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EDITORIAL COMMENTS

The EU Charter of Fundamental Rights still under discussion

Although we are still waiting for the final version of the Nice Treaty, we may observe that the meeting of the European Council, held on the French Riviera in December 2000, had some positive results. On 7 December 2000, the EU Charter of Fundamental Rights was "proclaimed" by the president of the European Parliament, Mrs Nicole Fontaine, the president of the European Commission, Mr Romano Prodi and the president of the Council of Ministers /General affairs, Mr Hubert Vedrine, French Minister for foreign affairs. This "proclamation" lacked the "solemnity" required by the exact wording of the conclusions of the European Council of Cologne (3-4 June 1999) which launched the whole process of elaborating a Charter of Fundamental Rights of the European Union. In fact, the Charter was signed in five minutes, in the presence of the Heads of State and Governments, and neither Mrs Fontaine nor Mr Prodi were allowed time to deliver the speeches they had prepared for the occasion. The Charter has been published in the Official Journal (which is still entitled the official Journal of the European Communities, and not of the European Union, although the Treaty of Nice will bring about that change)[1] as an intergovernmental agreement; it is now there, nourishing debate as to its significance for the entire process of European unification and integration.[2]

1. Which fundamental rights?

The reference to fundamental rights in EC law appeared in the case law of the ECJ as early as 1969 (*Stauder*) and 1970 (*Internationale Handelsgesellschaft*) with a view to making EC law prevail over national law in any circumstances, including the protection of fundamental rights of individuals usually guaranteed by national constitutions. Such prevalence was eventually acceptable for the Member States as long as the fundamental rights applied by the Court

1. O.J. 2000, C 364, of 18 Dec. 2000.
2. In the context of this Editorial comment, only certain aspects of the Charter are dealt with; a more detailed presentation of legal issues , including the legal effect of the Charter, will be published in the next issue of this *Review*.

"emerged from the common constitutional traditions of the Member States as general principles of Community law". A corpus of Community fundamental rights could have continued to develop in the framework of the ECJ's law-making practice, in particular in view of the Court's regular reference to the rights as codified by the European Convention on the Protection of Human Rights and Fundamental Freedom (hereafter "ECHR"), which has tended to become a common European "Bill of Rights". The legal protection of individuals' rights in the Union would not have suffered if such a process had simply continued.

However, as emphasized by the conclusions of the European Council of Cologne "there appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens". With the extension of the EU/EC competences after Maastricht and Amsterdam, and in the perspective of the new accessions, in order to compensate for the democratic deficit perceived as a permanent defect of European institutions, the time had come, even in the absence of a proper constitution of the Union, to help the European citizens to become conscious of their rights which effectively already existed in a Union and Community submitted to the rule of law. The contemplated objective was less legal than political. The ambition of the Charter is not to create new rights but to make visible and known what had so far remained unnoticed by the European citizens. To illustrate this, the authors of the draft Charter chose to divide its 54 articles into six chapters with titles which were meaningful and easy to remember: dignity, freedoms, equality, solidarity, citizens' rights, justice. They used short sentences and kept the style as simple as possible in order to promote both the acceptance of such values by the people of the EU and the latter's identification with those values. What is the substance of such values?

The Europe Council of Cologne had proposed that the EU Charter in addition to "basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law" should "also include the fundamental rights that pertain only to the Union's citizens." "Account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union."[3]

3. See Annexe IV of the Presidency Conclusions of the Cologne European Council, 3 and 4 June 1999. The Preamble of the Treaty on European Union also confirms the commitment

Unanimity was achieved quite easily on the issue of incorporating the *classic fundamental rights*, most of them based on the ECHR provisions, and which appear in the chapters "dignity", "freedoms", "equality" and "justice". Although the members of the Convention (the name ultimately given to the body which elaborated the text of the Charter) knew that the Charter would remain "soft law" as long as the European Council did not decide differently, they bound themselves in advance to formulating the Charter in such a way that it can at any time be incorporated into the treaties or can in some other way be made binding. As a consequence, in order to prevent differences of interpretation by potential judges, the drafters used the exact terms of the ECHR whenever stating rights that appear in the ECHR. However, it must be stressed that the Charter is not a pure copy of the ECHR as adopted in Rome in 1950. On some points the Charter brings the original Convention of Rome up to date; for instance, the prohibition of trafficking in human beings is added to the prohibition on slavery and forced labour (Article 5) and the right of conscientious objection is added to the freedom of thought, conscience and religion (Article 10). The most innovative provisions concern the definition of principles in the field of medicine and biology, such as the prohibition of the reproductive cloning of human beings (Article 3), and the protection of personal data (Article 8); their inclusion in the Charter was the result of intense debates as to the adaptation of fundamental rights to the challenge of a constantly changing society.

The inclusion of *fundamental social rights* raised difficult issues. Those such as the Parliament, the Commission and some Member States, who looked forward to the inclusion of social rights reflecting the importance of the social dimension of the Union, met with resistance especially from those States which do not consider such rights to be *fundamental* rights, or to be a matter for the Union. In the view of the latter, in light of the subsidiarity principle, most social rights remain a matter for Member States. Through difficult and lengthy debates, on which representatives of the "civil society" such as the European Trade Union Confederation exerted a significant influence, the various parties in the Convention managed to narrow the gap to the extent that a common denominator appeared for the inclusion of a series of fundamental social rights under the concept of "solidarity". The consensus within the Convention went in the direction of considering fundamental social rights as an aspect of human dignity emphasized in Article 1 of the Charter. Thus the text provides, *inter alia*, for protection against unjustified dismissal, as well as the right to healthy, safe and adequate working conditions in the EU. The inclusion of the provisions on health care, or social security and social

to the European Social Charter of the Council of Europe signed in Turin in 1961, and to the Community Charter of 1989, which was signed by the UK as late as 1997.

assistance appears more as the recognition of principles than the definition of enforceable rights. On the other hand, no provisions on a right to employment have been included, as this is outside the competence of the Union, which at present is only entitled to recommend a higher level of employment.

In contrast to social rights, there was widespread unanimity on the subject of *citizens' rights* that were already codified in the EU Treaty (right to vote, ombudsman, right to petition, etc.). However, as only Union citizens were entitled to some of these rights, the drafting of this chapter led to reflections on the issue of whether fundamental rights should only apply to EU citizens or to third-state nationals as well. Among the various parties of the Convention it became progressively clear that the really fundamental rights should apply to everyone where EC/EU law applies. With the exception of some special rights of the citizen (right to vote, right to free movement, right to diplomatic protection), most civil and political rights provided in the Charter include everybody within the territory of the Union, regardless of nationality. The subject of some fundamental rights under the label of equality or solidarity have had to be defined, but only for the sake of clarity: children, elderly, disabled, women, workers, employees. Some of these social rights are also limited to those *legally* residing in the Union (e.g. Art. 34(2))

2. Scope, justiciability and legal value of the Charter

If the Charter merely broadcasts a catalogue of values and remains "soft law", the question of its scope and justiciability is not relevant. However, as mentioned earlier, the Convention intended to draft the Charter in such way that it could be made binding. The so-called "general provisions" address questions of legal importance in this context, such as the scope of the Charter, its relationship with the ECHR and other existing international conventions in the area of fundamental rights.

The European Council had proposed a Charter of the Union. Article 51, which defines the scope of the Charter, states that its provisions are addressed to the institutions and bodies of the Union and to Member States "only when they are implementing Union law". This new concept of "Union law" indicates that the Charter covers the entire range of Union activities, including the sensitive questions of second and third pillars. On the other hand, with due regard to the principle of subsidiarity, the Charter does not establish any new power or task for the Community or the Union. However, as the Charter is not part of the constitution of a federal entity, it might be surprising to find provisions on family life, or the death penalty, which are entirely outside the competences of the Union. The answer is that such provisions are the expression of common values against which Union institutions and Member States could not make a stand even if they do not have to implement them.

Another "horizontal issue" is that of the *relationship between the Charter and other instruments on fundamental rights* either national (constitutions of Member States) or international. Iin 1996, admittedly, the ECJ ruled that "at the current stage of Community law, the Community is not competent" to accede to the ECHR;[4] however, due to the parallelism between the ECHR and part of the Charter, if the latter is included in the treaties, the issue of the relationship of the European Court of Human Rights to the ECJ will again come into focus. During the debates, the proposal to make explicit reference in the Charter to the case law of the European Court of Human Rights was the subject of extreme controversy. Several of the Convention's members opposed it most strenuously: it would run against the principle of autonomy of the Charter and link its substance to unknown future developments of the case law of a Court which will never be the natural judge of the Charter. The representative of the European Court of Human Rights, present in the Convention as an observer, and who favoured the inclusion of such a reference has had some success: there is a reference to the case law of the Strasbourg Court in the Charter's Preamble, and in the "explanations"[5] under Article 52. This must be understood as an incitement to continue and strengthen the dialogue practised now for many years between the two courts. It should not be forgotten in this context that the European Court of Human Rights is ultimately only competent in cases concerning human rights dealt with in the ECHR; for the protection of other fundamental rights, namely those which appear in the Charter, the ECJ would continue to have jurisdiction within the limits of the treaties.

The inclusion of the catalogue of fundamental rights in the EU Treaty, either through a reference in Article 6(2) or in any other way, would give the Charter its full effect, allow it to bear on the EU's institutions and provide citizens with an effective means of enforcing their rights either in national courts or the ECJ. However, in the present situation, the proclaimed Charter is not deprived of *practical effects, also on legal grounds.* Even before its adoption by the Convention on 2 October 2000, the draft Charter was referred to in the report of the "Sages" on the situation in Austria (September 2000). In the future, it will certainly become a reference for the application of Article 7 TEU (persistent violation of human rights and fundamental freedoms by a Member State). The Charter may constitute an important set of principles for the EU relations to third countries: the protection of human rights is actually

4. ECJ 2/94, Opinion, 28 March 1996, [1996] ECR I-1543.

5. The "explanations" are not part of the Charter; they have been drafted under the responsibility of the Presidium (composed of the President of the Convention, the representative of the Commission, and the three vice-presidents representing the Council of Ministers, the European Parliament and the national parliaments). These explanations indicate the sources used for the different rights and clarify the meaning of certain formulae.

part of the central objectives of the Union's foreign and security policy as well as its economic development cooperation policy. The Charter will also have the effect of sending a signal to the newly joining States as to the standard of fundamental rights to be attained in the Union; however the candidates will certainly object to any sort of supplementary conditions to which their future entry could be submitted.

Within the Union, it is very likely that the Charter, a document negotiated by the political entities – representatives of Member States, the Commission, the European Parliament and national parliaments -, reproducing rights which are already accepted either as Community law or as expressing a common view of Member States, and proclaimed during a European Council and then published as an interinstitutional agreement, will inspire the judges in their interpretation of fundamental rights, even if it is only "soft law". There is no reason why European judges should not use it as a source of inspiration, in the same way as they have used the ECHR.

3. Future prospects

Another interesting aspect is the *process* through which the Charter came about: discussions were organized in such a way that a text, which is not without shortcomings but does have substance and rationale, was agreed upon in less than nine months. The Convention, composed as indicated earlier, worked in a very particular way. Proposals were made by the Presidium; after extensive debates in the Convention, the Presidium tried to find a common denominator and to obtain a consensus between the parties, without a formal vote. That unorthodox method of negotiation took place in an atmosphere of transparency; debates were open to the public and all successive drafts of the Charter were made available on the web site of the Convention, in order to attract comments and proposals from the "civil society", which responded very positively by sending a great number of suggestions for amendments.

After the Nice Summit, the IGC process is undergoing severe criticism for its lack of efficiency. Some voices, namely in the European Parliament, suggest that a procedure similar to that of the Convention, combining mixed composition, transparency and a search for consensus, could prepare the next reform, which is planned for 2004. It should proceed to a simplification of the treaties and a proper delimitation of competences between Member States and the Union; it may also have to define the future legal status of the Charter which, being presently a catalogue of values contributing to a stronger identification of EU citizen with "their" Europe, could in the future become a "Bill of Rights".