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Leslie Dumas Flaubert Nietzsche Turgenev Balzac
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THE DECLARATION OF THE RIGHTS OF MAN
AND OF CITIZENS

A Contribution to Modern Constitutional History

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TRANSLATOR'S PREFACE.

Although several years have elapsed since this essay was published, [Pg iii] it has apparently come to the attention of only a few specialists, and those almost exclusively in modern European history. It deserves consideration by all students of history, and it is of special importance to those who are interested in the early constitutional history of the United States, for it traces the origin of the enactment of bills of rights. In the hope that it will be brought before a larger number of students who realize the significance of this question and who appreciate genuine scholarly work, this essay is now translated.

Wesleyan University,
Middletown, Ct., *March 1, 1901.*

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THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS.

CHAPTER I.

THE FRENCH DECLARATION OF RIGHTS OF AUGUST 26, 1789, AND ITS SIGNIFICANCE. [Pg 1]

The declaration of "the rights of man and of citizens" by the French Constituent Assembly on August 26, 1789, is one of the most significant events of the French Revolution. It has been criticised from different points of view with directly opposing results. The political scientist and the historian, thoroughly appreciating its importance, have repeatedly come to the conclusion that the Declaration had no small part in the anarchy with which France was visited soon after the storming of the Bastille. They point to its abstract phrases as ambiguous and therefore dangerous, and as void of all political reality and practical statesmanship. Its empty [Pg 2] pathos, they say, confused the mind, disturbed calm judgment, aroused passions, and stifled the sense of duty,—for of duty there is not a word. [1] Others, on the contrary, and especially Frenchmen, have exalted it as a revelation in the world's history, as a catechism of the "principles of 1789" which form the eternal foundation of the state's structure, and they have glorified it as the most precious gift that France has given to mankind.

Less regarded than its historical and political significance is the importance of this document in the history of law, an importance which continues even to the present day. Whatever may be the value or worthlessness of its general phrases, it is under the influence of this document that the conception of the public rights of the individual has developed in the positive law of the states of the European continent. Until it appeared [Pg 3] public law literature recognized the rights of heads of states, the privileges of class, and the privileges of individuals or special corporations, but the general rights of subjects were to be found essentially only in the form of duties on the part of the state, not in the form of definite legal claims of the individual. The Declaration of the Rights of Man for the first

time originated in all its vigor in positive law the conception, which until then had been known only to natural law, of the personal rights of the members of the state over against the state as a whole. This was next seen in the first French constitution of September 3, 1791, which set forth, upon the basis of a preceding declaration of rights, a list of *droits naturels et civils* as rights that were guaranteed by the constitution. [2] Together with the right of suffrage, the "*droits garantis par la constitution*", which were enumerated for the last time in the constitution of November 4, 1848, [3] form to-day the basis of French theory and practice respecting the personal public rights of the indi [Pg 4] vidual. [4] And under the influence of the French declaration there have been introduced into almost all of the constitutions of the other Continental states similar enumerations of rights, whose separate phrases and formulas, however, are more or less adapted to the particular conditions of their respective states, and therefore frequently exhibit wide differences in content.

In Germany most of the constitutions of the period prior to 1848 contained a section upon the rights of subjects, and in the year 1848 the National Constitutional Convention at Frankfort adopted "the fundamental rights of the German people", which were published on December 27, 1848, as Federal law. In spite of a resolution of the *Bund* of August 23, 1851, declaring these rights null and void, they are of lasting importance, because many of their specifications are to-day incorporated almost word for word in the existing Federal law. [5] These enumerations of rights appear in greater numbers in [Pg 5] the European constitutions of the period after 1848. Thus, first of all, in the Prussian constitution of January 31, 1850, and in Austria's "Fundamental Law of the State" of December 21, 1867, on the general rights of the state's citizens. And more recently they have been incorporated in the constitutions of the new states in the Balkan peninsula.

A noteworthy exception to this are the constitutions of the North German Confederation of July 26, 1867, and of the German Empire of April 16, 1871, which lack entirely any paragraph on fundamental rights. The constitution of the Empire, however, could the better dispense with such a declaration as it was already contained in most of the constitutions of the individual states, and, as above stated, a series of Federal laws has enacted the most important principles of

the Frankfort fundamental rights. Besides, with the provisions of the Federal constitution as to amendments, it was not necessary to make any special place for them in that instrument, as the Reichstag, to whose especial care the guardianship of the fundamental rights must be entrusted, has no difficult forms to observe in amending the constitu [Pg 6] tion. [6] As a matter of fact the public rights of the individual are much greater in the German Empire than in most of the states where the fundamental rights are specifically set forth in the constitution. This may be seen, for example, by a glance at the legislation and the judicial and administrative practice in Austria.

But whatever may be one's opinion to-day upon the formulation of abstract principles, which only become vitalized through the process of detailed legislation, as affecting the legal position of the individual in the state, the fact that the recognition of such principles is historically bound up with that first declaration of rights makes it an important task of constitutional history to ascertain the origin of the French Declaration of Rights of 1789. The achievement of this task is of great importance both in explaining the development of the modern state and in understanding the position which this state assures to the individual. Thus [Pg 7] far in the works on public law various precursors of the declaration of the Constituent Assembly, from Magna Charta to the American Declaration of Independence, have been enumerated and arranged in regular sequence, yet any thorough investigation of the sources from which the French drew is not to be found.

It is the prevailing opinion that the teachings of the *Contrat Social* gave the impulse to the Declaration, and that its prototype was the Declaration of Independence of the thirteen United States of North America. Let us first of all inquire into the correctness of these assumptions.

FOOTNOTES:

[1] First of all, as is well known, Burke and Bentham, and later Taine, *Les origines de la France contemporaine: La révolution*, I, pp. 273 et seq.; Oncken, *Das Zeitalter der Revolution, des Kaiserreiches und der*

Befreiungskriege, I, pp. 229 *et seq.*; and Weiss, *Geschichte der französischen Revolution*, 1888, I, p. 263.

[2] Titre premier: "Dispositions fondamentales garanties par la constitution."

[3] Hélie, *Les constitutions de la France*, pp. 1103 *et seq.*

[4] Cf. Jellinek, *System der subjektiven öffentlichen Rechte*, p. 3, n. 1.

[5] Binding, *Der Versuch der Reichsgründung durch die Paulskirche*, Leipzig, 1892, p. 23.

[6] When considering the constitution, the Reichstag rejected all proposals which aimed to introduce fundamental rights. Cf. Bezold, *Materialen der deutschen Reichsverfassung*, III, pp. 896-1010.

CHAPTER II.

ROUSSEAU'S *CONTRAT SOCIAL* WAS NOT THE SOURCE OF THIS DECLARATION. [Pg 8]

In his *History of Political Science*—the most comprehensive work of that kind which France possesses—Paul Janet, after a thorough presentation of the *Contrat Social*, discusses the influence which this work of Rousseau's exercised upon the Revolution. The idea of the declaration of rights is to be traced back to Rousseau's teachings. What else is the declaration itself than the formulation of the state contract according to Rousseau's ideas? And what are the several rights but the stipulations and specifications of that [Pg 9] contract? [7]

It is hard to understand how an authority upon the *Contrat Social* could make such a statement though in accord with popular opinion.

The social contract has only one stipulation, namely, the complete transference to the community of all the individual's rights. [8] The individual does not retain one particle of his rights from the moment he enters the state. [9] Everything that he receives of the nature of right he gets from the *volonté générale*, which is the sole judge of its own limits, and ought not to be, and cannot be, restricted by the law of any power. Even property belongs to the individual only by virtue of state concession. The social contract makes the state the master of the goods [Pg 10] of its members, [10] and the latter remain in possession only as the trustees of public property. [11] Civil liberty consists simply of what is left to the individual after taking his duties as a citizen into account. [12] These duties can only be imposed by law, and according to the social contract the laws must be the same for all citizens. This is the only restriction upon the sovereign power, [13] but it is a restriction which follows from the very nature of that power, and it carries in itself its own [Pg 11] guarantees. [14]

The conception of an original right, which man brings with him into society and which appears as a restriction upon the rights of the sovereign, is specifically rejected by Rousseau. There is no funda-

mental law which can be binding upon the whole people, not even the social contract itself. [15]

The Declaration of Rights, however, would draw dividing lines between the state and the individual, which the lawmaker should ever keep before his eyes as the limits that have been set him once and for all by "the natural, inalienable and sacred rights of man." [16]

The principles of the *Contrat Social* are accordingly at enmity with every declaration of rights. For from these principles there [Pg 12] ensues not the right of the individual, but the omnipotence of the common will, unrestricted by law. Taine comprehended better than Janet the consequences of the *Contrat Social*. [17]

The Declaration of August 26, 1789, originated in opposition to the *Contrat Social*. The ideas of the latter work exercised, indeed, a certain influence upon the style of some clauses of the Declaration, but the conception of the Declaration itself must have come from some other source.

FOOTNOTES:

[7] "Est-il nécessaire de prouver, qu'un tel acte ne vient point de Montesquieu, mais de J.-J. Rousseau?... Mais l'acte même de la déclaration est-il autre chose que le contrat passé entre tous les membres de la communauté, selon les idées de Rousseau? N'est ce pas l'énonciation des clauses et des conditions de ce contrat?" — *Histoire de la science politique*, 3me éd., pp. 457, 458.

[8] "Ces clauses, bien entendues, se réduisent toutes à une seule: savoir l'aliénation totale de chaque associé avec tous ses droits à toute la communauté." — *Du contrat social*, I, 6.

[9] "De plus, l'aliénation se faisant sans réserve, l'union est aussi parfaite qu'elle peut l'être et nul associé n'a plus rien à réclamer." I, 6.

[10] "Car l'État, à l'égard de ses membres, est maître de tous leurs biens par le contrat social." I, 9.

[11] "... Les possesseurs étant considérés comme dépositaires du bien public." I, 9.

[12] "On convient que tout ce que chacun aliène, par le pacte social, de sa puissance, de ses biens, de sa liberté, c'est seulement la partie de tout cela dont l'usage importe à la communauté; mais il faut convenir aussi que le souverain seul est juge de cette importance." II, 4.

[13] "Ainsi, par la nature du pacte, tout acte de souveraineté, c'est-à-dire toute acte authentique de la volonté générale, oblige ou favorise également tous les citoyens." II, 4.

[14] "La puissance souverain n'a nul besoin de garant envers les sujets." I, 7.

[15] "Il est contre la nature du corps politique que le souverain s'impose une loi qu'il ne puisse enfreindre ... il n'y a ni ne peut y avoir nulle espèce de loi fondamentale obligatoire pour le corps du peuple, pas même le contrat social." I, 7.

[16] Constitution du 3 septembre 1791, titre premier: "Le pouvoir législatif ne pourra faire aucune loi qui porte atteinte et mette obstacle à l'exercice de droits naturels et civils consignés dans le présent titre, et garantis par la constitution."

[17] Cf. Taine, *loc. cit.*: *L'ancien régime*, pp. 321 et seq.

CHAPTER III.

THE BILLS OF RIGHTS OF THE INDIVIDUAL STATES OF THE NORTH AMERICAN UNION WERE ITS MODELS. [Pg 13]

The conception of a declaration of rights had found expression in France even before the assembling of the States General. It had already appeared in a number of *cahiers*. The *cahier* of the *Bailliage* of Nemours is well worth noting, as it contained a chapter entitled "On the Necessity of a Declaration of the Rights of Man and of Citizens", [18] and sketched a plan of such a declaration with thirty articles. Among other plans that in the *cahier des tiers état* of the city of Paris has some [Pg 14] interest. [19]

In the National Assembly, however, it was Lafayette who on July 11, 1789, made the motion to enact a declaration of rights in connection with the constitution, and he therewith laid before the assembly a plan of such a declaration. [20]

It is the prevailing opinion that Lafayette was inspired to make this motion by the North American Declaration of Independence. [21] And this instrument is further declared to have been the model that the Constituent Assembly had in mind in framing its declaration. The sharp, pointed style and the practical character of the American document are cited by many as in praiseworthy contrast to the confusing verbosity and dogmatic theory of the French Declaration. [22] Others bring forward, as a [Pg 15] more fitting object of comparison, the first amendments to the constitution of the United States, [23] and even imagine that the latter exerted some influence upon the French Declaration, in spite of the fact that they did not come into existence until after August 26, 1789. This error has arisen from the French Declaration of 1789 having been embodied word for word in the Constitution of September 3, 1791, and so to one not familiar with French constitutional history, and before whom only the texts of the constitutions themselves are lying, it seems to bear a later date.

By practically all those, however, who look further back than the French Declaration it is asserted that the Declaration of Independ-

ence of the United States on July 4, 1776, contains the first exposition of a series of rights of man. [24]

Yet [Pg 16] the American Declaration of Independence contains only a single paragraph that resembles a declaration of rights. It reads as follows:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness; That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." [Pg 17]

This sentence is so general in its content that it is difficult to read into it, or deduct from it, a whole system of rights. It is therefore, at the very start, improbable that it served as the model for the French Declaration.

This conjecture becomes a certainty through Lafayette's own statement. In a place in his *Memoirs*, that has as yet been completely overlooked, Lafayette mentions the model that he had in mind when making his motion in the Constituent Assembly. [25] He very pertinently points out that the Congress of the newly formed Confederation of North American free states was then in no position to set up, for the separate colonies, which had already become sovereign states, rules of right which would have binding force. He brings out the fact that in the Declaration of Independence there are asserted only the principles of the sovereignty of the people and the right to change the form of government. Other rights are included solely by implication from the enumeration of the violations of right, which justified the separation from the mother country. [Pg 18]

The constitutions of the separate states, however, were preceded by declarations of rights, which were binding upon the people's representatives. *The first state to set forth a declaration of rights properly so called was Virginia.* [26]

The declarations of Virginia and of the other individual American states were the sources of Lafayette's proposition. They influenced not only Lafayette, but all who sought to bring about a declaration of rights. Even the above-mentioned *cahiers* were affected by them.

The new constitutions of the separate American states were well known at that time in France. As early as 1778 a French translation of them, dedicated to Franklin, had appeared in Switzerland. [27] Another [Pg 19] was published in 1783 at Benjamin Franklin's own instigation. [28] Their influence upon the constitutional legislation of the French Revolution is by no means sufficiently recognized. In Europe until quite recently only the Federal constitution was known, not the constitutions of the individual states, which are assuming a very prominent place in modern constitutional history. This must be evident from the fact, which is even yet unrecognized by some distinguished historians and teachers of public law, that the individual American states had the first written constitutions. In England and France the importance of the American state constitutions has begun to be appreciated, [29] but in Germany they have remained as yet [Pg 20] almost unnoticed. For a long time, to be sure, the text of the older constitutions in their entirety were only with difficulty accessible in Europe. But through the edition, prepared by order of the United States Senate, [30] containing all the American constitutions since the very earliest period, one is now in a position to become acquainted with these exceptionally important documents.

The French Declaration of Rights is for the most part copied from the American declarations or "bills of rights". [31] All drafts of the French Declaration, from those of the *cahiers* to the twenty-one proposals before the National Assembly, vary more or less from the original, either in conciseness or in breadth, in cleverness or in awkwardness of [Pg 21] expression. But so far as substantial additions are concerned they present only doctrinaire statements of a purely theoretical nature or elaborations, which belong to the realm of political metaphysics. To enter upon them here is unnecessary. Let us confine ourselves to the completed work, the Declaration as it was finally determined after long debate in the sessions from the twentieth to the twenty-sixth of August. [32]

FOOTNOTES:

[18] "De la nécessité d'établir quels sont les droits de l'homme et des citoyens, et d'en faire une déclaration qu'ils puissent opposer à toutes les espèces d'injustice." — *Archives parlementaires I. Série, IV*, pp. 161 *et seq.*

[19] *Archives parl.*, V, pp. 281 *et seq.*

[20] *Arch. parl.*, VIII, pp. 221, 222.

[21] Cf. e.g. H. v. Sybel, *Geschichte der Revolutionszeit von 1789 bis 1800*, 4. Aufl., I, p. 73.

[22] Cf. Häusser, *Geschichte der franz. Revolution*, 3. Aufl., p. 169; H. Schulze, *Lehrbuch des deutschen Staatsrechts*, I, p. 368; Stahl, *Staatslehre*, 4. Aufl., p. 523; Taine, *loc. cit.*: *La révolution*, I, p. 274: "Ici rien de semblable aux déclarations précises de la Constitution américaine." In addition, note 1: cf. *la Déclaration d'indépendance du 4 juillet 1776*.

[23] Stahl, *loc. cit.*, p. 524; Taine, *loc. cit.* The fact that Jefferson's proposal to enact a declaration of rights was rejected is expressly emphasized in a note.

[24] Stahl, *loc. cit.*, p. 523, does mention, in addition, the declarations of the separate states, but he does not specify when they originated, nor in what relation they stand to the French Declaration, and his comments show that he is not at all familiar with them. Janet, *loc. cit.*, I, p. v *et seq.*, enters at length into the subject of the state declarations in order to show the originality of the French, and he even makes the mistaken attempt to prove French influence upon the American (p. xxxv). The more detailed history of the American declarations he is quite ignorant of.

[25] *Mémoires, correspondances et manuscrits du général Lafayette, publiés par sa famille*, II, p. 46.

[26] "Mais les constitutions que se donnèrent successivement les treize états, furent précédées de déclarations des droits, dont les principes devaient servir de règles aux représentans du peuple, soit aux conventions, soit dans les autres exercices de leur pouvoirs. La Virginie fut la première à produire une déclaration des droits proprement dite." — *Ibid.*, p. 47.