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Conceptual Analysis of Fundamental Rights in French Administrative Law

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ABSTRACT

Fundamental rights constitute one of the complex subjects in human rights law. These rights are achievements of the rule-of-law state, which—based on a legal structure grounded in the hierarchy of norms, the principle of the rule of law, and the separation of powers—has been formed upon a liberal foundation. In the realm of fundamental rights, it is not appropriate to distinguish between rights as constitutional or non-constitutional, nor to focus on whether they are expressly stipulated in the constitution or not; rather, what matters are the principles, values, and foundations through which the rule-of-law state conceives fundamental rights as its ultimate objective. In this regard, the jurisprudence of the Constitutional Council of France is particularly noteworthy, as this body has assumed a prominent role in the dynamism and development of fundamental rights. Consequently, understanding and comprehending the concepts and characteristics of these rights requires attention to their formative contexts, underlying foundations, and the manner of their evolution. These rights belong to the category of superior norms; in other words, fundamental rights embody a value system concerning rights and freedoms deemed fundamental, as reflected and strongly emphasized in international instruments such as human rights declarations and the two Covenants (civil and political rights; economic, social, and cultural rights).

Keywords: *rights; fundamental; state; rule-of-law; norm*

Introduction

In the field of human rights and freedoms, the term *fundamental rights* is among the relatively new designations that is widely used today. In this regard, numerous questions arise. At first glance, these rights appear to be constitutional in nature and, naturally, ought to be so. But what is the source of their constitutional character? Is their fundamental status in legal systems derived from their inclusion in superior or constitutional texts, or do these rights, by their very nature, inherently possess such prominence and superiority in a way that their absence would lead to the disintegration of human identity? What is the concept of these rights and what characteristics do they have? What is evident and indisputable is that fundamental rights belong to the category of superior norms. Most legal systems have accepted this proposition. Accordingly, they have been incorporated into international

instruments such as human rights declarations and the two Covenants (civil and political rights, and economic, social, and cultural rights), where strong emphasis has been placed upon them. Domestic legal systems are currently analyzing these rights within their constitutional and supra-legal documents. Although many of these rights have existed historically following the rise of constitutionalism, new and evolving debates have emerged concerning their scope, authority, and necessity.

Another perspective on fundamental rights is to set aside purely analytical approaches and instead focus on the gradual historical process of their emergence, namely the context in which these rights developed and were nurtured, as well as their roots and prerequisites. The rule-of-law state, which lays claim to these rights, must itself be examined.

What kind of state is this? It is a state that declares the protection and guarantee of fundamental rights as its ultimate objective—a state in which power is recognized solely through the medium of law.

In this study, particular attention is paid to French constitutional law.

Fundamental rights are examined from the perspective of French legal scholars, and the instruments employed by the Constitutional Council to protect these rights are analyzed.

Generalities of Fundamental Rights

At the outset, an effort is made to explain the general aspects of fundamental rights, including their foundations, primary concepts, the rule-of-law state, and its necessary elements.

A. The Concept of Fundamental Rights

Today, fundamental rights are addressed in most constitutional law analyses. Expressions such as the “rights revolution,” “normative fundamentalism in the framework of human rights,” and the “empire of rights” frequently appear in legal literature. This subject has a particular appeal because it is a foundational discussion that can become the ultimate objective of many theories of public law. At the beginning, it is necessary to distinguish between the two concepts of *being right* and *having a right*. The first concept occupies a special place in value-based discussions (good and bad), whereas it is the second concept—having a right—that forms the subject of human rights propositions. In other words, when the law recognizes an individual as a rights-holder, it means that the legal system places that individual in a special legal position (1).

This notion of having a right appears under various titles such as human rights, rights and freedoms, citizenship rights, and fundamental rights in domestic and international instruments. The question that arises, however, is how certain rights acquire the attribute of being *fundamental*. Do these rights possess specific characteristics? In response, it may be stated that fundamental rights—independently of formalist approaches that consider official constitutional guarantees or equivalent regulations as the decisive criterion—are such that their existence ensures the coherence of human personality, and their absence leads to the erosion of individuality (2). Human beings, by virtue of being human, are entitled to these rights—rights that are inseparable from their inherent dignity. These rights are of such value that they must never be violated and must be safeguarded.

In other words, within this concept, the human being becomes a bearer of rights—rights that are intertwined with personality itself. This understanding of rights overrides any opposing justification and prevails in conflict with other considerations. Rights and freedoms, in fact, form sets or systems at the center of which lie primary and essential rights and freedoms that are necessary and intrinsic to human existence. These rights are universal, inherent, innate, and inalienable, and in their final analysis, the presumption is in favor of their absolute character (3).

If we return to the legal realm and distinguish between form and substance within a legal system, fundamental rights constitute its very essence. They are rights that can serve as the foundation and philosophy of that system and occupy the apex of its hierarchy of norms, since without them its structure would become unstable. In this respect, the Universal Declaration of Human Rights addresses all human beings as inherently endowed with these rights and as possessing equal dignity and rights, in such a way that these rights tolerate no distinction or discrimination.

B. Foundations of Fundamental Rights

Human freedom in its legal and political sense is rooted in freedom in its philosophical sense, namely the inherent and innate capacity for choice. In this way, human beings are created free, and any freedom in the realm of thought and action that rests upon this innate foundation falls within the category of human rights. Whether one adopts a human-centered and secular perspective or a religious and divine one, the conclusion remains the same: no power is capable of restricting the inherent and natural rights of human beings, who are presumed to have been created free, and whose inherent rights and duties are not subject to transformation (4).

Human dignity is the most fundamental substantive principle of human rights—one that, from a human rights perspective, is both in need of no proof and, indeed, incapable of proof. Fundamental rights are the concrete expression of a set of moral, political, and philosophical norms nourished by the sources of freedom, equality, democracy, and the rule-of-law state. Accordingly, from an essentialist perspective, all rights and freedoms whose existence ensures the continuity of human individuality, and whose absence leads to its disintegration, may be regarded as fundamental, even though adherence to temporal and spatial logic may at times render this inward-looking conception fluid (5).

In contrast to this view, some authors consider rights and freedoms that are formally guaranteed by the constitution or regulations of equivalent rank to be fundamental. Professor Louis Favoreu and several other constitutional scholars have defended this position. According to this group of scholars, the advantage of the term *fundamental rights and freedoms* lies in the fact that, without the need to distinguish between rights and freedoms, it encompasses all rights and freedoms protected by constitutional or international norms. From the moment these rights are protected by constitutional or international norms, they enter the category of fundamental rights and freedoms (6).

Therefore, depending on which perspective is adopted, the scope of fundamental rights will differ. Some scholars believe that fundamental rights constitute a limited list, insofar as only those rights upon which human personality and identity depend—and which cannot, under any circumstances, be restricted—qualify as fundamental, perhaps numbering only a few. However, if the second perspective is adopted, the scope of fundamental rights becomes extensive, encompassing a long list observable in constitutions and superior legal norms. In this case, various kinds of rights and freedoms fall within the ambit of fundamental rights. In light of the foregoing discussions, although cultures and subcultures related to freedom, equality, democracy, and the rule-of-law state vary from one country to another, the catalogue of fundamental rights and freedoms will naturally exhibit significant differences across legal systems. For example, in the Constitution of the United States of America, most protected fundamental rights and freedoms belong to the first generation of rights, whereas European countries such as France, Spain, and Portugal also support economic and social rights. Similarly, the European Convention on Human Rights divides the rights and freedoms it contains into qualified and unqualified rights. Qualified rights are those whose exercise may be restricted by reference to concepts such as national security, public order, or morality, and such restrictions are

deemed justified under the Convention. These include the right to private life, freedom of thought, freedom of expression, and freedom of association. Interference with these rights, subject to determination by public authorities and compliance with prescribed conditions, is considered legitimate. By contrast, unqualified rights are those whose exercise may not be restricted under any circumstances, even by invoking the aforementioned concepts. Accordingly, the Convention does not accept any limitations on the right to life, freedom from torture, or freedom from slavery (7).

Nevertheless, what is of importance in the discussion of fundamental rights is their fundamental and basic character. In other words, the degree to which these rights are essential to human identity and existence, or the extent to which human survival depends upon them, is not the central issue. Rather, their importance lies in the fact that they are situated within the body of constitutional and superior norms and occupy the upper levels of the hierarchy of norms.

C. The Status of Fundamental Rights

Fundamental rights possess the rank and authority of constitutional norms and must be articulated within the framework of constitutional rules. In this sense, they lie not only outside the domain of regulatory instruments, but even ordinary legislation cannot provide an adequate legal locus for them within the legal system. Among constitutional principles and rules, these rights have a supra-constitutional function: they operate as the normative "source" from which other principles and rules draw, such that, in their absence, the attribution of other rights and freedoms would also become impossible.

In German and Spanish law, the term *fundamental rights* is explicitly employed by the constitutions of those countries and, thus, has formally entered their constitutional order. The first part of the Basic Law of the Federal Republic of Germany is entitled "Fundamental Rights" and, in Articles 1 to 19, addresses matters such as human dignity, family rights, freedom of assembly, the right to asylum, and so forth. In Spain, a similar approach is observed. By contrast, the Constitution of France does not employ the term *fundamental rights*. Nonetheless, most of the matters that are recognized as fundamental rights in constitutions such as those of Germany and Spain are recognized by the Declaration of the Rights of Man and of the Citizen (1789) and by the Preamble to the 1946 Constitution. At present, according to the explicit statement of the Preamble to the French Constitution, these texts possess a value equivalent to constitutional norms. Yet these latter texts likewise did not use the term *fundamental rights*. In contrast, the modernizing jurisprudence of the Constitutional Council of France has led that institution to employ the term without hesitation; this was reflected in Decision No. 89-269 of 22 January 1990. Unlike the German and Spanish approaches, however, the Constitutional Council has shown restraint in conferring the "fundamental" label upon rights and freedoms, recognizing only a limited number of them as fundamental (5).

Accordingly, differences can be observed in the catalogues of fundamental rights in the above-mentioned countries. These differences become apparent depending on whether one adopts a substantive (essentialist) or a formal (positivist) approach. In other words, some rights are such that their existence ensures the persistence of human individuality, and their absence leads to its disintegration (in the sense that they cannot be separated from the human person or negated), such as freedom from slavery and immunity from torture (8). On this view, rights such as the principle of human dignity and freedom of thought are fundamental. Conversely, some writers regard as fundamental those rights and freedoms that are guaranteed by the constitution or by norms of equivalent rank. On this approach, there is no meaningful differentiation between first-, second-, and third-generation rights; all are deemed to have comparable normative standing.

The Constitutional Council of France has, in several instances, taken note of this subtle point and has distinguished between the two formulas “rights and freedoms of constitutional value” and “fundamental rights and freedoms of constitutional value.” In its decision of 13 August 1993, after citing paragraph 4 of the Preamble to the 1946 Constitution, the Council treated legislative respect for the right of asylum as constitutionally required and immediately underscored its fundamental character. In that same decision, the Council also treated the accused’s right of defense as a fundamental right possessing constitutional characteristics. Although some of the Council’s formulations may suggest an equivalence between “fundamental” status and “constitutional value,” the explicit language used in the decision of 10 June 1998 (concerning the law on the reduction of working time) indicates that the Council does not consider all rights or freedoms “of constitutional value” to be fundamental. The referenced formula states: “principles and rules of constitutional value, especially regarding fundamental rights and freedoms” (5).

D. Characteristics of Fundamental Rights

By virtue of their nature, fundamental rights possess distinctive characteristics. They are, in principle, inherent and innate and pertain to human identity. Nevertheless, it would be inaccurate to treat them as absolute rights, because it is difficult to identify rights that are truly absolute. Concepts such as public order, national security, public morality, the general interest, and the rights and freedoms of others readily render these rights relative and remove them from an unconditional state. Even so, given the protective interpretive approach that should govern fundamental rights, and considering their importance within the legal system, the presumption favors their broad scope unless, under particular conditions and within specific temporal and spatial contexts, the aforementioned considerations justify limiting them. Two salient features of fundamental rights are their universality and their non-derogable/non-waivable character.

1. Universality

In the Universal Declaration of Human Rights, rights are articulated in connection with human dignity and worth, regardless of racial, territorial, religious, sexual, or similar affiliations—thereby reflecting the theoretical basis of universality. The principle of non-discrimination set out in Article 2 of the Universal Declaration likewise follows from the same foundational premise. These provisions, read in light of the Declaration’s Preamble—which recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world—acquire a universal meaning. The two other foundational instruments, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are in substance more elaborated articulations of the Declaration. The choice of the title “Universal Declaration,” rather than an “International Declaration,” indicates its association with a trans-territorial, supra-sovereign idea (1).

The Vienna Declaration and Programme of Action—adopted in June 1993 at the Second World Conference on Human Rights in Vienna—also reflects this proposition, and consensus was reached among participating states on this point. Paragraph 5 of Part I of that Declaration provides that human rights are universal, indivisible, interdependent, and interrelated; that the international community must treat them in a fair and equal manner, on the same footing and with the same emphasis; and that, while the significance of national and regional particularities and diverse historical, cultural, and religious backgrounds must be borne in mind, states have the duty—regardless of their political, economic, and cultural systems—to promote and protect all human rights and fundamental freedoms. As has been argued, at the conceptual level there is only limited divergence among states’ views

regarding the recognition of human rights, and even this level of shared understanding provides a measure of encouragement for humanitarian efforts (7).

Accordingly, in light of the foregoing, the universality of human rights has been recognized, and—given the conditions of global society—this is necessary and important, albeit with due regard to the historical, cultural, and social contexts of nations. Neglecting this attribute of human rights may entail harmful consequences for the international community.

2. Non-derogability and Non-waivability

Fundamental rights, as examined above, are sacred, non-transferable, and not subject to deprivation. Because these rights are inherent, they are closely connected to the human person and cannot readily be removed; otherwise, human identity would be impaired. Individuals or groups are permitted to restrict the freedom of others only when the principle of self-preservation of one or more persons is exposed to a serious threat or danger (9).

In this regard, Article 29 of the Universal Declaration of Human Rights provides: (1) everyone has duties to the community in which alone the free and full development of personality is possible; (2) in the exercise of rights and freedoms, everyone is subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society; and (3) these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations (10).

The International Covenant on Civil and Political Rights likewise refers to such limitations in Articles 14 and 18, in Article 19(3), and in Articles 21 and 22. Article 19(3) provides that freedom of expression may be subject to restrictions necessary for respect of the rights or reputations of others, or for the protection of national security, public order, public health, or public morals. Article 18 treats limitations on freedom of religion as those necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. Articles 21 and 22, concerning the right of assembly and association, provide that the exercise of these rights is subject only to restrictions prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Similarly, the International Covenant on Economic, Social and Cultural Rights provides in Article 4 that permissible limitations must be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society (10).

The European Convention on Human Rights—as the first comprehensive human rights convention that envisaged the establishment of an international court for adjudicating human rights matters—also sets out rules on limitations of rights and freedoms, including in Article 10. These conditions include: (1) any limitation must be prescribed by law; (2) the limitation must pursue a legitimate aim; and (3) the limitation must be necessary in a democratic society (7).

E. The Rule-of-Law State

Addressing the subject of fundamental rights and understanding their concepts will be futile without examining the rule-of-law state, because this concept has been articulated, developed, and refined under the auspices of such a state. In its gradual evolution, the rule-of-law state places fundamental rights—understood as a set of basic human rights and freedoms—at the apex of the hierarchy of norms and establishes mechanisms that result in the guarantee of these rights. In this perspective, the rule-of-law state, beyond the hierarchy of norms, is the advocate of a set of principles and values that enjoy explicit legal recognition and are expanded through appropriate guarantee

mechanisms. Consequently, the formal notion of the rule-of-law state has been replaced by a substantive (or constitutional/material) notion that encompasses and transcends it, and the hierarchy of norms becomes one of its constitutive elements. On this basis, the rule-of-law state is a state that, in its relations with its citizens, is subject to a particular legal regime. In such a state, public power is deemed permissible only when exercised through legal instruments recognized by the legal order, and citizens have the right to invoke the law against potential abuses of power by governing authorities. At the core of the theory of the rule-of-law state lies a principle according to which state institutions may perform only those acts that possess a legal character. When state institutions respect superior legal norms, the rule-of-law state appears within the formal framework of the hierarchy of norms. At the outset, the theory of the rule-of-law state rests on the assumption that the administrative apparatus is subject to law (11).

1. The Foundations of the Rule-of-Law State

The theory of the rule-of-law state encompasses specific and distinctive concepts. The ideological genealogy of these concepts, as well as the prevailing social and political realities in which they are embedded, are of considerable importance, because without attention to these foundations the rule-of-law state becomes a meaningless phenomenon. This theory is linked to a set of views and values that, through a gradual and steady movement across the history of European countries, formed the conditions of its existence. This legal concept speaks in terms of the idea of justice and is grounded in a conception of power and individual freedoms that became manifest in France and its revolution. At the same time, the theory emerges within liberal regimes confronted with democratic struggles and appears as a political and social organization whose aim is the application of liberal-democratic principles. Accordingly, the foundation of this state is liberal, incorporating a profound conception of public freedoms and democracy. The earliest dimension of limiting power is rooted in the phenomenon of human rights. The rule-of-law state includes a particular conception of the relationship between the individual and the state that lays the groundwork for legal structures. State power not only encounters its limitations in fundamental rights specific to individuals, but the ultimate justification for that power is the guarantee of those rights (11). Ultimately, the rule-of-law state is built upon the primacy of the individual within the social and political organization; this, in turn, entails an “instrumentalization” of the state whose purpose is to serve freedoms and to render rights inherent.

In all liberal countries, the foundations of the rule-of-law state are protected by a set of fundamental rights recorded in texts of superior legal value. These rights possess constitutional value and are guaranteed through a complex network of legal arrangements.

According to this discourse, all political authorities and institutions—including parliament—must be subject to legal rules, especially those protecting fundamental rights. No political authority or institution may restrict fundamental rights and freedoms except within the framework of the specific and complex procedures provided for by law.

This concept was first advanced by German jurists in the sense of moving beyond the *police state*—the symbol of which was administrative power. The rule-of-law state appears as a “war machine” against the *legal state*. Within the framework of the legal state, legislation is sacred and immune from review, and at most one may subject administrative activity to a limited form of oversight. By contrast, even the acts of an institution such as parliament should not remain beyond review. The legal state entailed only the rule of law over relations among citizens; the emergence of the rule-of-law idea extended the scope of the rule of law to the state itself. Legislation, as the emblem of parliamentary power, can don the mantle of legitimacy only when enacted under the constraints of the constitution

as a superior norm. Determining the conformity of legislative acts with superior norms should, logically, be entrusted to a specific institution, such as the Constitutional Council in France, the Guardian Council in Iran, a constitutional court (as in Austria and Germany), or the supreme court (as in the United States).

The minimalist substance of the rule-of-law state rests on three ideas. The first is the idea of limiting power: each authority exercises only defined and specified competences, and the exercise of those competences must occur within prescribed procedures. The second is the hierarchical ordering of acts by public authorities, which entails reviewing subordinate acts on the basis of superior norms. The third is the right to judicial redress and access to a judge: all individuals, regardless of their social or political status, must be able—where appropriate, even against the state itself—to seek judicial protection before an independent judge. It is precisely within the framework of this idea that the Constitutional Council of France, in Decision No. 85-195, states that the law expresses the national will only within the framework of respect for the constitution, and that the law can reflect the general will only if it upholds the principles and objectives set out in the constitution (6).

2. Formal and Substantive Rule-of-Law State

The rule-of-law state is not the rule of *any* law, but rather the rule of laws that conform to values—because, in a sense, even a fascist order could approximate a purely formal conception of the rule-of-law state. Yet such rules would not be grounded in fundamental human rights; rather, they would be unjust rules contrary to the fundamental principles of human rights.

The rule-of-law state has a specific nature and may be examined through three concepts, or at three levels: formal, substantive, and general. In its formal sense, the rule-of-law state is one in which the relationship between the state and citizens is regulated within a legal order; the existence of a legal order is a necessary condition. In such a state, public power is exercised only through law, in the manner authorized by the legal order. A reciprocal, rights-and-duties-based relationship between the state and citizens operates under legal rules, whereas disciplinary states were characterized by one-sided relations. The first condition for establishing a legal order is the plurality of legal sources. The second is the clarity of legal sources and the hierarchical relationship among them. The third is the guarantee of compliance with that hierarchy, in particular through judicial review.

The second level of the rule-of-law state is the substantive rule of law. Here, the law must conform to the value system prevailing in society, to the collective conscience, to fundamental human rights, and to human rights regimes.

The third level is the rule of law in a general sense. At this level, the relationship between law and the state is examined. In this sense, the rule-of-law state is a state whose inner structure and core are juridical, and which, in a meaningful way, corresponds to modern and democratic states. The formal rule-of-law state is a necessary condition for attaining the substantive rule-of-law state (12). The transformations of the rule-of-law state have been largely influenced, on the one hand, by the global human rights movement and, on the other, by the formation of European human rights. On this basis, the rule-of-law state is more than a hierarchical legal order; it is an institution charged with guaranteeing fundamental rights and freedoms.

The Concept of “Fundamental Rights” in French Constitutional Law

A. The Emergence and Evolution of “Fundamental Rights”

The term “fundamental rights” developed and expanded in a particular way in Germanic countries beginning in 1848 (13).

In the classification of rights within French law, various schools and approaches exist; the most prominent are briefly presented below.

Classical works on human rights and public liberties did not provide a satisfactory classification of fundamental rights. Those classifications tended instead to divide human rights according to “generations.” The first classification divided rights and freedoms from the standpoint of their “history.” On this view, rights are grouped into three generations: (1) first-generation rights, consisting of civil and political rights; (2) second-generation rights, consisting of economic and social rights; and (3) third-generation rights, consisting of solidarity rights (14).

First-generation rights consist of “rights-as-liberties” that were proclaimed and established in eighteenth-century declarations. These rights are grounded in liberal thought and grant individuals the freedom to perform certain acts or to become the owner of something. There is no dispute that these rights merit inclusion within “fundamental rights” (14).

Economic and social rights presuppose state intervention and are therefore identified as “rights-as-claims.” The time of their formulation and proclamation is the first half of the nineteenth century, following the demands advanced by socialist ideologies; examples include the right to the state’s social obligations, the right to education, the right to work, the right to nourishment and leisure, and the right to health (14).

These rights, because they are alien to the traditional concept of liberties and because their implementation is more complex, have generated less “normative density” than first-generation rights, to the point that it is sometimes asked whether such rights truly fall within the category of fundamental rights (15).

The third generation includes various “solidarity” rights, rooted in the demands and claims of developing countries and proclaimed in the second half of the twentieth century—for example, the right to development, the right to peace, the right to a healthy environment, and the right of peoples to self-determination. These are considered remote from the core of fundamental rights. This threefold classification has been criticized. The updating of rights and freedoms in the contemporary era has generated ambiguities about whether certain rights properly belong to these categories. For example, in today’s world, is the right to property a first-generation right or a second-generation right? Does freedom of communications not also have an economic and social dimension, even though it is commonly placed in the first category? Is the right to strike not a continuation of freedom of expression?

The jurisprudence of the French Constitutional Council also emphasizes that the placement of a right or freedom in the first generation does not imply its superiority or precedence over other rights and freedoms. In the Council’s view, the rights contained in the 1789 Declaration of the Rights of Man and of the Citizen and those contained in the Preamble to the 1946 Constitution enjoy equivalent constitutional value (16).

One objection to the above tripartite classification is the temporal gap between doctrinal presentations and the legal sources themselves. For example, in France, the rights declarations incorporated into the Preamble of the 1958 Constitution proclaim rights of both the first and second generations. The International Covenant on Civil and Political Rights (1966) establishes trade-union rights and rights relating to family protection—rights that also appear in the International Covenant on Economic, Social and Cultural Rights (1966). In other words, the historical/time-based distinction that served as the basis of the tripartite division no longer has clear meaning or practical relevance. Moreover, a purely historical approach does not generate a significant difference in legal value between the generations of human rights.

Another classification is based on a threefold distinction between physical liberties, intellectual liberties, and liberties of collective expression. This classification was proposed by Jean Rivero, the late and renowned professor of French administrative law (17), and it is also discussed in major doctrinal writings (18).

Under this theory, bodily liberty (the right of control over one's body, the right of pre-conception, the right to bodily integrity), freedom of movement, the right to respect for private life, the right to security, and the right to private life belong to the category of physical liberties.

Intellectual liberties include freedom of thought, freedom of religion, freedom of the press/media, freedom of education, and freedom of audiovisual communications.

Freedoms of assembly, association, trade union activity, and the right to strike form liberties of collective (social) expression.

The objection to this classification is that it suffers from limited scope and practical indeterminacy: it is difficult both to incorporate all rights and freedoms into it and to assign them precisely. For example, where do the right to property and freedom of enterprise belong?

In addition, assigning an exclusive "physical" or "intellectual" dimension to a liberty does not align well with the structure of positive law. Professor Lebreton notes, for example, that the right to private life does not view the human being merely as a bodily creature, but also as a spiritual one (19).

A further objection to this classification is that, on the basis of no legal criterion, does it become possible to extract a concept of fundamental rights from it. The "fundamental" character of a right or liberty is not assessed by reference to the physical or spiritual dimension of the relevant right or liberty, just as it cannot be derived simply from its civil, political, economic, or social nature.

Another classification is based on the dichotomy between personal liberties and collective liberties. This is the most common existing classification.

The distinction between personal and collective liberties is grounded in the view that a fundamental right is, before anything else, a right attached to the human person. Dominique Rousseau writes that "with the primacy of the individual over society, the primacy of personal liberties over collective liberties should correspond; the former are quickly described as fundamental, the latter as secondary" (20).

Treating all personal liberties as identical to fundamental rights requires a precise demarcation of boundaries between the two types of liberty. Does religious freedom, freedom of association, or the right to property fall within the first category or the second? Depending on how they are manifested, do they sometimes belong to the first and sometimes to the second? And then, what criterion exists for identifying the "most inherent" and "most fundamental" among personal rights and freedoms?

Another objection to this classification is that it treats only human beings as rights-holders, whereas some constitutional scholars consider national legal persons to be holders of such rights when their nature permits. In this regard, for example, Article 33 of the Italian Constitution of 27 December 1947 proclaims fundamental rights for universities. Article 12.2 of the Portuguese Constitution of 2 April 1976 also provides for the recognition of fundamental rights and duties for legal persons.

Another classification relies on the criterion of the inviolability (non-derogability) of fundamental rights. International lawyers and scholars of European human rights law emphasize the "non-infringeable" nature of certain rights as a basis for distinguishing fundamental rights.

The criterion of "judicial protection" is another basis for classifying fundamental rights, and the Constitutional Council takes this criterion into account. It can be inferred from the Council's jurisprudence that, since its decision of 10–11 October 1984, it has distinguished "fundamental liberties" from other rights and freedoms. In that decision, the Council stated for the first time that freedom of the press is a "fundamental liberty," of such value that its exercise constitutes one of the guarantees for the implementation of other rights and freedoms and for national sovereignty (21).

It should be noted that, in the Constitutional Council's jurisprudence, freedom of the press, freedom of movement, freedom of education, freedom of association, and the right of asylum possess this character. These fundamental public liberties are distinguished from ordinary public liberties by the judicial protection from which they benefit (21).

The Constitutional Council considers these liberties to be connected to the public interest. They possess three features:

1. They cannot be made subject to a prior-declaration requirement, for example in relation to assemblies (21).
2. They cannot be impaired by local regulations (21).
3. They constitute acquired rights, in the sense that no law may alter the guarantees that make them more effective. In this regard, the Council considers that "ordinary legislation cannot regulate a fundamental liberty unless it makes it more effective or reconciles it with other rules or principles enjoying constitutional value" (21).

One consequence of distinguishing fundamental constitutional liberties from other rights and freedoms is that it enables a hierarchy among liberties that are situated at the same level of legal value. This hierarchy is not formal but functional. Reconciliation between two liberties of equal legal value is carried out in favor of one of them. Any liberty, even a fundamental one, may be reconciled with another liberty that is also fundamental.

Bertrand Mathieu, professor at Paris I, maintains that the recognition of fundamental rights should be based on "matrix and structural principles." In his view, a right is "fundamental" when it constitutes the source and framework of other rights (22). He argues that "some principles become 'senior' principles—structural principles—in that they generate other rights with varying scope and values."

Examples of this idea appear in the Constitutional Council's jurisprudence. For instance, the Council has held that the principle of human dignity—derived from paragraphs 10 and 11 of the Preamble to the 1946 Constitution—creates "the possibility for every person to have suitable housing" (22). The principle of equality also generates equality before the law, equality in public burdens, equality in public employment, equality in voting, and equality regarding all forms of privileges and facilities. Freedom of movement also generates the inviolability of the home and the principle of responsibility derived from personal liberty.

Mathieu maintains that the "matrix principle policy" enables the constitutional judge, even where a principle is not expressly stated in the constitutional text, to review compliance with principles that are truly fundamental (22).

An objection to this theory is that it grants judges discretionary power to select which derived principles should be treated as foundational.

The late Louis Favoreu, regarded as a leading figure of modern French constitutional law, defines fundamental rights as those rights and freedoms protected by constitutional and international norms (21). This theory, which emerged decades ago and remains the dominant traditional view, aligns with the spirit of positive law.

Doctrine and judicial practice also fill the gaps in constitutional and international texts. The doctrinal tendency is to expand the scope of rights and freedoms beyond the scope contemplated by judicial practice.

It should also be noted that ordinary courts address fundamental rights without necessarily ensuring coordination with the Constitutional Council or the courts of the European Union.

Professor Véronique Champeil-Desplats clarifies that, within legal debates, there is a noticeable divergence in the use of the category of fundamental rights (23).

Fundamental rights are absent from the textual language of the 1958 Constitution. That constitution uses the concept of "fundamental" only rarely—for example, stating that the French people "affirm the fundamental rights recognized by the laws of the Republic," and that parliament is competent to enact rules concerning "fundamental guarantees granted to citizens for the exercise of fundamental liberties" (23).

Thus, in France, "fundamental rights" are not expressly mentioned in the constitutional text. By contrast, the constitutions of Germany and Spain list rights explicitly described as "fundamental." The French situation is often attributed to an older legacy of French philosophy grounded in skepticism and relativism: under this philosophical approach, personal natural rights cannot be articulated in a logically "bare" manner. The law therefore assumes responsibility for providing an objective and positive definition of these personal natural rights under the heading of "public liberties" within the framework of the "rule of law" (11).

Nevertheless, the absence of an explicit textual reference to "fundamental rights" in the constitution has been remedied by the discourse of the constitutional judge. This transition constitutes a cornerstone for establishing the rule-of-law state in France, beginning with the Constitutional Council's landmark decision of 16 July 1971. In that decision, relying on the 1789 Declaration and the 1946 Preamble, the Council attributed to certain rights—contained in texts treated as "fundamental"—a legal value that may be invoked against legislation. In other words, the Constitutional Council thereby treated "fundamentality" as equivalent to "constitutionality" (16).

It should be added that, to date, the Constitutional Council has not classified a large number of rights as fundamental. The following rights are among those recognized as fundamental by the Council:

- The right to property, in Decision No. 81-132 of 16 January 1982.
- Freedom of communications, in Decision No. 84-181 of 10–11 October 1984, and Decision No. 94-345 of 29 July 1994.
- The principle of equality, in Decision No. 89-259 of 22 January 1990.
- Personal liberty and security, freedom of movement, freedom to marry, the right to a normal family life, the right of asylum, and defense rights, in Decision No. 93-325 of 13 August 1993 and Decision No. 97-389 of 22 April 1997.
- Freedom of enterprise, equality before the law and public burdens, the right to employment, trade-union rights, and the right recognized for workers to participate in the collective determination of working conditions and in the management of enterprises, in Decision No. 98-401 of 10 June 1998.

B. "Public Liberties" as France's Legal–Cultural Heritage

The logic of the adjective "public" in the expression "public liberties"—a characteristic of French political and social culture—operates on two levels: first, liberties are "public"; second, they participate in defining good government in modern society, and their ultimate aim is not only the individual but also society.

The notion of public liberties is narrower than the notion of human rights: public liberties reflect rights and freedoms that are guaranteed by law, and particularly by statute. This derives from the specific historical context in which the term "public liberties" was created and developed: in the French Third Republic, public liberties were deployed by the legislature against the executive. It is in this sense that Léon Duguit, a major public-law scholar, at

the beginning of the nineteenth century counted the following among public liberties: personal liberty, freedom to work, to trade and to contract, freedom of opinion, freedom of religion, and freedom of association (24).

From 1789 and again in 1875 (the beginning of the Third Republic), the “principle of the supremacy of statute” was added to the French public-law tradition so that, within the sphere of positive law, an effective guarantee of human rights could be established (25).

The *legal state* is sometimes defined as a situation in which the legal system rests upon a hierarchy of norms, with parliamentary statute at the apex of the pyramid. Under this conception, the scope of statutory power is unlimited; “rights-as-liberties” are subsumed under public liberties; and, accordingly, the person—by reason of social and political appearances—becomes subject to the regime of public liberties.

One objection to the concept of public liberties is that it is exclusively dependent on the will of parliamentary majorities. Under liberal thought and representative government, parliament can act either in favor of liberties or against them, because no superior norm reviews parliamentary enactments, and the legislature is free to determine or amend the status of each liberty in the absence of any judicial review that would bind it.

As has been noted, during the Second World War totalitarian regimes violated individuals’ “rights-as-liberties” under the cover of their ideologies. Immediately after the war, solutions were sought so that liberties might be protected in a different manner; thus, following the establishment of the rule-of-law state, “public liberties” gave way to “fundamental liberties,” and the protection of liberties was secured at a level above ordinary legislation—namely, within the constitution.

Accordingly, this historical legacy of legislative allocation and articulation of liberties is what determines the place of statute in the law of liberties. Under the Fifth Republic, the constitutionalization of the legislature’s competence in this domain is expressed in Article 34 of the Constitution: “Statute determines the rules concerning civil liberties and the fundamental guarantees granted to citizens for the exercise of public liberties.”

In this context, the undergraduate course dedicated to public liberties, created in 1954, was initially taught by administrative-law professors (26). Public liberties were essentially regarded as guarantees for those governed against the administration; therefore, teaching them required an in-depth study of administrative case law.

In 1997, this teaching was replaced—by decree—by a course entitled “Law of Fundamental Liberties.”

The current French Constitution of 1958 modernized the national legal system through a particular version of the rule-of-law state—one that Louis Favoreu termed the “constitutional state”—grounded in the supremacy enjoyed by the constitution within a legal order that has become organized around the axis of “the constitution” (16).

Although France is often described as a country of human rights, and although it was a principal member of the Council of Europe and acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms on 3 May 1974, the concept of “fundamental liberties” entered the French legal system relatively late, and its constitution—unlike neighbors such as Germany and Italy—does not contain an enumerated catalogue of rights and freedoms.

In academic debate, Michel Fromont published an article in 1974 entitled “Fundamental Rights in the Legal Order of the Federal Republic of Germany,” appearing in a collection of studies honoring Charles Eisenmann, which used the concept of “fundamental rights” for the first time, though it did not by itself spark an extensive academic discussion (27).

It is Louis Favoreu to whom the progress of the concept of “fundamental rights” in France is largely attributed.

In fact, the first occasion on which the concept of “fundamental rights” entered French legal discourse was during a congress organized by the “Study and Research Group on Constitutional Litigation” in February 1981 in Aix-en-Provence on the theme “European Constitutional Courts and Fundamental Rights.”

In legislative debate and jurisprudence, as noted above, the Constitutional Council, to remedy the gap created by the absence of an explicit statement of “fundamental rights” in the constitutional text, undertook what can be described as the “constitutionalization of liberties.” Within this approach, Favoreu describes the “constitutional bloc” as the set of principles and rules with constitutional value whose observance is imposed on the legislative and executive branches, as well as on citizens (16). This transformation took place through Decision No. 71-44 of 16 July 1971, known as the “Freedom of Association” decision, by which the Constitutional Council attributed constitutional value to the Preamble and, by adding a material dimension to liberties, expanded the set of reference norms through which it would review legislation.

Decision No. 85-197 of 23 August 1985, known as the “New Caledonia” development, articulated the model formula of this jurisprudential policy: “the statute enacted … can reflect the general will only if it complies with the constitution.”

Through this method, the Constitutional Council reinterpreted the constitutional center of gravity in France in a way that accelerated the metamorphosis from the legal state toward a fully developed rule-of-law state, in which constitutional review becomes the priority mechanism for guaranteeing liberties against any form of arbitrariness by public authority.

In Decision No. 81-132 of 16 January 1982, known as “Nationalization I,” the Constitutional Council attributed a fundamental character to the right to property. Thereafter, in Decision No. 84-181 of 10–11 October 1984, it characterized the freedom of communication of ideas and opinions as a fundamental liberty. In Decision No. 89-269 of 22 January 1990, known as “Equality between French and Foreigners,” the Constitutional Council formulated the well-known expression “fundamental liberties and rights of constitutional value” (21).

Following this jurisprudence, the constitutional legislature, by the constitutional revision of 25 November 1993, inserted a new provision—Article 53-1—under Title VI of the Constitution (“Treaties and International Agreements”), providing that the French Republic may conclude agreements with European states which undertake, on the basis of reciprocal commitments, obligations relating to asylum and the protection of human rights and fundamental freedoms.

The Constitutional Council’s support for the concept of fundamental liberties, and the subsequent completion of this process by the jurisprudence of ordinary courts, generated the impression that another page in the constitutional history of guarantees of liberties had been turned, and that this represented—implicitly—the passage from the legal state to the rule-of-law state.

In any event, the term “fundamental liberties,” or its close analogue “fundamental rights,” is a modern concept that has only recently entered French law. Its origin lies in countries where the development of the rule-of-law state and the primacy of individual rights have been achieved primarily through judicial avenues, and especially through the initiative of the constitutional judge. In Spain and Germany, fundamental rights are among the rights guaranteed by the constitution or by international treaties and are enforced by the constitutional judge.

These rights bind all political institutions—not only the administration, but also the legislature (since the product of legislation, namely statute, is subject to constitutional review) and private persons as well.

This latter perspective is referred to as the “horizontal effect” of fundamental rights (3). The German theory of *Drittwirkung*, on the one hand, systematizes the opposability of fundamental rights between private persons, and, on the other hand, the state’s responsibility to guarantee that opposability. In this sense, the state is responsible for enacting legislation that provides guarantee mechanisms; for example, where interference—without consent—in private life is carried out by private third parties (6).

On this account, the “fundamental” character of liberties and rights refers to their “importance”—that is, they are not secondary or ancillary, but significant and foundational (8). From a legal standpoint, the adjective “fundamental” refers back to the idea of a “foundation,” a basis and a source; fundamental rights, in this sense, are rights that “found” the legal order and constitute the source of other rights and principles.

Put differently, the term “fundamental rights,” from a formal perspective, points to the issue of legal sources. In France, extensive debates have arisen over whether “fundamental rights” are simply human rights that have the additional feature of being stated in the constitution. Supporters of this view argue that only the constitution, as a particular superior norm, can confer the “fundamental” character upon rights.

This theory was proposed and defended by Louis Favoreu. It treats as “fundamental” any liberty that possesses a strong legal status by virtue of being set forth in a norm of constitutional value or in a supranational treaty norm. On this doctrinal approach, fundamental liberties are legal authorizations guaranteed by a norm of supra-legislative (ordinary) value. “Fundamentality,” in this meaning, derives from the normative rank at which a liberty is stated.

Favoreu maintains that fundamental rights and freedoms are those protected by constitutional norms and/or by European and international norms—no more and no less—and that all rights and freedoms benefiting from constitutional, international, or European protection are fundamental rights, even if their degree of “fundamentality” varies (21).

Favoreu also enumerates a number of advantages attributed to fundamental rights, including: the direct effect of constitutional norms relating to fundamental rights; the “reservation of statute” (reservation of legislative competence); the protection of the essential core and the prohibition of distortion of the right’s nature; the exceptional and conditional character of limitations; and the constraints imposed by constitutional amendment procedures (1).

The French Constitutional Council has employed the notion of “fundamental rights” in this formal sense since Decision No. 81-132 of 16 January 1982 (“Nationalization I”).

A frequent criticism of the formal theory is that it does not differentiate among fundamental liberties, because it places them on a single plane without distinction. By contrast, Article 53 of the Spanish Constitution of 27 December 1978 introduces a form of hierarchy among liberties based on the degree of protection granted. At the level of the European human rights system, paragraph 2 of Article 15 of the European Convention on Human Rights distinguishes four rights that are excluded from derogation and benefit from absolute protection.

Favoreu’s response is that one should not, in principle, establish a hierarchy among fundamental liberties (3). He argues—by reference to contested interpretations of Constitutional Council decisions—that erroneous readings were subsequently corrected and that later jurisprudence refuted such interpretations.

Another criticism of the formal theory is that it is not always aligned with the reality of positive law, because many examples suggest that the Constitutional Council has, in practice, preferred certain fundamental liberties over others. From this, it may be inferred that some liberties are “more fundamental” than others, and one may speak of norms with “stronger constitutional value.”

Favoreu replies that, for example, the existence of distinct enforcement mechanisms for certain rights and liberties in the Spanish Constitution does not imply their superiority over other rights listed there; in his view, a hierarchy among fundamental rights is valid only if established by the constitutional judge.

Another weakness of this approach is that it neglects the fact that some rights stated in the constitution or related texts have been expressly identified by judges—especially constitutional judges—as "fundamental."

It is also criticized for failing to take into account the existence of different catalogues of "fundamental" rights that may be recognized by different judges. For example, in the framework of emergency interim relief for liberties, the administrative judge has recognized the right of asylum, the right to property, the right to strike, the right to a normal family life, the right to marry, and the right to consent to medical treatment as "fundamental liberties"—a list that does not necessarily coincide with the Constitutional Council's list or with what judges in the judicial order identify as "fundamental rights."

In a similar vein, the Social Chamber of the French Court of Cassation has developed an autonomous concept of "fundamental liberties of employees," where any infringement renders a dismissal void, and it has included within this category, inter alia, trade-union freedoms and freedom of expression (28).

The formal approach to fundamental rights is also criticized for denying that rights stated in sources other than the constitution—such as international sources—may possess a fundamental character, even though international instruments constitute rich sources of human rights.

Another approach advanced in France, particularly by Étienne Picard, is "objectivism." On this view, there are rights that can be called fundamental in the sense of being intrinsic—intrinsic to the legal order that contains them, and intrinsic to the humanity of their holders (29). This concept reflects the German understanding of fundamental liberties and the idea, developed by German constitutional jurisprudence, that the constitution rests upon an "objective order of values."

Under this approach, the criterion of fundamentality is assessed by the capacity of a right to prevail intrinsically over other rights and, where necessary, over legal norms. Fundamental rights are applied both through the norms that enact them and—where formal rules are silent—even in spite of those rules.

A principal difficulty with this approach is its breadth: defining or delimiting the fundamental rights that are essential and intrinsic to humanity requires an external benchmark, whereas, in contemporary positive legal culture, the domains of morality and law are often separated.

On this view, a liberty is fundamental if it enjoys a strong legal status relative to the importance accorded to it by society within the value system. Put differently, the national legal order is treated as an objective order of social values, and fundamental liberties are treated as "values whose content is more intrinsic than others," because they concern the foundation of rights and constitute the basis of the rule-of-law state (30).

Accordingly, the value of fundamentality is independent of the hierarchy of norms; it becomes possible to identify liberties as "fundamental" across different normative ranks, because the author or interpreter of a legal norm has so decided. For example, France's Council of State has treated trade-union freedom as fundamental (31).

The advantage of this theory is that it outlines a hierarchy of legal norms based on a hierarchy of liberties; it aligns with, and is built upon, the reality of positive law; and it makes fundamental liberties a vector and model for a particular conception of the human being and society.

Its drawback is that it turns fundamental liberties into a relative concept prone to subjectivism and provides no operationally objective criterion for identifying degrees of fundamentality (8).

A final criticism directed at both the formal and substantive approaches is that both render unobservable the strategic use of the concept (10).

In light of the foregoing explanations and evidence, at present in French constitutional law—whether from the standpoint of legal doctrine, the jurisprudence of the Constitutional Council, or the practices of administrative and judicial courts—there is no single, unified classification regarding the scope of fundamental rights. In view of the above theories, fundamental rights appear to be a complex structure with an elusive definition. Fundamental liberties may be defined as liberties stated at a supra-legislative normative rank, because their content embodies a value that, within a given society, is regarded as foundational (32).

Safeguarding Fundamental Rights

The protection and support of fundamental rights has been recognized as one of the most important duties of states—an obligation that requires appropriate mechanisms of both positive and negative protection. The constitution, as one of the most essential requirements for supporting fundamental rights, forms the infrastructure of the national legal system and serves as a core instrument for guaranteeing individual rights and allocating sovereign powers. Protecting this foundational instrument and preventing deviations from, or violations of, it is not possible without establishing an institution that functions as the final interpreter and as a supervisor ensuring that other laws and regulations do not contravene it. Ordinarily, this function is entrusted to supreme courts, constitutional courts, or constitutional councils.

In other words, a body must be designated with competence to review ordinary statutes and other legal arrangements, to compare them with the constitution, to decide on their compatibility, and—where unconstitutionality is found—to declare invalidity or to prevent enactment. Clearly, if this requirement is not observed, first, individuals' constitutional and fundamental rights are disregarded; and second, the principle of stability and continuity of the country's political structure—necessary to preserve order, establish justice, and protect individual rights—will be undermined (32). In summary, constitutional adjudication refers to the set of institutions and mechanisms whose purpose is to ensure respect for, and the supremacy of, the constitution. The various functions of constitutional justice can be summarized as follows: reviewing the constitutionality of parliamentary enactments; interpreting the constitution; supervising elections and political voting (parliamentary or presidential elections and referenda); ensuring the proper functioning of public authorities; providing general regulation; supervising the exercise of exceptional powers; and, ultimately, supporting fundamental rights and freedoms (5).

The French Constitutional Council constitutes an example of such a dynamic institution. The French Constitution refers to fundamental rights and freedoms only to a limited extent. If one adopts a purely formal view, the rule-of-law state could not have emerged successfully within this legal system; however, the transformation and evolution of the Constitutional Council—through delineating and expanding the scope of fundamental rights in its jurisprudence, interpreting higher-ranking texts (the Declaration of the Rights of Man and of the Citizen and the constitutional preambles), and adopting a rights-protective approach—made it possible to establish an effective legal mechanism within which fundamental rights could develop.

A. The Structure of the Legal System

In conceptualizing the rule-of-law state—a state whose rights and rules generate legal order—multiple elements play a role. Some of these elements, such as separation of powers and judicial independence, organize its institutional architecture; others, such as the hierarchy of norms, define its normative framework; and still others,

such as legal certainty and equality, facilitate the realization of the rule-of-law state's ultimate purpose, namely the protection of fundamental rights and freedoms. According to Jacques Chevalier, every state, in order to earn respect, must move along the path of the rule-of-law state. From another angle, the rule-of-law state—beyond a legal system possessing hierarchy and sanctions—also has a political and ideological dimension and is not neutral or value-free (11).

In another typology, the rule-of-law state is divided into "intrinsic" rule-of-law states and "teleological" (goal-oriented) rule-of-law states. In the first group, the concept is a foundational notion of constitutional law—an institutional and legal construct that predetermines the exercise of political power through guarantees established in the constitution; this ultimately leads to formal and substantive conceptions of the rule-of-law state grounded in constitutional protection, legality, and fundamental rights and freedoms. Among the principles of particular relevance here is the hierarchy of norms. Under this principle, relations among norms within the legal order are organized in a pyramidal structure and a form of hierarchy. Three characteristics are salient: the constitution's position at the top and the structuring of hierarchy in reference to it; the subordination of lower norms to higher norms; and a linear relationship whereby each norm relates only to its higher and lower norms and derives its legal validity from the higher norm. The hierarchy of norms complements separation of powers, because the production of norms is closely tied to institutions and their organic relations; in this sense, constitutional review and legality operate as the formal guarantee for this hierarchy (33).

The formal conception of the rule-of-law state rests on the hierarchy of norms. On this view, the law of the state appears as a layered structure composed of multiple levels stacked upon one another and mutually subordinated. A norm is valid only if, by virtue of its content or the conditions of its promulgation, it is capable of satisfying the requirements set by the higher-level norm; and legal regulatory mechanisms must be provided to verify the correctness of norms and, where appropriate, to remove defective norms from the body of legal prescriptions (11).

B. The Telos of the Rule-of-Law State: Protecting Fundamental Rights

Along this path, the rule-of-law state establishes a large set of formal and substantive rules. The principle of legal certainty, the principle of equality, the protection of acquired rights, the non-retroactivity of laws, and many other principles are invoked to reach the concept of fundamental rights. Within this framework, fundamental rights are understood as those rights and freedoms that correspond, in effect, to internationally recognized human rights once they are guaranteed in constitutional texts. On this approach, describing constitutional rights and freedoms as "fundamental" does not imply their superiority over other rights and freedoms, because that would generate a hierarchy among rights and freedoms—an outcome that should be avoided. This does not mean, however, that one must deny the constitution's particular emphasis on certain rights and freedoms (33).

Yet, in its evolution, the rule-of-law state increasingly adopts a substantive perspective on fundamental rights and freedoms and recognizes the values that govern them. In other words, this set of values becomes a whole that manifests across practices and institutional performance. At this stage, the debate is no longer framed in terms of whether rights are fundamental or non-fundamental; nor can mere inclusion in, or omission from, particular texts damage their substance or undermine their validity.

In domestic legal orders—particularly democratic systems—norms are typically ranked as follows: the constitution (and international treaties), ordinary statutes, and administrative regulations.

C. The Juridification of Power

One of the significant phenomena of the present century is the return of law and its powerful presence across all spheres. Given the confidence placed in law, it can function as an important restraint on a state that may not be inherently trustworthy. Law appears as a form of guarantee or protection that helps secure the stability and safety of social relations. Politically, this phenomenon carries particular sensitivity. Strengthening the process of juridification on the basis of the constitution has profoundly altered political balances. In this setting, parliamentary regimes that enact statutes are also required to respect legal prescriptions and prohibitions. The constant expansion of constitutional case law, in continuous interaction with the freedom to decide, affects political decision-making. The French Constitutional Council intervenes in order to judge the legality of established arrangements, and this intervention has become a regularized phenomenon. In this way, the Council has become a final authority for adjudicating the constitutional validity of legislation. As the shadow of the constitutional judge increasingly weighs upon political functioning, that judge gradually becomes a genuine reviser of political "rules of the game." In such circumstances, intervention—though inevitably entangled with political calculations—must remain coherent. Resort to constitutional jurisprudence appears as an authoritative voice in political debates; and political issues, passing through the gate of law, become increasingly clarified and placed within legal frameworks (11).

Conclusion

Fundamental rights constitute a relatively complex concept in legal studies. In addition to the extensive debates surrounding their nature and characteristics, the multiplicity of perspectives held by their proponents—particularly constitutional adjudicators—the prioritization of certain aspects by legal systems, and the lack of coherence regarding their overall scope and boundaries further intensify this complexity. In essence, fundamental rights encompass a value system concerning rights and freedoms that are regarded as foundational.

Accordingly, identifying and understanding these rights and their features requires close attention to the contexts of their emergence, as well as the conditions and processes through which they developed. These rights have their roots in liberal democratic systems centered on individual values. The rule-of-law state, or legal state, which seeks the predominance of law across all spheres, has nurtured these rights and adopted their protection as its ultimate objective.

The rule-of-law state employs a variety of instruments, including separation of powers, the principle of the rule of law, the hierarchy of norms, judicial review of governmental action, and numerous other legal principles. It is as if one is confronted with a vast and intricate network of rules and regulatory systems, each with its own specific function, where any deficiency in one element can undermine the whole.

Fundamental rights represent one such system, grounded in the ideological objectives and values of the legal order. Within this framework, the role of constitutional judges is critical, as they act as sentinels and guardians who must safeguard each of its components.

In French constitutional law—a subject examined at length here—the role of the Constitutional Council is particularly prominent. As explained, the French Constitution does not explicitly refer to "fundamental rights," and it mentions freedoms only in a limited manner. Nevertheless, the Constitutional Council has assumed a significant role in the dynamism and development of fundamental rights. Through its jurisprudence and interpretative practices, the Council has progressively expanded the scope of these rights, incorporating the Declaration of the Rights of Man and of the Citizen and the constitutional preambles into France's constitutional foundations and adopting a protective approach that has afforded fundamental rights a high level of protection.

According to the Council's perspective on fundamental rights, the issue is not the presumed superiority of some rights over others, nor the classification of rights as primary or secondary, nor even their explicit inclusion or omission from the constitutional text. What truly matters is that these rights embody values pursued by the legal system as a whole—values for which fundamental rights serve as a defining symbol.

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All authors equally contributed to this study.

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