

THE MAKING OF MODERN FREEDOM

General Editor: R. W. Davis

THE
FRENCH IDEA OF FREEDOM
THE OLD REGIME AND THE DECLARATION
OF RIGHTS OF 1789



Edited by Dale Van Kley

STANFORD UNIVERSITY PRESS
STANFORD, CALIFORNIA
1994

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Series Foreword

Stanford University Press
Stanford, California

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Leland Stanford Junior University
Printed in the United States of America

CIP data appear at the end of the book
Stanford University Press publications
are distributed exclusively by
Stanford University Press within
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they are distributed exclusively by
Cambridge University Press throughout
the rest of the world.



JC599
F8
F74X
1994
(LC)

THE STARTLING AND MOVING events that swept from China to Eastern Europe to Latin America and South Africa at the end of the 1980s, followed closely by similar events and the subsequent dissolution of what used to be the Soviet Union, formed one of those great historic occasions when calls for freedom, rights, and democracy echoed through political upheaval. A clear-eyed look at any of those conjunctions—in 1776 and 1789, in 1848 and 1918, as well as in 1989—reminds us that freedom, liberty, rights, and democracy are words into which many different and conflicting hopes have been read. The language of freedom—or liberty, which is interchangeable with freedom most of the time—is inherently difficult. It carried vastly different meanings in the classical world and in medieval Europe from those of modern understanding, though thinkers in later ages sometimes eagerly assimilated the older meanings to their own circumstances and purposes.

A new kind of freedom, which we have here called modern, gradually disentangles itself from old contexts in Europe, beginning first in England in the early seventeenth century and then, with many confusions, denials, reversals, and cross-purposes, elsewhere in Europe and the world. A large-scale history of this modern, conceptually distinct, idea of freedom is now beyond the ambition of any one scholar, however learned. This collaborative enterprise, tentative though it must be, is an effort to fill the gap.

We could not take into account all the varied meanings that freedom and liberty have carried in the modern world. We have, for example, ruled out extended attention to what some political philosophers have called "positive freedom," in the sense of self-realization of the individual; nor could we, even in a series as large as this, cope with the enormous implications of the four freedoms invoked by Franklin D. Roosevelt in 1941. Freedom of speech and freedom of the

The Idea of a Declaration of Rights

KEITH MICHAEL BAKER

THE SEARCH FOR ORIGINS can be hazardous. In the case of the Declaration of the Rights of Man and of the Citizen, its pitfalls have long been evident in the classic exchange between Georg Jellinek and Emile Boutmy now a century old. In 1895, Jellinek set out to demolish two prevailing opinions regarding the sources of the Declaration. The first traced the principal inspiration of the text to the philosophy of Rousseau. Jellinek had little difficulty in pointing out that the essential terms of the social contract, as Rousseau imagined it, involved the complete transference to the community of all the individual's rights. Nor did he fail to note Rousseau's insistence that, since the general will emanated from all and applied to all, individual citizens needed no guarantees against the sovereign they collectively constituted.¹ This being the case, Jellinek concluded, "the principles of the *Contrat Social* are accordingly at enmity with every declaration of rights."² The idea of a Declaration of Rights had to find its origin elsewhere.

In the opinion providing Jellinek's second target, this origin was assumed to lie in the American Declaration of Independence. Jellinek, however, deemed the opening paragraph of the latter document far too general to serve as the model for the French text, which he found instead in the bills of rights preceding many of the constitutions adopted by the American states between 1776 and 1783. The French may have packaged their declaration in a more metaphysical wrapping, flavoring it perhaps with a Gallic hint of Rousseauism. But Jellinek's comparison of articles and clauses left him convinced that the essential ingredients of the Parisian product were imported from Virginia, with embellishments from Massachusetts and Maryland, North Carolina and New Hampshire, Pennsylvania and Vermont.

The French articles, he concluded, "brought out nothing new, or unknown to the American stipulations."³

The prevailing wisdom thus demolished, at least to his own satisfaction, Jellinek went on to trace the American defense of rights to two earlier traditions. First came common law protection of the rights of Englishmen, rights these latter enjoyed not by their very nature as individuals but as members of a common people. Jellinek traced this tradition to the forests of Germany, primal source of that Teutonic conception of the state in which "prince and people form no integral unity, but stand opposed to each other as independent factors."⁴ Second came the Reformation, its affirmation of religious individualism issuing in claims for the right to liberty of conscience that lay at the heart of the American experience. In this experience, Jellinek argued, the common rights of Englishmen were gradually infused with higher value as rights endowed upon all individuals by their Creator.

Not surprisingly, such an assertion of the Germanic, protestant sources of the Declaration of the Rights of Man elicited an irritated response from across the Rhine. It came from Emile Boutmy in 1902.⁵ Boutmy found no contradiction in the claim that Rousseau's arguments had inspired many of the articles of the Declaration of Rights, whether or not their author had actually made a case for a declaration of this kind. Nor did he see anything to preclude a sovereign people from utilizing this form to promulgate an essentially Rousseauian understanding of the principles of equality and universality as the essence of freedom under the law. Neither the form nor the content of the French Declaration owed much in Boutmy's judgment to the American models. In his analysis, similarities between the American and French documents (when they were not the illusory effect of Jellinek's method of comparison) derived less from any direct influence than from a common matrix of eighteenth-century thought. The differences were in any case more fundamental. They were differences in style, between the crabbed juridical idiom of the American declarations and the vibrant, universalistic tones of the French. And they were differences in substance, between Anglo-Saxon insistence upon the limits upon power and an indisputably Gallic—and transparently Rousseauian—affirmation of freedom through the common exercise of sovereignty.

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Not that Boutmy insisted on the influence of the *Social Contract* alone. Behind Rousseau, he descried Locke, Montesquieu, Voltaire, and other exponents of the theory of natural rights. In his view, indeed, the Declaration of the Rights of Man and of the Citizen gave quintessential expression to the thinking of an entire century. Where Jellinek traced the origins of this affirmation of individual rights back to the Reformation, Boutmy saw it as the essential offspring of Enlightenment. Liberty of conscience, he insisted, was not the fruit of the Reformation, which had to the contrary inflamed the sectarian intolerance of religious fervor. Toleration was the child of the Enlightenment, which finally dared in the name of 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."⁶

Who was right, Jellinek or Boutmy? Perhaps both? Perhaps neither? Jellinek was surely justified in insisting upon the fundamental importance of the example the Americans offered in prefacing their state constitutions with explicit declarations of rights. It would now be difficult to deny, in the face of Franco Venturi's research, the passionate interest in these constitutions evoked in France (as elsewhere in Europe) in the years preceding the Revolution.⁷ Nor, after the careful recent readings of the debates of the Constituent Assembly by such scholars as Marcel Gauchet and Stéphane Rials, could one dismiss the urgency with which the Constituents sought to define and distinguish, with an eye to the American models, their own views of the meaning of a declaration of rights and its proper relationship to the constitution they had sworn to create.⁸ Define *and* distinguish: for it is abundantly clear that the French deputies kept the American example in mind for a variety of purposes, those on the right of the Assembly warning against its dangers no less vociferously than those on the left set out to surpass its limitations.

If Jellinek's insistence on the pertinence of the example of the American bills of rights to the composition of the French declaration seems to have been borne out by subsequent research, however, few scholars would now subscribe to his assertion that all the essential articles of that document came from across the Atlantic. Nor would many deny Boutmy's contention that the French deputies drew on Rousseauian formulations at absolutely crucial points in the composition of their document, in ways that went far beyond the applica-

tion of Gallic style to Anglo-Saxon truths. Few, moreover, would even wish to dispute Boutmy's more general claim that the Declaration bears the marks not only of Rousseau but of Enlightenment thinking in many of its aspects. Why, indeed, contest a claim that is so general as to be virtually meaningless?

For the fact of the matter is that the Declaration of the Rights of Man and of the Citizen is an immensely complex document. It was also drawn up with enormous difficulty and great urgency, at the cost of bitter argument, inevitable linguistic compromises, and dramatic theoretical tensions, by an assembly profoundly divided over the nature and purpose of the text it was struggling to construct. It seems remarkable, in retrospect, that neither Jellinek nor Boutmy appears to have been in the least interested in the process by which the Declaration of the Rights of Man was actually composed, or the purposes it was intended to serve. Whether there should be a declaration of rights; what it would mean if there were; whether it should be drafted or proclaimed before or after the redaction of a new French constitution; what articles it should contain; how its every clause might be worded: each of these issues was highly contested, within the National Assembly and outside it, in the summer of 1789. Each involved a struggle to define the nature and meaning of the revolutionary situation; each bore on the political choices of language from which the Declaration of the Rights of Man and of the Citizen eventually emerged. Arguments invoked and ideas espoused in the debates doubtless came from many sources; it is important to identify them as precisely as possible. But the study of origins and influences cannot capture the particular significations these arguments and ideas assumed in the context of the assembly's debates, nor can an historical pedigree alone fix the meaning of the text to which the debates ultimately gave rise.

Fortunately, it has been one of the salutary effects of recent scholarship to shift attention precisely from questions of origins and influences to questions of meaning and situation. Before it was a text, Marcel Gauchet has aptly remarked, the Declaration of the Rights of Man was an act.⁹ It was a speech act, one might say, that derived its meanings—for they were as multiple as they were contested—less from the historical sources of its particular utterances than from the illocutionary force of these utterances in a particularly tense and complex situation. In what follows I shall first try to sketch the principal competing

understandings, in prerevolutionary discourse, of the act of promulgating a declaration of rights; then I shall turn to the process of deliberation which led the National Assembly finally to take such an act.

< I >

The American Models

An undated, fragmentary note among the papers of the abbé Emmanuel-Joseph Sieyès, the French Revolution's first constitutional theorist, offers a fascinating comment on the history of declarations of rights before 1789. Earlier documents of this kind were, in Sieyès's view, no more than chapters in the history of despotism. Assuming the form of treaties between masters and their rebellious subjects, he argued, they were no more than pacts between two contending powers who wished to demarcate the boundaries between their respective rights and prerogatives. Forced by circumstances to recognize the subjects' grievances, a despotic ruler would make concessions that "loosened some links in the chain of general servitude." But by accepting these concessions rebellious subjects in effect acknowledged their ruler's sovereignty. Declarations of rights were thus drawn up "the way one reaches a settlement before a notary. The general and common character of all the declarations is always the *implicit recognition* of a seigneur, a suzerain, or a master to whom one is naturally obligated, and of some oppressions one wishes no longer to endure. Everything comes down to these words: 'You promise not to renew this link in your chain.'"¹⁰

In Sieyès's analysis, the American Revolution was the first to break with this traditional pattern in that it overthrew the entire yoke of despotism rather than merely alleviating it. But the break was not complete. In drawing up their bills of rights, the Americans continued to regard the governments they were establishing in the same spirit of suspicion with which they had confronted the power they had overthrown: they wished, above all, to guard themselves against abusive authority. "They declared their own rights, it appearing that thus reassured one could go about one's business in peace. The memory of ills suffered, of those most resented, guides the pen of the authors of the *declarations of rights*."¹¹

It was a profound mistake, Sieyès thought, for the Americans

thus to persist in conceiving a declaration of rights in the traditional manner, as a direct response to immediate injuries. Declarations drawn up on this assumption could only be particular in their articles, as each people recalled its most bitter grievances. But particularistic declarations of this kind, insisted the French theorist, must ever be the symptom of incomplete revolutions. A people regaining its complete sovereignty needs only the universal. "It cannot say: man, the citizen, will not bear such and such a chain. It must break them all. All that was *different* in the declaration of rights of all the peoples of the earth cannot enter into its declaration. . . There is only that which is common to all; that which belongs to man, to the citizen." On this assumption, the entire character of a declaration of rights must change. "It ceases to be a settlement, a transaction, a condition of a treaty, a contract, etc., between one authority and another. There is *only one* power, *only one* authority."¹²

Was this characterization of traditional declarations accurate as a description of the bills of rights adopted in the American state constitutions? Alexander Hamilton, writing in *The Federalist*, certainly thought so. "It has been several times truly remarked," he argued, "that bills of rights are in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince . . . It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants."¹³ But that was in 1787. The bills of rights were much closer in their assumptions about government to a very different theory, which Hamilton himself espoused in 1775 when he argued the principle that "the origin of all civil government, justly established, must be a voluntary compact between the rulers and the ruled."¹⁴ This principle of compact, it was insisted, required "that certain great first principles be settled and established, determining and bounding the power and prerogative of the ruler, ascertaining and securing the rights and liberties of the subjects, as the foundation stamina of the government; which in all civil states is called the constitution, on the certainty and permanency of which, the rights of both the ruler and the subjects depend."¹⁵

Like the Declaration of Independence, the American bills of rights bolstered traditional collective claims with new appeals to the rights

of individuals. But their essential concern was the defense of the common law freedoms of the ruled against their rulers. Born of rebellion against the despotism of Crown and Parliament, they extended the same mistrust of power to the magistrates and legislative bodies upon whom authority would be conferred by the new state constitutions. They were intended to ensure the continued exercise of those rights of the people which could never be divested by any compact. Hence the formulation of the "DECLARATION OF RIGHTS made by the Representatives of the good people of VIRGINIA . . . which rights do pertain to them and their posterity, as the basis and foundation of Government." Hence, too, the "Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania." These declarations, and others similarly entitled, defended the collective rights of the inhabitants of each state against their magistrates and representatives. The Massachusetts declaration, for example, burst with references to "the people of this Commonwealth"—"the people" whose rights it reserved in order "to prevent those, who are vested with authority, from becoming oppressors."¹⁶ By contrast, the French Declaration of the Rights of Man and of the Citizen refers only once to "the French people," only once to "the nation," and several times, but only in an abstract generic sense, to "society" (or its members). The collectivity from which the document is ultimately held to derive is virtually effaced by the abstract form of its appeals to universality. Part of the task of understanding the Declaration of the Rights of Man and of the Citizen must be to explain this profound difference between the American models the French deputies invoked as they began to discuss their declaration of rights and the text of the document upon which they were finally able to reach agreement.

< II >

The Uses of a Declaration of Rights

The first French declaration of rights bore all the characteristics of a traditional bill of rights. It was that "declaration of the rights of the nation" proclaimed on 3 May 1788 by the Parlement of Paris in its last-ditch resistance to monarchical policies. This defiant resolution of the king's magistrates against the encroaching despotism of his ministers was perhaps the purest expression of what I have else-

where called the "discourse of justice" in eighteenth-century French politics. The discourse of justice drew on the conceptual resources of a constitutional tradition with deep roots in French history: a tradition effaced by the growth of absolutism since the sixteenth century but dramatically revived and reworked in the constitutional conflicts of the late eighteenth. As these conflicts escalated, so did the vehemence with which parliamentary theorists reasserted the existence of fundamental laws limiting royal sovereignty, falling back upon these laws as the indispensable ramparts of an historical constitution to which both king and nation were party.

Accordingly, the declaration of 3 May sought to avert the despotism of an unconstrained royal will by appealing to a compact between the people and its ruler—a compact the magistrates construed as perpetually renewed by "a general oath, that of the coronation, which unites all of France with its sovereign." It declared that France was a monarchy governed according to fundamental laws fixing the rights of the Crown, on the one hand, those of the nation on the other. These latter included the right of the nation to give its free consent to taxation through the organ of the Estates General, "regularly convoked and constituted"; the irremovability of judicial magistrates and the rights of the courts to register the legal expression of the king's will in accordance with the constitutional laws of each province and the fundamental laws of the state; protection of each citizen from arbitrary arrest by the right to trial, without delay and only by "his natural judges."¹⁷

The rights of the nation, it was to turn out after 25 September 1788, were also held by many to include the constitutional separation of the three Estates of the realm and their separate representation in the Estates General. The political explosion over that claim transformed the pattern of French political contestation, opening up conflicts over the composition and form of the Estates General that were only to be resolved by the revolutionary creation of the National Assembly on 17 June 1789. It also introduced a profound ambiguity into these conflicts. For after 25 September 1788, French political discourse revolved around two overlapping but quite distinct issues: the issue of liberty, or the need to limit power, specifically the power of the monarch and his administrative agents; the issue of equality, or the need to assert power—initially the power of the king, ultimately the power appropriated by the nation itself—to

destroy aristocracy and institute civil equality. This ambiguity ran throughout the debates that occurred, before the Estates General met and in its early weeks, over the existence or non-existence of a French constitution and the necessity to fix one. It ran, similarly, through the many demands or proposals for a declaration of rights that would characterize such a constitution.

In this context, a formal declaration could be seen as a means of reasserting traditional rights of the French people against abuses of power, but it could also be used to reinforce the defense against arbitrary rule (as in the American examples) by appeal to the doctrine of natural rights. This was the syncretic spirit in which *cahiers* could demand "a declaration of national rights," "a reestablishment of the French nation in all the rights of man and of the citizen," "a French charter which will assure for ever the rights of the king and of the nation," a proclamation of the rights that "belong as much to each citizen individually as to the entire nation," or a "fundamental declarative law, enunciating the natural, essential and imprescriptible rights of the nation."¹⁸ In such formulations, historical rights frequently merged with natural rights, those of the nation intermingling with those of the individual. In such demands, too, a declaration of rights frequently seemed synonymous with a constitutional charter. Assuming the power of the monarch, they sought to contain it: they envisaged the limitation of an existing power rather than the institution of a new one.

The same may also be said of more liberal projects for a declaration of rights, written with the American example more explicitly in mind. The marquis de Lafayette's first draft for a declaration of rights in January 1789, for example, assumed that France was and would remain a monarchy in declaring that "Nature has made men equal, and the distinctions between them necessitated by the monarchy are based, and must be measured against, general utility."¹⁹ It insisted that "all sovereignty resides essentially in the nation" (amended in subsequent drafts to read "the source of all sovereignty resides [imprescriptibly] in the nation");²⁰ but this proposition led directly to a statement of the principle of division of powers, in a grammar that subtly acknowledged the existing authority of the king. The legislative, Lafayette proposed, "must be principally exercised by a numerous representative assembly," while the judiciary "must be entrusted to courts whose sole function is to keep the repository of the laws,"

applying them strictly, independently, and impartially. But the executive, he wrote, "*belongs* solely to the king."²¹

In Lafayette's succeeding drafts for a declaration of rights, specific references to the monarch were gradually effaced. His final version of a declaration, presented to the National Assembly in July 1789, offered a far more abstract formulation of the principle of the balance of powers, now justified on the grounds that the common good "requires that the legislative, executive and judiciary powers be distinct and definite; and that their organization assure the free representation of citizens, the responsibility of [administrative] agents, and the impartiality of judges."²² But Lafayette still explained the necessity of such a declaration as crucial "at the moment when the government takes a certain and determinate modification, such as the monarchy in France."²³

It was in the same spirit of the modification of existing institutions that Jean-Joseph Mounier, famed for his prerevolutionary leadership of the constitutionalist resistance in Grenoble, drew up his own draft declaration of the rights of man and of the citizen. In Mounier's analysis, presented to the National Assembly in a speech of 9 July on behalf of its first constitutional committee, the deputies had indeed been charged (in the language of the Tennis Court Oath) to "fix the constitution" of France. Yet they had not been charged to begin that task *de novo*. "The French are not a new people that has just left the forests to form an association," Mounier emphasized in a language that was to echo throughout the assembly's early debates, "but a vast society of twenty-four million persons that wishes to tighten the bonds uniting all its parts and to regenerate the realm, a society for whom the principles of true monarchy will always be sacred."²⁴ Mounier held it to be the deputies' task to build a complete constitutional order upon the basis of fragmentary historical foundations and rudimentary fundamental laws. In his thinking, the tradition of French constitutionalism, eroded by decades of ideological contestation, had indeed been reduced to its barest minimum: the enduring national choice of monarchical government, on the one hand; the principle of consent to taxation, on the other. But the deputies, he nevertheless insisted, had been assembled to regenerate their monarchy, not to inaugurate an entirely new social contract.

Accordingly, when Mounier came at the end of July to prepare a draft declaration of rights for discussion by the National Assembly's

second constitutional committee, he offered a text by which the "representatives of the FRENCH NATION, convoked by the king, gathered in a NATIONAL ASSEMBLY," would "declare and establish by the authority of our constituents, as Constitution of the French Empire, the fundamental maxims and rules, and the form of government."²⁵ Like Lafayette's draft declaration, Mounier's began with the proposition that "nature has made men free and equal in rights. Social distinctions must thus be based on common utility." Like Lafayette's, it insisted that "the source of all sovereignty resides in the nation; no body, no individual can have authority that does not emanate expressly from it." Like Lafayette's, too, its provisions for limiting the monarchical power included a formula for the separation of powers. "To prevent despotism and assure the empire of the law," it proclaimed, "the legislative, executive and judiciary powers must be distinct and cannot be united." Similar formulations recurred in the draft declaration Mounier formally presented to the Assembly on 27 July, this time on behalf of its constitutional committee. But the committee found it particularly important to elaborate upon the case for the separation of powers. "To prevent despotism and assure the empire of the law, the legislative, executive and judiciary powers must be distinct," it now insisted. "Their union in the same hands would put those entrusted with them above all the laws, for which [those so entrusted] would be able to substitute their own wills."²⁶ For Mounier and his allies on the constitutional committee, this principle would eventually be translated into an argument for constitutional government dividing and balancing powers along the lines of the English model.

Within this constitutionalist discourse of justice, then, there was a close link between the idea of a declaration of rights and the notion of a separation of powers. Each was seen as a fundamental device for limiting an existing monarchical power: the first by establishing the incontrovertible rights of the individual and the nation, the second as an indispensable constitutional guarantee of the preservation of those rights. But there was no necessary logic linking the project of a declaration of rights to specific constitutionalist assumptions regarding the separation of powers. The two could, indeed, be conceived as strictly antithetical. This much is made entirely clear in the extended notes added to the French edition of John Stevens's *Observations on Government* published early in 1789.²⁷ Stevens's *Observations* had

been written in 1787 to repudiate the conception of a balance of powers elaborated in Delolme's account of the English constitution and proffered to Americans as the model of political freedom in John Adams's *Defence of the Constitutions*. In 1789, the French translation of his work became the vehicle for a sustained attack, by the marquis de Condorcet and Pierre-Samuel Dupont de Nemours among others, on the essential assumptions of balanced government in the Anglo-American style.

For political rationalists like Condorcet and Dupont de Nemours, heirs to the physiocratic tradition, the idea of separating and balancing powers was the very epitome of incoherence. Tyranny would be destroyed not by an artificial and irrational balancing of potentially arbitrary wills, they argued, but by setting forth the first principles of social organization in a rational exposition of the rights of man. The American declarations had been neither systematic nor complete; but the Americans had had the genius to recognize the need to put these declarations first, before any merely constitutional provisions. It was only necessary to reason more systematically from this premise to arrive at a declaration of rights that would be universally applicable. "One can reach such a degree of perfection in this genre that there could not be two declarations in the entire universe that would differ from one another by a single word. Where would arbitrary governments be then?"²⁸

In the logic of this physiocratic discourse of reason, the very act of declaring the rights of man was the fundamental antidote to despotism. Publicity itself was the essence of a declaration of rights; publicity itself was the force that would make such a declaration the measure of all governments and the touchstone of all laws. "Ignorance is the first attribute of savage and isolated man," François Quesnay had insisted in his *Droit naturel*; "in society it is the most fatal human infirmity, it is an enormous crime, for ignorance is the most general cause of the evils of the misfortunes of the human race."²⁹ If ignorance was the principal cause of human misfortunes, it followed that instruction was their principal remedy. Accordingly, Quesnay, the founder of the physiocratic school, had made it one of his fundamental maxims of government that "*the nation be instructed in the general laws of the natural order, which evidently constitute the most perfect government.*"³⁰ Public tranquility and

prosperity were possible only to the degree that knowledge of these laws was made general, he insisted. "The more a nation applies itself to this science, the more the natural order will dominate within it and the more its positive order will be regular. No one would propose an unreasonable law in such a nation, because the government and the citizens would immediately see its absurdity."³¹

In physiocratic theory, then, public knowledge of the rational principles of social order—which is to say, of the natural rights and duties of individuals in society—was the essential remedy for abuses of power. The very self-evidence of these principles, once communicated to an entire nation, would render despotism impossible because absurd—just as it would render constitutionalist notions of checks and balances obsolete because incoherent and dangerous. For decades, accordingly, physiocratic propagandists had argued against political mechanisms for dividing authorities and multiplying countervailing powers. For decades, they had proclaimed that authority should be unitary but rational, transformed from within by the logic of social reason, constrained from without only by the direct and immediate force of enlightened public judgment. Those seeking means to prevent the abuse of wealth and power had invented "a thousand different kinds, all totally useless," insisted another physiocratic propagandist, the abbé Nicolas Baudeau, in his *Introduction à la philosophie économique*. But the only truly efficacious means of achieving this end was public, general, and continual instruction in the (physiocratic) principles of the natural social order. "All the other means, such as republican forms, political counterforces, and the demand for human and positive laws, are insufficient remedies to halt abuses of the predominant force."³²

Writing in 1771, at the height of the constitutional struggles over the Maupeou Revolution, Baudeau had been anxious above all to defend the principle of unitary authority in the service of enlightened reform. Not surprisingly, then, he had reserved his most emphatic scorn for those remedies against arbitrary power favored in the constitutionalist discourse mobilized in opposition to chancellor Maupeou's attack upon the parlements. In his vocabulary, "fundamental laws" could be reduced to vestiges of arbitrary human wills lacking any foundation in the principles of social order, and hence destructive of the true rights of mankind; an "intermediary power," in its turn, was ultimately no more than a means of preventing what was

beneficial to society and ensuring what was harmful to it. As for "countervailing forces," were they really more than "the shock of blind, exclusive, oppressive, usurping passions against other blind, exclusive, oppressive, usurping passions, as celebrated modern writers understand and formally explain?" Could they ever be more than a recipe for social disorder and political confusion? "This continual battle among repositories of authority ceaselessly struggling . . . is evidently a state of war; it is the antithesis of society—in its principle, in its action, in its effects."³³

Never more baldly stated than by Baudeau, opposition to the constitutionalist program for separating and dividing powers remained a fundamental tenet in physiocratic thinking. Unitary political authority at once sustained and transformed by publicity into the exercise of social reason; ignorance, that most profound source of human ills, eliminated by general knowledge of the true principles of social order; arbitrary government rendered impossible by the immediacy of enlightened public judgment: these were the essential maxims of the physiocratic discourse of reason as it took form in the last decades of the Old Regime. These, too, were the convictions that gave the issue of a declaration of rights its supreme importance to Condorcet and Dupont de Nemours on the eve of the Revolution.

The rationalist case for a Declaration as the essential remedy against arbitrary power was passionately made in Condorcet's *Idées sur le despotisme, à l'usage de ceux qui prononcent ce mot sans l'entendre*. "The sole means of preventing tyranny," he argued, "which is to say the violation of the rights of men, is to bring all these rights together in a declaration, to set them forth there clearly and in great detail, to publish this declaration with solemnity, establishing there that the legislative power, under whatever form it is instituted, can ordain nothing contrary to any of these articles." The more detailed and comprehensive this declaration, Condorcet insisted, "the clearer and more precise it will be; the surer of being protected from any tyranny will be the nation that has recognized it and become attached to it by principle, by opinion. For any tyranny evidently attacking one of these rights would see general opposition arise against it." Liberty would thus be secured at no cost to public tranquility or social progress. For an enlightened nation "armed with this shield would cease to be anxious about every innovation."³⁴

Not that Condorcet and Dupont lacked anxiety themselves as they

watched the Estates General assemble. Whatever the long-term effects they expected from a declaration of rights in transforming the nature of French politics and society, their insistence on the importance of such a document was also motivated by a more immediate concern: fear of what the Estates General might do once it seized legislative power. Preoccupied for decades by the need to transform royal authority from within rather than limiting it from without, and for that reason unenthusiastic about the convocation of the Estates General, these advocates of enlightened administrative reform now found the risks of despotism augmented rather than diminished by the prospective assertion of popular will.³⁵ While Condorcet warned of the dangers in his *Idées sur le despotisme*, Dupont reiterated physiocratic doctrine concerning the definition of legislative power in another note added to the *Examen du gouvernement d'Angleterre*. There he insisted that legislative will can never be unlimited; even the people does not have the right to act unjustly. From this it followed necessarily that "legislation in its entirety is contained within a good declaration of rights." And not only legislation, of course, but legislators. This was the obscure wisdom Dupont found locked into the canny linguistic fact that at the origins of societies men had chosen *legislators*, not *legisfactors*: those who would bear the law from the repository of nature rather than making it of their own will. Necessary as a guide to the legislators, a declaration of natural rights would also provide the very touchstone by which their actions would be judged. "Every citizen has the right to subject [them] to the test of this touchstone by a free discussion, communicated as broadly as possible to other citizens. This is why the invention of printing is infinitely helpful; this is why liberty of the press must be placed among the imprescriptible rights of all and of each."³⁶ Palladium of rationality, the declaration would by its very presence transform political will into public reason.

For Condorcet and Dupont, therefore, a declaration of universal human rights would not only serve as an instrument of social and political transformation. No less important, it would become an immediate safeguard against the potential dangers of revolutionary political will. It is striking, however, that Sieyès, that other heir to physiocratic doctrine, placed quite a different inflection upon physiocratic language in this respect. To be transformed, in his judgment, power had first to be seized. Before it could become an instrument for the

rationalization of society, a declaration of rights had to function as a justification for revolutionary legitimacy.

The revolutionary potential of a declaration of rights for such use was made quite explicit by Sieyès in writing, on behalf of the duc d'Orléans, the latter's instructions regarding the *cahiers* to be drawn up in the electoral assemblies of the baillages under his jurisdiction. The very first item appearing in these instructions under the rubric of "most pressing national needs" concerned a Declaration of Rights. Such a document would designate the purpose of the legislative body, Sieyès explained, while also propagating among the people the true principles of social existence. But no sooner had Sieyès enumerated these two general purposes of a declaration of rights than he slipped into a more urgent, unenumerated third, linking the need for a declaration precisely to the exigencies of a revolutionary moment.

"One sees how a declaration of rights is a constitutional need in our present position," the *Instructions* argued; "we are far from directing our conduct only according to the principles of the social order." It followed from this extraordinary situation that, in the forthcoming Estates General, constituent power (in Sieyès's new political language) would necessarily be confused with constituted power, the will of the nation necessarily usurped by its representatives. "It will be necessary to allow this usurpation," Sieyès maintained, "as we would surely allow our friends the initiative to seize our possessions from the hands of a stranger, even without any special charge from us to do so." The essential point was that the deputies make good use of this usurpation "and that in arrogating to themselves the right to give us a constitution, they place therein a principle of reformation fit to be developed, to follow constantly the progress of enlightenment, and to recall it to its true origin."³⁷ Thus the revolution, Sieyès already announces in effect, will be a revolution of the deputies; entrusted with legislative power, they will seize constituent power on behalf of the nation even in the absence of any explicit charge to do so. In this revolutionary usurpation of power, the gap in legitimacy will be filled by "presenting the peoples with the table of their essential rights, under the title of *Declaration of Rights*."³⁸

For Sieyès, then, the most immediate use of a declaration of rights would be to proclaim and legitimate the assertion of a revolutionary political will, breaking with all existing powers. In this manner, his

project for a declaration of rights found its justification within a radical discourse of will invoking a language of national sovereignty. But it did not thereby lose its importance within a rationalist discourse of society. Here, as elsewhere in his political theory, Sieyès blended Rousseauian and physiocratic themes.³⁹ No sooner would the nation recover the exercise of its sovereignty, he anticipated, than it would use its power to institute a new order inaugurated in accordance with the necessary and universal principles governing the social art. Hence the two general purposes of a declaration of rights to which he had earlier adverted. In the first, a declaration "designates for the legislative body the social goal for which it is created and organised; it leaves [the legislative body] all the power, all the force to arrive at this goal with a firm step, and at the same time it surrounds it with precautions, such that it possesses neither power nor force the moment it wishes to diverge from the road set out for it."⁴⁰ Note the formulation: the declaration designates the goal to be followed by the legislative body, but it leaves this body all the power to reach that goal; at the same time, it functions in such a way that this power is lost immediately the legislative body diverges from the purpose set out for it. Power was not to be checked by countervailing power in Sieyès's imagination. It was to be either exercised or lost—turned on or off, as it were, by some kind of automatic switch governing its flow through the political grid. It would circulate through the political system with the same ease as wealth would circulate through the ideal, unimpeded economy.

What would govern the operation of this switch? Sieyès does not make his answer to this question explicit in this text. But a clue may be found in the second of the general purposes he has earlier attributed to a declaration of rights: to serve as an instrument of enlightenment, "penetrating the generality of the citizens with the principles essential to all legitimate, which is to say *free*, human association."⁴¹ Put these two purposes of a declaration of rights together and the point seems clear. Sieyès's declaration will rationalize power by setting forth for everyone to see the principles underlying all social organization. On this basis, a representative body will be instituted to decide on behalf of the nation, but in accordance with invariable principles; the nation in its turn will be enlightened to such a degree that any act of the legislative body in contravention of its rationally established purposes will automatically and immediately become

null and void. Under the aegis of a declaration of rights, power will be exercised rationally, or not at all.

The constitutionalist limitation of power as conceived within a discourse of justice, the revolutionary appropriation of power justified within a discourse of political will, the transmutation of power understood within a discourse of social reason: these were some of the hopes invested in a declaration of rights before the Estates General met. They afforded many competing possibilities as regards the purpose, the form, and the content of a declaration. But transformed into a National Assembly after 17 June 1789, the deputies of the French nation had first to decide whether they wanted a declaration of rights at all.⁴²

< III >

Declaratory Dilemmas

On 27 June, Louis XVI, reluctantly acquiescing for the moment in the National Assembly's existence, ordered that it be joined by those clerical and noble deputies who had continued to meet in their separate assemblies. Bertrand de Barère, writing in *Le Point du jour*, celebrated this reunion of the nation's representatives as finally inaugurating the reign of reason. "Doubtless the assembly's first use of its time and enlightenment will then be given to the declaration of the rights of the nation and the constitution of the state on unshakeable foundations," he declared. "The force of opinion will finally destroy the slavery of abuses; natural justice will bring to an end the tyranny of usages; the courageous and enlightened patriotism that animates all the national representatives will at last achieve the most beautiful revolution accomplished on earth."⁴³ But this was the rhapsody of a man who thought that the constitution could be sketched out in the work of a day. He was soon to discover otherwise.

The assembly now called upon to establish a declaration of rights labored under immense difficulties. Its size was enormous: a body of some twelve hundred persons could not easily reach agreement regarding the draft of any document. The terms of its composition also remained profoundly ambiguous, consisting as it now did of the deputies of the Third Estate who had declared themselves a National

Assembly on 17 June, the liberal members of the privileged orders who had voluntarily decided to join it before or after that date, and the more recalcitrant clerical and noble deputies who found themselves in this common assembly only on the king's orders. Moreover, it had no established organization and forms of procedure, and no accepted rules for deliberation and voting, all of which remained to be defined. Its conditions of existence remained uncertain: early discussion over a declaration of rights took place as the assembly found itself surrounded by royal troops threatening its dispersal; later debate was interrupted by the crisis of widespread unrest in the provinces. And it faced a constantly escalating series of issues as the deputies were obliged, in response to successive crises, to take on the functions of a legislative and executive body in addition to those of a constituent assembly.

All of these conditions merely served, however, to exacerbate the assembly's most profound problem: the radical uncertainty of its constitutional task. By the Tennis Court Oath, the National Assembly had sworn not to disperse until the constitution of the realm had been "established and strengthened . . . on solid foundations."⁴⁴ But what did it mean to "establish" or "strengthen" the constitution? Was there a constitution to be restored—an ancient constitution ravaged by despotism, whose remnants were to be recovered, reassembled on more secure foundations, and reinforced with new protections? Or was there, to the contrary, a constitution to be created—a constitution instituting a true political order where none had previously existed? The division over this matter to be found in the mandates the deputies had brought to Versailles was made clear to the National Assembly by the comte de Clermont-Tonnerre, reporting on behalf of its constitutional committee, on 27 July 1789. "Our constituents want the regeneration of the state," he affirmed. "But some have expected it from the simple reform of abuses and the re-establishment of a constitution that has existed for fourteen centuries . . . Others have regarded the present social order as so vitiated that they have demanded a new constitution, and (excepting monarchical government and its forms, which the hearts of all the French are disposed to cherish and respect) they have given you all the powers necessary to create a constitution."⁴⁵

The question of a declaration of rights lay at the very heart of this dilemma. Indeed, as Clermont-Tonnerre acknowledged, the demand

for such a declaration was "the sole difference existing between the *cahiers* desiring a new constitution and those demanding only the re-establishment of what they regard as an existing constitution."⁴⁶ Nor was Clermont-Tonnerre simply reporting on the language of the *cahiers* in this respect. He was also recapitulating a fact that had become abundantly clear in the assembly's earliest deliberations. To debate the question of a declaration of rights was necessarily to open up the most profound differences within the assembly regarding the nature of its constitutional task.

Reporting to the assembly on 9 July, on behalf of its first committee on the constitution, Mounier had done his best to efface these differences by defining a common ground upon which all could agree. In his analysis, it was more important to give French government a determinate form than it was to decide whether a new constitution was thereby being instituted or an old one restored or perfected. "Let us fix the constitution of France," he exhorted the deputies. "And when good citizens are satisfied with it, what will it matter that some say it is new and others say it is old, provided that by general consent it assumes a sacred character?"⁴⁷ The same spirit of compromise led Mounier to insist at once on the necessity for a declaration of rights and the means of containing its potential dangers. To be good, he reasoned, a constitution had to be founded upon, and clearly protect, the rights of men. This required that "the principles forming the basis of every kind of society" be reiterated in advance, so that each constitutional article might be understood as a consequence of one of these principles. Mounier deemed it essential, however, that the statement of principles take the form of a short, concise preamble to the constitution, rather than becoming a separate document. Otherwise, "arbitrary and philosophical ideas, if they were not accompanied by their consequences, would make it possible to imagine other consequences than those accepted by the Assembly."⁴⁸ The declaration of rights should accordingly be considered an integral part of the constitution, to be neither definitively adopted until the constitution itself was completed, nor published separately from it. Only in that way could the dangers of abstract principles be contained by positive constitutional provisions.

What dangers? Chosen to define a middle ground, Mounier's language remained oblique. But the concerns to which he was alluding were quickly made more explicit by the comte de Lally-Tollendal in

response to the first actual draft of a declaration of rights presented to the Assembly: that proposed on 11 July, to enthusiastic applause, by Lafayette. Lally-Tollendal did not repudiate the idea of drawing up a declaration of rights as a necessary preliminary to the drafting of the constitution, but he expressed alarm at the possibility that such a document might take on a life of its own before the completion of the constitution. The French, he insisted, were not "an infant people announcing its birth to the universe . . . a colonial people breaking the bonds of a distant government." They were "an ancient and immense people, one of the world's first, which gave itself a form of government for the past fourteen centuries and obeyed the same dynasty for the past eight, which cherished this power when it was tempered by customs and will revere it when it is regulated by laws."⁴⁹ Such a society, he feared, could be rapidly thrown into disorder by the spread of metaphysical principles and abstract notions of equality.

Isolated from precise constitutional provisions, Lally-Tollendal warned, a declaration of natural rights would open the Assembly to charges that it was subverting authority and throwing all social order into confusion. It would lead to the possibility that "disturbed imaginations, misunderstanding our principles . . . [or] perverse minds wishing to misunderstand them, would give themselves over to disorders or willfully go to extremes." It would produce problems and delays at a time when "the people suffers and demands real help from us, far more than abstract *definitions*." Ascent to the metaphysical peaks of natural right principles had therefore to be followed by a rapid return to the plain of positive law. "Let us certainly go back to natural law, for it is the source of all the others; but let us pass quickly down the chain of intermediary propositions; and let us hasten to descend again to the positive law which attaches us to monarchical government."⁵⁰

The "incalculable dangers" of metaphysical abstractions in a complex traditional society, and the more compelling need for immediate, practical measures of political and social reform and social relief: these were to become the central themes in the arguments of the many deputies within the assembly who opposed a prior declaration of rights. Clearly sounded by Lally-Tollendal on 11 July, they received overwhelming support. At his suggestion, Lafayette's proposed Declaration of Rights was quickly referred to the thirty *bureaux* into which the assembly had divided itself for regular discus-

sion in smaller groups, a measure that effectively precluded its immediate adoption by the assembly as a whole.

Three days later, on 14 July, surrounded as they were by the royal troops that threatened their very existence as a body, the deputies returned again to the issue raised by Lafayette's motion. "In what circumstances if not when they are violated must we recall the rights of men?" a deputy had demanded. "They would be the enemies of monarchy who said that a declaration of rights is contrary to it."⁵¹ But some deputies wanted a declaration of rights to be placed at the beginning of the constitution, as its foundation; others would only accept a declaration that would appear at the end of the constitution, as its consequence. All that could be agreed, after lengthy debate, was that a declaration of rights should appear somewhere in the constitution. That decision, in its turn, simply raised the question of how the constitution itself would be drawn up. Eventually, the assembly decided upon the appointment of an eight-person constitutional committee drawn from the three orders in proportion to the numbers of their representatives. But even as the deputies debated, a popular uprising was underway in Paris. That evening they received the news of the storming of the Bastille. They were not to hear from their new committee until 27 July.

When it came, the anxiously-awaited committee report was divided into three parts, presented respectively—with obvious symbolism—by a deputy from each of the three Estates that had been so precisely balanced in the committee's composition. The first, offering a general outline of the committee's views, was brought to the assembly with the moral authority of the clergy by Jérôme-Marie Champion de Cicé, archbishop of Bordeaux. The second, the report on the *cahiers* prepared by the comte de Clermont-Tonnerre, carried the weight of tradition. Analyzing the content of the *cahiers*, it divided their constitutional demands into "acknowledged principles" (monarchical government, consent to taxation, the sanctity of property and liberty) and still open questions. But these latter included such issues as the balance of the three Estates within the Estates General, as well as its constitutional relationship to the monarch. Clermont-Tonnerre's vocabulary offered a striking contrast to the language the National Assembly had been forging since 17 June—and with it a powerful reminder of the traditional social claims still

to be fully confronted within an assembly where deputies drawn from the three Estates now so ambiguously coexisted. It underlined the fact that the difference Clermont-Tonnerre reported between those *cahiers* demanding the restoration of a traditional constitution and those demanding a new one—the difference he found symbolized in their positions regarding a declaration of rights—necessarily involved the constitution of society as well as of its government.

It was left to a deputy of the Third Estate, Mounier, to present the articles on which the committee had so far agreed. They consisted of a statement of the principles of French monarchical government, preceded by a Declaration of the Rights of Man and of the Citizen. For the constitutional committee had indeed accepted the arguments for a prior declaration of rights as an indispensable means of establishing the principles upon which a new constitution should be based—and judged by the nation as a whole. "This noble idea, conceived in another hemisphere, must preferably be transplanted first among us," proclaimed Champion de Cicé.⁵² He was convinced that the deputies wanted the ineffaceable principles of the rights of man constantly before them. They wanted the nation "to be able, at every moment, to relate and compare to [these principles] each article of the constitution it has entrusted to us, to assure itself of our faithful conformity to them, and to recognize the obligation and duty that arise for it to submit to laws that inflexibly maintain its rights." They wanted, in erecting "a continual guarantee for us against our own errors," to ensure that, should any future power seek to impose laws incompatible with the principles so declared, "this original and perpetual model would immediately denounce to all citizens the crime or the error."⁵³

But if the National Assembly needed a declaration of rights to secure its own revolutionary legitimacy, it needed also to guard against the dangers of such a document. True to the logic of Lally-Tollendal's earlier warning, the constitutional committee had therefore hastened to move from abstract principles to positive law. Its proposed declaration was to be welded as tightly as possible to the forms of a monarchical constitution. Written by Mounier on the model of Lafayette's earlier draft and his own, the Declaration the committee presented on 27 July was "short, simple, and precise"—as Mounier had earlier insisted it should be. In opting for it, the committee had emphatically set aside the alternative model for a declaration of

rights, that of the systematic exposition of the principles of political association presented to it by Sieyès.⁵⁴

Champion de Cicé portrayed this choice as a strategic rather than a philosophical one. He allowed Sieyès's version the virtue of building a systematic and complete exposition upon the first principles of human nature, "following it without distraction in all its developments and in its social combinations." Indeed, he praised it as the work of a genius "as profound as it is rare." But this was only to ask whether there were not disadvantages "perhaps in its very perfection," since its philosophical qualities might place it beyond the comprehension of the universality of citizens. In Mounier's draft, to the contrary, Champion de Cicé found the same principles of human nature enunciated in "formulations that are complete, but detached one from another."⁵⁵ The educated, in reading them, could fill in the logical connections; the uneducated could retain them more easily as separate propositions, free from an intimidating philosophical apparatus.

This was a shrewd understatement of the implications of choosing Mounier's draft over Sieyès's. There was more involved than mere form. It was Sieyès's claim that only a systematic exposition of the rights of man could make clear that the deputies were acting not simply to limit an existing authority but to institute an entirely new order through the exercise of an ordinary constituent power.⁵⁶ Behind the choice between Mounier's telegraphic articles and Sieyès's extended, systematic exposition, as the deputies were soon to discover, there still lay the fundamental question of whether the French were reforming a traditional system of government or inaugurating a new society.

< IV >

Rights or Duties?

Before the National Assembly could decide the issue of a Declaration of Rights, it had first to decide how to decide. It was not until 29 July that it reached agreement on its rules of procedure, including the fundamental one that decisions would be reached by simple majority vote (with no provision for graduated pluralities to protect the rights of privileged minorities). At the same time, it was decided that the

deputies would continue to meet daily in the separate *bureaux* for more informal discussion, while assembling for deliberation in general session only twice weekly. This latter arrangement seems to have found little favor among the most fervent advocates of a declaration of rights, particularly those endorsing Sieyès's draft. They detected little prospect of early action as *bureaux* meetings, when not inconclusive, continued simply to reject the draft declarations submitted to them.⁵⁷ By the evening of 30 July, Charles-François Bouche was already proposing that the assembly meet daily in plenary session, rather than twice weekly.⁵⁸ Compromise with ancient prejudices was all that Bouche expected from intimate assemblies, like the *bureaux*, in which ideological differences were blunted by traditional habits of deference.⁵⁹ He looked instead for decisive action from large assemblies in which "spirits are fortified and electrified; names, ranks, and distinctions count for nothing; everyone . . . will regard himself as a portion of the sovereign whose representative he is."⁶⁰ Bouche's motion was passed the following day, on 31 July. He was about to have his electrifying general debate.

Thus it was in the uncertain early days of August that the National Assembly, constantly inundated as it was with news of widespread popular disorder throughout the countryside, came finally to debate whether the constitution should actually begin with a declaration of rights. On 1 August, opponents of a prior declaration failed to turn the assembly's discussions immediately and exclusively to the business of the constitution, "such as it must be in a monarchical state, without there being any need for a declaration of rights."⁶¹ No fewer than fifty-six deputies thereupon declared their intention to speak—and began doing so at such length that the first day's debate produced a call (from none other than the impatient Bouche) for a time limit on speeches!⁶² "The moment has finally arrived when a great revolution in ideas and things is going to transport us, so to say, from the mire of slavery to the land of liberty," rhapsodized the *Journal des Etats-Généraux*. "In the new hemisphere, the brave inhabitants of Philadelphia have given the example of a people seizing back its liberty; France will give it to the rest of the globe."⁶³ The *Point du jour* was more measured in its assessment. In Barère's judgment, the moment had come for the deputies of the French nation to decide whether the practice of the New World could indeed be naturalized in the Old; whether the examples of nascent republics might be fol-

lowed in an ancient monarchy; whether there were now greater dangers to be feared from a declaration of the rights of man than from ignorance and contempt for them. "It was in the midst of these doubts and uncertainties," he reported, "that the debates began."⁶⁴

The charge of those opposed to a prior declaration of rights in the current circumstances was led by Jean-Baptiste-Marie Champion de Cicé, bishop of Auxerre. Unlike his brother, the archbishop of Bordeaux, this noble prelate remained among those who mistrusted the transatlantic example of a country inhabited only by "propertyholders, farmers, equal citizens." He deemed it necessary for the French to establish laws to hold society together before announcing indiscriminately the ideal of equality.⁶⁵ This reasoning found substantial support. The principles of the rights of man were eternal, Antoine-François Delandine acknowledged; they had been clearly demonstrated by modern philosophers. But since they were easily misunderstood by the people, they were more wisely reserved to legislators capable of recognizing in the postulate of equality "a philosophical fiction that disappears as soon as there is born, alongside a feeble infant, another stronger one whose intellectual faculties will be greater." An abstract declaration would be dangerous, Delandine insisted, precisely because "each individual, interpreting it at will, could give it a terrifying extension."⁶⁶

Pierre-Victor Malouet expounded along similar lines. "They took man in the bosom of nature and presented him to the universe in his original sovereignty," he acknowledged of the Americans. But it was one thing to do this in a society untouched by the legacy of feudalism, among a people already prepared for democracy by its customs, manners, and geography. It was quite another to do so in the midst of a vast mass of propertyless persons long oppressed and ignorant, a multitude desperately seeking subsistence in the midst of luxury and opulence. In such a situation, the bonds of society had first to be tightened, the classes brought together, the roots of luxury attacked, the spirit of family restored, love of the *patrie* consecrated; only then would it be wise to "announce in an absolute manner to suffering men, deprived of knowledge and means, that they are equal in rights to the most powerful and most fortunate." The conclusion was clear. "An explicit declaration of general and absolute principles of liberty and natural equality can destroy necessary bonds. Only the constitution can preserve us from universal disruption."⁶⁷

The most radical response to these arguments was an avowedly (if quirky) Rousseauian one. Jean-Baptiste Crenière, deputy of Vendôme, invoked the *Contrat social* in distinguishing the constitution of a people from the mere form of its government. "Since every association is voluntary," he argued, "only the will of the associates can determine their relations." A people's true constitution was the act of association by which an assemblage of individuals agreed to form a political society; only by virtue of that act did they acquire rights in their relations one to another. Thus a true declaration of rights, enunciating the terms of the contract by which the French constituted themselves as a people, was necessarily prior to the institution of any particular form of government.⁶⁸

Beyond a passing correction from Mounier, Crenière's speech elicited little response from other deputies. None was prepared to follow him so boldly in a reading of Rousseau that reduced rights to the consequences of a political convention.⁶⁹ Those favoring a prior declaration of rights preferred instead to find justification for the assembly's actions in principles beyond human will. "The rights of man in society are eternal; no sanction is needed to recognize them," reasoned the young comte de Montmorency-Laval. It followed that a declaration of rights was the essential foundation of the constitutional edifice; it had to be laid before this edifice could be constructed.⁷⁰

In this view, there was greater danger of disorder in preserving ignorance and prejudice than in declaring universal truths. "The truth cannot be dangerous," insisted Guy-Jean-Baptiste Target, author himself of a much-discussed draft declaration. Moreover, any attempt to conceal the truth would be both criminal and useless. "The people does not sleep for ever; it is gathering its forces to overthrow the yoke with which it is burdened; we must direct its efforts with wisdom and prudence."⁷¹ It would be a profound mistake to stress the dangers of a declaration of rights, added the comte de Castellane, particularly in a moment of social unrest "when all the springs of government are broken, and the multitude abandons itself to excesses that inspire fear of even greater ones." To the contrary, the "true means of stopping licence" was "to lay the foundations of liberty."⁷² "Philosophical and enlightened peoples are calm," Antoine-Pierre-Joseph-Marie Barnave reassured the assembly; "ignorant peoples act restlessly." It followed necessarily that the constitution be preceded by a simple declaration comprehensible to all, a declaration that would become an indispensable *catéchisme national*.⁷³

But there were many more-experienced catechizers in the National Assembly than Barnave, and they were far from imagining his catechism of *rights*. In fact, members of the clergy were conspicuous in the debate during its third day as they insisted that any declaration of rights also comprise a declaration of *duties*. The development was a telling one: it meant that the debate was shifting from the issue of whether there should be a prior declaration to the question of what it should contain. "One of the most interesting spectacles for a philosopher is to observe the rapid progress of truth and reason in the national assembly," reported the *Point du jour* in its account of the assembly's deliberations. "The first day of the debates, it seemed doubtful whether even the idea of a declaration of rights separate from the constitution would be adopted; the second day, the objections raised against all declarations (this example to French liberty given by American liberty) evaporated; finally, the third day, the discussion was only about whether the declaration of duties would be combined with the declaration of rights."⁷⁴

On this third day, over repeated appeals for an immediate vote on the issue of a prior declaration, the assembly suddenly began to hear demands that any exposition of principles preceding the constitution include duties as well as rights. "This was one of the most tumultuous of sessions," reported the *Journal des Etats Généraux*, describing the "hurricane of ideas" that blew as successive speakers persisted in the face of cries "*Aux voix! Aux voix!*"⁷⁵ The clash of opinions was fundamental, touching as it did upon the deepest convictions regarding the nature of enduring social bonds. "Let us first establish and fix the duties of man; for to whom shall we give laws when the very natural spirit of independence has excited all minds and broken the bonds that maintain the social pact?" urged Pierre-Charles-François Dupont, one of the deputies of the Third Estate of Bigorre.⁷⁶ "If a declaration is necessary," thundered the bishop of Chartres, "there is a pitfall to avoid. There is a risk of awakening egoism and pride. The flattering expression of *rights* must be accompanied by *duties* as a *corrective* . . . It is desirable that there be, at the head of this work, some religious ideas nobly expressed."⁷⁷ The abbé Baptiste-Henri Grégoire, future revolutionary bishop, was no less passionate in insisting that a declaration of the rights of man was inseparable from a declaration of the duties necessarily paralleling and limiting them. While some deputies countered with the argument that duties were simply the corollary of rights—and therefore needed no explicit exposition—others now struggled,

in refutation, to prove the converse. In the meantime, the Jansenist canon lawyer Armand-Gaston Camus obstinately demanded a formal vote on his amendment to the motion: "Will there, or will there not, be a declaration of the rights and duties of man and of the citizen?"⁷⁸ In the shouting match that followed, the clergy demonstrated its passionate conviction of the dangers of any attempt to found a society on purely individualistic principles.

The demand for a declaration of duties was strong enough to dictate a roll-call vote but not to convince a majority of the deputies: the motion was defeated by 570 to 433. Nevertheless, the issue had been a decisive one. In voting against a declaration of duties, the deputies had in effect opted for a declaration of rights.⁷⁹ Before closing the morning session of 4 August, the assembly decreed—"almost unanimously"—that the constitution would indeed be preceded by a Declaration of the Rights of Man and of the Citizen.

It is scarcely necessary to describe the events of the evening session of that same day. Acting on the celebrated Night of the Fourth of August to abolish every vestige of the "feudal regime," the National Assembly suddenly swept aside the bonds of a traditional social order opponents of a prior declaration of rights had been so anxious to defend. The writers of Mirabeau's *Courier de Provence* saw a direct—and surprising—connection between this "holocaust of privileges" and the preceding debate. They claimed the emotional abandonment of privileges was sparked by a desperate final maneuver on the part of those still opposed to a prior declaration.⁸⁰ This is an unlikely interpretation: the plan to propose an abandonment of privileges seems rather to have come from those favoring a declaration of rights than from those opposing it.⁸¹ Yet there is little doubt that the emotions that swept the National Assembly on the Night of the Fourth of August were charged as much by the frustrations and delays of the preceding debates over a declaration as by the need to restore social order. "A great question agitated us today; the declaration of the rights of man and of the citizen has been deemed necessary," acknowledged one deputy during that night of sacrifices. "The abuse the people makes of these same rights presses you to explain them, and to establish with skillful hand the limits it must not cross." The assembly, this deputy nevertheless insisted, "would have prevented the burning of chateaux" had it been quicker to declare its determination to annihilate "the terrible instruments" of oppression they con-

tained.⁸² The deputies had indeed left it very late. Now those who had pressed for a prior declaration of rights rushed to embrace the immediate concrete actions their opponents had long demanded as an alternative. Making dramatic use of the sovereignty to which it had laid claim on behalf of the nation, redefining property rights in the act of upholding them, the National Assembly began to give substance to its notion of the rights of man and of the citizen.

< V >

"A Difficult Work"

It was to take the deputies a week to translate into legislative form the momentous decisions of the Night of the Fourth of August. Having done so, they returned immediately to the question of the Declaration of Rights—only to be confronted by the dozens of proposed declarations which had by then accumulated. Anxious for a text that would provide a basis for rapid deliberation, the assembly agreed on 12 August to form a Committee of Five to consolidate the various proposals into a working text.⁸³ Led by the comte de Mirabeau and Jean-Nicolas Dêmeunier, an authority on American politics and a strong advocate of a declaration of rights, the committee quickly set aside the existing proposals to produce a new version of its own.

This draft appears to have been composed largely in Mirabeau's "workshop" with the help of the Genevan exiles he had assembled to constitute his personal writing-stable and think tank. Mirabeau "had the generosity, as usual, to take the work upon himself and give it to his friends," one of them, Etienne Dumont, later recalled. "There we were, then, with Du Roveray, Clavière and himself, drafting, disputing, adding one word and eliminating four, exhausting ourselves in this ridiculous task, and finally producing our little piece of marquetry, our mosaic of supposedly eternal rights that had never existed."⁸⁴ Indeed, Dumont claimed to remember that, feeling all the absurdity of a "puerile fiction" as dangerous as it was fallacious, he became so disenchanted with the entire project that even Mirabeau and the other Genevans were persuaded of its futility.

It is difficult to evaluate these recollections written much later by a man who was to end up editing that classic refutation of the Declaration of the Rights of Man and of the Citizen, Jeremy Bentham's

Anarchical Fallacies. Etienne Clavière and Jacques-Antoine Du Roveray, after all, were political refugees, veterans of a revolutionary democratic movement that had claimed the inspiration of Rousseau, and almost certainly acquainted with the textbook account of natural rights theory propounded by their compatriot, Jean-Jacques Burlamaqui. Indeed, Du Roveray's *Thèses philosophiques sur la patrie*, published in Geneva in 1767, had ended in a political call strikingly similar to a famous phrase of the preamble they now prepared for the Declaration of the Rights of Man: "Our misfortunes must instruct us, we owe all our ills to forgetfulness of these eternal maxims."⁸⁵ It seems unlikely, then, that Mirabeau's Genevans were quite as disenchanted with their task as Dumont later suggested.

At the same time, it is undeniable that when Mirabeau offered his committee's work to the National Assembly on 17 August, he did so with striking reservations. "The declaration of the rights of man in society is doubtless only an exposition of some general principles applicable to all forms of government," the great orator began. "From that point of view, one would think a labor of this nature very simple and little susceptible of contestations and doubts." But the committee had not found it so. Indeed, it had "quickly realized that an exposition of this kind, when it is destined for an old and almost failing political body, is necessarily subordinate to many local circumstances and can only ever attain a relative perfection. From this perspective, a declaration of rights is a difficult task." The assignment was all the more arduous, Mirabeau continued, insofar as it involved the composition of a document to serve as preamble to a constitution not yet decided, to be prepared in a few days (as the Assembly had charged) as a digest of many conflicting proposals, and to be cast in a manner appropriate for the use of a people "prepared for liberty by the force of facts and not by reasoning."⁸⁶

The *Courier de Provence* (written for Mirabeau mostly by Dumont and Du Roveray) was even more direct about the difficulties of drawing up a declaration of rights in a revolutionary situation. It found its argument in Rousseau's observation that society is advantageous only insofar as all its members have something and none have too much. "This profound truth contains the cause of the difficulties of making a *declaration of rights* for a people grown old in its prejudices," the journal explained. "Truth commands that everything be said, and wisdom invites temporization; on the one hand,

the force of justice propels beyond the timid considerations of prudence; on the other, the fear of exciting a dangerous fermentation alarms those who do not wish to buy posterity's good at the price of the present generation's misfortunes. Oh you, tyrants of the earth, you did not feel half the misgivings, in covering it with evils and ravages, that its benefactors experience in seeking to remedy them!"⁸⁷

Whatever their views regarding the intrinsic logic of a declaration of rights, these veterans of revolution in Geneva were apparently convincing themselves, and Mirabeau, that a declaration might produce a general conflagration in a complex and corrupt society. They acknowledged that a philosopher writing for eternity without thought of addressing the multitude was obliged to be uncompromising in announcing the rights of humanity. But it now seemed that the political actor in an immediate situation had necessarily to be more cautious—especially in regard to the dangers of popular misunderstanding. The people could not be armed with ideological weapons unless it was also taught their use, "for fear that it might abandon itself to fury in a first transport of drunkenness, turn them against itself, then cast them aside with as much remorse as horror."⁸⁸

The Committee of Five had nevertheless produced a draft. And in doing so, Mirabeau explained to the Assembly on 17 August, it had preferred a series of articles in the more direct American style to the "scientific abstraction" favored by Sieyès and his supporters. Like the Americans, it had sought to present "political truths . . . in a form that could easily become that of the people, to whom alone liberty matters, and who alone can maintain it." Like them, it had opted for the language of "everyday life and simple reasonings." Like them, it had aimed to evoke "the sensations that have served to kindle liberty . . . setting aside, as far as possible, all that presents itself under the apparatus of novelty." Nonetheless, Mirabeau acknowledged, the committee had encountered many problems in realizing this form. It had proven difficult to distinguish what was natural to humanity from what was specific to particular societies; to enunciate the principles of liberty without entering into details or drifting into the formulation of laws; to avoid carrying "resentment of the abuses of despotism to the point of composing less a declaration of the rights of man than a declaration of war against tyrants." In brief, the Committee of Five had fallen far short of the ideal declaration of rights that "would contain axioms so simple, evident and fertile in consequences that it

would be impossible to diverge from them without being absurd and one would see all Constitutions emanate from them."⁸⁹

A revealing remark this, for it suggests that while Mirabeau and his colleagues had rejected the philosophical style of exposition favored by Sieyès they were still far from abandoning the rationalist ideal to which it was linked. Nothing, indeed, revealed this ideal more clearly than the language of the preamble which Mirabeau now proposed:

The representatives of the French people constituted as the National Assembly, considering that ignorance, forgetfulness, or contempt for the rights of man are the sole causes of public misfortunes and the corruption of government, have resolved to reestablish, in a solemn declaration, the natural, inalienable and sacred rights of man; in order that this declaration, constantly present to all members of the social body, may ceaselessly remind them of their rights and duties; in order that the acts of the legislative and the executive power, since it will be possible to compare them at each moment to the goal of every political institution, may be the more respected; in order that the demands of the citizens, henceforth founded on simple and incontestable principles, may always be directed towards the maintenance of the Constitution and to the happiness of all.

In consequence, the National Assembly recognizes and declares the following articles.⁹⁰

The language of this preamble is, of course, virtually identical to that ultimately adopted in the final version of the Declaration of the Rights of Man. But it appealed less to the popular experience Mirabeau had been invoking than to the physiocratic ideal of a rationality that would unerringly guide the individual choices driving the entire system of modern society. Nor is this surprising. Mirabeau, that often wayward son of a founding father of physiocracy, had certainly been willing in his earlier *Essai sur le despotisme* to reiterate physiocratic demands for instruction that would allow every act of legislation to be compared directly to the ineffaceable and imprescriptible natural laws establishing the rights of man.⁹¹ And he acknowledged the same inspiration yet again in debating the fate of his committee's recommendations. "Everything is in this principle—so elevated, so liberal, so fertile—that my father and his illustrious friend, M. Quesnay, consecrated thirty years ago, and M. Sieyès has perhaps demonstrated better than any other" he admitted; "and all the rights, all the duties of man derive from it."⁹²

In this case, though, the physiocratic vision was rapidly conflated with the Rousseauian ideal of collective freedom achieved by the ex-

ercise of a common political will. For the articles that followed in the declaration of rights drafted by Mirabeau's committee were strikingly Rousseauian. Having declared that all men are born free and equal, the draft offered a definition of political association that came directly from the *Contrat social*: "Every political body receives its existence from a social contract, express or tacit, by which each individual places his person and his faculties in common under the supreme direction of the general will, and the body simultaneously receives each individual as a part." This formulation was followed, in turn, by an article defining a constitution as the explicit expression of the will of the nation, subject to change by that will at any moment. "Since all the powers to which a nation submits itself emanate from the nation, no body, no individual can have authority that does not derive expressly from it. Every political association has the inalienable right to establish, to modify or to change the constitution, that is to say, the form of its government, the distribution and the limits of the different powers composing it." And, in due course, there appeared the Rousseauian insistence that "the law, being the expression of the general will, must be general in its object, tending always to assure all citizens of their liberty, property and civil equality."⁹³

A draft of this kind, presented with such ambivalence, did little to lay the basis for consensus among the deputies. In fact, it invited a virtual reprise of the arguments of 1–4 August. The ensuing debate left the Assembly, on 18 August, in a state of utter indecision. In the absence of support for Mirabeau's draft, it was simply thrown back to where it had been a week earlier—which is to say, faced with dozens of competing drafts for a declaration of the rights of man. Its only hope now seemed to be to choose one of these drafts and discuss it article by article. But even as the deputies began to vote on this procedure, Mirabeau suddenly adopted a new tack. Abruptly, he proposed reiterating the decision to make a declaration of rights an integral and inseparable first chapter of the constitution, but postponing the composition of this declaration until other parts of the constitution had been determined.⁹⁴ This meant, in effect, that the Assembly would simply confess its inability to agree on any draft, quietly retreating from its earlier decision to begin its constitutional work with a declaration of rights. Applauded by some, Mirabeau's maneuver was bitterly attacked by others as the arrogance of an orator cynically convinced of his ability to manipulate the Assembly's decisions. In response, the

report of the Committee of Five was simply referred to the *bureaux*. A day later, it was formally rejected as a basis for further discussion.

At an impasse, the deputies reverted to earlier disagreements over the procedural advantages of continuing the search for a text in a general assembly or referring it again to the *bureaux*. This time, it was Lally-Tollendal's turn to insist that they either decide upon the language of a declaration or abandon the attempt. The Assembly's inability to arrive at a draft seemed in his judgment simply to underline the dangers of such a project. "If the twelve hundred of us have such difficulty in agreeing upon the manner of understanding this declaration," he demanded, "can we believe that it will fix the reasoning of twenty-four million in a uniform manner?" In this view, the assembly should immediately adopt a short, clear declaration, hastening to draw true practical consequences from its principles before others drew false ones. If this was impossible, it should save its time and proceed directly to a constitution—as Mirabeau had suggested. "The people is waiting, wanting, suffering" Lally-Tollendal reminded the deputies; "it is not for its happiness that we leave it any longer prey to the torments of fear, the scourge of anarchy, the very passions devouring it, which it will one day blame on those who have inflamed them. Better that it recover earlier its liberty and tranquillity; let it sooner receive the effects and later know the causes."⁹⁵

Faced with this call either to act or to abandon the entire effort of a declaration, a majority of the deputies decided, finally, to cut the Gordian knot. Agreeing to an immediate choice of a text that would serve as a basis for detailed discussion, the Assembly opted for one of the more laconic draft declarations earlier presented to it, that proposed by its Sixth Bureau.⁹⁶ With sudden energy flowing from desperation to complete a task that had proved so unexpectedly problematic, the deputies now began discussing and revising this minimal text clause by clause. Within a week, little of the original wording of its articles was left; much had been sacrificed to language taken from other drafts or hammered out in discussion on the Assembly floor. Few members of the Assembly would probably have wished to claim for the resulting document more than that "relative perfection" Dêmeunier urged them again to accept.⁹⁷ But the representatives of the French nation had nevertheless arrived by 27 August, after so much hesitation and difficulty, at a Declaration of the Rights of Man and of the Citizen.

As passionate as they were profound, the Assembly's discussions

of particular articles of the Declaration will be considered as necessary in the following chapters. But it is worth remarking here that the preamble to the draft declaration first proposed so unenthusiastically by the Committee of Five, and then rejected so easily by the National Assembly, suddenly became the basis for the definitive text. Several possible preambles were proposed on 20 August. There was even a call for the Declaration to be preceded by the Decalogue (just as Duquesnoy had suggested earlier that it be preceded by the text of the *Social Contract*).⁹⁸ Many deputies expressed the importance of invoking the name of the Supreme Being, which was indeed added to the eventual text. But it was the preamble of the Committee of Five and its Geneva ghostwriters—adroitly presented by Dêmeunier with minor modifications suggested by the tenor of the preceding debate⁹⁹—that suddenly regained favor during a discussion in which, even "at the last minute, one was far from foreseeing the solution."¹⁰⁰ Of all the passages proposed to the National Assembly in the various versions of a declaration of rights submitted to it, this luminous preamble—with its promise of political transparency—found its way into the final document in a form most remarkably close to its initial formulation.

Even so, the text the Assembly had hammered out by 27 August was not yet definitive; nor was it formally adopted as complete. Instead, discussion of further articles was simply suspended on that date, their consideration now being postponed until "after the constitution."¹⁰¹ The deputies had arrived at a provisional text adequate for the moment to satisfy the philosophical imperative of a prior declaration; they could no longer defer the practical imperative of fixing the French constitution in the light of its principles. "The order of the day had been to deal with articles to be added to the declaration of rights," reported the *Point du jour*; "but the order of needs was to work on the constitution."¹⁰² Long before that constitution was completed, however, the Declaration of the Rights of Man and of the Citizen had taken on a separate and definitive life of its own.

< VI >

A Problematic Choice

Though it has often been seen as at once the most striking proof and almost inevitable product of a notorious French rationalism, the text

of the Declaration of the Rights of Man and of the Citizen—indeed its very appearance—was far from being a foregone conclusion in 1789. To the contrary, the story of its composition is one of profound uncertainty and conflict over the meaning and essential purpose of any declaration of rights; over its necessity or desirability; over its benefits or potential dangers; over the form it should take; over the procedures by which it might be composed; over the precise relationship it would bear to the constitution the National Assembly had committed itself to “fix”; over the relative place within it of rights and duties; over the claims of eternal, universal principles as opposed to particular considerations of time and place. Several times, the project of a declaration of rights seemed destined simply to founder in the face of these difficulties and uncertainties. Remarkably, it survived to be realized in a text composed by an assembly of twelve hundred persons in a final week of passionate public debate.

It is scarcely surprising, then, that the resulting document bore the marks of its difficult birth. Though it rapidly assumed a virtually sacred status, it was left by its authors as a text still provisional and incomplete. Though it appealed to eternal principles, it was shaped by acute conflicts over the exigencies of the political moment. Though it held out the ideal of political transparency, it emerged as a work of textual compromise and conceptual ambiguity. In adopting the language of the Declaration of the Rights of Man and of the Citizen, the deputies had not decisively resolved many of the issues dividing them so much as they had arrived at a series of linguistic compromises upon the basis of which they could now turn to debate the constitution. Many of the provisions of the Declaration remained profoundly ambiguous—their meaning left to be determined in subsequent arguments over the constitutional provisions that would give them effect.

The Declaration nevertheless answered enough of the needs of the particular moment, and satisfied enough of the competing political strategies formulated in response to it, to gain the acceptance of a body that had been so profoundly divided over its production. First and foremost, it gave the National Assembly a statement of universal, eternal, natural principles to legitimate its defiance of an absolute monarch.¹⁰³ General truths were held out against the despotism of arbitrary, particular will. Truths valid for all times and places were invoked to end the injustices and vicissitudes of a political order now implicitly emptied of the authority of historical prescrip-

tion and reduced to a regime of power constantly destabilized by the play of vicious interests. The imprescriptible rights of individuals, the inalienable sovereignty of the nation, the natural order of society: these conceptions justified the deputies in their resistance against a monarchical power hitherto constituted as the sole point of unity within a particularistic regime of orders and Estates, the political vehicle by which the transcendent claims of the divine became the norms of earthly existence.

But this revolution carried out in the name of national sovereignty was not, strictly speaking, a revolution of the nation. More precisely, it was a revolution of deputies acting in the name of the nation. Moreover, it was a revolution of deputies who had initially received powers very different from those they soon found themselves exercising—and from a nation defined very differently from the one they were summoning into existence. Recurring debate over the nature of the “mandates” the deputies had received from their constituents constantly revealed the aporia between representation and national sovereignty in the revolutionary situation. The deputies had to legitimate representation even as they broke with the forms that had constituted them as representatives. They had to justify what Sieyès had so frankly called their “usurpation,” a usurpation not only in relation to the monarch but in relation to the nation itself. The principles of publicity, immediacy, and transparency set forth in the preamble to the Declaration of the Rights of Man and of the Citizen offered an essential solution to this problem. This declaration that would be *constantly present* to all members of society promised the closing of the gap between the people and its representatives. It promised a world of instantaneous communication in which the deputies would be directly and immediately linked to the nation they served: a world in which the people could therefore assure itself, *at each moment*, that it was at one with its representatives. The physiocratic circuit of knowledge now closed the gap in the Rousseauian circuit of power.

Enough deputies were therefore convinced of the necessity of a statement of universal, eternal principles—and of a promise of political transparency—to make these indispensable features of the Declaration of the Rights of Man and of the Citizen. But many were also fearful of the dangerous implications that might be drawn from abstract principles in a situation of widespread unrest. They feared that disorder would arise from popular insurrection justified by appeal to

the primitive rights of man, that anarchy would result from the dissolution of social bonds in the name of individualistic principles of liberty and equality. They were offered some recognition of these concerns in the preamble's promise that the Declaration would ceaselessly remind all members of the social body of their duties as well as their rights, while constantly ensuring respect for the acts of the legislative and executive bodies. But they sought their principal safeguards against anarchy and disorder in language more immediately controlling the implications of the successive rights the Declaration announced. They wanted rights contained by the positive provisions of the law.

This concern for social order became one of the principal motivations behind the markedly "legicentric" provisions of many articles of the Declaration of the Rights of Man and of the Citizen.¹⁰⁴ Time and again, the more conservative or moderate members of the Assembly insisted on the need to qualify the general statement of a right by immediate reference to the constraints of the law and the needs of civil society. "Each step it takes in the exposition of the rights of man," the *Courier de Provence* observed of the Assembly's final debates over the declaration, "it appears struck by the abuse that the citizen may make of them—abuse that prudence will often even exaggerate. Hence these multiple restrictions, these minute precautions, these conditions laboriously applied to all the articles to follow: restrictions, precautions, conditions which almost everywhere substitute duties for rights, hindrances for liberty, and which, encroaching in more than one respect on the most taxing details of legislation, will present man bound by the civil state and not the free man of nature."¹⁰⁵

But a convergence was possible here between fear of social disorder and fear of despotism. Fear of social disorder required that the subversive potential implications of rights be limited by the law. Fear of despotism required that rights remain free from abridgment by any arbitrary personal power, which is to say that their exercise be limited *only* by the law. With this "only," the law could be established as the solid reality exorcising the competing specters of disorder and despotism. Liberty could be defined as "being able to do anything that does not injure another," with the limits necessary to fulfill this latter condition safely left to be "determined *only* by law" (Article 4). The law, but only the law, could fix the point at which re-

ligious opinion troubled the public order (Article 10); the law, but only the law, could determine the cases in which speech or action constituted an abuse of the right to freedom of expression (Article 11). By way of this *only*, the discourse of justice found its place in the text of the Declaration.

Nevertheless, it did so in a curiously alloyed form. For the law the Declaration invoked was henceforth to be understood as "the expression of the general will" (Article 6), that impersonal collective power emanating from all and applying to all. Understood in this way, the law would have the right "to forbid *only* actions harmful to society" (Article 5), and to "lay down *only* those penalties that are strictly and evidently necessary" (Article 8). But the judgment as to which forbidden actions were or were not harmful to society—and which penalties were or were not necessary for their punishment—could not be left to individuals, even though these latter were held to be endowed with an inalienable right of "resistance to oppression" (Article 2). Since the law was the expression of the general will, it followed that "every citizen summoned or seized by virtue of the law must obey at once; he makes himself guilty by resistance" (Article 7). It followed, in short, that *only* the law could decide the limits of the law. But this meant, in effect, that the law—even if *only* the law—could indeed fix the meanings and limit the exercise of the rights of man and of the citizen. It meant that political will—even if only the general will—could ultimately limit the exercise of rights. It meant legislative sovereignty, the sovereignty of the Rousseauian discourse of will.

By such linguistic compromises and conceptual transpositions, the divided deputies finally reached a measure of agreement on a text for a Declaration of the Rights of Man and of the Citizen. But they did so at the cost of accepting a document that blended competing discourses into a volatile compound, a document producing profound ambiguities that would henceforth drive the revolutionary dynamic. The deputies agreed in adopting Article 16 of the Declaration, for example, that "a society in which the guarantee of rights is not secured, or the separation of powers not clearly established, has no constitution." But in the context of the political languages of 1789, the phrase "separation of powers" was susceptible of two quite different interpretations. Within the discourse of justice, it could be understood as applying to a system of checks and balances on the Anglo-American model favored by Mounier and the

Monarchiens. Within the discourse of will, however, it could be construed according to the Rousseauian distinction between legislative and executive power, the former constituting the formal expression of the general will by the sovereign body of the people, the latter its application to particular persons and cases by the act of government. This distinction entailed a clear separation of powers, but proscribed any system of checks and balances; it operated simply to make the executive clearly subordinate to the general will. The language of Article 16 therefore glossed over the differences between two fundamentally antithetical conceptions of a division of powers. It was as compatible with an English model of government as it was with the Rousseauian notion of the general will.

Much, then, depended on the constitutional application of the language of Article 6 to the effect that "the law is the expression of the general will." Was it to be construed as implying the strong Rousseauian notion of a direct and immediate sovereignty that could ultimately have no limits outside itself, no restrictions other than those inherent in its very generality? Or might it imply some less demanding conception of sovereignty? Once again the Declaration was ambiguous. For, having declared the law to be the general will, Article 6 went on to say that all citizens have the right to participate personally or through their representatives in its formation. How, then, was this article to be understood if it admitted the possibility of representation so emphatically denied by Rousseau on the grounds that it was fundamentally incompatible with the notion of the general will? Little clarification could be found in Article 3 of the Declaration proclaiming that "the source of all sovereignty resides essentially in the nation. No body, no individual can exercise authority that does not explicitly proceed from it." To assert that the nation was the ultimate *source* of all sovereignty was not necessarily to say that the nation must exercise that sovereignty directly and immediately. Indeed, it was the specific virtue of this formulation that it glossed over the considerable difference between a strong Rousseauian version of the principle of national sovereignty (embraced by its more radical members) and the weaker one espoused by the moderates led by Mounier.

The choice between these competing definitions of sovereignty lay at the heart of the arguments that immediately occurred when the deputies finally turned, at the end of August, to debate the issue

of the constitution. In the course of these debates, the assembly opted for a Rousseauian gloss on the notion of the separation of powers enunciated in Article 16 of the Declaration. It abandoned and repudiated the idea of checks and balances, favoring instead the idea of a binary separation between the legislative power—exercised by a unitary representative assembly, understood as expressing the general will—and an executive power responsible for applying that will to particular cases. This is to say that the Assembly opted, in effect, for a Rousseauian interpretation of the idea of the general will enunciated in Article 6, as of the principle of national sovereignty proclaimed in Article 3. It thus fell back upon a conception of political right that ultimately found individuals protected by the inherent generality of the general will itself rather than by any external, institutional limitations upon it.

But it was a condition of the generality of the general will, in Rousseau's conception, that it be neither alienated nor represented. How then could the deputies avoid profound contradiction when they found themselves compelled to combine the theory of the general will with the practice of representation unavoidable in a large state? Nothing was to prove more problematic for the revolutionaries—or more volatile in its implications—than this notion of representing the general will, which opened up the constant risk that the will represented might be the particular will of the representative body rather than the general will of the nation. The suspensive royal veto adopted by the National Assembly in September 1789 was seen as a mechanism to close this gap between sovereignty and representation by offering a procedure through which legislative decisions could be appealed to the general will.¹⁰⁶

In the event, it served to widen that gap and to exacerbate the tension between sovereignty and representation. Against the will of the deputies, the royal veto was swept away on 10 August 1792 (and, with it, the very constitution of which it formed part) by a new revolution justified and carried out in the name of popular sovereignty. With that revolution, the dynamic established by the attempt to combine sovereignty and representation became clear. The problematic relation between the people's two bodies—the insoluble problem of making the will of its representative body consubstantial with the will of its sovereign collective body (or those outside the National Assembly who claimed to express that will)—became the critical

center of revolutionary politics. The Terror took form as the "people" and its representatives sought, in turn, to purge and purify one another to secure their unity and mutual identity.

The Terror took form, too, as the revolutionaries continued the struggle to realize, *at each moment*, that impossible transparence of will and understanding between the nation and its representatives that had been promised by the preamble of the Declaration of the Rights of Man and of the Citizen in 1789. The principles of that document had been enunciated in the name of universal reason and a common humanity. But its ambiguities served to inaugurate a radical dynamic that subverted representation in the name of the general will, constitutionalism in the name of political transparence, the rights of individuals in the name of the right of the nation.

PART II

Text

