ENCYCLOPÉDIE D'HISTOIRE NUMÉRIQUE DE L'EUROPE

Does a European Standard for Liberties Exist?

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ABSTRACT

Evoking a "European standard" for liberties amounts to examining the existence and development of legal norms applicable to all states in the area concerned. In the current state of the law, there is the clear emergence of what could be called a "continental" law, one of the essential characteristics of which is the promotion of stringent requirements in matters of liberties, particularly insofar as it is characterized by constant evolution. It nevertheless meets with active opposition, both externally and internally.

"Strasbourg- European Court of Human Rights. Photo: CherryX. Source: Wikimedia Commons "

The Unifying Role of the European Court of Human Rights

This European standard essentially has its origin in the European Convention for the Protection of Human Rights signed by member states of the Council of Europe on November 4, 1950. It consequently has continental scope, for this international organization today includes forty-seven European states. It provides guarantees of effectiveness, with jurisdictional guarantee being provided by the European Court of Human Rights, whose decisions are imposed on the states. Finally, it has a remarkable capacity for adaptation, for the court relies on the principle that the Convention is a living text that should be interpreted in light of society's evolution. The Court was thus able to define rules in areas not mentioned by the Convention, ones as varied as the rights of surrogate children or

protection against biometric record collection.

Through its decisions, the court has granted new rights that were gradually imposed in all states that are signatories. For instance, the ban on inhumane or degrading treatment formulated in article 3 of the Convention is used today to sanction deficient conditions of incarceration for prisoners as well as child excision. These basic elements are accompanied by procedural constraints imposed by the court on all signatories. The assistance of a lawyer from the beginning of custody was thus imposed by the Court, first on Turkey in the Salduz case on November 27, 2008, and then on France in the Brusco decision of October 14, 2010.

This normative construction, of which we could cite numerous examples, did not spark opposition from the European Union, whose initial role was not to promote liberties. The Union was born from its promoters' awareness that economic and political solidarities would enable ensuring peace between states marked by wars. The only liberty legally guaranteed by the Treaty of Rome was thus the liberty of circulation for people and goods. The Charter of Fundamental Rights of the European Union, the first text to develop a global conception of liberties in the Union, was not adopted until 2002 at the European Council of Nice, and took legal effect only in 2007 with the Treaty of Lisbon. It did not bind all states, as the United Kingdom, Poland, and the Czech Republic negotiated a derogation system. Moreover, it did not involve all liberties, as social rights were given modest space in the text.

The European Union thus preferred appropriating the laws guaranteed by the European Convention of Human Rights. In its Preamble, the Charter of Fundamental Rights itself "reaffirms the rights as they result […] from the European Convention for the Protection of Human Rights and the case-law of the European Court of Human Rights." The Court of Justice of the European Union did not hesitate to base itself directly on the European Convention, believing for example that the right to property, which is nevertheless established by Community texts, should also be appreciated in terms of the additional Protocol to the Convention that guarantees it.

The process of the European Union's accession to the European Convention of Human Rights is currently underway. It is nevertheless far from being finished, especially given that on December 18, 2014, the Court of Justice of the European Union rendered a negative opinion in this matter, considering that the proposal that had been submitted was not in accordance with the treaties.

The Opposition

This opinion by the Court of Justice demonstrates the degree of opposition to the emergence of a European standard for liberties.

The most visible opposition, but also perhaps the most temporary, comes from within the Council of Europe, particularly from the United Kingdom. The British Conservative government announced its desire to "reestablish the sovereignty of Westminster" by modifying the Human Rights Act of 1998, which requires British courts to apply the case-law of the European Court of Human Rights. The goal is not withdrawal from the European Convention, a politically sensitive decision considering that the United Kingdom is one of the founding states of the Council of Europe. On the contrary, it declares its attachment to the text of the Convention, but plans to consider the Court's decisions as so many advisory opinions that are not binding for British judges.

The opposition crystallized around a few decisions that were considered emblematic of this "intrusion" into the sovereignty of the United Kingdom. The opinion is very hostile to a jurisprudence that sanctions penitentiary laws that systematically forbid exercise of the rights to vote for all inmates. With regard to the government, it was especially irritated by the Al Skeini and Al Jedda judgments from 2011 that condemned the United Kingdom for various abuses committed by British soldiers in Iraq. This British opposition is far from being isolated, and is looked favourably upon in a number of states including France, and especially within Eurosceptic movements.

An “external” opposition, more discreet but more powerful, supports British efforts. The United States is in fact endeavouring to prevent the emergence of a European standard for liberties. In a number of areas, European norms have indeed proven to be more demanding than American law.

This is true of privacy laws. In the United States, information—even private information—is a goods that can freely circulate and be used for commercial purposes, for example to establish consumer profiles. Privacy is protected, very modestly, through contracts. Europe, on the other hand, gives precedence to privacy over freedom of information, and imposes rules that formally originate in laws or international conventions.

This opposition was captured in the recent conflict opposing Google and the European Union. Basing itself on contractual provisions, Google systematically refused to let internet users exercise their right to be forgotten, in other words the right to obtain the unreferencing of data prejudicial to privacy. In its May 13, 2014 decision, the CJEU declared that the right to be forgotten was applicable to search engines, subsequently imposing on them the application of European data protection law.

The emergence of a European standard, and therefore of a continental law of liberties, certainly appears to be a means for unifying Europe around common principles. The results on this point are far from negligible, given that some states in the Council of Europe only recently instituted the rule of law. However, and this is perhaps the most important issue, this European standard for liberties is also the instrument of a legal construction that is powerful enough to oppose the application of US law in all of Europe.

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