THE BILL OF RIGHTS AND HUMAN RIGHTS

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Résumé

Au moment où s'élaborait la Constitution américaine, l'expression « droits de l'homme » n'était pas de son contenu, comme un important document de droits de l'homme.

Le Bill of Rights (Déclaration des droits) intervenu ultérieurement en amendement à la Constitution n'utilise pas cette expression un seul instant. Cependant il comporte, en réalité, une gamme importante de droits de l'homme, même s'il n'avait pas, au départ, l'ambition de défendre de tels droits, mais plutôt d'assurer seulement la jouissance d'un certain nombre de libertés individuelles. Ce faisant toutefois, il a défendu des libertés chères, non seulement aux Américains, mais à tout être humain. Raison justement pour laquelle des normes internationales en matière de droits de l'homme, élaborées de nombreuses décennies plus tard, n'ont pas manqué de prendre en compte les libertés envisagées dans ce texte.

INTRODUCTION

When it comes to framing constitutions, it is seldom question of human rights, for one thing : in democratic countries, it is very rare that a constitution falls in contradiction with human rights. In those countries, constitutional norms are said to offer better protection than is possible by human rights whose contents, by the way, is generally more unprecise and unambitious.

In the context of the American constitution, the situation is rather different. For about two centuries, American colonies had been under the domination of Great Britain who had constantly caused injuries to them, violating human rights in passing. Becoming independent states in 1776, they kept a bitter memory of the way they had been treated in the time, and had somewhat of a reserved attitude to administration. As consequence of this, many states had conceived specific constitutional guarantees for individuals, in the shape of appendixes to their constitutions. Nevertheless the original text of the American Constitution had not included such a document. But this tendency to encourage provisions about individual guarantees was so strong that it had been indispensable to take it into account in the end. In effect, disregarding such a situation would probably have caused the constitution to be left unratified for a long time, or to be simply abandoned. In the face of so difficult alternatives, Federalists agreed to the idea of including provisions on individual guarantees therein, but in the form of amendments : thus were the first ten amendments[1] annexed to it. They were adopted and ratified together in 1791 and were known as the " Bill of Rights ". This expression cannot be found in the constitution, however. It is used in reference to the way those amendments were born.

In the Bill of Rights – as well as in the rest of the Constitution – there is nowhere any mention of the phrase " human rights ". But we must remember that in the late 18th Century when the document was written, this expression was almost inexistent. People spoke rather of " God's law " or " law of nature " or " law of reason ". It was later, in the 20th Century, that all these expressions disappeared for the appellation " human rights "[2]. So we must not be surprised at the fact that such a phrase was not mentioned in the Bill of Rights whose elaboration dates as far back as two centuries earlier .

[1] Originally fifteen in number, the proposals submitted to Congress

by Virginia were reduced by three when examined by that Institution. Of the remaining twelve, ten were ratified by States. The two clauses which were discarded dealt with the number of representatives in Congress and with the modification of their salary. Let us note in passing that Virginia's proposals were written by James MADISON.

What really matters in the study of such a document is its contents. So, from this point of view, is the Bill of Rights concerned with human rights ?

A brief analysis of its main provisions relative to fundamental liberties
(I) and to the protection of the rights of the accused (II) will help us have a precise idea about this issue .

I. PROTECTION OF FUNDAMENTAL LIBERTIES

1 . 1 RELIGIOUS LIBERTY

In many democratic countries, the question of religious liberty can sound old fashioned or self-evident today . But in the frame of the Bill of Rights it was an extremely serious problem. As a matter of fact, many American settlers had left Europe because of religious persecution and lack of free religious practice. It is not surprising then, that the very first clause of the Bill of Rights deals with religious freedom. It does not define what is meant by religious liberty, however.

We find that definition in article 18 of the Universal Declaration on Human Rights , which underlines that : « this right includes freedom to change (one's) religion or belief and freedom either alone or in common with others and in public or private to manifest (one's)religion or belief in teaching practice worship and observance » .

Religious freedom is totally observed in the United States . As a consequence , many sects and religions developed freely there. Almost every religion in the world can be found in the US .But the Nation is a lay republic that cannot support any religion in particular[3] .

But whereas religious faith is free , religious practice must conform to law and public order . Such is the position of the supreme court that rejected as unlawful the practice of polygamy by members of the Mormon Sect[4] .

1 . 2 . FREEDOM OF THE PRESS

The fundamental questions arising in the field of freedom of the press are the following ones : Who can determine what must be published ? Which of the people or the government can indicate what it is fit to publish ?

James Madison , the fourth president of the US thought rightly that the right of deciding what can be published belongs to the people. It is the only condition on which freedom of the press can be effective. The righteousness of that position is confirmed by the fact that, wherever it is the government that determines what can be published , there is censure , and therefore absence of freedom of the press. Undemocratic countries around the world offer so many examples that it is hardly worth quoting any one in particular.

Freedom of the press, besides, is the counterpart of the people's right to know. At least it is the cornerstone of the American mass-media policy. So in the field of knowing what is to be known , it is the people and only the people who matters . Therefore the same first article of the Bill of Rights makes it impossible for the congress to abridge freedom of the press. Does this mean that such freedom has no limits ? Of course it has[5] . But the sacrosanct principle in that field is freedom.

Part of freedom of the press is - theoretically at least - freedom of thought. The Bill of Rights does not make any explicit mention of

(2) See : Universal Declaration on Human Rights, (Resolution 217 A III) of December, 10th, 1948.

(3) In the vein of that principle, the Supreme Court ruled in 1962 that public school officials could not require pupils to recite state composed prayers at the start of each school day, even if the prayers were not denominational and even if pupils who so desired could be excused from reciting them. In the view of the Court, that was an unconstitutional attempt to establish religion. (Engel V.Vitale : 1962).

(4) Supreme Court: Reynolds V. United States ; 1878.

it, but it is very important, because wherever there fails to be freedom of thought, there will fail to be freedom of the press, and vice versa. The two notions are very closely linked. And it is not at all surprising that the Universal Declaration on Human Rights (article 19) considers that freedom of the press is a necessary result of freedom of thought. In other words, freedom of the press is the proof or the consequence of freedom of thought.[5]

From that observation springs the outstanding importance of the press freedom: suppressing it means not only inexistence of free media, but also and especially enslavement of human mind, which is worse than any other form of slavery.

I.3 Right of assembly

The Bill of Rights acknowledges the right of assembly that the government must likewise safeguard. As a matter of fact, no gathering, no meeting can be legally forbidden in USA. So, trade unions, religious congregations, associations of various kinds, can hold meetings as they think it fit. No official permission is required to that end. On the ground of this right, the supreme court (less conservative in the 1950 60) did its best to protect such associations as the NAACP (National Association for the Advancement of Coloured People) and the Civil Liberties Union against Southern anti Negro White organisations.

But terrorist, violent or thieves' associations are not admitted to the benefit of this right: only peaceful organisations are concerned with the exercise of such a right. In effect, the existence within a nation of terrorist and ruffians' associations would be contrary to the requirements of public order. We find the same restriction in article 20 of the Universal Declaration of Human Rights as well as in article 16(2) of the American Convention on Human Rights, and article 11 of the European Convention on Human Rights.

I.4 Right of petition

Intrinsically speaking, a petition is a claim formulated by citizens and addressed to a parliamentary assembly in order to denounce the abuses of the administration and ask for a redress of the existing order.[7]

In the history of American colonies, petitions were repeatedly (and vainly) sent to the British government who was administrating them. Those petitions were to reveal the grievances and injustices to which had given rise the exploiting policy of the colonizer, but none of them was taken into consideration by the latter. The mention of such a clause in the Bill of rights is no doubt a consequence of the discontent resulting from that situation which most settlers considered insulting. The declaration of independence criticized and condemned that attitude vigorously. Thus, we cannot be surprised at the mention of such a right in the present document, even if that mention is very rare in national constitutions around the world.

What it is important to underline here besides, is that the people's right to petition calls for the government's effort to amend such or such aspect of his administration. Whether this amendment is compulsory or not depends on the relevance of the petition and on the nature of the policy to be amended. In the end, we must notice that the right to petition is a heterogeneous right which derives to some extent from freedom of the press and of association. But it looks specific and cannot be totally confused with either of them.

1.5 Right of property :

The Bill of Rights does not mention explicitly the right to property, but makes allusions to it in two important passages which do not deal basically with that right. The first allusion is made by article 3 which aims at protecting house owners from lodging soldiers against their will. The second one is to be found in article 5 which mainly deals with the right of the accused in criminal affairs. This passage protects private property from being taken off for public use without just compensation.

On the basis of this clause,

(5) The Supreme Court ruled that limits can be imposed on the exercise of freedom of the press in some cases:
-when what is said presents a clear and present danger (Schenck V. US 1919.)
-when the exercise of that freedom endangers social and moral standards:(Roth V. US: Alberto V California.1957)
-when defamatory reports on public officials are issued out of malice. i.e., while the author knows that the information is false. or if he does not do anything to check its veracity(New York Times Co. V. Sullivan.1960.)

(6) In this respect. see also article 13 of the American Convention on Human Rights. whose title reads : " Freedom of thought and expression ".

(7) Guillien R. et Vincent J. : Lexique de termes Juridiques. Paris – DALLOZ. 1985.

we can consider that the right to property is guaranteed. In effect, if it were otherwise, no expropriation could be arbitrary. Protection from arbitrary expropriation and protection of the right to property are two different aspects of the same thing : if the right to property exists, to protect it, we need to protect against arbitrary expropriation. And if it does not exist, it becomes unnecessary to speak of arbitrary expropriation. Let us notice however that in the Universal Declaration on human rights, the two aspects are envisaged simultaneously : article 17 which tackles the problem is divided into two paragraphs; the first of which recognizes formally the right to property, and the second, the right to be protected against arbitrary expropriation.

We must on the other hand, remember that if the American Declaration of independence views the " pursuit of happiness "as a fundamental human right, such recognition cannot be meaningful without the effectiveness of the right to property.

On the whole, the Bill of Rights recognizes perfectly the right to property.

1.6 Protection from unreasonable searches and seizures

There are some forms of searches which can endanger peace and tranquillity of individuals, and violate uselessly the privacy[8] and the secrecy of their homes and affairs. The Bill of Rights considers that, to be undertaken, they must be based on substantial grounds. In effect, the disturbance likely to be caused by such operations are so serious that they can be undergone but exceptionally, because, by their nature, they can entail violation of some of other basic rights[9], especially the right to dignity, the right to move freely within one's own country, secrecy of correspondence etc.

For that reason, among others, searches and seizures can take place only on reasonable grounds.

But who can determine the reasonability of such measures ? It is the justice who is qualified to make such an appreciation. He thus, delivers a warrant authorizing the search, the seizure or the arrest of the individual in question. Article 4 of the Bill of Rights insists strongly on the fact that such warrants must specify " the place to be searched " and " the things and persons to be seized ". Very certainly, failure to give such details and (or) to hold convincing grounds for such operations can nullify the warrant, or simply prevent from establishing it. No search or seizure is possible either, when the evidence on which the warrant is based proves to be false[10].

1.7 Benefit from rights other than those defined in the Constitution

Article 9 of the Bill of Rights seems to make an amalgamation as far as human rights and people's rights are concerned. Apart from the right to self determination and the right of minorities within a nation, or the right to security, the people has practically no specific right which is not included in the scope of human rights. This article runs as follows:

" The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"

Here, it is simply question of avoiding that the rights which belong to the people presently or which are likely to exist in her favour, should be discarded from her benefit, on the only pretence that such rights are not mentioned in the Constitution.

Of course, these rights refer to individuals in general, and pertain to the realm of human rights.

[8] In that respect, see Universal Declaration on Human Rights, article 12 :

" No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks ".

[9] Contrarily to the Universal Declaration of Human Rights, the Bill of rights does not acknowledge explicitly the right of privacy. Yet, the Supreme Court ruled that it is part of rights which derive from a set of rights explicitly granted by some clauses of the Constitution, i.e. : 3rd, 4th, 5th and 9th amendments. The doctrine thus enounced by the court his known as " Penumbral rights ". See : Griswold V. Connecticut, 1965.

[10] Supreme Court, Mapp V. Ohio, 1961

Article 10 seems to convey the same concern, although from a slightly different point of view. This article makes it clear that powers not attributed to the federal government belong either to States or to the people.

As suggested a few lines above, distinction between the rights of a people and those of individuals is rather ambiguous. That same ambiguity prevails when it comes to distinguishing people's duties and individuals' duties.

What powers, not delegated to the national government nor denied to States, belong for instance to the State, or the people? Here, we can take two fields into consideration : regulation of education and regulation of marriage and divorce. These domains are not within the range of matters directly controlled by the national government on the basis of the federal constitution. At the same time we notice that the right to education and the right to marriage and family life are rights which by their nature, can be enjoyed but by individuals as human rights. Whereas for the States, it comes to guaranteeing the benefit of such rights.

Nevertheless the exercise of the rights in question can imply the fulfilment of some specified duties : individuals have the right to get married, but also they have the duty of complying with the rules of marriage. Individuals have the right to education, but they samely have the duty of sending their children to school.

On the whole, in so ruling, articles 9 and 10 aim respectively at protecting the people from a possible encroachment on their rights by the National government, and at protecting individuals from that of States. But the most important point at stake is the enjoyment of human rights by individuals, because wherever human rights are applied, both people's and individuals' as well as States' rights are positively observed.

The rights studied so far concern any person, as they belong to the realm of human rights. But there is another set of human rights which, though of the same nature as these, benefit a particular type of individuals: the accused.

II. Protection of the rights of the accused

Independently from the fact of being accused or not, every person having to do with the court is presumably assured of equitability of trials. In addition to this, the accused benefit from specific measures of protection whose contents vary according as it comes to criminal or civil affairs.

2.1 Guarantees for equitable trials

To be valid and acceptable, trials must have some characteristics and be in harmony with some requirements, such as the following ones :

2.1.1 Speedy and public trials :

Trials must be rapid. Moreover, they must be held in public. This is probably a reaction against the practice of Great Britain where political trials were retarded for years to be finally held in secret. Nevertheless, no delay is defined in the Bill of Rights. In effect, the circumstances surrounding some offences can be more or less complex, so that the time necessary to have precise ideas about the facts can be variable. But whatever the case, such delays should be admittedly reduced.

2.1.2 Specifications about the jury :

The jury must be impartial. Their appreciation must be based on the facts and the law as it is at the moment the offences are committed. Objectivity, neutrality and equity seem to be required from the members of the jury.

In addition, that jury must pertain to the state and the district in which the crime has happened. In effect a criminal in flight can have gone from a state to another in order to escape trials. When he is caught in a state far from that in which he has misbehaved, he is likely to be brought by the police to the state and district in which his misdeed occurred. Of course, in such a place, it would be easier to make more successful investigations about the crime.

2.1.3 Information of the accused

When the accused is heard by the jury, the sentence is not yet delivered. Only an indictment is issued. The Bill of rights makes it compulsory to state in detail the nature and the cause of the accusation. The reason why the act is illegal (the law which is broken) and the circumstances which make it serious, must be brought to the

knowledge of the accused. This will help him prepare his defence.

Besides, the Supreme Court ruled that the right to information applies to suspects in police custody, who must be informed of their right to be silent, of their right to counsel and of the fact that anything they say may be used against them (Miranda V. Arizona, 1966)

2.1.4 Confrontation with the witnesses of the opposed party

If it happens that the witnesses against the accused are not in good faith or are telling lies, or if they are simply ill – informed about the situation, much damage can be unjustly caused to the accused. But in case there is confrontation, this risk can be corrected, because the accused can point out mistakes and errors arising from their statements. Otherwise, the subsequent sentence could be wrong and damaging to the accused.

2.1.5 Assistance of a counsel

In the terms of the Bill of rights (article 6), assistance of a counsel in the trial of a criminal is compulsory. Without such assistance, the trial could not be valid. In effect, in cases the accused fail to ensure a counsel for his own defence, the Supreme Court demands that he be provided with one. Which means that if this requirement is not fulfilled, the trial would be void.

2.2 Safeguarding the rights of the accused in criminal affairs

Crimes are serious offences which call for severe punishments by law. Doubtless because of the severity of those punishments[11], the Bill of Rights provides important guarantees for the accused. Those guarantees run as follows :

2.2.1 Requirement of a grand jury :

Before a person is tried in court on a charge of capital or infamous crime, he must be heard by a grand jury. A grand jury is a group of experienced persons who examine collectively the quality of the evidence used against the accused. If that evidence is not sound enough, the grand jury cannot indict the accused. But if it happens that the evidence is serious enough, it is taken into consideration and the accused is indicted. Then, and only then can he be brought to court for trial.

The advantage of this measure in the field human rights protection is that it limits the risk of bringing to court innocent persons.

2.2.2 Protection against a second trial of the same criminal offence

In case a criminal offence is judged and the sentence issued, the accused cannot be judged over again. This idea seems to refer to a case in which the jury could be too lenient in their appreciation of the facts. The fifth amendment makes it clear that in any case, no second trial must be undertaken. The reason is that, as such a trial has exposed once the accused to the loss of his life, it is not any more normal that so high a risk be taken again.

However, if the jury has not yet come to a decision, because for instance, of lack of informations likely to facilitate the appreciation of some facts, the accused can be heard a second time. But after the sentence is delivered, this is simply impossible

2.2.3 Protection from forced testimony against oneself

An accused cannot be forced to give evidence against himself. Of course, there are cases in which the accused, from their heart of hearts, acknowledge what they are reproached with. This is not a forced testimony, but a confession. As a consequence, it is not what is forbidden. But when it comes to obliging an accused to give testimony against himself, this falls within the range of what is rejected by the present clause (article 5).

In effect, as long as the accused is not proven guilty, he is considered innocent.

2.3 The idea of due process of law[12]

It is indicated in the same clause that no one can be deprived of life, liberty and property without due process of law. This means that for an accused to be killed, imprisoned or deprived of his property, the rule of law must be followed. Any mistake either about the proceedings or the examination of facts could make it impossible to fulfil the requirements of this principle. As a consequence no sentence could be taken to that effect. Even if it were, it runs the

risk of being void.

2.3 Safeguarding the rights of the accused in civil affairs

Trial by jury is observed also in civil affairs in which the financial amount at stake is at least twenty dollars. Article 7 of the Bill of Rights rules that, if affairs so tried by a jury should be re-examined, it would be according to the rule of common law. The provision sounds like one of those formerly studied in the frame of criminal offence, but the latter are far more detailed and precise, and considers re examinations as exceptional.

2.4 Protection of the accused from too severe sanctions

It can happen that decisions of the court be too harsh in comparison with the offence committed by the accused. In such cases, decisions are not equitable, because they fail to establish a reasonable balance between the offence and the damage caused by the offender. To put it otherwise, they offend the offender more badly than the offender has offended while breaking the rule of law. The result of this is injustice in detriment to the accused. As justice is needed to correct injustice, and not the reverse, article 8 of the Bill of Rights makes it clear that " bails " and " fines " must not be " excessive " and that " punishments " shall not be " unusual ". The world " unusual "here means : unreasonable or inequitable.

On the basis of that clause, the supreme Court judged in 1972 (Furman Vs Georgia) that the capital punishment which was imposed on the accused constituted a " cruel and unusual punishment ".But on the contrary, the Court held that death ,as punishment for persons convicted of first degree murder, was not in and of itself cruel and unusual punishment in violation of the 8th amendment. The Court indicated also that to effect such a punishment, the jury and the sentencing judge should consider the individual character of the offender and the circumstances of the crime before deciding whether or not to impose the death sentence (Gregg V. Georgia; Profitt V. Fia; Jureck V. Texas:1976).

CONCLUSION

The Bill of Rights guarantees certainly various fundamental individual liberties (religious freedom, freedom of the press, freedom of assembly and petition...) and most of the rights of the accused. But not every human right is envisaged by it; in so far as such important rights as the right to free movement within the national territory, the right to work, the right to cultural life, etc... are not taken into account therein. Thus is posed the problem of the rights not mentioned in the constitution, and of the consequence of that situation : article 9 of the Bill of Rights proves to be welcome as it rules that the rights not acknowledged in that document must not be considered as refused to people: this provision is undoubtedly a clever approach to that difficulty. But what if such a clause were omitted ? Would the rights unmentioned fail to exist, as a consequence ?

In the field of human rights, the rights are supposed to have ever existed, prior to any written text. So, were they mentioned or not, they would soundly exist, provided it is demonstrated that they are human rights. But how to effect such a demonstration without a text ?

On the other hand , except probably the second amendment which refers to bearing of arms by States, the Bill of rights deals so relevantly with human rights that one can wonder whether it is a mere bill of rights or a Bill of human rights. This has been made possible by the fact that both human rights and the Bill of rights are based on the same fundamental principle : protection and defence of individuals against their own governments.

ANNEX : The Bill of Rights

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by Congress, and ratified by the several states, pursuant to the fifth article of the original Constitution.

AMENDMENT I

Congress shall make no

[12] For a more detailed study of the principle of due process of law, see : BARRON (J.A) and DIENES (C. Th.) : Constitutional law : West Publishing Co., St Paul. Minnesota. 1987 (pp. 141 – 156).

[13] Guillien (R) and Vincent (J.) : op. cit : see also: Barron(J.) and Dienes (C. Th.) : Constitutional Law : Op. Cit. p.138:paragraph A1 (dissenting opinions in the Supreme Court).

law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right to the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV.

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.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

AMENDMENT VII.

In suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

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