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The Charter of Fundamental Rights: an ID Card for the European Union

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The Charter as an aspect of the progressive constitutionalisationof the EU

The build ing of the Euro pean Un ion is an un prece dented pro cess of pro gres sive shar ing of sov er eignty by an in creas ing number of na tion states. It im plies set ting up a dual su pra na tional struc ture (the Com mu nity and the Un ion) with its own in sti-tu tions and stipu lat ing in ter na tional trea ties that have to be modi fied and up dated over time. From it de rives, among other things, what may le giti mately be de fined as a process of progressive constitutionalisation.[2]

The de ci sion of the July 1999 Co logne Euro pean Coun cil to gather "the fun-da men tal rights ap pli ca ble at Un ion level ... in a Char ter and thereby [make them] more mani fest"[3] may be con sid ered part of this pro cess. The word ing is cor rect be-cause fundamental rights have already been in force at the European level for some time. This was re it er ated by the Euro pean Court of Jus tice (ECJ) as early as 1969,[4] when it ob served that "the pro tec tion of fun da men tal rights con sti tutes an in te gral part of the gen eral le gal prin ci ples of which the Court en sures re spect"; and was de fini tively sanc tioned by the Treaty of Maas tricht in Ar ti cle 6.2: "The Un-ion shall re spect fun da men tal rights, as guar an teed by the Euro pean Con ven tion for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 No vem ber 1950 and as they re sult from the Con sti tu tional tra di tions com mon

1 MEP Pa ci otti was the EP dele gate for the Group of the Party of Euro pean So cial ists to the Con ven-tion for the Draft ing of the Char ter of Fun da men tal Rights. The Ital ian ver sion of this ar t i cle ap-peared in the no. 1, 2001 is sue of *Europa-Europe*. Trans lated from the Ital ian by *Gab ri ele Tonne*.

2 A. Bar bera, "Esiste una 'co st ituz ione eu ro pea'?", *Quadernicostituzionali*, vol. 20, no. 1, 2000, p. 59.

3 Euro pean Coun cil, Con clu sions of the Pres dency, Ti tle IV, Co logne, 3-4 June 1999.

4 Judge ment of 12 No vem ber 1969, case 29- 69, p. 419.

to the Member States, as general principles of Community law." In order to list those rights more sys tem ati cally, how ever, they had to be set down in a Char ter, as re quested by the Euro pean Par lia ment.

The link be tween draft ing a Char ter of Fun da men tal Rights and writ ing a real con sti tu tion is ob vi ous. But the fact that the two have not been worked out con tem-po ra ne ously in the Euro pean Un ion is one of the origi nal char ac ter is tics of the con-struction of European supranationality. The national constitutions introduced in Euro pean coun tries in the sec ond half of the twen ti eth cen tury were the re sult of the fall of authoritarian re gimes and the es tab lish ment of lib eral demo cratic sys-tems based on the prin ci ples of the con sti tu tional state and the rule of law. But the cur rent situa tion in the Euro pean Un ion is quite dif fer ent, as its re quire ments are in creas ing to deal with greater com pe ten cies, es pe cially in view of en large ment to the countries of East ern Europe.

An innovation: the Convention

Particularly original was the body to which the Euro pean Coun cil gave the man-date for drafting the Charter of Fundamental Rights: a body whose composition was es tab lished by the Euro pean Coun cil held in Tam pere on 14-15 Oc to ber 1999. Delegates included fifteen representatives of heads of state and government of the mem ber states; one rep re sen ta tive of the Euro pean Com mis sion; six teen rep-resentatives designated by and from the European Parliament; and thirty mem-bers designated by and from national parliaments (two for each national par lia ment, one for each cham ber).

Since the Char ter was to be pro claimed jointly by the three Euro pean in sti tu-tions –- the Coun cil, the Com mis sion and the Par lia ment – it was only right that it should be drafted by their representatives and that, in particular, the two EU or-gans which represent, respectively, the legitimacy of the states (the European Council, whose meet ings are also at tended by the presi dent of the Com mis sion) and the legitimacy of the people (the Par lia ment) should be pres ent on an equal footing.

Un prece dented was the pres ence of rep re sen ta tives of na tional par lia ments – and in greater number than the other components. Moreover, while the other components could consider themselves real representatives of the institutions that had delegated them (in the sense that the representatives of the heads of state and government were directly re spon si ble to their lead ers, the rep re sen ta-tive of the presi dent of the Com mis sion was re spon si ble to the presi dent and each MEP designated by the European Parliament using this organ's proportional method had a man date from the EP), the dele gates from the na tional par lia ments rep re sented a plu ral ist as sem bly with out a com mon po si tion. Nev er the less, their presence turned out to be invaluable as an essential liaison with national public opin ion, po liti cal spheres and le gal tra di tions.

Also to tally new was the work ing method of the body thus des ig nated, which de cided to call it self Con ven tion. Trans par ency was to tal: the meet ings were open

to the pub lic and all docu ments were pub lished on the inter net. In deed, a con sid er-able number of docu ments and sug ges tions were pro duced not only by mem bers of the Con ven tion (which pre sented more than a thou sand amend ments) but also by pri vate as so cia tions, lob bies, schol ars. Hear ings were or gan ised with the coun-tries that are candidates for en try into the Un ion and with a large number of non-governmental organisations that had requested them. Work was based on docu-ments prepared by the presidency, that is the president and vice-presidents elected by the Con ven tion, the Com mis sion rep re sen ta tive and the rep re sen ta tive of the Coun cil's presi dency, which formed the edi to rial com mit tee. The texts were dis cussed by the Con ven tion, re- elaborated on the ba sis of the ori en ta tions that emerged during discussion and the amendments presented, and then re-submitted to the Con ven tion. There was no vot ing at this stage, just a search for the widest possible consensus for further pro gres sive adjustments.

An other sin gu lar fact was that the Con ven tion did not know whether the text it was pre par ing would re main a po liti cal dec la ra tion or whether it would turn into a le gally bind ing docu ment as part of the Treaty on Euro pean Un ion. The mat ter was solved by the wise sug ges tion put for ward by the Con ven tion's presi dent, Ro man Her zog, and taken up by the Con ven tion: the docu ment would be drafted "as if" it were a le gal text, re sem bling those that form the first part of most con ti nen tal con-stitutions, formulated therefore in brief articles using the clearest possible language.

The con tents of the Char ter

The contents of the Charter basically correspond to the Cologne mandate: civil and po liti cal rights, fun da men tal rights of the citi zens of the Un ion, eco nomic and so cial rights. In this con text, the work of the Con ven tion in volved com pi la tion more than innovation. But it is obvious that a body composed of members legiti mated not so much by their legal com pe tence – al though there were un doubt edly some ex tremely quali fied mem bers –- as by their in sti tu tional and po liti cal rep re sen ta tive-ness, would pro duce a docu ment char ac ter ised by strong crea tive ele ments. But they are not in con tra dic tion with the Co logne man date. The Char ter is es sen tially a kind of codification inspired by various sources. The first was the indications set down in the Cologne man date; the sec ond a number of in ter na tional con ven tions signed by the fifteen mem ber states in the Coun cil of Europe, the United Na tions, the In ter na tional La bour Or gani sa tion (un der writ ten by all fif teen mem ber coun tries, these texts indicate a general consensus on the principles they contain). Then, there was EC treaty law and sec on dary leg is la tion, and the case law of the ECJ and the Euro pean Court of Hu man Rights. Re course to this mul ti plic ity of sources made it pos si ble to find ade quate foun da tions for and suf fi cient con sen sus on some new rights which, although in force, have not yet been explicitly established as fun da-men tal rights. They per tain above all to the pro tec tion of per sonal data, prin ci ples re lat ing to bio eth ics, the right to good gov ern ance (one of the rights of Euro pean citi zens), as well as the al ready well known new gen era tion of fun da men tal rights

of consumers and rights relating to the environment.

A text resulting from cooperation among subjects so different in national background, political opinion and legal tradition, could not but be a compromise. Even in its formal expression, the document does not provide a unitary and inspired vision of Europe as some might have wished and as is still demanded by Catholic integralists, the extreme left and American-style liberalists. But these demands go against the very idea of a European Union, which is by nature a union of states, of peoples and of nations which are and want to remain different; a Union that respects diversity by enhancing the rights of the individual and does not require standardisation; a Union that is not founded on a single identity, based on bloodlines, territory or ethnie, but on shared values, principles and rules, ensured by a constitutional system of law, and guaranteed by layinstitutions which allow for the coexistence of diversities.

Thus opposition to the Charter can be justified only in those who are against the European Union itself. In fact, in addition to the British Conservatives, there are a number of minority, localist, nationalist and separatist groups within the European Parliament which are against a deepening of the European Union. They all expressed their objections to the Charter, not because of its content, but because of its very existence, which *per se* provides proof of the political and not merely market nature of the Union. More difficult to understand is the opposition of those who claim that the Charter's substance is not advanced enough or seriously lacking in parts: among them are some Convention members belonging to the Party of European Socialists who contributed quite intensely to its drafting, but whose proposals were not all or not entirely accepted. This should not justify opposition to a document that is, on the whole, dignified and definitely to be valued for its significance and historical importance.

The structure of the Charter: the indivisibility of fundamental rights

One of the most innovative characteristics of the Charter is its structure. In addition to the preamble (the proposal for the first draft was put forward by Italian representatives), the Charter includes fifty articles which are no longer divided according to the traditional distinction between civil and political rights, and social and economic rights. Instead, they are grouped together around six fundamental rights: dignity (Articles 1 to 5), freedom (Articles 6 to 19), equality (Articles 20 to 26), solidarity (Articles 27 to 38), citizenship (Article 39 to 46) and justice (Articles 47 to 50), plus four articles (Articles 51 to 54) containing general provisions.

This structure puts all the fundamental rights on the same plane, thereby emphasising their indivisibility. The concept of indivisibility, insisted upon by a number of delegates and eventually accepted by the entire Convention, made it possible to overcome recurrent objections to the introduction of certain principles or rights on the grounds that the Charter need not protect fundamental rights for the respect of which the Community or Union is not responsible. These observations were always very contradictory in that they were never made with reference

to clas sic rights con tained, for ex am ple, in the Euro pean Con ven tion on Hu man Rights, which often deal with matters that are still the sole competency of the states (regulations for criminal trials, the prohibition of capital punishment), but were raised with respect to economic and social rights, far more directly im pli- cated in ac tivi ties of com mu nity com pe tence than those in cluded in the Euro pean Con ven tion.

The cri te rion of in di visi bil ity does not re spond only to the ob vi ous prin ci ple of co ex is tence and in ter re la tion among the vari ous rights, mak ing it pos si ble to ade- quately interpret the scope of each in the con text of all the oth ers. Among other things, it con sti tutes a per ma nent frame work for the de vel op ments cur rently un der way and for a pos si ble re defi ni tion of the com pe ten cies of the Un ion's in sti tu tions and or gans. If the trea ties are modi fied to ex pand the com pe ten cies of Euro pean in sti tu tions and greater na tional sov er eignty is shared at the Un ion level, the Char- ter will not have to be changed to embrace a new fundamental law.

This ini tia tive does away with the much criti cised preva lence of the val ues of eco nomic ef fi ciency over those of jus tice and so cial eq uity en shrined in the Trea- ties: for the first time, an at tempt has been made in a non- national fo rum to draft a com plete stat ute for the fun da men tal pre roga tives guar an teed each in di vid ual, in ad di tion to those en sured the citi zens of Europe. Above and be yond this or that shortcoming, the Charter is, as Giuseppe Bronzini so rightly commented, "the most comprehensive, complete and persuasive list of fundamental prerogatives avail able to day in a non- national con text",[5] in which the pro tec tion of all the rights and prin ci ples taken as the fun da men tal val ues of the Un ion de fines a Euro pean so cial model that is quite dif fer ent from the merely mer can tile and eco nomic one gen er ally attributed to the European Union. Even in the con soli dated field of the rights de riv ing from the lib eral bour geois tra di tion, there is a Euro pean speci fic ity, for ex am ple, in the pro hi bi tion of capi tal pun ish ment, which is not com mon to the en tire demo cratic West.

In the preamble, mention is made of a peaceful future which refers to the value of peace enshrined in the premises of the Treaties. The at tempt to in tro- duce a sub jec tive right to be ac ti vated to pre vent the use of force failed, but then again, no such right ex ists in any Euro pean Con sti tu tion. Also un suc cess ful was the author's at tempt to for mu late a spe cific right to peace for Euro pean citi zens as a re ward for hav ing built in sti tu tions com mon to na tions that have gone to war with one another for cen tu ries. The es tab lish ment of Un ion in sti tu tions founded on the rule of law and the re spect for di ver sity by means of trea ties of in de ter mi- nate duration that cannot be denounced makes not only for a state of peace among the peo ples that are united by those trea ties, but also for a real guar an tee for main tain ing it.

With the exception of these attempts and others even more justified but

5 "La Carta dei dir itti fon da men tali dell'Unione eu ro pea (ovvero l'Eu ropa dopo la guerra in Ko sovo e la crisi aus tri aca", *Ques tione Gi us tizia*, no. 5, 2000, p. 937 ff.

equally un suc cess ful (such as the right to be able to bene fit, on equal con di tions, from the results of free scientific research, at least in the biomedical field), the Charter manages innovatively to embrace the main socio-economic rights and some third generation rights. This out come was un cer tain for a time be cause of the rep re sen ta tives of some coun tries like Great Brit ain who tried to limit the Charter to a strictly lib eral ho ri zon, and the Scan di na vian coun tries which did not want social rights included in the Charter for fear they might cause competencies for these mat ters to be as signed at the com mu nity level.

In the end, the docu ment guar an tees pro tec tion against un jus ti fied dis missal and a work er's right to in for ma tion and con sul ta tion, items that can not be found even in the Italian Constitution. In deed, the ob jec tions of some as so cia tions are un founded in that they claim that the Charter does not define cer tain rights with suf fi cient de tail and would like to see the Un ion ad here to the Euro pean Con vention on Hu man Rights, yet the lat ter has been to tally ab sorbed into the Char ter and the Char ter ac tu ally goes be yond it to in clude new rights and more ex ten sive protec tion of the rights found in the Con ven tion.

Conclusion

Unexpectedly, both the Court of Justice in Lux em bourg and the Court of Hu man Rights in Strasbourg were against the Charter, at least at the beginning of the draft ing pro cess, un nec es sar ily con cerned that they might lose their pre roga tives. But the Char ter fur thers the in ter ests of the law. In deed, the De haene Re port on the in sti tu tional im pli ca tions of en large ment de liv ered on 18 Oc to ber 1999[6] states that re form of the com mu nity le gal or der is es sen tial for mak ing man age ment of Euro pean af fairs more flexi ble, trans par ent and re spon si ble, on the one hand, and for offering European citizens a cata logue of their ba sic rights, on the other.

While in sti tu tional re form, car ried out by means of se cret dip lo matic ne go tiations at the in ter gov ern men tal con fer ence, has made lit tle head way and achieved unsatisfactory results, the spe cial Con ven tion con ducted with to tal trans par ency and maxi mum open ness has set the Un ion on the road to "de moc ra ti sa tion" based on the codi fi ca tion of ba sic rights. The Char ter, ex plic itly ap proved by the Com mission, the Coun cil and the Euro pean Par lia ment, was pro claimed by the presi dents of the three in sti tu tions on 7 De cem ber 2000 at Nice.

The Char ter al ready has value not only as a po liti cal docu ment and as an ID card for the Union with respect to its citizens, third countries and the countries seeking en try into it, but also le gally. In fact, the ECJ in Lux em bourg can not but take it into ac count in its prac tice. Then again, the Char ter has been quoted in the "Three Wise Men's Re port on Aus tria" and the docu ment of the Un ion's bio ethi cal

6 R. Von Weiszäcker, J.-L. De haene, D. Si mon, "The In sti tu tional Im pli ca tions of En large ment", Report to the Euro pean Com mis sion, Brus sels, 18 Oc to ber 1999.

group,[7] and will be the ba sis for the re port that the Euro pean Par lia ment's Commis sion on the free doms and rights of the citi zens draws up each year. The president of the European Parliament and the president of the Commission have of fi cially de clared that they in tend to ap ply it in te grally.[8]

Bring ing the Char ter into the Trea ties is not a su per flu ous pur suit, both because it could thereby be come the first part of a Euro pean "con sti tu tion" and because it would change the mean ing of the Trea ties them selves. Up to now the ECJ has rec og nised the fun da men tal rights only in as much as they do not com pro mise the ob jec tives of the Trea ties. By in sert ing the Char ter into the Trea ties, the ob jective of the Un ion would be come re spect for the dig nity of the in di vid ual and the entire Euro pean con struc tion would have to be meas ured by this yard stick.

7 Re spec tively, M. Ahtii sari, J. Frow hein, M. Oreja, "Re port on Aus tria by the 'Wise Men'", Strasbourg, 8 Sep tem ber 2000, pp. 4-6; and Groupe Eu ropéen d'Ethique des Sci ences et des Nou velles Tech nolo gies au près de la Com mis sion Eu ropéenne, "Les As pets Ethiques de la Richer che sur les Cel lules de Souche Hu maines et leur Utili sa tion", Brus sels, 14 No vem ber 2000.

8 See S. Ro dotà, "Ma l'Eu ropa già ap plica la nuova Carta dei dir itti", *La Repubblic* a, 3 Janu ary 2000.