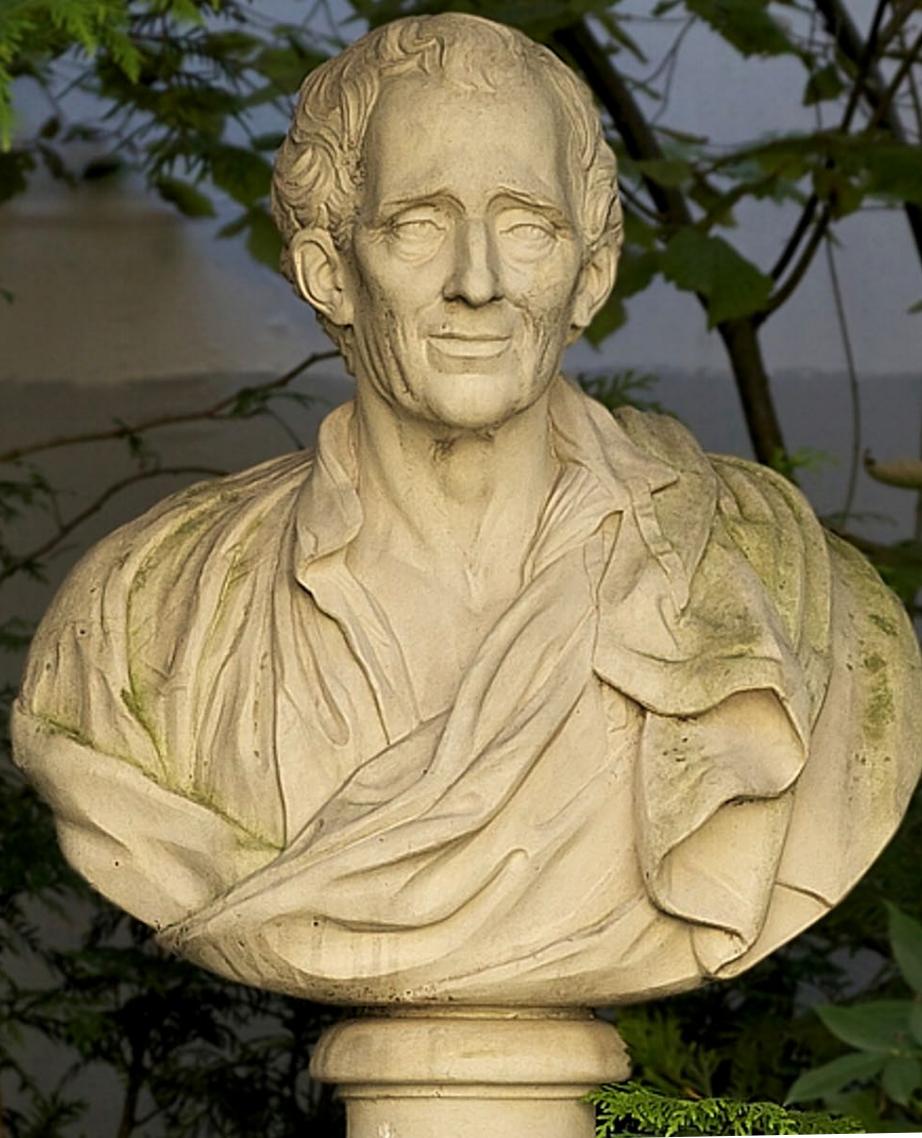


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Recent draft amendments to the Environmental Charter
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Constitutional law:

Recent proposed amendments to the Charter for the Environment

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Almost ten years on since its promulgation, France's Charter for the Environment continues to surprise (1). Its adoption on 1 March 2005 on the initiative of the then President of the Republic, Jacques Chirac, was just one such surprise (2), even when the idea of extending the corpus of French constitutional law to include the environment was not new (3). Another surprise was its immediate application by the constitutional (4), administrative (5) and criminal (6) courts, as compared with the contentious fate of other declarations under French law to which the Preamble to the 1958 Constitution refers, i.e. the Declaration of the Rights of Man and of the Citizen and the Preamble to the 1946 Constitution. A third surprise lays in the situation whereby the nature of some of the Charter's provisions remains as yet undecided, almost ten years after the promulgation of a law composed of ten articles preceded by a Preamble of seven short paragraphs.

The uniqueness of the Charter on the Environment is well established. It is unique, firstly, in terms of its ambition. Contained as it is within the Preamble to the 1958 Constitution, it is intended to become the 21st-century equivalent of the very declarations of rights which the Charter features alongside, namely the 1789 Declaration of the Rights of Man and of the Citizen, together with the Preamble to the 1946 Constitution. Secondly, the Charter is also unique in terms of the context in which it was drafted. Unlike the adoption of other French declarations of rights, the 2005 constitutional amendment was quite removed from any change of regime such as the French Revolution of 1789 or the advent of the Fourth Republic in 1946. Thirdly, it is unique in terms of the drafting process, which attached particular importance to the involvement of civil society. Prior to the parliamentary debates and the adoption of the constitutional law by the Congress of the French Parliament, a national consultation and regional workshops were conducted and followed by the Yves Coppens Commission (named after the palaeontologist chairing it). Composed primarily of representatives from employers' organisations, trade unions, agricultural and consumer groups, together with qualified individuals from the fields of the social sciences, medicine and biology, the Commission was tasked with producing a report which served as the basis for the Government's draft amendment. Finally, the Charter is unique in terms of its content. Indeed, this was the first time that a State had armed itself with a constitutional law devoted entirely to the environment. The purpose of this constitutionalisation was to respond "*to the gradual assertion, in the second half of the previous century, of so-called "third-generation" rights, environmental rights, consumer rights, citizens' rights, etc.*" (7).

Thus the 2004 Charter recognises, under Article 1, "*the right to live in a balanced environment which shows due respect for health*"; and, under Article 7, "*the right [...] to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-making process likely to affect the environment*". While it is no longer considered "fashionable", the Charter also specifies a number of duties: the duty to participate in preserving and enhancing the environment (Article 2); to prevent damage that anyone may cause

to the environment or, failing that, limit the consequences thereof (Article 3); to contribute to the reparation of the damage that anyone may cause to the environment (Article 4). Finally, aside from the requirement that public policies promote sustainable development (Article 6), it is incumbent upon public authorities, in applying the precautionary principle and in their respective fields of operation, to implement risk assessment procedures and adopt temporary measures commensurate to the risk involved in order to preclude the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, which may seriously and irreversibly harm the environment (Article 5).

Nevertheless the Charter's uniqueness must not be overstated. It is not a revolutionary legal document. It is not "as innovative in its field as were some landmark, historic declarations in the field of individual rights and civil liberties" (8). Indeed, on the one hand, "a comparison with foreign States shows France to be a latecomer to the constitutionalisation of environmental law" (9). On the other hand, the Charter for the Environment has not had the same influence in the world as the other two French declarations of rights. Finally, the Charter's content is not particularly innovative. Firstly, "since the 1970s, international law and European Union law have broadly recognised a large part of the general rights and principles of environmental law that are enshrined by the Charter". Secondly, some principles or rights laid down by the Charter already featured in the *Code de l'environnement* or Environmental Code, although the phrasing differs. This is the case, for instance, of the right to live in a balanced environment, the precautionary principle, the right of access to information and to participate in environmental matters under Articles L.110-1 and L.110-2 of the *Code de l'environnement*.

Today, the surprising aspect of the Charter for the Environment is the number of proposals to amend it. And these are themselves surprising for several reasons: firstly, the proposed constitutional bills are put forward as much by Deputies in the National Assembly as they are by Senators; secondly, the proposed bills were all tabled very recently, whereas the members of France's Parliament had not previously shown the slightest inclination to make any changes to the Charter; thirdly, they all concern the same provision, namely the precautionary principle. Some aim to de-constitutionalise it (10), while others provide that the scope of the principle is to be defined (entrusting Parliament with the task of establishing the conditions for its application (11)), while still others aim to balance the principle out with the addition of a new principle, the innovation principle - although the term already features in the text of the Charter - in order to compensate for the excesses that the precautionary principle has allegedly brought about (12). It is surprising that the principle should be at the heart of all of these challenges: on the one hand, it drew the attention of all members of Parliament during the debates on the Charter in 2004; on the other hand, it was the members of Parliament themselves who carved the principle into the constitutional marble when the Coppens Commission, which was behind the constituent procedure, had itself refused to do so, precisely because it could not reach a consensus (13); finally, while the definition of the conditions of application and limits of the principle was not referred back to the legislature (unlike other rights and freedoms laid down in the Charter), the phrasing of the principle is quite precise (14).

Nonetheless, while Parliament's challenge to the precautionary principle is astonishing compared with the debates in 2004, it is only half a surprise in light of the relevant reports. According to the report from the *Commission pour la libération de la croissance française* (France's Commission for Growth) chaired by Jacques Attali, the constitutionalisation of the principle is allegedly based on a

petrified notion of reality and thus is an obstacle to growth; the report recommends that the principle should either be repealed or, at the very least, its scope be clearly defined in an amendment (15). Equally, *Le Pacte pour la compétitivité de l'industrie* (16), written by Louis Gallois, and an official report titled *Pour un Big-Bang économique fiscal et culturel* (17) by "Génération Entreprise-Entrepreneurs associés", an industry lobby group, both challenge broad, even abusive, interpretations (without mentioning which) of the precautionary principle which prevent technical progress and paralyse research. Also, the precautionary principle faced more criticism when the *Innovation 2030* Commission "proposes to acknowledge at the highest level the existence of an innovation principle" (18) in order to redress the balance of its effects, or when the *Académie des sciences morales et politiques* suggested that the rights and duties of citizens in the protection of the environment and its conservation for future generations are exercised under the conditions laid down by the law (19). Finally, further to an information report highlighting the issues surround the application of the precautionary principle and the concerns raised (20), the National Assembly adopted a draft resolution on 1 February 2012 aiming to establish guidelines for the implementation of the precautionary principle with a view to defining the intentions of both the legislature and Parliament and thus take the monopoly away from case law (21).

The recent proposed constitutional laws are therefore the result of the constant and growing challenges to the precautionary principle laid down under Article 5 of the Charter. The recurring criticisms of the excessive interpretations of the principle would justify the amendment of the Charter, on condition that both Houses of Parliament decide so, as well as the French people, who would necessarily be consulted in view of the author of the initiative (22). This constitutional review is not welcome in light of the doctrine of the Veil Committee, developed in 2008 during the review undertaken of the Preamble to the 1958 Constitution (23). The *Comité de réflexion sur le Préambule de la Constitution* (Committee appointed to review the Preamble to the Constitution) – generally known to as the Veil Committee after the chairwoman, Simone Veil – was tasked by the then President, Nicolas Sarkozy, to examine "whether and to what extent the fundamental rights acknowledged by the Constitution must be supplemented by new principles" (24). However, before publishing its findings, the Committee attempted to develop a doctrine on its idea "of the constituent power's role in fundamental rights" (25). This methodological preliminary led it to establish four principles, the first of which are "to respect France's constitutional heritage" and "to guarantee the inviolability of recent constitutional texts".

The Charter for the Environment is not yet ten years old. Furthermore, it is mentioned in the Preamble to the 1958 Constitution alongside other French declarations of rights. Consequently, owing to its relative "youth", any proposed amendment surely constitutes a correction of recent constitutional texts (I) and, in view of its position in the Constitution, a challenge to France's constitutional heritage (II). The doctrine is therefore an invitation to Parliament to bring an end to the current procedure to amend the Charter for the Environment, owing to the questionable subject to which Parliament's proposals relate.

I – A correction of recent constitutional texts

Although the Constitution is no longer "that work etched in bronze which, as in ancient Rome, it would suffice to admire and respect" (26), its stability remains essential. Indeed, "the instability of the Constitution is harmful to maintaining constitutionalism" (27). Between 1992 and 2008, 19 amendments were made to the Constitution; bearing in mind that the current President of the

Republic also intends to alter it before the end of his term of office, this will bring the total number of amendments under the Fifth Republic to 25. Furthermore, some have been quite significant. For example, the amendment of 23 July 2008 changed or added no fewer than 47 articles (28). An umpteenth amendment would surely add further instability to the Constitution.

Above all, according to the Veil Committee, when it comes to “setting aside one of the constitutionalized norms, qualifying it, supplementing it, even expressing it differently, the answer could only ever be in the negative (...) the experiment is too recent for any potentially corrective lessons to be drawn from it” (29). While some members of Parliament refuse to undertake any corrections (30), where it is a matter of deconstitutionalising the precautionary principle, to balance it out or even task the legislature with defining it, the proposals surely aim to correct the work done by the constituent power in 2004. Some members of Parliament clearly acknowledge as much when they admit either that the proposed bill proceeds with a “substantial redrafting of the Charter” (31) or that what it produces “is not perfect” (32), or that “the abolition of the precautionary principle’s direct effect could be perceived as a step backwards” (33). Furthermore, the constitutionalisation of the principle was the subject of vigorous debate (34), thus expressing a real choice on the part of members of Parliament, and all the more so given that the Coppens Committee hesitated as to its inclusion in the Constitution. Moreover, the direct effect of Article 5 is the result of a desire on the part of the constituent power in 2005. This choice is confirmed, *a contrario*, by Articles 3, 4 and 7 of the Charter, which refer to the law, namely the duties to prevent environmental damage and to contribute to the repair of any damage, as well as the rights of access to information and public participation on environmental issues. Consequently, correcting the deliberate choice made by Parliament less than ten years after that choice was made may serve to emphasise the Constitution’s instability even further. Besides, this is not an isolated case. A proposed constitutional bill on the jurisdictional liability of the President and the Government (35) was tabled on 14 March 2013 at the National Assembly, when the provisions on the liability of the Head of State under Articles 67 and 68 of the Constitution (which, incidentally, have never been applied) had already been reformed on 23 February 2007.

The precautionary principle did not escape the Veil Committee’s scrutiny either. The Committee explicitly refused to recommend any amendments to it, along with the other provisions of the Charter for the Environment, owing to the legal authority that it carries (36). Indeed, having acknowledged the constitutional value of all of the Charter’s provisions in 2008, the *Conseil d’Etat* and the Constitutional Council went so far as to state that they “are binding on the government and on administrative authorities in their respective areas of responsibility” (37). It follows that it would be regrettable for the Constitution’s readability and stability if Parliament were to follow the trend of demolishing that which they have only just built and if the same problems affecting France’s laws were also to impact on the Constitution.

II – The challenge to France’s constitutional heritage

According to the Veil Committee, “when it comes to fundamental rights, France’s constitutional heritage rests indissolubly both on the founding legal texts and on the case law arising therefrom” (38). By “founding texts”, the Committee means the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the 1946 Constitution, and the Charter for the Environment that came into force in 2005. In other words, France’s constitutional heritage is made up of texts, each drawing on a different source of inspiration, to which the Preamble to the 1958 Constitution

refers. Indeed the framers of the 1958 Constitution had "deliberately chosen the path of *sedimentation*" (39) and "the constituent power, in recent times, has not moved away from the same of reverence towards the bequests of 1789 and 1946. The constitutionalisation of the Charter for the Environment in March 2005 came about in the form of the simple addition of a new level to the constitutional edifice, without amendment and, therefore, without entrenchment *vis à vis* the existing one" (40). The Charter for the Environment cannot be amended without this affecting France's constitutional heritage, especially as it is a matter here, not of enhancing it, but of excising – or at least limiting the effects of – one of its articles. Admittedly, there are no constitutional provisions preventing the framers of the Constitution to amend the Charter for the Environment. Aside from a number of time limits scattered through the Constitution, the derived constituent power has only one material limit imposed on it by Article 89: the impossibility of amending the republican form of government. An amendment to the Charter for the Environment would certainly not contravene that interdict. Nevertheless, proceeding with such an amendment would necessarily go against the historic tradition of stratification of constitutional standards on the protection of fundamental rights.

Even more fundamentally, the question is whether the provisions of the Charter for the Environment are constitutional provisions like the others. Formally, there is nothing to suggest that they could be anything else insofar as, by virtue of the principle of parallel powers, that which the derived constituent power can do, it can also undo. Conversely, still others consider that the Charter "is a rather poorly identified legal and constitutional object" (41) with "the same character as the two declarations of rights" (42). Certainly, its position in the body of the Constitution alongside the 1789 Declaration of the Rights of Man and of the Citizen and the Preamble to the 1946 Constitution renders the three declarations indissociable, although the Charter does not have the seniority of its counterparts. The *Conseil d'Etat* has acknowledged this bond – indeed, more explicitly than did the Constitutional Council in its decision concerning to the law on genetically-modified organisms (43) when it asserted that the provisions under Article 7 of the Charter "as with all rights and duties defined in the Charter for the Environment, and like all those proceeding from the Preamble to the Constitution, have constitutional value" (44). Consequently, to envisage an amendment of the Charter for the Environment is akin to opening a Pandora's Box. Once the newest declaration of rights has been amended, there will no longer be any obstacle, in view of the precedent created, to an amendment of the older declarations (i.e. those of 1789 and 1946), although that possibility remains unimaginable for the time being (45). It follows that if the amendment process reaches completion, this will break down the political – if not psychological – barriers which currently prevent any amendment of the rights to which the Preamble to the 1958 Constitution refers. France's constitutional heritage would then be called into question in its entirety.

All in all, as far as the precautionary principle is concerned, amending the Constitution is not the answer, especially where this involves amending a part of France's constitutional heritage that is so firmly focused on future generations.

Notes:

- (1) HEDARY D., « *Les surprises de la Charte de l'environnement* », Droit de l'environnement, 2009, n°175, p. 3.
- (2) PRIEUR M., « *Promesses et réalisations de la Charte de l'environnement* », NCCC, 2012, n°43, p. 5.

- (3) PRIEUR M., « *La constitutionnalisation du droit de l'environnement* », in Cinquantième anniversaire de la Constitution française, MATHIEU B. (dir.), Dalloz, 2008, p. 489.
- (4) CC n° 2005-31 REF, 24 March 2005, Rec. p. 56 ; CC n°2005-516 DC, 7 July 2005, Rec. p. 102.
- (5) TA Chalons-en-Champagne, order of 29 April 2005; CE, 6 April 2006, *Ligue pour la protection des oiseaux*, n°283103 ; CE, 13 June 2006, *Association FNE*, n°293764 ; CE, 19 June 2006, *Association eaux et rivières de Bretagne*, n°282456.
- (6) *Tribunal correctionnel* (criminal court) of Orléans, 9 December 2005, note J.-Ph. Feldman, Rec. Dalloz, 2006, p. 814.
- (7) JEGOUZO Y., « *La Charte de l'environnement* », AJDA, 2005, p. 1156.
- (8) Ibid.
- (9) MORAND-DEVILLER J., « *L'environnement dans les constitutions étrangères* », NCCC, 2012, n°43, p. 83.
- (10) *Proposition de loi constitutionnelle visant à ôter au principe de précaution sa portée constitutionnelle*, (Constitutional proposal to strip the precautionary principle of its constitutional scope), National Assembly, n°1242, 10 July 2013; *Proposition de loi constitutionnelle visant à retirer le principe de précaution du bloc de constitutionnalité* (Constitutional proposal to withdraw the precautionary principle from the constitutional framework), National Assembly, n°2033, 13 June 2014.
- (11) *Proposition de loi constitutionnelle visant à modifier la Charte de l'environnement pour préciser la portée du principe de précaution* (Constitutional proposal to amend the Charter for the Environment in order to stipulate the scope of the precautionary principle), Senate, n°125, 27 May 2014.
- (12) *Proposition de loi constitutionnelle visant à équilibrer le principe de précaution avec le principe d'innovation* (Constitutional proposal to balance the precautionary principle against the innovation principle), National Assembly, n°1580, 26 November 2013; *Proposition de loi constitutionnelle visant à modifier la Charte de l'environnement pour exprimer clairement que le principe de précaution est aussi un principe d'innovation* (Constitutional proposal to amend the Charter for the Environment to state clearly that the precautionary principle is also an innovation principle), Senate, n°183, 3 December 2013.
- (13) See the two proposed variations: Yves Coppens, *Rapport de la Commission Coppens de préparation de la Charte de l'environnement*, published by the French Ministry for the Environment and Sustainable Development, 2005, p. 38 et s.
- (14) PRIEUR M., « *Promesses et réalisations de la Charte de l'environnement* », cited above, p. 13.
- (15) Jacques Attali, *Rapport de la Commission pour la libération de la croissance française : 300 décisions pour changer la France*, La documentation française, 2008, p. 91-92.
- (16) Louis Gallois, *Pacte pour la compétitivité de l'industrie française*, La documentation française, 2012, p. 39.
- (17) GEEA, *Pour un Big-Bang économique, fiscal et culturel*, 2013, <http://www.generation-entreprise.fr/spip.php?article46>
- (18) Anne Lauvergeon, *Un principe et sept ambitions pour l'innovation*, La documentation française, 2013, p. 14.
- (19) *Avis de l'Académie sur le projet de loi constitutionnelle concernant la Charte de l'Environnement*, http://www.asmp.fr/travaux/avis_charte.htm
- (20) Alain Gest et Philippe Tourtelier, *Evaluation de la mise en œuvre de l'article 5 de la Charte de l'environnement relatif à l'application du principe de précaution*, Rapport d'information (Information Report: Evaluating the implementation of Article 5 of the Charter for the

Environment on the application of the precautionary principle), National Assembly, n°2719, 8 July 2010.

- (21) Alain Gest et Philippe Tourtelier, *Proposition de résolution sur la mise en œuvre du principe de précaution* (Proposed resolution on the implementation of the precautionary principle), National Assembly, n°4008, 25 November 2001.
- (22) Under Article 89 of the Constitution, only Government Bills to amend the constitution may be submitted to Parliament convened in Congress where the President of the Republic so decides where these are passed by both Houses in identical terms. As to proposed constitutional amendments, these are compulsorily subject to final approval, not by Parliament convened in Congress, but by referendum.
- (23) Simone Veil, *Redécouvrir le Préambule de la Constitution*, La documentation française, 2008, p. 18 et s.
- (24) Article 1, *Décret n°2008-328 du 9 avril 2008 portant création d'un comité de réflexion sur le Préambule de la Constitution* (Decree n°2008-328 of 9 April 2008 for the creation of a committee to examine the Preamble to the Constitution).
- (25) Simone Veil, *Redécouvrir le Préambule de la Constitution*, op. cit., p. 21.
- (26) LAVROFF D. G., « *De l'abus des réformes : réflexions sur le révisionnisme constitutionnel* », RFDC, 2008, n°5, p. 57.
- (27) Ibid., p. 58.
- (28) MONTALIVET P., « *La dégradation de la qualité de la norme constitutionnelle sous la Ve République* », RDP, 2012, n°4, p. 925.
- (29) Simone Veil, *Redécouvrir le Préambule de la Constitution*, op. cit., p. 26.
- (30) "The aim of Amendment n°3 put forward by M. Détraigne (...) is not to restrict the scope of the precautionary principle, but to stipulate for educational purposes that it is not an obstacle to scientific research", Patrice Gélard, *Compte rendu des débats de la commission des lois* (Transcript of debates, Law Commission), 27 May 2014, Senate.
- (31) Michel Teston, *Séance du 27 mai 2014 (compte rendu intégral des débats)* [Session of 27 May 2014 (full transcript of debates)], Senate.
- (32) Yves Détraigne, *Comptes rendus de la commission des lois* (Report from the Law Commission), 21 May 2014, Senate.
- (33) Patrice Gélard, *Compte rendu des débats de la commission des lois* (Transcript of debates, Law Commission), 27 May 2014, Senate.
- (34) Jean Bizet, *Avis visant à modifier la Charte de l'environnement pour exprimer plus clairement que le principe de précaution est aussi un principe d'innovation* (Opinion on amendments to the Charter on the Environment to state more clearly that the precautionary principle is also an innovation principle), Senate, n°532, 14 May 2014, p. 13.
- (35) *Projet de loi constitutionnelle relatif à la responsabilité juridictionnelle du Président de la République et des membres du Gouvernement* (Draft constitutional law on the jurisdictional responsibility of the President of the Republic and members of the Government), National Assembly, n°816, 14 March 2013.
- (36) Simone Veil, *Redécouvrir le Préambule de la Constitution*, op. cit., p. 27 et 28.
- (37) CE, Ass., 3 October 2008, *Commune d'Annecy*, n°297931 ; CC n°2008-564 DC, 19 June 2008, Rec. p. 313.
- (38) Simone Veil, *Redécouvrir le Préambule de la Constitution*, op. cit., p. 21.
- (39) Ibid., p. 11.
- (40) Ibid., p. 26.

(41) Jean-Jacques Hiest, *Séance du 27 mai 2014 (compte rendu intégral des débats)* (Session of 27

May 2014 (full transcript of debates), Senate.

(42) Alain Richard, *Comptes rendus de la commission des lois* (Report from the Law Commission) 21 May 2014, Senate.

(43) CC n°2008-564 DC, 19 June 2008, Rec. p. 313.

(44) CE, Ass., 3 October 2008, *Commune d'Annecy*, n°297931.

(45) "From a sociological or historical point of view, the 1789 Declaration is an irreversible achievement in the minds of the French people (...) For the French, the 1789 Declaration is an intangible treasure. That precludes the slightest thing being excised from it", G. VEDEL, *La déclaration des droits et la jurisprudence*, PUF, 1989, p. 72.

The Charter for the Environment

The French People,

Considering that:

Natural resources and equilibriums have conditioned the emergence of mankind;

The future and very existence of mankind are inextricably linked with its natural environment;
The environment is the common heritage of all mankind;

Mankind exerts ever-increasing influence over the conditions for life and its own evolution;
Biological diversity, the fulfilment of the person and the progress of human societies are affected by certain types of consumption or production and by excessive exploitation of natural resources;

Care must be taken to safeguard the environment along with the other fundamental interests of the Nation;

In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of future generations and other peoples to meet their own needs,

Hereby proclaim:

Article 1

Everyone has the right to live in a balanced environment which shows due respect for health.

Article 2

Everyone is under a duty to participate in preserving and enhancing the environment.

Article 3

Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage.

Article 4

Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.

Article 5

When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage.

Article 6

Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress.

Article 7

Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment.

Article 8

Education and training with regard to the environment shall contribute to the exercising of the rights and duties set out in this Charter.

Article 9

Research and innovation shall contribute to the preservation and development of the environment.

Article 10

This Charter shall inspire France's actions at both European and international levels.