The EU Charter of Fundamental Rights
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On the 7th of December, in Nice, the EU Charter of Fundamental Rights was "proclaimed" by the president of the European Parliament, Mrs Nicole Fontaine, the President of the Commission, Mr Romano Prodi and the President of the Council of Ministers/General affairs, Mr Hubert Vedrine, French Minister of foreign affairs. With reference to the exact wording of the conclusions of the European Council of Cologne (3-4 June 1999), which launched the whole process of the elaboration of a Charter of Fundamental Rights of the European Union by a body – subsequently renamed Convention –, this"proclamation" lacked "solemnity". The Charter was signed in five minutes, in the presence of the Heads of State or Government and neither Mrs Fontaine nor Mr Prodi where allowed time to deliver the speeches they had prepared for the occasion. The Charter has been published in what is still the Official Journal of the European Communities (C 364, 18 December 2000) as an intergovernmental agreement; it is now there, nourishing debate as to its significance for the entire process of European unification and integration((1)).

I. Which Fundamental Rights?

The reference to Fundamental Rights in EC law appeared in the case law of the ECJ as early as 1969 (Stauder case) and 1970 (Internationale Handelsgesellschaft case) with a view to making EC law prevail upon national law in any circumstances, including the protection of Fundamental Rights of the individuals usually guaranteed by national constitutions, a prevalence which became acceptable for the Member States as long as the Fundamental Rights applied by the Court "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 its regular reference to the rights as codified by the European Convention on the protection of Human Rights and Fundamental Freedoms (hereafter "ECHR") which tends to become a common European "Bill of Rights". The legal protection of the individual' s rights in the Union would not have suffered from such a process.

However, as underlined by the conclusions of the European Council of Cologne "at the present stage of development of the Union, it is necessary to establish a charter of these rights in order to anchor their exceptional importance and their scope in a way which will make them visible for the citizens of the Union". With the extension of EU/EC competences after Maastricht and Amsterdam and in the perspective of new adhesions, in order to compensate the democratic deficit presented 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/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 remained until then unnoticed by the European citizens. To illustrate this, the authors of the draft Charter chose to divide its 54 articles in six chapters with meaningful titles, easy to remember: dignity, freedoms, equality, solidarity, citizen right's, justice. They

used short sentences and a style as simple as possible in order to promote the acceptance of such values by EU's populations and the latter's identification with those values.
But what is the substance of such values? The European Council of Cologne had proposed that the EU Charter, in addition to the "procedural rights guaranteed in the ECHR and such as can be derived from the constitutional traditions of the Member States as general principles of Community Law", should "also contain fundamental rights to which only Union citizens were entitled". Furthermore, "fundamental social rights as set forth in the European Social Charter and in the Community Charter of Fundamental Social Rights of Employees (Article 136 of the EC Treaty) should be taken into account where they go beyond merely setting goals for the Union action"((2)).
Unanimity prevailed 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 knew that the Charter would remain "soft law" as long as the European Council would not decide differently, they bound themselves in advance to formulate 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 when stating rights which appear in the ECHR used the exact terms of the ECHR. However it must be underlined that the Charter is not a pure copy of the ECHR adopted in Rome in 1950.
On some points, the Charter brings up to date the Rome Convention; for instance the prohibition of trafficking in human beings is added to the prohibition
of 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 like the Parliament, the Commission and some Member States that expected the inclusion of social rights reflecting the importance of the social dimension of the Union, met up with resistance especially from States that do not consider such rights to be fundamental rights or to be a matter for the Union. According to the latter's view, 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 confederation of unions (CES) 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 emphasised in Article 1 of the Charter. Thus the text provides, inter alia, for the protection against unjustified dismissal as well as the right to healthy, safe and adequate work conditions in the EU. The inclusion of provisions on health care or social security and social assistance appears more as the recognition of principles than the definition of enforceable rights. On the other hand, no provision on a right to employment has been included as this is outside the competences of the Union which currently is only entitled to recommend a higher level of employment.
In contrast to social rights, there was widespread unanimity on the subject of citizen's rights which 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 in the territory of the Union, regardless of nationality. The subjects 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, employers.

II. 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 a 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 the 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 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 don't 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. As already mentioned, part of the Charter is directly based on the ECHR. Admittedly, in 1966 the ECJ ruled that "at the current stage of Community law, the Community is not competent" to accede to the ECHR((3)); 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 once again come into focus. During the debates, the proposal to make explicit reference in the Charter to the European Court of Human Rights' jurisprudence was the object 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 the Human Rights, present in the Convention as an observer, favouring the inclusion of such a reference, has had some success: there is a reference to the jurisprudence of the Strasbourg's Court in the preamble of the Charter and in the "explanations"((4)) under article 52. This must be understood as an incitement to continue and strengthen the information exchange co-operation 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 human rights cases dealt with by 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 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, including 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 (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 part of the central objectives of the Union's foreign and security policy as well as its economic development co-operation 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 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".

III. Future prospects

Another interesting aspect is the process through which the Charter was discussed in such a way that a text, which is not without shortcomings but has substance and rationale, was agreed upon in less than nine months. The Convention, composed as indicated earlier, worked in a very peculiar 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 formal vote. That unorthodox method of negotiation took place in an atmosphere of transparency; debates where open to the public and all successive drafts of the Charter made available on the web site of the Convention in order to attract comments and proposals from the part of the "civil society", which responded very positively by sending a great number of amendments.
After the Nice summit, the ICG process has been strongly criticised 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 search for consensus, could prepare the next reform, that 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 citizens with "their" Europe, could in the future become a "Bill of Rights".

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1) In this context, only some aspects of the Charter are dealt with.

2) The Preamble of the Treaty of the European Union also confirms the commitment to European Social Charter of the Council of Europe signed in Turin in 1961 and to the Community Charter of 1989 which has been signed by the UK only in 1997.

3) ECJ 2/94 Opinion, 28 March 1996, vol.1996, 1-3 p.1543.

4) 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 formulas