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Charter of Fundamental Rights of the European Union

Opinion [1]
Political Affairs Committee
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I. INTRODUCTION

1. We should be careful not to regard the drafting of a Charter of Fundamental Rights for the European Union as a purely legal matter. Political and legal aspects are inextricably linked. It could even be said that many view the charter as the culmination, or at least a very important stage, of a long political process leading to a strengthened European Union.

2. The early stages of European integration were dominated by the quarrel between the federalists (also known as the constitutionalists), who wanted to build Europe in one go, on the basis of a single text, and the functionalists, who preferred to advance at a more gradual pace. The realism of the latter group prevailed and, from the creation of the Common Market to the present day, Europe has developed through a multitude of summits, political declarations and treaties.

3. Human rights occupy a modest and at times uncertain position in this rich but inevitably vague kaleidoscope of texts, although over the years the concept has assumed greater importance through the case-law of the Court of Justice of the European Communities (ECJ), so-called "human rights clauses" in co-operation agreements with third countries and a number of new provisions contained in the Maastricht and Amsterdam treaties. We are entitled to wonder whether we are now witnessing the resurgence of the constitutionalists, who view the codification of fundamental rights

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1 See Doc. 8611

as an invaluable opportunity to bring greater coherence to the diverse mass of texts and equip the Union with a fundamental text that may act as an embryonic constitution.

4. Before discussing the merits and drawbacks of this initiative, we should stress, however, that other arguments appear to be combining in favour of the idea to draw up a charter. Since the start of European Union's enlargement process, the Union appears to have adopted a new stance, taking a more severe attitude[2] with regard to the human rights situation in applicant states.

II. WHAT EXACTLY IS MEANT BY A CHARTER OF FUNDAMENTAL RIGHTS?

5. We shall not dwell on the background to the decisions that led the European Union to set up a body with the specific task of drawing up a charter. A detailed description of this is given in various Assembly documents, in particular the report by the Committee on Legal Affairs and Human Rights. However, we should examine some of the texts and declarations that have been produced in connection with the process if we are to gain a better understanding of the instigators' intentions, the stated objectives and, in some cases, the contradictions that are evident in these texts.

6. It might be expected that the charter's supporters should have converging medium-term aims. However, as far as content, method and form are concerned, these aims appear unfocused. As things stand, work on the charter is characterised by the profusion of priorities that have been set or are envisaged. The special body therefore has an extremely tough task ahead of it.

7. In a resolution adopted in early 1996 – in other words, before the intergovernmental conference that was to prepare the amendment to the Treaty on European Union – the European Parliament stressed the importance of the section on human rights and listed a number of rights which should feature in the amended treaty. These included both "traditional" rights and other rights regarded as more innovative, such as protection against abuse, sexual harassment and anti-Semitic violence. The cultural and linguistic rights of minorities were also mentioned. In the same text, alongside the amendment of treaties, the Parliament urged the European Union to accede to the European Convention on Human Rights (ECHR).

8. The rest is history: the European Parliament's requests came to nothing, because in the meantime the ECJ delivered its famous opinion 2/94[3] of 28 March 1996. Hence the matter was not dealt with in an amendment to the Amsterdam Treaty, the European Union was unable to accede to the ECHR and the question was simply put on the back burner until, on the initiative of the German government, it resurfaced, firstly in Cologne in June and then at the Tampere summit in October 1999.

9. Careful reading of the conclusions of the European Council meeting in Tampere reveals a wide range of proposals aimed at paving the way for an "area of freedom, security and justice". The text attempts to reconcile the imperatives of internal order within the Union and its requirements with regard to external relations. The draft charter has a role to play in this impressive search for coherence and is described as being closely linked to the three areas mentioned above, although no indication of its content is given. However, the individual sections of the Tampere conclusions contain frequent references to matters such as asylum, immigration, access to justice, family law and extradition.

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2 Article 7 of the Amsterdam Treaty (Article F.1 of the Treaty on European Union) provides that the Council may take measures against a member state failing to respect human rights by suspending the rights deriving from the application of the treaty, including voting rights within the Council. This article may be regarded as a "shield" against any abuses by future members.

3 For the wording, see Doc. 8611, paragraph 15.

10. At a press conference a few days before the adoption of the Tampere conclusions, the two co-rapporteurs of the European Parliament, MM Duff and Voggenhuber, reiterated the latter's views that the text should not be an empty declaration with no obligations but should be innovative and legally binding. Mr Voggenhuber added that there were an increasing number of "empty rights" within the Union because texts had not been translated into tangible rights. He felt that the future charter should also contain provisions on refugees, bioethics and data protection.

11. The management and labour and NGO representatives, in particular the representatives of the European Trade Union Confederation (ETUC), Amnesty International and the International Federation of Human Rights Leagues (FIDH), appeared to be unanimous in favouring the inclusion of social rights in the charter. The ETUC felt that the charter should be an integral part of the treaties forming the European Union and should include not only provisions taken from existing international legal instruments, but also new provisions dealing with "transnational trade union rights". In a preliminary communication to the European Council, Amnesty International and the FIDH stated that a charter would be pointless unless it offered better protection than the ECHR. They warned the Council that if such a project were to be embarked upon, discrimination in the treatment of non-EU citizens should be avoided. While certain "political" rights (for example, concerning elections) could be made available to European Union citizens only, "civil" rights should be guaranteed for everyone.

12. The various viewpoints summarised above[4] clearly illustrate that at present, a consensus on the content of the charter would appear to be a long way off. Although the idea itself is praiseworthy, its boundaries are vague and there is therefore a danger that it might become a forum for a variety of far-fetched ambitions and interest groups. Are we to infer from this that the project cannot meet our expectations because it conveys a fragmentary notion of the purpose of the Union? We shall return to this point.

III. THE EUROPEAN UNION'S COMMITMENT TO HUMAN RIGHTS – A FEW POTENTIAL PROBLEMS

13. The statement made in paragraph 5 of Mr Magnusson's report that the Communities have always shown an interest in human rights is not entirely correct. It is a well-known fact that the texts instituting the Communities did not contain a single reference to human rights, with the exception of freedom of movement. Not until the 1986 Single European Act was the subject mentioned explicitly.

14. It should not be forgotten that originally, the ECSC first of all and then the EEC were primarily economic concepts. Initially, therefore, the body of Community law was built up around principles of economic liberalism and not equality and non-discrimination. In contrast, it was always difficult to incorporate concepts relating to social rights, for example, into an economics-oriented legal system.

15. We should applaud the efforts made in recent years within the Union to move away from and indeed transcend the by and large economic philosophy of the initial years. The institution of a "European citizenship", the inclusion into the Maastricht Treaty of strengthened social objectives and rights (even though they were limited in scope and have not been accepted by all member states) and the multiplication of "joint positions" with regard to the protection of human rights in non-member countries are all new and encouraging factors towards this end.

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4 The main aspects of the report by the Expert Group on Fundamental Rights are described in detail in Doc. 8611 and have therefore not been reproduced here.

16. Nonetheless, some of the principles and rights proclaimed continue to cause problems. The concept of "citizenship" established by the Maastricht Treaty is limited to the right to vote in the elections for the European Parliament and the right to participate in municipal elections in the host country. Does this restricted concept correspond to the leading role which the European Union should be playing in promoting political rights throughout the continent? The same is true for the Schengen agreements and the right of asylum. The emergence of Community solidarity and policy has had the indirect effect of making asylum seekers' rights more restricted than they were before. The Schengen area which is aimed as a response to a security deficit and which could spread to encompass the whole of the European Union is increasing the number of control measures and making it more difficult for all categories of non-EU travellers to obtain visas. Asylum seekers' rights have become more limited because:

- asylum requests submitted by foreigners having transited a state in which there is no risk of persecution in principle are rejected[5];
- asylum requests between European Union member states are not accepted[6].

17. An analysis of Community texts shows two things:

- it is very difficult to identify what may be termed "fundamental" rights,
- the noble declarations of principle of the European Union institutions are often at variance with a restrictive application of these principles, which can on occasion lead to effects which are contrary to the original intentions.

Accordingly, it is necessary to rework and amalgamate these texts.

18. European integration has always been a difficult and controversial process. In this field, there are likely to be further reserved reactions from certain European Union member states, if only in the name of the subsidiarity principle. The problems of competition and duplication of effort between the draft "charter" and the ECHR have been sufficiently developed by the Committee on Legal Affairs and Human Rights. I share Mr Magnusson's view that the division of responsibilities between the two Courts does not need to be an obstacle and could be overcome by adjustments of a legal or practical nature.

19. The question we are faced with is more a political one. Is it not so that the initiative taken by the European Union to provide itself with a Charter of Fundamental Rights is rather an expression of the will of certain member states to establish a new political entity, which is more introspective in its self-satisfaction and self-sufficiency, and therefore indifferent to what takes place outside its borders? Is there not a danger that the Union could develop into a club of well-off democracies, considering itself to be the élite, disregarding the rest of Europe and behaving in a way which could lead to a rift in Europe, a new split, a new "wall"? This would be politically disastrous.

20. The European Union cannot wish to break itself off from this broader Europe represented by the Council of Europe. It can even less jeopardise the work of promoting democracy and human rights undertaken over the last 50 years by the Council of Europe, by setting up, alongside and outside the framework of the ECHR, something similar but competing. It should in contrast consolidate this work, by being part of it by acceding to the ECHR and, therefore, accepting that on

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5 Council resolution by the ministers responsible for immigration (30 November 1992)

6 Protocol to the Treaty of Amsterdam

the legal level it should be subject to the control mechanisms provided for in the ECHR with regard to its acts and decisions in the field of fundamental rights. If it does not, it risks negating the achievements of the last 50 years which should be maintained in the interests of the rest of Europe which is not yet (for some time to come) or which will never be in the European Union.

IV. CONCLUSIONS

21. On the basis that developments in the European Union are moving towards an extension and consolidation of fundamental rights, already proclaimed in fragmentary documents or those still being worked on, we are faced with the fundamental question of how best this objective can be achieved.

22. In essence, the answer is perhaps to be found in the ECJ's opinion 2/94. In speaking against EU accession to the ECHR, given the current state of the Community legal system, the Court expressed the view that "... such a modification ... would be of constitutional significance...". We note here the last two words which imply a revision of the treaties and denote the dividing line between the responsibilities of judges and politics.

23. Today, a constitution is no longer, as before, a set of rules governing the relationships between political institutions, but increasingly a catalogue of individual rights and freedoms. The proposal to amend the treaties to incorporate fundamental rights therefore comes down to likening all the treaties to a constitution. This notion could and should mark the starting point for any attempt to merge the various texts into a single one, in other words into a constitution of the European Union.

24. We know that in the European Parliament there are those who defend the idea of putting the Union onto a constitutional footing. This will doubtless be a long process but an essential one if the Union is to be thoroughly reformed. For some of them, the drafting of a Charter is an integral part of this constitutional process. Even though I share their fervour for the further development of the Union, our views are different with regard to the method and timing.

25. I would especially like them to be on their guard against the temptations of the isolationism of a European Union which is too self-focused and, consequently, unaware of the worthwhile achievements made and being made outside it in the field of the protection of fundamental rights, in other words the ECHR. Rather, the European Union should become part of it in order to reinforce it. It should therefore accede to the ECHR and overcome the legal obstacles which have been put forward hitherto. This is essential for a coherent political vision of the future of Europe.

26. The European Union, which has now become a world power in all sectors, and which will soon be enlarged, can no longer govern itself by a multitude of treaties; rather it deserves a single constituent text incorporating the principles of democracy, the rule of law and human rights. The European Union should provide itself with an internal legal system which corresponds to its world role and its requirements in its relations with non-member countries. This new strategy should reduce the trend towards "fortress Europe" which is hostile to foreigners; it should include a new approach to combat the evils of racism, xenophobia and ethnic violence; it should also incorporate the results of a reflection on new information technologies and communications and their impact on society. It should be comprehensive, contemporary and effective.

27. Pending this, an intermediary formula should be found to enable the European Union to accede to a series of the Council of Europe's fundamental treaties, not only the ECHR, but also other legal instruments, such as the Framework Convention for the Protection of National

Minorities, the Bioethics Convention, the Data Protection Convention and, obviously, the European Social Charter.

28. The ECHR has today become, above and beyond its standard-setting role, a reference of political culture and civilisation. Its acceptance is also a precondition for accession to the European Union. It is not normal, under such conditions, for the European Union not yet to be part of it. I am convinced that the European Union's accession to these instruments would enable its sensitivities and viewpoints to have an influence on their developing case-law and, conversely, this case-law could serve as a basis for the future revision of the European Union constituent texts.

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Secretaries to the committee: Mr Perin, Mr Sich, Ms Ruotanen, Ms Hügel-Maffucci