

## **Human Rights and Maritime Law Droit maritime et droits fondamentaux**

**Pierre-Louis MERER**

*L'interaction entre les droits fondamentaux et le droit maritime est ancienne. L'évolution côte à côte et indépendante de ces deux matières a toutefois conduit à de nouveaux points de rencontre. Comme jadis, la préservation de la vie demeure au centre des intérêts, mais l'apparition de droits sociaux depuis la moitié du XXème siècle notamment, a trouvé une application inédite dans le domaine maritime. Les droits procéduraux fondamentaux sont également intervenus sous un nouveau jour pour encadrer des situations en mer.*

*L'application des droits fondamentaux dans le domaine maritime a été rendue possible en partie par la volonté du législateur d'étendre le champ de ces droits par la loi, mais aussi par l'importance croissante d'une jurisprudence internationale en la matière. Cette même jurisprudence a assuré le respect de ces principes fondamentaux aussi bien au niveau national qu'international.*

*“Homme libre, tu chériras la mer.”<sup>1</sup>  
Charles Baudelaire, *Les Fleurs du Mal**

Poets and authors often picture the sea as a place of freedom. Charles Baudelaire, for example, considered the ocean to be a reflect of the human soul, that every free man should cherish: both deep and secret. On a more legal aspect, the sea has been one of the first objects of controversy for academics in *ius gentium* regarding freedom. In the XVIIth century, Grotius confirmed the perception that poets had of the ocean when defending, even though for different reasons, that it should stay a place of liberty<sup>2</sup>.

But beyond the lyrical freedom provided by the immensity of the sea and beyond the theory of *mare liberum*, more pragmatic considerations were developed to ensure the protection of fundamental freedoms at sea. The ocean was known to be a dangerous place and required the establishment of protections for the persons on board ships. In the XIX<sup>th</sup> century, one British mariner out of five died at sea.<sup>3</sup> Even today, being a fisherman is still one of the most dangerous jobs in the world<sup>4</sup>. This sad observation led to the promotion of principles of humanity between seafarers recognised later by the case-law<sup>5</sup>. Assistance to other navigators became a duty for the Master of a ship in order to preserve life, one of the most essential human rights.

As History then shows, human rights and Maritime Law have already interacted in the past. However, human rights are in permanent evolution, as well as the Law applicable to persons on board ships. Indeed, the connection between the two has changed and responds today to different legal issues that cannot be limited only to the preservation of life.

Therefore, in order to fully grasp the scope of application of human rights at sea, it is necessary to determine and understand what kind of fundamental rights apply to persons on board ships (1). Then, considering the great increase in number of international and national instruments, which created new scopes of application of human rights, it is crucial to examine the legal

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<sup>1</sup> “Free man, you will cherish the sea.”

<sup>2</sup> Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade* (first published 1608, Oxford University Press, 1916)

<sup>3</sup> Nicolette Jones, *The Plimsoll sensation: The great campaign to save lives at sea* (Abacus, 2006).

<sup>4</sup> Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries in 2014* (2015)

<sup>5</sup> *Scaramanga v Stamp* (1880) 5 CPD 295, CA

mechanisms allowing the application of human rights to persons on board ships (2). Finally, the mere existence of human rights at sea would be useless without enforcement mechanisms. Therefore, the last part of this analysis will focus on how these rights are enforced (3). In order to illustrate better our analysis, we will focus on the French flag State when needed.

## **1. The human rights applying to persons on board ships at sea**

The preservation of human life is, to this day, one of the human rights at the epicentre of Maritime Law (a). However, more modern human rights have emerged, as shows the development of social rights (b). Other oldest principles, such as fundamental procedural rights, found a new application for persons on board ships (c).

### **a. The preservation of human life**

Among the International Conventions, which were drafted to set out a precise legal framework at sea, the preservation of life is still a central issue. This can be explained by the fact that life at sea involves a number of risks which, for the most part, are placed on the shoulders of the seafarers. For instance, article 98 of the UNCLOS<sup>6</sup> Convention makes mandatory for the master of a ship to render assistance to any person in distress at sea or in danger of being lost. Furthermore, Regulations 10(a) and (33) of the SOLAS<sup>7</sup> Convention provide similar obligation, as well as article 10 of the International Convention on Salvage<sup>8</sup>.

This humanitarian principle that has existed for a long time is finding a new impetus today because of the migrant crisis. As of now, no international framework deals exclusively with stowaways. The only one existing, namely the International Convention relating to Stowaways adopted in Brussels the 10<sup>th</sup> October 1957, has never come into force. However, other international instruments may apply to migrants<sup>9</sup>. The provisions previously highlighted concerning the duty to rescue persons in distress should apply to boat people as well<sup>10</sup>. Accordingly, migrants have the right to be rescued by seafarers if their life is in danger.

Nevertheless, this fundamental right goes beyond the rescue. Indeed, while on board a ship, migrants are subject to others rights ensuing preservation of life. The UN Declaration of Human Rights and the European Convention on Human Rights (hereafter the European Convention) both prohibit degrading or inhumane treatments<sup>11</sup>. Applying these provisions to migrants on board ships would mean, for example, providing them with water, food, clothing, medical treatment and accommodation<sup>12</sup>. Not only must human life be preserved at sea but also human condition in general.

### **b. Social human rights**

Social human rights are, in France, listed as modern fundamental rights. They are mainly the result of the preamble of the French Constitution of 1946 which states that all men can defend their interests through unions<sup>13</sup> or that every worker shall participate in the collective determination of their conditions of work<sup>14</sup>. These provisions have a constitutional rank<sup>15</sup> meaning that not even the Law can

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<sup>6</sup> United Nations Convention on the Law of the Sea (UNCLOS)

<sup>7</sup> Safety of Life at Sea

<sup>8</sup> S Cacciaguidi-Fahy, “The Law of the Sea and Human Rights” [July 2007] Panóptica

<sup>9</sup> Workshop at the University of Southampton, 30 September 2015, “Boat people : legal and practical considerations”, Shipping & Trade Law, (2015) 15 STL 9 1

<sup>10</sup> A Hastings, “Stowaways : a real and ongoing risk” [2015] Maritime Risk International

<sup>11</sup> Article 5 of the Universal Declaration of Human Rights and Article 3 of the European Convention of Human Rights

<sup>12</sup> A Hastings, “Stowaways : a real and ongoing risk” [2015] Maritime Risk International

<sup>13</sup> § 6 of the Preamble of the 1946 Constitution

<sup>14</sup> *Ibid*, § 8

<sup>15</sup> Decision n°71-44 of the French Constitutional Council

go against them. These modern human rights have been incorporated in European Law<sup>16</sup> and, more recently, in International Law specifically for workers on board ships<sup>17</sup>. Indeed, the International Labour Organisation (ILO) drafted the Maritime Labour Convention 2006 (hereafter the MLC 2006) aiming at setting “a comprehensive set of basic maritime labour principles and rights”<sup>18</sup>. Thus, article 4 of the MLC 2006 enshrines the right for seafarers to a safe and secure workplace, to fair terms of employment, to decent working and living conditions on board ship and to social protection. This Convention was particularly important in the light of the different social regimes existing, sometimes inside a same state<sup>19</sup>. In order to guarantee a broad ratification, the MLC 2006 offers flexibility in its application. As a result, some flags of convenience such as Liberia and Panama, often criticised for their lack of social rights in the benefit of their seafarers<sup>20</sup>, ratified the Convention as well.

### c. Procedural human rights

Contrary to social human rights, procedural human rights are not recent. For instance, the rights of liberty and security whereby no one can be detained without a legal basis were already contained in the Habeas Corpus Act of 1679 in the United Kingdom or in the French Declaration of the Rights of Man and of the Citizen of 1789. However, this principle found new repercussions as well: the European Convention took over this fundamental right in its article 5 § 1 which has recently been applied to persons on board ships. In *Medvedyev v France*<sup>21</sup>, the European Court of Human Rights (hereafter the European Court) considered that France had violated the right of liberty of drug smugglers acting in the high seas. According to the facts of the case, the Winner, a ship flying Cambodian flag, was suspected of drug smuggling. After having asked permission to the Kingdom of Cambodia to intercept it, the French navy took control over the ship and held the crew members in detention. The latter argued that France had violated their right of liberty because their detention had no legal basis. Indeed, the Court held that Cambodia was not part of any Convention allowing the French navy to take measures against the crew members: Cambodia had not signed the Montego Bay Convention nor the Vienna Convention against Illicit Traffic in Narcotic Drugs, which could have provided a legal basis for action. Even though the agreement that took place between Cambodia and France was enough legal basis to intercept the ship, it did not entitle the French authorities to take measures against the crew members, according to the Court. Moreover, the European Court considered in a piracy case, *Hassan v France*<sup>22</sup>, that notwithstanding an agreement between Somalia and France concerning the necessary measures that could take the French authorities against pirates, the four-day detention on a French frigate that suffered the claimants was unlawful because French Law against piracy was not compliant with the European Convention. Indeed, as the former French Ministry of Justice admitted himself<sup>23</sup>, French Law against piracy did not provide, at that time, an adequate legal framework for the detention of persons on board ships under the supervision of a judge.

Another procedural fundamental right, incorporated in article 5 § 3 of the European Convention, that has also been applied to people on board ships in the *Medvedyev* case, is the right to be brought promptly before a judge. In addition to the claim for violation of article 5 § 1, the drug smugglers claimed that France had violated its duty of promptness considering the long period of detention they had suffered before being brought before a judge. Indeed, the claimants had been held in detention for

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<sup>16</sup> European Social Charter

<sup>17</sup> Maritime Labor Convention 2006 (hereafter MLC 2006)

<sup>18</sup> [http://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/WCMS\\_153450/lang-en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/WCMS_153450/lang-en/index.htm) (consulted 17 December 2015)

<sup>19</sup> In France, for example, the International French Registry can be applied to some ships, allowing lighter social duties for the employer towards his crewmembers. See art L. 5611-1 et seq. of the French Transports Code.

<sup>20</sup> See for example the International Transports Workers' Federation statement :

<http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/> (consulted 3rd January 2016)

<sup>21</sup> *Medvedyev and Others v France* App no 3394/03 (ECHR, 29 March 2010)

<sup>22</sup> *Hassan and Others v France* App no 46695/10 and 54588/10 (ECHR, 4 December 2014)

<sup>23</sup> Ministerial Circular dated 13 July 2011 concerning the fight against maritime piracy and concerning the use of police forces in the high seas (NOR : JUSD1119584C)

thirteen days on a French frigate before arriving at Brest's harbour and being brought before a judicial body. However, the European Court held that the French authorities could not have done otherwise in view of the state of the ship and the weather conditions. Therefore, there was no violation of article 5 § 3 of the European Convention. Nevertheless, the Court held otherwise in another drug smuggling case<sup>24</sup> and in a piracy case<sup>25</sup>. In the latter, after a period of detention of four days on a ship, the detainees were then held in custody for two more days after arriving at Brest's harbour. The Court decided that the period of detention on a ship could not be cumulated with a period of custody of two days. French authorities were expected to organise the presentation of the detainees before a judicial body as soon as they arrived in France. Procedural rights are therefore another category of human rights that must be taken into account for persons on board ships.

## **2. The legal mechanisms allowing the application of human rights to persons on board ships at sea**

In general, the scope of application of human rights is determined by the provisions setting them out (a). However, in light of the European Court case-law, it seems that these legal instruments can be interpreted broadly in order to extend the application of human rights (b).

### **a. The scope of application determined by the Law**

As a result of the *Medvedyev* case, the Law No 2011-13 dated 5 January 2011 was enacted by the French Parliament for the detention of pirates and drug smugglers to comply with the procedural human rights stated in the European Convention. Henceforth, detainees on a ship have, for example, the right to a medical visit<sup>26</sup> and their detention must now be supervised by a judge, if it exceeds 48 hours<sup>27</sup>. These provisions contained in French Law and concerning crew members will apply as soon as detention measures are taken against them by French authorities, regardless of the nationality of the crew, and of the flag that flies the intercepted ship.

When domestic law is not modified by international case-law, changes can be brought by international conventions. Indeed, international legal instruments often provide that the contracting States will have to adopt adequate legislation to comply with the said convention. For instance, article II.2 of the MLC 2006<sup>28</sup> sets out its scope of application by stating that the Convention applies "to all seafarers". Article 5 completes the latter article by explaining the control that can exercise States to assure compliance with the rights provided by the Convention<sup>29</sup>. Following the ratification of the MLC 2006, the French Parliament enacted the Law No 2013-619 dated 16 July 2013, modifying French Maritime Labour Law in order to take into account the provisions of the MLC 2006. For instance, article L.5514-1 of the French Transports Code now gives power to French authorities to review the maritime labour certificate, that every ship registered in a Member State must have, and certify that the working conditions are compliant with the social human rights provided in the MLC 2006.

The same mechanism applies to the preservation of life at sea: the scope of application of the duty of rescue is mainly determined by international conventions incorporated into domestic Law. For instance, under Article 98(1) of the UNCLOS, flag States have an obligation to adopt domestic legislation that establishes penalties for shipmasters who violates the duty to rescue or fail to provide

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<sup>24</sup> *Vassis and Others v France* App no 62736/09 (ECHR, 27 June 2013)

<sup>25</sup> *Ali Samatar and Others v France* App no 17110/10 and 17301/10 (ECHR, 4 December 2014)

<sup>26</sup> Article L.1521-13 of the French Defence Code (Translation provided in the Table of Statutes)

<sup>27</sup> Article L.1521-14 of the French Defence Code

<sup>28</sup> Article I.1 states that each Member which ratifies this Convention undertakes to give complete effect to its provisions in order to secure the right of all seafarers to decent employment

<sup>29</sup> "Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirement of this Convention [...]"

Each Member shall ensure that ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance as required by this Convention

A ship to which this Convention applies may [...] be inspected by a Member other than the flag State, when the ship is in one of its port to determine whether the ship is in compliance with the requirement of this Convention."

assistance. In application of this provision, article L.5262-5 of the French Transports Code sentences to two years of imprisonment every Master found guilty of this behaviour. France decided to apply this duty very broadly: it does not apply only to ships flying French flag but to every ship in general, and French Law will apply as long as a claim is brought before the French Courts<sup>30</sup>. A broad application of human rights might also result from the case-law, as the decisions of the European Court show.

#### **b. The scope of application determined *de facto***

Article 1 of the European Convention states that the Contracting Parties must secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. In the *Medvedyev* case, the European Court held that, despite the territorial definition of jurisdiction, “acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them”<sup>31</sup>. According to the Court in this case, the French authorities had taken precise action aimed at intercepting the drug smuggling ship and, therefore, had exercised jurisdiction over it. In conclusion, the European Court decided to apply the European Convention, and the relevant human rights it contained, to the case, even though the ship was not in French territorial waters, nor was it flying a French flag, or was carrying French crew members. What might appear as too wide a definition of the notion of jurisdiction is actually an appropriate application of Article 1 of the Convention. Indeed, it is preferable for human rights to be broadly applied, in particular to States having signed legal instruments such as the European Convention. Holding otherwise would create “Guantanamo zones” in the high seas. For instance, a Contracting State could then pretend not to apply human rights just because the ship was not registered in one of the Contracting States of the European Convention.

### **3. The enforcement of human rights applied to persons on board ships at sea**

Human rights established by international conventions are generally enforceable by the courts of the States parties to the said conventions (a). However, in order to harmonise the application of those rights, and in order to put pressure on States that may be reluctant to apply them, some conventions created their own judicial body. It is the case for the European Court of Human Rights (b).

#### **a. The enforcement of human rights by domestic courts**

As a direct result of being incorporated into domestic law, human rights applicable to persons on board ships are mainly enforced by domestic courts. French Courts directly apply human rights contained in French Law but also those contained in international conventions, such as the Universal Declaration of Human Rights or the European Convention. In the cases of piracy previously mentioned, *Ali Samatar v France* and *Hassan v France*, a claim for violation of human rights was first brought before the French Courts, as it is requested from the European Convention<sup>32</sup>. The French Courts took into consideration the case-law established by the European Court but the grounds on which the applicants relied did not succeed. However, had the judges agreed on a violation of human rights, the remedies available for the parties could have been the annulment of an act of procedure<sup>33</sup>, in addition to the award of damages. The annulment of an act of procedure can be very effective considering that the prosecution might have to start the process of indictment from the beginning, resulting in the immediate release of the detainees in some cases.

#### **b. The enforcement of human rights by international courts: the example of the European Court of Human Rights**

Concerning the enforcement of human rights, the European Court is, again, worth a special mention. The proceedings in the piracy cases studied in 3. a. led to a claim before the European Court, which in itself shows that the existence of an international court is an efficient tool for the enforcement

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<sup>30</sup> Article L.5132-1 and L.5262-1 of the French Transports Code

<sup>31</sup> *Medvedyev v France*, § 64

<sup>32</sup> Article 35 § 1 of the European Convention

<sup>33</sup> Article 171 of the French Criminal Proceedings Code

of human rights. Indeed, even though French Courts had rejected the claims of violation of human rights, the pirates were able to file a claim before the European Court judges, who held otherwise. The possibility for a judicial institution, independent from any State, to give its view on the application of human rights offers an additional guarantee for their enforcement. Furthermore, the decisions from the European Court against a Contracting State must be taken into consideration not only by the said State but by all the Contracting States of the European Convention. This mechanism allows a faster evolution of the case-law on human rights, considering the great amount of litigation brought before this Court<sup>34</sup>, and an updated application of those rights to new legal issues.

However, despite the great importance of the European Court concerning the enforcement of human rights, its decisions can only lead to monetary compensation<sup>35</sup>, and not to the annulment of domestic decisions. Only national courts can annul domestic decisions. It remains that the European Court is an important tool of soft law, pushing States to change their legislation, if needed, to ensure their compliance to human rights, as the *Medvedyev* case has shown.

### Conclusion

To conclude, human rights find today a new application to persons on board ships that goes beyond the well-known preservation of life at sea, as illustrated by the emancipation of social human rights as well as procedural human rights. The mechanisms making possible to apply these fundamental rights are essentially set out in international conventions, which provide them, or in national laws, which incorporate them. The result is a broad application of these freedoms illustrated, for example, by the position of the European Court regarding the notion of “jurisdiction” provided in the European Convention. As for their enforcement, the domestic courts remain the first concerned, although some international judicial institutions, like the European Court, play an important part to ensure compliance with human rights.

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*Vassis and Others v France* App no 62736/09 (ECHR, 27 June 2013)

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<sup>34</sup> In 2014, 56 250 claims were brought before a judicial body of the European Court

<sup>35</sup> Article 41 of the European Convention

Statutes

**International Conventions:**

United Nations Convention on the Law of the Sea

Safety of Life at Sea of IMO

Universal Declaration of Human Rights

European Convention of Human Rights

European Social Charter

Maritime Labor Convention 2006 of ILO

**French Transports Code:**

Article L.5262-1 (obligation to provide assistance): the provisions of this chapter apply to the ships, vessels and floating devices as mentioned in art. L. 5132-1 (free translation).

Article L.5262-5: Every master who does not provide assistance to any person, even enemy, found at sea in danger for his life, is sentenced to pay a 3750€ fine and to two years of imprisonment. [...] (free translation)

Article L.5132-1: The provisions in the following chapter apply to the assistance of vessels in danger, including war vessels, as well as to the help of same nature provided between ships and vessels, without any regard to the waters where the said help has been provided (free translation).

Article L. 5611-1: (The French International Registry) The purpose of the Ship Registry, denominated “the French International Registry”, is to enhance maritime employment and to strengthen maritime security and safety by promoting the French flag (free translation).

**French Defence Code:**

Article L.1521-13: Every person on board being held in custody benefits from a medical examination provided by a qualified person on board in a 24hours delay starting from the beginning of the custody measure. Another medical examination takes place not later than 10 days after the last medical examination.

A reporting is made to the *procureur de la République* (French Public Prosecutor) establishing, notably, if it is possible to maintain the custody measure (free translation).

Article L.1521-14: Before the expiration of the 48hours delay starting from the beginning of the custody measure [...], the Liberties and Detention Judge rules on a possible deadline extension for a maximum period of another 120hours starting from the expiration of the previous period [...] (free translation).

**French Criminal Proceedings Code:**

Article 171: There is a nullity when the breach of an essential formality provided for by a provision of the present Code or by any other rule of criminal procedure has harmed the interests of the party it concerns. (translation from [legifrance.gouv.fr](http://legifrance.gouv.fr))

### **Ministerial Circular**

Ministerial Circular dated 13 July 2011 concerning the fight against maritime piracy and concerning the use of police forces in the high seas (NOR : JUSD1119584C)