The *référé législatif* and the *cahiers de doléances* of 1789

di Paolo Alvazzi del Frate

In this presentation I would like to trace the origins of the so-called *référé législatif* in the texts of the French *Cahiers de doléances*, presented to the Estates-General of 1789. In the first part, I will describe the *référé législatif* system, its historical sources and its links to the juridical doctrine of the 18th century. In the second part, I will stress the contribution of the *cahiers de doléances* of 1789 to the creation of the so-called *référé législatif* process by the National Assembly in 1790. In my conclusion, I will try to demonstrate that this process derives both from Enlightenment Thought and the Old Regime legal tradition. For this reason the *référé législatif* received widespread approval in the revolutionary National Assembly.

1. The *référé législatif* was created by the National Assembly with the statutes of August 16, 1790 (art. 12, tit. II) and of November 27, 1790 (art. 21). It was based on two different legal concepts: the "facultative" and the "compulsory" *référé*: 1) the *facultative* concept was claimed by a judge for a doubt in interpretation or for a legislative hole encountered during a trial; 2) the *compulsory* concept was provoked by a conflict in interpretation between the French Supreme Court – the *Tribunal de Cassation* – and a Court to which an annulled case was assigned. The two *référés* were different, but they derived from the same principles. So it is possible to describe their common origins.

The *référé législatif* was composed of two aspects: 1) the *prohibition* for the judge to interpret the laws when making a ruling (we can define this as *prohibition of interpretation*); 2) the *obligation* for him to refer to the legislator whenever he considers it necessary to interpret a law or to enact a new one. In the first case, the judge identifies an interpretative doubt, and in the second, a legislative hole.

It is necessary to clarify that in the Old Regime the French juridical doctrine used to consider the "interpretation of statutes" as a broad judicial function. It was the so called in latin *interpretatio* in the *Jus commune* system that was not only a judicial function, but also a legislative function. The judge had the power to solve doubts by interpretation, to fill a legislative hole, and to extend or reduce the range of the application of statutes. So, the *application* was distin-

guished from the *interpretation*. For example, the French jurist Rodier wrote in the 17th century that «the Judge must apply the statutes to the facts of the case, but only the Legislator – namely the King – can interpret them»[1].

Today the doctrine considers the term *interpretation* to define only the process in which we can give statutes a meaning. Therefore, it is impossible to distinguish *clear* from *obscure* legal texts because all statutes – even the simplest – need and have multiple interpretations. There is no *application* without an *interpretation*.

The theoretical structure of *référé législatif* is derived from the rigid conception of separation of powers. Particularly it stresses the separation between: 1) the phase in which the legal rule is created (*legislation*); 2) the phase in which it is applied (*jurisdiction*).

From this point of view the *interpretation* was considered an activity of creating the law, so a normative activity. If interpretation is a form of creating rules, it therefore must be denied to the Courts and assigned exclusively to the legislators. Only the legislators have the power to interpret the law, as written in the famous maxim of Roman law *Ejus est interpretari, cuius est condere leges*. The only form of interpretation permitted is the *authentic interpretation* because it is enacted by the legislator with an interpretative law that has general effects.

After any doubt in interpretation is resolved by the legislator's intervention, the judge can decide the controversy applying the interpretative law. The process was simple and coherent. Its main purpose was to guarantee the "purity" of the statute law and avoid the risk of misunderstanding the real meaning of the statutes provoked by the decisions of the Courts. This was a strong instrument for preventing the success of a legal system of judicial precedents.

The *référé législatif* was not a totally new creation of the French Revolution. Its sources are ancient and can be found in Justinian law, Canon law, and French law: a) in *Justinian Law* the concepts of "ban of *Interpretatio*" and the process of *relatio ad Principem*, that is the obligation to refer to the Emperor in case of doubt of interpretation already existed. This obligation was based on several roman statutes. For example, in the constitution of 539 a.d. *De legibus et constitutionibus principum et edictis* («tam conditor quam interpres legum solus imperator iuste existimabitur[2]») and in the *Tanta* constitution (Digestum)[3], «[Imperatori] soli concessum est leges et condere, et interpretari»; b) in *Canon Law* the authentic interpretation, after the Council of Trent,

[1] M.-A. Rodier, *Questions sur l'Ordonnance de Louis XIV, du mois d'avril 1667, relatives aux usages des Cours de Parlement, et principalement de celui de Toulouse*, new edition, Toulouse, Dupleix, 1679, p. 11.

[2] C. 1.14.12: «leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet (...) tam conditor quam interpres legum solus imperator iuste existimabitur».

[3] «Si (...) ambiguum fuerit visum, hoc *ad imperiale culmen per iudices referatur*, et ex auctoritate Augusta manifestetur, *cui soli concessum est leges et condere, et interpretari*».

became very important. The Bull *Benedictus Deus* enacted by Pius IV in 1563, established the obligation to refer to the Pope (who was the legislator) when there was a doubt of interpretation. In 1564 a *Congregation for the execution and interpretation of the Council of Trent* was created by Pius V with the Bull *Alias nonnullas*[4]; c) in *French Law* we can point out the *Ordonnance civile* of Louis XIV of 1667. Its art. 7 of Title I, established that: «If during a trial (…) a doubt or a problem emerges in the application of our statutes [the so called in French *ordonnances*, *édits*, *déclarations* and *lettres-patentes*] we forbid the judges to interpret them, instead we want them to stop the trials and wait to hear our will». That was – once more – the prohibition of interpretation and the obligation to refer to the legislator.

The members of the Constituent Assembly recognized that the origins of the *référé législatif* could be found in Roman law. Robespierre even proposed in 1790 to assume «the maxim, that was known in public Roman law and in our traditional monarchist government: the Roman law established that interpretation of the statutes belong to whom enacted the statutes: *eius est interpretari legem, qui condidit legem*. If a different authority than the legislator were able to interpret the statutes, that authority could modify them and heighten its will above the legislator[5]».

Following the model of the *Ordonnance civile*, several reforms in Europe established the prohibition of interpretation and the obligation to refer to the legislator. We can mention, among others, the King Frederick II's Prussian project of civil code of 1749[6]; the *Leggi e Costituzioni* of Charles Emmanuel III, King of Sardinia in 1770; and also the *Dispaccio reale* of Ferdinand IV, King of Naples, in 1774.

The goal of these reforms was to deny the Courts decisions from taking a legislative role and assign the interpretation exclusively to the legislator. From their point of view, the legislators were trying to stop the "usurpation" of the legislation committed by the Courts.

To conclude this first part of my presentation about the Old Regime, I would like to quote the definition of *référé législatif* written by Philippe-Antoine Merlin in his *Répertoire universel de jurisprudence*:

> [the *référé législatif* is] the process by which the judges, before deciding on an issue that they considered impossible to solve, due to the ambiguity of the law or to a legislative hole, referred to the authority holding the legislative power for the interpretation[7].

[4] Later with the Bull *Immensa aeterni Dei* enacted by Sixtus V in 1587, the Congregation became the *Congregatio pro executione et interpretatione Concilii Tridentini*, to which «[si] dubietas aut difficultas emerserint, interpretandi facultatem, nobis tamen consultis, impartimur».
[5] 25 mai 1790, in *Archives parlementaires*, I série, XV, p. 670.
[6] Art. 7 and 8, Part. I, Book I.
[7] Ph.-A. Merlin, *Référé au législateur*, in *Répertoire*, 5th ed., Paris 1827, XIV, p. 368.

The contribution of the juridical doctrine of the Enlightenment to the creation of the *référé législatif* is so evident that we do not have to take time going into delay on this point. We will just point out the diffusion of the following two concepts in the 18th Century: 1) the judicial function as a *syllogism*, 2) the negative connotation of the term *interpretation of law* as *corruption of law*.

That was the case of Montesquieu who considered the judicial function «in some ways, *null and void*», because the judge does not have the right to *interpret* the law, but only to *apply* it literally. The judges «are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor[8]». The judges – according to Montesquieu – must follow the law to the letter, «otherwise the law might be *interpreted* to the prejudice of every citizen, in cases where their honour, property, or life are concerned[9]».

Also very important was Voltaire's doctrine. Take, for example, his affirmation in his *Philosophical dictionary*: «let all laws be clear, uniform and precise: to *interpret* laws is almost always to *corrupt* them[10]».

The Italian jurists of the Enlightenment in particular led a radical campaign *against the interpretation of laws*. The most explicit essay was the article *On interpretation of laws* published in 1766 in the periodical *Il Caffé* by Pietro Verri. It is a very interesting text that can be considered as a "manifesto" of the theory of legal interpretation of the Enlightenment[11]. Verri affirmed that «the judge becomes the legislator if he is allowed to interpret the laws».

The same theories are presented by Cesare Beccaria in his *Of Crimes and Punishments*[12] in 1764 and by Gaetano Filangieri, Neapolitan jurist and philosopher, in his *Riflessioni politiche* of 1774.

To summarize: the juridical thought of the Enlightenment was characterized by a campaign to demonstrate the negativity of the exaggerated legislative role of the Courts with the goal of reserving all the legislative power for the legislator. In the name of separation of powers, the jurists considered *statute law*, the only source of law, in an almost holy light. Consequently, they had absolute confidence in the legislator and a deep mistrust for judges. The judicial interpretation was criticized by the Enlightenment doctrine because of the lack of legal certainty. Their proposed solution was to enforce the judges to limit their functions to a syllogistic application of the law. In this way only the authentic interpretation – i.e. the interpretation of the legislator – was considered admissible.

[8] Montesquieu, *The Spirit of Laws*, Book 11, Ch. 6.
[9] Montesquieu, *De l'esprit des Lois*, Liv. VI, ch. III. Book 6, Ch. 3.
[10] Voltaire, *Civil Laws*, in *Philosophical Dictionary*.
[11] P. Verri, *Sulla interpretazione delle leggi*, in «Il Caffè», 2 (1766), n. XXVIII.
[12] C. Beccaria, *Dei delitti e delle pene*. Particularly in chap. 4, entitled *Of the Interpretation of Laws*.

2. In their juridical arguments, the *cahiers de doléances*, presented to the Estates-General of 1789, mixed the traditional culture of the Old Regime with certain requests of the Enlightenment doctrine[13]. The most influenced by the Enlightenment culture were the *cahiers* of the Third Estate. The majority of these texts presented the petition of: 1) abolition of privileges, 2) constitutionalism, 3) separation of powers, 4) codification of law, 5) unity of jurisdiction.

The *Summary of the cahiers on judicial reformation established by the counsellor*[14], an official document of 1789, gives a general view about the petitions of these texts. We find the requests for: 1) *unifying* the Kingdom's legislation: «Art. 15. Let the civil and criminal codes be reformed, simplified, and intelligible to everybody (…) to be applied uniformly in all the Kingdom»; 2) *uniformity* of the jurisprudence of the Courts: «Art. 19. Let the jurisprudence be uniforme for all Courts and deny them from enacting decisions against the laws»; 3) *banning* judicial interpretation in order to avoid any normative activity put into practice by the judges: «Art. 18. [It is forbidden for judges] to repeal in part or interpret the laws»; 4) *obliging* Courts to explain the motives for their rulings, in order to control and verify judicial activity: «Art. 79 bis. Let all enacted judgements, civil or criminal, explain the motivations for the decision».

Regarding the relations between *legislation* and *jurisdiction*, the *cahiers* were substantially in agreement for claiming the separation of legislative power from the judicial power. For that reason they requested a legislative monopoly for the legislator, the abolition of the *Arrêts de règlement* and the prohibition of interpretation. The general goal of the Third Estate was to contain the political role of the Courts. So the limitation of judges' functions was considered an instrument to achieve this goal. The *cahiers* certainly aimed to guarantee the independence of the judicial power, but they mainly tried to protect the legislative power from the Courts interference. This attitude prevailed in the Third Estate, whereas the *cahiers* of the of Aristocracy and Clergy were more traditional and yet covered of a wide range of opinions. That can be explained by considering the political role of privileged Estates (the 1st and 2nd) in the judicial system of the Old Regime.

To conclude, the most frequent judiciary claims in the *cahiers de doléances* of 1789 were: 1) legislative unification, 2) prohibition of judicial interpretation, 3) obligation to explain the motives for all judgements.

The quotations in these texts are innumerable so the following quotations must be considered only as samples.

It is necessary to clarify that the meaning of the terms *code* and *codification*, employed in the these texts, does not correspond to the present meaning. The authors of the *cahiers* intended to refer to the enactment of a *code of civil*

[13] See *Archives parlementaires de 1787 à 1860*, par J. Mavidal et E. Laurent, Ie série, volumes I-VI.
[14] Published in E. Seligman, *La justice en France pendant la Révolution*, I, pp. 489-505.

or criminal procedure – like the *Codes* of 1667 and 1670, the *Ordonannces* of Louis XIV – and not to a *code of substantial law*. So, until the Revolution, the term *code* was synonymous with *code of procedure*.

We will limit ourselves to quoting some of the most significant texts:

> the interpretation of law shall be reserved for the legislator, the motives for each ruling shall be explained in the judgements (tiers-état de Bailleul, Flandre maritime)[15].
>
> the judges shall be obliged to explain the motives of their ruling (...) the letter of the law shall always be followed, without allowing the judges the right of interpretation (cahier de la ville de Bergues-Saint-Winoc)[16];
>
> do not permit the Courts and judges to be able to depart from the text of the laws to allow the creation of new ones under the pretext of interpreting them (clergé de Beauvais)[17];
>
> [today] all powers are confused in the judicial power... under the pretext of the *Arrêts de règlement*, the Supreme Courts assigned themselves a portion of the legislative power (noblesse de Blois)[18];
>
> The judges shall be obliged to follow the letter of the law, with no pretext to move away from it (cahier général du Tiers de la sénéchaussée de Guyenne)[19];
>
> do not allow any Court or jurisdiction to extend or modify the laws (Tiers de la ville de Brest)[20];
>
> [the judges] shall be limited through precise laws and shall only be witnesses of the laws, apply the laws and not interpret them (noblesse de Bugey)[21];
>
> France needs to have a clear legal code, simple, and easy to apply ... in order to limit the judge in his only function, i.e. to apply the laws and not to interpret them (cahier de la paroisse de Clemart-sous-Meudon, Paris hors les murs)[22];
>
> the law cannot be modified or interpreted but by another *authentic law* (cahier de la communauté de la Ciotat)[23].

The *cahier* of the community of Mirabeau is particularly significant because it includes not only the ban of interpretation, but also the obligation to refer to the legislator:

> nothing shall be left to the judges' free will; they must explain the motives of their judgements and be accountable to them; it shall be forbidden to annotate the law, or to interpret the laws in relation with the old ones, but in unprecedented cases, the *judges must stop the trial and refer to the King and to General Estates in order to enact a new additional law*[24].

[15] Cahier du Tiers-état de la Flandre maritime, Bailleul, art. 6, 7, *Législation*, in *Arch. parl.*, I s., II vol., p. 177.
[16] Cahier de la ville de Bergues-Saint-Winoc, Art. 7, 11, in *Arch. parl.*, I s., II vol., p. 180.
[17] Cahier du clergé de Beauvais, *ibid.* II, p. 291.
[18] Cahier de la noblesse de Blois, *ibid.* p. 381.
[19] Cahier général du Tiers de la sénéchaussée de Guyenne, *ibid.*, p. 399.
[20] Cahier du Tiers de la ville de Brest, *ibid.*, p. 470.
[21] Cahier de la noblesse de Bugey, *ibid.*, II vol., p. 481.
[22] Cahier de la paroisse de Clemart-sous-Meudon, Paris hors les murs, in *Arch. parl.*, I s., IV vol., p. 442.
[23] Cahier de la communauté de la Ciotat, art. 45, *ibid.*
[24] *Ibid.*, p. 532.

It is also the case of the Nobility's *cahier* of the *balliage* of Evreux:

> no Courts shall be able to modify, interpret or change the law (...) in any context. *All the interpretations, changes or regulations must be formally enacted by the legislator*[25].

3. *Conclusions*

Even if the cahiers de doléances of 1789 were not accurate from the legal and systematic point of view, most of them clearly adhered to a system based on a rigid separation of legislative powers from judicial powers. The interpretation of statute law was considered as a phase of the creation of legal rules so it was denied to the judge and assigned exclusively to the legislator.

The *référé législatif* was not explicitly foreseen in the *cahiers de doléances* but it was the logical consequence of the French legal doctrines of 18th Century.

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[25] *Ibid.*

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