idea that slaves born in the colonies are "born free", that those taken by force from their homeland "remain free", that they are "equal in rights" with those who purchase them, mistreat them and exploit them, and that "the anti-social distinction which exists between them is grounded in the common utility".
5. The idea of common or public utility stated in Art. 1 is never clarified. It could mean either "the utility of each" or "the utility of all". In the first case, social distinctions would be justified only when they benefit each individual, including those at the bottom of the relevant scale. Even children benefit from the exclusion of children from certain activities. In the second case, distinctions are justified when they increase the total welfare or utility in society. The problem is that the first situation is extremely unlikely to obtain, whereas the second might justify slavery if the benefits to the slaveowners were sufficiently great. Historically, slave-owners have tended to argue that slavery is better for everybody, including the slaves themselves. It is not clear which interpretation Mirabeau had in mind when

attacked the idea that slavery might be justified by the common utility.

6. The colonies also created problems for the implementation of Art. 6 in the Declaration. One issue was whether “hommes de couleur” in the colonies, meaning (free) mulattos, should have the right to vote in the electoral assemblies if they satisfied the criteria for being an “active citizen”. The mulattos, who had full civil rights, were often slave owners themselves. The planters and their spokesman in the assembly, notably Barnave, argued that granting mulattos full political rights would trigger a mass uprising of the slaves.
7. Another issue was whether the representation of slaveowners in the Assembly should be based on their own numbers or on the total number of inhabitants, slaves and free, black and white. In a brilliant speech Garat (the younger) demolished the claims of the planters, concluding that he would reserve judgment as to the number of deputies they were entitled to until they had declared that they would abstain from voting on all issues related to slavery. In the end they nevertheless obtained six deputies, three times more than their proportional share.
8. The main difficulty with Art. 6 in the Declaration arose with respect to voting and eligibility on the French mainland. By adopting a restrictive definition of “citizen” in that article, it might be possible to limit the right to vote and to elective office of the propertyless. This is what the Assembly did in October 1789, when it adopted a system of weak tax-paying requirements for voting and strong tax-paying requirements for eligibility. In the debates, Robespierre denounced in

violent terms the contradiction between the limited suffrage and eligibility on the one hand and the Declaration on the other. In the October 1789 debates he stated that neither suffrage nor eligibility should be subject to any economic qualifications. In 1791 he made a frontal attack on the very idea of a “passive citizen”, asking “who can be so stupid as not to see that the word cannot change the principles, nor resolve the difficulty, since to declare that some citizens will not be active, or to say that they will not exercise the political rights attached to citizenship, is one and the same thing”. Here, Robespierre shows himself as adept at unmasking hypocrisy as at perpetrating it. If the status of a passive citizen and of a non-citizen is one and the same thing, so is that of an unfree man and a slave.

9. The hostility to the 1789 legislation induced a largely cosmetic reform in 1791, when the assembly decided on low tax-paying requirements for primary voters and for deputies, while very stringent economic qualifications were required for the electors who were to be chosen by the primary voters and in turn would choose the deputies. In this way, one could assert with the appearance of truth that all or most taxpayers could vote and be deputies, while at the same time making it very likely that those effectively chosen as deputies would belong to the wealthy group that chose them.
10. Not all reactions to the contradiction were hypocritical. In 1791, an anonymous notice in the official journal Le Moniteur offered a response to the claim that “France now has citizens that are passive or subject”. The response asserts that in contradistinction to countries where some individuals are condemned to lifelong subjection, “there

is no French citizen who by a few years of work and saving cannot make himself competent to fill all public functions”. In other words, rights can be universal and yet conditional if anyone can satisfy the conditions by his or her own efforts. Whatever the motivation behind the argument, it is not intrinsically absurd.

11. For a contemporary example, consider the right to drive a car. Each adult person possesses this right, but it is conditional on passing a test to obtain a driver’s license. Most people can do so if they try hard enough, but some may not be able to. There is no injustice in denying the right to the latter. Similarly, it would not be intrinsically unjust to subject voters to literacy tests or to require them to answer some basic questions about the political system, although it is easy to think of circumstances in which these practices would indeed be unjust. When Sieyes proposed to include a right to assistance for the needy in the Declaration – a proposal that was not adopted – he added that in return the individual had to “subject himself to the orders of society”. In the language of today’s debate, there would not be an unconditional basic grant. I shall return to this issue at the end of the talk.

12. We can gain some more insight into the Declaration by considering Jeremy Bentham’s acid comments on several drafts and on the Declaration itself. As is well known, Bentham was strongly opposed to the idea of natural, sacred or inviolable rights. In his most famous statement, “natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.” In another passage he refers to the tendency to seek a spurious natural

parentage for rights that properly understood are “the child of law” as “the second French disease”, the first one being syphilis. Some of his charges against the Declaration are manifestly unfair and unfounded, as his claim that Art. 1 and Art. 2 taken together imply that property ought to be equally divided. What these articles say is simply that all properties ought to be equally respected. Yet in his several manuscripts on the topic Bentham also makes a number of acute and interesting observations, which I shall briefly canvass.

13. One recurring theme is the tendency of the Declaration to use the verbs “can” and “is”, as for instance in Articles 2 and 7, instead of “ought”. This reflects of course his aversion to the idea that there are natural rights. Another theme is his charge that by justifying past insurrections the Declaration invites future ones. In fact, he states more extravagantly that the intention or “object” of the Declaration was “to excite and keep up a spirit of resistance to all laws, a spirit of insurrection against all governments”. In a more moderate form, the argument is that a Declaration adopted prior to the laws will have insurrections as a probable effect.
14. These statements were made in 1795, and may have been tainted by retrospective wisdom. As I mentioned in my talk in Budapest, however, Mirabeau and Malouet had already made similar claims in 1789. In his Reflections on the Revolution in France from 1790, Burke said that “The soldier is told he is a citizen and has the rights of man and citizen. The right of a man, he is told, is to be his own governor and to be ruled only by those to whom he delegates that self-government. It is very natural he should think that he ought most

of all to have his choice where he is to yield the greatest degree of obedience. He will therefore, in all probability, systematically do what he does at present occasionally; that is, he will exercise at least a negative in the choice of his officers.” Lack of discipline in the army was in fact an endemic problem at the time.

15. A third recurring theme is the danger of limiting rights by the law. Since a main object of the Declaration is to constrain the legislature, it is perverse, Bentham argued, to allow the legislature to set limits to the Declaration. With regard to Art. 10, he notes that by virtue of the limits set by “public order” it is so open-ended that even Louis XIV would not have hesitated to receive it.
16. Bentham also argues that the limits on rights stipulated in Art. 4 are too narrowly defined. For one thing, he writes, it deprives “legislators of all power of repressing [...] any acts by which no individual sufferers are to be found”. A deserting soldier, for instance, does not “injure the individual rights of any one assignable individual”, and yet one would not want to establish a right to desertion. For another, he objects to principles that “abolish all laws against excesses which are prejudicial to other no otherwise than in as far as they are prejudicial to the party himself who gives into them, such as drunkenness, sacrifice of virginity without marriage, suicide, abortion at an early period of gestation, idleness coupled with indigence, and the like”. At the very least, he says, “infants and persons insane” must sometimes be coerced for their own good. I shall return to the issue of paternalism at the end of the talk.

17. Bentham further comments on the juxtaposition of equality and proportionality of taxation in Art. 13. As he notes, the only way in which taxes can be both literally equal and proportional is if property is equally divided among the citizens. Strictly speaking, the French text, that citizens ought to be taxed “en raison de leurs facultés”, does not use the word “proportional”, but it is at least a reasonable interpretation. If, however, we interpret the phrase as meaning “as a function of” their situation, it would be consistent with progressive or, for that matter, regressive taxation. The literal interpretation of “equal” is not, however, a reasonable one. What the authors of the Declaration intended was the abolition of the intricate system of tax exemptions that existed under the ancien régime.
18. In comments from 1795 on a draft by Sieyes from July 1789, Bentham focuses on Art. 3 in the draft: “Every man is sole proprietor of his own person”. He repeats a comment he had already made in August 1789 on the same article, namely that it “seems to be leveled against Negro slavery”. Yet, he claims, the immediate abolition of slavery would both be an injustice to the masters and harm the slaves. He also seems, although in somewhat elusive language, to endorse marital rape when he objects that the article would prevent a man from exercising “the rights supposed to be given him by marriage on his wife”.
19. In his draft Sieyes included an article saying that “Letters [...] ought to be sacred for all intermediaries between the writers and the intended recipient”. This article reflects and forbids a notorious practice of the French kings, who had a “black cabinet” at their

disposal to open and read the private letters of the citizens. Although many other drafts had similar clauses, the final Declaration does not, somewhat surprisingly, clearly outlaw this practice. The Declaration does not assert the right to privacy.

20. Bentham was not opposed to the idea of opening the mail of the citizens. In a passage that could have been written by the Justice Department in the Bush administration, he asked whether it was in the public interest that the government should be able to open letters, and answered, “If the law forbids it, the mail will become a terrible instrument in the hands of wrongdoers and conspirators. With the intention of protecting the communications of individuals the law exposes the public to the greatest dangers. Some crimes are so harmful that one should not deprive oneself of any means to prevent them or to bring them to light.”

21. Unlike the framers of the Declaration, Bentham perceived a tension between liberty and security. Art. 2 of the Declaration, which cites security as one of the basic natural rights, along with liberty, property and resistance to oppression, does not recognize the possible conflicts among these rights. The explanation may be that the authors of the Declaration had in mind “vertical” threats to security coming from the government, not “horizontal” threats from other citizens. In an age of terrorism, things look different. One might even argue that citizens have a right to be protected against private harm.

22. In another article of his draft Sieyès stated that “The law has the common interest as its only object. Hence it cannot grant any privilege of any kind; and if privileges have been established, they

ought to be instantly abolished whatever their origin.” Bentham objected, first, that abolition ought be gradual so as not to violate the rights of the privilege-holders. As he put it, the word “instantly” is imported from Alger or Constantinople. Second, he argued that one privilege was in fact beneficial. “This is the privilege that in England one grants for a limited time to the inventor of a new machine, a new cloth, of a new technique. Of all ways of stimulating and rewarding industry this is by far the least onerous for the State and the best proportioned to the merit of the invention.” In today’s debate the issue arises, for instance, with the respect to the right of HIV infected individuals to cheap or free medication.

23. Sieyes, finally, proposed that “Each man is free to dispose of his goods, his property, and to spend his money, as he deems best.” Bentham responds without going into any detail that “there are cases in which sumptuary laws may be appropriate”. More importantly, he objects to the proposed article that it would enable parents to disinherit their children.

24. Overall, Bentham adopted a consequentialist attitude to many of the issues that were at stake in the Declaration. Although he was, as usual, somewhat idiosyncratic in his views, he was often right on target. His recognition of the liberty-security tradeoff, of the usefulness of some temporary monopolies, of the restrictions on testamentary powers, of the danger of open-ended limits on rights, and of the value of some paternalistic legislation stands in stark contrast to the extremely abstract attitude of the Declaration.

25. Before I move into the twentieth and twenty-first centuries, let me briefly compare the Declaration with the American Bill of Rights.
26. Art. 3 of the Bill corresponds roughly to Art. 10 of the Declaration, with the difference that unlike the latter it expressly protects the freedom of worship.
27. Art. 4 of the Bill, asserting the right of the people to keep and bear arms, has no analogue in France. Although a similar proposal was made in the debates, it did not make its way into the final document. The reason was perhaps that the French peasantry in arms had just shown itself to be an acute threat to property.
28. No analogue to Art.5 of the Bill, forbidding the quartering of soldiers, was debated in the French assembly. In the U. S., this article was inspired by the English Declaration of Rights of 1689.
29. Articles 6 through 10 of the Bill, dealing with matters of legal procedure, are much more detailed than the corresponding articles 7, 8, 9 and 17 of the Declaration. Both documents have a ban on torture.
30. The Bill does not refer to political rights at all. These were of course stated in the Constitution, which in the U. S. had been adopted before the Bill of Rights. In fact, there is nothing in the American document that reflects the French distinction between man and citizen.
31. A final difference is that whereas the American Bill of Rights early became part of American constitutional jurisprudence, the French Declaration did not gather constitutional force until 1971. In that year the French Conseil Constitutionnel took it upon itself to declare that via the reference to the Declaration in the Preamble to the

Constitution of 1946 it was part of French constitutional law. Since then it has become an integral part of French the jurisprudence.

32. I shall now fast-forward two centuries, to contrast the Declaration with the similar documents that were adopted as parts of the new constitutions in East and Central Europe after 1989. As in 1789, the new constitutions were adopted in a turbulent period of massive regime change. The purpose of the comparison is both to take the measure of the changes that had taken place and to ascertain what remained constant. I am not at all concerned with the issue of causal influence. In most countries, the German constitution seems to have been the dominant influence. Advice or pressure from the Council of Europe may in some cases have been decisive. Any influence from the French Declaration must have been indirect, and mediated by a succession of other texts.
33. I shall use the phrase “the new Declarations” to refer to the Bill of Rights and similar texts adopted in Bulgaria, Czechoslovakia before the break-up of the federation, the Czech Republic after the breakup, Hungary and Romania. As Poland’s Bill of Rights was not adopted as part the same historical wave, I am not going to discuss it. I am also going to ignore the changes that have taken place since 1992.
34. Some of the new Declarations follow the French Declaration in asserting the political rights of the citizens. The Hungarian and Romanian constitutions also include political group rights in the form of a guaranteed representation for minorities in parliament. This respect paid to groups would have been wholly alien to the authors of the French Declaration. They had just emerged from an extremely

particularistic regime, in which cities, provinces and corporations had extensive privileges and rights. In their perspective, nothing was to come between the citizen and the state.

35. The French framers were just as opposed to individual rights based on group membership as they were to group rights. That is why, for instance, they were strongly opposed to tax exemptions based on status. By contrast, the new Declarations had numerous articles guaranteeing the rights of members of ethnic or national minorities. The most important of these were the right to study one's own language in school and, more ambitiously, the right to study any subject in one's own language. The right to use one's language in court and in dealing with the central administration also belongs here. All these rights would have been unthinkable for the authors of the French Declaration. In fact, this was one privilege that the French kings never granted. Even today, the rights of linguistic minorities are much less respected in France than in any other European country.

36. The New Declarations have impressive lists of the criteria with respect to which equal, non-discriminatory treatment is said to be mandatory. They include notably race, skin color, ethnicity, nationality, gender, religion, age, education, political affiliation, opinion, personal status, social status, property, status, national or social origins. In the Hungarian constitution, the list is concluded by a ban on discrimination "on any other grounds whatsoever". With that implicit exception, none of the declarations has a ban on discrimination based on age or sexual orientation.

37. Mostly, these documents follow the French Declaration in limiting equal treatment to the public sphere. The main exceptions are the clauses asserting that men and women shall have equal pay for equal work or clauses asserting the right to a fair remuneration for work. These are, however, rights against the employer, not against the state. Many of the new Declarations would not, however, prevent a private employer from discriminating on racial grounds.
38. Apart from this limited extension to private employment relations, one might ask whether these elaborate statements represents progress compared to the condensed formulations in the French Declaration. In fact, they might even constitute a step backward. If a Bill of Rights enumerates, say, thirteen different grounds on which equal treatment is mandatory and sexual orientation is not one of them, bigoted officials might think they were justified in refusing to appoint gays or lesbians to public office. It was fears of this kind that led the American framers to adopt the Ninth Amendment and, presumably, the Hungarian framers to include the “any other grounds whatsoever” clause. In fact, the inclusion of that phrase shows that the Hungarians might have achieved what they wanted simply by banning discrimination on any grounds. Although many drafts of the French Declaration referred to specific rights, such as the right for anyone to enter any trade, whether in wholesale or retail, the final statement simply subsumed them all under a general ban on discrimination.
39. The idea of positive discrimination did not exist in 1789. One might have thought that affirmative action in favor of disadvantaged groups might be justified under the heading of “fraternity”, but that aspect of

the revolutionary ideology is not part of the Declaration, which deals only with liberty and equality. In modern constitutional thinking, positive discrimination is an important and controversial topic. Among the new Declarations, two have a complete and one a partial ban on affirmative action. The Bulgarian constitution asserts that “There shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status, or property status”. The Slovakian constitution has a similar clause. The Romanian constitution has a ban on positive discrimination in favor of national minorities, which would it impossible for instance to reserve some places at medical school for members of the Roma community.

40. If we look to the French Declaration, the two relevant articles point in different directions. Art. 6 suggests that affirmative action is excluded, whereas Art. 1 suggests that it might be justified if it promotes “public utility” or the general interest. According to current French jurisprudence, the Conseil Constitutionnel would certainly strike down affirmative action on ethnic grounds, although no law to that effect has been proposed. A law mandating a certain percentage of women on the governing bodies of firms was struck down. Positive discrimination on socio-economic grounds has been accepted, but only to ensure equality of opportunity, not equality of outcome. Quotas might be acceptable when recruiting students to elite educational institutions, but not when making employment decisions.

41. The new Declarations assert a number of limitations on rights. Some of them are quite unusual. In the Bulgarian constitution, for instance, “public health” is cited not only as a limitation on freedom of movement on the territory, which makes sense in the case of an epidemic, but also as a limitation on freedom of conscience and religion and on freedom of information. Slovakia, too, restricts freedom of conscience by “public health”. The Bulgarian constitution also restricts the free sale of land, by declaring that “arable land shall be used for agricultural purposes only”. It also contains a blanket clause to the effect that “Rights shall not be abused, nor shall they be exercised to the detriment of the rights or the legitimate interests of others.” The Slovakian constitution has a similar clause. In the Romanian constitution, freedom of expression does not protect “defamation of the country and the nation” or expressions of “territorial separatism”.
42. By contrast, the rights of the individual in the French Declaration are limited only by the rights of others and by the general interest. Importantly, the general interest is defined in terms of the interest of individuals that make up society. Since there is no such thing as the interest of a nation, it is not possible to hurt it. Also, the idea of limiting rights by the interests of other individuals is absent. It would, in fact, have been incompatible with the emerging market economy, in which individuals constantly undercut the interests of others by underselling them. The Bulgarian and Slovakian framers do not seem to have understood this basic fact.

43. In the new Declarations, the freedoms asserted in the 1789 Declaration are supplemented by duties and welfare rights. The lists of duties are for the most part unsurprising. They include the duty to pay taxes, to do military service, to educate one's children. None of the documents establish the duty to vote or the duty to accept elective office. The lists of welfare rights, sometimes but misleadingly called positive rights, are the most distinctive features of the new Declarations. They include the right to work, to a fair remuneration, to a clean environment, to health care, and in Hungary even the right to "the highest possible level of health".
44. It is hard to say whether these articles owe their existence to the persistence of an ancien-régime mind-set among the deputies or to the need to give concessions to the surviving Communist forces. Perhaps they were conceded in the expectation that they would be merely programmatic rights without legal force. If so, things turned out differently. Constitutional Courts in the region have repeatedly struck down legislation as inconsistent with welfare rights. A partial exception has been the Czech Republic, where Vaclav Klaus has downplayed these rights as being incompatible with the market economy.
45. The authors of the 1789 Declaration had also debated whether to include a right to assistance, conditionally on placing oneself under "the orders of society", but in the end did not adopt it. A commonly cited objection was that it might prove destabilizing by creating unrealistic expectations. Its advocates, though, may have thought that

it would have a stabilizing effect, by removing the threat to property from the unemployed poor.

46. I shall conclude by making some normative claims. They fall in four categories: virtues of the Declaration, ambiguities in the Declaration, gaps in the Declaration, and flaws in the Declaration. As I shall argue, some gaps may also be virtues.
47. A main virtue of the Declaration is that it satisfied the aspiration of one of its authors, that of being “short, simple and precise”. Napoleon said that a constitution ought to be “short and obscure”, and be “written so as not to hinder the action of the government”. He would presumably have said the same about a Declaration of Rights. Because the deputies of 1789 did want to set limits on the actions of the government, they did their best to avoid obscure and opaque language. Although they did not succeed completely, they did remarkably well and much better than the authors of many later documents. In particular, the abstract formulations of the Declaration are preferable to more concrete enumerations, which suggest that there is no obligation to respect un-enumerated rights.
48. Another virtue was their ability to liberate themselves, almost completely, from the mindset of the ancien régime. All too often, critics of a flawed regime retain some of its flaws. In transitional justice, for instance, the reckoning with a lawless regime may itself violate the rule of law. After 1989, some post-Communist constitutions retained parts of the Communist rhetoric. Although some deputies wanted the Declaration of 1789 to include the right to protect one’s honor, this monarchical idea was not retained. The only

sign of an incomplete liberation is in Art. 14, where citizens are said to have the right to consent to taxes rather than to determine them.

49. The relentlessly individualistic nature of the Declaration is also, in my view, one of its virtues. The idea of group rights is obscure and, to the extent that it is intelligible, dangerous. What is a right for the group can become an obligation for the individual member. Also, there are many groups and no natural way of singling out which of them shall be the subjects of rights. This does not exclude that individuals can be granted rights on the basis of their membership in a group. The biological differences between men and women, menstruation and pregnancy, justify differences in their rights.

50. Beyond these formal virtues, the Declaration has many substantive merits. The rule of law and equality before the law are asserted strongly and unambiguously, as is the control of the citizens over the government. The idea in Art. 16 that protection of individual rights requires the separation of powers has been strongly vindicated. One way of paraphrasing it is that a dictator is unable to protect rights, because he is unable to make himself unable to interfere.

51. A seeming ambiguity in the Declaration is whether individual rights are limited mainly by the public interest or by the rights of others, or whether these two constraints are actually one and the same, as suggested by the conjunction of Art. 4 and At. 5. The most plausible interpretation of the Declaration as a whole is that these are separate constraints. By contrast, individual rights are not, as in some recent texts, constrained by individual interests.

52. The idea of “public utility” in Art. 1 is itself ambiguous. If taken in a utilitarian sense, the article might, at least in theory, be used to justify slavery. If taken in the sense of a Pareto-improvement, benefiting some while not harming any, it would not have many implications. In practice, all reforms have losers. The proper resolution seems to be that rights and utility mutually constrain each other. In some cases, utility trumps rights. A public epidemic is an example. In others, rights trump utility. Here, slavery is an example. This being said, nobody to my knowledge has proposed a satisfactory theory of the relation between consequentialist and non-consequentialist values.
53. Another ambiguity concerns the universal nature of the rights. The Declaration seems to assert that rights are universal in a full sense that also includes being unconditional. This is certainly true for many of them, such as the right not be tortured. Yet there was a tacit consensus that only active citizens, defined in part by economic criteria, would hold political rights. Hence some rights might be conditional on criteria that anyone could satisfy if they made an effort. A non-tax-payer might, by hard work, earn enough to pass the threshold of tax payment for voting and eligibility. The idea of conditional rights has fallen in disrepute because it has been consistently used as a tool of class warfare, but it is not intrinsically objectionable.
54. An obvious gap in the Declaration is the lack of a right to worship. Another is the lack of a right to privacy, for instance the inviolability of the mail. Whereas the lack of a right to worship is probably due to the conflictual nature of the issues, the lack of protection of private

communication is more puzzling. A further gap, observed by Bentham, is the lack of limits defined by the harm an individual could do to himself, rather than to others or to society. A ban on Internet gambling or on cigarette ads would not have been underwritten by the Declaration. One might also deplore the lack in the Declaration of rights against discrimination by private parties, such as employers, and the lack of a right to be protected against private violence.

55. Along with the absence of group rights, the lack of welfare rights in the Declaration should be seen, as the phrase goes, as “a much-needed gap”. To defend this claim would require another lecture. Let me simply say that this is one area where the “government of judges” makes little sense. The members of a Constitutional Court are not well equipped to decide on matters of macroeconomic policy.

56. Are there any flaws in the Declaration? Does it contain clauses that are positively harmful or dangerous? Having read and reread it in preparing these talks, I do not think so. Consider as a contrast the second amendment to the American constitution, which is now mainly used or rather abused by the gun industry. In 2006, the right of the American people to keep and bear arms is positively harmful or dangerous. By virtue of the abstract and general character of its articles, the Declaration of 1789 was much less liable to cause harm.

