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# The Ideology of Human Rights

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The technologies in the 20th and 21st Century, must respect human rights. But human rights correspond to a conception of beings and things that took a long time to build.

## 1.1. Constitutional texts

These texts have not always been an essential part of international or national law, far from it. For a while, only the United Kingdom was interested in protecting a suspected offender against arbitrary detention, notably with *habeas corpus*<sup>1</sup>. Human rights correspond to an old philosophical aspiration but they only entered the political sphere in the 18th Century, with texts of constitutional value, attached to the States, the French Declaration of Human Rights and the Citizen, the US constitution and its amendments.

### I) *The Declaration of the Rights of Man and of the Citizen*

This emerged as part of the philosophy of the Enlightenment, encompassing a number of philosophical works, notably by Rousseau and Diderot, such as the Encyclopedia.

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<sup>1</sup> 1679.

The rights declared are rather numerous. The first<sup>2</sup> rights are freedom and equality, inseparable in nature. These are freedom and equality as rights, not as achieved concepts. However, freedom and equality as rights are the foundation for many other rights, listed in part in the Declaration of the Rights of Man and of the Citizen, and then later in future texts pertaining to civil law

A) *Freedom*: freedom is defined in a very broad manner. Everything that is not prohibited by the law is considered to be a freedom. Article 5 states: “The law can only protect against actions that are detrimental to society”. All actions that are not made illegal in the law are included in the vast domain of freedom.

The Declaration of the Rights of Man and of the Citizen focuses particularly on the freedom of opinion<sup>3</sup> and the freedom of expression. The freedom of opinion encompasses all ideas, “even religious”. This notion of “even religious” refers to the importance of religious opinions in the society of the 18th Century. The principle of royalty was founded on religion and its church (Catholic), and later its churches (since the Edict of Nantes). The King’s legitimacy arises largely from his crowning, a religious ceremony. However, in the 18th Century, a number of men were able to separate themselves from the influence of religious opinions, either by freeing themselves from the concept of God (atheists remained a minority, however, who rarely expressed their beliefs; Libertines, such as Voltaire and D’Holback, were rather discrete on the matter of their atheism or their agnosticism) or by adopting a faith that was separate from the ecclesiastic institutions<sup>4</sup>. The constituents made progress by separating the world of politics from religion. Consequently, the revolutionary governments went after refractory priests refusing to swear allegiance as required. Robespierre, however, attempted to impose a new spiritualist institution by proclaiming a worship of the Supreme Being. Later the Empire re-established the influence of the churches. However, the work of the Declaration has survived, providing a foundation for the legal basis of freedom of opinion.

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2 Article 1.

3 Article 10.

4 La Profession de foi du... Vicaire Savoyard (J-J Rousseau).

Freedom of opinion is not sufficient. It must continue to include freedom of expression<sup>5</sup>. This corresponds to the freedom to express ideas and opinions. Citizens attempt to share their ideas with other citizens, and this freedom of exchange is carried out through a number of media: speech (in later centuries through radio or television), writing (pamphlets, books, newspapers) and, since no one at the time could envisage electronic writing, social media, Internet and print. In this way, freedom of expression results in the freedom of the press through the right to print diverging or converging ideas. The first years of the revolution were marked by a huge rise in the freedom of the press, with a large diversity of opinions, marked by an underlying freedom of tone.

The power to detain, a privilege of public order forces, is greatly limited. The law anticipates offenses, and the curbing of freedom caused by an arrest is anticipated by the lawmaker: “No man can be accused, arrested or detained unless in the manners prescribed by the law”<sup>6</sup>. The presumption of innocence is stated here<sup>7</sup>: “Any man is presumed innocent until proven guilty, and if it is deemed necessary to arrest him, any severity that is not needed to accomplish this shall be duly reprimanded by the law”.

The last freedom joins the first, proclaimed as solemnly<sup>8</sup>: this is the right to property, presented as “inalienable and sacred”. The right to property belongs to both civil law and economic law.

B) *Property*: exemptions are provided. Limitations to civil rights are envisaged by the law. Even property can be suspended “when public necessity, legally determined, requires it, and in exchange for a fair compensation beforehand”.

The Declaration of the Rights of Man and of the Citizen is actually included in the constitutional texts of the Fifth French Republic in the same way as the *Preamble de la Constitution* of 1946, and the *Chartre de l'Environnement*. They participate in the constitutional control process carried out by the constitutional council, either beforehand (referral to the

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5 Article 11.

6 Article 7.

7 Article 9.

8 Article 17.

Constitutional Council before the passing of a law) or afterward, since the 2008 reform with the question of constitutional priority.

Thus, the constitutional council came to the decision that certain nationalizations planned by the Pierre Mauroy government went against article 17 and violated inalienable and sacred principles of property.

The question of constitutional priority has several times looked into the correct application of freedom of opinion and freedom of expression. As a result, labor unions are allowed to distribute tracts without permission from the employer. This is not the case for electronic tracts, which require approval from the employer, unless an overall agreement is found. The priority issue of constitutionality (QCP) on September 27, 2013<sup>9</sup> declared that the Internet contains various networks that a company needs to monitor to some extent, and therefore the employer's authorization could not be considered an impingement of the freedom of expression as claimed by the CFTC.

Beyond the French constitution, the Declaration of the Rights of Man and of the Citizen has been a source of inspiration for all those reflecting on human rights in an international context.

II) *The other constitution/reference is the American Constitution of September 17, 1787.* The first 10 amendments make up the Bill of Rights; they were put forward by the First Congress on September 25, 1789 and ratified on December 15, 1791. The Declaration of the Rights of Man and of the Citizen and the Bill of Rights appeared at the same time. However, while the Declaration of the Rights of Man and of the Citizen lists the rights of French citizens, the Bill of Rights does not list the rights of citizens, but instead lists actions that the American Federal State cannot carry out on its citizens.

A) *The first amendment of the constitution covers freedoms:* freedom of opinion, freedom of expression and freedom of assembly. Regarding civil freedoms, the first amendment stresses the importance of the freedom to practice one's religion. The constituents are very attached to religious convictions and faith, even though the first Americans – the descendants of

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<sup>9</sup> QPC 2013-345.

Protestant colonists – were supporters of the freedom to choose religion. The American constitution contains many references to religion, and the President of the United States still swears an oath on the Bible when they take up their duties. Furthermore, in court citizens also swear an oath on the Bible. However, this freedom of opinion and expression is not limited to religion. All opinions can be held by American citizens, and they cannot be worried about showing their attachment to one or the other. This is why the freedom of the press cannot be limited. On this point, there is a dichotomy between the concept of the freedom of man and the citizen and the concept of freedom in the first amendment to the American constitution.

In France, revisionism is illegal and there are no revisionist websites. On the contrary, in the United States, where pro-Zionist lobbies are key in American politics, and where the United States is the unconditional allies of Israel in all and every context, revisionist websites are flourishing.

B) *The other amendments*: the fourth amendment concerns trespassing and illegal searches: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”. In the common law country, that is the United States, jurisprudence regarding the fourth amendment is sizeable.

The sixth amendment pertains to the rights of the accused. Suspects have the right to be defended and the jurisprudence relating to this stresses the importance of the role of lawyers<sup>10</sup>.

The American constitution and its amendments<sup>11</sup> have had particular influence on common law countries. The American constitution is the product of a philosophical and political movement that survived the American Civil War<sup>12</sup> and later the political and military events that marked the 20th Century.

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10 May 26, 2009: Montejo/Louisiana (presence of lawyers during police interrogations).

11 The first 17 amendments correspond to the Bill of Rights.

12 The Confederate States had adopted a constitution inspired by the Constitution of the “Northern States”.

The movement supporting human rights, which appeared in the constitutions of the 18th Century, became widespread after the Second World War in the context of the creation of the United Nations.

## 1.2. Some texts have an international scope

This is the case for the Universal Declaration of Human Rights of the International Covenant on Civil Rights. The UN set up a new world order after the Second World War. It followed the objectives of the League of Nations, but in a different context, as the defeat of the Germany/Italy/Japan Axis led to the fall of a number of values that were no longer acceptable. The United Nations Charter, signed June 26, 1945, reaffirms its “faith in fundamental human rights, in the dignity and worth of the human person” and invites member States to enforce “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. The members of the drafting committee came from different nations: Eleanor Roosevelt (USA), Peng Chun Chang (China), Charles Habib Malik (Lebanon), William Hodgson (Australia), Hernan Santa Cruz (Chile), René Cassin (France), Alexander E. Bogomolov (USSR), Charles Dukes (United Kingdom) and John Peters Humphrey (Canada). Out of the 58 participating countries, 48 voted in favor of the Declaration of Human Rights and eight abstained. Some reasons are geopolitical: citing the principle of universality as stated in article 2 (oriental block: USSR, Czechoslovakia, Poland, Yugoslavia). Some reasons are linked to actual resistance regarding some principles of the Declaration. Saudi Arabia, protector of the Walhabi faith, was not convinced of the equality between men and women. South Africa was not convinced of the equality between races. Two other states did not partake in the vote: Yemen and Honduras.

1) *The Universal Declaration of Human Rights is resolution 217 (III) A.* It has no value as a legally binding document, but it is a reference text, and has become increasingly known as new States become members of the UN, especially since the 1960s with the time of decolonization. In addition to the principles of freedom, which were already established, recognition of social rights were also added. Moreover, the UN Commission for Human Rights plays a considerable role, relaying knowledge of the Universal Declaration

of Human Rights to new Member States, which has already become very widespread throughout the 20th Century, even in States that are not yet ready to apply it.

A) *The first article proclaims the principles of freedom and of equal rights*, which were already present in the Declaration of the Rights of Man and the Citizen, and where some might recognize the work of the Frenchman René Cassin. The rights invoked are those of “human beings”, meaning men and women, which explains the difficulties of some States to accept the Declaration, notably Saudi Arabia. The first article explains the reasons for this equality: human beings are endowed with “reason and conscience”. This double term justifies the acceptance of the rights that are developed throughout the whole of the Declaration.

“Distinctions” are not permitted: a list is made up of these distinctions that should not be taken into account: race, color, sex, language, religion, political opinion or “any other opinion”, national or social background, wealth, birth or “any other situation”. These distinctions can in no circumstance lead to discrimination<sup>13</sup>.

B) *Next the rights are listed*: right to life, freedom and safety. Slavery, servitude, torture, and “cruel, inhuman or degrading treatment or punishment” are all prohibited.

Articles 10 and 11 on the rights of the accused appear to be slightly influenced by certain amendments of the American constitution, but the presumption of innocence<sup>14</sup>, inherited from the Declaration of the Rights of Man and of the Citizen, is also stated. The accused has the right to a defense. Article 12 is the first text that is a foundation of the respect of private life and the secrecy of correspondence: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation”.

Other rights proclaimed are the right to free movement<sup>15</sup>, the right to asylum, the right to a nationality and the right to have a family. Others include those at the center of the Declaration of the Rights of Man and of the Citizen: right to property, freedom of thought, conscience and religion. The

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13 Article 7 of the Universal Declaration of Human Rights.

14 Article 11.

15 This implies the freedom to leave one’s country, but also to return (article 13).

Declaration stresses the importance of religion and explains that freedom of conscience leads not only to the freedom to change religion (which is not accepted by certain religious faiths) but also to practice one's religion, share one's convictions and carry out rituals. Article 19 is dedicated to the freedom of opinion and expression "this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". The right to assembly corresponds to article 20.

Next come the rights relating to the sovereignty of the people (which did not exist in the texts of the 18th Century) and to social rights.

Article 21 states that "The will of the people shall be the basis of the authority of government". This will of the people is seen in "honest" elections that must be held periodically, using equal universal suffrage, and with a secret ballot.

Social rights include the right to social security, the right to work, the right to rest and hobbies, the right to a minimum quality of life and the right to education.

The objective of social security is to allow the achievement of "economic, social and cultural rights indispensable for his dignity and the free development of his personality"<sup>16</sup>. The right to work involves free choice of the work and protection against unemployment<sup>17</sup>. "Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection". The freedom to join unions is guaranteed.

The right to rest is based on a limit on the amount of time worked (maxima, deadlines) and on periodical paid vacation.

A sufficient quality of life is also a fundamental right<sup>18</sup>; this must allow every individual and their family to have access to food, clothing, shelter, medical care, social services, security in the case of "unemployment, sickness, disability, widowhood, old age or other lack of livelihood".

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16 Article 22.

17 Article 23.

18 Article 25.



Motherhood, as well as children “whether born in or out of wedlock”, are protected.

Education combines a vision that is both secular and religious. For religious reasons, the parents are at the center of the choice of education. For reasons of secularism, education is free “at least in the elementary and fundamental stages”, making it obligatory to a degree. Higher education is encouraged and must be accessible on a basis of equality and meritocracy.

These social rights are largely challenged nowadays by certain States and companies for reasons of the priority given to competition in commercial societies, limiting access to social rights and social protection: most of the reforms advised by the IMG, the OECD, or even the Union European ask for a reduction of public spending on schemes meant to increase the happiness of the majority of citizens.

Indeed, the International Labour Office (ILO) claims that globalization is compatible with its conventions, but most employers’ organizations in the majority of States are against the ratification of ILO conventions. Otherwise, when the conventions are ratified, they tend to demand the convention be denounced so that companies are able to deal with competition properly, as was the case in France with Convention 158 of the ILO, which makes it obligatory for there to be a reason behind a redundancy, with an appeal and compensation available. Whatever the ILO might think, it seems globalization presents a threat to the rights “acquired” by employees in developed countries, since globalization provides access to very cheap labor in less developed countries.

The Universal Declaration of Human Rights, while non-binding, is referenced by all individuals, physically and morally, who have a direct or indirect attachment to human rights.

II) *The International Covenant on Civil and Political Rights*<sup>19</sup> was adopted by the General Assembly of the UN in resolution 2200 A (XXI). The Universal Declaration of Human Rights was written in French. The International Covenant on Civil and Political Rights is written in English, Chinese, Spanish and Russian. The Pact is binding for States that have

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19 PIDCP.

ratified it. As the name suggests, it focuses on the first group of concepts covered by the Universal Declaration of Human Rights, which are civil rights. It came into force on March 23, 1976, after 35 instruments of ratification had been obtained. The first part, made up of the first article, focuses on peoples. The second part lists the civil and political rights that the State is committed to protecting.

A) *The first article states that different peoples have the right to self-determination.* These peoples determine their political status and their methods of economic and social development.

B) *Individuals (in this work, this is not the same as “citizens” and “persons”) have their own rights in the same way as peoples do.* No distinction can be made based on race, color, gender, religion, political or other opinion, national or social origin, wealth or birth that would change the rights of individuals recognized by the State. This is why States guarantee remedies for individuals if their rights are violated. If an exceptional public danger threatens the very existence of the nation, States may need to adopt derogatory measures with regard to the covenant, as long as these measures are compatible with international law and do not engender discrimination based on race, color, gender, language, religion or social origin.

All humans have a right to life and the covenant is in favor of abolishing capital punishment. In States where this punishment still exists, it can only be carried out for the most heinous crimes. The death penalty cannot be given to minors, and pregnant women cannot be executed. Torture, inhumane, cruel and degrading treatment are prohibited. Individuals must not be subjected to medical or scientific experimentation. Clearly the memory of the eugenics programs carried out by Nazi Germany on individuals with mental disabilities in concentration camps during the Second World War was fresh in the minds of the authors of the covenant.

Slavery and servitude are forbidden. Forced labor is regulated and monitored. Generally, forced labor as a punishment is not allowed. Forced labor can, however, complement a punishment of imprisonment, as long as it is ordered by a court. The following are not considered prohibited forced labor: work or services required of an inmate following a legal order or on conditional release; military service, and, in countries where conscientious objection is permitted, the relevant service required for conscientious

objectors; service required in the case of disasters or emergencies; work or services that constitute normal parts of obligatory civil duties.

All individuals have a right to freedom and safety. Arbitrary arrests and detention are not permitted. Any individual who is arrested must be notified of the accusations made against them. Arrested individuals are treated “with humanity and with respect for the inherent dignity of the human person”<sup>20</sup>. Upmost efforts are made to keep defendants and inmates separate during detention, and young defendants must be kept separate from adults. The presumption of innocence is solemnly stated: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”<sup>21</sup>. The rights to a defense are guaranteed.

Each individual has the right to legal personality. The rights to free movement, private life and the freedom of thought, conscience, opinion and assembly are all guaranteed.

Freedom of movement implies the freedom to move freely within a State, to choose a residence and to leave countries, including one’s own. The exceptions made to this principle aim to protect national security, public order, health and public morality. Foreigners must not be expelled from the country, except for compelling reasons of national security, and they should have the opportunity to file an appeal.

The right to privacy<sup>22</sup> leads to a similar approach as that of the Universal Declaration of Human Rights: there can be no interference with privacy, whether at home, as a violation of the secrecy of correspondence, or as an attack on honor or reputation<sup>23</sup>.

The freedom of consciousness focuses mainly on religious freedoms, leading to several subclauses. Religious freedom implies the freedom to choose religion, to express one’s religious convictions “individually or in community with others”<sup>24</sup>, in public or privately through worship, rituals,

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20 Article 10 of the International Covenant on Civil and Political Rights.

21 Article 14.

22 Article 17.

23 Essentially, this targets libel and slander.

24 Article 18.

dogma and teaching. States aim to respect the choice of parents and legal guardians with regard to the religious and moral education of children under their care, in line with their own convictions. This approach, at a time where State atheism is the legal *status quo*, corresponds to a western position, if not an American one, but is also in line with the aspirations of muslim States.

Everyone has the right to freedom of opinion and expression. Freedom of expression includes the freedom to research, receive and spread information and ideas orally through writing, print, artistically or in any other format.

The right to peaceful assembly is recognized: this can only be limited in the interest of national security, public security and public order. Freedom of association and the freedom to membership of a trade union are protected.

While men and women are considered to be equal, the covenant stresses the importance of family in the listing of rights. Article 23 goes as far as stating<sup>25</sup>: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. Individuals of “marriageable age” are granted the right to marry and to start a family<sup>26</sup>. Marriage can only be entered with the full consent of the intending spouses.

Children have the right to<sup>27</sup> “such measures of protection as are required by his status as a minor, on the part of his family, society and the State”. Children are registered from birth, and have the right to a name and a nationality.

“Ethnic, religious or linguistic” minorities<sup>28</sup> cannot be denied by the State the right, in common with other members of their group, to have their own cultural life, to profess and practice their own religion, or to use their own language.

These rights are not only principles, they are defined in detail and the guarantees established can give rise to minute accommodation, especially in the domains that play an important in the covenant, such as religion

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25 The influence of religion, omnipresent throughout the covenant, is particularly present in this article.

26 It led to various different – sometimes divergent – interpretations.

27 Article 24.

28 Article 27.

and family. Solutions are often provided in the case of violations of these rights.

For this reason, the creation of a Human Rights Committee<sup>29</sup>, to ensure these rights are not violated, is unsurprising. This Committee consists of citizens of the ratifying States: these individuals are held to be competent on the subject of human rights: some have experience in the legal field. The members of the Committee are elected by secret ballot from a list of people fulfilling the criteria mentioned above, presented by the ratifying States. To ensure the independence of the committee, one State can only be represented by a single person<sup>30</sup> (the Committee comprises 18 representatives); during elections, an attempt is made to consider a very diverse geographical distribution, as well as the desire to represent various forms of civilization and the main legal systems (notably common law, roman law).

By the end of January 2015, the covenant had been ratified by 168 States. The United States ratified it in 1992 with a number of conditions, making parts of it non-binding on the American soil. For example, article 20 of the covenant, listing exceptions to the right to spread ideas, prohibits pro-war propaganda and the inciting of racial or religious hatred. This limitation, which is accepted within the European Union, goes against the first amendment of the United States constitution. France has also expressed reservations, with regard to article 27, in the name of Republican universalism. The French Republic is “one and indivisible”, and minorities have no special rights. In fact, in France classifications based on ethnicity or on the concept of minorities are prohibited. In 2008, the UN Economic and Social Council asked France<sup>31</sup> to remove this reservation, but the recommendation was not followed up.

Two successive protocols were added to the covenant. The first of these establishes a mechanism to be used following a complaint concerning a violation of the covenant by a ratifying State. This protocol came into force on March 23, 1976. The second protocol prohibits the death penalty. It came into force on July 11, 1991.

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29 Fourth part.

30 Article 31.

31 “Observations faites à la France par le Comité des Droits économiques et sociaux”, 4th session, 28 April–16 May, 2008.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, while intended to have a universal reach, have been mainly influenced by the legal systems of democratic western countries.

### 1.3. European texts

Other more “operational” texts involve laws of general interest. Most notably, this is the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms, an international treaty signed by the member States of the Council of Europe<sup>32</sup>, and that came into force on September 3, 1953 in the context of a bipolar world: at the time the Member States of the Convention were all western countries, which stopped being the case after 1990.

I) *The European Convention for the Protection of the Human Rights and Fundamental Freedoms* refers explicitly to the Universal Declaration of Human Rights. Violations of the rights listed in the Convention are taken to the European Court of Human Rights by way of the State; if this violation has been committed by a State, the case is taken to the ECHR by the individual<sup>33</sup>, which can only happen after all paths internal to the State in question have been exhausted.

The following rights and freedoms are listed:

A) *Among these rights are the right to life, the prohibition of slavery and forced labor and the right to safety.* Every person’s right to life is protected. Death cannot be handed out intentionally, except as part of a sentence of the death penalty, which is later prohibited. Torture and inhuman or degrading treatment are not allowed. Even so, some States are to later be convicted of acts of torture: Turkey is one example. France, which only joined the Convention in 1974 and only allowed individual requests in 1981, effectively waited for torture to stop being a regular practice before ratifying the Convention<sup>34</sup>. Slavery and forced labor are prohibited. The exceptions made for forced labor (additional sentence to detention, military service,

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32 The Council of Europe covers States located in the European continent that claim to adhere to democratic values. Turkey is a member, and, following the end of the Cold War, Ukraine and Russia also joined.

33 Article 56 of the Convention.

34 Cf. Algerian war.

service in the event of a disaster or crisis) are repeated in the International Covenant on Civil and Political Rights.

Individuals cannot have their freedom taken away, except in certain scenarios following legal pathways: imprisonment as a sentence given by a court; in the case of subordination; as a form of temporary detention; normal detention of a minor in a supervised educational facility; detention of a person likely to spread a contagious disease; detention of mentally ill individuals, alcoholics, drug addicts, vagrants; arrest and detention of an individual to stop them illegally moving in the territory of State or against whom extradition proceedings are ongoing. These exceptions are rather numerous and leave a large margin for discretion to the State. Nevertheless, a person arrested or detained is entitled to certain rights: they must be quickly informed of the reasons for their arrest, brought before a magistrate, judged within a reasonable timeframe or freed during the procedure. In the occurrence of arrests or detentions that go against the Convention, the victim must be able to obtain compensation.

The trial must be fair. The process is made public, except when the proceedings are not in the interest of morality, public order, national security in a democratic society or when they are against the interests of minors or protection of privacy. The individual accused is presumed to be innocent until they are proven guilty. The accused has the right to detailed information on the reasons for their arrest, provided in a language that is understandable by them; they have the right to an adequate defense, i.e. to help a defense of their choosing, or the free assistance of a state-appointed lawyer if the accused does not have the resources to pay for a lawyer themselves, and the free assistance of an interpreter, if the person is an alien.

## B) Freedoms

Every individual has the right to privacy to freedom of thought, conscience, religion, freedom of expression, assembly and association.

Everyone has the right to the protection<sup>35</sup> of their privacy and family life, their home and their correspondence.

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<sup>35</sup> Article 8, often referred to.

Each has the right to freedom of thought, conscience and religion; this implies the possibility of changing religion and convictions, but also expressing one's religious or other convictions, alone or in public, through worship or teaching. The limits of the freedom to express religious or other convictions arise from measures necessary in a democratic society for public security, the protection of order and the protection of the rights and freedoms of others.

Freedom of opinion implies the right to receive or share information or ideas without interference from public powers, which can, however, exert some level of control over radio or television stations.

Everyone is entitled to the freedom of peaceful assembly and association, including the right to belong to a trade union.

Each person of a marriageable age has the right to marry and start a family.

These rights and freedoms are guaranteed without any distinction made based on gender, race, color, religion, opinions, national or social origin, belonging to a national minority, wealth or birth. Discrimination is strictly prohibited. Violations of rights are also prohibited.

However, States can make exceptions on the basis of the principle of proportionality. This is the case for security, most notably national security. In this way, France informed the Secretary General of the Council of Europe on November 24, 2015 that some exemptions would be made<sup>36</sup> to the European Convention for the Protection of Human Rights during the state of emergency for reasons of national security. The question is do certain actions carried out in the name of a state of emergency go beyond the context of the terrorism warranting the state of emergency in the first place?

### *C) Additional protocols have been adopted*

Protocol number 1 relates to property, education and elections: private property is protected (taken from the Declaration of the Rights of Man and of the Citizen). Parents decide on the methods of education for

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36 No exemptions are possible for articles 2 (right to life), 3 (prohibition of torture), 4 (no slavery or servitude) and 7 (no sentence without a law).



their children in line with their religious or philosophical convictions. Citizens have the right to present themselves in the context of free and regular elections.

Protocol number 4 prohibits the imprisonment of individuals “on the ground of inability to fulfill a contractual obligation”. The expulsion of nationals of a State from that State is prohibited, as is the collective expulsion of aliens. Most importantly, article 2 of protocol four guarantees freedom of movement within a country, as well as the right to leave the country.

Protocol number 6 abolishes capital punishment during times of peace<sup>37</sup> and is discussed in detail by a large number of States. Protocol number 7 concerns expulsion, appeals regarding penal matters and equality between spouses: article number 1 prohibits the expulsion of “lawfully resident” aliens, unless the law decides differently, and even in this case the aliens in question have a right to know the reasons for their expulsion and may ask for their case to be reexamined. This protocol also refers to family and states the equality of spouses.

Protocol number 12 extends the ban on discrimination to all legal rights, even if they are not present in the Convention, as long as they are present in a national text.

Protocol number 13 calls for the complete abolition of the death penalty, both during times of war and peace. This protocol has not been ratified by all States, although it would be accurate to say that the countries of the Council of Europe do not have capital punishment, as it is not applied. Nonetheless, discussions are ongoing, and some political parties in several member States of the Council of Europe that have ratified protocol number 6 and sometimes 13 demand the repudiation of these protocol and the reestablishment of the death penalty. This is one of the most widespread topics of discussion along with immigration and security.

These protocols have been ratified.

For this year protocols 15 and 16 have not been ratified. Protocol number 15 seeks to reduce the number of individual requests made to the European

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<sup>37</sup> In this protocol, the death penalty can only be carried out in times of war or in a state of emergency.

Court of Human Rights by involving national judges in applying the Convention during the appeals process. France signed protocol number 15 on June 24, 2013, but has not ratified it. By the end of 2014, 10 out of 47 States had ratified this text.

Protocol number 16 covers the optional jurisdiction of the European Court of Human Rights. An assent procedure is set out and is available to the highest national courts. It covers theoretical questions on the interpretation and application of the rights and freedoms mentioned above. By the summer of 2014, 14 States had signed the protocol, but so far no State has ratified it.

For our subject matter, the main references are article 8 on the right to privacy and the secret of correspondence, and article 2 of protocol 4 on the freedom of movement.

There is a link between the European Convention for the Protection of Human Rights and Fundamental Freedoms and the laws of the European Union. The UE is not a member of the Convention, as it did not possess legal personality at the time of creation of the Convention. However, the Treaty on European Union states in article 6: “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms... Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. Furthermore, all Member States of the Union have ratified the Convention. Moreover, in 2005 the European Court of Human Rights declared itself competent to verify the conformity of the acts of application of norms emanating from European Union law<sup>38</sup>.

II) *The European Charter of Human Rights*: at the level of the European Union, there is a specific body that deals with human rights, largely inspired by the Declaration of Human Rights and the International Covenant on Civil Rights. This is the Charter of Fundamental Rights of the European Union, a bill of rights adopted on December 7, 2000. The Treaty of Lisbon in 2007 incorporated the Charter into the article covering fundamental rights and aims to make it binding; this aspect was met at the start with reservation

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38 Bosphorus judgment; ECHR, June 30, 2005, 45036/98.

from Poland and the United Kingdom. Since then, Donald Tusk has expressed Poland's intention to fully adhere to the Charter.

The process was the following: the European Councils of Cologne<sup>39</sup> and Tampere<sup>40</sup> gave a mandate to a working group regarding the creation of a project regarding human rights. The European Council of Biarritz<sup>41</sup> gave its unanimous consent to the project; on November 14, 2000, the European Parliament adopted the Charter and the Commission granted its approval on December 6, 2000.

The presidents of the European Parliament, Council and Commission signed and proclaimed the Charter on December 7 in Nice. The Charter was then solemnly proclaimed on December 12, 2007 during a ceremony at the European Parliament in Strasbourg. This was an achievement as since the Nold judgment<sup>42</sup>, fundamental rights recognized by the laws of Member States, are part of the right of communities.

The Charter of Fundamental Rights of the European Union contains a unique text listing all of the civic and social rights of European citizens: this text is also valid for all individuals living in the territory of the European Union.

Since December 2009 and the coming into force of the Lisbon Treaty, the Charter of Fundamental Rights of the Union has acquired obligatory legal powers, identical to those of treaties. Article 6(1) TUE states: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

The Charter applies to the three European pillars. The Charter is also a reference for activities launched by the Union Agency for Fundamental Rights, set up in February 2007.

This agency has the following three main missions:

– to gather information and data;

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39 June 3 and 4, 1999.

40 October 1999.

41 October 13 and 14, 2000.

42 Judgment of the Court of Justice of European Communities May 14, 1974.

- to provide advice to the European Union and its Member States;
- to favor dialog with civil society in the domain of fundamental rights.

In the French version of Charter 2000/C 364/01, the first word of Chapter 1 of the charter is “Dignité”.

A) *Rights*: dignity includes human dignity, the right to life, the right to the integrity of the individual and the prohibition of torture, slavery and forced labor.

Human dignity is inalienable<sup>43</sup>. It must therefore be protected and respected: this is the essence of article 1 of the Charter.

The right to life implies the abolition of the death sentence and the prohibition of executions. The abolition of the death penalty is therefore an integral part of the principles of the Charter.

Individuals also have a right to human integrity: this concerns mainly medicine and health. Eugenics, notably practices aiming to carry out selection, is prohibited. Making a profit from the human body or from any of its components is forbidden. This implies a ban on organ trafficking, as well as on surrogate mothers when they revolve around a monetary contract. The reproductive cloning of humans is also illegal. This section is particularly interesting for medical research and its problems that could be potentially justified in the name of science and omnipotent consumers.

The following are also prohibited: torture, inhuman or degrading treatment, slavery and forced labor, including derogatory labor as it also appears in the International Covenant on Civil Rights.

B) *Chapter 2 is dedicated to freedoms*. Some of these freedoms that appear in older texts are universal; others are new for this type of document, such as the protection of personal data.

Everyone has a right to privacy and the protection of their family life, their home and their communications<sup>44</sup>.

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43 It is afforded the same status as property is given in the Declaration of the Rights of Man and of the Citizen in 1789.

44 The term “communications” replaces the traditional term “correspondence”.

Everyone has a right to the protection of his or her personal data. These data are treated with loyalty, with a defined objective and on the basis of consent given by the person in question. Every individual has the right to access and rectify these data. This is controlled by an independent authority.

These statements are nearly identical to those of the UN General Assembly resolution of December 14, 1990 of Convention 108 of the Council of Europe, and directive 95/46 of the European Union. However, while all these sources of law looked into the protection of personal data, they were never meant to be the basis for fundamental rights. In the 21st Century, personal data are therefore presented in the Charter as representing an issue of personal freedoms. In the era of “Big Data”, while public authorities seek to defend security by gaining a privileged access to some data, and while moral individuals in private law consider data files as being an essential part of their business, this vision is realistic but also reflects a very European approach, as the points of view of the United States on the matter is very different.

Articles 9 and 10 are more conventional. Everyone has the right to get married and start a family: there is no mention of a “marriageable age”, but instead guarantees are made regarding national laws. It is therefore the principle of subsidiarity that applies.

Each individual has the right to freedom of thought, conscience and religion. Religious freedom involves the freedom to change religion; moreover, the freedom of conscience and religion implies the ability to express one’s religion or convictions, individually or collectively, publicly or privately.

The right to conscientious objection is recognized<sup>45</sup> but governed by national laws, here too depending on the type of subsidiarity.

The freedom of expression<sup>46</sup> encompasses the freedom of opinion and the freedom to receive and express ideas; the article states that there can be no interference on behalf of public authorities, which is highly useful. The

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45 Article 10, paragraph 3.

46 Article 11.

freedom of the media (no longer press, but media) is guaranteed, and pluralism is respected. This freedom is both a civic and economic freedom; jurisprudence has shown that the economic and civic aspects of this freedom are not easily reconciled as economic freedom involves the search for maximal profit, while the freedom to express minority opinions in a medium can be problematic economically and civically.

Everyone has the right to freedom of peaceful assembly and association at “all levels”, in all “political, trade union and civic matters”<sup>47</sup>, which results in the freedom to join trade unions for the protection of one’s interests.

Political parties at Union level contribute to expressing the political will of citizens of the European Union. The ability to aid in the expression of the will of the people appears in the constitutions of several member States, including France<sup>48</sup>.

Article 13 is quite original: it states that the arts and scientific research are free; this means that both the arts and research cannot be given fixed objective by public authorities.

Each person has the right to education. This involves the possibility to receive compulsory education; public primary and secondary education that does not seek to make a profit must be available; registration fees can be more or less high. However, public education exists alongside other forms of teaching, as the covenant proclaims the freedom to create educational establishments and the right of parents to choose for their children a form of education in line with their religious, philosophical<sup>49</sup> and pedagogical beliefs, which is relatively innovative, in which – despite the diversity of pedagogical methods trialed during the 20th Century – pedagogical diversity had never been considered in reference texts on human rights.

Next are the freedoms that are halfway between civil and economic rights: professional freedom, entrepreneurial freedom, right to property and right of asylum.

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47 Article 12.

48 “Les partis politiques... concourent à l’expression du suffrage”, Constitution of 1958, article 4.

49 It features in the international treaties covered previously.

Every person has the right to work and a “freely chosen or accepted occupation”,<sup>50</sup>. The search for employment is carried out over the entirety of the territory of the European Union.

Entrepreneurial freedom refers to both to community law and national laws. Every person has the right to property. Public utility can limit this right, but in this case fair compensation must be given. This principle of compensation in the case of nationalization has become a rule in western countries, especially following the nationalization of the Suez Canal by Egypt, and the ensuing violent reaction from the United Kingdom and France<sup>51</sup>. The use of goods can be regulated by the law “in so far as is necessary for the general interest”. Intellectual property is recognized and protected.

The right to asylum is guaranteed in line with the Geneva Convention on July 28, 1951 and protocol 1067 on January 31 regarding the status of refugees.

Collective expulsions are prohibited, and no one can be expelled or extradited to a State where fundamental rights are not respected, where the person in question is likely to face the death penalty, torture or inhumane or degrading treatment.

C) *Chapter 3 is called “equality”*. The main principles are of non-discrimination, equality between the sexes and the rights of children.

All individuals are born equal in right, going back to the very old axiom of the Declaration of the Rights of Man and of the Citizen on 1789.

All forms of discrimination are forbidden, especially when they aim to make distinctions between gender, race, color, social or ethnic origins, genetic characteristics<sup>52</sup>, language, religion, political or other opinions, wealth, birth, disability<sup>53</sup>, age, sexual orientation<sup>54</sup> or nationality.

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50 Article 15.

51 Called a “confiscation” by the UK and France in 1956.

52 It does not appear in older texts.

53 The prohibition of discrimination based on disability appeared at the end of the 20th Century.

54 Like disability, this also appeared at the end of the 20th Century.

Equality between men and women is guaranteed in all areas including employment, work and pay. This principle of equality does not exclude the adoption of measures to help represent the underrepresented gender (currently the female gender). This explains the measures taken in some countries for the benefit of parity, aiming to increase the representation of women in legislative assemblies<sup>55</sup>.

Children have a right to protection and care that is vital to their wellbeing. This justifies the work of social services when the family is found to be lacking or abusive. Children can express their opinions freely. These opinions are taken into consideration regarding matters that concern them, depending on their age and maturity. The effectiveness of this requirement is not clear, especially when it conflicts with other rights, especially family rights. In nearly all States of the European Union, magistrates favor the link between child and parent, whatever the parent's behavior toward the child may be. Regarding questions of custody, when a child expresses the desire to sever relations with one of his or her parents, this is hardly ever respected, regardless of the age or maturity of the child. However, paragraph three of article 24 states: "every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests". Judges hardly ever consider this contact to be "contrary to his or her interests".

Chapter 3 focuses on the rights of elderly people, a growing demographic within the European Union, and on the rights of disabled people. "Equality" is here linked to the preservation of dignity.

Chapter 4, dedicated to "solidarity", proclaims social rights, the right to collective negotiation, right to strike, protection against unjustified dismissal, limits to maximum working hours, the right to daily and weekly periods of rest<sup>56</sup>, the prohibition of the employment of children, the right to social security and the protection of health, access to services of general economic interest and the protection of the environment of consumers.

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<sup>55</sup> This is the case in France.

<sup>56</sup> The right to a weekly rest, and not specifically Sunday rest, directive 93/104 on November 23, 1993.



Chapter 5 is dedicated to citizenship. Everyone has the right to vote and is eligible for election to the European Parliament in the Member State where he or she resides. The members of the European Parliament are elected by direct universal suffrage in a free and secret ballot<sup>57</sup>. The citizens of the European Union also have the right to vote and stand in municipal election in the Member State where they reside.

Article 45 proclaims the freedom of movement and residence in the territory of the Member States. The Schengen area was established through the Agreement and Convention signed between 1985 and 1990.

Chapter 6 is dedicated to justice.

Every individual has the right to an affective remedy before a court of law. They must be heard fairly and publicly, and have the possibility of being aided by a defense. Legal aid is therefore obligatorily provided for individuals without the means needed to cover the costs of their defense.

The accused is presumed innocent until they are proved to be guilty by a court of law.

No one shall<sup>58</sup> “be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”. The severity of the sentence is determined based on the severity of the crime.

No one can be put on trial or punished for a crime for which he or she has already been acquitted or sentenced within the European Union.

An explicit reference is made to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since the Charter reuses some rights that are present in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the mean and scope of these rights are the same as those provided in the Convention. This does not stop the Union establishing rights with a broader reach.

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<sup>57</sup> Discussions on electronic voting, which is not used for European Parliament elections.

<sup>58</sup> Article 49.

The Charter is effectively in line with the Convention, and it covers relatively recent concepts. It supplements certain rights and freedoms with regard to the progress made in human and social sciences in the past 20 years. It reflects European culture and values, and is more advanced in some domains than the texts that came before it.

Beyond and in addition to these rules, some non-governmental organizations have conducted work in the matter of human rights, notably in the United Kingdom and in the United States. ACLU<sup>59</sup> and Privacy International have conducted considerable efforts in the defense of freedoms.

ACLU is an American not-for-profit organization based in New York whose goal is to defend the individual and collective freedoms guaranteed in the American Constitution and in the laws of the United States. It forms a lobby of sorts in terms of civil rights, providing information in terms of new dangers that are likely, with time, to threaten the fundamental rights of Americans, and sometimes carry out actions in court. The work conducted by ACLU has resulted in the evolution of a number of aspects of constitutional law. This organization is critical of both the Democrat and Republican Party. We shall return later to some of the battles of the ACLU, especially against the CIA and the NSA.

Privacy International was created in 1990, and was granted the status of not-for-profit organization in 2002. It focuses mainly on the problems relating to personal freedoms in the United States in the sector of electronic communication and private life.

In Europe, the EDRI<sup>60</sup> seeks to defend freedoms in the area of information and communications technology. Its members come from a large number of people from Western and Eastern Europe.

While these organizations have a very different approach to the treaties, they are highly vigilant and cannot be ignored in their actions to prevent those aspects of modern technology that might violate individual freedoms.

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59 American Civil Liberties Union.

60 European Digital Rights is a not-for-profit organization.