FONDATION ROBERT SCHUMAN

POLICY PAPER

European issues
n°342
3rd February 2015

Does the European Court of Human Rights threaten democracy?

Jean-Claude MIGNON
and René ROUQUET

Abstract:

If we are to believe the press and Britain's leaders the answer is undeniably, yes. In France various recent judgments in sensitive areas like unions in the army, surrogacy and Somali pirates have led some to wonder whether there was not cause for France to withdraw from the European Convention on Human Rights, and return later, once the Convention has been renegotiated.

We can understand the irritation, even the indignation that some decisions might cause. We understand it, but we do not feel the same, because on the one hand, it seems exaggerated and on the other it could be a serious threat to the rule of law in Europe. In all events the method retained is not the right one to rectify any possible problems.

This issue is not a new one. Let us take a step back into the past. Mistrust of judicial power is deeply embedded in our history. The malpractice of the Parliaments of the Ancien Régime, jurisdictions that tried to take over the powers of parliament, led to sharp response at the time of the French Revolution. In a speech delivered on 24th March 1790 Jacques-Guillaume Thouret recalled that "*the second abuse that distorted the judicial power in France was the confusion created in the hands of the holders of this power between the functions they were required to perform and the incompatible and incommunicable functions of other public powers. It emulated the legislative power and revised, amended or rejected the laws; it rivalled the administrative power and disturbed its operations, prevented its movement and disturbed the agents of that power.*"

The law of 16th-24th August 1790 meant that the courts "*shall not make regulations, but they shall have recourse to the legislative body, whenever they think necessary, either to interpret a law or to make a new one.*" Article 5 of the Civil Code prohibits "*judges from deciding on cases submitted to them by way of general and regulatory provisions.*" "*The revolutionary prohibition on judicial interpretation is total. [1]*"

Much later in 1921 Edouard Lambert published "*Judicial activism and the fight to counter social legislation in the USA. The American experience of judicial control over the constitutionality of legislation.*" In the introduction already the author deplores that article 5 of the Civil Code is no longer implemented, since the decisions of the Court of Cassation (Appeal) become de facto regulatory decisions. He notes that "*any effort to mask this vital detail of modern judicial life is dangerous to my mind because it helps obscure the main cause of the increasingly frequent failure of the legislator's instructions and prevents him from taking vital steps to channel jurisprudence and stop the excesses that threaten the stability of legislative work.*" [2]

Prophetically he noted that "*the day the French judicature has in turn taken control of the constitutionality of legislation it will find in our Declaration of Rights all of the constitutive pieces of the four-stringed instrument called "due process of law", which has been used by the American judicatures to bring the legislatures under their supremacy*." [3]

Today the French Constitutional Council has considerable power which has been increased significantly by the creation of priority questions of constitutionality. And its decisions are at least as "creative" as the other supreme courts.

The UK is incidentally coherent in that it's Parliament has maintained a high level of sovereignty in relation to the British jurisdictions.

1. Jacques Krynen. *L'emprise contemporaine des juges* – NRF 2012, page 37
2. Edouard Lambert, op. quoted, page 2
3. Idem – page 227

Some of the European Court of Human Rights' decisions do then seem to be an intolerable interference in matters that come under the total competence of the British Parliament. The UK did in fact defend the idea during the Brighton Conference 2012 of a reform of the Court and that the States should benefit from wide margin of appreciation in the implementation of the European Convention of Human Rights, whatever the issue.

This conflict in approach found focus in the affair of prisoners' voting rights. In the Hirst judgments the Court challenged the automatic deprivation of prisoners' voting rights provided for by British law, however serious the crime. These judgments led to a series of appeals [4] which will only multiply if the Court's decisions are not enforced. At one time there seemed to be possible a solution with the preparation of a draft bill that would have provided for a conviction "threshold" regarding the deprivation of voting rights. Now the government has mentioned a possible withdrawal of the European Convention of Human Rights.

By addressing questions of society, which are extremely sensitive, since public opinion is often sensitive to them, and by guaranteeing the rights of categories of people who are necessarily popular, the Court naturally – beyond conflicts of principle like this one – will see its decisions being challenged.

The Court is not insensitive to this. Hence we might think that it had taken this factor into account when the Grand Chamber overthrew the ban on wearing crosses in classrooms in Italy or when it validated French legislation on banning the veil.

Generally the main difficulty encountered by the Court in the execution of its judgments is not so much an issue of principle but the difficulty experienced by some Member States in rising to the standards set out in the Convention. In 2013, nearly half involved five of the 47 Member States of the Council of Europe (Russia, Turkey, Romania, Ukraine and Hungary).

The complexity of normative sources, and in particular the multiplication in the number of norms in international law have enhanced the power of the judge, the only valid interpreter, his authority strengthened by the faculty he has in setting aside the law to the benefit of supra-legislative norms: constitutional principles [5], international conventions, European Union law, etc.

The judge, whoever he is, often faces contradictory principles, the importance of which he has to consider. Hence the European Court of Justice often has to arbitrate between the respect of free competition and the good functioning of services of general interest, which in French law are called the "public services".

We are sensitive to the danger of seeing legislative power, the holder of democratic legitimacy because it is elected, impeded by a "power", the legitimacy of which is infinitely more obscure. But the question extends far beyond the European Court of Human Rights.

He who wants to take on the European Court of Human Rights will also have to take on all of the supreme jurisdictions, the Court of Justice, that is infinitely more powerful, the constitutional Council, the Council of State, etc. Is this realistic? We doubt that we can return to 1790, when things were not functioning as well, in a legal environment that was much simpler than the extremely complex one of today. We might add that modern law is often neither of a clarity or a quality that it might be used as a single point of reference. Indeed the increasing number of hastily prepared texts is one of the banes of our time. We can hardly believe in a return to the past even if we might legitimately question the fundaments of a judicial power.

As General de Gaulle said, "*It is quite natural to feel nostalgia about the empire, as we might regret the soft light of the oil lamp, the splendour of sailing ships, the charm of the times when ships had crews. But what of this? No policy is worth anything outside of reality.*" [6]

In view of the results of the European Court of Human Rights, is an in-depth review needed? Its results are in fact excellent. Of course there are problems, we shall come back to this – but they do not call for a solution as radical as the withdrawal of the Convention.

__4.__ On 30/9/2014, for example the Court invited the UK government to present observations on 1015 appeals pertaining to the same question.
__5.__ Often 'discovered' by the judge.
__6.__ Speech on 14th June 1960

States like France and the UK are legitimately proud of a glorious past in terms of the defence of Human Rights. But does this mean that everything is perfect? In France's case should we blame the Court for having encouraged us to revise police custody [7] and of having challenged us about the state of our prisons that is so often contrary to the most elementary Human Rights?

And if we are legitimately in disagreement with this and that decision taken by the Court, we should not caricature the decision. Here we take the example of unions in the army. Sometimes the Court is criticised for making an abusive interpretation of the Convention. But what does article 11 of the Convention say about this?

1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

What does the Court say about this?

Considering that article 11 excludes no category from the right to form a union, that restrictions can be placed on this right but they must be strictly interpreted and not affect this right to the point of emptying it completely of its meaning, the Court looked into whether the prohibition placed on the French military had a legitimate goal – and if affirmative, whether the prohibition was necessary in a democratic society.

The Court answered positively to the first two points but deemed that an absolute ban was excessive in a democratic society. It accepted however "restrictions, even significant" to this right.

We might add that the Council of Europe's "Committee of Ministers", mainly comprising ambassador representing the Member States declared on 24th February 2010 that it supported the right of the military to form a union!

In short, on the one hand the Court did not deform the Convention, and on the other, it did not give permission for the creation of "soviets" in the army.

May be the Court needs to communicate more and better regarding its decisions in a bid to prevent misunderstandings? The absence of Advocates General, unlike the Luxembourg Court, complicates the interpretation of its decisions even more. Hence might we not conceive of there being a regular publication, a little like the "Cahiers" published by the Constitutional Council?

May be the Court needs to ensure a better guarantee of the total legibility of its judgments regarding the national jurisdictions involved? Many judgments are made [8], and it is vital for total coherence amongst these.

Likewise, not wanting to expose myself to criticism, it is imperative to ensure that its judges are all of an impeccable quality, that they have the necessary experience, and that they speak the Court's two languages fluently etc ….

We should not deny that an increase in the Court's budget would be welcome; it totalled 67 million € in 2014 in comparison with 355 attributed to the Court of Justice in Luxembourg.

Would the withdrawal of the Convention be the right method to encourage necessary change? Withdrawal would endanger the very existence of the system to protect Human Rights introduced in 1949. Since the fall of the Berlin Wall we have demanded that all new members join the Convention. In what way would this be coherent politically if the founding States withdrew from the Convention whilst it has become the pillar of the organisation? The question of the legitimacy of their presence within the Council

7. *In the judgment Selmouni v France on 28th July 1999, the Court condemned France for acts of torture whilst a prisoner was held in police custody (kicking, thumping with a baseball bat, various humiliating acts, notably of a sexual nature, threats made by a blow-torch etc …).*
8. *In 2013, the Court delivered 916 judgments that involved 3 659 requests. In all it finalised the assessment of 93 397 requests in 2013.*

of Europe would then be challenged. And above all the States that joined us after the collapse of the USSR might no longer feel bound by our system to protect Human Rights. Two decades of progress, even if much remains to be done, would be wiped out. From a procedural point of view we should note that the reserves method that might be applied to the Convention is limited in that the Court has restricted its scope, derogating to traditional international public law (cf. particularly Loizidou .v. Turkey 23rd March 1999).

And withdrawal by France and the UK would probably mean the end of an organisation, the Council of Europe, created in 1949 so that we might never experience again the horrors of the first half of the 20th century, at a time when military tension and the rise of extremes are seriously affecting our continent once more.

In conclusion although the case made against the European Court of Human Rights might be exaggerated, this does not mean ruling out a more general question being raised by about reconciling the unprecedented power of the judges in the 21st century with the respect of democracy, since it is true that the rule of law is above all one of its interpreters. This deserves overall thought by all of those involved on a European level, without demagogy, nor abusive simplifications and without specifically challenging one jurisdiction rather than another.

Jean-Claude Mignon,
French MP,
Former President of the Parliamentary Assembly of the Council of Europe (PACE)

René Rouquet,
French MP and Chairman of the French Parliamentary Delegation at the PACE

You can read all of our publications on our site :
www.robert-schuman.eu

Publishing Director : Pascale JOANNIN

THE FONDATION ROBERT SCHUMAN, created in 1991 and acknowledged by State decree in 1992, is the main French research centre on Europe. It develops research on the European Union and its policies and promotes the content of these in France , Europe and abroad. It encourages, enriches and stimulates European debate thanks to its research, publications and the organisation of conferences. The Foundation is presided over by Mr. Jean-Dominique Giuliani.