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EDITORIAL COMMENTS

The European Parliament is *"determined to achieve a basic Community instrument with a binding legal character guaranteeing fundamental rights"*. This manifesto is what is asserted in a Resolution of 12 April 1989.[1] In the same resolution it considered that "the identity of the Community makes it essential to give expression to the shared values of the citizens of Europe" and it affixed a "Declaration of Fundamental Rights and Freedoms" comprised of 28 articles which enumerated some 24 fundamental rights.

It is always acceptable to adhere to fundamental rights; no one objects to these principles. The substantive question remains: what is the purpose of this Declaration? Does the European Parliament see the European Union (to which it also refers) as a super-State whose constitution should not contain less than constitutions of other States? The European Union was never intended to become a super-State. Our experience with super-States is not positive as such, which limits our desire to create more of them. The European Union was designed to be a marriage of closely cooperating States, with various powers transferred to the Union, especially whenever this may be beneficial to the citizens of Europe, but not all powers. Some duties can better be performed by the States themselves, others better by a group of States larger than the Community.

The protection of fundamental human rights is not a simple matter. Yes, one can easily enumerate a number of fundamental rights. There are

1. O.J. 1989, C 120/51.

many national and international instruments which offer us examples; one need only to copy existing documents. Fundamental rights have value only when they can be enforced. The European Union needs some kind of machinery, *i.e.*, judges with sufficient authority, armed with supervisory powers, to enforce the execution of their judgments. The Court of Justice of the Communities could, of course, be charged with the adjudication. Its decisions have authority and their execution is reasonably well supervised by the other institutions and the Member States. In fact the Court of Justice already guarantees that Community acts do not violate fundamental human rights, but it cannot guarantee to the citizens of the Community any particular protection for most of the rights enumerated in the Parliament's resolution, such as the right to life, the freedom of thought, conscience and religion, the freedom of expression or the right to just working conditions. For realisation of those rights, new powers would have to be attributed to the Court of Justice. If such powers were eventually granted to the Court, only then could it start on the long road to defining and interpreting the rights enumerated by the Parliament.

Fundamental rights do not operate in a vacuum; for instance, the freedom of expression is important but is tempered by the need to protect military secrets and one's right to speak does not grant licence to insult other people. The freedom of religion does not necessarily include the freedom to perform all acts which a religion may prescribe. A great deal of case law will be necessary to define just working conditions. It will take a large amount of work for the Court and many years to develop an adequate system for the protection of fundamental rights. One might ask: should the Court do this when we already have a European Court of Human Rights which over a period of more than thirty years has interpreted and refined the European Convention on Human Rights? Why is that Convention not good enough for the European Parliament? Is it too old? It has presently been amended by eight protocols and further protocols are possible. Would it be desirable to develop a new human rights system next to the one of the Council of Europe? Certainly not. We should be content that there are fields of European law in which the whole of the Western part of our continent participates and in which several of the Eastern European states want to participate as well.

Demolishing this cooperation by creating a separate system for the Community seems unwise and is to nobody's benefit. It would harm the system of the Council of Europe to the detriment of the peoples of the other eleven countries who need protection of fundamental rights not less than the peoples of the twelve. The value of European integration lies in the system's intricacy, in a careful division of competences between the Community and its Member States as well as between the Community and other European organisations. In his speech in Strasbourg of 6 July President Gorbatchev suggested that the Eastern European countries could take part in some of the activities. Undoubtedly a pan-European organisation for the environment would further complicate the European structure. We may eventually require it and we must be able to structure our "European house" in such a way that all activities can be performed at the level where they fit best. In the human rights domain, this level is not the one of the Community; it would have been wiser if the European Parliament had not encroached upon this field. Following their resolve, their draft requires critical comment.

The *first* difficulty arises because it is unclear where the responsibility rests for guaranteeing the enumerated rights. The European Convention on Human Rights starts with an article obliging the participating States to secure the enumerated rights to everyone within their jurisdiction. Complaints for violation against these rights must be lodged against the States; they are responsible. This may lead to a gap in the protection of human rights when an infringement is committed by the Community. No State can be held responsible for its acts. Complaints against the Community have so far been held inadmissible by the organs of the European Convention on Human Rights. It is certainly desirable to fill this gap. The Commission of the European Communities proposed to do this by having the Community adhere to the Human Rights Convention.[2] The Court of Justice in fact fills the gap by applying fundamental human rights as a condition for the legality of all Community acts. These efforts merit our support. They aim at a completion of the system: under the European Convention the States on the one hand are responsible for the application of human rights in all fields where they are sov-

2. Memorandum of the Commission of 4 April 1979, EC Bulletin, Suppl. 2/79.

ereign – and that covers at least ninety-five per cent of all human rights cases – the Community, on the other hand, accepts responsiiblity in its field of competence. This approach is not adhered to by the European Parliament. It proclaims human rights which are clearly outside the competence of the Community. It suggests to the citizens that the Community will care for these human rights, but it does not offer any rules on the responsibility for their actual protection. Of course, this makes it easier to gain acceptance for rather sweeping rights, such as the right to just working conditions (Art. 13) or to social assistance (Arts. 15, 2), but it also makes the draft an empty gesture which creates confusion on what the law actually is. Are the rights codified in the European Convention still our fundamental human rights or are they replaced by the rights enumerated by the European Parliament?

Our *second* point of criticism concerns the definition of the rights mentioned. All human rights have their limits and for a lawyer these limits are of the greatest importance. The majority of the case law under the Human Rights Convention concerning the articles on respect for private and family life and on the freedoms of religion, expression and assembly focus not on the rights themselves but rather on the exceptions which the second paragraphs to these articles offer in the interests of national security, public order or the rights of others. The Parliament's resolution only contains a general article (Art. 26) providing: "The rights and freedoms set out in this declaration may be restricted within reasonable limits necessary in a democratic society, only by a law which must at all events respect the substances of such rights and freedoms". This article which applies in the same way to all human rights involved would require a completely new development of case law, to which it offers little guidance.

Our *third* point of criticism concerns the rather careless drafting of the Parliament's declaration. Important notions such as "Community citizen" and "European citizen" are not or wrongly defined. Article 8 of the declartion grants to "Community citizens" the right to move freely and choose their residence within Community territory and it allows "Community citizens" to leave and return to Community territory. Thus, it makes the content of Article 2 of the Fourth Protocol to the European Convention applicable to the Community. Article 25(3) offers

a definition of the term "Community citizen", but Article 3(3) prohibits any discrimination between "European citizens" on the grounds of nationality, and Article 17 offers "European citizens" the right to take part in the election of the European Parliament and grants "European citizens" an equal right to vote and stand for election. This difference in terminology would make more sense if different notions were meant. Swiss, Austrian and Polish citizens are European citizens while they are not Community citizens. Obviously, they were not envisaged by the European Parliament. Codification of human rights at our time, when there is an enormous development available, deserves more meticulous drafting than the European Parliament has performed.