THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION:

the *travaux préparatoires* and selected documents

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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPEENNE

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CONTRIB 1

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après un rapport de position établi par la Fédération Internationale des Ligues des Droits de l'Homme (Fidh) [1].

[1] Ce document n'a été transmis qu'en langue française.

Une Charte des droits fondamentaux pour l'Union européenne : un réel progrès ?

Sommaire

Le Conseil européen de Cologne des 3 et 4 juin 1999 a affirmé son intention d'«*établir une charte des droits fondamentaux afin d'ancrer leur importance exceptionnelle et leur portée de manière visible pour les citoyens de l'Union*». Le Conseil extraordinaire de Tampere des 15 et 16 octobre 1999 a mis sur pied l'enceinte pour l'élaboration du projet de charte des droits fondamentaux de l'Union européenne, définissant sa composition, sa méthode de travail et ses modalités pratiques de fonctionnement (voir Annexe). Jusqu'à présent, les discussions ont essentiellement porté sur des questions de procédure. Le temps est à présent venu de réfléchir aux enjeux d'une telle charte, dont la portée ne saurait demeurer symbolique.

En effet, la FIDH considère que la seule justification possible à l'adoption d'une Charte européenne, alors que tous les Etats membres sont déjà parties à la Convention européenne des droits de l'Homme, réside dans l'adoption d'une Charte qui soit davantage protectrice que la Convention européenne elle-même.

La FIDH demande, depuis plusieurs années, que la Communauté européenne adhère à la Convention européenne des droits de l'Homme, ainsi qu'à la Charte sociale européenne et à son Protocole additionnel prévoyant un système de réclamations collectives (1995). Lorsque tous les Etats membres de l'UE auront ratifié la Charte sociale européenne révisée, la Communauté devrait à son tour ratifier cette dernière.

La FIDH maintient sa position à cet égard, et considère que le débat sur l'adoption d'une nouvelle Charte des droits fondamentaux de l'UE ne doit en aucune façon reléguer cette question au second plan.

Par ailleurs, la FIDH se réserve de préciser sa position concernant l'adoption d'une nouvelle Charte en fonction du projet dont elle aura pu prendre connaissance. Si le nouvel instrument n'aboutit pas à un renforcement de la protection des droits de l'Homme qui prévaut actuellement, la FIDH n'hésitera pas à prendre position **contre** l'adoption d'un tel instrument. C'est le degré de protection effectif, réel, qui guidera le choix de notre organisation.

Il serait souhaitable qu'à l'occasion de l'adoption de la Charte des droits fondamentaux de l'Union européenne, la Communauté européenne se voie investie de la compétence d'adhérer aux instruments internationaux de protection des droits de l'Homme qui présentent un rapport avec les compétences déjà attribuées à la Communauté. A défaut, les Etats membres de l'Union européenne pourraient être accusés d'avoir surtout adopté ladite Charte afin de protéger l'ordre juridique communautaire contre toute tentation de la part de la Cour européenne des droits de l'Homme d'effectuer un contrôle plus poussé de la garantie qu'y reçoivent les droits fondamentaux. Il n'est pas indifférent à cet égard que le Conseil de Cologne à l'occasion duquel l'idée de la Charte des droits fondamentaux de l'Union européenne a été lancée à l'initiative de la présidence allemande, ait pris place quatre mois après l'arrêt *Matthews c. Royaume-Uni* de la Cour européenne des droits de l'Homme, dans lequel celle-ci affirme en termes nets que «*La Convention n'exclut pas le transfert de compétences à des organisations internationales, pourvu que les droits garantis par la Convention continuent d'être 'reconnus'. Pareil transfert ne fait donc pas disparaître la responsabilité des Etats membres*» (para. 32 de l'arrêt).

Il serait regrettable que l'initiative de l'élaboration d'une Charte des droits fondamentaux de l'Union européenne ait pour objectif – et, sinon pour objectif, pour conséquence – de placer le droit communautaire, autant que possible, à l'abri d'un contrôle de la Cour européenne des droits de l'Homme, et ainsi, de permettre aux Etats membres de l'Union d'échapper à la «responsabilité conjointe» qui est la leur, vis-à-vis de la Convention européenne des droits de l'Homme, dans l'élaboration du droit communautaire. L'adoption de la Charte des droits fondamentaux de l'Union européenne pourrait en effet avoir un tel effet, compte tenu de ce que la jurisprudence récente de la Cour européenne des droits de l'Homme, telle qu'elle résulte de l'arrêt Matthews précité, n'a pas formellement rejeté le raisonnement qui était à la base de la jurisprudence antérieure de la Commission européenne des droits de l'Homme. Cette jurisprudence considérait en effet que "*le transfert de pouvoirs à une organisation internationale n'est pas incompatible avec la Convention, à condition que, dans cette organisation, les droits fondamentaux reçoivent une protection équivalente*" (Cf. DH, déc. Meelchers et Co. c. RFA, du 9 février 1990, req. n°13258/87). Compte tenu de cette jurisprudence, l'adoption d'une Charte des droits fondamentaux au sein de l'Union européenne, dont le respect serait susceptible de contrôle juridictionnel de la part de la Cour de justice des Communauté européenne (CJCE), pourrait être de nature à encourager une contrôle moins exigeant de la part de la Cour européenne des droits de l'Homme sur les actes de droit communautaire, ou sur les actes étatiques qui s'inscrivent dans le champ d'application du droit communautaire.

La FIDH considère que l'adoption d'une nouvelle Charte des droits fondamentaux de l'UE génère au moins cinq enjeux, lesquels sont interdépendants et devront être examinés attentivement dans le cadre de l'enceinte chargée de l'élaboration de la Charte.

Le présent rapport de position part du postulat que la Charte des droits fondamentaux de l'Union européenne ne se présentera pas sous la forme d'une Déclaration solennelle des institutions communautaires (Commission, Conseil et Parlement européens), mais sous la forme d'un chapitre additionnel au traité sur l'Union européenne ou au traité CE.

Si la Charte ne devait faire l'objet que d'une Déclaration solennelle, sa valeur ajoutée par rapport à la protection déjà reconnue aux droits fondamentaux dans l'Union européenne serait faible ou nulle. L'initiative pourrait dans ce cas être suspectée de ne répondre qu'à des préoccupations démagogiques : gagner l'adhésion des citoyens au projet européen parfois en manque de légitimité. Les personnes vivant sur le territoire de l'UE seraient très surprises si elles ne pouvaient pas se prévaloir des droits inscrits dans la nouvelle Charte. A terme, une telle opération porterait atteinte à la crédibilité du projet européen.

Il convient cependant de préciser que la note est élaborée à un moment où la forme que revêtira la Charte n'a pas encore été tranchée.

I. Droits fondamentaux à reconnaître dans la Charte des droits fondamentaux de l'Union européenne

Le contenu des droits qui vont figurer dans la Charte doit tenir compte du statut qui est actuellement déjà reconnu aux droits fondamentaux dans l'Union européenne, statut par rapport auquel la Charte doit constituer une source de progrès.

A l'heure actuelle, les droits fondamentaux qui figurent parmi les principes généraux du droit communautaire[1] dont la CJCE assure le respect, sont puisés aux traditions constitutionnelles communes aux Etats membres et dans les instruments internationaux de protection des droits de l'Homme auxquels les Etats membres ont adhéré ou coopéré[2][3]. Aux droits ainsi identifiés s'ajoutent des droits propres à l'ordre juridique communautaire[4]. Ces sources s'interpénètrent fréquemment, si bien qu'il n'est pas toujours aisé d'identifier l'origine du droit fondamental que la Cour de justice choisit d'intégrer parmi les principes généraux du droit communautaire[5].

a) Les droits fondamentaux figurant dans les instruments internationaux relatifs aux droits de l'Homme auxquels les Etats membres ont adhéré ou à l'élaboration desquels ils ont participé

Parmi l'ensemble des droits ainsi consacrés par la jurisprudence communautaire - qui leur reconnaît le statut de principes généraux du droit communautaire, sur lequel l'on revient ci-dessous (Titre IV) -, il en est que la CJCE est tenue de respecter en vertu du droit communautaire lui-même.

L'article 307 du traité CE (anc. art. 234 du traité CE, amendé) dispose en effet que «*Les droits et obligations résultant de conventions conclues antérieurement*» à leur adhésion aux Communautés européennes par les Etats membres de celles-ci, «*entre un ou plusieurs Etats membres, d'une part, et un ou plusieurs Etats tiers, d'autre part, ne sont pas affectés par les dispositions du présent traité*» (al. 1). La véritable raison d'être de cet article n'est pas uniquement, comme le suggère la CJCE, de «*lever l'obstacle pouvant résulter pour un Etat membre à son adhésion à la Communauté, en ce qui concerne l'exécution de conventions antérieurement conclues avec des Etats tiers*»[6]. Elle n'est pas politique, mais juridique, en ce qu'elle est imposée par le droit international lui-même, qui ne permet pas qu'un Etat puisse échapper à ses obligations envers des Etats tiers par la conclusion d'un traité international postérieur[7].

A moins que l'on ne soit prêt à accepter une exception au principe de l'uniformité d'application du droit communautaire, chaque fois que celui-ci impose aux Etats membres des obligations contraires à celles contractées antérieurement par cet Etat dans l'ordre juridique international (ce qui serait la conséquence immédiate de l'article 307 du traité CE), cette disposition vise en réalité à prévenir de telles situations. **Elle oblige les institutions communautaires à ne pas prendre de dispositions contraires aux engagements antérieurs des Etats membres, si ces dispositions ne peuvent être respectées de manière uniforme à travers l'ensemble de la Communauté.**

Précisément, cela signifie que l'élaboration du droit communautaire doit tenir compte notamment des instruments internationaux relatifs aux droits de l'Homme suivants[8], chacun de ces instruments ayant été ratifié par au moins un Etat membre de l'Union européenne avant le 1er janvier 1958, date d'entrée en vigueur du traité de Rome, ou avant l'adhésion de cet Etat aux Communautés ou à l'Union européenne :
- la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, ouverte à la signature le 4 novembre 1950 (STE, n°5), entrée en vigueur le 3 septembre 1955 à l'égard de cinq des six Etats membres originaires de la Communauté économique européenne ;
- le Protocole n°1 additionnel à la Convention européenne des droits de l'Homme, ouvert à la signature le 20 mars 1952 (STE, n°9), entré en vigueur le 18 mai 1954 ;
- les dispositions de la Charte sociale européenne, ouverte à la signature le 18 octobre 1961 (STE, n°35), entrée en vigueur le 26 février 1965, qui étaient déjà acceptées par les Etats (Royaume-Uni, Irlande, Danemark, Grèce, Espagne, Portugal, Finlande, Suède, Autriche) lors de leurs adhésions respectives aux Communautés ou à l'Union européennes ;
- le Protocole n°4 à la Convention européenne des droits de l'Homme, ouvert à la signature le 16 septembre 1963 (STE, n°46), entré en vigueur le 2 mai 1968 ;
- la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, ouverte à la signature le 21 décembre 1965 (660 UNTS 195), entrée en vigueur le 4 janvier 1969 ;

- le Pacte international relatif aux droits civils et politiques, ouvert à la signature le 16 décembre 1966 (999 UNTS 171), entré en vigueur le 23 mars 1976 ;
- le Pacte international relatif aux droits économiques, sociaux et culturels, ouvert à la signature le 16 décembre 1966 (993 UNTS 3), entré en vigueur le 3 janvier 1976 ;
- la Convention sur l'élimination de toutes les formes de discrimination envers les femmes, ouverte à la signature le 18 décembre 1979, entrée en vigueur le 3 septembre 1981 ;
- la Convention pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel, ouverte à la signature le 28 janvier 1981 (STE, n°108), entrée en vigueur le 1er octobre 1985 ;
- le Protocole n°7 à la Convention européenne des droits de l'Homme, ouvert à la signature le 22 novembre 1984 (STE, n°117), entré en vigueur le 1er novembre 1988;
- la Convention internationale relative aux droits de l'enfant, ouverte à la signature le 20 novembre 1989, entrée en vigueur le 2 septembre 1990.
- certaines conventions fondamentales adoptées dans le cadre de l'Organisation Internationale du Travail.

L'énumération de ces instruments appelle deux précisions complémentaires, le caractère non limitatif de cette énumération ayant déjà été souligné.

La première précision concerne **l'effet normatif** de l'article 307 du traité CE[9]. Alors que cette disposition ne constitue que la traduction, dans le traité CE, du principe de la force obligatoire des traités internationaux et de leur effet relatif, la Cour de justice des Communautés européennes a dû se prononcer sur l'étendue des obligations qui résultaient de cet article pour les institutions communautaires, elles-mêmes. Dans des arrêts rendus notamment à propos de l'effet des conventions de l'OIT sur le travail de nuit des femmes[10] ou de la convention unique de 1961 sur les stupéfiants[11], elle a décidé qu'il résultait de cet article que, lorsqu'une convention conclue par un Etat membre antérieurement à l'entrée en vigueur du traité CEE ou à son adhésion lui imposait certaines obligations, ce qu'il appartient aux juridictions nationales de vérifier, l'exécution de ces obligations internationales peut faire obstacle à l'application du droit communautaire, uniquement dans la mesure où il n'est pas possible à l'Etat d'en assurer l'exécution fidèle de manière compatible avec le droit communautaire. Il en résulte pour les institutions communautaires «*l'obligation (...) de ne pas entraver l'exécution des engagements des Etats membres découlant d'une convention antérieure. Toutefois, cette obligation des institutions communautaires ne vise qu'à permettre à l'Etat membre concerné d'observer les engagements qui lui incombent en vertu de la convention antérieure* ***sans, pour autant, lier la Communauté à l'égard de l'Etat membre intéressé***»[12].

Ainsi, si l'article 307 CE permet de justifier certaines dérogations au principe de l'applicabilité uniforme du droit communautaire, et ainsi d'en réduire l'effectivité, il n'a pas pour effet d'imposer de nouvelles obligations à la Communauté dans l'ordre juridique international. Il ne saurait en aller autrement, conformément aux principes généraux du droit international, que dans l'hypothèse où la Communauté se substitue aux engagements internationaux d'un ou de plusieurs Etats membres, par la conclusion d'un nouvel accord qui, avec le consentement de tous les partenaires, prend la place du premier.

Dès lors, si les instruments internationaux relatifs aux droits de l'Homme qu'on a énumérés doivent être pris en compte dans l'élaboration de la Charte des droits fondamentaux de l'Union européenne, ce n'est pas parce que ces instruments obligeraient les Communautés ou l'Union européennes dans l'ordre juridique international, mais parce que si leurs prescrits ne sont pas respectés dans l'élaboration du droit communautaire, l'uniformité d'application de ce dernier à travers l'ensemble de la Communauté européenne est menacée. Cela pourrait notamment conduire à des distorsions de concurrence[13] entre les entreprises selon l'Etat membre sur le territoire duquel elles conduisent leurs activités. Ainsi, par exemple, si les obligations imposées aux entreprises dans le domaine social ne sont pas uniformes sur tout le territoire de l'UE, des distorsions de concurrence en résulteraient.

La seconde précision concerne le cas particulier des **instruments internationaux relatifs aux droits de l'Homme qu'un Etat membre ratifie à un moment où il a déjà adhéré à l'Union européenne**, et où, par conséquent, l'article 307 du traité CE ne s'applique pas. Les règles qui, dans le droit international public, régissent la conclusion de traités successifs par un même Etat, conduisent à conclure que la responsabilité internationale de cet Etat, vis-à-vis des autre parties au traité postérieur, ne saurait être engagée pour les conséquences qui résultent du traité antérieur. Ainsi notamment, un Etat membre de l'Union européenne ne pourra normalement être tenu de répondre des conséquences qui pourraient résulter des actes de droit dérivé communautaire à l'adoption desquels il n'a pas pu s'opposer, même si ces conséquences sont en violation d'un instrument international de protection des droits de l'Homme auquel il a adhéré, lorsque ce dernier instrument est entré en vigueur à son égard à un moment où il était déjà membre de l'Union européenne.

Par contre, dans cette hypothèse, l'Etat demeure tenu de s'opposer à toute révision des traités constitutifs des Communautés européennes, ou à toute révision du traité sur l'Union européenne, dont l'effet serait d'aboutir à une violation des droits fondamentaux qu'il s'est engagé à respecter. Même si l'adhésion d'un Etat à un instrument international de protection des droits de l'Homme est postérieure à son adhésion à l'Union européenne, le fait de ratifier cet instrument crée dans le chef de l'Etat ce qu'on pourrait qualifier d'obligation de *standstill* (non-rétrogression) : l'Etat doit s'opposer, au sein de l'Union européenne, à toute évolution qui ne peut avoir lieu sans son assentiment, c'est-à-dire qu'il a le pouvoir d'empêcher, si pareille évolution risque de conduire à une violation des droits de l'Homme que cet Etat s'est internationalement engagé à respecter.

Telle était précisément l'hypothèse de l'affaire *Matthews c. Royaume-Uni*, qui a donné lieu le 18 février 1999 à un arrêt de la Cour européenne des droits de l'Homme dans lequel celle-ci condamne le Royaume-Uni pour avoir consenti à une extension des pouvoirs du Parlement européen lors des négociations du traité de Maastricht sur l'Union européenne, sans obtenir concomitamment une extension du droit de suffrage aux élections européennes au bénéfice des habitants de Gibraltar.

Un aspect notable de l'arrêt est en effet que la disposition violée était l'article 3 du Protocole n°1 à la Convention européenne des droits de l'Homme, alors que ce protocole s'applique à Gibraltar depuis le 25 février 1988, date postérieure à l'adhésion du Royaume-Uni aux Communautés européennes. Selon la Cour européenne des droits de l'Homme[16], «*La Convention n'exclut pas le transfert de compétences à des organisations internationales, pourvu que les droits garantis par la Convention continuent d'être 'reconnus'. Pareil transfert ne fait donc pas disparaître la responsabilité des Etats membres*»[17].

Ainsi, s'il est loisible aux Etats membres de l'Union européenne de progresser sur la voie de l'union politique, en réalisant une intégration toujours plus poussée, c'est à condition de ne pas aller à l'encontre de leurs engagements internationaux en matière de droits de l'Homme, sans qu'y change quoi que ce soit la circonstance que l'intégration était déjà entamée avant leur adhésion aux instruments où ces engagements sont inscrits.

b) Les droits fondamentaux émanant des traditions constitutionnelles communes des Etats membres

Il résulte du paragraphe précédent que la Charte des droits fondamentaux de l'Union européenne doit au moins comprendre les droits fondamentaux inscrits dans les instruments internationaux de protection des droits de l'Homme énumérés. L'inclusion de ces droits est incontournable si la Charte a notamment pour objectifs (1) de faciliter le respect par les Etats membres de l'Union européenne de leurs engagements internationaux en matière de droits de l'Homme (la Charte devant alors énumérer des droits de façon telle que le processus d'intégration européenne pourra progresser sans que la responsabilité internationale des Etats membres risque d'être engagée au regard des instruments internationaux relatifs aux droits de l'Homme auxquels ils ont adhéré) et (2) d'éviter une mise en cause de l'uniformité d'application du droit communautaire, telle que la rend possible l'exception que ménage l'article 307 du traité CE. Cette disposition peut en effet être invoquée par un particulier devant une juridiction nationale pour inviter celle-ci à écarter la disposition du droit communautaire qui s'avèrerait incompatible avec un traité international entré en vigueur à l'égard de l'Etat dont ce juge est l'organe avant son adhésion à l'Union européenne.

La Charte des droits fondamentaux de l'Union européenne pourrait tendre non seulement à éviter une mise en cause de **l'uniformité d'application** du droit communautaire sur l'ensemble du territoire de l'Union européenne, mais aussi à assurer la **primauté** du droit communautaire.

L'on sait en effet que cette primauté n'a été admise, notamment par le Tribunal constitutionnel fédéral allemand, que dans la mesure où la protection des droits fondamentaux dans l'ordre juridique communautaire demeure à un niveau suffisamment protecteur de l'individu[18]. Soucieuse de ne pas reconnaître la subordination du droit communautaire aux ordres juridiques nationaux, y compris dans l'identification des principes généraux du droit communautaire dont elle assure le respect, la CJCE a parfois explicitement[19] refusé d'aligner sa jurisprudence relative aux droits fondamentaux sur le droit national le plus protecteur[20]. Elle court ainsi le risque, délibérément, d'un démenti de la part du juge constitutionnel national, si celui-ci choisit de faire primer les garanties de sa constitution étatique sur la reconnaissance de la primauté du droit communautaire.

Afin de mettre un terme aux doutes qui entourent encore les rapports entre ordre juridique communautaire et ordre juridique national – doutes que la décision du 12 octobre 1993 du Tribunal constitutionnel allemand[21] relative à la constitutionnalité du traité de Maastricht sur l'Union européenne a encore ravivés -, la Charte des droits fondamentaux de l'Union européenne devrait être élaborée avec le souci de faire prévaloir le niveau de protection le plus élevé, en alignant systématiquement le niveau de protection du droit communautaire sur la protection constitutionnelle la plus forte.

c) Autres sources d'inspiration de la Charte des droits fondamentaux de l'Union européenne

Des motifs proprement juridiques incitent à proposer l'intégration dans la Charte des droits fondamentaux de l'Union européenne des droits figurant dans les deux sources mentionnées. Le même raisonnement ne peut en revanche être tenu à propos de l'intégration des garanties, particulièrement développées, qui figurent dans la Charte communautaire des droits sociaux fondamentaux des travailleurs, adoptée en décembre 1989 par onze Etats des douze Etats alors membres des Communautés européennes [19].

La FIDH est cependant favorable à l'intégration des garanties de cette Charte des droits sociaux fondamentaux des travailleurs dans la Charte des droits fondamentaux de l'Union européenne. La question centrale est celle de l'opportunité d'énoncer des droits sociaux dans la Charte – lesquels droits seraient alors juridiquement contraignants [20] et susceptibles de produire des effets juridiques immédiats. A l'heure actuelle, la Charte de 1989 se limite en effet [21] à définir les objectifs à atteindre par un programme législatif d'adoption du droit communautaire dérivé.

L'ensemble des droits de l'Homme - civils, politiques, économiques, sociaux et culturels – sont interdépendants et indivisibles. Ces principes ont été consacrés dans la Déclaration de Vienne de 1993, mais ont également été régulièrement réaffirmés depuis par l'UE elle-même. Le Premier Rapport annuel de l'Union européenne sur les droits de l'Homme est rédigé en des termes dépourvus de toute ambiguïté à cet égard.

Il serait paradoxal et difficilement justifiable qu'à l'heure où cette indivisibilité et cette interdépendance sont reconnues par l'ensemble des Etats membres de l'UE, le nouvel instrument envisagé ne couvre pas l'ensemble de ces droits.

Par ailleurs, le Premier Rapport annuel de l'Union européenne sur les droits de l'Homme souligne le besoin pour l'Union d'identifier des mesures concrètes que les gouvernements pourraient adopter pour renforcer la jouissance des droits économiques, sociaux et culturels, afin qu'ils deviennent une réalité pour tous. L'adoption d'une Charte incluant les droits économiques, sociaux et culturels serait un premier pas dans le sens d'une promotion et d'une protection renforcées de ces droits.

II. Catégories de droits fondamentaux

La notion de «droits sociaux» figure déjà dans les paragraphes qui précèdent, à différents endroits, pour désigner deux réalités distinctes qu'il importe de ne pas confondre en dépit de leur homonymie.

Le terme «droits sociaux» s'applique d'abord, dans certains cas, aux droits fondamentaux qui sont invoqués dans le contexte de l'emploi ou de la relation de travail : l'on y fera figurer, par exemple, le droit au respect de la vie privée du travailleur dans les rapports d'emploi, le droit à la liberté de circulation comprise comme droit d'accès à un emploi offert, ou la liberté d'association syndicale.

Seuls méritent un bref commentaire les droits qualifiés de «sociaux» non parce qu'ils seraient invoqués dans le contexte d'un rapport d'emploi, mais parce que, impliquant des prestations de la part de l'Etat, leur justiciabilité est parfois contestée, c'est-à-dire qu'il est parfois difficile de les invoquer devant le juge (juge national ou juge communautaire) afin que celui-ci en garantisse le respect. Tel est le cas par exemple du droit à une rémunération équitable (art. 4 de la Charte sociale européenne (CSE)), du droit à une formation professionnelle (art. 9 de la CSE), du droit à une protection sociale adéquate (art. 13 et 14 de la CSE), ou du droit à l'intégration professionnelle et sociale des personnes handicapées (art. 15 CSE).

Le droit international des droits de l'Homme affirme aujourd'hui l'identité de principe entre les droits dits «civils et politiques» et les droits «économiques et sociaux», lesquels réclament généralement une intervention de la part de l'Etat, notamment par l'engagement de ressources budgétaires. Cette tendance [22] n'est pas seulement doctrinale. Elle se manifeste d'ailleurs de façon spectaculaire dans la jurisprudence de la Cour européenne des droits de l'Homme, lorsque celle-ci reconnaît les prolongements d'ordre économique et social que peuvent appeler, pour leur effectivité, les droits que la Convention européenne des droits de l'Homme énonce, ce qui se traduit par [23] l'imposition à l'Etat d'obligations positives impliquant l'engagement de certaines ressources budgétaires.

La même tendance se traduit en outre, dans la jurisprudence, par l'émergence d'une série de techniques qui permettent d'atténuer la séparation entre les deux catégories de droits, selon qu'ils appellent ou non des prestations de la part de l'Etat. Ces techniques sont d'autant plus à rappeler qu'elles connaissent des manifestations en droit communautaire, précisément quand ce droit ne peut être appliqué directement et afin que son effectivité soit néanmoins garantie.

Une première technique consiste à permettre au particulier dont le droit à certaines prestations a été violé d'agir contre l'Etat **en réparation du dommage subi** du fait du manquement de celui-ci à son obligation internationale, au contentieux de la responsabilité[23]. L'utilisation de cette technique afin d'assurer l'effectivité des droits sociaux repose sur l'idée que, s'il peut être délicat pour un juge de se substituer au législateur afin de donner un contenu concret et précis aux droits sociaux invoqués devant lui, en revanche, il n'est pas exclu que le juge puisse en constater la violation lorsque celle-ci est manifeste, et évaluer le dommage éventuel qui en résulte dans le chef du demandeur en responsabilité. Point n'est besoin pour un juge de mettre sur pied un système de formation professionnelle, s'il peut constater le manquement à son obligation internationale dont l'Etat se rend coupable en ne prenant aucune mesure en matière de formation professionnelle, alors que, l'offre et la demande de main d'oeuvre sur le marché du travail ne se rencontrant pas, subsiste un chômage massif. Face à l'inscription de droits sociaux dans la Charte des droits fondamentaux de l'Union européenne, on peut concevoir que le juge communautaire procède vis-à-vis de ces droits comme vis-à-vis des droits attribués par une directive communautaire que l'Etat n'a pas transposée dans les délais impartis : en affirmant que la méconnaissance de l'obligation de mettre en oeuvre lesdits droits «impose un droit à réparation»[24].

Une seconde technique consiste à imposer le respect d'une obligation de *standstill*, ou de non-rétrogression, à l'Etat qui s'est engagé au respect de certains droits sociaux qui n'ont pas été définis avec une précision suffisante, et ainsi ne peuvent comme tels fournir au juge le fondement nécessaire à sa décision de justice. Il s'agit à travers l'affirmation d'une telle obligation d'interdire de **réduire le niveau de protection déjà atteint** de ces droits. Entre les mains du juge, cette doctrine se traduit par le refus d'application de la règle qui, postérieure à la règle d'où l'obligation de *standstill* est déduite, prétend diminuer le niveau de protection du droit, par rapport au niveau qui était le sien au moment de l'entrée en vigueur de la règle imposant l'obligation de *standstill* : à la règle qui risque de diminuer le niveau de protection du droit déjà atteint, le juge préfèrera substituer la règle antérieure, ou le droit commun, qui avait permis d'atteindre tel niveau de protection déterminé. Ici encore, un tel effet de substitution n'est pas inconnu du droit communautaire, la CJCE. ayant, par exemple, résolu par le recours à une technique semblable le problème résultant du silence de la directive 76/207 relative à l'égalité de traitement quant au niveau des sanctions que la loi nationale d'un Etat membre doit prévoir dans l'hypothèse de violation de la règle de non-discrimination[25].

Une troisième technique résulte de **la combinaison de l'affirmation de tel droit requérant certaines prestations de la part de l'Etat avec la règle de non-discrimination**. La jurisprudence de la Cour européenne des droits de l'Homme admet l'autonomie de la règle qui prohibe toute différence de traitement discriminatoire dans la jouissance des droits et libertés reconnus dans la Convention ; par conséquent, la violation de la disposition garantissant tel droit ou telle liberté combinée avec l'exigence de non-discrimination est concevable, même en l'absence d'une violation de la première disposition considérée isolément. Identiquement ici, l'on peut concevoir que tel droit à une prestation, dont la violation indépendante ne saurait se concevoir faute pour ce droit d'être défini de manière suffisamment précise, produise néanmoins un effet juridique – et soit, à ce titre, justiciable -, si l'on en combine la garantie avec l'interdiction de toute discrimination : ainsi le droit au travail ou le droit au logement, même si l'on devait considérer qu'ils ne peuvent en tant que tels être invoqués devant le juge, pourraient être invoqués en combinaison avec la règle de non-discrimination ; ce pourrait être le cas si les règles relatives à l'accès à l'emploi ou au logement aboutissaient à créer entre catégories de personnes des différences de traitement non susceptibles d'une justification objective et raisonnable. Ce raisonnement est transposable aux droits sociaux qui seraient énumérés dans une Charte des droits fondamentaux de l'Union européenne : le juge communautaire, ou le juge national en application du droit communautaire, procéderaient comme lorsque, par exemple, des avantages sociaux sont accordés de façon discriminatoire en fonction de la nationalité des attributaires, donc en violation de l'article 12 du traité CE (ancien article 6)[26].

Enfin, il ne faut pas sous-estimer la **capacité du juge de prolonger l'oeuvre du législateur**, en identifiant plus concrètement le contenu de certains droits, dont la définition aurait été laissée relativement vague, par le choix de critères leur conférant une précision dont ils auraient été initialement dépourvus. Ainsi le comité européen des droits sociaux, alors appelé comité d'experts indépendants, a-t-il estimé que la notion de «rémunération suffisante» figurant à l'article 4, § 1er, de la Charte sociale européenne, doit s'entendre comme faisant référence à un «seuil de décence» établi à 68 % du salaire moyen national, en tenant compte non seulement du salaire effectivement versé, mais également des mécanismes de redistribution dont bénéficient les couches de la population les plus défavorisées (allocations familiales, aides au logement, prestations sociales importantes par exemple). En application de ce critère, l'Etat lié par cette disposition qui tolère que les travailleurs les moins bien payés se situent en-dessous de ce

seuil des 68% du salaire moyen national se place en infraction par rapport à son engagement «*à reconnaître le droit des travailleurs à une rémunération suffisante pour leur assurer, ainsi qu'à leurs familles, un niveau de vie décent*» (art. 4, § 1er, CSE) [28].

Cette quatrième technique implique que le juge, appelé à se prononcer sur la violation d'un droit social invoqué devant lui, compense par son inventivité le défaut de précision dans la formulation de ce droit : cela revient pour le juge à se substituer au législateur, afin de compléter son ouvrage. Les autres techniques réclament cependant moins de la part du juge. En accueillant l'action en responsabilité introduite contre l'Etat qui a échoué de manière manifeste à garantir les droits sociaux qu'il s'est engagé à respecter, en imposant de la part de l'Etat qu'il ne diminue pas le niveau de protection déjà atteint de ces droits, en combinant les droits sociaux avec l'exigence de non-discrimination, le juge se contente de reconnaître un effet utile aux droits sociaux ainsi consacrés, tout en demeurant dans les limites de son office.

La FIDH considère que les droits sociaux devraient figurer dans une Charte des droits fondamentaux de l'Union européenne, au même rang que les droits civils et politiques [29]. La question n'est pas de savoir si ces droits sont justiciables ou non, car ils le sont. En les inscrivant dans la Charte, ses rédacteurs confèreront au juge le pouvoir, potentiellement considérable, de procurer une signification concrète à ces droits ; ils peuvent également privilégier l'option consistant à restreindre les virtualités de ces droits en définissant avec précision leur contenu et leur portée.

Les techniques passées en revue ont été présentées en fonction de l'hypothèse où des droits sociaux seraient invoqués contre l'Etat, et ce lorsque l'Etat met en oeuvre le droit communautaire ou fait usage d'une clause de dérogation prévue par le droit communautaire (voy. ci-dessous, section IV). Rien ne paraît cependant s'opposer à ce qu'il soit recouru à ces techniques afin d'obliger les institutions communautaires, dans les limites de leurs compétences, à respecter les droits sociaux. La possibilité d'engager la responsabilité extra-contractuelle des Communautés lorsque celles-ci se rendent coupables d'une violation manifeste des droits sociaux qu'elles se sont engagées à respecter (a), la possibilité de postuler l'annulation ou de faire constater l'invalidité de l'acte de droit communautaire dérivé qui, soit, diminue le niveau de protection déjà atteint des droits sociaux fondamentaux (b), soit reconnaît ces droits de façon discriminatoire (c), peuvent s'inscrire dans les modalités que recouvre déjà actuellement le contrôle juridictionnel communautaire.

III. Garanties juridictionnelles

L'utilité de la reconnaissance des droits fondamentaux est fonction des voies de recours qui permettent d'en réclamer le contrôle juridictionnel. Or, le système des voies de recours de l'ordre juridique communautaire présente deux insuffisances, l'une plus grave, l'autre plus marginale.

a) Le recours direct du particulier en annulation de l'acte communautaire de portée générale

La première insuffisance résulte des limites que met la jurisprudence actuelle de la CJCE à la recevabilité des recours directs en annulation du particulier, dans les conditions que prévoit l'article 230, al. 4 du traité CE. Il est exceptionnel que de tels recours puissent être reçus lorsqu'ils sont dirigés contres des actes communautaires de portée générale, c'est-à-dire contre des actes qui ne constituent pas des «décisions» au sens matériel du terme. Il en résulte qu'il est plus aisé pour les particuliers qui s'estiment victimes d'une violation de leurs droits fondamentaux d'introduire une requête en vertu de l'article 34 de la Convention européenne des droits de l'homme, y compris lorsque la violation alléguée a sa source dans un acte normatif de portée générale, que d'agir devant le juge communautaire en annulation des actes communautaires de portée générale.

Le problème qui résulte de cette situation est double. Tout d'abord, il en résulte une lacune dans la protection des droits fondamentaux des destinataires du droit communautaire. Dans son Rapport de mai 1995 sur certains aspects de l'application du traité sur l'Union européenne, la Cour de justice notait : «*L'on peut (...) se demander si le recours en annulation prévu par l'article 173 du TCE et par les dispositions correspondantes des autres traités qui n'est ouvert aux particuliers qu'à l'égard des actes qui les concernent directement et individuellement est suffisant pour leur garantir une protection juridictionnelle effective contre les atteintes à leurs droits fondamentaux pouvant résulter de l'activité législative des institutions*» (point 20). Elle semblait ainsi rejoindre une doctrine majoritaire qui regrette depuis les arrêts de 1962-1963 *Confédération nationale des producteurs des fruits et légumes* [30] et *Plaumann* [31] les limites mises à la recevabilité des recours en annulation introduits par les particuliers contre les actes communautaires ayant une portée générale [32].

L'autre difficulté résulte des différences qui séparent, sur le plan de la recevabilité des recours des particuliers contre les actes normatifs de portée générale, les interprétations jurisprudentielles de l'article 230, al. 4, du traité CE, d'une part, et de l'article 34 de la Convention européenne des droits de l'Homme, d'autre part. Cette situation implique en effet que tel individu qui estime ses droits fondamentaux lésés par l'existence d'un acte normatif communautaire de portée générale pourra être tenté d'introduire une requête auprès de la Cour européenne des droits de l'Homme, en prenant appui sur sa qualité de «victime» au sens de l'article 34 de la Convention, sans que l'on puisse lui reprocher de n'avoir pas agi en annulation devant le juge communautaire, et sans, par conséquent, qu'on puisse même songer à lui opposer l'exception de l'absence d'épuisement des voies internes de recours (art. 35 de la Convention). L'ordre juridique communautaire serait plutôt mieux préservé, et non menacé, d'un contrôle de la part de la Cour européenne des droits de l'Homme s'il procédait à un élargissement du recours direct en annulation du particulier.

Si l'utilité d'un élargissement des conditions du recours en annulation introduit par le particulier est généralement admise, les modalités qu'il devrait prendre ne sont pas toujours comprises de façon identique. La formulation choisie par la CJCE pour exprimer sa préoccupation à cet égard indique que sa préférence irait à un recours limité à la protection des droits fondamentaux, sur le modèle du *Verfassungsbeschwerde* prévu à l'article 93, § 4, de la Loi fondamentale allemande [34]. D'autres imaginent un recours général, visant à faire sanctionner toute illégalité figurant dans un acte communautaire de droit dérivé, qu'elle conduise à une violation des droits fondamentaux ou non, et à la seule condition que le requérant ait un intérêt à agir contre l'acte querellé. Le choix entre ces différentes pistes doit tenir compte non seulement de la nécessité de ne pas encore surcharger un juge communautaire qui éprouve de plus en plus de difficultés à faire face au flot de recours ou de renvois qui lui sont présentés, mais également en fonction de la faisabilité – douteuse, et cela de l'avis même des meilleurs spécialistes de la matière [35] – de la solution intermédiaire préconisée par la CJCEdans son rapport de mai 1995.

b) Le recours en annulation dans l'intérêt collectif

Certains ont suggéré que le traité reconnaisse le recours en annulation dans l'intérêt collectif, introduit par des personnes morales en vue de la protection de leur objet social, y compris contre les actes communautaires normatifs de portée générale.

Si elle était admise, une telle modification du régime du recours en annulation aboutirait à une décentralisation considérable de la mission de surveillance du traité que celui-ci confie encore essentiellement à la Commission européenne et aux États membres. Pourtant, cette solution pourrait s'avérer à certains égards plus prometteuse que l'extension pure et simple du droit du particulier d'agir en annulation contre des actes communautaires de portée générale. Spécialement, elle permettrait de garantir la représentativité de l'auteur du recours en annulation, laquelle est plus aisée à contrôler dans le chef d'un groupement que dans le chef d'un individu déterminé. Elle présenterait aussi l'avantage, dans les termes mêmes qu'emploie le juge communautaire, de permettre «*d'éviter l'introduction d'un nombre élevé de recours différents» dirigés contre les mêmes actes communautaires, ce qui présente, note le juge, des «avantages procéduraux*» [36].

Aussi cette solution mérite-t-elle qu'on l'étudie avec soin, même si l'on doit définir les limites dans lesquelles le recours en annulation dans l'intérêt collectif doit être admis, par analogie avec le droit des groupements d'agir en justice, dans les ordres juridiques étatiques, au contentieux administratif ou au contentieux de la constitutionnalité des lois.

La FIDH est convaincue que toute tentative d'améliorer la protection des droits fondamentaux dans l'ordre juridique communautaire devrait s'accompagner d'un assouplissement des conditions d'accès au juge communautaire ou, à défaut, d'une extension des circonstances dans lesquelles les juridictions nationales des Etats membres doivent accueillir l'action en justice portée devant elles et qui tend à la préservation de la légalité communautaire.

IV. Conséquences de la Charte des droits fondamentaux de l'Union européenne sur la définition des compétences de la Communauté européenne

L'article 25, § 1er, de la Déclaration des libertés et droits fondamentaux adoptée par le Parlement européen le 12 avril 1989 prévoyait que «*la présente Déclaration protège toute personne dans le champ d'application du droit communautaire*».

Cette formulation est conforme au statut que reçoivent aujourd'hui les droits fondamentaux comme faisant partie des principes généraux du droit communautaire dont la CJCE assure le respect. Celle-ci a en effet estimé pouvoir imposer le respect des droits fondamentaux aux actes communautaires et aux actes étatiques s'inscrivant dans le domaine d'application du droit communautaire. La CJCE contrôle ainsi la conformité des actes des Etats membres aux droits fondamentaux figurant parmi les principes généraux du droit communautaire, soit, lorsque ces actes des Etats membres prétendent faire emploi d'une exception qu'autorise le droit communautaire[37], soit, lorsqu'ils appliquent le droit communautaire ou lui procurent exécution[38], soit encore lorsqu'ils s'inscrivent dans une procédure conduisant à l'adoption d'un acte communautaire[39]. Par contre, elle se refuse à contrôler la compatibilité avec les droits fondamentaux inclus parmi les principes généraux du droit communautaire des mesures nationales ne présentant aucun lien de rattachement avec le droit communautaire.

Aux termes de l'arrêt *Cinéthèque* du 11 juillet 1985 : «*S'il est vrai qu'il incombe à la Cour d'assurer le respect des droits fondamentaux dans le domaine propre du droit communautaire, il ne lui appartient pas, pour autant, d'examiner la compatibilité, avec la convention européenne[40], d'une loi nationale qui se situe (...) dans un domaine qui relève de l'appréciation du législateur national*»[41]. Comme un arrêt ERT du 18 juin 1991 l'illustre parfaitement, le statut reconnu aux droits fondamentaux en tant que principes généraux du droit communautaire ne prive pas ces droits de toute portée autonome vis-à-vis des actes des Etats membres qui s'inscrivent dans le domaine d'application du droit communautaire : la reconnaissance de ces droits implique que des actes étatiques, par ailleurs conformes aux autres exigences du droit communautaire, pourraient être jugés incompatibles avec le droit communautaire s'ils sont adoptés en violation des droits fondamentaux[42]. Par contre, les rapports juridiques régis par le seul droit national, c'est-à-dire vis-à-vis desquels le droit communautaire est indifférent, ne sont soumis qu'aux règles nationales ou, le cas échéant, aux instruments internationaux de protection des droits de l'Homme applicables dans cet Etat, sans que les principes généraux du droit communautaire trouvent à s'y appliquer.

Il convient d'interpréter dans le même sens l'article 6, § 2, du traité sur l'Union européenne (anc. art. F, § 2), qui énonce que «*l'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'Homme (...) et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres,* ***en tant que principes généraux du droit communautaire***».

Cette dernière disposition, initialement introduite par le traité de Maastricht sur l'Union européenne du 7 février 1992, n'a eu d'autre effet que de constitutionnaliser la jurisprudence de la CJCE mentionnée précédemment. Il ne s'agissait pas d'affirmer une compétence de l'Union ou de la Communauté européennes en matière de droits fondamentaux, ni de fournir à la CJCE une base juridique sur laquelle fonder un éventuel contrôle de la conformité de l'ensemble des actes des Etats membres par rapport aux exigences des droits fondamentaux ; il s'agissait uniquement d'interdire à la fois aux institutions communautaires et aux Etats membres, dans la mesure où ils agissent dans le cadre du droit communautaire, de prendre des dispositions contraires à ces droits. Reconnaître aux droits fondamentaux un tel statut n'affecte pas l'étendue des compétences de la Communauté ou de l'Union européennes par rapport aux compétences des Etats membres.

Il n'est manifestement pas envisagé de reconnaître un statut différent aux droits figurant dans la Charte des droits fondamentaux de l'Union européenne. Pourtant la question se pose de savoir si l'insertion dans le traité CE d'un catalogue de droits fondamentaux ne peut pas conduire, au moins à terme, à une extension des compétences de la Communauté européenne, d'une part, à un rôle plus actif de la CJCE dans la garantie des droits fondamentaux par les Etats membres, d'autre part. Ces deux questions sont liées : elles affectent l'une et l'autre la répartition des compétences entre la Communauté et les Etats membres.

Cette question comporte différents aspects :

1. La plupart des droits fondamentaux dont l'insertion dans la Charte est envisagée sont susceptibles de faire l'objet de certaines restrictions, pour autant que celles-ci soient «*prévues par la loi*», et puissent être considérées comme «*nécessaires, dans une société démocratique*», à la réalisation de certaines fins considérées comme légitimes. La première de ces conditions, traditionnellement appelée condition de légalité, signifie que **des restrictions ne peuvent être apportées à un droit fondamental qu'au travers d'une réglementation suffisamment précise et accessible**, permettant au titulaire de droits de prévoir avec un degré de certitude suffisant les limites qui s'attachent à l'exercice de ces droits ; s'il estime que la restriction qui lui est imposée est arbitraire, il peut solliciter le juge pour qu'il contrôle les conditions entourant cette restriction.

Cette condition de légalité n'est pas problématique lorsqu'elle intervient dans le cadre du contrôle du respect des droits fondamentaux par des mesures étatiques qui, soit parce qu'elles apportent une restriction à une liberté, restriction que prévoit le droit communautaire, soit parce qu'elles mettent en oeuvre le droit communautaire, s'inscrivent dans son champ d'application, et doivent dès lors être conformes aux droits fondamentaux contenus dans une Charte des droits fondamentaux de l'Union européenne.

En revanche, lorsque telle mesure de droit communautaire dérivé crée une ingérence dans un droit fondamental de l'individu, mais sans que le droit communautaire définisse le régime juridique de l'ingérence litigieuse, le juge communautaire pourrait être amené à constater que cette condition de légalité est violée.

Une telle appréciation aurait pour conséquence d'imposer aux institutions communautaires qu'elles adoptent une réglementation suffisamment précise et complète en telle matière, afin de doter leurs interventions du cadre légal qui leur fait défaut, ou qui n'est pas suffisamment précis. Certes, cette exigence n'affecte pas directement la répartition des compétences entre le niveau communautaire et le niveau étatique ; mais elle peut impliquer que la Communauté européenne soit tenue d'adopter des réglementations particulièrement détaillées, le cas échéant en limitant la marge d'appréciation des autorités nationales lorsqu'elles mettent en oeuvre le droit communautaire.

Tel pourrait être le cas, à tout le moins, des actes de droit communautaire dérivé qui sont directement applicables par les autorités nationales, et qui aboutissent par conséquent à imposer au particulier l'adoption de comportements déterminés. En effet, dès lors que ces actes imposent certains comportements sous la menace de sanctions, communautaires ou nationales, l'imprécision des conditions entourant la restriction dont est assorti le droit considéré risque d'inciter le bénéficiaire de ce droit à ne pas l'exercer par crainte de subir cessanctions, dont il ne sait pas exactement dans quelles hypothèses elles peuvent être imposées.

2. L'insertion dans le traité CE d'une Charte de droits fondamentaux encouragerait un courant qui tend à **présenter la garantie des droits fondamentaux, à un niveau de protection uniforme sur l'ensemble du territoire de l'Union européenne, comme un aspect des libertés fondamentales de circulation**. Menacés de voir certains de leurs droits fondamentaux violés, certains bénéficiaires des libertés de circulation prévues en droit communautaire pourraient renoncer à exercer ces libertés qui leur sont formellement reconnues.

Cela justifierait que les droit fondamentaux soient considérés comme invoqués «*dans le domaine d'application du droit communautaire*» dès l'instant où une telle liberté de circulation a été exercée et qu'il en est résulté une violation d'un droit fondamental, ou lorsque cette liberté n'a pas pu être exercée en raison de la crainte, bénéficiaire de la liberté de circulation de voir ses droits fondamentaux violés s'il devait accepter un emploi, s'établir comme indépendant, ou offrir des services dans un autre Etat membre . L'on peut rappeler à cet égard que la directive 95/46/CE du Parlement européen et du Conseil du 24 octobre 1995 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données «précise et amplifie» les garanties de la Convention n°108 conclue le 28 janvier 1981 dans le cadre du Conseil de l'Europe dans la même matière, notamment en «*considérant que l'établissement et le fonctionnement du marché intérieur dans lequel (...) la libre circulation des marchandises, des personnes, des services et des capitaux est assurée, nécessitent non seulement que des données à caractère personnel puissent circuler librement d'un Etat membre à l'autre, mais également que les droits fondamentaux des personnes soient sauvegardés*» ; la directive est adoptée, du reste, sur la base juridique de l'article 100 A du traité CE (actuel art. 95), qui prévoit la procédure applicable à l'adoption des mesures «*relatives au rapprochement des dispositions législatives, réglementaires et administratives des Etats membres qui ont pour objet l'établissement et le fonctionnement du marché intérieur*».

L'extension de cette tendance dans le droit communautaire impliquerait que le domaine d'application du droit communautaire, dans lequel les droits fondamentaux reconnus en droit communautaire sont susceptibles d'être invoqués, s'étendrait à toute hypothèse où une liberté communautaire a été exercée mais a abouti à placer celui qui a exercé cette liberté sous la juridiction d'un Etat qui viole ses droits, ou au contraire n'a pas pu être exercée en raison de ce que le titulaire de la liberté de circulation a eu des motifs de craindre de subir cette violation s'il en faisait usage.

Le nombre de situations où pourraient être invoqués les droits fondamentaux reconnus en droit communautaire se trouverait évidemment radicalement étendu à la suite d'une telle évolution. Pourtant l'on ne serait pas encore, pour autant, dans l'hypothèse maximaliste où toute violation des droits fondamentaux sous la juridiction d'un Etat membre de l'Union européenne serait interprétée comme une violation du droit communautaire, puisqu'un certain élément de rattachement au droit communautaire demeurerait requis.

3. Il résulte de la considération précédente que l'expression «*dans le domaine d'application du droit communautaire*» n'est pas toujours univoque, même si elle doit servir explicitement à éviter que l'inscription des droits fondamentaux dans le traité CE ne conduise à un bouleversement des compétences respectives de la Communauté européenne et des Etats membres. L'on doit encore souligner que la formulation de pareille limitation n'est pas la seule option ouverte.

Une autre option consisterait, sur le modèle de la clause de non-discrimination inscrite dans le traité CE par le traité d'Amsterdam du 2 octobre 1997 (nouvel article 13 du traité CE) ou sur celui de l'égalité de traitement (actuel article 141 du traité CE), à prévoir que **les institutions communautaires reçoivent la compétence de prendre les mesures propres à garantir les droits fondamentaux figurant dans la Charte des droits incluse dans le traité CE**.

Certes, une telle perspective paraît pour l'heure peu réaliste. Elle impliquerait en effet une extension des compétences de la Communauté, et un développement de l'activité législative de ses institutions, qui paraissent aller à contre-courant de la tendance actuelle, qui encourage plutôt une subsidiarité de l'intervention. En outre, même si une telle option aurait pour elle de créer dans l'ensemble de l'Union européenne un espace où les droits fondamentaux bénéficieraient d'une protection uniforme, contribuant de la sorte à l'effectivité des libertés de circulation dans cet espace, force est de constater que cette uniformité résulte déjà, très largement, du fait que tous les Etats membres de l'Union européenne sont Parties à la Convention européenne des droits de l'Homme.

4. Enfin, quelle que soit en définitive l'option choisie entre les différentes possibilités qui viennent d'être passées en revue, il convient de souligner que l'insertion d'une Charte des droits fondamentaux dans le traité CE devrait s'accompagner d'une **modification du traité permettant de surmonter l'obstacle que, dans son avis 2/94 du 28 mars 1996, la CJCE voyait à l'adhésion de la Communauté européenne à la Convention européenne des droits de l'Homme**[39].

Rendu à la veille de l'ouverture de la Conférence intergouvernementale qui allait déboucher sur le traité d'Amsterdam du 2 octobre 1997, l'avis 2/94 constatait qu'en raison de l' «envergure constitutionnelle» de l'adhésion envisagée, le recours à l'article 235 du traité CE (actuel article 308) ne pouvait suffire à lui fournir sa base juridique, à défaut d'une compétence plus explicite de la Communauté européenne dans le domaine des droits de l'Homme. Les négociateurs du traité d'Amsterdam n'ont cependant pas investi la Communauté européenne d'une telle compétence[40]. Il est probable qu'il ne suffise pas, pour surmonter l'obstacle que la CJCE voyait à l'adhésion de la Communauté à la Convention européenne des droits de l'Homme, de faire figurer la protection des droits de l'Homme parmi les missions et objectifs de la Communauté (articles 2 et 3 du traité CE) : la création d'une nouvelle compétence, plus explicite, paraît requise[41].

V. Bénéficiaires des droits fondamentaux

Les instruments internationaux relatifs aux droits de l'Homme, et la Convention européenne des droits de l'Homme en particulier, garantissent ces droits à **toute personne placée sous la juridiction** des Etats que ces instruments obligent, **indépendamment de la nationalité** de ces personnes[42].

Certes, les garanties de la Charte sociale européenne, comme celles de la Charte sociale révisée de 1996, ne sont reconnues aux étrangers que «***dans la mesure où ils sont ressortissants des autres Parties*** *résidant légalement ou travaillant régulièrement sur le territoire de la Partie intéressée (...)*»[43]. Mais il convient de relativiser la portée de cette restriction, d'un double point de vue.

a) S'agissant de droits aussi fondamentaux que le sont, par exemple, le droit à la protection de la santé (art. 11 CSE) ou le droit à l'assistance sociale et médicale (art. 13 CSE), il est très contestable d'en réserver le bénéfice aux personnes séjournant légalement dans l'Etat où elles se trouvent. Si certains droits économiques et sociaux, notamment liés aux prestations de sécurité sociale, peuvent être subordonnés à la régularité du séjour sur le territoire de l'Union européenne du ressortissant d'un Etat tiers, les **droits à l'assistance médicale et sociale** sont au cœur de la dignité humaine et la privation de ces droits peut constituer un traitement inhumain et dégradant. Certains droits économiques et sociaux devraient ainsi être reconnus non seulement aux résidents légaux, mais également aux demandeurs det aux personnes en situation illégale. De même, le **droit des enfants à l'instruction** ne peut être refusé au motif que la situation administrative des parents ne serait pas régulière, et ne saurait être subordonné à la légalité du séjour.

Il faut par ailleurs garder à l'esprit la Déclaration universelle des droits de l'Homme, le Pacte international relatifs aux droits économiques, sociaux et culturels, ainsi que la Déclaration de l'OIT sur les droits fondamentaux des travailleurs (juin 1998).

On peut de plus s'interroger sur l'utilité d'exclure de ces garanties les personnes qui ne sont pas en ordre de séjour car, d'une part, une série de dispositions de la Charte sociale européenne ne peuvent par principe s'appliquer à ces personnes, parce qusont liées à l'exercice d'un emploi auquel elles n'ont pas accès, et, d'autre part, la différence entre la situation d'un étranger en séjour légal sur le territoire d'un Etat partie et celle d'un étranger qui n'est pas en ordre de séjour est suffisamment objective pour justifier, le cas échéant, une différence de traitement entre les deux situations, pour autant qu'elle soit raisonnablement justifiée[46].

b) Le fait de réserver aux seuls nationaux des Etats parties à la Charte sociale européenne révisée le bénéfice des droits qui s'y trouvent, suivant le modèle de la réciprocité, ne paraît guère compatible avec l'exigence de non-discrimination qui figure, dans la Convention européenne des droits de l'Homme, en tant que garantie complémentaire à chacun des droits protégés. Dans une affaire où était précisément revendiqué le bénéfice d'un droit social patrimonial - une allocation de chômage d'urgence -, la Cour européenne des droits de l'Homme a affirmé que «*seules des considérations très fortes peuvent [l]'amener (...) à estimer compatible avec la Convention une différence de traitement exclusivement fondée sur la nationalité*»[47]. Il est ainsi certain que, là du moins où c'est un même droit qui est reconnu à la fois par la jurisprudence relative à la Charte sociale européenne et par la Convention européenne des droits de l'Homme[48], la restriction de la protection aux seuls nationaux des autres Etats parties ne pourra pas être admise sans autre justification, plus circonstanciée.

Même dans les autres champs, une différence de traitement fondée uniquement sur la nationalité du bénéficiaire potentiel d'un droit ne semble pas pertinente[49] : soit cette différence de traitement peut être justifiée, et alors les limites mêmes qu'impose la règle de non-discrimination suffisent à justifier cette différence de traitement – la règle de non-discrimination n'interdit pas une différence de traitement fondée sur une justification objective et raisonnable[50] -; ou bien elle ne peut être justifiée, et alors elle constitue une discrimination, ce que prohibent d'autres instruments internationaux de protection des droits de l'Homme.

La FIDH considère absolument fondamental que les droits figurant dans une Charte des droits fondamentaux de l'Union européenne soient reconnus à toute personne, sans discrimination. Seule une telle définition des bénéficiaires des droits fondamentaux est conforme au droit international des droits de l'Homme et au principe d'universalité, qui en est un des fondements essentiels. Des différences de traitement pourront ensuite être établies entre les ressortissants d'Etats membres et les ressortissants d'Etats tiers, à condition cependant qu'elles demeurent objectivement justifiables et proportionnées à l'objectif, dont la Cour européenne des droits de l'Homme a reconnu la légitimité, de constituer entre Etats de l'Union européenne «*un ordre juridique spécifique, ayant instauré de surcroît une citoyenneté propre*»[51].

Il est essentiel de délier nettement la reconnaissance des droits fondamentaux dans l'Union européenne de la notion de citoyenneté de l'Union européenne, et cela d'autant plus que la citoyenneté européenne est fondée sur le critère de la nationalité d'un Etat membre. Il convient d'ailleurs de noter que certains droits énoncés dans la deuxième partie du traité CE («La citoyenneté de l'Union») sont d'ores et déjà étendus aux personnes physiques résidant dans un Etat membre (droit de pétition au Parlement européen (art. 194 du traité CE), droit de s'adresser au médiateur de l'Union européenne (art. 195 du traité CE)). Il serait inadmissible que la nouvelle Charte marquât une régression à cet égard.

VI. Conclusion

La Charte des droits fondamentaux de l'Union européenne devrait tendre à un niveau de protection qui soit au moins équivalent à celui des instruments internationaux de protection des droits de l'Homme liant au moins un Etat membre de l'Union européenne au moment de son adhésion aux Communautés européennes, et aux dispositions constitutionnelles nationales les plus protectrices relatives aux droits de l'Homme. C'est à cette condition seulement que l'uniformité d'application du droit communautaire et la primauté dont il bénéficie dans l'application qu'en procurent les juridictions nationales seront préservées.

Les droits sociaux devraient figurer dans la Charte des droits fondamentaux de l'Union européenne, à l'instar des droits civils et politiques. Le juge devant qui ces droits seront invoqués, lorsque pareille invocation a lieu dans le domaine d'application du droit communautaire, dispose de techniques permettant de leur reconnaître un effet juridique. Le juge communautaire a développé ces techniques, notamment au moment où il a dû garantir l'effectivité des droits attribués par voie de directives, à l'instar du juge national lorsqu'il lui a fallu reconnaître la juridicité des droits sociaux.

L'accès des particuliers, voire des organisations non-gouvernementales et autres associations intéressées, aux garanties juridictionnelles (CJCE) devrait être élargi dans le domaine des droits fondamentaux.

L'inscription de droits fondamentaux dans une Charte propre à l'Union européenne n'opérera normalement reconnaissance de ces droits que dans le domaine d'application du droit communautaire ; l'identification exacte de ce que recouvre ce domaine d'application n'est cependant pas définitivement arrêtée. Aussi conviendrait-il de préciser de manière claire ce que signifie cette expression. En outre, il conviendrait de décider si, oui ou non, l'affirmation des droits fondamentaux investit les institutions communautaires d'une compétence nouvelle, celle de prendre les mesures propres à mettre en oeuvre les droits reconnus à l'échelle de la Communauté. Enfin, il faudrait prévoir dans le Traité une compétence nouvelle dans le chef de la Communauté européenne, celle d'adhérer aux instruments internationaux de protection des droits de l'Homme qui présentent un rapport avec les compétences déjà attribuées à la Communauté.

Les droits fondamentaux inscrits dans la Charte envisagée doivent être reconnus à tous, sans distinction aucune, notamment de nationalité. Seuls les droits politiques *stricto sensu*, c'est-à-dire les droits d'électorat et d'éligibilité actuellement reconnus aux citoyens de l'Union européenne, quel que soit leur Etat membre de résidence, peuvent être attachés à la citoyenneté de l'Union européenne. Ces droits devraient cependant également être étendus aux personnes résidant légalement sur le territoire de l'Union, sous certaines conditions à préciser.

D'autres droits jusqu'à présent réservés aux seuls ressortissants d'Etats membres, notamment les droits liés à la liberté de circulation, ne devraient pas – dans la logique même d'un espace sans frontières intérieures – être subordonnés à cette condition de nationalité. Dès à présent, l'exigence de non-discrimination détermine dans certaines limites l'exclusion de certaines personnes du bénéfice de ces droits. L'exigence de non-discrimination exclut en effet qu'une différence de traitement soit justifiée par le seul argument formel d'une différence de nationalité. On peut du reste considérer que le droit de «*circuler librement*» et de «*choisir librement sa résidence*» (art. 2, Protocole n°4 à la Convention européenne des droits de l'Homme), que la Convention européenne des droits de l'Homme reconnaît à «*quiconque se trouve régulièrement sur le territoire d'un Etat*», sera à l'avenir interprété de façon à imposer l'extension de ces droits à toute personne se trouvant sur le territoire de l'UE dans le cadre communautaire, à mesure même que progresse l'intégration de l'Union européenne.

Notes :

1. Voy. par ex. C.J.C.E., 18 mai 1982, AM & S Europe Ltd. c. Commission des C.E., 155/79, Rec., p. 1575 (confidentialité de la correspondance entre l'avocat et son client); ou C.J.C.E., 18 octobre 1989, Orkem c. Commission des C.E., 374/87, Rec., p. 3283 (droit de ne pas avoir à témoigner contre soi-même).

2. Voy. par ex. C.J.C.E., 14 mai 1974, J. Nold, Kohlen- und Baustoffenhandlung c. Commission des C.E., 4/73, Rec., p. 491; C.J.C.E., 13 décembre 1979, L. Hauer c. Land Rheinland-Pfalz, 44/79, Rec., p. 3727 (droit au respect des biens); C.J.C.E., 5 mars 1980, J. Pecastaing c. Etat belge, 98/79, Rec., p. 691 (équité du procès); C.J.C.E., 18 mars 1980, SpA Ferreira Valsabbia et al. c. Commission des C.E., aff. jtes 154/78, 205 et 296/78, 226/78, 228/78, 263/78, 264/78, 39/79, 31/79, 83/79, Rec., p. 907 (droit au respect des biens).

3. Notamment en matière de fonction publique communautaire : C.J.C.E., 4 juillet 1963, M. Alvis c. Conseil CEE, 32/62, Rec., p. 99; C.J.C.E., 1er juillet 1964, R. Degreef c. Commission CEE, 80/63, Rec., p. 767: C.J.C.E., 1er juillet 1964, Pistoj c. Commission CEE, 26/63, Rec., p. 681; C.J.C.E., 15 mars 1967, Max Gutmann c. Commission CEEA, aff. jtes 18 et 35/65, Rec., p. 75.

4. Voy. par ex. C.J.C.E., 13 déc. 1989, A. Oyowe et A. Traore c. Commission des C.E., C-100/88, Rec., p. 4285, not. pts 15 et 16 (liberté d'expression des fonctionnaires chargés de la rédaction du «Courrier ACP-CE»).

5. Cette expression résulte de l'arrêt rendu dans l'affaire Nold le 14 mai 1974, lequel est intervenu avant que la Convention en cause n'entre en vigueur à l'égard de la France; c'est pourquoi la CJCE ne pouvait pas retenir simplement "*les instruments internationaux auxquels les Etats membres ont adhéré*".

6. C.J.C.E., 14 octobre 1980, Attorney General c. Juan C. Burgoa, 812/79, Rec., p. 2787, pt 10.

7. Voy. l'article 30 de la Convention de Vienne sur le droit des traités, du 23 mai 1969.

8. Ne sont énumérés ici que les instruments les plus importants, dont l'objet présente certains liens avec les compétences communautaires, et qui garantissent certains droits substantiels, à l'exclusion d'autres instruments dont l'objet est sans lien avec les compétences des Communautés européennes, ou qui sont relatifs aux mécanismes de contrôle dans le système des Nations Unies ou dans celui du Conseil de l'Europe.

9. Le second alinéa de l'article 307 du traité C.E., qui figurait déjà dans l'article 234 du traité C.E. avant sa révision par le traité d'Amsterdam, précise : «*Dans la mesure où ces conventions ne sont pas compatibles avec le présent traité, le ou les Etats membres en cause recourent à tous les moyens appropriés pour éliminer les incompatibilités constatées*». Les traités ultérieurs n'ont apporté aucune modification à cet article, devenu art. 307 par l'effet de la renumérotation opérée par le traité d'Amsterdam. Du second alinéa, il se peut qu'il faille déduire dans le chef des Etats membres de l'Union une obligation de dénoncer le traité international incompatible avec le respect de leurs obligations communautaires. C'est en tout cas l'attitude adoptée par l'Etat français à la suite de l'arrêt Stoeckel de la Cour de justice (C.J.C.E., 25 juillet 1991, Stoeckel, C-345/89, Rec., p. I-4047) : la dénonciation de la convention n°89 de l'O.I.T. est intervenue le 26 février 1992, soit avant le prononcé de l'arrêt Lévy (C.J.C.E., 2 août 1993, Lévy, C-158/91, Rec., p. I-4287), dans lequel la Cour de justice admet pour la première fois que l'article 234 du traité C.E.E. fait obstacle à ce qu'il puisse être reproché à l'Etat partie à ladite convention de ne pas respecter la directive 76/207, sur le point où une incompatibilité existe. Voy. sur ceci les concl. de l'avocat général G. Tesauro du 16 janvier 1997 préc. C.J.C.E., 13 mars 1997, Commission des C.E. c. Rép. française, C-197/96. Si une telle obligation de dénonciation devait être affirmée - l'arrêt du 13 mars 1997 ne fournit cependant aucun indice à cet égard -, les conséquences en seraient considérables, la plupart des instruments internationaux relatifs aux droits de l'Homme précités fixant des conditions relativement peu exigeantes à leur propre dénonciation.

10. C.J.C.E., 2 août 1993, Lévy, C-158/91, précité; C.J.C.E., 3 févr. 1994, ONEM c. Minne, C-13/93, Rec., p. I-371.

11. C.J.C.E., 28 mars 1995, The Queen and Secretary of State for the Home Department, ex parte : Evan Medical Ltd and MacFarlan Smith Ltd, C-324/93,

12. C.J.C.E., 14 octobre 1980, Attorney General c. Juan C. Burgoa, 812/79, Rec. , p. 2787, 2803 (pt 9).

13. Voy., parmi les considérants qui précèdent la directive 95/46/CE du Parlement européen et du Conseil du 24 octobre 1995 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, J.O.C.E., n°L 281/31 du 23.11.1995 : «*considérant que les différences entre Etats membres quant au niveau de protection des droits et libertés des personnes, notamment du droit à la vie privée, à l'égard des traitements de données à caractère personnel peuvent empêcher la transmission de ces données du territoire d'un Etat membre à celui d'un autre Etat membre ; que ces différences peuvent dès lors constituer un obstacle à l'exercice d'une série d'activités économiques à l'échelle communautaire, fausser la concurrence et empêcher les administrations de s'acquitter des responsabilités qui leur incombent en vertu du droit communautaire (...) (pt 8) ; considérant que l'objet des législations nationales relatives au traitement des données à caractère personnel est d'assurer le respect des droits et libertés fondamentaux, notamment du droit à la vie privée reconnu également à l'article 8 de la convention européenne de sauvegarde des droits de l'Homme (...) ; que, pour cette raison, le rapprochement de ces législations ne doit pas conduire à affaiblir la protection qu'elles assurent mais doit, au contraire, avoir pour objectif de garantir un niveau élevé de protection dans la Communauté (pt 10)*». Ces considérants nous paraissent pouvoir être transposés, mutatis mutandis, aux motivations qui doivent guider les négociateurs de la Charte des droits fondamentaux de l'Union européenne. Voy. ci-dessous, III.

14. «*Les Hautes Parties contractantes s'engagent à organiser, à des intervalles raisonnables, des élections libres au scrutin secret, dans les conditions qui assurent la libre expression de l'opinion du peuple sur le choix du corps législatif*».

15. Cour eur. D.H., arrêt Matthews c. Royaume-Uni (req. n°24833/94) du 18 février 1999, § 32.

16. Voy. BVerfG, 18 oct. 1967, Juristenzeitung, 23 (1968), n°3, p. 99, note W. Wengler, et R.T.D.E., 1968, p. 204 ; également BVerfG, 29 mai 1974, BvL 52/71, ainsi que G. Cohen-Jonathan, «Cour constitutionnelle allemande et règlements communautaires», C.D.E., 1975, p. 149 ; et BVerfG, 22 octobre 1986, trad. angl. C.M.L.Rev., 1987, p. 225. Pour des synthèses concernant le rapport entre la protection des droits fondamentaux dans l'ordre juridique communautaire et les conditions auxquelles les juridictions constitutionnelles nationales, notamment le Bundesverfassungsgericht, admettent la primauté du droit communautaire, voy. S. O'Leary, «Aspects of the Relationship Between Community Law and National Law», in : N. Neuwahl & A. Rosas, The European Union and Human Rights, Martinus Nijhoff Publ., Kluwer, The Hague-Boston-London, 1995, p. 23 ; L.B. Krogsgaard, «Fundamental Rights in the European Community After Maastricht», L.I.E.I., 1993/1, p. 99, spéc. p. 106 ; H.G. Schermers, «The Scales in Balance : National Constitutional Court v. Court of Justice», C.M.L. Rev., 1990, p. 97 ; J. Weiler, «Eurocracy and Distrust : Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities», 61 Wash. L. Rev. 1103 (1986).

17. Voy. not. C.J.C.E., 21 septembre 1989, Hoechst AG c. Commission, aff. jtes 46/87 et 227/88, Rec., p. 2919, 2924 (pt 17).

18. 2 BvR 2134/92 et 2 BvR 2159/92, trad. fr. R.U.D.H., 1993, p. 286.

19. Sur cet instrument, voy. not. Ch. Pettiti, «La Charte communautaire des droits sociaux fondamentaux des travailleurs, un progrès ?», Droit social, 1990, p. 387 ; E. Vogel-Polsky, «Quel futur pour l'Europe sociale après le sommet de Strasbourg», Droit social, 1990, p. 219.

20. Voy. ci-dessous, en II, à propos de la juridicité des droits sociaux appelés à figurer dans la Charte des droits fondamentaux de l'Union européenne.

21. Voy. not. la directive 91/533 du 14 octobre 1991, relative à l'obligation de l'employeur d'informer le travailleur des conditions applicables au contrat ou à la relation de travail, J.O.C.E., n°L 288/32 du 18.10.1991 ; ou la directive 93/104 du 23 novembre 1993, concernant certains aspects de l'aménagement du temps de travail, J.O.C.E., n°L 307/18 du 13.12.1993. Depuis l'entrée en vigueur du traité d'Amsterdam (le 1er mai 1999), c'est suivant les procédures prévues par le chap. I (Dispositions sociales) du Titre XI du traité C.E. (Politique sociale, éducation, formation professionnelle et jeunesse) (art. 136 et suivants du traité C.E.) que les institutions communautaires sont appelées à poursuivre la mise en oeuvre de ce programme législatif. Aux termes de l'article 137, § 6, demeurent exclus de l'harmonisation les rémunérations, le droit d'association, les droits de grève et de lock-out.

22. Voy., notamm., Comité des Nations Unies pour les droits économiques, sociaux et culturels, General Comment n°9 : The Domestic Application of the Covenant, adopted at the 51st meeting on 1 December 1998 (nineteenth session) (UN Doc. E/C.12/1998/24), où le Comité s'exprime ainsi en ce qui concerne l'invocabilité du Pacte international relatif aux droits économiques, sociaux et culturels devant le juge national : «*It is important (...) to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). (...) There is no Covenant right which could not, in the great majority of <national legal> systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which*

puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets or human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society» (para. 10).

23. Voy. parmi beaucoup d'exemples les arrêts suivants : Cour eur. D.H., arrêt Airey c. Irlande du 9 octobre 1979, Série A n°32, § 26 ; arrêt Artico c. Italie du 13 mai 1980, Série A n°37 ; arrêt Bouamar c. Belgique du 29 février 1988, Série A n°29 ; arrêt Union Alimentaria Sanders S.A. c. Espagne du 7 juillet 1989, Série A n°157, § 40 ; arrêt Pammel c. Allemagne du 1er juillet 1997, §§ 68-69.

24. Voy. par exemple les suites que pourrait connaître l'arrêt Aerts c. Belgique rendu par la Cour européenne des droits de l'Homme le 30 juillet 1998 : O. De Schutter et S. van Drooghenbroeck, «Internement d'aliénés, assistance judiciaire, et politique budgétaire des droits de l'Homme», A.P.T., 1998, pp. 223-250.

25. C.J.C.E., 19 novembre 1991, A. Francovich et al. c. Rép. italienne, aff. jtes C-6/90 et C-9/90, Rec., p. I-5357 (pt 39).

26. C.J.C.E., 8 novembre 1990, E.J.P. Dekker c. Stichting Vormingscentrum voor jong Volwassenen, C-177/88, Rec., p. I-3941.

27. Voy. ainsi C.J.C.E., 30 septembre 1975, Christini, 32/75, Rec., p. 1085 (réductions sur les transports publics en faveur des familles nombreuses) ; C.J.C.E., 27 mars 1985, Hoeckx et Scrivner (deux arrêts), 249/83 et 122/84, Rec., p. 982 et p. 1029 (minimum des moyens d'existence) ; C.J.C.E., 12 juillet 1984, Castelli, 261/83, Rec., p. 3199 (revenu garanti aux personnes âgées et aux ascendants à charge du travailleur) ; C.J.C.E., 14 janvier 1982, Reina, 65/81, Rec., p. 33 (octroi d'un prêt sans intérêt à la naissance).

28. Voy. par exemple Conclusions V, pp. 25-26 ; Conclusions XII-2, pp. 80-81 ; Conclusions XIII-1, pp. 112-113.

29. L'on notera d'ailleurs que la Déclaration des droits et libertés fondamentaux adoptée par le Parlement européen le 12 avril 1989 (doc. 12-3/89, J.O.C.E. n°C 120/51 du 16.5.1989) faisait référence à des droits tels que le droit à l'éducation et à une formation professionnelle (art. 12, § 2 : droit «de toute personne» à «une formation professionnelle appropriée et correspondant à ses besoins la qualifiant pour travailler» ; art. 16, al. 1 : «Toute personne a droit à l'éducation et à une formation professionnelle selon ses capacités»), le droit au travail (art. 12, § 3 : «Nul ne peut être privé d'un travail pour des raisons arbitraires (...)»), le droit à des conditions de travail équitables (art. 13), le droit à une rémunération décente (art. 13, § 2 : «Les mesures nécessaires seront prises en vue d'assurer (...) une rémunération qui permette de mener une vie digne»), le droit à des soins de santé (art. 15, § 1 : «Toute personne a le droit de bénéficier de toutes les mesures lui permettant de jouir du meilleur état de santé possible»), le droit à la sécurité sociale (art. 15, § 2), le droit à l'assistance sociale et médicale (art. 15, § 3 : «Toute personne démunie de ressources a droit à l'aide sociale et médicale»), le droit au logement (art. 15, § 4 : «Toute personne qui, pour des raisons indépendantes de sa volonté, n'est pas en mesure de se loger décemment a droit, à cet effet, à l'aide des pouvoirs publics compétents»). Beaucoup de ces droits figuraient déjà, formulés en termes à peu près identiques, dans le projet de Constitution de l'Union européenne (résolution du Parlement européen du 10 février 1984).

30. C.J.C.E., 14 décembre 1962, Confédération nationale des producteurs de fruits et légumes et al. c. Conseil de la CEE, aff. jtes 16 et 17/62, Rec., VIII (1962), p. 901, ici pp. 917-918.

31 C.J.C.E., 15 juillet 1963, Plaumann & Co. c. Commission, 25/62, Rec., p. 197.

32. M. Fromont, «L'influence du droit français et du droit allemand sur les conditions de recevabilité du recours en annulation devant la Cour de justice des Communautés européennes», R.T.D.E., 1966, pp. 47-65; G. Rasquin & R.-M. Chevallier, «L'article 173, al. 2, du traité C.E.E.», R.T.D.E., 1966, pp. 31-46. On peut citer dans la doctrine plus récente en faveur d'une extension de la recevabilité des recours en annulation des particuliers contre les actes normatifs de portée générale: A. Barav, «Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court», C.M.L. Rev., 1974, pp. 191-198; R. Kovar & A. Barav, «Le recours individuel en annulation», C.D.E., 1976, p. 68; H. Rasmussen, «Why is Article 173 Interpreted against Private Plaintiffs?», E.L.Rev., 1980, pp. 112-127; R.M. Greaves, «Locus Standi under Article 173 When Seeking Annulment of a Regulation», E.L.Rev., 1986, pp. 119-133; J. Usher, «Individual Concern in general legislation - 10 years on», E.L.Rev., 1994, pp. 636 ss.; P. Craig, «Legality, Standing and Substantive Review in Community Law», Oxford Journ. Legal Studies, 1994, pp. 507-537; A. Arnull, «Private Applicants and the Action for Annulment under Article 173 of the EC Treaty», C.M.L. Rev., 1995, pp. 7-49; D. Waelbroeck et A.-M. Verheyden, «Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires à la lumière du droit comparé et de la Convention européenne des droits de l'homme», C.D.E., 1995, pp. 440-441; G. Vandersanden, «Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées», C.D.E., 1996, pp. 535-552; N. Neuwahl, «Article 173, Paragraph 4 EC: past, present and possible future», E.L.Rev., 1996, p. 17; F. Schockweiler, «L'accès à la justice dans l'ordre juridique communautaire», J.T.D.E., 1996, pp. 1-8. En revanche, conteste la nécessité d'une révision de l'article 173, al. 4, du traité C.E. sur ce point: P. Nihoul, «La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale», R.T.D.E., 1994, pp. 171-194.

33. C'est là aussi ce qu'avait envisagé la présidence irlandaise du second semestre 1996, le recours du particulier contre des actes communautaires de portée générale devant se trouver limitée à la protection de ses droits fondamentaux. Voy. Conference of The Representatives of the Governments of the Member States, Presidency Suggested Approach, 8 october 1996, CONF/3945/96, p. 4.

34. Il faut cependant souligner que lors d'une discussion informelle avec un des auteurs de ce rapport, le juge K. Lenaerts a souligné la difficulté qu'il y a à faire dépendre la recevabilité d'un recours de l'identité des moyens invoqués à l'appui du recours, surtout lorsque, ces moyens devant être pris de la violation des droits fondamentaux dans la proposition de la Cour de justice des C.E., ils peuvent couvrir une gamme d'arguments extrêmement vaste. En effet, le jugement de recevabilité sera très proche, du point de vue de la motivation qui sera requise et du point de vue de l'étude que l'affaire requiert de la part du juge, du jugement rendu au fond.

35. T.P.I., 6 juillet 1995, AITEC, aff. jtes T-447/93 et T-449/93, Rec., p. II-1971, pt 60.

36. C.J.C.E., 28 octobre 1975, R. Rutili, 36/75, Rec., p. 1219 (pt 32) ; C.J.C.E., 25 juillet 1991, Commission c. Pays-Bas, 353/89, Rec., p. 4089 (pt 30) ; C.J.C.E., 18 juin 1991, E.R.T., C-260/89, Rec., p. I-2925 (pt 43).

37. C.J.C.E., 13 juillet 1989, H. Wachauf, 5/88, Rec., p. 2609 (pt 19).

38. Voy. C.J.C.E., 3 décembre 1992, Oleificio Borelli SpA c. Commission des C.E., C-97/91, Rec., p. I-6313 (pts 14 et 15).

39. C.J.C.E., 11 juillet 1985, Cinéthèque S.A. et al., aff. jtes 60 et 61/84, Rec., p. 2605 (pt 24).

40. C.J.C.E., 18 juin 1991, ERT, C-260/89, Rec., p. I-2925 (pt 43).

41. En ce sens, voy. not. les concl. de l'avocat général M.F.G. Jacobs préc. C.J.C.E., 30 mars 1993, C. Konstantinidis, C-168/91, Rec., p. I-1191 (selon l'avocat général, le ressortissant communautaire qui exerce une liberté de circulation reconnue dans le traité «*n'a pas seulement le droit de poursuivre son entreprise ou sa profession et de bénéficier des mêmes conditions de vie et de travail que les ressortissants de l'Etat d'accueil ; il a droit, en outre, à l'assurance que, où qu'il se rende pour gagner sa vie dans la Communauté, il sera traité selon un code de valeurs fondamentales, en particulier celles inscrites dans la Convention européennes des droits de l'Homme*» (pt 46 des concl.). On retrouve une approche semblable dans le chef de l'avocat général W. van Gerven, dans ses concl. préc. C.J.C.E., 4 octobre 1991, The Society for the Protection of the Unborn Children Ltd. c. Stephen Grogan et al., 159/90, Rec., p. 4685, not. pt 31 des concl. (l'effectivité de la liberté de prestation des services suppose que toute réglementation nationale qui constitue une entrave à la libre prestation des services doit voir sa compatibilité évaluée au regard des droits fondamentaux, en l'espèce à la liberté d'expression figurant à l'article 10 de la Convention européenne des droits de l'Homme). En doctrine, voy. en ce sens J. Weiler, « The European Court at a Crossroads : Community Human Rights and Member State Action», in : Du droit international au droit de l'intégration. Liber amicorum Pierre Pescatore, Nomos Verlagsgesellschaft, Baden-Baden, 1987, p. 821, ici pp. 840-841.

42. Directive précitée.

43. Voy. C.J.C.E., 28 mars 1996, Avis 2/94, Rec., p. I-1759. Sur cet avis, voy. O. De Schutter et Y. Lejeune, « L'adhésion de la Communauté à la Convention européenne des droits de l'Homme. A propos de l'avis 2/94 de la Cour de justice des Communautés européennes», C.D.E., 1996, n°5-6, pp. 555-606.

44. Voy. O. De Schutter, « Les droits fondamentaux dans le traité d'Amsterdam», in : Y. Lejeune (coord.), Le traité d'Amsterdam. Espoirs et déceptions, Bruxelles, Bruylant, 1998, p. 153, ici pp. 154-155.

45. Comp. à cet égard O. De Schutter et Y. Lejeune, « L'adhésion de la Communauté à la Convention européenne des droits de l'Homme. A propos de l'avis 2/94 de la Cour de justice des Communautés européennes», op. cit., n°25, avec P. Wachsmann, « Les droits de l'Homme, R.T.D.E. (numéro spécial consacré au traité d'Amsterdam), 1997, pp. 883-902, ici p. 883, et avec le commentaire du même auteur, « L'avis 2.94 de la Cour de justice relatif à l'adhésion de la Communauté européenne à la Convention européenne des droits de l'Homme», R.T.D.E., 1996, pp. 467-491, ici p. 479.

46. Voy. l'article 1er de la Convention européenne des droits de l'Homme, ainsi que l'article 2, § 1er, du Pacte international relatif aux droits civils et politiques, et l'article 2, § 2, du Pacte international relatif aux droits économiques, sociaux et culturels.

47. Annexe à la Charte sociale européenne révisée: «Portée de la Charte sociale européenne révisée en ce qui concerne les personnes protégées». La Charte sociale européenne se distingue à cet égard de la Convention européenne des droits de l'Homme. Une autre trace en est les rédactions différentes que reçoit la clause de non-discrimination dans chacun de ces instruments : comp., avec l'article 14 de la C.E.D.H. (qui fait référence, entre autres motifs de discrimination prohibés, à l'»origine nationale»), l. E de la Charte sociale européenne révisée (qui ne réfère pas à ce critère de distinction mais seulement à l'«ascendance nationale», alors que le texte est manifestement inspiré de l'art. 14 C.E.D.H.). Ces deux dispositions, cependant, affirment que les motifs de distinction repris ne doivent pas être conçus comme limitativement énumérés. Aux termes du rapport explicatif de la Charte sociale révisée, «*Alors que l'origine nationale n'est pas un motif de discrimination acceptable, l'exigence d'une citoyenneté spécifique peut être acceptée sous certaines circonstances, par exemple pour le droit d'être employé dans les forces armées ou dans l'administration*» (§ 133). Ce passage semble en contradiction avec l'Annexe à la Charte sociale européenne révisée, dont on a rappelé le texte.

48. De ce point de vue, l'article E de la Charte sociale révisée, relatif à la non-discrimination, aurait largement suffi à justifier que les étrangers qui ne sont pas en ordre de séjour soient exclus du bénéfice de certaines prestations, sans qu'il soit nécessaire de les en écarter d'office.

49. Cour eur. dr. h., arrêt Gaygusuz c. Autriche du 16 septembre 1996, § 42.

50. Il faut s'attendre à des interactions, surtout, en ce qui concerne la liberté d'association syndicale (art. 11 C.E.D.H. et art. 5 de la Charte sociale révisée), le droit aux prestations de sécurité sociale (art. 1er du Prot. n°1 à la C.E.D.H. et art. 12 de la Charte sociale révisée), le droit de l'enfant à une protection de la part de l'Etat contre «la négligence, la violence ou l'exploitation» (art. 8 C.E.D.H. (voy. Cour eur. D.H., arrêt Stubbings c. Royaume-Uni du 22 octobre 1996, § 64: "*Les enfants et autres personnes vulnérables ont droit à la protection de l'Etat, sous la forme d'une prévention efficace les mettant à l'abri de sortes aussi graves d'ingérence dans des aspects essentiels de leur vie privée*") et art. 17, § 1er, de la Charte sociale révisée), et le droit au respect de la vie familiale (art. 8 C.E.D.H. et art. 16 de la Charte sociale révisée).

51. En ce sens, C. Pettiti, «La Charte sociale européenne révisée», Rev. trim. dr. h., 1997, pp. 3-16, ici pp. 13-14. Cependant, contrairement à ce que l'auteur suggère, nous ne sommes pas d'avis que la règle de non-discrimination conduit simplement à étendre la bénéfice des dispositions de la Charte sociale révisée aux seuls travailleurs étrangers «*de la nationalité d'un des Etats membres du Conseil de l'Europe*»: l'arrêt Gaygusuz ne contient nullement cette restriction.

52. Rapport explicatif de la Charte sociale révisée, § 133.

53. Cour eur. D.H., arrêt C. c. Belgique du 7 août 1996, § 38. Voy. déjà Cour eur. D.H., arrêt Moustaquim c. Belgique du 18 février 1991, Série A n°193, § 49.

Annexe 1 : Conclusions de la présidence

Conseil européen de Tampere (15 - 16 octobre 1999)

Annexe : Composition, méthode de travail et modalités pratiques de l'enceeint pour l'élaboration du projet de charte des droits fondamentaux de l'Union européenne envisagé dans les conclusions de Cologne.

A.Composition de l'enceinte

i) Membres
a) Chefs d´Etat ou de gouvernement des Etats membres
Quinze représentants des chefs d´Etat ou de gouvernement des Etats membres.
b) Commission
Un représentant du président de la Commission européenne.
c) Parlement européen
Seize membres du Parlement européen désignés par celui-ci.
d) Parlements nationaux
Trente membres des parlements nationaux (deux par parlement) désignés par ceux-ci.
Les membres de l'enceinte peuvent être remplacés par des suppléants en cas d´empêchement.

ii) Président et vice-présidents de l´enceinte
L´enceinte élit son président. Un membre du Parlement européen, un membre d´un parlement national et le représentant du président du Conseil européen exercent les vice-présidences de l´enceinte, s´ils n´ont pas été élus à la présidence.
Le membre du Parlement européen exerçant la vice-présidence est élu par les membres du Parlement européen faisant partie de l'enceinte. Le membre du parlement national exerçant la vice-présidence est élu par les membres des parlements nationaux faisant partie de l'enceinte.

iii) Observateurs
Deux représentants de la Cour de justice des Communautés européennes désignés par la Cour.
Deux représentants du Conseil de l´Europe, dont un représentant de la Cour européenne des droits de l´homme.

iv) Instances de l´Union européenne devant être entendues
Le Comité économique et social
Le Comité des régions
Le médiateur

v) Echange de vues avec les pays candidats
Il convient d´organiser un échange de vues approprié entre l´enceinte ou son président et les pays candidats.

vi) Autres instances, groupes sociaux ou experts devant être entendus
D´autres instances, groupes sociaux et experts peuvent être entendus par l´enceinte.

vii) Secrétariat
Le Secrétariat général du Conseil assure le secrétariat de l´enceinte. Afin de garantir une bonne coordination, des contacts étroits seront établis avec le Secrétariat général du Parlement européen, avec la Commission, et, dans la mesure nécessaire, avec les secrétariats des parlements nationaux.

B. Méthodes de travail de l'enceinte

i) Travaux préparatoires
Le président de l´enceinte propose, en étroite concertation avec les vice-présidents, un programme de travail pour l´enceinte et effectue les autres travaux préparatoires nécessaires.

ii) Transparence des délibérations
En principe, les débats de l´enceinte et les documents présentés au cours de ces débats devraient être rendus publics.

iii) Groupes de travail
L´enceinte peut constituer des groupes de travail ad hoc, qui sont ouverts à tous ses membres.

iv) Rédaction
Sur la base du programme de travail établi par l´enceinte, un comité de rédaction, composé du président, des vice-présidents et du représentant de la Commission et assisté par le Secrétariat général du Conseil, élabore un avant-projet de charte en tenant compte des propositions de texte soumises par tout membre de l´enceinte.

Chacun des trois vice-présidents procède régulièrement à des consultations avec les composantes respectives de l´enceinte dont il est issu.

v) Elaboration du projet de charte par l´enceinte
Lorsque le président de l'enceinte, en concertation étroite avec les vice-présidents, estime que le texte du projet de charte élaboré par l'enceinte peut être en définitive adopté par toutes les parties, celui-ci peut être transmis au Conseil européen conformément à la procédure préparatoire habituelle.

C. Modalités pratiques

L´enceinte se réunit à Bruxelles, alternativement dans les locaux du Conseil et dans ceux du Parlement européen.

Le régime linguistique intégral s´applique aux réunions de l´enceinte.

Annexe 2 : Conseil européen de Cologne - 3 et 4 juin 1999

Communication préliminaire aux chefs d'Etat et de Gouvernement à propos du projet de Charte européenne des droits fondamentaux. Communication conjointe FIDH - Amnesty international

A la veille du Sommet européen de Cologne, où sera débattue la proposition de la présidence allemande de doter l'Union européenne d'une Charte de droits fondamentaux, la FIDH et Amnesty International entendent rappeler certaines données essentielles.

La présente communication préliminaire ne préjuge pas de la position de nos organisations sur l'utilité d'une Charte européenne des droits fondamentaux, mais a pour seule vocation de souligner, de façon non-exhaustive, quelques questions qu'il nous paraît essentiel de voir prises en compte dès le début des discussions sur le sujet. Pour autant, nos organisations considèrent que la seule justification possible à l'adoption d'une Charte européenne, alors que tous les Etats membres sont déjà parties à la Convention européenne des droits de l'Homme, réside dans l'adoption d'une Charte qui soit davantage protectrice que la Convention européenne elle-même.

A cet égard, nos organisations se réservent de préciser leurs positions en fonction du projet dont elles auront pu prendre connaissance et réitèrent leurs appels précédents à ce que l'Union européenne en tant que telle se mette en position d'adhérer à la Convention européenne des droits de l'Homme et à la Charte sociale européenne révisée.

Les questions sur lesquelles nos organisations souhaitent d'ores et déjà attirer l'attention des Chefs d'Etat et de Gouvernement sont de trois ordres: elles concernent la détermination des catégories de droits et de leurs titulaires ; les garanties juridictionnelles dans le domaine des droits fondamentaux ; et enfin la coordination entre les instruments et les mécanismes de protection de l'Union européenne et du Conseil de l'Europe.

I. Catégories de droits fondamentaux et catégories de bénéficiaires

La notion de «droits civiques», utilisée notamment dans le Rapport du Comité des Sages, présidé par Maria de Lourdes Pintasilgo, intitulé «Pour une Europe des droits civiques et sociaux» (octobre 1995-février 1996) , est contestable en ce qu'elle fusionne deux catégories de droits distinctes quant à leurs destinataires, et prête ainsi à confusion.

Les droits dits «civils» doivent être reconnus à tous sans distinction, en raison même de leur caractère universel et fondamental. La Convention européenne de sauvegarde des droits de l'homme oblige d'ailleurs les Etats membres de l'Union européenne à garantir ces droits à toute personne se trouvant sous leur juridiction (art. 1er de la C.E.D.H); ils ne sauraient se délier de cette obligation internationale en déléguant certaines compétences aux Communautés européennes, sans que leur responsabilité internationale se trouve engagée vis-à-vis des autres parties à la Convention. De même les droits reconnus dans le Pacte international relatif aux droits civils et politiques doivent être accordés sans discrimination, fondée notamment sur l'origine nationale, «à tous les individus se trouvant sur le territoire et relevant de la compétence» des Etats ayant ratifié cet instrument (art. 2 du Pacte international du 16 décembre 1966 relatif aux droits civils et politiques)

Seuls les droits dits «politiques» - droit d'électorat et d'éligibilité – peuvent être réservés aux citoyens de l'Union, conformément à l'article 25 du Pacte international du 16 décembre 1966 relatif aux droits civils et politiques qui admet que soient réservés aux seuls «citoyens» certains droits de citoyenneté (prendre part à la direction des affaires publiques, voter et être élu, accès à la fonction publique). Ces droits devraient également être étendus aux personnes résidant légalement sur le territoire de l'Union, sous certaines conditions à préciser.

Le droit à la liberté de circulation, jusqu'à présent réservé aux seuls ressortissants des Etats membres de l'Union européenne, ne devrait pas – dans la logique même d'un espace sans frontières intérieures –être subordonné à cette condition de nationalité. On peut du reste considérer que le droit de «circuler librement» et de «choisir librement sa résidence» (art. 2, Protocole n°4 à la Convention européenne des droits de l'homme), que la Convention européenne des droits de l'Homme reconnaît à «quiconque se trouve régulièrement sur le territoire d'un Etat», sera à l'avenir interprété de façon à imposer cette exigence dans le cadre communautaire, à mesure même que progresse l'intégration de l'Union européenne.

Il convient d'autant plus de délier la reconnaissance des droits fondamentaux dans l'ordre juridique communautaire de la nationalité d'un Etat membre de l'Union européenne que les droits économiques et sociaux traditionnels, envisagés par la Cour européenne des droits de l'Homme comme des créances susceptibles de constituer des «biens» au sens de l'article 1 du Protocole n°1 à la Convention européenne des droits de l'Homme, ne peuvent selon cette juridiction être réservés aux seuls nationaux d'un Etat, sans que cette différence de traitement soit susceptible d'aboutir à une discrimination contraire aux articles 1 du Protocole n°1 et 14 combinés de la Convention européenne des droits de l'Homme. Selon la Cour européenne des droits de l'Homme en effet, «seules des considérations très fortes peuvent amener la Cour à estimer compatible avec la Convention une différence de traitement exclusivement fondée sur la nationalité» (Cour eur. D.H., arrêt *Gaygusuz c. Autriche* du 16 septembre 1996, § 42). De même, le Pacte international du 16 décembre 1966 relatif aux droits économiques, sociaux et culturels fait obligation aux Etats l'ayant ratifié de reconnaître les droits qui s'y trouvent énoncés sans discrimination, fondée notamment sur l'origine nationale (art. 2, § 2).

Certains droits économiques et sociaux, notamment liés aux prestations de sécurité sociale, peuvent être subordonnés à la régularité du séjour sur le territoire de l'Union européenne du ressortissant d'un Etat tiers; en revanche, les droits à l'assistance médicale et sociale sont au cœur de la dignité humaine et la privation de ces droits peut constituer un traitement inhumain et dégradant. Certains droits économiques et sociaux devraient ainsi être reconnus non seulement aux résidents légaux, mais également aux demandeurs d'asile et aux personnes en situation illégale. De même, le droit des enfants à l'instruction ne peut être refusé au motif que la situation administrative des parents ne serait pas régulière, et ne saurait être subordonné à la légalité du séjour.

II. Garanties juridictionnelles

La Cour de justice des C.E. garantit déjà un certain nombre de droits fondamentaux, qu'elle fait figurer parmi les principes généraux du droit communautaire dont elle assure le respect dans le domaine d'application du droit communautaire.

Les difficultés qui subsistent sont principalement au nombre de deux.

D'une part**, l'accès au juge communautaire ne garantit pas une protection pleinement efficace des droits fondamentaux**. Cela tient d'abord aux conditions restrictives auquel est soumis le recours direct en annulation introduit par un particulier (article 230, al. 4 du Traité C.E.) et à l'interprétation restrictive que la Cour de justice des C.E. fait de cette disposition; cette dernière impose d'ailleurs des conditions plus restrictives au recours du particulier que, par exemple, l'article 34 de la Convention européenne des droits de l'homme. L'insuffisance de la garantie communautaire tient ensuite à ce que l'alternative de la saisine d'une juridiction nationale suivie d'un renvoi préjudiciel vers la Cour de justice des C.E. (art. 234 du Traité C.E.) n'est pas satisfaisante dans le domaine des droits fondamentaux dans la mesure où elle peut contraindre l'individu, qui soupçonne que tel acte de droit dérivé communautaire viole ses droits fondamentaux, à violer cet acte ou la règle nationale qui en assure la transposition, afin de fournir au juge communautaire la possibilité de se prononcer sur sa validité.

D'autre part, si elle garantit effectivement les droits fondamentaux dits «civils», la Cour de justice des C.E. apparaît encore très réticente à accepter l'invocation en justice des **droits économiques et sociaux**, tels qu'ils sont codifiés, notamment, dans la Charte sociale européenne révisée ou dans la Charte communautaire des droits sociaux fondamentaux (au plan européen), ainsi que dans le Pacte international relatif aux droits économiques, sociaux et culturels (au plan international).

Aussi, toute tentative d'améliorer la protection des droits fondamentaux dans l'ordre juridique communautaire devrait s'accompagner d'un assouplissement des conditions d'accès au juge communautaire ou, à défaut, d'une extension des circonstances dans lesquelles les juridictions nationales des Etats membres doivent accueillir l'action en justice portée devant elles et qui tend à la préservation de la légalité communautaire. Demeurera également insatisfaisante toute réforme qui ne progressera pas vers l'affirmation du caractère juridiquement contraignant, dans le cadre communautaire, des droits sociaux fondamentaux.

III. Coordination entre l'Union européenne et le Conseil de l'Europe

Sur un nombre de questions toujours croissant, et notamment en ce qui concerne les droits sociaux et la protection de la vie privée vis-à-vis du traitement des données à caractère personnel, l'Union européenne prend des initiatives qui dédoublent les acquis du Conseil de l'Europe. Amnesty International et la FIDH insistent sur la nécessaire complémentarité qui doit exister entre les deux organisations, en lieu et place d'une concurrence aux conséquences essentiellement négatives.

Premièrement, une conception étroite de la nécessité de préserver l'autonomie de l'ordre juridique communautaire, qui conduit à préférer l'adoption de garanties des droits fondamentaux propres au système communautaire à l'adhésion de l'Union européenne ou des Communautés européennes aux instruments existants du Conseil de l'Europe, a pour conséquence que **la Communauté européenne n'est pas, ou n'est pas suffisamment, représentée au sein des instances du Conseil de l'Europe**.

Pourtant, le droit communautaire est effectivement soumis au jugement de ces instances, à travers la transposition ou l'exécution qu'en font les Etats membres. Rendu le 18 février 1999 par la Cour européenne des droits de l'homme, l'arrêt *Matthews c. Royaume-Uni* illustre ce danger : en dépit de ce que la Communauté européenne n'a pas adhéré à la Convention européenne des droits de l'Homme, les négociateurs du traité d'Amsterdam n'ayant pas jugé devoir combler la lacune identifiée à cet égard dans les compétences de la Communauté européenne par la Cour de justice des C.E. (avis 2/94 du 28 mars 1996), la Cour européenne des droits de l'Homme s'est effectivement prononcée dans cet arrêt sur la compatibilité du droit communautaire dérivé (en l'espèce, l'acte portant élection du Parlement européen au suffrage universel direct (décision 76/787 du Conseil du 20 septembre 1976)) avec l'article 3 du Protocole n°1 à la Convention (droit à des élections libres au scrutin secret).

L'applicabilité directe de la plupart des dispositions du droit communautaire impliquant leur assimilation au droit interne des Etats membres, ces dispositions sont soumises au même contrôle que le droit interne; il s'imposerait d'en tirer les conséquences procédurales. L'adhésion des Communautés européennes ou de l'Union européenne aux instruments du Conseil de l'Europe qui sont pris dans le champ de leurs compétences permettrait ainsi une représentation spécifique du point de vue communautaire dans les institutions que ces instruments mettent sur pied.

Deuxièmement, les candidats à l'adhésion à l'Union européenne sont déjà membres du Conseil de l'Europe. Ils ont ratifié la plupart des conventions les plus importantes ouvertes à la signature dans le cadre de cette organisation et font d'importants efforts pour réformer leur système juridique. L'amélioration du système communautaire des droits fondamentaux par de nouveaux instruments différents de ceux existant déjà au sein du Conseil de l'Europe imposerait à ces pays un effort supplémentaire alors que **la logique du système voudrait que les ratifications des instruments du Conseil de l'Europe et les réformes qu'elles ont impliquées dans les systèmes juridiques de ces Etats, constituent une étape sur le chemin de leur adhésion à l'Union européenne.**

Amnesty International et la FIDH espèrent que les remarques contenues dans cette communication préliminaire seront entendues par les Chefs d'Etat et de Gouvernement des Etats membres de l'Union à Cologne, et que leurs préoccupations seront reflétées dans les décisions qui seront prises à l'issue du Conseil européen.

Notes :

1. La Commission européenne avait décidé la mise en place de ce Comité des Sages en avril 1995, notamment pour examiner les suites susceptibles d'être réservées à la Charte communautaire des droits sociaux des travailleurs dans le cadre de la révision des traités de l'Union européenne prévue par le Traité de Maastricht.

Annexe 3 : lettre ouverte de la FIDH et d'Amnesty international adressée aux membres du Comité des représentants permanents

To the members of the Committee of Permanent Representatives of Member States

Dear Permanent Representatives,

Re : Composition of the Body to elaborate a draft EU Charter of Fundamental Rights

We are writing you to express our concern in relation to the composition of the Body to elaborate a draft EU Charter of Fundamental Rights.
The common position that came out of the discussions within the Committee of Permanent Representatives of Member States (Coreper) seems to be that human rights and social NGOs will not benefit from the status of observers to that Body. They will not necessarily be consulted by the Body and will not be allowed to systematically follow the discussions going on within the Body. Human Rights

and social NGOs " may " be invited by the body to give their views, which means that their consultation is not ensured.
We regret the weakness of this formula. The wording of the Decision of the European Council of Cologne (June 1999) was stronger in this regard (" social groups as well as experts should be invited to give their views "). The European Parliament also adopted a clearer position : " Calls, as regards the membership of the drafting authority and the organisation of its work : (...) for appropriate steps to be taken to ensure transparency of activities ; for contributions from NGOs and the general public also to be ensured, and for public hearings to be held ") .
Amnesty International and FIDH have already contributed in the past to the discussions concerning the establishment of a new EU Charter (notably through a note elaborated in view of the Cologne Council), and our organisations have also asked since a long time the accession of the European Community to the European Convention on Human Rights.
Amnesty International and FIDH intend to further contribute to the discussions concerning the EU Charter and will issue a position on this question before the end of the year. We are convinced that full consultation of specialised and representative NGOs as well as experts is essential in relation to such a delicate exercise.
The Platform of European Social NGOs, which regroups 25 European networks and federations working in the social field, maintains that representative NGOs must be fully consulted on, and involved in the preparation of the Charter and support the call of human rights NGOs for NGOs to be given observer status on the Drafting Commitee.
As the Expert Group on Fondamental Rights established by the Commission says in its February 1999 report (Simitis report), " Experience shows that the development of both credible and effcient fundamental rights policies depends to a decisive extent on continuous dialogue with those whose rights are to be guaranteed ".
We hope that you will have the possibility to take into consideration the points we raised and that a fruitful collaboration will take place during the whole drafting process of the Charter.
We remain,
Sincerely yours

Brussels, October 6, 1999

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 7 January 2000

CHARTE 4104/00

CONTRIB 4

INTRODUCTORY NOTE

Subject : Draft Charter of fundamental rights of the European Union
- submission of the Permanent Forum of Civil Society

Please find hereafter a Draft European Citizen's Charter, submitted by the Permanent Forum of Civil Society. [1] [2]

[1] Place du Luxembourg 1, B-1050 Bruxelles, tel. 322 512 44 44, fax 322 512 66 73.
[2] This text has been submitted in French and English language.

European Citizens' Charter
(Draft)

Preamble

This Charter constitutes the founding pact of a Community of Peoples and States reflecting the humanism characteristic of European civilization.

Presented on the 40th anniversary of the Treaty of Rome, it marks a turning point in the history of European construction.

It confirms the economic, social, cultural, civil and political rights of citizens of the Union. It also defines their duties.

This draft presented by the European Forum of Civil Society, in Rome on 22 March 1997, will be forwarded to the European Parliament for adoption and to the High Contracting Parties for ratification

The Signatory States agree to annex this Charter as a Joint Declaration to the Treaty on European Union. They undertake to make its provisions their criteria for the evaluation and approval of the Union's initiatives. They promise to ensure that the Treaty comes into force in accordance with the principles of the Charter.

Title I

A People's Europe

Article 1 The Union is based upon the human individual.

The human individual is at the heart of the European undertaking.

The Union is based upon all the fundamental rights prescribed by the Universal Declaration of Human Rights (New York, 1948), the European Convention on the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), the European Social Charter (Turin, 1961, revised 1988), the Community Charter of WOrkers' Fundamental Social Rights (Strasbourg, 1989), the Charter for the Protection of Ethnic Minorities and the United Nations International Covenants on Civil, Political, Economic and Social Rights (1966). These rights form its ethical, moral and cultural heritage.

The Union adheres to the International Convention on the Protection of Minorities and the International Convention on the Protection of Children. The Union protects the diversity of identity of all its inhabitants.

The Union is the guardian of a common good made up of all individual civil, economic and social rights. It cultivates the shared values of civilisation that are peace, dignity and respect for the human individual, democracy, freedom and the duty of solidarity.

Article 2 European citizenship

Citizenship entails complementary local, regional, national, European and worldwide dimensions, in line with the principle of subsidiarity.

Every citizen of any Member State is a citizen of the Union. Residents have the right to obtain the citizenship of the State where they reside. The Union shall ensure the harmonization of rights of access to national citizenship.

European citizenship has two principal components: civic and political, social and economic. These two elements of citizenship are indivisible. The Union shall endeavour to strengthen them jointly.

European citizenship resides on a European model of society which includes respect for the individual and for fundamental rights and a commitment to solidarity amongst its members.

Article 3 Sovereign power

Within the framework of the competences of the Union, sovereign power belongs to the citizens of the European Union.

Article 4 The missions of the European Union

The Union shall have the task of ensuring peace and democracy, balanced and sustainable development, economic and social cohesion, full employment and occupation and cultural development based on pluralism, dignity and respect for others.

4.1 Sustainable human development

The Union shall work to promote sustainable human development that is at once economic, social and ecological, giving each individual the opportunity to participate in an employment-creating economic and social life. Every individual is entitled to a healthy environment. The Union shall guarantee respect for the integrity of the human person in the environment and in the face of technological development, in particular with respect to biotechnology and the information society. The rights of future generations are recognized and protected in the Union.

Rejecting unrestrained competition and all forms of exclusion, this project is based on solidarity and equity in relations between Europeans and between Europe and other regions of the world.

The Union shall base its external activities, in particular its common foreign and security policy, on peace and the promotion of sustainable development, economic, social, cultural, civil and political rights, economic and social equity, equality between men and women and the fight against poverty and social exclusion.

In the context of Community policies and legislation, the Union shall respect the undertakings agreed at the United Nations Conferences on the Environment and Development (Rio, 1992), Human Rights (Vienna, 1993), the Population (Cairo, 1994), Women (Beijing, 1995), Social Affairs (Copenhagen, 1995) and the Habitat (Istanbul, 1996).

The Union shall ensure that the World Trade Organization guarantees the tying-in of social standards and trade on the basis of corresponding ILO conventions on forced labour, child labour and all forms of discrimination at the workplace, freedom of association and the right to collective bargaining. All trade cooperation treaties or agreements to which the Union shall become a contracting party must establish positive social and environmental clauses inciting respect for human and democratic rights.

4.2 A cultural project

The Union's cultural and educational activities shall be built on both the diversity and richness of its cultural and linguistic heritage and recognition of a common heritage, and on a cultural community, shared values, respect for the arts and cultures of the peoples of Europe, cross–border cooperation and dialogue with other civilisations. Protection of the cultural and linguistic heritage are civic rights.

It shall promote the conditions enabling each individual to develop his cultural, civic, creative and cognitive abilities.

The Union shall assure the protection and development of the common European heritage composed of its natural resources and the environment and its natural, cultural and linguistic heritage, in all its diversity.

4.3 A European civic area

The Union is a representative and participatory democracy. It shall guarantee the balanced representation of men and women. It shall provide the means necessary for active participation, in particular through the democratization of knowledge of decision-making.

4.4 Security

The Union shall have the objective of ensuring the security of all its inhabitants by working in favour of the social integration of all and of protection of the environment and worldwide natural resources.

The Union shall also endeavour to protect citizens against all forms of crime which are a threat to security and the European civil area.

Title II

The European Civic and Political Area

Article 5 Civic and political citizenship

The equality of men and women is a fundamental principle of the Union. The Union prohibits all forms of racism and xenophobia. The Union and its Member States shall provide conditions of equality and freedom for men and women alike. The Union shall take measures necessary for the establishment of sanctions.

Every citizen of the Union, in exercising his civil, political, social and economic rights, is entitled to the diplomatic protection of the Union and its Member States, and to the consular protection of the Member States in accordance with international rules

Democracy at the level of the Union is made up of two components : representation and participation.

Article 6 A representative democracy

The will of the citizens, the sovereign power; shall express itself directly at the level of the Union in particular through the election of the European Parliament and indirectly through the Council.

The European Parliament shall elect the European Commission, after consultation of the Council of the Union.

The Commission shall be accountable to Parliament and the Council. The President of the Commission may replace a Member of the Commission at the request of the European Parliament.

All of the Union's legislation, constitutional and budgetary acts and international agreements shall require approval by the majority of Members of the European Parliament and the national governments meeting in the Council of the Union.

Article 7 A participatory democracy

All citizens and all representative organizations have the right to formulate and make known their opinions on every area of the Union's competence. The Union shall guarantee the participation of all, in particular individuals and groups in a situation of poverty and social exclusion.

Practical implementation of rights and duties must not be limited to relations between the institutions and individuals. It also requires the presence of group players who stimulate the development of these rights and duties, explain them, defend them and implement them. Civil society is structured in this way.

The Union shall recognize organisations representing civil society as its permanent partners. It shall consult them regularly on all areas of Union citizenship, in particular on all Community acts related to civil, political, economic and social rights recognized by this Charter.

7.1 Representation of citizens
All European citizens have the right to vote and stand for election in European and local elections in their place of residence, irrespective of their nationality. The right to vote and stand for election in European and local elections shall be extended to all persons having resided legally in the European Union for five years. There shall be one method of voting for European elections. The voting method chosen shall include the right to cast a vote of preference amongst different individuals, since lists of candidates may be established on a transnational basis.

7.2 The right to information, transparency and public enquiry
The deliberations, proposals and legislative acts of all Union bodies, in particular the Council of the Union, shall be public.

The Union shall guarantee access to information in every area for which it has competence. The public and private mandates exercised by European officials and agents shall be public.

7.3 The right to evaluation
The Community's plans, programmes, policies and budgets shall be subject to prior evaluation by the European Parliament in a procedure that is transparent, public, pluralist and adversarial, in line with the principles and rights recognized by this Charter. The European Parliament shall consult the Economic and Social Committee and the Committee of the Regions.

The Charter signatory States shall make such evaluation a prerequisite to their acceptance of proposals from the Commission.

7.4 The right of legislative initiative
This right may be exercised collectively by citizens of the Union, in accordance with the conditions laid down by a Community law.

7.5 The right of popular consultation
The exercise of this right by European citizens, following presentation of a petition which has obtained signatures in all the States of the Union, shall be governed by a Community law developed on the basis of existing national legislations and practices..

7.6 The right to justice
All European citizens and all individual residing in a Member State have the right to institute legal proceedings before the Court of Justice of the Union in cases of non-observance of Community legislation or of the rights and principles recognized by this Charter.

7.7 The right of association
The Union recognizes the right of association. It shall establish a statute of European association enabling European group players to participate in the life of the Union and, through social experimentation and innovation, to defend and implement the rights and duties of European citizenship. It shall involve them in regular assessment of its activities and policies. The Member States shall not restrict the right of association on grounds of the nationality of members.

Title III

The European social and economic area

Article 8 Social and economic citizenship

European citizenship entails economic and social rights which are an integral part of the objectives of the Union. The Union shall promote the right to human dignity, education, life-long training, paid employment, recognition of socially useful activities, a minimum income guaranteeing respect for human dignity, equitable working conditions and pay, retirement, housing, the professional and social integration of the disabled, social protection and the consideration of the interests of the family and of the child.

The need for social policies shall be implemented by means of a partnership between the public authorities and civil society.

European citizenship as defined above must lead every individual to participate fully in the economic and social life of the Union, his country of residence and his local communities.

8.1 Social Rights

The rights of citizens include those laid down in the revised Turin European Social Charter, the CommunityCharter of Workers' Fundamental Social Rights and conventions of the International Labour Organization and the World Health Organization.

The rights of trade unions are guaranteed. Transnational rights of association, information, consultation, negotiation and action, including the right to strike, are part and parcel of citizens' rights. The different bodies of the Union shall be responsible for developing European collective bargaining legislation.

Child labour and forced labour are prohibited in the European Union, as are all forms of trade in human beings.

8.2 Services of general interest

The Union is the guardian of solidarity and social cohesion. It shall establish to this effect public and social rules on the internal market and common development policies. Access of European citizens, at Union and Member State level, to services of general interest contributing to the objectives of equality, solidarity and social cohesion, is an integral part of the recognition and guaranteed exercise of the fundamental rights of the individual. Every European citizen shall be entitled in particular to a healthy environment, equal justice for all, education, health care and quality social services.

Title IV

Constitutional Pact

Article 9 Sanctioning of a Member State

In the event of an infringement of the principles of the present Charter, the Commission, the European Parliament, any Member State and any individual as defined in Article 7.6 may initiate proceedings before the Court of Justice of the Union, which is entitled to take sanctions.

Member State status shall be suspended by a vote of the European Parliament for any State found to be in serious infringement of the principles of this Charter. The infringement finding shall be made by the Court of Justice of the Union.

Article 10 Final and interim provisions

This Charter shall constitute the basis of a constitutional pact open to the Peoples and States of Europe willing to accept it. The Union and the Member States shall be charged with setting into place a constitutional process with the peoples of the Union.

(DRAFT) EUROPEAN CITIZENS' CHARTER

Explanatory Memorandum

1. In spite of the historical, institutional and practical importance of the treaty, mere reading of it will never be enough to draw crowds of enthusiastic European Union supporters, nor will its revision. *"The European Union must draw up a Charter of its own, clearly setting out the ideals on which it is based, its role and the values it hopes to represent."(Vaclav Havel).* That is the ambition of the draft European Citizens' Charter.

2. The draft Charter is meant to establish a hierarchy of the Union's values. Where the Union is perceived as primarily a "free-trade area", "a market", *the Charter places men and women at the heart of the undertaking. It defines what constitutes the common good.*

3. The Charter presented on the fortieth anniversary of the Treaty of Rome is meant to mark a turning point in European history. It proposes a new founding pact for a community of Peoples and States reflecting the humanism characteristic of European civilisation. It proposes the definition of *a European model of society*.

4. It asserts that *sovereign power belongs to the citizens of the Union* and not to the market or the technocracy.

5. It constitutes the basis of a *constitutional pact* open to the Peoples and States willing to accept it.

6. As noted in the report by the Committee of Wise Men, For a Europe of Civil and Social Rights, "the European Union must assert its identity more clearly, an identity that cannot be separated from citizenship. At this stage, citizenship of the Union as laid down in Articles 8 to 8E of the EC Treaty is lacking in substance." *The Charter develops the concept of European citizenship, recognizing its two principal elements: civil and political, social and economic*. It is aimed at defining a frame of reference for the Union's actions and laying down the bases of a future collective and democratic demarche: the constitutional process.

7. This Charter also concerns the definition of a *European civil area*. The text proposes *an inter-linking between European representative democracy and European participatory democracy*. The writing of the Charter itself puts this vision into practice: drafted at a forum bringing together more than 80 European organisations, the text was forwarded to the European Parliament with the request that it be debated, amended if necessary and adopted in a final version that would then be submitted to the States for ratification.

8. The Charter concerns the fundamental rights and duties resulting, on the one hand, from European citizenship and, on the other, *extended in part to all individuals residing legally on Union territory but who are not citizens of the Union.*

From the time of its creation, the Union has been a multinational, multicultural, multilinguistic and multireligious Community with a strictly secular nature. The Charter aspires to place its proposals on non-Union citizens residing legally on its territory within the framework of the geopolitical developments in which war and peace will be played out in the 21st century. Given the globalization of the economy, the communication technologies changing the world of work, the acceleration of population movements, the need to maintain a young population as a means of preserving the rights of retired Europeans, Europe must be given a strategy adapted to its new challenges. A "war of civilizations" must also be rejected. Civilizations considering foreigners to be their enemy either degenerate into barbarism or perish.

The Charter seeks to build bridges to other peoples and other civilizations. It plays the card of hospitality, integration, exchange and multiple memberships, convinced that this approach will best guarantee reciprocity and the economic and social future of Europeans and will make Europe the avant-garde of the future democracy without frontiers that will become a reality in the 21st century.

9. Social cohesion is at the heart of the challenges facing the Union and its identity. *The Charter defines the initial elements of a social and economic citizenship*. European citizenship encompasses economic and social rights that are an integral part of the objectives of the Union and which must make possible the full participation of every individual.

10. This Charter is the Charter of European Citizenship, and not simply of European Citizens' Rights. In laying down the elements of European citizenship, the Charter is structured on the idea "that there are no rights without responsibilities, nor democracy without a sense of civic duty". The need to take action to ensure the success of the European civil area and of European policies promoting social cohesion is reflected in and built upon strong commitments by civil society. *The partnership with the new group players acting in civil society is recognized.*

11. The Charter defines an ambitious project for Europe. It takes as its foundations the most advantageous provisions existing in the Member States and rejects the smallest-common-denominator strategy. *The most favorable provisions in force in one or more Member States and incorporated into the Charter concern in particular the right to vote in European and local elections, the right of popular initiative and the right of popular consultation.*

12. The Charter complements existing treaties that form the foundation of the European Union. Rights and obligations at European level come on top of the fundamental rights guaranteed at national level. The organisations submitting it to Parliament *reiterate the imperative nature of the revision of the Treaty proper*. They note that their concerns regarding employment, social rights and the fight against poverty and social exclusion imply inclusion in the Treaty of a platform of social and civil rights. It is also imperative for the Treaty to make co-decision with Parliament and majority vote the rule.

13. One of the roles of the Charter is the definition of standards for the *strategic assessment of Community programmes, projects and budgets*. The Charter signatory States shall ensure that the Treaty comes into force in accordance with the principles outlined in the Charter. The Charter signatory States must undertake to make such evaluation a prerequisite for their acceptance of proposals from the Commission.

14. Just as the revised treaty shall be submitted to a vote by the European Parliament, this Charter shall be forwarded to the European Parliament for debate, amendment and adoption. The Forum calls on the Member States wishing to sign the Charter passed by Parliament to *establish a link between the timing of the signature of the revised Treaty and the signature of the present Charter*. If necessary, as in 1985 and 1992 precedents, the Forum shall ask Member States to postpone the signature of the Treaty until the time of adoption of the present Charter by Parliament and its annexation to the Treaty as a Joint Declaration of the Charter signatory States.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 18 January 2000

CHARTE 4106/00

CONTRIB 5

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter the report of the Parliamentary Assembly of the Council of Europe (Rappporteur: Mr. Göran Magnusson) [1].

[1] This text has been submitted in French and English language.

Doc. 8611

14 January 2000

Charter of Fundamental Rights of the European Union

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Göran Magnusson, Sweden, Socialist Group

Summary

Is the coexistence of two parallel systems of human rights protection in Europe possible and in particular is it not likely to lead to inconsistencies? That is the question the Assembly was confronted with following the decision taken by the European Council, in Cologne in June 1999 to draw up a Charter of Fundamental Rights of the European Union.

The Assembly, while welcoming improvements in the guarantee of fundamental rights in Europe, draws the attention of the European Union to the existence of the European Convention on Human Rights, to which all of its member states have adhered, and to the European Court of Human Rights responsible for his interpretation. It also proposes solutions which would make it possible to avoid the inconsistencies of such a coexistence: the inclusion in the Charter of the rights contained in European Convention on Human Rights and the ratification of the Convention by the European Union.

I. Draft resolution

1. The Assembly considers it necessary to make a number of observations following the decision by the EU European Council in Cologne on 3 and 4 June 1999 to draw up a Charter of Fundamental Rights of the European Union, to be submitted to the European Council in December 2000.

2. At this stage, without knowing the Charter's content, the Assembly wishes to bring a number of matters to the attention of those responsible for drafting this instrument, that is to say the "body" established to that end in Tampere, and may have occasion to make observations on the substance of the Charter in due course.

3. The European institutions, first the Communities and then the European Union, have always shown an interest in human rights, in particular the European Convention on Human Rights, and have mentioned those rights as the foundation of democracy in their successive treaties. The European Parliament and the Commission have on a number of occasions come out in favour of the Union's accession to the Convention. The Parliamentary Assembly has itself welcomed this proposal. However, it has not yet been translated into action, following an opinion by the Court of Justice in Luxembourg on whether accession to the Convention was compatible with the Community treaties, in which the Court found that, as Community law stood at the time, the Commission had no competence to accede.

4. At a time when it is reinforcing its powers, the Union wishes to make the importance of human rights more visible to its citizens, as stated in the decision taken in Cologne, and to bring these currently scattered rights together in a single text. The Assembly welcomes this initiative as a sign of a resolve to strengthen further the cause of human rights in Europe.

5. The Assembly nonetheless considers that, in adopting a Charter of Fundamental Rights, the achievements of the European Convention on Human Rights and the body of its case-law established over almost fifty years, which has had far-reaching effects on the law of the member states of the Council of Europe and therefore of the European Union, cannot be disregarded. It further draws attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights.

6. In this connection, the Assembly recalls the communication of 19 November 1990 issued by the Commission of the European Communities on accession to the European Convention on Human Rights, in which it stated that accession did not rule out the option of a set of fundamental rights specific to the Community. The opposite inference can therefore be made, ie that adoption of a Charter does not rule out accession to the Convention on Human Rights.

7. The European Union and the Council of Europe undeniably guarantee a number of rights which are not contained in the European Convention on Human Rights, particularly economic and social rights, and the Charter should therefore include these rights, adding to them others now accepted as fundamental rights. The Assembly draws attention to the other instruments for the protection of human rights on which the Charter could draw, in particular the revised European Social Charter, which guarantees economic and social rights and is an instrument to which the Assembly has invited the Union to accede. It recalls that, following the Treaty of Amsterdam, a reference to the Social Charter of the Council of Europe was included in the Treaty on the European Union.

8. The Assembly refers to the European Union report, prepared in February 1999 by an expert group chaired by Professor Simitis, which recommends that Articles 2 to 13 of the European Convention on Human Rights be incorporated into Community law, together with the rights secured in the protocols to the Convention. The inclusion of rights guaranteed by the Convention would be a means of avoiding having two different sets of rights in Europe, thus creating two categories of citizens enjoying different rights.

9. The Assembly believes that there can be no discrimination in the application of fundamental rights and that everyone coming under the jurisdiction of a Council of Europe member state must enjoy the protection of such rights, as provided for in Articles 1 and 14 of the European Convention on Human Rights.

10. In conclusion, in the light of the above, the Assembly invites the European Union:

to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols in the Charter of Fundamental Rights and to do its utmost to safeguard the coherence of the protection of human rights in Europe and to avoid diverging interpretations of those rights;

to pronounce itself in favour of accession to the European Convention on Human Rights of the Council of Europe and make the necessary amendments to the Community treaties;

to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account.

II. Draft recommendation

1. The Assembly, having regard to its Resolution … (2000) on the European Union Charter of Fundamental Rights, in which it invites the European Union:

to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols in the Charter of Fundamental Rights and to do its utmost to safeguard the coherence of the protection of human rights in Europe and to avoid diverging interpretations of those rights

to pronounce itself in favour of accession to the European Convention on Human Rights of the Council of Europe and make the necessary amendments to the Community treaties;

to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account,

recommends that the Committee of Ministers of the Council of Europe pronounce itself in favour of the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to be made to this treaty.

III. Draft order

The Assembly, having regard to its Resolution … (2000) and Recommendation … (2000), instructs its Committee on Legal Affairs and Human Rights to carefully follow and monitor the outcome of the drafting work on the Charter of Fundamental Rights, and to report back to it on this subject in due course.

IV. Explanatory memorandum by Mr Magnusson

A. Introduction

1. In a motion for a resolution (Doc 8542), some members of the Parliamentary Assembly expressed their concern on learning of the decision taken by the European Union's European Council, in Cologne on 3-4 June 1999, to draw up a Charter of Fundamental Rights of the European Union.

2. As the draft is to be prepared and presented in time for the meeting of the European Council in December 2000, the signatories of the motion felt there was a certain urgency to take a stand on that decision. They considered it necessary that the Council of Europe be involved in the drawing up of such a Charter. They believed that such a Charter should not be integrated into the treaties of the European Union, as it would doubtless result in different interpretations of the Convention's provisions by the European Court on Human Rights on the one hand and the Court of Justice of the European Communities on the other.

3. They therefore called upon the Parliaments of the European Union's member States to renew their efforts in favour of the accession of the Union to the Council of Europe's European Convention on Human Rights (hereafter: ECHR), and in the meantime to do their utmost to prevent the granting of treaty value to any European Union Charter of Fundamental Rights.

4. The present draft report aims at analysing the situation, starting by summarising the relations of the European Institutions with human rights, trying to identify the possible developments in the light of the decision taken at the Cologne meeting and making proposals to avoid the above-mentioned risks of duplication in the interpretation of the rights and of two systems of protection, one for the citizens of the European Union's member States and another for the citizens of the rest of Europe.

B. The European Institutions and Human Rights

5. It is to be noted that the European Institutions, first the Communities and now the European Union (hereafter: EU), have always shown an interest in human rights and in so doing they have always made reference to the ECHR.

6. The preamble of the Single European Act of 1986 expressed the European Community member states' determination "to work together to promote democracy on the basis of the

fundamental rights recognised in the constitutions and laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".

7. Some specific rights are explicitly included in the Treaties of the Communities, such as freedom of movement for workers, freedom of establishment and freedom to supply services, equality of treatment between men and women and non-discrimination on the ground of nationality.

8. To these rights four new rights have been added in the Treaty on the European Union: right to move and reside freely within the territory of member states; right to vote and to stand as a candidate in municipal and European elections in the member State where one resides; right to petition the European Parliament and right to apply to the European Ombudsman; protection in third countries by the diplomatic and consular authorities of any member State.

9. However, these rights are scattered and it has been thought that they should be grouped and also completed with other ones. At the same time, protection through accession to the ECHR was already envisaged in the 1970s.

10. As was recalled in the report on the accession of the European Community to the ECHR (Doc 7383) of 1995, presented by Mrs Wohlwend, following the Commission of the European Communities' memorandum of 4 April 1979 and the European Parliament Resolution of 27 April 1979, the Parliamentary Assembly of the Council of Europe welcomed the prospect of such accession, emphasising in its Resolution 745 of January 1981 that accession "would form an important bond between the European Communities and the member states of the Council of Europe in the specific field of human rights and fundamental freedoms, and would thus contribute to strengthening the principles of parliamentary democracy and the implementation of basic human rights".

11. This was reaffirmed several times by the European Parliament, which reiterated its support in three resolutions, on 18 January 1994, on 4 May 1994 and on 11 April 1995. The Parliamentary Assembly also reiterated its support in its Recommendation 1365 (1998).

12. In its Communication on the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols (SEC (90) 2087 final of 19 November 1990), the Commission of the European Communities concluded as follows:

> "The Commission accordingly requests that the Council:
>
> - approve the request for the Community's accession to the ECHR
> - authorise the Commission to negotiate the details of this accession in accordance with the directives set out in Annex 1, the aim being to make necessary adjustments to the Convention to make possible this accession (notably to provide for Community representation in the Commission of Human Rights and the Court of Human Rights)."

It also stated that the accession of the European Community to the ECHR does not exclude the option of a catalogue of fundamental rights specific to the Community.

13. The Parliamentary Assembly adopted Resolution 1068 (1995) on the accession of the European Community to the ECHR on 27 September 1995. In this text, it expressed the hope that the Community would soon take the necessary steps to submit its formal application for accession.

14. Since the adoption of that resolution important developments have taken place. First, on 26 April 1994, the Council of Ministers of the Community asked the Court of Justice of the European Communities for its opinion on the compatibility of accession to the European Convention on Human Rights with the Community treaties.

15. In its opinion adopted in March 1996, the Court held that "such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could only be brought about by way of Treaty amendment" and it concluded that as Community law stood at that time the Community had no competence to accede to the ECHR.

16. Following this opinion by the Court of Justice, the question of European Community accession to the ECHR was not subsequently discussed in the framework of the Intergovernmental Conference which led to the conclusion of the Treaty of Amsterdam.

17. The Amsterdam Treaty, signed on 2 October 1997, and which entered into force on 1 May 1999, affirms in its Article 6§1 the European Union's commitment to human rights and fundamental freedoms and confirms the Union's attachment to fundamental social rights.

18. This is nothing new, as we have already seen.

19. What is new is the decision taken by the European Council of the European Union at its meeting in Cologne on 3 and 4 June 1999 "to draw up a Charter of Fundamental Rights of the European Union, to make their overriding importance and relevance more visible to the Union's citizens".

20. According to the terms of the decision "the European Council believes that this Charter should contain fundamental rights and freedoms as well as 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. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter 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, insofar as they do not merely establish objectives for action by the Union".

C. Strengthening Human Rights in Europe

21. As already said, the concern for human rights has always been present in the European Union. However, with the adoption of the Amsterdam Treaty which reinforces the power of the EU, some member States felt it necessary to put in a single text the rights which are already guaranteed and to add to it other rights. Another reason for that is the wish to make visible EU concern for human rights (see para 19).

22. As stated before, the Commission of the European Communities already said in its communication of 1990 that the accession of the Community to the ECHR does not exclude the option of a catalogue of fundamental rights specific to the community.

23. Furthermore, the Parliamentary Assembly itself, in the explanatory memorandum to its Resolution 1068 (1995), acknowledged that the fundamental rights and freedoms of Community citizens needed to be clearly affirmed, especially as new protection requirements were becoming apparent. It also stated: "in the absence of explicit references in the treaties, some Community states have given the fundamental rights appearing in their national constitutions precedence over the provisions of derived Community law. Such a threat to the uniform application of Community law is one of the factors behind the drawing of a Community code of fundamental rights."

24. From all the foregoing it seems very clear that the decision to draw up a Charter is a logical consequence of the evolution in both the European Institutions and in the Council of Europe towards the protection of human rights in Europe.

25. What remains to be seen is how this aim would be best achieved.

26. The Council of Europe has to contribute to reaching this aim. One has to recall that all the member States of the EU are also members of the Council of Europe and that they should be coherent.

27. Firstly, concerning the involvement of the Council of Europe in the drawing up of the Charter of Fundamental Rights, the decision setting up the body[1] to elaborate a draft EU Charter foresees that the Council of Europe will be represented in the body set up to elaborate the Charter as an observer. It is entitled to two representatives, including one from the European Court of Human Rights.

28. Secondly, it must be taken into account that five members of the Parliamentary Assembly have been nominated among the two members from each national parliament, including the Rapporteur and the Chairperson of the Committee on Legal Affairs and Human Rights.

D. The Charter: contents and implementation

a. The rights to be guaranteed

29. As mentioned in the decision of Cologne, the ECRH is a reference to be taken into consideration when drafting the Charter. How?

30. Should the ECHR be included as such in the Treaty of the EU? This was to some extent the opinion expressed by the Expert Group on Fundamental Rights, chaired by Professor Simitis, which prepared a report at the request of the European Commission.

This report entitled "Affirming fundamental rights in the European Union - Time to act" was completed in February 1999. According to the Expert Group "the rights provided in Articles 2 to 13 of the ECHR should be incorporated in their entirety into the Community law, together with the rights in the Protocols to the ECHR". They considered that clauses detailing and complementing the ECHR must be added, as it appears necessary. They gave as an example a list of rights which are already recognised in Community law or in the case-law of the Court of Justice of Luxembourg:

[1] For its membership see Appendix I.

- the right to equality of opportunity and treatment, without any distinction such as race, colour, ethnic, national or social origin, culture or language, religion, conscience, belief, political opinion, sex or gender, marital status, family responsibilities, sexual orientation, age or disability ;

- the freedom of choice of occupation ;

- the right to determine the use of personal data ;

- the right to family reunion ;

- the right to bargain collectively, and to resort to collective action in the event of a conflict of interests; and

- the right to information, consultation and participation in respect of decisions affecting interests of workers.

31. One cannot know at this stage what will be the proposals by the body responsible for elaborating the Charter. However, the following comments have to be made regarding Professor Simitis's report.

32. First, the inclusion of the ECHR in the Community law would be a good solution in that it would avoid having two different sets of rights in Europe thus creating two categories of citizens entitled to different rights.

33. One has, however, to question the exclusion of article 1 of the ECHR. Article 1 of the ECHR states: "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention".

34. This is an essential aspect of the protection of human rights: one cannot exclude people on the ground of their national origin, as mentioned in the article on non -discrimination cited as an example by the Expert Group. This should cover not only the citizens of the Union's member states wherever they are, but also the citizens of other countries who are within their jurisdiction. Only some political rights, such as the right to vote or to be elected, which are recognised to the citizens of the EU, could be linked to citizenship, although they could also be extended to persons residing on a legal basis on the territory of the Union.

35. The other articles which have been excluded by the Expert Group are Article 14 of the ECHR, which concerns the prohibition of discrimination, Article15 concerning the derogation in time of emergency and Article 16 concerning restrictions on political activity of aliens.

36. Article 14 is the object of a draft Protocol No 12 to the ECHR with a view to extending it. The Assembly has been called upon to give its opinion on this draft Protocol. At this stage it is however obvious that the scope envisaged by the Expert Group is much wider than that of the draft Protocol.

37. This does not seem to be an obstacle, on the contrary. The approach is to take the ECHR as minimum standard to which the Union could add more rights in order to take into account its own law.

38. The report refers also to the "relevant rights in the Protocols to the ECHR". They mention the following rights: the right to property (Article 1 of the First Protocol), the right to vote (Article 3 of the First Protocol) and the right to free movement (Article 2 of the Fourth Protocol).

39. They leave out a number of other rights, such as the right to education, the prohibition of imprisonment for debt, the prohibition of expulsions of nationals, the prohibition of collective expulsion of aliens, the abolition of the death penalty, as well as Protocol No 7, which guarantees some procedural rights.

40. As regards the social rights one could also recommend the inclusion of the European Social Charter into the Community law. Of course the question of their implementation remains to be solved. Social rights require an intervention by the State and in particular have financial implications.

b. The implementation of the rights guaranteed

41. Even if the ECHR were included into the Charter of Fundamental Rights, the risk still exists that their interpretation might vary if two Courts are responsible for it. This is probably the main concern upon which the Parliamentary Assembly should concentrate.

42. The European Court on Human Rights is responsible for the interpretation of the ECHR and should continue to be so. Ways should be found to keep its competence for the interpretation of the rights contained in the ECHR even if they are included in the Charter, while the Court of Justice of Luxembourg should keep its competence to interpret the other rights and in particular the alleged violations of human rights by Community institutions without a member State intervention.

43. The report on which is based Resolution 1068 (1995), paragraph 25, had foreseen a problem which has occurred in the meantime. In implementing the Community's law, it is the member States that are ultimately liable to be subjected to the sanctions of the European Court of Human Rights in the Community's stead, and be condemned on account of derived Community law. The conclusion of the Community treaties by the states has not released them from the obligations they contracted in the framework of the ECHR. Consequently, it is still possible for an individual to submit to the Strasbourg Court an application against a member State in respect of a national measure designed to implement Community law, and even a measure taken by the Community, and for the state to be condemned.

44. This occurred recently in the Matthews case against the United Kingdom, which concerned the situation of the people of Gibralter who were not allowed to vote in the European Parliament elections even though they were subject to European Union "legislation". The case was brought before the European Court of Human Rights.

45. Accession to the ECHR would remove this risk by permitting direct appeals against such acts as well as against implementing measures taken by member States in cases where they do not possess wide discretionary powers.

46. Of course both the accession of the European Communities/Union to the ECHR and the repartition of competencies between the two courts need adjustments. These adjustments are of a legal nature and if the political will exists they should not be an obstacle.

47. Different options exist, such as prejudicial request for an opinion of one Court to the other, or a repartition according to the right involved or the organ or State respondent for the alleged violation.

48. Already in 1990, the Commission of the Communities, in its Communication on the accession to the ECHR, appended the following negotiating directives:

> "1. The purpose of the negotiations is to draw up an additional Protocol to the ECHR of 1950, enabling the Community to become a party to the Convention and some of its Protocols;
> 2.In order to ensure that the Community participates fully in the organs of the Conventions, the Community will have to be represented as such in the (Commission of Human Rights) the Court of Human Rights. An ad hoc solution will have to be envisaged for its representation in the Committee of Ministers.
> 3.The negotiating directives will be defined, where necessary, by the usual procedures."

E. Preliminary conclusions

49. The Parliamentary Assembly recognises that the drawing up of a Charter of Fundamental Rights of the European Union is a logical development in the evolution of the European Union and considers it as a strengthening of the protection of human rights in Europe. It should ensure that this is the case and that the rights are guaranteed to everyone within the jurisdiction of the Union.

50. It however would like to draw attention to the existence of the ECHR and its mechanism of protection through the former European Commission and the Court of Human Rights, which have proved their efficiency. It accordingly calls on the attention of the body in charge of elaborating this Charter to take this mechanism into account. In particular, it recommends it to follow the conclusions of the Expert Group on Fundamental Rights, chaired by Pr Simitis, to include and incorporate the articles of the ECHR into the Community law, together with the relevant rights in the Protocols to the ECHR. One should avoid in the future a situation in which there are two different systems of protection with two different courts whose case-law could be divergent

51. The Parliamentary Assembly also reiterates its recommendation that the European Communities/Union accede to the ECHR, to which all its member states are Parties, as was advised on many occasions in the past both by the institutions of the European Communities and by the Council of Europe. It could also accede to the European Social Charter. In order to allow this accession, the Committee of Ministers should start preparatory work.

52. In addition, in order to avoid a different interpretation of these rights by the two European Courts, it recommends that the competence of each of them be clearly defined.

APPENDIX

COMPOSITION METHOD OF WORK AND PRACTICAL ARRANGEMENTS FOR THE BODY TO ELABORATE A DRAFT EU CHARTER OF FUNDAMENTAL RIGHTS, AS SET OUT IN THE COLOGNE CONCLUSIONS

A. COMPOSITION OF THE BODY

(i) Members

(a) Heads of State or Government of Member States

Fifteen representatives of the Heads of State or Government of Member States.

(b) Commission

One representative of the President of the European Commission.

(c) European Parliament

Sixteen members of the European Parliament to be designated by itself.

(d) National Parliaments

Thirty members of national Parliaments (two from each national Parliament) to be designated by national Parliaments themselves.

Members of the Body may be replaced by alternates in the event of being unable to attend meetings of the Body.

(ii) Chairperson and Vice-Chairpersons of the Body

The Chairperson of the Body shall be elected by the Body. A member of the European Parliament, a member of a national Parliament, and the representative of the President of the European Council if not elected to the Chair, shall act as Vice-Chairpersons of the Body.

The member of the European Parliament acting as Vice-Chairperson shall be elected by the members of the European Parliament serving on the Body. The member of a national Parliament acting as Vice-Chairperson shall be elected by the members of national Parliaments serving on the Body.

(iii) Observers

Two representatives of the Court of Justice of the European Communities to be designated by the Court. Two representatives of the Council of Europe, including one from the European Court of Human Rights.

(iv) Bodies of the European Union to be invited to give their views

The Economic and Social Committee

The Committee of the Regions

The Ombudsman

(v) Exchange of views with the applicant States

An appropriate exchange of views should be held by the Body or by the Chairperson with the applicant States.

(vi) Other bodies, social groups or experts to be invited to give their views

Other bodies, social groups and experts may be invited by the Body to give their views.

(vii) Secretariat

The General Secretariat of the Council shall provide the Body with secretariat services. To ensure proper coordination, close contacts will be established with the General Secretariat of the European Parliament, with the Commission and, to the extent necessary, with the secretariats of the national Parliaments.

I: B. WORKING METHODS OF THE BODY

(i) Preparation

The Chairperson of the Body shall, in close concertation with the Vice-Chairpersons, propose a work plan for the Body and perform other appropriate preparatory work.

(ii) Transparency of the proceedings

In principle, hearings held by the Body and documents submitted at such hearings should be public.

(iii) Working groups

The Body may establish ad hoc working groups, which shall be open to all members of the Body.

(iv) Drafting

On the basis of the work plan agreed by the Body, a Drafting Committee composed of the Chairperson, the Vice-Chairpersons and the representative of the Commission and assisted by the General Secretariat of the Council, shall elaborate a preliminary Draft Charter, taking account of

drafting proposals submitted by any member of the Body.
Each of the three Vice-Chairpersons shall regularly consult with the respective component part of the Body from which he or she emanates.

(v) Elaboration of the Draft Charter by the Body

When the Chairperson, in close concertation with the Vice-Chairpersons, deems that the text of the draft Charter elaborated by the Body can eventually be subscribed to by all the parties, it shall be forwarded to the European Council through the normal preparatory procedure.

II. C. PRACTICAL ARRANGEMENTS

The Body shall hold its meetings in Brussels, alternately in the Council and the European Parliament buildings.

A complete language regime shall be applicable for sessions of the Body.

Reporting committee: Committee on Legal Affairs and Human Rights

Budgetary implications for the Assembly: none

Reference to committee: Doc 8542, Reference No. 2440 of 24 September 1999

Draft resolution adopted unanimously with one abstention, and *draft recommendation and draft order* adopted unanimously by the committee on 10 January 2000

Members of the committee: MM *Jansson* (*Chairperson*), *Bindig*, Frunda, Moeller (*Vice-Chairpersons*), Mrs *Aguiar*, MM *Akçali*, Arzilli, Attard Montalto, Bal, *Bartumeu Cassany, Brand*, Bulic, *Clerfayt*, *Columberg*, Contestabile, Demetriou, Derycke, Enright, Mrs *Err*, Mrs Frimansdóttir, Mr Fydorov (alternate: Mr *Glotov*), Ms *Hlavac*, Mr Holovaty, Mrs Imbrasiene (alternate: Mr *Kuzmickas*), MM *Jaskiernia*, *Jurgens*, Kelam, Kelemen, Lord Kirkhill, MM *König*, *Kresak*, Mrs Krzyzanowska, Mr Le Guen, Ms Libane, MM Lintner, Loutfi, *Magnusson*, Mancina, Mrs Markovic-Dimova, MM Martins, *Marty*, *McNamara*, *Mozetic*, Mrs *Näslund*, MM *Nastase*, *Pavlov*, Pollo,

Polydoras, Mrs Pourtaud, MM Robles Fraga, Rodeghiero, Mrs Roth, Mrs Roudy, MM Saakashvili, *Shishlov*, Simonsen, Solé Tura, Solonari, Svoboda, Symonenko, Tabajdi, Verhagen, Verivakis, *Vishnyakov*, *Vyvadil*, Mrs *Wohlwend*.

N.B. The names of those members who took part in the vote are printed in italics.

Secretaries to the committee: Mr Plate, Ms Coin and Ms Kleinsorge

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 20 January 2000

CHARTE 4108/00

CONTRIB 6

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter an open letter to the members of the body from the European Parliament Intergroup (Fourth World European Committee) [1]

[1] This text has been submitted in French and English language.

Open letter to the members of the body responsible for drawing up a Charter of fundamental rights

Brussels, 12 January 2000

Dear Sir/Madam/Colleagues,

Since 1980 Members of the European Parliament have met in an intergroup called the "European Fourth World Committee" in order to include the concerns of the poor in Parliament's discussions . The secretariat of this intergroup is run by the International Movement ATD Fourth World, which brings together people experiencing extreme poverty and other citizens who ally themselves with them. The Committee has decided to write to you today because its action has always been dominated by the fact that poverty is a violation of all fundamental rights (civil, political, economic, social and cultural).

It would like to inform you of its proposals regarding the drafting of a Charter of fundamental rights. It considers that:

(a) the Charter must be incorporated in the European Union Treaties and must be designed with this in mind, since it would otherwise amount to an ineffectual declaration and prove to be a source of further disappointment;

(b) the Charter must include all the rights enshrined in the European Convention on Human Rights (Rome, 1950) and in the revised European Social Charter (Strasbourg, 1996);

(c) this Charter must include not only the rights which can be invoked direct but also "positive-action" programmatic rights (which can be invoked only indirectly since they oblige the institutions concerned to take measures or implement programmes in order to give everyone access to the rights). This is particularly important as regards rights enshrined in the revised European Social Charter such as:

- the right to protection against poverty and social exclusion (Article 30),
- the right to housing (Article 31);

(d) this Charter must include, as the "Comité des sages" chaired by Ms Maria de Lourdes Pintasilgo proposed in 1996, the right to a guaranteed minimum income which allows all people to live in dignity, to safeguard their health and well-being and that of their families;

(e) this Charter must include the right of the European NGOs to participate in, and be consulted by, the European institutions through the implementation of a structured civil dialogue;

(f) this Charter must contain an explicit undertaking by the European Community that it will sign the European Convention on Human Rights and the revised European Social Charter.

In order for the views of the least favoured sections of the population to be heard, the Committee also asks you to give hearings to the International Movement ATD Fourth World during your discussions.

Our hope is that the European Union can be given a new grounding in fundamental rights.

Yours faithfully,

Marietta Giannakou-Koutsikou
Chair of the Fourth World European Committee

José María Gil-Roblés Gil-Delgado
Former President of the European Parliament

Sylviane Ainardi Ieke van den Burg Hélène Flautre Graham Watson
Vice-Chairs of the Fourth World European Committee

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 20 January 2000

CHARTE 4109/00

CONTRIB 7

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed The Charter of Fundamental Rights and Freedoms - Evidence to Council of Europe January 2000 submitted by Bench House (Mr. Stephen Jakobi).[1] [2]

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[1] This text has only been submitted in English language.

[2] Bench House, Ham Street, Richmond, TW10, 7 HR. Phone: 0181 332 2800. Fax: 0181 332 2810.

THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

EVIDENCE TO COUNCIL OF EUROPE

January 2000

BENCH HOUSE ·HAM STREET,RICHMOND•TW10 7HR
PHONE: 0181 332 2800 • FAX: 332 2810

THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

EVIDENCE TO COUNCIL OF EUROPE

1. Outline of evidence

1.The Fair Trials Abroad Trust is a unique EU based organisation concerned with the individual citizen's rights to justice when outside their own country. Our concerns are not theoretical but the practical enforcement of fundamental rights in the police stations and courts of first instance throughout the community.

2.*Background to the Charter* It is particularly important to take note of the creation of a European Legal Space initiated at the Tampere conference . A number of novel measures were proposed: mutual recognition of judgements, fast track extradition etc. These developments without appropriate counter measures pose unparalleled and unacceptable risks to civil liberties and fundamental rights within Community's geographical area. Such basic problems as equality before the law will become exacerbated by the Tampere proposals. Whilst there is now a general recognition by European institutions that there are problems it is unlikely that effective solutions to them will become universally operative because of treaty limitations.

3.*Standards of justice within the Union* Concern is expressed that in certain countries of the Union the individual facing serious criminal charges is unlikely to receive such fundamental rights as adequate interpretation or access to a competent lawyer to defend him if he cannot afford to pay. Crucially, there is as yet no general standard that the judicially advanced states of the Union, including the United Kingdom, consider adequate for their own citizens There appears to be, in general terms, three standards of administration of justice co-existing within the Union: "Best practice," European Convention and Mediterranean.

4.*The need for an effective charter* The European Legal space is a creature of the successive treaties that have created the present parameters of the European Union: it is subject to the built in limitations of those treaties. The measures required to ensure that the citizen has adequate protection against abuse of fundamental freedoms cannot be formulated within them. It is clear that the European Convention of Human Rights does not represent an adequate standard for the Union: the enlargement process will make matters worse

5.*Some essential characteristics of an effective Charter* We consider it important that the Charter be considered as the latest in a line of international instruments giving ever more detailed protection to the citizen. Effective mechanisms for adjudicating citizens grievances and supplying appropriate remedies are required. The shortcomings of the European Court of Human Rights are considered and recommendations made for improvements

6.*Conclusions* The Union has a pressing need for a modern and effective charter. The European Convention standards are obsolescent and poorly policed by its mechanisms. Unless the Charter has substantive legal effect many Citizens will not enjoy the fundamental freedoms they expect in their native lands when they travel to other parts of the union. Having regard to the stasis in development of standards under the ECHR we would particularly encourage the concept of the Charter as a living document with sufficient flexibility to change with the times.

Introduction

7.The Fair Trials Abroad Trust was formed in July 1994 with the intention of ensuring Fair Trials for EU Citizens out of country. Now widely known as Fair Trials Abroad, or FTA for short, it remains the only EU based organisation concerned with the individual citizen's rights to justice when outside their own country. The basis of these rights are the domestic law of the country concerned including international treaty obligations where those obligations give rise to justiciable rights (European Convention of Human Rights, International Covenant on Civil and Political Rights) recognised in that country.

8.The Trust has developed into a major advisory body for all those concerned with interstate machinery of criminal justice problems affecting the Union Citizen. This it has done by concentrating on individual cases exhibiting injustices, and discovering patterns exhibiting problems in the machinery of justice. One of the most important tools of advice and research has proven to be the unique network of local native correspondents.

9.It will be seen that the trust is a practitioners organisation utilising international treaty law in the specialist sector of the administration of criminal justice. Our observations should be considered as directly applicable to our sphere of competence, though they may have more general implications for the content of the new Charter and its enforcement machinery.

Background to the Charter

10.It is particularly important to take note of developments in the parallel creation of a European Legal Space also initiated at the Tampere Conference. Mutual recognition of judgements was endorsed without any reference to standards of judicial competence or other safeguards (Clause 33). The Council approved fast track extradition without attention drawn to the potential for discrimination in the current lack of provisional liberty for non-native citizens. It was also apparent that extradition without formality was to be granted in cases of final judgement (even if trials have taken place in absentia and without notice to the accused!) (Clause 34).

11.These developments without appropriate counter measures pose unparalleled and surely unacceptable risks to civil liberties and fundamental rights within the Community's geographical area. There is now a general recognition by European institutions that what is needed is a twin track approach to the creation of a European Legal Space in which the innocent sojourner (to include visitors, asylum seekers and migrants as well as citizens) is protected against injustice by tackling the "Freedom" problems of defence simultaneously with the "Security" problems of prosecution.

12.Unfortunately, the history of Third Pillar development and consequent evolution of the department supporting the Commissioner of Justice and Home Affairs has been entirely law enforcement orientated. There was, so far as we are aware, no recorded instance of a civil liberties topic achieving priority for consideration by the Council of Ministers prior to the conception of the Charter of Freedoms during the German Presidency. The summit created a novel area of operational responsibility for Civil Liberty oriented tasks within the Commission. We have little doubt that a number of the problems highlighted by us will be tackled methodically and pragmatically over the next five years. If the pattern of compliance with European Court of Human Rights decisions in the past is any guidance, those countries which represent "best practice" of fundamental rights will undoubtedly improve the protection they

offer foreigners against injustice: nevertheless the citizens throughout the Union as a whole are likely to suffer if they have no direct remedies. Such basic problems as equality before the law and de facto application of fundamental rights to an acceptable standard will become exacerbated by the Tampere proposals.

Equality before the law.

13.The proposed measures were publicly and clearly aimed at international crimes of a conspiratorial nature (Community fraud, drug and human trafficking and terrorism) which represent menaces to society. The difficulties created in the pragmatic solutions to prosecution problems proposed by the European Council is that they will inevitably result in a far higher proportion of conspiracy cases involving a mixture of native and foreign defendants being brought before the various national courts of Europe. It follows that the numbers of defendants, some innocent, being handicapped by unequal treatment before the law will increase. Equality before the law is therefor an issue, and must be addressed by appropriate measures.

14.We should emphasise here that whilst one recognises there will be sections of the Charter that only apply to rights of citizens (freedom of movement, residence and rights to work) the rights to Fair Trial cannot be so confined. We are unaware of anywhere in the civilised world where a two tier system of criminal justice is countenanced.

The application of fundamental rights within the Union.

15.The issues of general protection from injustice were ignored in the preparations for Tampere and did not feature at the summit itself. This may have been due to two mistaken presumptions: that the standards of the European Convention on Human Rights are being implemented in practice throughout the Union and that these standards in themselves are adequate.

16.From the outset of our research into causes of injustice to the travelling Union citizen we have been concerned about obvious major defects in the observance of the ECHR within the Union. Two research projects we have been responsible for AJISE (Access To Justice in Southern Europe) and ELIP (European Legal Interpreters Project) gave substance to the proposition that in certain countries of the Union the individual facing serious criminal charges is unlikely to receive such fundamental rights as adequate interpretation so that he can understand and be understood, or access to a competent lawyer to defend him if he cannot afford to pay.

Standards of Justice within the Union

17.Crucially, there is as yet no general standard that the more judicially advanced states of the Union, including the United Kingdom, consider adequate for their own citizens within their own geographical boundaries: it is to the Charter that one must look for the creation of such a standard.

18.There appears to be, in general terms, three standards of administration of justice co-existing within the Union; "best practice," European Convention and Mediterranean. The differences between them can be illustrated through the standards applied in the provision to the accused of state funded representation and interpretation services.

"Best practice"

19.Modern **"**best practice" was codified in a resolution adopted by General assembly of the United Nations in 1988, "**A body of principles for the protection of all persons, under any form of detention or imprisonment**". It was adopted without a vote. These principles build on the experience of previous regional and international treaties and go into far more detail on protection than, for example, the International Convention on Civil and Political Rights (ICCPR.)

20.Under Principle 15, communication with counsel cannot be denied under any circumstances for more than a matter of days. He shall be entitled to have the assistance of council promptly after arrest (Principle 17} and have legal counsel assigned to him if he does not have means to pay.

21.Under Principle 14, a person who does not adequately understand or speak the language used by the authorities in question is entitled to receive promptly in a language he understands all information required under the principles and to have the assistance free of charge of an interpreter in connection with legal proceedings subsequent to his arrest.

22.It is also to be noted that the draft articles of the Corpus Juris, the attempt to provide a criminal code and procedure for the Community gave the following rights to the accused

:-***Article 29 Rights of the Accused***

23.In any proceedings brought for an offence as set out above (Articles 1 to 8), the accused enjoys the rights of the defence guaranteed by Article 6 of the European Convention on Human Rights and Article 10 of the UN International Covenant on civil and political rights.

24.A person may not be heard as a witness but must be treated as accused from the point when any step is taken establishing, denouncing or revealing the existence of clear and consistent evidence of guilt and, at the latest, from the first questioning by an authority aware of the existence of such evidence.

25.From the time of his first questioning, the accused has the right to know the content of the charges against him, the right to be assisted by a defence lawyer of his choice, and, if necessary, an interpreter.

26.**State funded legal representation.** Almost all Union states provide that when a citizen is detained for questioning the citizen has, in general, the right to demand a lawyer of his choice be contacted and to refuse to answer questions addressed to him until he has received legal advice. In "best practice" states such as Great Britain, Denmark and the Netherlands state funded legal advice and representation will be forthcoming at this stage if the person detained has no means to pay a lawyer. Without some form of duty solicitor scheme this is unlikely to be logistically feasible. e.g. In the Irish Republic, where there does not appear to be a duty solicitors scheme, a lawyer may sometimes be available and will operate under a post facto legal aid authorisation though this is not a rule.

27.**Interpretation and translation.** There is general agreement by "best practice" countries that there must be a right to be assisted from the outset by the services of a competent interpreter. In other countries it is commonplace for incompetent, ill-prepared or poorly skilled

interpreters to be provided. It is paramount for the accused in a foreign jurisdiction to have direct and full knowledge of the charges to enable him to mount an effective defence. Furthermore, it is not sufficient for an accused to have verbal interpretation only of the indictment. If there is any risk of the accused being put at a disadvantage he must be provided with a written translation of the indictment in a language which he understands and all statements should be tape recorded in both languages for verification in case of doubt.

European Convention of Human Rights.

28.Signed in 1950, and having come into force in 1953, the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) is our regional human rights treaty and all current members of the Community have ratified it. The standards of the European Convention are currently the benchmark for judicial standards within the Union.

29.One of the main problems in considering the Convention is that adjudged by "best practice" there are also basic shortcomings in the standards set by articles 5 and 6 of the convention even after taking due account of the decisions of the court.

30.**State funded legal representation** Article 6 limits the scope of the right to a lawyer, in general, to the trial and preparation for it. There is a right to (6b) "adequate time and facilities for the preparation of the defence" and to (6d) "obtain witnesses and cross-examine the prosecution witnesses during the legal process" (though not necessarily at trial).

31.All citizens also have a right to Legal Aid if they cannot afford a lawyer and are facing serious criminal offences. Under Article 6(3) of the Convention everyone charged with a criminal offence has the following rights 'to be given it (legal assistance) free when the interests of justice require….'

32.Other sections of the article and decisions by the European Court of Human Rights lay down the standards required. Legal Aid must be " practical and effective" and not merely "theoretical or illusory" and where the Legal Aid lawyer proves incompetent or for any other reason incapable of carrying out an adequate defence, the authorities should intervene. (Article v Italy).

33.**Interpretation and translation.** Article 6 (3) provides that anyone charged with a criminal offence has the right, inter alia, "to be informed properly in a language which he understands and in detail, of the nature and cause of the accusation against him " and "To have the free assistance of an interpreter if he cannot understand or speak the language used in court."

34.A decision of the European Court of Human Rights (Kamasinski v Austria) related specifically to the provision of court interpretation services. It emphasises that all written documents, including statements of evidence, necessary to the defendant in putting his case adequately before the court should be translated. It also states that the provision of an interpreter alone is not enough. Those providing the service are responsible for the standard and competence of the interpreter. It is now ten years since that decision was delivered. The standards that it demands are ignored throughout the Union save in the "best practice" countries. We have yet to be consulted in a case in France or Spain where the stipulations as to translation of documents have been observed.

Mediterranean

35.We are particularly concerned that in countries bordering the Mediterranean (Greece, Italy, Portugal and Spain) the provision of competent state financed lawyers and appropriate interpretation services to citizens in serious trouble with the law would appear to be the exception rather than the rule.

36.**State funded legal representation.** The main continuously funded project of the trust has been a closely interlinked data bank and Europeanisation project designed to locate competent criminal lawyers with languages throughout the European Union. By March 1998, a correspondent and representative network of 600 lawyers had been achieved with some presence in every country of the Union. Much general information has been gained on Legal Aid systems from the specially designed questionnaire employed. In Northern European countries such as U.K and Germany those who have a dedicated Legal Aid practice are in the majority (70% and 67% respectively). In the Mediterranean countries this is unknown for experienced lawyers. In these states Legal Aid rates of pay are so low, if available, that only inexperienced lawyers will conduct cases.

37.**Interpretation and translation** Our own survey Communication within the Legal Process, a report on interpreting and translation in the courts of Europe, sets out the findings of an 18-month survey across 5 representative countries of the European Union. The survey was required to establish how communication is handled by the courts and investigating authorities when one or more parties are not native speakers. The guiding principle was the degree of access to justice without discrimination against non-native citizens. The general results were more disturbing than anticipated. Pay for interpreters working in the highly specialised arena of the courtroom is, in general so low that only the very dedicated or the untrained will present themselves for work. In Mediterranean countries appropriate training courses for legal interpreters are non-existent.

The Need for an effective charter

38.The European Legal Space is a creature of the successive treaties Rome, Maastricht and Amsterdam that have created the present parameters of the European Union. As such it is subject to the built in limitations of those treaties, the principles of sovereignty and subsidiarity as expounded through the treaties and the various European Councils.

39.We would argue that fundamental freedoms and human rights are not subject to these constraints and indeed the measures required to ensure that the citizen has adequate protection against abuse cannot be formulated within them. The abusers of fundamental rights are, in general, public servants of the sovereign national state utilising powers entrusted to them. It is surely for this reason that the appropriate international instruments of human rights and fundamental freedoms, once ratified. carry supranational authority and have embodied within their systems international tribunals to adjudicate on what is essentially state misconduct against individuals.

40.One of the essential questions for the Community is whether the local current standards and enforcement system in the fields of fundamental rights are adequate not only for the immediate present but for the foreseeable future. In other words does the European

Convention of Human Rights and the machinery provided by the European Court of Human Rights provide effective protection to the citizen in general "best practice" terms within the Union? We have already illustrated in some detail the variable geometry of national standards in the fundamental rights to legal representation and interpretation and it is clear that the European Convention of Human Rights does not represent an adequate standard for the Union.

41.Further, the question of equality before the law for citizens within the Union cannot essentially be tackled without some sort of declaration coupled with an enforcement procedure and this too is argues for the need for an effective Charter.

42.By 2010, we are likely to increase the membership of the Union by 12 nation states mainly from Central and Eastern Europe. The trusts casework experience of a number of these nations demonstrates virtual non recognition of fundamental rights to justice in most of these nations court systems. They are all members of the European Council and subject to the jurisdiction of the European Court of Human Rights. We cannot foresee improvement within a generation unless the citizens of these states have an unfettered right to make direct appeal to a new effective system under the Charter.

Some essential Characteristics of an effective Charter

43.We have already remarked that the trust is essentially a practitioners organisation and would not presume to give evidence outside its sphere of competence. It is not for us to give advice on the clauses or indeed the wording of the proposed charter. Our concern is with the practical effectiveness of the Charter and its enforcement mechanism in ensuring that the citizens fundamental rights are protected

The Charter as a development in international law .

44.We consider it important that the Charter be considered as the latest in a line of international instruments giving ever more detailed protection to the citizen involved in the determination of criminal accusations against him from investigation to completion of the trial process. We illustrate this by way of the provisions in international instruments for the protection of the citizen in the process of arrest and detention. A similar exercise, with the same result, could be performed for the trial process

45.**The Universal Declaration of Human Rights.** The Universal Declaration of Human Rights came into force in 1948. One of the foundation documents of the United Nations, it is considered generally applicable to the conduct of all nation states. It contains articles on arrest, detention and fair trial. **Article 9** states "No one shall be subjected to arbitrary arrest or detention."

46.**The International Covenant On Civil and Political Rights** Adopted by UN general assembly 1966 and came into force 1976. This covenant is a formal legal agreement which recognises in more detail the fundamental rights and freedoms set out in the Universal Declaration of Human rights. For example the provisions on arrest and detention. **Article 9.1** No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. **Article 9.2** Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. **Article 9.3** Anyone arrested or detained on a criminal charge shall be brought

promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. **Article 9.4** Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

47.**The Principles for the Protection of all Persons Under Any Form of Detection or Imprisonment**. This U.N resolution has already been referred to (paragraph 12) These principles go into far more detail on protection than the ICCPR. e.g. Principle 12 gives detailed requirements for recording the circumstances of arrest , consequent detention and the duty to communicate these records in writing to the arrested citizen and his legal representative.

48.Similar protective codes covering the same ground have been adopted on a national level within the Union. The Criminal Evidence Act in England and Wales has its equivalent in other "Best Practice" countries.

The relationship between Charter and Convention

49.We would assert that possible conflict between rights to apply to Luxembourg (Charter) and Strasbourg (Convention) are more apparent than real. It is not generally realised that coterminous Jurisdictions already exist in states of the European Union and the aggrieved accused has the choice between pursuing his remedies in Strasbourg or in Geneva under the provisions of the ICCPR before the UN commission for Human Rights.

50.The citizen is on election and confined to pursuing his remedies in only one of the fora. We would assume that such rules would also apply to the Charter.

Enforcing Rights under the Charter

51.Without effective mechanisms for adjudicating citizens grievances and supplying appropriate remedies the charter will become a mere declaration of moral principle. The European Court of Human Rights has now been in existence for 45 years and provides useful guidance to those considering the characteristics required by the machinery of court adjudication and enforcement of rights granted under the Charter. Problems that have not been solved by the ECHR that require attention include the following:

52.**Initiating proceedings**. In "Best Practice" countries abuse of fundamental freedoms are almost invariably resolved in domestic courts and within their appellate structures. However outside this group such problems cannot be safely left to the domestic structures. E.g. We have had several cases in France where persons who at worst might have been involved as minor soft drug couriers were held incommunicado from their spouses and nearest family for several months (in one case 15 months) despite appeals and contrary to the conventions on family life. In candidate nations such as Bulgaria abuse of basic rights to fair trial are commonplace for native and foreigner alike and the appellate system does not assist.

53.Further, the obligation to exhaust all domestic remedies before cases can be considered by the European Court of Human Rights, whilst administratively convenient, has often caused intolerable delay to the victimised and added unnecessary months and years of imprisonment. For example, the recent case of Venables and Thompson v The United Kingdom was adjudicated upon eight years after the original incident and some seven years after the original trial

54.It is for these reasons that citizen must be allowed direct access to the court (which we assume to be the European Court of Justice) provided he has shown a suitable prima facie case and he is short of an effective remedy. There will be a need for a filter to prevent frivolous or vexatious cases clogging up the court procedure. One solution to give effective remedies at national level might be to create a special court to consider complaints by aggrieved citizens under the Charter but this is dependent on the willingness of the nation state concerned to incorporate the Charter as part of national law. Since the European Court of Justice has to cope with these problems anyway it is again worth building on experience.

Powers of the court

55.**Injunctive relief**. A suitable fast track procedure must be available for appropriate cases of urgency. Decisions made by the ECHR on such topics as trial delay and provisional liberty do not provide effective relief for the individual concerned.

56.**Declaratory powers**. In cases which may require changes of law enforcement or trial procedure, whether in a particular state, a number of states or throughout the Union, a mechanism should be formulated for the monitoring of such changes with penalties for non compliance; presumably via an appropriate European institution. This is of course an automatic consequence of decisions by the European Court of Justice.

The aftermath of the decision in Kamasinski v Austria (Paragraph. 33) may be considered typical of the state of affairs under the European Convention. As a result of the case, which should have promoted rapid and effective changes in legal interpretation and translation procedures and practice throughout Europe, the effect was limited. Austria took steps to comply with the ruling. The Netherlands took steps to investigate whether changes in their practice were required. Certain northern European countries were already complying with the standards. The great majority of Council members have not complied.

EQUALITY BEFORE THE LAW

57.We have already stated that the Charter requires a declaration that all sojourners must be treated as equal before the law in national legal systems. Such a declaration will have the effect of the outlawing of discriminatory practices. Some examples of current discriminatory practices brought to our attention are:-

- Refusal of provisional liberty on the grounds of "lack of community ties" where the citizen is arrested outside his own country.

•Inadequate interpretation or translation facilities handicapping those who are not familiar with the native language.

•Trials in absentia of citizens from other Union countries.

CONCLUSIONS

The need for a Charter

1. For the past 45 Years. There has been a consensus that Europe needs a "charter" of fundamental rights together with adjudication and enforcement mechanisms. The European Convention of Human Rights and its mechanisms is the current response to this demand. What we attempt to demonstrate in our evidence is that in relation to the administration of Justice it is wholly inadequate.

2.We have considered at some length (paragraphs 28-37) the current standards set by the European Convention of Human Rights to two vital fundamental rights: that of effective legal advice and representation for the indigent and the provision of interpretation and translation services to the accused and court. It is clear that the standards set by the ECHR in these fields are obsolescent. Crucially, (Paragraph17) there is as yet no general standard that the majority of the states of the Union, including the United Kingdom, consider adequate for their own citizens within their own geographical boundaries: it is to the Charter that one must look for the creation of such a standard. The Union has a pressing need for a modern and effective Charter.

3.Further,(Paragraph41) the question of equality before the law for citizens within the Union cannot essentially be tackled without some sort of declaration coupled with an enforcement procedure and this too is argues for the need for an effective Charter.

4.We believe that subsidiarity and sovereignty have no role to play in the scope and application of fundamental individual rights. Indeed they are restricting factors. "Subsidiarity" is for example perhaps the rationale behind the requirement that applicants to the European Court of Human Rights must have exhausted all local remedies as a precondition for their application: it weakens the effectiveness of the court (Paragraph 53). "Sovereignty" is the classic defence of governments throughout the ages against any outside interference with governmental abuse of the fundamental rights of their own natives.

The status of the Charter

5.Unless the Charter has substantive legal effect many citizens will not enjoy the fundamental freedoms to the standard they expect in their native lands when they travel to other parts of the Union.

6.We consider that the Charter requires a separate Treaty of equivalent status to the ECHR and ICCPR.. We have discussed (Paragraphs 38,39) the limitations imposed by the fundamental Treaties of the Union not least the principles of sovereignty and subsidiarity as expounded through the Treaties and the various European Councils. Again, we would argue that fundamental freedoms and human rights are not subject to these constraints and indeed the measures required to ensure that the citizen has adequate protection against abuse cannot be formulated within them.

7.We have discussed the shortcomings of current mechanisms of enforcement under ECHR and the Court of Human Rights Justice (Paragraphs 52-56.). The "Charter court" must be of necessity the Court of Justice. We consider the arguments for individual direct access to the courts to be compelling (paragraphs 52-54). We would hope that the incorporation of

Charter provisions within National legal systems would follow the precedent set by the pattern of incorporation of the European Convention of Human Rights and thereby take some of the burden off the Court of Justice. Indeed we have made a suggestion that special National courts might be considered (Paragraph 54). We see no real conflict or concern with coterminous jurisdiction with the European Court of Human Rights at Strasbourg (Paragraph 49,50).

The scope of the Charter

8.The Charter should impose obligations on all national governments and European institutions. .The fundamental freedoms with regard to due process should apply to all sojourners (citizens, immigrants and visitors alike). We should emphasise here that whilst one recognises there will be sections of the Charter that only apply to rights of citizens (freedom of movement, residence and rights to work) the rights to Fair Trial cannot be so confined. We are unaware of anywhere in the civilised world where a two tier system of criminal justice is countenanced (Paragraph 14.)

The content of the Charter.

9.The trust is a practitioners organisation utilising international treaty law in the specialist sector of the administration of criminal justice. Our observations should be considered as directly applicable to our sphere of competence, though they may have more general implications for the content of the new Charter and its enforcement machinery.

10.However, with regard to "Due Process" problems and on examination of the Cologne Councils catalogue of derivative sources, we would argue that it is from the "rights derived from the constitutional traditions of the (Best Practice) member states" that the provisions of the Treaty we consider desirable can be evolved.

11.Having particular regard to the stasis in development of standards under the ECHR and the enormous practical difficulties of modernisation through protocol we would particularly encourage the concept of the charter as a living document with sufficient flexibility to change with the times.

12.A possible model for this approach in the field of due process would be the incorporation of a code of principles and conduct similar in kind to the U.N 1988 resolution on principles for the protection of all persons under any form of detection or imprisonment. Some States already have such codes in whole or in part, including the United kingdom.

13. Advancing standards in the development of state funded legal representation and professional standards in legal interpretation and translation as well as such technological developments as mechanical recording of law enforcement interviewing and evidence by close circuit television could then be incorporated as they arise.

Stephen Jakobi, January 2000.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 21 January 2000

CHARTE 4110/00

CONTRIB 8

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed the report "Property rights within european law" by the European Landowners Organisation (ELO)[1].

[1] This text has been submitted in French and English language.

European

Landowners

Organisation

ELO 3/99

PROPERTY RIGHTS WITHIN EUROPEAN LAW

1. INTRODUCTION

The development of property rights is a cornerstone of our cultural, political, economic and social system. Securing property rights and ensuing they work smoothly is a necessity which reflects the general interest. The Union has a role to play in this.

1.1 While property rights constitute an essential pillar of the common market, article 222 of the Treaty of Rome strangely leaves each member state the care to regulate it; “This Treaty shall in no way prejudice the rules in member states governing the system of property ownership.”

The contents of article 222 of the EEC Treaty result from the will of member states to continue to decide alone the nationalisation of their private companies and the privatisation of their public companies. This legal vacuum within the Treaty of Rome has forced the court in Luxembourg to develop a jurisprudence in matters relating to the protection of property rights which is inspired in part from the judgements of the European Court of Human rights, in Strasbourg because article 222 does in no way contradict the development of a European property right.

1.2. The European Court of Justice in Luxembourg has only very progressively been brought tostate that, since it had been entrusted with upholding the law, it had to scrutinise the fundamental rights recognised and guaranteed by the constitutions of the member states.

Thanks to this jurisprudence, the Court of Justice has taken several important steps with regard to the protection of property rights, thereby underlining the ambiguity of the Treaty.

Thus the Hauer Ruling, made in 1979, specifies that restrictions based on the general interest should not go further than needed, and should not touch the substance of property rights. In 1989 the Court went even further in the Wachauf case, which stated that when the infringement of property rights is too important, financial compensation must be paid.

In so doing, the European Court in Luxembourg offered what can be called a “minimum standard of protection”.

1.3. The European Court of Human Rights in Strasbourg has approached the issue of property rights from a somewhat different angle. Whereas the Court in Luxembourg continues to interpret property rights as a fundamental principle of the organisation of the common market, the Strasbourg Court sees it as a fundamental right for the individual.

1.4. Finally, the Amsterdam Treaty offers the prospect of new developments. The EU in this Treaty commits itself to take into account the European Convention of Human Rights and, consequently, property rights.

However, article 164 of the Treaty of Rome specifies that the Court of Justice (in Luxembourg) shall ensure that, in the interpretation and application of this Treaty, the law is observed. The Court should thus be brought to ensure the implementation of the principles of the European Convention. It is not impossible that in the future we will see a competition between the two Courts with regard to the implementation of the Convention.

2. CURRENT SITUATION

A. DISTORTIONS IN COMPETITION

2.1 Articles 222 and 164 of the Treaty of Rome, completed by article 6-1 of the EU Treaty. (F and F1 of the Amsterdam Treaty) provide some necessary guarantees in relation to human rights, and thus to the recognition of property rights. Their lack of coherence underlines theextent to which property rights are not managed as a simple clear and uniform concept in European law.

European law is economic in nature, and thus is essentially preoccupied with the regulation of market practices, forgetting that owners of means of production – whatever these are – lie behind the market. European law can thus be compared to a cathedral builder who, faced with the magnitude of his achievements, and out of breath, is not able to install at its summit the keystone; as long as this is not done, the whole construction is in danger.

2.2 Some will state rightly that according to the Treaty of Rome property rights are, through subsidiarity, to be dealt with by the member state. The experience to date demonstrates that even if this initial concept is coherent, this situation generates not only a failure to take into account property rights but moreover is the source of distortions in competition such as defined by articles 85 and 86 of the Treaty.

While the intention is to build the Union, freedom has been left to each member state through article 222 of the Treaty to build its own system on bases which are sometimes very different. At the same time, owners and economic actors have to implement the competition rules outlined in articles 85 and 86.

B. SUBSIDIARITY

2.3 The Maastricht Treaty setting up subsidiarity leaves the door open to widely different methods of implementation of community regulations by the member states.

2.4 The main criticism made with regard to the protection of property as currently defined is that the various impacts which European directives have on property rights are not examined in sufficient depth, and fail to consider the situation as whole.
These various impacts on property may be acceptable taken separately, but accumulated constraints often create an unbearable load. Everyone knows that, in Lilliput, Gulliver was not held down by a thick rope but by many very thin ropes. Does the same not apply to the landowner who, because of the many rural and environmental regulations he needs to respect, finds himself trapped in a system which deprives him of his freedom? The strength of this comparison does not rest only in the image of the very thin ropes, but equally in the

fact that Gulliver could be trapped because he was deeply asleep. Democratic freedom needs the participation of everyone in order not to fall asleep.

These “ropes” notably arise from the limitations deriving from the CAP (e.g. production quotas) from the EC’s initiatives on environmental protection based on articles 130R and S of the Treaty, and very soon perhaps from the Community’s initiatives on environmental liability, etc.

3. EXAMPLES

3.1 CAP Measures

The nature of CAP is market intervention with the allocation of rights, duties and subsidies to producers, not the property owners. The quota systems imposed have had significant impact. An example can be found in the application in the UK of the Sheep Annual Premium and Suckler Cow Premium Quota Regulations (No. 3567/92 and 3886/92). By allocating premium rights to producers with the option of trading them away from the holding, the owners’ asset, as represented in the value of the land, is diminished. a challenge was made to certain articles of this regulation at the European Court of Justice (case C-38/94). The outcome was not satisfactory from the owners’ view. The arguments were mainly on the legal meaning of articles that were intended to compensate owners forloss but in practice failed to do so. The point remains, that despite protestation to the contrary, the European Union does impose regulation that has a direct and negative impact on owners’ rights in property. In this particular case, where there is no alternative enterprise choice to sheep farming in the hills, the transfer away from the land of quota rights by a tenant leaves the owner with a reduced asset value – his land – usually in favour of another owner of land.

Through subsidiarity, a margin of manoeuvre is given to member states to implement European regulation. This leads to situations in which European citizens in the same situation are treated unequally, depending on their geographical location. Thus, as we have just mentioned, British landowners receive no compensation for the loss and value of the land when the tenant farmer sells sheep premium rights away from the holding. On the other hand, in the Netherlands, when dairy quota are sold the tenant and the landowner share the proceeds of the sale.

In the same vein, member states have taken measures to implement European regulations on ceasing dairy production (Regulations 1336/86 and 2321/86), For instance, France have adopted implementation decrees regarding grants to producers who undertake to abandon definitively dairy production, and this without any consultation of the landowner or any compensation for the loss of value of the holding. However, as in the United Kingdom where, for topographic reasons only sheep can graze on the hills, some regions in France can only produce milk or meat. In the case of dairy production, taking away what has in practice become a right to produce, amounts to removing the only possible agricultural production on certain soils and consequently the income and profits which can be derived from them. The unavoidable consequence of this is the loss of value of the holding, which is borne by the landowner alone, regardless of the fact that he will no longer be able to rent his land or farm it directly.

3.2 Environmental Liability (Draft White Paper)

The aspect of this proposed European legislation that gives us most concern is the further EU erosion of private property rights by adding layers of negative regulation to existing Member State laws. All the independent evidence, both legal and economic, has demonstrated that there is no case for EU harmonisation in terms of further legislation.

We are concerned particularly about the proposal to give NGOs the powers (and taxpayer funds) to bring cases against owners and Member State regulating authorities. In all the member states, provision exists to sue others for actions of negligence and nuisance. The problems related to the unowned environment are dealt with by existing state regulatory authorities. Extending such powers to unelected organisations is an unjustifiable attack on the interests of property owners. It is against the public interest and contrary to the Western democratic systems.

Landowners in particular are concerned by this draft directive because of the responsibilities that may be imposed on them in the future while they will not necessarily have polluted the land themselves.

Two explicit examples can be used to illustrate this:

- Inputs spread on agricultural land. Landowners who do not farm the land (notably in France and Belgium) are refused by law (national law) the possibility to accept or refuse the spreading of inputs considered as potentially dangerous on their land, because the law states that this is a normal management act undertaken by the farmer. It is quite likely that a few years hence, acting in implementation of the environmental liability directive and certainly other regulations, the criteria determining dangerous levels of certain inputs will have been modified in line with changing scientific knowledge. It is landowners who will be held responsible for pollutions (on land and outputs) and who in any case will have to bear the consequences, in the shape of lost revenues because agricultural production will no longer be allowed on the land, an obligation to decontaminate the land and the loss of value of the asset or even its negative value.

- GMOs (genetically modified organisms): dangers of contamination exist there too: contamination of the soils, cross pollinisation to other crops, land being declared unfit for agricultural production, etc.

3.3. Habitats Directive – Natura 2000 (Directive 92/43/EEC)

This Directive which imposes land-use designation on private sites throughout the European Union causes much concern to landowners. There has been a failure by the Commission to consult adequately with landowners throughout the process. This is also true of many member states (one exception being Sweden). The recent activity of NGOs submitting additional “shadow lists” to the Commission is adding to the perception that the Commission are involved in a process of European State nationalisation of the use of private land.
The whole process has been badly managed by the Commission. They have failed to understand that they cannot simply draw lines on maps throughout Europe to define protected areas, and demand prescriptive land management practices without thought to the impact on private interests, and the expertise and resources needed to fulfil the objectives of the designation.

Our criticism is that private property rights have been, and continue to be ignored.

Subsidiarity also means that a great degree of freedom is left to member states to implement the Natura 2000 network. Disparities and ultimately distortions of competition can be observed. Sweden for instance has a legislation providing compensation for landowners who will accept to bring their holding within the Natura 2000 network and will consequently have to accept constraints to reach the stated objectives. However, in other member states, large areas have been designated sometimes without even consulting the main parties concerned by this classification, and with no plan to compensate them. Although costs may

have been evaluated, funding mechanisms have still not been set up.

This has very important consequences for landowners as they are the only ones who will have to bear these constraints in the general interest. For instance French tribunals have refused to compensate fish farmers whose production has been eaten by cormorants, a species protected by the Birds directive, and who have caused damages estimated at the time to more than 6 million French francs. This protection, which derives directly from the implementation of the Birds directive, does not take into account the legitimate interests of individuals. Another example is the implementation of the same directives in the Flemish region of Belgium, which completely bans the shooting of water-fowl on some of its territory, whereas other member states do not forbid it (is the Birds directive limited only to the Flemish region?). Individuals have seen the income from their mostly marshy land vanish, and can no longer afford its maintenance and management with a view to accommodating waterfowl. No compensation has been planned to make good the loss of income as well as the loss of value of the holding, as the Flemish authorities justify their action by the obligation they have to transpose the Birds directive into national legislation.

Must subsidarity degenerate into a series of measures resulting in unequal treatment of European citizens? The losses then take place in a complete legal vacuum, where European regulations are adopted without the slightest care for the fundamental rights of citizens, and without any control.

The consequence of this is that many owners of marshy land in the Flemish region, who were interested in shooting, have no longer provided any irrigation, and the wetlands have reverted to scrub, with a much lower biodiversity value.

3.4 Nitrates Directive

There are many aspects about this Directive that give rise to concern to landowners – not the least the weakness of the public health case that underpins it. But the point that we make, in the context of this paper, is its effect on the owner's choice of land-use activity.

The implementation of the Directive has meant that for owners within Nitrates Vulnerable Zones, they are denied the freedom of enterprise choice. In many cases, this has resulted in reduced income or increased cost without compensation. In the UK, before the implementation of this directive, owners in Nitrates Sensitive Areas were compensated for losses due to change in land-use practice, and it was on a voluntary basis (but very well supported). The EU Directive has effectively removed entirely an appropriate voluntary provision with an expropriation of property rights without compensation.

Another example is that of the implementation of this Directive in the Flemish region. Some zones have been classified as vulnerable, with an obligation to implement the "zero fertilizer" rule, or to only keep two heads of livestock per hectare. In such conditions, agricultural holdings are no longer profitable, and from 2003 will disappear. Once again, this sort of regulation takes no account of the legitimate interest of the parties, and no compensation is planned for losses in income and in asset value. The Flemish region had taken measures with regard to compensation in its decrees on farmyard manure in 1995 and 1999. These measures are currently being contested by the Commission, which among other reasons refuses to endorse a payment of compensation for loss in asset value because it alleges that there has been no such loss.

However, the refusal to grant such compensation creates distortions in competition and discriminates between landowners who have to implement such measures and the others who do not have to, as can be seen in other EU countries.

The only motivation for the decree on farmyard manure taken by the Flemish region is to

reach the objectives defined in the Directive. If it didn't do this, it would be put in the docks by the Commission (which is anyway what has happened) and could be condemned by the European Court of Justice. National regulation is adopted only because member states are obliged to transpose European Directives to reach their objectives by all useful means.

On the one hand European institutions shelter behind the principle of subsidiarity to avoid having to take the burden of implementing regulations, and argue that it is up to member states to take responsibility for the laws and decrees they adopt. "The Commission notes that changes concerning the relative value of land in wetlands, natural zones and other regions in Flanders are due to the legislation adopted by the Belgium authorities with a view to fulfilling their obligations in the framework of the Nitrates Directive" (In: invitation to submit observations concerning subsidy C12/99-199/C-129/02;1 – page 8).

How can the affected owners get recognition of their fundamental rights as recognised by article F of the Amsterdam Treaty? There is a complete legal vacuum here which ignores the fundamental rights of European citizens and is contrary to the principle of an EU based on law. In this specific case, article 11 of the Belgian Constitution is blocked by the ban set by the Commission to give fair and prior compensation because, according to the Commission, this indemnity constitutes a distortion in competition.

4. GENERAL PRINCIPLES OF ARTICLE 164 OF THE TREATY OF ROME

Article 164 of the Treaty of Rome was used by the Court in Luxembourg to derive general principles which, once again, underline the lack of coherent treatment of this subject.

Developments in the jurisprudence of the Court of justice in Luxembourg on the protection of property rights were made possible by the interpretation given by the Court to article 164 of the Treaty. This article specifies that "The Court of justice shall ensure that in theinterpretation and application of this Treaty the law is observed". Progressively however, the Court has been brought to declare that the respect of the law meant the respect of the fundamental rights recognised and guaranteed by the constitutions of the Member State.

In the Nold Ruling of 14 May 1974 (Rec.1974,481) the Court recognises property rights as a fundamental right, protected by Community law. The Court refers to the international instruments which member states have adopted or simply cooperate with and state that the Court "was under the obligation to draw its inspiration from the common constitutional traditions of the member states. Finally the ruling contains a new statement according to which the Court could not, therefore, admit measures incompatible with the fundamental rights recognised and guaranteed by the constitutions" of the member states.

The Hauer ruling of 13 December 1979 (REC.1979,3727) constitutes a decisive step in the evolution of the Court's jurisprudence with regard to the protection of property rights. The case concerned a German landowner, Mrs Liselotte Hauer, who wanted to plant vineyards on her land and whose request to do so was refused, notably because of Regulation 1162/76 EEC forbidding the planting of new vineyards during a certain period. For the first time, the Court quoted Article 1 of the First supplemental protocol of the Convention for the protection of human rights and interpreted as if it were a part of European Union legislation.

The Court used the principle of proportionality as a basic principle for the protection of property. The ruling stated that restrictions based on the general interest should go no further than needed, and should not touch the substance of property rights. *The Hauer* ruling is remarkable because of the new principles it sets down, but unfortunately can be criticised for the way in which it implements these principles in practice.

The Court makes a distinction between what constitutes a taking and what constitutes

regulation of usage. In this specific case the Court decided that the restriction did not constitute a taking as the owner could still use her land in other ways.

But how many uses are there? Does not a ban on planting vineyard on sloping land constitute a huge loss? What other uses are there for this land? At the very least the Court should have done what it decided later in the Wachauf case (ruling of 13 July7 1989.REC.1989.2633). The Court considered in this ruling that a substantial limitation to the uses of a good had to be compensated financially. Following these developments in the jurisprudence of the Court of Justice, it is today recognised that there is a minimum protection of property rights within the European Union.

5. ARTICLE 1 OF THE SUPPLEMENTAL PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL LIBERTIES

Article 1 states that any physical or moral person has a right to property protection. Nobody may have his property taken except for public interest purposes and pursuant to generally accepted international principles of law. It also states that these provisions do not limit the right of the state to put forward any legislation they consider necessary to regulate property use in the general interest or to ensure the payment of taxes or other contributions or fines. The European Court of Human Rights in Strasbourg has produced an abundant jurisprudence concerning the protection of property rights and the interpretation of article 1 of the first supplemental protocol which however doesn't give enough protection.
One example of this is the famous *Sporrong et Lönnroth* Ruling of 23 September 1982 against the Swedish State. Land belonging to the couple *Sporrong Lönnroth* had been frozen for 23 years by a threat of expropriation. In its ruling, the Court considered that, in the absence of a formal expropriation, it had to look beyond appearances and analyse the reality of the case (ruling paragraph 63) in order to determine whether a fair balance was maintained between the requirements of the general interest of the community and the imperatives of the protection of the fundamental rights of the individual (ruling paragraph 69.2) and this even though the delivery and renewal of the expropriation permits respected Swedish law. (Ruling paras 67.3 and 68).

In other terms, the authorities cannot abuse the right they have to “freeze” the normal use of property during a period exceeding the necessary delay to conduct a feasibility study for the work envisaged. Upon the expiry of this period, the public authority must either proceed with the expropriations and give to those who have been expropriated the “fair indemnity” planned by the law or give up the project, or maintain the project and indemnify the landowner for the losses incurred by the freeze being extended beyond a reasonable period. Unfortunately one must remember that most citizens are unable to afford the luxury of such an appeal: the required budgets mean that justice becomes a class justice.

If European law was clear on these matters, a citizen would only need to appeal to its national jurisdiction.

6. THE EU’S CALLING TO PROTECT FUNDAMENTAL RIGHTS

The transformation of the EEC into a European Union, as well as the signing of the Amsterdam Treaty have deeply altered the initial concept that the EEC had no interest in fundamental rights to the extent that, today, it seems to be one of the requirements of the Union to respect them.

If this requirement were only skin-deep, and if, in reality, the protection of fundamental rights were viewed as a constraint imposed on the Union, there is then a risk that the Union will contribute to restrict these rights rather than develop them.

The Union does not have the option to select between different fundamental rights as, by

their very essence, the international community has recognised their indivisibility. 8

The Treaty on European Union (Article 6.1) specifies that : «The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law».

Beyond a simple reminder of fundamental rights, the vocation to protect them also implies securing their development. This means, by implication, that the European legislator will no longer be able to leave property rights to the subsidiarity of Member States.

There is a need to become aware that the general assertion of the principle of respect of fundamental rights has a much greater scope than the recognition of certain rights which are precisely defined within the body of the treaty itself.

This reminder of fundamental rights contributes to assimilating the text of the Treaty to a real Constitution. A Constitution is increasingly defined today as a text which not only organises the relationship between public bodies but more importantly proclaims the rights and liberties of individuals, with a guaranteed legal sanction.

7. PERSPECTIVES AND SUGGESTIONS

To get out of this dead-end, the objective must be the explicit recognition by Community law of the fundamental role played by property rights also in the organisation of the single market. Article 222 must be strengthened and the Treaty must include, on the one hand the protection of property rights and, on the other hand the associated right to a full compensation in case of expropriation or in case of an abusive limitation of the use of the asset.

In this process, two avenues are worth exploring.

A. Coherence

It is vital that the national legislation which define the use of property rights and especially those that restrict its use, are coherent.

This does not mean that legislation must be harmonised but that the underlying concept of compensation be applied as an integrated element in the protection of property rights throughout the Union.

Because of the single market, the distortions between national legislation on matters such as expropriation, protection of the environment, agricultural policy, national and regional development, etc. must be avoided in order to ensure an “equal treatment”.

B. Motivation and evaluation of the cost of restrictive measures

Another avenue which could be explored is the setting up of an obligation to motivate measures restricting property rights. This obligation should bear not only on the usefulness of the proposed measure, but equally on its cost. It would entail, prior to certain regulations, to request an impact assessment study and to calculate notably the costs and reductions in value that this or that measure would impose on owners. This obligation to motivate and to calculate the impact on landholdings has been in force in the United States for more than ten years

An increased protection of the environment must go hand in hand with a strengthening of the protection of property in order to ensure a positive co-operation of the owner in the interest of public interest. The protection of property rights in the European Union must evolve and go beyond the existing framework of the jurisprudence of the Court in Luxembourg. The objective to reach – based on article 1 of the first supplemental protocol of the Convention for the protection of human rights – is a modification of article 222 of the Treaty of Rome with the objective including property rights among the fundamental rights of community law. Failing that change to the Treaty, an appropriate use of existing Community instruments could result in a noticeable improvement of the protection of property at European level. This would constitute a step forward in the search for an integration of property rights on the one hand and economic, social, and environmental policies, on the other hand.

Even though all the attacks on property rights originate, through subsidiarity, in member state legislation, they are still due each time to Community regulations. It is the legal vacuum of article 222 and the principle of subsidiarity which have harmful consequences for property rights.

The wide variety in the rulings of the Court of Justice and the lack of coherent jurisprudence clearly demonstrate that these problems derive from the Treaty, while the Court of Human Rights is more coherent.

For the ELO, the new Intergovernmental Conference and the drafting of a charter on fundamental rights are an occasion to fill once and for all this legal vacuum.

As fundamental rights are indivisible, it will no longer be possible to avoid this debate.

ELO POLICY GROUP
05 October 1999
A0842434

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CHARTE 4113/00

CONTRIB 9

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find attached the draft Opinion of the Committee of the Regions.

COM-Inst.Aff./008

Brussels, 25 November 1999

DRAFT OPINION

of the Committee of the Regions

on the

European Charter of Fundamental Rights

Rapporteurs: **Mr Bore** (UK, PSE) and **Mrs du Granrut** (F, EPP)

N.B.: This document will be discussed at the next plenary session on 16 and 17 February 2000. The Bureau's standing orders regarding the tabling of amendments (Rule 8.4) specify that amendments must reach the general secretariat not later than three working days before the opening of the plenary session, which in this case means by **5 p.m.** (Brussels time) **on 11 February** (fax: + 32 2 282 23 26). They must be submitted in writing and bear the names of the members sponsoring the amendment.

DOCUMENT SUBMITTED FOR TRANSLATION: 22 November 1999

The Committee of the Regions,

HAVING REGARD TO the decision of the Bureau of 15 September 1999 to draw up, in accordance with the fifth paragraph of Article 265 of the Treaty establishing the European Community, an opinion on the subject, and to instruct the Commission for Institutional Affairs to prepare the Committee's work on the subject;

HAVING REGARD TO the draft opinion adopted by the Commission for Institutional Affairs on 27 October 1999 (rapporteurs: **Mr Bore** (UK, PSE) and **Mrs du Granrut** (F, PPE));

WHEREAS the European Council feels there is a need, at the present stage in the development of the Union, to establish a European Charter of Fundamental Rights (Annex IV of the Presidency Conclusions of the Cologne European Council on 3 and 4 June 1999),

adopted the following opinion at its ... plenary session of ... (meeting of ...):

1. General comments

1.1. The Committee of the Regions has always stressed the need to strengthen citizenship and participatory democracy in the European Union, and the importance of formulating the rights of European citizens to attain this objective; it takes the view that, as the representative of regional and local authorities - the bodies which are closest to the citizens - and as the guarantor of the subsidiarity principle, it should make its contribution to drawing up the Charter of Fundamental Rights of the citizens of the European Union.

1.2. Basic rights constitute the bedrock of a society based on the principles of liberty, democracy, respect for human rights and fundamental liberties and the rule of law, as enshrined in the constitutional traditions which are common to the Member States.

The European Union's capacity to help build a society which corresponds to these aspirations largely depends on citizens claiming these rights - i.e. accepting them and above all exercising them.

1.3. The Committee of the Regions recognises the fast-changing character of the European Union and the growing challenges which it faces at the beginning of the 21st century. The last four decades have seen the gradual development of the European Union. Developing in several phases, an increasing number of European countries have pooled their resources and achieved together a very significant degree of economic growth, social stability and political harmony, without managing to generate the sense of commonality among the citizens of Europe needed to realise the full potential of a social and political Europe which guarantees fundamental rights.

The last fifteen years have seen an enormous acceleration of economic integration with the development of the single European market and a common European economic area. It is due to be further accelerated by the creation in 1999 and putting into circulation in 2002 of the single currency, the Euro.

1.4. A number of steps have been taken towards greater social cohesion and increased political cooperation. These have found expression in the establishment and development of new European institutions such as a directly elected Parliament and the Committee of the Regions and in the introduction of European-wide social and civil guarantees.

At the Council of Europe's initiative, a European Convention on Human Rights was drawn up, allowing for cases to be brought, and there is a European Social Charter which can be used for reference, but without the right to resort to legal action in the event of non-compliance.

It had been envisaged that the European Union as such would be a signatory of the European Convention on Human Rights. This is now excluded by Opinion 2/94 of the European Court of Justice, dated 28 March 1996, which states that this would involve the Community in a distinct international institutional system, that it would introduce all the provisions of the European Convention on Human Rights into the Community legal system, and finally that at the present stage of Community law the European Union does not have the powers to accede to the Convention.

1.5. Up to now, fundamental rights with respect to acts of sovereignty of the Community institutions have been safeguarded in the first place by the European Court of Justice. At an early stage, the Court of Justice established the binding force of fundamental rights as unwritten principles of law at EU level too. The Treaty bases for safeguarding fundamental rights in the EU were expanded and strengthened by the Maastricht and Amsterdam Treaties. The Treaty of Amsterdam, signed on 2 October 1997 and inaugurated on 1 May 1999, represents an important stage in the consolidation of the fundamental rights (cf. Article 6(2) of the consolidated Treaties). However, these wider issues have lagged behind the developments in the economic area.

Moreover, while the Treaty reaffirms the commitment of the Union to fundamental rights, it includes gaps and inconsistencies with regard to the guarantee of these rights or of those linked to the objectives set out.

Acknowledging the existence of these gaps and inconsistencies provides an opportunity to correct them and arrive at a clear, unequivocal text on the basic rights of European citizens and the ways to guarantee them.

1.6. The 1990s have seen signs of greater citizen uncertainty about these developments towards European integration. These have been reflected most recently in the very low turnout for the elections to the European Parliament in June 1999. A quickening in the pace of economic and financial integration, combined with a lessening of confidence by citizens in European institutions, represents a dangerous scenario for the future of the European Union. It requires swift action to bring the social, political and cultural needs of citizens into correspondence with the changing economic realities. This makes the call for a Charter of Fundamental Rights for European citizens all the more important and urgent. However, to address the issue of a lack of public confidence, this Charter needs to be a simple, straightforward, easily understood document, free from the bureaucratic and legalistic jargon that often mars formal constitutional documents.

At a time when the Treaties of Maastricht and Amsterdam have granted new powers to the European Community, giving rise to wider responsibilities in terms of fundamental rights for the Community, and when the Community has chosen not to subscribe to the European Convention on Human Rights, it seems urgent for the Community to take up a clear position on the basic rights which it wishes to see guaranteed to citizens of the Union, following from the scope of its action.

The Committee of the Regions is of the view that the incorporation of these rights into European Union Treaties would give a clear indication of Member States' commitment to building a Union based on the values of liberty, equality and solidarity.

The Committee points out that historically declarations of citizens' rights are preambles to Constitutions and have their *raison d'être* in them, as the basis of the powers needed for the exercise of those rights.

The Committee stresses the constitutional nature of the Charter because it feels that the process of drawing up a charter of rights cannot and must not be separated from the institutional reform to be undertaken by the next Intergovernmental Conference

2. **The content of the Charter**

The Charter of Fundamental Rights for citizens of the European Union must cover three fields: individual rights, economic, social and cultural rights, and civil and political rights.

The first field should cover the basic rights covered by the Universal Declaration of Human Rights, and more specifically by the European Convention on Human Rights.

2.1. **Rights linked to the person**

- Right to life, right not to be subjected to torture or inhuman or degrading punishment or treatment. Right not to be subjected to slavery, servitude or forced labour, right to freedom of movement.
- Right to freedom of thought, conscience and religion, freedom of expression and information.
- Right to a proper civil or penal trial.
- Right to privacy regarding private life, personal data, correspondence and home life.
- Right to housing, right to property and to respect for property.

2.2. Economic, social and cultural rights

- Right to work, to freely negotiated working conditions, to a fair wage, to a reasonable length of notice of termination of employment, to appropriate vocational guidance, training and re-training.
- Right to freedom of movement and establishment for workers and to equality of treatment with workers of the country concerned.
- Right to equality of opportunity and treatment, without discrimination based on race, sex, colour, ethnic, national or social origin, culture, language, religion, political beliefs, family situation, sexual orientation, age or disability.
- Right to set up trade union organisations and right to collective bargaining, information, consultation, and participation for decisions affecting workers' interests.
- Right to social security, social and medical assistance, and the benefit of social services.
- Right to education, right to freedom to choose an occupation and right to continuing vocational training.
- Rights linked to economic and entrepreneurial activity: right to property, right of competition, right to conclude contracts, etc.

2.3. Civil and political rights

- Right to vote in local and European Parliament elections for non-nationals from other EU countries in the Member State where they are resident.
- Right to set up European political parties, right of petition, association and demonstration.
- Right to check on legality of administrative action.
- Right of minorities to protection for their religion, language and culture.

2.4. Clearly, these rights cover a very broad canvas. The crucial task is to make them meaningful and practical, so that they give people a clear sense of the rights they enjoy across the European Union as a whole.

It is not enough to define rights. The principle of their justiciability must be established and appeal procedures set up for those who wish to claim them before national courts or before the Court of Justice of the European Communities.

2.5. As well as detailing these rights, the Charter should contain, as appropriate, complementary clauses expanding on particular aspects. This opinion from the Committee of the Regions wishes to highlight a number of areas where this is felt to be necessary.

2.5.1. In an increasingly multi-cultural, multi-racial, multi-ethnic European Union equal opportunities is a "horizontal theme" which cuts across a number of these rights. Thus, the Bill of Rights should guarantee the right to equality of opportunity and treatment without any distinction of race, ethnic, national or social origin, language, religion, gender, marital status, sexual orientation, age or disability.

2.5.2. In the light of the conclusions of the Tampere European Council on 15 and 16 October 1999 and its resolutions on the integration of third country nationals, the Committee of the Regions believes that the body responsible for drawing up the Charter of Fundamental Rights should examine the issue of whether long-term residents should be granted a set of rights that resemble as closely as possible those of EU citizens.

2.5.3. The right to a fair, public hearing needs to be reinforced by the creation of common legal standards and a common sense of justice throughout the European Union. Given the huge and growing degree of travel within the European Union for work, leisure and tourism, a set of common standards to ensure a common level of justice and fairness should be applicable across all EU Member States. We give two examples: a guarantee that effective legal advice and where necessary,

language interpretation services are available for EU citizens arrested outside their home Member State; the establishment of a common system of European bail so that people are not arrested and held on remand in cells in another country for lengthy periods.

2.5.4. Finally, with regard to the rights of private individuals, the new charter of rights needs to recognise the contemporary reality of patterns of divorce, separation and remarriage within modern European society. The new charter should make clear the rights of mothers and fathers to have fair and equitable access to their children in the event of divorce and/or separation; and indeed the rights of children to be able to see both of their parents if they so wish on a regular basis. There should be common rules governing access for parents and children across the European Union.

2.6. Beside these four specific areas where the introduction of the Charter of Fundamental Rights into European law will give clear civil and social rights to residents of the Union and help to match the growing common European economic space with a complementary social, civic and political space, the Committee of the Regions wishes to stress three issues related to European citizenship.

2.6.1. The Charter will enable each national of an EU Member State to identify his specific European citizenship as involving new rights and expressing membership of the new entity known as the European Union.

European citizenship is a major challenge for the European Union; it is not an alternative to national citizenship; it is at once complementary, unique and resolutely political.

For the Committee of the Regions the Charter of Fundamental Rights is the foundation of European citizenship.

2.6.2. The Committee of the Regions takes the view that the fundamental rights have a constitutional nature, enabling individuals who enjoy them to appeal to the relevant courts, where appropriate national courts and the Court of Justice of the European Communities, every time such a right is threatened.

In the case of the European Union, the Committee of the Regions takes the view that since the fundamental rights have a constitutional value of their own, and create a homogeneous, coherent Community legal order, they justify the application of a "constituent text".

2.6.3. The fundamental rights therefore have an essential political dimension, because they link the democratic basis of political society with its limitation by the recognition of citizens' rights.

The Committee of the Regions is convinced that this right of participation in public life, exercised first and foremost by electing local authorities, is the first and indispensable link in a chain of political responsibilities in which the citizen must participate and feel involved.

Once the citizen feels a part of the chain of power emanating from him and extending to the summit of the European Union, he will accept the constraints of the "res-publica" and the decisions of those whom he has entrusted with it.

The fundamental rights thus lay the basis for participatory democracy, which respects the citizen's power and that of the various levels of authority to which he delegates his power.

3. The future process

3.1. European Union leaders have agreed to the proposal for the drawing up of a Charter of Fundamental Rights. The preparation of the Charter is the responsibility of a working group made up of representatives of the governments of the Member States, a person appointed by the Commission President, MEPs and national parliamentarians. The Committee of the Regions is to be consulted in this procedure and has been invited to speak to the forum, but it believes that it should be more fully involved and be given observer status.

In compliance with the subsidiarity principle, the forum advocated by the European Council for drawing up the charter should be wide enough to allow every level concerned, that is Europe, the Member States and local and regional authorities, to obtain a hearing for their views on the content of the European Charter of Fundamental Rights and in particular enable the public to express views and have access to information prior to decisions being taken by Europe and the Member States.

3.2. The proposal to develop a Charter of Fundamental Rights is an important step forward by the European Union. The COR intends to participate fully in this process and to take forward the ideas contained within this opinion into that wider forum. The COR representatives will highlight the main themes in this opinion during the forum's deliberations. At the same time they will stress the importance for the final document not only to be incorporated within the EU Treaties, but also to be produced as a stand-alone document highlighting the key elements that form Europe's bill of political, social and civil rights.

4. Conclusion

The European Union is very much at a watershed in its development. It is vitally important that urgent steps are taken to involve the public in decision-making so as to boost public confidence in both European institutions and the European Union as a whole. Making clear, in very practical and straightforward terms, the key economic, social, cultural, civil and political rights which the Union guarantees to all of its members is the urgent task. The development of a Charter which gives

expression to a citizens' and people's Europe, which will complement the common economic space which is currently being developed, is the way forward. This should be the clear goal and objective of the Charter of Fundamental Rights. That is the task which the Committee of the Regions and its representatives will argue for in the months ahead.

4.2. The Committee of the Regions comes out firmly in favour of a Charter of Fundamental Rights of the citizens of the European Union, which will give the Union homogeneous, coherent Community law with constitutional force.

4.3. On the basis of this new participatory citizenship, it will then be a matter of considering the need to set up democratically - going beyond the Community *acquis* - a supra-national constituent power with the aim of uniting Europeans around a great common project, respecting national identities and regional diversities and capable of creating a Community of shared destiny.

4.4. The European Union, governed by law and based on adherence to common values which are legally guaranteed, is henceforth indispensable, and must be enshrined in the next Treaty on Union.

Brussels, ...

The President of the Committee of the Regions	The Acting Secretary-General of the Committee of the Regions
Manfred Dammeyer	Vincenzo Falcone

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 28 January 2000

CHARTE 4114/00

CONTRIB 10

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed the opinion from the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe. [1]

[1] This text has been submitted in French and English language.

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Doc. 8615

17 January 2000

Charter of Fundamental Rights of the European Union

Opinion [1]

Political Affairs Committee

Rapporteur: Mr Clerfayt, Belgium, Liberal, Democratic and Reformers' Group

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 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.

[1] See Doc. 8611

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

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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.

contain frequent references to matters such as asylum, immigration, access to justice, family law and extradition.

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

[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.

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.

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.

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

6 Protocol to the Treaty of Amsterdam

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 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.

* * *

Reporting committee: Committee on Legal Affairs and Human Rights

Committee for opinion: Political Affairs Committee

Reference to committee: Doc. 8568 and Reference No. 2440 of 4 November 1999

Opinion approved by the committee on 11 January 2000

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

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 28 January 2000

CHARTE 4115/00

CONTRIB 11

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed the texts adopted by the Parliamentary Assembly of the Council of Europe on 25 January 2000:

- recommendation 1439 (2000)
- resolution 1210 (2000) and
- directive no 561 (2000).[1]

[1] These texts have been submitted in French and English language.

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Provisional edition

Charter of Fundamental Rights of the European Union

Recommendation 1439 (2000)[1]

1. The Assembly, having regard to its Resolution 1210 (2000) on the European Union Charter of Fundamental Rights, in which it invites the European Union:

i. to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols in the Charter of Fundamental Rights and to do its utmost to safeguard the coherence of the protection of human rights in Europe and to avoid diverging interpretations of those rights;

ii. to pronounce itself in favour of accession to the European Convention on Human Rights of the Council of Europe and make the necessary amendments to the Community treaties;

iii. to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account,

recommends that the Committee of Ministers of the Council of Europe pronounce itself in favour of the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to be made to this treaty.

[1] Assembly debate on 25 January 2000 (3rd Sitting). See Doc. 8611, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Magnusson), Doc. 8615, opinion of the Political Affairs Committee (rapporteur: Mr Clerfayt) and Doc. 8627, opinion of the Social, Health and Family Affairs Committee (rapporteur: Mr Evin). Text adopted by the Assembly on 25 January 2000 (3rd Sitting).

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Charter of Fundamental Rights of the European Union

Resolution 1210 (2000)[1]

1. The Assembly considers it necessary to make a number of observations following the decision by the EU European Council in Cologne on 3 and 4 June 1999 to draw up a Charter of Fundamental Rights of the European Union, to be submitted to the European Council in December 2000.

2. At this stage, without knowing the Charter's content, the Assembly wishes to bring a number of matters to the attention of those responsible for drafting this instrument, that is to say the "body" established to that end in Tampere, and may have occasion to make observations on the substance of the Charter in due course.

3. The European institutions, first the Communities and then the European Union, have for some time past shown an interest in human rights, in particular the European Convention on Human Rights, and have mentioned those rights as the foundation of democracy in their successive treaties. The European Parliament and the Commission have on a number of occasions come out in favour of the Union's accession to the Convention. The Parliamentary Assembly has itself welcomed this proposal. However, it has not yet been translated into action, following an opinion by the Court of Justice in Luxembourg on whether accession to the Convention was compatible with the

1 Assembly debate on 25 January 2000 (3rd Sitting). See Doc. 8611, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Magnusson), Doc. 8615, opinion of the Political Affairs Committee (rapporteur: Mr Clerfayt) and Doc. 8627, opinion of the Social, Health and Family Affairs Committee (rapporteur: Mr Evin). Text adopted by the Assembly on 25 January 2000 (3rd Sitting).

Community treaties, in which the Court found that, as Community law stood at the time, the Community had no competence to accede.

4. At a time when it is reinforcing its powers, the Union wishes to make the importance of human rights more visible to its citizens, as stated in the decision taken in Cologne, and to bring these currently scattered rights together in a single text. The Assembly welcomes this initiative as a sign of a resolve to strengthen further the cause of human rights in Europe.

5. The Assembly nonetheless considers that, in adopting a Charter of Fundamental Rights, the achievements of the European Convention on Human Rights and the body of its case-law established over almost fifty years, which has had far-reaching effects on the law of the member states of the Council of Europe and therefore of the European Union, cannot be disregarded. It further draws attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights.

6. In this connection, the Assembly recalls the communication of 19 November 1990 issued by the Commission of the European Communities on accession to the European Convention on Human Rights, in which it stated that accession did not rule out the option of a set of fundamental rights specific to the Community. The opposite inference can therefore be made, ie that adoption of a Charter does not rule out accession to the Convention on Human Rights.

7. The European Union and the Council of Europe undeniably guarantee a number of rights which are not contained in the European Convention on Human Rights, particularly economic and social rights, and the Charter should therefore include these rights, adding to them others now accepted as fundamental rights. The Assembly draws attention to the other instruments for the protection of human rights on which the Charter could draw, in particular the revised European Social Charter, which guarantees economic and social rights and is an instrument to which the Assembly has invited the Union to accede. It recalls that, following the Treaty of Amsterdam, a reference to the Social Charter of the Council of Europe was included in the Treaty on the European Union.

8. The Assembly refers to the European Union report, prepared in February 1999 by an expert group chaired by Professor Simitis, which recommends that Articles 2 to 13 of the European Convention on Human Rights be incorporated into Community law, together with the rights secured in the protocols to the Convention. The inclusion of rights guaranteed by the Convention would be a means of avoiding having two different sets of rights in Europe, thus creating two categories of citizens enjoying different rights.

9. The Assembly believes that there can be no discrimination in the application of fundamental rights and that everyone coming under the jurisdiction of a Council of Europe member state must enjoy the protection of such rights, as provided for in Articles 1 and 14 of the European Convention on Human Rights.

10. In conclusion, in the light of the above, the Assembly invites the European Union:

i. to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols in the Charter of Fundamental Rights and to do its utmost to safeguard the coherence of the protection of human rights in Europe and to avoid diverging interpretations of those rights;

ii. to pronounce itself in favour of accession to the European Convention on Human Rights of the Council of Europe and make the necessary amendments to the Community treaties;

iii. to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account.

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Charter of Fundamental Rights of the European Union

Order No. 561 (2000)[1]

The Assembly, having regard to its Resolution 1210 (2000) and Recommendation 1439 (2000), instructs its Committee on Legal Affairs and Human Rights, and its Social, Health and Family Affairs Committee for an opinion, to carefully follow and monitor the outcome of the drafting work on the Charter of Fundamental Rights, and to report back to it on this subject in due course.

1 Assembly debate on 25 January 2000 (3rd Sitting). See Doc. 8611, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Magnusson), Doc. 8615, opinion of the Political Affairs Committee (rapporteur: Mr Clerfayt) and Doc. 8627, opinion of the Social, Health and Family Affairs Committee (rapporteur: Mr Evin). Text adopted by the Assembly on 25 January 2000 (3rd Sitting).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 28 January 2000

CHARTE 4116/00

CONTRIB 12

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Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed the opinion from the Social and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe. [1]

[1] This text has been submitted in French and English language.

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Doc. 8627

24 January 2000

Charter of Fundamental Rights of the European Union

Opinion[1]

Social, Health and Family Affairs Committee

Rapporteur: Mr Claude Evin, France, Socialist Group

CONCLUSIONS OF THE COMMITTEE

1. The report presented by the Committee on Legal Affairs and Human Rights provides a comprehensive picture of a question which is crucial to Europe's institutional equilibrium and warrants close attention. It nevertheless raises questions which the Social, Health and Family Affairs Committee feels can be clearly and conclusively answered without an extensive examination.

2. The Social, Health and Family, Affairs Committee substantially agrees with the views expressed in the report, which welcomes the Union's initiative and determination to make human rights more visible to European citizens.

3. On the other hand, the Social, Health and Family, Affairs Committee considers that the debate ought not to centre on the sole question of the European Community's accession to the European Convention on Human Rights. The real question raised by the preparation of an EU Charter of Fundamental Rights concerns the shortcomings of the existing international legal instruments for the protection of human rights - the Council of Europe conventions included - particularly in that they do not adequately secure social rights.

1 Doc. 8611 - report, draft resolution, draft recommendation and draft order adopted by the Committee on Legal Affairs and Human Rights on 10 January 2000.

4. In this respect, the committee fully endorses paragraph 7 of the draft resolution and takes the view that the inclusion in the future Charter of enforceable social rights would represent a considerable advance in citizens' protection in Europe.

5. Indeed, on the strength of the Council's long standing experience and recent work[2] the Committee considers it indispensable that the rights, social rights included, should be enforceable before courts and covered by a right of individual petition before a supranational judicial authority.

EXPLANATORY MEMORANDUM

6. Since their inception the Council of Europe as a whole and its Parliamentary Assembly in particular have been the nerve centre for furtherance of human rights in Europe. The Council of Europe has never yet abdicated its time-honoured mission of strengthening the institutions that uphold democracy and fundamental freedoms in Europe. It can therefore rightfully pride itself on its achievements in this regard at a time when the Europe of the 15 contemplates following in its footsteps.

7. The substance of the debate in hand is that the Assembly should consider and define its position on these three crucial questions:

– whether or not the Parliamentary Assembly is in favour of the European Union's drawing up a Charter of Fundamental Rights;

– whether or not the Parliamentary Assembly is in favour of the future Charter constituting not a plain policy statement by the Union but an integral part of the Treaties in the fullest sense, in order that the set of rights which it embodies may not only come within the remit of the European Commission, which would accordingly issue the appropriate instructions for their effective realisation by the Member States, but may also be enforceable, signifying that their infringement by the Member States would be liable to sanctions before the Court of Justice of the European Communities;

– regarding content, whether or not the Parliamentary Assembly is in favour of the future Charter enshrining a complete and coherent body of civil and political rights and social rights, as secured in particular by the European Convention on Human Rights and the European Social Charter.

8. Any impulsive liberal-mindedness would unhesitatingly prompt affirmative replies, whereas in fact none of the answers to these questions is straightforward. The advancement of human rights in Europe, social rights included, cannot be entirely realised at the present time through the mere existence of a European Convention on Human Rights and a European Social Charter.

9. It is salutary that the European Union displays firm social ambitions. Consequently, one is bound to welcome the process initiated and to support any genuine effort by the Community institutions with the intention of effectively strengthening human rights not only within the Union and for the full benefit of the citizens of the Europe of the 15 but also – a valuable opportunity – outside the Union in its relations with its non-member partners.

[2] Recommendation 1415 (1999) on *an additional protocol to the European Convention on Human Rights concerning fundamental social rights* (Doc. 8357)

10. Contrary to the previous evasiveness and hesitancy of the Union, which has not always put into practice the policy statements adopted, the present approach is more ambitious and anticipates a second Intergovernmental Conference (IGC) and a revision of the Treaties.

11. National MPs as well as MEPs have had frequent occasion to deplore the inadequacy of the human rights safeguards afforded by the Community instruments. There is no complete single text listing the civil, political and social rights which protect the citizens of the Union. The European Parliament has repeatedly advocated including in the body of the Treaty a catalogue of fundamental rights (see in particular its resolution adopting a Declaration on fundamental rights and freedoms of 12 April 1989, its resolution on the Constitution of the European Union of 10 February 1994, and its resolution on the IGC of 13 March 1996). There is of course a Community Charter of the Fundamental Social Rights of Workers dating from 1989 and now signed by all fifteen Member States albeit only with declaratory status. Yet the Amsterdam Treaty had to be awaited before definite progress occurred in objectifying the Union's social goals (references made to the European Social Charter; inclusion of Agreement on social policy forming Protocol No 14 to the Treaty establishing the European Community (Chapter 1, Title 11, new Rules 136 to 145), etc.).

12. It now proves truly indispensable to **clarify the role of our respective organisations in Europe:** Council of Europe and European Union. The two organisations are admittedly dissimilar in their legal foundation as well as in their procedures and their functions. The Council of Europe conventions - over 170 to date - and especially the European Convention on Human Rights and the European Social Charter are extremely fertile texts. However, the functions which have devolved on each organisation since they came into being are plainly tied to their institutional structure; the Union, because it holds supranational powers and does not strictly depend on intergovernmental co-operation, possesses a coercive authority that bears no comparison.

13. The Social, Health and Family Affairs Committee held a joint meeting in Brussels on 23 November 1999 with the European Parliament Committee on Employment and Social Affairs. Members discussed the draft Charter of Fundamental Rights, particularly the social dimension of the project.

14. The discussions held on that occasion raised the following points:

– human rights protection signifies a very different approach for the Council of Europe and the European Union; the Council of Europe acts as a pioneer in the human rights field, whereas the Community has a far lower profile on that score;

– the two organisations have legal instruments of a vastly different nature;

– the content of the Council of Europe texts, chiefly the European Convention on Human Rights and the European Social Charter, can enhance the Union's approach;

– the machinery for supervising enforcement of rights is very go-ahead in the Council of Europe as citizens can apply directly to the European Court of Human Rights;

– a legal instrument like the EU Charter of Fundamental Rights should be given great prominence, and so it is imperative to include this catalogue of rights in a new Treaty;

– the Charter should answer the purpose of enhancing the Union's social dimension and should therefore include a complete set of social rights;

– the Charter would be rendered virtually ineffective were it not binding on the Union institutions and Member States; the adoption of the Charter necessarily entails radical reform of the judicial control machinery, in order that every citizen may have direct access to the Court of Justice.

15. To advance reflection in the matter, the two committees decided to set up a joint working group whose task will be to ensure that the social rights as defined in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers are included in the EU Charter of Fundamental Rights.

16. As to the **substance** of the draft Charter of Fundamental Rights, it will quite conceivably be the subject of lengthy discussion in the Charter drafting body and the various institutions of the Union. It is equally certain that the principal Council of Europe legal instruments (European Convention on Human Rights, European Social Charter and revised Charter, European Code of Social Security and revised Code, etc.), by virtue of their substance, effective application and quality, can provide legal models and references and inform the Union's reflection. They are moreover evolutive instruments that move with the times and adjust to Europe's new political, economic and social challenges.

17. It is indispensable that the future Charter embody a **complete range of social rights**, relating to protection not only of workers but also of the family, women and children, freedom to form and join trade unions, collective bargaining, social security, health, housing, child welfare, etc.

18. In any event a widening of the gulf between the two Europes must be avoided. The aforementioned body should therefore be instructed to apply itself to drawing up a list of **identical rights** to those which the States have already undertaken to uphold as parties to the European Convention on Human Rights or the European Social Charter.

19. The **legal scope** of the future Charter of Fundamental Rights also remains to be considered. Given the present position of Community law and practice, it is only possible to point out the inadequacies of the supervisory machinery.

20. Nonetheless, the Charter's proposed integration with the Treaties means that it will be endowed with a dual supervisory system for verifying the due application of these rights at national level: on the one hand the European Commission's authority to issue Directives could allow a purposive Community policy to be framed; on the other hand, respect for the rights would be supervised under the Community judicial system.

21. This requires a clear commitment by the Community institutions, the European Commission in particular, to ensure that the States make the rights genuinely applicable and do not settle for vague token declarations.

22. Ultimately the future will reveal the reality of the Union's political intention to make a radical reform of its institutions and judicial machinery, as it remains to be seen whether the Union will allow its citizens the possibility of bringing direct individual petitions before the Court of Justice of the Communities when their rights are violated.

23. There is no point in drafting a Charter of Fundamental Rights unless it establishes civil, political, economic and social rights that are credible and concrete, as well as guaranteeing their reality and applicability for all persons. It is not a matter of securing their proclamation and promotion alone; effective safeguards must be introduced.

24. The Rapporteurs of the European Parliament Committee on Constitutional Affairs, MM A. Duff and J. Voggenhuber, have stated their support for conferring binding force on the Charter of Fundamental Rights and ensuring that citizens have direct access to the Court of Justice of the European Communities[3].

25. Lastly, the current debate surrounding the Union's Charter of Fundamental Rights should not leave out of account the need to continue **the effort to promote and improve the existing Council of Europe conventions** and their supervisory machinery.

26. The Social, Health and Family Affairs Committee recalls in this connection that in April 1999 it presented the Parliamentary Assembly with a report on an *additional protocol to the European Convention on Human Rights concerning fundamental social rights*, in which it recalled that if democracy was to be firmly rooted in Europe, greater effectiveness and greater enforceability of social rights must be guaranteed. It therefore requested that consideration be given to the possibility of incorporating into the European Convention on Human Rights certain rights set forth in the revised European Social Charter.

27. The studies made by the Committee for some years and just recently show that is vital that there should exist at European level a body of social rights which are enforceable and which carry a right of individual petition to a supranational judicial authority**.**

28. In any case, also having regard to the technicality of the questions at issue, it is plainly imperative that a clear position be stated by the Council of Europe, which has observer status in the EU Charter drafting body. It will also need to impress upon the Union and the Union Member States its matchless experience built up over more than 50 years in the furtherance and protection of human rights in their entirety.

[3] See working document EP 232.397 of 7 December 1999

Proposed amendments

29. The Social, Health and Family Affairs Committee wishes to put forward the following amendments to the draft resolution and the draft order:

Amendment No 1:

«In the draft resolution, replace paragraph 10. iii with the following text:

"to incorporate into the Charter of Fundamental Rights the whole range of social rights protecting workers, the family, women and children, taking into account the rights secured in the revised European Social Charter."»

Amendment No 2:

«In the draft order, add after "Human Rights":

", and its Social, Health and Family Affairs Committee for an opinion,"».

*
* *

Reporting committee: Committee on Legal Affairs and Human Rights (Doc. 8611)

Committee for opinion: Social, Health and Family Affairs Committee

Reference to committee: Doc. 8542, decision of the Bureau on 13.12.99, modifying Reference No. 2440, 24.9.99

Opinion approved by the committee on 24 January 2000

Secretaries to the committee: Mrs Meunier and Mrs Clamer

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 3 February 2000 (08.02)

CHARTE 4119/00

CONTRIB 15

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Delegations will find herewith a Resolution adopted by the Synod of the Protestant Church in Germany (EKD) at its meeting in Leipzig on 11 November 1999. [1]

[1] This text was submitted in English, French and German.

Evangelische
Kirche
in Deutschland

I. RESOLUTION

of the Synod of the Protestant Church in Germany at its meeting in Leipzig the 11th November 1999

on the

Charter of Fundamental Rights of the European Union

At the European Council meeting in Cologne on 3rd and 4th June 1999, the Council took the decision to draw up a draft Charter of fundamental rights. At the Tampere European Council on 15th and 16th October 1999 the body to do this was appointed: Members of the European Parliament, the national Parliaments, representatives of the Head of State or Government of Member States and representatives of the other European Institutions. This body has the task of finding a draft by the Council meeting in Paris in December 2000.

The Synod welcomes the fact that the Charter is being drawn up, a commitment on the part of the European Union to human rights and fundamental freedoms, in this transparent manner, whereby the results of the debate will be made accessible to the public for discussion.

The Synod asks the Council of the Protestant Church in Germany to involve itself unreservedly in compiling the contents of the Charter and to bring the ideas of the Protestant Church in Germany as to its composition to the attention of the German Bundestag, the German Government, and also raise it in dialogues between the other European sister churches and the European Parliament and other European authorities.

These should be the salient considerations:

- A Charter of fundamental rights offers the chance to reveal the very foundations of European polity as an order of peace of a unique kind and to set them out clearly for our citizens,
  to emphasise the validity for the European Union of rights to freedom as they are laid down in the European Convention on Human Rights of the Council of Europe,
  to secure basic social rights as being an inseparable part of fundamental rights.

- Religious liberty constitutes a basic tenet of the fundamental rights catalogue. Here, there is the need to guarantee both the right of religious bodies to self-govern their own affairs and the freedom of worship.

- The rights being formulated should not be limited to EU citizens only. Therefore all considerations on these rights must be start with the question as to their validity for persons who are nationals of third countries or asylum-seekers and do not have the citizenship of an EU Member State.

- The fundamental rights to be defined in the Charter must not only be applicable within the EU but constitute a leading principle in its external relations of the European Union. Thus, Community policies in the area of trade and development-co-operation must contribute to respect of human rights, for example by including human rights clauses.

- Efficient safeguard of fundamental rights presupposes in principle potential recourse to judicial protection. This should be the parameter by which the compatibility of actions taken by European authorities and institutions should be measured in relation to its basic principles. Even if the Charter is not initially legally binding, there should be an underlying aim while drawing it up to make it ultimately a binding part of the European treaties.

- The process of determining and revising fundamental rights on the European level should continue in the long-term to be an open one. This is essential in view of the challenging changes the EU faces with globalisation, new technologies, for example in the field of biotechnology and telecommunication and especially with the enlargement to countries in Central and Eastern Europe as well as in the Mediterranean area in the next decade.

Leipzig, 11th November 1999

The President of the Synod
of the Protestant Church in Germany

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Editors' note to CHARTE 4120/00 ADD 1, **Declaration of the Association of Women of Southern Europe (AFEM) (dated 29/01/00)**:

The INIT FR version was dated 3 February 2000.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 28 February 2000

CHARTE 4120/00 ADD 1

CONTRIB 16

ADDENDUM TO COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the English version of the declaration of the Association of Women of Southern Europe (AFEM). [1] [2]

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[1] This text has been submitted only in English language.

[2] AFEM: 5, rue Villaret de Joyeuse - 75017 Paris. Tél: 33-1-72 12 03. Fax: 33-1-72 15 03 E-mail: assafem@aol.com

AFEM
ASSOCIATION DES FEMMES DE L' EUROPE MÉRIDIONALE
ASSOCIATION OF WOMEN OF SOUTHERN EUROPE
Declaration on the Charter of Fundamental Rights
Adopted by the Board at its meeting in Paris on the 29th of January 2000

The Association of Women of Southern Europe (AFEM) welcomes the European Union's decision to provide itself with a Charter of Fundamental Rights.

Being an essential element of a Community based on the rule of law and an indispensable means to promote a constant and balanced economic and social development, this Charter constitutes an opportunity to revive the more and more declining interest of the citizens in the EU.

However, as the Permanent Forum of the Civil Society also underlines, the following should be ensured:

- in respect of the procedure, a large consultation with the civil society;
- in respect of the content, an advance, in particular on economic and social rights;
- in respect of effectiveness, the binding force of the Charter, by integrating it in the Treaty.

The AFEM underlines **the necessity that the Charter**, after proclaiming the fundamental principle of equality and prohibiting any discrimination, **should guarantee substantive equality of women and men and prohibit any direct or indirect discrimination on the ground of sex in all areas, by a rule of direct effect.**

The AFEM considers it indispensable that the following should be expressly provided:

- "Democracy" means parity democracy.
- The "right to dignity" implies the interdiction of the traffic in the human body or part thereof, with or without the consent of the person concerned, since it is impossible to know whether this consent is freely given.
- The "right to protection against violence" implies the absolute interdiction of violence within the family as well as of sexual mutilations.
- The practical conditions for implementing the rights recognised to migrants should garantee that women will effectively benefit therefrom, subject to the same conditions as men.
- For the granting of asylum, the fact that one is unable to dispose of oneself or that one's liberty or physical integrity is threatened should be considered as persecution, whether the authorities of the country of origin are the authors of such persecution or threats or they tolerate them or are unable to oppose them.
- Effective judicial protection of the aforementioned rights will not be achieved, unless NGOs have standing to have recourse and/or support the recourse of a victim before the competent national and European authorities.

Marcelle Devaud - Honorary President, *Micheline Galabert Augé,* President,
Annita Garibaldi, Vice-President, *Maria Angeles Ruiz Tagle Morales* - Vice-President, *Maria Alzira Lemos,* authorised by Maria Regina Tavares da Silva - Secretary General unable to attend, *Valérie Vection*, Treasurer, *Sophia Spiliotopoulos*, replacing until the next elections Rena Lampsa, Vice-President, deceased.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 February 2000 (11.02)
(OR. f)

CHARTE 4124/00

CONTRIB 19

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a Resolution of the European Trade Union Confederation (ETUC), adopted by its Executive Committee on 16/17 September 1999.[1]

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[1] This text was submitted in French, English and German.

ETUC Position:

"The incorporation of fundamental civic, social and trade union rights into the European Union Treaties" (adopted by the Executive Committee on 16-17 September 1999)

As a firm promoter of EU Fundamental Rights, ETUC welcomes the decision of the

Cologne European Council in June 1999 to initiate a procedure to draw up a concrete proposal on EU Fundamental Rights in the context of the next revision of the Treaty.

ETUC agrees with the Cologne Summit Conclusions that the "protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy", and, likewise, that thereir exists a clear need "to make their overriding importance and relevance more visible to the Union's citizens".

Although the Amsterdam Treaty did bring about some progress (e.g. TEU Art 6 & 7/human rights and TEC Art 13/non-discrimination), important shortcomings still exist.

The social implications of the realisation of EMU and the introduction of the EURO, the realisation of IM and the massive industrial restructuration, underpins the importance of securing fundamental rights at European level too.

A recent political initiative (intervention mechanism) and a ECJ pending ECJ case (C-67/96 on collective agreements) clearly shows clearly the potential pressure upon, and the threat to, vested trade union rights in the wake of the European integration process which will exist as long as fundamental trade unio n rights are not explicitly recognised at European level.

ETUC considers fundamental rights as an indispensable part, in combination with the development of the social socle, in the building of the Social Union and safeguarding and developing the European social model. Their incorporation will also be important in view of enlargement. The respect of fundamental rights is necessary for a Citizens' Europe to become a reality.

It should also be clear that the global trading partners will expect the European Union and its Member States themselves to secure the respect for fundamental rights when promoting these issues in the global trade agreements (as in the WTO).

4. The Cologne Summit did not conclude on "how the Charter should be integrated into the treaties". A solemn political declaration in the form of a "Charter", however, will not be sufficient to meet the stated objectives. A real "protection of fundamental rights" implies the legally binding incorporation of these rights in the treaties.

Therefore, in the ETUC 9th Congress resolutions, it is stated that: aAbove all, bringing the Union closer to its citizens requires political, civil, social and trade union rights - including cross-border sympathy action, including strikes – to be fully recognised by the Union and enshrined in the Treaty.

As regards specific trade union rights, ETUC calls for the full recognition of such rights in the EU Treaty beginning with the ILO Conventions on Freedom of Association, Collective Bargaining, Right to strike, Child Labour and Forced Labour.
Consequently, the ETUC 9th Congress decided to campaign for full recognition of these rights to be enshrined in the Treaty on the occasion of its next revision.

5. The fundamental political, civil, social and trade union rights to be incorporated into the Treaty should include the rights already laid down in existing international instruments and of EU specific cross border / transnational rights.

First, consequently, the rights included in the following instruments should consequently establish the core to be recognised by, and in, the EU:
Universal Declaration of Human Rights
European Convention on Human Rights
ILO Declaration on Fundamental Principles and Rights at Work
Community Charter of the Fundamental Social Rights of Workers
Revised European Social Charter
UN Convention on the Rights of the Child

These rights should be guaranteed throughout the territory of the European Union.

It goes wit hout saying that these rights constitutes a minimum, and a non-regression principle should be applied to existing rights in the EU or its Member States.

Secondly, the EU specific cross- border and transnational related rights as well should also be included, especially transnational trade union rights, freedom of movement and the European citizenship political rights.

6. As underlined by the ETUC 9th Congress, equal treatment must be extended to all people who are legally resident in the EU, whether or not they are EU citizens. This will be particularlyin particular important as regards fundamental rights in the EU.

The proposed approach is obvious as regards scope and content, obvious both from a political as well as from a practical point of view and s hould be time- saving. As underlined by the latest Commission expert report (Simitis report), "it is time to act". The issue has already been the subject offor lengthy and in- depth political and legal analysis and debate over at least the last decade at least. The process establishing the 1989 Community Charter or the Commission "Comité des Sages" (Pintasilgo) report, the EP resolution on trade union rights as well as the Amsterdam Colloquium organised by ETUC in the Amsterdam IGC process are just examples of a number of initiatives taken.

There exists no need, therefore, to reopen an analytical debate on the basics, but, on the contrary, to take decisions to pursue and to complete a process which has been progressed upon in the Amsterdam Treaty.

The EU Member States have already all signed and ratified the mentioned international instruments and rights, (or as regards the Council of Europe revised Social Charter, are in the process of ratification).
Beyond the inclusion of the European Human Rights Convention, the European treaties now also includes a reference to the Community Charter and the Council of Europe Social Charter.

The principal difference to the present situation, when incorporating these rights of the international instruments in the EU Treaty, will therefore be, that the Member States becomes obliged, in a binding manner vis à vis the European Unionoblige, to respect and adhere to these international instruments (and the compliance procedures of these institutions).

Whether the obligation vis -à-vis the European Union will become legally or politically binding depends on the method of incorporation into the EU Treaty.

8. For ETUC, the aim should be to anchor the recognition and respect for the EU fundamental rights visibly and efficiently in the Treaty. Enshrining the rights in the context of the Citizenship Chapter should therefore be considered.

A Charter based alone on a solemn political declaration would fall short of the needs and objectives set out by the Cologne Summit; ETUC (in line with its 9th Congress decisions) is in favour of incorporating in the Treaty in a binding manner a "EU Bill of Rights" based upon already existing core rights of international instruments combined with EU specific cross border and transnational rights. ETUC is actively preparing a proposal based on these principles with the objective of being introduced into the drafting process to be initiated at the Tampere European Council in October 1999.

However, should the EU Member States at present not be prepared to take this logical step in view of the achieved EU integration to integrate fully such a EU Bill of Rights, ETUC considers that the Tampere process, as a first step as a minimum in order to stay credible, should result in the incorporation in the Treaty of:

A binding Treaty obligation for the Member States (and the Union) to adhere to (the above mentioned) international instruments combined with a sanction procedure (political and/or legal)
and
b) Selected individual and collective universal core rights directly enshrined in the Treaty and with priority to EU-specific cross-border and transnational trade union and workers' rights:
national and transnational trade union rights of association, collective bargaining and trade union action, including the right to cross-border sympathy action and strike
national and transnational rights for workers to information, consultation and participation
the right of equal treatment and equal opportunities for men and women
prohibition of all forms of discrimination, racism and xenophobia
ban on child labour
the right of occupational health and safety protection
the right to a minimum income including social protection in case of unemployment
freedom of movement within the EU, including for third country nationals who are legally resident in the EU.

At a later stage, ETUC will submit a specific text on the above mentioned rights to be incorporated into the Treaty.

One outstanding issue to be clarified during the Tampere drafting process will be whether or not the European Union itself should accede to the European Convention on Human Rights and its additional Protocols (Council of Europe)."

9. ETUC believes that the development of the proposal for EU Fu ndamental Rights must be carried out by way of a transparent and participative procedure, involving, as decided at the Cologne Summit, the European Parliament and other EU institutions as well as national parliaments. ETUC however stresses the importance of fully involving civil society and the trade unions in the process. ETUC is looking forward to being invited to participate actively in the drafting procedure.

In view of the preparatory analysis and political clarification already undertaken, it is crucial and also realistic to conclude the Tampere drafting procedure on time to allow the EU Fundamental Rights proposal to be integrated into the next IGC procedure.as planned

In July 1998, ETUC and the Platform of European Social NGO's launched jointly July 1998 a joint campaign for a Bill of Rights. The Cologne Summit decision to draw up a Charter of Fundamental Rights of the EU can be considered a first positive step and outcome. . Consequently, ETUC consequently therefore will therefore be intensifying its campaigning, both at European level vis-à-vis the European institutions and - carried by its affiliates - at national level, with the objective ofto rallying support for a real incorporation of fundamental rights in the Treaty.

Strong cooperation between the European trade union movement and civil society will be important. ETUC will therefore will continue the joint campaign activities with the Platform of European Social NGO's, and it calls upon the affiliates to do the same at national level, as is customary according to the traditions. ETUC also calls upon especially the European Parliament to continue to play an active role as a promoter of fundamental rights and henceso a Citizens' Europe.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 9 Februar 2000

CHARTE 4126/00

CONTRIB 21

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte anliegend die Erklärung von Halle zur Europäischen Grundrechtscharta, vom 2.12.1999, vorgelegt vom Rat der Gemeinden und Regionen Europas - Deutsche Sektion. [1]

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[1] Dieser Text ist uns nur in deutscher Sprache zugegangen.

♎ RGRE ♎ Postfach 51 06 20 ♎ 50942 Köln Rat der Gemeinden und Regionen Europas ♎ Deutsche Sektion

ERKLÄRUNG VON HALLE

zur

Europäischen Grundrechtscharta

Die in der Delegiertenversammlung 1999 in Halle (Saale) versammelten Kommunalpolitiker/Kommunalpolitikerinnen aus den Mitgliedskommunen der Deutschen Sektion des RGRE

B e g r ü ß e n den Beschluss der Staats- und Regierungschefs der Mitgliedstaaten der Europäischen Union vom Juni 1999 (Kölner Gipfel), eine Charta der Grundrechte der Europäischen Union zu erarbeiten.

B e t r a c h t e n die Erarbeitung einer EU-Grundrechtscharta als wichtigen und notwendigen Schritt, um mit der ökonomischen und der politischen Einheit auch die konstitutionelle Einheit der Europäischen Union herbeizuführen.

W e i s e n darauf hin, dass mit einer EU-Grundrechtscharta die Chance besteht, die EU als eine Wertegemeinschaft, also auf gemeinsame Werte, Rechtsordnungen und Traditionen aufbauende Gemeinschaft, sichtbar zu machen.

E r a c h t e n eine gemeinsame Grundrechtscharta als ein wichtiges Element, um die Union den europäischen Bürgern näher zu bringen, indem sie Klarheit und Transparenz über die ihnen zustehenden Rechte schafft und damit zunehmend das Bewusstsein einer gemeinschaftlichen Identität vermittelt.

U n t e r s t r e i c h e n die Signalwirkung einer Grundrechtscharta für den Annäherungsprozess der Beitrittsländer Mittel- und Osteuropas an die Europäische Union als politische und Wertegemeinschaft

E r w a r t e n, dass sich die Erarbeitung der EU-Grundrechtscharta unter Einbeziehung aller gesellschaftlichen Gruppen in einem breitangelegten öffentlichen Dialog vollzieht, auch durch Beteiligung der RGRE/CCRE bei der angestrebten Anhörung.

B e t o n e n in dieser Hinsicht, dass die europäischen Kommunen und Regionen als die dem Bürger nächste Ebene im Verwaltungsaufbau der Europäischen Union ein wichtiger Impulsgeber sind und daher in diesem Dialog (über ihre repräsentativen Vereinigungen) beteiligt werden müssen.

B e g r ü ß e n die Absicht, den "Ausschuss der regionalen und lokalen Gebietskörperschaften" (AdR; Art. 263 ff EG-V) als Organ in die institutionelle Debatte miteinzubeziehen.
U n t e r s t ü t z e n die vom Präsidenten des Ausschusses der Regionen gegenüber der finnischen Ratspräsidentschaft geäußerte Erwartung, bei den Arbeiten für eine europäische Grundrechtscharta die Verankerung des Prinzips der kommunalen Selbstverwaltung im EG-Vertrag vorzusehen.

F o r d e r n die Berücksichtigung folgender aus kommunaler Sicht wichtigen Elemente in einer europäischen Grundrechtscharta:

Kommunale Selbstverwaltungsgarantie

Das Recht der Bürger, über die Angelegenheiten der örtlichen Gemeinschaft - ihre Angelegenheiten - selbständig zu entscheiden, gehört in allen Mitgliedsländern der Europäischen Union zum gesicherten Verfassungsbestand (Art. 6 EU-Vertrag). Darüber hinaus haben alle Mitgliedsländer der Europäischen Union die Europäische „Charta der kommunalen Selbstverwaltung“ (des Europarates) unterzeichnet und bis auf Frankreich und Belgien auch ratifiziert und in innerstaatliches Recht umgesetzt.

Eine künftige Charta der Grundrechte der Europäischen Union muss daher das Recht auf bürgerschaftliche Selbstverwaltung als wichtigen Bestandteil der „nationalen Identität ihrer Mitgliedstaaten“ (Art. 6 Abs. 3 EU-Vertrag) gegenüber der Union und ihren Organen anerkennen und schützen.

Subsidiarität

Die Beachtung des Subsidiaritätsprinzips ist eine der wesentlichen Voraussetzungen für Bürgernähe in der Europäischen Union und damit letztendlich auch für die breite Akzeptanz des europäischen Integrationsprozesses in der europäischen Öffentlichkeit.

Das Subsidiaritätsprinzip ist mit dem Maastrichter Vertrag zu einem konstitutiven Element der europäischen (Verfassung-) Ordnung geworden (Art. 5 EG-Vertrag). Es trägt dazu bei, dass die Vielfalt und die Unterschiedlichkeit der Traditionen und Strukturen in Europa Bestand haben. Wegen dieser, für die Gestalt Europas identitätsbildenden Funktionen, gehört das Subsidiaritätsprinzip in eine EU-Grundrechtscharta.

Gleichzeitig muss das Subsidiaritätsprinzip konkretisiert und damit vervollständigt werden, indem die Kommunen und Regionen ausdrücklich in seine Anwendung durch die Organe der Union einbezogen werden.

Klagerecht bei Verletzungen der kommunalen Selbstverwaltungsgarantie und des Subsidiaritätsgrundsatzes

Ein wirksamer Schutz der kommunalen Selbstverwaltungsrechte und des Subsidiaritätsprinzips gegen ungerechtfertigte Eingriffe durch die Organe der Europäischen Gemeinschaft ist nur dann gewährleistet, wenn die Möglichkeit besteht, vermutete Verstöße gerichtlich feststellen zu lassen.

Das bürgerschaftliche Grundrecht auf kommunale Selbstverwaltung sowie das Subsidiaritätsprinzip bedürfen daher der Verfestigung durch die Gewährung eines Klagerechts vor dem Europäischen Gerichtshof bei Verstößen gegen die Grundsätze der kommunalen Selbstverwaltung und der Subsidiarität.

Dieses Klagerecht soll sich nicht auf die inneren Entscheidungen und Strukturen der Mitgliedstaaten und ihren Verwaltungsaufbau erstrecken, muss aber deren Schutz vor Eingriffen durch die EU und deren Organe garantieren (Abwehrrecht)

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 9 February 2000

CHARTE 4127/00

CONTRIB 22

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission from Euronet [1] on the Recognition of the Rights of the Child in the Charter of Fundamental Rights. [2]

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[1] Euronet, the European Children's Network, Place de Luxembourg 1, 1050 Bruxelles, Belgium. Tel: +32-2-512 4500, fax: +32-2-512 6673. E-mail: savechildbru@skynet.be

[2] The text has only been submitted in English language.

EXECUTIVE SUMMARY

Recognition of the Rights of the Child in the Charter of Fundamental Rights

Submission from Euronet – The European Children's Network, to the drafting group for an EU Charter of Fundamental Rights

Euronet – the European Children's Network, is a network of children's rights organisations including transnational networks such as BICE (International Catholic Children's Bureau) and International Save the Children Alliance, and national members in all 15 EU member states.

Euronet welcomes the initiative of the Council of Ministers to elaborate a charter of fundamental rights. Euronet recommends that children's rights must be included in the charter of fundamental rights and that the charter should be legally binding. Children make up 20% of the EU population yet their rights as established in international law are currently almost invisible in EU legislation, programmes and political decisions. Additionally the Charter should not simply codify existing rights but advance human rights.

Reasons to mention children's rights explicitly in the Charter:

- To ensure that in areas where the EU legislates, children's interests are taken into account and that legislation is not inadvertently discriminating against children.
- To ensure that the EU itself is also implementing existing international commitments such as the UN Convention on the Rights of the Child.

The 1989 **UN Convention on the Rights of the Child** is the fullest contemporary international expression of the fundamental rights of all people under the age of 18 –ie children. It has almost universal ratification with only two countries (USA and Somalia) not having ratified. The Convention states clearly that the best interests of the child should be a primary consideration in all legislation and policy (Article 3). The Convention has been ratified by all EU member states. However, whilst member states have a legal obligation to promote the best interests of the child and protect children's fundamental rights, the EU is under no such obligation although there are many areas in which the EU currently passes legislation which have a direct or indirect bearing on children's lives. Examples include labour legislation, consumer legislation, information and media legislation, health and the environment. Integration of the Convention on the Rights of the Child would ensure that the EU would be obliged to use the Convention as a "child proofing" tool when passing legislation.

Children's current legal status in the EU Treaty is unclear as children's legal status as European citizens is unclear. The EU Treaty primarily focuses on the "citizen as worker", which excludes children. In EU law children are seen too often as only "victims" or "dependents" or "barriers to work" which is in direct contradiction with their status in the Convention on the Rights of the Child. At the moment the principle of "the best interests of the child" is only included in EU legislation on ad hoc basis. In some cases the EU has legislated to promote the highest standards of safety for children, for example in the Toy Safety Directive 1988. In other cases commercial considerations come before the best interests of the child with the potential to infringe children's rights, for instance the Distance Selling Directive and toy and TV advertising policies of the EU. Inclusion of a reference to children's rights in the Charter would help ensure that this process was systematic and no longer ad hoc. At present, many cases on children's rights in the EU have had to be established by taking cases to the Court of Justice. This is inefficient and costly – integration of children's rights into EU legislative processes would have made such cases unnecessary and ensure a more systematic protection and promotion of children's rights.

The current Amsterdam Treaty contains legal bases which give the Commission a limited competence to promote children's rights:

- Article K - which contains an explicit reference to "offences against children", creates an intergovernmental competence to tackle a whole range of cross border and transnational issues affecting children. However, this Article is outside the Community application of the Treaty and fails to cover many other areas of concern for children.
- Article 13 – Non Discrimination, in particular the non discrimination on the basis of age
- Article 137 – Social Exclusion, which can be used to address the problem of children facing social exclusion (20% of EU children are living in poverty, Eurostat figures)
- Article 141 – refers to equal treatment for men and women in matters of employment, which can indirectly benefit children
- Article 143 – Demography, which could be used to collect age disaggregated statistics, including improved information on the situation of Union citizens under the age of 18.

Children need their own special set of rights in the Charter of fundamental rights because:

- Existing international standards ie the Convention on the Rights of the Child recognise the need for children to have their own set of rights.
- Children have not always been accepted as holders of rights and animals were often given rights before children.
- Children are a special category of people who have specific needs different from adults and who do not have the ability to protect themselves.

Concerning **subsidiarity**, Euronet recognises the fact that the principal competence for policy and legislation on children's issues is the responsibility of the member states' governments. However, many issues affecting children are neither uniquely national or transnational, for example, legal consequences for children when their parents separate and choose to live in different countries of the EU and the standardisation of products and services (TV, internet, media).

Conclusions

It is recommended that:

- The Charter of Fundamental Rights contains a full reference to the protection and promotion of children's rights in the EU, best expressed by an explicit reference to the UN Convention on the Rights of the Child.
- The Charter of Fundamental Rights should be legally binding.
- A new Article should be inserted in the EU Treaties so that the Community can contribute to the promotion and protection of the rights and needs of children.

Recognition of the rights of the child in the Charter of Fundamental Rights.

Submission from Euronet – The European Children's Network, to the drafting group for an EU Charter of Fundamental Rights.

Introduction

Euronet welcomes the initiative of the Council of Ministers to elaborate a charter of fundamental rights. In this submission Euronet demonstrates why it is necessary to have a comprehensive reference to children's rights in the charter. Euronet recommends that in order to promote and protect children's rights and interests and to foster their development and protect them from unforeseen negative effects of growing European integration, a reference in the Charter of Rights would need to be accompanied by a comprehensive legal basis in the Treaty on European Union.

Euronet also recommends that the Charter of Fundamental Rights is legally binding and that it goes beyond already existing international and European legal instruments.

What is Euronet ?

Euronet – the European Children's Network, is a network of children's rights agencies including BICE (International Catholic Children's Bureau), International Save the Children Alliance, and national members in all 15 EU member states. Together these agencies shared a concern about the general invisibility of children in EU policy, legislation and programmes. Euronet began as a network to press for recognition of children's rights in the EU Treaty in 1995. Euronet members worked together to strengthen the rights of the child by, amongst other things, trying to include a reference in the Amsterdam Treaty to the norms of the UN Convention on the Rights of the Child, ratified by all member states of the EU. Following this, Euronet has gone on to develop a comprehensive EU Children's policy in "A Children's policy for 21st Century Europe: First Steps".[1]

Euronet believes that children have a right to live without experiencing prejudice, exclusion and discrimination and have a right to be heard within the European institutions, including the European Parliament, Commission, Council of Ministers and Council of Europe.

[1] "A children's policy for 21st century Europe: First steps," Ruxton S, Euronet, Brussels, 1999

Children in the EU

Children in the EU make up 20% of the population but their rights as established in international law are currently almost invisible. This leads to children's invisibility in the legislation, policies, programmes and political decision making of the Union. Yet the future economic, social, political and cultural development of Europe is dependent on these 90 million children. As the ageing of Europe continues, children will become an even more precious and important resource. Neglecting their proper care and protection will have increasingly serious consequences. Furthermore, the EU institutions have frequently stated that it is important to "get closer to citizens" yet the interests of children are rarely included in EU legislation and Europe is still a long way from a "Citizens Europe" which includes children.

"We are children and young people of the European Union meeting in Belfast at the end of May 1998. We demand that the European Union listen carefully to the voices of its 90 million children and young people under the age of 18 years of age. We as Europe's young citizens are eager to contribute actively to the development and progress of Europe…In our Europe every child will be respected and listened to and every child will have the right to participate in the democratic process."[2]

At the beginning of the 21st Century, Europe is at a crossroads, as it enters monetary union, enlarges eastwards and faces demographic challenges. Children will be more affected by decisions with long term implications being taken now than any other population group.

Why do children's rights need to be included in the Charter ?

"Our efforts to discover children's needs in Europe are met with difficulties for two reasons. Firstly because in the EU citizens are seen as employers, employees and consumers only and secondly because children are seen as children of working parents only."[3]

The fundamental human rights of children [4], as expressed in the UN Convention on the Rights of the Child (1989) are not yet integrated into any of the core legal texts of the EU and therefore are not integrated into EU policy and legislation. As a result children's needs are currently largely ignored. Indeed, at present, legislation is inadvertently affecting children in a negative way. Other groups such as consumers, women, animals, disabled people are at least mentioned in the existing EU Treaty.

[2] Active voices – children's choices – Belfast Euronet symposium, 28/29 May 1998
[3] Children as Citizens of Europe – From Rhetoric to Reality, speech at Euronet Conference Belfast – 28/5/98.
[4] Up to now the European Commission has preferred to use the term 'fundamental rights' in preference to human rights in discussing its work in this area.

This means that EU legislation, policy and programming is to a certain extent sensitive to their fundamental rights and interests. However in the area of children's policy this is currently not the case. EU member states, by comparison have made greater progress to integrate the principles of the Convention into their national laws since ratification and although Euronet believes that many member states still need to make improvements before their legislation fully reflects the principles of the best interests of the child, substantial progress has been made in this area (see for example "A children's policy for 21st Century Europe: First steps" p20 – 21[5]).

The briefing argues why children should be explicitly mentioned in the Charter in order to:-

a) Ensure that the EU itself is also implementing existing international commitments such as the UN Convention on the Rights of the Child which all EU member states have ratified.

b) Ensure that in areas where the EU legislates, children's interests are taken into account and that legislation is not inadvertently discriminating against children

The UN Convention on the Rights of the Child

"The increasing importance attached to the concept of children's rights and the major role attributed by the international Community to the Convention on the Rights of the Child of 1989, serve to underline the desirability of a greater EU sensibility in this area….The Commission (should) ensure that all legislation it drafts is fully compatible with the requirements of the Convention."[6]

The 1989 UN Convention on the Rights of the Child is the fullest contemporary international expression of the fundamental rights of all people under the age of 18 – ie children. More than any other human rights instrument it incorporates the whole spectrum of human rights, civil, political, economic, social and cultural rights. The Convention states clearly that the best interests of the child should be a primary consideration in all legislation, and policy.

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legal bodies, the best interests of the child shall be a primary consideration," [7]

[5] Op cit

[6] Leading by Example – A Human Rights Agenda for the European Union for the Year 2000 – Cassese, Lalumière, Leuprecht, Robinson. Published by Academy of European Law, European University Institute, p 102.

[7] Article 3 – Convention on the Rights of the Child.

The UN Convention on the Rights of the Child is the most widely ratified human rights instrument ever, having been ratified by all states in the world (except the USA and Somalia). All EU member states, EEA states and states about to accede to the EU have ratified the Convention. However, at the moment the EU itself is under no obligation to respect the principles of the UN Convention on the Rights of the Child.[8]

This means that whilst the member states have a legal obligation to promote the best interests of the child and protect children's fundamental rights, the EU and is under no such obligation. This is inconsistent and means for example that member states are regularly assessing and reviewing how their actions and legislation affects the human rights of children, whilst the EU does not do so. Without systematic reference to the Convention on the Rights of the Child as a yardstick by which to judge the extent to which actions and policies promote children's rights, there is no means by which to be sure that children's rights are being upheld and promoted.

As the EU moves towards further integration, more and more issues concerning children are becoming transnational ones. It is important that the EU should be bound by international standards that member states have already signed up to.

There are many areas in which the EU currently passes legislation which have a direct or indirect bearing on children's lives, these include, labour legisation (Young People at Work Directive, Parental Leave Directive), consumer legislation (see above), information and media legislation and policy, health and the environment. Integration of the principles of the Convention on the Rights of the Child would act as a "child proofing" tool and ensure that the EU was under the same obligations as its member states.

The Convention on the Rights of the Child enshrines children's right to participate in decisions which affect them. [9] It is important that children are also given the possibility to participate actively in the development of the European ideal and concept.

Are Children's Rights dealt with by existing provisions in the Treaty covering human rights ?

Many commentators argue that the EU's overall legislative competence and approach to human rights is weak and that there is a human rights deficit.

[8] For a further discussion see "Towards an EU Human Rights Agenda for Children" – International Save the Children Alliance Europe Group,1998, Brussels, Rädda Barnen.
[9] Article 12, Convention on the Rights of the Child.

"The Treaty did not and still does not even after the measures introduced by Amsterdam, list human rights among its objectives….the Community lacks any significant constitutional competence to deal with all but a very circumscribed range of human rights matters." [10]

Similarly the report by the Comité de Sages concluded "As regards the Treaties of the European Union, what we have at present is not a genuine framework of social and civil rights but rather a set of ad hoc, piecemeal measures to accompany economic integration and to allow minimum social policies to be pursued." [11]

Euronet agrees with these assessments. Not only are existing human rights provisions in the EU Treaty weak, but those that are in the Treaty do not specifically mention children's human rights. This has very practical consequences, meaning that where human rights clauses are inserted into trade agreements or cooperation agreements, no specific attention is paid to children's rights.

Why do we need a separate expression of children's rights ?

If human rights cover all human beings, why do children need their own special set of rights ?

- Existing international standards ie the Convention on the Rights of the Child recognise the need for children to have their own set of rights, reflecting their particular needs and status. [12]

- Children have not always been accepted as holders of rights and animals were often given rights before children.

- Children are a special category of people who have specific needs and who do not have the ability to protect themselves. Adults rights are often different from children's rights and vice versa. Talking about human rights in general but not identifying specific rights for children renders children invisible and vulnerable.

[10] See "Leading by example – A Human Rights Agenda for the European Union for the Year 2000", Cassese, Lalumière, Leuprecht, Robinson, Academy of European Law, European University Institute, Florence, 1998, para 60

[11] "For a Europe of civic and social rights" – Report by the Comité de Sages, European Commission, Brussels, 1996.

[12] See "The Child and the European Convention on Human Rights, Kilkelly, Ursula, Ashgate, UK, 1999.

What about subsidiarity – Surely the protection of children's rights rests at the member state level ?

The principal competence for policy and legislation on children's issues is the responsibility of member state's Governments. However there is also a clear European dimension to the question of children's policy. Many issues affecting children are neither uniquely national nor transnational. For example, the legal consequences for children when their parents choose to live in different parts of the EU following family breakdown, the greater cross border dissemination of child pornography, and child trafficking. Similarly as standardisation and harmonisation of products and regulation of TV, internet and media takes place at EU level, in many cases the best interests of the child are overlooked.

Euronet is not arguing for the competence for children's policy to move to the European level but rather, where the EU passes legislation, policy and programmes, children's rights must be taken into account. The Charter should provide a clear, simple legal basis which enables European legislators to ensure that the best interests of the child is taken into account in all European policy, law and programming. Children are affected differently from adults by European legislation and it is important that all EU policy and legislative proposals takes their needs into consideration.

Would incorporation of the ECHR into the EU Treaty help children?

Legal opinion varies as to whether incorporation of the ECHR into the EU Treaty is possible and desirable. Leaving this wider debate aside, incorporation would bring limited value for children.

Children are not specifically mentioned in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), although it has been frequently used to protect children's rights in such areas as respect for family life, the right to education, protection against discrimination and the protection of physical integrity. However there are significant limitations on the ECHR as an instrument for the promotion and protection of children's rights including its focus on relations between the state and individuals, its silence on many important areas of children's lives. [13]

The ECHR "is....in many ways blind to children. It does make limited reference to children for example – in respect of the public nature of court proceedings in respect of juveniles and liberty and security of the person. But it fails entirely to address the concept of human

[13] See "Areas and Rights covered by the UN Convention on the Rights of the Child which are not covered by the European Convention on Human Rights" Pascale Boucard – Steering Committee for Human Rights, Council of Europe, Strasbourg, 1995.

rights for children within a framework appropriate to childhood in the way developed by the UN Convention on the Rights of the Child." [14]

Children's rights as EU Citizens – a promise unfulfilled

"The advice I have received…is that the reference to all persons who have citizenship of a member state covers everybody, including children" [15]

Despite this positive statement, the rights of children as EU citizens are unclear. The focus in the Treaty on the "citizen as worker" has meant that children's legal status as European citizens is unclear. This has led for example to the failure to incorporate the best interests of the child into EU legislation. It also means that only a limited number of action programmes, and temporary budgetlines have children as a principal target group.

Article 17 (2) of the Treaty of Amsterdam states "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby." However, citizenship of the Union only confers the rights which are covered by the Treaty, most of which exclude children. This is because the Treaty primarily regulates issues of an economic nature, therefore focusing on groups such as workers or people providing services. As a result rights are currently related to the fact that you are an economic entity. In EU law children are seen too often as only "victims" or "dependents" or "barriers to work" in direct contradiction with their status in the Convention on the Rights of the Child and in member states' laws.

The consequences of a lack of specific recognition for children's rights

One of the strongest illustrations of why it is necessary to have a reference to children in the Charter is the current ad hoc nature of inclusion of the principle of "the best interests of the child" (fundamental to the protection of children's rights in international law) in EU legislation. This is evident for example in the field of harmonisation and standardisation legislation as illustrated below.

a) Negative effects on children from EU Directives

The protection of children's human rights should be a priority for all policies. Because of children's particular vulnerability and needs, adults have a particular responsibility to safeguard them.

[14] "European Convention on Human Rights – Implications for Children"1997, UK – Gerison Lansdown.

[15] Statement from the then Irish Foreign Minister Gay Mitchell, representing the Irish Presidency of the EU, during revision of Amsterdam Treaty.

On the positive side there have been a number of cases where the EU has legislated to promote the highest standards of safety for children. These have included the Toy Safety Directive 1988, and other directives aimed at establishing standards for producers so that children cannot undo fastenings on potentially dangerous products, such as bottles of medicines. Beyond these specific cases, children have to some extent been covered by more general consumer protection initiatives.

However despite this, many problems remain. Too often commercial considerations come before the best interests of the child with the potential to infringe children's rights. Examples of this:-

- **Distance Selling:** There is no reference to the protection of children in EU Directives on misleading advertising and on distance selling, despite evidence from consumer groups that children are often unable to distinguish between covert advertising and information and are therefore at specific risk.

- **Toy Advertising:** In a recent case toy manufacturers called on the European Commission to take action against the Greek Government. The Greek Government had banned TV advertising of toys because of a concern to promote the best interests of the child and ensure that no advertising was transmitted between certain hours. However the Commission claims that the Greek Government's action breaches single market rules, placing commercial interests above those of Europe's youngest citizens.

- **TV Advertising:** In a similar case in 1995 a UK TV station transmitted advertisements to children in Sweden, although these are prohibited for children under 12 in Sweden. Because the single Market creates a free market for movement of goods and services, this action is perfectly lawful, even though it may not be in the best interests of children.

- **Chemicals and Toys**: Although many member states took action to ban the use of PVC (polyvinylchlorides) in babies' toys, the European Commission took many months to introduce an EU wide ban on the use of PVC in toys. This was despite evidence from consumer and environmental groups that such toys contain harmful levels of chemicals and may damage children's rights to the highest attainable health standards.

All these examples demonstrate that the need for better protection of children's rights within the policy and decision making processes of the EU. Inclusion of a reference to children's rights in the Charter would help ensure that this process was systematic and no longer ad hoc.

b) Unnecessary Court of Justice Cases

The lack of recognition of the human rights of children in the EU Treaties, and in particular the principle of promoting the best interests of the child has meant that children's rights in the EU have developed in a piecemeal way. In some cases children's rights in the EU have had to be established by taking cases to the Court of Justice. This is inefficient and costly - it would be far more efficient to ensure that the principles of the Convention on the Rights of the Child were incorporated into the Treaty on European Union. Whilst both the judgements below did in fact rule in favour of the rights of the child, a further demonstration of the problems resulting from the lack of systematic protection of those rights, this was only achieved by taking the case to the European Court of Justice. Integration of the fundamental rights of the child into EU legislative processes would have made such cases unnecessary and ensure a more systematic protection and promotion of children's rights.

In the first case, the Commission v Belgium (42/87) established that children in one member state but living in another continue to be entitled to all forms of state education in the host country even if the working parent has retired or died in that state. The second case of Moritz v the Netherlands Ministry of Education (390/87) established that this was the case even if the child moves back to the state of origin.

c) Economic, Trade and Poverty issues

Children are also affected by EU economic and trade policies, EU Trade agreements, Economic and Monetary Union, and the single market all can impact on children, it is important that children's interests (which can be different from adults' interests) are not overlooked in these debates. [16]

EU economic policy for example which requires specific regions within Europe to undertake adjustment to a new economic environment can damage the development of entire generations of children in those regions. Children in such regions make up significant numbers of the 20% of EU's children suffering from social exclusion.

d) Asylum and Immigration policy

The EU is now legislating in a number of crucial areas of asylum and immigration policy as it moves from the third pillar to the first pillar. Children have very particular needs, especially child asylum seekers who are separated from their parents.

[16] See "Children, Economics and the EU – Towards Child Friendly Policies" – Save the Children, 2000.

Do existing legal bases offer sufficient protection for children's rights ?

"The action taken by the EU in relation to the protection of children is still very limited, because of a lack of explicit legal bases and a failure to recognise that this action is of prime importance to the very future of the Union." [17]

The current legal bases in the Amsterdam Treaty gives the Commission only a very limited competence to protect children's rights. In particular it creates a limited intergovernmental competence to tackle a whole range of cross border and transnational issues affecting children's rights. [18]

On the positive side, for the first time in the history of the EU, children are explicitly mentioned in the Amsterdam Treaty in Article K which contains an explicit reference to "offences against children". Article K allows for increased cooperation between member states' police and judicial authorities in tackling crimes against children which cross national borders. Increasingly as borders disappear, children are at risk from organised crime and member states have had limited powers to deal with this in a coordinated fashion. However, Article K is outside the Community application of the Treaty, and any action has to be agreed on a case by case basis and has limited European dimension. Furthermore Article K is limited to offences against children and fails to cover many other areas of concern for children and does not provide for children's interests to be taken into account systematically in the drafting of EU legislation.

Therefore a major failing of the Treaty of Amsterdam is that it does not incorporate the respect for the fundamental principles of children's rights. It gives only a very limited competence to work at European level on a whole range of cross border and transnational problems affecting the fulfillment of children's rights. Below we analyse the limitations of other legal bases in promoting children's rights.

[17] Quote from MEP in "Towards a Children's Policy for 21st Century Europe: First Steps" op cit.

[18] For a more detailed analysis see Euronet - "The New Treaty on European Union – What is in it for children ?", Sutton, Diana, Brussels 1997 and Euronet "Towards a Children's Policy for 21st Century Europe", op cit.

EU Treaty Articles relevant to children:

Article 13 - Non Discrimination:

In theory the inclusion of a non-discrimination clause on grounds of age should offer protection to children's rights, especially the right not to be discriminated against (Article 3 of the Convention on the Rights of the Child). However the reference to non discrimination on grounds of age in Article 13 has the following limitations:-

- Although age discrimination can occur at the lower end of the age range, the Commission has not yet interpreted "non discrimination on grounds of age" to include children.
- Secondly this clause does not have "direct effect", this means that it cannot be used by an individual in a court of law and cannot be used in the European Court of Justice.
- Thirdly, all measures proposed under this clause require the unanimous agreement of all EU member states' Governments.
- Fourthly, Article 13 has limited value for children because it only deals with measures aimed at combating discrimination and as we have seen children are affected by numerous other issues at a European level, and no measures can be taken under this clause to address these wider issues.
- Finally there is no spending power attached by Member States to this clause and therefore the impact of any measures taken under it will be very limited. It could not therefore be used as a legal basis for a European programme in the area of children's rights and children's policy.

Article 137 - Social Exclusion

The inclusion of Article 137 gives the Community a legal basis to combat social exclusion. This is welcome given that recent Eurostat figures demonstrate that 20% of the European Union's children are living in poverty. This new legal basis will be used for the adoption of an action programme on social exclusion, which can be used to address the problem of children facing social exclusion. It is recommended that Member States work with a broad definition of social exclusion. This clause can be agreed by qualified majority voting, thus eliminating potential problems with one or two member states blocking progress.

Article 141:

Although not directly relevant to children's rights issues this clause could be beneficial to children, since it makes reference to equal treatment for men and women in matters of employment and occupation, which could for example have a bearing on issues such as parental leave and child care.

Article 143 - Demography

This clause could be used to ensure that the European Union collects age disaggregated statistics, including improved information at the lower end of the age range, ie on the situation of Union citizens under the age of 18. Such an approach would enable the Union to have an accurate statistical assessment of the different ages of all its citizens and would assist the Union and Member States' in planning policy and services. It is important that information about the situation of children is included in such a report for a number of reasons. First children's needs are different from adults, second children will have to be responsible for supporting both financially and otherwise the Union's ageing population and finally children's services and interests must not be prejudiced as the Union and Member States focus their attention on the needs of Europe's ageing population.

The need for a legally binding charter of fundamental rights

Euronet recommends that the charter of fundamental rights is legally binding. Although a specific reference to children's rights in a non legally binding Bill of Rights would have the advantage of giving children and children's rights political visibility and as such may assist focusing the Commission and Member states attention more on the issue of European Children's policy, it would not have any legal significance and will therefore not assist in child proofing of legislation, its significance would therefore be only symbolic.

Moreover, Euronet recommends that the charter is not simply a declaration of existing rights but rather advances the promotion of children's rights and human rights. Euronet believes that a charter that is not legally binding would not address the problems of EU legislation inadvertently affecting children in a negative way which are raised in this submission.

Conclusions

It is recommended that the drafting of a Charter of Fundamental Rights should contain a full reference to the need for protection and promotion of children's rights in the EU. This is best expressed through a clear and explicit reference to the UN Convention on the Rights of the Child. Such a reference should be used to ensure that the child dimension is taken into account in all relevant EU policy, programmes and budgets. Member states should also ensure that existing legal bases are used to the greatest extent possible to promote children's rights.

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January 2000

Editors' note to CHARTE 4128/00 ADD 1, **Contribution of the Secretariat of the Commission of the Bishops' Conferences of the European Community (COMECE) (dated 8/02/00)**:

The INIT FR version was dated 11 February.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 7 March 2000

CHARTE 4128/00 ADD 1

CONTRIB 23

ADDENDUM TO COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the English version of the contribution of the Secretariat of the Commission of the Bishops' conferences of the European Community (COMECE). [1] [2]

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1 This text has been submitted only in English language.

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COMMISSION of the BISHOPS' CONFERENCES of the EUROPEAN COMMUNITY

- COMECE -

to the Draft

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Document of the COMECE Secretariat

8 February 2000

Translation from the **ORIGINAL FRENCH** version

I. Text

Preamble

ON BEHALF OF THE PEOPLES OF EUROPE,

CONSIDERING the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly of 10 December 1948,

CONSIDERING the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe on 4 November 1950,

CONSIDERING the European Community Charter of Fundamental Rights of Workers, adopted by the European Community on 9 December 1989,

CONSIDERING the revised European Social Charter, adopted by the Council of Europe on 3 May 1996,

CONSIDERING the respect for fundamental rights resulting from constitutional traditions common to the Member States, as one of the general principles of Community law,

RECALLING that all human beings are equal in dignity and under the law,

CONFIRMING that recognition of the inherent dignity of all members of the human family and the protection of their inalienable rights is the foundation of freedom, justice and peace in the world,

REAFFIRMING that the European Union is founded on the principle of freedom, democracy, respect for human rights and fundamental freedoms, the rule of law and justice,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen, in accordance with the principle of subsidiarity,

DESIRING to further enhance the democratic and efficient functioning of the institutions to enable them to better carry out the tasks entrusted to them in the respect of human dignity and fundamental rights,

the High Contracting Parties have agreed as follows.

Right to life

Human life has an absolute value.

Every human being has the right to respect for his/her life from its beginning until its natural end.

Every human being has the right to be born of a man and a woman.

These rights must be specially safeguarded in medical and biotechnological applications, as well as in the context of research.

Family rights

The family is the natural and fundamental element of society and is entitled to protection by society and the State.

The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the fundamental principles established in this Charter.

No marriage shall be entered into without the free and full consent of the intending spouses.

The choice of one of the two spouses to stay home to take care of the children shall be protected.

Equal rights and judicious sharing of responsibilities between the spouses as to marriage shall be laid down in national law, during marriage and upon its dissolution. In the event of dissolution of the family, the law shall make the necessary provisions to ensure proper protection of the children, solely in their interest and for their wellbeing.

The law recognises that children born outside of wedlock have the same rights as those born in wedlock.

Freedom of thought, conscience and religion

Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change one's religion or belief, as well as the freedom, either alone or in community with others and in public or private, to manifest one's religion or belief through worship, teaching, practice and observance.
Freedom of religion also includes the right for the Churches and religious associations or communities in the Member States to lay down all practical or legal acts relating to religion.

Right to education

Everyone has the right to education, which shall be based on the principles of freedom, dignity and solidarity. In the exercise of any function it may assume in the field of education, the Union shall respect the right of parents to provide for such education in line with their religious and philosophical convictions.

The right to religious education, provided for in accordance with the rules laid down in national law, is recognised to parents and to pupils.

Right to political asylum

All persons who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality and are unable or, owing to such fear, are unwilling to avail themselves of the protection of their country, have the right to request asylum in a State of the European Union.

No refugee shall be sent to a place where he/she is at risk of once again being persecuted.

Right to fair and proper access to health care

Everyone has a right to fair access to proper quality health care.

Right to protection against any form of discrimination on the grounds of health or genetic characteristics

Everyone has a right to protection against any form of discrimination on the grounds of health or genetic attributes.

Right of disabled people

Whatever the origin or nature of their disability, all disabled persons have the right to benefit from additional measures to promote their occupational and social integration, mobility and living conditions.

Right to rest and leisure

Everyone has a right to rest and leisure, including reasonable limitation of working time and periodic holidays with pay. This right includes the respect of Sunday, a day of rest common to all Member States and, as such, an expression of their identity and a part of their common cultural heritage.

Right to social protection and to satisfy basic material needs

Every worker in the European Union has a right to proper social protection and, irrespective of his/her status or the size of the enterprise for which he/she works, is entitled to an adequate level of social security benefits.

All persons legally resident on the territory of the Union who are excluded from the labour market either because they have not been able to enter it or because they have not been able to rejoin it, and who have no means of subsistence are entitled to adequate benefits and resources in line with their personal or family situation.

Pregnant women without the means of subsistence necessary for their personal or family situation are entitled to receive benefits and resources permitting them to take responsibility for their condition.

Protection of the elderly

Every worker in the European Union is entitled, when he/she retires, to benefit from sufficient resources to ensure that he/she has a decent standard of living.

Any person legally resident in the territory of the Union who has reached retirement age but has been excluded from entitlement to a pension and who has no other means of subsistence, is entitled to benefit from adequate resources and from welfare and medical assistance in line with their specific needs.

Rights of children in the labour market

In accordance with Article 1 of the 1989 Convention on the Rights of the Child, "child" means any human being under the age of 18, except where the age of majority is earlier under the legislation applying to him/her.

All young workers have a right to suitable initial vocational training, as well as to protection that takes into account their specific situation in the labour market.

The European Union shall respect the age of 18 as the minimum working age. However, derogations may be provided for young employees carrying out light work that is unlikely to affect their health, moral upbringing or education.

Children who are still subject to compulsory education shall never be employed in work that deprives them of the full benefit of such education.

Young workers have the right to fair pay. Their hours and days of work shall be limited in order to avoid harming the development of their health and personality.

National law shall ensure special protection against any physical or moral dangers to which children might be exposed, especially those resulting directly or indirectly from their work.

II. Explanatory memorandum

General comments

The Commission of the Bishops' Conferences of the European Community (COMECE) welcomes the decision adopted at the Cologne European Council in June 1999 to draw up a Charter of Fundamental Rights of the European Union. Protecting the fundamental rights of people in a way that is legally enforceable against the European Union and its organs is an important initiative to which COMECE attaches great value.

Since it is anxious to participate in a joint drafting of this Charter, the General Secretariat of the Commission of the Bishops' Conferences of the European Community (COMECE) is submitting a number of specific draft texts, together with a Memorandum to explain their scope.

The rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the acknowledged rights and freedoms of European Union citizens in the treaties of Maastricht and Amsterdam have now been adopted throughout the European Union. They have not been included in the draft submitted by COMECE, except where they sometimes appeared to need supplementing. Nonetheless, all of the rights and freedoms to which the European Union Member States have subscribed in the above treaties will, of course, need to be included in the Charter, either by referring to the said treaties or by fully integrating the text of the rights enshrined in the respective treaties.

Obviously a rational solution would be for the European Union to become a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms. And it would be desirable for the forthcoming Intergovernmental Conference to adopt this decision.

The rights included in COMECE's proposal have been drawn up in the desire to give them binding legal force. Some of these rights relate to matters that already form part of the European Union's remit. Others are the remit of the Member State national authorities but, should the European Union's action encroach directly or indirectly upon their remit, it would be appropriate to ensure that these fundamental rights are respected.

In drawing up the draft articles, COMECE largely based its proposals on internationally agreed texts, i.e. the 1948 Universal Declaration of Human Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1961 European Social Charter, the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights and the 1989 Convention on the Rights of the Child.

Preamble

The preamble states that this Charter has been adopted on behalf of the peoples of Europe. This reference confirms the authors' desire to ensure that the initiative remains close to citizens.

In the preamble, reference is also made to the main international texts on fundamental rights to which the Member States have adhered, as well as to the European Union's major objectives.

Finally, the preamble underscores that these fundamental rights are rooted in a concern for the respect of human dignity.

Right to life

It should be self-evident that this is the most important of all the fundamental rights. However, as a result of scientific advances, developments could result in certain abuses that undermine human dignity. For instance, current cloning techniques have shown that it is becoming possible to reproduce life without any merging of gametes, i.e. without an egg having been fertilised by a sperm.

Taking into account developments in scientific research, it is becoming an urgent matter to lay down absolute respect for human life and dignity.

Family rights

There have been changes in this sphere also, but in this case they involve questions of social lifestyle. Although the family has been the fundamental unit of society since the dawn of humanity, one must now take into consideration the fact that, alongside the family founded on marriage, there are other forms of union: single-parent families and cohabitation. In these cases, too, children have the right to protection.

Furthermore, these developments should not penalise the traditional family, which still deserves the protection of the State and society. Therefore no tax system adopted within the Union should discourage a spouse from remaining in the family home to raise the children. In the same spirit, even though new forms of conjugal living are becoming established, the principal characteristics of marriage should be reserved solely for this traditional institution.

Freedom of thought, conscience and religion

This right is very effectively enshrined in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Nevertheless it warrants being supplemented in order to take into account the fact that the right enshrined in this article is generally considered from the angle of an individual right, even though it is externalised collectively and in public. In fact, freedom of thought, conscience and religion would be incomplete if it failed to take into consideration the collective dimension. By this, we mean that churches, religious associations and communities must be allowed to perform acts that are the concrete expression of this freedom, and these acts must be afforded legal recognition. Without this extra dimension, such freedom would to a large degree be meaningless.

Reference should be made in this regard to Joint Declaration no. 11, appended to the Treaty of Amsterdam.

Right to education

This right often gives rise to much debate within EU Member States.

Without wishing to undermine the principle of subsidiarity it is, however, desirable to clarify its scope and content in view of the comment on the previous article.

Right to political asylum

The protection of refugees is a highly topical issue in the European Union. At the Tampere European Council, the Member States that had signed the 1951 Geneva Convention reasserted their desire to allow individual protection for refugees. It is important to guarantee this right a t Union level, since the Treaty of Amsterdam entrusted the Union with new powers to create an area of freedom, security and justice.

Right of fair and proper access to health care

Along with medical advances, sophisticated but also increasingly costly treatments are becoming widespread. In view of the increase in the European Union's ageing population and growing problems in balancing social security budgets, it is becoming urgent to provide fair measures of health care access for all.

Right to protection against any form of discrimination on the grounds of health or genetic attributes

There has been a plethora of scientific advances, which have been particularly spectacular in the field of genetics. However, such developments could lead to abuses for people who might be discovered to be prone to certain illnesses (with regard to employment contracts or the payment of insurance premiums, for example). In striving to combat a host of different forms of discrimination, we should not overlook the sort of discrimination based on health or genetic characteristics.

Right of handicapped people

In its concern to combat all forms of discrimination, the Treaty of Amsterdam has also included disability as an unacceptable criterion of discrimination. However, this provision is not enough in itself: positive measures must also be provided to assist disabled people.

Right to rest and leisure

The right to rest and leisure is one of the twentieth century's greatest achievements. This important social right is enshrined in the Universal Declaration of Human Rights, in particular.

Although the right to rest must take into account a number of criteria and be adapted to suit local requirements, it is nevertheless important to establish a common day for the convenience of families, the organisation of leisure, and cultural requirements. This day should obviously be Sunday, for centuries a day of rest common to all European countries. The choice of Sunday as a day of rest therefore forms part of Europe's cultural heritage.

Right to social protection and to the satisfaction of basic material needs

One of the European Union's greatest concerns is to combat social exclusion. The right to social protection and to the satisfaction of basic material needs (in terms of food, clothing, accommodation and urgent medical care) must be included in any Charter of Fundamental Rights.

Every worker in the European Union must be able to benefit from this right, as well as any person who is unable or no longer able to work (spouses remaining at home or unemployed people) and any person legally resident in the territory (for example, anyone who has been given the right of asylum).

This right should include pregnant women who lack the necessary means of subsistence, who must be provided with the assistance required to allow them to cope with and take responsibility for their condition.

Protection of the elderly

In the same concern as that expressed above, any persons in the European Union who find themselves in a situation where they are at a severe disadvantage must be allowed to benefit from protection that provides them with a decent standard of living. This of course also applies to elderly people, whether they are workers in the Union or people legally resident there, examples of which have been given in the previous article.

Rights of children in the labour market

The concern to ensure the wellbeing of all people in the European Union who deserve protection should not neglect young people, a group that is sometimes at a disadvantage in the labour market.

For the definition of "child", reference should be made to article one of the Convention on the Rights of the Child, adopted by the United Nations Organisation in 1989. This Convention and the European Social Charter of 1961 were the main sources of inspiration for this article.

Brussels, 8 February 2000

Editors' note to CHARTE 4129/00 ADD 1, **Common statement by the International Federation of Human Rights (FIDH) (dated 14/02/00)**:

The INIT FR version was dated 16 February.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 7 June 2000

CHARTE 4129/00

ADD 1

CONTRIB 24

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the English version of the common statement by the International Federation of Human Rights (FIDH) . [1] [2]

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[1] This text has been submitted in English and French languages.

[2] FIDH: 91, rue de l'Enseignement, 1000 Brussels, Belgium. Tel: +32-2-209 62 89. Fax: +32-2-209 63 80. E-mail: fidh.bruxelles@linkline.be

EUROPEAN JUSTICE AND PEACE COMMISSIONS
INTERNATIONAL FEDERATION OF HUMAN RIGHTS (FIDH)
EUROPEAN MIGRANTS' FORUM
INTERNATIONAL CATHOLIC MIGRATION COMMISSION (ICMC)
KAIROS EUROPE
PAX CHRISTI INTERNATIONAL
PRESENCE DES COMMUNAUTES D'ORIGINE AFRICAINE
QUAKER COUNCIL FOR EUROPEAN AFFAIRS

The European Union Charter of Fundamental Rights and Third Country Nationals

The European Council of Cologne (June 1999) resolved to draft a Charter of Fundamental Rights for the European Union (EU). The Extraordinary European Council in Tampere (October 1999) agreed on the composition and method of work of the Body to elaborate the draft EU Charter.

The debate has now entered a new phase: it is now time to go ahead on discussions on the drafting procedure and to address the content of the future Charter.

Taking into consideration the discussions so far on the Charter and the ambiguity surrounding the scope of the Charter (who it will apply to), our organisations call for the full and express recognition of the fundamental rights of Third Country Nationals within the territory of the European Union.

Consequently, the following three basic principles need to be remembered:

The universality of human rights

Human rights, by definition, benefit every human being for the simple reason that he/she is a human being. The universality of human rights has already been established through the body of existing international and regional Human Rights instruments, to which the EU member states are signatories. For example:

- Article 2 of the Universal Declaration of Human Rights states that:
  «Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.»
- Article 1 of the European Convention of Human Rights (ECHR) provides that:
  «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.»
- Article 2 of the International Covenant on Civil and Political Rights reads:
  «Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.»
- Article 2 of the International Covenant on Economic, Social and Cultural Rights states, in paragraph 2, that:
  «The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status.»

2. Non-discrimination

As the European Court of Human Rights has repeatedly stressed, distinctions between citizens and non-citizens of the EU can only be established on the condition that they are objectively justified and proportionate to the goal of setting up specific legal arrangements between the EU member states, after establishing its own citizenship. Hence, the principle of non-discrimination, an essential reference in the field of fundamental rights, implies that the rights restricted to EU citizens should be narrowly defined and that such a difference in treatment should be firmly justified and proportionate to the objective to be achieved.

In this regard, our organisations invite the body drafting the Charter to examine the best wording possible for the specific non-discrimination clause which will be included in the Charter. The proposed Protocol to the ECHR (Protocol 12) on non-discrimination will probably be adopted during the year 2000. This could form a good reference point for this purpose.

The basic principle must be that the rights enshrined in the Charter will be universal. Differences in application of the Charter's rights should result from an objective difference in the circumstances of those entitled to the rights. It is not necessary to create *a priori* categories of beneficiaries.

As for civil and political rights, international law at present allows the **rights to vote and eligibility to stand for election** in European and municipal elections to be conferred solely on EU citizens. The international treaties binding Member states (Article 25 of the International Covenant on Civil and Political Rights, Article 21 of the Universal Declaration of Human Rights) provide for the possibility of such a restriction. We urge however the drafters of the Charter to **extend this right to people residing legally** in the territory of the EU, provided they comply with specific conditions (e.g. 5 years of legal residence), as requested by the European Parliament in April 1999[1]. The fact that Third Country Nationals live in the territory of the EU is today a permanent characteristic of European societies. The Council of Europe's Convention on the Participation of Foreigners in Public Life at local level (1992) could serve as a reference in this field.

If a form of **diplomatic protection** (Article 20 of EEC) could be reserved to the EU citizens, the **right to petition** before the European Parliament and the **right to introduce a complaint to the European Ombudsman** should continue to be available to all people residing in the territory of Member states. The **right to address** the European institutions in any of the 12 official languages and to receive a response in that language (Article 21 EEC) should equally be extended to all people under the jurisdiction of the EU Member states.

[1] Resolution on the strategy document on the Position of the European Union regards migration and asylum adopted 13 April 1999, para.23.

The **right to move and reside freely** (Article 18 EEC) within the EU is, for the time being, restricted to Member states nationals. Our organisations believe that this right should benefit all people residing legally within the EU, in conformity with the general prohibition of discrimination on the basis of nationality.

In addition, the extension of this right to third country nationals could be considered in the future to be a requirement resulting from the right to move freely within States, enshrined in various international human rights instruments. These instruments do not include any reference to nationality as a pre-condition (Article 2 of Protocol 4 to ECHR, Article 12 of the International Covenant on Civil and Political Rights[2]). In line with the progress of European integration, it is logical and fair that the right to move and reside freely within the EU should equally benefit all people residing legally in Member states. This would be conform to the aim to create an internal market without borders.

Eventually, in relation to this right, the future Charter should include an explicit reference to the right of asylum-seekers, stateless people and people entitled to benefit from family reunification to enter the territory of Member states.

Other rights which would only benefit Third Country Nationals could be enshrined in the Charter. For example, the prohibition of collective expulsions of foreigners (as foreseen in Article 4 of Protocol 4 to ECHR).

The signatory organisations of this paper consider that **economic and social fundamental rights** should have the same scope of application to the persons as the civil and political rights. Therefore, the right to medical and social assistance (including the right to adequate housing and sufficient food), the right of children to education and the right to gender equality should benefit to all people under the jurisdiction of EU Member states. This should be regardless of their nationality and the legality of their residence in the EU.

Some social rights are linked to the exercise of a job (for example, the right to vocational training), others depend on the legality of residence (for instance, the right to work, the right to social welfare – this is different from the fundamental right to medical and social assistance). Therefore, those residing illegally in the territory of the Union will not benefit from these rights. A specific clause excluding these people from the benefit of such rights is neither necessary nor desirable.

[2] « Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.»

3. Harmonisation of the instruments of protection

Our organisations are convinced that the proposed EU Charter of Fundamental Rights and the ratification by the EU (or in default by the EC) of the European Convention on Human Rights and the Revised European Social Charter are complementary. It is only by combining these processes that contradictory jurisprudence will be avoided since in the medium term, the Charter might become a binding instrument and be invoked before the Community courts. This is also the only way to ensure coherence among the mechanisms of protection of fundamental rights in Europe.

Such an accession would require a revision of the EEC Treaty. Therefore, we call for the inclusion of the Charter of Fundamental Rights as well as the accession to the relevant instruments of the Council of Europe (in particular ECHR and the Revised ESC) on the agenda of the forth-coming Inter-Governmental Conference.

Our organisations call upon the Body elaborating the Charter of Fundamental Rights to make sure that all its thematic working groups duly take into account the situation of Third Country Nationals residing within the EU, and consistently keep in mind the universal nature of fundamental rights.

Brussels, 14 February 2000

This paper is signed by the following organisations:
European Justice and Peace Commissions – tel: ++32 2 738 08 01
International Federation of Human Rights - FIDH – tel: ++32 2 209 62 89
European Migrants' Forum – tel: ++32 2 230 28 60
ICMC – tel: ++32 2 230 94 35
KAIROS Europe – tel: ++32 2 479 96 55
Pax Christi International – tel: ++32 2 502 5550
Présence des Communautés d'origine africaine – tel: ++32 477 48 22 62
Quaker Council for European Affairs – tel: ++32 2 230 49 35

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPEENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 16 février 2000

CHARTE 4130/00

CONTRIB 25

NOTE DE TRANSMISSION

Objet : Projet de charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une contribution de la Fédération Européenne des Retraités et Personnes Agées (FERPA). [1] [2]

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[1] Ce texte a été soumis seulement en langue française.

[2] FERPA: boulevard du Roi Albert II nº 5, 1210 Bruxelles, Belgique. Tel: +32-2-224 04 42. Fax: +32-2-224 04 54. E-mail: jmontiel@etuc.org

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Bruxelles, le 11 février 2000

Madame, Monsieur,

Lors de son Congrès de mai 1999, la FERPA a arrêté un catalogue énumérant les Droits Fondamentaux.

Cette liste a été élaborée après un examen des propositions faites notamment dans le rapport Staedelin au Comité Economique et Social, du Comité des Sages, du projet de Traité élaboré par Herman et présenté au Parlement Européen.

La FERPA, Fédération Européenne des Retraités et Personnes Agées compte dans ses rangs, des syndicalistes qui ont participé activement à la construction de l'Europe dès 1950 et à la création de la Confédération Européenne des Syndicats en 1973. Elle organise actuellement tous les syndicats des pensionnés et des personnes âgées des confédérations nationales affiliées à la CES. La FERPA regroupe quelques dix millions de membres dans les 15 Etats membres.

La FERPA lutte pour une Union Européenne de paix, démocratique, sociale et de solidarité entre générations. La FERPA se bat pour l'inclusion sociale des femmes et des hommes âgés. Elle veut davantage de justice, grâce à une répartition plus juste des richesses qui réduit les inégalités choquantes, élimine la prauvreté, garantit un minimum de pension et un minimum vital de ressources, de soins de santé et une habitation décente pour tous.

La FERPA est à la disposition de "l'Enceinte" devenue "Convention".

Projet de catalogue au niveau de l'Union des droits civiques, politiques, économiques et sociaux des citoyens européens

(à inscrire dans le traité)

Droits humains fondamentaux, civiques et politiques

1. Droit à la vie

Toute personne a droit à la vie. Nul ne peut être condamné à la mort, ni être soumis à la torture.

2. Droit à la dignité humaine

Droit fondamental à des ressources et prestations suffisantes pour vivre une vie humaine digne.

3. Egalité devant la loi

- Toute personne est égale devant la loi.
- Est interdite toute discrimination fondée sur le sexe, la race ou l'origine ethnique, l'appartenance à une minorité nationale, la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle, la fortune, la naissance.
- Egalité entre hommes et femmes (dans tous les domaines).
- Est interdite toute forme de racisme et de xénophobie.

4. Liberté de pensée, d'opinion et d'information

La liberté de pensée, de conscience et de religion est garantie, de même que la liberté d'expression et le droit de communiquer des informations ou des idées.

5. Vie privée

Toute personne a droit au respect de la vie privée.

6. Protection de la famille

Toute personne a droit de fonder une famille. La famille, la paternité et la maternité de même que l'enfant sont protégés .

7. Droit de circuler librement

Les citoyens européens ont le droit de circuler librement sur le territoire de l'Union et d'y choisir leur résidence.

8. Liberté de réunion et d'association

Toute personne a le droit d'organiser et de participer à des réunions et manifestations pacifiques et le droit à la liberté d'association. Un statut d'association européenne sera institué.

9. Droit de propriété

Le droit à la propriété est garanti.

10. Droit à l'éducation

Toute personne a droit à une éducation et une formation permanente tout au long de la vie et de choisir son propre cheminement et ce sur l'ensemble du territoire de l'Union.

11. La santé publique et la protection des consommateurs

La santé publique de l'ensemble de la population et la protection des consommateurs sont des objectifs impératifs à défendre d'une manière permanente.

12. Droit d'accès aux informations

Toute personne a un droit d'accès et de rectification pour les documents administratifs et les autres données qui la concernent.

13. Le Droit à la justice

Toute personne résidant dans un Etat membre a le droit d'ester en justice auprès de la Cour de justice de l'Union. L'accès à la justice est effective.

Droits économiques

14. Droit d'association

Les employeurs et les travailleurs ont le droit de s'associer pour défendre et promouvoir les droits, les intérêts et les causes qui les concernent directement et indirectement.

15. Le droit de négociation

Entre eux le droit est garanti au niveau européen, ainsi que celui de conclure des conventions collectives au niveau interprofessionnel et sectoriel. Le droit à des actions collectives, ainsi que le droit de grève est garanti.

16. Le droit d'information, de consultation et de participation

Les travailleurs ont le droit d'être informés régulièrement de la situation économique et financière de leur entreprise, d'être consultés sur les décisions susceptibles d'affecter leur intérêt et de participer à la prise de décision qui les concernent.

17. Liberté professionnelle et conditions de travail

- L'Union reconnaît le droit au travail. L'Union et les Etats membres prennent les mesures pour rendre ce droit effectif.
- Toute personne a le droit de choisir librement sa profession, ainsi que son lieu de travail et d'exercer librement sa profession.
- Nul ne peut être contraint d'effectuer un travail déterminé.
- Tout travailleur a droit à des conditions de travail équitables, à une rémunération juste et décente et à la protection contre tout licenciement arbitraire.
- Le droit à la santé dans le milieu du travail doit être garanti.

Droits sociaux

18. Tout travailleur a droit à une protection sociale adéquate et doit bénéficier, quel que soit son statut et quelle que soit la taille de l'entreprise dans laquelle il travaille de prestations de sécurité sociale d'un niveau suffisant (par rapport à son salaire, sa rémunération).

Les travailleurs indépendants ont droit à un système de sécurité sociale équivalent.

19. Tout travailleur doit bénéficier, au moment de la retraite, de ressources lui assurant un niveau de vie décent en rapport avec celui acquis avant sa retraite. Un minimum de pension doit être fixé et régulièrement adapté.

20. Le droit à un revenu minimal est garanti à toute personne qui ne bénéficie d'aucune autre ressource de revenu. Il doit être suffisant pour vivre décemment.

21. Toute personne a droit à l'accès à des soins de santé.

22. Toute personne handicapée doit bénéficier de mesures visant à favoriser son intégration professionnelle et sociale.

23. Toute personne qui n'est pas en mesure de se loger convenablement a droit à l'aide des pouvoirs publics compétents pour être logée.

24. L'Union est garante de la solidarité et de la cohésion sociale. L'accès des citoyens à des services d'intérêt général est garanti.

25. L'Union doit veiller à un environnement sain et le garantir pour les générations futures.

Georges DEBUNNE

Président de la Fédération Européenne des Retraités et Personnes Agées

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 February 2000

CHARTE 4132/00

CONTRIB 27

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a letter to the members of the Convention by the European Women's Lobby. [1] [2]

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[1] European Women's Lobby: 18 rue Hydraulique, B-1210 Brussels. Tel: +32-2-217 9020. Fax: +32-2-219 8451. E-mail: ewl@womenlobby.org

[2] The text has been submitted in English and French language.

LOBBY EUROPEEN DES FEMMES
EUROPEAN WOMEN'S LOBBY

To the attention of the Members of the Convention responsible for drawing up a draft charter of Fundamental Rights for the European Union.

14th February 2000

Dear Member of the Convention,

I am writing to you on behalf of the European Women's Lobby (EWL), the largest coalition of women's non-governmental organisations in Europe with over 2700 member associations in the 15 Member States.

Having followed closely the work of the Convention, I note that the gender dimension has not been integrated in any part of the Convention's work. I regret very much this situation and would therefore like to make the following comments and recommendations:

Composition of the Convention

The EWL objects that only nine of the 62 persons involved in the elaboration of the Charter are women. The majority of the national governments and Parliaments have completely failed to nominate women as participants in the Convention. Of the eight women representing national institutions, four are alternate members, and as such, lack the right to speak and vote as long as the titular member is present. As for the European Parliament, its decision to nominate twice as many men as women clearly shows that its standpoint on gender balance in decision making is not always carried out in reality.[1]

The EWL deeply regrets the present situation: not only because it is distressing to see that women's position is still undervalued within the EU institutions, national parliaments and governments, but also because the lack of women in the Convention will certainly affect the outcome of its work. The EWL fears that women's interest may be overlooked in the elaboration process and demands that this situation be corrected as soon as possible.

[1] The information of the composition of the Convention is based on facts presented on the web-site designed to keep the public up to date with the Convention's work; http://db.consillium.eu.int/DF/intro.asp?lang=en.

List of rights

The EWL calls for the integration in the Charter of a provision stating clearly the unconditional and fundamental principle of equality between women and men. In order to do so, the provision should not only prohibit discrimination on the grounds of sex, but also make the promotion of equality between men and women mandatory. Promoting equality between women and men is one of the tasks as well as a goal of the European Union. As such, it seems reasonable that the Charter's provision in question reflects this. Merely prohibiting discrimination on the grounds of sex is not sufficient.

Furthermore, I would like to draw your attention to the need for this provision to be dedicated *solely* to the fight against discrimination on the grounds of sex. The discrimination suffered by women is different from the discrimination against vulnerable groups of society such as disabled people, ethnic minorities or homosexuals. Women make up over 50 percent of the population in the EU. Many women suffer from multiple discrimination. It is clear that the discrimination suffered by women is more complex, far-reaching and more persistent than any other type of discrimination.

The EWL urges also the Convention to adopt a gender perspective while elaborating the entire draft Charter. The principle of mainstreaming applies to all EU activities and consequently needs to be respected also by the Convention throughout its work on the EU Charter on Fundamental Rights.

Lastly, I wish to reiterate the demand, put forward by the Platform of European Social NGOs, for a regular exchange of views between the civil society and the Convention. As a member of the Platform of Social NGOs, the EWL fully supports this demand.

I urge you to consider in a positive way our demands and would be very happy to meet with you to discuss these matters further.

Yours sincerely,

Denise FUCHS
President of the European Women's Lobby

Copy to: *Members of the European Parliament*

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Addendum: 1

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 21 February 2000 (23.02)
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Directorate General for Research

WORKING DOCUMENT

FUNDAMENTAL SOCIAL RIGHTS IN EUROPE

SOCIAL AFFAIRS SERIES

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Directorate General for Research

WORKING DOCUMENT

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1-2000

Contents

Part I: Introduction

1. Aim and contents of the study

At its meeting in Cologne in early June 1999 the European Council decided to set up a body composed of representatives of the Heads of State or Government, the President of the Commission and Members of the European Parliament and national parliaments to draft a Charter of Fundamental Rights of the European Union. Once the Council, the Commission and Parliament have solemnly proclaimed the Charter, it will be decided if it is to be integrated into the EU Treaty. Europe may thus be on the eve of a new era that begins with its own bill of rights and perhaps leads to the creation of a European constitution[2].

This working document is intended as a contribution to the debate on the creation of a bill of rights and on its contents. It considers the fundamental social rights that already exist at European level and especially those included in the constitutions of the Member States of the European Union. The constitutions of some candidate countries are also examined.

European Communities activity in the economic sphere and growing Member States' cooperation within the EU in internal affairs and law are such that almost all aspects of EU citizens' lives are now affected by EU legal acts. Thus there appears to be a need for the individual to identify his fundamental rights, by which these acts are gauged, not only in the constitution of his own country but also in EU primary law[3]. The present system, whereby the European Court of Justice develops general principles of Community law and references are made to the European Convention on Human Rights (ECHR)[4], the European Social Charter (ESC) adopted by the Council of Europe in 1961 and the Community Charter of Fundamental Social Rights adopted in 1989[5], does not ensure sufficient transparency[6] and is unlikely to increase public confidence in the EU.

The low turnout for the elections to the European Parliament in 1999 is a clear sign of poor public identification with Europe. A bill of rights is also important in the context of eastward enlargement, common foreign and security policy and development cooperation. The EU will seem more credible when demanding that other countries respect human rights and obey the rule of law if it itself clearly bases its activities on these principles.

It remains to be seen how far social rights will form part of an EU bill of rights since, unlike the classical liberal civil rights and liberties recognised in all constitutions, social rights are not regarded as fundamental rights in all Member States.

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2 See Pernice, Vertragsrevision oder europäische Verfassungsgebung, *Frankfurter Allgemeine Zeitung*, 7 July 1999, p.7; Rengeling, Eine Charta der Grundrechte, *Frankfurter Allgemeine Zeitung*, 21 July 1999, p.13.

3 Report of the Expert Group on Fundamental Rights, 'Affirming Fundamental Rights in the European Union – Time to Act', European Commission, p.13.

4 This reference is to be found in Article 6(2) of the Treaty on European Union, but not in the EC Treaty.

5 Article 136 of the EC Treaty and the fourth recital of the preamble to the Treaty on European Union.

6 Report of the Expert Group on Fundamental Rights, op. cit. p.10.

2. Concept and definition of 'fundamental social rights'

Fundamental social rights in this context mean rights to which the individual citizen is entitled, which he can exercise only in his relationship with other human beings as a member of a group and which can be made effective only if the State acts to safeguard the individual's environment[7]. Social rights are a necessary complement to civil rights and liberties, since the latter cannot be enjoyed without a minimum of social security. In contrast to civil rights and liberties, this means that it is not freedom from the State that is achieved, but freedom with the State's help. These are, then, fundamental rights in the form of entitlements.

Although this would appear at first glance to indicate that they can be distinguished from the classical civil rights and liberties and the general principle of equality, there is considerable overlap. This study considers only those fundamental rights not included among the 'classical fundamental rights'. It does not therefore have anything to say on the right of freedom of occupation in the sense of freedom of occupational choice and the prohibition of forced labour or on the right to form associations and engage in collective bargaining or the right to strike. Nor will the study discuss in any depth fundamental rights which primarily concern equality and are generally recognised, such as the right to equal pay for men and women[8].

Fundamental social rights in Europe should also be generally distinguished from European social policy, which cannot be considered in this context. It forms the basis of social rights, which are not, however, fundamental rights in the constitutional sense.

2. General comments on the protection of fundamental rights at constitutional level

The theories adopted by the various legal systems of the Member States as regards the protection of fundamental rights are reviewed in the following.

3.1. Functions of fundamental rights

Fundamental rights may take the form of litigable or 'individual' rights, i.e. the individual may refer directly to such rights in courts of law. In principle, this may be true both of rights of self-defence, i.e. rights concerning freedom from the State, such as the inviolability of the home and freedom of opinion, and of rights to equal treatment as well as entitlements that justify a claim to State action.

Fundamental rights may also take the form of guarantees of establishment, which require the State to ensure the existence of a given legal institution (e.g. private ownership, universities). They may further be included in provisions defining objectives of the State that require all its authorities to observe them in any action they take and so have an impact on legislation and administrative action.

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7 H.-J. Wipfelder, Die verfassungsrechtliche Kodifizierung sozialer Grundrechte, *Zeitschrift für Rechtspolitik* 1986, p.140.

8 This right is also recognised as a general principle of Community law; see European Court of Justice, Case 149/77 – Defrenne, ECR 1978, p.1379.

Fundamental rights may also be policy clauses in the sense that they instruct the legislator to ensure that a right is made effective by means of ordinary laws. The individual can enforce the entitlements arising from this ordinary legislation – i.e. not from constitutional law – by applying to the ordinary courts or to special administrative or social courts provided the right takes the form of an individual right.

A further distinction needs to be made between a situation where a fundamental right is effective only vis-à-vis the State or third parties as well ('third-party effect'), i.e. where the individual may refer to his fundamental right only in a legal dispute with the State, and a situation in which it can also have a bearing in civil legal disputes, as in labour law. A distinction must then be made between direct and indirect third-party effect, depending on whether the fundamental right has a legal effect directly or simply indirectly in the form of, say, an interpretation of civil law or even an employment contract that upholds fundamental rights.

3.2. Social rights as fundamental rights?

All the Member States have social rights at the level of ordinary law. They are to be found in particular in labour law in the relationship between employees and employers, where they include, for example, rules on protection against dismissal, minimum wages, leave and safe working conditions. The social security systems are also governed by ordinary legislation that guarantees various social benefits in emergencies or where certain situations arise. The question is, however, whether social rights should be raised to the level of constitutional law.

Those who advocate that as many fundamental rights as possible be explicitly enshrined in the constitution claim this to be the only way to ensure that such rights are not eroded by ordinary legislation or the administration of justice, since constitutions are not as a rule as easy to amend as ordinary legislation and normally remain largely unchanged even after a change of government.

Critics, on the other hand, maintain that the inclusion of fundamental social rights in the constitution would result in the definition of a certain standard of living, which changing economic and financial circumstances might make it impossible to sustain, and in the inclusion of provisions inappropriate to future situations since they are based on current social conditions[9].

Nor, according to the opponents of the inclusion of fundamental social rights in constitutions, should such rights be placed on a par with fundamental and inalienable human rights (such as the right to life, freedom and physical integrity), because most fundamental social rights cannot be guaranteed and do not have the same value. In a market economy, for example, the state is de facto unable to guarantee many rights, one such being the right to work because it cannot offer enough jobs. In contrast, it is able to guarantee rights to freedom, self-defence and equality, because all this usually entails is restraint on its part or the passing of legislation to bring about equality.

[9] Such as full-time employment by a single employer, which will not necessarily be the rule in the future; see Bognetti, Social Rights, a Necessary Component of the Constitution? The Lesson of the Italian Case, in: Bieber/Widmer (eds), *L'espace constitutionnel européen, Der europäische Verfassungsraum, The European Constitutional Area*, Zürich 1995, pp.85 ff.

Where the EU is specifically concerned, another factor that must be considered in the debate is that the EU is not a State and has only the powers transferred to it by the Member States. As things now stand, therefore, it is able to protect its citizens' fundamental rights only where EU law applies, i.e. where the EU or one of the Communities acts or where national bodies take action within the scope of the Treaties. Otherwise, the protection of fundamental rights is left to the Member States unless they transfer this task in its entirety to Europe and a European court. With opinions differing widely in some respects, this is unlikely and given the present structure of the Union, or Communities, hardly possible[10]. Nor is there at present any genuine level of constitutional law by which EU action must be gauged. The establishment of a common bill of rights should logically be followed by the creation of an EU constitution and constitutional court.

The constitutional lawyer Udo Di Fabio, who has just been appointed as a judge to the German Federal Constitutional Court, has proposed in the context of the debate on the charter of fundamental rights that the monitoring of such rights should not be entrusted to a European Court of Justice that is already overextended. Instead, a separate Union court should be set up for issues relating to fundamental rights on the model of the European Court of Human Rights, which does not form part of the European Union. A court of this kind would have no other task but to monitor, when requested by Union citizens, the exercise of Community power, taking European fundamental rights as its yardstick[11].

Finally, it is important to realise that there is a rather tense relationship between the principles of democracy and the division of power on the one hand and the protection of fundamental rights on the other. If too many constraints are placed on the legislature by the constitution and especially the constitutional court, decisions will ultimately no longer be taken by the democratically legitimised parliament but by judges who have not been elected by the people[12]. The executive too needs some room for manoeuvre if it is to be able to act effectively and must not be totally restricted by the constitution and constitutional court.

[10] This is also rejected by the Committee of Wise Men (Cassese/Lalumière/Leuprecht/Robinson) in the agenda *'Leading by example: A human rights agenda for the European Union for the year 2000'*, p.9.

[11] Udo Di Fabio, Für eine Grundrechtsdebatte ist es Zeit, *Frankfurter Allgemeine Zeitung*, 17 November 1999, p.11.

[12] In the United Kingdom no real level of constitutional law by which acts of parliament must be gauged is therefore recognised; see Part III, section 2.15, below.

Part II: The recognition of fundamental social rights at European level

1. The European Social Charter

The European Social Charter (ESC) can be seen as the 'social counterpart' of the European Convention on Human Rights (ECHR). Like the ECHR, it emerged from the Council of Europe and since 1961 has been signed by 22 countries, though with reservations and derogations in some cases[13].

The ESC requires the signatory states to take legal and administrative measures in the areas of working life and social security. Although it does not provide for any real sanctions for infringing the rules, it does obligate the signatory states to send a report every two years to the Committee of Experts, which then identifies infringements and submits proposals for changes. As a result, the ESC has had a major influence on the legislation of the signatory states, this being especially true of the first twenty years of its existence. In the 1970s, for example, the United Kingdom and Denmark amended their merchant shipping acts because they contravened the prohibition of forced labour referred to in Article 1(1) of the ESC.

The EU itself is not a party to the ESC. In the preamble to the 1987 Single European Act (SEA) the Member States of the Community nevertheless referred to the 'fundamental rights recognised in … the European Social Charter, notably freedom, equality and social justice'[14]. This declaration is now also to be found in the preamble to the Treaty on European Union (fourth recital). The European Court of Justice has also referred to the ESC on several occasions in its judgements and uses it as a source of legal findings when establishing general principles of Community law[15].

Articles 1 to 19 of the European Social Charter list the following fundamental rights:

- the right to work;
- the right to just, safe and healthy working conditions;
- the right to fair remuneration;
- the right to organise;
- the right to bargain collectively;
- the right of children and young persons to protection;
- the right of employed women to protection;
- the right to vocational guidance and training;
- the right to protection of health;

[13] The signatory states, with date of entry into force: Austria (28.11.1969), Belgium (15.11.1990), Cyprus (6.4.1968), Denmark (2.4.1965), Federal Republic of Germany (26.2.1965), Finland (29.5.1991), France (8.4.1973), Greece (6.4.1984), Ireland (26.2.1965), Iceland (14.2.1976), Italy (21.11.1965), Luxembourg (9.11.1991), Malta (3.11.1988), Netherlands (22.5.1980), Norway (26.2.1965), Poland (25.7.1997), Portugal (30.10.1991), Slovakia (22.6.1998), Spain (5.6.1980), Sweden (26.2.1965), Turkey (24.12.1989), United Kingdom (26.2.1965).

[14] See Irmgard Wetter, *Die Grundrechtscharta des Europäischen Gerichtshofes*, Frankfurt am Main 1998, pp.61 f.

[15] See, for example, Rutili, Case 36/75 (1975), ECR 1219; Hoechst, Case 227/88 (1989), ECR 2859; Gravier, Case 293/83 (1985), ECR 593; it is worth noting that the ESC has even been taken as the basis for judgments concerning countries that have not ratified it; see, for example, Defrenne, Case 149/77 (1978), ECR 1365. The European Court of Justice therefore clearly considers some of the fundamental rights set out in the ESC to be general principles of Community law.

- the right to social security;
- the right to social and medical assistance and to benefit from social welfare services;
- the right of disabled persons to vocational training and integration;
- the right of the family to protection;
- the right of mothers and children to protection;
- and rights relating to the freedom of movement, combined with the right to protection and assistance.

A question that has yet to be answered is whether the EU, or EC, should itself accede to the ESC (and to the ECHR). Parliament has always favoured this, but the Court of Justice takes the view that the EC lacks a legal basis for such action[16]. The two charters might, however, be incorporated into Community law without formal accession[17]. A particular problem with accession is that, as the two charters would rank higher than EU law, it would have to be possible for the case law of the European Court of Justice to be reviewed by the European Court of Human Rights in Strasbourg. These issues cannot, however, be considered in any greater depth here[18].

2. The Community Charter of the Fundamental Social Rights of Workers

The Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 was signed at the time by all the EC Member States except the United Kingdom. It is neither a binding legal act of the EU, nor is it a treaty among the signatory states that is binding in international law. It is merely a solemn declaration by the Heads of State or Government of the Member States. It should nonetheless be used as an aid to the interpretation of the provisions of the EC Treaty, since it reflects views and traditions common to the Member States and represents a declaration of basic principles which the EU and its Member States intend to respect[19]. Together with the action programme for implementing the Community Charter, which has also been approved by the Heads of State or Government, it is therefore used by the Commission as a basis for justifying many of the directives it proposes[20].

Title I of the Community Charter of the Fundamental Social Rights of Workers details rights in the following areas:

- freedom of movement;
- employment and remuneration;
- improvement of living and working conditions;
- social protection;
- freedom of association and collective bargaining;
- vocational training;
- equal treatment of men and women;
- information, consultation and participation of workers;

16 See European Court of Justice 2/94, 28.3.1996.

17 See de Witte, 'Protection of Fundamental Social Rights in the EU – The Choice of the Appropriate Legal Instrument', in: Betten/McDevitt, *The Protection of Fundamental Social Rights in the European Union*, pp.66 ff.

18 For recent developments concerning the ESC and future prospects see: The Social Charter of the 21st Century, Council of Europe 1997.

19 E. Lundberg, The Protection of Social Rights in Europe, in: Drzewicki/Krausse/Rosas, op. cit., p.183.

20 It should be remembered, however, that binding acts cannot be based solely on the Charter; it may only be cited together with provisions of the EC Treaty.

- health protection and safety at the workplace;
- protection of children and adolescents;
- elderly persons;
- disabled persons.

Title II of the Community Charter makes it clear that the Member States are generally responsible for guaranteeing fundamental social rights in accordance with national practices. The EU takes action only inasmuch as Articles 29 and 30 of the Charter require the Commission to draw up an annual report on the application of the Charter and to forward it to the Council, Parliament and the Economic and Social Committee. As a consequence, it has already been stated in the literature that the ESC of the Council of Europe (see 1 above) affords better protection of fundamental social rights than the EU Member States' Community Charter[21]. Now that the Treaty of Amsterdam has helped fundamental social rights to find their place in the preamble to the EU Treaty, the Court of Justice might take greater account of them – as the 'driving force of integration' – in its case law on fundamental rights and so make them an important element of the system of fundamental rights[22].

[21] E. Lundberg, loc. cit., with a reference, inter alia, to B. Hepple, The Implementation of the Community Charter of Fundamental Social Rights, *The Modern Law Review*, Vol. 53, p.645, and P. Watson, The Community Social Charter, *Common Market Law Review*, Vol. 28, p.49.

[22] See Bergmann, in: Bergmann/Lenz (eds): Der Amsterdamer Vertrag, Kommentar, Cologne 1998, pp.35 f.

Part III: Fundamental social rights in the constitutions of the Member States

1. Preliminary remarks

Comparing systems of fundamental rights is difficult because some similar concepts are apparently defined differently and an accurate comparison always requires an examination of the environment of the constitution as a whole, the dogmatics of constitutional jurisprudence and the judgments of the constitutional court, where it exists. In this context no more than an overview can therefore be given of the various approaches adopted in the Member States' constitutions.

2. The constitutions of the Member States

2.1. Belgium

Compared to other recent constitutions, the Belgian constitution of 1994 refers to only a few fundamental social rights[23]. Despite this restraint, Belgium has extensive social legislation and is therefore a genuine welfare state, even though the latter has not been defined in any detail in the constitution[24].

The most important social rights are based on Articles 23 and 24. Article 23 gives everyone the right to a decent life. This right is defined in paragraphs 1 to 5 and comprises both the right to work and the right to fair remuneration, social security, health protection, social, medical and legal assistance, adequate housing, a healthy environment and cultural and social self-fulfilment. According to paragraph 1, the state is responsible for guaranteeing these economic, social and cultural rights in that it is required to pass laws which enable the individual to lead a decent life. Although there is no instrument for enforcing social rights at constitutional level[25], the legislature would be contravening the constitution if it failed to make appropriate arrangements or restricted fundamental rights contrary to the constitution.

Article 24 of the Belgian constitution gives everyone the right to free and neutral training, free education and a moral or religious upbringing.

It is noticeable that these rights are not reserved for Belgians, but may be exercised by anyone[26]. This is confirmed by Article 191 of the Belgian constitution, according to which any foreigner in principle enjoys the same protection of his person and his assets as any Belgian national.

2.2. Denmark

The Danish constitution of 5 June 1953 contains two provisions that provide for fundamental social rights within the meaning of this study, namely sections 75 and 76.

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[23] Isabel Álvarez Vélez/Fuencisla Alcón Yustas, *Las Constituciones de los 15 estados de la Unión Europea*, p.145.
[24] ibid., p.145.
[25] Aristovoulos Manessis, in: Julia Iliopoulos-Strangas (ed.), *Grundrechtsschutz im europäischen Raum - Der Beitritt der Europäischen Gemeinschaft zur Europäischen Menschenrechtskonvention*, p.33.
[26] ibid., p.33.

Section 75(1) refers to a right to work in that it states that 'to further public welfare, the aim shall be to ensure that every citizen capable of work is able to work under conditions that secure his existence.' The wording itself makes it clear that this is not an individual right but a policy clause.

Section 75(2), on the other hand, is worded as an individual right: 'Anyone who is unable to support himself or his dependants and for whose welfare no one else is responsible shall be entitled to public assistance provided, however, that he enter into the obligations for which the law provides.' Whether this is indeed an individual right or a policy clause, however, is disputed in legal theory[27].

According to section 76, all children of school age are entitled to free elementary education. This is likely to be an individual right since it is so worded and the state has no difficulty in making it effective.

Fundamental social rights do not, then, feature very strongly in the constitution. One of the reasons for this is that the constitution was originally drawn up in 1849 and has largely remained liberal in nature. The Scandinavian countries also have a legal tradition of judicial restraint, the courts being wary of declaring acts of the legislature unconstitutional in their desire to respect the will of the democratically elected parliament[28]. The Scandinavian welfare states are able to manage without a detailed list in their constitutions mainly because social rights frequently emerge from agreements between trade unions and employers and from consensus in politics and society.

In Denmark the social rights of the citizen therefore enjoy effective protection primarily under ordinary laws, and the ordinary courts are in principle there for decisions by the administration to be contested[29].

2.3. Germany

Unlike the Weimar constitution of 1919, the German Basic Law of 1949 does not generally refer to fundamental social rights. The only reference to an individual right is to be found in Article 6(4) of the Basic Law, under which every mother is entitled to protection and care. The main reason for this restraint is that the authors of the constitution wanted to avoid the need for such rights to be constantly adjusted to changing economic and social conditions[30].

Articles 20(1) and 28 describe the Federal Republic as a democratic and social federal state. All acts of the public authorities must comply with the welfare state principle. Although fundamental social rights, unlike the classical fundamental rights, are not specifically referred to in the German constitution, or Basic Law, they are nonetheless covered by the welfare state

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[27] See Rosas, The Implementation of Economic and Social Rights: Nordic Legal Systems, in: Matscher (ed.*), Die Durchsetzung wirtschaftlicher und sozialer Grundrechte – eine rechtsvergleichende Bestandsaufnahme*, p.231, with further references.

[28] Katrougalos, The Implementation of Social Rights in Europe, *Columbia Journal of European Law* 1996, p.277; ibid., p.295.

[29] Rosas, op. cit., p.233.

[30] Luis María Díez-Picazo/Marie-Claire Ponthoreau, *The Constitutional Protection of Social Rights: Some Comparative Remarks*, p.18.

principle[31]. This principle is thus the overriding concept for the various social rights, and although this has the disadvantage that these rights are not specified, the shift in emphasis to ordinary laws has the advantage that the latter can be adjusted to requirements more quickly.

There are some references to fundamental social rights in the constitutions of the *Länder*. However, they are virtually unenforceable since the Federal Government has assumed almost total responsibility for social matters.

In 1994 Article 20a was inserted into the constitution to protect the environment. It is worded as a provision defining a state objective and therefore transfers to all three organs of state the responsibility for protecting the natural foundations of life for future generations. The need for this provision was due less to deficient protection than to a need for clarification, since such protection could be deduced from the fundamental rights even before Article 20a was inserted into the Basic Law. Just as a right to a minimum social subsistence level ensues from the first sentence of Article 2(2) in conjunction with Article 1(1) of the Basic Law, a right to a 'minimum ecological subsistence level' can, by analogy, be deduced[32]. A decent life is possible, after all, only in a decent environment. A fundamental environmental right was nonetheless eschewed since it proves extremely difficult to specify what is to be protected and it would be impossible to make a right of this kind litigable[33]. Nor, then, can an enforceable entitlement of the individual to a fundamental right be inferred from this; it is more in the nature of an objective value decision by the constitution that commits the public authorities[34].

2.4. Greece

The part of the Greek constitution of 9 June 1975 as amended on 12 March 1986 that concerns fundamental rights (Part II, Articles 4-25) is very long and defines individual and social fundamental rights in detail.

The nine paragraphs of Article 16, for example, require the state to develop and promote art and science, research and teaching (paragraph 1), stipulate that education is a basic task of the state (paragraph 2), thus giving all Greeks the right to free education at all stages in state educational establishments (paragraph 4, first sentence) and the universities the right to financial assistance (paragraph 5, second sentence). Paragraph 4 also provides for assistance for students who distinguish themselves but need help or special protection. Under paragraph 9 the state has overall responsibility for sport and is required to subsidise all confederations of sports clubs.

Article 21(2) states that large families, persons disabled in war or peace, war victims, orphans and widows of persons killed in the war and persons suffering from incurable diseases are entitled to special state care. Paragraph 3 requires the state to ensure the health of its citizens and to take special measures to protect young people, the elderly, the disabled and persons unable to pay for care. Under paragraph 4 the provision of housing for persons with no or inadequate accommodation is a matter of particular concern for the state.

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31 Kittner, in: Kommentar zum GG für die BR Deutschland, Vol. I, Articles 1-37, lit. 64.
32 Scholz, in: Maunz/Dürig, Article 20a GG I, lit. 28.
33 ibid., Article 20a GG I, lit. 12.
34 ibid., Article 20a GG I, lit. 33.

Article 22(1) recognises a right to work and places it under the protection of the state, which is required to ensure full employment and to provide the working rural and urban population with moral and physical support. Paragraph 4 also requires the state to ensure the social insurance of the working population, further details to be set out in a law.
Despite these detailed provisions, fundamental social rights in Greece cannot be enforced by law, and the state cannot be required by a court of law to take action[35]. Social reality in Greece is also different. This is especially true of the right to free education, there being insufficient university places on many courses in Greece.

2.5. Spain

The Spanish constitution of 1978, like Portugal's, occupies a prominent position among European constitutions. This is primarily due to the fact that in these young constitutions an attempt has been made to take account of today's social problems rather than to exclude them. After 40 years of dictatorship the aim was to bring an end to lawlessness and allot to the individual as comprehensive a list of rights as possible[36].

The preamble refers to a desire to ensure democratic co-existence on the basis, *inter alia*, of a fair economic and social system. The Spanish constitution was guided by the German Basic Law[37] and emphasises in Article 1 that Spain is a social and democratic state based on the rule of law, the order in which the adjectives appear in this phrase revealing the importance of social rights in Spain[38]. The institutions for which the constitution provides and the ordinary administration of justice must conform to this welfare state clause[39]. However, the Spanish constitution differs significantly from Germany's in that it includes an unusually long list of social rights.

Fundamental rights in the Spanish constitution are divided into three groups[40]. The first group (Articles 14 to 29) comprises the classical fundamental rights, including the right to education (Article 27). The second group (Articles 30 to 38) is primarily concerned with citizens' rights and obligations, including the right to work (Article 35), while the third group (Articles 39 to 52) is largely devoted to the protection of rights arising from the economic and social policies.

The principles governing the last group mainly concern the social sphere of interest here:

- Under Article 39 the state affords the family legal and social protection.
- Article 40 requires the public authorities to improve the conditions for the fairer distribution of incomes and conditions relating to continuing education and training and protection at the workplace and to guarantee leave and limited working hours.
- Article 41 guarantees a public system for the social security of the public that provides them with adequate help in emergencies and especially when they are unemployed.

35 P. Spyropoulos, *Constitutional Law in Hellas*, p.139.
36 José Vida Soria in Matscher, op. cit., p. 290, Manessis, op. cit., p.47.
37 Díez-Picazo/Ponthoreau, op. cit., p.20.
38 Vida Soria, op. cit., p.292.
39 Díez-Picazo/Ponthoreau, op. cit., p.20.
40 ibid., p.21.

- Article 43 recognises a right to health protection, paragraph 2 requiring the public authorities to organise this protection and paragraph 3 requiring them to promote health education[41].

- Article 44 guarantees the individual access to culture, paragraph 2 also requiring the public authorities to promote culture.

- Article 45 entitles everyone to the enjoyment of nature and also requires the state to use its influence to ensure the preservation and restoration of the environment (paragraph 2).

- Article 47 grants all Spaniards the right to housing, the necessary conditions to be promoted by the public authorities.

- Article 48 requires the public authorities to create the conditions for the involvement of young people in social development.

- Article 49 is devoted to the integration and protection of disabled people.

- Article 50 guarantees adequate provision for old age and support for the elderly with respect to health, housing, culture and leisure.

The protection of these rights is governed by Article 53. Under Article 53(1) and (2) the rights of the first two groups can be claimed before the ordinary courts, and all legislation must respect the essential substance of these rights. As regards enforceability, rights are graded in such a way that those in the first group – which include the right to education – may be claimed, pursuant to Article 53(1) in conjunction with Article 161(b) in conjunction with Article 53(2), before the constitutional court after all other legal means have been exhausted. These are, then, individual and also litigable fundamental rights.

The particularly topical right to work is, pursuant to Article 53(1), binding on the public authorities and may be claimed before the ordinary courts. The opposite conclusion to be drawn from Article 53(3), however, shows that only the rights it lists enjoy protection to be obtained by appealing to the constitutional court. As the right to work cannot be claimed before the constitutional court, it is not a litigable fundamental right.

Similarly, the rights to health, a healthy environment and adequate housing are worded as individual rights. Under Article 53(2), however, they are principles which are binding on the three organs of state and so take the form of a provision defining a state objective without providing the foundations for an individual right[42].

2.6. France

The French constitution of 1958 was drawn up in 'great haste because of the Algerian crisis'[43]. It contains no more than a minimum of fundamental rights[44] and no social rights at all. It pivots on

[41] The same applies to physical education, sport and the suitable use of leisure time pursuant to Article 43(3).
[42] Díez-Picazo/Ponthoreau, p.22.
[43] Marco Itin, *Grundrechte in Frankreich*, p.6.

the preamble, in which reference is made to the 1946 constitution and the 1789 Declaration of Human and Civil Rights to the extent that they refer to human rights and the principles of national sovereignty[45]. The 1946 constitution was influenced by the experience of totalitarianism and is geared primarily to the protection of workers, the structure of the economy and the social order.

The reference in the 1958 preamble results in the rights arising from the 1946 preamble also being enshrined in the constitution. It also means that the 1789 Human Rights Declaration has constitutional force[46]. It remains to be seen what form these rights take and whether an individual right arises from them. The 'classical' rights referred to in the 1789 Human Rights Declaration, which are 'inalienable and sacred', are recognised as forming the basis of French public law[47] and are also actionable.

The situation is different where the social rights arising from the 1946 preamble are concerned. Thus although everyone has not only a duty to work but also a right to employment under paragraph 5 of the preamble, this is, despite the wording, an instruction to the legislator to find solutions to unemployment rather than an individual right[48]. The tenth section requires the nation to lay the necessary foundations for the individual and his family to develop, the wording itself revealing that it is for the state to decide how this is to be achieved. The same is true of the eleventh section, which requires children, mothers and older workers to be assisted in the areas of health, physical security, rest and leisure. Anyone incapable of working is entitled to adequate resources, the question of adequacy again leaving considerable scope for interpretation. The right to education and training in the thirteenth section is similarly so worded as to oblige the state to make the necessary provisions, to which the individual has an undisputed fundamental right[49], although its form is determined by the state.

Social rights are thus not recognised in the constitution in the same way as the classical fundamental rights, which are protected by the 1789 declaration. They have a complementary effect and require the legislature to create appropriate laws, but are not themselves litigable[50].

2.7. Ireland

Ireland adopted its first constitution in 1922, but as it was based on a treaty between Ireland and Britain, it was not widely recognised. A new constitution intended to put Ireland's actual independence to the test was therefore introduced in 1937[51].

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44 They concern the principles of equality and religious freedom (Article 2(1)), the freedom to form political parties and groupings (Article 4) and the freedom of movement (Article 66).

45 Marco Itin, op. cit., p. 12. Owing to the broad interpretation of the term 'human rights', the problem of the scale of reference along these lines hardly arises, since the 1789 Human Rights Declaration and the 1946 preamble contain few statements that concern neither human rights nor the principles of national sovereignty.

46 ibid., p. 17; Díez-Picazo/Ponthoreau, op. cit., p.14.

47 Itin, op. cit., p.14.

48 Díez-Picazo/Ponthoreau, op. cit., p.16.

49 Itin, op. cit., p. 112. The right to secular and free education is undisputed and even an obligation.

50 Díez-Picazo/Ponthoreau, op. cit., p.16. This is confirmed by Article 34 of the constitution, according to which the law defines the principles for labour law, trade union law and social safeguards.

51 Byrne/McCutcheon, *The Irish Legal System*, p.8.

The Irish constitution clearly reflects the deep religious convictions of the Irish people. This finds expression primarily in the preamble, but also in the fundamental rights. Thus the family is recognised in Article 41 as a moral institution of society, and in the second sentence of paragraph 1 the state guarantees to protect it. Paragraph 2 in particular requires the state to support mothers so that they need not go out to work and are able to devote themselves to their families and so contribute to the public welfare. This is a particularly clear illustration of the highly traditional attitude of the Irish state on the woman's role.

Article 42, which concerns education, again makes it clear how far the Irish constitution is devoted to religious values. Under Article 42(1) the family is responsible for bringing up children, and, according to paragraph 3, the state cannot force parents to send their children to school if this is incompatible with their conscience. The second sentence, however, requires the state to ensure that every child receives a minimum of moral, spiritual and social education. It also emerges from paragraph 4 that the state is obliged to provide free primary education.

Under the heading 'Directive Principles of Social Policy' Article 45(2)(i) states that the policy is to be directed in particular towards ensuring that citizens have the right to earn a living through their occupations. In paragraph 4 the state also pledges itself to protect and support financially the weaker sections of the community. It will also endeavour to ensure that workers are not exploited and no one is forced by economic necessity to undertake activities unsuited to their gender, age or strength.

The wording clearly reveals that the authors of the constitution preferred policy clauses to specific fundamental rights.

Other fundamental social rights arise from Article 40(III), although they are not explicitly enumerated[52], the words 'in particular' showing that Article 40(III) covers other rights as well as those referred to[53]. It is generally acknowledged that these rights include the right to work and the right to health protection[54]. However, the right to work does not go so far as to oblige the state to provide the citizen with a job. It comprises rather his right freely to decide how to use his labour and the freedom to choose and pursue a given occupation[55]. The fundamental rights referred to are also effective as they stand, without further action on the part of the legislature[56]. However, it also true to say that the rights which are not explicitly referred to are not absolute, but must be taken into account by the public authorities insofar as they are able[57].

2.8. Italy

The Italian constitution of 27 December 1947 as amended in 1993 refers to a number of fundamental social rights, some of which are also individual rights. In Article 4 of the section

[52] Duncan S.J. Grehan, in: Eberhard Grabitz (ed.), *Grundrechte in Europa und USA*, p.294.

[53] Article 40(3), first sentence: 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'
Article 40(3), second sentence: 'The State shall, *in particular*, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

[54] Grehan in: Grabitz, op. cit., pp.295 f.

[55] ibid., p.295.

[56] James Casey, *Constitutional Law in Ireland*, p.309.

[57] ibid., pp.316, 329; see also footnote 40: '*as far as practicable*'.

headed 'Basic principles' the Republic recognises the right of all citizens to work and promotes such conditions as will make this right effective.

Article 31 requires the state to facilitate, by means of economic and other provisions, the formation of the family and the fulfilment of the tasks connected therewith, with particular consideration for large families, and to protect mothers, children and young people by promoting and encouraging institutions necessary for this purpose.

Article 32 requires the Republic to provide health safeguards as a basic right of the individual and in the interests of the community and to grant free medical assistance to the indigent.

Article 34 stipulates that at least eight years of elementary education are to be compulsory and free and gives capable and deserving pupils the right to attain the highest grades of learning even if they lack financial resources. The Republic is required to give effect to this privilege by means of scholarships, contributions to the families of pupils and other provisions, to be awarded by competitive examination.

The right to work – arising from Article 4 – is complemented by Article 36, which stipulates that everyone is entitled to remuneration which is in proportion to the quantity and quality of his work and is sufficient to provide him and his family with a free and dignified existence. Article 36 also provides for any employed person to have a weekly day of rest and annual paid leave.

Besides the principle of equal remuneration for women, Article 37 rules that conditions of work must make it possible for women to fulfil their essential family duties and provide for the adequate protection of mothers and children.

Article 38 guarantees a right to social security by granting a right to private and social assistance to anyone unable to work who does not have the resources necessary for life and to all workers a right to adequate insurance for their requirements in the event of accident, illness or disability, in old age and when unemployed. The State is required to designate or set up institutions to perform these tasks. The same is true of the right to education and vocational training for citizens completely or partly unable to work.

In the opinion of the Italian Constitutional Court, however, this list is not complete. In its judgements it has recognised other fundamental social rights, which it gleans from the constitution, especially a right to adequate housing[58] and a right to a healthy environment. The Court arrives at the latter right from a broad interpretation of the right to health (Article 32) and the protection of the environment (Article 9). The Constitutional Court has added various facets to the right to health, including a right to sexual identity as part of the right to mental and physical integrity[59].

The Court generally plays an important role in the protection of fundamental rights in Italy, since it has recognised some of the fundamental rights referred to above as individual rights. In Italian constitutional law a distinction is made between 'unconditional' and 'conditional' fundamental rights. Unconditional fundamental rights are those for which provision is made in the

[58] Sciarra, *From Strasbourg to Amsterdam*, p. 12, with a reference to Decision 404/1988; de Vergiottini, in: Matscher, op. cit., p.330, with a reference to Decisions 49/1987, 217/1988, 404/1988 and 252/1985.

[59] de Vergiottini, op. cit., p.330.

constitution and which are effective in themselves, without requiring legislation. Conditional rights, on the other hand, require some kind of 'infrastructure' to become effective[60].

The right to health, for example, is an unconditional, enforceable right inasmuch as it entails a right to mental and physical integrity, but a conditional right inasmuch as it represents a right to benefit from the health system[61]. The right to housing is similarly not recognised as an unconditional right[62].

In various cases the Constitutional Court and Supreme Court of Appeal have accepted that unconditional fundamental rights are effective in themselves in relation both to the State and to third parties[63]. They include the right to paid leave (Article 36), the right to fair remuneration (Article 36) and the right to social security (Article 38). It would thus seem that the distinction between conditional and unconditional fundamental rights has not been consistently maintained, since the right to social security also calls for action on the part of the legislature to create the necessary institutions.

A peculiarity in Italy is that the citizen has no means of appealing directly to the Constitutional Court. The individual may, on the other hand, appeal directly to the ordinary courts for the recognition of unconditional fundamental rights.

Bognetti[64] is highly critical of fundamental social rights being made individual rights, especially by the Constitutional Court. He points out that this has done the Italian State enormous damage since it has taken it to the brink of financial ruin. He claims that this is because the provisions of the constitution were used by trade unions and Marxist parties in the 1970s and 1980s to mobilise public opinion against the government by accusing it of not doing enough to achieve the social objectives of the constitution. The subsequent increase in government expenditure led to inflation and heavy public indebtedness, which the constitution seeks to prevent (Articles 47 and 81) and which harmed the country's economic situation[65].

2.9. Luxembourg

The Luxembourg constitution dates back to 1868 and was last amended in 1998. Like its predecessor, which was adopted in 1841, it is very closely aligned with the Belgian constitution and with the constitutional law of other neighbouring countries. In the interpretation of its constitution Luxembourg has again always been guided by its neighbours' constitutional doctrine, partly because the absence of a law faculty of their own has forced Luxembourg lawyers to acquire their knowledge abroad[66].

The constitution refers to very few fundamental social rights. Under the heading 'Luxembourgers and their rights' Article 11 states that the law guarantees the right to work and ensures that every citizen may exercise this right. The aim of this constitutional provision, which was amended in

60 de Vergiottini, op. cit., p.237; Díez-Picazo/Ponthoreau, *The Constitutional Protection*, p.11.
61 ibid., p.11.
62 de Vergiottini, op. cit., p.332.
63 ibid., p.327.
64 Giovanni Bognetti, Professor at the University of Milan, op. cit., pp.90 ff.
65 ibid., pp.92 f.
66 Manessis, op. cit., p.35; Danny Pieters in: Grabitz (ed), op. cit., p.447.

1948, was to provide a constitutional guarantee for rights hitherto protected only by ordinary laws[67]. This was intended to prompt the legislature to give wider form to social rights and to adapt them to the economic environment[68].

Article 11 also provides for workers' social security, health protection and recreation. Article 23 requires the state to ensure that every Luxembourger receives free and compulsory primary education. It also states that medical and social assistance are regulated by law. However, it is generally recognised that these rights are not fundamental rights of the individual, but rather legislative programmes for whose organisation the state is responsible[69].

In addition, fundamental rights of a social nature can be deduced from the third paragraph of Article 11, which guarantees the natural rights of the individual and of the family[70]. However, this is a very vague legal basis since it can be seen as a principle under which the ensuing rights must be viewed and may also represent an authorising basis for the practical creation of further rights[71]. So far, however, no advantage has been taken of the latter.

2.10. The Netherlands

Until the early 1980s the Netherlands had one of the oldest constitutions in Europe. It was only in 1983 that the 1815 constitution was completely revised and brought up to date[72].

To establish the welfare state constitutionally, the Netherlands constitution has defined social rights as a mandate for the state[73]. Article 19(1) calls on the state to provide sufficient employment. The authors of the Netherlands constitution opted against wording that granted an individual right, since they were aware that the state does not allocate jobs on its own and can therefore improve the labour market situation only by taking certain measures[74]. Article 20(1) also makes it the state's responsibility to secure the individual's means of subsistence and to distribute wealth. This again is an instruction to the state to take appropriate measures.

As Article 20(2) requires the adoption of legislation on social security, the legal basis for the citizen is ordinary law.

Article 20(3) grants needy Dutch nationals a right to public assistance, but as this is to be governed by a law, the constitution again fails to grant the citizen a fundamental right in this respect.

Article 21 specifies that it is for the state to protect and improve the environment.

Article 22 requires the state and the other public authorities to take steps to promote public health, the creation of sufficient housing and social and cultural development, including leisure activities.

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67 Álvarez Vélez/Alcón Yustas, op. cit., p.441.
68 Pieters, op. cit., p.467.
69 ibid., pp.467, 469.
70 ibid., p.463.
71 ibid., pp.463 f.
72 Manessis, op. cit., p.37.
73 Álvarez Vélez/Alcón Yustas, op. cit., p.463.
74 van der Pot, *Handboek van het Nederlandse Staatsrecht*, p.293.

Article 23 makes education the government's responsibility and stipulates that it is free, though supervised by the authorities. Under Article 23(4) it is the municipalities' responsibility to ensure that school education is provided.

The Netherlands constitution does not, then, grant citizens any individual rights and has instead opted to instruct or require the state to take action.

It should also be noted that the constitution does not refer to any means for its own protection or for the enforcement of rights and that Article 120 even goes so far as explicitly to prohibit reviews of the constitutionality of acts of parliament.

2.11. Austria

The Austrian constitution does not refer to any fundamental social rights, only to 'classical' liberal fundamental rights, such as the right to work (Article 6 of the Basic State Law) and the right freely to choose and practise an occupation (Article 18).

However, a debate on whether fundamental social rights should be enshrined in the constitution has been in progress since the 1980s. Building on the deliberations of a working party of experts, a political fundamental rights commission has listed in two drafts the various rights that are conceivable and defined the form in which each of these rights should be made effective in the constitution[75]. The following fundamental social rights (within the meaning of the study) were referred to in this context:

The right to work (including aspects of vocational guidance, government employment policy and protection against dismissal), the right to appropriate remuneration (guarantees of a minimum wage and equal pay for men and women), the right to fair conditions of employment (working hours, appropriate rest periods, employee participation), the right to the protection of children, young people and mothers (including the prohibition of child labour, the exclusion of women from certain occupations), the right to housing (including government promotion of housing construction), the right to education (including free education), the right to social security (above all, a guarantee of the social insurance system and public assistance).

According to Article 1(4) of the second draft, there should also be an individual right to free placement and vocational guidance.

According to the draft that followed the fundamental rights reform inquiry, the institution of social insurance for illness, accidents, disability, old age and unemployment should be enshrined in the constitution, and it should also be possible for the Constitutional Court to review the right to equal participation in the social insurance system. After all, even the chairman of the commission of inquiry believed this concern to enshrine fundamental social rights in the constitution sought nothing other than an improved guarantee of the continued existence of the welfare state, the substance of which, he claimed, was already set out in numerous conventions and agreements between the two sides of industry[76].

[75] Okresek, in: Matscher, op. cit., p.195.
[76] Quoted in Okresek, op. cit., p.196.

However, no fundamental social rights have yet been enshrined in the constitution. Despite this, Austria ranks among the Member States with the most extensive social security.

2.12. Portugal

The Portuguese constitution, which dates back to 1976, was last revised extensively in 1997. It describes fundamental rights in even greater detail than the Spanish constitution. Like the latter, the Portuguese constitution was intended to safeguard democracy as far as possible after the period of dictatorship, and economic and social rights as well as fundamental civil rights and liberties are therefore guaranteed[77].

Article 2 of the constitution defines Portugal as a democratic state based on the rule of law and having economic, social and cultural democracy as its goal. Accordingly, the constitution distinguishes between economic, social and cultural rights. The first category includes the right to work, which is covered by Article 58. Article 59 guarantees not only regular and paid leave but also an entitlement to unemployment benefit and fair remuneration.

The social rights comprise the right to social security (Article 63), the right to health protection (Article 64), the right to appropriate housing that meets adequate standards of hygiene (Article 65), the right to a healthy environment (Article 66) and the right of the family (Article 67), parents (Article 68), children (Article 69), young people (Article 70), the disabled (Article 71) and the elderly (Article 72) to protection.

The cultural rights include not only the right to education and culture (Article 73) and to school and university education (Articles 74 and 76) but also the right to participate in cultural life (Article 78) and to physical training and sport (Article 79).

This list shows how the Portuguese constitution has endeavoured to cover as much of the sphere of concern to the citizen as possible. The rights are all worded as individual rights, creating the impression that they are also enforceable. However, the second section of the various rights regularly instructs the State on how rights are to be made effective. The right of the citizen is thus always accompanied by a specific duty of the State[78].

The right to work, for example, is complemented by the State's duty to use certain economic and social policy plans[79].

The entitlement to social security is defined by the State's obligation to develop a social insurance system that covers the citizen in the event of illness, old age, disability, the death of a spouse and of parents and in all other cases in which an individual becomes incapable of working.

The State has a duty to implement an appropriate housing policy and to ensure medical care throughout the country.

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[77] José Vida Soria, in: Matscher, op. cit., p.304; Manessis, op. cit., p.44.

[78] Vida Soria, op. cit., p.308.

[79] They include the implementation of a policy of full employment, equality of opportunity in the choice of occupation or employment and the cultural, professional and vocational training of workers.

These rights are protected by Articles 17 and 18. Article 17 explains the application of the system of rights, freedoms and guarantees to the rights referred to in Section II and to fundamental rights of a similar nature. Article 18 stipulates that the provisions of the constitution concerning rights, freedoms and guarantees are directly applicable and are binding on public and private bodies.

Like Spain's constitution, Portugal's faces the problem of 'eternal effectiveness' as regards the protection of social and economic fundamental rights[80]. However, the preferential treatment of fundamental rights under Article 17 applies only to the rights referred to in Section II. On the other hand, as the fundamental social rights described above are covered by Section III, they are not protected[81]. The possibility of analogous application referred to in Article 17 is not exploited in practice, evidently owing to a fear of too broad an interpretation of analogous rights.

The Portuguese constitution does not provide for the possibility of a complaint to the Constitutional Court in the event of an infringement of fundamental rights. This is most certainly true of social rights[82]. Pursuant to Article 283, however, the Constitutional Court may rule that there has been failure to comply with the constitution by omission on the part of the necessary legislative acts.

2.13. Finland

Section 15 of the Finnish constitution of 17 July 1919 as amended on 1 August 1995 not only recognises the right to freedom of occupation and calls for the 'protection of labour' but also stipulates that the public authorities are to promote employment and to strive to secure the right to work for everyone. It also requires the legislature to enshrine the right to vocational training in appropriate laws.

These are not litigable fundamental rights, as is evident from the wording. However, the literature also includes the opposite view that there is a legal right to work, although this should not be understood as a right to the 'immediate' allocation of a job[83].

At the level of ordinary law Finland had something like an individual right under a 1987 Employment Act for people under 20 years of age and the long-term unemployed[84]. This has since been so amended, however, that only people under 25 have an individual right to further training if they are unemployed and cannot find a training place.

Section 15a of the Finnish constitution states that anyone unable to obtain the security needed for a decent life has a right to essential assistance and care. Paragraph 2 defines this as a right to the provision of the basic needs for life at times of unemployment, illness, incapacity, advanced age, confinement or loss of the provider.

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80 Vida Soria, op. cit., p.308.

81 ibid., p.308; the preferentially protected rights, however, include the right to protection against dismissal and to participation in the employer's decision-making.

82 Vida Soria, op. cit., p.310.

83 See C. Tomuschat, 'The Right to Work', in: Rosas & Helgesen (eds*): Human Rights in a Changing East-West Perspective*, 1990, pp.181 ff.

84 See Rosas, op. cit., p.230.

Paragraph 3 requires the public authorities to secure for everyone, 'in the manner stipulated in greater detail by Act of Parliament, … adequate social welfare and health services … . Public authorities shall also support the abilities of families and others charged with the care of children to provide for their welfare and individual growth.' Paragraph 4 specifies that it is the task of the public authorities to promote the right to housing and to support the individual in any attempt to find accommodation by his own efforts. The wording of the first sentence of paragraph 3 indicates that there is an individual right to the social benefits referred to in accordance with the legal provisions. Otherwise, these are policy clauses.

At the level of ordinary law there is a clear tendency to make social benefits individual public rights that can be enforced before the administrative courts, examples being the right to social assistance, accommodation for children under the age of 3, support for and the provision of housing for children and their families in emergencies and certain kinds of assistance for seriously disabled people[85].

Outside the part of the constitution concerning fundamental rights (Part II) fundamental social rights are to be found in Part XIII, which concerns education. Section 78, for example, requires the State to promote research and higher education in technology, agriculture and commerce and the other applied sciences and the pursuit of the fine arts. If these subjects are not taught at the universities, the State is to maintain special colleges and support private institutions established for these purposes (second sentence). This provision can be seen as an institutional guarantee.

Under section 79 institutions of higher general education and higher elementary education are to be maintained or, if necessary, assisted at the State's expense. In the view of Parliament's Constitution Committee it cannot be inferred from the words 'if necessary, assisted' that any institution facing financial crisis is entitled to individual assistance[86].

Pursuant to section 13, everyone has the right to free primary education, and the second sentence of section 80 reiterates that primary school education is free for everyone. Section 81 requires the state to maintain the teaching establishments for the technical occupations, for agriculture and ancillary trades, for commerce and seafaring and for the fine arts or to support them with government resources if the need arises. This provision is intended to safeguard vocational training.

The fundamental rights that can be deduced from this part of the constitution are again not individual rights but institutional guarantees and policy clauses. Nonetheless, they are very important for constitutional reality in Finland, since the State does indeed guarantee many social benefits in the sphere of education in accordance with these provisions. Thus higher education is not only free but also includes meals, health care and, in some cases, free transport to school and accommodation. This depends on the local authorities, which are responsible and meet the cost jointly with central government. Vocational school pupils enjoy the same advantages. University attendance is also free; scholarships and loans are available to meet the cost of living[87].

2.14. Sweden

[85] Rosas, op. cit., p.234.
[86] Pentti Arajärvi: The Right to Education in Finland, in: Drzewicki/Krause/Rosas (eds), op. cit., p.282.
[87] ibid., pp.282 f.

In the constitution of the Kingdom of Sweden of 1 January 1975 as amended on 1 January 1980 Article 2(2) of Chapter 1 – headed 'Basic Principles' – states that the personal, economic and cultural welfare of the individual is the fundamental aim of public activity. According to the second sentence of this paragraph, it is, in particular, incumbent upon the public administration to secure the right to work, housing and education and to promote social care and security and a good living environment.

It is noticeable that reference is made to these fundamental social rights not in Chapter 2 (Fundamental Rights and Freedoms) but among the basic principles of the constitution. This reflects the fact that the Kingdom of Sweden sees itself as a welfare state. The fundamental social rights referred to can therefore be seen as provisions defining the state's objectives, by which any public activity is to be guided. It is also clear from this, however, that these fundamental rights are not litigable[88].

As in the other Scandinavian countries, the many social rights of the citizen are defined in ordinary legislation and, where they are individual rights, they are enforceable before administrative courts[89]. The administration of justice in social matters has not been left to the ordinary courts in Sweden because there has traditionally been some scepticism about the judiciary, with its largely conservative background. It has been feared that their judgments would erode social rights[90].

Sweden considers it particularly important that social assistance from the State does not lead to the stigmatisation of individuals. In principle, everyone is therefore entitled to a wide range of State benefits regardless of his financial background[91]. This reveals the image of a State which not only guarantees a minimum of security for the citizen and gives everyone the same rights but also seeks to achieve real social equality.

2.15. United Kingdom

To understand how fundamental rights are protected in the United Kingdom's legal system, it must first be remembered that Britain has no written constitution in the form of a comprehensive document and that there is no list of fundamental rights. Instead, various texts, such as the Magna Carta of 1215, the Petition of Rights of 1627, the Act of Habeas Corpus of 1679 and the Bill of Rights of 1689 form a kind of 'constitution'.

In principle, however, there is no formal distinction between constitutional law and ordinary law, owing to the fact that it is not the people but parliament that is the sovereign power. Its laws cannot therefore be unconstitutional and must be applied by the courts. Nor is there a system of constitutional courts to enable acts of the public authorities to be examined for their constitutionality[92]. Instead, it is for the judges in ordinary courts of law to interpret the acts of parliament and to develop law in the form of common law. The individual's fundamental rights

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88 Rosas, op. cit., p.229, with a reference to the official commentary by Petren & Ragnehalm, Sveriges grundlagar och tillhörande författningar med förklaringar, Stockholm 1980, p. 20; Katrougalos, op. cit., pp.294 f.

89 Rosas, op. cit., p.233.

90 Katrougalos, op. cit., p.295.

91 ibid., pp.293 f.

92 Ridley: 'The British Constitution and Constitutional Reform in Britain', in: Bieber/Widmer (eds*), L'Espace constitutionnel européen – Der europäische Verfassungsraum – The European constitutional area*, Zürich 1995, pp.30 ff.

must therefore be deduced from ordinary acts of parliament and from common law. This is made particularly difficult by the fact that parliament does not as a general rule formulate any positive rights along the lines of 'Everyone shall have the right to ...', but that the various spheres are covered by detailed rules from which the protection of fundamental rights can be deduced. In simple terms, this means that the individual has any right as long as it is not explicitly restricted[93].

This concept results in civil rights and liberties playing a major role, whereas fundamental social rights in the sense of participatory rights have not yet, by and large, been recognised in British jurisprudence. Fundamental rights are here equated with freedom from the State. Gaining freedom and security as fundamental rights with the help of the State is inconceivable for most British lawyers[94].

British lawyers point out in particular that extending fundamental rights to include fundamental social rights would mean sacrificing individual freedoms and that there is no point in putting rights that are not for the most part directly enforceable but represent policy clauses on a par with traditional civil rights and liberties. This would simply dilute the idea of fundamental rights[95].

A right to work, for example, is recognised only insofar as the individual has a right to practise his chosen occupation without being unjustifiably excluded from it[96].

A constitutional right to social security does not exist in the United Kingdom. Despite this, there are, of course, various social benefits comparable with those in other Member States and a national health service to which everyone has free access[97].

There is also an individual right to enjoy these social benefits in accordance with the provisions of law. This is not, however, a constitutional right. Disputes with the administration can be referred to 'administrative tribunals'. Appeals may then be lodged with the 'social security commissioners'[98]. In contrast, the ordinary courts and common law play virtually no part in the protection of social rights, since the courts have generally refused to develop social rights[99] .

3. Overview of existing rights

3.1. Table

[93] Dicey, Introduction, p.197.

[94] Trautwein, *Der Schutz der bürgerlichen Freiheiten und der sogenannten sozialen Grundrechte in England*, pp.189 ff.

[95] ibid., pp.191 f.

[96] ibid., p.195, with a reference to Nagler v Feilden (1966), 1 All E.R. 689, 693; Quinn v Letham (1901), A.C. 495, 534.

[97] The national health insurance scheme is governed by the National Health Reorganisation Act 1973, the provision of housing by the public authorities by the Housing Act 1957, social assistance by the National Security Act 1975; see Kingston/Imrie: 'Vereinigtes Königreich von Großbritannien und Nordirland', in: Grabitz (ed): Grundrechte in Europa und USA, Kehl, Strasbourg, Arlington, 1986.

[98] Harris in: Matscher, op. cit., p.218.

[99] ibid., pp.218, 201; for the situation in Scotland, which differs in some respects, see Kingston/Imrie, op. cit., pp.833 ff.

The following table is an overview of the contents of the Member States' constitutions. It shows what fundamental social rights are enshrined in the constitutions. It is impossible, however, to forge a link between the existence of fundamental social rights and the existence and level of social benefits and institutions in the Member States concerned[100]. This is clear primarily from Austria and the United Kingdom, their columns being empty whereas they do, of course, have social rights.

The symbol ■ in the table means that the right concerned is referred to in the constitution. The symbol ❒ means that, though not explicitly enshrined in the constitution, it is recognised.

[100] See Arbeitskreis 'Europäisches Sozialrecht', Soziale Rechte in der EG, Berlin 1990, p.24.

	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	FIN	S	UK
Right to work	■	■		■	■	■	❐	■	■	■		■	■	■	
-fair/safe working conditions	■				■			■				■			
-fair wages	■				■			■				■			
-paid leave								■				■			
Right to education and training	■			■	■	■	■					■	■	■	
-free elementary education	■	■		■	■		■	■	■			■	■		
-free secondary school education				■								■			
-free university education												■			
-vocational training					■							■	■		
Right to housing	■			■	■			❐		■		■	■	■	
Right to health	■			■	■	■	❐	■	■	■		■	■		
-free for the indigent								■				■			
Right to social security	■	■	❐	■	■	■		■	■	■		■	■	■	
-public welfare					■	■		■				■	■		
-special protection for mothers			■		■	■	■	■				■			
-special protection for families/parents			■	■	■		■	■				■	■		
-special protection for the disabled				■	■							■			
-special protection for children/young people.				■	■	■		■				■			
-special protection for the elderly				■	■	■						■	■		
Right to culture	■				■					■		■			
Right to a healthy environment	■		■		■			❐		■		■		■	

3.2. The three models

The table shows that social rights are enshrined in the constitutions of almost all the Member States. They are all welfare states that have set themselves the goal of eliminating excessive social differences. A comparison of the Member States does, however, reveal different approaches to incorporating social rights in the constitution. In the final analysis, a constitution always reflects a country's traditions and economic and political experience. Fundamental rights can be divided into various 'generations'. The first generation comprises the classical civil rights and liberties. Social rights did not emerge at constitutional level until the late 19th or early 20th century and were consolidated after the Second World War. The third generation consists of the fundamental rights that concern culture and the environment. Here again, it is clear that developments in society always have an influence on the constitution. Unlike the civil rights and liberties, which are directly applicable, what the second- and third-generation rights have in common is that the reference to them in the constitution is not enough on its own for them to be effective: this depends on the goodwill of the legislature[101]. As regards incorporation in constitutions, a rough distinction can be made between three systems: a liberal model, a southern European model and a moderate model, although they overlap to some extent.

3.2.1. The liberal model

It must first be remembered the United Kingdom and Austria occupy a special position among the Member States in that both have forgone the inclusion of social rights in their constitutions. For one thing, there is no constitution in the United Kingdom in the conventional sense of the term, and for another, the liberal attitude to the economy and politics is difficult to reconcile with the adoption of specific social rights[102]. Although the United Kingdom paved the way in social legislation with the introduction of the poor laws[103], the judiciary has always been very restrained in granting entitlements[104]. Like the USA, the United Kingdom prefers market-oriented solutions that emerge regardless of any influence the state may bring to bear. From the wide-ranging social safeguards in Austria and the United Kingdom, however, it is clear that fundamental social rights do not need to be enshrined in the constitution for the public to be assured of basic social services.

3.2.2. The southern European model

The 'southern European model' is characterised by the fact that extensive fundamental social rights have been included in the constitution. The authors of such constitutions endeavoured to cover every sphere of life and to provide as comprehensive protection as possible for the citizen in their constitutions. The countries concerned include Italy, Greece, Spain and Portugal. The words 'Everyone shall have the right to …' are frequently to be found in their constitutions, creating the impression that they are individual fundamental rights. Despite the choice of words,

[101] Iliopoulos-Strangas, op. cit., p.19.
[101] ibid., p.279.
[102] ibid., p.279.
[103] The poor laws were met with fierce criticism since they were seen as granting state assistance not as a right but as charity. At the beginning of this century the foundation stone was laid for today's social legislation. The system was expanded after the Second World War, when it began to be guided by the principles of universality, equality and justice. These principles were primarily intended to prevent the exclusion of poorer sections of the population, who depend on the solidarity of the rest of society.

such rights are rarely enforceable. In some cases the constitutions do not even provide for complaints to be lodged with a constitutional court. The individual right is ultimately treated as an instruction to the State to initiate measures that enable the citizen to exercise the right concerned.

3.2.3. The moderate model

The constitutions of the other countries combine liberal tendencies with the definition of rights, whether as individual rights, as objectives of the State or as policy clauses.

The authors of these constitutions were aware, however, that the opportunities for exercising influence in a market economy are limited and, in particular, that it is difficult to make the fundamental right to work effective. Nevertheless, almost all countries have included it in their constitutions, at least as a policy clause, in order to obligate governments to stimulate the labour market.

An exception is the German Basic Law, which protects social rights through the welfare state clause which the public authorities are required to respect in any action they take. It is also worth mentioning that in Scandinavia, unlike the other countries, there has always been a cross-party consensus on the need for social safeguards in a market economy system.

Part IV: The constitutions of the Central and Eastern European candidate countries

1. Preliminary remarks

Given the impending enlargement of the EU, the position of the first countries to accede should be considered in the debate on a bill of rights. The constitutions of the Central and Eastern European countries are therefore considered in the following.

All the former Communist countries of Central and Eastern Europe have adopted new democratic constitutions in recent years, often guided by western models. The market economy is accepted everywhere as the basic system for the economy, and in some cases the principle of the 'social market economy' on the German model is explicitly enshrined in the constitution, as in Article 20 of the Polish constitution and in the preamble to the Hungarian constitution. The role of the State in the redistribution of wealth is no longer explicitly mentioned. Fundamental social rights played an important role in the socialist theory of constitutional law and were regarded as the main element of individual rights and freedoms[105]. Despite some criticism[106], they have been retained or reinstated in the new constitutions, albeit in varying degrees of detail.

2. Czech Republic

In the Czech Republic's constitutional system fundamental rights are to be found not in the constitution of 16 December 1992 itself, but in a separate declaration of fundamental rights and freedoms. Pursuant to Article 3 of the constitution, this forms part of the constitutional order. Its Chapter 4 contains an extensive list of fundamental social rights within the meaning of this study.

Pursuant to Article 26(3), everyone has the right to earn his living by work, and the state is required to provide an adequate level of material security for those citizens who are unable, through no fault of their own, to exercise this right. Pursuant to the fourth sentence of Article 6(3), further details will be set out in laws. This wording is also to be found in Articles 28, 29, 30, 31, 32, 33, 34 and 35. Fundamental social rights are thus to be accurately defined in ordinary legislation.

Article 28 gives employees the right to fair remuneration and satisfactory working conditions. Article 29(1) gives women, adolescents and persons with health problems the right to increased protection of their health at work and to special working conditions. According to Article 29(2), adolescents and persons with health problems also have the right to special protection in labour relations and to assistance in vocational training. Otherwise, Article 31 gives everyone the right to health protection: citizens have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law. Under Article 30(1) citizens have a right to material security in old age, during periods of work incapacity and in the event of the

[104] Kedzia, Social Rights in the (Draft) Constitutions of Central and Eastern Europe, in: Drzewicki, Krause, Rosas, pp.203 f.

[105] Katrougalos, op. cit., p.300.

loss of their provider. Article 30(2) refers to the right to assistance in the event of material need to the extent necessary to ensure a basic standard of living.

Under Article 32(1) parents, families, children and young people enjoy the particular protection of the law. Article 32(2) guarantees pregnant women special care, protection in labour relations and suitable working conditions.

Article 33 concerns the right to education, defining it as a right to free school and university education. Under conditions defined by law citizens have a right to assistance from the state during their studies.

Article 34(2) grants the right of access to the nation's cultural wealth under the conditions set by law, while Article 35(1) gives everyone the right to a favourable environment and Article 35(2) the right to timely and complete information on the state of the environment and natural resources.

The Czech constitution thus includes one of the most detailed lists of fundamental social rights in Europe, most of them being formulated as individual rights.

3. Estonia

The Estonian constitution of 28 June 1992 is less detailed in its definition of fundamental social rights than the Czech constitution. Article 27 refers to special protection for the family, parents and children. Under Article 28 everyone has a right to health protection and to state assistance in old age, when unable to work, in the event of the loss of the provider and in emergencies. Article 29(3) requires the state to provide for vocational training and to assist job-seekers. On the other hand, there is no right to work. The right to education is guaranteed by Article 37. It includes the right to instruction in Estonian and to free education in state schools.

4. Hungary

The Hungarian constitution of 20 August 1949 as amended in 1997 is generally very precise and contains only three brief provisions that refer to fundamental social rights, Articles 16, 17 and 18. They require the Republic of Hungary to pay particular attention to the economic security, education and upbringing of young people and to protect their interests (Article 16), to provide for extensive social measures for the needy (Article 17) and to safeguard the right of each individual to a healthy environment (Article 18).

5. Poland

The new Polish Basic Law was adopted by the National Assembly on 2 April 1997 and confirmed in a referendum held in October 1997. The very first chapter concerning the republic sets out the obligation to abide by the principle of social justice (Article 2), to ensure equal access of the people to cultural assets (Article 6(1)) and to assist Poles living abroad so that they may retain their links with their national cultural heritage.

Part IV of Chapter 2 contains a list of economic, social and cultural rights. Where work is concerned, Article 65(4) merely requires a minimum wage or the manner in which it is determined to be specified by law. Paragraph 5 requires the state to pursue a policy geared to full employment by implementing programmes that combat unemployment, by creating jobs in the public sector and by intervening in the economy. Thus, although it includes a right to work for the individual, it sets out broad lines of labour market policy in the context of fundamental rights. A right to healthy and safe working conditions is required by Article 66(1), and Article 66(2) covers the right to a minimum amount of leave in accordance with more detailed provisions to be set out in a law.

Article 67 refers to the right of citizens to social security in the event of invalidity and in old age. According to Article 68(1), everyone has the right to health protection. Article 68(3) requires the State to take particular care of children, pregnant women, disabled persons and the elderly.

Article 70 grants the right to education. Education in state schools is free, according to Article 70(2). Detailed provisions on the protection of families and children are included in Articles 71 and 72. Particularly worth noting in this context is that Article 72 gives everyone the right to require the organs of state to protect children against violence, brutality, exploitation and acts that endanger their morals.

Article 74 requires the state to ensure the ecological security of the present and future generations with the policy it pursues. As in the Czech constitution, Article 74(3) defines a right to information on the quality of the environment and its protection. Article 74(4) requires the state to support activities undertaken by the public to protect the environment.

The state is also required to pursue a policy that takes account of the public's housing requirements and to protect the rights of tenants by law (Article 75).

The Polish Basic Law thus contains numerous policy clauses that require the state to pass laws and take practical measures.

6. Slovenia

Article 2 of the Slovenian constitution of 23 December 1991 includes a clause on the welfare state, which is explained in greater detail in Articles 50 et seqq.

The right to social security under the law exists for all citizens in accordance with Article 50, the right to health protection in accordance with Article 51. Security and vocational training for disabled persons are guaranteed by Article 52. Article 56 provides for the special protection and care of children and Article 57 for free education and for the state to ensure appropriate education for all citizens. Article 66 requires the state to provide for employment, while Article 72 gives everyone the right to a healthy environment pursuant to more detailed provisions of laws. Article 78 instructs the State to create the necessary conditions for everyone to be adequately housed.

The Slovenian constitution thus details few fundamental social rights.

7. Summary

To some extent, it can be inferred from the wording of fundamental rights, the general nature of their protection and the granting of the right of access to the courts in these countries that fundamental social rights are protected by the same means as other rights, i.e. they may be claimed before the courts[107]. However, as it is usually left to ordinary legislation to determine in more precise terms what form fundamental social rights are to take, the enjoyment of rights largely depends, of course, on the economic situation and on the political will of the country's leaders.

As in the EU countries, the constitutions of the candidate countries in no way reflect social reality but, at best, the strength of the political will to guarantee the citizen's fundamental social rights. Although the Commission stated in its 1998 reports on progress towards accession by the various candidate countries[108] that economic, social and cultural rights are respected, it calls for improvements in the health sector, health protection and safety at the workplace and in the social dialogue in almost all the countries.

[107] Kedzie, op. cit., p.207.

[108] Commission of the European Communities, Regular report from the Commission on progress towards accession by the Czech Republic in 1998; idem, Regular report from the Commission on progress towards accession by Estonia in 1998; idem, Regular report from the Commission towards accession by Hungary in 1998; idem, Regular report from the Commission on progress towards accession by Poland; idem, Regular report from the Commission on progress towards accession by Slovenia in 1998; published under http://europa.eu.int.comm/dg1a/enlarge/report. Similar reports have been drawn up exist on all the other candidate countries.

Part V: The European Parliament's position in the past

The European Parliament (EP) first adopted a resolution on respect for the fundamental rights of citizens in the Member States in the development of Community law[109] on 4 April 1973. This was followed by a resolution on the precedence of Community law and the protection of fundamental laws, which was adopted on 15 June 1976[110]. The EP submitted a draft European constitution on 14 February 1984.

The most important EP document is the Declaration of Fundamental Rights and Freedoms of 12 April 1989[111]. This contains a comprehensive list of fundamental rights that includes fundamental social rights and state objectives as well as the classical fundamental rights:

- 'Article 7: The family shall enjoy legal, economic and social protection.'
- 'Article 13(1): Everyone shall have the right to just working conditions.'
- 'Article 13(2): The necessary measures shall be taken with a view to guaranteeing health and safety in the workplace and a level of remuneration which makes it policy to lead a decent life.'
- 'Article 14(3): Workers shall have the right to be informed regularly of the economic and financial situation of their undertaking and to be consulted on decisions likely to affect their interests.'
- 'Article 15(1): Everyone shall have the right to benefit from all measures enabling them to enjoy the best possible state of health.'
- 'Article 15(2): Workers, self-employed persons and their dependants shall have the right to social security or an equivalent system.'
- 'Article 15(3): Anyone lacking sufficient resources shall have the right to social and medical assistance.'
- 'Article 15(4): Those who, through no fault of their own, are unable to house themselves adequately, shall have the right to assistance in this respect from the appropriate public authorities.'
- 'Article 16(1): Everyone shall have the right to education and vocational training appropriate to their abilities.'
- 'Article 24: The following shall form an integral part of Community policy: the preservation, protection and improvement of the quality of the environment; the protection of consumers and users against the risks of damage to their health and safety and against unfair commercial transactions. The Community institutions shall be required to adopt all the measures necessary for the attainment of these objectives.'

Even before the intergovernmental conferences that led to the Treaty of Maastricht, Parliament had called for the list of fundamental rights it had adopted to be included in the Treaties, but with as little success as it had before the intergovernmental conferences in 1996, which led to the Treaty of Amsterdam[112].

[109] OJ C 26, 1973, pp.7 f.
[110] Reproduced in EuGRZ 1976, pp.246 f.
[111] OJ C 120, 16.5.1989, pp. 51 ff.
[112] See 'Martin report' of 20 November 1990 (EP Doc A3-270/90) and the resolution of 13 March 1996, reproduced in EuGRZ 1996, p.167.

The 1998 Declaration is nonetheless tremendously important, since it was adopted by the European Parliament, the only institution at European level to have direct democratic legitimation. It represents an expression of the 'popular will' of the European peoples. The EU's own bill of rights will not therefore come into being without the explicit approval of the European Parliament, whatever its status in law may be.

Part VI: Summary

In early June 1999 the European Council meeting in Cologne decided to set up a body to draft a charter of fundamental rights for the European Union. As decisions by the EU now affect almost all areas of the lives of the Union's citizens, it is time to develop a bill of rights as a yardstick for the institution's actions. Only then can it be ensured that the citizen is aware of his fundamental rights, since the present system of references to the ECHR, ESC and Community Charter of Fundamental Social Rights of Workers does not ensure sufficient transparency.

Fundamental social rights in this context are the rights to which the individual is entitled as a member of a group and which can be made effective only if the State takes action to safeguard the individual's environment. They do not give effect to freedom from the State but to freedom with the State's assistance. Particular reference should be made in this context to the right to work, the right to education and training, the right to housing, the right to health, the right to social security, the right to culture and the right to a healthy environment.

They are to be found in various forms in constitutions. On the one hand, they may take the form of individual rights. This means that the individual may appeal directly to courts for such rights to be respected. Many constitutions also refer to fundamental social rights in the form of policy clauses and provisions defining the State's objectives. The legislature and all public authorities are then required to make the rights concerned effective.

Whether or not social rights should be enshrined in constitutions is a contentious issue. On the one hand, it ensures that such rights cannot be eroded by legislation and case law. On the other hand, a certain standard of living is then specified in the constitution, and it may not be possible to ensure it is respected in the future because of economic and social changes.

Another problem arising in connection with the creation of a bill of rights for the EU is that the EU is not a State and derives its competence from the Member States. It can therefore protect fundamental rights only to the extent that EU law is applied.

At European level there are two charters setting out fundamental social rights. The Community itself is not a party to the European Social Charter, and the Community Charter of Fundamental Social Rights of Workers is no more than a solemn declaration by the Heads of State or Government of the Member States. It is primarily through the case law of the European Court of Justice, however, that the two charters influence Community law.

In the Member States' constitutions various courses have been charted in enshrining fundamental social rights. Owing to the liberal basic attitude in Austria and the United Kingdom, for example, there are no constitutional social rights in these countries. The German Basic Law does not specify any fundamental social rights apart from the right of mothers to special protection. Germany nonetheless sees itself as a welfare state and, by defining state objectives, requires the public authorities to base all their actions on the welfare state principle. The Benelux countries, France and the Scandinavian countries have fundamental social rights in the form of individual rights, policy clauses or provisions defining the state's objectives, but tend to be restrained when it comes to detail, leaving this to ordinary legislation.

The southern European countries all have extensive bills of rights, which also include detailed fundamental social rights, formulating them primarily as individual rights. Despite the wording, however, they are not as a rule enforceable rights but instructions to the legislature to make them effective.

Three of the candidate countries, Estonia, Hungary and Slovenia, tend to adopt a moderate approach in the wording of fundamental social rights, while the Czech Republic and Poland follow the southern European model.

It is impossible, however, to forge a link between the existence of fundamental social rights in a constitution and social reality in the country concerned.

The European Parliament has always advocated the creation of a Community bill of rights. The most important document is the Declaration of Fundamental Rights and Freedoms of 1989, which also includes a number of fundamental social rights. The particular value of this declaration is its democratic legitimation.

In a resolution on the establishment of the Charter of Fundamental Rights the European Parliament 'draws attention to the need for an open and innovative approach to shaping the Charter, the nature of the rights to be featured in it, and the part it will play and the status it will command in the constitutional development of the Union'[113].

[113] Resolution B5-0110/99 of 16 September 1999, not yet published in the Official Journal.

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 29 February 2000

CHARTE 4143/00

CONTRIB 33

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from the European Bureau for Lesser Used Languages (EBLUL). [1] [2]

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[1] EBLUL: E-mail: eblul@eblul.org

[2] The text has been submitted only in English language.

Brussels 25.2.2000

Call for Linguistic Rights in New Fundamental Rights Charter

The European Bureau for Lesser Used Languages (EBLUL) welcomes the decision of the European Union to draft and approve the Charter of Fundamental Rights of the European Union. The Charter will be a further step in the process of European integration. It is highly significant because it signals a move away from mostly economic matters which have been at the centre of European attention in recent years towards a more comprehensive understanding of European citizenship, incorporating the notion of fundamental rights.

Cultural and linguistic diversity in Europe lies at the heart of fundamental rights for its citizens as the integration process advances. An essential part of this diversity are the regional and minority languages traditionally spoken by linguistic communities within the EU member states.

The importance of preserving and promoting these languages has been considered highly important by some relevant European institutions. The European Charter on Regional and Minority Languages can be considered to be Council of Europe's convention setting out basic minimum standards. There are several other relevant documents, including the Council of Europe's own Framework Convention for the Protection of National Minorities. The OSCE mentions minority languages in several documents, including their Document of the Copenhagen Meeting of the Conference on the Human Dimension, adopted in June 1990, containing 11 paragraphs relating to linguistic minorities. Furthermore, the activities of the High Commissioner, the Foundation of Inter-Ethnic Relations adopted in 1996, the Hague recommendations regarding the education rights of National Minorities and in 1998 the Oslo Recommendations regarding the linguistic rights of national minorities, must be considered. These latter two documents give a comprehensive overview of the rights needed for protection and promotion of languages.

EBLUL stresses the need for clauses specifically related to linguistic rights of communities speaking regional and minority languages to be included in the Charter of Fundamental Rights for the European Union. The Charter should provide at least a minimum standard of protection of regional and minority languages which will become a fundamental basis in this field for the European Union itself and for its current and future member states.

EBLUL will remain at the disposal of the Body elaborating the draft EU charter of Fundamental Rights and other EU institutions as well as member states' governments and parliaments for any further consultations in this matter.

The European Bureau for Lesser Used Languages will also evaluate the possibility of producing more detailed proposals on this matter.

Bojan Brezigar
President
European Bureau for
Lesser Used Languages
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ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

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Brüssel, den 29. Februar 2000

CHARTE 4144/00

CONTRIB 34

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Sie erhalten nachstehend einen Diskussions-Vorschlag der EU-Vertretung der Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege (BAGFW). [1] [2]

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[2] Dieser Text wurde nur in deutscher Sprache übermittelt.

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Diskussions-Vorschlag
der Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege (BAGFW)
zum Entwurf einer EU- Grundrechtscharta

Artikel ….
Recht auf Bürgerdialog und Grundsicherung

(1) Jeder Mensch in der Europäischen Union hat ein Recht auf gesellschaftliche Partizipation (Bürgerdialog) und auf Schutz vor Armut und Ausgrenzung (Grundsicherung).

(2) Der Bürgerdialog wird nach den Prinzipien der Solidarität und Subsidiarität auf lokaler, regionaler, nationaler und europäischer Ebene insbesondere durch die Zusammenarbeit mit den Sozialpartnern, Nichtregierungsorganisationen und Wohlfahrtsverbänden als Akteuren der Bürgergesellschaft gewährleistet

(3) Die Grundsicherung beinhaltet das Recht auf ein sozio-kulturelles Existenzminimum in allen sozialrechtlichen Regelungen. Dazu gehört das Recht auf Inanspruchnahme sozialer Dienste, die unter Mitwirkung von Freiwilligen von den Sozialpartnern und von Wohlfahrtsverbänden als dem Gemeinwohl verpflichtete Akteure des Sozialschutzes und als Träger gemeinnütziger Einrichtungen und Dienste angeboten werden.

Begründung :
Die Bürger müssen mehr Vertrauen in den europäischen Einigungsprozess gewinnen. Die weltweit zu beobachtende, sich weiter öffnende Kluft zwischen Arm und Reich sowie die damit einhergehende Beschäftigungskrise erfordert neue Wege der Bekämpfung von Armut und Ausgrenzung. Nur so kann den Ängsten vor der Globalisierung im allgemeinen und vor der Erweiterung der EU im besonderen Rechnung getragen werden. Das europäische Sozialmodell muss weiter entwickelt werden. Die nach dem gegenwärtigen Stand bereits Ende 2000 von der EU zu beschließende Grundrechtscharta muss deshalb auch soziale Rechte beinhalten.

Für das neu einzuführende Recht auf Bürgerdialog muss die Zusammenarbeit mit den Sozialpartnern, Nichtregierungsorganisationen und Wohlfahrtsverbänden als Akteuren der Bürgergesellschaft gewährleistet werden, und zwar auf lokaler, auf regionaler, auf nationaler und auf europäischer Ebene. Nur durch ausreichende Gewährleistung gesellschaftlicher Partizipation kann das Demokratieprinzip nachhaltig gesichert werden. Dabei müssen die Prinzipien der Subsidiarität und der Solidarität beachtet werden.

Es muss ein Recht auf ein sozio-kulturelles Existenzminimum in allen sozialrechtlichen Regelungen eingeführt werden. Entsprechend Art. 14 der Europäischen Sozialcharta muss das auch ein Recht auf Inanspruchnahme sozialer Dienste beinhalten. Die Zusammenarbeit mit den Sozialpartnern und mit Wohlfahrtsverbänden als Träger sozialer Einrichtungen und Dienste (vgl. Maastrichter Erklärung Nr. 23 zur « Zusammenarbeit mit den Wohlfahrtsverbänden »), die den Beitrag der freiwilligen Dienste zur Entwicklung der sozialen Solidarität nutzen (vgl. Amsterdamer Erklärung Nr. 38 zu « freiwilligen Diensten »), entspricht in besonderer Weise den in Art. 136 des EG-Vertrages (Amsterdamer Fassung) verankerten Zielen der europäischen Sozialpolitik.

Bonn, den 16. Februar 2000 Soscha Gräfin zu Eulenburg BAGFW-Präsidentin

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 8 March 2000 (10.03)
(OR. fr)

CHARTE 4153/00

CONTRIB 40

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find enclosed the opinion of the Committee of the Regions, adopted by the Committee on 16 February 2000.

COM-Inst.Aff./008

Brussels, 28 February 2000

OPINION

of the Committee of the Regions

of 16 February 2000

on the

"Process of drawing up a Charter of Fundamental Rights of the European Union"

The Committee of the Regions,

HAVING REGARD TO the decision of the Bureau of 15 September 1999 to draw up, in accordance with the fifth paragraph of Article 265 of the Treaty establishing the European Community, an opinion on the subject, and to instruct the Commission for Institutional Affairs to prepare the Committee's work on the subject;

HAVING REGARD TO the draft opinion adopted by the Commission for Institutional Affairs on 27 October 1999 (rapporteurs: **Mr BORE** (UK, PSE) and **Mrs du GRANRUT** (F, PPE));

WHEREAS the European Council feels there is a need, at the present stage in the development of the Union, to establish a Charter of Fundamental Rights of the European Union (Annex IV of the Presidency Conclusions of the Cologne European Council on 3 and 4 June 1999) ;

WHEREAS the Convention to draft a Charter of Fundamental Rights of the European Union was set up on 17 December 1999,

adopted the following opinion at its 32nd plenary session of 16 and 17 February 2000 (meeting of 16 February 2000):

*

* *

1. General comments

1.1 The Committee of the Regions has always stressed the need to strengthen citizenship and participatory democracy in the European Union, and the importance of formulating the rights of European citizens to attain this objective; it takes the view that, as the representative of regional and local authorities - the bodies which are closest to the citizens - and as the guarantor of the subsidiarity principle, it should make its contribution to drawing up the Charter of Fundamental Rights of the citizens of the European Union.

1.2 Basic rights constitute the bedrock of a society based on the principles of liberty, democracy, respect for human rights and fundamental liberties and the rule of law, as enshrined in the constitutional traditions which are common to the Member States.

The European Union's capacity to help build a society which corresponds to these aspirations largely depends on citizens claiming these rights - i.e. accepting them and above all exercising them.

1.3 The Committee of the Regions recognises the fast-changing character of the European Union and the growing challenges which it faces at the beginning of the 21st century. The last four decades have seen the gradual development of the European Union. Developing in several phases, an increasing number of European countries have pooled their resources and achieved together a very significant degree of economic growth, social stability and political harmony, without managing to generate the sense of commonality among the citizens of Europe needed to realise the full potential of a social and political Europe which guarantees fundamental rights.

The last fifteen years have seen an enormous acceleration of economic integration with the development of the single European market and a common European economic area. It is due to be further accelerated by the creation in 1999 and putting into circulation in 2002 of the single currency, the Euro.

1.4 A number of steps have been taken towards greater social cohesion and increased political cooperation. These have found expression in the establishment and development of new European institutions such as a directly elected Parliament and the Committee of the Regions and in the introduction of European-wide social and civil guarantees.

At the Council of Europe's initiative, a European Convention on Human Rights was drawn up, allowing for cases to be brought, and there is a European Social Charter which can be used for reference, but without the right to resort to legal action in the event of non-compliance.

It had been envisaged that the European Union as such would be a signatory of the European Convention on Human Rights. This is now excluded by Opinion 2/94 of the European Court of Justice, dated 28 March 1996, which states that this would involve the Community in a distinct international institutional system, that it would introduce all the provisions of the European Convention on Human Rights into the Community legal system, and finally that at the present stage of Community law the European Union does not have the powers to accede to the Convention.

1.5 Up to now, fundamental rights with respect to acts of sovereignty of the Community institutions have been safeguarded in the first place by the European Court of Justice. At an early stage, the Court of Justice established the binding force of fundamental rights as unwritten principles of law at EU level too. The Treaty bases for safeguarding fundamental rights in the EU were expanded and strengthened by the Maastricht and Amsterdam Treaties. The Treaty of Amsterdam, signed on 2 October 1997 and inaugurated on 1 May 1999, represents an important stage in the consolidation of the fundamental rights (cf. Article 6(2) of the consolidated Treaties). However, these wider issues have lagged behind the developments in the economic area.

Moreover, while the Treaty reaffirms the commitment of the Union to fundamental rights, it includes gaps and inconsistencies with regard to the guarantee of these rights or of those linked to the objectives set out.

Acknowledging the existence of these gaps and inconsistencies provides an opportunity to correct them and arrive at a clear, unequivocal text on the basic rights of European citizens and the ways to guarantee them.

1.6 The 1990s have seen signs of greater citizen uncertainty about these developments towards European integration. These have been reflected most recently in the very low turnout for the elections to the European Parliament in June 1999. A quickening in the pace of economic and financial integration, combined with a lessening of confidence by citizens in European institutions, represents a dangerous scenario for the future of the European Union. It requires swift action to bring the social, political and cultural needs of citizens into correspondence with the changing economic realities. This makes the call for a Charter of Fundamental Rights for European citizens all the more important and urgent. However, to address the issue of a lack of public confidence, this Charter needs to be a simple, straightforward, easily understood document, free from the bureaucratic and legalistic jargon that often mars formal constitutional documents.

At a time when the Treaties of Maastricht and Amsterdam have granted new powers to the European Community, giving rise to wider responsibilities in terms of fundamental rights for the Community, and when the Community has chosen not to subscribe to the European Convention on Human Rights, it seems urgent for the Community to take up a clear position on the basic rights which it wishes to see guaranteed to citizens of the Union, following from the scope of its action.

The Committee of the Regions is of the view that the incorporation of these rights into European Union Treaties would give a clear indication of Member States' commitment to building a Union based on the values of liberty, equality and solidarity.

The Committee points out that historically declarations of citizens' rights are preambles to Constitutions and have their *raison d'être* in them, as the basis of the powers needed for the exercise of those rights.

The Committee stresses the constitutional value of the Charter because it feels that the process of drawing up a charter of rights cannot and must not be separated from the institutional reform to be undertaken by the next Intergovernmental Conference.

2. The content of the Charter

The Charter of Fundamental Rights for citizens of the European Union must cover three fields: individual rights, economic, social and cultural rights, and civil and political rights.

The first field should cover the basic rights covered by the Universal Declaration of Human Rights, and more specifically by the European Convention on Human Rights.

2.1 **Rights linked to the person**

- Right to life, right not to be subjected to torture or inhuman or degrading punishment or treatment.
- Right not to be subjected to slavery, servitude or forced labour, right to freedom of movement.
- Right to freedom of thought, conscience and religion, freedom of expression and information.
- Right to a proper civil or penal trial.
- Right to privacy regarding private life, personal data, correspondence and home life.
- Right to housing, right to property and to respect for property.
- Right to health protection.

2.2 **Economic, social and cultural rights**

- Right to work, to freely negotiated working conditions, to a fair wage, to a reasonable length of notice of termination of employment, to appropriate vocational guidance, training and re-training.
- Right to freedom of movement and establishment for workers and to equality of treatment with workers of the country concerned.
- Right to equality of opportunity and treatment, without discrimination based on race, sex, colour, ethnic, national or social origin, culture, language, religion, political beliefs, family situation, sexual orientation, age or disability.
- Right to set up trade union organisations and right to collective bargaining, information, consultation, and participation for decisions affecting workers' interests.
- Right to social security, social and medical assistance, and the benefit of social services.
- Right to education, right to freedom to choose an occupation and right to continuing vocational training.
- Rights linked to economic and entrepreneurial activity: right to property, right of competition, right to conclude contracts, etc.

2.3 **Civil and political rights**

- Right to vote in local and European Parliament elections for non-nationals from other EU countries in the Member State where they are resident.
- Right to set up European political parties, right of petition, association and demonstration.
- Right to local democratically constituted decision-making bodies.
- Right to check on legality of administrative action.
- Right of minorities to protection for their religion, language and culture.
- Right to equal opportunities of women and men in all decision-making fields.

2.4 Clearly, these rights cover a very broad canvas. The crucial task is to make them meaningful and practical, so that they give people a clear sense of the rights they enjoy across the European Union as a whole.

It is not enough to define rights. The principle of their justifiability must be established and appropriate access to national courts and the European Court of Justice defined or clarified, to ensure that rights can be exercised in practice.

2.5 As well as detailing these rights, the Charter should contain, as appropriate, complementary clauses expanding on particular aspects. This opinion from the Committee of the Regions wishes to highlight a number of areas where this is felt to be necessary.

2.5.1 In an increasingly multi-cultural, multi-racial, multi-ethnic European Union equal opportunities is a "horizontal theme" which cuts across a number of these rights. Thus, the Bill of Rights should guarantee the right to equality of opportunity and treatment without any distinction of race, ethnic, national or social origin, language, religion, gender, marital status, sexual orientation, age or disability.

2.5.2 In the light of the conclusions of the Tampere European Council on 15 and 16 October 1999 and its resolutions on the integration of third country nationals, the Committee of the Regions believes that the body responsible for drawing up the Charter of Fundamental Rights should examine the issue of whether long-term residents should be granted a set of rights that resemble as closely as possible those of EU citizens.

2.5.3 The right to a fair, public hearing needs to be reinforced by the creation of common legal standards and a common sense of justice throughout the European Union. Given the huge and growing degree of travel within the European Union for work, leisure and tourism, a set of common standards to ensure a common level of justice and fairness should be applicable across all EU Member States. We give two examples: a guarantee that effective legal advice and where necessary, language interpretation services are available for EU citizens arrested outside their home Member State; the establishment of a common system of European bail so that people are not arrested and held on remand in cells in another country for lengthy periods.

2.5.4 Finally, with regard to the rights of private individuals, the new charter of rights needs to recognise the contemporary reality of patterns of divorce, separation and remarriage within modern European society. The new charter should make clear the rights of mothers and fathers to have fair and equitable access to their children in the event of divorce and/or separation; and indeed the rights of children to be able to see both of their parents if they so wish on a regular basis.

2.5.5 The Charter of Fundamental Rights must also address questions related to new areas such as the knowledge society, environmental changes or biotechnology.

2.6 Beside these four specific areas where the introduction of the Charter of Fundamental Rights into European law will give clear civil and social rights to residents of the Union and help to match the growing common European economic space with a complementary social, civic and political space, the Committee of the Regions wishes to stress three issues related to European citizenship.

2.6.1 The Charter will enable each national of an EU Member State to identify his specific European citizenship as involving new rights and expressing membership of the new entity known as the European Union.

European citizenship is a major challenge for the European Union; it is not an alternative to national citizenship; it is at once complementary, unique and resolutely political.

For the Committee of the Regions the Charter of Fundamental Rights is the foundation of European citizenship.

2.6.2 The Committee of the Regions takes the view that the fundamental rights have a constitutional value, enabling individuals who enjoy them to appeal to the relevant courts, where appropriate national courts, the Council of Europe's Court of Human Rights and the Court of Justice of the European Communities, every time such a right is threatened.

The Committee of the Regions considers that fundamental rights need to be effectively guaranteed within the European Union, within a framework that ensure that citizens will have recourse to appropriate legal remedies.

2.6.3 The Charter of Fundamental Rights should therefore reiterate **in some form** the principles of local self-government as set out in Article 3 of the Council of Europe's Charter of Local Self-Government.

2.6.4 The fundamental rights therefore have an essential political dimension, because they link the democratic basis of political society with its limitation by the recognition of citizens' rights.

The Committee of the Regions is convinced that this right of participation in public life, exercised first and foremost by electing local authorities, is the first and indispensable link in a chain of political responsibilities in which the citizen must participate and feel involved.

Once the citizen feels a part of the chain of power emanating from him and extending to the summit of the European Union, he will accept the constraints of the "res-publica" and the decisions of those whom he has entrusted with it.

The fundamental rights thus lay the basis for participatory democracy, which respects the citizen's power and that of the various levels of authority to which he delegates his power.

2.6.5 As regards social and economic rights, the principle of subsidiarity needs also to be taken into account, given the different social, economic and legal structures within the Member States.

3. The future process

3.1 European Union leaders have agreed to the proposal for the drawing up of a Charter of Fundamental Rights. The preparation of the Charter is the responsibility of a working group made up of representatives of the governments of the Member States, a person appointed by the Commission President, MEPs and national parliamentarians. The Committee of the Regions is to be consulted in this procedure and has been invited to speak to the Convention , but it believes that it should be more fully involved and be given observer status.

In compliance with the subsidiarity principle, the Convention advocated by the European Council for drawing up the charter should be wide enough to allow every level concerned, that is Europe, the Member States and local and regional authorities, to obtain a hearing for their views on the content of the European Charter of Fundamental Rights and in particular enable the public to express views and have access to information prior to decisions being taken by Europe and the Member States.

3.2 The proposal to develop a Charter of Fundamental Rights is an important step forward by the European Union. The COR intends to participate fully in this process and to take forward the ideas contained within this opinion into that wider forum. The COR representatives will highlight the main themes in this opinion during the forum's deliberations. The COR does not rule out drawing up a further position which could supplement and clarify the opinion in the light of the work of the Convention responsible for drawing up the draft Charter of Fundamental Rights to be submitted to the European Council in Nice in December 2000. At the same time they will stress the importance for the final document not only to be incorporated within the EU Treaties, but also to be produced as a stand-alone document highlighting the key elements that form Europe's bill of political, social and civil rights.

4. Conclusion

4.1 The European Union is very much at a watershed in its development. It is vitally important that urgent steps are taken to involve the public in decision-making so as to boost public confidence in both European institutions and the European Union as a whole. Making clear, in very practical and straightforward terms, the key economic, social, cultural, civil and political rights which the Union guarantees to all of its members is the urgent task. The development of a Charter which gives expression to a citizens' and people's Europe, which will complement the common economic space which is currently being developed, is the way forward. This should be the clear goal and objective of the Charter of Fundamental Rights. That is the task which the Committee of the Regions and its representatives will argue for in the months ahead.

4.2 The Committee of the Regions comes out firmly in favour of a Charter of Fundamental Rights of the citizens of the European Union, which will give the Union homogeneous, coherent Community law with constitutional value within which these rights may be effectively exercised.

4.3 Thus the European Union, governed by law and based on adherence to common values which are legally guaranteed, will be enshrined in that form in the next Treaty on European Union.

Brussels, 16 February 2000

The President
of the Committee of the Regions

Jozef Chabert

The Acting Secretary-General
of the Committee of the Regions

Vincenzo Falcone

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPEENNE

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Bruxelles, le 14 mars 2000

CHARTE 4155/00

CONTRIB 41

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution intitulée "Convention europeenne de protection contre la violence et le harcelement raciste" soumise par M. Joël Zylberberg, psychoanalyste, expert devant les tribunaux Belges. [1] [2]

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[2] Ce texte a été soumis en langue française uniquement.

TRAVAUX CONÇUS ET DIRIGES PAR
JOËL ZYLBERBERG,
PSYCHANALYSTE, EXPERT DEVANT LES TRIBUNAUX BELGES.

CONVENTION EUROPEENNE

DE PROTECTION CONTRE LA VIOLENCE ET

LE HARCELEMENT RACISTE

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DEUXIEME PARTIE : PROJET DE CONVENTION EUROPENNE

1. INTRODUCTION

Si le politique ou le législateur est appelé à prendre position au sujet du racisme il est primordial qu'il prenne le temps d'étudier, une bonne fois pour toute, la nature de ce qu'il prétend traiter **avant** de s'exprimer !

C'est trop souvent par méconnaissance, qu'il recourt à des arguments paralogiques permettant au racisme de se développer tout en étant apparemment combattu.

Il serait sain que nos dirigeants prennent le temps de s'interroger sur l'existence même du racisme au sein de la société en tant que révélateur de leur méconnaissance des mécanismes qui le sous-tendent.

Car, au-delà des discours creux, personne ne semble disposé à établir le constat paradoxal suivant, comme point de départ de l'absolue priorité à devoir le combattre sous un autre angle : **LE RACISME CROIT PAISIBLEMENT GRACE A LA DEMOCRATIE.** Les rares esprits brillants de ladite démocratie qui ont vaguement perçu le phénomène, en ont conclu, par une erreur de raisonnement supplémentaire, qu'il fallait incriminer à la publicité que l'on faisait indirectement au racisme en le traitant, la cause de ce paradoxe. Cet « argument » les conduisit, tout naturellement, à la super conclusion que seul le **SILENCE** pouvait combattre le racisme.

En extrapolant à peine, dans la voie de ce discours, le seul remède contre le racisme serait feindre de l'ignorer ! N'oublions jamais qu'il est autant à craindre du silence des pantoufles que du bruit des bottes !

Il n'est que trop significatif qu'il faille pousser le raisonnement adopté par nombre de démocraties, presque jusqu'à la caricature, pour qu'il révèle l'exacte nature de ce qu'il renferme. La démonstration qui précède illustre combien, laissé en l'état, il donne bonne conscience à ceux qui l'adoptent, puisqu'il ne crache son paradoxe que si on le presse au-delà de sa logique apparente.

Or la seule conclusion logique, à laquelle ce paradoxe devrait amener tout esprit en alerte, est que si le racisme croît lorsqu'on le combat c'est parce que le remède n'est pas adapté au mal.

Cette bavure découle de l'ignorance de la nature EXACTE du mal. Il est donc vital pour notre société de reprendre l'étude du phénomène à la base et d'en dégager, à partir de ces nouvelles données, des moyens adaptés et par conséquent efficaces à combattre ce fléau. **CE N'EST QU'A CE PRIX QUE L'ON CONSTATERA QUE LE SEUL MILIEU OU LE RACISME NE PEUT CROITRE C'EST LA DEMOCRATIE JUSTEMENT !**
Il serait temps que le racisme sache que le glas sonnera pour lui le jour où la démocratie sortira de sa position frileuse et somnolente à son égard. Le paradoxe naît de ce que les moyens ne sont pas adaptés à la nature du phénomène et non du combat en lui-même.

* *
*

2. ETUDE DE LA NATURE REELLE DU RACISME

LE RACISME EST L'EXPRESSION D'UN TROUBLE PSYCHIQUE !

En tant que tel, le racisme n'est que la partie apparente d'un iceberg, alors ne faisons pas comme l'idiot qui, lorsqu'un doigt pointe vers la lune, regarde le doigt !

En fait, le racisme est l'expression, l'extériorisation, non d'une opinion mais de l'arrêt du développement mental de l'individu qui en est porteur, au stade de l'enfant confronté à la découverte de l'autre et par conséquent à la prise de conscience de lui-même. **LE RACISTE EST MENTALEMENT UN ENFANT DANS UN CORPS D'ADULTE.**

Pour bien mesurer la portée de cet éclairage il nous faut faire référence à l'évolution du petit d'homme en général ce qui permettra de mieux cerner en quoi le racisme est la **conséquence** d'une évolution individuelle pathologique.

Qu'il nous soit fait crédit par le lecteur, jusqu'à ce qu'il atteigne la fin de ce paragraphe, que le développement qui va suivre s'inscrit dans la substantifique moelle de notre explication et n'est, en aucune façon, une digression de « psy. » en manque d'interprétation sauvage à propos de tout et n'importe quoi. L'effort consenti par le lecteur à ce stade de notre développement le positionnera sur un plan tel, qu'au terme de cet article, il n'aura plus le regard fixé sur le doigt mais bien vers la lune !

Dans l'histoire de tout être humain, la prise de conscience de son identité n'est pas un acquis depuis la naissance, mais est le fruit d'un long processus maturatif que l'on peut, pour les besoins de la démonstration, scinder en quatre étapes :

PREMIERE ETAPE :

Avant sa naissance tout un chacun préexiste pour ceux qui vont le concevoir et est le fruit d'un désir. Ses géniteurs le créent en lui ayant attribué une place pour qu'il puisse advenir. Pendant la grossesse on l'imagine, on lui parle, on lui aménage son espace, on lui attribue un nom… En fait, depuis l'idée de la conception jusqu'à la naissance, ce qui préside à l'histoire de tout être, qui aura ou non la chance d'exister à ses propres yeux un jour, est le résultat plus ou moins heureux de la séquence synthétisée ci-dessus. Le bon déroulement de cet enchaînement fait de la naissance l'aboutissement d'une première étape de l'évolution de l'être et non son début.

Le bébé naissant dans un tel contexte est comparable à la pièce maîtresse manquante d'un puzzle dont les contours sont parfaitement définis par les pièces qui l'entourent et qui n'a plus qu'à prendre place à l'endroit qui l'attend, complétant ainsi le tout conçu pour lui et lui donnant sens. Un tel bébé, désiré, attendu et reconnu trouvera dans son entourage la sécurité nécessaire pour poursuivre son évolution vers notre deuxième étape.

DEUXIEME ETAPE :

Elle s'étend en gros sur les huit à dix premiers mois de la vie. Elle devient visible à partir d'un zoom arrière effectué au départ de la première où elle apparaît comme l'englobant. La future notion de conscience de soi s'inscrira dans une continuité ou dans un chaos, selon que cette étape prolonge harmonieusement ou non la précédente.

Elle comprend cette période où le bébé et l'entourage interagissent avec plus ou moins de bonheur pour répondre le plus adéquatement possible à un compromis entre la place que le bébé prend, tant par sa présence physique que par l'éveil de sa personnalité, et la place que l'entourage, de par la personnalité des gens qui le composent, est prêt à lui consentir en fonction de l'image qu'il avait de lui avant sa naissance.

En d'autres termes, la poursuite du développement normal d'un petit d'homme dépend de la délicate résultante entre lui et :

1° la place que les membres de son entourage lui donnaient à l'intérieur d'eux-mêmes avant sa naissance

2° La place que les membres de son entourage lui donnent depuis sa naissance.

3° Sa présence physique réelle

4° Ses traits de caractère innés.

En résumé, à cette étape, l'enfant reçoit ou non une place effective dans le monde aux yeux des autres alors qu'il ne sait pas qui il est.

Il existe pour les autres alors qu'il n'a pas conscience d'exister à ses propres yeux !

Cette étape peut être comparée à l'existence, pour l'enfant, d'une continuation, sur le plan psychique, de la vie intra-utérine, où il baignait dans un milieu qui subvenait à tous ses besoins.

Du point de vue de l'enfant, à ce stade, le degré de **différenciation entre lui et les autres est quasi nul**. Vue sous l'angle qui nous intéresse, la fin de cette période se signale par un changement d'attitude qu'adoptera l'enfant vis-à-vis des personnes ne faisant pas partie de son entourage direct, ce qui témoignera d'un cap dans l'acquisition d'un nouveau degré de différenciation.

TROISIEME ETAPE :

L'enfant adopte une **attitude de retrait,** voire de peur, lorsqu'il est mis en présence d'êtres qui ne lui sont pas familiers, alors qu'avant, il ne manifestait aucune différence de comportement, quelle que fût la nature de celui en présence duquel on le mettait.

Or, on constate que les manifestations de peur sont d'autant plus intenses que l'enfant n'a pas pu développer des liens positifs puissants avec les membres de son entourage proche.

En d'autres termes, la place que l'enfant va donner à l'existence de l'autre, alors qu'il ne sait toujours pas lui-même qui il est, est d'autant plus facile à intégrer qu'il aura évolué dans un milieu où il possédait une place aux yeux des siens.

Réciproquement, il va rejeter l'existence de l'autre à l'image du rejet dont il fut victime !

La compréhension de cette étape est capitale pour la suite de nos propos car elle lie la manière dont un bébé réagit vis-à-vis d'un autre à la manière dont on a agi vis-à-vis de lui antérieurement.

La précocité de cette loi (nous parlons des premiers mois de la vie !) devrait retenir toute l'attention du lecteur car, comme il le pressent, du moins l'espérons-nous, elle contribue grandement à définir ce qui plus tard ne donnera lieu, pour certains, qu'à une expression parmi d'autres d'une opinion « démocratiquement » respectable et qui s'appellera **LE RACISME ! !**

Il manque encore toutefois quelques chaînons à notre démonstration pour que son analyse soit limpide.

Que traduit l'apparition de ce comportement chez l'enfant ?

- **Primo**, que le bébé a atteint un degré de maturité suffisant lui permettant d'accéder à un niveau de discrimination où il prend conscience qu'il existe une différence entre les individus (ce qui n'était pas perçu auparavant !).

Ceci conduit à la création de deux classes d'individus : d'une part ceux qui lui sont proches et donc **ses familiers** auxquels il sourit et qui le font rire et d'autre part, ceux qui lui sont éloignés et donc **étrangers** et qui lui font peur et pleurer.

- **Secundo**, que c'est par la présence des autres (compris comme le reste du monde moins son entourage), que le bébé va acquérir la notion complémentaire des siens. La prise de conscience de l'identité des siens n'est possible, en tant que forme consciente, que parce que le degré de sa maturité lui fait d'abord apparaître le reste des individus comme le fond.

La forme ne se détache et donc n'existe que grâce au fond : avant lui tout est uniforme ! Rien ne se détache de rien, tout est interchangeable (lui, les autres, le monde, le dedans, le dehors). Puisque rien n'a de statut propre, rien n'existe ! En conséquence, et alors que le bébé n'a toujours pas conscience de son identité propre, c'est par la pertinente information que lui apporte, sans le vouloir, l'étranger à son entourage, qu'il va pouvoir ressentir un lien d'appartenance liant les individus distincts de son milieu.

En d'autres termes la conscience de l'existence des autres étrangers est la manifestation PREMIERE, NECESSAIRE à ce que la conscience de l'existence des autres proches puisse advenir !

- Tertio, que le risque est que cette expérience princeps se vivant dans un premier temps sur fond d'anxiété et de peur, il n'assimile la conscience de l'autre à une expérience négative.

Le racisme part du tertio ! ! …

Ici, deux cas de figure se présentent :

a) soit le bébé a grandi dans un milieu favorable où il a eu sa place et l'expérience évolue positivement car le milieu, par son action, joue un rôle apaisant ; alors, le phénomène ne réactive pas la trace chez l'enfant d'un vécu semblable, rapporté à lui, et où il n'eut pas de place en tant qu'autre.
b) Soit le milieu est défavorable et l'expérience réactive la souffrance liée à l'histoire propre du bébé. La peur s'enracinera alors et il aura tendance à percevoir l'existence de l'autre comme cause de cette peur.

La réaction « normale », de son point de vue, sera l'agressivité dirigée contre l'autre pour le détruire afin de supprimer, croit-il, la peur.

L'autre, de par son existence, devient un reproche vivant qui empêche de « vivre ».

Toute l'énergie de l'individu est mise au service de cette cause de survie et aucun moyen ne semble déplacé pour atteindre sa fin.

L'existence de l'autre devient son obsession et légitime tous ses actes dont la place de la parole à ce stade (huit à dix mois) est assez absente (bonjour la future démocratie !).

Il se sent victime de l'existence de l'autre et devient bourreau par défense ! ? ! …

QUATRIEME ETAPE :

C'est celle de la prise de conscience de soi qui s'étend plus ou moins du huitième au vingt-quatrième mois.

A ce stade, le niveau de conscience de départ auquel se trouve le petit d'homme sera avantageusement illustré par l'expérience suivante : si vous mettez un enfant de cet âge devant un miroir il ne se reconnaîtra pas. Plus encore, il aura tendance à aller voir derrière le miroir et il imitera les gestes que sa propre image lui renvoie, de la même manière que mis face à un autre enfant du même âge, il imitera ses gestes. De cette expérience nous pouvons tirer l'enseignement suivant :

1°/ l'enfant n'a pas une conscience innée de lui puisqu'il vit son image comme si il s'agissait d'un autre enfant .

2°/ L'enfant qui a conscience de lui-même a acquis cette notion.

3°/ **L'acquisition de la conscience de soi se fait par et grâce à l'existence d'un autre.** En effet, c'est grâce à la perception globale du corps d'un enfant du même âge que lui, que le bébé va acquérir la conscience de l'entité du sien.

C'est donc à nouveau la présence mais cette fois-ci d'un pair, qui sera la condition nécessaire à l'évolution de la prise de conscience propre qu'aura l'enfant de lui-même. Dans cette évolution vers la prise de conscience de soi il y a d'abord confusion : **le bébé se prend pour l'autre !**

Quand l'autre se fait mal et pleure, le bébé qui n'a rien se met à pleurer. Quand il frappe sur l'autre, il dit que c'est lui qui est battu.

La source de l'identité propre d'un être est l'autre et ce n'est que dans un deuxième temps que l'enfant va pouvoir acquérir la conscience de lui-même à la première personne.

En bref, lors d'une évolution normale, pour qu'un individu puisse un jour se prendre pour lui-même, il faut qu'il se soit pris au départ pour un autre !

Il est également à noter que, à cette étape, l'enfant ne dit pas **JE** quand il parle de lui-même, mais il dit « **IL** » ! (ou il s'appelle par son prénom).

Cet indice linguistique supplémentaire prouve que la notion de conscience de soi n'est pas innée et que, même dans l'acquisition du langage, **l'enfant adopte le point de vue de l'autre pour parler de lui !**

Après cette synthèse de l'évolution normale chez tout individu, de la notion d'entourage familier et de la notion de prise de conscience de soi, **nous allons enfin pouvoir analyser correctement la nature même du phénomène raciste.**

Quels sont les ingrédients du propos raciste et leurs articulations ?

1°/ La peur de ce qui **N'EST PAS FAMILIER** rapport à un entourage connu et prétendument sécurisant. Sur le plan adulte, la notion de famille proche, existant vers plus ou moins huit mois, est devenue la notion de NATION et la seule identité possible est **L'IDENTITE NATIONALE.**

2°/ L'insécurité, engendrée par la présence d'étrangers n'ayant pas la même origine, est définie comme la **CAUSE DE L'INSECURITE**.

3°/ L'accroissement du sentiment de l'identité nationale est présenté comme le **REMEDE** à la peur et à l'insécurité.

4°/ Identifié comme la cause de la peur et de l'insécurité, **l'étranger** est donc bien un **agresseur** qui, n'étant pas chez lui sur la terre du raciste, est **PAR NATURE** hors la loi ! Toute réaction pour l'en chasser est donc assimilée à de la légitime défense, le raciste étant victime de l'agression que perpétue l'étranger par sa seule présence.

5°/ La résistance de l'étranger à rentrer chez lui justifie le recours à la violence devenue légitime. C'est dans un ultime effort de « respect » de l'étranger que le raciste le convie gentiment à disparaître de sa vue, faute de quoi la résistance que manifesterait l'étranger à reconnaître sa nature d'agresseur obligerait le raciste, bien malgré lui, à recourir à la **violence légitime,**

institutionnalisée comme seul moyen de survie et étant décrite comme l'étape « malheureusement » nécessaire à pouvoir enfin vivre en paix entre gens de bien.

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3. ANALYSE CRITIQUE DU RACISME, DE LA NATURE DE SES PROPOS A SA LOGIQUE INTERNE.

Le lecteur objectif qui nous aura suivi jusqu'à ce point ne pourrait qu'être frappé par la révélation de ce que la nature des propos racistes est identique en tous points à la nature des notions définissant l'évolution normale de tout être face à son environnement et face à la prise de conscience de lui-même (peur, insécurité…).
Or, si l'évolution normale de ces étapes conduit un individu à vivre en harmonie avec les autres et avec lui-même, la reprise de ces même notions par les racistes, avec comme but final l'élimination de « l'étranger », prouve que **LE RACISME EST L'EXPRESSION D'UN CONFLIT INFANTIL NON RESOLU.**

Qu'il n'est que la traduction, par des êtres psychologiquement immatures, d'une pathologie relationnelle dont l'origine se situe dans l'échec de l'évolution de la conscience de soi, ainsi que de celle de son rapport à l'entourage proche.
C'est en effet **L'ABSENCE** d'un entourage proche et chaleureux, n'ayant offert aucune place à l'enfant qu'il fut, qui précipitera, par un **DOUBLE RETOURNEMENT** (1°/ de la famille sur le monde extérieur et 2°/ de son désespoir en agressivité), le futur raciste dans sa haine du non familier. Sa peur légitime, lors de ses premières expériences de contact avec l'étranger à sa famille, n'est pas adoucie par son milieu proche. Il va donc attribuer comme cause à sa peur la présence de l'autre.

Alors que cette peur n'est que l'indice d'une évolution normale et, comme nous l'avons décrit plus haut, ne devrait être que passagère, elle devient permanente par la carence du **rôle tampon** que devraient jouer ses parents proches à cet période cruciale.

La peur et l'insécurité exprimées par les racistes proviennent de cette période de leur évolution et **N'A RIEN A VOIR AVEC L'EXISTENCE PRESENTE D'ETRANGERS POUR EUX.** Si ce n'est que cette **présence réactive** le traumatisme infantile, ce qui les pousse doublement à souhaiter leur disparition !

C'est par un renversement que, adulte, le raciste idéalise la **nation** comme sa famille proche (cf. point 1 des propos), alors qu'enfant c'est justement sa famille proche, son entourage familier qui était carentiel par rapport à ce qu'il en attendait. Il faut bien comprendre qu'il est souvent **psychiquement intolérable** pour un être d'attribuer à des figures aussi fondamentales de son existence que sont son père ou sa mère la cause de son désespoir.

Voici pourquoi le **premier renversement** s'opère **vers l'extérieur**. L'intolérable, dû en réalité à l'absence d'une identité familiale sécurisante, ne vient plus de l'intérieur mais de l'extérieur à son monde ! Comme il a rejeté dehors le négatif, **l'intérieur devient MAGIQUEMENT positif !**

La dynamique du point deux des propos racistes (insécurité) est directement issue du même processus, et se doit d'idéaliser à ce titre l'identité nationale (assimilée au **pôle positif interne**) comme le creuset sécurisant, garant de l'apaisement de la peur citoyenne légitime face à l'étranger (assimilé au **pôle négatif externe**).

N'oublions pas que **ce premier renversement va masquer à tout jamais la réalité et précipiter l'individu dans un monde de mensonges par rapport à lui-même, ouvrant la voie à la pathologie.**

La source de l'intolérable se voyant à présent localisée à l'extérieur, le **deuxième renversement** va s'opérer et aura pour résultat de muer le désespoir interne en agressivité externe. Cette agressivité est dirigée vers celui dont la présence involontaire a révélé inconsciemment cette carence affective du milieu proche et qui peut, à présent, être consciemment identifié comme la source intolérable ! « C'est sa faute si tout ça est arrivé »… Voilà le point quatre des propos racistes qui montre le bout de nez : « l'étranger est la cause de la peur et de l'insécurité et est donc bien un agresseur » ! ?

Il devient « **LOGIQUE** », à partir de cette perception tronquée de la réalité, que c'est par sa nature que l'étranger est responsable du préjudice qu'il inflige au raciste. Que cette manière de ne pas comprendre qu'il l'agresse est irritante en soi ! Que tout ceci arme la légitime violence comme droit à la défense de sa survie ! ?…

Or, «l'étranger » d'aujourd'hui dans l'histoire du raciste ne comprend pas plus que celui d'hier, dans l'histoire de l'enfant qu'il fût, le rôle qu'on lui attribue.
Sa présence, dans les deux cas, est involontaire et n'a, du chef de l'étranger, aucune intention destructrice à l'égard de quiconque.

Vécu à l'échelle de son drame personnel, tout ceci n'est que la résultante d'un double renversement, qu'adulte, il projettera sur la scène du monde, inconscient de sa méprise !

Le raciste va donc se mettre « légitimement » à battre l'étranger (point 5). Tel l'enfant de plus ou moins huit à dix-huit mois qui dit être battu lorsqu'il bat, le raciste aura le vécu d'être la victime luttant pour sa survie face à l'agresseur étranger.

Or, justement, en voulant détruire l'autre, le raciste signe la pathologie de son évolution : rappelons-nous que le décours d'une évolution normale de la conscience de soi passe immanquablement par un stade où l'autre est le référent qu'introjecte le petit enfant comme source à son identité. La négation de l'existence de l'autre conduit au fantasme d'auto-engendrement, qui plus tard chez le raciste, prendra la forme de sa xénophobie, ne lui réservant le droit de se reproduire qu'avec des individus appartenant au même « groupe ».

L'aboutissement de la logique interne du raciste lui impose de se perdre une deuxième fois, car, à l'image du traumatisme de son enfance où il refusa à l'autre d'être le support de son identité, ce qui l'empêcha d'acquérir une identité mature, il définit l'étranger comme destructeur et ne peut par conséquent pas voir en lui la source qui pourrait enfin le faire exister.

En refusant le miroir de lui-même qu'est tout être humain, le raciste meut son existence, ainsi que celle de sa civilisation, **en mouroir** dont il rendra responsables ceux-là même qui étaient sa planche de salut !

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4 CONCLUSIONS PROVISOIRES :

A) ANALYSE CRITIQUE DES MECANISMES D'EVOLUTION DE L'IDEE RACISTE.

B) PASSAGE DU NIVEAU INDIVIDUEL AU NIVEAU GROUPAL.

Ce long développement fut rendu nécessaire parce que l'attitude de certains démocrates face au racisme nous semblait indigne. A présent, un peu mieux informés des racines profondes du racisme, nous espérons qu'ils auront quelques réserves à soutenir que le racisme est à considérer comme une opinion politique parmi d'autres qui, bien que ne recevant pas leur aval quant au fond, devrait jouir du droit à l'expression.

Nous espérons qu'au terme de notre analyse ces mêmes démocrates prendront conscience que le racisme est l'expression d'une pathologie relationnelle reflétant une immaturité psychologique et dont sont le siège des individus infantiles. Le racisme est la traduction d'un tentative inconsciente de solutionner un problème identitaire propre à l'individu.

IL N'Y A PAS DE PROJET SOCIAL DANS LE RACISME.

S'il regroupe des gens, ces derniers souffrent tous de la même pathologie c'est ce qui les unit ! Enfants enfermés dans des corps d'adultes, privés de maturité, ils adulent un chef qui pense à leur place. Cette configuration donnera au racisme la forme d'une **PIEUVRE** : une « tête pensante » et des tentacules.

C'est dans cette structure que réside le vrai danger car **si les adeptes du racisme pensent comme des enfants ils frappent comme des adultes !**

Cet aspect illustre que le racisme ne peut recruter que chez des êtres immatures, décérébrés, qui forment corps autour de ce chef.

Or, si le racisme recrute c'est parce que **la nature de son discours est pervers !** Il utilise les mots, la communication, non pour éveiller l'esprit des citoyens permettant que chacun d'entre eux devienne une tête pensante, capable de condamner tout propos portant atteinte à la dignité humaine, mais comme une pompe à vide destinée à faire disparaître en eux tout reste d'humanité.

A ce premier stade**, le discours** manipulateur **du « chef » opère une illusion criminelle** : il provoque le sentiment d'exister chez certains citoyens, au moment même où il les prive de leur droit à l'existence propre ! Il atteint son but suprême lorsqu'il a réussi a transformer les citoyens qui l'écoutent en morts-vivants.

Le racisme est un discours de mort qui a rendez-vous avec la mort, dont la survie dépend de cette unique tête pensante à laquelle ils adhèrent pour ne pas mourir une deuxième fois**.** Le **paradoxe du racisme** c'est que ses adhérents vont vouer fidélité et abnégation à celui-là même qui les a mis à mort. Le racisme est d'abord l'assassinat mental de ses adhérents.

Comme on le constate, la pieuvre du racisme n'a pas visage humain et ne respecte même pas la dignité de ceux qui « y adhèrent », puisqu'elle les prive de leur cerveau.

Or, l'idéal de la démocratie est la multiplication des têtes pensantes.

Il est capital que les citoyens prennent conscience de ce que le racisme est au sein de la démocratie comme une poudrière munie d'un système de mise à feu à retardement.

Prétendre qu'en parler c'est lui faire de la publicité, c'est mal en définir la nature. Il faut savoir que le racisme est comme la moisissure. Comme elle, mise à la lumière, elle se dessèche et ne peut se développer. Ce n'est que dans l'obscurité des esprits qui sommeillent qu'elle prend corps, alors que les projecteurs de l'information ne peuvent contribuer qu'à l'éveil des consciences.

L'histoire a prouvé que lorsque le racisme tente de s'ancrer ce n'était ni le fait de se boucher les oreilles ni celui de se cacher les yeux qui n'avait désamorcé ou empêché son explosion.

Le ferment du racisme est l'ignorance, la bêtise, les préjugés, la violence.

Démonter les mécanismes simplistes sur lesquels le racisme prend appui, ses raisonnements tronqués, ses manipulations, ses généralisations fallacieuses, ne peut que l'affaiblir en renforçant l'esprit critique des citoyens les rendant attentifs et actifs dans la lutte contre ce **virus de la démocratie.**

Ce changement d'attitude n'est envisageable que par une participation active des médias et des politiques qui, bien loin de se contenter du silence au pire ou d'une répercussion passive de l'information au mieux, adopteront une position critique et engagée mettant en évidence les mécanismes qui se prétendent invisibles et qui sous-tendent l'architecture du racisme.

De plus, **ne pas parler** de l'existence d'une réalité qui ronge les entrailles de la démocratie **c'est se rendre complice actif** de son évolution **par le consensus du silence** en infantilisant les citoyens par une attitude paternaliste ou l'on décide de ce qu'il est bon ou non de leur divulguer.

Or, justement, c'est cette attitude de déresponsabilisation des citoyens qui contribue à en faire des citoyens irresponsables et vulnérables parce que faibles face à un discours de propagande visant à les faire agir comme un seul homme en les privant de tout esprit critique.

Le racisme ne peut que se briser s'il se heurte à des citoyens adultes et réfléchis dont on ne pourra noyauter la solidarité autour d'une idée simpliste et globalisante jetant l'anathème sur d'autres humains.

Le racisme est, rappelons-le, une pieuvre qui n'autorise qu'une tête pensante transformant le reste des citoyens en autant de tentacules décérébrées destinées à lui obéir aveuglément. Combien de citoyens conscients et informés sainement seraient candidats à ce destin ?

Ne pas parler du racisme c'est entretenir l'analphabétisme civique des citoyens.

N'oublions jamais que si l ' Histoire se répète ce n'est pas parce qu'elle est un mauvais professeur mais parce qu'il n'y a pas d'élèves dans sa classe. Combattre le racisme en en parlant c'est permettre de remplir la classe de l'Histoire et donc contribuer à ce qu'elle ne se répète plus.

Or, les démocraties agissent trop souvent inconsciemment envers le racisme, comme le ferait un adulte vis-à-vis d'un enfant, ne lui prêtant pas plus d'intérêt ! Il faudrait pourtant à tout prix combattre le germe de l'idée raciste pour ne pas avoir à combattre ses conséquences.

Que les démocraties prennent garde à ce que laissant le racisme affirmer que l'enfer c'est les autres il ne les transforme en brasier !

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1. 5. INTRODUCTION AU PROJET DE CONVENTION

L'éclairage que nous avons apporté dans les pages précédentes ouvrent les portes à une toute nouvelle approche du racisme.

Peut être qu'à ce stade, certains lecteurs seraient encore habités par quelques scrupules à ôter au raciste le droit de recourir à quelques principes appliqués en démocratie tel l'exercice de «la liberté d'expression». ?!

A ceux là nous aimerions proposer la réflexion suivante : peut-on indéfiniment prétendre que le droit, démocratiquement acquis, d'exprimer une opinion puisse servir de cadre de référence à l'expression de contre-vérités consciemment sélectionnées et « savamment » articulées ? !

A) IL FAUT RESERVER L'EXERCICE DES LIBERTES DEMOCRATIQUES AUX SEULS DEMOCRATES

L'argumentation selon laquelle tout raciste en raison du fait qu'il vit en démocratie aurait droit à en revendiquer les privilèges doit être réfutée parce qu'elle est construite sur un sophisme.

La structure de ce sophisme est la suivante :

La démocratie permet la liberté d'opinion,

le raciste vit en démocratie,

donc le raciste a le droit à la liberté d'expression.

Le défaut de cette argumentation ressort si on affirme une fois pour toute que :

1°/ Si **le raciste** vit en démocratie il **n'est pas démocrate** puisque l'opinion, dont il revendique le droit à l'expression, s'attaque à l'origine même de l'espèce dont il est issu et que

2°/ Par son attitude **il se met lui-même hors de la démocratie**.

On ne peut, par conséquent, concevoir logiquement que cette dernière lui accorde ses privilèges ou qu'il se permette de les revendiquer.

La position du raciste est léonine en ce qu' **il avance en utilisant la démocratie comme masque** exigeant les droits qu'elle offre sans en respecter les devoirs.

Tendant à considérer l'individu raciste comme un "super-citoyen", cette argumentation est de ce fait particulièrement dangereuse. Cette constatation peut être faite si on garde à l'esprit que la liberté d'expression n'a jamais été absolue, puisque tout système démocratique prévoit toujours d'en limiter l'exercice[1] et que le principe de limitation fait en quelque sorte intrinsèquement partie de cette liberté.

[1] A titre d'exemple de limite à l'exercice de la liberté d'expression, on peut citer les crimes de lèse-majesté ou les injures à magistrats.

On peut dès lors affirmer que prétendre ne pas pouvoir porter atteinte au droit que les individus racistes auraient à exercer leur liberté d'expression c'est vouloir ignorer que dans certains contextes des limites sont déjà posées. Les individus racistes auraient de ce fait l'exorbitant privilège d'une non-limitation absolue, sorte de "super-loi" pour "super-citoyens".

B) Par contre il faut utiliser les moyens de la démocratie pour condamner les individus racistes

Nous ne pouvons donner raison à ceux qui prétendent que le raciste, parce qu'il se met en dehors de la démocratie, ne peut bénéficier des mêmes garanties démocratiques pour se défendre.

Nous sommes dans un état de droit. Ce qui différencie l'état de droit de la barbarie qu'est le racisme c'est qu'il prévoit pour chacun le droit aux mêmes moyens pour se défendre.

Notre état se doit de condamner les individus racistes en utilisant les moyens que la démocratie donne à tout individu, dût-il avoir été irrespectueux de ses principes fondateurs.

Le jury populaire est l'une de ces garanties, éminemment démocratique, qui doit être maintenue au bénéfice de tout citoyen pour lequel ce procédé a été prévu.

L'établissement d'un jury a certes été prévu pour garantir l'exercice d'une liberté, mais n'a certainement jamais eu pour objectif de conférer une immunité absolue à celui qui en bénéficie. ¨Vue sous un autre angle que celui de la seule garantie, l'institution d'un jury pourrait être approchée sous l'angle d'un mécanisme auto-régulateur de l'exercice de la liberté d'expression.

Pour mieux illustrer notre propos faisons la comparaison entre les mécanismes d'auto-régulation que sont un jury populaire et une assemblée parlementaire lorsqu'elle décide de lever une immunité parlementaire.

Dans les deux cas, l'assemblée parlementaire comme le jury populaire sont une sorte de verrou de protection de l'espace de liberté.

Le dépassement de certaines limites qui encadrent l'exercice de la liberté ainsi protégée pourra donner lieu à la levée du verrou de protection pour permettre la sanction.

De la même manière, pourrait-on considérer que le jury initialement conçu comme mécanisme protecteur de la liberté d'expression puisse décider en fonction du caractère raciste d'une publication de lever le verrou de sa protection pour exercer une répression.

Pour justifier du renvoi des délits de presse à caractère raciste devant des tribunaux correctionnels, certains ont prétendu que l'atteinte portée à la dignité humaine par le propos raciste était telle qu'elle effaçait tout débat sur la liberté d'expression.

En réalité, comme nous venons déjà de le constater, l'atteinte à la dignité n'efface pas le débat sur la liberté mais articule la loi dans un autre esprit qui
veut que ce qui protège le journaliste démocrate puisse également servir à condamner l'auteur de propos raciste.

On peut également souligner qu'à la notion de garantie telle qu'elle est rattachée à la liberté d'expression il doit également être ajoutée celle de responsabilité de la part du journaliste lorsqu'il décide de publier une information.

Si cette responsabilité n'est pas assumée en fonction de la nature de ce qu'il diffuse, la loi devra intervenir pour le sanctionner.

Avoir le droit ou le privilège de s'exprimer n'équivaut pas à donner la permission de dire n'importe quoi.

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6. EXPOSE DES MOTIFS PRESIDANT A LA REDACTION DE LA CONVENTION EUROPEENNE EN MATIERE DE VIOLENCES ET DE HARCELEMENT RACISTE

De nombreuses législations ont déjà vu le jour en matière de racisme, mais force est de constater que chacune d'entre elles traduit la même difficulté à cerner ce qu'elles tentent de combattre : **racisme ou discrimination ?**
Trop nombreux sont ceux qui se perdent dans l'idée que le racisme est une forme de discrimination, ce qui amène les différents projets de lois à dresser de véritables catalogues d'actes jugés discrimInatoires sans nécessairement couvrir toutes les hypothèses et possibilités que les esprits pervertis par des idées racistes auront tôt fait de développer.
Exposer la différence entre ces concepts de racisme et de discrimination permet d'éviter l'écueil ci-dessus mentionné, mais surtout permet de briser le cercle vicieux que la confusion de ces deux notions engendre et qui a pour gravissime conséquence, qu'involontairement le législateur participe au renforcement de l'idéologie raciste en la consacrant même dans ces textes de loi !

Pour distinguer racisme et discrimination, partons de cette première constatation : le concept de discrimination peut donner lieu à des autorisations de la loi (discriminations positives) et n'est donc pas ipso facto punissable.

Le racisme lui, ne souffre d'aucune exception légale et **ne trouve à s'exprimer qu'au mépris du principe de base qui assure la cohérence de l'espèce humaine à savoir l'unicité de la race rapportée au genre humain.**

L'incohérence du propos raciste trouve son origine dans le fait que celui qui l'exprime énonce un jugement de valeurs sous la forme d'une hiérarchie.

Cependant, comme tout jugement suppose nécessairement qu'un point de comparaison serve de référence à ce que l'on évalue et **QU'AU SEIN DU GENRE HUMAIN AUCUNE AUTRE RACE QUE LA RACE HUMAINE N'EXISTE,** cela implique que celui qui exprime une pensée raciste ne peut que se situer en dehors de la seule race à laquelle lui comme nous tous appartenons.

Ce raisonnement démontre ce que la logique ne peut admettre, à savoir qu'un individu puisse prétendre se placer en dehors de ce qui le définit lui-même en tant qu'être humain.

EN INFERIORISANT CERTAINS GROUPES DE PERSONNES sous le couvert de leur race, **L'AUTEUR DE TEL PROPOS RACISTE S'ATTAQUE EN REALITE NON SEULEMENT A LUI-MEME, PUISQU'IL ATTAQUE LA SEULE RACE QUE SON ESPECE COMPOSE, MAIS IL VISE EGALEMENT TOUTES LES AUTRES PERSONNES QUI EN FONT PARTIE, A SAVOIR L'HUMANITE TOUTE ENTIERE.**

Le **racisme** EST l ' **injure suprême** à la **démocratie** et à l'humanité toute entière.

Trop souvent pourtant, a t'on voulu considérer que seuls ceux contre qui des actes racistes étaient dirigés étaient concernés, sans se rendre compte en fait qu'en tant qu'hommes ce n'était pas eux mais nous tous qui étions visés.

Croire au droit à la liberté d'expression de ceux qui se placent en dehors de ce dont ils font en réalité partie c'est nécessairement se placer comme eux en dehors du seul groupe dont nous faisons tous partie et par de là participer à l'incohérence de leur système.

La position du raciste peut être comparée à celle d'une personne atteinte d'une maladie auto-immune. Dans ce cas, l'organisme ne reconnaît plus toutes ses parties constituantes comme un tout lui appartenant, mais se met à en combattre certaines, comme si elles lui étaient étrangères, ce qui le conduit à la limite à sa propre destruction.

Partant de cette idée de vie et de survie de notre société, il est essentiel de définir le principe de base de l'espèce humaine et des sociétés qu'elles composent **:**

"LA RACE EN TANT QUE CONCEPT RAPPORTE A L'ESPECE HUMAINE EST COMPRISE COMME UNE ENTITE INDIVISIBLE."

Ce postulat fait partie de notre propre définition en tant qu'être humain.
Le nier revient donc à se nier en tant qu'homme.

L'individu ou le groupe d'individus qui conçoit la race humaine autrement que dans son acception d'unicité ne commet en réalité aucune discrimination puisque celle-ci exigerait pour avoir lieu que plusieurs races existent au sein du genre humain.

C'est de cette confusion entre les concepts de discrimination et de racisme qu'est née l'impossibilité des textes de loi de prohiber le premier sans involontairement consacrer le second.

En effet, l'affirmation dans un texte de loi, de ce qu'une discrimination pourrait exister si le critère de la race est avancé, serait la prohibition de la discrimination en tant que telle, ce qui consacrerait implicitement mais certainement l'existence d'au moins deux races, sans quoi l'existence de la discrimination que l'on dénoncerait n'est pas fondée...

Prétendre se placer dans le chef de celui qui discrimine pour énumérer les critères qu'il invoque et qu'on ne peut accepter ne nous fait pas sortir de cette incohérence.

C'est en cela que **ce texte de convention est novateur,** constructif et dynamisant.

Il part de la définition du concept de race rapporté à l'humain et énonce un principe qui est de nos jours scientifiquement reconnu et prouvé :

L'UNICITE ET L'INDIVISIBILITE DE LA RACE HUMAINE.

Par sa simple énonciation ce principe exclu nécessairement ce qu'il n'est pas.

Il permet au législateur de ne pas tomber dans le piège de l'énumération de ce qui ne peut être admis, pour laisser la seule place à ce qui l'est.

En conséquence, la définition du principe d'unicité ainsi formulé lui donne :

une portée universelle : ce qui permet de définir ceux qui n'y adhèrent pas de criminel envers l'humanité toute entière;

une efficacité maximale : car tout défenseur d'une autre acception se trouvera confronté, face aux tribunaux, aux renversement de la charge de la preuve qu'il sera incapable de fournir s'assurant par voie de conséquence la condamnation.

Les dispositions civiles, reprises à la page 18 (Partie III) de la convention, complètent l'esprit de cette dernière en la mettant d'application dans la vie courante. Elles sensibilisent et responsabilisent chaque citoyen en plaçant à l'avant plan, lors de toute transaction, le facteur humain.

Ceci aura pour effet de créer **une cohérence dans la société** entre l'aspect fondateur de cette convention (aspect théorique) et sa mise en application. Chaque citoyen serait à la fois un partenaire actif et une sorte de courroie de transmission.

Il est historiquement avéré qu'aucun régime raciste une fois établi n'est démocratique. Il en va donc de la survie de la démocratie de tuer dans l'oeuf tout mouvement dont l'objectif, même masqué, comporte une atteinte à son intégrité. Dans cette veine le racisme est la **priorité** des **priorités**.

La future Charte Européenne des Droits Fondamentaux offrirait un siège idéal au principe de l'unicité de la race humaine et de son corollaire le droit de tout être humain au respect de son intégrité psychique.

Pour être efficace, il est impératif que cette charte soit de nature contraignante.

Le projet de convention devrait, quant à lui, figurer parmi les instruments de droit pénal européen destinés à sanctionner toute violation de ce principe.

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PROJET :

CONVENTION EUROPEENNE

DE PROTECTION CONTRE LA VIOLENCE ET

LE HARCELEMENT RACISTE

TABLE DES MATIERES

CONVENTION

Préambule

Considérant que les états membres de l'Union européenne ont confirmé dans le préambule de l'Acte Unique Européen leur détermination à promouvoir ensemble la démocratie en se fondant sur les droits fondamentaux reconnus dans leur Constitution, dans la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales, dans la Charte Sociale Européenne ainsi que dans le traité d'Amsterdam qui prévoit en son article 6 (ex article F) que «l'Union est fondée sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales, ainsi que de l'Etat de droit, principes qui sont communs aux Etats membres.»

Considérant que l'article 29 (ex article K.1) du traité d'Amsterdam prévoit que l'Union Européenne à pour objectif d'offrir aux citoyens un niveau élevé de protection dans un espace de liberté, de sécurité et de justice et qu'elle peut à cette fin élaborer une action commune aux états membres dans le domaine de la coopération policière et judiciaire en matière pénale, en prévenant le racisme et en luttant contre ce phénomène.

A cette fin, déterminés à faire respecter le principe de l'unicité de la race humaine en reconnaissant que toute doctrine de supériorité est scientifiquement fausse, universellement reconnue injustifiable en théorie comme en pratique, moralement condamnable, socialement dangereuse, et nécessairement fondée sur une acception de l'espèce humaine reconnue illégale par la présente Convention.

Convaincus que défendre, diffuser, prôner et faire la propagande de telles doctrines par le biais d'action, de diffamation ou d'injure constitue des abus de la liberté d'expression. Que de tels abus mettent en péril la dignité humaine et la société démocratique.

Affirmons que l'interdiction de la diffusion et de la propagande de telles doctrines est une des restrictions de la liberté d'expression qui "constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale et à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui..." [2]

Convaincus que l'existence de groupements ou d'associations dont l'objet est la défense, la diffusion et la propagande de telles doctrines est un danger pour la survie et la stabilité de toute démocratie et résolus à dissoudre tout groupement ou association qui aurait diffusé, prôné ou fait la propagande de telles doctrines et à condamner toute personne en raison de son appartenance à de tels groupements ou associations.

Sont convenus de ce qui suit :

[2] Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales; Article 10§2.

PARTIE I : DISPOSITIONS GENERALES

Section 1 : définitions et notions

Article 1

La présente Convention réprime la **violence raciste.** Par **violence raciste** il y a lieu d'entendre : "toute menace de violence ou toute violence dans le cadre de laquelle les victimes sont "choisies", non en tant qu'individus, mais en tant que représentants de «communautés minoritaires [ou non] imaginées"[3].

Article 2

La **violence raciste** doit être considérée comme un **acte de cruauté mentale** constitutif de violences psychiques. La **cruauté mentale** réside dans la menace de violence que renferme tout acte raciste et la contrainte morale qu'elle exerce sur la victime et les membres du «groupe» que la victime est sensée représenter.

Section 2 : énoncé des principes

Article 1

Les états parties reconnaissent **l'unicité** comme concept fondateur de toute référence à l'espèce humaine, que cette référence soit faite sur le plan individuel ou non.

Ils reconnaissent **l'universalité** de ce principe et déclarent que toute violation de ce principe est un crime qui sera réprimé par la présente convention sous la dénomination de « crime de harcèlement raciste ».

Article 2

[3] Rob Witte, "Combattre la violence raciste et xénophobe en Europe" in Conseil de l'Europe, 1997;p. 13. "La nature et les causes de la violence raciste et xénophobe en Europe".

La seule acception légale du concept et du terme de **race** est celle qui se fondant sur le principe d'unicité énoncé à l'article 1§1, les définit en terme d'entité indivisible.

L'expression de toute autre acception, en ce qu'elle ne pourrait pas ne pas nier qu'elle soutient que la réalité de tout groupe ou individu humain serait concevable dans son essence même en d'autres termes que ceux qui sont communs à l'ensemble de l'espèce, viole le principe d'unicité énoncé à l'article 1 §1.

Article 3

La seule acceptation et utilisation légale du concept et du terme de **groupe** rapporté à l'être humain est celle qui par respect du principe d'unicité énoncé à l'article 1§1, le définit par un ensemble de caractéristiques communes qui ne lui sont propres qu'à lui à l'exclusion de tout autre, et dans lesquelles il se reconnaît lui-même.

L'expression ou l'utilisation de toute autre acception du concept ou du terme de groupe rapporté à l'être humain viole le principe d'unicité susmentionné au même titre que l'article 2 § 2.

Article 4

La Convention déclare criminels les organisations, institutions et les individus qui commettent le crime de harcèlement raciste.

La Convention tient pour pénalement responsable sur le plan international les personnes qui favorisent ou encouragent indirectement la perpétration du crime de harcèlement raciste ou y coopèrent directement.

Est notamment considéré comme favorisant ou encourageant indirectement la perpétration du crime de harcèlement raciste le fait pour une autorité publique d'inscrire ou de maintenir l'inscription sur une liste électorale d'un parti qui défend, prône ou diffuse des idées ou des théories racistes de manière manifeste ou répétée.

Article 5

L'obéissance hiérarchique ne justifie pas celui qui, agissant par ordre de ses supérieurs pour des objets du ressort de ceux-ci, exécute un ordre qui viole la présente convention.

Les peines prévues par la présente convention sont appliquées tant aux supérieurs qui ont donné l'ordre qu'à ceux qui les ont exécutés.

Section 3 : description de l'infraction de harcèlement raciste et de ses composantes

Article 1 : Définition de l'infraction

L'infraction de harcèlement raciste est tout acte de violence raciste[4] commis par action ou omission qui **porte atteinte au principe d'unicité fondateur de toute identité humaine, individuelle ou de groupe :**

- en provoquant un sentiment d'insécurité, de terreur et d'angoisse ce qui rompt l'équilibre psychique de la victime et des membres du groupe ou de la communauté qu'elle représente ou auquel elle a été associée;

[4] Cf. Partie I, Section 1 : définitions des notions , article 2, p. 36.

- en rongeant et déchirant le tissu social ce qui met en danger l'existence même de toute société humaine ainsi que les principes qui sont communs aux états membres de l'Union.[5]

Article 2 : Comportement matériel de l'infraction

Pour être constaté par le juge, le comportement matériel de l'infraction requiert la réunion des éléments suivants :

1 La commission d'un acte de violence raciste au sens de la présente convention[6] ;

2 Accompli dans l'une des conditions de publicité suivantes :

- dans des réunions ou des lieux publics;
- en présence de plusieurs individus, dans un lieu non public, mais ouvert à un certain nombre de personnes ayant le droit de s'y assembler ou de le fréquenter;
- dans un lieu quelconque, en présence de la victime et devant témoins; par des écrits imprimés ou non, des images ou des emblèmes affichés, distribués ou vendus, mis en vente ou exposés aux regards du public;
- par des écrits non rendus publics, mais adressés ou communiqués à plusieurs personnes.

3 Dirigé contre un groupe, contre une communauté ou contre une personne perçue comme leur appartenant ou leur étant associée.

[5] Cf. art. 6 Traité d'Amsterdam précité au préambule.

4 A l'occasion duquel il est constaté que l'auteur a fait référence aux caractéristiques phénotypiques de la victime ou/et à son origine nationale ou/et à sa religion ou/et à sa culture ou/et à tout stéréotype généralement utilisé pour caractériser l'identité de certaines personnes.

Formes explicite ou implicite de la référence :

La référence est **explicite** lorsqu'elle a donné lieu à des propos, des écrits, des images ou des emblèmes à l'occasion de la commission de l'infraction.

La référence est implicite lorsque le comportement incriminé est une discrimination au sens de la présente convention.[7]

Dans ce cas, la preuve du caractère objectivement justifié d'une discrimination, et du rapport raisonnable et proportionnel avec le but poursuivi par son auteur est toujours à charge de celui-ci.[8]

5. De nature à provoquer des sentiments d'insécurité, de terreur etd'angoisse.

Article 3 : Elément moral de l'infraction

Il s'agit d'un acte commis dans l'intention de rejeter, de stigmatiser un groupe, une communauté ou une personne perçue comme leur appartenant ou leur étant associée sans tenir compte du danger que cet acte fait encourir à la structure même de la société.

[6] Ibid.

[7] Proposition de loi tendant à lutter contre la discrimination (déposée par M. Lallemand, Mme Merchiers et consorts) in Documents Parlementaires ;Sénat de Belgique–Session ordinaire 1998-1999 ;

Chap. 1er, Art. 2 « il y a lieu d'entendre par discrimination : «les comportements ayant directement ou indirectement pour but ou pour effet, dans les domaines politique, économique, social ou culturel ou dans tout autre domaine de la vie sociale, d'établir une distinction entre les personnes, les groupes de personnes ou les communautés, basée sur …la naissance…ou une caractéristique physique, dénuée de justification objective et sans rapport raisonnable et proportionnel avec le but poursuivi. ».

[8] Ibidem.

Article 4 : Preuve de l'intention

Est à charge de l'auteur et doivent être cumulativement rapportées,

les preuves de ce que :

- la/les caractéristique(s) de la victime à laquelle/auxquelles l'auteur a fait référence lors de l'infraction sont **commune(s)** au groupe ou à la communauté prétendument défini;
- la/les caractéristique(s) de la victime à laquelle/auxquelles l'auteur a fait référence lors de l'infraction est/sont **propres** à ce groupe ou à cette communauté, **à l'exclusion** de tout autre;
- la/les caractéristiques à laquelle/auxquelles l'auteur a fait référence fait/font partie d'un ensemble de caractéristiques dans lequel **le groupe se reconnaît**.

Section 4 : les circonstances aggravant la peine de l'infraction de harcèlement raciste

LES CIRCONSTANCES RELATIVES A L'AUTEUR DE L'INFRACTION

1. **La préméditation.**
2. **La récidive.**
3. **La qualité de fonctionnaire, d'officier public, de dépositaire ou d'agent public de l'auteur lorsqu'il commet l'infraction de harcèlement raciste dans l'exercice de ses fonctions.**

LES CIRCONSTANCES RELATIVES AUX FAITS

1. **L'infraction de harcèlement raciste commise à l'aide de violences physiques ou de menaces de violences physiques**.

2 **L'infraction de harcèlement raciste qui a pour conséquence des Traumatismes psychiques graves.**

Sont considérés comme graves les traumatismes psychiques qui engendrent chez la victime une infirmité permanente.

L'infirmité permanente existe dès que la victime « présente un état confusionnel variable mais permanent, que ses facultés mentales sont gravement et définitivement atteintes, qu'elle est incapable de mener une vie indépendante sur le plan économique ou même personnel et qu'elle vit emmurée dans ses propres carences.»[9]

L'existence d'une infirmité permanente sera constatée par un expert devant les tribunaux[10].

3 **L'incitation au harcèlement raciste :** par "inciter" au harcèlement raciste il y a lieu d'entendre le fait d'entraîner et de pousser autrui à rejeter, à stigmatiser ou à ressentir de la haine à l'égard d'un groupe ou d'une communauté ou à l'égard d'une ou de plusieurs personnes perçues comme appartenant ou associées à ce groupe ou a cette communauté.

9 Cass. crim. 25 mars 1980 (Bull. crim. n°101 p.236).

10 Cf. Développements annexés à la présente convention : «*évaluation de la gravité du PTSD»*, page 61, note n° 7.

4 Le caractère organisé des actes de harcèlement raciste

est considéré comme organisé :

- l'acte de violence raciste accompli par une organisation, un groupement ou une association raciste.

- L'acte, qui sans pouvoir être directement imputé à une organisation, un groupement ou une association raciste, décèle un certain degré d'organisation. Un degré d'organisation est considéré comme suffisant lorsqu'une des deux conditions suivantes est constatée :

  - l'acte a nécessité une certaine structure humaine, technique, administrative ou financière;
  - l'acte démontre une stratégie :
    - soit parce qu'un lien de connexité existe entre plusieurs actes ce qui permet de les considérer comme une "série" d'actes orchestrés et menés à l'encontre d'un même groupe de victimes spécifiques ou de la même victime;
    - soit parce que le lieu de commission de l'infraction démontre à lui seul qu'une stratégie a été adoptée;
    - soit parce que les moyens mis en oeuvre sont significatifs d'une stratégie

5 La commission d'actes de harcèlement raciste dans les lieux de culte ou des lieux symboliques pour le groupe ou la communauté visée.

Section 5 : imprescriptibilité de l'infraction de harcèlement raciste

Article 1

Les infractions prévues par la présente Convention sont imprescriptibles.

Le principe d'imprescriptibilité s'applique aux infractions commises après l'entrée en vigueur de la présente Convention dans l'état contractant et s'applique également aux infractions commises avant cette entrée en vigueur dès lors que le délai de prescription n'est pas encore expiré.

PARTIE II: DISPOSITIONS PENALES

Section 1 : la répression de l'infraction de harcèlement raciste

A. LES INFRACTIONS A l'EGARD DES PERSONNES OU DES CORPS CONSTITUTES

Article 1

Est puni par l'emprisonnement d'une durée de 1 mois à 1 an et d'une amende de 500 à 1000 € ou de l'une de ces deux peines seulement, quiconque aura adressé une injure raciste à un groupe, à une communauté ou à une personne perçue comme leur appartenant ou leur étant associée.

En cas de condamnation le tribunal pourra en outre ordonner les peines accessoires suivantes:

- l'inéligibilité du condamné pendant un terme de 5 à 10 ans.
- l'affichage de sa décision en caractères très apparents, dans les lieux qu'il indique, aux frais du condamné;
- la publication intégrale ou partielle de la décision ou l'insertion d'un communiqué, informant le public des motifs et du dispositif de celle-ci, aux frais du condamné.

Lorsque l'injure raciste est aggravée, elle est punissable de 6 mois à 2 ans de prison et le juge pourra en outre prononcer les mêmes peines accessoires que celles prévues à l'alinéa précédent.

Article 2

Est puni par l'emprisonnement d'une durée de 1 mois à 1 an et d'une amende de 500 à 1000 € ou de l'une de ces deux peines seulement, quiconque aura dans une intention raciste commis une discrimination[11].

En cas de condamnation le tribunal pourra en outre ordonner les peines accessoires suivantes:

: - l'inéligibilité du condamné pendant un terme de 5 à 10 ans.
- l'affichage de sa décision en caractères très apparents, dans les lieux qu'il indique, aux frais du condamné;
- la publication intégrale ou partielle de la décision ou l'insertion d'un communiqué, informant le public des motifs et du dispositif de celle-ci, aux frais du condamné.

11 Cf. notes n°5 & 6.

Lorsque l'infraction est aggravée, elle est punissable de 6 mois à 2 ans de prison et le juge pourra en outre prononcer les mêmes peines accessoires que celles prévues à l'alinéa précédent.

Article 3

Est puni par l'emprisonnement d'une durée de 2 à 5 ans et d'une amende de 5000 à 10.000 €, ou de l'une de ces deux peines seulement, quiconque aura calomnié ou diffamé, dans une intention raciste, un groupe, une communauté ou une personne perçue comme leur appartenant ou leur étant associée.

En cas de condamnation le tribunal pourra en outre ordonner les peines accessoires suivantes:

- l'inéligibilité du condamné pendant un terme de 5 à 10 ans.
- l'affichage de sa décision en caractères très apparents, dans les lieux qu'il indique, aux frais du condamné;
- la publication intégrale ou partielle de la décision ou l'insertion d'un communiqué, informant le public des motifs et du dispositif de celle-ci, aux frais du condamné.

Lorsque l'infraction de calomnie ou de diffamation raciste est aggravée, elle est punissable de 5 à 10 ans de prison et le juge pourra en outre prononcer les mêmes peines accessoires que celles prévues à l'alinéa précédent.

Article 4

Est puni d'une peine de prison de 5 à 10 ans quiconque aura, dans une intention raciste, fait des blessures ou porté des coups à une personne.

Lorsque l'infraction est aggravée ou que les coups ou les blessures ont causé une maladie ou une incapacité de travail personnelle, le coupable sera puni d'une peine de dix à quinze ans de prison.

Outre l'affichage et la publication de la décision, le juge pourra ordonner l'inéligibilité à perpétuité du condamné.

Article 5

Est puni d'une peine de dix à quinze ans de prison et sera frappé d'inéligibilité à perpétuité quiconque aura, dans une intention raciste, volontairement fait des blessures ou porté des coups sans intention de donner la mort et l'aura donnée.

Le juge pourra en outre ordonner l'affichage et la publication de la décision aux frais du condamné.

Article 6

Est puni par les travaux forcés à perpétuité quiconque aura, dans une intention raciste, causé la mort d'une personne.

Le juge pourra en outre prononcer l'affichage et la publication de la décision aux frais du condamné.

B. LES INFRACTIONS CONTRE LES PROPRIETES

Article 1

Est puni par une peine de prison à perpétuité ceux qui auront, dans une intention raciste, mis le feu à des propriétés appartenant à un groupe, à une communauté ou à une personne perçue comme leur appartenant ou leur étant associée, si l'auteur a dû présumer qu'il s'y trouvait une ou plusieurs personnes au moment de l'incendie.

Le juge pourra en outre prononcer l'affichage et la publication de la décision aux frais du condamné.

Article 2

Est puni par une peine de prison de quinze à vingt ans et sera frappé d'inéligibilité à perpétuité ceux qui auront, dans une intention raciste mis le feu à des propriétés immobilières appartenant à un groupe, à une communauté ou à une personne perçue comme leur appartenant ou leur étant associée.

Le juge pourra en outre prononcer l'affichage et la publication de la décision aux frais du condamné.

Article 3

Est puni par une peine de prison de dix à quinze ans et sera frappé d'inéligibilité à perpétuité ceux qui auront, dans une intention raciste mis le feu à des propriétés mobilières appartenant à un groupe, à une communauté ou à une personne perçue comme leur appartenant ou leur étant associée.

Le juge pourra en outre prononcer l'affichage et la publication de la décision aux frais du condamné.

Article 4

Seront punis des peines portées par les articles précédents et d'après les distinctions qui y sont établies, ceux qui auront, dans une intention raciste, détruit ou tenté de détruire, par l'effet d'une explosion, des propriétés appartenant à un groupe, à une communauté ou à une personne perçue comme leur appartenant ou leur étant associée.

Article 5

Quiconque aura, dans une intention raciste et en dehors des cas visés aux articles précédents, détruit en tout ou en partie, mutilé ou dégradé, par quelque moyen que ce soit, des propriétés appartenant à un groupe, à une communauté ou à une personne perçue comme leur appartenant ou leur étant associée, sera puni d'une peine de 5 à 10 ans de prison.

Le juge pourra en outre prononcer l'inéligibilité du condamné pour un terme de 5 à 10 ans ainsi que l'affichage et la publication de la décision aux frais du condamné.

C. LES ORGANISATIONS, GROUPEMENTS ET ASSOCIATIONS RACISTES

Article 1

Sera dissout, toute organisation, groupement ou association qui soit défendrait, prônerait ou diffuserait des idées ou des théories racistes, soit inciterait autrui à rejeter, à stigmatiser ou à ressentir de la haine à l'égard d'un groupe, d'une communauté ou de toute personne perçue comme leur appartenant ou leur étant associée.

Article 2

L'organisation, le groupement ou l'association raciste sera condamné à la confiscation spéciale :

- des choses formant l'objet de l'infraction et de celles qui ont servi ou devaient servir à la commettre.
- Des choses produites par l'infraction.
- Des avantages patrimoniaux tirés directement de l'infraction ainsi que des biens et valeurs qui leur ont été substitués et des revenus de ces avantages investis.

Article 3

Seront punis de la réclusion et de l'inéligibilité de 5 à 10 ans, ceux qui font partie ou qui ont prêté leur concours à des organisations, groupements ou associations qui ont défendu, prôné ou diffusé des idées ou des doctrines racistes de manière manifeste ou répétée.

Article 4

Les états parties dont l'autorité publique admet ou maintient l'inscription d'un parti sur une liste électorale alors qu'il défend, prône ou diffuse des idées ou des théories racistes de manière manifeste ou répétée pourront voir leur responsabilité internationale engagée et seront passibles d'une astreinte de 100.000 à 500.000 € par jour et jusqu'à la suppression définitive de l'inscription incriminée.

En cas de condamnation le tribunal pourra en outre ordonner les peines accessoires suivantes :- l'inéligibilité du condamné pendant un terme de 5 à 10 ans.

- l'affichage de sa décision en caractères très apparents, dans les lieux qu'il indique, aux frais du condamné;
- la publication intégrale ou partielle de la décision ou l'insertion d'un communiqué, informant le public des motifs et du dispositif de celle-ci, aux frais du condamné.

Section 2 : la répression de l'abstention coupable face à la violence raciste

Article 1

Le fait pour quiconque ayant connaissance d'un crime de harcèlement raciste dont il est encore possible de prévenir ou de limiter les effets ou dont les auteurs sont susceptibles de commettre de nouveaux crimes qui pourraient être empêchés, de ne pas en informer les autorités judiciaires ou administratives est puni d'une amende de 1000 à 5000 €.

Sont exceptés des dispositions qui précèdent, sauf en ce qui concerne les crimes commis sur les mineurs :

1) les parents en ligne directe et leurs conjoints, ainsi que les frères et sœurs et leurs conjoints, de l'auteur ou du complice du crime;
2) Le conjoint de l'auteur ou du complice du crime, ou la personne qui vit notoirement en situation maritale avec lui.[12]

[12] Article qui s'inspire du Code pénal français; Art 434-1, Chap. IV.

Article 2

Est puni par l'emprisonnement d'une durée de 1 mois à 6 mois et d'une amende de 2000 à 5000 € ou de l'une de ces deux peines seulement, quiconque, pouvant empêcher par son action immédiate, un fait qualifié de crime de harcèlement ou de crime d'incitation au harcèlement raciste, s'abstient volontairement de le faire ».

PARTIE III : DISPOSITIONS CIVILES

Article 1

Sans préjudice des sanctions prévues par la présente convention, toute infraction de harcèlement raciste donne lieu à une réparation sous forme de dommages et intérêts.

Article 2

Sont nulles les clauses d'un contrat contraires aux dispositions de la présente convention et celles qui prévoient qu'un ou plusieurs contractants renoncent par avance aux droits garantis par la présente convention.

Article 3

La référence au principe d'unicité tel qu'il est formulé à l'article 1er , Partie I, Section 2 de la présente convention est une des conditions de validité substantielle de tout contrat.

Sont nuls les contrats qui ne remplissent pas cette condition.

Article 4

Dès l'entrée en vigueur de la présente Convention, les états parties veilleront à ce que tous les manuels d'enseignement soient épurés de toute expression qui pourrait à la lumière du présent texte être jugée raciste. La constatation d'un manquement à une telle obligation pourra donner lieu à des astreintes pour le cas où il ne serait pas mis fin.

PARTIE IV : EFFETS DE LA CONVENTION

Article 1

Les états parties reconnaissent à la présente convention un effet direct dans leur ordre juridique interne et poursuivront tout comportement qui par application des articles 2 §2 et 3§2 [13]de la présente convention porterait atteinte au principe d'unicité énoncé à l'article 1 §1 [14].

Article 2

Tout manquement à l'obligation de poursuivre engagera la responsabilité pénale internationale de l'état défaillant. La constatation d'un tel manquement pourra donner lieu à des astreintes pour le cas où il n'y serait pas mis fin.

Sont considérés comme des manquements à l'obligation de poursuivre le fait pour des autorités judiciaires de ne pas engager de poursuites pour des faits que la présente convention qualifie de crime de harcèlement raciste dans un délai de 1an à dater du jour où ces faits ont été portés à leur connaissance ou pouvaient leurs être connus.

[13] Cf. Partie I, Section 2, p.36.
[14] Ibidem.

Article 3

Les états partie à la présente convention s'engagent à poursuivre les auteurs du crime de harcèlement raciste, qu'ils résident ou non sur le territoire de l'état dans lequel ces actes ont été perpétrés, et qu'il s'agisse de ressortissants de cet état ou d'un autre état ou de personnes apatrides.

Article 4

Les états parties enregistreront tout les incidents dont le caractère raciste est allégué par la victime en se référant au modèle d'enregistrement européen prévu à cet effet.

Article 5

Sont considérés comme des manquements à l'obligation d'enregistrement :

- le fait pour des autorités administratives ou judiciaires de ne pas procéder à l'enregistrement d'incidents dont les victimes allèguent le caractère raciste;
- le fait pour des autorités administratives ou judiciaires de procéder à l'enregistrement d'un incident dont la victime allègue le caractère raciste sans tenir compte des normes et des critères prévus par le modèle européen d'enregistrement des incidents racistes.

Article 6

Chaque état partie s'engage à établir un système général de suivi des affaires concernant des actes de violence raciste et transmettra un rapport annuel à l'Observatoire européen contre le racisme pour l'informer sur l'évolution des incidents racistes enregistrés sur son territoire et sur les suites qui leurs ont été données.

PARTIE V : PROCÉDURE

Article 1

Les états parties assureront à toute personne soumise à leur juridiction une protection et une voie de recours effective, devant les tribunaux nationaux et autres organismes d'état compétents, contre tout acte de violence raciste ainsi que le droit de demander à ces tribunaux satisfaction ou réparation juste et adéquate pour tout dommage dont elle pourrait être victime par suite d'un tel acte.[15]

Article 2

L'action devant les juridictions internes peut être déclenchée par :

- la constitution de partie civile des victimes de l'infraction;
- lorsqu'un préjudice est porté aux fins statutaires qu'ils se sont données pour mission de poursuivre, toute association et tout établissement d'utilité publique jouissant de la personnalité juridique.
- Le ministère public.

[15] Article s'inspirant de l'article 6 de la Convention de New York de 1966.

PARTIE VI : DISPOSITIONS FINALES

Article 1

La présente Convention ne peut faire l'objet d'aucune réserve et est ouverte à la signature de tous les Etats membres de l'union.

Article 2

La présente convention est d'application sur tous les territoires de pays de l'Union.

DEVELOPPEMENTS & COMMENTAIRES DES ARTICLES

A. Généralités

L'une des nombreuses questions qui s'est posée lors de la rédaction de ce projet de convention était de savoir s'il y avait eu lieu de prévoir une convention de droit pénal européen ou de droit pénal international.
Sachant qu'une convention de droit pénal avec effet direct dans les états contractants était de toute façon « une première » il fallait dans les deux cas de figure envisager de profondes réformes.

Un argument qui penchait en faveur d'une convention de portée internationale était que le principe d'unicité de la race humaine concerne l'humanité toute entière et qu'il était dès lors assez cohérent et souhaitable d'essayer d'obtenir une adhésion à cette convention qui soit « la plus universelle possible », soit de la part du plus grand nombre d'états possible. Cependant, lorsque nous avons évalué la possibilité d'une convention de droit pénal international, nous avons parmi d'autres relevé les difficultés suivantes :

- un plus grand nombre de pays étant à consulter sur le plan international, une prise de position commune qui se concrétiserait par l'adoption d'une convention serait assez difficile à obtenir.

- D'un point de vue technique, le seul organe international actuellement compétent
- Pour connaître des plaintes émanant tant des états que des particuliers est le Tribunal Pénal International (TPI). Or, le TPI est uniquement compétent pour les crimes que ses statuts énumèrent. Le crime de harcèlement raciste n'y figurant pas, la seule solution serait de prévoir une extension de ses compétences par une

modification de ses statuts (ce qui est possible selon le texte mais sans doute difficile à obtenir vu le nombre de pays qui devraient le voter).

Ce qui nous a finalement incités à choisir l'insertion de cette convention sur le plan européen plutôt qu'international ce sont les arguments suivants :

- une position commune des pays de l'union serait peut être moins ardue à obtenir car des déclarations émanant des pays de l'union qui affirment le souhait d'adopter des actions communes en matière de justice et plus particulièrement de lutte contre le racisme ont déjà été consacrées par les textes (cf. traité d'Amsterdam);

- un véritable espace de justice et de sécurité européen est en train de voir le jour et dispose déjà de nombreux outils juridiques tels que les conventions d'entraide judiciaire, de coopération et d'extradition ainsi que de nombreuses organisations telles qu'Europol, etc…

Quelles seraient les principales réformes juridiques à envisager pour insérer cette convention sur le harcèlement raciste dans les instruments de droit pénal européen ?

Il faudrait entre autre :

- élargir le champ matériel d'application de l'article 31 point e (ex-article K.3) du traité de l'union européenne aux infractions de racisme;

- insérer dans la future «charte européenne des droits de l'homme »[16] (en espérant qu'elle soit de nature contraignante) le principe d'unicité de la race humaine qui confère à chaque individu le droit à la protection de son identité (intégrité) psychique contre toute violation de ce principe

16 Projet en cours de réalisation d'une sorte de «constitution européenne » (concrétisation aux environs de 2001).

L'adoption d'une constitution européenne rendrait la cour européenne de Luxembourg compétente pour sanctionner les états de l'union qui ne respecteraient pas les droits que cette constitution consacre.

B. Commentaires article par article

Partie I – Section 2

Article 4 § 3

Le mot «notamment» est présent pour indiquer qu'il a lieu de donner au comportement précisé par ce paragraphe une portée seulement exemplative.

Article 5

Pour rappel : les agents publics doivent respecter les deux obligations suivantes : - le devoir d'obéissance hiérarchique;
- le respect de la légalité.

Lorsque l'ordre hiérarchique est manifestement illégal, une jurisprudence constante et unanime considère que le devoir d'obéissance s'efface et qu'il ne justifie plus l'exécution de l'ordre par l'agent.

Le présent article prévoit quant à lui, que le respect de la légalité, à savoir le respect de la présente convention, doit toujours primer sur le devoir d'obéissance.

Cet article introduit l'idée selon laquelle la résistance à un ordre manifestement illégal n'est pas seulement un droit dont les fonctionnaires peuvent se prévaloir mais une obligation pour l'agent subordonné.[17]

[17] «L'émergence d'un droit de résistance à un ordre illégal » dans « Ordre illégal et obéissance hiérarchique dans le droit disciplinaire de la fonction publique ; J.T. 1998, p. 267.

Partie I – Section 3

Article 1

Est visé par le présent article tant l'action que l'omission.

Une discrimination commise dans une intention de harcèlement raciste peut prendre la forme d'une omission. Ainsi le refus de fourniture d'un produit ou d'un service par une personne normalement tenue à cette prestation en raison d'une obligation légale ou morale.

Il faut souligner l'aspect multidimensionnel de l'infraction de harcèlement raciste. Cette infraction porte attente au principe d'unicité de la race humaine or ce principe est le fondement de toute identité :

- humaine (1ère dimension) ;
- individuelle (2ème dimension) et
- de groupe (3ème dimension).

Un acte raciste porte donc triplement atteinte au principe d'unicité susmentionné :

- quant à l'atteinte à l'identité individuelle de la victime, la constatation de l'infraction nécessite la preuve que l'intention de l'auteur raciste est de rejeter et de stigmatiser la victime[18];
- quant à l'atteinte à l'identité de groupe et à l'identité humaine :
  elle porte atteinte au tissu de la société ce qui met en danger son existence.

18 Cf. dans le texte de la convention « la preuve de l'intention », article 4, page 41.

Cette mise en danger de la société a lieu par la seule commission de l'acte raciste; vu sous cet angle l'infraction de harcèlement raciste est ce que l'on appelle une infraction de mise en danger[19], c'est-à-dire une infraction formelle. L'insouciance sociale de l'auteur suffit comme intention morale.

Article 2

Point 4 : forme explicite ou implicite de la référence

Lorsque l'auteur commet l'infraction et exprime de manière explicite son rejet à l'égard d'un groupe, d'une communauté ou d'une personne (injures lors de l'infraction etc. …) il ne devrait y avoir aucune difficulté pour le juge (il y a alors référence «explicite» selon le texte de la convention.

Beaucoup plus difficiles sont les cas de harcèlement raciste « silencieux » (référence «implicite»). Il nous a semblé que dans ces cas de figure il fallait tenter de procéder par étape. La première étape consiste à prouver que l'auteur a commis une discrimination non objective et non proportionnelle.
Une fois cette discrimination établie, il restera à prouver que l'intention poursuivie par l'auteur était une intention de harcèlement raciste. Dans ce cas, c'est la discrimination à elle seule qui constitue le corps matériel de l'infraction à savoir : l'acte de violence raciste.

Point 5

«de nature à provoquer des sentiments d'insécurité, de terreur et d'angoisse.» Ce point restera de l'appréciation subjective des juges.

[19] « La mise en danger est le comportement actif ou passif, qui engendre un risque concret de lésion pour une valeur sociale pénalement protégée. L'élément psychologique de l'incrimination consisterait dans cette insouciance sociale qui témoigne d'une absence de considération pour autrui et pour les normes qui assurent la protection d'autrui . » in Revue internationale de droit pénal, 1969 ; n°0270, page 84 .

Cependant, le catalogue des comportements incriminés par la présente convention permettra aux juges de se référer à des «comportements racistes types» : injures, diffamation, …

Article 3

A noter que cet élément moral précise « ….sans tenir compte du danger que cet acte fait encourir à la structure même de la société.». Ainsi il y a lieu de considérer que l'élément moral de l'infraction de harcèlement raciste est non seulement l'intention de stigmatiser ou de rejeter mais également « l'insensibilité ou l'insouciance sociale ainsi que l'état d'immaturité qui se manifeste par une absence de considération pour l'intégrité, les droits et les biens d'autrui.»[20]

Article 4

Cet article établit un renversement de la charge de la preuve à l'égard de l'auteur de l'infraction.

II. Partie I – Section 4

Circonstances relatives aux faits – point 1

Lorsque l'acte de violence raciste qui rappelons-le est un acte de violence et de menace psychique, est accompagné de violences ou de menaces physiques, il y a aggravation de la peine.

En effet, il est important de souligner que ce qui est réellement novateur dans ce projet de convention c'est de prendre en considération la cruauté mentale que représente la violence raciste.

[20] Revue Internationale de droit pénal, 1969, p. 74 .

Dès lors, toute menace ou tout acte de violence physique ne viendrait que se « surajouter » à la violence psychique subie par la victime de harcèlement raciste ce qui justifie l'aggravation de la peine déjà encourue par l'auteur de cette infraction.

Circonstances relatives aux faits– point 2. traumatismes psychiques graves

Il faut souligner que l'infraction de harcèlement raciste est conçue comme étant une infraction de mise en danger. Le simple fait de porter atteinte au principe d'unicité de la race humaine met en danger les intérêts protégés et est réprimé.

Il s'agit d'une infraction qui existe dès sa commission indépendamment de toute lésion causée. Le «indépendamment de toute lésion causée» ne signifie nullement qu'aucune lésion ne soit concrètement provoquée.

Il est malheureusement scientifiquement établi qu'un lien de causalité existe entre la violence raciste subie et des troubles psychiques ou le PTSD (« Posttraumatic Stress Disorder) que présente la victime après l'agression.[21]

Ce que la convention prévoit c'est l'aggravation de la peine lorsque le PTSD de la victime est grave. L'évaluation de la gravité du PTSD est rendue possible par l'utilisation d'échelles qui permettent de mesurer certains symptômes provoqués par de la violence raciste tel que l'angoisse[22].

[21] «Gender Issues in the Assessment of Posttraumatic Stress Disorder » par J. Wolfe et R. Kimerling in «Posttraumatic Stress Disorder – a comprehensive Text » édité par P.A. Saigh & J. D. Bremner ; Chapter 7, page 192.
«Gender and Postraumatic Stress Disorder» par G. Saxe et J. Wolfe édité dans la même revue ; Chapter 8, page 160.

[22] National Center for PTSD, Dudley D. Blake & Weathers : Caps-DX Scale.

Une lésion pourra être reconnue comme «grave» au sens de la présente convention lorsqu'un certain degré d'intensité, de fréquence et de permanence du symptôme sera constaté.

Il y aura alors une circonstance qui aggravera la peine déjà encourue par l'auteur. Afin de garantir une application homogène de cette convention dans tous les pays de l'union, il importe qu'au cours du processus d'adoption de la présente convention les états parties précisent l'échelle qu'ils s'engageront à utiliser.

Partie II – Section 1

Remarques générales :

1. Le taux des peines encourues est uniquement indiqué à titre exemplatif. En effet, il y aura lieu de vérifier que les peines prévues par la présente convention respectent le principe de proportionnalité des peines.[23]
Une gradation dans la sévérité de ces peines est représentative de la gravité de l'atteinte subie par la victime : c'est ainsi que si l'injure (art. 1) et la discrimination avec intention de harcèlement raciste (art. 2) sont punies des mêmes peines de prison et d'amende, l'infraction de calomnie et de diffamation (art. 3) est quant à elle beaucoup plus sévèrement punie puisqu'elle présuppose qu'une intention de l'auteur était d'atteindre la victime en donnant à son acte une publicité plus grande.

2. l a été souhaité qu'une sévérité particulière caractérise les peines encourues par les organisations, associations et groupements racistes ainsi que pour toute personne qui en fait partie ou qui lui a prêté son concours.[24] La raison de cette sévérité est le danger que ces organisations, associations et groupements représentent pour nos démocraties et le rôle malheureusement déterminant qu'ils

[23] J. Biancarelli, « Les principes généraux du droit communautaire applicables en matière pénale », Rev. Sc. Crim. 1987, p. 131-166, p. 150.
[24] « Les organisations, groupements et associations racistes », p. 49

ont dans la montée de violence raciste qui se constate ces dernières années dans de nombreux pays.

Par les termes «organisations, associations et groupements » sont également visés les partis politiques.

La convention distingue trois types de responsabilités :

- la responsabilité pénale des **organisations**, associations et groupements (responsabilité pénale des personnes morales) qu'elle sanctionne par des peines de confiscation et de dissolution;

- la responsabilité pénale des **personnes** qui en faisaient partie ou qui leurs ont prêté leurs concours et qu'elle sanctionne des peines de réclusion et d'inéligibilité;

- la responsabilité pénale internationale de **l'état** dont l'autorité publique admet ou maintient l'inscription sur une liste électorale d'un parti qui défend, prône ou diffuse des idées ou des théories racistes de manière manifeste ou répétée. Quant à cette dernière catégorie de responsabilité, les situations pratiques peuvent être les suivantes :
  - le parti politique est déjà inscrit sur une liste électorale lorsqu'il se met au cours de sa campagne électorale à prôner, diffuser ou inciter autrui à avoir des idées ou des théories racistes. Dans ce cas, par application de l'article 1er[25], les autorités judiciaires doivent introduire une action en dissolution dudit parti et par application de l'article 4 de la même section les autorités publiques ne peuvent maintenir l'inscription électorale de ce parti sous peine d'engager la

[25] Voir Partie II, Section 1, Point C, page 49.

responsabilité internationale de l'état.

* Le parti politique fait déjà l'objet d'une action en dissolution lorsqu'il demande son inscription sur une liste électorale. Dans ce cas par application de l'article 4 de la même section il ne pourra être inscrit par l'autorité publique sans que celle-ci ne voit sa responsabilité engagée.

Partie II – Section 2

Inspirés par le code pénal français, l'article 1 et 2 de cette section distingue :

- la non information des autorités judiciaires (article 1) :
  il s'agit d'une obligation d'informer les autorités judiciaires de ce qu'un crime de harcèlement raciste a été commis ou de ce qu'il est en préparation.
  Le code pénal français prévoit que certaines catégories de personnes soient exemptées de cette obligation en raison de leur parentèle avec l'auteur de l'infraction. Il nous a semblé que cette exemption pouvait être maintenue.
  Il est à noter que les catégories de personnes qui bénéficient de l'exemption du devoir d'information sont restrictivement énumérées ce qui implique que les personnes légalement tenues au secret professionnel (et qui ne figurent pas en tant que telles dans cette énumération) ne pourront invoquer ce secret pour échapper à l'application de la convention.
  Une remarque doit cependant être faite quant à l'exception prévue pour les «crimes commis sur des mineurs» : il y aura lieu en effet d'harmoniser l'âge de la minorité en matière pénale au sein des quinze états de l'union.

- La non opposition à un crime de harcèlement raciste (article 2) :
  il s'agit d'une obligation de s'opposer à la commission de l'infraction. Ce qui nécessite que l'infraction ne soit pas seulement au stade de la préparation (dans ce cas il y aurait application de l'article 1er) mais bien au stade de sa commission. La manière dont on s'oppose à la commission d'une infraction de harcèlement raciste n'est volontairement pas déterminée dans la présente convention.

  Des critères permettront aux juges de constater qu'une opposition à bien eu lieu. Ainsi, cette opposition devra être immédiate et efficace. Elle sera également adaptée aux circonstances et aux moyens dont dispose la personne sur laquelle pèse cette obligation.

Partie III : Dispositions civiles

Article 1

La réparation civile donne lieu au paiement de dommages et intérêts. Il est à noter que lorsque la victime présente un traumatisme psychique grave l'évaluation psychométrique de ce dommage permettra un dédommagement plus juste.

Article 3 et Article 4

Ces dispositions poursuivent un but éducatif. De nombreux états ont déjà pris des mesures pour informer et éduquer les jeunes à l'école (l'article 4 s'inspire d'une mesure prise par les autorités hollandaises). Par l'insertion de l'article 3 nous souhaitons étendre cet aspect éducatif à toute personne contractante.

Partie IV : Effets de la convention

Article 3

Cet article établit une compétence universelle qui permet à tout état partie à la convention et sur le territoire duquel l'infraction de harcèlement raciste a été commise d'engager les poursuites.

Articles 4 et 5

Il a été relevé que le caractère raciste allégué par la victime était souvent mis de côté voire ignoré par les autorités chargées de prendre leur déposition.
Ces articles ont pour but d'imposer l'utilisation d'une grille (modèle de questions) aux autorités chargées d'enregistrer les plaintes pour violence raciste.
Le but est d'éviter toute subjectivité dans le types de questions posées aux victimes Lorsqu'elles déposent et de s'assurer que leur perception des faits sera fidèlement reproduite et prise en considération.

Partie V: Dispositions finales

Article 1

Face aux nombreuses réserves qu'ont pu exprimer certains états parties à la Convention internationale sur l'élimination de toutes les formes de discrimination raciale de1966, beaucoup de l'efficacité de ce texte (qui n'était pas à effet direct) a été perdue. Dès lors, c'est pour conserver l'unité, la cohérence et l'efficacité de cette convention sur le harcèlement raciste, qu'il ne sera pas permis aux états contractants d'émettre des réserves.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 March 2000

CHARTE 4157/00

CONTRIB 42

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution of the Association of Women of Southern Europe (AFEM) on the proposed Charter provisions. [1] [2]

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[1] AFEM: 5, rue Villaret de Joyeuse - 75017 Paris.

[2] This text has been submitted in English only.

AFEM
ASSOCIATION DES FEMMES DE L' EUROPE MÉRIDIONALE
ASSOCIATION OF WOMEN OF SOUTHERN EUROPE

PROPOSED CHARTER PROVISIONS

I. INTRODUCTORY NOTE

1.- Following their Declaration on the Charter (CONTRIB 16), the Association of Women of Southern Europe (AFEM) has the honour to propose, as a *minimum*, some provisions which follow, in principle, the outline of the Praesidium's Proposal.

On this occasion, the AFEM asks the Convention to kindly note that the expressions used in the provisions should be sex neutral or should refer to both sexes (see**,** e.g.**,** *infra* the proposed formulation of Articles 1, 2, 17, 21, 23, 24). This should apply also to provisions which are taken from the EC Treaty (e.g.**,** Article 141(2): "in respect of his/her employment, from his/her employer"), the ECHR (e.g.**,** Article 2: "his/her life") or any other instrument.

2.- The AFEM underlines the need to take into consideration the EU acquis, the international one (treaties ratified by all Member States), as well as the constitutional acquis common to the Member States, as ***minimum standards,*** and to ensure an advance in relation to these.

3.- The EU will thus prove its dedication to the universal principles proclaimed by Article 6(1) EU Treaty[1] and its determination to ensure that neither this provision nor those of Articles 7[2] and 49[3] of this Treaty become a dead letter. It will thus confirm that it really wants to be a Community based on the rule of law and will strengthen its credibility both with its citizens and the international community.

4.- The AFEM recalls the solemn declarations of the EU according to which:
- "*economic success cannot be ensured unless human rights are observed and guaranteed*";
- the EU "*insists*" on the "*equivalence*", the "*interdependence*" and "*inter-relatedness*" of all human rights, including economic, social and cultural rights whose judicial protection it wishes to promote[4].

5.- ***It is common knowledge that general non-discrimination clauses do not suffice to eradicate direct and indirect discrimination on the ground of sex, in particular against women, and to establish substantive equality between women and men. The acknowledgement of this fact has led:***

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1 Article 6(1) EU Treaty: "*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.*"

2 Sanctions against Member States which violate the principles proclaimed by Article 6(1) EU Treaty.

3 The respect of these principles constitutes a fundamental condition of admission to the EU.

4 Annual Report of the EU on human rights (1999), paras. 5.1, 5.2, Statement by Mr. J.Fischer on behalf of the EU to the Commission of Human Rights annexed to this Report.

a) at international level:

* to the adoption of special instruments guaranteeing fundamental rights of women[5];
* then, to the inclusion of specific provisions prohibiting discrimination on the grounds of sex in the CovenantCPR and the CovenantESCR;
* further, as even this has proved insufficient[6], to the adoption of the Convention on the elimination of all forms of discrimination against women;

b) at Community level:

- to the enshrinement of equality between women and men as a general principle and a specific fundamental right (well-established ECJ case law);
- to the proclamation of equality between women and men as a fundamental mission and objective of the Community which it undertakes to promote in all areas of its jurisdiction (Articles 2, 3(2), 137 EC Treaty);
- to the development of an acquis deriving from legislation and case law in respect of equality between women and men and of the prohibition of direct and indirect discrimination based on sex, including any kind of unfavourable treatment on the ground of pregnancy or maternity;
- to the development of an acquis deriving from legislation and case law and concerning judicial protection against direct and indirect sex discrimination;

c) at national level, to explicit and specific constitutional guarantees of equality between women and men.

6.- However, in spite of all that, ***substantive equality between women and men has not been achieved as yet***. In order to remedy this situation:

* the Convention on the elimination of all forms of discrimination against women [Art.(1)] provides for positive action in favour of women and the Commission which monitors the application of this Convention insists on the necessity of such action;
* the organs which monitor the application of the two International Covenants insist on the necessity of positive action in favour of women;

- an increasing number of national constitutions guarantee substantive equality between women and men and legitimise positive action[7], thus forming a "*constitutional tradition common to the Member States*";
- Article 141(4) EC Treaty provides for positive action "with a view to ensuring full equality in practice between men and women in working life" and Declaration No 28 annexed to the Treaty of Amsterdam specifies that such action "*should, in the first instance, aim at improving the situation of women*";

5 Conventions on the political rights of women, on the nationality of married women etc.

6 See Preamble of the Convention on the elimination of all forms of discrimination against women.

7 German [Article 3(2)], Austrian [Article 7(2)], Portugese [Article 9(h)], Finnish [Article 6(4)], Swedish, French [Articles 3, 4], Greek [draft] Constitutions.

- specific Community action programmes for promoting substantive equality between women and men are being adopted and implemented;
- the EU proclaims officially and solemnly "*the need to emphasise women's rights*", including those of the "*girl child*"[8];
- the UN General Assembly has adopted an optional Protocol to the Convention on the elimination of all forms of discrimination against women, which provides for individual complaints; the EU underlines that it "has supported this initiative" and "is now working for the early entry into force of this new instrument"[9].

7.- ***It is thus obvious that if the Charter is limited to a general non-discrimination clause, without explicitly enshrining substantive sex equality, it will constitute a regression in respect of equality between women and men which certainly nobody wishes. Discrimination on the grounds of sex is of a particular, structural, nature and affects mainly women. Women are not a minority, but more than half of the European population and often suffer multiple discrimination. They have the right to enjoy effectively all fundamental rights and freedoms and to be full citizens, in all areas.***

8.- The *family*, as a "natural and fundamental unit of society", as well as *children* are protected by numerous Community and international instruments and by national Constitutions, while the EU solemnly declares the *"there is an urgent need to strengthen children's rights"*[10].

Abbreviations
CCR: International Convention on Children's Rights
CEDAW: International Convention on the Elimination of all Forms of Discrimination against Women
CJEC: Court of Justice of the European Communities
CCPR: International Covenant on Civil and Political Rights
CESCR: International Covenant on Economic Social and Cultural Rights
ECHR: European Convention on Human Rights
ECtHR: European Court on Human Rights
EP Decl.: European Parliament Declaration on Fundamental Rights and Freedoms
Proposal: Articles proposed by the Praesidium (CONVENT 5 and 8)
Social Charter: European Social Charter (revised)

Article preceding proposed Article 1
The Union and the Community as well as Member States secure to everyone within their jurisdiction the effective enjoyment of the rights and freedoms defined in the following Articles, which may be relied upon as against their organs and institutions as well as against individuals, in all areas of Union and Community jurisdiction. (Art. 1 ECHR, Horizontal Questions (BODY 3), para, 8).

[8] EU Report on Human Rights, *op.cit*. paras. 5.12, 5.13, Statement of J.Fischer, *op.cit*.
[9] EU Report on Human Rights, *op.cit*., para. 5.12.
[10] Statement of J.Fischer, *op.cit*., EU Report on Human Rights, *op.cit*., para. 5.13.

Comments: We consider that, since there is a kind of dualism between the EU and the EC and since there are doubts as to whether the EU possesses a legal personality, it would be preferable that reference should be made to both. Besides, it is obvious that, without vertical and horizontal direct effect, the provisions of the Charter will be a dead letter.

Article 1. Dignity of the human person

Everyone has the right to the respect and protection of his/her dignity. The human body or any part thereof is not for trade, regardless of whether the person concerned has consented. (Art. 1 Poposal; Art. 1 EP Decl.)

Comments: We consider that the exemption of the human body from trade, so that nobody may derive profit or any other benefit therefrom, is a way of implementing respect and protection of human dignity rather than a corollary of the right to life. Consequently, this provision should not be limited to the area of medicine and biology, but should have a more general scope which should also include the prohibition of trafficking in persons, in particular in women and children, for the purpose of forced labour or sexual exploitation, so that the well-known and constantly increasing problems of trafficking in women and children throughout Europe are dealt with. It is indispensable to specify that the consent of the person concerned is irrelevant, since it is obvious and confirmed by common experience that it is impossible to know whether this consent has been freely given. Moreover, extensive research on the matter has proved that, in the great majority of cases, women engaging in prostitution, at least at the outset, do not act with their free consent.

For the rest, we agree with para. 3 of Article 1 of the Praesidium's Proposal. As concerns para. 2 of Article 1 of this Proposal, see infra, Comments under Article 2.

Article 2. Right to life

Everyone has the right to the protection of his/her life and of his/her physical, psychological and genetic integrity. Torture or inhuman or degrading punishment or treatment, such as sexual mutilations, as well as any other kind of physical or moral violence, including violence within the family, are in particular prohibited.

(Art. 1, 2 Proposal; Art. 2, 3 ECHR; Art. 6, 7 CCPR; Art. 2 EP Decl.)

Comments: The prohibition of torture may be included in Article 2 or in Article 1 as in the Praesidium's Proposal. What is important is the reference to "sexual mutilations" which, as it is well-known, take place even on European territory, as well as the prohibition of "any other kind of physical or moral violence". For the rest, we agree with para 2 of Article 2 of the Praedisium's Proposal, in its alternative wording.

Article 4. Right to an effective judicial remedy and to a fair trial

1. ***Everyone, without distinction of any kind, is entitled to real and effective judicial protection of the rights and freedoms recognised by the present Charter as well as of any other right conferred by Community or Union law, against any public authority and any individual. This right comprises in particular the right to effective access to justice and to legal aid in case of insufficient resources, the right to effective judicial control as regards respect of one's rights and freedoms, the right to fair trial, the right that a real and effective sanction against violations be inflicted by the competent court, and the right to execution of any final judgment.***

(Art. 4, 5 Proposal; CJEC case law; Directive 97/80; Art. 6 ECHR; Art. 2, 14 CCPR; Art. 19 EP Decl.)

Comments: We consider that it is necessary to enhance the formulation of Article 4 of the Praesidium's Proposal, in view of CJEC case law in conjunction with ECtHR case law. The CJEC has ruled up to now on certain expressions of the principle of real and effective judicial protection, a principle it has established by drawing inspiration from Articles 6 and 13 of the ECHR and from the constitutional traditions common to the Member States. It has in particular developed the right of access to court, the right to effective judicial control as regards respect of substantive rights derived from Community law, as well as rights relating to the kind of evidence and the burden of proof and the right to a real and effective sanction[11]. CJEC case law seems more advanced in certain respects than ECtHR case law, but the former is complemented in certain other respects (e.g., in matters of legal aid and execution of judgments) by the latter as well as by Articles 2 and 14 CCPR.

We agree with the transposition of ECHR Article 6 to Article 5 of the Praesidium's Proposal, but we consider that this is not sufficient and that it is necessary, in any event, to have a more explicit provision relating to the content of the right to judicial protection and corresponding to the successive stages of this protection. This is why we propose the second sentence of para. 1.

2. *Trade unions and NGOs have the right to lodge any complaint or judicial proceedings or to support those lodged by a person who alleges a violation of the rights mentioned in the 1st paragraph of the present Article, with any competent national or European judicial or other authority.*

Comments: The usefulness of the above provision is obvious. In all areas, the support of trade unions and NGOs encourages victims of violations of rights and freedoms and protects them from prejudicial consequences of their complaints.

Article 9. Right to found a family and right of the family to protection

1. *Men and women of marriageable age have the right to marry and to found a family, according to their national law. Marriage should be entered into with the free consent of each intending spouse.*

2. *Spouses shall enjoy equality of rights and responsibilities before national and European authorities as well as between them and in their relations with their children, during marriage and in the event of its dissolution. In all cases, the best interests of the child shall be a primary consideration.*

3. *The family as well as all its members as such have the right to protection, without any distinction, in all areas of Union and Community jurisdiction, as well as the right to claim this protection from any competent national and European authority. Large and single parent families have the right to special protection.*

(Art. 9 Proposal; Art. 12 ECHR and Art. 5 Protocol No 7 ECHR; Art. 16 Social Charter; Art. 23 CCPR; Art. 10 CESCR; Art. 3, 18, 20, 21 CCR; Art. 7 EP Decl.)

Comments: This Article should come after Article 8 of the Praesidium's Proposal. The more general protection of children should be the object of a special provision. See infra Art. 21.

[11] See in particular certain leading cases: Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *UNECTEF/Heylens* [1987] ECR 4112; Case 14/83 and Case. 79/83 *von Colson* and *Harz* [1984] ECR 1891 and 1921; Case C-177/88 *Dekker* [1990] ECR I-3941; Case C-97/91, *Oleificio Borelli* [1992] ECR I-6330; Case 199/82, *San Giorgio* [1983] ECR 3595; Case 109/88, *Danfoss* [1989] ECR 3220.

Article 17. Rights of aliens

1. ***Everyone who is persecuted has the right of asylum in the Union; it is in particular considered that there is persecution[,] when a woman or a man is unable to freely dispose of him/herself or his/her freedom or fundamental rights or physical or psychological or genetic integrity are threatened, whether the authorities of the country of origin are the authors of such persecution or threats or they tolerate them or are unable to oppose them.***

2. ***The conditions for the implementation in practice of the rights conferred on migrants shall secure that women benefit therefrom under the same conditions as men.***

3. ***Collective expulsions of aliens are prohibited.***

(Art. 17 Proposal; Art. 63 EC Treaty; Art. 4 Protocol No 4 and Art. 1 Protocol No 7 ECHR)

Article 20. Right to substantive and effective equality between women and men

1. ***In all areas of Union and Community jurisdiction, women and men have equal rights, including the equal right to work freely chosen or accepted, the right to the same working conditions, the right to fair and equal pay for work of equal value, the equal right to social security and assistance for themselves and their family. Any direct or indirect discrimination on the ground of sex is prohibited in any area. Positive measures are advisable, in order to improve, in the first instance, the position of women, until substantive and effective equality between men and women is achieved.***

2. ***For the purposes of the principle of equal pay between men and women for work of equal value, "pay" means*****……..(the rest of the text of Article 141(2) EC Treaty should be inserted here).**

(Art. 19(2) Proposal; Art. 141 EC Treaty; Declaration No 28 annexed to the Treaty of Amsterdam; Art. 4(1) CEDAW; Directives 76/207, 75/117, 79/7, 86/613, 96/97; Art. 4, 20 Social Charter; Art. 3 CCPR; Art. 3, 7 CESCR; ILO Convention No 100).

Comments: For the reasons mentioned in the Introductory Note (Nos 5-7), we consider that the above provision should constitute a separate Article, which should come after the Articles containing the general non-discrimination clauses and should guarantee real and effective equality between men and women in all areas of Union and Community jurisdiction. This is necessary in order that the relevant Community acquis be taken into consideration, consolidated and developed. Such a provision is also required by virtue of the Member States' international obligations, in particular those obligations undertaken through the ratification of the Convention on the elimination of all forms of discrimination against women (CEDAW).

Furthermore, the inclusion of sex as a ground of discrimination among the other grounds mentioned in Article 13 EC Treaty is not advisable, since discrimination on the ground of sex is of a particular, structural, nature and sex differs fundamentally from the other grounds of discrimination which concern mainly minorities. This is why positive measures are necessary "in order to improve, in the first instance, the position of women", according to Declaration No 28 annexed to the Treaty of Amsterdam, and which will be temporary, until substantive and effective equality between women and men is achieved, according to Article 4(1) of the CEDAW. Consequently, the general non-discrimination clause should not include "sex".

Paragraph 2 is necessary in order to consolidate the Community acquis in respect of the concepts of "pay" and "work of equal value".

Article 21. Rights of children

Every child, without any distinction in his/her respect or in respect of his/her parents, has the right to a legal existence, to the protection of his/her interests and to the enjoyment of the rights and freedoms defined in Articles……of the present Charter. (CCR; Art. 7, 17 Social Charter; Art. 24 CCPR; Art. 10 CESCR)

Article 22 Right to the protection of pregnancy and maternity

Every woman, without any distinction, has the right to the protection of pregnancy and maternity, including the right to sufficient maternity leave, at least of the duration provided by Community law and remunerated through social security benefits and to the maintenance, during this leave, of her rights relating to her employment, as well as to be guaranteed protection against working conditions which may harm her and/or her child, before or after confinement, and against ailments which have their origin in pregnancy, confinement or breast-feeding.
(Art. 152(1) EC Treaty; Directive 92/85; Art. 8 Social Charter; Art. 10 CESCR)

Article 23 Rights of parents

Every mother and father has the right to the protection of his/her parental and family function, including the right to leaves, at least of the duration provided by Community law and remunerated through social security benefits, in order to raise and take care of her/his children, and to the maintenance, during this leave, of the rights relating to her/his employment. Any discrimination against them is prohibited.
(Directive 96/34; ILO Convention No 156; Art.27 Social Charter)

Article 24. Right to an adequate and decent standard of living

Everyone has the right to an adequate and decent standard of living for him/herself and his/her family and to protection against social exclusion.
(Art. 11 CESCR; Art. 30, 31 Social Charter; Art. 15 EP Decl.)

Article 25. Protection of the elderly, incurables, handicapped and indigent

Every person who is elderly, incurable, handicapped or indigent has the right to special protection.

Article 26.

The Union and the Community as well as the Member States ensure that the provisions of the present Charter are brought to the knowledge of the persons whose rights they guarantee, by all appropriate and effective means. These persons have the right to be informed thereof.
(Cf. Art. 7 Directive 75/117; Art. 6 Directive 76/207)

Article X. RIGHTS OF CITIZENS OF THE EU

Every citizen of the Union, without any distinction, has the rights provided by the law of the Union and national law in respect of access to candidacy for elections and exercise of the corresponding functions, as well as to posts of the organs and institutions of the Union, the Community and the Member States; positive measures are advisable, in order to favour equal access of women and men thereto.
(Art. 19, 190 EC Treaty; Art. 25 CCPR; Art. 17 EP Decl.)

Article Z. LEVEL OF PROTECTION

No provision of this Charter may be interpreted as placing restrictions on the protection afforded by the provisions of the European Convention on Human Rights and the other international instruments relating to human rights and freedoms, ratified by the Member States, as well as by the provisions of the Constitutions and legislation of Member States relating to such rights and freedoms.

Comments: Article Z of the Praesidium's Proposal is reinforced in view of what has been stated supra, in the Introductory Note. The EU cannot ignore the international obligations of its Member States without losing its credibility both with its citizens and the international community, the more so as it considers itself and must be a Community based on the rule of law and wishes to play a leading role in the respect and promotion of human rights around the world. The Charter has no raison d' être unless it is built on the international acquis and the constitutional acquis of its Member States and develops them. ***It is to the universal values and principles that Article 6(1) EC Treaty refers.*** *Article Z, as proposed, is also in line with the Community and international principle according to which Community and international provisions contain minimum standards which may be surpassed by national law and may in no case serve as an excuse for lowering the existing national level of protection (see also Art. 137(5) EC Treaty).*

Note: The new Articles proposed by the Praesidium (CONVENT 8) have just come to our knowledge, after the proposed provisions had been drafted. We welcome the inclusion of a specific provision on equality between men and women, since this constitutes an advance in relation to the Draft List of fundamental rights (BODY 4). However, for the reasons indicated in our Introductory Note (Nos 5-7) and in our Comments under Article 20 *supra*, we consider that it is necessary to include in the Charter an even more specific and explicit provision, applying to all areas of Union and Community jurisdiction, which will consolidate and develop the Community acquis and will take into consideration the international obligations of the Member States, such as the provision we propose (Article 20).

We have further noted with great interest that the Convention intends to give particular attention to the content of the Article concerning the principle of democracy. We have no doubt that it will be proclaimed in this Article that real democracy is parity democracy.

In thanking the Convention for their attention and congratulating them on their efforts to promote and guarantee fundamental rights, the AFEM wishes them successful completion of their task.

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Editors' note to CHARTE 4157/00 ADD 1, **Contribution de l'Association des Femmes de l'Europe Méridionale (AFEM)**:

The French version differs slightly from the English (paragraph on gender-neutral language at §1 excluded) and so is included.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 17 mars 2000

CHARTE 4157/00 ADD 1

CONTRIB 42

ADDENDUM AU NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint la version française d'une contribution de Association des Femmes de l'Europe Méridionale (AFEM). [1] [2]

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[1] AFEM: 5, rue Villaret de Joyeuse - 75017 Paris.

[2] Ce document existe en langues anglaise et française.

AFEM
ASSOCIATION DES FEMMES DE L EUROPE MÉRIDIONALE

PROPOSITION DE DISPOSITIONS DE LA CHARTE

I. NOTE INTRODUCTIVE

1.- Suite à sa Déclaration sur la Charte (CONTRIB 16), l'Association des Femmes de l'Europe Méridionale (AFEM) a l`honneur de proposer quelques dispositions, qui suivent, en principe, le schéma de la Proposition du Présidium.

2.- L`AFEM souligne le besoin de prendre en compte l'acquis communautaire et international (traités ratifiés par tous les États membres), ainsi que l'acquis constitutionnel commun aux États membres, comme ***standards minima***, et de marquer une avancée par rapport à ceux-ci.

3.- Ainsi, l`UE fera preuve de son attachement aux ***principes universels proclamés par l`article 6§1er Traité UE***[1] et de sa détermination d`assurer que ni cette disposition ni celles des articles 7[2] et 49[3] de ce Traité ne deviendront lettre morte. Elle confirmera ainsi qu`elle se veut vraiment une Communauté de droit et renforcera sa crédibilité tant envers ses citoyens qu`envers la communauté internationale.

4.- L`AFEM rappelle les déclarations solennelles de l`UE selon lesquelles:

- "*le succès économique ne peut être assuré que si les droits humains sont observés et garantis*";
- l`UE "*insiste*" sur *"l`équivalence*", "*l`interdépendance*" et "*l`unicité*" de tous les droits, y compris les droits économiques, sociaux et culturels dont elle souhaite promouvoir la justiciabilité;[4]

5.- ***Il est bien connu que les clauses générales de non discrimination ne suffisent pas pour éliminer les discriminations directes et indirectes en raison du sexe, et surtout celles contre les femmes, et à établir une égalité substantielle entre femmes et hommes***. La constatation de ce fait a conduit:

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1 Article 6§1er Traité UE: *"L`Union est fondée sur les principes de la liberté, de la démocratie, du respect des droits de l`homme et des libertés fondamentales, ainsi que de l`État de droit, principes qui sont communs aux États membres*."

2 Sanctions contre les États membres qui violent les principes de l`article 6§1er Traité UE.

3 Le respect de ces principes constitue une condition primordiale de l`adhésion à l`UE.

4 Rapport annuel de l`UE sur les droits de l`homme (1999), points 5.1, 5.2, et Déclaration de M. J.Fischer au nom de l`UE à la Commission des Droits de l`Homme annexée à ce Rapport.

a) au niveau international:

- à l`adoption d`instruments spéciaux garantissant des droits fondamentaux des femmes[5];
- puis à l`insertion dans le Pacte DCP et le Pacte DESC de clauses spécifiques interdisant les discriminations en raison du sexe;
- ensuite, comme même cela s`est avéré insuffisant[6], à l`adoption de la Convention sur l`élimination des discriminations à l`égard des femmes;

b) au niveau communautaire:

- à la consacration de l`égalité entre femmes et hommes comme principe général et droit fondamental spécifiques (jurisprudence constante de la CJCE);
- à la proclamation de l`égalité entre femmes et hommes comme mission et objectif fondamentaux de la Communauté et à l`engagement de celle-ci à la promouvoir dans tous les domaines de sa compétence (articles 2, 3§2, 137 Traité CE);
- au développement de l`acquis législatif et jurisprudentiel en matière d`égalité entre femmes et hommes et d`interdiction des discriminations, directes ou indirectes, fondées sur le sexe, y compris toute espèce de traitement défavorable en raison de la grossesse ou de la maternité;
- au développement de l`acquis législatif et jurisprudentiel en matière de protection juridictionnelle contre les discriminations, directes ou indirectes, en raison du sexe;

c) au niveau national, à des garanties constitutionnelles expresses et spécifiques de l`égalité entre femmes et hommes.

6.- Cependant, en dépit de tout cela, ***l`égalité substantielle entre femmes et hommes n`est pas encore atteinte.*** Pour remédier à cette situation:

- la Convention sur l`élimination des discriminations à l`égard des femmes (article 4§1er) prévoit des actions positives en faveur des femmes et la Commission qui contrôle l`application de la Convention insiste sur la nécessité de ces actions;
- les organes qui contrôlent l`application des deux Pactes internationaux insistent sur la nécessité d`actions positives en faveur des femmes;
- un nombre croissant de Constitutions nationales garantit l`égalité substantielle entre femmes et hommes et légitimise les actions positives[7], en formant ainsi une "tradition constitutionnelle commune aux États membres";
- l`article 141§4 Traité CE prévoit des actions positives "pour assurer concrètement une pleine égalité entre hommes et femmes dans la vie professionnelle" et la Déclaration No 28 annexée au Traité d`Amsterdam précise que ces actions doivent "*avant tout améliorer la situation des femmes";*

5 Conventions sur les droits politiques des femmes, sur la nationalité des femmes mariées etc.

6 V. préambule de la Convention sur l`élimination des discriminations à l`égard des femmes.

7 Constitutions allemande [article 3§2], autrichienne [article 7§2], portugaise [article 9(h)], finlandaise [article 6§4], suédoise, française [articles 3 et 4], hellénique (projet).

- des programmes d`action communautaire spécifiques, pour promouvoir l`égalité substantielle entre femmes et hommes, sont adoptés et mis en oeuvre;
- l`UE déclare officiellemt et solennellement qu`une "*priorité spéciale doit être accordée aux droits des femmes"*, y compris ceux *des petites filles*[8];.
- l`Assemblée Générale de l`ONU vient d`adopter un Protocole facultatif à la Convention sur l`élimination des discriminations à l'égard des femmes qui rend possibles les recours individuels; l`UE souligne qu`elle a appuyé cette initiative et qu`elle oeuvre en vue de l`entrée en vigueur à bref délai de ce nouvel instrument[9].

7.- ***Il est ainsi évident que, si la Charte se limite à une clause générale de non discrimination sans consacrer explicitement l`égalité effective des sexes, elle marquera une régression en matière d`égalité entre femmes et hommes, que certes personne ne souhaite. Les discriminations en raison du sexe sont de nature particulière, structurelle, et affectent surtout les femme. Celles-ci ne sont pas une minorité, mais plus que la moitié de la population européenne et souffrent souvent de discriminations multiples. Elles ont le droit de jouir effectivement de tous les droits et libertés fondamentaux et d`être des citoyennes à part entière, dans tous les domaines.***

8.- La *famille*, en tant qu` "élément naturel et fondamental de la société", ainsi que les *enfants* sont protégés par de nombreux instruments communautaires et internationaux et par les Constitutions nationales, tandis que l`UE déclare solennellement qu`il est "*urgent de renforcer les droits des enfants"*[10].

II. PROPOSITION DE DISPOSITIONS

Abréviations
CDE: Convention internationale sur les droits des enfants
CEDH: Convention européenne des droits de l`homme
CEDF: Convention sur l`élimination des discriminations à l`égard des femmes
Charte sociale: Charte sociale européenne (revisée)
CJCE: Cour de Justice des Communautés européennes.
CourEDH: Cour européenne des droits de l`homme
Décl. PE: Déclaration des droits et libertés fondamentaux du Parlement Européen (1989).
PacteDCP: Pacte international relatif aux droits civils et politiques
PacteDESC: Pacte international relatif aux droits économiques, sociaux et culturels
Proposition: Proposition d`articles établie par le Présidium (CONVENT 5 et 8)

Article précédant l`Article 1 de la Proposition
L`Union et la Communauté européennes ainsi que les États-membres garantissent à toute les personnes relevant de leur juridiction la jouissance effective des droits et libertés définis aux articles suivants, dont elles pourront se prévaloir à l`encontre de leurs organes et institutions, comme à l`encontre des particuliers, dans tous les domaines de compétence de l`Union et de la Communauté. (Art. 1 CEDH; Questions horizontales (BODY 3), point 8).

8 Rapport de l`UE sur les droits de l`homme, points 5.12, 5.13, Déclaration J.Fischer, op.cit.
9 Rapport de l`UE sur les droits de l`homme, op. cit., point 5.12.
10 Rapport de l`UE sur les droits de l`homme, op. cit., point 5.12.

Commentaire: Nous croyons que, puisqu`il existe une sorte de dualisme entre l`UE et la CE et qu`il subsiste des doutes quant à la personalité morale de l`UE, il serait préférable de se référer à toutes les deux. Par ailleurs, il est évident que sans effet direct, vertical et horizontal, les dispositions de la Charte resteront lettre morte.

Article 1. Dignité de la personne humaine

Toute personne a droit au respect et à la protection de sa dignité. Le corps humain ou quelconque partie de celui-ci est hors commerce, que ce soit sans ou avec le consentement de la personne concernée. (Art. 1 Proposition; art. 1 décl.PE,)

Commentaire: Nous considérons que la mise du corps humain ou de quelconque partie de celui-ci hors commerce, afin que personne n`en puisse tirer profit, est une forme de respect et de protection de la dignité de la personne humaine, plutôt qu`un corollaire du droit à la vie. Par conséquent, cette disposition ne doit pas être limitée au domaine de la médecine et de la biologie, mais avoir une portée plus générale qui inclut aussi l`interdiction de la traite des êtres humains, notamment des femmes et des enfants, aux fins d`exploitation de leur travail ou d`exploitation sexuelle, afin que puissent être envisagés les problèmes bien connus et constamment croissants de traite de femmes et d`enfants à travers l`Europe. Il est indispensable de préciser que le consentement de la personne concernée est sans incidence, puisqu` il est évident et confirmé par l`expérience commune qu`il est impossible de savoir si celui-ci est donné librement. Des recherches multiples en la matière ont d`ailleurs démontré que dans la grande majorité des cas, la prostituée, au moins au commencement, n`agit pas après une décision prise librement.

Pour le reste, nous sommes d`accord avec le paragraphe 3 de l`article 1 de la Proposition. En ce qui concerne le paragraphe 2 de l`article 1 de cette Proposition, voy. ci-dessous, Commentaire sous l`article 2.

Article 2. Droit à la vie

Toute personne a droit au respect et à la protection de sa vie et de son intégrité physique, psychique et génétique. Sont notamment interdits la torture et les peines ou traitements inhumains et dégradants, telles les mutilations sexuelles, ainsi que toute autre forme de violence physique ou morale, y compris celle exercée au sein de la famille.
(Art. 1, 2 Proposition; art. 2, 3 CEDH; art. 6, 7 Pacte DCP; art. 2 décl.PE).

Commentaire: L`interdiction de la torture peut être insérée dans l`article 2, ou bien dans l`article 1 comme dans la Proposition. Ce qui importe est la mention des "mutilations sexuelles" qui, comme il est bien connu, ont lieu même sur le territoire européen, ainsi que l`interdiction de "toute autre forme de violence physique ou morale". Pour le reste, nous sommes d`accord avec le paragraphe 2 de l`article 2 de la Proposition, dans sa formule alternative.

Article 4. Droit à un recours effectif et à un procés équitable

1. ***Toute personne, sans distinction aucune, a droit à la protection juridictionnelle effective et efficace des droits et libertés reconnus dans la présente Charte et de tout autre droit conféré par le droit communautaire ou de l`Union Européenne, envers toute autorité publique et tout particulier. Ce droit comprend notamment les droits à l`accès effectif à la justice et à l`aide juridique en cas de ressources insuffisantes, au contrôle juridictionnel effectif sur le respect de ses droits et libertés, à un procès équitable, à une sanction effective et efficace contre les violations prononcée par le tribunal compétent et à l`exécution de tout jugement définitif.***(Art. 4, 5 Proposition; jurispr. CJCE; Directive 97/80; art. 6 CEDH; art. 2, 14 Pacte DCP; art. 19 décl.PE).

Commentaire: Il est nécessaire que la formulation de l`article 4 de la Proposition soit enrichie, compte tenu de la jurisprudence de la CJCE en combinaison avec celle de la CourEDH.
La CJCE s`est prononcée jusqu`aujourd`hui sur quelques expressions du principe de protection juridictionnelle effective et efficace, principe qu`elle a consacré en s`inspirant des articles 6 et 13 CEDH et des traditions constitutionnelles communes aux États membres; elle a notamment consacré le droit à l`accès au juge, le droit au contrôle juridictionnel effectif sur le respect des droits communautaires substantiels, ainsi que des droits relatifs aux moyens et à la charge de la preuve et le droit à une sanction effective et efficace[11]*. Sa jurisprudence semble être plus avancée à quelques égards que celle de la CourEDH, mais elle est complétée à d`autres égards (p.ex. en matières d`aide juridique et d`exécution des jugements) par celle de la CourEDH et par les articles 2 et 14 du PacteDCP.*

Nous sommes d`accord sur la transposition de l`article 6 de la CEDH dans l`article 5 de la Proposition, mais nous croyons que ni cela ne suffit et qu`il est nécessaire, en tout cas, d`avoir une disposition plus explicite sur le contenu du droit à la protection juridictionnelle qui corresponde aux étapes successives de cette protection. C`est pourquoi nous proposons le second alinéa du 1er paragraphe de l`article 4 ci-dessus.

2. *Les organisations syndicales et les ONG ont le droit de porter plainte ou de former un recours juridictionnel ou de soutenir ceux d`une victime de violation des droits mentionnés au 1er paragraphe du présent article auprès de toute instance compétente nationale ou européenne.*

Commentaire: L`utilité d`une telle disposition est évidente. Dans tous les domaines, le soutien des organisations syndicales et des ONG encourage la victime de violations des droits et libertés et la protège contre les conséquences préjudicielles de sa plainte ou de son recours juridictionnel.

Article 9. Droit de fonder une famille et droit de la famille à la protection

1. *A partir de l`âge nubile, l`homme et la femme ont le droit de se marier et de fonder une famille selon le droit national. Le mariage doit être librement consenti par chacun des futurs époux.*

2. *Les époux jouissent de l`égalité de droits et d`obligations dans leurs rapports avec les autorités nationales et européennes, ainsi qu`entre eux et dans leurs relations avec leurs enfants, durant leur mariage et lors de sa dissolution. Dans tous les cas l`intérêt de l`enfant sera la considération primordiale.*

3. *La famille, ainsi que ses membres en tant que tels, ont droit à la protection, sans distinction aucune, dans tous les domaines de compétence de l`Union et de la Communauté européenne, ainsi que le droit de revendiquer cette protection auprès des instances compétentes nationales et européennes. Les familles nombreuses ou monoparentales ont droit à une protection spéciale.*

(Art. 9 Proposition; art. 12 CEDH et art. 5 Protocole No 7 CEDH; art. 16 Charte sociale; art. 23 PacteDCP; art. 10 Pacte DESC; art. 3, 18, 20, 21 CDE; art. 7 décl.PE).

Commentaire: Cet article suit l`article 8 de la Proposition. La protection plus générale des enfants doit faire l`objet d`une disposition spéciale. V. ci-dessous art. 21

[11] Voy. notamment quelques arrêts de principe: CJCE 15.5.1986, aff. 222/84, *Johnston*, Rec. p. 1651; CJCE 15.10.1987, aff. 222/86, *UNECTEF/Heylens*, Rec. p. 4112; CJCE 10.4.1984, aff. 14/83 et aff. 79/83 *von Colson* et *Harz*, Rec. pp. 1891 et 1921; CJCE 8.11.1990, aff. C-177/88, *Dekker*, Rec. p. I-3941; CJCE 3.12.1992, aff. C-97/91, *Oleificio Borelli*, Rec. p. I-6330; CJCE 9.11.1983, υπόθ. 199/82, *San Giorgio*, Rec. p. 3595; CJCE 17.10.1989, aff. 109/88, *Danfoss*, Rec. p. 3220.

Article 17. Droits des étrangers

1. ***Toute personne persécutée a le droit d`asile; est notamment considérée comme persécution, pour les femmes comme pour les hommes, le fait de ne pouvoir disposer librement de soi-même ou d`être menacé(e) dans sa liberté ou ses droits fondamentaux ou dans son intégrité physique, psychique ou génétique, que les pouvoirs publics du pays d'origine soient les auteurs de ces persécutions ou menaces, qu'ils les tolèrent, ou qu'ils soient dans l'incapacité de s'y opposer.***

2. ***Les conditions pratiques de mise en oeuvre des droits reconnus aux migrants doivent garantir que les femmes en bénéficieront effectivement dans les mêmes conditions que les hommes.***

3. ***Les expulsions collectives d`étrangers sont interdites.***

(Art. 17 Proposition, art. 63 CE; art. 4 protocole No 4 et art. 1 Protocole No 7 CEDH)

Article 20. Droit à l`égalité substantielle et effective entre femmes et hommes

1. ***Dans tous les domaines de compétence de l`Union et de la Communauté européennes, femmes et hommes ont des droits égaux, y compris les droits au travail librement choisi ou accepté, aux mêmes conditions d`emploi, à une rémunération équitable et égale pour un travail de valeur égale, à la sécurité et à l`assistance sociale pour eux/elles-mêmes et leur famille. Toute discrimination, directe ou indirecte, en raison du sexe est interdite dans quelque domaine que ce soit. Des mesures positives sont indiquées, avant tout pour améliorer la situation des femmes, jusqu`à ce que l`égalité substantielle et effective entre femmes et hommes soit atteinte.***

2. ***Aux fins d'application du principe de l'égalité des rémunérations entre femmes et hommes pour un travail de valeur égale, on entend par rémunération…..*****(continuer en insérant tout le reste du texte du paragraphe 2 de l`article 141 Traité CE).**

(Art. 19§2 Proposition, art. 141 Traité CE; Déclaration No 28 annexée au Traité d`Amsterdam; art. 4§1 CEDF; Directives 76/207, 75/117, 79/7, 86/613, 96/97; art. 4, 20 Charte Sociale; art. 3 PacteDCP; art. 3, 7 PacteDESC; Convention OIT No 100).

Commentaire: Pour les raisons indiquées dans la Note introductive (Nos 5-7) nous considérons que la disposition ci-dessus doit constituer un article distinct, qui suive les articles contenant des clauses générales de non discrimination, et qui garantisse l`égalité effective et substantielle entre les hommes et les femmes dans tous les domaines de compétence de l`Union et de la Communauté. Cela est nécessaire afin que soit pris en compte, consolidé et développé l`acquis communautaire en la matière. Une telle disposition est aussi requise par les engagements internationaux des États membres, et notamment ceux entrepris par la ratification de la Convention sur l`élimination des discriminations à l`égard des femmes.

Par ailleurs, l`insertion du sexe comme un motif de discrimination parmi les autres motifs mentionnés dans l`article 13 du Traité CE n`est pas indiquée, puisque la discrimination fondée sur le sexe est de nature particulière, structurelle, et que le sexe diffère fondamentalement des autres motifs de discrimination, qui se réfèrent surtout à des minorités. C`est pour cela que sont nécessaires des mesures positives, "avant tout pour améliorer la situation des femmes", selon la Déclaration No 28 annexée au Traité d`Amsterdam, et temporaires, jusqu`à ce que l`égalité substantielle et effective entre femmes et hommes soit atteinte, selon l`article 4§1 de la Convention sur l`élimination des discriminations à l`égard des femmes. Par conséquent, la clause générale de non discrimination ne doit pas inclure le sexe.

Le paragraphe 2 est nécessaire pour consolider l`acquis communautaire en ce qui concerne les notions de "rémunération" et de "travail de valeur égale".

Article 21. Droits des enfants
Tout enfant, sans distinction aucune, à son égard ou à l`égard de ses parents, a droit à une existence légale, à la protection de son intérêt et à la jouissance des droits et libertés reconnus par les articles……de la présente Charte.
(CDE; art. 7, 17 Charte Sociale; art. 24 PacteDCP; art. 10 PacteDESC)

Article 22. Droit à la protection de la grossesse et de la maternité
Toute femme, sans distincion aucune, a droit à la protection de la grossesse et de la maternité, y compris le droit à un congé de maternité suffisant, au moins de la durée prévue par le droit communautaire, et rémunéré par des prestations de sécurité sociale, et au maintien pendant ce congé des droits liés à son emploi, ainsi qu` à la garantie de protection contre les conditions d`emploi qui peuvent nuire à elle-même et/ou à son enfant, avant et après l`accouchement, et contre les affections qui ont leur origine dans la grossesse, l`accouchement ou l`allaitement.
(art. 152§1 Traité CE; Directive 92/85/CEE; art. 8 Charte Sociale, art. 10 PacteDESC)

Article 23. Droits des parents
Toute mère et tout père a droit à la protection de sa fonction parentale et familiale, y compris le droit à des congés, au moins de la durée prévue par le droit communautaire, et rémunérés par des prestations de sécurité sociale, pour élever et soigner ses enfants. Toute discrimiation à leur égard est interdite.
(Directive 96/34/CE; Convention OIT No 156; art.27 Charte Sociale)

Article 24. Droit à un niveau de vie suffisant et décent
Toute personne a droit à un niveau de vie suffisant et décent pour elle-même et sa famille et à la protection contre l`exclusion sociale.
(Art. 11 PacteDESC, art. 30, 31 Charte Sociale, art. 15 décl.PE)

Article 25. Protection des personnes âgées, incurables, handicapées ou indigentes
Toute personne âgée, incurable, handicapée ou indigente a droit à une protection spéciale.

Article 26
L'Union et la Communauté européennes, ainsi que les États membres veillent à ce que les dispositions de la présente Charte soient portées à la connaissance des personnes dont elles garantissent les droits, par tout moyen approprié et efficace. Ces personnes ont le droit d`en être informées.
(Cf. article 7 Directive 75/117/CEE, article 6 Directive 76/207/CEE

DROITS DES CITOYENS DE L`UNION

Article X. ***Tous les citoyen de l`Union européeenne, sans distinction, ont les droits prévus par le droit de l`Union et le droit national en matière d`accès aux mandats électoraux et aux fonctions électives, ainsi qu`aux postes des institutions et organes de l`Union, de la Communauté et des États membres. Des mesures positives sont indiquées pour favoriser l`égal accès des femmes et des hommes à ces mandats, fonctions et postes.***
(Art. 19, 190 Traité CE, art. 25 PacteDCP, art. 17 décl.PE,)

Article Z. NIVEAU DE PROTECTION

Aucune disposition de la présente Charte ne peut être interprétée comme restreignant la protection offerte par les dispositions de la Convention européenne des droits de l`homme et des autres instruments internationaux relatifs aux droits et libertés de la personne humaine, ratifiés par les États membres, ainsi que par les dispositions des Constitutions et des législations des États membres relatives à ces droits et libertés.

Commentaire: L`article Z de la Proposition de la Convention est renforcé en considération de ce qui est exposé dans la Note introductive ci-dessus. L' UE ne peut ignorer les obligations internationales de ses États membres sans perdre sa crédibilité tant envers ses citoyens qu`envers la communauté internationale, d`autant plus qu`elle se veut et doit être une Communauté de droit et qu`elle veut et doit jouer un rôle moteur pour le respect et la promotion des droits humains dans le monde. La Charte n`a de raison d`être que si elle est construite sur l`acquis international et l`acquis constitutionnel des États membres et développe ceux-ci.* ***C`est aux valeurs et principes universels que se réfère l`article 6§1er du Traité UE.*** *L`article Z, en sa teneur proposée, est aussi en ligne avec le principe communautaire et international selon lequel les dispositions communautaires et internationales contiennent des standards minima qui peuvent être dépassés par le droit national et ne peuvent en aucun cas servir d`excuse pour l`abaissement du niveau national de protection en vigueur. Voy. aussi article 137§5 du Traité CE.

Note: Nous venons de prendre connaissance, après la rédaction des dispositions ci-dessus, des nouvelles Propositions d`articles du Présidium (CONVENT 8). Nous nous félicitons que l`insertion d`une disposition spécifique sur l`égalité entre les femmes et les hommes y soit incluse, ce qui constitue un progrès par rapport au Projet de liste de droits fondamentaux (BODY 4). Cependant, pour les raisons indiquées dans la Note introductive ci-dessus (Nos 5-7) et notre Commentaire sous l`article 20 ci-dessus, nous considérons qu`il est nécessaire d`inclure dans la Charte une disposition encore plus spécifique et expresse, applicable dans tous les domaines de compétence de l`Union et de la Communauté, qui consolide et développe l`acquis communautaire et tienne compte des engagements internationaux des États membres, comme celle que nous proposons (article 20).

Par ailleurs, nous avons noté avec grand intérêt que la Convention se propose d`accorder une réflexion particulière au contenu de l`article sur le principe de la démocratie. Nous ne doutons pas que dans cet article sera explicitement proclamé qu`il n`est de démocratie véritable que paritaire.

En remerciant la Convention de son attention et en la félicitant de ses efforts pour promouvoir et garantir les droits fondamentaux, l`AFEM lui souhaite un bon aboutissement de ses travaux.

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ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 14. März 2000

CHARTE 4159/00

CONTRIB 43

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte anliegend einen Beitrag der Konrad-Adenauer-Stiftung zur EU-Grundrechtscharta.[1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Dr. Burkard Steppacher	FuB

EU-Grundrechtscharta

Ziele – Methoden – Bewertung

Gliederung:

Zusammenfassung

Zur Ausarbeitung einer „Charta der Grundrechte der Europäischen Union“ trat erstmals im Dezember 1999 in Brüssel ein 62köpfiges Gremium („Konvent“) zusammen, in dem Beauftragte der Staats- und Regierungschefs der EU sowie Mitglieder der nationalen Parlamente, der Europäischen Kommission und des Europäischen Parlaments vertreten sind. Auftrag des Gremiums ist es, einen Entwurf auszuarbeiten, der im Dezember 2000 (unter franzö sischer EU-Präsi-dentschaft) feierlich proklamiert und gegebenenfalls in die EU-Verträge aufge-nommen werden soll.

Entscheidend für den Erfolg des Projektes wird es sein, a) eine inhaltlich glaubwürdige, das heißt nicht überzogene Grundrechtscharta zu erarbeiten, und dabei b) die Bürger in den Entstehungsprozeß stark einzubeziehen.

1. Zielsetzung

Krisen können Wendepunkte sein. In einer solchen Situation befand sich 1999 die Europäische Union. In der Folge der monatelangen Glaubwürdigkeitskrise derEU, die im Rücktritt der Santer-Kommission gipfelte, beschloß der Europäische Rat bei seiner Tagung in Köln am 3./4. Juni 1999, „daß es im gegenwärtigen Entwicklungsstand der Union“ erforderlich ist, eine Charta der Grundrechte zu erstellen.

Absicht dieses ambitiösen Projektes ist es, die Legitimität der Europäischen Union zu stärken. Der Rückgriff auf die bereits 1950 vom Europarat aufgelegte„Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK)“ genügt aus EU-Sicht offenkundig nicht mehr.

So wie die Mitgliedstaaten der EU in ihren Verfassungen eigenständige Grund-rechtskataloge enthalten – und dies vom Ansatz her ja auch nicht mit der Mitgliedschaft im Europarat und dem Vorhandensein der EMRK kollidiert, so schlagen die Staats- und Regierungschefs der EU die Ausarbeitung einer speziellen Grundrechtscharta vor. Ziel ist es, die überragende Bedeutung der Grundrechte in der EU auch in einem Dokument der EU eigens herauszustellen.

Konkret sollen die auf der Ebene der Union im Primär- und Sekundärrecht geltenden Grundrechte sowie die wesentlichen Elemente der ständigen Recht-sprechung des Europäischen Gerichtshofs (EuGH) in einer Charta zusammen-gefaßt und dadurch „für die Unionsbürger sichtbarer“ gemacht werden.

2. Bisherige Rechtslage

Schon im Vertrag von Maastricht (1992: Art. F Abs. 2 EUV) verpflichtete sich die EU auf die Achtung der Grundrechte gemäß der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK) von 1950 und entspre-chend der gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten.

In Amsterdam wurde dies 1997 konkretisiert, indem der neue Art. 6 EUV(ex-Art. F) festhält: „Die Union beruht auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedstaaten gemeinsam".

Daß dies bereits heute schon auch die Mitgliedstaaten der EU verpflichtet, zeigen die Sanktionsmöglichkeiten des Art. 7 EUV, der in Amsterdam neu in das Unionsrecht aufgenommen wurde: „Auf Vorschlag eines Drittels der Mitgliedstaaten oder der Kommission und nach Zustimmung des Europäischen Parlaments kann der Rat, der in der Zusammensetzung der Staats- und Regierungschefs tagt, einstimmig feststellen, daß eine schwerwiegende und anhaltende Verletzung von in Artikel 6 Absatz 1 genannten Grundsätzen durch einen Mitgliedstaat vorliegt“. 1 Wird unter diesen vertraglich klaren Voraus-setzungen eine derartige Feststellung getroffen, so kann der Rat mit qualifizierter Mehrheit beschließen, bestimmte Rechte auszusetzen, die sich aus der Anwendung des Vertrags auf den betroffenen Mitgliedstaat herleiten, einschließ-lich des Stimmrechts im Rat (vgl. Art. 7 Abs. 2 EUV). Dabei muß der Rat allerdings die möglichen Auswirkungen einer solchen Aussetzung auf die Rechte und Pflichten natürlicher und juristischer Personen berücksichtigen.

Die Formulierungen des Art. 6 EUV gewährleisten allerdings keinen Individual-schutz.
Hier ist die bereits erwähnte Rechtsprechung des Europäischen Gerichtshofs von Bedeutung. In einer Vielzahl von EuGH-Urteilen wurde die Verpflichtung der EU zur Achtung der Grundrechte bestätigt und ausgeformt.

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1 Interessanterweise haben sich die Staats- und Regierungschefs der EU auch bei der prophylaktischen Androhung von Sanktionen (Erklärung der portugiesischen Ratspräsidentschaft vom 31.01.2000) im Falle einer mißliebigen österreichischen Regierungskoalition auf diese beiden EUV-Artikel berufen, was nicht nur in Österreich, sondern auch bei EU-Rechtsexperten heftig umstritten ist. Schon ein erster Blick zeigt aber, daß hier weder die materiellen, noch die formellen Voraussetzungen des Vorgehens korrekt waren.

3. Zu den Inhalten einer Grundrechtscharta

Wie umfassend und detailliert der Inhalt einer solchen „Charta der Grundrechte der Europäischen Union“ sein soll, ist umstritten. Zum Teil wird sogar die Notwendigkeit einer eigenständigen Kodifikation der Grundrechte überhaupt angezweifelt und auf das Vorhandensein der EMRK verwiesen, welche nach dieser Position ausreiche, um Grundrechtschutz zu gewähren.

Nach Auffassung des Europäischen Rates allerdings soll die geplante „Charta der Grundrechte der Europäischen Union“ die Freiheits- und Gleichheitsrechte sowie die Verfahrensgrundrechte umfassen, wie sie in der EMRK und entsprechend der gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten bestehen. Darüber hinausgehend sollen in ihr die Grundrechte enthalten sein, die nur den Unions-bürgern zustehen (z.B. Niederlassungsrecht). In Köln haben die Staats- und Regierungschefs zudem beschlossen, daß bei der Ausarbeitung der Charta auch wirtschaftliche und soziale Rechte „zu berücksichtigen“ sind, wie sie in der Europäischen Sozialcharta und in der Gemeinschaftscharta der sozialen Grund-rechte der Arbeitnehmer (vgl. Art. 136 EGV) enthalten sind.

Gerade die zuletzt genannten Punkte sind aber politisch sehr umstritten.

Letztlich steht das Projekt einer „Charta der Grundrechte der Europäischen Union“ vor der Frage, inwieweit als Ergebnis lediglich ein Minimalkonsens *(status quo,* oder eventuell ein *status quo minus)* vereinbart werden kann, ob eine sinnvolle Aktualisierung der heute verstreut vorhandenen Grundrechte in Frage kommt (z.B. Datenschutz, Recht auf Zugang zu Informationen etc.) oder ob – was problematisch wäre – im Rahmen von Kompromissen als Ergebnis die Summe alles potentiell Wünschbaren ins Haus stehen könnte.

4. Zusammensetzung des Gremiums und Arbeitsmethode

Bevor an die konkrete Arbeit gegangen werden konnte, mußte geklärt werden, „wer, was, zu welchem Ziel, in welcher Frist und mit welcher Methode“ in Angriff nehmen sollte. Anfänglich war heftig umstritten, ob das Gremium eher eine Art konventioneller Regierungskonferenz sein sollte und in welchem Umfang Mitglieder der nationalen Volksvertretungen und des Europäischen Parlaments im Gremium repräsentiert würden.

Der Europäische Rat legte schließlich fest, zur Ausarbeitung eines solchen Entwurfs einer „Charta der Grundrechte der Europäischen Union“ eine Ad-hoc-Instanz einzuberufen, die sich aus

Vertretern unterschiedlicher Institutionen zusammensetzt. Die Zusammensetzung dieses Gremiums, dessen Grundzüge bereits in Köln skizziert wurden, wurde auf der Tagung des Europäischen Rates am 15. und 16. Oktober 1999 in Tampere präzisiert.

Mitglieder des Gremiums
Das Gremium umfaßt 62 Mitglieder, die in vier Gruppen eingeteilt werden können:
– fünfzehn Beauftragte der Staats- und Regierungschefs der Mitgliedstaaten,
– ein Beauftragter der Kommission,
– sechzehn Mitglieder des Europäischen Parlaments,
– dreißig Mitglieder der nationalen Parlamente.
Die Mitglieder des Gremiums können sich im Verhinderungsfalle durch Stellvertreter vertreten lassen. (vgl. die Mitgliederliste im Anhang)

Von deutscher Seite sind Mitglieder des Gremiums Prof. Dr. Roman Herzog (Beauf-tragter der Bundesregierung); Prof. Dr. Jürgen Meyer, MdB (SPD) (Deutscher Bundestag); Peter Altmaier, MdB (CDU) (Stellvertreter); Jürgen Gnauck (Thüringen) (Bundesrat); Wolf Weber (Niedersachsen) (Bundesrat, Stellvertreter);
Deutsche EP-Abgeordnete im Gremium sind: Ingo Friedrich (CSU/EVP), Hans-Peter Martin (SPD/SPE), Martin Schulz (SPD/SPE), Sylvia-Yvonne Kaufmann (PDS/ KVEL/NGL) sowie Peter Michael Mombaur (CDU/EVP, Stellvertreter).

Die Beobachter
Es gibt vier Beobachter, und zwar zwei Vertreter des Gerichtshofs der Europäischen Gemeinschaften, die von diesem benannt werden, und zwei Vertreter des Europarates, darunter einer des Europäischen Gerichtshofs für Menschenrechte.

Zu hörende Einrichtungen der Europäischen Union
– Wirtschafts- und Sozialausschuß
– Ausschuß der Regionen
– Europäischer Bürgerbeauftragter

Darüber hinaus können sonstige Gremien, gesellschaftliche Gruppen oder Sachver-ständige gehört werden (noch offen).

Der Europäische Rat hat in Tampere ferner vorgesehen, daß ein angemessener Gedankenaustausch des Gremiums oder seines Vorsitzenden mit den Beitrittsländern stattfinden soll.

Geklärt ist mittlerweile auch die Frage des Vorsitzes. Der Vorsitz rotiert nicht halbjährlich zwischen Vertretern aus den Staaten, die jeweils die EU-Ratspräsi-dentschaft innehaben, vielmehr hat sich der insbesondere vom Europäischen Parlament nachdrücklich vertretene Gedanke durchgesetzt, einen Vorsitzenden für die gesamte Wirkungsdauer aus der Mitte des Gremium zu wählen, wodurch die Unabhängigkeit des Gremiums gegenüber dem Rat unterstrichen wird.

Bei der konstituierenden Sitzung des Gremiums am 17. Dezember 1999 wurde der ehemalige deutsche Bundespräsident Prof. Dr. Roman Herzog zum Vorsitzenden gewählt.

Als drei gleichberechtigte Stellvertreter wurden aus den drei großen Delegationen bestimmt:
– Gunnar Janson (Finnland) für die nationalen Parlamentsabgeordneten,
– Iñigo Mendez de Vigo (EVP, Spanien) für das Europäische Parlament sowie
– Pedro Bacelar de Vasconcellos (Portugal) als Beauftragter der EU-Präsident-schaft.

Der Vorsitzende und die Stellvertreter haben anschließend ein Arbeitsprogramm für das weitere Vorgehen entworfen, worüber bei der folgenden Plenarsitzung am 1./2. Februar 2000 beraten wurde. Zu klären waren Arbeitsmethode und Vorge-hensweise einschließlich eines Zeitplans *(s. unten)*. Entsprechend der Vorgaben des Europäischen Rates von Tampere kann das Gremium Ad-hoc-Arbeitsgruppen einsetzen, die allen Mitgliedern des Gremiums offenstehen.

Koordiniert werden diese Arbeiten durch einen *Redaktionsausschuß*, der sich aus dem Vorsitzenden, den drei stellvertretenden Vorsitzenden sowie dem Vertreter der Kommission zusammensetzt und der vom Generalsekretariat des Rates unterstützt wird.

5. Transparenz und Öffentlichkeit

Anders als bei Regierungskonferenzen oder Ausschußarbeiten wird die Ausarbeitung der Charta völlig transparent sein: Grundsätzlich sollen die Sitzungen des Gremiums und die in diesen Sitzungen vorgelegten Dokumente der Öffentlich-keit zugänglich sein.

Damit sich die interessierte europäische Öffentlichkeit ein aktuelles Bild von den Arbeiten an der Grundrechtscharta machen kann, wurde zur Umsetzung des Transparenzgrundsatzes eine eigene *Internet-Website* eingerichtet. Die Website, die in allen elf Amtssprachen angeboten wird, soll die Öffentlichkeit über den Zeitplan und den Inhalt der Beratungen des Gremiums informieren, ihr alle im Verlauf der Erörterungen des Gremiums vorgelegten Dokumente zugänglich machen sowie alle

von außerhalb vorgelegten Beiträge, die dem Gremium unterbreitet werden, aufnehmen und einordnen. Die Adresse lautet < http://db.consilium.eu.int/df/ > .

Ebenso wurde für externe Nutzer eine *spezielle E-mail-Adresse* zur Verfügung gestellt, über die eine Kontaktaufnahme mit dem Gremium möglich ist:
< fundamental.rights@consilium.eu.int >. Auf der Website befinden sich spezielle Angaben über die Form von Dokumenten und zur Dokumentensuche.

6. Zeitplan

Nach den Plenarsitzungen vom 17.12.1999 und 1./2.2.2000 wird das Gremium am 21./22.3. und 5./6.6.2000 erneut in Brüssel gesamthaft zusammentreten. Ab Ende Februar finden zum Teil in ein- bis zweiwöchigen Abständen im Parlaments- und im Ratsgebäude Arbeitstreffen statt.

Auf der Grundlage des Arbeitsplans und unter Berücksichtigung der Formulie-rungsvorschläge der Mitglieder soll der Redaktionsausschuß noch vor der Sommerpause 2000 einen ersten Entwurf der Charta erstellen, die dann bis Oktober überarbeitet und dem Europäischen Rat übergeben werden kann *(vgl. den Zeitplan im Anhang*).

In welcher Form das Gremium selbst letztlich über den Entwurf befinden wird (z.B. die Frage einer qualifizierten Abstimmungsmehrheit bei der Schlußabstim-mung), ist gegenwärtig noch nicht entschieden.

7. Bewertung des Vorhabens

Im derzeitigen Anfangsstadium der Arbeiten kann noch wenig über die *inhaltlichen Ergebnisse* gesprochen werden. Allerdings lassen die heute bekannten und in mancher Hinsicht recht detailverliebten Vorschläge für die Grund-rechtscharta befürchten, daß die Charta inhaltlich überfrachtet werden könnte. Schon der Auftrag des Kölner Gipfels war zu weit gefaßt. Es kann nicht jeder Wunsch und jede Forderung zu einem EU-Grundrecht werden.

Noch nicht abschließend geklärt ist die Frage, ob der auszuarbeitende Entwurf tatsächlich ein justitiabler Rechtstext werden soll oder ob er – wegen der zu befürchtenden Aufblähung – eine letztlich unverbindliche politische Erklärung wird. Wenn das Ziel, die Grundrechte in der Union zusammenzufassen und dadurch „für die Unionsbürger sichtbarer“ zumachen, aber ernst gemeint

ist, dürfen sich die Arbeiten nicht darauf beschränken, eine Art „Werbebroschüre für Europa“ zu produzieren.

Das weitere Vorgehen ist noch offen: In den Schlußfolgerungen des Europäischen Rates von Köln wird der Entwurf als Grundlage für eine „feierlich zu proklamie-rende“ interinstitutionelle Erklärung zwischen Rat, Parlament und Kommission eingestuft, wobei „im Anschluß daran geprüft“ wird, „ob und gegebenenfalls auf welche Weise“ der Text in die Verträge aufgenommen werden kann. Wenn beabsichtigt ist, die Charta als Rechtstext in die Verträge (bzw. konkret in den EU-Vertrag) aufzunehmen, müssen aber die Arbeiten im Gremium entsprechend gestaltet und daraufhin konzentriert werden. Die Entscheidung darüber kann nicht bis Herbst aufbewahrt werden.

Die *Zusammensetzung des Gremiums* ist ein innovativer Schritt. Anders als bei früheren Reformkonferenzen sind hier die zentralen Akteure in der EU und ihren Mitgliedstaaten vertreten, so daß das Gremium einen recht hohen Grad an Repräsentativität besitzt. Insofern besteht die Chance, daß mögliche Ergebnisse nicht schon im Vorhinein in Frage gestellt und zerredet werden. Es wird zu prüfen sein, inwieweit diese Zusammensetzung modellhaft für künftige Reform-konferenzen sein kann.

Positiv ist der Ansatz, die *Öffentlichkeit* umfassend über die Tätigkeiten zu informieren und den Bürgern und gesellschaftlichen Gruppen über das Internet die Möglichkeit der Einbindung in die Arbeiten zu geben. Von entscheidender Wichtigkeit für den Erfolg des Projektes wird es aber sein, ob und wie die Politiker das Thema in der Öffentlichkeit vermitteln.

Problematisch ist nicht zuletzt der *Zeitdruck* , unter dem das Vorhaben steht. Es stellt sich die Frage, ob die Qualität des ambitiösen Vorhabens dadurch nicht leiden könnte. Allerdings bietet der knappe Zeitrahmen auch die Chance, sich auf das Wesentliche zu beschränken.

Das Vorhaben der Ausarbeitung einer „Charta der Grundrechte der Europäischen Union“ steht in engem Zusammenhang mit der ebenfalls in diesem Jahr aus-zuarbeitenden institutionellen Reform des EU-Rechts. Zu bedauern ist, daß keine personelle und inhaltliche Verknüpfung beider Projekte vorgenommen wurde. Beide Vorhaben sind ein Beitrag zur Reform der bereits bestehenden, aber fragmentierten Verfassung der Europäischen Union.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 14 mars 2000

CHARTE 4161/00

CONTRIB 45

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Conseil Central des Communautés Philosophiques non Confessionelles de Belgique (CCL-CVR) [1] [2]

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[1] CCL - CVR: Campus de la Plaine, ULB CP 236 Avenue A. Fraiteur, 1050 Bruxelles. Tél: +32-2627 6811. Fax: +32-2-627 6801.

[2] Ce texte a été soumis uniquement en langue française.

Contribution du CCL-CVR à la Charte des droits fondamentaux

Vocation humaniste de l'Europe

En Europe ont convergé les apports de divers courants de sensibilité et de pensée. L'humanisme est fait de toutes les valeurs qui ont germé dans ces différentes cultures. De nombreux courants ont contribué d'une manière ou d'une autre à la formation de l'humanisme moderne : certes, ils ont également recelé des tendances anti-humanistes et ont pu entrer parfois en contradiction les uns avec les autres.

On peut retenir les principales valeurs constitutives de l'humanisme, dont l'Europe a été le creuset. Tout d'abord, au-delà de toutes distinctions ou situations, la dignité égale de toute personne humaine, d'où découlent la liberté et la justice comme exigences indivisibles et universelles. Cette valeur inconditionnelle, irréductible, doit être affirmée comme présupposé incontournable. Il s'agit là d'un sentiment commun, d'une conviction, qui se sont progressivement imposés au cours de l'histoire, et qui marquent chaque homme, quelles que soient les motivations diverses dont on les étaye.

La reconnaissance de l'égale dignité de toute personne humaine, femme ou homme, induit un type de société qui permet et favorise la dimension foncièrement relationnelle de la liberté humaine. Même régulée par des lois, d'ailleurs en constant remaniement, cette société doit s'ouvrir à la possibilité de transgressions responsables car celles-ci sont le ferment indispensable d'autonomie personnelle et de progrès des institutions.
La conscience de la fragilité de tout système suscite des structures ouvertes aptes à l'écoute, au dialogue, au changement. D'où le refus de tout “intégrisme” et la capacité d'intégrer du nouveau. Cette mémoire, qui confère à l'Europe une chance et une responsabilité spécifiques, doit cependant nous rappeler aussi les dérives particulièrement graves dont elle porte le poids.

Le brassage des cultures qui a fait l’identité européenne et sa richesse impose aux gouvernants et aux citoyens de l’Europe un devoir d’ouverture et d’acceptation de la diversité
Enfin, les valeurs de tolérance et d’humanisme qui constituent le patrimoine commun et le ciment de l’Europe moderne, au delà des différences nationales, régionales ou traditionnelles implique dans le chef de toute autorité publique une rigoureuse impartialité à l’égard de toutes les conceptions philosophiques ou religieuses et la garantie de l’indépendance de la sphère privée des citoyens en matière d’option confessionnelle ou non confessionnelle.

Les valeurs communes européennes exigent de toutes les institutions publiques, celles de l'Union et celles des Etats, un rigoureux devoir d'impartialité et la garantie de la dignité des personnes et des droits humains.

Par leur adhésion aux différents traités et à l'Union, les Etats membres garantissent en leur nom et au nom des institutions européennes l'égalité de tous devant la loi sans distinction de sexe, d'origine, de culture, de conviction ou de choix de vie.

Relations de l'Union européenne avec les Églises

Sous "l'Ancien Régime", les Églises (le plus fréquemment seule l'Église de la religion dominante) intervenaient dans les affaires de la Cité.
Actuellement les Églises se considèrent toujours comme porte-parole de valeurs, de normes et de règles de vie que tous les citoyens sont censés partager. On constate que des fidèles, de plus en plus nombreux et même ceux d'entre eux qui recourent à des cérémonies religieuses, ne suivent plus les mots d'ordre de leur Église et souvent contestent ceux-ci en de nombreuses matières.
Les Églises ne sont plus représentatives de l'ensemble de leurs fidèles et certainement pas de l'ensemble des citoyens dont un nombre de plus en plus important n'adhère plus à aucune Église.
Il faut remarquer que plusieurs d'entre elles sont organisées de manière non démocratique.
Le cas de l'Église catholique est particulier car elle a la possibilité d'intervenir par le biais de l'État du Saint Siège, État lequel n'a pas adhéré et n'est pas en condition d'adhérer à la Convention européenne des droits de l'Homme.

Une charte des droits fondamentaux doit affirmer la laïcité des institutions européennes et le principe d'impartialité qui implique qu'aucune conception religieuse ou philosophique particulière ne peut bénéficier d'un traitement privilégié (ce qui implique notamment le retrait du statut d'observateur et des privilèges diplomatiques accordés à un Etat sans peuple, tel le Vatican.)
Aucune scorie de l'histoire ne peut plus justifier l'ingérence d'une autorité religieuse, quelle qu'elle soit, dans les affaires publiques de l'Union ou des Etats membres.

Une charte des droits fondamentaux doit relever qu'au même titre que tout autre groupe de pression ou tout mouvement associatif les Eglises peuvent être entendues par les autorités publiques de l'Union ou des Etats membres, mais que ces consultations éventuelles ne peuvent être institutionnalisées, ni donner l'apparence d'une confessionalisation de l'Europe ou d'un Etat membre, en contradiction avec l'idéal démocratique.

Une charte des droits fondamentaux doit faire référence à la liberté religieuse garantie, notamment par la Convention européenne de sauvegarde des droits de l'Homme et par les Constitutions nationales des États membres de l'Union. La charte doit préciser que cette liberté essentielle instituée au bénéfice des personnes de toutes convictions, confessionnelles et non confessionnelles ne confère aucun privilège aux institutions religieuses, entièrement soumises à la loi commune.
La charte doit aussi rappeler qu'aucune prescription religieuse ne peut avoir d'effet contraignant sous l'angle de la loi civile et que la force publique ne peut en aucune hypothèse y prêter main forte.

Neutralité des pouvoirs publics

L' acceptation du pluralisme induit une ouverture, une pratique de la tolérance à l' égard de la personne d' autrui et une stricte neutralité des pouvoirs publics des États et de l'Union à l' égard de toutes les convictions religieuses et philosophiques.

Pour autant que les fondements de la démocratie soient respectés, le principe de la séparation des Églises et de l' État implique:

1° la non-ingérence de toute organisation religieuse ou philosophique non confessionnelle dans les affaires des États et de l'Union.
2° la non-ingérence des États et de l'Union dans les affaires de toute organisation religieuse ou philosophique non confessionnelle. Un État se garde d'intervenir dans leur organisation interne, dans la définition de leurs positions éthiques ou encore dans la nomination de leurs représentants;
3° la garantie par les États et l'Union de la sphère d'autonomie de chaque individu quant à ses conceptions philosophiques ou religieuses;
4° dans le cas où les États et l'Union financent les organisations religieuses ou philosophiques non confessionnelles, ce financement doit répondre aux critères d'équité, de transparence et de démocratie interne de l'organisation subsidiée.
5° l'abandon par les États et l'Union de toutes les pratiques de participation à des cérémonies religieuses officielles ou encore l'attribution de places privilégiées aux représentants d'un seul culte qui tendent à présenter de facto le culte majoritaire comme religion d'État.

Dispositions établissant les relations entre les personnes morales de droit public et les organisations ou communautés religieuses ou philosophiques non confessionnelles.

Article 1er

Les prescriptions religieuses ne peuvent faire obstacle à la pleine jouissance et au plein exercice des droits civils et politiques. Elles ne peuvent davantage dispenser du respect de ces droits.
Aucune prescription religieuse ne peut être retenue comme cause de justification, cause d'excuse ou de circonstance atténuante d'une infraction pénale.

Article 2

Les personnes morales de droit public ne peuvent, directement ou indirectement, organiser de cérémonies officielles qui font référence, notamment par des circonstances de temps ou de lieu, à une conception philosophique confessionnelle ou non confessionnelle.

Article 3

Les protocoles des pouvoirs publics donnent, de plein droit, la préséance aux corps constitués et aux autorités civiles. S'il y a lieu, ils attribuent aux représentants des organisations et communautés philosophiques ou religieuses un même rang protocolaire. Le titre de doyen du corps diplomatique est reconnu au diplomate, chef de corps accrédité, le plus ancien dans la fonction.

Article 4

Aucun bien meuble ou immeuble affecté à un service public ne peut contenir ou être orné de signe ou d'objet quelconque caractéristique d'une conception religieuse ou philosophique.
Cette disposition ne concerne pas les signes ou objets exposés dans les musées ou expositions ou intégrés à des monuments et sites classés.

Respect de la personne et de la dignité humaine

La charte de droits fondamentaux devrait, sur ces questions, demeurer très générale.
La référence au respect de la personne et de la dignité humaine, s'appliquant aux questions éthiques, est très largement dépendante de l'état des connaissances scientifiques, à un moment déterminé, sur la question envisagée.
C'est la raison pour laquelle la Convention dite de biomédecine du Conseil de l'Europe prévoit une révision à intervalles réguliers. Même si une part de l'objectif de l'établissement d'une charte des droits fondamentaux peut être de rassurer des citoyens, il ne serait pas raisonnable d'inclure dans celle-ci des matières aussi sujettes à évolution que les tests génétiques, les pratiques de clonage ou de recherche sur embryons, pour ne citer que celles là.
Il convient de faire observer que les interdictions de recherches sont en contradiction avec la "*liberté de recherche scientifique*" qu'une charte européenne se doit de proclamer comme faisant partie de la grande tradition et du fonds commun de l'héritage européen.

La formule alternative de l'article 2 §2 telle qu'elle est proposée par le Présidium dans le document du 15 février 2000 parait donc inappropriée alors que la formulation première, très générale, garde toute son importance: "*nul ne peut être soumis à la torture, ni à des peines ou traitements inhumains ou dégradants*"..

D'autre part, la charte devrait prévoir d'assurer *la dignité de la personne dans les conditions de travail.*

Liberté d'expression

Toute personne a droit à la liberté d'expression. *Ce droit ne peut être limité par des considérations d'ordre politique ou religieux.*

Non discrimination

En complément des dispositions de l'article 13 (ex 6 A) du Traité de l'Union, il y aurait lieu d'ajouter dans la charte à l'article 19 § 1 de la proposition du Présidium:
La non discrimination entre les sexes comporte l'égalité entre les hommes et les femmes à l'accès aux charges publiques et privées et à la protection sociale.

Droit à l'éducation

Toute personne a droit à l'éducation.

1- Ce droit ne comporte pas l'obligation des pouvoirs publics de subventionner un enseignement autre qu'un enseignement ouvert à tous, en dehors de toute référence politique et religieuse. Les Pouvoirs publics ne peuvent imposer un enseignement religieux.

2-Les parents ont le droit d'assurer l'éducation religieuse ou philosophique de leurs enfants conformément à leurs convictions, dans un système éducatif visant à former des citoyens responsables, capables de contribuer au développement d'une société démocratique, solidaire, pluraliste et ouverte aux autres cultures.
Justificatif
La liberté de choix des parents ne peut avoir pour conséquence le renforcement de tendances anti-démocratiques ou intolérantes.

Commentaires

1- Pour éviter toute confusion ou reconnaître d'emblée qu'un enseignement de caractère confessionnel peut évidemment s'inscrire avec ses références philosophiques ou religieuses dans les objectifs visés ici, il suffit qu'il reconnaisse que d'autres valeurs, d'autres références sont aussi légitimes dans une société que celles qu'il a lui-même retenues.

2- Dans un tel système éducatif, les élèves y sont formés à reconnaître la pluralité des valeurs qui constituent l'humanisme. En ce sens, il fournit aux jeunes les éléments d'information qui contribuent au développement libre et graduel de leur personnalité et qui leur permette de comprendre les options différentes ou divergentes qui constituent l'opinion.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 15 March 2000 (16.03)
(OR. fr)

CHARTE 4162/00

CONTRIB 46

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find attached a contribution from the Federation of Catholic Family Associations in Europe. [1]

[1] Text supplied in French, German and English.

PROJECT FOR THE CHART OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

CONTRIBUTION OF THE FEDERATION OF CATHOLIC FAMILY ASSOCIATIONS IN EUROPE

Paris March 7th 2000

The Federation of Catholic Family Associations in Europe groups numerous national family associations originating in divers European countries. It represents 5,5 million European families, or about 25 million persons.

Strengthened by this mandate and conscious of the importance of the future European Chart of Fundamental Rights, we intend to submit the fruit of our experience to your reflection.

EXPOSURE OF MOTIVES

The Federation of Catholic Family Associations in Europe supports the reflection being currently devoted by the European Union to the elaboration of a Chart of Fundamental Rights conform to the conclusions formulated by the presidency at the European Councils of Cologne and Tampere. However, it is not the object of the FCFAE to take a stand on the constraining character of this Chart or on the rapport of jurisdictions between the European Court of Justice and the European Court on Human Rights.

The Federation of Catholic Family Associations in Europe,

- **Rejoicing** that fundamental rights have benefited from constant attention on behalf of the European Court of Justice as well as the Council of Ministers,

- **Concerned** the European fundamental rights remain faithful to their philosophical and religious foundation, notably by a just understanding of the dignity of the human person and his life environment,

- **Considering** the Universal Declaration of Human Rights proclaimed by the United Nations' General Assembly of 10 December 1948, in particular Article 1 (*All human beings are born free and equal in dignity and in rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.)*

- **Considering** the European Convention of the Protection of the Human Rights and Fundamental Liberties, adopted by the Council of Europe on the 4 November 1950, and in particular its Articles 8 and 12,

- **Considering** the revised European Social Chart, adopted by the Council of Europe on the 3 May 1996, and in particular its Articles 16, 17 and 19,

- **Considering** the principle of subsidarity of citizens, families, cities, regions, nations and States, which implies the respect of the national and the regional laws of the member countries and the candidate countries,

- **Considering** that there are fundamental duties which correspond to fundamental rights

- **Reminding all** that the family, the community of the life of a man and a woman, founded upon the stable public engagement of marriage and open to life, structures society and assures its cohesion, and that it is the only social cell capable of transmitting life, all the while offering to the child an adapted educative milieu, and that the family consequently merits having its' legal recognition, protection and promotion reinforced within the fundamental rights .

- **Considering** that child's rights, and notably as they are guaranteed on the international level by the United Nations Convention on Child's Rights of 1989, are an integral part of fundamental rights, and in particular in its preamble and its Articles 5 and 18,

- **Reiterating** that the first right of a child is that of a "protected childhood" within the heart of a stable family and that law must favor this protection and stability,

- **Concerned** that the contribution of families to the economic activity of the European Union, and that their importance as a factor of growth as investors, educators and consumers be justly appreciated,

- **Desirous** that particular attention be accorded to the educative tasks accomplished within the heart of the family, and that the family's irreplaceable value on the human, social, cultural, as well as economic levels, be taken into account,

The Federation of Catholic Family Associations in Europe insists that the following rights be guaranteed within the framework of the Chart of Fundamental Rights of the European Union.

RESOLUTION

The first human right is the right to life. The respect of human life extends to all ages of life, whatever may be the state of health of the person.

The right to contract a marriage, as the union of a man and a woman, and the right to found a family must be recognized, if the future spouses have reached the required age and unite the conditions demanded in this case by national laws, to the extent that these laws do not conflict with the fundamental principles established in the present chart. The marriage can only be contracted with the free and full consent of the future spouses.

The family is the natural and fundamental element of society. It has the right to specific economic, juridical and social protection, notably by the means of social and family benefits, by fiscal measures, by the encouragement to build lodgings adapted to the needs of families, by help given to young households, and by all and any other appropriate measures.

Every child has the right to be raised by its natural or adoptive parents. The European Union will respect the right of parents to assure the education of their children conform to their religious and philosophical convictions.

Migrant families have the right to the same social protection as that accorded to other families.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 15 March 2000

CHARTE 4163/00

CONTRIB 47

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a Memorandum of the Dutch Standing Committee of experts on international immigration, refugee and criminal law, written as evidence for the inquiry of the European Communities Committee Sub-Committee E (Law and Institutions) of the House of Lords of the United Kingdom. [1] [2]

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[2] This text has been submitted in English only.

MEMORANDUM ON THE EU CHARTER OF FUNDAMENTAL RIGHTS
BY
THE STANDING COMMITTEE OF EXPERTS
ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW

for the European Communities Committee
Sub-Committee E (Law and Institutions)
of the House of Lords

February 2000

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Memorandum on the EU Charter

MEMORANDUM ON THE EU CHARTER OF FUNDAMENTAL RIGHTS BY THE STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW

1. Introduction

The Standing Committee of Experts on International Immigration, Refugee and Criminal Law is pleased to give evidence to Sub-Committee E of the House of Lords on the important subject of the EU Charter of Fundamental Rights. We welcome inquiries in national parliaments in advance of decision-making which can contribute to proper deliberation in a public forum on a controversial initiative to adopt a Charter by the end of the current IGC. We would bring to the Sub-Committee's attention the fact that a similar initiative was undertaken by the Dutch members of the `Convention' preparing the EU Charter. Several members of our Committee have actively participated in the hearing organized in The Hague, in order to assist the Dutch representatives in the process of assessing the Charter's potential implications.[1]

In our opinion, the proposed EU Charter raises difficult legal questions as to how precisely it must be positioned within the legal order of the European Union, its precise scope, what its relationship will be with other international systems of human rights protection, in particular that of the European Convention on Human Rights, and how the substantive rights it confers can be enforced and applied in practice.

One of the main avowed purposes of this EU Charter is the political drive to appear to do something concrete for the citizen in the EU, something he or she can directly relate to. The question is of course whether a non-binding declaration of existing fundamental rights without a specific means of redress will indeed fulfil the function of doing something that the citizen can as such directly relate to in the context of the EU. Another purpose must be, in the light of recent fraud and corruption scandals at the level of the EU, to address concerns about the lack of accountability of EU institutions as actors in the political and administrative decision-making process. The idea presumably is in this context that by providing a visible focus of the fundamental rights context within which these institutions operate the citizen will recover confidence in the EU integration process as a whole. Finally there is the related wish to codify in the context of the text of the EU Treaties themselves a list of the applicable fundamental rights provisions in the application of Community and or Union law. This would address concerns about the current structural lack of transparency of the system of fundamental rights protection which essentially relies upon the role of the Court of Justice in Luxembourg in "discovering", interpreting and applying these norms. It is of course impossible for the citizen to understand at present how precisely the provisions at national level, in the European Convention on Human Rights and the Court's case-law interact nor what the practical consequences of such interaction might be.

[1] Public hearing of 21 February 2000, written report not yet available.

But do we really need another charter at the international level in order to fulfil these functions? Is the risk not that an additional "Charter of Human Rights" at the European level will not only threaten to undermine the position of the European Convention on Human Rights but would also considerably add to the fragmentation of human rights protection at the international level?

We have in particular been asked for our views on the need for and the status, scope and content of the EU Charter and we address each of these issues in turn.

2. The Need for an EU Human Rights Charter

The epicenter of human rights *protection* in Europe is without doubt the European Convention on Human Rights (ECHR) and the supervisory system it sets in place. The ECHR was drafted on the presumption that all implementation and applicability of the law is the responsibility of a single (clearly identified) state[2]. The question arose decades ago with regard to the European Community, that since the Community is itself not a party to the ECHR, does that imply that, by transferring power to the Communities, it was possible for the Member States to *de facto* deprive their citizens from the very protection previously enjoyed by virtue both of the terms of the ECHR itself (as well as by virtue of their national constitutions)? The answer by now is well known and national constitutional courts, the Court of Justice and the supervisory organs in Strasbourg all ultimately adopted a tandem approach accepting the pivotal (and exclusive) role of the Court of Justice in ensuring the protection of human rights within the scope of Community law as a specific instance of a "general principle" of Community law.

The Court of Justice, in the absence of any express provision in the Treaties themselves, "incorporated" in a certain sense the provisions of the ECHR as well as principles gleaned from the constitutional traditions of the Member States into the Community legal order. The Court thereby successfully fought off the threat posed by rebellious constitutional courts in various Member States as well as the risk that the Strasbourg organs would assume human rights jurisdiction over matters falling within the scope of Community law. Measures incompatible with fundamental human rights were deemed to be unacceptable and judicial protection of those rights took root in the Community legal order. Respect for human rights became a condition of the lawfulness of *Community* acts and is supervised by the Court of Justice itself. In addition, *national* acts or measures in so far as they have effects falling within the scope of Community will also be scrutinized for their compatibility with the human rights norms developed by the Court of Justice.

As is well known the European Commission on Human Rights responded to the Court of Justice's established line of case law by asserting that it had no jurisdiction in actions brought by private individuals directly or indirectly against the European Communities. One of the major factors in prompting this reply by the European Commission on Human Rights was the protection provided by the Court of Justice in the Community legal system.[3]

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2 See Article 25 of the original version of the Convention: "The Commission may receive petitions...claiming to be a violation by one of the High Contracting Parties..." (*cf.* Article 34 of the Convention as amended by Protocol No. 11).

3 See the decisions of 10 July 1978, *CFDT v. European Communities*, No. 8030/77, DR 13, p. 231; of 19 January 1989, *Dufay v. European Communities*, No. 13539/88 and of 9 February 1990, *M and Co v. Federal Republic of Germany*, No. 13258/87, DR 64, p. 138.

Over the years however much criticism has been voiced as to the approach of the Court of Justice in this regard. The criticism ranged from worry as to the possibility that the two courts in question (Strasbourg and Luxembourg) could give divergent interpretations of the same provision of the ECHR despite the so-called "incorporation" of the ECHR into the Community legal order[4] to the more aggressive accusation that the Court of Justice did not take human rights seriously.[5] The complexity and unclear nature of the institutional system for the individuals affected (Strasbourg incorporated in Luxembourg and applied by the Luxembourg judges but only within the scope of application of Community law) was also emphasized.[6]

In these circumstances the possibility of the Community simply acceding as such to the ECHR has featured prominently over the years in institutional debates about the reform of the EC. Indeed, it has long been assumed that accession by the EC to the ECHR would be the best way forward, both symbolically but also in terms of ensuring control by an *external* judge.[7] The accession option became however much more unlikely since the Court of Justice's opinion to the effect that the Community did not currently possess the legal capacity to accede, largely on institutional-technical grounds.[8] What seems to have *sotte voce* been a key consideration was the fact that upon accession the Strasbourg Court would have had the last word on human rights matters and that this might prove incompatible with the Court of Justice's perception of the entire system of EU judicial remedies.

In our view the key problem in the current approach to human rights protection at the EU level is *the lack of structural visibility* of fundamental rights in the legal order of the European Union. It can reasonably be argued that fundamental rights can only fulfil their function if both legislators and citizens are aware of their existence. When drafting legislation, decision makers should be guided by an authoritative set of basic rights and fundamental freedoms which form the foundations of their society; individuals should be conscious of their ability to enforce these rights. It is consequently crucial to express and present fundamental rights in a way that permits the individual to know and access them: fundamental rights must be visible. It is in this regard in particular that the current regulation of human rights in the EU legal order falls short. Fundamental rights are not elaborated in the text of the EU Treaties as such, with a few almost haphazard exceptions (right of access to information, right of non-discrimination and right to equal pay). This makes it extremely difficult for both the Community legislator and the individual to know in a structured fashion what rights are entitled to protection in the Community legal order and by what means they are to be enforced.

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4 See, for example, R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in R. Lawson and M. de Blois (eds.) *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of H.G.Schermers,* Vol. III, (Dordrecht, 1994), p. 219-252.

5 See, J. Coppel and A. O'Neill, "The European Court of Justice: Taking Rights Seriously?" 29 CML Rev. (1992), p. 669-692.

6 See, A. Clapham, "A human rights policy for the European Community" in *Yearbook of European Law,* vol. 10 (1990), p. 309-366.

7 See, for example, the President of the Court of Justice himself, Rodriguez Iglesias, in: The protection of fundamental rights in the case law of the Court of Justice of the European Community, *Columbia Journal of European Law*, 1 (1995) p. 169.

8 See, Opinion 2/94 of 28 march 1996, ECR 1996, pp. I-1759. See for further comments N. Burrows, *Question of Community Accession to the European Convention Determined*, E.L. Rev. 22 (1997), pp. 58-63; G. Gaja, *ECJ-Opinion 2/94: Accession by the EC to the ECHR*, CMLR 33 (1996), pp. 973-989; T. Jaag, *Beitritt der EG zur EMRK?*, Aktuelle Juristische Praxis 5 (1996), pp. 980-984; S. O'Leary, *Accession by the European Community to the European Convention on Human Rights - The Opinion of the EJC*, EHRLR (1996), pp. 362-377; H.G. Schermers, *Toetreding van de EG tot het EVRM: Het Hof van Justitie adviseert*, NJCM-Bulletin 21 (1996), pp. 874-883; C. Vedder, *Anmerkung zum Gutachten 2/94, EMRK, des EuGH*, EuR 31 (1996), pp. 309-319; P. Wachsmann, *L'avis 2/94 de la Cour de justice relatif à l'adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales*, RTD eur. 32 (1996), pp. 467-491.

This structural invisibility was only rectified to a limited extent in the Treaty of Amsterdam. That Treaty essentially affirmed the practice of the Court by providing that the Union "shall respect fundamental rights, as guaranteed by the European Convention [on Human Rights] … and as they result from the constitutional traditions common to the Member States, as general principles of Community law". This approach displays once more the uncertain status of fundamental rights in the Community legal order: they are to be qualified as "general principles" of Community law, on a par with other judicially developed general principles such as the principle of proportionality and the principle of legitimate expectations but with no clear hierarchy in the Community legal system. Moreover it is clear from the wording used that the provisions of the ECHR are not binding as such but rather a source of inspiration for the Court alongside the national constitutional traditions in working out what are the applicable standards at the Community level.

At the last IGC, the Dutch Addendum to the Dublin Draft Treaty involved the reinforcement of the role of the Court of Justice in the protection of human rights within the European Union. It entailed the amendment of the EU Treaty so that the EU would be *bound* by the terms of the ECHR as such and not merely as discretionary elements of the "general principles" of Community law (the current situation). This would have involved some alteration of what the late Federico Mancini famously termed the ECJ's "genetic code"[9]. Instead the Amsterdam treaty in its final form rather more weakly provided that its terms must be "guaranteed" as "general principles of law" which represented essentially the *status quo*. Experience has shown that this does not mean that the provisions of the ECHR are binding as such and without further ado in the Union legal system but rather that due account is taken of the provisions and the interpretation given by the Strasbourg supervisory organs without interfering with the discretion of the ECJ in the final instance.

The fact that this discretion may indeed involve the ECJ explicitly departing from the interpretation of the Strasbourg Court on a provision of the ECHR has recently been explicitly confirmed by the ECJ itself. In the *Emesa* case the applicant, who was litigating before the ECJ, sought leave to submit observations in response to the Opinion of the Advocate General. In this connection the applicant relied on well-established case-law of the European Court of Human Rights, according to which the right to adversarial proceedings entails that the parties to a criminal or civil trial must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed, including the submissions of the Advocate General before the highest national jurisdictions.[10] The ECJ, however, rejected this argument, concluding that the

> "case-law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court's Advocates General".[11]

Of course, one may share the ECJ's analysis or disagree – but the point is that the ECJ's ruling cannot be reviewed by the organ specifically charged with the interpretation and application of the ECHR: the European Court of Human Rights.

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9 F. Mancini and D. Keeling, "Language, Culture and Politics in the Life of the European Court of Justice", *Columbia Journal of European Law* 1 (1995), p. 397.

10 See, *inter alia,* the judgments of: 20 February 1996 in *Vermeulen v Belgium* (Reports of Judgments and Decisions, 1996, p. 224); 20 February 1996 in *Lobo Machado v Portugal*, Reports 1996, p. 195); 25 June 1997 in *Van Orshoven v Belgium*, Reports 1997, p. 1040); 27 March 1998 in *J.J.* and *K.D.B. v Netherlands*, Reports 1998, pp. 604 and 621); and most recently 8 February 2000, *Voisine v France* (n.y.r.), paragraph 30.

11 Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, judgement of 4 February 2000.

At any rate it seems safe to say that the ECJ is not applying the terms of the ECHR as interpreted by the Strasbourg Court, but rather that it enjoys considerable discretion with regard to its formulation of the general principles within the Community legal order.[12] This reinforces in our view the need to reinforce the structural visibility of the substantive rights applicable in the EC/EU context. In this sense one can speak of a "need" to formulate and adopt an EU Charter.

At the same time the *status quo* has changed in Strasbourg too since *Matthews v. United Kingdom*. This case arose from the fact that Gibraltar was excluded from participating in the direct elections to the European Parliament. The United Kingdom was of the opinion that it was not liable for this exclusion under the terms of the ECHR since Community law was at the origin of this exclusion. The Court disagreed and concluded that the United Kingdom had indeed violated article 3 of the First Protocol to the Convention and was responsible for the violations of the Convention even where the power in question had been transferred to an international organization. It ruled that:

> "The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.
>
> In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliament's competencies brought about by the Maastricht Treaty. [...] The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.
>
> The suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar".[13]

This seems to be quite a clear signal from the Court in Strasbourg that it is entering a new phase in its relationship with international organizations in general and the European Union in particular. In other words, the "need" for an EU Charter within the context of the EU has been shown if individual (or collective) Member State liability for breach of the Convention is to be avoided within the scope of EU law.

3. The Status of an EU Human Rights Charter

It is difficult to comment in the abstract on the status of a Charter the legal context of which has not been decided upon. It would however seem logical and desirable to incorporate any such Charter into the EU treaty as such, either in the preliminary general provisions as a separate, albeit rather detailed article or else to use the instrument of a protocol to the treaty as the more specific working out of a general provision included within the introductory provisions to the EU treaty. Such protocol would in principle have the same legal status as the substantive provisions of the treaties themselves. In our view it is essential that the proposed charter of fundamental rights is inserted into the EU treaty as such and thus would cover in principle the full spectrum of activity by the EU as well as all the bodies

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12 See also CFI, 20 April 1999, joined cases T-305/94 a.o., *Limburgse Vinyl Maatschappij a.o.* v *Commission*, n.y.r., par. 419-420: "That case-law is [...] based on the existence of a general principle of Community law [...]. The fact that the case-law of the European Court of Human Rights [...] has evolved [...] therefore has no direct impact on the merits of the solutions adopted in those cases".

13 ECHR, judgement of 18 February 1999 (n.y.r.), paragraphs 32-34.

and institutions operating in that context. It would not be acceptable to anno 2000 draw up a Charter, which would only apply, to activities by institutions operating within the more limited concept of the EC treaties.

It is suggested that this is in line with the existing provisions of the Amsterdam treaty. The EU has acknowledged in diverse ways that it has an important role to play in promoting respect for human rights of those resident within the Union and of ensuring those rights are fully respected. The Amsterdam Treaty proclaims that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law" while making it obvious that the Member States remain the principal guardians of human rights within their own territories[14]. Moreover, the Union attempts to staunchly defend human rights in its external affairs by *inter alia* insisting that those States seeking admission to the Union and those seeking cooperation agreements or aid or benefit from trade preferences undertake to respect human rights.[15] If that undertaking is breached then the agreement in question can be suspended. Moreover since the Amsterdam Treaty any Member State violating human rights in a "serious and persistent" way can lose its rights under the Treaty.

Given the existing *status quo* of enforcement of fundamental rights by the Courts in Luxembourg with particular reference to the provisions of the ECHR, it is suggested that the legal status of the Charter must be a legally binding one and one which is subject to enforcement by judicial means. It is submitted that the most obvious way to ensure enforcement of the Charter in the EU legal order is by the Court of Justice itself. The main difference with the existing *status quo* would be that the legal status of the Charter and its incorporation of all the substantive rights into the EU legal order would entail that the rights and freedoms are clearly regulated and no longer have the status of "general principles" of EU law. Moreover the ECJ would be bound to apply the provisions of the ECHR as specifically incorporated into the Charter as such and would no longer enjoy its current discretion in that regard (as to the precise contents of the general principles and where precisely it seeks inspiration in so doing). The further development of the EU Charter as a "living instrument" would obviously be a matter for the Court of Justice although it may be considered desirable to further consider to what extent the Court of Justice will be bound in the future by the ongoing judgements of the Strasbourg Court on the interpretation of relevant provisions of the ECHR (in origin).

It is further submitted that as a matter of course the current system of judicial remedies will fully apply to the provisions of a binding Charter and that individuals and privileged complainants should be able to invoke violation of its terms as a ground for annulment of legal measures or other measures. One point which in our view requires separate consideration in this context is the question of amending the *locus standi* of individuals (and groups) so that they may more easily challenge EU measures where they submit that their fundamental rights as contained in the EU Charter have been violated. In this context it is considered desirable that individuals are rather easily given *locus standi* where it can be shown that their rights and interests have been affected by EU action or inaction as broadly defined. At the same time it is submitted that great caution should be taken in revamping the preliminary reference mechanism in a manner, which could make it more difficult for individuals to have questions of human rights violations, brought indirectly before the ECJ. Access to justice is indispensable in the area of fundamental rights.

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14 See further, P. Alston (ed.), *The EU and Human Rights,* (Oxford, 1999).

15 See, in general, E. Riedel and M. Will, "Human Rights Clauses in External Agreements of the EC", *ibid*.

Memorandum on the EU Charter

4. The Scope of the EU Charter

§ 4.1 The `Passive Scope' of the Charter: Protection against the EU

The EU Charter should protect individuals against arbitrary interferences by the EU. Traditionally, the ECJ's jurisdiction – and thus the Court's protection of fundamental rights – is confined to activities in the first pillar (the three Communities). However, an effective protection of the rights and freedoms guaranteed by the Charter requires activities within the second and third pillars to fall with the `passive scope' of the Charter too. The same is true for the conduct of more or less independent entities, such as Europol. We are witnessing a genuine proliferation of new forms of inter-governmental cooperation. To the extent that these new bodies are capable of interfering with individual rights, the rule of law requires judicial review of their activities. The Charter should reflect this: it should contain a provision stipulating that it offers protection against acts and omissions of the EC/EU institutions and organs, as well as entities which have been established on the basis of the EU Treaty. The other side of the coin is that the ECJ should be competent to review these acts and omissions. This competence has already been recognized in some cases (such as Europol), but certainly not on a systematic basis.

On the other hand, the EU Charter is not – and should not be – directed against the national authorities. Their conduct is subject to their constitutions and laws, as well as the ECHR. To subject them to the EU Charter too, would create confusion. Still one has to face the fact that complications are likely to occur where domestic authorities implement Community law or derogate from it. In these circumstances the ECJ has consistently held that the domestic authorities are equally bound by the general principles of Community law, including fundamental rights.[16] As it is unlikely that the adoption of the EU Charter will entail a loss of ECJ competence, one may anticipate that the EU Charter will bind the domestic authorities where they implement Community law or derogate from it. This means that the domestic courts may be confronted with two distinct standards: the EU Charter, as interpreted by the ECJ, and the ECHR, as interpreted by the European Court of Human Rights. This underlines the importance of avoiding diverging interpretations at all costs.

§ 4.2 The `Active Scope' of the Charter: Holders of Guaranteed Rights

One of the basic tenets of international human rights law is that civil rights, such as the prohibition of torture, apply to anyone within the jurisdiction of the State concerned. This is clearly reflected in Article 1 ECHR ("The High Contracting Parties shall secure to everyone within their jurisdiction..."). Nationality and residence status are irrelevant in this connection. The same should apply to the EU Charter: anyone within the Union's jurisdiction should be entitled to rely on the `classic' rights and freedoms guaranteed by the Charter. In this connection it should be recalled that rights extend to both natural and legal persons.

Traditionally, however, certain political and social rights have been reserved to specific groups of individuals (nationals of the State, European citizens). Mention may be made of the right to vote, the right to diplomatic and consular protection, access to the Community civil service, free movement of workers. At first sight it seems acceptable to extend the guarantee of these rights in the EU Charter only to nationals of the Member States. Any preferential treatment, however, must always be based on objective and reasonable grounds. And in the case of difference of treatment based exclusively on the ground of nationality, the European Court of Human Rights insists that "very weighty reasons" must be put forward to justify this under the Convention.[17]

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16 See for instance ECJ, case 5/88, *Wachauf* [1989] ECR 2639, § 19; case C-260/89, *ERT* [1991] ECR I-2964, § 42.

17 See in this connection the important judgment of the European Court of Human Rights in the case of *Gaygusuz v Austria* of 16 September 1996, (Reports 1996, p. 1129), paragraph 42

Besides, as Community law evolves, more rights are being granted to third country nationals. This pleads against restricting rights to Union citizens alone, at least as far as social rights are concerned. Rather, it is the scope *ratione personae* that determines the applicability of the EU Charter. If a third country national falls outwith the scope of EU law, he/she will be unable to invoke the rights of the EU Charter. Conversely, if he/she falls within the scope of EU law, it seems in line with the fundamental nature of human rights to accord social rights to him/her as well.

5. The Content of the EU Charter

§ 5.1 The rights and freedoms of the ECHR

It is common ground that the EU Charter should not take a step backwards in relation to the existing *acquis*. Article 6 TEU requires the Union to respect the rights and freedoms of the ECHR as general principles of Community law. Thus, from a legal point of view, the ECHR already constitutes a minimum standard and the Charter could not fall short of the ECHR as interpreted by the European Court of Human Rights. It may be added that each Charter provision that offers less protection than its corresponding ECHR provision would damage the credibility of both the EU human rights policy and the Convention.

Against this background some critical remarks may be leveled against the draft list of fundamental rights which was proposed on 11 February 2000 by the presidency of the `Convention' preparing the Charter (CHARTE 4123/1/00/REV 1). The draft articles differ from the Convention provisions. To give three examples:

— The right to a fair trial (Article 5) does not specify that judgment shall be pronounced publicly, as required by Article 6. Is this a deliberate omission, or just an accident?
— To incorporate a general limitation clause (as was previously suggested by the presidency) will obviously do away with the detailed and sophisticated case-law of the Strasbourg authorities under the Articles 8 to 11, par. 2. Indeed, the right to respect for private life (Article 8 of the Draft) does not contain a specific limitation clause. What does this mean for the applicability of the Strasbourg jurisprudence? For instance, the Court tends to subject limitations of the freedom of the press (Article 10 ECHR) to careful scrutiny, whereas it leaves a wider margin of appreciation to State authorities restricting the right to respect for family life in the case of expulsion (Article 8 ECHR). Would this distinction still apply under a general limitation clause?
— What is the relationship between the right to respect for family life (Article 8 of the draft) and the protection of the family envisaged in Article 9 of the same draft?

These examples illustrate how delicate the question of phrasing the Charter is. From the perspective of legal certainty, and assuming that the Strasbourg level of human rights protection must not be undermined, we therefore recommend that the substantive rights and freedoms of the Convention and its protocols are integrally transferred to the Charter. This is all the more necessary if the accession of the EU to the Convention is not guaranteed.

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§ 5.2 Additional rights and freedoms guaranteed in other instruments

This is not to say that the body preparing the EU Charter should limit itself to copying the substantive provisions of the ECHR. There are at least two reasons to move beyond a mere reproduction of the ECHR:

— In practice most attention tends to be directed towards the ECHR, but other instruments contain important additions. To the remaining States parties to these treaties it is unacceptable for the EU Member States to transfer powers to the EU, if the latter is not bound to these additional rights.
— The discussions on the Charter should provide for an opportunity to develop rights and freedoms, which are geared to the powers and functions of the EU.

An obvious source of inspiration may be found in the treaties on which the Member States have collaborated. To mention some of the most important ones: the European Social Charter, the Genocide Convention (1948), the UN Convention on the Elimination of All Forms of Racial Discrimination (1965), the two UN Covenants of 1966, the UN Convention on the Elimination of All Forms of Discrimination against Women (1979), the UN Convention on the Rights of the Child (1989) and several ILO Conventions.

It must be realized, however, that not all Member States have ratified all these instruments, whereas some have made reservations to specific provisions. In addition, the constitutional traditions of the Member States have always been regarded as a source for Community rights as well.

It is hard to predict which synthesis will be acceptable for the body preparing the EU Charter. Yet, already at this stage one can foresee that certain internationally recognized rights will not make it to the Charter. This will create the risk of *a contrario* types of reasoning: the absence of a specific norm might be taken to mean that it does not bind the EU. A similarly undesirable situation may occur if international human rights law continues to develop – which it is likely to do – and new instruments are adopted. Obviously the EU Charter will not reflect these changes. Should it then have to be amended?

The disadvantages of a `static' Charter might be taken away by the introduction of the following provision, which is borrowed from the ECJ's case-law:[18]

> The European Union will also respect the fundamental rights and freedoms which have been laid down in international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.

§ 5.3 Economic and Social Rights

It is hard to defend the view that the Charter should limit itself to civil and political rights. A watertight division between `classical' and social rights has never existed, and the development of positive obligations under the ECHR has blurred the distinction even further. In recent EU-documents the indivisibility is acknowledged and emphasized.[19]

In this connection it is suggested that social rights are not necessarily mere policy guidelines or instructions addressed to the authorities. Especially in the case of basic needs (such as medical care in case of emergency or basic social welfare), individual entitlements exist. The best way forward is to examine each separate right and determine which elements lend themselves to judicial review.

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18 See ECJ, case 4/73, *Nold*, [1974] ECR 507, § 13.

19 See, e.g., the *EU Annual Report on Human Rights 1998-1999*, adopted by the Council in October 1999, p. 33.

Memorandum on the EU Charter

§ 5.4 `New' rights

The Court of Justice has recently developed quite stringent case-law with regard to the respect of fundamental rights by the EC institutions themselves, in particular with regard to the securing of the principle of good administration within the EU institutions and the fact that everyone is entitled to a fair legal process. In so doing it has relied very explicitly on the provisions of the ECHR and applied them directly. Moreover, it appears that the Court is, within the limits of its current jurisdiction, contributing to the securing of the EU citizens' right of participation in an "effective political democracy". In other words the Court has in a number of test cases already made a significant contribution to a citizens' right to obtain information about the decision-making processes from a number of EU institutions and bodies (the Council, the Commission and "comitology" committees).[20] In an effective political democracy, the idea of an informed citizenry, the free expression of opinion of the people in the choice of the legislature and the possibility to complain about one's government and administration must indeed be secured as fundamental rights. The Court is responsible for the development and application of these ideas in the context of the EU. It provides an excellent example of the ECJ going further than the minimum provisions in this regard provided in the ECHR and could provide an example of the kinds of rights that could be included in an EU Charter as a "new" generation of rights applicable in the specific context of the EU.

6. Conclusions

The inclusion of an EU Charter in the circumstances outlined above could provide a clarification of the current system of protection and reinforce the aim of structural visibility of such rights within the evolving EU legal order. It is however imperative in our view that clear provisions be included as to the enforceability of the substantive rights in question and the remedies available to different categories of complainants in different circumstances. At the same time it must be acknowledged that in the long term interests of visibility as well as in the interests of (truly) external control (accountability of EU institutions to an external supervisory body) the most rational and transparent solution remains accession by the EU as such to the ECHR system.

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Dr. Rick Lawson, University of Leiden
Professor André Nollkaemper, University of Amsterdam

Standing Committee of Experts on International Immigration, Refugee and Criminal Law,
Utrecht, the Netherlands, 22 February 2000

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[20] See further, D. Curtin, "Citizens' Fundamental Right of Access to EU Information: An Evolving Digital *Passepartout?"* 37 CML Rev. (2000), pp. 1-35.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 16. März 2000

CHARTE 4164/00

CONTRIB 48

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte anliegend Vorschläge der Initiative "Netzwerk Dreigliederung". [1] [2]

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[2] Dieser Text wurde nur in deutscher Sprache übermittelt.

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Vorschläge zum Entwurf der Charta der Grundrechte der Europäischen Union

im Rahmen der Anhörungen von Repräsentanten der Zivilgesellschaft durch den Konvent[1]

Vorbemerkung: Die Vorschläge folgen der im Dokument CHARTE 4141/00 CONVENT 10 vom 28.02.00 vorgeschlagenen Gliederung in Abschnitte, durch welche sich die in CHARTE 4112/2/00 REV 2 vorgeschlagene Reihenfolge und Zählung der Rechte teilweise ändert.[2]

Vorschläge zum 1. Abschnitt: Die fundamentalen Rechte des Menschen

Kommentar: Wir schlagen eine eigene Fassung vor, obwohl wir uns der teilweisen Überschneidung mit den bereits vorliegenden Vorschlägen bewusst sind. Wir möchten jedoch durch Anregungen dazu beitragen, dass bei diesem so delikaten und zugleich so entscheidend wichtigen Teil der Charta die einzelnen Formulierungen nuanciert genug sind und zugleich in einem inneren Zusammenhang, nicht als bloße additive Aufreihung, erscheinen.

1 Unter Verwendung der Texte des Grundgesetzes für die Bundesrepublik Deutschland, der UNO–Menschenrechtsdeklaration, der Europäischen Menschenrechtskonvention, der schweizerischen Bundesverfassung, von Vorschlägen der Initiative Schweiz im Gespräch, der Aktion mündige Schule Schleswig–Holstein und des Kuratoriums für einen demokratisch verfassten Bund deutscher Länder.

2 Zwar zeigt sich bei dieser Systematik die Schwierigkeit, eine Ausgewogenheit zwischen den Abschnitten herzustellen. Dies ist auch in unserem Vorschlag sichtbar. Wir denken jedoch, dass diese Schwierigkeit eher dadurch zu lösen ist, dass noch weitere Abschnitte eingefügt werden und die Gliederung dadurch feinmaschiger wird, als durch Rücknahme des Gedankens der abschnittsweisen Gliederung.
Entsprechend dem im Dokument CHARTE 4141/00 vom 28.2. durch den Vorsitzenden des Konvents gemachten Vorschlag beginnt auch bei uns die Numerierung der Artikel in jedem Abschnitt mit einem Artikel 1.
Der Übergang zur abschnittsweisen Darstellung und die dadurch notwendige neue Numerierung erschwert allerdings die Übersichtlichkeit bei Vorschlägen, die sich auf vorliegende Entwürfe beziehen. Daher haben wir, um eine leichtere Übersicht zu ermöglichen, jeweils auch ausdrücklich vermerkt, wo wir keinerlei Veränderungsbedarf gegenüber bereits vorliegenden Entwürfen sehen.

Artikel 1 [Menschenwürde; staatliche Grundrechtsbindung]

(1) Die Würde des Menschen ist unantastbar. Die menschliche Individualität zu achten, zu schützen und in ihrer Selbst- und Mitverantwortung zu fördern, ist höchste Verpflichtung aller staatlichen Gewalt.

Wir schlagen vor, Absatz (2) und evtl., falls man diese Frage im Abschnitt 1 regeln will, auch (3) aus CHARTE 4123/1/00 REV 1 in Art. 2 zu plazieren, da sie bereits eine Spezialisierung des generellen Postulats der Menschenwürde darstellen.

(2) Die Europäische Union (EU) und ihre Mitgliedstaaten verpflichten sich darum zur Wahrung und Verwirklichung der unverletzlichen und unveräußerlichen Menschenrechte als Grundlage jeder menschenwürdigen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.

(3) Diese Grundrechtscharta bindet alle rechtssetzende, rechtsanwendende und rechtsprechende Gewalt in der EU und deren Mitgliedstaaten. Sie umfasst individuell einklagbare Ansprüche des einzelnen sowie wegleitende Ordnungsprinzipien einer freiheitlichen, demokratischen und sozialen Gesellschaft.

Begründung: Wir halten es für notwendig, gleich am Anfang zu betonen, dass die Grundrechte dieser Charta einklagbare Rechte sind.

Artikel 2 [Recht auf Leben]

(1) und (2) wie in CHARTE 4123/1/00 REV 1 CONVENT 5, S. 2 formuliert (wobei allerdings u.E. „psychische Unversehrtheit" schwer definierbar sein dürfte).
Das Verbot der Folter (in der oben zitierten Aufzeichnung des Präsidiums im Artikel 1 platziert) sollte u.E. in Artikel 2, Absatz (3) mit der Feststellung über die Abschaffung der Todesstrafe zusammengezogen werden.

Artikel 3 [Freiheit der Person; Handlungs- und Vertragsfreiheit]

(1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die grundrechtliche Ordnung der Europäischen Union bzw. der Mitgliedstaaten verstößt.
(2) Jeder Mensch hat im Rahmen allgemeiner Handlungsfreiheit der Person das Recht, seine Beziehung zu anderen durch vertragliche Vereinbarung zu regeln und zu gestalten.

Begründung: Die Anschauung des Menschen als eines mündigen,. d.h. zum verantwortungsvollen Handeln aus eigener Einsicht fähigen Wesens, ist der innerste Kern des modernen Rechtsbewusstseins. Die sich daraus ergebende Handlungsfreiheit der Person sollte explizit formuliert sein.

Vorschläge zum 2. Abschnitt: Freiheitsrechte

Artikel 3 bis 7 aus Dokument CHARTE 4123/1/00 REV 1 CONVENT 5 haben wir hier nicht berücksichtigt, da sie nach der Systematik der Abschnitte jetzt in den Abschnitt 6 (Justizielle Rechte) fallen.

Artikel 1 [Gedanken-, Gewissens- und Religionsfreiheit]

Wir schlagen eine Modifikation des entsprechenden Artikels 10 aus CHARTE 4137/00 vor. Die Änderungsvorschläge sind fett gesetzt:

(1) Jede Person hat das Recht auf Gedanken-, Gewissens- und Religionsfreiheit; dieses Recht umfasst die Freiheit**, seine Religion, seine weltanschauliche und ethische Überzeugung frei zu bestimmen** *(statt: die Religion oder Weltanschauung zu wechseln),* **und diese** *(statt: und die Freiheit, die Religion oder Weltanschauung)* einzeln oder gemeinsam mit anderen öffentlich oder privat durch Gottesdienst, Unterricht, *(streichen: oder Praktizieren von)* Bräuche und Riten **oder auf andere Weise** zu bekennen **und zu praktizieren.**

Begründung: Mündigkeit bedeutet, sich seine eigene Auffassung der Welt bilden, d.h. diese frei bestimmen zu dürfen. Das ist mehr als das Recht, die Religion oder Weltanschauung zu wechseln. Auch sollte die ethische Überzeugung ausdrücklich in den Artikel einbezogen werden. Das Praktizieren der eigenen Weltanschauung und Lebensorientierung muss möglichst umfassend geschützt werden. Daher sollte jeder Anschein vermieden werden, dass der von diesem Artikel gewährte Rechtsschutz sich auf das Praktizieren von Bräuchen und Riten reduziert. Die übrigen Änderungsvorschläge sind sprachliche Vereinfachungen.

(2) Niemand darf gegen sein Gewissen zum Kriegsdienst mit der Waffe gezwungen werden.

Begründung: Dies ergibt sich zwar eigentlich als logische Konsequenz aus der Gewissensfreiheit, sollte aber u.E. ausdrücklich formuliert werden.

Artikel 2 [Meinungs-, Informations-, Medienfreiheit; Kunst und Wissenschaft]

(1) Jeder Mensch hat das Recht, seine Meinung frei zu bilden und mit allen Verständigungsmitteln ungehindert zu äußern und zu verbreiten sowie das Recht auf uneingeschränkten Zugang zu allen öffentlichen Informationen.

Hier wäre u.U. als Absatz einzufügen das im Entwurf des Präsidiums (CHARTE 4137/00) als eigener Artikel 14 (Recht auf Zugang zu Information) formulierte Zugangsrecht zu Dokumenten der EU-Organe.

Begründung: Wir halten es für problematisch, das Informationsrecht an dieser Stelle auf den Zugang zu EU-Dokumenten zu beschränken.

(2) Die freie Berichterstattung durch die Medien ist gewährleistet. Sie findet ihre Schranke allein an der unantastbaren Würde der Person anderer sowie am Anspruch der Kinder und Jugendlichen auf besonderen Schutz der Unversehrtheit ihrer Person und Entwicklung. Das Redaktionsgeheimnis ist unverletzlich. Eine Zensur findet nicht statt.

(3) Die Freiheit der Kunst und des Unterrichts sowie der wissenschaftlichen Forschung und Lehre sind gewährleistet.

Begründung: Wir halten es für sinnvoll, den Artikel differenzierter auszugestalten als bisher in der Aufzeichnung des Präsidiums (CHARTE 4137/00) unter 11 (Freiheit der Meinungsäußerung) vorgesehen. Nur diese Ausgestaltung gibt auch die Möglichkeit, das Problem des Schutzes der Persönlichkeitsrechte und des Jugendschutzes in einer durch Medien geprägten Gesellschaft aufzugreifen, ohne dabei den Grundsatz „Im Zweifel für die Freiheit" in Frage zu stellen.

Artikel 3 [Versammlungs-, Vereinigungs- und Koalitionsfreiheit]

Wir halten eine ausführlichere Formulierung als die in Artikel 13 CHARTE 4137/00 vorgesehene für erwägenswert. Eine Möglichkeit wäre die folgende:

(1) Jeder Mensch hat das Recht, sich ohne Erlaubnis friedlich und ohne Waffen zu versammeln.

(2) Jeder Mensch hat das Recht, sich mit anderen zu Vereinen, Gesellschaften oder anderen selbstverwalteten Körperschaften zusammenzuschließen.

(3) Das Recht, zur Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen Vereinigungen zu bilden, ist allgemein gewährleistet.

(4) Niemand darf gezwungen werden, einer Vereinigung anzugehören.

Artikel 4 [Bewegungsfreiheit]

Wie in der Grundrechtsliste des Präsidiums (CHARTE 4112/2/00 REV 1) bereits vorgesehen. Wir haben keinen eigenen Formulierungsvorschlag.

Artikel 5 [Unverletzlichkeit der Privatsphäre, Datenschutz]

(1) Jeder Mensch hat Anspruch auf Schutz seines privaten Lebensbereichs. Die Vertraulichkeit nichtöffentlicher Mitteilungen in Wort, Schrift, Bild oder Zeichen ist unverletzlich.

(2) Jeder Mensch hat ein Recht an seinen persönlichen Daten, auf Einsicht in alle ihn betreffenden Akten und Datenbestände sowie auf deren Schutz.

Begründung: Wir hielten es für zweckmäßig, die Gesichtspunkte von Art. 8 (CHARTE 4123/1/00 REV 1) und 15 (CHARTE 4137/00) zusammenzuziehen.

Artikel 6 [Asylrecht]

Vgl. Art. 19 in CHARTE 4137/00. Dieser Artikel sollte das Asylrecht in Europa menschenrechtskonform regeln und festhalten, dass Flüchtlinge nicht in einen Staat abgeschoben oder ausgeliefert werden dürfen, in dem sie verfolgt werden. Ferner, dass niemand in einen Staat abgeschoben werden darf, in dem ihm Folter oder eine andere Art grausamer und unmenschlicher Behandlung oder Bestrafung drohen.

Artikel 7 [Recht auf Familiengründung, Rechte und Schutz von Kindern und Jugendlichen]

(1) Jeder hat das Recht, eine Familie zu gründen.

(Wie in CHARTE 4123/1/00 REV 1 in Art. 9 Familienleben.)

(2) Kinder und Jugendliche haben Anspruch auf umfassende Erziehung und Ausbildung, welche sich an den Bedingungen und Möglichkeiten der Entwicklung ihrer Individualität orientiert.

(3) Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die primär ihnen obliegende Pflicht. Die staatliche Gemeinschaft gewährleistet, dass auch außereheliche oder ohne elterliche Betreuung lebende Kinder im Schutz einer Lebensgemeinschaft aufwachsen können. Sie schützt und fördert jede Lebensgemeinschaft, in der Kinder und Jugendliche aufwachsen, bei ihrer selbstverantwortlichen Aufgabenerfüllung.

(4) Kinder und Jugendliche haben darüber hinaus Anspruch auf besonderen Schutz der Unversehrtheit ihrer Person und ihrer Entwicklung.

Begründung: Wir halten es für notwendig, die Rechte der Kinder und Jugendlichen zu stärken. Daher schlagen wir vor, diesem Thema breiteren Raum zu geben.

Es ist noch zu fragen, ob die Artikel 7 und 8 nicht in einen eigenen Abschnitt kommen sollten, da sie ihrem Gehalt nach nicht nur Freiheitsrechte sind, sondern z.B. auch die Chancengerechtigkeit beinhalten.

Artikel 8 [Recht auf Bildung]

(1) Jeder Mensch in Europa hat das Recht auf Bildung. Für Kinder und Jugendliche darf der Besuch von Bildungseinrichtungen nicht von den wirtschaftlichen Verhältnissen der Eltern abhängig sein.

(2) Die Freiheit der elterlichen Erziehungsverantwortung ist gewährleistet; sie umfasst namentlich das Recht der Eltern, für ihre Kinder die Art der Bildungseinrichtung frei zu wählen.

(3) Der Staat garantiert den gleichen Zugang und die freie Wahl der Schule durch die Ermöglichung und gleichberechtigte Förderung von öffentlichen Schulen in staatlicher und freier Trägerschaft.

(4) Die von den Eltern gewählten Schulen in staatlicher oder freier Trägerschaft nehmen gleichberechtigt ihren öffentlichen Bildungsauftrag wahr. Das Recht zur Gründung sowie autonomen Gestaltung und Verwaltung von Schulen in freier Trägerschaft, einschließlich der eigenständigen Ausbildung der Lehrkräfte, ist gewährleistet.

(5) Angehörige nationaler oder ethnischer Minderheiten haben das Recht, ihre Muttersprache zu lernen und eigene Schulen zu gründen und zu unterhalten.

(6) Das Schulwesen untersteht der Rechtsaufsicht der einzelnen europäischen Staaten.

Begründung: Das sich integrierende Europa sollte ein modernes freiheitliches Bildungswesen anstreben. Dem sollte die Formulierung des Rechts auf Bildung entsprechen. Sie sollte keinesfalls hinter den Artikel 26 [Recht auf Bildung] der Allgemeinen Erklärung der Menschenrechte und hinter die Entschließung des Europäischen Parlaments über die Freiheit der Erziehung (14. März 1984) zurückfallen. Daher schlagen wir vor, die Formulierung des Art. 12 aus CHARTE 4137/00 zu erweitern. Der dort enthaltene Absatz (4) ist sinngemäß Bestandteil unseres Art. 2 dieses Abschnitts und würde sich deshalb hier erübrigen.

Artikel 9 [Eigentum]

(1) Eigentum wird gewährleistet. Sein Gebrauch und seine Formen sollen zugleich der Erhaltung und Entwicklung der natürlichen und sozialen Lebensbedingungen dienen.

(2) Eine Enteignung ist nur im öffentlichen Interesse zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen.

Begründung: Wir halten es für ein modernes Eigentumsrecht für notwendig, zugleich mit der klaren Garantie des individuellen Eigentums die Sozialbindung des Eigentums deutlich zu formulieren. (Vgl. Art. 16 in CHARTE 4137/00.)

3. Abschnitt Gleichheitsrechte

Artikel 1 [Gleichheit]

Wie in CHARTE 4137/00, Art. 18.

Artikel 2 [Nichtdiskriminierung]

Wie in CHARTE 4137/00, Art. 19.

Vorschläge zum 4. Abschnitt: Wirtschaftliche und soziale Rechte, Sozialziele, Umweltschutz und Nachhaltigkeit

Wir schlagen zunächst vor - in Übereinstimmung mit der in CHARTE 4112/2/00 formulierten Intention -, Sozialrechte und Sozialziele zu unterscheiden. Außerdem schlagen wir eine Formulierung zum Umweltschutz und zum Prinzip der Nachhaltigkeit vor. Der letzte Gedanke könnte natürlich auch systematisch in einem eigenen Abschnitt behandelt werden.

Artikel 1 [Berufs- und Konsumfreiheit; vertragliche Gestaltungsfreiheit und Selbständigkeit der Wirtschaft]

(1) Die freie Wahl, Zugänglichkeit und Ausübung des Berufs sind gewährleistet; ebenso die Selbstbestimmung des Verbrauchers und die Vertragsfreiheit zwischen den Wirtschaftsteilnehmern. Die gesetzlichen Bestimmungen zum Schutz der Menschen und der Natur bleiben vorbehalten.

(2) Die Wirtschaft regelt und verwaltet ihre Angelegenheiten auf der Grundlage der staatlichen Rahmengesetzgebung selbständig; sie kann dazu vertragsberechtigte Organe bilden, an denen alle Wirtschaftsteilnehmer, Unternehmer, Mitarbeiter und Konsumenten, verantwortungsvoll beteiligt sind.

Kommentar: Es handelt sich um einen Formulierungsversuch für den in CHARTE 4112/2/00 REV 2, D S. 6 vorgesehehenen Artikel 6 Recht auf Arbeit und Berufsfreiheit. Hier halten wir es für sachgemäß, den Zusammenhang von Berufs- bzw. Gewerbefreiheit mit der Konsumfreiheit und der Freiheit der Vertragsgestaltung zwischen den Wirtschaftsteilnehmern zu betonen - im Rahmen der Schutzgesetzgebung für Mensch und Natur. Die Frage der Arbeitsförderung sollte u.E. in den Artikel über die Sozialziele verschoben werden (s. weiter unten).

Artikel 2 [Recht auf Hilfe in Notlagen]

(1) Wer in Not gerät, hat Anspruch auf Hilfe und Betreuung und auf die Mittel, die für ein menschenwürdiges Dasein unerlässlich sind.

Kommentar: Wir waren der Meinung, dass eine solche knappe Formulierung den möglichen Konsens in Europa hinsichtlich eines einklagbaren Anspruchs auf Solidarität - bei Offenhaltung der einzelnen Verwirklichungsformen - am besten zum Ausdruck bringt. Es wäre allerdings auch denkbar, diesen Artikel als Absatz 4 in den Artikel 2 zu platzieren. Damit wäre bereits in der Beschreibung der Fundamentalrechte die Bandbreite zwischen Freiheits- und Sozialaspekt der Menschenrechte aufgewiesen.

Artikel 3 [Gewährleistung sozialer Sicherheit]

(1) Es ist Ziel der Gesellschaft als Ganzer sowie ihrer einzelnen Mitglieder, dass jeder Mensch innerhalb und außerhalb der Europäischen Union an der allgemeinen Entwicklung der Lebensbedingungen in angemessener Weise teilnehmen kann.

(2) Die Europäische Union und ihre Mitgliedstaaten setzen sich im Rahmen ihrer Zuständigkeit dafür ein, dass arbeitsfähige Menschen Aufgaben unter angemessenen Arbeitsbedingungen finden oder entsprechende Verhältnisse selbst schaffen können.

(3) Für Menschen, die keine Möglichkeit dazu haben und deshalb arbeitslos sind oder deren Arbeitsfähigkeit infolge von Krankheit, Unfall oder Invalidität nicht gegeben ist oder die aufgrund ihrer Jugend, ihrer Pflicht zur Erziehung oder Sorge für andere, ihres Alters oder aus anderen gesellschaftlichen Gründen von der Arbeit freigestellt sind, stellen die EU bzw. ihre Mitgliedstaaten den notwendigen Lebensunterhalt rechtlich sicher; dieser bemisst sich anhand gesellschaftlicher Vergleichbarkeit. Ebenso schaffen sie Rahmenbedingungen für eine menschenwürdige medizinische Betreuung und Versorgung.

(4) Im Mittelpunkt der rechtlichen Gewährleistungspflicht der sozialen Sicherheit stehen unabhängig verwaltete sozialpartnerschaftliche Lösungen oder solche gesellschaftlicher Solidarität. Private Initiative und Verantwortung können ergänzend in die Sicherstellung einbezogen werden. Private Vorsorgeformen befreien dagegen nicht von zumutbaren Beiträgen an allgemeine soziale Sicherungseinrichtungen.

(5) In Ergänzung zu diesen Formen sozialer Sicherheit kann der Staat auch materielle Beiträge leisten; diese bedürfen einer gesetzlichen Grundlage und richten sich nach den verfügbaren Mitteln.

(6) Wissenschaftsfreiheit, Methodenpluralismus, Therapiefreiheit und die Selbstbestimmung des Patienten einschließlich freier Wahl von Arzt und Krankenhaus sind generell wie auch innerhalb solidarischer Finanzierungsformen zu gewährleisten.

Begründung: Es ist u.E. wichtig, die Sozialziele so zu formulieren, dass keine bloßen Prinzipien verkündet werden, sondern Leitlinien staatlichen Handelns formuliert werden, die realisierbar sind, zugleich aber den Grundsatz der Subsidiarität beachten, d.h. den Staat als Gewährleistungsinstanz sozialer Sicherheit - dies auch durch Förderung selbstverwalteter Solidarlösungen -, nicht aber als sozialbürokratisch-allzuständiges Gebilde zu fassen. Aus dem Solidarproblem der Finanzierung darf also kein Vormundschaftsproblem erwachsen. In diesem Sinne halten wir es für richtig, diesen Artikel nicht durch zuviele Einzelbestimmungen zu befrachten. Ungeachtet dessen könnten hier aber weitere in CHARTE 4112/2/00 aufgelistete Sozialrechte Aufnahme finden, soweit ihre ausdrückliche Nennung für nötig erachtet wird.

Artikel 4 [Umweltschutz, Grundsatz der Nachhaltigkeit; Achtung des Lebens]

(1) Die EU und ihre Mitgliedstaaten gewährleisten den Schutz des Menschen und seiner natürlichen Umwelt vor schädlichen Einwirkungen. Die Kosten der Vermeidung solcher Einwirkungen trägt der Verursacher.

(2) Die EU und ihre Mitgliedstaaten sind dem Grundsatz der Nachhaltigkeit verpflichtet. Sie regeln die Verfügbarkeit über die nicht vermehrbaren Güter, wie Boden, Wasser, Luft und Rohstoffe derart, dass ihr Charakter als Lebensgrundlage für die künftigen Generationen gewahrt bleibt und ein ausgewogenes Verhältnis zwischen der Beanspruchung der Natur und der Pflege ihrer Artenvielfalt und Erneuerungsfähigkeit entsteht.

(3) Die EU und ihre Mitgliedstaaten sind der Achtung des Lebens verpflichtet. Sie gewährleisten insbesondere den Schutz der Tiere als Mitgeschöpfe des Menschen.

Begründung: Es handelt sich um den Versuch, Punkt 19. des Entwurfs einer Grundrechtsliste durch den Präsidenten (CHARTE 4112/2/00) umzusetzen, d.h. die Inhalte Umwelt- und Lebensschutz in einem eigenen Artikel zu formulieren und mit dem zukunftsweisenden Gedanken der Nachhaltigkeit zu verbinden.

Vorschläge zum 5. Abschnitt: Politische Rechte

Artikel 1 [Recht auf Mitwirkung im staatlich-politischen Leben; Initiativ- und Abstimmungsrecht, Wahlrecht]

(1) Alle volljährigen Bürgerinnen und Bürger der Union haben das Recht, an der Gestaltung des staatlich-politischen Lebens ihres Landes und der Europäischen Union auf allen Ebenen teilzunehmen.

(2) Dies geschieht durch die Ausübung des Initiativ- und Abstimmungsrechtes sowie die Teilnahme an allgemeinen, freien, gleichen und geheimen Wahlen.

(3) Die Chancengleichheit der bei Abstimmungen oder Wahlen konkurrierenden Inhalte oder Bewerber ist zu gewährleisten.

Begründung: Wir halten es für wichtig, die demokratischen Beteiligungsrechte in Europa zu stärken und zu betonen, dass alle Staatsgewalt von den Bürgerinnen und Bürgern der Union ausgeht.

Artikel 2 [Zulassung zu öffentlichen Ämtern, Recht zur Gründung von Parteien, Petitionsrecht]

(4) Alle Bürgerinnen und Bürger in der Union haben unter gleichen Bedingungen das Recht auf Zulassung zu öffentlichen Ämtern in ihrem Lande und in der Europäischen Union.

(5) Das Recht zur Gründung von Parteien und sonstigen politischen Vereinigungen ist gewährleistet.

(6) Jeder Mensch hat das Recht, sich einzeln oder in Gemeinschaft mit anderen schriftlich mit Petitionen oder Beschwerden an die zuständigen Stellen und an die Volksvertretungen zu wenden; es dürfen ihm daraus keine Nachteile erwachsen.

Begründung: Es ist sicher eine Ermessensfrage, ob man - wie in CHARTE 4141/00, Art. 1 - das Petitionsrecht unter die justiziellen Rechte einreiht. Unser Gesichtspunkt ist, dass das moderne Petitionsrecht kein bloßes Beschwerderecht (geschweige denn bloßes Bittrecht) ist, sondern das Vorschlags- und Intiativrecht einschließen muss, was seine Einordnung unter die politischen Rechte begründen könnte.

Artikel 3

Hier können spezielle weitere Rechte der Unionsbürgerinnen und -bürger, wie in CHARTE 4112/2/00 aufgelistet, ihren Platz finden.

6. Abschnitt: Justizielle Rechte

Zu diesem Abschnitt haben wir keine eigenen Vorschläge, sondern beziehen uns auf die CHARTE 4141/00 bereits vorgeschlagenen Formulierungen.

Vorschlag auf Aufnahme eines eigenen Abschnitts 7:

Grundrechtsgarantie

Kommentar: Wir schlagen vor, den Grundrechtsgarantien einen eigenen Abschnitt zu widmen. Die auch vom Präsidum des Konvents beabsichtige Wesensgehaltsgarantie (vgl. in CHARTE 4123/1/00 REV 1 den Artikel Y. Einschränkungen) würde damit stärker betont. Zudem würde nationaler Rechtsprechung - z.B. dem Urteil des deutschen Bundesverfassungsgerichts zum Maastricht-Vertrag - deutlicher Rechnung getragen.

Artikel 1 [Einschränkung von Grundrechten; Wesensgehalts- und Rechtswegegarantie]

(1) Jeder Mensch ist in Ausübung seiner Rechte und Freiheiten nur den Beschränkungen unterworfen, die das Gesetz ausschließlich zu dem Zwecke vorsieht, um die Anerkennung und Achtung der Rechte und Freiheiten anderer zu gewährleisten bzw. ein überwiegendes öffentliches Interesse zur Geltung zu bringen. Der Grundsatz der Verhältnismäßigkeit muss bei jedem Eingriff in Grundrechte gewahrt werden. In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden.

(2) Soweit ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muss das Gesetz allgemein und nicht nur für den Einzelfall gelten. Außerdem muss das Gesetz das Grundrecht unter Angabe des Artikels nennen.

(3) Die Grundrechte gelten auch für juristische Personen innerhalb der Europäischen Union, soweit sie ihrem Wesen nach auf diese anwendbar sind.

Artikel 2 [Verwirklichung der Grundrechte]

(1) Die Grundrechte müssen in der gesamten Rechtsordnung zur Geltung kommen.

(2) Wer Grundrechte ausübt, muss die Grundrechte anderer achten.

(3) Wer öffentliche Aufgaben wahrnimmt, ist zur aktiven Verwirklichung der Grundrechte verpflichtet.

Begründung: Dieser Artikel würde zusammen mit dem einleitenden Menschenwürdeartikel u.E. eine wichtige Klammer der Charta bilden.

Artikel 3 [Niveau des Grundrechtsschutzes]

(1) Weitergehende Grundrechtsgarantien der einzelnen Mitgliedstaaten sowie der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK) werden in ihrem Bestand durch diese Grundrechtscharta nicht berührt.

Begründung: Vgl. hierzu S. 11 in CHARTE 4123/1/00 REV 1. Die Intention der dort vorgeschlagenen Formulierung wird aufgegriffen und zugleich generalisiert (Gedanke der Irreversibilität des einmal erreichten Grundrechtsniveaus).

Vorschlag für einen zusätzlichen Abschnitt 8 der Charta: Prinzipien und Aufgaben der Europäischen Union, die sich aus den Grundrechten ergeben

Begründung:Wir halten es für dringend erforderlich, die Prinzipien und Aufgaben zu entwickeln, die sich aus den Grundrechten notwendig für das Staatsverständnis und das Staatshandeln in der Union ergeben.

Insbesondere halten wir es für erforderlich, dass zentrale Prinzip der Subsidiarität in einem eigenen Artikel zu behandeln. Dies auch deshalb, weil die Charta nicht nur Ausdruck des europäischen Rechtsbewusstseins ist, sondern u.a. auch zu seiner Schärfung beitragen könnte. Ein so zentraler Gedanke wie der der Subsidiarität sollte daher rechtlich sauber gefasst werden.

Artikel 1 [Prinzipien der Europäischen Union, Widerstandsrecht]

(1) Die Europäische Union ist eine Gemeinschaft souveräner Staaten, die dem Frieden, demokratischen, rechtsstaatlichen, sozialen und föderativen Prinzipien und dem Grundsatz der Subsidiarität verpflichtet ist. Ihre vornehmste Aufgabe sieht sie in der Schaffung der rechtlichen und tatsächlichen Bedingungen dafür, dass die in dieser Charta proklamierten Grundrechte von jedem Menschen innerhalb der Union auch faktisch wahrgenommen werden können.

(2) Alle Staatsgewalt in der Europäischen Union geht von den Bürgerinnen und Bürgern aus. Sie wird in Wahlen, in Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.

(3) Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die unabhängige Rechtsprechung sind an Gesetz und Recht gebunden.

(4) Gegen jeden, der es unternimmt, die freiheitliche, demokratische und soziale Grundrechtsordnung zu beseitigen, haben alle Menschen innerhalb der Union das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist.

Artikel 2 [Subsidiarität]

(1) Die EU und ihre Mitgliedstaaten fördern das Ergreifen gesellschaftlicher Aufgaben aus freier Initiative und Verantwortung in allen Bereichen, welche der Gesetzgeber nicht aus zwingenden Gründen staatlichem Handeln vorbehält. Staatliche Aufgaben sind auf der jeweils untersten möglichen Stufe wahrzunehmen und zu regeln.

(2) Die EU und ihre Mitgliedstaaten schaffen fördernde Rahmenbedingungen, damit die Kultur sich in ihrer Vielfalt frei und selbstverwaltet entfalten kann; sie wahren den Grundsatz der staatlichen Neutralität gegenüber den verschiedenen kulturellen Bestrebungen.

(3) Die EU und ihre Mitgliedstaaten sichern den Grundsatz der vertraglichen Selbstgestaltung des Wirtschaftslebens; sie schaffen geeignete Rahmenbedingungen für eine leistungsfähige, strukturell und regional ausgewogene, sozialverantwortliche Wirtschaft. Die EU und ihre Mitgliedstaaten werden selbst nicht wirtschaftlich tätig; Ausnahmen regelt das Gesetz.

Begründung: s. oben.

Artikel 3 [Erfüllung öffentlicher Aufgaben]

(1) Die staatlichen Organe der EU und ihrer Mitgliedstaaten erfüllen ihre Aufgaben in Verwirklichung der Grundrechte und Sozialziele bürgerfreundlich, sachgemäß und wirtschaftlich.

(2) Die EU, ihre Mitgliedstaaten, sowie die nichtstaatlichen Organisationen, welche öffentliche Aufgaben erfüllen, schöpfen alle geeigneten Möglichkeiten und Formen der Zusammenarbeit aus, insbesondere die regionale und sozialpartnerschaftliche. Sie stärken dabei die Selbstverantwortungs- und Selbstverwaltungskräfte der betroffenen Menschen.

(3) Aufgaben sind regelmäßig daraufhin zu überprüfen, ob sie notwendig sind und die Art ihrer Erfüllung zweckmäßig ist. Durchführungsqualität und Wirtschaftlichkeit sind laufend zu evaluieren und wo nötig zu verbessern.

(4) Die EU und ihre Mitgliedstaaten sorgen in ihrem Zuständigkeitsbereich für eine umfassende, aufeinander abgestimmte Aufgaben- und Finanzplanung; sie geben Rechenschaft über deren Umsetzung und erstellen eine Sozialbilanz.

Begründung: Dem Staatshandeln in Europa einen verbindlichen Rahmen in dieser Art zu setzen, wird unter anderem auch die Akzeptanz der Charta bei den Bürgerinnen und Bürgern Europas verbessern.

Vorschläge zu Übergangs- und Schlussbestimmungen

Übergangs- und Schlussbestimmungen

(1) Die EU und ihre Mitgliedstaaten unterstellen die Grundrechtscharta einem Referendum ihrer Bürgerinnen und Bürger.

Begründung: Absatz 1 begründen wir mit der großen Bedeutung der Charta für die europäische Entwicklung. Um der Glaubwürdigkeit der Festschreibung der demokratischen Rechte in der Charta willen, sollte diese selbst nicht ohne einen demokratischen Willensakt der Bürgerinnen und Bürger der Union in Kraft gesetzt werden.

(2) Die EU erklärt ihre Absicht, bis spätestens im Jahre 2005 der Europäischen Menschenrechtskonvention beizutreten.

Mit dieser Formulierung folgen wir der Forderung der parlamentarischen Versammlung des Europarats, die EU möge offiziell der EMRK beitreten.

Stuttgart, den 12. März 2000

Gerald Häfner Dr. Christoph Strawe Dr. Robert Zuegg

Editors' note to CHARTE 4165/00, **Contribution submitted by the Europeans Landowner's Organisation (ELO) (dated 15/03/00)**:

The revised version REV 1 does not contain the annex included in the initial version.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 16 March 2000

CHARTE 4165/00

CONTRIB 49

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution of Europeans Landowner's Organisation (ELO) concerning the article 16 of the draft EU Charter on Fundamental Rights. [1] [2]

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[1] ELO: Avenue Pasteur 23, B 1300 Wavre. Tel: +32-10-23 2902. Fax: +32-10-23 2909. E-mail: elo@skynet.net

[2] This text has been submitted in English only.

Charter of Fundamental Rights

Article 16 : Right to Ownership

The European Landowners' Organisation (ELO) proposes that the text of the article on the Right on Ownership should be:

Everyone is entitled to the peaceful enjoyment of his possessions. No one may be deprived of his possessions or restricted in their use, except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to full and prior compensation.

Explanatory Memorandum

The European Landowners' Organisation (ELO) supports the objectives, agreed at the Cologne Summit in 1999, of establishing a Charter of Fundamental Rights, and of making the overriding importance and relevance of those rights more visible to the Union's citizens.

In particular, the ELO very much welcomes that the Presidium has proposed the inclusion in the draft Charter, an article on the right to ownership. This memorandum explains why the right to ownership is so important for all Europe's citizens, and proposes some amendments to the current text of the draft Charter in relation to this right (article 16). These amendments would reinforce the positive work so far undertaken by the Convention to include this right to ownership.

The ELO speaks for 30 million land based rural business owners who provide employment, a living countryside, food and other products, amenities and environmental land management across the European Union. The ELO is well placed to speak on this subject, because its members are engaged, day to day, in the active management of property which serves as a base in satisfying needs and demands of modern society.

The need for a secure framework of ownership rights

Human rights are the cornerstone of democracy. Amongst these basic rights must be a right for the protection of ownership.

History shows with emphasis, however, that when ownership rights are not properly protected, both economic development and the environment are endangered. An efficient protection of ownership rights becomes even more important as the EU prepares for the entrance of a number of candidates countries which have in the past suffered from a lack of protected ownership rights.

In addition, the "new economy" (high-technology revolution) requires protection of intellectual property, so that the entrepreneurial climate will inspire investment, employment and incomes in Europe.

A social market economy, essential to a mature democracy, and for optimal management of the world's resources and the environment, cannot work without secure ownership rights. Ownership rights are a prerequisite for **long term investment**, not only in intellectual property but also in agriculture, forestry and manufacturing. A secure framework of ownership rights is vital for the long-term stewardship of our environment. Not only is a long-term perspective needed, but so often environmental conservation involves the positive management and individual commitment that can be provided only by someone with the ownership of the property.

Moreover, **there is across Europe a social aspiration to ownership**, seen as a symbol of permanence, prosperity and security.

Of course, with rights come responsibilities. Ownership must cede if it is necessary to satisfy an overriding public interest. But this can be done with the maintained respect for the owners' legitimate interests and without distorting the functioning of the market economy, provided that the owner is granted full compensation for his loss.

A framework of rights, particularly ownership rights, makes it possible for society to enter into secure, productive and transparent relationships with individuals and businesses. These relationships require, but also enable, those individuals and businesses successfully to meet the demands of the public for improving standards.

The ELO submits that the EU Charter is a unique opportunity – not to be missed – to redefine this relationship between public authorities, acting on the basis of EU legislation and policy (itself directed by the Charter) and individuals and businesses, to reflect a more enlightened balance between constructive partnership on the one hand, and regulation on the other.

Individuals and businesses are the providers of investment, innovation, stewardship and improving standards, in the countryside and elsewhere. Wherever possible, public authorities and their agencies should work in partnership with rural and other businesses to engage their **voluntary co-operation and commitment.** Compulsion should be only the last resort. Regulation, restriction and at its extreme, expropriation, can prevent actions, but cannot inspire positive initiative. So there should be a greater emphasis on partnership and a lesser dependence on regulation and constraint.

The text of the Charter on ownership rights should reflect this positive and forward-looking approach. ELO is pleased to note that the proposals made by the Presidium (Convent 9) are a good step in this direction. The submissions of ELO should be seen as a devoted effort, based on vast experience, to improve even further the article 16.

<u>Specific amendments to the draft article on the right to ownership</u>

ELO submits that the words "**or restricted in their use**" should be added after "possessions".

The legislative and administrative practices of Member States and, in particular, EU legislation, have highlighted that many modern day-to-day problems that hamper the efficiency in managing assets stem from restrictions of use, which may have the same economic consequence as expropriation. It should be noted that such restrictions, if not compensated, may not only cause problems for the owner but will ultimately have negative effects on society as a whole as they will most certainly lead to distortions in the market economy and an inefficient allocation of resources.

ELO submits that the words "**where deemed necessary**" should be added after "except".

These words oblige the authority acting on behalf of the "public interest" to demonstrate that action to deprive a person of his possessions, or to restrict him in their use, is the only way to meet that overriding public interest. In fact there is a growing urge already reflected in at least one national constitution to qualify the requirement "public interest" by prescribing that it should be "a significant public interest". ELO submits also this wording for possible consideration by the Convention.

ELO submits that "fair" should be replaced by "**full**".

Several constitutions of European countries (Holland, Finland, Denmark) provide for full compensation. There is no reason why an individual should support the burden of a limitation of his property use (that can sometime reach the situation of quasi-expropriation), when that burden is applied in the general interest.

It cannot be regarded correct that the state, when depriving a citizen of his possessions, may compensate him with a lower value than his fellow citizens would pay him if that property was traded in the open market.

ELO further supports the requirement that compensation should be prior to a taking or a restriction. Even if not all constitutions do not already have such wording, it would send wrong signals to the citizens if the Charter did not reflect the higher standard prescribed in some constitutions. An alternative wording could be to prescribe that full compensation be guaranteed.

A mechanism for citizens to invoke the right

This submission does not go into detail on the issue of the legal status of the Charter. However, ELO believes that it will be essential for a direct and effective mechanism to be created to enable citizens and businesses to invoke the Charter, and to seek a practical remedy where they believe their right to ownership may be infringed.

Conclusion

At a time when there is an increasing demand for the Union's Institutions to build a "Europe of citizens", and in the context of the enlargement to countries where people suffered negative economic and social consequences of the nationalisation of their properties**,** the EU Charter must meet key tests to be successful.

First: in order to direct the institutions of the EU to uphold fundamental rights when they make EU policy and legislation, the Charter must set out these rights clearly, and in a way that could eventually enable its incorporation into the EU's Treaty base. The Charter can then fill a gap that currently exists, in that basic human rights are already incorporated into national legislation, but not into the policy and law making functions of the EU itself.

Second, the Charter must respond to the legitimate demands of individuals and groups within society to enjoy a protection of basic human rights, including ownership rights, which they will find acceptable and in terms they can understand. Commitments in the Charter to uphold the rights in such a manner will be welcomed by the public.

Third; the Charter must demonstrate that the EU is forward looking, and capable of responding to new challenges. Since Europe's citizens will benefit from less bureaucratic institutions and from an innovative market economy, regulation and control should play a diminishing role. Incentives to positive action will become more and more important. And so will an improved protection of ownership both for material and intellectual property, enabling citizens to take a long term approach to investment and economic development, and reassuring them that they will not be deprived of the fruits of their work. The Charter must fully embrace this forward-looking approach, in particular in a clear and effective text on ownership rights.

The Charter must succeed in defining the rules for ownership rights in a way which not only protects the citizen but which also promotes the best use of resources, both human and natural.

ELO is pleased to be able to submit this paper and would welcome the opportunity to develop our reasoning further or provide any clarification needed.

15th March 2000

Annex

The UN-Declaration on Human Rights

Art. 17: Everyone has the right to own property alone as well as in association with others.
No one shall be arbitrarily deprived of his property.

Art. 29 Everyone has duties to the community in which alone the free and full development of his personality is possible.
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1 of the Protocol to the Convention:
Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The European Parliament Declaration of fundamental rights and freedoms
(Doc. A2-3/89, J.O. No. C 120/51)

Article 9: The right of ownership shall be guaranteed. No one shall be deprived of their possessions except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to fair compensation.

Article 25 1. This declaration shall afford protection for every citizen in the field of application of Community law.
2. Where certain rights are set aside for Community citizens, it may be decided to extend all or part of the benefit of these rights to other persons.
3. A Community citizen within the meaning of this declaration shall be any person possessing the nationality of one of the Member States.

Article 26: 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 substance of such rights an freedoms.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 16 March 2000

CHARTE 4166/00

CONTRIB 50

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Bureau for Lesser Used Languages (EBLUL). [1]

[1] This text has been submitted in French and English languages.

Call for Linguistic Rights in European Fundamental Rights Charter

The European Bureau for Lesser Used Languages (EBLUL) welcomes the decision of the European Union to draft and approve the Charter of Fundamental Rights of the European Union. The Charter will be a further step in the process of European integration. It is highly significant because it signals a move away from mostly economic matters which have been at the centre of European attention in recent years towards a more comprehensive understanding of European citizenship, incorporating the notion of fundamental rights.

Cultural and linguistic diversity in Europe lies at the heart of fundamental rights for its citizens as the integration process advances. An essential part of this diversity are the regional and minority languages traditionally spoken by linguistic communities within the EU member states.

The importance of preserving and promoting these languages has been considered highly important by some relevant European institutions. The European Charter on Regional and Minority Languages can be considered to be Council of Europe's convention setting out basic minimum standards. Another relevant document of the Council of Europe is the Framework Convention for the Protection of National Minorities.

The OSCE mentions minority languages on several occasions, including the Document of the Copenhagen Meeting of the Conference on the Human Dimension, adopted in June 1990, containing 11 paragraphs relating to linguistic minorities. Furthermore, the following should also be considered: the activities of the High Commissioner for National Minorities; the Foundation of Inter-Ethnic Relations in 1996; the Hague Recommendations Regarding the Education Rights of National Minorities as adopted in 1996 and the Oslo Recommendations Regarding the Linguistic Rights of National Minorities as adopted in 1998. These latter two documents give a comprehensive overview of the rights needed for protection and promotion of languages.

EBLUL stresses the need for clauses specifically related to linguistic rights of communities speaking regional and minority languages to be included in the Charter of Fundamental Rights for the European Union. The Charter should provide at least a minimum standard of protection of regional and minority languages which will become a fundamental basis in this field for the European Union itself and for its current and future member states.

Brussels 25.2.2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 16 March 2000

CHARTE 4167/00

CONTRIB 51

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution of European Round Table of Charitable Social Welfare Associations (ETWelfare). [1] [2]

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[1] ETWelfare: rue De Pascale 4-6, B-1040 Brussels. Tel: +32-2-230 4500. Fax: +32-2-230 5704.

[2] This text has been submitted in English only.

ETWelfare

Proposal from
ETWelfare
(European Round Table of Charitable Social Welfare Associations)
concerning the draft of an EU Charter of Basic Rights

Article …
The Right to Civil Dialogue and Basic Protection

(1) Every person in the European Union has a right to social participation (civil dialogue) and to protection against poverty and exclusion (basic protection).

(2) Civil dialogue adheres to the principles of solidarity and subsidiarity, and will be conducted at the local, regional, national and European levels, in particular by means of co-operation with the social partners, non-governmental organisations and charitable social welfare associations as actors of civil society.

(3) Basic protection includes the right to a socio-cultural subsistence, to be anchored in all social policy regulations. Part of this is the right to benefit from social welfare services, that are offered by the social partners and the charitable associations, with the involvement of volunteers, as actors of social protection and institutions responsible for voluntary establishments and services.

Reasons:

The citizens need to have more confidence in the process of European unification. The rift between rich and poor and the inherent employment crisis are evident at a global level, and require new ways of fighting against poverty and exclusion. This is the only way to encounter the fears of globalisation in general and of enlarging the EU in particular. It is imperative to further develop the European social model. The current state of play seems to indicate that the EU may adopt a Charter of Basic Rights by the end of 2000, and for the reasons given above it must include social rights.

The newly to be created right to civil dialogue requires the guarantee that there will be co-operation with the social partners, non-governmental organisations and charitable social welfare associations as actors of civil society, at the local, regional, national and European levels. Only a sufficient degree of social participation can give durability to the principle of democracy. And in doing so, it must respect the principles of subsidiarity and solidarity.

All social policy regulations need to include the right to a socio-cultural subsistence level. Pursuant to Article 14 of the European Social Charter this must include the right to benefit from social welfare services. Co-operation with the social partners and the charitable associations responsible for social establishments and services (see Maastricht Declaration N° 23 on "Co-operation with Charitable Associations"), and that use the input from voluntary services to develop social solidarity (see Amsterdam Declaration N° 38 on "Voluntary Services") corresponds specifically to the objectives of European social policy as stipulated in Article 136 of the EU Treaty (Amsterdam version).

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Brussels, 3 March 2000

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 16 mars 2000

CHARTE 4168/00

CONTRIB 52

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Groupement Européen des Fédérations intervenant dans l'immobilier (GEFI) [1]

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[1] Ce texte a été soumis en langue française seulement.

CHARTE EUROPÉENNE DES DROITS FONDAMENTAUX

PROJET DU GEFI

Groupement Européen des Fédérations intervenant dans l'Immobilier

Transmis le jeudi 16 mars pour diffusion sur le site internet :
Consilium.eu.int

INTRODUCTION

1 Dans l'Europe qui se constitue, au sein de l'ensemble communautaire, la propriété est un droit fondateur, acquis pour les uns depuis quelques siècles, retrouvé pour les autres depuis quelques années. Et pour chacun, le droit de disposer d'une propriété demeure une motivation dans son activité professionnelle et dans sa vie personnelle.

Pour autant, demander à voir ce droit reconnu dans un texte, constitué de principes directeurs de l'action des institutions communautaires, ne relève pas de la redondance. C'est d'ailleurs ce que traduit globalement le plan d'action de Vienne, qui avait demandé le 3 décembre 1998 que trois notions, pourtant ancrées dans l'esprit collectif européen, soient protégées : la liberté, la sécurité et la justice.

2 Dans sa sagesse, le Conseil européen de Cologne a confirmé, en faisant suite au Traité d'Amsterdam (articles 6 et 7 du Traité sur l'UE), qu'il n'existait pas d'évidence en matière de Droits de l'Homme. Il a jugé qu'à ce stade du développement de l'Union européenne, la subsidiarité était compatible avec l'affirmation solennelle d'un état de droit demeuré jusque là implicite et insuffisamment cohérent.

Ce souci de visibilité des droits fondamentaux, qui devrait notamment se fonder sur l'acquis précieux de la Convention européenne des Droits de l'Homme et de la Cour de Strasbourg, ainsi que sur les traditions constitutionnelles communes des Etats membres, consacre, quelle que soit la valeur juridique du texte à venir, un basculement de l'ère des agents économiques à celle des citoyens européens, d'une communauté d'intérêts à un état de droit.

Cette configuration nouvelle laisse la liberté d'inventer un modèle cohérent, qui concilie nos destins nationaux et notre communauté de destin européen. A l'évidence, ce défi ne se limite pas à la reconnaissance de droits établis. Il suppose également de les concilier avec de nouvelles exigences et de trouver par là un nouveau sens, une vocation renouvelée de ces droits fondateurs.

3 La propriété illustre cette nouvelle donne. Etroitement liée à l'ensemble des libertés qui sont le fondement, l'objet même de la Communauté Européenne et qui se déclinent en liberté d'entreprendre, liberté de la concurrence, ou liberté de la circulation, elle a vu son rôle évoluer au cours des dernières années.

Certes, elle demeure plus que jamais une motivation, un ressort essentiel pour l'activité humaine. Elle encourage et permet de mener un projet personnel, d'imaginer son futur, celui de sa famille. Elle constitue, en ce sens, un moteur économique et un facteur d'harmonie sociale unique, qu'il est indispensable de préserver et plus encore de développer.

Parallèlement, elle participe d'autres objectifs, celui de la solidarité notamment, face à l'accroissement, depuis le début de la décennie 80, du nombre des sans-abri et à l'insuffisance des moyens engagés en faveur des personnes âgées, des handicapés et des sous-populations aux besoins spécifiques. Elle est de plus en plus intégrée dans les politiques de protection de l'environnement et de développement durable. La propriété,

qui induit le partage, assure par là un des fondements essentiels de la citoyenneté moderne.

C'est cette double faculté de la propriété qui explique le renouvellement de son rôle économique et social dans l'ensemble des Etats membres de la Communauté Européenne, au cours des années 80.

4 La fondation au niveau de l'Union Européenne d'un droit de propriété moderne et pérenne doit donc tenir compte de la conservation pleine et entière de ce droit d'intérêt général, dans des conditions qui permettent de répondre aux exigences du temps présent, ainsi qu'à celles de notre avenir commun.

Cela revient à s'interroger sur les limites aux atteintes qui lui sont portées, de sorte que l'exception n'annihile pas le principe et que les restrictions d'usage ne privent pas de facto le propriétaire de son droit.

Au préalable, un état des lieux s'impose, qui montrera toute l'utilité d'une clarification communautaire.

A l'image de nombreux autres droits fondamentaux, en effet, l'espace européen de la propriété immobilière n'existe pas (II), mais il se construit progressivement (III).

Absence d'espace européen de la propriété et convergences nationales croissantes

5 Pourquoi un espace européen de la propriété immobilière ? parce que c'est un droit fondamental, inscrit de surcroît dans un espace économiquement intégré, qui se veut socialement cohérent. L'égalité de traitement doit permettre en tous domaines une fluidité des capitaux et des investissements dans l'immobilier, une mobilité transnationale du travail, une égalité de traitement pour les revenus les plus modestes voulant accéder au logement ou à la propriété.

A cet égard, le filtre des politiques nationales permet de discerner quelques conceptions concrètes de la propriété, souvent ancrées dans une histoire récente, celle des 50 dernières années, et dans des environnements nationaux différents (2.A). Cela ne remet pas pour autant en cause des valeurs communes, qui s'accompagnent de réelles convergences (2.B).

2.A. Des choix stratégiques et des réglementations différenciées

6 Si tous les pays membres de l'Union s'interrogent sur la meilleure politique du logement possible pour répondre notamment aux nouvelles formes d'exclusion, les voies et moyens adoptées divergent.

Les choix stratégiques fondamentaux pourtant partagés après-guerre n'ont pas donné lieu à mise en œuvre dans des conditions comparables. Dans la mesure où ils ne furent

jamais remis en cause, si ce n'est au Royaume-Uni, du moins dans leurs grands principes, les évolutions qui en ont résultées ont le plus souvent divergé.

2.A.1 Les choix stratégiques de l'après-guerre

7 Al'issue de la Seconde guerre mondiale, deux types de réponses ont été apportés au problème de l'insuffisance de logements :

| soit, l'Etat a investi directement dans le secteur et construit des logements dont il était propriétaire, à charge pour lui de les louer ou de les vendre ;

| soit, il a adopté des mesures d'incitation des agents économiques à investir dans le secteur du logement, des ménages pour leur fonction de consommateurs de service du logement et de tous les autres, pour leur fonction d'épargne et de gestion de leur patrimoine.

Le choix entre ces deux options s'est, en général opéré, suivant des considérations pragmatiques d'efficacité des interventions et de rapidité d'obtention des résultats. C'est le poids relatif de six facteurs principaux, qui permet d'expliquer les différences entre les politiques du logement retenues. **Leur énumération rapide permet de comprendre l'actualité et la pertinence de cette grille de lecture pour toute politique du logement, à quelque niveau que ce soit :**

- la philosophie économique et sociale des dirigeants ;
- le degré de légitimité des interventions de l'Etat dans le secteur du logement ;
- le degré d'acuité de la crise du logement ;
- le niveau d'organisation des institutions sur lesquelles l'Etat peut s'appuyer pour intervenir ;
- la situation générale de l'économie ;
- le degré de motivation préalable des agents économiques.

8 **Dans tous les pays, les gouvernements ont mis en œuvre des politiques d'incitation à l'accession à la propriété**, essentiellement dans « le neuf », par l'octroi de primes, de subventions, de bonification d'intérêts, d'avantages fiscaux ou de prêts à taux réduits.

| Là où la légitimité de l'intervention étatique était ancienne, la solution de l'Etat investisseur fut immédiatement retenue, démarche des pays scandinaves et du Royaume-Uni.

| Là où elle apparaissait plus faible ou plus récente, il s'est agi de permettre aux ménages les plus modestes d'accéder à des logements décents, sans effort trop lourd. Cette politique restreinte du logement (plafonnement des ressources) s'est traduite par la construction de logements sociaux en France, en Belgique, au Luxembourg et, de façon temporaire, en RFA.

| Les Pays-Bas avaient adopté une position plus nuancée, orientée vers le logement social, qui se traduisait dans les faits par un libre accès à ce parc.

| L'Espagne, la Grèce et le Portugal, dans leur contexte politique particulier et compte tenu de leur isolement international, ne purent commencer à mettre en oeuvre une véritable politique du logement que beaucoup plus tard.

9 Dans le secteur locatif, la situation était plus diversifiée encore :

| dans les pays scandinaves et au Royaume-Uni, la puissance publique ont joué un rôle déterminant soit en aidant les acteurs privés, soit en se substituant à eux.

| dans les autres pays européens, la situation plus ambiguë a conduit les gouvernements à tergiverser : ils ont refusé d'intervenir dans le secteur locatif au-delà de la distribution de quelques aides à la construction, tout en comptant sur les acteurs privés, au point de leur aménager des conditions législatives exceptionnelles. Ce fut l'échec, en France et en Allemagne notamment, qui a conduit l'Etat à intervenir massivement au travers d'organismes d'utilité publique.

2.A.2 Les politiques ultérieures et l'émergence de groupes de pays

10 L'amélioration générale de la conjoncture à partir de la fin de la décennie 50 va faciliter la résorption des tensions sur le marché de l'immobilier. Pourtant une ligne de fracture va très rapidement se faire jour :

| Dans les pays où les gouvernements sont intervenus rapidement, l'accroissement de l'offre de logements et l'élévation des revenus réels ont permis de lever rapidement le contrôle des loyers : la RFA est en 1963, le premier pays à le faire. Dans ces pays, les pouvoirs publics ont pu également s'appuyer sur les investissements privés. En RFA, par exemple, l'Etat s'est retiré, dès la fin des années cinquante, du système des logements subventionnés et a favorisé le secteur locatif par l'octroi d'aides de caractère essentiellement fiscal.

| Dans les pays où l'action de l'Etat fut plus tardive et moins massive, la levée des contrôles des loyers n'est intervenue que beaucoup plus tard : le cas extrême est celui des pays de l'Europe du Sud. Toutefois, dans ces pays, l'Etat cherche à réduire ses interventions financières en utilisant la progression des revenus réels. Il multiplia les catégories de logements. Chaque catégorie devait correspondre à un groupe particulier de population selon ses revenus. C'est sans doute la France qui est allée le plus loin possible dans cette voie : en 1968, on ne comptait pas moins de 6 catégories de logements ouverts aux organismes locatifs sociaux.

11 A l'inverse de l'effet recherché, les pays peu interventionniste ont vu se réduire l'offre de logements de bonne qualité sur le marché locatif privé, ce qui a contribué à une baisse générale de l'investissement dans le logement et de l'entretien du parc. L'Etat a dû, au fil des années, répondre à ces carences, en renforçant son intervention, notamment en compensant le recul du parc locatif privé par le développement du parc locatif public.

Les pays les plus rapides (RFA, Pays-Bas, Danemark, pays nordiques) ont en revanche créé une spirale vertueuse : après avoir résorbé les déséquilibres quantitatifs, ils ont pu transférer au secteur privé la responsabilité de l'accroissement de l'offre nouvelle de logements, sans jamais abandonner complètement le secteur privé au marché, de sorte qu'il remplisse une vraie fonction sociale.

12 Le déclenchement de la crise de 1974 va contribuer à figer les situations nationales en imposant progressivement une « orthodoxie budgétaire » peu favorable au secteur social en particulier, aux dépenses publiques en général. Cette nouvelle option va se traduire par l'incitation à l'accession à la propriété privée.

13 Les années suivantes vont confirmer une segmentation des pays en trois groupes principaux :

- L'Europe du Nord (Danemark, Pays-Bas, RFA) se caractérise par une volonté des pouvoirs publics de faire jouer à la propriété privé un rôle social qui contribue à son développement, notamment sous la forme de conventionnements.
- L'Europe du Sud (Espagne, Grèce, Italie, Portugal) place le secteur locatif privé sous contrôle, ce qui conduit à la disparition d'une offre locative, conditionne le choix de l'accession assistée, aboutit le plus souvent au délabrement du patrimoine immobilier.
- L'Europe de l'Ouest (Belgique, France, Grande-Bretagne, Irlande) choisit le désengagement général de l'immobilier en assurant la promotion à l'accession Cela a induit des risques de rupture sociale, notamment par le développement d'une ségrégation spatiale, ce contre quoi les pouvoirs publics s'efforcent aujourd'hui de lutter.

2.B. Des convergences croissantes

14 Les politiques nationales ne résument pas à elles seules la façon par laquelle on peut caractériser le statut de la propriété dans les pays membres de l'Union Européenne. Elles traduisent un état de fait, dont il convient de tenir compte, mais elles ne délimitent en aucune façon un cadre indépassable.

En revanche la base constitutionnelle reconnue à la propriété dans chacun des pays est révélatrice de l'importance fondamentale de ce droit, ainsi que d'une vraie cohérence des pays membres de l'Union sur ce point.

Au-delà même de cette unanimité de principe quasi absolue, les orientations récentes des politiques nationales semblent indiquer des évolutions convergentes.

2.B.1 Les Constitutions, unanimes mais nuancées

15 Presque tous les pays d'Europe, héritiers du droit romain, ont inscrit la propriété privée dans leur Constitution comme droit fondamental et inviolable, sous réserve de restrictions inspirées par des motivations d'intérêt public. Seul le Royaume-Uni a conservé un droit issu du système féodal, régi par la « common law ». A noter une autre singularité, l'Autriche : sa Constitution ne traite que des règles d'organisation des pouvoirs publics.

De conception le plus souvent récente, les textes originels ou issus de révisions constitutionnelles adoptent pour la plupart d'entre eux une formulation pragmatique. Mais certains choisissent une affirmation plus solennelle de ce droit.

16 C'est le cas en particulier de l'Irlande et de le France. Dans son article 43, la Constitution irlandaise dispose « **l'Etat reconnaît que l'homme, en vertu de son être raisonnable, a le droit normal, antérieur à la loi positive, à la propriété privée** des marchandises externes ». Le texte français, issu de la Déclaration des Droits de l'Homme et du citoyen du 26 août 1789 (art.17), est le suivant : **« La propriété étant un droit inviolable et sacré**, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité ».

17 Les autres textes constitutionnels vont d'emblée à la **nécessité de l'équilibre à instaurer entre propriété privée et intérêt public**. A cet égard, l'exigence des constituants est plus ou moins grande, eu égard au respect de la propriété privée. **Quatre groupes de pays peuvent être distingués**:

- les pays dont les constituants exigent une pleine compensation (Danemark, Finlande, Grèce, Pays-Bas) ;
- les pays dont les Constitutions garantissent une juste et parfois préalable indemnisation (Belgique, France, Luxembourg, Portugal) ;
- les autres pays évoquent le principe d'équité ou de caractère approprié dans le dédommagement (Allemagne ; Espagne)
- la dernière catégorie, la moins représentée, est illustrée par les pays ne caractérisant pas précisément la nature de la compensation (Italie, Suède)

2.B.2 Les orientations récentes, convergentes

18 Outre ce voisinage de principe entre les Etat européens, les préoccupations communes qui se sont exprimées durant les années 90 révèlent désormais une problématique partagée, relative aux orientations politiques en matière de logement et de propriété immobilière.

19 Ces convergences sont plus particulièrement visibles pour les actions en faveur du secteur locatif privé.

Ce secteur représente actuellement de l'ordre de 21% du parc de logements des Etats membres (contre 18% pour le parc locatif social et 56% pour les propriétaires et accédants) et enregistre des signes de regain encourageants.

L'exemple de l'Allemagne, qui par des aides fiscales en faveur des propriétaires bailleurs a permis de conserver un puissant secteur locatif privé, de qualité et de confort, et le contre-exemple d'une baisse sensible de l'offre liée à la réglementation des loyers, accompagnée du développement de l'insalubrité (exemple : le Portugal), ont conduit les Etats européens à reconsidérer le rôle de la propriété privée.

Les actions entreprises depuis une dizaine d'années dans la plupart des Etats en faveur du secteur locatif privé commencent à progressivement produire des effets. Les réglementations des loyers ont été presque partout assouplies, des incitations fiscales accompagnent le plus souvent les orientations des politiques publiques, des actions de réhabilitation du parc existant sont engagées, des systèmes de conventionnement se développent.

20 Cette première partie de l'analyse, si elle montre la diversité européenne, constat qui ressort de l'évidence, met également en exergue des traits communs fondamentaux et, de plus en plus, des évolutions convergentes. Une déclaration des Droits ne saurait ainsi ignorer que les différences nationales temporaires ne font indubitablement pas obstacle à une mise en cohérence, d'autant qu'elle est initiée par les gouvernements. Un tel texte a, en outre, pour vocation, d'encourager ces évolutions, dans le sens du respect le plus grand des droits dont il est question.

Cette tâche est facilitée par le fait que le travail européen et communautaire a déjà été entamé.

Logique de cohérence européenne et prise en compte de nouveaux enjeux

21 L'Europe, par la voix des Cours de Strasbourg et de Bruxelles, a apporté les premiers éléments de cohérence de ces politiques nationales et établi certains principes de hiérarchisation des droits (3.A).

Mais ces évolutions demeurent encore trop souvent ancrées dans une vision traditionnelle du droit de propriété et de ses relations avec les puissances publiques. Non seulement la Charte peut aisément établir un cadre juridique sur la base de l'existant. Mais elle peut, plus encore, préparer certaines évolutions probables et souhaitables (3.B).

3.A. Un fondement juridique européen aujourd'hui bien établi

3.A.1 L'article 1er du protocole additionnel à la Convention européenne de sauvegarde des Droits de l'Homme et des Libertés Fondamentales

22 L'article 1er du Protocole n°1 est ainsi rédigé :

> « Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.
>
> Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »

Selon la jurisprudence de la Cour de Strasbourg, cet article contient **trois normes** distinctes (arrêt *James et autres C. Royaume-Uni, du 21 février 1986*) : la première, qui s'exprime dans la première phrase du premier alinéa et revêt un caractère général, énonce **le principe du respect de la propriété** ; la deuxième, figurant dans la seconde phrase du même alinéa, vise la **privation de** propriété et la soumet à certaines conditions ; quant à la troisième, consignée dans le second alinéa, **elle reconnaît aux**

Etats contractants le pouvoir, entre autres, de réglementer l'usage des biens conformément à l'intérêt général.

23 Sur cette base, la Cour de Strasbourg a produit une jurisprudence très abondante relative au droit de propriété, qui vise en général à concilier sa protection nécessaire avec l'existence de droits concurrents et reconnus par là inférieurs dans l'ordre juridique communautaire.

Quelques arrêts permettront à titre d'exemple d'évaluer la portée de cette jurisprudence qui ne s'en tient pas à une garantie formelle du droit de propriété.

∂ Ainsi, dans un arrêt Sporrong et Lönnroth . Suède du 23 septembre 1982, la Cour a jugé que l'absence d'expropriation formelle conduisant néanmoins au gel d'un terrain pendant 23 ans ne respectait pas un juste équilibre entre des exigences d'intérêt général et les impératifs de sauvegarde des Droits de l'Homme.

• Plus récemment, la Cour a jugé qu'une loi établissant une présomption irréfragable selon laquelle les propriétaires riverains, parce qu'ils tirent profit de la construction d'une route nationale, ne peuvent être indemnisés que pour une partie des biens expropriés, s'avère d'une « rigidité excessive » et fait supporter aux propriétaires une « charge spéciale et excessive », qui emporte violation de l'article 1 du Protocole 1 (*Papachelas C. Grèce, 25 mars 1999*).

÷ Des réglementations d'usage ont également été condamnées par la Cour à l'occasion de 2 arrêts très récents.

| Ainsi, l'obligation faite aux petits propriétaires français par la loi « Verdeille » de faire apport du droit de chasse sur leurs fonds à une ACCA poursuit bien un but d'intérêt général – éviter une pratique anarchique de la chasse et favoriser une gestion rationnelle du patrimoine cynégétique-, mais constitue une violation du droit de propriété en ce qu'elle fait peser une « charge démesurée » sur les propriétaires, qui ne disposent en pratique d'aucun moyen d'échapper à cet apport forcé (*Chassagnou et autres c. France, 29 avril 1999*).

| Est aussi une réglementation de l'usage des biens la législation qui, par la prolongation de baux locatifs et la suspension puis l'échelonnement de l'exécution forcée des décisions judiciaires ordonnant aux locataires de libérer les lieux, place un propriétaire dans l'impossibilité d'obtenir l'exécution d'une décision d'expulsion (*Immobiliare SAFFI C. Italie, 28 juillet 1999*). Une telle législation, qui tend à faire face à des besoins urgents en matière de logement et à éviter des tensions sociales, poursuit bien un but légitime. Bien que reconnaissant au législateur une ample marge d'appréciation en matière de réglementation de l'usage des biens, la Cour juge ici que l'application de la législation italienne à la requérante a placé celle-ci pendant environ 11 ans dans l'incertitude quant au moment où il lui serait possible de récupérer son appartement et lui a fait subir une « charge spéciale et excessive » constitutive d'une violation de l'article 1 du Protocole 1.

24 La lecture de ces quelques exemples jurisprudentiels montre le souci des juges de Strasbourg de porter son regard au-delà des limitations d'usage dès lors qu'elles emportent l'impossibilité effective de jouir de son bien.

Mais la justice européenne est un luxe auquel peu de concitoyens européens peuvent accéder, ce qui légitime la protection au sein de l'Union de ces droits, ainsi qu'un renforcement de l'intervention des juges de Luxembourg.

3.A.2 Un dispositif de mieux en mieux relayé au sein de l'Union Européenne

25 La base juridique de l'intervention de l'Union en matière de droits fondamentaux, à l'origine très étroite, s'est au cours des dernières années notablement étendue.

C'est en effet l'article 6 (F), deuxième alinéa, du traité de l'Union Européenne, qui fait obligation à l'Union de respecter les droits fondamentaux tels qu'ils sont garantis par la Convention européenne de sauvegarde des Droits de l'Homme et des libertés fondamentales .

Pour le respect de ces droits, certaines dispositions peuvent être prises contre certains Etats membres qui se rendent coupables de violations à leur égard. Ces dispositions sont applicables en vertu de l'article 236 (309, paragraphe 2) du Traité de l'Union.

Par ailleurs, les articles 11 § 1 (J.1 § 2), 5ème tiret, et 30 (K.2) § 1 du traité de l'Union, ainsi que l'article 177 (130 U) § 1 et 2 du traité CE, mentionnent la protection des droits fondamentaux et les droits de l'homme.

Enfin, le préambule de l'Acte unique se réfère à la Convention européenne de sauvegarde des droits de l'homme.

26 Hors des procédures contentieuses, le Parlement Européen a pris depuis 1977 des initiatives visant à une meilleure protection des libertés fondamentales des citoyens européens. En 1993, la Commission des libertés publiques et des affaires intérieures, mise en place après le traité de Maastricht, a établi le premier rapport annuel sur le respect des droits de l'homme dans la Communauté, suivi d'une résolution sur le même sujet. C'est par ailleurs, sur son initiative, qu'a été envisagée l'adhésion de l'Union à la Convention européenne des Droits de l'Homme, idée rejetée par la Cour de Justice dans un avis du 28 mars 1996.

27 La Cour de Luxembourg a pris le relais des textes et des initiatives parlementaires. Elle a été amenée à fonder sa jurisprudence sur les droits fondamentaux reconnus et garantis par les Constitutions des Etats membres, ainsi que sur le texte de la Convention Européenne pour assurer le respect des droits fondamentaux dans l'Union Européenne. C'est ainsi qu'elle a pu établir **dès 1974 que les droits fondamentaux, tel que le droit de propriété, faisaient partie des principes généraux du droit, équivalents, dans la hiérarchie des normes communautaires, au droit communautaire primaire.**

28 Par ailleurs, sa jurisprudence est allée en se précisant, dans le sens de garanties mieux affirmées du droit de propriété. Mais elle demeure encore, à certains égards, imprécise.

Dans l'arrêt Nold du 14 mai 1974, la Cour reconnaît le droit de propriété en tant que droit fondamental, protégé par l'ordre juridique communautaire. Elle fait référence aux instruments internationaux auxquels les Etats membres ont adhéré ou simplement coopéré et énoncent que la Cour « est tenue de s'inspirer des traditions

constitutionnelles communes aux Etats membres ». A cet effet, il est précisé qu'il ne saurait être admis « des mesures incompatibles avec les droits fondamentaux reconnus et garantis par les Constitutions » des Etats membres.

L'arrêt « Hauer », rendu le 13 décembre 1979, constitue une étape décisive vers une protection plus effective de la propriété. Il précise, en effet, que les restrictions justifiées par l'intérêt général ne sauraient aller au-delà de la mesure nécessaire, ni porter atteinte à la substance même du droit de propriété. Le principe de proportionnalité ainsi affirmé se fonde pour la première fois sur l'article 1er du Premier Protocole additionnel à la Convention européenne et l'interprète comme s'il s'agissait d'une disposition de droit communautaire.

Cette avancée notable de la jurisprudence connaît néanmoins une limite, qui tient à la distinction faite entre privation et règlement de l'usage de la propriété: le même arrêt Hauer précise qu'il n'existe pas de privation si le propriétaire peut continuer à disposer de sa propriété et en user de toutes autres manières, sous réserve qu'elles ne soient pas prohibées.

La limite ainsi établie entre la substance d'un droit et les restrictions qui peuvent y être apportées est plus que ténue, en tout cas mal définie. Dans la mesure où cette substance n'est pas établie et où les atteintes portées sont conformes au droit existant, tous les abus de droit restent possibles.

Cela renvoie notamment à la distinction artificielle faite dans un certain nombre de droits nationaux entre la perte totale de la propriété, qui est indemnisée, et la perte d'éléments qui, même s'ils peuvent apparaître comme fondamentaux (par exemple une inconstructibilité totale) ne le sont pas. De nombreuses atteintes remettant en cause le sens et la portée du droit de propriété peuvent ainsi échapper à une réparation.

A cet égard, la Cour a pris, dans l'affaire Wachauf du 13 juillet 1983, une position qui va dans le sens de l'indemnisation du préjudice subi. Elle a, en effet, estimé qu'une importante limitation au droit de propriété, devait être compensée financièrement. L'influence de la jurisprudence de la Cour européenne des droits de l'Homme apparaît ici avec la force de l'évidence. Ainsi, la Cour fait-elle du bilan coût-avantage un élément fondamental que toute Charte moderne du droit de propriété paraît devoir aujourd'hui appliquer.

Cette évolution jurisprudentielle apparaît finalement aussi encourageante qu'elle est inachevée. Dans la situation actuelle, le droit de propriété, même reconnu, ne jouit pas de garanties stables face aux droits concurrents. En réalité, il n'existe pas encore.

3.B. Une actualisation indispensable

29 Le futur article de la Charte relatif au droit de propriété doit, compte tenu des dispositions constitutionnelles de certains des Etats membres de l'Union et de la jurisprudence de la Cour Européenne des Droits de l'Homme aller au-delà des dispositions de l'article 1 du Protocole 1 de la Convention européenne de sauvegarde des Droits de l'Homme et des Libertés Fondamentales.

30 Il convient tout d'abord d'affirmer **le rôle que joue la propriété immobilière dans l'équilibre social et le développement économique des pays membres de l'Union**. C'est précisément ce rôle et la conscience qu'en ont les propriétaires eux-mêmes et les Etats, qui fondent les droits relatifs à sa protection.

L'exercice de ce droit ne pose problème que dès lors que des droits concurrents viennent limiter son libre exercice. A cet égard, plusieurs éléments doivent être mentionnés dans le texte futur :

31 Il doit être rappelé, comme le fait l'article 1 du Protocole 1 de la Convention, que « nul ne peut être privé de sa propriété que pour une cause d'utilité publique ».

32 Ce droit de la puissance publique doit être encadré par l'existence de **normes législatives et constitutionnelles**. Il peut en effet être envisagée qu'une loi ne soit pas nécessairement confrontée à ces normes suprêmes de la hiérarchie des normes. Il est donc nécessaire que la conformité de la loi à la Constitution soit examinée d'office.

La compensation liée à ces opérations doit se conformer à des garanties de fond et de procédure.

33 Sur le fond, il est indispensable de ne plus distinguer les restrictions à l'usage de la propriété de privations pures et simples, dans la mesure où, comme on l'a vu, l'un aboutit de fait souvent à l'autre. C'est la raison pour laquelle, la **compensation prévue doit être pleine et entière** et non pas seulement équitable. Cette dernière notion revêt, en effet, un caractère relatif qui laisse à l'arbitraire une place trop grande.

34 **Cette compensation doit être également préalable** pour éviter, autant que faire ce peut, que l'empiètement sur l'exercice du droit de propriété ne se transforme en privation .

35 Enfin, le propriétaire ne peut appréhender complètement un préjudice que s'il dispose de toute l'information utile à la formation de son appréciation. Aussi, convient-il d'ajouter l'exigence **d'une procédure loyale et contradictoire.**

Conclusion

La meilleure protection des droits des locataires et la réalisation effective du droit au logement passe, comme le démontrent les politiques nationales dans les pays du nord de l'Europe, ainsi qu'en Allemagne, par une protection effective des droits des propriétaires.

C'est là une condition de la confiance dans les rapports entre propriétaires et puissance publique et une étape indispensable vers certaines formes de partenariat.

C'est dans ce cadre, qui intègre un principe de solidarité indispensable, et renouvelle donc le rôle de la propriété immobilière dans la Cité que des garanties nouvelles doivent être ajoutées à celles que les institutions européennes ont déjà reconnues.

La base de cette reconnaissance ne saurait donc se limiter durablement à ce qui n'est qu'une référence de base, la Convention européenne de sauvegarde des Droits de l'Homme et des Libertés Fondamentales.

L'Union Européenne sera ainsi en mesure de répondre à sa vocation d'espace politique cohérent, faisant application d'un cadre juridique uniformément respecté et inspirant durablement les pratiques étatiques.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 17 March 2000

CHARTE 4169/00

CONTRIB 53

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Children's Network (Euronet). [1] [2]

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[1] Euronet: c/o Place du Luxemburg 1, B-1050 Brussels. Tel: +32-2-512 7851/4500. Fax: +32-2-512 6673. E-mail: savechildbru@skynet.be

[2] This text has been submitted in English only.

To: The Convention to draft the EU Charter of Fundamental Rights
Mr Roman Herzog, Chair of the Convention
c/o European Council of Ministers
175 Rue de la Loi
1048 Bruxelles

Re: Note from the Praesidium CHARTE 4123/1/00 REV 1, Convent 5

Brussels, 27 February 2000

Dear Mr Herzog,

Rights of the Child

I am writing to follow up your note with draft articles for the Draft Charter of Fundamental Rights of the European Union of 15 February 2000. Euronet, the European Children's Network was particularly interested in your comments on Article 9 Family life and in particular the commentary on the Convention on the Rights of the Child.

We welcome the fact that the Convention drafting the Charter is giving consideration to adding the phrase "in accordance with the UN Convention on the Rights of the Child 20 November 1989" to paragraph 3. This is in line with recommendations by Euronet in its submission to the Convention drafting the EU Charter of fundamental rights. In particular we would like to answer the question posed by the Convention, as to whether reference should be made to an instrument external to Union which may develop independently. We recommend that a reference to the UN Convention on the Rights of the Child, as the most comprehensive contemporary expression of children's rights, with almost universal ratification, is the most straightforward way to integrate the rights of the child. Although the UN Convention on the Rights of the Child can be amended, Article 50 (3) states clearly that when an amendment enters into force, it shall be binding only on those states parties which have accepted it. Other states parties are bound by the provisions of the present Convention (and any earlier amendments which they have accepted.) Therefore it is not possible to envisage a situation where the Union would be bound to a changing and developing legal instrument, as amendments only bind states which agree to them. In addition the phrase "in

accordance with the UN Convention on the Rights of the Child" does not amount to ratification by the EU and simply means that the EU has to respect the principles of the present Convention.
In the event that the Convention decides that a reference to international legal instruments is not possible, then we would urge that reference is made to the principle of the best interests of the child and the other four key principles (Articles 2, 3, 6 and 12) in the UN Convention on the Rights of the Child.

We would also like to point out that the current reference proposed in the draft Charter in Article 9 should be wider than "The Union shall ensure protection of children." The UN Convention on the Rights of the Child contains a number of other important rights not only protection rights. Our submission also raises a number of other issues and not only child protection. Children should not merely be seen as objects of rights but as bearer of rights. We would therefore urge that a reference is included to the Union ensuring protection and promotion of the rights of the child.

We would be pleased to discuss these comments further with you.

Yours sincerely,

Mieke Schuurman
Euronet Co-ordinator

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 20 March 2000

CHARTE 4171/00

CONTRIB 54

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution of European Liaison Committee on Services of General Interest (CELSIG). [1] [2]

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[1] CELSIG: 1-2 Avenue des Arts, boîte 9, B-1210 Brussels. Tel: +32-2-221 0429. Fax: +32-2-217 6612. E-mail: celsig@worldnet.fr

[2] This text has been submitted in English and French languages.

Comité européen de liaison sur les Services d'intérêt général
European Liaison Committee on Services of General Interest
Europäisches Verbindungskomitee "Dienstleistungen von allgemeinem Interesse"

Secrétariat / Secretariat / Sekretariat : Pierre Bauby et Jean-Claude Boual, RESEAUX SERVICES PUBLICS

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2 March 2000

CELSIG Propositions in view of the elaboration of the Charter of Fundamental Rights and the Intergovernmental Conference

Services of general interest constitute a significant element of the Union's common values. This opinion has been underlined by the Commission itself in its communication of September 1996:

> "*European societies are committed to the general interest services they have created which meet basic needs. These services play an important role as social cement over and above simple practical considerations. They also have a symbolic value, reflecting a sense of community that people can identify with. They form part of the cultural identity of everyday life in all European countries.*"

Today, following the establishment of the common market over the whole European territory and the introduction of the common currency, we may add that these services, equally constitute a factor of economic cohesion in the European Union. Further, the Treaty of Amsterdam (article 16) recognises their role in the strengthening of social and territorial cohesion. The services of general interest play, in addition, an essential role in the guarantee to all, of the application of individual's fundamental rights.

These orientations should be consolidated during the elaboration of the Charter of fundamental rights in the European Union and during the Intergovernmental Conference.

That is why the European Liaison Committee on Services of General Interest proposes the following:

1/ Charter of fundamental rights

Democratic values and the respect of Human Rights are the basis of the European civilisation. The Charter of fundamental rights must allow the exercise of these values by all European citizens and residents. The proper functioning of the European democracy depends on this aspect.

The Charter of fundamental rights, based on the European Social Charter (Council of Europe), must guarantee the integrity, the freedom, the equality, the dignity, the well being and personal advancement of the person. Services of general interest are a factor that guarantees the exercise of these fundamental rights, of having access to goods and essential services such as food, security, employment, housing, culture, education and training, health treatment, transport, energy, information and communication (postal services, telecommunications, Internet, media), access to financial and bank services, consumer protection, good quality environment for today and for generations to come.
...

We therefore propose that the following appear in the Charter:

"Article X – Services of general interest

1. Every individual has a right to access to services of general interest

2. Services of general interest guarantee the exercise of fundamental rights".

“Article Y – Right to an effective appeal action

Any individual, physical or moral, whose rights and liberties have been violated, has a right to an effective appeal action before a judge designated by the law, including before the Court of Justice of the European Communities."

The Charter of fundamental rights should be integrated into the treaty of the European Union, in order to have constraining legal significance.

2/ Intergovernmental Conference

On these bases, the article 16 (formerly article 7D) of the Treaty must be supplemented:

"a) Services of general interest are components of the common values of the Union; they participate in ensuring the exercise of the fundamental rights of the individual as defined in the present Treaty; they contribute to the promotion of social and territorial cohesion in the Union.

"b) The European Union and its Member States guarantee the access of everyone to services of general interest.

"c) Without prejudice to articles 73, 86 and 87, the Community and its Member States, each within their respective powers and within the sphere of implementation of the present Treaty, guarantee that such services operate on the basis of principles and conditions which enable them to fulfil their missions. Such measures are established in full respect of, *inter alia*, the principles of equality of treatment, quality, continuity of these services, as well as of the principles of transparency and evaluation concerning their definition, their application and their operation".

3/ Charter of the services of general interest

A Charter of the services of general interest at the Community level should be elaborated with all stakeholders (institutions, elected representatives, enterprises, employees and unionists, consumer organisations, civic NGOs, etc). Such a Charter should permit the taking into account of the principle of subsidiarity and it should in particular include:

- the creation of democratic evaluation bodies at each relevant level (local, national, European);

- the establishment of regulations at the respective levels;

- the consideration of the creation of services of general interest at the Community level, in certain sectors of European interest.

Further, CELSIG suggests that an encompassing directive, democratically elaborated, provides the possibility for the general interest coherence to the sector related directives and for the provision of a legal basis to these propositions.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPEENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 22 mars 2000

CHARTE 4172/00

CONTRIB 55

NOTE DE TRANSMISSION

Objet : Projet de charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une déclaration de l'Association des Femmes de l'Europe Méridionale (AFEM), délibérée en Assemblée Générale réunie à Strasbourg le 17 mars 2000. [1] [2]

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[1] Ce texte a été soumis seulement en langue française.

[2] AFEM: 5, rue Villaret de Joyeuse - 75017 Paris. **Tél.: 33-1-45 72 1203. Fax: 33-1-45 72 1503.** E-mail: assafem@aol.com

AFEM
ASSOCIATION DES FEMMES DE L'EUROPE MERIDIONALE

Déclaration de l'AFEM sur la Charte des Droits Fondamentaux
Délibérée en Assemblée Générale réunie à Strasbourg le 17 mars 2000

L'Association des Femmes de l'Europe Méridionale (AFEM) se félicite que l'Union européenne ait décidé de se doter d'une Charte des Droits Fondamentaux.

L'AFEM note avec intérêt l'avancement des travaux de la Convention, et notamment la proposition du Praesidium d'inclure une disposition spécifique sur l'égalité entre les femmes et les hommes.

Elle estime toutefois qu'il faut aller plus loin et insérer parmi les premiers articles de la Charte un article spécifique qui consacre le droit fondamental à l'égalité substantielle entre femmes et hommes dans tous les domaines en tant qu'élément constitutif de l'ordre public en Europe. Ainsi il sera impossible de déroger à ce droit, dont le bénéfice sera automatiquement acquis à toute personne présente sur le territoire de l'Union.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 22 March 2000

CHARTE 4173/00

CONTRIB 56

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by Amnesty International on the right of asylum and the protection of refugees under the European Union Charter of fundamental rights. [1] [2]

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[1] Amnesty International: rue du Commerce 70-72, B-1040 Brussels. Tel: +32-2-502 1499. Fax: +32-2-502 5686. E-mail: Amnesty-EU@aieu.be

[2] This text has been submitted in English only.

AMNESTY INTERNATIONAL

EUROPEAN UNION ASSOCIATION

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TEL.: +32-2-502.14.99
FAX.: +32-2-502.56.86
E-Mail: Amnesty-EU@aieu.be

Convention for the EU Charter of fundamental rights
Convention Secretariat
c/o Council Legal Secretariat
175 rue de la Loi
B-1048 Brussels

Brussels, 20 March 2000

Dear Sirs,

In light of the discussions that the Convention Working Group is expected hold in the near future on the draft article 17 of the European Union Charter of fundamental rights, which relates to the "right of asylum and expulsion", please find enclosed some comments by Amnesty International on the right of asylum and the protection of refugees.

Amnesty International acknowledges the transparency in the working methods of the Convention as well as its expressed interest in receiving the views of civil society.

Although our organisation will present at a later stage a comprehensive position on the subject, we would like to recall that the adoption of a Charter of fundamental rights must not result in diminishing the current level of protection that human rights enjoy in member states under the European Convention on Human Rights and other relevant international human rights instruments and that the Charter of fundamental rights should take account of the developments in international law, both of treaty and of customary legal nature, and therefore serve to crystallise fundamental rights that have not been object of written formulation so far.

Amnesty International is an independent worldwide movement working for the release of all prisoners of conscience, fair and prompt trials for political prisoners and an end to torture, extrajudicial executions, "disappearances" and the death penalty. It is funded by donations from its members and supporters throughout the world. It has formal relations with the United Nations, Unesco, the Council of Europe, the Organization of African Unity and the Organization of American States.

Amnesty International also recalls that under international human rights law, the fundamental rights of individuals cannot be object of discrimination on account of national origin. The Charter of fundamental rights must therefore ensure that the rights of all individuals present in the territory of the European Union are recognised

I hope that you will find these comments useful in the development of your work.

Thank you very much for your attention.

Sincerely yours,

María-Teresa Gil-Bazo
Executive Officer

Brussels, 20 March 2000

Comments by Amnesty International on the right of asylum and the protection of refugees under the European Union Charter of fundamental rights

(in light of the discussions on draft article 17 on the "right of asylum and expulsion")

1.- Amnesty International welcomes the inclusion of a provision on the right of asylum in the EU Charter of fundamental rights. Indeed, this reflects the development of international law and gives substance to the undertaking made by member states under article 3 of the Dublin Convention to examine the application for asylum of any individual, in accordance with their international obligations.

2.- Amnesty International would like to see an express reference to the UN Refugee Convention but also to other relevant international obligations for member states, such as the European Convention on Human Rights, in line with article 63 of the Treaty on the European Community.

3.- Amnesty International notes that the current draft provision excludes nationals of member states from the right of asylum. Such limitation constitutes a clear violation of the UN Refugee Convention and other international human rights treaties.

Amnesty International recalls that under international law, discrimination in the enjoyment of fundamental rights on the grounds of national origin is forbidden (article 2 of the Universal Declaration of Human Rights, article 3 of the UN Refugee Convention, article 3 of the International Covenant on Civil and Political Rights, article 14 of the European Convention on Human Rights) and therefore calls for the express recognition of the right of asylum to all individuals. Such recognition would be in line with conclusion 13 of the Tampere Summit, whereby the Heads of State and Government reaffirmed "the importance the Union and Member States attach to absolute respect of the right to seek asylum". Evenmore, the obligation of states to respect the right to seek asylum is a norm of customary international law and as such, no derogation from it is permitted (article 53 of the Vienna Convention on the Law of Treaties).

4.- Amnesty International would like to see an express provision on the absolute norm of *non-refoulement*, as included in article 33 para. 1 of the UN Refugee Convention and in other international treaties, of universal and regional application, such as article 3 of the UN Convention against torture and article 3 of the European Convention on Human Rights, which prohibit the forced return of individuals to the territories where their lives or freedom are at risk.

5.- Amnesty International would like to see an express provision on the guarantees that assist individuals in expulsion, extradition, or any other form of forced removal that they may be subjected to. Such provision would be in line with article 13 of the International Covenant on Civil and Political Rights (to which all member states are parties) and with the case-law of international monitoring bodies, such as the European Court of Human Rights, the UN Human Rights Committee or the UN Committee against Torture.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 22 March 2000

CHARTE 4174/00

CONTRIB 57

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter an open letter by the European Federation of National Organisations Working with the Homeless (FEANTSA) to the members of the Convention.[1] [2]

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[1] FEANTSA: 1 rue Defacqz, B-1000 Brussels. Tel.+32-2-538 6669. Fax: +32-2-539 4174. E-mail: office@feantsa.org

[2] This text has been submitted in French and English languages.

Brussels, 21 February 2000

Open letter to the members of the Convention responsible for drafting the proposed European Union Charter of Fundamental Rights

Dear Madam / Sir,

I am writing to you on behalf of FEANTSA - the European Federation of National Organisations Working with the Homeless. FEANTSA brings together some 60 not-for-profit organisations in the social or community sector that provide a wide range of services to homeless people in all the EU member states, and in a number of the accession countries.

We have been very interested to hear about the work being carried out by the Convention with responsibility for drafting the proposed European Union Charter of Fundamental Rights. We are convinced that the proposed EU Charter should also enshrine those rights which are most important to the most disadvantaged members of our societies - including the right to housing.

Decent housing and living conditions are among the most basic needs of each individual. Gaining secure access to adequate accommodation is often a pre-condition for exercising many of the fundamental rights which form the foundations of all decent societies, and should be enjoyed by everyone. These include the right of access to education, the right to work, the right to social protection, the right to healthcare services, the right to personal privacy and family life, as well as access to basic services such as water and electricity.

The European Observatory on Homelessness (which has conducted research on homelessness in the Member States on behalf of FEANTSA since 1991) has compiled an overview of the situation in the fifteen EU member states. Approximately three million people have no fixed home of their own, while a further 15 million people live in sub-standard or overcrowded accommodation. On this basis, we can estimate that across the European Union, one person in 20 is denied access to decent housing.

Since 1948, the Universal Declaration on Human Rights has proclaimed that: "*everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services*" (Article 25.1). More than 100 states are committed to taking appropriate steps to ensure the realisation of the right to housing, under article 11.1 of the International Covenant on Economic, Social and Cultural Rights (1966).

At the level of the Council of Europe, the European Social Charter was adopted in 1961, and the revised European Social Charter (RESC) was opened for signature in 1996. The right to housing is enshrined in Article 31 of the RESC, which sets out a series of three objectives:

> "*With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:*
> *1. to promote access to housing of an adequate standard;*
> *2. to prevent and reduce homelessness with a view to its gradual elimination;*
> *3. to make the price of housing accessible to those without adequate resources*".

The Revised European Social Charter officially entered into force on 1 July 1999. But the current situation is that only five countries have completed the ratification process: France, Italy, Sweden, Romania and Slovenia. Most of the EU countries have signed but not yet ratified the RESC: Austria, Belgium, Denmark, Finland, Greece, Luxembourg, Portugal and the United Kingdom. FEANTSA strongly advocates that every European country should sign and ratify the Revised European Social Charter. This will provide us with a common foundation, upon which we can develop and implement effective policy solutions at all levels, in order to tackle social exclusion and homelessness.

In relation to the proposed European Union Charter of Fundamental Rights, we must ask the following question: Will the proposed Charter represent a step forward in terms of protecting the fundamental rights of the most disadvantaged members of our societies?

We welcome the fact that the Convention is willing to consider all the main dimensions of fundamental human rights, including civil, political, legal, social and economic rights. However, we are extremely concerned that the right to housing was not included in the draft list of fundamental rights which was presented at the most recent meeting of the Convention.

As civilised and democratic societies, we have a collective responsibility to ensure that all citizens and residents are able to gain access to adequate accommodation. The prevention and elimination of homelessness can only be achieved through the recognition and realisation of the right to housing. This conviction is enshrined in the revised European Social Charter, and in also reflected in numerous texts of national constitutions and laws that have been enacted in the member states of the European Union.

We fear that the adoption of an EU Charter of Fundamental Rights which excludes the right to housing would send out a negative signal to the citizens of Europe and to the national governments of the member states and of the accession countries. It would suggest that the right to housing is somehow less important than other fundamental human rights. It would imply that our societies are willing to tolerate that thousands of people become homeless every year. It could undermine the efforts of those of us who are working to protect the fundamental rights of the most disadvantaged members of our societies.

We respectfully appeal to you to ensure that the full range of social rights - including the right to housing - are included in the proposed EU Charter of Fundamental Rights.

Yours sincerely,

John Evans
President of FEANTSA

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 22. März 2000

CHARTE 4175/00

CONTRIB 58

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag des Zentralverband der Deutschen Haus-, Wohnungs- und Grundeigentümer e.V. ("Hans und Grund Deutschland"). [1] [2]

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[1] Hans und Grund Deutschland: Cecilienallee 45, 40474 D-Düsseldorf. Tel: +49-211-4 78 17 0. Fax: +49-211-4 78 17 23.

[2] Dieser Text wurde nur in deutscher Sprache übermittelt.

Herrn
Prof. Dr. Roman Herzog
Vorsitzender des Konvents zur Erarbeitung
einer europäischen Grundrechtscharta
Rue de la Loi / Wetstraat 175
B-1048 Brüssel

8. März 2000

Sehr geehrter Herr Vorsitzender,
sehr geehrte Mitglieder des Konvents,

in Erfüllung des Auftrages des Europäischen Rates vom 3. und 4. Juni 1999 erarbeitet der Konvent derzeit eine europäische Grundrechtscharta, um die auf der Ebene der Union geltenden Grundrechte zusammenzufassen und dadurch „die überragende Bedeutung der Grundrechte und ihre Tragweite für die Unionsbürger sichtbar zu verankern".

Haus & Grund Deutschland begrüßt diese Entwicklung. Sie darf jedoch nicht dazu führen, dass der Grundrechtsschutz in der Bundesrepublik Deutschland geschwächt wird. Denn anders als im bislang geltenden Völkerrecht bietet das Grundgesetz einen starken Eigentumsschutz.

Der europäische Grundrechtskatalog darf lediglich die Europäischen Gremien binden, so wie dies im bisher vorliegenden Entwurf der Präambel oder des Artikel 1 vorgesehen ist. Gleichzeitig muss ein umfassender Schutz des Eigentums vorgesehen sein, da über die Rechtsetzung der Europäischen Union zwangsläufig Eingriffe in das nationale Recht zu erwarten sind.

Der in Art. 16 des Entwurfs der Grundrechtscharta festgelegte Eigentumsschutz bleibt jedoch hinter dem in der Bundesrepublik zurück. So bedarf es insbesondere der Ergänzung, dass Art. 16 einen unmittelbar durchsetzbaren Anspruch und eine Bestandsgarantie des Eigentums bewirkt.

Der Schutz des Eigentums auf nationaler Ebene muss auch weiterhin der Eigentumsordnung der Mitgliedstaaten überlassen bleiben, so wie es Art. 222 EGV bereits jetzt festhält: Dieser Vertrag (d.i. EG-Vertrag) lässt die Eigentumsordnung in den verschiedenen Mitgliedstaaten unberührt. Dies steht auch im Einklang mit dem häufig zitierten Subsidiaritätsprinzip, so wie es in Art. 3 b EGV niedergelegt wurde, da alles, was durch die Mitgliedsstaaten geregelt werden kann, auch weiterhin von ihnen geregelt werden sollte. Dies trifft auch auf die Eigentumsordnung zu.

Weitere Ausführungen entnehmen Sie bitte unserer in der Anlage beigefügten Stellungnahme.

Mit freundlichen Grüßen

Dr. Friedrich-Adolf Jahn

Stellungnahme

In Erfüllung des Auftrages des Europäischen Rates vom 3. und 4. Juni 1999 erarbeitet der Konvent derzeit eine europäische Grundrechtscharta, um die auf der Ebene der Union geltenden Grundrechte zusammenzufassen und dadurch „die überragende Bedeutung der Grundrechte und ihre Tragweite für die Unionsbürger sichtbar zu verankern".

Haus & Grund Deutschland begrüßt diese Entwicklung. Sie darf jedoch nicht dazu führen, dass der Grundrechtsschutz in der Bundesrepublik Deutschland geschwächt wird. Anders als im bislang geltenden Völkerrecht bietet das Grundgesetz einen starken Eigentumsschutz. Dieser starke Schutz des Eigentums ist vor dem Hintergrund der deutschen Geschichte zu erklären. Vor diesem Hintergrund muss auch die Betonung des Föderalismus und die explizite Bindung der drei Gewalten an Recht und Gesetz sowie die Rechtswegegarantie gesehen werden

Zu den Grundrechten zählen im deutschen Grundgesetz bspw. die persönlichen Freiheitsrechte, der Gleichheitsgrundsatz sowie nicht zuletzt die Eigentumsgarantie, die als elementares Grundrecht - als „Wertentscheidung von besonderer Bedeutung" - vor anderen Verfassungsrechten besonders betont wird. Art. 14 GG konstatiert: „Das Eigentum und das Erbrecht werden gewährleistet." Dieses Recht gilt für alle natürlichen und juristischen Personen, jedoch nicht für den Staat. Gleichzeitig wird in Satz 2 normiert, „Inhalt und Schranken werden durch die Gesetze bestimmt." Dies verbrieft jedoch kein Recht des Gesetzgebers, den Eigentumsbegriff frei zu definieren und dadurch in seiner Substanz auszuhöhlen; die Begriffsdefinition muss sich vielmehr an dem durch die Rechtsordnung vorgegebenen Eigentumsbegriff orientieren. Durch Art. 14 Abs. 1 S. 1 GG werden zum einen die konkreten Vermögensrechte (Rechtstellungsgarantie) und zum anderen die Wirtschafts- und Gesellschaftsordnung (Institutsgarantie) geschützt. Demnach wäre es nicht mit der Verfassung zu vereinbaren, weite Bereiche der Gesellschaftsordnung ohne Privateigentum zu organisieren. Damit spricht sich die Verfassung jedoch noch nicht für eine bestimmte Wirtschaftsverfassung aus, weder für eine soziale, noch für eine anders geartete Marktwirtschaft. Sie gibt lediglich einen festen verfassungsrechtlichen Rahmen vor. Wenn nämlich Bestand und Wert des Eigentums in der Hand des Eigentümers gesichert wird, kann die Wirtschaftsordnung nicht ohne Markt existieren.

Unter Eigentum wird i.S.d. Art. 14 GG jedes vermögenswerte Recht verstanden. Daher fallen unter den Eigentumsschutz z.B. das Grundeigentum sowie alle daraus abgeleiteten Rechte, aber auch Anliegerrechte, d.h. bspw. das Recht des Zutritts zum öffentlichen Straßennetz. Nicht geschützt sind Gewinnchancen, Interessen, wirtschaftliche Möglichkeiten u.ä. Es wird zudem das Recht am Eigentum und nicht ein Recht auf Eigentum geschützt. Das Recht auf Eigentum kann durch Art. 14 GG nicht geschützt werden, da dieses Rechts sich gegen das Eigentum eines Dritten richten würde. Die Garantie des Instituts Privateigentum allein ist ein schwacher Schutz. Erst durch Art. 1 Abs. 3 GG wird die „Institutsgarantie" zu unmittelbar geltendem Recht. Art. 1 Abs. 3 GG stellt fest: „Die Grundrechte (sie umschließen die Eigentumsgarantie des Art. 14 GG, d.V.) binden die drei staatlichen Gewalten als unmittelbar geltendes Recht." Damit wird das Recht am Eigentum zum durchsetzbaren Anspruch.

Das Eigentumsrecht gilt nicht unbegrenzt, es unterliegt der Sozialbindung. Es ist zu beachten: Inhalt und Schranken des Eigentums werden durch Gesetze bestimmt (Art. 14 Abs. 1 Satz 2 GG). Zudem konstatiert Art 14 Abs. 2 GG: Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohl der Allgemeinheit dienen. Damit ist zwar ein „Einfallstor“ für Eingriffe in das Privateigentum geschaffen, auch und insbesondere im Bau- und Wohnraummietrecht, aber die Eigentumsrechte dürfen unter dem Hinweis auf die Sozialpflichtigkeit nicht soweit eingeschränkt werden, dass das Recht nur noch eine „leere Hülse“ ist.

Zwar lässt der Eigentumsschutz eine Enteignung zu, sie „ist jedoch nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt.“ (Art. 14 Abs. 3 GG). Damit dürfen Enteignungen nicht willkürlich, sondern nur auf der Grundlage eines Gesetzes vorgenommen werden. Zudem sind sie nur zulässig, wenn das Wohl der Allgemeinheit, nicht bereits wenn das öffentliche Interesse sie erfordert. Folglich sind Enteignungen grundsätzlich möglich, müssen jedoch an strenge Voraussetzungen geknüpft werden. Zwingend erforderlich ist dann eine Entschädigung (Junktimsklausel). Eine Entschädigung kann jedoch keine rechtswidrige Enteignung rechtfertigen, das wäre eine Enteignung, die zum Wohle der Allgemeinheit eben nicht notwendig ist.

Bei einer Verletzung des Eigentumsrechts steht dem Betroffenen der ordentliche Rechtsweg offen, nach Ausschöpfung dieser Möglichkeit bleibt der Weg zum Bundesverfassungsgericht. Doch die konkrete Fassung des Eigentumsrechts, die Ausdehnung bzw. Einschränkung bleibt der Rechtsprechung überlassen.

Im Vertrag über die Europäische Gemeinschaft (EG-Vertrag) wird in Art. 222 EGV festgehalten:„Dieser Vertrag (EG-Vertrag, d.V.) lässt die Eigentumsordnung in den verschiedenen Mitgliedstaaten unberührt.“ Dieser Artikel ist eine sog. negative Kompetenzbestimmung. In diesem Sinne stellt er lediglich fest, dass die Mitgliedstaaten über die Gestaltung ihrer Eigentumsordnung selbst entscheiden.

Damit verfügt die EU über keinerlei Zuständigkeiten im Bereich der Eigentumsordnung. Auf diese Weise sind zunächst die geltenden Eigentumsordnungen der Mitgliedstaaten vor Eingriffen der Gemeinschaft geschützt, die Mitgliedstaaten verfügen weiterhin über das Recht, ihre Eigentumsordnung entsprechend ihren politischen Vorstellungen zu gestalten. Gleichzeitig verhindert die Formulierung des Art. 222 EG-Vertrag - zumindest grundsätzlich - einen Eingriff der Gemeinschaft durch Sekundärrecht in die Eigentumsordnungen der Mitgliedsländer.[1]

Diese Vorschrift erscheint auch im Zusammenhang mit dem häufig zitierten Subsidiaritätsprinzip, wie es in Art. 3 b EGV niedergelegt wurde, sinnvoll, da alles, was durch die Mitgliedstaaten geregelt werden kann, auch weiterhin von ihnen geregelt werden sollte. Und dies trifft auch auf die Eigentumsordnung zu.

[1] Diese neutrale Haltung der Europäischen Verträge gegenüber den Eigentumsordnungen der Mitgliedsländer wird allerdings durch eine Reihe sekundärrechtlicer Vorschriften gebrochen, mit deren Hilfe die Gemeinschaft im Zuge der Erfüllung von Aufgaben in die Verfügungsgewalt der Eigentümer einschränkend oder steuernd eingreift, so z.B. im Zuge des Wettbewerbspolitik der Gemeinschaft. Doch dies ist weitgehend vergleichbar mit Eingriffen in das Eigentumsrecht durch deutsche Gesetze.

Daher ist es unseres Erachtens sinnvoll, den Schutz des Eigentums auf nationaler Ebene auch weiterhin der Eigentumsordnung der Mitgliedstaaten zu überlassen, so wie es Art. 222 EGV bereits jetzt festhält: Dieser Vertrag (d.i. EG-Vertrag) lässt die Eigentumsordnung in den verschiedenen Mitgliedstaaten unberührt.

Der europäische Grundrechtskatalog darf lediglich die Europäischen Gremien binden, so wie dies im bisher vorliegenden Entwurf der Präambel oder des Artikel 1 vorgesehen ist. Gleichzeitig muss ein umfassender Schutz des Eigentums vorgesehen sein, da über die Rechtsetzung der Europäischen Union zwangsläufig Eingriffe in das nationale Recht zu erwarten sind. Die Ausführungen des Eigentumsschutzes in Art. 16 des Entwurfes der Grundrechtscharta enthält jedoch einen Grundrechtsschutz, der hinter dem nach der vorstehend erläuterten verfassungsrechtlichen Regelung in der Bundesrepublik zurückbleibt. So bedarf es insbesondere der Ergänzung, dass Art. 16 in erster Linie einen unmittelbar durchsetzbaren Anspruch und eine Bestandsgarantie des Eigentums bewirkt.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 27 March 2000

CHARTE 4190/00

CONTRIB 73

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by three European owners organisations; European Association of Real-estate Owners (GEFI), the European Confederation of Forest owners (CEPF) and the European Landowners' Organisation (ELO).[1]

[1] This text has been submitted in English language only.

To the Convention's members

Right to ownership

The three main European owners organisations, representing dozens of millions of European family owners, share the same position in favour of a better recognition and protection of the Fundamental Rights and Freedoms within the European Union.

It is with a great satisfaction that the GEFI (Groupement européen des Fédérations intervenant dans l'Immobilier – European Association of Real-estate Owners), the CEPF (Confédération européenne des Propriétaires Forestiers – European Confederation of Forest owners) and the ELO (European Landowners' Organisation) have noted the Presidium's intention to formally include the right of ownership in the Charter.

Through the attached paper, GEFI, CEPF and ELO encourage the Praesidium and the Convention to ensure a balanced protection and recognition of property which guarantees its economic, environmental and social permanence.

GEFI, CEPF and ELO will give all needed support to the Praesidium and the Convention on the issue of ownership rights.

21st March 2000

(Signed)

M. Gildas de Kerhalic	M. Joseph Crochet	M. Johan Nordenfalk
GEFI	CEPF	ELO

Charter of Fundamental Rights

Article 16 : Right to Ownership

The GEFI (Groupement européen des Fédérations intervenant dans l'Immobilier – European Association of Real-estate Owners), the CEPF (European Confederation of Forest Owners) and the European Landowners' Organisation (ELO) propose that the text of the article on the Right on Ownership should be:

Everyone is entitled to the peaceful enjoyment of his possessions. No one may be deprived of his possessions or restricted in their use, except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to full and prior compensation.

Explanatory Memorandum

The GEFI (Groupement européen des Fédérations intervenant dans l'Immobilier – European Association of Real-estate Owners), the CEPF (European Confederation of Forest Owners) and the ELO (European Landowners' Organisation) support the objectives, agreed at the Cologne Summit in 1999, of establishing a Charter of Fundamental Rights, and of making the overriding importance and relevance of those rights more visible to the Union's citizens.

In particular, the GEFI, the CEPF and the ELO very much welcome that the Presidium has proposed the inclusion in the draft Charter, an article on the right to ownership. This memorandum explains why the right to ownership is so important for all Europe's citizens, and proposes some amendments to the current text of the draft Charter in relation to this right (article 16). These amendments would reinforce the positive work so far undertaken by the Convention to include this right to ownership.

The GEFI, the CEPF and the ELO speak for dozens of millions of land based business owners who provide employment, a living countryside, food and other products, amenities and environmental land management across the European Union. The GEFI, the CEPF and the ELO are well placed to speak on this subject, because their members are engaged, day to day, in the active management of property which serves as a base in satisfying needs and demands of modern society.

The need for a secure framework of ownership rights

Human rights are the cornerstone of democracy. Amongst these basic rights must be a right for the protection of ownership.

History shows with emphasis, however, that when ownership rights are not properly protected, both economic development and the environment are endangered. An efficient protection of ownership rights becomes even more important as the EU prepares for the entrance of a number of candidates countries which have in the past suffered from a lack of protected ownership rights.

In addition, the "new economy" (high-technology revolution) requires protection of intellectual property, so that the entrepreneurial climate will inspire investment, employment and incomes in Europe.

A social market economy, essential to a mature democracy, and for optimal management of the world's resources and the environment, cannot work without secure ownership rights. Ownership rights are a prerequisite for **long term investment**, not only in intellectual property but also in agriculture, forestry and manufacturing. A secure framework of ownership rights is vital for the long-term stewardship of our environment. Not only is a long-term perspective needed, but so often environmental conservation involves the positive management and individual commitment that can be provided only by someone with the ownership of the property.

Moreover**, there is across Europe a social aspiration to ownership**, seen as a symbol of permanence, prosperity and security.

Of course, with rights come responsibilities. Ownership must cede if it is necessary to satisfy an overriding public interest. But this can be done with the maintained respect for the owners' legitimate interests and without distorting the functioning of the market economy, provided that the owner is granted full compensation for his loss.

A framework of rights, particularly ownership rights, makes it possible for society to enter into secure, productive and transparent relationships with individuals and businesses. These relationships require, but also enable, those individuals and businesses successfully to meet the demands of the public for improving standards.

The GEFI, the CEPF and the ELO submit that the EU Charter is a unique opportunity – not to be missed – to redefine this relationship between public authorities, acting on the basis of EU legislation and policy (itself directed by the Charter) and individuals and businesses, to reflect a more enlightened balance between constructive partnership on the one hand, and regulation on the other.

Individuals and businesses are the providers of investment, innovation, stewardship and improving standards, in the countryside and elsewhere. Wherever possible, public authorities and their agencies should work in partnership with rural and other businesses to engage their **voluntary co-operation and commitment**. Compulsion should be only the last resort. Regulation, restriction and at its extreme, expropriation, can prevent actions, but cannot inspire positive initiative. So there should be a greater emphasis on partnership and a lesser dependence on regulation and constraint.

The text of the Charter on ownership rights should reflect this positive and forward-looking approach. GEFI, CEPF and ELO are pleased to note that the proposals made by the Presidium (Convent 9) are a good step in this direction. The submissions of GEFI, CEPF and ELO should be seen as a devoted effort, based on vast experience, to improve even further the article 16.

<u>Specific amendments to the draft article on the right to ownership</u>

GEFI, CEPF and ELO submit that the words "**or restricted in their use**" should be added after "possessions".

The legislative and administrative practices of Member States and, in particular, EU legislation, have highlighted that many modern day-to-day problems that hamper the efficiency in managing assets stem from restrictions of use, which may have the same economic consequence as expropriation. It should be noted that such restrictions, if not compensated, may not only cause problems for the owner but will ultimately have negative effects on society as a whole as they will most certainly lead to distortions in the market economy and an inefficient allocation of resources.

GEFI, CEPF and ELO submit that the words "**where deemed necessary**" should be added after "except".

These words oblige the authority acting on behalf of the "public interest" to demonstrate that action to deprive a person of his possessions, or to restrict him in their use, is the only way to meet that overriding public interest. In fact there is a growing urge already reflected in at least one national constitution to qualify the requirement "public interest" by prescribing that it should be "a significant public interest". GEFI, CEPF and ELO submit also this wording for possible consideration by the Convention.

GEFI, CEPF and ELO submit that "fair" should be replaced by "**full**".

Several constitutions of European countries (Holland, Finland, Denmark) provide for full compensation. There is no reason why an individual should support the burden of a limitation of his property use (that can sometime reach the situation of quasi-expropriation), when that burden is applied in the general interest.

It cannot be regarded correct that the state, when depriving a citizen of his possessions, may compensate him with a lower value than his fellow citizens would pay him if that property was traded in the open market.

GEFI, CEPF and ELO further support the requirement that compensation should be prior to a taking or a restriction. Even if not all constitutions do not already have such wording, it would send wrong signals to the citizens if the Charter did not reflect the higher standard prescribed in some constitutions. An alternative wording could be to prescribe that full compensation be guaranteed.

A mechanism for citizens to invoke the right

This submission does not go into detail on the issue of the legal status of the Charter. However, GEFI, CEPF and ELO believe that it will be essential for a direct and effective mechanism to be created to enable citizens and businesses to invoke the Charter, and to seek a practical remedy where they believe their right to ownership may be infringed.

Conclusion

At a time when there is an increasing demand for the Union's Institutions to build a "Europe of citizens", and in the context of the enlargement to countries where people suffered negative economic and social consequences of the nationalisation of their properties, the EU Charter must meet key tests to be successful.

First: in order to direct the institutions of the EU to uphold fundamental rights when they make EU policy and legislation, the Charter must set out these rights clearly, and in a way that could

eventually enable its incorporation into the EU's Treaty base. The Charter can then fill a gap that currently exists, in that basic human rights are already incorporated into national legislation, but not into the policy and law making functions of the EU itself.

Second, the Charter must respond to the legitimate demands of individuals and groups within society to enjoy a protection of basic human rights, including ownership rights, which they will find acceptable and in terms they can understand. Commitments in the Charter to uphold the rights in such a manner will be welcomed by the public.

Third; the Charter must demonstrate that the EU is forward looking, and capable of responding to new challenges. Since Europe's citizens will benefit from less bureaucratic institutions and from an innovative market economy, regulation and control should play a diminishing role. Incentives to positive action will become more and more important. And so will an improved protection of ownership both for material and intellectual property, enabling citizens to take a long term approach to investment and economic development, and reassuring them that they will not be deprived of the fruits of their work. The Charter must fully embrace this forward-looking approach, in particular in a clear and effective text on ownership rights.

The Charter must succeed in defining the rules for ownership rights in a way which not only protects the citizen but which also promotes the best use of resources, both human and natural.

GEFI, CEPF and ELO are pleased to be able to submit this paper and would welcome the opportunity to develop our reasoning further or provide any clarification needed.

21st March 2000

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Editors' note to CHARTE 4194/1/00 REV 1, **Contribution submitted by the Platform of European Social NGOs and the European Trade Union Confederation (ETUC)**:

The initial version mentions that this contribution was submitted by "the platform of European social NGOs (CES ETUC)".

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Platform of European Social NGOs and the European Trade Union Confederation (ETUC). [1]

[1] This text has been submitted in 11 languages.

Platform of European Social NGOs

CES ETUC *Plate-forme des ONG européennes du secteur social*

— FUNDAMENTAL RIGHTS:
— THE HEART OF EUROPE

Campaign paper

for the incorporation of fundamental rights in the European Union

and

European Community Treaties

Foreword

Introduction

1. **General Principles**
2. **Explicit fundamental rights**
3. **Binding political objectives**
4. **Rights in the Union's external policies**

Fundamental Rights: The Heart of Europe

The European Trade Union Confederation and the Platform of European Social NGOs have prepared this campaign document to animate a debate amongst our members. We are launching a concerted campaign throughout the fifteen countries of the Union in order to involve our constituencies and seek their opinions so that we may make informed representations to the EU Convention which is drafting the European Charter of Fundamental Human Rights.

The social implications of the realisation of Economic and Monetary Union and the introduction of the EURO underpin the importance of securing fundamental rights at European level. We consider fundamental rights as an indispensable part in the building of the Social Union and safeguarding and developing the European social model. Their incorporation will also be important in view of enlargement. The respect of fundamental rights is necessary for a Citizens' Europe to become a reality.

It is time for action. A Charter, which guarantees civil, social, economic, political and cultural rights will counter the apathy and scepticism which appears so prevalent. It is time to put ideals back into Europe.

Some people argue that a new Charter is unnecessary, as the European Convention on Human rights and the European Social Charter already exist. But these documents are neither broad enough, or sufficiently legally enforceable, to guarantee the full range of civil, political, social and economic rights. An EU Charter of Fundamental Human Rights would, for the first time, give all who are living in the EU a common framework of enforceable and wide-ranging rights.

This campaign document does not intend to be a definitive text. It is meant to inform and inspire debate. Over the coming months we will hold conferences, seminars and meetings in all the EU Member States to discuss what rights should be in the EU Charter of Fundamental Rights and how these rights should be made enforceable in law.

The prosperity of Europe has been built on our ability to balance our need to be economically competitive with that of ensuring we live in a society based on solidarity with access to basic social rights for all. This balance is being threatened by some of the effects of globalisation and must be redressed by ensuring that the whole range of civil, political, social, economic and cultural rights are guaranteed for all. It is time to put fundamental rights at the heart of Europe.

INTRODUCTION

The June 1999 EU Summit decided that a Charter of fundamental rights for Europe should be drawn up. Support for the European integration project had been put at risk by the social effects of introducing the Single Currency and by finalising the Single Market. Citizens had lost trust in Europe. It was now important to reassert the social dimension of the European integration by underlining the importance of protecting fundamental rights at the European level.

At stake and at issue was going to be the nature of the Charter to be prepared. Would it be a simple proclamation or would it be a legally binding set of rights, which could be seen to protect and advance human rights in the Union? There were differences of opinion among EU Leaders, with the result that, the Summit left the delicate issue of the status of the Charter to be decided at a later stage. In October of that same year, meeting in the Finnish town of Tampere, the EU Council decided to set up a Convention, composed of national and European parliamentarians, as well as representatives of governments, to draw up the Charter of Rights.

The Convention will be meeting at regular intervals throughout the Year 2000 and will consult with a wide spectrum of civil society organisations before drawing up and agreeing the Charter by October 2000. It is then to be endorsed by the European Parliament and Commission in time for the December 2000 EU Summit taking place in Nice, France.

In recent years, significant advances have been made to recognise the importance of fundamental rights within the Union**. The Amsterdam Treaty, states «the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States»**.[1] It also stipulates that **«the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as principles of Community law»**. [2] In addition, Article 46 of the Treaty of the European Union (TEU), which deals with the jurisdiction of the European Community Court of Justice, gives competence to rule on the actions of the Institutions of the European Union in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950).

The Amsterdam Treaty makes it a binding obligation for the Union to respect the European Convention of Human Rights,[3] and also for the Member States to respect the principle of "liberty, democracy, respect for human rights and fundamental freedoms and the rule of law", on which the Union is founded.[4]

[1] Art 6.1 TEU
[2] Art 6.2 TEU
[3] Art 6.2 TEU
[4] Art 6.1 TEU

The Amsterdam Treaty prescribes a political rather than a judicial means of enforcement in the event of a Member State being in serious breach of the founding principles of the Union.[5] Article 7 of the TEU gives the Council the possibility to suspend certain rights of a Member State, for example, suspension of the right to vote in Council. The European Court of Justice has competence to judge on matters relating to the respect of human rights only in relation to the activities of the Union or its Institutions.

The Maastricht and Amsterdam Treaties made progress in the protection of fundamental rights within the European Union. Amongst the most significant provisions were:

- Article 13 of the European Community Treaty (TEC) relating to non-discrimination against individuals or groups on grounds of gender, race or ethnic origin, religion or beliefs, disability, age or sexual orientation.
- The incorporation into the Treaties of references to the 1989 Community Charter of Fundamental Social Rights of Workers and the European Social Charter (Turin, 1961). (Article 136 of the TEC).
- The recognition of European Citizenship and the provision of rights – such as freedom of movement, the right to vote in local and European elections and the right to petition. (Articles 17-22 of the TEC).
- Article 137 of the TEC, which gives the Union competence to put in place programmes to fight poverty and promote social inclusion.

In spite of this progress, the process of European integration, with its clear implications for human rights, requires that real and effective protection of fundamental rights are afforded to the citizens and workers of Europe and that these rights should be set out explicitly in one coherent text.

Fundamental rights are an indispensable part both in strengthening the Social dimension of the European Union and in safeguarding and developing the European social model. The incorporation of the Charter in the Treaties is of paramount importance in view of the forthcoming enlargement of the Union.

The European Union is asserting itself as one of the key players in the global scene. Council, Parliament and Commission make frequent calls on the need to advance human rights as agreed through Declarations, Covenants and Conventions drawn up by the United Nations and its institutions. The EU Council has stated that Europe must become a clarion voice for human rights. This respect of fundamental rights must become an integral and coherent part of the commitments and demands of the European Union and its Member States in their trade and foreign relations.

[5] Art 6.1 TEU

Human rights are indivisible. The full set of rights: civil, political, economic, social, cultural and trade union, should be incorporated in the Treaty in a binding manner. An EU Charter of fundamental rights which limits itself to being a solemn political declaration, would fall short of what is needed now in terms of the objectives of a European construction, the enlargement of the Union and our global role. More importantly, it would not reinstate our fellow Europeans' faith that alongside the economic and monetary union, we intend to give equal importance to the social dimension of European integration that should focus on the individual.

Respect of fundamental rights is essential for the realisation of a Citizens' Europe.

A CHARTER OF FUNDAMENTAL RIGHTS FOR EUROPE

1. GENERAL PRINCIPLES

The incorporation of rights into the Treaty must remain consistent with and subject to the fundamental rights as defined in:

- the Universal Declaration of Human Rights (UN 1948) and relevant Covenants (ICCPR & ICESCR,1966);
- the European Convention on Human Rights (Council of Europe, 1950)
- the Revised European Social Charter (Council of Europe, 1996)
- the Community Charter of Workers' Fundamental Social Rights (European Union, 1989)
- the ILO Conventions referred to in the ILO Declaration on Fundamental Principles and Rights at Work (1998)
- the Convention on the Elimination of all Forms of Discrimination against Women (UN, 1979)
- the Convention on the Rights of the Child (UN, 1989)
- the Convention on the Status of Refugees (UN, 1951) and its Protocol (UN, 1967)

The general principles common to all Member States reflect the obligations undertaken by them in these instruments and formally commit them to a series of obligations. The Member States and the Union should therefore assume joint responsibility for the enforcement of the rights appearing in these Instruments.

The rights to be included in the Treaty shall be guaranteed throughout the territory of the European Union. They should be regarded as a minimum level of protection and consequently are a minimum guarantee. They must not be used to undermine rights which already exist at European Union or Member State level and which may derive from either legislation or collective agreements. The Charter must not set rights which constitute a retreat from those already agreed through the UN and its Institutions or through the Council of Europe. They shall not lie below international standards.

The rights to be included in the Treaty shall, in principle, be available to all citizens of a Member State as well as third country nationals lawfully residing in a Member State of the Union. The rights which are to be afforded to other individuals who are on the territory of the Union are dealt with in a separate section of this document.

In order to emphasise the indivisibility of human rights, and in a spirit of pan-European political cohesion, the European Union shall also make the commitment to accede to the European Convention on Human Rights (including its Protocols), and to the Revised European Social Charter.

Legal implications: enforcement and jurisdiction

All rights to be included in the EU and EC Treaties should be subject to enforcement either on an individual or collective basis according to the following principles:

The legal system within each Member State will be competent with respect to the enforcement of fundamental rights which are not protected by any specific EU provision. This however does not exclude the use of the political sanction mechanism in relation to serious breaches of human rights.

The European Court of Justice will have competence, in accordance with existing procedures, with respect to the enforcement of EU provisions on a Union level and with respect to the implementation of both Union and Community law on a national level.

The European Court of Justice will have competence in relation to cross-border rights such as the freedom of movement and trans-national trade union rights.

In its case law, the European Court of Justice shall take into consideration all applicable practice and case law, established by other competent international bodies of the UN, ILO and the Council of Europe, so as to avoid the European Court of Justice deciding rulings, the effect of which would be to reduce the level of protection offered.

Any recourse for the interpretation and/or enforcement of these rights brought before the competent bodies established by international human rights instruments, other than the EU ones, cannot be re-addressed in the first instance or in appeal before the European Court of Justice.

The EU may adopt measures designed to promote the implementation by Member States of the binding political objectives or programmatic rights, listed in this document.

The Council, after due consultation with the other European Institutions, social partners and European NGOs, must adopt a five-year plan on the implementation of programmatic rights. Such a plan shall fix the calendar of deadlines and the procedures and mechanisms of enforcement. The draft plan should be submitted to the Council by the Commission within the year following the ratification of the Treaty. The Commission will submit regular progress reports and a follow-up plan will be prepared to be adopted at the end of the first five years.

2. EXPLICIT FUNDAMENTAL RIGHTS

2. 1 Civil and political rights

The civil and political rights enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (UN) and the European Convention on Human Rights (Council of Europe) must be guaranteed throughout the European Union.

The following civil and political rights shall be available to all citizens of the European Union and to third country nationals who are legally resident in one of the Member States of the Union:

- No one shall be sentenced to death.
- No one shall be submitted to torture or to inhuman or degrading treatment.
- Freedom of thought, opinion and religion, freedom of expression and communication of information and ideas as well as the right to property.
- Freedom of association, of representation and of action at the local, national and European level.
- The right to life and to the protection of privacy.
- Everyone is equal before the law and must enjoy effectively and without any discrimination, all rights listed in the Treaty.
- Everyone shall have the right to equal treatment and opportunities without discrimination on grounds of sex, social, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

Rights linked to citizenship

The Treaties define a citizen of the Union as every person who holds the nationality of a Member State and that citizenship of the Union shall complement and not replace national citizenship (Art. 17, TEC).

The following rights must be guaranteed:

- Every citizen shall have the right to move, to reside freely and to work throughout the territory of the Union. These rights also apply to third country nationals lawfully residing in one of the member States of the Union.
- European citizenship also includes effective direct and indirect participation through the representative European Institutions (European Parliament, Economic and Social Committee, Committee of the Regions). After a specified period of legal residence, third country nationals must gain the right to vote in local and European elections.
- The right of citizenship requires a transparency of decision-making procedures and freedom of information.
- Everyone has the right of access to and correction of the administrative documents and other data, which are related to them. (Exceptions to this rule must be defined by law)
- The right to petition the European Parliament.
- The individual and collective right to challenge, with the possibility of recourse to the courts, the actions and shortcomings of the European Institutions.

The Treaty recognises the importance of the social dialogue with employers' and workers' organisations both within and across sectors of activity and this dialogue can also be extended to cross-border agreements. The right to European Collective Agreements must now be established.

The right to consultation of European NGOs must be recognised and result in the establishment of a structured civil dialogue.

Rights of third country nationals legally residing in the European Union

Third country nationals legally residing in the EU must have equality of treatment with EU citizens as regards civil, political, economic, social and cultural rights, including freedom of movement.

The Union and the Member States shall take co-ordinated measures to combat all forms of discrimination and ensure the promotion of equality of treatment.

Rights of third country nationals who are within the territory of the Union without being legally resident

The Union shall oversee the respect of the right to asylum as specified by the 1951 Geneva Convention and its 1967 Protocol. The Member States must take co-ordinated measures to give full effect to this right.

Every person on the territory of the Union shall be guaranteed the following rights without discrimination based on gender, race, social or ethnic origin, religion or belief, disability, age or sexual orientation:

- The right to life and to the protection of privacy. No one shall be sentenced to death. No one shall be submitted to torture or to inhuman or degrading treatment.
- The right to medical, legal and social assistance (food and shelter).
- The right of access for school-age children to education on the basis of equality of treatment with nationals of the State in which they reside.
- The right to equality before the law, to transparency and to understand decisions that concern them, and access to a system of appeal.
- The right to form associations and to take part in actions which concern them.

2.2. Social and economic rights

The following social and economic rights must be guaranteed:

- Everyone shall have the right to equal treatment and opportunity in all fields of life and work; regardless of gender, race, social or ethnic origin, religion or belief, disability, age or sexual orientation.
- Everyone is entitled to social, legal and economic protection.

- The right of all individuals, regardless of status, to a decent minimum income, enabling them and their family to live in dignity, to ensure their health and well-being.
- The right to social protection in case of unemployment.
- The right to social and medical assistance.
- Everyone has the right to privacy, and the protection of personal data.
- All children shall have the rights laid down in the Convention on the Rights of the Child.
- All children have the right to protection of their integrity and personal development, as well as to safety, education and health. The Union and the Member States shall take all necessary and effective measures to ban any form of child labour, which could endanger their health, safety or morality and to respect the guarantee the two ILO Conventions relating to child labour (ILO 138 and ILO 182).

Rights pertaining to work:

- Workers shall have the national and trans-national right of freedom of association, collective bargaining and trade union action, including the right to cross-border solidarity action and to strike;
- Everyone shall have the right to earn a living through their work, to choose their occupation freely, to just and satisfactory working conditions, and to protection against unemployment;
- Everyone has the right to equal pay for equal work without discrimination;
- Workers shall have the right to efficient occupational health and safety protection at work;
- Workers shall have the right to information, consultation and participation at work at all levels and at national as well as cross-border levels.

Policies, programmes and measures need to be implemented in order to ensure access to all of these direct social rights.

3. BINDING POLITICAL OBJECTIVES (PROGRAMMATIC RIGHTS)

Programmatic rights are those rights which depend on the implementation of political programmes. Such rights require appropriate policies, programmes and measures to ensure their promotion, access, enforcement and effectiveness.

The following programmatic rights shall be guaranteed:

- The right to work and to full employment must be ensured by joint actions of the European Union and of its Member States;
- The right to protection against arbitrary dismissal;
- The right to education and to life-long learning;
- The right to choose one's educational system is assured throughout the territory of the Union;
- The right to equivalence of diplomas;
- The right to effective social protection, and appropriate health care;
- The right to decent housing;
- The right of people with disabilities to programmes and measures to promote their occupational and social integration;
- The right of elderly persons to live a decent life; the entitlement to a decent income, care allowance, and social protection;
- The right of every worker at the time of retirement to resources necessary for a decent standard of living;
- The right to a minimum pension to be set and regularly reviewed;
- The right for people and families to protection against poverty and social exclusion;
- The right for everyone, as a member of society, to economic, social and cultural rights essential to dignity and the freedom to develop their personality;
- Consumers' rights (fairness in credit, financial services, general interest services, healthy and environmentally-sound products); the right to public health;
- Citizens' rights to be informed and consulted at the relevant level of authority (European, national and local) for instance on matters concerning public health, area planning and management, the environment and quality of life;
- Right of access to services of general interest without discrimination.

The Council, after due consultation with the other European Institutions, social partners and European NGOs, must adopt a five-year plan on the implementation of programmatic social rights. Such a plan shall fix the calendar of deadlines and the procedures and mechanisms of enforcement. The draft plan should be submitted to the Council by the Commission within the year following the ratification of the Treaty. The Commission will submit regular progress reports and a follow up plan will be prepared to be adopted at the end of the first five years.

4. RIGHTS IN THE UNION'S EXTERNAL POLICIES

The Treaties stipulate that one of the objectives of the Union's and Community's external policies is "the development and strengthening of democracy and the rule of law, as well as the respect of human rights and fundamental freedoms."[6] The external policies of the Union, following the example of those of the Community defined in Articles 177 and 178 (TEC), must therefore promote fundamental rights, as enshrined in the instruments of the United Nations and other competent organisations.

To this end, the agreements between the Union and third countries shall include a clause requiring the respect of fundamental rights as described in particular in the Universal Declaration on Human Rights and the ILO Declaration on Fundamental Social Rights. This clause shall also be binding in international relations and in negotiations within the multilateral institutions involving the European Union or the European Community.

The Union shall draw on the social guarantees enshrined in the Generalised Preference System in order to promote the abolition in third countries of forced labour and of the worst forms of child labour. Within this framework, the Union shall also promote the Core ILO Conventions governing the right of association, to collective bargaining, child labour, slave and bonded labour, freedom from discrimination and equal pay.

The Union shall ensure that Member States and applicant countries ratify and enforce the Instruments of the Council of Europe pertaining to fundamental rights (European Convention of Human Rights and Revised European Social Charter) as well as the international standards specified in the General Principles of the present document. The Union shall support the emergence and the reinforcement of civil society in these applicant countries.

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[6] Art 11 TEU & Arts 177 and 178 TEC

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 31 March 2000

CHARTE 4197/00

CONTRIB 78

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union — Declaration of the European Health Forum Gastein 1999 (EHFG) submitted by the International Forum Gastein (dated 06/09/10/99)

Please find hereafter a Declaration of the European Health Forum Gastein 1999 (EHFG) submitted by the International Forum Gastein. [1] [2]

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[2] This text has been submitted in English, French, German and Spanish languages.

European Health Forum Gastein 1999

Creating a better Future for Health in Europe

Health and Social Security

6 to 9 October 1999

Gastein Health Declaration

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Preamble

From October 6 to 9, 1999 politicians, scientists, industry and business representatives, health experts, non-governmental organisations and representatives of affected groups gathered in Bad Hofgastein to discuss problems of health and social security with the aim of "Creating a Better Future for Health in Europe".

Renowned personalities from over 30 countries highlighted this event with their participation and contribution. Just to name a few:

Hajdu Gabor, Romanian Minister for Health, **Caspar Einem,** Austrian Minister for Science, **Erwin Jordan**, German Secretary of State for Health, **Fernand Sauer,** Executive Director of the European Agency for the Evaluation of Medicinal Products (EMEA), **Marlene Haffner**, US Food and Drug Administration (FDA), Prof. **Rolf Krebs**, Vice-President of the International Federation of Pharmaceuticals Manufacturers Associations, **Ulrich Bode**, President of the Austrian Association of Pharmaceutical Industries, Prof. **Spencer Hagard**, London School of Hygiene and Tropical Medicine, Prof. **Albert R. Bakker** International Medical Informatics Association, **Mary McPhail**, European Public Health Alliance, **Albert van der Zeijden**, International Alliance of Patients' Organisations.

In the numerous contributions made by the various speakers on different perspectives of health and social security in Europe, particular attention was given to the following issues: solidarity for health, the connection of the health industry's needs with those of social security systems, the WHO concept of "Health for All" as a challenge for the health economy, and the role of non-governmental organisations in the areas of health and social security.

The most important results of the six Forums and an additional workshop that worked on the following topics are presented below:

1. "Improving the Quality of Care"
   Main recommendation: access to good health quality for all (in care, treatment, and services) within reasonable time.

2. "Improving Equity in Health and Health Care"
   Main recommendation: The existing gap in access, scope, and quality of health must be studied and gradually abolished, whereas certain groups of persons (e.g. migrants and refugees), the adjustment of the membership candidates, and certain areas (e.g. employment possibilities, alcohol, and drugs) require particular attention.

3. "The Role of Public Health and Health Promotion in a Changing Europe"
   Main recommendation: The proposed EU-declaration of the rights of citizens must include references to health and public health measures. Further, public health research must be integrated more efficiently into existing structures, both within the EU and in the member states.

4. "Information Technology: Health and Technological Developments"
Main recommendation: A system for certification of HC Telematic products at the European level should be set up, to ensure that these products are medically cost beneficial, technically interoperable and reliable as well as beneficial to the patient (directly or indirectly). The certification is to be carried out by independent neutral bodies.

5. "Rare Disorders and Orphan Drugs: Research without Return on Investment"
Main recommendation: All efforts (public and private) on an European level must aim at combining funds, research programmes, and information initiatives, as well as at reducing relevant taxes and promoting investment in this area for the benefit of those affected.

6. "The Impact of Biotechnology on Health Systems and Health Services"
Main recommendation: Basic biotechnological research will lead to the development of new drugs, vaccinations, diagnostic methods, and medical procedures. In order to derive practical benefits from these achievements for those affected, it is necessary to establish an open dialog and a functioning communication between researchers in biotechnology, other experts, and the general public.

7. Workshop: "European Economic Integration and Health Systems in an Enlarged Europe"
Main Recommendation: Health should be given a higher priority in the accession process and more support should be given to their health reform . Candidate Countries should be more 'actively' integrated in the European health arena.

In detail, the participants of the six Forums developed the following scenarios and recommendations, which were adopted and further elaborated upon by the authors of the present declaration.

Günther Leiner,
President of the European Health Forum Gastein

Forum I: Improving the Quality of Care

1. Situation

1.1 The quality concept must be defined on different levels and with different targets: politicians, professionals, managers, economists, patients, consumers, etc. must co-operate.

The quality concept is about
- Defining / developing criteria (ideals)
- Implementing / improving good quality
- Measuring / comparing outcomes (effectiveness)

1.2 Consensus on main principles
- It is useful to talk about „quality“ in terms of improvement referring to the needs and interests of healthcare users.
- Patients / consumers are the real stake-holders and remain the ultimate point of reference for quality criteria.
- Criteria should not primarily be provider-induced.
- Integral quality-improvement should be based on experience, information exchange and the education of professionals as well as that of patients / consumers.
- Patients / consumers should be called upon to set criteria, put to contribution and participate in the evaluation of the outcome.

2. Recommendations

2.1 Recommendations on national level
- Access for all to good quality of care, treatment and, services within reasonable time. Quality should be based on equity.
- Participation of patients / consumers in decision-making on the quality of care and the healthcare system in general.
- Empowerment of individual users in decision-making on their own treatment (integrated approach).
- Support of patient / consumer organisations in providing advice, education, information, etc. to users and providers.
- Training of all professionals in awareness of good quality as a goal, not as a threat. Stress on the importance of effective interaction with patients and awareness-building of their real needs.

2.2 EU-targets in quality of care
- EU has the role – within the limits of subsidiarity – of promoting good quality of care
- Why?
  - Four freedoms
  - Promoting equity
  - Identification of best practise

- Obstacles
  - Legal limitations
  - Cultural and economic differences
  - Institutional resistance
  - Unequal starting points
  - Confusion between different levels
- Targets for the EU
  - Encourage the member states to implement national recommendations.
  - Gather and exchange information; networking.
  - Standardise methodology in data collection, measuring and processing, etc., for quality improvement
  - Set indicative standards and objectives for good practise

2.3 Agenda for EU-action

- Develop quality standards and quality targets
  - Promote the establishment of databases on quality outcome, using existing expertise in member states; standard information
  - Use this information to develop indicative standard objectives and targets for good practise
  - Disseminate the information to member states and relevant organisations
- Support patient and consumer groups in getting involved in quality improvement
  - Support existing organisations and bring them together on the European level
  - Provide them with information on quality and benchmarking
  - Promote patient advocacy by training and consultancy
  - Promote the involvement of patients and consumers in meetings on health care
- Support training of health professionals on quality issues
  - Define minimum standards for training and working conditions
  - Provide national authorities and professional organisations with information concerning training in quality awareness
- Promote research on quality improvement
  - Improve existing methodology on defining quality indicators and quality evaluation
  - Promote inventories and the analysis of "patient needs", related to consumer-induced quality criteria
  - Analyse the effect of cross-cultural differences on the application of quality standards

Forum II: Improving Equity in Health and Health Care

1. Situation

Behind the issue of improving the equity of access to health care lies a vast range of diverging interests. Different financial capacities and competencies in national health care systems as well as the presence of social security systems of extremely varying capacity can be found. Moreover, political and economic interests from various areas collide, each with an impact on the actual health policy situation in a region, a country, or within the EU. Enhancing the social value of "health" by targeted and co-ordinated efforts from the various levels may constitute a remedy. The forum's objective was to demonstrate how this can be achieved and for whom it would require a change of views.

The majority of the participants stressed the large gap between the access, scope, and quality of national health care systems in EU member countries as compared to those existing in the candidate countries. The identification of regional problem zones in health care as well as a regional or national definition of poverty limits would enable a better targeting of EU interventions and of national or regional efforts. The participants believe that health gaps can be filled by increasingly identifying interfaces of interest with other socio-political areas of action. As a result, both supranational aid, particularly in the area of research, and national policy action could ensure that in future the people affected no longer fall through the social net. By presenting regional examples, various participants pointed to the fact that some parts of the EU are still too slow in combating the link between structural poverty, poor health, and more difficult access to diagnosis and treatment. On an abstract level, health care systems are often seen as distribution systems for funds, and important references to other areas with a direct or indirect impact on the quality of life and health care are not sufficiently understood.

2. Recommendations

2.1 General recommendations

- The creation of employment and the establishment of dignified living conditions constitute political and social priorities. This eminent social responsibility is considered the duty of the Community and of national and regional decision-makers.
- The existing gap in access, scope, and quality of health care must be studied and gradually abolished.
- A social understanding of disease must be established and developed, and the value of moral principles in health matters must be enhanced.
- Disease is not merely a personal state of emergency but is also determined by social factors – particularly among the unemployed and the disabled.

2.2 Recommendations on a national level

- There is need to establish more and better information on the social determinants of disease and to develop health perspectives, particularly for the poor and the elderly.
- Research on the causes of disease and dissemination of knowledge must increasingly replace the mere treatment of symptoms in the health sector.
- Interfaces with other social areas of responsibility must be defined and health gaps must be filled.

2.3 EU objectives in connection with “Equity in Health and Health Care”

- Approximation of the candidate countries to EU standards is to be achieved through increasing efforts to enhance the value of health and social policy in those countries.
- The creation of employment opportunities is of utmost significance.

2.4 Objectives for EU campaigns

- EU standards must be established in the areas of health insurance and old-age pension provision as well as in the area of other social benefits – in particular for migrants and refugees.
- Health regions with comparable health-related situations must be defined.

- Social tasks with an impact on the health situation must be identified on an EU level as well as on a national and regional level. A "Think European, Act Local" approach is necessary.
- There is need to develop information on issues with a high social impact like alcohol, nicotine, and drugs. This information must then be disseminated in a manner which encourages people to act.

FORUM III: The Role of Public Health and Health Promotion in a Changing Europe

1. Situation

1.1 The health status of European Union citizens today is better than it has ever been before. However, there is still room and need for improvement, especially considering the big differences between and within member states. These differences are even more striking , when one looks at Europe as a whole.

1.2 Public Health, which has been defined as the "organised attempt by society to prevent illness, lengthen life and to promote health on the basis of scientific evidence", has a key role in meeting this challenge.

1.3 Health promotion is an important delivery mechanism for public health activities. It should not be regarded as a cost, but rather as an investment for society, making society more conducive for health and leading to health gain. This will also enable society to support excluded groups and elderly people and to help them to engage in economic activities which would again lead to further economic gain.

2. Recommendations at EU and member state level

2.1. There is a need to generate public pressure and to mobilise concerns so that public health issues receive higher priority in Europe – both in the EU and within individual countries. In order to be effective, public health actions must promote change at all levels.

2.2. At Community level, the proposed EU-declaration of the rights of the citizens must include references to health.

2.3. Health inequalities as a major crosscutting theme could become a major topic of the next European Health Forum Gastein.

2.4. Health impact assessments can be an important tool in order to understand the health consequences of certain policy measures. Policies on nutrition are an important example illustrating how a better understanding of policies and actions can influence dietary habits and the quality of foods.

2.5. Stronger structural linkages between public health action and public health research – be it in the Member States, be it in the EU – have to be established. Research has a key role in determining and addressing public health priorities.

2.6. General objectives and priorities of public health policy should not be subordinated to single-issue concerns and health scares. Work on food safety, communicable diseases and health information must be integrated into a coherent health policy logic.

2.7. Public health concerns must play an important role in the enlargement process of the EU. The Community's public health policy must address the needs and requirements of applicant countries.

2.8. NGOs are of crucial importance in public health, in terms of their advocacy work and their involvement in specific public health activities.

2.9. Health promotion is a new tool in addressing health issues and problems at different levels. Further investments in health promotion are needed to develop mechanisms to include the societal context into interventions and evaluation of projects. Health promotion should be seen as a learning activity. While there is a pan-European dimension, it is heavily culturally determined.

2.10. New fields of action need to be explored and new instruments need to be developed to reach the socially excluded.

Forum IV: Information Technology: Health and Technological development

1. General conclusions and actual situation

Basically the required technology is available, the emphasis should be now onimplementation rather than on experiments and prototypes (although there still is a need to develop products based on the knowledge and experience gained).

To harvest the potential benefits of telematics, adaptation of the processes will be necessary (this will probably lead to adaptation of the organisational structures as well; similar effects have occurred in other industries). This could represent an unique opportunity to put the citizen in the centre of the adapted health systems.

To allow for successful application of telematics accompanying measures will often be necessary with respect to: education, financing, infrastructure.

Internet exists and is growing rapidly, with its regulations based on the market. Some special regulations will be necessary in the domain of security. As a minimum Codes of Conduct must be defined.

The countries, which are candidates for enlargement of the EU, may be in a favourable position to take advantage of this new technology because there will be less opposition from existing structures.

2. Recommendations for action

2.1 At the regional/national level

- The definition of the implementation plans should involve all the various partners (health care professionals, HCEs, patients' organisations, technicians) and not only the latter.
- Both initial and continuous education should be organised for all professions and for the patients. This will also contribute to reducing the risk of social exclusion.
- In the implementation plans, the targets to be achieved have to be clearly formulated. Systematic assessment of the degree in which the targets have been met must be established.
- Regulations and legislation should be adapted to allow for the effective use of telematics in health care in all the necessary areas (e.g. electronic signatures, electronic media, coding systems).

2.2 At the EU level

- European co-operation in developing educational programmes should be stimulated.
- The development of tools for evaluation should be stimulated as well as exchange of assessment results.
- A system for certification of HC telematics products at the European level should be set-up, to ensure that these products are medically cost-beneficial, technically interoperable and reliable, as well as beneficial to the patient (directly or indirectly). The certification to be carried out by independent neutral bodies.
- The development of Codes of Conduct for the use of Internet in Health Care and the definition of info-ethical regulations for the use of telematics in health care should be stimulated.
- Standardisation in health telematics should get a higher priority. In addition, a system should be set up to make specifications of products and solutions widely available (de facto standards).

Forum V: Rare Disorders and Orphan Drugs: Research without Return on Investment

1. Situation

Rare diseases are defined in Europe as those which affect 5 in 10,000 of the population or less or those which need special measures to combat their effects because of the small numbers involved. Although individually a disease may not be rare there are very many different conditions - over 8000 have been identified - so the number of people affected (either directly or indirectly) is large. It has been estimated that in the EU this number may add up to 30 million.

For many patients with rare diseases, hopes for a cure rest on orphan drugs. Orphan drugs are those which, due to the small number of those who need them, are not economically viable to develop under normal commercial consideration and which need special incentives in order for the patients to benefit from their development.

Not all rare diseases need to be treated by orphan drugs. Some will be able to benefit from new uses of existing drugs. Most rare diseases will remain untreatable for the foreseeable future due to a lack of knowledge about their basic biology and the need for much more fundamental research.

In response to the needs of those affected with rare disorders the EU is in the process of introducing two measures, the Rare Diseases Programme and Orphan Medicinal Products Regulations. Rare diseases are also a feature of the 5th Framework Programme.

The Rare Diseases Programme is foreseen for a period of five years. A budget of 6.5m Euro (1.3m/yr) was allocated and three areas of activity were defined, namely the creation of information databases on rare disorders, support for patient groups for those affected and for umbrella bodies and -investigation of clusters of rare diseases.

Orphan medicinal product regulations will give to the European Agency for the Evaluation of Medical Products (EMEA) the power to stimulate the development of orphan products and to approve their use by granting market authorisation. Orphan products will benefit from a ten-year period of market exclusivity, during which time no similar product will be licensed for use in respect of the use claimed by the orphan product. The USA has had orphan drug laws for seventeen years and in that time almost 200 new drugs have been authorised. The FDA's Office of Orphan Drugs has a substantial budget to stimulate research and to waive the fees normally charged for granting market approval. The European Parliament has just approved a budget for EMEA which does not include any funding for the operation of the orphan medicinal products regulations when they come into force early in the New Year. Without proper budgetary provisions the Agency will be unable to be proactive, nor will it be able to waive fees normally charged to applicants.

2. Recommendations

2.1 Recommendations for the EU

- The original budget for the Rare Disease Programme (30m Euro) should be restored in order for the programme to have a significant impact on opportunities for those at whom it is targeted.
- EMEA should be given a dedicated budget to enable it to operate the Orphan Medicinal Products regulations effectively and ensure the speedy release of orphan drugs on the market.
- EU agencies responsible for the rare diseases programme, orphan medicinal products regulations and the Fifth Framework Programme should collaborate with each other and with external agencies such as patient groups, the Engelhorn Foundation and others to ensure the efficient and effective use of resources and best value for money.

- Procedures developed to manage these programmes should stimulate, not stifle innovation, encouraging investment and the creation of new enterprises and new jobs.

2.2 Recommendations for member states

- Tax credits and other fiscal incentives to stimulate R & D of orphan products should be introduced.
- Rules for the prescription and/or reimbursement of orphan products should be such that all those who need them can benefit. Furthermore, products are not to be denied to patients on grounds of cost.
- Medical education programmes should be developed to increase doctors' knowledge of rare disorders.

2.3 Recommendations for others

- Public understanding of the potential benefits of biotechnology and genetic medicine should be encouraged and enhanced through the media and other channels.
- The investment potential afforded by orphan medicinal products from private sector sources should be publicised and promoted.
- Solidarity and the willingness of society to respond to the health care needs of all its members should be emphasised when considering the use of health care resources (and also when working out the economic, social and human costs associated with not treating when potentially treatment would be possible).
- Patient groups should be recognised and supported in their role of reducing the isolation and improving the services and support for those with rare disorders.

Forum VI: The Impact of Biotechnology on Health Systems and Health Services

1. Situation

Biotechnology and research in genetics will have a large impact on medicine through an increased knowledge base. An important milestone will be reached in about 2 -years, when the whole human genome will have been sequenced.

These data together with bio-informatics are opening up the path for genomics, which in many years to come will expand our understanding of how the human body functions at the cellular and molecular level. Genomics are leading to a constant flow of new drugs, diagnostics and vaccines.
At the same time, new medical procedures such as cellular therapies, bio-surgery, organ transplants as well as gene therapy are being developed and are becoming available to patients. Some of these new (not all genetics based) techniques are increasingly posing novel challenges for the health care system and are raising fundamental questions about the nature and value of human life.

2. Recommendations to be enacted both at national and European levels:

2.1 Both basic and problem oriented research need to be increasingly funded. There will be no applied research without continuing basic research. The competent authorities should take note of the fact that government funding for biomedical research is massively on the increase in the USA. Nations ought to have clear ethical and legal guidelines on research. These should be derived from broad societal deliberations. A common European standard is necessary.

2.2 The authorities should encourage industries to develop new drugs, diagnostics, vaccines andmedical procedures, including those needed by small groups of patients with rare diseases. These rare diseases represent a major health care problem affecting in total approximately 25-30 million Europeans. Such encouragement needs financial backing. The health care system needs to be flexible enough to allow the rapid introduction of new beneficial materials and procedures. National governments will have to ensure that those who need the innovative products and services can afford them.

2.3 There needs to be a more open dialogue between researchers in biotechnology, the medical profession and the general public. Without a broad understanding of what science and technological innovation can offer, individuals, groups and political decision-makers may have difficulty in making balanced and informed judgements with the risk that worthwhile opportunities will be lost. Professionals need to take the concerns and worries of patients seriously. They should communicate with the patient and the general public, accepting them as equal partners - communication is a two-way process: each side can and should learn from the other. This is also important in Eastern Europe, where open public debates don't have a long tradition.

2.4 Governments are encouraged to address ethical issues raised by the application of new technologies. Society depends on a "contrat social" based on common ethical principles founded on human rights, solidarity and diversity. Many of the ethical issues appear to be novel, and although in some cases there are underlying similarities to issues long discussed (if not resolved), each society, each generation will have to confront them. Again, a good level of understanding and access to information will contribute to resolving differences and balanced use of innovation.

2.5 There is an urgent need for the EU to introduce and enact (or adapt) science-based legislation that will allow Europeans to benefit from products and services generated through biotechnology (as discussed in the workshop, it is not biotechnology but its applications that are being discussed). At the same time the maintenance of a high level of safety is imperative. Without a reliable and rational regulatory framework, the European industrial base is likely to erode in this area. This also applies to the area of patenting, where discoveries may not be patented (nobody is attempting to obtain "Patents on Life"). However inventions need the possibility of being patented in order to maintain the incentive for investment in research and development, while ensuring prompt and effective diffusion of the new knowledge and techniques. To further this aim, patents should be available on useful innovations, but not on genetic material (human or other) in its natural state.

Workshop: European Economic Integration and Health Systems in the Enlarged Europe:

1. Situation

1.1 All candidate countries make important efforts in reforming their health systems, albeit different in advances and scope.

1.2 But the candidate countries' health systems show important flaws giving raise to doubts about their ability to fully participate in the European social security co-ordination: the gap in health status and health systems, insufficient resources devoted to the health sector, over-capacity and ill maintained health care facilities, low motivation of health professionals and lack of communication to and encouragement of participation of the population. All this could lead to migration pressure (health professionals) and the health status gap is a potential burden on the European Union's economic capacity.

1.3 Additionally, the future European Member States face similar problems with respect to the increasing economic integration as the present member states, even though these could in some cases even be considered as opportunity: the possibility of "exporting" health services (Kohll/Dekker) to other Member States represents an important incentive for quality improvement and could attract the necessary capital for updating health care facilities.

2. Recommendations

2.1 Health should be given a higher priority in the accession process. Special support should be given to the upgrading of health care facilities in the candidate countries.

2.2 Candidate countries should take into account the influences of European law when reforming their health care systems and increasingly voice their concerns and interests in the "European health arena".

2.3 Many of the issues discussed at the Gastein Forum are very relevant in the context of enlargement. There is a clear role for the Community in the support of quality issues: development of Europe-wide standards (services, facilities, professionals, dissemination of best practices). The candidate countries should be fully integrated in this process.

2.4 Active "integration" of candidate countries should include the exchange of professionals, administrators and researchers. Increased communication and easily accessible information systems are essential.

2.5 Increasing involvement of candidate countries in health activities at the European level, especially in those meetings which focus on the internal market and health issues.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 4 April 2000

CHARTE 4198/00

CONTRIB 79

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution submitted by European Justice and Peace Commissions, International Federation of Leagues for Human Rights (FIDH), European Migrant's Forum, International Catholic Migration Commission (ICMC), KAIROS Europe, Pax Cristi International, Representatives of Communities of African Origin, and Quaker Council for European Affairs (QCEA). [1]

[1] This text has been submitted in English language only.

EUROPEAN JUSTICE AND PEACE COMMISSIONS
INTERNATIONAL FEDERATION OF LEAGUES FOR HUMAN RIGHTS (FIDH)
EUROPEAN MIGRANTS' FORUM
INTERNATIONAL CATHOLIC MIGRATION COMMISSION (ICMC)
KAIROS EUROPE
PAX CHRISTI INTERNATIONAL
REPRESENTATIVES OF COMMUNITIES OF AFRICAN ORIGIN
QUAKER COUNCIL FOR EUROPEAN AFFAIRS

The European Union Charter of Fundamental Rights and Third Country Nationals

The European Council in Cologne (June 1999) decided to draft a Charter of Fundamental Rights for the European Union (EU). The Extraordinary European Council in Tampere (October 1999) agreed the composition and methodology of the Drafting Body.

The debate has now entered a new phase: realistically, it is too late to alter the adopted drafting procedure, but there is still time to contribute to the content of the future Charter.

With regard to the interventions and debates so far, on the substance of the Charter and the ambiguity surrounding who the Charter will apply to, our organisations would like to call for the complete and express recognition of the Fundamental Rights of Third Country Nationals within the territory of the European Union.

Consequently, the following three basic principles need to be remembered:

1. The universal character of human rights

Human rights, by definition, benefit all humans. The universality of human rights has already been established through the collective protection offered by existing international and regional instruments, to which the member-states of the EU are signatories. For example:

- Article 2 of the Universal Declaration of Human Rights laid-out that:
  "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status."

- Article 1 European Convention of Human Rights (ECHR) foresees that:
  "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

- Article 2 of the International Covenant on Civil and Political Rights reads:
  "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

- Article 2 of the International Covenant on Economic, Social and Cultural Rights states, in paragraph 2, that:
  "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

2. Non-discrimination

As the European Court of Human Rights has continuously underlined, the distinctions between citizens and non-citizens of the EU can only be established on the condition that they are objectively justified and consistent with the goal of setting up specific legal arrangements, between member-states, relating to citizenship. Hence, the principle of non-discrimination is an essential reference within the field of EU fundamental rights, as it implies that the rights of EU citizens should be narrowly defined and that such a difference in treatment should be in response to a firm justification which is in proportion to the objective concerned.

In this regard, our organisations invite the Drafting Body of the Charter to examine the best formulation possible for the specific non-discrimination clause of the Charter. The proposed Protocol of the ECHR (Protocol 12) on non-discrimination will probably be adopted within 2000. This could form a good reference point for the Charter's Drafting Body.

The basic principle must be that the rights within the Charter will be universal. Any differences in application of the Charter's rights should be as a result of a difference in circumstances rather than status. It should not be necessary to create *a priori* categories of beneficiaries.

As for civil and political rights, international law at present allows the **rights to vote and eligibility to stand for election** in European and municipal elections to be reserved for EU citizens. Freedom to make such a restriction is in fact provided for in the international agreements, which are binding on the Member-states (Article 25 of the International Covenant on Civil and Political Rights, Article 21 Universal Declaration on Human Rights). The signatory organisations call for the drafters of the Charter to **extend this right to people legally resident** in the territory of the EU, in accordance with certain conditions (eg. 5 years of legal residence), as proposed by the European Parliament in April 1999[1]. The existence of Third Country Nationals living in the territory of the EU will be a permanent characteristic of European societies. The Council of Europe's Convention on the Participation of Foreigners in Public Life at local level (1992) could serve as a good reference in this field.

If a form of **diplomatic protection** (Article 20 of EEC) is to be reserved for the citizens of the EU, the **right to petition** before Parliament and the **right to introduce a complaint to the European Ombudsman** should be available to all residents of the member-states. The **right to be addressed in one of the 11 official languages** of the European institutions and to receive a response in that language (Article 21 EEC) should elsewhere equally be heard by all the relevant persons in the member-states and the EU.

[1] Resolution on the strategy document on the Position of the European Union regards migration and asylum adopted 13 April 1999, para.23

The rights of **freedom of movement and establishment** (Article 18 EEC) within the EU is, at present, reserved for member-state nationals. Our organisations believe that this right should be of benefit to all persons legally resident in the EU in order to conform to the general clause on anti-discrimination on the basis of nationality.

In addition, the extension of this right to Third Country Nationals could be considered in the future to be a result of the right to freedom of movement, as consecrated in various international human rights protection instruments. These clauses have no references to nationality as a criteria for application (Article 2 of Protocol 4 ECHR, Article 12 of International Pact on Civil and Political Rights[2]). In regards to European integration, it is logical and fair that the rights to freedom of movement and establishment within the EU should equally benefit all persons legally resident. This would follow the ethos of those who originally dreamt of an internal market and Union without borders.

Finally, in relation to this right, the future Charter should include an explicit reference to the right of asylum-seekers, persons considered stateless and those who should benefit from family reunification to enter the territory of the EU.

There are other rights that are likely to figure in the Charter, but only benefit Third Country Nationals. For example, the prohibition of collective expulsions of foreigners (as foreseen in Article 4 of Protocol 4 ECHR).

The signatory organisations of this paper consider that **fundamental economic and social rights** should have the same field of personal application as the civil and political rights. Therefore, the rights to medical and social assistance (including the right to adequate housing and a sufficient standard of living), the right of children to an education and the right to equal treatment on the basis of gender should benefit all persons under the jurisdiction of the member-states of the EU. This should be regardless of their nationality and the permanence of their stay on EU territory.

Certain social rights are bound to the employment status of the individual (for example, the right of association), others are dependent on the permanence of their stay (for instance, the right to work, the right to social security – this is different from the fundamental right to medical and social assistance). Therefore by consequence, those with irregular status residing in the territory of the Union will not benefit from these rights. A specific clause on their exclusion is neither necessary nor desirable.

3. Harmonisation of the protective instruments

Our organisations are convinced of the complementary goals of the proposed EU Charter of Fundamental Rights and the potential ratification by the EU (or by default by the EC) of the European Convention on Human Rights and the European Social Charter (revised). It is only by combining these proposals that the overlapping of jurisdictions could be avoided; otherwise, in the medium term, the Charter could become a restrictive instrument in Community law. This is also the only way to assure coherence in the protection of European fundamental rights.

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2 "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

Such an addition would require a revision of the preamble to the Treaty basis of the European Union. Therefore, we call for this debate to be included on the agenda of the forth-coming Inter-Governmental Conference.

In conclusion, our organisations call upon the Drafting Body of the Charter of Fundamental Rights to be watchful that all the thematic working groups, given the task of creating the Charter, duly take into account the situation of Third Country Nationals within the EU, and consistently protect the universal nature of fundamental rights.

Brussels, 14 February 2000-03-23

This paper is signed by the following organisations:
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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 7 avril 2000

CHARTE 4213/00

CONTRIB 89

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une contribution de la Confédération Européenne des Syndicats Indépendants (CESI) .[1] [2]

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[2] Ce texte a été soumis en langues française et allemande.

Prise de position de la CESI sur la création d'une charte des droits fondamentaux européens

Introduction:

Le Conseil européen de Cologne et les réflexions poursuivies dans le cadre du Conseil de Tampere ont posé les jalons de la création d'une charte des droits fondamentaux européens. Une convention composée de 65 délégués sous la présidence de Roman Herzog devrait proposer un projet pour la fin 2000.

Dans ce contexte, l'on constate une très grande disparité entre le sens, la place et la portée attribués à cette charte par les différents acteurs. Une partie de ceux-ci nient la nécessité de la création d'une Charte communautaire en se référant à un document déjà existant, la Convention européenne des droits de l'homme. D'autres prônent seulement la proclamation de « tables de la loi », c'est-à-dire une déclaration de principe politique sans caractère coercitif. En définitive, l'on encourage la création d'un catalogue des droits fondamentaux plus ou moins étoffé, qui serait intégré dans les traités et aurait valeur de constitution.

La CESI est d'avis qu'une Charte communautaire européenne dotée d'un catalogue de droits fondamentaux, des principes d'État de droit ainsi que d'un arsenal légal nécessaire à l'exécution des droits de défense devrait être élaborée et intégrée plus tard aux traités.

La CESI motive son avis comme suit:

Communauté de valeurs et catalogue de droits fondamentaux

Les États membres garantissent déjà une protection étendue des droits fondamentaux au sein de l'Union européenne et ont également signé la Convention européenne des droits de l'homme. Le simple citoyen de la Communauté jouit ainsi d'un florilège de droits élémentaires et de droits de défense par rapport aux Institutions étatiques. Par ailleurs, les traités communautaires - sans présenter de catalogue des droits fondamentaux – contiennent de nombreuses dispositions séparées qui garantissent les droits fondamentaux ou au moins des droits équivalents (interdiction de toute discrimination, les quatre libertés fondamentales de l'économie de marché, liberté d'association, etc.). Par ailleurs, la Cour de justice des Communautés européennes (CJCE) a élaboré une série de principes relatifs à la philosophie de l'État de droit (droit d'être entendu devant un tribunal, principe de proportionnalité, etc.) et relatifs aux droits fondamentaux proprement dits (par exemple: les libertés, règle d'égalité, liberté de confession, respect de la vie privée et de la vie familiale).

La CESI estime toutefois que, sans préjudice des droits fondamentaux protégeant déjà les personnes morales et juridiques au sein de l'Union européenne, la nécessité d'une charte européenne des droits fondamentaux existe. En se référant à la subsidiarité et aux traditions juridiques des différents États membres, l'on peut interpréter la notion de « nécessité » de telle sorte qu'une Charte communautaire ne soit pas obligatoire. Cependant, l'intégration croissante entraîne inéluctablement la création d'une communauté de valeurs trop souvent citée par le passé qui devrait s'exprimer concrètement, selon la CESI, dans une charte des droits fondamentaux. Il ne s'agit pas seulement de faire la clarté sur la portée des droits fondamentaux, sur la prévisibilité, la sécurité juridique et l'application des droits la plus rapide possible, mais surtout d'identifier les citoyens de l'Union. D'après la CESI, cet argument, que de nombreux critiques taxent de « creux », est pourtant l'un des plus convainquants. Comme l'ont confirmé les dernières élections européennes, l'Union européenne ne joue qu'un rôle secondaire dans la conscience des citoyens, en dépit de son influence considérable et sans cesse plus importante. Force est toutefois de constater qu'une Union qui ne peut pas prendre pied dans la société et qui ne se base pas sur la reconnaissance de ses citoyens et de leurs représentants politiques, ne parviendra qu'avec difficulté à atteindre l'intégration approfondie souhaitée. La CESI estime par conséquent que la création d'une charte de droits fondamentaux européens est absolument nécessaire.

Relations avec la Convention européenne des droits de l'homme

L'objectif des six membres fondateurs de la Communauté européenne, qui sont en même temps les pères fondateurs du Conseil de l'Europe et les États signataires de la Convention européenne des droits de l'homme, consiste à créer une communauté exclusivement orientée sur des préoccupations d'ordre économique. La protection des droits fondamentaux n'était investie que d'un rôle secondaire, voire inexistant. Au fur et à mesure de l'intégration de la Communauté économique européenne, de la Communauté européenne et enfin de l'Union européenne, les Institutions européennes se sont vu doter de compétences législatives, exécutives et judiciaires plus étendues, alors que l'adhésion à la Convention européenne des droits de l'homme, et, ce faisant, la soumission à la jurisprudence de la Cour européenne de Justice en matière de droit de l'homme, restait limitée aux États nationaux. Cette évolution a entraîné une situation quelque peu paradoxale où les droits fondamentaux, c'est-à-dire des droits de défense contre les Institutions européennes, ne sont pas dérivés des constitutions nationales ni de la Convention européenne des droits de l'homme, mais seulement des droits fondamentaux communautaires – incomplets.

C'est la raison pour laquelle l'on a sollicité à maintes reprises l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme en tant qu'organisation supranationale. Seul ce geste fort pourrait permettre de construire un système cohérent pour protéger les droits de l'homme. Un protocole supplémentaire devrait permettre de combler le manque d'engagement des organisations supranationales.

La CESI se prononce en faveur de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme, mais insiste toutefois pour créer une Charte communautaire. Les spécificités de la supranationalité de l'Union européenne exigent – en plus de la Convention européenne des droits de l'homme – la création d'une propre Charte communautaire permettant en particulier d'opposer des droits de défense étendus et spécifiques aux compétences législatives et réglementaires étendues transmises à l'Union européenne

La Charte communautaire et la Convention européenne des droits de l'homme créent une protection des droits fondamentaux cohérente en Europe

La condition déterminante pour la création d'une Charte communautaire européenne est, dans un premier temps, l'éclaircissement de sa position par rapport à la Convention européenne des droits de l'homme ratifiée par tous les États membres. La CESI estime qu'il convient à tout prix d'éviter la mise en place de plusieurs catalogues de droits fondamentaux européens indépendants les uns des autres, puisque le danger de la naissance d'une Europe à deux vitesses contredit le principe de l'universalité des droits de l'homme. C'est la raison pour laquelle la CESI sollicite la création d'une relation non équivoque entre la Convention européenne des droits de l'homme et la nouvelle charte qui permette une coexistence complémentaire. La CESI se félicite dès lors expressément des propositions avancées par Roman Herzog, selon lesquelles il convient de reprendre des références à la Convention européenne des droits de l'homme dans la Charte communautaire. Dans ce contexte, la Charte communautaire devrait jouir de la priorité – en se fondant sur des principes constitutionnels – pour autant qu'elle ne limite pas la portée de la protection conférée par la Convention européenne des droits de l'homme. Ce faisant, l'on tiendrait compte des objectifs à réaliser selon la CESI (la spécificité de la supranationalité de l'Union européenne et la cohérence entre la Convention européenne des droits de l'homme et la Charte communautaire).

Applicabilité de la charte des droits fondamentaux

La Charte communautaire devrait être applicable comme « Constitution de l'Union européenne » dans le cas où des Institutions ou des organes européens – dans le cadre des compétences et des tâches leur attribuées conformément au 1er, 2ème ou 3ème pilier – prennent des mesures que les États membres appliquent ou transposent le droit communautaire ou de l'Union. La CESI rejette une restriction du champ d'application sur la prise de mesures des Institutions et organes européens dans le cadre du droit communautaire. D'une part, il s'agit de garantir des droits de défense correspondants à toutes les formes de transposition et à tous les aspects du droit communautaire et de l'Union, d'autre part, la distinction entre le droit communautaire et le droit de l'Union n'est pas pertinente dans ce cas. En effet, le passage aisé du droit communautaire au droit de l'Union ainsi que l'élargissement du droit communautaire et des compétences des organes communautaires dans des domaines réservés jusqu'ici au droit de l'Union, ne peuvent pas motiver de distinction dans la problématique du champ d'application des droits fondamentaux communautaires. Les objectifs de prévisibilité, de sécurité du droit et d'application étendue du droit sont ainsi manqués.

Droits fondamentaux et principes de l'État de droit

La CESI estime qu'une Charte doit définir, outre un catalogue des droits fondamentaux clair et explicitement formulé, des principes généraux de l'État de droit ainsi que l'arsenal juridique permettant d'appliquer les droits de défense. Les principes de l'État de droit jouent un rôle tout aussi important que les droits fondamentaux au sein des États démocratiques et ne doivent pas entrer en vigueur par la seule force du droit prétorien, c'est-à-dire par des décisions de principe de la Cour européenne de Justice. La CESI se félicite dès lors de la division en deux de la Charte en une partie générale, où les droits fondamentaux proprement dits sont énumérés, et une partie spécifique destinée à garantir la « sécurité du droit».

Portée et essence des droits fondamentaux

Le catalogue des droits fondamentaux devrait contenir à la fois les droits de l'Homme *généraux* conformément à la Convention européenne des droits de l'homme et des droits fondamentaux spécifiques à l'Union. La CESI prône par ailleurs de garantir les principes fixés dans la Charte communautaire des droits fondamentaux sociaux. Dans ce cadre, l'on met notamment en exergue les principes de la liberté d'exercer une profession, de l'égalité des chances, du droit à un salaire décent, de la liberté d'association, de la liberté des conventions collectives, de la cogestion des salariés, de l'accès à une formation professionnelle, de la protection sociale adaptée ainsi que de la protection de la santé et de la sécurité sur les lieux de travail. De plus, conformément à la Charte sociale, il convient de reprendre dans le projet de charte fondamentale le droit pour chacun de gagner sa vie grâce à un travail non contraint.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 10 April 2000

CHARTE 4215/00

CONTRIB 91

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Forum for Freedom in Education (EFFE), submitted with a view for the hearing on 27 April 2000. [1] [2]

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[1] EFFE: Annener Berg 15, G-58454 Witten. Tel: +49-2302-699 442. Fax: +49-2302-699 443

[2] This text has been submitted in German, French and English. (The commentary has been submitted in German and English only).

Charter of Fundamental Rights of the European Union
(Article 16)

1. Everyone shall have the right to education.

2. There shall be freedom of education. Education shall foster the full development of individual gifts and abilities.

3. The right of parents to have their children educated and taught in accordance with their religious, philosophical and educational convictions shall be guaranteed.

4. There shall be the right to found and administer educational establishments. Choice of educational establishment shall be ensured through equitable distribution of public resources to governmental and non-governmental schools.

Proposal

Article 16

Addressing the Right to Education

for the

Draft Charter of Fundamental Rights of the European Union

Article 16

1. Everyone shall have the right to education.

2. There shall be freedom of education. Education shall foster the full development of individual gifts and abilities.

3. Parents shall have the right to educate their children in accordance with their religious, philosophical and educational convictions.

4. The right to establish educational establishments and to provide instruction shall be guaranteed. Free choice in education shall be ensured through the equitable distribution of public resources for governmental and non-governmental schools.

Commentary

The European Forum for Freedom in Education (EFFE) fully supports the decision to draft a bill of rights for the united European countries in which the significance of human rights is justifiably addressed through the recognition of the right to education as well as the right to freedom in education as fundamental rights.

Regardless of whether or not the right to education is understood and enforced as a fundamental social right, the issue of education must be introduced into a Charter of Fundamental Rights of the European Union.[1] The right to education is a human right which can be made effective only if the State acts to safeguard the individual's environment. Thus this does not have merely a protective character.

The goal of such a Charter must be to strengthen the rights of the European citizen. We must take those countries that have realised the human and fundamental rights in an exemplary manner as our point of departure.[2] Only in this way will Europe be able to become a Europe of its citizens.

The European Forum for Freedom in Education hereby submits the above proposal for Article 16 pertaining to the right to education in the Charter of Fundamental Rights of the European Union in accordance with the working principles of the Convention and in reference to the constitutions of the member countries, Articles 149 and 150 of the Treaty of the European Community, Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, taking into consideration the European Parliament's Draft of an European Constitution (1994), the resolution of the European Parliament concerning freedom of education in the European Community (March 14, 1984), Article 10 of the European Social Charter and Article 8 of the European Charter for Regional and Minority Languages of the European Council, as well as Articles 14, 18, 28, 29 and 30 of the UN Convention on the Rights of the Child.

[1] This is also the position taken by the German government, which has stated that "the Charter of Fundamental Rights must contain all rights, the denial of which could lead to a constitutional complaint. This applies to the rights named in Articles 1-19.....The Charter should...also [include] such fundamental social rights that are justifiably considered to be individual rights....such as the right to education....in as much as this lies within the sovereignty of the Union."; Herta Däubler Gmelin, From Citizen of the Market to Citizen of the Union, FAZ from 10. January 2000, P.11.

[2] Compare Frank-Rüdiger Jach, Schulverfassung und Bürgergesellschaft in Europa, Berlin 1999.

Until now the fundamental right to freedom in education has been guaranteed by the constitutional traditions of the Member States as well as by the European Human Rights Convention and the approach taken by the European Court of Justice in its jurisdiction. Article 2 of Protocol No. 1 of the EHRC from 20. March, 1952 is thus particularly relevant. It says:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The European Parliament has also recognised the right to education and has stated in Article 16 of the Declaration of Fundamental Rights and Freedoms from 12. April 1989 that:

> "Everyone shall have the right to education and vocational training appropriate to their abilities.
> There shall be freedom in education.
> Parents shall have the right to make provision for such education in accordance with their religious and philosophical convictions."

Although this position is still to be found in Title VIII, Article 14 of the European Parliament's Draft of a European Constitution[3], where it is phrased as follows:

> “Everyone has the right to education and vocational training appropriate to their abilities.
> There shall be freedom in education.
> Parents have the right to make provision for such education in accordance with their religious and philosophical convictions, whilst respecting theright of the child to ist own development.”

in the study entitled Protecting Fundamental Rights in the European Union prepared by the committee of eexperts on 'Fundamental Rights', the right to education is not mentioned. The fact that this right has been omitted shows that the study is in need of amendment.

In order to ensure that education meets the expectations voiced in the EHRC and inherent in the constitutional traditions of the Member States, an article addressing educational rights and freedoms must contain the following:

3 PE 203.601/endg.2

- Protection of the fundamental social rights of parents and children
- Prohibition of discrimination based on nationality, race, citizenship, sex, philosophical or religious convictions, social class, or economic standing
- Guarantee of educational diversity
- Recognition of academic freedom
- Recognition of the importance of education's role in achieving tolerance and a European consciousness.

§ 1. Everyone shall have the right to education.

The central focus of an article addressing educational rights within a European Charter of Fundamental Rights must be to ensure that no one shall be denied access to education. This follows from the position taken in the Treaty of Amsterdam, where, in the Preamble, the resolve of the Member States to uphold a high standard of knowledge among their citizens through non-discriminatory access to education and continuing education is clearly stated. [4] Unquestionably, the right to education must include access to compulsory education without cost.

Everyone, regardless of his or her nationality, race, citizenship, sex, philosophical or religious conviction, social class or economic standing, has the right to an education appropriate to his or her individual gifts and abilities and capable of fostering his or her sense of freedom and social responsibility.

§2. There shall be freedom of education. Education shall foster the full development of individual gifts and abilities.

Education must not become subservient to economic policy. Especially in the face of economic globalisation, the right to childhood must be recognised and protected.

The purpose of education to enable children and young people to become mature, socially responsible, tolerant individuals can be recognised as an important part of the cultural inheritance of Western Europe. It implies the right of the child to evolve his or her own sense of identity as is given by the right to an education that fosters the full development of individual gifts and abilities.

In accordance with fundamental human rights and freedoms, the primary obligation in education is to guarantee the right of the child to develop the full spectrum of his or her individual abilities with respect for the child's sense of identity and cultural values; within this framework tolerance towards all cultural, religious, philosophical and ethnic differences is of the utmost importance.

[4] Preamble, Treaty of the European Community, Paragraph 8

§3. The right of parents to educate their children in accordance with their religious, philosophical and educational convictions shall be guaranteed.

In addition to the fundamental right to education referred to as the right of access to education and the guarantee of the principle of equal access, a European bill of rights must recognise the primacy of the educational responsibility of parents.

Thus the rejection of a state monopoly of education corresponds with the right of parents to decide upon the form of education appropriate for their children, reflected in the right to free choice of educational establishment. Within the European Union, the parental right of educational choice, in addition to the right of choice based on religious conviction or ethnicity, is inherent in the constitutional traditions of the Member States.[5]

§4. There shall be the right to found educational establishments and provide instruction. Choice in education shall be ensured through the equitable distribution of public resources for compulsory education to governmental and non-governmental schools.

The primary responsibility of parents for the education of their children necessitates the recognition of the right to found and administer independent schools as the foundation upon which free choice of educational establishment is possible

The right of choice in education can, however, only then be guaranteed if the choice between governmental and non-governmental schools is placed upon an equitable economic base.

An article addressing education within the Charter of Fundamental Rights of the European Union is connected to other fundamental freedoms stated in the Treaty of the European Community. Private education comes under the category of active and passive services and must not be unduly hindered.

Within the jurisdiction of the European Court of Justice it is recognised that Article 2 of the Protocol No. 1of the EHRC does guarantee the right to found and administer private schools without guaranteeing a corresponding right to have such schools financed. It is, however, important to keep in mind that a majority of the Member States do provide financial support to private schools and that by the adoption of Protocol No. 1 , Holland took the position that Article 2 does indeed call for financial support for non-governmental schools.[6]

[5] Compare Frank-Rüdiger Jach, Schulverfassung und Bürgergesellschaft in Europa, Berlin 1999

[6] Compare Karl Josef Partsch, Die Rechte und Freiheiten der europäischen Menschenrechtskonventionen, Berlin 1966, P. 240; Claus Eiselstein, Staatliches Bildungsmonopol und Europäische Menschenrechtskonvention, in: Hans-Jörg Birk/Armin Dittmann/Manfred Erhardt, Kulturverwaltungsrecht im Wandel, Stuttgart 1981, P. 178 (184).

The European Forum for Freedom in Education wishes particularly to call to mind the Declaration of the European Parliament concerning Freedom of Education in the European Community from 14. March 1984.[7] This declaration calls for the protection of freedom in education and teaching and for respect for the parents right to choice in education. Inherent in the stated position is the governmental recognition of freely established schools as well as their right to award the same qualifications as State schools. In this Declaration, the European Parliament also calls for the practical realisation of this right through financial support and takes the position that non-governmental schools should receive the same treatment as governmental schools in the distribution of public resources without discrimination as regards administration, parents, pupils or staff. Notwithstanding this, however, freely established schools may be expected "to make a certain contribution of their own as a token of their own responsibility and as a means of supporting their independent status".

Thus in a number of decisive points stated in the Declaration from 1984, the European Parliament has laid the foundation for a European bill of rights. With regard to the fundamental right to freedom of education, the EP has submitted an exemplary proposal corresponding to the constitutional traditions of the Member Sates and manifesting the right to education as a fundamental right of all European citizens.

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7 See Albert Fernandez/Siegfried Jenker, Ed., International Declarations and Conventions on the Right to Education and the Freedom of Education, published by the European Forum for Freedom in Education, Bd. 8

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 7. April 2000

CHARTE 4216/00

CONTRIB 92

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag von Herrn Thomas Clement zu den Bürgerrechten. [1] [2]

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[2] Dieser Text wurde nur in deutsche Sprache übermittelt.

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An den Konvent zur Ausarbeitung der Grundrechte der Europäischen Union Brüssel Sehr geehrte Damen und Herren, Sehr geehrter Herr Vorsitzender Herzog, mit Interesse verfolge ich die Regierungskonferenz 2000 über die Reform der Organe der EU und war überrascht, daß hinsichtlich der Formulierung einheitlicher Grundrechte in der EU ein gesonderter Konvent einberufen wurde. Da ich an den Rat der Europäischen Union (bzw. an dessen Generalsekretär) und an die Kommission einen "Vertrag betreffend die Verfassung der Europäischen Union" als Antwort auf die Aufgaben der Regierungskonferenz 2000 gesendet habe, möchte ich Ihnen die, die Grundrechte betreffenden Ausschnitte (einschließlich von Kurzkommentaren) hieraus auf diesem Wege übermitteln:

Teil V. - Die Bürgerrechte der Europäischen Union

Abschnitt 1 - Unionsbürgerschaft

Artikel 12

(1) Die Staatsbürger der Unionsstaaten sind Unionsbürger im Sinne dieser Verfassung; davon ausgenommen sind Staatsbürger von Unionsstaaten, die ihren ständigen Wohnsitz in Teilen des Staatsgebiets ihres Heimatstaates haben, die vom Unionsgebiet ausgeschlossen sind.

(2) 1. Jedem Unionsbürger, der sich in einem Unionsstaat dauernd niedergelassen hat, deren Staatsbürgerrecht er nicht besitzt, ist auf Antrag spätestens sieben Jahre nach seiner dauernden Niederlassung das Staatsbürgerrecht des Unionsstaates und spätestens ein Jahr nach seiner dauernden Niederlassung das Bürgerrecht der Gemeinde zu verleihen.

2. Die Unionsstaaten wenden bei der Ausführung der Bestimmungen dieses Absatzes das Kapitel I. des am 6. Mai 1963 in Straßburg unterzeichneten Übereinkommens über die Verringerung der Mehrstaatigkeit und über die Wehrpflicht von Mehrstaatern an; sie können gegebenenfalls durch Staatsvertrag davon abweichendes festlegen.

3. Unionsbürger können in keinem Unionsstaat dem Ausländerrecht unterworfen werden und gelten nicht als Ausländer.

(3) Die Union kann einheitliche Vorschriften für die Erwerbung und den Verlust der Staatsbürgerschaft eines Unionsstaates durch Verfassungsgesetz erlassen.

Rechtsvergleiche

ersetzt die Artikel 17 Absatz 1 und 19 Absatz 1 EGV.

Kurzkommentar

Der Artikel präzisiert die Angaben des Artikel 17 Absatz 1 Satz 1 und 2 EGV, die im Verfassungsentwurf zusammengefaßt werden, indem er die Staatsbürger der Unionsstaaten, die in den, gemäß Artikel 2.1 Absatz 2 des Verfassungsentwurfs ausgeschlossenen Teilen des Staatsgebiets wohnhaft sind, von der Unionsbürgerschaft ausschließt. Ansonsten sind alle Staatsbürger der Unionsstaaten automatisch auch Unionsbürger im Sinne des Verfassungsentwurfs. Der durch den Amsterdamer Vertrag angefügte Satz 3 des Artikels 17 Absatz1 EGV wurde wieder weggelassen, da die nationale Staatsbürgerschaft, auf der die Unionsbürgerschaft in Artikel 12 ausdrücklich ruht, nur durch Verfassungsänderung bzw. Vertragsänderung abgeschafft werden könnte.

Absatz 2 ist eine **neue Rechtsnorm**, die besagt, daß Unionsbürger, die sich in einem Unionsstaat niedergelassen haben, dessen Staatsangehörigkeit sie nicht besitzen, nach dem Ablauf von sieben Jahren nach ihrer dauernden Niederlassung auf Antrag die Staatsangehörigkeit des betreffenden Unionsstaates erlangen können und somit einen Rechtsanspruch genießen. Die zweite neue Rechtsnorm, die den Artikel 19 Absatz 1 EGV unter vollständiger Neufassung und unter anderen Gesichtspunkten das kommunale Wahlrecht der Unionsbürger sichert; spätestens ein Jahr nach seiner dauernder Niederlassung ist einem Unionsbürger das Gemeindebürgerrecht auf Antrag zu verleihen, auch wenn er nicht oder noch nicht Staatsbürger des, der Gemeinde angehörenden Staates ist. Die Verleihung des Gemeindebürgerrechts ist in einigen Unionsstaaten (wie z.B. Frankreich, welches das passive Wahlrecht in Bezug auf den Maire nicht auf die Unionsbürger erstreckt; diese Bestimmung wurde jedoch Frankreich durch Übergangsbestimmung belassen) weitergehender als das Kommunalwahlrecht für Unionsbürger nach Artikel 19 Absatz 1 EGV (z.B. hat ein Teil der deutschen Bundesländer den Artikel 19 EGV so umgesetzt, daß die Unionsbürger vollberechtigte Gemeindebürger werden).

Der zweite Unterabsatz des Absatzes 2 macht den Unionsstaaten und den Unionsbürgern hinsichtlich der doppelten Staatsangehörigkeit dahingehende Einschränkungen, daß eine doppelte Staatsbürgerschaft (hier sind die nationalen Staatsbürgerschaften, auf denen die Unionsbürgerschaft ruht, gemeint) in Übereinstimmung mit dem Übereinkommen über die Verringerung der Mehrstaatigkeit und über die Wehrpflicht von Mehrstaatern vom 6.5.1963 nicht zulässig ist, daß also ein Unionsbürger, der nach Maßgabe des Absatzes 2 erster Unterabsatz die Staatsbürgerschaft eines Unionsstaates begehrt, mit der Verleihung dieser Staatsbürgerschaft, seine ursprüngliche Staatsbürgerschaft zurückgeben muß.

Der dritte Unterabsatz verbietet es den Unionsstaaten, Unionsbürger aus anderen Unionsstaaten als Ausländer zu behandeln; sie können zwar einem besonderen Recht unterworfen werden, nicht aber dem Ausländerrecht und sie dürfen nicht als Ausländer gelten. So müßte z.B. der § 15 des deutschen Aufenthaltsgesetz/EWG geändert werden.

Absatz 3 bestimmt, daß die Union nach Maßgabe des Artikels 25 Absatz 3 durch ein Verfassungsgesetz gemeinsame Vorschriften über die Staatsbürgerschaften der Unionsstaaten verabschieden kann. Mit der Aufnahme dieses Absatzes 3 wird verhindert, daß Artikel 25 Absatz 3 dritter Spiegelstrich Anwendung findet.

Schlußfolgerungen

Weitreichende Rechtsänderungen. Die Unionsbürger erhalten durch Unionsvertrag einen Anspruch auf die Staatsbürgerschaft des Staates, in dem sie ihren Hauptwohnsitz genommen haben. Das Staatsbürgerschaftsrecht bleibt zwar Angelegenheit der Unionsstaaten, doch schränkt der Verfassungsentwurf diese Zuständigkeit etwas ein.

Abschnitt 2 - Europäische Menschenrechtskonvention

Artikel 13

Die in der, am 4. November 1950 in Rom unterzeichneten Konvention zum Schutze der Menschenrechte und Grundfreiheiten und deren Zusatzprotokollen aufgeführten Rechte und Freiheiten binden die Gewalten der Europäischen Union als unmittelbar geltendes Recht.

Rechtsvergleiche

ersetzt Artikel 6 Absatz 2 EUV; entspricht Artikel 3 des Entwurfs zu einer Satzung der Europäischen (Politischen) Gemeinschaft vom 10.März 1953.

Kurzkommentar

Im Gegensatz zu Artikel 6 Absatz 2 EUV besagt der Artikel 13, ähnlich wie Artikel 1 Absatz 3 des Grundgesetzes für die Bundesrepublik Deutschland vom 23. Mai 1949, daß die durch die Europäische Menschenrechtskonvention und deren Zusatzprotokollen festgestellten Menschenrechte und Grundfreiheiten (Artikel 2 bis18 MRK, Artikel 1 bis 3 ZP, Artikel 1 bis 4 4.ZP, Artikel 1 und 2 6.ZP, Artikel 1 bis 5 7.ZP) für die Gewalten der Europäischen Union (Þ Artikel 15 des Verfassungsentwurfs) verbindlich sind. Die genannten Rechte und Freiheiten gelten als unmittelbares Recht in allen Unionsstaaten.

Die Vorbehalte hinsichtlich einiger Grundrechte und Freiheiten, welche die Unionsstaaten gemäß der Konvention eingelegt haben und die gemäß der Konvention abgegebenen Territorialerklärungen finden gemäß der Übergangsbestimmungen zu Artikel 13 weiterhin Anwendung, doch kann der Ministerrat die einzelnen Unionsstaaten auffordern, diese Vorbehalte und Territorialerklärungen zu ändern, zurückzunehmen oder aufzuheben.

Die Europäische Union ist zum Zeitpunkt des Inkrafttretens dieses Verfassungsentwurfs trotz der weitreichenden Bestimmung des Artikels 13 auch weiter nicht Vertragspartei der Menschenrechtskonvention im Sinne des Völkerrechts, doch kann die EU gemäß Artikel 5.3 Vertragspartei der Konvention werden, da ihr durch den Artikel 13 (insbesondere durch die Übergangsbestimmung zu Artikel 13) eine indirekte Zuständigkeit der Konvention übertragen wird.

Schlußfolgerungen

Im Gegensatz zur Verfassung des Deutschen Reiches von 1871, die durch Verträge zwischen den nachmaligen Bundesstaaten des Deutschen Reiches festgestellt wurde, verzichtet dieser Verfassungsentwurf keinesfalls auf Grundrechte. Grundrechte haben heute eine ganz andere Bedeutung als Grundrechte im Jahr 1871, was man schon daran erkennt, daß es in Europa (und zwar das vom Atlantik bis zum Ural) eine Menschenrechtskonvention gibt, die gleichzeitig einen Gerichtshof zur Überwachung dieser Konvention über alle nationalen Grenzen hinaus einsetzt .

Die in den einzelnen Unionsstaaten weitergehenden Grundrechte bleiben aber bestehen, sofern sie nicht einen Punkt berühren, in welchem die EU Europarecht erläßt und somit gemäß Artikel 1.4 Absatz 2 das Unionsrecht Vorrang vor dem nationalen Grundrecht genießt. Interessantes Beispiel in Deutschland ist der Artikel 16a des Grundgesetzes für die Bundesrepublik Deutschland vom 23. Mai 1949 und der Artikel 105 in Verbindung mit Artikel 98 der Verfassung des Freistaates Bayern vom 2. Dezember 1946. Der Artikel der Bayerischen Verfassung geht hinsichtlich des Asylrechts bedeutend über den Artikel des Grundgesetzes hinaus, doch findet der Artikel des Grundgesetzes volle Anwendung, da das Ausländerrecht Sache des Bundes ist; die bayerische Verfassung bleibt hier unberücksichtigt.

Abschnitt 3 - Bürgerrechte

Artikel 14.1

(1) Jeder Unionsbürger hat das Recht, sich im Unionsgebiet frei zu bewegen, sich dort aufzuhalten und sich dauernd niederzulassen.

(2) Durch oder aufgrund eines Unionsgesetzes kann die Ausübung dieser Rechte für den Fall außergewöhnlicher Umstände eingeschränkt werden.

Rechtsvergleiche

ersetzt Artikel 18 EGV.

Kurzkommentar

Der Artikel 14.1 ist die Fortschreibung der Artikel 39 bis 48 EGV (Freizügigkeit der Arbeitskräfte, Niederlassungsrecht). Das Recht der Freizügigkeit und der Niederlassung der Unionsbürger im gesamten Gebiet der Union, das zwar praktisch bereits besteht aber noch nicht als Recht festgestellt ist, wird festgeschrieben. Die Einschränkung dieser Rechte durch die Artikel 39 bis 48 EGV (besonders die Beschränkung auf Arbeitskräfte) oder durch die, gemäß Artikel 18 Absatz 1 EGV erlassenen Durchführungsvorschriften fallen innerhalb einer Frist von zehn Jahren fort, wie die Übergangsbestimmungen zu Artikel 14.1 bestimmen (Þ Übergangsbestimmungen zu Artikel 14.1). Im Gegensatz zu Artikel 18 Absatz 2 EGV, der den Rat zum Erlaß von Vorschriften zur Erleichterung der Ausübung des Freizügigkeitsrechts ermächtigte, ermächtigt Artikel 14.1 Absatz 2 die Union, Gesetze zu erlassen, welche die Ausübung dieser Rechte für den Fall außergewöhnlicher Umstände einschränken kann. Dadurch erkennt man, daß das Recht der Freizügigkeit und des Niederlassungsrechts nach Absatz 1 allumfassend und nicht eingeschränkt zu verstehen ist. Die Umschreibung "für den Fall außergewöhnlicher Umstände" ist einschränkend oder freizügig auslegbar; ob z.B. eine Einschränkung der Freizügigkeit für Luxemburg aufgrund des bereits sehr hohen Ausländeranteils in Luxemburg ein außergewöhnlicher Umstand ist, wird Auslegungssache sein (Stichwort: Aufrechterhaltung von öffentlicher Ordnung und Sicherheit).

Die Übergangsbestimmungen finden auch nach dem Ablauf der zehnjährigen Übergangsfrist auf Großbritannien sowie Irland gemäß den bestehenden Protokollen zu Großbritannien und Irland Anwendung (Þ Protokoll über die Anwendung bestimmter Aspekte des Artikels 14 des Vertrags zur Gründung der Europäischen Gemeinschaft auf das Vereinigte Königreich und Irland vom 2.10.1997 und das Protokoll über die Position des Vereinigten Königreichs und Irlands vom 2.10.1997.).

Schlußfolgerungen

Die größtenteils bereits vorhandene Freizügigkeit und Niederlassungsfreiheit für Staatsbürger der Mitgliedstaaten der Europäischen Union in allen ihren Mitgliedstaaten, teilweise auch mittels des Artikels 308 EGV durchgesetzt, wird endlich rechtlich als "Grundrecht der Unionsbürger" festgeschrieben.

Artikel 14.2

Jeder Unionsbürger hat das Recht, aus Gewissensgründen den Dienst mit einer Waffe zu verweigern.

Rechtsvergleiche

z.B. Artikel 4 Absatz 3 des Grundgesetzes für die Bundesrepublik Deutschland.

Kurzkommentar

Durch die Einführung einer gemeinsamen Verteidigungspolitik gemäß Artikel 7.1 wurde auch das Recht der Wehrdienstverweigerung als allgemeines Grundrecht für die EU übernommen. Da dieses Recht in der MRK fehlt (wie auch im Vertrag über die Gründung der Europäischen Verteidigungsgemeinschaft vom 27. Mai 1952, in Artikel 12 des Militärprotokolls aber angedeutet), wird es hierher übernommen, da in allen Mitgliedstaaten der Europäischen Union das Recht der Wehrdienstverweigerung geltendes Recht ist.

Schlußfolgerungen

Keine wesentliche Rechtsänderung !

Artikel 14.3

Jeder Unionsbürger mit Wohnsitz in einem Unionsstaat, dessen Staatsbürgerrecht er nicht besitzt, kann in dem Unionsstaat, in dem er seinen Wohnsitz hat, das aktive und passive Wahlrecht bei den Wahlen zum Europäischen Parlament ausüben, wobei für ihn dieselben Bedingungen gelten, wie für die Angehörigen des betreffenden Unionsstaates.

Rechtsvergleiche

ersetzt Artikel 19 Absatz 2 EGV.

Kurzkommentar

Das Wahlrecht für die Wahlen des Europäischen Parlaments in einem Unionsstaat, dessen Staatsbürgerschaft ein Unionsbürger (noch) nicht besitzt, wird durch den Artikel 14.3 uneingeschränkt bestätigt. Artikel 19 Absatz 2 Satz 2 EGV, der den Rat ermächtigte, sowohl die Einzelheiten für die Ausübung dieses Rechts wie auch Ausnahmeregelungen für einige Mitgliedstaaten mit besonderen Problemen (z.B. Luxemburg mit seinem hohen EU-Bürger-Anteil) zu erlassen, entfällt ohne Übergangsfrist.

Das Recht bedarf keiner Durchführungsbestimmungen, da der Artikel alle erforderlichen Bestimmungen enthält. Das Wahlrecht der Unionsbürger gilt für diese unter denselben Bedingungen wie für die eigenen Staatsbürger des betreffenden Mitgliedstaates.

Schlußfolgerungen

Nur für diejenigen Mitgliedstaaten, die eine Ausnahmeregelung gemäß Artikel 19 Absatz 2 Satz 2 EGV im Rat durchgesetzt haben, ist diese Bestimmung eine **Rechtsänderung**. Für die übrigen Mitgliedstaaten ist die Weglassung der Ausnahmebestimmungen keine Rechtsänderung.

Artikel 14.4

(1) Jeder Unionsbürger sowie jede natürliche oder juristische Person mit Wohnort oder satzungsmäßigem Sitz in einem Unionsstaat kann allein oder zusammen mit anderen Bürgern oder Personen in Angelegenheiten, die in die Tätigkeitsbereiche der Union fallen und die ihn oder sie unmittelbar betreffen, eine Petition an das Europäische Parlament richten.

(2) Jeder Unionsbürger kann sich an den Bürgerbeauftragten der Europäischen Union wenden.

(3) Jeder Unionsbürger kann sich schriftlich in einer der Amtssprachen der Europäischen Union an jedes Organ oder an jede Einrichtung der Europäischen Union wenden, und eine Antwort in derselben Sprache erhalten.

Rechtsvergleiche

ersetzt die Artikel 21 und 194 EGV.

Kurzkommentar

siehe Kommentare zu den Artikeln 21 und 194 EGV.

Schlußfolgerungen

Das Petitionsrecht der Bürger der Union an das Parlament bleibt bestehen, wird jedoch in einem Artikel zusammengefaßt und an die Stelle der Grundrechte verschoben. **Keine Rechtsänderung.**

Artikel 14.5

(1) Jeder Unionsbürger sowie jede natürliche oder juristische Person mit Wohnsitz oder satzungsmäßigem Sitz in einem Unionsstaat hat das Recht auf Zugang zu Dokumenten des Europäischen Rates, des Europäischen Parlaments, des Ministerrates der Europäischen Union und der Kommission in allen Amtssprachen der Europäischen Union, vorbehaltlich der Grundsätze und Bedingungen, die nach Absatz 2 festzulegen sind.

(2) 1. Die allgemeinen Grundsätze und die aufgrund öffentlicher oder privater Interessen geltenden Einschränkungen für die Ausübung dieses Rechts auf Zugang zu Dokumenten werden durch einen verbindlichen Rechtsakt der Union festgelegt.

2. Jedes der genannten Organe legt in seiner Geschäftsordnung Sonderbestimmungen hinsichtlich des Zugangs zu seinen Dokumenten fest.

Rechtsvergleiche

ersetzt Artikel 255 EGV.

Kurzkommentar

Der Artikel wurde erst durch den Amsterdamer Vertrag vom 2.10.1997 in den EGV eingestellt. Er gibt den Bürgern das Recht auf Einsicht in alle Dokumente der Organe der Europäischen Union unter den Einschränkungen, die durch Rechtsakt der Union bestimmt sind. Jedes einzelne Organ kann zusätzlich zu diesem verbindlichen Rechtsakt noch Sondervorschriften bezüglich des Zugangs zu seinen Dokumenten machen.

In einer Übergangsbestimmung zu Artikel 14.5 wird ausdrücklich das Fortgelten der nach Maßgabe des Artikels 255 EGV erlassenen Einschränkungen des Rechts auf Zugang zu den Dokumenten der Europäischen Union bestimmt.

Schlußfolgerungen

Das Grundrecht auf Dokumenteneinsicht, das der Bürgernähe dienen soll, kann durch einfachen Rechtsakt der Union, in der Regel in der Form eines Unionsgesetzes (Þ Artikel 24.1 Absatz 2 des Verfassungsentwurfs), stark eingeschränkt werden. Es wurde trotzdem zu den Bürgerrechten hinzugefügt, um die Übersichtlichkeit dieser Bürgerrechte zu gewährleisten.

Keine Rechtsänderung !

Artikel 14.6

(1) 1. Jeder Unionsbürger hat das Recht auf den Schutz der ihn betreffenden personenbezogenen Daten, soweit er daran ein schutzwürdiges Interesse hat.

2. Durch Rechtsakt der Union kann über den Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und dem freien Verkehr solcher Daten Beschränkungen festgelegt werden.

(2) Durch Rechtsakt der Union wird eine unabhängige Kontrollinstanz errichtet, die für die Überwachung der Anwendung solcher Unionsgesetze auf die Organe und Einrichtungen der Union verantwortlich ist; der Rechtsakt legt erforderlichenfalls andere einschlägige Bestimmungen fest.

Rechtsvergleiche

ersetzt Artikel 286 EGV.

Kurzkommentar

Der Artikel wurde erst durch den Amsterdamer Vertrag vom 2.10.1997 in den EGV eingestellt. Er gibt den Bürgern das Recht auf Datenschutz. Der Artikel ist weiter gefaßt als der Artikel 286 EGV, der nur für Daten, die von der Europäischen Union und ihrer Organe verarbeitet werden, gültig war.

Der Artikel 14.6 des Verfassungsentwurfs dagegen gibt jedem Unionsbürger das Recht auf den Schutz der ihn betreffenden personenbezogenen Daten, jedoch unter der Einschränkung, daß dieses Recht durch einfachen Rechtsakt, der in der Regel in der Form eines Unionsgesetzes (Þ Artikel 24.1

Absatz 2 des Verfassungsentwurfs) zu erlassen ist, stark eingeschränkt werden kann. Solange und soweit ein solcher Rechtsakt der Union nicht erlassen wird, können die Unionsstaaten weiterhin Gesetze zum Datenschutz erlassen. Das Subsidiaritätsprinzip nach Artikel 1.4 wirkt hier auf die EU fast so einschränkend, wie die Fassung des Artikels 286 EGV.

Der Absatz 2 entspricht den Bestimmungen des Artikels 286 Absatz 2 EGV, der zur Durchsetzung der Datenschutzbestimmungen in den Organen und Einrichtungen der Union ein unabhängiges Kontrollorgan ermöglicht.

In einer Übergangsbestimmung zu Artikel 14.6 wird ausdrücklich das Fortgelten der nach Maßgabe des Artikels 286 EGV erlassenen Einschränkungen des Rechts auf Datenschutz bestimmt.

Schlußfolgerungen

Das Grundrecht auf Datenschutz, das im EGV bisher nur eingeschränkt galt, wird als Bürgerrecht der Unionsbürger voll als europäisches Recht ausgeweitet. Dieser Artikel, insbesondere der Absatz 1 ist eine **Rechtsänderung und eine Kompetenzergänzung** gegenüber den bisherigen Verträgen, wobei jedoch hier auch das Subsidiaritätsprinzip die Kompetenz der Union wiederum einschränkt.

Artikel 14.7

Diskriminierungen von Unionsbürgern aus Gründen der Staatsangehörigkeit sind verboten.

Rechtsvergleiche

ersetzt Artikel 12 EGV.

Kurzkommentar

Der Artikel legt das älteste Grundrecht in der EU fest, das Diskriminierungsverbot, das bereits im Jahr 1957 durch den EWGV eingeführt wurde. Da die in Artikel 12 EGV ermöglichten Einschränkungen dieses Verbots nicht ergangen sind, wohl aber einige Urteile des Gerichtshofs das Recht ausgelegt haben, wurde es durch den Verfassungsentwurf als Bürgerrecht nochmals aufgewertet und jegliche Diskriminierung von Unionsbürgern aus Gründen ihrer Staatsangehörigkeit untersagt. Das Recht gilt unmittelbar und kann gemäß diesem Verfassungsentwurf nicht beschränkt werden.

Das in Artikel 12 EGV faktisch für alle Diskriminierungen aus Gründen der Staatsangehörigkeit (also auch für Staatsbürger außerhalb der Unionsbürgerschaft) gültige Recht wird auf die Staatsbürgerschaften innerhalb der Unionsbürgerschaft, also nur für die Unionsbürger im Sinne des Artikels 12 des Verfassungsentwurfs beschränkt.

Schlußfolgerungen

Keine wesentliche Rechtsänderung.

Artikel 14.8

Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung sind zu bekämpfen. Das Nähere regelt ein besonderes Unionsgesetz.

Rechtsvergleiche

ersetzt Artikel 13 EGV.

Kurzkommentar

Das durch den Artikel bestimmte allgemeine Diskriminierungsverbot für Unionsbürger und Ausländer ist so formuliert, daß darin kein einklagbares Recht (im Gegensatz zum Diskriminierungsverbot nach Artikel 14.7) entsteht. Er verpflichtet die Union und ihre Staaten dazu, Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion, einer körperlichen oder geistigen Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen. Diese Bekämpfung erfolgt in spezifischen Tätigkeitsbereichen der EU durch einfaches Unionsrecht, allgemein aber durch das in Artikel 14.8 genannte besondere Unionsgesetz (Unionsgesetz mit einstimmiger Zustimmung des Rates).

Der Artikel ist jedoch durch den Artikel 14 der Europäischen Menschenrechtskonvention in Verbindung mit Artikel 13 des Verfassungsentwurfs teilweise überlagert, da dieser unmittelbar geltendes Recht in der EU ist. So ist die EU nur verpflichtet, die Diskriminierung wegen einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen, die anderen Diskriminierungsarten sind einklagbare Rechte nach Artikel 13 des Verfassungsentwurfs.

Schlußfolgerungen

Das Diskriminierungsverbot nach Artikel 14.8 des Verfassungsentwurfs, das eher ein Staatsziel als ein Grundrecht ist, kann durch ein besonderes Unionsgesetz (siehe Artikel 25 Absatz 1 des Verfassungsentwurfs) als unmittelbar geltendes Recht ausgebaut werden. **Keine wesentliche Rechtsänderung !**

Artikel 14.9

(1) Kein Unionsbürger darf an einen Staat außerhalb der Union ausgeliefert werden.

(2) Wer in einem Unionsstaat wegen eines Verbrechens angeklagt ist und sich der Strafverfolgung durch Flucht in einen anderen Unionsstaat entzieht und dort aufgegriffen wird, ist an den Unionsstaat, aus dem er geflohen ist, auszuliefern, sobald die Regierung dieses Unionsstaates es verlangt.

Rechtsvergleiche

ersetzt Artikel 31 Buchstabe b); siehe auch Artikel 3 des 4. Zusatzprotokolls zur MRK vom 16. September 1963.

zu Absatz 1 vergleiche die Verfassungen einiger Mitgliedstaaten der Europäischen Union (z.B. Artikel 16 Absatz 2 des Grundgesetzes für die Bundesrepublik Deutschland vom 23. Mai 1949, § 7 der Finnischen Regierungsform vom 17. Juli 1919, Artikel 33 Absatz 1 der Verfassung der Republik Portugal vom 2. April 1976, Kapitel 2 § 7 Absatz 1 der Verfassung der Königreichs Schweden vom 1. Januar 1975).

zu Absatz 2 vergleiche Artikel IV. Abschnitt 2 Absatz 2 der Verfassung der Vereinigten Staaten von Amerika vom 17. September 1787.

Kurzkommentar

Der Artikel schafft ein neues Recht, das eng mit dem Ausbau der Unionsstaatsbürgerschaft des Artikels 12 zusammenhängt.

Der Artikel 3 des 4. Zusatzprotokolls zur MRK, der gemäß Artikel 13 des Verfassungsentwurfs unmittelbar geltendes Recht der Europäischen Union ist, besagt, daß kein Staatsbürger durch seinen eigenen Staat aus dessen Staatsgebiet ausgewiesen werden kann. Zwar sind Ausweisung und Auslieferung aufgrund einer strafbaren Handlung zwei verschiedene Rechtssachen, doch besteht ein gewisser Zusammenhang, da eine Auslieferung eine besondere Art der Ausweisung bzw. richtiger gesagt eine Abschiebung aus einem Staatsgebiet und die Verbringung in ein anderes Staatsgebiet darstellt. Die Abschiebung erfolgt jedoch faktisch erst, wenn eine behördlich ausgesprochene Ausweisung durch den Ausgewiesenen nicht erfolgt ist.

Während der Absatz 1 also der Union und ihren Mitgliedstaaten verbietet, einen Unionsbürger, auf welcher Staatsangehörigkeit auch immer diese beruht, im Sinne des Völkerrechts auszuliefern, verpflichtet Absatz 2 die Mitgliedstaaten, eine in einem Unionsstaat straffällig gewordene Person, die sich in ihren Heimatstaat (oder einen anderen Unionsstaat) geflüchtet hat, an den Unionsstaat, in dem die Person straffällig geworden ist (Ort der Straftat) auszuliefern. Somit würden die in den oben aufgeführten Verfassungen der Mitgliedstaaten der EU festgelegten Auslieferungsverbote für eigene Staatsbürger hinsichtlich der Auslieferung an einen Unionsstaat obsolet.

Schlußfolgerungen

Das Auslieferungsverbot für Unionsbürger wurde als Bürgerrecht eingestuft und steht deshalb an dieser Stelle im Verfassungsentwurf. Es enthält einige **neue Rechtsbestimmungen**, die sich auf den gemäßigten Ausbau der Unionsbürgerschaft positiv auswirken und die Union zu einem einheitlichen Rechtsverfolgungsraum im Sinne der Schaffung eines Raums der Freiheit, der Sicherheit und des Rechts nach dem Dritten Teil, Titel IV. EGV und Titel VI. EUV (nach dem Verfassungsentwurf dann Titel IV. Kapitel 1 und 2 EUVneu) machen sollen.

.....

Artikel 30.7

(1) Wird in einem Verfahren vor dem Gerichtshof eine grundsätzliche Frage bezüglich der Auslegung oder des Umfangs der Rechte und Freiheiten aus der, am 4. November 1950 in Rom unterzeichneten Konvention zum Schutze der Menschenrechte und Grundfreiheiten und den weiteren, diese Konvention ergänzenden und ändernden Zusatzprotokolle aufgeworfen, so ist der Gerichtshof verpflichtet, das Verfahren an den, durch diese Konvention errichteten Europäischen Gerichtshof für Menschenrechte abzugeben. Das Urteil des Europäischen Gerichtshofs für Menschenrechte hat die Wirkung eines endgültigen Urteils des Gerichtshofs.

(2) Entscheidungen des Gerichtshofs über die Auslegung oder den Umfang der Rechte und Freiheiten aus der, am 4. November 1950 in Rom unterzeichneten Konvention zum Schutze der Menschenrechte und der weiteren, dieser Konvention ergänzenden und ändernden Zusatzprotokolle können beim Europäischen Gerichtshof für Menschenrechte nach Maßgabe der genannten Konvention angefochten werden.

Rechtsvergleiche

Siehe Artikel 45 des Entwurfs zu einem Vertrag über die Satzung der Europäischen Politischen Gemeinschaft vom 10. März 1953.

Kurzkommentar

Der Artikel beschreibt die Sondervorschriften des Gerichtshofs bei der Auslegung des Artikels 13 des Verfassungsentwurfs.

Der Gerichtshof hat die Zuständigkeit als Wahrer der Menschenrechte und Grundfreiheiten nach den Verfahren der Vorabentscheidung (Þ Artikel 28.4), gegen einen Unionsstaat (Þ Artikel 29.1 bis 29.4) und der Nichtigkeitsklage (Þ Artikel 29.5 und 29.6) , da der Artikel 13 des Verfassungsentwurfs die Menschenrechte und Grundfreiheiten, die im Abschnitt 1. der Europäischen Menschenrechtskonvention und den weiteren Zusatzprotokollen zu dieser Konvention aufgeführt sind, mit unmittelbarer Rechtswirkung in der Europäischen Union ausstattet (unter Einschränkung nach den Bestimmungen der Übergangsbestimmung zu Artikel 13).

So kann sowohl ein Gericht eines Unionsstaates wegen Verletzung eines Rechts aus der Menschenrechtskonvention in einem seiner Verfahren den Gerichtshof anrufen wie auch die ausführende Gewalt (sowohl der Ministerrat als auch die Kommission) und jeder Unionsstaat einen anderen Unionsstaat wegen der Verletzung eines solchen Rechts vor dem Gerichtshof verklagen. Natürlichen und juristischen Personen steht ein direktes Klagerecht im Verfahren der Nichtigkeit (Þ Artikel 29.5 Absatz 2) zu.

Der Gerichtshof wird jedoch durch den Artikel 30.7 verpflichtet, wenn er feststellt, daß in einem Verfahren eine grundsätzliche Frage bezüglich der Auslegung oder dem Umfang eines, in der Konvention niedergelegten Rechts aufgeworfen wird, dieses Verfahren an den Europäischen Gerichtshof für Menschenrechte abzugeben. Wie das weitere Verfahren in einem solchen Fall ist, kann durch den Verfassungsentwurf nicht bestimmt, werden; hier wird wohl eine Absprache zwischen dem Gerichtshof und dem Gerichtshof für Menschenrechte getroffen oder ein Vertrag zwischen der Europäischen Union und dem Europarat geschlossen werden müssen; in jedem anderen Fall müßte ein Unionsstaat, der nicht von dem Verfahren betroffen ist, als Hohe Vertragspartei der Konvention von dem EU-Gerichtshof aufgefordert werden, eine Klage nach Artikel 33 der Konvention ("Staatenbeschwerde") einzulegen. Die Entscheidungen des Gerichtshofs für Menschenrechte nach diesem Artikel haben dann dieselbe Wirkung wie ein Urteil des EU-Gerichtshofs.

Nach Absatz 2 bleibt es einer Verfahrenspartei vor dem EU-Gerichtshof nicht versagt, gegen das Urteil des Gerichtshofs beim Europäischen Gerichtshof für Menschenrechte nach Maßgabe der Konvention eine Klage einzulegen. Hier findet die Konvention, insbesondere der Artikel 34 der Konvention ("Individualbeschwerde") Anwendung und das Urteil des EU-Gerichtshofs gilt als Urteil der letzten innerstaatlichen Instanz.

Schlußfolgerungen

Der Artikel ist zum Schutz der ausschließlichen und endgültigen Auslegung der Menschenrechte nach der Konvention durch den Gerichtshof für Menschenrechte eingefügt worden. Der Gerichtshof wird somit ermächtigt, ohne Urteil das Verfahren an den Gerichtshof für Menschenrechte weiterzuleiten.

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Teil IX. - Übergangsbestimmungen

.....

Zu Artikel 12 Absatz 2 erster Unterabsatz

Für Frankreich findet der Artikel 12 Absatz 2 erster Unterabsatz nur nach Maßgabe des Artikel 88-3 der Verfassung der Französischen Republik Anwendung, und zwar während der Dauer der Gültigkeit des Artikels 88-3 der Verfassung der Französischen Republik.

Anmerkungen

Die Unionsbürger können nach Artikel 88-3 der französischen Verfassung auch weiterhin (auch als ordentliche Gemeindebürger im Sinne des Artikels 12 Absatz 2 erster Unterabsatz dieses Verfassungsentwurfs) nicht Bürgermeister einer französischen Gemeinde werden. Nur wenn der Unionsbürger auch französischer Staatsbürger wird, findet diese Bestimmung keine Anwendung.

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Zu Artikel 13

Die gemäß den Artikeln 56 und 57 der am 4. November 1950 unterzeichneten Konvention zum Schutze der Menschenrechte und Grundfreiheiten und den entsprechenden Artikeln der

Zusatzprotokolle zu dieser Konvention von den Unionsstaaten abgegebenen Erklärungen und Vorbehalte bleiben in Kraft, bis sie durch die Vertragsparteien der Konvention geändert, zurückgenommen oder aufgehoben werden. Solange die Europäische Union nicht Vertragspartei der Konvention ist, kann der Ministerrat die Vertragsparteien verpflichten, die von ihnen abgegebenen Erklärungen und Vorbehalte zu ändern, zurückzunehmen oder aufzuheben oder von einem Unionsstaat nicht ratifizierte Zusatzprotokolle zu ratifizieren.

Anmerkungen

Da in den Verfassungsentwurf keine eigene Grundrechtscharta aufgenommen wurde, dafür aber der Artikel 13 des Verfassungsentwurfs die seit 1953 in Kraft befindliche Europäische Menschenrechtskonvention (MRK) als unmittelbar geltendes Recht erklärt hat (und somit die, seit 1959 einheitlich für alle Mitgliedstaaten des Europarates durch den Europäischen Gerichtshof für Menschenrechte ausgelegten Menschenrechte in allen Teilen der Union Verfassungsrecht sind), wird in der Übergangsbestimmung zum Artikel 13 auf die unterschiedliche Geltung einzelner Bestimmungen der MRK in jedem Unionsstaat Rücksicht genommen. Nur diejenigen Menschenrechte und Grundfreiheiten gelten einheitlich in der EU, für welche durch die Unionsstaaten keine Vorbehalte gemacht wurden.

Die in dem Verfassungsentwurf als Unionsstaaten vorgesehenen Staaten haben alle Vorbehalte oder wenigstens Erklärungen zur MRK abgegeben, außer Belgien, Zypern, Dänemark, Griechenland, Italien, Lettland, Luxemburg, Polen, Slowenien und Schweden; für die genannten Staaten gelten also alle Menschenrechte und Grundfreiheiten nach der EMRK, wiederum jedoch nicht alle, in den Protokollen niedergelegten Menschenrechte. Frankreich, Großbritannien und die Niederlande haben sogar Territorialerklärungen abgegeben, die Teile ihres Staatsgebiets (hier insbesondere außereuropäische Gebiete) von der Wirkung der MRK ausnehmen (ganz oder teilweise). Das Protokoll Nr. 4 zur MRK (Verbot von Freiheitsentziehung wegen Schulden, Freizügigkeit, Verbot von Ausweisungen) wurde von Großbritannien nicht ratifiziert. Das Protokoll Nr. 6 (Abschaffung der Todesstrafe) wurde von Belgien, Zypern, Estland, Griechenland, Lettland, Litauen, Polen und Großbritannien zwar nicht ratifiziert, die Todesstrafe wurde jedoch nach nationalem Recht abgeschafft bzw. nicht mehr angewendet (hierzu besteht auch eine Erklärung in der Schlußakte zum Vertrag von Amsterdam vom 2.10.1997). Das Protokoll Nr. 7 (verschiedene Bestimmungen zum Strafverfahren) wurde von Belgien, Zypern, Deutschland, Irland, den Niederlanden, Polen, Portugal, Spanien und Großbritannien noch nicht ratifiziert. Die, die Protokolle ratifizierenden Staaten haben teilweise Vorbehalte oder Erklärungen abgegeben.

Die Vorbehalte und Erklärungen zur MRK und dessen Zusatzprotokollen bleiben in den einzelnen Unionsstaaten gemäß der Übergangsbestimmung zwar erhalten, da eine solche Ungleichheit in der Rechtswirkung einzelner Grundrechte der MRK und seiner Protokolle in den einzelnen Unionsstaaten nicht auf Dauer bestehen kann und soll, wird jedoch der Ministerrat ermächtigt (solange die EU nicht selbst Vertragspartei der MRK ist), einzelne Mitgliedstaaten zu verpflichten, solche Vorbehalte oder Erklärungen zurückzunehmen und Zusatzprotokolle zu ratifizieren. Der Unionsstaat hat dieser Verpflichtung nachzukommen.

Zu Artikel 14.1

1. Die bestehenden Beschränkungen der Freizügigkeit für Unionsbürger innerhalb des Unionsgebiets bleiben für weitere zehn Jahre in Kraft, doch kann die Union durch verbindliche Rechtsakte im Rahmen der Bestimmungen der Artikel 40, 41 und 42 des Vertrags über die Europäische Union sowie der Artikel 40, 42, 44 und 47 des Vertrags zur Gründung der Europäischen Gemeinschaft Vorschriften erlassen, mit denen die Ausübung dieses Rechts erleichtert wird.

   Durch verbindlichen Rechtsakt ist sicherzustellen, daß mit dem Ablauf der zehnjährigen Frist das Recht der Freizügigkeit innerhalb des Unionsgebiets nach Maßgabe des Artikels 14.1 uneingeschränkt wahrgenommen werden kann.

   Mit dem Ablauf der zehnjährigen Übergangsfrist werden folgende Bestimmungen des Vertrags über die Europäische Union geändert:

   a) In Artikel 40 Buchstabe a) werden die Worte "Maßnahmen zur Gewährleistung des freien Personenverkehrs nach Artikel 14 des Vertrags zur Gründung der Europäischen Gemeinschaft in Verbindung mit unmittelbar damit zusammenhängenden flankierenden" gestrichen.

   b) In Artikel 41 Nr. 1 werden die Worte: ", daß Personen, seien es Bürger der Union oder" ersetzt durch "daß" und nach dem Wort "Länder" entfällt das Komma.

2. Für das Königreich Dänemark findet das Protokoll über die Position Dänemarks im Anhang zum Vertrag über die Europäische Union und zum Vertrag zur Gründung der Europäischen Gemeinschaft weiterhin Anwendung. 3. Für das Vereinigte Königreich von Großbritannien und Nordirland sowie für Irland findet das "Protokoll über die Anwendung bestimmter Aspekte des Artikels 14 des Vertrags zur Gründung der Europäischen Gemeinschaft auf das Vereinigte Königreich und auf Irland" auch nach dem Ablauf der in Absatz 1 festgelegten zehnjährigen Frist entsprechende Anwendung.

Anmerkungen

Die Ziffer 1 der Übergangsbestimmung zu Artikel 14.1 des Verfassungsentwurfs entwickelt den Artikel 18 EGV weiter, indem er die Freizügigkeit für Unionsbürger innerhalb des Unionsgebiets, das im Artikel 18 Absatz 1 EGV mit genereller Einschränkung geschaffen, und deren Beschränkungen in Artikel 14.1 des Verfassungsentwurfs fast vollständig aufgehoben wurden. Da jedoch eine sofortige vollständige Freigabe der Freizügigkeit durch die Mitgliedstaaten wohl nicht gewünscht und auch nicht durchgesetzt werden könnte, hat der Verfassungsentwurf erstmals eine zehnjährige Frist gesetzt, während der die Freizügigkeit mit Blick auf die volle Gültigkeit des Artikels 14.1 geschaffen werden soll. Mit dem Ablauf der Frist fällt jede Beschränkung fort, auch wenn der in Absatz 2 der Ziffer 1 vorgesehene Rechtsakt zur Sicherstellung der Freizügigkeit nicht ergangen wäre. Mit dem Ablauf der Frist kann jeder Unionsbürger sein Freizügigkeitsrecht gerichtlich einklagen und somit auch durchsetzen. Die im Absatz 3 genannten Verfassungsänderungen dienen der Klarstellung der, nach der Frist eintretenden Rechtslage im Bereich der Innenpolitik der EU.

Hinweis: die genannten Artikel 40, 41 und 42 des EUV haben den (nur in Details geänderten) Wortlaut der Artikel 61, 62 und 62 EGV in der geltenden Fassung; die genannten Artikel 40, 42, 44 und 47 EGV wurden teilweise erheblich geändert !

Die Ziffern 2 und 3 bestätigen wiederum das Sonderrecht Dänemarks, Großbritanniens und Irlands hinsichtlich der Freiheit des Personenverkehrs innerhalb der EU, zu dem auch die Freizügigkeit gehört.

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Zu Artikel 14.5

Die gemäß Artikel 255 des Vertrags zur Gründung der Europäischen Gemeinschaft in der Fassung des am 2. Oktober 1997 unterzeichneten Vertrags von Amsterdam festgelegten Grundsätze und Bedingungen gelten bis zum Erlaß des Unionsgesetzes gemäß Artikel 14.5 dieser Verfassung entsprechend fort; diese können nur durch einen verbindlichen Rechtsakt der Union geändert, ergänzt oder aufgehoben werden.

Anmerkungen

Um eine neuerliche Beschlußfassung über die Grundsätze betreffend den öffentlichen Zugang zu den Dokumenten der Europäischen Union, die bereits gemäß dem bisherigen Artikel 255 EGV erlassen werden konnten, auszuschließen, wurden die bereits beschlossenen Grundsätze in der Übergangsbestimmung zu Artikel 14.5 als fortgeltend bezeichnet; die bisherige Beschlußfassung hat somit dieselbe Rechtswirkung wie der in Absatz 2 des Artikels genannte Rechtsakt der Union und kann auch nur durch einen solchen geändert, ergänzt oder aufgehoben werden.
Die Übergangsbestimmung ist eine Sonderbestimmung zur Fortgeltung von bestehendem Recht unter dem Verfassungsentwurf und damit eng mit der zweiten Schlußbestimmung des Verfassungsentwurfs verbunden.

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Zu Artikel 14.6

Die gemäß Artikel 286 des Vertrags zur Gründung der Europäischen Gemeinschaft in der Fassung des am 2. Oktober 1997 unterzeichneten Vertrags von Amsterdam anwendbaren Rechtsakte gelten bis zum Erlaß des Unionsgesetzes gemäß Artikel 14.6 entsprechend fort; diese können nur durch Unionsgesetz geändert, ergänzt oder aufgehoben werden.

Anmerkungen

Wie die Übergangsbestimmung zu Artikel 14.5 ist auch die Übergangsbestimmung zu Artikel 14.6 eine Sonderbestimmung zur Fortgeltung bestehenden Rechts, hier das Recht auf Datenschutz, das gemäß dem bisherigen Artikel 286 EGV erlassen werden konnte.

Ich hoffe auf ein gutes Gelingen des Konvents und verbleibe hochachtungsvoll Thomas Clement

PROYECTO DE CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

fundamental.rights@consilium.eu.int

Bruselas, 10 de abril de 2000 (12.04)
(OR. fr)

CHARTE 4217/00

CONTRIB 93

NOTA DE TRANSMISIÓN

Asunto: Proyecto de Carta de los derechos fundamentales de la Unión Europea

Se adjunta una contribución de D. Isaac Ibañez Garcia. [1] [2]

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[2] Este texto se ha presentado en lengua española únicamente.

PROPUESTA RELATIVA AL CONTENIDO DE LA CARTA DE DERECHOS FUNDAMENTALES DE LA UNION EUROPEA

Autor: Isaac Ibáñez García

I.- I N T R O D U C C I O N.

En el Consejo Europeo de Colonia (3 y 4 de junio de 1.999) los Jefes de Estado o de Gobierno, se pusieron de acuerdo sobre la idea de que, en el actual estado de evolución de la Unión, era necesario establecer una Carta de los derechos fundamentales con el fin de poner de manifiesto la importancia sobresaliente y el alcance de los mismos ante los ciudadanos de la Unión.

La Carta se adoptaría mediante una declaración solemne y conjunta del Consejo Europeo, el Parlamento Europeo y la Comisión.

En una fase posterior a este proceso se examinaría si la Carta debe incorporarse a los Tratados y, en caso afirmativo, de qué modo ha de hacerse.

El Consejo ha estimado que dicha Carta deberá incluir los derechos de libertad e igualdad y los principios procesales fundamentales. **La carta deberá contener asimismo los derechos básicos que corresponden únicamente a los ciudadanos de la Unión.**

A mi juicio, en dicha Carta, con finalidad codificadora, deben incluirse asimismo aquellos derechos fundamentales ya reconocidos por los Tratados, como el **Derecho de petición**.

II.- EL DERECHO DE PETICIÓN EN LA UNION EUROPEA.

En mi opinión el artículo 21 del Tratado CE, en su redacción dada por el Tratado de Ámsterdam, supone un avance sobre su regulación anterior, pero tiene una redacción confusa, que puede llegar a ser interpretada como que el Derecho de petición únicamente puede ejercitarse ante el Parlamento Europeo y no ante el resto de las instituciones u organismos de la Unión. De hecho así ha llegado a interpretarse por alguna.

Restringir el ejercicio de petición al Parlamento Europeo no tiene sentido jurídico, pues las peticiones deben poder dirigirse a todas aquellas instituciones que tienen poder de iniciativa en los ámbitos de actuación de la Comunidad.

Asimismo, el inciso **"que le afecte directamente"** incluido en el artículo 194 del Tratado CE, supone desconocer el Derecho de petición como un derecho de carácter fundamentalmente político (vid. Derecho de petición y derecho de queja. I. Ibáñez García. Ed. Dykinson. Madrid, 1993). De hecho, la Comisión de peticiones del Parlamento Europeo ha llegado a interpretar este inciso de forma contraria a su interpretación literal, con el fin de no restringir la utilización del propio Derecho.

El artículo 8 D del Tratado CE, en su redacción dada por el Tratado de Maastricht, era del siguiente tenor:

"Todo ciudadano de la Unión tendrá el derecho de petición ante el Parlamento Europeo, de conformidad con lo dispuesto en el artículo 138 D.

Todo ciudadano de la Unión podrá dirigirse al Defensor del Pueblo instituido en virtud de lo dispuesto en el artículo 138 E".

Al antiguo artículo 8 D del Tratado CE (ahora artículo 21), el Tratado de Amsterdam ha añadido un importante tercer párrafo:

"Todo ciudadano de la Unión podrá dirigirse por escrito a cualquiera de las instituciones u organismos contemplados en el presente artículo o en el artículo 7 en una de las lenguas mencionadas en el artículo 314 y recibir una contestación en esa misma lengua".

Se amplía así el derecho de petición originariamente reconocido ante el Parlamento Europeo y el Defensor del Pueblo (en este caso, *rectius*, derecho de queja o reclamación), al resto de las instituciones y organismos de la Unión, es decir, puede ejercitarse tal derecho, además, ante el Consejo, la Comisión, el Tribunal de Justicia, el Tribunal de Cuentas, el Comité Económico y Social y el Comité de las Regiones.

De la Resolución del Parlamento Europeo sobre las deliberaciones de la Comisión de Peticiones durante el año parlamentario 1998-1.999 y del Informe de dicha Comisión sobre sus deliberaciones en citado año parlamentario, pueden destacarse las siguientes apreciaciones:

- Considerando que el derecho de petición impone al Parlamento Europeo la correspondiente obligación de tramitar las peticiones de la forma más efectiva posible, con la asistencia de la Comisión y de los órganos competentes del Parlamento.

- Subraya que el derecho de petición aumenta las posibilidades de los ciudadanos de la Unión en cuanto a la participación e información democráticas...

- Destaca que es el Parlamento en su conjunto quien, debido a su propia función y responsabilidad política, garantiza en una respuesta directa al ciudadano el derecho de petición reconocido en el Tratado de la Unión Europea.

- Las cifras demuestran que los ciudadanos recurren con frecuencia a su derecho de petición, gratuito para ellos y que puede referirse a todos los asuntos comunitarios que incidan en el ámbito de actividades de la Unión Europea.

- Las peticiones tienen una importante función en la detección y tramitación de casos de infracción.

- Las peticiones se pueden transmitir (por la Comisión de Peticiones) a otra comisión o delegación de acuerdo con los procedimientos establecidos, “para información”, “para actuación”, para que se tengan en cuenta en el examen de cualquier propuesta legislativa relacionada, o “para opinión”, único caso en que cabe exigir una respuesta escrita de la comisión de que se trate.

El Informe de 6 de mayo de 1.988 de la Dirección General de Estudios del Parlamento Europeo, concluye:

"El derecho de petición se considera en todos los países europeos como una característica esencial del Estado de Derecho. Con frecuencia, este derecho tiene un efecto preventivo. En los países en los que desempeña un papel más importante, este hecho tiene como consecuencia que el parlamento sea informado más detalladamente de las preocupaciones y de las opiniones de los ciudadanos y que, de este modo, pueda satisfacer de forma más eficaz su misión de órgano de control del ejecutivo**. De la función del derecho de petición como instrumento político podrían derivarse consecuencias para un parlamento en forma de la aprobación o la modificación de leyes**".

La Comisión Europea, en su segundo informe sobre la ciudadanía de la Unión, de 27 de mayo de 1.997, considera que las peticiones constituyen una medida extrajudicial de protección de los derechos individuales y colectivos, a disposición de toda persona residente en la Unión; señalando que a través de las peticiones la Comisión ha abierto diversos procedimientos de infracción contra Estados miembros por violación del Derecho comunitario.

De las palabras de BENJAMIN CONSTANT, en su famosa conferencia de 1819 *De la liberté de les modernes comparée avec celle des anciens* (recogidas por el profesor GARCIA DE ENTERRIA en su obra: Justicia y seguridad jurídica en un mundo de leyes desbocadas. Civitas, 1999) se ve como el derecho de petición es un instrumento al servicio de la libertad:

> "Preguntaos primero, señores, lo que en nuestros días un inglés, un francés, un habitante de los Estados Unidos de América entienden por la palabra libertad. Es para cada uno el derecho de no estar sometido más que a leyes, de no poder ser detenido, ni llevado a prisión, ni condenado a muerte ni maltratado de ninguna manera por el efecto de la voluntad arbitraria de uno o varios individuos. Es para cada uno el derecho de decir su opinión, de escoger su trabajo y de ejercerlo; de disponer de su propiedad, incluso de abusar de ella; de ir y venir sin necesidad de obtener un permiso y sin tener que dar cuenta de sus motivos o de sus pasos. Es, para cada uno, el derecho de reunirse con otros individuos, sea para tratar de sus propios intereses, sea para profesar el culto que él y sus asociados prefieran, sea, simplemente, para llenar sus días y sus horas de la manera más conforme a sus inclinaciones, a sus fantasías. **En fin, es el derecho para cada uno de influir sobre la administración del gobierno, bien por el nombramiento de todos o de ciertos funcionarios, bien por exposiciones, peticiones, demandas que la autoridad esté más o menos obligada a tomar en consideración**".

III.- C O N C L U S I O N. PROPUESTA.

A nuestro juicio, el Derecho de Petición debe ser incorporado a la Carta de derechos fundamentales de la Unión Europea; con una redacción que posibilitara una recta interpretación del Derecho reconocido en el Tratado y que, en su momento –si decide incorporarse el contenido de la Carta a los Tratados- mejorara la redacción de los mismos.

Una posible redacción a incorporar a la Carta sería la siguiente:

"Cualquier ciudadano de la Unión, así como cualquier persona física o jurídica que resida o tenga su domicilio social en un Estado miembro, tendrá derecho a presentar ante las instituciones u organismos contemplados en los Tratados, individualmente o asociado con otros ciudadanos o personas, una petición sobre un asunto propio de los ámbitos de actuación de la Unión Europea. El peticionario tiene derecho a recibir una contestación motivada sobre el fondo del asunto planteado en el más breve plazo posible".

Asimismo, considero que debería recogerse en la Carta el derecho a presentar quejas ante el Defensor del Pueblo Europeo.

Plasencia, 31 de marzo de 2.000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 7 April 2000

CHARTE 4219/00

CONTRIB 94

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a recommendation and a report by the Council of Europe on Protection of human rights and dignity of the terminally ill and dying, submitted by Mr. Reinhard Rack, member of the German Bundestag. [1]

[1] These texts have been submitted in French and English languages.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE
Parliamentary Assembly
Assemblée parlementaire

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Provisional edition

Protection of the human rights and dignity of the terminally ill and the dying

Recommendation 1418 (1999)[1]

1. The vocation of the Council of Europe is to protect the dignity of all human beings and the rights which stem therefrom.

2 Medical progress, which now makes it possible to cure many previously incurable or fatal diseases, the improvement of medical techniques and the development of resuscitation techniques, which make it possible to prolong a person's survival, defer the moment of death. As a result the quality of life of the dying is often ignored, as is their loneliness, their suffering and that of their families and of the care-givers.

3. In 1976, in its Resolution 613, the Assembly declared that it was "*convinced that what dying patients most want is to die in peace and dignity, if possible with the comfort and support of their family and friends*", and added in its Recommendation 779 that "*the prolongation of life should not in itself constitute the exclusive aim of medical practice, which must be concerned equally with the relief of suffering*".

4. Since then, the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine has formed important principles and paved the way without explicitly referring to the specific requirements of the terminally ill or dying.

[1] Assembly debate on 25 June 1999 (24th Sitting). See Doc. 8421, report of the Social, Health and Family Affairs Committee (rapporteur: Mrs Gatterer) and Doc. 8454, opinion of the Committee on Legal Affairs and Human Rights (rapporteur: Mr McNamara). Text adopted by the Assembly on 25 June 1999 (24th Sitting).

5. The obligation to respect and to protect the dignity of a terminally ill or dying person derives from the inviolability of human dignity in all stages of life. This respect and protection find their expression in the provision of an appropriate environment, enabling a human being to die in dignity.

6. This task has to be carried out especially for the benefit of the most vulnerable members of society, a fact demonstrated by the many experiences of suffering in the past and the present. Just as a human being begins his or her life in weakness and dependency, he or she needs protection and support when dying.

7. Fundamental rights deriving from the dignity of the terminally ill or dying person are threatened today by a variety of factors:

i. the insufficient access to palliative care and good pain management;

ii. the often lacking treatment of physical suffering and psychological, social and spiritual needs;

iii. the artificial prolongation of the dying process by either using disproportionate medical measures or by continuing treatment without a patient's consent;

iv. the lack of continuing education and psychological support for health care professionals, working in palliative medicine,

v. insufficient care and support for relatives and friends of terminally ill or dying patients, which otherwise could elevate human suffering in its various dimensions,

vi. the fear of patients to loose control of themselves and to become a burden to and totally dependent upon relatives or institutions;

vii. the lack or inadequacy of a social as well as institutional environment in which someone may take leave of his relatives and friends peacefully;

viii. the insufficient allocation of funds and resources for the care and support of the terminally ill or dying;

ix. the social discrimination of the phenomena of weakness, dying and death.

8. The Assembly calls upon member states to provide in domestic law the necessary legal and social protection against these specific dangers and fears which a terminally ill or dying person may be faced with in domestic law, and in particular against:

i. dying exposed to unbearable symptoms (for example, pain, suffocating, etc.);

ii. prolongation of the dying process of a terminally ill or dying person against his or her will;

iii. dying in social isolation and disintegration;

iv. dying under the fear of being a social burden;

v. limiting of life-sustaining treatment due to economic reasons;

vi. insufficient provision of funds and resources for adequate supportive care of the terminally ill or dying.

9. The Assembly therefore recommends that the Committee of Ministers encourage the member states of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects:

a. by recognising and protecting a terminally ill or dying person's right to comprehensive palliative care, while taking the necessary measures

i. to ensure that palliative care be recognised as a legal entitlement of the individual in all member states;

ii. to provide equitable access to appropriate palliative care for all terminally ill or dying persons;

iii. to ensure that relatives and friends be encouraged to accompany the terminally ill or dying and be professionally supported in their endeavours. If family and/or private networks prove to be either insufficient or overstretched, alternative or supplementing forms of professional medical care are to be provided;

iv. to provide for ambulant hospice teams and networks, to ensure that palliative care be available at home, wherever ambulant care for the terminally ill or dying may be feasible;

v. to ensure co-operation between all those involved in the care of a terminally ill or dying person;

vi. to ensure the development and implementation of quality standards for the care of the terminally ill or dying;

vii. to ensure that a terminally ill or dying person will receive adequate pain relief (unless the patient chooses otherwise) and palliative care, even if this treatment as a side-effect may contribute to the shortening of the individual's life;

viii. to ensure that health professionals be trained and guided to provide medical, nursing and psychological care for any terminally ill or dying person in co-ordinated teamwork, according to the highest standards possible;

ix. to set up and further develop centres of research, teaching and training in the fields of palliative medicine and care as well as in interdisciplinary thanatology;

x. to ensure that specialised palliative care units as well as hospices be established at least in larger hospitals, from which palliative medicine and care are to evolve as an integral part of any medical treatment;

xi. to ensure that palliative medicine and care be firmly established in public awareness as an important goal of medicine.

b. by protecting the terminally ill or dying person's right to self-determination*, while taking the necessary measures*

i. to give effect to a terminally ill or dying person's right to truthful and comprehensive, yet compassionately delivered information on his or her health condition while respecting an individual's wish not to be informed;

ii. to enable any terminally ill or dying person to consult doctors other than his or her usual doctor;

iii. to ensure that no terminally ill or dying person be treated against his or her will while ensuring that the individual neither be influenced nor pressured by another person. Furthermore, safeguards are to ensure that this wish not be formed under economic pressure;

iv. to ensure that a currently incapacitated terminally ill or dying person's advance directive or living will refusing specific medical treatments be observed. Furthermore, by ensuring that criteria of validity as to the bearing of such advance directives as well as the nomination of proxies and the scope of their authority be defined; and by ensuring that surrogate decisions by proxies based on advance personal statements of will or assumptions of will are only to be taken if the will of the person concerned has not been expressed directly in the situation or if there is no recognisable will. In this context, there must always be a clear connection to statements that were made by the person in question close in time to the decision-making situation, referring specifically to the dying situation, and in an appropriate situation without exertion of pressure or mental disability. To ensure that surrogate decisions that rely on general value judgements present in society should not be admissible and that in case of doubt, the decision must always be for life and the prolongation of life;

v. to ensure that — notwithstanding the physician's ultimate therapeutic responsibility — expressed wishes of a terminally ill or dying person with regard to particular forms of treatment be taken into account, provided they do not violate human dignity;

vi. to ensure that in situations where an advance directive or living will does not exist the patient's right to life not be infringed upon. A catalogue of treatments which under no condition may be withheld or withdrawn is to be defined.

c. by upholding the prohibition against intentionally taking the life of terminally ill or dying persons*, while taking the necessary measures*

i. recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member states, in accordance with Article 2 of the European Convention on Human Rights which states that "*no one shall be deprived of his life intentionally*...";

ii. recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;

iii. recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.

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Doc. 8421
21 May 1999

Protection of the human rights and dignity of the terminally ill and the dying

Report
Social, Health and Family Affairs Committee
Rapporteur: Mrs Edeltraud Gatterer, Austria, Group of the European People's Party

Summary

At the approach of death, patients are faced with specific fears, anxieties and dangers, which are most often ignored or underestimated. Their vulnerability, state of weakness and dependency, their suffering and loneliness are painful factors which weigh heavily on them.

Respect and protection of the dignity of a terminally-ill or a dying person implies above all the provision of an appropriate environment, enabling him or her to die in dignity. Priority should therefore be given to the development of palliative care and the treatment of pain, and to the social and psychological support of patients and their families.

Legal and social protection should be strengthened. In this framework, a right to self-determination and a right to comprehensive information, need to be recognised for the terminally-ill and the dying. Patients should never be given treatment against their will.

Lastly, the fundamental right to life as established in Article 2 of the European Convention on Human Rights needs to be recalled and fully guaranteed, in the special conditions which constitute the terminal phase of life. The report consequently calls on states to uphold the prohibition of intentionally taking the life of terminally-ill or dying persons.

I. Draft recommendation

1. The vocation of the Council of Europe is to protect the dignity of all human beings and the rights which stem therefrom.

2. Medical progress, which now makes it possible to cure many previously incurable or fatal diseases, the improvement of medical techniques and the development of resuscitation techniques, which make it possible to prolong a person's survival, defer the moment of death. As a result the quality of life of the dying is often ignored, as is their loneliness, their suffering and that of their families and of the care-givers.

3. In 1976, in its Resolution 613, the Assembly declared that it was "*convinced that what dying patients most want is to die in peace and dignity, if possible with the comfort and support of their family and friends*", and added in its Recommendation 779 that "*the prolongation of life should not in itself constitute the exclusive aim of medical practice, which must be concerned equally with the relief of suffering*".

4. Since then, the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine has formed important principles and paved the way without explicitly referring to the specific requirements of the terminally ill or dying.

5. The obligation to respect and to protect the dignity of a terminally ill or dying person derives from the inviolability of human dignity in all stages of life. This respect and protection find their expression in the provision of an appropriate environment, enabling a human being to die in dignity.

6. This task has to be carried out especially for the benefit of the most vulnerable members of society, a fact demonstrated by the many experiences of suffering in the past and the present. Just as a human being begins his or her life in weakness and dependency, he or she needs protection and support when dying.

7. Fundamental rights deriving from the dignity of the terminally ill or dying person are threatened today by a variety of factors:

i the insufficient access to palliative care and good pain management;

ii. the often lacking treatment of physical suffering and psychological, social and spiritual needs;

iii. the artificial prolongation of the dying process by either using disproportionate medical measures or by continuing treatment without a patient's consent;

iv. the lack of continuing education and psychological support for health care professionals, working in palliative medicine,

vi. insufficient care and support for relatives and friends of terminally ill or dying patients, which otherwise could elevate human suffering in its various dimensions,

vii. the fear of patients to loose control of themselves and to become a burden to and totally dependent upon relatives or institutions;

viiii. the lack or inadequacy of a social as well as institutional environment in which someone may take leave of his relatives and friends peacefully;

viii. the insufficient allocation of funds and resources for the care and support of the terminally ill or dying;

ix. the social discrimination of the phenomena of weakness, dying and death.

8. The Assembly calls upon member states to provide in domestic law the necessary legal and social protection against these specific dangers and fears which a terminally ill or dying person may be faced with in domestic law, and in particular against:

i. dying exposed to unbearable symptoms (e.g. pain, suffocating, etc);

ii. prolongation of the dying process of a terminally ill or dying person against his or her will;

iii. dying in social isolation and disintegration;

iv. dying under the fear of being a social burden;

v. limiting of life-sustaining treatment due to economic reasons;

vi. insufficient provision of funds and resources for adequate supportive care of the terminally ill or dying.

9. The Assembly therefore recommends that the Committee of Ministers encourage the member states of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects:

a) by recognising and protecting a terminally ill or dying person's right to comprehensive palliative care, while taking the necessary measures

i. to ensure that palliative care be recognised as a legal entitlement of the individual in all member states;

ii. to provide equitable access to appropriate palliative care for all terminally ill or dying persons;

iii. to ensure that relatives and friends be encouraged to accompany the terminally ill or dying and be professionally supported in their endeavours. If family and/or private networks prove to be either insufficient or overstretched, alternative or supplementing forms of professional medical care are to be provided;

iv. to provide for ambulant hospice teams and networks, to ensure that palliative care be available at home, wherever ambulant care for the terminally ill or dying may be feasible;

v. to ensure co-operation between all those involved in the care of a terminally ill or dying person;

vi. to ensure the development and implementation of quality standards for the care of the terminally ill or dying;

vii. to ensure that a terminally ill or dying person will receive adequate pain relief (unless the patient chooses otherwise) and palliative care, even if this treatment as a side-effect may contribute to the shortening of the individual's life;

viii. to ensure that health professionals be trained and guided to provide medical, nursing and psychological care for any terminally ill or dying person in co-ordinated teamwork, according to the highest standards possible;

ix. to set up and further develop centres of research, teaching and training in the fields of palliative medicine and care as well as in interdisciplinary thanatology;

x. to ensure that specialised palliative care units as well as hospices be established at least in larger hospitals, from which palliative medicine and care are to evolve as an integral part of any medical treatment;

xi. to ensure that palliative medicine and care be firmly established in public awareness as an important goal of medicine.

b. by protecting the terminally ill or dying person's right to self-determination*, while taking the necessary measures*

i. to give effect to a terminally ill or dying person's right to truthful and comprehensive, yet compassionately delivered information on his or her health condition while respecting an individual's wish not to be informed;

ii. to enable any terminally ill or dying person to consult doctors other than his or her usual doctor;

iii. to ensure that no terminally ill or dying person be treated against his or her will while ensuring that the individual neither be influenced nor pressured by another person. Furthermore, safeguards are to ensure that this wish not be formed under economic pressure;

iv. to ensure that a currently incapacitated terminally ill or dying person's advance directive or living will refusing specific medical treatments be observed. Furthermore, by ensuring that criteria of validity as to the bearing of such advance directives as well as the nomination of proxies and the scope of their authority be defined;

v. to ensure that - notwithstanding the physician's ultimate therapeutic responsibility - expressed wishes of a terminally ill or dying person with regard to particular forms of treatment be taken into account, provided they do not violate human dignity;

vi. to ensure that in situations where an advance directive or living will does not exist the patient's right to life not be infringed upon. A catalogue of treatments which under no condition may be withheld or withdrawn is to be defined.

c. by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while taking the necessary measures

i. to ensure that the right to life, especially with regard to a terminally ill or dying person, be guaranteed by the member states, in accordance with Article 2 of the European Convention on Human Rights which states that "*no one shall be deprived of his life intentionally...*";

ii. to ensure that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;

iii. to ensure that a terminally ill or dying person's wish to die never constitutes any legal justification to carry out actions intended to bring about death.

II. Explanatory memorandum by Mrs Gatterer

INTRODUCTION

1. It is undisputed that dealing with the concerns of the terminally ill or dying is to be guided by the notion of human dignity and the concept of human rights founded therein.

2. The 1997 European Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine protects in accordance with other relevant international documents on human rights the dignity and identity of every human being. It guarantees everybody, without discrimination, respect for their integrity and rights and fundamental freedoms.

3. Dignity is bestowed equally upon all human beings, regardless of age, race, sex, particularities or abilities, of conditions or situations, which secures the equality and universality of human rights. Dignity is a consequence of being human. Thus a condition of being can by no means afford a human being its dignity nor can it ever deprive him or her of it.

4. Dignity is inherent in the existence of a human being. If human beings possessed it due to particularities, abilities or conditions, dignity would neither be equally nor universally bestowed upon all human beings. Thus a human being possesses dignity throughout the course of life. Pain, suffering or weakness do not deprive a human being of his or her dignity.

5. The equality and universality of human dignity and human rights do not originate from a convention. One possesses dignity and its subsequent rights not due to the recognition of other human beings, but due to one's descent from them.

6. An individual's dignity can be respected or violated, yet it can neither be granted nor lost. Respect for human dignity is independent of factual reciprocity. Respect for human dignity is also due where reciprocity is not, not yet or not anymore possible (i.e. towards patients in coma). To believe that human dignity may be divided or limited only to certain stages or conditions of life is a form of disregard for human dignity.

7. The recognition and protection of the dignity of the most vulnerable members of society – who may find it difficult to express themselves on a societal level – have proven to be inadequate. The terminally ill or dying are among these vulnerable members of society. Due to their public marginalisation they are in danger of being exposed to individual, social and societal pressure.

8. The responsibility of affording a terminally ill or dying person with the means and the infrastructure worthy of his or her dignity results from the fundamental understanding that human dignity is imperishable.

9. Among the factors obstructing humane dying and palliative care in our societies, the primary one is the decreasing willingness to confront oneself with death and dying.

10. Most people wish to die in familiar surroundings, yet, in Europe, in the majority of cases, death takes place in hospitals and nursing homes. This is related to lacking or deficient social structures.

11. Although palliative medicine and care have made remarkable progress, its practical application still appears far behind the state of the art. This deficiency results from lack of training and teaching, false apprehensions, prejudices as well as lack of societal awareness.

12. It is evident that there is a tendency to use excessive technical therapy and to apply inappropriately high medical technology even in cases where an agonising process of dying thereby is prolonged in an inhumane way.

13. Especially deficiencies in the structures of public health care providers create problems with regard to care for the terminally ill or dying.

14. Human care for the terminally ill or dying implies the readiness to provide sufficient allocations of funds and resources for the benefit of palliative medicine and care.

15. Illness, suffering and death per se cannot deprive any individual of his or her dignity, yet often, certain circumstances may be regarded as inhumane to the extent that an individual is left alone in his helplessness in those instances where suffering could be avoided.

16. Meeting the needs of a terminally ill or dying person is the purpose of palliative medicine and care. Palliative medicine and care therefore should become an integral part of medicine as such.

17. The World Heath Organisation describes palliative care as "*the active total care of patients whose disease is not responsive to curative treatment. Control of pain, of other symptoms and of psychological, social and spiritual problems is paramount. The goal of the palliative care is achievement of the best possible quality of life for patients and their families*."

18. Palliative medicine and care thus is an approach of understanding human being holistically in both its psychological and physical dimensions. In addition to pain-treatment in the narrower sense of the word, it therefore comprises psycho-social and spiritual care.

19. An individual's right to self-determination is rooted in his inviolable and inseparable dignity. This right to self-determination is to be protected against any extraneous influences.

20. The legal systems of the Member States of the Council of Europe penalise the killing of human beings. Now, it is necessary to confirm this fundamental legal good especially with regard to the terminally ill and dying, since there is a grave danger that in particular with regard to this group of people at their last stage of life, justifications may be sought under various pretences (pity, shortage of resources, ambivalent expressions of will) in order to undermine the fundamental prohibition against taking life.

A. TO RECOGNISE AND TO PROTECT A TERMINALLY ILL OR DYING PERSON'S RIGHT TO COMPREHENSIVE PALLIATIVE CARE

21. The Member States are to pay special attention to making it possible to fulfil the wish of the majority of the terminally ill or dying to be able to die in a familiar surrounding. Ambulatory, flexible care services are to be supported. Socio-political programmes operating under given conditions are to enable children to accompany their parents in taking leave of this world as they themselves cared for their children when they entered into it.

22. Apart from the Convention for the Protection of Human Rights and the Dignity of the Human Being with Regard to the Application of Biology and Medicine, article 13 of the European Social Charter also foresees equal access to health care services of appropriate quality. To guarantee this principle for the terminally ill or dying is a pressing need.

23. One important political goal of health services is to guarantee palliative medicine and care of appropriate quality. The humanity of a society finds its expression not least in its care of the weak and dying.

24. If a family desires to care for a dying person they often need professional advice and help. There is not only a need for medical and nursing assistance but also for psychological and, if wished, for religious and spiritual support. Familiar relations in the widest sense (family, friends, neighbours ...) as close and trusted contacts, are to be supported by professional services in such a way that they can adequately accompany the last phase of life at home. In this context the necessary measures must be taken to provide for instruction in basic care for this circle of persons.

25. The additional use of voluntary assistants play an important part in accompanying and caring for dying persons. Continuity and normality of life can be maintained through their contribution. Volunteers in the care of dying persons should be trained and supported and take over independent tasks in a team with professionals.

26. In numerous hospitals throughout Europe, relatives and friends or other involved persons are restrained from spending the amount of time they would wish to spend with a terminally ill or dying. Adequate infrastructures are thus to be provided enabling and enhancing the prudent inclusion of the familiar environment of a terminally ill or dying person, whose wishes are thereby to be given prevalence.

27. The goal of palliative medicine and care is to provide a comprehensive improvement in the quality of life of the patient while respecting his or her wishes. A necessary precondition in achieving this goal is the mutually trusting co-operation of all persons involved.

28. The goal of medical intervention is to cure illness and relieve pain, not however to prolong life at all costs. To relieve all suffering of persons who - at least by human standards - must be deemed terminally ill is one of a physician's obligations. The unbearable symptoms and pain of a patient should not be left untreated for fear of a minimal shortening of the life span which might be related to the therapy for the alleviation of pain. This fear is often the cause of inadequate efforts to relieve pain. In these difficult instances physicians are to be granted adequate discretionary powers.

29. Administrative barriers to providing an efficient pain relief treatment are to be removed.

30. All professions confronted with terminally ill or dying persons are to receive qualified instructions in the course of their duties. Forms of education and further training are to be preferred that are interdisciplinary and include - in addition to the medical or nursing fields - relevant aspects from psychology, sociology, anthropology, ethics or theology in order to be able to accept and respect persons in the last phase of life. Therefore, the education of physicians, nurses and other health professionals in all Member States of the European Council concerning palliative medicine and care has to be improved.

31. The degree of recognition of palliative medicine and care varies considerably throughout Europe. If there are still no or only inadequate educational facilities for palliative medicine and care no efforts should be spared in coming abreast with the state of the art. Palliative medicine and care as a discipline should be prominent in the programme of every educational institution for future health professionals. Graduates of these schools and universities should have successfully completed practical and theoretical examinations in the field of palliative medicine and care.

32. Since 1967, when the physician and social worker Cicely Saunders founded the modern hospice in England, there have been exemplary cases of adequate pain relief through the observant control of symptoms and attentive humane care that testify to the fact that it is possible to make the last phase of life worth living and to maintain human dignity: The hospice movement has spread – with varying density -throughout Europe as a grass-root movement. In contrast to the traditional hospital the hospice focuses its attention on the dying person in companionship with his or her closest relations. Supporting the foundation of further hospices is one effective way to provide for the care of the terminally ill or dying in accordance with human dignity.

33. A sufficient number of hospital wards and hospices must be established in order to make possible the education and further education in palliative medicine and care. Palliative medicine and care - as is the case with other fields as well - cannot be learned merely theoretically. Every student of medicine or nursing should be obliged to absolve a clinical practice in a ward dealing mainly with palliative medicine and care. This applies equally to the postgraduate training for physicians, psychologists, psychotherapists as well as social workers. These professions must learn that accompanying the terminally ill or dying can only be accomplished in an interdisciplinary team. As medical progress cannot exclude the care for the terminally ill and dying provisions must be made for research in the field of palliative medicine and care. For this reason as well it is necessary to establish further palliative wards and hospices.

34. Whenever killings of the terminally ill or dying in institutions have shaken the general public – as was the case in Austria, Germany, Denmark, the Netherlands, France and other countries – deficiencies in training and counselling and coaching of the responsible health care staff have regularly shown to be one of the main reasons for these incidents. This demonstrates that professional as well as voluntary health care staff are in need of support to fulfil their task. Support is to be provided in part by the interdisciplinary team (this needs sufficient time and space) and in part by staff counsellors and coaches.

35. Deficiencies in their training as well as the feeling of being overwhelmed by their task may mislead health care staff to contemplate taking the live of a terminally ill or dying person. The wish to die expressed by a terminally ill or dying person should therefore be thoroughly examined. Health care staff as well as the individual's family, friends or other involved persons are primarily obliged to determine whether this wish is the authentic expression of the individuals determination or rather a cry for more intensive therapeutic, social and spiritual attention.

The aims of this training should meet the following standards:

- palliative medicine and care affirm life and regard dying as a normal process,
- neither hastens nor postpones death,
- provides relief from pain and other distressing symptoms,
- integrates the psychological and spiritual aspects of patient care,
- offers a support system to help patients live as actively as possible until death, and
- offers a support system to help the family and other involved persons cope during the patient's illness in their own bereavement.

37. Research on palliative medicine and care is urgently needed. It should address the physical, psychological and socio-economic issues related to caring for people with terminal illnesses. Such research should address pain and other physical symptoms, depression and other mental health conditions, spirituality and existential meaning, communication between physician and patient, family and other involved persons, burdens on care-givers and economic hardships.

38. In the public discourse it is important to stress that palliative medicine and care need to become and stay an integral part of any medical teaching and training. Any medical therapy should comprise palliative components, palliative medicine and care, however, should not be implemented in isolation.

B. TO PROTECT A TERMINALLY ILL OR DYING PERSON'S RIGHT TO SELF-DETERMINATION

39. According to article 5 of the Convention on the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine any medical intervention is allowed only after the person in question has been fully informed about the projected intervention and has freely agreed to it. This is also the case with the terminally ill and dying.

40. Modern medical diagnosis and therapy can ease much pain and suffering when they are applied carefully and in accordance with the will of the individual in question. The medically possible does not, however, always correspond with the wishes of the terminally ill or dying person. The patient must be given the real - not the only theoretical - opportunity to refuse further therapy. However, in order to be able to participate meaningfully in the decision making, full information - about the illness itself, the assumed prognosis and the sense and objectives, the burdens and the goals of further diagnostic and therapeutic efforts - must be made comprehensible to the patient.

41. It is not unusual that fulfilling the basic rights of each person to all available information about his or her health condition presents difficulties. Most recent studies show that a significant number of physicians hesitate to provide comprehensible information with reference to diagnosis and further treatment. These explanations are often considered to be the most difficult and burdensome professional task because they are concerned not only with empathetically communicating medical information but also with providing help in making life-and-death decisions. Given the patients consent, his or her family or other involved persons should ideally be included in such consultations. In the interest of his or her self-determination, a terminally ill or dying person needs careful attention as the questions and anxieties with which he or she is concerned in this final phase of life.

42. A terminally ill or dying person can make a self-determined decision for or against a further life prolonging treatment only on the basis of truthful and comprehensible information as to his or her condition. Foregoing therapy instead of unwanted prolongation of suffering - when this is in accord with the wish of the patient – must be acceptable and legally guaranteed. The knowledge that a cessation of therapy can be legal and is strictly to be distinguished from "physician-assisted suicide" or "mercy killing" must be conveyed to professionals in the field of health.

43. Any pressure on the terminally ill or dying to forego therapy for economic reasons must be avoided. It has been empirically demonstrated, that the health costs in the last phase of life rise

considerably. In view of the scarcity of funds and resources of both the health sector and, within that sector, for palliative medicine and care, there is a grave danger that instead of dignified support of a terminally ill or dying person economic pressure makes itself felt to forego further - and arguably appropriate - curative or palliative therapy.

44. While expressions of the will of a patient to forego certain treatments must be recognised and abided to by the physician, the wish for actively ending life must be denied. The physician must never impinge on the integrity of the body or soul of a patient even upon his or her wish.

45. The wishes of a terminally ill or dying person, the fulfilment of which is contrary to human dignity as well as relevant codes of professional conduct carry no weight. Article 4 of the Convention for the Protection of the Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine demands the observance of relevant codes of professional conduct (e.g. the World Medical Association Declarations of Madrid - 1987 and Marbella - 1992). Wishes of a terminally ill or dying person that are not in line with these codes of professional conduct are not to be executed. The following passage from the Madrid World Medical Association Declaration of 1987 maintains: "*deliberately ending the life of a patient, even at the patient's own request or at the request of close relatives, is unethical. This does not prevent the physician from respecting the desire of a patient to allow the natural process of death to follow its course in the terminal phase of sickness*."

46. Wishes such as those for "mercy killing" and "assisted suicide" are those that are illegitimately put to health care professionals. Such wishes are not to be executed, as they are in violation of ethically founded codes of professional conduct. The World Medical Association Marbella Declaration of 1992 maintains: "*Physician-assisted suicide, ..., is unethical and must be condemned by the medical profession*."

47. In order to preserve the right to self determination of those terminally ill or dying persons who are temporarily or permanently incapacitated, formerly expressed wishes regarding medical care should be taken into serious consideration. This conforms to article 9 of the Convention for the Protection of the Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine.

48. In the consideration of anticipated wishes and statements it must be distinguished between a refusal of treatment and other wishes regarding for example a specific treatment.

49. Wishes for a specific treatment, however, must be viewed from the standpoint of medical advisability, because a patient cannot expect a physician to initiate a treatment that does not conform to the standards of his or her profession. A patient cannot force a physician to undertake a treatment contrary to the rules of medical science or the ethics of the medical profession. Should a physician on the basis of his or her professional competence be convinced that it is necessary to act contrary to a written wish of a patient, then he or she should make a written explanation to clarify the decision for the patient, the patient's attorney, and his or her family.

50. In cases in which – due to factual incapacitation of the terminally ill or dying person – a surrogate decision becomes necessary this decision is to be taken to the patients welfare. Determination of the patients welfare is to be undertaken in a process of deliberation between those involved in the individual's care. Proxies, family or other involved persons may play an important part in this process. They should, however, remain simply interpreters and refrain from making independent value judgements. Their role in the decision making process must remain a subsidiary one which is overridden as soon as the patient decides him- or herself or as soon as the physician

gains the impression that the views of the family are not in the interests of the dying person but are guided by extraneous interests.

51. Criteria of validity as to the bearing of such surrogate or proxy decisions are of particular relevance with reference to permanently incapacitated (e.g. permanently incapacitated persons such as the mentally disabled). For the protection of this particularly vulnerable group it appears essential to determine certain treatments that under no conditions may be withheld or withdrawn.

C. TO UPHOLD THE PROHIBITION AGAINST INTENTIONALLY TAKING LIFE ALSO WITH REGARD TO TERMINALLY ILL OR DYING PERSONS

52. The European Convention for Protection of Human Rights and Fundamental Freedoms states in article 2 that "*everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally...*".

53. The fundamental right to life and the prohibition of intentionally taking human life are to be upheld also under the special conditions of the terminal phase of an individual's life. Dying is a phase of life. Thus the right to die in dignity corresponds with the right to a life in dignity. This principle of an unconditional protection of dignity is also reflected in the preamble of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: "*Convinced of the need to respect the human being both as an individual and as a member of the human species and recognising the importance of ensuring the dignity of the human being*".

54. Guaranteeing the individual's right to a life in dignity the Member States thereby acknowledge a right to die in dignity. A terminally ill or dying person has the right to self-determination as to the course of the process of dying, he or she, however, has no right to be killed.

55. The legal system prohibits the killing of a human being even if the killing is wished for by the individual. This applies to the elderly, the sick or the disabled and indisputable to the terminally ill or dying as well. Abating the prohibition to take a human being's life with regard to the terminally ill or dying will bring incalculable consequences for the legal system. Inevitably individual or societal pressure on a terminally ill or dying person would mount, given that he or she is under the impression of being a burden while society offers the option of having oneself killed. Experiences in societies that have a lenient approach towards the prohibition against taking life show that in due consequence human beings are killed without their consent. This development undermines the fundamental protection of life and furthermore threatens to lead to the acceptance of annihilation of life deemed senseless.

Society recognises the practice and especially the ethics of the healing professions that nobody shall participate in the taking of the life of another human being.

57. A terminally ill or dying person's wish to die constitutes no legal justification to have one's life taken by another human being. Otherwise this would mean that the legal system would signal permission to kill another human being deliberately and actively.

58. Taking a patient's life is no therapeutic option, especially as it is not directed towards terminating the patients suffering but rather at terminating the patient himself.

59. With no claim to being complete this recommendation strives to promote measures for the protection of terminally ill or dying. The Council of Europe remains truthful towards its intention and ambition of protecting human rights with special awareness of the needs of the most vulnerable and weak members of society. Amongst the weakest members of society are the terminally ill or dying.

Reporting committee: Social, Health and Family Affairs Committee

Budgetary implications: none

Reference to committee: Doc. 7236, Reference No. 1996, 15.03.95

Draft recommendation adopted by the committee on 11 May 1999 with 19 votes in favour, 4 against and 4 abstentions

Members of the committee: *Mr Cox (Chairman)*, Mr Weyts, *Mrs Ragnarsdottir*, *Mr Gross (Vice-Chairs)*, Mrs Albrink, MM. *Alis Font*, *Arnau*, *Mrs Belohorska*, Mrs Biga-Friganovic, Mrs Björnemalm, *Mrs Böhmer*, MM. Christodoulides, Chyzh, *Dees*, Dhaille, *Duivesteijn*, Evin, *Flynn, Mrs Gatterer*, *MM. Gibula, Gregory*, Gusenbauer, Haack, *Hancock*, *Hegyi*, *Mrs Høegh*, Mrs Hornikova, Mrs Jirousova, Mr Kalos, Mrs Kulbaka, Mrs Laternser, *Mr Liiv*, *Mrs Lotz*, Mrs Luhtanen, Mr Lupu *(Alternate: Mr Popescu)*, Mrs Markovska, MM. Marmazov, Martelli *(Alternate: Mr Evangelisti)*, *Mattéi*, Mozgan, Mularoni, Mrs Näslund, MM. Niza, Paegle, *Poças Santos*, Mrs Poptodorova, *Mrs Pozza Tasca*, *Mrs Pulgar*, *MM. Raskinis*, Regenwetter, Rizzi *(Alternate: Mr Polenta)*, *Sharapov*, Silay, Sincai *(Alternate: Mr Paslaru)*, Skoularikis, Mrs Stefani, MM. Surján *(Alternate: Mr Kelemen)*, Tahir, Valkeniers, *Vella*, Mrs Vermot-Mangold, MM. Volodin, Voronin, *Wójcik*, Yürür

NB: *The names of those members present at the meeting are printed in italics.*

Secretaries to the committee: Mr Perin, Mrs Meunier and Mrs Clamer

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 11 avril 2000

CHARTE 4220/00

CONTRIB 95

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une contribution du Conseil des communes et régions d'Europe (CCRE), en vue de l'audition du 27 avril 2000.[1] [2]

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[1] CCRE: 14 rue de Castiglione. F-75001 Paris. Tél: +33-1-44 50 5959. Fax: +33-1-44 50 5960. Bruxelles: 22-24 Rue d'Arlon. B-1050 Bruxelles. Tél: +32-2-511 7477. Fax: +32-2-511 0949.

[2] Texte du message a été transmis en français, en allemand et en anglais.Texte du "Le principe de subsidarité" a été transmis en français uniquement.

CONSEIL DES COMMUNES ET REGIONS D'EUROPE

SECTION EUROPEENNE DE IULA

22.3.2000/cg

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CHARTE DES DROITS FONDAMENTAUX

MESSAGE DU CCRE A L'ATTENTION DE LA CONVENTION

Réuni sous la présidence de Valéry Giscard d'Estaing à Sintra le 21 mars 2000, le Bureau Exécutif du CCRE :

- RAPPELLE son attachement à l'élaboration d'une Charte des droits fondamentaux, socle d'une nouvelle Union européenne ;

- ESTIME indispensable que le statut qui sera accordé à cette Charte permette de renforcer concrètement les garanties dont disposent les citoyens européens dans le domaine de la protection de leurs droits, qu'ils soient politiques, économiques ou sociaux ;

- APPORTE son soutien aux travaux de réflexion actuellement conduits par la Convention, et notamment l'énumération des droits des citoyens européens ;

- INVITE la Convention à inclure, parmi ces droits fondamentaux des citoyens, sous une forme ou une autre, les principes essentiels de l'autonomie locale tels qu'ils sont définis par la Charte européenne de l'autonomie locale et à prendre en compte les aspirations au développement de l'autonomie régionale ;

- SUGGERE que des dispositions précisent les moyens juridiques adaptés permettant de garantir les droits de l'autonomie locale vis-à-vis des actes et décisions de l'Union européenne ;

- REDIT sa disponibilité à participer ,dans un esprit de partenariat, aux prochaines auditions de la Convention.

Congress of Local and Regional Authorities of Europe
Chamber of Local Authorities

Congrès des pouvoirs locaux et régionaux de l'Europe
Chambre des pouvoirs locaux

Strasbourg, 11 octobre 1999 CONF/ANC (99) 3

Groupe de travail
"Charte européenne de l'autonomie locale"

Conférence internationale

Les Chartes de l'autonomie locale et régionale du Conseil de l'Europe : la subsidiarité en action

Compétences et finances des collectivités locales et des régions

Ancone, Italie, 14-16 octobre 1999

"Le principe de subsidiarité - Fondement de l'autonomie des administrations locales et régionales dans l'Union européenne"

1. Dr. Heinrich Hoffschulte
1er Vice-Président du Conseil des Communes et Régions d'Europe (CCRE),
Président de la Section allemande du CCRE

"Le principe de subsidiarité -

Fondement de l'autonomie des administrations locales et régionales dans l'Union européenne"

A) En introduction: le contexte

1) Elargissement de l'Union européenne et proximité citoyenne

A l'heure actuelle, l'Union européenne compte quinze membres et environ 371 millions d'habitants. Un tel ordre de grandeur n'est *a priori* pas véritablement conciliable avec cette "proximité citoyenne" réclamée de toute part. Le contraste est d'autant plus frappant qu'il se situe à un moment où une, voire plusieurs étapes d'un nouvel élargissement sont très concrètement.envisagées. En admettant que la première décennie du siècle et du millénaire à nos portes pourrait voir - et verra sans doute - adhérer douze à quinze nations, petites et grandes, l'Union européenne comptera prochainement un demi-milliard d'habitants. Les négociations sont engagées avec un premier contingent de candidats à l'adhésion[1], un second groupe[2] comprend certains pays qui prétendent être tout aussi bien préparés[3]. Si l'adhésion de Malte[4] ne soulève aucune contestation, l'Union n'est quant à elle pas prête sur le plan institutionnel[5]. En effet, il est urgent de mettre en chantier un grand nombre de réformes internes afin de garantir le mode de fonctionnement de l'UE, dès lors que la prochaine admission de nouveaux membres "n'est pas simplement une adhésion de plus"[6], mais que bien plus elle signifie une transformation tant quantitative que qualitative de l'Union[7].

Or une Union de 500 millions d'habitants, plus encore que l'actuelle Communauté, est guettée par le risque d'impopularité auprès de citoyens la jugeant abstraite, lointaine, opaque. Risque d'autant plus réel que les milieux et les responsables de la politique nationale, et parfois même régionale, ont depuis longtemps pris pour habitude de "se décharger" sur Bruxelles, pour ainsi dire. Nombre de dysfonctionnements nationaux sont imputés à une Union jouant un rôle de "bouc émissaire" facile à accuser et peu enclin à se défendre. De même, rien n'est plus facile que d'expliquer la paralysie des réformes nationales en faisant remarquer qu'il serait impossible - ou à tout le moins peu souhaitable - de faire cavalier seul sur tel ou tel dossier, ne serait-ce que pour des raisons juridiques

1 Il s'agit de l'Estonie, de la Pologne, de la Hongrie, de la République tchèque, de la Slovénie et de Chypre.

2 Lettonie, Lituanie, Slovaquie, Bulgarie, Roumanie.

3 C'est ainsi que la Lettonie a vivement protesté parce qu'elle ne faisait pas partie du premier groupe, exigeant d'être placée sur un pied d'égalité avec l'Estonie, qui a atteint un stade incontestablement très avancé.

4 Dès 1990, Malte avait sollicité son adhésion en tant que membre à part entière, mais le gouvernement de gauche dirigé par le Premier ministre Sant, en 1996, avait "différé" cette demande, réactivée par le gouvernement démocrate-chrétien élu en septembre 1998 et dirigé par Fenech Adami, l'objectif déclaré étant l'adhésion d'ici à 2004.

5 D'après les règles habituellement appliquées jusqu'ici, Malte devrait avoir la faculté (par exemple comme le Luxembourg) d'être représentée par un membre à la Commission et par six députés au Parlement européen. Mais à un moment où un élargissement aussi important est à l'ordre du jour, l'Union ne souhaitera pas "prolonger" une telle pratique.

6 Cf. l'exposé exhaustif des problèmes et des questions en suspens, Wieczorek-Zeul, "Nicht einfach ein 'weiter Beitritt'", *in* Frankfurter Allgemeine Zeitung du 18 août 1998, p. 11

7 La Commission a donc présenté avec "l'Agenda 2000" une base de travail résumant les réformes à mettre en chantier et les ficelant en un ensemble soumis à négociation.

tenant à la nécessité d'unifier les règles européennes. Vu l'imminence d'un élargissement concrètement envisagé, le risque est réel que l'élan intégrateur ne fléchisse, que la cohésion ne pâtisse d'un sentiment d'aliénation et de manque d'identité, voire que l'ensemble un jour ne se désintègre.

Si tous les intéressés ont en filigrane effectivement conscience de cet aspect, rares ont été pendant toutes ces années les tentatives sérieuses de le prendre à la racine. Au contraire, la réforme institutionnelle visée a échoué alors même que Maastricht allait marquer une étape décisive d'un parachèvement de l'union politique par le biais d'une union monétaire décidée et ancrée irrévocablement.

Ce n'est pas ici l'endroit pour examiner les étapes à suivre vers l'union politique. Mais force est de constater que dans "l'Euroland", pour reprendre le terme utilisé occasionnellement pour qualifier l'Europe communautaire, tous les hommes politiques n'ont de cesse d'invoquer à bon marché et en restant dans le flou une "proximité citoyenne" qui s'étendrait même à l'Union européenne, à ses organes et à sa politique concrète, par exemple les nombreuses directives et règlements, aussi judicieux soient-ils.

Dans le cas de l'Allemagne, au surplus, la Loi fondamentale postule expressément le dessaisissement d'une administration exécutive propre au niveau national. Aux termes de l'art. 30 GG (Loi fondamentale), "l'exercice des prérogatives de l'Etat et l'accomplissement des missions de l'Etat relèvent... de la compétence des Länder" dans la mesure où la Loi fondamentale n'admet ou ne prévoit pas expressément d'autres règles. Ce principe s'applique donc également aux missions de l'Union européenne dès lors que leur mise en œuvre incombe aux Etats membres. Rares sont les Etats membres ayant atteint un tel degré de décentralisation ou, plus précisément, rares sont les nations dont à tout le moins l'organisation interne de l'exécutif soit aussi clairement régie par le principe de subsidiarité.

Or les Länder (eux avant tout) font à leur tour largement appel aux villes, aux communes et aux districts. Puisque nous parlons de proximité citoyenne, il existe sous ce rapport une possibilité réelle, par le biais d'agents recrutés au niveau communal et placés sous la responsabilité de la commune, de pratiquer la proximité citoyenne sur le lieu même de la mise en application pratique, et du même coup de rapprocher l'Europe de ses citoyens dans l'exercice de l'autorité et la communication des décisions au jour le jour.

2) Intégration croissante : centralisme ou subsidiarité ?

Ce n'est pas un hasard si le Traité de Maastricht, tout en prévoyant l'achèvement de l'Union économique et monétaire et le lancement d'une monnaie unique, facteur important de l'intégration européenne, notamment d'un point de vue psychologique, s'est accompagné de l'invocation expresse du principe de subsidiarité de la part de l'Union. L'article 3 B de ce Traité[8] réitère cette référence au principe de subsidiarité du préambule[9], principe qu'il fait expressément porter sur les

[8] L'actuel article 5 du Traité sur l'Union européenne.

[9] Dans le préambule au Traité sur l'Union européenne, les parties contractantes se déclarent „résolues à poursuivre le processus de création d'une union sans cesse plus étroite des peuples d'Europe au sein de laquelle les décisions sont prises conformément au principe de subsidiarité et aussi près que possible des citoyens. En outre, le Traité d'Amsterdam précise en son art. 1 al. 2 : "Le présent traité constitue une nouvelle étape dans la réalisation d'une union sans cesse plus étroite des peuples d'Europe, dans laquelle les décisions sont prises aussi ouvertement et aussi près que possible des citoyens."

relations entre l'Union et les Etats membres. Sans doute l'objectif politique défini par cet article est-il très diversement apprécié[10]. Ainsi, il est souvent considéré en France comme une clause débouchant sur une extension des compétences de l'Union[11] ; de fait, la formulation du principe selon lequel les tâches dont les Etats ne peuvent eux-mêmes s'acquitter seront confiées à l'Union est l'autre face de l'interprétation exclusive qui en est faite en Grande-Bretagne, selon laquelle le transfert de compétences vers Bruxelles devrait être aussi réduit que possible. L'application et l'interprétation allemandes reflètent plutôt l'expérience nationale d'un principe agissant „dans les deux sens«[12].

La **notion de subsidiarité** remonte à l'Antiquité (hellénique), mais elle est dans son acception actuelle marquée par la **doctrine sociale de l'Eglise catholique** des XIX^{e} et XX^{e} siècles, sur la base des encycliques du Vatican[13]. L'encyclique "Quadragesimo anno" de 1931, notamment, utilise des formules que les Etats et la Société des Nations avaient à l'époque en vue, mais qui ont inspiré le libellé du Traité de Maastricht[14]. Il n'est donc pas surprenant que les débats à propos de l'introduction du principe de subsidiarité aient été projetés de la politique italienne[15] sur la scène européenne. Lors de l'élaboration du projet de constitution du Parlement européen de 1984[16] - sous l'égide du député italien Altiero **Spinelli** -, les organes de la Communauté européenne engagèrent sur ce principe de subsidiarité une discussion qui déboucha sur l'art. 3 B.

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10 Cf. Hort, "Am Ende steht das Wort", *in* Frankfurter Allgemeine Zeitung, avec des précisions sur la très grande diversité dans l'utilisation politique de la notion de subsidiarité.

11 Cf.

12 Ainsi, le Bundesrat a reconnu en 1995, dans la perspective de la préparation du Traité d'Amsterdam, que le principe de subsidiarité avait pour objet "non seulement une consolidation des Etats membres, mais aussi une extension des compétences de l'Union européenne" ; cité d'après le P^{r} Dammeyer, président du "Comité des Régions" (CdR) de l'UE, cf. Frankfurter Allgemeine Zeitung du 18.07.1998, p. 5.

13 Sur les racines du principe de subsidiarité et son importance dans l'évolution juridique de l'UE, cf. M. Schmidhuber (alors Commissaire de la CE), "Le principe de subsidiarité dans le Traité de Maastricht", *in* DVBI 1993, 417 sq. et ib. *in* NVWZ 1992, 720 sq., Hoffschulte *in* "Autonomie des administrations communales et régionales dans l'Europe des régions - Du rôle du quatrième niveau dans l'Union européenne", *in* Knemeyer (dir. de publ.) "L'Europe des régions - L'Europe des communes", 135 sq. 150/151.

14 Cf. Pape Pie XI dans l'encyclique "Quadragesimo anno", notamment les chiffres 78 à 80, ainsi que le prolongement et l'actualisation de ces textes dans l'encyclique "Pacem in Terris", Pape Jean XXIII, du 11 avril 1963, notamment les chiffres 140 et 141. Cf. à ce sujet Hoffschulte *op. cit.*, 151/152. De même, la "3ème encyclique sociale" ("Mater et Magistra"), Pape Jean XXIII, du 15 mai 1961, réitère le principe de subsidiarité, cf. notamment chiffre 53 id.

15 Cf. entre autres l'exposé très approfondi de Paolo Magagnotti, "Il Principio di Sussidarietá nella Dottrina Sociale della Chiesa".

16 Le "projet Spinelli", ainsi nommé d'après le député italien Spinelli qui avait présidé un groupe de travail du PE chargé d'élaborer un projet de constitution. Spinelli était communiste à l'origine, et député communiste au Parlement italien, où il échangea ses points de vue avec Don Sturzo, député chrétien-démocrate et jésuite. En 1979, alors qu'il avait déjà rendu sa carte du Parti communiste italien, il était cependant l'un des candidats sur la liste du PCI lors des premières élections directes au PE, dont il fut l'un des parlementaires les plus considérés.

Ce principe du Traité de Maastricht s'applique-t-il également **aux relations entre l'Union et les substructures des Etats membres ?** Les arguments juridiques avancés sont controversés[17]. Mais la négation d'une telle applicabilité directe fait peu de cas du dynamisme de la formule politique dont Jacques Delors, longtemps président de la Commission européenne, n'a pas été le seul à souligner la force[18]. Cette négation est par ailleurs à courte vue parce que l'article F du Traité de Maastricht[19] se greffe sur les structures et les traditions juridiques de l'Etat membre considéré, et qu'en outre l'art. 3 B du Traité sur l'Union européenne, l'actuel art. 5 du Traité CE, vise, du moins indirectement, le troisième et quatrième niveau de l'Union européenne, - en ce sens à structure fédérale -, et de ses membres. D'ailleurs, la Commission européenne, répondant pour son compte à une question expresse sur la ratification du Traité de Maastricht, s'est déclarée liée par le principe de subsidiarité, et de ce fait tenue dans son travail de respecter également les communes et les régions en tant que parties intégrantes des Etats membres lorsque sont présentés des règlements ou des directives intéressant les communes ou les régions[20]. Et les Länder allemands, appuyés sur ce point par les fédérations des communes allemandes[21], ont souscrit au même point de vue, estimant qu'aucune tâche à exécuter au sein de l'Union ne devait remonter au niveau européen dès lors que les communes et les régions sont généralement mieux à même de s'en acquitter[22].
La formulation exacte de l'actuel art. 6 du Traité UE, et du texte qui l'avait précédé (art. 3 B), fit à l'époque l'objet d'âpres discussions, dont l'enjeu était en particulier de mettre les choses au clair en traçant une ligne de démarcation par rapport à ce qui aurait pu être une nouvelle "clause d'habilitation"[23] qui, en dernière analyse, signifierait une extension des compétences des organes de l'Union. Le 4 décembre 1991, le Gouvernement allemand, reprenant une proposition des chefs de

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17 Cf. l'aperçu qu'en donne Schäfer, "Die deutsche kommunale Selbstverwaltung in der Europäischen Union", p. 285 sq., constatant en résumé que l'art. 3 B al. 2 du Traité CE établit un principe juridique qui n'est sanctionnable que dans certaines limites et qui ne saurait actuellement offrir aucune protection efficace contre les interventions communautaires dans l'autonomie administrative des communes des Etats membres.

18 Cf. les développements de Jacques Delors devant le Parlement européen *in*: Débats du PE, n° 3-424/160, 164 sq. du 18 novembre 1992. De même, le "Protocole de subsidiarité" du Traité d'Amsterdam, élaboré en 1997 à la demande allemande dans le prolongement des textes d'Edimbourg, parle d'un "concept dynamique" de subsidiarité.

19 L'actuel art. 6 du Traité sur l'Union européenne, complété à Amsterdam par un nouvel al. 3 : "L'Union respecte l'identité nationale de ses Etats membres."

20 Cf. à ce propos Hoffschulte *op. cit.*, 153/154

21 Cf. les propositions du RGRE (de la Section allemande du "Conseil des communes et des régions d'Europe) du 15 mai 1996 à propos du prolongement des décisions d'Edimbourg de 1992 (cf. *infra*) et la position de l'Union fédérale des Communes allemandes du 28 mai 1996 dans le cadre de l'audition des commissions en charge des affaires européennes au sein des deux chambres du Parlement allemand à propos du "Principe de subsidiarité dans l'UE" le 8 mai 1996, ainsi que...

22 ...la précédente déclaration du 26 novembre 1992 des Länder de la R.F.A. en préparation du Sommet d'Edimbourg (11 et 12 décembre 1992). Dans le même esprit, les chiffres 2 et 3 de la "Déclaration de Munich" du 27 octobre 1987 des Ministres-présidents - Conférence des Länder ; cf. notamment Knemeyer "Subsidiarité - Fédéralisme, décentralisation", DVBl 1990, 449 sq., 450 et Konow (secrétaire d'Etat à Düsseldorf), "A propos du principe de subsidiarité du Traité de Maastricht", DÖV 1993, 405 sq., 411.

23 On redoutait une "habilitation" d'une simplicité semblable à ce que permettait l'ex-article 235 des Traités de Rome, c.-à.d. l'actuel art. 308 du Traité CE, fréquemment appliqué également pour étendre les compétences de Bruxelles.

gouvernement des Länder, avait donc présenté une version plus (re)strict(iv)e de la formulation de l'art. 3 B alinéa 2 du Traité UE ; mais cette version s'avéra impossible à faire passer[24].

L'avenir nous dira comment évoluera la pratique dans ce domaine. Certes, le Gouvernement allemand du Chancelier Helmut Kohl avait tenté de clarifier ce point lors du "Sommet de la subsidiarité" à Edimbourg[25], mais aussi en amont du Traité d'Amsterdam (1997) qui, tout en reprenant les dispositions du Traité de Maastricht l'ayant précédé, devait avoir pour objet de parachever, de clarifier et de compléter le Traité de 1992[26].

L'intensification des relations juridiques directes et indirectes entre l'Union européenne d'une part et les communes d'autres part est encore largement ignorée de larges secteurs de la vie publique[27]. Ainsi, il y a plusieurs années déjà, alors que la Commission présentait un Livre blanc sur la réalisation du Marché intérieur, environ 120 des 286 projets institutifs de droit énumérés à l'époque concernaient le niveau communal. Si l'on passe en revue les organigrammes des municipalités ou des districts, en s'intéressant tout particulièrement aux agents qui appliquent le droit européen, on constatera que, dans la presque totalité des secteurs, les administrations communales transposent le droit communautaire - désormais appelé droit de l'Union - dans la vie quotidienne de nos concitoyens. De la qualité de l'eau potable aux directives concernant les caisses d'épargne en matière de droit bancaire, de la réglementation du trafic automobile et de l'immatriculation des véhicules à la législation relative aux plans d'aménagement des paysages, aux plans d'occupation des sols et aux plans d'urbanisme passés au crible du droit de l'Union pour s'assurer de leur compatibilité avec l'environnement, du droit de la médecine vétérinaire aux contrôles des denrées alimentaires qui, par suite de l'ouverture des frontières, touchent les produits de tous les pays, l'Europe est de plus en plus présente dans notre vie quotidienne, et par conséquent dans notre action au niveau communal.
A cela s'ajoutent **de nombreux programmes** de l'Union européenne conçus pour venir en aide à l'agriculture en mutation structurelle, ainsi qu'aux régions traditionnellement fondées dans le charbon, la sidérurgie, l'industrie navale et le textile. Des programmes comme RECHAR, RESIDER, RENAVAL, RETEX sont autant d'exemples de coopération entre les communes et l'Union européenne, et les régions transfrontalières telles que l'EUREGIO germano-néerlandaise élaborent avec Bruxelles des expertises structurelles et des programmes d'investissement dans le transfrontalier (INTEREG). Sans même parler de l'importance de l'aide régionale dans les Länder

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24 La teneur en était la suivante : "Dans les domaines ***qui sont réglementés dans le Traité*** et qui ne relèvent pas de sa compétence exclusive, la Communauté n'entre en action, conformément au principe de subsidiarité, que si et dans la mesure où les objectifs des mesures envisagées ne peuvent pas être ***suffisamment*** réalisés à l'échelon des Etats membres et ***de ce fait***, en raison de leurs dimensions ou de leurs effets, peuvent être mieux réalisés au niveau communautaire." (Les passages en italique soulignent les conceptions alternatives les plus importantes du point de vue allemand).

25 Cf. les "Lignes directrices pour l'application du principe de subsidiarité et de l'art. 3 B du Traité sur l'Union européenne" dans la version des "Conclusions du Conseil européen à Edimbourg les 11 et 12 décembre 1992", ainsi que les compléments du "Projet d'accord interinstitutionnel entre le Parlement européen, le Conseil et la Commission sur les procédures d'application du principe de subsidiarité."

26 Cf. ladite "Clause de révision" du Traité de Maastricht sur l'Union européenne, art. N al. 2, qui spécifiait que 1992 serait l'année de convocation d'une nouvelle conférence intergouvernementale aux fins de révision du Traité, et qui de ce chef entraînait l'obligation d'engager des négociations, lesquelles aboutirent ultérieurement au Traité d'Amsterdam.

27 Voir cependant à ce propos le compte rendu exhaustif de van Ameln dans cette publication.

issus de l'ex-RDA, où il n'est guère de commune´s qui ne fonctionnent sans les aides de l'Union européenne[28].

Mais alors, s'il est incontestable que les règles de droit et les programmes de l'Union européenne exercent, tant directement qu'indirectement, une influence croissante non seulement sur les Etats nationaux, mais aussi sur leurs substructures et sur les collectivités territoriales[29], il ne peut à la vérité subsister la moindre raison de douter que le même principe de subsidiarité doive régir également les **rapports de la Communauté d'une part avec les organes de l'administration et de l'autonomie des communes et des régions d'autre part[30].**
Mieux, on est en droit d'affirmer que l'idée fondamentale de subsidiarité, une fois ancrée dans le droit constitutionnel de l'Union, si elle doit bien s'appliquer aux rapports avec les Etats nationaux, doit d'autant plus („à plus forte raison«) régir les relations avec les régions et les collectivités territoriales, et cela pour une double raison : d'une part, l'article 30 GG (Loi fondamentale), replacé dans le cadre de l'Union européenne, aboutit pour ainsi dire automatiquement, - du moins en Allemagne -, à ce que les Länder (et les villes constitutives de Länder), représentent le niveau sur lequel porte le droit européen directement applicable (règlements)[31] ; d'autre part, on voit surgir ici l'autre approche de la subsidiarité, fondamentalement différente de l'objectif de la décentralisation, une assimilation erronée faite dans la plupart des pays ; si l'adoption du principe de subsidiarité, plus encore que dans l'évolution qu'a connue jusqu'ici l'Union européenne, s'accompagne d'une réflexion sur l'éventualité et l'admissibilité juridique d'un transfert de missions et de compétences „du bas vers le haut«[32], les raisons de transférer au niveau européen les missions pouvant généralement être accomplies par les régions et les collectivités territoriales seront moins invocables encore que cela n'est d'ores et déjà le cas des missions et des compétences situées au niveau national[33].

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28 Le 28 janvier 1998, en faisant une "Communication sur un projet de 'Programme d'action en vue du développement durable des villes'", la Commission a fourni un exemple d'actualité illustrant l'intensité de l'intervention et de l'action dans le domaine relevant des tâches communales ; cf. van Ameln *op. cit*.

29 Cf. l'exposé éloquent de Haberzettel-Roth-Schläger "L'Europe dans les mairies - Répercussions de la législation européenne sur les communes". Les auteurs examinent à simple titre exemplatif ces effets sur le droit électoral des communes, la législation en matière d'énergie, la passation de marchés, la culture, la politique d'environnement et la politique structurelle.

30 Cf. la proposition de compléter en ce sens l'art. 3 B, l'actuel art. 5 du Traité CE, Hoffschulte, pp. 157/158, id. *in* "Autonomie administrative des communes et des régions dans l'Allemagne de l'après-Maastricht" *in* „L'Europe pour les politiques au niveau communal« (Fondation de formation à la politique communale (1994), p. 9 sq., pp. 33-34.)

31 Ce à quoi ne s'oppose pas le fait que, dans le cas d'une exécution défaillante de la part de l'Union, seul l'Etat national, c'est-à-dire en l'espèce le Gouvernement fédéral, peut être mis en accusation par-devant la CJCE puisqu'il doit s'agir sur ce point de faire observer les traités.

32 Sur le principe de subsidiarité comme "principe structurel" des rapports Etat - communes, cf. Knemeyer, Importance et configuration du principe de subsidiarité en Allemagne, manuscrit du 18 juin 1993, p. 9 sq.

33 Sur le principe de subsidiarité eu égard par exemple à la politique structurelle de l'UE ou de la CE, cf. Derenbach, "Politique structurelle européenne: fonds structurels et programmes d'action ayant une incidence sur les communes". Manuscrit (pour la Conférence des *Landkreise*) d'août 1993, p. 15 sq. Derenbach met l'accent sur la décentralisation systématique, même à l'intérieur des Etats membres, et sur "l'interface" avec l'échelon communal.

Cependant, il n'échappera à personne que les **demandes de subventions** ont plutôt pour effet d'amollir la résolution des intéressés sur cette question, et à cet égard de **contrarier** plus souvent qu'il ne le faudrait l'application conséquente du **principe de subsidiarité**. Naturellement, cela vaut surtout pour les Etats membres plus faibles économiquement qui, dans l'espoir d'obtenir une aide de Bruxelles, ne sont que trop enclins à appeler de leurs vœux l'intervention de la centrale européenne. Mais cela vaut aussi dans une mesure croissante pour le rôle des régions, et même des communes : dans de nombreux cas, il y va d'aides financières à des projets de développement régionaux ou même locaux qui, si l'UE restait davantage en retrait, pourraient parfaitement rentrer dans le cadre de la subsidiarité et faire l'objet d'une péréquation financière régionale ou nationale, ou de programmes de soutien à l'échelon national. Les fréquents débats sur la délimitation des domaines bénéficiaires d'une aide illustrent le problème de manière très éclairante : pris isolément, un problème peut être énorme pour une ville, une commune ou une région ; considéré d'un point de vue européen et „converti« à l'échelle du pays où il se situe, il apparaît souvent convenir davantage à une intervention régionale, ou nationale dans les cas extrêmes[34]. Le Sommet de Berlin, début 1999, a démontré éloquemment combien il était après coup difficile de redresser la situation.

La politique agricole de l'UE est - sous ce rapport - un domaine dans lequel, même depuis Maastricht, on hésite beaucoup à se demander s'il ne vaudrait pas mieux, pour des raisons d'efficacité et de moyens à mobiliser, intervenir sur le plan national, ou même régional, pour aider des structures et des secteurs spécifiques en difficulté, à tout le moins dans le cas de mutations structurelles et d'aides aux entreprises, et non pas d'interventions à grande échelle et de flux financiers ayant plutôt pour effet de cimenter les structures en place. La réforme financière de l'UE, au programme des deux prochaines années, nous réserve sans doute quelques surprises en termes de subsidiarité et de retour des responsabilités au niveau national. Les arguments ne manquent pas en faveur d'une **"renationalisation"** partielle du financement agricole préalablement à l'élargissement de l'UE, comme le montre une circonstance remontant à plusieurs années déjà, et dans laquelle les premiers pas de la réforme agraire se soldèrent pour l'agriculture allemande par des réductions qui, à brève échéance (et aussi sous la pression des gouvernements des Länder du sud de l'Allemagne) conduisirent au déblocage de ressources fédérales correspondantes[35]. Les débats récurrents autour de la nécessité de réductions budgétaires de l'UE, le plus souvent assortis du refus contre toute logique de s'accommoder d'une diminution correspondante de ses propres ressources (par exemple dans l'agriculture), portent à croire qu'il s'est agi là d'un cas plutôt exceptionnel d'application - financière - du principe de subsidiarité.

Une question importante concerne en outre les effets de l'impératif de proportionnalité que le Traité de Maastricht fait dériver du principe de subsidiarité dans le cas d'interventions et de répercussions sur l'autonomie administrative des communes et dans les conditions de l'art. 5 al. 3 du Traité CE[36].

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34 C'est ainsi que les Etats riverains de la Méditerranée, redoutant du fait de l'unification de l'Allemagne une diminution des aides leur provenant, eurent pour première réaction de rejeter les problèmes des nouveaux Länder sur "l'opulente" Allemagne, à leurs yeux suffisamment puissante pour résoudre seule ces problèmes. Il fallut l'intervention énergique du Chancelier allemand, et l'assurance concomitante que les anciens bénéficiaires ne subiraient aucun désavantage, pour que les Länder de l'ex-RDA fussent mis sur les programmes d'aide de l'UE.

35 Il était alors question de réaffectations budgétaires d'un montant de 3 milliards de DM.

36 L'ex-article 3 B du Traité sur l'Union européenne, qui stipulait : "Les mesures de la Communauté n'excèdent pas ce qui est nécessaire pour la réalisation des objectifs du présent Traité."

Avant même Maastricht, ce principe dominait l'ordre juridique de la Communauté[37]. En cette matière, la CJCE a souligné que „les moyens choisis pour la réalisation du but visé doivent être appropriés et ne peuvent excéder les proportions requises à cet effet.«[38]

Les annexes au **Traité d'Amsterdam** ont donné une orientation décisive à cet impératif de proportionnalité[39]. De ce principe de proportionnalité découlent les critères d'adéquation, de nécessité et d'appropriation qui, entre autres, peuvent parfaitement être invoqués pour protéger les communes[40]. Toutefois, la protection[41] assurée par cet alinéa 3 de l'art. 5 du Traité CE prendra davantage la forme d'une prise d'influence politique dès lors que le Comité des régions pourra invoquer cet article lors de la mise en consultation de documents et de projets de directives et de règlements. De même, les Etats membres ont de plus en plus tendance à se réclamer de ce principe afin de repousser des réglementations trop détaillées. Dans ses délibérations, le Parlement européen jouit des mêmes prérogatives, en particulier lorsque le Comité des régions a souligné les interventions ou les effets prévisibles.

B) De l'importance et de l'application futures du principe de subsidiarité et de la proximité citoyenne en Europe

Ni le cadre ni le moment présents ne conviennent à l'exposé des instruments disponibles pour renforcer le rôle des communes ou des régions dans le sens de la subsidiarité. Les résultats obtenus au fil des ans sont étonnamment abondants, que ce soit au Conseil de l'Europe ou dans l'Union européenne.

S'agissant du **Conseil de l'Europe,** nous mentionnerons à simple titre d'exemple : l'adoption de la "Charte de l'autonomie communale", signée par 37 des 41 Etats membres, et déjà ratifiée par pas moins de 30 d'entre eux ; la mise en place d'un Congrès des Pouvoirs locaux et régionaux de l'Europe doté de deux chambres ; l'efficacité croissante d'une procédure de "monitoring", de la part de la Chambre des communes, servant à contrôler l'avancement de la mise en pratique de la Charte de 1985 et l'évolution de l'autonomie administrative des communes dans les Etats membres ; l'inestimable contribution du Conseil de l'Europe et du Congrès à la démocratisation "par le bas" des Etats d'Europe centrale et de l'Est grâce à la mise en place, dans les anciens Etats centralisés, d'une autonomie administrative améliorée sur le plan local et régional, etc.

Pour **l'Union européenne,** il s'agit avant tout de la création d'un "Comité consultatif des Pouvoirs locaux et régionaux" auprès de la Commission de la CE, à un moment où le Conseil des ministres croyait encore pouvoir exclure les communes et les régions ; ensuite, avec le Traité de Maastricht, son renforcement et sa transformation en "Comité des collectivités locales et régionales", aujourd'hui abrégé en CdR (Comité des régions) un peu par paresse (et au détriment des intérêts des communes) ; l'intégration du principe de subsidiarité dans le Traité de Maastricht, principe auquel le Conseil d'Edimbourg allait peu après donner corps ; la revalorisation du CdR au

37 Cf. Kutscher, "Principe de proportionnalité", p. 89 sq. et, à la même source, la mention de la jurisprudence de la CJCE ; voir également Langguth *in* Lenz, art. 3 B, numéro en marge 12 n.

38 Cf. par ex. Rs. C-426/93 (Allemagne c/ Conseil), Jurispr. 1995, I. p. 3723 sq.

39 Cf. les développements pour la proportionnalité *in* Chiffre 6 du „Protocole relatif à l'application des principes de subsidiarité et de proportionnalité« annexé au Traité d'Amsterdam *in* EU-Nachrichten, documentation n° 3, p. 47 sq., 48.

40 En ce sens, voir par ex. Schäfer, *op. cit.*, p. 282.

41 Schäfer *op. cit.*, p. 284, fait observer à juste titre qu'il ne peut en découler aucune protection juridique.

niveau d'interlocuteur du Parlement européen par le Traité d'Amsterdam ; le partenariat effectif entre l'UE et les régions, mais aussi les communes, dans le cadre des programmes d'aide et de développement régional, où la concrétisation pratique des programmes, très souvent et parfois même mieux que dans la politique nationale, a été décentralisée et reconvertie en procédure "bottom-up" ("du bas vers le haut"), conformément au principe de subsidiarité ou de "proximité".

Le **Sommet européen de Cologne** a chargé un groupe de travail composé d'experts indépendants - choisis à dessein en dehors d'appareils gouvernementaux et nationaux hésitants - d'élaborer d'ici à la fin 2000 un projet de **Charte des droits fondamentaux** des citoyens européens. Est restée en suspens la question de savoir si les conclusions seraient intégrées aux Traités de Rome[42], par exemple dans la section du Traité de Maastricht instituant pour la première fois une citoyenneté de l'Union[43], revendication appuyée par de nombreuses parties, allemande notamment. D'autres tentèrent d'y faire obstacle, voulant se ménager la possibilité d'en rester à une "Déclaration solennelle", semblable par exemple à celle que les organes de la CE firent en leur temps pour proclamer que la Convention européenne des droits de l'homme était désormais un "droit commun" à tous les membres, qui s'engagèrent à le respecter, sans qu'il fût préalablement nécessaire de modifier les traités. L'expérience a montré qu'il ne pourrait s'agir là que d'un intermède peu satisfaisant, ne pouvant, même dans le cas de la déclaration d'alors, résister à la pression politique qui déboucha sur une institutionnalisation dans les traités.
Dans ce contexte, il conviendrait de saisir l'occasion et de tout mettre en œuvre pour que soit atteint l'objectif d'une **formalisation de la protection de l'autonomie administrative des communes et des régions.** Pour ce faire, il existe un quadruple "levier" :

- Le **droit à l'autonomie administrative des communes** est un **droit fondamental des citoyens** (exercé par leurs représentations). Une charte des droits des citoyens devrait aussi dégager et souligner les niveaux auxquels le citoyen lui-même peut encore prendre ses droits en mains. Vu sous cet angle, l'exercice communautaire des droits fondamentaux est en soi un droit fondamental essentiel, que doit reconnaître une charte des droits fondamentaux inspirée par le principe de subsidiarité, et protéger contre les interventions abusives et les atteintes disproportionnées à l'autonomie administrative régionale et locale de la part l'UE et de ses organes.

- Dans le contexte de l'élargissement du Conseil de l'Europe par suite du changement de régime en Europe centrale et de l'Est, tous les candidats à l'adhésion ont dû signer et ratifier deux (des nombreuses) conventions du Conseil de l'Europe : la **Convention des droits de l'homme** et la **"Charte de l'autonomie de l'administration communale" du Conseil de l'Europe** de 1985. La première, du fait de la mention expresse des droits de l'homme dans le Traité de Maastricht (1992) est *de facto* devenue une part du droit constitutionnel de l'UE. [(Ainsi, le préambule parle de "l'engagement (des Etats membres) de respecter les droits de l'homme et les libertés fondamentales«. L'art. 6 al. 2 Traité UE (ex-art. F de Maastricht) dispose : "L'Union respecte les droits fondamentaux, tels qu'ils sont garantis dans la Convention européenne pour la défense des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950...". Et depuis Amsterdam, l'art. 6 al. 1 Traité UE précise en outre : "L'Union repose sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales ainsi que de l'Etat de droit ; ces principes sont communs à tous les Etats membres.")]

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42 Cf. Rengeling, „Une Charte des droits fondamentaux« *in* Frankfurter Allgemeine Zeitung du 21 juillet 1999.

43 Les actuels art. 8 sq. du Traité CE.

- Il faut que cette incorporation réussie d'une convention du Conseil de l'Europe s'étende également à la "Charte communale" ! Compte tenu que tous les 15 membres de l'UE ont signé la Charte communale depuis 1985, même si la France et la Belgique ne l'ont pas encore ratifiée, alors que même la Grande-Bretagne, qui avait longtemps refusé de signer, a fini par signer et ratifier la Charte (1997/98). Sur un nombre d'actuellement 41 Etats membres, 37 ont signé la Charte communale (31 l'ayant ratifiée), l'art. 6 al. 1 du Traité UE complété à Amsterdam vaut donc également pour cette Charte : "Ces principes sont communs à tous les Etats membres."

- Si l'on considère au demeurant que le même art. 6 Traité UE ajoute depuis Amsterdam : "**L'Union respecte l'identité nationale de ses Etats membres"**, la conséquence en est là aussi, - du moins en République fédérale d'Allemagne et en Autriche, pour ne citer que des Etats où une large autonomie de gestion des communes et des régions revêt une grande importance constitutionnelle, sociale et politique -, que l'Union est tenue de respecter cette autonomie comme faisant partie de **"l'identité nationale"**, et qu'elle n'est donc pas habilitée, sans motif contraignant, à restreindre davantage que les Etats eux-mêmes ne le font (ne peuvent le faire) les deux formes de responsabilité et d'autonomie citoyennes. Ce serait en même temps tenir compte du fait que, dans plusieurs Etats membres, pour ne pas dire dans la plupart, l'autonomie administrative régionale et locale a une longue histoire qui correspond à ce que l'al. 2 du même art. 6 Traité UE circonscrit comme **"les traditions constitutionnelles communes aux Etats membres** en tant que principes généraux du droit communautaire« que l'Union s'engage à respecter.

Dans le même sens, on citera l'observation de **Benjamin R. Barber,** politologue américain et conseiller du Président Clinton[44] : "Dans les milieux du Fonds monétaire international, de l'industrie internationale du divertissement, de l'OTAN ou de la Commission européenne, le citoyen n'a plus aucun poids." L'un de ses projets vise donc à "familiariser progressivement avec des processus de décision démocratiques les participants à des initiatives communales." D'après Benjamin Barber, **"la participation aux décisions reste cantonnée au niveau communal,** alors que l'exercice du pouvoir est de plus en plus centralisé.**"** Et d'ajouter : "Plus la politique s'éloigne de la base, plus la démocratie (!) se porte mal."[45] En son temps, Jean-Jacques Rousseau avait fait la même remarque, observant que le citoyen perd d'autant plus d'argent que s'éloigne de lui la gestion de taxes et d'impôts ensuite redistribués avec de grandes pertes, et que son mécontentement vis-à-vis de l'Etat n'en sera que plus vif. Pourquoi devrait-il en être autrement dans une Union européenne élargie ?!?

Naturellement, je serais très heureux que vous puissiez intégrer ces réflexions et objectifs aux avis qui devront être prochainement élaborées. Nul doute qu'un **vote du Comité desRégions** en ce sens pèserait d'un grand poids. Par ce biais, le CdR réaffirmerait résolument les exigences et les objectifs qui avaient été les siens jusqu'alors ; d'ailleurs, les Länder allemands ont déjà défendu la même cause à Amsterdam. Simplement, par égard envers les Etats membres hésitants sur ce point, il ne faut jamais cesser de répéter qu'il ne s'agit pas d'intervenir dans les structures internes, - serait-ce uniquement pour des raisons liées à la subsidiarité -, mais que les communes (comme les régions) doivent être mises à l'abri d'autres interventions, restrictions et sollicitations de la part de l'UE et de

[44] Cf. Focus 19/1999 du 10 mai 1999.

[45] Il convient de faire remarquer que d'après Focus (*op. cit.*), ce politologue américain entretient "de bons contacts avec Roman Herzog, président de la R.F.A.", que le Chancelier Schröder, d'après la même source, a prié de participer en tant que représentant de l'Allemagne et expert au groupe de travail chargé d'élaborer un projet de Charte des droits fondamentaux entre l'automne 1999 et la fin 2000.

ses organes. Cela s'inscrirait logiquement dans le prolongement du principe de subsidiarité. Mais il en irait avant tout du respect de „l'identité nationale des Etats membres« (art. 6 al. 3 Traité UE).

Dans le même esprit, le Conseil des communes et des régions de l'Europe négociera avec les membres du Parlement européen, d'autant plus qu'il élabore un Livre blanc sur la mise en pratique effective du principe de subsidiarité.

Les principaux objectifs et exigences des communes et des régions européennes peuvent se résumer comme suit :

- Sans les communes et les régions, la **proximité citoyenne** dans l'Union européenne est irréalisable. L'autonomie des administrations locales et régionales doit être d'autant plus renforcée que l'UE s'élargit, ce qui permettra ainsi de rapprocher les citoyens du fonctionnement quotidien de l'UE et de son droit communautaire.
- **L'autonomie administrative des communes**, nonobstant la multiplicité de ses traditions et de ses formes dans les divers pays, constitue un **droit fondamental et communautaire des citoyens** dans une Europe de liberté[46]. Une **garantie formelle de l'autonomie administrative** doit en constituer le pendant dans le droit communautaire[47].
- Dans ses traités, l'Union européenne doit à l'avenir reconnaître la **"Charte de l'autonomie administrative des communes"** du Conseil de l'Europe (1985) comme droit commun à l'Union et à ses Etats membres, ce qui apparaît un prolongement logique compte tenu de la réussite de la Charte au cours des 10 dernières années.
- Une future **Charte des droits fondamentaux** des citoyens de l'UE doit également protéger le droit à **l'autonomie citoyenne** vis-à-vis de l'Union et de ses organes.
- L'application par les organes de l'Union du **principe de subsidiarité** régissant également leurs relations et normes juridiques vis-à-vis des régions et des communes, c'est-à-dire l'application du droit matériel de la garantie d'autonomie administrative, doit se développer conformément aux protocoles annexés au Traité d'Amsterdam.
- Le droit des communes, de leurs groupements représentatifs ou du CdR **d'ester en justice** en cas de violation de ces deux principes et garanties.
- Le renforcement de **l'autonomie administrative** des communes et des régions reste toutefois un **défi permanent au sein des Etats membres.** L'autonomie ne pourra être protégée au niveau européen que si elle reflète non seulement les traditions nationales, mais aussi la pratique quotidienne des Etats membres.
- L'assistance et le soutien dans la mise en place d'administrations autonomes et efficaces au niveau local et régional des **nouveaux Etats démocratiques de l'Europe centrale et de l'Est** restera pendant une génération au moins une mission importante pour tous les Etats, aussi bien dans l'UE que dans le Conseil de l'Europe.

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46 Cf. art. 6 Traité UE (complétant l'art. F du Traité de Maastricht) : "L'Union repose sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales ainsi que de l'Etat de droit ; ces principes sont communs à tous les Etats membres."

47 L'art. 6 al. 3 du Traité UE dispose : "L'Union respecte l'identité nationale de ses Etats membres." Voir également l'avis du Bundesrat sur le Traité d'Amsterdam, 28 novembre 1997, Section II.

- La **procédure du Conseil de l'Europe** visant à contrôler l'avancement de l'autonomie administrative des 41 Etats membres est à cet égard l'un des instruments les plus importants dont le perfectionnement devra se poursuivre.

Conclusion :

La force de l'Europe tient à sa diversité. Le rôle futur des communes et des régions de l'Union européenne de la génération à venir devra refléter cette diversité et la faire valoir. Une Union vaste et puissante, comptant alors un demi-milliard de "citoyens européens", cherchera son identité dans cette diversité, elle devra par conséquent respecter et conforter l'autonomie et la responsabilité locales et régionales si elle veut à son tour être acceptée comme une unité nécessaire.

Subsidiarité et proximité citoyennes impliquent par ailleurs que "l'Europe des citoyens" soit une Europe des régions et des communes - sous peine d'échouer. Il s'agit là d'un élément irremplaçable, d'un trait caractéristique de la nouvelle identité européenne.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 12. April 2000

CHARTE 4223/00

CONTRIB 98

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend die vorläufige Stellungnahme der "European Co-operation in Anthroposophical Curative Education and Social Therapy" (ECCE). [1] [2]

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[1] ECCE: Baarnseweg 5. NL-3735 MK Bosch en Duin. Tel: +31-30 692 7199. Fax: +31-30 692 7190.

[2] Dieser Text wurde nur in deutscher Sprache übermittelt.

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An die Europäische Union

Konvent für Grundrechte **7.4.2000**

Sehr geehrter Herr Prof. Dr. Herzog,
Sehr geehrte Damen und Herren,

Die Europäische Kooperation für anthroposophische Heilpädagogik und Sozialtherapie umfasst Verbände von Angehörigen behinderter
Menschen sowie Verbände von Einrichtungen in zehn Ländern der europäischen Union.

Wir beobachten die Schaffung von europäischen Grundrechten mit großem Interesse und möchten uns in den laufenden Prozess mit der folgenden Stellungnahme einbringen. Ergänzungen anhand der weiteren Entwicklung bleiben vorbehalten.

Wir sind gerne bereit , unsere Positionen bei einer Anhörung persönlich zu vertreten.

Mit freundlichen Grüßen

Hellmut Hannesen
(Beauftragter für EU-Grundrechte)

Beauftragter für EU-Grundrechte:
Hellmut Hannesen

Verband.anthr@t-online.de

Stand: 2000-04-07

Vorläufige Stellungnahme zur
Charta der Grundrechte der Europäischen Union

1. Würde des Menschen

Der Schutz der Menschenwürde wird in Artikel 1, Charte 4149/00 vom 2000-03-08 kurz aber eindeutig festgelegt. Zum Schutz der Menschenwürde gehören auch das Thema Bioethik (siehe unten 2) und ein Mindestmass an sozialer Sicherung (siehe unten 5).

2. Recht auf Leben

In Artikel 2 (4149/00) heißt es: „Jede Person hat das Recht auf Leben“. Besser wäre hier die gleiche Wortwahl wie in Artikel 1 („Würde des Menschen“), da von einigen Vorden-kern der Bioethik zwischen Mensch und Person unterschieden wird.

In Artikel 2, Fassung 2000-02-15 (Charte 4123/1/00) wurde in Absatz 2 zusätzlich ge-regelt: „Jeder hat das Recht auf körperliche, psychische und genetische Unversehrtheit.“ Zu Absatz 2 wurde außerdem eine ausführliche Alternativfassung vorgeschlagen, die die aktuellen Themen der Bioethik behandelt.

Dies ist in der Fassung vom 2000-03-08 in einen Artikel 3 eingegangen. Dort fehlt die „genetische Unversehrtheit“. Immerhin sind aber in Absatz 2 einige Aspekte der Bioethik geregelt, wie Verbot eugenischer Praktiken, Verbot des Klonens von Menschen usw.

Hier sollte ein Zusatz eingefügt werden: „Medizinische Forschung ist nur zulässig, wenn der Betroffene selbst wirksam eingewilligt hat.“

3. Nichtdiskriminierung

Im Entwurf vom 2000-02-24 (4137/00) gab es einen „Artikel 19 Nichtdiskriminierung“, in dessen Aufzählung auch Behinderung enthalten war. Diese Bestimmung sollte im neuen Entwurf wieder aufgenommen werden.

4. Familie und Kinder

In Artikel 9 in der Fassung vom 2000-02-15 (4123/1/00) wurde auf den „rechtlichen, wirtschaftlichen und sozialen Schutz der Familie“ und speziell auf den „Schutz des Kindes“ hingewiesen.

Wegen aktueller Gefährdungen durch vorgeburtliche Praktiken sollte das Lebensrecht jedes Kindes besonders betont werden: „Jedes Kind hat ein Recht auf Leben“. (Dies gehört systematisch in Artikel 2 der Fassung vom 2000-03-08.)

Das Aufwachsen der Kinder ist aber heute ebenfalls gefährdet durch Umweltzerstörung, Einfluss der Massenmedien, Lärm, Technisierung usw. Deshalb ist eine Benennung dieses Schutzbedürfnisses angebracht.

5. Soziale Sicherung

In den Grundrechten sollten nicht nur individuelle Rechte enthalten sein, sondern auch ein Mindestmaß an sozialer Solidarität normiert werden, etwa in folgender Formulierung:

1) Jeder hat ein Recht auf menschenwürdige Existenz und die dazu erforderlichen materiellen Mittel.

2) Die Gesellschaft bekennt sich zu solidarischer Hilfe und zur Teilhabe aller am allgemeinen Wohlstand.

3) Bei der Gewährung sozialer Leistungen ist das Recht auf Selbstbestimmung und auf freie Wahl von Angeboten und Diensten zu achten.

Da der Sozialstaat eine Entwicklung der neueren Zeit ist, fällt es schwer die wesent-lichen, grundrechtlichen relevanten Aspekte kurz und knapp zu fassen. Anliegen ist hier, einerseits auf eine Verpflichtung der Gemeinschaft hinzuweisen, dass ein menschenwür-diger sozialer Standard (Mindestmaß!) gewährleistet werden muss, andererseits muss deutlich gemacht werden, dass die Freiheit der Lebensgestaltung und Selbstbestimmung auch gegeben sein muss, wenn ein Mensch auf finanzielle oder sachliche Hilfe der Ge-meinschaft angewiesen ist (Pflege, Betreuung, ambulante Dienste usw.). Er darf dann nicht ein Objekt der Bürokratie und Sozialplanung werden. Z.B. muss er zwischen unterschiedlichen Therapierichtungen der Medizin wählen können (z.B. Homöopathie) oder soziale Dienste von Trägern mit unterschiedlicher Konzeption und Arbeitsmethode.

Da es sich teilweise um ein Freiheitsrecht handelt, könnte dieser Teil auch bei dem allge-meinen Recht auf persönliche Freiheit bzw. Entfaltungsfreiheit angesiedelt werden.

In der Charte 4193/00 vom 29.3.2000 sind gute Vorschläge für die soziale Sicherung enthalten. Es fehlt aber die wichtige Regelung über Selbstbestimmung und Wahlmöglichkeiten auf diesem Gebiet.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 12. April 2000

CHARTE 4224/00

CONTRIB 99

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme des Forum Menschenrechte zur Grundrechtscharta. [1] [2]

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[1] AG EU-Grundrechtscharta des Forum Menschenrechte: c/o FIAN, Overwegstr. 31. D-44625 Herne. Tel: +49-2323-490099. Fax: +49-2323-490018. E-mail: fian@fian.de

[2] Dieser Text wurde nur in deutscher Sprache übermittelt.

FORUM MENSCHENRECHTE

Stellungnahme zur EU-Grundrechtscharta

Das FORUM MENSCHENRECHTE begrüßt den Beschluss des Europäischen Rates vom Juni 1999, eine Charta der Menschen- und Bürgerrechte auszuarbeiten, wie wir schon 1997 gefordert haben.[1]

Transparenz und Partizipation

Der Europäische Rat hat dem Konvent, der die Grundrechtscharta ausarbeiten soll, jedoch einen sehr engen Zeitplan gesetzt: schon im Oktober 2000 will der Konvent seinen Entwurf vorlegen, im Dezember soll die Grundrechtscharta vom Europäischen Rat "feierlich erklärt" werden. Dies lässt uns daran zweifeln, dass die immer wieder eingeforderte starke Bürgerbeteiligung zum Tragen kommt. Ein transparenter und partizipativer Prozess kann nicht so aussehen, dass von den 350 Millionen EU-Bürgern gerade mal ein paar Dutzend Experten an diesem Prozess beteiligt sind. Dies wird sich auch nicht durch die Internetseite des Rates (http:\\ue.eu.int) ändern.
Als Zusammenschluß von 40 Menschenrechtsorganisationen in Deutschland ist es dem FORUM MENSCHENRECHTE wichtig, angesichts der wachsenden Macht der EU-Institutionen die Rechte der Einzelnen zu stärken.

Verbindlichkeit

Dieser Grundrechtsschutz kann nur gewährleistet werden durch eine Charta, die für alle Organe und Behörden der EU sowie ihrer Mitgliedsstaaten unmittelbar verbindlich gilt. Dies gilt gerade auch in Hinblick auf die neu hinzukommenden Bereiche der gemeinsamen Außen- und Sicherheitspolitik und der Innen- und Justizpolitik. So muß z.B. im Bereich der Militärpolitik die Gewissensfreiheit von Kriegsdienstverweigerern geschützt werden.
Die Charta muß in den Vertrag selbst aufgenommen werden, damit die in ihr verankerten Menschen- und Bürgerrechte durch die einzelstaatlichen Gerichte und letztlich durch den EuGH, zu dem die Bürger direkt Zugang haben, nachprüfbar sind. Eine bloße Proklamation der Grundrechtscharta wäre ohne Rechtsverbindlichkeit eher kontraproduktiv und würde nicht zu der angestrebten Identifikation der Menschen mit der EU beitragen.
Es muß Ziel sein, einen Großteil der in der Grundrechtscharta verankerten Rechte allen Menschen zuzusprechen und nur einige ausgewählte Rechte den Unionsbürgerinnen und –bürgern vorzubehalten. Das Grundrecht auf diplomatischen und konsularischen Schutz muß auch auf anerkannte Asylbewerber ausgedehnt werden, da diese den Schutz des Herkunftslandes nicht mehr in Anspruch nehmen können. Gleichzeitig darf das Asylrecht Staatsangehörige der EU-Mitgliedsstaaten auf keinen Fall ausschließen.
Das Verfahren zur Einschränkung der in der Charta verankerten Menschen- und Bürgerrechte muß so ausgestaltet werden, dass das Europäische Parlament massgeblich beteiligt ist.

[1] Siehe Dokumentation des Kongresses "Für ein Europa der politischen und sozialen Rechte", Materialien Nr. 8

Den Grundrechteschutz stärken

Keine Neuformulierung einer Charta zum Schutz der Menschen- und Bürgerrechte kann im 21. Jahrhundert auf die Berücksichtigung neuer Probleme und Gefahren verzichten, wie z.B. Umweltprobleme, informationelle Selbstbestimmung und Bio- und Gentechnologie. Eine bloße Kodifizierung bereits bestehender Grundrechte reicht deshalb nicht aus.
Dabei dürfen die Errungenschaften aus früheren Zeiten nicht vergessen werden. Wir möchten auf vier Bereiche aufmerksam machen, in denen nach Stand der aktuellen Diskussion ein Rückschritt droht: wirtschaftliche und soziale Menschenrechte, das Menschenrecht auf Asyl, das Verbot der Todesstrafe und Minderheitenrechte.

Wirtschaftliche, soziale und kulturelle Menschenrechte

Die Unteilbarkeit der Menschenrechte gehört zu den Grundlagen der Menschenrechtsidee auf denen die internationalen Menschenrechtserklärungen aufbauen. In Kontinuität dieser Tradition wurde auf der Wiener Menschenrechenrechtskonferenz 1993 festgestellt: ”Alle Menschenrechte sind universell, unteilbar, bedingen einander und hängen miteinander zusammen”. Diese Grundübereinkunft hat in den letzten Jahren zu einer erheblichen Stärkung der Anerkennung wirtschaftlicher, sozialer und kulturelle Menschenrechte geführt. In den neuen Verfassungen der letzten 15 Jahre werden wirtschaftliche und soziale Menschenrechte selbstverständlich und gleichberechtigt integriert.

Wir wenden uns gegen das Missverständnis, dass die Durchsetzung wirtschaftlicher, sozialer und kultureller Menschenrechte den Aufbau eines zentralen Versorgungsstaates erfordert. Vielmehr geht es dabei um die Schaffung und Sicherung sozialer und wirtschaftlicher Teilhabe. Der Staat hat in dieser Hinsicht Verpflichtungen auf drei Ebenen: die Respektierungspflicht, die Schutzpflicht und die Gewährleistungspflicht. Da das Gemeinschaftsrecht grundsätzlich dem nationalen Recht vorausgeht, ist eine Bindung der gesetzgebenden und ausführenden Organe auf EU-Ebene und in den Mitgliedsstaaten an die Respektierung der wirtschaftlichen, sozialen und kulturellen Menschenrechte zwingend notwendig. Die Respektierung dieser Menschenrechte muß auch Grundlage in der Beziehung zu Drittstaatenangehörigen und für alle Menschen einklagbar sein. Sozial benachteiligte Personen haben das Recht auf besondere Unterstützung. Ziel muss es sein, die wirtschaftlichen, sozialen und kulturellen Menschenrechte als Maßstab für politisches Handeln im Auge zu haben, auf nationalstaatlicher wie auf europäischer Ebene. Um dies zu gewährleisten, müssen die wirtschaftlichen, sozialen und kulturellen Menschenrechte Bestandteil der Grundrechtscharta werden, basierend auf den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Menschenrechte.

Das Menschenrecht auf Asyl

Die Frage nach dem Maßstab für politisches Handeln stellt sich zur Zeit insbesondere in der Weiterentwicklung einer gemeinsamen Innen- und Justizpolitik. Grundlage für diese Politik bietet der Amsterdamer Vertrag, der am 1. Mai 1999 in Kraft trat. Bis zum Jahr 2004 sollen zentrale Bereiche der Asyl- und Migrationspolitik Gemeinschaftsrecht werden, das für alle EU-Mitgliedsstaaten bindend sein wird.

Bedeutend ist die Frage nach dem Maßstab für politisches Handeln deshalb, weil der Vertrag von Amsterdam zwar eine weitgehende Verlagerung der Asyl- und Migrationspolitik auf den ersten Pfeiler anstrebt, es aber unterlassen wurde, wirkunsvolle Mechanismen der demokratischen und gerichtlichen Kontrolle bereits für die fünfjährige Übergangszeit zu installieren. Durch die Beibehaltung des reinen Anhörungsrechts für das Europäische Parlament und durch die geringen Kontrollmöglichkeiten des Europäischen Gerichtshofes bleibt es bei der untragbaren Situation, daß Regierungen im Rat als Legislative beschließen und zu Hause als Exekutive die Regelungen umsetzen, ohne einer demokratischen Kontrolle unterworfen zu sein.

Der Schutz vor Verfolgung ist ein bedeutender Rechtsfortschritt im System des allgemeinen Menschenrechtsschutzes seit 1948.Die Entwicklung des Flüchtlingsrechts bildete sich gegen vielfältige staatliche Widerstände heraus. Sein Aushöhlung ist vorprogrammiert, wenn der Flüchtlingsschutz allein, wie im Fall der EU, vom staatlichen bzw. politischen Willen der Regierungen abhängig wird. Der völkerrechtliche Bezugsrahmen des Flüchtlingsrechtes, der höhere Rang des internationale Flüchtlingsschutzes als besondere Form des allgemeinen Menschenrechtsschutzes ist ins Zentrum zu rücken. Die Genfer Flüchtlingskonvention wird zu Recht als Magna Charta des Flüchtlingsrechtes bezeichnet. Insgesamt haben 137 Staaten die Konvention ratifiziert. Alle Mitgliedsstaaten der EU sind Unterzeichnerstaaten der Genfer Flüchtlingskonvention.
Dieser völkerrechtliche Mindeststandard bildet außerdem die Grundlage für die europäische Gestaltung des Asyl- und Flüchtlingsrechtes. Auf dem Sondergipfel in Tampere sind die Staats- und Regierungschefs der EU "... *übereingekommen, auf ein Gemeinsames Asylsystem hinzuwirken, das sich auf die uneingeschränkte und allumfassende Anwendung der Genfer Flüchtlingskonvention stützt* [2]".

Die Zukunft des europäischen Asylrechts hat Auswirkungen nicht nur auf den Menschenrechtsstandard in Europa, sondern auch weit darüber hinaus, wie Jean Noel Wetterwald, Vertreter des UNHCR kürzlich feststellte: "*Die zukünftige EU-Asylpolitik wird maßgeblich auch darüber entscheiden, wie im nächsten Jahrhundert das internationale Schutzsystem für Flüchtlinge überhaupt aussehen wird. Die politisch Verantwortlichen müssen sich bewußt sein: Die Wertegemeinschaft Europäische Union steht hier in der Verantwortung für einen Grundwert, nämlich für die Institution des Asyls, deren Einrichtung man durchaus auch nach den Erfahrungen in diesem Jahrhundert als Antwort der Zivilisation auf die Barbarei begreifen kann.* "

Ein grundrechtlich garantiertes Recht auf Asyl und eine Rechtsschutzgarantie sind die beste Garantie dafür, daß die Europäischen Union und ihre Mitgliedsstaaten ihren völkerrechtlichen Verpflichtungen gerecht werden. Die Rechtswegegarantie ist das Rückgrat des modernen Rechtsstaates. Die Aufnahme des Flüchtlingsschutzes in die Grundrechtscharta ist die beste Gewähr, daß die EU ihren eigenen Ansprüchen gerecht würde. Der Text der Charta sollte unbedingt einen expliziten Verweis auf die Genfer Flüchtlingskonvention enthalten.

[2] Schlussfolgerungen des Vorsitzes - Europäischer Rat Tampere . Oktober 1999

Das Verbot der Todesstrafe und der Folter

Ebenfalls explizit verankert werden muß das Verbot der Todesstrafe und der Folter. Die Verankerung des Verbots der Todesstrafe und der Folter muß unabhängig von Spekulationen über eine Wiedereinführung der Todesstrafe als ein Menschenrecht in der Charta verankert werden. Mit einer Grundrechtscharta, die das Verbot der Todesstrafe und der Folter nicht explizit enthält, würde die EU ausserdem die Bemühungen um ein weltweites Verbot der Todesstrafe und der Folter negativ beeinflussen.
Das Prinzip des individuellen Abschiebeschutzes entsprechend der Genfer Flüchtlingskonvention und der Europäischen Menschenrechtskonvention muß in die Charta aufgenommen werden. Hier muß ein Verweis auf das Verbot der Todesstrafe und der Folter erfolgen.

Minderheitenrechte

"Niemand darf wegen seiner Rasse, Abstammung, Nationalität, Sprache, seines Geschlechts, seines Alters, seiner sexuellen Identität, seiner sozialen Herkunft oder Stellung, seiner Behinderung, seiner religiösen, weltanschaulichen oder politischen Überzeugung bevorzugt oder benachteiligt werden."
Die besonderen Bedürfnisse von Minderheiten müssen im Sinne der Gleichbehandlung Eingang in der EU-Grundrechtecharta finden. Denn Minderheiten sind Bestandteil einer jeden Gesellschaft. Minderheiten werden immer wieder Opfer von Diskriminierungen, die von Intoleranz bis hin zu physischer Vernichtung reichen.

Das A und O des Minderheitenschutzes ist das Prinzip der Gleichbehandlung. Das daraus abgeleitete Diskriminierungsverbot muss für die EU-Bürgerinnen und Bürger wie für Drittstaatenangehörige in gleicher Weise gelten. Richtig verstanden bedeutet Gleichbehandlung, dass Personen, die wegen ihrer Zugehörigkeit zu einer Minderheit Nachteile erlitten haben, eine besondere Unterstützung zusteht. Dies gilt für alle Minderheiten, seien sie ethnische, sprachliche, religiöse oder soziale Minderheiten.
Unbewältigte Minderheitenfragen, wie die Missachtung von sprachlichen Minderheiten, gibt es sowohl in den EU-Mitgliedsstaaten als auch in den Ländern, die der EU möglichst bald beizutreten wünschen. Die Aufnahme von Minderheitenrechten in die Grundrechtscharta würde klar signalisieren, dass sich die künftige Politik der EU am Schutz von Minderheiten und an dem Prinzip der Nicht-Diskriminierung ausrichtet. Dies schließt insbesondere die Respektierung und den Schutz sowie die Förderung der Minderheitensprachen ein.

Für eine glaubwürdige Menschenrechtspolitik

Die EU-Grundrechtscharta wird Auswirkungen haben auf die internationale Menschenrechtsdiskussion, insbesondere auf die konzeptionelle Weiterentwicklung der wirtschaftlichen und sozialen Menschenrechte, auf das Asylrecht, das Verbot der Todesstrafe und auf den Umgang mit Minderheiten. Hier wird die EU ihre Glaubwürdigkeit als ein politisches Gebilde, das sich an den Menschenrechten orientiert, beweisen müssen. Nur dann sind menschenrechtliche Klauseln in internationalen Verträgen überzeugend.

Die EU muss in Zukunft eine kohärente und konsequente Menschenrechtspolitik betreiben: nach außen und nach innen.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 12 April 2000

CHARTE 4226/00

CONTRIB 101

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the Confederation of British Industry (CBI).[1] [2]

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[1] CBI: Centre Point, 103 New Oxford Street. London WC1A 1DU. Tel: +44-0171-379 7400. Fax: +44-0171-240 1578.

[2] The message has been submitted in English only.

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CBI SUBMISSION TO THE EU CHARTER OF FUNDAMENTAL RIGHTS DRAFTING CONVENTION

The Confederation of British Industry (CBI) is the voice of British business, representing more than 250,000 employers, large and small, industrial and commercial.

Introduction

1. The CBI supports the European Council's objective of making the existing recognised fundamental rights and freedoms more visible to European citizens, thus promoting a culture of rights and responsibilities across the European Union.

2. We believe that EU member states already participate in a successful system of rights protection, and that the Charter should complement and not compete with this system. The best way of adding value to existing rights, instruments and systems is through a Charter that:

   - highlights the existing rights and freedoms which are generally recognised as fundamental within the EU but does not attempt to create new rights; and
   - clarifies the existing rights system, but does not undermine it.

3. This submission concentrates on the question of economic and social rights as this is the locus of the business community. The CBI is concerned that a Charter which seeks to extend beyond existing fundamental rights and complicate the existing system of rights protection could prove very damaging to the interests of European business and European citizens.

The Charter should highlight the existing rights and freedoms which are generally recognised as fundamental within the EU

4. The European Union already has an effective system for the protection of fundamental human rights, guaranteed by member states' adherence to the European Convention on Human Rights (ECHR) and by the European Treaties.

5. There is however a strong case for a Charter to:

- set out the fundamental values that all EU member states share at the start of the 21st century;
- make visible to EU citizens the existing fundamental rights and how they are justiciable.

6. A high profile Charter will help reinforce the European culture of rights – which benefits European businesses as well as citizens.

7. For this to achieve wide acceptance – including in the business community - the Charter must:

- focus on existing fundamental rights; and
- complement the existing rights protection system.

The Charter should focus on existing fundamental rights

8. The Charter should focus on the existing rights and freedoms which are generally recognised as fundamental and inalienable within the EU such as the dignity of human beings, the right to life, to liberty and security and the right to a fair trial. There are certain social rights which are equally fundamental; equal treatment between men and women, the freedom to choose and engage in an occupation are, for example, clearly recognised as legal rights by member states and individuals.

9. Other social rights, such as the right to rest periods and annual leave, the right to parental leave, and certain rights to workers' information and consultation are well-established in EU legislation. They are however of a different nature to the above fundamental rights. They are limited and qualified employment rights. They are not fundamental or universal; they could be modified should the Directives that established them be reviewed, and they are therefore not inalienable rights. The inclusion in the Charter of these rights would devalue the notion of fundamental rights.

The Charter should complement the existing rights protection system

10. The CBI supports the idea of a declaratory Charter clearly setting out the status and scope of the fundamental rights which are currently recognised by the EU. We have welcomed the UK Government's proposal of a two-part document, the first part identifying the existing rights in clear and simple language for maximum impact, the second explaining the nature and scope of those rights and pointing to the appropriate source instrument and existing enforcement mechanisms.

11. This is the best way to add value to existing rights, instruments and systems, without prejudice to legal certainty. It also offers a more flexible means of highlighting rights within a wider context than would a legally binding text, which would be very difficult to agree given Member States' differing approaches.

The Convention should not seek to create new fundamental rights or new legal mechanisms for enforcement

12. Many organisations have argued that the Charter should both increase the scope of fundamental social and economic rights and ensure that they are included in the EU Treaties. We set out below why this approach is:

- wrong in principle as new rights should only be created through inter-governmental negotiations;
- potentially deeply damaging European businesses in practice should political aspirations be construed in fundamental rights; and
- likely to undermine the existing rights protection system should the Charter become legally binding.

The Convention should not bypass the normal EU decision making process by creating new fundamental rights

13. Fundamental rights are special. They are a recognition of the critical importance of an independent judiciary in protecting universal and inalienable rights. They are superior law to which all actors and legislation must conform. Placing this enormous responsibility on an unelected judiciary is reasonable only in certain cases, where rights are truly fundamental.

14. Creating new fundamental rights must therefore be done only after very serious consideration. To allow judicial review at the European level of decisions taken by national or local governments risks taking decisions out of the hands of democratically elected politicians which are rightly their responsibility.

15. Creating new fundamental rights should not be the aim of the Charter and is not the approach intended by the European Council. The Charter should not bypass the normal EU decision making process by creating new fundamental rights across EU member states. The balance of rights between the European institutions and the Member States should only be altered by governments through inter-governmental negotiations.

16. Business rejects suggestions to include in the Charter the rights in respect of workers' information and consultation, collective bargaining and action, or training. Although certain rights to workers' information and consultation are well-established in EU legislation through the collective redundancy Directive and the European works councils Directive, these are qualified and limited employment rights in specific circumstances. No fundamental, unqualified right to information and consultation of workers is recognised in the EU. Similarly, issues such as collective bargaining or training have traditionally been the responsibility of member states, in accordance with the subsidiarity principle. All member states make some provision for the use of collective agreements. However, laws and practice in relation to collective bargaining and industrial action vary considerably across member states. There is no common basis for a fundamental right. There is no legal right to vocational training currently recognised at EU level.

Political aspirations construed as fundamental rights would be damaging

17. The distinction established by the European Council at Cologne between fundamental rights and policy objectives is a vital one. Political aspirations, particularly on economic and social issues, must be recognised as such and not given legal status. The Charter should not reproduce the confusion caused by an undiscriminating use of the word 'right' in earlier EU texts such as the 1989 Community Charter. Political aspirations must not become ill-defined justiciable 'rights'.

18. Turning political aspirations into legal rights would also potentially breach the subsidiarity principle. The social and employment chapters of the Treaties have already set out the powers of the Union to act on a European level. The Member States have specifically excluded the topics of pay, right of association, as well as the right to strike or impose a lockout from EU legislative competence. For example, a 'right to fair remuneration' would potentially jeopardise member states' responsibility for and effective control over wages policy, breaching the subsidiarity principle. These are aspirations all member states share. But it is equally clear that member state governments have taken the view that these aspirations can only be delivered at national or local level.

19. This is not just an important point of principle. It also has major practical implications as, unlike other genuinely fundamental rights, these aspirations would be almost impossible to interpret in practice by a Court, generating uncertainty for businesses. For example:

- It is not clear how 'fair remuneration' could sensibly be decided by the European Court of Justice. Wage policies should reflect national economic and political conditions – any 'one size fits all' EU level approach could cause significant increases in unemployment in some European countries.

- Adequate social protection is also a policy objective, which is mainly the responsibility of national Governments, not an EU level legal right. The difficulties of determining what an adequate level of social security provision would be in a legal sense are compounded by the variety of social protection systems across the EU.

20. If incorporated into the Treaties, these aspirations would allow judicial review by the European Court of national policy. Decisions would have direct effect, requiring member states to make immediate changes to national and local legislation.

The Convention should not seek to create new legal mechanisms for enforcement

21. The CBI believes that a legally binding Charter, effectively transferring jurisdiction over core fundamental rights from the Human Rights Court at Strasbourg and national courts to the European Court of Justice, would undermine the existing rights system and create legal uncertainty.

22. The Strasbourg Court – which has jurisdiction over the ECHR - has developed a balanced approach to the interpretation and protection of fundamental rights over fifty years. In particular it has interpreted civil and political rights which have application in the employment context - such as the right to freedom of expression or the right to freedom of assembly and association - sensitively, in line with national differences. The ECJ's experience is of a different nature; it is one of harmonisation, through the creation of common standards of interpretation.

23. The CBI agrees with the Parliamentary Assembly of the Council of Europe, who have underlined the potential risks of creating a parallel human rights jurisdiction through the ECJ. Overlaps of jurisdiction between the Strasbourg Court and the European Court of Justice would lead to different interpretations of fundamental rights, creating legal uncertainty. It would also create a two-speed system between EU members and the rest of the non-EU members of the Council of Europe, weakening the latter. The Charter should not bring into question the responsibilities of the existing European Courts.

Conclusion

24. The CBI supports the idea of a declaratory Charter, without legally binding effect, setting out clearly the fundamental rights which are currently recognised by the EU. We believe this is the best way to add value to existing rights and instruments, without prejudice to legal certainty. As we have highlighted, the Convention should not seek to create new fundamental rights or new legal mechanisms for enforcement

April 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 April 2000

CHARTE 4228/00

CONTRIB 102

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the Initiative "Netzwerk Dreigliederung", submitted with a view for the public hearing on the 27th of April 2000 in Brussels.[1] [2]

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[2] This text has been submitted in English and German languages.

Contribution to the public hearing on the Charter of fundamental rights of the European Union on the 27th of April 2000 in Brusselles

Christoph Strawe / Initiative „Netzwerk Dreigliederung“
BueroStrawe@t-online.de

Ladies and Gentlemen,

let me first thank you for giving us the opportunity to speak to you. The discussion on the Charter gives us a chance to let Europe arize in the heads and the hearts of its citizens in a new way - not only as an economic or political executive purpose alliance, but as an actual community of culture, law, and economy - built on a common understanding of the bases and functions of Europe and on the conscious and free agreements of the citizens. In our humble opinion we shall, however, only succeed, if the inclusion of the civil society is not exhausted in this hearing. Today should rather have to form the prelude for a European-wide broad public discussion of the Charter design. This should culminate in a referendum of the citizens in the member states. The Charter has to improve the level of the fundamental right protection and strengthen the democratic participation rights in Europe. This historical chance must not be given away! As initiative, in which single personalities, organizations and institutions for an up-to-date social organization co-operate, we have made extensive suggestions for the Charter, which are published in the Internet. In the shortness of the time I shall focus on only one item:

Subsidiarity

We suggest to include an article „subsidiarity“ in a passage „Principles and functions of the European Union, which result from the fundamental rights“. In the Maastricht contract the EU has committed itself to the principle of subsidiarity, which - as formulated in a classic phrasing - has the following meaning: „[...] just as that, which the invidual can accomplish out of his own initiative and with his own strength, may not be taken from him and given to the activity of society, thus it violates justice if that, which the smaller and subordinate communities can accomplish and lead to a good end, is being claimed for the broader and superordinate community [...]“.[1]

1 Enzyklika „Quadragesimo anno“, Pius XI., 1931.

The confession to subsidiarity includes, which is sometimes overlooked, an obligation concerning the inner order of the associated states, not only referring to their relationship to the Union. In addition, the principle of subsidiarity sets, which is likewise overseen quite often, limits to the activity of the state not only in a vertical direction (the superordinate public level may not regulate, what can be regulated by a subordinate level), but in a horizontal direction, too: What can be regulated by the initiative of individually responsible societies, shall and must not be regulated by activities of the state at all.

Otherwise the state will be „covered and crushed under too many obligations and liabilities“[2]. And it is even more important, that the responsibility of the single competent human being be not „covered and crushed“. In this point the principle of subsidiarity connencts itself with the principle of the human rights, because these human rights, which to protect is the most distinguished obligation of the states of Europe, make individual humans the starting point and carrier of social organization.

As paragraph 1 of the article „subsidiarity“ we suggest the following formulation for the reasons mentioned:

„(1) The EU and its member states promote a seizing of social functions on free initiative and responsibility in all areas, which the legislator does not reserve to public concerning for mandatory reasons. Public functions are in each case to be assumed and regulated on the lowest possible level.“

The vertical subsidiarity with orientation on the lowest level of possible regulation is to prevent that, to cite a phrase of Roman Herzog, Europe becomes a „a moloch of regulations“.

The horizontal subsidiarity is to protect the independence of culture and economics. Therefore we suggest two further paragraphs for the article:

„(2) The EU and its member states create promoting basic conditions, so that culture can unfold in its varieties freely and self-administered; they protect the principle of public neutrality in relation to different cultural efforts.“ (I mark that, with these principles, we also support the suggestions of the European Forum for Freedom in Education and other organizations.)

Paragraph 3: *„The EU and its member states protect the principle of the contractual self organization of the economic life; they create suitable basic conditions for an efficient, structurally and regionally balanced, social responsible economy. The EU and its member states do not become economically active themselves; the law regulates exceptions.“*

2 Quadragesimo anno.

This basic regulation should be completed by a further article, which imposes upon certain concrete obligations to the community of states with the *„fulfilment of public functions“,* which would give security to the citizen that genuine state functions are assumed in as efficient and citizen-friendly a form as possible. These suggestions would, in our opinion, also contribute to improve the acceptance of the Charter and European integration by the citizens of Europe. In all other respects I may refer you again to our further suggestions as published on the webpages of the convention.
Thank you for your attention!

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 18 April 2000

CHARTE 4229/00

CONTRIB 103

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Association of German Public Service Broadcasting Corporations (ARD) and German Television (ZDF) with a view for the hearing on the 27 April 2000. [1] [2]

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[1] ARD: Rue de la Loi 223, B-1040 Brussels. Tel: +32-2-280 1785. Fax: +32-2-230 4434.

[2] This text has been submitted in German, French and English.

Draft

for a

EUROPEAN FUNDAMENTAL RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION

in the

European Charter on Fundamental Rights

submitted by
the Association of German Public Service Broadcasting Corporations (ARD)
and German Television (ZDF)
1.4.2000

A. Draft text

1. The right to freedom of expression shall be guaranteed. Likewise, the right to obtain comprehensive information from a range of generally accessible sources shall be guaranteed. This includes, but is not limited to, access to cultural and educational content.

2. The freedom of the press, broadcasting, film and other communications addressed to the public shall be guaranteed.

3. These rights may be restricted by law only to protect legal interests of higher priority. In no case may they be restricted on account of the content of the opinion expressed, unless such a restriction serves to protect minors or personal honour, or to prevent the glorification of violence or the expression of opinions that fail to respect human dignity.

4. There shall be no censorship.

B. Notes

I. General notes

The draft text for a European fundamental right to freedom of expression and information is founded on the guarantees in Article 10 of the European Convention on Human Rights (ECHR). It takes account of the jurisdiction of the European Court of Human Rights but presents it in more concrete and more extensively developed terms. The underlying consideration is that the ECHR already provides a benchmark for fundamental rights for the whole of Europe and that its contents represent a common denominator for all European states in this respect.

This draft European fundamental right to freedom of expression and information for a European Charter on Fundamental Rights deals with key principles, especially for broadcasting. Broadcasting is protected by the constitutions of all countries (except in the case of the United Kingdom, which has no written constitution). It is either an express provision (for example, in Germany and Portugal) or part of general freedom of opinion (for example, in Italy, France, Spain, Belgium and in Article 10(1) ECHR). In all countries, broadcasting is assigned a special role in the formation of public opinion and, hence, for society. The fundamental right to broadcasting freedom always has an objective legal aspect, too, according to the equivalent construction in all states.

Moreover, all European institutions, including - to a minor extent - the European Court of Justice (ECJ) in its jurisdiction, have repeatedly and expressly emphasized the fundamental importance and necessity of securing pluralism in broadcasting. The context of the pluralism principle also provides the justification of a dual broadcasting system. Such a system exists in all EU Member States, with central broadcasting functions assigned to public broadcasting. At a European level this consensus on the leading role of public broadcasting is set out in the Protocol to the Amsterdam Treaty. Here the special role of public broadcasting for democracy, social integration and culture is expressly pointed out and thus acknowledged at the level of the Amsterdam Treaty. Similarly, it guarantees the competence of the Member States to regulate the mission, financing and organization of public broadcasting. These guarantees and large-scale exemption of the financing of public broadcasting from the provisions of the EC Treaty must not be affected by the creation of a charter of fundamental rights. In this respect, the draft contains no assignment of competence that would favour EU institutions.

The addressee and holders of the fundamental right to freedom of expression and information are specified in the general provisions of the Charter on Fundamental Rights. In this context, it must be ensured that the charter is addressed only to the European Union and its bodies and institutions. The European Charter on Fundamental Rights including the Fundamental Right to Freedom of Opinion and Information may neither replace nor supersede the constitutions of the Member States and their regulations on media law. In particular, the way the freedom of broadcasting and, especially, public broadcasting is organized falls within the competence of each Member State and can be measured only by the respective fundamental rights guaranteed by each Member State.

One of the basic requirements for a European Charter on Fundamental Rights is that its guarantees must be justiciable. The holders of fundamental rights must be able to defend themselves in court against EU bodies and institutions. Therefore, a judicial EU authority must be created separately from the ECJ to provide effective (individual) legal protection against violations of fundamental rights by EU bodies and institutions, through special proceedings. There must also be a clear demarcation between that authority and the European Court of Human Rights, to avoid any incompatibility with the latter's jurisdiction.

ARD and ZDF regard as indispensable these requirements regarding the content and function of a European Fundamental Right to Freedom of Opinion and Information, its addressees and limitations on its effectiveness and organization according to the laws of the Member States and regarding the special judicial protection of fundamental rights. If some of these requirements cannot be achieved, ARD and ZDF recommend that a European Charter of Fundamental Rights should be brought about in such a way that the European Union should accede to the European Convention on Human Rights after meeting the corresponding pre-conditions.

II. Individual notes

1. Paragraph 1

Sub-paragraph 1 of paragraph 1 defines the "right to freedom of expression" as the fundamental right to freedom to hold opinions in a traditional and comprehensive sense. Both the internal process of forming an opinion and the external action of expressing it should be protected. With the wording "[…] shall be guaranteed", sub-paragraph 1 makes it clear that as well as being a subjective defensive right, the fundamental right also has objective legal content which must be respected by European institutions.

Sub-paragraph 2 fundamentally protects freedom of information from generally accessible sources. This guarantee is found in the same, or similar, form in all constitutions and in Article 10 ECHR and thus takes up traditional regulations. The right to gain "comprehensive" information from "varied" sources expressly accounts for the principle of pluralism, which plays a central role in all European constitutions and is emphasized by EU institutions time and again. In view of the development of an information and knowledge society, this is obviously of great importance, particularly since the constantly increasing amount of information is - to some extent - restricted by technical and financial conditions.

Sub-paragraph 3 places the guarantee in sub-paragraph 2 in more concrete, broader terms. The wording "access to cultural and educational content" - in addition to the pluralism guarantee - aims to take account of the move towards an information and knowledge society and to ensure that such content may be enjoyed. In this respect, it meets the corresponding concerns of broadcasting providers to be able to provide coverage.

2. Paragraph 2

Paragraph 2 protects the press, broadcasting, film and all other (mass) communication media and their activities. Alongside its role in providing a subjective defensive right against state intervention, it also contains an institutional safeguard. Owing to the importance of these media for society and democracy, this guarantee of fundamental rights has received a paragraph of its own. It protects communication in a comprehensive manner. The guarantee is open to any kind of media development.

3. Paragraph 3

Paragraph 3 regulates restriction options for the guarantees given in paragraphs 1 and 2 and their pre-conditions.

Under sub-paragraph 1 the fundamental rights in paragraphs 1 and 2 may be restricted only to protect legal interests of a higher priority. This may occur solely on the basis of consideration of each individual case. In addition, such a restriction must be effected "by law". The term "law" means a type of action described in the general provisions of the Charter of Fundamental Rights. In view of the outstanding importance of the freedom of opinion and information, the formal requirements for this type of action must be of a high standard, which involves, in particular, qualified participation by the European Parliament.

Sub-paragraph 2 points out in sub-sub-paragraph 1 that no restriction may be made on account of the content of the opinion expressed. Exceptions to this rule are listed in the form of a final catalogue in sub-sub-paragraph 2 and concern the protection of minors, the protection of honour, protection against the glorification of violence and the protection of human dignity. Sub-paragraph 2 must be understood in conjunction with sub-paragraph 1. As regards restrictions on a given opinion, consideration is also required in individual cases, but the inviolability of human dignity may not be the subject of consideration.

4. Paragraph 4

Paragraph 4 features the traditional ban on censorship. This guarantee is of fundamental importance. The ban on censorship should essentially emerge from the overall view of the other provisions in this draft and thus has only a declarative meaning. However, to avoid any uncertainty regarding the existence of a ban on censorship it has been expressly mentioned in the last paragraph.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

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Brüssel, den 18. April 2000

CHARTE 4230/00

CONTRIB 104

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag des Diakonischen Werks der Evangelischen Kirche in Deutschland, im Hinblick auf die Anhörung am 27. April 2000. [1]

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[1] Dieser Text wurde nur in Deutscher sprache übermittelt.

Schriftliche Stellungnahme des Diakonischen Werkes der EKD zur Vorlage beim Konvent der EU zur Ausarbeitung einer europäischen Grundrechte-Charta.

Das Diakonische Werk der EKD beteiligt sich als einer der sechs Spitzenverbände der Freien Wohlfahrtspflege in Deutschland an dem Diskussionsprozeß um die Europäische Grundrechtecharta. Das Diakonische Werk vertritt über 30 000 Einrichtungen mit über 800 000 freiwilligen und hauptamtlichen Mitarbeitern, die in partnerschaftlicher Zusammenarbeit mit den staatlichen Institutionen der Bundesrepublik Deutschland soziale Dienste und Aufgaben der Daseinsvorsorge erfüllen. Im Rahmen dieser Partnerschaft ist das Diakonische Werk Bestandteil des deutschen Sozialstaatssystems. Als kirchlicher Wohlfahrtsverband richtet das Diakonische Werk sein Handeln am christlichen Menschenbild aus. Seine Arbeit ist Wesens- und Lebensäußerung der Evangelischen Kirche. Darüber hinaus gehört das Diakonische Werk zur "Zivilgesellschaft". Es erfüllt sozialanwaltschaftliche Funktionen und hat es sich zur Aufgabe gemacht, Menschen in allen Lebenslagen zu beraten und zu begleiten, die Stimme zu erheben für diejenigen, die nicht gehört werden, und für eine menschenwürdige Gesetzgebung einzutreten. Gleichzeitig bringt es seine Erfahrung als bedeutendes internationales Hilfswerk in die Diskussion ein, das sich weltweit für Gerechtigkeit und Wahrung der Menschenrechte einsetzt.

Für das Diakonische Werk als wertorientiert arbeitenden Wohlfahrtsverband liegt große Bedeutung in der Tatsache, daß die EU mit der Ausarbeitung der Grundrechtecharta Wertvorstellungen zur Richtschnur ihrer Politik macht. Die EU-Bürger werden mit Rechtspositionen ausgestattet, die für diese Freiheiten und Ansprüche begründen. Das ist eine greifbare Konkretisierung der in Artikel 6 EUV niedergelegten Zielbestimmung, daß sich das politische Handeln der EU an Wertvorstellungen orientieren muß, die allen europäischen Staaten gemeinsam sind.

In diesem Prozeß der Umsetzung von Wertorientierung in Politikgrundsätze und Rechtspositionen möchte das Diakonische Werk sich vor dem Hintergrund seines Selbstverständnisses und seiner Aufgabenstellung vor allem zu drei Themenbereichen äußern und dabei jeweils nur auf ausgewählte Artikel eingehen, um seine Position klar darzulegen. Diese drei Themenbereiche sind:

1) Freiheitsgrundrechte, insbesondere Menschenwürde, Religionsfreiheit und Asylrecht
2) Politische Partizipation
3) Soziale Grundrechte

ad 1): Freiheitsgrundrechte, insbesondere Menschenwürde, Religionsfreiheit und Asylrecht

Das Diakonische Werk unterstützt nachdrücklich die Absicht des Konvents, in Artikel 1 der Charta die Wahrung der Menschenwürde festzuschreiben. Als "Muttergrundrecht", aus dem sich die meisten weiteren Freiheits- und Gleichheitsrechte und die sozialen Grundrechte ableiten lassen, gebührt der Menschenwürde dieser herausgehobene Platz in der Charta.

Noch klarer als der derzeitige Formulierungsvorschlag "Die Würde des Menschen wird unter allen Umständen gewahrt" wäre eine Formulierung in Anlehnung an Artikel 1 des Grundgesetzes:

"Die Würde des Menschen ist unantastbar".

Der Grundsatz der Wahrung der Menschenwürde verpflichtet die staatlichen Gewalten – und damit auch die Organe der EU - für jeden Menschen Lebensfreiräume zu sichern, ihm die materielle Grundlage für ein würdiges Leben zu verschaffen und insbesondere die Rechte der Schwachen und Fremden zu achten und ihnen Gerechtigkeit zukommen zu lassen. Nach Auffassung des Diakonischen Werkes besteht eine unauflösliche Verknüpfung zwischen der Gewährleistung von Freiheits- Gleichheits- und schließlich sozialen Rechten. Freiheitsrechte, die bei den elementaren Lebensgrundrechten beginnen und in den ideellen Freiheiten der Gedankes- und Gewissensfreiheit ihre Fortsetzung haben, sind nicht denkbar ohne die einzelnen Ausformungen der Gleichheitsgrundrechte, die jedem die gleichberechtigte Teilhabe am politischen und sozialen Leben ermöglichen. Die gleichberechtigte Teilhabe ist widerum nicht denkbar ohne daß für jeden einzelnen durch die Festschreibung sozialer Grundrechte die materielle Grundlage dafür gesichert ist.

Dementsprechend begrüßt das Diakonische Werk die im Charta-Entwurf gewählte Grundrechtehierarchie, die mit den elementaren Freiheitsrechten - Recht auf Leben, Recht auf körperliche Unversehrtheit, Verbot der Folter und unmenschlicher Behandlung einschließlich des Verbotes der Todesstrafe (Artikel 2-4) - beginnt. Das Diakonische Werk tritt für eine möglichst weite Auslegung dieser Rechte ein, die frauenspezifische Aspekte umfaßt.

Zu den Lebensfreiräumen jedes einzelnen gehört nach Auffassung des Diakonischen Werkes unbedingt die Freiheit des weltanschaulichen oder religiösen Bekenntnisses. Dieses Recht ist insofern von besonderer Natur, als es die Freiheit des einzelnen, sich zu einer Weltanschauung oder zu einer Religion zu bekennen, und gleichzeitig die Freiheit des gemeinschaftlichen Bekenntnisses und die Freiheit, dieses Bekenntnis gemeinsam auszuüben, umfaßt. Die gemeinschaftliche Ausübung des Bekenntnisses ist oftmals dessen Ausdrucksform. Diese äußert sich in vielen Bereichen des gesellschaftlichen und politischen Lebens, die im Chartaentwurf präzisiert werden sollten. Für besonders bedeutend hält das Diakonische Werk Tätigkeiten in Form von Nothilfe, struktureller Hilfe und Hilfe zur Selbsthilfe, die unter dem Begriff der ”karitativen Tätigkeiten” zusammengefaßt Teil des aktiven Praktizierens von Weltanschauungen und Religionen sind.

Das Diakonische Werk begrüßt daher die Festschreibung der Gedankes- Gewissens- und Religionsfreiheit in Artikel 14 der Charta. Es bedauert die Entscheidung des Konventes, es bei der kurzen Formulierung des Artikel 14 zu belassen (”Jede Person hat das Recht auf Gedanken-, Gewissens- und Religionsfreiheit”) und schließt sich daher dem Vorschlag der EKD zu einer ergänzenden Formulierung an:

”Jede Person hat das Recht auf Gedanken- Religions- und Gewissensfreiheit. Die Religionsfreiheit schließt das öffentliche und private, individuelle und gemeinschaftliche Bekenntnis sowie das Recht von Kirchen und Religionsgemeinschaften zur Ordnung und Verwaltung ihrer Angelegenheiten nach den Gesetzen der Mitgliedstaaten ein”

Da das Diakonische Werk es sich zur Aufgabe macht, besonders für die Rechte der Fremden einzustehen, hält es die Festschreibung eines Asylgrundrechtes in der Europäischen Grundrechtecharta für unbedingt notwendig. Das Diakonische Werk unterstützt die in dem Änderungsantrag von Herrn Jürgen Meyer vorgeschlagene Formulierung des Asylrechrechtes und möchte sie um einen Verweis auf die Genfer Flüchtlingskonvention ergänzen:

Artikel 19 Asyl

(1) Jeder, der nach Maßgabe der Genfer Flüchtlingskonvention politisch verfolgt wird oder unmenschlicher oder erniedrigender Bestrafung oder Behandlung ausgesetzt ist, genießt Asylrecht. Frauenspezifische Asylgründe sind zu berücksichtigen.
(2) Niemand darf in einen Staat abgeschoben werden, wenn stichhaltige Gründe für die Annahme bestehen, daß nach der Abschiebung die in Abs. 1 beschriebenen Maßnahmen drohen.
(3) Kollektivausweisungen von Ausländern sind nicht zulässig.

Der Schutz vor Verfolgung ist ein bedeutender Rechtsfortschritt im System des allgemeinen Menschenrechtsschutzes seit 1948. Auf dem Sondergipfel in Tampere sind die staats- und Regierungschefs der EU "übereingekommen, auf ein Gemeinsames Asylsystem hinzuwirken, das sich auf die uneingeschränkte und allumfassende Anwendung der Genfer Flüchtlingskonvention stützt" (Schlußfolgerungen des Vorsitzes – Europäischer Rat Tampere, Oktober 1999). Die Aufnahme des Flüchtlingsschutzes in die Grundrechtscharta ist die beste Gewähr, dass die EU ihren eigenen Ansprüchen gerecht würde. Die Zukunft des europäischen Asylrechts hat dabei Auswirkungen nicht nur auf den Menschenrechtsstandard in Europa, sondern auch weit darüber hinaus, wie Jean Noel Wetterwald, Vertreter des UNHCR kürzlich feststellte: "Die Wertegemeinschaft Europäische Union steht hier in der Verantwortung für einen Grundwert, nämlich für die Institution des Asyls, deren Einrichtung man durchaus auch nach den Erfahrungen in diesem Jahrhundert als Antwort der Zivilisation auf die Barbarei begreifen kann." (Vgl. Stellungnahme des "FORUM MENSCHENRECHTE" zur Vorlage bei der gemeinsamen Anhörung von Bundestag und Bundesrat, an der das Diakonische Werk mitgewirkt hat.)

Das Asylrecht bedarf nach Auffassung des Diakonischen Werkes einer Ergänzung im Bereich des Schutzes der Familie. Flüchtlinge müssen am Recht auf Familienleben partizipieren können. Das Diakonische Werk begrüßt deshalb die Formulierung des Artikel 13 des Charta-Entwurfes in der "Jeder"-Form: auch Flüchtlinge im Sinne der Genfer Konvention müssen Teilhaber dieses Rechtes sein.

Zu Artikel 13 verweist das Diakonische Werk im Übrigen auf die Stellungnahme der Arbeitsgemeinschaft der Familienverbände, die dem Konvent vorliegt.

ad 2: Politische Partizipation

Das Diakonische Werk bedauert, daß in den Abschnitt über die "Bürgerrechte" keine Vorschrift über die politische Teilhabe der Bürger durch Vereinigungen und Verbände eingefügt worden ist. Wenn die Absicht der europäischen Institutionen, den "Bürgerdialog" stärker zu strukturieren und die Beteiligung der "Zivilgesellschaft" an der politischen Meinungsbildung zu intensivieren, umgesetzt werden sollen, muß sich dies in der Charta in einem Grundrecht auf Bildung entsprechender Vereinigungen niederschlagen. Ein solches individuelles Partizipationsrecht ist außerdem eine wichtige Ergänzung zu dem in Artikel 15 niedergelegten Grundrecht auf Freie Meinungsäußerung. Das Diakonische Werk schlägt daher vor, in den Abschnitt "Bürgerrechte" nach Artikel D "Recht auf Teilnahme an Kommunalwahlen" folgenden neuen Artikel E einzufügen:

Artikel E Vereinigungs- und Koalitionsfreiheit

Jeder Unionsbürger hat auf Ebene seines Mitgliedstaates und auf der Ebene der Europäischen Union das Recht, Vereine und Gesellschaften zu bilden. Solche Vereinigungen können der Durchsetzung wirtschaftlicher und sozialer Interessen dienen und in Rechtssetzungsverfahren gehört werden.

ad 3: Soziale Grundrechte:

Das Diakonsiche Werk begrüßt nachdrücklich den in den Schlußfolgerungen des Rates von Köln festgelegten Grundsatz, soziale Grundrechte in die Charta einzufügen. Menschenrechte sind unteilbar. Ihre Unteilbarkeit ist ein Gebot der Menschenwürde. Die Festschreibung sozialer Grundrechte zu verweigern, hieße, die Ausübung der zu beschränken oder gar unmöglich zu machen.

Das Diakonische Werk ist sich bewußt, daß es bei der Gewährleistung der sozialen Grundrechte unterschiedliche Ebenen gibt. Im internationalen Menschenrechtsschutz hat sich dafür folgende Terminologie gebildet: ”to protect, to respect and to fulfill”: soziale Grundrechte können ihrer Natur nach politische Zielbestimmungen sein, die staatliches Handeln – oder das Handeln der EU – binden, oder justitiable individuelle Rechtspositionen.

Das Diakonische Werk tritt für die Formulierung solcher individuellen justitiablen Rechtspositionen ein. Die Europäische Union steht an der Schwelle ihrer Entwicklung von der Wirtschaftsunion zu einer politischen Union, die alle Aspekte gesellschaftlichen Lebens umfaßt. Nur wenn in dieser Union die individuelle Durchsetzung von Rechtspositionen im sozialen Bereich gewährleistet ist, ist sichergestellt, daß das Wohlergehen des einzelnen Menschen ebensolche Beachtung findet wie die Durchsetzung der Wirtschaftsinteressen im Binnenmarkt.

Besonders nachdrücklich möchte das Diakonische Werk folgende Artikel des Charta-Entwurfes unterstützen bzw. kommentieren:

Artikel II Berufsfreiheit.

Jede Person hat das Recht, ihren Beruf und ihr Gewerbe frei zu wählen und auszuüben, unbeschadet der die Freizügigkeit von Personen betreffenden Bestimmungen des Vertrages.

Gleichberechtigte Teilhabe am Berufs- und Erwerbsleben ist ein maßgeblicher Bestandteil eines menschenwürdigen Lebens. Sie bedeutet Teilhabe am gesellschaftlichen und sozialen Leben und damit Integration in die Gesellschaft. Aufgrund des oben beschriebenen Selbstverständnisses ist es dem Diakonischen Werk ein zentrales Anliegen, daß jeder ein individuelles Recht auf Zugang zum Beruf hat. Dementsprechen unterstützt das Diakonische Werk nachdrücklich das in Artikel X formulierte Recht auf Berufsausbildung und Berufsberatung.

Artikel XIII Daseinsvorsorge

(1) Jede Person hat entsprechend den jeweiligen Gegebenheiten der einzelnen Staaten Anspruch auf staatliche Daseinsvorsorge, insbesondere auf Sozialleistungen von notwendigem Umfang
(2) Jede Person hat das Recht, soziale Dienste ihrer Wahl gemäß ihrer Weltanschauung in Anspruch zu nehmen.

Staatliche Daseinsvorsorge ist die wichtigste Ausformung des Grundsatzes, daß jeder Mensch ein seiner Würde entsprechendes Leben führen kann. Die europäischen Gesellschaften gründen sich auf den Grundsatz der Solidarität. Jeder muß gleichberechtigten Zugang zu Leistungen der Daseinsvorsorge und des sozialen Schutzes haben. Das schließt mit ein, daß die Bereitstellung dieser Leistungen von allen Mitgliedern einer Gesellschaft getragen und deswegen als staatliche Aufgabe definiert wird. Die Ableitung dieses Rechtes aus der Menschenwürde gebietet es, einen Rechtsanspruch auf Daseinsvorsorge zu formulieren und die Bereitstellung von Leistungen der Daseinsvorsorge und sozialer Dienste nicht den freien Marktkräften zu überlassen. Da soziale Dienstleistungen auch mit Wertorientierungen verknüpft sind, ist die Wahlfreiheit zwischen verschiedenen Angeboten Äquivalent des Artikel 14 ad 1) Gedankens- Gewissens- und Religionsfreiheit.

Artikel XIV Recht auf garantierte Mindestsicherung

Jeder Person muß entsprechend den jeweiligen Gegebenheiten der einzelnen Staaten eine angemessene soziale Unterstützung gewährt werden, die es ihr ermöglicht, ein menschenwürdiges Leben zu führen. Die Mindestsicherung soll darauf ausgerichtet sein, zur Selbsthilfe zu befähigen.

Das Recht auf garantierte Mindestsicherung ist ein notwendiges Korrelat zu dem Rechtsanspruch auf Leistungen der Daseinsvorsorge: gerade die Ärmsten in einer Gesellschaft dürfen – wiederum unter Berufung auf die Menschenwürde – nicht von der Solidarität der Gemeinschaft ausgeschlossen werden. Im bundesdeutschen Sprachgebrauch ist die Verwendung des Begriffs ”Sozialhilfe” für eine garantierte Mindestsicherung an dieser Stelle mißverständlich, weil sie auf die Sozialleistung Sozialhilfe verweist, die in der Bundesrepublik nur einem ausgewählten Personenkreis gewährt wird. (z.B. keine Asylbewerber). Angelehnt an die ”Empfehlungen des Rates über gemeinsame Kriterien für ausreichende Zuwendungen und Leitungen im Rahmen der Systeme der sozialen Sicherung” wird hier der Ausdruck ”garantierte Mindestsicherung” empfohlen.

Die garantierte Mindestsicherung bezieht sich nicht nur Einkommen und damit auf Geldleistungen, sondern z.B. auch Beratung zur Sicherung von Rechtsansprüchen. Sie muß auf die individuellen Bedürfnisse ausgerichtet sein, weil gerade in Notsituationen der individuelle Bedarf stark variiert. Die Ergänzung, daß die Mindestsicherung an dem in dem Mitgliedstaat geltenden Minimum ausgerichtet sein soll, betont die Bedeutung der Mindestsicherung als Instrument zur gesellschaftlichen Integration.

Das Diakonische Werk schlägt außerdem die Ergänzung vor, daß die Unterstützung der Aktivierung von Selbsthilfe dienen soll. Ausgehend von der protestantischen Sozialethik und der katholischen Soziallehre ist von unserem Verständnis her jeder gehalten, nach seinen Mitteln selbst für sich zu sorgen; ist er dazu nicht fähig, bekommt er die Unterstützung, die ihn wieder in die Lage zur Selbsthilfe bringt.

Artikel XV Recht auf Zugang zu Gesundheitsleistungen

Jede Person muß entsprechend den jeweiligen Gegebenheiten der einzelnen Staaten Zugang zu umfassenden individuell notwendigen Gesundheitsleistungen haben.

Das Recht auf Gesundheitsleistungen sollte so umfassend wie möglich formuliert und interpretiert werden, da Zugang zu Leistungen der Behandlungspflege allein nicht ausreichend sind. Auch ist die Präzisierung wichtig, daß medizinische Bedürfnisse individuell höchst verschieden sind und dem Einzelbedarf entsprechen müssen.

Jürgen Gohde
Präsident

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 18 April 2000

CHARTE 4231/00

CONTRIB 105

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Association of Women of Southern Europe (AFEM) with a view for the hearing on the 27 April 2000. [1]

[1] This text has been submitted in French and English.

AFEM
ASSOCIATION DES FEMMES DE L' EUROPE MÉRIDIONALE
ASSOCIATION OF WOMEN OF SOUTHERN EUROPE

ADDENDUM TO THE PROPOSAL OF AFEM (CONTRIB 42)
FOR THE HEARING OF 27 APRIL 2000

The AFEM wishes to thank the Convention for admitting it to the hearing and welcomes the advancement of the Convention's work. The AFEM recalls that it has been among the first NGOs which submitted contributions to the Convention: a Declaration of its Board (CONTRIB 16), a Proposal of provisions (CONTRIB 42) and a declaration of its General Assembly (CONTRIB 55), in French and English.

Following the evolution of the Convention's work and on the occasion of the hearing of 27 April 2000, the AFEM has the honour to submit an Addendum to its Proposal (CONTRIB 42) which concerns certain articles of CONVENT 13, 17, 18 and 19.

All the proposals of AFEM are supported by the ***European Women's Lobby*** and the ***Marangopoulos Foundation of Human Rights***.

- **CONVENT 13**

The fundamental principle of gender equality in all areas

Gender equality is a fundamental principle of Community law, a task of the Community and an objective, which the Community is obligated to promote in all its activities, and a fundamental human right (CJEC, EC Treaty)[1].

We welcome the proposal of Mr. Guy Braibant (CONTRIB 63, Article I) to proclaim this general principle in all areas, due to its importance, by one of the first Articles of the Charter and then to apply it in economic and social matters. This proposal reinforces the coherence of the Charter. It is, however, necessary to complement it as follows:

"1. *Substantive equality between women and men must be ensured and applied in all areas; any direct or indirect discrimination on the ground of sex is prohibited*."

"2. *Temporary positive measures are indicated, in order to improve, in the first instance, the position of women, until substantive equality between women and men is achieved."*

Comments: In this way the Charter will implement CJEC case law and will respond to the findings of the competent Community and international organs that general non discrimination clauses do not suffice to eradicate discrimination on the ground of sex and to establish substantive equality between women and men.

Sex differs fundamentally from the other grounds of discrimination mentioned in Article 13 EC Treaty. Discrimination on the ground of sex is of a particular nature. It is due to prejudice which has infiltrated social and economic structures and affects mainly women. Women are neither a minority nor a group, but one of the two forms in which the human being is incarnated, and they often suffer multiple discrimination, on the ground of sex and on other grounds.

[1] Cases 149/77 *Defrenne III* [1978] ECR 1509, C-270/97 *Sievers* 10.2.2000; Arts. 2, 3(2) EC Treaty.

This is why temporary positive measures are indicated. These do not constitute discrimination, but means for achieving substantive or *de facto* gender equality, according to Article 4(1) of the Convention for the elimination of discrimination against women and Article 141(4) EC Treaty. Declaration No 28 annexed to the Amsterdam Treaty specifies that these measures "*should, in the first instance, aim at improving the situation of women"*. Such measures are also provided by an increasing number of national Constitutions[2] and are recommended by the competent Community and international organs. They must be applied until prejudice is overcome and substantive equality between women and men is achieved. - If the Charter does not provide for such measures, it will constitute a regression with regard to Community and international "*acquis*" (see our CONTRIB 42, Introductory Note).

The particular nature of discrimination against women and the aforementioned character of positive action have been very recently confirmed by the CJEC judgment in *Badeck* (Case C-158/97, 26.3.2000).

ARTICLE 3: Right to the respect of physical and mental integrity.This right implies the absolute prohibition:

- of ***eugenic practices*****,** with or without the consent of the person concerned;
- of the ***cloning of human beings***, with or without the consent of the person concerned;
- of the ***trading in the human body*** or any ***part*** thereof (we have proposed that these be declared "***not for trade***"), with or without the consent of the person concerned.

Comments: It is indispensable to specify in all cases that the consent of the person concerned is irrelevant. In the 1st and 2nd case this mention is required by bioethics. In the 3rd case it is obvious that it is impossible to know whether the consent is freely given. The prohibition of trading should not be limited to the areas of medicine and biology, but should be of a wider scope, including also the prohibition of trafficking in human beings, namely women and children, the transnational dimensions of which is a serious concern of the EU, as well as the prohibition of trading in children with a view to adoption and the renting of surrogate mothers (see Article 1 of our CONTRIB 42 and comments thereon).

ARTICLE 4: Prohibition of torture and inhuman or degrading treatment or punishment. Sexual mutilation (which, as it is well known, is practised even on European territory) and any other form of physical or mental violence, including violence within the family, should be expressly prohibited (see our CONTRIB 42, Article 2).

ARTICLE 16(3). Right to education. "***The right of parents to have their children educated and taught in accordance with their religious and philosophical convictions shall be guaranteed, to the extent that the latter do not contravene the values and rights recognised by this Charter. In exercising this right parents shall act in the child' s best interest"*** (the last sentence adopts a proposal of Mr. G. Papadimitriou, see CONTRIB 97).

[2] Constitutions: German [Art. 3(2)], Austrian [Art. 7(2)], Portuguese [Art. 9(h)], Finnish [Art. 6(4)], Swedish [Chapter 2 §16], French [Art. 3 and 4], Greek (under discussion in Parliament).

ARTICLE X. Limitations. Such an Article, if it is to be included, should:

- mention to which Articles it refers and, in any event, exclude at least Articles 1, 2, 3, 4, 5(1), 7, 8, 9 and the principle of gender equality on which neither the EC Treaty nor most of the Constitutions allow limitations[3];
- be complemented as follows: "***Without prejudice to provisions affording more protection than this Charter or the European Convention on Human Rights or any other international instrument relating to human rights and freedoms, ratified by the Member States, as well as to the provisions of the Constitutions and legislation of Member States relating to such rights and freedoms…"***

See our CONTRIB 42, Article Z, and Comments thereon, according to which:
The EU cannot ignore the international obligations of its Member States without losing its credibility both with its citizens and the international community, the more so as it considers itself and must be a Community based on the rule of law and wishes to play a leading role in the respect and promotion of human rights around the world. ***It is to the universal values and principles that Article 6(1) EC Treaty refers.*** *This Article, as proposed, is also in line with the Community and international principle according to which Community and international standards are a minimum which may be surpassed by national law and may in no case serve as an excuse for lowering the existing national level of protection (see also Art. 137(5) EC Treaty).*

ARTICLE Y. Level of protection. This article should be complemented as follows:
"No provision of this Charter may be interpreted as placing restrictions on the protection afforded by the European Convention on Human Rights or any other international instrument relating to human rights and freedoms, ratified by the Member States, as well as by the provisions of the Constitutions and legislation of Member States relating to such rights and freedoms" (see our CONTRIB 42, Article Z, and Comments thereon as quoted *supra* under Article X).

FIELD OF APPLICATION: See our CONTRIB 42, introductory Article:
"The Union and the Community as well as Member States secure to everyone within their jurisdiction the effective enjoyment of the rights and freedoms defined in the following Articles, which may be relied upon as against their organs and institutions as well as against individuals, in all areas of Union and Community jurisdiction."

Comments: This Article specifies that individuals have not only rights, but also obligations. Moreover, the term "jurisdiction" means that the Charter applies in all areas that member states have yielded, or will yield in future, to EC or EU jurisdiction.

- **CONVENT 17 - RIGHTS OF CITIZENS**

ARTICLE A: This Article should be complemented as follows:
"The Union and its institutions are founded on the principles of liberty, democracy, respect of human rights and equality between women and men[4] and the rule of law, principles which are common to the Member States."

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3 The Greek constitutional provision that allows exceptions, subject to strict conditions, is in the course of being abolished in order to be replaced by a provision relating to positive action

4 Article 3(2) EC Treaty, CJEC case law [Case 43/75 *Defrenne II* [1976] ECR 455: Article 119 (now 141) EC Treaty "*forms part of the foundations of the Community*"].

CONVENT 18 - SOCIAL RIGHTS

ARTICLE I. Equality between women and men. This Article should be complemented as follows, in accordance with the general principle of gender equality (*supra* A. I):

"1. Substantive equality between women and men must be ensured with regard to employment and social protection; any direct or indirect discrimination on the ground of sex is prohibited. Are namely ensured the equal rights of men and women to work freely chosen or accepted, to the same working conditions, to fair and equal pay for work of equal value, to social security and assistance for themselves and their family."

"2. ***For the purposes of the principle of equal pay between men and women for work of equal value, "pay" means*** .....(insert the rest of Article 141(2) EC Treaty).

"3. ***Temporary positive measures are indicated, in order to improve, in the first instance, the position of women, until substantive equality between women and men is achieved."***

Comments: The 1st and 2nd paras. implement the "*acquis Communautaire*". In respect of the 3rd para. see supra Comments under A. I (principle of gender equality).

ARTICLE VIII: Rights of children. According to contemporary conceptions, which are expressed in the Convention on the rights of the child, the child should not be only an object of protection, but furthermore a subject of rights. SPECIFIC ARTICLE:

"1. ***Children shall be treated as individuals and shall be permitted to influence matters affecting them according to their degree of maturity***." (Proposal of Mr. Paavo Nikula inspired from Article 6 of the Finnish Constitution, CONVENT 8)

"**2.** ***Every child, without any distinction in his/her respect or in respect of his/her parents, has the right to a legal existence, to the protection of his/her interests and to the enjoyment of the rights and freedoms defined in Articles……of this Charter."***
(the Articles relating to rights that do not presuppose the age of majority should be cited; see our CONTRIB 42, Article 21).

ARTICLE XI: Right to protection of maternity. This right constitutes an expression not only of Article 137 (protection of health and security of workers), but also of Article 152 (high level of protection of human health) EC Treaty. It is inherent to human dignity and of capital importance for the very survival of Europe. It is thus wider than the right to maternity leave and belongs to every woman, not only employed women. This is why we have proposed the following Article which takes also into consideration of CJEC case law on Directive 92/85 (maternity protection) and Directive 76/207 (equal treatment). See our CONTRIB 42, Article 22:

"Every woman, without any distinction, has the right to the protection of pregnancy and maternity, including the right to sufficient maternity leave, at least of the duration provided by Community law and remunerated through social security benefits and to the maintenance, during this leave, of her rights relating to her employment, as well as to be guaranteed protection against working conditions which may harm her and/or her child, before or after confinement, and against ailments which have their origin in pregnancy, confinement or breast-feeding."

Comments: By referring to Community law as concerns the length of the leave we ensure that the above *minimum* rights shall be adapted to any Community law evolution.

ARTICLE XII. Rights of parents. The social rights of parents should not be limited to parental leave. See our CONTRIB 42, Article 23, to which should be added that: "*the organisation of working time must ensure the conciliation of family and professional life"*. As to the length and remuneration of parental leave, see *supra* our proposals on maternity protection.

- **CONVENT 19**

ARTICLES XIII-XV. We agree with Mr. G. Braibant that the rights to social security and health must belong to every person and cover also pregnancy and maternity (see supra our Art. XI). The guarantee of an "adequate" level should remain.

LANGUAGE: The expressions used in the Charter should either be sex neutral or refer to both sexes (e.g. he/she, his/her).

- **FINAL DECLARATION:** The AFEM supports the proposals of the ***EURONET*** on the rights of the child (CONTRIB 22) as well as those of the European Bureau for Lesser Used Languages (***EBLUL***, CONTRIB 50).

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Editors' note to CHARTE 4232/00 ADD 1,
Contribution by the International Federation of Human Rights (FIDH) with a view to the hearing on 27/04/00:

The INIT FR version was dated 18 April.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 7 June 2000

CHARTE 4232/00

ADD 1

CONTRIB 106

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the English version of the contribution by the International Federation of Human Rights (FIDH) with a view to the hearing on 27 April 2000. [1]

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[1] This text has been submitted in English and French languages.

FIDH INTERVENTION BEFORE THE CONVENTION
Hearing of April 27, 2000

« All human rights are universal, indivisible and interdependent and interrelated» (par. 5 of the Vienna Declaration and Programme of Action, 1993).

These words are not rhetoric : they have a very concrete meaning and real consequences – notably on the elaboration of the new instrument currently drafted at the EU level.

1. **Universality** means that all individuals under the jurisdiction of the European Union Member States must benefit from the fundamental rights stated in the Charter. It would be inadmissible for FIDH that the Charter would establish categories of beneficiaries, distinguishing between European citizens, legal residents, and illegal immigrants. As a rule, the rights enshrined in the Charter should apply to all human beings; only very limited exceptions will possibly be provided for certain specific rights (right to vote and of being elected, diplomatic protection). The rights limited to European citizens should be exceptions.

In this regard, FIDH calls on the Convention to seize the occasion of the drafting process of the Charter to propose the extension of the European citizenship to persons residing legally in a member State for at least five years.

2. The universal character of human rights also means that they represent a **common standard of achievement for all peoples and all nations**. If the Council of Europe, followed by the EU, have been built on the basis of human rights, this does not mean that these values are proper to Europeans only ; that they are their own attribute or an original characteristic. Human rights lay the foundation of the identity of all human beings, and not only of Europeans. The Universal Declaration of Human Rights was adopted even before the European Community was born.

It is true that the EU is composed of strong democracies and that people living in its territory benefit from a particularly developed system of guarantees of their rights. However, people from other regions of the world also aspire to the acknowledgement of their fundamental rights, and every single day, a lot of them put their life or their security in danger for the sole reason that they appeal to the respect of these universal human rights.

If the external policy of the EU is based on human rights and democratic principles, it is precisely because these are universal values – and not because they are specifically European ones.

As the EU is elaborating a new instrument for the protection of human rights, it should reaffirm, more than ever, the universal character of these rights, as resulting from the United the Nations and ILO instruments. These instruments are the everyday reference of human rights organisations and human rights defenders all around the world. By letting believe that human rights represent a European specificity, the EU would weaken its capacity of action in favour of human rights at the international level, facing the risk to be accused of « cultural imperialism » by authoritarian regimes.

In this perspective, the submission of the European institutions to the external control of the European Court of Strasbourg would have a determinant symbolic impact vis-à-vis third States and their nationals. **The Charter must not be a pretext allowing the European institutions to withdraw from all external control. The elaboration of a Charter and the accession to the relevant instruments of the Council of Europe are two parallel and complementary processes.**

3. Human rights are **indivisible and interdependent.** The terminology used has no incidence in this regard :the expressions « human rights », « rights of the person » or « fundamental rights » always refer to the same rights. In international law, the only distinction admitted amongst human rights is the one distinguishing between rights which cannot be derogated, whatever the circumstances (war, etc.), and the other fundamental rights (cf. art. 15.2 ECHR, art. 4.2 of the International Covenant on civil and political rights, art. 3 common to the four Geneva Conventions of 1949). The other distinctions sometimes referred to are not valid and their only effect is to increase confusion.

The rights are **indivisible** : they are of equal importance, and their implementation is closely linked, being civil and politic rights, or economic, social and cultural rights. Therefore, it is desirable that the future Charter consecrate all these rights.

4. **The accession of the EU to the European Convention for the Protection of Human Rights (ECHR) and to the revised European Social Charter (ESC) remains an essential point that must be kept in mind while elaborating the Charter.**

Regarding the accession to ECHR :

The European Parliament has rightly stressed the dangers, for legal security as well as for the coherence of the system of human rights protection in Europe[1], that might result from a Charter that would be binding. Indeed, the highest carefulness is necessary to avoid the adoption of the Charter making the European jurisdictional system obscure to citizens, already often ignorant of the existing procedures.

Submitting Community and Union acts to an external control, as for the acts of sovereign national authorities and jurisdictions, could reassure constitutional Courts about the existence of an equivalent protection of fundamental rights in the Community legal body. The risk that constitutional Courts of some States could question the primacy and uniform application of community law, deciding to check themselves the conformity of community acts to fundamental rights, would therefore be reduced.

As regards the risk of **divergent – or even contradictory - interpretations**, adopted by the European Courts, adhering to the ECHR and the external control it entails could limit the apparition of such incoherence, and have a preventive effect, binding the Community institutions to take more care over the respect for ECHR when preparing community legislation.

[1] « Insists that the rights contained in the Charter must in principle be made justiciable by the European Court of Justice, after careful consideration concerning, and adequate legislative forestalling, the multiple potentially conflicting jurisdiction as between the European Court of Human Rights, the European Court of Justice, and the highest Constitutional Court of the Member States » EP resolution on the Area of Freedom, Security and Justice, 15 Febr. 2000). « Underlines the need to establish a clear hierarchy of legal rules and a proper definition and delimitation of the powers of the Court of Justice of the European Communities, the Court of Human Rights and the national courts, in order to prevent different legal standards from being applied ». Resolution on the report on Human Rights in the EU,March 16, 2000, point 87. See also : Memorandum on the EU Charter of fundamental rights by the Standing Committee of experts on international immigration, refugee and criminal law, February 2000, p. 7 et 11 : « The EU Charter will bind the domestic authorities where they implement Community law or derogate from it. This means that the domestic courts may be confronted with two distinct standards : the EU Charter, as interpreted by the ECJ, and the ECHR, as interpreted by the European Court of Human Rights. This underlines the importance of avoiding diverging interpretations at all costs... the most rational and transparent solution remains accession by the EU as such to ECHR system ».

The European Parliament has several times requested the accession of the European Communities, and more recently, of the EU, to the ECHR[2]. The Parliamentary Assembly of the Council of Europe has also asked for it[3].

It is important to note that the attribution of the legal personality to the Union and its accession to the ECHR appear amongst the issues the Portuguese Presidency might propose to the European Council of June to be added to the mandate of the IGC (inter-governmental conference).

FIDH considers that, by adopting a Charter of fundamental rights and by including it in the Treaty of the EU, Member States establish fundamental rights as an object (objective) of the EU. This means that the accession of the EU to the instruments of the Council of Europe will henceforth be possible, by virtue of Article 308 of the EC Treaty (former article 235).[4].

In fact, in its opinion of March 28, 1996, the Court of Justice of the European Communities (ECJ) stated that, if no specific competence - being express or implicit –confers generally to the Community institutions the power of promulgating rules in the field of human rights or to conclude international conventions in this field, one had to consider whether art. 235 of the Treaty (new art. 308) could form a legal basis for the accession of the European Communities to the ECHR. The Court considered that the consequences of such an accession would have gone beyond the limits of art. 235, and therefore would have supposed a previous modification of the Treaty, because the general frame resulting from the treaty provisions, and especially those defining the missions and actions of the Community, did not explicitly refer to human rights.

Taking into account this case-law, FIDH considers that if they include in the Treaty a reference to the new Charter, or even the full text of the Charter, Member States will remove the obstacle to the accession of the European Communities to the ECHR.

By adopting the Charter, Member States would take a big step towards the accession to ECHR. No fundamental objection to this accession will remain.

In particular resolution on respect for human rights in the European Union, 16 March 2000, point 88, « Urges Member States to give the EU legal personality to enable it to accede to the ECHR ». Resolution on the Charter of fundamental rights, 16 March 2000, point S and art. 15 : « Whereas the Union's access to the European Convention on Human rights following the necessary amendments to the Treaty on European Union would represent an important step towards the strengthening of the protection of fundamental rights in the Union…calls upon the IGC to enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights. »

3 Resolution of 25/01/2000

4 Art. 308 : If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Some of the Member States could consider that the accession to ECHR would imply in-depth modifications of the European system of protection of human rights (constitutional level). In that case, FIDH calls for the insertion in the Treaty, on the occasion of the Inter-governmental Conference, of an express provision foreseeing the possibility for the EU to accede to the ECHR.

Regarding the accession to the revised European Social Charter :

It is appropriate to distinguish between the accession to the ECHR and to the revised ESC because the monitoring mechanisms established by these instruments are completely different ; This has as consequences that (1) the reasons calling for these two ratifications do not present the same urgency and (2) these accessions do not have comparable implications on the revision of the Treaties.

(1) The ECHR comes together with an extremely elaborated jurisdictional mechanism, which generates a risk of incoherence and confusion if the EU adopts a binding Charter with its own jurisdictional mechanism. This powerful argument in favour of the accession to the Charter is only valid to a lesser extend concerning the accession to the revised ESC, which is endowed of a less developed monitoring mechanism than the ECHR. There is however some risk of contradictory decisions between the ECJ (when it will be responsible for monitoring the respect of the future Charter) and the European Committee for social rights (which controls the respect of the ESC). The accession of the EU to the ESC is therefore desirable, but not so urgent as the accession to the ECHR – notably because all the EU Member States have not yet ratified the revised ESC.
(2) The accession of the EU to the revised ESC would not have consequences of « constitutional scope » (cf. opinion 2/94 of 28 March 1996, ECJ), precisely because the monitoring mechanisms set up by the revised ESC are much less developed than those set up by the ECHR. The EU should therefore be able to ratify the revised ESC without any previous modification of the Treaties.

5. The competence of the EU has considerably increased, notably since the entry into force of the Treaty of Amsterdam. The Charter should therefore cover the three pillars of the EU Treaty, including the common foreign and security policy and the judicial and police co-operation in criminal matters (which are part of the competence of the Union and not of the European Community – 3rd pillar). Indeed, the matter would be of a Charter of fundamental rights of the *European Union* - and not of the European Communities – covering consequently **the three pillars of the European Union Treaty**. This orientation corresponds to the political will expressed on the occasion of the European Councils of Cologne and Tampere, where it has systematically been question of a Charter of fundamental rights of the European Union. Furthermore, that understanding answers the will of increasing visibility in the field of fundamental rights and of increasing legal security.

The same reasoning is valid concerning the accession to the ECHR and to the revised European Social Charter. **The European Union should accede as such** to the relevant instruments of the Council of Europe, in order to ensure that all the acts posed by the European institutions that could have consequences on the enjoyment of fundamental rights would be submitted to the control of the Court of Strasbourg. The next inter-governmental Conference should be the occasion to confer to the EU the legal personality, in order that it could accede as such to the instruments of the Council of Europe.

6. Many people, to begin with the ECJ itself, have recognised that the right of individuals to appeal to the Court is too restricted, which is particularly unfortunate in the field of the protection of fundamental rights. FIDH considers that if the drafters of the Charter do not broaden the conditions of introduction of individual appeals before the Court - which would lead to overburden the Court - , an alternative solution could be to **allow the petition of collective interest** (by NGOs) in the cases where individual appeal is not admissible(e.g. : claim to strike out a ruling of general application). This mid-way solution would allow to avoid a congestion of the Court, that would lead to an excessive extension of procedures, violating therefore the right to a fair trial. This would also guarantee a jurisdictional protection of all the rights included in the future Charter, avoiding that some cases escape from all jurisdictional control. Besides, the environmental NGOs have also asked for such a mechanism (in the field of environment, damages very seldom affect directly and individually one person only, but have, on the contrary, collective consequences[5]).

The alternative solution generally presented consists in creating a mechanism of ***preliminary ruling from ECJ to ECHR*** for the questions related to the interpretation of the ECHR or to the compatibility of Community law with the Convention. That proposal does **not** seem **satisfactory**. First, it does not seem easily feasible, because of the lengthening of the procedures it would imply. Second, it is not desirable for substantial reasons : ECHR is not supposed to decide *in abstracto* on the compatibility of the internal law of a State party with the ECHR. Furthermore, to entrust an international jurisdiction external to the Community legal order the power of establishing the invalidity of an act of Community law would go beyond what the accession to ECHR requires. It would almost certainly derogate from the principle of the autonomy of the legal order of the European Communities. The EC would indeed be deprived of the possibility to decide on the ways to execute a possible decision of condemnation issued by ECHR.

FIDH SIX POINTS OF RECOMMANDATIONS:

1. no categories of beneficiaries of rights
2. to recall strongly the universal character of human rights
3. to consecrate all human rights (civil, political, economic, social and cultural) within the Charter, and propose an increase of the level of protection of fundamental rights
4. to include the Charter within the Treaties in order to confer it a binding character and open the door to the accession of the EU to the relevant instruments of the Council of Europe, and at least to the ECHR
5. recognition, to allow such an accession, of the legal personality of the Union
6. allowing NGOs to appeal to the ECJ when individual appeal is not possible

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5 See : « Verdir le Traité III », recently adopted by the main environmental NGOs in preparation of the next IGC, p 7-9.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 18 April 2000

CHARTE 4233/00

CONTRIB 107

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Conference of European Churches with a view to the hearing on the 27 April 2000. [1] [2]

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[1] Conference of European Churches, Church and Society Commission, rue Joseph II 174, B-1000 Brussels.

[2] This text has been submitted in English language only

CONFERENCE OF EUROPEAN CHURCHES

CHURCH AND SOCIETY COMMISSION

THE EU CHARTER OF FUNDAMENTAL RIGHTS - FIRST SUBMISSION TO THE CONVENTION

1 Introduction

1.1 The Conference of European Churches brings together 125 Anglican, Protestant, Old Catholic and Orthodox churches throughout the whole of Europe. The task of its Church and Society Commission includes following developments in the institutions of the European Union both on behalf of all the member churches of the Conference and specifically on behalf of those in member states of the Union.

1.2 The Executive Committee of the Church and Society Commission has discussed the initial steps towards the drafting of an EU Charter of Fundamental Rights and has made a first comment on certain elements of the Charter. The present document has been developed further following comments by members of the Commission's working groups in the light of developments in the Convention drafting the Charter. As the drafting of the Charter is a dynamic process, this document will be submitted to the plenary meeting of the Commission at the beginning of May 2000 which will discuss the matter further, review developments in the Convention which is drafting the Charter and will adopt any further comment necessary on the Charter.

1.3 The document has two sections following this introduction. In the section 2 there are a number of remarks relating to more general aspects of the Charter. In the following section 3 there is a more specific discussion of the issue of freedom of thought, conscience and religion including a suggested wording for an article on this subject. The Church and Society Commission would want to stress that it sees the Charter as an important development in the life of the European Union and its member states. It views it as an opportunity to make the Union more real to all those who live within the European Union by ensuring that they are offered a standard of human rights protection in relation to the Union and all its institutions and policies which is as high as they enjoy *vis à vis* the Member State in which they live.

2 General Comments

2.1 On the assumption that the content of the Charter is acceptable, there would be support for **a legally binding Charter**. Even if the drafting Convention has no clear mandate to prepare a legally binding document, the Charter should be more than an exercise containing only political declarations, however solemn, if it is to meet the expectations of people in the Member States. The Charter should be framed in such a way that it can become a binding part of the European Union treaties.

2.2 The Charter should be concerned not with an exhaustive list of general rights but should be **directly linked with the actions of the European Union and of member states executing the policies and legislation of the Union**. It should, therefore, cover the Common Foreign and Security Policy and the Co-operation in the Fields of Justice and Home Affairs as well as the European Community. A Charter on these lines would have an added value in clearly stating to people resident on the Union's territory that the Union's activities are at least as much linked to fundamental rights as are those of the Member States, all of which have signed and ratified the European Convention on Human Rights. At present there is technically a lower standard of human rights protection with regard to the actions of the European Union and its institutions than there is in relation to the member states. A natural corollary of this could be to amend the Union treaty to allow the European Union itself to adhere to the European Convention on Human Rights which should remain the minimum reference point for human rights throughout Europe. There would certainly need to be, however, a means of ensuring that there was a procedure to ensure that there was no conflict between the European Court of Justice and the European Court of Human Rights and no sense of there being two standards of human rights in Europe as a whole which could be used to relativise human rights and deny their universality.

2.3 As a pan-European body, the Conference of European Churches hopes that the Charter will be of interest throughout Europe and, in particular, it would expect the fullest possible **consultation with and participation of countries currently seeking membership of the European Union**. The proposal of the European Parliament's Commission on Constitutional Affairs that such countries should be given observer status in the context of the Convention and that permanent dialogue may be engaged with them in the context of the European Conference is supported.

2.4 The possibility of **direct access by individuals to the European Court of Justice** in case of infringements of rights should be considered. Direct protection of fundamental rights would be seen as an important step towards strengthening judicial control in the EU. An element of direct democracy would then strengthen the relationship between the process of developing of the Charter and deepening the character of European integration. It would be another step towards bringing the European Union closer to those who reside on its territory.

2.5 The question of **social, economic and cultural rights** should be considered in an appropriate way. The churches have a history, at least in recent times, of arguing for social justice and would welcome extensions of rights which give effect to that aim. It is recognised, however, that defining what is appropriate is a difficult task especially if the Charter is to be legally binding. It is essential that any rights granted in a legally binding Charter must be defined in such a way that they can be enforced. Thus provisions relating to equal treatment between women and men, the protection of children and young people and the right to social assistance clearly be made enforceable. It is important, however, that such rights should be expressed in sufficiently general way that the Charter does not have to be revised every time standards are raised. There must be a balance between precision and generality.

2.6 **Fundamental Rights listed in the Charter should not be limited automatically to EU citizens**. Rights of non-EU citizens, migrants, people who are nationals of third countries and asylum seekers need to be considered and there is a need to examine each provision carefully to see whether it requires to be limited to EU Citizens with it is hoped the presumption that whenever possible rights should be extended to the widest group possible. A number of particular concerns are found in this area relating to the enjoyment of the right to asylum and the need for it to have a priority over financial and administrative practice. While it would be unrealistic for persons on the territory of the Union without appropriate documentation to have every right, they are at least entitled to the absolutely fundamental right of being treated fairly and with dignity. These are issues which the Church and Society Commission is currently following up with the Churches Commission for Migrants in Europe.

2.7 Nevertheless, there should be a discussion as to whether the preparation of the Charter should also be taken as an opportunity to define the **rights of Citizens of the European Union** so as to give a real content to the concept first expressed in the Treaty on European Union in 1992. For example, consideration could be given to a right for Citizens of the European Union to vote in one of the member states to which they have a relationship at all levels in addition to their existing right to vote in the lowest level of local elections and in elections to the European Parliament.

3 Freedom of Thought, Conscience and Religion

3.1 Christian churches along with other communities of faith and conviction have an interest to see a provision in the Charter on **freedom of religion and the right to express faith or conviction individually or collectively**. At present the proposals being discussed in the Convention concentrate on statements of a positive character and it is noted that it will later address the question of general or specific clauses expressing limitations on the exercise of rights. For the moment the Church and Society Commission has followed the same pattern and would want to return to the question of limitation clauses at the time when the Convention discusses them.

3.2 The following wording is proposed for article 14 of the Convention as an alternative to the text currently being discussed by the Convention:

Everyone has the right to freedom of thought, conscience and religion. Freedom of religion includes the public and the private, the individual and the corporate manifestation of belief as well as the right of churches and religious communities to organise and to administer their own affairs according to the laws of the Member States.

3.3 The following **statement of reasons** supports this proposal. Actions of the European Union not only affect how individuals exercise fundamental rights but also religious institutions, especially churches and established religious communities. The European Commission on Human Rights linked to the Council of Europe has in several statements emphasised the right of churches and religious communities to appeal under Article 9 of the European Convention of Human Rights in their own right and not only on behalf of their members. In doing so the Human Rights Commission has in fact recognised that, under Article 9, churches and religious communities can be considered as principals. To avoid ambiguity in law, it is therefore appropriate to include the praxis of these statements in the formulation of Article 14 of the EU Charter of Fundamental Rights. Furthermore the European Union is bound by the Declaration No. 11 annexed to the Treaty of Amsterdam concerning the status of churches and philosophical and non confessional organisations. The status which churches and religious associations and communities have in Member States under national law should be respected and not prejudiced. The same applies to philosophical and non-confessional organisations.

3.4 Churches and religious communities in the Member States can be organised in many different ways and have different relationships to the state. Such structures and relationships can sometimes be regulated by law or through Church/State agreements. Many churches and religious communities have a high degree of autonomy in organising and administering their own affairs. The way in which new religious and quasi religious communities acquire established status varies from Member State to Member State. It is vital, therefore, to indicate in the Charter how the legal status in the Member States hinders actions in the Union. A reference to national law would be parallel to the proposed wording of Article 13 of the Charter dealing with family life. The right to marry and start a family is also regulated very differently in each Member State and there is, therefore, reference to national law in Article 13. In the same way reference must also be made here to the national law in the Article 14 of the Charter.

April 2000

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 2 May 2000

CHARTE 4234/00

CONTRIB 108

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the General Council of the Bar of England and Wales. [1] [2]

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[2] This text has been submitted in English language only.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

SUBMISSION BY THE GENERAL COUNCIL OF THE BAR OF ENGLAND AND WALES [1]

WHAT IS THE CHARTER FOR?

1. An EU Charter of Rights means different things to different people. The purposes which might be served by such a Charter, not all of them consistent with one another, include:

* Publicising existing rights

* Guaranteeing new rights

* Cementing the supremacy of EU over national law

* Providing the basis for an EU Constitution

* "Bringing Rights Home" from Strasbourg to the EU

2. The first and most modest of those purposes is suggested by the Presidency Conclusions of the Cologne Council of 3 and 4 June 1999, which identified the need for a Charter to "consolidate" the fundamental rights applicable at Union level "in order to make their overriding importance and relevance more visible to the Union's citizens". It was pressed by Lord Goldsmith QC, the UK Government representative at the second plenary meeting of the Drafting Body on 2 February 2000. [2]

3. The more ambitious aim of guaranteeing new rights also derives support from the Cologne and Tampere Conclusions. It is difficult to see why there would need to be discussion of whether the Charter should be integrated into the Treaties, or why such an august Drafting Body should have been convened, [3] if the purpose of the Charter was limited to a publicity exercise of the kind envisaged by the United Kingdom Government. [4] The European Parliament has called for the Charter to have "an innovative character", [5] and the President of the European Commission has described the drafting of the Charter as providing "a unique opportunity to set up a coherent and effective system of human rights protection in Europe" . [6]

4. The other three purposes identified are concerned more with constitutional matters than with the protection of human rights.

5. The third purpose – cementing the supremacy of EU over national law – recalls the jurisprudence of a number of national constitutional courts, most famously the German Federal Constitutional Court in its Solange I and Solange II cases, to the effect that the supremacy of Community law will be acknowledged only to the extent that the Community provides equivalent protection of fundamental rights to that provided under national constitutional law. [7] The decisions of the German and Danish Supreme Court in their Maastricht cases demonstrate the continued importance of this issue. [8]

6. As to the fourth purpose, the European Parliament has referred to "a mandatory fundamental rights system" as "a fundamental step towards providing the European Union with a democratic constitution". [9] In the words of the Danish delegate to the Drafting Body, Eurosceptic MEP Jens-Peter Bonde: "Whether we like it or not, we are busy drawing up a Constitution". [10] The consequences of this are potentially far-reaching and are considered further below. [11]

7. The fifth possible purpose – "bringing rights home" from Strasbourg – engages the delicate relationship between the European Convention of Human Rights and the EU. The adoption of a binding Charter may diminish the effectiveness of the arguments which have consistently been made by the Community institutions and a substantial number of Member States for EU accession to the Convention. [12] It might also give the ECJ the latitude to develop its own human rights jurisprudence, distinct from that of Strasbourg. [13] There are implications here not only for the EU but for the coherence of human rights protection in a greater Europe which already stretches from the Atlantic to the Pacific. [14]

THE NEED FOR AN EU CHARTER

8. Whether a Charter is needed depends upon what purpose one wishes it to serve. A comprehensive and fully enforceable Charter of Human Rights might well be considered necessary or at least highly desirable by anyone wishing to see the construction of a federal European Union on the model of a nation state. It would also strengthen the hand of the ECJ as against both those national constitutional courts which have challenged its supremacy on human rights related grounds, and the European Court of Human Rights which has indicated that it will assert jurisdiction over acts falling within the Community sphere if and to the extent that human rights protection in the EU is lacking. [15]

9. We express no opinion on the essentially political question of whether those developments would be desirable or not. We do however comment from a human rights perspective on the issues raised by the first two purposes identified in the opening paragraph of this submission: whether a Charter is necessary in order either to expand or to publicise the protection of human rights in the EU. We shall do so principally in the context of the judicial protection of human rights, though we are mindful that there are many non-judicial dimensions to the question, relating for example to the competence of the Union to integrate human rights into its other policies, and the impact that a Charter would have on the human rights clauses in EU Association Agreements and on the Lome Convention. [16]

Expanding Human Rights Protection

Civil and Political Rights

10. Article 6 of the Treaty on European Union declares the Union to be founded on the principle of respect for human rights and fundamental freedoms, and commits it to respecting fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States.

11. In relation to matters of Community law, justiciable in the ECJ and the Courts of the Member States, that commitment is generally honoured in practice. Under pressure from the courts of (in particular) Germany and Italy, the ECJ has been careful to give effect to fundamental rights, as regards both the acts of the Community institutions themselves [17] and – more recently – the acts of the Member States within the scope of Community law. [18] Though it is always possible to point to cases in which the ECJ wrongly understood the ECHR, [19] it is more difficult to point to a case in which the ECJ has knowingly departed from its requirements.

12. Advocate-General Jacobs was therefore correct when he stated:

"For practical purposes the European Convention of Human Rights can be regarded as part of Community law and can be invoked as such both in this Court and in national courts where Community law is in issue." [20]

This is notwithstanding the continued non-accession of the Communities to the ECHR. In limited respects, the ECJ has even built upon the jurisprudence of the European Court of Human Rights, notably in acknowledging the right to carry on a business, distinct from the rights in Article 1 of Protocol 1 to the Convention, and in extrapolating Convention principles to cover a right to a name. [21]

13. Any practitioner of EU law would acknowledge that there are gaps in the existing mechanisms for protecting civil and political rights. Some of the more obvious difficulties in this respect are:

(a) the complete absence of judicial control over the remaining third pillar matters (police and judicial co-operation in criminal matters);

(b) the highly restrictive standing rules for judicial review of Community acts in the Community courts (in particular, the requirement under Art. 230 (ex 173) of "individual concern"); [22]

(c) the length of time that a case takes to go through the Community courts; [23] and

(d) opaque decision-making processes within the Community institutions, coupled with inadequate access to documents.

A further and rather more esoteric gap, identified by the European Court of Human Rights in Matthews v UK, is the absence of any judicial control of human rights violations inherent in the Community Treaties themselves, as they exist or as they may be amended in the future. [24]

14. It does not however follow from the existence of these gaps that the adoption of an EU Charter is an appropriate or necessary way to fill them. The gaps relate not so much to deficiencies in the standards of human rights protection already acknowledged by the ECJ, as to political exclusions of certain areas from those standards and to methods of enforcing such standards as exist. Specific solutions exist for such problems. Thus, the jurisdiction of the ECJ could be extended to second and third pillar matters (as it already has been, by the Treaty of Amsterdam, in relation to immigration and asylum); the rules on standing could be relaxed by Treaty amendment or judicial decision; ECJ procedures could be reformed, and the necessary resources provided; and recent tentative advances towards freedom of information could be accelerated. It appears that in Strasbourg at least, there is even a remedy in relation to unreviewable provisions of Union law which are not Convention-compliant. [25] A number of suggestions have also been made for improving co-ordination between the ECJ and the European Court of Human Rights. [26]

15. It follows that in our opinion, the proposed Charter is not an obvious or necessary solution to such shortcomings as exist in the EU's protection of civil and political rights.

Economic Social and Cultural Rights

16. There are proponents of economic, social and cultural rights who would like to see them take a more central place in the legal scheme of the EU, and who see the Charter as a means to that end. Though Community law grants many social and economic rights to Union citizens, those rights have been developed in the context of market integration. They have therefore historically concerned non-discriminatory access by Union citizens to such social provision and economic opportunity as Member States choose to make available to their own citizens, rather than the imposition of minimum standards of provision in favour of all those within the jurisdiction of the Member States. Even in those specific fields where minimum standards are now required by Community law (e.g. equal pay and treatment, working time, parental leave, industrial democracy), such standards have been motivated to a large extent by concerns to create a level playing field for businesses within the Union.

17. Economic and social rights of a more general nature are still perceived, in most if not all Member States, as beyond the reach of hard law. Such rights have traditionally been regarded as little more than exhortations to governments and decision-makers. They have very weak international enforcement mechanisms, [27] and, at the domestic level, courts have either lacked jurisdiction, or have hesitated to interfere with what are held to be political decisions, often involving the allocation of resources.

Existing Conventions have the potential to guide the development of EU law in this field, as Article 136 (ex 117) of the EC Treaty already acknowledges with its express reference to fundamental social rights such as those set out in the European Social Charter (1961) and the Community Charter of the Fundamental Social Rights of Workers (1989). The European Social Charter has also been referred to on a number of occasions by the ECJ, its Advocates-General and the Court of First Instance. [28] However, responsibility for social, educational and welfare provision still rests overwhelmingly with the Member States rather than the Union. The last Inter-Governmental Conference showed itself unwilling to incorporate into the Treaty a specific list of social and economic rights, as had been proposed by the Comite des Sages responsible for the report prepared for the IGC on a Europe of Civic and Social Rights. In this field, the Union will clearly have to proceed with caution.

18. The universal nature of most social, economic and cultural rights is still sufficiently controversial for the question of whether there is a gap in the protection of social, economic and cultural rights in the Union to be

essentially a political one. Even if it is accepted that such a gap exists (because, for example, it is considered to be unconscionable that anyone resident in the Union should be unhoused, or unfed, or paid below a certain level) it has not so far as we know been suggested that the Conventions already referred to in Article 117 of the Treaty are inadequate as a statement of the relevant rights.

19. Debate is likely to centre rather on the extent to which some such rights should be rendered fully justiciable in the Community court and in the courts of the Member States in their capacity as courts of Community law. When dealing with rights which are so general in scope, and so potentially expensive in their application, it may well be that the best way of achieving the full justiciability of particular social, economic or cultural rights would be by addressing each issue in the specific Treaty context in which it arises.

Conclusion

20. We favour measures aimed at ensuring the greater effectiveness of human rights protection in the Community, but doubt the utility of the proposed EU Charter as a significant means to that end. Catalogues of fundamental rights are a necessary foundation for any modern legal order: but such catalogues already exist, in the Treaties themselves and in the various human rights Conventions already referred to in the Treaties. The energies being devoted to the formulation of the Charter might be more productively employed on less glamorous but more practical projects aimed at improving the effectiveness of human rights enforcement in the Community.

21. We are strengthened in those views by the conclusions of the EUI Final Report on the Project on the European Union and Human Rights, and by the conclusions of the Comite des Sages for whom the Final Report constituted the principal reference document. [29] No fewer than 56 specific recommendations are made in the Report, ranging from EU accession to the ECHR to procedural reforms and the introduction of detailed measures giving full effect to the anti-discrimination provision, Article 13 EC. The formulation of a Charter of Rights is conspicuous by its absence, both from the Report and from the recommendations of the Comite des Sages.

22. The final paragraph of the Report deserves quotation at length:

“The principal shortcoming of the EU’s human rights policy is not a lack of novelty or grand gestures. It is a consistent reluctance to come to grips with some basic home truths about the indivisibility of internal and external human rights policy, the need for a clear and unambiguous commitment at all levels, and the need for effective political and

bureaucratic structures to give effect to those commitments. The various components of the recipe for achieving those objectives have been evident for a number of years. Until those indispensable building blocks are put into place by the Member States and the institutions of the Union there will be little point in creating grand new designs for their own sake."

We agree. The "grand gesture" of the Charter may serve a political purpose, but it is difficult to see it having much of a tangible effect on human rights protection in the EU.

Publicising Human Rights Protection

23. The United Kingdom Government's alternative conception of the Charter is of a document that does no more than publicise the existing protection of human rights. Lord Goldsmith QC envisages a document that is "capable of being pinned to the wall in every government office and company headquarters to remind everyone of the rights which must be respected". [30] His suggested draft structure would contain (in Part A) a simple list of the existing rights enjoyed within the EU, and (in Part B) a statement of the legal basis for each right and of the conditions applicable to it.

24. The utility of such a document should not be over-emphasised. It would presumably not be given Treaty status, and could be no substitute for the practical measures of the type identified in the Final Project Report of the EUI. Nonetheless, we would applaud any document, officially-endorsed or otherwise, which renders the arcane world of European Union and human rights law more comprehensible to the ordinary citizen, or even to the ordinary lawyer. There are many barristers' chambers and solicitors' firms that could benefit from such a document, and none – we suspect – that would have no need for it. A Charter along those lines could have a useful role to play, particularly if accompanied by a wide-ranging education programme, though that role would be a far more limited one than appears to be envisaged by the establishment of the drafting apparatus and procedures that are currently in operation.

THE STATUS OF THE CHARTER

25. A Charter that took the form of a restatement or paraphrase of existing rights would be of the nature of a Treaty commentary rather than a Treaty provision. To give such a document Treaty status would appear to be pointless and even counter-productive. It would duplicate rights already embedded in the Treaty, and could open the way for arguments that established rights were to be construed in the light of the paraphrased version.

26. On the contrary assumption that the Charter that is proclaimed in December 2000 seeks to expand existing levels of human rights protection, the decision as to whether it should be given Treaty status is more difficult and more political. Any concluded view at this stage, when the content of the Charter is entirely unknown, would be premature. One comment may however be in order.

27. Whether to give Treaty status to whatever Charter emerges from the political process seems to us to be a question of greater importance for the future constitution of Europe than it is for the effectiveness of judicial human rights protection within the Union.

28. So far as human rights protection is concerned, the ECJ – and national courts applying Community law – may choose to apply the provisions of the Charter regardless of whether or not it is actually incorporated in the Treaty, and are likely to do so where necessary to achieve justice in the individual case. [31]

29. At the constitutional level, however, there can be no doubt but that to give Treaty status to a free-standing catalogue of fundamental and other rights would assist those who see the European Union developing into an autonomous State. It is not fanciful to suppose that the EU will some day acquire legal personality and a constitution of its own. [32] Any modern constitution may be expected to rest upon a catalogue of fundamental rights. The ECJ currently borrows the fundamental rights to which it gives effect from international Conventions (principally, the ECHR) and from the constitutional traditions of the Member States. A "patriated" catalogue of EU rights, tailored to the specific requirements of the EU, would strengthen the hand of those who wish for the EU to develop on the traditional model of the federal nation State.

30. The manner in which such a catalogue is introduced might also have far-reaching implications for the balance of power within the constitution of the Union. In particular, to the extent that a catalogue of fundamental rights is accorded the status of a "basic law", whether by the express words of the treaties or by the European Court of Justice in interpreting the Treaties, it could provide a benchmark by which the ECJ could examine the constitutionality not only of secondary legislation and Community action but of subsequent Treaty amendments proposed by the Member States – and perhaps even of existing Treaty provisions. [33] In that event, it would no longer be true to say of the Member States that they are, in the well-known phrase of the German Federal Constitutional Court, "the Masters of the Treaties".

31. We conclude that if the function of the Charter is to publicise or comment upon existing rights, there would be no point in giving it Treaty status. If its function is to guarantee new rights, the question of whether it should have Treaty status is an essentially political one, with important consequences for the future constitution of Europe, including the balance of power between the ECJ and the Member States.

THE SCOPE OF THE CHARTER

32. Under this heading, a number of issues arise upon which we comment only briefly.

On whom should the Charter impose obligations?

33. There appear to be at least two issues here, which will arise in the event that the Charter is given legal force: how if at all the public authorities upon whom any obligations will principally rest are to be defined; and the extent to which, if at all, the rights enshrined in the Charter should apply also in legal relations between individuals.

34. As to the first of those issues, there are a number of different contexts in which the concept of public authority falls to be defined in the law of the EU. The developing case law of the ECJ on those emanations of the State against which directly effective provisions of law may be enforced would provide the obvious model. [34] This is an area where the ECJ could sensibly be allowed to develop its own jurisprudence.

35. As to the second issue, the concept of Drittwirkung, or the horizontal enforcement of human rights, is a notoriously complex one. Whilst Drittwirkung is not a requirement of the ECHR, nothing in the ECHR prevents the States from conferring Drittwirkung upon Convention rights and freedoms within their national legal systems. [35] Whether the EU will wish to do so is another matter.

36. The appropriate course – as chosen by the United Kingdom in the Human Rights Act 1998 - may well be to impose any obligations against "public authorities" and to leave it to the courts to decide the extent to which the courts, as public authorities themselves, find it appropriate to give horizontal effect to particular obligations. The courts may however be assisted by some appropriate words in whatever Charter is drafted. Sir Sydney Kentridge QC has made a persuasive plea for the advantages of Mittelbaredrittwirkung , as practised by the courts of South Africa under the Constitution of 1996, whereby human rights have an indirect influence on the development of all jurisprudence by means of a constitutional requirement that "when developing the common law … every court must promote the spirit, purport, and objects of the Bill of Rights". [36]

To whom should the Charter give rights?

37. To the extent that the Charter merely rehearses rights granted under the Treaty to EU or EEA nationals (e.g. the right to move freely between States and to work without discrimination), there can be no objection to so limiting those rights in the form in which they may be summarised, reproduced or extended in the Charter.

38. Where fundamental rights are at stake, however, we can see no justification for limiting them to nationals of the EU. Ever since the UN Declaration of 1948, the universality of human rights has been recognised as inherent in the very nature of human beings. The ECHR requires Contracting States to secure the rights and freedoms defined in the Convention to "everyone within their jurisdiction". The Charter should do the same.

Should the Charter apply to all three pillars?

39. The Charter should in our opinion be presumed to apply to all EU law that is justiciable before the ECJ and national courts in their capacity as courts of EU law. [37] Some areas currently excluded – in particular, police co-operation under the third pillar – have the potential to raise serious human rights issues. To the extent that there are legitimate sensitivities about judicial intrusion, it would seem appropriate to deal with these by the terms in which the rights themselves are formulated rather than by a blanket exclusion of whole policy areas from the courts and from the Charter.

THE CONTENT OF THE CHARTER

40. If the purpose of the Charter is to publicise existing human rights protection, as the United Kingdom Government believes, the content of the Charter will be self-evident: a catalogue of all existing rights, whether derived from the law of the EU, from international human rights conventions or from the constitutional principles of the Member States.

41. If the purpose of the Charter is to "patriate" Strasbourg rights, including principally the ECHR , we consider that any change to the wording of long-established Convention provisions should be avoided, and that express words should be included (as they were in s2. Human Rights Act 1998) requiring the ECJ and other courts applying EU law to take account of any relevant judgment, decision, declaration or advisory opinion of the European Court of Human Rights. [38]

42. There are three reasons for this view. First, to have two similar but distinct catalogues of fundamental rights and freedoms, which would sometimes be applicable in the same case, would cause confusion within the EU, even to professionals in the field. Secondly, it would tend to diminish the attraction of the Council of Europe and its Conventions to the States of eastern Europe and the former Soviet Union. Thirdly, it would make it more difficult for the EU in the future to accede to the ECHR, a step which we believe could well prove to be a positive one.

43. It is sometimes pointed out that Contracting Parties to the Council of Europe have their own national catalogues of fundamental rights, distinct from those in the ECHR, and suggested that there is no reason why the EU should not do the same. That argument overlooks the fact that the EU is not a contracting party to the ECHR, and therefore not subject to its overall control. The political reality may well prove to be that once it has its own distinct Charter of fundamental rights, the EU will diverge from the Strasbourg model with unfortunate effects for the remainder of Europe.

44. To the extent that the Charter includes rights not so far formulated in any Council of Europe or other international convention, such rights should so far as possible reflect international thinking. For example, if as has been suggested a freestanding non-discrimination requirement is to be included in the Charter, its formulation should take careful account of the negotiations that are taking place within the Council of Europe as regards the formulation of an equivalent requirement. [39]

45. We are asked, finally, about the role of subsidiarity in a Charter of EU Rights. Subsidiarity arguments may be influential in arguing for the non-inclusion of a particular right in the Charter, or for the manner in which a particular right is expressed. Once the Charter exists, however, we doubt that the concept will have much relevance. Rights contained in the EU Treaties are presumed to apply equally to all Member States: derogations are granted only exceptionally and for time-limited periods. Similarly, the derogations and reservations entered by Contracting Parties to the ECHR are relatively few in number, and new adherents to the ECHR are in many cases being required to accede to Protocols that even long-standing members did not ratify for many years. [40]

46. There may be room for Charter standards to be applied in different ways in different Member States. That room is however likely to be limited, and would be better defined in terms of margin of appreciation (broadly, the tolerance of national conditions that is exercised by a supranational court) rather than subsidiarity (the principle that rules should be adopted at the closest practicable level to the people). Even the "colonial clause" of the ECHR [41] has been narrowly construed: a similar clause could be contained in the Charter, but it would be unrealistic to expect it to have a wide application within the EU.

CONCLUSION

47. Few independent commentators and few lawyers practising in the field would have put an EU Charter of Rights anywhere near the top of their lists of useful initiatives for improving the effectiveness of human rights protection in the EU. Such gaps as we are aware of in the protection of human rights in the EU could have been filled, given the political will, in more focussed and more effective ways.

48. The constitutional implications of an EU Charter are at least as important as the human rights implications. Two of these stand out. First, a Charter has the potential to weaken the close bonds between the EU and the human rights enforcement machinery of the Council of Europe. We hope that this will not be allowed to happen. It would have been preferable in many ways if the EU had chosen to go in the opposite direction by committing itself to accession to the ECHR. Secondly, a Charter with Treaty status has the potential to boost the evolution of the EU as a self-standing federation on a nation-state model, and to increase the power of the ECJ at the expense of the Member States. On that essentially political issue we express no view.

49. Against that background, it is easy to understand why the United Kingdom Government has taken the minimalist approach of support for a Charter which would be nothing more than an informative catalogue of existing rights. There would be modest value in such a Charter, though it would hardly deserve such a grand name. It remains to be seen whether it will be sufficient to satisfy the political appetite in some quarters for more.

9 February 2000

[1] Written evidence on behalf of the Bar Council International Relations Committee, Bar Human Rights Committee, and the Bar European Group as submitted to the European Communities Committee, Sub-committee (Law and Institutions), House of Lords, England. This joint submission was drafted by David Anderson Q.C. with substantial assistance from Mathew Heim, Jemima Stratford and Margaret Gray, February 9, 2000.

[2] At the time of submitting this submission, the minutes of this plenary meeting are not available and we are unaware of its conclusions.
[3] Annex to the Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.
[4] Christian Democrat Ernst Hirsch Ballin, representing the Dutch Parliament, commented on Lord Goldsmith's proposal "We are not here to draw up a brochure to promote Europe but to draw up a legal text, transposable into law:" Agence Europe No. 7648, 4 February 2000.
[5] Resolution annexed to Draft Report of 10 January 2000.
[6] "Added Value and Shared Values", Speech to Parliamentary Assembly of the Council of Europe, Strasbourg, 25 January 2000.
[7] See, generally, Slaughter Sweet and Weiler, The European Courts and National Courts – Doctrine and Jurisprudence (Hart, 1998).
[8] [1994] 1 CMLR 57 and [1999] 3 CMLR 854.
[9] Draft Resolution on drawing up a Charter, 10 January 2000, last recital.
[10] Agence Europe No. 7648, 4 February 2000.
[11] See paragraphs 29-30, below.
[12] The Community was held to lack competence to acceded in Opinion 2/94 [1996] ECR I-1759; but the position could be reversed by Treaty amendment at any time.
[13] We are not aware of any group or institution which has overtly pressed "independence from Strasbourg" as a reason for adopting a binding Charter. However there are substantial sensitivities on the point within the Council of Europe: see the Resolution of the Council of Europe Parliamentary Assembly of 25 January 2000, with its conclusion that "the existence of two systems of human rights protection in Europe would … run the risk of inconsistency between their case-law, weaken the Council of Europe Court of Human Rights and be detrimental to legal certainty" (press release on Council of Europe website).
[14] There are 41 Contracting Parties to the ECHR, with a total population of more than 800 million, as against 370 million in the 15 Member States of the EU.
[15] M & Co. v Germany 64 DR 138 (1990); Matthews v United Kingdom, Judgment of 18 February 1999 (see further fn. 24 below).
[16] See, e.g., Alston and Weiler, "An 'ever closer union' in need of a human rights policy: The European Union and human rights' in The EU and Human Rights (ed. Alston, OUP 1999). That chapter is an amended version of the Final Project Report of the EUI Project on the EU and Human

Rights which was the principal reference document used by the Comite des Sages in "Leading by Example: a Human Rights Agenda for the European Union for the Year 2000" (EUI 1998).

[17] Case 26/69 Stauder [1969] ECR 419, 425.

[18] Case 5/88 Wachauf [1989] ECR 2609, 2639.

[19] The classic examples are Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859 (application of Article 8 ECHR to business premises) and Case 374/87 Orkem v Commission [1989] ECR 3283 (privilege against self-incrimination: judgment implicitly criticised by European Court of Human Rights in Funke (1993) A 256-A).

[20] Case C-84/95 Bosphorus [1996] ECR I-3953, 3972 para 53.

[21] Case C-168/91 Konstantinidis, per Jacobs A-G (though see, contra, Gulmann A-G in Case C-2/92 Bostock [1994] ECR I-955, fn. 12).

[22] To some extent this gap is remedied by the opportunity to assert Community rights in the national courts, coupled with the availability of the procedure for a preliminary ruling under Art. 234 (ex 177) EC. However there are significant drawbacks to this method of attacking acts and measures of the Community institutions, notably the lack of suitability of the reference procedure for the finding of fact (as to which, see Jacobs A-G in Case C-188/92 TWD [1994] ECR I-833) and the time which a reference takes even in an urgent case.

[23] In Case C-185/95P Baustahlgewebe, Judgment of 17 December 1998, the ECJ characterised a delay of more than 4 years by the Court of First Instance as a violation of the requirement in Article 6(1) ECHR of a trial within a reasonable time. In Pafitis v Greece, Judgment of 26 February 1998, the European Court of Human Rights characterised the 32-month period that it took for a preliminary ruling to be made as "relatively long" .

[24] Matthews concerned a provision denying the people of Gibraltar the right to vote in European elections which was (by Council decision) incorporated into the EC Treaty and was therefore not subject to challenge in the ECJ. The Strasbourg Court ruled that the provision violated the ECHR. The case marks a new willingness on the part of Strasbourg to hold the Member States to account for their participation in EU decisions in respect of which the judicial structure of the Union provides insufficient remedies. It also creates a dilemma for the ECJ, which may not disregard or overturn the Community Treaties and which therefore appears to lack the jurisdiction to follow the Strasbourg ruling.

[25] Another possibility would be for the ECJ to assert its own jurisdiction to review Treaty provisions for compatibility with fundamental rights, a course that might be open to it were the Community to accede to the ECHR. Indeed even in advance of such accession, it would have to decide whether to give effect to the Convention over a Treaty provision if – as is possible – the subject-matter of the Matthews case were ever to come before it. Such an assertion of jurisdiction would have fundamental consequences for the ultimate balance of power in the Union: see paragraph 30, below.

[26] We are not attracted by the suggestion of a reference

procedure modelled on Article 234 EC whereby the ECJ could consult the European Court of Human Rights on Convention issues (see e.g. Schermers (1990) 27 CMLRev 97-105; Lenaerts (1991) 16 ELRev 367 at 380). This could only add to the already lengthy delays that afflict almost all litigation in Luxembourg. There would be much to be said though for more contact between the two Courts, and for the circulation of judges between them.

[27] For example, the application of the European Social Charter is submitted solely to a system of supervision. There are national reports every two years which are examined by a Committee of Independent Experts, a Governmental Committee and a Parliamentary Assembly which adopts an Opinion. A recommendation may be made to a Contracting Party by the Committee of Ministers. The Community Charter of the Fundamental Social Rights of Workers does not even provide for a system of supervision, but simply for an annual report by the Commission. It is accompanied by an action programme, but progress towards implementation has been slow.

[28] See e.g. Case 24/86 Blaizot [1988] ECR 379; Case 236/87 Bergemann [1988] ECR 5125; Case C-192/89 Sevince [1990] ECR I-3461; Case T-45/90 Speybrouck [1992] ECR II-33.

[29] "Leading by Example: A Human Rights Agenda for the European Union for the Year 2000" (EUI, 1998).

[30] Address to Second Plenary Meeting of the Charter of Rights Convention, 2 February 2000.

[31] That is demonstrated by the current position of the ECJ in relation to the ECHR, which does not have binding legal force in the Community legal order but is for all practical purposes applied as if it did: see the comment of Jacobs A-G in the Bosphorus case cited at paragraph 12, above.

[32] Commentators have argued that such a constitution already exists: but it is difficult to accept that the Treaties establish a constitution in the true sense of an instrument that creates a legal system without deriving its own validity from any other legal system. See generally T. Hartley, Constitutional Problems of the European Union (Hart, 1999) at pp. 179-181.

[33] Some of the academic literature relating to this possibility is referred to by T. Hartley, op. cit., p. 146 at footnote 75.

[34] See, e.g., Case C-188/89 Foster v British Gas [1990] ECR I-3313.

[35] See the discussion in van Dijk and van Hoof, Theory and Practice of the European Convention of Human Rights (3rd edn., 1998), pp. 22-26.

[36] "Lessons from South Africa" in The Impact of the Human Rights Bill on English Law (ed. Markesinis, OUP 1998) at pp. 27-28.

[37] That is the current position: see e.g. Case C-299/95 Kremzow [1997] ECR I-2969, in which the ECJ refused to rule on questions involving fundamental rights because they arose in an area outside the ambit of Community law. There is an interesting debate, more appropriately

resolved by courts than by the draftsmen of Charters, as regards the circumstances in which an act of a Member State falls within the ambit of EU law for the purposes of the application of general principles, including fundamental rights: R v MAFF ex p First City Trading [1997] 1 CMLR 250 (Laws J).

[38] Clearly, the Charter would have to be construed as a living instrument, as is the ECHR itself by the European Court of Human Rights.

[39] Article 1 of Draft Protocol 12 to the ECHR. The current draft would extend the scope of the non-discrimination clause contained in Article 14 from the rights and freedoms of the ECHR itself to "any right set forth by law".

[40] Notably Protocol 6 on the abolition of the death penalty, which the United Kingdom ratified only very recently.

[41] Article 56(3), ex 63(3), which provides: "The provisions of this Convention shall be applied in [certain territories for whose international relations a Contracting Party is responsible] with due regard, however, to local requirements."

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 April 2000

CHARTE 4236/00

CONTRIB 109

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a preliminary statement of the Union of Industrial and Employers' Confederations of Europe with a view to the hearing on the 27 April 2000. [1] [2]

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[1] UNICE: rue Joseph II box 4, B-1000 Brussels. Tel: +32-2-237 6511. Fax: +32-2-231 1445. E-mail: main@unice.be

[2] This text has been submitted in French and English languages.

UNICE
Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

27 March 2000

Preliminary UNICE statement

on a

Charter of Fundamental Rights

1. UNICE supports the objective of the Cologne European Council to establish a charter on fundamental rights and make their overriding importance and relevance more visible to the Union's citizens. Article 6 paragraph 2 of the Treaty on the European Union already asserts that the Union shall respect fundamental rights as a general principle of the Community law. This objective is important not only for EU citizens but also for citizens of countries aspiring to join the EU.

2. Undoubtedly the proposed Charter should unambiguously recognise those rights and freedoms which are generally considered to be fundamental and inalienable such as the respect of dignity of the human person, the right to life, to liberty and security, or the right to a fair trial.

3. The Charter should also include other freedoms and rights associated with democracy such as freedom of assembly, freedom of expression, and the right to own and enjoy property, including intangible assets such as intellectual and industrial property.

4. In drafting the Charter, recognition should be given to the vital need for Europe to remain competitive in a global and open trading system, since this is the best way to guarantee social well being and employment. The Treaty's four fundamental freedoms - free movement of persons, goods, services and capital- should be explicitly included in the Charter, as these freedoms represent an important dimension of European citizenship. In this context, the Charter should acknowledge the key issues of freedom of enterprise and trade. Should the Charter encourage the free flow of information, this ought to be balanced against the right to privacy and data protection, including the protection of business secrets and proprietary information.

5. The application of the Charter should be limited to the Institutions and bodies of the European Union within the framework of the powers and tasks assigned to them by the European Treaties. It should respect present competences of the European Union and should not extend existing powers. The obligation to respect fundamental rights should be a constraint on the Community's action and not a licence to legislate.

6. The Charter should:

- make the existing human rights and fundamental freedoms for European citizens more visible;
- be consistent and compatible with international conventions and Member States' national constitutions;
- be applicable to the Union's institutions within the context of EU legislative competencies.
- give a clear statement of the common values of democracy, tolerance and liberty for all while at the same time respecting Europe's diversity;
- be clear and simple for maximum public impact.

7. The credibility and broad public acceptance of the Charter could be threatened if expectations are raised that cannot be fulfilled. Fundamental rights and political aspirations must be clearly delineated. In addition it should be remembered that the social and employment chapters of the Treaties have already set out the powers of the Union to act on a European level. Any change should be a specifically inter-governmental matter. It should be kept in mind that hitherto the Member States have specifically excluded the topics of pay, right of association, as well as the right to strike or impose a lockout from EU legislative competence.

8. Whatever status is given to the Charter it is essential that it should not give rise to legal uncertainty. The Charter should neither compromise existing rights nor raise conflicts of jurisprudence. In particular, overlaps of jurisdiction should be avoided, and it is important that the Charter should not raise new questions of responsibilities of the existing European Courts.

9. A forward-looking Charter should not miss the unique opportunity to express Europe's readiness to meet the upcoming challenges of developing a well-functioning market economy throughout the European Union. Therefore the freedom of establishment and entrepreneurship should be fully recognised in order to ensure the development of a democratic and enlarged Union. In focussing on the rights of European citizens, it is vital that the rights of European undertakings are also respected. Finally, UNICE believes that the Charter should specifically recognise the value and richness of diversity in Europe.

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 18 April 2000

CHARTE 4237/00

CONTRIB 110

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a statement of the European Bureau for Lesser Used Languages (EBLUL) with a view to the hearing on the 27 April 2000. [1]

[1] This text has been submitted in French and English languages.

Statement of the European Bureau for Lesser Used Languages[i] on European languages in the Charter of Fundamental Rights for the European Union

A. Preamble

Having regard to the principle of non-discrimination as a fundamental principle of human rights, established in conventional and customary law binding the member states of the European Union[ii];

recognising that this principle must be essential to the Charter of Fundamental Rights for the European Union;

maintaining that freedom of expression and the respect for cultural identity as established in international law include the protection of linguistic rights[iii];

emphasizing that the protection of cultural and linguistic diversity in the European Union is a matter of concern to all citizens of the member states[iv];

the European Bureau for Lesser Used Languages wishes the following principles to be incorporated in the Charter of Fundamental Rights for the European Union:

B. Article

1.
European Citizens have the right to maintain and develop their own language and culture, in community with the other members of their group, as an expression of the cultural and linguistic diversity that is a common heritage of Europe.

2.
Within its spheres of competence, the European Union shall promote the effective exercise of this right.

3.
No policies and measures of the European Union shall be adopted or applied in ways that are detrimental to the linguistic diversity of Europe.

C. Justification

1.
"European Citizens have the right to maintain and develop their own language and culture, in community with the other members of their group, as an expression of the cultural and linguistic diversity that is a common heritage of Europe."

Justification
This principle is already established in other documents binding the member states of the European Union[v].

The Charter of Fundamental Rights of the European Union should lead EU member States to elaborate policy and law protecting and promoting official, State, and regional or minority languages of the member states.

This task of definition is all the more urgent, as the European Union through the process of enlargement will meet demands to address the protection of linguistic rights in the applicant countries.

2.
"Within its spheres of competence, the European Union shall promote the effective exercise of this right."

Justification
Within its spheres of competence, the European Union already deals with matters concerning linguistic diversity[vi].

The development of the Regions of Europe necessarily has a cultural dimension.

European integration will in the future need support of further policies in this field, especially on plurilinguistic education and promotion of cultural diversity in media and arts.

3.
"No policies and measures of the European Union shall be adopted or applied in ways that are detrimental to the linguistic diversity of Europe."

Justification
Measures concerning unification of the Common Market of the European Union present a risk of conflict with the principle of protection of local languages.

There is need for an instrument to balance harmonisation and integration with respect for linguistic and cultural diversity.

The suggested instrument would commit the EU to a general principle of respect for linguistic diversity, supplementing more detailed approaches developed through other instruments[vii].

Notes

[i] The European Bureau for Lesser Used Languages (EBLUL, www.eblul.org) is an independent Non-Governmental Organization. It acts and speaks on behalf of the more than 40 million European Union citizens who speak an autochthonous language other than the main official language of the State in which they live. The Bureau's general aim is to promote the autochthonous lesser used (regional, minority and non-territorial) languages of the member states of the European Union and the linguistic rights of those who speak these languages. One of the Bureau's goals is to define legal frameworks that could be applied to authorities at all levels in order to guarantee all citizens belonging to a linguistic minority all of the services they need to develop and use their language in everyday life. The members' associations are organized within Member State Committees. At present, the European Bureau is made up of 13 Committees which represent the interests of the various communities (Portugal and Greece are excepted). The Member State Committees comprise cultural organizations, official institutions and other bodies active in the field of regional or minority languages and cultures. EBLUL is in special consultative status with the Economic and Social Council of the United Nations; in operational relations with UNESCO; and having consultative status with the Council of Europe. It works in close co-operation with the European Parliament and takes part in the meetings of the Intergroup for Regional and Minority Languages. It has active relations with the Committee of the Regions.

[ii] United Nations Universal Declaration of Human Rights 1948, article 2 ; Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe 1950, article 14; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, paragraphs 30 – 40

[iii] International Covenant on Civil and Political Rights, United Nations 1966, article 27; Convention on the Rights of the Child, United Nations 1989, articles 29 and 30; Convention Against Discrimination in Education, United Nations 1960, article 5; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 1990, paragraphs 32, 33, 34, 35, 40

[iv] European Charter for Regional or Minority Languages, Council of Europe 1992; Framework Convention for the Protection of National Minorities, Council of Europe 1995

[v] International Covenant on Civil and Political Rights, United Nations 1966, article 27; Convention on the Rights of the Child, United Nations 1989, articles 29 and 30; Convention Against Discrimination in Education, United Nations 1960, article 5; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 1990, paragraphs 32, 33, 34, 35, 40

[vi] Proposal for a decision of the European Parliament and of the Council on European Year of Languages 2001, COM(1999) 485 final

[vii] European Charter for Regional or Minority Languages, Council of Europe 1992, articles 1 and 2; Framework Convention for the Protection of National Minorities, Council of Europe 1995, article 5

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 19 April 2000

CHARTE 4239/00

CONTRIB 112

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a position by the European Union of Christian Democratic Workers (EUCDW) with a view to the hearing on the 27 April 2000. [1]

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[1] This text has been submitted in French, German and English languages.

Position of the EUCDW in view of the inclusion

of Fundamental Social Rights in the Charter of human rights with the objective to be included in the EU Treaty

12.04.00

The EUCDW considers social rights as a necessary addition to the freedom rights. Basic freedom rights can only be practised when a minimum of social security is ensured. Fundamental Social Rights should be considered equally as liberties. On the contrary of "classical" freedom rights, which represent in principle "defensive rights" against the state, we demand the realisation of freedom with the help of the state.

A point of crucial importance is the exigence of work. Work is more than just a job, more than only a security of material existence. It is also a crucial factor for the own development, the own satisfaction. It also opens the chance to participate in the formation of our society. For these reasons everyone has the duty and the right to building within his own possibilities.
A number of rights result from those considerations. Those rights have to avoid that working conditions are beneath human dignity and prevent the temptation to see work only as good.

In this field, the EUCDW requires first of all the recognition of the following rights in the European Union:

- the Universal Declaration of Human Rights
- The European Convention of Human Rights
- The ILO Declaration on fundamental principles and rights at work
- The Community Charter of Workers' Fundamental Social Rights
- the above mentioned European Social Charter
- The United Nations Convention on the Rights of the Child.

The EUCDW also demands a broadly catalogue of Fundamental Social Rights, which covers beyond the rights of Workers, also the rights related to the entire life situation of persons:

- The right for families to legal, economic and social protection
- The right to equal treatment and equal chances for men and women
- The prohibition of all forms of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation
- The right for disadvantaged groups to be integrated into the job market and society.
- The prohibition of Child labour.
- The right to a large social protection, which guarantees a human existence in particular in the case of unemployment, illness, care dependence and old age.
- The right to a minimum income, which makes a human existence possible.
- The right to education and training as well as lifelong education in accordance with the abilities of each person.
- The right to free choice of work.
- The right to health and safety protection at work.
- The national and trans-national right of freedom of association, collective bargaining and trade union action, including the right to cross-border solidarity action and strike.
- The right to information, consultation and participation at work on national as well as cross-border level.
- The right to conservation, protection and the improvement of the quality of the environment, to protection of the consumers and the users against an endangerment of their health and as well security against unfair commercial practices
- The right to free movement, also the third country nationals who are legally resident in the EU.
- The right to family reunification for all those who are legally in the EU.

The EUCDW demands the legally and binding inclusion of the Fundamental Social Rights in the new EU Treaty. The EUCDW is convinced that those rights, included in the Treaty, must be the best guarantee for the protection of the citizens.

For the EUCDW, respect for fundamental rights is a criterion for the adhesion to the European Union. Additionally, it is of the opinion that sanctions must be foreseen, in case of infringement of those rights.

The EUCDW also emphasises that each one which enjoys a right, has also the obligation to respect those rights: for the protection of human dignity, in particular in order to guarantee the basic values of liberty, solidarity and democracy.

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Brussels, 19 April 2000

CHARTE 4240/00

CONTRIB 113

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Children's Network (EURONET) with a view to the hearing on the 27 April 2000. [1]

[1] This text has been submitted in English language only.

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12 April 2000

To: The Convention to draft the EU Charter of Fundamental Rights
Mr Roman Herzog, Chair of the Convention
c/o European Council of Ministers
175 Rue de la Loi
1048 Bruxelles

Dear Mr Herzog

Re: Note Convent 13 and 18 from the Praesidium: Draft Charter of Fundamental Rights of the European Union

We are writing to follow up the most recent note from the Praesidium to enclose our comments and proposals for the draft Article on the Rights of the Child.

We welcome the fact that there has been a specific commitment by the Convention to include an Article on the Rights of the Child (given in the statement of reasons for Article 13 in Convent 13). This would help ensure that the EU is in line with international commitments made by member states when ratifying the Convention on the Rights of the Child 1989. It also recognises the fact that some of the rights in the Charter would not be appropriate or applicable to children and that an article is therefore needed on the rights of the child. A more detailed explanation of the need for a reference to children's rights in the Charter of Rights is contained in our submission to the Convention. (Recognition of the Rights of the Child in the Charter of Fundamental Rights, Submission from Euronet).

We have pleasure in enclosing a number of possible suggestions for texts of the article on the Rights of the Child.

The first proposal is suggested for inclusion in the introduction as an overall principle on human rights for children:

"The Union shall respect and promote children's rights, as guaranteed by the UN Convention on the Rights of the Child adopted on 20 November 1989."

The second proposal is to be placed within the different categories of rights:

"The European Union shall ensure that all EU activities are fully compatible with the principle of the best interests of the child as a primary consideration as expressed in the UN Convention on the Rights of the Child."

Our preference is for an article in the Charter which contains an explicit reference to the Convention on the Rights of the Child, since this is the most comprehensive statement of children's rights and has almost universal ratification.

We have noted that several members of the Convention have tabled amendments concerning children and youth and education. We would like to refer members of the Convention to the Convention on the Rights of the Child of 1989. This Convention, adopted in 1989, is the fullest contemporary international expression adopted on human rights for children below the age of 18 years and expresses an holistic view of the child.

At this stage we are also writing to express our views about the proposals for Article 16 – Right to education (Convent 13). We believe that Articles 28, 29 and 30 of the UN Convention on the Rights of the Child deal more appropriately with the question of education of the child in line with religious, and philosophical convictions (a copy is enclosed). Article 30 states that a child belonging to a religious, linguistic minority or of indigenous origin shall not be denied the right to enjoy his or her own culture, profess and practise his or her own religion or use his or her own language. Similarly Article 14 of the UN Convention on the Rights of the Child states that states parties shall respect the right of the child to freedom of thought, conscience and religion. In this respect we also would like to refer to Articles 2, 3 and 12 of the UN Convention on the Rights of the Child, which concern the principles of non-discrimination, the best interests of the child and the child's right to express its opinion.

We therefore believe a better way of phrasing this would be:
No child shall be denied the right to education, which promotes "his or her own cultural identity, religion, language and values and the national values in the country in which the child is living, the country from which he or she may originate and for civilizations different from his or her own."

An additional suggestion on the right to education we have is:

"Every child has the right to education"
"Children of minority communities and indigenous populations have the right to enjoy their own culture and to practise their own religion and language".

We would also like to comment on your recent proposal for social rights in Convent 18. Article VIII refers to the protection of children and young people in respect of employment and working conditions. We would like to include a reference here to the ILO Convention 182, which aims to ban the worst forms of child labour. We see this Article as complementary to the general Article on the Rights of the Child.

We would be pleased to discuss these areas in more detail with the Convention and those responsible for drafting it.

Yours sincerely

Mieke Schuurman
Euronet Co-ordinator

Encl:
- Recognition of the Rights of the Child in the Charter of Fundamental Rights, Submission Euronet
- Copy UN Convention on the Rights of the Child, Articles 28, 29, 30.

EXECUTIVE SUMMARY

Recognition of the Rights of the Child in the Charter of Fundamental Rights

Submission from Euronet – The European Children's Network, to the drafting group for an EU Charter of Fundamental Rights

Euronet – the European Children's Network, is a network of children's rights organisations including transnational networks such as BICE (International Catholic Children's Bureau) and International Save the Children Alliance, and national members in all 15 EU member states.

Euronet welcomes the initiative of the Council of Ministers to elaborate a charter of fundamental rights. Euronet recommends that children's rights must be included in the charter of fundamental rights and that the charter should be legally binding. Children make up 20% of the EU population yet their rights as established in international law are currently almost invisible in EU legislation, programmes and political decisions. Additionally the Charter should not simply codify existing rights but advance human rights.

Reasons to mention children's rights explicitly in the Charter:

- To ensure that in areas where the EU legislates, children's interests are taken into account and that legislation is not inadvertently discriminating against children.
- To ensure that the EU itself is also implementing existing international commitments such as the UN Convention on the Rights of the Child.

The 1989 **UN Convention on the Rights of the Child** is the fullest contemporary international expression of the fundamental rights of all people under the age of 18 –ie children. It has almost universal ratification with only two countries (USA and Somalia) not having ratified. The Convention states clearly that the best interests of the child should be a primary consideration in all legislation and policy (Article 3). The Convention has been ratified by all EU member states. However, whilst member states have a legal obligation to promote the best interests of the child and protect children's fundamental rights, the EU is under no such obligation although there are many areas in which the EU currently passes legislation which have a direct or indirect bearing on children's lives. Examples include labour legislation, consumer legislation, information and media legislation, health and the environment. Integration of the Convention on the Rights of the Child would ensure that the EU would be obliged to use the Convention as a "child proofing" tool when passing legislation.

Children's current legal status in the EU Treaty is unclear as children's legal status as European citizens is unclear. The EU Treaty primarily focuses on the "citizen as worker", which excludes children. In EU law children are seen too often as only "victims" or "dependents" or "barriers to

work" which is in direct contradiction with their status in the Convention on the Rights of the Child. At the moment the principle of "the best interests of the child" is only included in EU legislation on ad hoc basis. In some cases the EU has legislated to promote the highest standards of safety for children, for example in the Toy Safety Directive 1988. In other cases commercial considerations come before the best interests of the child with the potential to infringe children's rights, for instance the Distance Selling Directive and toy and TV advertising policies of the EU. Inclusion of a reference to children's rights in the Charter would help ensure that this process was systematic and no longer ad hoc. At present, many cases on children's rights in the EU have had to be established by taking cases to the Court of Justice. This is inefficient and costly – integration of children's rights into EU legislative processes would have made such cases unnecessary and ensure a more systematic protection and promotion of children's rights.

The current Amsterdam Treaty contains legal bases which give the Commission a limited competence to promote children's rights:

- Article K - which contains an explicit reference to "offences against children", creates an intergovernmental competence to tackle a whole range of cross border and transnational issues affecting children. However, this Article is outside the Community application of the Treaty and fails to cover many other areas of concern for children.
- Article 13 – Non Discrimination, in particular the non discrimination on the basis of age
- Article 137 – Social Exclusion, which can be used to address the problem of children facing social exclusion (20% of EU children are living in poverty, Eurostat figures)
- Article 141 – refers to equal treatment for men and women in matters of employment, which can indirectly benefit children
- Article 143 – Demography, which could be used to collect age disaggregated statistics, including improved information on the situation of Union citizens under the age of 18.

Children need their own special set of rights in the Charter of fundamental rights because:

- Existing international standards ie the Convention on the Rights of the Child recognise the need for children to have their own set of rights.
- Children have not always been accepted as holders of rights and animals were often given rights before children.
- Children are a special category of people who have specific needs different from adults and who do not have the ability to protect themselves.

Concerning **subsidiarity**, Euronet recognises the fact that the principal competence for policy and legislation on children's issues is the responsibility of the member states' governments. However, many issues affecting children are neither uniquely national or transnational, for example, legal consequences for children when their parents separate and choose to live in different countries of the EU and the standardisation of products and services (TV, internet, media).

Conclusions

It is recommended that:

- The Charter of Fundamental Rights contains a full reference to the protection and promotion of children's rights in the EU, best expressed by an explicit reference to the UN Convention on the Rights of the Child.
- The Charter of Fundamental Rights should be legally binding.
- A new Article should be inserted in the EU Treaties so that the Community can contribute to the promotion and protection of the rights and needs of children.

Recognition of the rights of the child in the Charter of Fundamental Rights.

Submission from Euronet – The European Children's Network, to the drafting group for an EU Charter of Fundamental Rights.

Introduction

Euronet welcomes the initiative of the Council of Ministers to elaborate a charter of fundamental rights. In this submission Euronet demonstrates why it is necessary to have a comprehensive reference to children's rights in the charter. Euronet recommends that in order to promote and protect children's rights and interests and to foster their development and protect them from unforeseen negative effects of growing European integration, a reference in the Charter of Rights would need to be accompanied by a comprehensive legal basis in the Treaty on European Union.

Euronet also recommends that the Charter of Fundamental Rights is legally binding and that it goes beyond already existing international and European legal instruments.

What is Euronet ?

Euronet – the European Children's Network, is a network of children's rights agencies including BICE (International Catholic Children's Bureau), International Save the Children Alliance, and national members in all 15 EU member states. Together these agencies shared a concern about the general invisibility of children in EU policy, legislation and programmes. Euronet began as a network to press for recognition of children's rights in the EU Treaty in 1995. Euronet members worked together to strengthen the rights of the child by, amongst other things, trying to include a reference in the Amsterdam Treaty to the norms of the UN Convention on the Rights of the Child, ratified by all member states of the EU. Following this, Euronet has gone on to develop a comprehensive EU Children's policy in "A Children's policy for 21st Century Europe: First Steps".[1]

Euronet believes that children have a right to live without experiencing prejudice, exclusion and discrimination and have a right to be heard within the European institutions, including the European Parliament, Commission, Council of Ministers and Council of Europe.

Children in the EU

Children in the EU make up 20% of the population but their rights as established in international law are currently almost invisible. This leads to children's invisibility in the legislation, policies, programmes and political decision making of the Union. Yet the future economic, social, political and cultural development of Europe is dependent on these 90 million children. As the ageing of Europe continues, children will become an even more precious and important resource. Neglecting their proper care and protection will have increasingly serious consequences. Furthermore, the EU institutions have frequently stated that it is important to "get closer to citizens" yet the interests of children are rarely included in EU legislation and Europe is still a long way from a "Citizens Europe" which includes children.

[1] "A children's policy for 21st century Europe: First steps," Ruxton S, Euronet, Brussels, 1999

"We are children and young people of the European Union meeting in Belfast at the end of May 1998. We demand that the European Union listen carefully to the voices of its 90 million children and young people under the age of 18 years of age. We as Europe's young citizens are eager to contribute actively to the development and progress of Europe…In our Europe every child will be respected and listened to and every child will have the right to participate in the democratic process."[2]

At the beginning of the 21st Century, Europe is at a crossroads, as it enters monetary union, enlarges eastwards and faces demographic challenges. Children will be more affected by decisions with long term implications being taken now than any other population group.

Why do children's rights need to be included in the Charter ?

"*Our efforts to discover children's needs in Europe are met with difficulties for two reasons. Firstly because in the EU citizens are seen as employers, employees and consumers only and secondly because children are seen as children of working parents only.*"[3]

The fundamental human rights of children [4], as expressed in the UN Convention on the Rights of the Child (1989) are not yet integrated into any of the core legal texts of the EU and therefore are not integrated into EU policy and legislation. As a result children's needs are currently largely ignored. Indeed, at present, legislation is inadvertently affecting children in a negative way. Other groups such as consumers, women, animals, disabled people are at least mentioned in the existing EU Treaty. This means that EU legislation, policy and programming is to a certain extent sensitive to their fundamental rights and interests. However in the area of children's policy this is currently not the case. EU member states, by comparison have made greater progress to integrate the principles of the Convention into their national laws since ratification and although Euronet believes that many member states still need to make improvements before their legislation fully reflects the principles of the best interests of the child, substantial progress has been made in this area (see for example "A children's policy for 21st Century Europe: First steps" p20 – 21[5]).

The briefing argues why children should be explicitly mentioned in the Charter in order to:-

a) Ensure that the EU itself is also implementing existing international commitments such as the UN Convention on the Rights of the Child which all EU member states have ratified.

b) Ensure that in areas where the EU legislates, children's interests are taken into account and that legislation is not inadvertently discriminating against children

2 Active voices – children's choices – Belfast Euronet symposium, 28/29 May 1998

3 Children as Citizens of Europe – From Rhetoric to Reality, speech at Euronet Conference Belfast – 28/5/98.

4 Up to now the European Commission has preferred to use the term 'fundamental rights' in preference to human rights in discussing its work in this area.

5 Op cit

The UN Convention on the Rights of the Child

"The increasing importance attached to the concept of children's rights and the major role attributed by the international Community to the Convention on the Rights of the Child of 1989, serve to underline the desirability of a greater EU sensibility in this area….The Commission (should) ensure that all legislation it drafts is fully compatible with the requirements of the Convention."[6]

The 1989 UN Convention on the Rights of the Child is the fullest contemporary international expression of the fundamental rights of all people under the age of 18 – ie children. More than any other human rights instrument it incorporates the whole spectrum of human rights, civil, political, economic, social and cultural rights. The Convention states clearly that the best interests of the child should be a primary consideration in all legislation, and policy.

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legal bodies, the best interests of the child shall be a primary consideration," [7]

The UN Convention on the Rights of the Child is the most widely ratified human rights instrument ever, having been ratified by all states in the world (except the USA and Somalia). All EU member states, EEA states and states about to accede to the EU have ratified the Convention. However, at the moment the EU itself is under no obligation to respect the principles of the UN Convention on the Rights of the Child.[8]

This means that whilst the member states have a legal obligation to promote the best interests of the child and protect children's fundamental rights, the EU and is under no such obligation. This is inconsistent and means for example that member states are regularly assessing and reviewing how their actions and legislation affects the human rights of children, whilst the EU does not do so. Without systematic reference to the Convention on the Rights of the Child as a yardstick by which to judge the extent to which actions and policies promote children's rights, there is no means by which to be sure that children's rights are being upheld and promoted.

As the EU moves towards further integration, more and more issues concerning children are becoming transnational ones. It is important that the EU should be bound by international standards that member states have already signed up to.

There are many areas in which the EU currently passes legislation which have a direct or indirect bearing on children's lives, these include, labour legisation (Young People at Work Directive, Parental Leave Directive), consumer legislation (see above), information and media legislation and policy, health and the environment. Integration of the principles of the Convention on the Rights of the Child would act as a "child proofing" tool and ensure that the EU was under the same obligations as its member states.

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6 Leading by Example – A Human Rights Agenda for the European Union for the Year 2000 – Cassese, Lalumière, Leuprecht, Robinson. Published by Academy of European Law, European University Institute, p 102.

7 Article 3 – Convention on the Rights of the Child.

8 For a further discussion see "Towards an EU Human Rights Agenda for Children" – International Save the Children Alliance Europe Group,1998, Brussels, Rädda Barnen.

The Convention on the Rights of the Child enshrines children's right to participate in decisions which affect them. [9] It is important that children are also given the possibility to participate actively in the development of the European ideal and concept.

Are Children's Rights dealt with by existing provisions in the Treaty covering human rights ?

Many commentators argue that the EU's overall legislative competence and approach to human rights is weak and that there is a human rights deficit.

"The Treaty did not and still does not even after the measures introduced by Amsterdam, list human rights among its objectives….the Community lacks any significant constitutional competence to deal with all but a very circumscribed range of human rights matters." [10]

Similarly the report by the Comité de Sages concluded "As regards the Treaties of the European Union, what we have at present is not a genuine framework of social and civil rights but rather a set of ad hoc, piecemeal measures to accompany economic integration and to allow minimum social policies to be pursued." [11]

Euronet agrees with these assessments. Not only are existing human rights provisions in the EU Treaty weak, but those that are in the Treaty do not specifically mention children's human rights. This has very practical consequences, meaning that where human rights clauses are inserted into trade agreements or cooperation agreements, no specific attention is paid to children's rights.

Why do we need a separate expression of children's rights ?

If human rights cover all human beings, why do children need their own special set of rights ?

- Existing international standards ie the Convention on the Rights of the Child recognise the need for children to have their own set of rights, reflecting their particular needs and status. [12]

- Children have not always been accepted as holders of rights and animals were often given rights before children.

- Children are a special category of people who have specific needs and who do not have the ability to protect themselves. Adults rights are often different from children's rights and vice versa. Talking about human rights in general but not identifying specific rights for children renders children invisible and vulnerable.

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9 Article 12, Convention on the Rights of the Child.

10 See "Leading by example – A Human Rights Agenda for the European Union for the Year 2000", Cassese, Lalumière, Leuprecht, Robinson, Academy of European Law, European University Institute, Florence, 1998, para 60

11 "For a Europe of civic and social rights" – Report by the Comité de Sages, European Commission, Brussels, 1996.

12 See "The Child and the European Convention on Human Rights, Kilkelly, Ursula, Ashgate, UK, 1999.

What about subsidiarity – Surely the protection of children's rights rests at the member state level ?

The principal competence for policy and legislation on children's issues is the responsibility of member state's Governments. However there is also a clear European dimension to the question of children's policy. Many issues affecting children are neither uniquely national nor transnational. For example, the legal consequences for children when their parents choose to live in different parts of the EU following family breakdown, the greater cross border dissemination of child pornography, and child trafficking. Similarly as standardisation and harmonisation of products and regulation of TV, internet and media takes place at EU level, in many cases the best interests of the child are overlooked.

Euronet is not arguing for the competence for children's policy to move to the European level but rather, where the EU passes legislation, policy and programmes, children's rights must be taken into account. The Charter should provide a clear, simple legal basis which enables European legislators to ensure that the best interests of the child is taken into account in all European policy, law and programming. Children are affected differently from adults by European legislation and it is important that all EU policy and legislative proposals takes their needs into consideration.

Would incorporation of the ECHR into the EU Treaty help children?

Legal opinion varies as to whether incorporation of the ECHR into the EU Treaty is possible and desirable. Leaving this wider debate aside, incorporation would bring limited value for children.

Children are not specifically mentioned in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), although it has been frequently used to protect children's rights in such areas as respect for family life, the right to education, protection against discrimination and the protection of physical integrity. However there are significant limitations on the ECHR as an instrument for the promotion and protection of children's rights including its focus on relations between the state and individuals, its silence on many important areas of children's lives. [13]

The ECHR "is....in many ways blind to children. It does make limited reference to children for example – in respect of the public nature of court proceedings in respect of juveniles and liberty and security of the person. But it fails entirely to address the concept of human rights for children within a framework appropriate to childhood in the way developed by the UN Convention on the Rights of the Child." [14]

[13] See "Areas and Rights covered by the UN Convention on the Rights of the Child which are not covered by the European Convention on Human Rights" Pascale Boucard – Steering Committee for Human Rights, Council of Europe, Strasbourg, 1995.

[14] "European Convention on Human Rights – Implications for Children"1997, UK – Gerison Lansdown.

Children's rights as EU Citizens – a promise unfulfilled

"The advice I have received…is that the reference to all persons who have citizenship of a member state covers everybody, including children" [15]

Despite this positive statement, the rights of children as EU citizens are unclear. The focus in the Treaty on the "citizen as worker" has meant that children's legal status as European citizens is unclear. This has led for example to the failure to incorporate the best interests of the child into EU legislation. It also means that only a limited number of action programmes, and temporary budgetlines have children as a principal target group.

Article 17 (2) of the Treaty of Amsterdam states "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby." However, citizenship of the Union only confers the rights which are covered by the Treaty, most of which exclude children. This is because the Treaty primarily regulates issues of an economic nature, therefore focusing on groups such as workers or people providing services. As a result rights are currently related to the fact that you are an economic entity. In EU law children are seen too often as only "victims" or "dependents" or "barriers to work" in direct contradiction with their status in the Convention on the Rights of the Child and in member states' laws.

The consequences of a lack of specific recognition for children's rights

One of the strongest illustrations of why it is necessary to have a reference to children in the Charter is the current ad hoc nature of inclusion of the principle of "the best interests of the child" (fundamental to the protection of children's rights in international law) in EU legislation. This is evident for example in the field of harmonisation and standardisation legislation as illustrated below.

a) Negative effects on children from EU Directives

The protection of children's human rights should be a priority for all policies. Because of children's particular vulnerability and needs, adults have a particular responsibility to safeguard them.

On the positive side there have been a number of cases where the EU has legislated to promote the highest standards of safety for children. These have included the Toy Safety Directive 1988, and other directives aimed at establishing standards for producers so that children cannot undo fastenings on potentially dangerous products, such as bottles of medicines. Beyond these specific cases, children have to some extent been covered by more general consumer protection initiatives.

However despite this, many problems remain. Too often commercial considerations come before the best interests of the child with the potential to infringe children's rights. Examples of this:-

[15] Statement from the then Irish Foreign Minister Gay Mitchell, representing the Irish Presidency of the EU, during revision of Amsterdam Treaty.

- **Distance Selling:** There is no reference to the protection of children in EU Directives on misleading advertising and on distance selling, despite evidence from consumer groups that children are often unable to distinguish between covert advertising and information and are therefore at specific risk.

- **Toy Advertising:** In a recent case toy manufacturers called on the European Commission to take action against the Greek Government. The Greek Government had banned TV advertising of toys because of a concern to promote the best interests of the child and ensure that no advertising was transmitted between certain hours. However the Commission claims that the Greek Government's action breaches single market rules, placing commercial interests above those of Europe's youngest citizens.

- **TV Advertising:** In a similar case in 1995 a UK TV station transmitted advertisements to children in Sweden, although these are prohibited for children under 12 in Sweden. Because the single Market creates a free market for movement of goods and services, this action is perfectly lawful, even though it may not be in the best interests of children.

- **Chemicals and Toys**: Although many member states took action to ban the use of PVC (polyvinylchlorides) in babies' toys, the European Commission took many months to introduce an EU wide ban on the use of PVC in toys. This was despite evidence from consumer and environmental groups that such toys contain harmful levels of chemicals and may damage children's rights to the highest attainable health standards.

All these examples demonstrate that the need for better protection of children's rights within the policy and decision making processes of the EU. Inclusion of a reference to children's rights in the Charter would help ensure that this process was systematic and no longer ad hoc.

b) Unnecessary Court of Justice Cases

The lack of recognition of the human rights of children in the EU Treaties, and in particular the principle of promoting the best interests of the child has meant that children's rights in the EU have developed in a piecemeal way. In some cases children's rights in the EU have had to be established by taking cases to the Court of Justice. This is inefficient and costly - it would be far more efficient to ensure that the principles of the Convention on the Rights of the Child were incorporated into the Treaty on European Union. Whilst both the judgements below did in fact rule in favour of the rights of the child, a further demonstration of the problems resulting from the lack of systematic protection of those rights, this was only achieved by taking the case to the European Court of Justice. Integration of the fundamental rights of the child into EU legislative processes would have made such cases unnecessary and ensure a more systematic protection and promotion of children's rights.

In the first case, the Commission v Belgium (42/87) established that children in one member state but living in another continue to be entitled to all forms of state education in the host country even if the working parent has retired or died in that state. The second case of Moritz v the Netherlands Ministry of Education (390/87) established that this was the case even if the child moves back to the state of origin.

c) Economic, Trade and Poverty issues

Children are also affected by EU economic and trade policies, EU Trade agreements, Economic and Monetary Union, and the single market all can impact on children, it is important that children's interests (which can be different from adults' interests) are not overlooked in these debates. [16]

EU economic policy for example which requires specific regions within Europe to undertake adjustment to a new economic environment can damage the development of entire generations of children in those regions. Children in such regions make up significant numbers of the 20% of EU's children suffering from social exclusion.

d) Asylum and Immigration policy

The EU is now legislating in a number of crucial areas of asylum and immigration policy as it moves from the third pillar to the first pillar. Children have very particular needs, especially child asylum seekers who are separated from their parents.

Do existing legal bases offer sufficient protection for children's rights ?

"The action taken by the EU in relation to the protection of children is still very limited, because of a lack of explicit legal bases and a failure to recognise that this action is of prime importance to the very future of the Union." [17]

The current legal bases in the Amsterdam Treaty gives the Commission only a very limited competence to protect children's rights. In particular it creates a limited intergovernmental competence to tackle a whole range of cross border and transnational issues affecting children's rights. [18]

On the positive side, for the first time in the history of the EU, children are explicitly mentioned in the Amsterdam Treaty in Article K which contains an explicit reference to "offences against children". Article K allows for increased cooperation between member states' police and judicial authorities in tackling crimes against children which cross national borders. Increasingly as borders disappear, children are at risk from organised crime and member states have had limited powers to deal with this in a coordinated fashion. However, Article K is outside the Community application of the Treaty, and any action has to be agreed on a case by case basis and has limited European dimension. Furthermore Article K is limited to offences against children and fails to cover many other areas of concern for children and does not provide for children's interests to be taken into account systematically in the drafting of EU legislation.

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16 See "Children, Economics and the EU – Towards Child Friendly Policies" – Save the Children, 2000.

17 Quote from MEP in "Towards a Children's Policy for 21st Century Europe: First Steps" op cit.

18 For a more detailed analysis see Euronet - "The New Treaty on European Union – What is in it for children ?", Sutton, Diana, Brussels 1997 and Euronet "Towards a Children's Policy for 21st Century Europe", op cit.

Therefore a major failing of the Treaty of Amsterdam is that it does not incorporate the respect for the fundamental principles of children's rights. It gives only a very limited competence to work at European level on a whole range of cross border and transnational problems affecting the fulfillment of children's rights. Below we analyse the limitations of other legal bases in promoting children's rights.

EU Treaty Articles relevant to children:

Article 13 - Non Discrimination:

In theory the inclusion of a non-discrimination clause on grounds of age should offer protection to children's rights, especially the right not to be discriminated against (Article 3 of the Convention on the Rights of the Child). However the reference to non discrimination on grounds of age in Article 13 has the following limitations:-

- Although age discrimination can occur at the lower end of the age range, the Commission has not yet interpreted "non discrimination on grounds of age" to include children.
- Secondly this clause does not have "direct effect", this means that it cannot be used by an individual in a court of law and cannot be used in the European Court of Justice.
- Thirdly, all measures proposed under this clause require the unanimous agreement of all EU member states' Governments.
- Fourthly, Article 13 has limited value for children because it only deals with measures aimed at combating discrimination and as we have seen children are affected by numerous other issues at a European level, and no measures can be taken under this clause to address these wider issues.
- Finally there is no spending power attached by Member States to this clause and therefore the impact of any measures taken under it will be very limited. It could not therefore be used as a legal basis for a European programme in the area of children's rights and children's policy.

Article 137 - Social Exclusion

The inclusion of Article 137 gives the Community a legal basis to combat social exclusion. This is welcome given that recent Eurostat figures demonstrate that 20% of the European Union's children are living in poverty. This new legal basis will be used for the adoption of an action programme on social exclusion, which can be used to address the problem of children facing social exclusion. It is recommended that Member States work with a broad definition of social exclusion. This clause can be agreed by qualified majority voting, thus eliminating potential problems with one or two member states blocking progress.

Article 141:

Although not directly relevant to children's rights issues this clause could be beneficial to children, since it makes reference to equal treatment for men and women in matters of employment and occupation, which could for example have a bearing on issues such as parental leave and child care.

Article 143 - Demography

This clause could be used to ensure that the European Union collects age disaggregated statistics, including improved information at the lower end of the age range, ie on the situation of Union citizens under the age of 18. Such an approach would enable the Union to have an accurate statistical assessment of the different ages of all its citizens and would assist the Union and Member States' in planning policy and services. It is important that information about the situation of children is included in such a report for a number of reasons. First children's needs are different from adults, second children will have to be responsible for supporting both financially and otherwise the Union's ageing population and finally children's services and interests must not be prejudiced as the Union and Member States focus their attention on the needs of Europe's ageing population.

The need for a legally binding charter of fundamental rights

Euronet recommends that the charter of fundamental rights is legally binding.
Although a specific reference to children's rights in a non legally binding Bill of Rights would have the advantage of giving children and children's rights political visibility and as such may assist focusing the Commission and Member states attention more on the issue of European Children's policy, it would not have any legal significance and will therefore not assist in child proofing of legislation, its significance would therefore be only symbolic.

Moreover, Euronet recommends that the charter is not simply a declaration of existing rights but rather advances the promotion of children's rights and human rights. Euronet believes that a charter that is not legally binding would not address the problems of EU legislation inadvertently affecting children in a negative way which are raised in this submission.

Conclusions

It is recommended that the drafting of a Charter of Fundamental Rights should contain a full reference to the need for protection and promotion of children's rights in the EU. This is best expressed through a clear and explicit reference to the UN Convention on the Rights of the Child. Such a reference should be used to ensure that the child dimension is taken into account in all relevant EU policy, programmes and budgets. Member states should also ensure that existing legal bases are used to the greatest extent possible to promote children's rights.

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January 2000

UN CONVENTION ON THE RIGHTS OF THE CHILD

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 25 avril 2000

CHARTE 4241/00

CONTRIB 114

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de CAFECS en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française uniquement.

DES
DROITS FONDAMENTAUX

Contribution de CAFECS
à l'élaboration
de la Charte des droits fondamentaux
de
l'Union européenne

avril 2000
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SOMMAIRE

CONTRIBUTION DE CAFECS

Depuis septembre 1996, à la suite de la publication du rapport « Pour une Europe des droits civiques et sociaux » - élaboré, à la demande de la Commission européenne, par un Comité des Sages présidé par Mme Pintasilgo, ancien premier ministre du Portugal, et dont Frédéric Pascal et Jean-Baptiste de Foucauld ont été membre et rapporteur - la Fonda anime un débat en vue de sensibiliser les associations à la construction d'une Europe plus civique et plus sociale.

La Fonda réunit des acteurs associatifs issus de secteurs diversifiés qui, au-delà de leurs divers champs d'activité, veulent contribuer à faire avancer l'idée d'une Europe qui puisse réussir son intégration politique, son développement social, son union monétaire et son élargissement. Ils se réunissent au sein d'un groupe qui a pris le nom de CAFECS (Carrefour pour une Europe civique et sociale), groupe ouvert et pluraliste. Ses membres et les associations dont ils sont issus adhèrent à la construction d'une Europe civique et sociale et se réfèrent à la Déclaration du 25 mars 1997 « Pour une Europe civique et sociale » qui a recueilli 370 signatures émanant de personnalités du monde associatif, syndical, politique et religieux.

CAFECS a salué la décision du Conseil européen de Cologne de mettre en chantier l'élaboration d'une Charte des droits fondamentaux de l'Union européenne, selon une procédure de consultation nettement améliorée par rapport aux méthodes inter-gouvernementales habituelles.

CAFECS déplore parallèlement la brièveté des délais qui sont prévus, l'incertitude qui accompagne le rôle et la place future de la Charte et surtout l'absence de démarche de citoyenneté active qui aurait permis de mener en profondeur une réflexion commune sur les finalités de la construction européenne.

Pour pallier ces lacunes, les membres de CAFECS ont pensé qu'il serait intéressant d'expérimenter, à échelle réduite, la méthode qui aurait dû, à leur sens, être employée pour définir des droits. Ils ont donc décidé de travailler plus particulièrement un certain nombre de droits pour lesquels ils se sentaient une appétence et une compétence particulières.

Chaque texte a été préparé par un membre de CAFECS, qui sert de relais avec la ou les associations où il milite, le sujet ayant été choisi en fonction des préoccupations propres à chaque association. Les textes préparés ont fait l'objet, dans un premier temps, de débats au sein de CAFECS, puis remis en débat lors d'un séminaire élargi sur la base des signataires de la Déclaration du 25 mars 1997, le samedi 11 mars 2000, séminaire qui a réuni 110 participants. La rédaction définitive des textes, tenant compte des travaux du séminaire, fait l'objet de la présente publication.

Le Carrefour pour une Europe civique et sociale (CAFECS) est animé par **Jean-Baptiste de Foucauld** (Convictions) et **Frédéric Pascal** (Fonda)
En sont membres : **Agnès Antoine** (Démocratie et Spiritualité) - **Pervenche Berès** (Députée européenne - La Gauche européenne) – **Jacques Berthillier** (AIRE) **- Jean-Claude Boual** (Réseaux Services Publics) **- Elisabeth Boyer** (Tiers Etat) **- Maurice Braud** (Action Fédéraliste « Socialisme et Liberté ») **- Anne David** (Fonda) **- Serge Depaquit** (Réseau Icare) **- Geneviève Dourthe - Serge Dumartin** (Comité Chrétien de Solidarité avec les chômeurs) - **Hugues Feltesse** (Union Nationale Interfédérale des Organismes Privés Sanitaires et Sociaux - UNIOPSS - Réseau Européen de lutte contre la pauvreté France - EAPN France) **- Michel Gevrey** (Comité de Coordination des OEuvres Mutualistes et Coopératives de l'Education Nationale - CCOMCEN) **- Arlette Heymann-Doat** (Ligue des Droits de l'Homme) **- Bernard Levasseur** (Fonda) **-Bernard Marx** (Confrontations) **- Martine Méheut** (Union pour l'Europe fédérale) **-Jean Nestor** (Notre Europe) **- Valérie Peugeot** (Europe 99) **- Robert Toulemon (** Association Française d'Etude pour l'Union européenne - AFEUR) **- Patrick Viveret** (Centre International Pierre Mendès France) **- Sylviane de Wangen** (France Terre d'Asile).

DES
DROITS FONDAMENTAUX

La liste des droits étudiés ne prétend pas à l'exhaustivité. Elle résulte des intérêts dont sont porteurs les associations dont les responsables sont membres de CAFECS.

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✎✎✎✎✎ Droit d'accès au sens et au patrimoine symbolique de l'humanité
✎✎✎✎✎ Développement « durable » et droits de l'homme
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Identité européenne et droits de l'homme

Si l'Union Européenne ressent aujourd'hui la nécessité d'établir une Charte des droits fondamentaux, c'est qu'elle a conscience d'avoir à exprimer une identité pour être elle-même. C'est précisément parce qu'elle se constitue sur une base volontaire, coopérative, démocratique, non-violente que l'Europe doit définir son identité. Parce que son développement politique ne repose ni sur la force, ni sur l'idéologie, l'Europe est contrainte d'innover et de construire son identité.

Cela est d'autant plus vrai que la situation identitaire de l'Europe est paradoxale : elle a un passé, une mémoire, un héritage commun ; mais il est fait autant de divisions et de guerre que d'unité, autant de conquêtes et de domination que d'ouverture à autrui ; elle a développé une conception exigeante de la personne et a su formuler les droits de l'Homme avant de les universaliser ; mais elle les a particulièrement violés aussi. En sorte qu'au lendemain de la guerre, l'union de l'Europe s'est faite largement autour du refus de la Shoah et de la lutte contre le totalitarisme, et cela au moment même où la Déclaration universelle des droits de l'Homme était élaborée comme un rempart à la barbarie. L'Europe se situe ainsi au coeur des contradictions du monde moderne ; elle vise à les assumer et à les dépasser.

L'Europe, pour toutes ces raisons ne peut se contenter de se référer aux droits fondamentaux. Elle doit bien entendu le faire, mais en les affinant et en leur apportant sa coloration particulière, sa vision, son expérience, son idéal. Ceci conduit à trois affirmations :
- les droits et les responsabilités sont fragiles, difficiles à exercer et à faire respecter ; il y faut une attention particulière, une pédagogie constante et des garanties soigneusement élaborées ;

- le principe fondamental d'égale dignité de chacun est d'une extrême exigence, presque utopique, plus souvent violé que respecté, rarement appliqué dans son intégralité ; la conscience aiguë de cette situation doit mener à la vigilance et à un travail constant sur les institutions, afin qu'elles servent bien les finalités qui leur sont assignées ;
- dans toute société, mais particulièrement en Europe du fait de son histoire, la conciliation entre l'unité et la diversité constitue l'enjeu démocratique fondamental. Cette conciliation présente de nombreux aspects, qui ont chacun leurs difficultés propres. Cela est particulièrement le cas dans le domaine culturel.

Face aux défis du monde moderne, l'Europe est un pari risqué et difficile : porter l'ardente obligation de réaliser effectivement, concrètement, pour chaque personne le projet des droits de l'homme, sans se contenter de les déclarer et d'en affirmer l'existence formelle. C'est précisément dans ce défi, qui suppose que ces droits et responsabilités soient portés par des politiques, des institutions et des comportements concrets, que réside la vocation de l'Europe.

L'Europe se caractérise par l'extrême diversité des peuples qui la composent, mais aussi par la communauté des valeurs autour desquelles ceux-ci se retrouvent. Ils attachent la même valeur suprême à la dignité de la personne humaine, et ils ont des conceptions et des exigences communes en matière de démocratie et de droits de l'homme. Ce sont ces valeurs, inscrites dans une histoire et dans un projet communs, qui font l'identité européenne. L'Europe ne peut être elle-même qu'en les mettant au premier rang de ce qu'elle entreprend, que ce soit dans la construction de ses institutions, dans ses politiques internes, dans sa politique d'élargissement ou dans ses relations avec le reste du monde. Nous proposons aux représentants des peuples européens de se fixer des objectifs qui soient des réponses aux défis du monde moderne conformes aux valeurs qu'ils proclament.

Principaux défis

1. La globalisation

Elle se présente aujourd'hui principalement comme un phénomène subi. Il faut apprendre à la construire en utilisant de nouveaux outils politiques.

Elle rend plus aiguë la conscience des obligations envers les peuples étrangers et plus évident le devoir de protéger les droits de l'homme partout où ils sont menacés. La nécessité s'impose de faire émerger un nouvel ordre mondial, qui comportera des institutions à compétence planétaire. Il ne s'agit pas d'abolir les institutions existantes, mais de les faire évoluer et de les intégrer, en créant, quand c'est nécessaire, des instances de pouvoir mondial dont l'autorité soit fondée juridiquement et qui soient dotées de réels moyens. Ceci oblige aussi à considérer avec plus d'acuité un problème encore mal résolu : comment concilier l'universalité et les particularismes.

2. L'extrême pauvreté et la croissance démographique

Aujourd'hui plus d'un milliard d'hommes vivent en dessous du seuil de dignité. Dans les cinquante ans qui viennent la population mondiale verra doubler son effectif par rapport à celui du début des années 90. La technique rend théoriquement possible de relever ces deux défis, mais il faut définir un nouvel ordre économique et le mettre en place.

3. Les techniques de production

La techno-science permet d'intervenir de plus en plus profondément au coeur de la matière et de la vie, et de plus en plus massivement. Il en résulte des menaces qui intéressent la collectivité humaine tout entière, et la liberté d'entreprendre ne peut plus être affirmée sans limitations. Les principes qui fondent ces limitations nouvelles doivent être dégagés.

4. La communication et l'information

L'exercice de la citoyenneté dans un monde globalisé et complexe nécessite la mise à disposition des opinions publiques d'informations très variées et vérifiées, et d'évaluations sérieusement établies. Les nouvelles techniques de traitement et de diffusion de l'information rendent cela possible, mais elles représentent aussi une menace pour la liberté spirituelle et personnelle.

Objectifs fondamentaux

En considération de ces défis, il nous paraît urgent de rappeler les valeurs

fondamentales auxquelles sont attachés les peuples européens et de proclamer leur volonté de poursuivre ensemble les objectifs fondamentaux suivants :

1. Améliorer les institutions de l'Europe pour les rendre plus efficaces

et plus démocratiques. Renforcer le pouvoir européen en lui confiant les décisions qui par leur nature ne peuvent être conçues que du point de vue communautaire (subsidiarité positive) tout en continuant à respecter le principe de subsidiarité négative, et parallèlement cultiver la diversité qui fait la richesse de l'Europe.

2. Donner aux citoyens la possibilité de participer effectivement aux décisions politiques et, plus généralement, à la construction du monde qu'ils légueront à leurs descendants. A cet effet la formation pendant l'enfance et tout au long de la vie, la disposition de temps pour l'exercice d'activités citoyennes, l'accès à un champ très large d'informations vérifiées et d'évaluations sérieusement fondées, sont des droits qui demandent à être mieux définis et considérablement élargis.

3. Eliminer de son sein les situations d'extrême pauvreté et d'exclusion sociale.

4. Reconnaître leur pleine dignité aux étrangers vivant sur notre sol.

5. Accueillir les peuples voisins que l'histoire a tenus écartés de la première phase de construction de l'Europe, dès lors qu'ils adhèrent aux mêmes valeurs et qu'ils partagent les mêmes objectifs.

6. Encourager la création dans les autres régions de la terre d'entités de même type, basées elles aussi sur la communauté de vision et sur la proximité géographique.

7. Contribuer à la définition d'un nouvel ordre mondial, tel que les droits politiques, économiques et sociaux de l'ensemble des humains, dans leur effectif prévisible, puissent être effectivement respectés et les conditions d'un développement durable réunies.

8. Contribuer à l'élaboration d'institutions mondiales disposant de l'autorité juridique et de moyens pratiques suffisants pour mettre en place et gérer ce nouvel ordre dans le respect des principes démocratiques**.**

Droit d'accès au sens
et au patrimoine symbolique
de l'humanité

« Qui osera mesurer les conséquences de l'interruption forcée des divers processus qui mènent à long terme à des prises de conscience sur les plans ontologique, éthique et historique et qui dépendent à la fois de l'accès aux sources et de la confrontation ouverte des idées en cours de recherche ? Bref, qui peut mesurer les conséquences de l'impossibilité d'une quelconque circulation normale de l'information, de la pensée, des connaissances, des valeurs et de toutes les prises de position publiques ? (...) A quelle profonde impuissance morale et spirituelle cette castration de la culture ne risque-t-elle pas de mener demain la nation ? »

Vaclav Havel
Lettre ouverte à Gustav Husak
1975

Ce projet espère contribuer à la définition du modèle démocratique dont est porteuse l'Europe, un modèle où la personne humaine est au centre du dispositif politique, non seulement parce que ses droits les plus fondamentaux y sont reconnus et protégés, mais parce qu'en tant que sujet moral et responsable, elle participe, avec toutes ses ressources, à l'élaboration du destin commun de l'humanité. C'est dire qu'il propose de spécifier le modèle démocratique européen, comme un cadre politique concerné, de par son origine historique même, par ***le perfectionnement de l'humain en l'homm****e.*

I - Exposé des motifs

La démocratie est la forme politique qu'ont élaborée les modernes pour donner pleinement expression à la reconnaissance de l'égale souveraineté et dignité de chaque être humain. C'est parce que les hommes sont libres et égaux, qu'il ne peut y avoir de souveraineté politique que collective et que **chacun est appelé à participer** à l'élaboration du destin commun, à **la création de l'histoire humaine.**

Le récent effondrement des systèmes idéologiques et étatiques, qui, sous prétexte de quitter l'ordre ancien - dont le fondement était religieux - en avaient reconstruit la dimension totalisante, fait apparaître véritablement, pour la première fois dans l'histoire, la promesse démocratique dans toute son exigence : **il ne s'agit rien moins que de faire advenir le régime de la pluralité humaine**.

Un tel horizon implique, outre des formes de représentation et de participation renouvelées, **un rôle à la fois plus conscient et accru de la société civile dans la définition des valeurs et des finalités de l'existence collectiv**e. Plus que jamais, d'ailleurs, les défis politiques, économiques, et scientifiques interrogent le sens qui doit inspirer nos différentes formes d'action dans l'histoire et la capacité que nous avons d'en maîtriser les conséquences. Du fait de la maîtrise croissante de la nature et de sa propre nature biologique, l'homme se voit en effet investi de responsabilités aussi nouvelles que considérables, qu'il ne peut assumer sans lucidité sur les risques pris, et donc sans conscience aigüe de ce qu'il a appris de lui-même au cours de l'histoire et sans interrogation sur le mystère qu'il est à lui-même. D'autre part, la question montante de l'exclusion sociale, liée à l'accumulation productive et à la sélectivité croissante du marché du travail, pose en termes nouveaux la question de la fraternité, de la solidarité et du rapport à l'autre, qui doivent être en permanence actualisées et refondées. C'est dire que les enjeux auxquels l'humanité se confronte, sont, de plus en plus, d'abord d'ordre éthique.

La prise en charge par la collectivité du sens de sa destinée ne saurait toutefois être pensable sans une aptitude de plus en plus grande des individus à donner signification à leur propre existence et à se construire comme personnes. Plus qu'auparavant, la démocratie exige de véritables sujets, conscients de leur liberté et de leur responsabilité. **C'est donc,**

plus généralement, les conditions d'accès de chaque individu à sa propre souveraineté qui méritent d'être examinées sous un nouveau jour, tout comme les risques d'exclusion de cet accès.

Cette perspective conduit à reconsidérer la frontière entre la sphère privée et la sphère publique, entre l'homme et le citoyen. La démocratie aujourd'hui, pour être réelle, exige en effet, comme le souhaitaient les penseurs de sa fondation, que soient formés des citoyens intéressés à la chose publique, responsables et conscients de leurs droits et de leurs devoirs, c'est-à-dire, ayant intériorisé les règles du jeu démocratique. Mais plus largement encore, elle nécessite des consciences aptes à la réflexion, à la délibération, et à l'innovation morales, afin de nourrir activement le débat d'opinion permanent dans lequel elle se constitue dynamiquement, selon un processus historique ouvert. Elle demande une véritable culture morale des individus.

A l'intérieur de l'espace public démocratique en effet, et dans le respect de ses règles, l'orientation morale des décisions politiques ne saurait s'imposer a priori, mais doit être construite **à partir de différentes sources éthique**s, en vue d'un consensus lui-même provisoire sur ce qui est humainement bon, ici et maintenant. **A la pluralité des hommes, telle que veut la respecter et la déployer la démocratie, doivent donc correspondre, dans la culture démocratique, la pluralité des points de vue sur l'homme** et une recherche plurielle de la vérité.

Le travail de création de sens de la démocratie ne saurait donc se faire sans, d'une part, l'enracinement personnel des individus dans des traditions spirituelles vivantes et sans, d'autre part, la présence active de ces traditions dans le champ culturel. Et loin qu'en chaque être humain s'opposent l'individu privé et le sujet politique, ils sont appelés à fonctionner dans un processus dialectique, la personne, avec toutes ses aspirations et ses expériences de vie, contribuant à former le citoyen, tandis que, réciproquement, le citoyen enrichit l'homme.

Or, parce que les démocraties modernes ont en commun d'avoir succédé à un ordre théologico-politique, et parce qu'elles se sont construites parfois de façon conflictuelle contre lui, elles ont procédé, à des degrés divers, à une mise à l'écart de la morale et de la religion, renvoyées à la sphère de l'existence individuelle.

Cette privatisation d'une partie des ressources de sens est d'abord cause d'un appauvrissement du patrimoine culturel dont dispose la société démocratique pour se penser elle-même et travailler son identité en puisant dans les différentes strates qui se sont constituées à travers l'histoire. Cette privatisation est ensuite **source d'inégalité profond**e, tout particulièrement à l'égard des milieux socialement défavorisés. Sous couvert de neutralité, elle n'offre pas la chance à tous les hommes d'avoir accès à la diversité des systèmes d'interprétations de la vie humaine, et de construire leur identité personnelle. Elle ne permet pas non plus à tous les individus de donner une expression culturelle, dans l'espace public, à ce qui fait sens pour eux. En refoulant la dimension morale et spirituelle de l'existence humaine de la culture commune, **elle nourrit les phénomènes fondamentalistes, communautaristes et sectaire**s. Elle met en danger à la fois le bon fonctionnement et la vitalité de la démocratie, dont elle affaiblit l'imagination créatrice.

Si un des enjeux majeurs des débuts historiques des démocraties au XIX ème siècle fut la généralisation de l'instruction, pour instaurer le suffrage universel, le défi auquel elles doivent faire face, à l'aube du XXI ème siècle, devient le problème de l'accès de tous à l'ensemble des réponses morales et métaphysiques que l'être humain a apportées, dans l'histoire, au sens de son existence, pour former le jugement éthique de chacun, construire son autonomie et accéder à une souveraineté plus responsable et plus authentique.

Parce qu'elle a été construite, après la seconde guerre mondiale, sur le refus de la dénégation de l'homme, l'Europe constitue déjà, en soi, un espace éthique. Parce qu'elle est aussi au carrefour de plusieurs héritages civilisationnels et spirituels, et riche de présences culturelles variées, elle est le lieu où peut s'affirmer, historiquement, aujourd'hui, cette démocratie plus existentielle, qui ne soit pas seulement un espace où coexistent pacifiquement de libres individualités concurrentes et où est assurée l'égalité de leurs droits, mais le lieu d'une naissance à soi pour chaque être humain et, par un même mouvement, d'une histoire voulue pour la société dont il est membre, dans le souci permanent du discernement de ce qui est humain. Dans l'espace européen, coexistent en outre plusieurs formes d'expression institutionnelle et culturelle de la laïcité, produits de contextes socio-historiques différents, et dont la mise en dialogue est un atout pour faire surgir cet **humanisme pluriel**.

II - Nature et extension d'un « droit d'accès au sens et patrimoine symbolique de l'humanité »

Il résulte des considérations précédentes que les démocraties modernes, pour fonctionner, doivent garder présentes et en débat les sources historiques, philosophiques, littéraires, spirituelles et religieuses de l'humanité, et les interrogations dont elles sont porteuses, pour s'appuyer sur elles dans le processus de construction du sens personnel et collectif. Mais la transmission des systèmes de valeurs, du fait de l'individualisation et du relâchement du lien social, ne se fait plus de façon naturelle et mécanique. Elle doit donc être construite socialement et collectivement, en respectant des règles d'objectivité et de pluralisme.

C'est l'un des buts des systèmes éducatifs. Mais d'une part, certaines disciplines qui ont pour objet la mémoire des sources sont dévalorisées et menacées, au nom d'un pragmatisme à courte vue ; d'autre part, en raison de la séparation excessive entre espace public et espace privé déjà évoquée, certaines sources, notamment les sources religieuses, ne sont pas prises en considération.

Il en résulte qu'un principe de nature juridique devrait être posé pour organiser l'accès de chacun à la diversité de nos sources symboliques, autrefois justement dénommées « humanités », et que ce principe devrait inspirer les modalités européennes d'organisation des espaces publics de transmission et d'échange culturels mis en place par la puissance publique, ou auxquels elle contribue, qu'il s'agisse :
- du système d'enseignement,
- de la formation permanente,
- des médias,
- ou des aides publiques à la production culturelle.

C'est pourquoi nous lançons un appel pour que les droits fondamentaux européens **concernant l'information, l'éducation et la culture** soient formulés de façon à inclure de façon explicite **le droit à l'accès au sens et au patrimoine symbolique de l'humanité.** Il ne s'agirait pas tant d'ajouter un nouveau droit à la liste des principaux droits fondamentaux, que d'infléchir la rédaction des droits cités, en précisant leur contenu, dans le sens de la dimension humaniste de l'entité européenne.

Développement durable et droits de 1'homme

Soumis au double impératif éthique de solidarité synchronique avec la génération présente et de solidarité diachronique avec les générations futures, le développement durable poursuit une finalité sociale : l'épanouissement de tout l'homme et de tous les hommes (François Perroux) ou, si l'on préfère, la construction d'une civilisation de l'être dans le partage équitable de l'avoir (Joseph Lebret). Chemin faisant, il veille au respect des contraintes environnementales tout en recherchant la viabilité économique, condition instrumentale, néanmoins essentielle, pour sa réalisation.

La Charte des Nations Unies, la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques et culturels jalonnent le processus **de l'internationalisation des droits de l'homm**e.

En parallèle, sous la pression des mouvements citoyens et sociaux et de l'opinion publique, on assiste dans de nombreux pays à la consolidation des Etats de droit, le renforcement des garanties des **libertés négatives** (freedom from) et l'élargissement des **libertés positives** (freedom for). Partout ailleurs la lutte pour les droits de l'homme, avec ses succès et ses échecs lourdement payés, constitue un axe fondamental de la politique. Alors que se consolide le registre de **la première génération des droits** politiques, civils et civiques balisant le pouvoir d'action de l'Etat et s'étoffe celui de la **deuxième génération des droits** sociaux, économiques et culturels imposant une action positive à l'Etat, une

troisième génération de droits, cette fois-ci **collectif**s, fait son apparition : droit à l'enfance, droit à l'environnement, droit à la ville, droit au développement des peuples, enfin reconnu à la Conférence de Vienne en 1993. Enfin, Luiz Carlos Bresser Pereira postule une **quatrième génération de droits** républicains garantissant aux citoyens l'accès et le bon usage des patrimoines publics – historique, environnemental et économique – (la res publica au sens littéral du terme).

Développement et démocratisation se confondent en tant que processus historique, à condition de donner une acception large au second terme. Au-delà de la simple instauration (ou rétablissement) de l'Etat de droit et des institutions de gouvernance démocratique, la démocratisation c'est aussi l'approfondissement, jamais achevé, de la démocratie au **quotidie**n, de l'exercice de la **citoyenneté** en vue de l'expansion, de l'universalisation et de l'appropriation effective des droits de seconde et troisième générations.

Alors qu'en théorie les droits de l'homme sont indivisibles, dans la pratique on ne peut tout à fait éluder la question de leur hiérarchisation, notamment pour ce qui est de l'application des différents droits économiques et sociaux au vu de la multiplicité des besoins et de la pénurie des moyens. A partir de ce constat, la tentation est grande de procéder à des arbitrages abusifs. L'efficacité socio-économique ne saurait être en aucun cas invoquée pour justifier la dérive autoritaire. L'expérience tragique de notre siècle nous a appris que les droits de la première génération constituent une valeur absolue. Quant aux arbitrages délicats portant sur les droits de seconde génération, ils relèvent du fonctionnement de l'Etat de droit démocratique.

La Déclaration et le Programme d'action de Vienne, adoptés par la Conférence mondiale sur les droits de l'homme, proposent, dans le paragraphe 98, pour renforcer la jouissance des droits économiques, sociaux et culturels, la mise en oeuvre d'un système d'indicateurs pour évaluer les progrès accomplis dans la réalisation des droits énoncés dans le Pacte international.

L'analyse du développement en tant qu'appropriation des droits de l'homme pourrait donner lieu à l'élaboration d'un rapport sur la condition humaine d'une richesse considérable et d'une utilité certaine pour la

formulation des politiques publiques de développement, recentrées sur la promotion des quatre générations des droits de l'homme.

Après avoir choisi la liste des droits considérés, il faudrait enquêter pays par pays sur l'état d'appropriation effective de chaque droit en distinguant la situation des différentes catégories sociales.

L'entreprise peut paraître ambitieuse. Elle est à la mesure de l'enjeu et tout à fait praticable, à condition de mobiliser les organisations citoyennes du tiers secteur travaillant dans les différents domaines couverts par un tel rapport. Elle se prête en outre à une réalisation par modules si l'opération devait s'échelonner sur plusieurs années ou devenir permanente. Il suffirait, dans ce cas, de choisir chaque année un nombre limité de droits ou encore de restreindre la portée géographique de l'étude à une région, de privilégier tantôt les populations urbaines, tantôt les populations rurales, les découpages se faisant en fonction des moyens. Mais la démarche la plus judicieuse pourrait consister à européaniser et à adapter cette démarche au processus de la Charte des droits fondamentaux.

Il s'agirait ainsi d'ouvrir une démarche précise coiffant l'ensemble des propositions **: l'analyse du développement en tant qu'appropriation des droits fondamentaux pourrait donner lieu à l'élaboration d'un rapport sur la réalisation de ceux-ci. Il s'agirait d'enquêter pays par pays sur l'état d'appropriation effective de chaque droit en distinguant la situation des différentes catégories sociales.**

Une telle démarche serait d'utilité certaine pour la formulation et l'évaluation des politiques publiques de développement recentrées sur la promotion des différentes générations de droits humains.

La proposition suivante, formulée par Ignacy Sachs, pourrait être valable pour l'ensemble de la Charte : *« La Déclaration et le Programme d'action de Vienne, adoptées par la Conférence mondiale sur les droits de l'homme proposent, dans le paragraphe 98, pour renforcer la jouissance des droits économiques, sociaux et culturels, la mise en oeuvre d'un système d'indicateurs pour évaluer le progrès accomplis dans la réalisation des droits énoncés dans le Pacte international. »*

Mais la pratique des « indicateurs » (généralement chiffrés) peut être très réductrice. On devrait plutôt songer à des dispositifs d'analyse et d'évaluation en termes de « grille ».

Du droit au travail au droit à la pleine activité

Exposé des motifs

L'inscription de ce droit dans la Charte répond à un double objectif :
- faciliter l'intégration dans la société, des personnes exclues ou menacées d'exclusion par la persistance d'un chômage structurel que le retour à la croissance ne permettra pas d'éliminer ;
- assurer la satisfaction de besoins individuels ou sociaux, partiellement insolvables ou mal assurés grâce au développement d'un tiers secteur moins coûteux et moins rigide que les services publics classiques, mieux adapté aux réalités de la société contemporaine, au prolongement de la vie humaine, au développement des organisations non gouvernementales.
L'innovation que représente le droit à la pleine activité suppose que soit écartées d'emblée deux objections : l'instauration de ce droit ne saurait s'accompagner de nouvelles contraintes imposées aux chômeurs, ni se traduire par le développement camouflé d'un nouveau secteur public.

Modalités de mise en oeuvre

Une grande souplesse dans l'application devrait être laissée aux Etats. Ceux-ci pourront organiser eux-mêmes la pleine activité ou en confier la mise en oeuvre aux collectivités décentralisées. Ils seront cependant comptables devant l'Union de la garantie effective du droit à la pleine activité. On peut se demander s'il ne conviendrait pas de reconnaître une possibilité, voire une obligation d'intervention de l'Union, en cas de carence d'un Etat.

Les Etats ou les collectivités décentralisées pourront avoir recours à des associations ou à des entreprises pour l'offre de contrats d'activité et l'organisation de services destinés à employer les titulaires de ces contrats.

Sélection des candidats

Le droit à la pleine activité ne sera subordonné à aucune condition de diplôme ou d'expérience professionnelle. Chaque candidat aura la possibilité d'exiger qu'une offre raisonnable lui soit présentée. Après trois refus successifs de sa part, il pourra faire appel à une instance d'arbitrage. Celle-ci appréciera si les offres rejetées étaient raisonnables. Il faut entendre par là l'offre d'une activité correspondant aux capacités du demandeur et dans la mesure du possible à ses souhaits, mais non nécessairement à son niveau de qualification ou à ses expériences professionnelles antérieures. Un mécanisme d'appel devra être prévu afin d'assurer une jurisprudence harmonisée dans l'ensemble des Etats membres.

Les Etats membres auront la faculté, mais non l'obligation, de limiter l'offre de pleine activité aux personnes à qui aucune offre d'emploi satisfaisante dans l'économie marchande n'a pu être proposée.

Le contrat pourra être interrompu si l'organisme employeur estime que le titulaire ne donne pas satisfaction. Celui-ci aura la faculté de solliciter un autre contrat auprès d'un autre organisme. En cas de litige, il pourra faire appel à l'instance d'arbitrage.

Il ne saurait être question d'étendre le droit à la pleine activité aux retraités. Il serait dépourvu de toute signification pour les bénévoles. En revanche, le développement d'un tiers secteur d'économie sociale devrait permettre la mobilisation de retraités et de bénévoles en vue de tâches d'intérêt général.

Les bénévoles recevraient des indemnités pour frais, par exemple de transport, ou des indemnités complémentaires en cas d'insuffisance de leurs revenus. Il en serait de même des retraités. Ceux-ci pourraient notamment, en fonction de leurs capacités et de leurs expériences, se voir confier des tâches d'encadrement.

Tâches susceptibles d'être assurées par un tiers secteur d'économie sociale

On ne donnera ici que quelques exemples dans le domaine de l'aide aux personnes, de la santé, de la sécurité, de l'environnement et de la justice.

1 – Aide aux personnes

Le tiers secteur serait particulièrement utile pour permettre le maintien à domicile des personnes âgées (l'aide aux achats, aux formalités administratives, soins mineurs, réconfort moral), l'aide aux couples ayant des enfants et dont les deux conjoints exercent une profession (garde des enfants à domicile, accompagnement à la crèche ou à la halte garderie, voire assistance scolaire à domicile).

2 – Santé

Le recours au tiers secteur permettrait d'améliorer les services rendus aux personnes hospitalisées et, dans certains cas, de réduire la durée des hospitalisations (voir ci-dessus aide aux personnes âgées qui peut aussi bien s'appliquer aux personnes en convalescence).

3 – Sécurité

Le maintien ou le rétablissement de la sécurité, en particulier dans les transports et dans le milieu scolaire fait partie des tâches qui pourraient être confiées à des titulaires de contrats d'activité, aussi bien jeunes qu'adultes ou en retraite. Les contrats emplois-solidarité offerts à des jeunes constituent une première expérience qui s'est révélée utile et devrait être pérennisée.

4 – Environnement

De nombreux travaux d'entretien ou d'aménagement gagneraient à être confiés à des associations lorsque les administrations d'Etat ou locales n'ont pas les moyens de les exécuter. Il en est ainsi en particulier des travaux qui ne nécessitent pas l'emploi d'un matériel lourd ou même dont l'emploi d'un matériel lourd est de nature à compromettre la bonne exécution. Tel est le cas de l'entretien des sentiers, cours d'eau et de leurs berges.

Dès à présent, l'entretien et la mise en valeur de certains éléments du patrimoine naturel ou architectural sont assurés par des associations de bénévoles. L'action de ces associations pourrait être utilement développée si elles disposaient d'un encadrement permanent dans le cadre de contrats d'activité. Elles pourraient aussi offrir des contrats à des demandeurs d'activité.

5 – Justice

Il est généralement reconnu que la prison n'est pas le meilleur mode de traitement de la délinquance primaire. L'organisation de chantiers soumis à une discipline stricte serait sans aucun doute préférable à l'enfermement qui place de jeunes délinquants primaires sous l'emprise de délinquants ou de criminels confirmés.

Dans ce domaine, il pourrait être fait appel à des personnes en retraite ou en pré-retraite ayant exercé des fonctions d'autorité, qu'il s'agisse d'enseignants, de militaires ou de cadres du secteur privé.

Certes, l'organisation de chantiers pour délinquants primaires ne pourrait relever entièrement des contrats d'activité. Mais ceux-ci devraient en faciliter la mise en place et en réduire le coût.

Retour à l'emploi-formation

La proposition visant à reconnaître, à côté du droit à l'emploi, un droit à l'activité est parfois décrite comme une menace d'extension de la précarité. Il s'agit là d'un contresens. En effet, l'un des objectifs essentiels qui vise la reconnaissance de ce droit est précisément de faire échapper à la précarité toutes les personnes qui manifestent un désir sincère et une volonté réelle de s'intégrer à la société et de se rendre utiles. Cet objectif sera d'autant mieux reconnu que seront ménagées les possibilités de retour à l'emploi dans l'économie marchande ou dans les services publics. C'est pourquoi des formations devront être offertes aux titulaires de contrats d'activité : soit en début de contrat, lorsqu'une formation préalable s'avère nécessaire, soit en cours de contrat, en vue d'un perfectionnement, soit en fin de contrat, en vue soit d'un changement d'affectation au sein du tiers secteur, soit du passage ou du retour à

l'économie marchande ou aux services publics. Concernant ces derniers, il serait approprié de reculer les limites d'âge en fonction de la durée du travail, dans un contrat d'activité, voire d'en faire un critère d'admission aux concours des fonctions publiques d'Etat, locale ou hospitalière.
La reconnaissance du droit à la pleine activité ne saurait être considérée comme un palliatif temporaire à la crise de l'emploi. Il s'agit en réalité d'un mode de transformation de la société donnant sa juste place à des activités ne relevant ni du secteur marchand, ni des services publics classiques. Il s'agit aussi, dans l'optique de ce qu'Edgar Morin appelle une « politique de civilisation », d'offrir à toutes les personnes qui en ont le désir et la possibilité de participer à la vie de la société en exerçant une activité d'intérêt général, le plus souvent contre rémunération, mais aussi, le cas échéant, à titre totalement ou partiellement bénévole.
En généralisant une telle innovation, l'Union européenne libèrerait ses Etats membres de rigidités qui les paralysent tout en mettant à son actif une véritable avancée de civilisation.

Proposition
« Toute personne adulte dépourvue d'emploi doit se voir offrir la possibilité de participer à une activité d'intérêt général normalement rémunérée. »

Droit à des moyens d'existence digne

Ce texte a soulevé des réserves de la part des associations, tant sur le principe que sur les modalités, au cours des différentes réunions de CAFECS. Ces idées doivent continuer à être approfondies, car elles sont novatrices.

Exposé des motifs

A mesure que, globalement, le monde s'enrichit, on note que les inégalités s'accroissent. Le droit au travail est inscrit dans la Déclaration universelle des droits de l'homme, mais le travail est inégalement réparti. Or, chaque individu, comme producteur et/ou consommateur, contribue à tout âge à l'augmentation du PIB d'un pays, d'un continent ou de la planète. A défaut de la reconnaissance de ces rôles naturels d'agents économiques, une large partie des citoyens se trouve ainsi spoliée. On tend alors à rompre l'unité du corps social dont chaque individu est l'une des composantes, obligeant ainsi les plus démunis à se déclarer pauvres et à dépendre de l'assistance des autres. Il s'agit donc d'un droit fondamental : celui de l'accès aux fruits de la richesse collective pour disposer de moyens d'existence digne. Ce constat nous oblige à réfléchir sur l'évolution des modes d'appropriation et de répartition des richesses :

- peut-on persister à vouloir faire du travail le seul facteur d'intégration sociale ?
- le temps n'est il pas venu de prendre en compte la richesse collective ?

chacun n'a-t-il pas un droit naturel à en recevoir une part ?
en ce sens peut on encore refuser la reconnaissance d'un droit à des moyens d'existence digne ?
Pour répondre à ces interrogations, réfléchissons sur la valeur donnée au travail dans notre société, plus particulièrement dans les rapports entre :

le travail et la propriété
le travail et la productivité
le travail et les revenus.

I - Travail et propriété

Si la propriété individuelle est un droit naturel de l'homme, car il est légitime de posséder ce que l'on a obtenu par ses efforts ou par ceux des siens, la délimitation de la part revenant à chacun pose un double problème :

1- D'une part, en raison de l'importance de l'héritage culturel commun. En effet, toute appropriation privée (de machines, de travail) ainsi que les revenus qui en découlent sont aussi le résultat d'échanges multiples, marchands mais aussi non marchands, dépendant de l'ensemble des connaissances, du capital matériel et social accumulé, et encore des infrastructures et de la culture même dans laquelle nous sommes plongés. C'est cet ensemble qui conditionne l'efficacité des efforts individuels et caractérise le niveau de vie d'un pays. Ces fruits appartiennent donc à tous, qu'ils travaillent ou non, et la justice sociale impose que chacun en reçoive une part égale.

2 - D'autre part, la multiplication des échanges, la mondialisation de la circulation des biens et des hommes génèrent de nouvelles formes de richesses, dont il est difficile d'identifier les auteurs et donc de déterminer la part leur revenant en propre. En outre, la révolution informationnelle dématérialise le travail et produit des synergies multiples et en réseaux. A qui appartient le produit de ce travail ? Qui peut en revendiquer la propriété de bout en bout ? Personne en propre. Dans ce contexte, le travail individuel est comme dissout, mais ses effets sont démultipliés dans des proportions non mesurables.

Ces phénomènes existaient déjà en proportion moindre jusqu'ici ; leur amplification soudaine nous les rend incontournables. Ils nous imposent, aujourd'hui, de trouver la contre-partie revenant à chacun de la reconnaissance de ce capital collectif.

II - Travail et productivité

Dans l'entreprise, on ne peut éluder les effets des gains de productivité sur la réduction de la durée du travail ni en tirer les conséquences. Il y a un siècle on travaillait 4.000 heures et actuellement moins de la moitié ; le temps libre est ainsi devenu supérieur au temps de travail, selon une tendance inscrite dans une évolution historique irréversible. La productivité est bonne en soi, car elle améliore notre qualité de vie, d'autant qu'en permettant l'augmentation du temps libre, elle devient créatrice de richesses par les relations et les activités non marchandes quelle suscite, si elle s'accompagne d'un large effort d'éducation et de communication.

Mais cette augmentation de temps libre serait récessive si elle devait entraîner une baisse de revenu, tout particulièrement pour les catégories les moins favorisées.

III - Travail et revenus

Un nombre appréciable d'individus ou d'institutions disposent d'un pouvoir non négligeable sur le maintien de leur revenu : les fonctionnaires par leur statut protégé, les salariés des grandes entreprises par la pression syndicale, les détenteurs de capitaux par leur rentabilité à long terme, les retraités par la sécurité de leur retraite. A l'opposé, les travailleurs indépendants, les occasionnels, les petits salariés du privé sont totalement livrés aux fluctuations du marché.

Ce sont précisément ceux qui pour vivre ne dépendent que de leur seul travail ou ne disposent que de minima précaires, car conditionnels, qui subissent le plus violemment les incidences des mutations technologiques et économiques. En outre, la volonté de travailler n'assure plus un revenu suffisant au travailleur précaire qui n'a aucune prise sur le marché du travail. Sa précarité est aggravée par un triple constat : il ne peut choisir

son activité ni négocier sa rémunération, et il vit au jour le jour sans assurance pour le lendemain.

La condition de ceux qui se trouvent ainsi paupérisés crée un nouveau clivage social et la nouvelle grande inégalité sociale d'aujourd'hui.

Proposition

On retrouverait le sens de la liberté et de la fraternité en investissant dans la personne par la reconnaissance de son droit à des moyens d'existence digne tout au long de sa vie.

Pour la collectivité ce serait prendre en compte la part du capital social humain revenant de droit à chaque individu. Loin d'être une charge, cela réaliserait un vivifiant investissement social, car l'individu, lors de sa vie active, serait ainsi incité à contribuer par lui même à l'enrichissement collectif. Ce droit apporterait le gène du changement au bénéfice d'une société au service de l'homme, dans laquelle :

- la sécurité serait mieux assurée et les initiatives libérées
- chaque homme serait reconnu dans son appartenance à la communauté.

On imagine le caractère fédérateur de ce nouveau contrat social s'il était proposé par la France, inspiratrice des droits de l'homme, pour être peu à peu adopté dans l'Union européenne par les Etats membres.

Droit au temps choisi

Exposé des motifs

Tout individu adulte est titulaire de responsabilités envers lui-même, envers sa famille, envers les groupes sociaux dont il fait partie ou avec lesquels il contracte. A l'exercice de chacune de ces responsabilités, l'individu alloue la partie requise du temps total dont il dispose. Encore faut-il que les contraintes de l'organisation sociale ne s'opposent pas à cette allocation du temps, notamment celui nécessaire à la vie personnelle et familiale à laquelle la personne a droit comme l'un des garants de sa dignité.

Or, les évolutions contemporaines mettent en cause la capacité de l'individu de gérer son temps, donc sa capacité de faire face à l'ensemble des responsabilités qui lui incombent. Deux grandes tendances se font jour :

- l'une est la difficulté de plus en plus grande à encadrer contractuellement le temps de travail. Le temps de travail est plus difficile à contrôler du fait que, sous l'effet notamment des nouveaux moyens de communication, il n'y a plus de relation, aussi systématique que dans le passé, entre temps de travail et lieu de travail. Par ailleurs, la flexibilité des horaires et du calendrier de travail s'accroît. Dans certains cas, la dimension mondiale des échanges professionnels soumettent d'aucuns aux rythmes temporels de personnes situées dans un tout autre contexte géographique et social. Or la flexibilité s'oppose à la prévisibilité. Elle obère donc la capacité de l'individu à organiser ses autres temps sociaux ;
- la deuxième tendance renforce la première. C'est le fait que la fonction économique prend de plus en plus le pas sur toutes les autres fonctions,

quand elle ne nie pas purement et simplement leur légitimité et leur rôle. C'est en imposant ses temps et ses rythmes qu'elle marque sa prééminence et contrarie l'exercice des responsabilités sociales essentielles portées par les individus.

Affirmation d'un droit

En conséquence, dans le cadre européen, qui semble particulièrement bien adapté pour en traiter, il convient d'affirmer le droit suivant :

Dans le cadre contractuel des relations de travail, chacun a le droit de faire valoir tout au long de son existence, l'harmonie des temps consacrés à sa vie professionnelle, à sa formation, à l'exercice de ses responsabilités familiales et civiques et à son épanouissement personnel.

Modalités de mise en oeuvre de ce droit

La mise en oeuvre d'un tel droit n'est pas aisée. Elle doit se traduire, soit par des dispositifs réglant :

- la quantité de temps consacrée à la vie professionnelle,
- les interférences de la vie professionnelle avec les autres responsabilités sociales,
- les délais de prévenance pour les changements d'affectation du temps ;

soit par la précision d'un certain nombre de principes découlant de ce droit fondamental, principes qui pourront être invoqués en cas de recours pour non respect dudit droit.

1. Quantité de temps consacrée à la vie professionnelle

Pour que l'intégrité de la personne soit respectée, les législations nationales doivent comporter :
- des règles d'âge minimum ;
- une ou des définitions du temps de travail effectif qui se réfèreront au temps à disposition de l'employeur, quelle que soit la localisation de la personne. Pourraient être considérés comme temps à disposition de l'employeur les temps d'interruption de l'activité professionnelle

inférieurs à un certain pourcentage du temps de travail quotidien, ainsi que les temps pendant lesquels il est fait obligation au salarié d'être joignable par tout moyen de communication ;
- des durées maximales quotidienne, hebdomadaire, annuelle. Pour s'adapter aux caractéristiques des secteurs professionnels, ces durées maximales ne seront pas fixées de manière absolue, mais conditionnelle ; par exemple, plus la durée hebdomadaire maximum sera élevée, plus la durée annuelle maximum sera faible ;
- des règles de compensation du non-respect des durées contractuelles, avec abondement d'un compte épargne-temps.

2. Interférences réciproques de la vie professionnelle et des autres responsabilités sociales

Pour que l'intégrité de la personne et l'exercice de ses responsabilités familiales et sociales soient respectés, il convient d'encadrer la vie professionnelle de telle manière que ses modalités d'organisation n'aient pas pour effet de perturber les autres temps sociaux. Inversement, les autres temps sociaux ne doivent interférer sur la vie professionnelle que dans des cas limités et précis.

L'application du premier principe se traduit par :

- l'ouverture d'une possibilité, pour chacun, d'adapter la durée, les horaires et le calendrier de travail aux contraintes résultant de l'exercice de ses responsabilités familiales et sociales. Cette possibilité est, la plupart du temps, déjà ouverte par des dispositions du droit du travail, soit pour des évènements familiaux (maternité, décès de proches, mariage, ...), soit pour l'exercice de responsabilités syndicales. Elle pourrait être étendue par des dispositifs d'épargne-temps avec des règles de tirage, modulées selon les motifs du tirage, ou par la pratique de la renégociation des temps contractuels de travail, en cas de changement dans la situation familiale, voire sociale, du salarié ;

- le respect de délais de prévenance en cas de changement d'horaire ou de calendrier de travail. Les délais de prévenance peuvent être réduits, tant pour le salarié que pour l'employeur, pour les seuls cas de force majeure. L'invocation de la force majeure estt elle-même limitée à un certain nombre de cas dans l'année et fait jouer, à chaque fois, une clause

de pénalisation en temps au profit du salarié ou au profit de l'employeur, selon les cas ;
- un devoir de préservation, dans le travail, de l'intégrité du salarié de telle sorte que ne soit pas obérée sa capacité d'assumer ses responsabilités hors de son travail.

L'application du deuxième principe se traduit par :

- un devoir de ne pas utiliser de façon abusive les règles instaurées pour préserver les temps sociaux autres que le temps professionnel,
- le jeu à double sens des pénalisations liées au non-respect des délais de prévenance.

Droit d'asile

Exposé des motifs

Le respect, la promotion et la sauvegarde des droits de l'homme et des principes démocratiques, qui font l'objet de références explicites dans le dispositif du Traité sur l'Union européenne, constituent un facteur essentiel des relations entre la Communauté européenne et les pays tiers. Le respect des droits de l'homme, qui s'affirme comme l'un des éléments fondamentaux de l'appartenance à l'Union européenne, a été consacré comme principe de base de son action.

Le droit à l'asile est reconnu comme un droit fondamental de toute personne, quelle que soit son origine, qui se sent persécutée, et que tout Etat de droit se doit de respecter indépendamment du contexte économique et politique (et donc de la politique migratoire) du moment. Il est inscrit dans de nombreux textes de proclamation des droits : dans certaines constitutions européennes, en particulier dans le préambule de celle de la France, et dans la Déclaration universelle des droits de l'homme. La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés et dont le champ d'application a été étendu hors d'Europe par un Protocole de 1967 donne une définition du réfugié et fixe son statut. Ces deux textes - la Convention et le Protocole - ont été signés et ratifiés par tous les actuels Etats membres de l'Union européenne. Ils fournissent le socle juridique sur lequel doit être fondé le droit d'asile à l'intérieur de l'Union.

Mais depuis la fin des années 70, les conditions d'exercice du droit d'asile ont été rendues plus difficiles dans les pays riches, notamment dans les pays de l'Union européenne, du fait :

- du nombre toujours important et grandissant des réfugiés (violations massives des droits de l'homme dans le monde entier, développement de l'information et prise de conscience de leurs droits par les victimes, développement des moyens de transport),
- de la montée du chômage dans les pays européens et de la fermeture de leurs frontières à l'immigration économique, rendant plus problématique le simple accès sur leurs territoires,
- de la plus grande complexité des relations diplomatiques.

En conséquence les pays d'accueil, notamment européens, ont semblé être pris de court par l'augmentation des demandes d'asile ; d'autre part les réfugiés sont quelquefois utilisés comme un enjeu dans les relations (politiques, économiques, diplomatiques) entre les gouvernements, des Etats n'admettant pas que certains de leurs ressortissants puissent trouver protection auprès d'un autre Etat. Ces éléments ont conduit à des variations dans l'application de la Convention de Genève de 1951 et du traitement des demandes d'asile dans les différents pays de l'Union européenne qui ont senti la nécessité d'harmoniser leurs pratiques.

Aussi, depuis une quinzaine d'années, les questions touchant au droit d'asile sont une préoccupation constante dans les relations intergouvernementales des Etats membres. Elles sont formalisées dans le Traité de Maastricht instituant l'Union européenne et seront probablement communautarisées, au moins partiellement dans les cinq ans de l'entrée en vigueur du Traité d'Amsterdam.

Les conclusions du Sommet européen de Tempere abordent pour la première fois la question du droit d'asile en termes de droits de l'homme « *4. Notre objectif est une Union européenne ouverte et sûre, pleinement attachée au respect des obligations de la Convention de Genève sur les réfugiés et des autres instruments pertinents en matière de droits de l'homme, et capable de répondre aux besoins humanitaires sur la base de la solidarité...* ».

Mais cette déclaration, dont les interprétations peuvent être diverses, ne trouve pas encore sa traduction dans les traités ou les textes fondamentaux de l'Union européenne.

Le droit d'asile doit être inscrit parmi les tout premiers droits politiques dans une Charte des droits fondamentaux de l'Union européenne :

- parce que, étant l'une des valeurs fondatrices de l'Europe et touchant à un point particulièrement sensible du monde moderne, le traitement du problème par l'Union européenne aura des conséquences dans le monde entier. Si l'Europe veut être un modèle en matière de droits de l'homme, elle se doit de les proclamer et de les respecter d'abord chez elle ;
- parce que si la solidarité en matière d'accueil de réfugiés s'exerce dans le partage entre pays européens, elle est aussi un devoir et une nécessité au plan international, car les réfugiés sont accueillis, en écrasante majorité, dans les pays pauvres ;
- parce que, bien que toujours proclamé, c'est un des droits les plus menacés pour les raisons citées ci-dessus. La Convention de Genève de 1951 elle-même, qui connaît des variations dans son application, a subi des attaques frontales de la part de certains gouvernements européens (notamment par l'Autriche). La pléthore de textes dans ce domaine (résolutions, conclusions, recommandations, positions communes...) élaborés entre pays de l'Union depuis quinze ans est d'ailleurs le reflet de cette menace. Il convient donc d'en fixer le principe, qui devra être appliqué selon la Convention de Genève et le droit dérivé des traités, sous le contrôle de la Cour de justice ;
- parce que la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales signée au sein du Conseil de l'Europe - le seul grand texte européen sur les droits de l'homme actuellement efficace, puisqu'il est assorti d'une instance juridictionnelle chargée de sanctionner, sur saisine individuelle, les manquements au respect de ses dispositions - n'en traite pas. Plusieurs tentatives, dans les années 80, d'y annexer un protocole sur l'asile n'ont pas abouti ;
- parce que les Etats candidats à l'entrée dans l'Union européenne n'ont pas les mêmes traditions à cet égard et doivent sans ambiguïté s'aligner sur les standards communs en la matière en cas d'élargissement de l'Union.

Propositions

Une Charte des droits fondamentaux de l'Union européenne devrait donc :

1 - proclamer le droit de quiconque craignant une persécution, quels que soient son sexe, son origine géographique, sa nationalité, sa religion, etc... de trouver asile dans l'Union. Ce droit implique l'accès des demandeurs d'asile à une procédure juste et efficace pour l'examen de leur demande et, par voie de conséquence, l'accès au territoire des Etats membres en tenant compte de leur choix du pays en raison des attaches familiales, culturelles, linguistiques ou autres. Des conditions de vie dignes doivent être assurées dès l'entrée sur le territoire ;
2 - programmer la signature par l'Union elle-même de la Convention de Genève de 1951 qui doit être appliquée sans restriction et de façon harmonisée conformément à la doctrine du Haut commissariat des Nations Unies ;
3 - rappeler le caractère non inamical de l'acte d'accorder l'asile.

Droits du citoyen et technologies
de l'information et de la communication

Contexte

L'entrée dans l'ère numérique représente une révolution qui est certainement du même ordre d'importance que celle qu'a représentée l'imprimerie. Elle a une dimension technique et une dimension économique qui ne doivent pas être négligées, mais elle entraînera aussi une transformation culturelle profonde. L'homme de l'ère numérique disposera de possibilités absolument nouvelles pour produire, traiter et diffuser les informations et les savoirs. Si ces possibilités sont intelligemment exploitées et convenablement maîtrisées, elles ouvrent des perspectives considérables à l'enrichissement personnel et à la participation des citoyens à la vie publique. Mais ces effets heureux ne sont que possibles, il faut les vouloir et les construire.

La Commission européenne a réagi à l'ampleur du défi que représentent les nouvelles techniques en définissant l'initiative eEurope (1) .

L'initiative de la Commission mérite d'être suivie d'effet, mais elle fait preuve aussi d'insuffisances, ce qui inspire les propositions qui suivent.

Propositions

1 - Le programme d'éducation tel qu'il est proposé est essentiellement tourné vers la maîtrise de l'outil technique. C'est évidemment la première étape à franchir, mais c'est la plus facile. Le véritable enjeu, c'est d'apprendre aux nouvelles générations à s'orienter, à gérer un flux

permanent d'informations d'une importance jamais vue. Il y a un risque que les esprits soient noyés ou restent passifs devant cette masse. Il faut donc qu'ils apprennent à sélectionner, comprendre, interpréter avec un esprit critique, enfin à utiliser ces informations et ces savoirs.

2 – L'action « gouvernements en ligne » semble se limiter au niveau communau-taire et gouvernemental. Tout en respectant le principe de subsidiarité, il conviendrait d'encourager et d'aider les actions au niveau local et territorial. C'est un échelon privilégié déjà riche d'initiatives où pourront être expérimentées, dans la diversité, des formes nouvelles d'exercice de la démocratie.

3 - Le besoin d'information du citoyen n'est pas limité au secteur gouvernemental. Quel que soit leur statut, public ou privé, les entreprises et les associations ont une activité qui intéresse la collectivité toute entière. Elles devraient être soumises à des obligations de transparence et d'évaluation de leur activité plus grandes qu'actuellement. Les nouvelles techniques permettent de rendre disponible en ligne la masse d'informations et de rapports qui en résulterait, à condition qu'elle soit dans un langage clair et accessible.

4 - La Commission se montre très sensible aux possibilités de la « nouvelle économie » en termes de croissance et d'emplois. Ce sont en effet des aspects importants. Il serait néanmoins dangereux de ne pas envisager la dimension complète de la révolution en cours. Il faut ouvrir la place à une utilisation non exclusivement marchande de la Toile, en considérant celle-ci comme un véritable service public de la communication citoyenne, ce qui suppose multiplication des points d'accès publics, moyens de financement, acteurs autorisés et peut-être là encore autorité de régulation.

5 - Les conditions de la naissance de la Toile ont fait que la langue anglaise y est très largement prédominante. L'Europe devrait introduire dans son programme une dimension de préservation de sa diversité linguistique. Cela commence par la mise en place de normes de logiciels permettant d'écrire et de transporter sans les déformer les signes qui ne sont pas utilisés en anglais (accents).

6 - L'ère numérique ouvre un champ nouveau à la liberté d'expression, donc aussi à des abus possibles de cette liberté. Il conviendrait de réfléchir

aux conditions d'application des limites déjà existantes (diffamation, protection de la vie privée, incitation au crime, etc…) mais aussi à la possibilité d'authentifier les informations (labels de vérification, autorité de contrôle ?).

7 - Dans une organisation où la plupart des actes de la vie courante sont susceptibles de laisser une trace informatique, la puissance des outils informatiques en matière de saisie, de stockage de données, de regroupement de fichiers, ouvre des possibilités de manipulations attentatoires à la liberté, à la dignité ou à l'intimité des personnes. Le droit à la protection des données, tel qu'il est actuellement formulé n'est pas suffisant. La loi devrait également prévoir des restrictions concernant le stockage et l'exploitation qui est faite de ces données.

8 - Les techniques de traitement de l'information et de la communication, si elles ne sont pas mises à la portée de tous, constitueront un nouveau facteur d'inégalité, voire d'exclusion. Bien utilisées, elles peuvent au contraire servir à lutter contre l'exclusion. Il est donc très important de bien formuler les conditions pratiques d'exercice du droit à l'accès à la Toile.

(1) Les objectifs qu'elle a retenus sont les suivants :
« faire entrer tous les citoyens, foyers, entreprises, écoles, et administrations dans l'ère numérique et leur donner un accès en ligne ;
introduire en Europe une culture numérique soutenue par un esprit d'entreprise favorable au financement et au développement de nouvelles idées ;
veiller à ce que l'ensemble de ce processus ait une vocation d'intégration sociale, gagne la confiance du consommateur et renforce la cohésion sociale. »

Bioéthique et droits de l'homme

Les progrès de la biologie et de la médecine posent des questions pour les droits de l'homme.

Ils sont incontestablement positifs pour certains droits : le droit à la connaissance, le droit à la protection de la santé. Mais ils présententent des risques : que l'homme soit traité en objet, qu'il soit soumis à des discriminations. Ces risques ont été formalisés par la doctrine eugéniste, à la fin du XIX ème siècle, visant à améliorer l'espèce humaine. Le nazisme se présenta comme une mise en oeuvre de cette doctrine.

Une réponse morale fut d'abord apportée par les médecins : Code de Nuremberg (1947), Déclaration d'Helsinki (1964). Des réponses juridiques ont été ensuite formulées dans des lois (en France, lois « bioéthique », 1994), des conventions internationales (Convention « biomédecine » du Conseil de l'Europe, 1996).

La Communauté européenne a intégré dans son champ de compétences ces questions. Au « Groupe des conseillers pour l'éthique de la biotechnologie », créé en 1991 auprès de la Commission, a succédé, en 1997, le « Groupe européen d'éthique des sciences et des nouvelles technologies » (GEE). Il a rendu des avis sur les banques de tissus humains et sur la recherche sur l'embryon humain. Une directive sur les brevets en matière génétique a été adoptée en 1998. Le Parlement européen a adopté une résolution, en 1998, en faveur de l'interdiction du clonage des êtres humains.

Des droits ont été dégagés : dignité de la personne humaine, respect de la vie privée, non-discrimination, droit à la protection de la santé. Leur protection passe par le respect de certaines conditions : consentement

de la personne, non patrimonialité du corps humain, intégrité de la personne.

La découverte, permanente et de plus en plus rapide, de nouvelles techniques médicales et de nouvelles données biologiques, pose, sans cesse, la question de l'acceptabilité de l'usage de ces découvertes au regard de ces droits.

Pour répondre, il convient, et c'est peut-être le plus difficile, d'identifier les critères qui sont pertinents et ceux qui ne le sont pas.

Premier axe : qui peut (et doit) poser des règles ?

Ce sont les autorités politiques, en ce qu'elles sont démocratiques. Ce ne sont ni les autorités médicales, ni les autorités religieuses, ni les acteurs économiques. Autrement dit, il revient à la loi de trancher en cas de conflit.

Deuxième axe : existe-t-il des principes qui doivent guider le législateur et le juge ?

Un premier principe correspond à la finalité des règles : elle est éthique, ce qui signifie que la fin des décisions est le respect des personnes (Jean-Paul Thomas : « il n'est pas d'autre principe éthique que celui du respect des personnes (1) ». Un deuxième principe est la prise en compte, dans l'usage des techniques nouvelles, de la notion de proportionnalité entre la fin et les moyens. On en trouve une application dans la directive sur les brevets.

L'Union européenne intervient, de façon normative, dans les domaines de la recherche biologique et de la santé. Ses actes doivent être inspirés par des principes directeurs qu'il convient de formaliser.

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(1) in La bioéthique est-elle de mauvaise foi ? PUF, 1999, p.39)

Droit d'accès
aux droits fondamentaux

L'affirmation de droits fondamentaux ne suffit pas si n'est pas garantie leur pleine effectivité.

Constat

□□□□□ Les personnes en difficulté n'ont pas un accès satisfaisant à l'ensemble de la palette des droits offerts (manque d'information, complexité des procédures, temps administratifs ne correspondant pas aux rythmes sociaux, arbitraires administratifs, absence d'aide au remplissage des formulaires et à la recherche des justificatifs demandés…). Elles ne peuvent en conséquence mobiliser convenablement leur pleine capacité à sortir de leur précarité, de leur marginalité ou de leur isolement.

□□□□□ Les personnes en difficulté ont besoin, plus que d'autres, d'un accompagnement pour les aider à retrouver dignité et citoyenneté. L'accompagnement social, bien que prévu dans un certain nombre de dispositifs (logement, emploi, revenu minimum) reste souvent trop aléatoire ou trop restrictif.

□□□□□ Les aides et interventions délivrées par les administrations (guichets et services divers…) sont trop souvent cloisonnées et souffrent de discontinuité les unes par rapport aux autres, engendrant une grande perte d'efficacité.

□□□□□ Plutôt que de rendre effectif pour chacun l'accès aux droits existants, une mauvaise tentation est trop souvent éprouvée par les pouvoirs publics

de créer des droits, plus ou moins au rabais, qui marginalisent les plus démunis.

Propositions

Une réelle garantie de la pleine efficacité des droits doit reposer sur trois piliers :

□□□□□ l'accessibilité et la proximité
□□□□□ la garantie de plein exercice
□□□□□ l'évaluation contradictoire

1. L'accessibilité et la proximité des droits fondamentaux

Devant la complexité du droit et des dispositifs publics, aujourd'hui sont contredites les affirmations « nul n'est censé ignorer la loi » et « tous sont égaux devant la loi ». On ne peut que déclarer « nul n'est censé connaître la loi » et « la loi protège les forts et délaisse les faibles ».

Droit à l'information

Pour que le droit soit effectif, il faut envisager l'obligation pour les administrations d'informer sur la nature et l'étendue des droits des publics concernés.

□□□□□ Créer des lieux d'information inter-administratifs.
□□□□□ Instaurer dans chaque ville, quartier ou zone rurale un service public de conseil juridique.
□□□□□ Rendre responsable tout service public du bon traitement (délais) et de la transmission des dossiers (guichet unique interne).
□□□□□ Obliger fermement toutes les administrations et services publics à motiver précisément tout refus d'accès à un droit ouvert et à donner toutes les informations utiles pour faciliter un éventuel recours.
□□□□□ Renforcer les mesures qui encouragent les personnes les plus qualifiées et expérimentées à s'investir professionnellement dans les zones géographiques défavorisées.
□□□□□ Prévoir dans tout dispositif public des moyens de communication adaptés aux publics les plus démunis.

□□□□□ Instaurer un **droit à l'interprétation** pour les personnes d'origine étrangère.

Droit à la formation

Pour que le droit ne soit pas une source d'incompréhension pour tous ceux qui doivent s'y référer dans leurs interventions et démarches, il faut généraliser une formation à la connaissance des situations et des processus d'exclusion sociale.
□□□□□ Introduire, dans les programmes de formation initiale et continue des professionnels susceptibles d'être en contact avec les populations en difficulté (enseignants, personnels de justice, policiers, professionnels de santé, travailleurs sociaux…), un enseignement leur permettant de mieux connaître et prendre en compte les réalités des situations de précarité, pauvreté ou exclusion sociale.
□□□□□ Promouvoir la formation dans les écoles à l'ensemble des droits de l'homme (droits civiques, civils, économiques, sociaux et culturels…)

Droit à la représentation et au partenariat

Pour que tous soient à même de voir pris en compte leurs droits dans les lieux où se décident leur avenir
□□□□□ Instaurer un **droit à la représentation** des personnes en difficulté ou des associations ou organisations syndicales au sein desquelles elles font entendre leur parole dans toutes les instances où se définissent des orientations ou des décisions concernant leurs droits fondamentaux.
□□□□□ Etablir un **droit à la domiciliation** pour l'ensemble des personnes y compris pour les personnes sans domicile fixe.
□□□□□ Instaurer un **droit à l'accompagnement** pour toute personne en difficulté sociale : l'accompagnement devant être entendu comme une démarche volontaire engageant de manière réciproque accompagnant et accompagné.

2. La garantie d'exercice des droits fondamentaux
Droit au recours non juridictionnel *:* c'est-à-dire à la médiation, la conciliation et l'arbitrage

□□□□□ Généraliser auprès de chaque autorité locale la présence permanente et disponible d'un correspondant du médiateur national.
□□□□□ Accroître le nombre de médiateurs-conciliateurs auprès des tribunaux.

Droit au recours juridictionnel

□□□□□ Renforcer la justiciabilité de tous les droits fondamentaux affirmés, y compris les « droits interprétables » (ex. : aide sociale).
□□□□□ Rendre pleinement accessible l'aide juridique.
□□□□□ Donner sa pleine application à la notion de délai raisonnable de jugement définie par la Cour européenne des droits de l'homme.

Droit à la continuité

□□□□□ Rendre impossibles les chutes brutales de ressources liées à des changements de situation administrative.
□□□□□ Introduire des dispositifs accompagnant les ruptures financières : surendettement, garantie d'accès à l'énergie et à l'eau, garantie du droit à un logement…

3. L'évaluation contradictoire

Pilotée par une instance indépendante, l'évaluation de la pleine effectivité de l'accès aux droits fondamentaux est essentielle pour garantir que les personnes qui en ont le plus besoin ne restent pas à l'écart de leurs droits.

□□□□□ Produire tous les deux ans un rapport public rassemblant l'expression de toutes les parties concernées par la mise en oeuvre de la législation garantissant les droits fondamentaux.
Promouvoir à l'échelon local et régional des consultations des usagers des services publics et des associations au sein desquelles ils font entendre leur parole.

BILAN PROVISOIRE DES TRAVAUX DE LA CONVENTION

Les 11 et 12 septembre 2000, la Convention chargée de l'élaboration du projet de Charte des droits fondamentaux de l'Union européenne transmettra le résultat de ses travaux au Conseil et au Parlement européen. S'engagera alors un débat portant à la fois sur le contenu et sur le statut de la Charte, qui sera conclu à l'occasion du Conseil européen de Nice les 7 et 8 décembre 2000. Quelle que soit l'issue de ce processus, l'état des travaux de la Convention permet de dresser un bilan provisoire de cette expérience originale.

Ce bilan provisoire peut se lire sous deux angles :

- l'appréciation du contenu du projet de Charte : l'état d'élaboration de la soixantaine d'articles sur lesquels la Convention a concentré ses travaux ;
- l'appréciation de la valeur de la procédure originale qui a été suivie par la Convention.

1 - Pour ce qui concerne le contenu de la Charte, il apparaît que la Convention aura globalement rempli sa mission : la soixantaine d'articles qu'elle proposera consolideront les droits épars dans diverses conventions internationales sous une forme lisible par les citoyens européens. Seront ainsi confortés à la fois le support d'une citoyenneté enrichie par rapport aux actuels Traités et un ancrage plus explicite de l'Union dans les formes d'une communauté politique régie par le droit.

Il est par contre probable que certaines des difficultés rencontrées dans les travaux de la Convention ne trouveront pas de solution définitive à l'échéance du Conseil de Nice :
- l'expression de certains droits liés à l'évolution des sciences et des techniques (intégrité du corps humain, protection des données individuelles) ou à celle de nos sociétés (éducation, droit de la famille) gardera une formulation provisoire qui, pour être adaptée aux réalités du monde actuel, nécessitera une poursuite de la réflexion ;
- il en est de même en matière de droit au travail et à un revenu, de temps choisi, de droit à l'initiative, de droit à l'insertion, et plus généralement de droit à un développement socialement et écologiquement durable, pourtant au coeur des débats de société actuels ;
- la définition actuelle de la citoyenneté européenne, liée à la nationalité dans les Etats-membres, ne permettra pas une distinction claire et définitive entre les droits des citoyens européens, ceux des résidents sur le territoire de l'Union, et ceux garantis à toute personne se trouvant sur ce territoire, quel que soit son statut ;
- la distinction entre les droits fondamentaux, les principes directeurs des politiques de l'Union et certaines décisions destinées à favoriser l'exercice de ces droits restera ambiguë (égalité des sexes, statut d'association européenne).
Dans ces différents domaines, la Charte revêtira le caractère d'un exercice ambitieux, permettant une affirmation politique immédiate, mais en même temps provisoire, et nécessitant un approfondissement ultérieur.

2 - Pour ce qui concerne la procédure en elle même, il est clair qu'elle aura démontré ses mérites :
- le caractère ouvert et public des travaux, qui donne lieu à des échanges approfondis contraste heureusement avec celui, limité, abscons et codifié de la CIG (Conférence intergouvernementale), prisonnière de sa configuration diplomatique et de son ordre du jour limité. S'il s'agit d'approfondir la question : « pourquoi voulons nous vivre ensemble, et pour quoi faire ? », la procédure de la Convention apparaît considérablement plus imaginative que celle de la CIG (Conférence intergouvernementale) ;

- l'association des Parlements nationaux au processus de la construction européenne apparaît considérablement plus prometteur que celle offerte par les procédures habituelles (COSAC) qui restent axées sur le contrôle extérieur.

Il apparaît, dans le même temps qu'elle n'aura pas pu aller jusqu'au bout de la démarche qu'elle a initié :

- la Convention n'a réellement développé ses travaux selon la méthode ouverte et publique qu'elle a initiée qu'à compter de février 2000. La notoriété de celle-ci reste ainsi limitée et réservée à un cercle restreint d'associations et de responsables familiers des enceintes bruxelloises. Beaucoup de voix qui méritaient d'être entendues n'auront pu s'exprimer que tardivement et partiellement ;

- sur beaucoup de questions abordées, le dialogue aura à peine eu le temps de se nouer (cf. les points soulignés au 1° ci-dessus) et laisserait un sentiment d'inachèvement s'il devait s'arrêter en décembre 2000. Clore les travaux de la Convention à l'automne 2000 serait ainsi une source de frustration par rapport aux espoirs soulevés par le caractère ambitieux de la démarche qu'elle a initiée. « Siffler la fin de la récréation » laisserait à beaucoup l'impression d'avoir été manipulés, ce qui n'était certainement pas le but de l'exercice.

3 - Quelle que soit l'approche retenue, celle du contenu comme celle de la procédure, **il apparaît impensable que l'exercice en cours soit clos avec le Conseil européen de Nic**e. Ceci serait de surcroît contradictoire avec les objectifs stratégiques 2000-2005 « Donner forme à la nouvelle Europe » proposés par la Commission (1) , qui font de la « promotion de nouvelles formes de gouvernance » permettant de renforcer la voix de la société civile dans l'élaboration et la mise en oeuvre des politiques la première des quatre priorités de l'Union pour la période considérée. La seule question qui devrait se poser est donc celle du comment poursuivre les travaux entamés : faut-il pérenniser la formule de la Convention, inventée dans une perspective précise (celle du Conseil de Nice), ou imaginer une procédure plus « institutionnelle » qui garde un lien privilégié avec le Parlement européen et accorde un rôle plus

(1) COM 2000 - 154 final 9.02.2000 « Objectifs stratégiques 2000-2005 »

explicite à un Comité économique et social dont le troisième collège serait rénové en conséquence ?

Afin d'éviter toute rupture démobilisatrice, le plus sage serait de proroger les travaux de la Convention pour une période de trois ans et, à la lumière d'une procédure qui aurait ainsi pu aller jusqu'à son terme, décider de l'avenir de ce type de mécanisme participatif. Les travaux de la Convention ainsi prolongée auraient trois débouchés distincts :

- la mise au points de compléments à la Charte retenue à l'automne 2000 (quel que soit son statut) sur les points qui méritent un approfondissement ;
- l'élaboration de principes directeurs pour les politiques de l'Union (par exemple la lutte contre les discriminations), qu'ils soient généraux ou spécifiques à certaines politiques ;
- la proposition de mesures destinées à « renforcer la voix de la société civile » : par exemple un statut européen pour les associations et les fondations.

En conséquence, CAFECS propose d'ajouter dans les traités, l'article suivant :

« La Charte des droits fondamentaux est complétée par une nouvelle réunion de la Convention pour une période de trois ans et selon une procédure analogue ».

1er avril 2000

Annexe 1
Déclaration
pour une Europe civique et sociale

La société change, un autre monde est en train de naître. L'Europe est à la croisée des chemins. Elle a besoin d'une nouvelle fondation pour répondre aux défis auxquels elle est confrontée, ceux de la monnaie unique, de l'approfondissement politique, de l'élargissement à l'Est et de son ouverture sur le monde.

Les questions civiques et sociales sont désormais au coeur des défis de la construction européenne. L'Union européenne ne se construira pas sur fond de chômage et d'exclusion. Sans cohésion sociale, la monnaie unique sera friable. Or, le défi de l'emploi et de l'exclusion exige un renouvellement important des politiques et des conceptions du travail et de l'activité. Il faut défendre le modèle social européen, mais aussi innover pour faire progresser cet atout de compétitivité et de redistribution. Enfin, l'Union doit affirmer beaucoup plus nettement son identité et celle-ci est indissociable de la citoyenneté. Or, l'ébauche de citoyenneté européenne instituée par le Traité de Maastricht a un contenu principalement fonctionnel et n'apparaît pas encore comme l'expression d'une société politique en gestation.

Les nouvelles fondations de l'Europe seront civiques et sociales ou ne seront pas. Cela suppose que le sens et le contenu du projet politique européen soient débattus, puis définis clairement. L'Europe doit réfléchir aux finalités qu'elle se donne et mettre l'économie à sa place, au service de l'homme et non l'inverse.

A cet égard, les conditions actuelles de déroulement de la Conférence intergouvernementale ne paraissent pas à la hauteur des enjeux. la CIG n'aura véritablement atteint son but que si elle donne une assise suffisante à la citoyenneté et à la solidarité. Alors l'Union sortira renforcée, pourra s'élargir dans de bonnes conditions et faire face aux défis auxquels elle est confrontée.

13 dispositions constituent le minimum que les citoyens sont en droit d'attendre de la CIG

1 - Intégrer dans le Traité une liste de droits fondamentaux civiques et sociaux indivisibles, en particulier le principe de non discrimination et de promotion de l'égalité des chances dans le progrès, un meilleur exercice de la liberté de circulation et d'association pour tous les résidents. Le respect de ces droits s'imposerait à toutes les institutions de l'Union. Ils seraient directement applicables par la Cour de justice des Communautés européennes.

2 - Permettre à la Cour de justice des Communautés européennes de contrôler le respect des droits fondamentaux reconnus par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales du Conseil de l'Europe, par la Charte sociale de ce même Conseil et par les conventions internationales signées par tous les Etats membres, comme celles de l'OIT ou de l'ONU.

3 - Ouvrir un espace publie de délibération permettant l'expression d'une citoyenneté active. Le processus de révision institutionnelle de l'Union ne peut rester strictement intergouvernemental et doit permettre aux citoyens, à leurs organisations ou à leurs représentants de s'exprimer. L'Europe civique et sociale a besoin d'une méthode dont les principes doivent être posés dès maintenant par la CIG :

- en associant plus étroitement le Parlement européen aux travaux de la CIG ;
- en posant le principe que la règle de la majorité qualifiée s'applique pour la mise en oeuvre des droits civiques et sociaux dans le cadre des compétences de l'Union ;
- en prévoyant que les citoyens, la société civile, le Comité économique et social, le Comité des régions, les parlements nationaux et le Parlement européen soient réellement associés à l'élaboration et à la mise en oeuvre

des politiques communautaires et aux progrès institutionnels de l'union politique européenne ;
- en assurant la lisibilité des textes, nécessaire au débat public, en particulier en regroupant en un seul document les textes concernant la Communauté européenne et l'Union européenne, actuellement dispersés en 15 traités ;
- en lançant dès à présent un processus d'élaboration collective d'une charte pour le progrès des droits et responsabilités civiques et sociaux, processus s'étendant sur plusieurs années et permettant de prendre en compte les nouvelles aspirations et contraintes de nos sociétés (éducation tout au long de la vie, environnement, générations futures, temps choisi, bioéthique, nouvelles techniques d'information, minorités, etc.).

4 - Etablir et fonder des politiques communes en matière de justice et d'affaire intérieures sur le respect des droits fondamentaux de la personne et des conventions internationales, notamment pour les politiques d'immigration et d'asile, d'entrée et de séjour des citoyens des pays tiers ; les faire rentrer sur ces bases dans le domaine communautaire.

***5* -** Prévoir des dispositions particulières pour permettre à l'Union de menr des actions de lutte contre l'exclusion, coordonnées avec celles des Etats et reconnaître, au niveau de l'Union, le principe du droit à un revenu minimum les modalités et conditions étant déterminées par les Etats membres.

6 - Conférer aux politiques sociales relevant de la compétence de l'Union une efficacité aussi grande que les autres : les regrouper dans un titre unique intégrer le Protocole social dans le Traité après en avoir élargi le contenu en matière de lutte contre l'exclusion sociale ; leur appliquer la règle de la majorité qualifiée ; évaluer systématiquement sur une base pluraliste et contradictoire l'impact des politiques et programmes de l'Union sur la cohésion sociale.

7 - Affirmer fortement la légitimité des dispositions qui permettent à l'Union, à la Commission et au Parlement européen de mener des actions d'animation du débat, de coordination, d'impulsion, de coopération, d'expérimentation et d'évaluation, notamment dans le domaine social. L'Europe doit apprendre à s'enrichir de ses différences dans le respect des principes de subsidiarité et de proportionnalité, qui ne doivent pas pour autant constituer un alibi à l'immobilisme ou aux crispations nationales.

8 - Définir clairement les responsabilités de l'Union en matière d'emploi et les instruments monétaires, économiques et financiers nécessaires pour les assumer. La CIG devra notamment :
- prévoir des dispositions pour que les orientations relatives à la politique de l'emploi et à la politique économique permettent de promouvoir la croissance et l'emploi en même temps que la stabilité des prix ;
- assigner à la Banque Centrale européenne un objectif de pleine utilisation des forces productives s'ajoutant à l'objectif actuel de stabilité des prix.

9 - Renforcer le rôle de partenaire de toutes les organisations syndicales et patronales représentatives dans le domaine des relations de travail, des droits économiques et sociaux, dans l'élaboration et le suivi des politiques sociales ; reconnaître un véritable droit européen des conventions collectives sur le plan interprofessionnel et au niveau des branches, afin notamment de lutter contre le dumping social.

10 - Reconnaître plus explicitement le rôle des associations : les impliquer davantage dans le processus d'élaboration et de suivi des politiques sociales ; faire une place particulière aux organisations de la société civile qui s'efforcent de promouvoir la participation et la représentation des chômeurs et des exclus.

11 - Reconnaître la spécificité des modes de production et des structures des organisations de l'économie sociale (coopératives, mutualités, associatims/fondations) reconnaître le caractère d'intérêt général de certaines de leurs opérations adopter un statut de coopérative européenne, de mutualité européenne et d'association européenne permettant des coopérations sur une base transnationale.

12 - Reconnaître explicitement dans le Traité, le rôle des services publics et d'intérêt général en matière de cohésion sociale et d'aménagement du territoire.

13 - Contribuer par des mesures adéquates non seulement au développement économique, mais aussi à la promotion des droits civiques et sociaux dans les pays émergents et dans les pays à l'écart du développement.

25 mars 1997

Annexe 2
Pour une citoyenneté active en Europe

Le récent Conseil européen de Cologne a décidé la convocation d'une Conférence intergouvernementale pour résoudre les questions institutionnelles qui n'ont pas été réglées à Amsterdam et doivent l'être avant l'élargissement. Il a également estimé que, « à ce stade de développement de l'Union Européenne, il conviendrait de réunir les droits fondamentaux en vigueur au niveau de l'Union dans une charte de manière à leur donner une plus grande visibilité ». L'annexe 4 des conclusions de la présidence précise le contenu et surtout les modalités d'élaboration de cette charte : « Une enceinte composée des représentants des Chefs d'Etat et de Gouvernement et du Président de la Commission européenne ainsi que de membres du Parlement européen et des parlements nationaux, devrait élaborer un projet... Des représentants de la Cour de justice devraient y participer à titre d'observateurs. Des représentants du Comité économique et social et du Comité des régions ainsi que des groupes sociaux et des experts, devraient être entendus. Le secrétariat devrait être assuré par le Secrétariat général du Conseil ». Cette enceinte doit « présenter un projet en temps utile avant le Conseil européen en décembre de l'an 2000 ». La Charte sera alors solennellement proclamée, et « ensuite il faudra examiner si et, le échéant, la manière dont la charte pourrait être intégrée dans les traités ».

Il faut certes se féliciter que cette proposition du Comité des Sages, fortement soutenue par le mouvement associatif et reprise par plusieurs partis politiques (les partis socialistes européens et, en France, les Verts

et l'UDF), ait été ainsi validée et que l'on sorte de façon ténue, sur ce point au moins, de la méthode intergouvernementale dont on a trop vu les limites.

Il importe cependant de ne pas se tromper sur la portée de l'entreprise. Autant par son mode d'élaboration que par son contenu, la Charte des droits fondamentaux est une occasion unique d'ouvrir la voie au pacte constitutionnel qui se révélera nécessaire pour accompagner et réussir le grand élargissement vers l'Est et vers le Sud. L'exercice de discussions des droits, la manière de les élaborer, importe autant que leur proclamation et leur application. C'est une bonne façon d'initier l'espace politique de débat public dont nous avons besoin pour être assurés fonctionnement démocratique de l'Union et du respect de la souveraineté populaire. Plus qu'un traité, moins qu'une constitution, ce texte devrait être l'expression de cette démocratie participative constituante que les Etats membres n'ont pas su mettre en oeuvre jusqu'ici et que les méthodes strictement intergouvernementales de révision des traités ne permettent pas.

Or, du fait de la méthode retenue, la décision de Cologne risque d'aboutir, si elle est appliquée limitativement, à une codification sans grande portée de textes existants. On aurait ainsi manqué un rendez-vous historique pour vivifier une citoyenneté européenne menacée par l'abstention et pour bâtir ensemble le projet de civilisation dont l'Europe a besoin. Les insuffisances de la procédure envisagée apparaissent dans quatre domaines :

1) Il ne s'agit pas seulement de « réunir les droits fondamenta vigueur », mais de les affiner, de les approfondir, et de les compléter pour tenir compte des évolutions de la société. Une série de questions nouvelles se pose en effet : comment se décline aujourd'hui le droit au travail ? faut-il créer un droit à l'insertion ? au temps choisi ? à un environnement de qualité ? faut-il compléter le droit à la santé par un droit des malades ? comment prendre en compte les droits des générations futures ? comment protéger la vie privée ? quelles sont les limites des recherches génétiques ? Et quelles sont les responsabilités de l'Etat, mais aussi les devoirs de la société civile pour parvenir à un exercice effectif de ces droits ? Et cette liste n'est évidemment pas limitative et devra faire l'objet d'un débat.

2) Un travail collectif important est donc indispensable pour formuler de façon correcte et réaliste cet ensemble de droits et de responsabilités. Cette charte ne peut pas être octroyée d'en haut, élaborée à dire d'experts, ni résulter d'un collage technocratique des déclarations existantes. Son élaboration doit être issue d'un processus de citoyenneté active qui lui donne toute sa valeur et toute sa force. A cet égard, le processus de consultation envisagé, bien que substantiellement amélioré, n'est ni assez large, ni assez ouvert ; en particulier, la société civile, dans toutes ses composantes, ne pourra pas être vraiment associée aux débats. Les sujets à traiter sont en effet très complexes et techniques et très discutés, notamment par des ONG spécialisées qui ont beaucoup à dire. Il conviendrait donc qu'un ensemble de livres blancs concernant les différents droits et devoirs en cause soit rédigé puis discuté avant que les instances politiques ne tranchent.

3) Tout cela prend nécessairement du temps : c'est là le prix de la démocratie ! Il est illusoire de penser qu'un vrai travail démocratique puisse être réalisé en un peu plus de un an. Soit l'on se contentera d'un bref « bill of rights », soit l'exercice sera bâclé. Il est donc indispensable de se donner le temps nécessaire. Notamment pour permettre au Parlement européen nouvellement élu de débattre du projet de Charte, après avoir auditionné les représentants des forces civiques et sociales européennes. Faire l'écononùe de ce débat serait dénier au Parlement son rôle de représentation des citoyens et donner indirectement raison aux abstentionnistes dont la proportion croissante était unanimement déplorée à l'issue de l'élection du 13 juin dernier.

4) Enfin, un délai plus long, pour une opération plus lourde, n'a de sens que si elle est assurée de son utilité, c'est-à-dire s'il est convenu, dès le départ, que la Charte sera pleinement intégrée dans les Traités. Ce point devrait donc être acté dès le démarrage du processus.
Ne gâchons pas une belle occasion de faire de la politique autrement et de réconcilier l'Europe et le citoyen : cette chance est à notre portée.

Pour CAFECS
Jean-Baptiste de Foucauld
Jean Nestor - Frédéric Pascal
La Croix - 7.10.99

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 19 April 2000

CHARTE 4242/00

CONTRIB 115

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Housing Forum (EHF) with a view to the hearing on the 27 April 2000. [1]

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[1] This text has been submitted in French and English languages.

CECODHAS
COFACE
ENHR
EOSH
ESCS
EUROCITIES
FEANTSA
IUT
RHF
UEPC

EUROPEAN HOUSING FORUM

A Forum for a Housing Debate in the european Union

The right to housing and the charter of fundamental rights of the european union

Formed following the European Parliament resolution on social aspects of housing (May 1997), the European Housing Forum is a centre of exchange and discussion between networks involved in housing present in Brussels (local authorities, social landlords, private developers, surveyors, charitable and family associations, tenants, researchers).

Its aims are the exchange of information between its members, the identification of themes deserving discussion, the instigation of joint initiatives with regard to EU institutions on specific subjects unanimously chosen by its members, and the promotion of the importance of the housing sector at all levels.

The Forum members are the European federations most representative in the housing sector:

CECODHAS, European liaison committee for social housing, housing nearly one out of four Europeans in the European Union,

COFACE – housing commission, Confederation of family organisations in the European Union,

ENHR, European Network for Housing Research, grouping together nearly a thousand researchers from all disciplines working on questions concerning housing,

EOSH, European social housing observatory,

ECSH, European society of chartered surveyors,

EUROCITIES, European network of major European cities,

FEANTSA, European federation of national associations working with the homeless,

IUT, international tenants association,

RHF, Network, habitat and French-speaking countries,

UEPC, European association of builders and developers.

Within the scope of auditioning NGOs and civil society, the forum members wished to contribute collectively to the works of the convention by inviting its members to discuss the right to housing, based on an inventory of the recognition of the right to housing on international, European, Community and national levels.

In addition, the Forum members invite the convention members and the NGO and civil society representatives to participate in their European conference which will take place on 15 September at UNESCO in Paris on the theme of: "Access to housing in the European Union: a right?" within the framework of the 12th informal meeting of European Union housing ministers which will take place on 18 and 19 September in Paris on the theme of access to housing.

Brussels, 14 April 2000

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The recognition of the right to housing:

A inventory for a debate on the convention of the right to housing

THE RIGHT TO HOUSING AT INTERNATIONAL LEVEL	
Universal declaration of human rights, 1948	article 25.1: "every person has the right to a standard of living sufficing to ensure his health, his well-being and those of his family, in particular as regards food, clothing, housing, medical care, as well as for the necessary social services".
Agreement on economic, social and cultural rights, 1966	article 11: " the States which are party to this agreement acknowledge the right of every person to a standard of living sufficing for himself and his family, including sufficient food, clothing and housing, as well as a constant improvement in his living conditions".
Declaration on progress and development in the social domain (United Nations, 1969)	article 10 f part II defines as one of the main objectives of the development policies: "To provide for all, and in particular for people with a low income and large families, satisfactory housing and collective services".
Workers (ILO, 1962), refugees (ILO, 1961), children (UN, 1959, 1989), women (UN, 1979), elderly workers (ILO, 1980), immigrant workers (ILO, 1990), minorities (UN, 1991), native peoples (UN, 1993)	Are all target groups which are protected, in particular, by an explicit reference to housing conditions.
Habitat Conference II 3 to 14 juin 1996	International undertaking and plan of action consisting of "obligations of the government to help the population to obtain housing and to protect and improve the neighbourhoods". Affiliation of the European Union to the Istanbul declaration

THE RIGHT TO HOUSING AT EUROPEAN LEVEL	
Council of Europe European Agreement on the protection of human rights and basic liberties, 4 November 1950:	No reference is made to the right to housing but.... Article 8 states the right of all people to respect for their private and family life, their home and their correspondence and article 12, the right to found a family.
Council of Europe The European Social Charter drawn up at the Council of Europe on 18 October 1961 and revised on 3 May 1996	**The revised social charter adds new rights, specifying in particular that all people have the right to protection against poverty and social exclusion and that all people have the right to housing.** Article 31 "With a view to ensuring the proper exercise of the right to housing, the parties undertake to take measures intended: To encourage access to housing of an adequate standard, to prevent and reduce the state of homelessness with a view to its gradual elimination, to make the cost of housing accessible to people who do not have sufficient resources.
Permanent conference of local and regional authorities of Europe, 1993	Recommendation aiming at integrating the right to housing in the existing legal instruments, in particular the European Agreement of Human Rights

THE RIGHT TO HOUSING AT COMMUNITY LEVEL	
Treaty of the European Union	Article 136 of the Treaty instituting the European Community refers to the fundamental social rights set out in the European Social Charter of 1961. (the revised social charter includes the right to housing).
European Parliament, Commission on the freedom and rights of citizens, Bertal Haarder report (March 2000)	The report demands that all economic and social rights – ranging from social protection to adequate housing conditions and from health care to appropriate education – be incorporated in the future EU Charter of basic rights.
European Parliament resolution on the social aspects of housing (May 1997)	"Invite the European Union to include the right to housing in treaties and in the CIG.
European Parliament resolution on the United Nations Habitat II conference (May 1996)	"Immediately invite the European Union to incorporate the right to housing in all treaties and charters regulating the activities and goals of the European Union".
European Parliament, Resolution on housing for the homeless (June 1987)	"(...) that the right to a habitat be guaranteed by legislative texts, that the member States acknowledge it as a fundamental right"
Committee of the regions: announcement of initiative for the homeless (1999/C 293/ 07) :	**Recommendations 5.4: "To reinforce the principle of the right to housing on a European Union scale** Considering that housing is the first condition to enable a person to engage in a process of social and professional insertion, the Committee of the regions invites the European courts to increase the study of the principle of the right to housing"
European Commission Communication: Building a Europe of "inclusion" (March 2000)	"The loss of housing is one of the most serious representations of poverty and social exclusion". "…improve the general impact of social inclusion measures thanks to a framework legislation that defines exclusion in terms of access to fundamental rights in the fields of employment, housing, health care, justice, education, culture, family and the protection of children".

THE RIGHT TO HOUSING IN THE MEMBER STATES	
Constitution: Belgium	Article 23 of the Constitution of 1994: "Everyone has the right to lead a life which respects human dignity (…) by guaranteeing economic, social and cultural rights (…) These rights include: … the right to decent housing "
Constitution: Spain	Article 47 of the Constitution of 1978: "All Spanish people have the right to enjoy decent and suitable housing… "
Constitution: Greece	Article 21 of the Constitution of 1975: "The obtaining of housing by the homeless or those who are housed in an unsuitable fashion constitutes a matter for special attention by the State"
Constitution: Portugal	Article 65 of the Constitution of 1976 revised in 1992 : "Everyone has the right for himself and his family to housing of a suitable size, meeting standards of hygiene and comfort and preserving personal and family privacy…"
Constitution: Finland	Section 15a of the Constitution of 1995: "The public authorities must (…) promote everyone's right to decent housing and encouraging everyone's efforts to have his own housing is the task of the public authorities"
Constitution: Netherlands	Article 22.2 of the Constitution of 1984: "The public authorities have the duty of supplying proper housing"
Constitution: Sweden	Article 2, chapter I of the Constitution of 1976/77: " …it is incumbent on the community to ensure the right to housing…"
Constitution of certain German länder	Bremen, Berlin, Brandeburg, Bavaria, Hamburg
Law : France	Law of 22 June 1982; law of 31 May 1990, exclusion law of 1998: exclusion law "The right to lodging is a fundamental right" Decision of the Constitutional Council of 19 January 1995 "the possibility of everyone to have decent housing is an objective of constitutional value"
Law: Denmark	Anti-poverty legislation: the law on social assistance places on the town councils the burden of supplying suitable housing
Law: United Kingdom	Housing Act of 1996: the law imposes on the local authorities [the duty] to house certain categories of homeless persons
Law: Italy	The right to housing is acknowledged in the legislation of a number of Italian regions; it is considered to have a constitutional role. Judgments of the constitutional court of Italy: housing is a fundamental social right
Law: Ireland	Housing Act of 1988: the local authorities are obliged to assess the importance of housing needs, to make a census of homeless persons and to set housing priorities
Law: Luxembourg	No specific legislation
Law: Germany	Despite a refusal by the federal authorities to speak of the right to housing, the länder and the Communities must ensure that nobody sleeps in the street. For public order's sake, they may requisition vacant housing.

EUROPEAN HOUSING FORUM

Conference 2000

CECODHAS – COFACE – ENHR – EOSH – ESCS – EUROCITIES – FEANTSA – IUT – RHF - UEPC

Access to housing in the EU :A right ?

venue
UNESCO - Paris
14-16 september 2000

14 september 2000

6.30 pm - 7 pm : registration - dossier

7 pm : cocktail of welcome

8 pm : free

(invited persons to be confirmed)

15 september 2000

8.30 : welcome

9.15 : Opening of the conference by Mrs Martine Aubry, french minister of employment and solidarity

9.30 : Introductory report on access to housing in the EU and the right to housing (expert)

10.00 : European Housing Forum panel : from right to practices : focal issues of partnership process

10.00 : Local authorities (EUROCITIES)

10.30 : debate

10.45-11.30 : coffee break

11.30 : Social sector (CECODHAS-RHF)

11.45 : Private sector (UEPC - ESCS)

12.00 : Associative sector (FEANTSA)

12.15 : debate

12.30 - 2.00 : lunch

2.00 : Tenants and families associations (IUT - COFACE)

2.15 : debate

2.30 : synthesis and conclusions of the panel by ENHR

3.00 : The right to housing and the european charter of fundamental rights : stakes for social and urban cohesion of the EU (a european parliamentary : reporter of human rights report)

3.30 : Political panel :

- United Nations : Klaus Topfer, Habitat : security of tenure and urban governance campaign
- Council of Europe : Antonio Mesquita : social charter and access to housing
- European Parliament : Nicole Fontaine : Charter of fundamental rights of the EU
- Committee of the Region : François Geindre : report on housing for the homelessness
- European commission : Anna Diamantopoulou : building a Europe of social inclusion

- A Mayor of a city of a eastern country candidate : access to housing dilemma and strategies in eastern Europe

5.00 : adoption of the resolution of the conference towards the convention, the ministries of housing and the french presidency

5.15 : conclusions of the conference by Louis Besson, State secretary on housing, France

5.30 : cocktail

16 septembre 2000 (to be confirmed)

9.30 - 12.00 : professionnal visits on projects on access to housing for target groups in Paris and the region Ile-de-France

Reminder :

18-19 september 2000 – Paris : 12th informal meeting of EU housing ministers on access to housing and public policies

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 19 avril 2000

CHARTE 4243/00

CONTRIB 116

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Collectif pour la Charte des droits fondamentaux (CCDF) en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française uniquement.

Sur la logique et la structure du projet

1. Le CCDF a décidé de ne pas ajouter une revue exhaustive des articles du projet à celles qui ont été déjà entreprises... souvent par des organisations qui comptent parmi ses membres. Il concentrera donc ses remarques, suggestions et propositions d'amendements, d'une part sur les partis méthodologiques et dispositions du projet qui posent problème au regard de sa plate-forme initiale, d'autre part sur certaines dispositions dont l'enjeu lui semble particulièrement essentiel.

2. Il apparaît ainsi dès l'examen des articles 1er à 16 - mais cette remarque concerne à la vérité l'ensemble du texte - que la structure même du projet ne peut, en l'état, satisfaire aux exigences de transparence et de sécurité juridique qui s'imposent tout particulièrement dans l'élaboration d'une Charte des droits fondamentaux.

Le texte est en effet dédoublé en une succession d'articles numérotés, rédigés avec concision et reproduits en caractères gras, et en une série d'« exposés des motifs » accompagnant chacun de ces articles, si bien qu'un lecteur de bonne foi, fût-il juriste, s'attend à ce que, comme leur nom l'indique, les « exposés des motifs » se bornent à expliquer les raisons pour lesquelles ont été retenues les normes contenues dans la-série des articles.

Il n'en est malheureusement pas ainsi. Il arrive que l'« exposé des motifs » restreigne considérablement le contenu (par exemple article 2.2) et/ou la portée (par exemple article 1er) de la norme posée dans l'article correspondant, cependant que la formulation à la fois brève, très générale voire ambiguë, des articles en vient parfois à priver d'effectivité les principes posés et les droits reconnus (par exemple du fait du recours à « notamment » dans l'article 3.2, ou de la simple référence à « des cas spécifiques » dans l'article 6).

Le lecteur qui se bornerait à prendre connaissance des articles, comme il est habitué à le faire en lisant par exemple la Déclaration française de 1789 ou la Déclaration universelle de 1948, d'une part croirait intégralement protégés des droits qui ne le sont que partiellement ou conditionnellement (par exemple en ce qui concerne l'interdiction de la peine de mort posée apparemment sans restrictions par l'article 2.2), d'autre part ne peut toujours mesurer avec une certitude raisonnable la portée de la reconnaissance et de la protection des droits fondamentaux, du fait des formulations elliptiques et ambiguës ci-dessus critiquées.

On peut en particulier se demander pourquoi les références à la CEDH ont toutes été renvoyées aux « exposés des motifs », alors qu'elles constituent souvent des restrictions de la portée des droits énoncés dans les articles. Il serait moins trompeur pour le lecteur de pratiquer des références explicites, fussent-elles concises, dans le corps des articles ; cela permettrait du même coup de s'interroger sur l'opportunité de certaines de ces références qui ont pu vieillir au point de heurter les conceptions des droits fondamentaux que nous partageons aujourd'hui (par exemple lorsque l'article 5e de

la CEDH, cité par l'exposé des motifs de l'article 6, admet la détention des personnes porteuses d'une maladie contagieuse et des vagabonds... ; les rédacteurs ont parfois senti le danger au point de réécrire certaines formules : ainsi les « principes généraux du droit reconnus par les nations civilisées » de l'article 7.2 de la CEDH sont-ils devenus dans l'article 10.2 « les principes généraux du droit reconnus par les nations démocratiques » ; il se confirme ainsi que l'écriture dans le corps des articles a des effets salutaires).

La reprise des formulations de la CEDH peut comporter des conséquences franchement inadmissibles, par exemple lorsque l'article 13, portant sur le respect de la vie familiale, énonce un « droit de se marier et de fonder une famille » qui subordonne l'existence de la famille au prononcé du mariage. Que la liberté du mariage mérite d'être protégée en tant que telle ne fait aucun doute ; que soient pour autant niés ou ignorés les droits et libertés des couples non mariés (et notamment des couples homosexuels) passe aujourd'hui l'entendement.

Il est donc absolument indispensable de revenir à l'usage qu'impose la logique : au dispositif la norme, à l'exposé des motifs la glose, et au lecteur la garantie de la sincérité de cette répartition des espaces et des valeurs.

La Charte et la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales : questions de rédaction

Le Conseil européen a demandé que la Charte des droits fondamentaux de l'Union européenne contienne les droits de liberté et d'égalité ainsi que les droits de procédure tels que garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.

Pour la plupart des articles, le projet reprend le texte de la Convention affirmant le droit et renvoie dans un exposé des motifs les dispositions de la Convention qui précisent les cas dans lesquels l'exercice de ces droits peut être limité. Par ailleurs, un article « horizontal » (convent 13, 8 mars 2000, article X) définit de façon générale les conditions de licéité des limitations « au respect des droits et libertés » reconnus dans la Charte.

Qu'il soit nécessaire de préciser ces conditions est certain. C'est un élément essentiel de la garantie des droits et libertés. Et les conditions définies par l'article X sont convenables, même si l'exposé des motifs interprète de façon extensive l'arrêt Huvig, en admettant que l'exigence de loi soit comprise au sens matériel et non formel. Cela est une régression par rapport à la démocratie, comme le pensait Sir Robert Megarry dans l'affaire Malone (28 février 1979) et comme la Cour interaméricaine des droits de l'homme ne l'admet pas (9 mai 1986).

Une interrogation subsiste sur l'opportunité de reprendre dans l'exposé des motifs l'intégralité des dispositions de la Convention européenne de sauvegardes des droits de l'homme. En effet, il apparaît que certaines reflètent des conceptions qui avaient cours en 1950, mais qui ne sont plus admissibles cinquante ans après. Par exemple, l'exposé des motifs du projet d'article 6 (droit à la liberté et à la sûreté) reprend l'article 5 CEDH, avec l'ensemble de ses exceptions, y compris le e), qui permet la détention « d'une personne susceptible de propager une maladie contagieuse, d'un aliéné, d'un alcoolique, d'un toxicomane ou d'un vagabond ».

En ce qui concerne les vagabonds, cette disposition reflète des conceptions du XIX° siècle, que le nouveau code pénal français a abandonnées. Pour les maladies contagieuses, elle est lourde de menaces, compte tenu des risques de traitement discriminatoire qui ont surgi avec l'apparition du SIDA. C'est, en définitive, l'ensemble du e) qui est contestable, comme reflet d'une volonté de contrôle social aboutissant à l'exclusion.

Il serait donc nécessaire de réexaminer la Convention européenne des droits de l'homme en tenant compte de l'évolution de la pensée libérale.

Sur le projet d'article 3 : droit au respect de l'intégrité

L'alinéa 2 porte sur le respect de principes dans le cadre de la médecine et de la biologie. Qu'il faille poser des principes dans ce domaine est certain. Ils doivent correspondre à la finalité poursuivie par les décisions dans ce domaine, qui ne peut être que le respect des personnes, seul principe éthique de portée générale (Jean-Paul Thomas : « il n'est pas d'autre principe éthique que celui du respect des personnes », in *La bioéthique est-elle de mauvaise foi ?* P.U.F.1999,p.39).

Des droits ont été affirmés depuis un demi-siècle. Leur respect s'impose dans le cadre de la recherche biologique et de la médecine : ce sont la dignité de la personne humaine, le respect de la vie privée, la non-discrimination, le droit à la protection de la santé. Leur protection passe par le respect de certaines conditions : consentement de la personne, non patrimonialité du corps humain, intégrité de la personne.

Qu'au lieu de réaffirmer ces droits et le principe de respect des personnes, une charte des droits fondamentaux pose des interdictions revient à aborder la question à l'envers. Les rédacteurs sont alors contraints, dans l'exposé des motifs de préciser que « l'énumération n'est pas exhaustive, ce qui permet une évolution pour tenir compte des progrès éventuels en la matière ». C'est faire penser que des progrès doivent se traduire par de nouvelles interdictions. C'est aussi supposer que les Etats puissent s'accorder sur l'admissibilité de ces progrès, alors qu'on sait qu'il n'en est rien. Ni l'Allemagne, ni l'Angleterre, pour des raisons opposées, n'ont ratifié la convention européenne pour la protection des droits de l'homme et de la dignité de l'être humain à l'égard des applications de la biologie et de la médecine. La charte ne peut éluder le rôle du législateur national.

Cette approche naît plus de la diabolisation des progrès de la connaissance biologique et de la médecine, que des interdictions permettraient d'exorciser, que d'un réel souci de mettre le respect de l'homme au centre des droits (cf. Jean-Pierre Baud, *L'affaire de la main volée, une histoire juridique du corps*, Seuil, 1993).

Une charte des droits doit affirmer des droits (respect de la personne, protection de la vie privée, non discrimination, droit à la protection de la santé) qui devront être protégés dans tous les cas et ne pas se contenter d'interdictions qui ne correspondent qu'aux craintes du moment.

Droit d'asile

Proposition d'amendement

Le Point 2 sur les expulsions collectives devrait faire l'objet d'un article séparé. Le titre de l'article 17 se réduirait donc à : droit d'asile. En associant le droit d'asile à la notion d'expulsion, on se place dans une logique de police de l'immigration et non dans une logique de droits fondamentaux.

17.1

Remplacer le paragraphe par *: «* **Toute personne fuyant la persécution a droit de trouver asile dans un Etat membre de l'Union. Ce droit implique l'accès des demandeurs d'asile à une procédure juste et efficace pour l'examen de leur demande et, par voie de conséquence, l'accès au territoire des Etats membres, en tenant compte de leur choix du pays en raison des attaches familiales, culturelles, linguistiques ou autres. Les Etats de l'Union appliquent la convention de Genève de 1951 sur les réfugiés sans restriction et de façon harmonisée. Ils rappellent le caractère non inamical à l'égard du pays d'origine de l'acte d'accorder l'asile. »**

Exposé des motifs :

I.- La Charte des droits fondamentaux de l'Union européenne ne peut pas énoncer des droits en deçà de ce qu'énonce et garantit déjà le droit international. Or la Convention de Genève de 1951 sur les réfugiés (avec son protocole de 1967) n'admet plus de restrictions géographiques à son champ d'application et prohibe toute discrimination quand au pays d'origine (article 3)

1/ Sur le principe, la notion de « pays sûr », qui est implicite dans la rédaction proposée de l'article 17.1, et celle de droit d'asile sont antinomiques.
- d'une part, parce qu'aucun Etat n'est jamais définitivement « sûr ». La démocratie et le respect des droits de l'homme sont garantis aussi par l'existence de contre-pouvoirs, de procédures de contrôle et de recours contre d'éventuelles dérives dont aucun Etat n'est totalement à l'abri (les exemples ne manquent pas). Un Etat vraiment « sûr » n'a pas besoin de se proclamer tel.
- d'autre part, si le fait de donner l'asile à une personne, et a fortiori d'examiner sa demande d'asile, est considéré comme un acte inamical ou un jugement de valeur sur le pays d'origine, il n'y aura plus de droit d'asile car, surtout dans un contexte de mondialisation de l'économie, celui-ci sera l'objet de pressions diplomatiques et de marchandages de toutes sortes au détriment du droit des gens.

2/ en droit, la définition actuelle du réfugié peut s'appliquer à toute personne qui se trouve hors de son pays d'origine ou, pour les apatrides, de celui où elle a sa résidence habituelle, c'est-à-dire hors du pays duquel elle est en droit d'attendre une protection. Cette protection s'exerce, à travers la détention d'un passeport ou d'un titre de voyage, par les représentations consulaires des Etats. Or il n'y a pas encore de passeport unique et de consulats de l'Union européenne. Exclure la possibilité pour les ressortissants d'un Etat de L'Union de pouvoir demander l'asile dans un autre Etat de l'Union reviendrait à restreindre le champ d'application de la Convention de Genève de 1951 ainsi que l'a souligné Haut Commissariat des Nations Unies pour les Réfugiés.

3/ La portée de cette restriction du champ d'application d'une convention internationale protectrice qui a été élaborée par et pour l'Europe serait concrètement négligeable car il y a très peu de demandes dans l'actuelle Union européenne. Par contre son impact juridique et sa possible utilisation à travers le monde seraient redoutables.

Pour toutes ces raisons, les défenseurs du droit d'asile ne peuvent pas accepter la rédaction proposée de l'article 17.1. C'est toute la Charte des droits fondamentaux qui deviendrait suspecte à leurs yeux si cette rédaction était maintenue.

Il faut noter que la France n'a jamais reconnu la notion de « pays sûr » en matière de droit d'asile et n'a jamais établi officiellement de liste de pays sûrs.

Le protocole sur le droit d'asile pour les ressortissants des Etats membres de l'Union européenne a déjà donné lieu, en septembre 1998, à un avis dans ce sens de la Commission Nationale consultative des droits de l'homme auprès du Premier ministre.

II.- Par « fuyant une persécution », il faut entendre que l'intéressé craint une persécution et que c'est en raison de cette crainte qu'il a fui son pays.

III.- Le réfugié doit être protégé et ses droits fondamentaux garantis. L'application de la convention de Dublin qui définit l'Etat responsable de l'examen d'une demande d'asile ne doit pas conduire au non respect d'autres droits, notamment en séparant les familles. C'est pourquoi son choix du pays d'asile doit être pris en considération.

ANNEXE

I.- Rappel du projet présenté par le présidium de la Convention :

Article 17. Droit d'asile et expulsion

1. Les personnes qui ne sont pas ressortissants de l'Union ont un droit d'asile dans l'Union européenne [*conformément à la Convention de Genève du 28 juillet 1951 et au protocole du 31 janvier 1967 relatifs au statut des réfugiés]*[*dans les conditions prévues par les traités].*

2. Les expulsions collectives d'étrangers sont interdites.

Commentaire

Cet article est inspiré de l'article 4 du protocole N° 4 à la convention européenne des droits de l'homme en ce qui concerne les expulsions collectives. La déclaration du Parlement européen de 1989 ne contenait aucune indication mais il n'existait pas à l'époque de politique communautaire. Le texte du paragraphe 1 est inspiré de l'article 63 CE qui incorpore en droit communautaire la convention sur les réfugiés. Les dispositions de l'article 1 du protocole n° 7 à la convention européenne des droits de l'homme relatives aux garanties procédurales en cas d'expulsion n'ont pas été reprises car la plupart des Etats membres n'ont pas signé ou ratifié ce protocole. De toute façon, la convention de Genève contient des garanties en ce domaine. Il a été suggéré d'ajouter une référence au droit à une protection temporaire pour les personnes déplacées « dans les conditions fixées par les traités ou les mesures prises pour son application, mais en l'état actuel du droit positif, existe-t-il un tel droit ?

Sur les « droits des citoyens »

Dans le « convent 10 » du 28 février, la structure de la Charte comportait une section consacrée aux « droits politiques ». Ce terme a été remplacé par celui de « droits des citoyens » dans le « convent 17 » du 20 mars 2000.

Ce changement semble regrettable. Le terme de « droits politiques » a l'avantage d'être plus clair, plus facile à cerner. Utiliser le terme de « droits des citoyens » est une extrapolation abusive des articles 17 à 22 CE, introduits par le traité de Maastricht, sous le titre de « citoyenneté de l'Union ». Il s'agissait alors de rapprocher l'Europe des citoyens, ce qui était un ancien projet, qu'on peut faire remonter au sommet de Copenhague de 1973. Pour cela, la voie choisie a été l'attribution de droits liés à la libre circulation des travailleurs. On a ainsi permis à des travailleurs de continuer à exercer leurs droits civiques aux élections locales de leur lieu de résidence et aux élections européennes, comme cela avait été esquissé dans le rapport Adonino de 1984, en liant ces droits à la liberté de circulation et de séjourner, et en y ajoutant le droit à une protection diplomatique, le droit de pétition et le recours à un médiateur.

De son côté, le Parlement européen a adopté, en 1989, une Déclaration sur les droits et libertés fondamentaux, sans limiter leur bénéfice aux citoyens des Etats membres de la Communauté européenne.

Le terme de « citoyenneté » a eu un énorme succès, sans qu'on s'interroge nécessairement sur son contenu. A priori, on a considéré que c'était un pas en avant, vers une Europe plus politique, moins strictement économique.

Il est fâcheux de continuer à « enrichir » cette notion, sans réfléchir sur le sens même du terme de citoyenneté, car cela conduit à …appauvrir la portée des droits, en réservant aux « citoyens » des droits dont il n'y aucune raison de refuser le bénéfice à tous. Ainsi, le projet réserverait aux citoyens le droit à une bonne administration.

La difficulté est ressentie par les rédacteurs, qui utilisent alternativement la formule « citoyen » et « toute personne » (articles E, H).

Il convient donc de distinguer les droits politiques, réservés aux citoyens de l'Union européenne, et les autres droits. Pour de nouveaux droits, comme le droit à une bonne administration, il n'y a aucune raison de ne pas les attribuer à toute personne. Pour les droits créés par le traité de Maastricht, sous la rubrique « citoyenneté de l'Union », mais qui ne sont pas des droits politiques (accès au médiateur, liberté de mouvement) il convient d 'une part de s'interroger sur la pertinence de la référence au citoyen et d'autre part d'intégrer les modifications apportées par le traité d'Amsterdam.

Enfin, nous estimons qu'il faudra parvenir à dissocier l'attribution de la citoyenneté de l'Union européenne de la nationalité des Etats membres.

Sur les droits sociaux

La Charte des droits fondamentaux de l'Union Européenne doit assurer la prise en compte des droits sociaux dans l'ordre juridique européen. Elle devra donc comporter un corpus dédié à ces préoccupations, en prenant le soin :

- d'entendre les droits sociaux au delà de l'acception courante,
- de les garantir par une rédaction utile.

Quels sont les droits sociaux à garantir ?

La Charte des droits fondamentaux de l'Union Européenne doit affirmer :

1. Dans le travail :

- le droit à une rémunération équitable,
- le droit à l'égalité de traitement entre les hommes et les femmes,
- le droit à la liberté d'exercice professionnel dans tous les pays de l'Union,
- le droit à l'information, à la consultation, et à la participation, des travailleurs,
- le droit d'association, de négociation et d'action collective des employeurs et des travailleurs,
- le droit au repos hebdomadaire et aux congés annuels payés,
- le droit à la sécurité et à l'hygiène dans le travail,
- l'interdiction du travail pour les mineurs de moins de 16 ans et le droit à des conditions spécifiques pour les travailleurs de moins de 18 ans,

- le droit à la protection en cas de licenciement,
- le droit à la formation et à l'orientation professionnelle,
- le droit des travailleurs à la protection maternelle,
- le droit des travailleurs au congé parental.

2. Dans la garantie de revenus.

- le droit à un revenu minimum garanti indépendamment du travail pour ceux qui n'occupent pas un travail.

3. Dans le logement.

- le droit à un logement décent.

4. Dans la protection sociale :

- le droit à la sécurité sociale pour toute personne, travailleur et ses ayants droits,
- le droit à l'aide sociale pour toute personne dont la situation ne permet pas de bénéficier des prestations de sécurité sociale.

5. Dans l'accès aux soins de santé :

- le droit à l'information de santé,
- le droit aux moyens de prévention en matière de protection de la santé,
- le droit aux soins de santé.

6. Dans les droits de personnes malades et handicapées.

Il semble nécessaire d'ajouter des droits pour les personnes malades ou handicapées (pour éviter les discriminations en raison de l'état de santé). Ce sont aussi parfois des droits des personnes tout simplement (accès au dossier médical).

On trouvera en annexe une contribution à cet égard. Chaque élément est sans doute à ventiler entre les articles transversaux (anti-discriminations) et des articles spécifiques (droit à la protection des données informatiques personnelles, droit au dossier, droit à la dignité….).

Quelle rédaction revendiquer ?

⇨ Il faut insister sur la nécessité de rédactions précises en posant le principe que tout membre de phrase pouvant générer un doute ou une interrogation doit être complété, soit par une indication temporelle, soit par une précision spatiale, soit par tout critère ad hoc. C'est la seule manière d'aller au delà d'une charte "pétition programmatique".

⇨ Mais, c'est peut-être dans les articles transversaux qu'il faut œuvrer le plus pour faire en sorte que les droits reconnus par la Charte soient effectifs, le plus possible, pour les personnes (exemple de l'article anti-discrimination).

⇨ Il faut aussi penser à la rédaction "cliquet" :

« Toute disposition conférant un droit supérieur à celui reconnu par les dispositions de la présente charte s'applique sans préjudice des droits énoncés par cette dernière ».

Contribution sur les droits des personnes malades :

Droit à l'information.

« Le patient a le droit d'être pleinement informé de son état de santé, y compris des données médicales qui s'y rapportent ; des actes médicaux envisagés, avec les risques et avantages qu'ils comportent, et des possibilités thérapeutiques alternatives, y compris des effets d'une absence de traitement et du diagnostic, du pronostic et des progrès du traitement.

Le patient a le droit de ne pas être informé, sur sa demande expresse.

Le patient a le droit de choisir une personne qui, le cas échéant, devra recevoir l'information en leur nom ».

Droit au consentement.

« Aucun acte médical ne peut être pratiqué sans le consentement éclairé préalable du patient. Il a le droit de refuser un acte médical ou de l'interrompre.

Lorsqu'un représentant légal est requis, le patient doit être néanmoins associé à la prise de décision.

Le consentement du patient est également requis pour la conservation et l'utilisation des substances provenant de son corps.

Le consentement éclairé du patient est aussi nécessaire pour toute participation à l'enseignement clinique et pour toute participation à une activité de recherche scientifique ».

Droit d'accès au dossier médical.

« Le patient, le cas échéant par l'intermédiaire d'une personne qu'il désigne, a le droit d'accéder directement à son dossier médical, de recevoir copie de la totalité ou de partie de ces dossiers. Cet accès ne s'applique pas aux données relatives à des tiers ».

Droit à la protection du dossier médical.

« Les informations confidentielles concernant un patient ne peuvent être divulguées que si le patient y consent explicitement ou que si la loi l'autorise expressément. Toutes les données identifiables concernant un patient doivent être protégées par un moyen de protection adapté au mode de stockage choisi. Les substances humaines à partir desquelles des données identifiables peuvent être obtenues, doivent également être protégées.

Le patient a le droit de demander que soit corrigées, complétées, supprimées, précisées et/ou mises à jour, les données de caractère personnel ou médical le concernant, lorsqu'elles sont inexactes, incomplètes, ambiguës ou périmées, ou sans rapport avec les besoins du diagnostic, du traitement et des soins ».

Droit à la protection de la vie privée et de l'intimité.

« Le patient a le droit au respect de sa vie privée qui ne peut faire l'objet d'aucune ingérence sauf si elle est justifiée par les nécessités du diagnostic, le traitement et les soins, et que le patient y consent.

Le patient a le droit au respect de l'intimité de sa personne ».

Droit à la dignité.

« Le patient a le droit d'être soulagé de la douleur, dans la mesure où le permettent les connaissances. Il a le droit de recevoir des soins palliatifs humains et de mourir dans la dignité ».

Droit à l'assistance religieuse et au soutien.

« Le patient a le droit de recevoir ou de refuser une aide spirituelle ou morale, y compris celle d'un ministre représentant la religion de son choix.

Le patient a le droit de recevoir ou de refuser le soutien de ses parents, proches et amis, ou des représentants d'une organisation non gouvernementale de son choix ».

Droit à la participation.

« Les patients ont un droit collectif à être représentés à chaque niveau du système de santé à propos des questions relatives à la planification et à l'évaluation des services, y compris la gamme, la qualité et le fonctionnement des prestations et services ».

Droit à la médiation et à la réclamation.

« Le patient doit avoir accès aux informations et aux conseils lui permettant d'exercer les droits énoncés ci-dessus. Celui qui estime que ses droits n'ont pas été respectés doit avoir la possibilité de faire examiner son litige par un organisme indépendant, le cas échéant également compétent pour exercer une médiation, et/ou devant une juridiction ».

Sur les services d'intérêt général

a) Toute personne a droit à l'accès aux services d'intérêt général.
b) Les services d'intérêt général garantissent l'exercice des droits fondamentaux.
c) Un contrôle continu et démocratique s'assure de leur efficience et de leur capacité à s'adapter en permanence aux évolutions des besoins ainsi qu'au progrès social et technologique.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 19 avril 2000

CHARTE 4244/00

CONTRIB 117

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Conseil Central des Communautés Philosophiques non-Confessionelles (CCL) en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française uniquement.

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Charte des droits fondamentaux

Audition de la société civile du 27 avril 2000

Mémoire et vocation de l'Europe: L'humanisme européen

En Europe, de nombreux apports de divers courants de sensibilité et de pensée ont convergé. L'humanisme est fait de toutes les valeurs qui ont germé dans ces différentes cultures.
Ces courants ont contribué d'une manière ou d'une autre à la formation de l'humanisme moderne : certes, ils ont également recelé des tendances anti-humanistes et ont pu entrer parfois en contradiction les uns avec les autres.

On peut retenir les principales valeurs constitutives de l'humanisme, dont l'Europe a été le creuset. Tout d'abord, au-delà de toutes distinctions ou situations, la *dignité égale de toute personne humaine*, d'où découlent *la liberté et la justice* comme exigences indivisibles et universelles. Cette valeur inconditionnelle, irréductible, doit être affirmée comme présupposé incontournable. Il s'agit là d'un sentiment commun, d'une conviction, qui se sont progressivement imposés au cours de l'histoire, et qui marquent chaque homme, quelles que soient les motivations diverses dont on les étaye.

La reconnaissance de l'égale dignité de toute personne humaine, femme ou homme, induit un type de société qui permet et favorise la dimension foncièrement relationnelle de la liberté humaine. Même régulée par des lois, d'ailleurs en constant remaniement, cette sociéte doit s'ouvrir à la possibilité de transgressions responsables car celles-ci sont le ferment indispensable d'autonomie personnelle et de progrès des institutions.

La conscience de la fragilité de tout système suscite des structures ouvertes aptes à l'écoute, au dialogue, au changement. D'où le refus de tout "intégrisme" et la capacité d'intégrer du nouveau. Cette mémoire, qui confère à l'Europe une chance et une responsabilité spécifiques, doit cependant nous rappeler aussi les dérives particulièrement graves dont elle porte le poids.

Le brassage des cultures qui a fait l'identité européenne et sa richesse impose aux gouvernants et aux citoyens de l'Europe un *devoir d'ouverture et d'acceptation de la diversité*

Enfin, les valeurs de tolérance et d'humanisme qui constituent le patrimoine commun et le ciment de l'Europe moderne, au delà des différences nationales, régionales ou traditionnelles implique dans le chef de toute autorité publique une rigoureuse impartialité à l'égard de toutes les conceptions philosophiques ou religieuses et la garantie de l'indépendance de la sphère privée des citoyens en matière d'option confessionnelle ou non confessionnelle.

Les valeurs communes européennes exigent de toutes les institutions publiques, celles de l'Union et celles des Etats, un rigoureux devoir d'impartialité et la garantie de la dignité des personnes et des droits humains.

Par leur adhésioin aux différents traités et à l'Union, les Etats membres garantissent en leur nom et au nom des institutions européennes l'égalité de tous devant la loi sans distinction de sexe, d'origine, de culture, de conviction ou de choix de vie.

Pour une charte étendue

Il est certes intéressant de présenter clairement au public européen certains droits que l'on pourrait appeler de base. Ceux-ci sont acquis et exprimés dans des textes dont tous ne sont pas encore bien connus des citoyens.

Nous ferons à ce propos quelques remarques par rapport aux articles actuellement proposés par le Présidium.

Mais une charte européenne devrait pouvoir faire davantage.
Une partie importante de la population s'interroge et voudrait entendre exprimer des droits qu'elle considère fondamentaux, compte tenu de l'évolution de la société moderne.
Le risque est grand de décevoir ces citoyens européens en publiant une charte qui ne répond pas à leur attente concernant les exigences, de droits culturels, de droits sociaux, de droits des enfants, de normes et indicateurs de développement durable, ...
Ne pourrait on également définir les droits à une participation des citoyens à des services d'intérêt général ?

Il s'agit, non plus de droits individuels, mais de droits collectifs (collective rights).
Nous ferons à cet égard quelques suggestions

Une charte des droits fondamentaux doit affirmer *la laïcité des institutions européennes et le principe d'impartialité qui implique qu'aucune conception religieuse ou philosophique particulière ne peut bénéficier d'un traitement privilégié* .

La charte fait référence à la liberté religieuse garantie, notamment par la Convention européenne de sauvegarde des droits de l'Homme et par les Constitutions nationales des États membres de l'Union.

Une charte des droits fondamentaux doit préciser que cette liberté essentielle instituée au bénéfice des *personnes* de toutes convictions, confessionnelles et non confessionnelles ne confère aucun privilège aux *institutions* religieuses, entièrement soumises à la loi commune.
La charte doit aussi rappeler qu'aucune prescription religieuse ne peut avoir d'effet contraignant sous l'angle de la loi civile et que la force publique ne peut en aucune hypothèse y prêter main forte.

Une charte des droits fondamentaux doit relever qu'au même titre que tout autre groupe de pression ou tout mouvement associatif les Eglises peuvent être entendues par les autorités publiques de l'Union ou des Etats membres, mais que ces consultations éventuelles ne peuvent être institutionnalisées, ni donner l'apparence d'une confessionalisation de l'Europe ou d'un Etat membre, en contradiction avec l'idéal démocratique (annexe 2).

Remarques concernant la proposition du Présidium

ART. 3 - **Droit au respect de l'intégrité**

§ 2, 4ème alinéa - Clonage reproductif humain

Le paragraphe 2 dernier alinéa relatif au clonage reproductif humain n'a pas sa place dans une Charte des droits fondamentaux et devrait être retiré.

Commentaires:
Comme le souligne le commentaire du document, ce point est extrait de la Convention de biomédecine du Conseil de l'Europe, convention qui peut être régulièrement soumise à revision par les Puissances signataires, notamment pour des raisons d'évolution des connaissances scientifiques. Il ne parait pas indiqué de devoir faire évoluer de telle sorte la Charte.
Il convient également de faire observer que cette interdiction est en contradiction avec la "*liberté de recherche scientifique*" que la charte entend proclamer et qui fait partie de la grande tradition et du fonds commun de l'héritage européen.

Un commentaire plus général est en annexe 1.

ART 14 - **Liberté de conscience**

Il y aurait lieu d'ajouter un second paragraphe:

Toute personne a droit à la garantie par les États et l'Union de la sphère d'autonomie quant à ses conceptions philosophiques ou religieuses.

Commentaire:
L'acceptation du pluralisme induit une ouverture, une pratique de la tolérance à l'égard de la personne d'autrui et une stricte neutralité des pouvoirs publics des États et de l'Union à l'égard de toutes les convictions religieuses et philosophiques. (annexe 2)

Cette neutralité implique:

la non-ingérence des États et de l'Union dans les affaires de toute organisation religieuse ou philosophique non confessionnelle. Un État se garde d'intervenir dans leur organisation interne, dans la définition de leurs positions éthiques ou encore dans la nomination de leurs représentants;

la non-ingérence de toute organisation religieuse ou philosophique non confessionnelle dans les affaires des États et de l'Union.

ART 15 - **Liberté d'expression**

Au §1 il conviendrait d'ajouter:

La liberté d'expression vaut aussi pour les informations et idées qui heurtent, choquent ou inquiètent

ART 16 - **Droit à l'éducation**

Toute personne a droit à l'éducation.
Le § 1 devrait être complété comme suit:

Ce droit ne comporte pas l'obligation des pouvoirs publics de subventionner un enseignement autre qu'un enseignement ouvert à tous, en dehors de toute référence politique et religieuse.

Les Pouvoirs publics ne peuvent imposer un enseignement religieux.

Le § 3 devrait être modifié comme suit:

Les parents ont le droit d'assurer l'éducation religieuse ou philosophique de leurs enfants conformément à leurs convictions, dans un système éducatif visant à former des citoyens responsables, capables de contribuer au développement d'une société démocratique, solidaire, pluraliste et ouverte aux autres cultures.

i) Justificatif

La liberté de choix des parents ne peut avoir pour conséquence le renforcement de tendances anti-démocratiques ou intolérantes.

ii) Commentaires

Pour éviter toute confusion ou reconnaître d'emblée qu'un enseignement peut s'inscrire avec ses références philosophiques ou religieuses dans les objectifs visés ici, il suffit qu'il reconnaisse que d'autres valeurs, d'autres références sont aussi légitimes dans une société que celles qu'il a lui-même retenues.

Les élèves doivent être formés à reconnaître la pluralité des valeurs qui constituent l'humanisme européen. En ce sens, le système éducatif fournit aux jeunes les éléments d'information qui contribuent au développement libre et graduel de leur personnalité et qui leur permette de comprendre les options différentes ou divergentes qui constituent l'opinion.

Droits à établir

Non-discrimination

1- Une clause indépendante de non-discrimination devrait être prévue, s'inspirant de l'article 13 (ex 6A) du Traité de l'Union:

La jouissance des droits fondamentaux doit bénéficier à toute personne sans discrimination fondée sur le sexe, l'origine ethnique ou sociale, les croyances religieuses ou philosophiques, un handicap, l'âge ou l'orientation sexuelle. La non discrimination entre les sexes comporte l'égalité entre les hommes et les femmes à l'accès aux charges publiques et privées et à la protection sociale.

2- Discrimination sur base religieuse

Les prescriptions religieuses ne peuvent faire obstacle à la pleine jouissance et au plein exercice des droits civils et politiques. Elles ne peuvent davantage dispenser du respect de ces droits. Aucune prescription religieuse ne peut être retenue comme cause de justification, cause d'excuse ou de circonstance atténuante d'une infraction pénale.

Annexe 1

C'est principalement au nom du respect de la dignité humaine qu'est condamnée *a priori* la naissance programmée d'un enfant qui serait la réplique exacte, la "photocopie" d'une personne vivante ou ayant existé. Ce seul fait le priverait de toute personnalité propre puisqu'il ne serait ni plus ni moins qu'un moyen de satisfaire une curiosité, le fantasme de l'immortalité ou celui, plus inacceptable encore, d'une réserve d'organes immunocompatibles.

Cette présentation est assurément réductrice en cela qu'elle ne souligne que l'inacceptable perspective de la conception d'un être comme moyen et non comme une fin en soi. Cette attitude excessive se doit en effet d'être nuancée d'autant plus qu'elle justifie aux yeux de beaucoup une interdiction absolue de tout transfert d'un noyau humain dans un ovocyte énucléé, qu'il s'agisse d'aboutir à la naissance d'une personne, à la production de pré-embryons ou à celle de cellules différenciées en culture.

Il est par ailleurs inexact d'affirmer qu'un tel transfert nucléaire crée une copie parfaite. Cette assertion fait une fois de plus l'apologie du déterminisme génétique et ignore les influences épigénétiques qu'exercent le cytoplasme de l'ovocyte, les échanges foeto-maternels durant la gestation, l'environnement de l'enfant.

Nul n'est jamais la réplique exacte d'un autre. Tout au plus lui est-il physiquement très semblable comme le sont les vrais jumeaux à chacun desquels l'Eglise accorde d'ailleurs une âme et l'Etat, le droit de vote. Ils sont donc très loin d'être privés l'un ou l'autre de leur propre dignité, ceux qui sont d'inestimables véhicules de culture comme le souligne si bien le professeur Fernand LEROY dans l'ouvrage qu'il leur consacre ("Les Jumeaux dans tous leurs états" Ed. De Boeck Université, 1995).

C'est l'intention qui est à la base de la conception volontaire d'une prétendue copie et non l'existence de celle-ci qui fait d'elle un moyen ou une fin en soi. La création *ex vivo* de jumeaux ne semble donc pas être justifiable alors que la multiplication embryonnaire par dissociation précoce des blastomères pourrait fort bien trouver sa raison d'être dans la perspective de recherches ou dans la constitution d'une réserve de pré-embryons pour augmenter les chances de succès d'une fécondation *in vitro*. Cette justification pourrait tout aussi bien s'appliquer au transfert des noyaux d'un embryon précoce fait de quelques cellules d'autant plus qu'aucune de ces deux stratégies ne bouleverserait les règles de la parenté.

Un moratoire volontaire

Un moratoire pourrait permettre une réflexion en profondeur sur l'opportunité d'envisager la conception d'un être par clonage dans des circonstances exceptionnelles. Il pourrait par exemple s'agir de satisfaire le désir d'avoir un enfant génétique manifesté par un couple dont la femme souffre d'une affection héréditaire grave transmise par les seules mitochondries du cytoplasme des ovocytes (myopathie, cardiomyopathie, neuropathie optique de Leber) ou encore celui manifesté par un couple dont le partenaire masculin est totalement stérile. Dans le premier cas, un enfant qui ne serait la réplique de personne pourrait naître du transfert d'un noyau d'un pré-embryon du couple concerné dans le cytoplasme d'un ovocyte d'une donneuse. Dans le second, un noyau somatique d'un des parents pourrait être transféré. L'enfant qui en serait issu serait assurément le "clone" de sa mère ou de son père dans le sens qu'on a donné à ce mot à propos de la naissance de Dolly. Mais l'intention d'avoir un enfant et non un sosie doit ici être prise en considération.
Ajoutons que dans le cas du transfert d'un noyau paternel dans l'ovocyte énucléé maternel, le génome nucléaire du premier serait accompagné du génome mitochondrial du second et qu'à ce titre, l'enfant ne serait pas une réplique génétique parfaite du père. Les influences épigénétiques feraient d'ailleurs aussi de leur fille une personne différente de la mère.

Ces deux exemples ne font qu'illustrer la complexité d'un problème qu'on ramène trop souvent à la vision diabolique d'armées d'individus identiques soumis au pouvoir d'un petit nombre. Lorsque furent connus les premiers essais de fécondation *in vitro* menés par le Prof. R. EDWARDS, des voix se sont élevées dénonçant une pratique qui ne pouvait conduire qu'à la dégénérescence de l'espèce humaine...

Extrait de: Henri Alexandre, in Outils de réflexion, Centre d'action laïque, Bruxelles, (2000)

Annexe 2 - Relations avec les Églises

Sous "l'Ancien Régime", les Églises (le plus fréquemment seule l'Église de la religion dominante) intervenaient dans les affaires de la Cité.
Actuellement les Églises se considèrent toujours comme porte-parole de valeurs, de normes et de règles de vie que tous les citoyens sont censés partager. On constate que des fidèles, de plus en plus nombreux et même ceux d'entre eux qui recourent à des cérémonies religieuses, ne suivent plus les mots d'ordre de leur Église et souvent contestent ceux-ci en de nombreuses matières.
Les Églises ne sont plus représentatives de l'ensemble de leurs fidèles et certainement pas de l'ensemble des citoyens dont un nombre de plus en plus important n'adhère plus à aucune Église.
Il faut remarquer que plusieurs d'entre elles sont organisées de manière non démocratique.
Le cas de l'Église catholique est particulier car elle a la possibilité d'intervenir par le biais de l'État du Saint Siège, lequel n'a pas adhéré et n'est pas en condition d'adhérer à la Convention européenne des droits de l'Homme.
Aucune scorie de l'histoire ne peut plus justifier l'ingérence d'une autorité religieuse, quelle qu'elle soit, dans les affaires publiques de l'Union ou des Etats membres (ce qui implique notamment le retrait du statut d'observateur et des privilèges diplomatiques accordés à un Etat sans peuple, tel le Vatican.) .

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 19 avril 2000

CHARTE 4245/00

CONTRIB 118

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de "Terre Des Hommes France" en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française uniquement.

TERRE DES HOMMES FRANCE

4, rue Franklin - 93200 Saint Denis - ☎ : 01.48.09.09.76 - Fax 01.48.09.15.75 - CCP 2133Z Paris

La grave situation d'exclusion et de pauvreté qui touche des millions d'êtres humains a probablement deux causes fondamentales :
- d'une part , les graves déséquilibres Nord Sud : le poids négatif de la dette sur les efforts de développement des pays pauvres, la politique internationale d'échanges commerciaux (OMC)...
- d'autre part, le déséquilibre de réalisation entre les droits civils et politiques et les droits économiques, sociaux et culturels .

Le dernier rapport du Développement humain réalisé par le Programme des Nations Unies pour le Développement affirme que : « ...plus de 80 pays ont aujourd'hui un revenu par habitant inférieur à ce qu'il était il y a dix ans...»
Nous sommes parvenus à la certitude qu'un travail de solidarité ne suffit pas à lui seul et que notre devoir d'ONG est d'agir, en collaboration avec nos partenaires, pour faire reconnaître les droits économiques, sociaux et culturels comme une dimension pleine et entière du développement humain.

Tout comme René Cassin croyait en la force d'une déclaration pour faire avancer les droits de l'Homme, Terre des Hommes pense qu'il ne saurait y avoir de progrès durable dans le Monde sans l'adoption de textes juridiques applicables qui reconnaissent les droits économiques, sociaux et culturels comme un droit fondamental de la personne humaine.

De quel autre moyen disposons nous pour lutter contre la situation dénoncée par Bernard Cassen dans le Monde Diplomatique de Novembre 1999 à propos de Seattle: "...les représentants de gouvernements dont seulement une poignée ont les moyens humains de suivre des dossiers techniques complexes. Autour d'eux, les milliers de lobbyistes des multinationales les encadrent et les conseillent. Ce sont eux seuls qui sont demandeurs d'une nouvelle dose de libéralisme affectant des domaines d'activité jusqu'ici à l'abri de la marchandisation comme l'éducation et la santé".

Voilà pourquoi Terre des Hommes France mène un combat pour une reconnaissance juridique et économique des droits économiques, sociaux et culturels, et souligne leur interdépendance et leur indivisibilité.

L'association veut particulièrement attirer l'attention sur ces droits qui, en dépit d'efforts formels, semblent encore négligés. Une charte des droits fondamentaux ne peut décemment se construire à partir d'une hiérarchisation des droits.

Longtemps considérés comme subsidiaires, les droits économiques, sociaux et culturels ont démontré qu'ils étaient une condition de réalisation des droits civils et politiques.

- Que vaut la liberté de la presse pour l'analphabète,
- le droit de vote pour l'esclave,
- que signifie la citoyenneté pour l'affamé ?

En conséquence, Terre des Hommes France propose la contribution suivante, base de son intervention le 27 avril 2000 dans le cadre du projet de Charte des Droits fondamentaux:

L'exemple du droit à l'éducation tel qu'il est aujourd'hui abordé dans le projet de charte suscite les inquiétudes de l'association.

D'une part, parce qu'il est séparé des autres droits économiques, sociaux et culturels.

S'il n'est pas faux de le concevoir comme un droit fondamental, il paraît inique de le traiter en dehors du champ social global déterminé par les droits économiques, sociaux et culturels.
On ne peut accepter l'argument qu'un titre relatif aux droits de l'enfant développera la question car le droit à l'éducation n'est pas spécifique à l'enfance.

D'autre part, parce que la conception de ce droit, tel qu'il est présenté, est réductrice.

C'est une vision libérale essentiellement qui consacre le droit à l'instruction conçu comme un droit d'accès à l'enseignement public, gratuit et obligatoire sans proposer une vision rénovée du droit à l'enseignement. Le texte entretient la confusion entre instruction, éducation et enseignement et semble s'orienter vers un droit à l'éducation qui serait un droit/liberté (n'exigeant pas une action positive de l'Etat). Seul le droit à l'instruction apparaît comme un droit/créance.

Si nous ne nous en tenons qu'au droit à l'instruction, le combat de la gratuité est aujourd'hui dépassé, car ce droit ne se réduit pas à la gratuité et à l'obligation. S'instruire, c'est disposer d'un enseignement de qualité dans un environnement favorable au développement des facultés intellectuelles.

Le droit à l'instruction se confond dans la Charte avec le droit à l'enseignement. L'école est-elle aujourd'hui et sera t-elle demain la seule dispensatrice des savoirs?

Il existe dans les sources internationales des droits de l'Homme qui font allusion à l'épanouissement individuel par l'éducation et qui intègrent une dimension culturelle (Déclaration universelle des droits de l'Homme de 1948 ; Pacte relatif aux droits économiques, sociaux et culturels de 1966 dans son article 13 ; Convention sur les droits de l'enfant de 1990 dans son article 29). Or, le nouveau projet ne fait pas référence à ces textes mais cite exclusivement les traditions constitutionnelles des États et l'article 2 du Protocole additionnel de la Convention européenne des droits de l'Homme de 1950. Il semble qu'il y ait là une marque idéologique.

Enfin, il semble nécessaire que l'Europe intègre une dimension culturelle aux droits fondamentaux à travers le droit à l'éducation qui se définit comme « la mise en œuvre des moyens propres à assurer la formation et le développement d'un être humain ». L'ensemble des droits culturels, dont la teneur est définie dans le projet de déclaration de l'Unesco, ne peuvent exister sans éducation, d'où la nécessité selon nous de consacrer un titre au droit à l'éducation dans lequel pourraient apparaître deux paragraphes, le premier sur l'instruction, le second sur les droits « éducatifs » (culture et famille) qui ne sauraient être confondus avec l'instruction.

Christiane CHARRETON
Présidente

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 19 April 2000

CHARTE 4246/00

CONTRIB 119

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Region of the International Lesbian and Gay Association (ILGA-Europe) with a view to the hearing on the 27 April 2000. [1]

[1] These texts have been submitted in English language only.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Address by ILGA-Europe[1],
The European Region of the International Lesbian and Gay Association,
to the Charter Convention on 27 April 2000

It is a great honour for our organisation, the European Region of the International Lesbian and Gay Association, to address the Convention on behalf of Europe's lesbian, gay, bisexual and transgendered communities. But for us it is more than an honour: it is an important symbol of the immense change taking place in European society: 20, 15, even 10 years ago our presence at an event such as this would have been unthinkable. Centuries-old patterns of exclusion, enforced invisibility, oppression, even at times persecution, are breaking up. And with the break-up of these patterns an immeasurable burden of isolation, emotional deprivation, self-denial and discrimination is being lifted from the shoulders of millions of people in Europe.

The European Union has made important contributions to this development, with repeated resolutions by the Parliament, and of course with Article 13 of the EC Treaty. It can make a further very important contribution with the Charter, particularly in the articles covering non-discrimination and family life.

The Treaty of Amsterdam broke new ground with the inclusion of age, disability and sexual orientation in Article 13 of the EC Treaty. We believe most strongly that all three characteristics should be included in the non-discrimination article of the Charter.

As regards sexual orientation discrimination, the reality is that, despite the progress referred to above, discriminatory practices remain widespread, involving both private individuals, and governments. Our written submission to you provides much detail. Suffice it to say here:

- that such discrimination can be found in the laws or regulations of seven member states and eight accession countries, including both the criminal code, and access to certain types of state employment;
- that discrimination by individual employers is extensive;
- that homophobic violence remains a serious problem, as last year's London pub bombing, which killed three people and injured sixty, reminded us all too tragically.

[1] ILGA-Europe is a non-governmental organisation that seeks to defend the human rights of lesbian, gay, bisexual and transgendered persons at European level. Its membership consists of over 150 non-governmental organisations, whose members are mainly lesbian, gay, bisexual and transgendered individuals, in over 30 European countries. It is a member of the Platform of European Social NGOs and enjoys consultative status with the Council of Europe.

But the problem goes beyond particular acts of discrimination by governments or individuals: the fact remains that many people both in public life and as private citizens still consider the expression of homophobic attitudes legitimate and respectable. Explicit reference in the Charter is needed above all to signal that sexual orientation discrimination is as unacceptable as discrimination based, for example, on race or religion.

Transsexual and transgender people experience very similar types of discrimination: violence, harassment, and the denial of jobs or services. Their small number makes them particularly vulnerable on the one hand, but on the other, makes it extremely difficult for them to obtain any protection against discrimination through new legislation. For these reasons, we urge that you also include gender identity in the non-discrimination article of the Charter.

Turning now to the question of partnerships and family life: some of the realities of life in Europe today are:

- that millions of people are living together as same-sex partners;
- that in many cases children are being brought up by these couples, or indeed by single people who are lesbian, gay, bisexual or transgendered.

To repeat: these are realities. They cannot be wished away or ignored.

The qualities which go to make up a good partnership and a good family -- for example, love, mutual respect, commitment, equality, -- are in no sense dependent on the sex of the members. The desire to be a parent, and the qualities that make a good parent, are also unrelated to the sexual orientation or gender identity of the individual.

These partners, these children, these parents, these families, deserve the protection and support of society just as much as any others. This protection and support can come only with proper and full legal recognition. We urge therefore that the articles of the Charter dealing with these issues be drafted in a manner that is inclusive rather than exclusive, acknowledging that a variety of forms of family exists in today's society.

We have emphasised the need for the new Charter both to signal the unacceptability of discrimination based on sexual orientation or gender identity, and to foster a vision of family life which is humane, inclusive, and grounded in reality. We have highlighted the progress made in recent years, but also shown how far there is still to go. Europe will be a better, freer, and more accepting place for all its citizens when those who are lesbian, gay, bisexual and transgendered can be themselves, openly and without fear. We believe that if our suggestions are taken up in the Charter, that Europe will be one step closer to becoming a reality.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Submission of ILGA-Europe[1],
the European Region of the International Lesbian and Gay Association,
to the Charter Convention[2]

1. Summary

ILGA-Europe's main recommendations are as follows:

The non-discrimination article of the Charter should include every ground of discrimination listed in Article 13 of the EC Treaty and Article 14 of the European Convention on Human Rights. The list in Article 13 EC, adopted in 1997, includes three important new grounds, disability, age and sexual orientation, which do not appear in the list in Article 14 of the Convention, adopted in 1950. However, ILGA Europe would wish to see the combined EC Treaty/Convention list supplemented in the European Union Charter by one additional ground, gender identity. We believe that this would serve to emphasise the need for protection from discrimination of a small, but very vulnerable group, transgendered people.

Article 13, **Family Life** of the draft Charter should be worded to recognise the **diversity of family life** in today's Europe.

2. NON--DISCRIMINATION

2.1 The inclusion of sexual orientation in the list of prohibited grounds of discrimination

The two main arguments for the inclusion of sexual orientation in the non-discrimination clause of the European Union Charter rest on the serious and wide-spread nature of the discrimination, and on the numerous precedents which now exist in European and national law for the inclusion of such a reference.

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1 ILGA-Europe is a non-governmental organisation that seeks to defend the human rights of lesbian, gay, bisexual and transgendered persons at European level. Its membership consists of over 150 non-governmental organisations, whose members are mainly lesbian, gay, bisexual and transgendered individuals, in over 30 European countries. It is a member of the Platform of European Social NGOs and enjoys consultative status with the Council of Europe.

2 Drafted for the Board of ILGA-Europe by Nigel Warner, with the assistance of Dr. Robert Wintemute, School of Law, King's College, University of London, United Kingdom, and Dr. Kees Waaldijk, Faculty of Law, University of Leiden, Netherlands.

2.1.1 The seriousness of sexual orientation discrimination

ILGA Europe has recently published a comprehensive survey of discrimination against lesbian, gay and bisexual persons in Europe[3]. This reveals a most disturbing picture of the extent and seriousness of sexual orientation discrimination in Europe, whether among Member States of the European Union, the accession countries, or other European countries. For example:

* Discrimination on the basis of sexual orientation can be found in the laws or regulations of 7 Member States[4], and 8 accession countries.[5] The most common such provision, a discriminatory age of consent (4 Member States and 6 accession countries), has been ruled a violation of the European Convention on Human Rights by the European Commission on Human Rights.[6]
* 4 Member States and 2 accession countries[7] have legal provisions or regulations that deny employment on the basis of sexual orientation in certain fields of state employment. The most common such provision, in the case of the armed forces (applying in 3 Member States and 2 accession countries), has been ruled a violation of the Convention by the European Court of Human Rights.[8]
- Studies in Sweden and the UK show that employment discrimination by individual employers is extensive. For example, a 1997 report by the Swedish Ministry of Labour included a survey of 650 lesbian, gay and bisexual persons. 12% said they had been turned down for a job as a result of sexual orientation, 8% had been denied promotion, and 8% had been forced to leave their job.[9]
- Homophobic violence is very common, as surveys in Ireland, Sweden and the United Kingdom have revealed.[10] Typically, around a quarter of respondents in these surveys had been the victim of a violent attack. It is clear that in many European countries it can be very dangerous to identify oneself in public places as gay.

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3 "*Discrimination Against Lesbian, Gay And Bisexual Persons In Europe*" - A report by ILGA-Europe to the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe as a contribution to the preparation of its Report and Recommendations on the Situation of Lesbians and Gays in the of the Council of Europe (Motion for a Resolution - Doc. 8319) 16th February 2000 – available at: http://www.steff.suite.dk/ilgaeur.htm#Information

4 Austria, Germany, Greece, Ireland, Luxembourg, Portugal, UK

5 Bulgaria, Cyprus, Estonia, Hungary, Lithuania, Poland, Romania, Turkey

6 European Commission of Human Rights report on Application No.25186/94, *Euan Sutherland against United Kingdom* (1 July 1997)

7 Germany, Greece, Luxembourg, Poland, Portugal, Turkey. In the case of Germany, a report in the *Tageszeitung* on 8th April 2000 suggests that the Ministry of Defence, faced with losing a case before the Federal Constitutional Court, is in the process of lifting the restrictions on homosexuals serving in the armed forces.

8 Lustig-Prean & Beckett v. United Kingdom (Applications nos. 31417/96 and 32377/96) (27 Sept. 1999)

9 Arbetsmarknadsdepartementet. Stockholm (1997): Förbud mot diskriminering i arbetslivet på grund av sexuell läggning. Betänkande av utredningen mot diskriminering i arbetslivet på grund av sexuell läggning (SEDA). Statens offentliga utredningar 1997:175

10 Gay and Lesbian Equality Network and NEXUS Research Co-operative (1995) - Poverty, Lesbians and Gay Men: The Economic and Social Effects of Discrimination" Dublin: Combat Poverty Agency; Tiby, E and Lander, I (1996) – "Hat, hot, våld - utsatta homosexuella kvinnor och män. En pilotstudie i Stockholm. Stockholm: Folkhälsoinstitutet; Mason, A. and Palmer, A. (1996) - "Queer Bashing -- a national survey of hate crimes against lesbians and gay men". London: Stonewall;

* Only 4 Member States and one accession country[11] accord a significant degree of legal recognition to same-sex partnerships (none of which is without discriminatory elements).

Inclusion of sexual orientation in the non-discrimination clause of the European Union Charter is made all the more necessary by:

the failure of so many governments to recognise that sexual orientation discrimination is as pernicious and as damaging as other forms of prohibited discrimination, and to take steps to eliminate it both from their own laws and regulations, and to counter it in society generally;
The fact that many people, both in public life, and as private citizens, still consider the expression of homophobic attitudes to be legitimate and respectable.

2.1.2 Precedents in European and National Law[12]

The European Community has express competence to combat sexual orientation discrimination under Article 13 of the EC Treaty, inserted by the Treaty of Amsterdam in 1997. This is a most important precedent, in the light of which the exclusion of sexual orientation discrimination from the non-discrimination clause of the Charter would be highly anomalous. Indeed, omission from the Charter would represent a signal that the Union had weakened its view as to the unacceptability of sexual orientation discrimination.

Although the European Convention on Human Rights does not make explicit mention of sexual orientation, a recent judgment of the European Court of Human Rights recognises that sexual orientation discrimination is a prohibited ground of discrimination under Article 14 of the Convention.[13] Moreover, the Parliamentary Assembly of the Council of Europe voted in January 2000 to support a recommendation that sexual orientation be included in the list of prohibited grounds in the new draft Protocol No 12 to the Convention, which is currently under consideration by the Committee of Ministers. It took the view that explicit reference should be made to grounds of discrimination that were "especially odious", and that sexual orientation discrimination was amongst these.[14]

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11 Denmark, France, Hungary, Netherlands, Sweden

12 For a comprehensive survey of the national and international precedents, see Submission of ILGA-Europe to the Steering Committee for Human Rights (CDDH), Council of Europe (28 February 2000) on enshrining the principle of equality between men and women in the new Draft Protocol No. 12, and on the inclusion of sexual orientation discrimination in the list of prohibited grounds of discrimination. The submission can be accessed at: http://www.steff.suite.dk/Protocol_12_Submission1.doc

13 Salgueiro Da Silva Mouta C. Portugal - (Application no 33290/96) (21 Dec. 1999)

14 Opinion No. 216 (2000) – Assembly debate on 26 January 2000

Since the 1970s, national anti-discrimination legislation and bills of rights in national constitutions, within and outside Europe, have increasingly recognised sexual orientation discrimination. Within the Member States of the European Union, the term ”sexual orientation” (or a similar ground intended to cover sexual orientation) appears as a prohibited ground of discrimination in the legislation of 8 states: Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Spain and Sweden. It also appears in the legislation of one accession country, Slovenia, in that of two other European countries, Iceland and Norway, and in that of seven countries outside Europe, Canada[15], Australia[16], the United States[17], Israel, Namibia, New Zealand and South Africa. Moreover, in four countries, South Africa (1993), Ecuador (1998), Fiji (1998) and Switzerland (1999), sexual orientation (or a similar ground intended to cover sexual orientation) is included in the non-discrimination provision of the national constitution.

2.2 Gender Identity[18]

2.2.1 ILGA-Europe submits that the non-discrimination article of the EU Charter should also include the ground “gender identity” so as to make it clear that people who are transsexual or transgender[19] are protected and in recognition of the particular vulnerability of this group.

2.2.2 The seriousness of discrimination

Transsexual and transgender people are one of the most vulnerable minorities in Europe. Their relatively small numbers make it extremely difficult for them to obtain any protection against discrimination through new legislation. They face violence, harassment and the denial of jobs or services because their gender identity or expression does not correspond with their recorded birth sex.[20] The discrimination they face can be quite as severe as that faced by other groups who traditionally are accorded specific protection by national and international anti-discrimination legislation.

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15 In legislation at the federal level, in 9 of 10 provinces, and in 1 of 3 territories; in addition the Supreme Court of Canada has ordered that it be ”read into” the legislation of the 3 remaining jurisdictions.

16 In the legislation of 5 of 6 states and in both territories

17 In the legislation of 11 of 50 states, the District of Columbia, and most major cities

18 For a more detailed statement of the arguments, see “*Proposed Additional Protocol Broadening Article 14 Of The European Convention: The Need For Express Inclusion Of "Gender Identity*" (A submission by ILGA-Europe to the Steering Committee on Human Rights, Council of Europe – accessible at: http://www.steff.suite.dk/art14trans.htm

19 The term transgender is used as an umbrella term that includes both pre- and post-surgical reassignment transsexual people. It also includes transsexual people who choose not or who, for some other reason, are unable to undergo genital reconstruction. It further includes all persons whose perceived gender or anatomic sex may conflict with their gender expression, such as masculine-appearing women and feminine-appearing men.

20 See Melanie McMullan & Stephen Whittle, Transvestism, Transsexualism and the Law, 2d ed. (London: The Beaumont Trust, The Gender Trust, 1995).

When a transsexual person undergoes gender reassignment, some countries refuse to acknowledge the change of their social gender and/or the change of their body morphology[21]. In these states transsexual people are forced to endure the almost daily humiliation of revealing their birth sex in many practical areas of life, so making them vulnerable to discrimination and prejudice regardless of the success of their gender role transition. The European Court of Human Rights condemned this practice, where forced disclosure of birth sex is sufficiently frequent, by finding a violation of Article 8 in *B.* v. *France* (1992). In that case, the applicant could not legally change her male forename, and could not prevent the disclosure of her birth sex (male) in documents such as her national identity card and her passport, and in her social security number.[22]

Additionally this failure to recognise their new gender role means that for many they are effectively unable, in law, to found families and to take on the full social responsibilities embedded within the family.

2.2.3 Increasing recognition at the European and national level

There is throughout Europe ever wider recognition of transsexuality both by legislation and judicial decision and sex change surgery is allowed in every member state of the European Community.

In 1989 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1117 on discrimination against transsexuals and a Resolution on the condition of transsexuals, which in cases of transsexualism called on Member States to introduce legislation whereby

> "all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention of Human Rights."[23]

Moreover, despite the extreme difficulties that transsexual people experience in attempting to invoke the legislative process, there have been in the 1990s a growing number of precedents within countries for express protection. The anti-discrimination legislation of a number of cities in the USA includes "gender identity" as a prohibited ground[24]. In the US state of Minnesota, anti-discrimination legislation defines "sexual orientation" as including "having ... a self-image or identity not traditionally associated with one's biological maleness or femaleness"[25] and in California gender and gender expression are protected categories under the state's Hate Crime's legislation[26].

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21 See Amicus Brief by Liberty in the Sheffield and Horsham case - http://www.pfc.org.uk/legal/lib-amic.htm

22 B v France [1992], Ser. A, No. 232-C, paras. 25-26, 59-63. The Court noted, at para. 12, that the applicant was "unable to find employment because of the hostile reactions she aroused".

23 Recommendation 1117, 1989, Parliamentary Assembly of the Council of Europe

24 These cities include Minneapolis, San Francisco, Evanston (Illinois), Louisville (Kentucky) and Houston

25 See Minn. Stat. Ann. s. 363.01(45).

26 Calif. Stat. AB 1999, signed on the 28th September 1998.

Discrimination against transsexual persons is also expressly prohibited in South Australia[27] and in the Northern Territory of Australia[28] where the ground sexuality is defined to include 'transsexuality', and in the Australian Capital Territory, where "transsexuality" is a separate prohibited ground[29]. In New South Wales in Australia[30] discrimination is prohibited 'on transgender grounds' and the legislation refers to people as 'being transgender'.

2.3 A Non-Exhaustive List of Grounds

The Charter's non-discrimination article will establish a general non-discrimination principle for the EU. Such a general principle can only be established if the list of grounds in the article is open-ended or non-exhaustive, as is the case in Article 14 of the European Convention ("on any ground such as ... or other status"), Article 2 of the Universal Declaration of Human Rights ("without distinction of any kind, such as ... or other status"), or Article 26 of the International Covenant on Civil and Political Rights ("on any ground such as ... or other status").

The current draft of the Charter's non-discrimination article – Draft Article 19(1) (CHARTE 4137/00 – CONVENT 8) is not open-ended. It should therefore be reworded as follows:
"1. Any discrimination based on any ground such as ... or other status shall be prohibited."

3 PRIVATE AND FAMILY LIFE

The European Convention on Human Rights includes respect for private and family life in one article, with the following wording: "the right to respect for private and family life".

The most recent draft of the text covering private and family life available at the time of writing (CHARTE 4149/00 CONVENT 13) separates the right to respect for family life from that for private life by placing it in Article 13, Family Life, and refers to "privacy" rather than "private life". We believe that it would be preferable for the Charter to follow the approach used in the Convention:

a. "Private life" is a concept that has been interpreted by the European Court and Commission of Human Rights in a large number of published decisions. "Privacy", found in Article 26 of the International Covenant on Civil and Political Rights, may or may not have the same breadth as "private life", and has been interpreted in relatively few cases by the United Nations Human Rights Committee.

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27 Equal Opportunity Act, 1984.
28 Anti-Discrimination Act (REPA007), 1996.
29 Discrimination Act No.81 of 1991.
30 Anti-Discrimination Act No 48 of 1977, as amended by the Transgender (Anti-Discrimination and Other Acts Amendment) Act No. 22 of 1996, Schedule 1.

b. "Private life" should also appear in the same article as "family life", to emphasise, as the European Court of Human Rights has done in its case law, that family life can exist between cohabiting partners in the absence of a marriage. In both Article 2 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights, the reference to "privacy" is followed immediately by a reference to "family". This is logical in that "family life" is one of the most important aspects of a person's "private life".

4 RIGHT TO MARRY AND TO FOUND A FAMILY

The most recent draft of the article on Family Life (CHARTE 4149/00 CONV 13) reads as follows:

"Article 13. Family life
1. Everyone has the right to respect for his family life.
2. Everyone has the right to marry and to found a family, according to the laws of the Member States governing the exercise of this right.
3. Protection of the family on a legal, economic and social level shall be ensured."

As noted above, we believe that the "right to respect for family life" should be moved to Article 12, Respect for Private Life.

In addition, we suggest that Draft Article 13(3) should be amended as follows:

"3. Protection of families on a legal, economic and social level, and recognition of their diversity, shall be ensured."

It is abundantly clear at the dawn of the 21st century that we can no longer speak of "the family", as if every family in the EU consisted of a married heterosexual couple and their children living together. We would not speak of "the religion", because there are different religions in the EU. Similarly, there is now a variety of forms of "families" in the EU, and the EU Charter must provide for the recognition of this social reality.

5 LEGAL STATUS OF CHARTER

ILGA-Europe considers that the Charter must be incorporated in the European Union Treaties, so as to avoid amounting to no more than an ineffectual declaration.

6 THIRD COUNTRY NATIONALS

ILGA-Europe supports the complete and express recognition of the fundamental rights of third country nationals within the territory of the European Union.

15th April 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 19 April 2000

CHARTE 4247/00

CONTRIB 120

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Women's Lobby with a view to the hearing on the 27 April 2000. [1]

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[1] This text has been submitted in French and English languages.

LOBBY EUROPEEN DES FEMMES
EUROPEAN WOMEN'S LOBBY

10/04/00

EWL opinion on a gender perspective in the drafting of a European Union Charter on Fundamental Rights

Having followed closely the work of the Convention in charge of the drafting of a EU Charter on Fundamental Rights, the European Women Lobby formulates the following demands in relation to the introduction of a gender perspective in the Charter[1]:

1. Concerning the content of the Charter:

- The EWL stresses that **human rights are indivisible** and that the full set of rights, civil, political, social and economic and political should be incorporated in the Charter.

- The EWL urges the Convention to adopt a **gender perspective** while elaborating the whole Charter. The principle of gender **mainstreaming** i.e. the integration of women's interests and perspective needs to be respected by the Convention throughout its work on the EU Charter on Fundamental Rights.

- The **List of rights** should include:

  - **The prohibition of gender-based discrimination**

A provision solely dedicated to the fight against discrimination on the ground of sex is crucially needed. It should clearly state the unconditional and fundamental principle of equality between women and men. The provision must not only ensure equal treatment and rights before the law, or prohibit discrimination on the ground of sex, but also commit the EU to the goal of de facto gender equality, thus taking the shape of positive obligation.

  - **Parity democracy**

The principle of parity democracy, meaning the equal representation of women and men in all bodies, should be established as a fundamental principle for both the European integration and the institutions of the Union.

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Tel. +32 2 217 90 20 – Fax: +32 2 219 84 51 - e-mail: ewl@womenlobby.org
Website: http: //www.womenlobby.org

1 A more complete opinion in relation to the Charter is being prepared by the EWL.

- **Integrating a gender dimension in asylum policy**

The Charter should contain a provision recognising the special needs of women asylum seekers and refugees. Specific gender-related violence or persecution should be considered a violation of women's human rights, on the basis of which asylum can be granted.

These persecutions include among others, genital mutilation, forced marriage, rape and other forms of sexual violence, restrictions or discriminatory treatment, whether they are enforced by legal norms or imposed by social or religious norms, and which threaten or harm women's physical or psychological integrity.

2. Concerning the form of the Charter and the composition of the Convention

- Form of the Charter

The EU Charter should have a fully binding legal status and a mandatory character upon the institutions and the Member States.

It should also be given direct effect, allowing any European Citizen to bring an action to court on the basis of a violation of a provision contained in the Charter.

- **Composition of the Convention in charge of drafting the Charter**

The EWL deplores that only 9 of the 62 members working on the elaboration of the Charter are women. Of 8 women representing national institutions, 4 are alternate members, and as such, do not have the right to speak and vote when the full member is present. The EWL fears that women's interest may be overlooked in the elaboration process and demands that this situation be corrected as soon as possible.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 19 avril 2000

CHARTE 4248/00

CONTRIB 121

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de Eurocities, soumise par M. Delebecque, vice-Président de la Communauté Urbaine de Lille, en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française uniquement.

AF/PB/137.2000

Mesdames et Messieurs,

An nom d' EUROCITES je tiens à vous remercier vivement d'avoir bien voulu accepter de nous recevoir pour vous exposer **les grandes lignes** de nos préoccupations en tant qu'Elus, maires de grandes villes et leaders de métropoles européennes.

Créé il y a plus de 10 ans, Eurocités réunit actuellement **97 grandes villes** et métropoles de l'Union Européenne auxquelles sont associées des villes appartenant à des Pays d'Europe de l'Est et d'Europe centrale qui devraient intégrer l'Union Européenne au cours des années à venir.

En tant que Maires et Elus, nous avons donc en charge « le destin » de près de 100 millions de citoyens qui sont pour l'essentiel des **citadins**, qui travaillent et vivent dans un **milieu urbain** au sens large du terme. Nos responsabilités nous obligent à être extrêmement attentifs à leurs besoins et à leurs attentes.

Les collectivités locales sont les premiers donneurs d'ordre en terme d'investissements et nous avons en tant qu'Elus une double responsabilité à l'égard de nos citoyens : **une responsabilité financière**, en réalisant les équipements, les services publics et les infrastructures les mieux adaptés aux objectifs de progrès et de développement, tout en étant respectueux de l'argent publics.

Une responsabilité politique et morale, en faisant en sorte que les citoyens soient les acteurs à part entière de la vie de la cité et qu'ils puissent pleinement prendre part à tous les domaines de la vie quotidienne : économique, sociale, éducative, culturelle, etc...

Or, depuis 10 ans, nous sommes bien placés pour observer et constater des tendances qui s'expriment avec acuité dans les grandes villes : la pauvreté, les détresses morales, l'isolement, la difficulté d'affronter les administrations, l'insécurité, le tout sur fond de chômage...

Certes, les grandes villes sont à bien des égards des « moteurs de développement » et c'est ce qui incite des catégories de personnes à venir y habiter, y trouver refuge espérant obtenir sinon les attributs d'une citoyenneté reconnue, du moins un peu de quiétude et de secours élémentaires.

Mais les grandes villes sont aussi et malheureusement des lieux où se concentrent et s'accumulent les difficultés. Les maires ne peuvent pas à eux seuls faire face à cette accumulation de problèmes, et résoudre les situations personnels qu'ils rencontrent quotidiennement. En tous les cas, nous ne voulons plus nous satisfaire de cette situation ! ...

C'est la raison pour laquelle les Maires d'Eurocités saluent chaleureusement l'initiative de l'Union Européenne, de doter l'Europe d'une Charte des Droits Fondamentaux qui de surcroît, aura « **force de Loi** » en s'imposant aux Etats-membres. Le Parlement Européen qui a massivement approuvé son caractère **juridiquement contraignant** par le biais de son incorporation au Traité d'Amsterdam, est un élément fondamental pour EUROCITES.

Car en effet, il faut savoir que les maires de grandes villes ont tout autant que les simples citoyens, beaucoup de difficultés à démêler les fils inextricables d'administrations qui, à tous les niveaux, rendent les procédures toujours plus complexes à l'égard des citoyens.

De ce fait ils leur est souvent impossible d'apporter des solutions à leurs problèmes. ILs seraient simples à régler s'ils ne se heurtaient pas à une multiplicité d'acteurs dont les points de vue et règlements sont souvent en opposition... Et voilà pourquoi chaque Etat s'avère le plus souvent incapable d'améliorer par lui même la condition de certaines catégories de citoyens.

Or, grâce à ce que l'on peut déjà considérer comme une **loi « supra nationale »** la Charte Européenne permettra par le simple fait d'y faire référence, d'apporter **la** solution au problème pratique rencontré « sur le terrain » et contourner ainsi les procédures administratives locales qui faisaient précisément obstacle à une solution satisfaisante et cohérante...

Pour le reste, et je ne vous étonnerai pas, en vous disant combien EUROCITES est sensible et motivé sur le respect et l'application de certains droits fondamentaux tels que :

⇒ le droit de vote aux **élections municipales** pour les citoyens des villes et communes qui n'ont pas la nationalité d'un état-membre de l'Union Européenne mais qui travaillent et vivent au sein d'une collectivité où ils sont régulièrement et durablement installés.

⇒ les droits **sociaux** et **économiques** sont également au cœur de nos préoccupations pour les raisons que j'évoquais précédemment et je veux citer pour exemple :

- le droit à une éducation et une formation répondant au voeu de chacun,
- le droit d'accéder et de participer à la vie culturelle de la cité,
- le droit de bénéficier d'une information claire et complète sur les droits et les devoirs des citoyens
- le droit de bénéficier d'un environnement écologique et urbain adapté et équilibré,
- le droit à la dignité et à la santé, à l'assistance en faveur des plus défavorisés,
- le droit de vivre dans un logement sain et adapté aux familles,
- la prise en compte des enfants et des jeunes en les dotant de droits protecteurs, en leur forgeant un sentiment d'identité européenne, en faisant d'eux les acteurs de développement de demain. Etc...

Je sais qu'actuellement la Convention travaille sur ces différents points et, vous savez pouvoir compter sur nous, si vous souhaitiez obtenir **un avis** sur les problématiques urbaines dans leur ensemble.

EUROCITES a adressé à ses membres, **un questionnaire** qui permettra, au vu des observations formulées, d'élaborer **un texte solennel d'Eurocités** sur la question des droits des citoyens qui vivent au cœur de nos villes.

Ce texte vous sera adressé au début du mois de novembre, afin qu'il soit en quelque sorte la **contribution à la Charte** dont vous aurez défini les termes.

Soyez assurés de notre soutien en faveur de votre démarche. Celle-ci doit marquer un **tournant décisif** dans la prise de conscience des Européens quant à leur sentiment d'**appartenance** à l'Europe et la certitude que jamais dans l'Histoire, la dignité humaine et le respect des droit des citoyens n'auront été affirmés et **effectivement appliqués** avec autant de lucidité et de conviction.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 19. April 2000

CHARTE 4249/00

CONTRIB 122

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag von der Evangelischen Akademie Thüringen zu Forderungen der Frauentagung.[1] [2]

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[1] Evangelische Akademie Thüringen, Zinzendorfhaus, D-99192 Neudietendorf. Tel: +33-036202-9840. E-mail: evakthue@t-online.de

[2] Dieser Text wurde nur in deutscher Sprache vorgelegt.

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Forderungen der Frauentagung der Evangelischen Akademie Thüringen

„Frauenstimmen im Vaterland - Frauen und nationale Identität“:

Am Wochenende vom 31.03.-02.04.2000 fand im thüringischen Neudietendorf eine internationale Frauentagung statt. Die Teilnehmerinnen aus Polen, Litauen, Tschechien, Bosnien, Russland, der Türkei, aus Deutschland, Migrantinnen und Asylbewerberinnen beschäftigten sich auch mit der zur Zeit entstehenden Europäischen Charta der Menschenrechte. Als Ergebnis der Tagung stellen die Frauen folgenden Forderungskatalog auf:

- Änderungsvorschlag zu Artikel 1 des Charta-Entwurfs: **Gleichheit von Männern und Frauen**

  Die Gleichheit von *Frauen und Männern* in den Bereichen Arbeit und Beschäftigung und sozialer Schutz ist zu gewährleisten.

  „Die Gleichbehandlung von *Frauen und Männern* ist zu gewährleisten. Die Chancengleichheit für Frauen und Männer ist *zu garantieren*. Zu diesem Zweck sind *alle notwendigen Maßnahmen durchzuführen*, mit denen die Verwirklichung der Gleichheit von Frauen und Männern vor allem im Hinblick auf den Zugang zu Beschäftigung, Arbeitsentgelt, Arbeitsbedingungen, sozialen Schutz, allgemeine und berufliche Bildung sowie beruflichen Aufstieg sichergestellt wird. *Es sind Instrumente einzuführen, welche die Umsetzung dieser Maßnahmen auf nationaler und internationaler Ebene kontrollieren. Hierzu müssen geschlechtsspezifische Erhebungen und Statistiken erstellt und weitergeführt werden*.“

- Änderungsvorschlag zu Artikel 19 des Charta-Entwurfs: **Asyl**

  (Dieser Vorschlag bezieht sich auf den Änderungsvorschlag, der durch Prof. Dr. Jürgen Meyer im Konvent eingebracht wurde.)

  1. *Jeder und jede, der oder die* politisch verfolgt wird oder unmenschlicher oder erniedrigender Bestrafung oder Behandlung ausgesetzt ist, genießt Asylrecht. Frauenspezifische Asylgründe*, vor allem Vergewaltigung oder Handlungen die das sexuelle Selbstbestimmungsrecht (z.B. durch Menschenhandel) verletzen*, sind zu berücksichtigen.

2. Niemand darf in einem Staat abgeschoben werden, wenn stichhaltige Gründe für die Annahme bestehen, dass nach der Abschiebung die in Abs. 1 beschriebenen Maßnahmen drohen.

3. Kollektivausweisungen von *Ausländerinnen und Ausländern* sind nicht zulässig.

Begründung:

Die in Abs.1 Satz 2 enthaltene Aufnahme von frauenspezifischen Asylgründen lehnt sich an der international zunehmenden Erkenntnis an, dass Frauen als *Hälfte der Menschheit* oftmals besonderen Verfolgungen ausgesetzt sind.

- Aufnahme **reproduktiver und sexueller Rechte** in die Charta

(Dieser Vorschlag bezieht sich auf die IPPF-Charta über sexuelle und reproduktive Rechte)

Reproduktive und sexuelle Rechte, das heisst die Rechte auf sexuelle Orientierung, auf Entscheidungsfreiheit über Heirat, Gründung und Planung einer Familie und Lebensgemeinschaft sollen allen Personen gegen eine erzwungene Eheschließung schützen, sowie ihnen die Entscheidungsfreiheit über Kinderzahl und das Lebensalter der Frauen, in dem die Kinder geboren werden, garantieren.

Das Recht auf Gesundheitsversorgung und den Schutz der Gesundheit soll das Recht aller Personen auf den bestmöglichen Grad medizinischer Versorgung schützen und ebenso das Recht auf Schutz vor traditionellen Praktiken, die die Gesundheit gefährden.

Das Recht auf Freiheit von Folter und Mißhandlungen soll Kinder, Frauen und Männer vor allen Formen sexueller Gewalt, Ausbeutung und Mißbrauch schützen.

- Aufnahme einer **Geschlechterquote bei Entscheidungsprozessen** in die Charta

Es soll sichergestellt werden, dass in den Gremien der EU Frauen nicht weniger als 40 Prozent ausmachen.

Kommentar:

Dieser demokratische Grundsatz wird in den Programmen der UNO bereits verwirklicht.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 20 April 2000

CHARTE 4250/00

CONTRIB 123

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the European Blind Union with a view to the hearing on the 27 April 2000. [1]

[1] This text has been submitted in English language only.

M. Jean Paul Jacque
Convention Secretariat
Council Legal Service
Council of the European Union
Justus Lipsius Building
Rue de la Loi 175
B-1048 Brussels
Belgium

19 April 2000

By email to fundamental.rights@consilium.eu.int, copied to Margit.Huy@consilium.eu.int

Dear M. Jacque

Re: European Blind Union participation in the hearing at the Convention meeting of 27 April 2000.

Further to your letter to our President John Wall CBE of 7 April with details of the hearing on 27 April 2000, please find below a short submission on behalf of the European Blind Union. This begins on the following page. We would be very grateful if this could be circulated to members of the Convention ahead of the hearing.

Many thanks in advance for your cooperation.

Yours sincerely

Julian Smith
On behalf of John Wall CBE, President of the European Blind Union

Submission of the European Blind Union:

About blind and partially sighted people in the EU

Across the fifteen EU member countries the number of blind and partially sighted people is 7.4 million. As the age profile of the visually impaired population is biased towards older people, the increase in the number of older people across Europe will lead to an increase in the number of people with a visual impairment. It is clear therefore that the rights and needs of visually impaired people will remain an important subject for the European Union and will need to be borne in mind by the Convention.

A summary of the European Blind Union's views on the Draft Charter

The Convention's work on drafting a Charter of Fundamental Rights offers an historic opportunity for the rights of visually impaired people to be publicly recognised by the EU as a whole. Such recognition would help enormously the many visually impaired people in the EU who are working for proper social and related rights to be included in individual items of legislation as they affect our everyday lives. Having a positive Charter to refer to would strengthen our arguments in favour of our rights being met in each relevant law and standard as they are negotiated, in a huge variety of subject areas – for example, on accessible design of future transport vehicles and systems, on access to information from the public and private sector, and on employment rights for visually impaired people. These are just three examples of the huge number of policy subjects which could be assisted by a strong Charter of Fundamental Rights.

The primary concern for visually impaired people is the right to have access to information in a format we can use. Without access to the same information the rest of society receives, visually impaired people are effectively discriminated against and excluded from parts of life which others take for granted.

The following four specific points are suggested for inclusion in the Charter:

1. All disabled people in the European Union have the right to lead their lives free from discrimination based on their disability and to enjoy equal civil rights with the rest of society. The EU governments and institutions agreeing this Charter recognise the need for actions to be taken to make these rights a reality, beginning as a priority with the right of people to have access to information in a format they can use and the right to be able to work.

2. The EU governments and institutions agree to meet the rights and needs of disabled people in the EU when drawing up measures relating to the Internal Market for goods, services, capital and labour.

3. The EU governments and institutions agree to assess the ways in which all proposed EU and national legislation and programmes can take account of the needs and rights of disabled people.

4. The EU governments and institutions agree to consult widely with disabled people themselves, through their representative organisations at EU and national level, when assessing proposed legislation and programmes, particularly when these are specifically targeted at meeting the needs and rights of disabled people. Such consultation should include disability-specific organisations where appropriate, for example consulting the European Blind Union where visually impaired people are directly affected by a particular proposed measure.

John Wall CBE
President of the European Blind Union
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United Kingdom

Telephone number + 44 171 391 2205, or + 44 171 391 2202
Email cbird@rnib.org.uk or jksmith@rnib.org.uk
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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 26 avril 2000

CHARTE 4251/00

CONTRIB 124

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de l'Office catholique d'information et d'initiative pour l'Europe (OCIPE) en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française uniquement.

Charte des droits fondamentaux

Consultation des ONG 27 avril 2000

Proposition de l'OCIPE
Office catholique d'information et d'initiative pour l'Europe
3 rue de Trévires, 1040 Bruxelles
Tél 737 97 22 e-mail : pierredecha@compuserve.com
Pierre de Charentenay

L'OCIPE propose de commencer la Charte par un préambule qui pourrait contenir des éléments comme suit (en l'absence de préambule, ces éléments devraient être présents dans la Charte):

Préambule

Les peuples de l'Union Européenne se dotent d'une Charte des droits fondamentaux pour manifester à tous, citoyens d'Europe et citoyens du monde, les valeurs qui sont les leurs et qu'ils veulent promouvoir autant dans leurs frontières qu'à l'extérieur. Fondés sur la dignité humaine, ces droits trouvent leur sens dans la possibilité pour chaque citoyen de constituer des communautés de vie et de travail. Ne pouvant être réalisés que par l'action déterminée de chacun, ces droits forment un ensemble de tâches à accomplir dont la première est l'exigence de solidarité et de fraternité. Dans le respect des différences, tous les citoyens de l'Union européenne sont acteurs et bénéficiaires de ces droits pour former ensemble une communauté politique.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 26 avril 2000

CHARTE 4252/00

CONTRIB 125

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de "World Conference on Religion & Peace" (WCRP) en vue de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française seulement.

W C R P Europe
World Conference on Religion & Peace

BELGIAN CHAPTER (local adress)
Avenue Boileau, 12
1040 Bruxelles
Tél. : 0032-2-772.27.37
Fax : 0032-2-771.44.39
Email : excoser.j.agie@skynet.be

Bruxelles, le 25 avril 2000

PROJET POUR l'AUDITION

Monsieur le Président,

La "World Conference on Religion and Peace " (W.C.R.P.), O.N.G. reconnue par les Nations Unies regroupe des représentants des grandes religions du monde en vue de promouvoir la paix et de soutenir tous les efforts susceptibles d'y conduire, une paix durable au bénéfice de tous les être humains.

Dans cette perspective, la W.C.R.P. soutient le '' Projet de Charte des Droits fondamentaux de l'Union européenne '' dans la mesure où d'une part il ne met pas en cause les droits de l'homme déjà reconnus en Europe, et d'autre part se centre sur des droits liées directement à une citoyenneté européenne.

A. La question des droits de l'homme.

LA W.C.R.P. considère que les droits de l'homme sont par excellence une préoccupation appartenant à l'ensemble de l'humanité représentés par les Etats membres des Nations Unies. Il en est tout particulièrement ainsi depuis que la Déclaration et le programme d'action de la Conférence mondiale sur les droits de l'homme de Vienne en juin 1993, a été adopté par consensus par les représentants des 171 Etats. Ce document associe clairement les droits de l'homme et le principe de démocratie. Il présente un programme de développement et de lutte contre la pauvreté et les inégalités comme moyen d'aboutir à une paix durable.

Les droits de l'homme appartenant à toute l'humanité, la W.C.R.P. attire l'attention de l'Union européenne sur la nécessité de maintenir sa claire adhésion à la Convention européenne des droits de l'homme et au principe d'une Cour européenne des Droits de l'homme.

La W.C.R.P. s'associe donc aux craintes exprimées par le Conseil de l'Europe ainsi qu'aux vues exprimées par le Rapport Simitis exprimant l'avis d'un groupe d'experts réunis par la Commission européenne.

La W.C. R. P. estime qu'une Charte européenne ne peut remettre en cause des engagements qui sont pris dans une perspective mondiale.

B. Une Charte des droits des citoyens.

La W. C. R. P. voit dans le projet d'une Charte européenne une occasion de combler un vide grandissant dans le processus politique plutôt qu'économique. Au niveau des personnes, cela a conduit à un déficit démocratique incontestable.

Le processus européen qui semble devoir s'étendre à terme à l'ensemble des Etats du continent européen soulève le problème d'un ''espace conceptuel commun de la nationalité''. Celui-ci se doit de renforcer le respect des droits de l'homme en y associant une vision commune des droits liés à la prééminence du principe de territoire, à l'acquisition de celui-ci, à la question d'une défense prioritaire par 1' Europe d'un accès aux réfugiés persécutés en raison de leur religion ou de leurs convictions philosophique et politique. Le droit des travailleurs à la présence de leur famille se doit d'être respecté : le droit électoral de l'ensemble des citoyens européens doit être garanti.

Une Charte ainsi conçue possèderait ainsi son objet propre et viendrait heureusement compléter l'application par 1'Europe des droits de l'homme. Ceci constituerait un pas supplémentaire d'un processus dont l'objectif Premier est de maintenir la paix en Europe et d'aider à la défense de celle-ci dans le monde.

Dr. Joseph AGIE de SELSATEN
WCRP Belgium
Président

Mr. Jehangir SAROSH
WCRP Europe
Moderator

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 2. Mai 2000

CHARTE 4253/00

CONTRIB 126

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte anliegend die Stellungnahme des Europäischen Forums für Freiheit im Bildungswesen (EFFE) anlässlich der Anhörung vom 27. April 2000. [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Herrn
Jean Paul Jacqué
Rue de la Loi 175

B-1048 Bruxelles

25.4.2000

Charta der Grundrechte der Europäischen Union

Sehr geehrter Herr Jacqué,

das Europäische Forum für Freiheit im Bildungswesen unterbreitet für einen Bildungsartikel der Charta der Grundrechte der Europäischen Union (zur Zeit Art. 16 des Entwurfs) folgenden Formulierungsvorschlag:

Artikel 16: Recht auf Bildung

(1) Jeder hat das Recht auf Bildung. Dazu gehört der unentgeltliche Zugang zum allgemeinbildenden Unterricht bei gleichen finanziellen Bedingungen für alle allgemeinbildenden Schulen.

(2) Bildung und Erziehung sind frei. Sie sind auf die volle Entfaltung der Fähigkeiten und Begabungen gerichtet.

(3) Das Recht der Eltern, Erziehung und Bildung ihrer Kinder entsprechend ihren religiösen, weltanschaulichen und pädagogischen Überzeugungen sicherzustellen, wird garantiert.

(4) Jeder hat das Recht zur Errichtung und zum Betrieb von Bildungseinrichtungen unter Beachtung der Menschenrechte und Grundfreiheiten. Die freie Wahl der Schule wird garantiert.

Begründung:

Das Europäische Forum für Freiheit im Bildungswesen ist ein Netzwerk von Bürgern Europas aus 30 Ländern, die davon überzeugt sind, daß die Zukunft Europas entscheidend davon abhängt, wieviel innere und äußere Freiheit Bildung und Erziehung ermöglichen. Darum begrüßt und unterstützt das EFFE die Forderung nach einer Charta der Grundrechte für die Europäische Union,

in der auch das Recht auf Bildung und die Unterrichtsfreiheit ihren Ausdruck finden. Das Recht auf Bildung ist Menschenrecht und kann nur durch staatliche Leistungen verwirklicht werden. Dementsprechend geht es über einen rein abwehrrechtlichen Charakter hinaus.

Der zuletzt veröffentlichte Entwurf des Art. 16 gewährleistet bereits

- die Anerkennung des Rechts auf Bildung,
- die unentgeltliche Teilnahme am Pflichtschulunterricht,
- die Gründungsfreiheit,
- das Elternwahlrecht in Übereinstimmung mit eigenen religiösen und weltanschaulichen Überzeugungen.

Nach Auffassung des EFFE fehlen jedoch zwei unverzichtbare Bestandteile eines den gegenwärtigen Zeitforderungen entsprechenden Bildungsartikels. Ziel der Charta der Grundrechte muß es sein, die Rechte der Bürger Europas zu stärken. Deswegen reicht auf dem Feld der Bildung und Erziehung ein Minimalkonsens auf in allen Mitgliedstaaten bereits verwirklichte Verfassungsgrundsätze nicht aus. Den Orientierungsrahmen bieten vielmehr die Staaten, in denen die Menschen- und Grundrechte bereits vorbildlich verwirklicht worden sind. Nur so kann Europa zu einem Europa der Bürger werden.

1. Elternwahlrecht in Übereinstimmung mit pädagogischen Überzeugungen:

Der Entwurf von Art. 16 gewährleistet bereits die primäre Erziehungsverantwortung der Eltern und ihr Recht, die Grundentscheidung über die Erziehung ihrer Kinder durch die freie Wahl der Schule zu treffen. Darin liegt zugleich die Absage an ein staatliches Schulmonopol und die Förderung von Vielfalt im Bildungsleben. Die Gewährleistung einer lebendigen, das Schulsystem der Mitgliedstaaten immer neu befruchtenden Vielfalt darf sich aber nicht darauf beschränken, religiöse und weltanschauliche Überzeugungen zu respektieren, sondern muß auch für pädagogische Überzeugungen Raum bieten. In der Europäischen Union ist neben dem religiösen auch das pädagogische Elternrecht Bestandteil der Verfassungstradition der Mitgliedstaaten.

2. Das Prinzip der Nichtdiskriminierung hinsichtlich der finanziellen Bedingungen für alle allgemeinbildenden Schulen unabhängig von ihrer Trägerschaft:

Erziehung und Bildung dürfen nicht zum Objekt finanzieller Interessen werden. In einer Zeit der Leistungsgesellschaft haben die Mitgliedstaaten insbesondere die Verpflichtung, dafür zu sorgen, daß Bildung und Erziehung weder von einzelnen Staaten im Sinne eines Schulmonopols für sich beansprucht werden noch dem Wettbewerb eines freien Marktes überlassen werden, sondern vielmehr von Bürgerinnen und Bürgern Europas in eigener gesellschaftlicher Verantwortung als öffentliche Aufgabe gestaltet werden.

Die primäre Erziehungsverantwortung der Eltern erfordert neben dem Recht, die Schule frei zu wählen, die Anerkennung des Rechts zur Gründung und Unterhaltung von Schulen in freier Trägerschaft. Dieses Wahlrecht setzt jedoch voraus, daß Eltern unter gleichen materiellen Bedingungen zwischen staatlichen und nichtstaatlichen Schulen frei wählen können.

Ein Bildungsartikel für die Europäische Charta der Grundrechte steht auch in engem Zusammenhang mit anderen Grundfreiheiten des Gemeinschaftsvertrages. So fällt der Unterricht an privaten Bildungseinrichtungen unter die aktive und passive Dienstleistungsfreiheit und darf nicht behindert werden.

In der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte ist anerkannt, daß Art. 2 des ersten Zusatzprotokolls der Europäischen Menschenrechtskonvention das Recht garantiert, eine Privatschule zu begründen und zu führen. Daraus wird zwar ein Recht auf Finanzierung dieser Schulen nicht unmittelbar hergeleitet; jedoch gewährt die Mehrheit der Mitgliedstaaten nichtstaatlichen Schulen Finanzleistungen. Ferner haben die Niederlande bei Abschluß des Zusatzprotokolls den Standpunkt vertreten, daß sehr wohl eine Finanzierung der nichtstaatlichen Schulen durch Art. 2 des ersten Zusatzprotokolls geboten sei.

Das EFFE erinnert außerdem nachdrücklich an die Entschließung des Europäischen Parlaments zur Freiheit der Erziehung in der Europäischen Gemeinschaft vom 14.3.1984. Ziffer I 9 dieser Entschließung lautet:

"Aus dem Recht der Freiheit der Erziehung folgt wesensnotwendig die Verpflichtung der Mitgliedstaaten, die praktische Wahrnehmung dieses Rechts auch finanziell zu ermöglichen und den Schulen die zur Durchführung ihrer Aufgaben und zur Erfüllung ihrer Pflichten erforderlichen öffentlichen Zuschüsse ohne Diskriminierung der Organisatoren, der Eltern, der Schüler oder des Personals zu den gleichen Bedingungen zu gewähren, wie sie die entsprechenden öffentlichen Unterrichtsanstalten genießen;

dem steht jedoch nicht entgegen, daß von den frei gegründeten Schulen ein gewisser Eigenbetrag als Ausdruck der Eigenverantwortlichkeit und zur Unterstützung ihrer Unabhängigkeit zu fordern ist."

Mit freundlichen Grüßen
für das Europäische Forum
für Freiheit im Bildungswesen

(Krampen)

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 2 mai 2000

CHARTE 4254/00

CONTRIB 127

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après la présentation du "Diakonischen Werks der Evangelischen Kirche in Deutschland" à l'occasion de l'audition du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langues française et allemande.

Présentation orale de la prise de position du „Diakonisches Werk der Evangelischen Kirche Deutschlands" à l'occasion de l'audition de la Société civile tenue par la Convention pour l'élaboration d'une Charte des Droits fondamentaux de l'Union Européenne.

Le „Diakonisches Werk der Evangelischen Kirche Deutschlands" participe au débat de l'élaboration de la Charte des Droits fondamentaux en tant qu'une des six Grandes Organisations allemandes de solidarité et d'assistance sociale. Le „Diakonisches Werk" représente plus de 30.000 sous-organisations avec plus de 800.000 employés salariés ou volontaires. En partenariat avec l'Etat fédéral allemand, le Diakonisches Werk offre des services sociaux de tout genre. Depuis 150 ans, nous sommes un acteur important de la Société civile. Basé sur l'image chrétienne de l'homme nous collaborons avec notre organisation-soeur, la Caritas, pour combattre l'exclusion sociale.

Le „Diakonisches Werk" considère la dignité de la personne humaine telle qu'elle sera définie dans l'article premier du projet de Charte comme le droit de base, dont tous les autres droits fondamentaux doivent être déduits (article 1, document „Convention 13").

Nous estimons que l'un des droits les plus importants à déduire de la dignité de la personne humaine est la liberté de pensée, de conscience et de religion (article 14, document „convention 13"). Ce droit doit inclure le droit à l'excercice commun de la religion ou conviction. Quant à la rédaction de ce droit sous forme d'un paragraphe supplémentaire à la version actuelle de l'article 14 nous nous joignons à la proposition de l'Eglise Protestante Allemande (Evangelische Kirche Deutschlands). Le droit d'exercice commun d'une conviction ou religion peut s'avérer dans la Société civile comme source d'actions inspirées par des valeurs.

En rédigeant nos propositions pour les articles concernant les droits sociaux nous nous sommes basés sur notre richesse d'expérience comme acteur de la Société civile inspiré par des valeurs. En revendiquant des droits fondamentaux sociaux, nous voulons assurer la possibilité de chacun de participer à la vie sociale. Pour nous, cette participation de chacun est partie intégrante de la dignité de la personne humaine.

Par conséquent, nous estimons nécessaire de munir chacun d'un droit à l'accès aux prestations et aux services sociaux. Je souligne: d'un droit à l'accès. En demandant les droits fondamentaux sociaux, nous ne voulons pas obliger l'Etat à des prestations irréalisables. Nous voulons plutôt assurer le droit individuel de chacun de participer aux prestations et aux services sociaux dans la mesure où il en a besoin. Nous considérons ce droit individuel comme base pour le combat efficace contre l'exclusion sociale.

Il s'agit précisément de ce droit de chacun de participer à la vie sociale et aux régimes de sécurité sociale quand nous parlons de Services d'Intérêt Général. („Daseinsvorsorge"). C'est en toute connaissance de cause que nous avons introduit cette notion de Services d'Intérêt Général dans notre proposition de rédaction de l'article XIII du document „Convention 19" Par cette notion nous entendons une sécurité de base au sense large, une sécurité de base dans son meilleur sense. Par cette notion nous n'entendons pas une hyperprotection, mais l'accès garanti aux prestations sociales, apte à mobiliser des forces pour des efforts personnels des personnes aidées.

Nous tenons spécialement aux articles garantissant l'accès à la profession, aux prestations dans le domaine de la santé et à un minimum de sécurité sociale (articles II, XV et XIV du document „Convention 18"). Nous sommes convaincus que la garantie de l'accès à ces prestations de Services d'Intérêt Général dans le cadre des législations des Etats membres exprime le principe de solidarité que déjà maintenant le Traité de l'Union Européenne évoque comme un de ses éléments de base. La Charte des droits fondamentaux doit être à la hauteur de ce principe.

Qui veut vraiement garantir les droits fondamentaux au niveau européen, doit, si nécessaire, assurer pour chacun les conditions matérielles qui lui permettent de jouir des droits de liberté et d'égalité. Uniquement si l'on assure des droits fondamentaux sociaux individuels dans l'Union Européenne, on réalise une condition essentielle pour que le bien-être de chacun soit reconnu au même niveau que les intérèts économiques des acteurs du grand marché intérieur.

Bruxelles, le 27 avril 2000

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 28. April 2000

CHARTE 4255/00

CONTRIB 128

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme der Europäischen Union Christlich-Demokratischer Arbeitsnehmer (EUCDA) zur Einbeziehung sozialer Grundrechte anlässlich der Anhörung am 27. April 2000. [1]

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[1] Dieser Text wurde nur in deutscher Sprache vorgelegt.

Stellungnahme der EUCDA zur Einbeziehung sozialer Grundrechte in die Charta der Menschenrechte mit dem Ziel, sie in den EU-Vertrag aufzunehmen

15.04.00

Die EUCDA sieht in den sozialen Rechten eine notwendige Ergänzung zu den Freiheitsrechten. Grundfreiheiten können nicht wahrgenommen werden, wenn nicht ein Mindestmaß an sozialer Sicherheit gewährleistet ist. Von daher sind soziale Grundrechte vom Verfahren her auf eine Stufe zu stellen mit den Freiheitsrechten. Im Gegensatz zu den "klassischen" Freiheitsrechten, die im Prinzip "Abwehrrechte" gegen den Staat darstellen, fordern wir die Verwirklichung von Freiheit mit Hilfe des Staates ein.

Ein Punkt von zentraler Bedeutung ist dabei die Forderung nach Arbeit. Arbeit ist mehr als Beschäftigung, mehr als nur eine Absicherung der materiellen Existenz. Sie ist auch ein entscheidender Faktor der eigenen Entwicklung, der Selbstverwirklichung. Sie eröffnet aber auch die Chance zur Teilnahme am Aufbau der Gesellschaft. Aus diesen Gründen hat jeder im Rahmen seiner Möglichkeiten die Pflicht zur und das Recht auf Arbeit.
Aus dieser Überlegung folgt eine Reihe von Rechten, die menschenunwürdige Arbeitsbedingungen ebenso verhindern sollen wie die Versuchung, Arbeit allein als käufliche Ware zu betrachten.

Die EUCDA schließt sich in diesem Zusammenhang zunächst einmal der Forderung an, daß von der Europäischen Union folgende Rechte anerkannt werden sollen:

- die allgemeine Erklärung der Menschenrechte
- die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten
- IAO- Erklärung über die Grundprinzipien und Grundrechte am Arbeitsplatz
- die Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer
- die überarbeitete Europäische Sozialcharta
- UN- Übereinkommen über die Rechte des Kindes

Die EUCDA fordert darüber hinaus einen breit angelegten Katalog an sozialen Grundrechten, der über die Rechte der Arbeitnehmerinnen und Arbeitnehmer hinaus soziale Rechte und auch Verbote umfaßt, die die gesamte Lebenssituation der Menschen betreffen:

- *das Recht der Familie auf rechtlichen, wirtschaftlichen und sozialen Schutz*

- *das Recht auf gleiche Behandlung und gleiche Chancen für Männer und Frauen*

- *das Verbot aller Formen der Diskriminierung* aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung

- *das Recht bislang benachteiligter Gruppen auf Eingliederung in den Arbeitsmarkt und die Gesellschaft*

- *das Verbot der Kinderarbeit*

- *das Recht auf einen umfassenden sozialen Schutz, der insbesondere im Fall der Arbeitslosigkeit, bei Krankheit, bei Pflegebedürftigkeit und im Alter ein menschenwürdiges Dasein garantiert*

- *das Recht auf ein Mindesteinkommen, das ein menschenwürdiges Dasein ermöglicht*

- *das Recht auf Bildung und Ausbildung sowie lebenslange Weiterbildung gemäß den Fähigkeiten jedes Einzelnen*

- *das Recht auf freie Berufswahl*

- *das Recht auf Sicherheit und Gesundheitsschutz am Arbeitsplatz*

- *das Recht auf nationale und grenzüberschreitende Vereinigungsfreiheit und Kollektivverhandlungen sowie auf Gewerkschaftsaktionen einschließlich des Rechts zu grenzüberschreitenden unterstützenden Aktionen und Streiks*

- *das nationale und grenzüberschreitende Recht der Information, Konsultation und Partizipation der Arbeitnehmerinnen und Arbeitnehmer*

- *das Recht auf die Erhaltung, den Schutz und die Verbesserung der Qualität der Umwelt, auf den Schutz der Verbraucher und der Benutzer vor einer Gefährdung ihrer Gesundheit und Sicherheit sowie gegen unlautere Handelspraktiken*

- *das Recht auf Freizügigkeit, auch für die Angehörigen von Drittstaaten, die sich legal in der EU aufhalten*

- *das Recht auf Familienzusammenführung für alle diejenigen, die sich rechtmäßig auf dem Gebiet der EU aufhalten*

Das mittel- und langfristige Ziel der EUCDA ist es, daß die sozialen Grundrechte rechtlich verbindlich und einklagbar in den neuen EU-Vertrag aufgenommen werden. Sie ist davon überzeugt, daß die Rechte, die in die Verträge aufgenommen werden, die besten Standards für den Schutz der Bürgerinnen und Bürger setzen müssen.

Dabei ist es der EUCDA bewußt, daß einige Grundrechte unmittelbar anwendbar sind, während andere Grundrechte nur durch ein individuelles Klagerecht auf der Grundlage eines Rechtsaktes (Richtlinie, Gesetz etc.) durchgesetzt werden können. Dieser Rechtsakt selbst muß selbstverständlich auf einem Grundrecht beruhen.

Die EUCDA sieht in der Einhaltung von Grundrechten nicht nur ein Kriterium für die Aufnahme in die Europäische Union, sie hält es auch geboten, Sanktionsmechanismen für den Fall von deutlichen Verstößen gegen sie einzurichten.

Die EUCDA hebt auch hervor, daß jeder, der Rechte genießt, auch die Verpflichtung hat, durch eigenes Verhalten für diese einzustehen: für die Wahrung der Menschenwürde, insbesondere für die Sicherung der Grundwerte der Freiheit und der Solidarität sowie für eine Stärkung der Demokratie.

Europäische Union Christlich-Demokratischer Arbeitnehmer

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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 28 avril 2000

CHARTE 4256/00

CONTRIB 129

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une intervention de la Plate-forme des ONG européennes du secteur social, présentée par M. Olivier Gerhard lors de l'audition publique du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française seulement.

Intervention de la Plate-forme des ONG européennes du secteur social, présentée par Olivier Gerhard, devant la Convention chargée de l'élaboration d'une Charte des droits fondamentaux dans l'Union européenne, Bruxelles, le 27 avril 2000

Mesdames et messieurs les membres de la Convention,

La Plate-forme des ONG européennes du secteur social rassemble une trentaine d'ONG. Elle s'est engagée en faveur d'une Charte des droits fondamentaux dans l'Union européenne dès que cette proposition a été formulée par le Comité des Sages, présidé par Mme Maria Lourdes Pintasilgo. En 1998, avec la Confédération européenne des syndicats, elle a lancé un appel pour qu'une telle Charte soit élaborée. Depuis, cette collaboration s'est renforcée et a conduit la Confédération européenne des syndicats et la Plate-forme des ONG européennes du secteur social à mener une campagne commune, comportant d'une part des documents de proposition et d'autre part des réunions dans les 15 Etats membres, de façon à prendre en compte, dans l'élaboration de cette Charte, les attentes des personnes qui vivent dans l'Union européenne et qui, souvent, mais malheureusement pas toujours, y travaillent.

Au cours de l'année dernière, nous avons élaboré en commun un document de travail intitulé " Les droits fondamentaux : le coeur de l'Europe " et sous-titré " Intégrer les droits fondamentaux dans les Traités de l'Union ". Permettez-moi donc de souligner aujourd'hui cinq points indispensables afin que la Charte que vous êtes en train d'élaborer place les droits fondamentaux, dans leur ensemble, au centre de la construction européenne.

Le premier point a déjà été souligné par de nombreux orateurs. Cette Charte serait sans valeur si elle n'était pas contraignante et intégrée dans les Traités.

Le second point tient à ce que cette Charte doit bénéficier à tous. Nous nous félicitons que la plupart des articles prévus disent " toute personne a droit à .. ". Nous pensons pourtant que certains droits réservés pour le moment aux citoyens comme le droit à la libre circulation ou le droit de vote aux élections locales et européennes doivent être étendus aux résidents. Il serait également nécessaire d'introduire dans la Charte un article prévoyant une égalité de traitement en matière de droits civils, politiques, économiques, sociaux et culturels entre citoyens européens et ressortissants de pays tiers résidant légalement dans l'Union européenne.

Lors de ses travaux, et ce sera le troisième point, la Convention s'est référée de façon permanente à la Convention européenne des droits de l'homme. Maintenant qu'elle aborde la question des droits sociaux, nous souhaitons qu'elle prenne de même pour référence la Charte sociale européenne, cet instrument du Conseil de l'Europe qui a été révisé en 1996. Cette révision a amené une série de nouveaux droits, aussi bien pour les travailleurs (par exemple le droit à la dignité dans le travail) que pour toute personne (par exemple le droit au logement ou le droit à la protection contre la pauvreté et l'exclusion sociale). Avec son mécanisme de contrôle et la possibilité de réclamation collective, cette Charte est un instrument moderne dont il faut s'inspirer. Il faut aussi savoir faire des pas supplémentaires. Par exemple, la Charte sociale européenne révisée prévoit un " droit à

l'aide sociale ", repris dans les projets soumis actuellement par le secrétariat à la Convention. Sur ce point, la Convention doit suivre les progrès faits par quasiment l'ensemble des Etats membres en inscrivant le " droit à un revenu minimum garanti pour vivre dans la dignité ". Par rapport à ce droit au revenu minimum garanti comme sur d'autres droits sociaux, trois députées européennes membres de votre Convention, Mme Bérès, Pacioti et van den Burg ont soumis plusieurs amendements, nous vous demandons de les soutenir.

Le quatrième point porte sur la façon dont la Charte des droits fondamentaux dans l'Union européenne sera contraignante. Pour les droits civils et politiques, les juristes sont habitués à prévoir des recours individuels ou collectifs. Concernant les droits sociaux, il s'agit souvent moins de recours directs que de recours par rapport à l'action, aux programmes, aux moyens (ou au manque de tels moyens) mis en oeuvre par l'Union et les Etats membres pour assurer l'accès effectif aux droits. C'est pourquoi nous proposons que, dans la Charte, figure l'engagement de l'Union de mettre en oeuvre un plan quinquennal de mise en oeuvre des droits sociaux, avec un mécanisme précis d'évaluation et de suivi.

Le cinquième et dernier point porte sur les ONG. Cette audition est une mise oeuvre d'une consultation des ONG, d'un dialogue civil. Ce qui est ici vécu est désormais reconnu comme essentiel au bon fonctionnement de la démocratie. C'est pourquoi nous demandons que la Charte comporte un article sur le droit des ONG à être consultées au niveau de l'Union européenne, droit qui doit donner lieu à l'établissement d'un dialogue civil structuré.

Nous vous remercions de nous avoir permis d'exercer ici ce droit.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 28 April 2000

CHARTE 4257/00

CONTRIB 130

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the Eversheds Business Lawyers in Europe. [1] [2]

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[2] This text has been submitted in English language only.

SUBMISSIONS ON THE DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Eversheds is a European law firm, with key locations within a number of EU jurisdictions. The exercise which we have undertaken is to draw comparisons across three of the EU jurisdictions, by way of illustration, to explain the existing provisions, and help to illustrate whether the fundamental rights are really required via a separate EU Charter. We make this submission following a review of the proposed new rights and having undertaken a review of the existing legislation in each of the EU countries where we operate, or as appropriate propose new legislation. We have considerable experience in relation to dealing with issues of discrimination, fundamental rights, employment issues and human rights. We are particularly concerned that the most effective venue for enforcement of rights at the nature identified, is in the domestic courts and legislation. In the establishment of the EU Charter, individuals presumably, would be given the right to seek to challenge and refer matters to the European Court of Justice on assistance and interpretation. Organisations and business in particular, will therefore face the potential for further claims and challenges. A more effective method by which rights of the nature set out in the Charter are introduced should be via the existing route of directives which are then interpreted as appropriate and brought into effect by domestic laws where they become enforceable in the domestic courts.

Summary Response

Our overriding concern in relation to the proposed Charter is that it extends well beyond the scope of the original terms of the Treaty of Rome. In addition, it also touches upon rights already provided for in the European Convention on Human Rights ("*ECHR*"). The potential for dual challenges to be brought by individuals may therefore exist under both the EU Charter as well as the European Convention, and potentially a third challenge where in particular jurisdictions the rights guaranteed by the ECHR have been in-acted within domestic legislation.

There is a particular issue in this regard within the United Kingdom, where, with effect from October 2000, the Human Rights Act 1998 will introduce new domestically enforceable rights within the UK jurisdiction as well as placing public bodies, including the courts, under an obligation to observe and enforce the rights enshrined within the ECHR.

We set out below, based on the proposed Articles to be contained in the Charter, our comments on each fundamental right.

1 **Article I - Equality between Men And Women**

Proposal: "*Equality between men and women must be ensured with regard to work and employment and social protection*".

Such protection is already contained within a number of EU provisions including:

- Article 141 (in respect of pay);
- The Equal Treatment directive; and
- The Equal Pay directive.

certainly as regards work.

In the UK, such rights are enshrined both by direct reliance upon the European provisions, as well as the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

In the Netherlands, Article 1 of the Dutch constitution ("*GRONDWET*"), the General Equal Treatment Act and the Act of Equal Treatment of Men and Women in Labour Relations of 1980. Furthermore, Article 7: 646, 647 and 647 of the Dutch civil code deals with preventing discrimination in training programmes, conditions of employment and promotion as well as when terminating employment contracts.

French law contains provisions regarding equality between men and women within the Labour code (Article L.123-1 and L.122-45) both during the recruitment procedure, the term of the contract and at dismissal. The French provisions moreover carry the sanction of criminal penalties against an employer.

2 Article II - Right to choose an Occupation

Proposal: "*Everyone has the right to choose and to engage in his occupation or business, without prejudice to the rules in the Treaty relating to the free movement of persons*".

Within the European Union and indeed the European Economic Area, freedom of movement is provided for across the member states. To this extent the right to choose and engage in occupation is protected.

Furthermore, in the UK as well as preventing sex discrimination, the context of which are dealt with above, the Race Relations Act 1976 also prevents discrimination on grounds of an individual's race, colour, ethnic or national origin.

Of course, freedom of movement is also a fundamental right embodied within the Treaty of Rome.

Again in the Netherlands, Section 19 paragraph 3 of the Dutch constitution contains a right to freedom of labour to prevent interference by the authorities - although these rights are subject to social economic circumstances.

Under French law, the same right to choose an occupation is implicit within the preamble of the 1958 constitution. However, there are certain regulated professions for which freedom is restricted.

It is suggested that such a potentially wide ranging right to choose an occupation, would have to be qualified as appropriate, taking into account policy considerations and occupations where qualifications are clearly essential in order to be able to carry out the role in question.

3 Article III - Worker's Right to Information & Consultation

Proposal: "*Workers and their representatives have the right to effective information and consultation within the undertaking which employs them, particularly in the context of collective redundancy procedures and decisions relating to conditions of work and to the working environment*".

Again, provisions have already been enacted at European level to deal with European Works Councils in respect of transnational bodies and Community undertakings.

Within the UK, there is already a substantial amount of protection which requires consultation with worker's representatives (Trade Union or employee representatives) and obligations to inform and consult in respect of:-

- Collective redundancies;
- Contractual changes which are proposed;
- Collective matters which may result in dismissal; and
- Health and safety consultation obligations.

In the Netherlands, a substantial body of existing law already provides for the establishment of works councils and collective consultation, including:-

- The Works Council Act;
- The Notification of Redundancy Act;
- Social Economic Council Merger Conduct Code; and
- Collective Employment Contract.

Works Councils under the first item listed must be established in undertakings of 50 or more consisting of employee representatives elected by the employees. Rights to certain information is also provided, including details concerning the control, reduction, expansion or changes to the undertaking in which the employee works. The Notification of Redundancy Act requires collective consultation and information and there are also provisions dealing with mass lay off.

In France, the right to information is provided through the requirement placed upon an employer to post minimum information (for example in respect of working hours and collective agreements which are applicable) at the works premises and again, there is a

mechanism for the election and appointment of staff representatives. Information and consultation obligations exist for works councils concerning matters affecting the volume structure, working time, conditions of the workforce as well as changes in the economics or control and structure of the employer company. Substantial remedies exist in respect of infringement of these provision, including imprisonment and/or a fine.

Many European Union countries already have a provision which enact the provisions concerning workers representatives and redundancies under Directive 98/59/EC in addition to the European Works Council provisions.

4 **Article IV - Freedom of Association, Rights of Collective Bargaining and Collective Action**

Proposal: "*Employers and workers have the right to associate freely, including at European Union level, in order to form the professional or trades union organisations of their choice to defend their economic and social interests*.

Every employer and every worker has the right to join or not to join these organisations, without this causing him any personal or professional harm".

In the UK, provisions already exist to protect individuals from joining or indeed declining to join a recognised Trade Union. This protection extends to prevent individuals being refused employment, being subjected to a detriment or indeed being dismissed or victimised in any other way. In addition, under the Trade Union and Labour Relations (Consolidation) Act 1992, recognised Trade Unions and their representatives gain the right to certain minimum information concerned with collective bargaining as well as health and safety rights and time off rights for training. Thus, provision already exists to allow freedom of association.

Under Dutch legislation, both the constitution (Article 8), the Dutch Civil Code (Article 7: 670 sub 5) and the Collective Employment Contracts Act protects the individual's right and freedom to join a Trade Union and termination of the contract, because of membership or because the individual has undertaken the activities of an association or Trade Union, is unlawful.

Similarly, under the French jurisdiction, there is the right to associate a protection against dismissal or discrimination. Discrimination on grounds of Union membership is indeed a criminal offence (punishable by two years' imprisonment and/or a fine).

Proposal: "*Employers or employers' organisations, on the one hand, and workers' organisations, on the other hand, have the right, under the conditions laid down by national legislation practice, to negotiate and conclude collective agreements, including at European Union level*".

As such, legislation does not exist to provide the right to negotiate and conclude collective agreements European wide. However, there is nothing to prevent organisations from forming PAN European Associations and indeed a number of employers and indeed Union bodies already do so.

At a domestic level, under UK legislation, the right to negotiate and conclude collective agreements (known as "*recognition*") is about to be introduced by new legislation in the summer of 1999 under the Employment Relations Act 1999. It would be of major concern if, in addition to the freedom of association rights contained in the ECHR and the new rights contained in the Employment Relations Act 1999, a further additional right and requirement was invoked by the introduction of the EU Charter provisions.

Collective bargaining is also already provided for under Dutch law in the Collective Employment Contract Act, the Works Council Act and Social Economic Council Merger Conduct Code. Whilst this is provided on a private law basis, it is based on the principle of freedom of contracts and although there is no right to require an organisation to determine or agree a collective employment contract, the right to so contract exists.

Proposal: "*Workers and employers have the right in cases of conflicts of interest to take collective action at European Union level should the occasion arise, including the right to strike*".

Within each jurisdiction, individual employees have a right to strike or take other collective action although this right does not appear to be formally recognised in legislation. However, the Council of Europe Social Charter which recognises the right to collective action is, for example, deemed applicable in the Netherlands. It is in fact a constitutional right under

French law and special protection exists in the UK to restrict or limit the circumstances in which individuals who are taking collective action can be dismissed.

The Charter here however appears to envisage the right to take collective action at European Union level, presumably, where a particular issue arises between the worker and employer which has an impact at a PAN European level. Our view is that the right to strike and to take other action needs to be carefully regulated and set out and that it is preferable for the circumstances in which action can be permitted to be determined by domestic laws. From the point of view of encouraging the economic well being of the European Union, we would not support the encouragement of European level collective action save in circumstances where there genuinely is an "*EU issue*" at stake.

5 **Article VII - Right to Equal Remuneration for Equal Work**

Proposal: "*Every worker has the right to equal remuneration for work of equal value*".

We refer to our observations at Article I above as to the provisions already applying.

Many jurisdictions have already enacted the Equal Pay Directive and are obliged to observe Article 141 of the Treaty, and we do not see the need to duplicate these requirements and rights by separate EU Charter legislation.

6 **Article VI - Right to Rest Periods and Annual Leave**

Proposal: "*Every worker has the right to a weekly rest period and to an annual period of paid leave*".

These provisions were required to be introduced in all member states by the Working Time Directive. It is suggested therefore that protection already exists in this area and all European Union member countries should have enacted the Working Time Directive provisions in October of 1998. If the Commission is not satisfied that all individual employees and workers are being given these rights, we suggest that that is a matter which should be addressed via infringement proceedings.

Again, we are concerned that what is being proposed amounts to a duplication of rights.

The UK have certainly introduced the Working Time Directive, which does guarantee weekly rest and annual periods of leave through its Working Time Regulations.

In France, Articles L-223-1 of the Labour Code provides for 5 weeks' paid holiday and 20 minute rest breaks for every 6 hours as well as a requirement that individuals are not required to work more than 6 consecutive hours and, reflecting the EU Directive a daily 11 hour rest.

In the Netherlands the Working Hours Act again addresses minimum holiday entitlement (20 days) which can be increased by collective agreement or individual agreement (together with maximum work times and minimum rest periods).

7 **Article VII - Safe and Health Working Conditions**

Proposal: "*Every worker has the right to safe and healthy working conditions*".

Again, there is European Directive legislation via the "*framework*" directive and subsequent daughter directives, which have been enacted in the UK, again via the management of Health and Safety Work Regulations, in the Netherlands by a number of items of legislation including:-

- The Working Conditions Act;
- The Working Conditions Regulations; and
- The Working Conditions Scheme.

Similarly, it is part of the Labour Code in France contained within Article L-231-1.

These provisions respectively deal with the requirement to establish works committees with health and safety responsibilities and to consult on such items.

8 **Article VIII - Protection of Children and Young People**

Proposal: "*The minimum age of admission to employment must not be lower than the minimum school leaving age and, in any case, not lower than 15 years.*

Young people under 18 years of age must have working conditions which suit their age and be protected against any work likely to harm their safety, health or physical, mental, moral or social development or to jeopardise their education".

The Working Time Directive referred to in paragraph 6 above provides for the protection of young workers throughout the European Union.

As stated in paragraph 6 the Directive has been implemented within the UK. Young workers are defined in the Directive as being aged between 15 or the minimum school leaving age (whichever is the lowest) and 18. The Directive provides for the protection of young workers as defined including minimum rest periods of 12 consecutive hours in each 24 hours, a weekly rest period of not less than 48 hours in each 7 day period the young worker is employed, and protection to ensure that the young worker's specific development and vocational training and access to employment needs are met.

In Holland, the Working Hours Act define a minor as a person under the age of 18 and, from the age of 16 only is entitled to enter into an employment agreement. Any person under the age of 16 can only be employed with the permission of his legal representative. There are special working hours and rest period restrictions and night working and overtime employment is forbidden.

Similarly, under the French labour code, specific protection exists for what are defined as young workers and this includes restrictions on their working time so that those under 18 cannot work for more than 8 hours per day or 4½ hours without a break.

9 **Article IX - Right to Protection in Cases of Termination of Employment**

Proposal: "*Workers have the right not to have their employment terminated without valid reason and to adequate compensation or other appropriate relief if their employment is terminated without valid reason*".

It is accepted that the provisions as to termination and protection in this regard is very limited under EU legislative provisions. In the UK, protection exists under the Employment Rights Act 1996, in laws which prevent what is known as "*unfair dismissal*". These

provisions go on to limit the circumstances in which an individual can be dismissed for fair reasons and provide remedies currently at £50,000 as a maximum award where a dismissal is not for a valid (fair) reason. Additional compensation and in some circumstances reinstatement or re-engagement to require the employer to take the individual back in their employ exists, for example in relation to pregnancy related dismissals, Trade Union related dismissals and indeed, dismissals on grounds of health and safety or representative status.

In the Netherlands, an employer is required to obtain a permit from the Director or the District Employment Services Authority before giving notice to terminate or alternatively an application must be made to the Cantonal Court under the Dutch Civil Code, requesting the setting aside of a contract of employment for serious reasons. Again, special protection exists to prevent dismissal for reasons such as Trade Union membership and political affiliation. Finally, there is also the right to be granted severance pay upon termination provided the employee is not at fault for the dismissal. The amount of severance pay reflects the damages suffered.

In France again, there are certain protected employees (such as staff representatives) who cannot be dismissed without prior authorisation from the Labour Inspector which will only be given after a contradictory enquiry is undertaken. There is also a legal dismissal procedure in respect of non-protected employees.

10 **Article X - Right to Vocational Training and Guidance**

Proposal: "*Everyone must have access, without discrimination, to appropriate vocational training and guidance and to benefit therefrom throughout his working life*".

In the UK, there is the concept of lifetime training and encouragement is certainly given to provide vocational training although no specific right to training provided. There is similarly no such right under Dutch law, although in France, an employer has an obligation of guidance and adaptation in respect of his employees.

11 **Article XI - Right of Employed Women to Protection of Maternity**

Proposal: "*Every employed woman has the right to maternity leave of at least 14 weeks before and/or after childbirth*".

The Pregnant Workers Directive introduced minimum requirements to be invoked in each member state. In the UK, this was enacted in 1993 and has further been enhanced by a recent change which provides to all individuals the right to 18 weeks' maternity leave (if their baby is expected on or after the 30th April 2000).

In Holland, 16 weeks' maternity leave on full pay is an obligation as well as other special protection and in France a minimum of 6 weeks before giving birth and 10 weeks after.

Again, these rights are already guaranteed and provided by the implementation of the Pregnant Workers Directive, in each member state. We therefore do not see the merit in further duplication.

12 **Article XII - Right to Parental Leave**

Proposal: "*Every worker has the right to parental leave of at least 3 months following the birth or adoption of a child*".

The Parental Leave Directive again, as with the Pregnant Workers Directive, obliges member states to introduce a minimum right to parental leave in respect of a child following birth or adoption.

This has been enacted in the UK, Holland and France. Given again that this is a more recent new right, we cannot see the merit or indeed the driving force behind imposing this as a fundamental right in the European Union through the Charter, when it is already provided for and in existence.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 2 May 2000

CHARTE 4258/00

CONTRIB 131

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter two contributions by the Union of European Federalists (UEF) on occasion of the hearing on 27 April 2000. [1]

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[1] This text has been submitted in French, English and German languages.

UEF

Union of European Federalists
Union des Fédéralistes Européens
Union der Europäischen Föderalisten

Charter of Basic Rights

Resolution of the UEF Federal Committee on the Charter of Basic Rights and the Intergovernmental Conference (Extract)
Brussels, 20 – 21 November 1999

The Union of European Federalists,

(…)

- recalls the decision of the Cologne European Council in June 1999 that "the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident";

- insists that this proposed Charter, which is important in itself, must not be a substitute for a **European Union Constitution**;

- welcomes the introduction of a new working method involving representatives of the European Parliament, national parliaments, citizen's organisations and the Member States' governments in the preparation of the Charter, thereby establishing a new procedure which provides the method by which the European Union Constitution should be drawn up.

The Union of European Federalists,

therefore calls on the European Council meeting in Helsinki to decide on joint action with the European Parliament and the Member States' Parliaments to **adopt the same procedure as agreed by the European Council of Cologne for the Charter of Basic Rights to draw up a Constitution of the European Union which should include citizen's rights and obligations.**

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Resolution on the EU Charter of Fundamental Rights as an important step towards a European Constitution

The UEF Federal Committee meeting in Brussels on 1 and 2 April 2000,

1. Welcomes the initiative for the drafting of an EU Charter of Fundamental Rights and reminds
   - that the European Union is a union of shared values
   - that a consolidation of these crucial basic and human rights constitutes an important point of reference for European citizens
   - that the fundamental rights of the European Union include not only human but also social and cultural rights as well as rights devolving from the implications of the IT society;

2. Underlines the democratic principle that all political power originates from the political will of the citizens. This principle has to be integrated in the EU Charter of Fundamental Rights. The coming into office of the future European Government has to reflect the result of European elections;

3. Calls for
   - the incorporation of the EU Fundamental Rights into the EU and EC treaties, thus granting them fully binding legal status
   - the application of the EU Charter of Fundamental Rights throughout the Union and any infringements to be dealt with by the European Court of Justice;

4. Calls for the members of the EU Fundamental Rights Convention to initiate a broad public debate involving the parliaments and assemblies at different levels as well as organisations of the civil society;

5. Considers
   - that the elaboration of the EU Charter of Fundamental Rights is an important step towards a European Constitution
   - that other elements will have to follow such as the provisions on the decision-making process of the European Union and the distribution of competences between the EU, the Member states, and the subnational levels of governments;

Welcomes the introduction of a new method by which members of the European Parliament, members of national parliaments and representatives of the national governments - involving the organisations of the civil society - are working together for the drafting of the Charter. After the successful completion of the deliberations on the EU Charter of Fundamental Rights, the Convention should commence to work on further elements of a European Constitution.

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Tél. +32-2-508.30.30 – Fax +32-2-512.66.73 – E-mail: uef.european.federalists@skynet.be

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 2 May 2000

CHARTE 4259/00

CONTRIB 132

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the statement by the European Newspaper Publishers' Association (ENPA) given at the hearing on 27 April 2000. [1]

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[1] This text has been submitted in English, French and German languages.

Hearing on a draft Charter of Fundamental Rights 27 April 2000, European Parliament, Brussels

- Statement by the European Newspaper Publishers' Association ENPA -

ENPA represents some 3000 daily, weekly and Sunday newspapers from seventeen European countries. The associated publishing houses sell more than 91 million copies each day, which are read by over 240 million people.

In the context of framing a draft Charter of Fundamental Rights, freedom of expression and press freedom are of paramount importance to ENPA.

European newspaper publishers welcome the Convention's attempt to put the fundamental right to freedom of expression at the heart of its proposal. Nevertheless, a general clause such as this demands clarification, such as how it is subsequently to be understood by the newspapers.

Freedom of expression as an essential prerequisite for the realisation and development of the individual is well established in the classic tradition of human rights. As such, this freedom is an integral requirement of a democratic system of government. Accordingly, the European Court of Human Rights stressed that freedom of expression, according to Article 10, paragraph 1 of the European Convention on Human Rights (ECHR), is one of the foundation stones of a democratic society and is essential to its further development as well as individual self-realisation. Furthermore this freedom is recognised as a general legal principle in Community law (Article 6 TEU).

Given this background and the stipulation that press freedom is part of the right to freedom of expression, the European newspaper publishers support the following interpretations of the aforementioned rights.

Press freedom is primarily a right to defence against intervention from both public and private sectors. Only a free press, free from censorship, can fulfil its important democratic function.

Publishers and other media companies must, therefore, be able to establish themselves freely in society like other private businesses. They are therefore in journalistic and economic competition, in which public authorities are fundamentally not allowed to intervene. This must be rooted in the principle that anyone, at any time has the right to run a press business without the permission of the authorities and without a licence.

Gathering information is also a basic prerequisite for a functioning press. In particular, this includes unhindered access to information available in public institutions and its divulgence by the competent offices.

Furthermore, every possible technical means of communication must play a part in guaranteeing press freedom. The right to freedom of expression would be worthless if the press were hindered in the dissemination of their products.

Moreover, press freedom must not be differentiated according to individual product categories and journalistic or technical qualities. Freedom covers the entire content of publications, including editorial as well as advertising.

Existing limitations, as we know them for instance from the European Convention on Human Rights, must be interpreted narrowly with regard to the Charter and must not infringe the basic right of press freedom. This is untouchable.

In this context ENPA has the following expectations of the Charter and its interpretation.

- The defence of the fundamental right to press freedom in the framework of the European Charter, should not retreat from the framework established by Article 6, paragraph 2 (TEU). The guarantee of press freedom as a basic right also derives from Article 10 (ECHR) and from the joint constitutional traditions of the Member States.

- A codified basic right to press freedom at a European level should primarily be a right to defence against state or state-tolerated third-party intervention.

- Rewordings by the Charter must not reduce the current level of press freedom. On the contrary: for the benefit of democracy and the development of the individual this should be recognised as an opportunity to blaze a trail for a more liberal level.

The convention will shortly receive a comprehensive legal opinion on the subject of press freedom at a European level, commissioned by the "Foundation for Democracy and Press Freedom" and the foundation "Press Freedom". Both are German institutions.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 2 mai 2000

CHARTE 4260/00

CONTRIB 133

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver le texte proposé de la Fédération Humaniste Européenne à l'occasion de l'audition du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française seulement.

Fédération Humaniste Européenne

Voici le texte proposé par notre Fédération dans le cadre de l'audition de ce jeudi 27 avril.

Je vous en souhaite bonne réception

Charte des Droits fondamentaux de l'Union Européenne.

Audition de la société civile du 27 avril 2000 - Parlement Eurpéen - Bruxelles.

Texte proposé par la Fédération Humaniste Européenne/European Humanist Federation.

La Fédération Humaniste Européenne, qui regroupe plus de vingt cinq associations dans seize pays européens, s'inscrit dans la tradition humaniste des Lumières. A ce titre ses membres militent pour le dépassement des nationalismes, pour le respect des droits de l'homme, pour une démarche morale humaniste s'appuyant sur la responsabilité et la solidarité civile et sociale et pour le pluralisme philosophique.

Leur action se fonde sur une approche éthique rationnelle reposant essentiellement sur la libre pensée et la liberté de conscience.

Notre Fédération s'inscrit donc sans réticence dans le projet d'une Europe ouverte et tolérante.

La réflexion qui nous rassemble fait partie d'une démarche pleine de promesses, à condition que celle-ci se fasse dans la cohérence. C'est la raison pour laquelle la FHE réitère son souhait, déjà exprimé lors des auditions dans le cadre de la CIG précédente, de voir l'UE adhérer

à la Convention Européenne des Droits de l'Homme. Celle-ci devrait s'accompagner de la reconnaissance de la juridiction obligatoire de la Cour européenne des droits de l'homme et du droit de présenter des requêtes individuelles. Ce système aurait l'avantage de permettre le contrôle, par un juge externe à l'ordre juridique communautaire, de la compatibilité du droit communautaire avec la Convention européenne des droits de l'homme.

Fidèle à sa tradition, la FHE insiste pour que la Charte sauvegarde, sans ambiguïté, la préséance des droits individuels fondés sur l'affirmation humaniste des libertés fondamentales par rapport à toute autre grille de lecture de la notion de droits de l'homme. A ce titre, la liste des différentes formes de discrimination à l'article 13 du traité d'Amsterdam devrait être étendue afin d'englober celle fondée sur les convictions philosophiques.

Cette protection due à l'individu, qui est - tout compte fait- la minorité la plus minoritaire, s'accompagne de la nécessité de promouvoir la responsabilité citoyenne. Cette notion doit encore être largement renforcée en Europe. C'est la raison pour laquelle nous souhaitons que la Charte soit proclamée au nom des citoyens européens et qu'elle soit ratifiée, dans les différents états, après une large consultation de ces mêmes citoyens.

La Charte doit clairement poser le principe de la non discrimination entre les hommes et les femmes et, en matière de liberté de conscience, il convient de rappeler que celle-ci englobe le droit de changer de religion ou de ne pas en avoir. En matière d'éducation, si les parents ont certes le droit d'élever leurs enfants en fonction de leurs convictions, il n'en reste pas moins que ces enfants doivent pouvoir devenir des adultes autonomes et responsables, capable de formuler leurs propres jugements de valeurs et choix de vie.

Une autre de nos préoccupations est d'éviter que la notion des "Droits de l'Homme" soit détournée de son véritable objet par une interprétation ou une utilisation extensive et abusive. Ce problème se pose, entre autres, dans deux domaines sensibles: celui de l'autonomie de décision en matière de choix de vie et celui de la bioéthique.

Par exemple,il serait inacceptable de voir la Charte interprétée pour limiter la liberté individuelle face à des questions aussi délicates que le droit à une mort digne ou la possibilité pour les femmes d'interrompre une grossesse non désirée. De même, utiliser une Charte des droits fondamentaux pour empêcher les recherches sur l'embryon ou

le génome humain ne nous paraîtrait pas plus concevable dans une Europe soucieuse de respecter la diversité des approches en matière d'éthique. Enfin, inclure dans la Charte des dispositions destinées à protéger un concept de "famille" dont la définition ne tiendrait pas compte des récentes évolutions que celui-ci a subi ne manquerait pas de mettre le texte en porte à faux par rapport à la réalité sociologique qui prédomine dans nos pays.

La Charte se doit aussi d'intégrer et de protéger le modèle social européen comme rempart contre l'exclusion. Il conviendrait donc de s'inspirer de la Charte européenne des droits sociaux adoptée par le Conseil de l'Europe. De même, une réflexion s'impose afin que l'adoption de la Charte ne renforce pas la forteresse "Europe" et que ses dispositions en matière de droits sociaux tiennent aussi compte de l'importance que continueront à avoir dans l'avenir les communautés de migrants en fonction des politiques d'asile et d'immigration de l'UE. Ces politiques devraient, selon nous, aller de pair avec une coopération plus active avec les pays tiers, notamment ceux qui sont en voie de développement.

Enfin, et nous l'avons salué, l'Europe qui se construit est une Europe de la diversité culturelle, ethnique, religieuse. Elle se doit donc d'être une aire de tolérance et, mieux encore, de respect et de compréhension mutuelle. La Fédération insiste sur le rôle que la puissance publique doit jouer en cette matière, particulièrement en matière d'enseignement.

Nous considérons que seule la prééminence du civil sur le religieux, de l'intérêt public général sur les aspirations de groupes idéologiques particuliers, seront en mesure d'éviter que la diversité socio-culturelle ne se traduise en une juxtaposition de ghettos indifférents, voire opposés, sinon hostiles, les uns aux autres.

Si l'Union européenne veut être un espace de liberté, de sécurité et de justice,

c'est en affirmant, en vertu de la légitimité démocratique, le principe de base de la séparation de l'autorité publique de toute puissance particulière ou influence partisane de quelque nature que ce soit, qu'elle y parviendra le plus sûrement.

Texte présenté par la

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 2 May 2000

CHARTE 4262/00

CONTRIB 135

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the Young European Federalists (JEF) on the occasion of the hearing on 27 April 2000. [1]

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[1] This text has been submitted in English language only.

Jeunes Européens Fédéralistes

Young European Federalists

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THE YOUNG EUROPEAN FEDERALISTS ON THE CHARTER OF FUNDAMENTAL RIGHTS

The Young European Federalists welcome the decision to establish a Charter of the Fundamental Rights of the European Union and stress the following points:

1. **The establishment of a Charter of the Fundamental Rights of the European citizens is a crucial achievement and could be the first piece of a real European Constitution.** The European Union and the European Communities are still dominated by the economic dimension, the Single European Market and the Monetary Union. Most of the citizens feel the Union as distant, bureaucratic and far from their problems. The establishment of the Charter could mark the start of a new Europe focussed on the citizens and moving forward to a real Political Union. However, the Charter can unfold all its potential only if its creation is soon accompanied by a radical and comprehensive reform of the Union's foundations and institutions, that lead to a true European federal Constitution, to give the Union the capacity to pursue effectively the values and goals that the Charter will solemnly enshrine. It would be very important if the Convention kept such point in front of the member states, specially considering the parallel ongoing process of the Intergovernmental Conference.

2. **It is vital that the Charter becomes a legally binding document, integral part of the Treaties, and does not remain a simple Declaration.** The European Union has already seen many Fundamental Rights declarations (see for example the European Parliament Declaration from 1989). Many international organisations have issued Declarations and Conventions of Rights, without having the powers to enforced them. What the Union needs now is a visible and transparent Bill of Rights of the European Citizens which gives the people awareness of their rights and access to the European Court of Justice for their enforcement. A binding Charter - by defining clearly the values, principle and goals at the heart of the Union - would also enhance the legitimisation and credibility of the future work and actions of the all Union's institutions. This is even more important in view of the enlargement of the Union to new members.

3. **The Charter should acknowledge and enshrine the unique features of the European model.** A mixture and balance of individual freedom, in all its aspects, and solidarity and welfare make the European model unique. This should be reflected in the Charter. Moreover, European unification marks the historic achievement of European pacification by the creation of a Union among nations and peoples that fought each other for centuries: the inclusion in the Charter of the individual's "right to peace", and the Union's obligation to defend it, would symbolise perfectly such novelty of the European experiment. An other important way to transform "empty rights" in the Treaties into tangible rights would be to guarantee the right of direct access by individuals to the European Court of Justice, and to extend the civil rights to all residents of the EU, regardless of their citizenship.

4. **The Charter should acknowledge and enshrine the achievements of the European political tradition paving the way for a clarification of what the Union is and how it works.** Centuries of political fights in Europe have established the basic principle that "sovereignty lies in the people" and that of the division of powers. These historic achievements at national level are still opposed in the European Union, which is therefore not yet a democracy. The "European citizenship" has been created by the Amsterdam Treaty, but it remains an empty word as long a the citizens are deprived of the fundamental right of

5. citizenship: the power to decide the Government and the policies of the Union. The institutions of the Union are the embryo of a real supranational democracy, but the European Parliament is still denied full legislative powers, the Council combines legislative and executive powers ineffectively, the Commission is not a real Government - all this makes the Union still undemocratic and ineffective. If the Charter reaffirmed the basic principle of "people sovereignty" in the Union, this could pave the way for a comprehensive redefinition of what the Union is and how it works, and thus for a real European democracy.

6. **The Convention process to draft the Charter is very innovative and should be extended to the reform of the Union's institutions.** So far, the building of Europe has left aside the citizens and their elected representatives in the European Parliament, it has been the exclusive domain of the representatives of the member states governments. The involvement of the European Parliament and the national parliaments, as well as the dialogue with the civil society, makes the mechanism to elaborate the Charter profoundly innovative and more democratic than any other procedure experienced at European level so far. This method should replace the elaboration of fundamental texts of the European Union by Intergovernmental Conferences. The Convention could make its voice heard on this point already during the current Intergovernmental Conference.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 May 2000

CHARTE 4263/00

CONTRIB 136

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Federation of Catholic Family Associations in Europe on the occasion of the hearing on 27 April 2000. [1]

[1] This text has been submitted in French, German and English languages.

PROJECT FOR THE CHART OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Contribution of the Federation of Catholic Family Associations in Europe

Paris March 7th 2000

Fédération des Associations Familiales Catholiques en Europe
Föderation der Katholischen Familienverbände in Europa
Federation of Catholic Family Associations in Europe

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The Federation of Catholic Family Associations in Europe groups numerous national family associations originating in divers European countries. It represents 5.5 million European families, or about 25 million persons.

Strengthened by this mandate and conscious of the importance of the future European Chart of Fundamental Rights, we intend to submit the fruit of our experience to your reflection.

EXPOSURE OF MOTIVES

The Federation of Catholic Family Associations in Europe supports the reflection being currently devoted by the European Union to the elaboration of a Chart of Fundamental Rights conform to the conclusions formulated by the presidency at the European Councils of Cologne and Tampere. However, it is not the object of the FCFAE to take a stand on the constraining character of this Chart or on the rapport of jurisdictions between the European Court of Justice and the European Court on Human Rights.

The Federation of Catholic Family Associations in Europe,

Rejoicing **that fundamental rights have benefited from constant attention on behalf of the European Court of Justice as well as the Council of Ministers,**

Concerned the European fundamental rights remain faithful to their philosophical and religious foundation, notably by a just understanding of the dignity of the human person and his life environment,

Considering the Universal Declaration of Human Rights proclaimed by the United Nations' General Assembly of December 10th 1948, in particular Article 1 (*All human beings are born free and equal in dignity and in rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.)*

Considering the European Convention of the Protection of the Human Rights and Fundamental Liberties, adopted by the Council of Europe on the 4th of November 1950, and in particular its 8th and 12th articles,

Considering the revised European Social Chart, adopted by the Council of Europe on the 3rd of May 1996, and in particular its 16th, 17th and 19th articles,

Considering the principle of subsidarity of citizens, families, cities, regions, nations and States, which implies the respect of the national and the regional laws of the member countries and the candidate countries,

Considering that there are fundamental duties which correspond to fundamental rights

Reminding all that the family, the community of the life of a man and a woman, founded upon the stable public engagement of marriage and open to life, structures society and assures its cohesion, and that it is the only social cell capable of transmitting life, all the while offering to the child an adapted educative milieu, and that the family consequently merits having its' legal recognition, protection and promotion reinforced within the fundamental rights .

Considering that child's rights, and notably as they are guaranteed on the international level by the United Nations Convention on Child's Rights of 1989, are an integral part of fundamental rights, and in particular in its preamble and its 5th and 18th article,

Reiterating that the first right of a child is that of a "protected childhood" within the heart of a stable family and that law must favor this protection and stability,

Concerned that the contribution of families to the economic activity of the European Union, and that their importance as a factor of growth as investors, educators and consumers be justly appreciated,

Desirous that particular attention be accorded to the educative tasks accomplished within the heart of the family, and that the family's irreplaceable value on the human, social, cultural, as well as economic levels, be taken into account,

The Federation of Catholic Family Associations in Europe insists that the following rights be guaranteed within the framework of the Chart of Fundamental Rights of the European Union.

RESOLUTION

The first human right is the right of life. The respect of human life extends to all ages of life, whatever may be the state of health of the person.

The right to contract a marriage, as the union of a man and a woman, and the right to found a family must be recognized, if the future spouses have reached the required age and unite the conditions demanded in this case by national laws, to the extent that these laws do not conflict with the fundamental principles established in the present chart. The marriage can only be contracted with the free and full consent of the future spouses.

The family is the natural and fundamental element of society. It has the right to specific economic, juridical and social protection, notably by the means of social and family benefits, by fiscal measures, by the encouragement to build lodgings adapted to the needs of families, by help given to young households, and by all and any other appropriate measures.

Every child has the right to be raised by its natural or adoptive parents. The European Union will respect the right of parents to assure the education of their children conform to their religious and philosophical convictions.

Migrant families have the right to the same social protection as that accorded to other families.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 4 mai 2000

CHARTE 4264/00

CONTRIB 137

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint l'introduction de la Conférence du Régions Périphériques maritimes d'Europe (CRPM) faite à l'occasion de l'audition du 27 avril 2000.[1]

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[1] Ce texte a été soumis en langue française seulement.

CONTRIBUTION DE LA CRPM A L'ELABORATION DU PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPEENNE

Nous voudrions tout d'abord vivement remercier la convention de permettre à la CRPM, organisation représentant 126 régions d'Europe, de s'exprimer sur une question aussi majeure pour nos citoyens.

Le respect des droits fondamentaux de nos citoyens est l'un des principes fondateurs de l'Union européenne et la condition essentielle pour sa légitimité, comme l'affirme à juste titre le Traité. Bien qu'un encadrement juridique contraignant existe déjà en partie, nous considérons toutefois que la décision du Conseil européen de Cologne des 3 et 4 juin 1999, d'établir une Charte des Droits Fondamentaux, est essentielle afin de renforcer leur visibilité et leur portée auprès des citoyens de l'Union.

Dans cette configuration, la CRPM souhaiterait aujourd'hui même rappeler deux grands principes qui lui semblent indispensables d'être érigés à terme comme des droits fondamentaux.

Le premier principe est celui de la relation essentielle entre la gouvernance de l'Union européenne et la mobilisation des citoyens européens au travers de la reconnaissance et de l'implication du niveau régional. Rapprocher l'Europe des citoyens, est en effet un des enjeux majeurs de l'avenir de la construction européenne et l'une des garanties de sa crédibilité. Prendre en considération dans l'élaboration de cette Charte des droits fondamentaux, les droits économiques et sociaux des citoyens, est à juste titre un élément essentiel et indispensable. Nous considérons toutefois qu'il est également important de ne pas oublier que l'Union est aussi fondée sur le principe intangible de démocratie, reconnu sous la forme de la démocratie représentative, c'est à dire du droit des citoyens de participer à la gestion des affaires publiques par l'intermédiaire de leurs représentants élus. Sans vouloir rentrer ici dans le débat sur le déficit de démocratie, nous considérons que le droit d'expression des citoyens dans la définition et la mise en œuvre des orientations stratégiques et des politiques de l'Union passe nécessairement par la reconnaissance du « fait » régional, ou d'une plus grande implication des échelons infra-étatiques à la gouvernance de l'Union. Echelons qui représentent aujourd'hui au mieux les préoccupations de nos citoyens et qui constituent leur plus proche capacité d'expression. Cette reconnaissance d'un plus grand rôle des régions comme partenaires à part entière de la construction européenne est seule à même de redonner aux citoyens un véritable « droit d'expression» sur les orientations générales de l'avenir de l'Union et surtout sur les politiques ayant un impact territorial, et qui, de ce fait, les concernent directement.

Le second principe est intimement lié au précédent. Il s'agit de la reconnaissance de l'objectif de cohésion territoriale au même titre que celui de la cohésion économique et sociale et ce si nous voulons éviter la construction d'une Europe à deux voire trois vitesses avec tous les risques de rejet et d'éclatement que celle-ci impliquerait. Cette dimension territoriale est un autre élément que la Charte devrait prendre en considération. La tendance actuelle est en effet à la concentration

des activités économiques dans les régions fortes de l'Union, autour de grandes capitales, ce qui se traduit par de fortes disparités de développement entre nos territoires. Les principaux écarts de compétitivité subsistent, voire se creusent en termes d'accessibilité aux marchés, d'innovation, de formation et d'adaptation des systèmes productifs. Cette évolution ne peut perdurer d'autant plus que l'élargissement risque encore d'accroître les écarts de développement. Nos citoyens pourront-ils adhérer au projet européen tant qu'il subsiste un réel déséquilibre de développement entre leurs territoires, tant que la croissance et le développement de l'économie européenne ne profitent pas à tous et n'offrent pas à chacun l'opportunité de s'épanouir dans son espace culturel et social de référence ? Le territoire ne doit pas, à notre sens, rester uniquement un espace de référence politique mais devenir également un espace capable d'offrir à ses habitants toutes les opportunités de développement économique. Or la cohésion territoriale, c'est à dire le développement harmonieux et équilibré du territoire européen, trop absente du débat européen, doit devenir un complément indispensable à la cohésion économique et sociale qui figure déjà à l'article 2 du Traité. Nous considérons ainsi qu'il est fondamental de donner à chaque citoyen européen, quel que soit le territoire où il réside, les mêmes opportunités de développement, d'accès à l'éducation, à la formation, au savoir etc. Il s'agit d'un véritable droit dont doivent jouir nos concitoyens et que la Charte devrait, par conséquent, prendre légitimement en considération.

Comme vous pouvez le constater, il s'agit de deux principes de base qui nous semblent devoir être absolument affirmés et qui donc à ce titre trouvent toute leur place au sein d'une telle charte. De toute évidence, leur prise en compte et leur affirmation constituent aux yeux de la CRPM une condition indispensable pour une bonne poursuite du processus d'intégration européenne.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 4 May 2000

CHARTE 4265/00

CONTRIB 138

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution with specific reference to the revised European Social Charter by Mr. Klaus Lörcher. [1]

[1] This text has been submitted in English language only.

Contribution

to the

Draft Charter of Fundamental Rights

of the European Union

(CHARTE 4112/2/00 REV 2)

FUNDAMENTAL SOCIAL RIGHTS

with specific reference

to the

REVISED EUROPEAN SOCIAL CHARTER

by Klaus Lörcher

March 2000

Table of Contents

Introduction

This contribution to the Draft Charter of Fundamental Rights of the European Union is aimed at facilitating the work on the formulation of the fundamental social rights. Its basis is the Presidency note (CHARTE 4112/2/00 REV 2) containing the 'list of rights'.

Following the principal line of the Presidency note the contribution is mainly based on the Revised European Social Charter (ESC) of the Council of Europe. In guaranteeing the social rights the ESC is the indivisible counterpart of the European Convention on Human Rights.

The first part of the contribution is devoted to the comparison of the short description in the 'list of rights' with wording of the ESC of the respective rights.

Furthermore, the contribution aims at showing that a significant number of rights contained in the Revised European Social Charter have not been incorporated in the 'list of rights' as yet. Thus, the second part of this paper.

In general, these remarks could be seen in the context of the references in CHARTE 4124/00 (CONTRIB 19) to the Revised European Social Charter and should be seen as argument to prevent any further progress in respect of fundamental social rights.

PART I: FUNDAMENTAL SOCIAL RIGHTS CONTAINED IN THE REVISED EUROPEAN SOCIAL CHARTER AND REFERRED TO IN THE LIST (CHARTE 4112/2/00 REV 2)

This table aims at comparing the list of economic and social rights contained in CHARTE 4112/2/00 REV 2 (the list) with the wording[2] of the

- Revised European Social Charter (ESC)[3] and the
- Community Charter of Fundamental Social Rights of Workers (Com.Ch.).

Besides the references in the list to the

- Treaty establishing the European Community (EC) and
- the Declaration of fundamental rights an freedoms adopted by the European Parliament on 12 April 1989 (EP Decl.)

it further adds short references to

- secondary legislation in the social policy field by EC Directives[4] (EC Dir.) and
- ILO Conventions[5] (ILO Conv.) relevant to the rights in question.

[2] The text in 'Arial' is quoting CHARTE 4112/2/00 REV 2; all additions to this text appear in 'Times New Roman'.

[3] The text of the provisions of the ESC does not contain the horizontal provisions in Part V of the ESC and in the Appendix.

[4] These references are not exhaustive; in particular all the individual dircetives on safety and health are not mentioned.

[5] These references are not exhaustive; in general they stick to the most recent Convention. Furthermore, Recommendations are not mentioned either.

COMPARATIVE TABLE FOR SOCIAL RIGHTS (CHARTE 4112/2/00 REV 2)

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
			Article[1]	With a view to ensuring the effective exercise of the right ..., the Parties undertake[2]	Point		Article	Article		No.
(13)[3]	Right to education and vocational training, freedom of choice of method of education[4]		10	[see No. 7]	15	[see No. 7]	150	16		
(14)	Freedom of association and assembly, including freedom to demonstrate, freedom to form trade unions and freedom to join a political party		5	that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.	11	Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choise for the defence of their economic and social interests. Every employer and every worker shall have the freedom to join or not to join such organizations without any personal or occupational damage being thereby suffered by him.				87

[1] The figures in [ ]-brackets refer to the paragraphs of the articles of the ESC
[2] This is the introductory part of every article of the European Social Charter, it hs to complemented by the right in question.
[3] Nos. (13) and (14) refer to the first part of rights in the list of CHARTE 4112/2/00 REV 2; the following numbers refer to the part 'Economic and social right/objectives'
[4] For the new formulation for the "Right to education" see CHARTE 4149/00, CONVENT 13, Art. 16 (vocational training is not mentioned)

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
1.	Right to work	Objective of a high level of employment,	1 [1]	to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;			127			122
		freedom to choose and engage in an occupation	1 [2]	to protect effectively the right of the worker to earn his living in an occupation freely entered upon;	4	Every individual shall be free to choose and engage in an ocupation according to the regulations governing each occupation.				
2.	Right to safety and health at work	right or political objective	3 [1]	to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;	19	Every worker must enjoy satisfactory health and safety conditions. Appropriate measures must be taken in order to achieve further harmonisation of conditions in this area while maintaining the improvements made. These measures shall take account, in particular, of the need for training, information, consultation and balanced participation of workers as regards the risk incurred and the steps to eliminate or reduce them. The provisions regarding implementation of internal market shall help to ensure such protection.	140	13	89/ 391 and a large number of individual directives	155 and a large number of further Conventions
			3 [2]	to issue safety and health regulations;						
			3 [3]	to provide for the enforcement of such regulations by measures of supervision;						
			3 [4]	to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.						

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
3.	Fair remuneration and minimum wage	Distinguish what falls under a right and what consti-tutes a political right	4[5] [1]	to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;	5[6]	All emplyment shall be fairly remunerated. To this end, in accordance with arrangements applying in each country: (i) workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them wo have a decent standard of living; (ii) workers subject to terms of employment other than an open-ended full-time contract shall benefit from an equitable reference wage;		13		
			4 [5]	to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.		(iii) wages may be withheld, seized or transferred only in accordance with national law; such provisions should entail measures enabling the worker concerned to continue to enjoy the necessary means of subsistance for him or herself and his or her family.				95
4.	Right to weekly rest period and	right or political objective	2 [5]	to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;	8	Every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonized in accordance with national practices.			93/104 Art. 5	14, 106
	paid holidays		2 [3]	to provide for a minimum of four weeks' annual holiday with pay;					93/104 Art. 7	132

[5] Last part of Art. 4 ESC: „The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.“

[6] Although Point 4 of the Community Charter is mentioned here, it it obvious that Point 5 was meant (see the correct reference in No. 1 to Point 4 of the Community Charter).

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
5.	Pensions[7]	right or political objective	23	to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular: to enable elderly persons to remain full members of society for as long as possible, by means of: **a** adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;	24 and	According to the arragements applying in each country: 24. Every worker of the European Community must, at the time of retirement, be able to enjoy resources affording him or her a decent standard of living.				
				to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: **b** the health care and the services necessitated by their state;	25	25. Any person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs.				
6.	Free access to placement serveces	right or political objective	1 [3]	To establish or maintain free employment services for all workers;	6	Every individual must be able to have access to public placement services free of charge.				96
7.	Vocational guidance and continuing training	right or political objective	9 and ...	9. to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including schoolchildren, and to adults.	15	Every worker of the European Community must be able to have access to vocational training and to benefit therefrom throughout hisworking life. In the conditions governing access to such training there may be no discriminiation on grounds of notionality. The competent public authorities, undertakings or the two sides of industry, each within their own sphere of				142

[7] The word 'pension' might not be correct in this context, since this area is linked to 'social security' (see No. 12), whereas the pricnipal area here seems to be the general protection of the elderly people in respect of their financial resources

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
						competence, should set up continuing and permanent training systems enabling every person to undergo retraining more especially through leave for training purposes, to improve his skills or to acquire new skills, particularly in the light of technical developments.				
			10 [1]	To provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;						
			10 [2]	To provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments;						
			10 [3]	to provide or promote, as necessary: **a** adequate and readily available training facilities for adult workers; **b** special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment;						
			10 [4]	to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed;						
			10 [5]	to encourage the full utilisation of the facilities provided by appropriate measures such as: **a** reducing or abolishing any fees or charges;						

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
				b granting financial assistance in appropriate cases; **c** including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment; **d** ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.						
8.	Workers' right to information and consultation		6 [1]	to promote joint consultation between workers and employers;[8]	17	Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. This shall apply especially in companies having establishments in two or more Members States of the European Community.	137	14	Many articles in individual directives; 94/45[9]	
9.	Right to collective bargaining		6 [2]	to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;	12	Employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have to right to negotiate and conclude collective agreements under the condition laid down by national legislation and practice. The dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in cotractual relations at	137			98

[8] The reference should not only contain Art. 6 para. 1 ESC, but also Art. 21 ESC ('The right to information and consultation') and Art. 22 ESC ('The right to take part in the determation and improvement of working conditions and working environment')

[9] European Works Council Directive

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
						inter-occupational and sectoral level.				
10.	Right to strike		6 [4]	and recognise: the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.	13	The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to obligations arising under national regulations and collective agreements. In order to facilitate the settlement of industrial disputes the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice.[10]		14		[11]
11.	Right to health	right or political objective	11	either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:	19	[see under No. 2]	152	15		
			11 [1]	to remove as far as possible the causes of ill-health;						
			11 [2]	to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;						
			11 [3]	to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.						
12.	Right to social security, right	right or political	{12}	to establish or maintain a system of social security;	10	According to the arrangement applying in		15		102, 121,

[10] see in this respect ESC Art. 6 para. 3: to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; (which has not been referred to expressey in the list)

[11] Case-law of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) and Committee on Freedom of Association (CFA)

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
	to social and medical assistance	objective	[12] [1]			each country: 10. Every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits. Persons who have been unable to enter or re-enter the labour market and have no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation.				128, 130, 168.
			{12} [2]	to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;						
			{12} [3]	to endeavour to raise progressively the system of social security to a higher level;						
			{12} [4]	to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: **a** equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the						

[12] The list is not referring to Art. 12 ESC (that is why Art. 12 only appears in { }-brackets); but the reference to Point 10 of the Community Charter makes it perfectly clear that this is the content of the 'ritght to social security' (Art. 13 ESC, which is referrred to alone only deals with the field of the 'right to social and medical assistance').

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
				persons protected may undertake between the territories of the Parties; **b** the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.						
			13 [1]	to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;						
			13 [2]	to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;						
			13 [3]	to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;						
			13 [4]	to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the Euroepan Convention on Social and Medical						

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
				Assistance, signed at Paris on 11 December 1953.						
13.	Protection of maternity		8 [1]	to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks;					92/85 Art. 8	103, [13]
			8 [2]	to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;					92/85 Art. 10	158 Art. 5 lit. e
			8 [3]	to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;					-	
			8 [4]	to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;					92/85 Art. 7	89 with Prot.
			8 [5]	to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.					92/85 Art. 6	45
14.	Protection of children and		{7}[14] [1]	to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions	20 seq.	20. Without prejudice to such rules as may be more favourable to young people, in			94/33 Art. 4	138

[13] The International Labour Conference 2000 will most problably adopt a revised Convention

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
	young persons			for children employed in prescribed light work without harm to their health, morals or education;		particular those ensuring their preparation for work through vocational training, and subject to derogations limited to certain light work, the minimum employment age must not be lower than the minimum school-leaving age and, in any case, not lower than 15 years.				
			{7} [2]	To provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy;					94/33 Art. 7	
			{7} [3]	To provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;						
			{7} [5]	To recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;		21. Young people who are in gainful employment must receive equitable remuneration in accordance with national practice.			-	
						22. Appropriate measures must be taken to adjust labour regulations applicable to young workers so that their specific development and vocational training and access to employment needs are met.				
			{7} [4] and	4. to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their		The duration of work must, in particular be limited - without it being possible to circumvent this limitation through recouse			94/33 Art. 8	79

[14] The list is not referring to Art. 7 ESC (that is why Art. 7 only appears in [ ]-brackets); but the reference to Point 20 seq. Of the Community Charter makes it perfectly clear that this is the content of the 'protection of children and young workers' (Art. 17 ESC, which is referrred to instead deals with the wider field of 'the right of children and young persons to social, legal and economic protection'.

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
			[8]	need for vocational training; 8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;		to overtime - and night work prohibited in case of workers under 18 years of age, save in the case of certain jobs laid down in national legislation or regulations.			and 9	
			{7} [6]	To provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;		23. Following the end of complusary education, young people must be entitled to receive initial vocational training of a sufficient duration to enable them to adapt to the requirements of their future working life; for young workers, such training should take place during working hours.			94/33 Art. 8 para. 3	
			{7} [9]	to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;						77 and 78
			17	either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: **a** to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; **b** to protect children and young persons against negligence, violence or exploitation; **c** to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;						

No.	Description	right or objective	ESC	(Revised) European Social Charter (ESC)	Com Ch.	Coomunity Charter on Fundamental Social Rights of Workers (Com.Ch.)	EC	EP Decl	EC Dir.	ILO Conv
			17 [2]	to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.						
15.	Integration of disabled persons		15 [1]	to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;	26	All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training ...				159
			15 [2]	to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services;		... ergonomics ,...				
			15 [3]	to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.		... accessibility, mobility, means of transport and housing.				

I. PART II: FUNDAMENTAL SOCIAL RIGHTS CONTAINED IN THE REVISED EUROPEAN SOCIAL CHARTER AND *NOT* REFERRED TO IN THE LIST (CHARTE 4112/2/00 REV 2)

The following compilation is based on Part II of the Revised European Social Charter. It contains all substantive articles. Only those provisions which have been taken account of in the 'list of rights' have been taken off, instead one will find a special reference to the relevant number in Part I "[See No. in the list in Part I]".

Many of these major deficiencies are even less understandable, since the rights are already recognised not only in the Revised European Social Charter but also by EC Directives and/or ILO Conventions.

Rights[1]	**ESC provisions**	**EC Directives**	**ILO Conventions No.**
Information on essential aspects of the contract	Art. 2 para. 6	91/533	
Protection in case of night work	Art. 2 para.7	93/104 Art. 8 seq.	171
Period of notice for termination of employment	Art. 4 para. 4		158
Migrant Workers	Art. 18 and 19		97 and 143
Termination of employment	Art. 24		158
Protection of workers' claims in the event of the insolvency of their employer	Art 25	80/987	
Workers with family responsibilities	Art. 27		156
Workers' representatives protection in the undertaking and facilities to be accorded to them	Art. 28		135
Information and consultation in collective redundancy procedures	Art. 29	75/129	158

Some 'new' provisions remain. The main elements should also be taken into account when formulating fundamental social rights in the new perspective of the European Union and European Community, which is also standing for these rights[2]:

- right to dignity at work (Art. 26 ESC)

[1] Taken from the Revised European Social Charter in numerical order
[2] be it be Recommendations (dignity at work) or by programms (poverty and social exclusion).

- poverty and social exclusion (Art. 30 ESC)
- right to housing (Art. 31).

N.B.

Although the following provisions also have not been taken accopunt of in the list there seem to be specific reasons

Content	Provisions of the ESC	Possible Reasons
Equality of men and women	Art. 4 par. 3 and Art. 20 ESC	New Art. 141 EC
Consultation and contribution	Art. 21 and 22 ESC	See No. 8 in Part I

EUROPEAN SOCIAL CHARTER

(Revised)

Strasbourg, 3.V.1996

ETS No. 163

Part II

Article 1 - The right to work

With a view to ensuring the effective exercise of the right to work, the Parties undertake:

1. [See No. 1 in the list in Part I]
2. [See No. 1 in the list in Part I]
3. [See No. 1 in the list in Part I]
4. to provide or promote appropriate vocational guidance, training and rehabilitation.[3]

Article 2 - The right to just conditions of work

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

1. [See No. 4 in the list in Part I]
2. to provide for public holidays with pay;
3. [See No. 4 in the list in Part I]
4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations;
5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;
6. to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship;
7. to ensure that workers performing night work benefit from measures which take account of the special nature of the work.

Article 3 - The right to safe and healthy working conditions

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and

[3] Although this provision has not been referred to expressely it could be regarded to be covered by No. 7 of the list in Part I

workers' organisations:

1. [See No. 2 in the list in Part I]
2. [See No. 2 in the list in Part I]
3. [See No. 2 in the list in Part I]
4. [See No. 2 in the list in Part I]

Article 4 - The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

1. [See No. 3 in the list in Part I]
2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
3. to recognise the right of men and women workers to equal pay for work of equal value;
4. to recognise the right of all workers to a reasonable period of notice for termination of employment;
5. [See No. 3 in the list in Part I].

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.

Article 5 - The right to organise

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake

[See No. (13) in the list in Part I]

Article 6 - The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. [See No. 8 in the list in Part I]
2. [See No. 9 in the list in Part I]
3. [See No. 10 in the list in Part I]

and

4. [See No. 10 in the list in Part I]

Article 7 - The right of children and young persons to protection

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:

1. [See No. 14 in the list in Part I]
2. [See No. 14 in the list in Part I]
3. [See No. 14 in the list in Part I]
4. [See No. 14 in the list in Part I]
5. [See No. 14 in the list in Part I]
6. [See No. 14 in the list in Part I]
7. to provide that employed persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay; [4]
8. [See No. 14 in the list in Part I]
9. [See No. 14 in the list in Part I]
10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

Article 8 - The right of employed women to protection of maternity

With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:

1. [See No. 13in the list in Part I]
2. [See No. 13 in the list in Part I]
3. [See No. 13 in the list in Part I]
4. [See No. 13 in the list in Part I]
5. [See No. 13 in the list in Part I]

Article 9 - The right to vocational guidance

With a view to ensuring the effective exercise of the right to vocational guidance, the Parties undertake

[See No. 7 in the list in Part I]

Article 10 - The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake:

1. [See No. 7 in the list in Part I]
2. [See No. 7 in the list in Part I]
3. [See No. 7 in the list in Part I]

[4] Since the general provision on paid leave has been included [see No. 4 in the list in Part I] and since there is no higher standard required for young persons, this provision seems to be covered by the list.

4. [See No. 7 in the list in Part I]

Article 11 - The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. [See No. 11 in the list in Part I]
2. [See No. 11 in the list in Part I]
3. [See No. 11 in the list in Part I]

Article 12 - The right to social security

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. [See No. 12 in the list in Part I]
2. [See No. 12 in the list in Part I]
3. [See No. 12 in the list in Part I]
4. [See No. 12 in the list in Part I]

Article 13 - The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. [See No. 12 in the list in Part I]
2. [See No. 12 in the list in Part I]
3. [See No. 12 in the list in Part I]
4. [See No. 12 in the list in Part I]

Article 14 - The right to benefit from social welfare services

With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake:

1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;
2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

Article 15 - The right of persons with disabilities to independence, social integration and participation in the life of the community

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1. [See No. 15 in the list in Part I]

2. [See No. 15 in the list in Part I]

3. [See No. 15 in the list in Part I]

Article 16 - The right of the family to social, legal and economic protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Article 17 - The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake,

1. [See No. 14 in the list in Part I]

2. [See No. 14 in the list in Part I]

Article 18 - The right to engage in a gainful occupation in the territory of other Parties

With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:

1. to apply existing regulations in a spirit of liberality;

2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;

3. to liberalise, individually or collectively, regulations governing the employment of foreign workers;

and recognise:

4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.

Article 19 - The right of migrant workers and their families to protection and assistance

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;

3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

   a remuneration and other employment and working conditions;

   b membership of trade unions and enjoyment of the benefits of collective bargaining;

   c accommodation;

5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;

6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;

8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;

9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;

10. to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply;

11. to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;

12. to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker.

Article 20 - The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

a access to employment, protection against dismissal and occupational reintegration;

b vocational guidance, training, retraining and rehabilitation;

c terms of employment and working conditions, including remuneration;

d career development, including promotion.

Article 21 - The right to information and consultation

With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

a to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and

b to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.

Article 22 - The right to take part in the determination and improvement of the working conditions and working environment

With a view to ensuring the effective exercise of the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute:

a to the determination and the improvement of the working conditions, work organisation and working environment;

b to the protection of health and safety within the undertaking;

c to the organisation of social and socio-cultural services and facilities within the undertaking;

d to the supervision of the observance of regulations on these matters.

Article 23 - The right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

to enable elderly persons to remain full members of society for as long as possible, by means of:

a [See No. 5 in the list in Part I]

b provision of information about services and facilities available for elderly

persons and their opportunities to make use of them;

to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;

b [See No. 12 in the list in Part I]

to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

Article 24 - The right to protection in cases of termination of employment

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.

Article 25 - The right of workers to the protection of their claims in the event of the insolvency of their employer

With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection.

Article 26 - The right to dignity at work

With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:

1. to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct;

2. to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

Article 27 - The right of workers with family responsibilities to equal opportunities and equal treatment

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake:

1. to take appropriate measures:

   a to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;

   b to take account of their needs in terms of conditions of employment and social security;

   c to develop or promote services, public or private, in particular child daycare services and other childcare arrangements;

2. to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;

3. to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

Article 28 - The right of workers' representatives to protection in the undertaking and facilities to be accorded to them

With a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking:

a they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking;

b they are afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.

Article 29 - The right to information and consultation in collective redundancy procedures

With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.

Article 30 - The right to protection against poverty and social exclusion

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

a to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

b to review these measures with a view to their adaptation if necessary.

Article 31 - The right to housing

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 22 May 2000

CHARTE 4266/00

CONTRIB 139

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the submission by the Society for Threatened Peoples International in occasion of the hearing on 27 April 2000. [1]

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[1] This text has been submitted in German and English languages.

society for
threatened
peoples
international

Towards the effective protection of minorities in the EU ’s future Charter on Fundamental Rights

Written submission by Society for Threatened Peoples International to the hearing of the European Parliament in Brussels on 27 April 2000

Mr President,
Representatives of the European Parliament
and the EU Member States,
Ladies and Gentlemen,

On behalf of the Society for Threatened Peoples (Gesellschaft fur bedrohte Voelker/GfbV)International we salute you and thank you for the invitation to attend this hearing.

Our human rights organisation,which has been working for more than 30 years on behalf of linguistic,ethnic and religious minorities subjected to discrimination and persecution in Europe and throughout the world, welcomes the advent of a European Union Charter on Fundamental Rights.It is high time for the growing might of the EU institutions to be balanced by the establishment of legal rights of a binding and individually accessible nature for the people living in Europe.We note with particular concern,however,that the draft texts of the Convention on Fundamental Rights to date have made no provision for the necessary protection of linguistic, ethnic and religious minorities in Europe.

Minorities are an integral part of every society.They contribute to the essential diversity of cultures.They are therefore entitled to recognition and protection. Nevertheless time after time minorities in Europe have become the victims of persecution,climaxing in the crimes of genocide,class murder and mass deportation committed by the National Socialistm,Fascist and Communist dictatorships.Such crimes are still continuing in the Balkans today.Even in the stable democracies of western Europe people are discriminated against on account of their skin colour,language,culture or religion.

The victims of discrimination also include members of linguistic minorities and ethnic groups long-established in Europe.Although citizens of their own national states and of the EU,they are frequently deprived of the resources their educational and cultural institutions require.This has resulted in a process of progressive cultural impoverishment:the „euromosaic “study published by the European Commission in 1996 indicated that almost half the 46 minority languages of Europe had either only „limited “or „no prospects of survival “.

It is the opinion of international lawyers of repute that the only effective source of protection for linguistic,ethnic, religious and similar communities is the guarantee of their collective rights.However it appears to have already been decided that,following the tradition of international agreements on human rights already in force and the constitutions of the European democracies,the Charter on Fundamental Rights will embody individual rights.It appears all the more important,then,that the Charter should incorporate an Article which guarantees **minimum rights for the members of ethnic or national,linguistic and religious minorities** .Based on Article 27 of the International Covenant on Political and Civil Rights of 1966 we propose the following form of words:

> Persons belonging to ethnic or national,linguistic or religious minorities shall have the right,in community with other members of their group,to practise their religion,to promote their own culture and to use their own language in private or public.

The **outlawing of discrimination** on the grounds of race,origin,nationality,language,gender,sexual orientation,religion,ideology or political opinion is likewise imperative if minorities are to be protected.It is almost certain that the Charter on Fundamental Rights will in fact contain an Article dealing with this subject and it is essential therefore that the prohibition of discriminationshould apply not only to the citizens of the Union but explicitly to all peoples within the area of the EU.

As we are aware from discussions relating,for example, to the equal status of men and women or the problems of disabled persons,discrimination applied in practice against entire groups can often only be remedied with difficulty.In order to ensure that equal opportunities for such groups is a reality,we call for „affirmative action “ along the lines of the successful American model:groups that have suffered discrimination should qualify for specialsupport. Such support should moreover be targeted in particular at members of long-established linguistic, ethnic or national minorities.The discussion concerning whether the Charter should include political targets inaddition to individual rights has been a source of controversy.Nevertheless we are now proposing that the following paragraph be added to the Article dealing with the protection of minorities:

> The EU and the Member States call for specific measures to be taken to ensure the genuine equality of members of national majorities and members of linguistic,ethnic or national minorities.The EU calls for trans-border co-operation in minority regions.

We also urge the EU to give a lead regarding the prevention of genocide,mass expulsion and other grave crimes against humanity by adopting the Charter on Fundamental Rights.In addition to making this a target for political action,we would also urge the inclusion of an Article on the **right to a homeland** that would offer **individual protection from expulsion** :

1. Every person shall have the right to remain in their place of residence,their home region and their own country.
2. Every person shall have the right likewise to return of their own free decision to a place of their choice within their country of origin.

The prohibition of individual or collective expulsion,the right to a return home in safety and the freedom to choose a place of residence are already enshrined in different Articles of the International Covenant on Civil and Political Rights and in the European Convention on Human Rights and the Supplementary Protocols thereto.The right to a homeland was introduced in the Draft Declaration on Population Transfers and the Implantation of Settlers unanimously adopted by the UN Human Rights Commission on 17 April 1998.

Finally we would counsel against any attempt to limit the scope of the Fundamental Rights concerned or to restrict the Charter to a non-binding declaration. Not only would this result in the destruction of the concept of a European „Bill of Rights “,the international evolution of human rights would also experience a severe setback. In the final declaration issued by the Council of Europe meeting in Copenhagen in 1993 the Members of what was then the EC stated that their willingness to agree to the admission of additional states was conditional on the enactment of legislation incorporating the protection of minorities into the constitutions of the countries concerned.The adoption of such a right in the Charter on Fundamental Rights has therefore become a test of credibility.

On behalf of GfbV International we wish the members of the Convention every sagacity,courage and success in dealing with the task in front of them.

Luxembourg/Goettingen,April 2000,
Tilman Zulch,President of GfbV International,
Andre Rollinger,Vice-president

The Society for Threatened Peoples (Gesellschaft für bedrohte Völker/GfbV)International,human rights organization for discriminated and persecuted ethnic,religious and national minorities,has offices in Germany, Luxembourg,Austria,Switzerland,South Tyrol/Italy,Bosnia-Hercegovina and in France.Since 1993,she has Consultative Status (Cat.Spec.)with the Economic and Social Council (ECOSOC)of the United Nations.

To get more information about our human rights work,to support this submission for a better protection of minorities in the EU ’s future Charter on Fundamental Rights or in case of any questions,suggestions or new ideas concerning this campaign,please contact Dr.Andreas Selmeci at our main office,P.O.Box 20 24,D-37010 Göttingen,Tel.+49 551 49906-22,Fax +49 551 58028,e-mail pogrom@gfbv.de.Information about this campaign is also available on our homepage www.gfbv.de (click on the British banner and look at „Documents and Statements about Threatened Peoples and Minorities “).

Editors' note to CHARTE 4268/00, **Intervention du Mouvement international ATD Quart Monde à l'occasion de l'audition publique du 27/04/00**:

CHARTE 4267/00 never issued.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 5 mai 2000

CHARTE 4268/00

CONTRIB 141

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver l'intervention du Mouvement international ATD Quart Monde à l'occasion de l'audition du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française seulement.

Intervention du Mouvement international ATD Quart Monde, devant la Convention chargée d'élaborer une Charte des droits fondamentaux dans l'Union européenne, jeudi 27 avril 2000

Le Mouvement ATD Quart Monde qui est né en 1957, dans la glaise d'un bidonville de la banlieue parisienne de la volonté du Père Joseph Wresinski, un homme qui avait personnellement connu la grande pauvreté, se réjouit d'avoir été retenu dans le cadre de cette audition dédiée à la Charte des droits fondamentaux dans l'Union européenne.

Associé aux prises de position de nombreuses ONG présentes et, notamment au " Common statement " signé par beaucoup d'entre elles, le Mouvement international ATD Quart Monde voudrait vous exprimer cinq propositions.

Tout d'abord - et c'est le premier point, nous nous réjouissons de voir les travaux de la Convention progresser dans une optique très positive, qui consiste à rédiger une Charte à caractère contraignant et destinée à être intégrée dans les Traités de l'Union européenne. Cette attitude correspond à l'attente de millions de citoyens et de citoyennes qui seraient très déçus de trouver en fin de compte une coquille vide.. entourée d'un très joli ruban.

Du coup - et c'est mon deuxième point - on aborde le contenu de la Charte. Celle-ci doit comprendre l'ensemble des droits garantis dans la Convention européenne des droits de l'homme (Rome 1950) et dans la Charte sociale européenne révisée (Strasbourg 1996) qui constitue une excellente base pour les droits sociaux. Elle comprend notamment, à son article 30, un droit qui ne figurait dans aucun autre instrument des droits de l'homme, le " droit à la protection contre la pauvreté et l'exclusion sociale ". Ce nouveau droit a été obtenu suite aux propositions des personnes et familles très pauvres. Il devrait figurer aussi dans votre Charte, de même que le droit au logement qui se trouve à l'article 31 de la Charte sociale européenne révisée.

Je vais maintenant mettre l'accent sur un 3ème point, le droit à un revenu minimum garanti, qui est une revendication très ancienne du Mouvement ATD Quart Monde. Nous nous sommes réjouis lorsqu'en 1996, le Comité des Sages, présidé par Mme Maria Lourdes Pintasilgo avait proposé que ce droit figure parmi les droits fondamentaux à mettre dans le Traité d'Amsterdam comme symbole de l'Europe sociale. Car ce droit doit permettre à chacun de vivre dans la dignité. Il constitue un tremplin pour que chacun puisse être intégré à la société et assurer sa santé, son bien-être et celui de sa famille. Le projet travaillé actuellement par votre Convention comprend un article XIV sur le " droit à l'aide sociale ". A nos yeux, la ligne de progrès dans ce domaine serait de passer de " l'aide sociale " au " revenu minimum garanti ". Nous sommes heureux que plusieurs membres de la Convention aient déposé un amendement en ce sens.

Un quatrième point correspond également à l'une de nos plus anciennes demandes, c'est l'inscription dans la Charte du droit à la consultation et à la participation des ONG européennes auprès des Institutions européennes. De récentes initiatives nous laissent espérer des avancées dans ce que l'on désigne désormais par " dialogue civil structuré ". En tout cas, l'audition organisée aujourd'hui par la Convention conforte cet espoir.

En conclusion, il n'est pas inutile de rappeler que l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme et à la Charte sociale européenne révisée favoriserait une cohérence entre les différentes politiques de protection des droits en Europe.

Ainsi, sur ce point comme sur d'autres, l'action du Mouvement international ATD Quart Monde s'inscrit dans une mémoire, dans une histoire. Le 17 octobre 1987, le Père Joseph Wresinski réunissait une nombreuse assistance au Trocadéro à Paris. Depuis, cette date a été prise par l'ONU comme Journée mondiale du refus de la misère et on peut lire sur la Dalle du Parvis des Libertés et des Droits de l'homme cette inscription : " Là où des hommes sont condamnés à vivre dans la misère, les droits de l'homme sont violés. S'unir pour les faire respecter est un devoir sacré. "

Le 10 mai 1998, à la Haye, lors du 50ème anniversaire du premier Congrès européen, au cours duquel les Européens avaient été appelés à " faire échec à la guerre, à la peur et à la misère ", Madame Alwine de Vos van Steenwijk, présidente internationale du Mouvement ATD Quart Monde, était intervenue à la séance de clôture pour que le XXe siècle ne se termine pas sans un acte fort, un Sommet européen contre la pauvreté. Le récent Conseil européen de Lisbonne, malgré un ordre du jour chargé, a donné une première réponse à cette demande en lançant une nouvelle méthode ouverte de coordination prenant en compte les millions d'exclus et en qualifiant la situation " d'intolérable ".

Monsieur le Président, je ne cacherai pas mon émotion en vous confiant ce message au nom des plus démunis : " Dans cette Europe que nous voulons construire avec plus de paix, de prospérité et de solidarité, ne nous laissez pas camper aux portes de la Cité, parce que nous voulons contribuer à réaliser une démocratie digne de ce nom, fondée sur les droits fondamentaux pour tous. "

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 8 May 2000

CHARTE 4273/00

CONTRIB 146

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the position paper of the Irish Business Bureau (IBB) and Employers Confederation (IBEC) following the hearing of 27 April 2000. [1] [2]

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[1] This text has been submitted in English language only.

[2] Irish Business and Employers Confederation, Brussels Office - The Irish Business Bureau Rue Montoyer 17-19, box 3, 1000 Brussels. Tel. +32 (0)2 - 512.3333. Fax +32 (0)2 512.1353 e-mail: ibb@ibec.ie

The Inter-Governmental Conference of the European Union

and

The Charter on Fundamental Human Rights

Position Paper of the Irish Business and Employers Confederation

This submission is IBEC's contribution to the Irish Government both in respect of the recently opened negotiations to revise the European Union's Treaties and the simultaneous, but separate, elaboration of a Charter on Fundamental Human Rights.

1. The Inter-Governmental Conference

The legal rationale for holding yet another Inter-Governmental Conference (IGC) stems from a Protocol annexed to the last treaty revision, the 1997 Amsterdam Treaty. It stipulated that at least one year before the membership of the European Union exceeds twenty, a conference of the 15 EU governments would be convened in order to revise 'the composition and functioning of the institutions'. Thus, for enlargement to become a reality, the EU would be obliged to reform its working methods.

This IGC opened on 14 February 2000, not one year before enlargement to new Member States, as foreseen by Amsterdam, but years before that could realistically happen. The Heads of State and Government, at the Helsinki European Council in December 1999, agreed that the three so-called 'leftover' issues[1] from Amsterdam must be addressed right now, before the enlargement negotiations started at all. This means that what is decided over the coming year by the 15 will actually settle the shape and working methods of a Union eventually comprising upwards of 13 more countries.[2]

A more ambitious agenda of reform, as articulated by the Commission, has been postponed.

The IGC will continue to meet on a weekly basis at the level of personal representatives of the EU's Foreign Ministers, chaired by the Portuguese and subsequently by the French Presidencies. It is envisaged that the negotiations will conclude at the Nice Summit on 7-8 December.

The issues that are relevant from a business and employer perspective include:

* Ireland's influence within the Community Institutions
* Extending Qualified Majority Voting
* The scale of ambition of the IGC

- IBEC's Overarching Views

IBEC takes the view that the Irish Government should not restrict itself to a cautious and incremental approach to the negotiations on Treaty reform, but should adopt a robust and pro-active attitude to adapt the Community in advance of enlargement.

While recognising political realities at EU level, IBEC believes it is in the long-term interest of the Community to proceed now with fundamental constitutional reform. Rather than focusing on the limited agenda favoured by the majority of Member States, there is merit in considering extending the IGC process to other areas, some of which have been identified by the Commission. Recognising that enlargement will not happen before 2005, Member States could set the target of having the results of a more comprehensive IGC submitted to Europe's electorate in June 2004, the date of the next direct elections to the European Parliament.

IBEC also believes that, at a fundamental level, the current negotiations must not lead to the traditional balance between large and small Member States being re-weighted in favour of the former, to the extent that a 'directory' of five, and eventually six countries, could come to dominate the future direction and policies of the EU. This would not achieve the declared Treaty goal of 'deepening the solidarity between the peoples of Europe while respecting their history, their culture and their traditions'.

- Reform of the European Commission

The Treaty of Amsterdam stipulated that at the date of the next enlargement - now expected sometime between 2004 to 2006 - the Commission would comprise of only one representative from each country, thus reducing the number of Commissioners from Germany, France, Italy, Spain and the UK. In the short term therefore, assuming that fewer than five countries join in the first wave, this would possibly mean all countries which have two Commissioners would lose one nomination.

IBEC does not share the view that some Member States can be ultimately left un-represented within the College of Commissioners. In particular, any attempt to fix the number of Commissioners at a level[3] which would result in uninterrupted representation of large Member States but with some form of rotation for smaller countries, is not acceptable. The essence of democracy is adequate representation. In Ireland's case, it is inconceivable that we would be excluded from the Executive given the pivotal role it plays.

By contrast, the option of re-casting the role of Commissioners would be much more practicable. In this scenario, the President would head a College comprising of a reduced number of 'senior' Commissioners, with 'junior' Commissioners reporting to individual Commissioners, much in the same way as cabinet government already operates in several Member States. The number of junior positions could easily vary as a function of the number of countries in the EU at any given time; while the allocation of the senior Commission portfolios would be decided by the President elect, on the basis of merit rather than the country of origin of the prospective Commissioner, and independently of deliberations within the Council, as has been the case up to now. In this way, the calibre of politicians putting their names forward for a post in the Commission would be the decisive factor in the quality of their post in Brussels.

- Re-weighting of Voting Strengths in the Council of Ministers

The above-mentioned Amsterdam Protocol stated that the modification of national representation in the Commission would be conditional upon an appropriate re-weighting of votes in the Council, thereby 'compensating' larger Member States for the loss of their second Commissioner. The two options suggested at Amsterdam were a straight re-weighting of the number of votes allocated to each country, or the introduction of a dual majority, in which a qualified majority would equal, not 71% of the votes cast, but would instead constitute a simple majority of the Member States and a majority of the EU population.

The latter of these options is favoured by IBEC, as it guarantees the interests of sovereign states - one Irish vote being equal to one German vote, just as Alaska (0.6 million people) and California (32 million) are equally represented in the US Senate. On the other hand, the will of the EU population as a whole would be justly reflected in the need for all adopted legislation to represent a majority of EU citizens - thus in a system with 370 votes (each vote representing 1 million voters) where 186 were necessary to adopt a proposal, Ireland would have 4 votes and Germany 87; each vote representing one million voters. This dual majority system would have the benefit of simplicity, transparency and ultimately flexibility, in the event of successive enlargements.

- Voting Procedures in the Council of Ministers

Qualified majority voting already applies to over 70% of all legislation negotiated in Brussels and Strasbourg. It is proposed that QMV be extended to all of the remaining spheres of Community legislation, with the exception of major constitutional decisions, such as accession of new Member States and reforms of the treaties. IBEC accepts in principle the logic of a further extension of QMV to some of the areas, in particular internal market issues, still covered by unanimity.

IBEC believes QMV should be extended to the following areas:

- in the budgetary field of own resources (Art. 269);
- measures taken when a Member State is threatened with severe difficulties caused by exceptional occurrences (Art. 100);
- transport regime affecting living standards and employment (Art. 71,2);
- culture (Art. 151,5[4]), decisions on freedom of movement in the EC (Art. 18,2[5]);
- rights of self-employed to provide services in other Member States (Art. 47, 2[6]); and
- actions in favour of the competitiveness of industry (Art. 157,3).

Further consideration needs to be given regarding the extension of QMV to external trade policy issues (Art. 133).

A failure to grasp the nettle of a further pooling of sovereignty in these areas can only increase the threat of greater use of 'closer co-operation' between some Member States. Ireland has already experienced, in a less than ideal manner, the operation of such flexibility both from the inside and the outside (EMU and Schengen).

The provisions in the treaty on EMU need to be updated, taking account of the fact that the euro is now a reality, and providing greater clarity for potential second and third wave entrants. In addition, for the purpose of simplicity and greater democratic accountability, IBEC considers that the existing articles on economic and monetary policy under Title VII of the EC Treaty relating to the use of the 'co-operation' procedure should be replaced with the co-decision procedure.

No further extension of QMV can be accepted in areas fundamental to the sovereignty and national interests of Member States. This includes national social security arrangements (and all other measures foreseen by Art. 137,3), environment measures of a fiscal nature (and all other measures foreseen by Art. 175,2), tasks and objectives of the structural funds (Art. 161), and, above all, taxation policy and tax rates (Art. 93-94). However, implementing decisions which stem from earlier unanimous framework decisions in the taxation field could be taken by QMV.

- Other Issues

In the event that the IGC extends its agenda to such matters as the first and second pillars, IBEC would reserve the right to make a further submission.

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2. Charter On Fundamental Human Rights

The Treaty of Amsterdam states (Article 6.1)*: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms.* Thus there is already a clear assertion that fundamental rights exist and must be respected.

In trying to create a "Europe of the Citizen", fundamental rights were deemed by politicians only to work if they are highly visible and if ascertainable rights "*stimulate the readiness to accept the EU and to identify with its growing intensification*" in the EU citizen. The expected 'Bill of Rights' did not appear in the Amsterdam Treaty.

In attempting to address these concerns, the Helsinki European Council has brought together a Convention of MEPs, members of government (Michael O'Kennedy T.D. for the Irish government) and members of national parliaments (Desmond O'Malley T.D. and Bernard Durkan T.D. for *Daíl Eireann*). Their brief is to produce a draft Charter of Fundamental Rights covering civil, political and social rights.

The list of rights the group is reviewing is extensive, inspired by the 'main' Charters which already apply including the European Convention of Human Rights, various ILO, UN and Council of Europe Treaties. One issue which has already emerged is whether a distinction could be made between civil and political rights and economic and social objectives and how they may be implemented. The biggest problem is less the content of the Charter but its legal status. At present, the aim is to establish a Bill of Rights, rather than conferring new powers on the Union to legislate in the field of fundamental rights. While the Charter is intended to apply solely to the Union's institutions and not to activities of Member States, the efficient safeguard of fundamental rights as a rule presupposes judicial protection. Thus there is significant political pressure to make the Charter legally binding as part of the EU's Treaties.

The impact of this aspiration has not yet been thought through. To give legal status to, for example, the right to a healthy environment or to join a trade union could give any citizen the right to bring an individual company or Member State to a national court or the ECJ for not safeguarding that right, or *in extremis* could force the national legislator or the ECJ to develop a more coherent theory of limitation. The binding nature of the Charter would not be a problem if it merely listed the rights that have an essentially justiciable character. However, if the Charter included rights that would ordinarily be considered to be in the nature of non-binding commitments or aspirations, the whole project could become a legal minefield. Creating legal uncertainty must be avoided at all costs. While the choice is a political one, the Charter is already being drafted so that it is capable of being incorporated into the treaties if needed.

A binding Charter is strongly supported by the European Parliament whose MEPs foresee plaintiffs taking cases on foot of the Charter having access to the ECJ. The Parliament also has on its agenda that fundamental rights could be extended to cover such matters as biotechnology.

A strategy which is gaining in popularity within the Convention is to have two parts to the Charter, one which is legally binding, the other describing these rights and obligations and which reflects aspirations and is not binding. This is the ideal way to give added value to European citizens, without prejudice to legal certainty.

Another complication is that the Charter may place those rights simultaneously under the jurisdiction of the European Court of Justice and the European Court of Human Rights, creating the need for a new relationship to be worked out.

The draft Charter will be ready by the end of 2000**,** and may become part of the new Treaty on institutional reforms which may be adopted by the Nice Summit in December.

IBEC supports the drawing up of a Charter subject to the following comments:

1. Only fundamental and universal rights should be covered by the Charter. Standards set by Community Directives should not fall within the remit of the Convention.
2. The Charter should express the Treaty's four fundamental freedoms (free movement of goods, people, services and capital), but should not declare these principles to be fundamental rights.
3. The Charter should state, perhaps in the Preamble, that the protection of fundamental rights recognises the importance of maintaining Europe's competitiveness.
4. It should clarify existing rights, but not undermine them.
5. No new rights should be promulgated.
6. No new powers should be given to the Community's Institutions. The Charter is not a licence for the EU to regulate.
7. The Charter should not be legally binding.
8. There should be no commitment to a right to vocational training (ref: Article 12) or to workers' information and consultation (these issues are more appropriate to secondary legislation, or to Codes of Best Practice).
9. The right to join a trade union should be balance with a right to exercise freedom not to join a trade union or association (ref: Article 13).
10. The right to ownership should have regard to Ireland's constitutional position on property rights and the Planning Act 2000 (ref: Article 16).
11. Respect for the Charter should be conditional of continuing membership of the Union.
12. The autonomy of the European social partners under the Social Protocol should be acknowledged, perhaps by an interpretative statement.
13. The current non-binding Social Charter should not be amended by the Convention. Proposals to enshrine trade union rights and to incorporate such rights as the right to a minimum wage, the right to housing and the right to protection from social exclusion and to include a right of access to social rights are, in accordance with the principle of subsidiarity, not a matter for determination at Community level.

The Charter will be portrayed as being of real significance to the Union's citizens. Therefore nothing should be included that cannot be fulfilled. A clear distinction should be made between fundamental rights and political aspirations. Corresponding obligations should also be included where this is relevant.

Finally, IBEC would like to know whether a referendum will be needed in Ireland if the Charter is adopted.

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3. Communicating "Europe"

The Programme for Prosperity and Fairness includes a commitment that a programme will be put in place by government *"to adjust Irish public awareness of EU matters away from the direct cash transfers and towards the more indirect but still substantial benefits arising from the social, economic and cultural development of the EU"*. (Framework IV, section 4.6.4).

IBEC believes this initiative should be launched as soon as possible in the context of the current IGC and the on-going work of the Convention. Public awareness of Europe in Ireland is positive. Therefore it is critical that the issues being negotiated this year are communicated in a professional, timely and transparent manner. A debate about Ireland's role in an enlarged Europe should be encouraged.

April 2000

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1 Size and composition of the European Commission; weighting of votes in the Council of Ministers; and possible extension of qualified majority voting in the Council.

2 Poland, the Czech Republic, Hungary, Slovenia, Estonia and Cyprus; who were joined by Slovakia, Latvia, Lithuania, Romania, Bulgaria and Malta following the Helsinki Summit, with Turkey recognised as a long-term candidate. Positive reaction to the recent political advances in Croatia would suggest that both it and other Balkan states will not be excluded from the enlargement process.

3 For example, fixing the number of Commissioners at 21 would hypothetically allow 6 Member States to be guaranteed a seat, but would force the remaining 21 countries to be represented in only 5 of 7 Commission terms of office.

4 Decisions in this sphere, while taken by co-decision between the institutions, are seriously delayed by the requirement for unanimity in Council throughout the procedure. A similar anomaly for decision in the R&D sector was removed at Amsterdam.

5 *Ibid*.

6 *Ibid*.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 8 mai 2000

CHARTE 4274/00

CONTRIB 147

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint le texte de l'exposé de la Fédération des Associations Familiales Catholiques en Europe à l'occasion de l'audition du 27 avril 2000.[1]

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[1] Ce texte a été soumis en langue française uniquement.

FEDERATION DES ASSOCIATIONS FAMILIALES CATHOLIQUES EN EUROPE
FÖDERATION DER KATHOLISCHEN FAMILIENVERBÄNDE IN EUROPA
FEDERATION OF CATHOLIC FAMILY ASSOCIATIONS IN EUROPE

Charte Européenne des Droits Fondamentaux

Intervention auprès de la Convention le 27 avril 2000 **le 25.04.2000**

Monsieur le Président, Mesdames et Messieurs les Députés, Mesdames et Messieurs,

Au nom de **La Fédération des AFC en Europe**, qui représente 5.5 millions de familles, je vous remercie de l'audition qui nous est accordée.

La **Famille** est la plus ancienne structure de la Communauté humaine, elle précède toute organisation publique ou d'Etat, elle est l'élément naturel et fondamental de la Société.

Communauté de vie d'un homme et d'une femme, établie sur l'engagement public stable du mariage, ouverte à la vie, la **Famille** structure la Société et assure sa cohésion en profondeur. Elle est le lieu privilégié à l'accueil de la vie.

C'est en son sein que s'accomplit l'apprentissage fondamental et indispensable du « **vivre en société** » par les tâches éducatives qui incombent aux parents, mais aussi à travers des liens d'amour, d'affection et de protection, qu'aucune loi ne peut décréter.

C'est en **famille** que l'on apprend l'acceptation de l'autre différent de soi, le vivre ensemble au jour le jour, le partage des biens matériels comme aussi des joies et des peines, la tolérance et le pardon qui permettent de dépasser les situations conflictuelles, le soutien aux plus faibles, la solidarité et la prise en charge intergénérationnelle. La **Famille** n'est-elle pas la première caisse de chômage pour les jeunes en quête d'emploi ?

Par la complémentarité **Homme-Femme, Père-Mère** dans leurs rôles éducatifs respectifs, dès le plus jeune âge, l'enfant peut se structurer psychiquement et affectivement. « *L'enfant, pour l'épanouissement harmonieux de sa personnalité, doit grandir dans le milieu familial, dans un climat de bonheur, d'amour et de compréhension ». (Conv. Droits de l'enfant).* L'enfant a le droit d'être élevé par sa mère et son père.

Certes, des dysfonctionnements existent dans certaines familles, d'autres sont blessées, notamment par des séparations, cependant cela n'enlève en aucun cas les valeurs essentielles pour la vie en société, transmises dans et par la **cellule familiale**.

C'est pourquoi, une Société soucieuse de son avenir doit veiller à la **stabilité des familles** et favoriser **l'accueil de la vie.**

Aucune structure d'Etat n'est en mesure de remplacer la **Famille**, plusieurs exemples à travers l'histoire l'ont largement démontré. Plutôt que de tenter de se substituer aux **familles**, les pouvoirs publics ont le devoir de soutenir les **familles**, de les encourager, de leur garantir des droits spécifiques.

L'ONU dans sa « Déclaration Universelle des Droits de l'Homme », Le Conseil de l'Europe dans sa « Convention Européenne des Droits de l'Homme » et dans sa « Charte Sociale Révisée », enfin la « Convention des Nations Unies sur les droits de l'enfant » mentionnent clairement que *« la **Famille** est l'élément naturel et fondamental de la société, qu'elle est le milieu naturel pour la croissance et le bien être de tous ses membres et en particulier des enfants, et qu'elle doit recevoir la protection et l'assistance dont elle a besoin pour pouvoir jouer pleinement son rôle dans la communauté. »*

Il nous paraît indispensable que la **Famille** soit intégrée dans la « ***Charte Européenne des Droits Fondamentaux*** ». Cette ***Charte*** ne peut pas rester en deçà des conventions susmentionnées déjà ratifiées par beaucoup d'Etats. Il est hautement souhaitable qu'une recommandation européenne en faveur d'une réelle **politique familiale** soit élaborée afin de servir de cadre aux Etats-membres.

La **Famille** représente infiniment plus que des droits individuels additionnés, (droit de l'Homme, droit de la Femme, droit de l'Enfant) et par le principe de la non discrimination, elle doit être prise en compte en tant que telle, élément naturel et fondamental de la Société, à laquelle sont attachés des droits comme aussi des devoirs.

C'est cela que nous demandons dans notre « **Contribution** », Contribution qui vous fut adressée et dont je vous remercie de bien vouloir prendre connaissance, afin d'en tenir compte dans la rédaction de la ***CHARTE.***

Je vous remercie de votre attention.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 8. Mai 2000

CHARTE 4275/00

CONTRIB 148

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag des deutschen Städte- und Gemeindebundes. [1]

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[1] Dieser Text wurde nur in deutscher Sprache vorgelegt.

Deutscher
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Herrn
Bundespräsident a.D.
Prof. Dr. Roman Herzog
Präsident des EU-Grundrechtekonvents
Postfach 86 04 45
81631 München

Berlin, den 17. April 2000 G/3 050-25 zi

Erarbeitung einer EU-Charta der Grundrechte

Appell des Deutschen Städte- und Gemeindebundes nach einem Recht auf Selbstverwaltung in der EU-Charta der Grundrechte

Sehr geehrter Herr Bundespräsident a.D. Professor Dr. Herzog,

der Deutsche Städte- und Gemeindebund möchte Ihnen gerne einen Vorschlag im Rahmen der Erarbeitung einer EU-Charta der Grundrechte unterbreiten.

Die deutschen Städte und Gemeinden sind in vielfältiger Weise vom europäischen Integrationsprozess betroffen. Sie legen dabei ein klares Bekenntnis zur Europäischen Union und zum europäischen Einigungsprozess ab. Wenn davon gesprochen wird, ein "Europa der Bürger und Bürgerinnen" errichten zu wollen, so möchten wir in diesem Zusammenhang darauf hinweisen, dass es die kommunale Ebene ist, die dem Bürger am nächsten steht und tagtäglich vor diesen in der Verantwortung, die Politikgestaltung der höheren politischen Ebenen zu vertreten und umzusetzen. Gleichermaßen erlaubt und gewährleistet es die kommunale Selbstverwaltung, die Identifizierung des Bürgers mit dem Staat zu stärken und Demokratie als politische Mitwirkungsmöglichkeit unmittelbar erlebbar zu machen.

Der Deutsche Städte- und Gemeindebund ist daher der Auffassung, dass der Prozess der Erarbeitung einer EU-Charta der Grundrechte auch Anlass sein sollte, über dieses Politikmodell und dessen Zukunft im europäischen Integrationsprozess nachzudenken und entsprechende Schlüsse für die Charta zu ziehen.

Bei der EU-Charta der Grundrechte geht es nicht nur darum, einen Konsens unter den nationalen (verfassungs-)rechtlichen Grundpositionen zu erzeugen. Die supranationalen Handlungsformen der EU haben Frage- und Problemstellungen auch für bürgerschaftliche Rechtspositionen erzeugt, die naturgemäß bisher von den nationalen Rechtsordnungen nicht beantwortet werden mussten. Daher muss eine EU-Charta der Grundrechte notwendigerweise über den Konsens der nationalen Ordnungen hinaus Antworten auf diese europäischen Fragen geben.

Dies betrifft insbesondere das Subsidiaritätsprinzip, das in der sowohl in der Präambel des EU-Vertrages wie auch in Art. 5 des EG-Vertrages unmittelbar im europäischen Primärrecht verankert ist. Da es sich hierbei um ein so tragendes wie grundlegendes Prinzip für die (zukünftige) Entwicklung der Europäischen Union handelt, muss das Subsidiaritätsprinzip auch als bürgerschaftliche Rechtskomponente Aufnahme in die EU-Charta der Grundrechte finden.

Wir schlagen daher vor, dies dadurch anzustreben, dass folgende Textpassage eines "Rechts auf Selbstverwaltung" zur Verwirklichung des Subsidiaritätsprinzips im Verhältnis zum Bürger in die Charta aufgenommen wird:

"Die Europäische Union gewährleistet und fördert das Recht der Bürgerinnen und Bürger, ihre örtlichen Angelegenheiten mit Hilfe kommunaler Gebietskörperschaften selbst effektiv zu gestalten, die über demokratisch legitimierte Beschlussfassungsorgane und eine große Autonomie im Hinblick auf ihre Befugnisse und Mittel verfügen."

Ein bürgerschaftliches Recht auf effektive Gestaltung der örtlichen Angelegenheiten durch demokratisch gewählte Vertretungen ist eine praktische Ausprägung des Subsidiaritätsprinzips. So wie es möglich war, die Inhalte der Europäischen Menschenrechtskonvention in Artikel 6 des EU-Vertrages aufzunehmen, muss es auch möglich sein, die für die Bürgernähe wesentlichen örtlichen Freiheits- und Gestaltungsrechte in geeigneter Form zu gewährleisten. Dies gilt umsomehr, als die lokale Gestaltung des unmittelbaren Lebensumfeldes ein wichtiger Bestandteil europäischen Kultur- und Politikverständnisses ist.

Vor der Gründung der Nationalstaaten war Europa ein Gebilde aus Städten und Gemeinden. Aus diesen selbstbewussten dezentralen Strukturen ist auch die EU gewachsen. Die in der Charta der kommunalen Selbstverwaltung des Europarates (1988) festgeschriebenen Grundsätze der kommunalen Selbstverwaltung sind allen EU-Mitgliedsstaaten gemein. Diese Charta wurde von nahezu allen EU-Mitgliedsstaaten völkerrechtlich verbindlich ratifiziert. Daher kann bereits davon gesprochen werden, dass die Grundsätze kommunaler Selbstverwaltungstätigkeit zur nationalen Identität der Mitgliedsstaaten im Sinne des Art. 6 Abs. 3 EU-Vertrag zählen.

Der beratende Ausschuss der regionalen und lokalen Gebietskörperschaften in der Europäischen Union (AdR) hat wiederholt ihre Aufnahme in die EG-Verträge gefordert. Dies ist um so notwendiger und nützlicher, als die Charta der kommunalen Selbstverwaltung die erste rechtliche Vereinbarung zwischen europäischen Staaten war, in der das Subsidiaritätsprinzip definiert wird.

Bei dem Subsidiaritätsprinzip handelt es sich um ein sozialphilosophisches Konzept. Es betrifft in grundlegender Weise die Gestaltung einer gesellschaftlichen Kompetenz- und Zuständigkeitsverteilung. Diese Verteilung lässt in erkennbarer Weise Schlüsse für die Zuweisung von Kompetenzen für die über- und untergeordneten Regierungs- und Verwaltungsebenen eines Staates zu. Es wäre somit angemessen, in der EU-Charta der Grundrechte die Grundsätze einer effektiven Gestaltung der örtlichen Lebensverhältnisse als bürgerschaftliche Rechtsposition aufzunehmen.

Der "örtliche Bezug" des Subsidiaritätsprinzips ist bereits heute im EG-Vertrag erwähnt. So gibt bspw. Art. 19 Abs. 1 EG-Vertrag jedem Unionsbürger das aktive und passive Wahlrecht bei Kommunalwahlen. Dieses durch den EG-Vertrag gewährleistete Recht unterstellt denknotwendig eine effektive Gestaltung der Lebensverhältnisse vor Ort durch demokratisch gewählte Vertretungen. Es ist daher nur konsequent, diese Komponente auch in der EU-Charta der Grundrechte anzuerkennen. Schließlich bringt es das Subsidiaritätsprinzip schlechthin zum Ausdruck, dass politische Entscheidungen möglichst bürgernah getroffen werden. Mit einem modernen Grundrecht auf Selbstverwaltung und Subsidiarität betritt man also im EG-Recht nicht grundsätzlich "Neuland".

Der AdR hat in seiner Stellungnahme zur Erarbeitung einer EU-Grundrechtecharta (Dokument CdR 327/99 rev. 1) ebenfalls aufgefordert, ein bürgerschaftliches Recht aufzunehmen, nach dem die örtlichen Angelegenheiten von demokratisch gewählten Vertretungen effektiv wahrgenommen werden können. Dies wird zu dem zutreffend in der Initiativstellungnahme des Ausschusses der Regionen zu dem Thema "Unionsbürgerschaft" (Az.: CdR 226/99 rev. 2) zum Ausdruck gebracht.

Gerade im Zusammenhang mit der Erweiterung der EU nach Mittel- und Osteuropa hat dieser Zusammenhang neue Bedeutung erlangt. Die Beitrittsstaaten legen großen Wert auf die Kultivierung lokaler und regionaler Demokratie, gerade und auch im EU-Zusammenhang. Durch eine möglichst bürgernahe Politik in der EU erfolgt zudem eine Stärkung der Europäischen Integration. Der Formulierungsvorschlag des Deutschen Städte- und Gemeindebundes für ein Recht auf Selbstverwaltung als Ausprägung des Subsidiaritätsprinzips überlässt es zudem ganz im Sinne des Subsidiaritätsprinzips den Mitgliedsstaaten und Regionen selbst, wie die konkrete Ausgestaltungen örtlicher Demokratie erfolgen soll.

Wir würden Sie daher sehr gerne darum bitten, sehr geehrter Herr Bundespräsident a.D. Professor Dr. Herzog, sich im Sinne unseres Vorschlags beim weiteren Prozess der Erarbeitung der EU-Charta der Grundrechte einzusetzen.

Mit freundlichen Grüßen

(Dr. Gerd Landsberg)

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 8 mai 2000

CHARTE 4276/00

CONTRIB 149

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint le texte de l'intervention de l'OCIPE à l'occasion de l'audition du 27 avril 2000.[1] [2]

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[1] Pierre de Charentenay, Directeur del'OCIPE (Bureau européen des jésuites) 3 rue de Trévires, 1040 Bruxelles. Tél. 737 97 22.

[2] Ce texte a été soumis en langue française uniquement.

Audition de l'OCIPE à la Convention de la Charte des droits fondamentaux
27 avril 2000

Je veux d'abord approuver le travail déjà fait par la Convention et appuyer tout ce processus de rédaction d'une Charte des droits fondamentaux. Ces droits doivent être défendus et leur mise en forme est une étape politique essentielle pour l'Europe.

Mais mon propos voudrait insister sur la dimension collective de notre vie commune. Le bien de la communauté politique européenne ne sera pas automatiquement servi par une juxtaposition des droits individuels. Cette juxtaposition risque d'isoler les individus, voire de les opposer les uns aux autres, en tout cas de briser le lien de solidarité sans lequel il n'y a pas de société humaine. Nous avons tous besoin de relations, de communauté autant que du respect de nos droits individuels. Quelle société européenne aurons nous construit, si nous préparons des vies protégées mais dans la solitude et l'ignorance mutuelle ? Nous aurons renforcé le côté négatif de la modernité de plus en plus individualiste en augmentant l'anomie et l'isolement dans lesquels vit chaque citoyen. Dans ce contexte, une défense absolue des droits individuels risque de favoriser les effets pervers d'éclatement de nos sociétés comme si l'individu pouvait vivre seul au monde.

Or notre modèle européen est un modèle unique d'équilibre qui allie le respect de l'individu et de la communauté. Il n'est ni entièrement dominé par le seul souci de l'individu, ni entièrement dominé par la seule préoccupation de la communauté. Ainsi les individus ont-ils des obligations vis-à-vis de la collectivité. Quant à la communauté, elle a aussi des droits, même si elle n'a pas tous les droits. La dignité humaine, fondement des droits, ne peut être réalisée et protégée que dans le cadre d'une vie en communauté. C'est là dessus que la Charte doit prendre position en soulignant l'obligation sociale des individus et le droit correspondant de chaque citoyen à une vie relationnelle, une vie communautaire humaine

Si cette charte doit être au moins aussi exigeante que tous les grands textes précédant elle ne peut pas faire moins que la Déclaration Universelle des droits de l'homme de 1948 qui dans son article 1 invite tous les êtres humains " à agir les uns envers les autres dans un esprit de fraternité "

C'est dans cet esprit que je propose que soit rédigé un court préambule à cette charte, dont je vous mets un projet ci-dessous:

Préambule

Les peuples de l'Union Européenne se dotent d'une Charte des droits fondamentaux pour manifester à tous, citoyens d'Europe et citoyens du monde, les valeurs qui sont les leurs et qu'ils veulent promouvoir autant dans leurs frontières qu'à l'extérieur. Ces droits sont fondés sur le respect de la dignité humaine. Ils trouvent leur expression dans une vie sociale et politique, et dans la possibilité pour chaque citoyen de constituer des communautés de vie et de travail. Ne pouvant être réalisés que par l'action déterminée de chacun, ces droits forment un ensemble de tâches à accomplir dont la première est l'exigence de solidarité et de fraternité. Dans le respect des différences, tous les citoyens de l'Union européenne sont acteurs et bénéficiaires de ces droits pour former ensemble une communauté politique.

Pierre de Charentenay
OCIPE

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 12 mai 2000

CHARTE 4277/00

CONTRIB 150

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une contribution du Centre Européen des Entreprises à Participation Publique et des Entreprises d'Intérêt Économique Général (CEEP) [1] [2]

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[1] Ce texte a été soumis en langue française seulement.

[2] CEEP: rue de la Charité 15 boîte 12, B-1210 Bruxelles. Tél: +32-2-219 2798. Fax: +32-2-218 1213. E-mail: CEEP@interweb.be

CENTRE EUROPEEN DES ENTREPRISES
À PARTICIPATION PUBLIQUE
ET DES ENTREPRISES
D'INTÉRÊT ÉCONOMIQUE GÉNÉRAL
EUROPEAN CENTRE OF ENTERPRISES
WITH PUBLIC PARTICIPATION
AND OF ENTERPRISES
OF GENERAL ECONOMIC INTEREST

CEEP.00/S.P.05
Le 5 mai 20000

CONTRIBUTION DU CENTRE EUROPÉEN DES ENTREPRISES À PARTICIPATION PUBLIQUE ET DES ENTREPRISES D'INTÉRÊT ÉCONOMIQUE GÉNÉRAL (CEEP)

Droits fondamentaux et services d'intérêt général

Parmi les droits fondamentaux, on peut distinguer les droits de nature constitutionnelle tels que le droit d'expression, le droit d'association, …qui sont affirmés par des textes de portée juridique, et que les citoyens peuvent exercer individuellement ou collectivement. Aucune structure particulière n'est nécessaire pour permettre l'exercice de ces droits. Si un citoyen considère que ses droits sont bafoués, il a la possibilité de s'adresser directement au pouvoir judiciaire pour faire cesser le trouble.

Mais il existe d'autres types de droits, principalement dans le domaine économique et social, qui constituent en fait des objectifs, tels le droit à la santé, à l'éducation, au logement, les droits d'accès à des moyens de communication, de déplacement, …. Ces droits sont des objectifs pour nos sociétés démocratiques, dont la mise en oeuvre est assurée par des services. Ces services ont des caractéristiques particulières, notamment en ce qui concerne l'égalité d'accès, et la continuité de service, et des modalités d'organisation et de gestion dont les principes doivent être définis et contrôlés par l'autorité publique, principalement dans les domaines de la sécurité, la tarification, et la qualité de service. Ce sont des services d'intérêt général .

Les droits fondamentaux doivent être garantis

Affirmer les droits fondamentaux des citoyens suppose que des mesures efficaces sont prises pour en assurer le respect.

En ce qui concerne les droits qui peuvent être exercés directement par les citoyens, la garantie de l'exercice de ces droits est assurée par un texte ayant une portée juridique permettant l'accès individuel au tribunal compétent.

Lorsque les droits nécessitent l'accès à un service d'intérêt général, il appartient à l'autorité publique compétente d'organiser ce service en respectant certains critères dont les principaux ont été évoqués précédemment. Si cette organisation est défaillante, le recours aux tribunaux n'est possible que dans des cas limités (discrimination individuelle par exemple).

La nécessité d'un document de référence au niveau européen concernant les services d'intérêt général

Si des droits fondamentaux basés sur des services d'intérêt général sont affirmés au niveau de l'Union Européenne, un texte doit être établi au même niveau pour définir les principes régissant ces services, afin d'assurer une garantie et cohérence minimales concernant l'exercice de ces droits au niveau européen, et de servir de référence aux Etats candidats à l'adhésion. Il faut souligner qu'il n'existe actuellement même pas une définition commune de la notion de service d'intérêt général, et que le seul texte officiel est une communication de 1996 de la Commission Européenne, qui ne traite qu'une partie du sujet et qui n'a pas de portée réglementaire.

Ce texte de référence pourrait prendre la forme d'une Charte des Services d'Intérêt Général.

Le CEEP demande à la Convention de prendre en considération cette lacune, en préconisant dans ses conclusions la préparation d'une Charte des Services d'Intérêt Général comme complément indispensable de la Charte des Droits Fondamentaux.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 May 2000

CHARTE 4278/00

CONTRIB 151

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the intervention by the Franciscans (Commission for Justice, Peace and Integration of Creation) made at the hearing on 27 April 2000. [1]

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[1] This text has been submitted in English language only.

Dear Ladies and gentlemen, members of the European Parliament

We appreciate the chance that you give the Franciscan movement, to contribute to the Charter intended to improve and guarantee the rights of the people in the European Union. We stand in the tradition of St. Francis of Assisi respecting all life.
Related to the Tampere paper "Franciscans International", the NGO of the Franciscan family together with the International Catholic Migration Commission, intervened during the 56th U.N. Human Rights commission on the question of migrant workers informing the Commission of the seminar: "Europe: an area of freedom, security and justice?"(10 and 11 April 2000). The seminar on European Refugee and Migration Policy brought 90 participants together mostly from Church based organizations all over Europe. Human Dignity, inalienable, indivisible and inherent to every human being, no matter where they come from or which legal status they may enjoy, was at the centre of all our reflections during these two days. In our view, the respect for Human Dignity implies a specific approach to the different policy areas. We are glad to see, that this value is also reflected in the Charter. Values need to be fed by a spirituality that strengthen people to fulfill human values. Some results of the conference I will share with you:

- **Refugees and Asylum seekers:** Among the Member States of the European Union, there is a need for harmonized asylum procedures as well as a common refugee definition. Together with decent reception conditions there is a need to respect the basic rights of every refugee or asylum applicant. These measures will not only help refugees in an uncertain situation, but also prevent an "Asylum Shopping" in different Member States. According to the Universal Declaration of Human Rights, the notion of security does not only apply to the States but also every human being. In this context, we are concerned about the European Union's readmission policy with regard to States where the security of the refugee cannot be guaranteed.

- **Migrants:** We call for a positive approach to Migration, which is, and always has been be an important benefit in our societies.The present lack, in many European Countries, of a coherent immigration legislation has a role to play in forcing people to use the asylum corridor to immigrate, and eventually get into an illegal situation. Our economies make large profit from migrants, not only byimporting highly qualified specialists, but also by implicitly accepting the system's need for clandestine, low-qualified and badly-paid labour force. In this context, we may never forget the dignity of every migrant who is often in search for a better life for him- or herself and his/her family.

- **Trafficked Women and Children.** Our concern goes to the victims of trafficking who are the weakest of all, having been humiliated, raped and consequently deprived of the most basic rights. They are often traumatized and need long term protection, legal and social assistance. They should be entitled to a permanent legal resident status, not to be limited to the sole purpose of serving as witnesses against the traffickers. Trafficking with human beings is a world business with high profit and low risk, compared to the trafficking with drugs and weapons. Traffickers who use coercion should undergo severe punishment, the confiscated money being used to provide help to the victims. However, as long as no coercion is used, trafficking might be the only hope for a refugee to get to the European Union. It is therefore indispensable to ensure the access to EU territory in order to provide for the examination of an asylum claim. This element finally shows the close links that exist between the different policies needed to create an area of freedom, security and justice for all.

Point 3 on page 10 of the charter speaks about the treatment of refugees. I suppose, this also means, that the so-called Dublin claimants and the repeated asylum seekers have the right for a shelter, food etc. We experience that these refugees have not always access to this rights in the Netherlands and sometimes not always in other European countries.
The procedures do not give people a citizen status for years resulting in psychological damages and other trauma.
In the whole discussion on migration we see the reduction of human beings to an economic factor: In fact to buy computer specialist in Poland and India without giving European citizens rights is a form of colonialism; could be experienced as a new form of colonialism human knowledge from the south to the industrialized Northern countries.
As a catholic worker priest in Berlin last year proved a lot of people who work illegal are exploited: low wages and the total lack of social security.
Women and children are trafficked for the sex industry. As soon as they are found they have no right of protection nor the necessary support for the trial against the traffickers and for their own rehabilitation. They have been abused by citizens of Europe.
Some examples: I know a case of a young 17 year old woman, who did not get sufficient support from the German authorities to proceed against traffickers in the Netherlands. She wanted to stay on a safe place in Germany.
A Dutch woman from Moroccan origin does not get the necessary protection against her family, who do not accept her independence. Human Rights means direct protection without any reserve.
Human Rights means, that a human being is more than a economic asset or a juridical entity.
Asylum seekers don't have the same rights and obligations as other people and the authorities. If a asylum seeker don't observe the rules and the terms, he or she looses his or her case. However, if the authorities don't observe the rules and the terms there often are no sanctions.
Man and woman ought to have the same right in the asylum procedure.
Refugees should have the right to visit their family, if the family lives in another region or country.
A citizen of Europe can contribute to the society. A asylum seeker has no right to contribute to his or her stay during the procedure by looking for work: a strange situation, that encourages and stimulates xenophobia. This prescription prevents asylum seekers having the possibility contributing to the society they live in.
Human Rights means, that anyone, who has a legal status has the right to marry without restrictions. Very often Government officials, who have to judge the story of an asylum seeker, are of the opinion, that every asylum seeker is a liar, unless he proves the opposite.
So we agree with your viewpoint on page 46: the Charter has to cover anyone in the territory of the Union, which includes foreigners and, in particular, immigrants.
On page 21 you talk about the right on peace. Therefore I ask you to support the European Network for Civil Peace Services, that wants to intermediate in areas of conflicts.
Economic sanctions referred to on page 48 function only with the support of opposition leaders, who are recognized as decent women and men. With regard to foreign policy we have to realize the consequences of our colonial past until now. This is also important for economic relations and trade.
I suppose, that this charter will function as international law so that the member states are obliged to implement this Charter. We agree with conclusion 4 on page 50.
Good and just rights will prevail.

Two other points: Equality of the person with regard to the law and Human Rights can't imply differentiation between rich and poor. We see that people with money can protract a procedure while people with little money are forced to stop their procedure for the court.
Security means also traffic security. That gives the authorities the obligation to make traffic more secure. Last weekend (Eastern) until Sunday evening here in belgium were already 14 people killed by accidents.

We want to contribute further if you so wish.
Peace and all Good.
Louis Bohte ofm

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 May 2000

CHARTE 4279/00

CONTRIB 152

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a letter from the Marangopoulos Foundation for Human Rights to the Convention. [1]

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[1] This text has been submitted in English language only.

To the Convention elaborating the
Draft Charter of Fundamental Rights
of the European Union

By this letter the Marangopoulos Foundation for Human Rights, which enjoys consultative status with the UN [ECOSOC (special), DPI], the UNESCO (official relations) and the Council of Europe, expresses its support to the AFEM proposals concerning the European Human Rights Charter (CONTRIB 105 in conjunction with CONTRIB 42).

We would be grateful if you could transmit this letter to the President and the members of the Convention and have it published on the website of the Convention.

Sincerely,

Prof. Alice Yotopoulos-Marangopoulos
President of the Foundation

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 5 mai 2000
(OR. d)

CHARTE 4281/00

CONTRIB 154

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après les observations concernant les documents CHARTE 4149/00 CONVENT 13, CHARTE 4137/00 CONVENT 8, CHARTE 4170/00 CONVENT 17, CHARTE 4192/00 CONVENT 18, CHARTE 4193/00 CONVENT 19, CHARTE 4227/00 CONVENT 26 et CHARTE 4235/00 CONVENT 27, élaborées par le gouvernement, le ministère des affaires étrangères et le ministère de la justice de la République fédérale d'Allemagne.[1]

[1] Ce texte est présenté en langue allemande et en langue française.

Berlin, le 26 avril 2000

Observations concernant les documents Convent 13, 8, 17, 18, 19, 26, 27

Article 13 Vie familiale (Convent 13)

Modification possible : Complément éventuel concernant les communautés de vie (par exemple : "Les communautés de vie établies de façon durable ont un droit à la protection contre la discrimination").

Article 16 Droit à l'éducation (Convent 13)

Observation : Se pose la question du lien avec l'article sur la formation et l'orientation professionnelles, article X (Convent 18).

Article 13 Liberté de réunion et d'association (Convent 8)

Observation : Se pose la question du lien avec les dispositions relatives aux partis, article B (Convent 17), et aux syndicats, article IV (Convent 18).

Article 14 Droit d'accès aux informations (Convent 8)

Proposition de modification : Au lieu de "institutions de l'Union européenne", adopter une formulation plus proche du texte de l'article 255 : "…droit d'accès aux documents *du Parlement européen, du Conseil et de la Commission*."…

Article 15 Protection des données (Convent 8)

Modification possible : La formulation pourrait être plus axée sur le droit des personnes à déterminer ce qui peut être fait des données les concernant (par exemple : "Toute personne a le droit de décider elle-même de la divulgation et de l'utilisation de ses données personnelles, ainsi que d'obtenir des informations sur l'enregistrement de ces mêmes données, dans la mesure où les droits de tiers ne s'y opposent pas.").

Article 16 Droit de propriété (Convent 8)

Modification possible : Dans le texte, on pourrait remplacer "indemnité préalable" par "indemnité octroyée rapidement" ou par une autre formule analogue.

Article 17 Droit d'asile et expulsion (Convent 8)

Observation : Sous réserve de propositions de modification.

Article 19 Non-discrimination (Convent 8)

Observation : Il y aurait lieu de préciser le lien entre ce droit fondamental et l'interdiction des discriminations entre les ressortissants des États membres, article J (Convent 17).

Article A Principe de démocratie (Convent 17)

Proposition de modification : Il y a lieu de renoncer au paragraphe 1, étant donné que la notion de "peuple" ne peut faire l'objet d'un consensus et qu'elle ne renvoie à aucun droit. Au paragraphe 2, on peut supprimer le terme "institutions". Au paragraphe 3, on peut parler des "membres du Parlement européen". Au paragraphe 3, deuxième moitié de la phrase, il serait souhaitable d'ajouter le critère de l'égalité de suffrage.

Article C Droit de participer aux élections du Parlement européen (Convent 17)

Observation : Possibilité de fusionner les articles C et D. Possibilité de renoncer le cas échéant à la deuxième phrase compte tenu de la clause horizontale H 3.

Article D Droit de participer aux élections municipales (Convent 17)

Observation : L'article D peut être fusionné avec l'article C. Possibilité de renoncer le cas échéant à la deuxième phrase compte tenu de la clause horizontale H 3.

Article E Droit à une bonne administration [relations avec l'administration] (Convent 17)

Proposition de modification : Il conviendrait d'ajouter le mot "notamment" ("ce droit comporte notamment…") avant l'énumération qui figure au paragraphe 2, étant donné que celle-ci n'est pas exhaustive. Le cercle des destinataires devrait être étendu à tous les citoyens de l'Union ("Tout citoyen de l'Union et toute personne…").

Article J Non-discrimination (Convent 17)

Observation : Le lien avec d'autres discriminations interdites (Article 19 Convent 8) et la place par rapport à celles-ci restent à préciser.

Article I Égalité entre les hommes et les femmes (Convent 18)

Proposition de modification : Le texte devrait parler d'"égalité de traitement" au lieu d'"égalité".

Observation : La possibilité de procéder à une "discrimination positive" pourrait être ouverte dans le cadre de la disposition générale relative à la non-discrimination (actuellement article 19 Convent 8).

Article II Liberté professionnelle (Convent 18)

Proposition de modification : Les termes "Toute personne" devraient être remplacés par "Tout citoyen et toute citoyenne de l'Union". Il y aurait alors lieu de supprimer la deuxième moitié de la phrase à partir de "sans préjudice".

Article III Droit à l'information et à la consultation des travailleurs (Convent 18)

Proposition de modification : Dans la version allemande, remplacer, dans le titre de l'article "Pflicht zur" par "Recht auf" [cette proposition ne concerne pas le texte français]. Au début du texte doit figurer un "ou" au lieu d'un "et" ("Les travailleurs ou leurs représentants") conformément à l'article 21 de la Charte sociale. Alléger le reste du texte dans la mesure du possible, c'est-à-dire supprimer le membre de phrase commençant par "notamment…".

Article IV Droit d'association, de négociation et d'action collective (Convent 18)

Proposition de modification : La deuxième phrase du paragraphe 1 devrait être supprimée. Il serait souhaitable de supprimer la référence au droit de grève.

Article V Droit à une rémunération égale pour un travail égal (Convent 18)

Proposition de modification : Devrait être supprimé, car l'article 4 de la version révisée de la Charte sociale, en son point 3, qui concerne ce sujet, a un autre contenu et ce principe ne peut être formulé comme un droit sans que cela pose des problèmes considérables.

Article VI Droit au repos et au congé annuel (Convent 18)

Modification possible : On peut se demander si cet élément mérite de figurer dans la Charte ou s'il entre trop dans les détails.

Article VIII Protection des enfants et des adolescents (Convent 18)

Proposition de modification : La limite d'âge de quinze est trop rigide. Il doit pouvoir y avoir des exceptions, comme celles permises par le point 20 de la Charte communautaire des droits sociaux fondamentaux. Les termes "en tout cas" doivent être supprimés. Il sera peut-être nécessaire de modérer encore le texte. Se pose en outre la question de savoir si cette disposition est trop spécifique, ou si ce domaine de protection est couvert par d'autres droits fondamentaux. Une disposition générale relative à la protection des enfants et des adolescents est encore en cours d'examen au sein de la Convention.

Article IX Droit à la protection en cas de licenciement (Convent 18)

Observation : Des exceptions doivent être possibles, pour les petites entreprises comportant jusqu'à cinq salariés et pour les relations de travail durant les six premiers mois, par exemple. Au cas où la clause générale de limitation ne le permettrait pas, la possibilité de faire des exceptions devrait être prévue dans le texte de la disposition.

Article X Droit à la formation et à l'orientation professionnelles (Convent 18)

Proposition de modification : Dans l'intitulé, il conviendrait d'ajouter les termes "un accès sans discriminations à" après "Droit à". Par ailleurs, il faut tirer au clair la question du lien avec le droit à l'éducation (actuellement article 16, Convent 13).

Article XI Droit des travailleuses à la protection de la maternité (Convent 18)

Proposition de modification : Afin de rendre le texte plus général, il convient d'insérer après "maternité" le mot "approprié" et de supprimer les termes "d'au moins quatorze semaines" : "Toute travailleuse a droit à un congé de maternité *approprié* avant et/ou après l'accouchement." Reste à savoir si cet élément mérite de figurer dans la Charte et s'il n'est pas trop spécifique.

Article XII Droit au congé parental (Convent 18)

Proposition de modification : Afin de rendre le texte plus général, il convient d'insérer après "parental" le mot "approprié" et de supprimer les termes "d'au moins 3 mois" : "Tout travailleur a droit à un congé parental *approprié* à la suite de la naissance ou de l'adoption de son enfant." Reste à savoir si cet élément mérite de figurer dans la Charte et s'il n'est pas trop spécifique.

Article XIII Sécurité sociale (Convent 19)

Proposition de modification : Au lieu de "selon les modalités", formuler de la manière suivante : "selon la situation juridique."

Article XIV Droit à l'aide sociale (Convent 19)

Proposition de modification : Au lieu de "ressources suffisantes", mieux vaut opter pour "ressources nécessaires". Ajouter le cas échéant le droit à une aide permettant d'accéder à un logement convenable.

Article XV Droit à l'accès aux soins de santé (Convent 19)

Observation : Problème des destinataires (compétences de l'Union).

Article XVI Droit des personnes âgées à la protection sociale (Convent 26)

Observation : La question du lien de cet article avec la protection sociale en général pourrait être soulevée.

Article XVII Droits des personnes handicapées à l'insertion sociale et professionnelle (Convent 26)

Observation : Le texte pourrait par la suite être formulé de manière à être plus proche de l'article 19, paragraphe 2 (Convent 8), et même y être éventuellement inséré.

Article XVIII Droit des travailleurs migrants à l'égalité de traitement (Convent 26)

Observation : Ce texte pose un problème, parce qu'il fonde un droit dont ne bénéficient que des pays tiers. Se pose par ailleurs la question de sa place par rapport aux autres dispositions relatives à la non-discrimination.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 2 May 2000

CHARTE 4282/00

CONTRIB 155

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the presentation by the General Council of the Bar of England and Wales at the hearing on 27 April 2000. [1] [2]

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[1] General Council of the Bar of England and Wales Brussels Office: Avenue de la Joyeuse Entree 1, B-1040 Brussels. Tel: +32-2-230 4810. Fax: +32-2-230 4596.

[2] This text has been submitted in English language only.

Charter of Fundamental rights, Hearing, April 27

Bar Council of England and Wales contribution

On February 9, 2000 the Bar Council International Relations Committee submitted a 13 page paper to the House of Lords Select Committee, (Upper House of the British Parliament) which was at the time considering a number of questions about the Charter, and had sought the Bar's opinion. That document was submitted by the Bar to the Convention in advance of this hearing, and I refer you to it for a detailed exposé of our position.

Some of the main points arising are :

* The Tampere Council's objective to "consolidate" the fundamental rights applicable at Union level "in order to make their overriding importance and relevance more visible to the Union's citizens" is not necessarily best served by the creation of a new charter.
* Expansion of human rights protection could be achieved by other means, including the extension of the ECJ's jurisdiction to second and third pillar matters, and the development of the jurisprudence in line with existing conventions, as has happened in relation to the ECHR. The Bar also believes that, in any event, the Community should become a signatory to the Convention.
* We are concerned, apart from anything else, not to give the wrong signal to non-EU signatories and potential signatories to the Convention.
* Treaty status - we consider that this question is of more political and constitutional significance than legal - treaty status is not an essential pre-requisite to improving the effectiveness of judicial human rights protection in the Union.

However, since that document was drafted, the voices in favour of having a Charter, which will be incorporated into the Treaties, seem to have become louder. Accordingly, whilst I commend to you the Bar's submitted paper which sets out the debate, today I would like to mention a few practical concerns that we have, based on that assumption.

Justicability and enforceability

The Bar, being an independent referral profession, has the scope, possibly more than almost any other branch of the legal profession, apart from those in large law firms, to specialise. However, even those who validly claim to be specialists in the field of human rights experience difficulty from time-to-time in dealing with national human rights protection and the Convention system.

A third layer of Community law, differing from the others, would result in great confusion for all - most especially for the very citizens we are supposed to be serving.

It is essential to ensure that the Charter is uncomplicated to understand and does not increase legal complexity.

New rights - provided they are clearly drafted, we do not choose to comment on them substantively at this point.

However, any rights that are already covered by the Convention should be incorporated in exactly the form in which they are already familiar from that.

Areas of confusion over jurisdiction, notably between the European Court of Human rights ("ECHR") and the European Court of Justice ("ECJ"):

Situation when the rights are the same or similar to those in the European Convention are incorporated into the Charter,

* What force of law will the jurisprudence of the ECHR have?
* How can it be ensured that the courts develop consistent jurisprudence hereafter?
* If there are contradictions, which will have precedence?
* Could we end up with a situation where national courts could cherry-pick between them?
* If the same issue is before both courts at the same time, which, if either, should stay the procedure pending the others' decision?
* Where does this leave us in advising clients both within the EU and outside?

New rights

* If an issue is within the scope of EU law, will new rights apply?
* If it is outside the scope of EU law but within that of the European Convention will the new rights still apply? Again, what if there is a conflict with Strasbourg?

Balance of Powers

In its 1999 judgement in the Matthews case, the ECHR took the dramatic stance of striking down a Treaty article for breach of the Convention.

* Is the ECJ to be able to do the same?
* What effect will that have on the balance of powers? - Member States would no longer hold sole power to change the Treaty?

Thank you.

Evanna Fruithof
General Council of the Bar of England and Wales,
Brussels Office
Ave de la Joyeuse Entrée 1 - 5,
B-1040

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 May 2000

CHARTE 4283/00

CONTRIB 156

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the statement by Food First Information and Action Network (FIAN-International) for Forum Menschenrechte given at the hearing on 27 April 2000. [1]

[1] This text has been submitted in English language only.

Charter of Fundamental Rights

Public Hearing of the Convent

April, 27th 2000, Brussels

Contribution by **Michael Windfuhr,**
Executive Director,
FIAN – FoodFirst Information and Action Network

For Forum Menschenrechte (German Forum for Human Rights)

Today, Forum Menschenrechte, which was founded in connection with the 1993 Conference for Human Rights in Vienna, is bringing together 40 German human rights organisations. The Forum Menschenrechte has been following the debate on the fundamental rights in the European Union and since 1997 has been calling for a Charter of Fundamental Rights[1].

Forum Menschenrechte has formulated a joint statement on the Charter which has been presented to the German members of the Charter, and which can be obtained from the homepage of the European Council. Forum Menschenrechte has asked Michael Windfuhr from FIAN to represent the German human rights organisations in the hearing of the Convent.

FIAN (FoodFirst Information and Action Network) was founded in 1986 by human rights activists in Belgium, Germany and Sweden with the aim of establishing an international human rights organisation concerned with the question of the implementation of social, economic and cultural human rights (esc-rights). As the International Covenant on Economic, Social and Cultural rights comprises of a variety of rights, the founding members of FIAN decided to focus the mandate of FIAN on the right to adequate food (Article 11 of the Covenant). Currently, FIAN-International has sections and co-ordinating bodies in 20 countries, and members in about 60 countries. FIAN has advisory status with the United Nations, as well as with the OAU and the European human rights system.

Why include economic rights in the Charter of Fundamental Rights?

Essentially, there are five arguments for the inclusion of economic rights in the Charter. These should be mentioned here, before discussing the arguments that are commonly levelled against the inclusion of economic rights in the Charter, especially the lack of justiciabilty.

[1] See documentation of the congress held in 1997 „Für ein Europa der politischen und sozialen Rechte“Forum Menschenrechte, Materialien Nr. 8

Five arguments for the inclusion of economic rights in the Charter of fundamental rights:

1. The defence of human dignity calls for the recognition of the indivisibility of human rights

In the Universal Declaration of Human Rights, the signatory states obligate themselves to the "creation of a world in which the human beings, free from fear and need, enjoy the freedom of speech and belief." This statement has its origin in the observation that social crisis has commonly been one of the factors in promoting rises in fascism. These words of the preamble of the Universal Declaration of Human Rights are pointing to the close connection between, and the common reference of, both civil-political, and economic, social and cultural human rights, which is manifesting itself in the concept of human dignity. In 1966, the United Nations finalised the adoption of two treaties codifying human rights, making them legally binding – the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Both became effective in 1976, bound together by a joint preamble that emphasises the indivisibility of human rights: "The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."

2. The division of human rights is undermining the effective protection of human rights

Additional to the historical reasons for the emphasis on the indivisibility of human rights, practical experiences has made it mandatory for human rights organisations to defend the indivisibility of human rights. Those who are facing political persecution and discrimination are often activists, trade unionists etc., who are engaging themselves in the defence of economic, social and cultural rights.
Working with organisations in the defence of the human right to food, FIAN is on a daily basis experiencing this close relationship. For the victims of human rights violations, any differentiation in classes of human rights is irrelevant. They experience both types of threats as what they are: a violation of their dignity as human beings.

3. Lately, the idea of the indivisibility of human rights has experienced impressive support

The indivisibility of human rights is part of the consensus on which the international treaties in the field of human rights are based. Following this tradition, the 1993 Vienna Conference on human rights again emphasised the indivisibility of human rights – "All rights are universal, indivisible, and interdependent and interrelated." This basic consensus has led to an immense improvement in the recognition of esc-rights during the last 15 years. A lot of new constitutions have placed esc-rights alongside civil-political rights. The work on esc-rights within the human rights system of the United Nations has developed dramatically since the end of the 1980s. In the African, inter-American and European human rights systems, esc-rights have naturally been integrated, and the inter-American and the European system have even developed an appeal procedure.

4. A Charter of Fundamental Rights lacking economic human rights would be a step backward and a precarious international signal

Until today, 50 years after the Universal Declaration of Human Rights, the indivisibility of human rights has not been realised neither in state practice or in the human rights instruments of the United Nations and in public consciousness. Translating this human rights mandate into practice has to be the central aim of a modern human rights system. A Charter of Fundamental Rights lacking economic human rights would throw us back 20 years in the understanding of human rights and would call into question the results of the Vienna Conference. For the human rights system this would weigh more heavily than the questioning of human rights using cultural arguments. States responsible for massive violations of economic, social and cultural rights could point to an European Charter lacking economic rights in defence of their actions.

5. All EU member states have accepted the protection and the fulfilment of esc-rights as binding obligations

In all EU member states, esc-rights have been accepted for a long time already, and are therefore part of the state obligations of the EU countries. In addition, the EU members have supported the European Social Charter and have ratified a variety of other conventions which explicitly and implicitly include esc-rights, and which therefore imply obligations for the EU member states. These are for example the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, as well as a variety of conventions of the ILO. During several World Summits throughout the 1990s, the EU member states have declared their intention to implement esc-rights (World Population Summit, World Social Summit, etc). It is therefore obvious that they have taken on the responsibility to respect, to protect and to fulfil these rights when also acting within the framework of the European Union. This is even more important as decisions on the EU-level have direct influence on the fulfilment of the esc-rights of those people resident in the member states of the European Union.

Discussion of arguments and problems which are levelled against the inclusion of esc-rights in the Charter of Fundamental Rights

Below are the series of arguments which are generally levelled against esc-rights, some of which can be found also in the discussion on the Charter

The first argument questioning the nature of esc-rights as fundamental and human rights is the high costs connected with the fulfilment of these rights. In order to provide all people with access to adequate food, housing, education and health services, massive investment and economic development is needed. Another argument closely connected with the one of high costs is a justiciable one, dealing with the nature of esc-rights. All rights have to be directly implementable. Esc-rights, on the other hand, are said to be implementable only over a long period of time and are therefore to be seen as political goals, not as rights. Another conclusion on the different legal nature

of the two groups of human rights is that civil-political human rights are first of all 'negative rights' protecting the individual against abuse of state power, while esc-rights call for an active role of the state in their implementation and are therefore called 'positive rights'. From this point of view, the writing-down of esc-rights as directly implementable fundamental rights would restrict the states too much politically and would reduce political fields of action.

The rest of this text will deal with the counter arguments to these assumptions. At the centre is the change in direction that has been achieved in the human rights system dealing with esc-rights during the last few years. This change in direction has coincided with several other developments supporting this change: the end of the Cold War, the growing demands for economic rights by NGOs; the creation of an UN Committee on Economic, Social and Cultural Rights that is equal in status to the UN Human Rights Committee; and the strengthening of esc-rights in the regional human rights systems.

1. The legal nature of esc-rights is not different from civil-political rights: they comprise of state obligations on three levels

The starting point of this change in direction lies with the growing experience of concrete cases of violations of esc-rights that have been documented by NGOs and by the UN bodies working on human rights. Of course, not every hungry or illiterate person is the victim of human rights violations. However, the influence of wrong or missing state intervention on the number of hungry, illiterate and homeless people is very high. State forces are often directly involved when people are evicted from their land or when homes are destroyed for urban development. They do not act when peasants are violently thrown from their land by the owners of large estates, when wages are paid below the minimum wage or when certain groups are denied their right to work. Often, they only use a percentage of available resources to enable people without any income to get access to productive resources.

These examples illustrate that the old judicial opposition of negative and positive rights cannot be justified objectively. Esc-rights do not essentially obligate states to anything different from civil-political rights:

1. The respect of existing possibilities for participation, both political and economic, meaning the respect of an individual's physical integrity as well as freedom of profession or the access to land (**obligation to respect**)
2. The protection of the individual by legal systems and the police, for example the freedom to act politically as well as the freedom to use resources for economic purposes (freedom from corruption, security of land titles, protection of the tenant etc.) (**obligation to protect**).
3. State action to create supportive frameworks for the fulfilment of human rights, this means the reduction of destructive frameworks and the creation of supportive ones (**obligation to fulfil)**.

2. The costs of implementing esc-rights are not necessarily higher than implementing civil-political rights

Civil-political rights call for the same state involvement and are in the same way impossible to be realised without money. No state can immediately guarantee free access to land to everyone the same as no state can immediately guarantee an independent judiciary based on fair trial. The

number of human rights specialists and of NGOs who, in agreement with the results from the Vienna Conference, see an end to the differential interpretation of the two Covenants and who only see slight differences in the degree of the obligations to respect, to protect and to fulfil, is growing rapidly. Human rights law both obligate states to refrain from violating human rights and to pursue an active policy aimed at fulfilling these rights. **The implementation of esc-rights does not call for the revival or the cementing of a centralised supplier state, but for the creation of opportunities and the protection of social and economic participation for everyone.**

3. **esc-rights are often seen as second-class rights, as their complete fulfilment can be achieved only step by step or gradually. However, this is also the case with other fundamental rights that belong to the group of civil-political rights (For example non-discrimination of men and women). In the same way as these rights, esc-rights should be recognised as fundamental rights, even if their fulfilment can be achieved only gradually.**

The protection of fundamental rights can therefore not be restricted to directly implementable and justiciable rights but has to be comprehensive. The line deviding directly implementable and justiciable rights does not lie between civil-political rights and esc-rights but between the possibility for direct realisation of different levels of state obligations resulting from human rights. The obligations to respect and to protect are largely directly implementable and justiciable.

4. **esc-rights are largely directly implementable, so one cannot talk of a lack of justiciability**

In its legal commentary on the nature of state obligations in relation to esc-rights (General Comment No. 3), the UN Committee on Economic, Social and Cultural Rights has pointed out that many obligations resulting from the esc-rights are directly realisable, for example all anti-discriminatory measures. The state obligations to respect and protect these rights are largely directly implementable and justiciable.

5. **The nature of esc-rights should generally not be questioned using the argument that for their full implementation positive state action is needed. The availability of state social security forms the basic content of esc rights and should also be at the core of the Charter of Fundamental Rights.**

The realisation of civil-political rights also requires positive state action, without their legal nature being called into question. Should the fulfilment bound obligations on esc rights be excluded from the Charter as they can only be realised gradually and consequently represent political goals rather than rights?
Answering this question, we have to make the difference of whether we are talking about the implementation of basic standards or about the full realisation of these rights. In its previous work, the UN Committee on Economic, Social and Cultural Rights has made explicit that the obligation to fulfil first of all obligates the state to identify all groups at risk and to design policies to support them. If the state fails to do so, it has already violated the right concerned (for example the right of minorities to access education services). Furthermore, the Committee has developed the concept of "core content" (for the right to education: access to primary education), which implies that basic

services should be provided by all states irrespective of their level of development. International jurists have impressively supported this in the Maastricht Guidelines. In our opinion, in the Charter of Fundamental Rights, the right to a living wage should be read as the core content of the right to an adequate standard of living.
The question of available resources for the implementation of esc-rights becomes relevant only beyond the fulfilment of the core content. The full realisation of the right to education requires more financial resources. In article 2, the Covenant on Economic, Social and Cultural Rights calls for the use of the "maximum of available resources". This full implementation can certainly only be included in the Charter as a political goal, so that the state's freedom to act is not restricted too much. However, the progressive full implementation of esc-rights has to be supplemented with benchmarks and has to be monitored regularly.

6. In the international human rights system, esc-rights are provided for with weaker instruments and have been largely neglected by international law. This discrimination against esc-rights should however not be used as an argument for continuing discrimination in the future.

Except for the obligation to report, international law does not know any instruments for enforcement of esc-rights, like a procedure for individual complaint. This means that no case law has been developed. The inter-American and the European human rights systems have in the meantime accepted procedures for individual complaints. Concerning the Covenant on Economic, Social and Cultural Rights, an optional protocol to the Covenant is currently being considered by the Commission on Human Rights.

Again and again, it is suggested that esc-rights are not formulated in a precise legal manner, because the relevant clauses in the Covenant are not exact. Again, one can say, that, as with all fundamental rights, interpretation and the development of case law will help develop a more precise understanding. Case law of the ECHR has contributed to an immense improvement in the understanding of these rights. In the field of esc-rights, the Committee on Economic, Social and Cultural Rights has started to develop precise legal commentaries in the form of "General Comments". The accusation that esc-rights are not well enough defined has its roots in the fact that intensive legal occupation with these rights has only started recently. Case law and legal interpretations will help to overcome this backward nature.

However, there are also other reasons than legal ones responsible for the neglect of esc-rights. Both groups of human rights have been politically intrumentalised during the Cold War. While the Western countries have been referring to the violation of civil-political rights in Eastern Europe, the East was pointing to the neglect of economic and social rights in the West (like unemployment and homelessness). This political take-over has thoroughly influenced the understanding and education on human rights. In Western countries, the public understanding and media coverage of human rights is dominated by the focus on civil-political rights like the right to be free from torture, death penalty and political oppression.

7. The inclusion of esc-rights in the Charter will not extend the responsibilities of EU institutions beyond those laid down in the EU treaties. The aim of including esc-rights is firstly to ensure that all the esc-rights of those resident within the EU are not violated by decisions taken on the European level.

Especially in the field of the fulfilment of esc-rights, the EU has already far-reaching legal capabilities. The accountability of policies of all organs of the EU and the member states is very important, especially as the economic frameworks are largely determined at the European level. Esc-rights imply negative rights, protecting all residents in the EU against the possible negative implications of EU-policy on the application of these rights.
The European citizens and all those resident within the EU, will not understand and accept the implied set-back in the protection of their rights if the Charter does not include the respect, the protection and the fulfilment of their economic, social and cultural rights.

Conclusion

- Through their commitment to human rights, states are obligated to not violate these rights and to actively pursue their fulfilment. The implementation of esc-rights does not call for the revival or the cementing of a centralised supplier state, but for the creation of opportunities and the protection of social and economic participation for everyone.
- A Charter of Fundamental Rights lacking economic human rights would throw us back 20 years in the understanding of human rights and would call into question the results of the Vienna Conference. For the human rights system this would weigh more heavily than the questioning of human rights using cultural arguments. States responsible for massive violations of economic, social and cultural rights could point to an European Charter lacking economic rights in defence of their actions.

Editors' note to CHARTE 4286/00,
Common Statement of the Platform of European Social NGOs and the European Trade Union Confederation (ETUC) given at the public hearing on 27/04/00:

See also CHARTE 4324/00.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 12 May 2000

CHARTE 4286/00

CONTRIB 158

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a Common Statement of the Platform of European Social NGOs and the European Trade Union Confederation (ETUC) participating in the public hearing on 27 April 2000.
[1] [2]

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[1] For the names of the NGO's, please refer to page 2.
[2] This text has been submitted in English language only.

Association des Femmes de l'Europe Méridionale (AFEM)
ATD Quart Monde
Carrefour pour une Europe civique et sociale (CAFECS)
Collectif sur la Charte des droits fondamentaux
Commission Justice et Paix
Eurolink Age
European Anti Poverty Network (EAPN)
European Movement
European Union Migrant's Forum
Fédération européenne du Personnel des Services Publics (EUROFEDOP)
FONDA pour la vie associative
Franciscans (Commission for Justice, Peace and Integration of Creation)
Initiative "Netzwerk Dreigliederung"
International Rehabilitation Council for Torture Victims
Office catholique d'information et d'initiative pour l'Europe (OCIPE)
Permanent Forum of Civil Society
Society for Threatened Peoples International
Terre des Hommes France
The European Region of the International Lesbian and Gay Organisation (ILGA)
Union des Fédéralistes Européens (UEF)*
Young European Federalists (JEF)*

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* avec le commentaire suivant : "L'élaboration de la Charte des droits fondamentaux doit s'inscrire dans le cadre d'un processus d'élaboration d'une Constitution européenne".

THE QUALITY TEST"

Common Statement of NGOs participating in the Hearing on the Charter of Fundamental Rights Brussels, 27 April 2000.

What the Charter needs to be	What that requires
1. An EU Charter, shining beacon across Europe on common values and objectives of peoples sharing the same aspiration to peace, development and freedom, belonging to various faiths, beliefs and civilisations and part of the first planetary generation.	• To address the universal character of Fundamental Rights.
2. A Charter for Women and Men	• To recognise equality between women and men as a founding principle of the Union • To use inclusive language.
3. A Charter for *all*: Citizens, Residents, Migrants, Refugees, Undocumented persons	• To recognise the principle of non discrimination • To protect the rights of minorities, to use their languages and to transmit their cultures and values in accordance with the Charter
4. A Charter on essential rights from the Council of Europe, the U.N. and I.L.O agreements	• Never to fall short of agreements even if signed only by some of the EU Member States • To supplement, strengthen, build on existing rights
5. A Charter on Individual and Collective Rights,	• To protect collective rights such as cultural and linguistic rights, the rights of trade unions and associations • To guarantee a right of consultation for NGOs at the European level • To recognise access to justice at EU level for NGOs defending the common good and the rights of future generations
6. A Charter on the Common Good	• To secure recognition of the common good which is the foundation of a community of persons living together in solidarity and respect • To give everyone access to the common goods and Public Services, secure transparency in management and participation in the assessment of

	the management
7. A Charter on civil and political, social, cultural and ecological rights	• To declare that the Charter secures indivisible rights • To recognise and guarantee the right to local self-government • To guarantee the key programmatic social, environmental, cultural and education rights for all, for the implementation of which (i) indicators and convergence mechanisms need to be designed (ii) a multiannual implementation programme needs to be developed (iii) a system of monitoring, benchmarking and assessment needs to be in place
8. A Charter on Participatory Democracy at European level	• To secure transparency and access to information • To define participatory democracy rights at EU as well as at local level • To recognise the right to a democracy based on equality and parity
9. A Charter which inspires the Union in all its external actions.	• A Charter which defines the criteria for strategic impact assessments of EU policies on all those who find themselves affected by EU actions abroad
10. A legally binding Charter	• The Charter should be legally binding for all the EU Institutions and the Member States. • Infringement should be examined by the EU Court of Justice and Member State status should be suspended for any State found to be in serious infringement
11. A Charter adopted by a participatory procedure	• To be submitted to an indicative vote by the Parliamentary Assembly of the Council of Europe, involving MPs of all EU Applicant Countries • To ask for an indicative vote of NGOs on the draft Charter
12. A Charter to be integrated in the Treaty	• To pass the above quality test successfully.

The Signatories request the opportunity to have a real debate with the Members of the Convention on 6 June 2000, at the occasion of the "open doors" day organised by the Convention in the EP.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 8 mai 2000

CHARTE 4287/00

CONTRIB 159

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint l'intervention du Comité européen de coordination de l'habitat social (CECODHAS) faite à l'occasion de l'audition du 27 avril 2000.[1]

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[1] Ce texte a été soumis en langue française uniquement.

Intervention de J. Berké, au nom du CECODHAS, à la séance d'audition par la convention chargée d'élaborer la charte des droits fondamentaux de l'Union Européenne le 27 avril au Parlement européen

Destinataires :

- N. Van Velzen – M. Delebarre
- J. Badet
- P.L. Marty
- Convention

Je me présente, Jacques Berké, vice-président de l'Union nationale HLM et vice-président du CECODHAS, le comité européen de coordination de l'habitat social, présidé par Nico Van Velzen, que je représente aujourd'hui.

Le CECODHAS réunit l'ensemble des fédérations d'organismes qui produisent et gèrent des logements sociaux en Europe. Nous produisons 500.000 logements par an, nous en gérons 20 millions et nous avons vendu ou financé 10 millions de logements en accession ; en résumé nous logeons environ un européen sur 5.

Nous avons examiné avec attention, compte tenu de notre diversité, l'idée d'intégration du droit au logement dans la charte des droits fondamentaux de l'Union européenne.

Naturellement, les traités ne reconnaissent pas de compétence à l'Union en matière de logement et nous sommes en faveur du maintien du principe de subsidiarité en ce domaine.

Mais au niveau européen, la charte sociale de 1996 fait déjà référence au droit au logement dans son article 31 ; je la cite : en vue d'assurer l'exercice effectif du droit au logement, les parties s'engagent à prendre des mesures destinées :

- A favoriser l'accès à un logement d'un niveau suffisant,
- A prévenir et à réduire l'état de sans abri en vue de son élimination progressive,
- A rendre le coût du logement accessible aux personnes qui ne disposent pas de ressources suffisantes.

Il y a donc là une première reconnaissance, au niveau européen, du droit au logement.

Nous avons ensuite étudié la situation dans nos différents pays. La référence au droit au logement n'apparaît pas dans toutes les législations du fait notamment des interprétations différentes données à la notion de droit : droit programmatique ou droit sanctionnable ? Nous avons noté que si certains pays n'ont pas inscrit ce droit dans leurs législations, ces mêmes pays vont parfois plus loin que les autres dans la mise en œuvre effective de ce droit pour certains types de populations : je pense en particulier aux femmes seules avec des enfants en Grande Bretagne ou aux sans abri en Allemagne.

Enfin nous avons constaté que la garantie d'un certain nombre d'autres droits passe par la mise en œuvre du droit au logement comme l'a rappelé C. Parmentier tout à l'heure au nom des sans abri : les droits relatifs à la sûreté de la personne, au respect de la vie privée, de la vie familiale, le droit au travail, à l'éducation, à la santé supposent évidemment l'accès à un logement ; la notion même de dignité humaine suppose des conditions décentes d'habitat.

Compte tenu de tous ces éléments, nous avons considéré à l'unanimité des représentants des 15 pays dans notre comité, que le droit au logement devait être reconnu comme un droit de nature programmatique, qui oblige les pouvoirs publics de chaque pays à développer les politiques et mobiliser les moyens qui permettent de favoriser l'accès à un logement décent.

Si ce droit programmatique ne peut être un droit sanctionnable, nous pensons que la mise en œuvre de ce droit passe par le développement d'une politique de logement social que nous avons proposée à la commission européenne de définir ainsi : des logements locatifs ou en accession à la propriété pour lesquels sont définies des règles d'accès en faveur des ménages ayant des difficultés à se loger, ceci précisément afin de favoriser la mise en œuvre du droit au logement.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 8. Mai 2000

CHARTE 4288/00

CONTRIB 160

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend zwei Briefe, die die Jungen Europäischen Föderalisten (JEF) an Herrn Bundespräsident a.d. Roman HERZOG gerichtet haben. [1]

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[1] Dieser Text wurde nur in deutscher Sprache vorgelegt.

internationale
Junge Europäische Föderalisten
Bundesverband

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Berlin/Hamburg, 27.11.1999

Arbeit des Grundrechtskonvents

Sehr geehrter Herr Prof. Herzog,

zunächst möchten wir Ihnen zu Ihrer Nominierung als Mitglied des Europäischen Grundrechtskonventes als Vertreter des Bundeskanzlers gratulieren.

Wir, die Jungen Europäischen Föderalisten, sind eine in 30 europäischen Staaten aktive, europapolitische, aber parteipolitisch unabhängige Jugendorganisation und haben uns der Förderung der europäischen Integration durch Aktionen, Kampagnen, Seminarveranstaltungen, Vorträgen und Veröffentlichungen verschrieben.
So setzen wir uns seit Jahrzehnten für die Schaffung einer föderalen europäischen Verfassung ein.

1997 haben wir in diesem Zusammenhang die Kampagne für eine europäische Verfassung gestartet und eine *virtuelle Arbeitsgruppe Verfassung* ins Leben gerufen, die über das Internet Gedanken zu den wünschenswerten Inhalten einer Verfassung für einen Europäischen Bundesstaat austauschte.
Die von uns diskutierten Punkte betrafen die Kompetenzverteilung, die Grundprinzipien einer künftigen Europäischen Verfassungsordnung wie Demokratie, Rechtsstaatlichkeit, Menschenrechte, Subsidiarität und Solidarität und v. a. eine umfassende Grundrechtsordnung.

Vorangestellt haben wir unserem Vorschlag demgemäß als Kernpunkt einer künftigen europäischen Verfassung einen Katalog von Grund-, Freiheits- und Verfahrensrechten, den Sie anliegend erhalten.

In diesem Zusammenhang begrüßen wir auch die Einrichtung eines konstitutionellen Ausschusses im neugewählten Europaparlament.

Wir verstehen unsere Arbeit als Input für alle, die an der Schaffung einer europäischen Verfassungsordnung arbeiten und haben uns demgemäß mit Politikern aus Bundestag und Europaparlament in Verbindung gesetzt um ihnen unsere Ideen zu vermitteln.
Zu unserer Freude hat sich zu Beginn der neuen Legislatur des Europäischen Parlaments eine interfraktionelle *Intergroup* für eine Europäische Verfassung gegründet, der bereits über 130 Abgeordnete angehören.

Wir würden uns freuen, wenn sich auch der europäische Grundrechtskonvent mit unseren Ideen auseinandersetzen und die JEF im Rahmen der Beteiligung von Nichtregierungsorganisationen mit in seine Arbeit einbeziehen würde.

Wir wünschen Ihnen viel Erfolg bei Ihrer Arbeit und verbleiben

mit freundlichen Grüßen

Marc-Oliver Pahl — David Schneider-Addae-Mensah

Bundesvorsitzender — Stv. Bundesvorsitzender

Anlage: Ideen der virtuellen JEF-AG Verfassung zu einem europäischen Grundrechtskatalog

internationale
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An den
Europäischen Grundrechtskonvent
c/o Generalsekreteriat des Rates
Rue de la Loi 175

B-1049 Bruxelles

Berlin/Hamburg, 14. März 2000

Arbeit des Grundrechtskonvents

Sehr geehrte Mitglieder des Grundrechtskonvents,

wie wir bereits mit Schreiben vom 27.11.1999 an den Vorsitzenden des Grundrechtskonvents, Herrn Prof. Dr. Roman Herzog, auf das wir bedauerlicherweise keine Antwort erhielten, mitteilten, sind wir, die Jungen Europäischen Föderalisten, eine in 30 europäischen Staaten aktive, europapolitische, aber parteipolitisch unabhängige Jugendorganisation.
Wir haben uns der Förderung der europäischen Integration durch Aktionen, Kampagnen, Seminarveranstaltungen, Vorträgen und Veröffentlichungen verschrieben.
So setzen wir uns seit Jahrzehnten für die Schaffung einer föderalen europäischen Verfassung ein.

1997 haben wir in diesem Zusammenhang die Kampagne für eine europäische Verfassung gestartet und eine *virtuelle Arbeitsgruppe Verfassung* ins Leben gerufen, die über das Internet Gedanken zu den wünschenswerten Inhalten einer Verfassung für einen Europäischen Bundesstaat austauschte.
Die von uns diskutierten Punkte betrafen die Kompetenzverteilung, die Grundprinzipien einer künftigen Europäischen Verfassungsordnung wie Demokratie, Rechtsstaatlichkeit, Menschenrechte, Subsidiarität und Solidarität und v. a. eine umfassende Grundrechtsordnung.

Vorangestellt haben wir unserem Vorschlag demgemäß als Kernpunkt einer künftigen europäischen Verfassung einen Katalog von Grund-, Freiheits- und Verfahrensrechten, den wir bereits an Herrn Prof. Herzog übersandt hatten.

Wir verstehen unsere Arbeit als Input für alle, die an der Schaffung einer europäischen Verfassungsordnung arbeiten und haben uns demgemäß mit Politikern aus Bundestag und Europaparlament in Verbindung gesetzt um ihnen unsere Ideen zu vermitteln.
Zu unserer Freude hat sich zu Beginn der neuen Legislatur des Europäischen Parlaments eine interfraktionelle *Intergroup* für eine Europäische Verfassung gegründet, der bereits über 130 Abgeordnete angehören.

Wir apellieren an den Konvent, mit seiner Arbeit nicht nur einen weiteren Katalog von Grundrechten zu schaffen, der dann in der Luft hängt.
Vielmehr fordern wir den Prozeß der Grundrechtskodifikation mit jenem der derzeit laufenden Vertragsrevision zu verknüpfen und die von Ihnen erarbeitete Grundrechtscharta bereits in Nizza in den EU-Vertrag zu integrieren. Nur so kann eine echte Union der Bürger entstehen.

Ein wirklich demokratisches Europa braucht eine Verfassung!

Demokratisch gebotene Transparenz in der Europäischen Union erfordert die Auflösung der derzeitigen, verworrenen Vertragssituation und den Übergang von der Vertragslogik zur Verfassungslogik.

Zur wirklichen Demokratisierung der Europäischen Union bedarf es tiefgreifender institutioneller Reformen, die sich nicht in der Bearbeitung der *left overs* von Amsterdam erschöpfen, sondern ein Europäisches Parlament mit zentraler Bedeutung für die europäische Gesetzgebung schaffen und den Rat zu einer zweiten parlamentarischen Kammer machen.
Nur so wird die Union der 25 oder 30 wirklich überlebensfähig sein.

Ein demokratisches Europa verlangt aber auch eine klare Kompetenzaufteilung zwischen der EU und ihren Mitgliedstaaten, in der durchaus auch der Rückfluß einzelner Zuständigkeiten an die Mitgliedstaaten und Regionen denkbar ist.
Dennoch legen wir größten Wert auf eine exklusive Kompetenz der EU in der Außen- und Verteidigungspolitik und weitgehenden Kompetenzen in der Innen- und Rechtspolitik.

Ein *System Weimar* muß verhindert werden. D. h. die von Ihnen erarbeiteten Grundrechte der Union müssen einklagbare subjektive Rechte darstellen, weswegen wir die Schaffung einer europäischen Verfassungsgerichtsbarkeit mit entsprechenden Rechtsbehelfen für unabdingbar halten.

Solch tiefgreifende institutionelle Veränderungen sind aber nur im Rahmen einer europäischen Verfassung möglich.
Deshalb fordern wir den Konvent auf, seine Arbeit nicht isoliert zu sehen, sondern als historische Chance zum Einstieg in einen echten Konstitutionalisierungsprozeß in Europa zu begreifen.

Als europaweit agierender Verband möchten wir Sie bitten, uns gemäß dem Kölner Ratsbeschluß künftig stärker in Ihre Arbeit einzubinden.
Nur durch den Kontakt mit gesellschaftlichen Gruppen der Mitgliedstaaten kann eine wirkliche Bürgerverfassung für Europa gelingen.

In diesem Sinne wünschen wir Ihnen und uns allen ein gutes Gelingen der Grundrechtscharta als Grundstein einer künftigen europäischen Verfassung und verbleiben

mit freundlichen Grüßen

Marc-Oliver Pahl — David Schneider-Addae-Mensah

Bundesvorsitzender — Stv. Bundesvorsitzender

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

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Brüssel, den 10. Mai 2000

CHARTE 4289/00

CONTRIB 161

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme der Kommission Europa des Deutschen Juristinnenbundes. [1] [2]

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[1] Dieser Text wurde nur in deutscher Sprache vorgelegt.

[2] Deutscher Juristinnenbund: Reuterstraße 241, 53113 D-Bonn. Tel: +49-0228-91510-0. Fax: +49-0228-211009.

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Charta der Grundrechte der Europäischen Union

Stellungnahme der Kommission Europa des djb

Stand: 5. Mai 2000

Die Grundrechtscharta der Europäischen Union wird das Europa der Bürgerinnen und Bürger um einen großen und entscheidenden Schritt voranbringen. Der djb begrüßt es, wenn hiermit der heute erreichte Grundrechtsstandard niedergeschrieben wird und gleichzeitig die Chance genutzt wird, diesen weiterzuentwickeln, bspw. durch die Aufnahme sozialer Grundrechte.

Ausgangspunkt

Derzeit hat die EU gemäß Art. 6 Abs. 2 EUV die Grundrechte gemäß der EMRK, und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten ergeben, zu achten. Hierzu liegt bereits umfangreiche Rechtsprechung des EuGH vor.

Fortentwicklung

Es ist allerdings zu beachten, daß die EMRK nicht mehr den aktuellsten Stand der europäischen Grundrechtskultur formuliert; so weist sie z.B. Lücken beim Gleichheitssatz auf. Bei einer Gesamtschau der europäischen Verfassungstraditionen sollten auch die Verfassungen der deutschen Länder berücksichtigt werden; diese formulieren z.B. weitergehende Handlungsziele.

Ziel

Die Bürgerinnen und Bürger der Europäischen Union sollen wissen, welche Rechte Ihnen zustehen (*Transparenz*), daß die EU sich hieran halten will (*rechtliche Verbindlichkeit*) sowie daß und wie sie diese durchsetzen können (*effektiver Rechtsschutz*).

Transparenz
Die Grundrechte müssen für die EU-Bürgerinnen und Bürger verständlich geschrieben und leicht auffindbar sein. Letzteres spricht auch dafür, sie in den EUV aufzunehmen.

Rechtliche Verbindlichkeit
Um diese Verbindlichkeit zu erreichen, sollte die Grundrechtscharta entsprechend formuliert in den EUV selbst aufgenommen werden. Eine umfassende Bindung der EU ist dabei anzustreben (Handlungen aller Organe etc.).

Effektiver Rechtsschutz
Der Rechtsschutz ist effektiv zu gestalten. Zu den bisherigen Möglichkeiten wie z.B. Vorlageentscheidungen nationaler Gerichte an den EuGH hinzu kommen muß daher eine Grundrechtsklage insbesondere für die einzelnen Bürgerinnen und Bürger direkt zum EuGH und zwar nach Erschöpfung des nationalen Rechtsweges sowie wenn keine gleichzeitige Klagemöglichkeit andernorts besteht. Hierbei sollte auch Verbänden – wie z.B. dem djb - zumindest ein Recht zur Stellungnahme eingeräumt werden; eine Verbandsklage wäre wünschenswert.

Zwingende Folge einer solchen zusätzlichen Klagemöglichkeit ist eine verbesserte Ausstattung des EuGH im Hinblick auf seine Ressourcen. Denkbar wäre eine Grundrechtskammer. Bei der Besetzung ist neben einem Proporz der Mitgliedstaaten auch ein Geschlechterproporz notwendig.

Sprachliche Fassung:
Die vom Präsidium vorgelegten überarbeiteten Artikel (Convent 13) sind geschlechtsneutral bzw. geschlechtsdifferenziert formuliert worden. Der djb regt an, daß die gesamte Grundrechtscharta entsprechend formuliert wird.

Die bis jetzt vorliegenden Formulierungsvorschläge sind grundsätzlich zu begrüßen, da sie den europäischen Grundrechtsstandard sachgerecht formulieren. Klarstellungen und Änderungen werden für folgende Bereiche vorgeschlagen:

Art. 1 Würde des Menschen (Convent 13)
Die Würde des Menschen wird unter allen Umständen geachtet und geschützt.

Anmerkung:
Sinnvoll ist die Regelung des Geltungsbereichs in einem Artikel 1 vor der Nennung der Grundrechte oder in einer Präambel.

Keinesfalls darf der Grundrechtskatalog aber in irgendeiner Form von der Regelung des Geltungsbereichs unterbrochen werden. Sonst besteht die Gefahr, daß die Bindung an die vor der Regelung stehenden Grundrechte angezweifelt wird. Insofern sollte die Regelung des Geltungsbereichs auch nicht in einem Absatz 2 zu dem Artikel über die Menschenwürde stehen.

Art. 2 neu Recht auf freie Entwicklung der Persönlichkeit
Alle Menschen haben das Recht, sich frei in ihrer Persönlichkeit zu entwickeln, soweit sie nicht gegen die Rechte anderer, innerstaatliches Recht oder das Recht der Europäischen Union verstoßen. Der Kern ihrer Persönlichkeit ist frei von hoheitlicher Einmischung.

Begründung:
Eine allgemeine Handlungsfreiheit ist mehreren europäischen Verfassungen bekannt. Ihre Auffangfunktion macht eine Überprüfung der Rechtmäßigkeit jeglicher belastender Eingriffe möglich, insbesondere des auch europarechtlich anerkannten Grundsatzes der Verhältnismäßigkeit.

Als besonders wichtige Ausprägung der Menschenwürde bedarf es eines ausdrücklichen absoluten Schutzes des Persönlichkeitskerns, der auch über den Schutz des Privatlebens im Sinne des Art. 12 (Convent 13) hinausgeht.

Die Menschenwürde stellt eine absolute Tabugrenze dar, die klassisch mit Bereichen wie Menschenhandel, Folter, Todesstrafe oder Euthanasie verbunden wird.

Die neuere Rechtsentwicklung und die durch sie reflektierte rasante Entwicklung im technologischen Bereich haben jedoch gezeigt, daß auch Fälle wie die Verwendbarkeit von Tagebucheintragungen, die Speicherung persönlicher Daten, der Schutz des Namens, das Recht auf Kenntnis der eigenen Abstammung etc. den Kernbereich sowohl der allgemeinen Handlungsfreiheit als auch der Menschenwürde berühren. Eine ausdrückliche grundrechtliche Absicherung ist deshalb geboten.

Die Formulierung „Achtung ihres Privatlebens“ aus Art. 12 (Convent 13) dagegen deutet auf eine Begrenzung des Persönlichkeitsschutzes auf den Bereich außerhalb des Berufs, des öffentlichen Lebens, kurz innerhalb der eigenen vier Wände hin, der zwar notwendig aber nicht ausreichend ist

Art. 7 Recht auf gerichtlichen Rechtsschutz und Verfahrensgrundsätze (Convent 13)
Jede Person, deren Rechte und Freiheiten verletzt worden sind, hat das Recht auf wirksamen Rechtsschutz vor einem Gericht.
Jede an einem Gerichts- oder Verwaltungsverfahren beteiligte Person hat Anspruch auf rechtliches Gehör.
Jede Person hat einen Anspruch darauf, daß Verfahren in angemessener Dauer durchgeführt und mit einer anfechtbaren sowie mit einer begründeten Entscheidung abgeschlossen werden.
Für das Handeln der Gemeinschaftsorgane gilt der Grundsatz der Verhältnismäßigkeit.
Der Grundsatz der Vertraulichkeit und Amtsverschwiegenheit wird garantiert.

Begründung:
Es erscheint wünschenswert wegen der zu erwartenden Zunahme von Verfahrensentscheidungen der Gemeinschaftsorgane nicht nur die Beschwerdemöglichkeit einzuräumen, sondern schon für das vorher stattfindende Verwaltungsverfahren die grundlegenden Verfahrensprinzipien in die Grundrechtscharta aufzunehmen und somit die Rechtsstaatlichkeit auch dieses Handelns festzuschreiben.

Es könnte einfach auf die insoweit bereits existierende Rechtsprechung zu den vom EuGH anerkannten bzw. entwickelten Verfahrensgrundrechten zurückgegriffen werden. Die Beachtung dieser Verfahrensrechte in allen Verfahren ist ein elementarer Grundsatz des Gemeinschaftsrechts.

Wegen der Bedeutung dieser allgemeinen Verfahrensgrundsätze sollten diese als Abs. 2 – 5 angefügt werden.

Art. 8 Recht auf ein unparteiisches Gericht (Convent 13)
Jede Person hat Anspruch darauf, daß ihre Sache in billiger Weise öffentlich und innerhalb einer angemessenen Frist von einem unabhängigen und unparteiischen, auf Gesetz beruhenden Gericht verhandelt wird. Für diejenigen, die nicht über ausreichende Mittel verfügen, wird eine unentgeltliche Prozeßkostenhilfe bereitgestellt, sofern diese Hilfe unerläßlich ist, um den Zugang zum Recht wirksam zu gewährleisten. Dies gilt auch für Zeuginnen und Zeugen sowie Opfer von Gewaltstraftaten.

Begründung:
Wünschenswert wäre im Hinblick auf Satz 2, daß - insbesondere in Strafverfahren - neben den Rechten des Beschuldigten auch die Rechte der Zeugen beziehungsweise allgemein der Opfer von Gewaltstraftaten angemessen auszugestalten sind und ihnen ebenfalls unentgeltlich effektiver Schutz ihrer Rechte im Verfahren gewährleistet wird. Dies wird in dem neuen Satz 3 vorgeschlagen.

Eine solche Regelung ist für Frauen besonders wichtig, da sie oft über kein eigenes Einkomme oder lediglich über geringes Einkommen verfügen.

Art. 12 Achtung des Privatlebens (Convent 13)
Jede Person hat Anspruch auf Schutz des Privatlebens vor Zugriffen anderer oder der Union so auf freie Gestaltung ihrer Privatsphäre, auf Schutz ihrer Ehre, ihrer Wohnung sowie ihrer Kommunikation.

Begründung:
Die vom Präsidium vorgeschlagene Formulierung *"Achtung des Privatlebens"* ist ungenau und vermittelt den Eindruck eines im Schutzgehalt nur gering ausgestalteten subjektive Rechts. Es wird daher eine Präzisierung vorgeschlagen, die deutlich macht, daß das Recht auf Privatleben sowohl ein subjektives Abwehrrecht, als auch ein subjektives Recht auf Gestaltung der privaten Sphäre nach eigener persönlicher Entscheidung umfaßt.

Die Einfügung des Begriffes der *"Ehre"* wird begrüßt, da damit über den gegenständlich zu erfassenden Privatbereich hinaus ein Anspruch auf Schutz persönlicher Wertvorstellungen, Empfindungen und Einstellungen gewährt wird. Der Schutz der Ehre ist von Art. 1 *"Würde des Menschen"* zwar grundsätzlich mit abgedeckt, dennoch ist eine Konkretisierung gegenüber dem allgemein gefaßten Grundrecht der Menschenwürde notwendig. Durch die Einbeziehung der Ehre in den Schutzbereich des Privatlebens wird der persönlichen Integrität eines jeden Menschen eine hervorragende Bedeutung zugemessen.

Die Aufnahme des Ehrenschutzes in den Bereich der Schutzklausel zur Achtung des Privatlebens bedeutet eine Aufwertung gegenüber der Ehrenschutzregelungen des deutschen Grundgesetzes. Dort ist die Ehre in Artikel 5 Abs. 2 GG als eine Schranke des Grundrechts der Meinungs-, Presse- und Rundfunkfreiheit normiert.

Unter Zugrundelegung eines weitgehenden Verständnisses des Ehrenschutzes wird von dessen Schutzbereich nicht nur die Abwehr ehrverletzender Äußerungen oder Werturteile erfaßt, sondern vielmehr auch jede weitere Handlung gegen die persönliche Integrität, insbesondere die – psychische und physische – Gewalt in der Ehe oder sonstige Belästigungen, die in den Persönlichkeitsbereich eines Menschen eingreifen.

Der Ehrenschutz geht im übrigen weiter, als der in Artikel 3 (Convent 13) geschützte Bereich der körperlichen und psychischen Unversehrtheit. Dort zeigt insbesondere Abs. 2, daß der Schutzbereich von Artikel 3 eher in die Richtung einer medizinisch-biologischen Unversehrtheit zu verstehen ist, wohingegen der Ehrenschutz die Unversehrtheit der Gefühle, Empfindungen und Wertvorstellungen erfaßt.

Die Gewährung des Ehrenschutzes darf nicht zur Einschränkung der Selbstbestimmung von Frauen führen.

Art. 13 Ehe und Familie (Convent 13)
Jede Person hat das Recht auf rechtlichen, wirtschaftlichen und sozialen Schutz ihres Familienlebens.
Jede Person hat das Recht, nach den Gesetzen der Mitgliedstaaten, die die Ausübung dieses Rec regeln, eine Ehe einzugehen und eine Familie zu gründen. Niemand darf zur Eheschließung gezwungen werden.
Die Vereinbarkeit von Familie und Erwerbsarbeit ist zu gewährleisten.

Begründung:
Zu Abs. 1:
Die vom Präsidium vorgeschlagene Formulierung „Achtung“ ist zu präzisieren unter Zuhilfenah des vom Präsidium vorgeschlagenen Absatzes 3. Die hier vorgeschlagene Formulierung „rechtlicher, wirtschaftlicher und sozialer Schutz“ (bisher Abs. 3 des Präsidiumsvorschlages) ist differenzierter und faßt es als subjektives Recht klarer. Alleinerziehende, kinderreiche Lebensgemeinschaften und solche mit behinderten Angehörigen sind mit der vorgeschlagenen Formulierung ebenso erfaßt wie Menschen, die in häuslicher Gemeinschaft Kinder aufziehen oder Hilfsbedürftige betreuen.

Zu Abs. 2:
Die zentrale Gefährdungslage im Eherecht – der Zwang zur Eheschließung – ist im Präsidiumsvorschlag nicht berücksichtigt und sollte ergänzt werden.

Zu Abs. 3:
Das Recht auf Ehe und Familie kann nicht losgelöst von der im täglichen Leben immer auftauchenden Frage der Vereinbarkeit mit der Erwerbsarbeit geregelt werden. Frauen und Männer sind Erwerbstätige und tragen zugleich Familienverantwortung. Dies gilt insbesondere im Zuge der fortschreitenden Individualisierung der Rechte und im Hinblick darauf, daß die Alleinverdienerfamilie heute nicht mehr die Lebenswirklichkeit widerspiegelt. Dieses Spannungsfeld ist zu thematisieren und die Vereinbarkeit als Handlungsziel in die Grundrechtscharta aufzunehmen. Die Union sollte verpflichtet werden, die Vereinbarkeit von Familie und Erwerbsarbeit von Frauen und Männern zu berücksichtigen, wenn sie im Rahmen ihrer Zuständigkeiten Maßnahmen beschließt.

Art. 18 Gleichheit (Convent 8, S. 7)
Alle Menschen sind vor dem Recht gleich.
Unterscheidungen nach der ethnischen oder sozialen Herkunft, der Hautfarbe, der Religion, der politischen Anschauung, der sexuellen Identität oder der Behinderung sind untersagt, sofern sie nicht zum Ausgleich bestehender Nachteile erforderlich sind.

Begründung:
Abs. 2:
Der hier vorgeschlagene Abs. 2 entspricht im Kern dem vom Präsidium vorgeschlagenen Art. 19. Die Rechtsgleichheit wird hier im Sinne genereller rechtlicher Differenzierungsverbote konkretisiert. Kompensatorische Maßnahmen sind ausdrücklich zulässig. Allerdings müssen diese auch erforderlich sein. Die vorgeschlagene Umschreibung des Benachteiligungsverbotes ist klarer und juristisch eindeutiger als ein Diskriminierungsverbot. Es sind wesentliche Merkmale ausgewählt worden, die elementaren Unrechtserfahrungen entsprechen. Das vom Präsidium auf der Grundlage der EMRK vorgeschlagene generelle Unterscheidungsverbot nach dem Alter oder dem Vermögen wird abgelehnt. In beiden Fällen existieren vielfältige und allgemein akzeptierte gesetzliche Differenzierungen (Altersgrenzen; Steuer- und Leistungsgesetze), die ein generelles Differenzierungsverbot nicht sachgerecht erscheinen lassen. Der allgemeine Gleichheitssatz bietet hier einen ausreichenden Schutz.

Art. 19 Gleichstellung von Frau und Mann (Convent 8, S. 7)
Die Union und die Mitgliedstaaten sind verpflichtet, die Bedingungen für die Gleichstellung von Frauen und Männern in allen Bereichen zu schaffen und bei ihren Maßnahmen die Geschlechtergleichstellung miteinzubeziehen.
Neben der Ungleichbehandlung nach dem Geschlecht ist die Verwendung von Kriterien untersagt, die formal geschlechtsneutral sind, jedoch einen erheblich höheren Anteil der Angehörigen eines Geschlechtes betreffen, ohne daß sie durch wichtige Gründe, die nicht auf das Geschlecht bezogen sind, gerechtfertigt werden können.
Zur Herstellung tatsächlicher Gleichberechtigung sind Maßnahmen zur Förderung des benachteiligten Geschlechts zulässig.

Begründung:
Die vom Präsidium vorgeschlagene Einbindung der Geschlechtergleichstellung in die Nichtdiskriminierung (Art. 19) ist unangemessen. Die Verankerung der Gleichstellung von Frauen und Männern sollte in einem eigenständigen Artikel besonders herausgehoben werden. Mehr als die Hälfte der Bevölkerung in den Mitgliedstaaten sind Frauen. Die Rechte von Frauen sind deshalb nicht als ein Aspekt des Minderheitenschutzes zu betrachten.

Abs.1:
Die Voraussetzungen der tatsächlichen Gleichberechtigung können von der Union und den Mitgliedstaaten verwirklicht werden. Das Ergebnis selbst, wie z.B. die gleiche Teilhabe auf allen Ebenen des Erwerbslebens kann nicht von den Mitgliedstaaten oder der Union hergestellt werden. Im zweiten Teilsatz ist der gender-mainstreaming-Ansatz formuliert. Union und Mitgliedstaaten müssen die Geschlechtergleichstellung überall miteinbeziehen.

Abs. 2:
Das unmittelbare Diskriminierungsverbot ist in einer Grundrechtscharta festzuschreiben. Dazu gehören auch verdeckte Benachteiligungen, die nur ein Geschlecht betreffen. Die Verankerung eines qualifizierten mittelbaren Diskriminierungsverbotes ist gleichfalls notwendig. Das entspricht der bisherigen Rechtslage.

Abs. 3:
Die Wirklichkeit zeigt deutlich notwendigen Handlungsbedarf. Frauen nehmen anders als Männer am öffentlichen Leben und am Erwerbsarbeitsleben teil. Sie sind in Entscheidungspositionen im wirtschaftlichen und politischen Bereich deutlich unterrepräsentiert, wenn überhaupt vertreten. Im Hinblick auf die effektive Gewährleistung der vollen Gleichberechtigung von Frauen und Männern sind deshalb spezifische Vergünstigungen des benachteiligten Geschlechts beizubehalten oder zu beschließen. Eine Kompensationsklausel, wie in Abs. 3 vorgeschlagen, ist deshalb in die Grundrechtscharta aufzunehmen.

Art. 19 Asyl (Convent 8, S. 6)
(1) Jede nicht der Union angehörende Person, die politisch, aus religiösen oder rassistischen Gründen verfolgt wird oder unmenschlicher oder erniedrigender Bestrafung oder Behandlung ausgesetzt ist, hat ein Recht auf Asyl in der Europäischen Union. Sie hat ein Bleiberecht bis zum Abschluß des Verfahrens.
Kollektivausweisungen von Ausländerinnen und Ausländern sind nicht zulässig.

Begründung:
Das Asylrecht in Abs. 1 ist differenzierter zu fassen. Die vorgeschlagene Formulierung ermöglicht die Anerkennung religiöser, rassistischer und frauenspezifischer Fluchtgründe. Der notwendige Abschiebungsschutz ist als Satz 2 angefügt.

Art. E Recht auf Vertretung
Die gleichberechtigte Teilhabe und Vertretung von Frauen und Männern sind zu gewährleisten.

Begründung:
Frauen sind in EU-Gremien eklatant unterrepräsentiert. Die Besetzung des Konvents zum Entwurf einer Grundrechtscharta ist hierfür ein deutlicher Beweis (9 Frauen und 53 Männer).

Die vorgeschlagene Regelung sichert, daß zukünftig die wahlrechtlichen und organisatorischen Voraussetzungen für eine angemessene Beteiligung von Frauen und Männern getroffen werden müssen. Eine solche Verpflichtung kann in unterschiedlicher Weise umgesetzt werden. Eine Regelung mit langfristiger Geltung sollte kein bestimmtes Verfahren festlegen, sondern offen sein für Weiterentwicklungen und Anpassungsnotwendigkeiten an geänderte Verhältnisse.

Art. II Berufsfreiheit (Convent 18)
(1) Jede Person hat das Recht, ihren Beruf und ihr Gewerbe frei zu wählen und auszuüben, unbeschadet der die Freizügigkeit von Personen betreffenden Bestimmungen des Vertrages.
(2) Zwangsarbeit ist verboten.

Begründung:
Abs. 2:
Das in einem neuen Absatz 2 vorgeschlagene Verbot der Zwangsarbeit entspricht den Grundsätzen der mitgliedstaatlichen Demokratien.

Art. XI Rechte der Arbeitnehmerinnen und Arbeitnehmer als Eltern (Convent 18)
Arbeitnehmerinnen und Arbeitnehmer genießen als Eltern besonderen Schutz. Den Belangen von schwangeren Arbeitnehmerinnen ist besonders Rechnung zu tragen.

Begründung:
Elternschaft ist Aufgabe von Müttern und Vätern, die in aller Regel gleichzeitig Arbeitnehmerinnen und Arbeitnehmer sind. Um ihren gesellschaftlich wichtigen Betreuungs- und Erziehungsaufgaben nachkommen zu können, benötigen sie einen besonderen Schutz. Dieser besondere Schutz beschränkt sich nicht auf die Gewährung von Elternurlaub. Der durch die Richtlinie 96/34/EG vorgegebene Anspruch auf mindestens drei Monate Elternurlaub ist zudem ausbaufähig. Es sind auch andere Maßnahmen, wie etwa die Freistellung wegen Krankheit des Kindes oder ein Anspruch auf Teilzeit denkbar. Entsprechende gesetzliche Regelungen existieren bereits auf nationaler Ebene oder sind in Vorbereitung.

Im Präsidiumsvorschlag wird in Art. XI (Convent 18) ein Mutterschutz von mindestens vierzehn Wochen als Recht der Arbeitnehmerin formuliert, der gestrichen werden sollte. Der Vorschlag entspricht zwar der momentanen Rechtslage (Richtlinie 92/85/EG). Es ist aber denkbar, daß weitergehende und andere Maßnahmen zum Schutz schwangerer Arbeitnehmerinnen entwickelt werden. Eine Grundrechtscharta sollte diese Entwicklungsmöglichkeit bieten.

Wegen des Sachzusammenhangs sollten die vom Präsidium vorgeschlagenen Art. XI und XII zu dem hier vorgeschlagenen einheitlichen Art. XI zusammengefaßt werden.

gez. Sabine Overkämping
Vorsitzende der Kommission Europa des djb

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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CHARTE 4290/00

CONTRIB 162

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the position and the statement by the Amnesty International presented at the hearing on 27 April 2000. [1]

[1] This text has been submitted in English language only.

(a) amnesty international

EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

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Amnesty International is an independent worldwide movement working for the release of all prisoners of conscience, fair and prompt trials for political prisoners and an end to torture, extrajudicial executions, "disappearances" and the death penalty. It is funded by donations from its members and supporters throughout the world. It has formal relations with the United Nations, Unesco, the Council of Europe, the Organization of African Unity and the Organization of American States.

Introduction

The question of how to protect human rights in the European Union (EU) legal order has been debated since the very first steps were taken to found the European Communities.

As the activity of the European Community (EC) started to extend to areas in which it had an increasing influence on individual rights, the concern among Member States in relation to human rights protection grew[1]. While the European Court of Justice stated the primacy of Community Law, even over the constitutional orders of Member States, it refused to recognise jurisdiction on matters of fundamental rights, in absence of Community Law provisions[2]. However, the European Court of Justice, concerned that the precedence of the Community legal order might be questioned by Member States, soon started to develop an indirect protection of human rights, stating that fundamental rights are enshrined in the general principles of Community law, and protected by the Court[3]. In 1974, the European Court of Justice stated that in guaranteeing respect for human rights, the Court is bound to draw inspiration from the constitutional traditions common to Member States and from the international human rights treaties on which the Member States have collaborated or of which they are signatories[4]. A year later, the European Court of Justice referred for the first time to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as a reference for the protection of fundamental rights within the EC legal order[5]. The International Covenant on Civil and Political Rights was first mentioned in the *Orkem* case, judgment of 18 October 1989[6].

The importance of respect for fundamental rights has been repeatedly recognised by the other EU institutions in non-legally binding texts, such as the Joint Declaration on Fundamental Rights of the European Parliament, the Council and the Commission of 5 April 1977[7], which has been followed by several other texts of political nature[8].

A treaty reference to human rights was first introduced by the Preamble of the 1986 Single European Act, and was later included in the body of a treaty by article F(2) of the 1992 Treaty on the European Union (TEU), the Maastricht Treaty. Article 6 of the TEU, as amended by the 1997 Amsterdam Treaty, is the current human rights provision applicable to the activities of the EU, which as article F(2) already did before, states that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". The Amsterdam Treaty has also introduced a mechanism for the Union to address "serious and persistent" violations of human rights by Member States (article 7 of the TEU), which reinforces the accountability of Member States in relation to human rights protection.

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1 Cases *Frontini e Pozzari*, judgment of 27 December 1973 (*Il Foro Italiano*, 1974-I, p. 315) and first *Solange* case, judgment of 29 May 1974 (BverfGE, 37, p. 271).

2 Case 1/58, *Stork v. High Authority* [1959] ECR 17, later confirmed by Joint Cases 36, 37, 38 and 40/59, *Comptoir de vente de charbon de la Rürhr v. High Authority* [1960] ECR 423.

3 Case 29/69, *Stauder*, [1969] ECR 419.

4 Case 4/73, *Nold* [1974] ECR 491.

5 Case 36/75, *Rutili* [1975] ECR 1219.

6 Case 374/87, *Orkem* [1989] ECR 3283.

7 OJ 1977 C 103/1.

8 For a list of such texts, see European Court of Justice Opinion 2/94 (*ECHR*) [1996] ECR I-1759, at I-1768.

The latest step in this process is the elaboration of the European Charter of Fundamental Rights, decided by the European Council meeting in Cologne in June 1999.

As a human rights organisation, Amnesty International welcomes initiatives to improve human rights protection. Amnesty International is an independent and impartial worldwide movement with more than a million members and supporters. Its mission is to contribute to the observance throughout the world of human rights as set out in the Universal Declaration of Human Rights. It campaigns to fulfil this goal by promoting human rights in general as well as opposing specific abuses. Recognising that all human rights are indivisible and interdependent, Amnesty International urges all governments to ratify and implement international human rights standards. It seeks to improve on the protection offered by those standards, in particular in respect of fundamental civil and political rights.

Amnesty International's interest in the proposed European Charter is a positive one in that it offers a perspective of real improvement in the human rights protection currently afforded by the European Union. At the same time Amnesty International is concerned that it should in no way result in a lowering of the current level of protection, and that any ambiguity in that respect be ruled out.

To that end, this paper analyses the issues raised by the adoption of the European Charter and advances recommendations so that it could constitute a real improvement in the human rights protection currently afforded by the EU. In doing so, Amnesty International wishes to emphasise that the European Charter should only be adopted as a legally binding instrument if certain basic conditions are fulfilled.

Part I: Horizontal issues

1. Legal nature of the European Charter

The mandate that the Convention in charge of drafting the European Charter has received from the Cologne European Council is the elaboration of a non-legally binding declaration. However, as the Cologne conclusions already foresaw, its legally binding nature may be decided at a later stage.

Amnesty International believes that the incorporation of a charter recognising the strongest possible guaranteed human rights into the provisions of the TEU or in an annexed protocol, thus ensuring its legally binding nature, would be a desirable step, provided certain essential conditions are satisfied, for the following reasons:
1) The status of human rights in the EU legal order would be clearly spelled out, thus correcting the legal uncertainty which currently surrounds this issue.
2) Human rights would obtain an enhanced status in the EU legal order, thus ensuring that they are not considered “inferior law”, and subordinated to the “higher law” of the economic freedoms granted by the Treaty establishing the European Community (TEC).
3) A new layer of human rights protection would be established, while access to the Council of Europe protection organs would still be available.

A legally binding European Charter, however, must meet certain conditions in order to constitute a real improvement in human rights protection in the EU:
1) The adoption of the European Charter must not result in a possible diminution of the current level of protection that human rights enjoy in its Member States under the European Convention on Human Rights and other relevant international human rights instruments, as interpreted by relevant courts and monitoring bodies.
2) Furthermore, as the European Convention on Human Rights and other international human rights instruments provide for a minimum contemporary standard, nothing precludes the EU going beyond that minimum standard and developing the highest level of protection for individuals subject to its jurisdiction. Therefore, the European Charter should take account of the developments in international law, both of treaty and of customary legal nature, as well as developments reflected in a variety of non-treaty standards and serve to include fundamental rights that have not necessarily been included in other international instruments.
3) Everyone's fundamental rights must be recognised without discrimination, since under international human rights law, fundamental rights cannot be object of discrimination on account of national origin.
4) The European Charter rights must be justiciable. Therefore, the necessary treaty amendments should be adopted in order to ensure that the European Court of Justice has jurisdiction in all the areas of EU activity in relation to human rights violations, this is, full jurisdiction not only on EC matters (including Title IV of the TEC) but also on Title V (Common Foreign and Security Policy) and Title VI (Justice and Home Affairs) of the TEU. Similarly, the necessary treaty amendments should be adopted in order to ensure proper access by the individual to the European Court of Justice[9].

Amnesty International calls for a legally binding European Charter provided that it guarantees the fundamental rights of all individuals without discrimination, strengthens rather than weakens the current level of human rights protection in the EU, serves to include fundamental rights that have not necessarily been included in other international instruments, and is fully justiciable by the European Court of Justice and by national courts when applying EC/EU Law.

2. Scope of the European Charter

The European Charter is currently intended to apply to the activities of the EU institutions and to those actions of Member States which fall within the scope of EC/EU legislation. It is also intended to apply to all activities of the EU, this is to all three pillars (European Community, Common Foreign and Security Policy, Justice and Home Affairs) and not only to activities under the framework of EC law.

An effective protection of fundamental rights requires that not only the traditional EU actors are bound by the European Charter, but also the different entities created under the TEU, particularly in the framework of the intergovermental cooperation, as their activities are increasingly likely to have an effect on fundamental rights (for instance, the High Level Working Group on Asylum and Migration, which has received the mandate to adopt an inter-pillar approach in its activities).

[9] These arguments shall be developed below, under section 3.

In line with the case law of the European Court of Justice, the European Charter should also be applicable to private parties acting with the consent or acquiescence of governments, when human rights violations result from their activities. An example of such action by private parties is that of carriers' involvement in immigration control[10], which may result in the violation of the right of everyone to leave a country in which they fear persecution[11].

Such a scope for the European Charter would confirm the *status quo*. A new dimension in the field of human rights protection in the EU would be to ensure that the European Charter covers Member States' action *outside* the current sphere of EC/EU law. This would enhance human rights protection through EC/EU Law and would confer added value to the European Charter even if such action was only justiciable at the national level[12].

Amnesty International calls for a European Charter that applies to all the activities of the EU institutions, the entities created under the TEU, Member States when acting within and also outside the sphere of EC/EU law and to private parties acting with the consent or acquiescence of governments.

3. Justiciability of human rights in the EU

In assessing the protection of human rights by the European Court of Justice, it is important to note that the European Court of Justice is neither an international human rights court nor a court of appeal. In this regard, and notwithstanding the protection of fundamental rights developed by the European Court of Justice which has been described above, the jurisdiction of the European Court of Justice is a *sui generis* one.

a) Limited access by individuals

In application of article 230 of the TEC, an individual may bring a case before the European Court of Justice asking for the repeal of certain decisions adopted by the EU when such decisions are addressed to him or her, or when, although in the form of a regulation or a decision addressed to another person, they are of direct and individual concern to the former. The European Court of Justice has developed a very restrictive interpretation of these requirements. In addition, the grounds for these claims are very limited: the European Court of Justice shall have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TEC or of any rule of law relating to its application, or misuse of powers. The possibilities for individuals to bring their cases before the European Court of Justice for assessment of alleged human rights violations by the EU are therefore very limited.

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10 ILPA submissions on an European Union Charter of Fundamental Rights (ILPA European Update: March 2000, p. 6).

11 Cf. Human Rights Committee general comment on article 12 of the ICCPR.

12 Clapham, A. *On Complementarity in Europe*", paper presented at the Conference "The Protection of Human Rights in the 21st Century: Towards Greater Complementarity within and between European Regional Organisations", organised by Irish Presidency of the Council of Europe, 3-4 March 2000, Dublin.

b) Limited scope *ratione materiae*

Under article 46 of the TEU, the jurisdiction of the European Court of Justice is extended to article 6, but it is limited to actions by the institutions, in so far the European Court of Justice has jurisdiction according to the relevant provisions in the treaties. And indeed, several areas of EC/EU action which are likely to have an effect on fundamental rights are either excluded from the European Court of Justice control or such control is limited.

This is the case in relation to Title IV of the TEC, where the general rules on the European Court of Justice jurisdiction are applied restrictively in the field of asylum, as it is provided by article 68 of the TEC: the European Court of Justice is only given jurisdiction on cases where a question on the interpretation of the Treaty provisions or on the validity or interpretation of acts of the institutions of the Community based on such provisions is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law. In that case, that court or tribunal is not obliged to submit the case to the European Court of Justice, but shall do so only if it considers that a decision on the question is necessary to enable it to give judgment. However, despite this restrictive jurisdiction, due to the fact that decisions by the European Court of Justice on interpretation of EC Law are binding on all Member States, any decision on one individual case would be automatically applicable in all Member States.

Similarly, under article 35 of the TEU, the European Court of Justice jurisdiction on Justice and Home Affairs matters is restricted and furthermore, Title V on Common Foreign Security Policy is completely excluded from the jurisdiction of the Court.

Amnesty International calls for the necessary treaty amendments to be adopted in order to ensure greater access for individual complaints about the violation of fundamental rights and that the European Court of Justice has jurisdiction in all the areas of EU activity in relation to human rights, this is, full jurisdiction not only on EC matters (including Title IV of the TEC) but also on Title V (Common Foreign and Security Policy) and Title VI (Justice and Home Affairs) of the TEU.

4. International accountability of the EU in the field of human rights: accession to the European Convention on Human Rights

Even if the EU adopted a legally binding European Charter of fundamental rights applicable to all EU activities, fully justiciable by the European Court of Justice, the interpretation of human rights observance would remain sealed within the EU's own institutional system. It would not fulfill the fundamental requirement that the EU be subject to international obligations and monitoring in this field.

a) The need for international accountability of the EU in the field of human rights

While EU Member States' violations of international human rights law can be assessed by international monitoring bodies, EU activities lack international accountability as no international court or other body has jurisdiction to assess violations of international human rights law by the EU.

Taking note that Member States have ceded ever increasing areas of competence to the EU, which results in an ever larger impact on the individual by rules determined and adopted at EU level, Amnesty International recalls that ceding competence to take action in certain fields to a supra-national authority should not remove those fields from the scope of application of Member States' international commitments. Member States when implementing European Union law remain subject to the supervisory mechanisms of the European Convention on Human Rights. However, the EU decisions as such are not subject to external supervision under the European Convention on Human Rights. Independent investigation and assessment by the international human rights monitoring mechanisms established under international treaties is critical to the protection of human rights. The effectiveness of international instruments in safeguarding human rights is diminished where external scrutiny is excluded. The principle of accountability of states and supra-national bodies for human rights compliance to international human rights enforcement mechanisms must be respected.

This approach, however, raises issues related to the competence of the EC/EU in the field of human rights. Article 5 of the TEC establishes that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein. Therefore, the EC has only those powers which have been conferred to it.

The European Court of Justice has played a key role in the development of the source, nature and extent of EC competence. The European Court of Justice case law has established that the powers on the basis of which the EC acts are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them[13]. In relation to human rights, the Court held in its opinion 2/94 on accession by the EC to the European Convention on Human Rights that there is no express or implicit EC competence to act in the field of human rights, as "no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field"[14]. Such competence would require Treaty amendment.

b) Diverging interpretations of the European Charter and the European Convention on Human Rights

In the ever increasing context of EU activity in the field of human rights, the risks of different interpretations of the same fundamental rights by the two bodies charged with the interpretation of the European Charter and the European Convention on Human Rights should not be underestimated.

Although the European Court of Justice has followed the case-law of the Strasbourg organs in its interpretation of European Convention on Human Rights provisions in most cases, the European Court of Justice has not considered itself bound to do so, and it has sometimes produced its own interpretation of European Convention on Human Rights provisions[15].

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13 Opinion 1/76 (*European laying-up fund for inland waterway vessels*) [1977] ECR 741.

14 [1996] ECR I-1759, at I-1787.

15 Diverging interpretations can be found, for instance, in Case 260/89, *ERT* [1989] ECR 2925 and *Informationsverein Lentia et al. c. Austria*, on article 10 European Convention on Human Rights; or Cases 46/87 and 227/88, *Hoerchts* [1989] 2859 and *Nimietz v. Alemania*, judgment of 16 December 1992 on article 8. On this issue, see Lawson, R. "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg", in Lawson, R. and de Blois, M. (eds.) *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermes*, 1994, pp. 219-252.

Although international monitoring bodies do not have jurisdiction to examine decisions by EU institutions, they do have jurisdiction to examine claims from individuals against Member States decisions in application of EU law. It can be expected that as more competencies are transferred to the EC in areas that affect basic human rights (and particularly in relation to rights of an absolute nature, such as the right to life or to freedom from torture), there is a also a risk that divergence of interpretations may become more common. The Strasbourg organs have stated that although they have no jurisdiction to examine claims against EU institutions, they do have jurisdiction to examine the compatibility of measures adopted by State Parties in application of EC law with the European Convention on Human Rights.

The case law of the European Court of Human Rights has outlined the relation between EC Law and the European Convention on Human Rights in several decisions. In a recent case, the European Court of Human Rights has pronounced itself on the compatibility of the application of the Dublin Convention (whose content should be the object of an EC instrument in application of article 63 of the TEC) with the European Convention on Human Rights in *TI v. the UK* (decision following the admissibility hearing of 7 March 2000). The Court stated that the UK could not rely automatically "on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims" since "where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution".

As we can see, in the case of diverging interpretations between the European Convention on Human Rights and European Charter, Member States may sometimes be faced with the obligation to comply with two contradictory international obligations or even judgments in relation to the same matter. Accession by the EC/EU to the European Convention on Human Rights would be one way to ensure a uniform interpretation of the same provisions.

Amnesty International recommends that a method be devised to ensure that the EC/EU act in conformity with the European Convention on Human Rights and its Protocols, as interpreted by the European Court of Human Rights, as well as other international human rights law and standards. One way of achieving this objective, which Amnesty International has recommended in the past, would be to make the necessary amendments to the Treaties to enable and require the EC/EU to accede to the European Convention on Human Rights[16]. As the EC can acquire exclusive external competence in certain areas through different means, Amnesty International recomends that great care be taken in the drafting of any Treaty provision in this regard, so as to exclude the possibility that the EC/EU acquire any exclusive external competence in the field of human rights, as it would be detrimental to the international development of human rights standards if Member States were precluded from adhering to new conventions setting higher human rights standards.

[16]The organisation has already expressed itself in the same terms in 1993 as the issue was raised by the Belgian Presidency of the EU and in 1996 in the context of the IGC which resulted in the Amsterdam Treaty.

Part II: Fundamental Rights in the European Charter

The following comments by Amnesty International are based on the draft articles included in document CHARTE 4149/00, except those related to freedom of assembly and association and to the right to asylum, which are based in document CHARTE 4137/00, as the wording of these rights has not been the object of revision by the Convention so far. However, the organisation may wish to submit further comments on future drafts.

Article 2. Right to life.

The fundamental right to life, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. This right is non-derogable in all circumstances.

Amnesty International opposes the death penalty as a violation of human rights, holding that it violates the right to life and is the ultimate cruel, inhuman and degrading punishment. Although Amnesty International recognises the logic of including the prohibition of the death penalty in the article on the right to life, as has been done in many national constitutions, it recommends that the prohibition of the death penalty is linked also to the prohibition of torture and cruel, inhuman or degrading treatment or punishment, as has been done in some national constitutions. In Amnesty International's view, the death penalty violates both of these rights.

Support for this position comes from court decisions, such as the Hungarian Constitutional Court ruling of 24 October 1990 that the death penalty violates the right to life and to human dignity as provided under the country's constitution. Further support is evidenced by the adoption of international and regional instruments providing for the abolition of the death penalty: the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention on Human Rights. Furthermore, under the Rome Statute of the International Criminal Court adopted in 1998, the death penalty is excluded from the punishments which this court will be authorised to impose, even though it has jurisdiction over extremely grave crimes: crimes against humanity, including genocide, and violations of the laws of armed conflict. Similarly, in establishing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda in 1993 and 1994 respectively, the UN Security Council excluded the death penalty for these crimes.

Amnesty International calls for a European Charter provision which not only prohibits that individuals shall be condemned to the death penalty or executed, but which also includes the prohibition of enacting or retaining any laws that provide for the death penalty. Amnesty International also recommends that the prohibition of the death penalty (without exception) be linked not only to the right to life, but to other human rights, in particular the right to physical and mental integrity (and specifically the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment).

Articles 3 and 4. The right to respect for integrity and the prohibition of torture

The principle that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. This right is non-derogable in all circumstances.

Torture and other cruel, inhuman or degrading treatment or punishment violate the integrity and dignity of the human person, constitute a breach of all accepted norms of civilised behaviour and are universally prohibited under national and international law.

2. Amnesty International recalls that the victims of torture can include not only political prisoners, but also members of vulnerable groups such as ethnic and sexual minorities, refugees and asylum-seekers, immigrants, common criminal suspects and prisoners, the socially deprived and the economically marginalised.

Amnesty International calls on EU member states to commit themselves to the total abolition of torture and other forms of ill-treatment, including the adoption of effective laws to take action so that those responsible for torture from anywhere in the world who enter their territory are brought to justice, either by submitting their cases to their prosecuting authorities or by extraditing the suspects, as required by the Convention against Torture.

Amnesty International calls for a European Charter provision that enshrines the principle that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Therefore, the current wording should read “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, in line with Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the Universal Declaration on Human Rights.

Article 6. Right to liberty and security

The fundamental right to liberty and security of person, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. The essential corollary to the right to liberty is protection against arbitrary arrest or unlawful detention. This basic guarantee applies to everyone, whether held in connection with criminal charges or on any other grounds, such as for instance, immigration control.

The current wording of Article 6 falls short of the guarantees recognised in the European Convention on Human Rights and its Protocols and other relevant international law and standards, such as the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Rome Statute of the International Criminal Court, the Statutes and Rules of Procedure and Evidence of the International Crimes Tribunals for the former Yugoslavia and for Rwanda, the UN Standard on Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Basic Principles on the Independence of the Judiciary, or the UN Basic Principles on the Role of Lawyers.

Amnesty International notes that imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law, as well as other infringements of fundamental rights which may result from such deprivations, such as torture and "disappearances", may –as recognised in the Rome Statute- constitute a crime against humanity if committed on a widespread or systematic basis pursuant to or in furtherance of a state or organisational policy.

Therefore, the article on the right to liberty and security should not only be non-derogable, but should also include the safeguards reflecting the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation, which include the following rights among those set out in more detail in Amnesty International's *Fair Trials Manual*, 1998 (AI Index: POL 30/02/98):

1.- The right to be promptly informed of one's rights, including the right to lodge complaints about one's treatment.
2.- The right to be brought before a judicial authority without delay after being taken into custody.
3.- The right to prompt access to a lawyer and family or friends.
4.- The right to have a lawyer present during questioning.
5.- The right to challenge the lawfulness of detention.
6.- The right to trial within a reasonable time or to release from detention.

Article 7. Right to an effective remedy

The fundamental right to an effective remedy, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. This right should be non-derogable.

The current wording of Article 7 falls short of the guarantees recognised in the European Convention on Human Rights and its Protocols and other relevant international law and standards, such as the International Covenant on Civil and Political Rights, the Convention against Torture, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Final Report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, Annex II: Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/Sub. 2/1997/20(1997) (Joinet Principles), the UN Commission on Human Rights Independent Expert on the Right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000, U.N. Doc. E/CN.4/2000/62(2000) (Van Boven-Bassiouni Principles) or the rights of victims and accused to remedies in Articles 75 and 85 of the Rome Statute of the International Criminal Court.

Therefore, the article on the right to an effective remedy should also include the safeguards reflecting the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation. In this regard, the current wording omits the clarification that the right applies "notwithstanding that the violation has been committed by persons acting in an official capacity". The provision should not be construed as excluding remedies before national authorities, in so far the responsibility of member states may be engaged in the application of the European Charter.

Articles 8 and 9. Right to a fair trial and rights of the defence

The fundamental right to a fair trial, which includes rights to an effective defence, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. This right should be non-derogable in all circumstances. Indeed, depriving a protected person under international humanitarian law of the right to a fair trial during armed conflict may constitute a war crime in certain circumstances.

The current wording of Articles 8 and 9 falls short of the guarantees recognised in the European Convention on Human Rights and its Protocols and other relevant international law and standards, such as the International Covenant on Civil and Political Rights, the Convention against Torture, the Rome Statute of the International Criminal Court, the Statutes and Rules of Procedure and Evidence of the International Crimes Tribunals for the former Yugoslavia and for Rwanda, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Basic Principles on the Independence of the Judiciary, or the UN Basic Principles on the Role of Lawyers. Therefore, the specific rights enshrined in international treaties and standards should be expressly included in the provisions.

Amnesty International also notes that (see Amnesty International's *Fair Trials Manual*, 1998; AI Index: POL 30/02/98):

1. Article 8 omits a number of important aspects of the right to a fair trial in Article 14 (1) of the International Covenant on Civil and Political Rights, not expressly mentioned in Article 6 of the European Convention on Human Rights, including the right to equality before courts and tribunals, to be tried by competent tribunal and to a public judgment.

2. The right to free legal aid in Article 8 is more restrictive than in Article 14 (3) (d) of the International Covenant on Civil and Political Rights and Article 67 (1) (d) of the Rome Statute by requiring a threshold showing that it is "indispensible" and it changes the standard from "the interests of justice" to the undefined "ensure the effectiveness of access to justice".

3. Other important rights to a fair trial recognised in contemporary international instruments not found in the European Convention on Human Rights or its Protocols are omitted, such as the right to remain silent, without such silence being a consideration in the determination of guilt or innocence (Article 55 (2) (b) of the Rome Statute, Rules 42 (A) (iii) of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda Rules of Procedure and Evidence) and the right not to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel (Article 55 (2) (d) of the Rome Statute and Rules 42 (B) of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, both of which include the right to be informed of the right before questioning). These examples are, of course, only illustrative.

4. Article 9 falls short of the guarantees of the right to a presumption of innocence in Articles 66 and 67 (i) of the Rome Statute.

Article 11. Right not to be tried or punished twice

The fundamental right not to be tried or punished twice, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. This right should be non-derogable.

The current wording of Article 11 falls short of the guarantees recognised in the European Convention on Human Rights and its Protocols and other relevant international law and standards, such as the International Covenant on Civil and Political Rights.

Therefore, the article on the right not to be tried or punished twice should reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation. In particular, it should include a reference to the single jurisdiction limitation, in line with Article 4 para. 1 of Protocol 7 to the European Convention on Human Rights.

Article 14. Freedom of thought, conscience and religion

The fundamental right to freedom of thought, conscience and religion, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. This is a non-derogable right.

The current wording of Article 14 falls short of the guarantees recognised in the European Convention on Human Rights and its Protocols and other relevant international law and standards, such as the International Covenant on Civil and Political Rights.

Therefore, the article on the right to freedom of thought, conscience and religion (a non-derogable right under article 4 of the International Covenant on Civil and Political Rights) should reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation. In particular, the provision should reflect that freedom of thought, conscience and religion includes the right conscientious objection and that the right to freedom of religion includes the right to change one's religion or belief, the freedom, either alone or in community with others and in public or private, to manifest one's religion or beliefs in worship, teaching, practice and observance, as well as the right not to hold any religious beliefs or to practice any religion

Article 15. Freedom of expression

The fundamental right to freedom of expression, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter.

The current wording of Article 15 falls short of the guarantees recognised in the European Convention on Human Rights and its Protocols and other relevant international law and standards, such as the International Covenant on Civil and Political Rights. For example, Article 15 fails to make clear that it protects the right to freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers**.**

Therefore, the article on the right to freedom of expression, and any restrictions on this right, should reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation.

Article 13 (CHARTER 4137/00). Freedom of assembly and association

The right of everyone to freedom of peaceful assembly and to freedom of association, as recognised in international law and standards, including the European Convention on Human Rights and its Protocols, should be enshrined in the European Charter. Any limitations must be consistent with international law and standards.

Many individuals throughout the world are detained because they have exercised peacefully their right to freedom of assembly and association. This right is at the core of Amnesty International's work and should be enshrined in the European Charter as strongly as possible.

Article 17 (CHARTER 4137/00). The right to asylum and *non-refoulement*

The right of everyone to asylum should be enshrined in the European Charter. This right is already enshrined in the legal orders of all member states, so its inclusion in the European Charter would reflect this legal development in an international instrument at the European level.

Amnesty International would like to see an express reference to the UN Refugee Convention and to other relevant international obligations for member states, such as the European Convention on Human Rights, in line with article 63 of the Treaty on the European Community.

Amnesty International notes that the current draft provision excludes nationals of member states from the right to asylum. In order to ensure that people who would risk serious human rights violations if returned to a particular country are identified as such and afforded protection, all asylum-seekers should have access to a fair and satisfactory asylum procedure.

Restricting the right to asylum on the grounds of national origin constitutes a clear violation of the UN Refugee Convention and other international human rights treaties. Amnesty International recalls that under international law, discrimination in the enjoyment of fundamental rights on the grounds of national origin is forbidden (article 2 of the Universal Declaration of Human Rights, article 3 of the UN Refugee Convention, article 3 of the International Covenant on Civil and Political Rights, article 14 of the European Convention on Human Rights) and therefore calls for the express recognition of the right to asylum for all individuals. Such recognition would be in line with conclusion 13 of the Tampere Summit, whereby the Heads of State and Government reaffirmed "the importance the Union and Member States attach to absolute respect of the right to seek asylum".

Amnesty International asks for an express provision on the absolute principle of *non-refoulement*, a norm of customary international law, as included in article 33 para. 1 of the UN Refugee Convention and in other international treaties, of universal and regional application, such as article 3 of the UN Convention against torture and article 3 of the European Convention on Human Rights,

which prohibit the forced return of individuals (whether directly or indirectly) to the territories where their lives or freedom are at risk or where they would be at risk of torture. Amnesty International asks for this provision to include an express prohibition against sending an individual to a country where he or she would face an unfair trial or the death penalty.

Amnesty International asks for an express provision on the guarantees that assist individuals in expulsion, extradition, or any other form of forced removal procedures that they may be subjected to in accordance with due process of law. Such provision would be in line with Article 32 of the UN Refugee Convention and article 13 of the International Covenant on Civil and Political Rights (to which all member states are parties) and with the case-law of international monitoring bodies, such as the European Court of Human Rights, the Human Rights Committee or the Committee against Torture.

Summary of recommendations by Amnesty International

1.- As a human rights organisation, Amnesty International welcomes initiatives to improve human rights protection. Recognising that all human rights are indivisible and interdependent, Amnesty International urges all governments to ratify and implement international human rights standards. Amnesty International's interest in the proposed European Charter is a positive one in that it offers a perspective of real improvement in the human rights protection currently afforded by the European Union. At the same time Amnesty International is concerned that it should in no way result in a lowering of the current level of protection, and that any ambiguity in that respect be ruled out. Amnesty International wishes to emphasise that the European Charter should only be adopted as a legally binding instrument if certain basic conditions are fulfilled.

2.- Amnesty International calls for a legally binding European Charter provided that it guarantees the fundamental rights of all individuals without discrimination, strengthens rather than weakens the current level of human rights protection in the EU, serves to include fundamental rights that have not necessarily been included in other international instruments, and is fully justiciable by the European Court of Justice and by national courts when applying EC/EU Law.

3.- Amnesty International calls for a European Charter that applies to all the activities of the EU institutions, the entities created under the TEU, Member States when acting within and also outside the sphere of EC/EU law and private parties acting with the consent or acquiescence of governments.

4.- Amnesty International calls for the necessary treaty amendments to be adopted in order to ensure greater access for individual complaints about the violation of fundamental rights and that the European Court of Justice has jurisdiction in all the areas of EU activity in relation to human rights, this is, full jurisdiction not only on EC matters (including Title IV of the TEC) but also on Title V (Common Foreign and Security Policy) and Title VI (Justice and Home Affairs) of the TEU.

5.- Amnesty International recommends that a method be devised to ensure that the EC/EU act in conformity with the European Convention on Human Rights and its Protocols, as interpreted by the European Court of Human Rights, as well as with other international human rights law and standards. One way of achieving this objective, which Amnesty International has recommended in the past, would be to make the necessary amendments to the Treaties to enable and require the EC/EU to accede to the European Convention on Human Rights. As the EC can acquire exclusive external competence in certain areas through different means, Amnesty International recomends that great care be taken in the drafting of any Treaty provision in this regard, so as to exclude the possibility that the EC/EU acquire any exclusive external competence in the field of human rights, as it would be detrimental to the international development of human rights standards if Member States were precluded from adhering to new conventions setting higher human rights standards.

6.- Amnesty International urges that the articles on fundamental rights be drafted to reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation.

Statement by Amnesty International

Convention NGO Hearing on the European Charter of Fundamental Rights

27 April 2000

The question of how to protect human rights in the European Union (EU) legal order has been debated since the very first steps were taken to found the European Communities.

As a human rights organisation, Amnesty International welcomes initiatives to improve human rights protection throughout the world. Recognising that all human rights are indivisible and interdependent, Amnesty International urges all governments to ratify and implement international human rights standards. Amnesty International's interest in the proposed European Charter is a positive one in that it offers a perspective of real improvement in the human rights protection currently afforded by the European Union. At the same time Amnesty International is concerned that it should in no way result in a lowering of the current level of protection, and that any ambiguity in that respect be ruled out. Amnesty International wishes to emphasise that the European Charter should only be adopted as a legally binding instrument if certain basic conditions are fulfilled.

To that end, the organisation has issued a paper which analyses the issues raised by the adoption of the European Charter as well as the draft articles as they stand today, and advances recommendations so that it could constitute a real improvement in the human rights protection currently afforded by the EU. Copies of this paper are available now and an electronic version shall be forwarded to the Convention Secretariat.

1. Amnesty International calls for a legally binding European Charter provided that it guarantees the fundamental rights of all individuals without discrimination (particularly discrimination on the grounds of national origin), strengthens rather than weakens the current level of human rights protection in the EU, serves to include fundamental rights that have not necessarily been included in other international instruments, such as the fundamental right to asylum, and is fully justiciable by the European Court of Justice and by national courts when applying EC/EU Law.

2. Amnesty International calls for a European Charter that applies to all the activities of the EU institutions, the entities created under the TEU, Member States when acting within and also outside the sphere of EC/EU law and private parties acting with the consent or acquiescence of governments.

3. Amnesty International calls for the necessary treaty amendments to be adopted in order to ensure greater access for individual complaints about the violation of fundamental rights and that the European Court of Justice has jurisdiction in all the areas of EU activity in relation to human rights, this is, full jurisdiction not only on EC matters (including Title IV of the TEC) but also on Title V (Common Foreign and Security Policy) and Title VI (Justice and Home Affairs) of the TEU.

4. Amnesty International further recommends that a method be devised to ensure that the EC/EU act in conformity with the European Convention on Human Rights and its Protocols, as interpreted by the European Court of Human Rights, as well as with other international human rights law and standards. One way of achieving this objective, which Amnesty International has recommended in the past, would be to make the necessary amendments to the Treaties to enable and require the EC/EU to accede to the European Convention on Human Rights. As the EC can acquire exclusive external competence in certain areas through different means, great care should be taken in the drafting of any Treaty provision in this regard, so as to exclude the possibility that the EC/EU acquire any exclusive external competence in the field of human rights, as it would be detrimental to the international development of human rights standards if Member States were precluded from adhering to new conventions setting higher human rights standards.

5. Amnesty International urges that the articles on fundamental rights be drafted to reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 10 May 2000

CHARTE 4291/00

CONTRIB 163

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the presentation by the European Landowner's Organisation (ELO) given at the hearing on 27 April 2000. [1]

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[1] This text has been submitted in English language only.

Presentation by Johan Nordenfalk, President of ELO, at the public hearing regarding the Charter of Fundamental Human Rights, given before the Convention on April 27, 2000.

Mr President, Ladies and Gentlemen,

We from the European Landowners' Organisation – ELO – thank you very much for allowing us to come here and present our views on ownership rights.

ELO is a federation of national landowners' organisations in the EU countries. We represent, directly or indirectly, 30 million people owning land in the countryside - quite a force, for instance four times bigger than the 7 million agricultural farmers. Many of us are also involved in agriculture, but most perform other rural activities, ranging from forestry and small business to energy production and aqua-culture etc.

Today I represent also the forest-organisation **CEPF** and the millions of urban owners, as their organisations **GEFI** and **UIPI** have authorised us to speak on their behalf.

Why then are ownership rights so important?
Well history shows that whenever ownership rights are neglected, the economy and the environment suffers - look for instance at former eastern Europe.

As to the economy, this is particularly important right now when the Union is embarking on an ambitious economic program to achieve full employment.
In my country, Sweden, we learnt this the hard way, because when earlier ownership was less well protected, major entrepreneurs like the founders of well-known companies like Ikea, Tetrapak etc migrated. The Union must not repeat that mistake. Ownership conditions for secure long term investments are crucial.

As to the environment**:** what nobody owns, nobody cares about. What is needed is an owner that loves his property, cares for it, wants to pass it on to his children, and feels safe enough to share it also with others. A secure owner is the environment's best friend!

And now to the wording of the article.

We are very glad that the Praesidium has proposed some changes in comparison with the European Convention on Human Rights, which is not adequate for the demands of today. The Praesidium's wording is an important step in the right direction. We have however, in a document registered as contribution 73 submitted proposals for some further improvements.

Before commenting on these, let me just underline that we fully accept that the authorities always must have the right to intervene for some good reason – it is the criteria and the conditions we are discussing.

Mr President, in order to describe our submissions, let me use an example that can fit both the countryside and the cities

Suppose you own a house with a nice garden. One day the authorities come and say that you must for some reason, perhaps biodiversity, plant thistles all over your garden.
I guess you would be upset – your children will not be able to play on your lawn, enjoy the flowers etc.
But the authorities may say: ”Why complain? You still own your house and your garden!”
”But”, you say, ”I have little use for it anymore!”

This is why we want the words **”and restricted in their use”** included – it must be clearer that is not only depriving you of your house that counts.

Secondly, there must be some acceptable reason for the authorities' intrusion. Maybe in our example there is - it depends on the circumstances. But to only prescribe **”in the public interest”** is too weak - almost anything can be labelled
”public interest”, as also very recent history shows. We suggest **”where deemed necessary”**. Also other wordings are possible, like some already used in the Union countries**:** for instance **”significant public cause**”, or **”public need”**.

Thirdly the compensation. Suppose in our example that you decide to sell your house and instead buy another one just like it. Before the thistle decision they were both worth, say, 100. Now you will only get, say, 80 for yours but the other still costs 100. I believe most of us would consider it correct that you get compensation for your loss of 20 so that you can buy the similar house.
That is why we have proposed **”full and prior compensation”.**

Anyone of you who owns a house, a business or whatever, may one day face a compulsory intervention – something that can change your life. It can not be correct that one person alone shall carry the burden for something that should benefit society as a whole and thus be born by all of us as taxpayers.

In addition to these three changes submitted in our document, our
German members have mentioned that the ”Grundgesetz” also explicitly protects ”inheritance”. To make it more clear we would thus propose to add **”right to inheritance”** to the first sentence in your wording.

Mr President, Ladies and Gentlemen!
One task of the Charter is to make the rights more visible to the Union's citizens.
We believe that our suggestions achieve just that and make the article on ownership more clear and understandable.
But equally important, we believe that with our wording, we will have ownership rights that will benefit the whole Union, its economy, the employment and the environment.

ELO proposed wording of article on ownership rights :

Everyone is entitled to the peaceful enjoyment of his possessions and the rights to inheritance. No one may be deprived of his possessions or restricted in their use, except where deemed necessary in the public interest and in the cases and subject to the conditions provided for by law and subject to full and prior compensation.

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 23 May 2000

CHARTE 4292/00

CONTRIB 164

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter an open letter to the Convention and the intervention by the Federation of National Organisations Working with the Homeless (FEANTSA) given at the hearing on 27 April 2000. [1]

[1] This text has been submitted in French and English languages.

Brussels, 8 May 2000

Open letter to the members of the Convention responsible for drafting the proposed European Union Charter of Fundamental Rights

Dear Madam / Sir,

I am writing to you on behalf of FEANTSA - the European Federation of National Organisations Working with the Homeless. FEANTSA brings together some 60 not-for-profit organisations in the social or community sector that provide a wide range of services to homeless people in all the EU member states, and in a number of the accession countries.

We have been very interested to hear about the work being carried out by the Convention with responsibility for drafting the proposed European Union Charter of Fundamental Rights. We are convinced that the proposed EU Charter should also enshrine those rights which are most important to the most disadvantaged members of our societies - including the right to housing.

Decent housing and living conditions are among the most basic needs of each individual. Gaining secure access to adequate accommodation is often a pre-condition for exercising many of the fundamental rights which form the foundations of all decent societies, and should be enjoyed by everyone. These include the right of access to education, the right to work, the right to social protection, the right to healthcare services, the right to personal privacy and family life, as well as access to basic services such as water and electricity.

The European Observatory on Homelessness (which has conducted research on homelessness in the Member States on behalf of FEANTSA since 1991) has compiled an overview of the situation in the fifteen EU member states. Approximately three million people have no fixed home of their own, while a further 15 million people live in sub-standard or overcrowded accommodation. On this basis, we can estimate that across the European Union, one person in 20 is denied access to decent housing.

Since 1948, the Universal Declaration on Human Rights has proclaimed that: "*everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services*" (Article 25.1). More than 100 states are committed to taking appropriate steps to ensure the realisation of the right to housing, under article 11.1 of the International Covenant on Economic, Social and Cultural Rights (1966).

At the level of the Council of Europe, the European Social Charter was adopted in 1961, and the revised European Social Charter (RESC) was opened for signature in 1996. The right to housing is enshrined in Article 31 of the RESC, which sets out a series of three objectives:

> "*With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:*
> *1. to promote access to housing of an adequate standard;*
> *2. to prevent and reduce homelessness with a view to its gradual elimination;*
> *3. to make the price of housing accessible to those without adequate resources*".

The Revised European Social Charter officially entered into force on 1 July 1999. But the current situation is that only five countries have completed the ratification process: France, Italy, Sweden, Romania and Slovenia. Most of the EU countries have signed but not yet ratified the RESC: Austria, Belgium, Denmark, Finland, Greece, Luxembourg, Portugal and the United Kingdom. FEANTSA strongly advocates that every European country should sign and ratify the Revised European Social Charter. This will provide us with a common foundation, upon which we can develop and implement effective policy solutions at all levels, in order to tackle social exclusion and homelessness.

In relation to the proposed European Union Charter of Fundamental Rights, we must ask the following question: Will the proposed Charter represent a step forward in terms of protecting the fundamental rights of the most disadvantaged members of our societies?

We welcome the fact that the Convention is willing to consider all the main dimensions of fundamental human rights, including civil, political, legal, social and economic rights. However, we are extremely concerned that the right to housing was not included in the draft list of fundamental rights which was presented at the most recent meeting of the Convention.

As civilised and democratic societies, we have a collective responsibility to ensure that all citizens and residents are able to gain access to adequate accommodation. The prevention and elimination of homelessness can only be achieved through the recognition and realisation of the right to housing. This conviction is enshrined in the revised European Social Charter, and in also reflected in numerous texts of national constitutions and laws that have been enacted in the member states of the European Union.

We fear that the adoption of an EU Charter of Fundamental Rights which excludes the right to housing would send out a negative signal to the citizens of Europe and to the national governments of the member states and of the accession countries. It would suggest that the right to housing is somehow less important than other fundamental human rights. It would imply that our societies are willing to tolerate that thousands of people become homeless every year. It could undermine the efforts of those of us who are working to protect the fundamental rights of the most disadvantaged members of our societies.

We respectfully appeal to you to ensure that the full range of social rights - including the right to housing - are included in the proposed EU Charter of Fundamental Rights.

Yours sincerely,

John Evans
President of FEANTSA

Public Hearing of the Convention on the EU Charter of Fundamental Rights

European Parliament, Brussels, 27 April 2000

Address by Catherine Parmentier, Secretary General of FEANTSA

Mr Chairman, Ladies and Gentlemen members of the Convention, the following address is made on behalf of FEANTSA, the European Federation of National Organisations Working with the Homeless.

FEANTSA currently brings together some seventy national and regional associations working to provide a broad range of services for the homeless in the Member States of the EU as well as in a number of candidates for EU membership. FEANTSA is also responsible for running a research structure, the European Observatory on Homelessness, which works in cooperation with 15 universities and research organizations throughout the Member States.

The wish we express today is for recognition by the members of the Convention of a right to decent and affordable housing for all, even for those on low incomes.

1. The context

At present, 18 million Europeans (or one person in twenty) in the 15 countries of the European Union are denied access to reasonable housing. Of these, 3 million are actually homeless, and 15 million are living in sub-standard and overcrowded housing.

The European housing market is characterized by rising costs, particularly in the private rented sector, while insecurity in the labour market means that the resources households are able to devote to housing are increasingly under pressure.

In these conditions there is an urgent need for the right to decent housing to be placed at the centre of the political agenda at all levels, and consequently also therefore at the centre of the Charter of Fundamental Rights.

2. Housing and the other Fundamental Rights

Adequate housing and reasonable living conditions are among the most basic needs of each individual. Housing is the first and last line of defence against social exclusion.

The access to decent, stable housing is frequently also the indispensable precondition for the exercise of most of the other fundamental rights currently under discussion in this forum and whose inclusion in the Charter appears not to pose a problem.

What real relevance for homeless people have any of the following rights: the right to privacy? the right to personal dignity? the right to lifelong education? the right to maternity care? the right to social protection? the right to protection of children? the right to the integration of the handicapped? the right to the protection of family life? the right to health care? the right to education for children? the right to personal security? the right to work? the right to a normal working week? The right to vote?

These rights are all devoid of meaning for people who have lost their homes. It is no exaggeration to describe homelessness as a negation of citizenship.

3. Integrating the right to housing in the Charter

Housing is too important and too expensive an item to be decided by the law of the market with no public regulation. Recognition of a right to adequate and affordable housing by the public authorities at all levels constitutes the best long-term guarantee for the implementation of general policies designed to address this fundamental and universal need.

I would like to remind you (and on this subject the document drawn up by the European Housing Forum can be consulted on the websites of the Convention and of the Forum) that the need for recognition of the right to housing has received backing at the community level from several sources, including :

- the European Parliament: three Resolutions (87, 96 and 97) and the Bertel Haarder report in March 2000 of the Commission on the freedom and rights of the citizens;

- the Committee of the Regions: Own Initiative report, 1999, Opinion on housing and the homeless;

- the European Commission, in its March 2000 Communication *Building an inclusive Europe*, points out that *'Homelessness is one of the most severe expressions of poverty and social exclusion'*.

It is relevant to mention here that the European political calendar over the next two years contains a unique combination of initiatives for promoting adequate housing provision for everyone:

- the examination in the annual meetings of housing ministers under four successive presidencies - Portugal, France, Sweden and Belgium - of the role of public policy in facilitating access to housing;

- the work of the group of specialists on access to housing of the Council of Europe and the publication by this group in 2001 of a report on housing among disadvantaged groups in Europe, plus recommendations to the Committee of Ministers of the Member States;

- the launch this year by the United Nations of the Global Campaign for Security of Tenure, and the organization in 2001 at New York of the World Habitat Conference (Istanbul + 5).

The European Union must include these ideas and efforts in its action.

Access to decent and affordable housing for all is an absolute precondition for the social cohesion which was identified at the Lisbon Summit as one of the main objectives for the Union.

Ladies and Gentlemen of the Convention, I submit that if the Charter of Fundamental Rights is to be a truly coherent document, forming the basis of a project for European society, with the aim defined by the committee of experts on Fundamental Rights of informing the action of the European Union in all areas and at all times, then the right to housing must be included. This is a priority.

Thank you.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 16 May 2000

CHARTE 4293/00

CONTRIB 165

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the position paper from Eurolink Age on occasion of the public hearing on 27 April 2000. [1] [2]

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[1] This text has been submitted in French and English languages.

[2] Eurolink Age: Tel: +44-181 765 7715. Fax: +44-181 679 6727.

ELA PP 02/2000

European Union proposals for a draft Charter of fundamental rights of the EU

Eurolink Age position paper

Introduction

Eurolink Age is a network of organisations and individuals throughout the European Union that promotes good policy and practice on ageing in the interests of the 121.4 million older people (defined as 50+) in the EU. It has been in operation since 1981. As a non-governmental organisation we are delighted to respond to the invitation to contribute to the drafting process for a Charter of fundamental rights for the EU.

This position paper, based on the Presidency note of 27 January 2000, has been drawn up in consultation with c.140 Eurolink Age members across Europe who are concerned to ensure that older people's interests are fully taken into account by the Charter drafted by the Convention.

Comments on `Draft list of fundamental rights' circulated by the Portuguese Presidency on 27 January 2000

List of rights

Eurolink Age draws to the attention of the Convention some specific rights which are particularly sensitive for older people, aspects of which should, in our opinion, be addressed as detailed drafting work continues. The following comments are numbered in accordance with the Portuguese Presidency list.

Dignity

1. This right should incorporate the relevant United Nations Principle for Older Persons: 'Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse'.

Right to life
2. This right must take account of the sensitive issue of end of life rights, relating to access to medical treatment, to health-related choices in later life, and in relation to euthanasia. This is an emotive matter which must be treated with great respect.

Liberty and security
3. The European Convention on Human Rights and Fundamental Freedoms sets out exceptions to the general right to protection in the event of deprivation of liberty. These include: 'the lawful detention of persons .....of unsound mind, ...' (Article 5(e)). In view of the higher incidence of mental frailty among older people, Eurolink Age believes it is important that 'persons of unsound mind' be defined in such a way that adequate protection is ensured for individuals, such as Alzheimer's disease sufferers, whose liberty may be infringed while they are still capable of – and can benefit from – taking some responsibility for their own affairs.

Respect for private and family life: right to privacy, home, correspondence
8. In practice today, this right is often infringed in the case of frail older people. The Charter should follow the United Nations Principles which address these issues, particularly in relation to supporting the continuing independence of older people and also concerning their 'human rights and fundamental freedoms when residing in any shelter, care or treatment facility'.

Due regard should be given to those older people who find themselves victim to family abuse.

Article 23 of the Revised European Social Charter, on the right of elderly people to social protection, guarantees the respect of older people living in institutions. Eurolink Age calls on the Convention to incorporate Article 23 in its entirety into the draft Charter.

Right to education and vocational training, freedom of choice of method of education
13. The drafting of this right should take account of life-long learning, and the need to tailor education and vocational training to individual requirements. Research by Eurolink Age suggests that within the workplace older workers are often unable to benefit from training due to inappropriate delivery aimed at younger people.

Freedom of movement
17. The EC affords limited rights for those above retirement age to reside in another Member State. We believe that this right should be expressed in such a way that individuals will be able to rely on it when the implementing provisions are not applied in the spirit of the Treaties by all Member States, as is often the case today.

Right to property
18. Eurolink Age believes that the term 'property' should be defined to include social security rights and benefits which apply and which are accrued by the individual in the course of their life.

Non-discrimination
21. Age as a basis for discrimination is included in Article 13 of the EC Treaties but not *per se* in the ECHR (Article 14). Eurolink Age believes that all persons of whatever age should enjoy the right of freedom from discrimination in all aspects of their lives, including the workplace, health and other services.

Economic and social rights/objectives

2,3 and 4. ***Working conditions***
Eurolink Age welcomes the basic rights put forward for the benefit of all workers. It is important that those with informal employment status are also taken into account, including volunteers and informal family carers.

5. ***Pensions***
Eurolink Age argues that there should be a right to an adequate pension for all older people, in line with Council Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems. Older people currently make up the highest proportion of Europe's socially excluded people - 35% of those living below the poverty line in the EU are age 50 and over (ECHP, 1995 wave). They are among the most vulnerable, and least able to change their situation.

11, 12 and 15. ***Social protection***
Eurolink Age believes that everyone covered by the Charter should enjoy a right to a minimum level of healthcare, to social security, social and medical assistance, and – if affected by a disabling condition – to positive measures towards integration in society.

Implementing the Charter

Accessible for all
2. The EU Council has stated that the protection of fundamental rights is a founding principle of the EU, and that there is a need to make these fundamental rights more visible to the Union's citizens.[1] Eurolink Age believes that these rights will only be visible to individuals if they are presented in an understandable and accessible manner, and if there is straightforward, affordable recourse for individuals whose rights are denied.

3. The Convention has indicated that it is not yet certain what legal status the Charter will have, if any. Eurolink Age argues that it is imperative that the Charter is legally binding and can ultimately be relied upon by individuals. Unless the Charter is applied in practice, the original goal set out at the Cologne summit in June 1999 – 'to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens' – becomes a nonsense. In particular, we believe that it is no longer acceptable to sideline those – such as non-EU citizens or older people without a history of involvement in the labour market - who may be affected by, but not yet protected by the EC Treaties.

[1] Conclusions of the European Council in Cologne, 3-4/6/99

Grievances should be dealt with within an acceptable timeframe.

4. At present, those provisions under the EC Treaties with direct effect (which can be relied upon by individuals) are enforceable through national judicial systems and the European Court. The process is time consuming. Where a case is referred to the Court of Justice, it can take two years or longer before a judgment is given. If the final Charter is to be relied upon by individuals, legal procedures must ensure that an already lengthy system is not further worsened as a result of the Charter. Especially for elderly people, recourse must be obtainable within an acceptable timeframe.

5. We draw the attention of the Convention to the 'Declaration of principles to mark the end of the European Year of the Elderly and Solidarity between Generations' agreed by the EU Council and Ministers for Social Affairs, meeting on 8 December 1993, as well as to the United Nations Principles for Older Persons[2]. We believe that these principles should be incorporated into the draft Charter.

[2] Resolution 46/91, adopted by the UN General Assembly on 16 December 1991

Annex 1
Extract from the **Declaration of Principles of the Council of the European Union and the Ministers for Social Affairs, meeting within the Council of 8 December 1993 to mark the end of the European Year of the Elderly and of Solidarity between Generations (1993)**

Ministers .....

9. DECLARE that:
- Member States recognize, in their legislation and policies, the full citizenship of the elderly, in freedom and with equal rights and obligations, in all areas of the life of the community;

- they intend to promote the integration of the elderly in all areas of the life of the community, thereby acting to counter social exclusion and isolation as well as discrimination, given that all persons of any age are entitled to recognition of their human dignity;

10. – DECLARE that Member States wish to pursue policies based on the essential principles of solidarity between and within generations in order to:

- promote the social integration of the elderly by enabling them to manifest themselves in society in the spheres of family, social, political, cultural, recreational and educational life;

- encourage respect for the elderly as individuals and their right to privacy and physical integrity, and promote opportunities for the elderly to assume their responsibilities;

11. CALL UPON MEMBER STATES, in accordance with the above principles, to approve the following objectives framing policies concerning areas of special interest to the elderly:

(i) regarding level of income and standard of living:

(a) take measures to guarantee the elderly the right to minimum resources and/or access to other systems of social protection and to enable them to play a continuing part in social life on an independent basis;
(b) grant the elderly, when ceasing work at the end of their working lives, a substitute income, determined by means of standard benefits or calculated in relation to their earlier earnings, maintaining their standard of living in a reasonable manner, on the basis of their participation in appropriate social-security schemes;

(c) refer, in setting amounts, to such indicators as they consider appropriate, e.g. statistics on the average available income in the Member State concerned, statistics on household consumption, the statutory minimum wage, if any, or price levels;
(d) introduce arrangements for periodic review of such amounts in accordance with these indicators, to ensure that needs continue to be met;
(e) ensure that the elderly can remain active in society and, having due regard to the economic and employment situation in each Member State, can retain links with the labour market;
(f) in due course, adapt pension schemes to demographic changes, while maintaining the basic role of statutory retirement arrangements;

(ii) regarding housing and mobility:

(a) encourage a flexible housing policy providing for a variety of accommodation which enables the elderly to continue to play a part in the life of the community; in this connection, account should be taken of the personal wishes of the elderly to continue living in their own homes;
(b) ensure that the independence and privacy of the elderly are respected;
(c) encourage the independence of the elderly by promoting a residential environment and transport infrastructure that are accessible and safe;

(iii) regarding provision of care and services:

(a) on the basis of objective criteria, provide adequate assistance geared to the autonomy and physical, mental and social well-being of the elderly; such assistance could include home care, home help, mobile services, sheltered housing and health services;
(b) encourage co-ordination of the various health and social services;
(c) promote a range of qualified services to meet the new requirements of a population with increasing numbers of very elderly people, so that dependence and institutionalization can be avoided as far as possible; this applies in particular to persons suffering from ageing diseases;

(d) establish criteria for introducing and organizing such services and facilities;
(e) without concentrating exclusively on the elderly as a target group, envisage preventive measures aimed at forestalling or delaying the onset of diseases and the beginning of dependence;

(iv) regarding employment of elderly workers and preparation for retirement:

- take initiatives to:

(a) assess, in a spirit of solidarity between generations, the extent to which differential treatment based on age is justified;
(b) make possible a smooth transition from working life to retirement;
(c) provide appropriate support for the elderly during that transition by introducing facilities for advice and counselling, information and practical assistance and streamlining administrative procedures accordingly;
(d) encourage the passing on of expertise to rising generations in order to take advantage of the experience of the elderly;

(v) regarding the participation of the elderly:

promote, in all layers of society, full involvement of the elderly in the life of the community through suitable provision of the information needed for active involvement in appropriate fashion in all areas concerning them;

12. EMPHASIZE that:

(a) the attainment of the above objectives can make a considerable contribution towards combating and preventing the social exclusion and isolation of the elderly;
(b) it is desirable to encourage the attainment of those objectives in the Member States;
(c) the Council and the Ministers for Social Affairs will periodically review progress in implementing those objectives;

13. NOTE the following statement by the Commission:

'The Commission emphasizes that demographic trends, and the ageing of the population in particular, constitute one of the major challenges for social policies. It further points out that the European Year of the Elderly and of Solidarity between Generations has enabled firm progress to be made on, in particular, data analysis, the debate on the implications of ageing, the development of innovative approaches, the exchange of experience, the mobilization of the bodies involved, co-operation between the latter and active participation by the persons concerned.

In this connection, it emphasizes that activities need to be undertaken which draw on this progress and that the 1994 budget guidelines provide a modest, but useful, basis for this purpose.

On the basis of the evaluation under way and the achievements of the European Year it intends to make medium-term proposals in 1994 for increased Community support for Member States' policies in this area.'

Annex 2

Revised European Social Charter

Article 23 the right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:

a adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
b provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
b the health care and the services necessitated by their state;

- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 12 May 2000

CHARTE 4294/00

CONTRIB 166

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the presentation by "European citizens and their associations" (ECAS), given at the public hearing on 27 April 2000. [1] [2]

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[1] This text has been submitted in English language only.

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CIRC 0013
27 April 2000

Presentation by ECAS to THE HEARING FOR NGOS ON THE DRAFT CHARTER on fundamental rights

ECAS is an advice service for European citizens and their associations. As part of the "Dialogue with citizens" project, our team of lawyers has handled over 30,000 questions from ordinary people about their rights to live and work in the EU. You can find with us the evidence of how Europe is not working properly for citizens in the areas of recognition of free movement, social rights and professional qualifications. We have also carried out discussion groups and research on European citizenship.

There is much rhetoric in the discussion of rights. We hope that the convention will keep in mind the concerns of ordinary people. There is a need to reaffirm European citizenship. All too often there is a clash between the expectations to which this concept gives rise and what happens in practice when Member States' administrations apply the exceptions rather the spirit of Community law. How can the 16 year old German girl denied access to a training course in France because of her nationality, or the aid worker facing an expulsion order from Belgium, or the teacher waiting five years for her qualifications to be recognised in Spain take the concept of European citizenship seriously? It is vital therefore for the convention to address how effective mechanisms for advice, conciliation and access to justice can be developed nationally and at EU level. The charter should hold out tangible benefits to people.

We would like to make three points referring in particular to the proposed articles on the rights of citizens (doc. Charte 4170/00, convent 17) and a fourth point concerning relations between the Charter and the European convention on human rights:

1. The need for a focal point on European citizenship

Why since Maastricht has citizenship of the Union remained a cinderella concept? One reason is that in the Treaties and hence in the administrative and committee structures of the Institutions the notion of citizenship is atomised and responsibilities scattered. The charter could therefore provide a focal point by bringing together and strengthening in a single text all EU provisions relating to European citizens. The convention, in articles A to J, is making progress on grouping together different aspects of the citizen's relations with the EU Institutions and political rights. More needs to be done in the area of freedom of movement in the broadest sense where there is only one article proposed, letter J, thus neglecting other Treaty provisions on free movement of workers, recognition of qualifications and access to employment in the public sector.

For example, the right to diplomatic and consular protection was included in the draft list of fundamental rights proposed on 27 January 2000 but appears to be forgotten so far in the draft articles. The Commission and European Parliament have often called for a regrouping of all articles relating to European citizenship and free movement, whilst the report of the high level panel chaired by Simone Veil of March 1997 called for a single Commissioner.

2. The need to develop the concept of European citizenship

The convention should also come forward with ideas to develop European citizenship, since article 18 of the Treaty recognises that it is an evolving concept. In response therefore to your question "Where rights are reserved for citizens alone, should there be a general clause to the effect that such rights may be extended to third country nationals?", our reply is "yes", but subject to certain conditions such as legal residence in a Member State for five years or over. Why in an internal market and a global economy does the EU allow its own citizens to live and work in other Member States, whilst keeping third country nationals locked in separate national economies? And there are other issues here too. By accepting Article 18 as it stands with its apparently innocuous phrase "subject to the limitations and conditions laid down", the convention would be endorsing an economic, 19th century concept of citizenship whereby EU citizens without sufficient resources may be expelled from another Member State. The EU's own concept of citizenship is at variance with other Treaty provisions on non-discrimination and fighting social exclusion. Free movement is easier for those in employment than for job seekers, trainees or students. If all EU citizens were given a one year unrestricted residence right, many problems could be resolved.

3. The need to solve problems and make rights enforceable

People expect European citizenship to mean that the EU Institutions have a responsibility to deal with their problems, and are transparent and accountable. The convention is responding to this demand, but the draft articles remain rather general, and could address as follows, some more specific and legitimate grievances:

- One could add to the principles of democracy in Article A that "*deliberations of a legislative nature in the Institutions are held in public*" which is true in this house but not in the Council of Ministers.

- One could also add to Article E "*citizens of the Union have a right to be informed of their European rights and duties and of the policies of the Union*", which is really a precondition to having any relations with the administration.

- The right to be heard and receive a response should be defined (i.e. not exceeding one month) and also applied to the particular issue to which the ombudsman has drawn attention, i.e. the accountability of the Commission to complainants;

In this report, we would propose an amendment to strengthen the rights of the citizen as follows:

"*Every natural of legal person has the right to address a complaint to the European Commission and to be informed of the action taken, or of the reasons why the Institution considers that no action should be taken. If the absence of action has no legal grounds, the plaintiff with a legitimate interest may bring the matter directly before the European Court of Justice*".

This sanction does not mean that we are in favour of litigation per se. On the contrary we know that people are extremely reluctant to go to court, and we believe that the convention should also reflect the mood both of the public and ministries of justice in favour of quick, inexpensive and effective alternative dispute resolution.

4. The Charter and the European Convention on human rights

For the last 10 years, like other NGOs we have been demanding that the EU should adhere to the Council of Europe convention on the protection of human rights and fundamental freedoms. Citizens should have the same right of appeal in relation to EU decisions as they have in relation to their own governments and courts. Today we would probably go further. The Council of Europe has enlarged rapidly, some would say too rapidly, with the risk of erosion of its human rights "acquis". It is also the traditional meeting place of EU members and applicant states. The convention should not only recommend the Treaty changes and protocols necessary for the EU to join, but also how to strengthen and modernise the Council of Europe's human rights machinery and provide for sanctions to ensure that the decisions of the Strasbourg Court are enforced. There is often a case for strengthening Institutions which exist rather than creating new ones, which in this case would simply add to the widespread confusion about the role of the different European and International Courts.

Finally, there can be no true citizenship based solely on rights without the other side of the coin – responsibilities - and we do not find this reflected yet in the draft.

SUMMARY OF THE ECAS POSITION

ON EUROPEAN CITIZENSHIP AND FUNDAMENTAL RIGHTS

1) Every person holding the nationality of a member state and/or legally resident in the European Union for over five years should be able to acquire certain European citizenship rights.

2) The Union should accede to the European Convention for the protection of human rights and fundamental freedoms and its protocols.

3) Every person should be guaranteed protection against discrimination on whatever grounds including age, disability, race, religion, sex and sexual orientation. Positive discrimination to ensure equal rights should be allowed.

4) The Union should have action programmes which cover the issues of social rights, access to services, safety, health and the environment. There should be particular attention to vulnerable groups in society.

5) Citizens of the Union have a right to seek work and reside freely anywhere in the Union without internal border controls and a common external frontier. An action programme should seek to eliminate the visible and hidden barriers to exercising these rights.

6) Every citizen of the Union residing in another Member State should have the right to vote and stand as a candidate in all elections and to participate in referenda.

7) Citizens of the Union should have the right to associate freely and establish European associations or foundations across borders to make their voice heard by the Union institutions.

8) Citizens of the Union should have a right to be informed of the Union's policies whilst enjoying freedom of access to documents and the legislative process.

9) Every natural or legal person should be able to hold the Commission accountable to respond to complaints in addition to the right to petition the European Parliament or apply to the Ombudsman.

10) Every person, or association acting on their behalf, should be able to defend their European rights in a tribunal and be able to appeal to the European Court of Justice if other remedies are exhausted.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 16 May 2000

CHARTE 4296/00

CONTRIB 168

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the intervention by the European Council of Steiner Waldorf Schools given at the hearing on 27 April 2000. [1]

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[1] This text has been submitted in English language only.

European Council of Steiner Waldorf Schools
STATEMENT MADE AT THE HEARING OF NGOs ON APRIL 27th, 2000 BEFORE THE CONVENT ENTRUSTED WITH DRAFTING A EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

Dear Mr. Chairman, dear members of the convent,

my name is Detlef Hardorp and I am speaking here today on behalf not only of the German "Bund der Waldorfschulen", but also on behalf of the European Council of Steiner Waldorf Schools (ECSWS). We represent the largest school movement *independent* of church and state in Europe. Of the 800 plus Steiner Waldorf schools world-wide, 589 are in Europe, in 19 European countries. We have been working together with a number of other European organisations like ECNAIS and OIDEL, representing altogether more than ten million pupils in European independent schools, on a wording for article 16, and a joint proposal will be presented this afternoon by the European Forum for Freedom in Education (EFFE).

My plea here today is for a Europe which actively supports more diversity in education with a stronger emphasis on understanding and tolerance within a multi-cultural Europe.
Steiner Waldorf schools follow an international curriculum that gets adapted to the particular culture of the region the school happens to be in, with a strong emphasis on the European dimension. For example, Steiner Waldorf Schools immerse children in two foreign languages and their respective cultures from class one - with 80 years of experience to look back upon.

The Netherlands have treated all providers of primary and secondary education equally since 1917, without discrimination with regard to public funding. This could have a model function. Other countries demand that a school follow their national curriculum in order to be eligible for subsidies. This can lead to discrimination against those parents who, for example, opt for a stronger European or international orientation of the school of their choice. Should this remain acceptable in Europe? Is it not precisely the task of the EU to reinforce the European dimension of education (as noted, for example, by Andrew Duff, CHARTE 4218/00, page 104)?

Without subsidies, independent schools either turn into classic "private" schools for the rich - which is not compatible with the social philosophy of Steiner Waldorf education, or they are forced to underpay their teachers and to constantly hover on the brink of economic disaster - the plight of Steiner Waldorf schools in a number of European countries. So my plea here is for diversity in education which must guarantee funding through the member states.

It would suffice to take seriously the "Resolution on Freedom of Education in the European Community" of the EP, passed in 1984 (14-3-1984). I would like to quote one sentence in particular:
»In accordance with the right to freedom of education, Member States shall be required to provide the financial means whereby this right can be exercised in practice, and to make the necessary public grants to enable schools to carry out their tasks and fulfil their duties under the same conditions as in corresponding State establishments, without discrimination as regards administration, parents, pupils or staff.«

Besides the Netherlands, there is a definitive tendency in this direction. Sweden, for example, put this into practice about a decade ago: primary and secondary education is now equitably funded in that country. In other words, schools run by the state and schools run by third sector NGOs receive the same amount of money. National authorities there no longer privilege themselves. There has been no remorse about the greater diversity of education this has brought about in Sweden.

The EU is not and should not be in a position to regulate the content of education beyond assuring diversity and non-discrimination and furthering the European dimension. But that is already a lot, if taken seriously and given a binding framework.

Please allow me a brief comment on the fear of sects opening schools, which has been voiced occasionally in the discussion. It should go without saying that all schools must respect human and fundamental rights. The fear of sects seems to come largely from countries with little experience with diversity in education. I have not heard of sects taking over schools in countries that already have a lot of diversity. Is the fact that paper money can be counterfeited an argument against the free circulation of money? Obviously measures against counterfeiting need to be taken, and these exist.

Please allow a further remark with regard to M. Berthu's minority opinion: subsidiarity is not only applicable between different levels of governmental authorities, but should also be applied between authorities and citizens! Precisely *because* we want freedom and diversity, we need an article on education in the charter which takes us a step forward in giving more responsibility in education to the third sector.

I quite agree with Mr. Griffith and others that it is insufficient to speak only of parental choice with regards to religious and philosophical convictions, but that *educational* preferences (critères pédagogiques) need to be included in the wording of the charter.

To sum up: It would be helpful to have a European Charter of Fundamental Rights which guarantees minority rights also in the educational sector with regard to reasonable educational convictions of parents, and which stipulates non-discrimination also for powerful member states with regards to less powerful NGOs trying to serve the needs of these minorities with innovative quality education: subsidiarity at the lowest level. This is - in my view - the direction in which education needs to develop in a civil society.

Thank for your attention!

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MEMBERS:
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BELGIUM: Federatie van Rudolf Steinerscholen in Vlaanderen
CZECH REPUBLIK: Asociace waldorfských ckol
DENMARK: Sammenslutningen af Rudolf Steiner Skoler i Danmark
ESTONIA: Eesti Waldorfkoolide Ühendus
FINLAND: Steinerpedagogiikan seura ry
FRANCE: Fédération des Écoles Rudolf Steiner en France
GERMANY: Bund der Freien Waldorfschulen e.V.
HUNGARY: Magyar Waldorf Szövetség
ITALY: Federazione della Scuole Rudolf Steiner in Italia
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NORWAY: Steinerskolene i Norge
RUSSIA: Association of Waldorf Schools
SWEDEN: Waldorfskole-federationen
SWITZERLAND: Arbeitsgemeinschaft der Rudolf Steiner Schulen
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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 25 May 2000

CHARTE 4298/00

CONTRIB 170

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the second submission by the Confederation of British Industry (CBI). [1]

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[1] This text has been submitted in English language only.

Confederation of British Industry

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CBI SECOND SUBMISSION TO THE EU CHARTER OF FUNDAMENTAL RIGHTS DRAFTING CONVENTION

The Confederation of British Industry (CBI) is the voice of British business, representing more than 250,000 employers, large and small, industrial and commercial.

This second CBI submission to the Convention focuses on the economic and social rights which are currently being discussed.

Summary

1. As outlined in its earlier submission to the Convention, the CBI supports a declaratory Charter which sets out existing justiciable fundamental rights – whether derived from the European Convention on Human Rights or the EU Treaties – and how citizens can enforce them. We believe this approach will maximise the visibility of fundamental rights to EU citizens, whilst preserving the existing, effective legal mechanisms.

2. We remain deeply concerned by calls to extend the list of existing fundamental rights and to make the Charter legally binding by incorporating it into the Treaties.
   The advocates of this approach aim to develop a European Constitution by creating binding rights at EU level in areas which have traditionally been the ultimate responsibility of national governments. This would be an enormous political step. Such shifts in sovereignty have major implications and should only be considered through full intergovernmental discussions. We do not believe that contemplation of such a radical approach is compatible with the mandate provided at Cologne – which was clear that the Convention's primary role was to consider how to make existing rights more visible.

3. The term 'fundamental social rights' can create confusion. It is used in different community texts to describe both justiciable rights and political aspirations which cannot be enforced by the Courts. For example, the European Convention on Human Rights clearly has direct legal effect – EU citizens can take cases under it to the Strasbourg Court. Such rights should, in our view, be included in the Charter. By contrast, the fundamental rights referred to in the 1961 European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers are political aspirations, values and policy objectives that all member states agree to pursue at the appropriate level, but which have no legal effect. Whilst these are of great importance, they do not have the same legal status as justicicable rights. We do not believe that they should be included in the Charter.

The CBI believes that it is critical that the differing legal status of "fundamental social rights" must be fully acknowledged in discussion of both the scope and legal status of the Charter.

A declaratory Charter focusing on those rights which are currently justiciable is the best way to meet the Council's objective of raising EU citizens' awareness of their fundamental rights.

5. The CBI believes the role of the Charter is to raise EU citizens' awareness of their existing rights – an objective that we fully support. Looking at the Convents 18, 19 and 26, the CBI believes that only those fundamental rights and freedoms which are at present directly enforceable should be incorporated into the Charter, namely:

   - The freedom to choose and practise trade and profession, which is closely associated with the right to move and reside freely within the territory of the Member States as established in article 18 of the TEC.

   - The right to equal pay between men and women, as set out in article 141 of the TEC.

   - The right to freedom of association, set out in article 11 of the ECHR.

   - The right to equality between men and women and the right of disabled persons to social and professional integration should be considered as elements of the general principle of non-discrimination established in article 14 of the ECHR.

6. The Charter should set out these justiciable rights in clear and simple language for maximum impact and point to the appropriate source instrument and existing legal mechanisms by which citizens can enforce these rights.

7. The legal mechanisms for enforcing ECHR rights would be altered if they were incorporated into the EU Treaties. This would undermine the current effective system of enforcement and generate considerable legal uncertainty:

   - Overlaps of jurisdiction between the Strasbourg Court and the European Court of Justice would lead to different interpretations of fundamental rights, undermining legal certainty.

   - It would also create a two-speed system of case law development that would weaken the Council of Europe. The European Court would develop its own body of case law that would not be applicable to non-EU members of the Council of Europe.

   - The Strasbourg Court – which has jurisdiction over the ECHR - has developed a balanced approach to the interpretation and protection of fundamental rights over fifty years, which should be built on rather than undermined. Some have argued that even if the ECHR were incorporated into the Treaty, it would be possible to ensure the precedence of the Strasbourg Court over ECHR rights. It is unclear how this could be achieved given that the European Court has responsibility for Treaty rights.

The balance of powers between the EU and member states should only be altered through intergovernmental negotiations

8. There have been many calls to include in the Charter fundamental rights which are not currently legally enforceable by citizens through the Courts. There have been particular demands for inclusion of the political aspirations outlined in the 1961 European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers. These Charters set out important values and objectives which EU member states have agreed to respect and work towards, at national or European level as appropriate. But these "fundamental rights" are clearly of a different nature and status from the justiciable rights in the European Convention and enshrined in the EU Treaties (as set out above). The CBI believes that they should not be incorporated into a legally binding Charter as this would:

   - Create new rights at EU level, shifting the balance of power between member states and the EU outside of the normal process of intergovernmental negotiations; and
   - Create considerable legal confusion for business and individual citizens.

9. The CBI believes that guaranteeing new rights at EU level through their incorporation into the Treaty would change the balance of power between member states and the EU. The social and employment chapters of the Treaties have clearly set out the powers of the Union to act on a European level, specifically excluding topics such as pay, the right of association, the right to strike or impose a lockout from EU legislative competence. To incorporate such rights in a legally binding Charter would expand the competence of the EU in these areas. For example:

   - Empowering the ECJ to undertake judicial review of the French SMIC or the UK national minimum wage would undermine member states' responsibility for and effective control over wages policy.

   - Collective bargaining systems vary considerably across member states. To introduce an unqualified fundamental right to collective bargaining in EU law would risk overturning national industrial relations cultures.

   - Each member state has its own unique system of social protection. Creating EU level rights in relation to social security would risk undermining national systems which are responsive to the democratic choices of the electorate.

   Equally, issues such as health, education and employment policy have traditionally been the responsibility of national governments. The principle of subsidiarity – that action should be taken at the lowest effective level – requires that these remain largely national rather than EU-level issues.

10. From a practical viewpoint, the CBI believes that incorporating such 'aspirational' rights into the Charter would create legal confusion, as they would be almost impossible to interpret in practice by a Court. For example, it is not clear how rights to 'fair remuneration' or to 'adequate social security' could be interpreted at EU level. Wage policies need to take into account national economic conditions; there is no "one size fits all" approach. Equally, the diversity of social security systems across the EU would make it very difficult to determine what is an 'adequate' level.

Directives should not become justiciable fundamental rights

11. There are, of course, a range of areas covered by the 1961 and 1989 Charters where the EU has a Treaty competence. Maternity rights, rights to parental leave, rest periods, certain rights to workers' information and consultation, and to health and safety in the workplace (and so on) are well established in EU legislation. However, they are heavily qualified legislative rights which apply only in specific circumstances. To turn them into unqualified justiciable fundamental rights would potentially lead to a more expansive interpretation of these rights by the ECJ. This would require member states to make immediate changes to national and local legislation, therefore generating legal uncertainty for business. For example, an unqualified right to information and consultation would potentially lead to a complete overhaul of all national frameworks of industrial relations. Whilst there are already information and consultation rights set out in Directives on European Works Councils, Collective Redundancies, Acquired Rights etc., these only apply when certain conditions have been met. And at national level, consultation rights are triggered in differing situations following national industrial relations traditions. An unqualified binding fundamental right in this area would allow the ECJ to develop a more expansive, harmonising jusrisprudence that would fail to respect national culture and practice.

ILO Conventions are different

12. A number of organisations have also argued that some of the rights outlined in ILO Conventions signed by EU member states should be included in the Charter. These are critically important global minimum standards, which are binding on those member states that ratify them. But they are not directly justiciable rights which can be enforced by individuals in a way which can be compared with the ECHR or the Treaty rights. Instead they are enforced through decrees of an ILO committee following successful applications from either trade unions or employer organisations. Their inclusion in a legally binding Charter - where they would have direct effect on the law of member states through judgements of the European Court - would not be appropriate.

Conclusion

13. The CBI supports a declaratory Charter clearly setting out the existing justiciable fundamental rights and freedoms set out in the Treaties and in the ECHR.

14. Those fundamental rights which do not have direct legal effect, such as those referred to in the 1961 and 1989 Charters, are of a different nature and status. They are political aspirations of the European Union, best delivered either at national level or through Directives – where Treaty powers exist. The Convention should take full account of this distinction when drafting the Charter.

15. It is not appropriate for the Convention to seek to shift the balance of power between the EU and member states through the development of a Charter to be incorporated into the Treaty. Any such shifts in sovereignty should only be proposed following full intergovernmental discussions.

Human Resources Policy, May 2000

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

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Brüssel, den 23. Mai 2000

CHARTE 4300/00

CONTRIB 172

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme der Evangelischen Kirche in Deutschland (EKD), im Hinblick auf die Anhörung am 27. April 2000. [1]

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[1] Dieser Text wurde nur in deutscher Sprache vorgelegt.

Stellungnahme der Evangelischen Kirche in Deutschland (EKD) zur Erarbeitung einer Charta der Grundrechte der Europäischen Union

I. Vorbemerkungen

1. Die Evangelische Kirche in Deutschland (EKD) begrüßt den Beschluss der Staats- und Regierungschefs der Europäischen Union, den Schutz der Grundrechte in der Europäischen Union durch eine Charta zu verstärken, und verfolgt die Beratungen des mit der Erarbeitung beauftragten Konvents mit großer Aufmerksamkeit. Die Synode der Evangelischen Kirche in Deutschland hat anlässlich ihrer Tagung im November 1999 in Leipzig einige Grundprinzipien formuliert, die für die Erarbeitung der Charta leitend sein sollten. Dieser Beschluss wurde dem Konvent bereits übermittelt und ist auf der Website des Rates zur Charta verfügbar.

Die Evangelische Kirche in Deutschland erwartet, dass die Charta dazu beitragen wird, der Union ein für Bürgerinnen und Bürger sichtbares politisches Fundament zu geben und die Rechtsgemeinschaft zwischen der Union und den Mitgliedstaaten zu stärken. Sie hält das Vorhaben zudem für dringlich, da die Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten (EMRK) ungeachtet Artikel 6 Abs. 2 des EU-Vertrages die supra-nationalen Institutionen der Europäischen Union zur Zeit nicht unmittelbar bindet, da die Europäische Union bzw. die Europäische Gemeinschaft dieser Konvention bisher nicht beigetreten ist bzw. beitreten konnte.

2. Grund- und Menschenrechte sowie Grundwerte sind Ausdruck von Wertüberzeugungen und Einstellungen, die für den gesellschaftlichen Zusammenhalt eines Gemeinwesens wichtig sind und von denen die Erfüllung der staatlichen Aufgaben abhängt. Gerade der weltanschaulich neutrale Staat, der – wie es im Diktum des deutschen Verfassungsrechtlers Ernst-Wolfgang Böckenförde heißt – von Voraussetzungen lebt, die er selbst nicht garantieren kann, ist darauf angewiesen, dass Kirchen, Religions- und Weltanschauungsgemeinschaften Werte bilden und vermitteln. Die Evangelische Kirche in Deutschland nimmt daher die Gelegenheit gerne wahr, zur Erarbeitung der Charta Stellung zu nehmen. Sie möchte in diesem Zusammenhang nicht unerwähnt lassen, dass einige Grundrechte, namentlich der Schutz der Menschenwürde, zum Kern der christlichen Tradition unserer europäischen Kultur gehören.

II. Zum Inhalt der Charta

1. Die Akzeptanz der geplanten Charta wird vermutlich erleichtert und gefördert, wenn sie sich im Bereich der Menschenrechte und Grundfreiheiten an den Artikels 2 bis 14 der Europäischen Menschenrechtskonvention orientiert. Gleichwohl muss auch hier der Fortentwicklung durch die Zusatzprotokolle sowie der Rechtsprechung des Menschenrechtsgerichtshofs ausreichend Rechnung getragen werden. Die Evangelische Kirche in Deutschland hält daher eine horizontale Klausel für unabdingbar, die sicherstellt, dass der durch die Charta vermittelte Schutz der Grund- und Menschenrechte jedenfalls nicht hinter dem durch die

EMRK einschließlich der zu ihr entwickelten Rechtsprechung zurückbleiben darf. Daneben ist die eigenständige Rechtsentwicklung in der Europäischen Gemeinschaft, die Auswirkungen der Binnenmarktfreiheiten sowie die Ausprägungen von Grundrechten eigener Art wie beispielsweise die Gleichbehandlung von Frauen und Männern im Arbeitsleben bei der Formulierung von Rechten gebührend zu berücksichtigen.

Da Artikel 6 EU-Vertrag sich bezüglich der Achtung der Menschenrechte nicht ausschließlich auf die EMRK, sondern darüber hinaus auf die „gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten" bezieht, erscheint es geboten, bei der Konzipierung der Charta auch die Verfassungskataloge der Mitgliedstaaten zu beachten. Dem Geist der Gemeinschaft und den Traditionen, die sich in der Geschichte der europäischen Integration herausgebildet haben, würde es nach kirchlicher Auffassung entsprechen, auch die Grundrechtskataloge der Verfassungen der EU-Beitrittskandidaten ergänzend zu Rate zu ziehen, um beispielsweise herauszufiltern, was sie zu den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten beitragen werden.

2. Die Evangelische Kirche in Deutschland ist der Auffassung, dass der Charta eine **Präambel** vorangeschickt werden sollte, in der neben einem Bekenntnis zu den unverletzlichen und unveräußerlichen Menschenrechten auch Gemeinschaftsprinzipien als politische Handlungsziele der Union formuliert werden sollten. In Anlehnung an Artikel 6 Abs. 1 EU-Vertrag sollten Freiheit, Demokratie, Achtung der Menschenrechte und Rechtsstaatlichkeit als Voraussetzung für die Entfaltung föderaler, sozialer und kultureller Prinzipien unter Beachtung des Grundsatzes der Subsidiarität festgehalten werden.

3. Zu den bereits vorliegenden Artikelvorschlägen des Präsidiums sind folgende Anmerkungen zu machen:

Artikel 1. Würde des Menschen
Die Evangelische Kirche in Deutschland schlägt vor, diesen Artikel anders als im Dokument CONVENT 13, COR 1 folgendermaßen zu formulieren:
„ Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen, ist Verpflichtung aller öffentlichen Gewalt, soweit sie durch die Europäische Union ausgeübt wird".

Artikel 13. Familienleben
Der Artikel sollte die Überschrift Ehe und Familie erhalten und wie folgt lauten:

(1) Jeder hat das Recht auf Achtung seines Familienlebens.
(2) Männer und Frauen haben das Recht, nach den innerstaatlichen Gesetzen, welche die Ausübung des Rechts regeln, eine Ehe einzugehen und eine Familie zu gründen.
(3) Der Schutz der Familie und ihre rechtliche, wirtschaftliche und soziale Förderung werden gewährleistet.

Aus kirchlicher Sicht ist eine derartige Formulierung geboten, um klarzustellen, dass eine Ehe nur zwischen zwei Personen verschiedenen Geschlechts geschlossen werden kann. Die Förderung der Familie ist nach kirchlicher Auffassung in erster Linie Aufgabe der Mitgliedstaaten. Dieser Anknüpfungspunkt bei den Mitgliedstaaten stellt auch in Zukunft sich verändernde gesellschaftliche und rechtliche Entwicklungen im Blick auf Ehe und Familie sicher.

Artikel 14. Gedanken-, Gewissens- und Religionsfreiheit
Um sicherzustellen, dass auch die korporative Religionsfreiheit gewährleistet ist, wird in Abänderung der Formulierung in Dokument CONVENT 13 folgender Text vorgeschlagen:
Jede Person hat das Recht auf Gedanken-, Religions- und Gewissensfreiheit. Die Religionsfreiheit schließt das öffentliche und private, individuelle und gemeinschaftliche Bekenntnis sowie das Recht von Kirchen und Religionsgemeinschaften zur Ordnung und Verwaltung ihrer Angelegenheiten nach den Gesetzen der Mitgliedstaaten ein.

Durch das Handeln der Union ist nicht nur der einzelne in der Ausübung seiner Grundrechte betroffen, sondern auch Körperschaften im Bereich der Religion, insbesondere Kirchen und verfasste Religionsgemeinschaften. Die Menschenrechtskommission des Europarates hat in ihrer Spruchpraxis der letzten Jahre zunehmend Kirchen oder Religionsgemeinschaften eine Berufung auf Artikel 9 EMRK aus eigenem Recht und nicht nur stellvertretend für ihre Mitglieder zugesprochen und damit grundsätzlich die Rechtsträgerschaft einer Religions- oder Weltanschauungsgemeinschaft nach Artikel 9 anerkannt. Aus Gründen der Rechtsklarheit ist es angezeigt, diese Spruchpraxis in der Formulierung von Artikel 14 aufzunehmen.
Des weiteren ist die Union durch die Erklärung zum Status der Kirchen und weltanschaulichen Gemeinschaften zum Vertrag von Amsterdam (Erklärung Nr. 11) gehalten, den Status, den Kirchen und religiöse Vereinigungen oder Gemeinschaften in den Mitgliedstaaten nach deren Rechtsvorschriften genießen, zu achten und nicht zu beeinträchtigen. Gleiches gilt für Weltanschauungsgemeinschaften.

Die Organisationsformen von Kirchen und Religionsgemeinschaften und ihr jeweiliges Verhältnis zu den Mitgliedstaaten ist in der Union sehr unterschiedlich. Teilweise ist es mit Verfassungsrang ausgestattet oder durch Konkordate und Staatskirchenverträge ausgestaltet. Viele Kirchen und Religionsgemeinschaft genießen ein hohes Maß an Autonomie bei der Regelung und Verwaltung ihrer Angelegenheiten. Die Einwirkungen des Gemeinschaftsrechtes ist angesichts dieser Vielfalt ebenso unterschiedlich. Zudem ist die Anerkennungspraxis neuer religiöser und quasireligiöser Gemeinschaften von Mitgliedstaat zu Mitgliedstaat sehr uneinheitlich. Aus diesen Gründen ist es unverzichtbar, in die Charta einen Bezug auf die Rechtslage in den Mitgliedstaaten als Schranke für das Handeln der Union aufzunehmen. Eine Anknüpfung an innerstaatliches Recht steht zudem in Parallele zur Regelung des Entwurfs für Artikel 13 Abs. 2 zum Familienleben. Da das Recht, eine Ehe einzugehen und eine Familie zu gründen, in den Mitgliedstaaten sehr unterschiedlich geregelt ist, muss auch hier die Charta eine Anknüpfung an innerstaatliches Recht der Mitgliedstaaten vornehmen.

Wirtschaftliche und soziale Rechte
Da die europäische Sozialordnung auch eine Ausprägung der christlichen Tradition Europas ist, hält die Evangelische Kirche in Deutschland es für wichtig, dass die Charta **Bestimmungen zu wirtschaftlichen, sozialen und kulturellen Rechten** enthält, die so formuliert werden, dass sie keine Probleme der Justitiabilität aufwerfen und zur richterlichen Überprüfung im Individualbeschwerdeverfahren geeignet sind. Daher ist bei elementaren Mindestschutzforderungen, wie sie z.B. im Rahmen der ILO und des UN-Sozialpaktes enthalten sind, an eine Aufnahme in die Charta zu denken, insbesondere, soweit die Mitgliedstaaten ihnen beigetreten sind und diese in allen EU-Staaten verfassungsrechtlich oder einfachgesetzlich gewährleistet sind.

Der Beschluss des Europäischen Rates von Köln hat die Europäische Sozialcharta ausdrücklich als Referenzdokument für die Erarbeitung der Charta genannt. Hiermit sind jedoch unbestreitbar eine Reihe von Problemen, z.B. die unterschiedliche Verbindlichkeit gegenüber den Signatarstaaten sowie der ggfs. rasche Wandel von Einzelbestimmungen verbunden, die in den Beratungen dieses Kapitels der Charta auch im Konvent bereits angesprochen worden sind. Letztlich wird am Bereich der wirtschaftlichen und sozialen Rechte die Problematik einer Ausgestaltung der Rechte als Menschenrechte – von der grundsätzlich ausgegangen werden sollte - bzw. als EU-Bürgerrechte besonders deutlich.

Statt konkreter Artikelvorschläge möchte die Evangelische Kirche in Deutschland auf folgende Herausforderungen hinweisen, die bei der Beratung von wirtschaftlichen und sozialen Rechten beachtlich sind:

- Generationengerechtigkeit und Nachhaltigkeit
- Stärkung der Selbstverantwortung des Menschen einerseits, damit der Sozialstaat nicht durch ein Übermaß an Ansprüchen überfordert wird, und Verpflichtung zur Hilfe für diejenigen, die sich aus eigener Kraft nicht helfen können, andererseits,
- Verstärkung der Ausbildungs- und Weiterbildungsangebote z.B. für Niedrigqualifizierte
- Ausbau der Rechte Behinderter
- Bekämpfung von Ausgrenzung und Armut
- Verantwortung der Industrieländer für die weltweite Entwicklung.

III. Zum Geltungsbereich der Charta

Ungeachtet der offenen Frage, ob die Charta durch eine Implementierung in das Vertragswerk unmittelbare Rechtsverbindlichkeit erlangen wird, sollte dieses Ziel bei ihrer Formulierung durchgängig bedacht werden, damit eine Einfügung in das Vertragswerk ohne große textliche Änderungen möglich wird.

Bislang noch nicht hinreichend deutlich ist die Formulierung der horizontalen Bestimmungen bzw. der Schranken der in der Charta verankerten Grund- und Menschenrechte. Die Evangelische Kirche in Deutschland möchte zu folgenden Aspekten konkrete Vorschläge machen:

Träger von Grundrechten
Als Träger von Grundrechten kommen in erster Linie natürliche Personen in Betracht, in einem gewissen Umfang jedoch auch juristische Personen. Hierzu wird folgender Formulierungsvorschlag unterbreitet:
Die in der Charta aufgeführten Grundrechte gelten für natürliche und für juristische Personen sowie für sonstige Vereinigungen, soweit sie ihrem Wesen nach auf diese anwendbar sind.

Bindungswirkung und Schutzniveau
Zur Bindungswirkung wird folgender Vorschlag gemacht:
Die in dieser Charta enthaltenen Grundrechte binden die Organe der Europäischen Union und die Mitgliedstaaten, soweit sie Gemeinschaftsrecht vollziehen. Keine Bestimmung dieser Charta darf als Einschränkung des Schutzes ausgelegt werden, der durch die Europäische Menschenrechtskonvention in der Auslegung durch den Europäischen Menschenrechtsgerichtshof gewährt wird.

Konkurrierende Kontrollmechanismen
Es scheint dringend geboten zu verhindern, dass es in der Konsequenz der Grundrechtecharta zu konkurrierenden Kontrollmechanismen durch den Europäischen Gerichtshof für Menschenrechte und den Europäischen Gerichtshof kommt. Die vom Generalsekretär des Europarates Dr. Walter Schwimmer angeregte Regelung, die es dem EuGH erlauben würde, Auslegungsfragen dem Europäischen Gerichtshof für Menschenrechte vorzulegen, erscheint unter diesem Gesichtspunkt sehr erwägenswert (vgl. Walter Schwimmer, Einheit – auch in den Menschenrechten, FAZ vom 14. März 2000, S. 12).

Brüssel, den 10. April 2000

Heidrun Tempel
Oberkirchenrätin
Leiterin des Büros

Für Rückfragen:
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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 17 May 2000

CHARTE 4301/00

CONTRIB 173

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the International Institute for Right of Nationality and Regionality. [1]

[1] This text has been submitted in German and English languages.

Professor Dr. Dieter Blumenwitz, Würzburg
Markus Pallek, LL.M. (NYU), Attorney-at-Law (New York), Berlin

A. Draft of a minority protection clause in the Charter on Fundamental Rights of the European Union

Article x

A minority in the sense of this charter is a group numerically inferior to the rest of the population of a State, in a nondominant position, whose members – being citizens of the Union traditionally settling in their well-defined and long-established territories – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Article y

(1) Persons belonging to national or ethnic, religious or linguistic minorities have the right to equality before the law and equal protection of the law. Any discrimination based on belonging to a minority shall be prohibited. Every person belonging to a minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage of any kind shall result from this choice. Affirmative action policies intending to promote equality in fact between persons belonging to minorities and persons belonging to the majority in all areas of economical, social, political, and cultural life, shall not be considered to be an act of discrimination. Within the framework of their general integration policy, member States shall refrain from policies and practices aimed at assimilation of minorities against their will. This applies especially to measures of any kind in the traditional settling territories of those minorities.

(2) Persons belonging to such minorities shall have the freedom to peaceful assembly and shall have the right to found associations and organizations, including political parties.

(3) Persons belonging to such minorities shall have the right to enjoy their own culture and traditions, to profess and practice their own religion or to use their own language across frontiers and also in community with other members of their group. This shall include the right to use their names in the minority language and the right to official recognition of them.

(4) In their traditional settling areas persons belonging to such minorities shall have the right to use their minority languages in relation with administrative and judicial authorities, which shall include the right to receive answers from these authorities in their minority languages. In case of an arrest a person belonging to a minority shall have the right to be informed in a language which he understands of the nature and cause of any accusation against him, and to defend himself in this language, if necessary with the free assistance of an interpreter.

(5) Persons belonging to such minorities shall have the right to learn their minority language. In their traditional settling areas they shall have the right to be instructed in their languages. These rights shall be implemented by the member States within the frameworks of their educational systems or by permitting the right to set up and manage private educational establishments. Member States contribute financially to the latter mentioned establishments an proportional amount that equals their proportional financial engagement in public educational establishments. Moreover, the member States shall take measures in fields of education and research to foster knowledge of the culture, history, language and religion of such minorities and of the majority.

Article y

The member States respect the identity and the interests of immigrant groups. Persons belonging to such groups have the right to equality before the law and equal protection of the law. Any discrimination based on belonging to such a group shall be prohibited.

B. Conclusions (short version)

The elaboration of a Charter on Fundamental Rights of the European Union is a wise amendment of the body of community law despite the already existing fundamental rights jurisprudence of the Court of Justice of the European Communities. Through its transparency a written statute of fundamental rights illustrates these rights for the citizens of the Union, thus raising the acceptance of the Union and the identification with the Union on the side of the citizens. However, the latter mentioned goal can only be achieved, if legally binding provisions are laid down, not just political intentions or hortatory provisions.
The inclusion of a minority protection clause in the Charter on Fundamental Rights of the European Union is necessary, because community law does not yet contain any direct provisions ensuring the protection of minorities and the few provisions that provide some indirect minority protections are insufficient and extremely fragmented.
The international standard of the substantive law of minority protection is enshrined in Article 27 of the International Covenant of Civil and Political Rights of 1966 and in the Declaration of the General Assembly of the United Nations on the Rights of members of national or ethnic, religious and linguistic minorities of 1992. The minority protection within the framework of the CSCE/OSCE system in as far as the CSCE documents influenced and inspired the respective works of other bodies like the Council of Europe or the European Union.
For the determination of the European standard of minority protection the work of the Council of Europe, in particular the European Charter on Regional or Minority Languages of 1992, the draft additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Protection of National Minorities and the Framework Convention of the European Council on the Protection of National Minorities of 1995, can be considered as crucial. Especially the last mentioned document contains the current standard of substantive minority protection law, that should also be codified in a minority protection clause in the Charter on Fundamental Rights of the European Union. This result is also reflected in the state practice of the European Union, e.g. regarding the criteria that have been formulated for a diplomatic recognition of the successor states of Yugoslavia or the criteria that have been formulated for the accession of the middle and east European states to the European Union.
Immigrant groups, or “new minorities” as they are referred to by some academics in the field of public international law are in a situation which differs fundamentally from the situation of the “classic”, i.e. the well-defined and long-established minorities. Whereas immigrant groups are above all interested in protection against discrimination and their smooth integration into the society of their new resident country, minorities, which are normally fully integrated into the majority society, are rather interested in preserving their cultural specifics, which are constantly endangered by a certain pressure to assimilate flowing from the constant exposure to the majority culture. Both immigrant groups and minority groups are in need of special protection and also deserve special protection. However, applying an identical protection concept to both groups would amount to ignoring their particular and very different protection needs. Therefore, the task must be to develop protection concepts for each group, immigrants on the one hand and minorities on the other hand, which are individually tailored to suit their particular protection needs. The formulation of a minority protection clause or a minority definition must be clearly based on this approach.
The Court of Justice of the European Communities must be charged with the control of the enforcement of the provisions of the Charter on Fundamental Rights of the European Union.

C. Detailed paper on the inclusion of a minority protection clause in the Charter on Fundamental Rights of the European Union

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I. Initial thoughts

The idea to elaborate a Charter on Fundamental Rights of the European Union emerged from the desire to agree on a set of fundamental rights for the EU citizens to be included in the body of substantive EC law, despite the existence of the European Charter on Human Rights (ECHR) and the fundamental rights jurisprudence of the Court of Justice of the European Communities (ECJ). Germany chairing the European Council in the first half of 1999 had a strong interest in the creation of such a Charter and accordingly put the issue on the agenda for its presidency. Communicating the focal points of the German EU-presidency to the European Parliament, the German minister of foreign affairs, *Joseph Fischer*, announced the following statement on January 12, 1999 in Strassbourg:[1]

> "*In order to strengthen the rights of the citizens, Germany proposes in the long run the elaboration of a European Charter on Fundamental Rights. We intend to launch an initiative in this direction during our presidency. Our aim is to consolidate the legitimacy and identity of the EU. The European Parliament, which provided important preliminary work elaborating the draft constitution of 1994, as well as the national parliaments and possibly many other social groups shall participate in the drafting of such a Charter on Fundamental Rights.*"

This initiative was warmly welcomed by German EU politicians across party lines and - with only little dispute with regard to the contents and the implementation of the project - strongly supported. In late April 1999 the (then) 47 MEPs of the CDU/CSU revived the discussion about a Constitution for the EU with a proposal that also touched on the creation of a Charter on Fundamental Rights.[2] On behalf of the German MEPs *Georg Jarzembowski* (CDU) stressed how important it was for the EU citizens to know which rights they were entitled to in a Europe that was more and more turning into a federal state. If they feel that their fundamental rights have been violated there must be the possibility to bring the case in the European Court of Justice. The codification of a European Charter on Fundamental Rights would be a crucial element to get there. On behalf of the Federal Government the Minister of Justice *Herta Däubler-Gmelin* stated that the drafting of a Charter on Fundamental Rights would be a difficult but very rewarding project.[3] Party chairman *Wolfgang Schäuble* (CDU) and the foreign affairs spokesman of the CDU/CSU fraction in the German Bundestag *Karl Lamers* also issued opinions on this topic suggesting the creation of a "European Constitutional Treaty" ("europäischer Verfassungsvertrag"), which, among other things, would have to answer the question about the fundamental values, convictions and interests that tie the Europeans together.[4] Moreover, there would be a consensus in Germany that the profile of the EU as a "community of values" would have to be sharpened, without aiming at the creation of a "super-state Europe" and that the elaboration of a European Charter on Fundamental Rights would be an appropriate instrument to reach that goal. Within the framework of the European Council summit on June 3 and 4, 1999 in Cologne the German presidency managed to convince their European partners of the importance to elaborate a Charter on Fundamental Rights of the European Union and the following decision was taken:

[1] Cited from Frankfurter Allgemeine Zeitung (FAZ) of December 13, 1999.
[2] FAZ of April 24, 1999.
[3] FAZ of April 28, 1999.
[4] *Schäuble/Lamers*, Europa braucht einen Verfassungsvertag, in: FAZ of May 4, 1999.

> "*The safeguarding of fundamental rights is a founding principle of the European Union and the indispensable prerequisite for its legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and developed by the jurisprudence of the European Court of Justice. In view of the current status of the Union it is necessary to draft a Charter on these rights to visibly lay down the significance of the fundamental rights and their range for the citizens of the Union.*
>
> *In the opinion of the European Council this Charter shall comprise equality, liberty and due process rights, as they are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they follow from the constitutional traditions common to the Member States, as general principles of Community law. Moreover, the Charter shall include fundamental rights that only the citizens of the Union shall be entitled to. Furthermore, when the Charter will be drafted economical and social rights, as they are laid down in the European Social Charter and in the Community Charter on Fundamental Social Rights of Workers (Article 136 EC Treaty), shall also be considered in as far as they do not merely determine aims for actions of the Union (...)*"[5]

In the decision the German presidency asked the future Finnish chair to create the prerequisites for the implementation of this decision until the next European Council special summit on October 15 and 16, 1999 in Tampere.[6] Moreover, it was decided in Cologne to generally revise the Community Treaties with the Amsterdam amendments within the framework of an intergovernmental conference during the course of 2000. It is planned to begin this intergovernmental conference under Portuguese presidency in the first half of 2000 and to complete it under French presidency until the end of 2000.[7]

The necessity to include a minority protection clause in such a Charter on Fundamental Rights of the European Union arises from a variety of political reasons. One of the main reasons is that especially in the conflict in former Yugoslavia it became very clear how drastic ethnic tensions can erupt where a functioning system of minority protection is lacking. However, this conflict was only the tip of the iceberg, effectively presented by the mass media, of European minority problems. Many unresolved minority crises are looming, even in the Member States of the European Union or the Council of Europe. A further reason to consider the inclusion of a minority protection provision in a Charter on Fundamental Rights of the European Union is that the academic world almost unanimously criticizes the existing European law on the protection of minorities as inefficient or insufficient.[8]

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5 Decision of the European Council of June 4, 1999 on the elaboration of a Charter on Fundamental Rights of the European Union, Annex IV. Text cf.: EuGRZ 1999, pp. 364.

6 European Council of Cologne, Final conclusions of the presidency.

7 FAZ of June 5, 1999; *Gelinsky*, Ein Luftschloss ?, in: FAZ of September 28, 1999.

8 Cf.: *Hofmann*, Minderheitenschutz in Europa (Berlin 1995), pp. 63; *Streinz*, Minderheiten- und Volksgruppenrechte in der Europäischen Union, in: *Blumenwitz/Gornig*, Der Schutz von Minderheiten- und Volksgruppenrechten durch die Europäische Union (Köln 1996), p. 11, 29; *Siegert*, Minderheitenschutz in der Bundesrepublik Deutschland (Berlin 1999), p. 93; *Niewerth*, Der kollektive und der positive Schutz von Minderheiten und ihre Durchsetzung im Völkerrecht (Berlin 1996), pp. 215; *Scherer-Leydecker*, Minderheiten und sonstige ethnische Gruppen (Berlin 1997), p. 167.

1. The current situation under EC law and the European Council decision of Cologne

Starting point and background of the reflections to create a Charter on Fundamental Rights of the European Union is the discussion – that has been going on for some time both in academia and in practice - about the existence or emergence of a European constitutional law and about the codification of European fundamental rights.[9] Even if we do not have a written catalogue of fundamental rights in substantive community law yet, this does not mean that the EU citizens are unprotected in that respect.[10] Since its ruling in the *Stauder* case[11] in 1969 the European Court of Justice protects the fundamental rights, which the Court derives as general principles of community law from a synopsis of the constitutional traditions common to the Member States and a blink towards the ECHR.[12] In particular the ECJ has defined the following fundamental community rights and applied them in different cases: the right to human dignity, the right to privacy in various forms, the right to equal protection by the law, the principle of equal opportunities, the freedom of religious belief, the freedom to form associations, the principle of free trade, the occupational liberty, the right to own property, the prohibition of gender discrimination, the principle of equality before the law, the freedom of speech and the freedom of the press, the prohibition of retroactive criminal laws and due process rights.[13] A individual or collective fundamental right envisaging the protection of minorities does, as of yet, neither exist in community law, nor can it be found by the jurisdiction of the ECJ.[14] With regard to fundamental rights the Union citizen faces the difficulty of

9 Cf. the recent article by the director of the Walter-Hallstein-Institute for European Constitutional Law at Humboldt Univerity Berlin Professor Dr. *Ingolf Pernice*, Vertragsrevision oder Europäische Verfassungsgebung, in: FAZ of July 7, Juli 1999. Cf. generally on the issue: *v. Bogdandy*, Skizzen einer Theorie der Gemeinschaftsverfassung, in: *v. Danwitz*, Auf dem Weg zu einer Europäischen Staatlichkeit (Bonn 1993), pp. 9; *Häberle*, Die europäische Verfassungsstaatlichkeit, in: *Weber/Rath-Kathrein*, Neue Wege zur Allgemeinen Staatslehre (Kehl 1993), pp. 29; *Grimm*, Braucht Europa eine Verfassung ?, in: JZ 1995, pp. 581; *Rodriguez-Jglesias*, Zur „Verfassung" der Europäischen Gemeinschaft, in: EuGRZ 1996, pp. 125; *Schilling*, Die Verfassung Europas, in: StW&StPr 1996, pp. 387; *Zuleeg*, Die Verfassung der Europäischen Gemeinschaft in der Rechtsprechung des Europäischen Gerichtshofs, in: BB 1994, pp. 581; *Schuppert*, Zur Staatswerdung Europas – Überlegungen zu Bedingungsfaktoren und Perspektiven der europäischen Verfassungsentwicklung, in: StW&StPr 1994, pp. 35; *v. Bogdandy/Nettesheim*, Die Europäische Union: ein einheitlicher Verband mit eigener Rechtsordnung, in: EuR 1995, pp. 3162; *Schröder*, Grundsatzfragen einer europäischen Verfassungsgebung, in: FS Heymanns Verlag, pp. 349.

10 Cf. generally on the issue: *Streinz* (footnote 8), pp. 11; *Rengeling*, Eine Charta der Grundrechte, in: FAZ of July 21, 1999; *Gelinsky*, Kleine Schritte genügen nicht, in: FAZ of April 18, 1999; *Gelinsky*, Im Jubiläumsjahr des Grundgesetzes steht Europa im Mittelpunkt, in: FAZ of April 26, 1999.

11 ECJ Case 29/69, *Erich Stauder vs. Stadt Ulm*, E.C.R. pp. 419 (1969).

12 *Streinz*, Europarecht (Heidelberg 1996), 3rd Ed., pp. 108.

13 *Streinz* (footnote 12), pp. 115; *Hummer/Simma/Vedder*, Europarecht in Fällen (Baden-Baden 1999), 3rd Ed., pp. 415.

14 In this context reference shall be made to an initiative of the *Europäische Akademie Bozen*: in December of 1998 the Academy presented an action plan to promote human rights, minority rights, cultural diversity and economic and social consolidation to the President of the European Commission. Academics who participated in drafting this study tried, sometimes through the use of extensive interpretations of current provisions, to shed new light on the way ahead with regrad to Community law. These interpretations, however, question in no way the call for the codification of a Charter on Fundamental Rights of the European Union. Cf.

lacking transparency, because, as has been mentioned before, the fundamental rights have not been laid down in a written catalogue yet. Apart from the fundamental freedoms the EC Treaty only contains the principle of equal remuneration for men and women (Article 141 EC Treaty) and the prohibition of discrimination (Article 12 EC Treaty). Moreover, Article 6 EU Treaty spells out that the Union is based on the principles of freedom, democracy, the respect for human rights and fundamental freedoms, as well as the rule of law and that the Union respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. As regards the necessity to formulate European fundamental rights the German Foreign Office (Auswärtiges Amt) stated on August 9, 1999 in its report on the status of the implementation of the European Council decision of Cologne and in preparation of the summit of Tampere:

> "*With regard to fundamental rights that have to be observed by the Union the Treaties only point in a general clause to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions common to the Member States (Article 6 Paragraph 2 EU Treaty). Moreover, reference is made to the European Social Charter and the Charter of Social Fundamental Rights of the Workers (Article 136 EC Treaty). A codification of fundamental community rights would render the fundamental rights more visible with regard to their range and significance and would thus strengthen the identity and legitimacy of the Union. Also the transparency and legal certainty with regard to the scope of the protection of fundamental rights would be enhanced that way.*"

More transparency and clarity for the Union citizen with regard to the existence of his fundamental rights thus become important reasons for the elaboration of a Charter on fundamental rights of the European Union. Moreover, seen from the perspective of European human rights foreign policy within the framework of the Common Foreign and Security Policy it seems wise to be able to point to a set of fundamental rights laid down in a written catalogue. Finally, the Union would give some guidance to the accession candidates in Middle and Eastern Europe on how to run a fundamental rights policy on a national level.[15] Bearing in mind the futile efforts of other bodies at other times, the codification of fundamental rights on the initiative of the European Council now seems to be the right way at the right time. In 1989 for example the European Parliament passed a declaration on fundamental rights and fundamental freedoms and in 1994 it rendered a resolution on the constitution of the European Union.[16] Once again these drafts did not contain any provisions on the minority protection on a European basis.

Europäischen Akademie Bozen, Paket für Europa, Arbeitsheft der Akademie Nr. 10 (1998). Cf. also: *Blumenwitz*, Die minderheitenschutzrechtlichen Anforderungen der EU hinsichtlich des Beitritts der ost- und ostmitteleuropäischen Staaten, in: *Blumenwitz/Gornig/Murswiek*, Fortschritte im Beitrittsprozeß der Staaten Mitteleuropas zur EU (Bonn 1999), p. 25, 34.

15 *Rengeling* (footnote 10), in: FAZ of July, 21 1999.

16 Second report of the institutional committee on the constitution of the European Union of February 9, 1994 („Herman-Report"); cf.: *Hilf*, Eine Verfassung für die Europäische Union: Zum Entwurf des Institutionellen Ausschusses des Europäischen Parlaments, in: Integration 1994/2, pp. 68; *Rengeling* (footnote 10), in: FAZ of July, 21 1999.

These initiatives were then not picked up by bodies who would have been competent to implement them. The last initiative to lay down European fundamental rights in the substantive body of community law had been launched in 1996 as an accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms had been contemplated. According to the ECJ an accession of the European Community to the ECHR could only be executed in the form of an explicit amendment of the Treaties because of the massive impact this would have on the legal system of the Community.[17] In the decisive passage of its opinion the ECJ holds:[18]

> "*Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.*"

The ECJ concluded that under current EC law the Community is lacking the competence to accede to the ECHR.[19] The content of a Charter on Fundamental Rights of the European Union to be drafted was roughly outlined by the European Council in its Cologne decision of June 4, 1999. Apart from liberty rights, equality rights and due process rights, which can also be found in the ECHR and in the constitutions of the Member States, the inclusion of economic and social rights in the Charter on Fundamental Rights, like those laid down in the European Social Charter of October 18, 1961 and the Community Charter of fundamental social rights of workers of December, 9, 1989, shall also be considered. The addition that economic and social rights shall only be included "*in as far as they do not merely determine aims for actions of the Union*", signals that those rights to be created shall be enforceable by the individual citizen, and shall not be merely aims for action or programmatic clauses.[20] Moreover, a distinction between human rights and Union citizen rights shall be drawn.

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17 ECJ, opinion 2/94, *accession of the Community to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, E.C.R. pp. I-1763 (1994).

18 ECJ, opinion 2/94, *accession of the Community to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, E.C.R. pp. I-1763 (1994), note 34.

19 ECJ, opinion 2/94, *accession of the Community to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, E.C.R. pp. I-1763 (1994), note 36.

20 Cf. *Rengeling* (footnote 10), in: FAZ of July 21, 1999.

2. The fundamental choice between a legally binding and a hortatory document

A very fundamental initial decision must be taken with respect to the question whether a Charter on Fundamental Rights of the European Union should be legally binding under public international law or Community law or whether it should merely be hortatory as a political document. Although both options entail advantages, the decision should be in favor of a legally binding document.

A classic example for a mere policy instrument are the documents of the Conference for Security and Cooperation in Europe (CSCE). Clear advantage of these kinds of diplomatic arrangements is the inclination of the negotiating parties to make farther reaching commitments and to formulate the provisions more clearly than they would be if a binding international treaty would be negotiated which could perhaps be enforced by other States or even by individual citizens in national courts. Even if no distinct legal obligations exist, such political arrangements can have great impact in the international area. The CSCE process for example, which was initiated in 1975 in Helsinki, was of decisive significance for the East West disengagement and eventually for the end of the "Cold War". Nevertheless it can also not be denied that this process did not entail a significant improvement of the substantive legal position of the individuals living in the CSCE States. A Charter on Fundamental Rights of the European Union could be adopted as mere policy agenda in the hope that the ECJ may incorporate the Charter in the body of directly applicable and effective Community law through its jurisprudence. The improved chances of being able to achieve further reaching and clearer provisions that way would be obvious. However, to proceed that way can be quite risky. Even if in the early years the ECJ's jurisdiction showed a certain inclination to declare provisions directly applicable, which initially were not necessarily supposed to have that effect,[21] it is highly unlikely that nowadays the ECJ would still maintain such an inclination. To even consider its direct effect the ECJ basically requires a provision to be "sufficiently precise and unconditional".[22] A direct effect of provisions in international treaties, even if they may be binding under public international law, is granted very seldom by the ECJ. The jurisprudence concerning GATT/WTO provisions[23] or in the context of association treaties of the EU with third country States[24] may prove this estimation right. Moreover, in its opinion on the ECHR[25] the ECJ makes it very clear, that it is not willing to assume the political responsibility for the introduction of a written catalogue of fundamental rights, if the Member States themselves seem reluctant to agree to an

21 Cf. especially the decision of the ECJ on the direct applicability of primary EC law, commencing with case 26/62, *van Gend & Loos*, E.C.R. pp. 1 (1963); or the jurisprudence on the direct effect of directives: cf. the leading cases 148/78, *Ratti*, E.C.R. pp. 1629 (1979); case 41/74, *van Duyn*, E.C.R. pp. 1337 (1974).

22 Cf. case 190/87, *Moormann*, E.C.R. pp. 4689 (1988).

23 Cf. the decisions of the ECJ in joint cases 21-24/72, *International Fruit Company*, E.C.R. pp. 1219 (1972); or case C-280/93, *Germany v. Council (Banana market regulation)*, E.C.R. pp. I-4973 (1994).

24 Cf. case 12/86, *Demirel*, E.C.R. pp. 3719 (1987).

25 ECJ, opinion 2/94, *accession of the Community to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, E.C.R. pp. I-1763 (1994).

explicit amendment of the Treaties in that respect.

The drafting of a Charter on Fundamental Rights of the European Union in the form of binding Community law and possibly as integral part of primary EC law by laying it down in the Treaties themselves, seems to be the clearly favorable option. Although the European Council is as of yet undecided in that respect, it showed a slight inclination towards the option of a legally binding document.[26] In the decision of June, 4 1999 the European Council states:[27]

> "*The European Council will propose to the European Parliament and the Commission to ceremoniously proclaim together with the Council a Charter on Fundamental Rights of the European Union on the basis of the draft. Subsequently, it must be determined if and should the occasion arise in which way the Charter shall be included in the Treaties. The European Council charges the General Council with initiating the necessary steps until the Tampere summit of the European Council.*"

The Federal Government supports the inclusion of the Charter in the Treaties.[28] In any event, it should be decided that the Court of Justice shall have jurisdiction over the rights enshrined in the Charter. This is not self-evident as can be seen looking at the limited jurisdiction of the ECJ with regard to the second and third pillar of the European Union, the common foreign and security policy and the cooperation in justice and home affairs.[29] Whether or not to introduce some kind of "European constitutional complaint" to the ECJ is an issue that can be tackled after the core content of fundamental rights to be included in the Charter has been drafted.[30]

3. The political situation until the European Council at Tampere (15./16.10.1999)

As regards the procedural aspects of the drafting of a Charter on Fundamental Rights of the European Union the European Council has rendered the following decision:[31]

> "*The European Council is of the opinion that such a Charter of Fundamental Rights of the European Union must be drafted by a committee that consists of representatives of the heads of States and governments and the president of the European Commission as well as members of the European Parliament and the national parliaments. Representatives of the Court of Justice shall participate as observers. Representatives of the Economic and Social Council, the Council of the*

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[26] Cf. for the latest negotiation results: *Gelinsky* (footnote 7), in: FAZ of September 28, 1999.

[27] Decision of the European Council of June 4, 1999 on the elaboration of a Charter on Fundamental Rights of the European Union, Annex IV. Text cf.: EuGRZ 1999, pp. 364.

[28] Report of August 12, 1999 by the AA to the EU-Committee of the Deutsche Bundestag under § 3 EuZBBG and § 3 EuZBLG. Cf. also the unequivocal statement of Bundesjustizministerin *Däubler-Gmelin* at the Richtertag 1999 in Karlsruhe, reported in: FAZ of October 5, 1999.

[29] Cf. article 46 EU Treaty.

[30] Cf. *Gelinsky* (footnote 10), in: FAZ of April 18, 1999; *Gelinsky* (footnote 10), in: FAZ of April 26, 1999.

[31] Decision of the European Council of June 4, 1999 on the elaboration of a Charter on Fundamental Rights of the European Union, Annex IV. Text cf.: EuGRZ 1999, pp. 364.

Regions and social groups as well as experts shall be consulted. The secretariat general of the Council shall be charged with administrative tasks. The committee shall timely present a draft until the European Council summit meeting in December 2000."

On its meeting on June 3 and 4, 1999 in Cologne the European Council has asked the Finnish presidency to take the necessary steps for the implementation of its decision until the special European Council meeting on October 15 and 16, 1999 in Tampere. Together with the European Parliament the Council must decide the issue of the composition of the committee, the chair of the committee and procedural question. After informal consultations with the European Parliament the position of the Council was scheduled to be determined by the general council on October 11 and 12, 1999 the latest. The decision was subsequently taken by the European Council on its special meeting in Tampere.[32] In preparation of this decision an ad-hoc-group was installed that met twice until the Tampere summit. Until the Tampere summit the following issues were considered as not yet decided by the Finnish Presidency: regarding the chair of the committee there are three options: a) the respective representative of the Council chair (1999 Finland, first half of 2000: Portugal, second half of 2000: France); b) permanent chairman; c) permanent chairman to be determined by the committee itself. As regards the number of member of the European Parliament it remains to be decided whether 8 MEPs (reflecting the number of fractions of the EP) or 15 MEPs (reflecting the number of representatives of the heads of States and governments) should participate. With regard to the number of representatives of the national parliaments there are also two options: a) 15 members of national parliaments altogether or b) 30 members altogether to enable States with bicameral systems to send a representative from each chamber. As concerns the working procedure three options are currently discussed: a) "small" secretariat: chairman and vice-chairman of the committee together with the Council secretariat; b) "large" secretariat: all representatives of the heads of States and governments are members, to increase the influence of the national governments; c) determination of this issue by the committee itself. Eventually, the adoption of the Charter by the committee remains to be decided. Again there are three options: a) "soft consensus": draft Charter is deemed to be adopted as soon as the chair is convinced that a respective consensus is achieved; b) majority decision or c) the adoption procedure will be determined by the committee itself.[33] These formal aspects were finally determined at the Tampere summit.[34]

Even before the Tampere summit an agreement could be reached with regard to the following issues.[35] First of all, it was decided that 15 representatives of the heads of States and governments and a representative of the president of the Commission shall participate. The representative of the

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32 Cf. FAZ of October 16, 1999 and FAZ of October 18, 1999.

33 Cf. the report of August 12, 1999 by the AA to the EU-Committee of the Deutsche Bundestag under § 3 EuZBBG and § 3 EuZBLG and the report of the Council Presidency to COREPER of July 30, 1999.

34 The decisions of the Tampere summit were not yet available when this paper was written. According to information provided by FAZ the committee will consist of 62 members who will appoint a chairman. Cf. FAZ of October 16, 1999 and FAZ of October 18, 1999.

35 The decisions of the Tampere summit were not yet available when this paper was written. According to information provided by FAZ the committee will consist of 62 members who will appoint a chairman. Cf. FAZ of October 16, 1999 and FAZ of October 18, 1999.

Federal Republic of Germany is former Federal President *Roman Herzog*.[36] Furthermore, there was consensus that two representatives of the European Court of Justice will participate having observer status. Moreover, the vast majority of delegations would like to invite representatives of the Council of Europe and the European Court of Human Rights – in view of their great expertise in the field of fundamental rights - giving them also observer status. Also undisputed is that the Economic and Social Council, the Council of the Regions and the European ombudsman shall be consulted as organs of the European Union and that the accession candidates shall also have a fair chance to be involved. The committee shall be entitled to consult other bodies, social groups or experts. The secretariat shall be administered by the secretariat general of the Council. As regards procedural issues it was decided that the meetings of the committee shall be public and the documents deliberated shall be accessible for the public. The committee will convene in Brussels in the Council building and the Parliament building alternately. The meetings shall be interpreted in all Community languages.[37]

II. The international standard of substantive minority protection law

The first thing to be contemplated if a minority clause is to be included in the Charter on Fundamental Rights of the European Union is the content of such a provision. In order to do this it seems useful to start out by analyzing the current international standard of substantive minority protection law.

In view of the failure of the minority protection system during the time between the world wars, the architects of a future world order lost their faith in systems providing collective protection of minorities at the end of World War II.[38] The human individual moved to the center of the protection efforts. The leading opinion[39] at that time was that if only the international community could succeed in establishing a comprehensive system of the protection of individual human rights, minority protection would almost naturally be included in such a system.[40] The protection of the group, in other words the social context of the individual, seemed superfluous. Neither the Charter of the United Nations of June 26, 1946, nor the Universal Declaration of Human Rights of December 10, 1948 contained minority protection provisions. Only General Assembly Resolution 217 (III) C of December 10, 1948 stated laconically that the United Nations must not turn a blind eye on the fate of minorities.[41]

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[36] *Gelinsky* (footnote 7), in: FAZ of September, 28 1999.

[37] Cf. the report of August 12, 1999 by the AA to the EU-Committee of the Deutsche Bundestag under § 3 EuZBBG and § 3 EuZBLG and the report of the Council Presidency to COREPER of July 30, 1999.

[38] *Thornberry*, International law and the rights of minorities (Oxford, New York 1994), pp. 46.

[39] *Kunz*, Present status of the international law for the protection of minorities, in: 48 AJIL 282 (1954); *Lerner*, Group rights and discrimination in international law (Dordrecht u.a. 1991), p. 14.

[40] Cf. the 1950 study of the UN secretariat general „Study of the Legal Validity of the Undertakings Concerning Minorities“, UN Doc. E/CN.4/367, pp. 70.

[41] Res. 217 (III) C., „Fate of minorities“, UN Doc. A/3/SR.183, S. 935; cf. *Scherer-Leydecker* (footnote 8), pp. 47.

A new glacial period for the further development of the law of minority protection, at least in its collective form, set in. Even the dedicated efforts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,[42] which had been established in 1947 by the UN Human Rights Commission, on the one hand, and the inclusion of a minority protection provision[43] in the International Covenant on Civil and Political Rights of December 19, 1966 on the other hand, could not change this. Only countries that were driven by the fear that their multi-ethnic identity might lead to the decline of the integrity of their whole state had a vital interest in pushing the development of minority rights ahead within the international community.[44]

However, in the beginning of the eighties a process of rethinking and reconsidering the issue of minority rights slowly set in as after the death of *Josip Broz Tito* the Yugoslavian tragedy took its course. Both Yugoslavia and the Soviet Union were decomposed by the erupting nationalism of their ethnic minorities, which could no longer be subdued. The stability of the "Cold War" was gone and in Europe as well as in other continents historically deeply rooted nationality conflicts broke out again, often in a cruel way.[45] "Pandora's box" of minority and ethnic groups problems had been opened once again.[46]

Scholars and practitioners realized that these conflict potentials could not be tamed by merely providing human rights, but that re-introducing and ensuring means to legally protect the rights of minorities was absolutely indispensable.[47] The British scholar *Patrick Thornberry* saw the law of minority protection rise again like phoenix from the ashes.[48] And indeed, the beginning of the nineties saw the emergence of significant instruments for the protection of minorities both on an international[49] and a national level.[50]

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42 *Ansbach*, Die Unterkommission zur Verhinderung der Diskriminierung und zum Schutz von Minderheiten – Perspektiven ihrer weiteren Arbeit, in: AVR 1993, pp. 232.

43 Article 27 CCPR.

44 *Brems*, Die politische Integration ethnischer Minderheiten (Frankfurt am Main 1995), pp. 21 and 224; *Meissner*, Nationale Autonomie und Minderheitenschutz in der Sowjetunion, in: *Blumenwitz/v. Mangoldt*, Neubestätigung und Weiterentwicklung von Menschenrechten und Volksgruppenrechten in Mitteleuropa (Bonn 1991), pp. 95.

45 *Brems* (footnote 45), p. 1.

46 *Blumenwitz*, Minderheiten- und Volksgruppenrecht - Aktuelle Entwicklung (Bonn 1992), p. 5.

47 Vgl. etwa: *Capotorti*, Die Rechte der Angehörigen von Minderheiten, in: VN 1980, pp. 113; *Gerdes*, Minderheitenschutz – eine internationale Rechtsnorm auf der Suche nach ihrem Gegenstand, in: VN 1980, pp. 126; *Ermacora*, Späte Einsichten - Der Entwurf der UN-Erklärung zum Minderheitenschutz, in: VN 1992, pp. 149.

48 *Thornberry*, Is there a Phoenix in the Ashes ? International law and minority rights, in: 15 TexasILJ 421 (1981).

49 Cf. the „Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities" of December 18, 1992, which was adopted by the UN General Assembly as Resolution 47/135; UN Doc. A/RES/47/135, pp. 210.

50 Cf. for example the document of the Copenhagen conference on the human dimension of the CSCE of June 29, 1990, reprinted in: 29 ILM 1305 (1990); cf. also the European Charter on Regional and Minority Languages of June 22, 1992, BGBl. 1998 II, pp. 1315; and the European Framework Convention for the Protection of National Minorities of November 10, 1994, EuGRZ 1995, pp. 268.

1. Art. 27 of the International Covenant of Civil and Political Rights of 1966

A careful change in the States' position towards the protection of minorities through instruments of public international law on a universal level came about in the sixties and led to the codification of article 27 of the International Covenant on Civil and Political Rights of December 19, 1966 (CCPR)[51]. This provision held:

> *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*[52]

The CCPR entered into force on March 23, 1973. Although article 27 of the CCPR is primarily an individualistic fundamental right, it also contains a collective element through the formulation "in community with other members of their group".[53] As regards the content[54] of the provision, minorities undoubtedly are guaranteed a privileged right to commonly enjoy their culture, language and religion as against the majority of the population. As a primarily negating right, the provision obliges the State parties to refrain from any action, which could pressure the minorities towards assimilation. However, according to the predominant opinion[55] the States are not obliged to actively promote their minorities, in other words they are not urged to introduce "affirmative action" measures. Because of its universal application article 27 CCPR is formulated in a very general way.[56] Together with a facultative protocol[57] the Covenant provides for means to enforce the guaranteed rights. According to article 40 CCPR the State parties are obliged to report to a Human Rights Committee, which was established by virtue of article 28 *et seq.* of the CCPR, the measures they have taken in order to implement the guaranteed rights by the CCPR. Under the facultative protocol persons belonging to minorities can reprimand a violation of their rights to the Human Rights Committee by virtue of an individual request for relief. This slowly established a sort of article 27 "case law", which helps clarifying contested questions on the interpretation of the provision.[58] Persons belonging to a minority in the sense of article 27 CCPR are defined by the Human Rights Committee - in accordance with the dominant academic opinion and the states practice - by subjective criteria (e.g. free confession to belong to a minority) which are counterbalanced by objective (e.g. a certain stability of the minority group) criteria.[59] The Human

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51 BGBl. 1973 II pp. 1534.

52 Definition: BGBl. 1973 II p. 1534.

53 *Kimminich*, Minderheiten- und Volksgruppenrecht im Spiegel der Völkerrechtsentwicklung nach dem Zweiten Weltkrieg, in: BayVBl. 1993, p. 321, 323; *Hofmann*, Minderheitenschutz in Europa, in: ZaöRV 1992, p. 1, 9.

54 *Nowak*, UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll. CCPR-Kommentar (Kehl am Rhein u.a. 1989), Art. 27, footnotes 38 et seq.; *Hofmann* (footnote 54), pp. 9.

55 *Franke/Hofmann*, Nationale Minderheiten – Ein Thema für das Grundgesetz ?, in: EuGRZ 1992, p. 401, 403; *Hailbronner*, Der Schutz der Minderheiten im Völkerrecht, in: Im Dienste der Gemeinschaft, Festschrift für D. Schindler (Basel u.a. 1989), p. 75, 83.

56 *Blumenwitz* (footnote 47), p. 49.

57 BGBl. 1992 II S. 1247 ff.

58 *Rensmann*, Der Minderheitenschutz im Rechtssystem der Vereinten Nationen, in: AWR-Bulletin 1992, p. 99, 101 ff. (brief presentation of the leading cases).

59 *Oxenknecht*, Der Schutz ethnischer, religiöser und sprachlicher Minderheiten in Art. 27 des Internationalen Paktes über bürgerliche und politische Rechte vom 16. Dezember 1966

Rights Committee expressively includes aliens, i.e. persons who do not have the citizenship of the country where they reside, in the scope of application of article 27 CCPR.[60] However, in the light of the ongoing developments under the auspices of the CSCE and the Council of Europe, which will be explained in detail *supra*, it seems very doubtful whether this opinion is shared by the States in a way permitting to consider this opinion as customary law in that respect.[61]

(Frankfurt am Main u.a. 1988), pp. 191; *Hofmann* (footnote 54), pp. 8.

60 *Nowak* (footnote 55), Art. 27, footnote 17.

61 *Hofmann* (footnote 54), pp. 7.

2. The Declaration of Rights of persons belonging to national or ethnic, religious and linguistic minorities of 1992

In 1971 the Sub-Commission on Prevention of Discrimination and Protection of Minorities charged its member *Francesco Capotorti* with elaborating a comprehensive study on the rights of minorities. This study,[62] which was completed in 1977, concluded that the General Assembly should render a basic resolution supposed to facilitate the implementation of the rights guaranteed by article 27 CCPR. The study is based on a dynamic interpretation that understands article 27 CCPR, because of its indefinite operative aims, as a framework provision to be brought to life by adequate executing action on a national level.[63]

After the Sub-Commission adopted the goals of this study, Yugoslavia came forth with a draft declaration,[64] which was the subject of the following debates together with the *Capotorti*-study. In detail the Yugoslavian draft contains the right of existence of a minority, the right to claim respect and the promotion of the particular minority specificities as well as the right of full equality as against the majority population. Moreover, the draft lays down the principle of non-discrimination and acknowledges the necessity of measures, which enable the minority to freely express and develop their cultural characteristics. The fundamental rights are formulated in a way that give them a collective effect.[65] The consultations in a especially established open ended working group dragged on until 1991. Only under the impression of resurrecting nationality conflicts in east and southeast Europe and after express request by the General Assembly, the working group came forth with a final draft[66] in December of 1991. The 48th session of the Human Rights Commission deliberated eventually adopted this draft in February 1992 and sent it via the Economic and Social Council (ECOSCO) to the 48th General Assembly, which adopted the declaration[67] on December 18, 1992 in consensus.

62 *Capotorti*, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1.; cf. also *Capotorti* (footnote 48), pp. 113.
63 *Dicke*, Die UN-Deklaration zum Minderheitenschutz, in: EA 1993, p. 107, 109.
64 UN Doc. E/CN.4/L.1367/Rev.1.
65 *Blumenwitz* (footnote 47), S. 50.
66 „Draft Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities", UN Doc. E/CN.4/1992/48.
67 General Assembly, Res. 47/137 of December 18, 1992.

The declaration consists of a preamble and nine operating articles.[68] In the preamble the General Assembly spells out its motives. It considers the protection of minorities as integral part of the protection of human rights thereby strengthening the individualistic concept and rejecting the Yugoslavian conception of collective group rights.[69] Article 1 of the Declaration determines that States must create safe and favorable development conditions for the existence and identity of minorities through legislation and otherwise. Articles 2 and 3 define the rights of persons belonging to minorities. Those shall have the right to exercise their own culture, religion and language alone and in community with other members of their group. Moreover, within the limits of national laws they shall have the right to participate in political decisions on a national or regional level as far as these decisions touch on the minorities' interests. They are permitted to found associations and to maintain relations with members of their own group across State borders and with other minorities. Article 3 contains a special non-discrimination provision: persons belonging to minorities may exercise their rights individually or in community with other members of their group without any discrimination resulting from this. Article 4 contains four tiered State obligations. States are obliged to take measures to enable persons belonging to minorities to enjoy their human rights without being discriminated against. The States must create favorable conditions to enable minorities to exercise their particularities with regard to culture, language, religion and tradition, safe actions that would violate national laws or international standards. The other three State obligations are weaker. States shall ensure, as far as possible, that persons belonging to minorities get the chance to learn their mother tongue or to be taught in that respective language. Furthermore, States shall ensure the possibility for minorities to learn about their history, their traditions, their language and their culture. Persons belonging to minorities must have the opportunity to acquire knowledge about the society they live in. This provision was created to prevent the segregation of minorities and facilitate their integration. Persons belonging to minorities shall be able to participate in the economic development of the country and shall be adequately consulted with regard to matters of national policy making as well as of international cooperation according to article 5. Articles 6 and 7 contain hortatory provisions concerning cooperation, the exchange of information and experience in the field of minority issues. These provisions underscore the conflict preventive character of the law of minority protection. According to article 8 State measures based on the Declaration shall not be considered to be an act of discrimination,[70] which puts affirmative action measures in the field of minority protection in conformity with human rights. However, the Declaration justifies on violation of the goals and principles of the Charter of the United Nations and in particular the sovereign equality, territorial integrity and political independence of States. Finally, article 9 encourages the organs and special organizations within the United Nations system to help implementing the goals and rights enshrined in the Declaration within their respective competence to the fullest possible extent.

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68 „Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities" of the General Assembly of December 18, 1992, UN Doc. A/RES/47/135; cf.: *Dicke* (footnote 64), pp. 107; *Rensmann* (footnote 59), pp. 99; *Ermacora* (footnote 48), pp. 149.

69 Preamble, point 4.

70 In the sense of the Universal Declaration of Human Rights of 1948.

The Declaration has been criticized for giving the States too much discretion with regard to the implementation of the rights, because on the one hand the formulations were too cautious and too vague[71] and on the other hand provisions envisaging the implementation and the enforcement of the rights were lacking altogether.[72] What is also missing is the definition of the term "minority", what led the German delegation to issue a declaration stating that the Federal Republic of Germany would only recognize citizens as minorities who have been living in its territory for a long period of time, thereby excluding aliens and migrant workers from the scope of minority protection. However, what finally remains to be said about the Declaration is that it is based on a modern understanding of statehood and sovereignty. The State founded on the principles of democracy and the rule of law is the prerequisite of an effective system of minority protection. The principle of the prohibition of discrimination already deeply rooted in international law is consequently supplemented by the obligation of the States to promote the existence and identity of minorities and to prevent assimilative pressure.[73] The success of the Declaration, however, depends on the willingness of the States to implement into national policy the underlying insight of the Declaration, that the protection of ethnic, religious and linguistic minorities needs special promotion. From a legal point of view the Declaration is not a binding act under public international law but merely a hortatory guideline and thus soft law.[74] However, if the goals of the Declaration are sufficiently and universally recognized, there is a possibility that it might become a general principle of international law and thus customary law.[75]

71 *Blumenwitz* (footnote 47), p. 51.
72 *Ermacora* (footnote 48), p. 149, 151.
73 *Dicke* (footnote 64), p. 107, 115.
74 *Heintschel von Heinegg*, in: *Ipsen*, Völkerrecht (München 1990), 3rd Ed., § 19 notes 13.
75 *Ermacora* (footnote 48), p. 149, 151.

3. Further provisions of public international law

On a universal level the discussed provisions on the protection of minorities are flanked by further provisions of public international law.[76] In order to gather a "minimum standard" of the substantive law of minority protection, analyzing these flanking provisions seem to be unproductive. For this reason they will not be further assessed at this point.[77]

III. Minority protection under the CSCE/OSCE system

A further object of examination shall be the development of the system of minority protection within the Conference on Security and Cooperation in Europe (CSCE).

1. The emergence of the substantive minority protection

In the Helsinki final act[78] of August 1, 1975 minority protection was explicitly mentioned for the first time. In principle VII, the so called human rights principle, the CSCE States declared to recognize the right of persons belonging to minorities to equality before the law and to let those people enjoy human rights and fundamental freedoms to the fullest extent. Unfortunately, this confession was limited to those States where minorities existed. This, however, gives the States the possibility to get around their obligation to protect minorities by simply denying their existence on the country's territory. Nevertheless, with the acknowledgement of specific justified demands of persons belonging to minorities the foundation was laid for a development that was later referred to as the "CSCE-process".[79] At the follow-up meetings in Belgrade (1977/78) and Madrid (1980-83) no further progress with regard to minority protection could be achieved. The development of the protection of minorities was continued at the follow-up meeting in Vienna, which began on November 4, 1986 and ended with the adoption of the final document on January 15, 1989.[80] Besides the repetition of the declaration of Helsinki (protection of fundamental rights and prohibition of discrimination) a totally new aspect was introduced: the guarantee to protect the ethnic, cultural, linguistic and religious identity of national minorities was supplemented by the declaration to create conditions to promote that identity. This meant that the participating States explicitly committed themselves to taking actions in the field of minority protection (principle sections 18 and 19). Persons belonging to minorities were allowed to maintain contacts across borders with persons sharing the same national origin or the same cultural heritage (section 31). Moreover, educational training in the field of their own culture and instruction of the children in their own language, religion and cultural identity by the parents was granted (section 68).[81] A real breakthrough in the field of minority protection was reached with the adoption of the final

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76 *Hailbronner* (footnote 56), p. 85 ff.

77 Cf. the instruments on the protection of „indigenous peoples" (cf.: *Heintze*, Völkerrecht und indigenous peoples, ZaöRV 1990, pp. 39).

78 Reprinted in: EA 1975, D 437.

79 *Widmer*, Europäische Bemühungen zur Lösung der Minderheitenfrage, in: EA 1993, p. 265, 267; *Kimminich* (footnote 54), p. 321, 325.

80 Reprinted in: EuGRZ, 1989, pp. 85.

81 *von Studnitz*, Minderheitenschutz im KSZE-Prozeß, in: *Blumenwitz/von Mangoldt*, Neubestätigung und Weiterentwicklung von Menschenrechten und Volksgruppenrechten in Mitteleuropa (Bonn 1991), p. 31, 35.

document[82] at the Copenhagen meeting of the conference on the human dimension of the CSCE on June 29, 1990. The overcoming of the East-West conflict brought about a very favorable political climate. The body of minority rights that were passed at the Copenhagen meeting filled a whole chapter in the final document (Chapter IV, sections 30-40) is still the basis of the law of minority protection of the CSCE system. The participating States granted their national minorities the right to enjoy their human rights and fundamental freedoms without discrimination and in full equality before the law and declared to take affirmative action measures if necessary to enforce theses rights (section 31). Moreover, it was agreed that every person belonging to a minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage of any kind shall result from this choice (section 32). Section 32 paragraphs 1 through 6 contain further and more detailed individual minority rights, concerning in particular the private and public use of minority languages, the practice of a religion, the guarantee to cross-border contacts, the freedom to form associations, and cultural activities. Section 34 contains the commitment to provide the opportunity for minorities to be instructed in their mother tongue and to use their mother tongue before authorities. Sections 33 through 35 oblige to protect and to promote the identity of national minorities.[83] For the time being the process of creating substantive minority rights came to an end with the success of Copenhagen. In the "Charter of Paris for a new Europe" of November 21, 1990[84] the participating States merely affirmed that the ethnic, cultural, linguistic and religious identity of national minorities must be protected and that persons belonging to national minorities must have the right to freely express, to preserve and to develop this identity without any discrimination and in full equality before the law. In order to improve the cooperation with regard to minorities and in the field of minority protection it was decided to hold an expert meeting on July 1 through 19, 1991 in Geneva on the issue. There, however, no progress could be made predominantly because of the hesitant and counterproductive positions of countries like Bulgaria, Romania, France, Greece and Turkey. Accordingly, the final act[85] is characterized by compromises. Some collective minority rights were granted and it was agreed that supporting minority rights must not be considered as an intervention in the internal affairs of another participating country. However, these "gains" were significantly weakened by the accord that not all ethnic, cultural, linguistic or religious differences would necessarily lead to the formation of a national minority, because this formulation gives the States the possibility to deny the existence of minorities.[86]

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82 Reprinted in: EuGRZ, 1990, pp. 239.

83 *Hofmann* (footnote 54), pp. 14.

84 Reprinted in: EuGRZ 1990, pp. 517; cf.: *Schöndube*, Eine Ära des Föderalismus in Europa ist angesagt - die Wiederentdeckung der nationalen Minderheiten, in: Das Parlament of May 1, 1992, p. 2.

85 Reprinted in: EuGRZ, 1991, pp. 492.

86 *Blumenwitz* (footnote 47), p. 54; *Hofmann* (footnote 54), pp. 16.

2. The emergence of institutional protection

The third meeting of the conference on the human dimension, which was held from September 10 through October 4, 1991 in Moscow,[87] could not agree to adopt new provisions in the field of minority protection. However, the participating countries agreed on a procedural mechanism to check whether the obligations concerning the granting of human rights and minority protection were accordingly met. This procedure was named "the mechanism of the human dimension". Should a human rights or minority rights problem occur, either the concerned State or a group of otherwise interested States can - if necessary even without the consent of the concerned State - invite a CSCE expert commission. This commission is charged with finding facts, reporting and issuing recommendations. The recommendations of the experts will then be considered by the Committee of High Officials of the CSCE, which can take further action. Since the second meeting of the Council of Foreign Ministers of the CSCE Member States on January 30 and 31, 1992 in Prague,[88] such a decision to seek further action, which formerly required a consensus, can now be taken even without the consent of the concerned State in cases of clear, flagrant and ongoing violations of obligations under the "human dimension" of the CSCE. This agreement was named "consensus-minus-one-rule".[89] It is quite remarkable that the "mechanism of the human dimension" now allows new interventions in the principle of non-interference in internal affairs, which was formerly defended vigorously by several States.[90] Also at the fourth follow-up meeting on March 24 through July 8, 1992 in Helsinki[91] no further progress in the field on minority rights was made. Executing a recommendation of this follow-up meeting, the heads of States and Governments decided at their summit on July 9 and 10, 1992 in Helsinki to establish the office of a "High Commissioner on national minorities".[92] The mandate of the High Commissioner, however, is very limited. Under the auspices of the Committee of High Officials he deals with emerging conflicts threatening to aggravate into international conflicts. The High Commissioner, whose task it is to draw the attention of the competent CSCE bodies to dangerous developments, may initiate emergency action to prevent conflicts. However, he will not be able to consider individual complaints filed with his office by single persons belonging to minorities. Moreover, he is explicitly barred from dealing with those minority conflicts that entail violent acts of terrorism.[93] Eventually, it was decided to hold so-called implementation meetings on a regular basis and in the presence of non-governmental-organizations. Purpose of those meetings is a details exchange of opinions about the latest implementation developments with regard to the obligations under the "human dimension" including the provisions on minority protection.[94] The first implementation meeting on

87 Final act reprinted in: EuGRZ 1991, pp. 495.

88 Final act reprinted in: EuGRZ 1992, pp. 124.

89 *von Studnitz*, Politische Vertretung von Minderheiten- und Volksgruppenrechten auf verschiedenen staatlichen und zwischenstaatlichen Ebenen, in: *Blumenwitz/Gornig*, Minderheiten- und Volksgruppenrechte in Theorie und Praxis (Bonn 1993), p. 17, 21; *Hausmann*, KSZE ... Ein Kürzel, das die Welt veränderte, in: Das Parlament of May 1, 1992, p. 5.

90 *Widmer* (footnote 82), p. 265, 270.

91 Final act reprinted in: Bulletin des Presse- und Informationsamtes der Bundesregierung 1992, pp. 773.

92 Cf.: The Economist, September 11, 1999, p. 39 and *Rüb*, Früh und regelmäßig, in: FAZ of November 19, 1999.

93 *Widmer* (footnote 82), p. 265, 271; *Hofmann*, Die Bedeutung des Schutzes von Minderheiten und Volksgruppen für eine neue Ordnung in Europa und in der Welt, in: AWR-Bulletin, No. 1-2/94, p. 19.

94 *von Studnitz* (footnote 94), p. 17, 21.

the “human dimension” was held on September 27 through October 15, 1993 in Warsaw.[95]

[95] Cf. EA, 1993, Z 246.

3. Current developments

For the time being, the development in the field of minority protection under the CSCE system came to an end with the summit in December of 1994 in Budapest, where the renaming of the CSCE in "Organization for Security and Cooperation in Europe (OSCE)" took place.[96] This change, however, had no influence on the existing institutional structure. Some of the existing institutions were renamed.[97] The substantive standard of minority protection was neither extended or refined in Budapest nor anytime later.

4. The legal character of the CSCE/OSCE documents

Finally, a brief word on the legal character of the CSCE/OSCE documents and acts shall be said. At several follow-up and expert meetings the CSCE/OSCE managed to adopt quite an impressive number of minority rights. One of the reasons for this success might have been the legal character or quality of the final acts, which are mere political agreements and do not have a legally binding effect as long as they have not become customary law yet.[98] But still these provisions, which are usually adopted by consensus, are politically binding, what led to a quite satisfactory adherence to them. The lately passed consensus rules show an effect which is increasingly binding. Especially the control mechanisms make it difficult for the Member States to get around the obligations they have committed themselves to.[99]

IV. Minority protection by the works of the Council of Europe

Next, the work of the Council of Europe in the field of minority protection shall be analyzed.[100] The Council of Europe as a regional European international organization has compulsory competence on the field of human rights. The efforts of the Council of Europe with regard to the protection of minorities were in most instances initiated by the Parliamentary Assembly of the Council of Europe.[101] After initial efforts in the field of minority protection proved futile, the nineties brought the adoption of the Charter on the Protection of Minority or Regional Languages and the Framework Convention on the Protection of National Minorities.[102]

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96 Cf. the Budapest document reprinted in: Bulletin des Presse- und Informationsamtes der Bundesregierung 1994, pp. 1079; cf. also *Tretter*, Von der KSZE zur OSZE – Einführung in die für den Schutz der Menschenrechte relevanten Teile des Budapester KSZE-Dokuments 1994, in: EuGRZ 1995, pp. 296.

97 Details cf.: *Scherer-Leydecker* (footnote 8), pp. 184.

98 *Blumenwitz* (footnote 47), p. 52; *Hofmann* (footnote 54), p. 14.

99 *Widmer* (footnote 82), p. 265, 267; *von Studnitz* (footnote 84), p. 31, 34.

100 Cf. generally: *Konstantinov*, Minderheitenschutz und Europarat, in: *Heintze*, Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt (Bonn 1997), pp. 177.

101 Formerly: Counselling Assembly.

102 Cf.: *Scherer-Leydecker* (footnote 8), pp. 141; *Hofmann* (footnote 8), pp. 33; *Niewerth* (footnote 8), pp. 203

1. Initial efforts

On the initiative of the Danish delegate *Hermod Lannung* the issue of the inclusion of a minority protection clause in the ECHR[103] was already debated at the consultative meeting of the Council of Europe when it was drafting the ECHR. However, a provision on minority protection was not included in the final version of this document.[104] In 1956 the issue minority protection was again on the agenda of the Counseling Assembly of the Council of Europe. The Assembly established a sub-committee of the legal committee to analyze the issue. The work of the minority sub-committee dragged on for several years until a group of delegates suggested to draft an additional protocol to the ECHR on the protection of minorities. First of all, the minority sub-committee dealt with the definition of the term minority and reached a consensus that only "*separate or distinct groups, well-defined and long established on the territory of a state*" should be comprised.[105] In 1961 the legal committee finally agreed on the wording of a minority protection provision, which was supposed to be adopted as an additional protocol to the ECHR:[106]

> „*Persons belonging to a national minority shall not be denied the right, in community with other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their own schools and receive teaching in the language of their choice or to profess and practice their own religion*."

The codification of a minority definition had been dropped. Even though the Assembly adopted this provision as recommendation no. 285 (1961) and sent it to the Committee of Ministers for its adoption, the provision never entered into force, because the majority of the members of the Council of Europe opposed it.[107] It was argued, that the protection of minorities was already ensured by many documents in the field of public international law and that the practices of the States of the Council of Europe did not show the need for immediate action in that area.[108]

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103 Cf. *Lannung*, The rights of minorities, in: FS for Modinos, pp. 181; *Modeen*, The International Protection of National Minorities in Europe (Abo 1969), p. 127.
104 Cf. infra.
105 *Lannung* (footnote 106), pp. 181.
106 *Scherer-Leydecker* (footnote 8), p. 145; Cf. also *Lannung* (footnote 106), pp. 181.
107 *Lannung* (footnote 106), pp. 181; *Modeen* (footnote 106), p. 128.
108 Details cf. *Scherer-Leydecker* (footnote 8), pp. 145.

2. The European Charter on Human Rights of 1950

As already mentioned, the efforts of the Council of Europe in the field of minority protection reached back in its initial years in 1949. Following the fashion at that time of a concept of individual human rights the European Charter on Human Rights (ECHR) of November 4, 1950,[109] however, did not contain an explicit provision on the protection of minorities. Minorities were protected indirectly by the general prohibition of discriminations of article 14 of the ECHR. This provision contains the obligation of all Member States to provide for the enjoyment of the guaranteed rights and freedoms without any discrimination based on race, skin color, language, the national or social origin, or the belonging to a national minority. Moreover, the traditional lifestyle of a minority can fall within the scope of article 8 ECMR, which prohibits the invasion of privacy.[110] Article 6 paragraph 3 subparagraph e ECHR provides for the right of any accused to demand the free assistance of an interpreter if he cannot understand the language of the court or cannot defend himself in that language. This provision benefits foreigners as well as persons belonging to minorities. Moreover, through its jurisprudence the European Court of Human Rights has clarified some provisions of the ECHR with regard to their protective effect for minorities. In the quite known "Belgian language case" the European Court of Human Rights decided, that no obligation for States to establish or to finance a certain educational institution follows from article 2 of the Second Additional Protocol in conjunction with article 14 ECHR.[111] That meant in particular that there was no right for parents to claim that their children were instructed in any other language than the official language of the respective country.[112] In sum the significance of the ECHR in the field of the effective protection of national minorities in the State parties must unfortunately be considered as very low.[113]

109 BGBl. 1952 II p. 685, 953; latest amendment of November 1, 1994; BGBl. 1994 II pp. 3624.

110 Details cf.: *Hofmann* (footnote 8), pp. 33; *Hofmann* (footnote 54), pp. 12 and *Klebes*, Rechtsnormen – politische Willenserklärungen – praktische Projekte, in: Das Parlament of August 20, 1999, p. 2.

111 EuGMRE 2, pp. 1 = EuGRZ 1975, pp. 298.

112 *Blumenwitz*, Volksgruppen und Minderheiten. Politische Vertretung und Kulturautonomie (Berlin 1995), p. 157.

113 This are the conclusions of *Hofmann* (footnote 8), p. 33 and *Klebes* (footnote 113), in: Das Parlament of August 20, 1999, p. 2.

3. The European Charter on Regional or Minority Languages of 1992

In the beginning of the eighties, the Parliamentary Assembly of the Council of Europe put the issue of minority protection on the agenda once again. This time it picked the issue of the protection of regional and minority languages. By recommendation no. 928 (1981) the Parliamentary Assembly suggested that the Committee of Ministers consider action in that area.[114] Eleven years later, on June 25, 1992 the Committee of Ministers finally passed the "European Charter on Regional or Minority Languages", which was put up for signature on November 5, 1992.[115] Purpose of the Charter is the protection and promotion of regional and minority languages in schools, before the administrative bodies, before the courts and in the media, but not the promotion of minorities as such. That way the Committee of Ministers hoped to make the adoption of the Charter easier for those States, that denied the existence of minorities on their territory, through omitting long and fatiguing debates about the definition of the term minority.[116] However, through defining the object to be protected, i.e. the regional or minority languages, in article 1 paragraph a), the Charter implicitly also defined the minority groups to be protected. Article 1 paragraph a) has the following wording:

„For the purpose of this Charter:
"regional or minority language" means languages that are:
traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and
different from the official language(s) of that State;
it does not include either dialects of the official language(s) of the State or the languages of migrants;"

This definition excludes immigrant groups or sometimes so-called "new minorities" even twice from the scope of the Charter. On the one hand only languages spoken by nationals of one of the State parties are protected and on the other hand languages of migrants are explicitly excluded from protection, even if they have acquired the citizenship of their resident State in the meantime.[117]

The Charter is divided into five parts: general provisions, objectives and principles, measures to promote the use of regional or minority languages in public life, application of the Charter and final provisions.[118]

114 *Scherer-Leydecker* (footnote 8), pp. 146.
115 HRLJ 1993, pp. 148; BGBl. 1998 II pp. 1314.
116 *Konstantinov* (footnote 103), p. 188.
117 This is especially true for France and Great Britain. When the new laws on citizenship enter into force on Jnauary 1, 2000 this can also be expected for Germany. Cf.: Europäisches Parlament, Generaldirektion Wissenschaft, Doc. Nr. IV/WIP/98/10/022, Staatsangehörigkeit in den Mitgliedstaaten der EG, as of: October 30, 1998.
118 Cf. *Hofmann* (footnote 8), pp. 55.

Articles 2 and 3 which are the central clauses among the general provisions lay out the complicated structure of the Charter, which grants the State parties much leeway as to the intensity of protection they would like to allow under the Charter. Article 2 paragraph 1 generally obliges all States parties to apply the objectives and principles (i.e. article 7) of the Charter to all regional or minority languages which meet the criteria spelled out in article 1. Under article 3 paragraph 1 of the Charter each State party shall specify, in its instrument of ratification, each regional or minority language they would like to promote in a particular way according to the catalogue of part III. (articles 8 through 14). The reason for this complicated system is to give the State parties a wide discretion in order to gain wide acceptance of the Charter among the Member States of the Council of Europe. However, this also means that the contracting States are under no legal obligation to promote all regional or minority languages spoken within their territory according to part III. of the Charter in a particular way. The contracting parties are not even obliged to notify any of their regional or minority language for the particular protection provided for in part III. of the Charter. Moreover, the State parties have even further discretion. Even if they chose some or all of their minority languages for the special protection under part III. of the Charter, they can pick single provisions from part III. for each language. Only the obligation under article 2 paragraph 2 to at least pick out a specified minimum number of provisions from the offered catalogues to apply to their regional or minority languages limits this discretion in a certain way.[119]

Part II. of the Charter, which is codified in article 7, determines the objectives and principles, on which the State parties must base their policies, legislation and practice with respect to all regional or minority languages spoken within their territories. Article 7 hardly lays down any specific legal obligation of the State parties and confers no subjective rights to the speakers of regional or minority languages. Basically article 7 only encourages the State parties to promote the use of regional or minority languages, to facilitate their use in public life and determines that the promotion of regional or minority languages shall not be regarded as an act of discrimination against the majority language.[120]

Part III. of the Charter contains in articles 8 through 14 a detailed catalogue of the substantive measures to promote the regional or minority languages notified according to article 2 paragraph 2. As mentioned before, the contracting States can pick specific promotion measures and are only obliged to pick a minimum number of such measures from the different catalogues. Article 8 provides for specific promotional measures in the educational sector. Article 9 determines the protection measures supposed to allow the use of regional or minority languages before judicial authorities.

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119 The content of at least 35 of the substantive provisions in articles 8 through 14 has to be implemented. Among thoses provisions at least three have to be picked from article 8 (education) and 12 (cultural activities and institutions). At least one has to be picked from article 9 (judicial authorities), 10 (administrative authorities), 11 (media) and 13 (economic and social life).

120 *Hofmann* (footnote 8), p. 57.

Article 10 offers promotional measures to encourage the use of regional or minority languages before national or regional administrative authorities. Article 11 intends to promote the presence of regional or minority languages in the media sector. Article 12 wants to strengthen the position of regional or minority languages in the cultural sector. Article 13 offers promotional measures for regional or minority languages in economic and social life. Article 14 intends to strengthen the contacts of speakers of the same regional or minority languages across borders. Articles 15 through 17 control the implementation and enforcement of the Charter and establish a reporting system.

As the Charter entered into force on March 1, 1998[121] it is very difficult to assess it in a compulsory way.[122] A few points can be made though at this moment. The most positive aspect about the Charter is probably its mere existence. The fact that it was possible to agree on an international treaty which could be put up for signature is a great success in itself after so many initiatives to codify rights of minorities on an international level failed.[123] On the other hand there are several shortcomings of the Charter that cannot be overlooked. Firstly, the Charter does not confer a single subjective right to the speakers of regional or minority languages. The structure of the Charter, which allows the different State parties to pick different promotional measures, brings on the one hand with it, that a common minimal standard will not be feasible, and enables on the other hand States generally hostile towards minorities, to pick the least possible protection standard for their minorities without being exposed to the accusation not having joined the Charter. Moreover, many of the obligations are formulated in such a cautious way that a real legal obligation under international law is hardly existing. Finally, to choose a reporting system to monitor the implementation of the Charter is the "weakest" form to control the enforcement of an international treaty.[124]

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121 Cf. BT.-Drucks. 14/1130, p. 5 (report of the federal government on the activities of the Council of Europe).

122 *Hausmann*, Die bloße Existenz der Europäischen Charta ist ihre Stärke, in: Das Parlament of August 20, 1999, p. 3.

123 *Hausmann* (footnote 125), in: Das Parlament of August 20, 1999, p. 3.; *Hofmann* (footnote 8), p. 62.

124 Cf. *Hausmann* (footnote 125), in: Das Parlament of August 20, 1999, p. 3.; *Hofmann* (footnote 8), pp. 62 and *Scherer-Leydecker* (footnote 8), pp. 148

4. (Unsuccessful) initiatives on the way to the Framework Convention of 1995

Until the Framework Convention for the protection of national minorities could be put up for signature there were many efforts by the Council of Europe and its bodies to elaborate a compulsory code of the rights of minorities. For the moment the Framework Convention marks the final point in codifying the rights of minorities and the only compulsory set of international law in force that has been enacted under the auspices of the Council of Europe. For this reason the initiatives on the way to the Framework Convention shall only be analyzed briefly.[125]

In view of the aggravating minority conflicts after the collapse of the Eastern Bloc, the Council of Europe established on May 8, 1990 the European Commission for Democracy through Law, the so-called Venice Commission as a advisory body. This body, consisting of leading academics in the field of international law, presented to the Committee of Ministers on February 8, 1991 a compulsory draft convention[126] on the protection of minorities. This draft[127] contained a definition of the term minority that excluded aliens, many individual rights and some group rights. The monitoring mechanism provides for a reporting system and the possibility to file complaints both for States and individuals. On November 26, 1991 the government of Austria presented to the Committee of Ministers a draft additional protocol to the ECHR on the protection of minorities. This draft had the elegant advantage of conferring the control over the implementation of minority rights to already existing and reliable bodies within the system of the Council of Europe (the Human Rights Committee and the European Court for Human Rights).[128] Moreover, there existed a draft "Convention on Fundamental Rights of the European Ethnic Groups" (the so-called "Bozen draft") elaborated by the Federalist Union of European Ethnic Groups (FUEV), a non-governmental organization.[129]

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125 For a detailed analysis of the initiatives cf. *Hofmann* (footnote 8), pp. 38 and *Scherer-Leydecker* (footnote 8), pp. 149.

126 Reprinted in: Human Rights Law Journal 1991, pp. 296.

127 *Hofmann* (footnote 54), pp. 18; *Hofmann* (footnote 8), pp. 40 and *Scherer-Leydecker* (footnote 8), pp. 151.

128 *Hofmann* (footnote 54), pp. 21; *Hofmann* (footnote 8), pp. 43 and *Scherer-Leydecker* (foonote 8), pp. 153.

129 *Hillgruber*, Minderheitenschutz im Rahmen der Europäischen Menschenrechtskonvention – Stand und Entwicklung, in: *Blumenwitz/Gornig*, Minderheiten- und Volksgruppenrechte in Theorie und Praxis (Bonn 1993), p. 39, 43; *Ludwig*, Werden sie wirksam geschützt, so zücken sie den Dolch nicht – Nationale Minderheiten verlangen kollektivrechtlichen Volksgruppenschutz, in: FAZ of May 18, 1994, p. 8, und *Scherer-Leydecker* (footnote 8), pp. 159.

On November 23 through 27, 1992 the expert committee for the protection of national minorities met for the first time. The task of this committee was to assess the feasibility to create legal standards for the protection of national minorities in the spirit of the European Charter on Human Rights using the already existing drafts.[130] The findings of that expert committee were the decisive initiative for the discussion and finally the adoption of the additional protocol to the European Charter on Human Rights of February 1, 1993[131] by the Parliamentary Assembly of the Council of Europe. The term "national minority" is defined in article 1 of the draft additional protocol like this:

"*Article 1*

For the purpose of this Convention the term "national minority" shall mean a group of persons in a State who

a. settle within the territory of that State being citizens of that States,
b. maintain long existing and well established relations to that State,
c. possess specific ethnic, cultural, religious or linguistic characteristics,
d. are sufficiently represented, although their number is less than that of the rest of the population of that States or a region of this State,
e. are willing to commonly preserve the features that characterize their identity, especially their culture, their traditions, their religion or language."

The belonging to a national minority is a matter of personal choice, that must not entail any disadvantage. Persons belonging to national minorities have the right to freely express, to preserve and to develop their religious, ethnic, linguistic and/or cultural identity without being assimilated against their will. They can practice and enjoy their rights individually or in community with others. Persons belonging to national minorities have the right to equality before the law; any discrimination based on the affiliation with a national minority is forbidden. They have the right to found their own organizations, including political parties. Moreover, persons belonging to national minorities have the right to freely use their mother tongue. They can also use their names in their language. In regions where a significant part of a national minority settles, the persons belonging to that minority have the right to use their mother tongue before administrative authorities and before courts. Persons belonging to national minorities can demand that their language be taught as a foreign language in schools and that an adequate number of schools be established that use their mother tongue as language of instruction. Moreover, they have the right to establish and maintain cross-border contacts to people with the same minority identity. In regions, where persons belonging to national minorities form a regional majority, they shall have the right to maintain their own local or autonomous administrative bodies or shall have a special status. Measures of protection and promotion of persons belonging to national minorities are not to be considered as an act of discrimination against the rest of the population.[132] The Parliamentary Assembly recommended, the Committee of Ministers adopt an additional protocol to the European Charter on Human Rights on the rights of minorities using their draft as a guideline. The Committee of Ministers should enable the heads of States and governments of the Council of Europe to pass a protocol on minority rights at their meeting on October 8 and 9, 1993 in Vienna and put it up for

130 *Klebes*, Für ein gesamteuropäisches Minderheitenrecht – Zum Stand der Arbeiten des Europarates in Straßburg, in: Das Parlament of May 1, 1992, p. 4.

131 Recommendation No. 1201 (1993) concerning an additional protocol to the ECHR on minority rights reprinted in: EuGRZ 1993, pp. 151 or BT.-Drucks. 12/4572.

132 BT.-Drucks. 12/4572; BT.-Drucks. 12/5227; *Steiner*, Die Entwicklung des Minderheitenschutzes im Rahmen des Europarates, in: *Blumenwitz/Gornig*, Minderheiten- und Volksgruppenrechte in Theorie und Praxis (Bonn 1993), pp. 29, 36; *Wollenschläger*, Minderheitenschutz im internationalen, europäischen und nationalen Recht, in: AWR-Bulletin, No. 1-2/94, p. 9.

signature.[133] However, the Vienna summit[134] of heads of States and governments did not pass an additional protocol, but rather charged the Committee of Ministers with preparing a framework convention for the protection of national minorities. Moreover, an additional protocol was to be drafted, which was supposed to supplement the European Charter on Human Rights in the cultural area with provisions that would grant individual rights especially for persons belonging to national minorities.[135]

133 Recommendation No. 1201 (1993) concerning an additional protocol to the ECHR on minority rights reprinted in: EuGRZ 1993, pp. 151 or BT.-Drucks. 12/4572.

134 Final act „Declaration of Vienna" reprinted in: EA 1993, D 478.

135 EA 1993, Z 246; *Laux*, Das Gipfeltreffen des Europarates in Wien, in: EA 1993, D 478; *Ludwig* (footnte 132), in: FAZ of May 18, 1994, p. 8.

5. The Framework Convention of the Council of Europe on the Protection of National Minorities of 1995

In February 1994 the *ad-hoc*-committee that had been established by the Committee of Ministers began drafting the Framework Convention. Sensitive issues were resolved on a ministerial level in October 1994 and after the following meeting of the *ad-hoc*-committee the final draft of the Framework Convention was completed. The Committee of Ministers adopted the draft on November 10, 1994 and on February 1, 1995 the Framework Convention was put up for signature.[136]

Before an in-depth analysis of the Convention it must be noted that many Member States of the Council of Europe took a very hostile position during the discussions as they were still afraid of a destabilizing spiral beginning with the granting of a cultural autonomy for minorities, continuing with the minorities' self-administration and inevitably leading to a secession of the minority. Other States are philosophically based on the assumption that granting special rights for particular groups within a society would be incompatible with the principle of the universality of human rights,[137] what made it even further difficult to find a consensus.

Subject of the Framework Convention are national minorities or persons belonging to such minorities. The objective is the protection of the minorities through granting rights for persons belonging to them.[138] The Framework Convention does not provide a definition of the term "minority", because again no consensus could be reached in that respect. On this issue the explanatory report[139] says:

> "*Furthermore, it must be noted that the Framework Convention does not contain a definition of the term national minority. Therefore, a pragmatic view had to be chosen based on the realization that it is currently impossible to find a definition, which would be fully acceptable to all the Member States of the Council of Europe.*"

This means, in other words, that the supporters of minority protection were rather ready to accept an agreement on a text without a definition, than to run the risk of having to abandon the project of a convention on the subject altogether. The Framework Convention is an international treaty laying down the principles and leaving it up to the State parties to choose the means of its implementation.

The preamble of the Framework Convention addresses worries of many Member States of the Council of Europe, which participated in drafting this treaty, by explicitly stating in its last paragraph that the Framework Convention ensures "*the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of States.*" This clearly defines the outer boundaries of the scope within which the Member States are willing to grant minority rights.[140] Article 1 identifies the objective of the Framework Convention as "*the protection of national*

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136 The text is reprinted in: BGBl. 1997 II pp. 1408.

137 This is especially true for France.

138 An in-depth analysis of the Framework Convention was done by *Klebes*, Rahmenübereinkommen des Europarats zum Schutz nationaler Minderheiten, in: EuGRZ 1995, pp. 262. Cf. also *Scherer-Leydecker* (footnote 8), pp. 164 and *Hausmann*, Bescheidener Einstieg in ein gesamteuropäisches Recht, in: Das Parlament of August 20, 1999, p. 2.

139 Reprinted in: EuGRZ 1995, pp. 271.

140 Cf. *Klebes* (footnote 141), pp. 262, 265.

minorities and the rights and freedoms of persons belonging to those minorities."[141] In this respect paragraph 13 of the explanatory report[142] emphasizes that the Framework Convention does not grant any collective rights. It is equally clear that persons belonging to such minorities will not be provided with any subjective rights. Moreover, article 1 stresses the significance of the protection of minority rights as being an integral part of the international protection of human rights and as such falling within the scope of international cooperation, what should be self-evident. Article 2 of the Framework Convention reiterates another self-evident truth, namely that the Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighborliness, friendly relations and cooperation between States. Article 3 codifies the so-called "confession principle" bringing it in accordance with the dominant opinion[143] with regard to a minority definition, i.e. that the minority features are made up by subjective and objective criteria. Article 3 paragraph 1 says accordingly: "*every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such (...)*" Paragraph 35 of the explanatory report clarifies in that respect that article 3 does not grant the right for any person to arbitrarily decide for himself to belong to a certain national minority, but that the subjective choice of a person in that respect must be backed by inalienable and objective criteria regarding this identity. Article 4 codifies the right of minorities to equality before the law and equal protection by the law and statutes a fundamental prohibition of any discrimination. Article 4 paragraph 2 permits affirmative action measures and paragraph 3 states that such measures are not to be considered as acts of discrimination against the majority population. Article 5 lays down the prohibition of the assimilation of minorities against their will. However, this prohibition is limited as it binds the Member States "*without prejudice to measures taken in pursuance of their general integration policy*". Article 6 commands equally pathetic as meaningless to "*encourage a spirit of tolerance and intercultural dialogue and to promote mutual respect and understanding and cooperation*". Just like article 11 of the ECHR, article 7 of the Framework Convention grants the freedom of peaceful assembly and the freedom of association. Contrarily to the draft of an additional protocol to the ECHR on the protection of minorities,[144] the Framework Convention does not explicitly grant the right of minorities to found own organizations including political parties. Article 8 protects the right to manifest a religious belief.[145] Article 9 regulates the freedom of speech and expression and the freedom of the press with regard to minority languages. Article 10 of the Framework Convention addresses the use of minority languages generally. The freedom to use minority languages in private and in public life must be granted. The formulation of the right to use minority languages before administrative authorities is slightly weaker. The way article 10 is formulated leaves a lot of discretion to the States as to how they want to implement the provision.[146] In case of an arrest a person belonging to a minority shall according to article 10 paragraph 3 have the right to be informed promptly in a language which he understands, of the reasons for his arrest and shall have the right of free assistance of an interpreter if necessary. Article 11 paragraph 1 gives the persons belonging to minorities the right to use their names in the minority language. Again

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141 Cf. supra.

142 Reprinted in: EuGRZ 1995, pp. 271.

143 Cf. *Niewerth* (footnote 8), pp. 39.

144 Recommendation No. 1201 (1993) concerning an additional protocol to the ECHR on minority rights reprinted in: EuGRZ 1993, pp. 151 or BT.-Drucks. 12/4572.

145 Cf. also the corresponding article 9 ECHR.

146 An example for a vague formulation of an obligation under the Framework Convention would be article 10 paragraph 2: „*In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, theconditions which would make it possible to use the minority language in relations between those persons and the administrtive authorities.*"

watered down by very vague formulations, article 11 paragraphs 2 and 3 allow the use of topographical indications in the minority language. Article 12 permits the States to take promotional measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. Moreover, equal opportunities for access to education at all levels for persons belonging to minorities shall be promoted. Article 13 grants persons belonging to national minorities the right to set up and manage their own private educational and training establishments. This right is very limited by the additional remark that the exercise of this right shall not entail any financial obligation for the parties. Article 14 recognizes the right of every person belonging to a national minority to learn his minority language or even to have the opportunity to be instructed in the minority language. The content of article 14 is also watered down by its vague formulation. Article 15 wants to ensure the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. This hints to the ideas of participation and integration. Article 16 wants to save minorities in their traditional settling areas from demographic measures that might pose a threat to the minority community. Finally, articles 17 and 18 want to facilitate cross-border contacts of minority groups and the international cooperation of States to improve the situation in that area. In order to control the implementation of the Framework Convention, articles 24 through 26 provide for a reporting system, one of the weakest monitoring possibilities for international treaties.[147]

Comparing the provisions of the Framework Convention with the draft additional protocol to the ECHR on the protection of minority rights,[148] two provisions catch the eye which have not been included in the Framework Convention. Assessing those provisions, however, is useful for finding the current common standard of substantive European minority law. In contrast with article 11 of the draft additional protocol to the ECHR the Framework Convention does not include the right for minorities to establish their own regional or autonomous administrative authorities or get a special status in those parts of the country, where they form the majority. The reason for the non-inclusion of this provision in the Framework Convention is presumably the aforementioned fear of some Members of the Council of Europe of the spiral cultural autonomy - self-government - secession. Furthermore, the right to file an individual complaint, if a person belonging to a minority feels violated in his rights, which was codified in article 9 of the draft additional protocol to the ECHR, is also not included in the Framework Convention.[149]

147 *Niewerth* (footnote 8), pp. 205; *Weckerling*, Der Durchführungsmechanismus des Rahmenabkommens des Europarates zum Schutz nationaler Minderheiten, in: EuGRZ 1997, pp. 605.

148 Recommendation No. 1201 (1993) concerning an additional protocol to the ECHR on minority rights reprinted in: EuGRZ 1993, pp. 151 or BT.-Drucks. 12/4572.

149 Cf. article 9 of the draft additional protocol to the ECHR.

The Framework Convention of the Council of Europe for the Protection of National Minorities entered into force on February 1, 1998. Because practical experience is still scarce a compulsory conclusion is difficult to draw. The reporter of the Parliamentary Assembly of the Council of Europe summed up the criticism of the Framework Convention's content by saying in the framework of the putting up for signature ceremony:[150]

"Unfortunately the wording of the Convention is quite vague. It lays down a number of not very precisely defined objectives and principles, the keeping of which is an obligation of the States, but which are not enforceable by individuals. Its implementation mechanism is ineffective and there is indeed a danger that monitoring the implementation of the Convention is fully within the discretion of the States."

Nevertheless it must be seen as a great political success that already 26 out of the 41 Members of the Council of Europe, among them some "big", i.e. politically powerful ones, have ratified the Framework Convention.[151] Unfortunately countries like Turkey, Belgium or Greece could not be convinced to join the Convention so far. France is at least considering an accession to the Framework Convention.[152] Despite its shortcomings, the sometimes vague and restrictive formulation of the granted rights and the lack of an effective mechanism to control its implementation, the Framework Convention could have a chance of developing into a moral authority in the field of minority protection because of the accession of many and among those some very important States. Together with the European Charter on Regional or Minority Languages the Framework Convention is the basis for the creation of a genuine European law of minority protection.[153] In a way the rights laid down in the Framework Convention can be seen as the basic arsenal of European substantial minority law.

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150 Cf. *Klebes* (footnote 141), p. 262, 267.

151 The Framework Convention has already been ratified by Armenia, Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Liechtenstein, Malta, Moldavia, Norway, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Switzerland, Macedonia, the Ukraine, Great Britain, Bulgaria and Ireland; cf. *Hausmann* (footnote 141), in: Das Parlament of August 20, 1999, p. 2.

152 The Framework Convention has already been ratified by Armenia, Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Liechtenstein, Malta, Moldavia, Norway, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Switzerland, Macedonia, the Ukraine, Great Britain, Bulgaria and Ireland; cf. *Hausmann* (footnote 141), in: Das Parlament of August 20, 1999, p. 2.

153 Cf. *Klebes* (footnote 141), p. 262, 268 and *Hausmann* (footnote 141), in: Das Parlament of August 20, 1999, p. 2 and *Scherer-Leydecker* (footnote 8), p. 167.

V. Minority protection by the European Union

The law of minority protection can still not be found in the core provisions of substantive EC law as it is laid down in the treaties.[154] The few provisions that provide some indirect minority protection and the jurisprudence of the ECJ in that respect have already been analyzed *supra*.[155] Besides looking at some (unsuccessful) initiatives of the European Parliament to strengthen the protection of minority rights in community law, this part will briefly analyze the "foreign policy" of the European Union in the field of minority protection. As a real, genuine European foreign policy is not yet existing, the term "foreign policy" must be put in quotation marks. Instead of having means to formulate a compulsory foreign policy, the Union can take some action in that direction within the intergouvernmental cooperation under the second pillar of the Union, the common foreign and security policy.[156] In that respect it is interesting to assess the conditions the new middle and eastern European candidates for membership in the EU must comply with in the field of minority protection, and the position of the European Union with regard to minority protection during the conflict in former Yugoslavia.

1. (Unsuccessful) initiatives of the European Parliament

The European Parliament launched several initiatives to provide the minorities in the European Community with compulsory protection. None of these initiatives, however, developed into more than a draft. On July 31, 1984 42 members of the European Parliament introduced a motion for resolution which was mainly based on a report[157] on the rights of ethnic groups and minorities by the Bavarian delegate *Alfons Goppel*. Subsequently, this motion became the basis for further action of the European Parliament in that direction. In February 1992 the delegate *Franz Ludwig Graf Stauffenberg* presented a draft motion[158] by the EPP fraction in the EP which invited the governments of the Member States to determine the rights of ethnic groups and persons belonging to them, to secure them by laying them down in a binding Charter and to permanently protect them that way. The draft Charter defines the term "ethnic group" as the totality of all those citizens of a Member State of the European Community, which live in that territory traditionally and since generations, possess common ethnic, religious and/or linguistic characteristics, which distinguish them from other parts of the population, which possess a typical cultural identity and which form a numerical minority against the rest of the population of that State. Persons belonging to one of those ethnic groups shall have the right of recognition of their existence and their identity. Compulsory resettlement and expulsion shall be prohibited under the right to the native land. Persons belonging to an ethnic group shall have the right to establish their own political parties and to administrative self-government on a regional or municipal level within the common State order. They shall have the right of protection and promotion of the cultural life of the ethnic group and to preservation of their cultural heritage. The States are obliged to promote the production and dissemination of press, audio and video productions of the ethnic groups and to use bilingual topographic indications. Moreover, the States have to provide for ways so that persons belonging to ethnic groups can enforce their rights in the courts. However, it must also be noted that the legislative bodies of the

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154 *Brems* (footnote 45), p. 62.

155 Vgl. *Blumenwitz* (footnote 14), p. 25, 34; *Europäischen Akademie Bozen*, Paket für Europa, Arbeitsheft der Akademie No. 10 (1998).

156 *Streinz* (footnote 8), p. 11, 13.

157 Reprinted in: Europa Ethnica 1984, pp. 233.

158 On the content cf. *Kimminich* (footnote 54), pp. 321, 324; *Goppel*, Die Region: Hort für Minderheiten – Plädoyer für ein europäisches Volksgruppen- und Minderheitenrecht, in: Das Parlament of May 1, 1992, p. 16.

European Communities are probably lacking the competence to regulate minority issues, as even the general authorization of article 308 EC Treaty will not provide the power to legislate issues in that area. Therefore, a Charter on the Rights of Ethnic Groups would have to be designed as a special international treaty or an annex to the Treaties explicitly amending the primary law of the European Communities.[159] After MEP *Graf Stauffenberg* had been removed from the committee for law and civil rights, MEP *Alber* (who now is Advocate General with the ECJ) had been charged with pushing the draft Charter on the Rights of Ethnic Groups ahead. On May 14, 1993 Mr. *Alber* again presented an update of the draft Charter, which unfortunately also failed.[160]

2. The "Copenhagen criteria" for the accession candidates of 1993

Since the changes in middle and eastern Europe the European Union has encouraged these States to introduce human and minority rights. The desire of those States to join the European Union was seen as the strongest incentive to introduce such changes. In June of 1993 the heads of States and Governments decided at the Copenhagen summit, that the European Union generally welcomes the accession of the middle and eastern European candidates.[161] At the same time criteria for the accession were elaborated that entered the EU lingo as the "Copenhagen criteria".[162] The decisive passage of the final conclusions of the Council summit of Copenhagen reads like this:[163]

> „*membership requires that the candidate country:*
> *- has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities,*
> *- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union, and*
> *- (has) the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.*"

Even if grave doubt existed whether the Union would be serious about the political claims against the accession candidates, these doubts were dispelled by the Commission when it published its "agenda 2000" in July 1997. Of course the EU analyzed primarily economical data within the framework of the assessment of the candidates' progress with regard to an accession. Nevertheless also political criteria were broadly assessed and the totally unsatisfactory situation with regard to minority rights in Slovakia lead to the loss of this State's position among the group 1 accession candidates.[164]

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159 *Blumenwitz* (footnote 47), p. 60.

160 *Scherer-Leydecker* (footnote 8), pp. 170; *Streinz* (footnote 8), p. 11, 14.

161 States in group 1 are: Poland, the Czech Republic, Hungary, Slovenia, Estonia, and Cyprus. Other candidates are: Lithuania, Bulgaria, Latvia, Romania, the Slovak Republic and Malta. Turkey is associated since 1962.

162 Cf. *Blumenwitz* (footnote 14), pp. 25, 28; *Freudenberg*, Das diktierte Wohlverhalten für die Neuen im EU-Club, in: Das Parlament of August 20, 1999, p. 5.

163 *European Commission*, COM(97) 2000 Vol. 1, Agenda 2000, 1. For a stronger and wider Union, S. 41.

164 *Freudenberg* (footnote 165), in: Das Parlament of August 20, 1999, p. 5.

Applying the "Copenhagen criteria" the Commission made it very clear that it would, in their assessment, not only consider the constitution and the statutes of a candidate but also the political practice, which would also have to be in line with western European standards.[165] With regard to minority rights the Agenda 2000 states:[166]

> „*Respect for minorities*
>
> *Many of the applicant countries have minority populations, whose satisfactory integration into society is a condition for democratic stability. Minorities account for 44% of the population in Latvia (where 34% are Russian), 38% in Estonia (30% Russian), 20% in Lithuania (9% Russian, 7% Polish), 18% in Slovakia (11% Hungarian, 5% Roma), 14% in Bulgaria (9% Turks, 5% Roma) and 13% in Romania (8% Hungarian, 4% Roma).*
>
> *A number of texts governing the protection of national minorities have been adopted by the Council of Europe, in particular the Framework Convention for the Protection of National Minorities and recommendation 1201 adopted by the Parliamentary Assembly of the Council of Europe in 1993. The latter, though not binding, recommends that collective rights be recognized, while the Framework Convention safeguards the individual rights of persons belonging to minority groups. (...)*
>
> *Except for the situation of the Roma minority in a number of applicants, which gives cause for concern, the integration of minorities in their societies is, in general, satisfactory.*
>
> *Minority problems, if unresolved, could affect democratic stability or lead to disputes with neighboring countries. It is therefore in the interest of the Union and of the applicant countries that satisfactory progress in integrating minority populations be achieved before the accession process is completed, using all opportunities offered in this context.*
>
> *Conclusion*
>
> *Even though progress has still to be made in a number of applicant countries as regards actually practicing democracy and protecting minorities, only one applicant State - Slovakia - does not satisfy the political conditions laid down by the European Council in Copenhagen.*"

As regards the middle and eastern European States it is thus the Commission, who determines the quite cryptic Copenhagen criterion of the "*stability of institutions guaranteeing (...) respect for and protection of minorities*". It is noteworthy, though, that in doing so, the Commission uses two references to determine the standard of minority protection it demands on the side of the accession candidates: on the one hand it uses the Framework Convention of the Council of Europe for the Protection of National Minorities[167] and on the other hand it also consults recommendation no. 1201

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165 *Freudenberg* (footnote 165), in: Das Parlament of August 20, 1999, p. 5.

166 *European Commission*, COM(97) 2000 Vol. 1, Agenda 2000, 1. For a stronger and wider Union, S. 44 f.

167 The text is reprinted in: BGBl. 1997 II pp. 1408.

of the Parliamentary Assembly of the Council of Europe of February 1, 1993 concerning an additional protocol to the European Convention on Human Rights on the rights of national minorities.[168] The first document, though in force has not been ratified by States like Belgium, France and Greece, the latter document is not even in force but is still being negotiated.[169]

The Commission's approach of demanding from the accession candidates not only a "smallest common denominator" with regard to the standards of minority protection must be appreciated. This approach is obviously inspired by the jurisprudence of the ECJ in the field of its fundamental rights jurisdiction, which also sets the standards for fundamental rights not to the level of a "smallest common denominator".[170] In sum, the standard of minority rights as it is laid down in the Framework Convention and which is almost identical with the standard of rights as it is enshrined in the draft additional protocol to the European Charter on Human Rights concerning the rights of national minorities[171] seems to be the current standard of the body of European minority law according to the interpretation of the "Copenhagen criteria" by the Commission.

3. The position of the European Union in the conflict in Yugoslavia

Even before the "Copenhagen criteria" were formulated, the European Union had insisted on the obedience to minority rights when it set up the criteria for the diplomatic recognition of the new States that emerged after the disintegration of Yugoslavia.[172] After an increasing number of States declared themselves independent,[173] the Council determined the criteria for the recognition under international law of the emerging States by the Member States of the European Community on December 16, 1991.[174] On the basis of a common position[175] the EC demanded for the recognition of the new States under international law the "*recognition of the provisions of the UN-Charter and the obligations of the final act of Helsinki and the Charter of Paris, especially regarding the rule of law, democracy and human rights*", "*the guarantee of rights of ethnic and national groups and minorities in accordance with the obligations within the framework of the CSCE*" and the "*recognition of the inviolability of all borders, which can only be changed peacefully and conjointly.*"[176] The recognition of Slovenia followed suit without further conditions. For the recognition of Croatia the EU demanded further guarantees regarding the protection of the Serb minority in the Krajina.[177]

168 Recommendation No. 1201 (1993) concerning an additional protocol to the ECHR on minority rights reprinted in: EuGRZ 1993, pp. 151 or BT.-Drucks. 12/4572.
169 Vgl. *Klebes* (footnote 141), p. 262, 268, and *Scherer-Leydecker* (footnote 8), p. 158.
170 Vgl. *Streinz* (footnote 12), pp. 109.
171 These two instruments are compared in: EuGRZ 1995, pp. 279.
172 Vgl. hierzu: *Blumenwitz* (footnote 14), pp. 25; *Bothe/Hailbronner/Klein/Kunig/Schröder/Graf Vitzthum*, Völkerrecht (Berlin New York 1997), pp. 228; *Streinz* (footnote 8), p. 11, 12.
173 On October 10, 1991 Slovenia and Croatia declared themselves independent form Yugoslavia; cf. EA 1991, D 528.
174 EA 1992, D 120.
175 Now codified in article 12 EU Treaty.
176 Cf. EA 1992, D 120.
177 *Bothe/Hailbronner/Klein/Kunig/Schröder/Graf Vitzthum* (footnote 175), pp. 228.

Moreover, the EC demanded from the recognition candidates the obedience to the whole substantive minority law from the beginning of the CSCE in 1975 until the adoption of the "Charter of Paris for a new Europe".[178] As we have seen[179] this is basically the complete substantive body of minority law, which could be reached within the framework of the CSCE.

Basically the obligations until the Charter of Paris do not exceed the standard of rights as it had been codified in the Framework Convention and the draft additional protocol to the ECHR. Had the EC in 1991 already been able to refer to the minority protecting documents of the Council of Europe, it would doubtlessly have done so. In sum we can thus note, that the demands on the new accession candidates rather reflect the opinion with regard to the current standard of European minority law, than do those demands that the EC formulated in 1991 for the diplomatic recognition of the emerging States after the Yugoslavia crisis. Thus, the State practice during the conflict in Yugoslavia backs the result we have found so far: the current standard of the law on the protection of minorities is quite well reflected by the set of rights as it is laid down in the Framework Convention and in the draft additional protocol to the ECHR concerning the rights of national minorities.

VI. Conclusions and draft clauses

After an assessment of the current situation under EC law for the creation of a Charter on Fundamental Rights of the European Union and an analysis of the current standard of European and international law on the protection of minorities, we are now ready to dare formulating a draft minority clause that could become part of a Fundamental Rights Charter. In doing this there are of course also some political and tactical considerations that must be taken into account.

1. Political obstacles to the inclusion of a minority protection clause in the Charter on Fundamental Rights of the European Union

Without claiming to provide a general analysis of the chances and obstacles for the inclusion of a minority protection clause in a Charter on Fundamental Rights of the European Union, some comments on the difficulties of drafting such a minority protection clause, that could be encountered by a drafting committee, shall be identified at this point. Basically, fundamental objections against introducing a minority protection provision can be expected from three countries: Belgium, Greece and France. These three States have until now neither ratified the European Charter on Regional or Minority languages nor the Framework Convention of the Council of Europe for the Protection of the Rights of National Minorities.

178 *Blumenwitz* (footnote 14), pp. 25.
179 Point III.1.

Few States are structured as complicated as Belgium.[180] The federal system of the Belgian State comprises three regions: the Flamish, the Wallonian and the Brussels region; and three communities: the Flamish (59% of the population), the Wallonian (40% of the population) and the German (1% of the population). They all have their own parliaments, governments and competence. This complicated structure makes it very difficult for Belgium to implement minority rights, which were drafted to fit States with much less complicated minority structures.

Greece[181] recognizes within its territory only the "Muslim" (i.e. Turkish) minority in western Thracia. The Treaty of Lausanne of July 24, 1923 obliges Greece to recognize this minority. Many linguistic and religious minorities live within the Greek territory, which cannot be numbered specifically as Greece does not ascertain data on this issue. Apart from the so-called "Muslim" minority Greece denies to have further minorities and constantly takes a fundamentally hostile position when international treaties supposed to create minority rights are being negotiated.

France[182] denies the existence of any minority within its territory. The reason for this is a philosophical one. The official position is that there are no ethnic or linguistic minorities in France, but only French citizens with linguistic peculiarities. Moreover, it conflicts with the French understanding of the universality of human rights to grant special rights to a specific group within its population. This position is usually based on article 2 paragraphs 1 and 2 of the Constitution of the Fifth Republic:

> "*(1) France is a indivisible, laicistic, democratic and social republic. It ensures the equality of all citizens before the law without regard of differences of origin, race or religion. It respects any faith.*
> *(2) The language of the republic is French.*"

France always argues this opinion emphatically even on the international level. Pointing to the cited constitutional provision France has even entered a reservation to article 27 CCPR explaining that article 27 CCPR would not be applicable to France because there were no ethnic of religious minorities in France.[183] How deeply convinced of this opinion even the highest State bodies are can be told from several decisions of the Constitutional Council (*conseil constitutionnel*). The *conseil constitutionnel* declared the Statute of Corsica unconstitutional because it used the term "Corsican people („*peuple corse*")".[184] The *conseil constitutionnel* also declared the ratification of the European Charter on Regional or Minority Rights by France unconstitutional.[185] In view of this

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180 Cf. *Hofmann* (footnote 8), pp. 68; *Mathiak*, Die rechtliche Stellung der Minderheiten in Belgien, in: *Frowein/Hofmann/Oeter*, Das Minderheitenrecht europäischer Staaten (Berlin u.a. 1993), Teil 1, pp. 1; *Newson*, Europa und das Königshaus als Kitt für die zerstrittenen Volksgruppen, in: Das Parlament of August 20, 1999, p. 8.

181 Cf. *Hofmann* (footnote 8), pp. 95; *Filos*, Die rechtliche Stellung der Minderheiten in Griechenland, in: *Frowein/Hofmann/Oeter*, Das Minderheitenrecht europäischer Staaten (Berlin u.a. 1994), Teil 2, pp. 61.

182 Vgl. *Hofmann* (footnote 8), pp. 91; *Polakiewicz*, Die rechtliche Stellung der Minderheiten in Frankreich, in: *Frowein/Hofmann/Oeter*, Das Minderheitenrecht europäischer Staaten (Berlin u.a. 1993), Teil 1, pp. 126; *Wiegel*, „Ein Grammatikbuch ist besser als eine Anleitung zur Sprengkörperherstellung !", in: Das Parlament of August 20, 1999, p. 8; *Hausmann* (footnote 141), in: Das Parlament of August 20, 1999, p. 2 und *Rudolf* (footnote 87), p. 185, 192.

183 *Streinz* (footnote 8), p. 11, 26.

184 *Hofmann* (footnote 8), pp. 92; *Streinz* (footnote 8), p. 11, 26.

185 Cf. *Wiegel*, Die Sprache der Republik, in: FAZ of June 29, 1999; Le Monde of June 25, 1999; FAZ of June 19, 1999.

background it becomes clear that France also takes a usually fundamentally hostile position towards the codification of minority rights.[186]

The other Member States of the European Union do not seem to have specific tendencies to oppose the creation of a minority protection clause in a Charter on Fundamental Rights of the European Union.

2. Summary of the standard of the public international law and the EC law of minority protection

In sum there are four European and international legal documents that should be consulted within the framework of drafting a minority protection provision in a Charter on Fundamental Rights of the European Union: article 27 of the International Covenant on Civil and Political Rights, the Declaration of the UN General Assembly on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities of 1992, the European Charter on Regional or Minority Languages of 1992 and the Framework Convention of the Council of Europe for the Protection of National Minorities of 1995.

Because of its universal character the substantive content of article 27 of the CCPR is not very compulsory. Basically persons belonging to minorities shall have a privileged right against the majority of the population to commonly cultivate their specific culture, language and religion. This provision has therefore mainly the function of prohibiting any discrimination and keeping assimilative pressure from the minority groups.

The Declaration on the rights of minorities of the UN General Assembly of 1992 is wider and more detailed in setting the standards for the legal protection of minority rights. Articles 2 and 3 provide the standard set by article 27 CCPR more detailed and add the right for persons belonging to minorities to found their own organizations. Article 4 contains tiered State obligations. First, States are permitted to take affirmative action measures in order to implement the objectives laid down in articles 2 and 3. Moreover, persons belonging to minorities shall be given the opportunity to learn their mother tongue or even to be instructed in that language. Furthermore, through increasing the mutual knowledge of the language and culture of the minority population on the one hand and the majority population on the other, an approach of the different parts of the population and an improved integration of minorities shall be achieved. This objective is also being pursued by article 5. Finally, articles 6 and 7 stress the conflict preventive character of the law of minority protection by encouraging cross-border cooperation in that area. All of these rights are sometimes formulated very vaguely and are mostly under a *ordre-public* reservation. Under no circumstances these rights can justify violations of the sovereign equality of States and the territorial and political integrity of the States.

[186] *Rudolf* (footnote 87), pp. 185, 192.

The CSCE/OSCE system of protecting minorities which came to a halt in 1991 with the Charter of Paris does not provide further substantive rights compared with the aforementioned documents. Moreover, the merely politically but not legally binding character of the obligations in the CSCE documents inflates their importance even further.

The consultation of the European Charter on Regional or Minority Languages of 1992 also entails major difficulties. The concept of the Charter giving the State parties ample possibilities to pick the rights they would like to grant their minorities, makes is almost impossible to filter out a common standard of protection which could be used for drafting a minority protection provision in a Charter on Fundamental Rights of the European Union. Article 7, describing the core of protection that any regional or minority language must be provided with, merely encourages the States in a hortatory way to generally promote the use of regional or minority languages and clarifies that taking affirmative action measures must not be considered to be an act of discrimination. Basically, under article 2 paragraph 2 the State parties are only obliged to pick at least 3 paragraphs or subparagraphs of articles 8 (education) and 12 (cultural activities and institutions), which shows at least some focus. In particular the Charter stresses only the significance to learn and cultivate regional or minority languages in order to preserve them.

The main document which should be consulted to help drafting a minority protection provision for a Charter on Fundamental Rights of the European Union is the Framework Convention of the Council of Europe for the Protection of National Minorities of 1995. The Framework Convention's content is largely identical with the content of the 1993 draft additional protocol to the ECHR concerning the protection of minorities. However, the Framework Convention should be primarily consulted as it is actually in force in contrast to the draft protocol. The substantive content of the Framework Convention is based on the subjective "principle of confession" to which some objective criteria are added. Articles 4 and 5 codify the right of persons belonging to minorities to equality before the law and equal protection of the law, the prohibition of discrimination and the prohibition to be assimilated against their will. Affirmative action measures shall not be considered to be an act of discrimination against the majority population. Articles 7 and 8 grant the freedom of peaceful assembly, the freedom to found associations and the religious freedom. Article 9 regulates the use of regional or minority languages with regard to free speech and the freedom of the press. Article 10 sets up a tiered system for the use of regional or minority languages in other areas: in private and in public life persons belonging to minorities are of course free to speak their language, a little more limited is the use of regional or minority languages before administrative and judicial authorities. Article 11 permits the use of one's name and the use of topographic indications in the minority language. Articles 12 through 14 grant rights in the educational domain: persons belonging to minorities shall be able to get information about their own culture and traditions, they shall have the right to establish and manage educational institutions and they shall be given the opportunity to learn their mother tongue or even to be instructed in that language. Article 16 intends to preserve the minority communities in their traditional settling areas and articles 17 and 18 envisage the promotion of cross-border cooperation in the field of minority protection.

The "Copenhagen criteria", which the middle and eastern European accession candidates have to meet as current legal standard of minority protection, also ensue from the set of rights as it is codified in the Framework Convention.

In the light of these findings we can conclude that the standard of rights as it is codified in the Framework Convention of the Council of Europe for the Protection of National Minorities of 1995 should be used as a reference when drafting a minority protection provision for a Charter on Fundamental Rights of the European Union.

3. The problem of defining the term "minority" in the light of the discussion about emergence of "new minorities"

Looking at the emergence of the current standard of the European and international law of minority protection it is astonishing that it had not been possible to agree on a binding and universally accepted definition of the term "minority". This problem has even been aggravated by a recent debate on the protection of the so-called "new minorities". An academic opinion that recently emerged[187] wants to extend the set of legal standards that has been developed in order to protect minorities to immigrant groups.[188] Those immigrant groups are called "new minorities", what would consequently entail the inclusion of these groups in the definition of the term "minority".

a) The dispute

Since the end of World War I., the high time of the international law of minority protection, both academics and diplomats tried to agree on a definition of the term "minority" that would be universally acceptable.[189] Despite the investment of great efforts this undertaking failed almost completely. More than 80 years have passed since the end of World War I. and it seems doubtful if it will ever be possible to find a minority definition for the area of international law that could gain world-wide acceptance. This is basically the historical background and the reason why the substantive instruments of minority protection under international law do not contain a definition of the term "minority". Many academic writings in the field of international law[190] follow the definition proposed by the special rapporteur of the Sub-commission on the Prevention of Discrimination and the Protection of Minorities of the UN Human Rights Commission, *Francesco Capotorti*,[191] which at least offers some guidance. *Capotorti's* definition refers to article 27 of the

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187 *Tomuschat*, Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights, in: FS für Mosler (Berlin u.a. 1983), pp. 949.

188 This opinion is supported by: *Wolfrum*, The emergence of „new minorities" as a result of migration, in: *Brölmann/Lefeber/Zieck*, Peoples and minorities in international law (Dordrecht u.a. 1993), pp. 153; *Nowak* (footnote 55), Art. 27, note 16; *Niewerth* (footnote 8), pp. 44, und *Scherer-Leydecker* (footnote 8), pp. 270; *Brusis/Janning*, „Verhinderte Nationen". Über den Umgang mit ethnischen Minderheiten, in: Internationale Politik, Heft 9/1999, pp. 1 and *Schulze-Fielitz*, Verfassungsrecht und neue Minderheiten, in: *Fleiner-Gerster*, Die multikulturelle und multi-ethnische Gesellschaft (Fribourg 1995), pp. 133.

189 Cf.: *Blumenwitz* (footnote 47), pp. 37; *Steiner/Alston*, International Human Rights in Context (Oxford u.a. 1996), pp. 86; *Hofmann* (footnote 54), pp. 5 or *Erler*, Das Recht der nationalen Minderheiten (Münster 1931).

190 Cf. *Niewerth* (footnote 8), pp. 30 and *Scherer-Leydecker* (footnote 8), pp. 56.

191 *Capotorti*, Study on the rights of persons belonging to ethnic, religious and linguistic

CCPR, analyzed *supra*.[192] A minority in the sense of article 27 CCPR shall thus be defined as a:

> "*(...) group numerically inferior to the rest of the population of a State, in a nondominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language*"[193]

This definition[194] combines subjective and objective elements. Four of those elements are relatively clear and undisputed. The first criterion is the numerical inferiority. How many individuals are exactly necessary to form a minority remains unclear.[195] For our considerations this is irrelevant, though. The second criterion is the inferior position of the minority against the majority.[196] Thirdly, the minority group must possess specific ethnic, religious or linguistic characteristics. These can be objective (language) or subjective (religion) criteria. The fourth criterion is the existence of a certain sense of solidarity within the minority group. *Capotorti* claimed this criterion as the identity of a minority would surely be doomed to disappear without the members' will to preserve their culture and traditions.[197]

The mentioned four criteria are rather undisputed in the pertinent literature of international law. However, there are two criteria that are highly disputed. The dispute revolves around the question whether immigrant groups or aliens must generally and legally be considered as minorities, especially in the sense of article 27 of the CCPR. On the one hand, this touches on the question, whether the element of a "proven historical consistency" is an implicit part of the minority definition. In that context, *Capotorti's* definition simply mentions a sense of solidarity, directed towards preserving particular characteristics. In close connection to that issue is the other contested question, whether a minority must traditionally settle in a certain territory or whether it must settle within a closed area.

minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1.

192 Point II.1.

193 *Capotorti*, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1 para. 568.

194 An extensive analysis of the definition has been conducted by *Niewerth* (footnote 8), pp. 32 and *Scherer-Leydecker* (footnote 8), pp. 242.

195 *Niewerth* proposes to decide this on a case-by-case basis (footnote 8), p. 34; for *Scherer-Leydecker* two individuals suffice (footnote 8), p. 266.

196 The textbook example for a dominant minority is still the white population in South Africa: cf. *Ramaga*, Relativity of the minority concept, in: HRQ 1992, p. 104.

197 This happened to the Polish people who stayed in Germany after World War II. as they were assimilated losing their minority characteristics. Cf. *Hahn*, Die rechtliche Stellung der Minderheiten in Deutschland, in: *Frowein/Hofmann/Oeter*, Das Minderheitenrecht europäischer Staaten (Berlin u.a. 1993), Teil 1, pp. 63, note 7; *Blumenwitz* (footnote 47), pp. 113.

A further point of dispute is the question, whether persons belonging to a minority must be citizens of the State from which they claim minority protection. Here, the issue is whether the scope of article 27 of the CCPR also covers immigrants and aliens. These two groups, which are excluded from the scope of article 27 of the CCPR according to the definition of Capotorti, are often referred to as "new minorities".[198]

According to *Wolfrum*[199] the rights granted by article 27 of the CCPR are integral part of the personal identity. In his opinion, article 27 CCPR codifies the minimal protection against forced integration and assimilation and therefore must also cover immigrant groups. *Niewerth*,[200] founding his argumentation on the *travaux préparatoires* to article 27 CCPR, demands that immigrants must have lived at least for a certain period of time within the territory of a State before they can be eligible for minority protection. He sidesteps the question of how long this has to be exactly calling the issue a political one. This certain period of time is not demanded by the UN Human Rights Committee,[201] which includes immigrants in the scope of article 27 CCPR as a matter of self-evidence. The UN Human Rights Committee even includes aliens in the scope of article 27 CCPR. *Tomuschat*[202], *Wolfrum*[203] and others[204] share this view. The main argument here is that otherwise a State could arbitrarily deny certain groups their minority status simply by withholding citizenship from those groups.[205] The UN Human Rights Committee representing an extensive minority definition even goes one step beyond the opinion of the aforementioned scholars.[206] For the Human Rights Committee[207] persons belonging to minorities do not even have to be resident aliens. Not only migrant workers but also mere visitors or tourists in a country shall have the rights of article 27 of the CCPR.[208]

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198 Vgl. *Tomuschat* (footnote 190), pp. 949; *Wolfrum* (footnote 191), pp. 153; *Nowak* (footnote 55), Art. 27, and *Niewerth* (footnote 8), pp. 41; for a specific view form the angle of German law cf. *Schulze-Fielitz* (footnote 191), pp. 133 and *Murswiek*, Minderheitenschutz – für welche Minderheiten ?, in: *Blumenwitz/Murswiek*, Aktuelle rechtliche und praktische Fragen des Volksgruppen- und Minderheitenschutzrechts (Bonn 1994), pp. 39, 52.

199 *Wolfrum* (footnote 191), pp. 153, 163.

200 *Niewerth* (footnote 8), p. 44.

201 Cf. UN Doc. CCPR/C/79/Add. 73, S. 3, Ziff. 13: „*The Committee is of the view that article 27 applies to all persons belonging to minorities whether linguistic, religious, ethnic or otherwise including those who are not concentrated or settled in a particular area or a particular region or who are immigrants or who have been given asylum in Germany.*"

202 *Tomuschat* (footnote 190), p. 949, 960.

203 *Wolfrum* (footnote 191), p. 153, 161.

204 *Nowak* (footnote 55), Art. 27, note 16; *Scherer-Leydecker* (footnote 8), pp. 270; *Niewerth* (footnote 8), pp. 44.

205 *Tomuschat* (footnote 190), p. 949, 961.

206 Cf. the draft general comment to article 27: UN Doc. CCPR/C/SR.590. Cf. also *Scherer-Leydecker* (footnote 8), pp. 100.

207 UN Doc. CCPR/C/21/Rev.1: General comment No. 23 (50) (art. 27) adopted by the Human Rights Committee under Art. 40, paragraph 4, of the International Covenant on Civil and Political Rights at its 1314th meeting on 6 April 1994.

208 „*Just as they need not be nationals of citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.*" UN Doc. CCPR/C/21/Rev.1: General comment No. 23 (50) (art. 27) adopted by the Human Rights Committee under Art. 40, paragraph 4, of the International Covenant on Civil and Political Rights at its 1314th meeting on 6 April 1994.

A different view is represented by *Blumenwitz*[209], *Hofmann*[210] and other scholars[211], who base their argumentation on the fundamental differentiation that exists between citizens and aliens under international law. Citizens depend on the granting of minority protection while foreigners can claim the minimum standard of rights for aliens. According to this opinion aliens and immigrants do not have a minority status.

b) The background

The significance of the definition of the term "minority" can only be understood in the light of the underlying disputes in its context and their consequences. Logically the broader the minority definition is, the smaller the scope of minority rights must be. On the contrary, the narrower the minority definition is, the more intense a concept for the protection of minorities can be.[212] If one agrees with the extremely broad minority definition of the UN Human Rights Committee, the set of rights for the protection of minorities cannot go way beyond the prohibition of discrimination. In view of this background it seems very plausible when the dominant opinion[213] denies that article 27 CCPR entails an obligation to actively promote[214] minorities.

The reasons that might have caused a reconsideration of the traditional understanding of the definition of the term "minority" are probably globalisation and modern migration movements. Globalisation has become a slogan with which the necessity to fundamentally change traditional principles in many areas seems to be justifiable. People are able and do cross national borders significantly easier than some 50 years ago to live and work in States whose citizenship they do not have, sometimes only for a short period of time, sometimes for good. Modern economy demands international mobility from the workforce in various fields. By introducing the citizenship of the Union[215] the European Union even created a new kind of citizenship.[216] All these facts lead to a change in the meaning of the concept of citizenship. To be sure, this does not mean that citizenship has become meaningless nowadays, it just means that the legal concept of citizenship experiences a shift of the center of gravity among its various implications. A modern law of minority protection cannot disregard this shift. Moreover, the migration movements at the beginning of the 21st century challenge both international law and the national legal systems in an unparalleled way.[217] Thus, a

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209 *Blumenwitz* (footnote 47), p. 27.

210 *Hofmann* (footnote 54), pp. 7.

211 *Modeen* (footnote 106), p. 108; *Sohn*, The right of minorities, in: *Henkin*, The International Bill of Rights - The Covenant on Civil and Political Rights (New York 1981), p. 271, 279; *Pircher*, Der vertragliche Schutz ethnischer, sprachlicher und religiöser Minderheiten im Völkerrecht (Bern 1979), p. 25.

212 *Niewerth* (footnote 8), p. 48; this argumentation is also used by *Murswiek* to reject an extension of the law of miority protection to the foreigners and naturalized immigrants living in Germany, cf. *Murswiek* (footnote 201), pp. 39, 52.

213 Cf. *Hofmann* (footnote 54), pp. 9 and *Nowak* (footnote 55), Art. 27, note 46. A different view is supported by the UN Human Rights Committee: cf. the general comment to article 27 IPBPR, UN Doc. CCPR/C/21/Rev.1.

214 Often referred to as „affirmative action policy".

215 Articles 17 through 22 of the EC Treaty with the Amsterdam amendments.

216 Cf. *Zimmermann*, Europäisches Gemeinschaftsrecht und Staatsangehörigkeitsrecht der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit, in: EuR 1995, pp. 54.

217 Cf. *Niessen*, Migrant workers, in: *Eide/Krause/Rosas*, Economic, Cultural and Social Rights (Dordrecht u.a.

modern law of minority protection cannot tackle these challenges by ignoring them.

Whether these new challenges in the field of minority protection can be dealt with by simply including the immigrants in the minority definition seems to be more than doubtful.

It cannot be denied that the traditional, the "classic" minorities are in a situation which differs enormously from the situation the immigrants, may they have the citizenship of their resident country or not, find themselves in.[218] Whereas with respect to the "classic" minorities preserving and protecting their specific cultural identity must be the primary goal, it is the full integration into society which should have priority with regard to immigrant groups. "Classic" minorities are normally integrated into society in quite a satisfactory way. Their worry is the permanent threat of losing their particular minority identity that results from a constant assimilative pressure from the majority culture. Immigrant groups worry primarily about acts of discrimination that occasionally pose obstacles to their entry in the working and social world of their resident country. For them learning or perfecting the language of the resident country and understanding the social behavior

1994), p. 323; *Wolfrum*, International law on migration reconsidered under the challenge of new population movements, in: GYIL 1995, pp. 191, *Wolfrum* (footnote 191), pp. 153; *Sieveking*, Migration und Rechtsstatus von Zuwanderern – bundesrepublikanische und europäische Aspekte, in: RuP 1992, pp. 135; *Alexy*, Minderheitenschutz und Grundgesetz – Zur Rechtsstellung von Zuwanderern, in: *Barwig/Brinkmann/Huber/Lörcher/Schumacher*, Vom Ausländer zum Bürger - FS für F. Franz und G. Müller (Baden-Baden 1994), pp. 181.

218 Cf. *Oeter*, Überlegungen zum Minderheitenbegriff und zur Frage der „neuen Minderheiten", in: *Matscher* (Hrsg.), Wiener Internationale Begegnung zu aktuellen Fragen nationaler Minderheiten (Kehl am Rhein 1997), pp. 229, 245. This is an important point often overlooked by many commentators.

and the functioning of the society of the majority population takes priority. Therefore, it is very clear that a protection concept that had initially been designed for minorities in the classical sense of the word simply does not suit the needs of those "new minorities". In no way whatsoever does this mean that these "new minorities" are not worthy of being protected. It just cautions that a simple extension of the minority protection concept, a concept that had been tailored to suit the "classic" minorities, to the "new minorities" does not solve a single problem for those "new minorities". Rather to the contrary. The protection of "classic" and "new" minorities asks for differentiated approaches using different concepts.

c) *Eide's* suggestion

The suggestion of UN special rapporteur *Asbjørn Eide*[219] might be a solution to the aforementioned dilemma. In contrast to the ignorant approach of the UN Human Rights Committee *Eide* sees the aforementioned dilemma and understands the underlying problems. He sees the solution to the problem in working out a protection concept for every minority group and particularly tailored to suit the individual needs of every group. The consequence would be a different protection standard for each different minority group.[220] On the basis of a very broad general minority definition[221] including a guaranteed minimal protection standard, *Eide* wants to give the States the power to grant different sets of rights to different minority groups.

The disadvantage of *Eide's* suggestion is that although a "framework definition" of the term "minority" would have been found, this only shifts the problem to a lower level, the different minority groups. Shifting the problem to a lower level might even aggravate the disputed connected to it. In place of a discussion about the minority definition we would provoke a discussion about the different protection standards for the different minority "classes". One has to be very optimistic to expect better results from the latter discussion.

d) Comment

Nevertheless, it seems to me that *Asbjørn Eide's* approach is the right one, at least considering his basic assumptions. The key to resolve the mentioned dilemma indeed seems to be the differentiation of the different minority categories.

Two observations from analyzing the standards of substantive European and international minority laws shall at this point be briefly recalled: on a political level, the suggestion to simply extend the standard of minority protection that has been reached so far to immigrant groups, seems to be totally unacceptable. To demand this seems senseless and completely futile. Suffice it to point to the explicit exclusion of the languages of immigrants from the scope of the European Charter on Regional or Minority Languages.[222] Secondly, looking at the various drafts on the law of minority protection worked out by different committees the minority definition proposed by *Capotorti* still

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219 *Eide*, Protection of Minorities – Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, UN Doc. E/CN.4/Sub.2/1993/34.

220 *Eide* (footnote 222), para. 27 and 28.

221 *Eide* (footnote 222), para. 29: „*a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population.*"

222 Point IV.3.

seems to offer much guidance with regard to defining the term "minority" in its classical sense.

Therefore, should during the negotiations of a minority protection clause for a Charter on Fundamental Rights of the European Union the opportunity to codify a minority definition come up, there are two things that should be considered. First of all, a clear distinction between "classic" minorities and immigrant groups, which by the way should not even be referred to as "new minorities", should be drawn. In other words: minority protection for (classic) minorities, integration aid for naturalized immigrants, law concerning aliens for foreigners. Secondly, the basis for a definition of minorities should be *Capotorti's* definition. This definition, however, would have to be modified in at least one respect. Because the European Union is based on the principle of the prohibition of any discrimination on grounds of nationality, the citizenship requirement in *Capotorti's* definition would have to be replaced with the criterion "citizenship of the Union" (articles 17 *et seq.* EC Treaty). In order to prevent migration movements within the Union caused by a new law on the protection of minorities, a new criterion which demands that minorities can only claim protection if they are "*long established settling in traditional areas*" could be introduced.[223]

The formulation of a minority definition could therefore look like this:

Article x

A minority in the sense of this charter is a group numerically inferior to the rest of the population of a State, in a nondominant position, whose members – being citizens of the Union traditionally settling in their well-defined and long-established territories – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Nevertheless, in view of the frustrating experiences of the past with regard to efforts of defining the term "minority" in international law, it seems rather improbable that a breakthrough in that respect will happen at this time. However, in the context of the codification of a Charter on Fundamental Rights of the European Union this inability will not be detrimental if only the ECJ will be given jurisdiction over the Charter to be drafted. The power of the ECJ to control the implementation of the Charter would have to be ensured at any price.[224] This is another reason why the inclusion of the Charter in the Treaties would be a great advantage. In the framework of its jurisprudence the ECJ will, sooner or later, have to define the legal term "minority". The ECJ will have to define this term looking at the substantive provisions on minority protection and if it finds there a clear distinction between "classic" minorities and immigrants, naturalized or not, it will have sufficient guidance on how to define the term in a satisfactory way.

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223 The feature „*separate or distinct groups, well-defined and long established on the territory of a state*" seemed to be acceptable at a very early stage when the additional protocol to the ECHR was drafted. Cf. supra point IV.1. Cf. also article 1 paragraph a) of the European Charter on Regional or Minority Languages: „*(...) traditionally used within a given territory of a State by nationals of that State (...).*" Cf. supra point IV.3. Cf. also article 1 paragraph a) of the draft additional protocol to the ECHR. supra point IV.4.

224 This is not self-evident as can be seen from article 46 EU Treaty.

4. Draft of a minority protection clause in the Charter on Fundamental Rights of the European Union

As already stated, the Framework Convention of the Council of Europe for the Protection of National Minorities of 1995 should be the guideline for the substantive content for a minority protection provision in a Charter on Fundamental Rights of the European Union. Of course this provision cannot be as detailed as the content of the Framework Convention, because the Charter to be drafted is thought to have some "constitutional character". Thus, article 27 CCPR can serve as another guideline. Finally, for the reasons contemplated *supra*,[225] a clear distinction between minorities and immigrant groups should in any event be included. Ideally, this could be done in two separate articles, one on the protection of "classic" minorities and one on the protection of immigrant groups.

The formulation could therefore look like this:

Article y

(1) Persons belonging to national or ethnic, religious or linguistic minorities have the right to equality before the law and equal protection of the law. Any discrimination based on belonging to a minority shall be prohibited. Every person belonging to a minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage of any kind shall result from this choice. Affirmative action policies intending to promote equality in fact between persons belonging to minorities and persons belonging to the majority in all areas of economical, social, political, and cultural life, shall not be considered to be an act of discrimination. Within the framework of their general integration policy, member States shall refrain from policies and practices aimed at assimilation of minorities against their will. This applies especially to measures of any kind in the traditional settling territories of those minorities.

(2) Persons belonging to such minorities shall have the freedom to peaceful assembly and shall have the right to found associations and organizations, including political parties.

(3) Persons belonging to such minorities shall have the right to enjoy their own culture and traditions, to profess and practice their own religion or to use their own language across frontiers and also in community with other members of their group. This shall include the right to use their names in the minority language and the right to official recognition of them.

(4) In their traditional settling areas persons belonging to such minorities shall have the right to use their minority languages in relation with administrative and judicial authorities, which shall include the right to receive answers from these authorities in their minority languages. In case of an arrest a person belonging to a minority shall have the right to be informed in a language which he understands of the nature and cause of any accusation against him, and to defend himself in this language, if necessary with the free assistance of an interpreter.

[225] Cf. supra point VI.3.b).

(5) Persons belonging to such minorities shall have the right to learn their minority language. In their traditional settling areas they shall have the right to be instructed in their languages. These rights shall be implemented by the member States within the frameworks of their educational systems or by permitting the right to set up and manage private educational establishments. Member States contribute financially to the latter mentioned establishments an proportional amount that equals their proportional financial engagement in public educational establishments. Moreover, the member States shall take measures in fields of education and research to foster knowledge of the culture, history, language and religion of such minorities and of the majority.

Article y

The member States respect the identity and the interests of immigrant groups. Persons belonging to such groups have the right to equality before the law and equal protection of the law. Any discrimination based on belonging to such a group shall be prohibited.

This draft sums up the European standard of the law of minority protection in "clear" formulations. In a way this draft lays down the currently maximum achievable legal protection for the European minorities, without suggesting unrealistic rights. In negotiating a minority protection provision the standard of rights should be firmly defended. Compromises may perhaps be made with regard to the way these rights are formulated. The jurisdiction of the ECJ over the Charter on Fundamental Rights of the European Union, however, has to be established at any cost.

Editors' note to CHARTE 4302/00,
Contribution avec amendments sur les propositions du Présidium soumises par Lobby Européen des Femmes (LEF) (datée le 09/05/00):

The Council has no record of the English version of this document.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 25 mai 2000

CHARTE 4302/00

CONTRIB 174

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution avec amendements sur les propositions du Présidium relatives aux droits civils et politiques, droits sociaux et droits des citoyens, soumises par Lobby Européen des Femmes (LEF). [1] [2]

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[1] Ce texte existe en langues française et anglaise.

[2] EWL: 18 rue Hydraulique, B-1210 Brussels. Tel. +32-2- 217 90 20. Fax: +32 2 219 84 51. E-mail: ewl@womenlobby.org. Website: http://www.womenlobby.org

LOBBY EUROPEEN DES FEMMES
EUROPEAN WOMEN'S LOBBY

09/05/00

CONTRIBUTION DU LEF A LA REDACTION D'UNE CHARTE EUROPEENNE DES DROITS FONDAMENTAUX

Suite à ses contributions précédentes (CONTRIB 27 et 120), le LEF tient à féliciter la Convention du travail jusqu'à présent accomplit dans l'élaboration d'une Charte des Droits Fondamentaux ainsi que de l'inclusion d'un paragraphe consacré à la promotion de l'égalité entre les femmes et les hommes.

Toutefois, le LEF manifeste son accord d'ensemble envers les critiques et les amendements avancés par l'Association des Femmes d'Europe méridionale (AFEM, CONTRIB 42 et 105) et portant sur le projet de Charte déposé par la Convention : nous souhaitons rappeler que la discrimination fondée sur le sexe ne devrait pas figurer dans une clause générale de non-discrimination. En effet, une disposition de ce type n'appuie en rien l'éradication de la discrimination directe et indirecte que subissent les femmes, ni la mise en place de l'égalité des sexes.

Par conséquent, le LEF demande l'inclusion dans la Charte d'une disposition ayant un effet direct et établissant le principe inconditionnel et fondamental de l'égalité entre les femmes et les hommes, interdisant toute forme de discrimination fondée sur le sexe dans tous les domaines, et imposant des mesures positives en attendant l'instauration d'une égalité réelle. Cette disposition devrait figurer parmi les premiers articles de la Charte, dans le chapitre consacré aux droits civils et politiques, aux côtés de la déclaration du principe fondamental d'égalité et de l'interdiction de toute discrimination.

Partant, le LEF souhaite amender les propositions du Présidium de la manière suivante.

DROITS CIVILS ET POLITIQUES (CONVENT 13)

Article 1. Principe général d'égalité entre les femmes et les hommes dans tous les domaines

1. L'Union veillera au respect du principe inconditionnel et fondamental de l'égalité des sexes dans tous les domaines de sa juridiction.

2. L'égalité substantielle entre femmes et hommes doit être garantie et toute discrimination – directe ou indirecte – fondée sur le sexe doit être interdite. En outre, une perspective de genre doit être adoptée dans la lutte contre toutes les formes de discrimination afin d'éradiquer la discrimination multiple à laquelle beaucoup de femmes sont confrontées.

3. Des mesures positives doivent être mises en œuvre pour améliorer la situation des femmes en attendant l'instauration d'une égalité substantielle entre les femmes et les hommes.

*COMMENTAIRES :**Aux côtés de la proclamation du principe fondamental de l'égalité devant la loi et de l'interdiction générale de toute forme de discrimination (clause dont la liste des motifs ne devrait pas mentionner le "sexe"), une disposition devrait être exclusivement consacrée à la déclaration du principe inconditionnel et fondamental de l'égalité entre les femmes et les hommes dans tous les domaines de la juridiction de l'Union, et ne pas se limiter à la fixation des conditions salariales et de travail. Ce principe pourra dans un deuxième temps être d'application dans les domaines social et économique.*

Le principe général de l'égalité entre les femmes et les hommes fait partie des droits fondamentaux de la personne humaine reconnus par la CJCE. Par conséquent, la Charte est tenue de transposer la jurisprudence de la Cour et rappellera ainsi les remarques énoncées par l'UE et les organes internationaux, à savoir qu'une clause générale de non-discrimination ne suffit pas pour établir une véritable égalité entre les femmes et les hommes. En outre, ce type de disposition constituerait une régression au niveau de l'égalité des sexes, dans la mesure où la discrimination fondée sur le sexe revêt une nature particulière, d'ordre structurel, qui affecte principalement les femmes, soit la moitié de la population, et non une minorité. Celles-ci sont exposées à différentes formes de discrimination que ce soit sur la base de la race, de la couleur ou l'origine ethnique ou sociale, du handicap, de l'orientation sexuelle, de l'âge, de la religion ou les convictions, ceci en addition de la discrimination de base fondée sur le sexe. Une clause séparée exclusivement consacrée à la discrimination fondée sur le sexe permettrait de mieux lutter contre la discrimination multiple et de protéger le droit des femmes à jouir effectivement de tous leurs droits et libertés fondamentaux, d'être des citoyennes à part entière, dans tous les domaines.

En dépit de l'existence de mesures internationales, européennes et nationales, qui encouragent l'égalité entre les femmes et les hommes, on ne peut pas dire que ce principe soit devenu une réalité. C'est pourquoi il est nécessaire d'imposer des mesures positives à titre transitoire, en attendant que les mentalités aient changé et que les préjugées soient éliminés, afin qu'une égalité réelle et effective soit en vigueur dans tous les domaines de la juridiction de l'Union. L'article 4 §1 de la Convention sur l'élimination de toutes les formes de discrimination envers les femmes (CEDEF) ainsi que l'article 141 §1 du traité de l'Union, renvoient à la nécessité pour les États membres d'adopter des actions positives ; de même, la déclaration n°28 du traité d'Amsterdam précise que ces mesures devront avant tout viser à améliorer la situation des femmes. La Charte devrait donc énoncer des mesures positives, afin d'atteindre l'objectif d'une égalité réelle et complète.

Article 3. Droit au respect de l'intégrité

Le droit au respect et à la protection de l'intégrité physiques et mentales implique l'interdiction absolue :

- des pratiques eugéniques
- du clonage d'êtres humains
- de la traite et du commerce du corps humain, ou de ses parties, que la personne concernée ait ou non donné son accord.

COMMENTAIRE : *La protection et le respect de l'intégrité ne peuvent se limiter au domaine de la médecine et de la biologie : il convient d'en élargir le champ d'action, pour y inclure l'interdiction de la traite des personnes sous toutes ses formes, et en particulier des femmes et des enfants dans un but de travail forcé ou d'exploitation sexuelle. Cette disposition reflète l'importance des traités et des conventions internationales ratifiés par la plupart des États membres, comme la "Convention pour la suppression de la traite des personnes et de l'exploitation ou de la prostitution d'autrui" (1949), qui condamne la prostitution et la traite sous toutes leurs formes en tant que violations des principes fondamentaux des droits humains.*
Il est indispensable de préciser que le consentement de la personne concernée est sans incidence dans la mesure où, l'expérience l'a prouvé, il est manifestement impossible de déterminer si ce consentement a été librement accordé. En outre, il est désormais indubitable que la plupart des femmes impliquées dans la prostitution n'agissent pas de leur plein gré : à ce propos, il serait opportun de reconnaître que "la liberté de choix" est un facteur relatif, situé au carrefour des options économiques, sociales, culturelles et politiques ouvertes aux femmes au sein d'une société donnée. Comme le stipule la motion adoptée par le LEF en 1988, l'inégalité des relations de pouvoir entre les femmes et les hommes entame gravement la liberté de choix.

Article 4. Interdiction de la torture et des traitements inhumains

Nul ne peut être soumis à la torture, ni à des peines et traitements inhumains et dégradants. Ce principe renvoie à toute forme de violence physique ou morale, notamment toute violence liée au sexe comme les mutilations génitales, le viol, la violence domestique, le mariage forcé, les meurtres pour une question d'honneur, y compris quand ces actes sont perpétrés au sein de la famille.

COMMENTAIRE : *Une disposition condamnant toutes les formes de violence devrait instaurer l'interdiction absolue de la torture et des traitements inhumains ; elle devrait préciser explicitement que la violence ou la persécution fondées sur le sexe constituent une forme de torture. On sait pertinemment que les mutilations sexuelles, dont les femmes et les fillettes sont les premières victimes, sont encore d'actualité sur le territoire européen, au même titre que toutes les autres formes de violence liées au sexe. Non exhaustive, la liste énumérerait néanmoins les formes de violence les plus répandues subies principalement part les femmes.*

Article 17: Droit d'asile et expulsion

1. Les personnes qui ne sont pas ressortissants de l'Union ont droit d'asile dans l'Union européenne *(conformément aux règles de la Convention de Genève du 28 juillet 1951 et au protocole du 31 janvier 1967 relatifs au statut des réfugiés) (dans les conditions prévues par les traités).*

2. L'asile doit être accordé à toute femme ou tout homme dont l'intégrité physique, psychologique ou génétique est menacée, ou qui subit des traitements inhumains ou dégradants. La persécution fondée sur le sexe, comme les mutilations sexuelles ou les autres actes de violence liées au sexe, notamment le viol, le mariage forcé, la violence domestique,

les meurtres pour une question d'honneur, constitueront des motifs suffisants pour l'examen attentif d'une demande d'asile. Ceci est applicable lorsque les autorités du pays d'origine sont responsables de la persécution, qu'elles les tolèrent ou soient incapables de s'y opposer, ainsi que lorsque la violence sexuelle se produit en temps de guerre.

3. Les conditions de la mise en pratique des droits accordés aux migrants seront formulées de manière à ce que les femmes en bénéficient au même titre que les hommes. Les besoins spécifiques des femmes demandeuses d'asile et réfugiées devront être pris en compte, et même bénéficier d'une attention particulière.

4. Les expulsions collectives d'étrangers seront interdites.

***COMMENTAIRES**: La particularité des actes de persécution spécifiques au sexe dont souffrent principalement les femmes réfugiées et demandeuses d'asile doit figurer dans la Charte, et être considéré comme une violation des droits humains fondamentaux des femmes, suffisante pour envisager l'octroi de l'asile. Une liste explicite mais non exhaustive des persécutions sexuelles doit figurer dans la Charte. Les traitements qui menacent ou entament l'intégrité physique et psychologique des femmes doivent être considérés comme une forme de torture, qu'ils soient imposés par la loi, commis par des agents de l'état ou liés à des normes sociales ou religieuses.*
Il faut également protéger les femmes contre toute discrimination dans la mise en œuvre pratique des droits et des garanties conférés aux migrants, notamment en ce qui concerne les conditions de logement et de détention, ainsi que l'accès aux services juridiques et autres.
Enfin, les besoins propres aux femmes demandeuses d'asile devraient être pris en compte : leur sécurité physique et le respect de leur vie privée doivent être garantis dans les centres d'accueil et de détention. À cet effet, des logements séparés de ceux des hommes doivent être disponibles. En outre, elles doivent avoir accès à des services spéciaux en fonction de leurs besoins sanitaires, et notamment à des conseils gynécologiques et obstétriques. On évitera la détention des femmes en fin de grossesse et des mères allaitantes.

DROITS SOCIAUX (CONVENT 18)

Article I. Un égalité substantielle entre les femmes et les hommes

1. Il est nécessaire de garantir une égalité réelle et substantielle entre les femmes et les hommes, et d'éliminer tout type d'inégalités en matière d'emploi et de protection sociale. Ceci implique principalement le même droit à un travail librement choisi ou accepté, le droit à des conditions de travail identiques, le droit à une rémunération juste et équitable pour un travail de valeur égale, et un même droit à la sécurité sociale et à l'assistance pour les personnes concernées et leur famille.

2. Toute discrimination directe ou indirecte fondée sur le sexe est interdite dans les domaines cités au paragraphe 1.

3. Des mesures positives seront mises en œuvre pour améliorer la situation des femmes jusqu'à ce qu'une égalité réelle et effective entre les femmes et les hommes soit instaurée dans le secteur de l'emploi.

COMMENTAIRES : voir les commentaires relatifs au principe général d'égalité.

Article XII. Droit au congé parental

Les travailleuses et les travailleurs ont droit à un congé parental rémunéré d'au moins trois mois suivant la naissance ou l'adoption d'un enfant.

*COMMENTAIRES : **Pour améliorer le niveau d'indépendance des femmes en favorisant leur présence sur le marché de l'emploi, et parvenir à une égalité des sexes effective, il est nécessaire de partager équitablement les responsabilités familiales et le congé parental entre les femmes et les hommes. C'est pourquoi les dispositions en matière de congé parental doivent explicitement s'adresser aux hommes comme aux femmes. Une protection légale ainsi qu'un congé parental plus long et rémunéré devra être instauré, favorisant ainsi un partage équitable de la garde des enfants et des responsabilités familiales entre les femmes et les hommes.***

Article XIII. Protection sociale

1. Toute personne a droit, selon les modalités propres à chaque Etat, à une protection sociale comportant, notamment, des prestations sociales d'un niveau suffisant.

2. Les femmes et les hommes doivent pouvoir accéder de manière égale à une sécurité sociale individuelle.

3. Des services de garde d'enfants abordables et de qualité doivent être accessible à toute personne qui en a besoin.

*COMMENTAIRES : **Les États européens qui se sont engagés à assumer leur responsabilité sociale à l'égard de tous les citoyens doivent considérer la protection sociale comme un investissement social. Or, bien des femmes ne bénéficient toujours pas d'une protection individuelle et dépendent de leur famille et/ou de leur conjoint. Il faut donc enrayer cette discrimination structurelle et garantir aux femmes un accès à la sécurité sociale individuelle.** Ce principe passe par l'insertion dans la Charte d'une clause concernant la protection sociale, qui entérinera l'individualisation des droits en matière de sécurité sociale et assurera l'accès à une garde d'enfants de qualité.*

Article XIV. Droit d'accès aux soins de santé

1. Toute personne doit pouvoir bénéficier de mesures de prévention sanitaire et, en cas de maladie, accéder aux soins de santé.

2. Dans le cadre du droit à des soins de santé appropriés, les besoins spécifiques des femmes devront être pris en considération et satisfaits.

***COMMENTAIRES** : Pour que les besoins sanitaires de la totalité de la population soient satisfaits, les demandes spécifiques des femmes en la matière doivent également être pris en compte par la mise en place de services particuliers. Notamment, chaque femme doit pouvoir s'adresser à des services de gynécologie et d'obstétrique, et bénéficier de tous les services médicaux de prévention et de dépistage des maux proprement féminins.*

DROITS DES CITOYENS (CONVENT 17)

Article A. Démocratie paritaire

1. Tout citoyen de l'Union bénéficie des droits qui lui sont conférés par l'Union et la législation nationale en matière d'égalité d'accès à la candidature aux élections et d'exercice des fonctions correspondantes.

2. Une démocratie paritaire, c'est-à-dire une représentation égale des femmes et des hommes au sein de tous les organes et de toutes les institutions de l'Union, sera établie en tant que principe fondamental de l'intégration européenne comme des institutions de l'Union.

3. Des mesures positives seront mises en œuvre afin d'encourager un accès égal des femmes et des hommes aux organes gouvernementaux et communautaires, ainsi qu'au sein des partis politiques.

COMMENTAIRES: ***La notion de démocratie telle que figurant dans la Charte doit être entendue comme démocratie paritaire. Néanmoins, une référence explicite à l'objectif de démocratie paritaire devrait être inscrite dans la Charte pour endiguer le problème de la sous-représentation des femmes. La question de l'implication des femmes dans la prise de décisions est à considérer dans tous les secteurs de notre société, alors que nombre des mesures adoptées pour favoriser leur participation ne concerne que la prise de décision politique. Des mesures positives s'imposent pour assurer l'instauration d'une participation égale ou d'une parité effective dans tous les domaines.***

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 30 May 2000
(version multilingual EN/DE)

CHARTE 4311/00

CONTRIB 178

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter different contributions from the Kolping Society of Europe. [1]

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[1] This text has been submitted in German, French and English. (The text of the letter in German only).

Rat der Europäischen Union
Konvent zur Erarbeitung der Charta der Grundrechte
Herrn Prof. Roman Herzog
Rue de la Loi, 175

B-1048 Bruxelles

12.05.2000 GS/So

Sehr geehrter Herr Prof. Herzog,

das Kolpingwerk Europa verfolgt seit Jahren intensiv alle Schritte zur europäischen Integration und hat immer wieder das Anliegen betont, dass diese Idee der europäischen Einigung vor allem auch von den Bürgern in Europa mitgetragen werden muss.

Die Kontinentalversammlung des Kolpingwerkes Europa hat in einer Stellungnahme vom 12.09.1999 darauf verwiesen, dass das Kolpingwerk in einer Charta der Grundrechte der Europäischen Union eine gute Möglichkeit sieht für die Bürger zu erkennen, dass die Europäische Union nicht nur eine Wirtschaftsgemeinschaft ist, sondern längst zu einer Rechtsgemeinschaft wurde, die im Kern auch eine Friedensgemeinschaft ist.

Das Kolpingwerk Europa verfolgt daher mit großem Interesse die Diskussion um die Formulierung dieser Charta der Grundrechte und möchte zum aktuellen Diskussionsstand die beigefügte Stellungnahme abgeben. Gleichzeitig fügen wir diesem Schreiben auch noch einmal die mehr grundsätzliche Erklärung der Kontinentalversammlung des Kolpingwerkes Europa vom 12.09.1999 bei und würden uns freuen, wenn diese Stellungnahmen in den Diskussionsprozess mit eingebracht werden könnten.

Mit freundlichen Grüßen

Dr. Michael Hanke
Vorsitzender des Kolpingwerkes Europa

Hubert Tintelott
Europasekretär

Anlagen

Contribution to discussion from the Kolping Society of Europe on the work of the Convent on the preparation of a Basic Rights Charter of the European Union

The Kolping Society of Europe explicitly welcomed the decision of the European Council in June 1999 to prepare a Basic Rights Charter of the European Union and in an initial statement dated 12.09.1999 presented a few basic considerations for the drawing-up of this Charter. In this statement the Kolping Society undertook to actively accompany the process of discussion surrounding the formulation of the Basic Rights Charter and to incorporate its own positions in this discussion process.

It is with regret that the Kolping Society of Europe views the fact that the work of the Convent on the preparation of a Basic Rights Charter of the European Union has met with only very limited resonance from the public. This in its view is a danger to the unique opportunity for citizens of the European Union to become conscious of their basic values and recognise the fact that the EU is more than an economic community and that the future dynamism of the integration process also depends on achieving a consensus on common basic values.

A discussion conducted with inadequate publicity on a Basic Rights Charter with a view to reaching a decision during the EU summit meeting in Nice on 7 and 8 December 2000 also increases the risk of this Basic Rights Charter of the EU merely being decided in Nice as a ceremonial declaration of intent and thus of extensively restricting its legal effect.

In view of these shortcomings the Kolping Society of Europe calls upon the members of the Convent and also upon the political decision-makers at a European and national level to conduct a public and also controversial discussion on the contents of the Basic Rights Charter of the EU and to strive for an adoption of this Charter as part of the European Treaties. A Basic Rights Charter of the EU as a ceremonial declaration of intent would miss the aspired-to objective of being able to clearly recognise basic rights and thus dash hopes of strengthening the citizens' acceptance of the EU through clearly recognisable basic rights. The Kolping Society of Europe will do everything in its power to inform the public about the work of the Convent.

In addition to these more general considerations the Kolping Society of Europe would like to comment on the process of discussion up to now and on two articles of the current draft dated 8 March 2000.

1. Family life

The current draft of Article 13 (3) reads as follows: "The legal, economic and social protection of the family will be guaranteed."

This formulation overlooks the central significance of the family as a basic cell of society as described time and again in other catalogues of human rights. Throughout the history of man the family has always formed the core of society and has assumed irreplaceable responsibilities in terms of regenerating society and socialising its children. Without wishing to overlook the

change in the ways of life in our society such as marriage-like communities and the growing number of single parents, the fact should not be overlooked and neglected that still to the current day it is the family which still assumes the major share in regeneration of society and socialisation of its children.

For this reason the EU must be interested in strengthening families and ensuring the legal, economic and social protection of the family. The Kolping Society of Europe therefore calls upon the Convent to revert to the original version of Article 13 (3) which reads "The Union ensures the legal, economic and social protection of the family."

2. Freedom of thought, conscience and religion

The Kolping Society of Europe views the current formulation of Article 14: "Every individual has the right to freedom of ideas, conscience and religion" to represent a reduction in the regulations as presented, for example, in Article 8 of the European Catalogue of Human Rights. The basic rights of the European Catalogue of Human Rights have already become a common "Bill of Rights" through the jurisdiction of the organs of the convention. In view of the level of basic rights protection already achieved, a legal uncertainty should be avoided through new or reduced formulations. The Kolping Society of Europe believes it to be absolutely necessary that the freedom of the individual to change his religion or *Weltanschauung*, as well as the freedom to practise his religion or *Weltanschauung* alone or in community with others publicly or privately is explicitly laid down in the EU Basic Rights Charter.

The Kolping Society of Europe will be also be attentively following the further course of discussion and reserves the right to comment on the economic and social rights which have not yet been formulated at a later date.

On behalf of the Kolping Society of Europe

signed

Anton Salesny	Dr. Michael Hanke	Hubert Tintelott
Europe Commissioner	Chairman	International Secretary
International Kolping Society	Kolping Society of Europe	International Kolping Society

Kolping Society Demands Further Discussion of a European Constitution and the Adoption of a Charta of Basic Rights

The depressingly low voter turnout for the elections to the European Parliament showed that the idea and goal of European unification is gradually fading in the minds of the people, and opinion polls in the EU member states have shown that they are increasingly sceptical about European unification and further steps in this direction. This mood among the people of the European Union underestimates the achieved level of European unity and the benefits of the alliance. The European Union has long become a community of law, which is fundamentally also a community of peace. For example, 80% of all economic legislation in the EU member states is effected by EU institutions.

But this focus on economic issues and the discussion of interests and balancing of interests ignores the fact that a society is constituted essentially by common values. Europe must therefore discuss the concepts it has of itself and according to which it wants to live tomorrow, its image of humankind, its norms and the ethical conditions of freedom. This discussion will show that, despite all national differences, the European people have enough in common in their way of thinking, their cultural expression, their concept of society and their attitude to life to agree on a common set of fundamental values.

The European Union has always engaged in such a debate, right from the beginning of its integration process, and it has always been tied up in the debate on a European constitution. A first draft constitution was already completed in 1953. But, unfortunately, this debate on a constitution was repeatedly abandoned, although many elements of a constitution were incorporated in the 5 treaties of the European Union. The signing of the Treaties of Rome launched a slow process of forming a constitution, which has the express support of the Kolping Society. This process needs new stimulation at present, which it could obtain through a Charta of Basic Rights.

The Treaty of Amsterdam reinforces the European Union's support for human rights and fundamental freedoms and expressly confirms the Union's commitment to social basic rights. And basic and human rights are largely enforced in the constitutional structures of the individual EU states. But the European Union as a centre of Europe's structural architecture needs an independent Charta of Basic Rights to unite the former constitution-like documents and permanently strengthen basic rights and ensure their consistent integration in current activities and political decisions of the European Union.

The Kolping Society of Europe supports all efforts to formulate and adopt a Charta of Basic Rights, because

- This debate can contribute to making the people aware of their basic rights and enabling them to exercise these rights.

- A separate Charta of Basic Rights would overcome the current European system of relegation, so that basic rights would more visibly become a basis of political decisions.

The Kolping Society of Europe is aware of the risks of formulating a genuine community-focused catalogue of basic rights and therefore demands that

- The Formulation of a Charta of Basic Rights be based on the already formulated European Convention for the Protection of Human Rights and Fundamental Freedoms, which has become a joint European bill of rights through the jurisdiction of the parties to the convention.

- The Charta should focus on formulating basic rights that are justiciable.

- The debate on basic rights be protected against an excessive focus on current but temporary social trends, as only such basic rights should be included in a catalogue of basic rights that are supported by a broad majority of the people.

- A balance be found between legal protection of the individual and a law-based system of government.

- Democracy should remain viable and not be paralysed by exaggerated participation rights.

The Kolping Society of Europe undertakes

To raise awareness of the necessity to adopt a Charta of Basic Rights in its chapters.

To inform members of the contents of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

To contribute to the debate on the discussion and adoption of a Charta of Basic Rights and to voice its position based on a Christian image of humankind.

Discussed and adopted by the Continental Assembly of the Kolping Society of Europe on 12 September 1999 in Cologne/Immenreuth.

For the International Kolping Society:

signed

Anton Salesny	Dr. Michael Hanke	Hubert Tintelott
Europe Commissioner	Chairman	Secretary General
International Kolping Society	Kolping Society of Europe	International Kolping Society

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 25. Mai 2000

CHARTE 4312/00

CONTRIB 179

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Eingabe der Vereinigung zur Förderung des Petitionsrechts in der Demokratie e.V. [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Vereinigung zur Förderung des Petitionsrechts in der Demokratie e.V.

R. Bockhofer, Max-Planck-Str. 56, D-28357 Bremen,Tel.: 0049-421-256970

Bremen, den 13. Mai 2000

An die Mitglieder
des Grundrechte-Konvents
zur Erarbeitung einer EU-Charta
c/o Herrn Prof. Dr. Roman Herzog
Postfach 86 04 45
81631 München

Sehr geehrter Herr Vorsitzender Prof. Herzog,
sehr geehrte Damen, sehr geehrte Herren,

wir meinen, dass für das Zusammenwachsen der Unionsbürger/innen dem Petitionsrecht eine herausgehobene Rolle zukommen sollte.

Ihren Diskussionsprozess kennen wir nicht, wohl aber den Vorschlag für die Artikel 1 bis 12 vom 8. März 2000 (CHARTRE 4149/00), der das Petitionsrecht nicht enthält.

Unseren Entwurf, den wir Ihnen zur Prüfung übermitteln, haben wir auch dem Petitionsausschuss des Europäischen Parlaments (EP) geschickt.

Unser Text (siehe Anlage) enthält für einen entsprechenden Artikel in der Charta zu viele Einzelheiten. Aber man kann daraus leicht zwei Teile machen:

A. den Artikel, vgl. Ziffern 1 und 2, ggf. noch ergänzt um zentrale Prüfbefugnisse des EP, B. einen protokollarischen Anhang , z.B. Ziffern 3 bis 8.

Wir hoffen, dass unser Vorschlag Ihre Aufmerksamkeit findet und sachlich geprüft wird.

Über das Ergebnis Ihrer Beratung würden wir gern eine Antwort erhalten.

Für Ihre verdienstvolle Aufgabe wünschen wir Ihnen Erfolg.

Mit freundlichen Grüßen

Reinhard Bockhofer

Eingabe zur Gestaltung des Petitionsrechts in einer Europäischen Grundrechtecharta

A. Vorbemerkung

1. Eine Verständigung auf gemeinsame Werte und Grundrechte beschleunigt den europäischen Prozess. Die Ausarbeitung einer Grundrechtscharta wird als Einstieg der Europäischen Union in eine eigene Staatlichkeit von uns befürwortet.

2. Das Europäische Parlament ist die einzige durch allgemeine Direktwahlen legitimierte Institution des weiterhin im Aufbau und Ausbau befindlichen Europäischen Einigungswerkes. Viel spricht deshalb dafür, das Europäische Parlament als unerlässliches Bindeglied zwischen den Bürgern und der Union in seinen Rechten nachhaltig aufzuwerten.

3. Weil Bürgerrechte durch die zunehmende Übertragung von nationaler Souveränität auf die Europäische Union gefährdet sein können (sind), müssen die Bürgerinnen und Bürger der Union jetzt gemeinsam den Versuch machen, rechtliche Handlungsmöglichkeiten gegen die Europäische Union zu begründen und einzufordern. Hierzu gehört u.A. auch die Stärkung des Petitionsrechts.

4. Maßgeblicher Adressat von Petitionen muss das Europäische Parlament werden. Soll das Petitionsrecht als Grundrecht praktische Bedeutung gewinnen, sind für die Wahrheits-findung und Tatsachenermittlung wirksame Befugnisse erforderlich, die als Minderheiten-rechte ausgestaltet sind. Auf keinen Fall sollten die Befugnisse an die Mehrheit im Ausschuss gebunden sein, weil sonst den Abgeordneten kleiner Fraktionen und Länder der Handlungsspielraum beschnitten wäre. - Auf eine Klärung der Befugnisse des Petitionsausschusses z.B. gegenüber der Kommission, dem Rat sowie den Mitgliedsstaaten wurde im Vertrag von Amsterdam verzichtet. So ist die Rechtsstellung des im Jahre 1987 erstmalig eingesetzten Petitionsausschusses - im Vergleich etwa zum Petitionsausschuss des Deutschen Bundestages - ausgesprochen schwach geblieben. Die Grundrechtscharta darf diese Schwäche nicht übertünchen oder einfach fortschreiben.

5. Vom Grundsatz her sollte ein Petitionsausschuss wie ein ständiger bürgergerichteter Untersuchungsausschuss tätig sein können. Neben seinen Kontrollrechten müsste er an sich über gewisse Sanktionsmittel verfügen, wie sie wohl erst im Zuge der Entstehung einer eigenen Staatlichkeit voll verwirklicht werden können. Was sich hier schon heute sinnvoll machen lässt, ist schwer zu sagen. Zieht man hilfsweise die vom Europäischen Parlament (nach Artikel 193 EGV) eingesetzten Untersuchungsausschüsse zu Rate, finden sich eher bescheidene, kaum jedoch nachhaltig wirksame Untersuchungsrechte (vgl. Beschluss des Europäischen Parlaments, des (Minister-)Rates und der Kommission vom 19. April 1995 und Geschäftsordnung des Europäischen Parlamentes, vgl. Artikel 150, 151 ff.). Für die von uns gewünschten Regelungen geben sie leider nichts her.

B. Vorschlag für die rechtliche Ausgestaltung des parlamentarischen Petitionsrechts

(1) Jeder hat das Recht, sich mit Petitionen (Anregungen, Anträge und Beschwerden) einzeln oder in Gemeinschaft mit anderen schriftlich an das Europäische Parlament und die zuständigen Stellen der Europäischen Union zu wenden. Der Petent hat nach der Entscheidung des Europäischen Parlaments Anspruch auf eine begründete Antwort in angemessener Zeit.

(2) Das Europäische Parlament bestellt einen Petitionsausschuss, dem die Erarbeitung einer Beschlussempfehlung an das Europäische Parlament obliegt. Der Petitionsausschuss kann von sich aus tätig werden, wenn ihm auf andere Weise Mängel bei der Durchführung des Gemeinschaftsrechts bekannt werden, und dem Europäischen Parlament darüber berichten.

(3) Der Petitionsausschuss hat auf Antrag eines Zehntels seiner Mitglieder das Recht

a. zur Erarbeitung seiner Berichte und Beschlussempfehlungen von den Organen, Gremien und Behörden der Europäischen Union
   – mündliche oder schriftliche Auskünfte und Berichte einzuholen,
   – Akten und sonstige Unterlagen einzusehen,
b. durch von ihm beauftragte Mitglieder jederzeit und ohne vorherige Anmeldung die von der Europäischen Union verwalteten Einrichtungen zu besuchen sowie dort Auskünfte und Gutachten einzuholen,
c. Petenten und beteiligte Personengruppen anzuhören,
d. Zeugen und Sachverständige zu vernehmen,
e. aufgrund von Beschwerden den Haushaltskontrollausschuss um Mithilfe zu ersuchen, juristische Personen des Privatrechts, nicht rechtsfähige Vereinigungen und natürliche Personen, soweit sie für die Europäische Union oder unter deren Aufsicht öffentlich-rechtliche Tätigkeiten ausüben, zu überprüfen, ihre Einrichtungen zu besuchen und dort Auskünfte einzuholen,
f. Gegenstände, die über einzelne Petitionen hinausgehen und von allgemeiner Bedeutung sind, anderen Ausschüssen zur Beratung zu überweisen und für eine Antwort in angemessener Zeit Termine zu setzen,
g. neben Einzelberichten über die im Ausschuss behandelten Petitionen jährlich einen Bericht über seine Tätigkeit vorzulegen.

(4) Zutritt, Auskunft und Aktenvorlage dürfen nur verweigert werden, soweit zwingende Geheimhaltungsgründe entgegenstehen oder zu besorgen ist, dass einem Dritten ein erheblicher, nicht wieder gut zu machender Schaden entstehen würde. Die Entscheidung über die Verweigerung muss vor dem Europäischen Parlament vertreten werden.

(5) Im Europäischen Parlament findet auf Antrag eines Zwanzigstels seiner Mitglieder eine Aussprache zu einzelnen Petitionen und zum Jahresbericht statt.

(6) Der Petent hat Anspruch auf eine Mitteilung über den Eingang seiner Petition. Auf Antrag erhält er nähere Auskünfte über das parlamentarische Prüfverfahren und den zeitlichen Ablauf.

(7) Wer sich in seinem Petitionsrecht verletzt sieht, kann die nochmalige Prüfung seiner Petition beantragen. Im Falle der Zurückweisung der Verfahrenskritik steht dem Petenten der Rechtsweg zum Europäischen Gerichtshof offen.

(8) Das Nähere zum Verfahrensablauf regelt die Geschäftsordnung des Europäischen Parlaments.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 24 May 2000

CHARTE 4313/00

CONTRIB 180

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter an extract from the Press communiqué of the 106th session of the Committee of Ministers (10-11 May 2000), transmitted by the Council of Europe. [1]

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[1] This text has been submitted in French and English languages.

In this context, and with regard to the proposed European Union Charter of Fundamental Rights, the Ministers underlined the need to ensure that, whatever decisions the Institutions of the Union may take concerning the Charter, it does not lead to new dividing lines in Europe. It should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention, to all citizens of the Council of Europe's member States, including those of the European Union.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 24 mai 2000

CHARTE 4314/00

CONTRIB 181

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après l'intervention de l'Association des Femmes de l'Europe Méridionale (AFEM) donnée à l'audition du 27 avril 2000. [1]

[1] Ce texte a été soumis en langues anglaise et française.

AFEM

ASSOCIATION DES FEMMES DE L' EUROPE MÉRIDIONALE

AUDITION DU 27 AVRIL 2000 - INTERVENTION DE L`AFEM [1]*

Monsieur le Président, Mesdames, Messieurs Membres de la Convention.

L`Association des Femmes de l`Europe Méridionale (AFEM), fédération d`ONG françaises, italiennes, espagnoles, portuguaises et helléniques, vous remercie de lui avoir fait l`honneur de lui accorder une audition.

L`AFEM a été parmi les premières ONG à vous soumettre des propositions concrètes (CONTRIB 16, 42, 55 et 105) qui sont pleinement soutenues par:
- *le Lobby Européen des Femmes*;
- *l`Alliance Internationale des Femmes (AIF),* la plus ancienne fédération internationale d`ONG pour l`égalité entre femmes et hommes (fondée en 1902), dotée du statut consultatif de 1ère catégorie auprès de l`ONU et de toutes les agences spécialisées de celui-ci (OIT, UNESCO etc), ainsi qu`auprès du Conseil de l`Europe;
- *la Fondation Marangopoulos pour les Droits de l`Homme,* ONG internationale dotée du statut consultatif de 1ère catégorie auprès de l`ONU, de l`UNES CO et du Conseil de l`Europe et habilitée à faire des réclamations collectives en vertu du Protocole additionnel à la Charte Sociale Européenne de 1995;
- *le Comité International de Liaison des Associations Féminines (CILAF),* ONG dotée du statut consultatif auprès du Conseil de l`Europe;
- *la Ligue Hellénique pour les Droits des Femmes*, ONG associée au Département d`Information Publique de l`ONU.

- **CONVENT 13 - DROITS CIVILS ET POLITIQUES**

Le principe fondamental de l`égalité substantielle entre femmes et hommes dans tous les domaines

1. - L`AFEM se félicite que le Présidium ait proposé une disposition sur l`égalité entre les femmes et les hommes (CONVENT 8) et un article sur cette égalité en matière d`emploi et de protection sociale (CONVENT 18).

Cependant, d`après une jurisprudence constante de la CJCE[2] et selon le Traité, l`égalité entre femmes et hommes est un principe fondamental du droit communautaire - un droit fondamental de la personne humaine - une mission et un objectif de la CE[3].

Le Traité impose à la CE l`obligation positive de *"promouvoir"* cette égalité - c`est à dire, de ne pas se contenter de l`égalité formelle, mais d`oeuvrer pour atteindre l`égalité substantielle entre femmes et hommes - "*pour toutes ses actions*".

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[1]* Preprésentée par Me Sophia SPILIOTOPOULOS, avocate au Conseil d`État et à la Cour de cassation helléniques, experte indépendante de la Commission Européenne en matière d`égalité entre femmes et hommes, vice-présidente de l`AFEM.

[2] CJCE 15.6.1978, *Defrenne III,* 149/77, Rec 1509; 10.2.2000, *Sievers*, C-270/97.

[3] Voy. aussi Rapport annuel de l`UE sur les droits de l`homme (1999), point 5.12.

L`égalité substantielle entre femmes et hommes est un principe universel, consacré aussi par des traités ratifiés par tous les États membres, tels les Pactes de l`ONU[4] et la Convention sur l`élimination des discriminations contre les femmes, récemment dotée d`un Protocole permettant des recours individuels, pour lequel l`UE souligne qu`elle a oeuvré[5], ainsi que par la Charte Sociale Européenne (révisée) (article 20).

Elle est strictement exigée en tant que condition fondamentale d`adhésion (article 49 Traité UE) et activement promue par la coopération de l`UE avec les pays tiers[6].

2. - Nous nous rejouissons de la proposition de M. Guy BRAIBANT (CONTRIB 63, Article I) de consacrer ce principe général, en raison de son importance, dans tous les domaines, par un des premiers articles de la Charte, et de l`appliquer aussi en matière économique et sociale. Cette proposition renforce la cohérence juridique de la Charte. Elle devrait servir de base et être complétée par la nôtre (CONTRIB 105).

3. - Dès lors, est nécessaire un article spécifique, parmi les premiers de la Charte, qui transpose l`acquis et les impératifs communautaires et internationaux comme suit:

"**1.** ***L`égalité substantielle entre femmes et hommes doit être garantie et appliquée dans tous les domaines; toute discrimination directe ou indirecte en raison du sexe est interdite.***".

"2. ***Des mesures positives temporaires sont indiquées, avant tout pour améliorer la situation des femmes, jusqu`à ce que l`égalité substantielle entre femmes et hommes soit atteinte*****".**

Ces dispositions doivent être reprises en matière de droits sociaux (CONVENT 18, Article I) et de droits des citoyens (CONVENT 17, Article A§2), avec les adaptations nécessaires (voy. infra).

4. - Le sexe n`est pas un motif de discrimination comme les autres. Les discriminations en raison du sexe sont de nature particulière. Elles sont engendrées par des préjugés qui se sont infiltrés dans les structures sociales et affectent surtout les femmes.

Les femmes ne sont ni une minorité ni un groupe, mais une des deux formes dans lesquelles s`incarne l`être humain. Et pourtant, elles souffrent encore, dans tous les domaines, de discriminations qui atteignent leur dignité et sont souvent multiples, en raison de leur sexe et d`autres motifs.

Cette situation, que les institutions communautaires et internationales déplorent, tout en constatant que les clauses générales de non discrimination ne suffisent pas pour y remédier[7], a rendu

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4 Pacte des droits civils et politiques (Art. 3); Pacte des droits économiques, sociaux et culturels (Art. 3).

5 Voy. Rapport de l`UE sur les droits de l`homme, op.cit., point 5.12.

6 Voy. Commission Européenne, Rapport 1998 sur l'égalité des chance entre femmes et hommes (COM(1999)106 final), Section 5, Rapport 1999 (COM(2000)123 final), Section 5.

7 Voy. Rapport de l`UE sur les droits de l`homme, op.cit., point 5.12; Préambule à la Convention sur l`élimination des discriminations contre les femmes; Commission de la Condition de la Femme (ONU), Bulletin de presse WOM/1117, 12.3.1990, sur le Protocole à cette Convention permettant les recours individuels, voy. site: http://un.org.

nécessaires des dispositions et même des traités dont l`unique objet est l`égalité entre femmes et hommes, ainsi que d`autres mesures appropriées[8].

Cette situation appelle des ***mesures positives temporaires.*** Celles-ci ne constituent pas des discriminations, mais des moyens pour atteindre l`égalité substantielle, selon la Convention sur l`élimination des discriminations contre les femmes (Art. 4§1) et le Traité CE (Art. 141). La Déclaration No 28 annexée au Traité d`Amsterdam précise que ces mesures doivent viser "*avant tout à améliorer la situation des femmes"*. Elles sont aussi prévues par un nombre croissant de Constitutions nationales[9] (une "tradition constitutionnelle commune" étant ainsi formée) et sont jugées nécessaires par les institutions communautaires[10] et internationales[11].

La nature particulière des discriminations contre les femmes et le caractère précité des actions positives sont confirmés par la CJCE (arrêt *Badeck,* C-158/97, 26.3.2000).

5. - Notre Assemblée Générale a demandé par une Déclaration du 17 mars 2000 (CONTRIB 55) que soit consacré par un des premiers articles de la Charte "*le droit fondamental à l`égalité substantielle entre femmes et hommes dans tous les domaines"* en tant que droit absolu.

Nous remercions M. Inigo MENDEZ DE VIGO, Président de la délégation du PE et Vice-Président de la Convention et Mme Catherine LALUMIÈRE, députée européenne et membre de la Convention, ex Secrétaire générale du Conseil de l`Europe, d`avoir accueilli cette Assemblée au PE lors des "Entretiens de Strasbourg"[12] ainsi que de leur soutien à notre démarche. Nous remercions aussi les députées européennes et membres de la Convention Mmes Pervenche BERÈS, Fiorella GHILLARDOTTI, Elena PACIOTTI, les députées européennes Mmes Joke SWIEBEL, Maria-Antonia AVILES-PEREA, Sylviane AINARDI, Geneviève FRAISSE, Ilda FIGUEIREDO, Marie-Hélène GILLIG, Maria IZQUIERDO ROJO, Cristiana MUSCARDINI et Elena VALENCIANO de leur participation à ces "Entretiens" et de leur soutien.

Article 3§2: Droit au respect et à la protection de l`intégrité: (notre CONTRIB 105, Art. 3): Interdiction absolue des pratiques eugéniques, du clonage des êtres humains et de la *"**traite**"* de ceux-ci, transnationale ou non, et que ce soit **"*avec ou sans le consentement de la personne concernée*".**

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8 Tels les programmes d`action communautaires pour l`égalité entre femmes et hommes, dont le 5ème (2001-2005) couvrira tous les domaines de compétence communautaire Voy.: http://europa.eu.int/comm/dg05.

9 Constitutions allemande, article 3§2; autrichienne, article 7§2; portugaise, article 9(h); finlandaise, article 6§4; suédoise, chapitre 2§16; française, articles 3 et 4; hellénique (projet).

10 Résolution du Conseil du 12.7.1982 sur la promotion de l`égalité des chances pour les femmes, J.O. L 20/35, 28.7.82; Recommendation du Conseil 84/635/CEE du 13.12.1984 sur la promotion des actions positives pour les femmes, J.O. L 331/34, 19.12.84.

11 Commission sur l`Élimination des Discriminations contre les Femmes, Recommendations générales No 5 (7e Session 1988) [Doc.NU A/43/38] et No 8 (11e Session 1991) [Doc.NU A/46/38]; Comité des Droits de l`Homme, Commentaires généraux Nos 3 et 4 (13e Session 1981) [36 UN GAOR, Supp. No 40 (A/36/40), annexe VII].

12 Organisés par l`AFEM, le 16 mars 2000, sous le patronage du PE, avec le soutien de la Commission Européenne et du gouvernement français, sur le thème: "du Traité d`Amsterdam à la Charte des droits fondamentaux: quels enjeux pour les droits des femmes".

La traite, surtout de femmes et d` enfants, à des fins d`exploitation sexuelle, est une préoccupation majeure de l`UE (voy. Conclusions du Conseil Européen de Tampere qui a prévu votre Convention)[13].

Article 4: Interdiction de la torture et des peines ou traitements inhumains ou dégradants: Mentionner les ***"mutilations sexuelles"*** et ***"toute autre forme de "violence physique ou morale, y compris celle au sein de la famille",*** dont souffrent surtout femmes et enfants - préocuppation sérieuse de l`UE[14] (notre CONTRIB 105, Art. 4).

Article 8: Droit à un "procès équitable": Titre de l`article 6 CEDH, préférable à celui de "tribunal impartial". Il s`agit du droit à une "*protection juridictionnelle effective et efficace*", droit fondamental selon la CJCE. Ajouter un alinéa qui cite à titre indicatif le contenu du droit, selon la jurisprudence (CourEDH et CJCE[15]) et le Pacte DCP (Art. 2 et 14) ou, au moins, l`inclure dans l`exposé des motifs (v. notre CONTRIB 42, Art. 4).

Ajouter le droit des ONG de porter plainte ou d`ester en justice pour le compte ou à l`appui des victimes de violations des droits (v. notre CONTRIB 42, Art. 4).

Article 13: Vie familiale: V. notre proposition (CONTRIB 42, Art. 9), fondée sur l`article 12 de la CEDH, l`article 5 de son Protocole No 7, l`article 23 du Pacte DCP et la Convention sur les droits de l`enfant.

Article 16§3: ***Droit des parents d`assurer l`éducation et l`enseignement de leurs enfants selon leurs convictions, "dans la mesure où celles-ci ne contreviennent pas aux valeurs et droits reconnus par la Charte; dans l`exercice de ce droit les parents doivent agir dans l`intérêt de l`enfant"*** (notre CONTRIB 105, CONTRIB 97 de M. Georges PAPADIMITRIOU).

CONVENT 8 - Article 17: Droit d`asile:** droit de toute personne persécutée, même ressortissante de l`UE, y compris des personnes qui *"ne peuvent disposer librement d`elles-mêmes ou sont menacées dans leur liberté ou leurs droits fondamentaux ou leur intégrité physique, psychique ou génétique, que les pouvoirs publics du pays d'origine soient les auteurs de ces persécutions ou menaces, qu'ils les tolèrent, ou qu'ils soient dans l'incapacité de s'y opposer"*** (notre CONTRIB 42, Art. 17).

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13 Voy. aussi Commission Européenne, Rapport 1998, op.cit., Section 4, et Rapport 1999, op.cit., Section 1; Rapport de l`UE sur les droits de l`homme, op.cit., point 5.12.

14 Ibidem.

15 V. arrêts de la CJCE dans notre CONTRIB 42, note 11 sous Article 4.

-Nous sommes d`accord avec toutes les autres propositions de droits civils et politiques.

- **CONVENT 17 - DROITS DES CITOYENS**

Article A§2: ajouter ***"l`égalité entre femmes et hommes"*** (supra No 4 i.f. et notre CONTRIB 105, Art. A) et ***"la solidarité"*** (v. CONTRIB 144 de M. Jürgen MEYER).

- Nous sommes d`accord avec toutes les autres propositions de droits des citoyens.

- **CONVENT 18, 19 et 26 - DROITS SOCIAUX**

Rappelons les déclarations officielles et solennelles de l`UE, selon lesquelles:

- "*le succès économique ne peut être assuré que si les droits humains sont observés et garantis*";
- l`UE "*insiste*" sur *"l`universalité", "l`équivalence*", *"l`indivisibilité", "l`unicité*" et *"l`interdépendance*" de tous les droits, y compris les droits économiques, sociaux et culturels, dont le respect effectif elle s`efforce de promouvoir.[16]

Article I. Égalité substantielle entre femmes et hommes: Voy. notre proposition (CONTRIB 105, Art. I) qui reprend le principe général (supra), et transpose aussi l`acquis communautaire en matière sociale (Art. 141 Traité CE, directives-égalité).

Article VIII: Droits des enfants: L`enfant n`est pas seulement objet de protection, mais aussi sujet de droits (v. Convention sur les droits de l`enfant). Notre proposition (CONTRIB 105, Art. VIII):
1er paragraphe: principe général (Article 6 Constitution finlandaise, proposition de M. Paavo NIKULA).
2ème paragraphe: citer les droits qui ne présupposent pas la majorité. Les paragraphes de CONVENT 18 devraient suivre.

Article XI: Droit à la protection de la maternité: Il est inhérent à la dignité humaine et d`importance capitale pour la survie même de l`Europe. Dès lors, il devrait être reconnu à toute femme et être plus large que le congé de maternité, pour tenir aussi compte de l`acquis communautaire[17]. Durée minimum du congé: renvoyer au droit communautaire chaque fois en vigueur. (V. notre propositon, CONTRIB 105, Art. XI).

Article XII. Droits des parents: il en va de même de ces droits, ainsi que de la durée du congé parental. Ajouter aussi que ***"l`organisation du temps de travail doit garantir aux femmes et aux hommes la conciliation de la vie professionnelle et familiale"***[18] (V. notre CONTRIB 42, Article 23, et notre CONTRIB 105, Article XII).

Article XIV. Droit à l`aide sociale:** Il serait préférable de prévoir que ***"toute personne a droit à un niveau de vie suffisant et décent pour elle-même et sa famille et à la protection contre l`exclusion sociale"* (notre CONTRIB 42, Art. 24; cf. PacteDESC, Art. 11; Ch. Sociale, Art. 30).

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16 Rapport de l`UE sur les droits de l`homme, op.cit, points 5.1, 5.2; Déclaration J. Fischer à la Commission des Droits de l`Homme , op. cit.

17 Articles 137 et 152 Traité CE; Directives 92/85 et 76/207; jurisprudence de la CJCE.

18 Commission Européenne, Rapport 1998, op.cit. Section 2, Rapport 1999, op.cit.Section 2.

Article XV. Droit à l`accès aux soins de santé: "*en cas de maladie* ***ou de grossesse***".

- Nous sommes d`accord avec toutes les autres propositions de droits sociaux.

- **CONVENT 27. CLAUSES HORIZONTALES**

Article H.1. Champ d`application matériel:** "*Les dispositions…s`adressent aux institutions et organes de l`Union* ***et de la Communauté….ainsi qu`aux États membres, lorsque ceux-ci agissent dans le champ d`application du droit communautaire"*** ou ***"dans les domaines de compétence de l`Union et de la Communauté"*. Ces expressions respectent la division de compétences et l`acquis communautaire en matière de droits fondamentaux. V. discours du Juge M. Vassilios SKOURIS, représentant de la CJCE (BODY 1, ANNEXE V) et exposé des motifs[19].

L`expression de CONVENT 27 ("*exclusivement dans le cadre de la mise en oeuvre du droit communautaire"*) peut prêter à des malentendus et conduire à une régression par rapport à l`acquis communautaire. Il doit être clair que les droits fondamentaux doivent être respectés dans les domaines que les États membres ont cédés à la CE ou l`UE, même quand ceux-ci ne mettent pas en oeuvre le droit communautaire ou le mettent en oeuvre incorrectement.

Champ d`application personnel:** V. notre proposition (CONTRIB 42): ***"toute personne relevant de la juridiction de l`UE, de la CE et des États membres".*

Plusieurs intervenant(e)s et des membres de la Convention ont souligné la nécessité de prévoir des obligations des particuliers. C`est à ce souci que répond notre proposition que, au moins les droits civils et politiques, ainsi que la majorité des droits sociaux, y compris les droits à l`égalité entre femmes et hommes, à la protection de la maternité et des parents et les autres droits qui constituent l`acquis communautaire puissent être invoqués "***à l`encontre des organes et institutions de l`Union, de la Communauté et des États membres, comme à l`encontre des particuliers".***

Article H.2. Limitations. Nous nous félicitons du 1er paragraphe, qui marque une avancée par rapport à l`article X de CONVENT 13, en prévoyant des droits absolus. Parmi ceux-ci devraient figurer, en tout état de cause, les droits à la dignité, à la vie, à l`intégrité, à l`égalité entre femmes et hommes, comme le propose M. Guy BRAIBANT (CONTRIB 153) (cf. notre CONTRIB 105, Article X).

Article H.4. Niveau de protection. Nous nous félicitons de cet article, qui marque aussi une avancée par rapport à CONVENT 13 (Article Y), puisque il précise que la Charte contient des ***standards minima*** par rapport au droit national et international et à toutes les conventions internationales ratifiées par les États membres.

Cependant, la référence au "*droit de l`Union*" peut créer des confusions, puisque le "droit communautaire" n`est pas mentionné, et aussi en vue de l`incorporation de la Charte dans ce droit. Par conséquent, afin de sauvegarder le niveau éventuellement plus élevé des dispositions du droit de la CE et de l`UE autres que celles de la Charte, il serait préférable de se référer à ***"toute autre disposition du droit communautaire et de l`Union…"***.

- **DROIT À L`INFORMATION:** Voy. notre proposition (CONTRIB 42) inspirée des directives-égalité[20]: ***"L'Union et la Communauté européennes, ainsi que les États membres veillent à ce que les dispositions de la présente Charte soient portées à la connaissance des personnes dont elles garantissent les droits, par tout moyen approprié et efficace. Ces personnes ont le droit d`en être informées."***

[19] Voy. aussi CJCE 29.5.1997, C-299/95, *Kremzow*, Rec. I-2637.

[20] Article 7 Directive 75/117/CEE, article 6 Directive 76/207/CEE.

- **QUESTIONS LINGUISTIQUES:** Veuillez noter que la Charte devrait se référer **aux "*droits de la personne humaine*", *expression utilisée par la CJCE*[21], ou aux "*droits humains*"**, plutôt qu`aux "droits de l`homme", et que les expressions qu`elle contient devraient être ou bien neutres du point de vue du genre (p. ex. "*personne*") ou bien se référer aux deux genres (p. ex. *il/elle, ceux/celles*).

- **DÉCLARATION FINALE**: L`AFEM soutient:

- la Déclaration Commune du Forum de la Société Civile,
- les propositions de l`EURONET sur les droits des enfants.

Monsieur le Président, Mesdames, Messieurs Membres de la Convention.

L`AFEM vous remercie de votre attention et de vos efforts pour promouvoir et garantir les droits fondamentaux en Europe. En adoptant cette Charte que vous êtes en train d`élaborer l`UE fera preuve de son attachement aux principes universels proclamés par l`article 6§1er Traité UE et de sa détermination d`assurer que ni cette disposition ni celles des articles 7 et 49 de ce Traité ne deviendront lettre morte. Elle confirmera ainsi qu`elle se veut vraiment une communauté de droit et renforcera sa crédibilité tant envers ses citoyens qu`envers la communauté internationale

La crainte exprimée par quelques uns que cette Charte risque de créer des conflits de jurisprudence entre la Cour de Strasbourg et la Cour de Luxembourg n`est pas justifiée.
Les droits fondamentaux ont été introduits en droit communautaire, en tant que normes contraignantes, par la jurisprudence de cette dernière. Cette jurisprudence, qui n`a pas créé de problèmes de conflit, va continuer à ce développer, même en l`absence de Charte, et rien ne peut l`arrêter. C`est la visibilité des droits fondamentaux et leur lisibilité, voire leur plus grande efficacité dans notre vie de tous les jours, qui sera promue par la Charte selon le mandat du Conseil Européen que vous êtes en train de mettre en oeuvre par votre autorité.

L`AFEM vous souhaite un bon aboutissement de vos travaux.

AFEM: 5, rue Villaret de Joyeuse - 75017 Paris.
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[21] V. p. ex. CJCE jurisprudence citée ci-dessus, note 1. Cette expression est d'ailleurs recommandée par le Forum des ONG réuni à Vienne en juin 1993 (Recommandation No 23).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 24 May 2000

CHARTE 4315/00

CONTRIB 182

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a letter and a statement submitted by the United Nations Committee on Economic, Social and Cultural rights. [1] [2]

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[1] This text has been submitted in English language only.

[2] United Nations: Palais des Nations, CH-1211 Geneve 10. Tel: +41-22-917 9321. Fax: +41-22-917 9022. E-mail: atikhonov.hchr@unog.ch

NATIONS UNIES
HAUT COMMISSARIAT AUX DROITS DE L=HOMME

UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

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REFERENCE: G/SO 221/912

Geneva

27 April 2000

Dear Professor Herzog,

I have the honor to bring, through you as a President, to the attention of the Convention to elaborate a Draft Charter of Fundamental Rights of the European Union a self-explanatory Statement adopted by the United Nations Committee on Economic, Social and Cultural Rights with respect to the discussion by the Convention of a Draft Charter of Fundamental Rights of the European Union as far as it relates to the economic, social and cultural rights.

I would appreciate very much that due consideration be given by the Convention to the issues raised in the Committee's Statement.

Sincerely Yours,

Virginia Bonoan-Dandan
Chairperson
United Nations Committee on Economic,
Social and Cultural Rights

Professor Dr. Roman Herzog
President of the Convention to elaborate
a Draft Charter of Fundamental Rights of the European Union
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NATIONS UNIES
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1. The United Nations Committee on Economic, Social and Cultural Rights takes note of the impressive work presently devoted to the elaboration of a Draft Charter of Fundamental Rights of the European Union to be presented to the European Council and to the European Parliament by the end of this year, which endeavours to consolidate the existing human rights standards forming part of the 'acquis communautaire', as developed by the case law of the European Court of Justice, and embracing the common constitutional traditions of Member States of the European Union, as well as the human rights enunciated in the European Convention on Human Rights and Fundamental Freedoms and the European Social Charter. The Committee notes with great interest that the most recent draft articles elaborated by the Convent refer to economic and social rights as contained in the documents Convent 18, Charte 4192/00 of 27 March 2000 and Convent 19, Charter 4193/00 of 29 March 2000, and purport to entrench such rights alongside civil and political rights with the object of rendering all human rights at the European Union fully justiciable.

2. The Committee notes with satisfaction that the Convent thus endeavours to stress the indivisibility of all human rights and would like to point out that this strategy conforms with the existing international human rights obligations resting on each of the Member States of the European Union as parties to the International Covenant on Economic, Social and Cultural Rights.

3. Considering that in the context of the European Union, economic and monetary policies have been fully integrated, special attention should therefore be given to economic and social rights as a corollary to these steps of integration. So far, only the European Social Charter as revised, with Protocols, and the Declaration of the Community Charter of Social Rights of 1989, address these human rights issues, but they have not achieved the same degree of justiciability and enforceability as civil and political rights. The proposed articles on economic and social rights in the Draft Charter, therefore, mark a considerable step in the right direction.

4. The Committee, while wishing to express its fullest support for these proposals, would nevertheless like to point out that if economic and social rights were not to be integrated in the Draft Charter on an equal footing with civil and political rights, such negative regional signals would be highly detrimental to the full realization of all human rights at both the international and domestic levels, and would have to be regarded as a retrogressive step contravening the existing obligations of Member States of the European Union under the International Covenant on Economic, Social and Cultural Rights. In such a case, the Committee might have to raise this issue when examining reports by States parties, as a violation of the obligation under article 2(1) ICESCR 'to achieving progressively the full realization of the rights recognized' in that Covenant, i.e. taking measures geared to progressively realize and promote economic, social and cultural rights.

5. The Committee wishes to emphasize that only a Charter which will be fully binding on Member States of the European Union, and which would give every individual a justiciable right to complain about violations of civil and political, as well as economic and social rights, can fully secure the protection of all human rights.

6. Furthermore, the Committee, while noting that in the explanatory notes to each draft article on economic and social rights ample reference to the European law sources is provided, but no reference to the relevant economic and social rights' obligations existing under the International Bill of Human Rights, i.e. under the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights is given. The Committee in this connection welcomes draft amendments proposed by delegates to the Convent making express reference to such treaty obligations.
The Committee expresses its hope that the Convent, in drafting economic and social provisions in the Charter, will take the opportunity to remind Member States of their obligation to domestically apply the rights of the International Covenant on Economic, Social and Cultural Rights. Mentioning such international rights obligations in the explanatory notes to the Draft Charter articles will ensure their widest dissemination and encourage greater awareness of these existing international obligations. That opportunity should not be missed.

7. Finally, the Committee would like to reiterate its appreciation of the important work presently being undertaken by the Convent. Efforts to integrate all human rights and to ensure full justiciability for them, at the regional level, will be a major milestone towards the full realization of all human rights.

Virginia Bonoan-Dandan
Chairperson
United Nations Committee on Economic, Social and Cultural Rights

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 24 May 2000

CHARTE 4317/00

CONTRIB 183

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the positionpaper submitted by the Engineering Employer's Federation (EEF). [1]

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[1] This text has been submitted in English language only.

EU CHARTER OF FUNDAMENTAL RIGHTS – EEF POSITION

EEF

1 The Engineering Employers' Federation (EEF) is the representative voice of the UK engineering industry. It is a nationwide federation of 13 Regional Associations and the Engineering Construction Industry Association. The EEF has a growing membership of over 5,700 companies of all sizes, employing over 900,000 people in every sector of engineering, manufacturing, engineering construction and technology-based industry.

Background

2 The decision to draw up an EU Charter of Fundamental Rights was originally taken at the Cologne European Council in June 1999. The process by which this would be done was subsequently established at the Tampere Council in October 1999 and the Helsinki Council in December 1999.

3 The EEF understood that the aim was to make existing fundamental rights more visible within the EU. Given that ratification of the Council of Europe's European Convention on Human Rights is a condition of EU membership, there appeared to be no other pressing need for a new instrument establishing such fundamental rights. On this basis the industry considered the decision to be worthy of support.

4 It was thus envisaged that the Charter would consist largely of the fundamental rights and freedoms and the basic procedural rights enshrined in:

- the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the EU Treaties; and
- traditions common to Member States.

5 These fundamental rights would therefore include:

- the right to life;
- the right to be treated with dignity;
- the right to liberty and security;
- the right to a fair trial; and
- the Treaty's four fundamental freedoms – free movement of persons, goods, services and capital – which form the business rationale for the EU.

6 However, in monitoring the work to date of the Convention charged with drafting the Charter and the contributions from the EU institutions, **it has become clear to the EEF that consideration is now being given to drawing up an extensive document containing new EU rights, possibly with legal effect, rather than a brief declaratory statement of existing fundamental rights**. This is of great concern to the industry.

EEF Concerns

7 These cover, principally:

- The expansion of the Charter to include new social and economic "fundamental rights".

- The possibility that such rights will be legally binding.

New Social and Economic Fundamental Rights

8 The EEF has major concerns about the possible inclusion in the Charter of new social and economic 'fundamental rights', such as the right to vocational training.

9 The industry is also concerned at the apparent expansion of given rights into a general requirement. For example:

- the expansion of the requirement that men and women in the same employment receive equal pay for work of equal value into a general requirement for all workers to receive equal remuneration for work of equal value;

- the extension of the provisions of existing European legislation on Works Councils into a 'fundamental' right for all workers to be informed and consulted;

- the possible inclusion of a broad right to protection in cases of termination of employment.

10 The incorporation of such rights in the Treaty would effectively extend EU competence into new areas such as those governing pay and industrial relations. This could lead to incompatibility and inconsistency with existing Member State laws, e.g. those establishing a national Minimum Wage.

11 The EEF is also concerned at the possible inclusion of detailed and limited rights conferred by EU law, such as those specifying the minimum period of maternity leave. The Charter will become unnecessarily long and diffuse if every right provided by EU employment law is written into it, e.g. those on parental leave, rest periods and annual leave. It would also require constant revision. This would negate the aim of a clear and simple document carrying maximum public impact.

12 Similarly some of the other 'fundamental rights' currently being considered for inclusion are so broad as to be virtually meaningless, or at least susceptible to widely differing interpretations. An example is the right to health and safety at work. Such 'rights' could have a deleterious effect on the credibility and public acceptance of the document by raising expectations that cannot ultimately be fulfilled.

Incorporation of the Charter into the Treaty

13 The EEF understands that the status of the Charter will not be determined until after its terms are agreed. The concerns outlined above are therefore heightened by the possibility that such rights become legally binding and therefore justiciable through their incorporation in the Treaty.

14 The industry is of the view that the Charter should be a declaratory statement, if it is to be easily read and understood by citizens. By contrast a legal binding document:

- would not meet the aim of enhancing visibility;
- would be likely to have unintended consequences in view of its length and complexity; and
- would lead to great legal uncertainty for industry, impacting on competitiveness and therefore conflicting with the welcome recognition of the importance of enterprise and innovation at the recent Lisbon Summit.

15 The EEF has great concerns about the implications of the usurping of the Member State competence and the proper role of intergovernmental negotiations by creating new rights in this way. Indeed the Charter thus becomes little more than the pursuit of social and political objectives by the back door.

16 Even if it does not have legal effect, a Charter agreed by EU Member States and EU institutions setting out a detailed list of rights could be used as a platform for making such rights legally enforceable in the future. Having endorsed them in the Charter, no Member State would be able to deny acceptance of these rights or their 'fundamental' nature.

17 The incorporation of the Charter into the Treaty would bring into existence two parallel systems of human rights protection, thereby blurring the roles of the European Court of Human Rights and the European Court of Justice. The ECJ is already showing signs of overload. An extension of its remit in this way would have major resource implications, given the need for speedy resolution of cases.

Conclusion

18 The EEF supports a declaratory Charter clearly setting out the existing fundamental rights recognised by the EU.

19 The EEF hopes that the concerns of the industry as expressed above will be taken into account by the Convention drafting the Charter and the European Institutions.

EEF
May 2000

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 24. Mai 2000

CHARTE 4318/00

CONTRIB 184

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Beitrag des Deutschen Städte- und Gemeindebundes zum Recht auf Selbstverwaltung. [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Deutscher
Städte- und Gemeindebund

Herrn
Bundespräsident a.D.
Prof. Dr. Roman Herzog
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Berlin, den 13. Februar 2020 G/3 050-25 zi

Erarbeitung einer EU-Charta der Grundrechte

Appell des Deutschen Städte- und Gemeindebundes nach einem Recht auf Selbstverwaltung in der EU-Charta der Grundrechte

Sehr geehrter Herr Bundespräsident a.D. Professor Dr. Herzog,

der Deutsche Städte- und Gemeindebund möchte gerne einen Vorschlag im Rahmen der Erarbeitung einer EU-Charta der Grundrechte unterbreiten.

Die Städte und Gemeinden sind in vielfältiger Weise vom europäischen Integrationsprozess betroffen. Sie legen dabei ein klares Bekenntnis zur Europäischen Union und zum europäischen Einigungsprozess ab. Wenn davon gesprochen wird, ein "Europa der Bürger und Bürgerinnen" errichten zu wollen, so möchten wir in diesem Zusammenhang darauf hinweisen, dass es die kommunale Ebene ist, die dem Bürger am nächsten steht und tagtäglich vor diesen in der Verantwortung, die Politikgestaltung der höheren politischen Ebenen zu vertreten und umzusetzen. Gleichermaßen erlaubt und gewährleistet es die kommunale Selbstverwaltung, die Identifizierung des Bürgers mit dem Staat zu stärken und Demokratie als politische Mitwirkungsmöglichkeit unmittelbar erlebbar zu machen.

Der Deutsche Städte- und Gemeindebund ist daher der Auffassung, dass der Prozess der Erarbeitung einer EU-Charta der Grundrechte auch Anlass sein sollte, über dieses Politikmodell und dessen Zukunft im europäischen Integrationsprozess nachzudenken und entsprechende Schlüsse für die Charta zu ziehen.

Bei der EU-Charta der Grundrechte geht es nicht nur darum, einen Konsens unter den nationalen (verfassungs-)rechtlichen Grundpositionen zu erzeugen. Die supranationalen Handlungsformen der EU haben Frage- und Problemstellungen auch für bürgerschaftliche Rechtspositionen erzeugt, die naturgemäß bisher von den nationalen Rechtsordnungen nicht beantwortet werden mussten. Daher muss eine EU-Charta der Grundrechte notwendigerweise über den Konsens der nationalen Ordnungen hinaus Antworten auf diese europäischen Fragen geben.

Dies betrifft insbesondere das Subsidiaritätsprinzip, das in der sowohl in der Präambel des EU-Vertrages wie auch in Art. 5 des EG-Vertrages unmittelbar im europäischen Primärrecht verankert ist. Da es sich hierbei um ein so tragendes wie grundlegendes Prinzip für die (zukünftige) Entwicklung der Europäischen Union handelt, muss das Subsidiaritätsprinzip auch als bürgerschaftliche Rechtskomponente Aufnahme in die EU-Charta der Grundrechte finden.

Wir schlagen daher vor, dies dadurch anzustreben, dass folgende Textpassage eines "Rechts auf Selbstverwaltung" zur Verwirklichung des Subsidiaritätsprinzips im Verhältnis zum Bürger in die Charta aufgenommen wird:

"Die Europäische Union gewährleistet und fördert das Recht der Bürgerinnen und Bürger, ihre örtlichen Angelegenheiten mit Hilfe kommunaler Gebietskörperschaften selbst effektiv zu gestalten, die über demokratisch legitimierte Beschlussfassungsorgane und eine große Autonomie im Hinblick auf ihre Befugnisse und Mittel verfügen."

Ein bürgerschaftliches Recht auf effektive Gestaltung der örtlichen Angelegenheiten durch demokratisch gewählte Vertretungen ist eine praktische Ausprägung des Subsidiaritätsprinzips. So wie es möglich war, die Inhalte der Europäischen Menschenrechtskonvention in Artikel 6 des EU-Vertrages aufzunehmen, muss es auch möglich sein, die für die Bürgernähe wesentlichen örtlichen Freiheits- und Gestaltungsrechte in geeigneter Form zu gewährleisten. Dies gilt umsomehr, als die lokale Gestaltung des unmittelbaren Lebensumfeldes ein wichtiger Bestandteil europäischen Kultur- und Politikverständnisses ist.

Vor der Gründung der Nationalstaaten war Europa ein Gebilde aus Städten und Gemeinden. Aus diesen selbstbewussten dezentralen Strukturen ist auch die EU gewachsen. Die in der Charta der kommunalen Selbstverwaltung des Europarates (1988) festgeschriebenen Grundsätze der kommunalen Selbstverwaltung sind allen EU-Mitgliedsstaaten gemein. Diese Charta wurde von nahezu allen EU-Mitgliedsstaaten völkerrechtlich verbindlich ratifiziert. Daher kann bereits davon gesprochen werden, dass die Grundsätze kommunaler Selbstverwaltungstätigkeit zur nationalen Identität der Mitgliedsstaaten im Sinne des Art. 6 Abs. 3 EU-Vertrag zählen.

Der beratende Ausschuss der regionalen und lokalen Gebietskörperschaften in der Europäischen Union (AdR) hat wiederholt ihre Aufnahme in die EG-Verträge gefordert. Dies ist um so notwendiger und nützlicher, als die Charta der kommunalen Selbstverwaltung die erste rechtliche Vereinbarung zwischen europäischen Staaten war, in der das Subsidiaritätsprinzip definiert wird.

Bei dem Subsidiaritätsprinzip handelt es sich um ein sozialphilosophisches Konzept. Es betrifft in grundlegender Weise die Gestaltung einer gesellschaftlichen Kompetenz- und Zuständigkeitsverteilung. Diese Verteilung lässt in erkennbarer Weise Schlüsse für die Zuweisung von Kompetenzen für die über- und untergeordneten Regierungs- und Verwaltungsebenen eines Staates zu. Es wäre somit angemessen, in der EU-Charta der Grundrechte die Grundsätze einer effektiven Gestaltung der örtlichen Lebensverhältnisse als bürgerschaftliche Rechtsposition aufzunehmen.

Der "örtliche Bezug" des Subsidiaritätsprinzips ist bereits heute im EG-Vertrag erwähnt. So gibt bspw. Art. 19 Abs. 1 EG-Vertrag jedem Unionsbürger das aktive und passive Wahlrecht bei Kommunalwahlen. Dieses durch den EG-Vertrag gewährleistete Recht unterstellt denknotwendig eine effektive Gestaltung der Lebensverhältnisse vor Ort durch demokratisch gewählte Vertretungen. Es ist daher nur konsequent, diese Komponente auch in der EU-Charta der Grundrechte anzuerkennen. Schließlich bringt es das Subsidiaritätsprinzip schlechthin zum Ausdruck, dass politische Entscheidungen möglichst bürgernah getroffen werden. Mit einem modernen Grundrecht auf Selbstverwaltung und Subsidiarität betritt man also im EG-Recht nicht grundsätzlich "Neuland".

Der AdR hat in seiner Stellungnahme zur Erarbeitung einer EU-Grundrechtecharta (Dokument CdR 327/99 rev. 1) ebenfalls aufgefordert, ein bürgerschaftliches Recht aufzunehmen, nach dem die örtlichen Angelegenheiten von demokratisch gewählten Vertretungen effektiv wahrgenommen werden können. Dies wird zu dem zutreffend in der Initiativstellungnahme des Ausschusses der Regionen zu dem Thema "Unionsbürgerschaft" (Az.: CdR 226/99 rev. 2) zum Ausdruck gebracht.

Gerade im Zusammenhang mit der Erweiterung der EU nach Mittel- und Osteuropa hat dieser Zusammenhang neue Bedeutung erlangt. Die Beitrittsstaaten legen großen Wert auf die Kultivierung lokaler und regionaler Demokratie, gerade und auch im EU-Zusammenhang. Durch eine möglichst bürgernahe Politik in der EU erfolgt zudem eine Stärkung der Europäischen Integration. Der Formulierungsvorschlag des Deutschen Städte- und Gemeindebundes für ein Recht auf Selbstverwaltung als Ausprägung des Subsidiaritätsprinzips überlässt es zudem ganz im Sinne des Subsidiaritätsprinzips den Mitgliedsstaaten und Regionen selbst, wie die konkrete Ausgestaltungen örtlicher Demokratie erfolgen soll.

Mit freundlichen Grüßen

(Dr. Gerd Landsberg)

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 24 May 2000

CHARTE 4319/00

CONTRIB 185

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Danish Organisation of organisations of Disabled People (DSI). [1] [2]

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[1] This text has been submitted in English language only.

[2] DSI: E-mail: hw@handicap.dk

Den 16. maj 2000
J.nr. 1401.14 [30.5.2] /abj

1. The European Union reaffirms that all persons with disabilities - men, women and children - have a right to protection against discrimination by full and equal enjoyment of the international standards on human rights which have been laid down in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

2. Persons with disabilities have, individually and collectively, a right to equal opportunities and non-discrimination.

(a). Human rights are universal and, according to their nature, apply to all human beings, including persons with disabilities, because all people are born equal and have the same inalienable rights to life, education, work, independent living and access to active participation in all aspects of social life in the Member States. Any violation of this fundamental principle of equality and any discrimination or other negative differential treatment of persons with disabilities inconsistent with the UN Standard Rules on Equalization of Opportunities for Persons with Disabilities is therefore a violation of his or her human rights as a disabled person and citizen in the European Union.

(b). Reaffirming The Universal Declaration of Human Rights, The Vienna Declaration and Programme of Action, Chapter II, B, 6, article 63 and 64, and The Convention on the Rights of the Child, in particular article 23, the Member States reiterate their responsibility for and commitment to enhance equal opportunities for persons with disabilities as stipulated in the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

(c). While the obligation to implement the UN Standard Rules on Equalization of Opportunities for Persons with Disabilities lies primarily with the Member States it is also a matter of utmost importance and deep concern for the European Union. The Problems that need to be addressed in creating equal opportunities for persons with disabilities must be raised and solved at international, European, national, regional and local level and in every sector of society, be it public or private, where equal opportunities do not exist.

(d). The European Union and the member States are committed to combat and eliminate all socially - determined barriers, be they environmental, financial, social, cultural or psychological, which exclude or restrict disabled persons from full participation, inclusion and mainstreaming in the social life of the society where they live.

3. Persons with disabilities have individually a right to:

* Effective medical care and rehabilitation services so that they can reach and sustain their optimum level of independence and function.

* Independent living, integration and active participation in all aspects of society.

* Access to the physical environment as well as to information and communication.

* Access to shelter, infrastructure, means of public transport and all other basic services.

* Access to education and studies at all levels in integrated settings – taking into consideration the special needs of e.g. deaf people.

* Equal opportunities for productive and gainful employment in the labour market.

* Social security and income maintenance if they temporarily or permanently are unable to support their families and themselves.

* A right to full participation in the development process and inclusion in poverty eradication programmes.

4. Persons with disabilities have individually and collectively a right to:

* Formation and membership of organizations of disabled people and a right for such organizations to speak for and act as legitimate representatives on behalf of their members.

* Rehabilitation programmes

* Development of regional, national and local plans and programmes, concerning all the target areas for equal participation, in accordance with Rule 1 - 12 of the UN Standard Rules for Equalization of opportunities for Persons with Disabilities.

5. Persons with disabilities should be included in all strategies and plans aiming at eradication of poverty, promoting education and enhancing employment. Such strategies and plans should not only contain special components aiming at persons with disabilities, but also integrate persons with disabilities in the general measures and support offered to the poor and underprivileged parts of the population.

6. (a). Within the European Union and the Member States it is incumbent upon anyone who does not respect, comply with or acts in conformity with the UN Standard Rules on Equalization of Opportunities for Persons with Disabilities to substantiate that this treatment does not constitute discrimination against disabled persons.

(b). No European, national or international legal instrument must be interpreted or construed to place persons with disabilities at a disadvantage in any context or offer them less protection than other persons.

(c). Whenever a particular group of vulnerable, marginalized or impoverished persons are mentioned in this Charter or in any other Human Rights instrument the text shall be read to include persons with disabilities belonging to the group.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 24 mai 2000

CHARTE 4320/00

CONTRIB 186

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution avec la position de la COFACE. [1]

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[1] Ce texte a été soumis en langue française.

COFACE

DROITS FONDAMENTAUX

La COFACE a publié, dans la perspective de la prochaine C.I.G., une déclaration commune avec deux organisations européennes qui défendent les droits des enfants : Euronet et E.F.C.W.

Il y est fait notamment référence aux droits fondamentaux, en ces termes :

"L'Union respectera les droits fondamentaux, comme garantis par la Convention européenne pour la Défense des Droits de l'Homme et des Libertés fondamentales, signée à Rome le 4.11.50 et la Convention O.N.U. sur les Droits de l'Enfant, adoptée le 20.11.89".

Au delà de cette déclaration commune, la COFACE, porte-parole des associations familiales des Etats membres de l'U.E., tient à préciser sa position relative au projet de Charte des droits fondamentaux. Sans revenir sur un certain nombre de points déjà très largement admis, elle souhaite en effet formuler des propositions spécifiquement axées sur les droits des familles.

Des principes généraux

1. L'égalité entre tous les citoyens et le rejet de toute forme de discrimination requièrent une reconnaissance explicite de la diversité des modèles familiaux dans les Etats européens.

2. L'égalité entre les enfants implique que tous bénéficient des mêmes droits, sans référence au statut matrimonial de leur(s) parents.

3. Le vieillissement des populations européennes et l'évolution des familles exigent l'organisation d'une "société tous âges" qui prenne largement en compte les besoins de chacun et notamment des personnes âgées en voie de dépendance.

Des droits concrets

1. Protection sociale

   Le droit à la protection sociale doit être garanti et prévoir explicitement que :

   - tous les enfants ont droit aux soins de santé et à des prestations familiales,

   - toutes les personnes âgées doivent pouvoir bénéficier de revenus (retraites) et de services (soins de santé et aide à la vie journalière si nécessaire),

   - enfants et adultes handicapés ont droit à un soutien - en argent et/ou en services - répondant à leurs besoins spécifiques,

   - un revenu minimum garanti doit compléter les régimes de sécurité sociale, en vue d'assurer un "filet de sécurité" à ceux que les aléa de la vie ont marginalisés.

2. Education - Formation

- Tous les enfants doivent avoir accès à l'école et à une formation qui leur permette de s'insérer dans la vie économique et sociale,

- le droit à une formation "tout au long de la vie" doit permettre à chacun de trouver sa place dans notre société en évolution,

- le processus d'équivalence des diplômes entre pays de l'U.E. doit être amélioré et complété.

3. Emploi

- Dans le cadre des programmes pour l'emploi et l'intégration sociale, il faut assurer aux travailleurs (euses) de réelles possibilités de concilier emploi, vie familiale et insertion sociale,

4. Droit civil

- Dans le contexte du grand marché intérieur et du rejet des discriminations, il importe de garantir non seulement aux citoyens européens mais aussi aux ressortissants des pays tiers séjournant dans les Etats membres de l'U.E. un regroupement familial effectif, ouvert à l'ensemble de leur ménage,

- le respect des droits de l'enfant inclut un règlement équilibré des litiges entre les parents, notamment en cas de divorce ou de séparation de personnes de nationalités différentes.

5. Protection des consommateurs

- Les services d'intérêt général tels que les distributions d'eau et d'énergie, les services postaux et de téléphone, doivent être accessibles à toute la population,

- le consommateur a droit à une information objective sur les biens de consommation mis à sa disposition ; il doit notamment avoir l'assurance que sa sécurité alimentaire fait l'objet de contrôles sérieux au niveau européen,

- l'accès à des soins médicaux de bonne qualité doit être garanti à tous, ce qui suppose un financement adéquat et une bonne répartition géographique des services.

6. Le droit à la parole

- La citoyenneté européenne ne se limite pas au droit de vote ; elle s'exprime aussi par la participation organisée et continue à la construction d'une Europe démocratique. Le droit des O.N.G. à être consultées sur les questions qui concernent les groupes de population qu'elles représentent doit être garanti et assorti de conditions qui permettent à ces O.N.G. d'assumer pleinement leur rôle de porte- parole.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 25 May 2000

CHARTE 4321/00

CONTRIB 187

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the European Broadcasting Union (EBU) with the final comments. [1] [2]

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[1] This text has been submitted in English and French languages.

[2] EBU: Ancienne Route 17 A, CH - 1218 Grand-Saconnex/Geneva. Tel: +41-22-717 2511.

EUROPEAN BROADCASTING UNION **UNION EUROPEENNE DE RADIO-TELEVISION**

Legal Department ***Département juridique***

11.5.2000/4
DAJ/MW/mp
Original: English

EBU comments on the Charter of Fundamental Rights

The European Broadcasting Union (EBU/UER)[1] welcomes the consultation organized by the Convention which is drawing up a Charter of Fundamental Rights, and the involvement of civil society in that process. The present contribution concentrates on freedom of expression and other issues related to the media and the information society.

Before addressing those particular issues, however, we would briefly express our general agreement with the Charter project itself and the underlying recognition it gives that the protection of fundamental rights vis-à-vis the institutions of the European Union should be improved. A catalogue of fundamental rights enshrined in a Charter can lead to a stronger commitment on the part of the European institutions to fundamental rights, and to better enforcement of such rights at the European level. It will make the guarantee of fundamental rights more transparent, and readily understandable for European citizens, than in the current wording of Article 6(2) of the EU Treaty.

To achieve these objectives, it will be necessary for the institutions of the European Union to be subject to a binding legal text on fundamental rights, just as the Member States are subject to the European Convention on Human Rights and the fundamental rights enshrined in their national constitutions. Required too will be effective enforcement, through a Court specializing in human rights, open to direct access by citizens. Such a Court already exists in the form of the European Court of Human Rights; in this context, the option of the European Union becoming a party to the European Convention on Human Rights should be considered.

1. Freedom of expression

From the outset we would express satisfaction with Article 10 of the European Convention on Human Rights as it has been interpreted and applied by the European Court of Human Rights. Article 10 has become one of the cornerstones of democracy, and of a free media system, throughout Europe.

We therefore welcome the clarification in the draft Charter that nothing in the text may be interpreted as placing restrictions on the protection afforded by the European Convention on

[1] Founded in 1950, the EBU has a total of 69 active members, mainly national public service broadcasters, in all the Member States of the European Union and throughout other countries in Europe and the Mediterranean basin. The Union also has 48 associate members in 30 countries further afield.

Human Rights. For us, this is a very important point to retain; the protection afforded by Article 10 should be regarded as untouchable.

There is no need to "reinvent" Article 10. We believe that the Convention drawing up the Charter has been wise, in formulating the right to freedom of expression in its provisional draft, to retain the wording of Article 10 (i.e. the first two sentences of Article 10, which contain the essence).

Regarding possible limitations on freedom of expression, we appreciate, in particular, the emphasis that the Strasbourg Court of Human Rights has placed on the requirement that any limitation must be "necessary in a democratic society". It is welcome that the current draft takes up, at least in its horizontal rule on limitations, the criterion that any limitations must be necessary for the protection of legitimate interests in a democratic society. This criterion must be maintained.

Our first message, therefore, is that it is important to maintain the *"acquis*", i.e. Article 10 of the European Convention on Human Rights.

2. New issues: Media freedom and pluralism, cultural diversity, access to content

On the other hand, new issues have cropped up in the past 50 years, following the adoption of the Convention, and the Charter is an opportunity to address them in a modern way. The Charter can thus provide added value if it tackles such issues as media freedom, media pluralism, cultural diversity and equal access to information and content. Many of these issues are not really new, and they have been addressed in the framework of freedom of expression, and the case law regarding Article 10. However, in view of increased awareness of their importance, it would seem appropriate to address them now in a more direct way.

A free, pluralistic media system which functions properly is essential for democracy. This applies not only to the new democracies, which now stand on the threshold of the EU, but also to the democratic foundations of the EU itself. Such a system is also a means of fulfilling the political, cultural and social needs of citizens and of society as a whole.

Freedom of expression and information as a right for individuals cannot offer its full benefits for a democratic society unless there is a framework which ensures that the media system functions properly (with sufficient financial resources, a proper legal framework, and well-trained journalists), and unless there are safeguards for media pluralism (and media conglomerates are prevented from becoming dominant and controlling public opinion), as well as safeguards for cultural identity and diversity (so that they are not brushed aside by market forces and globalization). Nor can these benefits be achieved if key political, educational and cultural content is not accessible to all citizens, or if part of the population finds itself excluded from access to the new communications networks.

Consequently, each State must be the guarantor of a free, pluralistic media system, through, in particular, the creation of an appropriate legal and financial framework. One of the greatest challenges here is probably the safeguarding of media pluralism, and digitization makes these challenges even greater. Today we see strong concentrations in digital television (with very few digital television platforms), mega-mergers (as between Time Warner and AOL), and the emergence of new gatekeeper positions (regarding set-top box technology, conditional access systems, navigation systems, electronic programme guides, APIs, etc).

It is for Member States to take the necessary measures to guarantee the freedom of the press, of broadcasting and of other media, and to safeguard media pluralism and cultural diversity, and that should remain the case [2]. We therefore welcome the clarification in the current draft that the provisions of the Charter shall not establish any competence or any new task for the Community or the Union.

What is important is that the European institutions, within their spheres of competence, are bound by these values and objectives, by the obligation to contribute to a free and pluralistic media system and thus underpin the media and cultural policies of the Member States. Within their spheres of competence, the European institutions should contribute positively to the realization of the objectives of media pluralism and cultural diversity. This becomes relevant, for example, in the setting-up and implementation of Community support schemes (not only the MEDIA programme), in the application of internal market rules and, of course,competition rules.

One of the most sensitive areas is the funding of the media. Access to appropriate funding is a basic requirement for any media system, and for media pluralism in particular. In this area the European institutions must not only respect the competence of each Member State but must also ensure that any decisions falling within their spheres of competence and liable to have an impact on funding fully respect media freedom and contribute to media pluralism. This concerns access by the media to all kinds of advertising revenue, and access by public service broadcasters to public or mixed funding, but also taxation on revenue (e.g. reduced VAT rates for cultural or media products).

A final issue is the need to guarantee access for everyone to a diverse, comprehensive choice of content.

Nowadays, much attention is paid to the information society, or knowledge society, and to the importance of giving everyone the possibility to participate. This is not only a matter of access to the Internet. In fact, digital television will play an important role in the democratization of access to the information society, in integration and social cohesion, and in preventing a divide between the information haves and have-nots.

[2] The competence of the Member States has been reaffirmed, as far as public service broadcasting is concerned, by the Amsterdam Protocol on the system of public broadcasting in the Member States (Protocol No. 32 annexed to the EC Treaty).

The underlying concern is that every citizen should be entitled to participate actively in the political, cultural and social life of society. Today, participation in political or cultural life is less often through personal participation in events than indirectly through the media. It is thus essential for all individuals to have access, via communications networks, to a diverse, comprehensive choice of content relevant to their cultural and social background.

Providing varied and balanced programming for all - and not least political, educational and cultural content - has traditionally been a task for public service broadcasters. It is an example of how public services contribute to the realization of citizens' fundamental freedoms and to equality of chances, and this should be recognized in the Charter. Public service and universal service are means of achieving such equal access to key information resources.

3. Summary

To summarize, we suggest that the Charter should

- reaffirm freedom of expression as enshrined in Article 10 of the European Convention on Human Rights,
- explicitly guarantee the freedom of the press, of broadcasting and of other media,
- recognize the need to safeguard media pluralism and cultural diversity,
- grant all individuals a right of equal access, via communications networks, to impartial news and information and to a diverse, plural and comprehensive choice of content, covering the range of political, educational, social and cultural interests,

while leaving Member States free to determine, in conformity with the Treaty, which institutional arrangements may best contribute to the achievement of this right for their citizens.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 24 May 2000

CHARTE 4323/00

CONTRIB 189

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the Church and Society Commission of the Conference of European Churches with a letter to Mr. Roman Herzog, the President of the Convention, and a report from the Plenary Meeting of the Commission in Moscow on 5-9 May 2000. [1]

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[1] This text has been submitted in English language only.

CONFERENCE OF EUROPEAN CHURCHES

Church and Society Commission
Director: Keith Jenkins
Direct line: 32.2.234.68.38
e-mail: eeccs@skypro.be

Mr. Roman Herzog,
President,
Convention on Fundamental Rights,
Council Secretariat,
rue de la Loi 175
1048 Bruxelles

Ref: DIR/3.3.2

Brussels, 18 May 2000

Dear Mr. President,

On behalf of the Church and Society Commission of the Conference of European Churches, I am forwarding a statement concerning the draft Charter of Fundamental Rights. This was adopted by the Commission during its meeting earlier this month. I also attach a copy of the initial comment which was submitted to the Convention in April, the points of which were endorsed by the plenary meeting of the Commission.

May I take this opportunity of thanking the Convention for the opportunity afforded to organisations from civil society to present their comments orally at the end of April. I hope that their will be further opportunities for dialogue with civil society as the process continues. Our Commission will certainly continue to follow the work of the Convention with close attention and its members would want to affirm as strongly as possible the importance of a real involvement in the process of the potential new members of the European Union.

With every best wish,
Yours sincerely,

Keith Jenkins.

CONFERENCE OF EUROPEAN CHURCHES
CHURCH AND SOCIETY COMMISSION

Plenary Meeting of the Commission
Moscow, Russian Federation
5-9 May 2000

EU CHARTER OF FUNDAMENTAL RIGHTS

At its meeting in Moscow from 5th to 9th May, the Church and Society Commission of the Conference of European Churches, covering churches throughout the whole of Europe, was able to give consideration to the submission already made on its behalf to the Convention drafting the European Union Charter of Fundamental Rights.

The Commission wishes to endorse all the points made in that submission, of which we enclose a copy. We would like to take this opportunity to give emphasis to some of those points and to add some comments.

The churches represented on the Commission already have a record of commitment to the promotion and defence of human rights, with a special emphasis on social and cultural rights. These are all rooted in genuine Christian tradition. This commitment is expressed through the churches' engagement with European organisations – the OSCE, the Council of Europe and the EU. We therefore welcome the commitment shown by the member states of the EU in launching the process of the development of a Charter of Fundamental Rights.

The Convention has not yet determined how the Charter is to be structured. It is not yet clear what emphasis will be given to social and cultural rights, nor how the defined rights will be limited. In endorsing the view that this Charter should be legally binding, we recognise that the real test of this Charter is the enforcement of the rights contained in it, as much as their formulation. We insist that no provision of this Charter may be interpreted as restricting the scope of the rights guaranteed by European Community law, the law of the member states and international conventions, in particular the European Convention on Human Rights, as interpreted by the case law of the European Court of Human Rights.

We warmly welcome the idea that the Charter should be introduced with a preamble which lays out the common values on which the integration process is based, as outlined in Article 6 of the Treaty of Amsterdam. To this we would add the values of peace, solidarity and participation.

As people coming from the whole of Europe, and not just from the member states of the EU, we stress the importance of extending the process of consultation on this Charter to include the potential member states, beyond the hearing scheduled for June. If the fundamental rights in the Charter are to be expressions of values common to people across Europe, is it not only right that it should be drawn up with the participation of all those likely to be affected by it.

The potential member states are members of the Council of Europe and most have recently undergone the process of drafting their own constitutions. Since the Charter relies not only on European and international legal sources, but also on the national constitutions of the member states, those countries will be well placed to make a precious contribution based on their recent experience.

We look forward to the first complete draft being available soon. We will continue to monitor closely the forthcoming debate, particularly that on social and economic rights.

For the enforcement of the Charter to be successful, it is crucial there should be wide public discussion. We welcome the steps which the Convention has taken towards making this process as transparent and as open as possible. However, we note that in very few of the EU member states represented on our Commission is there adequate public awareness of this development. We therefore encourage members of the Convention to publicise their work more widely, so that their commitment should not be lost in the face of public suspicion and ignorance. We commit ourselves to promoting discussion of the Charter within our churches and beyond.

May 2000

Conference of European Churches,
Church and Society Commission,
rue Joseph II 174,
B-1000 Bruxelles.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 5 June 2000

CHARTE 4324/00

CONTRIB 190

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a common submission by several NGO's (list: see page 2). [1]

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[1] This text has been submitted in English and French languages.

Association des Femmes de l'Europe Méridionale (AFEM)
Association Internationale des Anciens des Communautés Européennes (AIACE)
ATD Quart Monde
Carrefour pour une Europe civique et sociale (CAFECS)
Centro Italiano di Formazione Europea
Cercle Populaire Européen
Collectif de Pratiques et de Réflexions Féministes "Ruptures"
Collectif sur la Charte des droits fondamentaux
Comité Européen de Liaison sur les Services d'Intérêt Général (CELSIG)
Commission Justice et Paix
Eurolink Age
European Anti Poverty Network (EAPN)
European Movement
European Union Migrant's Forum
Fédération européenne du Personnel des Services Publics (EUROFEDOP)
FONDA pour la vie associative
Forum Européen des Orthodoxes
Franciscans (Commission for Justice, Peace and Integration of Creation)
Gauche Européenne (section belge)
Initiative "Netzwerk Dreigliederung"
Institut Robert Schuman pour l'Europe
International Rehabilitation Council for Torture Victims
MAPP
Office catholique d'information et d'initiative pour l'Europe (OCIPE)
Permanent Forum of Civil Society
Points Cardinaux
Society for Threatened Peoples International
Terre des Hommes France
The European Region of the International Lesbian and Gay Organisation (ILGA)
Union des Fédéralistes Européens (UEF)*
Union des Fédéralistes Européens-Belgique
VIDES
Young European Federalists (JEF)*

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* avec le commentaire suivant : "L'élaboration de la Charte des droits fondamentaux doit s'inscrire dans le cadre d'un processus d'élaboration d'une Constitution européenne".

"THE QUALITY TEST"

Common Statement of NGOs participating in the Hearing on the Charter of Fundamental Rights Brussels, 27 April 2000.

What the Charter needs to be	What that requires
1. An EU Charter, shining beacon across Europe on common values and objectives of peoples sharing the same aspiration to peace, development and freedom, belonging to various faiths, beliefs and civilisations and part of the first planetary generation.	• To address the universal character of Fundamental Rights.
2. A Charter for Women and Men	• To recognise equality between women and men as a founding principle of the Union • To use inclusive language.
3. A Charter for *all*: Citizens, Residents, Migrants, Refugees, Undocumented persons	• To recognise the principle of non discrimination • To protect the rights of minorities, to use their languages and to transmit their cultures and values in accordance with the Charter
4. A Charter on essential rights from the Council of Europe, the U.N. and I.L.O agreements	• Never to fall short of agreements even if signed only by some of the EU Member States • To supplement, strengthen, build on existing rights
5. A Charter on Individual and Collective Rights,	• To protect collective rights such as cultural and linguistic rights, the rights of trade unions and associations • To guarantee a right of consultation for NGOs at the European level • To recognise access to justice at EU level for NGOs defending the common good and the rights of future generations
6. A Charter on the Common Good	• To secure recognition of the common good which is the foundation of a community of persons living together in solidarity and respect • To give everyone access to the common goods and Public Services, secure transparency in management and participation in the assessment of the management

7. A Charter on civil and political, social, cultural and ecological rights	• To declare that the Charter secures indivisible rights • To recognise and guarantee the right to local self-government • To guarantee the key programmatic social, environmental, cultural and education rights for all, for the implementation of which (i) indicators and convergence mechanisms need to be designed (ii) a multiannual implementation programme needs to be developed (iii) a system of monitoring, benchmarking and assessment needs to be in place
8. A Charter on Participatory Democracy at European level	• To secure transparency and access to information • To define participatory democracy rights at EU as well as at local level • To recognise the right to a democracy based on equality and parity
9. A Charter which inspires the Union in all its external actions.	• A Charter which defines the criteria for strategic impact assessments of EU policies on all those who find themselves affected by EU actions abroad
10. A legally binding Charter	• The Charter should be legally binding for all the EU Institutions and the Member States. • Infringement should be examined by the EU Court of Justice and Member State status should be suspended for any State found to be in serious infringement
11. A Charter adopted by a participatory procedure	• To be submitted to an indicative vote by the Parliamentary Assembly of the Council of Europe, involving MPs of all EU Applicant Countries • To ask for an indicative vote of NGOs on the draft Charter
12. A Charter to be integrated in the Treaty	• To pass the above quality test successfully.

The Signatories request the opportunity to have a real debate with the Members of the Convention on 6 June 2000, at the occasion of the “open doors” day organised by the Convention in the EP.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 26 mai 2000

CHARTE 4325/00

CONTRIB 191

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Contribution soumise par les syndicats français (datée le 25/04/00)

Veuillez trouver ci-après une proposition des syndicats français, accompagnée d'une lettre au Président Roman Herzog. [1] [2]

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[1] Ce texte a été soumis en langue française seulement.

[2] Syndicats français:
CFDT (Confédération Française Démocratique du Travail): 4 boulevard de la Villette, 75955 PARIS CEDEX 19. Tél.: + 33-1-4203 8000. Fax: +33-1-4203 8144.
CGC (Confédération Générale des Cadres): 59 rue du Rocher, 75008 PARIS. Tél.: +33-1-5530 1212. Fax: +33-1-5530 1313.
CFTC (Confédération Française des Travailleurs Chrétiens): 13, rue des Ecluses-Saint-Martin, 75483 PARIS 10. Tél.: +33-1-4452 4900. Fax: +33-1-4452 4918.
CGT (Confédération Générale du Travail): 263 rue de Paris; 93516 MONTREUIL. Tél.: +33-1-4818 8000.

Confédération Française Démocratique du Travail
Confédération Française de l'Encadrement /
Confédération Générale des Cadres
Confédération Française des Travailleurs Chrétiens
Confédération Générale du Travail

M. Roman HERZOG, Président de la Convention de la Charte des Droits fondamentaux.

Conseil européen
175 rue de la loi
1048 Bruxelles
Belgique

Paris, le 25 avril 2000.

Monsieur le Président,

Les syndicats français ont accueilli avec intérêt le projet de rédaction d'une Charte des Droits fondamentaux de l'Union européenne ; ils ont travaillé en commun au document que vous trouverez en annexe.

Cette Charte doit à nos yeux consacrer les droits des citoyens européens dans les domaines civils et politiques, économiques, sociaux et culturels ; ces droits devraient faire partie intégrante du futur Traité en discussion à la Conférence intergouvernementale, et ainsi constituer une référence claire pour les institutions, y compris la Cour de Justice auxquels les citoyens devraient pouvoir avoir accès en cas de besoin. Ainsi serait consacrée l'effectivité de ces droits fondamentaux.

Du point de vue des syndicats soussignés, la partie concernant les droits économiques et sociaux doit constituer la base juridique du « modèle social » européen et consacrer des droits concrets qui correspondent aux droits effectivement mis en œuvre dans la plupart des états-membres et intégrés dans leurs systèmes juridiques et sociaux, ainsi que les engagements internationaux et régionaux de ces états qui ont presque tous ratifié un nombre élevé de conventions internationales du travail et de traités, notamment au niveau du Conseil de l'Europe, de l'ONU, de l'OIT.

Nous voulons que soit fait référence à tous ces fondements juridiques dans la rédaction de la Charte, par exemple en ce qui concerne la liberté syndicale, le droit de négociation collective, les droits de participation concernant les conditions de travail, l'hygiène, la sécurité, la prévention des accidents de travail et des maladies professionnelles, et l'environnement de travail, au niveau national et transnational, ainsi que la liberté professionnelle et le droit au travail et au repos (congés hebdomadaires et congés annuels payés, durée du travail, services de l'emploi et allocations de

chômage total ou partiel), droit à la formation professionnelle initiale et permanente et à la formation tout au long de la vie, salaires minima et droits à pensions et allocations, égalité professionnelle et non discrimination dans l'emploi et la profession, droit au logement, protection de la maternité et des travailleurs handicapés et accidentés du travail, droit à la protection sociale, à la santé, pour rappeler les principaux points de notre document commun.

Sans référence explicite à tous ces droits la Charte serait sans effectivité réelle, et elle serait inférieure aux droits conquis par des décennies d'efforts du mouvement syndical et des organisations sociales des différents pays ;

En outre, la non respect des droits fondamentaux devrait entraîner des sanctions effectives, au même titre par exemple que le non respect du droit de la concurrence.

Une remise en cause du contrat social européen aurait à l'évidence des conséquences sérieuses pour le modèle social européen et constituerait un signal négatif en direction des pays de l'élargissement et également envers les pays du reste du monde, notamment en ce qui concerne les négociations commerciales internationales et l'universalité des traités internationaux relatifs aux droits humains et les conventions fondamentales de l'OIT.

Notre message est en pleine convergence avec la résolution du Comité exécutif de la Confédération Européenne des Syndicats de septembre 1999 et avec la position commune de la CES et de la plate-forme des ONGs européennes du secteur social.

Nous espérons que vous transmettrez nos préoccupations et nos suggestions à la Convention, et qu'elle saura les traduire dans une rédaction finale qui réponde aux attentes des travailleurs et des autres composantes de la société civile.

Veuillez agréer, Monsieur le Président, nos salutations respectueuses et nos sincères vœux de succès dans votre tâche.

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Confédération Française des Travailleurs Chrétiens
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Droits fondamentaux

Considérations préliminaires

Les droits économiques, sociaux et culturels (DESC) sont interdépendants avec les droits civils et politiques (DCP) ; ainsi, la liberté syndicale et les libertés de pensée, d'opinion, d'expression et d'association, de réunion et de manifestation, de négociation, sont liées. Si une « distinction entre DCP et DESC est faite à des fins de clarté » (BODY 4), il ne peut s'agir d'une hiérarchie, ni d'un ordre de priorité.

La formulation des DCP et des DESC doit être aussi concrète que possible, tout en étant ramassée, afin d'en faciliter la connaissance et la compréhension par les destinataires, l'interprétation, et en assurer la justiciabilité. Elle ne peut consister en une simple « référence morale » pour le juge, mais doit constituer un ensemble de principes fondamentaux qui s'imposent à lui et que les justiciables peuvent invoquer. A cet égard, il convient de résoudre le problème de l'accès au juge communautaire.

Si l'obligation de respect des droits fondamentaux pèse sur l'Union, elle doit concerner toutes ses institutions et les trois piliers, et s'étendre à la transposition ou à l'application directe du droit dérivé dans l'ordre juridique interne. Le juge national aura donc aussi compétence pour leur mise en œuvre

Si les syndicats sont concernés au premier chef par la liberté syndicale, le droit de négociation collective et les DESC en général, ils ont aussi à faire des remarques sur la formulation de certains DCP du point de vue de leur application aux travailleurs et à leurs organisations, en particulier.

En aucun cas les droits reconnus dans la Charte ne devraient pas être inférieurs ou affaiblir les droits déjà inscrits dans les traités universels de l'ONU et les conventions des organisations internationales, comme celles de l'OIT, dont sont membres et parties les états de l'UE, et ces droits devraient faire intégralement partie de l'acquis que sont tenus de respecter les états désirant devenir membres de l'Union. Les conventions du Conseil de l'Europe relatives aux droits humains et leurs systèmes de contrôle ne devraient pas non plus être affaiblis, car ils sont indispensables à la coopération et à la stabilité dans l'ensemble du continent européen.

(propositions d'amendements en italique gras, commentaires en italique; rappel en italique des conventions pertinentes de l'OIT et de quelques dispositions universelles; les commentaires contribuent à l'interprétation des dispositions; les remarques ne figurent que pour expliquer certaines modifications et ne seront pas reproduites dans le texte final).

Préambule.
(Il faudrait, dans un préambule ou des considérants, préciser ce qui suit).

Les droits humains, en raison de leur universalité et de leur indivisibilité, doivent être applicables à toute personne. Seuls des droits directement liés à l'exercice de la citoyenneté de l'Union peuvent être réservés aux seuls citoyens communautaires.

1. Liste des 9 premiers articles (BODY 4 et CONVENT 5).

Art. 1. Dignité de la personne humaine.

….
3. Nul ne peut être astreint à un travail forcé ou obligatoire, ***ni être tenu en servitude ou en esclavage***.

(remarque : il existe des formes contemporaines d'esclavage, comme la traite des êtres humains à des fins de prostitution ou de pornographie, la servitude pour dettes à l'égard de certains travailleurs migrants clandestins ; cela a aussi une importance en ce qui concerne les relations commerciales extérieures de l'UE, vis à vis de produits fabriqués par une main d'œuvre enfantine ou tenue en servitude pour dettes ; il faut aussi tenir compte de sectes qui réduisent leurs membres à une véritable servitude). [Conventions ONU de 1929, de 1954 contre les formes contemporaines d'esclavage, C. 29, 105 et 182 OIT].

4. Toutes les formes de harcèlement, de pression et de conditionnement psychologiques sont prohibées.

Art. 2. ajouter ***le secret médical.***
…
Art. 8. Respect de la vie privée ~~et familiale~~ de la confidentialité des communications.

1. Toute personne a droit au respect et à la protection de sa vie privée, de son identité, ~~et de la vie familiale~~, de sa réputation, ***de son image***, de son domicile.

Commentaire : la protection de la réputation concerne la protection contre la diffamation, les injures graves.

2. Le secret des communications, quel qu'en soit le support, est garanti.

Art. 9. Vie familiale.

1. Toute personne dispose du droit de ~~fonder une famille~~ se marier ***selon les dispositions prévues par la loi du pays de résidence***.

Commentaire: il faut un double consentement pour le mariage; la polygamie pose problème car contraire aux droits de l'UE, et ne peut être regardée que comme un état de fait non légalement protégé par l'Union et qui relève, comme les PACs, les mariages homosexuels, des lois nationales.

2. Toute personne a ***le droit de fonder une famille et*** le droit au respect ***et à la protection*** de sa vie familiale ***; en particulier, tous les travailleurs migrants ont droit au rapprochement familial.***

3. Toute personne a la faculté de divorcer.

(Commentaire : le divorce peut se faire par consentement mutuel sous contrôle du juge ou résulter d'un jugement ; il doit comporter des garanties d'équilibre économique entre les époux séparés; il s'effectue selon le droit du pays de résidence ; la répudiation unilatérale est prohibée sur le territoire de l'Union).

4. Tous les enfants disposent des droits contenus dans la Convention internationale des droits de l'Enfant de l'ONU.

5. Les mineurs et majeurs protégés doivent bénéficier d'une protection adéquate tout en étant traités comme des personnes à part entière ; ils doivent pouvoir participer et influer sur les questions les concernant personnellement, en fonction de leur niveau de maturité, y compris être représentés et entendus en justice.

2. Liste des articles 10 à 19 (CONVENT 8) :

*(Le principe de démocratie, **qui doit être maintenu sous peine de sanctions allant jusqu'à la suspension ou l'exclusion de l'UE est en outre un préliminaire fondamental à l'adhésion**, avec notamment le droit à des élections libres, art. 12 BODY 4 **ainsi que le droit au respect de la démocratie et des droits humains par les gouvernements, caractérisant l'Etat de droit,** devrait trouver sa place ici ; retenir aussi, y compris pour les étrangers résidents, **selon les modalités prévues dans les traités** :*
- droit de voter et d'être élu aux élections européennes et municipales dans les pays de résidence,
- droit de pétition au Parlement européen
- droit de s'adresser au Médiateur
- égalité d'accès à la fonction publique
- droit de s'adresser à l'UE et d'obtenir une réponse dans une langue officielle
- protection diplomatique et consulaire).

Art. 10. Liberté de conscience et de religion.
…

Art. 11 ~~Liberté d'expression~~ : ***Liberté d'opinion et d'expression***

Toute personne ~~a droit à la liberté~~ ***aux libertés d'opinion et*** d'expression. ~~Ce droit comprend~~ ***Ces droits impliquent*** la liberté de recevoir ou de communiquer des idées ou des informations sans considération de frontière ***ou de support***.

Art. 12 Droit à l'éducation :

1. Toute personne a droit à ***une*** éducation et à une formation professionnelle ***gratuites***. ~~selon ses capacités~~. ***L'enseignement initial (primaire, secondaire et professionnel) est obligatoire.***

Commentaire : Cela signifie qu'un service public d'enseignement doit exister et être accessible gratuitement, sans exclure d'autres modes d'enseignement ou de formation, y compris payants. Les personnes handicapées et les personnes rencontrant des difficultés scolaires doivent bénéficier des moyens spécifiques nécessaires à l'exercice de leurs droits.

- droit à la formation tout au long de la vie, à la reconversion professionnelle

- droit à l'équivalence des diplômes et des formations

2. Le choix ~~de l'établissement~~ ***du mode*** d'éducation et de formation professionnelle est libre.

3. Le droit des parents d'assurer l'éducation ~~et l'enseignement~~ de leurs enfants conformément à leurs convictions religieuses et philosophiques est respecté.

Commentaire : dans le respect de la dignité - art. 1- et des droits de l'enfant.

4. L'art, la science, la recherche ~~et l'enseignement~~ sont libres. ***Les libertés académiques sont respectées; l'égalité des chances dans l'accès à l'enseignement supérieur est garantie***.

Art. 13 . Liberté de réunion et d'association.

Toute personne a droit à la liberté de réunion ***et de manifestation*** pacifiques, à la liberté d'association, y compris le droit de fonder des ***partis politiques, des*** syndicats ***de travailleurs et d'employeurs***, de s'y affilier ***et de participer à leurs activités, dans l'entreprise comme au plan national, européen et international.***.

(les deux articles suivants devraient être avancés dans le texte)
Art 18. Egalité.

Toutes les personnes sont égales devant la loi ***et ont droit à l'égalité de chances et de traitement dans tous les domaines de la vie et du travail*** .

Art. 19. Non discrimination.

1. Toute discrimination est interdite, quel qu'en puisse être le fondement ***et notamment*** le sexe, la race, la couleur, ***la nationalité***, l'origine ethnique, l'appartenance à un groupe minoritaire, l'origine sociale, la naissance ou la fortune, la langue, la religion, les convictions, ***l'affiliation et l'activité politique ou syndicale, l'état de santé***, le handicap, l'âge, l'orientation sexuelle, ***ou toute autre base***.

2. L'Union cherche à éliminer les inégalités et à promouvoir l'égalité entre les hommes et les femmes.

Art. 14. Droit d'accès aux informations.

~~Tout citoyen de l'Union ou~~ Toute personne ~~résidant dans l'Union a~~ ***intéressée dispose*** d'un droit d'accès aux documents des institutions de l'UE. Ce droit s'exerce dans les conditions prévues par ~~l'art. 255 TCE~~ ***les traités***.

Art. 15. Protection des données.

Toute personne ~~physique~~ a droit à la protection de ses données à caractère personnel. ***Elle dispose à leur égard d'un droit d'accès, d'actualisation et de suppression. Ces données ne peuvent être utilisées à des fins autres que la fin licite pour laquelle elles sont collectées, par des organismes légalement habilités et dans le respect de la proportionnalité. Elles ne peuvent être interconnectées à l'aide d'un identifiant unique et ne peuvent être conservées au-delà du délai strictement nécessaire à l'accomplissement de la fin pour laquelle elles ont été recueillies et enregistrées.***

(remarques : il est indispensable de préciser mieux les droits vis à vis des données personnelles, y compris celles que les employeurs détiennent sur leurs salariés ; un recours contre les listes noires doit par exemple exister ; en outre, les personnes morales, associations, partis, syndicats ou entreprises devraient aussi bénéficier de certains droits vis à vis des données les concernant ; même si la notion de protection de la vie privée - traitée par l'art. 8- ne leur est pas directement applicable, elles doivent pouvoir, dans des formes appropriées, pouvoir protéger leur réputation et bénéficier d'une inviolabilité de leur siège social équivalente à celle du domicile et, pour les associations, protéger leurs membres et vérifier l'exactitudes des données sur leurs activités, leurs orientations, etc., et pour les entreprises se voir garanties une certaine confidentialité des affaires, de leurs stratégies commerciales, etc. et être protégées contre la diffusion d'informations préjudiciables non vérifiées).

Art. 16. Droit de propriété.

…

- Ce droit peut s'exercer de manière individuelle, mutualiste, coopérative, sociétaire ou collective, et sous réserve de l'abus de droit. Il ne peut être opposé à l'exercice d'autres libertés fondamentales contenues dans la présente charte.

- Les biens communs universels et les découvertes de la recherche fondamentale ne sont pas susceptibles d'une appropriation privée ni d'être, en tant que tels, l'objet de brevets.

Commentaire: Le droit de propriété est souvent opposé à l'exercice des diverses formes de l'activité syndicale dans l'entreprise : il n'a plus de notre temps le caractère purement individuel et "inviolable et sacré" de la Déclaration de 1789, mais doit, dans un but social, s'équilibrer avec les autres libertés; il conviendrait aussi d'envisager une référence à la notion de biens communs universels, tels que l'air, l'eau, le génome humain, et les génomes animaux et végétaux, (les génomes, le séquençage des chromosomes, doivent être considérés comme des découvertes scientifiques fondamentales, non brevetables par nature, comme la relativité ou la mécanique quantique...), la mer et son rivage ou l'espace et les corps célestes, etc. qui ne peuvent faire l'objet d'une appropriation privée (mais ces découvertes et ces biens peuvent être utilisés ou exploités à des fins licites, y compris éventuellement avec une rémunération pour services, comme la fourniture d'au potable ou de moyens thérapeutiques et de médicaments dérivés de la connaissance du génome).

Art. 17. ~~Droit d'asile et expulsion~~ Liberté de circulation ~~et d'établissement~~.

Liberté de circulation. CONVENT 5., non repris par CONVENT 8, mais qui devrait être conservé :

- ***Toute personne en situation régulière*** jouit de la liberté de circulation ***et d'établissement*** à l'intérieur de l'Union dans les conditions fixées par les traités.

Art. 17 bis. Droit des réfugiés, apatrides et demandeurs d'asile :

1. ***L'Union Européenne respecte le droit d'asile et protège les réfugiés et apatrides***.

Commentaire : *la persécution par un gouvernement quelconque, mais aussi par des groupes ou par des bandes armées terroristes, maffieuses, intégristes, ethniques, ou autres doit ouvrir accès au droit d'asile; le cas où, par suite de situations politiques particulières entraînant une altération du principe de démocratie, des personnes résidant dans un pays membre, y compris des citoyens de ce pays, peuvent être amenées à se réfugier ou demander asile dans un autre pays membre ne peut être écarté de manière absolue.*

2. **Les demandeurs d'asile et les personnes réfugiées sur le territoire de l'Union disposent des même droits que les résidents légaux de même nationalité d'origine.**

Commentaire : ces personnes doivent pouvoir notamment exercer une activité économique, jouir des droits culturels, bénéficier des prestations et droits sociaux, etc.

3. La détention arbitraire et les expulsions ~~collectives~~ ***forcées*** d'étrangers sont interdites.

Commentaire : toute expulsion sans garanties de procédure et exercice des droits de la défense doit être prohibée, de même que ne peuvent être tolérés les centres de rétention placés sous contrôle policier, sans accès pour le juge, les avocats ou les associations de défense.

3. DESC (liste de BODY 4).

Droits économiques, sociaux et culturels *(remarque : Reformuler le titre pour reprendre le nom du pacte de l'ONU correspondant. Les indications lapidaires de la liste sont reformulées ; la notion «d'objectif politique », dont la mention dans la charte est en général exclue - référence aux "droits existants"-, doit donc être autant que possible remplacée par la formulation de droits concrets et justiciables).*

DROITS ECONOMIQUES

Droit syndicaux, négociation collective, implication des salariés:

Commentaire : ces droits concernent tous les salariés, du secteur public ou privé.

- liberté d'association des employeurs et des travailleurs, y compris dans la fonction publique et les services publics. *[C. n° 87 de l'OIT]****; cette liberté s'exerce sur le lieu de travail, l'entreprise ou***

le groupe ou le service public, au niveau sectoriel, national, et transfrontière (régions transfrontières, UE, international. *(Remarque: la 2e pharase pourrait faire ici l'objet d'un commentaire, car les niveaux d'organisation et d'action ont été taités dans l'art. 13).*

- liberté de fonctionnement des syndicats sur les lieux de travail et aux autres niveaux, et protection des représentants des salariés *[C. 135 de l'OIT]****; facilités à leur accorder dans l'exercice de leurs mandats.***

- droits d'action collective et solidaire des salariés à tous les niveaux pour leurs intérêts matériels et moraux, directs et indirects, y compris le droit de grève.

- droit de négociation collective des conditions de travail et d'emploi, des salaires et des garanties collectives. *[C. 98, 151 et 154 de l'OIT]*

Commentaire : ce droit s'applique éventuellement sous une forme appropriée dans la fonction publique.

- droit de conclure des accords collectifs au niveau européen ou national, interprofessionnel et sectoriel.

Commentaire : le niveau sectoriel peut être celui de l'entreprise, du groupe, d'un territoire; ce droit s'exerce par les organisations représentatives et est soumis au principe de démocratie.

- droits à l'information, à la consultation et à la participation dans l'entreprise et le groupe

Commentaire : ces droits impliquent que les avis et suggestions des travailleurs et de leurs représentants soient effectivement pris en considération - caractère préalable de la consultation, droit de recours à une expertise indépendante à la charge de l'employeur, notamment- ; ils concernent par exemple la marche ou la stratégie de l'entreprise ou du groupe, l'embauche de travailleurs intérimaires, les projets de licenciements collectifs, la formation ou la reconversion, l'amélioration du milieu de travail, en particulier l'application des règles d'hygiène et de sécurité, la prévention et la reconnaissance des maladies professionnelles, etc. Ces droits demandent la création d'institutions spécifiques formées et fonctionnant démocratiquement.

Droit au travail et liberté professionnelle :

Commentaire : l'Union reconnaît le droit au travail et prend avec les états membres les mesures destinées à rendre ce droit effectif en visant à réaliser le plein emploi.

1. ***Toute personne dispose du libre choix et du droit d'exercer une profession, indépendante ou salariée et de son lieu d'exercice.***

Commentaire : ce droit couvre celui d'exercer une profession libérale, l'artisanat ou le commerce, de fonder une entreprise, dans le cadre des règles juridiques et fiscales applicables, y compris les règles spécifiques à l'exercice d'une profession réglementée. Le contrat à durée déterminée constitue la forme générale de la relation d'emploi entre employeurs et travailleurs; les contrats

avec de faux travailleurs indépendants doivent être requalifiés en contrats de travail normal. Le recours abusif à des formes précaires d'emploi, le recours permanent à l'intérim et la sous traitance en cascade ne doivent pas être admis. Le travail à temps partiel doit reposer sur une base volontaire.

1 bis. Tout travailleur a droit à un emploi, à une formation rémunérée ou à défaut à un revenu de remplacement.

6. ***1 ter. Toute personne à la recherche d'un emploi a le droit d'accéder à un service gratuit de placement ou d'orientation professionnelle et de formation. Nul ne peut être contraint à exercer un emploi déterminé.***

1 quater. Tout salarié privé d'emploi a droit à des allocations de chômage

Conditions de travail ***et d'emploi***:

1. une inspection du travail indépendante doit être instaurée pour le contrôle du respect et pour l'application des normes de travail. *[C. 81 OIT]*

2. une médecine du travail indépendante doit régulièrement surveiller l'état de santé des salariés, signaler les maladies professionnelles et formuler des recommandations concernant les postes de travail.

3. Obligation de reconnaissance et de compensation des maladies professionnelles, des accidents du travail et des incapacités de travail qui peuvent en découler.

2. ***4.***Tout travailleur a droit à la sécurité et à l'hygiène dans le travail ***et à des conditions de travail respectant sa santé physique et mentale et sa vie privée, ainsi qu'à la protection contre le harcèlement dans le milieu professionnel et contre tout abus du pouvoir de contrôle et de direction de l'employeur.***

Commentaire : la dernière proposition se rapporte notamment au développement des moyens technologiques de contrôle et de surveillance, au su ou à l'insu des salariés, aux déplacements géographiques abusifs, etc.

3. ***5.***Tout salarié a droit à une rémunération équitable et à un salaire minimal lui permettant, ainsi qu'à ses dépendants, de vivre dans des conditions dignes ***et d'assurer leur santé et leur bien-être. La rémunération doit évoluer régulièrement en fonction des qualifications, de l'expérience et des diplômes acquis, du niveau des prix et de la productivité du travail.***

6. droit à une protection contre toute forme de discrimination dans l'emploi et la profession. Droit à un salaire égal pour un travail de valeur égale ou équivalent. *[C. 111 et 100 OIT]*

4. ***7.***Tout salarié a droit ~~au~~ ***à un*** repos hebdomadaire et ~~aux~~ ***à des*** congés payés ***d'une durée suffisante***, ***et à une limitation de la durée hebdomadaire du travail*** *[art. 24 DUDH]. (remarque : cette durée devrait être fixée à 35 heures ou à une durée négociée équivalente; le recours à des heures supplémentaires hebdomadaires doit être limité.)*

8. Tout salarié a droit à une protection contre les licenciements arbitraires, discriminatoires ou illégaux.

9. Protection du salaire et des accessoires en cas d'insolvabilité de l'employeur,

10. Protection contre le chômage total ou partiel, droit à un revenu de remplacement ou de complément.

5. ***11.*** Tout travailleur ayant atteint l'âge légal de la retraite a droit à une pension lui permettant, ainsi qu'à ses dépendants, de vivre dignement.

12. Le travail des enfants au-dessous de l'âge minimum légal est interdit.

13. Les adolescents en apprentissage ou au travail bénéficient de protections spécifiques contre les risques pouvant affecter leur santé et leur développement, sur le plan physique et psychique.

DROITS SOCIAUX

Protection sociale et sécurité sociale.

1. Tout travailleur et ses ayants-droit ont droit à une protection sociale adéquate et doivent bénéficier de prestations de sécurité sociale d'un niveau suffisant, notamment par rapport au salaire ; les travailleurs indépendants ont droit à une protection équivalente. *(proposition FERPA)*

2. Protection contre la pauvreté et l'exclusion sociale. Toute personne ne bénéficiant pas d'une source de revenu suffisante a droit à un revenu minimum lui permettant de vivre, ainsi que ses dépendants, de manière digne.

Santé :

1. Toute personne a le droit d'accéder à des services de santé et de bénéficier d'un traitement approprié.

Protection de la maternité :

1. Protection de la femme enceinte et de la mère en congé maternité contre le licenciement,

2. droit à des services de protection maternelle et infantile,

3. droit à des allocations spécifiques,

4. aménagement des conditions de travail (allaitement, horaires de travail, etc.)

Commentaire : notamment prohibition du travail de nuit, des stations debout ou pénible, de l'utilisation de matériaux ou produits nocifs, aménagement des postes de travail).

Conciliation de la vie professionnelle et familiale :

1. accès à des crèches et garderies à un prix abordable, écoles maternelles.

2. congé parental pour élever ou soigner un enfant.

Protection de l'enfance :

1. sécurité, intégrité, développement services sociaux, de santé et d'éducation.

2. allocations familiales et protection économique.

3. protection contre toutes les formes d'exploitation et les mauvais traitements.

(Compléter éventuellement avec le texte de la plate forme ONGs-CES sur les enfants)

Personnes handicapées :

1. droit à des mesures facilitant leur autonomie, leur intégration sociale et professionnelle et leur participation à la vie de la communauté :
- accès à la formation, à des aides et supports techniques, à l'emploi.
- pension, assistance, allocations
- obligation d'embauche.
- aménagement des cadres de vie et de travail, d'enseignement et de formation.

Droit au logement :

1. droit de toute personne à un logement décent pour elle et sa famille à un prix abordable.

2. droit à des aides au logement en cas d'insuffisance de ressources.

Droit à des services d'intérêt général accessibles, qui constituent des moyens essentiels d'effectivité des droits économiques sociaux et culturels, de croissance durable, de cohésion sociale et territoriale; ces services doivent être gérés de manière transparente et démocratique, et s'adapter en permanence aux évolutions des besoins et au progrès social et technologique.

DROITS CULTURELS

1. droit au respect des langues et cultures régionales et à un enseignement dans ces langues.

2. liberté et autonomie culturelles.

3. droit d'accès aux moyens modernes de communication.

4. Mise en œuvre effective des DESC :

La mise en œuvre des droits économiques, sociaux et culturels exige l'adoption de programmes, de politiques, de moyens et de législations destinés à assurer leur effectivité.

Le Conseil et le Parlement devraient établir périodiquement un plan d'action concernant les objectifs à atteindre et les moyens à mettre en œuvre en ce qui concerne les droits à caractère programmatique, et la Commission faire rapport régulièrement sur les évolutions constatées. Les ONGs compétentes représentatives devraient être associées par les institutions à l'élaboration, à la conduite et à l'évaluation de ces plans.

5. Droits évoqués succinctement dans BODY 4 non repris dans CONVENTs 5 et 8 :

Environnement :
- droit à un environnement sain sur les lieux de vie et de travail
- droit d'alerte des salariés en cas de risques industriels majeurs et de risques de pollution.

- Droits des consommateurs :
- droit à l'information sur l'origine, la composition, la méthode de production des biens et des produits (traçabilité, étiquetage), sur la nature et le coût réel des services et du crédit, sur la portée exacte des obligations et prestations en matière de contrats.
- responsabilité des concepteurs, producteurs, fabricants, distributeurs et autres prestataires du fait de produits ou services défectueux.
- sécurité des produits, des biens et des services, garanties contre les vices cachés et les défauts de fabrication, les pannes.
- protection législative et juridique, droit de recours.
- sécurité alimentaire.
- usage du principe de précaution dans les politiques de gestion des risques, en cas de doute sur l'innocuité d'un produit, d'un bien, d'un processus de fabrication et de ses déchets et effluents.

6. Universalité et indivisibilité des droits humains :

Outre leur prise en compte dans l'acquis communautaire, les droits humains doivent aussi être dûment pris en considération dans les politiques extérieures et les relations commerciales internationales de l'Union.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 14 juin 2000

CHARTE 4325/00
COR 1

CONTRIB 191

CORRIGENDUM A LA NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver deux corrections de la contribution soumise par des syndicats français.

Page 4, paragraphe 5, première ligne:

"En aucun cas les droits reconnus dans la Charte ne devraient être inférieurs..."

au lieu de:

"En aucun cas les droits reconnus dans la Charte ne devraient pas être inférieurs..."

Page 10, dernier paragraphe (commentaire), deuxième phrase :

"Le contrat à durée indéterminée constitue la forme générale de la relation d'emploi entre employeurs et travailleurs..."

au lieu de:

"Le contrat à durée déterminée constitue la forme générale de la relation d'emploi entre employeurs et travailleurs..."

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 26 May 2000

CHARTE 4326/00

CONTRIB 192

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution of the "Aktionsgemeinschaft Dienst für den Frieden e.V" (AGDF) with a letter to the Convention regarding the participation in a war on the basis of a decision of conscience. [1]

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[1] This text exists in English language only.

Convention Secretariat
Council Legal Service
175 rue de la Loi
1048 Brüssel
BELGIEN

Bonn, 5.5.2000
uf/rh

Charter of basic rights of the European Union

Dear Madam/Sir,

We have been informed about the ongoing work on the charter of the basic rights of the European Union. By this letter we would like to ask you to incorporate the right to object to participate in a war on the basis of a decision of conscience.

These are the main reasons which we would like to be considered thoroughly:

1. Conscientious objectors symbolize the existence of people - men and women, young and old, working for peace by non-violent means. Such an attitude, based on a decision of consciousness represents a main condition for modern societies to organize their democratic life and to organize the relations to other states and people.

2. Conscientious objectors in the past have contributed considerably, in particular by their voluntary services, to foster the common good by their very strong personal convictions.

3. The right to refuse to kill in a war has been accepted in a series of European countries in basic laws and in laws and has had a good influence in these countries. We would especially quote the German example where the position of COs has been strengthened by the constitution.

Sincerely yours,

(Ulrich Frey)
Director

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 26 mai 2000

CHARTE 4327/00

CONTRIB 193

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution des syndicats français avec propositions des amendements aux dernières rédactions établies par le Présidium. [1]

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[1] Ce texte a été soumis en langue française seulement.

Contribution des syndicats français

CGC, CFTC, CFDT, CGT.
Paris, le 22 mai 2000.

Cette contribution propose des amendements aux dernières rédactions établies par le Presidium. Les syndicats français ayant participé à l'examen des documents soumis à la Convention rappellent d'emblée deux principes essentiels :

- Les droits fondamentaux sont indivisibles et interdépendants.

- La garantie de leur effectivité devra être assurée par leur intégration dans les Traités.

1/ Le document **CONVENT 28** du 5 mai traite de l'ensemble des droits civils et politiques et certains des droits culturels. Certains articles devraient être précisés et renforcés.

Article 19, protection des données; la rédaction actuelle semble incomplète, irréaliste, et n'offre pas de garantie de protection de la vie privée, de l'intégrité, de l'identité et des droits de la personne. Nous suggérons : "toute personne a droit à la protection de ses données à caractère personnel. Elle dispose à leur égard d'un droit d'accès, d'actualisation et de suppression. Ces données ne peuvent être utilisées à des fins autres que la fin licite pour laquelle elles ont été collectées par des organismes habilités ni être conservées au delà du délai strictement nécessaire à l'accomplissement de la fin pour laquelle elles ont été recueillies."

Article 21, droit d'asile et expulsion, devrait concerner toute personne ayant des raisons de craindre les persécutions pour les raisons exposées dans le projet de rédaction ainsi que pour d'autres raisons, qui ne figurent pas dans la Convention de Genève : persécution ou menaces de bandes ou groupes armés terroristes, criminels ou autres; ces personnes devraient bénéficier du droit d'asile dans l'un quelconque des pays membres de l'Union européenne.

La détention arbitraire et les expulsions forcées d'étrangers doivent être interdites.

Concernant le traitement des étrangers, le projet actuel se limite à la prohibition des expulsions collectives; d'autres situations, comme leur rétention arbitraire ou l'expulsion de demandeurs d'asile sans examen de leur demande, ne sont pas couvertes; c'est pourquoi nous proposons une formulation plus large.

Article 22, **égalité et non discrimination** ; nous suggérons d'ajouter "...les opinions et activités politiques, syndicales ou sociales".

2/ Les droits économiques et sociaux et les clauses horizontales (articles 31 à 50) font l'objet d'une nouvelle rédaction **CONVENT 34** (note du présidium, en date du 16 mai 2000).

Article 31. Droits et principes en matière sociale.
Compléter : il manque une clause de non régression.
Exposé des motifs, 5e ligne : "... les partenaires sociaux ... peuvent conclure des accords socio-économiques".

Article 33. Droit à l'information et à la consultation des travailleurs au sein de l'entreprise.
Formulation très restrictive par rapport à CONVENT 18, et qui est inférieure à l'acquis communautaire et aux articles 17 et 18 de la Charte communautaire, qui devraient être cités dans l'exposé des motifs, avec la Charte sociale européenne révisée. Nous proposons : "les travailleurs et leurs représentants ont droit à l'information, à la consultation et à la participation, régulières, effectives, préalables et en temps utile, au travail et à tous les niveaux de l'entreprise, de l'établissement et du groupe, ainsi qu'au niveau national et transnational."

Article 34. Droit de négociation et d'action collective. Remplacer par : "Les employeurs et leurs organisations et les organisations de travailleurs ont le droit de négocier et de conclure des conventions collectives relatives aux conditions de travail et d'emploi, aux rémunérations et aux garanties collectives. Les salariés ont le droit d'agir collectivement et solidairement à tous les niveaux pour la défense et la promotion de leurs intérêts matériels et moraux, y compris de recourir à la grève.".

Article 35. Droit au repos et au congé annuel.
L'exposé des motifs devrait se référer plus impérativement à l'article 2 de la Charte sociale révisée.

Article 36. Santé et sécurité dans le travail. Il convient d'ajouter l'hygiène, et de prévoir une participation des représentants des travailleurs conformément à l'article 19.2 de la Charte communautaire et à l'article 3 de la Charte sociale révisée.
Ajouter également : "les accidents du travail et maladies professionnelles ouvrent droit à des prestations sociales et indemnités".

Article 37. Protection des jeunes..
Revenir à la rédaction de CONVENT 18.
En tout état de cause, supprimer la fin du paragraphe 1 "et sauf dérogations ... légers".
Reformuler le 2e paragraphe comme celui de CONVENT 18 : "Les jeunes en dessous de 18 ans doivent bénéficier de conditions de travail adaptées à leur âge et être protégés contre tout travail susceptible de nuire à leur sécurité, à leur santé ou à leur développement physique, psychologique, moral ou social ou de compromettre leur éducation".

Article 38. Droit à la protection en cas de licenciement.
Reformuler : "tout travailleur a droit à une protection contre tout licenciement injustifié, abusif, discriminatoire ou illégal."
Le cas du licenciement collectif économique n'est pas traité, (voir directive) non plus que le droit au préavis et à indemnités de licenciement et réparation des préjudices.

Article 39. Droit de concilier vie familiale et vie professionnelle. Le congé de maternité doit être payé. Formuler la 2e phrase autrement : "Ce droit comprend une protection spéciale de la maternité et le droit à un congé de maternité payé ...etc.).

Article 40. Droit des travailleurs migrants à l'égalité de traitement.
Changer le titre : "**Droit des travailleurs ressortissants des pays tiers à l'égalité de traitement**".
L'égalité de traitement des travailleurs ressortissants de pays tiers ne peut se limiter aux conditions de travail. Elle doit concerner aussi notamment les droits à rémunération et à pension, la protection sociale, la santé, le logement, la formation, etc.

Article 41. Sécurité sociale et aide sociale. Rajouter "... de handicap...".

Article 43. Personnes handicapées. Remplacer par :
"Toute personne handicapée, quels que soient l'origine et la nature de son handicap, a le droit de bénéficier de mesures concrètes visant à favoriser son intégration sociale et professionnelle".

Questions manquantes:
- droit à l'orientation professionnelle et à la formation tout au long de la vie,
- droit à une rémunération équitable et égale pour un travail de valeur égale,
- droit au travail et droit d'accès à un service public gratuit de placement,
- droit d'accès pour tous aux services d'intérêt général, qui constituent un moyen puissant d'assurer l'effectivité de nombreux droits fondamentaux à caractère social.
- droit à la retraite et à une pension de retraite,
- absence de clause de non régression en matière sociale.

Nous espérons que ces questions feront l'objet d'une inclusion dans la version finale.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 26 May 2000

CHARTE 4328/00

CONTRIB 194

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the intervention by Mr. James Wilson, Bass Hotels & Resorts (Bass PLC), presented at the hearing on 27 April 2000. [1] [2]

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[1] This text exists in English language only.

[2] Bass PLC: 101 rue Neerveld, B-1200 Brussels.

Charter on Fundamental Rights: Public Hearing 27 April
European Parliament, Brussels
Intervention by James Wilson, Bass PLC

I restrict my views to the potential impact of the Charter on multinational business and employment. Why should business have a voice in this debate? Because we represent the interests of our shareholders, our employees, our suppliers, our customers and all of the stakeholders in wider society who share the fruits of our endeavours and the benefits of the employment which we create. It is only business that can deliver anything remotely close to an aspiration towards full employment through sheer enterprise, innovation and growth.

The charter should concentrate on civil and political rights

i) We support the broad objective of seeking to protect citizens' rights against the abuse of power by the EU institutions or by national governments in implementing EU policies. We consider that this can best be delivered by concentrating on fundamental political rights and civil liberties. For business, it is essential that the Charter has as a core objective the preservation of a strong competitive environment for innovation and enterprise. Business is global and becoming increasingly more so as the 'new economy' changes the way companies and consumers interact. For the EU to maintain its relative competitive position in the world it must provide the environment in which business can innovate and flourish. This means the preservation of five basic freedoms. Firstly, freedom of thought and stemming directly from that freedom of expression; freedom of enterprise; freedom to trade; freedom to own property and the freedom of establishment. These five freedoms are fundamental to the ability of business to generate the sustainable employment essential for a prosperous society.

The Charter should be declaratory and non-binding

ii) We support the idea of a declaratory Charter, with no legally binding effect. The Charter should be clear and simple for maximum public impact and should set out clearly the fundamental rights that are currently recognised by the EU. This is the best way to add value to existing rights, instruments and systems, without prejudice to legal certainty. We consider that a legally binding Charter, effectively transferring jurisdiction over core fundamental rights from the Human Rights Court at Strasbourg and national courts to the ECJ, would undermine the existing rights system and create legal uncertainty. Such a scenario would be potentially detrimental to EU business, by imposing high litigation costs, damaging restrictions on enterprise and encouraging investment to move offshore to the detriment of EU jobs.

The Charter should not record policy aspirations

iii) The Charter should not seek to record policy aspirations. The application of the Charter should be limited to the EU's Institutions within the framework of the powers and responsibilities assigned to them by the Treaties. The obligation to respect fundamental rights should be a constraint on the Community's action and not a licence to legislate. The Charter should respect present competences of the EU and should not extend existing powers.

The Charter should not deal with aspirational social rights

iv) The Charter must not restrict enterprise. The scope of the Charter should be to deal only with fundamental issues relating to civil, political and cultural rights, the preservation of peace and a clearly stated determination never to resolve conflict by war. It is not the correct constitutional instrument to deal with questions of social rights, which necessarily require full assessment of their economic impact and a democratic analytical debate. The social and employment chapters of the Treaties have already set out the powers of the Union to act on a European level. Any proposals to change these provisions must be dealt with specifically at the level of inter-governmental debate. It is essential to the economic well-being of society that social rights should only be dealt with through the legislative and budgetary process laid down by the Treaties, because:-

a) Social rights involve costs. The normal democratic legislative and budgetary process is required to determine what these costs are, to assess what the impact will be on job creation and the economy, to calculate how much money is involved, balance this against the desired impact on society, and then decide on the basis of this cost benefit analysis whether society can afford to pay and, if so, how to distribute the tax burden. If you attempt to short cut this process you will strangle enterprise and kill the goose that lays the golden eggs.

b) Society can only afford social rights if business flourishes, and creates the wealth necessary to generate sufficient tax revenues to underwrite the cost. The discipline necessary to conduct a thorough financial analysis of any new proposals cannot be circumvented. Anyone seeking to restrict business by stealth through the creation of putative social rights without having considered the cost-burden and full economic impact, would sound suspiciously like the first-time home-buyer who discusses with their interior designers the colour of the bed-room carpet for the new penthouse apartment, before they have checked with the builder that they can afford to pay for the foundations of the building.

If it ain't broke don't fix it

Business respects the communities in which it operates. The shared values of our society, (namely: democracy, tolerance, respect for the individual and liberty) have developed historically, under the strong influence of religious ethics. This ethical heritage has shaped modern European society, its culture and its laws. If we attempt to enshrine these common values in a non-secular Charter, there must be respect for the diversity of Europe and its minorities, and we must also consult the applicant states for membership. We must also ensure that the charter is robust enough to cope with the impact of future enlargements – which may encompass states with very different values from the ethical model with which we are familiar. In an increasingly global society, the rights and responsibilities embodied in the Charter should be attractive and acceptable to our trading partners and avoid the tendency to be inward looking within the EU. We must remind ourselves that the ethical model which has developed in Europe over time is one which has enabled enterprise to create prosperity for our society, and which has enabled this debate to take place. It would be irresponsible to destroy such a hard won advantage by unwittingly incorporating into this Charter obstacles which might prove to be disincentives to investment in EU enterprise and employment.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 30 May 2000

CHARTE 4329/00

CONTRIB 195

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union
Contribution submitted by the European Council on Refugees and Exiles (ECRE) on the right to asylum

Please find hereafter a contribution with comments by the European Council on Refugees and Exiles (ECRE) on the right to asylum. [1]

[1] This text exists has been submitted in English language only.

ECRE

EUROPEAN COUNCIL
ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES

COMMENTS
BY THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) ON THE RIGHT TO ASYLUM IN THE DRAFT CHARTER ON FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

1. At Tampere, the European Council established a body to draw up the Charter of Fundamental Rights of the European Union, first mentioned at the Cologne European Council. [1] This body (the Convention) will be meeting on 5 and 6 June 2000 to discuss a draft text[2] of the Charter, in particular the articles relating to Civil and political rights and citizens' rights, including article 21, which posits a right to asylum.

2. ECRE welcomes the inclusion of a right to asylum in the Charter of Fundamental rights of the European Union. The draft text however refers to asylum for third country nationals only.

3. ECRE recalls that at the Tampere European Council the EU Member States promised "an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments". [3] ECRE would argue that the EU Charter must accord with the Tampere European Council conclusions and reminds the Convention of the commitments made as to a Common European Asylum System. The Presidency Conclusions stated:

   "The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.[4]"

4. ECRE is deeply concerned that the restriction of the proposed right to asylum to nationals of third countries is a violation of the 1951 Convention relating to the Status of Refugees (the Refugee Convention) and the 1967 Protocol (the Protocol).

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1 See page 65, ECRE Tampere Dossier: the Presidency Conclusions, Tampere European Council, 15-16/10/99.
2 Charte 4284/00-Convent 28
3 Id 1 - page 66 - Para.4
4 Id 1 - page 68 - Para.13

5. ECRE reminds the Convention that by signing the Refugee Convention and the Protocol all Member States of the EU have adopted a refugee definition without any limitations as to country of origin. [5] Limitation of the Refugee Convention's application on grounds of national origin is inconsistent with Article 3 of the Refugee Convention.

6. The current draft introduces, in effect, a geographical reservation to the application of the Refugee Convention. This is incompatible with the Protocol and is prohibited by Article 42 of the Convention, which does not allow reservations to certain provisions, including Articles 1, 3 and 33.

7. ECRE welcomes the importance attached in the proposed draft to the Refugee Convention and Protocol. However, the principle of non-*refoulement*, as a norm of customary international law, is wider than the Refugee Convention. ECRE therefore welcomes the draft text of article 4 on prohibition of torture and inhuman treatment.

8. ECRE however wishes to stress that the prohibition of refoulement encompasses prohibition of indirect as well as of direct refoulement, and that the principle of non-refoulement applies to persons within the States's territory as well as to persons seeking admission at the border.

9. ECRE would therefore like to see an express provision in the Article on absolute respect for the principle of non-*refoulement*, as provided, *inter alia*, in Article 3 of the UN Convention against torture and Article 3 of the European Convention on Human Rights.

10. ECRE therefore proposes the following as the text of the right to asylum in the Charter of Fundamental Rights of the European Union :

"1. Everyone has the right to asylum in the European Union, consistent with the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other international human rights instruments for the protection of refugees

2. No Member State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."

May 2000

[5] The geographical and temporal restrictions in Article 1B(1) of the Refugee Convention can be lifted by a declaration under Article 1B(2) and accession to the 1967 Protocol: all EU States have acceded to the Protocol and have lifted geographical restrictions on application of the Refugee Convention.

For further information contact the European Council on Refugees and Exiles (ECRE) at:

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 30 May 2000

CHARTE 4331/00

CONTRIB 197

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the comments from Amnesty International - EU Association, to the proposed draft articles 1-30, civil and political rights contained in the document CHARTE 4284/00. [1]

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[1] This text exists in English language only.

AMNESTY INTERNATIONAL

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Comments by Amnesty International on the new proposal on civil and political rights in the Draft European Charter of Fundamental Rights (Charter 4284/00 of 5 May 2000)

Amnesty International takes note of the new proposal on civil and political rights in the draft European Charter of Fundamental Rights, issued on 5 May 2000.

While Amnesty International welcomes the improvements made in the new text, the organisation remains concerned that the text does not use gender neutral language and some of the draft articles in their current form still do not reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation.

In April 2000, Amnesty International submitted a position paper on the draft European Charter which analyses the issues raised by the adoption of the European Charter as well as the draft articles in their then current form, and advances recommendations with a view to insuring that the Charter would constitute a real improvement in the human rights protection currently afforded by the EU.

In the light of the foreseen amendments to the draft articles, Amnesty International calls the attention of Convention members to its position on the European Charter as set out in the document Charter 4290/00 and calls on them to ensure that the wording of the Charter reflects the highest level of protection of fundamental human rights.

The organisation urges that its recommendations as set out in Amnesty Internationals document on the Charter in respect of the following draft articles be taken up:
Article 9: Presumption of innocence and rights of defence, Article 11: Right not to be tried or punished twice, Article 14: Freedom of thought, conscience and religion, Article 15: Freedom of expression and Article 17: Freedom of assembly and association.

In addition, Amnesty International urges that the following be noted in relation to the current wording proposed for the following draft articles:

Article 1. Dignity of the human person

Amnesty International urges that this article include the right of everyone, without discrimination, to equal protection of law and equality before the courts, in accordance with Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights (ICCPR).

Article 2. Right to life

Amnesty International urges that this article also

1. set out the principle that the right to life shall be protected by law as well as the prohibition that no one shall be arbitrarily deprived of life, which are enshrined in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and Article 6 of the ICCPR

2. ensure that the prohibition of the death penalty:
- Sets out in full article 1 of Protocol 6 to the European Convention "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."
- Refers to the abolition of the death penalty as does Article 1 of the Second Optional Protocol to the ICCPR
- Includes a prohibition of enacting or retaining any law which provide for the death penalty as a possible punishment and the prohibition on any authority to apply the death penalty.

Article 4. Prohibition of torture and inhuman treatment

In order to fully reflect the prohibition as enshrined in Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR Amnesty International urges that this article should also include the prohibition of cruel treatment and punishment.

Amnesty International also urges that the second sentence of Article 4 should read as follows: “no one shall be expelled or extradited to a State where they would be at risk of being subjected to the death penalty or to other serious human rights violations, such as extrajudicial executions, torture, “disappearance”, or other cruel, inhuman or degrading treatment or punishment, or unfair trial”.

Article 6: Right to liberty and security

Amnesty International continues to urge that this article reflect the guarantees recognised in evolving international human rights standards and ensure that the right is non-derogable and includes at least the following safeguards:

- the right to be promptly informed of one’s rights, including the right to counsel and the right to lodge complaints about one’s treatment
- the right to be brought promptly before a judicial authority after being deprived of one’s liberty
- the right to prompt access to a lawyer and to family or friends

- the right to have a lawyer present during questioning
- the right to challenge the lawfulness of detention
- the principles that it should not be the general rule that people are detained prior to trial and that for juveniles, detention should only be used as a measure of last resort and for the shortest appropriate time, enshrined in Article 9(3) of the ICCPR and Article 37(b) of the Convention on the Rights of the Child, respectively.
- the right to trial within a reasonable time or release from detention

Article 8: Right to a fair trial

Amnesty International urges that the provision setting out the right to legal aid state clearly that at a minimum this right pertains where the interests of justice so require and without payment if the person lacks sufficient means to pay, as set out in Article 14(3)(d) of the ICCPR.

Article 21. Right to asylum

This article should recognise the right of every person without discrimination to asylum. It should also include a reference to other human rights instruments. Such formulation would be in line with the obligations of Member States under international and EC/EU law.

Amnesty International asks for an express provision on the guarantees that assist individuals in expulsion, extradition, or any other form of forced removal procedures that they may be subjected to in accordance with due process of law. Such provision would be in line with Article 32 of the UN Refugee Convention and Article 13 of the International Covenant on Civil and Political Rights (to which all member states are parties) and with the case-law of international monitoring mechanisms, such as the European Court of Human Rights, the Human Rights Committee or the Committee against Torture

Article 22. Equality and non-discrimination

In order to ensure that the prohibition of discrimination in Article 22(1) is at least as protective as Article 26 of the ICCPR the following must be added as prohibited bases of discrimination: national origin, other opinion (inserted after belief); or other status (inserted after birth).

Article 23: Children's rights

In addition to setting out the right of children to be treated as equal individuals and to influence matters pertaining to them (which should include the opportunity to be heard in any proceedings affecting them) Amnesty International believes that this provision should set out the other guiding principles for the treatment of children enshrined in the Convention on the Rights of the Child and other international human rights standards. These principles include among others the duty to

ensure that the best interests of the child are a primary consideration in all actions concerning children including those undertaken by court, administrative or legislative bodies and the duty ensure the right of each child to the protection by family state and society as required. See also Chapter 27.3 of Amnesty International's *Fair Trial Manual*.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 5 juin 2000

CHARTE 4334/00

CONTRIB 198

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de "European Forum for the Arts and Heritage (EFAH)" avec un texte sur les droits et libertés culturelles fondamentales. [1] [2]

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[1] Ce texte a été soumis en langue française seulement.

[2] EFAH: 18, rue de Suisse, 1060 Bruxelles. Tél.: +32-2-534 1150. Fax.: +32-2-537 4910. E-mail: info@efah-feap.org

Les droits et libertés culturelles fondamentales

Proposition

Article X

Toute personne, aussi bien seule qu'en commun a droit:

a. de choisir et de voir respecter son identité culturelle, dans la diversité de ses modes d'expression;

b. de connaître et de voir respecter sa propre culture ainsi que les cultures qui, dans leurs diversités, contribuent au patrimoine commun de l'Europe et de l'humanité;

c. d'accéder aux patrimoines culturels qui constituent des manifestations et expressions significatives des différentes cultures.

d. de participer librement, sans considération de frontières, à la vie culturelle à travers les activités de son choix.

Ce droit ne peut s'exercer que dans le respect de l'ensemble des libertés et droits fondamentaux.

Exposé des motifs

1. L'identité culturelle est *propre* au sujet; elle est une expression de sa dignité. Son non-respect est une violation de l'intégrité de la personne humaine (cf. art. 1 et 3 du Projet de Charte), et rend impossible l'exercice effectif d'autres droits de l'homme.

2. La diversité culturelle des pays membres de l'Union constitue son patrimoine et sa richesse, pour autant que cette diversité soit vécue comme interactive dans le respect mutuel. Il s'agit d'un principe général d'identité de l'Union (cf. art.2, al, 2 du Traité de l'UE) qu'il convient de rappeler, ainsi que d'un ensemble de droits individuels.

3. Ce principe fondateur et les droits individuels qui lui correspondent est particulièrement pertinent dans le projet de charte, parce que:

- les guerres en Europe centrale montrent que la sécurité démocratique passe toujours par le respect des identités individuelles et collectives et par la promotion de l'interculturalité;

- la globalisation des marchés économiques met en danger les identités européennes, collectives et individuelles, dans les différents aspects de la vie quotidienne comme dans la production scientifique, artistique et industrielle.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 30 juin 2000

CHARTE 4334/1/00 REV 1

CONTRIB 198

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une version révisée de la contribution de "European Forum for the Arts and Heritage (EFAH)" avec l'article modifié concernant les droits et libertés culturelles fondamentales. [1]

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[1] Ce texte a été soumis en langue française seulement.

Les droits et libertés culturelles fondamentales

Proposition

Article …

Toute personne a droit:

a. de choisir et de voir respecter son identité culturelle;

b. de connaître et de voir respecter sa propre culture ainsi que les cultures qui, dans leurs diversités, contribuent au patrimoine commun de l'Europe et de l'humanité;

c. de participer librement, sans considération de frontières, à la vie culturelle à travers les activités de son choix.

Exposé des motifs

En l'état actuel le Projet de Charte ne contient aucune disposition relative aux droits culturels pourtant reconnus dans les instruments relatifs aux droits de l'homme, notamment à travers le droit de participer à la vie culturelle (Déclaration universelle, a.27; Pacte international relatif aux droits économiques, sociaux et culturels, a. 15; Convention culturelle européenne). Plusieurs raisons peuvent être invoquées pour inscrire en bonne place ces droits dans le Projet de Charte.

1. **Le principe général**. La diversité culturelle des pays membres de l'Union constitue son patrimoine et sa richesse.. L'article 151, §.1 (ex-article 128) du Traité instituant la Communauté européenne stipule que "La Communauté contribue à l'épanouissement des cultures des Etats membres dans le respect de leur diversité nationale et régionale, tout en mettant en évidence l'héritage culturel commun". L'ensemble de l'article pourrait être intégralement repris.
2. **Le principe des droits individuels.** L'identité culturelle fait partie de l'intégrité de la personne. Son non-respect est une violation de cette intégrité (cf. art. 1 et 3 du Projet de Charte), rendant impossible l'exercice effectif d'autres droits de l'homme.
3. **Les limitations.** Il n'y a pas de risque de débordement puisque ces droits et libertés ne peuvent s'exercer que dans le respect de l'ensemble des libertés et droits fondamentaux, selon les dispositions générales du Projet de Charte.

Commentaire

4. **Un choix entre deux options.** L'option minimale consiste à rappeler ce principe du respect de la diversité culturelle. Cependant la proposition faite ici est plus exigeante, puisqu'il s'agit de reconnaître des droits individuels correspondants.
5. **Quant au fond et à l'opportunité.** Il est particulièrement pertinent et opportun d'insérer dans la Charte ce principe fondateur et les droits individuels qui lui correspondent, notamment parce que:
   - les crises dans le Sud-est de Europe on rappelé que la *sécurité démocratique* passe par le respect des identités individuelles et collectives et par la promotion de l'interculturalité;
   - la globalisation des marchés économiques met en danger les identités européennes, collectives et individuelles, dans les différents aspects de la vie quotidienne comme dans la production scientifique, artistique et industrielle.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 5 mai 2000

CHARTE 4335/00

CONTRIB 199

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de la Force Ouvrière avec observations sur le projet de Charte des droits fondamentaux de l'Union européenne. [1] [2]

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[1] Ce texte a été soumis en langue française seulement.

[2] Force Ouvirère: 141 Avenue du Maine, 75014 PARIS, FRANCE
rvalladon@force-ouvriere.fr

FORCE OUVRIERE
141 avenue du Maine
75014 Paris

Observations de Force Ouvrière à destination du Conseil

Confédération syndicale nationale française

Sur le projet de Charte des droits fondamentaux de l'Union européenne

Vers :
fundamental.rights@consilium.eu.int

Paris, le 22 mai 2000

Rien de ce qui concerne les droits fondamentaux ne peut être étranger à notre organisation qui a toujours milité pour les droits de l'Homme et pour la dignité des femmes et des hommes au travail.

Inhérents à l'individu, droits civils et politiques, et droits économiques, sociaux et culturels sont, dans cette conception, indissociables, car comment exercer son droit à la dignité quand on n'a pas de travail, pas de logement, pas de ressources, ou pas d'accès au soins de santé par impossibilité d'en assumer le coût, que ce soit dans la période active ou dans les moments d'inactivité dus au chômage, au handicap, à l'âge ?

C'est pour ces raisons que Force Ouvrière, sans confondre les rôles, et sans se prendre pour le « constituant » qu'elle n'est ni ne veut être, s'estime concernée par le projet d'élaboration d'une charte des droits fondamentaux de l'Union européenne et souhaite vous faire part de ses observations sur la rédaction de ce projet tel qu'il est connu à ce jour.

Marc Blondel

Secrétaire général
De Force Ouvrière.

OBSERVATIONS
DE FORCE OUVRIERE

A la date du 22 Mai 2000

SUR LE PROJET DE CHARTE DES DROITS FONDAMENTAUX DANS L'UNION

EUROPENNE

COMMENTAIRES SUR TEXTE « SN 2158/00 » du 23 MARS

ET TEXTE CONVENT 18 « SN 4192/00 »

SUR LE TEXTE « SN1998 /1/00 »Articles A à K

ET SUR LE TEXTE CONVENT.8 « CHARTE 4137/00 »

ET SUR LES TEXTES CONVENT 26 ET CONVENT 27.

Observations d'ordre général

Sur la forme définitive que prendra la charte :

1) La présentation « en éventail » qui est celle de la Charte Sociale Européenne nous paraît efficace :

la première partie y énonce de façon ramassée et percutante les droits , la deuxième partie en précise le contenu, les autres parties les circonstancient.

Néanmoins, sa nature de traité international lui impose des ratifications parlementaires dont la méthode à la carte très compliquée n'est heureusement pas transposable en droit communautaire.

Nous serions favorables à une telle présentation de la charte européenne des droits fondamentaux, en raison de la grande lisibilité que cela donne au texte, en raison du côté opérationnel que cela donne au texte.

Mais attention : dans le projet de la convention, nous pouvons observer que certains exposés des motifs viennent amoindrir les droits énoncés. Il ne faudrait pas, dans l'hypothèse d'un tel choix que la partie II précisant juridiquement les conditions de la pratique des droits, ne viennent amoindrir juridiquement les droits.

Il nous paraît indispensable de faire figurer dans le corps même de l'énoncé de chaque droit les articles des textes internationaux auxquels les rattachent les exposés des motifs ; il y aurait ainsi plus de clarté sur la portée des droits et moins de risques dans le cas où ce que nous appelons une clause d'amélioration ne serait pas retenue.

2) Pour ce qui concerne les droits économiques et sociaux, le texte doit placer en premier les droits basiques avant d'énoncer les droits dédiés aux conditions de travail.

Nous voulons que soient distingués le titulaire et l'exercice de ces droits. En effet le titulaire de ces droits est l'individu et doit le rester, même si l'exercice des droits est souvent collectif, ainsi le droit de grève est-il un droit individuel.

Pour l'ensemble de ces droits, il est important que l'Union travaille en complémentarité avec les organismes internationaux de normalisation et non en concurrence, afin d'éviter tant le recul des situations conquises par les travailleurs dans les pays membres, que le désintérêt qui pourrait atteindre le travail de ces institutions. La mondialisation des échanges et ses conséquences rendent leur action encore plus nécessaire que par le passé.

Il est indispensable de ne rien écrire dans la charte qui, en matière de droits économiques et sociaux, et particulièrement syndicaux n'ait été passé au crible des conventions de l'OIT.

Il existe un pont juridique possible entre la future charte et la Charte de Turin, très peu utilisé par les rédacteurs dans les projets qui nous ont été soumis jusqu'à présent alors qu'en matière des droits civils et politiques l'usage en est large (Art.136 1°al Traité CE). Cependant, la Charte de 1961 couvre un champ moins large que les conventions de l'OIT qui sont connues de tous les Etats membres .

Nous souhaitons donc que soient prises notamment en considération les conventions OIT n° 87, 135, 98, 151, 154, 14, 132, 140.

Sur le champ d'application :

Une charte pour qui ?

1) Pour tout résident sur le territoire européen, et pour les citoyens européens.

2) Pour des titulaires individuels de droits qui peuvent s'exercer, s'organiser et se gérer aussi collectivement.

Une charte pour quels droits ?

1) Pour des droits de l'Homme, droits civils, politiques, économiques et sociaux inhérents à l'individu, et à ce titre indissociables.

2) Pour des « droits », et non pour des « objectifs ».

3) Pour des droits universels, et non subsidiaires et subordonnés à des circonstances, ou à des zones, susceptibles de les rendre variables en nombre, en nature, en durée, en intensité (pas de possibilité d'y déroger, même partiellement).

4) Une charte pour faire mieux, et non une charte subsidiaire réduite à une « clause sociale »européenne.

5) Pour des droits justiciables (avec sanctions en cas de non respect).

6) Pour des droits transfrontaliers.

Une charte pour quelle utilisation ?

Pour des droits directement évocables par leurs titulaires ou leurs représentants désignés.

Une charte avec quelle force ?

Avec celle du droit communautaire par inscription des droits dans les traités en passant au crible les droits qui y figurent déjà pour ne garder que la rédaction la plus favorable aux intéressés.

Sur l'inclusion des droits dans les traités

Nous considérons qu'une déclaration politique solennelle ne répondrait pas aux besoins et objectifs fixés par le Conseil de Cologne et le processus de Tampere. Une charte des droits fondamentaux doit rassembler tout ce qui fait l'identité et la grandeur européenne et affirmer qu'une autre Europe communautaire existe bien à côté de celle des banquiers, et lui donner de la consistance.

Déjà l'article 7 du traité UE renvoyait à un système de valeurs essentielles, bien qu'elles n'y aient pas été précisées.

Commencée avec l'inclusion du pilier JAI dans le premier pilier et sa mise en ouvre sur un programme en deux étapes de deux et trois ans, la clarification se poursuit avec la charte en préparation.

Sans l'inclusion des droits reconnus par la charte dans le traité, les actes et décisions des organes communautaires ne seraient soumis à aucun contrôle international de légalité en matière de droits de l'Homme. La CJCE n'apprécie en effet que de la conformité des actes aux dispositions des traités. Il y aurait donc persistance d'un vide juridique.

Champ géographique d'application :

Tous les droits doivent être applicables en tous points du territoire de l'Union, sans que puisse être tolérée quelque dérogation géographique ou temporaire que ce soit. Il nous paraît important que cela soit spécifié au moins dans un considérant du préambule de la charte.

Pour la France, il existe encore en effet des disparités d'application de certains droits sociaux entre la métropole et certaines zones ultra-périphériques.

Nous proposons donc la rédaction d'un considérant tel qu'il suit :

« Tous les droits figurant à la Charte européenne des droits fondamentaux sont applicables sans possibilité d'y déroger en tous points du territoire communautaire ».

Sur les articles A à K concernant les citoyens et les non-citoyens :

Service public et services publics:

Pas de droits sans « bonne gouvernance », notion qui va plus loin que la « bonne administration » car elle garantit l'exercice des droits, et en premier lieu les droits à la vie, à la dignité, à l'intégrité physique, par l'organisation collective d'une fonction publique qualifiée, neutre et indépendante, et des services publics offrant à tous continuité, égalité d'accès et tarifs péréqués.

La charte doit absolument formaliser cette notion déjà acceptée par les Quinze à l'article 16 du traité d'Amsterdam, sans qu'ils en aient encore tiré tous les effets.

Nous ne méconnaissons pas la difficulté qu'il peut y avoir pour une structure comme l'Union à se doter clairement de tels principes, car comme l'énonçait la Déclaration des droits de l'Homme et du citoyen de 1789, « toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de constitution », garantie, qui bien sûr, requiert une force publique (cf. encore Déclaration des droits de l'Homme et des citoyens de 1789, art. 12, 13, 14, 15, 16). Or l'Union n'a en effet pas de constitution, pas de force publique et donc pas de vocation à prendre en charge l' « intérêt général ».

PROJET D'ARTICLES SUR LES DROITS DES CITOYENS

La synthèse de l'existant que propose la rédaction actuelle du projet de charte sur les droits du citoyen nous paraît intéressante pour la lisibilité qu'elle peut apporter au citoyen.

Par ailleurs les articles 6 et 7 du TUE font désormais obligation à l'Union de définir les valeurs dans lesquelles elle se reconnaît, et de donner forme au « modèle social européen ».

Quelques remarques :

CONCERNANT LES DROITS DES CITOYENS :

Articles A à K. Document SN/1998/1/00 du 15 mars 2000

PROJET DE LA CONVENTION :

Article A: Principe de démocratie

« 1) Toute autorité publique émane du peuple.

« 2) L'Union et ses institutions se fondent sur les principes de liberté, de la démocratie, du respect des droits de l'Homme et de l'Etat de droit, principes qui sont communs aux Etats membres. «3) Les représentants au parlement européen des peuples des Etats réunis dans la Communauté[l'Union] sont élus au suffrage universel direct ».

Observations :

Le principe de démocratie étant pour l'Europe le principe des principes, il serait opportun de distinguer l'essence et l'existence de la démocratie.

En effet, les alinea 1 et 3 qui font exister la démocratie dans l'Union sont de même nature, et appartiennent aux citoyens, quand l'alinea 2, qui rappelle l'essence même de la démocratie (liberté, respect des droits de l'homme, Etat de droit), concerne tous les résidents des Etats de l'Union.

PROJET DE LA CONVENTION

Article B; Partis politiques:

"Tout citoyen de l'Union a le droit de fonder avec d'autres des partis politiques et des s'y affilier. Les partis politiques au niveau européen contribuent à la formation d'une conscience européenne et à l'expression de la volonté politique des citoyens de l'Union".

Article C: Droit de participer aux élections européennes;

"Tout citoyen de l'Union résidant dans un Etat membre dont il n'est pas le ressortissant a le droit de vote et d'éligibilité aux élections au Parlement européen dans l'Etat membre où il réside dans les mêmes conditions que les ressortissants de cet Etat. Ce droit s'exerce selon les modalités prévues par le traité instituant la Communauté européenne".

Article D: Droit de participer aux élections municipales.

"Tout citoyen résidant dans un Etat membre dont il n'est pas le ressortissant a le droit de vote et d'éligibilité aux élections municipales dans l'Etat membre où il réside dans les mêmes conditions que les ressortissants de cet Etat. Ce droit s'exerce selon les modalités prévues par le traité instituant la Communauté européenne".

Il convient de vérifier le libellé de cet article qui tel quel change considérablement la portée de l'article 19§1 du traité.

En effet, le traité vise "tout citoyen de l'Union", alors que la version SN/ 1998/1/00 du 15 mars 2000 mentionne le droit de participer aux élections municipales pour "tout citoyen".

Article E: Droit à une bonne administration;

1) "Tout citoyen de l'Union et toute personne résidant dans un Etat membre a le droit de voir ses affaires traitées convenablement, équitablement et dans un délai raisonnable par les institutions et organes de l'Union.

2) Ce droit comporte notamment:

n le droit de toute personne d'être entendue avant qu' une mesure individuelle qui l'affecterait personnellement soit prise à son encontre

n le droit d'accès de toute personne au dossier pour autant que cet accès soit nécessaire pour qu'elle puisse faire valoir ses arguments et dans le respect des intérêts légitimes de la confidentialité de ses affaires

n l'obligation pou l'administration d'examiner avec soin tous les aspects pertinents de l'affaire

n l'obligation pour l'administration de motiver ses décisions.

3) Tout citoyen peut s'adresser aux institutions et organes de l'Union dans une des langues officielles de l'Union et doit recevoir une réponse dans cette langue".

Article F: Droit d'accès aux documents:

Rédaction de l'Article 14 du texte Convent.8 sous la dénomination droit d'accès aux informations:

"Tout citoyen de l'Union ou toute personne résidant dans l'Union a un droit d'accès aux documents des institutions européennes. Ce droit s'exerce dans les conditions prévues par l'article 255 du traité instituant la Communauté européenne".

Nous proposons pour cet article l'amendement suivant:

"Tout citoyen de l'Union, toute personne physique intéressée, et toute personne morale intéressée ayant son siège dans un Etat membre, a un droit d'accès aux documents des institutions de l'Union européenne....(le reste sans changement)"

L'exposé des motifs évoque une référence à l'article 255 du traité. Or ce dernier accorde ce droit aux personnes morales. Pourquoi faire moins? S'il ne s'agit que d'une question de mise en forme de la charte, laquelle dans ce chapitre a tenté de regrouper les droits des "citoyens", le droit d'accès aux documents pour les personnes morales doit être inscrit ailleurs et être éventuellement réservé aux personnes morales assistant les citoyens agissant pour recouvrer la jouissance de leurs droits fondamentaux bafoués.

A l'époque du développement du dialogue avec la "société civile", cela maintiendrait de la cohérence avec la réalité de la vie des citoyens.

Par ailleurs, la condition de résidence exigée interdit à des personnes extérieures à l'Union mais concernées par son action actuelle ou future (au titre d'accords d'association ou de procédure d'adhésion par exemple) de pendre connaissance d'actes les concernant. C'est la raison pour laquelle nous ajoutons l'adjectif "intéressée".

Article G : Accès au médiateur:

"Tout citoyen de l'Union et toute personne résidant sur le territoire d'un Etat membre a le droit de saisir le médiateur de l'Union des cas de mauvaise administration des institutions et organes communautaires, à l'exception de la Cour de Justice et du Tribnal de Première Instance dans l'exercice de leurs fonctions juridictionnelles. Ce droit s'exerce dans les conditions définies par le traité instituant la Communauté européenne et les dispositions prises pour son application".

Article H: Droit de pétition:

"Tout citoyen de l'Union et toute personne résidant sur le territoire d'un Etat membre a le droit de pétition devant le Parlement européen dans les conditions définies par l e traité instituant la Communauté européenne".

Article I: Liberté de mouvement:

"Tout citoyen a le droit de circuler et de séjourner librement sur le territoire des Etats membres selon les limitations et conditions définies par le traité instituant la Communauté européenne".

Article J: Liberté professionnelle:

[Sans préjudice des règles du traité relatives à la libre circulation des personnes,] toute personne a le droit de choisir librement et d'exercer librement sa profession et ses activités commerciales".

Article repris à l'article 2 du texte Convent 18 du 27 mars 2000 qui énonce les droits sociaux. Voir nos commentaires sous cet article.

Article K: Non-discrimination:

" Toute discrimination fondée sur la nationalité est interdite entre les citoyens de l'Union".

De la citoyenneté européenne et de son usage:

Les articles B,C,D,I, ne s'appliquent qu'aux citoyens, alors que les articles E, relatif à une bonne administration, et F, G,H,J,K, ne peuvent que concerner toute personne sous peine de faillir au respect des valeurs de la démocratie.

Les articles I et J, par l'application de la convention de Schengen, ont déjà une portée générale à l'égard des résidents en situation estimée régulière par les autorités du territoire de leur point d' entrée dans la Communauté.

Procéder à une classification des droits du «citoyen » européen dans la vie politique européenne, et des droits fondamentaux, apanage de toute personne, y compris du citoyen, permettrait une clarification sans que cette catégorisation n' enlève rien à quiconque ni ne crée de la "non-citoyenneté" où seraient cantonnés les non-résidents.

Aucune citoyenneté ne procède réellement de l'Union ; tout citoyen européen ne l'est que parce qu'il est citoyen d'un Etat membre. La citoyenneté en Europe vient des Etats et non d'une constitution européenne qui en aurait défini les contours par le haut. Or cette situation

conditionne l'exercice du droit d'asile, les règles sur les migrations (art.17 de la charte en projet), et même la liberté de circuler qui, au sens de la convention de Schengen veut dire se déplacer, et au sens du traité de Rome, veut dire séjourner, c'est-à-dire selon qu'on est citoyen ou résident.

Par ailleurs, comment concilier l'article B qui assure seulement à « tout citoyen de l'Union le droit de fonder avec d'autres des partis politiques et de s'y affilier », alors que par ailleurs, l'article 13 donne à « toute personne » « la liberté de réunion pacifique et la liberté d'association , y compris le doit de fonder avec d'autres des syndicats et de s'y affilier » ?

Il n'y a pas de manquement aux droits fondamentaux à énoncer dans une introduction la proposition d'amendement suivante :

«Sans préjudice des lois nationales plus favorables, tous les résidents du territoire européen bénéficient des droits fondamentaux tels que définis dans la présente charte et tous les ressortissants communautaires jouissent en outre des droits attachés à la citoyenneté européenne ».

En outre, l'alinea 1 de l'article 1 peut poser un problème de conformité constitutionnelle aux Français , particulièrement par rapport à l' article 3 et aux Préambules de la Constitution.

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PROJET D'ARTICLES SUR LES DROITS FONDAMENTAUX

Sur le texte « CONVENT 13 »
Charte 4149/9 du 8 mars 2000

Remarque générale : nous proposons que chaque article reprenne explicitement les références aux textes européens et internationaux mentionnés dans les exposés des motifs.

Sur l'article 1 : Dignité de la personne humaine

PROJET DE LA CONVENTION :

« La dignité de la personne humaine est respectée et protégée en toutes circonstances ».

Comme aux grands textes de droit français du passé, la rédaction condensée donne de la force.

Cet article peut se limiter à cette énonciation puisque les articles et les droits qui suivent en donnent les conditions, dont l'interdiction de l'esclavage, qui fait à juste titre l'objet d'un article spécifique.

Sur l'article 2 : Droit à la vie

PROJET DE LA CONVENTION :

« 1) Toute personne a droit à la vie.

« 2) Nul ne peut être condamné à la peine de mort, ni exécuté ».

Nous approuvons le renoncement à la peine de mort.

Nous notons la divergence entre la rédaction de cet article dans son alinea 2 et celle de l'article 2 de la CEDH. Le pont que fait entre les deux l'article 6 TUE rend-il les deux systèmes de normes compatibles entre eux, et avec les droits nationaux qui ont aboli la peine de mort ?

Ici il est patent que le dispositif accompagnant l'article est un affaiblissement ; l'amélioration pour tous consiste à proclamer que ce droit est plénier et qu'il ne souffre aucune exception. Si tel n'est pas le cas, il serait plus honnête et transparent de citer soit dans l'article la référence à l'article 2 de la CEDH, soit de faire figurer son contenu dans une partie II dotée de force juridique.

[CEDH ART.2 :« Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale prononcée par un tribunal au cas où le délit est puni de cette peine par la loi ».

Ceci nous porterait même à faire du droit à la vie un droit constitutionnel, au- dessus de toute loi supposée le protéger.

Sur l'article 3 : Droit au respect de l'intégrité

PROJET DE LA CONVENTION :

« 1) Toute personne à droit au respect de son intégrité physique et mentale.

« 2) Dans le cadre de la médecine et de la biologie, les principes suivants doivent notamment être respectés :

- -interdiction des pratiques eugéniques
- -respect du consentement éclairé du patient
- -interdiction de faire du corps humain et de ses produits une source de profit
- -interdiction du clonage des êtres humains ».

Nous soulignons l'attention particulière que portent les magistrats français à l'adverbe « notamment ».

Il faut impérativement ici, si cette forme de l'article est maintenue, que cet adverbe serve à maintenir grande ouverte la porte des adjonctions à cette liste. Il nous paraît cependant, dangereux de lier le principe, droit absolu et universel, avec les progrès de la médecine, par définition contingents, variables, et sujets à divergences d'interprétation.
Il vaudrait mieux ne raisonner qu' en termes de droit.

Nous aimerions mieux de toutes façons que, à l'alinea 2, l'interdiction de faire du corps humain et de ses produits une source de profits, soit rédigée plutôt sous forme de principe que sous forme d'interdiction :

Proposition d'amendement:

« Le corps humain n'est pas une marchandise ; ni le corps, ni ses produits, comprenant l'enfant en devenir, ne peuvent être sources de profit ».

Sur l'article 4 : Interdiction de la torture et des traitements inhumains

PROJET DE LA CONVENTION :

« Nul ne peut être soumis à la torture, ni à des peines et traitements inhumains et dégradants ».

Pas d'observations à cette date, si ce n'est la remarque générale d'introduction..

Sur l'article 5 : Interdiction de l'esclavage et du travail forcé

PROJET DE LA CONVENTION :

« 1) Nul ne peut être tenu en esclavage ni en servitude.

« 2) Nul ne peut être astreint à accomplir un travail forcé ou obligatoire ».

L'exposé des motifs qui renvoie aux articles 4 et 5 de la CEDH ne pose pas de problème sous réserve de son inscription dans le corps de l'article.

Sur l'article 6 : Droit à la liberté et à la sûreté

PROJET DE LA CONVENTION :

« Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans des cas spécifiques et selon les voies légales ».

Le choix de la rédaction d'articles peu circonstanciés mais percutants et qui renvoient pour leur interprétation au contenu de la CEDH par l'article 6 du traité UE, permet probablement un meilleur pyramidage entre les deux systèmes de normes, mais fait manquer l'occasion de moderniser certains éléments, comme le paragraphe e) de l'article 5 de la CEDH alors que la Convention à propos d'un autre droit a bien su changer la référence d 'un texte précédent parlant de « nations civilisées » pour « nations démocratiques »(art.10.2).

L'Union devra veiller au strict respect de ces principes dès avant la charte, lorsqu'elle mettra en ouvre de la décision d'Amsterdam d'intégrer le pilier Justice et Affaires Intérieures dans le premier pilier. (Traité d'Amsterdam titre IV).

[Cf. CEDH Art.5 e) : «... s'il s'agit de la détention régulière d'une personne susceptible de propager une maladie contagieuse, d'un aliéné, d'un alcoolique, d'un toxicomane ou d'un vagabond. »]

La remarque générale d'introduction est à faire ici aussi.

Sur l'article 7 : Droit à un recours effectif

PROJET DE LA CONVENTION :

« Toute personne dont les droits et les libertés ont été violés a droit à un recours effectif devant un tribunal ».
Pas d'observation à cette date, si ce n'est la remarque générale d'introduction..

Sur l'article 8 :Droit à un tribunal impartial :

PROJET DE LA CONVENTION :

« Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi. Une aide juridique gratuite est octroyée à ceux qui ne

disposent pas de ressources suffisantes dans la mesure où cette aide serait indispensable pour assurer l'effectivité de l'accès à la justice ».

Une référence directe à l'article 5§1 de la CEDH permettrait de faire connaître les limitations de la portée du droit de façon claire (cf. nos remarques générales).

Nous proposons d'amender l'article en lui ajoutant, après le mot « personne », les mots suivants :

«. , conformément à l'article 6 du traité sur l'Union Européenne et à l'article 5.1 de la Convention européenne des droits de l'Homme,. » (remarque générale d'introduction).

Sur l'article 9 : Droits de la défense :

PROJET DE LA CONVENTION :

« Tout accusé est présumé innocent jusqu'à ce que sa culpabilité ait été légalement établie et a droit au respect des droits de la défense . »
Nous proposons, comme précédemment, d'amender l'article en ajoutant après le mot « défense » :
« .conformément à l'article 6 du traité sur l'Union européenne et aux articles 6.2 et 6.3 de la Convention européenne des droits de l'Homme ».

(Remarque générale d'introduction).

Sur l'article 10 : Pas de peine sans loi

PROJET DE LA CONVENTION/

« 1) Nul ne peut être condamné pour une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national, le droit de l'Union ou le droit international. De même, il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise. Si postérieurement à cette infraction, la loi prévoit une peine plus légère, celle-ci doit être appliquée.

2) Le présent article ne porte pas atteinte au jugement et à la punition d'une personne coupable d'une action ou d' omission qui, au moment où elle a été commise, était criminelle d'après les principes généraux du droit reconnus par les nations démocratiques ».

Pas d'observations à cette date, sauf la remarque générale d'introduction..

Sur l'article 11 : Droit à ne pas être jugé ou puni deux fois :

PROJET DE LA CONVENTION:

« Nul ne peut être poursuivi ou puni pénalement en raison d'une infraction pour laquelle il a déjà été acquitté ou condamné par un jugement définitif nformément à la loi ».

Pas d'observation à cette date, sauf la remarque générale d'introduction

Sur l'article 12 :Respect de la vie privée :

PROJET DE LA CONVENTION :

« Toute personne a droit au respect de sa vie privée, de son honneur, de son domicile et du secret de ses communications ».

Proposition d'amendement:

Nous souhaitons ajouter de façon explicite « le respect de son image » après le mot « honneur ». Remarque générale d'introduction.

Sur l'article 13 : Vie familiale

PROJET DE LA CONVENTION:

« 1) Toute personne a droit au respect de sa vie familiale.

« 2) Toute personne a le droit de se marier et de fonder une famille selon les lois des Etats membres à l'exercice de ce droit.

« 3) La protection de la famille sur le plan juridique, économique et social est assurée ».

° Autant la notion de respect de la vie familiale et de fondation d'une famille dans le respect des lois nationales ne posent pas de problème, autant le lien qui est fait entre mariage et fondation d'une famille amène à s'interroger sur la notion de famille elle-même dans l'Europe des Quinze.
° Une autre interrogation concerne la perspective de l'adhésion d'un Etat comme la Turquie qui vient d'obtenir un statut de candidat.

Bien que l'Islam n'y soit pas une religion d'Etat, cette religion qui admet la polygamie y est très répandue.

° Par quel(s) titulaire(s) sera exercé le droit à la protection de la famille qui est repris à l'alinea 3 de l'article 13, par quelle autorité sera-t-il garanti, et pour quelle famille ?-monoparentale, biparentale, multiparentale ?

Les familles turques devenues membres de l'Union seront titulaires du droit de circuler librement dans le territoire et devront voir leurs droits respectés.

De quel type de famille parle le texte et parleront les institutions et organes communautaires? N'y aurait-il pas un intérêt à préciser la notion ?

° Ce droit, qui ne fait pas partie des articles A à K relatifs aux citoyens de l'Union, inclut-il les résidents légaux et leur famille ayant bénéficié du rapprochement ?

° Ce qui manque à l'énoncé de ce droit et c'est paradoxal, c'est l'approche communautaire et les implications transfrontalières de la liberté de circuler.

° Alinea 2 : la forme nous paraît devoir être reprise pour :

« .de se marier par libre consentement et de fonder une famille selon les lois des Etats membres relatives à l'exercice de ce droit ».

Remarque générale d'introduction.

Sur l'article 14 : Liberté de penser, de conscience, et de religion

PROJET DE LA CONVENTION :

« Toute personne a droit à la liberté de pensée, de conscience et de religion ».

L'article 10 du texte antérieur Convent.8 du 24 février 2000 charte 4137/00 circonstanciait l'exercice du droit par inclusion dans le texte de l'alinea 1 de l'article 9 de la CEDH

Nous proposons dans le cas où le maintien de l'ancienne rédaction redeviendrait d'actualité, de ne pas inclure les dispositions de l'article 9 al.1 CEDH sans l'alinea 2 qui, bien que posant des restrictions au principe de liberté de manifester sa religion ou ses convictions, définit celles-ci

limitativement, et nous paraît de nature à préserver la conception française de laïcité.

[CEDH Art.9:

1) Toute personne a droit à la liberté de pensée, de conscience, et de religion; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.

2) La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui.]

Sur l'article 15 : Liberté d'expression

PROJET DE LA CONVENTION :

« 1) Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir d'ingérence d'autorités publiques et sans considération de frontière ».

« 2) L'art, la science et la recherche sont libres »

Il nous paraît plus protecteur d'évoquer dans le texte de manière spécifique la liberté d'opinion en matière philosophique, politique et religieuse, sans restreindre le champ de ce droit à ces seuls aspects. Nous proposons l'amendement suivant:

A.15 al 1 2° phrase « Ce droit comprend tout particulièrement la

liberté d'opinion philosophique, politique, et religieuse, et plus généralement la liberté d'opinion ainsi que celle de recevoir ou de communiquer des informations ou idées sans qu'il puisse y avoir d'ingérence d'autorités publiques et sans considération de frontières. »

Par ailleurs la notion « d'ingérence d'autorités publiques » doit absolument être définie, peut-être dans une partie II. Car selon la définition, ou l'interprétation qui serait donnée par un tribunal, la limitation au droit qu'apporte ce membre de phrase pour être bénigne ou grave.

Remarque générale d'introduction sur l'inclusion nécessaire des textes de référence de l'exposé des motifs..

Sur l'article 16 : Droit à l'éducation

PROJET DE LA CONVENTION :

1. « Nul ne peut se voir refuser le droit à l'instruction qui comporte notamment la faculté de

suivre gratuitement l'enseignement obligatoire.

2. « La création d'établissements d'enseignement est libre.

3. « Le droit des parents d'assurer l'éducation et l'enseignement de leurs enfants, conformément à leurs convictions religieuses et philosophiques, est respecté ».

Nous souhaitons voir inscrite à cet article la mission de l'Etat dans le domaine de l'éducation :

Propositions d'amendement:

A.16 al. 2 : « L'Etat, dans l'exercice de ses fonctions, assume la responsabilité de l'organisation de l'enseignement.

La création d'établissements d'enseignement est libre ».

A.16 al. 3 : A la première ligne, enlever « et l'enseignement » ;

Après « est respecté. »,

ajouter : « , tant qu'il ne porte pas atteinte aux droits de l'enfant et à l'exercice futur de ses libertés ».

ARTICLES HORS CONVENT.13

NB :

Dans la rédaction dite « Convent. 13 » du 08 mars 2000 qui refond la première rédaction des articles 1 à 12 en articles 1 à 16 ne figurent pas les articles 13 à 19 énoncés par la rédaction du texte dit « Convent.8 » en date du 24 février. Nous ne doutons pas que dans sa forme définitive, la charte les mentionne, car ils sont de très grande importance. Ceux qui n'ont pas été évoqués supra sont cités ci-dessous dans leur rédaction du 24/02/2000 Doc.4137/00.

Sur l'article 13 Convent.8: la liberté de réunion et d'association:

PROJET DE LA CONVENTION :

Toute personne a droit à la liberté de réunion pacifique et à la liberté d'association, y compris le droit de fonder avec d'autres des syndicats et de s'y affilier ».

Nous proposons d'amender le texte par ajout de l' alinea suivant:

" Ce droit inclut la liberté de manifestation pacifique".

Sur l'article 14 Convent 8: le droit d'accès aux informations:

PROJET DE LA CONVENTION

"Tout citoyen de l'Union ou toute personne résidant dans l'Union a un droit d'accès aux documents des institutions de l'Union européenne. Ce droit s'exerce dans les conditions prévues par l'article 255 du traité instituant la Communauté européenne".

[Commentaires figurant sous article F supra du volet relatif aux droits des citoyens.]

Sur l'article 15 Convent.8: Protection des données:

PROJET DE LA CONVENTION

"Toute personne physique a droit à la protection de ses données à caractère personnel".

Nous proposons l'amendement suivant:

"Toute personne morale privée ou publique, assujettie au droit communautaire, a droit à la protection des données relatives à l'objet de ses activités licites dans le respect des lois relatives à l'ordre, à la sécurité , à la santé publics, et des droits et libertés individuels des personnes physiques qui concourent à la réalisation de son activité.

"Les données relatives aux personnes physiques et morales ne peuvent que:

- être collectées par des organismes légalement habilités,

- être utilisées à des fins licites et dans l'objet précis de leur collecte,

- être conservées pendant la durée limitée à la réalisation de l'objet de leur collecte.

"Toute personne physique et morale reste propriétaire de ses données, dispose d'un droit permanent d'accès, d'actualisation et de suppression".

Sur l'article 16 Convent. 8 : le droit de propriété:

PROJET DE LA CONVENTION/

"Toute personne a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les cas et conditions prévus par une loi et moyennant une juste [et préalable] indemnité".

Nous proposons l'amendement suivant:

"Les biens communs universels naturels indispensables à la vie [tels que l'air, l'eau], et intellectuels [comme la découverte du génome humain°] ne sont pas susceptibles d'appropriation".

Sur l'article 17 Convent 8: le droit d'asile et l'expulsion

PROJET DE LA CONVENTION:

1) "Les personnes qui ne sont pas des ressortissants de l'Union ont un droit d'asile dans l'Union européenne [conformément aux règles de la Convention de Genève du 28 juillet 1951 et au protocole du 31 janvier 1967 relatifs au statut des réfugiés] [dans les conditions prévues par les traités].

2) "Les expulsions collectives d'étrangers sont interdites".

Les visas, l'asile et l'immigration font maintenant partie des politiques communes, bien que les textes restent à finaliser (titre IV traité d'Amsterdam°).

Le fait de mêler dans un même article l'asile et la police des étrangers ne grandit pas la proclamation du principe qui devrait plutôt citer succinctement les conditions d'accès au droit d'asile.

Nous proposons un amendement qui sépare les deux alinea en deux articles; le nouvel article s'écrirait comme suit:

"Tout étranger en situation irrégulière dans l'Union peut notamment invoquer les droits énoncés aux articles 1 à 11 [duConvent.8] de la charte communautaire des droits fondamentaux.

Les expulsions collectives d'étrangers sont interdites".

Sur l'article 18 Convent.8: L'égalité

PROJET DE LA CONVENTION:

"Toutes les personnes sont égales devant la loi".

Nous proposons l'amendement suivant pour une nouvelle rédaction de l'article de sorte qu'il couvre un large spectre en englobant des données relatives à l'égalité sur lesquelles il y a déjà consensus dans l'Union:

"1)Toutes les personnes naissent libres et égales en dignité et en droit.

2)Elles sont égales devant la loi et ont droit sans discrimination à une égale

protection de la loi".

3)Toute discrimination à raison notamment du sexe, de la race, de la couleur ou de l'origine ethnique, de la religion ou des convictions, du handicap, de l'âge, et de l'orientation sexuelle est interdite

4)L'égalité entre les hommes et les femmes doit être assurée dans tous les domaines et particulièrement en matière d 'emploi et de travail et de protection sociale ».

Nous conservons le terme de "personne" parce que c'est celui qui est utilisé dans toute le projet de charte.

Sur l'article 19 Convent 8: Non discrimination

PROJET DE LA CONVENTION

"1) Est interdite toute discrimination fondée sur le sexe, la race, la couleur, ou l'origine sociale, la langue, la religion ou les convictions, l'appartenance à une minorité nationale, la fortune, la naissance, un handicap, l'âge ou l'orientation sexuelle.

2)L'Union cherche à éliminer les inégalités et à promouvoir l'égalité entre les hommes et les femmes.[L'égalité des sexes est notamment assurée dans la fixation des rémunérations et des autres conditions de travail conformément au traité et aux textes pris pour son application]".

Nous considérons que la non-discrimination, déjà garantie dans le traité, n'est qu'une facette du principe d'égalité et qu'il est plus fort de l'écrire dans l'article consacré à ce principe.

Par ailleurs, l'alinea 2 ne doit pas figurer dans une charte des droits fondamentaux; il est programmatique et n'énonce qu'un objectif.

ARTICLES HORIZONTAUX

LE CHAMP D'APPLICATION

ARTICLE H 1 CONVENT 27 DU 17.04.2000 :

Sur le champ d' application, voir nos observations générales, et celles formulées

sous l'article 1.

PROJET DE LA CONVENTION :

1. « Les dispositions de la présente Charte s'adressent aux institutions et organes de l'Union dans le cadre des attributions qui leur sont conférées par les traités ainsi qu'aux Etats membres exclusivement dans le cadre de la mise en ouvre du droit communautaire ».

2. Elles ne créent aucune compétence ni aucune tâche nouvelle pour la Communauté et pour l'Union ».
Nous proposons que soit ajouté l'amendement suivant :

« 3) Les dispositions de la présente Charte sont mises en oeuvre par les Etats membres selon les règles et pratiques nationales, sans préjudice du caractère transnational actuel ou à venir de certains droits fondamentaux, tels, notamment, que le droit à la vie, au respect de la dignité et de l'intégrité, à la liberté de se déplacer, de penser, de s'exprimer, de choisir sa profession, celle de se réunir et de s'associer, la liberté syndicale, le droit pour les travailleurs d'être informés et consultés et de négocier collectivement, celui d'agir collectivement et de recourir à la grève, le droit à un salaire minimum, le droit d'asile, l'égalité et la non-discrimination, les droits des citoyens européens, le droit d'accès aux soins de santé et la portabilité des droits d'ouverture à prestations sociales.
« 4) Les dispositions de la présente Charte ne peuvent être modifiées que selon des procédures d'élaboration et d'adoption identiques à celles qui ont prévalu pour l'élaboration et l'adoption de son texte initial.

ARTICLE H 2(Convent 27) : LIMITATIONS DES DROITS GARANTIS :

ANCIENNE REDACTION DE CET ARTICLE :

« ARTICLE X. LIMITATIONS :

PROJET DE LA CONVENTION : première rédaction :

« Sous réserve de dispositions plus protectrices de la présente charte ou de la Convention européenne des droits de l'Homme, toute limitation au respect des droits et des libertés reconnue dans cette charte doit être prévue par la loi. Elle doit respecter le contenu essentiel desdits droits et libertés et rester, dans le respect du principe de proportionnalité, dans des limites nécessaires à la protection d'intérêts légitimes dans une société démocratique ».

PROJET DE LA CONVENTION CONVENT 27:

ARTICLE H 2 :

1. « Les droits et libertés reconnus aux articles. de la présente charte ne peuvent faire l'objet d'aucune limitation.

2. Toute limitation, aux droits et libertés garantis par la présente charte doit être prévue par le législateur. Elle doit respecter le contenu essentiel desdits droits et libertés et rester, dans le respect du principe de proportionnalité, dans des limites nécessaires à la protection d'intérêts légitimes dans une société démocratique. Les limitations prévues par la Convention européenne des droits de l'Homme sont applicables à ceux des droits et libertés contenus dans la présente Charte qui sont également garantis par ladite Convention ».

ARTICLE H 3

« Les droits garantis par les articles .s'exercent dans les conditions et limites définies par le traité instituant la Communauté européenne »

Les commentaires sous ces trois articles ne peuvent être faits que sous la réserve de connaître les droits qui seront inscrits dans H2 et H3 à la place des points de suspension.

Dans l'état actuel de la rédaction, les articles H2et H3 semblent vouloir préciser les conditions d'exercice des droits en catégorisant entre ceux qui ne subiraient aucune limitation communautaire selon H2 al.1, et ceux qui s'exerceraient dans les conditions et limites définies par le traité CE, c'est-à-dire selon des limites venant des règles économiques communautaires, sans préciser lesquelles ni dans quelles circonstances.

Par ailleurs, l'article qui évoque ceux qui ne subiraient aucune limitation communautaire écrit aussitôt dans son 2° alinea quelles limitations peuvent exister, mais des règles nationales.

Quels droits resteront-t-ils ?

On peut de toutes façons s'interroger sur une approche qui voudrait des droits plus fondamentaux que d'autres. Pour Force Ouvrière il ne peut en tous cas y avoir de limitation dans le nombre des droits fondamentaux pour lesquels aucun « opting out » ne peut être autorisé, ni de limitation dans leur exercice, sauf prévue par le législateur national.

Dans l'état connu de la rédaction du texte au 22 mai 2000, nous proposons l'amendement suivant :

« 1) Les droits et libertés reconnus par la présente charte ne peuvent faire l'objet d'aucune limitation de nature et nombre et de contenu ».

2) Les droits et libertés garantis par la présente Charte s'exercent dans les conditions et limites définies par le traité instituant la Communauté européenne et par le législateur national, sans qu'il puisse être porté atteinte à leur nature et à leur nombre et à leur contenu sous peine de nullité de la mesure.

3) Toute limitation d'exercice aux droits et libertés garantis par la présente Charte doit avoir été prévue par la loi nationale. Elle doit respecter le contenu essentiel desdits droits et libertés et rester, dans le respect du principe de proportionnalité, dans les limites nécessaires à la protection d'intérêts légitimes dans une société démocratique. Les limitations prévues par la Convention européenne des droits de l'Homme sont applicables à ceux des droits et libertés contenus dans la présente Charte qui

sont également garantis par ladite Convention, sauf loi nationale plus favorable en vigueur dans les Etats membres ».

(Cf. pour la dernière ligne, le cas du droit à la vie, et la peine de mort, art. 2 CEDH et loi française, voir supra sous « droit à la vie ».).

ARTICLE H 4 : LE NIVEAU DE PROTECTION :

PROJET DE LA CONVENTION, ANCIENNE REDACTION :

ARTICLE Y LE NIVEAU DE PROTECTION :

« Aucune disposition de la présente charte ne peut être interprétée comme restreignant la protection offerte par la Convention européenne des droits de l'Homme ».
PROJET DE LA CONVENTION , CONVENT 27:

« Aucune disposition de la présente Charte ne peut être interprétée comme restreignant la portée des droits garantis par le droit de l'Union, le droit des Etats membres, le droit international et les conventions internationales ratifiées par les Etats membres, dont la Convention européenne des droits de l'Homme telle qu'interprétée par la jurisprudence de la Cour européenne des droits de l'Homme ».

Nous proposions d'amender le texte par un ajout après « Homme » :

« et par les traités internationaux relatifs aux droits de l'Homme ratifiés par les Etats membres ».

Nous annulons cette demande qui n'a plus lieu d'être si la rédaction du texte Convent 27 est retenue.

Mais nous proposons d'ajouter à toute forme de l'article qui ne comporterait pas cette précision l'alinea suivant:

«2) Toute limitation doit s'interpréter au sens strict ».

ARTICLE H 5 :INTERDICTION DE L'ABUS DE DROIT :

PROJET DE LA CONVENTION :

« Aucune des dispositions de la présente Charte ne peut être interprétée comme impliquant un droit quelconque de se livrer à une activité ou accomplir un acte visant à la destruction des droits ou libertés reconnus dans la présente Charte ».

Pas de commentaire.

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DROITS / OBJECTIFS ECONOMIQUES ET SOCIAUX

Nous préférons à ce titre, même s'il est encore provisoire, celui classique et reconnu qui ne parle que de droits, de:

« DROITS ECONOMIQUES, SOCIAUX, ET CULTURELS »

*dénomination du Pacte de l'ONU

*à reprendre telle quelle pour le titre du chapitre ;

*et s'en tenir aux droits, car les « objectifs » appartiennent aux gouvernements.

A) Droit au travail :

Ce chapitre commence par un vide car le droit au travail n'y est pas inscrit.

Or c'est en France un droit constitutionnel ainsi que celui d'obtenir un emploi. Par contre, atteindre un niveau d'emploi élevé est un objectif qui appartient au politique et ne peut s'analyser comme un droit dont le titulaire est un individu .

L'Union pourrait commencer par prendre à son compte le principe consacré par l'OIT et inscrire dans ses textes une fois pour toutes que :

« Le travail n'est pas une marchandise »

La liberté professionnelle qui est traitée à un autre endroit, viendrait en deuxième volet de ce droit au travail.

La rédaction de l'article 23 de la déclaration des droits de l'Homme qui est dans le style adopté pour les articles 1 à 16 de la charte qui nous intéresse est d'une grande force ,et peut servir ici de

modèle avec l'article 6 du Pacte international relatif aux droits économiques, sociaux et culturels.

Nous proposons la création d'un nouvel article selon la rédaction suivante:

"1) Le travail n'est pas une marchandise.

"2) Toute personne [terminologie de la Convention] a droit au travail, c'est-à-dire à la possibilité de gagner sa vie par un travail librement entrepris, à des conditions équitables et satisfaisantes de travail et à la protection contre le chômage".

Nous proposons un amendement sous forme d'une clause générale d'amélioration :

Un pyramidage sans hiérarchie des normes a été introduit dans les textes européens par le traité d'Amsterdam entre les normes sociales européennes; qu'on le veuille ou non, l'article. 136 du traité CE permet aux Quinze de puiser dans patrimoine des Quarante et un du Conseil de l'Europe pour mieux comprendre et interpréter leur propre droit.

Mais la référence ne concerne que la charte de 1961 qui ne comporte que 19 articles, pour certains déjà partie intégrante des droits nationaux; l'échange ne sera donc pas complet.
Par ailleurs la charte en préparation semble vouloir couvrir un champ plus large que ces 19 articles de 1961, englobant au passage (dans la rédaction du projet au 12 avril 2000) la plupart, mais pas tous, des droits de la Charte communautaire des droits sociaux fondamentaux des travailleurs et de la Charte révisée du Conseil de l'Europe; elle n'est, pour le moment, pas destinée à avoir une valeur contraignante pour les Etats membres, mais la plupart des droits listés sont en vigueur dans tous les Etats membres, et l'Union a elle-même rendus contraignants certains des droits de la Charte de Strasbourg.

On peut alors se demander :

1) si la charte en préparation aura de la valeur pour les institutions et organes communautaires auxquels elle est aujourd'hui destinée ;

2) s'il ne serait pas temps de simplifier l'empilage pour le rendre visible aux citoyens et opérationnel pour les praticiens.

Pourquoi ne pas mentionner explicitement dans le préambule la complémentarité de l'ensemble des normes civiles et politiques, économiques et sociales du système onusien (ONU, OIT), du Conseil de l'Europe (CEDH, Charte Sociale Européenne Révisée, et Protocoles) avec celles de l'Union (traités et chartes) ? et indiquer que, en cas de litige, c'est toujours la norme supérieure qui prévaudrait pour dire le droit, y compris si c'est la règle nationale ? Cela éviterait que ne se creusent des divergences de droit et de situation entre les membres de l'Union, et entre eux et les candidats à l'Union . Cela obligerait les Etats membres à ne pas diminuer leurs droits et leur niveau de protection (clause de non-régression de l'état des droits) .

Qui peut en effet prédire l'avenir d'une démocratie ?

Ce sera un des mérites de cette charte , si elle aboutit, que d'impliquer l'Union européenne dans la sauvegarde des droits fondamentaux presque sur l'ensemble du continent, par un auto-contrôle

multilatéral, qui serait, s'il fonctionne bien, une plus grande garantie pour les droits de l'Homme, que l'engagement unilatéral de la constitution d'un Etat vis à vis de ses citoyens.

On imagine mal, en effet, que quinze Etats deviennent fascistes en même temps .

Après, son adoption, il est possible que le texte devienne autonome et prenne le statut de référence pour tous. Il ne sert à rien pour l'Union de se livrer à un exercice de style, si ce n'est pas avec une réelle volonté de faire progresser les droits et leur respect. Ainsi l'aspect transnational de certains droits devrait être admis, comme les droits syndicaux transnationaux, les droits corollaires du principe de libre circulation, et ceux de la citoyenneté européenne .

Une clause d'amélioration de l'état et du niveau des droits aussi bien civils et politiques que économiques et sociaux est nécessaire.

Les Etats membres avaient déjà su accepter, au moment de signer la charte de Strasbourg, une clause de non-régression par rapport à leurs situations existantes.

Enoncer un texte trop basique et trop faible n'aiderait pas les nouveaux membres et menacerait les anciens. Il est inutile d'introduire ou de laisser perdurer des éléments légaux et contre productifs de dumping social entre les pays d'Europe. Il faut que les Etats acceptent de s'engager, comme les y invite le traité CE lui-même, à améliorer les conditions de vie (dont font partie les droits civils et politiques, économiques et sociaux), et de travail de leurs résidents .

Nous proposons que les considérants suivants figurent au préambule :

"...considérant que la proclamation solennelle des droits fondamentaux au niveau de la Communauté européenne ne peut justifier, lors de sa mise en ouvre, de régression par rapport à la situation existante dans chaque Etat membre ou signataire, et qu'au contraire cette mise en ouvre doit favoriser une égalisation dans le progrès de tous les droits en nature et en niveau dans l'ensemble des Etats membres et des Etats signataires "; .

" considérant qu'un des moyens d'y parvenir est d'appliquer la clause de la norme la plus favorisante chaque fois qu'il y aura concomitance de normes nationales ,européennes, et internationales;

" considérant que les Etats membres restent attachés à poursuivre leurs efforts dans le sens d'une amélioration des conditions de vie et de travail au sens de l'article 136 du traité instituant la Communauté européenne;"...

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Sur les articles proposés par le texte Convent. 18:
Charte/4192/00 du 27 mars 2000

1) Sur l'article I: Egalité entre les hommes et les femmes :

PROJET DE LA CONVENTION:

"L'égalité entre les hommes et les femmes doit être assurée en matière d'emploi et de travail et de protection sociale".

Compétence communautaire, article 137 traité CE)

De plus, le principe d'égalité de traitement entre tous les hommes et toutes les femmes au plan général est inclus dans le principe de non-discrimination qui figure déjà au traité CE dans son article 13. Il doit être inscrit dans la charte :

Cependant, les discriminations qui existent toujours dans tous les aspects du travail y compris chez les fonctionnaires d'Etat en France, justifient qu'un autre article réaffirme le principe d'égalité entre les sexes dans le domaine particulier du travail et de sa rémunération.

2) Sur l'article II: Liberté professionnelle :

PROJET DE LA CONVENTION

"Toute personne a le droit de choisir et d'exercer sa profession et ses activités commerciales, sans préjudice des règles du traité relatives à la libre circulation des personnes".

Ce droit est à la fois une liberté fondamentale et un élément constitutif du droit au travail dont il doit être rendu indissociable.

Il n'y a aucune raison pour le rendre dépendant des règles communautaires de la libre circulation des personnes, ni pour l'associer expressément, et donc restrictivement à des activités commerciales, ni pour effacer du texte l'adverbe "librement" qui figurait à la rédaction de l'article J du SN.REV1 du 15 mars relatif aux droits des citoyens.

Nous proposons une nouvelle rédaction de l'article comme suit:

1.« Dans le cadre de l'exercice de son droit au travail, toute personne a le droit de choisir et d'exercer librement sa profession ».

2. « Toute personne a le droit d'accéder à un service gratuit de placement».

3) Sur l'article III: le droit à l'information-consultation des travailleurs:

PROJET DE LA CONVENTION:

"Les travailleurs et leurs représentants ont le droit à une consultation effective au sein de l'entreprise qui les emploie, notamment dans le cadre des procédures de licenciement collectif et des décisions relatives aux conditions de travail et au milieu de travail".

L'ensemble des pays de l'Union pratiquent maintenant ce droit, au moins dans les Comités d'entreprise européens. Pour une proposition d'amendement, l'écriture peut donc s'inspirer de celle de la directive :

« Les travailleurs et leurs représentants syndicaux ont le droit d'être informés et consultés par les

dirigeants de l'entreprise qui les emploie,

préalablement à toute prise de décisions susceptibles d'affecter substantiellement leurs intérêts matériels et moraux, et particulièrement celles pouvant entraîner des conséquences importantes sur la situation de l'emploi dans l'entreprise, ainsi que sur celles relatives à l'amélioration de leurs conditions de travail et de leur milieu de travail ».

4) Sur l'article IV: le droit d'association , de négociation et d'action collective :

PROJET DE LA CONVENTION:

IV.al.1) -La liberté syndicale.

"Les employeurs et les travailleurs ont le droit de s'associer librement, y compris au niveau de l'Union, en vue de constituer les organisations professionnelles de leur choix pour la défense de leurs intérêts économiques et sociaux".

Tout employeur et tout travailleur a la liberté d'adhérer ou de ne pas adhérer à ces organisations, sans qu'il puisse en résulter pour lui un dommage personnel ou professionnel".

Nous estimons que comme l'OIT l'a fait, il convient de consacrer un article plénier à la liberté syndicale. Les droits syndicaux sont des droits fondamentaux , des droits de l'Homme, qui « méritent » autant que le droit à la vie ou le droit de propriété d'être individualisés ; ils ne sont pas un magma social, et doivent bénéficier de la même lisibilité que les autres droits fondamentaux.

Nous proposons l'amendement suivant pour une nouvelle rédaction:

« Tous les travailleurs et employeurs de l'Union européenne, du secteur privé comme du secteur public, ont le droit de s'associer librement au sein d'organisations nationales et [au lieu de « ou » NDLR] internationales de leur choix pour la défense de leur intérêts matériels et moraux ».

(le « et » introduit ainsi dans le texte l'art.5 de la C°87 OIT).

« Tout employeur et tout travailleur a la liberté d'adhérer ou de ne pas adhérer à ces organisations, sans qu'il puisse en résulter pour lui un dommage personnel ou professionnel. »

Nous citons les intérêts « moraux » qui réfèrent à la dignité des travailleurs en général et en particulier à tout ce qui concerne les pressions psychologiques et morales qu'ils subissent de manière renforcée dans la période contemporaine.

Droit d'interpellation collective

Nous souhaitons que, en l'absence d'un contrôle du respect et de la bonne application des droits économiques et sociaux dans les Etats membres par une inspection du travail européenne , et par parallélisme d'idée avec ce qu'ont déjà décidé entre eux les Etats de l'Union dans l'enceinte du Conseil de l'Europe, soit institué un droit d'interpellation collective.

La pratique d'une « médiation » de type ombudsman ne suffisant pas en matière sociale, nous nous inspirons à la fois de l'article 232 du traité CE et du Protocole additionnel à la Charte sociale européenne prévoyant un système de réclamations collectives.
Le titulaire du droit serait la personne lésée ; celle-ci pourrait subroger une organisation collective syndicale nationale ou internationale (ou patronale, par parallélisme avec le Protocole) dans son droit à agir.

L'organisation collective syndicale nationale ou internationale (ou patronale) serait également titulaire d'un droit à agir au nom du groupe de personnes qu'elle représente.

L'interpellation viserait soit l'Etat membre pour non exécution de ses engagements nés de la ratification de traités internationaux, soit l'Union européenne pour non exécution de leurs obligations par les institutions.

Ce droit d'interpellation permettrait d'asseoir la reconnaissance du fait syndical, ferait entrer les droits fondamentaux dans l'acquis communautaire, les rendrait visibles pour tous, et par cette surveillance des Européens eux-mêmes, conforterait le fonctionnement de la démocratie.

Nous souhaitons donc que la Convention fasse sienne cette proposition de rédaction :

Article 4 paragraphe 1 ,ajout d'un 3°alinea :

« Les organisations européennes d'employeurs et de travailleurs ont le droit d'interpeller les institutions de l'Union européenne devant la CJCE sur le respect et l'application des droits fondamentaux contenus dans la charte communautaire des droits fondamentaux.

Les organisations nationales représentatives d'employeurs et de travailleurs ont le droit d'interpeller leurs institutions nationales ainsi que les institutions de l'Union européenne devant la CJCE sur le respect et l'application des droits fondamentaux contenus dans la charte communautaire des droits fondamentaux ».

IV.al.2)-Le droit à la négociation collective.

PROJET DE LA CONVENTION:

"2) Les employeurs ou les organisations d'employeurs, d'une part' et les organisations de travailleurs, d'autre part, ont le droit, dans les conditions prévues par les législations et pratiques nationales, de négocier et de conclure des conventions collectives, y compris au niveau de l'Union".

Nous souhaitons que l'article soit rédigé selon la proposition d'amendement suivante:

« Les employeurs ou les organisations d'employeurs d'une part, et les organisations de travailleurs, d'autre part, ont le droit de négocier et de conclure des conventions collectives, dans le respect des conditions prévues par les législations et pratiques nationales, au niveau qu'ils estiment approprié, y compris au niveau de l'Union ».

IV.al.3) -Le droit à l'action collective et le droit de grève.

PROJET DE LA CONVENTION:

"Les travailleurs et les employeurs ont le droit de recourir en cas de conflits d'intérêts, à des actions collectives, éventuellement au niveau de l'Union, y compris le droit de grève".

La rédaction suivante qui est celle du SN 2158 nous paraît meilleure car ce droit ne peut concerner que les travailleurs ; s'il existe un droit collectif au lock out, il faut l'écrire en tant que tel, ailleurs dans la charte :

« Les travailleurs peuvent recourir à des actions collectives en cas de conflits d'intérêts, y compris à la grève .»

5) Sur l'article V: le droit à une rémunération égale pour un travail égal :

PROJET DE LA CONVENTION:

"Le droit à une rémunération égale pour un travail de valeur égale est garanti à tout travailleur".

Ce droit est un des volets du principe de non-discrimination (Articles 13 et 141 du traité CE).

Il doit :

*soit lui être rattaché directement et figurer en complément de l'article 1) ci-dessus, et s'énoncer sous la forme d'un ajout à la formulation proposée ci-dessus :

« Toute discrimination, y compris concernant le travail et sa rémunération,..(le reste sans changement) » ;

*soit être englobé dans une approche plus large de la notion de salaire.

En effet le principe du salaire égal pour un travail égal ne suffit pas pour la charte. Même si la rémunération est expressément exclue des compétences de l'Union, une proclamation de droits doit au moins faire référence au fait qu'un travail librement entrepris sert d'abord à gagner sa vie décemment et à obtenir un niveau de vie satisfaisant. L'Union a par ailleurs pour objectif d'améliorer les conditions de vie (Art. 136 du traité CE). Dans ce cas, nous proposons l'amendement suivant pour une nouvelle rédaction de l'article:

1)-Tout travail doit être rémunéré.

2)-Le « salaire » est la rémunération, fixée par accord ou par la législation nationale, qui est due en vertu d'un contrat écrit ou verbal par un employeur à un travailleur, soit pour le travail effectué ou devant être effectué, soit pour les services rendus ou devant être rendus.

4)-Le droit à une rémunération décente implique que celle-ci soit suffisante pour assurer un niveau de vie satisfaisant au travailleur et à sa famille, et qu'un minimum soit fixé collectivement par la loi ou les pratiques nationales.

5)-Le droit à une rémunération égale pour un travail égal ou de même valeur est garanti à tout travailleur ».

Les éléments complémentaires que contiennent la charte du Conseil de l'Europe et la charte communautaire sont à prendre en considération (CSE Article 4, Parties I et II; article 5 de la charte de Strasbourg)) et peuvent être rappelés par une référence à l'article 136 du traité CE).

6) Sur l'article VI: le droit au repos et au congé annuel :

PROJET DE LA CONVENTION:

"Tout travailleur a droit à un repos hebdomadaire ainsi qu'à une période de congés payés".

Compétence communautaire (article 137 Traité CE).

Notre proposition d'amendement est la suivante :

« Tout travailleur a droit à deux jours consécutifs de repos hebdomadaire ainsi qu'à un congé annuel payé d'au moins quatre semaines ».

La durée légale européenne de 48 heures par semaine est un maximum qui devrait être révisé.

Le congé annuel « d'au moins » quatre semaines est déjà inscrit à la charte sociale européenne révisée depuis 1996.

Par ailleurs, il doit être tenu compte de la pratique sociale et culturelle de chaque Etat pour le choix des 2 jours consécutifs .

7) Sur l'article VII: le droit à la sécurité et à l'hygiène dans le travail :

PROJET DE LA CONVENTION:

"Tout travailleur a droit à la sécurité et à l'hygiène dans le travail".

Compétence communautaire (.article 137 traité CE).

Notre proposition d'amendement pour une nouvelle rédaction est la suivante :

1)« Tout travailleur a droit à la sécurité et à la santé dans le travail ».

2)« Tout employeur est responsable de la mise en ouvre de tous moyens y compris préventifs pour assurer la sécurité et la santé des travailleurs dans le travail ».

8) Sur l'article VIII: la protection des enfants et des adolescents :

PROJET DE LA CONVENTION:

"L'âge minimal d'admission au travail ne doit pas être inférieur à l'âge auquel cesse la période de scolarité obligatoire ni, en tous cas, à quinze ans.

Les jeunes au-dessous de 18 ans doivent bénéficier de conditions de travail adaptées à leur âge et être spécialement protégés contre tout travail susceptible de nuire à leur sécurité, à leur santé ou à leur développement physique, psychologique, moral ou social ou de compromettre leur éducation".

Pour être en conformité avec ses ambitions en matière de valorisation des ressources humaines vers une société cognitive, de développement des formations destinées à rattraper le retard pris sur d'autres parties du monde (comme en matière de société de l'information), l'Union européenne doit accorder à l'enfance le temps le plus long possible pour parvenir au développement physique et mental complet de chacun.

Cette période correspond sensiblement à la période de minorité légale qui est généralement plus longue que celle de scolarité obligatoire .

L'exemple des pays les plus avancés doit servir de modèle en termes de scolarité obligatoire.

Tout travail effectué par un mineur serait ainsi dérogatoire et assorti de conditions spécifiques susceptibles d'être contrôlées par les autorités administratives.

Notre proposition d'amendement est la suivante :

« L'âge minimal d'admission au travail ne doit pas être inférieur à l'âge auquel cesse la période de minorité légale, ni en tous cas à quinze ans.

Les mineurs, et en tous cas les jeunes en dessous de dix huit ans, doivent bénéficier de conditions de travail adaptées à leur âge et être spécialement protégés contre tout travail susceptible de nuire à leur sécurité, à leur santé et à leur développement physique, psychologique, moral, social, ou de compromettre leur éducation ».

9) Sur le droit à la protection en cas de licenciement :

PROJET DE LA CONVENTION/

"Les travailleurs ont le droit à ne pas être licenciés sans motif valable, ainsi qu'à une indemnité adéquate ou autre réparation appropriée en cas de licenciement sans motif valable".

Notre proposition d'amendement est la suivante pour une nouvelle rédaction de l'article:

1)-« Aucun travailleur ne peut être licencié sans que lui en soit notifié le motif ; celui-ci doit être

fondé, et le cas échéant, doit être pouvoir être soumis à l'appréciation d'un juge qui peut condamner l'employeur à verser à l'intéressé une indemnité adéquate ou une autre réparation appropriée ».

2)-« Sont notamment considérés comme motifs irrecevables de licenciement, la race, l'origine ethnique, le sexe, la religion ou les convictions, le handicap, l'âge, l'orientation sexuelle, l'affiliation syndicale ou la participation à des activités syndicales, le fait de solliciter, d'exercer ou d'avoir exercé un mandat de représentation des travailleurs».

10) Sur l'article X : le droit à la formation professionnelle :

PROJET DE LA CONVENTION:

"Toute personne doit avoir accès sans discrimination à une formation et à une orientation professionnelle adéquate et en bénéficier tout au long de sa vie active".

Notre proposition de nouvelle rédaction de l'article est la suivante :

1)« Toute personne doit avoir accès sans discrimination à une formation et à une orientation professionnelle adéquate, et bénéficier de cet accès tout au long de sa vie active » .

2)« Tout travailleur peut bénéficier de formations professionnelles rémunérées».

11) Sur l'article XI: le droit des travailleuses à la protection de la maternité :

PROPOSITION DE LA CONVENTION

"Toute travailleuse a droit à un congé de maternité d'au moins quatorze semaines, avant et/ou après l'accouchement".

Notre proposition d'amendement pour une nouvelle rédaction de l'article est la suivante :

1)« Toute travailleuse a droit à un congé de maternité rémunéré d'au moins quatorze semaines, avant et/ou après l'accouchement, dont une période prénatale obligatoire d'au moins six semaines ».
2)« Le congé de maternité ne peut être un motif valable de licenciement ».

3)« L'état de grossesse justifie une protection de la travailleuse contre les travaux pénibles

et dangereux, son changement de poste avec maintien du salaire pour un poste adapté à son état, et son éviction du travail de nuit ».

12) Sur l'article XII : le droit au congé parental :

PROJET DE LA CONVENTION:

"Tout travailleur a droit à un congé parental d'au moins 3 mois à la suite de la naissance ou de

l'adoption de son enfant".

Pas d'observation à cette date.

13) Sur l'article XIII: le droit à la sécurité sociale

PROJET DE LA CONVENTION:

"Tout travailleur et ses ayant droits [toute personne] a droit, selon les modalités propres à chaque Etat, à une protection sociale comportant, notamment des prestations d'un niveau suffisant".

Les droits à la protection sociale et particulièrement à la sécurité sociale sont des droits dont les titulaires sont individuels et dont l'organisation est collective et fondée sur le principe de la solidarité nationale, et nous tenons à ce que l'Europe demeure pour le reste du monde « le » continent de la protection sociale collective.

Toute mesure qui diminue les protections collectives diminue aussi les protections individuelles, que ce soit en nature ou en niveau de droits.

Nous estimons par ailleurs que l'Union doit prendre en considération les conséquences de ses propres textes et faire un sort particulier aux droits de ses travailleurs migrants en matière de sécurité sociale, qu'il appartiennent au secteur public ou au secteur privé..

Notre proposition d'amendement est la suivante :

« Tout travailleur et ses ayants droits, selon les modalités propres à chaque Etat, a droit à une protection sociale comportant, notamment, des prestations sociales susceptibles de rétablir la capacité du travailleur à gagner sa vie, ou de compenser, pour lui-même et ses ayants droits, la perte de gains due à la maladie, à la perte d'emploi, aux charges de famille, à la vieillesse ».

Dans l'Union européenne, pour le calcul des prestations qui leur sont dues, les travailleurs migrants ont le droit de transférer d'un Etat membre d'origine vers un Etat membre d'accueil, la durée des périodes travaillées ».

14) Sur l'article XIV: le droit à l'aide sociale :

PROJET DE LA CONVENTION:

"Toute personne qui ne dispose pas de ressources suffisantes[et qui n'est pas en mesure de se les procurer ou de les recevoir d'une autre source] doit percevoir une aide sociale appropriée lui permettant de vivre dans la dignité".

Notre proposition d'amendement est la suivante :

« Toute personne qui ne dispose pas de ressources suffisantes notamment en raison du chômage, de l'âge, du handicap, doit percevoir une aide sociale appropriée lui permettant de vivre dans la dignité, et au moins équivalente à 40% du PIB par tête d'habitant pour ce qui concerne le minimum de ressources, à 50% du PIB par habitant pour ce qui concerne le minimum de pension ».».

15) Sur l'article XV: le droit à l'accès aux soins de santé :

PROJET DE LA CONVENTION:

"Toute personne doit pouvoir bénéficier des mesures de prévention sanitaire et, en cas de maladie, accéder aux soins de santé".

Notre proposition d'amendement est la suivante :

« Toute personne doit pouvoir bénéficier sans discrimination ni restriction

des mesures de prévention sanitaire et, en cas de maladie, accéder à l'ensemble des soins de santé de qualité nécessaires au recouvrement de sa santé

La France pratique déjà une discrimination par rapport à l'âge en termes de prix de la santé (au-delà de 75 ans pour les affections de longue durée, un surcoût est affecté aux actes médicaux); certains pourraient imaginer des arbitrages entre les différentes maladies ou entre les durées des affections, etc .

Cet amendement vise à protéger l'avenir de la santé de chacun.

16) Sur l'article XVI (Convent 26): le droit des personnes âgées à la protection sociale :

PROJET DE LA CONVENTION :

1. « Tout travailleur doit, au moment de sa retraite, être en mesure de jouir de ressources lui assurant un niveau de vie convenable ;

2. « Toute personne ayant atteint l'âge de la retraite sans avoir droit à une pension ou sans disposer d'autres moyens de subsistance doit avoir droit à des ressources suffisantes ainsi qu'à une aide médicale et sociale adaptée spécifiquement à ses besoins ».

Nous proposons de modifier cet article par l'amendement suivant :

« Art.XVI :

« 1) Tout travailleur, ou ses ayants-droit, au moment de la retraite, jouit, en remplacement de son revenu d'activité, d'un droit à ses pension et retraite lui assurant le maintien de son niveau de vie, et en tous cas, pas moins que 50% du PIB par habitant.

« 2) Toute personne ayant atteint l'âge de la retraite sans avoir de droit à pension ou sans disposer

de ressources personnelles, doit pouvoir bénéficier de moyens de subsistance suffisants, d'un accès aux soins de santé ainsi que de l'aide sociale.

« 3) Toute personne en situation de dépendance a droit à une prestation permettant de compenser les charges financières liées à sa perte d'autonomie et de bénéficier de l'aide d'une tierce personne».

Le deuxième alinea de cet article doit rester sous le numéro XVI car les destinataires sont différents de ceux de l'article XIV puisque ce sont spécifiquement les personnes atteintes par l'âge.

Nos références ici sont à la fois l'article 23 de la CSE.R du Conseil de l'Europe et la Convention 128 de l'OIT.

17) Sur l'article XVII (Convent 26): le droit des personnes handicapées à l'insertion sociale et professionnelle.

PROJET DE LA CONVENTION :

« Toute personne handicapée, quelles que soient l'origine et la nature de son handicap, a le droit de bénéficier de mesures concrètes supplémentaires visant à améliorer son intégration sociale et professionnelle ».

Nous proposons l'amendement suivant :

Après « a le droit », écrire l'article comme suit :

« à la protection sociale ainsi que, dans l'objectif d'accéder à la plus large autonomie possible, à bénéficier de tout système de formation de son choix et de mesures concrètes supplémentaires visant à trouver, à conserver un emploi, et à améliorer sa situation professionnelle et son intégration sociale».

Nos références sont l'article 15 de la CSE du Conseil de l'Europe et la Convention 159 de l'OIT.

18) Sur l'article XVIII (Convent 26): le droit des travailleurs migrants à l'égalité de traitement :

PROJET DE LA CONVENTION :

« Les travailleurs originaires de pays tiers qui résident légalement sur le territoire des Etats membres ont le droit à un traitement non moins favorable que celui dont bénéficient les travailleurs de l'Union européenne en matière de conditions de travail ».

Nous proposons l'amendement suivant :

« En matière de conditions de travail, les travailleurs originaires des pays tiers qui résident légalement sur le territoire des Etats membres ont droit à l'égalité de traitement avec les travailleurs de l'Union européenne ».

0 0

DROITS MANQUANTS AU PROJET DE LA CONVENTION

Droit au travail (cf. les observations ci-dessus).
Droit a un salaire minimum "garanti";
Droit syndical: protection des représentants des salariés;
Droit au logement;

Le 22 mai 2000.

Rédaction : Force Ouvrière
141 Avenue du Maine
75014 PARIS
FRANCE
rvalladon@force-ouvriere.fr

PROYECTO DE CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

fundamental.rights@consilium.eu.int

Bruselas, 31 de mayo de 2000 (05.06)
(OR. FR/ES)

CHARTE 4336/00

CONTRIB 200

NOTA DE TRANSMISIÓN

Asunto: Proyecto de Carta de los Derechos Fundamentales de la Unión Europea

Adjunto se remite una contribución de la "Confederación de Asociaciones de Vecinos, Consumidores y Usuarios de España" (CAVE).[1]

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[1] Este texto se ha presentado únicamente en español.

CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UE

En el Consejo Europeo de junio de 1999, los Jefes de Estado y de Gobierno decidieron poner en marcha la redacción de una Carta de los Derechos Fundamentales de la Unión Europea con el fin de dar visibilidad a los derechos y libertades de los ciudadanos y ciudadanas en la Unión Europea.

Posteriormente, en el Consejo de Helsinki, en diciembre de 1999, se decidió la composición del órgano que habría de redactar esta Carta al tiempo que se establecían los principios de transparencia en los trabajos y participación de otros agentes sociales.

En la actualidad, este órgano redactor, llamado no sin cierto simbolismo revolucionario, Convención, está elaborando un documento que recopila los principales derechos fundamentales existentes en las tradiciones constitucionales de los países de la UE junto con los ya recogidos en la Convención Europea de Salvaguarda de los Derechos Fundamentales del Consejo de Europa.

Los trabajados se encuentran bastante avanzados ya que los plazos así lo exigen. No en vano, el objetivo es aprobar esta Carta en el Consejo Europeo de Niza en diciembre del 2000 bajo presidencia francesa.

Las primeras dudas que asaltan al atento observador de estos trabajos son las siguientes: ¿tendrá la Carta carácter vinculante o será una mera declaración de principios?; ¿su contenido formará parte del Tratado, o será un protocolo anexo sólo vinculante para quienes la suscriban?; ¿cuáles serán los contenidos materiales de la Carta, recogerá los llamados derechos de cuarta generación?; ¿qué pasará con la Convención Europea de Salvaguarda de los Derechos Fundamentales, no corremos un riesgo de solapamiento de las garantías jurídicas transnacionales?. Estas son las principales dificultades con las que se encuentra la Convención, hasta la fecha, este órgano parece decidido a incluir la Carta en los Tratados como parte de su articulado y que ésta tenga carácter vinculante y sea oponible por parte de los ciudadanos ante los tribunales nacionales y en última instancia ante el Tribunal Europeo de Luxemburgo.

Desde la Confederación de Asociaciones de Vecinos Consumidores y Usuarios del Estado Español (CAVE), pensamos que no podemos hablar de ciudadanía europea si no hay un acervo de derechos fundamentales europeos que protejan a los ciudadanos en sus relaciones con la sociedad y con el estado. La construcción de la UE como instrumento superador o al menos como complemento de los actuales estados, requiere naturalmente, la recopilación y garantía de unos derechos fundamentales iguales para todos. En este sentido, esperamos que el silencio del gobierno español en este asunto, no implique una postura contraria a su inclusión en el futuro Tratado de Niza.

Pero si importante es el hecho de la puesta en marcha de este proceso y su inclusión en el Tratado, no menos importante es el contenido material de esta carta de derechos y sus sistema de garantías, en este sentido conviene recordar las palabras del insigne jurista Wallestein cuando afirmaba que “un derecho vale lo que valga su sistema de garantías” y es que un derecho sin posibilidades de ser oponible ante los tribunales se convierte en una declaración de intenciones.

En este sentido, desde CAVE proponemos la inclusión de una amplia batería de derechos cívicos y sociales al tiempo que se da entrada a los llamados derechos de "cuarta generación" es decir, el derecho al acceso a las nuevas tecnologías, la seguridad alimenticia, la bioética o la garantía de la privacidad en la Red. Más en concreto desde CAVE pensamos que hay que incluir el derecho de asociación europeo, el derecho a voto en las elecciones nacionales y europeas en base a un procedimiento electoral uniforme, el derecho a la salud, a la educación, a una vivienda digna, a unas prestaciones mínimas de integración, al medio ambiente, al deporte.....

Sólo una amplia gama de derechos cívicos y sociales puede dar sentido a esta iniciativa del Consejo. Si nos quedamos simplemente en los derechos procesales tipo "*Non bid in idem"* o el "*Habeas copus"* creo que se habrá avanzado muy poco y que el meritorio trabajo de la Convención caerá en saco roto.

En otro orden de cosas, pensamos que no se está cumpliendo mucho con el principio de transparencia y participación de otros agentes. La página Web habilitada por el Presidium de la Convención no contiene los últimos textos lo que dificulta las aportaciones de la sociedad civil que pueden estar ya superadas por los trabajos "no publicados" de la convención. Tampoco podemos decir que por publicar unos trabajos en una página Web que con gusto citamos (http://europa.eu.int) ya se cubren las necesidades informativas y de participación. Desde CAVE pensamos que hay que llegar más al fondo y trabajar también con los muchos ciudadanos que todavía no tienen acceso a Internet. Lo ideal sería abrir un gran debate social en torno a la Carta con el fin de popularizar el documento y fomentar la participación ciudadana. Esto se conseguiría si los Estados acordasen someter a referéndum el Tratado que salga de la cumbre de Niza en diciembre del 2000. Sin embargo, nos tememos que esta voluntad no esta en la mente de los actuales líderes de la UE.

PROPUESTAS DE CAVE DE CARA AL DEBATE EN TORNO A LA CARTA EUROPEA DE LOS DERECHOS FUNDAMENTALES

La Confederación de Asociaciones de Vecinos Consumidores y Usuarios de España (CAVE) se felicita por la decisión del Consejo Europeo de Colonia de comenzar la elaboración de una Carta de los Derechos Fundamentales de la UE con el fin de dar visibilidad y coherencia al conjunto de derechos de los ciudadanos de la UE.

Desde la CAVE también nos felicitamos por las conclusiones del Consejo Europeo de Tampere en donde se hizo mención a la transparencia de los trabajos y a la colaboración de los agentes sociales de cara a la elaboración de la Carta. No obstante, queremos señalar que esa transparencia no es completa, la página web habilitada no recoge los últimos documentos y tampoco son demasiado transparentes las convocatorias a las reuniones abiertas en el Parlamento Europeo.

1.- Cuestiones generales:

La CAVE defiende la inclusión de la Carta de los Derechos Fundamentales de la UE en el futuro tratado de la Unión una vez concluyan las negociaciones en torno a la Conferencia Intergubernamental. Una Carta de los Derechos Fundamentales como anexo al futuro Tratado, mandaría un mensaje muy contraproducente a la ciudadanía ya que supondría situar a los Derechos Fundamentales por debajo de las normas reguladoras del mercado único o de la Política Exterior y de Seguridad Común, lo cual tiene muy difícil explicación técnica y política.

La Carta debe implicar unos derechos oponibles ante los tribunales nacionales y en última instancia, ante el Tribunal de Justicia de Luxemburgo. Sólo así se dará contenido real, y no sólo simbólico, al concepto de ciudadanía europea.

La Carta ha de ser compatible con el Convenio Europeo de Derechos Fundamentales del Consejo de Europa, es más, éste debe ser la base material de la futura Carta. Se trataría en definitiva de extender y reforzar el sistema de garantías del Consejo de Europa a la Unión Europea.

La Carta de los Derechos Fundamentales no puede limitarse únicamente a los ciudadanos de la UE sino que debe ampliarse a los residentes legales con el fin de evitar discriminaciones y diferencias en función de la mayor o menor "generosidad" de las legislaciones nacionales.

La Carta debe recoger los derechos fundamentales de forma clara y sistemática evitando un lenguaje que hiciera difícil su interpretación. Cada uno de estos derechos debe completarse, cuando así sea necesario, por un reglamento europeo.

2.- Cuestiones materiales.

La CAVE considera imprescindible la inclusión de los siguientes derechos fundamentales en la futura Carta.

2.1 Derechos de la persona:

- Derecho a la vida
- Derecho a la dignidad de la persona
- Derecho a la libertad y a la seguridad
- Derecho a la asistencia jurídica y a un juicio justo
- Derecho al asilo

2.2 Derechos cívicos:

- Derecho al voto de los residentes legales en todos los ámbitos de decisión política incluyendo el nacional.
- Derecho de asociación y de reunión.
- Derecho a la participación política a través de partidos políticos.
- Derecho a la participación ciudadana en los medios de comunicación.

2.3 Derechos sociales:

- Derecho a la huelga y a la libre sindicación.
- Derecho al empleo y a un salario justo.
- Derecho a una pensión digna de jubilación.
- Derecho a una vivienda digna.
- Derecho a un salario mínimo de inserción.
- Derecho a la asistencia sanitaria gratuita.
- Derecho a la educación.
- Derecho de acceso a los bienes culturales.
- Derecho a un medio ambiente sostenible.
- Derecho a la participación de los consumidores.
- Derecho de acceso a los Servicios de Interés General.

2.4 Derechos de nueva generación:

- Derecho de acceso a Internet.
- Derecho a la privacidad e interdicción de la delación en la Red.
- Derecho a la seguridad alimenticia y al principio de precaución en materia de innovación biotecnológica.
- Garantía de la explotación en beneficio de la humanidad del genoma humano.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 31 mai 2000

CHARTE 4337/00

CONTRIB 201

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Contribution avec proposition d'amendement pour l'article sur le droit d'asile (plusieurs ONGs)

Veuillez trouver ci-après une contribution avec proposition d'amendement pour l'article sur le droit d'asile de: [1]

- Action des chrétiens pour l'abolition de la torture (ACAT),
- Association pour les professionnels de santé réfugiés (APSR),
- Service œcuménique d'entraide (CIMADE),
- Comité médical pour les exilés (COMEDE),
- Groupe accueil et solidarité (GAS),
- Groupe d'information et de soutien pour les immigrés (GISTI),
- Service social d'aide aux émigrés (SSAE),
- Amnesty International Section Française (AISF)

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[1] Ce texte a été soumis en langue françaisee uniquement.

Adressé par e mail à Guy Braibant, Pervenche Beres,

Georges Berthu, Thierry Cornillet, Hubert Haenel, François Loncle
Entre le 20 et le 22 mai 2000 en fonction des réponses des associations

Projet de Charte des droits fondamentaux de l'Union européenne
Proposition d'amendement pour l'article sur le droit d'asile

Proposition
de plusieurs associations de la Coordination française pour le droit d'asile

- **ACAT** **Action des chrétiens pour l'abolition de la torture**
- **APSR** **Association pour les professionnels de santé réfugiés**
- CIMADE Service œcuménique d'entraide
- **COMEDE** **Comité médical pour les exilés**
- **GAS** **Groupe accueil et solidarité**
- **GISTI** **Groupe d'information et de soutien pour les immigrés**
- **SSAE** **Service social d'aide aux émigrés**
- **AISF** **Amnesty International Section Française**

et du Collectif pour la Charte des droits fondamentaux (c/o Ligue des droits de l'homme)

Madame, Monsieur,

Lors de la réunion de la CNCDH à Paris, cette semaine, Monsieur Braibant nous a précisé qu'il reste fort peu de temps pour tenter d'orienter les travaux de la Convention et nous a conseillé de faire des suggestions d'amendements très précises. Les associations ci dessus énumérées ont bien noté les modifications déjà apportées par la Convention à l'article 21.1 (anciennement 17) de la Charte des droits fondamentaux de l'UE, intitulé *« Droit d'asile et expulsion »*, depuis le début de ses travaux, mais elles cherchent encore à faire évoluer ce texte en proposant un amendement.

D'une part, sur cette question du droit d'asile, il nous paraît préférable de reprendre la formulation utilisée pour un grand nombre des articles du projet de Charte *« Toute personne a droit à .. »* ; dans la version du 11 mai dernier, cette formulation est utilisée par exemple pour les droits civils et politiques suivants :
- droit au respect de son intégrité (3), de sa vie privée (12) et de sa vie familiale (13) ;
- droit à la liberté (6), à un recours (7) et à l'éducation (16) ;
- droit à la liberté de pensée (14), d'expression (15), de réunion (17).

D'autre part, il nous paraît important de distinguer le premier alinéa de cet article relatif à l'asile du second dont le thème est tout à fait différent, en l'occurrence l'expulsion.

Pour l'article de la Charte sur le *« Droit d'asile »* ou le *« Droit à l'asile »*, nous proposons la formulation suivante : *« Toute personne a droit à l'asile dans l'Union européenne conformément aux règles de la Convention de Genève du 28 juillet 1951 et du protocole du 31 janvier 1967 relatifs au statut des réfugiés et d'autres textes relatifs aux droits de l'homme ».*

Bien évidemment, je suis prêt à discuter de cette proposition si vous le souhaitez utile, vous pouvez me joindre par e mail ou par téléphone à mon domicile, au 01 46 45 98 18.

Avec nos remerciements

Pour les associations ci-dessus énumérées,
Patrick Delouvin
Responsable du Service Réfugiés, Amnesty International Section Française

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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 5 juin 2000

CHARTE 4338/00

CONTRIB 202

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de la Confédération Française des Travailleurs Chrétiens (syndicat CFTC) sur la rémunération et les services d'intérêt général. [1]

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[1] Ce texte a été soumis en langue française uniquement.

Objet :	Projet de charte des droits fondamentaux

Contribution du syndicat CFTC (Confédération Française des Travailleurs Chrétiens) en complément de celle envoyée le 23 mai au Présidium par les syndicats CGC – CFTC – CFDT – CGT et proposant des amendements aux articles rédigés dans les documents CONVENT 28 et CONVENT 34.

La contribution CFTC ne porte que sur deux points relatifs aux droits économiques et sociaux, droit à une rémunération équitable, et accès aux services d'intérêt général.

① Droit à une rémunération égale et équitable

Proposition

- **Tout travailleur, quel que soit son sexe et son origine, a droit à une rémunération égale pour un travail de valeur égale.**
- **Tout travailleur à droit à une rémunération équitable suffisante pour lui permettre, ainsi qu'aux siens, un niveau de vie décent.**

Commentaire

Ces droits sont mentionnés à l'article 4 de la charte sociale révisée ainsi qu'aux articles 5 et 16 de la charte des droits fondamentaux des travailleurs.

② Services d'intérêt général

Proposition

- **Toute personne a droit à des services d'intérêt général de qualité.**
- **L'accès à ces services d'intérêt général participe à l'exercice réel des droits fondamentaux.**
- **Ces services, dont l'accessibilité à un prix abordable et dont la qualité et la continuité sont des impératifs essentiels, doivent pouvoir être évalués de façon continue et démocratique afin de vérifier qu'ils s'adaptent en permanence aux évolutions des besoins ainsi qu'au progrès social et technologique.**

Commentaire

L'article 16 de la version consolidée du traité instituant la charte européenne précise : « La communauté et ses Etats membres … veillent à ce que les services (services d'intérêt économique général) fonctionnent sur la base de **principes** et dans les conditions qui leur permettent d'accomplir leurs missions.

Ces principes ont été précisés dans la **déclaration n° 13** annexée à l'article final : « Les dispositions de l'article 7d (devenu l'article 16) relatives aux services publics sont mises en œuvre dans le plein respect de la jurisprudence de la Cour de Justice, en ce qui concerne, entre autres, les principes d'égalité de traitement, ainsi que de **qualité** et de **continuité** de ces services. ».

En outre, l'article 153 de la version consolidée du traité instituant la charte européenne précise :

1. « Afin de promouvoir **les intérêts des consommateurs** … la **communauté contribue** à la protection de la santé, de la sécurité, et des intérêts économiques des consommateurs ainsi qu'**à la promotion de leur droit à l'information**, à l'éducation et s'organise afin de préserver leurs intérêts. »
2. « Les **exigences de la protection des consommateurs** sont **prises en considération** dans la définition et la mise en œuvre des autres politiques et actions de la communauté »

   Par ailleurs, un plan d'action triennal 1999-2001 pour la politique des consommateurs a été adopté à l'issue du conseil consommateur du **14 avril 1999**. Dans la **résolution** adoptée ce jour-là, le conseil, afin d'aider les consommateurs à mieux se faire entendre, invite la commission au renforcement des organisations qui les représentent au niveau européen. Il conviendra **d'assurer la diffusion des meilleures pratiques** et de consolider le rôle des représentants des consommateurs, **d'encourager le dialogue enter les organisations de consommateurs et les acteurs économiques** … un dialogue plus approfondi entre la commission et les Etats membres ainsi que l**'évaluation régulière** des progrès réalisés dans la mise en œuvre de cette résolution devront concourir à l'efficacité accrue de la politique des consommateurs à l'échelle européenne.

   A noter, par ailleurs, que lors du conseil consommateurs du 8 nov. 99, le conseil, à propos de la protection des consommateurs et des services d'intérêt général, a procédé à un débat (ouvert au public) qui a mis en évidence l'opportunité de mieux définir le concept de service d'intérêt général (qui recouvre des réalités différentes dans les Etats membres) en vue d'une approche législative globale adaptée à l'exigence des citoyens de bénéficier des **services de base de qualité** à des prix accessibles, dans un contexte de libéralisation et de globalisation des marchés et développements technologiques constants.

   En outre, le conseil européen de **Lisbonne** des 23 et 24 mars 2000 « estime qu'il est **essentiel**, dans le cadre du marché intérieur et d'une économie de la connaissance, de **tenir pleinement compte des dispositions du traité relatives aux services d'intérêt économique général** et aux entreprises chargées de la gestion de ces services. Il invite la commission de mettre à jour sa communication de 1996 compte tenu des dispositions du traité » (§19 des conclusions de la présidence).

Compte tenu de ce qui précède, c'est donc « à bon droit » (puisqu'il s'agit, pour l'essentiel, de textes communautaires) que les usagers des services d'intérêt général peuvent exiger un contrôle permanent et démocratique de la qualité de ces services

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 31 May 2000

CHARTE 4339/00

CONTRIB 203

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from the High Commissioner for Refugees of the United Nations with a letter and comments on the Right of Asylum.

19 May

Dear Mr. Jacque,

It has come to our attention that the Convention drawing up the EU Charter of Fundamental Rights will consider a draft of the first 30 articles of the Charter at its meeting of 5 and 6 June. These draft articles include a provision on the right to

asylum which UNHCR holds to be inconsistent with agreed principles of international refugee law. UNHCR therefore has prepared alternative wording for the relevant provision which you will find in annex to this letter.

We would very much appreciate it if UNHCR's observations could be taken into consideration in any further discussions related to the draft Charter provision on asylum and we would be happy to discuss our views on this matter with you in more detail at your earliest possible convenience.

Yours sincerely,

Raymond Hall
Regional Representative

Mr. Jean-Paul Jacque
Director
Legal Service
General Secretariat
Council of the European Union
175 rue de la Loi
1048 Brussels

UNHCR Comments on the Right of Asylum under the Draft Charter of Fundamental Rights of the European Union

1. UNHCR welcomes the proposal to include the right of asylum in the draft Charter on Fundamental Rights of the European Union. This will be consistent with the well-established European tradition of granting asylum to refugees and other persons in need of international protection, as well as with fundamental humanitarian principles that are part of the European human rights heritage.

2. All Member States of the European Union are States Parties to the 1951 Convention/1967 Protocol relating to the Status of Refugees and have thus adopted the refugee definition contained therein without restrictions on any ground. The universal and unconditional application of these international refugee instruments has repeatedly been emphasised by the international community. Most recently, the European Council, at its meeting in Tampere, reaffirmed the importance the Union and Member States attach to "absolute respect of the right to seek asylum."

3. As currently drafted, the Charter's provision on the right of asylum restricts access to this right in a manner which could be tantamount to discrimination on the basis of country of nationality. To avoid any inconsistency with the 1951 Convention/1967 Protocol, UNHCR wishes to propose for the consideration of the drafters of the Charter the following revision of the draft text on the right of asylum:

> **The absolute respect for the right of asylum will be fully ensured in the European Union, consistent with the 1951 Convention/1967 Protocol relating to the Status of Refugees and other international instruments for the protection of refugees.**

Statement of reasons

(i) Article 14(1) of the Universal Declaration of Human Rights provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution". This right is elaborated in the 1967 United Nations Declaration on Territorial Asylum and is reaffirmed in numerous other resolutions of the General Assembly of the United Nations, as well in Conclusions of the Executive Committee of UNHCR.

(ii) The Committee of Ministers of the Council of Europe has reaffirmed the principles of asylum in several instruments, including in Resolution 14/67 on Asylum to Persons in Danger of Persecution and in the Declaration on Territorial Asylum of 18 November 1977.

(iii) Article 63(1) of the Amsterdam Treaty provides that the Council shall adopt measures on asylum, in accordance with the 1951 Convention and 1967 Protocol relating to the Status of Refugees and other relevant treaties.

(iv) The Conclusions adopted by the European Council at its Tampere meeting of 15-16 October 1999 reaffirmed the importance that the Union and Member States attach to "absolute respect of the right to seek asylum".

Office of the United Nations High Commissioner for Refugees
Geneva, May 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 5 June 2000

CHARTE 4340/00

CONTRIB 204

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Contribution submitted by the International Rehabilitation Council for Torture Victims (IRCT)

Please find hereafter a contribution by the International Rehabilitation Council for Torture Victims (IRCT) with the statement presented at the hearing on 27 April 2000 and the proposal for an amendment to article 4. [1]

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[1] This text exists in English language only.

Mr Chairman

I speak on behalf of the International Rehabilitation Council for Torture Victims (IRCT). We would like to speak on two points: the importance of prevention of torture and the rehabilitation of torture victims.

The IRCT is a medically based organisation, supporting approximately 200 centres and programmes for rehabilitation of victims of torture world-wide.

The IRCT welcomes this important initiative from the EU with regard to its Human Rights obligations. The recognition and observance of fundamental human rights such as the prohibition of torture is a cornerstone in any democratic society with an aim of sustainable development. This has to be acknowledged in the process of accepting new member states and in the relations of the European Union with third countries. A charter on fundamental rights and freedoms will provide the necessary framework in which observance of these rights and freedoms can be implemented.

The IRCT supports 47 centres in 11 member states of the European Union. These rehabilitation centres provide a vital service for those people fleeing persecution in their own country and seeking refuge in Europe. Within the European Union, rehabilitation of tortured refugees will be instrumental in their social and economic reintegration. Torture as an experience carries many consequences such as social isolation, loss of self-confidence and anger. Left untreated, these people will not be able to adapt to the new society and will not be able to provide either for themselves or for their families. On the contrary, feelings of anger and hopelessness may turn into aggressive behaviour that may ultimately create dissonance in the society in which they live.

For this reason, we are pleased to see in the latest version of the draft charter that the prohibition against torture is now placed in a separate article.

However, we would like to see the inclusion of:

1. the right to rehabilitation, similar to article 14 of the Convention against Torture
2. the prohibition against the return of asylum seekers in danger of being tortured similar to the provisions in Article 33 in the Refugee Convention and Article 3 in the UN Convention Against Torture

We would further like to see that the highest standard possible be the aim of the Convention. Thus care should be taken to include all relevant developments in regard to the prohibition of torture such as case-law not only from the European Court on Human Rights but also other regional and international bodies.

The Charter should also take care to include into the right to reparation the right to a judicial remedy, compensation and restitution. Moreover, the Charter should include an article on training of relevant personnel as in article 10 of the UN Convention Against Torture.

We hope that these recommendations will be become part of this important discussion and we thank the Convention for giving us this opportunity for presenting our views.

Thank you

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Proposed amendment to Article: 4

Submitted by: IRCT (International Rehabilitation Council for Torture Victims)

The IRCT is a medically based organisation, supporting approximately 200 centres and programmes for rehabilitation of victims of torture world-wide.

Proposed text:

1. **No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.**
2. **No one may be expelled or extradited to a State where he would be in danger of being subjected to the death penalty, torture or other inhuman treatment.**
3. **The victim of an act of torture shall have an enforceable right to as full rehabilitation as possible, including the means for social reintegration.**

ARTICLE X:

Public authorities shall ensure that education and information regarding these rights and freedoms are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other public officers.

Reasons: **The IRCT bases its suggestions on provisions found in other fundamental texts such as the Convention against Torture (Articles 10 and 14).**

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 5 juin 2000

CHARTE 4341/00

CONTRIB 205

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Contribution de la Conférence des Notariats de l'Union Européenne (CNUE) (datée le 19/05/00)

Veuillez trouver ci-après une contribution de la Conférence des Notariats de l'Union Européenne (CNUE) avec la résolution adopté lors de son Assemblée extraordinaire le 19 mai 2000. [1] [2]

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[1] Ce texte a été soumis en langues française et allemande.

[2] CNUE – Rue Coudenberg, 70, B–1000 Bruxelles. Tél (+32 2) 513.95.29 Fax (+32 2) 513.93.82 E-mail: info@cnue.be

Conférence des Notariats de l'Union Européenne

La Conférence des Notariats de l'Union Européenne a adopté lors de son Assemblée extraordinaire le 19 mai 2000 à Bruxelles la résolution suivante:

La Conférence des Notariats de l'Union Européenne

- se déclare favorable à la décision prise par le Conseil européen de Cologne, d'élaborer un projet de Charte des droits fondamentaux de l'Union européenne, d'ici le Conseil européen de décembre 2000;
- partage l'avis selon lequel un catalogue des droits fondamentaux européens à caractère contraignant peut contribuer dans une large mesure, à renforcer le processus de l'intégration européenne;
- suit avec intérêt les travaux de la convention.

Afin de réaliser le but qui vise à assurer aux citoyens d'Europe une large protection des droits fondamentaux, la Conférence des Notariats de l'Union Européenne propose à la convention d'examiner les amendements suivants, numérotés de un à trois, et de les intégrer au projet de la Charte:

1. L'article 8 - Droit à un tribunal impartial (Convent 28; Charte 4284/00) est complété par un alinéa 3 ainsi rédigé:

(3) Toute personne a droit de se faire conseiller et de se faire assister en matière judiciaire et extrajudiciaire par le professionnel compétent.

Le titre de l'article 8 est complété par la notion **"et à l'assistanc**e".

2. L'article 8 – Droit à un tribunal impartial (Convent 28; Charte 4284/00) est complété par la disposition suivante:

Article 8 bis - Droit à la justice et à l'administration impartiale de la justiceL'existence des institutions indépendantes et impartiales de la justice et de son administration doit être garantie.
Toute personne doit pouvoir bénéficier de services juridiques et avoir accès à la justice et à l'administration indépendante et impartiale de celle-ci.

Allemagne – Autriche – Belgique – Espagne – France – Grèce – Italie – Luxembourg – Pays-Bas - Portugal

3. L'article 19 - Protection des données (Convent 28; Charte 4284/00) est complété par la disposition suivante:

Article 19 bis - Droit à la discrétion
Toute personne a droit à ce que les faits confiés à un professionnel du droit, ou dont celui-ci a pris connaissance du fait de sa qualité professionnelle, ne soient pas divulgués.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 5. Juni 2000

CHARTE 4342/00

CONTRIB 206

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Beitrag von Herrn. Prof. Dr. Martin Stock, Universität Bielefeld, Fakultät für Rechtswissenschaft,

Finden Sie bitte nachstehend eine Beitrag von Herrn. Prof. Dr. Martin Stock, Universität Bielefeld, Fakultät für Rechtswissenschaft, zur Medienfreiheit. [1] [2]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

[2] Prof. Dr. Martin Stock: Universität Bielefeld, Fakultät für Rechtswissenschaft, Universitätsstr. 25, 33615 Bielefeld. Tel: 0521-106 4390. E-mail: martin.stock@uni-bielefeld.de

Medienfreiheit in der EU-Grundrechtscharta: Art.10 EMRK ergänzen und modernisieren!

Von Martin Stock

I. Ein kühnes Projekt der Europäischen Union

Auf deutsches Drängen hat der Europäische Rat auf dem EU-Gipfel in Köln im Juni 1999 die Ausarbeitung einer „Charta der Grundrechte der Europäischen Union" beschlossen. Ein Entwurf einer solchen Charta soll von einem Gremium erstellt werden, dessen Zusammensetzung und Arbeitsweise die Staats- und Regierungschefs der EU-Mitgliedstaaten sodann auf dem Gipfel in Tampere (Finnland) im Oktober 1999 näher geregelt haben. Es handelt sich um ein in dieser Form neuartiges Gremium (nach dessen eigenem Sprachgebrauch: „Konvent") mit breiter nationaler und supranationaler parlamentarischer Rückkoppelung. Das Gremium ist im Dezember 1999 in Brüssel zu seiner konstituierenden Sitzung zusammengetreten und hat den früheren deutschen Bundespräsidenten und Verfassungsrechtsexperten Prof. Dr. Roman Herzog zu seinem Vorsitzenden gewählt. Im März dieses Jahres hat es mit den Beratungen über einen Grundrechtskatalog begonnen. Parallel dazu haben sich das Europäische Parlament sowie Bundesrat und Bundestag mit diesem kühnen und weitläufigen Vorhaben befaßt und es grundsätzlich positiv bewertet. Im Juni wird Herzog den Staats- und Regierungschefs über den Sachstand berichten, und bis zur Sommerpause (ca. Mitte Juli) soll der Grundrechtskonvent dem Europäischen Rat einen vorläufigen Gesamtentwurf vorlegen. Im Dezember 2000 soll die neue Charta dann auf dem EU-Gipfel in Nizza - zunächst nur im Sinn einer politischen Deklaration - feierlich verkündet werden. Anschließend soll sie eventuell mittels Vertragsänderung rechtsverbindlich gemacht werden.

Der Europäische Rat hat dem Konvent einen Arbeitsauftrag erteilt, in welchem sich ein groß angelegtes und anspruchsvolles rechtspolitisches Vorhaben der EU ankündigt. Ob daraus ein weiterer großer Schritt in Richtung auf eine veritable EU-Verfassung werden kann und auch werden sollte, wird zur Zeit unterschiedlich beurteilt. In der Grundrechtsdebatte spiegeln sich konkurrierende europapolitische Konzepte und Ideen wider, wie sie heute - nach mancherlei Brüsseler Krisen und vor neuen Herausforderungen (Osterweiterung) - auch auf organisatorisch-institutioneller Ebene eine Rolle spielen. Nach dem Kölner Mandat hat der Grundrechtskonvent wohl einen gewissen konzeptionellen Spielraum im Vorfeld möglicher all-gemeiner Verfassungsgebung. Er neigt allerdings dazu, politisch-demokratische konstitutionelle Bezüge des Grundrechtskatalogs vorerst auszuklammern, und operiert diesbezüglich sehr vorsichtig. Als hinderlich stellt sich im übrigen vor allem der enorme Zeitdruck dar, unter dem das Gremium nach den Vorgaben der Staats- und Regierungschefs und den Wünschen der jetzigen und der nächsten Präsidentschaft (Portugal, Frankreich) steht. Ob es die Hoffnungen, die von gesellschaftlichen und politischen Akteuren auf seine Arbeit gesetzt werden, tatsächlich erfüllen kann, wird sich erst noch erweisen müssen.

II. Medienfreiheit als europäisches Grundrecht - Typik und Inhalt

Das eben Gesagte gilt auch für die Medienfreiheit, die von der EU-Rechtsprechung bisher - über Art. 6 Abs. 2 des Vertrages über die Europäische Union (EUV), der gewisse richterrechtliche Freiheiten impliziert - aus Art. 10 der Europäischen Menschenrechtskonvention (EMRK) hergeleitet wird. Der Gerichtshof der Gemeinschaft (EuGH) greift dabei gern auf die Judikatur des (auf Europaratsebene angesiedelten) Europäischen Gerichtshofs für Menschenrechte (EGMR) zurück. Art.10 EMRK wird vom EuGH indes stärker ökonomisiert und in pressespezifischer Weise

mit der Dienstleistungsfreiheit nach den Art. 49 ff. des Vertrags zur Gründung der Europäischen Gemeinschaft (EGV) kombiniert: Medienfreiheit als Gewerbe- und Tendenzfreiheit. Und im Grundrechtskonvent steht man jetzt vor der Frage:

Soll insoweit alles beim alten bleiben oder soll ein Mediengrundrecht als künftiges genuines EU-Grundrecht neu konzipiert und tunlichst auf eine supranationale konstitutionelle Weiterentwicklung der Union zugeschnitten werden? Soll sich diese neue Medienfreiheit auf Europa als nach und nach immer staatsähnlicher werdendes konföderatives Gebilde beziehen, und soll sie den Integrationsprozeß auf ihre Weise voranbringen und intensivieren? Dies ist geradezu ein exemplarisches, für das Kodifikationsprojekt insgesamt charakteristisches Grundrechtsproblem, das besondere Aufmerksamkeit verdient. Dazu noch ein paar nähere Informationen und Thesen.

III. Art.10 EMRK als veraltetes Leitbild

Wenn man bei der erstgenannten Option bleiben, also alles beim alten lassen will, muß man mit einem Menschenrechtsartikel vorlieb nehmen, der schon älteren Datums ist und aus heutiger Sicht ziemlich rückständig und simpel erscheint. Er normiert eine Medienfreiheit nicht einmal ausdrücklich, vielmehr kann sie in ihm nur im Auslegungsweg und nur in rudimentärer Form vorgefunden werden, nämlich als sogenannter Unterfall individueller Meinungsverbreitungsfreiheit derjenigen Personen, welche jeweils als Medienträger (Verleger, Veranstalter) fungieren. Dieser Ansatz geht an der Typik binnenplural-öffentlicher Medien gänzlich vorbei. Er eignet sich am ehesten für marktorientierte private Tendenzmedien geringer Größenordnung, etwa für die letzten heute noch vorhandenen Reste lokaler Richtungspresse. Faktisch drängt sich gegenwärtig jedoch ein privat-kommerzieller Typus ganz anderer Art in den Vordergrund, der zu mancherlei Fehlentwicklungen führen kann und von dem älteren regulatorischen Ansatz der EMRK nicht adäquat erfaßt wird. Im Rundfunkbereich haben wir es nunmehr typischerweise mit einer rein erwerbswirtschaftlich betätigten, für kommunikative Verarmung und massive Vermachtung anfälligen Medienunternehmerfreiheit zu tun, beispielsweise in einer transnationalen, konkreter Gebiets- und Verbandsbezüge immer mehr ermangelnden globalisierten Variante. Für ein derartiges kommerzialisiertes Menschenrecht -womöglich als einzige europaweit eingeführte Grundrechtsvariante - gibt es in der Tat ein paar machtbewußte Global Players als reale Anwärter, und daneben zahlreiche beflissene Fürsprecher und Wegbereiter, auch in der Rechtswissenschaft und im politischen Raum. Auch die Medienpolitik der EU-Kommission litt noch unlängst an entsprechenden Simplifikationen und Einseitigkeiten. Neuerdings scheint die Kommission indes andere Wege einzuschlagen, wie sich insbesondere aus ihrer Mittteilung „Grundsätze und Leitlinien für die audiovisuelle Politik der Gemeinschaft im digitalen Zeitalter“ vom 14.12.1999, KOM (1999) 657 endg., ergibt. Darin ist jetzt auch ein anderes, differenzierteres Grundrechtskonzept angelegt.

IV. Vom kommerzialisierten Menschenrecht zum Funktionsgrundrecht

Damit sind wir auch schon bei der zweiten Option angekommen, kurz gesagt: Medienfreiheit als europäisches Funktionsgrundrecht, ungefähr nach dem Bilde des Art. 5 Abs. 1 Satz 2 GG in der (freilich auch ihrerseits erneuerungsbedürftigen) Interpretation des Bundesverfassungsgerichts. Darin hat sich die Public-Service-Idee nun auch grundrechtlich ausgeformt und in unverwechselbarer Weise konkretisiert. Die damit angesprochene konstitutionell wichtige, öffentlich-„dienende“ Medienfunktion läßt sich anhand der Karlsruher „Medium und Faktor“-Formel (etwa BVerfGE 57, S. 295, 319 ff.) verdeutlichen, was auch europäisch-integrative Adaptionen und Nutzanwendungen zugunsten einer künftigen EU-Verfassung erlaubt. Dabei geht es hauptsächlich um den jeweiligen öffentlichen Rundfunk, daneben aber auch - mit Abstrichen - um den privat-kommerziellen, d.h. insgesamt um duale Systeme. Neben innerstaatlich-nationalen Programmen kann dabei auch an ein relativ autonomes supranationales „Europäisches Fernsehen“

gedacht werden, wie es im Europäischen Parlament - etwa von dem deutschen Abgeordneten Wilhelm Hahn - schon in den frühen achtziger Jahren gefordert worden ist. Auf dem Boden des funktionalen Ansatzes wird sich auch die künftige EU-Medienfreiheit klarer bestimmen und rechtlich konsolidieren lassen.. Auch die Regulierungsprobleme der Multimedia-Entwicklung wird man so in den Griff bekommen können.

V. Alter Wein in neuen Schläuchen?

Das Präsidium des EU-Grundrechtskonvents hat sich schon frühzeitig auf Art. 10 EMRK als Basisnorm und Ausgangspunkt der einschlägigen Beratungen festgelegt. Bei dieser Vorgabe ist es dann - anscheinend aus pragmatischen Gründen und zum Zweck der Arbeitserleichterung - bis heute geblieben. In der derzeit letzten Fassung des Präsidiumsentwurfs (Dokument CONVENT 28 vom 5.5.2000) findet sich in Art. 15 unter der verkürzenden Überschrift „Freiheit der Meinungsäußerung“ immer noch lediglich folgender Normtext:

> „Jede Person hat das Recht auf freie Meinungsäußerung. Dieses Recht schließt die Meinungsfreiheit und die Freiheit ein, Informationen und Ideen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben.“

Dies deckt sich inhaltlich mit Art. 10 Abs. 1 Sätze 1 und 2 EMRK. Schrankenregelungen sollen einer allgemein gehaltenen, „horizontalen“ Bestimmung (derzeit Art. 47 laut Präsidiumsentwurf Dokument CONVENT 34 vom 16.5.2000) vorbehalten bleiben, die insoweit auf Art. 10 EMRK verweist. Darum sind Art. 10 Abs. 1 Satz 3 und Abs. 2 EMRK nicht in Art. 15 des Entwurfs übernommen worden. Im übrigen sind diese Gewährleistungen entsprechend dem völkerrechtlichen Charakter der (vom Europarat geschaffenen) Menschenrechtskonvention nach wie vor inter- und nicht supranational orientiert, so als ginge es nur um Free Flow innerhalb des EG-Binnenmarkts als einer Art Freihandelszone, eines politisch und publizistisch gestaltlosen „audiovisuellen Raums“ o.ä. Von Rundfunk als „Medium und Faktor“ europäischer diskursivischer Öffentlichkeit, nunmehr auch als Triebkraft fortschreitender Konstitutionalisierung und Verfassungsentwicklung, weiß der Präsidiumsentwurf noch gar nichts. So modern und verdienstvoll er sich in anderen Teilen darstellt - hier fehlt ihm jegliche Inspiration. Etwa veranlaßte Ergänzungen und Aufbesserungen des bejahrten EMRK-Artikels scheint das Präsidium nicht aktiv zu betreiben, vielmehr will es die Initiative wohl anderen überlassen.

Als erster hat der vom Deutschen Bundestag in den Konvent entsandte SPD-Abgeordnete Prof. Dr. Jürgen Meyer dieses Defizit bemerkt und darauf mit dem Vorschlag reagiert, Presse- und Rundfunkfreiheit explizit zu gewährleisten (vgl. Dokument CONTRIB 60 vom 28.3.2000). Ähnlich dann ARD und ZDF, die zu einer Brüsseler Anhörung im April dieses Jahres einen eigenen Alternativentwurf für ein „europäisches Grundrecht der Meinungs- und Informationsfreiheit“ (inklusive Medienfreiheit) vorgelegt haben (Dokument CONTRIB 103 vom 18.4.2000). Auch die deutschen Länder sehen hier neuerdings Diskussionsbedarf (vgl. Dokument CONTRIB 177 vom 17.5.2000). Dem Vernehmen nach haben sie jüngst ebenfalls vorgeschlagen, Presse- und Rundfunkfreiheit ausdrücklich in Art. 15 des Entwurfs aufzunehmen. Wie sich das Präsidium dazu stellen wird, bleibt abzuwarten. Es leitet aus dem Beschluß von Tampere für sich selbst, zumal für Herzog als Vorsitzenden, eine sehr großzügig bemessene, für eine quasi-verfassungsgebende Versammlung ganz ungewöhnliche Einschätzungsprärogative her, was die Zustimmungsfähigkeit des Entwurfs „für alle Seiten“ betrifft. Bei günstigem Verlauf mag die EU-Charta anhand der erwähnten Vorschläge textmäßig wenigstens ungefähr auf den Stand des Art. 5 Abs. 1 Satz 2 GG gebracht werden können - nur wird Karlsruhe insoweit nicht mehr die Interpretationshoheit haben, und vom EuGH weiß heute niemand, ob er fähig sein wird, seine bisherigen ökonomisch-wirtschaftsrechtlichen Prioritäten und Beengtheiten nach und nach zu überwinden. Was er kürzlich

über öffentliche Zuwendungen an das Portugiesische Fernsehen (RTP) als eventuell wettbewerbswidrige staatliche Beihilfen verlauten ließ (epd 38/2000), klingt noch recht unbeholfen und rückwärtsgewandt.

VI. Eine bessere Alternative

Mithin ist es höchste Zeit, die Diskussion über EU-Kommunikationsgrundrechte medienspezifisch zu vertiefen und zu verbreitern, also auch mehr wissenschaftliches und öffentliches Interesse für diese Dinge zu wecken. Vielleicht könnte jemand auch einmal die Staats- und Regierungschefs dafür interessieren und sie daran erinnern, was sie 1997 in dem neunten Protokoll zum Vertrag von Amsterdam festgelegt und sodann 1999 bekräftigt haben: „daß der öffentlich-rechtliche Rundfunk mit seinen kulturellen, sozialen und demokratischen Aufgaben, die er zum Wohle der Allgemeinheit erfüllt, von entscheidender Bedeutung für Demokratie, Pluralismus, sozialen Zusammenhalt, kulturelle und sprachliche Vielfalt ist“ (so die Entschließung des EU-Ministerrats und des Europäischen Rats über den öffentlich-rechtlichen Rundfunk vom 25.1.1999, Amtsblatt der EG Nr. C 30 vom 5.2.1999, S. 1). Daraufhin wird in dem - leider wenig bekannten - Grundsatzpapier der einhellige Wille der Mitgliedstaaten betont, unter Gesichtspunkten programmlicher Qualitätssicherung „die Rolle des öffentlich-rechtlichen Rundfunks herauszustellen“. Solche Einsichten und guten Vorsätze wären jetzt endlich einmal auch für die werdende europäische Grundrechtsdogmatik zu rezipieren und umzusetzen.

Wer das tun will, der kann nicht einfach bei Art. 10 EMRK bleiben und damit für ein schwächliches Marktmodell à la „Fernsehen ohne Grenzen“optieren. Wenn man Art. 10 EMRK überhaupt als Ausgangspunkt beibehalten will, wird man jedenfalls nicht ohne weitreichende funktionale Ergänzungen und Modernisierungen des bisherigen Wortlauts auskommen. Mögliche Textbeispiele dafür gibt es in Europa in Hülle und Fülle, vor allem dort, wo das Public-Service-Prinzip noch geläufig ist und in Blüte steht. Eine avancierte EU-Medienfreiheit könnte in der Grundrechtscharta beispielsweise durch folgende Einfügung in Art. 15 verankert werden:

> „(2) Die Freiheit der Presse, des Rundfunks, des Films sowie der sonstigen an die Allgemeinheit gerichteten Kommunikation wird gewährleistet.
>
> (3) Der Rundfunk dient der Information durch umfassende und wahrheitsgemäße Berichterstattung und durch die Verbreitung von Meinungen. Er trägt zur Bildung und Unterhaltung bei. Er ist Medium und Faktor des Prozesses freier Meinungsbildung. Er trägt der kulturellen Vielfalt in Europa Rechnung und fördert die europäische Integration. Er nimmt damit eine öffentliche Aufgabe wahr und ist darum unabhängig in der Programmgestaltung. Unbeschadet des Rechts, Rundfunk in privater Trägerschaft zu betreiben, werden Bestand und Entwicklung von Rundfunk in öffentlicher Trägerschaft gewährleistet.“

Abs. 2 lehnt sich an den ARD/ZDF-Vorschlag an. In Abs. 3 sind u.a. Passagen aus dem Rundfunkrecht deutscher Länder (Bayern, Nordrhein-Westfalen, Sachsen) enthalten, welche zu den für Art. 6 Abs. 2 EUV relevanten mitgliedstaatlichen Verfassungstraditionen gehören, wie sie nach dem Kölner Mandat auch der Grundrechtskonvent zu berücksichtigen hat. Die programmliche Unabhängigkeit des Rundfunks wird insbesondere im österreichischen und im Schweizer Verfassungsrecht angesprochen - beides Staaten mit einer ebenfalls hochentwickelten, dem Public-Service-Gedanken verpflichteten Medienrechtskultur. Hinzugefügt werden könnten eventuell noch strukturpolitische Richtwerte nach Art der Präambel des deutschen Rundfunkstaatsvertrags von 1991, etwa der Satz: „Anzustreben ist ein leistungsfähiges europäisches duales Rundfunksystem.“ Und wer noch ein übriges tun will, mag auch anfügen: „Auf rundfunkähnliche neue Mediendienste

sind diese Bestimmungen entsprechend anzuwenden.“ (Auch die Schrankenregelungen sollten nicht einfach aus der Menschenrechtskonvention übernommen werden.) Warum also nicht Art. 10 EMRK in dieser Weise ergänzen und modernisieren?

Hier bietet sich unversehens eine gute Gelegenheit, den europäischen Grundrechtsschutz des Rundfunks erheblich zu verbessern, gerade auch im Blick auf die Zukunft des öffentlichen Sektors unter Konvergenzbedingungen. Denn man könnte jetzt ein paar neue Pflöcke einschlagen: zugunsten einer kontinuierlichen und energischen, europaweit wirksamen programmlichen Qualitätsvorsorge, zugunsten der Bewahrung kultureller Vielfalt und Offenheit, auch zugunsten weiterer Selbstfindung und innerer Kräftigung der Union in politicis. Europa in „guter Verfassung“, auch kraft einer guten Rundfunkverfassung - warum diese Chance verschlafen?

Der EU-Grundrechtskonvent hat eine eigene Website eingerichtet, die in allen Amtssprachen angeboten wird und die Öffentlichkeit über Zeitplan und Inhalt der Beratungen des Gremiums informieren soll. Die dem Gremium vorgelegten deutschsprachigen Dokumente sind einsehbar unter http://db.consilium.eu.int./df/listall.asp?lang=en&slang=de&BTN_ALL. Dort finden sich auch die in diesem Beitrag genannten Dokumente. Der Beitrag gibt in kurzer Form Überlegungen wieder, die vom Autor weiter ausgeführt worden sind in der demnächst erscheinenden Schrift: Medienfreiheit in der EU-Grundrechtscharta: Art. 10 EMRK ergänzen und modernisieren! (Band 5 der vom Mainzer Medieninstitut herausgegebenen Studien zum deutschen und europäischen Medienrecht), Verlag Peter Lang GmbH Frankfurt a. M.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 5 June 2000

CHARTE 4343/00

CONTRIB 207

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from the European Children's Network (Euronet) regarding CONVENT 28 and 34. [1]

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[1] This text has been submitted in English language only.

CHILDREN'S RIGHTS IN THE EU CHARTER OF FUNDAMENTAL RIGHTS

Briefing on EU Charter of Fundamental Rights
Euronet's position with regard to Convent 28 and 34

Civil and Political Rights- Convent 28 of 5 May 2000

Article 23 – Children's Rights

Euronet, the European Children's Network welcomes the inclusion of an article on children's rights - Article 23 in Convent 28 of 5 May 2000 and is pleased that this article is based on the UN Convention on the Rights of the Child. However, Euronet believes that a clear reference to the UN Convention on the Rights of the Child within the Article is necessary, since this is the most comprehensive statement of children's rights and has almost universal recognition. In this respect we support the amendment underlined below tabled by Mrs Maij-Weggen MEP:

Existing article 23 plus amendment by Mrs Maij-Weggen MEP

Children must be treated as equal individuals, they must be allowed to influence matters pertaining to their person to a degree corresponding to their maturity. <u>The European Union shall ensure that all EU activities are fully compatible with the principle of the best interests of the child as expressed in the UN Convention on the Rights of the Child.</u>

The above amendment is our preferred option.

However, if this is not possible our second preference would be the amendment tabled by Mr Cornillet, Member of the Convention, since this includes the two main principles on the rights of the child as set out in the UN Convention on the rights of the Child.

Article 23 amendment by Mr Cornillet

1. <u>In all decisions affecting children, the best interests of the child shall be a primary consideration</u>

2. <u>Each child who is capable of forming his or her own views, has the right to express these views freely in all matters affecting the child and the views of the child shall be given due weight in accordance with the age and maturity of the child.</u>

Article 13- Family Life - Convent 28 of 5 May 2000

Euronet supports article 13 on family life which is drawn from the UN Convention on the Rights of the Child. However, another important principle of the Convention on the Rights of the Child is to support the family to protect and give special care to children. We therefore suggest the following additions, which are underlined:

1. Everyone has the right to respect for his or her family life.

2. Everyone has the right to marry and to found a family, according to the national laws governing the exercise of this right.

3. The family shall enjoy legal economic and social protection and be supported in giving children the care and protection they need.

Economic and Social Rights- Convent 34 of 16 May 2000

Article 37- Protection of young people

Article 37 refers to the protection of young people in employment. The current title is the protection of young people we believe that in line with the European Social Charter, the title should be changed to :

The protection of children and young people.

According to the Convention on the Rights of the Child the definition of a child is all persons under 18 years.

And the following should be added to Article 37 – drawn from Article 7 of the European Social Charter.

Children and young people shall be protected against physical and moral dangers to which they are exposed and particularly those resulting directly or indirectly from their work.

Statement of reasons
We also believe that the statement of reason should contain a reference to ILO Convention 182 which aims to ban the worst forms of child labour.

Preamble to the EU Charter of Fundamental rights

Euronet believes it is important that an explicit reference is made to children as holders of rights in the Preamble of the Charter. Children are a particularly vulnerable group within the EU and are not always explicitly recognised as EU citizens.

30 May 2000

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 7. Juni 2000

CHARTE 4345/00

CONTRIB 209

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag von des Paritätischen Wohlfahrtsverbands - Gesamtverband. [1] [2]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

[2] Der Paritätische Wohlfahrtsverband - Gesamtverband: Heinrich-Hoffmann-Straße 3 D-60528 Frankfurt am Main. Tel. + 49 69-6706-0. Fax + 49 69-6706-207 Internet http://www.paritaet.org/

PARITÄTISCHE Vorschläge

für eine

Charta der Grundrechte in der Europäischen Union

INHALT:

Vorbemerkung

Der PARITÄTISCHE Wohlfahrtsverband ist Dachverband von über 9300 rechtlich selbständigen Mitgliedsorganisationen, die soziale Arbeit als Hilfe für andere oder als Selbsthilfe leisten. Der PARITÄTISCHE ist Dienstleister für die ihm angeschlossenen Vereine und Organisationen der sozialen Arbeit und vertritt deren Interessen und die der von ihm betreuten Menschen gegenüber Öffentlichkeit, Politik und Verwaltung.

Mit diesem Mandat setzt sich der PARITÄTISCHE gemäß seinen im Oktober 1989 verabschiedeten Grundsätzen der Verbandspolitik ein

- für die Rechte der Menschen auf soziale Hilfen, wenn sie sich in Not befinden;

- für eine Politik, die auf die Beseitigung der Ursachen sozialer Not und sozialer Benachteiligung zielt;

- für das Initiativrecht freier Vereinigungen in der Wohlfahrtspflege und den Vorrang des mitbürgerlichen Engagements und der Selbsthilfe vor staatlichen Initiativen.

Währungs-, Wirtschafts- und Sozialpolitik stehen in einem engen Zusammenhang. Eine zukunftsweisende EU-Grundrechtscharta hat daher Europa auch als Sozialraum in den Blick zu nehmen. Dabei sind aus Sicht des PARITÄTISCHEN Zielformulierungen und Schutzrechte unabdingbar, die soweit wie möglich

- die Teilhabe der Bürgerinnen und Bürger an Arbeit, Wohnen und Bildung sichern;

- die Rechte der Bürgerinnen und Bürger auf soziale Hilfen, gesundheitliche Versorgung und Betreuung sichern, sofern sie dieser bedürfen;

- die Diskriminierung von Bevölkerungsgruppen ausschließen, die historisch oder aktuell in besonderer Weise der Gefahr der Diskriminierung unterliegen;

- den Vorrang des freien Bürgerengagements gegenüber staatlichen Initiativen in der Wohlfahrtspflege sicherstellen;

- das Wunsch- und Wahlrecht auch bei der Inanspruchnahme von sozialen Diensten berücksichtigen.

Vor diesem Hintergrund und unter Berücksichtigung der zwischen den EU-Mitglieds-staaten bereits getroffenen vertraglichen Vereinbarungen sowie der bereits vorliegen-den verschiedenen Ausarbeitungen für eine EU-Charta der Grundrechte schlägt der PARITÄTISCHE folgende Formulierungen für die oben genannten Aspekte vor:

> ***Wichtiger Hinweis:*** *In den Fußnoten wird an vielen Stellen auf Doku-mente des "Konventes" verwiesen; diese sind im Internet unter folgender Adresse abgelegt:*
> http://db.consilium.eu.int/df/default.asp?lang=de
> *Die Dokumente finden sich dann unter "Datenbank / Suche".*

A) Nichtdiskriminierung

1) Diskriminierungen wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der Sprache, der Religion oder der Welt-anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung, des Alters oder der sexuellen Ausrichtung sind verboten.[1]

2) Die Union wirkt darauf hin, Chancenungleichheiten zu beseitigen und die Gleichstellung von Männern und Frauen sowie von Menschen mit und ohne Behinderung zu fördern.[2]

B) Familienleben[3]

1) Jede Person hat das Recht auf Gründung einer Familie und Achtung des Familienlebens.

2) Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die primär ihnen obliegende Pflicht. Die staatliche Gemeinschaft schützt und fördert darüber hinaus jede Lebensgemeinschaft, in der Kinder und Jugendliche aufwachsen, bei ihrer selbstverantwortlichen Aufgabenerfüllung.

3) Kinder und Jugendliche haben darüber hinaus Anspruch auf besonderen Schutz der Unversehrtheit ihrer Person und ihrer Entwicklung. Sie haben insbesondere Anspruch, auf Angelegenheiten, die sie selbst betreffen, entsprechend dem Grad ihrer persönlichen Reife Einfluß zu nehmen.

C) Hilfe in Notlagen

Wer in Not gerät, hat Anspruch auf Hilfe und Betreuung und auf die Mittel, die für ein menschenwürdiges Dasein und für eine Teilhabe an der Gesellschaft unerläßlich sind [4].

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1 Formulierung übernommen aus Convent-Beratung 24.2.2000 Charte 4137/00 Convent 8, Art. 19 Abs. 1

2 Es handelt sich um eine Erweiterung von Artikel 19 Absatz 2 der Konvent-Beratung 24.2.2000 (Charte 4137/00 Konvent 8) um die Gleichstellung von Menschen mit und ohne Behinderung vor dem Hintergrund der deutschen Diskussion um Artikel 3 Abs. 3 Satz 2 GG (Benachteiligungsverbot für behinderte Menschen)

3 Eines besonderen Schutzes in der Gemeinschaft bedürfen Kinder. Im Grundgesetz der Bundesrepublik Deutschland konfligieren Artikel 1 Abs. 1 und Artikel 2 - aus denen sich eine stärkere Rechtsstellung des Kindes ableiten ließe - einerseits, und Artikel 6, wonach Pflege und Erziehung der Kinder das natürliche Recht der Eltern sind. Mit der Formulierung unter Abs. 3 soll klargestellt werden, daß Abs. 2 sich an dem Recht des Kindes auf Unversehrtheit seiner Person und seiner Entwicklung bricht, und darüber hinaus die zunehmende Mündigkeit des Heranwachsenden zu berücksichtigen hat.

4 Diese Formulierung folgt dem Vorschlag des Entwurf v. Gerald Häfner, Dr. Christoph Strawe, Dr. Robert Zuegg im Rahmen der Anhörung vonRepräsentanten der Zivilgesellschaft durch den Konvent v. 16.3.2000 (Charte 4164/00 CONTRIB 48, Artikel 2)

D) Gesundheitliche Versorgung

Jede Person hat ein Recht auf gesundheitliche Versorgung [5]. Niemandem dürfen wegen seiner wirtschaftlichen Situation oder aus anderen Gründen notwendige Leistungen der gesundheitlichen Versorgung vorenthalten werden.

E) Arbeit

Die Europäische Union (und ihre Mitgliedstaaten) setzen sich im Rahmen ihrer Zuständigkeit dafür ein, dass arbeitsfähige Menschen Arbeit unter angemessenen Arbeitsbedingungen finden oder entsprechende Verhältnisse selbst schaffen können.[6]

F) Bildung

1) Jede Person hat das Recht auf Bildung und Ausbildung gemäß ihrer Fähigkeiten. [7]

2) Angehörige nationaler oder ethnischer Minderheiten haben das Recht, ihre Muttersprache zu lernen und eigene Schulen zu gründen und zu unterhalten.[8]

G) Wohnen

Jede Person hat das Recht auf eine Unterbringung, die seiner Menschenwürde entspricht.[9]

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5 Zwar subsumiert bereits der Artikel „Recht auf Hilfe in Notlagen“ auch gesundheitliche Hilfen, doch bietet sich eine eigenständige Formulierung zur gesundheitlichen Versorgung an, da vor dem Hintergrund der demographischen Entwicklung in Europa, aber auch „hausgemachter“ Finanzierungsprobleme des Gesundheitssektors in ganz Europa auf Dauer mit einer sehr schwierigen Diskussion über Rationierungen in der gesundheitlichen Versorgung zu rechnen ist. Mit der vorgeschlagenen sehr allgemein gehaltenen Formulierung soll bereits ein Grundkonsens für die weitere Diskussion gelegt werden.

6 Die Formulierung folgt dem Vorschlag des Entwurf v. Gerald Häfner, Dr. Christoph Strawe, Dr. Robert Zuegg im Rahmen der Anhörung vonRepräsentanten der Zivilgesellschaft durch den Konvent v. 16.3.2000 (Charte 4164/00 CONTRIB 48, Art. 3 Abs. 2)

7 Formulierung übernommen aus Konvent-Beratung 24.2.2000 Art. 12 Abs. 1 (Charte 4137/00, Konvent 8, Artikel 12 Abs. 1)

8 Formulierung folgt dem Vorschlag des Entwurf v. Gerald Häfner, Dr. Christoph Strawe, Dr. Robert Zuegg im Rahmen der Anhörung von Repräsentanten der Zivilgesellschaft durch den Konvent v. 16.3.2000 (Charte 4164/00 CONTRIB 48, Artikel 8 Abs. 5)

9 Zwar subsumiert bereits der Artikel „Recht auf Hilfe in Notlagen“ die Hilfe bei Wohnungsnot, doch scheint es angesichts der Tatsache, daß ein menschenwürdiges Wohnen von besonderer Bedeutung für die Abwehr von Armut und Unterversorgung sind (vgl. Walter Hanesch u.a. „Armut in Deutschland“ 1994), ein eigener Artikel in Analogie zu den anderen Lebenslagenfaktoren „Gesundheit“, „Bildung und Ausbildung“ und „Arbeit“ als angemessen.

H) Wahlrecht bei Bildung, Erziehung und sozialen Diensten

Das Wunsch- und Wahlrecht der Personen, die soziale Diensten oder Einrichtungen der Erziehung, Bildung, Ausbildung und der Gesundheitsversorgung in Anspruch nehmen, bzw. ihrer Erziehungsberechtigten ist zu achten.

I) Stellung freier Vereinigungen in Bildung, Erziehung, Versorgung mit sozialen Diensten [10]

1) Das Initiativrecht freier Vereinigungen im Bereich der Bildung, der Erziehung und der Versorgung mit sozialen Diensten wird geachtet.[11]

2) Öffentliche Schulen in freier Trägerschaft sind staatlichen Schulen unbeschadet der staatlichen Planungs- und Versorgungsverantwortung gleichgestellt.

3) Die Vorrangstellung der Wohlfahrtsverbände und anderer freier dem Gemein-wohl verpflichteter Träger im Bereich der Wohlfahrtspflege und der Erziehung gegenüber staatlich vorgehaltenen sozialen Diensten ist unbeschadet der staat-lichen Planungs- und Versorgungsverantwortung zu achten.[12]

4) Die Verbände der freien Träger von Einrichtungen der Bildung, Erziehung und der Wohlfahrtspflege sind bei der politischen Gestaltung der Bereiche Bildung, Erziehung und soziale Dienste einzubeziehen.

Paritätischer Wohlfahrtsverband Gesamtverband
- Der Vorstand -

Frankfurt am Main, 13.05.2000

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10 Die Frage der Verhältnisses von staatlichem Handeln und freien Initiativen ist von wesentlicher Bedeutung für eine EU, die sich konstitutiv als eine Zivilgesellschaft versteht. Die Rechte freier bürgerschaftlicher Initiativen leiten sich direkt ab aus den allgemeinen Bürgerrechten einer EU-Charta. Ein eigener Artikel zur Frage der Subsidiarität und der Einbeziehung der freien Initiativen in die Politikgestaltung auf dem Feld der Erziehung, der Bildung und der Wohlfahrtspflege erscheint daher sinnvoll.

11 Formulierung in Anlehnung an die „Grundsätze der Verbandspolitik“ v. Okt. 1989

12 Der Absatz formuliert den sog. bedingten Vorrang freier Träger in Anlehnung das Urteil des Bundesverfassungsgericht v. 18.7.1967 (AZ 1BvL 15/62)

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 7. Juni 2000

CHARTE 4346/00

CONTRIB 210

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag des Bundesverbandes Deutscher Zeitungsverleger e.V. zur Pressefreiheit. [1] [2]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

[2] Bundesverband Deutscher Zeitungsverleger e.V.: Riemenschneiderstrasse 10, D-53175 Bonn. Tel: +49-0228-8 10 0411.

An den
Vorsitzenden des Konvents
zur Ausarbeitung des Entwurfs
einer Charta der Grundrechte der EU
Herrn Bundespräsident a.D.
Prof. Dr. Roman Herzog
Prinzregentenstraße 89

81675 München

Vorab per Fax (089-47027168)

An das
Sekretariat des Konvents
Rue de la Loi 175

B-1048 Brüssel

Vorab
per Fax (0032-2-2857837)
per E-mail (fundamental.rights@consilium.eu.int) 31.5.2000

Grundrecht der Pressefreiheit

Sehr geehrter Herr Vorsitzender,
sehr geehrte Damen und Herren Mitglieder des Konvents,

im Auftrag der Stiftervereinigung der Presse e.V. und der Stiftung Freiheit der Presse hat Herr Prof. Dr. Christoph Engel das beigefügte Rechtsgutachten "Die Europäische Grundrechtscharta und die Presse" erstellt.

Ausgehend von der Darstellung des Schutzbedarfs der Presse angesichts gegenwärtiger, vergangener und möglicher zukünftiger Konflikte sowie der Effekte einer Grundrechtscharta auf das Institutionsgefüge in Gemeinschaft und Mitgliedstaaten zieht Herr Prof. Dr. Engel normative Folgerungen für die Verankerung des Schutzes der Pressefreiheit in der EU-Grundrechtecharta.

In den Schlußfolgerungen der Untersuchung heißt es u.a.:

"Grundrechte sind in ihrem Kern Abwehrrechte gegen hoheitliches Handeln. Das gilt auch und gerade für die Pressefreiheit. Die schlechthin konstitutierende Bedeutung der Presse für ein demokratisches Gemeinwesen führt nicht etwa zu einem anderen Verständnis dieses Grundrechts, sondern zu einer Verstärkung des Freiheitsrechts. Denn Freiheit ist die Voraussetzung dafür, daß die Presse ihre demokratische Aufgabe wahrnehmen kann.

Bislang beschränkt sich der Entwurf auf den allgemeinen Schutz der Meinungsäußerungsfreiheit. Rechtstechnisch mag das genügen, den besonderen Schutzbedarf der Presse zu erfüllen und den Schutzstandard der Grundrechtstradition der Mitgliedstaaten auch gegenüber der Europäischen Gemeinschaft zu sichern. Eine ausdrückliche Garantie der Pressefreiheit würde aber jeden Zweifel hieran ausräumen. Sie wird unverzichtbar, wenn sich der Rundfunk mit dem Wunsch nach einer separaten Garantie durchsetzt. Erwägenswert ist es, Abgrenzungsschwierigkeiten durch eine allgemeine Medienfreiheit vorzubeugen.

Der Entwurf sieht ein recht kompliziertes System der Grundrechtsschranken vor. Wie jedes Grundrecht der Charta unterläge die Pressefreiheit zunächst der allgemeinen, unbenannten Schranke aus Art. H.2 II 2. Weil sie Teil der in Art. 10 EMRK garantierten Meinungsäußerungsfreiheit ist, wären nach Art. H.2 II 3 zusätzlich die benannten Schranken aus Art. 10 II EMRK zu beachten. Schließlich darf der Grundrechtsschutz nach Art. H.4 nicht hinter dem Schutzstandard von Art. 10 EMRK zurückbleiben. Die Auslegung ist zu beachten, die der Straßburger Menschenrechtsgerichtshof dieser Norm gegeben hat. Bei richtiger Handhabung führt dieses System der Schranken nicht zu Unzuträglichkeiten. Die Grundrechtsanwendung würde aber sehr vereinfacht, wenn die Pressefreiheit unmittelbar die benannten Schranken aus Art. 10 II EMRK erhielte.

Auch empfiehlt sich die Klarstellung, daß jede Berührung dieses Grundrechts der Rechtfertigung durch die Grundrechtsschranken bedarf. Damit würde verhindert, daß ein enges Konzept des Grundrechtseingriffs dazu eingesetzt wird, den Verhältnismäßigkeitsgrundsatz zu umgehen.

Die Presse steht nicht nur in einem Spannungsfeld zum Staat, sondern auch zu anderen Grundrechtsträgern. Daß die Grundrechtscharta viele dieser Personen schützt, etwa die Ehre als Schutzgut gesondert ausweist, darf aber nicht mißdeutet werden. Auch soweit aus den europäischen Grundrechten Schutzpflichten folgen, erweitern sich die Kompetenzen der Gemeinschaft nicht. Die meisten der potentiellen Grundrechtskonflikte werden aus diesem Grunde nicht aktuell. Die Zuständigkeit zu ihrer Bewältigung bleibt bei den Mitgliedstaaten.

Vorsorglich müssen die europäischen Grundrechte gleichwohl so ausgestaltet werden, daß ein gerechter Ausgleich der widerstreitenden Belange möglich wird, sollte die Gemeinschaft für einen Teilbereich zuständig sein oder werden. Praktisch kommt es vor allem darauf an, wie die Schranken dieser Grundrechte ausgestaltet werden. Sie müssen dem Gemeinschaftsgesetzgeber gestatten, diese Grundrechte zu Gunsten der berechtigten Anliegen der Presse zu beschränken.

Nach dem augenblicklichen Stand der Entwürfe ist das im Prinzip schon deshalb gewährleistet, weil Art. H.2 II 2 ja Grundrechtseingriffe zur Verfolgung jedes legitimen Ziels zuläßt. Der genaueren Überprüfung bedürfen aber die Schranken der Europäischen Menschenrechtskonvention, auf die Art. H.2 II 3 und Art. H.4 verweisen. Daß die Presse dort nirgends ausdrücklich erwähnt ist, ist unschädlich. Es muß aber zumindest sichergestellt sein, daß überall ein Vorbehalt für die "Rechte anderer" vorhanden ist. Darauf wäre auch zu achten, wenn sich der Grundrechts-konvent doch noch entschließt, selbst allen Grundrechten benannte Schranken zuzuweisen."

Die deutschen Zeitungsverleger bitten Sie, sehr geehrter Herr Vorsitzender, und den gesamten Konvent, die Ausführungen von Herrn Prof. Dr. Engel bei den Beratungen zur EU-Grundrechtecharta und speziell der Formulierung des Grundrechts, das die Freiheit der Presse garantiert, zu berücksichtigen.

Eine in die englische Sprache übersetzte Fassung des Rechtsgutachtens werden wir alsbald nachreichen.

Mit freundlichen Grüßen

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Bonn, den 06. Juni 2000

Die Europäische Grundrechtscharta und die Presse

Rechtsgutachten

im Auftrag der
Stiftervereinigung der Presse e.V. und der
Stiftung Freiheit der Presse

I. Fragestellung

Gute Verfassungen sind kurz und dunkel. Das erleichtert die Einigung auf den Verfassungstext. Niemand weiß so ganz genau, worauf er sich da gerade einläßt. Die Verfassungsväter ziehen vor den ohnehin schon dichten Schleier der Zukunft noch einen weiteren, künstlichen Schleier des Unwissens[3]. Die Römischen Verträge, auf denen die Europäische Wirtschaftsgemeinschaft ursprünglich beruhte, sind sogar noch weiter gegangen. Die Materialien sind bewußt nie veröffentlicht worden. Im Gegenteil hat der Vertrag seine Auslegung einem machtvollen internationalen Gericht überantwortet, dem Europäischen Gerichtshof.

Die Geschichte hat den Vätern der Römischen Verträge Recht gegeben. Welche Herausforderungen die Natur oder das Ausland an ein Gemeinwesen herantragen werden, ist ebensowenig vorhersehbar wie die politischen Prozesse und die Entwicklung der Mentalitäten im Inneren. Auch sind Verfassungen notwendig Kompromisse zwischen unterschiedlichen, ja fundamental unvereinbaren Blickwinkeln, von denen aus die Welt verstanden und bewertet werden kann[4]. Eine Verfassung tut gut daran, sich nicht auf einen dieser Blickwinkel festzulegen. Sie sollte stattdessen nach Instrumenten suchen, die es erlauben, die Bilder der sozialen Wirklichkeit immer neu übereinander zu legen, die aus diesen unterschiedlichen Blickwinkeln gezeichnet werden.

Die Europäische Union schickt sich an, ihrer Verfassung eine Grundrechtscharta beizufügen. Den Anstoß gab der Europäische Rat, also das Organ der Staats- und Regierungschefs[5]. Zu diesem Zweck hat der Rat einen Konvent einberufen, dem *Roman Herzog* vorsteht[6]. Das Präsidium des Konvents hat Textentwürfe vorgelegt, nach denen sich die Europäische Grundrechtscharta aus drei Teilen zusammensetzen würde: Freiheitsrechten, demokratischen Rechten, sowie wirtschaftlichen und sozialen Rechten[7].
Diese Entwürfe halten sich an die eingangs genannten Klugheitsregeln. Das macht es für einen

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3 Die Metapher hat ihre eigene Geschichte. S. zunächst *John Rawls:* A Theory of Justice, Harvard 1971, 136–142 und passim; sodann *Geoffrey Brannan/James M. Buchanan:* Die Begründung von Regeln. Konstitutionelle Politische Ökonomie (Die Einheit der Gesellschaftswissenschaften 83) Tübingen 1993, 37, 184 f., 196 und passim.

4 Anregend *Michael Thompson/Richard Ellis/Aaron Wildavsky:* Cultural Theory, Boulder 1990; *Guido Calabresi*: Ideals, Beliefs, Attitudes and the Law. Private Law Perspectives on a Public Law Problem. Syracuse 1985.

5 Zum Hintergrund und zur Entstehungsgeschichte näher *Sylvia Eickmeier:* Eine europäische Charta der Grundrechte. Bericht über das gemeinsame Forum des Bundesministeriums der Justiz und der Vertretung der Europäischen Kommission in Deutschland, in: DVBl. 1999, 1026-1029; *Jürgen Schwarze:* Auf dem Wege zu einer Europäischen Verfassung. Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht, in: DVBl. 1999, 1677-1689; *Herta Däubler-Gmelin:* Eine Europäische Charta der Grundrechte – Beitrag zur gemeinsamen Identität, in: EuZW 2000, 1; *Albrecht Weber:* Die Europäische Grundrechtscharta – auf dem Weg zu einer Europäischen Verfassung, in: NJW 2000, 537-544.

6 Einzelheiten <http://db.consilium.eu.int/df/default.asp?lang=de (12.04.2000)>.

7 Zu den Freiheitsrechten s. die folgenden Dokumente des Rats der Europäischen Union: 4123/1/00 REV 1 vom 15.02.2000; 4149/00 vom 08.03.2000; 4137/00 vom 24.02.2000. Zu den demokratischen Rechten s. Dokument 4170/00 vom 20.03.2000. Zu den wirtschaftlichen und sozialen Rechten s. Dokument 4192/00 vom 27.03.2000 und Dokument 4193/00 vom 29.03.2000. Weitere Textentwürfe von einzelnen Mitgliedern des Konvents und von außenstehenden Personen und Einrichtungen sind auf der in der vorigen FN genannten Website nachgewiesen.

Wirtschaftszweig wie die Presse nicht einfach, im Verfahren der Verfassungsgebung seine Interessen zu wahren. Die Aufnahme konkreter Ergebnisse, etwa des arbeitsrechtlichen Tendenzschutzes, in den Verfassungstext würde den Charakter einer Grundrechtscharta sprengen. Es muß deshalb darum gehen, die Pressefreiheit auch auf der Ebene der Europäischen Union angemessen zu verankern und den Text dadurch für die Bewältigung der schon bekannten und der vorhersehbaren Konflikte vorzubereiten.

Eine zweite Besonderheit tritt hinzu. Die Europäische Union gibt sich nur für ihre eigenen Zwecke Grundrechte[8]. Die Harmonisierung der Grundrechtskataloge in den Mitgliedstaaten ist nicht beabsichtigt. Scheinbar mindert das die Bedeutung der Grundrechtscharta für die Presse. Denn eine eigene Pressepolitik hat die Europäische Union bislang nicht entwickelt. Die Presse ist jedoch schon in der Vergangenheit immer wieder von allgemeinen Politiken der EG betroffen gewesen. Sie ist dafür regelmäßig ein ganz ungewöhnlicher Sonderfall. Gerade für die Bewältigung atypischer Konstellationen sind Grundrechte besonders gut geeignet. In der Zukunft könnte sich der Schutzbedarf noch vergrößern. Insbesondere könnte die Europäische Gemeinschaft versucht sein, ihre Politiken für andere Medien unter dem Vorwand auch auf die Presse zu erstrecken, daß die Presseinhalte nicht mehr nur auf Papier, sondern auch elektronisch dargeboten werden. Dies wird im einzelnen darzulegen sein[9].

Eine Europäische Grundrechtscharta birgt für die Presse aber nicht nur Chancen, sondern auch Gefahren. Diese Gefahren liegen auf zwei unterschiedlichen Ebenen. Eine Grundrechtscharta schützt die Individuen nicht nur besser vor dem Zugriff des europäischen Gesetzgebers. Vielmehr verändert sie zugleich das Institutionengefüge in der Gemeinschaft und im Verhältnis zu den Mitgliedstaaten. Auch wenn es gelingen sollte, eine rechtliche Ausweitung der Kompetenzen zu verhindern, wird sich doch politisch das Gewicht von Europa zu Lasten der Mitgliedstaaten erhöhen. Dem wird sich auf Dauer auch die Pressepolitik nicht entziehen können. Sie wird sich auf andere, zumindest aber komplexere Opportunity Structures einstellen müssen. Die Grundrechtscharta muß vorbeugend so ausgestaltet werden, daß die Presse auch in diesem Institutionengefüge ihre legitimen Interessen wahrnehmen kann.

Die zweite Gefahr ergibt sich letztlich aus dem multipolaren Charakter der meisten Regelungskonflikte. Ihrem gedanklichen Ursprung nach sind die Grundrechte bipolar gedacht. Der Staat greift von hoher Hand auf Freiheit oder Eigentum der Bürger zu. Unter Berufung auf seine Grundrechte weist der Bürger den Staat in seine Schranken. Solche Konflikte gibt es nach wie vor. Ein pressespezifisches Beispiel ist der Versuch der Strafgerichte, einen Journalisten zur Offenbarung seines Informanten zu zwingen[10]. Die meisten presserechtlichen Normen regeln aber Konflikte zwischen der Presse und anderen Individuen. Ein Standardbeispiel ist der Persönlichkeitsschutz[11]. Diese Normen bleiben natürlich Staatsakte. Wenn der Staat einseitig den Dritten schützt, ohne die legitimen Interessen der Presse zu achten, kann sich die Presse dagegen

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8 Näher unten IV 1 c).

7. Einzelheiten sogleich II.3. S. auch die Überblicksdarstellungen bei *Edgar Kull*: Das Europäische Recht und die Presse, in: AfP 1993, 430-435; *Christoph Engel/Sebastian Seelmann-Eggebert:* Kommunikation und Medien, in: *Manfred H. Dauses*: Handbuch des EU-Wirtschaftsrechts E.V (2. Auflage 1999) R 119-123; *Michael Schmittmann/Inge de Vries/Mariella von Loesch:* Die europäische audiovisuelle Politik. Ein Überblick zum Jahresbeginn 2000, in: AfP 2000, 37-56.

10 Näher unten II 2 h) und IV 1 e) sowie IV 2 a).

9 Näher unten II 3 b) sowie IV 4.

mit einem Grundrecht wehren, das als Abwehrrecht ausgestaltet ist[12]. Der multipolare Charakter des zugrundeliegenden Konflikts wirkt sich dann dogmatisch auf die Bestimmung des legitimen Ziels und auf die Höhe des Schutzniveaus aus[13]. Oft können die Dritten dieselbe Norm aber auch als Eingriff in ihren grundrechtlich geschützten Freiheitsbereich erfassen. So liegt es etwa, wenn der Katalog ein Grundrecht auf Schutz der Privatsphäre enthält[14]. Dann kommt es für die Presse grundrechtsdogmatisch zunächst einmal darauf an, daß ihre legitimen Belange auch Schranken der konkurrierenden Grundrechte darstellen. Noch anspruchsvoller wird es dogmatisch wie rechtspolitisch, wenn der Grundrechtskatalog nicht bloß Abwehrrechte enthält, sondern einzelnen oder allen Grundrechten auch andere Funktionen zuweist[15].

Aus diesen Vorüberlegungen leitet sich der Gang der Untersuchung ab. Sie bestimmt zunächst den Schutzbedarf der Presse (II), die Effekte einer Grundrechtscharta auf das Institutionengefüge in der Gemeinschaft und im Verhältnis zu den Mitgliedstaaten (III). Aus beidem zieht sie grundrechtsdogmatische Folgerungen (IV) und bedenkt schließlich, wie die offenen Flanken geschlossen werden können, die danach für einen Schutz der Presse noch verbleiben (V).

II. Schutzbedarf

Die Presse ist kein Wirtschaftszweig wie jeder andere. Sie bedarf des intensiven verfassungsrechtlichen Schutzes, um ihre Funktion für ein demokratisches Gemeinwesen erfüllen zu können (1) Die Presse braucht den Schutz der Grundrechte zuerst und vor allem dort, wo der Gemeinschaftsgesetzgeber in der Vergangenheit bereits regulierend eingegriffen hat (2). Grundrechte werden aber nicht für den Tag geschrieben. Auch wenn die Gründungsverträge der Europäischen Union häufiger und fundamentaler geändert werden als nationale Verfassungen, ist doch nicht sehr wahrscheinlich, daß ein einmal verabschiedeter Grundrechtskatalog alsbald umgeschrieben würde. Der Grundrechtskatalog sollte deshalb so gefaßt sein, daß er der Presse auch bei künftigen Interventionen des europäischen Gesetzgebers Schutz bietet. Solche Interventionen sind naturgemäß nicht mit Sicherheit vorherzusehen. Drei europapolitische Linien lassen sich aber fortdenken. Der europäische Gesetzgeber könnte Presserecht mit dem Argument harmonisieren, das erleichtere den Marktzutritt ausländischer Anbieter. Die rechtsvergleichende Umschau im Presserecht der Mitgliedstaaten verschafft einen Eindruck von der Bandbreite möglicher harmonisierter Regeln (3). Der europäische Gesetzgeber könnte sich auch auf die Konvergenz zwischen Print-Medien und elektronischen Medien berufen. Mit diesem Argument könnte er Politiken auf die Presse erstrecken, die er für die elektronischen Medien entwickelt hat (4). Schließlich könnten andere Politikfelder der Gemeinschaft auf die Presse ausgedehnt werden (5).

Eine Klarstellung ist angezeigt: die folgenden Überlegungen enthalten weder eine rechtspolitische Empfehlung noch eine rechtsdogmatische Aussage zu den Kompetenzen der Gemeinschaft. Sie sagen weder, daß die Gemeinschaft in der beschriebenen Weise tätig werden sollte, noch daß sie es nach dem EG-Vertrag überhaupt dürfte. Vielmehr gehorcht dieser Abschnitt einem Vorsichtsprinzip. Die neuen Grundrechte sollten so ausgestaltet sein, daß sie gegen alle Interventionen schützen, die wenigstens vorstellbar erscheinen. Ganz kostenlos ist diese Vorsicht

12 Näher unten IV 1 h).
13 Näher unten IV 1 i).
14 Näher unten IV 4.
15 Näher unten IV 1 k) und l).

nicht. Der Text der Grundrechtscharta mag noch so deutlich herausstellen, daß daraus keine zusätzlichen Kompetenzen der Gemeinschaft abgeleitet werden können[16]. Politisch wird unvermeidlich die Frage aufkommen, warum die Grundrechtscharta denn gegen ein Verhalten schützen sollte, zu dem die Gemeinschaft überhaupt nicht befugt ist. Trotzdem wäre es nicht klug, auf solche Sicherungen allein deshalb zu verzichten, damit dieses Argument nicht vorgebracht werden kann. Seit sie besteht, hat die Gemeinschaft ihren Zuständigkeitsbereich beständig zu Lasten der Mitgliedstaaten erweitert. Die Verankerung des Subsidiaritätsprinzips im EG-Vertrag hat diesen Prozeß nur verlangsamt und erschwert, aber nicht aufgehalten.

1. Die Aufgabe der Presse

Die Grundrechte schützen Freiheit um ihrer selbst willen. Grundrechtsschutz ist voraussetzungslos. Der Grundrechtsträger muß nicht darlegen, warum der Gebrauch seiner Freiheit Dritten oder der Allgemeinheit nützt. All das gilt auch für die Pressefreiheit.

Daß sich Unternehmen finden, die von dieser Freiheit Gebrauch machen, ist für ein demokratisches Gemeinwesen aber von schlechthin konstitutierender Bedeutung. Die Volkssouveränität bleibt ein bloßes staatstheoretisches Konstrukt, wenn nicht Intermediäre dafür sorgen, daß die Inhaber politischer Macht wirklich als Regierung für das Volk handeln. Parteien und Medien teilen sich in diese Aufgabe. Die Parteien organisieren Macht und machen dadurch die Demokratie für ein Volk von 80 Millionen Menschen überhaupt erst möglich. Parteien müssen Interessen zu diesem Zweck jedoch bündeln und zwischen unterschiedlichen Ideen ausgleichen. Zwischen Wahlen und Abstimmungen handeln die von den Parteien getragenen Organe in einer repräsentativen Demokratie gerade unabhängig von der direkten Einwirkung des Volkes. Für die repräsentative Demokratie sprechen gute Gründe. Sie birgt jedoch ein doppeltes Risiko: die Mandatsträger können die Wünsche ihrer Wähler falsch wahrnehmen. Und sie können ihre Entscheidungsfreiheit mißbrauchen. Sie können etwa ihre persönliche Ideologie als den Wählerwillen ausgeben, dem Einfluß gut organisierter Interessen nachgeben oder den Erhalt der Macht über die Richtigkeit der Entscheidung in der Sache stellen.

Eine repräsentative Demokratie bedarf deshalb der Medien. Sie sind zunächst einmal das Sprachrohr der Bürger. Weil Medien Interessen nicht bündeln und zwischen Ideen nicht ausgleichen müssen, können sie den Wählerwillen viel differenzierter abbilden als die Parteien. Sie können neuen Strömungen viel früher ein Forum bieten als der Parteienwettbewerb. Außerdem sprechen die Bürger durch die Medien beständig, nicht nur am Wahltag und bei Abstimmungen. Zugleich wäre die Kontrolle der Regierenden ohne die Medien stumpf. Die Medien informieren die Bürger über das Handeln von Staat und Politik. Weil Information immer reicher zur Verfügung steht, wird das immer mehr eine Aufgabe der Selektion und der Organisation öffentlicher Aufmerksamkeit. Wenn die Medien einen Mißstand anprangern, ist das schließlich die wirksamste Form der Sanktion, die den Bürgern zu Gebote steht. Diese Sanktion ist sogar noch wirksamer als die Wahlentscheidung. Denn Wahlentscheidungen sind Entscheidungen für die Zukunft. Vergangene schlechte Arbeit ist nicht mehr als ein Indiz für die Qualität des Regierens in der nächsten Legislaturperiode. Vor allem entscheiden die Wähler aber nicht nur über die Qualität der Mandatsträger, sondern untrennbar zugleich auch über deren ideologische Orientierung. Letzteres ist ihnen meist wichtiger. Das Wächteramt liegt deshalb zentral bei den Medien.

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[16] Nach dem augenblicklichen Entwurf soll die Präambel oder der Art. 1 der Charta folgenden Satz 3 enthalten: „Die Charta begründet weder neue Aufgaben oder Zuständigkeiten noch erweitert sie die bestehenden Aufgaben oder Zuständigkeiten“ Dok. 4123/1/00 REV 1 vom 15.02.2000.

Diese Einsichten sind oft mißdeutet worden. Die Medienfreiheiten sind als bloße Instrumente interpretiert worden, das demokratische Ziel zu erreichen. Umgekehrt ist es richtig: nur wenn und weil die Medien frei sind, können sie die ihnen zugedachte Aufgabe erfüllen. Die öffentliche Aufgabe der Medien ist nicht der Schutzzweck der Mediengrundrechte, sondern ein Reflex. Auch die Medien sind um ihrer selbst willen frei. Wenn sie es vorziehen, sich den Künsten, esoterischen Gedanken oder dem Unterhaltungsbedürfnis ihrer Rezipienten zu verschreiben, ist dagegen von Verfassungs wegen nichts zu erinnern. So sehr das deutschem Sicherheitsbedürfnis widerstrebt: die demokratische Funktion der Medien erhält der Staat nur dann, wenn er sie nicht befiehlt, sondern entstehen läßt. Die Geschichte zeigt, daß dem Staat dabei nicht bang zu sein braucht. Die Bürger wollen über politisches Handeln informiert werden und darauf durch die Medien Einfluß nehmen.

Auch wenn der Staat die demokratische Funktion der Medien nicht befehlen darf, so braucht er dieser ihm nützlichen Funktion gegenüber doch auch nicht blind zu sein. Je intensiver sich ein Medium aus eigener Entscheidung an dieser Aufgabe beteiligt, desto intensiveren Schutz verdient seine Freiheit vor staatlicher Intervention. Das hat für die Presse besondere Bedeutung. Denn weder Rundfunk noch Internet haben etwas daran geändert, daß die demokratische Funktion der Medien vor allem von der Presse wahrgenommen wird.

2. Gegenwärtige und vergangene Konflikte

In den vergangenen Jahrzehnten hat es manches Scharmützel zwischen der Presse und dem Europäischen Gesetzgeber gegeben. Regelmäßig haben die Kontrahenten ihre Kräfte nicht nur in der politischen Arena gemessen, sondern auch ihre Juristen gegeneinander aufgefahren. Der Europäische Gerichtshof hat seit langem aus dem Vergleich der mitgliedstaatlichen Verfassungen europäische Grundrechte entwickelt[17]. Er hat sich dabei jedenfalls theoretisch auch auf die Europäische Menschenrechtskonvention gestützt[18]. Art. F II des Mastrichter Unionsvertrags hat diese Praxis des Gerichtshofs sanktioniert. Der Amsterdamer Vertrag hat diese Regel in Art. 6 II EUV übernommen. Die meisten Konflikte sind deshalb auch in der Vergangenheit schon als Grundrechtsfragen diskutiert worden. Entsprechend kurz können sie hier behandelt werden.

Folgende gesetzgeberische Aktivitäten der Gemeinschaft haben schon in der Vergangenheit zu Konflikten mit der Presse geführt: das Arbeitsrecht (a), Regeln über die Medienkonzentration (b), das Urheberrecht (c), der Datenschutz (d), das Werberecht (e), das Vertriebsrecht (f), Vorgaben für die nationale Presseförderung (g), die Anwendung des europäischen Kartellrechts (h) und schließlich die Frage des Informantenschutzes bei der Anwendung von europäischem Verwaltungsrecht (i).

a) Pressearbeitsrecht

Zu den Kernelementen des deutschen Pressearbeitsrechts gehört der Tendenzschutz. Weder die unternehmerische noch die betriebliche Mitbestimmung darf das Recht des Verlegers beeinträchtigen, die Ausrichtung der Zeitung oder Zeitschrift zu bestimmen[19]. Auf Drängen der deutschen Verleger enthält auch die Richtlinie über die Einsetzung eines Europäischen Betriebsrats

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17 Umfassend *Hans-Werner Rengeling:* Grundrechtsschutz in der europäischen Gemeinschaft. Bestandsaufnahme und Analyse der Rechtsprechung des Europäischen Gerichtshofes zum Schutz der Grundrechte als allgemeine Rechtsgrundsätze, München 1993.

18 – es allerdings beharrlich unterlassen, auch die ausgefeilte Dogmatik der Straßburger Organe zu rezipieren –

19 S. nur BVerfGE 20, 162, 175; BVerfG AfP 1980, 33.

einen Vorbehalt, der es den Mitgliedstaaten erlaubt, an dem bisherigen Tendenzschutz festzuhalten[20]. Auch die Arbeitsschutzrichtlinie der Gemeinschaft verweist wegen des Tendenzschutzes auf die jeweiligen nationalen Regeln[21].

Auch die bis heute ergebnislosen Bemühungen der EG-Kommission um europäische Regeln über die Medienkonzentration haben eine arbeitsrechtliche Dimension. In seinen Entschließungen aus den Jahren 1990 und 1992 wollte das Europäische Parlament die sog. „Innere Pressefreiheit“ verwirklichen. Es wollte also den Journalisten vom Verleger nicht kontrollierte publizistische Freiräume einräumen, die sie zur schleichenden Änderung der Ausrichtung hätten nutzen können[22]. Das Parlament greift damit einen Vorschlag aus der deutschen Diskussion der 70er Jahre auf, der sich damals nicht hat durchsetzen können, weil er gegen das Grundrecht der Pressefreiheit verstößt. Der europäische Vorschlag ist intensiv an den ungeschriebenen europäischen Grundrechten und an der Europäischen Menschenrechtskonvention gemessen worden[23].

b) Medienkonzentration

Die EG-Kommission hat zu den Vorreitern eines publizistisch konzipierten Rechts der Medienkonzentrationskontrolle gehört[24]. Sie hat auch die deutsche Diskussion stark beeinflußt. Für den Rundfunk hat der Rundfunkstaatsvertrag das von der EG-Kommission favorisierte Zuschauermarktanteilsmodell verwirklicht[25]. Auf europäischer Ebene ist es bislang dagegen zu keiner Regelung gekommen[26]. Die Pläne der EG-Kommission waren von Anfang an ambitioniert.

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20 Art. 8 II Richtlinie 94/45 über die Einsetzung eines Europäischen Betriebsrates, ABl. 1994 L 254/84; zur Vorgeschichte *Kull* (FN 9) AfP 1993, 431 f.

21 Art. 11 II Richtlinie 89/391 über die Durchführung von Maßnahmen zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Arbeitnehmer bei der Arbeit, ABl. 1989 L 183/1; zur Vorgeschichte *Kull* (FN 9) AfP 1993, 432 f. Dort auch zu der Auseinandersetzung über den Tendenzschutz im Statut der Societas Europea. Bekanntlich ist die einschlägige Richtlinie bis heute nicht verabschiedet.

22 Entschließung des Europäischen Parlaments zur Konzentration im Medienbereich vom 15.02.1990, ABl. 1990 C 68/137; Entschließung des Europäischen Parlaments zur Medienkonzentration und Meinungsvielfalt vom 16.09.1992, ABl. 1992 C 284/44; die einschlägigen Vorschriften sind auch abgedruckt bei *Michael Kloepfer:* „Innere Pressefreiheit“ und Tendenzschutz im Lichte des Artikels 10 der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (Schriften zum Europäischen Recht 27) Berlin 1996, 52-56.

23 *Christoph Engel*: Einwirkungen des europäischen Menschenrechtsschutzes auf Meinungsäußerungsfreiheit und Pressefreiheit – insbes. auf die Einführung von Innerer Pressefreiheit, in: AfP 1994, 1-9; *Kloepfer* (vorige FN).

24 Grünbuch Pluralismus und Medienkonzentration im Binnenmarkt – Bewertung der Notwendigkeit einer Gemeinschaftsaktion, KOM (92) 940 endg.

25 §§ 25 – 37 RStV; zur Entstehungsgeschichte s. vor allem Die Sicherung der Meinungsvielfalt. Berichte, Gutachten und Vorschläge zur Fortentwicklung des Rechts der Medienkonzentrationskontrolle vom Herbst 1994 (Schriftenreihe der Landesmedienanstalten 4) Berlin 1995.

26 *Schmittmann/de Vries/von Loesch* (FN 9) AfP 2000, 43.

Sie wollte sich nicht auf das Fernsehen beschränken, sondern ein medienübergreifendes Recht der Konzentrationskontrolle schaffen und dabei auch die Presse einbeziehen[27]. Auch diese Frage hat zu einer intensiven grundrechtlichen Diskussion geführt[28].

c) Urheberrecht

Die Harmonisierung des Urheberrechts der Mitgliedstaaten hat erst relativ spät eingesetzt. Mittlerweile schreitet sie aber rasch voran[29]. In der Vergangenheit hat es einmal einen Konflikt auf der Grenzlinie zwischen Arbeitsrecht und Urheberrecht gegeben. Die Verlage haben erreicht, daß die Möglichkeit erhalten bleibt, durch Manteltarifvertrag klarzustellen, daß ein Redakteur sein urheberrechtliches Nutzungsrecht durch Abschluß des Arbeitsvertrags auf den Verlag überträgt[30]. Für die Zukunft dürften Konflikte vor allem bei der europäischen Ausgestaltung des Urheberrechts in der Informationsgesellschaft zu erwarten sein[31]. Ein Beispiel ist der in Deutschland bereits ausgebrochene Streit um elektronische Pressespiegel[32].

d) Datenschutz

Das deutsche Bundesdatenschutzgesetz enthält seit jeher ein Medienprivileg[33]. Die Medien sollen personenbezogene Daten sammeln dürfen, ohne daß der Betroffene zustimmen müßte, Löschung verlangen könnte oder vorab informiert werden müßte. Das soll ihnen erlauben, die Kritik von Politikern oder anderen Personen des öffentlichen Lebens sorgsam vorzubereiten. Der Betroffene soll sie nicht mit Hilfe des Datenschutzes daran hindern können. Außerdem dient das Medienprivileg dem Schutz der Presseinformanten. Die Datenschutzrichtlinie der EG enthält kein

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27 Vgl. auch die Resolution 1003 (1993) und die Empfehlung 1215 (1993 der Parlamentarischen Versammlung des Europarats sowie die Erwiderung des Ministerkommittees vom 24.03.1994). Näher *Dirk Uwer*: Medienkonzentration und Pluralismussicherung im Lichte des Europäischen Menschenrechts der Pressefreiheit (Berliner Juristische Universitätsschriften Öffentliches Recht 10) Berlin 1998, 70-76.

28 *Eckart Klein:* Einwirkungen des europäischen Menschenrechtsschutzes auf Meinungsäußerungsfreiheit und Pressefreiheit, in: AfP 1994, 9-18 (15 f.); *Thorsten Stein:* Pressefreiheit und EU-Recht, in: *Georg Ress/Thorsten Stein (Hrsg.)*: Die Pressefreiheit in Europa [unveröffentlichtes Manuskript]; *Georg Ress/Jürgen Bröhmer:* Europäische Gemeinschaft und Medienvielfalt. Die Kompetenzen der Europäischen Gemeinschaft zur Sicherung des Pluralismus im Medienbereich (Marbuger Medienschriften 1) Frankfurt 1998, 72-78; *Uwer* (FN 27) 77-186 und 359-608, s. auch ebd. 187-358 zur Vergleichung der Verfassung der Mitgliedstaaten.

29 Einen Überblick geben *Hanns Ullrich/Karlheinz Konrad:* Gewerblicher Rechtsschutz, in: *Manfred A. Dauses (Hrsg.*) Handbuch des EU-Wirtschaftsrechts C III (2. Auflage 2000) R 144-149.

30 *Kull* (FN 9) AfP 1993, 433.

31 S. dazu Grünbuch der Kommission über das Urheberrecht und verwandte Schutzrechte in der Informationsgesellschaft, KOM (95) 382 sowie den Richtlinienvorschlag ABl. 1998 C 108/6.

32 *Georg Wallraf:* Elektronische Pressespiegel aus der Sicht der Verlage, in: AfP 2000, 23-29.

33 § 41 Bundesdatenschutzgesetz.

vergleichbares Privileg[34]. Obwohl die Umsetzungsfrist seit langem abgelaufen ist[35], ist die Richtlinie bislang nicht in deutsches Recht umgesetzt[36]. Dafür ist auch das Problem des Mediendatenschutzes verantwortlich[37].

e) Werberecht

Eine cause célèbre des europäischen Grundrechtsschutzes der Presse ist das vollständige Verbot der Werbung für Tabak, das die Union verhängt hat[38]. Es hat eine ganze Flut grundrechtlicher Untersuchungen ausgelöst[39]. Gegen die Richtlinie schwebt eine Klage der Bundesrepublik Deutschland vor dem Europäischen Gerichtshof[40]. Zwei englische Gerichte haben Vorabentscheidungsersuchen an den Gerichtshof gerichtet[41]. Schließlich haben Medienunternehmen Klage vor dem Gericht Erster Instanz erhoben[42].

Die rechtspolitischen Vorstellungen der Mitgliedstaaten über Grenzen für die Zulässigkeit von Werbung weichen stark von einander ab[43]. Gleichwohl hat die Gemeinschaft bislang nur ein kleines Segment des Werberechts harmonisiert: die irreführende Werbung[44], wozu eine Änderungsrichtlinie nun auch die vergleichende Werbung rechnet[45]. Zunächst sah es so aus, als würde die

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34 ABl. 1995 L 281/31; zur Vorgeschichte *Kull* (FN 9) AfP 1993, 432.

35 Seit dem 24.10.1998.

36 Eine Ausnahme machen nur §§ 47–47 f RStV.

37 Die Frage hat den Studienkreis Presserecht und Pressefreiheit auf seiner Sitzung im Mai 2000 beschäftigt. Es haben referiert: *Michael Kloepfer*: Datenschutz statt Medienfreiheit? – Medienfreiheit statt Datenschutz?; *Spiros Simitis:* Sonderregeln für die Medien – das „widerspenstige Pferd" des Datenschutzes.

38 RL 98/43/EG des Europäischen Parlaments und des Rates zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über Werbung und Sponsoring zugunsten von Tabakerzeugnissen vom 06.07.1998, ABl. 1998 L 213/9.

39 S. insbes. *Peter J. Tettinger*: EG-rechtliche Verbote von Werbung und Sponsoring bei Tabakerzeugnissen und deutsches Verfassungsrecht, Bonn 1998; *Udo Di Fabio*: Werbeverbote – Bewährungsprobe für europäische Grundfreiheiten und Grundrechte, in AfP 1998, 564-570; *Thomas von Danwitz:* Produktwerbung in der Europäischen Union zwischen gemeinschaftlichen Kompetenzschranken und europäischem Grundrechtsschutz. Zum Rechtsschutz gegen das vorgeschlagene Verbot direkter und indirekter Tabakwerbung in Europa (Schriften zum europäischen Recht 47) Berlin 1998; *Bruno Simma/J.H.H. Weiler/Markus C. Zökler:* Kompetenzen und Grundrechte. Beschränkungen der Tabakwerbung aus der Sicht des Europarechts (Schriften zum europäischen Recht 59) Berlin 1999; *Hans-Peter Schneider/Thorsten Stein:* The European Ban on Tobacco Advertising 1999.

40 Rs. C-376/98.

41 Rs. C-47/99; Rs. C-243/99.

42 Rs. T-172/98, T-175/98, T-176/98 und T-177/98, alle Nachweise nach *Schmittmann/de Vries/von Loesch* AfP 2000, 55.

43 Umfassend *Peter Schotthöfer (Hrsg.):* Handbuch des Werberechts in den EU-Staaten, Köln² 1997.

44 RL 84/450/EWG zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über irreführende Werbung, ABl. 1984 L 250/17.

45 ABl. 1997 L 290/23.

Warenverkehrsfreiheit die restriktiven Werberechte, allen voran also das deutsche Lauterkeitsrecht, erschüttern können[46]. In der berühmten Keck-Entscheidung hat der Gerichtshof nicht diskriminierende Verkaufsmodalitäten aber bekanntlich aus dem Schutzbereich der Warenverkehrsfreiheit ausgenommen[47]. Das geschah gerade, um den Mitgliedstaaten bei der Ausgestaltung des Lauterkeitsrechts größere Freiräume zu belassen. Dieser Umstand ist dafür verantwortlich, daß die Diskussion über die Vereinbarkeit von Werbebeschränkungen mit Grundrechten nunmehr an den Straßburger Gerichtshof abgewandert ist[48].

f) Vertriebsrecht

Die EG hat ihre Rechtsangleichungszuständigkeiten seit langem für den Verbraucherschutz genutzt. Seit dem Mastrichter Vertrag hat sie auch eine originäre Verbraucherschutzzuständigkeit[49]. In Ausnutzung dieser Zuständigkeiten hat die Gemeinschaft Richtlinien erlassen, die auch für den Vertrieb von Zeitungs- und Zeitschriftenabonnements Bedeutung haben. Das gilt vor allem für die Richtlinie über Haustürgeschäfte[50], aber auch für die AGB-Richtlinie[51]. Auch das Primärrecht wirkt auf den Pressevertrieb ein. So hat der Gerichtshof entschieden, daß das österreichische Verbot von Preisaussschreiben in Zeitschriften gegen die Warenverkehrsfreiheit verstößt[52].

g) Nationale Presseförderung

Alle Mitgliedstaaten haben mehr oder minder weitreichende Instrumente zur Förderung der Presse. Weitverbreitet sind Mehrwertsteuerprivilegien. In Deutschland fällt etwa nur der Mehrwertsteuersatz von 7 % an, im Vereinigten Königreich[53] und in Finnland[54] sind Presseerzeugnisse sogar ganz von der Umsatzsteuer befreit. Das ist nur solange möglich, wie die einschlägige europäische Richtlinie Steuerbefreiungen zuläßt[55]. Traditionell förderten die

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46 EuGH 10.07.1980, Rs. 152/78, Slg. 2299; 07.03.1990, Rs. C-362/88, Slg. I 667 - GB-Inno; EuGH 25.07.1991, Rs. C-1/90, Slg. I 4151 - Aragonesa.

47 EuGH 24.11.1993, Rs. 267 und 268/91, Slg. I 1993, 6097 – Keck und Mithouard.

48 Dazu näher *Georg Nolte:* Werbefreiheit und Europäische Menschenrechtskonvention, in: RabelsZ 63 (1999) 507-519; *Rainer Kulms:* Werbung: Geschützte Meinungsäußerung oder unlauterer Wettbewerb? Zum Verhältnis von Art. 10 EMRK und UWG, in: RabelsZ 63 (1999) 520-536.

49 Nunmehr enthalten in Art. 153 EGV.

50 RL 85/577/EWG betreffend den Verbraucherschutz im Falle von außerhalb von Geschäftsräumen geschlossenen Verträgen, ABl. 1985 L 372/31.

51 RL 93/13/EWG über mißbräuchliche Klauseln in Verbraucherverträgen, ABl. 1993 L 95/29.

52 EuGH 26.06.1997, Rs. 368/95, Slg. I 3689 – Vereinigte Familiapress.

53 *Colin Munro:* Freedom of the Press in the United Kingdom, in: *Georg Ress/Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 13.

54 *Tore Moden:* Landesbericht Finnland, in *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 13.

55 S. Art. 13 Sechste Richtlinie 77/377/EWG zur Harmonisierung der Rechtsvorschriften der Mitgliedstaaten über die Umsatzsteuern – gemeinsames Mehrwertsteuersystem: Einheitliche steuerpflichtige Bemessungsgrundlage, ABl. 1977 L 145/1 in der jeweils geltenden Fassung.

Mitgliedstaaten die Presse häufiger auch durch Vorzugskonditionen für den Postzeitungsdienst[56]. Mittlerweile hat die Gemeinschaft jedoch die Privatisierung und Deregulierung der Postunternehmen erzwungen[57]. Die einschlägige Richtlinie gibt den Mitgliedstaaten zwar die Möglichkeit, einen Universaldienst vorzuschreiben[58]. Ein besonderer Postzeitungsdienst ist dort aber nicht genannt[59].

Andere Mitgliedstaaten fördern die Presse durch weit überhöhte Zahlungen für den Abdruck öffentlicher Bekanntmachungen[60]. Solche Praktiken müssen sich an den harmonisierten europäischen Regeln für die Vergabe öffentlicher Aufträge messen lassen[61]. Denn harmonisiert ist auch die Vergabe öffentlicher Dienstleistungsaufträge[62].

Andere Mitgliedstaaten fördern die Presse offen und mit erheblichen Summen aus dem öffentlichen Haushalt. So liegt es insbesondere in Frankreich[63], in Italien[64] und in Österreich[65]. Finnland nutzt Zahlungen an die Parteipresse als ein Instrument der indirekten Parteifinanzierung[66]. Schweden erhält regionale und lokale Zweitzeitungen durch öffentliche Subventionen am Leben[67]. Traditionell hat sich die Kommission bei der Anwendung der europäischen Beihilferegeln auf Maßnahmen zur Förderung von Kultur und Publizistik sehr zurückgehalten. Beim Rundfunk hat sich das bekanntlich aber geändert[68]. Unter dem Einfluß des Gerichts Erster Instanz könnte auch die Beihilfeaufsicht

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56 Das ist nicht nur in Deutschland so, sondern etwa auch in Frankreich (*Christian Autexier:* Landesbericht Frankreich, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 70 f.) und in Luxemburg (*Luc Weitzel:* Liberté de la Presse en Luxembourg, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 55).

57 Einzelheiten bei *Engel/Seelmann-Eggebert* in Dauses (FN 9) R 130-137.

58 Art. 3-6 RL 97/67/EG des Europäischen Parlaments und des Rates über gemeinsame Vorschriften für die Entwicklung des Binnenmarktes der Postdienste der Gemeinschaft und die Verbesserung der Dienstequalität, ABl. 1998 L 15/14.

59 Helfen könnte höchstens die 15. Erwägung. Danach bleibt das Recht der Betreiber von Universaldiensten unberührt, Verträge mit den Kunden individuell auszuhandeln.

60 So ist das etwa in Luxemburg (*Weitzel* [FN 56] 55); in Griechenland (*Prodomos Dagtoglou:* Pressefreiheit in Griechenland, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 25 sowie in Spanien (*Alejandro Munoz Alonso:* Press Freedom in Spanish Law, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 19).

61 Zusammenfassend *Ingelore Seidel:* Öffentliches Auftragswesen, in: *Manfred A. Dauses (Hrsg.)* Handbuch des EU-Wirtschaftsrechts H. IV.

62 RL 92/50/EWG des Rates über die Koordinierung der Verfahren zur Vergabe öffentlicher Dienstleistungsaufträge, ABl. 1992 L 209/1.

63 *Autexier* in *Ress/Stein* (FN 28) 52-55.

64 *Vincenzo Atripaldi*: Freedom of Press in Italy, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 49-55.

65 *Heinz-Peter Rill:* Landesbericht Österreich, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 66-77.

66 *Moden* in *Ress/Stein* (FN 54) 13.

67 *Erik Holmberg:* Freedom of the Press in Sweden, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 27.

68 Einzelheiten bei *Engel/Seelmann-Eggebert* in *Dauses* (FN 9) R 113.

über die Presse zunehmen. Das Gericht hat die Kommission schon gezwungen, die französische Praxis der Exportsubventionen für Bücher der Beihilfekontrolle zu unterwerfen[69].

h) Europäisches Kartellrecht

Auch die Anwendung des europäischen Kartellrechts führt immer wieder zu Konflikten mit Verlagen und der nationalen Pressepolitik. Das Gemeinschaftsrecht läßt selektive Vertriebsbindungen zwar grundsätzlich zu, achtet jedoch darauf, daß sie nicht diskriminierend ausgestaltet werden[70]. Auch gegenüber der Preisbindung zweiter Hand ist die Kommission kritisch[71]. Zusammenschlüsse von Verlagshäusern hatte die Kommission bisher selten zu prüfen. In den untersuchten Fällen hatte sie keine Einwendungen[72]. Deshalb ist auch noch nicht abschließend geklärt, welche Freiräume der Medienvorbehalt in § 21 III Fusionskontrollverordnung den Mitgliedstaaten verschafft[73].

i) Informantenschutz und Europäisches Verwaltungsrecht

Das Europäische Verwaltungsrecht setzt die Akzente anders als das deutsche. Das Interesse am wirksamen Vollzug des öffentlichen Anliegens setzt sich viel häufiger gegen rechtsstaatliche Bedenken durch als im deutschen Recht[74]. Dazu gehört auch, daß die Gemeinschaft umfangreiche Ermittlungsbefugnisse in Anspruch nimmt[75]. Das macht wahrscheinlich, daß die Gemeinschaft auch geneigt wäre, den Schutz von Presseinformanten zurückzustellen. Das Spannungsverhältnis zwischen Verwaltungseffizienz und dem Bestreben des Europarats nach mehr Informantenschutz ist also noch nicht ausgestanden[76].

3. Mögliche Konflikte aus der Erleichterung des Marktzutritts für ausländische Anbieter

Niemand kann Sicherheit über die künftige Entwicklung des Gemeinschaftsrechts und der Gemeinschaftspolitik haben. Gleichwohl macht es Sinn, Entwicklungstrends des Gemeinschaftsrechts fortzudenken. Nach wie vor ist die Europäische Gemeinschaft vor allem eine Wirtschaftsgemeinschaft, gerichtet auf die Schaffung und Sicherung eines Binnenmarkts. Bislang hat die Gemeinschaft daraus nicht die Folgerung einer eigenen Pressepolitik gezogen. Das lag gleich aus zwei Gründen nahe: die meisten Mitgliedstaaten halten sich traditionell bei der Regulierung der Presse sehr zurück, es gibt also wenig Handelshemmnisse. Überdies werden Presseerzeugnisse nur in kleinen Stückzahlen über die Landesgrenzen hinaus gehandelt. Denn die

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69 EuG 18.09.1995, Rs. 49/95, Slg. 1995 II 2501 - SIDE.

70 EuGH 03.07.1985, Rs. 243/83, Slg. I 1985, 2015, 2043 f. und 2046 - Binon; EuGH 26.11.1998, Rs. C-7/97, 7791; s. auch *Engel/Seelmann-Eggebert* in *Dauses* (FN 9) R 120.

71 Einzelheiten bei *Engel/Seelmann-Eggebert* in *Dauses* (FN 9) R 121 und *Schmittmann/de Vries/von Loesch* (FN 9) AfP 2000, 40.

72 WuW/E EV 2185 - News Paper Publishing; ABl. 1995 C 292/9; 1995 C 338/3.

73 Einzelheiten bei *Engel/Seelmann-Eggebert* in *Dauses* (FN 9) R 102.

74 S. aus der umfangreichen Literatur *Christoph Engel:* Die Einwirkungen des europäischen Gemeinschaftsrechts auf das deutsche Verwaltungsrecht, in: Die Verwaltung 1992, 437-476; *Hans-Werner Rengeling*: Deutsches und Europäisches Verwaltungsrecht - wechselseitige Einwirkungen, in: VVDStRL 53 (1993) 202-239; *Stephan Kadelbach*: Allgemeines Verwaltungsrecht unter Europäischem Einfluß (Jus Publicum 36) Tübingen 1999.

75 Die Grenzen waren Gegenstand von EuGH 21.09.1989, Rs. 46/87, Slg. 1989, 2859 - Hoechst.

76 EGMR 27.03.1996, Reports 1996 II – Goodwin; Council of Europe Recommendation R (2000) 7 on Legal Protection of Journalist's Sources vom 08.03.2000.

Presse ist an die Sprach- und Mentalitätsgrenzen gebunden und schreibt in der Regel für ein nationales (oder sogar regionales oder lokales) Publikum. Vorsorglich soll gleichwohl unterstellt werden,daß die Gemeinschaft künftig tätig würde, um die Märkte stärker für den Zutritt ausländischer Anbieter zu öffnen (a). Nach dem Vorbild der Europäischen Fernsehrichtlinie könnte sie sich auch veranlaßt sehen, die nationalen Regeln für die Presseinhalte zu harmonisieren (b), das Vertriebsrecht zu vereinheitlichen (c) oder gar in die nationalen Verfassungspolitiken der Medien einzugreifen (d). Schließlich könnte die Gemeinschaft an den Unterschieden zwischen den Regulierungsinstitutionen der Mitgliedstaaten ansetzen (e).

a) Marktöffnung

Offen diskriminierende Regeln für den Marktzutritt ausländischer Anbieter sind so zweifelsfrei gemeinschaftsrechtswidrig, daß die Mitgliedstaaten darauf normalerweise von selbst verzichten. Immerhin sah das portugiesische Recht aber vor, daß nicht mehr als 10 % des Eigentums an einem portugiesischem Verlag in ausländischer Hand liegen dürfen und daß das Unternehmen seinen Sitz im Lande haben muß[77]. Auch zeigt die Pressegesetzgebung der Beitrittsstaaten in der Mitte Europas, daß die liberale westeuropäische Tradition des Presserechts dort nicht gleichermaßen selbstverständlich ist. So hat das tschechische Pressegesetz erst unter fühlbarer Einwirkung des Europarats eine Fassung gefunden, die im wesentlichen den westeuropäischen Standards genügt[78].

b) Harmonisierung der Inhalte

Das zentrale Anliegen der Fernsehrichtlinie ist die Harmonisierung der Vorgaben für den Inhalt von Fernsehprogrammen[79]. Die nationalen Vorgaben für den Inhalt von Presseerzeugnissen sind nicht weniger unterschiedlich. Das gilt etwa für den Persönlichkeitsschutz[80] und das Recht der Gegendarstellung[81]. Deutschland hat aufgrund seiner Geschichte nationalsozialistische Propaganda unter Strafe gestellt[82]. Irland begründet sein Verbot der Werbung für Schwangerschaftsabbrüche mit seinem katholischen Hintergrund[83]. Das englische Recht faßt die strafrechtlich- und zivilrechtlich

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77 *Manuel Antonio Lopez Rocha*: Liberté de la Presse en Portugal, in: *Georg Ress/ Thorsten Stein (Hrsg.):* Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 15 f.

78 Gesetz 64/2000 vom 22.02.2000 über einige Rechten und Pflichten beim Herausgeben der periodischen Presse und über die Änderung von einigen weiteren Gesetzen.

79 RL 89/552/EWG des Rates zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Ausübung der Fernsehtätigkeit vom 03.10.1989, ABl. 1989 L 298/23 in der Fassung der Änderungsrichtlinie 97/36/EG des Europäischen Parlaments und des Rates vom 30.06.1997, ABl. 1997 L 202/60.

80 Einzelheiten bei *Jürgen von Gerlach:* Der Schutz der Privatsphäre von Personen des öffentlichen Lebens in rechtsvergleichender Sicht, in: JZ 1998, 741-753; die Unterschiede spiegeln sich auch in der Rechtsprechung der Straßburger Organe, dazu zusammenfassend *Thomas Giegerich:* Schutz der Persönlichkeit und Medienfreiheit nach Artt. 8, 10 EMRK im Vergleich mit dem Grundgesetz, in: RabelsZ 63 (1999) 471-506.

81 S. beispielhaft das von § 11 des tschechischen Privatrechtsgesetzes eingeführte zusätzliche Recht eines Angeklagten auf eine nachträgliche Mitteilung. Wenn über ein Strafverfahren berichtet worden war, dieses Verfahren aber nicht mit einem rechtskräftigen Urteil endet, kann der Betroffene solch eine Mitteilung verlangen.

82 §§ 86, 86 a, 130 III StGB; s. dazu auch BVerfGE 7, 198, 209 f.; 90, 241, 252.

83 Näher EGMR 29.10.1992, Ser. A 246 – Open Door and Dublin Well Woman.

geschützten Staatsgeheimnisse sehr weit[84]. Die Parlamentsberichterstattung bindet es an die strengen Regeln über Contempt of Parliament[85], die Gerichtsberichterstattung an die ebenso strengen Regeln über Contempt of Court[86].

c) Harmonisierung des Werbe- und Vertriebsrechts

Weniger weit streuen die Regeln der Mitgliedstaaten über den Absatz der publizistischen Leistung an Werbetreibende und Zeitungsleser. So kennt Frankreich etwa restriktive Regeln über Product Placement[87]. Im niederländischen Recht sind die Regeln für ideelle Werbung viel strenger als für kommerzielle[88]. Das dänische Recht unterwirft alle Verleger einem allgemeinen Kontrahierungszwang gegenüber Anzeigenkunden[89]. Das französische Recht zwingt die Verleger, alle Rabatte offenzulegen, die sie einzelnen Werbekunden gewährt haben[90]. Media Agenturen müssen dort die ihnen gewährten Provisionen den Werbetreibenden gegenüber offenlegen[91].

Auch beim Vertrieb gegenüber den Lesern gibt es manche Unterschiede. So dürfen Presseverkäufer in Frankreich ihre Vergütung mit dem Verlag nicht frei aushandeln[92]. Das deutsche und das österreichische Lauterkeitsrecht ziehen den Marketingstrategien der Verlage enge Grenzen[93].

d) Harmonisierung nationaler Verfassungspolitik der Medien

Die Presse erfüllt nicht nur ein Informations- und Unterhaltungsbedürfnis ihrer Leser, sondern sie ist zugleich auch ein Intermediär zwischen Staat und Gesellschaft. Nur auf diesem hohen Abstraktionsniveau besteht aber Einigkeit zwischen den Mitgliedstaaten. In der Ausgestaltung sind die Unterschiede groß. So nutzt Italien die Pressefinanzierung etwa als Vorwand für die Parteienfinanzierung[94]. Auch in Schweden haben Parteizeitungen einen großen Marktanteil[95].

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84 Illustrativ ist der Fall Spycatcher, EGMR 26.11.1991, Ser. A 216, 1 – Observer and Guardian; EGMR 26.11.1991, Ser. A 217, 1 – Sunday Times II; weitere Einzelheiten bei *Birgit Brömmekamp*: Die Pressefreiheit und ihre Grenzen in England und der Bundesrepublik Deutschland. Eine vergleichende Darstellung in verfassungsrechtlicher, zivilrechtlicher, strafrechtlicher und tatsächlicher Hinsicht (Europäische Hochschulschriften II/2142) Frankfurt 1997, 149-167.

85 *Brömmekamp* (vorige FN) 184-189.

86 Ebd. 190-235; zur Reaktion der Europäischen Menschenrechtskonvention s. auch *Christoph Engel*: Privater Rundfunk vor der Europäischen Menschenrechtskonvention (Law and Economics of International Telecommunications 19) Baden-Baden 1993, 306 f.

87 *Autexier* in *Ress/Stein* (FN 28) 14.

88 *N.H. Neerscholten:* Freedom of the Press in the Netherlands, in: *Georg Ress/Thorsten Stein (Hrsg.)*: Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 38.

89 *Rainer Hofmann:* Pressefreiheit und der Stand des Presserechts in Europa. Landesbericht Dänemark, in: *Georg Ress/Thorsten Stein (Hrsg.)*: Pressefreiheit und der Stand des Presserechts in Europa [unveröffentlichtes Manuskript] 20.

90 *Autexier* in *Ress/Stein* (FN 28) 62.

91 Ebd. 63.

92 Ebd. 56.

93 Das österreichische Recht verbietet etwa die vergleichende Werbung, die Spitzenstellungswerbung und erlaubt Zugaben sowie Gewinnspiele nur in engen Grenzen, Einzelheiten bei *Rill* in *Ress/Stein* (FN 65) 80-86.

94 *Atripaldi* in *Ress/Stein* (FN 64) 50.

95 Einzelheiten bei *Holmberg* in *Ress/Stein* (FN 67) 22 f.

Schweden legt zugleich großen Wert auf die Überwachungsfunktion der Presse. Deshalb hat jeder öffentliche Bedienstete das Recht, die Presse zu informieren, wenn er einen Mißstand vermutet. Sein Dienstherr darf daraus keine nachteiligen Folgerungen ziehen. Der Informant darf auch anonym bleiben[96]. Hierher gehören aber vor allem die sehr unterschiedlichen Auffassungen der Mitgliedstaaten über die Transparenz der Eigentumsverhältnisse an Verlagen. Frankreich hat strenge Regeln[97]. Griechenland verpflichtet die Verleger sogar, jährlich ihre Vermögensverhältnisse offenzulegen[98] und läßt als flankierenden Schutz bei einer Presseaktiengesellschaft nur Namensaktien zu[99]. Portugal[100], Italien[101] und Griechenland haben einschlägige Vorschriften in ihre Verfassungen aufgenommen[102]. Das deutsche Recht kennt bekanntlich keine dieser Vorschriften.

e) Angleichung der Regulierungsinstitutionen

Schließlich unterscheiden sich auch die Institutionen erheblich, denen die Mitgliedstaaten die Bildung und Anwendung des Presserechts übertragen haben. Das gilt insbesondere für Ausmaß und Befugnisse der Selbstkontrolle. In Schweden hat sie eine lange Tradition[103]. Dänemark vertraut dem Selbstkontrollorgan sogar die Entscheidung von Streitigkeiten zwischen Chefredakteur und Journalisten an[104]. In den Niederlanden ist es zum Streit darüber gekommen, ob der Presserat überhaupt strengere Maßstäbe anlegen darf als das Gesetz[105]. In England hat die Selbstkontrolle der Presse dagegen nach wie vor eine eher schwache Stellung[106]. In Frankreich gibt es gar keine Einrichtung nach der Art des Deutschen Presserats[107].

Manche Mitgliedstaaten haben auch halbstaatliche Regulierungsinstitutionen geschaffen. So hat Italien 1990 einen unabhängigen Kommissar bestellt[108]. Und das schwedische Recht hat Entscheidungen über den Ehrschutz einer Jury vorbehalten[109].

4. Mögliche künftige Konflikte aus der Ausstrahlung anderer Medienpolitiken

Der letzte Abschnitt hat Unterschiede zwischen dem Presserecht der Mitgliedstaaten zusammengetragen. Diese Unterschiede mag die Kommission eines Tages als Hemmnisse für einen europäischen Pressemarkt interpretieren und deshalb Harmonisierungsvorschläge machen. Sie müßte dann aber von ihrer bisherigen Überzeugung abgehen, eine europäische Pressepolitik sei nicht erforderlich. Zudem bräuchte sie eine Gesetzgebungskompetenz. Sehr viel wahrscheinlicher ist ein europäisches Presserecht dort, wo die Presse mit anderen Medien verschmilzt. Dazu kommt es vor allem durch die elektronische Erfassung der Inhalte, ihre Digitalisierung und den Vertrieb

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96 *Holmberg* in *Ress/Stein* (FN 67) 9 f.
97 *Autexier* in *Ress/Stein* (FN 28) 47.
98 *Dagtoglou* in *Ress/Stein* (FN 60) 4.
99 Ebd.
100 *Lopez Rocha* in *Ress/Stein* (FN 77) 2.
101 *Atripaldi* in *Ress/Stein* (FN 64) 1.
102 *Dagtoglou* in *Ress/Stein* (FN 6028) 2.
103 *Holmberg* in *Ress/Stein* (FN 67) 20 f.
104 *Hofmann* in *Ress/Stein* (FN 89) 9, s. auch 15-18.
105 Einzelheiten bei *Neerscholten* in *Ress/Stein* (FN 88) 25.
106 *Colin Munro* in *Ress/Stein* (FN 53) 27-31.
107 *Autexier* in *Ress/Stein* (FN 28) 41.
108 Einzelheiten bei *Atripaldi* in *Ress/Stein* (FN 64) 45-48.
109 *Holmberg* in *Ress/Stein* (FN 67) 19.

über elektronische Netze[110]. Die EG hat darauf vielfältig reagiert. Die Telekommunikationsnetze und –dienste sowie die darüber transportierten Inhalte sind eines der wichtigsten gegenwärtigen Politikfelder der Gemeinschaft[111]. Viele der schon erlassenen oder geplanten Regeln gelten auch für Presse. Verwiesen sei stellvertretend nur auf das Grünbuch Konvergenz[112].

5. Mögliche künftige Konflikte aus der Ausstrahlung anderer Politiken

Schließlich werden auch in der Zukunft aus anderen Politiken der Gemeinschaft Konflikte mit der Presse entstehen. Ein Gegenstand sei beispielhaft herausgegriffen. Das deutsche Recht hält sich traditionell mit der Gewährung von Informationsansprüchen an den Staat oder an gesellschaftliche Akteure sehr zurück. Die wichtigste Ausnahme, das Umweltinformationsgesetz, beruht gerade auf einer Richtlinie der Europäischen Gemeinschaft[113]. In anderen Mitgliedstaaten ist das ganz anders. Schweden kennt solche Ansprüche schon seit Jahrhunderten[114]. In Portugal ist der Informationsanspruch in der Verfassung garantiert[115]. Art. 255 EGV in der Fassung des Amsterdamer Vertrags gibt jedem Bürger einen Informationsanspruch gegen die Gemeinschaft. Die Kommission hat ein Grünbuch über Informationen des öffentlichen Sektors in der Informationsgesellschaft verabschiedet[116]. Diese Entwicklung muß der Presse nicht nur nützen. Öffentliche Stellen könnten versucht sein, auch Journalisten auf den allgemeinen Informationsanspruch zu verweisen. Dann stünden sie sich im Ergebnis schlechter als nach den deutschen Landespressegesetzen.

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110 Hellsichtig *Michael Hutter:* Ökonomische Eigenheiten des E-Commerce, in: AfP 2000, 30-32.

111 Einzelheiten bei *Engel/Seelmann-Eggebert in Dauses,* R 12-75 sowie 138-140; *Schmittmann/de Vries/von Loesch* (FN 9) AfP 2000, 38-43 sowie 48-51.

112 Vom 03.12.1997, KOM (97) 623; der anschließende Konsultationsprozeß hat mit den Schlußfolgerungen des Rates vom September 1999 sein vorläufiges Ende gefunden, ABl. 1999 C 283/1.

113 Näher *Joachim Wieland*: Freedom of Information, in: *Christoph Engel/Kenneth H. Keller (Ed.):* Governance of Global Networks in the Light of Different Local Values (Law and Economics of International Telecommunications 43) Baden-Baden 2000, 83-104.

114 Einzelheiten bei *Holmberg* in *Ress/Stein* (FN 67) 8-11.

115 *Lopez Rocha* in *Ress/Stein* (FN 77) 2.

116 KOM (98) 585.

III. Effekte einer Grundrechtscharta auf das Institutionengefüge in Gemeinschaft und Mitgliedstaaten

1. Einführung

Der Europäische Rat hat den Auftrag des Konvents darauf beschränkt, einen Grundrechtskatalog zu entwerfen, der weder Teil des EG- oder EU-Vertrages wird noch ein unabhängiges internationales Organ zu seiner Anwendung besitzt[117]. Wenn es auf Dauer dabei bliebe, wäre die Grundrechtscharta kaum mehr als eine Bekundung guten Willens. Das macht vor allem eine Unterscheidung von *Robert Alexy* deutlich. Er verweist darauf, daß die meisten Grundrechte Prinzipien sind, nicht Regeln. Sie enthalten also ein Finalprogramm, kein Konditionalprogramm. Grundrechte machen keine Wenn-Dann-Aussagen, sondern geben dem Adressaten Ziele vor, nach denen er sich auszurichten hat[118]. Ohne ein Verfahren zu ihrer authentischen Anwendung sind Grundrechte deshalb – zumindest juristisch[119] - wertloser Text.

Die deutschen Initiatoren der Europäischen Grundrechtscharta wollten deshalb auch von vornherein mehr[120]. Auch wenn die Gemeinschaft zunächst wirklich nur eine Deklaration beschließt, könnte sie damit doch auf einem juristischen oder einem politischen Wege Erfolg haben. Der Europäische Gerichtshof entnimmt dem ungeschriebenen Primärrecht der Gemeinschaft bekanntlich seit langem Grundrechte[121]. Der Gerichtshof könnte aussprechen, daß die Grundrechtscharta diese ungeschriebenen Grundrechte des Gemeinschaftsrechts kodifiziert[122]. Die politische Hoffnung setzt darauf, daß die Gemeinschaft Widerstände der Mitgliedstaaten seit jeher mit einer Art Salamitaktik überwindet[123]. Sie entlockt den Mitgliedstaaten zunächst einmal die Zustimmung zum Prinzip. Eine Weile später zieht sie daraus dann konkrete politische Folgerungen und beruft sich darauf, das Prinzip stehe ja außer Streit[124]. Im Folgenden wird deshalb unterstellt, daß die Grundrechtscharta schließlich zum justitiablen Bestandteil des primären Gemeinschaftsrechts geworden ist.

Auf den ersten Blick scheint die Presse durch solch eine justitiable Charta nur zu gewinnen. Sie könnte sich künftig gegen Übergriffe des europäischen Gesetzgebers in ihre Freiheit mit einem machtvollen Instrument wehren. Das ist besonders dann wichtig, wenn der Gemeinschaftsgesetzgeber mit Mehrheit entschieden und dabei den Einwand eines Mitgliedstaats ignoriert hat, die Garantie der Pressefreiheit in seiner nationalen Verfassung lasse die Zustimmung zu dem Vorschlag der Kommission nicht zu. Justitiable Grundrechte bringen jedoch auch neue

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117 Im Beschluß des Europäischen Rats von Köln wird das in die folgende beschönigende Formel gekleidet: „Der Europäische Rat wird dem Europäischen Parlament und der Kommission vorschlagen, gemeinsam mit dem Rat eine Charta der Grundrechte der Europäischen Union auf der Grundlage des Entwurfs feierlich zu proklamieren. Danach wird zu prüfen sein, ob und gegebenenfalls auf welche Weise die Charta in die Verträge aufgenommen werden sollte“.

118 *Robert Alexy:* Theorie der Grundrechte, Frankfurt³ 1996, 17-158.

119 Politikwissenschaftler verweisen zu Recht darauf, daß auch symbolische Politik Wirkungen haben kann. Sie verändert etwa kognitive Modelle oder Einstellungen, überwindet Tabus und bereitet den nächsten politischen Schritt vor.

120 *Däubler-Gmelin* (FN 5) EuZW 2000, 1.

121 Zusammenfassend *Rengeling*: Grundrechtsschutz (FN 17) 179-198.

122 S. allerdings unten 2 c) zur Anreizstruktur des Gerichtshofs.

123 Näher *Adrienne Héritier*: Policy-Making and Diversity in Europe. Escaping Deadlock, Cambridge 1999, 17.

124 Ebd. 53 f. zur Großfeuerungsanlagenverordnung und 77 zur Sozialpolitik.

Nachteile und Gefahren für die Presse mit sich. Die Gefahren liegen auf zwei Ebenen. Personen, mit denen die Presse im Konflikt liegt, erhalten ebenfalls Grundrechte und richten sie gegen die Presse. Diese Gefahr ist rechtsdogmatischer Natur und wird deshalb im Zusammenhang mit der Dogmatik der Grundrechtscharta behandelt[125]. Die zweite Gefahr ist weniger offensichtlich, aber nicht weniger erheblich. Sie wird vorab behandelt, weil zu ihrem Verständnis politikwissenschaftliche Kategorien benötigt werden.

Justititable Grundrechte haben erhebliche Wirkungen auf das Institutionengefüge in der Gemeinschaft selbst, im Verhältnis zu ihren Mitgliedstaaten und im Innern der Mitgliedstaaten. Sie ändern auf all diesen Ebenen die Opportunity Structures (2). Die Wirkung unterscheidet sich von den Grundrechtskatalogen in nationalen Verfassungen. Denn das Gemeinschaftshandeln ist viel schwächer demokratisch legitimiert (3). Wegen des Prinzips der begrenzten Einzelermächtigung findet europäische Politik außerdem stets in einem Mehrebenensystem statt. Die europäischen Grundrechte erfassen nur einen Teil dieses Systems (4). Sie haben das Potential, die Staatlichkeit der Europäischen Union zu verändern (5).

2. Änderung der Opportunity Structure

Funktional betrachtet verändert ein justitiabler Grundrechtskatalog die Verfassung der Gemeinschaft. Durch den veränderten institutionellen Rahmen verschieben sich die Bedingungen, unter denen im Verhältnis von Gemeinschaft und Mitgliedstaaten (a), im Verhältnis der Mitgliedstaaten zueinander (b), im Verhältnis der Organe der Gemeinschaft zueinander (c) und im Verhältnis zu den politischen Akteuren Politik gemacht wird (d).

a) EU und Mitgliedstaaten

Die verfassungspolitische Diskussion um die Europäische Grundrechtscharta ist von der Sorge um eine Ausweitung der Gemeinschaftskompetenzen beherrscht. Um dieser Besorgnis entgegenzutreten, soll Art. H.1 II den folgenden Satz enthalten:

„Die Charta begründet weder neue Aufgaben oder Zuständigkeiten noch erweitert sie bestehende Aufgaben oder Zuständigkeiten“[126].

Juristisch wäre diese Klarstellung wohl nicht einmal erforderlich. Der Grundsatz der begrenzten Einzelermächtigung würde durch die Aufnahme eines Grundrechtskatalogs in den EG- oder EU-Vertrag nicht tangiert. Im übrigen verpflichtet Art. 6 II EUV die Gemeinschaft ohnehin auf die Grundrechte[127].

Gleichwohl wird die Grundrechtscharta unvermeidlich einen unitarischen Effekt haben. Das belegt gerade die Erfahrung des Grundgesetzes. Durch immer dichtere verfassungsrechtliche Standards wird der formal nicht angetastete Kompetenzbereich der Länder zur Gesetzgebung materiell immer weiter ausgehöhlt. Das offensichtlichste Beispiel ist der Rundfunk. Die Rechtsprechung des

123 S. unten IV.4.

126 Art. H.1 II Dok. 4235/00. S. auch schon Präambel oder Art. 1, Satz 3 Entwurf des Präsidiums für Freiheitsrechte vom 15.02.2000, Dok. 4123/1/00 REV 1. NOTEREF

127 Auf beides hat *Schwarze* (FN 5) DVBl. 1999, 1685 zurecht hingewiesen.

Bundesverfassungsgerichts zu Art. 5 I 2 GG hat von der Rundfunkgesetzgebungskompetenz der Länder nicht viel übrig gelassen[128].

Die politischen Effekte der Grundrechtscharta sind weniger eindeutig. Denn sie schaffen nicht nur für die Gemeinschaft ein neues politisches Window of Opportunity[129], sondern auch für die Mitgliedstaaten, die Unternehmen und die Bürger. Die Folgen für die Staatlichkeit der Europäischen Union werden uns im Anschluß noch näher beschäftigen[130]. Daraus kann der Gemeinschaft ein größeres politisches Gewicht zuwachsen. Wenn der Gerichtshof die Grundrechte offensiv nutzt, gewinnt er ein zusätzliches Instrument zur Überwindung politischer Blockaden, so wie er das in der Vergangenheit schon häufig mit den Grundfreiheiten getan hat. Je nach dem, wie das Initiativrecht ausgestaltet wird, könnte die Kommission eine Entscheidung von Rat und Parlament mit der Begründung vor den Gerichtshof bringen, sie verstoße gegen Gemeinschaftsgrundrechte. Das würde ihr erlauben, den politischen Konflikt mit den Mitgliedstaaten vom Rat in ein Forum zu verlagern, in dem sie sich größere Chancen ausrechnet.

Das Initiativrecht würde aber sicher nicht ausschließlich der Kommission eingeräumt, sondern zumindest auch den Mitgliedstaaten. Logisch wäre es, auch eine Verfassungsbeschwerde von Unternehmen und Bürgern zuzulassen[131]. Sonst gäbe es im Grunde keine europäischen Grundrechte, sondern – völkerrechtlich gesprochen – bloß ein europäisches Fremdenrecht. Die Individuen wären nicht selbst geschützt, sondern bräuchten gleichsam Schutzmächte. Politisch ist die Entscheidung über das Initiativrecht bedeutsam, weil es seinen Inhabern die Möglichkeit gibt, der Gemeinschaft mit Hilfe des Gerichtshofs eine andere politische Agenda zu diktieren. Wenn der Gerichtshof mitwirkt, könnten sie auch Formelkompromisse und symbolische Politik frühzeitig entlarven[132]. Die politischen Organe der Gemeinschaft werden solche Klagen antizipieren. Auch ohne daß der Gerichtshof tatsächlich interveniert, wird sich ihr Verhalten folglich ändern.

Sollte die veränderte Opportunity Structure dazu führen, daß die Gemeinschaft eine aktivere Pressepolitik betreibt – soweit sie das nach der Kompetenzordnung überhaupt kann – hätte das voraussichtlich negative Folgen für die Presse. Denn die Gemeinschaft selbst ist bisher ja kaum regulierend tätig geworden[133]. Auch das Recht der Mitgliedstaaten hat sich relativ stark zurückgehalten. Von einem aktiveren Gemeinschaftsgesetzgeber hätte die Presse deshalb kaum eine weitere Liberalisierung der nationalen Rechtslage zu erwarten. Auch das Interesse der Presse an einem europaweiten Level Playing Field dürfte nicht groß sein. Die Pressemärkte sind nach wie vor im wesentlichen national, wenn nicht gar regional oder lokal. Wenn Presseerzeugnisse in anderen Ländern einen namhaften Marktanteil erringen, tun sie das üblicherweise mit adaptierten Ausgaben.

b) Mitgliedstaaten zueinander

Justitiable Grundrechte verändern auch das Verhältnis der Mitgliedstaaten zueinander. Denn die

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128 *Karin Gabriel-Bräutigam:* Rundfunkkompetenz und Rundfunkfreiheit. Eine Untersuchung über das Verhältnis der Rundfunkhoheit der Länder zu den Gesetzgebungszuständigkeiten des Bundes (Law and Economics of International Telecommunications 12) Baden-Baden 1990.

129 Zu diesem Konzept *Héritier* Deadlock (FN 123) 11 m.w.N.

130 S. unten V.

129 Zu den einschlägigen Überlegungen bei der Vorbereitung der deutschen Initiative für eine Europäische Grundrechtscharta näher *Eickmeier* (FN 5) DVBl. 1999, 1029; s. auch *Hans-Werner Rengeling:* Brauchen wir die Verfassungsbeschwerde auf Gemeinschaftsebene?, in: FS Everling II, Baden-Baden 1995, 1187-1212

132 Vgl. *Héritier* Deadlock (FN 123) 17 und 18 f.

133 Näher oben II 2.

glaubhafte Drohung, einen Akt des Gemeinschaftsgesetzgebers mit Hilfe der europäischen Grundrechte anzugreifen, gibt einem Mitgliedstaat zusätzliche Verhandlungsmacht. Mit diesem Pfund kann er bei den Verhandlungen im Rat wuchern. Er kann aber auch schon im Vorwege auf die Kommission einwirken, um einen Verordnungs- oder Richtlinienentwurf zu verhindern, der seinen Interessen widerspricht. Diese Drohung eignet sich besonders in zwei Konstellationen. Beide Konstellationen sind am Beispiel des Umweltrechts gut untersucht.

In der ersten Konstellation unterscheidet sich das Umweltrecht der Mitgliedstaaten im Schutzniveau. Einige Staaten haben strenge Regeln, andere viel großzügigere. Da besserer Umweltschutz im Normalfall auch teurer ist, legen die hochregulierten Staaten Wert darauf, ihre strengen Regeln durch harmonisiertes europäisches Recht auch den Konkurrenten aus anderen Mitgliedstaaten aufzuerlegen. Lange Zeit war die deutsche Umweltpolitik mit dieser Strategie erfolgreich[134]. Wettbewerbsverzerrungen sind jedoch auch dann möglich, wenn die Mitgliedstaaten sich über das Schutzanliegen und das Schutzniveau im wesentlichen einig sind, traditionell aber ganz unterschiedliche Instrumente einsetzen. Wenn die Gemeinschaft dann das Instrument eines Mitgliedstaats zum europäischen Standard erhebt, erlegt sie allen anderen Mitgliedstaaten Anpassungslasten und damit Wettbewerbsnachteile auf. Diese Erfahrung hat die Bundesrepublik in den vergangenen Jahren immer wieder gemacht. In der europäischen Umweltpolitik hat sich immer stärker das englische Denken durchgesetzt. Beispiele sind das Ökoaudit oder der integrierte Umweltschutz[135].

Grundrechte eignen sich allerdings auch in Verhandlungen besser, um eine Regelung zu verhindern, als um sie zu erzwingen. Anders ist das nur, wenn aus ihnen Schutz- oder Leistungspflichten abgeleitet werden können[136], oder wenn ein Mitgliedstaat die grundrechtliche Verhinderungsmacht an der einen Stelle als Pfand einsetzt, um ein aktives Handeln der Gemeinschaft an anderer Stelle zu erzwingen. Die Folgen der Grundrechte für das Verhältnis der Mitgliedstaaten zueinander haben für die niedrig regulierte Presse deshalb geringeres Gewicht als für andere Branchen.

c) Organe in der Europäischen Union

Welche Effekte ein Grundrechtskatalog für die politischen Organe der Gemeinschaft hat, hängt zunächst einmal von der Verteilung des Initiativrechts ab. Werden die Grundrechte in den EG- oder EU-Vertrag aufgenommen, liegt es nahe, daß auch die Kommission, das Parlament und der Rat Grundrechtsverletzungen vor den Gerichtshof bringen können. Eine Klage des Rats gegen eines der anderen Organe ist nach den bisherigen Erfahrungen wenig wahrscheinlich. Spektakuläre Klagen des Parlaments hat es dagegen gegeben, etwa in der Transportpolitik[137]. Auch die Kommission hat sich dieses Instruments immer wieder bedient. Würde das Initiativrecht dagegen den Grundrechtsträgern vorbehalten, wäre der Effekt kleiner. Immerhin könnten das Parlament oder die Kommission in ihren Verhandlungen mit dem Rat aber darauf verweisen, daß eine beabsichtigte Regelung grundrechtswidrig und eine Beschwerde dagegen wahrscheinlich sei.

Vor allem hätten justitiable Grundrechte aber Folgen für die Stellung des Europäischen Gerichtshofs und des Gerichts Erster Instanz im Institutionengefüge der Gemeinschaft. Auf den

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134 Näher *Adrienne Héritier/Susanne Mingers/Christoph Knill/Martina Becka:* Die Veränderung von Staatlichkeit in Europa. Ein regulativer Wettbewerb. Deutschland, Großbritannien und Frankreich in der Europäischen Union (Gesellschaftspolitik und Staatstätigkeit 2) Opladen 1994, 195-237.

135 Näher ebd. 238-326.

136 Dazu unten IV 1 k).

137 EuGH 22.05.1985, Rs. 13/83, Slg. 1985, 1513.

ersten Blick scheint es offensichtlich, daß die europäischen Gerichte durch diese zusätzliche Kompetenz gestärkt würden. Sieht man näher hin, liegen die Dinge komplizierter. Denn Gemeinschaftsgrundrechte sind dem Grundgedanken nach ja eher gegen die Gemeinschaftspolitik gerichtet. Bislang hat sich der Gerichtshof dagegen eher als Motor der Integration definiert. In seinem Selbstverständnis war er weniger ein Rechtsprechungsorgan als ein politisches Organ. Seine wichtigste Aufgabe sah er darin, institutionelle Blockaden aufzubrechen und so das Zusammenwachsen der Mitgliedstaaten zu einem einheitlichen Europa zu fördern[138]. Zu diesem Selbstverständnis paßt es, daß der Gerichtshof aus den Gemeinschaftsgrundrechten bislang wenig gemacht hat. Auf die hochdifferenzierte Dogmatik des Straßburger Menschenrechtsgerichtshofs[139] hat er sich nie eingelassen. Man wird den Eindruck nicht los, daß die Grundrechte dem Gerichtshof nach wie vor als „querrelle allemande“ erscheinen, zu denen er nur pflichtschuldig ein paar folgenlose Bemerkungen einstreut. Das muß natürlich nicht auf Dauer so bleiben. Die Aufnahme der Grundrechte in den EG- oder EU-Vertrag könnte eine Signalwirkung haben, der sich schließlich auch der Gerichtshof nicht entziehen kann. Selbst das dogmatisch wenig gehaltvolle Subsidiaritätsprinzip hat den Gerichtshof ja vorsichtiger werden lassen[140]. Das Gericht Erster Instanz hat seine Aufgabe von vornherein eher rechtsstaatlich als politisch definiert. Gewiß ist ein solcher Wandel des Selbstverständnisses aber nicht.

Selbst wenn sich der Gerichtshof dazu entschlösse, müßte er die Rückwirkungen der neuen auf die fortbestehenden älteren Aufgaben bedenken. Nach den deutschen Erfahrungen mit der Verfassungsbeschwerde würde der Gerichtshof dann mit so vielen Klagen überschwemmt, daß er ein offenes oder verstecktes Annahmeverfahren einführen müßte. Bislang konnte der Gerichtshof dem Problem ausweichen, weil der EG-Vertrag die Nichtigkeits- oder Untätigkeitsklage von Individuen an relativ enge Voraussetzungen geknüpft hat. Wenn der Gerichtshof künftig immer wieder Rechtsschutz verweigern müßte, würde er auch einen Teil seiner Legitimität verlieren. Das könnte auch Auswirkungen auf andere Aufgaben des Gerichtshofs und auf seine Reputation in der Gemeinschaft und gegenüber den Gemeinschaftsbürgern haben.

d) Politische Akteure

Schließlich geben justitiable Grundrechte den nationalen und europäischen politischen Akteuren neue Wirkungsmöglichkeiten. Das folgt wiederum vor allem aus einem Recht zur Grundrechtsbeschwerde an den EuGH. Denn die Grundrechte geben dem Gerichtshof politisch ja die Möglichkeit, Akte des Gemeinschaftsgesetzgebers aufzuheben, im Wege der grundrechtskonformen Interpretation zu verändern und die politische Agenda der Gemeinschaft umzuschreiben. All das konnte der Gerichtshof unter Berufung auf das Primärrecht schon bislang. Bislang war das Initiativrecht zum Gerichtshof aber eng limitiert. Es bestand oft deshalb die Aussicht, mißliebige Klagen im Vorfeld durch politischen Druck zu verhindern. Bei einer allgemeinen Verfassungsbeschwerde sind die Aussichten dafür gering. Das Initiativrecht ist der politischen Kontrolle praktisch entzogen. Diesen Umstand können politische Akteure nutzen, um sich mit dem Gerichtshof gegen die Mehrheit im Rat, das Parlament, die Kommission oder einzelne Mitgliedstaaten zu verbünden. Man kann es auch so sagen: die Grundrechtsbeschwerde macht den Gerichtshof zu einer subsidiären politischen Arena, in der die Gewichte anders verteilt sind[141].

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138 S. näher *Fritz W. Scharpf:* Regieren in Europa. Effektiv und Demokratisch?, Frankfurt 1999, 47-80.

139 Dazu näher unten IV 1.

140 Das deutlichste Indiz ist die Einschränkung der Warenverkehrsfreiheit durch die Keck-Rechtsprechung, EuGH 24.11.1993, Rs. 267 und 268/91, Slg. 1993, 6097.

141 Vgl. *Héritier* Deadlock (FN 123) 20 f.

3. Grundrechte bei schwacher demokratischer Legitimation

Deutsche Beobachter beklagen nicht nur den unzureichenden Grundrechtsschutz, sondern auch die geringe demokratische Legitimation des Gemeinschaftshandelns. Das Bundesverfassungsgericht hat sich diese Sorge im Maastricht-Urteil bekanntlich zu eigen gemacht[142]. Durch die Direktwahl des Europäischen Parlaments und die Ausweitung der Kodezision von Rat und Parlament hat das Ausmaß der direkten demokratischen Legitimation zwar zugenommen. Nach wie vor ist die demokratische Legitimation europäischer Normsetzung aber vornehmlich eine indirekte, vermittelt über die nationalen Parlamente und die von ihnen kontrollierten Regierungen.

Hinzu kommt ein politischer Grund. Seit dem Mastrichter Vertrag spricht die EG zwar programmatisch von einer Unionsbürgerschaft[143]. Gleichwohl empfinden sich die Bürger in ihrer großen Mehrheit nach wie vor nur als Angehörige ihrer Mitgliedstaaten. Es gibt bestenfalls Rudimente einer gemeineuropäischen Solidarität. Selbst wo ein formaler Legitimationsstrang bis zu den Völkern der Mitgliedstaaten führt, ist seine Legitimationskraft deshalb gering. Die Bereitschaft, eine Entscheidung allein deshalb zu akzeptieren, weil sie dem Willen der Mehrheit aller Unionsbürger entspricht, ist kaum vorhanden[144].

In einem politischen System mit derart schwacher demokratischer Legitimation wie der Europäischen Gemeinschaft sind die Grundrechte ein viel schneidigeres Instrument als etwa in Deutschland. Dort nimmt das Bundesverfassungsgericht in vielfältiger Weise Rücksicht auf den demokratisch gewählten Gesetzgeber. Es gesteht ihm Beurteilungs- und Prognosespielräume zu, nimmt die Kontrolldichte zurück und gesteht dem Gesetzgeber vor allem viel Freiheit bei der Bestimmung der Ziele zu, um derentwillen er in die Grundrecht der Bürger eingreift[145]. Dann werden die Grundrechte ein ziemlich stumpfes Instrument. Ein passendes Ziel läßt sich für fast jeden Grundrechtseingriff finden. Zu solcher Selbstbeschränkung der Grundrechtsdogmatik besteht kein Anlaß, wenn der Gesetzgeber bestenfalls marginal mehr demokratische Legitimation aufbieten kann als der Richter[146]. Auch in Europa ist der Rat als das politische Organ allerdings besser als der Gerichtshof im Stande, die normativen Erwartungen der Beteiligten zu erheben und zu bündeln. Wegen der geringen demokratischen Legitimation muß der Gemeinschaftsgesetzgeber jedoch vornehmlich mit der Sachangemessenheit der Regeln argumentieren, nicht so sehr mit dem Austarieren der widerstreitenden Kräfte im politischen Prozeß[147]. Über die Sachangemessenheit kann sich der Gerichtshof viel eher ein abweichendes Urteil erlauben[148].

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142 BVerfGE 89, 155, 186 ff. und passim.

143 Die einschlägigen Vorschriften sind jetzt in Art. 17-22 EGV enthalten.

144 *Scharpf* Europa (FN 138) 29 f. und passim.

145 Vielen Verfassungsrechtlern geht selbst das noch nicht weit genug. Programmatisch zuletzt die Habilitationsschrift von *Matthias Jestaedt:* Grundrechtsentfaltung im Gesetz. Studien zur Interdependenz von Grundrechtsdogmatik und Rechtsgewinnungstheorie (Jus Publicum 50) Tübingen 1999.

146 *Walter Pauly:* Strukturfragen des unionsrechtlichen Grundrechtsschutzes. Zur konstitutionellen Bedeutung von Art. F Abs. 2 EUV, in: EuR 1998, 242-262 (245 f., 256 f., s. auch 257 und 259).

147 *Scharpf* Europa (FN 138) 30.

148 *Pauly* (FN 146) EuR 1998, 259.

4. Grundrechte für ein Mehrebenensystem

Die Europäische Union ist kein Staat. Das folgt vor allem aus dem Grundsatz der begrenzten Einzelermächtigung. Der Amsterdamer Vertrag hat ihn in Art. 5 I EGV erneut bekräftigt. Diese Kompetenzen sind im Normalfall zwar keine ausschließlichen[149]. Gleichwohl verlieren die Mitgliedstaaten dadurch ihre Allzuständigkeit. Eine ökonomische Metapher macht die Folgen deutlich. Sie begreift den Staat als einen Anbieter öffentlicher Güter. Durch die Zuständigkeiten der Gemeinschaft verlieren die Staaten ihr Angebotsmonopol. Es kommt zu einem vertikalen Institutionenwettbewerb zwischen Gemeinschaft und Mitgliedstaaten[150]. Die politischen Wissenschaften sprechen davon, daß politische Entscheidungen nun in einem Mehrebenensystem getroffen werden[151].

In solch einem Mehrebenensystem haben Grundrechte eine andere Wirkung als in einem einheitlichen, monopolistischen Staat. Daß politische Akteure sie dazu instrumentalisieren können, politische Konflikte von der einen auf die andere Ebene zu transponieren, haben wir gerade schon gesehen. Auch die Grundrechte selbst sind in einem solchen System aber schwächer. Dem Bürger ist nicht mehr geholfen, wenn er seine Freiheit nur noch auf einer dieser Ebenen durchsetzen kann[152]. An die Stelle der einen Verfassung tritt „ein Netzwerk von Verfassungselementen“[153]. Deutlicher formuliert: nicht nur der Nationalstaat verliert sein Monopol, sondern auch die nationalen Grundrechte. Die dogmatischen Folgen werden uns noch beschäftigen[154].

5. Folgen für die Staatlichkeit der Europäischen Union

Die Europäische Union ist ein unfertiges politisches System, dessen Strukturen beständig in Bewegung sind[155]. Die Grundrechtscharta, ihrer Aufnahme in den EG- oder EU-Vertrag und die Zuständigkeit des Europäischen Gerichtshofs zur authentischen Interpretation der Grundrechte

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149 Das folgt aus dem Gegenschluß zu Art. 5 II EGV.

150 *Wolf Schäfer:* Globalisierung: Entmonopolisierung des Nationalen?, in: *Hartmut Berg (Hrsg.)*: Globalisierung der Wirtschaft. Ursachen – Formen – Konsequenzen (Schriften des Vereins für Socialpolitik NF 263) Berlin 1999, 9-21 (10 und passim).

151 Programmatisch *Adrienne Héritier/Dieter Kerwer/Christoph Knill/Dirk Lehmkuhl/Michael Teutsch/Anne-Cécile Douillet:* Differential Europa. New Opportunities and Restrictions for Policy-Making in the Member States [im Erscheinen].

152 *Christian Walter:* Die Folgen der Globalisierung für die Europäische Verfassungstradition, in: DVBl. 2000, 1-13 (9 f.). Noch dramatischer klingt es bei *Konrad Hesse*, zitiert nach *Schwarze* (FN 5) DVBl. 1999, 1681: „Wir leben insoweit von dem Gedankengut einer Welt, die nicht mehr die unsere ist und, wie wir immer deutlicher sehen, in den tiefen Wandlungen des ausgehenden 20. Jahrhunderts ihren Untergang gefunden hat. Über ihre Grundlagen, bislang als gesichert geltende Bestandteile der Staats- und Verfassungslehre, ist die Geschichte hinweggegangen“.

153 *Walter* (FN 152) DVBl. 2000, 7.

154 S. unten IV 1 c), h) und k) sowie IV 6.

155 *Brigid Laffan:* From Policy Entrepreneur to Policy Manager. The Challenge Facing the European Commission, in: Journal of European Public Policy 4 (1997) 422-438; s. auch *Weber* (FN 5) NJW 2000, 538: Die Europäische Union ist eine „sich verdichtende, supranationale Hoheitsgewalt“.

wären weitere Schritte auf dem Wege zu Staatlichkeit von Europa. Die deutschen Initiatoren[156] und das Europäische Parlament sprechen das auch ganz offen aus[157].

Die Grundrechte werden zugleich die Staatlichkeit Europas aber auch verändern. Die Organe der Gemeinschaft können künftig die politische Agenda nicht mehr unkontrolliert bestimmen[158]. Ihre Fähigkeit, Politik unterhalb der Wahrnehmungsschwelle zu machen, wird abnehmen[159]. Bedeutsam sind die Veränderungen aber vor allem im Lichte der Unterscheidung von Interessen und Ideen[160]. Grundrechte etablieren neue regulative Ideen[161]. Der Streit um die Grundrechte vor dem Europäischen Gerichtshof schafft neue Gelegenheiten zur Deliberation. Solche Prozesse stärken das Gewicht regulativer Ideen und vermindern die Bedeutung des Abgleichs des widerstreitenden Interessen im politischen Prozeß der Gemeinschaft[162].

Grundrechte haben das Potential, politische Konflikte in rechtliche zu verwandeln. Dann kommt es zu einem juristischen Paralleldiskurs politischer Fragen. Er zieht die teilweise Juridifizierung europäischer Politik nach sich.

Schließlich verschaffen justitiable Grundrechte der Europäischen Gemeinschaft zusätzliche Legitimation. Wiederum hilft ein politikwissenschaftliches Begriffspaar, die Wirkungen präziser zu benennen. Die politischen Wissenschaften unterscheiden zwischen Input- und Output-Legitimation[163]. Input-Legitimation wird vermittelt durch das, was die Juristen eine geschlossene Kette demokratischer Legitimation nennen. Aus den schon erwähnten Gründen steht diese Form der Legitimation dem europäischen Gesetzgeber nur in sehr engen Grenzen zur Verfügung. Output-Legitimation beruht demgegenüber darauf, daß es dem Gesetzgeber gelingt, die Rechtsunterworfenen für seine Entscheidungen zu gewinnen. Dazu trägt die europäische Grundrechtscharta auf mehrfache Weise bei. Die Kontrolle von Entscheidungen des Rats, des Parlaments und der Kommission anhand der Grundrechte macht es für gut organisierte Gruppen schwerer, ihre Interessen durchzusetzen und dabei Verteilungsgewinne zu Lasten der Mehrheit zu erzielen. Die Chance steigt also, daß europäische Gesetzgebung auch wirklich dem europäischen Gemeinwohl dient. Weil das so ist, erhöht sich zugleich die Problemlösungskapazität des Gemeinschaftsrechts[164]. Auf mittlere Frist kann vielleicht sogar die europäische Identität gestärkt werden, weil sich die Unionsbürger als Mitglieder einer Rechtsgemeinschaft empfinden, die von

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156 *Däubler-Gmelin* (FN 5) EuZW 2000, 1.

157 Europäisches Parlament Committee on Constitutional Affairs, Dok. PE 232.397, DT\385929EN.doc, 07.12.1999, R 21 und 42.

158 S. o. 2.

159 Vgl. *Scharpf* Europa (FN 138) 30.

160 Grundlegend *Albert S. Yee:* The Causal Effects of Ideas on Policies, in: International Organization 50 (1996) 69-108.

161 Vgl. *Héritier* Deadlock (FN 123) 14; vgl. auch einen Auszug aus der Rede von *Außenminister Fischer* zur Europäischen Grundrechtscharta, zitiert nach *Schwarze* (FN 5) 1679: „Wir sollten uns dabei von einem strikten rechtlichen Verständnis freimachen und unter ‚Verfassung' eher eine Zusammenstellung der Werte und der Grundprinzipien europäischen Zusammenlebens einschließlich des Funktionierens der Europäischen Union als Konstrukt sui generis begreifen".

162 Eine ausführlichere Analyse der Bedeutung der Unterscheidung für die Grundrechte findet sich bei *Christoph Engel:* Delineating the Proper Scope of Government – A Proper Task for a Constitutional Court?, in: Journal of Institutional and Theoretical Economics (erscheint demnächst).

163 *Scharpf* Europa (FN 138) 16-28.

164 *Dieter Grimm*: Braucht Europa eine Verfassung?, in: JZ 1995, 581-591 (590).

gemeinsamen Werten zusammengehalten wird[165]. Dann würde mehr Output-Legitimation schließlich zu mehr Input-Legitimation führen.

Zu einem Legitimationsgewinn für die Gemeinschaft führen Grundrechte aber auch deshalb, weil sie den Bürgern Klagerechte verschaffen[166]. Schließlich erhöhen die Verfahren vor dem Gerichtshof die Transparenz der Gemeinschaftsgesetzgebung. Auch das verschafft ihr zusätzliche Legitimation.

IV. Normative Folgerungen

Wir haben nun einen Eindruck von vergangenen und möglichen künftigen pressepolitischen Konflikten und von den Effekten europäischer Grundrechte auf die Verfassung der Europäischen Union. Aus beidem können wir nun normative Folgerungen ziehen. Wir müssen dabei noch einmal prognostisch werden und die Dogmatik noch gar nicht beschlossener Grundrechte skizzieren. Das ist aber keine allzu spekulative Tätigkeit. Wir können uns dabei nicht nur auf die schon vorhandenen Textvorschläge stützen, sondern auch auf die Grundrechtsrechtsprechung des Europäischen Gerichtshofs und vor allem auf die Menschenrechtsrechtsprechung des Straßburger Gerichtshofs. Diese Vorlagen gilt es, in einer geeigneten Weise für die Kontrolle des Gemeinschaftsrechts zu adaptieren. Im Zentrum steht dabei naturgemäß die Dogmatik der Pressefreiheit (1). Die Verlage sind aber auch durch andere Grundrechte geschützt (2). Andere Grundrechtsträger flankieren den Schutz (3). Zugleich sind aber auch Konflikte zwischen der Presse und anderen Grundrechten zu erwarten (4). Schließlich gilt es, das dogmatische Verhältnis der neuen europäischen Grundrechte zu anderem Primärrecht (5) und zu anderen Grundrechtsordnungen auszuloten (6).

1. Dogmatik der Pressefreiheit

Diese Untersuchung erscheint, während die Beratungen in dem Konvent voranschreiten. Der Stand dieser Beratungen ist der Ausgangspunkt für die Überlegungen zur Pressefreiheit (a). Die Pressefreiheit ist aber auch in anderen, für das Gemeinschaftsrecht erheblichen Quellen geschützt (b). Die Dogmatik dieses Grundrechts muß die Adressaten und angreifbaren Akte bestimmen (c), den Grundrechtsträger (d), den sachlichen Schutzbereich (e), das Konzept des Eingriffs (f), die formellen (g) und die materiellen Schranken (h). Dabei wird das vom Straßburger Gerichtshof entwickelte Konzept der Margin of Appreciation Bedeutung erlangen (i). Schließlich fragt sich, ob aus dem Grundrecht auch Schutzpflichten zu entnehmen sind (k).

a) Textvorschläge

In der momentan letzten Fassung des Entwurfs lautet das einschlägige Grundrecht wie folgt:

> „Art. 15. Freiheit der Meinungsäußerung
> (1) Jede Person hat das Recht auf freie Meinungsäußerung. Dieses Recht schließt die Meinungsfreiheit und die Freiheit ein, Informationen ohne behördliche Eingriffe und ohne

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165 So die Hoffnung des Ausschusses für Citizens‘ Freedoms and Rights des Europäischen Parlaments, PE 232.272/Fin.,AE\375756EN.doc vom 07.12.1999, 2.

166 Der Gedanke ist vor allem ausgeführt worden von *Ronald Dworkin:* Taking Rights Seriously, Duckworth[8] 1996.

Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben“[167].

Spezifische Schranken sind diesem Grundrecht nicht beigegeben. Die Schranken ergeben sich aus zwei Normen, die einheitlich für alle Rechte gelten sollen:

„Art. H.2 – Einschränkung der gewährleisteten Rechte

(1) Die in den Artikeln ... dieser Charta festgelegten Rechte und Freiheiten dürfen in keiner Weise eingeschränkt werden.
(2) Jedwede Einschränkung der durch diese Charta gewährleisteten Rechte und Freiheiten ist vom Gesetzgeber vorzusehen. Sie darf den Wesensgehalt dieser Rechte und Freiheiten nicht antasten und muß – unter Wahrung des Grundsatzes der Verhältnismäßigkeit – innerhalb der Grenzen bleiben, die für den Schutz legitimer Interessen in einer demokratischen Gesellschaft erforderlich sind. Die Schränkungen gemäß der Europäischen Menschenrechtskonvention finden Anwendung auf diejenigen in dieser Charta enthaltenen Rechte und Freiheiten, die auch im Rahmen der Europäischen Menschenrechtskonvention gewährleistet werden.“

„Art. H.4 – Schutzniveau

Diese Charta darf nicht als Einschränkung der Tragweite der durch das Recht der Union, das Recht der Mitgliedstaaten, das Völkerrecht und die von den Mitgliedstaaten ratifizierten internationalen Übereinkommen, darunter die Europäische Menschenrechtskonvention in ihrer Auslegung durch die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte gewährleisteten Rechte ausgelegt werden“[168].

Zwei deutsche Mitglieder des Konvents haben abweichende Textvorschläge vorlegt. Der Abgeordnete des Deutschen Bundestages *Meyer* möchte Art. 15 einen neuen Absatz 2 mit folgendem Wortlaut beifügen:

„Die Pressefreiheit und die Freiheit der Berichterstattung werden gewährleistet. Die Organe der Union sind ihm [!] verpflichtet, der Presse Auskünfte zu erteilen“[169].

Das Mitglied des Europäischen Parlaments *Sylvia Kaufmann* schlägt einen Text mit folgendem Wortlaut vor:

„Meinungs- und Informationsfreiheit
(1) Jeder Mensch hat das Recht auf freie Meinungsäußerung. Die Pressefreiheit und die Freiheit der Berichterstattung durch Hörfunk, Fernsehen und Film werden gewährleistet.
(2) Diese Rechte schließen die Freiheit ein, sich aus allgemein zugänglichen oder anderen, rechtmäßig erschließbaren Quellen ungehindert zu unterrichten.
(3) Diese Rechte finden ihre Schranken in den gesetzlichen Bestimmungen zum Schutz der Jugend, zur Wahrung der Würde der Frau und in den Persönlichkeitsrechten des Einzelnen.
(4) Kriegspropaganda ist verboten. Jedes Eintreten für nationalen und religiösen Haß sowie nationalistische, rassistische, faschistische, antisemitische, sexistische Propaganda sind verboten“[170].

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167 Entwurf der Präsidentschaft vom 08.03.2000, Dok. 4149/00.
168 Dok 4235/00, s.auch Art. X und Y Dok. 4149/00.
169 Dok. 5177/00 vom 28.03.2000.
170 Dok. 4189/00 vom 24.03.2000.

b) Andere Quellen

Der Gerichtshof hat mehrfach ausgesprochen, daß die Meinungs-, Presse- und Informationsfreiheit zu den ungeschriebenen Grundrechten des Gemeinschaftsrechts gehören[171]. Art. 10 EMRK schützt die Äußerungs-, Empfangs- und Informationsfreiheit[172]. Eine Entscheidung des Straßburger Gerichtshofs für Menschenrechte hat vor kurzem die Bedeutung der Menschenrechtskonvention für das Handeln der Europäischen Gemeinschaft sogar noch vermehrt. Die Gemeinschaft hat sich nicht nur in Art. 6 II EGV autonom verpflichtet, die Rechte der Menschenrechtskonvention zu achten. Vielmehr hat der Straßburger Gerichtshof auch entschieden:

> „The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competencies to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer"[173].

Auch der Verfassungsvergleich belegt, daß die Meinungsfreiheit[174], die Medienfreiheiten[175] und insbesondere die Pressefreiheit in all den Mitgliedstaaten geschützt sind, die überhaupt entwickelte Grundrechtskataloge haben[176].

c) Adressaten und angreifbare Akte

Wie erwähnt will die Grundrechtscharta ausdrücklich klarstellen, daß sie keinen Prüfungsmaßstab für das autonome Handeln der Mitgliedstaaten darstellt[177]. Entscheidend ist deshalb nicht die Bestimmung der Adressaten; dazu werden nicht nur die Organe der Gemeinschaft gehören, sondern auch die Mitgliedstaaten. Entscheidend ist vielmehr, welche Hoheitsakte angegriffen werden

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171 EuGH 17.01.1984, Rs. 43/82, Slg. 1984, 19, 62, R 33 f. - VBVB/VBBB;
EuGH 11.07.1985, Rs. 60/84, Slg. 1985, 2605, 3627, R 25 f. - Cinéthèque;
EuGH 26.04.1988, Rs. 352/85, Slg. 1988, 2085, 2136, R 40 f. - Bond van Adverterders;
EuGH 18.06.1991, Rs. C-260/89, Slg. 1991 I-2925, 2963 f., R 41-45 - ERT;
EuGH 25.07.1991, Rs. C-288/89, Slg. 1991 I-4007, 4043, R 23 - Stichting Collective Antennevoorziening Gouda;
EuGH 25.07.1991, Rs. C-353/89, Slg. 1991 I-4069, 4097, R 30 - Mediawet.

172 Zusammenfassend *Sabine Astheimer: R*undfunkfreiheit – ein europäisches Grundrecht. Eine Untersuchung zu Art. 10 EMRK (Schriftenreihe UFITA 88) Baden-Baden 1990; *Engel* (FN 86); *Wolfgang Peukert:* Die Kommunikationsgrundrechte im Lichte der Rechtsprechung der Organe der Europäischen Menschenrechtskonvention (EMRK), in: FS Mahrenholz, Baden-Baden 1994, 277-301.Speziell zur Presse *Engel* (FN 23); *Klein* (FN 28).

173 EGMR 18.02.1999, Rs. 24833/94, R 32 - Matthews (deutsche Übersetzung in NJW 1999, 3107).

174 *Rengeling* Grundrechtsschutz (FN 17) 78 f.

175 Ebd. 86-90.

176 Näher *Stein* in *Ress/Stein* (FN 28) 4 f.
Zur völkerrechtlichen Lage s. schließlich auch *Gilbert Hanno Gornig:* Äußerungsfreiheit und Informationsfreiheit als Menschenrechte. Die Verankerung der Äußerungs-, Informations-, Presse- und Rundfunkfreiheit sowie des Zensurverbots in völkerrechtlichen Übereinkommen und in den Rechtsordnungen der KSZE-Staaten unter besonderer Berücksichtigung rechtsphilosophischer und rechtsgeschichtlicher Aspekte (Schriften zum Völkerrecht 88) Berlin 1988.

177 Präambel oder Art. 1 im Entwurf des Präsidiums vom 15.02.2000, Dok. 4123/1/00 REV 1, im Wortlaut wiedergegeben oben FN 16.

können. Das muß davon abhängen, ob das hoheitliche Handeln jedenfalls auch der Europäischen Gemeinschaft zugerechnet werden kann. Das ist nicht nur im Bereich der ausschließlichen, sondern auch der konkurrierenden Kompetenzen der Gemeinschaft möglich[178]. Insbesondere gehört auch die Anwendung und der Vollzug von Verordnungen und Entscheidungen der Gemeinschaft durch die Mitgliedstaaten hierher[179]. Das entspricht der bisherigen Grundrechtsrechtsprechung des Europäischen Gerichtshofs[180]. Ebenso liegt es an sich, wenn Richtlinien nach Ablauf der Umsetzungsfrist unmittelbar anwendbar werden[181]. Dieser Fall kann allerdings nicht leicht praktisch werden, weil der Europäische Gerichtshof die horizontale Drittwirkung von Grundrechten ja gerade ausschließt[182].

Im übrigen liegt es schwieriger, weil die Richtlinie den Mitgliedstaaten ja einen Freiraum zur Umsetzung läßt[183]. Bei der Lösung sind die Eigenheiten von Grundrechten in einem Mehrebenensystem zu beachten[184]. Wollte man allein den Umsetzungsakt der Mitgliedstaaten an ihren jeweiligen Grundrechtsordnungen messen, entstünde eine doppelte Schutzlücke. Zum einen könnte der nationale Gesetzgeber einwenden, er habe seine eigene Entscheidung im wesentlichen gar nicht zu verantworten. Er habe ja nur der Umsetzungspflicht des Gemeinschaftsrechts gehorcht. Selbst wenn das nationale Verfassungsrecht diesen Einwand nicht gelten ließe, würden auf die Richtlinie aber allein die Maßstäbe der nationalen Grundrechte angewendet. Sie unterscheiden sich von Mitgliedstaat zu Mitgliedstaat. Die Kommission erhielte einen Anreiz, von der Verordnung zur Richtlinie überzugehen und so die europäischen Grundrechte stumpf zu machen.

Die eleganteste Lösung liegt im Prozeßrecht. Sie würde den Unionsbürgern erlauben, gegen die Richtlinie Grundrechtsbeschwerde zum Europäischen Gerichtshof zu erheben, obwohl sie davon gar nicht selbst und unmittelbar betroffen sind. Sind solche Beschwerden bereits vor Ablauf der Umsetzungsfrist zulässig, könnte der EuGH sie allerdings nutzen, um den Umsetzungsfreiraum der Mitgliedstaaten einzuschränken. Will man das vermeiden, müßte vorgeschrieben werden, daß die Grundrechtsbeschwerde an den EuGH erst nach Ablauf der Umsetzungsfrist zulässig ist. Dieselben Grundsätze passen auch für die Grundrechtskontrolle von Entscheidungen der Gemeinschaft, die nicht an Individuen adressiert sind, sondern an die Mitgliedstaaten.

Noch etwas schwieriger wird es, wenn sich die Kommission darauf beschränkt, die Anwendung des Gemeinschaftsrechts in den Mitgliedstaaten durch Leitlinien zu lenken. So möchte sie künftig insbesondere mit dem Kartellverbot verfahren[185]. Im deutschen Rechtsraum bestünde kein Zweifel,

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178 So zu Recht Europäisches Parlament Committee on Constitutional Affairs, PE 232.397, DT\385229EN.doc, 07.12.1999, R 27.

179 Ebd. R 19 f.; *Eickmeier* (FN 5) DVBl. 1999, 1028; *Weber* (FN 5) NJW 2000, 542 f.

180 EuGH 13.07.1989, Rs. 5/88, Slg. 1989, 2609, 2639 f. - Wachauf; EuGH 18.06.1991, Rs. C-260/89, Slg. 1991 I-2925, 2964 - ERT.

181 *Weber* (FN 5) NJW 2000, 542.

182 Umfassend *Martin Gellermann:* Beeinflussung des bundesdeutschen Rechts durch Richtlinien der EG, dargestellt am Beispiel des europäischen Umweltschutzes (Schriften zum deutschen und europäischen Umweltrecht 2) Köln 1994.

183 Darauf verweist etwas *Weber* (FN 5) NJW 2000, 542 m.w.N.

184 S. o. III 4.

185 Weißbuch über die Modernisierung der Vorschriften zur Anwendung der Artikel 85 und 86 EG-Vertrag vom 28.04.1999; dazu kritisch Sondergutachten der *Monopolkommission*: Kartellpolitische Wende in der Europäischen Union <http://www.monopolkommission.de/sg_28/text_htm>; *Ernst-Joachim Mestmäcker:* Versuch einer kartellpolitischen Wende in der EU, in: EuZW 1999, 523-529; *Wernhard Möschel:* Systemwechsel im europäischen Wettbewerbsrecht? in: JZ 2000, 61-67.

daß Rechtsschutz gegen solche allgemeinen Verwaltungsvorschriften ausgeschlossen ist. Er könnte sich nur gegen deren Anwendung im Einzelfall richten. Im Verhältnis zwischen Gemeinschaft und Mitgliedstaaten würde das aber zu denselben Schutzlücken führen, die wir gerade für die Richtlinie herausgearbeitet haben. Nur die prozeßrechtliche Bewältigung ist schwieriger. Denn die Leitlinien sind ja nicht nur im Verhältnis zu den Bürgern unverbindlich, sondern auch im Verhältnis zu den Mitgliedstaaten. Trotzdem dürfte die bessere Lösung auch hier in der Eröffnung der Grundrechtsbeschwerde gegen die Leitlinien an den EuGH bestehen. Denn nur die Leitlinien können ja der Gemeinschaft zugerechnet werden, nicht die einzelnen Kartellrechtsentscheidungen in den Mitgliedstaaten.

Mit dem Gedanken der Zurechnung gelingt es auch, eine weitere Konstellation abzugrenzen. Verordnungen und Richtlinien der Gemeinschaft verweisen für Detailfragen manchmal auf das Recht der Mitgliedstaaten. So war das etwa bei der Richtlinie über die Durchführung von Maßnahmen zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Arbeitnehmer bei der Arbeit, die auch für die Presse gilt[186]. Insoweit übernimmt die Gemeinschaft gerade keine Verantwortung für den Inhalt der Regeln. Sie können deshalb ausschließlich an den Grundrechten der Mitgliedstaaten gemessen werden.

d) Träger

Nach den Entwürfen des Präsidiums bestimmen die einzelnen europäischen Grundrechte jeweils, welchen Personen sie zustehen. Während die politischen Rechte jeweils nur den Unionsbürgern zustehen sollen[187], sind die Freiheitsrechte als Jedermann-Rechte ausgestaltet. Das gilt nach der Entwurfsfassung auch für die Freiheit der Meinungsäußerung[188]. Geschützt sind deshalb auch Anbieter aus Drittstaaten.

Die bisherigen Entwürfe sprechen nicht ausdrücklich aus, daß die europäischen Grundrechte auch juristische Personen schützen. Dies entspricht aber der bisherigen Rechtsprechung des Europäischen Gerichtshofs zu den ungeschriebenen Gemeinschaftsgrundrechten[189] und der Rechtsprechung der Straßburger Organe[190].

e) Sachlicher Schutzbereich

Der Entwurf des Präsidiums sieht eine allgemeine Meinungsäußerungsfreiheit vor[191]. Die Entwürfe der Abgeordneten Meyer und Kaufmann wollen dagegen der deutschen Tradition folgen und daneben die Pressefreiheit ausdrücklich schützen[192]. Beide Lösungen lassen sich vertreten, wenn sichergestellt ist, daß die Pressefreiheit umfassend geschützt ist und das Schutzniveau nicht hinter die Tradition der Verfassungen der Mitgliedstaaten zurückfällt. Getrennte Garantien für die

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186 Art. 11 II der Richtlinie vom 12.06.1989, ABl. 1989 L 183/1; zur Bedeutung für die Presse *Stein* in *Ress/Stein* (FN 28) 12.

187 Dok. 4170/00.

188 S. das Zitat oben a); vgl. auch Europäisches Parlament Committee on Constitutional Affairs, PE 232.397, DT\385929EN.doc vom 07.12.1999, R 28 f. und R 31.

189 EuGH 05.10.1994, Rs. 23/93, Slg. 1994 I-4795, 4833; vgl. auch EuGH 14.05.1974, Rs. 4/73, Slg. 1974, 491, 507-Nold: Danach gelten die Grundrechte sogar für eine nicht rechtsfähige Gesellschaft.

190 EGMR 22.05.1990, Ser. A 178, 1, 23, § 47 - Autronic; weitere Nachweise bei *Engel* Privater Rundfunk (FN 86) 71 und bei *Giegerich* (FN 80) RabelsZ 1999, 472.

191 Wortlaut oben a).

192 Einzelheiten ebd.

verschiedenen Medien führen unvermeidlich zu Abgrenzungsstreitigkeiten; davon legt das deutsche Verfassungsrecht beredtes Zeugnis ab[193]. Die Europäische Menschenrechtskonvention hat mit einer einheitlichen Meinungsfreiheit nicht unbedingt schlechte Erfahrungen gemacht[194]. Andererseits drängen die Rundfunkveranstalter, wie man hört, mit Macht auf eine separate Garantie der Rundfunkfreiheit. Dann wäre es in der Tat nicht hinnehmbar, wenn die Pressefreiheit nicht auch ausdrücklich garantiert würde. Sonst könnte schließlich sogar das Mißverständnis entstehen, nur der Rundfunk, nicht die Presse verdiene besonderen Schutz. Eine vermittelnde Lösung könnte darin bestehen, neben der allgemeinen Freiheit der Meinungsäußerung die Freiheit eigens zu erwähnen, Medien zu veranstalten. Das wäre vor allem als Fingerzeig für die Interpretation der Freiheit sinnvoll: wegen ihrer fundamentalen Bedeutung für ein demokratisches Gemeinwesen brauchen und verdienen die Medien stärkeren Schutz[195].

In den nationalen Grundrechtsordnungen war immer wieder umstritten, ob sich der Schutz der Pressefreiheit auch auf rein kommerzielle Inhalte und auf die finanziellen Grundlagen der Presse erstreckt[196]. Die Rechtsprechung des Straßburger Menschenrechtsgerichthofs tendiert in diese Richtung[197]. Wenn der europäische Grundrechtskatalog die Form des gegenwärtigen Entwurfs behält, besteht an der Einbeziehung der finanziellen Grundlagen in den Schutzbereich der Meinungsäußerungsfreiheit erheblicher Bedarf. Denn die Berufsfreiheit soll nach den augenblicklichen Vorstellungen des Präsidiums nicht als Freiheitsrecht, sondern als bloßes soziales Recht geschützt werden[198]. Auch wenn sich das noch ändern sollte, dürfte die Meinungsfreiheit auf höherem Niveau geschützt sein als die Berufsfreiheit. Ohne das ökonomische Substrat kann die Presse ihre publizistische Funktion nicht erfüllen[199]. Aus diesem Grunde ist es angemessen, auch ihre ökonomischen Grundlagen auf höherem Niveau zu schützen als bei anderen Branchen. Das ist am ehesten gesichert, wenn auch das ökonomische Substrat in den Schutzbereich der Meinungsfreiheit fällt. Dazu gehört nicht nur der Absatz von Werbeflächen, sondern auch der Vertrieb an die Leser. Geschützt ist schließlich auch die zur Herstellung und Vertrieb erforderliche Technik[200]. Je stärker Presse elektronisch verbreitet wird, desto bedeutsamer wird das werden.

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193 S. aus der umfangreichen Literatur etwa *Christoph Engel*: Multimedia und das deutsche Verfassungsrecht, in: *Wolfgang Hoffmann-Riem/Thomas Vesting (Hrsg):* Perspektiven der Informationsgesellschaft (Symposien des Hans-Bredow-Instituts 16) Baden-Baden 1995, 155-171; *Martin Bullinger*: Der Rundfunkbegriff in der Differenzierung kommunikativer Dienste, in: AfP 27 (1996) 1-8; *Wolfgang Hoffmann-Riem:* Der Rundfunkbegriff in der Differenzierung kommunikativer Dienste, in: AfP 27 (1996) 9-15; *Martin Bullinger/Ernst-Joachim Mestmäcker:* Multimediadienste. Struktur und staatliche Aufgaben nach deutschem und europäischem Recht (Law and Economics of International Telecommunications 30) Baden-Baden 1997.

194 S. im einzelnen *Engel* Privater Rundfunk (FN 86) 114 f.

193 S. näher unten i).

196 In Deutschland ist das seit jeher anerkannt, BVerfGE 21, 271, 278; 64, 108, 118; 85, 12. Die Werbung ist aber etwa in den Niederlanden vom Schutzbereich der Pressefreiheit ausdrücklich ausgenommen, *Neerscholten* in *Ress/Stein* (FN 88) 4.

197 Zusammenfassend *Nolte* (FN 48) RabelsZ 1999, 508 und FN 8; weiteres Material bei *Engel* Privater Rundfunk (FN 86) 115-119.

198 Näher unten 2 d).

197 Näher oben II 1.

200 Zur Parallelfrage beim Rundfunk für Art. 10 I EMRK *Engel* Privater Rundfunk (FN 86) 285-291.

f) Eingriff

Im deutschen Verfassungsrecht ranken sich um das Konzept des Grundrechtseingriffs immer kompliziertere Überlegungen[201]. Auch der Straßburger Menschenrechtsgerichtshof hat der Versuchung nicht ganz widerstanden[202]. Sie verneinen einen Eingriff in die Meinungsäußerungsfreiheit etwa dann, wenn der Verleger die gleiche publizistische Wirkung auch auf einem anderen zumutbaren Wege erreichen kann[203]. In seinem Kern dient das dogmatische Konzept des Grundrechtseingriffs dazu, dem Staat und insbesondere dem Gesetzgeber im sachlichen Anwendungsbereich der Grundrechte einen Freiraum zu verschaffen, der nicht vom Verhältnismäßigkeitsgrundsatz kontrolliert ist. Das ist schon im Verfassungsrecht ein problematisches Unterfangen. Vor allem paßt dieses Anliegen aber nicht gegenüber einem Gesetzgeber, dem die demokratische Legitimation weitgehend abgeht[204].

Praktische Bedeutung hat für die Presse vor allem die Figur des mittelbaren Eingriffs. Sie wird etwa gebraucht zur Abwehr von wettbewerbsverzerrenden Subventionen[205]. Auch staatliche Maßnahmen, die den Redakteuren eine Schere in den Kopf setzen, erfaßt man am besten als mittelbaren Eingriff[206].

g) Formelle Schranken

Art. H.2 II 1 aus dem Entwurf des Präsidiums der Konvention lehnt sich an eine Formulierung an, die die Europäische Menschenrechtskonvention verwendet. „Jedwede Einschränkung der in dieser Charta gewährleisteten Rechte und Pflichten*ist vom Gesetzgeber vorzusehen*“. Aus dieser Formulierung haben die Straßburger Organe die formellen Schranken der Menschenrechte entwickelt[207]. Manche Maßstäbe des Straßburger Gerichtshofs lassen sich ohne weiteres auf die Europäische Grundrechtscharta übertragen. Auch im Gemeinschaftsrecht muß die Norm ausreichend zugänglich sein, auf die eine hoheitliche Intervention gestützt ist[208]. Da die Gemeinschaft ihr Recht nur ausnahmsweise durch eigene Organe vollzieht, hat das vor allem für den Vollzug durch die Mitgliedstaaten Bedeutung. Angesichts der großzügigen Veröffentlichungspraxis der Gemeinschaft wird daraus aber auch nur selten ein Problem entstehen. Übertragen läßt sich auch ein zweites Erfordernis, das der Straßburger Gerichtshof aus dem Erfordernis „vom Gesetz vorgesehen“ ableitet: der Eingriff muß für den Betroffenen ausreichend vorhersehbar gewesen sein[209]. In seiner späteren Rechtsprechung hat der Straßburger Gerichtshof das zu einem differenzierten Bestimmtheitsgrundsatz ausgestaltet[210].

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201 S. nur *Herbert Bethge:* Der Grundrechtseingriff, in: VVDStRL 57 (1998) 7-56.

202 Einzelheiten bei *Engel* Privater Rundfunk (FN 86) 444-446.

201 EKMR ZE 2795/66, YECHR 12, 192, 194; EKMR ZE 4517/70, YECHR 14, 548, 566 f.; EKMR ZE 4570/70, Digest III, 423 f.; EKMR B 5178/71, DR 8, 5, 13 f., §§ 85 ff.

204 S. o. III. 3.

205 Vgl. *Engel* Privater Rundfunk (FN 86) 360-373 zur Parallelfrage beim Rundfunk.

206 Das amerikanische Verfassungsrecht spricht dann plastisch von einem „chilling effect“, vgl. zu seiner Behandlung unter der Menschenrechtskonvention *Giegerich* (FN 80) RabelsZ 1999, 477.

207 Einzelheiten bei *Engel* Privater Rundfunk (FN 86) 450-452.

208 Leitentscheidung EGMR 26.04.1979, Ser. A 30, 1, 31, § 49 - Sunday Times; weitere Nachweise bei *Engel* Privater Rundfunk (FN 86) 63.

209 Leitentscheidung EGMR 26.04.1979, Ser. A 30, 1, 31, § 49 - Sunday Times; weitere Nachweise bei *Engel* Privater Rundfunk (FN 86) 63 f.

210 Einzelheiten bei *Engel* Privater Rundfunk (FN 86) 451.

Schwerer fällt die Übertragung bei den beiden anderen Folgerungen, die der Straßburger Gerichtshof aus dem Tatbestandsmerkmal gezogen hat. Zunächst rankt sich eine differenzierte Rechtsprechung um die Frage, was denn im Sinne der Konvention überhaupt als „Gesetz" anzusehen sei. Der Straßburger Gerichtshof sieht sich zu einem Eiertanz genötigt, damit er das englische Common Law nicht in Bausch und Bogen verwerfen muß[211]. Gegenüber dem Gemeinschaftsgesetzgeber besteht kein Anlaß zu solcher Zurückhaltung. Nach dem EG-Vertrag kann er nur durch Verordnung, mittelbar auch durch Richtlinie oder staatengerichtete Entscheidung tätig werden. Greift er in anderen Formen oder auf anderer Grundlage in die grundrechtlich geschützte Sphäre ein, ist das mit den formellen Grundrechtsschranken nicht zu vereinbaren.

Schließlich folgern die Straßburger Organe aus dem Tatbestandsmerkmal „vom Gesetz vorgesehen", daß die nationalen Stellen das anwendbare Recht nicht offensichtlich falsch angewendet haben dürfen[212]. An sich sind die Straßburger Organe dabei sehr zurückhaltend[213]. Durch diese Zurückhaltung verhindert der Straßburger Gerichtshof, daß er in die Rolle einer Superrevisionsinstanz für alle Rechtsordnungen der Mitgliedstaaten gedrängt wird. Das Bundesverfassungsgericht faßt die formellen Grundrechtsschranken bekanntlich deutlich strenger. Besonders klar läßt sich das an der Rechtsprechung ablesen, die aus Art. 2 I GG ein Allgemeines Freiheitsrecht ableitet[214]. Solch ein allgemeines Recht hat unvermeidlich auch sehr weite materielle Schranken. Seine praktische Wirkung besteht deshalb vor allem darin, Verletzungen objektiven Verfassungsrechts zu subjektivieren, also der Verfassungsbeschwerde zugänglich zu machen.

Diese Entscheidung ist schon unter dem Grundgesetz richtig. Im Gemeinschaftsrecht ist sie noch besser begründet. Da der Gemeinschaftsgesetzgeber nur so schwach demokratisch legitimiert ist[215], besteht auch kein Grund zu seiner Schonung. Im Gegenteil wird die Gemeinschaft als Rechtsgemeinschaft gestärkt und gewinnt zusätzliche Legitimität, wenn auch die Bürger Kompetenzüberschreitungen vor den Gerichtshof bringen können. Wegen der fundamentalen Bedeutung der Pressefreiheit für ein demokratisches Gemeinwesen gilt das erst recht für Grundrechtsbeschwerden der Verlage. Die formellen Grundrechtsschranken werden dadurch zu dem dogmatischen Instrument, um den Grundsatz der begrenzten Einzelermächtigung und das Subsidiaritätsprinzip als Maßstäbe des Grundrechtsschutzes zu etablieren.

h) Materielle Schranken

Der Entwurf des Präsidiums geht für die materiellen Grundrechtsschranken einen scheinbar eleganten, im Ergebnis aber wenig ratsamen Weg. Art. H.2 II 2 stellt zunächst alle Freiheitsrechte einheitlich unter die Garantie von Wesensgehalt und Verhältnismäßigkeit und lehnt sich dabei an eine Formulierung an, die sich vielfach in der Europäischen Menschenrechtskonvention findet. Die Gemeinschaft ist auf die Maßnahmen beschränkt, „die für den Schutz legitimer Interessen in einer demokratischen Gesellschaft erforderlich sind"[216]. Art. H.2 II 3 erstreckt überdies die Schranken der parallelen Rechte aus der Europäischen Menschenrechtskonvention. Art. H.4 legt überdies fest, daß keine Vorschrift der Grundrechtscharta als Beschränkung des Schutzes interpretiert werden darf, den internationale Übereinkommen und insbesondere die Menschenrechtskonvention vermitteln.

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211 Das hat dann allerdings auch Folgen für andere Rechtsordnungen, s. etwa EGMR 24.04.1990, Ser. A 176-B , 15, § 28 - Huvig.

212 Leitentscheidung EGMR 26.04.1979, Ser. A 30, 1, 31, § 49 - Sunday Times.

213 Einzelheiten bei *Engel* Privater Rundfunk (FN 86) 271 f.; s. aber etwa EGMR 22.04.1992, Ser. A 226-B, §§ 57-64 - Rieme.

214 Grundlegend BVerfGE 80, 137 - Reiten im Walde.

215 S. o. III. 3.

216 Der volle Wortlaut der Vorschrift findet sich oben a).

Für allgemeine Schranken scheint zu sprechen, daß die Straßburger Organe die materiellen Schranken der Menschenrechte in ihrer Rechtsprechung trotz unterschiedlichem Wortlaut immer stärker aneinander angenähert haben[217].Sieht man näher hin, führt der Vorschlag allerdings in einen dogmatischen Irrgarten. Schon nach ihrem Wortlaut sind die Grundrechte der Charta und die parallelen Menschenrechte nicht vollständig identisch. So läßt der Entwurf des Präsidiums etwa – in der Sache ganz zu Recht – die verwirrende Rundfunkklausel aus Art. 10 I 3 EMRK weg[218]. Sobald die Auslegung der Grundrechtscharta einem europäischen Gericht überantwortet wird, werden sich selbst bei gleichem Wortlaut Unterschiede ergeben. Die Regelungstechnik des Entwurfs ist deshalb die Einladung an jeden findigen Anwalt, auf dem Klavier des doppelten Geltungsgrunds bzw. wegen Art. H.2 II 3 der doppelten Schranken zu spielen. Ganz läßt sich das ohnehin nicht verhindern. Wenn aber allein die Menschenrechtskonvention benannte Schranken kennt, wird es in nahezu jedem praktischem Fall zur doppelten Grund- und Menschenrechtsprüfung kommen. Stimmt die Umschreibung des Schutzbereichs eines Rechts in der Menschenrechtskonvention und in der Charta nicht vollständig überein, kann es überdies zu Qualifikationsstreitigkeiten kommen. Das ist auch dann zu bedenken, wenn die Pressefreiheit separat geschützt würde. Denn die Menschenrechtskonvention enthält, wie erwähnt, nur eine allgemeine Meinungsäußerungsfreiheit. Das Problem würde sich aber wohl relativ einfach lösen lassen, indem man die Pressefreiheit der Europäischen Gemeinschaft als einen Teil der Meinungsäußerungsfreiheit im Sinne von Art. 10 EMRK begreift. Dann hätte Art. H.2 II 3 zur Folge, daß der Katalog legitimer Ziele aus Art. 10 II EMRK auch für die Pressefreiheit des Gemeinschaftsrechts gilt.

Wichtiger als dieser rechtstechnische ist aber ein materieller Grund. Die praktische Bedeutung des Verhältnismäßigkeitsgrundsatzes steht und fällt mit der Definition des legitimen Ziels. Wenn die Grundrechtsdogmatik dem Gesetzgeber hier Freiheiten einräumt, ist das Verhältnismäßigkeitsprinzip wenig mehr als ein rhetorisches Exerzitium. Ein geeignetes Ziel läßt sich praktisch jeder staatlichen Intervention unterlegen. Das ist schon unter dem Grundgesetz ein Problem von Gewicht. Dort mag man gewisse Freiheiten des Gesetzgebers aber wenigstens noch mit seiner direkten demokratischen Legitimation rechtfertigen. Daran fehlt es, wie mehrfach erwähnt, beim Gemeinschaftsgesetzgeber im wesentlichen[219]. Output-Legitimation für Entscheidungen des Gemeinschaftsgesetzgebers verschaffen allein benannte Grundrechtsschranken.

Aus dem rechtstechnischen und dem verfassungspolitischen Grunde sollte sich die Gemeinschaft deshalb an den benannten Schranken orientieren, die in der Europäischen Menschenrechtskonvention enthalten sind. Das würde der Grundrechtsanwendung auch bei der Konkretisierung helfen. Im Zweifel und solange der Europäische Gerichtshof keine abweichenden Maßstäbe entwickelt hat, könnte die Praxis sich an der differenzierten Rechtssprechung der Straßburger Organe orientieren[220]. Einen weiteren Orientierungspunkt könnten vielleicht auch die „zwingenden Erfordernisse“ bilden, die der Europäische Gerichtshof der Warenverkehrs- und der Dienstleistungsfreiheit entnommen hat[221].

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217 Einzelheiten zu dem Diskriminierungsverbot des Art. 14 EMRK und zur Eigentumsgarantie aus Art. 1 ZP 1 bei *Engel* Privater Rundfunk (FN 86) 461-465.

218 Dazu näher *Engel* Privater Rundfunk (FN 86) 43-60.

219 S. o. III. 3.

220 Zusammenfassend *Engel* Privater Rundfunk (FN 86) 452-458 und *ders*.: Der Ordnungsvorbehalt in den Schranken der Europäischen Menschenrechtskonvention, in: Schweizerisches Jahrbuch für internationales Recht 46 (1989) 41-91.

221 Zusammenfassend *von der Groeben/Thiesing/Ehlermann – Müller-Graff*[5] Art. 30 EGV, R 203-230 und ebd. – *Troberg* Art. 59 EGV, R 19-23.

Ein weiteres Problem des deutschen Verfassungsrechts ist in der Europäischen Gemeinschaft dagegen gelöst. Die Unbestimmtheit des legitimen Ziels verkürzt den Grundrechtsschutz in Deutschland deshalb zusätzlich, weil der Gesetzgeber nicht gezwungen ist, die Absichten zu definieren, die er mit seiner Intervention verfolgt[222]. Art. 253 EGV verpflichtet den europäischen Gesetzgeber dagegen, seine Entscheidungen mit Gründen zu versehen. Tatsächlich sind Richtlinien und Verordnungen regelmäßig auch ausführliche Begründungen vorangestellt. An den Zielen, die der Gesetzgeber dort festlegt, muß er sich dann auch bei der Grundrechtsprüfung festhalten lassen. Ein wohlgesonnener Richter kann deshalb nicht nachträglich ein passendes Ziel unterschieben.

Bei der Bestimmung der legitimen Ziele sind schließlich die Besonderheiten von Grundrechten im Mehrebenensystem zu beachten[223]. Der bloße Wille zur Harmonisierung kann als Rechtfertigungsgrund nicht genügen[224]. Das wäre nämlich ein inhaltsleeres Ziel. Jede beliebige Intervention führt zu einem Level Playing Field. Auch die Sachentscheidung des europäischen Gesetzgebers muß deshalb mit dem einschlägigen Grundrecht zu vereinbaren sein. Noch weniger kann genügen, daß ein Kompromiß im Rat oder mit dem Parlament nur durch das Schnüren eines Pakets zu erzielen war. Die Grundrechte sollen ja gerade davor schützen, daß ihre Träger im politischen Prozeß unter die Räder geraten. Das Problem reicht aber noch tiefer. In der normativen ökonomischen Diskussion gilt seit langem nicht mehr als ausgemacht, daß ein Wettbewerb der Institutionen zwischen den Mitgliedstaaten von Nachteil ist[225]. Eine Grundrechtscharta verrechtlicht auch diese Frage. Der Institutionenwettbewerb wird künftig vor den Schranken des zuständigen europäischen Gerichts verhandelt werden müssen.

All das hat für die Presse besondere Bedeutung. Denn in den Mitgliedstaaten ist Pressepolitik zugleich immer auch Verfassungspolitik. Es läßt sich abstrakt nicht bestreiten, daß aus Unterschieden in der Verfassungspolitik der Mitgliedstaaten Handelshindernisse für einen ungehinderten europäischen Pressemarkt entstehen können. Es ist aber mehr als fraglich, ob daraus eine europäische Harmonisierung der nationalen Verfassungspolitiken abgeleitet werden dürfte. Denn den Mitgliedstaaten würde auf diese Weise ja nicht nur ein einzelnes politisches Instrument aus der Hand geschlagen, sondern sie würden zu einer Änderung ihres inneren politischen Systems gezwungen. Damit wäre die Grenze des Art. 6 III EUV überschritten. Diese Vorschrift verpflichtet die Gemeinschaft, die nationale Identität der Mitgliedstaaten zu achten. Einstweilen dürfte sich die Bewertung auch nicht mit Blick auf die Teile der Politik ändern, die in Europa gemacht werden. Richtig ist zwar, daß die Presse auch für das Verhältnis zwischen europäischen Organen und Unionsbürgern die Funktion eines Intermediärs wahrnimmt. Bislang ist eine genuin europäische Presse aber nicht entstanden. Vielmehr wird auch diese Intermediationsaufgabe von der jeweiligen nationalen Presse wahrgenommen. Das entspricht der Erkenntnis, daß die Völker der Mitgliedstaaten noch nicht zu einem europäischen Volk mit einer einheitlichen Identität verwachsen sind[226].

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222 In jüngeren Gesetzen tut er das allerdings zunehmend freiwillig, s. etwa § 1 TKG oder § 1 KrWAbfG.

223 Vgl. oben III. 4.

224 *Simma/Weiler/Zökler* (FN 39) 142.

225 S. nur *Lüder Gerken* (Ed.): Competition among Institutions, Houndmills 1995; *Markus Müller:* Systemwettbewerb, Harmonisierung und Wettbewerbsverzerrung. Europa zwischen einem Wettbewerb der Gesetzgeber und vollständiger Harmonisierung (Wirtschaftsrecht und Wirtschaftspolitik 136) Baden-Baden 2000.

226 Vgl. oben III. 5.

i) Schutzniveau

Grundrechtsschutz ist eine Frage von Grad und Maß. Überziehen die Gerichte, findet Gesetzgebung und Verwaltung schließlich nur noch vor ihren Schranken statt. Wiederum hat dieses Anliegen allerdings gegenüber dem europäischen Gesetzgeber weniger Gewicht als gegenüber den nationalen Gesetzgebern. Da er nur ganz schwach demokratisch legitimiert ist, darf, ja muß der Grundrechtsschutz strikter ausgestaltet werden[227]. Der Straßburger Gerichtshof hat für diese Aufgabe ein elegantes dogmatisches Instrument entwickelt, die Margin of Appreciation[228]. Art. H.2 II 2 des Präsidiumsentwurfs der Grundrechtscharta bezieht sich ausdrücklich auf diese Rechtsprechung. Denn die Vorschrift schließt mit dem Tatbestandsmerkmal „in einer demokratischen Gesellschaft erforderlich". Genau daraus hat der Straßburger Gerichtshof seine Doktrin entwickelt.

Die Margin of Appreciation leistet noch mehr. Sie nimmt all die Topoi auf, mit deren Hilfe das Schutzniveau eines Grundrechts differenziert werden kann. Das nutzen die Straßburger Organe etwa, um kommerziellen Äußerungen geringeren Schutz zu gewähren als ideellen[229]. Umgekehrt sind die Medien um so stärker geschützt, je mehr zugleich auch ihre demokratische Aufgabe der Vermittlung zwischen Staat und Gesellschaft beeinträchtigt oder gefährdet wird[230].

Das Konzept der Margin of Appreciation erlaubt außerdem, das Schutzniveau nach Maßgabe der jeweiligen kulturellen Prägung und Regulierungstradition zu differenzieren[231]. Für die Gemeinschaftsgrundrechte hat das scheinbar kaum eine Bedeutung. Denn für das autonome Handeln der Mitgliedstaaten sollen sie ja ohnehin nicht gelten. Die nationale Differenzierung des Schutzniveaus hilft aber einmal zur Rechtfertigung von Unterschieden beim Vollzug von Gemeinschaftsrecht durch die Mitgliedstaaten. Auch eine europäische Grundrechtscharta würde die Gemeinschaft also nicht dazu zwingen, den Vollzug ihres Rechts rigoros zu vereinheitlichen. Vor allem liefert die regionale Differenzierung des Schutzniveaus aber die Rechtfertigung dafür, daß die Gemeinschaft den Mitgliedstaaten Regelungsspielräume beläßt oder im Bereich ihrer ausschließlichen Zuständigkeit erst eröffnet.

Schließlich hilft die Margin of Appreciation noch zur Bewältigung eines letzten Problems. Allen Lippenbekenntnissen in den Entscheidungen des Europäischen Gerichtshofs zum Trotz spielen die Grundrechte als Grenze für den Gemeinschaftsgesetzgeber bisher praktisch keine Rolle. Eine rechtlich verbindliche und gerichtlich durchsetzbare Grundrechtscharta verlangt den Gemeinschaftsorganen deswegen eine erhebliche Veränderung ihres Verhaltens und ihrer Mentalität ab. Das wird nicht von heute auf morgen zu bewerkstelligen sein. Gegenüber den Mitgliedstaaten der Menschenrechtskonvention hat der Straßburger Gerichtshof die Margin of Appreciation deshalb als Hilfsmittel genutzt, um den Grundrechtsstandard nicht abrupt, sondern schrittweise anzuheben[232]. Gegenüber den Gemeinschaftsorganen hat dieses Anliegen allerdings

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227 *Pauly* (FN 146) EuR 1998, 243/248 und passim.

228 *Christoph Engel:* Die Schranken der Schranken der Europäischen Menschenrechtskonvention. Das Merkmal „notwendig in einer demokratischen Gesellschaft" in den Schrankenvorbehalten, das Diskriminierungsverbot, und die „Margin of Appreciation", in: ÖZöRV 1986, 261-287.

229 Näher *Nolte* (FN 48) RabelsZ 1999, 514 f.

230 Seit EGMR 07.12.1976, Ser. A 24, 1, 23, § 49 - Handyside; weitere Nachweise zu diesem Punkt bei *Engel* Privater Rundfunk (FN 86) 50; weiter Topoi, die die Straßburger Organe zur Differenzierung des Schutzniveaus der Meinungsfreiheit nutzen, ebd. 459-461.

231 Einzelheiten bei *Engel* (FN 228) ÖZöRV 1986, 276 und passim.

232 Näher *Engel* (FN 228) ÖZöRV 1986, 276 und passim.

geringeres Gewicht als gegenüber den Mitgliedstaaten der Menschenrechtskonvention. Wegen der geringen demokratischen Legitimation des europäischen Gesetzgebers geht es im wesentlichen nur um ein pragmatisches Problem. Wenn der Europäische Gerichtshof bei der Anwendung der Grundrechtscharta zu forsch vorangeht, provoziert er vielleicht Widerstand oder riskiert gar, daß der Rechtsschutz bei der nächsten Vertragsänderung wieder eingeschränkt wird.

j) Umgehungsschutz

Solche Vorsicht ist auch deshalb angeraten, weil die politischen Organe der Gemeinschaft sonst einen Anreiz erhalten, den neuen Grundrechtsschutz zu umgehen. Dazu gibt es viele Möglichkeiten. Wo das zulässig ist, können sie von der Verordnung zur Richtlinie übergehen und die grundrechtlich problematischen Entscheidungen den Mitgliedstaaten überlassen. Je geringer der Grundrechtsschutz in einem Mitgliedstaat ausgestaltet ist, desto größere Freiräume entstehen dadurch. Die Gemeinschaft könnte schließlich Politiken sogar ganz offen renationalisieren. Die zweite Ausweichstrategie setzt an den Handlungsformen an. Die Gemeinschaft kann sich darauf beschränken, rechtlich unverbindliche Guidelines zu veröffentlichen[233]. Sie kann bloß noch mit Regulierung drohen und darauf setzen, daß die Verbände ausgehandelte Regeln in ihrem Inneren durchsetzen[234]. Sie kann sich auch, wie beim Ökoaudit oder beim Datenschutzaudit, darauf beschränken, die Unternehmen zur Selbstkontrolle anzuhalten.

Für solch einen Wechsel der Handlungsform gibt es natürlich nicht nur strategische Gründe. Auch die nationalen Grundrechtsordnungen haben noch keine wirklich befriedigenden Lösungen für den Grundrechtsschutz solcher bloß vom Staat veranlaßter gesellschaftlicher Macht gefunden. Würde sich der Grundrechtsschutz allein auf die staatliche Einwirkungshandlung erstrecken, wäre er weitgehend wirkungslos. Oft fehlt es sogar an förmlichem staatlichen Handeln. Der Staat beschränkt sich auf eine Politik der hochgezogenen Augenbraue. Auch wo er seine Versprechungen oder Drohungen formalisiert, liefe ein Grundrechtsschutz aus justizpolitischen Gründen weitgehend leer, der sich allein hierauf erstreckt. Denn er bringt das zur Grundrechtsanwendung berufene Gericht in eine unmögliche Lage. Es steht vor einer Alles oder Nichts – Entscheidung. Es muß die staatliche Einwirkung entweder passieren lassen oder dem Staat sein Lock- oder Drohmittel ganz aus der Hand schlagen.

An dieser Stelle kann die Grundrechtsdogmatik nicht stehen bleiben. Sie müßte dann zusehen, wie aus der durch Grundrechte kontrollierten staatlichen Macht vom Staat veranlaßte, durch Grundrechte aber nicht mehr kontrollierte gesellschaftliche Macht wird. Theoretisch ist Abhilfe auf drei Wegen möglich. Auf dem ersten Weg würde auch die vom Staat veranlaßte gesellschaftliche Macht für die Zwecke der Grundrechtsanwendung dem Staat zugerechnet. Dann würden die Grundrechte die Trennung zwischen Staat und Gesellschaft in diesen Fällen aber aufheben. Der zweite Weg ist ein Klassiker der Grundrechtsdiskussion: die Drittwirkung der Grundrechte. Auch das vom Staat veranlaßte gesellschaftliche Handeln wird in dieser Vorstellung nicht zu staatlichem. Es werden nur die für den Staat geltenden Maßstäbe hierauf erstreckt. Derselbe Gedanke liegt auch dem Verwaltungsprivatrecht zugrunde. Die Grundrechtsdiskussion der vergangenen Jahrzehnte war gegenüber der Drittwirkungslehre aber zurecht zurückhaltend. Sie macht zwar nicht dogmatisch, wohl aber funktionell gesellschaftliches wieder zu staatlichem Handeln. Auch dann, wenn gesellschaftliche Macht nicht aus der Gesellschaft heraus entsteht, sondern auf staatliche Veranlassung, sind Schutzpflichten deshalb die angemessene Lösung. Das gesellschaftliche

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233 Dazu bereits oben c).

234 Zum konzeptionellen Hintergrund und zur verfassungsrechtlichen Einordnung näher *Christoph Engel:* Institutionen zwischen Staat und Markt (Preprint aus der Max-Planck Projektgruppe Recht der Gemeinschaftsgüter 1999/3).

Verhalten kommt nicht direkt in den Geltungsbereich der Grundrechte. Die Grundrechte verpflichten den Staat aber, dem Mißbrauch gesellschaftlicher Macht nicht einfach zuzusehen. Das gilt in besonderem Maße, wenn er, wie in den hier betrachteten Fällen, selbst erst für die Entstehung der gesellschaftlichen Macht gesorgt hat.

k) Schutzpflichten

Den deutschen Grundrechten entnimmt das Bundesverfassungsgericht seit langem Schutzpflichten[235]. Auch der Straßburger Gerichtshof geht so vor[236]. Dazu hat er insbesondere das Recht aus Art. 8 I EMRK auf Achtung des Privatlebens genutzt[237]. Art. 12 des Präsidiumsentwurfs der Grundrechtcharta enthält eine Norm, die sich eng an Art. 8 I EMRK anlehnt[238]. Es liegt nahe, daß der Europäische Gerichtshof an diese Tradition anknüpft, wenn ihm die Anwendung europäischer Grundrechte übertragen wird[239].

In ein Mehrebenensystem sind Schutzpflichten allerdings schwerer zu integrieren als Abwehrrechte[240]. Zunächst sind auch hier die Zurechnungsregeln zu beachten[241]. Folgt aus den gemeinschaftlichen Grundrechten eine Pflicht zur Gesetzgebung, ist sie von den Organen der Gemeinschaft zu erfüllen, nicht von den Mitgliedstaaten. Eine gemeinschaftsrechtliche Schutzpflicht der Mitgliedstaaten kommt nur dann in Betracht, wenn sie gerade durch den Vollzug des Gemeinschaftsrechts zu erfüllen ist. Dazu könnte es insbesondere kommen, wenn die Gemeinschaft den Vollzug ihres Kartellrechts wirklich weitgehend den Mitgliedstaaten überträgt[242].

Gewichtiger ist die zweite Besonderheit. Sie wird im Vergleich zu einem föderalen Staat deutlich. Nehmen wir an, daß die Bundesverfassung Grundrechte enthält, die für den gesamten Staat gelten. Entnimmt das Verfassungsgericht diesen Grundrechten eine Schutzpflicht, ändert das nichts an der föderalen Kompetenzverteilung. Fällt der Gegenstand in die Gesetzgebungs- oder Verwaltungskompetenz der Gliedstaaten, sind sie auch Adressaten der Schutzpflicht.

Auch im Verhältnis von Gemeinschaft und Mitgliedstaaten dürfen grundrechtliche Schutzpflichten die Kompetenzordnung nicht verändern. Dieser Satz hat nur viel einschneidendere Wirkungen als in einem föderalen Staat. Er entscheidet regelmäßig nicht nur darüber, wer die Schutzpflicht erfüllt, sondern ob sie überhaupt erfüllt wird. Das liegt an der Eigenart von Grundrechten im Mehrebenensystem[243]. Nicht nur dem Gemeinschaftsgesetzgeber fehlt das Monopol, sondern auch dem Gemeinschaftsgrundrecht. Der vollständige Grundrechtsschutz des Individuums setzt sich in diesem Mehrebenensystem erst aus den Gemeinschaftsgrundrechten und den Grundrechten der nationalen Verfassungen sowie prozessual aus der Verfassungsbeschwerde an ein europäisches Gericht und an das nationale Verfassungsgericht zusammen.

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235 *Johannes Dietlein:* Die Lehre von den grundrechtlichen Schutzpflichten, Berlin 1992.

236 Seit EGMR 09.10.1970, Ser. A 32, 17, § 32 – Airey; s. auch *Claus Dieter Classen*: Die Ableitung von Schutzpflichten des Gesetzgebers aus Freiheitsrechten. Ein Vergleich von deutschem und französischem Verfassungsrecht sowie der Europäischen Menschenrechtskonvention, in: JöR 36 (1987) 29.

237 Leitentscheidung EGMR 26.03.1985, Ser. A 91, 1, § 23 - X und Y gegen Niederlande.

238 Dok. 4149/00; zu dem gerade in unserem Zusammenhang relevanten Unterschied näher unten 4.

239 S. aber kritisch *Eickmeier* (FN 5) DVBl. 1999, 1029.

240 S. o. III. 4.

241 S. o. c).

242 S. o. c).

243 S. o. III. 4.

Im Ergebnis kann es deshalb zu Schutzlücken kommen. Sie ergeben sich, wenn die Grundrechte oder die Möglichkeiten zu ihrer Durchsetzung in einem Mitgliedstaat weniger weit gehen oder anders ausgestaltet sind als in der Gemeinschaft. Das führt zu einer letzten Besonderheit. An sich sind die Kompetenzen zwischen Gemeinschaft und Mitgliedstaaten nach einem anderen Prinzip verteilt als die Kompetenzen von Bund und Ländern unter dem Grundgesetz. Das Grundgesetz verteilt Kompetenzen nach Materien. Die Kompetenzen der Gemeinschaft sind dagegen funktional gedacht. Die Gemeinschaft ist zuständig, wenn das erforderlich ist, um eines der Ziele zu erfüllen, die ihr der EG-Vertrag überträgt.

Dieser Gedanke darf jedoch auf die Schutzpflichten nicht übertragen werden, die den Gemeinschaftsgrundrechten entnommen werden. Denn als Abwehrrechte müssen die Gemeinschaftsgrundrechte umfassend sein. Sie müssen den Bürgern gerade auch dort helfen, wo die Gemeinschaft in Lebensbereiche eingreifen will, deren Regelung dem nationalen Gesetzgeber zusteht. Auch als Schutzpflichten sind die Gemeinschaftsgrundrechte also kein versteckter Kompetenztitel. Vielmehr beschränken sie den Handlungsfreiraum der Gemeinschaft, dort wo die Verträge ihn überhaupt eröffnet haben. Anders gewendet: aus den Gemeinschaftsgrundrechten folgen nie unbedingte Schutzpflichten. Vielmehr geht es immer nur um eine Pflicht zum Einschreiten, falls der Gemeinschaft aus einem anderen Grunde die Zuständigkeit zusteht, etwa zur Verwirklichung des Binnenmarkts.

2. Schutz der Verlage durch andere Grundrechte

Die Verlage können sich nicht nur mit Hilfe der Pressefreiheit gegen europäische Hoheitsakte zur Wehr setzen. Vielmehr steht ihnen zugleich eine ganze Liste anderer Grundrechte zu Gebote, die in den vorliegenden Entwürfen enthalten sind. Im einzelnen sind das die Informationsfreiheit (a), Informationsansprüche (b) und der Datenschutz (c), die Berufsfreiheit (d) und das Eigentum (e), der Schutz der Geschäftsräume (f) und der Vertraulichkeit (g), die strafrechtlichen Grundrechte (h), der Gleichheitssatz (i) und die demokratischen Grundrechte (j).
Wir hatten gesehen, daß ihnen die Pressefreiheit einen weit gespannten Schutz verschafft, der insbesondere auch die vorbereitenden journalistische Tätigkeit und den Absatz an Abonnenten und Werbekunden umfaßt. Letztlich führen alle im folgenden betrachteten Grundrechte deshalb dazu, daß ein und derselbe Akt der Gemeinschaft an mehreren Grundrechte zugleich gemessen werden muß. Dieser Umstand bietet der Presse aber nicht nur Sicherheit vor – unangebrachten – restrikten Interpretationen der Pressefreiheit. Wenn der Staat in mehrere Grundrechte eines Verlages zugleich eingreift, erhöht das vielmehr auch das Schutzniveau[244]. Die Waagschale neigt sich bei der Verhältnismäßigkeitsprüfung früher zu Gunsten der Verlage.

a) Informationsfreiheit

Art. 15 des Präsidiumsentwurfs schützt nicht nur die Meinungsfreiheit, sondern auch die Freiheit, „Informationen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen“[245]. Dieses Recht soll jedermann zustehen, also auch den Verlagen. Es stellt ein Abwehrrecht dar, schützt also vor staatlichen Eingriffen in Kommunikationsvorgänge[246].

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242 S. zu diesem dogmatischen Konzept näher oben 1 i).

245 S. auch den Vorschlag der Abgeordneten *Kaufmann,* Dok. 4189/00.

246 Näher *Christoph Engel:* Der Zusammenhang von Sende- und Empfangsfreiheit unter der Europäischen Menschenrechtskonvention, in: ZUM 1988, 511-526 und *Engel* Privater Rundfunk (FN 86) 323 f.

Die Recherchetätigkeit der Presse ist also nicht nur als Vorbereitungshandlung für spätere Meinungsäußerungen geschützt[247], sondern auch unmittelbar.

b) Informationsansprüche

Art. 14 des Präsidiumsentwurfs lautet:

> „Jeder Unionsbürger und jede Unionsbürgerin sowie jede Person mit Wohnsitz in der Union hat das Recht auf Zugang zu Dokumenten der Organe der Europäischen Union. Die Ausübung dieses Rechts erfolgt unter den in Artikel 255 des Vertrages zur Gründung der Europäischen Gemeinschaft vorgesehenen Bedingungen“[248].

Dieses Recht schützt auch die Presse. Der Abgeordnete *Meyer* will darüber hinaus einen Auskunftsanspruch der Presse in der Grundrechtscharta verankern[249]. Das würde der Rechtslage nach den deutschen Landespressegesetzen entsprechen. Ob für solch eine Sonderregel Bedarf besteht, hängt von der Ausgestaltung der Bedingungen für den allgemeinen Informationsanspruch ab. In der Grundtendenz ist die Gemeinschaft sehr viel großzügiger als deutsche Behörden und Gerichte. Sie folgt im Grundsatz der skandinavischen und der amerikanischen Tradition[250].

c) Datenschutz

Art. 15 des Präsidiumsentwurfs soll lauten:

> „Jede natürliche Person hat Anspruch auf Schutz ihrer personenbezogenen Daten“[251].
>
> Zur Begründung verweist der Entwurf auf Art. 286 EGV. Auch dort ist der Schutz auf natürliche Personen beschränkt. Dagegen ist solange nichts einzuwenden, wie der Schutz von Geschäftsgeheimnissen durch andere Grundrechte gesichert wird.

d) Berufsfreiheit

Sehr viel problematischer ist der ausgesprochen schwache Schutz der Berufsfreiheit. Die einschlägige Vorschrift des Präsidiumsentwurfs findet sich nicht bei den Freiheitsrechten, sondern bei den sozialen und wirtschaftlichen Rechten. Art. II lautet:

> „Jede Person hat das Recht, ihren Beruf und ihr Gewerbe frei zu wählen und auszuüben, unbeschadet der die Freizügigkeit von Personen betreffenden Bestimmungen des Vertrages“[252].

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247 Dazu oben 1 e).
248 Dok. 4137/00.
249 Das soll in Art. 15 II 2 geschehen: „Die Organe der Union sind ihm [!] verpflichtet, der Presse Auskünfte zu erteilen“.
250 Näher *Wieland* in *Engel/Keller* (FN 113).
251 Dok. 4137/00.
252 Dok. 4192/00.

Das entspricht zwar dem Recht des Europarats. Auch die Europäische Menschenrechtskonvention enthält keine Garantie der Berufs- und Gewerbefreiheit. Berufsbezogene Rechte gibt es nur in der Europäischen Sozialcharta[253]. Das widerspricht aber der Verfassungstradition vieler Mitgliedstaaten[254]. Vor allem würde die Europäische Grundrechtscharta damit aber hinter die ständige Rechtsprechung des Europäischen Gerichtshofs zu den ungeschriebenen Grundrechten des Gemeinschaftsrechts zurückfallen[255].

Bislang äußert sich der Präsidiumsentwurf weder zu den Schranken der Sozialrechte noch zu den Mechanismen für ihre Durchsetzung. Anzuerkennen ist zwar das Bemühen des Präsidiums, den bestenfalls justitiablen Kern solcher Rechte herauszuschälen[256]. Trotzdem ist der Stellenwert der Berufsfreiheit viel prekärer, wenn sie nicht als Freiheits-, sondern nur als Sozialrecht garantiert ist. Die systematische Stellung könnte außerdem dazu verführen, den persönlichen Schutzbereich des Grundrechts eng zu fassen und es nur natürlichen Personen zuzugestehen.

Es kann kein Trost sein, daß die Folgen für die Presse weniger gravierend wären als für andere Branchen. Wir hatten ja schon gesehen, daß auch das ökonomische Substrat zum Schutzbereich der Pressefreiheit gehört[257]. Der Vergleich zum amerikanischen Verfassungsrecht zeigt, daß dies eine stabile dogmatische Grundlage für einen Schutz auch der ökonomischen Seite der Presse darstellen kann[258]. Gewiß ist das aber nicht. Es steht zu befürchten, daß der schwächere Schutz der Berufsfreiheit als Argument für eine restriktive Interpretation der Pressefreiheit instrumentalisiert wird.

e) Eigentum

Art. 16 des Präsidiumsentwurfs lautet:

> „Jede Person hat das Recht auf Achtung ihres Eigentums. Niemandem darf sein Eigentum entzogen werden, es sei denn aus Gründen des öffentlichen Interesses und nur in Fällen und unter Bedingungen, die durch Gesetz vorgesehen sind, sowie gegen eine angemessene [,*vorherige*] Entschädigung“[259].

Das entspricht der Verfassungstradition der Mitgliedstaaten[260], der Grundrechtsrechtsprechung des Europäischen Gerichtshofs[261] sowie Art. 1 des 1. Zusatzprotokolls zur Europäischen Menschenrechtskonvention. Wiederum wäre der Grundrechtsschutz der Verlage letztlich auch mit Hilfe einer weit interpretierten Pressefreiheit zu bewerkstelligen. Der zusätzliche Schutz des

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253 Europäische Sozialcharta vom 18.10.1961, BGBl. 1964 II 1262. Art. 1 enthält ein Recht auf Arbeit, Art. 9 ein Recht auf Berufsberatung, Art. 10 ein Recht auf berufliche Ausbildung; vgl. schließlich auch das in Art. 18 enthaltene Recht auf Ausübung einer Erwerbstätigkeit im Hoheitsgebiet der anderen Vertragsparteien.

254 Einzelheiten bei *Rengeling* Grundrechtsschutz (FN 17) 16-29.

255 Einzelheiten ebd.

256 Das wird vor allem im Vergleich zu dem einleitend geschilderten Katalog der Rechte deutlich, die schließlich nicht aufgenommen worden sind, Dok. 4192/00, 1 f.

257 S. o. 1 e).

258 Zusammenfassend zum Schutz der Presse im amerikanischen Verfassungsrecht: *Steven H. Shiffrin/Jesse H. Choper*: The First Amendment : cases, comments, questions (American casebook series) St. Paul[2] 1996.

259 Dok. 4137/00.

260 Näher *Rengeling* Grundrechtsschutz (FN 17) 30-32.

261 Näher ebd. 32-39.

Eigentums deckt aber die ökonomische Flanke. Insbesondere erschwert er Eingriffe in den Bestand des Vermögens. Richtigerweise sollte dazu auch das Unternehmen als lebende Einheit gehören[262]. Greift ein Hoheitsakt der Gemeinschaft zugleich in die Pressefreiheit und in das Eigentumsgrundrecht ein, erhöht das das Schutzniveau der Grundrechte.

f) Schutz der Geschäftsräume

Nach Art. 8 II des Präsidiumsentwurfs ist „die Achtung [...] der Wohnung [...] gewährleistet"[263]. Für deutsche Ohren klingt das zureichend. Das Bundesverfassungsgericht legt den Begriff der Wohnung in Art. 13 I GG bekanntlich weit aus und rechnet auch Geschäftsräume dazu[264]. Der Europäische Gerichtshof hat den Grundrechtsschutz der Geschäftsräume im Hoechst-Urteil jedoch ausdrücklich verneint[265]. Auch die – mittlerweile aufgelöste – Europäische Menschenrechtskommission war lange Zeit zweifelnd[266]. Mittlerweile hat der Menschenrechtsgerichtshof die Büroräume eines Rechtsanwalts jedoch in den Schutz von Art. 8 EMRK einbezogen[267]. Deshalb wäre es ratsam, daß die Geschäftsräume in Art. 8 II der Konvention ausdrücklich erwähnt werden. Dann könnte sich die Presse gegen die Durchsuchung einer Redaktion nicht bloß mit Hilfe der Pressefreiheit verteidigen. Die Redaktionsräume wären also nicht bloß deshalb grundrechtlich geschützt, weil sie zur Vorbereitung der publizistischen Tätigkeit der Presse dienen[268].

g) Vertraulichkeitsschutz

Ganz parallele Fragen stellen sich auch beim Vertraulichkeitsschutz. Nach Art. 8 II des Präsidiumsentwurfs ist auch „die Achtung der Privatsphäre [...] und der Vertraulichkeit des Post- und Fernmeldeverkehrs ungeachtet des Informationsträgers [...] gewährleistet"[269]. Ein wohlwollender Gerichtshof könnte aus diesem Wortlaut angemessene Schlüsse ziehen. Er könnte insbesondere zur „Privatsphäre" auch die Binnensphäre eines Unternehmens rechnen und die „Vertraulichkeit" auch für die geschäftliche Kommunikation garantieren. Ersteres hat vor allem für das Innenverhältnis zwischen Verlagsleitung und Journalisten Bedeutung, letzteres vor allem für das Verhältnis der Journalisten zu den Informanten. Letztlich ließe sich dieser Schutz wiederum auch mit Hilfe der Pressefreiheit bewerkstelligen[270]. Besser wäre es aber, wenn auch diese Punkte in dem Grundrechtskatalog ausdrücklich klargestellt würden.

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262 Einzelheiten zur praktischen Bedeutung dieses Grundrechts für die Medien bei *Engel* Privater Rundfunk (FN 86) 462-465.

263 Dok. 4123/1/00 REV 1; s. auch den Textvorschlag der Abgeordneten *Kaufmann,* Dok. 4189/00.

264 BVerfGE 32, 54, 68 f; 44, 353, 371; 76, 83, 86. Die literarische Kritik hat sich nicht durchsetzen können, zusammenfassend *von Mangoldt/Klein/Starck-Gornig*[4] Art. 13 GG, R 21-25.

265 EuGH 21.09.1989, Rs. 46/87, Slg. 1989, 2859, 2929, R 17; kritisch zu dem Urteil etwa *Georg Ress/Jörg Ukrow:* Neue Aspekte des Grundrechtsschutzes in der Europäischen Gemeinschaft. Anmerkungen zum Hoechst-Urteil des EuGH, in: EuZW 1990, 499-504, 502 f.

266 Deutlich etwa *Jochen Abr. Frowein/Wolfgang Peukert:* Europäische Menschenrechtskonvention, Kiel[1] 1985, Art. 8 EMRK, R 27.

267 EGMR 16.12.1992, Ser. A 251-B, §§ 27-33 - Niemitz.

268 Dazu oben 1 e).

269 Dok. 4123/1/00 REV 1.

270 S. o. 1 e).

h) Strafrechtliche Grundrechte

Der Präsidiumsentwurf folgt der Tradition der Europäischen Menschenrechtskonvention und enthält eine Vielzahl von Rechten für das Strafverfahren[271]. Ihre unmittelbare Bedeutung ist für das Gemeinschaftsrecht einstweilen gering. Denn der Gemeinschaft fehlt die eigene Strafgewalt. Auch der Einfluß des Gemeinschaftsrechts auf das nationale Strafrecht war bislang gering. Das könnte sich in der Zukunft allerdings einmal ändern. Dann möchten auch diese Garantien Bedeutung für die Presse erhalten.

i) Gleichheitssatz

In Art. 18 des Präsidiumsentwurfs heißt es: „Alle Menschen sind vor dem Recht gleich“[272]. Das entspricht der Verfassungstradition der Mitgliedstaaten[273] und der Rechtsprechung des Europäischen Gerichtshofs zu den ungeschriebenen Grundrechten des Gemeinschaftsrechts[274]. In der Europäischen Menschenrechtskonvention fehlt dagegen ein allgemeiner Gleichheitssatz. Art. 14 EMRK schützt nur vor der Ungleichbehandlung im sachlichen Anwendungsbereich benannter Freiheitsrechte[275]. An dieser abweichenden Tradition liegt es wohl, daß die vorliegenden Entwürfe ein ganzes Verwirrspiel von Gleichheitsrechten enthalten. Zunächst enthält Art. 19 I des Präsidiumsentwurfs eine Liste von (absoluten?) Diskriminierungsverboten und Art. 19 II das Gebot der positiven Diskriminierung zugunsten der Frauen[276]. Art. I des Präsidiumsentwurfs der Sozialrechte verbietet für diese Rechte die Ungleichbehandlung[277]. Schließlich heißt es in Art. J des Präsidiumsentwurfs der Bürgerrechte:

> „Im Anwendungsbereich des Vertrages zur Gründung der Europäischen Gemeinschaft ist unbeschadet der Bestimmungen dieses Vertrages jede Diskriminierung aus Gründen der Staatsangehörigkeit verboten“[278].

Wenn sich der Konvent nicht entschließen kann, einen einheitlichen, für sämtliche Grundrechtsbelange geltenden Gleichheitssatz zu schaffen, sollte er zumindest das Verhältnis dieser Gleichheitssätze zueinander klarstellen.

j) Demokratische Grundrechte

In Art. B des Präsidiumsentwurfs der Bürgerrechte heißt es zu den politischen Parteien:

> „Sie tragen dazu bei, ein europäischen Bewußtsein herauszubilden und den politischen Willen der Bürger und Bürgerinnen der Union zum Ausdruck zu bringen“[279].

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271 S. insbesondere Art. 6: Recht auf Freiheit und Sicherheit; Art. 8: Recht auf ein unparteiisches Gericht, Art. 9: Rechte der Verteidigung, Art. 10: Keine Strafe ohne Gesetz, Art. 11: Recht, wegen derselben Sache nicht zweimal vor Gericht gestellt oder bestraft zu werden, Dok. 4149/00.

272 Dok. 4137/00.

273 Nachweise bei *Rengeling* Grundrechtsschutz (FN 17) 137 f.

274 Einzelheiten ebd. 138-142.

275 Näher *Engel* (FN 228) ÖZöRV 1986, 278-285.

276 Dok. 4137/00.

277 Dok. 4192/00.

278 Dok. 4170/00.

279 Dok. 4170/00.

Nicht nur die Parteien, auch die Medien sind Intermediäre zwischen Staat und Bürger. Das paßt auch für das Verhältnis zwischen den Gemeinschaftsbürgern und der europäischen Hoheitsgewalt[280]. Gleichwohl empfiehlt es sich nicht, die Presse an dieser Stelle zu erwähnen. Die Presse braucht diesen Schutz ebenso wenig wie eine ausdrückliche institutionelle Garantie. Die Gefahr ist groß, daß er ihr schließlich nicht nützen, sondern schaden würde. Die Rundfunkrechtsprechung des Bundesverfassungsgerichts belegt, daß das Individualgrundrecht schließlich nur noch nach Maßgabe seiner demokratischen Nützlichkeit gewährt werden könnte[281].

3. Schutz der Presse in der Person anderer Grundrechtsträger

Wenn die europäische Hoheitsgewalt die Presse treffen will, braucht sie den Eingriff nicht notwendig an den Verlag zu adressieren. Sie kann statt dessen auch die Freiheit von Journalisten, Nachrichtenagenturen, Lesern, Werbetreibenden oder Financiers beeinträchtigen. Da die Pressefreiheit auch vor mittelbaren Eingriffen schützt[282], kann sich die Presse auch dagegen zur Wehr setzen. Die genannten Personengruppen sind aber auch selbst Grundrechtsträger. Oft gilt auch der spiegelbildliche Zusammenhang: ein Eingriff, der an die Verlage adressiert ist, greift mittelbar zugleich in die Grundrechte dieser Grundrechtsträger ein[283]. Diese Zusammenhänge haben vor allem prozessuale Bedeutung. Wenn eine europäische Verfassungsbeschwerde geschaffen würde, könnte sie von jedem dieser Grundrechtsträger eingelegt werden. Daß nicht nur der Verleger beeinträchtigt ist, sondern weitere Klassen von Grundrechtsträgern, erhöht außerdem das Schutzniveau der Grundrechte[284].

4. Konflikte mit anderen Grundrechten

Die Presse steht nicht nur in einem Spannungsfeld zum Staat, sondern auch zu anderen Grundrechtsträgern. Daß die Grundrechtscharta viele dieser Personen schützt, etwa die Ehre als Schutzgut gesondert ausweist, darf aber nicht mißdeutet werden. Auch soweit aus den europäischen Grundrechten Schutzpflichten folgen[285], erweitern sich die Kompetenzen der Gemeinschaft nicht. Die meisten der potentiellen Grundrechtskonflikte werden aus diesem Grunde nicht aktuell. Die Zuständigkeit zu ihrer Bewältigung bleibt bei den Mitgliedstaaten.

Vorsorglich müssen die europäischen Grundrechte gleichwohl so ausgestaltet werden, daß ein gerechter Ausgleich der widerstreitenden Belange möglich wird, sollte die Gemeinschaft für einen Teilbereich zuständig sein oder werden. Praktisch kommt es darauf an, daß die Schranken der widerstreitenden Grundrechte so ausgestaltet sind, daß die Gemeinschaft sie grundsätzlich zu Gunsten der Presse beschränken darf.

Nach dem augenblicklichen Stand der Entwürfe ist das im Prinzip schon deshalb gewährleistet, weil Art. H.2 II 2 ja Grundrechtseingriffe zur Verfolgung jedes legitimen Ziels zuläßt. Der genaueren Überprüfung bedürfen aber die Schranken der Europäischen Menschenrechtskonvention, auf die Art. H.2 II 3 und Art. H.4 verweisen. Daß die Presse dort nirgends ausdrücklich erwähnt ist, ist

278 S. näher oben II 1

281 S. erneut kritisch *Engel* (FN **Error! Bookmark not defined.**) AfP 1994, 185-191.

282 S. o. 1 f).

283 Näher zum Verhältnis von Äußerungs- und Empfangsfreiheit *Engel* (FN 246) ZUM 1988, 511-526.

284 Vgl. zu diesem dogmatischen Konzept oben 1 i).

283 S.o. 1 k).

unschädlich. Es muß aber zumindest sichergestellt sein, daß überall ein Vorbehalt für die „Rechte anderer“ vorhanden ist. Darauf wäre auch zu achten, wenn sich der Grundrechtskonvent doch noch entschließt, selbst allen Grundrechten benannte Schranken zuzuweisen. Vorsorglich wollen wir im folgenden die vornehmlich in Betracht kommenden Rechte deshalb durchmustern.

Die eingangs geschilderten Konflikte aus dem **Pressearbeitsrecht**[286] könnten sich am Verhältnis der Pressefreiheit zu zwei anderen Grundrechten entzünden. Der menschenrechtliche Kern des Problems ist in der Gewissensfreiheit angesprochen, die Art. 14 des Präsidiumsentwurfs schützt[287]. Im übrigen wird der Tendenzschutz gegen die Arbeitnehmerrechte abzusichern sein, die als soziale Rechte geschützt sind. Nach dem Präsidiumsentwurf gehört dazu die Pflicht zur Unterrichtung und Anhörung der Arbeitnehmer bei Entscheidungen über die Arbeitsbedingungen und die Arbeitsumwelt, Art. III; das Verbot, aus der Zugehörigkeit zu beruflichen oder gewerkschaftlichen Organisationen persönliche oder berufliche Nachteile abzuleiten, Art. IV (1) 2; das Recht, „auf Ebene der Union nach Maßgabe der einzelstaatlichen Rechtsvorschriften und Gepflogenheiten Tarifverträge auszuhandeln und zu schließen“, Art. IV (2); das Recht, gegebenenfalls auch auf Ebene der Union kollektive Maßnahmen zu ergreifen, die das Streikrecht einschließen“, Art. IV (3); das Recht auf sichere und gesunde Arbeitsbedingungen, Art. VII; das Verbot, Arbeitnehmer ohne triftigen Grund zu entlassen, Art. IX[288]. Keines dieser Rechte enthält einen Vorbehalt für den Tendenzschutz. Ohne Tendenzschutz kann die Presse ihre demokratische Funktion als Intermediär zwischen Staat und Bürger aber nicht wirksam erfüllen[289]. Das Schutzniveau der Pressefreiheit ist deshalb hoch[290]. Über den Vorbehalt der Rechte anderer kann es auch den arbeitsrechtlichen Grundrechten entgegengehalten werden.

Auch der eingangs geschilderte Streit um das Medienprivileg im **Datenschutz** läßt sich als Grundrechtskonflikt formulieren. Der Präsidiumsentwurf sieht in Art. 15 ein eigenes Grundrecht auf Datenschutz vor[291]. Nach Art. 12 des Entwurfs hat jede Person überdies „Anspruch auf Achtung [...] ihrer Kommunikation“[292]. Die Straßburger Organe rechnen unter die Parallelvorschrift des Art. 8 I EMRK auch die informationelle Selbstbestimmung[293]. Diese Grundrechte müssen aber so ausgestaltet werden, daß die Presse imstande bleibt, ihre publizistische Aufgabe zu erfüllen.

Der Konflikt um die **Tabakwerbung** ist nicht nur ein Streit um Grundrechte, sondern auch um die Kompetenzen der Gemeinschaft. Eine allgemeine Kompetenz zum Schutz der Volksgesundheit hat der EG-Vertrag der Gemeinschaft nicht eingeräumt[294]. Daran ändert auch die Grundrechtscharta nichts[295]. Schon aus diesem Grunde kann aus dem Recht auf körperliche und psychische Unversehrtheit, das in Art. 3 I des Präsidiumsentwurfs enthalten ist[296], keine neue Rechtfertigung für das vollständige Verbot der Tabakwerbung abgeleitet werden.

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286 S. o. II 2 a).
287 Dok. 4149/00.
288 Alle Entwurfsfassungen aus Dok. 4192/00.
287 S. näher oben II 1.
290 S. o. 1 i).
291 Dok. 4137/00, s.auch den Textvorschlag der Abgeordneten *Kaufmann,* Dok. 4189/00.
292 Dok. 4149/00 COR 1.
293 Einzelheiten bei *Giegerich* (FN 80) RabelsZ 1999, 472 f.
294 S. im einzelnen Art. 152 EGV und näher *Simma/Weiler/Zökler* (FN 39).
295 S. o. 1 k).
296 Dok. 4149/00.

Bei den übrigen Konflikten um das **Werberecht** der Gemeinschaft[297], spielt das Kompetenzargument dagegen eine geringere Rolle. Die Gemeinschaft hat zwar nach Art. 153 EGV nur begrenzte Kompetenzen für den Verbraucherschutz. Die Angleichung des Verbraucherschutzrechts der Mitgliedstaaten dient regelmäßig aber zugleich der Verwirklichung des Binnenmarkts. Die einschlägigen Richtlinien sind deshalb typischerweise auch auf Art. 95[298] oder auf Art. 47 II EGV[299] gestützt. Bislang enthält der Präsidiumsentwurf allerdings kein ausdrückliches Recht auf Verbraucherschutz. Das Sekretariat der Konvention hat den Verbraucherschutz aber in die Liste der Fragen aufgenommen, über die noch zu reden sein wird[300].

Wenn es zu einem Grundrecht auf **Verbraucherschutz** kommen sollte, könnte die Gemeinschaft auch versuchen, dieses Grundrecht als Rechtfertigung für ihre Harmonisierung des Vertriebsrechts einzusetzen[301].

Sollte die Gemeinschaft beabsichtigen, gegen die **nationale Presseförderung** vorzugehen[302], wäre zunächst einmal die Kompetenz sorgfältig zu prüfen. Die Absicht, den Wettbewerb vor Verzerrungen zu schützen, läßt sich auch als Grundrechtskonflikt zwischen dem begünstigten Unternehmen und der Berufsfreiheit aus Art. II des Präsidiumsentwurfs der sozialen Rechte[303] und zu dem Gleichheitssatz formulieren[304]. Mit den gleichen Argumenten lassen sich auch Konflikte aus der Anwendung des europäischen Kartellrechts grundrechtlich reformulieren[305].

Falls sich die Gemeinschaft in der Zukunft entschließen sollte, die nationalen Normen über **Presseinhalte** zu harmonisieren[306], könnte sie versuchen, auch die neuen Grundrechte als Rechtfertigung zu bemühen. Eine genuine Kompetenz zu einer europäischen Pressepolitik steht ihr allerdings nicht zu. Sie könnte aber versuchen, wie schon beim Werberecht, auch dafür ihre Binnenmarktkompetenzen zu nutzen und sich zur Unterstützung auf Schutzpflichten aus der Grundrechtscharta zu berufen. Wir hatten dargelegt, warum das dogmatisch wie rechtspolitisch falsch wäre[307]. Wie sonst auch ist diese Untersuchung aber vom Vorsichtsprinzip geleitet.

Das Angebot an einschlägigen Grundrechten ist reichhaltig. Im Zentrum steht Art. 12 des Präsidiumsentwurfs:

> „Jede Person hat Anspruch auf Achtung ihres Privatlebens, ihrer Ehre, ihrer Wohnung sowie ihrer Kommunikation“[308].

Bemerkenswert ist vor allem der ausdrückliche Schutz der **Ehre**. Der Entwurf weicht insofern bewußt von Art. 8 I EMRK ab[309]. Überdies schützt Art. 1 des Präsidiumsentwurfs die Würde des

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297 S. o. II 2 e).
298 Ehemals Art. 100 a EGV.
299 Ehemals Art. 57 II EGV.
300 Bulletin Quotiden Europa No.7647 vom 03.02.2000.
301 S. o. II 2 f).
302 S. o. II G g).
303 S. o. 2 d).
304 S. o. 2 i).
305 S. o. II 2 a).
306 S. o. II 3 b).
305 S. o. 1 k).
308 Dok. 4149/00 COR 1.
309 Dok. 4149/00, S. 13.

Menschen[310]. Art. 3 I des Entwurfs schützt nicht nur die körperliche, sondern auch die „psychische Unversehrtheit". All das darf nicht als Hindernis für investigativen Journalismus mißdeutet werden.

Auch die **Gerichtsberichterstattung** könnte zur Grundrechtsfrage gemacht werden. Das war beim ursprünglichen Präsidiumsentwurf der Freiheitsrechte besonders deutlich. Sein Art. 5 sollte die Überschrift tragen: „Recht auf ein gerechtes Verfahren"[311]. Auch im augenblicklich letzten Entwurf heißt es in Art. 8 aber:

> „Jede Person hat Anspruch darauf, daß ihre Sache *in billiger Weise* öffentlich und innerhalb einer angemessenen Frist von einem unabhängigen und *unparteiischen*, auf Gesetz beruhenden Gericht verhandelt wird"[312].

Art. 9 des Entwurfs legt außerdem die Unschuldsvermutung und den Anspruch auf Achtung der Verteidigungsrechte fest[313].

Schließlich könnte die Gemeinschaft versuchen, eine Harmonisierung der **Darstellung von Minderheiten** auf Art. 19 des Präsidiumsentwurfs zu stützen. Er lautet:

> „(1) Diskriminierungen wegen des Geschlechts, der Rasse, der Hautfarbe oder der ethnischen oder sozialen Herkunft, der Sprache, der Religion oder der Weltanschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung des Alters oder der sexuellen Ausrichtung sind verboten.
> (2) Die Union wirkt darauf hin, Ungleichheiten zu beseitigen und die Gleichstellung von Männern und Frauen zu fördern"[314].

Würde der Presse all das zur Auflage gemacht, wäre ihr von Rechts wegen eine Art publizistisches Programm vorgegeben. Ihre publizistische Aufgabe könnte sie nicht mehr erfüllen.

Art. 15 I des Präsidiumsentwurfs schützt u.a. auch „die Freiheit [...], Informationen und Ideen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben"[315]. Gäbe es allein diesen Wortlaut, könnte man versuchen, daraus einen **Informationsanspruch gegen Private** abzuleiten. Zu diesen Privaten könnten dann auch die Verlage gehören. Diese Interpretation liegt jedoch fern, weil Art. 14 des Entwurfs einen expliziten Informationsanspruch enthält. Er richtet sich nur an die Gemeinschaftsorgane[316]. Vor allem läge ein allgemeiner Informationsanspruch gegen Private aber außerhalb des Kompetenzbereichs der Gemeinschaft. Er kann deshalb auch den Gemeinschaftsgrundrechten nicht entnommen werden[317].

Ein letztes Anliegen liegt wieder eindeutig außerhalb der Gemeinschaftskompetenzen[318]. Die geplanten Bürgerrechte können nicht als Begründung genutzt werden, um die Verfassungspolitik

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310 Dok. 4149/00.
311 Dok. 4123/1/00 REV 1.
312 Dok. 4149/00, Hervorhebungen nicht im Original.
313 Ebd.
314 Dok. 4137/00.
315 Dok. 4149/00.
316 Dok. 4137/00.
317 S. o. 1 k).
318 Vgl. oben 1 k).

der Mitgliedstaaten zu harmonisieren[319]. Das gilt auch für die Harmonisierung von Vorschriften über die **Medienkonzentration**[320].

5. Verhältnis von Europäischen Grundrechten und anderem Primärrecht

Wenn die Europäische Grundrechtscharta schließlich in den EG- oder EU-Vertrag aufgenommen wird, muß auch das dogmatische Verhältnis zwischen den Grundrechten und dem übrigen Primärrecht der Gemeinschaft bewältigt werden. Die Frage hat eine materiellrechtliche und eine prozessuale Seite. Die beiden wichtigsten materiellrechtlichen Probleme haben wir bereits behandelt: Die Grundrechte erweitern die Kompetenzen der Gemeinschaft nicht[321]. Wenn es bei der bisherigen Formulierung bleibt, können die Grundrechte für jedes „legitime Ziel“ beschränkt werden. Dazu würden dann auch die anderen Normen des Gemeinschaftsrechts gehören. Wir haben dargelegt, warum das nicht empfehlenswert ist[322]. Lösungsbedürftig ist aber auch das Verhältnis zwischen Grundfreiheiten und Grundrechten. Die Grundfreiheiten sind nach der Rechtsprechung des Europäischen Gerichtshofs unmittelbar anwendbar. Sie werden von den Marktbürgern bislang aber vor allem gegen Handelsbeschränkungen durch die Mitgliedstaaten eingesetzt. Das Schrifttum fordert seit langem, den Grundfreiheiten auch Maßstäbe für das Sekundärrecht der Gemeinschaft zu entnehmen[323]. Gelegentlich hat der Gerichtshof erkennen lassen, daß er dieses Anliegen teilt[324]. In diesem Lichte sind Grundrechte und Grundfreiheiten dann nicht gegenläufig, sondern ergänzen einander. Schärfer gewendet: der Gemeinschaftsgesetzgeber wird künftig beide Schranken beachten müssen. Ebenso verhält es sich zwischen Grundrechten und den ebenfalls unmittelbar anwendbaren Wettbewerbsregeln.

Prozessuale Probleme könnten eintreten, wenn allein für die Grundrechte eine unbeschränkte europäische Verfassungsbeschwerde geschaffen wird[325]. Wenn zu den formellen Grundrechtsschranken nämlich auch die Beachtung von objektivem Gemeinschaftsrecht gehört[326], dann wird die Verfassungsbeschwerde zum Instrument, auch die Begrenzungen beim Rechtsschutz wegen der Verletzung von Grundfreiheiten und von anderem objektiven Gemeinschaftsrecht zu überwinden. Die Grundrechte können allerdings immer nur gegen Hoheitshandeln der Gemeinschaft eingesetzt werden[327]. Der geschilderte dogmatische Umweg führt also nur zur Ausweitung des Rechtsschutzes gegen den Gemeinschaftsgesetzgeber und gegen den Vollzug des Gemeinschaftsrechts durch die Mitgliedstaaten. Eine Beschwerde an den EuGH wegen der Verletzung der Grundfreiheiten durch das autonome Handeln der Mitgliedstaaten wird dadurch nicht erschlossen.

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319 S. o. II 3 d).
320 S. o. II 2 b).
321 S. o. 1 k).
322 S. o. 1 a) und 4.
323 Programmatisch *Ernst-Joachim Mestmäcker:* Auf dem Wege zu einer Ordnungspolitik für Europa, in: FS von der Groeben 1987, 9-49.
324 EuGH 7.2.1985, Rs. 240/83, Slg. 1985, 531, R 9 - Altöl.
325 S. bereits oben III 2 und IV 1 c).
326 Dazu oben 1 g).
327 S. o. 1 c).

6. Verhältnis zu anderen Grundrechtsordnungen

Die Europäische Grundrechtscharta wird nicht isoliert stehen. Im Verhältnis zu anderen Grundrechtsordnungen stellen sich teils dogmatische, teils justizpolitische Fragen. Die erste Frage hat der verfassungsgebende europäische Gesetzgeber in der Hand. Auch bislang gab es ja schon Grundrechte des Gemeinschaftsrechts. Nach Art. 6 II EUV sind sie aus der Europäischen Menschenrechtskonvention und den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten zu gewinnen. Es liegt nahe, diese Vorschrift aufzuheben, wenn die europäische Grundrechtscharta in den EG- oder EU-Vertrag aufgenommen wird. Die Gemeinschaft würde sonst für die Grundrechte „a lawyers paradise" schaffen.

Wir haben mehrfach betont, daß die Grundrechtscharta Grundrechte ohne Monopol enthalten wird[328]. Sie gelten nur für solches hoheitliche Handeln, das der Gemeinschaft zugerechnet werden kann. Das ist nicht etwa ein rechtspolitischer Mangel, der durch eineZuständigkeit der Gemeinschaft für die Menschenrechtspolitik zu beheben wäre. Vielmehr ist es nur auf diese Weise möglich, einen wirksamen Grundrechtsschutz zu gewährleisten, ohne von Supranationalität zu einem europäischen Bundesstaat überzugehen. Deshalb brauchen wir auch nicht näher zu untersuchen, wie sich die Grundrechtscharta gegenüber konkurrierenden Grundrechtsordnungen behaupten oder wie sie im Konzert mit ihnen gemeinsame Anliegen durchsetzen könnte[329]. Denn die Gemeinschaftsgrundrechte sind nur ein Kontrollmaßstab für hoheitliches Handeln, das der Gemeinschaft zugerechnet werden kann[330].

Gleichwohl wird es einen Überschneidungsbereich zwischen der Europäischen Grundrechtscharta, den Grundrechten der nationalen Verfassungen und der Europäischen Menschenrechtskonvention geben. Er setzt sich aus zwei Elementen zusammen. Wenn die Mitgliedstaaten Gemeinschaftsrecht vollziehen oder Gesetzgebungsaufträge des Gemeinschaftsrechts erfüllen, ist das in den dargelegten Grenzen der Gemeinschaft zuzurechnen[331]. Zugleich nehmen die Mitgliedstaaten dabei aber auch eigene Hoheitsgewalt in Anspruch. Deshalb unterliegt dieses Handeln auch den Grundrechten der nationalen Verfassungen und der Europäischen Menschenrechtskonvention. Im Maastricht-Urteil ist das Bundesverfassungsgericht bekanntlich noch weitergegangen. Es nimmt zumindest subsidiär auch die Kontrolle genuiner europäischer Hoheitsgewalt an den deutschen Grundrechten in Anspruch[332]. In ähnlicher Weise unterwirft auch der Menschenrechtsgerichtshof die Öffnung des Rechts der Mitgliedstaaten für die Europäische Hoheitsgewalt seiner Kontrolle[333].

Soweit ein und derselbe Hoheitsakt hiernach mehreren Grundrechtsordnungen unterworfen ist, muß auch das dogmatische Verhältnis dieser Ordnungen zueinander bestimmt werden. Im Kernbereich des Grundrechtsschutzes, also bei der Abwehrfunktion der Grundrechte, ist das zumindest theoretisch nicht schwierig. Die Kontrollmaßstäbe lassen sich verdoppeln. Das Hoheitshandeln muß allen Grundrechtsordnungen zugleich genügen. Daß solch eine Doppelkontrolle auch praktisch funktionieren kann, belegt das Kartellverbot. Art. 81 EGV und die Kartellverbote der nationalen

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328 S. insbesondere oben III 4.

329 Ein Überblick über die Möglichkeiten findet sich bei *Christoph Engel*: The Internet and the Nation State, in: *ders./Kenneth H. Keller (Eds.):* Understanding the Impact of Global Networks on Local Social, Political and Cultural Values (Law and Economics of International Telecommunications 42) Baden-Baden 2000, 201-261 (245-258).

330 S. o. 1 c).

331 S. o. 1 c).

332 BVerfGE 89, 155.

333 S. näher oben 1 b).

Kartellrechte werden seit jeher nebeneinander angewendet[334]. Vor allem aus der Sicht des Gemeinschaftsrechts kann das allerdings zu unerwünschten Ergebnissen führen. Obwohl es mit den Gemeinschaftsgrundrechten vereinbar ist, kann der Gemeinschaft zurechenbares hoheitliches Handeln dann nämlich wirkungslos bleiben. Noch schwieriger wird es, wenn den Grundrechtsordnungen Schutzpflichten entnommen werden. Dann kann ein und derselbe Hoheitsträger einander widersprechenden Anforderungen ausgesetzt sein. Dies wird allerdings aus den bereits dargelegten Gründen nicht allzu häufig der Fall sein. Denn auch die Schutzpflichten aus Gemeinschaftsgrundrechten gelten ja nur für hoheitliches Handeln, das der Gemeinschaft zuzurechnen ist[335]. Soweit mehrere Grundrechtsordnungen nebeneinander anwendbar sind, erhalten die Grundrechtsträger eine Chance zum Kampf um das Forum. Sie können in strategischer Absicht versuchen, den Konflikt in ein Forum zu verlagern, von dessen Grundrechten sie sich mehr Chancen versprechen.

Tatsächlich wird der Einfluß der nationalen Grundrechte und vor allem der Europäischen Menschenrechtskonvention auf die Dogmatik der Europäischen Grundrechtscharta jedoch sehr viel größer sein, als die gerade angestellten dogmatischen Überlegungen vermuten lassen. Denn die Entwicklung einer neuen Grundrechtsdogmatik braucht viele Jahrzehnte. Der Europäische Gerichtshof wäre nicht klug beraten, wenn er damit bei der Europäischen Grundrechtscharta noch einmal vollständig von vorne begänne. Überdies lehnt sich der Entwurf des Präsidiums ja vielfach an den Wortlaut der Europäischen Menschenrechtskonvention an. Art. H.4 bindet die Europäische Gemeinschaft sogar an die Auslegung, die der Straßburger Menschenrechtsgerichtshof den parallelen Garantien der Europäischen Menschenrechtskonvention gibt. Ist der Gerichtshof wirklich gewillt, mit dem europäischen Grundrechtsschutz ernst zu machen, wird überdies von den entwickelten Grundrechtsordnungen der Mitgliedstaaten ein Sog ausgehen. Er ist zugleich das wirksamste Instrument, um die Kerngedanken der nationalen Grundrechtsdoktrin auch ins europäische Recht einzupflanzen.

V. Offene Flanken

Zwei Flanken sind noch offen. Dogmatisch ist auch die rechtsfortbildende Tätigkeit des Europäischen Gerichtshofs ein Hoheitsakt der Gemeinschaft[336]. Wie soll man aber erreichen, daß sich der Europäische Gerichtshof selbst durch die Grundrechte beschränkt? Außerdem haben wir deutlich gemacht, das europäische Grundrechte die Opportunity Structure zwischen Gemeinschaft und Mitgliedstaaten, im Verhältnis der Mitgliedstaaten zueinander, im Verhältnis der Organe der Gemeinschaft zueinander und für politische Akteure verändern[337]. Wie sollen die Väter der Grundrechtscharta verhindern, daß dieser Preis für einen wirksamen Grundrechtsschutz schließlich zu hoch ist?

Allein durch die Dogmatik der Europäischen Grundrechte lassen sich diese Flanken schlecht schließen. Denn zur Anwendung und Fortentwicklung dieser Dogmatik ist ja gerade der Europäische Gerichtshof berufen, der sich traditionell als Motor der Integration definiert hat.

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334 Näher *Ulrich Immenga/Ernst-Joachim Mestmäcker*: GWB Kommentar² 1992, Einleitung, R 32-58.

335 S. o. 1 k).

336 S. o. IV 1 c).

337 S. o. III 2.

Auf das Kompetenzproblem hat das Präsidium des Konvents bereits mit dem erwähnten Art. H.1 II reagiert. Er soll ausdrücklich darauf hinweisen, daß die Charta den Zuständigkeitsbereich der Gemeinschaft nicht erweitert[338]. Wenn die Charta in die europäischen Verträge aufgenommen wird, könnte in gleicher Weise klargestellt werden, daß die Grundrechte auch für die rechtsfortbildende Tätigkeit des Europäischen Gerichtshofs gelten. Man sollte die Wirkung solcher Klauseln nicht unterschätzen. Würde Justizpolitik allein von Interessen bestimmt, wäre ihr Wert allerdings gering. Auch die Justizpolitik wird zugleich aber von Ideen bestimmt[339]. Auch das dogmatisch ähnlich hilflose Subsidiaritätsprinzip hat die Rechtsprechung des Europäischen Gerichtshofs ja wirklich verändert.

Gleichwohl macht es Sinn, ergänzend auch über die Sicherung der offenen Flanken durch Institutionen nachzudenken. An drei Elementen kann man ansetzen: am Initiativrecht, an der Zuständigkeit zur Anwendung der Grundrechtscharta sowie an der Anwendung konkurrierender Grundrechtsordnungen.

Wenn sich der Europäische Gerichtshof als Motor der Integration betätigt, ist er funktionell ein politisches, kein Justizorgan. Als politisches Organ ist er relativ schwach, weil er warten muß, bis ein geeigneter Fall zu ihm getragen wird. Je enger die Initiative ausgestaltet ist, desto geringer sind die Chancen für einen rechtspolitisch aktiven Gerichtshof. Trotzdem macht die restriktive Ausgestaltung der Grundrechtsinitiative wenig Sinn. Grundrechte ohne Befugnis zur Individualbeschwerde befrieden nicht und verschaffen der Gemeinschaft kaum zusätzliche Legitimität[340]. Eine Beschränkung des Initiativrechts für die Prüfung an anderen Maßstäben steht ohnehin nicht zur Diskussion. Daß ein weites Initiativrecht trotzdem beschränkend wirken kann, erschließt sich erst aus einer weiteren Voraussetzung für politisches Handeln des Europäischen Gerichtshofs. Er kann politische Macht nur in den Formen des Rechts ausüben. Er muß eine gemeinschaftsrechtliche Norm in einer Weise auslegen, die seinen politischen Absichten dient, und er muß jede Entscheidung kunstgerecht begründen, auch wenn sie zu seinem politischen Ziel nichts beiträgt. Schließlich müssen die Maßstäbe konsistent sein, die er in all seinen Entscheidungen anwendet. Grundrechtsbeschwerden können den Gerichtshof deshalb dazu zwingen, durch eine immer präzisere Dogmatik die eigenen Freiräume für politisches Handeln immer stärker zu beschränken.

Sobald die Gemeinschaftsbürger die Grundrechtsbeschwerde angenommen haben, wird der Europäische Gerichtshof allerdings ein offenes oder verstecktes Annahmeverfahren entwickeln müssen. Anders kann er nach den Erfahrungen der übrigen Grundrechtsordnungen seine eigene Arbeitsfähigkeit nicht bewahren. Das erlaubt ihm dann auch, solche Grundrechtsbeschwerden auszusondern, die ihn für die Zukunft allzu sehr beschränken würden. Aus diesem Grunde empfiehlt es sich, auch den Mitgliedstaaten das Initiativrecht wegen Grundrechtsverletzungen zu geben, und die Vorlagebefugnis nationaler Gerichte auch auf Grundrechtsfragen zu erstrecken.

Eine sehr viel radikalere Lösung bestünde darin, die Anwendung der Europäischen Grundrechte nicht dem Europäischen Gerichtshof zuzuweisen, sondern einem neuen Verfassungsgericht der Gemeinschaft. Dieses Gericht könnte dann auch zur Kontrolle von Entscheidungen des Europäischen Gerichtshofs am Maßstab der Europäischen Grundrechte berufen werden. Da es nur die Grundrechte als Entscheidungsmaßstab hat, wäre wahrscheinlich, daß es sich ein stärker rechtsstaatliches, nicht so sehr ein integrationspolitisches Selbstverständnis zulegt. Ob alle Mitgliedstaaten bereit wären, solch einer Änderung der Europäischen Verträge zuzustimmen,

338 Dok. 4123/1/00 REV 1, im Wortlaut oben FN 16.
339 S. erneut *Yee* (FN 160).
340 Vgl. oben III 5 d).

erscheint allerdings fraglich. Dogmatisch stünden die Grundrechte dann zwar nach wie vor auf ein und derselben Stufe der Normenhierarchie wie das übrige primäre Gemeinschaftsrecht. Durch den gespaltenen Gerichtsweg entstünde nach außen hin aber der Eindruck, daß die Gemeinschaft die Grundrechte dem übrigen Primärrecht überordnet. Der Europäische Gerichtshof und das Verfassungsgericht würden in einen Wettbewerb gedrängt, der sich vor allem an der Verzahnung der Grundrechte mit dem übrigen Primärrecht entzünden würde.

Eine begrenztere disziplinierende Wirkung könnte auch von einem Wettbewerb der Interpreten um die richtige Auslegung der Europäischen Grundrechtscharta ausgehen. Er ist schon deshalb schwer zu vermeiden, weil das Gemeinschaftsrecht ja im Normalfall von den Mitgliedstaaten vollzogen wird. Der Adressat kann den Vollzugsakt mit der Begründung vor die Gerichte der Mitgliedstaaten bringen, die vollzogene Norm verstoße gegen die Gemeinschaftsgrundrechte. Nach der Rechtsprechung des Gerichtshofs darf ein nationales Gericht sekundäres Gemeinschaftsrecht zwar nicht selbst für ungültig erklären, sondern muß die Frage dem Gerichtshof zur Entscheidung vorlegen[341]. Das könnte bei einem behaupteten Grundrechtsverstoß nicht anders sein. Zumindest erhalten die Nationalgerichte auf diese Art aber eine eigenständige Prüfungszuständigkeit. Schließlich stehen die nationalen Verfassungsgerichte und der Europäische Gerichtshof für Menschenrechte nach wie vor im Hintergrund in Reserve. Sollte sich herausstellen, daß der Europäische Gerichtshof die Grundrechte nicht ernst nimmt oder für integrationspolitische Ziele mißbraucht, könnte das Bundesverfassungsgericht mit den Grundsätzen des Maastricht-Urteils intervenieren[342]. Ebenso könnte der Menschenrechtsgerichtshof gegen einen Mitgliedstaat entscheiden, weil er Hoheitsgewalt an die Europäische Gemeinschaft übertragen hat, ohne für einen ausreichenden Schutz der Menschenrechte Sorge zu tragen[343].

VI. Schlußfolgerungen

1. Grundrechte sind in ihrem Kern Abwehrrechte gegen hoheitliches Handeln. Das gilt auch und gerade für die Pressefreiheit. Die schlechthin konstitutierende Bedeutung der Presse für ein demokratisches Gemeinwesen führt nicht etwa zu einem anderen Verständnis dieses Grundrechts, sondern zu einer Verstärkung des Freiheitsrechts. Denn Freiheit ist die Voraussetzung dafür, daß die Presse ihre demokratische Aufgabe wahrnehmen kann.

2. Die Europäische Gemeinschaft hat bislang keine eigene Pressepolitik entwickelt. Eine genuine Pressezuständigkeit fehlt der Gemeinschaft. Zur Nutzung ihrer Binnenmarktkompetenzen bestand kein Anlaß, weil der Pressebinnenmarkt nicht nennenswert behindert ist. Bedarf nach einem Grundrechtschutz gegen den Gemeinschaftsgesetzgeber besteht deshalb aktuell vor allem dann, wenn die Gemeinschaft allgemeine Politiken auch auf die Presse anwendet, ohne ausreichend auf die Besonderheiten dieses Wirtschaftszweigs Rücksicht zu nehmen. Der Schutzbedarf der Presse könnte sich in der Zukunft jedoch erhöhen. Daß Presseinhalte auch elektronisch dargeboten werden, könnte die Gemeinschaft zum Vorwand nehmen, Elemente aus der Regulierung anderer Medien, besonders des Rundfunks, auf die Presse auszudehnen. Jedenfalls sollte die Europäische Grundrechtscharta so ausgestaltet werden, daß sie auch gegen einen sehr viel aktiveren europäischen Gesetzgeber Schutz böte; zugleich ist zu verhindern, daß der Gesetzgeber den weitergehenden Schutz als Kompetenzausweitung mißdeutet.

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341 EuGH 22.10.1987, Rs. 314/85, Slg. 1987, 4199, 4232 - Foto-Frost.

342 S. erneut BVerfGE 89, 155.

343 Näher oben IV 1 b).

3. Maß und Qualität des Grundrechtsschutzes ergibt sich weniger aus dem Text der Grundrechtscharta als aus der Dogmatik. Sie läßt sich nur in sehr engen Grenzen im vorhinein im Text fixieren. Die zentrale Aufgabe dieser Untersuchung bestand darin, aus den vorliegenden Entwürfen eine Dogmatik zu entwickeln, die dem Schutzbedarf der Presse gerecht wird. Dieses Unterfangen war sehr weitgehend erfolgreich. Nur geringe Textanpassungen sind erforderlich oder zumindest wünschenswert.

4. Bislang beschränkt sich der Entwurf auf den allgemeinen Schutz der Meinungsäußerungsfreiheit. Rechtstechnisch mag das genügen, den besonderen Schutzbedarf der Presse zu erfüllen und den Schutzstandard der Grundrechtstradition der Mitgliedstaaten auch gegenüber der Europäischen Gemeinschaft zu sichern. Eine ausdrückliche Garantie der Pressefreiheit würde aber jeden Zweifel hieran ausräumen. Sie wird unverzichtbar, wenn sich der Rundfunk mit dem Wunsch nach einer separaten Garantie durchsetzt. Erwägenswert ist es, Abgrenzungssschwierigkeiten durch eine allgemeine Medienfreiheit vorzubeugen.

5. Der Entwurf sieht ein recht kompliziertes System der Grundrechtsschranken vor. Wie jedes Grundrecht der Charta unterläge die Pressefreiheit zunächst der allgemeinen, unbenannten Schranke aus Art. H.2 II 2. Weil sie Teil der in Art. 10 EMRK garantierten Meinungsäußerungsfreiheit ist, wären nach Art. H.2 II 3 zusätzlich die benannten Schranken aus Art. 10 II EMRK zu beachten. Schließlich darf der Grundrechtsschutz nach Art. H.4 nicht hinter dem Schutzstandard von Art. 10 EMRK zurückbleiben. Die Auslegung ist zu beachten, die der Straßburger Menschenrechtsgerichtshof dieser Norm gegeben hat. Bei richtiger Handhabung führt dieses System der Schranken nicht zu Unzuträglichkeiten. Die Grundrechtsanwendung würde aber sehr vereinfacht, wenn die Pressefreiheit unmittelbar die benannten Schranken aus Art. 10 II EMRK erhielte.

   Auch empfiehlt sich die Klarstellung, daß jede Berührung dieses Grundrechts der Rechtfertigung durch die Grundrechtsschranken bedarf. Damit würde verhindert, daß ein enges Konzept des Grundrechtseingriffs dazu eingesetzt wird, den Verhältnismäßigkeitsgrundsatz zu umgehen.

6. Der Schutz der Verlage durch andere Grundrechte hat eine empfindliche Lücke: die Berufsfreiheit ist nur als soziales Grundrecht geschützt. Sie sollte zu einem echten Freiheitsrecht gemacht werden. Außerdem wäre es ratsam, das verwirrende System der Gleichheitsrechte zu vereinfachen.

7. Die Presse steht nicht nur in einem Spannungsfeld zum Staat, sondern auch zu anderen Grundrechtsträgern. Daß die Grundrechtscharta viele dieser Personen schützt, etwa die Ehre als Schutzgut gesondert ausweist, darf aber nicht mißdeutet werden. Auch soweit aus den europäischen Grundrechten Schutzpflichten folgen, erweitern sich die Kompetenzen der Gemeinschaft nicht. Die meisten der potentiellen Grundrechtskonflikte werden aus diesem Grunde nicht aktuell. Die Zuständigkeit zu ihrer Bewältigung bleibt bei den Mitgliedstaaten.

   Vorsorglich müssen die europäischen Grundrechte gleichwohl so ausgestaltet werden, daß ein gerechter Ausgleich der widerstreitenden Belange möglich wird, sollte die Gemeinschaft für einen Teilbereich zuständig sein oder werden. Praktisch kommt es vor allem darauf an, wie die Schranken dieser Grundrechte ausgestaltet werden. Sie müssen dem Gemeinschaftsgesetzgeber gestatten, diese Grundrechte zu Gunsten der berechtigten Anliegen der Presse zu beschränken.

Nach dem augenblicklichen Stand der Entwürfe ist das im Prinzip schon deshalb gewährleistet, weil Art. H.2 II 2 ja Grundrechtseingriffe zur Verfolgung jedes legitimen Ziels zuläßt. Der genaueren Überprüfung bedürfen aber die Schranken der Europäischen Menschenrechtskonvention, auf die Art. H.2 II 3 und Art. H.4 verweisen. Daß die Presse dort nirgends ausdrücklich erwähnt ist, ist unschädlich. Es muß aber zumindest sichergestellt sein, daß überall ein Vorbehalt für die „Rechte anderer" vorhanden ist. Darauf wäre auch zu achten, wenn sich der Grundrechtskonvent doch noch entschließt, selbst allen Grundrechten benannte Schranken zuzuweisen.

8. Europäische Grundrechte werden das Verhältnis von Gemeinschaft und Mitgliedstaaten verändern. Nach aller Erfahrung mit Grundrechten in Bundesstaaten werden sie einen unitarischen Effekt haben. Außerdem gewinnt die Gemeinschaft erheblich an Legitimität und damit an politischer Handlungsfreiheit. Grundrechte werden auch das Verhältnis der Organe innerhalb der Gemeinschaft verschieben. Sie werden tendenziell den Rat als das Verhandlungsorgan der Mitgliedstaaten schwächen, die Kommission dagegen stärken. Den Gerichtshof werden sie zwingen, sich stärker als Kontrollorgan und weniger als politisches Organ zu begreifen. Der unitarische Effekt liegt eindeutig nicht im Interesse der Presse. Die beiden anderen Effekte sind ambivalent.

   Mit den Mitteln des Rechts lassen sich diese Effekte nur bedingt steuern. Art. H.1 II will ausdrücklich klarstellen, daß die Grundrechtscharta die Kompetenzen der Gemeinschaft nicht erweitert. In gleicher Weise sollte klargestellt werden, daß die Grundrechte auch der rechtsfortbildenden Tätigkeit des Europäischen Gerichtshofs Grenzen setzen.

   Wenn aus der Charta justitiable Rechte werden, sollte das Initiativrecht natürlich zuerst bei den Grundrechtsträgern liegen, es sollte also eine europäische Verfassungsbeschwerde geben. Die Flut der Beschwerden könnte das zuständige Gericht jedoch nur mit einem offenen oder versteckten Annahmeverfahren bewältigen. Damit daraus keine Schutzlücken entstehen, sollte parallel auch eine Nichtigkeitsklage der Mitgliedstaaten möglich sein. Auch sollten nationale Gerichte die Befugnis zur Vorlage erhalten.

   Der Grundrechtsschutz gegen den Europäischen Gerichtshof wäre am wirksamsten, wenn die Anwendung der europäischen Grundrechte einem eigenen, dem Gerichtshof gegenüber autonomen Europäischem Verfassungsgericht anvertraut würde. Wenn das politisch nicht durchzusetzen ist, braucht man weiterhin das Drohpotential der nationalen Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte. Sie können auch am ehesten verhindern, daß der unitarische Effekt ein zu hohes Gewicht erhält.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

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Brüssel, den 7. Juni 2000

CHARTE 4347/00

CONTRIB 211

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend die Position von Verbandes Privater Rundfunk und Telekommunikation e.V. (VPRT) [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Position des Verbandes Privater Rundfunk und Telekommunikation e. V. (VPRT)

zum Entwurf eines Europäischen Grundrechts der Meinungs- und Informationsfreiheit in der Europäischen Grundrechtscharta

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Der Verband Privater Rundfunk und Telekommunikation e. V. (VPRT) vertritt die Interessen von rund 170 Unternehmen aus den Bereichen Fernsehen, Hörfunk, Multimedia und Telekommunikation. Die Festschreibung eines Rechts auf Meinungs- und Informationsfreiheit innerhalb der Europäischen Grundrechtscharta ist für die privaten Rundfunkveranstalter in Deutschland von besonderer Bedeutung. Der VPRT bedankt sich daher für die Möglichkeit der Stellungnahme zum Entwurf eines Europäischen Grundrechts der Meinungs- und Informationsfreiheit in der Europäischen Grundrechtscharta.

I. Allgemeine Anmerkungen

Nach Ansicht der Mitgliedsunternehmen des VPRT ist die Meinungs- und Informationsfreiheit für freiheitlich-demokratische Staaten schlechthin konstituierend. So sichern neben Artikel 5 des Grundgesetzes der Bundesrepublik Deutschland auch Artikel 10 der Europäischen Menschenrechtskonvention (EMRK) und Artikel 19 des Internationalen Pakts über bürgerliche und politische Rechte der Vereinten Nationen (IPbürgR) die Meinungs- und Informationsfreiheit in jeweils unterschiedlicher Ausgestaltung ab. Auch der aktuelle Vorschlag des Grundrechtskonvents (Convent 28 vom 05. Mai 2000) sieht unter Artikel 15 ein solches Grundrecht auf Meinungs- und Informationsfreiheit vor.

> Textvorschlag des Konvents (Convent 28 vom 05. Mai 2000):
>
> *Jede Person hat das Recht auf freie Meinungsäußerung. Dieses Recht schließt die Meinungsfreiheit und die Freiheit ein, Informationen und Ideen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben.*

Der Begründung des Konvents kann entnommen werden, dass mit der Abfassung dieses Artikels die Übernahme der Grundsätze des Artikels 10 EMRK unter Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) beabsichtigt sind.

Wir erlauben uns, an dieser Stelle den Textvorschlag des VPRT, der den Vorschlag des Konvents aufgreift und auf diesem aufbaut, gegenüberzustellen. Die unterstrichenen Passagen kennzeichnen die aus unserer Sicht erforderlichen textlichen Erweiterungen bzw. Veränderungen.

Textvorschlag des VPRT:

(1) Jeder hat das Recht auf freie Meinungsäußerung. Dieses Recht schließt die Meinungsfreiheit und die Freiheit ein, Informationen und Ideen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben. Die Medien sind frei.

(2) In diese Rechte darf nur eingegriffen werden, soweit es zum Schutz anderer Rechtsgüter unerlässlich ist.

(3) Eine Zensur findet nicht statt.

1.
Die Mitglieder des VPRT unterstützen den Ansatz des Konvents, das in der Europäischen Grundrechtscharta vorgesehene Recht auf Meinungs- und Informationsfreiheit in Anlehnung an den Wortlaut des Artikels 10 Absatz 1 EMRK subjektiv-rechtlich auszugestalten.

Nach unserem Verständnis ist das Recht der Meinungs- und Informationsfreiheit ein klassisches Freiheitsrecht, dass den privaten Medien ebenso wie anderen Trägern des Grundrechts als eigenes, subjektives Recht zuzuordnen ist. Bereits der Abfassung des Artikels 10 Absatz 1 EMRK liegt in seiner subjektiv-rechtlichen Ausgestaltung ein modernes Verständnis der Meinungs- und Informationsfreiheit zugrunde, dass den Grundrechtsträgern vor dem Hintergrund aktueller technologischer Gegebenheiten in ausreichendem Maße Entwicklungsspielraum zubilligt und damit zur kulturellen Vielfaltssicherung und zur Stärkung des Binnenmarktes auf europäischer Ebene beiträgt. Aus der Sicht der privaten Rundfunkveranstalter verdeutlichen insbesondere die Entwicklung der digitalen Übertragungstechnik und die erweiterten Nutzungsmöglichkeiten des Internets die Notwendigkeit, dieses Verständnis der Meinungs- und Informationsfreiheit als klassisches, subjektives Freiheitsrecht innerhalb der Europäischen Grundrechtscharta fortzusetzen. Auch der Europäische Gerichtshof, der schon in der Rechtssache 4/73 festgestellt hat, dass die EMRK für das Gemeinschaftsrecht zumindest eine „orientierende Funktion“ besitzt (EuGH Slg. 1974, 491, 507), hat den Grundsatz der freien Meinungsäußerung mehrfach bestätigt und geht unter Berücksichtigung der Rechtsprechung des EGMR von einem subjektiven Verständnis dieses Freiheitsrechts aus (erstmals Rs. C-260/89, EuGH Slg. 1991, I-5485). Die Festschreibung eines Ausgestaltungsvorbehalts, wie ihn beispielsweise Artikel 5 Absatz 1 Satz 2 des Grundgesetzes der Bundesrepublik auf der Grundlage einer objektiv-rechtlichen textlichen Abfassung vorsieht, ist veraltet – eine Sondersituation des Rundfunks, die einen solchen Ausgestaltungsvorbehalt rechfertigen würde, ist schon lange nicht mehr gegeben: Bereits heute bringen die privaten Rundfunkanbieter in Deutschland und europaweit eine Vielzahl qualitativ hochwertiger Angebote hervor. Durch die Digitalisierung der Übertragungswege und der daraus resultierenden Schaffung neuer Übertragungskapazitäten wird diese Angebotsvielfalt kontinuierlich zunehmen. Diesem Umstand trägt der Konvent durch seine zeitgemäße Haltung, das Grundrecht auf Meinungs- und

Informationsfreiheit im Einklang mit den bereits existenten europarechtlichen Regelungen und deren Interpretation subjektiv-rechtlich auszugestalten, in jeder Hinsicht Rechnung.

Zu den Einzelheiten des Absatzes 1 und insbesondere zur Medienfreiheit vgl. unter II., 1. .

2.
Der Konvent hat in seinem Vorschlag vom 05. Mai 2000 zur Abfassung des hier diskutierten Artikels 15 davon abgesehen, die Schrankenregelung des Artikels 10 der EMRK zu übernehmen. Die Beschränkungen für die in der Charta vorgesehenen Freiheitsgrundrechte sollen vielmehr in einer allgemein gehaltenen, horizontalen Bestimmung niedergelegt werden, die ihrerseits jedoch wieder unmittelbar auf die Schrankenregelungen innerhalb der EMRK und damit auch auf die des Artikels 10 verweist (siehe Convent 27 vom 18. April 2000, Artikel H. 2).

Der VPRT möchte im Hinblick auf den Vorschlag des Konvents zu Artikel H. 2 im Zusammenhang mit dem Recht auf Meinungs- und Informationsfreiheit anregen, hier von einer allgemeinen, horizontalen Schrankenbestimmung mit einem Verweis auf die EMRK Abstand zu nehmen und sich statt dessen aus Gründen der gesetzgeberischen Präzision auf eine Regelung zu verständigen, welche die für die Meinungs- und Informationsfreiheit wesentlichen Schranken in einer in erheblichem Maße vereinfachten und dennoch umfassenden Weise normiert. Hierzu verweist der VPRT auf seinen Textvorschlag zu Absatz 2 des Rechts auf Meinungs- und Informationsfreiheit, der wie folgt lautet: *„In diese Rechte darf nur eingegriffen werden, soweit es zum Schutz anderer Rechtsgüter unerlässlich ist“*.

Eingangs möchte der VPRT klarstellen, dass seine Mitglieder selbstverständlich davon ausgehen, dass ein Eingriff in das Grundrecht auf Meinungs- und Informationsfreiheit wie bei allen Grundrechten nur dann zulässig sein kann, wenn dies auf der Grundlage eines Gesetzes erfolgt. Dieser Grundsatz entspricht dem bundesdeutschen Grundsatz des Vorbehalts des Gesetzes und ist im vorliegenden Fall zum Schutz des Grundrechts der Meinungs- und Informationsfreiheit unerlässlich. Der VPRT möchte anregen, diesen Grundsatz innerhalb der allgemeinen Regelungen der Europäischen Grundrechtscharta festzuschreiben. Unter dem Begriff des „Gesetzes“ ist hierbei eine legislative Handlungsform zu verstehen, die sich aus den allgemeinen Regelungen der Grundrechtscharta ergibt.

Des weiteren möchte der VPRT darauf hinweisen, dass der seinem Textvorschlag zu entnehmende Verzicht auf die Festschreibung des Kriteriums „zum Schutz anderer, höherrangiger Rechtsgüter“ rein sprachlicher, nicht jedoch inhaltlicher Natur ist. Keinesfalls soll hierdurch die Eingriffsschwelle in das Grundrecht auf Meinungs- und Informationsfreiheit herabgesenkt werden. Der hervorgehobene Bedeutungsgehalt dieses Grundrechts muss vielmehr zwingend im Rahmen einer konkreten Einzelfallabwägung zwischen den in Absatz 1 niedergelegten Rechten und dem jeweiligen anderen Rechtsgut, also innerhalb der Verhältnismäßigkeitsprüfung berücksichtigt werden. Der VPRT trägt durch diesen Ansatz dem Umstand Rechnung, dass dem Verhältnismäßigkeitsgrundsatz im Gemeinschaftsrecht überragende Bedeutung zukommt (vgl. z. B. für Maßnahmen der Gemeinschaft gegenüber den Mitgliedstaaten die Festschreibung in Artikel 5 Absatz 3 n. F. EGV). Eine Maßnahme muss also zur Erreichung des verfolgten Ziels geeignet, erforderlich und angemessen sein. Bei der Prüfung der Verhältnismäßigkeit legt der EuGH regelmäßig das Schwergewicht auf die Erforderlichkeit im Sinne des geringstmöglichen Eingriffs. Es ist also davon auszugehen, dass der Bewertung, ob ein anderes Rechtsgut gegenüber dem Grundrecht auf Meinungs- und Informationsfreiheit als höherrangig anzusehen ist, im Rahmen der Verhältnismäßigkeitsprüfung in umfassender Weise Rechnung getragen wird. Ein Eingriff in das Grundrecht ist demnach nur in sehr engen Grenzen gerechtfertigt.

Zudem möchten die Mitglieder des VPRT klarstellen, dass grundsätzlich keine Beschränkung des Rechts auf Meinungs- und Informationsfreiheit wegen eines bestimmten Meinungsinhalts erfolgen darf. Von diesem Grundsatz können insbesondere dann Ausnahmen erforderlich sein, wenn Bestimmungen zum Schutz der Jugend und zum Schutz der persönlichen Ehre betroffen sind. Auch hier ist jedoch zu berücksichtigen, dass etwa gesetzliche Bestimmungen zum Schutz der Jugend die grundlegende Bedeutung der in Absatz 1 des Textvorschlags des VPRT niedergelegten Rechte und den Grundsatz der Verhältnismäßigkeit wahren müssen. Notwendig ist demnach auch hier eine Güterabwägung zwischen der Forderung nach umfassendem Grundrechtsschutz und dem hervorgehobenen Interesse an einem effektiven Jugendschutz.

Weitere Anmerkungen zum Schrankenvorbehalt finden sich unter II., 2. .

3.
Hinsichtlich der Frage nach dem Adressatenkreis und der Trägerschaft des Europäischen Grundrechts der Meinungs- und Informationsfreiheit spricht sich der VPRT für eine Anwendbarkeit neben der jeweiligen nationalen Verfassung aus. Insoweit möchte der VPRT den in Artikel H.1 niedergelegten Ansatz des Konvents (Convent 27 vom 18. April 2000) unterstützen. Adressaten des Grundrechts auf Meinungs- und Informationsfreiheit sind demnach sowohl die Europäische Union und ihre Organe als auch die Mitgliedstaaten selbst. Ein klares Nebeneinander beider Grundrechtskataloge würde die Rechtsvereinheitlichung im Binnenmarkt fördern, die vorhandenen Grundrechtskataloge ergänzen und sich letztlich unter Gesichtspunkten des doppelten Grundrechtsschutzes keineswegs nachteilig auswirken.

4.
Da bereits angedacht wurde, die Europäische Grundrechtscharta - möglicherweise durch eine entsprechende Änderung des EG-Vertrages - rechtsverbindlich auszugestalten, möchte der VPRT zur Vermeidung von Zersplitterungen beider Regelungswerke anregen, die Grundrechtscharta in den EG-Vertrag einzubinden. Unter Anknüpfung an die bereits vorhandene Systematik innerhalb des EG-Vertrages erscheint hier die Einbindung in die in Artikel 17 ff n. F. EGV niedergelegten Unionsbürgerrechte ein sinnvoller Ansatz.

5.
Des weiteren spricht sich der VPRT dafür aus, die Justitiabilität der in der Europäischen Grundrechtscharta niedergelegten Rechte festzuschreiben. Nur so können sich die Träger der Grundrechte vor den jeweiligen Gerichten auf diese berufen und ihre Durchsetzung herbeiführen. Der Rechtsschutz auf europäischer Ebene sollte, da es sich um verfassungsrechtliche Streitigkeiten handeln würde, möglichst durch den EuGH sichergestellt werden. Hierzu könnte an die Einrichtung von entsprechenden Spezialkammern für Individualbeschwerden gedacht werden, die sich vorbereitend mit der streitgegenständlichen Materie beschäftigen. Zudem sollte eine Kooperation mit dem EGMR unter besonderer Berücksichtigung seiner subjektiv-rechtlich gefestigten Rechtsprechung zu Artikel 10 EMRK in Betracht gezogen werden.

II. Einzelerläuterungen

1. Absatz 1

(1) Jeder hat das Recht auf freie Meinungsäußerung. Dieses Recht schließt die Meinungsfreiheit und die Freiheit ein, Informationen und Ideen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben. Die Medien sind frei.

Die in Absatz 1 Satz 1 gewählte Formulierung „Jeder“ verdeutlicht zum einen den subjektiv-rechtlichen Charakter des Freiheitsrechts auf Meinungs- und Informationsfreiheit. Die Formulierung stellt klar, dass dieses Recht und damit auch die in Satz 3 ausdrücklich benannte Medienfreiheit (hierzu ausführlich unten) sowohl den privaten Rundfunkanbietern als auch anderen Grundrechtsträgern uneingeschränkt zusteht. Anders als der von Seiten des Konvents gewählte Ansatz „Jede Person“ lässt der Vorschlag des VPRT in Anlehnung an die Formulierung in Artikel 5 Absatz 1 Satz 1 des Grundgesetzes zudem unmissverständlich erkennen, dass Träger des Grundrechts auf Meinungs- und Informationsfreiheit nicht nur natürliche Personen, sondern beispielsweise auch juristische Personen oder andere Personenvereinigungen sein können. Die Festschreibung einer solchen Formulierung würde bereits im Vorhinein zur Rechtssicherheit im Hinblick auf mögliche Auslegungsfragen beitragen.

Unter dem in Absatz 1 Satz 1 normierten „Recht auf freie Meinungsäußerung“ ist das Grundrecht auf Äußerung und Verbreitung der Meinung zu verstehen. Hierdurch wird die nach außen gerichtete Handlung, also die Abgabe der Meinung sowie der Prozess der Informationsübertragung geschützt. In Satz 2 wird dann eingangs klargestellt, dass das Recht der freien Meinungsäußerung die Meinungsfreiheit (...) einschließt. Unter der hier separat normierten Meinungsfreiheit ist der innere Vorgang der Meinungsbildung zu verstehen. Zudem möchte der VPRT hierdurch klargestellt wissen, dass die Meinung inhaltlich frei ist („Meinungsneutralität“). Diese Auslegung findet ihre Entsprechung in den Ausführungen des VPRT zum Schrankenvorbehalt (vgl. I., 2.). Hier verdeutlicht der VPRT, dass grundsätzlich keine Beschränkung des Rechts auf Meinungs- und Informationsfreiheit wegen eines bestimmten Meinungsinhalts erfolgen darf, wobei von diesem Grundsatz insbesondere dann Ausnahmen erforderlich sein können, wenn Bestimmungen zum Schutz der Jugend und zum Schutz der persönlichen Ehre betroffen sind.

Unter der in Satz 2 normierten „Informationsfreiheit“ versteht der VPRT das Recht, sich aus allgemein zugänglichen, vielfältigen Quellen ungehindert zu informieren. Diese Interpretation der Informationsfreiheit trägt vor allem dem Gedanken der Förderung der Informationsgesellschaft auf europäischer Ebene Rechnung. Zudem entspricht sie dem gängigen Verständnis des Artikels 10 EMRK und der Auslegung des entsprechenden Kriteriums in Artikel 5 Absatz 1 Satz 1, 1. HS des Grundgesetzes.

Unter den in Satz 2 normierten Kriterien des „Empfangs und der Weitergabe“ von Informationen und Ideen ist auch und insbesondere die Veranstaltung und Verbreitung von Rundfunk zu verstehen, und zwar unabhängig von dem dieser Informationsweitergabe zugrunde liegenden technischen Übertragungsvorgang. Nach dem Verständnis des VPRT muss die Freiheit des Empfangs und der Weitergabe von Informationen alle wesensmäßig mit der Veranstaltung von Rundfunk zusammenhängenden Tätigkeiten, von der Beschaffung der Information (vgl. vorstehend) und der Produktion der Sendungen bis hin zu ihrer Verbreitung erfassen.

Die Aufnahme des als Satz 3 niedergelegten Textvorschlags des VPRT („Die Medien sind frei“) ist aus der Sicht der privaten Rundfunkanbieter von hoher Wichtigkeit. Durch diese Klarstellung lässt die Systematik des Absatzes 1 unzweifelhaft erkennen, dass das Recht der freien Meinungsäußerung (Satz 1) sowohl das Recht auf Meinungs- und Informationsfreiheit (Satz 2) als auch die Medienfreiheit (Satz 3) umfasst. Hierdurch soll zum einen verdeutlicht werden, dass den Medien das Recht auf Meinungs- und Informationsfreiheit uneingeschränkt zusteht. Dieser Gedanke steht in unmittelbarem Zusammenhang mit dem unter I., 1. und II., 1. dargelegten Ansatz des subjektiv-rechtlichen Verständnisses des Grundrechts und der daraus folgenden textlichen Klarstellung, dass „jeder“ und damit auch die privaten Medienanbieter Träger des Grundrechts auf

Meinungs- und Informationsfreiheit sind. Zum anderen ist es aus der Sicht der Mitglieder des VPRT vor dem Hintergrund der aktuellen technologischen Entwicklungen unerlässlich, dem Konvergenzgedanken dadurch Rechnung zu tragen, dass für alle Medien, die Träger dieses Grundrechts sein können, ein Oberbegriff gefunden wird, um ein in Teilbereichen schon existentes Zusammenwachsen einzelner Branchen abzusichern. Nur so kann der notwendige Entwicklungsspielraum für bereits vorhandene und in Zukunft aktuell werdende technologische Veränderungen (Internet, Digitalisierung) geschaffen werden. Hierbei sehen die Mitglieder des VPRT es als selbstverständlich an, dass unter die in Satz 3 normierte Medienfreiheit die klassischen elektronischen Medien ebenso wie die Presse und der Film zu fassen sind. Der Anwendungsbereich muss jedoch für die Medien insgesamt geöffnet werden, eine Auflistung einzelner Medienfreiheiten, wie sie etwa in Artikel 5 Absatz 1 Satz 2 des Grundgesetzes erfolgt, erscheint aus den benannten Gründen veraltet. Nur durch eine Verschmelzung der einzelnen Freiheiten zu einer Medienfreiheit, die sich für kein Medium nachteilig auswirken würde, kann das Wachstum der europäischen Informationsgesellschaft langfristig abgesichert werden. Der Gedanke der Konvergenz, der hier manifestiert werden sollte, fördert Wettbewerb und stärkt damit den europäischen Binnenmarkt.

2. Absatz 2

Wie bereits unter I., 2. dargelegt, möchte der VPRT im Hinblick auf den Vorschlag des Konvents zu Artikel H. 2 im Zusammenhang mit dem Recht auf Meinungs- und Informationsfreiheit anregen, von der Aufnahme einer allgemeinen, horizontalen Schrankenregelung mit einem Verweis auf die EMRK Abstand zu nehmen und statt dessen eine eigene Schrankenregelung in der folgenden textlichen Fassung aufzunehmen: *„In diese Rechte darf nur eingegriffen werden, soweit es zum Schutz anderer Rechtsgüter unerlässlich ist“*. Die herausragende Bedeutung des Rechts auf Meinungs- und Informationsfreiheit erfordert eine konkrete Einzelfallabwägung der in Rede stehenden Rechtsgüter im Rahmen der Verhältnismäßigkeitsprüfung. Zudem muss hier der Grundsatz des effektiven Grundrechtsschutzes berücksichtigt werden. Ein Eingriff ist deshalb nur in sehr engen Grenzen gerechtfertigt.

3. Absatz 3

Der Textvorschlag des VPRT greift in Absatz 3 das Zensurverbot auf. Bereits aus der Begründung des VPRT zum Schrankenvorbehalt (vgl. I., 2.) und der Begründung zur textlichen Fassung des Absatzes 1 (Recht auf Meinungsfreiheit, II., 1.) geht hervor, dass in keinem Fall eine Beschränkung des Rechts auf Meinungs- und Informationsfreiheit wegen eines bestimmten Meinungsinhalts erfolgen darf. Die Meinung muss also inhaltlich frei sein, was mit dem Stichwort der „Meinungsneutralität“ umschrieben werden kann. Zur Vermeidung möglicher Unklarheiten möchte der VPRT anregen, das Zensurverbot, das für die privaten Rundfunkanbieter in Deutschland eine Gewährleistung von hohem Bedeutungsgehalt darstellt, ausdrücklich zu normieren.

Bonn, 31.05.2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 4 July 2000

CHARTE 4348/00

CONTRIB 212

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the working group on EU-citizenship, fundamental rights and cultural diversity of the federalist group at the European institutions (UEF-EU) concerning Safeguarding public traditions and cultural heritage. [1]

[1] This text has been submitted in English language only.

CONCERNING
THE DRAFT CHARTER ON FUNDAMENTAL RIGHTS
ARTICLE 26 « RIGHT TO VOTE AND TO STAND IN LOCAL ELECTIONS »
ARTICLE 30 « FREEDOM TO MOVE AND TO SETTLE …»
PROPOSED AMENDMENT

by the Working group
on EU citizenship, fundamental rights and cultural diversity, UEF-EU,
and the Association of former trainees of the European Communities (ADEK)

NEED FOR AN AMENDMENT AS THERE IS A CONFLICT BETWEEN :

THE 'DEMOCRATIC PRINCIPLE' AND THE 'TERRITORIAL PRINCIPLE'
CONFLICT IN A MULTI-NATIONAL, MULTI-CULTURAL COMMUNITY
HAVING COMMON CITIZENSHIP, FREE MOVEMENT OF PEOPLE,
FREEDOM OF SETTLEMENT AND
THE RIGHT TO PARTICIPATE IN LOCAL ELECTIONS
BETWEEN
MAJORITY VOTING AND (PUBLIC) CULTURAL TRADITIONS
IN PARTICULAR AT THE LOCAL LEVEL ! ! !

INTRODUCING A NEW CATEGORY OF PUBLIC CIVIC RIGHTS
AS TO OFFICIAL TRADITIONS
IN CULTURE , LANGUAGE AND RELIGION AT A SPECIFIC PLACE

A SORT OF TERRITORIAL CIVIC RIGHT
AS TO CULTURE, LANGUAGE OR RELIGION

WHICH CANNOT BE TAKEN AWAY FROM A LOCAL COMMUNITY

BY A MAJORITY OF 'NEW-COMMERS'
EXCEPT THE CONCERNED COMMUNITY
(HISTORIC CULTURAL MAJORITY)
WANTS TO CHANGE THE OFFICIAL TRADITION ITSELF !

ARTICLE 26 SHOULD THEREFORE READ AS FOLLOWS :

Article 26 : Right to vote and to stand as a candidate in municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides under the same conditions as nationals of that State.
(> Democratic principle)

The "official heritage and public traditions as to culture, language or religion" of a local community should be recognised by every citizen participating in the elections by means of accepting the following principles:
(> Territorial principle)

1. Concerning the "public heritage of a local Community", like the official language in public live and administration, the official feasting or commemoration days as to culture or religion, **all rights and obligations resulting from the present legal situation in a Mem er State of the Union have to be respected.**
(> Status quo principle)

2 Any person w o intents to participate as a candidate in municipal elections should ave s own in practice that he or she is **ready to integrate into the existing local Community and is going to respect the "official cultural heritage"** of the place concerned.
(> **principle of good will to integrate**).

3. Any elected democratic majority having different preferences as to the "official and public traditions" **cannot change** the legally existing provisions as to the **linguistic rights and obligations or as to the official cultural traditions in public life of the municipality**, except the concerned "cultural/linguistic group" (historic majority) wants to change the provision or conditions itself.
(> **Principle of 'historic' rights/ancienty, or application of the principle: "Treat your neighbour as you want to be treated by him in the same situation!**").

PROPOSAL FOR AMENDING THE DRAFT CHARTER ON FUNDAMENTAL RIGHTS
concerning "Safeguarding public traditions and cultural heritage"

> reference: Article 26: "Right to vote and to stand in local elections …"
Article 30: "Freedom to move and to settle within the Union …"

EXPOSE DE MOTIF

The European Un on constitutes a multi-national, multi-cultural and multi-langual community. The treaty on the European Union (Maastricht, article 8) introduced the citizenship of the Union for all nationals of the Member states and the right to vote and to stand (for such nationals) as a candidate (not only in common European elections but also) in municipal elections in the Member state of residence.

Common citizenship and the free movement of people of different cultural and linguistic background within the citizenship's common political territory can not only create permanent linguistic conflicts between the different cultural groups of the political entity (Country, State, Community, Union), but also put a permanent strain on local self-government by threatening existing local majorities (ethnic, cultural or linguistic) to become minorities through the immigration of people from other parts of the Union having another cultural background and speaking other languages. (examples within Belgium, France, Spain, eastern European countries, ex-Yugoslavia, Russia etc.)

Thus, common citizenship, free movement of people and the right to participate in elections might, especially on the local level, bring, if there are different languages, cultures and traditions within this political union, two universally accepted principles into a permanent conflict, i. e.,

the territorial principle versus the democratic principle.

If the language and culture would be of uniformity all over the Union, state or Country, this conflict would not exist.

For a multinational community like the European Union it is therefore of vital interest for its long-term political cohesion that universally accepted principles and rules are applied, espec ally concerning - in an adequate way - the protect on of languages, cultures and traditions. This is n particular true on the local level as the cultural and linguistic identity of people living since generations in a specific area or place can be more easily outvoted through democratic elections by a sufficient number of newcomers having another linguistic and cultural background or other priorities in these fields.

In the context of the EU-citizenship and mobility, everybody who lives and/or works in a commune or town of another Member state can easily join local or regional parties or even create new local or regional groupings. Thus, through mobility and immigration, **present local majorities can become new minorities.**

Multinational and multi-cultural societies therefore need a general code of conduct for treating with the problem of changing local majorit es, respectively of new cultural and linguistic minorities, and this, in the first place, at the local level, i.e., the commune, municipality or town-district level, as they are the smallest democratically elected political entities covering a specifically defined territory.

Existing **problems linked to local and regional ethnic minorities can not be solved with this amendment to the Charter, but this amendment can help to a oid new conflicts between indigenous people and new-comers at the local level in the future**. Fundamental aspects of minorities at the local and regional level would have to be dealt within the framework of a general European charter on minorities. But the specific problem of a **possible switch in the local linguistic and cultural majority** in a specific municipality due to a large number of residents of other Member States who can now participate in this local balloting **must be solved within the general framework of a Charter on Fundamental Rights in the European Union.**

The Union level must show to its Member States and to all its citizens that it follows **universal principles** acceptable by everybody because it follows the ideas of the "categorical imperative" of Imanuel Kant,

'treat your neighbour as you want to be treated by him "

The target of this new article is to avoid future problems or solve them in advance before they generate linguistic, cultural or ethnic tensions within a multi-cultural society. That this is not a theoretical problem show the various national derogations or transitional provisions already foreseen (Luxemburg, Belgium, France) as to the Directive on the participation in municipal elections adopted by the Council in 1994.

The main target of this amendment should be therefore, to take away the fear and the possible negative impression that the European integration process, the mobility of people, common citizenship and the voting right of all citizens of the Union at the local level would lead in the medium and long run to a situation where a democratic elected majority decides a change in the linguistic rights and cultural traditions of the indigenous people which live since generation at that place.

Every citizen of the EU should be aware, that besides his individual and collective civic rights which he or she can enjoy everywhere in the Union, he or she also has to accept the rights and obligations coming from the idea of safeguarding public traditions and cultural heritage in an existing local community. (> idea of guaranteeing diversity within unity!)

Detailed argumentation for the amendment:

“RESPECT FOR PUBLIC TRADITIONS AND CULTURAL HERITAGE”

Objective/Targets

The common citizenship and the right of each citizen of the European Union to participate in municipal (local) elections **shall not come out as a threat to the linguistic, cultural and traditional heritage of indigenous people** living at a specific place since generations.

The guarantee of the "four freedoms" within the Union (mobililty of people having different cultural and linguistic background, free exchange of goods and services as well as free movement of capital) shall be accompanied by an equivalent guarantee of the language used in public administration and of public cultural traditions at the local level.

Principles

In th s context the following principles shall apply:

'The one who moves, whether for professional or for private reasons, has to adapt to the rules and public traditions of the place he or she has deliberately chosen to live.'
(General principle of a multi-national and multi-cultural Community, Union or Federation)

a) All rights and obligations resulting from the present legal situation as to the language(s) used in public administration and as to official contacts with local public authorities should be guaranteed. The same should apply to public cultural and religious events within the local community.
(Status quo principle)

b) Any person who intends to stand as a candidate in municipal elections should have shown in practice (by learning and using, for example, the language(s) in public life) that he or she is ready to integrate in the existing local Community and is going to respect the linguistic and cultural traditions which can be considered as a specific right, heritage or identity of the people living often since generations at that place.
(Principle of good will to integrate).

c) A democratically elected majority, having linguistic and cultural preferences which differ from the legally existing situation in the basic local government unit, can only change the elementary **linguistic rights and cultural traditions in public life** of that place, if the concerned former cultural majority group (historic majority of the concerned political self-governing unit) wants to change the cond t ons or prov s ons tself.
(Principle of 'historic' rights/ancienty).

Limitation and Exclusion

Existing **ethnic minorities on the local and regional level are not concerned** with this Charter article; problems in this context should be subject to a general European charter on rights and obligations of local minorities.

Change in the territorial extension of the basic local go ernment unit

A change in the territory of the basic local government unit can have an important impact on the political, cultural and linguistic majority within this unit; therefore, any change in the territorial extension of the basic local government unit, either by means of a fusion of communes, municipalities, town-districts or through a splitting up into smaller political self-governing units, shall- not only be subject of a mutual agreement between the old and new political majority groups of the original political unit(s), especially, if they are of different cultural and linguistic background, - but also be the result of applying un versal criteria to the local level and of objective indacators guaranteeing a viable local self-government such as common interests and sound financial structures of the old and new basic local government units.

A change in the territorial extension of a basic local government unit should at least take into consideration aspects like guaranteeing democratic representativity and secrecy (anonymity in voting procedures), possibility of realising common cultural and linguistic interests, equal

treatment of new minorities, average seize in population and territory of the new political unit within the larger political and administrative context (district, canton, Kreis, county, province, departement, region, Land, etc.), administrative efficiency, financial rentability, economic interdependencies, fiscal solidarity, financial perequat on mechanisms, etc.)

Protection of the local cultural and linguistic heritage

a) The protect on of **cultural traditions** shall include, in particular, the right to maintain publicly decided and/or organized cultural and religious events such as historic commemorations, special cultural and religious holidays, etc. including public subsidies for the conservation of such like traditional cultural heritage.

b) The protect on of **linguistic rights** shall cover, in particular, a language guarantee in local administration, that are **all elementary aspects of official language(s) use in local administration** like documents, announcements, public sessions, official meetings, official contacts between the local authorities and the citizens.

The language(s) used in local administration can be the national-wide spoken language, the regional or even a national-wide minority language spoken by the major ty at the concerned place.

In **a cultural and linguistic homogeneous state or country**, the language used in local administration and in official contacts with the local authorities is the language of (the majority of) the population at the concerned place which coincides with the national-wide spoken language;

In the **case of a multi-cultural and multi-linguistic state or country** specific linguistic rules on the basis of the territorial principle do already exist at the regional or local level. Mostly, the official language at the local level with the administration and local authorities is the regional or even local language, or the combination of two languages, the local-majority language and the national-wide language.

In a multi-national and multi-lingual Community like the European Union, for reasons of transparency and efficiency, the following guideline dealing with the relationship between the EU citizen and the public sector should become as a general target (as examples in Switzerland (CH) show):

Uni-lingual administration (protect on of the indigenous people and efficiency**), but a multi-lingual population** (target of integration and respect for cultural diversity within political unity)

Brussel/Bruxelles, 30.5.2000 Michael Cwik
Coordinator of the working Group 3
UEF-EU

**CONCERNING: CHARTER ON FUNDAMENTAL RIGHTS IN THE EU
EU-CITIZENSHIP AND LANGUAGE RIGHTS AND OBLIGATIONS
OF THE CITIZEN**

1. THE CITIZEN AND THE IN TITUTION OF THE EUROPEAN UNION (EU)

THE BASIC PRINCIPLES ARE:
- "All languages of Member States which have been recognized as official languages of the European Union shall be considered as equal as to their official treatment on the Union´s level."
- "Local and regional languages within the EU which are recognized by the concerned ember tate shall be treated on an equal footing by the European institutions when specific activities or information of the Union are foreseen at the place or region concerned."
- "The acceptance of linguistic diversity is the price of democracy within a multi-ethnic community where everyone wants to keep and safeguard his/her cultural and linguistic identity."

RIGHTS AND OBLIGATIONS OF A CITIZEN AND/OR CIVIL SERVANT AS TO EU ACTIVITIES:

1.1. RELATING TO THE **EXTERNAL RELATIONS** OF THE UNION'S INSTITUTIONS

- CONCERNING CORRESPONDENCE OF THE CITIZEN
Any EU-citizen as the right to address is correspondence to an official body or service of the European Union in is mother tongue as far as is language is recognized as official language of the Union; correspondence in ot er official languages of Member States as to pass the representative bodies of the concerned Member State at the European level.
The correspondence of the institutions of the European Union is done in the official languages of the Union and in particular in the language of the corespondent if this is known. In general and if there is no specific indication the reply of a service of the Union's institution is done in the language of the previous correspondence by the concerned person.

- CONCERNING DECISIONS OF THE INSTITUTIONS AND THEIR PUBLIC INFORMATION
All official decisions taken within the framework of the European Union like regulations directives recommendations court rules etc. are published in the official languages of the Union. Important information topics shall be in all official languages of the Union; publications for a specific public can be made in the language or languages of the audience concerned.

- CONCERNING MEETINGS OF OFFICIAL POLITICAL MANDATEES AT THE EU-LEVEL:

IN OFFICIAL MEETINGS OF THE EU-PARLIAMENT AND THE UNION'S COUNCIL
As neither an elected member of Parliament nor a representative of a government was appointed on the basis of his language knowledge he must on the Union's level have at least the possibility to speak in one of the official languages of the Union and to get the documents to decide over in the official language of his choice.

This is the right and obligation of every political mandatee (directly or indirectly elected) in the European Union.

IN WORKING AND STUDY GROUPS WITH NATIONAL REPRESENTATIVES
As representatives of Member States nominated for experts meetings on the European and international level should be selected on the basis of their professional capacities their linguistic background should be en general already multi-lingual; but as long as there is no decision about a non-discriminatory inter-ethnic communication language or one official working language within the European institutions each representative must have the right to express himself in one of the official languages of the Union.

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1.2. RELATING TO THE **INTERNAL RELATIONS** OF THE UNION'S INSTITUTIONS

- CONCERNING LINGUISTIC PRECONDITIONS TO BECOME AN EUROPEAN CIVIL SERVANT
Any person who is applying to work in the institutions of the European Union has to bring with him an adequate linguistic background; in principle he or she should besides the mother tongue be capable to understand to speak and to write two other languages of which one should be one of the official languages of the Union.

- CONCERNING THE WORKING LANGUAGES WITHIN THE EU INSTITUTIONS
In principle all official languages of the Union can be used as a working language by a staff member. For reasons of cost time and efficiency as to the need of translation in the medium term only one common working language should be foreseen for internal preparatory work within the services and institutions of the European Union; as long as a national language as to fulfill this function and until final acceptance after thorough experiments and tests by the staff and the competent bodies a non-discriminatory inter-ethnic communication language based on a language model (planned language) shall be placed alongside this national language as the second official working language within the EU institutions in order to balance the disadvantages for all those staff members who do have not the national working language as mother tongue. Thus also those speakers who can work in their mother tongue are obliged to learn and at least understand the second non-discriminatory working language.

2. THE CITIZEN AND THE PUBLIC AUTHORITIE IN MEMBER STATE

THE BASIC PRINCIPLE ARE:

- **"The one who moves has to recognize the public (cultural and linguistic) traditions of the place where he or she is going to!"**
- **" It is in the responsibility of the traveler to make himself understood and not an obligation of a public authority or its representative to be able to understand the language of a foreigner at a specific place."**
- **-"Persons employed in public services should get incentives to speak also other languages!"**

RIGHTS AND OBLIGATIONS OF A CITIZEN AND/OR CIVIL SERVANT AS TO THE PUBLIC SECTOR:

2.1. IN RELATION TO THE **PUBLIC AUTHORITIES** IN MEMBER STATES

- WHEN TRAVELING WITHIN MEMBER STATES OF THE EU
Public authorities of Member States are not obliged neither to speak nor to present official documents in another language than the official language at the place concerned. In general it is in the responsibility of everyone to make imself understood in any contact with public authorities althoug in specific social circumstances the costs of an interpreter or translator might be covered by the public service in question.

- WHEN INVOLVED IN LEGAL PROCEDURES IN MEMBER STATES
Every EU-citizen has the right when being involved in a legal procedure within the territory of the European Union to express himself in the language of is choice; nevertheless if the language chosen by him is neither understood by a competent representative of the legal procedure nor the official language of the place or territory in question all costs of interpretation or translation are at is charge.

- WHEN SETTLING IN WITHIN THE TERRITORY OF A MEMBER STATE
Having the right to travel and to settle without discrimination to a national resident wit in all Member States of the European Union every citizen of the Union as nevertheless to integrate into the public life of the place of his/her choice in particular as to the official language(s) of administration; althoug public staff members in specific functions wit frequent contacts to clients speaking other languages should in general be multi-lingual public services at the local regional or national level are not obliged for reasons of efficiency to have speakers or documents in a language which is not the official of the place concerned.

2.2. IN RELATION TO **LANGUAGE INSTRUCTION** WITHIN MEMBER STATES

- CONCERNING PUBLIC SCHOOLS
On the basis of an agreement between the ministers of education within the Member States of the European Union every person leaving school with in the EU shall in the medium term be able to master besides is mother tongue two other languages. The languages offered at a specific school are the result of the general educational system of the country or region of the local priorities of the school in question and of the language preferences expressed by the parents of the pupils of the school.. Elementary instruction in a mother tongue which is not the official or one of the official languages of the place concerned is subject to democratic decisions in the competent political bodies in particular as to the necessary allocation of the human and financial resources.

- CONCERNING PRIVATE SCHOOLS
Language groups which are speaking other languages than that or those officially instructed in public schools can organized themselves in the framework of the constitution and the educational system of the country or region concerned in private schools on their own expenditures; in order to assure a harmonious integration of these language groups into the local cultural and linguistic environment one official language of the place concerned shall be an obligatory instruction subject of the private schools.

Version: 26.5.2000 Document of t e Working Group 3 on EU citizens ip fundamental rig ts and cultural diversity
(UEF-EU coordinator: Mic ael Cwik
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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 8 juin 2000

CHARTE 4349/00

CONTRIB 213

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après l'intervention du Forum des Migrants de l'Union européenne à l'occasion de l'audition du 27 avril 2000. [1]

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[1] Ce texte a été soumis en langue française seulement.

Intervention du Forum des Migrants de l'Union européenne à l'occasion de l'audition des ONG devant la "Convention"

Bruxelles, le 27 avril 2000

Monsieur le Président,

Mesdames et Messieurs, membres de la "Convention ",

Le Forum des Migrants de l'UE remercie la "Convention" pour la possibilité qui lui a été donnée d'exprimer son opinion par rapport au projet de Charte des droits fondamentaux de l'Union européenne. La préoccupation du Forum des Migrants de l'Union européenne, en tant qu'organisation représentant les ressortissants des pays tiers résidant dans Union européenne, est celle de promouvoir l'égalité de traitement entre les ressortissants des Etats membres et les ressortissants des pays tiers légalement résidant dans l'Union.

L'Union européenne est désormais une communauté bien diversifiée dans laquelle des personnes de différentes langues, cultures, religions, appartenances ethniques, nationalités vivent ensemble. La question de la participation et de la jouissance des droits fondamentaux ne concerne pas uniquement les ressortissants des pays membres de l'Union européenne, mais aussi quelques 14 millions de personnes ressortissants des pays tiers résidant dans l'Union. A tel propos, le Forum des Migrants a à plusieurs reprises mis en évidence les limites du Traité révisé. Il nous semble que le traité de Amsterdam, en introduisant un concept de citoyenneté européenne liée à la nationalité des Etats membres et non pas à la résidence sur le sol de l'Union européenne, ait établit une "discrimination institutionnalisée" entre les ressortissants communautaires et les ressortissants des pays tiers. Un exemple pratique de cette discrimination est montré par le fait que, contrairement aux ressortissants des pays membres de l'Union européenne, les ressortissants des pays tiers qui résident dans un pays de l'Union européenne dont ils n'ont pas la nationalité, ne peuvent pas bénéficier du droit de voter et d'être élus aux élections européennes et municipales (article 19 CE).

La moitié de cette population immigrée, constituée par des enfants, est naturalisée, devenue européenne, mais ne pouvant participer, pour son jeune âge, à la prise de décision concernant son avenir ni par elle-même, ni par ses parents qui ne peuvent voter. A cette occasion, nous souhaitons aussi rappeler que l'article 13 du même traité, pourvoyant à une base légale pour une action contre

les discriminations sur le sol de l'Union, ne couvre pas les discriminations fondées sur la nationalité. Donc, aucune base juridique ne saurait pour l'instant couvrir les discriminations les plus graves reposant sur une distinction de nationalité.

Le Forum des Migrants garde l'espoir de voir toutes ou certaines de ces lacunes comblées lors de la CIG 2000 et garde surtout l'espoir que le projet de rédaction d'une Charte des droits fondamentaux ainsi que le travail de la Convention puissent contribuer à avancer dans ce sens. Nous croyons que les deux processus - celui de la rédaction de la Charte et de la Conférence intergouvernementale doivent être considérés comme intimement liés l'un à l'autre et qu'une synergie devrait exister entre le travail de la CIG et celui de la "Convention". Pour cette raison, nous espérons que la Convention puisse idéalement saisir l'occasion de la rédaction de la Charte afin de contribuer à surmonter la discrimination "institutionnalisée" dans le traité de Amsterdam que nous avons dénoncée. Cela devrait être possible si l'on considère que la Convention a, par rapport à la CIG, la particularité de travailler sous l'ongle des droits de l'homme et que les droits de l'homme, entre autres, ont la caractéristique d'être universels et indivisibles.

L'universalité des droits de l'homme exige que toutes les personnes sous la juridiction des Etats membres de l'Union européenne devraient bénéficier des droits fondamentaux énoncés dans la Charte. On ne peut pas établir des catégories de bénéficiaires. La règle doit être l'octroi des droits énoncés à tous les êtres humains, seuls des exceptions très limitées pour certains droits spécifiques pourraient être prévues à caractère exceptionnel. En effet, l'art. 2 de la Déclaration Universelle des droits de l'Homme et l'art. 2 ,2 du Pacte international sur les droits économiques demandent une application sans distinction par rapport à l'origine nationale. Dans le même sens, la Convention européenne des droits de l'homme à l'art. 1 et le Pacte international des droits civils et politiques à l'art. 2 prévoient, comme champs d'application, toute personne relevant de la juridiction d'un Etat signataire et tous les individus se trouvant sur son territoire. Les droits de l'homme sont indivisibles, ils sont d'égale importance et leur réalisation est intimement liée, qu'il s'agisse des droits civils et politiques ou des droits économiques, sociaux et culturels. En se basant sur ces deux principes, il est difficilement concevable que la Charte des droits fondamentaux de l'Union européenne puisse prévoir des droits réservés à une seule catégorie de résidants dans l'Union européenne, ceux ayant la nationalité d'un des Etats membres.

Le Forum des Migrants se joint à la FIDH concernant l'appelle adressé à la Convention à saisir l'occasion de la rédaction de la Charte pour proposer une extension de la citoyenneté européenne aux personnes résident légalement depuis au moins cinq ans dans un Etat membre. Dans le passé, le Forum des Migrants a plusieurs fois souligné la nécessité d'intégrer une procédure unique pour l'acquisition de ce droit de citoyenneté, sans nécessiter le préalable de la naturalisation. Maintenant la rédaction de la Charte offre la chance de la construction d'une citoyenneté européenne dissociée de la nationalité, basée sur les droits de l'homme et ouverte à tous ceux qui résident et travaillent sur le même territoire.

D'ailleurs, il n'est pas sûr que l'extension des droits des ressortissants des pays tiers légalement résidant dans l'Union européenne exigerait une ultérieure révision du traité. Dans la version actuelle du Traité sur l'Union européenne, il y a, en effet, une ultérieure marge d'action qui permettraient d'avancer vers l'égalité de traitement et notamment sous le titre IV du Traité. L'article 61 précise que la construction d'un espace de liberté, sécurité et justice implique aussi l'adoption de mesures dans les domaine de l'asile, de l'immigration et de la sauvegarde des droits des ressortissants des pays tiers. Le traité de l'Union révisé donne à l'Union la compétence d'adopter des mesures relatives au séjour des ressortissants des pays tiers (art. 63, 3 a) et encore des mesures qui définissent sur la base de quels droits les ressortissants des pays tiers qui résident dans un des Etats membres peuvent résider dans un autre pays membre (libre circulation des ressortissants des pays tiers vers d'autres pays membres (art. 63, 4).

Tout en restant confiants dans la contribution que potentiellement le projet d'une Charte des droits fondamentaux de l'Union européenne pourrait donner par rapport à la situation des ressortissants des pays tiers, nous craignons, en considération de l'état actuel des travaux de la Convention, que la Charte puisse finalement confirmer, au lieu de surmonter la discrimination établie par le traité d'Amsterdam. Nous regrettons, par exemple, dans l'exercice de la Charte l'établissement d'une catégorie de droits qui se réfèrent aux droits des citoyens. Nous craignons que cette méthodologie puisse confirmer ou renforcer la différence de traitement entre les nationaux européens et les ressortissants des pays tiers. Nous considérons le principe de l'égalité de traitement entre les ressortissants européens et les ressortissants des pays tiers sur la base de l'universalité et l'indivisibilité des droits de l'homme. Nous croyons, alors, que les droits réservés aux citoyens européens devraient avoir un caractère tout à fait exceptionnel.

Nous nous référons au document „Convent 17“ (Charte 4170/00) et saluons le projet d'octroyer le droit d'accès au médiateur européen et le droit de pétition devant le Parlement européen aux résidants (Article G et Article H). Cette extension est marquée par la formule „Tout citoyen de l'Union et toute personne résidant sur le territoire de l'Union“ contenues dans le même article.

Toutefois, nous souhaiterions voir cette démarche appliquée aussi à d'autres articles, notamment à l'article C (Droit de participer aux élections du Parlement européen après 5 ans de résidence légale) et à l'article D (Droit de participer aux élections municipales). On ne peut pas négliger, à ce propos, que le Parlement européen s'est prononcé à deux reprises dans les derniers mois (le 12 avril 1999 et le 15 février 2000) en faveur de l'extension du droit de vote aux ressortissants des pays tiers légalement résidant dans l'Union. Le Forum des Migrants a plusieurs fois appelé les institutions européenne à envisager d'introduire ce droit dans une Charte européenne des droits fondamentaux.

Nous insistons aussi sur le fait que le droit de circuler et de séjourner librement sur le territoire des Etats membres (article I du même document), actuellement réservé aux personnes possédant la nationalité d'un Etat membre, devrait être étendu aussi aux ressortissants des Etats tiers résidant depuis au moins 5 ans sur le territoire de l'Union européenne. De notre point de vue, l'extension de ce droit aux citoyens extra-communautaires devrait être considérée en tant qu'exigence résultant de la liberté de mouvement au sein des Etats, consacrée dans divers instruments internationaux de protections des droits de l'homme (art. 2 du Protocole 4 à la CEDH, art. 12 du Pacte international sur les droits civils et politiques). Par ailleurs, elle serait aussi conforme aux objectifs qui motivent la création d'un espace intérieur sans frontières.

En conclusion, nous espérons que les membres de la "Convention" voudrons bien prendre en considération les remarques du Forum des Migrants de l'UE et saisir l'occasion de la rédaction de la Charte des droits fondamentaux pour contribuer à revoir le statut des ressortissants des pays tiers légalement résidant dans l'Union européenne et remédier, ainsi, aux inégalités de traitement actuelles.

Merci, Monsieur le Président,
Merci, Mesdames et Messieurs, membres de la "Convention"

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 8 June 2000

CHARTE 4350/00

CONTRIB 214

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Revised contribution submitted by the Engineering Employer's Federation (EEF)

Please find hereafter the revised position of the Engineering Employer's Federation (EEF) on the draft EU Charter of Fundamental Rights.[1]

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[1] This text exists in English language only.

DRAFT EU CHARTER OF FUNDAMENTAL RIGHTS

EEF COMMENTS ON THE NEW PROPOSALS FOR THE ARTICLES ON ECONOMIC AND SOCIAL RIGHTS AND FOR HORIZONTAL CLAUSES (CHARTER 4316/2000, CONVENT 34)

The Engineering Employers' Federation (EEF) represents over 5,700 companies in the engineering sector which have some 900,000 employees. The EEF and its members have a particular interest in the economic and social provisions of the draft Charter.

General Comments

1. The EEF believes that the new draft represents some improvement on its predecessor (Convent 18 and 19). In particular we are pleased to see that some of the more problematical and ill-defined new "rights", such as that to equal remuneration for work of equal value, have been dropped. The EEF also notes that some rights previously classed as social and economic are now in the section on civil and political rights, i.e. those on vocational training and equality between men and women.

2. The EEF still has considerable difficulties with the proposed text, however. We continue to believe that the Charter should be a brief declaratory document consistent with the original intention of establishing "a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens". The current draft Charter shows substantial "mission creep". The draft is lengthy, technical and in our view will change directly and/or indirectly the relationship between the EU and the member states.

3. The current draft contains a number of Articles that are new rights and they will be used as stepping stones to further legislation on topics not yet covered by Directives. An example is Article 38 on "unjustified or abusive" terminations of employment.

4. The current draft also contains a number of Articles which seek to create new general rights out of limited specific rights such as Article 39 about the right of workers to "reconcile their family and professional lives" and Article 33 which seem to create a general unqualified right to information and consultation.

5. The precise way in which the current draft charter and the European Convention of Human Rights will interact is unclear.

6. The current draft charter is written in a way that suggests that it will have full legal status although this issue has not yet been decided. In any event it will have to be observed and implemented by EU institutions and bodies, member states and the social partners at Community level (Article 31).

Specific Points on the Draft Articles

7. Article 31 - This Article now includes reference to "the social partners at Community level", but this is not reflected in other Articles such as Article 46. The impact of the inclusion of the social partners at Community level is unclear. For example, it could be argued that this Article requires UNICE to enter into social dialogue to reach an agreement on "unjustified and abusive" termination of employment. The Article also maintains a distinction between social rights to be observed and social principles to be implemented. The statement of reasons refers only to social rights, and the distinction remains unclear.

8. Article 33 - This Article is an attempt to create a new general right out of limited and specific Directives about consultation and information. The draft Article pre-judges, for example, the discussion about the proposed Directive on information and consultation at national level.

9. Article 34 - This Article includes not only the right to negotiate but also to conclude collective agreements. This is not required by the European Convention on Human Rights and if included in the Charter would probably require a change in UK law. The UK statutory machinery for trade union recognition, including the specified Method of Collective Bargaining Order does not require either party to conclude collective agreements.

10. Article 35 - This Article is curiously worded. It can be argued that Article 35 is not needed when there is Article 36. Article 35 is based on the Working Time Directive that was brought forward as a health and safety measure.

11. Article 38 - This Article is about dismissal and seeks to create a new general right. It is a good example of the Charter moving away from summarising existing, well-recognised EU rights to creating new rights to fill a new Charter. The Article covers both "unjustified" and "abusive" terminations. It is assumed - but not clear - that abusive covers dismissals in breach of procedure rather than merely dismissals where the worker has been reviled at the time of termination.

12. Article 39 - This Article seems to create out of limited specific rights relating to maternity and parental leave a general right that "all workers have the right to reconcile their family and professional lives". It is most unclear what this means. It might, for example, include the right to work part-time.

June 2000

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 8. Juni 2000

CHARTE 4351/00

CONTRIB 215

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme von Herrn Karl Hermann Haack, Mitglied des deutschen Bundestags. [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

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Karl Hermann Haack
Mitglied der Parlamentarischen Versammlung des Europarates

Mitglied des Deutschen Bundestages

Beauftragter der Bundesregierung
für die Belange der Behinderten

An den Vorsitzenden des Konventes zur Ausarbeitung einer Europäischen Grundrechtecharta
Herrn Prof. Dr. Roman Herzog

Fax: 0032-22857837

Deutscher Bundestag

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Berlin, den 01.06.00

Aufnahme sozialer Grundrechte in die Grundrechtecharta der Europäischen Union

Sehr geehrter Herr Professor Herzog,

am kommenden Montag wird der Konvent seine Beratungen zum Einzelkapitel soziale Grundrechte auf der Grundlage des Conventes 34 mit einer weiteren Grundsatzaussprache fortsetzen. Die Parlamentarische Versammlung des Europarates und der Europarats-Sozialausschuss werden bei ihrer nächsten Sitzung Ende Juni die Frage sozialer Grundrechte in der EU-Grundrechtecharta ebenfalls beraten und eine gemeinsame Erklärung mit dem Europäischen Parlament verabschieden. Diese wird zur Zeit in einer gemeinsamen Arbeitsgruppe der beiden Sozialausschüsse vorbereitet.

Ich bitte Sie, dieses Positionspapier den Mitgliedern des Konventes frühestmöglich zur Verfügung zu stellen und auch eine Aufnahme in die im Internet abrufbaren Datenbank zu veranlassen. Eine Übersetzung in englischer und französischer Sprache wird dem Konvent in den nächsten Tagen ebenfalls zugehen.

Mit freundlichen Grüßen

Ihr

Karl-Hermann Haack

Ǝ

Karl Hermann Haack
Mitglied der Parlamentarischen Versammlung des Europarates

Mitglied des Deutschen Bundestages

Beauftragter der Bundesregierung
für die Belange der Behinderten

Stellungnahme zur Notwendigkeit der Aufnahme sozialer Grundrechte in die Grundrechtecharta der Europäischen Union

1. Die Entscheidung, eine Grundrechtecharta für die Europäische Union zu schaffen, stellt einen Meilenstein in der Geschichte der Europäischen Einigung dar. Die Charta bietet die Chance, dass die Europäische Union am Vorabend ihrer Erweiterung und institutionellen Reform deutlich als **Wertegemeinschaft** sowohl nach außen als auch gegenüber den Unionsbürgern auftritt. Damit diese auch volle Geltung beanspruchen kann, sind ausdrücklich die Pläne innerhalb des Konventes zu begrüßen, eine Aufnahme der Charta in die Verträge vorzunehmen und dadurch der Charta rechtsverbindlichen und einklagbaren Charakter zu geben.
2. Die hochrangige und kompetente Zusammensetzung des Gremiums zeigt, dass sich die EU der herausragenden Bedeutung der Arbeit und Zielsetzung des Konventes bewusst ist. Dies gilt in besonderem Maße für die Arbeit der Mitglieder des Konventes, die trotz des ehrgeizigen Zeitplanes für die Erarbeitung der Charta ihre Aufgabe mit großer Kompetenz und bewundernswerten Engagement erfüllen.
3. Angesichts des bisherigen Standes der Beratungen zur Frage der sozialen Grundrechte und der Präsidiumsvermerkes Convent 34 erscheint es allerdings notwendig, ausdrücklich auf die grundsätzliche Unteilbarkeit und Universalität der Menschenrechte hinzuweisen. Es entspricht der europäischen und internationalen Rechtsentwicklung des 20. Jahrhunderts, dass soziale Grundrechte nicht im Gegensatz zu den klassisch liberalen Grundrechten stehen, sondern sich die beiden Bereiche gegenseitig bedingen und nur als Einheit dem modernen Grundrechteverständnis entsprechen können
4. Diesem Grundrechtebegriff folgte auch der Kölner Ratsbeschluss indem er die Vorgabe machte :"Bei der Ausarbeitung der Charta sind ferner wirtschaftliche und soziale Rechte zu berücksichtigen, wie sie in der Europäischen Sozialcharta und in der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer enthalten sind, soweit sie nicht nur Ziele für das Handeln der Union begründen."[1]
5. Die vorliegende Fassung des Conventes 34 gibt Anlass zur Sorge, dass der Konvent bei der Ausgestaltung der wirtschaftlichen und sozialen Grundrechte hinter den für die Mitgliedsstaaten bereits geltenden internationalen Standards zurückbleiben wird. Da nicht klar zwischen Rechten und Handlungszielen unterschieden wird, entspricht das Convent 34 nicht dem Kölner Mandat.
6. Diese ernsten Bedenken werden auch vom Sozialausschuss des Europarates [2] und dem UN-Ausschuss für wirtschaftliche, soziale und kulturelle Rechte[3] geteilt, die in ihren Eingaben darauf hingewiesen haben, dass wirtschaftliche und soziale Grundrechte gleichberechtigt neben den Bürger- und Freiheitsrechten stehen müssen. Besonders ernst sollte der Konvent die

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1 Kölner Ratsbeschluß vom 3./4. Juni 1999
2 Charte 4116/00
3 Charte 4315/00

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Karl Hermann Haack
Mitglied der Parlamentarischen Versammlung des Europarates

Mitglied des Deutschen Bundestages

Beauftragter der Bundesregierung
für die Belange der Behinderten

Warnung des UN-Ausschusses nehmen, dass alle EU-Mitgliedstaaten riskieren, ihre Verpflichtungen zu verletzen, die sie in Art. 2, Abs. 1 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte (ICESCR) eingegangen sind.

7. Die regionale Rechtsentwicklung in der EU ist als Teil des international anerkannten und gültigen Rechtsregimes zu sehen. Ein Zurückbleiben hinter internationalen Standards der Grundrechte trägt die Gefahr in sich, dass die Grundrechtecharta von Anfang an mit erheblichen Legitimitätsproblemen in- und ausserhalb der Union konfrontiert sein wird. Alle bisherigen Äußerungen aus dem Europarat machen deutlich, dass dieser einer Grundrechtecharta, die nicht die Unteilbarkeit und Universalität der Menschenrechte widerspiegelt, keine Zustimmung erteilen wird.

8. Zusammenfassend bitte ich den Konvent eindringlich, seiner Verantwortung gerecht zu werden, indem er

- Den Ratsbeschluss von Köln umsetzt, und die Europäische Sozialcharta sowie die Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer insoweit berücksichtigt, wie es den mittlerweile gültigen nationalen und internationalen Standards entspricht.

  Die Revidierte Europäische Sozialcharta, die den neuesten Stand der Rechtsformulierung widerspiegelt, sollte dabei Berücksichtigung finden, um einem schnellen Veralten der Grundrechtecharta vorzubeugen.[4]

- in seinem Entwurf wirtschaftliche, soziale und kulturelle Grundrechte gleichberechtigt mit den Freiheitsrechten in die Grundrechtecharta aufnimmt, indem er die Vorschläge innerhalb des Konventes unterstützt, die von der grundsätzlichen Unteilbarkeit, Interdependenz und Universalität der Grund- und Menschenrechte ausgehen.

- dadurch dem Vorwurf vorbeugt, dass die Europäische Union beabsichtige, einen Sonderweg im Grund- und Menschenrechtsverständnis einzuschlagen und in seinem Entwurf keinen Zweifel daran aufkommen lässt, dass der Konvent die Europäische Grundrechtecharta als integralen Bestandteil des europäischen und internationalen Grund- und Menschenrechtsregimes begreift.

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[4] Der Ratifizierungsprozess für die RESC ist zur Zeit in mehreren Mitgliedsstaaten im Gange. Auch die Bundesrepublik Deutschland prüft gerade, wie noch bestehende Bedenken gegen eine Ratifizierung der RESC schnellstmöglich ausgeräumt werden können.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 June 2000

CHARTE 4353/00

CONTRIB 217

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the High Commissioner for refugees of the United Nations regarding the right of asylum.[1]

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[1] This text exists in English language only.

NATIONS UNIES
HAUT COMMISSARIAT
POUR LES REFUGIES

Délégation Régionale pour le Benelux et les Institutions Européennes

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VERENIGDE NATIES
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UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES
Regional Office for the Benelux and the European Institutions

FACSMILE MESSAGE

To: Mr. Francisco Fonseca, deputy chef de cabinet Commissioner Vitorino	***Destination Fax No:*** 299 49 80
From: Johannes van der Klaauw	***Return Fax No:*** 00 32 2 627 17 32 ***Tel:*** 00 32 2 649 01 53 ***Email:*** vanderkl
Date: 05 June 2000	***No. Of Pages Including This Page:*** 2

Subject: Charter of Fundamental Rights – Article 21 a

Dear Mr. Fonseca,

UNHCR is pleased to see that the newly proposed text for Article 21 of the draft Charter of Fundamental Rights on the right of asylum follows the amendment proposed by Commissioner Vitorino. We note that an additional sentence has been included to Article 21 a which was not included in Commissioner Vitorino s original amendment. While welcoming this additional sentence, we believe the text could benefit from the inclusion of a reference to persecution for refugee-related reasons and, hence, a prohibition of direct and indirect *refoulement.*

Please find attached the text of our proposal which we hope Commissioner Vitorino can promote in tomorrow s discussions in the Convention.

Yours sincerely,

Johannes van der Klaauw

cc. Mr. Jean-Paul Jacqué (fax 285 78 37)

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Suggested Article 21a:

1. Collective expulsion of aliens is prohibited.

2. No one shall be extradited or shall be expelled, directly or indirectly, to a State where he could be subjected to the death penalty, to torture or other inhuman treatment, or to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 13 juin 2000

CHARTE 4354/00

CONTRIB 218

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de la Fédération Internationale de l'ACAT - Action Chrétienne pour l'Abolition de la Torture (FI.ACAT). [1]

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[1] Ce texte a été soumis en langue française seulement.

Paris, le 6 juin 2000

La **FI.ACAT - Fédération internationale de l'ACAT** (Action des Chrétiens pour l'Abolition de la Torture) - est une association œcuménique internationale avec statut consultatif auprès des Nations Unies et du Conseil de l'Europe et statut d'observateur auprès de la Commission africaine des droits de l'Homme et des peuples. Elle regroupe 19 associations ACAT nationales affiliées et 8 autres en cours d'affiliation en Europe, Afrique, Amérique et Asie.

1) Observations à propos de l'article 2 du Projet de Charte des droits fondamentaux de l'Union européenne (Charte 4284/1/00 Rev1 - Convent 28)

L'article 2 alinéa 2 du Projet de Charte des droits fondamentaux de l'Union européenne (Charte 4284/1/00 Rev1; Convent 28) s'oppose d'une façon catégorique à la peine de mort. Cependant l'exposé des motifs du même article autorise des dérogations au principe posé du droit à la vie.
La FI.ACAT considère que l'interdiction de la peine de mort ne saurait souffrir aucune exception. Les exceptions prévues à l'article 2 du protocole n° 6 à la Convention européenne des droits de l'Homme autorisant l'application de la peine de mort pour les actes commis en temps de guerre ou de danger éminent de guerre ne peuvent pas être repris dans Charte. Ce serait un retour en arrière par rapport aux avancés réalisées ces dernières années dans le domaine des normes internationales. La FI.ACAT rappelle en effet qu'en vertu du statut de la Cour Pénale Internationale, adopté en juillet 1998 à Rome, la peine de mort est exclue même pour les crimes les plus graves crime contre l'humanité, tels que le génocide et violations de la législation sur les conflits armés. Et le Conseil de Sécurité des Nations Unies n'a pas voulu retenir la peine capitale pour les crimes soumis à la compétence du TPI "ex-Yougoslavie" et le TPI "Rwanda".

2) **Proposition d'amendement de l'article 4 du Projet de Charte**

La FI.ACAT soutient la proposition suivante (en langue anglaise) soumise par l'IRCT (International rehabilitation Council for Torture Victims) :

Proposed amendment to Article: 4

The IRCT is a medically based organisation, supporting approximately 200 centres and programmes for rehabilitation of victims of torture world-wide.

Proposed text:

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
2. No one may be expelled or extradited to a State where he would be in danger of being subjected to the death penalty, torture or other inhuman treatment.
3. The victim of an act of torture shall have an enforceable right to as full rehabilitation as possible, including the means for social reintegration.

ARTICLE X:

Public authorities shall ensure that education and information regarding these rights and freedoms are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other public officers.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 June 2000

CHARTE 4355/00

CONTRIB 219

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Contribution submitted by three trade union organisations (LO, TCO and SACO) in Sweden

Please find hereafter a contribution by three trade union organisations (LO, TCO and SACO) in Sweden regarding worker's right in the EU Treaty. [1]

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[1] This text exists in English and Swedish languages. (The letter in Swedish only).

Till
Utrikesminister Anna Lindh
Professor Daniel Tarschys
Riksdagsman Göran Magnusson
Riksdagsman Lars Tobisson

Med hänvisning till bilagda dokument hemställer vi

att de svenska representanterna i konventet för utarbetande av ett utkast till Europeiska unionens stadga om de grundläggande rättigheterna verkar för att stadgan utformas under fullt beaktande av dokumentet

att den svenska regeringen inom ramen för den nu pågående regeringskonferensen (IGC 2000) verkar för att fackliga rättigheter skrivs in i EUs fördrag på det sätt som föreslås i dokumentet.

Stockholm den 5 maj 2000

Wanja Lundby-Wedin	Sture Nordh	Anders Milton
LO	TCO	SACO

The EU should protect workers' rights!

LO's, TCO's and SACO's demands for changes to the Treaty

The free and common market that has been created in Europe is based on the free movement of goods, services, labour and capital. This single market provides excellent preconditions for growth and new jobs. However, if this market is to work properly and lead to improved welfare and prosperity for all, it must be complemented with social regulations of the type that have long been in existence at the national level. Market forces must be regulated by means of political decisions at the European level.

The steady increase in international competition has in turn increased the vulnerability of companies. Nevertheless, internationalisation and the free movement of capital and companies have strengthened the position of the employers in the short term. Co-operation within the EU, however, is now providing opportunities to control developments by means of political decisions and to introduce regulations that prevent abuses of free mobility and create competition on equal terms. We wish to use this joint political strength to guarantee the civil and trade union rights of employees. By so doing, we can create a better balance between the social partners.

The fact that production and factories can be moved freely between countries entails a risk that employers will be able to play employees off against each other. The employers can move, or threaten to move, jobs to other countries where the employees have been forced to accept poorer terms and conditions. The free movement of goods, services and capital must therefore be supplemented with a "fifth freedom", the freedom of employees to take trade union action across national borders. Without such a freedom, there is a risk that the employers will gradually advance their position to the detriment of employees' living standards, working conditions and other living conditions.

Strengthening the EU system of social regulations is thus is a joint challenge for all of the labour-friendly forces within the Member States.

For several years now, we have been demanding that employees' trade union rights should be more strongly protected by Community law. The ETUC Congress of 1991 supported the demand that the right to take sympathy action to support workers in other countries should be guaranteed. In February 1997, LO and TCO wrote to the Swedish government to demand that it should pursue the question of strengthening workers' rights at the then ongoing government conference.

The question now has renewed relevance, as the EU summit meeting held in Cologne in June 1999 decided that a statute on basic rights should be drawn up. A draft is to be presented prior to the summit meeting to be held in December this year. Subsequently, the question of whether the statute will be incorporated into the Treaty, and if so how, will be studied.

A special body, a Convention, with representatives of the heads of state and government, the Commission, the European Parliament and the national parliaments has been appointed to draw up this draft. The Swedish Government has appointed Daniel Tarschys as its representative. Parliament is represented by Göran Magnusson (Social Democratic Party) and Lars Tobisson (Moderate Party).

The strengthening of workers' rights within the EU must become an important part of this work.

What the trade union organisations want

- The EU Member States and the EU's institutions should be obliged to follow the Council of Europe's Convention on Human Rights and the fundamental ILO conventions on the right of association, the right to strike, the right to bargain collectively and the prohibition of child labour and enforced labour.
- An unconditional demand for membership of the EU for both present and future members should be that they ratify and comply with the conventions mentioned above.
- The conventions should continue to be interpreted by the international bodies and courts that have been given this task, i.e. the ILO and the European Court of Human Rights. We do not want duplicate systems.
- Other conventions of a more general nature that concern workers' rights, such as the UN Declaration on Human Rights of 1948 and the Council of Europe's revised Social Statute of 1996, should, due to their form and structure, be stipulated as goals for the work of the EU.
- The workers of Europe should be permitted to co-operate with each other, for example by being allowed to take trade union sympathy action across national borders.

We wish to see our demands realised in the form of binding regulations. At the same time, we wish to prevent power from being transferred from popularly-elected politicians in the Member States to judges in Brussels who cannot be dismissed. The Court of Justice of the European Communities must not therefore be given greater power over the national parliaments. This means that two methods will be required when workers' rights are incorporated into the EU's treaties.

- The institutions of the EU — the Commission, the Council, the Parliament and the Court — should be obliged to respect trade union rights in the course of their work. The Member States and, ultimately, the Court of Justice should be responsible for monitoring this. When interpreting various parts of Community law, for example, the Court should always guarantee the protection of workers' civil and trade union rights.
- On the other hand, it should not be possible to bring Member States before the Court for contravention of this part of the Treaty. It should instead be possible to exert pressure on them and, ultimately, subject them to political measures following a decision by the Council of Ministers if they fail to respect the basic rights protected by the Treaty.

More about protection at the EU level

The institutions of the EU, i.e. the Council, the Parliament, the Commission and the Court should, by means of express regulations in the Treaty, be obliged to always take into account certain basic conventions on civil and trade union rights. These conventions are the Council of Europe's Convention on Human Rights, the UN Convention on Civil and Political Rights and the fundamental ILO conventions on the right of association (including the right to strike), the right to bargain collectively and the prohibition of child and enforced labour.

The freedom of movement of goods, services, capital and labour within the Union must be complemented by a fifth freedom, the freedom of workers to defend their interests by means of trade union activities.

Human rights superordinate to economic rights

At present, the Court of Justice always pays regard to and defends the free movement of goods, services, capital and labour in its judgements. Certain other basic principles are also taken into account, above all that no-one should be discriminated against on the grounds of nationality and the preservation of free competition across national borders.

The Court of Justice has also stipulated that certain basic rights that are common to the Member States are a part of Community law, for example the prohibition of torture, guarantees concerning freedom of thought and expression and the right to a fair trial.

We feel that it is self evident that basic human rights, including the right to organise in trade unions, the right to negotiate freely with employers and the right to take industrial action, should be protected by Community law. We believe that the Court should always take the civil and trade union rights of workers into account in the course of its work. Human rights should, in our view, be superordinate to economic rights.

Such a development is also clearly underway. Particularly worthy of mention here is Council statute 2679/98, the so-called Monti Statute, which stipulates that basic rights, including the right to take industrial action, are superordinate to the free movement of goods. We can also mention directive 96/71 on the stationing of workers abroad, where point 22 of the introduction states that the right to take industrial action is superordinate to the directive. Finally, we can refer to a judgement of the Court of Justice in September 1999 in case C 67/96, the so-called Albany judgement. Here the Court stated that collective agreements that aim to improve employment and working conditions are superordinate to competition law.

It can thus be said that the principle that the civil and trade union rights of workers are superordinate to economic rights has already been established in Community law and that it is now important to clarify this by means of express regulations in the Treaty.

Technical structure etc.

Technically, these regulations should have the following form and structure. The EU's institutions should be obliged to take the trade union rights of workers (as expressed in the conventions mentioned above and as interpreted by the respective monitoring and supervisory bodies) into account in all their activities. A characteristic of these conventions is that they contain relatively specific regulations that can suitably be made legally binding. These rights are also of the type that we feel it is important to preserve and safeguard from a worker's perspective.

The obligation to observe these rights should be incorporated into the Treaty.

In concrete terms, our proposal means that the Court of Justice should be bound to respect the above mentioned conventions and the rights that they protect when the Court interprets Community law. These rights should in principle have priority over, for example, the free movement of goods, services and capital if they happen to come into conflict with each other. Similarly, the Commission should be obliged to respect the conventions when proposing new EU regulations and in the course of its other activities. Parliament and the Council should be bound by the regulations in the Treaty when, for example, they make decisions on new EU regulations.

There are other important conventions and international agreements in addition to those mentioned above. These include, above all, the UN Declaration on Human Rights of 1948, the UN Convention on Economic, Social and Cultural Rights of 1966, the UN Convention on Children's Rights of 1989 and the Council of Europe's revised Social Statute of 1996. These international declarations are of great value as documents that can be used when setting goals, but they contain regulations of a fairly general nature. We believe, therefore, that these regulations cannot suitably be made legally binding. They should, on the other hand, be respected as general goals for the work of the EU.

There are also those who believe that the EU should protect a much wider range of rights in the Treaty, such as the right to housing, support, education, culture and so on. We believe, as do most others, that such rights should not be covered by legally binding regulations but by regulations of a very general nature. Such rights should instead be stated as clear goals for the work of the EU. If legally binding regulations are introduced, then they must be very precise. Otherwise, the power of giving the regulations a concrete content will be transferred from popularly-elected politicians to court lawyers.

No duplicate systems

It is important that conflicts do not arise with regard to competence between, above all, the Court of Justice of the European Communities on the one hand and the European Court of Human Rights and the ILO system on the other. It is not tenable to have two systems for human rights with the Member States being obliged to follow both. It is important that the interpretation of the regulations is consistent and uniform. The institutions of the EU should therefore be bound by the interpretations of the respective conventions as determined by the ILO bodies and the European Court of Human Rights.

Obligations of the Member States

The Member States should also be obliged to respect the Council of Europe's Convention on Human Rights, the UN Convention on Civil and Political Rights and the fundamental ILO conventions on the right of association (including the right to strike), the right to bargain collectively and the prohibition of child labour and enforced labour. It should be an unconditional demand for all Member States that they ratify and comply with these conventions. No country that fails to comply with this demand should be granted membership of the EU.

The Member States should also be obliged to permit trade union sympathy action, particularly such action that aims to support industrial action in another country that has been decided upon in line with accepted trade union principles.

Background and technical structure

The strength of the workers lies in being able to act together. If employers are able to play us off against each other we will become weak. The strength and unity of the trade unions has been of decisive importance for the successes we have had in Sweden in promoting and defending the interests of our members. We must now work internationally in a similar way. The right of the trade unions in the EU countries to take sympathy action to support workers in other countries must therefore be extended, and this must become a real possibility. The Member States must be obliged to guarantee the right to take trade union sympathy action both nationally and internationally.

However, the question of whether a Member State is complying with the demands described above or not should not be tried or determined by the Court of Justice. An individual citizen should not, either directly or indirectly, be able to turn to the Court to try the question, for example, of whether or not the right to strike as expressed in the Member State concerned complies with the demands in the Treaty.

A Member State that does not meet its obligations should instead, following a decision by the Council, be liable to political pressure in line with Article 7 of the Treaty.

The reasons for this are as follows.

The labour legislation on the right to bargain collectively, the right to strike and so on varies greatly in the different Member States. In Sweden, for example, there is an almost absolute obligation not to take industrial action while a collective agreement is still valid, while the right to take such action is, on the other hand, very extensive when no collective agreements are in force. In some countries a collective agreement carries no such obligation, which of course does not mean that there are no other, completely different, limitations on the right to take industrial action. It is not possible to harmonise these rights at a common European level as the strength of the trade union organisations, the importance of collective agreements and so on vary greatly between the countries.

A development in which the Court of Justice formulates "an average European right to strike" on the basis of general rules and regulations would be completely unreasonable and would, in the long term, risk seriously weakening the position of our members and their trade union organisations. It would also entail a transfer of power from popularly-elected politicians to irremovable lawyers. It is a political task to resolve conflicting goals in society.

Summary

Concern that the right of association, the right to bargain collectively and the right to take industrial action would no longer be matters for national self-determination but would be transferred to the Court of Justice within a general framework of rules and regulations has previously made us doubtful about the possibility of guaranteeing these rights in the Treaty without undermining the regulations in Sweden. We have now found a technical solution to this problem.

The trade union rights described above should be incorporated into Article 6.1 of the Treaty, in which the fundamental democratic principles on which the EU is based are stipulated. If a country fails to comply with the conventions, the Council should be able to take political measures against the country concerned in line with Article 7 of the Treaty. It should not be possible, however, to have such matters tried by the Court of Justice.

20 March 2000

LO TCO SACO

PROYECTO DE CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

fundamental.rights@consilium.eu.int

Bruselas, 13 de junio de 2000 (15.06)
(OR. fr/es)

CHARTE 4356/00

CONTRIB 220

NOTA DE TRANSMISIÓN

Asunto: Proyecto de Carta de los Derechos Fundamentales de la Unión Europea

Adjunto se remite una contribución de la Sociedad General de Autores y Editores (SGAE) de España [1].

[1] El texto se ha presentado sólo en español.

PROYECTO DE CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

Propuesta de la Sociedad General de Autores y Editores (SGAE)

Madrid, 1 de junio de 2000

El 25 aniversario de la Declaración Universal de los Derechos Humanos, celebrado en diciembre de 1998, llevó al Consejo Europeo de Colonia del 3 y 4 de junio de 1999 a proponer, para finales del año 2000, la elaboración de una Carta de los derechos fundamentales de la Unión Europea. En su Decisión, el Consejo recuerda que en el artículo 6 del TUE "consta que la Unión se basa en los principios de libertad, democracia, respeto de los derechos humanos y de las libertades fundamentales del Estado de Derecho, principios que son comunes a los Estados miembros" y que "la Unión respetará los derechos fundamentales tal y como se garantizan en el Convenio Europeo para la Protección de los Derechos Humanos y las libertades fundamentales (CEDH) y tal y como resultan de las tradiciones constitucionales comunes a los Estados miembros como principios generales del derecho comunitario". El Consejo también considera en su decisión que al redactar la Carta deberán tenerse en cuenta "los derechos económicos y sociales, la Carta Social Europea y el Carta comunitaria de los derechos sociales fundamentales de los trabajadores".

Por todo ello, la SGAE entiende que el derecho de autor debe de formar parte de la futura Carta de derechos fundamentales de la Unión Europea y, como representante de parte del colectivo de autores españoles y europeos, solicita a la Convención encargada de redactar dicha Carta que, en base a los argumentos que a continuación se exponen, tenga en consideración su petición.

1. El CEDH en su preámbulo:

   - "Considera la Declaración Universal de los Derechos del Hombre, proclamada por la Asamblea General de las Naciones Unidas el 10 de diciembre de 1948",
   - Reconoce que el "objetivo del Consejo de Europa es alcanzar una unión más estrecha entre sus miembros y que uno de los medios para conseguirla es mediante la salvaguarda y el desarrollo de los derechos del hombre y de las libertades fundamentales";
   - **Insta a los Estados miembro a "tomar las medidas apropiadas para asegurar la garantía colectiva de algunos de los derechos enunciados e n la Declaración Universal de los Derechos del Hombre".**

   La Declaración Universal de los Derechos del Hombre de 1948 hace referencia de manera explícita al derecho de autor en su artículo 27:

   "Toda persona tiene derecho a participar libremente en la vida intelectual de la comunidad, a disfrutar de las artes y a participar en la vida científica y en los beneficios que de él resulten. **Toda persona tiene derecho a la protección de los intereses morales y materiales que la correspondan por razón de las producciones científicas, literarias o artísticas de que sea autora".**

Esta Declaración no tiene la fuerza del derecho internacional, pero sí tiene un valor moral. Se considera que forma parte del derecho consuetudinario de las naciones y que vincula moralmente a todos los Estados, sobre todo a aquellos que la firmaron y que firmaron a continuación los dos Pactos de las Naciones Unidas de 16 de diciembre de 1966. De hecho, **la obligación legal de respetar el derecho de autor** proviene, de uno de esos pactos, el **Pacto de Naciones Unidas sobre los Derechos Económicos, Sociales y Culturales,** cuyo artículo 15, inciso 1) apartado c) reproduce casi literalmente el artículo 27 de la Declaración. **Este Pacto vincula** a más de 130 Estados entre los que figuran **todos los Estados de la Unión Europea.**

Es importante destacar también, como lo ha hecho la Doctrina más especializada [1],que, si bien el articulado del CEDH no hace alusión expresa al derecho de autor, debe tenerse en cuenta que este Convenio se preocupa fundamentalmente de la protección del ciudadano frente a las intrusiones excesivas del poder público, y que se trata por lo tanto y ante todo, de un texto de "habeas corpus" ampliado. Precisamente, en el Borrador de la futura Carta [2], el Consejo deja claro que los objetivos de la misma son más amplios, ya que con ella aspira a alcanzar un principio básico de la Unión Europea: "la salvaguardia de los derechos fundamentales", para lo cual toma **como base** "un marco jurídico ya establecido y vinculante".

2. Varias Constituciones europeas hacen referencia de manera directa o indirecta a la necesidad de salvaguardar los derechos de los creadores para garantizar así libertad de pensamiento y de expresión. La **Constitución española** reconoce en su artículo 20 el derecho a la creación literaria, artística, científica y técnica. La **Constitución Portuguesa** consagra el artículo 42 a la Libertad de creación cultural, especificando que esta libertad implica el derecho a la invención, a la producción y a la difusión de obras científicas, literarias o artísticas y que comprende la protección legal de los derechos de autor. La **Constitución alemana**, en su artículo 5, establece que serán libres el arte y la ciencia, la investigación y la enseñanza. Por último cabe destacar la joven **Constitución de la Federación Rusa**, nacida en 1993, cuyo artículo 44 garantiza el derecho de todos a la libre creación literaria, artística, científica e intelectual, y establece que la propiedad intelectual deberá estar protegida por la ley.

En Francia, la Comisión Nacional Consultiva de los Derechos del Hombre, en su Opinión de 14 de noviembre de 1996 sobre la "Carta de Internet", recomendó a los poderes públicos, "teniendo en cuenta que la libre comunicación de pensamientos y de opiniones es uno de los derechos más preciados del hombre y que el artículo 10 de la CEDH consagra la libertad de recibir o de comunicar informaciones e ideas [...]" "que favorezcan la protección de los documentos y estudios protegidos por la propiedad intelectual y por los derechos de autor".

3. No cabe duda de que el derecho de autor protege a los ciudadanos en la libre expresión de sus ideas y de sus pensamientos, al garantizar la creación de unas obras literarias, artísticas o

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1 André Kéréver. "El Derecho de Autor es uno de los Derechos Humanos". Boletín de Derecho de Autor, vol. XXXII, nº3. Julio-septiembre 1998.

2 Ver: http://db.consilium.eu.int/DF/intro.asp?lang=es

científicas sin trabas y sin interferencias de los poderes públicos y de los demás ciudadanos. En su dimensión moral, el derecho de autor asegura la libre representación de la personalidad del autor. En su dimensión patrimonial, garantiza la independencia económica indispensable para hacer efectiva esa libertad de expresión y de creación. El Derecho de autor debe de ser considerado por lo tanto como una rama de la libertad de expresión y de creación, la cual, por su carácter fundamental y universal forma parte de los Derechos humanos.

4. Tomando como base el documento del Consejo de 8 de febrero de 2000, de referencia: CHARTE 4149/00 CONVENT 13. La SGAE propone a la Convención la siguiente redacción del artículo 15:

Artículo 15. Libertad de expresión.

1. Toda persona tiene derecho a la libertad de expresión. Este derecho comprende la libertad de opinión y la libertad de recibir o de comunicar informaciones o ideas sin que pueda haber injerencia de autoridades públicas y sin consideración de fronteras.

2. El arte, la ciencia y la investigación son libres. *Esta libertad comprende el derecho a la invención a la creación literaria, artística, científica y tecnológica y a la protección legal de la propiedad intelectual.*

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 June 2000

CHARTE 4357/00

CONTRIB 221

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the International FoodFirst Information and Action Network (FIAN) with proposals for amendments. [1]

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[1] This text exists in English language only.

FIAN – International
FoodFirst Information and Action Network

Eight proposals for changes or amendments to Convent No. 34 (18.05.00)

Draft of a Charter of Fundamental Rights

Heidelberg, June 2, 2000

FIAN (FoodFirst Information and Action Network) was founded in 1986 as an international human rights organisation working for the implementation of social, economic and cultural human rights (esc-rights), especially the right to adequate food. Currently, FIAN-International has sections and co-ordinating bodies in 20 countries, and members in about 60 countries. FIAN has consultative status with the United Nations, as well as with the OAU and the European human rights system.

FIAN – International - FoodFirst Information and Action Network

Eight proposals for changes or amendments to Convent No. 34 (18.05.00)

Concerning: Draft of the EU Charter of Fundamental Rights

Summary:
FIAN is proposing eight substantive changes in the wording of the articles concerning economic and social rights. Following this summary, all eight points are presented with the reasoning lying behind the proposed changes:
1. **Article 31** should be removed, because it is introducing a differentiation between different sets of human rights, contrary to the internationally recognized indivisibility of all human rights.
2. **Article 41** should be renamed as the right to an adequate standard of living. At least three changes of wordings are urgently required, which are described below.
3. The **right to work** is missing and substituted by the right to the freedom to choose an occupation.
4. The full content of the **right to health**, as it is part of the international bill of human rights, is considerably restricted to an access to medical care (**Article 42**). That would be one of the most restrictive definitions of the right to health ever made and a step back of more than 20 years in understanding economic and social rights.
5. In all Articles dealing with rights at work **(Articles 33, 34, 35, 36, 38, 39)** the Draft is only talking about the rights of workers, while in international human rights standards these rights are rights of everyone.
6. The draft is missing any substantive provision concerning non-discrimination at work. Any provision for **equal pay for equal work** is totally missing.
7. The draft has no provision for guaranteeing **the right to fair wages**, which is a basic international human rights standard
8. **Article 48** should be removed, because it restricts the scope of the charter to the existing treaties of the European Community. A fundamental rights charter cannot by principle be bound by normal legislation - otherwise its fundamental character is undermined.

1. General Comments concerning the inclusion of ESC-Rights into the Draft:

Concerning Article 31: FIAN is strongly in favour of deleting the whole article, which is introducing a differentiation between social rights and principles. This would be a move away from the recognition of the indivisibility of human rights. The EU would initiate a legal interpretation that would severely undermine what all EU-member countries have accepted as modern human rights understanding in the Vienna Human Rights Conference. The pure fact that the substance of ESC-Rights, which has been developed fast in the last ten years through the work of NGOs, UN-expert committees as well as many international Scholars, has not been taken fully into account.

Esc-rights do not essentially obligate states to anything different from civil-political rights:

1. The respect of existing possibilities for participation, both political and economic, meaning the respect of an individual's physical integrity as well as freedom of profession or the access to land (**obligation to respect**)

2. The protection of the individual by legal systems and the police, for example the freedom to act politically as well as the freedom to use resources for economic purposes (freedom from corruption, security of land titles, protection of the tenant etc.) (**obligation to protect**).
3. State action to create supportive frameworks for the fulfilment of human rights, this means the reduction of destructive frameworks and the creation of supportive ones (**obligation to fulfil)**.

All human rights have therefore elements that can only be implemented fully progressively. The end of all forms of discrimination against women is part of the International Covenant on Civil and Political Rights. Nobody would argue that this can only be seen as a principle because implementation will need some time. The differentiation between rights and principles should not be applied to both groups of human rights, neither to civil and political rights nor to economic, social and cultural rights. FIAN has prepared a detailed background paper in which all relevant arguments, which are used to differentiate between the different sets of human rights are taken up and are discussed. Please consider the paper to rethink the misconceptions that often build up against ESC-rights being full rights.

The inclusion of esc-rights in the Charter will not extend the responsibilities of EU institutions beyond those laid down in the EU treaties. The aim of including esc-rights is firstly to ensure that all the esc-rights of those resident within the EU are not violated by decisions taken on the European level.

Especially in the field of the fulfilment of esc-rights, the EU has already far-reaching legal capabilities. The accountability of policies of all organs of the EU and the member states is very important, especially as the economic frameworks are largely determined at the European level. Esc-rights imply negative rights, protecting all residents in the EU against the possible negative implications of EU-policy on the application of these rights.

2. Comment to Article 41: Social security and social assistance / Right to housing

The right to a income or minimum social security given to everyone to allow a life in dignity is the central objective of all economic and social rights. Therefore article 41 is the core of the social rights part of the planned Charter. Independent from the issue, which entity (EU or national state) has to guarantee social security the intention of article 41 should be that no EU policy is hindering the full enjoyment of an adequate standard of living. Consequently the article should be renamed as the most important social right, **the right to adequate standard of living**. This right is contained in the Universal Declaration of Human Rights as well as in the International Covenant on ESC-Rights Art. 11: *"The States Parties to the present Covenant recognize the right of everyone th an adequate standard of living for himself and his family, including adequate food, clothing and housing ..."*.

Beside this overall change of the focus of the article the current article has several severe weaknesses. (1) It starts with a limitation of the subject, without first clearly stating the right. (2) At least the wording "in particular" must be added before the vulnerable groups are being mentioned. ("... social security benefits providing protection ***in particular*** in the event of maternity...."). (3) The right to housing should be mentioned in a specific article and not together with social assistance. The right to housing requires that the states, or in case of the EU the EU, must secure that all policies are not negatively affecting access to housing. At the minimum an Article should be added guaranteeing the Right to Social Assistance as it was in the Draft from 29th March 2000 (Convent 19) in the former Article XIV "Right to Social Assistance." "*Any person who is without adequate resources (and who is unable to secure such resources by his own efforts or from other sources) must receive appropriate social assistance enabling him to live in dignity."*

3. Comment concerning the right to work:

A substantial limitation is that the draft articles do not contain the right to work. Article 32 guarantees only the right to choose and to engage in an occupation. Article 6 (1) of the ICESCR states: *"The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."* The international recognised standards of the right to work is therefore much higher than the standards in the draft of the Charter. The draft has a unnecessary restriction (it does not talk about the "right of everyone to the opportunity to gain his living by work", which is crucial to guarantee in the long run the core of all human rights work, to guarantee a life in dignity. Also Art. 6 does not require states to give jobs to everybody immediately but to safeguard that the state is not interfering with ones' opportunity to gain his living by work is essential. Especially when looking into the obligation of states to respect existing access to an opportunity to gain his or her living by work and to protect these opportunities, it must become clear that the right to work has to be an essential element of the Charter of Fundamental Rights.

4. Comment concerning Article 42 and the right to health:

Also missing in the draft of the Charter is a specific article on the right to health. Article 42 ("Everyone shall have access to medical care and prophylactic measures in accordance with each Member State´s rules") contains only a very small part of the international recognised right to health standard. It seems that the drafters have a severe fear that the recognition of the well established international human rights standards in the Draft Charter would widen the Mandate of the EU. This is in a double sense the wrong approach. Firstly the inclusion of esc-rights in the Charter will not extend the responsibilities of EU institutions beyond those laid down in the EU treaties. Secondly it neglects the real meaning of putting ESC-Rights into the Charter, the negative protection of EU-citizens against possible outcomes of current EU-policies on their rights. The aim of including esc-rights is to ensure that all the esc-rights of those resident within the EU are not violated by decisions taken on the European level, especially concerning the right to health, the enjoyment of which is highly influenced by framework conditions, like good standard for food, water etc. The recent competence of the EU in the economic sector by setting and harmonising standards are highly relevant to an individual's health situation. In such a situation the limitation of the right to health to the right of access to medical care is not acceptable.

Again the ICESCR provides a formulation much more adequate and it is a standard already recognised by all EU-members: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". The specification of that right in Art. 12 (2) as well as the interpretation of the right to health in the recent "General Comment" of that right, written by the UN-Committee on ESC-Rights shows, that the right to health is much broader than the current article 42 of the Draft.

5. Comments to the articles dealing with rights at work:

In Article 33, 34, 35, 36, 38 and 39 you are referring to the rights at work by talking about workers. All these rights are in international human rights texts and standards and are not only referred to as rights of workers but as rights of everyone, as you can see in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR): *"The States Parties of the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work..."* The broader formulation is necessary to secure that these rights are also guaranteed for all people working (also in the informal sector), not only those having an official

status as workers. In all the following proposals FIAN is referring in this paper mainly to the text of the ICESCR, firstly because it is one of the two central human rights treaties, which forms together with the Covenant on civil and political rights and the Universal Declaration of Human Rights the International Bill of Rights and secondly because all EU member states have ratified the Covenant and have to guarantee these rights on the national level.

6. **Equal pay for equal work:**

All the articles concerning the rights at work are missing a non-discrimination clause. Especially the provision concerning equal remuneration for men and women is missing. Guidance for a formulation can be drawn from Art. 2 (2) of the ICESCR where the states parties to the Covenant take the obligation *"to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind"*. Similarly is Art. 7 of the ICESCR *"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure in particular: (a) remuneration which provides all workers, as a minimum with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; ..."*. Equal remuneration is also part of the European Social Clause and in the constitutional tradition of EU member states. *

7. **Minimum wages:**

Moreover, the articles in the draft of the Charter regulating rights at work are missing another central element of international recognised human rights standards, the right of everyone to the enjoyment of just and favourable condition which ensure fair wages. The above mentioned quote of Art. 7 (a) of the ICESCR shows that fair wages *"allowing a decent living for workers and their families"* (Art. 7. (a) ii) are part of international recognised human rights standards. The right to fair wages is also enshrined in one of the central conventions of the International Labour Organisation. The Draft of the Charter should be amended with a provision containing that right. In general the text of the Art. 7. ICESCR is in many respects more comprehensive than the formulations chosen in the Charter. This for example is apparent when comparing Art. 35 of Convent 34 (Right to rest periods and annual leave) with Article 7 (d) of the ICESCR. Art. 35 of Convent 34 states that "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave", while Art 7 (d) of ICESCR states: "Rest, leisure and reasonable limitations of working hours and periodic holiday with pay, as well as remuneration for public holidays." The comparison shows that the very short Articles of the Draft are missing important elements of the central human rights covenant. The EU should include into its Charter of Fundamental Rights the already recognised international human rights standards and should not leave out central elements. FIAN is proposing to use the language of Art. 7 ICESCR instead of the language in the respective articles of the Draft of the Charter.

In substance the international human rights standards dealing with minimum wages are not requiring states to positively pay these wages, but to set a framework legislation guaranteeing that the respective national laws will secure that decent wages are paid giving the whole family a sufficient income.

8. Comment on Scope and Conditions: Articles 46-48:

Article 48 must be rewritten. Firstly, it refers only to the European Community. The Charter of Fundament Rights shall cover all work of the European Union. Secondly the formulation is very unfortunate. Fundamental Rights cannot be limited by normal treaty regulations. If fundamental rights are guaranteed by the EU to the people living in the EU they must be the general guidance for the EU-policies, otherwise there is the risk that ordinary treaty provisions override the Charter of Fundamental Rights. The limitation set by article 46 (2) is enough to comply with the reasons given in article 48.

Editors' note to CHARTE 4358/00, **Transmission: Textes relatifs à l'audition de la société civile du 27 avril 2000 [Extract]**:

Only the first six pages of this document are included. The remaining 269 pages includes copies of the submissions listed in those pages, all of which are included in this collection. CHARTE 4359/00 is not included (the first six pages are materially identical to these six, and the remainder again consists of 269 pages of duplicate documents).

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 14 juin 2000
(OR. F/DE/EN)

CHARTE 4358/00

CONTRIB 222

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne
– Textes relatifs à l'audition de la société civile du 27 avril 2000

Vous trouverez ci-après un recueil des textes relatifs à l'audition de la société civile, qui a eu lieu le 27 avril 2000 (**matinée)**. Ces textes sont présentés dans l'ordre de passage indiqué dans le tableau joint.

Sont repris dans ce document les contributions en langue française et, à défaut de français, en langue allemande ou anglaise. Une indication quant aux langues disponibles se trouve en footnote sur la première page de chaque contribution. Veuillez vous référer, pour les autres langues existantes, au site Internet.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPENNE
AUDITION DU 27 AVRIL 2000 - Mise à jour le 26 avril à 18h30

Demandeur	Représenté par:	Heure
Fédération internationale des Ligues des droits de l'Homme FIDH, 91, rue de l'enseignement, B-1000 Bruxelles (Isabelle Brachet)	M. Antoine BERNARD CHARTE 4101/00 CONTRIB 1 CHARTE 4129/00 CONTRIB 24 CHARTE 4232/00 CONTRIB 106	9h15
Forum Permanent de la société civile, Place du Luxembourg 1, B-1050 Bruxelles (Pier Virgilio Dastoli)	CHARTE 4104/00 CONTRIB 4 + Add. 1	9h20
ECAS Euro Citizen Action Service (53, Rue de la Concorde, B-1050 Bruxelles (Tony Venables)	CHARTE 4294/00 CONTRIB 166	9h25
European Movement/Mouvement européen, Place du Luxembourg 1, B-1050 Bruxelles (Marie-Claude Vayssade)		9h30
Die Kommission hat Ihre Beteiligung am 19.4. zurückgezogen. International Commission of Jurists, PO Box 216, 81A av; de Châtelaine, CH-1219 Châtelaine/Genève (Nathalie Prouvez)		9h35
Union of European Federalists, Place du Luxembourg 1, B-1050 Bruxelles (Jo Leinen)	M. Bruno BOISSIERE CHARTE 4258/00 CONTRIB 131	9h40
Jeunes Européens Fédéralistes, Place du Luxembourg 1, B-1050 Bruxelles (Paolo Vacca)	Mme Laure DAVIS CHARTE 4262/00 CONTRIB 135 CHARTE 4277/00 CONTRIB 150	9h45
Collectif sur la Charte des droits fondamentaux, 12 Villa Nicolas, F-93800 Epinay-sur-seine (Jean-Pierre Dubois, Vice-président de la ligue des droits de l'homme)	M. Stephane LARIGNON M. Christian SAOUT M. Jean-Pierre DUBOIS Mme Arlette HEYMANN-DOAT CHARTE 4243/00 CONTRIB 116	9h50
Union Paneuropéenne Internationale, D-München (Dr. Walburga DOUGLAS)	Gräfin Walburga DOUGLAS (begleitet von Stephan BAIER)	10h05
Conseil des communes et régions d'Europe, F-75001 Paris (M. V. Giscard D'ESTAING)	Heinrich HOFFSCHULTE Premier Vice-Président CHARTE 4220/00 CONTRIB 95	10h10
Conference des Regions Peripheriques Maritimes d'Europe, F-35000 Rennes (Xavier GIZARD)	M. François DESRENTES CHARTE 4264/00 CONTRIB 137	10h15
Eurocities Asbl, 18 Square de Meeûs, B-1050 Bruxelles (Eleni Marianou)	M. Bernard DELEBECQUE CHARTE 4248/00 CONTRIB 121	10h20
Diakonisches Werk der Evangelischen Kirche in Deutschland D-Berlin (M. Jürgen GOHDE)	Dr. Katharina ERDMENGER CHARTE 4230/00 CONTRIB 104 CHARTE 4254/00 CONTRIB 127	10h25
World Conference on Religion & Peace B-Bruxelles (M. Jango SAROSH)	M. AGIE de SELSATEN et M. Jehangir SAROSH CHARTE 4252/00 CONTRIB 125	10h30

Demandeur	Représenté par:	Heure
Commission des Episcopats de la Communauté européenne B-Bruxelles (Mr. Felix LEINEMANN)	Mme Anne MARCUS-HELMONS CHARTE 4128/ CHARTE 23 + Add. + 2	10h35
Frau Heidrun TEMPEL Oberkirchenrätin Evangelische Kirche in Deutschland (EKD) Bld Charlemagne 28, B-1000 Bruxelles	CHARTE 4119/00 CONTRIB 15 CHARTE 4300/00 CONRIB 172	10h40
Conférence des Eglises européennes, Rue Joseph II 174, B-1000 Bruxelles (Keith Jenkins)	M. Keith Jenkins CHARTE 4233/00 CONTRIB 107	10h45
Communautés philosophiques non-confessionnelles de Belgique CCL, Campus de la Plaine ULB CP 236 Avenue A. Fraiteur, B-10502 Bruxelles (Michel Magits + Philippe Grolet)	M. Georges LIÉNARD CHARTE 4161/00 CONTRIB 45 CHARTE 4244/00 CONTRIB 117	10h50
Franciscans (Commission for Justice, Peace and Integration of Creation)´, Beersdalweg 64, NL-6412 PE Heerlen (Louis Bohte)	CHARTE 4278/00 CONTRIB 151	10h55
Office catholique d'information et d'initiative pour l'Europe OCIPE , 3 Rue des Trévires, B-1040 Bruxelles (Pierre de Charantenay)	CHARTE 4251/00 CONTRIB 124 CHARTE 4276/00 CONTRIB 149	11h00
Fédération Humaniste européenne, Campus de la Plaine ULB CP 237, 1050 Bruxelles (Claude Wachtelaer)	CHARTE 4260/00 CONTRIB 133	11h05
Justitia et Pax (Commission Justice et Paix d'Europe) Rue M. Liétart 31 Bte 6, B-1150 Bruxelles		11h10
The European Newspaper Publisher's Association - Bruxelles (Mr. Dietmar WOLFF)	CHARTE 4259/00 CONTRIB 132	11h25
ARD Radio + TV Verbindungsbüro Brüssel, 223-225 rue de la Loi, B-1040 Bruxelles (Silke Müller)	Dr. Verena WIEDEMANN ** CHARTE 4229/00 CONTRIB 103 + ADD 1	11h30
***** ARD Verbindungsbüro hat darum gebeten, die Anhörungen von ARD Radio + TV und ARD und ZDF zusammenzulegen (Siehe 11h40).**		
Union européenne de Radio-Television, Case Postale 45, Ancienne Route 17A, CH-1218 Grand-Saconnex GE (Werner Rumphorst)	Mr Michael WAGNER, Senior Legal Adviser	11h35
ARD et ZDF (1ère et 2ème chaîne de télévision allemandes), D-55100 Mainz (Prof. Dr. Carl-Eugen Eberle)	*** CHARTE 4229/00 CONTRIB 103 + ADD 1	11h40
European Landowners' Organisation (ELO), B-Wavre (Mme Nathalie de CHABOT)	M. Johan NORDENFALK CHARTE 4165/1/00 CONTRIB 49 CHARTE 4190/00 CONTRIB 73 CHARTE 4291/00 CONTRIB 163	11h45
Bass-Hotels, Rue Neerveld 101, B1200 Bruxelles (James Wilson) Public Policy Executive Bass PLC)	CHARTE 4328/00 CONTRIB 194	11h50
The European Children's Network B-Bruxelles Ms. Mieke SCHUURMAN	CHARTE 4169/00 CONTRIB 53 CHARTE 4240/00 CONTRIB 113	11h55
Fédération des associations familiales catholiques en Europe, 28 Place Saint-Georges, F-75009 Parius (Georges Nothhelfer)	M Georges NOTHELFER et Mme Hilde YEN CHARTE 4162/00 CONTRIB 46 CHARTE 4263/00 CONTRIB 136 CHARTE 4274/00 CONTRIB 147	12h00

Demandeur	Représenté par:	Heure
The European Region of the International Lesbian and Gay Organisation ILGA-Europe, 81 rue Marché-au-charbon, B-1000 Bruxelles (Kurt Krickler)	CHARTE 4246/00 CONTRIB 119	12h05
Association des Femmes de l'Europe Meridionale AFEM, 48, Rue de Vaugirard, 5-75006 Paris (Micheline Galabert)	Me Sophie SPILIOTOPOULOS CHARTE 4120/00 CONTRIB 16 + Add. 1 CHARTE 4157/00 CONTRIB 42 + Add. 1 CHARTE 4172/00 CONTRIB 55 CHARTE 4231/00 CONTRIB 105 CHARTE 4314/00 CONTRIB 181	12h10
Bund der freien Waldorfschulen, Heidehofstr. 32, D-70184 Stuttgart (Eve Grothe)	Dr. Detlef HARDORP CHARTE 4296/00 CONTRIB 168	12h20
European Housing Forum, C/o EEF Bte 9, 1-2 Av. Des Arts, B-1210 Bruxelles (Laurent Ghekiere)	CHARTE 4242/00 CONTRIB 115	14h15
Eurolink Age, London Road, London SW 16 4ER (Liz Morrall)	CHARTE 4293/00 CONTRIB 165	14h20
Standing Committee of European Doctors CP, Av. De Cortenberg 66/2, 1040 Bruxelles (Dr. Markku Äêrimaa)		14h25
Forum des migrants de l'UE/European Union Migrant's Forum Rue Belliard 23 A, B 1040 Bruxelles (Annalisa Glückstadt)	CHARTE 4349/00 CONTRIB 213	14h30
International Rehabilitation Council for Torture Victims, 13 Borgergade, PO Box 2107, DK-1014 Copenhagen K (Dr. Inge Genefke)	CHARTE 4340/00 CONTRIB 213	14h35
Haut Commissariat pour les Réfugiés Nations Unies, Rue Van Ayèck 11B, B-1050 Bruxelles (Johannes Van der Klaauw)	M. Antonio FORTIN	14h40
Amnesty International, Rue du Commerce 70è72, B-1040 Bruxelles (Dick Oosting)	CHARTE 4173/00 CONTRIB 56 CHARTE 4290/00 CONTRIB 162	14h45
Standing Committee of experts on international immigration, refugee and criminal law, Postbus 201, NL-3500 AE Utrecht (Evelien Brouwer)	M. Arrien KRUIJT CHARTE 4163/00 CONTRIB 47	14h50
Gesellschaft für bedrohte Völker, PO-Box 2024, D-37010 Göttingen (Tilman Zülch)	M. Andreas SELMECI et M. Mateo TAIBON CHARTE 4266/00 CONTRIB 139	14h55
European Forum for Freedom in Education D-Witten Mme Nana GÖBEL	M. Ingo KRAMPEN CHARTE 4215/00 CONTRIB 91 CHARTE 4253/00 CONTRIB 126	15h00
European Bureau for Lesser Used Languages, Rue St. Josse 49, B-1210 Bruxelles (Tom Moring)	Prof. Patrick THORNBERRY (eingeführt vom Präsidenten Herrn Bojan BREZIGAR) CHARTE 4143/00 CONTRIB 33 CHARTE 4166/00 CONTRIB 50 CHARTE 4237/00 CONTRIB 110	15h05
European Blind Union, 58 Av. Bosquet, F-75007 Paris (John Wall)	M. Colin LOW (begleitet von M. Julian SMITH (sehend)	15h10

Demandeur	Représenté par:	Heure
Confédération Européenne des Syndicats B-Bruxelles (M. Emilio GABAGLIO)	CHARTE 4124/00 CONTRIB 19 CHARTE 4213/00 CONTRIB 89	15h15
European Social Action Network (ESAN), 60 Rue Ste Catherine, F-59800 Lille (Anthony Paulissen))	Mme Liliane CAROZZA (Vice-présidente)	15h20
Irish Business Bureau (Employers Confederation), Rue Montoyer 17-19 Box 3, B-1000 Bruxelles (Arthur Forbes)	M. Peter BRENNAN CHARTE 4273/00 CONTRIB 146	15h25
EUCDA Europ.Union Christlich-Demokratischer Arbeitnehmer, Parlement européen, PHS 6086 Rue Wiertz, B-1047 Bruxelles (Lux Delanghe)	M. Alexander VON SCHWERIN CHARTE 4239/00 CONTRIB 112 CHARTE 4255/00 CONTRIB 128	15h30
Confédération européenne des syndicats, Boul. Du Roi Albert II, 5, B-1210 Bruxelles (Erik Carlslund)	CHARTE 4124/00 CONTRIB 19 CHARTE 4194/1/00 CONTRIB 75 REV 1	15h35
Platform of european Social NGOs Rue de Londres 17, B-1050 Bruxelles (Sandrine Grenier)	M. Olivier GERARD CHARTE 4256/00 CONTRIB 129 CHARTE 4286/00 CONTRIB 158	15h40
Union des Confédérations de l'Industrie et des Employers d'Europe UNICE, Rue Joseph II, 40 Bte 4, B-1000 Bruxelles (Dirk F. Hudig)	M. Frank DOBERSTEIN CHARTE 4236/00 CONTRIB 109	15h45
European Anti Poverty Network EAPN, rue Belliard 205 Bte 13, B-1040 Bruxelles (Marie-Françoise Wilkinson)	M. Fintan FARELL	15h50
Fédération européenne d'associations nationales travaillant avec les sans-abri FEANTSA, 1, rue Defacqz, B-1000 Bruxelles (Catherine Parmentier)	CHARTE 4292/00 CONTRIB 164	15h55
European Disability Forum, Square Ambiorix 32 Bte 2a, B-1000 Bruxelles (Yannis Vardakkastainis)	M. Gilbert HUYBERECHTS	16h00
Terre des Hommes France ,4 Rue Franklin, F-93200 St. Denis (Alein Lejeune)	CHARTE 4245/00 CONTRIB 118	16h05
Eurochambers, Rue Archimède 5 Bte 4B, B-1000 Bruxelles (Arnaldo Abruzzini)	CHARTE 4366/00 CONTRIB 229	16h10
Fédération européenne du Personnel des Services Publics EUROFEDOP, Trierstraat 33, B-1040 Bruxelles (Bert Van Caelenberg)		16h15
Comité européen de liaison sur les Services d'intérêt général, 66, rue de Rome, F-75008 Paris (Pierre Bauby et Jean-Claude Boual) (manque Annexe)		16h20
CECODHAS (Comité européen de coordination de l'habitat social, Olympia 1, NL-1213 NS Hilversum PO Box 611 (Nico van Velzen)	CHARTE 4287/00 CONTRIB 159	16h25
Mouvement international ATD Quart Monde, Av. Victor Jacobs 12, B-1040 Bruxelles (M. Olivier Gerhardt)	M. Paul CALLOWALD CHARTE 4268/00 CONTRIB 141	16h30
Fonda pour la vie associative/CAFECS Carrefour pour une Europe civique et sociale, 18, rue de Varenne, F-75007 Paris (Frédéric Pascal)	M. Frédéric PASCAL CHARTE 4241/00 CONTRIB 114	16h35
Initiative "Netzwerk Dreigliederung", Büro Strawe, Haussmannstr. 44a, D-70188 Stuttgart (Dr. Christoph Strawe)	CHARTE 4164/00 CONTRIB 48 CHARTE 4228/00 CONTRIB 102	16h40

Demandeur	Représenté par:	Heure
Bar Council of England and Wales, 1 Av. De la Joyeuse Entrée, B-1040 Bruxelles (Evanna Fruithof)	CHARTE 4234/00 CONTRIB 108 CHARTE 4282/00 CONTRIB 155	16h45
Université de Sevilla,, Facultad de Derecho, Depart. de Derecho Constitucional Avd. Del Cid, E41004 Sevilla (Prof. Ana Carmona Contreras, Fernando Alvarez-Ossorio Micxheo, Jaquín pablo Urias Martinez)	M. Fernando Alvarez-Ossorio Micheo	16h50
Heinrich Böll Foundation, Rue le Titien 28, B-1000 Bruxelles (Silke Pillinger) **Die Böll Stiftung übergibt Ihr Redemandat an das Forum Menschenrechte** **(fax 12.4.2000)**	M. Michael Windfuhr (Forum Menschenrechte) CHARTE 4283/00 CONTRIB 156	17h00
Stichting Natuur en Milieu/The Netherlands Society for Nature and Environment, Dinkerstraat 17, NL-3511 KB Utrecht (R. Hallo)	Me Sabina VOOGD (Greenpeace Netherlands)	17h05

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 June 2000

CHARTE 4361/00

CONTRIB 224

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a letter and campaign paper of "Cooperativa Pangea", Rome. The collected signatures have been sent to the President of the Convention, Mr. Roman Herzog.[1] [2]

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[1] This text exists in English language only.

[2] Cooperativa Pangea: Via Fogliano 10, 00199 Roma. Tel and fax: 06-841 6600. E-mail: pangea@iol.it

Fair Trade: the right of being human beings

Campaign on the Charter of Fundamental Rights of the European Union

Context

The European Union is now writing a Charter of Fundamental Rights for the European Union whose higher goal is to constitute the basis on which the reformed Union will be founded. This Charter will define and protect the fundamental rights of all peoples living in the European Union and can become the ethical frame for European Union's political and commercial relations with third Countries.
For all these reasons, the Fair Trade movement - through its organisations in Italy, Spain, Portugal - believe it is important that the Economic and Social Rights, which are the basis of the Fair Trade action, are recognised and reinforced as Fundamental Human Rights, and that Fair Trade is recognised as a way for protecting and promoting these rights all over the World.
We ask you to back this action, by signing the following proposal.

Proposal

We, citizens of the European Union, aware of the importance of the European Union Charter of Fundamental Rights, wish to express our support to the Body in charge of its draft and development.
We, citizens of the European Union, require the inclusion of a reference to

a) Fair Trade as an important instrument of economic and social human rights defence all over the world

and to preview a

b) formal consultation of the European Fair Trade organisations to verify the implementation of economic and social rights.

We, citizens of the European Union, support the following requests of the **Fair Trade movement,** based in the Article 23 of the Universal Declaration of Human Rights:

The Charter of Fundamental rights should include:

1. Right to work and to choose an occupation.

2. Right to safety and health at work, favourable conditions of work and protection against unemployment, without any discrimination.

3. Right to a just remuneration, ensuring for the individual and his/her family a dignified life, supplemented, if necessary, by other means of social protection.

4. Right to equal pay for equal work, without any discrimination.

5. Right to weekly rest period, paid holidays and pensions.

7. Right to association and assembly, freedom to form and join trade unions and to join a political party, to collective bargaining and freedom of demonstration and to strike.

8 Right to health and social protection, social security, social and medical assistance.

9. Right to protection of children and young persons from any kind of exploitation.

10. Right to integration of disabled people, including construction of social structures and promoting equality in employment.

11. Right to environment and consumer protection: conservation of a healthy environment, principle of precaution and extensive information before introducing Genetically Modified Organisms.

*The campaign "**Fair Trade: the right of being human beings**" is promoted by Pangea (Italy), Associazione delle Botteghe del Mondo (Italy), La Bottega Solidale (Italy), O' Pappece (Italy), Setem Catalunha (Spain), Cidac (Portugal)*

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 13 juin 2000

CHARTE 4362/00

CONTRIB 225

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une contribution de l'Institut pour la Démocratie, Paris. [1]

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[1] Ce texte a été soumis en langue française seulement.

Contribution de l'Institut pour la Démocratie (Paris)

Quels droits fondamentaux européens ?

par Guy LARDEYRET
Président de l'Institut
pour la Démocratie
Conseiller général de la Sarthe

Le Conseil européen de Cologne de juin 1999 a décidé d'adjoindre au traité de Maastricht une Charte des droits fondamentaux de l'Union Européenne. Il s'agit d'une initiative heureuse.

Une telle charte ferait progresser la construction européenne car elle pourrait constituer, au delà des traites, l'amorce d'une future Constitution européenne. L'objet d'une charte des droits fondamentaux est de fixer dans le marbre les principes supérieurs qui garantissent la nature d'un régime politique et auxquels se soumettent, à plus ou moins long terme, tous les pouvoirs publics. Si l'initiative est heureuse, elle est malheureusement assortie de conditions douteuses.

Le gouvernement voudrait se servir d'une telle charte pour consacrer en Europe des droits prétendument «sociaux». Si l'intention est louable, son effet pourrait être l'inverse de celui souhaité : pérenniser le nombre scandaleusement élevé des chômeurs et des jeunes qui souffrent sur le vieux continent.

Prenons le droit au travail qui faisait la fierté de la Constitution soviétique. Il ne doit pas être confondu avec la liberté du travail, qui repose sur la liberté de l'employeur et du salarié. Les revenus du travail peuvent être insuffisants pour mener une vie décente, mais le légitime complément de ressource relève du devoir d'entraide, non de la rémunération du salarié.

De même, le droit à la santé est une expression impropre pur signifier la garantie donnée à chaque citoyen qu'il sera correctement soigné quelle que soit son niveau de revenu. Le même raisonnement s'applique au droit au logement, à l'instruction, et ainsi de suite. La façon dont le devoir d'entraide s'actualise ne relève pas des droits fondamentaux mais de la loi ordinaire, car elle dépend des ressources disponibles. Or la nouvelle tendance consiste à transférer ces décisions au niveau local pour leur meilleur contrôle par les citoyens.

La France et l'Europe étant engagés dans une compétition internationale désormais sans frontières, notre prospérité future dépendra de la compétitivité de l'environnement institutionnel des gens qui travaillent et produisent la richesse. Ce sont les citoyens qui offriront les services publics au meilleur qualité/prix qui jouiront demain du meilleur niveau de vie. Un point essentiel de la charte sera donc la façon dont nous saurons mieux formuler que les autres la séparation du public et du privé, le critère principal auquel se reconnaît un régime démocratique. Les avantages sociaux sont rendus possibles par l'efficacité économique, qui dépend elle-même du respect des libertés, qui doivent être garanties par une charte et une justice constitutionnelle.

La transcription des lois non écrites de la démocratie en une matière juridique est un travail d'orfèvre en philosophie politique. On aurait pu repérer les quelques experts européens capables de préparer un tel projet. La procédure retenue à Tampere d'en appeler à des représentants des gouvernements et à des délégations parlementaires, donnera-t-elle le résultat escompté ? Plus un sujet des complexe, plus on gagne à séparer la fonction d'expertise et la fonction tribunitienne.

Il faut espérer que l'idée juste à l'origine de cette initiative ne compromettra pas demain la mise en place d'une Constitution européenne dont le besoin se fait de plus en plus sentir.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 13. Juni 2000

CHARTE 4363/00

CONTRIB 226

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme des Deutschen Gewerksschaftsbundes. [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Abteilung Arbeitsmarkt- und
Internationale Sozialpolitik

Düsseldorf, 05. Juni 2000
ais-ad/krh

vertragsrev.stellungnahme soz.grundrechte
(convent 34)05.06.00

Stellungnahme des DGB
zum
Vorschlag des Präsidiums des Konvent zur Aufnahme sozialer Rechte in die Charta der Grundrechte der Europäischen Union (CONVENT 34)

1. Der DGB begrüsst die Bestrebungen des Konvents zu einer umfassenden Grundrechtecharta in der EU, die soziale Grundrechte einschliesst. Soziale Grundrechte müssen aus Sicht des DGB einen gleichgewichtigen Stellenwert erhalten. Die EU ist nicht nur eine Wirtschafts-, sondern auch eine soziale Wertegemeinschaft.

2. Der aktuelle Vorschlag des Präsidiums des Konvents für wirtschaftliche und soziale Grundrechte sowie für horizontale Bestimmungen (CONVENT 34) weist aus Sicht des DGB in die richtige Richtung.

   Der DGB stimmt mit dem Konvent insbesondere hinsichtlich folgender sozialer Rechte überein:

   - gesunde und sichere Arbeitsbedingungen
   - Schutz vor ungerechtfertigter oder missbräuchlicher Entlassung
   - Schutz der Wanderarbeitnehmer auf Gleichbehandlung

   Der DGB teilt gleichfalls die Auffassung, dass die Charta den Gemeinschaftsgesetzgeber, die Gesetzgebung der Mitgliedsstaaten bei der Umsetzung des Gemeinschaftsrechts sowie die Sozialpartner auf Gemeinschaftsebene, die nach Artikel 139 EGV Vereinbarungen auf Gemeinschaftsebene schliessen können, binden.

   Angesichts der Dynamik des Integrationsprozesses und des Charakters der Charta als Ausdruck der Werteordnung der Union und der Mitgliedsstaaten sollten die Rechte aber nicht eng auf die gegenwärtigen Zuständigkeiten der Union und der Gemeinschaft begrenzt werden.

Es muss sichergestellt werden, dass die Gewährleistung der EU-Charta nicht nur mit der Europäischen Menschenrechtskonvention als Mindeststandard kompatibel ist, sondern ebenso das Mindestschutzniveau der revidierten ESC sowie einschlägiger völkerrechtlicher Sozialnormen einhält. Der DGB erinnert daran, dass der neue Vertrag ausdrücklich anerkennt, dass die Menschenrechte die wirtschaftlichen und sozialen Rechte, wie in der revidierten Europäischen Sozialcharta und der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer von 1989 festgelegt, umfassen (Art. 136 EGV).

3. Zu der vom Präsidium des Konvents vorgelegten Liste sozialer Rechte nimmt der DGB wie folgt Stellung:

Artikel 31: Rechte und Grundsätze für den Sozialbereich

Dieser Artikel gibt zu Besorgnis Anlass, da den sozialen Rechten – im Unterschied zu den bürgerlichen und politischen Rechten – ein spezieller Rahmenartikel mit „Grundsätzen“ vorangestellt wird. Missverständliche Interpretationen wären die zwangsläufige Folge. Die Unteilbarkeit der miteinander verknüpften Menschenrechte macht besondere Rahmenartikel und Grundsätze speziell zu sozialen Rechten obsolet. Auch die vom Konvent bisher erarbeiteten bürgerlichen und politischen Rechte (CONVENT 28) beinhalten vielfach elementare Sozialrechte wie die Koalitionsfreiheit, das Verbot der Diskriminierung oder das Verbot der Zwangsarbeit. Soweit Aussagen zur Bindungswirkung gemacht werden sollen, sind diese in Artikel 46 aufzunehmen, der sich mit dem Anwendungsbereich befasst. Soweit das dynamische Element sozialer Rechte betont wird, sollte dies besser in der Präambel seinen Niederschlag finden. Der Vorschlag von Prof. Jürgen Meyer, Mitglied des Konvents (CONTRIB 144), hierzu ist ein wichtiger Diskussionsbeitrag. Er schlägt vor, den Grundsatz der „Solidarität“ in die Präambel aufzunehmen.

Der DGB setzt sich nachdrücklich für die Streichung dieses Artikels ein.

Artikel 32: Berufsfreiheit

Der Vorschlag „und ihr Gewerbe frei zu wählen und auszuüben“ ist missverständlich. Der DGB schlägt vor, das Recht wie folgt zu formulieren:

„Jede Person hat das Recht, ihren Beruf und ihre berufliche Tätigkeit frei zu wählen und auszuüben."

Artikel 33: Pflicht zur Unterrichtung und Anhörung der Arbeitnehmer im Unternehmen

Der DGB ist der Auffassung, dass das vom Konvent vorgeschlagene Recht zur Unterrichtung und Anhörung der Arbeitnehmer und ihrer Interessenvertretungen um ein Recht auf Mitwirkung erweitert werden muss. Die EU-Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer sieht dies ausdrücklich in Artikel 17 und 18 vor. Der Text sollte daher wie folgt lauten:

„Die Arbeitnehmer und ihre Vertreter haben Anspruch auf eine rechtzeitige Unterrichtung, Anhörung und Mitwirkung gegenüber ihrem Arbeitgeber."

Artikel 34: Recht auf Kollektivverhandlungen und Kollektivmassnahmen

Dieses zentrale Recht der Arbeitswelt zählt zweifelsfrei zu den unveräusserlichen völkerrechtlichen Menschenrechten. Es muss daher sichergestellt werden, dass die ESC und die einschlägigen Übereinkommen der IAO einschliesslich der jeweiligen Spruchpraxis der zuständigen Kontrollorgane als Mindestschutzniveau eingehalten werden.

Der Vorschlag des Präsidiums des Konvents kann dies jedoch nicht sicherstellen. In Artikel 6 Abs. 4 der ESC wird z. B. im Unterschied zum Vorschlag des Konvents das Streikrecht explizit gewährleistet. In den Vorschlägen des Präsidiums vom 27. März 2000 (Convent 18) wurde das Streikrecht in Artikel IV, Abs. 3 noch ausdrücklich genannt.

Nach Auffassung des DGB muss das Recht auf Kollektivverhandlungen zumindest folgendes sicherstellen:

„(1) Arbeitgeberverbände und Gewerkschaften haben das Recht, die wirtschaftlichen und sozialen Interessen ihrer Mitglieder zu vertreten. Sie haben das Recht, nach Maßgabe der geltenden Rechtsvorschriften und Gepflogenheiten Tarifverträge auszuhandeln und zu schließen sowie bei Interessenkonflikten auch auf der Ebene der Union kollektive Maßnahmen einschließlich des Streiks zu ergreifen.

(2) Arbeitnehmer dürfen wegen gewerkschaftlicher Betätigung einschließlich einer Teilnahme an einem Streik nicht benachteiligt werden."

Artikel 35: Recht auf Ruhezeit und Jahresurlaub

Neben der Anpassung der Überschrift sollte dieses Recht wie folgt präzisiert werden:

„Jeder Arbeitnehmer hat Anspruch auf angemessene tägliche und wöchentliche Arbeits- und Ruhezeiten sowie auf bezahlten Jahresurlaub."

Artikel 37: Schutz der Jugendlichen

Dem Vorschlag des Dokuments CONVENT 18 folgend sollte das Mindestalter von 15 Jahren in den Artikel und nicht nur in die Begründung aufgenommen werden.

Artikel 39: Recht, Familien- und Berufsleben miteinander in Einklang zu bringen

Zu diesem Recht sollte auch „ein angemessener Mutterschutz" aufgenommen werden. Durch eine ergänzende Regelung sollte klargestellt werden: „Arbeitnehmer mit Familienpflichten dürfen in der Arbeitswelt nicht benachteiligt werden."

Artikel 41: Soziale Sicherheit und soziale Unterstützung

Der Katalog der aufgelisteten Leistungen der sozialen Sicherheit ist unvollständig und sollte zumindest um zentrale Elemente wie Unfallschutz, Schutz bei Berufskrankheiten sowie bei Invalidität erweitert werden. Der Text sollte lauten:

Absatz (1): „Entsprechend den jeweiligen Gegebenheiten der einzelnen Mitgliedsstaaten werden Leistungen der sozialen Sicherheit von ausreichendem Umfang vorgesehen, die insbesondere bei Arbeitsunfällen, bei Berufskrankheiten, bei Mutterschaft, bei Krankheit, bei Pflegebedürftigkeit, bei Invalidität oder im Alter sowie bei Arbeitslosigkeit Schutz gewährleisten."

Absatz (2): zum Recht auf Sozialhilfe wurde im Dokument CONVENT 19 besser beschrieben: „Jeder Person, die nicht über ausreichende Mittel verfügt, muss eine angemessene soziale Unterstützung gewährt werden, die es ihr ermöglicht, ein menschenwürdiges Leben zu führen."

Ergänzt werden sollte dieser Text wie folgt:

„Es werden geeignete Massnahmen getroffen, um Armut und soziale Ausgrenzung zu verhindern bzw. zu beseitigen."

Artikel 42: Gesundheitsschutz

Der Vorschlag in CONVENT 34 fällt gleichfalls hinter den Vorschlag in CONVENT 19 zurück. Der ursprüngliche Vorschlag sollte wieder aufgegriffen werden:

„Jede Person muss die Massnahmen der Gesundheitsfürsorge in Anspruch nehmen können und im Falle der Erkrankung Zugang zu angemessener ärztlicher Versorgung haben."

Artikel 43: Behinderte

Der vorgeschlagene Artikel ist weniger aussagefähig als der Text in CONVENT 26. Die Übernahme aus CONVENT 26 wird empfohlen:

„Alle Behinderten haben unabhängig von der Ursache und Art ihrer Behinderung Anspruch auf konkrete ergänzende Massnahmen, die ihre soziale und berufliche Eingliederung fördern."

Artikel 47: Einschränkung der gewährleisteten Rechte

Es wird die Bestimmung unterstützt, dass Einschränkungen nicht über die im Rahmen der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten zulässigen Einschränkungen hinausgehen. Durch Bezugnahme auf die revidierte ESC muss dies aber auch für diese Charta des Europarates gelten.

Artikel 49: Schutzniveau

Ziel dieser Bestimmung ist es, das Mindestschutzniveau von europäischen und völkerrechtlichen Konventionen sicherzustellen. In der Bestimmung selbst wird aber nur die Europäische Menschenrechtskonvention aufgenommen. Zur Präzisierung sollte der letzte Halbsatz daher wie folgt ergänzt werden:

... alle Mitgliedsstaaten gehören. „Die Charta gewährleistet jedenfalls das Schutzniveau der Europäischen Menschenrechtskonvention und der revidierten Europäischen Sozialcharta sowie der einschlägigen Pakte und Konventionen der Vereinten Nationen und Übereinkommen der Internationalen Arbeitsorganisation."

Auch in der Begründung sollte als Mindestschutzniveau nicht nur auf die EMRK sondern ebenso auf die revidierte ESC (einschl. des Europäischen Komitees der sozialen Rechte) sowie die einschlägigen Übereinkommen der IAO und anderen Pakte und Konventionen der Vereinten Nationen sowie auf die Spruchpraxis der jeweils zuständigen Kontrollorgane Bezug genommen werden.

Zusätzliche bisher vom Konvent nicht aufgegriffene Sozialrechte.

Obwohl die revidierte ESC quasi die „EMRK" auf sozialem Gebiet ist und auch das Präsidium selbst bei vielen seiner Vorschläge darauf Bezug nimmt, fehlen bisher wichtige Sozialnormen der revidierten ESC. Hierzu zählen insbesondere

- das **Recht auf Arbeit**. Der Text des von allen Mitgliedsstaaten ratifizierten Artikels 1 der ESC sollte aufgegriffen oder zumindest die von Prof. Meyer vorgeschlagene Bestimmung aufgenommen werden. Das Recht auf Arbeit garantiert zwar kein einklagbares Recht auf einen konkreten Arbeitsplatz, jedoch leiten sich daraus staatliche Förderungspflichten ab, beispielsweise nach einer unentgeltlichen und neutralen Arbeitsvermittlung und der Integration benachteiligter Gruppen in den Arbeitsmarkt.

- das **Recht des Arbeitnehmers auf Schutz bei Zahlungsunfähigkeit** ihres Arbeitgebers. Dieses Recht lehnt sich nicht nur an das IAO-Übereinkommen Nr. 173 (Insolvenzschutz) sondern vor allem an die Richtlinie 80/987/EWG zur Angleichung der Rechtsvorschriften der Mitgliedsstaaten über den Schutz der Forderungen der Arbeitnehmer bei Zahlungsunfähigkeit ihres Arbeitgebers an.

- das **Recht auf Würde am Arbeitsplatz**. Mit der entsprechenden Empfehlung wurde bereits ein wichtiger Schritt zu einer Entwicklung dieses Rechts unternommen.

- das **Recht der Arbeitnehmervertreter auf Schutz im Betrieb und Erleichterungen, die ihnen zu gewähren** sind. Hier handelt es sich um eine wichtige Absicherung der Informations-, Anhörungs- und Mitwirkungsrechte, wie sie im übrigen bereits auch im IAO-Übereinkommen Nr. 135 gewährleistet sind.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 14 June 2000

CHARTE 4364/00

CONTRIB 227

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Centre of the International Council of Women (ECICW). [1] [2]

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[1] This text exists in English language only.

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Founded in 1961 in Axenstein
(Switzerland)
Granted consultative status with the
Council of Europe

The European Centre of the International Council of Women (ECICW), a non-governmental organisation, is a federation composed of the National Councils affiliated to the International Council of Women (ICW) in those countries which make up ICW's European Regional Group.

ECICW has affiliated Councils in Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Great-Britain, Greece, Hungary, Israel, Italy, Luxembourg, Malta, Netherlands, Russia, Spain, Switzerland, Turkey.

- *Its aim*

To encourage and achieve equal rights and opportunities for women in all fields.

- *Its principal tasks*

- To increase collaboration between the affiliated organisations and the International Council of Women as well as between the National Councils themselves.

- To make the voices of women heard and to promote their participation in European decision-making institutions.

- *Its organisation*

- Each National Council affiliated to ECICW has the right to appoint a delegate.

- The President, Vice-Presidents, Permanent Delegates to European institutions and the Treasurer are elected by the General Assembly every two years.

- The General Assembly meets twice a year.

- ECICW's administrative address is that of the President.

- *Activities of ECICW*

- To study all questions relating to the situation of women in Europe and their active participation in every aspect of life and society.

- To initiate and to organise *seminars* on human rights, education and the economic, legal and social position of women in Europe. These occasions give an opportunity for ECICW's National Councils to exchange views and experiences.

- *Seminars*

During recent years the following subjects have been dealt with in seminars :

▫ Women and poverty

▫ Women in decision-making positions.

▫ Equal opportunities for women and men – comparison of the legislative basis and programmes in the European Union and Russia.

▫ Women in public domain – sustainable development in the field of habitat and the role and active participation of women on the local level.

▫ Women and economics.

▫ Democracy and the enlargement of the European Union.

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Draft Charter of Fundamental Rights of the European Union

Contribution of the European Centre of the International Council of Women (ECICW) having Consultative Status with the Council of Europe

The following document is drafted by Lily Boeykens, Dr. Iuris and L.L.M. (Master in International Law) – President of the European Centre of the International Council of Women (ECICW).

The original text is in English, a translation in French is available.

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A. Preliminary note on ECICW's Contribution.

1. The European Centre of the International Council of Women (ECICW) proposes this contribution to the Draft Charter of Fundamental Rights of the European Union to the Members of the Convention.

2. ECICW supports several paragraphs of the contribution by the Association of Women of Southern Europe (AFEM) introduced on 13 March 2000 (Charte 4157/00 contrib 42) and 18 April 2000 (Charte 4131/00 contrib 105).

3. In the following document ECICW refers to parts of the AFEM contributions, so as to manifest our agreement with these paragraphs.

B. General Remarks on the proposed Charter provisions

I. EU Charter on fundamental rights

Referring to the Vienna Declaration and Programme of Action (June 1993) ECICW wants to underline that : "All human rights are universal, indivisible, interdependent and interrelated" and that "Women's Rights are Human Rights".

Considering that human rights are guaranteed to every human being, this EU Charter should be adopted and implemented by every Member State. The accession to this Charter should be a conditio sine qua non for the entry of new member states into the EU.

ECICW insists that the EU Charter must not contain less rights than the existing International Human Rights Treaties which are already ratified by most, if not all, EU Member States. *The EU Charter cannot be regressive compared to other human rights instruments, on the contrary, it should be complementary to these.*

II. International Complaint Procedure

In the text under discussion *too little attention is paid* to the need and possibilities to *seek redress and compensation* for infringements of human rights by a State Party.

In order to inform individuals, men and women, about the implementation of their human rights, and about the possibilities to lodge a complaint for infringements of these rights against a State party, *reference must be made to several* international legal instruments providing *international complaint procedures*.

In order to allow for individual complaints, an Optional Protocol was added and adopted to the following UN human rights instruments :

- to the International Covenant on Civil and Political Rights (ICCPR)
- to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Optional Protocols to ICCPR and to CEDAW provide provisions to enable the Human Rights Commission or the CEDAW Committee to receive and consider communications from individuals, or groups of individuals, claiming to be victims of violations of any of the rights set forth in these two documents.

Other Conventions have included a complaint procedure in the text of the treaty itself :

- The European Convention on Human Rights (1950) Art. 25
- The Convention on the Elimination of all Forms of Racial Discrimination (1965) Art. 14
- The Convention against Torture and other cruel, inhuman or degrading treatment or punishment (1984) Art. 22
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) Art. 77

Who can lodge a complaint with an International/EU special Commission or Court ?

Only individuals or groups of individuals claiming to be directly affected by a failure of a State Party to comply with its obligations. The communication must be introduced with the consent of the victim, unless the author(s) can justify the absence of consent.
This is the rule for every Convention mentioned above.

Why ?

During the drafting of the Optional Protocol to the CEDAW-convention (adoption in 1999) after a discussion in depth, the Assembly agreed to accept only complaints from individuals or groups of individuals instead of "groups" or "NGOs".

Indeed, if complaints are lodged by NGOs this can cause difficulties with regard to their representation :
- Are they national NGOs - or international or regional NGOs ?
- Do they have a Consultative Status – or not ?

Further NGOs will have to act on behalf of and/or in the interest of the victim whose human rights are violated. Conflicting interests might occur between the victim and the NGO lodging the complaint. Indeed, NGOs might have professional, religious, or ideological interests.

Also the necessary follow-up of the case and the support of the victim until the final decision can cause problems. Indeed, NGOs are living associations with periodic changes in their officers (presidents, members of the board, etc …), even in their policies, constitution and bylaws. Consequently the question of "sufficient interest" arises.

ECICW states that :
The new EU document on Fundamental Human Rights should contain an article on a complaint procedure allowing for redress of violations of the rights laid down in this EU Charter. Complaints will be lodged by individuals or groups of individuals having sufficient interest and acting on behalf of the victim.

III. ***Gender equality***

During recent years there have been some changes in terminology, including in UN jargon, when referring to equality. The word "sex" has been replaced by "gender"; so for example : "gender equality" instead of "sex equality".

Moreover, provisions should be gender neutral or refer to both sexes.

IV. Family

"The Family" as a natural and fundamental unit of society, has never been clearly defined. The family, as a unit, cannot claim "group rights". Only individuals, members of the family, can claim individual human rights.

The lack of a clear definition of "the family" is the major reason why the "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families" is not yet in force, although dating from December 1990. This convention refers to *married* persons and the *members of their family*. Defining the "members of their family" the Convention refers to *their dependent children and other dependent persons*, who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the states concerned.

This may bring about a lot of confusion as in certain regions "the family" is extended and comprises mainly a large range of dependents, while in other regions "the family" is small and includes only the dependent children, the father and mother, the sister and brother of the individual.

In the international legal order a new discussion started concerning the interest of the child regarding his/her genetic material (see recommendation of the Council of Europe on Bio-ethics R(97)5 and R(92).

See further remarks on Article 13.3 of the Draft EU Charter re. "Family life".

V. The child

Not enough attention is given to the rights of the child.

Children shall be treated as individuals and shall be permitted to influence matters affecting them. We would drop "according to their degree of maturity". Indeed, who will define the degree of maturity ? Is it linked to age ? Intelligence ? Behaviour ?

See further comments article 23.

VI. Respect for Juridical Acquis

1. AFEM and ECICW underline the need to take into consideration the EU and the international acquis (treaties ratified by all Member States), as well as the constitutional acquis common to the Member States, as minimum standards, and to ensure an advancement in relation to these documents.

2. The EU Member States will thus prove their dedication to the universal principles proclaimed by Article 6(1) EU Treaty [1] and their determination to ensure that neither this provision nor those of Articles 7[2] and 49[3] of this Treaty become a dead letter. They will thus confirm that they really want to be a Community based on the rule of law and it will strengthen their credibility vis-à-vis their citizens and the international community.

3. AFEM and ECICW recall the solemn declarations of the EU according to which :

- "economic success cannot be ensured unless human rights are observed and guaranteed";
- the EU "insists" on the "equivalence", the "interdependence" and "inter-relatedness" of all human rights, including economic, social and cultural rights which judicial protection they want to promote[4].

4. **It is common knowledge that general non-discrimination clauses do not suffice to eradicate direct and indirect discrimination on the ground of sex, in particular against women, and to establish substantive equality between women and men. The acknowledgement of this fact has led** :

a. <u>At international level</u> :

- To the adoption of special international instruments guaranteeing fundamental rights of women[5].
- To the inclusion of specific provisions prohibiting discrimination on the grounds of sex in the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol on individual complaints and the International Covenant on Economic and Cultural Rights.
- To the adoption and the ratification (now by all but 27 Member States of the UN) of the CEDAW Convention and the adoption of the Optional Protocol for individual complaints during the 43rd Session of the Commission on the Status of Women and the confirmation by the General Assembly in 1999.

b. <u>At community level</u> :

- To the enshrinement of equality between women and men as a general principle and a specific fundamental right (well-established European Court of Justice (ECJ) case law);
- To the proclamation of equality between women and men as a fundamental mission and objective of the Community which it undertakes to promote in all areas of its jurisdiction (Articles 2, 3(2), 137 EC Treaty);

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1 Article 6(1) EU Treaty : "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States."

2 Sanctions against Member States which violate the principles proclaimed by Article 6(1) EU Treaty.

3 The respect of these principles constitutes a fundamental condition of admission to the EU

4 Annual Report of the EU on human rights (1999), paras. 5.1., 5.2., Statement by Mr. J. Fisher on behalf of the EU to the Commission of Human Rights annexed to this Report.

5 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Conventions on the political rights of women, on the nationality of married women etc.

- To the development of an acquis deriving from legislation and case law in respect of equality between women and men and of the prohibition of direct and indirect discrimination based on sex, including any kind of unfavourable treatment on the ground of pregnancy or maternity **or the responsibility of child care**.
- To the development of an acquis deriving from legislation and case law and concerning judicial protection **such as the rights of individual complaint** against direct and indirect sex discrimination **by a member state.**

c. At national level : to explicit and specific constitutional guarantees of equality between women and men.

VII. Gender equality

However, in spite of all that, **substantive equality between women and men has not been achieved as yet**. In order to remedy this situation :

- The Convention on the Elimination of all Forms of Discrimination against women (Art. (1)) provides for positive action in favour of women and the Commission which monitors the application of this Convention insists on the necessity of such action **and the ratification and implementation of the Optional Protocol to this Convention;**
- The organs which monitor the application of the two International Covenants insist on the necessity of positive action in favour of women;
- An increasing number of national constitutions guarantee substantive equality between women and men and legitimise positive action[6], thus forming a *"constitutional tradtition common to the Member States"*;
- Article 141(4) EC Treaty provides for positive action "with a view to ensuring full equality in practice between men and women in working life" and Declaration No 28 annexed to the Treaty of Amsterdam specifies that such action *"should, in the first instance, aim at improving the situation of women"*;
- Specific EU directives and Community action programmes for promoting substantive equality between women and men are being adopted and implemented;
- The EU proclaims officially and solemnly *" the need to emphasise women's rights"*, including those of the *"girl child"* [7] (cf. 12th Critical area of concern of the Fourth World Conference on Women in Beijing 1995).
- After the UN General Assembly had adopted the Optional Protocol to the CEDAW convention, which provides for individual complaints; the EU pledged in the EU Report on Human Rights *op. cit*., par. 5.12 that it is "now working for the early entry into force of this new instrument" which will happen after the ratification of the 10th UN Member State.
- ***It is thus obvious that if the Charter is limited to a general non-discrimination clause, without explicitly enshrining substantive gender equality, it will constitute a regression in respect of equality between women and men which certainly nobody wishes. Discrimination on the grounds of sex is of a particular, structural nature and affects mainly women. Women are not a minority, but more than half of the European population and often suffer multiple discrimination. They have the right to enjoy effectively all fundamental rights and freedoms and be full citizens, in all areas.***

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6 German (Article 3(2)), Austrian (Article 7(2)), Portugese (Article 9(h)), Finnish (Article 6(4)), Swedish, French (Articles 3,4), Greek (draft) Constitutions.

7 EU Report on Human Rights, op.cit. paras. 5.12,5.13, Statement of J. Fisher, op.cit.

C. Amendments and comments on specific articles

The ECICW fully agrees with the introductory comments of AFEM and its comments on Article 1 and 2 of the Draft Charter :

- quote -

Article preceding proposed Article 1

The Union and the Community as well as Member States secure to everyone within their jurisdiction the effective enjoyment of the rights and freedoms defined in the following Articles, which may be relied upon as against their organs and institutions as well as against individuals, in all areas of Union and Community jurisdiction. (Art. 1 ECHR , Horizontal Questions (BODY 3), para, 8).

Comments :
We consider that, since there is a kind of dualism between the EU and the EC and since there are doubts as to whether the EU possesses a legal personality, it would be preferable that reference should be made to both. Besides, it is obvious that, without vertical and horizontal direct effect, the provisions of the Charter will be a dead letter.

Article 1. Dignity of the human person

Everyone has the right to the respect and protection of his/her dignity. The human body or any part thereof is not for trade, regardless of whether the person concerned has consented. (Art. 1 Proposal; Art. 1 EP Decl.)

Comments :
We consider that the exemption of the human body from trade, so that nobody may derive profit or any other benefit therefrom, is a way of implementing respect and protection of human dignity rather than a corollary of the right to life. Consequently, this provision should not be limited to the area of medicine and biology, but should have a more general scope which should also include the prohibition of trafficking in persons, in particular in women and children, for the purpose of forced labour or sexual exploitation, so that the well-known and constantly increasing problems of trafficking in women and children throughout Europe are dealt with. It is indispensable to specify that the consent of the person concerned is irrelevant, since it is obvious and confirmed by common experience that it is impossible to know whether this consent has been freely given. Moreover, extensive research on the matter has proved that, in the great majority of cases, women engaging in prostitution, as least at the outset, do not act with their free consent.
For the rest, we agree with para. 3 of Article 1 of the Praesidium's Proposal. As concerns para. 2 of Article 1 of this Proposal, see infra, Comments under Article 2.

Article 2 : Right to life

Everyone has the right to the protection of his/her life and of his/her physical, psychological and genetic integrity. Torture or inhuman or degrading punishment or treatment, such as sexual mutilations, as well as any other kind of physical or moral violence, including violence within the family, are in particular prohibited. (Art. 1 , 2 Proposal; Art. 2 , 3 ECHR; Art. 6 , 7 CCPR; Art. 2 EP Decl.)

Comments :

The prohibition of torture may be included in Article 2 or in Article 1 as in the Praesidium's Proposal. What is important is the reference to "sexual mutilations" which, as it is well-known, take place even on European territory, as well as the prohibition of "any other kind of physical or moral violence". For the rest, we agree with para 2 of Article 2 of the Praesidium's Proposal, in its alternative wording

- unquote -

Article 3 : Integrity of the person

The integrity of the person must not be protected in medicine only, but also in :

1. Violence in armed conflicts
2. Public or private sphere
3. The trade in human organs and blood.

According to ECICW it is an absolute necessity to add an additional paragraph concerning violence against women

Referring to the **UN Declaration on the Elimination of Violence against Women adopted by the General Assembly at its 85th Plenary Meeting on 20 December 1993, which provides in Article 1 for the definition of Violence against Women**

Article 1

For the purposes of this Declaration, the term « violence against women » means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

The United Nations Declaration on the Elimination of Violence Against Women which, in article 2, defines violence as encompassing, but not being limited to "physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women".

Referring to **Document E/CN.4/1996/53 of 5 February 1996 – Concerning the Commission of Human Rights 52th Session – Item 9 (a) of the Provisional Agenda - Concerning the Further Promotion and Encouragement of Human Rights and Fundamental Freedoms**.
Report of the Special Rapporteur on Violence against Women, its causes and consequences, Ms. Radhika Coomaraswamy in accordance with the Commission on Human Rights resolution 1995/85.

In *paragraph 23* a definition is given of *domestic violence* :

Domestic violence is violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law.

Paragraph 26

The rhetoric of public versus private and the consequent primacy accorded to the public realm has fundamentally affected perceptions of women's rights. In distinguishing certain forms of violence as domestic violence, definitions have arisen out of the original conceptualisation of such violence as private acts within the family. However, an inflexible definition of domestic violence, focusing solely on private actors, legitimises the public/private dichotomy. This construction has continually been challenged and critiqued by women's human rights activists, not least because it neglects a gender-specific dimension. Thus, the development of a comprehensive framework clearly depicting the relation between the nature of the violence perpetrated against women and their private personae is important in an effort to move beyond a private/public distinction in addressing violence.

Paragraph 29

It is the duty of State to ensure that there exists no impunity for the perpetrators of such violence. "In the case of intimate violence, male supremacy, ideology and conditions, rather than a distinct, consciously co-ordinated military establishment, confer upon men the sense of entitlement, if not the duty, to chastise their wives. Wife-beating is, therefore, not an individual isolated, or aberrant act, but a social license, a duty or sign of masculinity, deeply ingrained in culture, widely practised, denied and completely or largely immune from legal sanction".
<6> It is, therefore, argued that the role of State in action in the perpetuation of the violence combined with the gender-specific nature of *domestic violence* require that *domestic violence* be classified and treated as a human rights concern rather than as a mere domestic criminal justice concern.

Conclusions ECICW :

ECICW was represented at the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders (Vienna 10-17 April 2000).
In the statement of Antonio Costa – speaking on behalf of the European Union and Associated Countries – *the EU pledged* to develop legal measures to combat violence (see further in comments on paragraph 5) and to ensure the integrity of the person in the private sphere.

Article 5 – para 3 (added in Convent 36) : Traffic in human beings is prohibited

Referring to the **Statement of Antonio Costa, Minister of Justice of Portugal. Speaking on behalf of the European Union and Associated Countries at the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders**, he stated that countries are threatened by criminal acts. These matters need to be urgently addressed not only by individual states, but with the maximum amount of international co-operation. In this context the European Union has adopted a mobilising goal of creating an area of freedom, security and justice. It is a requirement for membership of the Union that all its member states must respect the rule of law as a common principle. The Union has been actively seeking to develop legal and other measures to strengthen the rule of law in criminal justice.

The theme of organised crime has been receiving significant attention from the Union. At its recent meeting, the European Council has affirmed its deep commitment to reinforcing the fight against serious and transnational crime.
The need to safeguard the rights of victims has attracted increasing attention.

Many delegations have underlined the interconnection between crime and human rights. It is therefore fully justified that both the Commission on Crime Prevention and Criminal Justice and the Commission on Human Rights deal with some topics. Their co-operation and exchange of information are of vital importance.

Comments :

ECICW strongly recommends to extend article 5 para 3 :

- Stating that transnational criminal groups are a threat to humanity;
- The protection of victims is part of their human rights;
- The traffic of human beings must be punished;

ECICW urges that all efforts be made to prevent enforced involuntary disappearances in times of armed conflict and/or in times of peace perpetrated by criminals.

Therefore ECICW proposes the addition of an article to the Draft EU charter on Fundamental rights :

Referring to the **UN Declaration on the Protection of All Persons of enforced disappearance (proclaimed by the General Assembly in its resolution 47/133 of 18 December 1992).**

Article 2
1. No State shall practice, permit or tolerate enforced disappearances;
2. States shall act at national and regional levels to contribute by all means to the prevention and eradication of enforced disappearance.

Article 3
Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Article 12 : Respect and Protection of Privacy

ECICW wants to refer to the following threats to "the right of privacy" :

1. *Referring to the* **Convention of Human Rights and Bio-Medicine (April 1997)**

   In Article 5 it is mentioned that the consent of the individual does not offer not enough protection, that the person must not only give his/her free consent but also his/her informed consent. In several UN documents, such as e.g. the Programme of Action of the International Conference on Population and Development (Cairo, 1994) dealing with reproductive rights and in the follow-up to the Fourth World Conference on Women of Beijing, special attention is given to informed consent.

2. The erosion of the right of privacy is a growing global problem. Violations of this fundamental right very often occur in the media, at the workplace, in processing personal data in computer networks, etc ..

3. The right to privacy also means the right of personal liberty to self-determination. So for instance in the medical field, in bio-ethics (see recommendation of the Council of Europe R(97)5, ethical and judicial conflicts may arise with reference to the protection of genetic information in the field of employment, insurance and social security, criminal proceedings.

Attention should also be given to possible conflicting interests between the individual and society. Legal documents should be elaborated at European and national levels for a number of conflict situations such as money laundering, violence within the family, …

Conclusion

- *With regard to the evolutions in the field of technology and science, new problems have arisen concerning the fundamental rights of privacy;*
- *Referring to the Conclusions of the 10th UN Congress on Crime Prevention and the Treatment of Offenders;*
- *Noting that in this intergovernmental meeting the urgency of combating transnational organised crime was stressed;*
- *ECICW insists that the members of the Convention prepare an innovative tekst on the Fundamental Rights of Privacy. This will prevent a situation of lawlessness in Europe and an inclination towards a society without legal security and protection against criminals.*

Article 13 concerning family life

Referring to **recommendation R (85) 4 of the Council of Europe on Violence in the Family**;

Considering that the family is the basic unit of society ;
Considering that the defence of the family involves the protection of all its members against any form of violence, which all too often occurs among them ;
Considering that there is violence in any act or omission which prejudices the life, the physical or psychological integrity or the liberty of a person or which seriously harms the development of his/her personality ;
Considering that such violence perpetrated within the family affects in particular children on the one side and women on the other, though in different ways ;
Considering that children are entitled to special protection by society against any form of discrimination or oppression and against any abuse of authority in the family and other institutions ;
Considering that the same is true for women as victims and as perpetrators ;
Considering that women insofar as they are subject to certain de facto inequalities which hamper the reporting of any violence of which they are victims ;
Referring to resolution (78) 37 of the Council of Europe on the Equality of spouses in civil law ;
Referring to the recommendation no R (79)17 of the Council of Europe concerning the protection of children against ill-treatment ;
Referring to the proceedings of the Council of Europe's 4th Criminological Colloquy on the ill-treatment of children in the family ;

Referring to recommendation 561 (1969) of the Consultative Assembly of the Council of Europe, on the protection of minors against ill-treatment ;
Referring to recommendation R (85) 4 of the Council of Europe on Violence in the Family ;

The **Council of Europe** recommends that the governments of member states :

I. **With regard to the prevention of violence in the family** :

1. Considering the seriousness and the specific characteristics of violence in the family, the member states should take measures to combat this phenomenon ;
2. Promote the early detection of potentially conflict situations and the settlement of interpersonal and intra-family conflicts ;
3. Governments should help and assist the victims of violent family situations, with due respect for the privacy of others ;
4. Set up administrative departments or multidisciplinary boards with the task of looking after victims of violence in the family and with powers to deal with such cases.
   Their powers might include the following :
   - to receive reports of acts of violence in the family
   - to arrange for medical examinations at the victim's request
   - to help, care for and advise the various parties involved in cases of violence against the family and to that end to carry out social inquiries
   - to pass on, either to the family and children's courts to the prosecuting authorities, information which the department or board deems should be submitted to one or another of those authorities.

5. Impose strict rules on these departments or boards concerning the divulging information to which they have access in the exercise of their powers ;

II. **With regard to the reporting of acts of violence in the family** :

6. Calculate specific information on the advisability and feasibility for persons who become aware of cases of violence in the family of reporting them to the competent bodies, particularly those mentioned in paragraphs 4 and 5 above, or of directly intervening to assist the person in danger ;
7. Considering the possibility to *removing the obligation of secrecy from the members of certain professions* so as to enable them to disclose to the bodies mentioned paragraph 5 above any information concerning cases of violence in the family ;

III. **With regard to state intervention following acts of violence in the family** :

8. Take steps to ensure that, in cases of violence in the family, the appropriate measures can be quickly taken, even if only provisionally, to protect the victim and prevent similar incidents from occurring ;
9. Take measures to insure that, in any case resulting from a conflict between a couple, measures are available for the purpose of protecting the children against any violence to which the conflict exposes them and which may seriously harm the development of their personality ;

10. Take measures to ensure that the victim's interests are not prejudiced by interference between civil, administrative and criminal measures, it being understood that criminal measures should be taken only as a last resort ;
11. Review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty ;
12. Study the possibility of entrusting cases of violence in the family only to specialist members of prosecuting or investigating authorities or of trial courts ;
13. Take steps to ensure that, as a general rule, a psycho-social inquiry is carried out into such cases and that, particularly on the basis of the findings of the inquiry and in accordance with criteria that take account of the interests of the victim as well as the children of the family, the prosecuting authority or the court is able to propose or take measures other than criminal ones, especially when the suspect or accused agrees to submit to the supervision of the competent social, medico-social or probation authorities;
14. Do not institute proceedings in cases of violence in the family unless the victim so requests or the public interest so requires;
15. Take measures to ensure protection against any external pressures on members of the family giving evidence in cases of violence in the family. In particular, minors should be assisted by appropriate counsel. Moreover, the weight of such evidence should not be diminished by rules relating to the oath ;
16. Consider the advisability of adopting specific incriminations for offences committed within the family.

Referring to the **UN Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (entry into force 9 December 1964)**

The Contracting States,
Desiring, in conformity with the Charter of the United Nations, to promote universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, **sex**, language or religion.

Recalling that Article 16 of the Universal Declaration of Human Rights states that :

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.

Reaffirming that all States should ensure, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

Comments and recommendations of ECICW :

1. ***Article 13 para 2 should read : "Every person has the right to found a family being married or not.***
2. ***If a marriage is concluded this will only be with the free and full consent of the spouses***
3. ***Child marriage should be prohibited.***

Article 21 – Right to asylum

ECICW proposes :

A third subparagraph should be added concerning the protection of trafficked persons (illegal migrants, trafficked persons especially women and children for slavery, labour and prostitution).

Motivation :

Trafficked persons should receive the same treatment and legal protection as refugees. Up till now only persons fearing to be persecuted for their race, religion, nationality and political opinion can be granted the status of refugee.

Referring to the **UN Convention relating to the Status of Refugees (entry into force : 22 April 1954)**

Article 1 - Definition of the term "refugee".

For the purposes of the present convention the term "refugee" shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 3 : Non-discrimination

The contracting states shall apply the provisions of this convention to refugees without discrimination as to race, religion or country of origin.

Comments and recommendations of ECICW :

1. More and more women are also falling under the definition of this Convention.
2. *Trafficked persons*, mainly women and children, should also fall under this definition. The traffic in human beings for "slavery, labour or prostitution" should be included and given attention and protection in the new European Charter of Fundamental Rights.
3. State Parties shall take appropriate measures to ensure that the child, who is seeking refugee status or who is considered a refugee, in accordance with applicable domestic law procedures shall, whether unaccompanied or accompanied by his/her parents, or by any other person, receive appropriate protection and humanitarian assistance.

Article 22 - Equality and non-discrimination

According to ECICW para 3 should read :

The Union will combat the inegalities and will realise equality between women and men. Gender equality will be assured in the employment of the renumerations and working conditions, but should also be a rule for the political participation, the power functions in economy and politics, in society and in private life.

Artikel 23 – Rights of the Child (singular as we speak of individual rights)

Comments and recommendations of ECICW

National and international law have to evolve from child and youth protection to juvenile rights.

Children shall be treated as individuals and shall be permitted to influence matters affecting them. ECICW wants to drop "according to their degree of maturity".

The Charter should not only guarantee children's civil rights but also their economic and social rights. The treaty should also provide children with a number of guarantees in the area of criminal justice in order to combat the *lucrative international trade in children*.

The Charter should also grant children the right to preserve their identity, and to express their opinions.

In the international legal order a new discussion has started concerning the interest of the child regarding his/her genetic material (see recommendation of the Council of Europe on Bio-ethics R(97)5 and R(92).

For these reasons ECICW wants to extend article 23 with the following paragraphs :

- State Parties shall ensure the rights of the child without discrimination of any kind based on race, sex, language, religion, opinions, nationality, ethnic or social origin, property, disability, birth or other status ; and this independent of the child's parents, legal guardians or family members;

- Referring to article 3.1 of the International Convention on the Rights of the Child;
  In all actions concerning children, whether undertaken by public and private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration;
- The child shall have the right to have a name, the right to acquire a nationality, in particular where the child would otherwise be stateless;
- State Parties should respect the right of the child to preserve his or her identity, including nationality, name and family relations;
- When a child is legally deprived of these rights, the State Parties shall provide appropriate assistance and protection;
- State Parties shall take measures to combat the illicit transfer and non-return of children abroad;
- The child shall have the right to freedom of expression in these matters;
- State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental menace, injury or abuse, neglect, maltreatment or exploitation, including sexual abuse (see art. 19 (1) of the Convention on the Rights of the Child);
- State Parties shall take appropriate measures to ensure that the child, who is seeking refugee status or who is considered a refugee, in accordance with applicable domestic law procedures shall, whether unaccompanied or accompanied by his/her parents, or by any other person receive appropriate protection and humanitarian assistance.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 14 June 2000

CHARTE 4365/00

CONTRIB 228

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission of the Church of Scientology regarding freedom of religion and belief in the European Charter of Fundamental Rights. [1] [2]

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[1] This text exists in English language only.

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The European Charter of Fundamental Rights - and Freedom of Religion or Belief

The Church of Scientology has several million members throughout Europe and is involved with human rights and social reform programmes in many countries around the world.

It is clearly important that European citizens see a real application of fundamental human rights principles and not just another round of grand sounding words which take months if not years to agree upon but have little practical application.

It is this concern which fires our contribution to the Charter of Fundamental Rights. Countries of Western Europe have all signed and ratified conventions, declarations and wonderfully idealistic statements on how things should be. This is of course correct as without the ideal there is nothing to head for.

However, it is, of course, but a first stage. What really counts is the application of these principles to the citizens of Europe. Our experience in the field of religious minorities is that in a number of countries members of religious and philosophical groups are seriously concerned that their survival is threatened by the very bodies who have signed these conventions and declarations but are doing nothing to enforce the duties and responsibilities they have to protect those rights.

For example, in the last two months, there has been a series of hearings where members of religious and philosophical groups have testified about discrimination in France and Belgium. Approximately 100 testimonies from 40 different groups were heard during this time and for each person who testified there are at least 10 more that were not heard. Multiply this by the number of people (family members, friends) that were affected through each individual incident and it amounts to thousands of people who are suffering simply because of their belief. Often the authorities are party to, either directly or tacitly, the discrimination.

Of course, similar experiences are found with other minorities and any discrimination which occurs on the basis of colour, sex, ethnic background or other arbitrary criteria is not acceptable. None of these are more or less important than the other but because our experience has been in the field of religion this submission is more tailored to this category. A short background summary will be helpful to understand the background to the problem and consequently why certain wordings have been proposed.

Background

There have been attempts to discredit the subject of religious minority rights from some sectors during the last five years - an attempt which has not succeeded but which has gained a certain amount of currency in some quarters. The main vehicles which have been used in the attempt to undermine religious freedom rights are analysed as follows :

a) Propaganda through assigning a derogatory meaning to a word

By assigning a derogatory meaning to the word "sect" or "cult" and equating as many religious minorities as possible with this categorization is a standard propaganda exercise which has been carried out on religious minorities before. By doing so there is an attempt to differentiate, and drive a wedge between traditional or modern, large or small and theistic or non-theistic religious groups. Nowadays, the word "sect" especially, as used in everyday language and almost constantly by the media, has a negative connotation which is broadly and freely used to categorize any minority religious group in an unfavourable light. Yet international standards on this subject emphasize quite the contrary.

The United Nations, religious experts, and UN treaty-based bodies have consistently found that the expression "religion or belief," as well as the individual terms "religion" and "belief," must be construed broadly to include non-traditional religions and all forms of belief. This was the opinion articulated in two studies prepared by the first two Special Rapporteurs on freedom of religion of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and expressly confirmed in the Working Paper, drafted by the third Special Rapporteur.

Likewise, the Human Rights Committee, in its General Comment No. 22 on Art. 18 of the International Covenant on Civil and Political Rights, notes that:

"Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that theyare newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community." (Para. 2)

Moreover, the 1996 Annual Report by the Special Rapporteur on Religious Intolerance to the United Nations Human Rights Commission provides the Rapporteur's opinion on the broad scope of the term religion and the need for equal treatment of all religions, including so called "sects." The Special Rapporteur notes that:

"Religions cannot be distinguished from sects on the basis of quantitative considerations saying that a sect, unlike a religion, has a small number of followers. This is in fact not always the case. It runs absolutely counter to the principle of respect and protection of minorities, which is upheld by domestic and international law and morality. Besides, following this line of argument, what are the major religions if not successful sects?"

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"Again, one cannot say that sects should not benefit from the protection given to religion just because they have no chance to demonstrate the ir durability. History contains many examples of dissident movements, schisms, heresies and reforms that have suddenly given birth to religions or religious movements." As to governmental efforts to distinguish between religions and sects, the Rapporteur concludes that: *"All in all, the distinction between a religion and a sect is too contrived to be acceptable. A sect that goes beyond simple belief and appeals to a divinity, or at the very least, to the supernatural the transcendent, the absolute, or the sacred, enters into the religious sphere and should enjoy the protection afforded to religions."*

b) Generalization : Making the acts of a few equate to the acts of many

To emphasise and dramatize the very few but certainly horrific events that have occurred with several minority groups is quite illogical and discriminatory. These actions are truly deserving of condemnation but to generalize about all religious or philosophical minorities and create a negative climate by painting all such groups with the same brush is unacceptable and purposefully done. The inherent bias of an "Observatory" into religious minorities which was established by the French government is graphically illustrated with the sweeping and utterly unfounded conclusion in its final report that

"Sects represent a real threat for the State, the society and individuals; it is therefore the task of the Observatory to fight against this threat."

The report relies on sweeping generalizations, serious factual inaccuracies, and vague or unsupported allegations to reach a conclusion that special and drastic governmental measures should be employed against minority religious groups classified by the pejorative term "sect".

The International Helsinki Federation in its 1999 international religious intolerance report, concluded in no uncertain terms that religious intolerance has reached alarming proportions in France:

"While other reports abroad (Swedish parliamentary report and report of the canton of Tessin) recommend dialogue with so-called sects, France has chosen open confrontation. This has led to slanderous reports in the media, to professional prohibitions, to religious discrimination by the French authorities and to increasing intolerance from civil society towards ordinary people on the grounds of their personal religious beliefs."

c) Spreading outright lies or, more often, misrepresentation of events and statements from the groups.

This is exemplified by the entirely false and unscientific reports of the French and Belgian Parliaments which held hearings without allowing the possibility of any correct response by the groups concerned and itemized almost 200 groups as "dangerous" (the Belgian Parliament never formally adopted their list but by the time it was withdrawn the damage was done and it is still used today to discriminatory effect).

That parliamentary bodies would even endorse such an approach is a cause for serious concern. The parliamentary committees acted as judge and jury without even presenting specific allegations to the groups concerned and allowing them to respond. Yet there were no external checks possible of these reports due to parliamentary confidentiality and/or privilege which was invoked to "protect" their work so it could not be challenged in any direct way.

Consequently, without any serious evidence, and certainly no opportunity for the groups concerned to respond to specific allegations, the parliaments of two countries sent a biased and intolerant message to their citizens and to the world in general.

The International Helsinki Federation stated in its 1999 report :

Currently, Austrian, Belgian, French, and German policies in this regard are completely founded on the distinction between "sects" and religions. The Parliamentary Assembly [of the Council of Europe] considers this to be a "pitfall, which the authorities must avoid." Its warning is extremely clear, and calls the neutrality and secularity of the four countries into question.

d) Justifying acts of intolerance by pseudo-scientific reasoning

To justify acts of intolerance or "explain" why people remain members of religious groups is attempted by passing off the theory, as though it were a fact, that such groups are somehow able to brainwash, control or coercively manipulate the minds and wills of their followers.

This theory has no scientific substantiation yet it can often be seen in media articles (and sometimes supposedly serious studies) as "reason" for taking discriminatory actions or making derogatory statements.

As Dr. Benjamin Beit-Hallahmi stated, as part of an American Psychological Association memorandum on the subject *"The term 'brainwashing' is not a recognized theoretical concept, and is just a sensationalist 'explanation' more suitable to 'cultists' and revival preachers. It should not be used by psychologists, since it does not explain anything"* (1987)

Professors James T. Richardson and Gerald Ginsburg (University of Nevada, Reno) further explained this in a paper originally prepared for presentation at Law and Science Seminar, presented by the Faculty of Laws, University College London, June 30, July 1, 1997 and later published in Law and Science: Oxford University Press, entitled "A Critique Of 'Brainwashing' Evidence In Light Of Daubert: Science And Unpopular Religions"

"Given the problematic nature of scientific support for brainwashing based theories as they are applied to participants in new religions, it is reasonable to ask why such evidence was ever admitted, and why it is sometimes still admitted (Richardson, 1996; Anthony and Robbins, 1995). The most plausible answer has to do with the operation of biases, prejudices, and misinformation in these cases that involve controversial parties and issues or, as Kassin and Wrightsman (1988) say: cases "involving emotional topics over which public opinion is polarized.""

e) Administrative and legislative actions based on the premise that "sects are a danger to society"

Of course, religion or belief is no justification for committing a crime or abusing the good intentions of an individual. Any violations of the law should be properly dealt with by the correct authorities. There exists, certainly within European Union countries, adequate basis for prosecuting anyone who breaks the law and so prosecution should be taken regardless of the religious or other beliefs of any individual or group involved.

What is discriminatory is the trend to propose legislation directed solely at curtailing activities which are religious with the intent of making this a crime, or alternatively, creating "shortcuts" with the intent of persecuting religious groups.

One example of this occurred at the end of last year when the French Senate passed a law which would amend a 1936 law which was passed at that time to curtail the activities of armed militia groups. On December 16, 1999, the French Senate, the upper house of the French legislative system, passed legislation designed to create a means to dissolve groups which, in the opinion of the government, "cause trouble to public order." This proposal was not made public prior to the 15 th December 1999, the same day that it was adopted by the Law Commission of the Senate and the day prior to it being voted by the Senate. This almost unheard of attempt to covertly slide non-urgent legislation through the legislative process without the possibility of public scrutiny did not speak well of the intentions or actions of those proposing this legislation.

Perhaps the most telling statement came from one of the Senators supporting the amendment when she said "*The dissolution, which is a political decision, also gives the advantage of not using the judicial procedures in which sects are so skillful in manoeuvring."*

The proposed law passed its first major legislative hurdle and is now sitting with the National Assembly for possible enactment. To his credit, it has been opposed by the French Interior Minister and so is currently "pending" but not specifically rejected.

Other examples of discriminatory administrative (i.e. government) "stops" are the use discriminatory materials against religious minorities in schools (examples in Germany and France), the use of "sect filters" - demanding that a person is not a member of a specific religious group (in use in some German Lander), the use of the tax administration and other government bodies to give special attention to religious groups with the intention of harassing (France, Belgium and Germany), special "enlightenment" campaigns to "educate"magistrates, judges and other public officials about the "dangers of sects" (France and Germany). [Details available on request.]

Once the above techniques have been used and repeated often enough even supposedly responsible members of society tend to believe that there is some kind of hidden menace. When media do not allow equal space to refute the allegations, and often ignore such statements altogether, there becomes reason for serious concern. Some of the attempted legislation which has been proposed during the last few years is as follows :

Government responsibility to actively prevent discrimination

International instruments which all members of the European Union have signed make it quite clear that religious freedom is a right guaranteed to all, not to be defined, controlled or otherwise manipulated government. Government even has the active obligation to protect these freedoms and **not stand by when discrimination occurs**.

The Final Helsinki Act which is at the core of the principles supported by the OSCE states that governments should not only

"recognize and respect the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience" but expects that governments *"recognize and respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere."*

The Concluding document from the Vienna Conference of the OSCE makes this even clearer by stating that the member states will

"take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise or enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life and ensure the effective equality between believers and non-believers."

It also calls on them to

"foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers."

There have been enough warnings from various human rights bodies that these should be taken note of (and indeed have by many European governments who have refused to countenance the measures outlined above).

For example the International Helskini Federation stated in 1999 that :

All major international human rights conventions as well as other international conventions to which Austria, Belgium, France, and Germany are signatories include a clause that prohibits discrimination on the basis of religion.

The OSCE participating states, which comprise all European countries except the Federal Republic of Yugoslavia, have pledged not only to prohibit discrimination but to "take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and to ensure the effective equality between believers and non-believers."Ê(Article 16 of the Vienna Concluding Document)

The OSCE participating states also have taken upon themselves the affirmative obligation of promoting tolerance. As the 1989 Vienna Concluding Document provides, all participating states shall Ê"foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers." (Article 16.2 of the Vienna Concluding Document) Therefore, Austria, Belgium, France and Germany and the other member states of the OSCE must respect and implement the provisions of these international instruments which fully guarantee the freedom of religion and belief of their citizens.

The acclaimed University of Essex Human Rights Centre 1997 study on the subject of freedom of religion finds, after conducting extremely detailed and exhaustive research on the topic, that new religions are a recurring target of discrimination in Europe:

"Freedom of religion therefore is not to be interpreted narrowly by states, for example, to mean traditional world religions only. New religions or religious minorities are entitled to equal protection. This principle is of particular importance in light of the evidence reflected in the Country entries, including those of the European section, revealing that new religious movements are a recurring target for discrimination or repression.

* * * * *

As mentioned earlier, the above mechanisms of discrimination apply, with variations on the same theme, to all minorities and so the principles which should be built into the Charter reflect the protection that should be given to all minorities - not just religious or philosophical ones.

To its credit, the European Commission has already taken steps in this direction with the proposal of anti-discrimination directives. Whilst these are limited to the field of employment it is clearly a move in the right direction done within limitations prescribed by the current treaties. To add an all-inclusive article, which stands alone, to a Charter of Fundamental Rights would obviously by inthe spirit of the above international standards which provide a obvious basis for the addition of such an article.

[N.B. Whilst certain countries have been mentioned above it is not the intention here to attempt to isolate them. It is clear that the great majority of their citizens, politicians and government administrators care to establish a real human rights environment. The points are, never-the-less, made to illustrate real problems which exist within the European Union and can be substantiated.]

Article 14 of The Charter

It has been stated that the different articles which have been proposed in the Charter have been purposely stated as concisely as possible in order to provide a relatively short and understandable Charter. Whilst this argument has some validity "conciseness" cannot be used as a justification for reducing (and whilst this is obviously not the intention it may well be the effect) fundamental rights.

It is never the majorities which need protecting but the minorities and to give the Charter more meaning and actual effect in daily life the wording should spell out the implications, duties and responsibilities enshrined in a right rather than leave these open to later interpretation - or perhaps misinterpretation. After all, what is the point of this exercise if it does not advance human rights protection but only re-states it.

It is therefore our opinion that the full range of rights should be spelt out and integrated into the Charter in order for it to have a full effect. Our proposal for a wording for article 14 supports, follows and extends the proposal made by Amnesty International and draws upon the wording of article 16 of the Concluding Document from the Vienna Conference of the Organisation for Security and Cooperation in Europe (March 1989) and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (November 1981). The following is therefore proposed :

"Freedom of thought, conscience and religion includes the right to conscientious objection and the right to freedom of religion. It includes the right to change one's religion or belief, the freedom, either alone or in community with others and in public or private, to manifest one's religion or beliefs in worship, teaching, practice and observance, as well as the right not to hold any religious beliefs or to practice any religion.

Furthermore Governments must take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and to ensure the effective equality between believers and non-believers;

Governments must foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers.

OoOOoo

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Appendix I

United Nations Human Rights Committee and
Special Rapporteur on Religious Intolerance (excerpts)

The United Nations, religious experts, and UN treaty-based bodies have consistently found that the expression "religion or belief," as well as the individual terms "religion" and "belief," must be construed broadly to include non-traditional religions and all forms of belief. This was the opinion articulated in two studies prepared by the first two Special Rapporteurs on freedom of religion of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and expressly confirmed in the Working Paper, drafted by the third Special Rapporteur.

Likewise, the Human Rights Committee, in its General Comment No. 22 on Art. 18 of the International Covenant on Civil and Political Rights, notes that:

> *"Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community."* (Para. 2)

The Committee goes on to find that:

> *"The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in the impairment of the enjoyment of any of the rights under the Covenant, including articles 18 [freedom of thought, conscience and religion] and 27 [protection of minorities], nor in any discrimination against adherents of other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of non-discrimination based on religion or belief and the guarantee of equal protection under article 26 . . . "* (Para. 9)

Moreover, the 1996 Annual Report by the Special Rapporteur on Religious Intolerance to the United Nations Human Rights Commission provides the Rapporteur's opinion on the broad scope of the term religion and the need for equal treatment of all religions, including so called "sects." The Special Rapporteur notes that:

> *"Religions cannot be distinguished from sects on the basis of quantitative considerations saying that a sect, unlike a religion, has a small number of followers. This is in fact not always the case. It runs absolutely counter to the principle of respect and protection of minorities, which is upheld by domestic and international law and morality. Besides, following this line of argument, what are the major religions if not successful sects?"*

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"Again, one cannot say that sects should not benefit from the protection given to religion just because they have no chance to demonstrate their durability. History contains many examples of dissident movements, schisms, heresies and reforms that have suddenly given birth to religions or religious movements." As to governmental efforts to distinguish between religions and sects, the Rapporteur concludes that: *"All in all, the distinction between a religion and a sect is too contrived to be acceptable. A sect that goes beyond simple belief and appeals to a divinity, or at the very least, to the supernatural the transcendent, the absolute, or the sacred, enters into the religious sphere and should enjoy the protection afforded to religions."*

Appendix II

Concluding Document from the Vienna Conference of the Organisation for Security and Cooperation in Europe, March 1989 (excerpts)

"(16) In order to ensure the freedom of the individual to profess and practise religion or belief, the participating States will, inter alia,

(16.1) - take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and to ensure the effective equality between believers and non-believers;

(16.2) - foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;

(16.3) - grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their States, recognition of the status provided for them in their respective countries;

(16.4) - respect the right of these religious communities to - establish and maintain freely accessible places of worship or assembly, - organize themselves according to their own hierarchical and institutional structure,
- select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State,
- solicit and receive voluntary financial and other contributions;

(16.5) - engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;

(16.6) - respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others;

(16.7) - in this context respect, inter alia, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;

(16.8) - allow the training of religious personnel in appropriate institutions;

(16.9) - respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief,

(16.10) - allow religious faiths, institutions and organizations to produce, import and disseminate religious publications and materials;

(16.11) - favourably consider the interest of religious communities to participate in public dialogue, including through the mass media.

(17) The participating States recognize that the exercise of the above-mentioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective exercise of the freedom of thought, conscience, religion or belief.

(18) The participating States will exert sustained efforts to implement the provisions of the Final Act and of the Madrid Concluding Document pertaining to national minorities. They will take all the necessary legislative, administrative, judicial and other measures and apply the relevant international instruments by which they may be bound, to ensure the protection of human rights and fundamental freedoms of persons belonging to national minorities within their territory. They will refrain from any discrimination against such persons and will contribute to the realization of their legitimate interests and aspirations in the field of human rights and fundamental freedoms.

(19) They will protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory. They will respect the free exercise of rights by persons belonging to such minorities and ensure their full equality with others."

Appendix III

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

Proclaimed by General Assembly resolution 36/55 of 25 November 1981

The General Assembly,

Considering that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of nondiscrimination and equality before the law and the right to freedom of thought, conscience, religion and belief,

Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

Convinced that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination,

Noting with satisfaction the adoption of several, and the coming into force of some, conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various forms of discrimination,

Concerned by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

Resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief,

Proclaims this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

Article 1
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 2
1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3
Discrimination between human being on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4
1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 5
1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

Article 6
In accordance with article I of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
(b) To establish and maintain appropriate charitable or humanitarian institutions;
(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

(d) To write, issue and disseminate relevant publications in these areas;
(e) To teach a religion or belief in places suitable for these purposes;
(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Article 7
The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

Article 8
Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 June 2000

CHARTE 4366/00

CONTRIB 229

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution and the intervention by Eurochambres given at the hearing on 27 April 2000. [1]

[1] The contribution exist in French and the intervention in English only.

CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

Audition du 27 Avril 2000
Parlement Européen

Contribution d'Eurochambres

Eurochambres, l'Association des Chambres de Commerce et d'Industrie européennes qui représente 14 millions d'entreprises, apporte tout son soutien à la décision du Conseil de Cologne de doter l'Union européenne d'une Charte des droits fondamentaux. En effet, à l'aube d'un élargissement historique et à l'heure de la globalisation de l'économie, la notion d'identité européenne reste encore, pour la majorité des citoyens, un concept flou La Charte des droits fondamentaux en énonçant les droits des citoyens leur permettra une plus forte prise de conscience de leur appartenance à l'entité européenne.

Offrir aux citoyens les moyens de pleinement jouir de leurs droits

Les Chambres de Commerce et d'Industrie considèrent que la Charte ne devrait pas se limiter à lister ou définir les droits et devoirs des citoyens européens. Sans pour autant conférer de nouvelles compétences aux instances communautaires, la Charte devrait mentionner leurs devoirs de favoriser l'établissement d'un climat économique, social et politique permettant aux citoyens d'accéder à leurs droits et de garantir leur effectivité.

Droits économiques et sociaux : le rôle sociétal de l'entreprise

Les droits économiques et sociaux des citoyens ne pourront trouver leur pleine expression sans l'existence de l'entreprise dont le rôle sociétal doit être mis en exergue.

En effet, celui-ci a fortement évolué. D'outil de production à l'origine, l'entreprise est devenue le moteur de la croissance économique, le premier pourvoyeur d'emplois et le principal créateur d'emplois. L'entreprise participe donc directement au bien être du citoyen.

Au niveau du progrès technologique, le rôle de l'entreprise a également changé. Autrefois l'entreprise était le champ d'application des découvertes. A présent l'entreprise est devenue le laboratoire où nombre d'innovations technologiques importantes ont été réalisées

Le rôle de l'entreprise mérite d'être encore analysé sous l'angle de la formation. La formation traditionnelle a été fortement critiquée car trop théorique et inapte à répondre aux besoins du marché. La formation en alternance entreprise/ université après avoir fait ses preuves en Allemagne est en passe de se généraliser au niveau européen.

Ainsi, l'entreprise est à présent le creuset où les intérêts économiques, sociaux et technologiques se rejoignent. L'entreprise joue un rôle sociétal primordial qu'il convient de souligner et mettre en évidence, car encore sous-estimé.

Dans ce contexte, l'entreprise doit trouver sa place dans le dialogue que les instances communautaires ont entamé avec la société civile. Les Chambres de Commerce et d'Industrie sont en faveur de l'établissement d'un dialogue structuré et institutionnel afin de renforcer la consultation démocratique dans le processus de prise de décision.

Interface entre les entreprises dont elles représentent les intérêts et les autorités publiques, les Chambres de Commerce et d'Industrie sont les interlocuteurs naturels des instances communautaires. Ce dialogue, dans la perspective de la mise en œuvre d'une « European Governance », sera d'autant plus significatif.

Droits civils et politiques en phase avec l'évolution de la société

Les droits civiques et politiques doivent pouvoir refléter les bouleversements qui ont marqué la société depuis ces dernières décennies.

Les ***concepts de subsidiarité et de proximité*** ont été sans nul doute les principes politiques les innovateurs et les plus marquants.

Pour les Chambres de commerce et d'industrie, ces principes doivent être repris dans l'exercice du droit des citoyens à ***une bonne administration*** : à savoir une administration efficace et simplifiée. En vertu du principe de subsidiarité et de proximité, l'administration doit être décentralisée et gérée au niveau le plus proche des citoyens, tenant compte de leurs besoins spécifiques et l'environnement économique et local dans lequel ils vivent.

L'administration ne doit pas nécessairement être gérée par les autorités publiques. Certaines de ses fonctions pourraient être assumées par des institutions socio-professionnelles représentatives des intérêts généraux de l'économie telles que les Chambres de Commerce, par exemple, plus aptes, compte tenu de leurs missions et de leurs connaissances du terrain, à les assumer.

Au niveau ***du droit à la protection juridique***, la globalisation des échanges internationaux, le développement du commerce électronique et la mobilité accrue des citoyens auront comme conséquence inévitable l'augmentation des litiges transnationaux.

Or, compte tenu de la lenteur, la complexité des procédures judiciaires et en particulier des problèmes liés à l'exécution des sentences, des formes alternatives de règlements de litiges doivent être promues tel que l'arbitrage, la médiation ou le règlement alternatif des litiges.

Les Chambres de Commerce, en tant qu'institutions non sectorielles et représentatives des intérêts généraux de l'économie, sont idéalement placées pour les promouvoir et pour y jouer un rôle central. Ainsi au niveau européen, les Chambres de commerce sont actuellement entrain d'élaborer un projet de règlement des litiges en ligne.

Quant *au* ***droit à l'information***, avec le développement du multi média, nous assistons à une augmentation exponentielle de l'information. Le citoyen doit faire face à trois facteurs : (i) savoir que l'information existe (ii) la trouver (iii) la comprendre. Les Chambres de commerce, compte tenu de leur réseau et de leurs compétences, sont par essence même des organes démultiplicateurs de l'information.

Une Charte indissociable du débat sur la réforme des instances institutionnelles

La décision du Conseil de Cologne de doter l'Union d'une Charte des droits fondamentaux représente pour les citoyens et pour le processus d'intégration européenne une avancée considérable.

Cependant, les Chambres de Commerce considèrent que la Charte doit être plus qu'une simple déclaration politique à valeur morale, elle doit avoir une force juridique contraignante. Les droits fondamentaux des citoyens ne doivent être pas être écartés de la réflexion sur l'avenir des institutions.

Pour une plus grande sensibilisation des citoyens de l'UE sur les travaux de la Convention

Les citoyens de l'Union européenne, bien que représentés au sein de la Convention par les membres du Parlement européen et par les membres des parlements nationaux, doivent être mieux informés des travaux menés dans leurs intérêts par la Convention.

Dans cet esprit, Eurochambres propose qu'un volet du plan financier adopté par la Commission européenne, pour encourager le débat public sur la Conférence intergouvernementale, soit consacré à la Charte des droits fondamentaux de l'UE, les deux actions étant complémentaires.

Eurochambres un réseau de 1300 Chambres au service de l'intégration européenne

Eurochambres rappelle que les 1300 Chambres européennes constituent un réseau profondément enraciné aux niveaux local et régional, qui s'étend sur l'ensemble du territoire européen. C'est ce réseau qu'elle met à la disposition de la Convention pour favoriser la sensibilisation des citoyens.

Conscientes des enjeux décisifs de l'intégration européenne, les Chambres de Commerce européennes, sous l'égide d'Eurochambres, ont signé en octobre 1999, la Charte des Chambres de Commerce et d'Industrie européennes. Cette Charte réaffirme solennellement l'engagement des 1300 Chambres et des 14 millions d'entreprises qu'elles représentent à promouvoir les intérêts généraux de l'économie que ce soit au niveau local, régional, national ou européen.

Le rôle des Chambres est également d'être précurseur et d'anticiper les évolutions économiques. Ainsi, elles offrent aux entreprises des services innovants qui leur permettront de s'adapter à la nouvelle conjoncture. L'exemple le plus illustratif est l'action que mènent les Chambres pour sensibiliser leurs membres aux enjeux de la nouvelle société et plus particulièrement du commerce électronique.

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BUSINESS ARE CITIZENS INSIDE THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

Intervention of Comm. Danilo Longhi
Vice President of Eurochambres
President of Unioncamere

Audition on The Charter of Fundamental Rights of the EU

Brussels, 27th April 2000

I represent here 1300 Chambers of Commerce members of Eurochambres and 14 million businesses registered in the Chambers.

The Chambers of Commerce, defined as promoters of local development are a network of institutions which interpret the new trend emerging in economy and society in Europe and they represent a junction between the State (including the EU level) and the market /businesses, also between public and private sector.

- **The Charter for a realignment of society, economy and EU**

The objective is presenting some consideration and proposals for the Charter of Fundamental Rights of the EU.

But why are Chambers of Commerce interested in the Charter of Fundamental Rights?

Since a long time Chambers of Commerce have felt the need of a deep reform of EU Treaties characterized by a realignment between civil society, business and institution. This realignment is necessary because businesses have assumed a new role in today's reality.

Changes have occurred in the international market and in the production organization have emphasized, in a definitive way, a **new role and a new function of business**, at least under two aspects:

- It expresses not only the needs of who owns the company but is a place of synthesis of different interests (economic, social, technological and professional) of the working world, of "techné", of capital, and of entrepreneurship.
- It's the principal subject of economic and social innovation and guarantees economic growth and social cohesion.

A realignment of institutions to this new "scenario" needs overcoming the sensation of gap between EU institutions and "citizen/business " because businesses too have to be considered as an organizational network of citizens for the execution of production activities. Filling up this gap means that the answers expected from the European institutions have to be adopted to the new request of citizens and businesses. All that requires a different approach of the European institutions, a different way of administrative management, a different transfer of public powers, a real partnership of organization of relationships between different institutions in the prospect of a new governance.

2. European Chambers of Commerce proposals

The form of our proposals is linked to what has already been said in the introduction.

2.1 Not only entrepreneurs or workers but also businesses in the Charter of fundamental rights

In our opinion it would be important that not only the right of association, negotiation and collective action of employers and workers (which the Charter already mentions[1]) but also the introduction of the right of the "new business" to be represented and to hold a dialogue with the institutions of the European Union because it plays today also an institutional role.

It is suitable remembering also how business has always been one of the prime movers of the European integration. To the old threelateral relationship between State/business, citizens/businesses, there has been the substitution with the threelateral relationship between business/national State/EU. Businesses have been, until now, one of the drives of the European integration thanks to the principle of non-discrimination quoted in the Charter[2]. The Italian jurist Cassese defines businesses as "the real spies of market disorder" because they can assert the principle of not discrimination in front of European institutions or, better, the principle of free competition.

In our opinion the Charter is important because we are moving from an idea of rights of freedom created in function of mercantile rights and of the creation of an internal market, to something different where rights do not have their particular foundation on market anymore but they found it in something else. The summit of Tampere on European space of freedom, justice and security has represented a further step in this direction: we moved from an economic space to a constitutional one.

1 Art. IV of Convent 18.
2 Art. 19 of Convent 8; art. J of Convent 17.

2.2 Not only a fair administration but a real subsidiarity and proximity

The Charter of fundamental rights states the right to a fair administration[3]. With regard to this it is suitable to fully supplement this right with the principle of subsidiarity and proximity as fundamental regulation of the relationships between EU and the different bodies of the European Union.

The principle of subsidiarity, already granted in the treaties of Maastricht and Amsterdam (but not enforced in real terms), has to be considered not only in a vertical direction (on the basis of an ascending progression from the smallest territorial scale to the largest one), but also in a horizontal one, as a lever to improve the autonomous ability of action of economic and social subjects.

Knotting again threads between society and European Union means also a significant simplification of relationships in order to assure a better effectiveness to the decisional process and to the administrative one.

2.3 Valorise functional autonomies and networks

We should introduce the following principle: public functions practice do not have necessarily to be reserved to the EU or national-regional institutions, but can be assured also by institutions, corporations or organisms which represent social bodies. This involves the valorisation of what the Italian legal system recognizes as *functional autonomies*, among which there are the Chambers of Commerce as representations of different interests, but always arising from citizens.

It is the awareness of this autonomy and its general function that motivated European Chambers of Commerce to adopt themselves a Charter of the European Chambers of Commerce, signed last October in Cyprus. Therefore, we have recognized ourselves as a network of local institutions able to independently understand the needs of territory, citizens and enterprises.

To the European Union this point is quite important in order to face properly a polycentric society enlarged to candidate States. And not only for this reason, but also referring to the right of information stated by the Charter that, without "legs" (that is the networks), risks to be hopeless.

3. Final remarks

These proposals and thoughts have been explained briefly and concern only few of the important issues of the Chambers of Commerce, even if they evoke such big topics. If through the EU Charter of Fundamental Rights it will be possible not only to give a contribution to the integration process and consciousness of citizen rights but also to influence the EU institutions reform (obtaining more effectiveness, simplification and an enlargement of autonomies), then we might gain approval from a new and wide public opinion towards the EU institutions and a substantial reconciliation of citizens and enterprise-citizens.

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[3] Art. E of Convent 17.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 15 June 2000

CHARTE 4368/00

CONTRIB 231

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by Mr. Dr. Bernhard W. Wegener, Universität Bielefeld, Juristische Fakultät, on environmental protection. [1] [2]

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[1] This text exists in German and English languages.

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Bielefeld, den 9. Juni 200

Environmental protection

Concerning environmental protection, the Praesidium of the Convent has proposed the following:

„Article 44. Environmental protection

Union policies shall ensure environmental protection, which involves preserving, protecting and improving the quality of the environment, protecting human health and prudent and rational utilisation of natural resources.“

We propose the following as the text of the right to environmental protection in the Charter of Fundamental Rights of the European Union:

Article X. Environmental protection Everyone has the right to the protection of his natural environment. Content and limits of this right shall be prescribed by law.

Reasons:

The proposal of the Praesidium refuses to give the citizens of the European Union a right to the protection of their natural environment. Instead, it suggests only a vague and practically hardly effective declaration of political obligations.

The present proposal gives everyone a genuine and enforceable right to the protection of his natural environment. As a citizen's right it should find its place among the Articles 1 - 30 of the Praesidium's proposal. Only then, the central importance of environmental protection for the citizens of the European Union and for the Union as such will be sufficiently acknowledged and respected.

The limitation of the right, proposed in sentence 2, will ensure, that the definition of the acceptable amount of environmental degradation and of the level of protection remains the prerogative of the legislator. The proposed right to environmental protection will be not more - and not less - than a right to protection according to law.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 15 June 2000

CHARTE 4369/00

CONTRIB 232

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution (amendments) by CAFECS as well as the intervention text given at the hearing on 27 April 2000. [1]

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[1] This text has been submitted in French and English languages. (The amendments in French only).

Contribution de CAFECS à l'élaboration de la Charte des droits fondamentaux de l'Union européenne

25.05.00

I - Amendements à la Charte

Ces amendements sont extraits de la Contribution de CAFECS « Des droits fondamentaux » (avril 2000)

Droit à l'éducation (Ajouter un alinéa 4 à l'article 16)
« Tout individu a droit à l'accès aux ressources de sens, historiques, littéraires, artistiques, philosophiques et religieuses, qui constituent le patrimoine symbolique de l'humanité, en vue de se constituer comme personne et comme sujet éthique.
Les Etats-membres ont le devoir de veiller à ce que les espaces publics de transmission et d'échange culturels organisés par eux ou auxquels ils participent, qu'il s'agisse du système d'enseignement, de la formation permanente, des médias ou des aides à la production culturelle, assurent la diffusion de ce patrimoine. »

Droit à la pleine activité
« Toute personne adulte dépourvue d'emploi doit se voir offrir la possibilité de participer à une activité d'intérêt général normalement rémunérée. »

Droit au temps choisi
« Dans le cadre contractuel des relations de travail, toute personne a le droit de faire valoir tout au long de sa vie, l'harmonie des temps consacrés à sa vie professionnelle, à sa formation, à l'exercice de ses responsabilités familiales et civiques et à son épanouissement personnel. »

Droit d'asile
« Toute personne craignant une persécution, quels que soient son sexe, son origine géographique, sa nationalité, sa religion, etc… a le droit de trouver asile dans l'Union. Ce droit implique l'accès des demandeurs d'asile à une procédure juste et efficace pour l'examen de leur demande et, par voie de conséquence, l'accès au territoire des Etats membres en tenant compte de leur choix du pays en raison des attaches familiales, culturelles, linguistiques ou autres. Des conditions de vie dignes doivent être assurées dès l'entrée sur le territoire. »

II - Ajout aux traités

« La Charte des droits fondamentaux de l'Union européenne est complétée par une nouvelle réunion de la Convention pour une période de trois ans et selon une procédure analogue ».

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Charter of Basic Rights
Speech by Frederic Pascal
on behalf of CAFECS
at the Convention
27 April 2000

As a member of the advisory committee which was formed in October 1995 under the chairmanship of Mrs. Pintasilgo, the former Prime Minister of Portugal, and at the initiative of the European Commission, I am pleased to see that the essential recommendation of our report regarding the collective development of basic rights for the European Union has been put into action.

As spokesman for *Carrefour pour une Europe civique et sociale* (CAFECS), which includes figures from French associations, I would like to present four points and a proposal for this Charter.

1. The Charter must reinforce European identity by ensuring the reality of the rights which it sets forth. It is not enough for Europe to refer to basic rights, it must make them a reality. This means that these rights must be observed by politicians, institutions and in concrete behaviour, not just through texts which present goals for the future. Through **concrete application of these right**s, Europe can distinguish itself from other countries which speak of rights while allowing humanly unacceptable situations to continue.

2. The democratic model of today's Europe puts the individual at the centre of the political system. But democracy requires a population interested in public affairs, responsible and aware of their rights and responsibilities, ready to think and to debate. This requires transmission of systems of moral, spiritual and cultural values compatible with the multiple forms of secular institutional expression. Such transmission, respecting freedom of conscience, is essential for the development of diverse humanism. This transmission must be included in the media, in education and in culture **to guarantee all people the right of access to the meaning and symbolic heritage of humanit**y. The article regarding the right to education should be modified to take this into account.

3. The right to work must be complemented b**y: the right to continuing education throughout one's life** in order to adapt one's skills and goals to economic possibilities and also **a right to time choices** in order to harmonise the time devoted to professional activities, training, to family and civic responsibilities and to personal development. **A socially-useful activity, with**

a normal wage, must be offered to all people without employment. The struggle against poverty and exclusion requires that **all people have real access to these basic rights**. This access is thus, in itself, a basic right which must be expressed and declared as such.

4. The right of association must be formally recognised. It must be distinguished from the right to form unions which reflects labour rights. The right of association must apply to all people living in the European Union. It must be written so that it can later be used to establish the principle of European associations which will give new momentum to civil society on the European level.

The debate concerning the articles already examined by the Convention has revealed difficulties and questions, particularly in scientific and technical areas which are constantly changing, as well as with the current definition of European citizenship linked to nationality. A charter of rights cannot accept that things are forbidden simply because of current fears. It must define basic rights to be protected in all situations.
This debate on the Charter will not be fully resolved at the Nice Council, further work is needed. With the creation of the Convention, we are fortunate to have a new forum for public debate involving organised citizens. We therefore think that it is essential for the Convention **to be extended for three years**. That is our proposal. This would allow for supplementing some points of the Charter, and especially developing the guiding principles of EU policy and reinforcing the expression of organised civil society which today is rarely, if ever, consulted by EU decision-making bodies.

18 April 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 15 June 2000

CHARTE 4370/00

CONTRIB 233

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the report of the European Group on Ethics in Science and New Technologies (GEE), as requested by President Prodi. [1]

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[1] This text exists in English language only.

CITIZENS RIGHTS AND NEW TECHNOLOGIES:

A EUROPEAN CHALLENGE

Report of the European Group on Ethics in Science and New Technologies on the Charter on Fundamental Rights related to technological innovation as requested by President Prodi on February 3, 2000

Brussels, May 23, 2000

EGE web site : http:// europa.eu.int/comm/secretariat_general/sgc/ethics/en/index.htm

Table of contents

PART I:

WHY A GREATER EMPHASIS ON ETHICS IS SO ESSENTIAL TO EUROPE?

Contemporary European civilisation is at the same time based on science, technology and multiculturalism. This multiculturalism, however, is moderated by the Graeco-Latin and Judeo-Christian traditions. These are the historical sources of European values, modern science and technology, and the roots of human rights, which ordains the respect of all individuals, including those of a non-European cultural background. Pluralism, tolerance, and open dialogue about cultural and moral differences constitute therefore a distinctive sign of the European idea. Its implementation requires discussion among all parties in a civil society as a primary source of legitimisation of the rules, to be followed by all.

European diversity is a wealth. European acculturation must include enlightening all citizens about multiculturalism, i.e. how vital it is to inculcate a culture that fosters the importance of many cultures getting along well together.

European education must also stress the importance of inculcating the culture of science and technology. Only then can citizens adopt an informed and balanced attitude towards advances in science and technology. Such an attitude is opposite to technophile or technophobe blindness. Science and technology must increase - and not decrease - freedom and choice for everyone.

This increase in freedom and choice not only involves new discoveries and future inventions, but also safeguards the wealth inherited from the past. Science and technology must be at the service of safeguarding human heritage. Insofar as science and technology replace nature and tradition whilst maintaining the idea of democracy and humanity, the legitimacy of this substitution depends on the capacity of this civilisation to show more active generosity than nature and tradition show.

This means that science and technology should strive to alleviate the suffering, inequality, injustice, and discrimination that tradition and nature have brought out. Moreover, science and technology should not introduce new suffering, inequality, injustice, servitude, constraints or discrimination. In this respect science, technology and multiculturalism face many challenges in the field of biotechnology and ICT. These challenges require not only recognition and the promotion of individual autonomy, but also vigilance with regard to social solidarity between all the individuals. This is to say that supporting individual rights does not mean the setting up of an egoistic society. A market economy in Europe must therefore not exclude a safety net, that is protection for all based on strong collective values.

PART II:

THE GROUP'S APPROACH OF THE RELATIONSHIP BETWEEN CITIZENS RIGHTS AND NEW TECHNOLOGIES.

A. Background Sources.

In suggesting provisions establishing the rights of the citizen or of the person when faced with science and new technologies, the Group did not refer only to its own opinions, but also to a variety of international instruments. The first is the European Convention on Human Rights as far as it is part of the body of Community law, reflected in particular by the case law of the Court of Justice in Luxembourg. However the Group has also drawn on other international instruments - binding or declaratory - and on European law concerning its areas of competence covering information technologies and life sciences.

These instruments include for example:

International legal instruments	European legal instruments
biomedicine and genetics:	
- UN Universal Declaration on the Human Genome and Human Rights (1998) - Council of Europe Convention on Human Rights and Biomedicine (1997)	- the Directive on the protection of biotechnological inventions (1998), which excludes the patenting of inventions which should be contrary to public order or morality - the Directive on in-vitro diagnostic medical devices (1998) which refers to the protection of the integrity of human persons
information technologies:	
- Council of Europe Convention on Data Protection (1981).	- the Directive on the data protection (1995), which refers to the principle of respect for privacy

The Opinions of the Group are the following:

EGE opinions
N°1.- Use of Performance-Enhancers in Agriculture and Fisheries (12/03/93);
N°2.- Products derived from Human Blood or Human Plasma (12/03/93);
N°3.- Legal Protection of Biotechnological Inventions (30/09/93)
N°4.- Gene Therapy (13/12/94)
N°5.- Labelling of Food derived from Modern Biotechnology (05/05/95)
N°6.- Prenatal Diagnosis (20/02/96)
N°7.- Genetic Modifications of Animals (21/05/96)
N°8.- Patenting of Inventions involving elements of Human Origin (25/09/96)
N°9.- Cloning Techniques (28/05/97)
N° 10 - The 5th Research Framework Programme (11/12/99)
N° 11 - Human Tissue Banks (21/07/98)
N° 12 - Human Embryo research (23/11/98)
N° 13 - Healthcare and information Society (30/07/99)
N° 14 - Doping in Sport (11/11/99)

Furthermore, the Group refers also to the opinions and reports published by the national ethics committees in the Member States or other relevant national bodies. The work carried out by these committees on a wide range of issues constitutes a useful source of inspiration for deliberations on ethics, and contributes to define ethical norms to be taken into account in national regulations or national policies. The Group urges the European Commission to make this information widely available and usable.

B. Basic ethical principles emerging from EGE Opinions

In its advisory task, the Group has identified ethical issues arising from the use of new technologies, both biotechnology and information and communication technology (ICT). It has done so with a view to helping European decision-makers both on legal and policy matters.

The Group considers the following starting points, which reflect Europe's social dimension:

1. - the Charter should highlight the two basic ideas, which are hallmarks of European society: dignity and freedom.

2. - the Charter cannot but refer explicitly to those technologies that deeply affect people's lives. In particular, ICT is increasingly pervasive, transforming people's lifestyles, identities, and choices on many levels, and contributes to changing education, health, social services, culture, etc.

3. - the Charter must not be confined, as the European Convention on Human Rights is, to stressing individual rights, rather it should include social rights according to the fundamental European value of solidarity.

4. - it is no longer enough to simply state "vertical" rights intended to protect citizens in their relations with public authorities. Therefore the Group also proposes listing "horizontal" rights to protect people's rights in their everyday life, vis-à-vis public and private bodies.

In its proposals, the Group expresses key ideas regarding the different areas in question:

Molecular genetics and biotechnology

Here the Group wishes to emphasise three particularly serious types of risk:

- "merchandising" the human body, its components and products;
- new forms of discrimination stemming from the knowledge of the genetic characteristics of humans;
- the instrumentalisation of the human beings through genetic manipulation of human beings, which the Group has deemed ethically unacceptable but which could become a reality at a time when human power over life is increasing considerably.

Information and communication technologies

These technologies are increasingly ubiquitous, permeating individual and social activities as well as objects of everyday use, influencing many aspects of daily life and work. Given the many opportunities these technologies offer, including the combination of genetic and ICT (eg. biobanks), it is vital to watch over their problematic aspects and in particular:

- to improve the protection of privacy (data protection), respecting people's right to maintain boundaries, but also to preserve privacy, autonomy, confidentiality, and solitude;
- to arm individuals against the introduction of systems likely to reduce their freedom and autonomy (video surveillance, behaviour control, and personal profiling based on Internet transactions) or likely to increase people's dependency on selection and decision mechanisms which are not transparent or understandable.

The ethics of responsibility

The Group wants to emphasise the major importance of the ethics of responsibility, which is a corollary of the risks linked to science and new technologies. Technoscience makes us more powerful but at the same time more vulnerable. This is shown by the damage recently caused in the course of new experimentation such as gene therapy or by the disastrous consequences of viruses on the web. Modern technology demands more accountability and even liability. It requires affirming for instance:

- the consumer's right to food safety, a principle which is considered by the Group as " an ethical imperative" (see the Opinion concerning "the labelling of foods derived from modern biotechnology"- 5/5/1995).
- the individual's right to information security, in the same way deemed "an ethical imperative to ensure the respect for human rights and freedoms of the individual, in particular the confidentiality of data…"(see the Opinion about " ethical issues of healthcare in the information society" 30/7/99).

Thus in the Group's view the precautionary principle commonly related to environmental law is applicable to all kind of fields, especially new technologies. It entails the moral duty of risk assessment pertaining to research and new technologies as well as the individual's right to fair reparation in case of damage. If not mentioned specifically in the Charter itself, such an approach with all its legal consequences must still be kept in mind. It is the expression of prudence as a genuine ethical virtue.

C. Towards a Charter with binding legal effect

The Group declared it was in favour of a Charter with binding legal effect. If not included in the Treaty itself, the Charter could at least be annexed to the Treaty in a declaration having the same binding legal effect. It is timely to assert legally the fundamental rights which underpin European identity. It is essential to launch a strong political message regarding the founding values of the European construction towards European citizens particularly in the context of enlargement. Furthermore, the use of new technologies, which are not confined to national borders, should be framed by binding rules based on clear common ethical values.

For the rest, the Group has bowed to the constraints of a Charter that is intended to be a permanent reference instrument. The group has limited itself to short, operational provisions. Two additional factors encouraged the Group in this approach. First, the rapidly progressing nature of the life sciences and information technology make it impossible to lay down very detailed provisions which fairly soon could become obsolete; second, the Group took account of the need to preserve the multicultural nature of European society which precludes issuing strict prohibitions.

PART III:

SPECIFIC PROPOSALS AND COMMENTS

The Group has considered the Draft Charter (CHARTE 4149/00 CONVENT 13), examined the articles relevant within its mandate, and proposes the following alternatives and comments.

Article 1

Draft Charter: ***"Dignity of the human person"***
The dignity of the human person shall be respected and protected in all circumstances.

EGE proposal: "Dignity and freedom of the human person"
Everyone's dignity and freedom must be respected.

Comments:

The respect of the dignity of the human person is at the root of the ethics of science and new technologies as well as of human rights. It is clear that by asserting " the inherently equal dignity of all members of the human family", the Preamble to the Universal Declaration of Human Rights is aimed at prohibiting all acts which do not conform to the ideas of humanity. Dignity, although a strong juridical and ethical concept in Europe, is a delicate idea when transposed into legal language. Indeed it states that humans have inalienable value, neither specifying who the person or the human being is, nor what the actions and situations which affect this intangible value are. "Any human being is all humanity". Jean-Paul Sartre summarised the scope of the principle of dignity, which is different from all other principles of law and rights.

Other rights and liberties are "neither general nor absolute", as is commonly stated by European Constitutional Courts.

The right to dignity, on the other hand, is impossible to restrict in any way for the reasons above mentioned. There is nevertheless a philosophical debate about the real meaning of such a principle.

- According to some people, all rights and freedoms stem from dignity, as an inherent value of the human person. Thus ideally there should be no conflict between dignity and freedom.

- But it cannot be denied that there are conflicts between this idea in the current debate. The bioethical discussion in particular illustrates this kind of conflict in a wide range of issues such as abortion and euthanasia.

The Group believes that clearly associating the ideas of dignity and freedom is the best way to ensure that the principle of dignity does not lead to an authoritarian society. In associating dignity and freedom, the Group underlines the necessity to debate what appears contrary to dignity according to society and to the person concerned.

This does not mean of course that the Group does not recognise the unique value of dignity as a principle of law. The Group referred many times to it in its diverse opinions. (see its Opinion on the Fifth Research Program (11/12/97) which states that the dignity of the human being has to be respected by researchers; see also its Opinion on healthcare information (30/7/99) which notes that amongst the ethical principles involved "human dignity serves as a basis for requirement of privacy, confidentiality and medical secrecy"; and its Opinion on doping in sport (11/11/99) which suggests that doping can be contrary to the dignity of the athlete).

The balanced approach of the Group associating dignity and freedom in the same article of the Charter is thus aimed at supporting a European society open to the debate.

Article 2

Draft Charter: *"Right to life"*

1.Everyone has the right to life.

2. No one shall be condemned to execution.

Comments:

The Group fully agrees with this belief already mentioned in Article 2 of the ECHR. Nevertheless, it has some remarks to make on its use in the context of bioethics.

1. The principle of the right to life is not used in international texts on bioethics such as the Council of Europe's Convention on Human Rights and Biomedicine and the UN Declaration on the Human Genome and Human Rights. This is not by chance. It is because the recognition of the right to life in the context of bioethics raises a number of delicate questions, for instance "to whom does this right apply?" "is this right applicable to the unborn child, as seems to be the case under article 40 of the Irish Constitution?" Is this right likely to be imposed by law if the person concerned is willing to shorten his/her life for personal reasons? These questions directly refer to the difficult issues of the status of the embryo and of euthanasia.

2. As stipulated in the Group's Opinion on human embryo research (23/11/98), "The respect for different philosophical, moral or legal approaches and for diverse national cultures is essential to the building of Europe". In this same Opinion, the Group avoided to use the expression "the right to life" which appeared as rather ambiguous. That is why the opinion in question refers to "the respect for human life, from the embryonic stage".

3. It should thus be pointed out that in establishing the right to life, in general, without associating it more explicitly with the prohibition of death penalty (that is to say in the same paragraph of the article concerned), the risk is that the Charter could lead to jurisprudence which might be the basis of European harmonisation on these controversial issues, which may be undesirable at the present time.

Article 3

Draft Charter: ***"Right to the respect of integrity"***

1. Everyone has the right to the respect of his physical and mental integrity.

2. ***In the fields of medicine and biology, the following principles in particular must be respected:***

- prohibition of eugenic practices

- respect of the informed consent of the patient

- prohibiting the making of the human body and its products a source of financial gain

- prohibition of the cloning of human beings

EGE proposal: "Right to the respect of integrity"

3.2 (a) - respect of the informed consent of the person.

Comments:

Unlike the right to life, the principle of informed consent does not raise specific difficulties in the context of bioethics. On the contrary, this principle is at the very origin of modern biomedical ethics. It was introduced in law firstly to condemn the horrific experiments carried out during the last world war on human guinea pigs. It has been since reaffirmed in a number of later international forums, such as the World Medical Association (which published in 1964 the well-known Declaration of Helsinki). It is noticeable that the only provision, which deals with bioethics in the UN Covenant on Civil and Political Rights of December 16, 1966 (article 7) states that " no one shall be subjected without his/her free consent to medical or scientific experimentation".

That means that before consent is sought, information must be given specifying the alternatives, risks, and benefits for those involved in a way they understand. When such information has been given, free and informed consent must be obtained. Depending on the nature of the intervention (or research), different consent procedures may be used. When the persons informed have reduced autonomy, special rules apply. Indeed vulnerable persons deserve special consideration and protection by the law.

Several Opinions of the Group refer to the principle of informed consent in very diverse circumstances. For instance, in its Opinion on prenatal diagnosis (2/2/96), the Group states that "tests should be done only at the request of the woman or couple after they have been fully informed, namely by genetic counselling". The Opinion on patents (25/9/96) stresses the fact that "the ethical principle of informed and free consent of the person from whom retrievals [of cells as sources of DNA] are performed, must be respected. This principle includes making the information about this person complete and specific, in particular the potential patent application on the invention, which could be made from the use of this element…".
In the same way, the Opinion on human tissue banking (21/7/98) states that "in order to be informed, the donor's consent must have been given on the basis of information provided in as clear and precise lay terms as possible by the doctor supervising the procurement".

- The Group suggests using "person" instead of "patient". Indeed there is an increasing number of persons who are not ill and who participate in scientific experimentation, for example healthy volunteers taking part in clinical trials.

- The Group recalls that consent is not sufficient, as other rights also have to be considered. For instance, the right to respect privacy and confidentiality, and to fair access to healthcare. These specific rights are guaranteed in the European Convention on Human Rights and Biomedicine as in the UN Declaration on the Human Genome and Human Rights.

3.2(b) - the individual's body and its parts cannot be traded.

Comments:

Financial gain from the use of the human body and its products is one of the most delicate questions in bioethics. The prohibition against financial gain from the human body and its products is now mentioned in the two main international instruments on bioethics:

- article 21 of the European Convention on Biomedicine and Human Rights states that "the human body and its parts shall not, as such, give rise to financial gain";

- article 4 of the UN Declaration on the Human Genome and Human Rights provides that " the human genome in its natural state shall not give rise to financial gain".

Nevertheless these provisions do not clarify the questions raised by the widespread industrial use of human body products to make pharmaceuticals or genetic tests kits.

- Does it preclude patenting human genes? Certainly not, at least according to the recent Parliament and Council Directive 98/44 on the legal Protection of Biotechnology inventions. This directive states that "an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element"(article 6.2.).

- Does it refer to the traditional distinction between patentable invention and simple discovery that are not patentable? Perhaps. In so doing it is in conformity with the Opinion of the Group on the ethical aspects of patenting inventions involving elements of human origin (25/9/96), which states that " this distinction…involves, in the field of biotechnology, a particular dimension. Which means that " the simple knowledge of the complete or partial structure of a gene cannot be patented". But it is doubtful that the provision in question will only be interpreted as referring to the distinction between invention and discovery which in the field of life sciences is by the way more and more flawed.

- Does it mean that the Charter reaffirms the principle of non-commercialisation of the human body? In its Opinion on products derived from human blood and human plasma (12/3/93), the Group strongly approved this principle in asserting that " the human body in general and the human blood in particular are not marketable". In its Opinion on human tissue banks (21/7/98), the Group noted that "all Member States of the European Union adhere to the principle that donations of human tissues must be free, following the example of blood, and this rules out any payment to the donor". But in the same Opinion, the Group stresses the fact that " the issue of the commercialisation of human tissues" especially those " which have been processed and prepared for therapeutic purposes" is " controversial". One must be aware that, although rooted in European cultural traditions, this principle is already under challenge in USA. In the US an increasing number of patients whose cells provided genes that have been patented are asking for financial rewards. But no Court agreements have to the knowledge of the Group yet appeared.

In expressing these remarks, the Group especially wants to underline that the subject is very complex. Moreover the Group considers that the draft Charter's wording on the prohibition of making financial gain from human body is much too vague. It is not only ambiguous with regard to patent law but it could also be interpreted as involving activities like professional sport.

Therefore the Group proposes a provision more specifically emphasising the protection of individuals from organ or tissue trafficking which would affect their dignity and rights. This prohibition of trade does not preclude the patenting of inventions derived from human elements nor the compensation for tissue bank services as far as long as legal conditions and strict limits for this in international conventions, or national laws if any, are satisfied.

3.2(c) Any discrimination based on …, genetic characteristics, health conditions…, shall be prohibited.

Comments:

Referring to the Article 19 "Non-discrimination" of the Draft Charter (CHARTE 4137/00 CONVENT 8) the Group proposes to add the two following items: "genetic characteristics" and "health conditions".

Although the principle of non-discrimination is already established in the Treaty itself, the Group still considers it essential to refer explicitly to it in the Charter again to reinforce the prohibition against discrimination. Non-discrimination also includes non-stigmatisation. Discrimination does not mean selection or distinction as such, but unfair discrimination unduly depriving anybody from their rights. Article 6 of the UN Declaration on the human genome and human rights states that "no one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity". This article must be reaffirmed at the EU level.

The social dimension of Europe implies taking into account new forms of discrimination due to genetic testing and screening. Genetic tests to discover predisposition or pre-symptomatic diseases may be useful in promoting health measures. On the other hand, such tests might be tempting for employers or insurance companies who wish to exclude individuals at risk of developing a disease. Such tests are becoming available on the European market. For instance a test which can detect a woman's predisposition to a certain type of hereditary breast cancer is now being imported from the US. Many other genetic tests will be available soon perhaps even through the internet. It would be remiss if the Charter did not deal with this topical issue.
That is why the Group proposes supplementing the article in the draft Charter on discrimination by adding discrimination based on genetic characteristics or health conditions. The prohibition to discriminate on the basis of health and disability is now found in legislation from several European countries.

The Group is presently studying the issue of the use of genetic testing in the workplace. Its Opinion is to be published in November 2000.

3.2(d) (Option 1) Human reproductive cloning is prohibited
(Option 2) No mention of cloning.

Comments:

The Group is divided on the question of cloning. In its Opinion on cloning techniques (28/5/97), the Group firmly condemned reproductive cloning, that is "cloning aimed at the birth of identical individuals". Distinguishing reproductive and non reproductive cloning (related for instance to human cells research), the Group stated that although " many motives have been proposed" to justify human reproductive cloning, "considerations of instrumentalization and eugenics render any such acts ethically unacceptable…". The Group recommended " to clearly express condemnation of human reproductive cloning in the relevant texts and regulations…" . Consequently the Decision adopting the Fifth Framework Research Programme (1998-2002) excludes funding of research aimed at reproductive cloning.

The Group has not substantially changed its Opinion, although however, some members believe that it is not appropriate to forbid cloning in the Charter itself, and one member is opposed to use of the term "reproductive cloning", preferring a prohibition against "cloning of human beings". Those who consider inappropriate to mention cloning in the Charter argue that:

- Other practices such as the creation of chimeras or hybrids are not mentioned although they would also violate human dignity. Not mentioning them would in turn result in reproductive cloning of individuals being considered more acceptable.

- To mention a specific technique in a rapidly moving field also risks making the provision in question obsolete. One must note for instance that national legislation which prohibits specific techniques - such as the Human Fertilisation and Embryology Act, 1990, in the UK - has been in his respect overshadowed by

scientific progress**.** For instance, article 3 (d) of this Act states that it is not authorised to "replace a nucleus of a cell of an embryo with a nucleus taken from a cell of any person, embryo or subsequent development of an embryo". But yet today there are similar techniques for the replacement of a nucleus that are thus not mentioned in this legislation. Similarly the Spanish law on artificial reproduction of 1988 forbids oocyte freezing. Recent developments show that this technique may be viable and safe. Thus the Spanish National Commission on Artificial Reproduction has asked for the change of the law. These examples show why it seems wise to certain members of the Group not to mention any technique, cloning or others.

- The reference to cloning is a condemnation of a certain use for technique rather than the affirmation of the principles, which lead to this condemnation. Yet, most people would consider that dignity of the human person implicitly excludes cloning of individuals.

- Furthermore, the philosophical and scientific debate on cloning is still open and it should be stressed that prohibition of a specific technique may prevent important discussions about human genetics.

All the members of the Group agree that the dignity of the person born by cloning, would not be in question, but they consider that the act of producing such a human being might be contrary to dignity. They also agree that the debate must continue, and that informing the public about applications of genetic techniques to human beings, and the strong ethical concerns which are raised must continue as well.

Specific additional article

EGE proposal: "Prohibition of eugenics"

Eugenic practices aimed at organising the selection and the instrumentalisation of persons are prohibited.

Comments:

As said before, the Group has referred to eugenics in its Opinion on cloning techniques (28/5/97). However, it admits that eugenics has a wide and controversial meaning, which has changed across the ages. From its origin in nineteenth century the term "eugenics" was intertwined with human genetics. The original idea was that society must foster the breeding of those who possessed favourable traits and to discourage the breeding of those who did not. At the time this seemed only common sense to many scientists and politicians in Europe. But after World War II and the fall of the Third Reich, eugenics as an acceptable social theory, appeared to be dead.
One must acknowledge that now the eugenics question in today being raised again. The Group roundly condemns in particular the following eugenic practices:

- Practices which involve for instance forced sterilisation, forced pregnancies or abortions, ethnically enforced marriages, etc, all acts which are expressly regarded as international crimes by the Statute signed in Rome on July, 18, 2000 to create the permanent International Criminal Court.

- Eugenics, as the Group said about reproductive cloning, may also involve genetic manipulations on human beings such as the modification of the germ line in view of enhancement, without any therapeutic aim.

Eugenics differs from other individual practices carried out to avoid the birth of a disabled child (preimplantation or prenatal diagnosis on severe and incurable diseases for instance). But would the possibility of being able to choose the sex of the future child be condemned as eugenics? The question is at present controversial even if many national legislation excludes such practices.

Considering the difficulty in defining eugenics, some members consider inappropriate to have it in a fundamental text such as the Charter, which deals with basic principles.

Nevertheless the majority of the Group believes that the Charter would be missing the point if it did not refer to one of the main challenges of human genetics. The Group only proposes more precise wording, which is inspired by the French law on bioethics of 1994.

Article 15

Draft Charter: ***"Freedom of expression"***

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. Art, science and research shall be free of constraint.

EGE proposal:

15.1 : to be added at the end : "as well as freedom to participate in public life."

15.2 : to be deleted: " of constraint."

Comments:

About the right to participate

The Group agrees fully with the provision related to freedom of expression. Indeed in the context of the information society, everyone understands this freedom not only as a right to information but also as a right to participate. Given the far-reaching implications of new technologies, people must be given a more active role in the shaping of these technologies. Procedures have to be developed to encourage and enable participation, such as 'consensus conferences', which help citizens understand technological choices and to voice their interests, or 'participatory systems design' which gives them the chance to intervene in the development of a system or application

of direct relevance to their work or personal life. Furthermore, people must be provided with guidance on the ethical and practical implications of new technologies, and the limitations and the appropriateness of their use. The Group strongly stressed this idea of participation, which would be a landmark in European democracy, namely in its Opinion on healthcare information (30/7/99). This Opinion states that" the right to participate in the medical decision-making process is a key part of the notion of the citizen as a stakeholder". Which means that "the citizen must not only have access to his/her electronic health record", but that "procedures (e.g. consensus conferences…) have to be developed to encourage and support the participation of citizens' collectives and users in the design of systems". In this context, the Group calls attention on the notion of 'electronic democracy'. This does not mean only to facilitate voting but also to foster public participation.

The additional phrase proposed by the Group refers to certain provisions of national Constitutions such as for example the Finnish Constitution (article 13) and the Portuguese Constitution (article 48.1).

About freedom of research

Scientific and artistic creativity have often been regarded as an expression of the human spirit. For instance, in the German Constitution of 1949 it is provided that "art and science, research and teaching shall be free". Article 12 of the UN Declaration on the human genome and human rights proclaims in the same way that "freedom of research, which is necessary for the progress of knowledge, is part of freedom of thought".

Nevertheless freedom of research is no more absolute than any other liberty. In the field of life sciences in particular, which involves the respect for human life and human dignity, researchers have to follow rigorous ethical principles. This balanced approach is reflected in many Opinions of the Group. For instance, the Opinion of the Group on "the Fifth Framework Research Programme" (11/12/97) calls for reconciling "the freedom to carry out research activities with the imperatives linked to the protection of the fundamental rights of European citizens…". In the same way, the Opinion on embryo research (23/11/98) deems "that it is crucial to recall that the

progress in knowledge of life sciences, which in itself has an ethical value, cannot, in any case, prevail over fundamental human rights and the respect which is due to all the members of the human family".

The question of setting limits to research, balancing respect of dignity with the duty to carry out research for improving knowledge, contributing to man's understanding of the world and life, alleviating suffering and bettering the quality of life, is certainly a delicate one. But it has to be faced and it is the role of ethics to help in so doing.

In insisting on the importance of the freedom of research, the Group wishes:

- not only to point out the necessity for all the powers that be – economic, social, political – to respect the moral and intellectual independence of researchers;

- but also to encourage European authorities as well as Member States of the EU to take positive measures in support of the free pursuit of research, especially fundamental research which is not immediately financially profitable. The idea is that to foster the intellectual and material conditions favourable to the free conduct of research is a key element of democracy.

15.3 Each individual has the right to benefit from sciences and technology.

Comments:

This article refers to the principle of justice, which implies fair access of all individuals to the benefits of scientific advances. This presupposes assessment and evaluation of such scientific progress. It has also to do with the principle of equal access to health, a principle put forward in several Opinions of the Group. For instance, in its Opinion on gene therapy (13/12/94) the Group stressed that "appropriate measures should be taken to assure equal access to gene therapy in the European Union" insofar as it is safe. To assert the right to benefit from science and new technologies is also a way to shed light on the importance of scientific and technological knowledge which must be part of the basic education of every European citizen.

Such a provision is not new. It is included in the UN Covenant on Economic, Social and Cultural Rights (December 1966) and in the UN Declaration on the Human Genome and Human Rights. Even if this provision does not allow claiming subjective rights before a court, it is important that the Charter gives a positive stand on technological developments, which are crucial to the welfare of European citizens.

Article 16

Draft Charter: *"Right to education"*

1. No person shall be denied the right to education, including in particular the right to receive free compulsory education.

2. The founding of educational establishments shall be free of constraint.

3. The right of parents to have their children educated and taught in accordance with their religious and philosophical convictions shall be guaranteed.

EGE proposal:

16.1 to be added at the end: "which shall facilitate mutual understanding between cultures".

Comments:

Cultural pluralism is a valuable characteristic of European society. The Group believes it important that a strong support is given to education at all levels to help the citizens from different cultures and traditions to live, communicate, and work together. Education has a fundamental role in promoting the active participation of all individuals and at all ages in awareness-raising and decision-making, thus allowing equity and social cohesion to develop. The implementation requires new working methods and modes of action, which recognise the rights, and civic responsibilities of citizenship.

This implies not only promoting knowledge of different cultures but also developing mutual understanding, which is the prerequisite for respect and tolerance.

The proposal of the Group is thus here to insist on the respect of pluralism, which the Group has mentioned, for example, in its Opinion on embryo research (23/11/98). It should be noted that many national Constitutional courts as well as the European Courts recognise pluralism as an essential condition of democracy.

The Group considered also the article 15 on data protection of the working document CHARTE 4137/00 CONVENT 8.

Article 15

Draft Charter: ***"Data Protection"***
Every natural person shall have a right to protection for his personal data.

EGE proposal:

15.1. Everyone has the right to protection for their personal data.

15.2. In the field of data protection, the following principles in particular must be respected:

- respect for confidentiality of personal individual data;

- right to determine which of one's own data are processed, by whom and for what purposes;

- right to have access to one's own data and to correct or delete them.

Comments:

Europe has become an information society like all developed regions of the world. Faxes, computers, the internet, mobile phones ...are common tools for everybody: public institutions, private companies, individuals. Technology has given rise to the so-called 'new economy'.

The considerable amount of personal data, which are collected, stored and spread all over the world is even more of a reason now than before to rethink the respect for privacy. Indeed through Internet, our lives are more and more in the open. That is why respect for privacy in this new context must not only reside in the respect for confidentiality. It must also involve the right to refuse to give access to one's own data or the right to refuse the collection of these data. In this sense, data protection underlines the necessity to recognise the citizen as a stakeholder. As it is said for example in the Opinion on healthcare information (30/7/99), information and communication technologies must offer to the individual the chance to enhance their choices and self-determination. The provisions above proposed by the Group are inspired by the idea of self-determination used for the first time by the German Constitutional Court in a judgement made in 1983.

Along these lines, these provisions refer to three fundamental principles:

- the principle of confidentiality reflecting the idea that personal data are part of the identity of the individual;
- the principle of autonomy linked to the principle of consent;
- the right to information which must be an 'active' right in the context of data protection. It includes the right to know what categories of information are available and the right to decide whether or not to be provided with this information.

15.3. No person shall be subject to surveillance technologies, which aim at or result in the violation of their rights or liberties.

Comments:

The Charter must take into account recent technological developments such as video surveillance in public, be it for co-ordinating traffic, for 'profiling' people's habits, or for identifying potential suspects, which may raise concerns related to the violation of rights or liberties of citizens.

The provision suggested by the Group does not define an individual right but much more a principle to be respected in a democratic society. Nevertheless it may be invoked before a court and thus reinforces individual rights.

CONCLUSION

The EGE's approach to the ethics of science and new technologies is meant to be positive with regard to scientific and technical progress, in the sense that this progress is meant to stimulate personal development without damaging social solidarity. Thus it also follows the spirit of the primary sense of the word ´bioethics´ as defined in 1970 "to ensure that the biomedical and biotechnological sciences serve human development, taking into account the complexity of the international society and of nature, as well as their interactions".

The Group believes that scientific progress and technological development should match the needs and aspirations of citizens in a way, which is respectful of EU values involving a new concept of citizenship.

Citizenship traditionally has been based on political rights in public life, namely the right to vote, and to be elected. The new idea of European citizenship has a much broader sense, as it now includes not a more direct and active participation of the citizens into debate and public life.

Apart from participation, there is another prerequisite for ensuring effective protection of citizens' rights in the context of new technologies: that is education. The Group strongly insists on the eminent role of European authorities in promoting structures for education not only in direction of the youngest generations as future citizens, but to every body throughout lifetime.
Indeed citizens need to be informed and enlightened to participate fully in democracy. Information society gives entirely new possibilities to underline the social dimension of the European citizens' fundamental rights by enabling everyone to be constantly informed and thus to contribute actively to the solidarity and community spirit without which the building of Europe would be meaningless. Technical possibilities to foster participation and education must be used to promote an interactive society and a society where mutual understanding between the different national cultures and traditions is ensured.

In view of the enlargement of the European Union to countries with different civil and legal traditions, it is all the more crucial to deal with the increasing multiculturalism in a way, which strengthens cohesion among all EU states.

We must construct a Europe where everyone plays a part, where everyone is a stakeholder, and no one is excluded.

The European Group on Ethics in Science and New Technologies:

The Members:

Paula MARTINHO DA SILVA	Anne Mc LAREN	Marja SORSA
Ina WAGNER	Göran HERMEREN	Gilbert HOTTOIS
Dietmar MIETH	Octavi QUINTANA TRIAS	Stefano RODOTA
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The Chairperson

Noëlle LENOIR

ANNEX

Summary of the European Group on Ethics proposals concerning the draft Charter on Fundamental Rights

(working document CHARTE 4149/00 CONVENT 13)

Article 1

Draft Charter: *"Dignity of the human person"*

The dignity of the human person shall be respected and protected in all circumstances.

EGE proposal: "Dignity and freedom of the human person"

Everyone's dignity and freedom must be respected.

Article 3

Draft Charter: *"Right to the respect of integrity"*

1.Everyone has the right to the respect of his physical and mental integrity.

2. In the fields of medicine and biology, the following principles in particular must be respected:

- prohibition of eugenic practices

- respect of the informed consent of the patient

- prohibiting the making of the human body and its products a source of financial gain

- prohibition of the cloning of human beings

EGE proposal:

3.2 (a) - respect of the informed consent of the person.

3.2 (b) - the individual's body and its parts cannot be traded.

3.2 (c) Any discrimination based on …, genetic characteristics, health conditions…, shall be prohibited.

3.2(d)(Option 1) Human reproductive cloning is prohibited

(Option 2) No mention of cloning.

Specific additional article

EGE proposal: "Prohibition of eugenics"

Eugenic practices aimed at organising the selection and the instrumentalisation of persons are prohibited.

Article 15 Draft Charter: *"Freedom of expression"*

1.Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2.Art, science and research shall be free of constraint.

EGE proposal:

15.1: to be added at the end: "as well as freedom to participate in public life."

15.2: to be deleted: " of constraint."

15.3 Each individual has the right to benefit from sciences and technology.

Article 16 Draft Charter: *"Right to education"*

1.No person shall be denied the right to education, including in particular the right to receive free compulsory education.

2. The founding of educational establishments shall be free of constraint.

3. The right of parents to have their children educated and taught in accordance with their religious and philosophical convictions shall be guaranteed.

EGE proposal:

16.1 to be added at the end: "which shall facilitate mutual understanding between cultures".

(working document CHARTE 4137/00 CONVENT 8)

Article 15 Draft Charter: *"Data Protection"*

Every natural person shall have a right to protection for his personal data.

EGE proposal:

15.1 Everyone has the right to protection for their personal data.

15.2 In the field of data protection, the following principles in particular must be respected:

- respect for confidentiality of personal individual data;

- right to determine which of one's own data are processed, by whom and for what purposes;

- right to have access to one's own data and to correct or delete them.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 21 June 2000

CHARTE 4374/00

CONTRIB 234

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union
– Audition of the candidate countries on 19 June 2000

Statement by H.E. Mr. A. Piebalgs, Ambassador of Latvia given at the hearing of the candidate

Please find hereafter the list of the representatives of the candidate countries and the statement by H.E. Mr. A. PIEBALGS, Ambassador of **Latvia.**

Participants at the hearing of 19 June 2000

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STATEMENT

BY H.E. MR. ANDRIS PIEBALGS,

AMBASSADOR OF THE REPUBLIC OF LATVIA TO THE EUROPEAN UNION,

ON THE EU CHARTER OF FUNDAMENTAL RIGHTS

BRUSSELS, 19 JUNE 2000

HEARING OF AND EXCHANGE OF VIEWS WITH THE 13 APPLICANT STATES

Mr. Chairman,
Ladies and Gentlemen,

First of all, I would like to thank the Convention for giving Latvia the opportunity to share our views about the EU Charter of Fundamental Rights.

We see the adoption of the Charter as a complimentary process to that of the EU enlargement. Both processes serve to establish a stable and prosperous Europe, unified on the grounds of common values and common general legal principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

The Tampere Council defined the composition of the body elaborating the Charter, confirming that also non-governmental organisations, social groups and experts would be invited to give their views on the Charter. This decision, as well as the broad representation of the European Parliament and the national parliaments of the EU Member States in the Convention represents a real increase in the transparency of the Charter's development. Such increased openness is an important step in bringing the EU closer to its citizens.

Latvia welcomes the initiative to elaborate the EU Charter of Fundamental Rights. We consider that the adoption of the Charter could achieve important objectives such as:

- to increase the visibility of the fundamental rights existing in contemporary Europe;
- to consolidate the minimum standards of human rights as enshrined in the European Convention on Human Rights and in the constitutional traditions of the EU Member States.

The Conclusions of the Cologne Council stated that the Charter should contain the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and derived from the constitutional traditions common to the Member States. Latvia welcomes this approach. As a future EU Member State, Latvia also welcomes the inclusion into the Charter of those rights, which are available only to the Union's citizens.

Latvia's Constitution and existing legislation provide guarantees for the protection of fundamental rights. Latvia is a member of the Council of Europe since 1995, and a State Party to the European Convention on Human Rights since 1997. In our opinion the European Court of Human Rights in Strasbourg has established the most effective type of international institution for the real protection of human rights.

We consider that the Charter should complement the legal system established by the European Convention on Human Rights, and not compete with it. Rather than search for new procedures, we support the further development of an efficient system on the basis of the existing elements that have already proven their worth. Experience shows that a proliferation of legal texts with competing enforcement mechanisms tends to impair the effectiveness of all existing procedures. Therefore, if the Charter's scope will transcend the borders of a declaratory document, a very clear legal definition of the Charter's application mechanisms for its provisions will be necessary.

All candidate states are also State Parties to the Council of Europe and therefore also to the European Convention on Human Rights. All candidate states are also actively aligning their national laws with the EU acquis. Therefore, as future EU member state, we are most interested in actively participating in the preparation and decision-making processes pertaining to the Charter in the future.

We believe that the original purpose of the EU Charter of Fundamental Rights, as stated by the Cologne Council, should be kept in the foreground: "to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens." This is a very crucial and valuable task with important impacts not only on the current EU citizens of the 15 member states, but just as important for the future EU citizens of Latvia and the other candidate states.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 21 June 2000

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COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union
– Audition of the candidate countries on 19 June 2000

Please find hereafter the list of the representatives of the candidate countries and the statement by Mr. Mitja DROBNIC, State Secretary at the Ministry of Foreign Affairs of the Republic of **Slovenia.**

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INTRODUCTORY PRESENTATION
BY STATE SECRETARY MITJA DROBNIČ ON THE OCCASION OF THE HEARING ON THE CHARTER ON FUNDMENTAL RIGHTS, BRUSSELS, 19 JUNE 2000

Mr President, esteemed members of the Convention.

Allow me, at the outset, to express my deep appreciation for the significance of the work you are engaged in. Taking part in the drafting process of the main document on human rights within the European Union is certainly a responsible task. Since the main objective of this document – the Charter of Fundamental Rights – is to introduce into the European Union legislation a comprehensive document on human rights, the process bears relevance which could be compared to other noble events in history, such as the drawing up of the French *Declaration des Droits des Citoyens*, *the Universal Declaration on Human Rights* or *the European Convention on Human Rights*. Being aware of the significance of your work, it is my sincere privilege to present to you the position of the Government of the Republic of Slovenia with regard to the drafting process on the Charter on Fundamental Rights.

Slovenia fully supports the decision of the European Council to draw up the Charter of Fundamental Rights. We see the Charter as a commitment of the European Union to explicitly proclaim the respect for human rights. In this way human rights in the European Union will be more significant and visible, but what is even more important – fundamental rights will be guaranteed to everyone within the jurisdiction of the European Union. Undoubtedly this process will lead to the strengthening of the protection of human rights in Europe.

Nevertheless, we are concerned that the introduction of the Charter on Fundamental Rights could also lead to the convergence with the existing systems of the protection of human rights on the European continent, in particular regarding the system in the framework of the Council of Europe. In order to avoid the inconsistencies of such an arrangement we are in favour of the following proposals. We are of the opinion that the Charter on Fundamental Rights should be a non-binding

legal document (declaration). We also think that the content of the Charter should be based on the standards of the protection of human rights which were already developed under the auspices of the Council of Europe, in particular the European Convention on Human Rights and the European Social Charter. We would also suggest that the European Union again reconsiders a possibility of its accession to the European Convention on Human Rights by making relevant amendments to the Community treaties.

It is our view that this would be the most appropriate way to avoid the risk of the duplication of human rights standards on the European continent, one for the citizens of the Member States of the European Union and the other for the citizens of the Member States of the Council of Europe.

At the same time the drafting process on the Charter of Fundamental Rights serves as a unique opportunity to include into the Charter certain rights which are relevant currently and which will gain in their significance in the future. I would particularly like to mention that we support the inclusion of the rights concerning the *field of biomedicine and biotechnology*, the *right to privacy* and the right to *safe environment*.

We also advocate the inclusion of rights pertaining to the *protection of national minorities*, and rights *protecting vulnerable groups*, in particular *children* and *disabled persons*. We fully support the *prohibition of the death penalty* and prohibition of extradition and expulsion of a person to a state where he or she would be in danger of being subjected to *death penalty, torture* or other *inhuman treatment*. We also support the so-called *horizontal protection of rights*, which pertains to all individuals who are residents in the Member States of the European Union.

Slovenia is also in favour of including the special chapter on social and economic rights into the Charter. This gives a more comprehensive meaning to the Charter and provides for the better protection of human rights, which are in essence interdependent and indivisible. With regard to social and economic rights we expect that the provisions of the Charter will enable the candidate countries for the accession to the EU to *maintain* the level of protection already achieved.

We are willing to attend any possible future meetings regarding the Charter on Fundamental Rights, which could provide an opportunity to discuss the contents of the Charter in more detail.

We would like to wish the distinguished members of the Convention fruitful work in the subsequent drafting process, leading to the adoption of the Charter in autumn 2000. I would like again to underline the significance of this process which will undoubtedly find a prominent place in the history of Europe.

Allow me to conclude my presentation by expressing my willingness to remain at your disposal for any possible questions you might have regarding the position of Slovenia concerning the Charter on Fundamental Rights.

Thank you for your attention.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 21 June 2000

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COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union
Audition of the candidate countries on 19 June 2000

Statement by Mrs. Antoinette Primatarova, Ambassador, Head of the Bulgarian Mission

Please find hereafter the list of the representatives of the candidate countries and the statement by Mrs. Antoinette PRIMATAROVA, Ambassador, Head of the **Bulgarian** Mission to the European Communities.

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M. Bostjan JERMAN, Second Secretary, Mission of Slovenia to the EU

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M. Ismail Hakki MUSA, Premier secrétaire à la délégation turque auprès de l'UE.

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STATEMENT

OF MRS. ANTOINETTE PRIMATAROVA, AMBASSADOR, HEAD OF THE BULGARIAN MISSION TO THE EUROPEAN COMMUNITITES, BEFORE THE CONVENTION FOR THE ELABORATION OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS

(Brussels, 19 June 2000 .)

Mr. President,

Ladies and gentlemen,

It is an honour and privilege for me to address such a highly esteemed forum as the Convention, where important personalities and distinguished specialists in the area of Human Rights have gathered together. Bulgaria highly appreciates being invited to express its opinion on the draft Charter of Fundamental Rights of the European Union.

Bulgaria welcomes the idea of EU Charter of Fundamental Rights and supports both the legal and the political reasons for its creation. Today, after the entry into force of the Maastricht and Amsterdam Treaties, the Charter is intended to provide an answer to the expectations of all people, living on the territory of the Union, with regard to their relations with the EU institutions. It should lead to a substantial improvement of the system for the protection of Human Rights and the legal certainty within the European Union. The idea of this Charter comes at a very advanced stage of the development of the Union, which is becoming more and more a political entity with new widening competencies. We are convinced that now the EU citizens need a text to which they can refer at the level of United Europe, as they do with their national constitutions at national level. It is natural, for example, that the development of the area of freedom, security and justice goes together with the improvement of the protection of Human Rights and Fundamental Freedoms of the citizens of the Union, which should become more visible and concrete. We see it as normal to respond to the

concern shared by different representatives of the European civil society about the necessity to link the overall process of European integration to clear rules for the protection of Human Rights. The European citizenship rights should also find their place in the Charter.

I would like to especially welcome the innovative method for the drawing up of the Charter. Compared to the traditional diplomatic methods of intergovernmental conferences, this is a step forward towards democratising the process of elaboration of texts in the area of human rights. Of particular interest to us are the opinions of the national and European parliaments' representatives, those of the Court of Justice and the Council of Europe. I would like to underline the importance of the full transparency of the process, which includes the hearings of different institutions, non-governmental organisations and candidate countries, as well as the possibilities of direct observation of the debates during the formal Convention meetings and the publication of all the working documents on the Internet. The interest, demonstrated by the civil society in Europe towards the work of the Convention proves the importance and the relevance of its work.

Before sharing my views on some of the questions linked to the elaboration of the future Charter, I would like to stress that Bulgaria, which is a Council of Europe member since 1992 and started at the beginning of this year accession negotiations with the European Union, fulfils the Copenhagen political criteria, including in the area of the protection of Human Rights and Fundamental Freedoms. My country is party to the main instruments in the sphere of Human Rights, including the social field – in particular the revised European Social Charter and the seven "basic" conventions of the International Labor Organisation. The Bulgarian Constitution is based on the same main principles as those of the EU Member States. The democratic institutions in the country have been established and are functioning successfully, the principle of the division of powers and independence of the judiciary is applied. On this basis the necessary guarantees for the protection of civil and political, as well as social and economic rights of the citizens are created in Bulgaria to the same degree as in the Member States, which is one of the preconditions for the country to join successfully and in reasonable time the European Union. Having this in mind, we consider that the respect of the rights as defined in the working documents of the Convention at this stage is generally achieved at national level in Bulgaria.

In our opinion, the future Charter should have an innovative character and be inspired both by the existing international texts and conventions in the human rights area and by the Community law and the case law of the Court of Justice. It has to cover not only the rights already protected by the international and European instruments, but also the new generation of rights, whose birth we witness, and which are in varying degrees enshrined in the constitutions and the legislation of the Member States and candidate countries, including Bulgaria. Here I would mention the rights, pertaining to data protection and new technologies, good governance, the media, health protection, bioethics, the environment and the contemporary aspects of equality. At the same time our position is that the rights covered by the Charter, irrespective of whether they are civil and political or social and economic, should not create new standards in the *acquis* of the Union, thus going beyond the present standards and posing new requirements in the context of accession negotiations.

The Charter should not extend the Union's legislative powers. It is extremely important, in the area of Human Rights too, to respect the subsidiarity principle, which could be applied both to the definition of some rights and to the implementation of a part of the social and economic rights.

An important aspect not only of the Convention work, but also of the ongoing Intergovernmental Conference, is the relationship and the consistency of the European Union Charter of Fundamental Rights with other international instruments in the area of Human Rights and with the European Convention for the Protection of Human Rights in particular. In this respect it would be useful to keep the clause stating that nothing in the Charter will restrict the protection offered by the European Convention on Human Rights, the common constitutional traditions and by other international instruments. Apart from that, we are of the opinion that the system for the protection of human rights provided under the European Convention to all citizens of the Council of Europe's Member States, including those of the European Union, should not be weakened. The Charter's provisions should be as close as possible to the wording of the European Convention provisions, the latter being the minimum standard, in relation to which the Charter cannot take a step backwards. At the same time we consider it possible, on some provisions, to have a more concise, clear and simple wording in order to convey the expected messages to the European citizens. It is also evident that the Charter will include categories of rights, which are not included in the ECHR – social and economic rights, rights related to the European citizenship, even some civil and political rights. The horizontal clause concerning the limitations foreseen by the European Convention of Human Rights is of the utmost importance. Finally, we are convinced, that at an

appropriate moment and in the light of the institutional reforms progress, the Member States should again have an in-depth discussion and take a stance on the possible accession of the European Communities to the European Convention for the Protection of Human Rights.

At this stage of the work of the Convention it is too early to take a stance on the question whether the Charter should have a legal or political character. The discussion on its possible incorporation in the Treaty is part of a larger discussion on the future of Europe and could continue in the medium, even in the long term. Keeping this in mind, we think that the direction taken now, namely to elaborate texts with legal character, is the right one, even if the incorporation in the Treaty is not imminent. As a realistic objective at this stage we could accept the mentioning of the Charter in the text of article 6 (2) of the Treaty of European Union. Whatever the fate of the Charter – political or legally binding document – we follow the discussions in the Convention with the understanding that it will be a substantial part of the *acquis* for the candidate countries.

The scope of the Charter is a topic, which could hardly be separated from that of its character. However it seems logical to take on the principles of the case law of the Court of Justice and to accept that the Charter may also cover the Member States authorities, only when they are acting in the field of Community law. This limitation is extremely important having in mind the possible overlapping of the Charter provisions with other legal texts from the national legislation or international law.

Concluding, I would like to wish the Convention successful work and to express the hope that it will be able to elaborate a consensual text by the Biarritz European Council. This would allow the Member States to have a productive discussion on the character and scope of the future Charter before the European Council in Nice.

Thank you for the attention.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 21 June 2000

CHARTE 4377/00

CONTRIB 237

COVER NOTE

Subject :	Draft Charter of fundamental rights of the European Union Audition of the candidate countries on 19 June 2000

Please find hereafter the list of the representatives of the candidate countries and the statement by Mr. Eugen DIJMARESCU, Secretary of State, Head of the Department for European Affairs within the Ministry of Foreign Affairs of **Romania.**

Participants at the hearing of 19 June 2000

République de Chypre/Republik Zypern:
M. Theophilos V. THEOPHILOU, Ambassadeur, Délégué Permanent de la République Chypre auprès de l'UE
Mme Maro CLERIDES-TSIAPPA, Senior Attorney of the Republic
M. Marios LYSIOTIS, Counsellor at the Permanent délégation of Cyprus to the EU

Malte/Malta
M. (Dr.) Michel FRENDO, membre du Parlement maltais
Mme Elena GRECH, Premier secrétaire à l'Ambassade de Malte

République de Hongrie/Republik Ungarn:
M. Béla SZOMBATI, Chef adjoint du Secrétariat d'Etat d'Intégration, Ministère des Affaires étrangères
Mme Eszter ORGOVÁN, Ministère des Affaires Etrangères
Mme Zsuzsanna MÁTRAI, Ministère des Affaires Etrangères (salle d'écoute)
Mme Éva TÖRÖK, Mission de la Hongrie auprès de CE (salle d'écoute)
m. Tamas SZÜCS, Mission de la Hongrie auprès de CE (salle d'écoute)

République de Pologne/Polnische Republik
M. Jerzy KRANZ, Undersecretary of State, Ministry of Foreign Affairs
M. Jan BARCZ, Directeur, European Union Department, Ministry of Foreign Affairs
M. Jerzy JASKIERNIA, Member of Parliament
M. Michael CZYZ, Minister Counsellor, Polish Mission to the EU
Mme Marta CYGAN, Cousellor, Polish Mission to the EU

Roumanie/Rumänien:
M. Eugen DIJMARESCU, Secrétaire d'Etat, Ministère des Affaires Etrangères
Mme Cristina TARCEA, Directeur au Ministère de la Justice
Mme Brandusa PREDESCU, Directeur au Ministère des Affaires Etrangères
M. Ion JINGA, Ministre-conseiller, Mission de la Roumanie auprès de l'UE
M. Viorel ARDELEANU, Ministre conseiller, Mission de la Roumanie auprès de l'UE
Mme Maria CIUCA-LIGOR, Troisième Secrétaire, Mission de la Roumanie auprès de l'UE

République Slovaque/Slowakische Republik
M. Daniel LIPSIC, Chef de l'office du Ministère de la Justice
Mme Jarmila BADIKOVA, Deuxième secrétaire de la mission slovaque auprès de l'UE
M. Juraj MIGAS, Ambassadeur
Mlle Andrea MATIZOVA, deuxième secrétaire.

République d'Estonie/Republik Estland
M. Meelis TIGIMÄE, Mission d'Estonie auprès de l'EU
Mme Kai KAARELSON, Ministère des Affaires Etrangères

Republique de Lettonie/Republik Lettland
M. Andris PIEBALGS, Ambassador of Latvia to EU
Mme Inese BIRZNIECE, Member of the European Affaires Committee, Parliamant of Latvia
Mme Katrina KOSA, Deputy Head, EU Policy Division, Ministry of Foreign Affairs
M. Aris VIGANTS, Second Secretary, Mission of Latvia to EU
M. Eriks FLAUMANIS, Attaché, Mission of Latvia to EU

République de Lithuanie/Republik Litauen:
M. Vilenas VADAPALAS, Director of the european Law Department under the Gouvernement of Lituania
M. Dainoras ZIUKAS, II Secdretary, Lithuanian Mission to the EC

République de Bulgarie/Republik Bulgarien:
Mme Antoinetta PRIMATAROVA, Ambassador
M. Mario MILOUCHEV, Counsellor in the Bulgarian Mission to the EC
M. Peter STEFANOV }
M. Vesselin VALKANOV } Counsellors in the Bulgarian Mission (salle d'écoute)
M. Ognyan CHAMPEOV }

République tchèque/Tschechische Republik
M. Martin PALOUS, Ministre-adjoint des Affaires Etrangères
M. Karel HEJC, Directeur, Département des droits de l'homme, Ministère Affaires Etrangères
Mlle Veronika STROMSIKOVÁ, Département des droits de l'homme, Min. Affaires Etrangères
M. Ludek STAVINOHA, Conseiller-Ambassadeur de la Mission tchèque auprès des CE
M. Michael STROUHAL, Premier Secrétaire de la Mission tchèque auprès des CE

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Statement by M. Eugen DIJMARESCU,

Secretary of State, Head of the Department for European Affairs
within the Ministry of Foreign Affairs of Romania

Mr. Chairman
Honourable Members of the Convention
Dear Colleagues,
Ladies and gentlemen,

I am particularly pleased to take part in this meeting today where a highly topical issue for the citizens of the community Romania wants to join - the European Union – is being considered.

I would like to start by congratulating the Convention for the substantial work accomplished so far, despite its complex and heavy agenda, providing us the opportunity to have an exchange of views on a comprehensive draft of the Charter.

It is in the interest of us all to have a strong Union where people are confident that the community they belong to is placing high on its agenda the building of a genuine area of freedom, security and justice, an area where citizens feel safe and protected.

It is along these lines that Romania as a country on the road towards accession to the EU welcomes with satisfaction the initiative of the Union to elaborate a Charter for Fundamental Rights.

I would also like to take this opportunity to express our appreciation for the initiative to invite candidate countries in the reflection exercise from the very conception phase since the Charter has the vocation of becoming part of the acquis of the European Union.

Ladies and gentlemen,

It is more than 50 years since the UN adopted the Universal Declaration on Human Rights. More than 150 year earlier, the Americans and French declaration on human rights had been adopted, and earlier still, other similar declarations were issued. Actually, human rights and respect for them have been a matter for philosophy and religion ever since man began to reflect on his destiny.

While major progress has been made in the area of human rights, particularly in recent years, achieving and securing general respect for human rights continue to remain one of the **most important political tasks of the 21st century.**

The elaboration of the Charter of Fundamental Rights will strengthen the latest development in this area, i.e. the fact that human rights cannot and should not be considered any longer a **national issue but our joint responsibility.**

Human rights are the expression of a global and common ethic. They are and must be the same for everyone, everywhere. ***Each and every country must accept that they are measured by the same yardstick.***

To this end, we expect the proclamation of the Charter of Fundamental Rights to represent a step forward towards a coherent system of human rights protection in Europe while taking into account all that has been accomplished in the field over the last half a century.

Ladies and Gentlemen,

Integration in the EU is not only an economic and political undertaking but a complex process of interaction among individuals, mentalities and cultures. This implies, among others, an increase in opportunities for our citizens to travel, stay and have access to jobs within the European Union.

As a general comment, we consider that the draft Charter of Fundamental Rights of the European Union meets the need to rationalize, in a single document, the relevant provisions of a, until now, scatered acquis on human rights. The added value brought about, in our view, by the Charter is that it attempts to incorporate, alongside the basic provisions of the European Convention for Human

Rights and the UN Pacts, also the relevant ones from the European Social Charter, placing these distinct categories of rights virtually on the same level of protection.

As common place as this may sound, it should be reminded that **fundamental rights** are, by definition, **rights vested in each individual,** meaning that criteria relating to his or her origin or geographical, economical or cultural status are not supposed to play any role in the protection of his or her fundamental rights.

However, after a preliminary reading of the text, we consider that the Charter should spell out more clearly the addressees of the rights described therein, be it institutions or categories of individuals. In this respect, we would be happy to see the spirit of the conclusions of the Tampere European Council referring to ***a fair treatment of third countries nationals*** be more extensively incorporated into the Charter. A clear reference to this important issue is made, in the current wording of the Charter, only in Art. 40 (Right of migrant workers to equal treatment).

The exercise we are doing here together strives to take stock of the views of all concerned, that is of candidate states included, as to certain sensitive, still unresolved items like the issue of the future character of this instrument as well as the future relation between the two Courts, the Human Rights Court in Strasbourg and the European Court of Justice in Luxembourg. As a candidate country to the EU but also a member of the Council of Europe, like all the countries around this table, we are, of course, concerned about the possibility of having divergent case law, and, by way of consequence, divergent solutions given by the two Courts with regard to own our citizens.

Although it is too early yet to speak about the Charter in terms of obligations incumbent upon candidate countries, it is nevertheless a fact that, given its constitutional provisions and common legislation in the field of human rights, Romania could, quite rapidly; adjust to the requirements of the Charter, provided it develops into something more than an inventory of rights. At any rate, without providing appropriately for effective remedies in case of infringements of the rights enumerated, the Charter is likely to contain a political message alone, even if a particularly strong one.

We are, obviously, not the only ones to note that certain inconveniences may appear due to the fact that relevant provisions from the European Convention on Human Rights were not taken up *ad literam* into the body of the draft EU Charter.

Given the fact that the terminology of the European Convention has generated and is still generating a rich and complex jurisprudence, it is likely that any new wording to be coined by the Charter may cause certain legal problems of interpretation.

In this respect, reference could be briefly made to the dispositions of art. 20 and art.21 of the draft Charter, on the right to property, the right to asylum and the expulsion.

By way of example, the second thesis of art. 20 of the Charter, regulating the "use of property", states that the use of property "should contribute to the general interest", while art. 1 of the first Additional Protocol to the European Convention allows for **the states only the right to adopt the laws they consider necessary to regulate the use of property, according to the general interest.** We consider that the different wording on this particular item may give rise to inconsistencies from the point of view of the principles established by the European Court of Human Rights in this matter.

The same goes for art.21 of the Charter regarding the right of asylum and expulsion. Romania ratified Protocol No. 7 to the European Convention which stipulates a number of guarantees that offer far more protection than those offered by the Geneva Convention. In this respect we would welcome the inclusion of a reference to this Protocol in the wording of art. 21. Related to this issue, it deserves mentioning that the European Convention is one step ahead with regard to the freedom of movement as this right is granted to all citizens under the jurisdiction of the parties to the Convention whereas art. 30 of the draft Charter grants this right only to the citizens of the European Union.

As to the final character of the Charter, we believe that the work in progress does not provide, at this stage, sufficient ground to support the expectation that the European Council in Nice will produce, by all means, a legally binding document. The solemn proclamation of a "political document", as initially decided by the Koln European Council, might prove to be the feasible working hypothesis for Nice, leaving open the door to move subsequently further ahead.

For ourselves, we are confident that the final text will not fail to incorporate a number of basic principles such as*: full respect for human rights and dignity; equality and the rejection of any discrimination; solidarity amongst individuals, generations and peoples; right to privacy and genuine right to freedom of movement; access to and control of the new opportunities made*

available by the scientific and technological progress; peaceful coexistence and the acceptance of diversity as founding principles and values of the European Union.

At the same time we join the views expressed by other candidate countries in encouraging the current process of drafting the Charter to act as a supportive and complementary element in the institutional reform process within the Union. We also share the views according to which the elaboration of the Charter and its practical consequences should not, in any way, delay the enlargement of the Union by affecting the already agreed calendars for accession negotiations.

By way of conclusion, I would like to inform you that it is our intention, after a more thorough examination of the contributions put forward so far, to draft and present to the Presidencies of the EU Council and of the Convention a non-paper containing Romania's views on the future Charter of Fundamental Rights.

Thank you for your attention.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 22 June 2000

CHARTE 4378/00

CONTRIB 238

COVER NOTE

Subject : Draft Charte of fundamental rights of the European Union

Please find hereafter a letter from the "Deutschen Mennonitischen Friedenskomittee"(DMFK)/ Mennonite Peace Committee on Conscientious Objection to Military Service. [1] [2]

[1] The attached 361 signatures have been transmitted to President Roman Herzog.
[2] This text has been sent in French, German and English.

6/2000

Conscientous Objection to Military Service

must be a European Basic Right

A European Convention, chaired by the former German President Dr. Roman Herzog,is preparing a Charter of Human Rights for the European Union. Conscientous objection to military service is not mentioned in the charter. We comit ourselves to making conscientous objection a basic right and ask the convention to do so.

„Noone may be forced against his or her conscience to do military service. Furthermore conscientous objectors have the right to asylum.“

Name	Address	Signature
1)	.....	.....

Send list of signatures to

Convention Secretariat, Council Legal Service, 175 rue de la Loi, B-1048 Brüssel

*An initiative of the **European Mennonite Peace Commitee**, M.B.van der Weerf, Assendorperdijk 174, NL-8012 EK Zwolle, Email: emfk1@noord.bart.nl*

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 22. Juni 2000

CHARTE 4379/00

CONTRIB 239

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme des DGB (Deutscher Gewerkschaftsbund), die er am 5. Juni beschlossen hat. [1]

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[1] Dieser Text wurde nur in deutscher Sprache übermittelt.

Berlin, 5. Juni 2000

Stellungnahme des DGB:

Europa braucht eine Charta der Grundrechte

Auf dem Kölner EU-Gipfel im Juni 1999 wurde beschlossen, eine „Charta der Grundrechte der Europäischen Union“ zu erarbeiten. Im Oktober des selben Jahres setzte der EU-Rat auf seinem Treffen im finnischen Tampere ein Gremium („Konvent“) aus Regierungsvertretern, Mitgliedern der nationalen Parlamente und des Europaparlamentes ein, das bis zum Oktober diesen Jahres den Entwurf einer Grundrechtecharta (GRC) erarbeitet. Dieser soll vom Europäischen Rat in Nizza am 7. und 8. Dezember verabschiedet werden.

Über die Inhalte und die Verbindlichkeit dieser Charta wird derzeit eine breit angelegte politische Debatte in allen Mitgliedsstaaten der Europäischen Union geführt, an der sich die deutschen Gewerkschaften beteiligen.

1. Die Zeit ist reif für eine Grundrechtecharta

In den letzten Jahren konnten Fortschritte bei der Anerkennung der Grundrechte in der EU erzielt werden. So heißt es im EU-Vertrag:

> „Die Union beruht auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedsstaaten gemeinsam“

Der DGB unterstützt alle Bestrebungen, nun eine **umfassende Grundrechtecharta** (GRC) auf Ebene der Europäischen Union und Gemeinschaft zu verabschieden.

Er legt dabei großen Wert auf die **Aufnahme sozialer Grundrechte** und unterstützt entsprechende Forderungen des Europäischen Parlamentes und des Wirtschafts- und Sozialausschusses. Soziale Grundrechte müssen einen gleichgewichtigen Stellenwert in der GRC erhalten als Ausdruck der sozialen Werte, denen sich die Union und die Gemeinschaft verpflichtet fühlen. Sie sind für den DGB ein unverzichtbarer Bestandteil der GRC und bilden ein Gegenstück zur primär wirtschaftlichen Ausrichtung der Union und vor allem der Gemeinschaft. Sie würde die soziale Dimension der EU stärken und damit den Weg in eine wirkliche Sozialunion bereiten.

Der DGB fordert seit langem einen verbindlichen Katalog einklagbarer Grundrechte für die EU. Bereits 1989 hat er konkrete Vorschläge für soziale Grundrechte unterbreitet.

Damals wie heute gilt, dass eine europäische Grundrechtecharta für die **politische und soziale Legitimation der EU** von entscheidender Bedeutung ist. Sie würde nach der Vollendung des Binnenmarktes und der Einführung der einheitlichen Währung die Identifikation der Bürger mit dem europäischen Einigungsprozess erhöhen und diesem mehr Glaubwürdigkeit verleihen. Sie würde die in der EU geltenden gemeinsamen Wertvorstellungen hervorheben. Eine Grundrechtecharta hätte über die Binnengrenzen hinaus Ausstrahlungskraft, was nicht zuletzt für den Prozess der EU-Erweiterung außerordentlich wichtig ist.

2. Die sozialen Grundrechte müssen Bestandteil der Charta sein

Der DGB ist der Auffassung, dass die GRC über die in den europäischen Verträgen enthaltenen Bestimmungen hinaus einen möglichst vollständigen Katalog von Grundrechten enthalten sollte, der insbesondere auch soziale Grundrechte umfasst.

Grundsätzlich ist der DGB der Ansicht, dass die Grundrechtecharta bei den bürgerlichen und politischen Grundrechten das Schutzniveau der **Europäischen Menschenrechtskonvention** (EMRK) und deren Zusatzprotokolle sicherstellen und die Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte einbeziehen muss.

Die GRC muss darüberhinaus auch sogenannte moderne Grundrechte einbeziehen, die neuere gesellschaftliche Entwicklungen aufgreifen (z. B. Umweltschutz und das Recht auf informationelle Selbstbestimmung). Hier können die Verfassungen von Mitgliedsstaaten herangezogen werden.

Bei der Umsetzung der in der Charta fixierten sozialen Grundrechte muss das Mindestschutzniveau der **revidierten Europäischen Sozialcharta** (ESC) sowie das völkerrechtliche Schutzniveau, insbesondere der einschlägigen IAO-Normen, eingehalten werden.

Aus Sicht des DGB muss die GRC die **Unteilbarkeit der Menschenrechte** betonen. Neben den klassischen individuellen und politischen Freiheitsrechten sowie dem Schutz der Menschenwürde sollten die folgenden, in den europäischen Verfassungstraditionen verwurzelten **sozialen Grundrechte** in die GRC Eingang finden:

- Recht auf Koalitionsfreiheit und Kollektivmaßnahmen einschließlich des Streikrechts
- Unterrichtung, Anhörung und Mitwirkung der Arbeitnehmer und ihrer Interessenvertretung
- Gleichbehandlung und Schutz vor Diskriminierung jeglicher Art
- Gleichstellung von Frauen und Männern
- Recht auf Freizügigkeit
- Recht auf Gesundheitsschutz und Arbeitssicherheit
- Schutz vor ungerechtfertigter, willkürlicher Entlassung
- Recht auf Bildung und freie Berufswahl

Als **politische Handlungsziele** der Union sollten insbesondere die folgenden sozialen Rechte in die GRC aufgenommen werden:

- Recht auf Arbeit im Sinne einer Verpflichtung, dem Ziel der Vollbeschäftigung Vorrang einzuräumen
- Recht auf angemessenen sozialen Schutz und Sicherung eines menschenwürdigen Existenzminimums
- Recht auf menschenwürdige Arbeitsbedingungen
- Recht auf Förderung und Schutz von Kindern, Jugendlichen und Behinderten

Dabei muss aus Sicht des DGB gewährleistet sein, dass günstigere nationale gesetzliche und kollektivvertragliche Regelungen, die zum Schutz von Arbeitnehmerinnen und Arbeitnehmern getroffen werden, erhalten und weiterhin möglich bleiben.

3. Die Grundrechte müssen einklagbar und die Charta bindend sein, sie muss für alle Menschen gelten und wirksam überwacht werden können.

Grundrechte müssen einklagbar sein. Insbesondere im Hinblick auf die garantierten sozialen Grundrechte muß ein **Klagerecht für die Gewerkschaften** zur Vertretung der Interessen ihrer Mitglieder gewährleistet sein.

Die **Bindungswirkung** der GRC sollte sich sachlich auf alle Bereiche der EU-/EG-Kompetenz erstrecken und daher alle EU/EG-Organe betreffen. Dies muss gleichermaßen für alle Ebenen der Mitgliedsstaaten bei der Umsetzung von Gemeinschaftsrecht gelten. Was den persönlichen Geltungsbereich betrifft, so sollten die Rechte aus der GRC grundsätzlich allen Personen unabhängig von ihrer Staatsangehörigkeit gewährt werden. Dies entspricht auch dem Ansatz der EMRK. Die Beschränkung auf Rechte der EU-Bürger/innen sollte nur in Ausnahmefällen, etwa bei bestimmten politischen Teilhaberechten, erfolgen.

Es ist ein **wirksamer Rechtsschutz** auf EU-Ebene zur Durchsetzung der in der Charta garantierten Grundrechte zu gewährleisten.

4. Die Charta muss auf die Tagesordnung der Regierungskonferenz

Der DGB begrüsst den politischen Willen des Konventes, die Debatte über die Charta in allen EU-Mitgliedsstaaten auf eine möglichst breite gesellschaftliche Grundlage zu stellen.

Wenn diese breite Debatte ihre politische Wirkung nicht verfehlen soll, muss die Grundrechtecharta auf die Tagesordnung der Regierungskonferenz gesetzt werden.

Rechtliche Verbindlichkeit ist nur zu erreichen, wenn die Charta in die Verträge aufgenommen wird und bindende Wirkung erhält. Eine feierliche Erklärung des Europäischen Rates zur GRC wäre aus Sicht des DGB keinesfalls ausreichend.

Die europäische Grundrechtecharta bietet eine historische Chance. Wer sie verstreichen lässt, schadet dem Europa der Bürger.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 22 June 2000

CHARTE 4380/00

CONTRIB 240

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution submitted by the Law Society of England and Wales. [1] [2]

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[1] The Law Society of England and Wales
113 Chancery Lane, London WC2A 2PL
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[2] The document has been submitted in English language only.

The draft Charter of Fundamental Rights of the European Union

Comments by the Law Society of England and Wales

113 Chancery Lane

London WC2A 1PL

The draft Charter of Fundamental Rights of the European Union

Comments by the Law Society of England and Wales

1. The Law Society welcomes initiatives from the European Union aimed at the better promotion and protection of human rights, both internally and externally. It has studied the proposal for a Charter of Fundamental Rights of the European Union ("the Charter") with interest but with some concern. It hopes that these comments will contribute to an outcome that will enhance the Union's implementation of the human rights principles to which it is committed.

2. In June 1999, the European Council decided that:

"Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. 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.

The European Council believes that this Charter should contain the fundamental rights and freedoms as well as 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. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter 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.

In the view of the European Council, a draft of such a Charter of Fundamental Rights of the European Union should be elaborated by a body composed of representatives of the heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments. Representatives of the European Court of Justice should participate as observers. Representatives of the Economic and Social Committee, the Committee of the Regions and social groups as well as experts should be invited to give their views. Secretariat services should be provided by the General Secretariat of the Council.

This body should present a draft document in advance of the European Council in December 2000. The European Council will propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties. The European Council mandates the General Affairs Council to take the necessary steps prior to the Tampere European Council". [1]

3. This text is reproduced in full because it contains the basic mandate for the proposed Charter some elements of which, including its content and purpose, appear to be causing a degree of confusion. Indeed, it seems that the only clarity is the date on which the Charter will be proclaimed - and that leaves a dangerously short period of time for other issues to be resolved.

[1] Presidency Conclusions Cologne European Council, 3 and 4 June 1999

4. The Union's commitment to human rights is beyond doubt. The Amsterdam Treaty states that "the Union is founded on the principles of liberty, democracy, respect for human rights and the rule of law".[2] It further states that "The Union shall respect fundamental rights, as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community Law".[3] Any member state responsible for a "serious and persistent breach" of human rights may lose their rights under the Treaty. [4] Criteria agreed by the Council in 1993 in Copenhagen governing the accession of new members to the Union include human rights. Human rights clauses have been included in external agreements since Lomé IV (1989). There have been important initiatives on issues such as sex equality and against racism. In addition there is no shortage of statements supporting human rights, for example: "The European Union is founded on the principles of liberty, respect for human rights, fundamental freedoms and the rule of law. These principles are common to all the Member States and are enshrined in the Treaty on European Union. The EU, which is deeply committed to the universality, indivisibility and interdependence of human rights, constitutes a community of shared values which refuses to admit any exceptions to these principles".[5]

5. However, many commentators agree that there is a pressing need for the Union to formulate an overall and comprehensive human rights policy. The present position has been described: "The human rights policies of the European Union are beset by a paradox. On the one hand, the Union is a staunch defender of human rights in both its internal and external affairs. On the other hand, it lacks a comprehensive or coherent policy at either level and fundamental doubts persist whether the institutions of the Union possess adequate legal competence in relation to a wide range of rights issues arising within the framework of Community policies".[6]

The Law Society agrees that the Union needs such a policy, applicable internally and externally. Broadly it agrees with the reasons given in *Leading by Example: A Human Rights Agenda For the European Union for the Year 2000* adopted in 1998 by the Comité des Sages,[7] particularly the following:

"A European Union which fails to promote and protect human rights consistently and effectively will betray Europe's shared values and its long-standing commitment to them. However, the Union's existing policies in this area are no longer adequate. They were made by and for the Europe of yesterday; they are not sufficient for the Europe of tomorrow. The strong rhetoric of the Union is not matched by the reality. There is an urgent need for a human rights policy which is coherent, balanced, substantive and professional.

There are many reasons why the European Union cannot remain without a comprehensive and effective internal human rights policy. They include:

- the rapid movement towards an 'ever closer Union' and towards a comprehensive single market;
- the adoption of a single currency for close to 300 million people;
- the increasing incidence of racism, xenophobia and ethnic hatred within Europe;

[2] Article 6 (1) TEU [3] Article 6(2) TEU

[4] Article 7 TEU

[5] Background information: 10-03-00 *Human Rights in the European Union* from the website of the European Parliament

[6] "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights" Philip Alston and J.H.H. Weiler in *The EU and Human Rights,* ed Philip Alston with Mara Bustelo and JamesHeenan, OUP 1999, page 6

[7] The Comité des Sages consisted of Judge Antonio Cassese, Mme Catherine Lalumière, Professor PeterLeuprecht and Mrs Mary Robinson

• the tendency towards a 'fortress Europe' which is hostile to 'outsiders' and discourages refugees and asylum-seekers;
• the growing cooperation in policy and security matters, which is not matched by adequate human rights safeguards;
• the increasingly complex political and administrative system that governs the Union and is supported by a bureaucracy with extensive powers; and
• the aspiration to bring at least five and perhaps as many as thirteen countries within the Union's fold in the years ahead.
…
Similarly, human rights must be a key part of the EU's policy towards the rest of the world. An integrated policy is essential for a European Union that:
• recognizes that respect for human rights among its neighbours and partners has an enormous impact on its own security;
• has been taught by history that respect for human rights is the only enduring foundation for building peace and harmony;
• is forging a common foreign policy, within which human rights must be a core element;
• has cooperation and other agreements with a vast number of other countries;
• plays a key role in many international organizations concerned with human rights; and
• spends well over a billion euros every year on development assistance and humanitarian aid".[8]

6. The stated purpose of the Charter is to make the "overriding importance and relevance" of fundamental rights "more visible to the Union's citizens". One immediate failing of the proposal is that it is aimed only at the Union's citizens. This makes the proposal contradictory in that sources for the Charter, notably the European Convention on Human Rights, apply to all those under the jurisdiction of the Union's members, not just its citizens. There are difficulties of maintaining the provisions of the European Convention, as a living instrument, in the Charter. Changing the beneficiaries of the rights guaranteed by the Convention will undermine any attempt to maintain legal certainty.

7. On the other hand, we encourage any effort which tries to make people better informed of their rights. Indeed, we understand that the United Kingdom Government has proposed that the Charter should be no more than a document that publicises the Union's existing protection of human rights. On this point, the Bar Council of England and Wales hascommented:

"The utility of such a document should not be over-emphasised…. we would applaud any document, officially-endorsed or otherwise, which renders the arcane world of European Union and human rights law more comprehensible to the ordinary citizen, or even to the ordinary lawyer. There are many barristers' chambers and solicitors' firms that could benefit from such a document, and none – we suspect – that would have no need for it." [9]

We hope that any such document will not be too lengthy or complex. We note that introducing it at the same time as the incorporation into UK law of the European Convention could be confusing within the context of the UK.

8. The content of the Charter is described in the second paragraph of the Cologne Conclusions, as reproduced above. The scope of the Charter has recently been defined as:

"The provisions of this Charter are addressed to the institutions and bodies of the Union within the framework of the powers conferred on them by the treaties, and also to the Member States exclusively within the framework of implementing Community Law. They shall not establish any competence or any new task for the Community or the Union."[10]

[8] The text of the *Agenda* is reproduced in *The EU and Human Right*s, op cit, page 921
[9] *Written evidence on behalf of Bar Council International Relations Committee, Bar Human Rights Committee,Bar European Grou*p, 9 February 2000
[10] Note from the Praesidium, 18 April 2000 [11] Luxembourg Presidency Conclusions, 12 and 13 December 1997, Annex 3

In this case, it appears that the Charter will serve, in either the proclaimed or integrated versions, as little more than a recital of existing rights contained in the treaties. As such, it will not advance the cause of a coherent, comprehensive and effective human rightspolicy.

9. Neither will it achieve the commitments made in the *Declaration by the European Council at the beginning of the year of the fiftieth anniversary of the Universal Declaration of Human Rights.*[11] In paragraph 2 of this *Declaration*, the European Council stressed:

"the universal nature of human rights and reiterates the obligation incumbent on all States, in accordance with the United Nations Charter, to develop and encourage respect for human rights and fundamental freedoms for all, regardless of race, gender, language or religion".

In paragraph 6 the Council appealed to all States to step up their efforts in the field of human rights by:

- "Acceding the international instruments to which they are not yet party with a view to achieving the objective of the universal ratification of the international treaties and protocols concerninghuman rights;
- Ensuring more stringent implementation of those instruments;
- Strengthening the role of civil society in promoting and protecting human rights;
- Promoting activities on the ground and developing technical assistance in the area of human rights;
- Strengthening in particular training and education programmes concerning human rights".

10. It is reasonable to assume that this *Declaration* was intended to apply to Union members as much as other states. Even at the level of accession to international human rights instruments – to take the first point from the list above – there are significant gaps in Union members' human rights obligations. For example, it is notable that only Ireland is not a party to the International Convention on the Elimination of All Forms of Racial Discrimination, nor to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The United Kingdom is the only Union member not to be party to the Optional Protocol to the International Covenant on Civil and Political Rights, allowing individual complaints, while France is the only member not party to its Second Optional Protocol, aiming at the abolition of the death penalty. A telling gap, given the grave concerns about racism in Europe, is the fact that six Union members who are party to the International Convention on the Elimination of All Forms of Racial Discrimination - Austria, Belgium, Germany, Greece, Portugal and the United Kingdom - have not made the declaration under Article 14 allowing individual complaints.

11. On the other hand, all Union members are party to important international human rights instruments. These include the Convention relating to the Status of Refugees; the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; the Convention on the Elimination of Discrimination against Women; the Convention on the Rights of the Child; and core standards of the International Labour Organisation, particularly Conventions Nos 87 on Freedom of Association and the Right to Organise and 98 on the Right to Organise and Collective Bargaining. There is a need to ensure that the rights enshrined in these treaties are not just visible but "stringently" implemented as required by the *Declaration.*

12. "Visibility" is not an adequate human rights policy. There are numerous proposals for reform and the development of a coherent human rights policy, many of them well rehearsed. The Union should be giving serious attention to these proposals which include accession to the European Convention on Human Rights – still a live issue despite the 1996 decision of the European Court of Justice. [12] One of the merits of many of these proposals is that they are based on institutional reform and thus do not raise fears – which have surfaced in the context of the Charter discussions – of the Union adopting a 'human rights constitution'.

11 Luxembourg Presidency Conclusions, 12 and 13 December 1997, Annex 3

13. In our view, the Charter proposal bypasses the key issue with which the Union should be engaged: the development of a comprehensive, coherent and effective human rights policy. Instead the Charter appears as merely a vehicle for publicity and self-congratulation. In the words of *Leading by Example: A Human Rights Agenda For the European Union for the Year 200*0, the Charter belongs to the Europe of yesterday. We are concerned that it will perpetrate the impasse described by Phillip Alston and J. H. H.Weiler:

"The principle shortcoming of the EU's human rights policy is not a lack of novelty or grand gestures. It is a consistent reluctance to come to grips with some basic home truths about the indivisibility of internal and external human rights policy, the need for a clear and ambiguous commitment at all levels, and the need for effective political and bureaucratic structures to give effect to those commitments. The various components of the recipe for achieving these objectives have been evident for a number of years. Until these indispensable building blocks are put into place by the Member States and the institutions of the Union there will be little point in creating grand new designs for their own sake".[13]

14. In conclusion, we repeat the following key points:

- The Charter, if there must be such a document, should be proclaimed only and not integrated into the treaties;
- Union members should swallow their own medicine and implement the provisions of the *Declaration by the European Council at the beginning of the year of the fiftieth anniversary of the Universal Declaration of Human Rights* at the national level;
- The Union should develop promptly a coherent, comprehensible and effective human rights policy that supports the universality, indivisibility and interdependence of all human rights and informs both its internal and external policies, primarily through institutional reform.

23rd May 2000

[12] Opinion 2/94 of 28 March 1996

[13] *The EU and Human Right*s, op cit, page 66

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 22 June 2000

CHARTE 4381/00

CONTRIB 241

COVER NOTE

Subject : Draft Charter on fundamental rights of the European Union

Please find hereafter a contribution by The Danish Centre for Human Rights. [1] [2]

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[1] Det Danske Center for Mennekeretigheder/Te Danish Centre for Human Rights
Studiestraede 38
DK-1455 Copenhagen V
Tél. 45 33 30 88 88 Fax 45 33 30 88 00

[2] This text has been transmitted in English only.

Dear Sir or Madam, The undersigned human rights institutes and centres welcome the formulation of an EU Charter on Fundamental Rights as an important dimension in the European development of human rights standards. In our capacity as experts in the field of human rights we believe, however, that it is imperative to raise the following issues for further consideration. The institutes and centres are primarily concerned with the fact that the rapid pace of the preparations for the drafting of the EU Charter preempts a much needed general debate on the implications of the Charter. Instead, discussions at the European level should be allowed to mature in a more steady pace, thereby creating a platform for a broad popular involvement in the issues at stake. The time frame should not be seen as an end in itself, nor as a valid justification for not securing an open and participatory public debate. The institutes recognize the use of the Internet as a means to create transparency. However, it should be borne in mind that it is still only a fragmented part of the European population who has access to this technology. The use of the Internet should therefore be complemented by other more widely accessible means of communication. It is decisive for the future legitimacy of the European Union that there is a broad awareness of and support to the Charter. The creation of an EU Charter seems to involve a risk of legal uncertainty for the individual. It should be kept in mind that the European Convention on Human Rights not only defines individual rights subject to the jurisdiction of the Court, but also forms part of national law in all EU Member States. It is thus crucial to avoid a situation where powers, if vested in the European Court of Justice, would compete with the European Court of Human Rights. The institutes and centres consider it to be of the utmost importance that the Charter reflects the interdependent and indivisible nature of all human rights. The current normative framework after the Amsterdam Treaty is not fully satisfactory in this respect. The importance attached to one regional human rights treaty, i.e. the European Convention on Human Rights, could lead to the unfounded interpretation that EU organs would not be bound by all human rights treaties ratified by its Member States. However, a promising sign of the interdependence and indivisibility not having been forgotten is the discussion of the horizontal article, tentatively referred to as article 49, which is intended to clarify that the EU Charter cannot be used to deviate from or restrict fundamental rights which have been guaranteed in international law, including existing human rights treaties. In the process of drafting the EU Charter, it has been noted that attention has been paid not only to civil and political rights but also to other human rights, including economic and social rights. However, upon studying the catalogue of proposed economic and social rights it is observed that, on the one side, the catalogue is expanded considerably in respect of the protection of rights related to the labour market, whereas, on the other side, it does not include all the traditional rights, e.g. the right to housing. In this way, the EU runs the risk of down-scaling fundamental economic and social

rights and, at the same time, upgrading detailed regulations, i.e. primarily within the realms of ILO conventions. Furthermore, in relation to economic and social rights the institutes and centres express their concern regarding proposals which would reduce economic and social rights to mere goals or policies in the EU Charter. In relation to non-discrimination it is positive that the draft Charter includes a prohibition against discrimination in all areas and not only in relation to civil and political rights as opposed to article 14 of the European Convention on Human Rights. At the same time, however, it is problematic that the provision limits the scope of this protection - unlike Article 14 - by listing an exhaustive number of grounds on which discrimination should be prohibited. Thus, the draft does not offer a general protection against discrimination on grounds of nationality - as does the ECHR. This should be changed as the charter should not restrict a fundamental right guaranteed by the ECHR, nor word it in more limited terms. Though, the draft Charter does offer a certain degree of protection against discrimination on grounds of nationality, in principle, this only relates to discrimination against citizens of other EU Member States - while human rights protection against (all) discrimination applies to “everyone”. It seems unclear why a prohibition against discrimination on grounds of nationality in the EU Charter should be limited. The inalienable right of any person not to be discriminated against on any ground ought to be included in the EU Charter on Fundamental Rights. Finally, the institutes and centres would like to point to the fact that the provision on the right to asylum as currently drafted could lead to discrimination on the basis of nationality. In general terms as well as in relation to the above mentioned draft article 49, it is crucial that there is consistency between the Charter and the 1951 Convention relating to the Status of Refugees and other international instruments regulating the protection of refugees. The institutes and centres will follow the process carefully and will, at the same time, make ourselves available for any further discussions with relevant bodies working on the draft EU Charter. It is of the utmost importance that Europe when embarking upon such an ambitious project is truly considering all aspects of the matter. This should be done in order not to divert or downgrade the human rights protection as it has developed since the adoption of the international and regional instruments in the aftermath of the Second World War. The human rights development is at a critical junction these years, and an EU Charter can, if carefully thought out, constitute an important contribution to furthering the protection of the human dignity.

On behalf of the Nordic Human Rights Institutes and Centres

Yours sincerely

Morten Kjaerum Director, The Danish Centre for Human Rights

Gudmundur Alfredsson, Director,

Raoul Wallenberg Institute Martin Scheinin, Director,

Åbo Akademi University Institute for Human Rights

Nils A. Butenschon, Director, Norwegian Institute of Human Rights

Bjarney Friðriksdóttir, Director, The Icelandic Human Rights Center.

Identical letters are sent to: Denmark's Foreign Minister, Niels Helveg Petersen Denmark's Minister of Justice, Frank Jensen Erling Olsen, the Danish Parliament Irli Plambech, the Danish Parliament .

Det Danske Center for Menneskerettigheder/ The Danish Centre for Human Rights Studiestraede 38 DK-1455 Copenhagen V Tel: (+45) 33 30 88 88 Fax: (+45) 33 30 88 00

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 22 juin 2000

CHARTE 4382/00

CONTRIB 242

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Contribution de Initiativ Liewensufank, de International Baby Food Action Network

Veuillez trouver ci-après une contribution de "Initiativ Liewensufank" Asbl [1] [2], Membre de ENCA (European Network of Childbirth Associations), de IBFAN (International Baby Food Action network) et de WABA (World Alliance for Brestfeeding).

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[1] Initiativ Liewensufank Asbl/Institut für die Verbesserung der Begingungen rund um die Geburt
20, rue de Contern, L-5995 Itzig
Tél. 36 05 98 ou 36 05 97-11 Fax 36 61 34

[2] Ce texte a été transmise en langue française uniquement.

le 16.6.2000

Mesdames, Messieurs,

Par la présente, je me permets de vous soumettre quelques propositions de l'Initiativ Liewensufank pour ajouter à la Charte des droits fondamentaux de l'Union européenne.

Nous avons constaté que le début de la vie, c.à.d. la grossesse, l'accouchement et l'allaitement ne sont pas mentionnés spécialement dans la charte comme des phases nécessitant une protection spéciale. Nous sommes d'avis que la santé de la mère, du foetus et du bébé nécessitent une protection spéciale. Pour en tenir compte, nous vous soumettons nos propositions d 'ajoutes:

Art. 3.2. Veuillez ajouter s.v.p.

- Reconsidération des événements de la vie des femmes pour qu'elles ne soient pas traités comme des problèmes médicaux d'où des interventions chirurgicales inutiles et des thérapeutiques inadaptées.

Ceci reprend le texte du § 103 accepté à la plate-forme des femmes à Béjing.

Art. 22.3. Veuillez ajouter s.v.p.

Il n'y a pas de discriminations des femmes à cause de leur fonction reproductives.

Art. 39 Veuillez ajouter s.v.p. la mention en gras

.....notamment le droit à un congé de maternité, avant et/ou après l'accouchement ***des pauses d'allaitement maternel****.....*

Ceci pour tenir compte de la convention de l'OIT sur la protection de la maternité.

Art. 42. Veuillez ajouter s.v.p.

Pour les parturientes, les droits ancrés dans la charte de droits de la parturiente (Doc B2 712/86 du Parlement Européen) sont mis en oeuvre

Ceci pour inclure ce texte important voté par le Parlement Européen

Art. 45 Veuillez ajouter s.v.p.

Le code de commercialisation des substituts de lait maternel est respecté et mis en oeuvre.

Ceci est important pour protéger la santé des consommateurs les plus vulnérables et le choix de leurs mères. Tous les pays de la CE ont marqué leur accord par leur vote à l'Assemblée mondiale de la Santé 1981. En outre, la CEE a entrepris les premiers pas de mise en oeuvre par la directive 91/321/EEC

En espérant que nos propositions puissent être prises en considération, veuillez accepter, Mesdames, Messieurs l'expression de notre plus haute considération.

Maryse Lehners

Chargée de direction

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 26 juin 2000

CHARTE 4384/00

CONTRIB 243

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-joint une prise de position par le Bureau de l'association "Maison de l'Europe du Land Brandebourg" relative au projet actuel de la Charte des droits fondamentaux. [1]

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[1] Ce texte nous a été transmis en français et allemand.

17 juin 2000

Prise de position
par le Bureau de l'association "Maison de l'Europe du Land Brandebourg"
relative au projet actuel de la Charte de droits fondamentaux

1. Au nom des membres de la "Maison de l'Europe du Land Brandebourg" le Bureau de l'association rend hommage aux efforts entreprises par la Convention visant à élaborer un projet d'une Charte de Droits Fondamentaux valable pour l'Union Européenne. Cette Charte de Droits Fondamentaux, dont l'exigibilité devrait être garantie par le Conseil de l'Union Européenne sera un aspect essentiel pour faciliter l'identification des citoyens avec cette Union Européenne. Elle sera d'après nous un premier important pas vers une Constitution européenne revendiqué aussi par nous, une constitution ressemblant tous les droits individuels valables pour toutes les personnes résidant sur le territoire de l'Union Européenne.

2. Il nous paraît indispensable que le projet de cette Charte de Droits Fondamentaux réuniras tous les droits civiles, politiques, mais aussi économiques, sociaux et culturels - de manière qu'elle se présent déjà visiblement par ce projet. Il faut également que les valeurs de ces droits reflètent au moins le niveau élevé constitué déjà par les conventions internationales des droits de l'homme et par les actes juridiques internationaux et nationaux sans être dans aucun cas inférieur à ceux-ci.
   Nous nous exprimons en faveur du principe de l'universalité des droits de l'homme qui devrait nécessairement aussi le principe de tous les droits stipulés par cette Charte de Droits Fondamentaux.
   Une telle Charte de Droits Fondamentaux européenne rendrait d'après notre conviction l'Europe en modèle digne d'être imité par le reste du monde.
   Nous regrettons par contre que ce projet ne corresponde pas des nombreuses positions de ses formules à ces exigences.
   Il est d'autant plus regrettable que sa structure et plusieurs de ses stipulation reflètent sensiblement les intérêts et besoins de certaines Etats et de certaines associations-lobbys, tandis que d'autres aspects sont ou reflété de manière minimisée ou ignorés complètement, particulièrement ceux qui ont été renviqués par des ONG.

3. Après avoir examiné ce projet du texte distribué par les websites du Conseil de l'Union Européenne à l'Internet, nous nous permettons de vous proposer seulement quelques-unes de nous remarques et amendements.

3.1 **Le préambule**

Parmi les principes mentionnés à alinéa (2) sur lesquels se baseront l'Union et ses institutions alors il faut aussi y ajouter les principes de la Paix et de la Solidarité.
Nous soutenons dont les propositions soumises par Mr. Jürgen Meyer en ce qui concerne le principe "la solidarité" et nous proposons d'y ajouter également en premier lieu le principe "la Paix" qui devrait être assurée par l'Union et toutes ses institutions.

3.2. **Article 1 - La dignité de l'homme**

L'alinea (1) devrait comporter le supplément " *ne devrait être jamais violée*" et se lire:
" (1) La dignité de l'homme ne devrait être jamais violée. Il faut la respecter et la protéger."
Nous estimons qu'il faut souligner expressément cette immunité de la dignité.

3.3. **Article 16 - Le droit à l'éducation**

à alinéa (3) "Le droit des parents d'assurer l'éducation et l'enseignement de leurs enfants, conformément à leurs convictions religieuses et philosophiques, doit être respecté."
Est à rayer sans conditions.

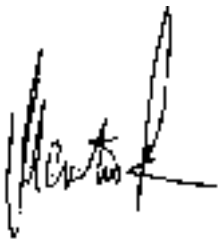
- *Son esprit est déjà exprimé par l'alinéa (1). Il touche également de manière contradictoire le sens de l'article 23 - Droits des enfants.*
- *Nous estimons que le respects de ce droit des parents ne pourrait pas être garanti par l'Union et ses institutions.*

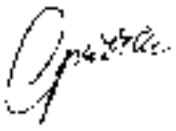
3.4. **Article 22 - Egalité et non-discrimination**

La dernière phrase de l'alinéa (3) "L'égalité des sexes est notamment assurée dans la fixations des rémunérations et des autres conditions de travail"
est à rayer sans condition.
Cette stipulation présente une forte limitation du principe de l'égalité et de non-discrimination.

3.5. En tant compte les titres juridiques de la Charte Sociale Européenne déjà ratifiée par de nombreux Etats-membres nous proposons d'ajouter à la Charte des Droits Fondamentaux au moins deux articles reflétant le devoir à l'assistance sociale de l'Union et de ses institution voir **le droit à l'emploi et le droit à un logement convenable** de chacun.

Au nom du Bureau de la Maison de l'Europe du Land Brandebourg





Le Président: Le Vice-président-Directeur:

Martin STOCK Dr. Horst GRÜTZKE

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 26. Juni 2000

CHARTE 4386/00

CONTRIB 245

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Vorschlag zu Artikel 15 (in der Fassung von Dokument Charte 4333/00 CONVENT 36), vorgelegt vom Initiativkreis für den öffentlichen Rundfunk Köln. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

A. INITIATIVKREIS FÜR DEN ÖFFENTLICHEN RUNDFUNK KÖLN

Düsseldorf, den 16.6.2000
Initia.Korresp.Herzog

An den Vorsitzenden des Konvents zur Ausarbeitung
einer Charta der Grundrechte der Europäischen Union
Herrn Professor Dr. Roman Herzog
Prinzregentenstr. 89
II. 81675 München

Sehr geehrter Herr Professor Herzog,

der Initiativkreis für den Öffentlichen Rundfunk Köln begrüßt es, dass die Charta der Grundrechte der Europäischen Union in Artikel 15 (in der Fassung von Dokument CONVENT 28) die Freiheit der Meinungsäußerung verankern will. Wir sind allerdings der Ansicht, dass diese Fassung ergänzt und präzisiert werden sollte, damit sie neben der persönlichen Meinungs- und Informationsfreiheit auch die Medienfreiheit mit ihren objektiven und subjektiven Dimensionen umfassend sichert. Letzteres ist in den Verfassungen mehrerer Mitgliedstaaten, u. a. Deutschland und Portugal, der Fall und sollte auch in der EU-Charta geschehen. Unsere Anregungen richten sich auch auf eine gedeihliche medienpolitische Kooperation von EU und Mitgliedstaaten auf dem Boden einer Klärung der jeweiligen Kompetenzen. Wir nehmen dabei auf die Amsterdamer Protokollerklärung über den öffentlich-rechtlichen Rundfunk in den Mitgliedstaaten Bezug. Der jüngste Kompromissvorschlag des Präsidiums (Art. 15 Abs. 2 laut Dokument CONVENT 36) trägt dem noch nicht ausreichend Rechnung. Wir wären Ihnen sehr dankbar, wenn Sie unsere Vorschläge in die weiteren Beratungen des Konvents einbeziehen würden.

Der 1994 gegründete Initiativkreis setzt sich für die Belange des Öffentlichen Rundfunks und seine Zukunftssicherung im Rahmen der „dualen Rundfunkordnung“ Deutschlands ein. Er wird von Persönlichkeiten aus dem kulturellen und gesellschaftlichen Leben getragen, die den Programmauftrag des Öffentlichen Rundfunks als „Rundfunk in gesellschaftlicher Verantwortung“ im Interesse unseres kulturellen Lebens und einer freien politischen Meinungsbildung für unverzichtbar ansehen. Daher wenden wir uns aus gegebenen Anlässen - wie hier - mit Eingaben und Vorschlägen an die für rundfunkpolitische Entscheidungen zuständigen Stellen.

Mit freundlichen Grüßen

Dr. h. c. Adalbert Leidinger

Sprecher: Dr. h. c. Adalbert Leidinger, 40472 Düsseldorf, Hetjensstr. 44, Tel.: 0211/651870, Fax: 6585661

III. Art. 15. Kommunikationsfreiheit

(1) Jeder hat das Recht auf freie Meinungsäußerung.

(2) Jeder hat das Recht, sich aus allgemein zugänglichen Quellen umfassend zu informieren und sich seine Meinung frei zu bilden. Dies schließt insbesondere den Zugang zu vielfältigen kulturellen Angeboten ein.

(3) Die Freiheit der Presse, des Rundfunks, des Films und der sonstigen an die Allgemeinheit gerichteten Kommunikation wird gewährleistet.

(4) Die Befugnisse der Mitgliedstaaten zur Sicherung von öffentlich-rechtlichem Rundfunk als Medium und Faktor des Prozesses freier Meinungsbildung bleiben unberührt.

Begründung:
Nach dem Vorschlag des Präsidiums des Konvents in Dokument CONVENT 28 soll sich Art. 15 eng an Art. 10 Abs. 1 Sätze 1 und 2 EMRK anlehnen. Garantiert werden soll danach zunächst die Freiheit der Meinungsäußerung. Diese schließt, wie dann hinzugefügt wird, „die Meinungsfreiheit" ein. Damit ist anscheinend die Freiheit der Meinungsbildung gemeint, was jetzt im Normtext klargestellt werden sollte. Weiter wird in Art. 15 des Präsidiumsvorschlags gesagt, die Freiheit der Meinungsäußerung schließe auch die Informationsfreiheit ein. Demgegenüber empfiehlt es sich, die Informationsfreiheit als selbständiges, zuoberst der Meinungsbildungsfreiheit zugeordnetes Grundrecht auszuweisen. Deshalb enthält unser Vorschlag in Abs. 1 die Meinungsäußerungsfreiheit und in Abs. 2 Informations- und Meinungsbildungsfreiheit. Letztere ist von so hohem Rang, dass es angezeigt erscheint, bestimmte nähere Maßgaben („umfassend", „vielfältig", Zugang zu „kulturellen Angeboten") in die Charta aufzunehmen. Damit folgen wir dem Textvorschlag von ARD und ZDF in Dokument CONTRIB 103.

Nach den jüngsten Kompromissvorschlägen des Präsidiums für Änderungen in Dokument CONVENT 36 soll Art. 15 um einen Abs. 2 mit folgendem Wortlaut ergänzt werden: „Die Presse- und Informationsfreiheit ist unter Achtung der Transparenz und des Pluralismus gewährleistet." Diese Formulierung könnte den Eindruck erwecken, Informations- und Pressefreiheit seien deckungsgleich, was keineswegs zutrifft. Darum sollte die Informationsfreiheit - wie oben vorgeschlagen - separat garantiert und in dem Absatz über Medienfreiheit nicht noch einmal erwähnt werden. Im übrigen sollte hier nicht nur - gewissermaßen pars pro toto - die Pressefreiheit genannt werden. Vielmehr ist davon jedenfalls die Rundfunkfreiheit zu unterscheiden, und diese ist ausdrücklich zu erwähnen, wie es auch von Prof. Meyer (Änderungsvorschlag 280) und Minister Gnauck (Änderungsvorschlag 289) gefordert wird. Einbezogen werden könnten auch die Filmfreiheit sowie die Freiheit sonstiger an die Allgemeinheit gerichteter neuer Mediendienste, wie es in dem ARD/ZDF-Vorschlag geschieht.

Mit dem von uns vorgeschlagenen Abs. 4 zielen wir auf eine explizite Bestands- und Entwicklungsgarantie für den Rundfunk in öffentlicher Trägerschaft ab. Damit wird dem Erfordernis programmlicher Qualitätssicherung Rechnung getragen, wie es in der Amsterdamer Protokollerklärung von 1997 betont wird. Eine derartige Garantie wird auch in den Änderungsvorschlägen 280 und 289 gefordert. Zur näheren Begründung weisen wir auch auf den von Prof. Stock vorgelegten Diskussionsbeitrag Dokument CONTRIB 206 hin.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 26 June 2000

CHARTE 4387/00

CONTRIB 246

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a Press Release, issued by the Platform of European Social NGOs. [1]

[1] This text has been submitted in English only.

Brussels, 21 June 2000

PRESS RELEASE

EU CHARTER OF FUNDAMENTAL RIGHTS: SOCIAL NGOS DISAPPOINTED BY POSITION TAKEN BY SOME MEMBER STATES AT THE FEIRA COUNCIL, BUT LOOK TO FRENCH PRESIDENCY FOR BOLD LEADERSHIP IN ENSURING A BINDING TEXT

The Platform of European of Social NGOs was extremely disappointed by the stance taken by several Member States, led by the UK, that the EU Charter of fundamental rights should not be legally enforceable.

Social NGOs and the European Trade Union Confederation have been campaigning together for several years for a binding Charter with a full set of rights. Since the Spring, the campaign has been taken to all the Member States with a series of national conferences, culminating in a joint European conference at the end of August, where the views expressed by citizens, social activists and trade unionists at national level will be gathered and conveyed to EU leaders.

Central to our campaign is the belief that social and economic rights must be guaranteed by the Charter. The European social model is at the core of our societies and is a major factor in Europe's success in the global marketplace. Within this perspective an enforceable Charter will prove indispensable in safeguarding and modernising our models of social protection and improving our economic performance.

In our view the key role of civil society must also be acknowledged in the Charter so that formalised consultation of NGOs is a right, not a favour. The Social Platform is disappointed that no reference was made to NGOs in the Feira conclusions, which constitutes a step backwards from the Lisbon Summit.

Responding to the events of the Feira Summit, Platform President Giampiero Alhadeff said “Social NGOs firmly believe that if the EU is to achieve its stated aim of becoming closer to the citizens, then the people living in Europe must not only have rights on paper, but the opportunity to seek legal redress if those rights are violated.

We now look to the leadership of the French Presidency to be bold and give the people of Europe what they deserve: an enforceable Charter with a full, indivisible set of rights. A solemn political declaration, would fall short of what is needed now in terms of the objectives of a Europe close to its citizens; the enlargement of the Union and our global role".

Ends

For more information contact Sandrine Grenier, Co-ordinator,at the Platform of European Social NGOs. Tel: 32.2/511.37.14 Fax: 32.2/511.19.09E-mail: sandrine.grenier@brutele.be

The Platform-ETUC joint campaign document " Fundamental Rights: the Heart of Europe" is available in all 11 EU languages at the Social Platform's web-site: www.socialplatform.org or on request from the Platform (platform@brutele.be)

The Platform of European Social NGOs was established to promote co-operation between Social NGOs and the European Union. It brings together **30** networks and federations operating in the social field representing a wide range of different groups throughout the Union, including women, lesbians and gays, older people, children & families, disabled people, unemployed people, migrants, people in poverty and homeless people.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 27 June 2000

CHARTE 4388/00

CONTRIB 247

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution on Sustainable Design and Construction, submitted by Mr. C.J. Walsh. [1]

[1] This text has been submitted in English only.

Forum on Sustainable Construction

Region of Ireland

European Charter on Sustainable Design

&

Construction

C. J. Walsh 1998-11-06

Architect, Fire Safety Engineer, and Technical Controller

Chief Technical Consultant, Sustainable Design International

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Explanatory Memorandum

1. Suggested by an idea of Mr. Gerry Walker, Dublin Institute of Technology, during preparations for the first conference in Ireland on Sustainable Design and Construction, this European Charter is a natural and logical next step following the major study project, co-ordinated by Working Commission 82 of the International Council for Building Research, Studies and Documentation (CIB) , which culminated in the recent production of **CIB Publication 225 - 'Sustainable Development and the Future of Construction'** .

2. The structure of the European Charter reflects the view that, fundamentally, Sustainable Construction is a response, in built form, to the concept of 'sustainable development' and its initial formal elaboration - the **Rio Declaration** of 27 Principles, and **Agenda 21** -both agreed in 1992 at Rio de Janeiro, Brazil. It is Sustainable Design, however, which will direct the future course of this innovative approach to construction.

3. During the completion phase of CIB Publication 225, problems arose when attempts were made to synthesize contributions from many different parts of the world. Is it yet possible, at this time, to reconcile and to fuse the following examples into a single understanding of Sustainable Construction ? .....

- The conviction, in Japanese tradition, that buildings are temporary and are not meant to have a long life cycle **;**
- The desire, amongst the countries of Central and Eastern Europe, to catch up with the 'lifestyle' of Western Europe, whatever the costs to the environment and sustainability **;**
- The pressing demands of social justice in a country like South Africa, with the consequent enormous challenge of providing sufficient housing and infrastructural development for the majority population, while still conserving a strongly indigenous approach to architecture and methods of building **;**
- The typical pattern of construction in the European Union (E.U.) , which typically involves a modification or alteration of the already over-developed 'built environment', within a 'natural environment' constantly under attack and straining for survival. Rather than immediately trying to formulate a bland global model for Sustainable Design, more progress might be made, in the short term, if separate regional responses were to be developed for Africa, Asia, Europe, North America, etc., in order to ensure a greater degree of suitability to local needs, cultures and economies. The E.U., because of a colonial history, its current highly evolved legal base underpinning an extensive array of policies and action programmes relating to energy, environmental and sustainable development concerns, and because of its specific commitments arising from the Kyoto Protocol of 1997, is well placed, and legally / morally obliged, to produce a first outline for one of these regional responses to the **Rio Declaration** and **Agenda 21** .

4. The European Charter on Sustainable Design and Construction, therefore, also comprises 27 Principles, which derive from a straightforward process ..... (i) each principle of the original Rio Declaration was closely examined, re-drafted to suit an E.U. context and, on the basis of existing Union legislation and international agreements and treaties to which it is a signatory, was strengthened considerably in expression (ordinary typeface) ~ where appropriate, a clause (bold typeface) relevant to sustainable planning, design and construction was added **;** (ii) unlike the Declaration, references to 'energy' were included in this document.

5. The Charter extols implementation, and the targeting / monitoring of 'real' performance.

European Charter on Sustainable Design & Construction

(Dublin, 1998-11-06)

Having met in Dublin from 5th.- 6th. November, 1998 **;**

In co-operation with the Commission of the European Union, and the International Council for Building Research, Studies and Documentation (**CIB**) **;**

Recognizing the integral and interdependent nature of the natural and built environments on this Earth, our home **;**

Re-affirming the Declaration of the United Nations Conference on Environment and Development (**Agenda 21**) , adopted at Rio de Janeiro on 14th. June 1992, and striving to respond to it on matters directly concerning the design and construction of a sustainable built environment, capable of providing for responsible and environment-conscious human, social, cultural and economic progress **;**

Mindful of the recent inclusions and amendments to the European Union (**E.U**.) treaties and certain other acts (see relevant extracts from the Amsterdam Treaty in Appendix I to this document) **;**

Working towards the achievement of equality of opportunity for every person in the European Union, which in turn must lead to full social inclusion (see Guideline Framework in Appendix II to this document) **;**

Understanding the importance of harmonizing language, concepts and terminology, in order to communicate more effectively with one another (see Vocabulary in Appendix III to this document)**;**

Confirming that direct and meaningful consultation with people, partnership between all sectors of society, consensus, transparency and openness are essential elements in **'social wellbeing' ;**

Proclaiming that Sustainable Design, Construction / De-Construction and Maintenance is the necessary, suitable and practicable response, in built form, to Sustainable Energy-efficient Environment-friendly Development (**SEED**) **;**

the following principles should be actively considered by the Institutions of the European Union and relevant authorities in each Member State, implemented, and monitored by means of benchmarking and the application of appropriate sustainability performance indicators .....

Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Movement towards a 'person-centred' and 'socially inclusive' approach in the planning / design/ construction of a built environment, i.e. placing real people, their needs and responsible desires at the centre of creative endeavours, should be encouraged and fostered by every keysector in society. The method of work in the various processes of planning / design / construction should be widely multi-disciplinary. An active dialogue between practitioners, researchers and end-users, based on meaningful consultation, partnership, and consensus should become the standard.

Principle 2

Member States of the European Union have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources, pursuant to shared E.U. energy, environment and sustainable development policy goals - and the obligation to ensure that activities within their own jurisdiction, or control, do not cause damage to the environment of other Member States or countries / areas beyond the limits of E.U. jurisdiction.

Principle 3

A responsibility is attached to the right of development - it must be achieved in such a manner as to equitably meet the energy, environment and development requirements of present and future generations.

Sustainability of the 'built environment' can only be understood in relation to that of the 'natural environment' ; it involves, with precision and accuracy, ...
(i) establishing limits on the capacity of the natural environment to sustain itself ;
(ii) stopping short of those limits, by a controlled factor of safety, in any further future modification or extension to the built environment ;
(iii) transforming the nature and course of human / social progress to become responsible and environment-conscious, i.e. sustainable development.
Life cycle management should be fully integrated into the processes of planning / design / construction of the built environment. Life cycle assessment / analysis / appraisal of product and service systems used or consumed should involve an evaluation of 'energy cycle' costs, 'environmental impact', and 'sustainability' performance.

Principle 4

In order to achieve sustainable development, environmental protection and energy efficiency should constitute integral parts of the development process, and should not be considered in isolation. **Environmental protection and energy efficiency requirements should be integrated into the definition of all European Union policies and activities, and implemented at all levels of the E.U. - most particularly at local level.**

Principle 5

Member States of the European Union should co-operate in the tasks of protecting human rights, eradicating poverty, and removing social inequality, as indispensable and necessary prerequisite steps to achieving sustainable development, in order to decrease disparities in standards of living and better meet the needs of all peoples in Europe. **The shared goal of Member States should be full social inclusion for every citizen of the E.U.**

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, should be given special priority. E.U. policies and activities in the fields of energy, environment and sustainable development should address the interests and needs of all peoples in the world.

Principle 7

Member States of the European Union should co-operate in a spirit of global partnership to conserve, protect, heal and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, countries have common but differentiated obligations. Europe acknowledges the responsibility that it bears, in the international pursuit of sustainable development, as a result of the pressures its society has placed on the global environment over past centuries, and of the technologies and financial resources it now commands. **Understanding the fragility of the natural environment, and observing the vast expanse of existing development and waste already generated in the built environment, every alternative should be exhausted before intruding further into the natural environment. All opportunities should be taken to heal previous injury to the natural environment ; initial damage repair by human intervention, sufficient only to promote natural self-healing, is a recommended course of action. Adequate resources should be allocated by the European Union towards the proper disposal of nuclear wastes.**

Principle 8
To achieve sustainable development and a higher quality of life for all peoples, Member States of the European Union should reduce and eliminate unsustainable patterns of production and consumption, and promote appropriate demographic policies. **With concern for the protection of indigenous architecture and methods of building, sustainable patterns of planning / design / construction of the built environment should be encouraged by means of ..... (i) concerted programmes of awareness raising and education at all levels of the construction, agriculture, marine, transport and energy industries in Europe; (ii) harmonized financial mechanisms and incentives in each Member State.**
Principle 9
Member States of the European Union should co-operate to strengthen capacity-building for sustainable development by improving scientific understanding through the exchange of information, and by enhancing the development, adaptation, diffusion and transfer of technologies, includingnew and innovative technologies. **Acknowledging our incomplete understanding of sustainable development, each Member State should establish a high level, cross-sectoral research group to examine the concept, and to suggest clear alternatives and make concise proposals with regard to implementation and monitoring strategies. Each Member State should establish a 'Forum on Sustainable Construction' - to articulate the necessary, suitable and practicable response, in built form, to the concept of sustainable development. As our understanding of sustainable development evolves, so also should the nature of our response. The smallest viable unit, with regard to concerted action in any of the above policy areas, is the 'region'.**
Principle 10
Environmental issues are best handled with the participation of all interested citizens, at the relevant level. At European Union and Member State levels, each individual should have access to complete relevant information concerning the environment which is held by public authorities and institutions, including information on hazardous materials and processes in their communities. Each individual has the right to participate in decision-making. Member States should facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings at all levels of the E.U., including redress and remedy, should be provided.
Principle 11
The European Union should properly enact, operate, monitor and control effective energy, environment and sustainable development related legislation. Standards, codes of good practice, and management objectives, priorities and systems should reflect the regional context to which they apply. E.U. standards, codes and systems may be entirely inappropriate, and of unwarranted economic and social cost in other regions of the world, particularly developing countries. **The E.U. should properly enact, operate, monitor and control effective health, safety and welfare related legislation ; the base concerning human health and safety, environmental protection and consumer protection, should be set at a high level, and should take account of any new developments verified by scientific fact.**
Principle 12
Member States of the European Union should co-operate to promote a supportive and open international economic system which must lead to economic growth and sustainable development in all countries, in order to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the E.U. should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13
The European Union should develop law regarding liability and compensation for the victims of pollution and other environmental damage. The E.U. should also co-operate in an expeditious and more determined manner to elaborate further international law regarding liability and compensation for harm to human health and the adverse effects of environmental damage caused by activities within its jurisdiction, or control, to countries / areas beyond the limits of its jurisdiction.
Principle 14
Member States of the European Union should co-operate effectively to prevent the relocation or transfer outside an individual Member State, or the importation into any part of the E.U., of an activity or substance which causes environmental degradation or is found to be harmful to human health.
Principle 15
The precautionary approach should be widely applied by the Member States of the European Union. Where there is a potential for harm to human health, or serious or irreversible damage to the environment, lack of full scientific certainty should not be used as a reason for postponing practicable prevention measures or countermeasures.
Principle 16
Member States of the European Union should promote the internationalization of environmental costs and the use of economic instruments, taking into account that the polluter should, in principle, bear the cost of pollution, with due regard to public interest and health, and without excessive distortion to international trade and investment.
Principle 17
An environmental impact assessment should be undertaken for any proposed activity which is likely to have a significant adverse impact on the environment **;** such an assessment should be subject to proper monitoring and control by competent authorities and institutions in the EuropeanUnion. **All practicable means for an improvement in sustainability and energy efficiency, and the reduction and elimination of adverse effects on the environment, should be shown in an Environmental Impact Statement.**
Principle 18
Member States of the European Union should immediately notify other Member States of any natural disasters or other emergencies which are likely to produce sudden harmful effects on human health, or on the environment of those States. A co-ordinated E.U. effort should be made to help States so afflicted. **E.U. resources should be directed towards effective management, monitoring, prevention and warning systems, particularly in the case of the fire safety of hazardous materials storage andprocessing.**
Principle 19
Member States of the European Union should provide prior and timely notification, with complete relevant information, to other potentially affected Member States or to countries outside the E.U., on activities which may have a significant adverse transboundary environmental impact. Notifications should be at the earliest possible stage of an incident, and in good faith.
Principle 20
Women have a vital role in environmental management and development. Their full participation is essential to achieve sustainable development. The experience and wisdom of the elderly should be valued **;** the abilities of every person should be cherished **;** and the creativity, ideals and courage of youth should be mobilized to forge a European partnership in order to ensure a betterfuture for all.

Principle 21
Local communities, and especially indigenous peoples and their communities, have a vital role in environmental management and development because of their knowledge and traditional practices. Member States of the European Union should recognize, duly support and celebrate their separate identities, cultures and interests, and enable their effective participation in the achievement of sustainable development.
Principle 22
The environment and natural resources of peoples under oppression, domination and occupation should be protected.
Principle 23
Warfare is inherently destructive of sustainable development. Member States of the European Union should respect international law providing protection for the environment in times of armed conflict, and co-operate in its further elaboration, as necessary. **The production, use, and supply of landmines or landmine technology should be prohibited by E.U. legislation. Appropriate resources should be allocated by the E.U. towards the clearance and proper disposal of existing landmines in the world. The further spread of strategic / tactical nuclear weapons and weapons technology should be prevented under E.U. legislation. Appropriate resources should be devoted to the elimination and proper disposal of existing nuclear, biological and chemical weapons of mass destructionin the E.U.**
Principle 24
Peace, responsible human / social development, environmental protection and energy efficiency are interdependent and indivisible.
Principle 25
Member States of the European Union should resolve their internal or external environmental or energy disputes peacefully, and by appropriate means, in accordance with E.U. law and the Charter of the United Nations.
Principle 26
Harmonized short, medium and long-term strategies in the policy areas of energy efficiency, environmental protection and sustainable development should be planned for implementation in the European Union over the following time frames :- (i) up to 2010 ; (ii) between 2011 and 2040 ; (iii) between 2041 and 2100. Such is the threat to quality of life and human progress caused by current environmental degradation, and such is the great timelag between implementation of corrective actions and resulting beneficial environmental impacts, that sustainability performance should be benchmarked at year 1990 in the Member States of the E.U. Detailed performance indicators for all stages of design, construction / de-construction, maintenance and disposal should be used to target improvements in sustainability performance, verify target attainment, and continually re-adjust targets at appropriate intervals thereafter.
Principle 27
The European Union and its Institutions, relevant authorities of the Member States, and the peoples of Europe should co-operate, in a spirit of partnership and good faith, to fulfil the principles embodied in this Charter, and to further elaborate E.U. and international laws - in pursuit of Sustainable Energy-efficient Environment-friendly Development (**SEED**) .

Appendix I
Extracts from the E.U. Amsterdam Treaty

(97 / C 340 / 01)
Sustainable Development
Environment
Human Health
Statistics
Personal Data Protection
Anti-Discrimination

Amsterdam Treaty

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2nd. October 1997. (97 / C 340 / 01)

1. Sustainable Development

Replaced Article 2 of the TEC (Treaty establishing the European Community)

' The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. '

Replaced 7th. Recital of the Preamble to the TEU (Treaty on European Union)

' Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.'

2. Environment

New Article 3c in the TEC

' Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development. '

Declaration No. 12 to the Final Act

' The Conference notes that the Commission undertakes to prepare environmental impact assessment studies when making proposals which may have significant environmental mplications. '

Replaced Paragraph 3 of Article 100a of the TEC

' The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'

3. Human Health
Replaced Article 129 of the TEC
' 1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities. '
4. Statistics
New Article 213a in the TEC
' 1. Without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the Council, acting in accordance with the procedure referred to in Article 189b, shall adopt measures for the production of statistics where necessary for the performance of the activities of the Community.
2. The production of Community statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality ; it shall not entail excessive burdens on economic operators. '
5. Personal Data Protection
New Article 213b in the TEC
' 1. From 1st. January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty. 2. Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 189b, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate. '
6. Anti-Discrimination
New Article 6a in the TEC
' Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religionor belief, disability, age or sexual orientation. '
1997-11-26

Appendix II
Guideline Framework
Achievement of Equality of Opportunity & Social Inclusion
For Every Person in the European Union (E.U.)

Guideline Framework
Achievement of Equality of Opportunity & Social Inclusion
For Every Person in the European Union (E.U.)

Direct and meaningful consultation with people, partnership between all sectors of society, consensus, transparency and openness are essential elements in **'social wellbeing'** . Set out below are a number of areas which should be actively considered by the Institutions of the E.U. and relevant authorities in each Member State, implemented, and effectively monitored through the informed application of sustainability performance indicators .....

1. Empowering People for Participation in Society

- respecting autonomy and independence
- re-adjusting education and training programmes to facilitate participation
- re-adjusting welfare and other supports to facilitate participation
- moving towards a 'person-centred' approach in the design / implementation of support services
- mainstreaming
- ensuring seamless provision of services
- ensuring the principle of participation

2. Removing Physical Barriers to Participation

- viewing access / egress / evacuation and health / safety / welfare issues in the light of equality of opportunity and the right to participate
- developing effective legislation, standards (nationally transposed EN's) , and technical guidance in order to eliminate all forms of barrier
- monitoring and controlling compliance with legislation
- moving towards a 'person-centred' approach in the planning / design / construction of a sustainable built environment

3. Opening Up Various Spheres of Society

- upholding the equal civic status of every person - promoting employment for people as a key to social inclusion

4. Nurturing Opinion of the Public, Government Administrators, and Design Professions to be Receptive to 'Person-Centredness' of the Built Environment awareness raising and education
1998-06-10

Appendix III
Vocabulary
Useful Terms & Definitions

Adaptability : The extent to which a building, or a building component, is esigned when new, or capable of being easily modified at any ater stage, to meet the changing living or working needs of the road average of potential occupants, who may be disabled orable-bodied.
Buildability : The extent to which the design of a building facilitates ease of CIRIA-GB) construction, subject to the overall requirements for the completed building.
Built Environment : Anywhere there is, or has been, an intrusion or intervention by a human being in the natural environment.
Construction Works : Any building or civil engineering works. (EU Directive 89/106/EEC)
Cost Effectiveness : To achieve a defined objective at the lowest cost, or to achieve(IEC Treaty, 1994*) the greatest benefit at a given cost.
Dimensional Co-Ordination : A convention on related sizes for the co-ordinating dimensions of (ISO 1791) building components and the buildings incorporating them, for their design, manufacture, assembly and/or installation. **Disabled :** Those people, of all ages, who are unable to perform, independently and without aid, basic human tasks or functions because of physical, mental or psychological impairment, whether of a permanent or temporary nature. This definition is derived from / based on the World Health Organization's definitions (1980) of 'impairment' and 'disability' only. The term **disabled** includes ..... - wheelchair users ;
- people who experience difficulty in walking, with or without aid, e.g. stick, crutch, calliper or walking frame ;
- the elderly (people over the age of 60 years) ;
- the very young (people under the age of 5 years) ;
- pregnant women ;
- people who suffer from arthritis ;
- the visually impaired ;
- the hearing impaired ; and
- people who panic in a fire situation or other emergency ;
- people who suffer incapacitation as a result of exposure, during a fire, to poisonous or toxic substances, and/or elevated temperatures.

Economically Reasonable Working Life :
(EU Directive 89/106/EEC) (i) The working life is the period of time during which the performance of the works will be maintained at a level compatible with the fulfilment of the Essential Requirements.
(ii) An economically reasonable working life presumes that all relevant aspects are taken into account, such as .....
- costs of design, construction and use ;
- costs arising from hindrance of use ;
- risks and consequences of failure of the works during its
working life and costs of insurance covering these risks ;
- planned partial renewal ;
- costs of inspections, maintenance, care and repair ;
- costs of operation and administration ;
- disposal ;
- environmental aspects.

Energy Cycle : The entire energy chain, including activities related to prospecting (IEC Treaty, 1994) for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimizing harmful environmental impacts.

Environmental Impact :

(IEC Treaty, 1994) Any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors ; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors. **Human Health :** A state of physical, mental, psychological, social, cultural andeconomic wellbeing.

Improving Energy Efficiency :

(IEC Treaty, 1994) Acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, while reducing the amount of energy required to produce that output.

Life Cycle : Consecutive and interlinked stages of a product (and/or service) (EN ISO 14040) system from raw material acquisition or generation of natural resources to the final disposal.

Life Cycle Assessment :

(EN ISO 14040) Compilation and evaluation of the inputs, outputs and the potential environmental impacts of a product (and/or service) system throughout its life cycle.

Life Cycle Impact Assessment :

(EN ISO 14040) Phase of life cycle assessment aimed at understanding and evaluating the magnitude and significance of the potential environmental impacts of a product (and/or service) system.

Life Cycle Interpretation :

(EN ISO 14040) Phase of life cycle assessment in which the findings of either the inventory analysis or the impact assessment, or both, are combined consistent with a defined goal and scope in order to reach conclusions and recommendations.

Life Cycle Inventory Analysis :

(EN ISO 14040) Phase of life cycle assessment involving the compilation and quantification of inputs and outputs, for a given product (and/or service) system throughout its life cycle.

Performance : Performance is a quantitative expression (value, grade, class or (EU Directive 89/106/EEC) level) of the behaviour of a works, part of the works or product, for an action to which it is subject or which it generates under the intended service conditions (for the works or part of the works) or intended use conditions (for products) .

Safety : Freedom from unacceptable risk of harm.(ISO/IEC Guides 2 & 51)

SEED : Sustainable , Energy-efficient , Environment-friendly Development.

Sustainable Development : Development which meets the needs of the present without (Bruntland Report, 1987) compromising the ability of future generations to meet their own needs. An improved definition of 'sustainable development' must also embody the following concepts .....

- the place of human beings in the environment, and the relationship between both ;
- the nature of human, social, cultural and economic development,

their current imbalances and inequities, and their future course ;

- the healing of existing injury to the natural environment.

Sustainable Construction : The creation and responsible maintenance of a healthy built (CIB/W82 & TG16) environment based on resource efficient and ecological principles.

Sustainable Design : The art and science of the design, supervision of related construction / de-construction, and maintenance of sustainability in the built environment. The definition of 'sustainable design' embodies the following concept .....

- 'person-centred' design , i.e. that design process which places real people at the centre of creative endeavours and gives due consideration to their health, safety and welfare in the built environment - it includes such specific performance criteria as a sensory rich and accessible (mobility, usability, communications and information) environment, fire safety, air, light and visual quality, protection from ionizing and electromagnetic radiation, thermal comfort (EN ISO 7730) , unwanted or nuisance noise abatement, etc. an important 'person-centred' design **aid** is the questionnaire survey, carried out by an independent, competent, non- threatening individual, and which comprises both open and closed format questions.

Sustainable Engineering : The application of scientific principles to relevant aspects of sustainable design.

Welfare : A general feeling of health and happiness.

Standards & Additional Reference Documents :

ISO 6707-1 : 1989

Building and civil engineering - Vocabulary. Part 1 **:** General terms.

ISO 6707-2 : 1993

Building and civil engineering - Vocabulary. Part 2 **:** Contract terms.

EN ISO 14040 : 1997

Environmental management - Life cycle assessment - Principles and framework.

E.U. Council Directive 85/337/EEC , of 2nd. June 1985, on the assessment of the effects of certain public and private projects on the environment.

E.U. Council Directive 89/106/EEC , of 21st. December 1988, on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products.

E.U. Council Directive 89/391/EEC , of 12th. June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work.

E.U. Council Directive 92/43/EEC , of 21st. May 1992, on the conservation of natural habitats and of wild fauna and flora.

E.U. Council Regulation (EEC) No. 1836/93 , of 29th. June 1993, allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme.

E.U. Council Directive 96/29/Euratom , of 13th. May 1996, laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation.

Sustainable Development and the Future of Construction - CIB Publication 225

International Council for Building Research, Studies and Documentation (**CIB**) . Report. CIB Working Commission 82 **:** Futures Studies in Construction. The Netherlands. May, 1998.

UNFCCC - The Kyoto Protocol : 1997

Agreed at the 3rd. meeting of the Conference of the Parties (COP 3) to the United Nations Framework Convention on Climate Change. Kyoto, Japan. December, 1997. This Protocol sets legally binding targets for different regions of the 'developed world' to limit emissions of an aggregate of six more greenhouse gases **:** C_{O2} , C_{H4} , $_{N}2O$, PFC's , HFC's , and S_{F6} .

Helsinki Declaration on Action for Environment and Health in Europe

World Health Organization, Regional Office for Europe. 2nd. European Conference on Environment and Health. Helsinki, Finland. 20th.- 22nd. June, 1994.

International Charter for the Conservation and Restoration of Monuments and Sites

International Council of Monuments and Sites (**ICOMOS**) . Venice, Italy. May, 1964.

International Charter for the Protection of Indigenous Architecture and Methods of Building

Conscious of the meaning of 'environmental impact' , it was agreed at a meeting of **CIB/TG16** in Paris, on 11th. June 1997, that work should commence on this proposed Charter. Possible sponsorship of the document by the United Nations will be explored.

*** International Energy Charter Treaty**
Lisbon, Portugal **;** December, 1994. Official Journal of the European Communities (**No. L 380**) . Office for Official Publications of the European Communities. Luxembourg. 1994.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 27 June 2000

CHARTE 4389/00

CONTRIB 248

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union
– Audition of the candidate countries on 19 June 2000

Please find hereafter the list of the representatives of the candidate countries and the statement by the Permanent Secretary of the Ministry of Foreign Affairs of the **Republic of Cyprus.**

Participants à l'audition des pays candidats le 19 juin 2000

République de Chypre/Republik Zypern:
M. Theophilos V. THEOPHILOU, Ambassadeur, Délégué Permanent de la République Chypre auprès de l'UE
Mme Maro CLERIDES-TSIAPPA, Senior Attorney of the Republic
M. Marios LYSIOTIS, Counsellor at the Permanent délégation of Cyprus to the EU

Malte/Malta
M. (Dr.) Michel FRENDO, membre du Parlement maltais
Mme Elena GRECH, Premier secrétaire à l'Ambassade de Malte

République de Hongrie/Republik Ungarn:
M. Béla SZOMBATI, Chef adjoint du Secrétariat d'Etat d'Intégration, Ministère des Affaires étrangères
Mme Eszter ORGOVÁN, Ministère des Affaires Etrangères
Mme Zsuzsanna MÁTRAI, Ministère des Affaires Etrangères (salle d'écoute)
Mme Éva TÖRÖK, Mission de la Hongrie auprès de CE (salle d'écoute)
m. Tamas SZÜCS, Mission de la Hongrie auprès de CE (salle d'écoute)

République de Pologne/Polnische Republik
M. Jerzy KRANZ, Undersecretary of State, Ministry of Foreign Affairs
M. Jan BARCZ, Directeur, European Union Department, Ministry of Foreign Affairs
M. Jerzy JASKIERNIA, Member of Parliament
M. Michael CZYZ, Minister Counsellor, Polish Mission to the EU
Mme Marta CYGAN, Cousellor, Polish Mission to the EU

Roumanie/Rumänien:
M. Eugen DIJMARESCU, Secrétaire d'Etat, Ministère des Affaires Etrangères
Mme Cristina TARCEA, Directeur au Ministère de la Justice
Mme Brandusa PREDESCU, Directeur au Ministère des Affaires Etrangères
M. Ion JINGA, Ministre-conseiller, Mission de la Roumanie auprès de l'UE
M. Viorel ARDELEANU, Ministre conseiller, Mission de la Roumanie auprès de l'UE
Mme Maria CIUCA-LIGOR, Troisième Secrétaire, Mission de la Roumanie auprès de l'UE

République Slovaque/Slowakische Republik
M. Daniel LIPSIC, Chef de l'office du Ministère de la Justice
Mme Jarmila BADIKOVA, Deuxième secrétaire de la mission slovaque auprès de l'UE
M. Juraj MIGAS, Ambassadeur
Mlle Andrea MATIZOVA, deuxième secrétaire.

République d'Estonie/Republik Estland
M. Meelis TIGIMÄE, Mission d'Estonie auprès de l'EU
Mme Kai KAARELSON, Ministère des Affaires Etrangères

Republique de Lettonie/Republik Lettland
M. Andris PIEBALGS, Ambassador of Latvia to EU
Mme Inese BIRZNIECE, Member of the European Affaires Committee, Parliamant of Latvia
Mme Katrina KOSA, Deputy Head, EU Policy Division, Ministry of Foreign Affairs
M. Aris VIGANTS, Second Secretary, Mission of Latvia to EU
M. Eriks FLAUMANIS, Attaché, Mission of Latvia to EU

République de Lithuanie/Republik Litauen:
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M. Dainoras ZIUKAS, II Secdretary, Lithuanian Mission to the EC

République de Bulgarie/Republik Bulgarien:
Mme Antoinetta PRIMATAROVA, Ambassador
M. Mario MILOUCHEV, Counsellor in the Bulgarian Mission to the EC
M. Peter STEFANOV }
M. Vesselin VALKANOV } Counsellors in the Bulgarian Mission (salle d'écoute)
M. Ognyan CHAMPEOV }

République tchèque/Tschechische Republik
M. Martin PALOUS, Ministre-adjoint des Affaires Etrangères
M. Karel HEJC, Directeur, Département des droits de l'homme, Ministère Affaires Etrangères
Mlle Veronika STROMSIKOVÁ, Département des droits de l'homme, Min. Affaires Etrangères
M. Ludek STAVINOHA, Conseiller-Ambassadeur de la Mission tchèque auprès des CE
M. Michael STROUHAL, Premier Secrétaire de la Mission tchèque auprès des CE

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M. Marcel KOPROL, Minister Plenitpotentiary, Deputy Head of Mission of Slovenia to the EU
M. Andraz ZIDAR, Counsellor, Ministy of Foreign Affairs
M. Bostjan JERMAN, Second Secretary, Mission of Slovenia to the EU

République de Turquie/Türkische Republik
M. Nihat AKYOL, Ambassadeur, Délégué permanent auprès de l'UE
M. (Prof.) Haluk KABAALIOGLU, Conseiller à la délégation turque auprès de l'UE
M. Ismail Hakki MUSA, Premier secrétaire à la délégation turque auprès de l'UE.

Statement by the Permanent Secretary of the Ministry of Foreign Affairs
of the Republic of Cyprus to the Audition with Candidate Countries
of the Convention for the Charter of Fundamental Rights of the European Union

The decision of the Cologne European Council to draw up a Charter of Fundamental Rights of the European Union was an important and timely decision which will have positive and beneficial effects in the process of European integration. The provisions of the Charter and their underlying message are addressed both to the member states and their citizens, the European citizens, as well as to the candidate countries and their peoples.

When the Republic of Cyprus submitted its application for membership in 1990, we knew that we were not applying to join just a common market, or a broader economic union, however important such a union might be. We were conscious, in fact we aspired, to join a community of shared values and principles, based on the rule of law, the protection and respect of human rights, and the promotion of peace and security in our continent and beyond, a community moving towards an ever closer union.

Certain important elements of this closer union were at the time not yet fully developed. Ever since the pace of European Integration was accelerated, the Economic and Monetary Union has taken form and life, the Common Foreign and Security Policy has been strengthened, the defence dimension is gradually being introduced. At the same time, the social dimension is gaining importance at the community level, as exemplified by the special summit in Lisbon this year. Furthermore, the Intergovernmental Conference on institutional reforms, is opening the way for the enlargement of the Union which is of extreme importance for the future of our continent.

The Cologne European Council decision for drawing up a Charter of Fundamental Rights of the European Union is the logical outcome and consequence of this evolution. It will fill an obvious gap in the already broad spectrum of the activities of the Union.

Drawing from our common European heritage for the protection of human rights, the different constitutional traditions of member states and reflecting the evolution in the field of protection of Human Rights, the Charter will strengthen the legitimacy of the Union in the eyes of its citizens. It can become a focal point of identification, giving to the ordinary citizen a source of meaning and understanding of the drive towards European Integration.

In order, however, to reach this goal, the Charter must be drafted in clear, simple and concise terms, so that it will be comprehensible to the ordinary citizen of the Union. The work done thus far by the Convention, satisfies, we believe, this criterion and we wish to congratulate the participants for what has already been achieved.

Mr. President and members of the Convention,

The Republic of Cyprus, has since its establishment 40 years ago, placed the protection of human rights at the center of its polity. The Treaty of Establishment of the Republic of Cyprus, the act of birth of the Republic, states in article 5:

"The Republic of Cyprus shall ensure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in section I of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th of November, 1950, and the Protocol of that Convention signed at Paris on 20th of March 1952."

Part II of the Constitution of the Republic of Cyprus, entitled "Fundamental Rights and Liberties" reproduces by and large the provisions of the Convention in the body of the Constitution.

These constitutional provisions are respected by the administration and are fully and directly enforceable before the courts of the Republic. Indeed under the Constitution the legislative, executive and judicial authorities of the Republic are bound to secure the effective application of the said provisions.

Furthermore, Cyprus has ratified not only the European Convention of Human Rights and the Protocols thereof but almost all international legal instruments appertaining to human and social rights, including the European Social Charter, the I.L.O. Convention and the Covenant for Civil and Political Rights.

Our own historical experience has demonstrated and still demonstrates the great importance and usefulness of the regional and universal instruments for the protection of Human Rights. Over the course of years the Republic of Cyprus and its citizens benefited considerably from the provisions of these instruments and the mechanisms established thereby.

In this regard allow me to mention in all humility that the record of compliance of the Republic of Cyprus with the obligations arising from these instruments is impeccable.

It is abundantly clear from the above that the Republic of Cyprus shares the objectives of the Charter of Fundamental Rights of the Union and it is our intention to adopt it in the form it will take, following the relevant decision of the European Council. We will do so not only because it will be part of the acquis communautaire with which we will have to harmonize but also because we fully comprehend its overall beneficial effects for Cyprus.

Mr. President,

We have been following closely the proceedings of this Convention and we are aware of the important debates taking place in this body as well as of the different approaches on certain aspects of the Charter. We believe, however, that in the few months of its existence and operation the Convention has already produced very positive and commendable results.

Of particular importance in the context of the deliberations of the Convention is, in our view, the issue of the overall system of the protection of human rights in Europe. We have in our continent, an important and effective system for the protection of Human Rights. We firmly believe that this system should be safeguarded and further strengthened.

We therefore share the position expressed by the Parliamentary Assembly of the Council of Europe in its resolution of 25 January 2000 (res. 1210) that "It is of vital importance to ensure consistency in the protection afforded to civil and political rights in Europe".

We trust that this consideration will weigh heavily in the decisions of the Convention. For, we believe that the two instruments could and should be consistent and complementary.

We take stock of the impressive results achieved thus far by the Convention: the identification of the fundamental rights, the way these are formulated and presented, as well as the introduction of a new set of rights, resulting from developments in the fields of science and technology and the general evolution of our societies. We also consider the Convention's work on social rights, as a solid basis for further development. The inclusion of such rights will be an important move, reflecting the general evolution of the Union in recent years.

12.6.2000

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 27 juin 2000

CHARTE 4390/00

CONTRIB 249

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne
– Audition des pays candidats du 19 juin 2000

Veuillez trouver ci-après la liste des représentants des pays candidats et l'intervention de M. Nihat AKYOL, Ambassadeur, Délégué permanent de la Mission de **Turquie.**

Participants à l'audition des pays candidats le 19 juin 2000

République de Chypre/Republik Zypern:
M. Theophilos V. THEOPHILOU, Ambassadeur, Délégué Permanent de la République Chypre auprès de l'UE
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M. Marios LYSIOTIS, Counsellor at the Permanent délégation of Cyprus to the EU

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M. (Dr.) Michel FRENDO, membre du Parlement maltais
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Mme Eszter ORGOVÁN, Ministère des Affaires Etrangères
Mme Zsuzsanna MÁTRAI, Ministère des Affaires Etrangères (salle d'écoute)
Mme Éva TÖRÖK, Mission de la Hongrie auprès de CE (salle d'écoute)
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Mlle Veronika STROMSIKOVÁ, Département des droits de l'homme, Min. Affaires Etrangères
M. Ludek STAVINOHA, Conseiller-Ambassadeur de la Mission tchèque auprès des CE
M. Michael STROUHAL, Premier Secrétaire de la Mission tchèque auprès des CE

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M. Bostjan JERMAN, Second Secretary, Mission of Slovenia to the EU

République de Turquie/Türkische Republik
M. Nihat AKYOL, Ambassadeur, Délégué permanent auprès de l'UE
M. (Prof.) Haluk KABAALIOGLU, Conseiller à la délégation turque auprès de l'UE
M. Ismail Hakki MUSA, Premier secrétaire à la délégation turque auprès de l'UE.

Bruxelles, le 19 juin 2000

POSITION DE LA TURQUIE

- La Turquie se joint à tous les autres candidats pour partager l'objectif d'une Union qui reposera sur les principes de liberté, de démocratie et de respect des droits de l'Homme et des libertés fondamentales, ainsi que sur la notion d'Etat de droit. Les décisions du Sommet d'Helsinki par lesquelles la candidature de la Turquie a été officialisée ont renforcé entre mon pays et l'Union la communauté de destin dont un des piliers est justement la protection et le développement des droits de l'Homme en général.

Nous pensons ainsi que la réalisation d'une Union sans cesse plus étroite entre les peuples de l'Europe, ainsi que le maintien et le développement de l'Union en tant qu'espace de liberté, de sécurité et de justice, devrait avoir comme principe de base le respect, général et non restrictif, de la dignité humaine unique, universelle et inviolable. Dans ce cadre, la Turquie accepte le respect des critères politiques de Copenhague ainsi que la substance de l'Article 6 du Traité de l'Union.

Alors que le volet économique de l'intégration européenne est désormais de plus en plus complété par un volet politique, nous comprenons fort bien les nécessités qui sont à la base de l'élaboration par l'Union européenne d'une Charte des Droits fondamentaux. Pour la même raison, nous soutenons les efforts de l'Union d'améliorer par ce biais les normes liées à la protection et au développement des droits de l'Homme. En effet, cette initiative offre l'occasion d'améliorer la protection des droits de l'Homme dans le cadre même de l'Union.

- Candidate à l'adhésion, la Turquie se réjouit de participer aux réunions successives qui sont organisées pour informer l'ensemble des pays candidats sur les travaux préparatoires à cette Charte. Nous souscrivons par ailleurs à l'appel du Parlement européen du 16 mars dernier, par lequel il propose que l'on accorde aux pays candidats un statut d'observateurs dans le cadre de la Convention chargée de l'élaboration de cette Charte.

Nous avons toutefois certaines préoccupations en ce qui concerne cette initiative de l'Union européenne, que nous soutenons dans l'ensemble. Nous observons d'ailleurs que ces préoccupations sont partagées par certains pays membres de l'Union comme par certains pays candidats. Nous voulons cependant souligner que ces préoccupations ne concernent nullement la nature des droits et libertés qui font l'objet de la Charte, que nous considérons comme une manifestation de la volonté d'intégration politique et juridique au sein de l'Union.

- Il apparaît d'ores et déjà, bien que l'examen des très nombreux amendements à la cinquantaine d'articles définis par la Convention n'ait pas encore abouti, que les droits et libertés fondamentaux énumérés dans la Charte, quoique rédigés d'une manière un peu différente, ressemblent dans une grande mesure aux droits et libertés consignés dans la Convention européenne des Droits de l'Homme.

- Les préoccupations qui sont les nôtres à cette étape de la Charte sont : d'une part, l'éventuel affaiblissement du système de la Convention européenne des Droits de l'Homme qui fonctionne de manière très efficace à l'heure actuelle, en créant un système différent. Et d'autre part, l'idée que, de la sorte, on pourrait être amené à penser qu'il existe une volonté de créer en Europe un système qui ait le pas sur un autre système existant. Ceci risquerait de susciter la réapparition des lignes de partage que nous voulons voir disparaître en Europe.

- Cette préoccupation quant à la formation d'une hiérarchie dans le système judiciaire européen a d'ailleurs été évoquée à diverses reprises ces derniers mois devant l'Assemblée parlementaire et au Comité ministériel du Conseil de l'Europe dont la Turquie est membre.

Le Comité ministériel du Conseil de l'Europe a adopté en date du 31 mai dernier le texte de sa réponse à la Recommandation 1439 (2000) de l'Assemblée parlementaire sur la Charte des Droits fondamentaux de l'Union européenne.

- En fait, les préoccupations de la Turquie ont déjà été exprimées par les institutions de l'Union européenne. Ainsi, la Résolution adoptée par le Parlement européen en date du 16 mars 2000 « a souligé que la Charte des Droits fondamentaux de l'Union européenne ne devrait entrer en aucune manière en concurrence avec la Convention européenne des droits de l'Homme ».

Ce souhait se trouve également à l'origine de l'invitation à l'Union à adhérer à la Convention européenne des droits de l'Homme qui constituerait, d'après le Parlement européen, un pas important vers le renforcement de la protection des droits fondamentaux au sein de l'Union.

Membre du Conseil de l'Europe, la Turquie épouse totalement cette recommandation. Nous estimons en effet que l'Union devrait non seulement adhérer à la Convention européenne, mais également renforcer avec le Conseil de l'Europe sa coopération déjà très étroite, afin d'éviter, par des moyens appropriés, d'éventuels conflits et confusions entre la Cour de Justice des CE et la Cour européenne des droits de l'Homme. Pour l'instant, nous constatons que la question des relations dans ces domaines entre la Convention européenne des droits de l'Homme et la Charte des Droits fondamentaux de l'Union européenne n'est pas encore réglée.

- L'examen du projet de la Charte nous semble indiquer que le texte consisterait en une déclaration non contraignante. Le débat au sein de la Convention sur ce point n'étant pas clair, la Turquie continuera à porter un vif intérêt au déroulement des travaux sur ce point précis.

- Enfin, on remarque qu'il n'est fait aucune mention dans le projet de Charte de la position accordée à la Convention européenne et à la Cour européenne des droits de l'Homme. Cependant existe le danger de l'apparition d'importantes divergences de vues quant au mécanisme de contrôle auxquels seront soumis dans l'avenir les pays qui sont à la fois membres de l'Union européenne et du Conseil de l'Europe.

PROGETTO DI CARTA DEI DIRITTI FONDAMENTALI DELL'UNIONE EUROPEA

fundamental.rights@consilium.eu.int

Bruxelles, 27 giugno 2000 (29.06)
(OR. FR/IT)

CHARTE 4391/00

CONTRIB 250

NOTA DI TRASMISSIONE

Oggetto: Progetto di Carta dei diritti fondamentali dell'Unione europea

Si allega un contributo della Consulta per la Giustizia Europea dei Diritti del'Uomo (presso il Consiglio dell'Ordine degli Avvocati di Roma). [1]

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[1] Il testo è stato trasmesso unicamente in lingua italiana (l'articolo proposto è redatto in francese).

Consulta per la Giustizia Europea dei Diritti dell'Uomo

Sede Palazzo di Giustizia, Piazza Cavour 00193 ROMA

(presso il Consiglio dell'Ordine degli Avvocati di Roma)

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E-MAIL **<< consulta@dirittiuomo.it >>**

Roma 15 giugno 2000

Il Presidente dell'Organo preposto all'elaborazione di un Progetto di Carta dei Diritti Fondamentali dell'Unione Europea

fundamental.rights@consilium.eu.int

Bruxelles

OGGETTO: Progetto di Carta dei Diritti Fondamentali dell'Unione Europea

<<Toute atteinte aux droits énoncés dans la présente Charte est susceptible de recours devant les jurisdictions appropriées nationales et européennes et si nécessaire avec un aide juridique et financière adaptée>>

La scrivente Associazione denominata Consulta per la Giustizia Europea dei Diritti dell'Uomo si è costituita il **13 giugno 1986**, con lo scopo di far conoscere alle Associazioni culturali e sindacali degli Avvocati e dei Magistrati italiani gli strumenti di tutela dei Diritti dell'Uomo, garantiti da norme internazionali. Hanno aderito alla Consulta per la Giustizia Europea dei Diritti dell'Uomo 24 ASSOCIAZIONI tra le più rappresentative del mondo forense in Italia: sezione di Roma dell'**ASSOCIAZIONE NAZIONALE FORENSE** **(già SINDACATO ROMANO AVVOCATI E PROCURATORI)**, **CAMERA PENALE DI ROMA, UNIONE FORENSE PER LA TUTELA DEI DIRITTI DELL'UOMO, ASSOCIAZIONE ITALIANA GIOVANI AVVOCATI (A.I.G.A.),** , **CIRCOLO GIURIDICO ITALIANO,** , **UNIONE GIURISTI CATTOLICI ITALIANI (U.G.C.I.), UNIONE DELLE CAMERE PENALI ITALIANE** , **UNIONE NAZIONALE AVVOCATI LAICO-SOCIALISTI** , **ASSOCIAZIONE NAZIONALE FORENSE, UNIONE DELLE CAMERE CIVILI** , **ASSOCIAZIONE GIURISTE ITALIANE (A.G.I.), SOCIETA' ITALIANA DEGLI AVVOCATI AMMINISTRATIVISTI** , **CENTRO STUDI GIURIDICI ROMA, UNIONE DEGLI AVVOCATI D'ITALIA (U.D.A.I.), COMITATO GIURISTI ROTARIANI, ASSOCIAZIONE NAZIONALE AVVOCATI PENSIONATI (A.N.A.P.), ASSOCIAZIONE NAZIONALE AVVOCATI ITALIANI (A.N.A.I.)** , **INIZIATIVA FORENSE** , **ASSOCIAZIONE NAZIONALE DIRITTO INFORMATICA E**

TELEMATICA (ANDITEL) , UNIONE ITALIANA FORENSE (U.I.F.), ASSOCIAZIONE GIOVANILE FORENSE (A.GI.FOR.) , ASSOCIAZIONE ITALIANA DEGLI AVVOCATI PER LA FAMIGLIA E PER I MINORI (A.I.A.F.) , ASSOCIAZIONE PER LA TUTELA DELLE PROPRIETÀ' COLLETTIVE E DEI DIRITTI DI USO CIVICO (A.PRO.D.U.C.) , ASSOCIAZIONE AVVOCATI DEL LAVORO, ASSOCIAZIONE INTERNAZIONALE GIURISTI ITALIA-U.S.A., ASSOCIAZIONE VALORE UOMO.

Tutto ciò premesso, la scrivente Associazione, intende fornire il proprio contributo all'elaborazione del Progetto di Carta dei Diritti Fondamentali dell'Unione Europea.

Visto il documento (CHARTE 4352/00 CONTRIB 216, pubblicato il giorno 8 giugno 2000) sottoposto dal Comitato delle Regioni dell'Unione Europea, dove si propone in calce l'aggiunta di un nuovo articolo dopo l'attuale 50 (cinquanta), che recita testualmente : **<<Toute atteinte aux droits énoncés dans la présente Charte est susceptible de recours devant les jurisdictions appropriées nationales et européennes et si nécessaire avec un aide juridique et financière adaptée>>**.

La scrivente Associazione, nell'esprimere la propria totale ed incondizionata adesione ad una siffatta proposta di emendamento sottoposta dal Comitato delle Regioni, ritiene doveroso richiamare l'attenzione di Codesto Ecc.mo Organo sulla constatazione che, qualsivoglia catalogo di diritti fondamentali, per quanto completo ed avanzato, non ha alcun valore senza una effettiva **giustiziabilità.**

Con la massima osservanza

Il Segretario avv. Maurizio de Stefano

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 30. Juni 2000

CHARTE 4394/00

CONTRIB 253

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag betreffend den Schutz der Privatsphäre, vorgelegt von Herrn Gerhard SCHMID, Mitglied des Europäischen Parlaments. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

An den Präsidenten
des Konvents für den Entwurf
einer Grundrechtscharta der EU
Herrn Prof. Dr. Roman Herzog
Sécretariat Général du Conseil
Rue de la Loi 175
1048 Bruxelles

Brüssel, den 22. Februar 2000

Betrifft: Schutz der Privatsphäre vor Eingriffen durch die EU-Mitgliedstaaten

Sehr geehrter Herr Präsident,

die Verfassungen oder zumindest die abgeleiteten Rechtsordnungen der Mitgliedstaaten schützen ihre Bürger vor einer willkürlichen Verletzung ihrer Privatsphäre durch den Staat. Mitlesen des Briefverkehrs, Abhören von Telephongesprächen sowie das Mitschneiden von Telefax oder e-mail dürfen deshalb nur auf richterliche Anordnung hin vorgenommen werden.

Dieser Schutz entfaltet sich aber für einen Staatsbürger nur gegenüber dem **eigenen Staat**. Es gibt bisher weder in den Verträgen noch im Sekundärrecht der Europäischen Union Schutzgarantien für den Bürger eines EU-Mitgliedstaates gegen die Verletzung seiner Privatsphäre durch Behörden eines anderen Mitgliedstaates. Der Artikel 6 EU-Vertrag führt jedenfalls nach Auffassung der Europäischen Kommission zu keinem entsprechenden Schutz (siehe Anlage).

Bei dem angesprochenen Problem handelt es sich keineswegs um eine theoretische Überlegung. Nach den dem Europäischen Parlament vorliegenden Informationen beteiligen sich Mitgliedstaaten systematisch durch "Anzapfen" von Fernmeldesatelliten an der Verletzung der Privatsphäre von Staatsangehörigen anderer EU-Staaten.
Unter diesen Umständen möchte ich Sie bitten zu prüfen, ob bei den Arbeiten zur Entwicklung einer Grundrechtscharta der EU das Problem eines Grundrechtsschutzes gegenüber dem Handeln eines anderen EU-Staates, dessen Staatsbürgerschaft man nicht besitzt, mit aufgenommen werden kann.

Dies geht über die Idee eines Grundrechtsschutzes hinsichtlich von Handlungen oder Rechtsakten der Europäischen Union hinaus. Mir erscheint es aber nicht nur wegen des angesprochenen Beispiels notwendig, die Bindungswirkung einer Grundrechtscharta für das Handeln der Mitgliedstaaten zu thematisieren. Auch bisher leiten sich aus den Verträgen schon einige Rechte eines Bürgers gegenüber **allen** Mitgliedstaaten ab (z.B. kommunales Wahlrecht, Recht auf konsularische Vertretung). Dieser Ansatz sollte ausgeweitet werden.

Es würde mich freuen, wenn Sie meine Anregung aufnehmen könnten.

Mit freundlichen Grüßen
Ihr

Anlage

SCHRIFTLICHE ANFRAGE E-2167/99
Von Gerhard Schmid (PSE)
An die Kommission
(29.11.1999)

Betrifft: Schutz der Privatsphäre durch Art. 6 EU-Vertrag
Die Verfassungen der Mitgliedstaaten schützen die Bürger vor einer Verletzung ihrer Privatsphäre durch den Staat (Mitlesen des Briefverkehrs, Abhören des Telefons). Eingriffe in die Privatsphäre dürfen deshalb nur unter den strengen Voraussetzungen eines Gesetzes vorgenommen werden.

Schützt die Grundrechtsgarantie in Art. 6 des EU-Vertrages einen Bürger der EU vor einem Eingriff in seine Privatsphäre durch einen anderen Mitgliedstaat als den, dessen Staatsbürger er ist?

E-2167/99DE
Antwort des Herrn Bolkestein
Im Namen der Kommission
(6. Januar 2000)

Artikel 6 des Vertrags über die Europäische Union verlangt von der Union, bei Ausübung ihrer Zuständigkeiten die Grundrechte zu achten.

Dem Schutz der Privatsphäre der Unionsbürger dienen folgende Gemeinschaftsrechtsvorschriften, die sich an die Mitgliedstaaten richten: Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr und Richtlinie 97/66/EG des Europäischen Parlaments und des Rates vom 15. Dezember 1997 über die Verarbeitung personenbezogener Daten und den Schutz der Privatsphäre im Bereich der Telekommunikation.

Ziel dieser Richtlinien ist es, die Rechte und Freiheiten natürlicher Personen bei der Verarbeitung personenbezogener Daten zu schützen. Sie sind daher von Bedeutung für die vom Herrn Abgeordneten angesprochenen Bereiche. Sie gelten grundsätzlich auch für die Verarbeitung personenbezogener Daten durch einen Mitgliedsstaat, wenn die betroffene Person nicht Bürger/in dieses Mitgliedstaats ist. Es ist allerdings zu beachten, dass der Geltungsbereich der Richtlinien auf die Verarbeitung personenbezogener Daten beschränkt ist, die im Rahmen von Tätigkeiten erfolgt, die unter das Gemeinschaftsrecht fallen. Zudem legen beide Richtlinien zur Wahrung bestimmter Interessen Ausnahmen und Einschränkungen fest (vgl. Artikel 13 der Richtlinie 95/46/EG und Artikel 14 der Richtlinie 97/66/EG).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 30 June 2000

CHARTE 4395/00

CONTRIB 254

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union
– Audition of the candidate countries on 19 June 2000

Please find hereafter the list of the representatives of the candidate countries and the statement by the **Slovak Republic.**

Participants à l'audition des pays candidats le 19 juin 2000

République de Chypre/Republik Zypern:
M. Theophilos V. THEOPHILOU, Ambassadeur, Délégué Permanent de la République Chypre auprès de l'UE
Mme Maro CLERIDES-TSIAPPA, Senior Attorney of the Republic
M. Marios LYSIOTIS, Counsellor at the Permanent délégation of Cyprus to the EU

Malte/Malta
M. (Dr.) Michel FRENDO, membre du Parlement maltais
Mme Elena GRECH, Premier secrétaire à l'Ambassade de Malte

République de Hongrie/Republik Ungarn:
M. Béla SZOMBATI, Chef adjoint du Secrétariat d'Etat d'Intégration, Ministère des Affaires étrangères
Mme Eszter ORGOVÁN, Ministère des Affaires Etrangères
Mme Zsuzsanna MÁTRAI, Ministère des Affaires Etrangères (salle d'écoute)
Mme Éva TÖRÖK, Mission de la Hongrie auprès de CE (salle d'écoute)
m. Tamas SZÜCS, Mission de la Hongrie auprès de CE (salle d'écoute)

République de Pologne/Polnische Republik
M. Jerzy KRANZ, Undersecretary of State, Ministry of Foreign Affairs
M. Jan BARCZ, Directeur, European Union Department, Ministry of Foreign Affairs
M. Jerzy JASKIERNIA, Member of Parliament
M. Michael CZYZ, Minister Counsellor, Polish Mission to the EU
Mme Marta CYGAN, Cousellor, Polish Mission to the EU

Roumanie/Rumänien:
M. Eugen DIJMARESCU, Secrétaire d'Etat, Ministère des Affaires Etrangères
Mme Cristina TARCEA, Directeur au Ministère de la Justice
Mme Brandusa PREDESCU, Directeur au Ministère des Affaires Etrangères
M. Ion JINGA, Ministre-conseiller, Mission de la Roumanie auprès de l'UE
M. Viorel ARDELEANU, Ministre conseiller, Mission de la Roumanie auprès de l'UE
Mme Maria CIUCA-LIGOR, Troisième Secrétaire, Mission de la Roumanie auprès de l'UE

République Slovaque/Slowakische Republik
M. Daniel LIPSIC, Chef de l'office du Ministère de la Justice
Mme Jarmila BADIKOVA, Deuxième secrétaire de la mission slovaque auprès de l'UE
M. Juraj MIGAS, Ambassadeur
Mlle Andrea MATIZOVA, deuxième secrétaire.

République d'Estonie/Republik Estland
M. Meelis TIGIMÄE, Mission d'Estonie auprès de l'EU
Mme Kai KAARELSON, Ministère des Affaires Etrangères

Republique de Lettonie/Republik Lettland
M. Andris PIEBALGS, Ambassador of Latvia to EU
Mme Inese BIRZNIECE, Member of the European Affaires Committee, Parliamant of Latvia
Mme Katrina KOSA, Deputy Head, EU Policy Division, Ministry of Foreign Affairs
M. Aris VIGANTS, Second Secretary, Mission of Latvia to EU
M. Eriks FLAUMANIS, Attaché, Mission of Latvia to EU

République de Lithuanie/Republik Litauen:
M. Vilenas VADAPALAS, Director of the european Law Department under the Gouvernement of Lituania
M. Dainoras ZIUKAS, II Secdretary, Lithuanian Mission to the EC

République de Bulgarie/Republik Bulgarien:
Mme Antoinetta PRIMATAROVA, Ambassador
M. Mario MILOUCHEV, Counsellor in the Bulgarian Mission to the EC
M. Peter STEFANOV }
M. Vesselin VALKANOV } Counsellors in the Bulgarian Mission (salle d'écoute)
M. Ognyan CHAMPEOV }

République tchèque/Tschechische Republik
M. Martin PALOUS, Ministre-adjoint des Affaires Etrangères
M. Karel HEJC, Directeur, Département des droits de l'homme, Ministère Affaires Etrangères
Mlle Veronika STROMSIKOVÁ, Département des droits de l'homme, Min. Affaires Etrangères
M. Ludek STAVINOHA, Conseiller-Ambassadeur de la Mission tchèque auprès des CE
M. Michael STROUHAL, Premier Secrétaire de la Mission tchèque auprès des CE

République de Slovénie/Slowenische Republik
M. Mitja DROBNIC, State Secretary, Ministy of Foreign Affairs
M. Marcel KOPROL, Minister Plenitpotentiary, Deputy Head of Mission of Slovenia to the EU
M. Andraz ZIDAR, Counsellor, Ministy of Foreign Affairs
M. Bostjan JERMAN, Second Secretary, Mission of Slovenia to the EU

République de Turquie/Türkische Republik
M. Nihat AKYOL, Ambassadeur, Délégué permanent auprès de l'UE
M. (Prof.) Haluk KABAALIOGLU, Conseiller à la délégation turque auprès de l'UE
M. Ismail Hakki MUSA, Premier secrétaire à la délégation turque auprès de l'UE.

European Charter of Human Rights

The endeavour to achieve respect and protection of fundamental human rights is a never-ending process. Our recent tragic experience with the communist totalitarian system and the continuing struggle with the remnants imprinted by the communist ideology in the minds of people enhance this need in the Slovak Republic. The possibility of participating in the drafting of a new European Charter of Human Rights is a significant appreciation of the progress our country achieved in its preparation for the accession to the European Union.

However, we hold that regardless of the accession date of the Slovak Republic to the European Union the Charter will either directly or indirectly affect the overall atmosphere of the political and civic life and also the quality of inter-personal relations in general. Despite the fact that in the pre-accession period the Charter will be a fundamental political document having a declaratory nature in the associated countries we consider the clear resolution of its legally binding status and its enforceability very important and paramount. It is equally important to clearly define the relation between the Charter and other international instruments on human rights, in particular the European Convention for the Protection of Human Rights including its protocols and other instruments adopted by the Council of Europe. These features of the Charter should be clearly declared in its Preamble so that the European Union citizens, whom this Charter should serve, get a clear message of its scope and field of action.

First of all, the Preamble of the Charter should contain a commitment to the natural law origin of human rights by emphasising the perpetuity of equality of people in their dignity and rights, a commitment to the principles of justice, natural justice and fairness. The reasons for this are that the application of strict law without equity law could result in an unfair process and unfair decision-making. The approach taken could be similar to the one in the Preamble to the International Covenant on Civil and Political Rights:
"…recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

The subsequent declarations in the draft of the European Charter Preamble concerning the principles of democracy continue the idea of the recognition of natural dignity of people in a logic way

" 1. All public power comes from the people.
2. The union and its bodies are built on the principles of freedom, democracy, respect for human rights, rule of law, principles which are shared by all Member States."

and they are also reflected in Article 1 of the draft Charter:
"1. Dignity of a human being shall be respected and protected."

Following this line of thinking, we would also like to recommend that in the provisions on the right to life, the text of Article 2 of the draft Charter be added a
paragraph 2 reading "*Human life should be protected already before birth."*

Proposals

1.

Article 24. Political Parties
“ Every citizen of the European Union shall have the right to establish a political party at the level of the Union and every person shall have the right to join such party. These political parties shall respect the rights and freedoms guaranteed in and by this Charter.”

shall be added another paragraph banning political parties advocating any form of intolerance, hatred, discrimination or violence.

2.

Article 41 Social Security and Social Assistance
“ 1. Conditions shall be created, in compliance with national regulations of each Member State, for social security providing protection in maternity, sickness, need or old age and in unemployment.”

We suggest to remove the category of “old age” from this provision and to elaborate it in a separate provision in a similar way to e.g. Article 43, which stipulates measures for the integration of disabled people.

3.

We propose to consider the addition of an Article 45 (protection of the environment)

The policy of the Union will be in the direction of preservation and protection of cultural and historic monuments of its Member States.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 3 juillet 2000

CHARTE 4396/00

CONTRIB 255

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne
– Audition des pays candidats du 19 juin 2000

Veuillez trouver ci-après la liste des représentants des pays candidats et l'intervention de M. Jerzy KRANZ, Sous-secrétaire d'Etat au ministère des Affaires Etrangères de la **République de Pologne.**

Participants à l'audition des pays candidats le 19 juin 2000

République de Chypre/Republik Zypern:
M. Theophilos V. THEOPHILOU, Ambassadeur, Délégué Permanent de la République Chypre auprès de l'UE
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M. Marios LYSIOTIS, Counsellor at the Permanent délégation of Cyprus to the EU

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M. (Dr.) Michel FRENDO, membre du Parlement maltais
Mme Elena GRECH, Premier secrétaire à l'Ambassade de Malte

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Mme Eszter ORGOVÁN, Ministère des Affaires Etrangères
Mme Zsuzsanna MÁTRAI, Ministère des Affaires Etrangères (salle d'écoute)
Mme Éva TÖRÖK, Mission de la Hongrie auprès de CE (salle d'écoute)
m. Tamas SZÜCS, Mission de la Hongrie auprès de CE (salle d'écoute)

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M. Viorel ARDELEANU, Ministre conseiller, Mission de la Roumanie auprès de l'UE
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M. Meelis TIGIMÄE, Mission d'Estonie auprès de l'EU
Mme Kai KAARELSON, Ministère des Affaires Etrangères

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M. Ismail Hakki MUSA, Premier secrétaire à la délégation turque auprès de l'UE.

Observations préliminaires au sujet d'une charte des droits fondamentaux de l'Union européenne

Intervention de M. Jerzy Kranz
sous-secrétaire d'Etat au ministère des Affaires étrangères
de la République de Pologne

Bruxelles, le 19 juin 2000

1. La Pologne suit avec grand intérêt les travaux sur l'élaboration de la Charte des droits fondamentaux de l'Union européenne. L'initiative en question résulte de façon naturelle du développement de l'Union. En effet, le respect des droits fondamentaux constitue l'un des principes sur lesquels est assise l'Union européenne.

2. La Pologne note avec satisfaction l'initiative d'inviter les candidats à l'adhésion à l'UE à la discussion sur la Charte et elle apprécie la possibilité de présenter à la Convention sa position à ce sujet. Il importe en effet que les pays candidats puissent se prononcer sur certains documents avant qu'ils deviennent membres de l'Union et qu'ils sachent vers quelle Union ils s'orientent.

3. L'initiative de l'Union de créer un catalogue de droits fondamentaux éveille en Pologne un grand intérêt et notamment dans les milieux parlementaires. Il y a quelques semaines que la Commission des affaires étrangères et de l'intégration européenne et la Commission des droits de l'homme et du respect du droit du Sénat polonais a tenu une session consacrée à la Charte des droits fondamentaux de l'UE. Plusieurs membres du Parlement ainsi que les représentants du gouvernement, des organisations non gouvernementales et de nombreux experts ont participé à cette réunion.

4. Le besoin de renforcer la protection des droits de l'individu résulte de façon naturelle de l'évolution de l'Union qui, par les arrêts de la Cour de Justice et les amendements aux Traités constitutifs, se réfère aux droits de l'homme, y compris à la Convention

européenne des droits de l'homme. Ce développement témoigne de l'importance de plus en plus grande du respect des droits fondamentaux dans le système communautaire.
La position de l'Union européenne dans le monde dépend non seulement de sa force économique, mais aussi de son rôle dans la promotion du modèle européen de l'Etat démocratique de droit. La Pologne est profondément attachée à une telle conception de l'intégration européenne.

5. Pour des raisons résultant de son expérience historique, la Pologne soutient l'initiative de créer un catalogue des droits fondamentaux qui exposerait mieux à l'opinion publique cet important aspect du processus d'intégration européenne.
Il est à noter dans ce contexte que la plupart des dispositions prévues par le projet de la Charte figurent dans la nouvelle Constitution de la République de Pologne de 1997. Notre Constitution contient en effet un grand catalogue des droits fondamentaux et libertés (politiques, civils, économiques et sociaux) et, à certains égards, elle assure une protection plus large que celle de la Convention européenne des droits de l'homme.

6. La Convention européenne des droits de l'homme et sa jurisprudence constituent - comme standard minimum - le fondement de la Charte. Il est néanmoins important que la Charte reflète un standard plus large des droits fondamentaux qui traduirait l'évolution récente dans ce domaine du droit international et du droit constitutionnel des pays européens.
La Pologne soutient l'élargissement - par rapport à la Convention européenne - de la protection de certains droits qui émergent tels que le droit de l'individu à la protection de son identité nationale, ethnique, religieuse ou culturelle; le droit de chacun aux chances égales dans le domaine de l'éducation et de la formation professionnelle; le droit d'accès aux documents; le droit de chaque enfant à être écouté. Bien entendu, le catalogue proposé nécessite encore une discussion approfondie.
Le projet d'article 46 de la Charte prévoit que:
"1. Les disposition de la présente Charte s'adressent aux institutions et organes de l'Union dans le cadre des attributions qui leur sont conférées par les Traités ainsi qu'aux Etats membres exclusivement dans le champ d'application du droit de l'Union.
2. La présente Charte ne crée aucune compétence ni aucune tâche nouvelle pour la Communauté et pour l'Union ni ne modifie les compétences et tâches définies par les Traités".

Le passage précité témoigne qu'il s'agit en l'occurrence d'une étape transitoire dont le but consiste à prendre en compte certains droits dans la formation et dans l'application du droit communautaire, mais non à octroyer directement des droits individuels.
Pour ce qui est des droits sociaux, ils sont en partie garantis par la Convention européenne ou par les principes (parfois des directives) du droit communautaire. Il reste néanmoins qu'il s'agit en l'occurrence des domaines soumis en principe à la législation nationale. Par conséquent, des modifications importantes en la matière nécessiterait entre autres un nouveau partage des compétences entre l'Union et ses Etat membres (p. ex. en matière de sécurité sociale ou de droit du travail).
Dans ce contexte, il semble pour l'instant préférable de se limiter en matière de droits sociaux aux principes communautaires résultant des Traités et de la jurisprudence de la Cour de Justice, aux principes fondamentaux garantis par les Constitutions des Etats membres (ce qui ne s'assimile pas à l'ensemble des normes nationales) et à certains accords internationaux auxquels ont adhérés les Etats membres.
Il convient cependant de distinguer à cet égard entre les droits - qui peuvent être revendiqués devant les tribunaux - et objectifs à atteindre (y compris leurs coûts financiers), car autrement on risque d'aboutir à un catalogue de vœux pieux.

7. La Charte doit renforcer dans les esprits des citoyens aussi bien les droits de l'homme en vigueur au sein de l'Union européenne que les valeurs sur lesquelles se fondent les droits en question.
A l'heure actuelle, les organes de l'Union ainsi que les organes nationaux agissant dans le cadre du droit communautaire sont obligés de respecter les droit fondamentaux qui découlent de la Convention européenne, du droit communautaire (y compris ses principes généraux) et des principes fondamentaux communs du droit national des Etats membres (art. 6 du Traité de l'UE).
Etant donné plusieurs problèmes d'envergure qu'affronte actuellement l'Union européenne (et notamment la Conférence intergouvernementale), il semble pour l'instant préférable d'élaborer une charte de caractère politique. Une telle charte pourrait constituer une incitation à l'ajustement de la législation communautaire ou nationale. L'application - directe ou indirecte - de la Charte par les organes communautaires permettra d'évaluer avec le temps la valeur de ses dispositions et servirait ainsi d'instrument de vérification. On peut également espérer que l'adoption de la Charte conduise à réduire d'éventuelles différences en matière de standards de protection.

Cette approche politique préliminaire n'exclut pas qu'à l'avenir l'application de la Charte aboutisse dans le cadre du droit communautaire à la naissance des droits ou libertés nouveaux (dont le caractère juridique serait confirmé par la jurisprudence de la Cour de Justice) ou conduise à la révision des Traités. Il ne semble cependant pas que l'Union soit aujourd'hui prête à une telle révision qui supposerait un aménagement de ses compétences et la ratification par les Etats membres.

8. Le fonctionnement des deux systèmes de protection - celui de l'Union et celui de la Convention européenne - s'effectue jusqu'à présent sans difficultés majeures. Le danger de conflit existe, mais il se réduit en partie en raison de la reconnaissance de la Convention européenne comme standard minimum que l'Union européenne est obligée de respecter. L'adoption d'une charte politique des droits fondamentaux ne doit pas être considérée comme un instrument de compétition, mais plutôt comme un élément complémentaire.
Il n'en reste pas moins que des controverses puissent subsister en raison de l'activité des deux cours indépendantes, compétentes pour juger des affaires semblables. Rien n'indique que cette situation change rapidement. Par conséquent; l'application et l'interprétation du droit par la Cour de Luxembourg et par la Cour de Strasbourg exigent une étroite coopération entre les deux instances.

Conclusions:

La Pologne soutient les travaux sur la Charte des droits fondamentaux en tant qu'instrument d'application progressive du droit communautaire. Notre pays désire également être engagé dans le débat approfondi concernant le contenu de la Charte.

La Charte, dont l'adoption est prévue au cours du Conseil européen de Nice, devrait constituer un document qui systématise le droit en vigueur et témoigne en même temps de l'évolution du droit communautaire, de la Convention européenne et de certains autres instruments internationaux auxquels ont adhéré les pays membres.

Le caractère politique de la Charte ne doit pas exclure la transformation, à un stade ultérieur, de certaines de ses dispositions en normes communautaires conventionnelles (introduites dans les Traités).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 3 July 2000

CHARTE 4398/00

CONTRIB 257

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a statement of the Executive Committee of the Leuenberg Church Fellowship (LCF). [1] [2]

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[1] This text has been submitted French, German and English languages.

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Leuenberg Church Fellowship (LCF)
Leuenberger Kirchengemeinschaft (LKG)
Communion ecclésiale de Leuenberg (CEL)

Executive Committee
Exekutivausschuss
Comité exécutif

Statement of the Executive Committee of the Leuenberg Church Fellowship on the Draft Charter of Fundamental Rights of the European Union

The Executive Committee of the Leuenberg Church Fellowship, to which 96 Protestant churches in Europe belong on the basis of the Leuenberg Agreement of 1973, dealt with the Draft Charter of Fundamental Rights of the European Union (Convent 28) at its meeting held in Belfast from 15 to 18 June 2000. From this place where the task of reconciliation in Europe between humans and confessions is of particular significance, we welcome and support expressly the intention of the European Union to strengthen the protection of fundamental rights by means of a charter. Such a charter will contribute to making tangible a common basis of fundamental human rights.

As representatives of the Leuenberg Church Fellowship we would like to comment on Article 14 (freedom of thought, conscience and religion). We are of the opinion that the freedom of religion should be guaranteed not only at an individual but also at a corporate level. With this in mind, we would like to suggest the following wording:

"Everyone has the right to freedom of thought, conscience and religion. The freedom of religion includes the freedom to bear witness in public or private, individually or collectively as well as the right of churches and religious communities to set out their own order and administration within the framework of the laws of the member states"

This wording insures the insertion of the collective freedom of religion and the inclusion of not only individuals but also communities and corporations in the range of influence of the European Union. In addition, it draws upon the decisions of the Human Rights Commission of the Council of Europe, in which churches and religious communities, on their own right, have increasingly been granted the resort to Article 9 of the European Convention on Human Rights.

On account of many different regulations regarding the State-Church relations, Article 14 would also have to refer to an inner-state right.

This statement has been made in a close partnership with the statements of the Conference of European Churches (CEC) whose Protestant members also belong to the Leuenberg Church Fellowship, and the Evangelical Church in Germany (EKD), a signatory member of the Leuenberg Agreement.

Belfast, 18 June 2000

signed Heinrich Rusterholz
President of the Leuenberg Church Fellowship

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 5 July 2000

CHARTE 4403/00

CONTRIB 260

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the European Study Group. [1] [2]

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[1] This text has been submitted in English language only.

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The draft Charter Of Fundamental Rights Of the European Union

Comments by the Member Companies of the European Study Group

London, 30 th June 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

COMMENTS BY MEMBER COMPANIES OF THE EUROPEAN STUDY GROUP

The European Study Group is an Association of private sector employers, all of whom are substantial employers in the Member States of the European Union and who, in total, employ over two million people worldwide. The majority, but by no means all, of the Member Companies are FTSE 100 companies based in the United Kingdom.

As leading EU based employers, we are conscious of our social responsibilities. We are also aware that we must operate in a highly competitive global economy. If we fail to continue to act competitively, we put at risk the interests of our employees, our suppliers, our customers and our shareholders.

The Member Companies of the European Study Group welcome the notion of a Charter in principle as it would:–

- raise the status, profile and visibility of human rights within the EU.
- present an opportunity for more open and positive communication between the EU institutions and the 'ordinary' people of Europe.
- help strengthen the culture of rights and responsibilities, if properly constructed and presented. make a positive contribution to the citizens of Europe's understanding of the purpose and values inherent in EU citizenship.
- provide clear indicators to citizens of candidate Member States of their rights and responsibilities as EU citizens.

Ideally the structure and the content would be:

Structure:	-	clear and simple
	-	consistent and compatible with existing constitutions and legislative frameworks
	-	practical
	-	present a clear statement of common values and responsibilities
Content:	-	based on established rights and not political aspirations
	-	robust and acceptable to all EU countries
	-	properly balanced and representative of all groups across the spectrum of society within the EU
	-	respectful of existing cultures
	-	encouraging and not restrictive
	-	able to deliver trust
	-	reasonably deliverable within the overall constraints of other EU objectives

From the documentation available, the subject of a Charter appears to have generated much controversial debate. Whilst the legal, political and social significance is clearly great, **it is felt that the process of the evolution of the Charter is almost as important as the end product.**

Because of the expectations that appear to have been raised and because of issues like the relationship of the European Union and its institutions, (particularly with regard to the European Convention of Human Rights) clearly being put back onto the political agenda, we have a number of observations to make and some concerns about which we would welcome clarity. These are outlined below under the headings of purpose, legal certainty, content, implementation plan and detailed observations.

Purpose

The Cologne European Council in June 1999 adopted the decision that:-'

> the protection of fundamental rights is a founding principle of the Union and an indispensable pre-requisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. 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.
>
> The European Council believes that this Charter should contain the fundamental rights and freedoms as well as 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 …'

We support these basic principles, as defined at the Cologne European Council. However, the present draft Charter still begs confusion despite:

- the Council proposing that the Charter should be a political declaration or a proclamation of existing rights enjoyed by EU citizens under current Treaties, rather than a Legal Charter;

and

- the drafting committee being given a mandate to restate present rights with no authority to fill any loopholes or gaps.

Legal Certainty

The European Court of Human Rights (in Strasbourg) was set up by the Council of Europe, under the European Convention of Human Rights in 1950, for jurisdiction over the European Convention of Human Rights (ECHR). All Member States recognise the jurisdiction of this court in human rights cases but are not bound by its decisions.

The ECJ in Luxembourg is the supreme custodian of EU enacted laws and its decisions take precedence over laws or judicial decisions made in Member States. Respect for fundamental rights forms an integral part of the general principles of Community law. For some time now the ECJ has

played a key role in identifying and articulating these rights. It has begun to take into account case law from the Strasbourg Court.

Taking this into account, before there is any further debate on content and interpretation of the Charter, it is suggested that its actual purpose and scope should be categorically and explicitly stated, i.e.

is it to be:

a) a 'showcase of existing rights' materialising the governing principles of the Union?

or, is it to be:

b) an opportunity to rewrite or update existing laws or indeed produce a whole new set of rights that are justiciable in the European Court of Justice (ECJ) and which confer direct and tangible rights/benefits for individuals?

Many would question the purpose of legislating twice for the same objective, even if that is thought acceptable as a legal matter. The avowed intention of the Cologne declaration is that this exercise does not unintentionally result in new laws which all the stakeholders in the EU have not had an opportunity to scrutinise properly. The Member Companies of the European Study Group are firmly of the view that the Charter should be a 'showcase of existing rights'.

Rights have no value without remedies and the clearer and simpler the processes that accompany those remedies, that avoid duplication of jurisdiction and improve the fairness and efficiency of the system, the greater the impact will be. In practical terms, individuals will measure the success of the Charter by what it actually does for them, so clarity is essential.

Content

The Cologne Council indicated that the Charter would include:-

– rights guaranteed by the ECHR
– rights derived from the constitutional traditions of Member States and reflected in case law
– rights exclusive to Union citizens under the Treaties
– economic and social rights, as contained in the European Social Charter, etc.

The present draft Charter goes a long way towards achieving these aims by creating a broad spectrum of rights and freedoms but the list as it stands calls into question EU competence in certain areas.

Under the Social Chapter subjects such as pay, the right of association, the right to strike and the right to impose lock-out, are formally excluded from legislative procedures. These, along with educational and welfare provision, currently remain the firm responsibility of the Member States.

The Charter will lose its legitimacy if it is used to bypass the existing decision-making processes to give additional competencies and create new rights in these areas. It will also prove to be more difficult to gain consensus on content if policy objectives or political aspirations are translated into rights.

The position of the Member Companies of the European Study Group is that the Charter should be a clear statement of standards that EU citizens enjoy, which would not impose any new legal obligations on Member States. 5

Implementation Plan

The Charter requires a detailed implementation plan to effectively convey the importance of fundamental rights for the citizens of the European Union, and to emphasise the democratic legitimacy of the Charter to the EU's citizens. The debate so far has been somewhat anodyne and is far removed from the awareness of the general public; unless the Charter is properly explained, it can easily be misrepresented by the malicious or hijacked by the mischievous for ulterior political purposes. In either circumstance, the Charter would run the risk of failing in its mission.

Critical to the execution of a successful plan for the Charter's implementation, is that its objectives should be clearly defined, it should be easily understood, and it should deal only with truly fundamental issues; non-core messages will only serve to over-burden the Charter, complicate the objectives, detract from the accurate communication of the Charter's purpose and confuse the focus of the exercise. Whether or not the document should be put to the citizens of all individual Member States for ratification by national vote, conducted by popular referendum,[1] should be considered as part of the overall plan to gain full democratic legitimacy for the Charter at Member State level.

This is a key consideration, given the fact that some Member States intend to put the matter to referendum, and that the absence of a common EU line might become divisive. The sensitivity of properly communicating the importance of EU citizenship and awareness of its purpose and values should not be underestimated. We refer especially to the poor electoral turn-out to the 1999 European Parliament elections, and the question mark which this has posed concerning the democratic deficit which exists between the institutions of the EU and its citizens. In this connection, a proper implementation and communications plan should be budgeted for, as a quintessential element of the strategy for this exercise.

1 Ireland and Denmark have indicated that a national referendum might be sought. It is important that the Citizens of the EU all feel that they have ownership, and buy into the exercise. The citizens of Member State "X" (which is to the contrary not planning any referendum) might very well feel aggrieved and question the democratic legitimacy of such a document if they know that the citizens of Member State "Y" are going to hold a referendum, whilst they (the citizens of state "X") are being denied this opportunity. This could detract from the whole purpose and value of the exercise, by undermining its perceived democratic legitimacy. However, this does call into question why a referendum is being called by some Member States if the Charter is merely a restatement of rights which are already in existence.

Detailed Observations

Articles 1 to 30

These proposals cover Civil, Political and Citizens' Rights matters on which we offer no specific comment at this time. We consider that as employers, generators of wealth and creators of jobs, our primary area of expertise, in which we are likely to be of most assistance to the work of the Præsidium, is in respect of the proposals for Articles 31 to 50 contained in Convent 34.

Article 31. Social rights and principles

It is important to carry out a full economic impact assessment of the implications of this Article and the subsequent articles dealing with Social and Economic issues. The economic impact assessment should consider the impact of this Article and the following Articles 32-50 (whether legally binding or declaratory) on job creation in the European Union, the impact on Member State public expenditure to implement these requirements, anticipated fiscal measures to pay for these costs, and the consequent impact on the competitiveness of European business in the global market, benchmarked against international companies of other jurisdictions.

Article 32. Freedom to chose an occupation

Should this Article not be balanced by the right of the individual to choose not to engage in an occupation, and also the right of the employer to refuse or to terminate employment in accordance with the national law of the relevant Member State jurisdiction?

Article 33. Workers' right to information and consultation within the undertaking

The Cologne principles state that "In drawing up the Charter, account should 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". Does not the proposal to include this Article conflict with the Cologne principles? This Article deals with a policy proposal that is already under consideration for action by the EU's institutions. The question of employee communications is under discussion by the Council in the context of the Commission's Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community, (COM (1998) 612 final). In this context, it should be noted that the questions of subsidiarity, proportionality and economic impact of the Commission's proposal have yet to be examined in detail by the Council.

Article 34. Rights of collective bargaining and action

Does not the proposal to include this Article conflict with the Cologne principles, in that it is a statement of aspirational policy? This is a subject that should be dealt with in accordance with the principle of subsidiarity and is not a matter for determination at EU level. The Charter will be promoted as being something of real significance to the citizens of the EU; it would therefore be counter-productive to attempt to cover political aspirations or statements concerning areas of policy in this document which are already adequately dealt with by alternative processes which respect the principle of subsidiarity where this is appropriate. Would the EU's citizens understand or respect the Charter if it contained promises upon which the EU's institutions cannot deliver?

Article 35. Right to rest periods and annual leave
Article 36. Safe and healthy working conditions
Article 37. Protection of young people

There are alternative processes in the EU Treaties available to examine the merits of these various propositions and to seek to achieve these objectives, if found to be justified having regard to their economic impact. In accordance with the Cologne principles, these subjects should accordingly be dealt with separately under the Commission's respective action programmes for the policy areas concerned, and not by the Charter.

Article 38. Right to protection in cases of termination of employment

Whilst the Member Companies of the European Study Group are sympathetic to the notion of protection against unfair or wrongful termination of employment, we are clear that there is currently no right at European Union level to such protection. Such protection that exists at national level should remain at national level. In addition, it should be noted that all employers have a right to refuse or terminate employment in accordance with the national law of the Member State concerned.

Article 39. Right to reconcile family and professional life

Although important, this is not a fundamental right. Member State competence is established already in this area. In accordance with the principle of subsidiarity and the Cologne principles, this subject should be dealt with under the respective national social programmes and not by the Charter. At the level of the workplace, the influence of the new economy is in any case already promoting company-based programmes that support work/life balance for employees. The indications are that the number and influence of these programmes will grow in the coming years, particularly in the context of growth in part-time employment and the rise in the number of women at work.

Article 40. Right of migrant workers to equal treatment

This subject is properly a matter for public policy within the Member States. It is not a fundamental right and as such is inappropriate for inclusion in the Charter. Also, the Cologne principles point to national action programmes and not the Charter as the correct context for this issue.

Article 41. Social security and social assistance

The sentiments and aspirations expressed in this article command wide support, but they are misplaced in a Charter of fundamental rights. The accompanying 'statement of reasons' acknowledges that social security and social assistance are implemented in national legislation. As economic and social issues they fall within the policy of each Member State under the principle of subsidiarity.

Article 42. Health protection

Health protection is a matter of public policy and not of fundamental rights under the Charter. To confuse the two, amounts to setting aside the Cologne principles, under which this subject is exclusively linked to public policy at the national level.

Article 43. The disabled

We note the Community has taken on new competence in this sphere under Article 13 of the Treaty, which has our full support. But we are unclear why it is necessary to repeat this as a fundamental right as it would appear to be already adequately provided for.

Article 44. Environmental protection

This provision describes an existing Community obligation. Whilst the objective is admirable, why does it have to be repeated as a fundamental right?

Article 45. Consumer protection

This is not a fundamental right. This is a statement of aspirational policy. It addresses important but non-fundamental areas of public policy relating to consumer affairs. There are alternative processes in the EU Treaties available to examine the merits of these various propositions and to seek to achieve these objectives, if found to be justified having regard to their respective economic impacts. In accordance with the Cologne principles, these subjects should accordingly be dealt with separately under the Commission's respective EU level action programmes for the policy areas concerned, and not by the Charter. Indeed, the competence to legislate under the Treaty in relation to health and safety matters lies exclusively with the Member States. Article 153 is a coordinating measure only. We doubt that it is necessary to repeat existing Treaty law, but if this is to be done, the repetition should be accurate.

Article 46. Scope

This Article states two admirable objectives which the Member Companies of the European Study Group fully support. The draft text of the Charter, as written, appears to contradict the provisions of Article 46 in a number and manner of ways. We hope the final text of the Charter will be in accordance with both Article 46 and the Cologne European Council mandate.

Article 47. Limitation of guaranteed rights

No specific comments.

Article 48. Conditions and limits defined by the Treaty

We support wholeheartedly the comments made in Article 48. (Also, see our comments on Article 46, above.)

Article 49. Level of protection

No specific comment.

Article 50. Prohibition of abuse of rights

No specific comment.

Summary

The Member Companies of the European Study Group welcome and endorse the notion of a Charter which delivers the benefits of visibility, good communications and positive ways of contributing to a strengthening of the culture of rights and responsibilities to be enjoyed by the present and future citizens of the European Union. However, we have certain important questions and concerns:

- **Clarity is required about the Charter's purpose and any enforcement measures that may be put in place to deliver the benefits that derive from it. Until these are clarified, employers cannot effectively consider the full implications of the draft Charter and therefore offer fully meaningful feedback.**

- **We need to know what the status of the Charter is to be. Is it to be a declaratory document or is it to be a legally binding Charter? Either way, we need to know what obligations and responsibilities will be placed on employers to conform and what remedies will it make available to individuals.**

- **Whatever status the final Charter has, Member Companies of the European Study Group would expect, at the very least, the usual intergovernmental procedures to be followed in adopting the Charter, but with the timescales for adoption extended to allow for detailed consideration of the issues and for effective consultation in the Member States.**

- **Once adopted, how is the Charter to be implemented and what opportunity will be given to the citizens of the European Union to have a say in its content and status? Will all Member States be encouraged or even required to hold a national referendum on its implementation?**

- **Finally, with regard to the proposals so far, the Member Companies of the European Study Group seriously question the legitimacy of including Articles 31–45 as these appear to extend the subject areas falling within the competency of the European Union. Therefore we would not expect these particular Articles to appear in the final draft of the Charter that is put forward for adoption.**

European Study Group
London, 30 th June 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 5 July 2000

CHARTE 4404/00

CONTRIB 261

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by "Groupement Européen des Sociétés d'Auteurs et Compositeurs" (GESAC) regarding copyright. [1] [2]

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[1] This text has been submitted in English and French languages.

[2] GESAC: 23, rue Montoyer. B-1000 Brussels. Tel: +32-2-511 4454. Fax: +32-2-514 5662. E-mail: gesac@skynet.ge

G E S A C

GROUPEMENT EUROPÉEN DES SOCIÉTÉS D'AUTEURS ET COMPOSITEURS

Brussels, 13 June 2000
CDF2000EN

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

COMMENTS AND PROPOSALS BY GESAC

GESAC, a European grouping of authors' and composers' societies in the European Union, Norway and Switzerland, supports the initiative proposed at the European Council in Cologne on 3 and 4 June 1999 concerning the formulation of a Charter of Fundamental Rights of the European Union. According to the actual conclusions of the Cologne and Tampere Councils, the aim of the Charter is to enshrine, on the basis of the existing Community legal framework, the exceptional importance and scope of fundamental rights in a visible manner for European Union citizens.

Copyright shares the characteristics of a fundamental right, and must be enshrined in the European Charter.

Copyright protects freedom of expression and of thought of citizens, and guarantees the creation of literary, artistic and scientific works. Emanating from the personality of its author, a work gives rise to a right which has all the attributes of a human right: it is a moral right, inalienable and indefeasible. From the moral point of view, copyright ensures the freedom of representation of the personality of its author.

Copyright is also a property right. A property of a special nature since it is intangible, but it has the same nature and must have the same fate as all other kinds of property. In terms of its pecuniary dimension, copyright guarantees the economic independence that is essential to ensure freedom of expression and of creativity. Copyright is one of the « branches » of freedom of expression and creativity which, through its fundamental and universal dimension, forms part of human rights.

The vocation of copyright is to increase the cultural heritage of the community as a whole. At a time when the wealth of content and of cultural diversity are assets for the European Union and its citizens, and when protecting and promoting them is a major challenge, notably for the harmonious development of the information society, GESAC considers that it is vital to recognise the importance and justification of copyright in a Charter of fundamental rights.

In expressly referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the constitutional traditions common to the Member States, the Treaty on European Union contains the bases for such recognition:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms :

  This Convention refers in its preamble to the United Nations Universal Declaration of Human Rights of December 1948, and asks the Member States to « take the first steps for the collective enforcement" of the rights set down in this Declaration.

  The Universal Declaration of Human Rights explicitly mentions copyright: « Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (Article 27). This Declaration has no binding legal force, but it indisputably has moral value, which is indirectly biding on the Union since it is one of the texts to which the Treaty refers.

- The common constitutional traditions of the Member States :

  Several European Constitutions refer directly or indirectly to the need to protect the rights of artists in order to guarantee freedom of thought and expression. For instance the Constitutions of Spain (Article 20), Portugal (Article 42) and Germany (Article 5). In France the National Advisory Commission on Human Rights issued an opinion on 14 November 1996 on the Internet Charter, in which it expressly referred to the protection conferred by copyright.

  GESAC proposes to the Convention that the following provision[1] be included in the text of the Charter:

  Article 20: right to property

  1. Everyone person has the right to own, use and dispose of lawfully acquired possessions. No one may be deprived of his possessions except in the public interest and in the cases and subject to the conditions provided for by law and subject to a prior guarantee of fair compensation.
  2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

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[1] Basis: document of 11 May 2000 ref. Charter 4284/1/00 Rev.1 Convent. 28.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 10. Juli 2000

CHARTE 4407/00

CONTRIB 264

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme vorgelegt von der Armutzkonferenz (Österreichisches Netzwerk gegen Armut und Soziale Ausgrenzung). [1] [2]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

[2] Die Armutzkonferenz: Postfach 318, 1070 Wien. E-mail: armutzkonferenz@akis.at

An den Europäischen Rat
Konvent zur Erarbeitung einer Charta der Grundrechte der Europäischen Union

**Stellungnahme durch „Die Armutskonferenz.
Österreichisches Netzwerk gegen Armut und soziale Ausgrenzung“ (3.Juli 2000)**

Die „Armutskonferenz“ ist eine NGO für Armutspolitik, in der sich 26 gesamtösterreichische bzw. bundesweit agierende Organisationen seit 1996 zusammengeschlossen haben. Zusammen mit den lokalen und regionalen Netzwerken, die in Österreich mit der „Armutskonferenz“ kooperieren, umfaßt das Netzwerk über 100 Organisationen in ganz Österreich.

Aktionsgemeinschaft der autonomen österreichischen Frauenhäuser/ Arbeitsgemeinschaft Schuldnerberatungen/ Bildungshaus St.Virgil/ Bundesarbeitsgemeinschaft Wohnungslosenhilfe/ Bundesdachverband soziale Unternehmen/ Caritas Österreich/ Diakonie Österreich/ Europäisches Zentrum für Wohlfahrtspolitik und Sozialforschung/ Evangelische Akademie Wien/ Forum Kirche und Arbeitswelt/ Internationaler Versöhnungsbund/ Katholischer Familienverband/ Katholische Frauenbewegung Österreichs/ Katholische Sozialakademie Österreichs/ Mieterschutzverband Österreichs/ Netzwerk österreichischer Frauen- und Mädchenberatungsstellen/ Österreichische Hochschülerschaft/ Österreichische Plattform der Alleinerziehenden/ Österreichischer Berufsverband Diplomierter SozialarbeiterInnen/ Österreichisches Kolpingwerk/ SOS Mitmensch/ Verein für Bewährungshilfe und soziale Arbeit/ Vereinigte Arbeitsloseninitiativen/ Volkshilfe Österreich

1. Der Rechtstext sollte innovativen Charakter erhalten, u.a. indem er ein **Recht auf soziale Grundsicherung unabhängig von Erwerbstätigkeit bzw. Versicherungsleistungen** aufnimmt. Dadurch würde die Charta im Rahmen der Europäischen Gemeinschaft zur Fortentwicklung des Rechts der sozialen Sicherheit beitragen. Bereits der *„Schlußbericht der Kommission an den Rat über das Erste Programm von Modellvorhaben und Modellstudien zur Bekämpfung der Armut“* (1983) nennt ja unter den Schritten zur Beseitigung von Armut die Gewährleistung eines effektiven Mindesteinkommens, um die Haushalte in der Gemeinschaft über der Armutsschwelle zu halten.
   Vor allem mit Blick auf neue Technologien und Organisationsformen (Rationalisierung, wachsende Arbeitsproduktivität) und die damit einhergehende Erwerbsarbeitslosigkeit ist ein „Recht auf Arbeit“ nicht ausreichend, sondern müßte durch ein Recht auf soziale Sicherung unabhängig vom Erwerbseinkommen ergänzt werden, um allen Bürgerinnen und Bürgern ein Leben zu ermöglichen, das ihrer Menschenwürde entspricht.

2. Die Erarbeitung einer europäischen Grundrechts-Charta für alle würde die Gelegenheit bieten, daß die Bürgerinnen und Bürger „Europa“ nicht bloß als Wirtschaftsunion, vielmehr als eminent politisches Projekt erfahren – als Gemeinschaft, die für Demokratie, Rechtstaatlichkeit und Menschenrechte steht. Um einen breiten Diskussionsprozeß über Ziel, Inhalte und Richtung der Charta zu ermöglichen, die das Entstehen einer europäischen Öffentlichkeit fördern würde, sollte die **Arbeitszeit an der Charta verlängert** werden. Zugleich sollte der Europäische Rat nach Möglichkeiten suchen, wie eine breitere Diskussion in allen Mitgliedsländer unterstützt werden könnte.

3. Weiters unterstützen wir die Forderung des Europäischen Parlaments vom 14. März 2000 nach **voller Rechtsverbindlichkeit** der Charta durch Aufnahme in die reformierten EU-Verträge.
Ebenso schließen wir uns der Ansicht des Parlaments an, daß die **Unteilbarkeit von Grundrechten** anerkannt werden muß – der Geltungsbereich der Grundrechte muß sämtliche Institutionen, Organe der Europäischen Union und alle Politikfelder umfassen.

4. Entsprechend des Mandats des Konvents, das der Europäische Rat in den Schlußfolgerungen von Köln am 4 . Juni 1999 ausdrücklich erwähnt hat, sollen (über das im Punkt 1 genannte Recht) **soziale Rechte** in die Charta aufgenommen werden, wie sie in der Europäischen Sozialcharta und der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer enthalten sind. Dies wäre eine Konsequenz aus der Absichtserklärung der EU im Amsterdamer Vertrag, den sozialen Grundrechten mehr Augenmerk zu schenken (Präambel, vierter Erwähnungsgrund).

Die Armutskonferenz
Postfach 318
1070 Wien
e-mail: armutskonferenz@akis.at

PROYECTO DE CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

fundamental.rights@consilium.eu.int

Bruselas, 10 de julio de 2000 (11.07)
(OR. fr/es)

CHARTE 4409/00

CONTRIB 266

NOTA DE TRANSMISIÓN

Asunto: Proyecto de Carta de los Derechos Fundamentales de la Unión Europea

Se adjunta una nueva versión de la propuesta de la "Sociedad General de Autores y Editores" (SGAE)".[1]

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[1] Este texto ha sido presentado sólo en lengua española.

PROYECTO DE CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

Propuesta de la Sociedad General de Autores y Editores (SGAE)

El 25 aniversario de la Declaración Universal de los Derechos Humanos, celebrado en diciembre de 1998, llevó al Consejo Europeo de Colonia del 3 y 4 de junio de 1999 a proponer, para finales del año 2000, la elaboración de una Carta de los derechos fundamentales de la Unión Europea. En su Decisión, el Consejo recuerda que en el artículo 6 del TUE "consta que la Unión se basa en los principios de libertad, democracia, respeto de los derechos humanos y de las libertades fundamentales del Estado de Derecho, principios que son comunes a los Estados miembros" y que "la Unión respetará los derechos fundamentales tal y como se garantizan en el Convenio Europeo para la Protección de los Derechos Humanos y las libertades fundamentales (CEDH) y tal y como resultan de las tradiciones constitucionales comunes a los Estados miembros como principios generales del derecho comunitario". El Consejo también considera en su decisión que al redactar la Carta deberán tenerse en cuenta "los derechos económicos y sociales, la Carta Social Europea y la Carta comunitaria de los derechos sociales fundamentales de los trabajadores".

Por todo ello, la SGAE entiende que el derecho de autor debe de formar parte de la futura Carta de derechos fundamentales de la Unión Europea y, como representante de parte del colectivo de autores españoles y europeos, solicita a la Convención encargada de redactar dicha Carta que, en base a los argumentos que a continuación se exponen, tenga en consideración su petición.

1. El CEDH en su preámbulo:

- "Considera la Declaración Universal de los Derechos del Hombre, proclamada por la Asamblea General de las Naciones Unidas el 10 de diciembre de 1948",
- Reconoce que el "objetivo del Consejo de Europa es alcanzar una unión más estrecha entre sus miembros y que uno de los medios para conseguirla es mediante la salvaguarda y el desarrollo de los derechos del hombre y de las libertades fundamentales";
- **Insta a los Estados miembro a "tomar las medidas apropiadas para asegurar la garantía colectiva de algunos de los derechos enuniciados en la Declaracíon Universal de los Derechos del Hombre".**

La Declaración Universal de los Derechos del Hombre de 1948 hace referencia de manera explícita al derecho de autor en su artículo 27:

> "Toda persona tiene derecho a participar libremente en la vida intelectual de la comunidad, a disfrutar de las artes y a participar en la vida científica y en los beneficios que de él resulten. **Toda persona tiene derecho a la protección de los intereses morales y materiales que le correspondan por razón de las producciones científicas, literarias o artísticas de que sea autora".**
>
> Esta Declaración no tiene la fuerza del derecho internacional, pero sí tiene un valor moral. Se considera que forma parte del derecho consuetudinario de las naciones y que vincula moralmente a todos los Estados, sobre todo a aquellos que la firmaron y que firmaron a continuación los dos Pactos de las Naciones Unidas de 16 de diciembre de 1966. De hecho, **la obligacíon legal de respetar el derecho de autor**

proviene, de uno de esos pactos, el **Pacto de Naciones Unidas sobre los Derechos Económicos, Sociales y Culturales,** cuyo artículo 15, inciso 1) apartado c) reproduce casi literalmente el artículo 27 de la Declaración. **Este Pacto vincula** a más de 130 Estados entre los que figuran **todos los Estados de la Unión Europea.**

Es importante destacar también, como lo ha hecho la Doctrina más especializada [1], que, si bien el articulado del CEDH no hace alusión expresa al derecho de autor, debe tenerse en cuenta que este Convenio se preocupa fundamentalmente de la protección del ciudadano frente a las intrusiones excesivas del poder público, y que se trata por lo tanto y ante todo, de un texto de "habeas corpus" ampliado. Precisamente en el Borrador de la futura Carta [2], el Consejo deja claro que los objetivos de la misma son más amplios, ya que con ella aspira a alcanzar un principio básico de la Unión Europea: "la salvaguardia de los derechos fundamentales", para lo cual toma **como base** "un marco jurídico ya establecido y vinculante".

2. Varias Constituciones europeas hacen referencia de manera directa o indirecta a la necesidad de salvaguardar los derechos de los creadores para garantizar así libertad de pensamiento y de expresión. La **Constitución española** (artículo 20), la **Portuguesa**(artículo 42), la **alemana** (artículo 5) y el artículo 44 de la joven **Constitución de la Federación Rusa**, nacida en 1993. **En Francia**, la Comisión Nacional Consultiva de los Derechos del Hombre, en su Opinión de 14 de noviembre de 1996 sobre la "Carta de Internet", recomendó a los poderes públicos "que favorezcan la protección de los documentos y estudios protegidos por la propiedad intelectual y por los derechos de autor".

3. Por estos motivos, la SGAE propone a la Convención integrar en en artículo 20 de la Carta la siguiente disposición:

Artículo 20. Derecho de propiedad

1. Toda persona tiene derecho a poseer bienes adquiridos legalmente, a usarlos y a disponer de ellos. Nadie puede ser privado de su propiedad, salvo por causa de utilidad pública y en los casos y condiciones previstos por la Ley y a cambio de una justa indemnización previa.

2. Toda persona tiene derecho a la protección legal de sus intereses morales y materiales en razón de las producciones científicas, literarias o artísticas de las que es autor.

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1 André Kéréver. "El Derecho de Autor es uno de los Derechos Humanos". Boletín de Derecho de Autor, vol. XXXII, nº3. Julio-septiembre 1998.

2 Ver: http://db.consilium.eu.int/DF/intro.asp?lang=es

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 11 July 2000

CHARTE 4410/00

CONTRIB 267

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a motion of the Liaison Committee of the Non-Governmental Organisations (NGOs). [1]

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[1] This text has been submitted in English and French languages.

LIAISON COMMITTEE OF THE
NON-GOVERNMENTAL ORGANISATIONS (NGOs)
enjoying consultative status
with the COUNCIL OF EUROPE
COMMISSION DE LIAISON DES
ORGANISATIONS NON GOUVERNEMENTALES (ONG)
dotées du statut consultatif
auprès du CONSEIL DE L'EUROPE

27 June 2000

Motion of INGOs having consultative status with the Council of Europe

407 international non-governmental organisations representing,
in the 41-nation Council of Europe, all aspects of life and tens of millions of people

The international non-governmental organisations meeting on 27 June at the Palais d'Europe in Strasbourg unanimously call on the Convention drawing up the draft Charter of Fundamental Rights of the European Union and the member states which shall be deciding upon it, to ensure that:

1. the principle of solidarity be included at the beginning of the Charter on a par with the principle of equality and the affirmation of the dignity of the human being;

2. the indivisibility of human rights be confirmed by the contents of the Charter and expressed in its structure, and that the universality of these economic, social, cultural, civil and political rights be acknowledged;

3. the European Union accede to the two Council of Europe instruments which implement the Universal Declaration of Human Rights, namely the European Convention on Human Rights and the revised European Social Charter, including their additional protocols;

4. the Charter of Fundamental Rights be incorporated into the treaties of the European Union, thereby acquiring a binding force;

5. the new risks and needs concerning protection of citizens in our society be covered by the Charter, including in the field of bioethics, the environment and information technology;

6. the principle of participatory democracy be strengthened in the Charter by including recognition of the right to civil dialogue granting organised civil society the right to information, communication and consultation in order to participate, propose, negotiate and verify political processes.

The INGOs having consultative status with the Council of Europe call for the opening of a transparent, democratic and participatory process on the future constitution of the European Union, independently of the drafting of the Charter of Fundamental Rights.

Council of Europe
Conseil de l'Europe
F – 67075 STRASBOURG cedex

Secretariat:
Tel: +33 (0)3 88 41 31 07
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Secretariat:
E-mail: NGO-Unit@coe.int
http://www.coe.fr

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 13. Juli 2000

CHARTE 4415/00

CONTRIB 271

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme, vorgelegt von IG Medien, zu Artikel 15. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

IG-Medien-Vorschlag

für ein

Europäisches Grundrecht der Medien-, Meinungs- und Informationsfreiheit

in der

Charta der Grundrechte der Europäischen Union

Die IG Medien – Druck und Papier, Publizistik und Kunst (IG Medien) ist eine Organisation für Medienschaffende sowie Künstlerinnen und Künstler aller Sparten. Seit ihrer Gründung setzt sie sich, wie bereits ihre Vorläuferorganisationen, nicht nur für die unmittelbaren wirtschaftlichen und sozialen Rechte ihrer Mitglieder ein, sondern darüber hinaus auch für die Medien-, Informations- und Meinungsfreiheit als unverzichtbare Grundlage demokratischer Verfassungsstrukturen.

In der Diskussion um den Vorschlag des Grundrechtskonvents um ein Grundrecht auf Meinungs- und Informationsfreiheit sieht die IG Medien die Chance „ein Mediengrundrecht als künftiges genuines EU-Grundrecht“ neu zu konzipieren und „auf eine supranationale konstitutionelle Weiterentwicklung der Union“ zuzuschneiden.

Die IG Medien ist der Auffassung, dass es höchste Zeit ist, die Diskussion über EU-Kommunikationsgrundrechte medienspezifisch zu vertiefen und zu verbreitern. Dies kann letztlich auch dazu dienen, den europäischen Integrationsprozeß voranzubringen und zu intensivieren.

Den Medien und insbesondere dem öffentlich-rechtlichen Rundfunk kommt hierbei im Sinne eines wirklichen „public service“ eine besondere Bedeutung zu. Nachdrücklich ist auf das Protokoll zum Vertrag von Amsterdam und die Position des Ministerrates zu verweisen. Dort wird zu Recht festgestellt, „daß der öffentlichrechtliche Rundfunk mit seinen kulturellen, sozialen und demokratischen Aufgaben, die er zum Wohle der Allgemeinheit erfüllt, von entscheidender Bedeutung für Demokratie, Pluralismus, sozialen Zusammenhalt, kulturelle und sprachliche Vielfalt ist“ (Entschließung des EU-Ministerrats und des Europäischen Rats über den öffentlich-rechtlichen Rundfunk vom 25.1.1999, Amtsblatt der EG Nr. C 30 vom 5.2.1999, S. 1).

Die IG Medien bezieht sich in diesem Zusammenhang auf Positionen und Stellungnahmen namhafter Medienwissenschaftler und Verfassungsrechtler (u.a. Professor Martin Stock), dass ein Grundrechtsverständnis, das gemäß Art. 10 der Europäischen Menschenrechtskonvention (EMRK) argumentiert, den Anforderungen an ein zukunftsfähiges Rundfunk- und Medienrecht nicht gerecht wird.

Die IG Medien schlägt daher folgende Fassung für den Art. 15 der Grundrechtscharta vor:

(1) Das Recht der freien Meinungsäußerung wird gewährleistet. Ebenso wird das Recht gewährleistet, sich aus allgemein zugänglichen Quellen umfassend zu informieren. Dies schließt insbesondere den Zugang zu kulturellen Angeboten und Angeboten der Bildung ein.

(2) Die Freiheit der Presse, des Rundfunks, des Films sowie der sonstigen an die Allgemeinheit gerichteten Kommunikation wird gewährleistet.

(3) Der Rundfunk dient der Information durch umfassende und wahrheitsgemäße Berichterstattung und durch die Verbreitung von Meinungen. Er trägt zur Bildung und Unterhaltung bei. Er ist Medium und Faktor des Prozesses freier Meinungsbildung. Er trägt der kulturellen Vielfalt in Europa Rechnung und fördert die europäische Integration. Er nimmt damit eine öffentliche Aufgabe wahr und ist darum unabhängig in der Programmgestaltung. Unbeschadet des Angebots privatwirtschaftlichen Rundfunks, werden Bestand und Entwicklung von Rundfunk in öffentlicher Trägerschaft gewährleistet.“

(4) Auf rundfunkähnliche Mediendienste sind diese Bestimmungen entsprechend anzuwenden.

(5) Eine Zensur findet nicht statt.“

Stuttgart, 30. Juni 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 July 2000

CHARTE 4416/00

CONTRIB 272

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a letter to Mr. Roman HERZOG, the President of the Convention, sent by the "Comité des Organisations Professionelles Agricoles de l"Union Européenne (COPA)", regarding the document CHARTE 4360/00 CONVENT 37. [1]

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[1] This text has been submitted in German, French and English languages.

Comité des Organisations Professionnelles Agricoles de l'Union Européenne

CC(00)132L1

Brussels, 7 July 2000

Mr Roman HERZOG
President of the Convention Charter of Fundamental Rights of the European Union
Council of the European Union
175, rue de la Loi
B-1048 Brussels

Re: Draft Charter of Fundamental Rights of the European Union (Doc. 4360/00)

Dear Mr President,

COPA follows with great interest the work of the Convention on the Charter of Fundamental Rights of the European Union.

The Charter will create an undeniable basis for the further development of the European Union.

It is evident that the Charter is of fundamental importance for those citizens working in European agriculture. Of special importance is the protection of property of the most important means of production, i.e. the land.

However, we would like to express basic reservations on the current draft of Article 20.

1. „Lawfully acquired possessions".

COPA considers that the words "lawfully acquired" should be deleted.

We are of the opinion that property is basically lawfully acquired. The wording "lawfully acquired" possessions means that the Convention assumes that property is usually not "lawfully" acquired. In any case, the wording "lawfully acquired" substantially restricts the protection of property. The fulfilment of this condition could only be evidenced with much difficulty (e.g. long dated acquisitions).

Therefore, COPA considers that the protection of property shall not be subject to this restriction.

2. **Restriction of possession, use and disposal**

COPA requests to add after the word „deprived" in sentence 2, 1 the words „**or restricted**".

Restricting the possession, use of property and disposal thereof will affect the core area of property. This kind of restriction must be fully compensated.

3. **Bequeathing**

COPA supports the proposal of the Praesidium of the Convention to add the right to bequeath to Article 20.
The right to bequeath is an essential part of property in all legal systems.

4. „**Fair** compensation "

COPA considers that the word "fair" in the second sentence should be replaced by the words "prior and full".
The withdrawal of property can only be operated in return for prior and full compensation. The wording "fair" gives cause to concern that possibly a lower compensation could be sufficient. Prior payment of compensation at the time of withdrawal of property is indispensable.

Therefore, COPA proposes the following text:

Article 20: Right to property

"Every person has the right to own, use, dispose of and bequeath possessions. No one may be deprived or restricted of his possessions, except in the public interest in the cases and subject to the conditions provided for by law and subject to prior and full compensation."

COPA trusts that you will take due account of the these considerations

Yours sincerely,

Noël DEVISCH
President of COPA

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 July 2000
(OR.En/Sw)

CHARTE 4418/00

CONTRIB 274

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from the boards of the Swedish Association of Local Authorities and the Federation of Swedish County Councils.[1]

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[1] This text has been submitted in English and Swedish.

SWEDISH
ASSOCIATION OF LOCAL AUTHORITIES

LANDSTINGS FÖRBUNDET
FEDERATION OF SWEDISH COUNTY COUNCILS

2000-05-19 *SK dnr: 2000/1204*
Lf dnr: 591/00

The EU Charter on Fundamental Rights

At the meeting in Cologne, the European Council resolved to draw up a Charter on fundamental rights for EU citizens. Work on drawing up a proposition is in progress within the so called Convention framework, comprising representatives of the governments and parliaments of the member states and from the European Parliament and the European Commission. The regulations are designed to apply to EU authorities and to official decisions based on European Community law.

The decision to draw up the Charter has generated intensive discussion, both within EU institutions and other European and national bodies. Common to most are far-reaching demands to create EU level guarantees for both basic human rights and cultural and individual rights, social rights e.g. rights to housing, social security, medical support and health protection, labour legislation and civil and political rights. Guarantees to be implemented by citizens being able to uphold their rights in the European Court of Justice.

The Boards of the two associations take note of the wide unity prevailing amongst EU member states over the need to clarify how the European Community protects and watches over fundamental rights. In efforts to establish more solid foundations for the Community it is necessary to explain to citizens the added value the Community can give them at this fundamental level.

It is both natural and urgently necessary for the EU to codify and clarify the human and civil rights pertaining to EU legislation in the Charter. According to the instructions issued for this work, it shall be established how the Charter is to relate to the Council of Europe Convention on human and social rights.

The conviction of the two Boards is that a EU Charter on fundamental rights must respect and take into consideration the division of competence reigning between member states and the EU but also the part played by municipalities and regions in national political systems. The rights that should be granted all EU citizens are already law in most member states, either by national constitution or via Council of Europe treaties on human and social rights.

In Sweden, local self-government is firmly established in the political system. In the other EU countries, a high level of self-government at sub-national level is also a central component in the democratic system.

The two Boards find that the draft texts now being promoted and proposed to the Convention include proposals for providing detailed determination of individual rights in e.g. the social sphere to which EU citizens are to be entitled at EU level. As representatives for local and regional authorities we strongly advocate a restrictive policy against opening up opportunities for the European Court of Justice to review in detail political decisions taken within the framework of local self-government and complying with the laws of a member state.

An important principle in regard to individual rights over and above fundamental civil rights enshrined in the Swedish Constitution is that those who decide over rights carry responsibility for the financing of the execution of such rights. In Sweden, most of this responsibility lies with the municipalities and / or county councils. Another requirement is that decisions on the modalities of service provision rests with those who decide upon rights. In Sweden this obligation usually falls upon municipalities or county councils. A third requirement in our country is for judicial reviews of decisions on beneficial rights to be restricted to legal requirements whereas issues within the discretion of local authorities cannot be challenged in the Courts. A fourth principle is that it must be possible to insist on elected decision makers assuming their political responsibilities.

It is important to make clear that the Charter on fundamental rights which is finally adopted is subject to EU authority and, to the extent that it is relevant to the area with shared competence between the EU and its member states. It is also made clear that the subsidiarity principle is to dictate the division of authority between different levels - that authority is to be placed at the lowest effective level. This principle should apply to both division of authority between the EU and member countries and to national division on executive levels. It will accordingly be the national delegation of responsibility which applies and which determines where and how citizens are to be able to demand their more exact political, economic and social rights - alongside the fundamental rights written into the EU treaties.

The value of municipal and regional self-government through communes and county councils is recognised and established throughout Europe, as can be seen from the fact that the Council of Europe Charter on local self-government has been ratified by the great majority of EU member states. Principally, local self-government is of very real importance to the private individual, providing opportunities to exert political influence in close dialogue with elected representatives. In order to emphasise that local self-government contains its own status as a civil right, this should be written into a future treaty.
To sum up the two Boards recognise the value of civil and human rights being codified and written into the Charter now in preparation, but do not consider that this text should open up for an extension of EU authority by judicial interpretation of the Court within the social areas as described in this memorandum.

Swedish Association
of Local Authorities

Ilmar Reepalu

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Lars Isaksson

PROYECTO DE CARTA DE DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA

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Bruselas, 17 de julio de 2000

CHARTE 4419/00

CONTRIB 275

NOTA DE TRANSMISIÓN

Asunto: Proyecto de Carta de derechos fundamentales de la Unión Europea

Adjunta se remite una contribución de D. Isaac IBÁÑEZ GARCÍA.[1]

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[1] Este texto se ha presentado únicamente en español.

EL DERECHO DE PETICIÓN EN LA UNION EUROPEA. LOS SUJETOS PASIVOS DEL MISMO: PROBLEMA MAL RESUELTO Y AUN ABIERTO.

Isaac Ibáñez García

I.- I N T R O D U C C I O N. CONSIDERACIONES PRELIMINARES.

En el Consejo Europeo de Colonia (3 y 4 de junio de 1.999) los Jefes de Estado o de Gobierno, se pusieron de acuerdo sobre la idea de que, en el actual estado de evolución de la Unión, era necesario establecer una Carta de los derechos fundamentales con el fin de poner de manifiesto la importancia sobresaliente y el alcance de los mismos ante los ciudadanos de la Unión.

La Carta se adoptaría mediante una declaración solemne y conjunta del Consejo Europeo, el Parlamento Europeo y la Comisión. El antecedente a esta declaración es la Declaración conjunta del Parlamento Europeo, del Consejo y de la Comisión, de 5 de abril de 1.977 (recogida en la obra: Derecho Comunitario Europeo. Libertades económicas y derechos fundamentales. LOPEZ GARRIDO, MARTINEZ HIGUERAS y HERNÁNDEZ F. DEL VALLE. Tecnos, 1986. Donde también se recogen otros textos y trabajos relativos al devenir del tema de los derechos fundamentales en las Comunidades Europeas). El breve texto de la Declaración fue el siguiente:

"1) El Parlamento Europeo, el Consejo y la Comisión subrayan la esencial importancia que atribuyen al respeto de los derechos fundamentales, que resultan en concreto de las Constituciones de los Estados miembros, así como del Convenio Europeo de Protección de los Derechos del Hombre y de las Libertades Fundamentales.

2) En el ejercicio de sus poderes y persiguiendo los objetivos de la Comunidad Europea, respetan y continuarán respetando tales derechos".

En una fase posterior a este proceso el Consejo manifiesta que se examinaría si la Carta debe incorporarse a los Tratados y, en caso afirmativo, de qué modo ha de hacerse. En su Resolución adoptada el 16 de marzo de 2000 (Informe de los Sres. Duff y Voggenhuber), el Parlamento Europeo pide a la Conferencia Intergubernamental que:

"a) incluya en su orden del día la incorporación al Tratado de la Unión Europea de la Carta de los Derechos Fundamentales, teniendo en cuenta el papel fundamental que juega en la realización de una Unión cada vez más estrecha entre los pueblos de Europa".

El Consejo ha estimado que dicha Carta deberá incluir los derechos de libertad e igualdad y los principios procesales fundamentales. **La carta deberá contener asimismo los derechos básicos que corresponden únicamente a los ciudadanos de la Unión.**

Para MENDEZ DE VIGO (Presidente de la Delegación del Parlamento Europeo en la Convención encargada de redactar la Carta de los Derechos Fundamentales), "la elaboración de una Carta de esta naturaleza supone el reconocimiento del carácter político de la Unión". En su discurso en la primera reunión de la Convención para la elaboración de la Carta, celebrada el 17 de diciembre de 1999, manifestó el deseo de que "la Carta de los Derechos Fundamentales debe tener carácter vinculante y debe ser incorporada al Tratado. En la medida en que los Tratados constituyen la Carta Constitucional de la Unión Europea, según reiterada jurisprudencia del Tribunal de Justicia, la Carta de Derechos Fundamentales debe formar parte de la misma. Y pienso que la coincidencia temporal entre el final de nuestros trabajos y de la Conferencia Intergubernamental es una buena ocasión para cumplir con ese objetivo".

Esta opinión es coincidente con la manifestada en el Informe del grupo de expertos sobre derechos fundamentales (Afirmación de los derechos fundamentales en la Unión Europea. Ha llegado el momento de actuar. Febrero 1.999), donde puede leerse: "El texto con la enumeración de los derechos debería introducirse en una parte especial o en un título particular de los Tratados. El lugar elegido deberá ilustrar claramente la importancia capital que se concede a los derechos fundamentales".

El representante único de la Comisión en la Convención, ANTONIO VITORINO, en su discurso en la primera reunión de la Convención, manifestó que "La Comisión se felicita por la transparencia conferida a los trabajos de este órgano: la redacción de un acto de tal importancia práctica e incluso simbólica no estaría en consonancia con el secretismo y la confidencialidad; la transmisión de los debates y, en especial, la disponibilidad de todos los documentos de trabajo en el sitio Internet dedicado a este órgano son ejemplos loables que deberían seguirse en otras ocasiones".

II.- EL DERECHO DE PETICIÓN EN LA UNION EUROPEA.

En mi opinión, el artículo 21 del Tratado CE, en su redacción dada por el Tratado de Ámsterdam, supone un avance sobre su regulación anterior, pero tiene una redacción confusa, que puede llegar a ser interpretada como que el Derecho de petición únicamente puede ejercitarse ante el Parlamento Europeo y no ante el resto de las instituciones u organismos de la Unión. De hecho así ha llegado a interpretarse por alguna.

Así, ante una petición formulada en el año 2.000 ante el Consejo de la Unión Europea, un funcionario del mismo contestó lo siguiente: "El artículo 21 TCE reconoce el derecho de petición ante el Parlamento Europeo **y no ante el Consejo**". Planteada esta cuestión al Defensor del Pueblo Europeo como un caso de mala administración, este contestó que no se trata de un caso de mala administración, "sino de una actuación de carácter político del Consejo de la Unión Europea", por lo que el Defensor dice no tener competencia para tramitar la reclamación. A nuestro juicio, el Defensor debería haberse planteado el estudio de la reclamación en otros términos. En efecto, primero debería haber analizado si el artículo 21 del TCE reconoce el ejercicio del derecho de petición ante el Consejo. De ser así es claro que estaríamos ante un caso de mala administración. La actuación del Consejo sería de carácter político en lo relativo a la decisión sobre el fondo de la petición, pero no sobre la negativa de tramitarla, en caso de que estuviera obligado a ello. La simple negativa de la Comisión de peticiones del Parlamento Europeo a examinar una petición relativa a un ámbito de actuación de la Unión Europea ¿sería un acto político no fiscalizable por el Defensor?.

El Defensor del Pueblo contesta posteriormente que:

"... No se recoge en el Tratado de la Unión Europea la obligación por parte del Consejo de la Unión Europea de aceptar a trámite una petición proveniente de un particular.

En este sentido, el artículo 21 del TUE, habla del derecho de petición ante el Parlamento Europeo de todo ciudadano. Además, en su tercer párrafo: *"Todo ciudadano de la Unión podrá dirigirse por escrito a cualquiera de las instituciones (...) y recibir una contestación en esa misma lengua*". En tanto que usted recibió respuesta del Consejo de la Unión Europea, no considero que se haya violado la letra del Tratado en ningún sentido".

No acabamos de entender si la reforma operada en el artículo 21 del TUE se refiere únicamente –y para ello es necesario reconocer lo obvio a nivel de todo un Tratado- a que si algún ciudadano cursa un escrito a alguna de las instituciones de la Unión Europea**, relativo a algún asunto de la competencia de las mismas**, tiene garantizado que se le contestará en alguna de las lenguas oficiales, aunque sea para decirle, simplemente, que le saludan muy atentamente y que, en el derecho comunitario actual, esta es contestación más que suficiente.

En el Glosario incluido en la página *web* de la Comisión Europea (sitio: Europa en directo, diálogo con los ciudadanos y las empresas), puede leerse lo siguiente acerca del Derecho de Petición:

"Por derecho de petición se entiende el derecho de todo ciudadano de la Unión Europea y de toda persona física o moral residente o con su sede estatutaria en un Estado miembro de presentar ante el Parlamento una queja o demanda sobre un asunto de la competencia de la Comunidad que le afecte directamente (artículos 21 y 194, ex artículos 8 D y 138 D del Tratado CE).

La Comisión parlamentaria de peticiones estudia la admisibilidad de la demanda y, si lo juzga necesario, puede someter la cuestión al Defensor del Pueblo. Para emitir un dictamen sobre una petición admisible, dicha Comisión puede solicitar a la Comisión Europea que le remita los documentos o la información necesarios.

El Tratado de Ámsterdam ha completado el artículo 21. Un nuevo párrafo precisa que todo ciudadano de la Unión puede escribir a cualquier Institución europea, al Comité de las Regiones, al Comité Económico y Social o al Defensor del Pueblo europeo, en cualquiera de las lenguas oficiales de la Unión, incluido el gaélico, y recibir una respuesta en la misma lengua".

No se desprende gran claridad de ideas, *sobre este tema*, en la siguiente opinión de una Dirección General de la Comisión Europea, manifestada en abril de 2.000:

"Me permito indicarle que el derecho de petición al que usted alude en reiteradas ocasiones, (art. 21.1 TCE) **se refiere únicamente a las relaciones entre los ciudadanos europeos y el Parlamento**

Europeo, institución europea que, a estos efectos, cuenta con una Comisión de Peticiones ad hoc. Igualmente, me permito señalarle que según el art. 21.3 del TCE, la obligación de la Comisión con relación a las preguntas o ruegos de sus ciudadanos, **se limita**, tal y como recoge el citado precepto, a dar respuesta al escrito recibido en la misma lengua, siempre que ésta se encuentre dentro de las mencionadas en el art. 314 TCE".

A mi juicio, restringir el ejercicio de petición al Parlamento Europeo no tiene sentido jurídico, pues las peticiones deben poder dirigirse a todas aquellas instituciones que tienen poder de iniciativa en los ámbitos de actuación de la Unión.

ALVAREZ CARREÑO (El Derecho de petición. Estudio de los sistemas español, italiano, alemán, comunitario y estadounidense. Ed. Comares, 1999) señala, con gran acierto, que "un elemento esencial del derecho de petición lo constituye, por tanto, **el acceso del individuo a todas las instancias del poder público sin obstáculos**, de forma directa y sin limitaciones temáticas". Refiriéndose al caso alemán, este autor subraya que "el artículo 17 de la Constitución establece que serán destinatarios del derecho de petición, aparte de la representación popular, "los órganos competentes". De este modo, **el constituyente alemán se apartó conscientemente de una concepción exclusivamente parlamentaria del derecho** para entender que éste también promueve y garantiza el acceso directo del ciudadano a las instancias de otros poderes públicos".

Es obvio que esto debe de ser así y que no tiene más vuelta de hoja. Sería incongruente que un peticionario debiera dirigirse a una cámara parlamentaria para solicitar que se adoptara una medida a través de un reglamento, pareciendo a todas luces más conveniente que pueda dirigirse desde un primer momento a quien tiene la potestad reglamentaria, el Gobierno.

En el documento de trabajo "nuevos derechos que hay que incluir en una lista de Derechos Fundamentales", de fecha 23 de agosto de 1.988, redactado por el eurodiputado VALVERDE LOPEZ, se preguntaba: **¿habría que plantearse una fórmula más amplia que englobe al resto de las instituciones?**. Y se proponía la siguiente redacción del derecho:

["Todo ciudadano de la Comunidad] [y cualquier otra persona física o jurídica que actúe en el territorio de la Comunidad Europea] tendrá derecho a presentar bien a título individual o bien en

asociación con otros ciudadanos, solicitudes o quejas [a las instituciones] de la Comunidad. Las peticiones se habrán de dirigir al Parlamento Europeo. [Los peticionarios tendrán derecho a respuesta en un plazo máximo de tres meses"].

En dicho documento, en el apartado de derecho comparado, se observa que en los Estados integrantes de la Comunidad Europea, el derecho de petición no se ejercita exclusivamente ante el Parlamento nacional, sino que también puede ejercitarse ante la Corona, autoridades públicas, órganos constitucionales, etc.

En la resolución de 10 de octubre de 1.986, el Parlamento Europeo "desea una "legislación comunitaria efectiva y obligatoria" para "reforzar el derecho de los ciudadanos y demás personas físicas y jurídicas que actúan en el territorio de la Comunidad, a presentar peticiones a las Instituciones Comunitarias **a través del Parlamento Europeo**".

A mi juicio, la petición ha de poder presentarse directamente ante la Institución que tenga competencia y poder de iniciativa sobre el asunto planteado.

En el proyecto de Constitución Europea (Resolución del Pleno del Parlamento Europeo de 10 de febrero de 1.994) se incluye un catálogo de derechos humanos, que según el artículo 7 del proyecto se respetarán en los ámbitos en los que se aplique el Derecho de la Unión. La redacción del derecho nº 20 es la siguiente:

"Toda persona tiene derecho a presentar peticiones o reclamaciones por escrito **a los poderes públicos**, que están obligados a dar respuesta a las mismas".

Asimismo, el inciso **"que le afecte directamente"** incluido en el artículo 194 del Tratado CE, supone desconocer el Derecho de petición como un derecho de carácter fundamentalmente político (vid. Derecho de petición y derecho de queja. I. Ibáñez García. Ed. Dykinson. Madrid, 1993). De hecho, la Comisión de peticiones del Parlamento Europeo ha llegado a interpretar este inciso de forma contraria a su interpretación literal, con el fin de no restringir la utilización del propio Derecho. CHUECA SANCHO (Derecho de petición al Parlamento Europeo y déficit democrático de la Unión Europea. Noticias de la Unión Europea, nº 137, junio 1996), ha escrito que el Parlamento Europeo examina las peticiones *ratione materiae* y no *ratione personae*.

El artículo 8 D del Tratado CE, en su redacción dada por el Tratado de Maastricht, era del siguiente tenor:

"Todo ciudadano de la Unión tendrá el derecho de petición ante el Parlamento Europeo, de conformidad con lo dispuesto en el artículo 138 D.

Todo ciudadano de la Unión podrá dirigirse al Defensor del Pueblo instituido en virtud de lo dispuesto en el artículo 138 E".

Al antiguo artículo 8 D del Tratado CE (ahora artículo 21), el Tratado de Amsterdam ha añadido un importante tercer párrafo:

"Todo ciudadano de la Unión podrá dirigirse por escrito a cualquiera de las instituciones u organismos contemplados en el presente artículo o en el artículo 7 en una de las lenguas mencionadas en el artículo 314 y recibir una contestación en esa misma lengua".

Se amplía así el derecho de petición originariamente reconocido ante el Parlamento Europeo y el Defensor del Pueblo (en este caso, *rectius*, derecho de queja o reclamación), al resto de las instituciones y organismos de la Unión, es decir, puede ejercitarse tal derecho, además, ante el Consejo, la Comisión, el Tribunal de Justicia, el Tribunal de Cuentas, el Comité Económico y Social y el Comité de las Regiones.

De la Resolución del Parlamento Europeo sobre las deliberaciones de la Comisión de Peticiones durante el año parlamentario 1998-1.999 y del Informe de dicha Comisión sobre sus deliberaciones en citado año parlamentario, pueden destacarse las siguientes apreciaciones:

- Considerando que el derecho de petición impone al Parlamento Europeo la correspondiente obligación de tramitar las peticiones de la forma más efectiva posible, con la asistencia de la Comisión y de los órganos competentes del Parlamento.

- Subraya que el derecho de petición aumenta las posibilidades de los ciudadanos de la Unión en cuanto a la participación e información democráticas...

- Destaca que es el Parlamento en su conjunto quien, debido a su propia función y responsabilidad política, garantiza en una respuesta directa al ciudadano el derecho de petición reconocido en el Tratado de la Unión Europea.

- Las cifras demuestran que los ciudadanos recurren con frecuencia a su derecho de petición, gratuito para ellos y que puede referirse a todos los asuntos comunitarios que incidan en el ámbito de actividades de la Unión Europea.

- Las peticiones tienen una importante función en la detección y tramitación de casos de infracción.

- Las peticiones se pueden transmitir (por la Comisión de Peticiones) a otra comisión o delegación de acuerdo con los procedimientos establecidos, "para información", "para actuación", para que se tengan en cuenta en el examen de cualquier propuesta legislativa relacionada, o "para opinión", único caso en que cabe exigir una respuesta escrita de la comisión de que se trate.

El Informe de 6 de mayo de 1.988 de la Dirección General de Estudios del Parlamento Europeo, concluye:

"El derecho de petición se considera en todos los países europeos como una característica esencial del Estado de Derecho. Con frecuencia, este derecho tiene un efecto preventivo. En los países en los que desempeña un papel más importante, este hecho tiene como consecuencia que el parlamento sea informado más detalladamente de las preocupaciones y de las opiniones de los ciudadanos y que, de este modo, pueda satisfacer de forma más eficaz su misión de órgano de control del ejecutivo**. De la función del derecho de petición como instrumento político podrían derivarse consecuencias para un parlamento en forma de la aprobación o la modificación de leyes**".

La Comisión Europea, en su segundo informe sobre la ciudadanía de la Unión, de 27 de mayo de 1.997, considera que las peticiones constituyen una medida extrajudicial de protección de los

derechos individuales y colectivos, a disposición de toda persona residente en la Unión; señalando que a través de las peticiones la Comisión ha abierto diversos procedimientos de infracción contra Estados miembros por violación del Derecho comunitario.

De las palabras de BENJAMIN CONSTANT, en su famosa conferencia de 1819 *De la liberté de les modernes comparée avec celle des anciens* (recogidas por el profesor GARCIA DE ENTERRIA en su obra: Justicia y seguridad jurídica en un mundo de leyes desbocadas. Civitas, 1999) se ve como el derecho de petición es un instrumento al servicio de la libertad:

> "Preguntaos primero, señores, lo que en nuestros días un inglés, un francés, un habitante de los Estados Unidos de América entienden por la palabra libertad. Es para cada uno el derecho de no estar sometido más que a leyes, de no poder ser detenido, ni llevado a prisión, ni condenado a muerte ni maltratado de ninguna manera por el efecto de la voluntad arbitraria de uno o varios individuos. Es para cada uno el derecho de decir su opinión, de escoger su trabajo y de ejercerlo; de disponer de su propiedad, incluso de abusar de ella; de ir y venir sin necesidad de obtener un permiso y sin tener que dar cuenta de sus motivos o de sus pasos. Es, para cada uno, el derecho de reunirse con otros individuos, sea para tratar de sus propios intereses, sea para profesar el culto que él y sus asociados prefieran, sea, simplemente, para llenar sus días y sus horas de la manera más conforme a sus inclinaciones, a sus fantasías. **En fin, es el derecho para cada uno de influir sobre la administración del gobierno, bien por el nombramiento de todos o de ciertos funcionarios, bien por exposiciones, peticiones, demandas que la autoridad esté más o menos obligada a tomar en consideración**".

III.- PROPUESTA A LA CONVENCIÓN.

A continuación se transcribe la propuesta que formulamos con fecha 31 de marzo de 2.000 a la Convención encargada de elaborar la Carta de los Derechos fundamentales (CHARTE 4217/00. CONTRIB 93. Página web del Consejo):

""A nuestro juicio, el Derecho de Petición debe ser incorporado a la Carta de derechos fundamentales de la Unión Europea; con una redacción que posibilitara una recta interpretación del Derecho reconocido en el Tratado y que, en su momento –si decide incorporarse el contenido de la Carta a los Tratados- mejorara la redacción de los mismos.

Una posible redacción a incorporar a la Carta sería la siguiente:

"Cualquier ciudadano de la Unión, así como cualquier persona física o jurídica que resida o tenga su domicilio social en un Estado miembro, tendrá derecho a presentar ante las instituciones u organismos contemplados en los Tratados, individualmente o asociado con otros ciudadanos o personas, una petición sobre un asunto propio de los ámbitos de actuación de la Unión Europea. El peticionario tiene derecho a recibir una contestación motivada sobre el fondo del asunto planteado en el más breve plazo posible".

Asimismo, considero que debería recogerse en la Carta el derecho a presentar quejas ante el Defensor del Pueblo Europeo.""

IV.- AVATARES DE LA CONCRECIÓN DEL DERECHO DE PETICIÓN EN LA CARTA DE LOS DERECHOS FUNDAMENTALES.

En la propuesta de artículos sobre los derechos del ciudadano, de 20 de marzo de 2.000, el artículo que reconoce el Derecho de petición se redacta como sigue:

"Todo ciudadano de la Unión y toda persona que resida en el territorio de un Estado miembro tiene derecho de petición ante el Parlamento Europeo, en las condiciones definidas por el Tratado constitutivo de la Comunidad Europea".

Se limita, por tanto, a reenviar el reconocimiento del Derecho a lo dispuesto en el Tratado. Esta técnica de reenvío es la tónica en buena parte de los artículos que se redactan en dicha propuesta.

De forma errónea, a mi juicio, dentro del reconocimiento del "derecho a una buena administración (relaciones con la Administración)", se incluye el siguiente párrafo:

"Todo ciudadano podrá dirigirse a las instituciones y órganos de la Unión en una de las lenguas oficiales de la Unión, y deberá recibir una respuesta en la misma lengua".

En el comentario a esta redacción se dice que este apartado "reproduce el artículo 21 del Tratado CE". Como hemos visto al principio, dicho artículo es el que reconoce el Derecho de petición.

El último documento publicado por la Convención al terminar estas apretadas páginas es la Nota del *Praesidium* (CHARTE 4360/00, de 14 de junio de 2.000. Síntesis de las enmiendas presentadas por el Praesidium), cuya introducción recoge lo siguiente:

"La Secretaría ha elaborado este documento a petición de la Convención para reagrupar por temas las enmiendas a los artículos 1 a 30 (doc. Charte 4332/00). No se han tenido en cuenta en este análisis las enmiendas de carácter redaccional o lingüístico, que se estudiarán de forma específica. Se comprobará que determinadas propuestas transaccionales del Praesidium se basan en enmiendas

que no están contempladas en el presente análisis; esto se debe a que el Praesidium ha recogido ya algunas enmiendas lingüísticas o redaccionales".

En lo referente al Derecho de petición, dicho documento contempla lo siguiente:

"Artículo 29. Derecho de petición.

Todo ciudadano y toda persona física o jurídica que resida o tenga su domicilio social en un Estado miembro tiene el derecho de petición ante el Parlamento Europeo.

Propuestas de enmiendas

1) Tres enmiendas tienen por objetivo que toda persona tenga el derecho de petición: enmiendas 574 (Hirsch Ballin/Patijn), 575 (Buitenweg) y 582 (Korthals Altes). Una enmienda propone, por el contrario, excluir a las personas jurídicas: enmienda 579 (Cisneros); otras dos sugieren añadir una disposición horizontal relativa a las personas jurídicas: enmiendas 576 (Friedrich) y 577 (Gnauck).

2) Tres enmiendas proponen limitar el derecho petición a los asuntos propios de los ámbitos de actuación de la Unión y que afecten directa o individualmente al que pretende ejercer dicho derecho: enmiendas 573 (Olsen), 576 (Friedrich) y 577 (Gnauck).

3) **Dos enmiendas proponen establecer un derecho de petición ante todas las Instituciones u órganos: enmiendas 574 (Hirsch Ballin/Patijn) y 582 (Korthals Altes).**

4) Una enmienda tiene por objetivo añadir que este derecho se ejercita en las circunstancias y con los límites establecidos en el artículo 194 del TCE: enmienda 573 (Olsen).

Propuesta del Praesidium:

Añadir "de la Unión" después de "ciudadano".

Se basa en la enmienda 581 (Dehaene).

A estas alturas de redacción de la Carta de los derechos fundamentales de la Unión Europea, puede observarse como la misma no supone ninguna aportación nueva a la regulación del Derecho de petición, que coadyuvaría a su fortalecimiento y a paliar en cierta medida el déficit democrático de las instituciones y órganos de la Unión distintos al Parlamento Europeo.

V.- EL DERECHO DE PETICIÓN EN ESPAÑA

El artículo 29 de la Constitución parece ser uno de los preceptos constitucionales de difícil desarrollo legal. Resulta paradójico que a los pocos años de vigencia de la Constitución de 1.978 se regulara el ejercicio de la iniciativa legislativa popular (art. 87.3 CE), mediante la Ley Orgánica 3/1.984, de 28 de marzo, y aún hoy se encuentre falto de desarrollo un derecho, como el de petición, mucho más accesible y utilizado por los españoles.

El artículo 23.1 de la Constitución consagra el derecho fundamental de los ciudadanos a participar en los asuntos públicos, directamente o por medio de representante libremente elegido. Como ha expuesto recientemente nuestro Tribunal Constitucional en su Sentencia 76/1.994, de 14 de marzo (relativa a la iniciativa legislativa popular) "nuestra Constitución en su artículo 1.3 proclama la Monarquía parlamentaria como forma de gobierno o forma política del Estado español y, acorde con esta premisa, diseña un sistema de participación política de los ciudadanos EN EL QUE PRIMAN LOS MECANISMOS DE DEMOCRACIA REPRESENTATIVA SOBRE LOS DE PARTICIPACION DIRECTA".

Ello, no obstante, no debe ser óbice para que el legislador descuide la regulación de instrumentos fundamentales diseñados para la participación política de los ciudadanos y de los grupos en que se integra -la denominada sociedad civil-. Instrumentos tales como el Derecho de petición y la participación en el procedimiento de elaboración de los reglamentos contemplado en el artículo 105 de la Constitución.

Según el Informe de 6 de mayo de 1.988 de la Dirección General de Estudios del Parlamento Europeo, "El derecho de petición puede considerarse como uno de los más antiguos derechos de los ciudadanos. De la función del derecho de petición como instrumento político podrían derivarse consecuencias para un parlamento en forma de la aprobación o la modificación de leyes".

Un ejemplo histórico de petición lo protagonizó en 1.827 el mercantilista Pedro Sainz de Andino, que presentó al Rey una exposición donde se ofrecía para "...aplicar a la formación de un Código mercantil, o sean Ordenanzas Generales del Comercio terrestre y marítimo, sus conocimientos que adquirió en esta parte de la legislación preparando materiales y ordenando un trabajo que pudiera ser después examinado y rectificado por una Junta". Esta fue la raíz del Código de Comercio de

1.829. Por Real Orden de 9 de enero de 1.828 se le encarga el proyecto de Ordenanzas que había sugerido. (EL DERECHO HISTORICO DE LOS PUEBLOS DE ESPAÑA. Gacto Fernández, Alejandre García y García Marín. 1.988).

En su sesión del 15 de abril de 1.994, la Comisión Constitucional del Congreso de los Diputados aprobó, por unanimidad y sin ninguna enmienda, la PROPOSICION NO DE LEY presentada el 23 de septiembre de 1.993 por el Grupo Parlamentario Catalán (Convergència i Unió), por la que se insta al Gobierno a la regulación del Derecho de Petición previsto en el artículo 29 de la Constitución.

El texto de la proposición no de ley

Exposición de motivos.

El Pleno del Congreso de los Diputados aprobó, el 22 de marzo de 1.988, una Proposición no de Ley del Grupo Parlamentario de la Minoría Catalana en la que se instaba al Gobierno a "remitir a esta Cámara, a la mayor brevedad posible, la propuesta de los proyectos de Ley que desarrollan aquellos preceptos constitucionales que, a su juicio, así lo requieren para su completa efectividad".

Transcurridos ya más de cinco años desde la aprobación de la mencionada Proposición, el Gobierno todavía no ha presentado un Proyecto de Ley Orgánica que desarrolle el derecho de petición individual y colectivo, previsto en el artículo 29 de la Constitución.

Concretamente, en el mencionado artículo de nuestra Carta Magna proclama que: "Todos los españoles tendrán el derecho de petición individual y colectivo, por escrito, en la forma y con los efectos que determine la Ley". Asimismo, este importante reconocimiento se produce en el marco de la sección primera del Capítulo Segundo de la Constitución, en donde se enumeran los derechos que tienen la consideración de "fundamentales" en nuestro ordenamiento jurídico.

Esta omisión en el desarrollo legislativo del Derecho de Petición no puede justificarse por la existencia de una normativa preconstitucional que lo regulaba, concretamente la Ley 92/1.960, dado que la misma no recoge todos los aspectos que el mismo comporta (ni tan siquiera contempla el derecho de petición colectivo) destacándose, por parte del propio Tribunal Constitucional, que la mencionada Ley el año 1.960 precisa de las inevitables adaptaciones que exige su aplicación en un

marco de libertades muy distinto del existente en la época de su promulgación" (STC 242/1.993, de 14 de julio).

Por todo ello, y atendiendo a la naturaleza del derecho de petición como derecho de participación ciudadana en el marco de nuestro Estado Social y Democrático de derecho, y a la utilización que del mismo se realiza por parte de los ciudadanos, el Grupo Parlamentario Catalán (Convergència y Unió) presenta la siguiente:

Proposición no de Ley.

"El Congreso de los Diputados insta al Gobierno a presentar ante las Cortes Generales, en el plazo de seis meses desde la aprobación de esta Proposición no de Ley, un Proyecto de Ley Orgánica reguladora del Derecho de petición reconocido en el artículo 29 de la Constitución".

Génesis de la proposición no de ley.

Esta loable iniciativa parlamentaria tiene su génesis en la petición que con fecha 30 de agosto de 1.993 realicé al que fue uno de los ponentes de nuestra Constitución y entonces Presidente del Grupo Parlamentario Catalán en el Congreso de los Diputados, Miquel Roca Junyent.

Petición fundamentada en:

"La Sentencia (242/1.993, de 14 de julio -BOE del 12 de agosto) del Tribunal Constitucional estima un recurso de amparo interpuesto por un ciudadano canario y reconoce la vulneración del artículo 29.1 de la Constitución provocada por la omisión de toda respuesta por parte del Parlamento canario a una petición dirigida por el recurrente.

La Sentencia, en su primer fundamento jurídico reconoce que la Ley 92/1.960, de 22 de diciembre, reguladora del derecho de petición fue promulgada en un marco de libertades muy distinto del actual, lo que exige inevitables adaptaciones en su aplicación.

Es obvio que citada ley reguladora de un derecho fundamental que recibe la más intensa protección -como dice el Tribunal Constitucional- debería haber sido, a mi juicio derogada y sustituida por otra que se adapte al marco de libertades vigente y se acerque a las que rigen en los países de nuestro entorno democrático.

Asimismo, el Tribunal Supremo, en su Sentencia de 10 de abril de 1.987, reconoció que mientras no se desarrolle por ley el artículo 29 de la Constitución, la ley 92/1.960 es el contenido "mínimo y provisional" del derecho.

Ambas consideraciones jurisprudenciales son una muestra de lo devaluado de la legislación reguladora de este derecho fundamental.

Por ello, me dirijo a Vd. -dada su sensibilidad hacia los asuntos constitucionales- con el ruego de que su Grupo Parlamentario estudie la posibilidad de presentar en el Congreso una proposición de ley orgánica que desarrolle el artículo 29 de la Constitución; o, en su defecto, una proposición no de ley por la que se inste al Gobierno a presentar el correspondiente proyecto de ley orgánica".

La Sentencia 242/1.993 del Tribunal Constitucional.

Esta Sentencia (ponente. de Mendizábal Allende), junto con el Auto del Tribunal 46/1.980 y la Sentencia 161/1.988, conforman la doctrina constitucional sobre el derecho de petición que recoge el artículo 29 de la Constitución.

La trayectoria del derecho de petición, según el ponente, puede rastrearse hasta los albores de nuestro constitucionalismo y aun más allá, prolongado sin desmayo alguno hasta nuestros días a través de los sucesivos textos donde se les reconoce a los españoles ese derecho de petición "en la forma y con los efectos que determine la Ley".

El núcleo de la doctrina constitucional sobre el artículo 29 es el siguiente:

- Este derecho recibe la más intensa protección.

- El derecho tiene un mucho de instrumento para la participación ciudadana, aun cuando lo sea por la VIA DE SUGERENCIA, y algo del ejercicio de la libertad de expresión como posibilidad de opinar.

- La petición, en suma, vista ahora desde su anverso, puede incorporar una sugerencia o una información, una iniciativa, "expresando súplicas o quejas", pero en cualquier caso ha de referirse a decisiones discrecionales o graciables, SIRVIENDO A VECES PARA PONER EN MARCHA CIERTAS ACTUACIONES INSTITUCIONALES, como la del Defensor del Pueblo o el recurso de inconstitucionalidad de las leyes.

- El derecho no incorpora una exigencia vinculante para el destinatario.

- Se trata de un derecho uti cives, del que disfrutan por igual todos los españoles en su condición de tales, que les permite dirigirse a los poderes públicos.

- Las Cámaras legislativas han estado siempre entre las instituciones receptoras: las Cortes y el Rey, señalaban las Constituciones de 1.837 y 1.845, a quienes desde 1.969 se añaden "las autoridades" o éstas y los Poderes Públicos en la de 1.931.

- La petición cumple también con la singular exigencia formal, su formulación escrita, característica de este derecho que exige una vestidura documental.

- El contenido de este derecho como tal es mínimo y se agota en la mera posibilidad de ejercitarlo, formulando la solicitud sin que de ello pueda derivarse perjuicio alguno para el interesado, garantía o cautela que está en el origen histórico de este derecho y ha llegado a nuestros días.

- Pero hoy el contenido del derecho comprende algo más, aun cuando no mucho más, e incluye la EXIGENCIA de que el escrito al cual se incorpore la petición sea admitido, le dé el curso debido o se reexpida al órgano competente si no lo fuera el receptor y se tome en consideración.

- Las obligaciones del destinatario son: Exteriorizar el hecho de la recepción y comunicar al interesado la resolución que se adopte.

- El derecho no incluye obtener una respuesta favorable a lo solicitado.

Notas para la regulación del Derecho.

Como acertadamente expone la doctrina constitucional, el derecho de petición "excluye cualquier pretensión con fundamento en la alegación de un derecho subjetivo o un interés legítimo especialmente protegido, incluso mediante la acción popular en el proceso penal o la acción pública en el contencioso-contable o en el ámbito del urbanismo. La petición en el sentido estricto que aquí interesa no es una reclamación en la vía administrativa, ni una demanda o un recurso en la judicial, como tampoco una denuncia, en la acepción criminal o las reguladoras de la potestad sancionadora de la Administración en sus diversos sectores".

Por tanto, a mi juicio, el objeto del derecho de petición que regule la futura ley orgánica ha de versar sobre propuestas para el mejoramiento de los servicios públicos; para el mejoramiento del ordenamiento legislativo; denuncias de contradicciones, defectos o insuficiencias del ordenamiento legislativo; o propuestas genéricas de carácter social, económico o político.

No deberán estar amparadas por la ley, en cuanto existan procedimientos legales específicos para ello:

- Las reclamaciones de derechos subjetivos.

- Las peticiones en defensa de un interés directo en el asunto de que se trate.

- las denuncias de infracciones penales, fiscales, civiles o de cualquier otra índole, cometidas por particulares o funcionarios.

Tampoco han de ser objeto de la ley reguladora las quejas subjetivas sobre el anormal funcionamiento de los servicios públicos, pues para ello está diseñada la institución del Defensor del Pueblo.

La iniciativa parlamentaria más reciente sobre este asunto es la proposición de ley orgánica reguladora del derecho de petición, presentada por el Grupo Parlamentario Federal de Izquierda Unida-Iniciativa per Catalunya (Boletín Oficial de las Cortes Generales. Congreso de los Diputados. VI Legislatura. 28 de abril de 1997).

En el programa electoral presentado por el Partido Popular a las Elecciones Generales del año 2.000, dentro del apartado "fortalecer el Estado de Derecho y las instituciones democráticas", puede leerse:

"Promoveremos la regulación del derecho de petición, de acuerdo con el artículo 29 de la Constitución".

VI.- EL DERECHO DE PETICIÓN EN LAS CONSTITUCIONES DE LOS ESTADOS MIEMBRO DE LA UNION EUROPEA.

Según recogemos de los textos constitucionales incluidos en la obra: Constituciones de los Estados de la Unión Europea (RUBIO LLORENTE y DARANAS PELAEZ. Ariel Derecho, 1997), el derecho de petición está reconocido de la siguiente forma.

Ley fundamental para la República Federal de Alemania, de 23 de mayo de 1.949:

Artículo 17: "Todos tendrán derecho a dirigir individual o colectivamente peticiones o quejas por escrito a las autoridades competentes y a las asambleas representativas".

El artículo 17a permite a las leyes sobre el servicio militar limitar el ejercicio del derecho.

Texto Refundido de la Constitución de Bélgica, de 17 de febrero de 1.994:

Artículo 28: "Todos tendrán derecho a dirigir a las autoridades públicas peticiones firmadas por una o más personas.
Sólo las autoridades constituidas podrán dirigir peticiones en nombre colectivo".

Artículo 57: "Queda prohibido presentar peticiones en persona a las Cámaras.
Cada una de las Cámaras tendrá la facultad de remitir a los Ministros las peticiones que se le dirijan. Los Ministros darán explicaciones sobre el contenido de aquéllas cuantas veces lo exigiere la Cámara".

Constitución del Reino de Dinamarca, de 5 de junio de 1.953:

Artículo 54: "No se podrán presentar peticiones al Parlamento más que por uno de sus miembros".

Constitución española de 31 de octubre de 1.978:

Artículo 29: "1. Todos los españoles tendrán el derecho de petición individual y colectiva por escrito, en la forma y con los efectos que determine la ley.
2. Los miembros de las Fuerzas o Institutos armados o de los Cuerpos sometidos a disciplina militar podrán ejercer este derecho sólo individualmente y con arreglo a lo dispuesto en su legislación específica".

No obstante lo dispuesto en su apartado segundo, se han producido peticiones colectivas en dicho ámbito. Así, en el diario La Ley (11-02-99), puede leerse: "La Asociación de Militares Españoles ha remitido una carta al presidente del Gobierno, avalada por 500 firmas de militares pertenecientes a dicha entidad, en la que se solicita al jefe del Ejecutivo y al ministro de Defensa, según informó el diario La Razón, de que hagan valer su influencia ante el Grupo Popular para que se incluya el derecho de asociación de los militares en el proyecto de Ley de Régimen del Personal de las Fuerzas Armadas, actualmente en tramitación en el Congreso de los Diputados".

Artículo 77: "1. Las Cámaras pueden recibir peticiones individuales y colectivas, siempre por escrito, quedando prohibida la presentación directa por manifestaciones ciudadanas.
2. Las Cámaras pueden remitir al Gobierno las peticiones que reciban. El Gobierno está obligado a explicarse sobre su contenido, siempre que las Cámaras lo exijan".

Constitución de Grecia:

Artículo 10: "1. Toda persona, o varias actuando en común, tendrán derecho, siempre que se ajusten a las leyes del Estado, a dirigir peticiones por escrito a las autoridades, las cuales deberán obrar lo más rápidamente posible conforme a las disposiciones vigentes y dar al peticionario una contestación por escrito y motivada, conforme a lo que la ley disponga.
2. No se autorizará la persecución del peticionario por infracciones eventualmente contenidas en la acusación, sino después de acuerdo definitivo de la autoridad a la cual iba dirigida la petición y con autorización de la misma.
3. Toda solicitud de información obliga a la autoridad competente a contestar en la medida en que la ley lo prevea".

Artículo 69: "Nadie podrá, sin haber sido invitado a ello, presentarse ante la Cámara para formular en ella una petición verbal o por escrito.
Las peticiones se presentarán por medio de algún diputado o serán entregadas al Presidente de la

Cámara, la cual tendrá derecho a dar traslado de ellas a los Ministros y Secretarios de Estado, quienes estarán obligados a facilitar aclaraciones cuantas veces se les solicite".

Sobre el primer párrafo de este artículo, RUBIO LLORENTE y DARANAS PELAEZ señalan que es un "precepto poco frecuente en los textos constitucionales. Cfr., sin embargo, a título precedente, artículo 57, párrafo primero, de la Constitución belga y artículo 67, también párrafo primero, de la luxemburguesa (tomado del primero)".

Constitución de la República Italiana, de 27 de diciembre de 1.947:

Artículo 50: "Todos los ciudadanos podrán dirigir peticiones a las Cámaras para solicitar se dicten disposiciones legislativas o exponer necesidades de índole común".

Constitución del Gran Ducado de Luxemburgo, texto refundido:

Artículo 27: "Todos tendrán derecho a dirigir a las autoridades públicas peticiones firmadas por una o varias personas. Sólo las autoridades constituidas tendrán derecho a dirigir peticiones en nombre colectivo".

Artículo 67: "Se prohíbe presentar en persona peticiones a la Cámara.
La Cámara tendrá derecho a trasladar a los miembros del Gobierno las peticiones que le fueren dirigidas. Los miembros del Gobierno deberán dar explicaciones sobre el contenido de aquéllas cuantas veces la Cámara lo solicite.
La Cámara no se ocupará de petición alguna que tenga por objeto intereses individuales, a menos que pretenda la reparación de agravios resultantes de actos ilegales cometidos por el Gobierno o las autoridades o que la decisión procedente sea de competencia de la Cámara".

Ley Fundamental del Reino de los Países Bajos:

Artículo 5: "Todos tendrán derecho a presentar peticiones por escrito al órgano competente".

Constitución de la República Portuguesa:

Artículo 52: "(Derecho de petición y derecho de acción popular). 1. Todos los ciudadanos tendrán derecho a presentar individual o colectivamente a los órganos de soberanía o cualesquiera autoridades peticiones, representaciones, reclamaciones o quejas para la defensa de sus derechos, de la Constitución, de las leyes y del interés general.

2. La ley determinará las condiciones en que las peticiones presentadas colectivamente a la Asamblea de la República deberán ser examinadas por el Pleno.

3. (dedicado a la acción popular)".

VII.- C O N C L U S I O N.

GOMEZ-FERRER MORANT (prólogo a la obra de COLOM PASTOR: El Derecho de Petición. Marcial Pons, 1997) señala que "el derecho de petición se presenta como una **vía de comunicación entre el Poder y la Sociedad**". "El derecho de petición es por tanto una vía que cobra especial relevancia pública cuando se utiliza por entes de relevancia constitucional como los sindicatos de trabajadores y las asociaciones empresariales, a los que se refiere el art. 7 de la Constitución Española".

Para este autor, "la importancia del derecho de petición se encuentra en conexión con el sistema vigente en cada época. De gran importancia política en la Edad Media, va a perder relevancia a medida que se avance hacia el reconocimiento de la soberanía popular. En este sentido, como indica COLOM, en el sistema de sufragio censitario propio de la Revolución liberal, el derecho de petición se configura como un mecanismo de corrección del sufragio político restringido –así en la Constitución Francesa de 1791-, como un instrumento de legitimidad democrática. Precisamente por ello, cuando se produce la Revolución democrática, y el sufragio universal, **podemos preguntarnos qué sentido tiene el mantenimiento del derecho de petición, que no figura ni en la Declaración Universal de los Derechos del Hombre y del Ciudadano, de 10 de diciembre de 1948, ni en el Pacto Internacional de Derechos Civiles y Políticos, de 19 de diciembre de 1966, ni en el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades, de 4 de noviembre de 1.950.**

A mi juicio esta pregunta, en esta época, tiene fácil respuesta. El reconocimiento y desarrollo del derecho de petición significa reconocer el legítimo derecho a la participación política –la participación en los asuntos públicos, individual o colectivamente- más allá del llamamiento a las urnas cada cierto tiempo. Significa, asimismo, una mayor legitimación de las instituciones democráticas receptoras y tramitadoras de las peticiones ciudadanas. En este sentido, hoy se están dando pasos desde las instituciones europeas. Así, en la Comunicación de la Comisión Europea al Parlamento Europeo, al Consejo, al Comité Económico y Social y al Comité de las Regiones. Revisión de la Estrategia para el mercado interior europeo(2000), de 3 de mayo de 2000, puede leerse: "Profundizar el Diálogo con los ciudadanos y las empresas. La informática no sólo se presta a una nueva gama de aplicaciones para las empresas, sino que sirve también de base para un planteamiento más abierto e interactivo del desarrollo de políticas. El Diálogo con los ciudadanos y

las empresas utiliza Internet no solamente para canalizar información hacia los ciudadanos y recoger sus puntos de vista y experiencias, lo que proporciona una imagen del funcionamiento (y los puntos débiles) del mercado interior mucho más completa que la que era posible obtener anteriormente. La importancia del Diálogo a este respecto ha sido reconocida por todas las instituciones.".

COLOM PASTOR (ob. cit) escribe que "con este derecho fundamental se produce una interesante paradoja. A medida que se profundiza y avanza en el Estado de Derecho pierde virtualidad", citando a MORODO: "la formalización del Estado de Derecho hará escasamente necesario el ejercicio de este derecho". Este último planteamiento supone, a mi juicio desconocer el derecho de petición como un derecho de participación política. Cosa distinta es la inexistente, en muchas ocasiones, actitud positiva de las instituciones receptoras de las peticiones en cuanto al estudio y tramitación de las mismas. Quizá por esta actitud, algunos ciudadanos utilizan un cauce distinto al normal para hacer sus propuestas. Así, el Catedrático emérito de Derecho Procesal, FAIREN GUILLÉN, escribió en el Diario La Ley (11-02-1998) un artículo titulado: "La formación de la voluntad del sujeto en las declaraciones de conformidad en el proceso penal. **Sugerencia al Ministerio de Justicia**".Otros, como TOMAS Y VALIENTE, ex presidente del Tribunal Constitucional, utilizan la prensa para hacer partícipe a los demás de sus peticiones. Así, en su artículo "Por si acaso" (El País, 10-12-94): "cuatro juristas, hemos enviado al ministro de Justicia, también él jurista y amigo, una petición de enmienda al texto del artículo 143 del proyecto de Código Penal para que, mejorando su redacción actual, que ya va por ahí, reconozca validez a las peticiones expresas, serias e inequívocas de ciertos enfermos, de modo tal que sirvan para eximir de responsabilidad penal a quienes, atendiendo aquellas peticiones, causen o cooperen activamente en la muerte del enfermo".

Las peticiones sirven para promover iniciativas legislativas. Así, en el preámbulo del Real Decreto 2191/1995, de 28 de diciembre, por el que se crea la Academia Aragonesa de Jurisprudencia y Legislación y se aprueban sus Estatutos; puede leerse:

"Con objeto de propiciar, estimular y difundir estudios e investigaciones de carácter jurídico, un grupo de profesionales del Derecho, residentes en Aragón, ha interesado la creación de una entidad que desempeñe con carácter autonómico una función relevante en el indicado campo, manteniendo una estrecha colaboración con la Real Academia de Jurisprudencia y Legislación, iniciativa que esta Corporación ha valorado de forma positiva".

Sirve también, este Derecho, para proponer a los órganos con posibilidad de efectuar propuestas de modificaciones legislativas, la reforma del Derecho vigente. Así, en la Resolución del Tribunal de Defensa de la Competencia, de 23 de octubre de 1995, puede leerse:

"Segundo: Solicita la recurrente, con carácter subsidiario, que el Tribunal ejercite la facultad que le concede el art. 2.2 de la Ley de Defensa de la Competencia y proponga al Gobierno que suprima o modifique situaciones, como la presente, que provocan restricciones de la competencia.

1. Es de advertir que el art. 2.2 habilita al Tribunal para proponer al Gobierno la modificación de aquellas normas legales que amparen o propicien la creación de restricciones a la competencia, facultad que el Tribunal puede ejercitar, bien con ocasión de un expediente específico o bien con carácter general, sin necesidad de que la restricción a la competencia haya sido advertida al resolver un caso concreto. La habilitación al Tribunal constituye la finalidad del precepto y en ella se agota su contenido: el art. 2.2 no concede un derecho subjetivo a los administrados para exigir al Tribunal que haga las propuestas que ellos crean convenientes. **Su petición en este sentido no es más que ejercicio del genérico derecho de petición y no el ejercicio de una acción.**

2. Esto supuesto, en el caso presente el Tribunal estima conveniente adelantar que dirigirá una propuesta al Gobierno que versará sobre dos aspectos".

Ejemplo de petición sobre asuntos europeos, de la que se hizo eco la prensa, fue la presentada ante la Comisión y el Parlamento Europeo por ECAS (Euro Citizen Action Service), de la que informó el diario El País (25-03-95) bajo el siguiente titular: "Grupos ciudadanos piden que las libertades de Schengen se extiendan a toda la UE".

En la segunda fase del Plan de Modernización de la Administración del Estado –español-, publicado por el Ministerio para las Administraciones Públicas (Madrid, 1994), se propone, para mejorar la atención al ciudadano "la elaboración de una nueva Ley que desarrolle el artículo 29 de la Constitución relativo al derecho de petición y el establecimiento de un procedimiento acorde a la Ley 30/92 sobre Procedimiento Administrativo".

Como he mantenido en este trabajo, los destinatarios naturales de las peticiones, en el ámbito de la Unión Europea, han de ser, sin limitaciones, todas las instituciones con poder de iniciativa respecto de la materia objeto de la petición.

Como mucho, si el Parlamento Europeo desea estar informado sobre las peticiones ciudadanas, podría establecerse el requisito de que la institución receptora de la petición enviara una copia de la misma a la Comisión de Peticiones, así como una copia de la ulterior resolución de la misma. Lo cual podría ser incluso hasta conveniente para el control político por parte del Parlamento.

A mi juicio, no debe molestar al Parlamento que se abra el abanico de las instituciones receptoras de peticiones. Con fecha 13 de septiembre de 1.986, el eurodiputado español LAFUENTE LOPEZ presentó una propuesta de resolución relativa a la creación de la institución del Defensor del ciudadano europeo, basada principalmente en la consideración de "que a pesar de que la investigación parlamentaria se ha venido realizando con toda dedicación, interés y cuidado por la Comisión de Reglamento y Peticiones, es evidente que la Cámara, a pesar de lo que declara la Resolución de 14 de julio de 1.985, no puede fiscalizar la actuación diaria de la Administración comunitaria, ni mucho menos investigar y corregir todas o la mayoría de las irregularidades de que tengan conocimiento, en lo referente a la tutela de los derechos de los ciudadanos europeos, máxime cuando en su estudio y vigilancia, se precisa la conexión con las autoridades de los Estados miembros, no siempre proclives a colaborar con la Comisión Parlamentaria y a suministrar con toda transparencia los datos que el Parlamento les solicita". El Parlamento, en aquella época, acordó que no era pertinente crear dicha institución. No obstante, hemos visto como después, el Tratado de Maastricht creó la Institución del Defensor del Pueblo Europeo; lo que ha servido, entre otras cosas para distinguir las quejas por casos de mala Administración de lo que son las peticiones políticas. MOLINA DEL POZO y otros (Comentarios al proyecto de Constitución europea. Ed. Comares, 1996), subraya que "el Parlamento no había pedido la creación del Defensor Europeo por temor a que se superpusiera al derecho existente, antes del TUE, de presentar peticiones. Se preveía el riesgo de confusión y debilitamiento mutuo de las dos vías posibles. Las disposiciones del Tratado de la Unión, como hemos visto, refuerzan los papeles respectivos de ambas instancias".

Conviene no olvidar que el derecho de petición se puede ejercitar individual o colectivamente y que en cualquier caso es un instrumento al servicio de la llamada sociedad civil. Por ello, no se entiende cómo en el Dictamen del Comité Económico y Social de la UE sobre "El papel y la contribución de

la sociedad civil organizada en la construcción europea", de 22 de septiembre de 1999, después de señalar que "La sociedad civil: tentativa de descripción". La sociedad civil es un concepto colectivo que designa todas las formas de acción social (**de individuos** o grupos) que no emanan del Estado y que no son dirigidas por él"; no trata en ningún momento del derecho de petición reconocido en el Tratado como instrumento de dicha sociedad civil.

El Tribunal Supremo norteamericano, en su sentencia *Eastern Railroad President´s Conference v. Noerr Motor Freight* (1961), dijo que en una democracia representativa, el concepto de representación depende de la capacidad de los ciudadanos para hacer que sus representantes conozcan sus deseos y que el derecho de petición está reconocido constitucionalmente, por lo que no puede ser suprimido por una Ley del Congreso como la *Sherman Act*. Esto lo pronuncia el Tribunal en el siguiente caso (vid. Derecho de los Negocios, nº 39, diciembre 1993, pag. 65): En los años cincuenta, las compañías de ferrocarriles comenzaron a sufrir la competencia de los conductores de camiones en el mercado de transporte de mercancías a larga distancia. Por este motivo, la *Eastern Railroad Presidents Conference* decidió promover la adopción de leyes estatales que limitaran el peso de los camiones que circularan por las carreteras y gravaran fiscalmente a los camiones pesados, y contrató los servicios de una compañía de relaciones públicas para que dirigiera una campaña dirigida a fomentar la desconfianza de la opinión pública en los conductores de camiones, por lo que éstos interpusieron una demanda por conspiración contraria a las normas *antitrust*.

Plasencia, 30 de junio de 2.000.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 19 juillet 2000

CHARTE 4420/00

CONTRIB 276

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Comité des Régions, concernant des propositions d'amendements au préambule, l'article 22 (Égalité et non discrimination) et l'article 44 (Clause horizontale), ainsi qu'une lettre au Président Herzog et la résolution 140/2000 REV 1. [1]

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[1] Ce texte à été soumis en langue française seulement.

PROPOSITION DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPENNE.

Proposition d'amendement : au préambule

Auteur : Le Comité des Régions

Texte proposé :

L'Union respecte le principe de l'autonomie locale tel qu'il est mis en œuvre par les Etats-membres.

Justificatif :

Cet ajout se fonde d'une part sur l'article 6 concernant l'application des Droits démocratiques du Traité sur l'Union Européenne et sur l'application du principe de subsidiarité tel qu'il ressort du premier paragraphe de l'article 1 du Traité sur l'Union Européenne.

PROPOSITION DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPENNE.

Proposition d'amendement à l'article : Proposition d'amendement à l'article 44 (clause horizontale)

Auteur : Le Comité des Régions

Texte proposé :

Les dispositions de la présente Charte s'adressent dans le respect du principe de subsidiarité aux institutions et organes de l'Union ainsi qu'aux Etats-membres et aux autorités régionales et locales exclusivement dans la mise en œuvre du droit de l'Union.

Justificatif :

Cet ajout se fonde sur le fait que certaines autorités régionales et locales sont des organes d'application du droit de l'Union.

PROPOSITION DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPEENNE

Proposition d'amendement à l'article : 22 - Egalité et non discrimination ou d'un nouvel article après l'article 22.

Auteur : Le Comité des Régions

Texte proposé :

Si amendement, nouveau paragraphe 3 : les minorités ont droit au respect de leur religion, de leur langue et de leur culture.

Si nouvel article : Droit des minorités

Les minorités ont droit au respect de leur religion, de leur langue et de leur culture.

Justificatif :

Référence à l'article 27 du Pacte international relatif aux droits civils et politiques.
Les articles 12, 14 15 et 22 s'appliquent à des personnes et non à des groupes.
Le concept de minorité mérite d'être intégré à la Charte des Droits Fondamentaux.
Cette insertion s'avère indispensable dès lors que l'Union sera élargie à des Etats comportant des minorités importantes.

Bruxelles, le

Monsieur le Président,

A la suite de l'audition des associations nationales et européennes de pouvoirs régionaux et locaux organisée le 4 juillet 2000 par le Comité des régions et à laquelle participait M. JACQUE, il est apparu que bien que l'ensemble des associations approuvaient la teneur de la rédaction de la Charte telle que présentée par ce dernier, il leur paraissait indispensable que le Préambule sur le principe de démocratie comporte un article sur le principe de l'autonomie locale et que les collectivités régionales et locales soient mentionnées parmi les collectivités chargées du respect des droits et libertés inscrits, dès lors qu'il leur incombe d'appliquer le droit communautaire.

Ces deux demandes sont reprises dans le projet de résolution du Comité des régions qui a été approuvé le 5 juillet par sa commission "Affaires institutionnelles" que vous voudrez bien trouver en annexe.

Parmi les autres suggestions du Comité des régions figure le respect du droit des minorités qui pourrait faire l'objet d'un article spécifique de la Charte.

Vous trouverez ci-joint les propositions d'amendements concernant ces différents points.

Pour les 1e et 2e amendements, le Comité des régions s'est appuyé sur un texte suggéré par notre collègue, M. GNAUCK, membre de la Convention.

Pour le 3e amendement relatif au droit des minorités, il a semblé opportun au Comité des régions de répondre par avance aux attentes des pays candidats à l'adhésion à l'Union européenne dans la mesure où ceux-ci comptent des groupes minoritaires importants.

J'ajoute que lors de l'audition des associations, celles-ci se sont déclarées prêtes à participer à une campagne de communication de la Charte auprès des citoyens de l'Union.

Je vous remercie par avance de l'accueil que vous réserverez à ces propositions d'amendements et vous prie de croire, Monsieur le Président, à l'expression de ma considération distinguée.

J. CHABERT

Monsieur Roman HERZOG
Président de la Convention pour la
rédaction de la Charte des droits fondamentaux
de l'Union européenne
CONSEIL DE L'UNION EUROPEENNE
Rue de la Loi 170
1048 Bruxelles

BT/ij/4302000

COM-Aff.Inst/ 011

Bruxelles, le 6 juillet 2000

PROJET DE RESOLUTION
du Comité des régions
sur

"La Charte des droits fondamentaux de l'Union européenne"

(Rapporteurs : M. BORE (RU, PSE) et Mme du GRANRUT (F, PPE)

Le présent document sera examiné lors de la session plénière des **20 et 21 septembre 2000**. L'article 23 du Règlement intérieur stipule que les amendements doivent parvenir au secrétariat au plus tard le septième jour ouvrable avant l'ouverture de la session plénière, c'est-à-dire, au plus tard le lundi 11 septembre à 14 heures 30 (heure de Bruxelles). Toutefois, en raison de la particularité de cette session qui se tiendra parallèlement à celle du Parlement européen et qui, de ce fait, aura lieu en même temps que celle du Comité économique et social, le Bureau a décidé le 13 juin de suggérer aux membres de faire parvenir les amendements au secrétariat **exceptionnellement le lundi 4 septembre 2000 à 14 heures 30** (heure de Bruxelles) **au plus tard**. Ils doivent être présentés par écrit par au moins six membres et indiquer leurs noms *(E-mail :isabella.jacobs@cor.eu.int)*.

La présente résolution a été élaborée sur la base du nouveau Règlement intérieur. En conséquence, conformément à l'article 51, aucun amendement ne peut être déposé concernant l'exposé des motifs.

Le Comité des régions,

VU la décision du Conseil européen concernant l'élaboration d'une Charte des droits fondamentaux de l'Union européenne;

VU les conclusions du Conseil européen de Cologne et celles du Conseil européen de Tampere;

VU la création de la Convention chargée de l'élaboration d'une Charte des droits fondamentaux de l'Union européenne constituée le 17 décembre 1999;

VU son avis du 16 février 2000 sur le processus d'élaboration d'une Charte des droits fondamentaux de l'Union européenne;

VU la décision du Bureau du 11 avril 2000, conformément à l'article 265 paragraphe 5 du Traité instituant la Communauté européenne, d'élaborer une résolution sur la Charte des droits fondamentaux de l'Union européenne et de charger la commission "Affaires institutionnelles" de l'élaboration des travaux en la matière;

VU le projet de résolution adopté par la commission "Affaires institutionnelles" lors de sa réunion du 5 juillet 2000 (rapporteurs : M. BORE (RU, PSE) et Mme du GRANRUT (F, PPE);

CONSIDERANT l'état d'avancement des travaux de la Convention chargée d'élaborer une Charte des droits fondamentaux de l'Union européenne;

CONSIDERANT que le Comité des régions s'est déjà prononcé fermement en faveur de l'élaboration d'une telle Charte, dotée d'un caractère juridique contraignant et de son inclusion dans les Traités;

CONSIDERANT qu'à la suite de l'avis du Comité des régions sur la Charte des droits fondamentaux de l'Union européenne adopté le 16 février 2000 et de l'audition du Président du Comité des régions, M. CHABERT, par la Convention chargée de rédiger ladite Charte, le Comité des régions a été invité à suivre les travaux de la Convention et à assister à ses réunions informelles;

CONSIDERANT que l'élaboration du projet de Charte proposé par le Presidium et en discussion au sein de la Convention a donné lieu à des prises de position diversifiées concernant son statut juridique, son rôle et sa finalité;

CONSIDERANT que pour certains membres de la Convention, la Charte devrait s'inscrire dans le cadre strict de l'Union européenne et de ses compétences, et que dès lors elle devrait se limiter à préciser les libertés fondamentales dont peuvent se prévaloir les citoyens européens et leur application dans le cadre des compétences qui relèvent de l'Union, et qu'ainsi elle n'aurait pas à énoncer les droits qui sont reconnus par les Etats et dont l'application relève d'eux seuls et qu'enfin, pour ce faire, elle se bornerait à reprendre à son compte une partie de la Convention européenne des Droits de l'Homme (CEDH);

CONSIDERANT que pour d'autres membres de la Convention, qui sont apparus majoritaires, la Charte des droits fondamentaux de l'Union européenne doit certes s'inspirer des droits inscrits dans la Convention européenne des Droits de l'Homme (CEDH) mais que sa mission consiste à les reformuler et à les compléter et ce, d'une part, en couvrant les domaines qui ne posaient pas de problèmes juridiques lors de sa rédaction et, d'autre part, par les autres sources d'inspiration que sont notamment le texte du Traité sur l'Union européenne, la Jurisprudence de la Cour de Justice européenne et la Charte sociale européenne;

CONSIDERANT que pour les tenants de cette position, il ne s'agit pas d'augmenter les compétences de l'Union européenne ni de s'ingérer dans la capacité normative et juridique des Etats membres;

CONSIDERANT que l'inscription des Droits économiques et sociaux dans la Charte a été l'occasion de préciser cette option et de la faire prévaloir;

CONSIDERANT que le Comité des régions ne peut que se réjouir de cette solution qui correspond aux recommandations de son avis;

a adopté la résolution suivante lors de sa ... session plénière des ... (séance du ...).

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* *
*

Le Comité des régions,

1. insiste sur le caractère politique de la Charte et sur son apport prépondérant comme fondement de la citoyenneté européenne. A cet effet, il suggère que la structure de la Charte prévoie que les droits du citoyen figurent à la suite du principe de démocratie;

2. propose de compléter, dans le préambule, le principe de démocratie par le principe d'autonomie communale et régionale, étant donné que cette dernière garantit également l'application pratique des droits démocratiques, il conviendrait, en outre, de mentionner le principe de subsidiarité et l'article 6 du Traité C.E. à un endroit approprié de la Charte; deuxièmement, il estime que tous les citoyens résidant en Europe depuis longtemps doivent disposer du droit de vote aux élections municipales ainsi qu'aux élections du Parlement européen;

3. réitère sa conviction selon laquelle la Charte doit couvrir trois aspects essentiels : les droits des personnes, les droits économiques, sociaux et culturels et, enfin, les droits civils et politiques. Les droits contribuent à l'expression des valeurs caractéristiques du modèle social européen. Regroupés dans un seul document, ils mettent en lumière les valeurs fondamentales de l'Union européenne; la Charte devrait également accorder une attention particulière à la protection de ces droits face aux abus dérivant de l'utilisation illégale des nouvelles technologies de l'information, de la dégradation de l'environnement ou du contrôle des concentrations des moyens de communication dans le cadre de la liberté d'expression ;

4. souligne la nécessité d'une formulation claire et lisible de la Charte qui apportera ainsi une plus-value aux droits fondamentaux et libertés garanties aux citoyens européens et les rende accessibles à tous ceux qui peuvent s'en prévaloir. A cet égard, il rappelle son souci de voir garantis juridiquement l'ensemble des droits inscrits dans la Charte et de permettre à tous l'accès aux services d'intérêt général;

5. exprime sa satisfaction que soient inscrits dans la Charte les droits économiques et sociaux qui permettent de répondre aux défis technologiques de la société européenne et d'en être des acteurs responsables, à condition qu'ils ne représentent pas uniquement des objectifs pour l'action de l'Union. Le Comité insiste également sur le droit des travailleurs à la formation professionnelle permanente indispensable à leur adaptabilité à l'emploi dans le contexte du progrès scientifique et technique de la société européenne et sur sa mise en oeuvre de manière harmonisée dans tous les Etats de l'Union et ce, afin de faciliter la libre circulation des travailleurs à l'intérieur de l'Union européenne.

6. recommande d'inscrire expressément dans la Charte la protection des minorités en tant que droit à part entière, pour déterminer ainsi un principe fondamental, notamment en ce qui concerne le traitement de la diversité ethnique au sein de l'Union européenne.

7. reconnaît la nécessité, dans le cadre des clauses horizontales, de préciser les limites des droits fondamentaux inscrits dans la Charte tout en leur donnant clairement comme objectif principal d'expliciter le champ de protection des droits fondamentaux et de refléter fidèlement leur niveau de protection ;

8. considère comme indispensable de dire clairement que les droits contenus dans la Charte ne justifient aucune nouvelle compétence de l'Union européenne ;

9. attire l'attention de la Convention sur le caractère indivisible des droits qui y sont inscrits, leur force découlant de cette indivisibilité;

10. considère que la Charte constitue un apport considérable à ce qu'il est convenu d'appeler l'acquis communautaire et que cet apport est majeur dans la perspective de l'élargissement aux pays candidats et à leurs ressortissants. Ceux-ci connaîtront d'emblée les droits et protections qui leur seront garantis ainsi que les obligations qu'ils devront assumer et ce, éventuellement par le truchement de modifications dans leur législation et dans leur système de gouvernement;

11. souligne que les élus locaux et régionaux peuvent jouer un rôle significatif dans la sensibilisation et la médiatisation de l'existence, du contenu et de la portée de la Charte auprès des citoyens;

12. propose que soit mis en oeuvre dès l'entrée en vigueur de la Charte un programme de communication qui s'appuie sur le Comité des régions et l'ensemble des élus locaux et régionaux. L'adhésion des citoyens à l'éthique et aux valeurs promues par la Charte ne pourra que renforcer leur sentiment d'appartenance à l'Union européenne et conférera à celle-ci un réel fondement démocratique;

13. rappelle que la position du Comité a toujours été de souhaiter que le Conseil européen décide de son intégration dans les Traités, et qu'ainsi la Charte acquiert une valeur juridique, réponde à l'attente des citoyens et confère un contenu à l'identité européenne et insiste enfin sur le progrès substantiel qu'elle représente pour les citoyens de l'Union européenne en faisant de celle-ci un instrument majeur de la solidarité communautaire et de sa capacité d'élargissement.

Bruxelles, le ...

Le Président du Comité des régions	Le Secrétaire général f.f. du Comité des régions
Jos CHABERT	Vincenzo FALCONE

Exposé des motifs

- En l'état actuel des discussions au sein de la Convention, il semblerait que la Charte des droits fondamentaux de l'Union européenne doive comporter :

- un préambule qui énonce le principe de démocratie
- des articles qui précisent les droits fondamentaux reconnus aux européens :
  a) Droits civils et politiques et droits du citoyen
  b) Droits économiques et sociaux;

- des clauses horizontales concernant les modalités d'application de ces droits.

- Le principe de démocratie s'énonce ainsi :

1. Toute autorité publique émane du peuple;

2. L'Union et ses institutions se fondent sur les principes de la Liberté de la démocratie, du respect des droits de l'homme ainsi que de l'état de droit, principes qui sont communs aux Etats membres.

Pour le Comité des régions, il apparaît impératif que la Charte décline ce principe de démocratie

jusqu'à la reconnaissance de l'autonomie locale et, à cet effet, il a proposé à la Convention un amendement en ce sens. L'autonomie des collectivités régionales et locales élues est reconnue même à des degrés divers dans tous les Etats membres. C'est par l'application du principe de subsidiarité le socle du pouvoir du citoyen sur l'organisation de sa vie quotidienne.

- Les droits civils et politiques (23 articles) traitent des droits de la personne humaine : dignité, droit à la vie, droit au respect de son intégrité par l'interdiction de la torture, de l'esclavage et de traitements dégradants; droit à la liberté et à la sûreté, droit de recours et à un tribunal impartial en cas d'atteinte à ces droits, respect des droits de la défense et présomption d'innocence - nécessité d'avoir commis une infraction à une loi pour être condamné; droit à ne pas être jugé ou puni deux fois pour la même infraction.

- Sur le droit de recours, le Comité des régions souhaite que l'article qui le prévoit se traduise par une garantie juridique fondamentale pour l'ensemble des droits inscrits dans la Charte.

Viennent ensuite les droits de la personne dans sa vie privée et sociale : respect de la vie privée, du domicile, du secret de la correspondance et des communications, vie familiale et protection de la famille et droits des enfants, respect de la liberté de pensée, de conscience et de religion, liberté d'expression et d'opinion, droit à l'éducation, droit des parents du choix de l'établissement d'enseignement, liberté de réunion et d'association, protection des données personnelles, du droit de propriété, droit d'asile et interdiction des expulsions collectives, et enfin, interdiction de toute discrimination.

A cet égard, le Comité des régions a proposé de renforcer la promotion de l'égalité entre les hommes et les femmes. Par ailleurs, il souhaite voir consacrer un article spécifique aux droits des minorités. Enfin, il s'associe à la proposition d'amendement concernant l'accès aux services d'intérêt général.

Les droits du citoyen (7 articles) traitent du droit de fonder un parti politique, du droit de vote et d'éligibilité au Parlement européen et aux élections municipales pour les résidents européens dans les mêmes conditions que les ressortissants d'un Etat membre, des obligations des administrations et des institutions européennes à l'égard des citoyens de l'Union, du rôle du médiateur, du droit de pétition, du droit de circuler et de séjourner librement sur le territoire des Etats membres.

La plupart de ces droits figurent dans différents articles du Traité sur l'Union européenne. Leur réunion les rend plus lisibles pour les citoyens. Le Comité des régions suggère que les droits du citoyen soient inscrits en tête de la Charte après l'énoncé du principe de démocratie.

- Les droits économiques et sociaux (13 articles) commencent par un article qui cherche à tenir compte de la spécificité des droits sociaux, du caractère de principe de certains d'entre eux et des modalités de leur application par les différents niveaux de collectivités responsables. C'est pourquoi, le Comité des régions demande, si cet article devait être maintenu, que les collectivités régionales et locales qui ont à mettre en œuvre certains de ces droits soient mentionnées dans cet article.

Les autres articles précisent les différents droits de la personne dans son travail : droit à l'information dans l'entreprise, droit de négociation et d'action collective, droit au repos et au congé annuel, droit à la santé et la sécurité dans son travail, droit à la protection en cas de licenciement, droit de concilier vie professionnelle et vie familiale, droit à la sécurité sociale et l'aide sociale, droits spécifiques des personnes handicapées, des personnes âgées et des jeunes.

- Les Clauses horizontales (5 articles) traitent du champ d'application des droits inscrits dans la Charte, de leur interprétation et de leur éventuelle limitation. Ces articles que l'on pourrait qualifier "de précaution" mériteraient d'être simplifiés et regroupés afin de ne pas paraître limitatifs et en retrait par rapport au reste de la Charte : le respect des droits fondamentaux s'impose aux Etats membres lorsqu'ils agissent dans le cadre du droit communautaire. Ceci est valable également pour les collectivités régionales et locales et doit être mentionné dans cette partie de la Charte.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 17 juillet 2000

CHARTE 4424/00

CONTRIB 278

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution des organisations suivantes**:**

- ATD-Quart Monde
- Confédération des Organisations Familiales de l'Union Européenne (COFACE)
- European Forum for Child Welfare (EFCW)
- Union nationale interfederale des Ouvres et organismes prives sanitaires et sociaux (UNIOPSS).

[1]

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[1] Ce texte à été soumis en langue française seulement.

- **ATD-Quart Monde**
- **Confederation des Organisations Familiales de l'Union Europeenne (COFACE)**
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- **Union nationale interfederale des Ouvres et organismes prives sanitaires et sociaux (UNIOPSS)**

Conseil de l'Union européenne
Secrétariat général
Charte des droits fondamentaux

Aux membres de la
Convention chargée d'élaborer un projet de charte des droits fondamentaux de l'Union européenne.

Bruxelles, le 22 juin 2000

Mesdames, Messieurs,

Dans le cadre d'un projet portant le titre "La protection sociale, facteur de lutte contre l'exclusion sociale et la discrimination et instrument de cohésion sociale - Recommandations aux institutions européennes", la Confédération des Organisations Familiales de l'Union Européenne ˆ laquelle se sont associées ATD-Quart Monde, European Forum for Child Welfare et l'Union nationale interfederale des Ouvres et organismes prives sanitaires et sociaux (France), a organise plusieurs réunions pour étudier différentes questions relatives ˆ la protection sociale.

Les représentants de ces associations se sont réunis le 19 juin 2000. Au terme d'une journée de travail centrée sur les droits sociaux fondamentaux et la protection sociale, ils ont estime nécessaire de vous faire parvenir sans retard leurs conclusions : elles portent sur une liste minimale de droits sociaux fondamentaux et de principes transversaux dont l'inscription et la mise en ouvre leur paraissent urgentes et indispensables.

Ces droits sociaux fondamentaux sont les suivants :

- Droit ˆ un revenu minimum permettant de vivre dans la dignité ;
- Droit aux soins de santé pour tous ;
- Droit aux prestations familiales pour tous et d'un montant suffisant pour couvrir les frais réels directs et indirects que représentent les charges familiales ;
- Droit ˆ un logement décent ;
- Droit pour tous ˆ des services sociaux de qualité.

Ces droits devraient être mis ouvre dans le respect des principes transversaux suivants :

- Non-discrimination et égalité des chances et de traitement, notamment entre les nationalités, races, sexes et entre les différentes structures familiales ;
- Prestations indexées et d'un niveau suffisant ;
- Une information effective des bénéficiaires.
- Effectivité des droits directs par une définition suffisamment précise et par la mise en place de procédures assurant l'effectivité des recours individuels.
- Pour tous les droits (directs et programmatiques), élaboration de procédures destinées ˆ favoriser la convergence des systèmes (Évaluations comparatives).

Les organisations espèrent que la Convention saura accorder toute l'attention requise cette revendication et l'en remercient.

Signatures des représentants des organisations

Editors' note to CHARTE 4425/1/00 REV 1,
Contribution from the Fondation Marangopoulos submitted by Mrs. Alice Yotopoulos-Marangopoulos, President of the Greek Commission on Human Rights:

The INIT version was dated 18 July and was essentially identical save that (i) it lacked the header and (ii) the list on p.3 lacked lettering ((a), b), c) etc)).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 1 September 2000

CHARTE 4425/1/00 REV 1

CONTRIB 279

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from the Hellenic Republic, National Commission for Human Rights, submitted by Mrs. Alice YOTOPOULOS-MARANGOPOULOS, President of the Greek Commission on Human Rights, with summary proposals for submission to the Convention. [1]

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[1] This text has been submitted in English only.

HELLENIC REPUBLIC

NATIONAL COMMISSION FOR HUMAN RIGHTS

Consultative to the Prime Minister

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

SUMMARY PROPOSALS FOR SUBMISSION TO THE CONVENTION

A. GENERAL COMMENTS

1. The Greek National Commission on Human Rights supports in principle the decision of the European Union to adopt its own Charter of Fundamental Rights.

This decision is indicative of the Union's intention to emphasize the importance of human rights, but also of the further development of the unification process, covering areas much wider than the management of strictly economic issues, as was originally the case with the EEC.

2. However, in order for the new Charter to take on substantive importance, not only should it not lag behind the international, and particularly the European, *acquis* in the area of human rights, but it should also contribute to further progress in mentalities and trends arising from practice at the international and, especially, the European level, for a more effective and full protection of human rights. Otherwise, this Charter may prove essentially useless, if not harmful.

2. We also consider it purposeful to emphasize the well-known fact that all member States of the European Union are also members of the Council of Europe which is already equipped with a remarkable legal arsenal for the protection of human rights, that is civil, political, as well as economic and social rights (after the recent codification and consolidation with the adoption of additional protocols to the European Social Charter). The inclusion in the Charter of the European Union of principles and provisions ensuring lower standards of protection as compared to the relevant provisions of the instruments of the Council of Europe which encompasses 41 members - namely all the members of the Union, but also countries which are in a phase of transition towards democracy and the rule of law -, would constitute a regression to be avoided.

Furthermore, the trends that emerge from the more recent Constitutions of the member States of the European Union should not be ignored, since they are also part of the European *acquis.*

3. The Charter, in accordance with the above principles, should not only introduce expressly some new rights, but also reformulate certain longstanding rights on the basis of a new approach. We will refer below to certain particular provisions based on this general guideline.

B. SPECIFIC PROVISIONS

1. We believe, first of all, that the Charter should establish a more substantive concept of equality. Practice has shown, as highlighted in a series of historical decisions of the Greek Council of State (decisions 1917- 1929/1998 and 1933/1998), that the mere establishment of formal equality of all before the law, is an hypocrisy and, in fact, perpetuates injustices to the detriment of disadvantaged and marginalized socio-economic groups, categories etc. Women form the largest of these groups (half of the world's population).

For this reason, the adoption of positive measures does not constitute 'discrimination' on the basis of gender, colour, religion, etc., in other words a restriction or negation of equality, but, on the contrary, a means to attain effective equality and to cast aside social injustice, i.e. effective discrimination.

Allow us to recall the relevant formulations of the provisions on equality contained in the following European Constitutions:*

a) the German Constitution: article 3, para.2;
b) the Portuguese Constitution: articles 29, paras. (d) and (h) and 109;
c) the Austrian Constitution: article 7, para. 2;
d) the French Constitution: article 3, as recently amended;
e) the Italian Constitution: article 3;
f) the Constitutions of various German Länder.

It is up to the Convention to choose to follow one of these formulations or to use a different wording, as deemed appropriate.

As regards in particular gender equality, experience has proved the importance of including in the Charter an explicit provision following the general provision on equality. The former should draw its inspiration from the relevant provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women, which has been incorporated into the domestic legal order of all member States of the Union, since they have all ratified it.

More specifically, we believe that the following text should be included in article 1 of document CONVEN 36, as a necessary addition in conformity with the spirit prevailing at both the international and European levels and reflected in relevant instruments of the European Union (especially article 2, para. 4 of Directive 76/207 of 9 February 1976, as further interpreted in a recent decision of the European Court of Justice (*Badeck* case, C- 158/1997, decision of 28 March 2000)):

1. Substantive equality between women and men shall be ensured and promoted in all areas. Any direct or indirect discrimination on the ground of gender is prohibited.
2. In order to improve, in the first instance, the position of women, it is recommended to adopt positive measures which shall remain valid until such time as substantive equality between women and men is achieved.

2. We also think it useful to expressly refer to the principle that any transaction concerning the human body or part thereof is prohibited as an affront to human dignity, and as endangering physical, spiritual and mental health or integrity - in many cases, even life itself. Any such activity must be punished, since the human body is an *extra commercium* good. Consequently, new forms of slavery, in particular sexual exploitation of women and children as a transnational organized crime which nowadays buffets Europe, as well as the traffic in organs for transplants - often

* For further details see A. Yotopoulos-Marangopoulos, *Affirmative Action: Towards Effective Gender Equality* (Athens/Brussels, Sakkoulas/Bruylant, 1998), at 44 ff.

connected to very serious crimes -, must be curbed by radical means by the cooperation of all States. Such a program of cooperation should comprise measures aiming at the punishment of offenders and the social reintegration of and solidarity with the victims. A provision to that effect should be included in article 1.

3. As experience has shown, an end should be put to human rights violations perpetrated under the veil of religious, cultural or historic customs which are bolstered today primarily by political or religious authorities inspired by religious extremism (fundamentalism). This often consists in the denial of all human rights to large sectors of the population, especially women.

The situation in the world today, even in Europe which is home to numerous supporters of such movements (particularly Islamic, but also of the Vatican) who insist on following practices contrary to human rights renders imperative the inclusion in the Charter of provisions along the lines of paras. I.5 and II. B. 3. 38 of the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights.

4. It is time for the Charter to expressly prohibit the death penalty in the member States of the Union.

5. Last but not least, we believe it essential that the Charter strengthen economic and social rights in general. The Council of Europe has already done so by expanding and reinforcing the Turin Charter in 1991 (adoption of the Protocol amending the European Social Charter, ETS No. 142), and particularly by adopting the Additional Protocol of 1995 (ETS No. 158) which recognizes for the first time the right to collective complaints for violations of social rights.

The Geneva World Summit for Social Development (Copenhagen + 5) of 24-26 June 2000 brought to light and proclaimed the pressing need to strengthen social rights as much as possible at a time when economic globalisation becomes increasingly inhuman and deepens the gap between individuals as well as between countries (the few rich, individuals and States, become constantly richer while the popular masses and Third World countries become poorer). Moreover, globalisation undermines democracy itself (as fewer and fewer individuals in every country become owners of the wealth and the mass media). Thus, the ultimate power belongs to a limited number of persons, without recognition by democratic constitutions, without being elected by the people and essentially under no control (since politicians stand in fear of this power and not the reverse).

It is to everybody's interest - even the few rich - that a check be put on this development, which can be achieved, at least in part, by a more effective protection of social rights, thus preventing social conflicts and wars.

Developments in Europe over the last few years are blatant evidence of the above-mentioned facts and demonstrate that the policy of restricting social rights is unjust, antidemocratic and unwise.

From: Prof. Alice Yotopoulos – Marangopoulos, President of the Greek Commission on Human Rights

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 17 juillet 2000

CHARTE 4426/00

CONTRIB 280

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de Mme Juliette LELIEUR, concernant l'article 11 (règle "non bis in idem"). [1]

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[1] Ce texte à été soumis en langue française seulement.

Juliette Lelieur
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Strasbourg, le 4 juillet 2000

Objet : rédaction de l'article 11 (règle *non bis in idem*) du projet de Charte des droits fondamentaux de l'Union européenne

Mesdames et Messieurs les membres de la Convention,

Préparant une thèse de doctorat en droit sur le thème de la règle *non bis in idem*, (à l'Université de Paris I Panthéon-Sorbonne, sous la direction de Mme le Professeur Mireille Delmas-Marty), je me suis intéressée à la formulation de l'article 11 du Projet de Charte des droits fondamentaux de l'Union européenne. Par la présente, je souhaite vous transmettre quelques observations au sujet de cet article et vous suggérer une légère modification rédactionnelle qui, à mon sens, permettrait d'élargir la protection des citoyens de l'Union.

Pour mémoire, je retranscris ci-dessous la formulation de la règle *non bis in idem* de l'article 4 du protocole 7 additionnel à la Convention européenne des droits de l'homme, dont est directement inspiré le projet de Charte des droits fondamentaux de l'Union européenne, ainsi que celle de l'article 11 dudit projet. Je me permets de souligner les termes sur lesquels je désire attirer votre attention.

Article 4 Protocole 7 additionnel à la CEDH :

Al. 1 : Nul ne peut être poursuivi ou puni pénalement par les juridictions du même Etat en raison **d'une infraction** pour laquelle il a déjà été acquitté ou condamné par un jugement définitif conformément à la loi et à la procédure pénale de cet Etat.

Article 11 du projet de Charte des droits fondamentaux de l'Union européenne :

Nul ne peut être poursuivi ou puni pénalement en raison **d'une infraction** pour laquelle il a déjà été acquitté ou condamné par un jugement définitif conformément à la loi.

L'inconvénient de la rédaction actuelle des article 4 protocole 7 additionnel à la CEDH et 11 du projet de Charte des droits fondamentaux de l'UE

L'interdiction d'engager une seconde poursuite -et de prononcer éventuellement une seconde sanction- ne s'applique, selon les termes de ces deux articles, que lorsque la seconde poursuite est entamée pour « une infraction pour laquelle [un individu] a déjà été acquitté ou condamné… », c'est-à-dire pour la même infraction que lors de la première poursuite. En revanche, si un individu est poursuivi une seconde fois pour les mêmes faits, pour un même comportement délictueux, mais sous une qualification différente, c'est-à-dire pour une autre infraction, la règle *non bis in idem* n'est plus applicable et l'interdiction de la double poursuite ne s'impose plus.

En pratique, cela signifie qu'une personne ayant eu un comportement incriminé par deux lois distinctes (concours idéal d'infractions), cas de figure extrêmement courant en raison de l'inflation normative constatée dans la plupart des Etats de l'Union européenne, peut tout à fait être poursuivie du chef de la première loi, puis de la seconde puisqu'il s'agit de deux infractions différentes. Ce peut être le cas lorsque les deux infractions relèvent du droit interne. Par exemple, en France, un contribuable qui omet de déclarer dûment ses revenus peut être poursuivi et pénalisé à la fois par l'Administration fiscale pour absence de déclaration fiscale (article 1728 Code général des impôts) et par le tribunal correctionnel pour fraude fiscale (article 1741 du Code général des impôts). Mais le problème se pose également à l'échelle communautaire et relève ainsi directement du champ d'application de la future Charte. En effet, une entente anticoncurrentielle peut porter atteinte à la fois aux prescriptions d'un Etat membre et à celles du droit communautaire, et donner lieu en conséquence à deux poursuites, l'une nationale, l'autre communautaire. Bien loin de constituer des hypothèses d'école, ces cas de figure ont donné lieu à une jurisprudence abondante, dont on ne citera que quelques exemples (Cass. crim. fr., 20 juin 1996 ; Cass. Crim. fr., 6 nov. 1997 ; CJCE 13 fév. 1969, Walt Wilhem, aff. 14-68 : Rec. 1 ; CJCE, 14 déc. 1972 ; Boehringer, aff. 7-72 : Rec. 1181). Dans toutes ces affaires, la règle *non bis in idem* a été écartée par les juridictions saisies et la double poursuite validée. Pour éviter d'être trop longue, je ne m'attarderai pas davantage sur ces décisions. En revanche, il s'avère particulièrement opportun d'analyser, ne serait-ce que brièvement, la jurisprudence de la Cour européenne des droits de l'homme, puisque cette dernière a été confrontée à la règle *non bis in idem* telle que formulée à l'article 4 protocole 7 additionnel CEDH, dont est inspiré l'article 11 du projet de Charte.

2. La Cour européenne des droits de l'homme confrontée à l'article 4 protocole 7 additionnel à la CEDH.

Pour se persuader de l'insuffisance de la rédaction de la règle *non bis in idem* dans les deux textes susvisés, il suffit d'observer la jurisprudence de la Cour européenne des droits de l'homme, qui a été confrontée au problème lors des affaires Gradinger contre Autriche (23 octobre 1995) et Oliveira contre Suisse (30 juillet 1998). Par souci de concision, je ne m'attarderai qu'à la seconde d'entre elles.

Mme Oliveira avait provoqué un accident de la circulation entraînant la blessure grave d'une personne. Elle a été condamnée une première fois par le tribunal de police (*Polizeirichteramt)* pour défaut de maîtrise du véhicule en raison de la non-adaptation de la vitesse aux conditions de circulation (article 31 et 32 de la loi sur la circulation routière). Puis un an et demi plus tard, elle a été poursuivie de nouveau devant le tribunal cantonal *(Bezirksgericht)*, cette fois pour lésions corporelles par négligence (article 125 du Code pénal), et a été une seconde fois condamnée. Alors que la Commission, s'appuyant sur la jurisprudence Gradinger de 1995, avait conclu par 24 voix contre 8 à la violation de l'article 4 du protocole 7, la Cour a estimé par 8 voix contre 1 que ladite disposition n'avait pas été violée. Les juges ont motivé leur décision de la manière suivante : « Il s'agit là d'un cas typique de concours idéal d'infractions, caractérisé par la circonstance qu'un fait pénal unique se décompose en deux infractions distinctes, en l'occurrence l'absence de maîtrise du véhicule et le fait de provoquer par négligence des lésions corporelles (…). Il n'y a là rien qui contrevienne à l'article 4 protocole 7, dès lors que celui-ci prohibe de juger deux fois une même infraction, alors que dans le concours idéal d'infractions, un même fait pénal s'analyse en deux infractions distinctes » (§ 26). On observe ici une illustration très éclairante sur les lacunes de l'article 4 protocole 7 : en interdisant le cumul de poursuites et de sanctions dans le seul cas où la qualification lors de la seconde procédure est strictement identique à la première, cette disposition ne permet pas d'éviter *toutes* les doubles poursuites ni *toutes* les doubles condamnations.

Les juges de Strasbourg n'ont d'ailleurs pas manqué de relever expressément dans le corps de l'arrêt les inconvénients liés à ce système : « Il aurait certes été plus conforme aux principes d'une bonne administration de la justice que, les deux infractions provenant d'un même fait pénal, elle fussent sanctionnées par une seule juridiction, dans une procédure unique » (§ 27). En outre, dans son opinion dissidente, M. le juge Repik insiste sur le souci « d'assurer au prévenu que son sort ne sera pas remis en question, c'est-à-dire de lui assurer qu'il ne sera pas deux ou plusieurs fois exposé aux contraintes des poursuites pénales et condamné pour la même cause » (voir aussi R. Merle et A. Vitu : Traité de droit criminel. Procédure pénale, Cujas, 4ème édition, 1989, p. 878). Ces différentes observations invitent à s'interroger sur les valeurs profondes que tend à protéger la règle *non bis in idem*. Immanquablement, cette réflexion laisse bien vite apparaître des arguments de fond en faveur de la révision de la rédaction actuelle de la règle qui, en l'état, n'assure pas pleinement la sauvegarde des valeurs qu'elle est censée protéger.

3. Les arguments de fond en faveur de la révision de la formulation de la règle *non bis in idem.*

Si elle contribue assurément à la réalisation d'une bonne administration de la justice, ainsi que le mentionnent les juges de la Cour européenne des droits de l'homme dans l'arrêt Oliveira, la règle *non bis in idem* tend avant tout à protéger l'individu contre la menace permanente d'être à nouveau poursuivi alors qu'il a déjà répondu de ses actes devant la justice : c'est cet élément essentiel que souligne M. le juge Repik dans son opinion dissidente. En effet, la suspension d'une véritable épée de Damoclès au-dessus de la tête des justiciables est insupportable car elle porte assurément atteinte à leur sécurité juridique. Or, comme l'explique la doctrine juridique allemande, la sécurité juridique des justiciables est l'un des éléments fondamentaux de l'Etat de droit. En outre, en ce qu'elle le réduit à un simple objet de la justice, la menace permanente d'être poursuivi à nouveau n'est pas compatible avec le respect de la dignité humaine. Enfin, elle limite nécessairement la liberté, au sens non pas physique mais psychologique, du justiciable (pour plus de détails sur ces divers arguments, voir notamment Schmidt-Assmann, in *Grundgesetz Kommentar*, von Theodor Maunz / Günter Dürig / Roman Herzog, Art. 103 III, n° 258 à 260).

En considération de l'aspect fondamental de ces valeurs que se doit de protéger la règle *non bis in idem*, il serait bien regrettable de reprendre telle quelle la rédaction insatisfaisante de l'article 4 protocole 7 additionnel à la CEDH pour la future Charte, alors que la correction de cette rédaction n'est pas si délicate ni aventureuse qu'on peut l'imaginer.

4. Proposition d'une nouvelle rédaction pour l'article 11 de la Charte des droits fondamentaux de l'Union européenne

Afin d'être efficace, la règle *non bis in idem* doit, à mon sens, interdire non seulement le cumul de poursuites et de sanctions pour une même infraction, mais également le cumul de poursuites en cas de concours idéal d'infraction. Pour lui permettre d'attendre ce but, une légère modification par rapport à la rédaction actuelle suffit : il s'agit du remplacement des termes « d'une infraction » par les termes « de faits ». On obtient ainsi la formulation suivante :

> « Nul ne peut être poursuivi ou puni pénalement en raison **de faits** pour lesquels il a déjà été acquitté ou condamné par un jugement définitif conformément à la loi ».

Le recours aux termes « des faits » permet de gommer la limitation de la règle au seul cas (bien rare) où la seconde poursuite est formulée de manière exactement identique à la première en termes de qualification juridique. Cette rédaction de l'article 11 rend possible l'interdiction d'une seconde poursuite pour un même fait alors même que celle-ci serait fondée sur une qualification différente. Elle pourra donc être à l'origine d'un progrès significatif en termes de protection de l'individu contre les excès du pouvoir répressif. Mais que les partisans des cumuls de poursuites et de sanctions en cas d'atteinte par un seul fait matériel à plusieurs valeurs sociales juridiquement protégées se rassurent : si cette rédaction permet une évolution par rapport à la jurisprudence Oliveira , elle ne l'impose pas. Comme je tenterai de le démontrer ci-après à la lumière de la jurisprudence française, le recours aux termes « de faits » à la place de « d'une infraction » laisse une grande marge de manœuvre aux potentiels interprètes de la Charte.

4. Une rédaction souple.

Pour expliquer la souplesse de la rédaction proposée, un détour par l'évolution de la jurisprudence française et des textes du Code de procédure pénale s'avère très utile. Dans l'ancien Code d'instruction criminelle, l'article 359 consacrait l'interdiction de reprendre des poursuites « à raison des mêmes faits » (en matière criminelle seulement, ce qui explique les possibilités de cumul en droit français pour tout ce qui relève des autres infractions, ce système étant encore en vigueur aujourd'hui). Aussi surprenant cela puisse-il paraître, deux interprétations radicalement différentes peuvent être données à cette formulation. Le législateur avait probablement voulu exclure l'éventualité d'une seconde poursuite quelle que soit la qualification (Hugueney, note sous CA d'Amiens, 12 juillet 1954, Dalloz 1955, p. 317). Il entendait sans doute interdire une seconde poursuite pour les mêmes « faits matériels ». Pourtant, la Cour de cassation française estima dans un premier temps qu'il fallait considérer les faits « juridiquement qualifiés » et non les faits « matériels ». Cette compréhension des termes de l'article 359 engendra une jurisprudence semblable à celle de la Cour européenne des droits de l'homme dans l'arrêt Oliveira. Ce n'est qu'en 1956 que la Cour de cassation fit évoluer sa jurisprudence, pour s'attacher désormais aux faits « matériels ». Ainsi, la double poursuite en matière criminelle devenait impossible même sous une autre qualification. Lors de l'instauration du Code de procédure pénale, le législateur a estimé bon de consolider cette dernière solution en prohibant, à l'article 368 dudit Code, une seconde poursuite « à raison des mêmes faits, même sous une qualification différente ».

L'évolution de la jurisprudence française est, me semble-t-il, très révélatrice de la souplesse de la rédaction que je propose pour l'article 11. Cette dernière ne contraint pas les interprètes à accepter tout type de cumul dès lors que la qualification varie, comme c'est le cas de l'article 4 protocole 7 additionnel à la CEDH, mais elle ne les oblige pas non plus à un refus systématique de tout cumul, qui nécessiterait sans doute des adaptations –certes souhaitables mais non bénignes- de l'articulation entre les ordres juridiques internes et l'ordre juridique communautaire. Remettons-en nous donc à la sagesse des juges, en leur donnant des instruments à la fois ouverts à l'amélioration de la protection des droits de l'homme et suffisamment souples afin qu'ils puissent apprécier le moment opportun pour engager le changement.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 31 August 2000

CHARTE 4431/00

CONTRIB 285

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution by the European Women's Lobby (EWL).[1]

[1] This text has been submitted in French and English languages.

LOBBY EUROPEEN DES FEMMES
EUROPEAN WOMEN'S LOBBY

POSITION OF THE EWL ON THE NEW DRAFT CHARTER OF FUNDAMENTAL RIGHTS

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At the 1995 World Conference on women, 189 countries agree, "Governments must not only refrain from violating human rights of all women, but must work actively to promote and protect these rights. (...) The gap between the existence of rights and their effective enjoyment derives from a lack of commitment by governments to promoting and protecting these rights" (Beijing Platform for action, 215 & 217).
Women in Europe would consider it a disgrace if European decision-makers fail to comply with this international commitment by simply ignoring them
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Having read through the new draft Charter proposed by the Praesidium (Convent 28 issued the 5th of May and Convent 34 from the 16th of May), the European Women's Lobby notices once more the lack of consideration of women's concerns by the authors of the Charter.

The EWL reiterates the fundamental demands formulated in its written contribution of May 2000, urging members of the Convention to integrate women's perspective in the Charter in order to ensure the protection of half the population's interests, meaning women's, and to promote equality between women and men.

1. The principle of equality between women and men in all fields

A provision exclusively dedicated to the unconditional principle of gender equality must be introduced in the first articles of the Charter. It must prohibit direct and indirect discrimination and provide explicitly and precisely for the adoption of positive measures by Member States.

The general principle of non discrimination as proposed in article 22 doesn't lead to a substantial equality between women and men. This general provision constitutes a backlash, since *gender discrimination is of a particular and structural nature, affecting women who represent half of the population and not a minority*. Women are likely to face different forms of discriminations, on the

ground of ethnic origin or disability for example, added to the structural discrimination on the ground of sex. The inclusion of a separate provision prohibiting exclusively gender discrimination would enable a better prevention of multiple discriminations and would allow women to enjoy effectively all fundamental rights and freedoms and to be full citizens in all areas.

The EWL therefore welcomes the amendment n° 470 tabled by **MM Einem** and **Holoubek** aiming at dedicating an exclusive and separate provision to equality between women and men, although it has reservations on the terminology used in the amendment.

The Lobby supports also the proposal of amendment n°436 submitted by **Mr Fayot** aiming at introducing a provision that states « the unconditional and fundamental principle of equality between women and men in all areas », the prohibition of « any discrimination on grounds of sex" as well as the introduction of « positive measures ».

Proposal of the EWL:

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Article 2. General principle of equality between women and men in all areas

1. *The Union shall promote respect for the unconditional and fundamental principle of equality between women and men in all areas of its jurisdiction.*

2. *Substantive equality between women and men must be established and direct or indirect discrimination on the grounds of sex must be prohibited. Moreover, a gender dimension should be adopted while combating all forms of discrimination in order to eradicate multiple discrimination that many women face.*

3. *Positive measures should be implemented to improve women's situation until substantive and effective equality between women and men is achieved.*

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At this stage, it is not appropriate to specify that this provision should be applicable to the area of work, since the principle of equality between women and men in the area of working conditions and salaries must constitute a separate provision in the chapter on economic and social rights.

2. Prohibition of gender related violence and persecutions

The provision condemning torture and inhuman treatment should explicitly state that gender related violence or persecution is a form of torture.

Sexual mutilation, whose first victims are women and the girl child, still take place on European territory. This inhuman treatment is a form of torture and should thus be considered as such, as well as other kinds of gender related violence such as rape, domestic violence, forced marriage, "honour" killing, including those which take place within the family.

Proposal of the EWL :

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Article 4. Prohibition of torture and inhuman treatment

No one shall be subjected to torture or to inhuman and degrading treatment. This refers to any kind of physical or moral violence, including any kind of gender related violence such as among others female genital mutilations, rape, violence in the home, forced marriage, "honour" killing, also when executed within the family.

3. Principle of PARITY democracy

A provision on parity democracy in the Charter is essential to achieve a balanced representation of women and men in decision-making positions.

The problem of under representation of women in decision-making positions persists and must be tackled with concrete measures such as the ones already adopted in some Member States. This principle must be integrated in the Charter through a clear and separate provision.

Proposal of the EWL :

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New article- Parity Democracy

1. Every citizen of the Union, without any discrimination, has the rights provided by the law of the Union and national law, of an equal access to candidacy for elections and the exercise of the corresponding functions.

2. A parity democracy, meaning an equal representation of women and men in all the organs and institutions of the Union, should be established as a fundamental principle for both the European integration and the institutions of the Union.

3. Positive measures should be taken in order to favour equal access of women and men in the governmental and EU bodies as well as in political parties.

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4. Equality between women and men in the areas of working conditions and salaries

The fundamental principle of equality between women and men in the areas of working conditions and salaries and social protection must be recalled in the part dedicated to economic and social rights, as was the case in the first draft of the Presidium (Convent 18 - article I).
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A general provision on non-discrimination does not constitute a sufficient measure to fight against the *de facto* inequality between women and men in the area of working conditions.

Conscious of this gap, European legislators introduced already in 1957 a provision stating clearly the principle of equality between women and men in the area of salaries. The possibility for Member states to adopt positive measures in order to achieve a *de facto* equality has been included in the Treaty later on – although not in a comprehensive way (Amsterdam 1997, article 141 § 4).
The fact that a Charter codifying common values for European countries does not include the principle of equality in the areas of working conditions and salaries constitute an unacceptable backlash in comparison with the progress accomplished by national and European legislations in this field. Integrating the aim of equality in the field of work in the last paragraph of a general provision on non-discrimination in the chapter on civil and political rights cannot legitimately fill this gap.

The Lobby welcomes therefore the amendments submitted by several members of the Convention with the aim of reintroducing the principle of gender equality as stated in the 1st draft. The EWL supports in particular the amendments of A. Rodriguez Berejo (n°0088) and P. Berès (n°0185) that introduce the principle of equal pay for work of equal value as well as the concept of positive measures in an unambiguous way.

Proposal of the EWL:

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New article (article31bis) : Equal treatment between women and men

1. *Substantial equality between women and men must be ensured and any kind of inequalities must be eliminated with regard to work, employment and social protection. This mainly includes the equal right to freely chose or accept to work, the right to the same working conditions, the right to fair and equal pay for work of equal value, and the equal right to social security and assistance for themselves and their family.*

2. *Any direct or indirect discrimination on the ground of sex is prohibited in the fields quoted in paragraph 1.*

3. *Positive measures should be implemented to improve women's situation until substantive and effective equality between women and men is achieved in this particular field of employment.*

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ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 31. August 2000

CHARTE 4432/00

CONTRIB 286

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme von Arbeitsgemeinschaft Freier Schulen (AGFS). [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

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Hamburg,
14. Juli 2000

Stellungnahme zu den bisherigen Vorschlägen für einen Artikel „Recht auf Bildung“ (z.Zt. Art. 16) der Charta der Grundrechte der Europäischen Union

In der Arbeitsgemeinschaft Freier Schulen (AGFS) arbeiten die Verbände der Schulen in freier Trägerschaft in der Bundesrepublik Deutschland zusammen (vergl. Fußzeile).

Zu dem aktuellen Entwurf eines Art. 16 „Recht auf Bildung“ gemäß dem Vermerk des Präsidiums vom 5. Mai 2000 (Dokument: CHARTE 4284/00, Convent 28) sowie zu weiteren vorgelegten Vorschlägen nimmt die AGFS wie folgt stellung:

Die AGFS unterstützt die Vorschläge des Europäischen Forum für Freiheit im Bildungswesen (EFFE) vom 10. und 25. April 2000(CHARTE 4215/00, Version multilingue und CHARTE 4253/00, überarbeitete Version nur in deutscher Sprache) mit den beiden zentralen Anliegen,

Mitglieder der AGFS: Arbeitskreis katholischer Schulen in freier Trägerschaft
Arbeitsgemeinschaft Evangelischer Schulbünde e.V.
Bund der Freien Waldorfschulen e.V.
Vereinigung Deutscher Landerziehungsheime
Bundesverband Deutscher Privatschulen, Bildungseinrichtungen in freier Trägerschaft e.V. (VDP)

1. das Elternwahlrecht in Übereinstimmung mit der pädagogischen Überzeugung nicht nur zu respektieren sondern zu gewährleisten und

2. durch gleichberechtigte Förderung aller Schulen - gleich ob in freier oder staatlicher Trägerschaft – auch praktisch zu ermöglichen.

Eine Begründung für diese Forderungen hat das Europäische Parlament bereits in seiner Entschließung zur Freiheit der Erziehung in der Europäischen Gemeinschaft vom 14.3.1984 unter Ziffer I 9 formuliert:

„Aus dem Recht der Freiheit der Erziehung folgt wesensnotwendig die Verpflichtung der Mitgliedsstaaten, die praktische Wahrnehmung dieses Rechtes auch finanziell zu ermöglichen und den Schulen die zur Durchführung ihrer Aufgaben und zur Erfüllung ihrer Pflichten erforderlichen öffentlichen Zuschüsse ohne Diskriminierung der Organisatoren, der Eltern, der Schüler oder des Personals zu den gleichen Bedingungen zu gewähren, wie sie die entsprechenden öffentlichen Unterrichtsanstalten genießen; dem steht nicht entgegen, dass von den frei gegründeten Schulen ein gewisser Eigenbeitrag als Ausdruck der Eigenverantwortlichkeit und zur Unterstützung ihrer Unabhängigkeit zu fordern ist.“

Auch der von der Initiative „Netzwerk Dreigliederung“ vorgelegte Vorschlag für einen Artikel „Recht auf Bildung“ (CHARTE 4164/00) stimmt mit diesen Forderungen inhaltlich überein. Der Formulierungsvorschlag des EFFE wurde mit anderen Europäischen Organisationen des Bildungswesens wie ECNAIS (The European Council of National Associations of Independent Schools), OIDEL (Organisation internationale pour le développement de la liberté), ECSWS (European Council of Steiner Waldorf Schools), die zusammen mehr als 10 Millionen Schüler an Europäischen Schulen in freier Trägerschaft repräsentieren, abgestimmt. Er lautet in der letzten Fassung gem. Dokument CHARTE 4253/00 wie folgt:

Artikel 16: Recht auf Bildung

(1) Jeder hat das Recht auf Bildung. Dazu gehört der unentgeltliche Zugang zum allgemeinbildenden Unterricht bei gleichen finanziellen Bedingungen für alle allgemeinbildenden Schulen.

(2) Bildung und Erziehung sind frei. Sie sind auf die volle Entfaltung der Fähigkeiten und Begabungen gerichtet.

(3) Das Recht der Eltern, Erziehung und Bildung ihrer Kinder entsprechend ihren religiösen, weltanschaulichen und pädagogischen Überzeugungen sicherzustellen, wird garantiert.

(4) Jeder hat das Recht zur Errichtung und zum Betrieb von Bildungseinrichtungen unter Beachtung der Menschenrechte und Grundfreiheiten. Die freie Wahl der Schule wird garantiert.

Auf die ausführlichen Begründungen zu diesem Vorschlag in den genannten Dokumenten des EFFE wird verwiesen.

Die Arbeitgemeinschaft richtet an das Konvent die dringende Bitte, diesen Vorschlag wohlwollend zu prüfen und es bei der Formulierung eines Artikels „Recht auf Bildung“ nicht bei einem Minimalkonsens der Mitgliedsstaaten zu belassen sondern sich an den Staaten zu orientieren, in denen die Menschen- und Grundrechte vorbildlich verwirklicht wurden.

Für die Arbeitsgemeinschaft

Stephan May
Geschäftsführer

Joachim Böttcher
Vorsitzender

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 31. August 2000

CHARTE 4433/00

CONTRIB 287

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag, vorgelegt von der Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunksanstalten der Bundesrepublik Deutschland (ARD). [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD)
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Mitglieder des Konvents zur Erarbeitung
einer europäischen Charta der Grundrechte

17. Juli 2000

Europäisches Grundrecht der Meinungs- und Informationsfreiheit

Sehr geehrte Damen und Herren,

den Landesrundfunkanstalten der ARD, dem Zweiten Deutschen Fernsehen ZDF sowie dem Bundesverband Deutscher Zeitungsverleger BDZV ist zur Kenntnis gelangt, dass Art. 15 der Europäischen Grundrechtscharta eine Überarbeitung erfahren hat. Demnach soll ein Absatz 2 eingefügt werden, nach dem die Presse- und Informationsfreiheit unter Achtung der Transparenz und des Pluralismus gewährleistet wird. Gegenüber dieser Neufassung des Grundrechts bestehen aus der Sicht von ARD, ZDF und BDZV durchgreifende inhaltliche Bedenken.

Die ausdrückliche Erwähnung der Pressefreiheit ohne gleichzeitige Erwähnung der Rundfunkfreiheit sowie der Freiheit der übrigen an die Allgemeinheit gerichteten Kommunikation erweckt den irreführenden Eindruck, als würde nur die Freiheit der Printmedien grundrechtlichen Schutz genießen. Die Aufnahme der Informationsfreiheit vermag dieses Defizit nicht zu kompensieren, da sie nur die Mediennutzer, nicht aber die Anbieter der genannten Massenmedien schützt. Die Rundfunkfreiheit hat sich heute, ebenso wie die Pressefreiheit, wegen ihrer Bedeutung für die freie Meinungsbildung als unerlässlicher Garant für Demokratie und gesellschaftlichen Zusammenhalt erwiesen. In einer modernen, zukunftsweisenden Grundrechtscharta sollte dies ebenso gewürdigt werden wie die neuen Kommunikations- und Informationsmedien, die im Hinblick auf ihre zunehmende Bedeutung als Instrumente auch der Massenkommunikation gleichermaßen ausdrücklich in das Grundrecht mit aufgenommen werden sollten.

Soweit die Überarbeitung des Art. 15 nunmehr den Begriff der Transparenz in den Grundrechtswortlaut eingefügt hat, ist dies nicht sachdienlich. Ist schon der gemeinhin bekannte Begriff des Pluralismus oder der Vielfalt im jeweiligen Kontext unterschiedlich zu werten, so spricht hingegen die Formulierung „Transparenz“ ein diffuses Inhaltsspektrum an. Weder den Verantwortlichen in Presse, Rundfunk und sonstigen Mediendiensten noch den Mediennutzern wird mit diesem Begriff ein klarer Aussagegehalt vermittelt. Entgegen dem Grundanliegen der Charta, den Betroffenen Klarheit und Rechtssicherheit zu verschaffen, werden Auslegungsfragen aufgeworfen und Rechtsunsicherheit geschaffen. Deshalb sollte auf den Begriff der Transparenz in Art. 15 ersatzlos verzichtet werden.

Wir wären den Mitgliedern des Konvents sehr verbunden, wenn sie diesem gemeinsamen Anliegen des öffentlich-rechtlichen Rundfunks und des Verbandes der Zeitungsverleger in Deutschland Rechnung tragen könnten.

Mit freundlichem Gruß

Eva-Maria Michel
Justiziarin des WDR Köln
für die ARD

Dr. Holger Paesler
Leiter Medienpolitik
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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 31 August 2000

CHARTE 4434/00

CONTRIB 288

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution by the Working Group of the Platform of European Social NGOs, regarding proposed amendments to the social rights and horizontal clauses.[1]

[1] This text has been submitted in English language only.

Charter of Fundamental Rights in the European Union

31 May 2000

Proposed Amendments to CONVENT 34 (Social Rights and Horizontal Clauses)

From

The Working Group of the Platform of European Social NGOs

Article 31 Delete – partial incorporation in Article 46

Article 32 Freedom to choose an occupation

Everyone has the right to freely choose and engage in an occupation.

New Article 32A Right to equal remuneration for equal work

Every worker has the right to equal remuneration for work of equal value.

Article 33 Workers' right to information and consultation within the undertaking

Workers and their representatives have the right to information and consultation in good time and in any case before a decision is taken by the central management and/or the management of the undertaking which employs them and this in all situations of company reorganisation and restructuring, including transnational situations, which affect their working conditions and interests.

Article 34 Rights of collective bargaining and action

Employers and workers have the right to negotiate and conclude collective agreements, including at European Union level and to take collective action, in cases of conflicts of interest, to defend their economic and social interests, including at European Union level. *[words deleted]* The right to take collective action includes the right to strike and to organise sympathy strikes, including at European level.

Article 35. Right to rest periods and annual leave

Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave of at least 4 weeks.

Article 36. Safe and healthy working conditions

Every worker has the right to safe and healthy working conditions.

Workers' representatives have the right, in co-operation with management, to evaluate and where necessary to improve the safety and health situation in the enterprise.

Work accidents or professional diseases must create the right to adequate social security benefits.

Article 37. Protection of children and young people at work

The minimum age of admission to employment must not be lower than the minimum school-leaving age without prejudice to such rules as may be more favourable to young people, in particular those ensuring their preparation for work through vocational training and subject to derogations limited to certain light work.

Children and young people admitted to work must have working conditions which suit their age and protect their safety, health or physical, mental, moral or social development and do not jeopardise their education.

Article 38. Right to protection in cases of termination of employment

All workers have a right to protection against discriminatory, unjustified or abusive termination of employment. In these situations the workers will have an unlimited right of access to independent justice to contest the termination as well as the right to adequate financial compensation and/or reinstatement.

Member States will define for certain groups of workers, such as pregnant women, trade union and workers' representatives a temporary prohibition for termination of their employment.

Article 39. Right to reconcile family and professional life

All workers have the right to reconcile their family and professional lives. This right includes in particular the right to paid maternity leave of at least 14 weeks before and/or after childbirth and the right to paid parental leave of at least three months following the birth or adoption of a child.

Article 40. Right of migrant workers to equal treatment

Third-country nationals working lawfully in the territory of the Member States are entitled to treatment not less favourable than that of European Union workers in respect of all working conditions, including pay as well as in respect of social security and social assistance.

Article 41. Social security and social assistance

1. Everyone has the right to social protection, including an adequate level of social security benefits in the event of maternity, illness, dependence or old age, and in the event of unemployment in accordance with each Member State's own procedures.

2. Every person must, from the age of retirement, be able to enjoy resources affording him or her a decent standard of living.

3. Any person who is without adequate resources must receive appropriate social assistance, including a minimum income enabling him/her to live in dignity.

4. Everyone has the right of access to quality social services.

New Article 41A Right to Housing

Provision shall be made for ensuring access to decent housing for everyone.

Article 43. Rights of disabled persons to social and professional integration

All disabled persons, whatever the origin and nature of their disability, are entitled to additional specific measures aimed at guaranteeing their full social and professional integration. These specific measures must include areas such as employment and vocational training, education, transport, culture, housing and public buildings and information.

New Article 43A Right to Protection Against Vulnerability

Provision shall be made to guarantee that vulnerable persons, notably disabled people, impoverished people, socially excluded people, and migrants, shall benefit fully and equally from all rights set down in this Charter of Fundamental Rights.

New Article 45A Access to services of general interest

1. Everyone has the right to services of general interest of guaranteed quality in all sectors which contribute to the quality of life, to life-long development, and more generally to the guarantee of fundamental rights. The provision of services of general interest is based on the principles of equality of access, universality, continuous provision, democratic accountability, and transparency.

2. The exercise of the right to free provision of services, and thus the right to competition, the right to insurance and the right to free access to public-sector markets can be limited in favour of the general interest.

Article 46. Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union and to the social partners within the framework of the powers conferred on them by the Treaties, and to the Member States exclusively within the scope of Union law.

2. This Charter does not establish any competence or any new task for the Community or the Union or modify competences *[four words deleted]* defined by the Treaties.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 31. August 2000

CHARTE 4435/00

CONTRIB 289

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag vorgelegt von die Jungen Europäischen Föderalisten (JEF), mit einen Beschluss des Bundesausschusses vom 09.07.2000. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Politische Beschlüsse des Bundesausschusses 02-00 der JEF Deutschland 08-09/07/2000 in München

Anbei die beiden zentralen politischen Beschlüsse des BA München:

BESCHLUSS 1

EU-Grundrechtscharta als Grundstein für eine Europäische Verfassung

Die Jungen Europäischen Föderalisten Deutschland (JEF-D) begrüßen die Einsetzung und transparente Arbeit des Konvents zur Schaffung einer europäischen Charta der Grundrechte.

Die JEF-D bedauern es sehr, dass sich auf dem Europäischen Rat in Feira angezeichnet hat, dass es den Staats- und Regierungschefs sehr schwer fallen wird, einstimmig dafür zu stimmen, der Grundrechtscharta schon in Nizza rechtsverbindlichen Charakter zu verleihen.

Die JEF-D fordern:

1. Die Schaffung der Grundrechtscharta darf nur erster Schritt hin zu einer echten Europäischen Verfassung sein, die einem Grundrechtskatalog eine klare Kompetenzabgrenzung zwischen Mitgliedstaaten und EU hinzufügt und grundlegende institutionelle Änderungen vornimmt.

2. Eine Europäische Verfassung darf nicht im Sinne des traditionellen Verständnisses einer nationalstaatlichen Verfassung, sondern muss als gesellschaftlicher Grundlagenvertrag der europäischen Bürgerinnen und Bürger verstanden werden.

3. Dementsprechend muss die Ausarbeitung einer weitergehenden Verfassung einem Konvent überantwortet werden, der nach dem Vorbild des derzeitigen Grundrechtskonvents aus Vertreterinnen und Vertretern des Europäischen Parlaments und der Europäischen Kommission sowie der Parlamente und der Regierungen der Mitgliedstaaten zusammengesetzt ist, ebenso transparent arbeitet und zivilgesellschaftlichen Organisationen die Möglichkeiten der Partizipation eröffnet.

4. Die EU-Grundrechtscharta muss ungeachtet der Diskussionen des Europäischen Rates von Feira bindenden Charakter erhalten, so dass sich die Bürgerinnen und Bürger unmittelbar vor den Gerichten auf die Charta berufen können.

5. Als erster Schritt muss die Charta daher bereits in Nizza in die Europäischen Gründungsverträge integriert werden. Mittelfristig müssen wir aber von der Vertrags- zur Verfassungslogik gelangen.

6. Die Bindung der europäisches Recht anwendenden hoheitlichen Einrichtungen an die Charta muss sichergestellt werden; aber auch der objektiven Werteordnung, die eine solche Charta normieren wird, muss ausreichend Rechnung getragen werden.

Begründung:

Seit Ende 1999 arbeitet der EU-Grundrechtskonvent aufgrund der Schlussfolgerungen der Europäischen Räte von Köln und Tampere 1999 an der Schaffung einer EU- Grundrechtscharta. Eine solche Charta wird die Identifikation der Bürgerinnen und Bürger der Europäischen Union erheblich erhöhen können.

Die besondere Bedeutung der Grundrechtscharta ergibt sich daraus, dass sie die EU auf dem Weg zu einer europäischen Verfassung einen wichtigen Schritt voranbringen könnte.

Das vom Europäischen Rat dem Konvent übertragene Mandat ist zwar auf die Erarbeitung der Grundrechtscharta beschränkt. Wir appellieren jedoch an alle europäischen Politikerinnen und Politiker, den Grundrechtschartaprozess zu einem umfassenden europäischen Verfassungsprozess auszubauen.

Verfassung heißt dabei für uns nicht Staat. Das Verfassungsverständnis des 19. Jahrhunderts hat sich überlebt, für Europa, wie auch für seine Gliederungen. Verfassung heißt vielmehr Selbstorganisation der Bürgerinnen und Bürger mittels einer rechtlichen Grundlage. Das heutige Europa der Nationalstaaten muss daher durch ein Europa der Bürgerinnen und Bürger abgelöst werden, die bisherige Vertragslogik einer Verfassungslogik weichen.

Eine solche Bürgerverfassung müssen sich die Bürgerinnen und Bürger selbst geben. Verfassungsgebendes Organ muss daher ein Konvent sein, der aus gewählten Bürgervertreterinnen und Bürgervertretern besteht und zivilgesellschaftliche Gruppierungen einbezieht.

Es reicht nicht aus, dass der aktuelle Grundrechtskonvent eine weitere Deklaration schafft, die den Bürgerinnen und Bürgern viel verspricht, aber keine einklagbaren Rechte an die Hand gibt.

Zwar wird eine verbindliche EU-Grundrechtscharta grundsätzlich nur die EU-Recht anwendenden Organe der EU und der Mitgliedstaaten binden. Dennoch wird, ähnlich wie in einigen Verfassungen der Mitgliedstaaten, dieser Katalog von Grundrechten nicht nur Individualrechte schaffen, sondern darüber hinaus eine objektive Werteordnung normieren.

BESCHLUSS 2:

Bis 2010 eine gesamteuropäische Föderation schaffen!
- Erweiterungsprozess voranbringen -

Die Jungen Europäischen Föderalisten Deutschland (JEF-D) fordern die europäischen Institutionen und die Parlamente und Regierungen die Mitgliedstaaten und der Kandidatenstaaten auf, das Jahr 2000 zu nutzen, um konkrete Fortschritte bei der Vertiefung und Erweiterung Europas zu erreichen. Die Europäische Union muss sich zum einen selbst aufnahmefähig machen. Zugleich muss mit vereinten Kräften daran gearbeitet werden, die Kandidatenstaaten beitrittsfähig zu machen und die Beitrittsverhandlungen zügig voranzubringen.

Spätestens im Jahr 2010 sollten folgende Ziele erreicht werden:

1. Alle zwölf Staaten, mit denen heute verhandelt wird, sollten Mitglied der EU sein.
2. Die Annäherung der Türkei und der anderen Staaten Südosteuropas an die EU sollte beschleunigt worden sein.
3. Umfassende Reformen der EU-Institutionen und der Entscheidungsverfahren, eine rechtsverbindliche Grundrechtscharta, eine bessere Kompetenzabgrenzung und eine Reform der Finanzverfassung und der ausgabenträchtigen Politiken sollten uns auf dem Weg zu einer demokratischen, bürgernahen, solidarischen und nachhaltigen gesamteuropäischen Föderation entscheidend vorangebracht haben.

I. Konstitutionelle Reformen der EU: In 2000 große Fortschritte nötig, bald mehr!

Eine ausreichende Reform der EU-Institutionen ist unabdingbare Voraussetzung für die Aufnahme neuer Mitgliedstaaten: Die Regierungskonferenz zur Überarbeitung der EU-Verträge, die bis zum Europäischen Rat in Nizza im Dezember 2000 zu Ergebnissen kommen soll, darf bei den institutionellen Reformen nicht zu einer „kleinen Lösung" kommen. Die Bewältigung allein der sogenannten „left-overs" von Amsterdam, d.h. die Stimmengewichtung im Ministerrat, die Erweiterung der Anwendung von Mehrheitsentscheidungen im Rat und die Zahl der Mitglieder der Europäischen Kommission, wird nicht zu einem effektiven politischen System führen, welches die beinahe Verdopplung der Mitgliedsländer verkraften kann. Eine bloße technische Anpassung ist nicht ausreichend, umfassendere Reformen der Institutionen sind nötig: Es müssen große Schritte hin zum Ziel eines Zwei-Kammer-Parlaments bestehend aus einer Bürger- und einer Staatenkammer (hervorgehend aus dem heutigen Europäischem Parlament und dem heutigen Rat) und der Weiterentwicklung der Europäischen Kommission zur Europäischen Regierung gemacht werden.

Besonders wichtig ist, dass die Einstimmigkeitsregel im Ministerrat mit der Ausnahme von Vertragsänderungen vollständig aufgehoben wird. Es sollte darüber hinaus im Vertrag von Nizza ein konkretes Datum festgelegt werden, zu dem Verhandlungen über weitere grundlegende Reformen der EU beginnen sollen. Vorgeschlagen wird diese Verhandlungen Anfang 2003 und damit bald nach dem voraussichtlichen Inkrafttreten des Vertrages von Nizza zu beginnen. Die künftigen Vertragsänderungen dürfen nicht mehr allein von einer Regierungskonferenz ausgehandelt werden. Die JEF-D fordert, dass zur Vorbereitung der nächsten Reformen nach dem Vorbild des Grundrechtskonventes ein inter-institutioneller Konvent bestehend aus Vertretern des Europäischen Parlaments, der Europäischen Kommission sowie der Parlamente und Regierungen der jetzigen und zukünftigen Mitgliedstaaten eingesetzt wird. Dies wäre ein wichtiger Schritt hin zu einer wahren Verfassung der europäischen Bürgerinnen und Bürger.

II. Erweiterungsprozess beschleunigen!

Die Europäische Union hat mit der Aufnahme von Beitrittsverhandlungen mit weiteren sechs Staaten Mittel- und Osteuropas im Februar 2000 einen wichtigen Beitrag zur Stabilisierung der politischen und wirtschaftlichen Situation in diesen Ländern geleistet. Beitrittsverhandlungen mit nun insgesamt zwölf Staaten sind zwar für beide Seiten schwierig, doch müssen die Verhandlungen wegen ihrer historischen Bedeutung nun mit noch größerer Energie voran gebracht werden.

Die JEF-D sieht dabei folgende zentrale Grundprinzipien.

Die Beitrittsverhandlungen mit den Staaten der ersten Runde, Estland, Polen, Slowenien, Tschechien, Ungarn und Zypern, müssen beschleunigt werden; auch in den sensiblen Kapiteln wie Freizügigkeit, Umwelt, Agrar und Bodenerwerb müssen bald erste Ergebnisse erreicht werden. In den Beitrittsverhandlungen mit Bulgarien, Lettland, Litauen, Malta, Rumänien und der Slowakei sollte es für die weit fortgeschrittenen Staaten möglich sein, zur ersten Gruppe aufzuschließen.

Auf dem Europäischen Rat in Nizza sollte ein Zieldatum für den Abschluss der Beitrittsverhandlungen mit den ersten Staaten gesetzt werden, um die beiderseitigen Anstrengungen zur Lösung der auftauchenden Fragen nach der bewährten Manier des Starttermins für den

Binnenmarkt und die Währungsunion zu verstärken. Als Zieldatum wird der 31. Dezember 2001 vorgeschlagen. Ausnahme- und Übergangsregeln für die neuen und die alten Mitgliedstaaten sollten nur in geringem Umfang und für maximal 10 Jahre zugelassen werden, um die neuen Mitglieder nicht zu Mitgliedern zweiter Klasse werden zu lassen.

Die Vorbereitung der Erweiterung in den Kandidatenstaaten darf sich nicht auf die (technische) Anpassung der Gesetzgebung, Verwaltung und Wirtschaft erschöpfen. Hinzukommen muss eine Aufklärung aller Bürgerinnen und Bürger über die EU und die mit einem Beitritt verbundenen positiven und negativen Konsequenzen. Die bis vor zwei Jahren euphorisch positive Haltung der meisten Bürgerinnen und Bürger in den Beitrittsstaaten unterliegt jetzt, wo zum Teil schmerzhaften Anpassungsmaßnahmen in Angriff genommen werden, einem nicht zu unterschätzenden Wandel. Der Transformationsprozess in den Beitrittsstaaten wird auch weiterhin zu einem radikalen Umbau der wirtschaftlichen und sozialen Verhältnissen führen. Es gilt, die Bürgerinnen und Bürger darauf vorzubereiten und die größten sozialen Härten abzufedern. Auch in den derzeitigen EU-Mitgliedstaaten werden die Beitritte zu Veränderungen führen. Auch hier werden für besondere Härten Ausgleichmaßnahmen nötig werden. Eine umfassende Information und Diskussion aller politischen und gesellschaftlichen Gruppen in den Mitglied- und den Beitrittstaaten über die Auswirkungen der EU-Erweiterung kann die Chancen der Erweiterung herausstellen und die Gefahren der Erweiterung entmystifizieren.

III. Weitere interne Reformen der EU nötig

Die EU muss mit Blick auf die Erweiterung neben institutionellen Reformen auch Reformen verschiedener Politikbereiche voranbringen: Insbesondere in der Agrar- und Strukturpolitik wird es zu umfassenden Reformen kommen müssen. Die beim Europäischen Rat in Berlin im März 1999 im Rahmen der Agenda 2000 beschlossenen Reformen sind mittelfristig nicht ausreichend. Um die neuen Mitglieder in die Gemeinsame Agrarpolitik integrieren zu können, sollte es noch vor den ersten Beitritten und damit vor 2006 zu einer weiteren Senkung der Garantiepreise und im Gegenzug zu einer am allgemeinen Einkommensniveau der jeweiligen Staaten orientierten angemessenen Erhöhung der direkten Einkommensbeihilfen kommen. Eine umfassende Politik für die Integration zwischen ländlichem und städtischem Raum muss den auch für die Zukunft zu erwartenden Arbeitsplatzabbau in der Landwirtschaft in Mittel- und Osteuropa durch Alternativarbeitsplätze vor Ort abfedern. Auch die EU-Strukturpolitik und das System der EU-Eigenmittel bedürfen vor Aufnahme der ersten Neumitglieder einer weiteren Revision.

IV. Partnerschaft mit allen anderen Europäerinnen und Europäern intensivieren!

Durch Assoziierungsverträge neuen Typs, die unter anderem eine Unterstützung beim Aufbau von demokratischen und rechtsstaatlichen Institutionen und bürgergesellschaftlichen Strukturen und eine Marktöffnung vorsehen müssen, sollten auch alle anderen Staaten Südosteuropas (Albanien, Bosnien-Herzegowina, Kroatien, Mazedonien, Moldawien), nach einem Übergang zur Demokratie auch die Bundesrepublik Jugoslawien bzw. Serbien, Montenegro und das Kosovo stärker an den Integrationsprozess herangeführt werden. Mittelfristig erscheint eine Aufnahmeperspektive möglich.

Für die Türkei müssen im Beitrittsprozess dieselben Kriterien wie für die Staaten Mittel- und Osteuropas gelten. Sollte die Einhaltung der fundamentalen Menschen- und Minderheitenrechte sowie die Stabilisierung der Demokratie in der Türkei erreicht sein, können konkrete Beitrittsverhandlungen begonnen werden. Die EU sollte die Türkei aktiv dabei unterstützen, die Aufnahmekriterien zu erfüllen.

Die politischen und wirtschaftlichen Beziehungen zwischen der EU und Russland, der Ukraine, Weißrussland und den kaukasischen Republiken sollten ausgebaut werden. Diese Zusammenarbeit mit dem Ziel der Stärkung von Wohlstand, Nachhaltigkeit und Frieden kann für die Ukraine, Weißrussland und die kaukasischen Republiken bei Erfüllung der Demokratie und Menschenrechtsstandards mit einer Beitrittsperspektive verbunden werden, sollte jedoch im Hinblick auf Russland nicht durch eine derzeit unrealistisch erscheinende Beitrittsperspektive belastet werden.

Sollten die Schweiz, Norwegen und Island beitreten wollen, wäre dies sehr zu begrüßen.

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 31 August 2000

CHARTE 4436/00

CONTRIB 290

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the International Federation of Human Rights (FIDH), on the inclusion of economic and social rights. [1] [2]

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[1] This text has been submitted in English language only.

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INTERNATIONAL FEDERATION OF HUMAN RIGHTS
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الفدرالية الدولية لحقوق الإنسان

Charter of Fundamental Rights of the EU : for the inclusion of economic and social rights

Since the Convention began its work on a draft of the Charter of Fundamental Rights of the EU, the FIDH has, along with numerous other non-governmental and labour organisations, requested the inclusion of economic and social rights in the Charter. In the absence of such rights, the added value of the Charter would be weak, or even, nil.

Today, the works of the Convention are well ahead regarding civic and political rights. On the other hand, economic and social rights are still subject to vivid discussions . That is the reason why the FIDH wishes to take advantage of this opportunity to stress the weaknesses of the EU's protection of economic and social rights, and to examine why, from this point of view, it is essential for the Charter to unequivocally sanction such rights and recognise them as legally binding.

Until now, the EU has not endowed itself with an effective European social policy. Although the new Charter is not supposed to be a substitute for such a policy, it has nevertheless three main advantages : it will (1) **avoid a regression in that field**, (2) **guide the future Community legislation** and (3) **guide the Statute law of the European Court of Justice (ECJ)**.

è It must be noted that the future Charter will have a restricted field of application : Indeed, the **project of article 49** states that the Charter will be directed to the institutions and the agencies of the Union, as well as to the Member States, when implementing Community Law[1]. It specifies that the Charter neither creates any power or new tasks for the Community and the Union, nor modifies the powers and tasks defined by the treaties.

Therefore , it will be possible for the rights sanctioned in the Charter to be put forward on the one hand, in relation to the acts of the institutions of the European Community and Union, and on the other hand, in relation to the acts of the Member States situated within the jurisdiction of Community law[2]. These rights are therefore conceived as *limitations* brought to the use that the institutions of the Union can make of their powers, or to that of the Member States, when the use of these powers is situated in the field of application of Community law.

Thus, the new Charter will oblige neither Member States to guarantee economic and social rights in their national legislation, nor the EU to legislate in that field. However, it will have the effect **of impeding Member States, while adopting Community law, to reduce the existing social guarantees to a level lower that the one established by the Charter**. As a consequence, it is important that the Charter establish the highest level of protection possible, in order for it to constitute a real guarantee against such an evolution. By doing so, the EU will be able to exercise its powers in the economic and social fields, with no risk of diminishing social guarantees.

è Furthermore, the Charter will sanction social principles that should afterwards **guide the action of the European Union in the social field, fixing goals to be attained.** It is desirable for the Commission to **make use of its power of initiative in the social field, in order to harmonise the obligations of the Member States upwards**[3]:the future Community rules will have to aim at realising social principles that will be established within the Charter. It will be the same for the legislation adopted by Member States when acting in the field of application of Community law. The Charter will therefore have a real added value in this respect.

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1 Charter 4422/00, CONVENT45, July 28, 2000.

2 It means that either they implement Community law, or they claim to bring a restriction to a freedom recognised by Community law, in the respect of the conditions fixed by Community law itself.

3 The principle of subsidiarity allows a Community intervention in a field which is not exclusively of Community jurisdiction « only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community », cf. article 5, al. 2, EC.

è Furthermore, the Charter will constitute a **reference for the European Court of Justice** (ECJ). If it has a constraining power, the Court will have to verify the conformity of Community legislation (or of the national legislation implementing it) to the Charter. As far as possible, it will confer on the Community legislation an interpretation congruent with the Charter. Even if the Charter is not binding, the Court will probably refer to it in order to interpret Community law.

A thorough analysis of the jurisprudence of the ECJ demonstrates that the Court allows Member States to adopt certain measures liable to hinder exchanges in order to maintain a high level of social protection[4]. Given that the ECJ will find that the Community law conforms with the economic and social rights that will be established in the Charter, the risk that the ECJ would require from the Member States to reduce the social guarantees in order to conform with Community law would be even more limited than now.

In the case where a Member State offers social guarantees executing international conventions that came into force in its respect before its accession to the European Community, art. 307 of the Treaty instituting the European Community provides in its paragraph 1 that the rights and obligations arising from conventions concluded by a Member State with one or more third countries before its accession to the EC are not affected by the Treaty. Paragraph 2 specifies that « To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established ».

It is possible to fear that this second line of the paragraph would compel the considered Member State to denounce the international convention in question in the case when it would stand in the way of the integral respect of this State's obligations resulting from Community law . In this case also, while consecrating economic and social rights, the Charter would provide the Court with a reference allowing it to interpret art 307.2 of the EC Treaty in conformity with the social objectives of the EU.

Given the potential added value of the Charter in the social field, FIDH regrets that some social

[4] CJCE, 14 juill. 1981, Procédure relative à des amendes contre S. Oebel, 155/80, Rec., p. 1993, pt 12. CJCE, 17 déc. 1981, Procédure pénale contre A.J. Webb, 279/80, Rec., p. 3305. CJCE, 17 déc. 1981, Procédure pénale contre A.J. Webb, 279/80, Rec., p. 3305 ; CJCE, 3 févr. 1982, Seco et Desquenne & Giral, aff. Jtes 62/81 et 63/81, Rec., p. 223, pt 14 ; CJCE, 27 mars 1990, Rush Portuguesa, C-113/89, Rec., p 1-1417, pt 17 ; CJCE, 28 mars 1996, Guiot, C-272/94, Rec., p I-1905, pt 16.

rights - as standing now in the projects of articles of the future Charter - are worded in a less precise manner that social rights established in the revised European Social Charter and in the Community Charter of fundamental social rights of the workers (1989).

The definition that the project of the Charter provides of the right to social security and social assistance[5] is far less explicit than article 12 of the Revised European Social Charter - which resumes, except for one modification, article 12 of the European Social Charter of October 18, 1961 ; the article devoted to « health care » in the Charter[6] gathers, in a sole disposition, the far more developed dispositions of articles 11 and 13 of the Revised European Social Charter, devoted respectively to « the right to health protection » and to « the right to social and medical assistance » (informal translation) [7]..

In addition, with regard to the social rights established in the international human rights instruments, the Charter has some loop-holes. Indeed, it does not mention the rights of workers' representatives to protection within the company, against acts that could cause them prejudice because of their specific quality and their right to « appropriate facilities in order to allow them to function rapidly and effectively» (informal translation), when the Revised European Social Charter provides this guarantee (art. 28). It is silent on the right of the elderly to « continue as long as possible as members of society », to « freely choose their way of life and to lead an independent life in their usual environment as long as they wish and as is possible », and, finally, regarding the elderly living in institutions, to enjoy a private life and to have the possibility of participating in the determination of the living conditions in the institution (art. 23 - informal translation).

These omissions are even more astonishing in that sometimes, subsidiary Community law has already intervened in order to recognise these rights. Thus, although the project of Charter of Fundamental Rights of the European Union does not mention the right of the worker to dignity at work, which means, more particularly, the protection against harassment (art. 26 of the Revised European Charter), two instruments already exist at the Community level aiming at harassment, considered as a form of discrimination regarding employment[8]. Also, workers rights to the

5 Project of article 32

6 Project of article 33.

7 The right to social and medical assistance, as defined by the Revised European Social Charter, is nevertheless partly recognised by article 32, § 3, of the project CHARTE 4422/00, CONVENT 45, July 28 2000 («The Union recognises and respects the right to social assistance and housing benefit in order to ensure a decent existence for persons lacking sufficient resources, in accordance with the rules laid down by Community law and national law and practices»).

8 Voy. Protection de la dignité de la femme et de l'homme au travail. Code de pratique visant à combattre le harcèlement

protection of their credit in the case of insolvency of their employer has been the object of a Community directive[9] , and nevertheless - although it is a right protected by article 25 of the Revised European Social Charter - does not appear in the Charter of fundamental rights of the European Union.

What is more, the horizontal clause headed « level of protection » does not fill this gap ; following the terms of this disposition, the Charter will neither be interpreted as limitative of, or interfering with, the rights recognised by international law and international conventions to which the Union, the Community or ALL Member States are party, nor by the Constitutions of the Member States[10].

NOW, the Revised European Charter, whose terms are more protective than the projects of articles of the new Charter, does not bind all Member States. This means that the Community judge will not be able to make it prevail over the new Charter, even if its dispositions are more protective[11].

This is why the FIDH appeals to the drafters of the Charter to introduce, in the horizontal clause related to the level of protection, a reference to the more protective dispositions, even if these bind only one Member State ; this seems even more justified given that this clause does refer to the Constitutions of Member States when these, by definition, only bind one Member State !

Recommendations :

- The FIDH appeals to the Convention to **reinforce and complete the wording of economic and social rights now presented in the projects of articles on economic and social rights,** taking its inspiration more particularly from the Revised European Social Charter.

sexuel, arrêté conformément à la résolution du Conseil concernant la protection de la dignité de la femme et de l'homme au travail (J.O.C.E., n°C 157, 27.6.1990), annexé à la Recommandation de la Commission du 27 novembre 1991 sur la protection de la dignité des femmes et des hommes au travail (J.O.C.E., n°C 27, 4.2.1992); ainsi que l'assimilation qu'opèrent les directives proposées sur la base de l'article 13 CE entre le harcèlement et la discrimination. Il existe également un projet de directive amendant la directive 76/207/CE interdisant le harcèlement sexuel sur le lieu de travail, proposé sur la base de l'article 13 CE.

9 Directive 80/987/CEE of Octobre 20, 1980 (*O.J.E.C*, n°L 283, 20.10.1980).

10 Project of article 51.

11 It will be the same for some conventions of the ILO.

- The FIDH also appeals to the drafters of the Charter **to modify the horizontal clause related to the level of protection in order to include in it a reference to any international convention more protective binding for at least one Member State.**

- Finally, the FIDH appeal to Member States to decide in favour of a **constraining Charter** whose respect could be ensured by the ECJ.

Brussels, August 4, 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 31 August 2000

CHARTE 4437/00

CONTRIB 291

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Newspaper Publishers' Association (ENPA) . [1]

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[1] This text has been submitted in English language only.

Dear Madam,
Dear Sir,

the European Newspaper Publishers' Association (ENPA) presented a statement on Article 15 of the Draft Charter (Doc 4149/00) at the public hearing of the Convention on 27 April 2000.

The Convention has recently published an amended proposal (Doc 4360/00) that suggests alteration of Article 15, by means of adding a second paragraph. This new provision reads as follows :

« Freedom of press and information shall be guaranteed with due respect for transparency and pluralism. »

We urge the Convention to delete the last part of the provision (« …with due respect for transparency and pluralism. »). The European Publishers are strongly opposed to this kind of restriction.

By principle, the fundamental right of the Freedom of the Press should not be devalued by such restrictions that would go beyond the ones already established in Article 10 Paragraph 2 of the European Convention on Human Rights. ENPA has given a detailed argumentation to this opinion in its above mentioned statement.

ENPA is very much concerned that the very words « transparancy » and « pluralism » will cause confusion. These terms can have different meanings. They lack clarity and certainty. They are open to differing interpretations and applications that could result in unnecessary and unjustified restrictions on freedom of expression and press freedom. The whole of the new paragraph and concepts that it introduces could lead not only to uncertainty but also to potentially detrimental curbs on freedom of expression.

We therefore hope that the Convention reconsiders its proposal so far as the restrictive part of Article 15 Paragraph 2 is concerned.

We also hope that the Convention ensures that exercise of the rights set out in Articles 15 and 18 could not be unnecessarily curtailed by Articles 12 and 19, so that rights to freedom of expression, press freedom and freedom of information will not be unduly restricted.

Further more we seize the opportunity to briefly comment on the published statement by GESAC (Doc : 4404/00). ENPA takes clear opposition to the view of GESAC on the issue of moral rights of authors. Apart from that we see no need for regulating this field in the envisaged Charter. The European Commission (DG Markt) is currently looking into the issue and has in public indicated that there is no reason for harmonisation so far.

Yours sincerely,

Dietmar Wolff

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 1 septembre 2000
(version multilingue)

CHARTE 4438/00

CONTRIB 292

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de l'Union Internationale de la Propriété Immobiliere (UIPI). [1] [2]

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[1] UIPI: 7 Sofokleus Street, Athènes 105.59, Greece. Tél.: +301-32 57 846. Fax: +301-32 18 055. E-mail: pomida@otenet.gr

[2] Ce texte nous a été transmis dans une version multilingue français/anglais.

UNION INTERNATIONALE DE LA PROPRIETE IMMOBILIERE (UIPI)

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Objet: Charte des Droits Fondamentaux.

Bruxelles, le 25 Juillet 2000

Monsieur,

L'Union Internationale de la Propriété Immobilière (UIPI) est une organisation non gouvernementale fondée dès 1923 regroupant la plupart des organisations nationales européennes de défense de la propriété immobilière.

A ce titre elle représente directement ou indirectement plusieurs dizaines de millions de citoyens possédant quelque propriété immobilière à usage d'habitation ou commerciale, représentant le plus souvent le fruit de leur épargne.

Il est inutile d'insister sur l'importance économique que revêt le secteur de la construction aussi bien pour l'emploi qu'il procure directement ou indirectement que pour la fonction de logement qu'il remplit pour les personnes non propriétaires de leur logement ou de leur bien.

Il est dès lors évident qu'il est essentiel de disposer en Europe d'un secteur immobilier sain offrant logements, commerces et bureaux en suffisance.

Dans cette optique et compte tenu des raisons exposées plus haut, l'UIPI est particulièrement attentive à la protection de la propriété immobilière aussi bien sur le plan juridique que politique.
C'est seulement en offrant une large protection efficace de la notion de propriété privée et en la respectant que l'on rétablira une confiance nécessaire au développement de ce secteur.
Dans ce cadre, nous nous félicitons tout d'abord de la présence de l'article 16 dans le projet de Charte Européenne des Droits Fondamentaux et nous souhaiterions apporter notre contribution à la rédaction de ce texte pour le rendre aussi précis que possible afin qu'il offre une protection effective du droit de propriété.

L'article 16 est actuellement ainsi formulé :

« *Every natural or legal person is entitled to the* ***peaceful enjoyment*** *of his* ***possessions.*** *No one shall be* ***deprived*** *of his possessions except in the public interest* ***and subject to the conditions provided for by the law*** *and by the general principles of international law."*

Nous nous permettons de suggérer les modifications suivantes afin de protéger au mieux les détenteurs d'un titre de propriété.

Remarques préalables :

1) Les termes « peaceful enjoyement (paisible jouissance) » sont abstraits. Il est nécessaire d'ajouter **« free disposition (libre disposition) »** afin de couvrir les besoins actuels.

2) **Le mot « possessions (possessions)»** n'est pas suffisant. Nous proposons d'employer le terme **« propriété »** qui est plus spécifique.

3) Le terme **« deprivation (dépossédé/depossession)** » ne correspond plus aux besoins actuels de protection du citoyen. De nos jours, les Etats et les autorités de l'Etat ne dépossèdent plus officiellement les citoyens européens de leur propriété immobilière . En lieu et place, ils VIDENT LA PROPRIETE DE TOUTE SA SUBSTANCE ôtant ainsi la signification même de propriété et éliminant de la sorte toute valeur financière, en limitant son usage à l'excès, en imposant une législation environnementale (trop) stricte ou en prolongeant les baux à loyers à l'infini, le plus souvent sans réelle nécessité sociale.

4) L'expression « **subject to the conditions provided by the law (soumis aux conditions prévues par la loi) »** est abstrait et ne protège pas les citoyens européens parce qu'il ne spécifie pas quelle est la protection minimale que chaque législation nationale devrait garantir en pratique aux citoyens européens. Ce qui est manquant dans la phraséologie est la garantie expresse aux détenteurs d'un titre de propriété d'une compensation **entière et préalable,** dans tous les cas d'une telle violation de ses droits.

NOUVELLE PROPOSITION DE TEXTE

« Every natural or legal person is entitled to the peaceful enjoyment ***and free disposition*** *of his* ***property.*** *No one shall be* ***deprived*** *of his property* ***or restricted in it's use*** *except in the public interest and subject to the conditions provided for by the law and by the general principles of international law,* ***and entitled to a full and prior compensation of his damage."***

Nous nous tenons à votre disposition pour toute discussion ou collaboration à ce sujet et vous remercions de l'attention bienveillante que vous porterez à nos propositions.

Pour l'UIPI

S. PARADIAS — A. VIZIANO

Secrétaire Général — Président

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 1 September 2000

CHARTE 4439/00

CONTRIB 293

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution by the European Women's Lobby (EWL), with a press release regarding women excluded from the EU Charter of Fundamental Rights. [1]

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[1] This text has been submitted in French and English languages.

LOBBY EUROPEEN DES FEMMES
EUROPEAN WOMEN'S LOBBY

3rd of August 2000

PRESS RELEASE

WOMEN EXCLUDED FROM THE EU CHARTER OF FUNDAMENTAL RIGHTS:

GENDER GAP AND SEXIST LANGUAGE

"The EWL very much regrets that d**espite our numerous proposals and recommendations, the draft Charter of Fundamental rights of the EU does not introduce the concept of gender equality as a basic unconditional and fundamental principle of the Union. To compound the omission, the Charter in the English, German, Spanish and French versions that we have read, uses sexist language in several articles. The Charter, as presently drafted, constitutes a devastating step backwards in the fight against the persistent structural discrimination faced by women all over Europe" said Denise Fuchs, President of the European Women's Lobby, adding "This exclusively male Presidium once again has failed to integrate women's perspective into the Charter.**"

The EWL notes that the general principle of non-discrimination as proposed by the text of the Charter does not take into consideration the structural discrimination faced by women in all areas. In order to allow women to fully enjoy their fundamental rights and freedoms, to be full citizens in all areas, **a provision exclusively dedicated to the unconditional principle of gender equality must be introduced in the first articles of the Charter and must provide explicitly for the adoption of positive measures by Member States**. "The sole references to gender equality in the charter are in article 21 where sex is grouped alongside other grounds of discrimination, by implication this positions women as a vulnerable group in society, whereas we represent half of the population, and in article 22 which limits gender equality to the area of employment and work. This is just not acceptable" said Mary Mc Phail, Secretary general of the EWL.

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Furthermore, the Charter in its English version uses sexist languages several times, for example in article 3(1) "Everyone has the right to respect for *his* physical and mental integrity". The EWL stresses that **one form of gender discrimination is the use of sexist language**. "The use of sexist language, though sometimes unintentional, is nonetheless damaging in excluding women and in rendering our reality and our experience invisible. In the case of the Charter, the political mistake is very serious. The EWL will mobilise women's organisations all over Europe to fight against this intentionally regressive text" added the President of the EWL.

Other key demands of the EWL are the inclusion of a provision on parity democracy in the Charter; a provision on gender related violence or persecution as a form of torture (Sexual mutilation still take place on European territory, as well as other kinds of gender related violence such as rape, domestic violence, prostitution, forced marriage, "honour" killing, including those which take place within the family).

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 1. September 2000

CHARTE 4440/00

CONTRIB 294

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme vorgelegt von der Kommission Europa des Deutschen Juristinnenbundes (DJB). [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Deutscher
Juristinnenbund

Vereinigung der
Juristinnen,
Volkswirtinnen und
Betriebswirtinnen e.V.
Geschäftsstelle

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S t e l l u n g n a h m e
der Kommission Europa des djb zur Charta der Grundrechte der Europäischen Union

Stand: 15. August 2000

Das Präsidium hat Ende Juli einen vollständigen Text der Charta vorgelegt. Der djb begrüßt den Text. Der Grundrechtsstandard ist im wesentlichen sachgerecht formuliert. Für folgende Artikel schlägt der djb Änderungen vor:

1. Recht auf freie Entwicklung der Persönlichkeit

Der djb schlägt vor, nach Art. 3 folgenden neuen Artikel einzufügen:

Artikel 3a Recht auf freie Entwicklung der Persönlichkeit

Alle Menschen haben das Recht, sich frei in ihrer Persönlichkeit zu entwickeln, soweit sie nicht gegen die Rechte anderer oder das Recht der Union verstoßen. Der Kern ihrer Persönlichkeit ist frei von hoheitlicher Einmischung

Begründung:
Eine allgemeine Handlungsfreiheit ist mehreren europäischen Verfassungen bekannt. Ihre Auffangfunktion macht eine Überprüfung der Rechtmäßigkeit jeglicher belastender Eingriffe möglich, insbesondere des auch europarechtlich anerkannten Grundsatzes der Verhältnismäßigkeit.

Als besonders wichtige Ausprägung der Menschenwürde bedarf es eines ausdrücklichen absoluten Schutzes des Persönlichkeitskerns, der auch über den Schutz des Privatlebens im Sinne des Art. 7 hinausgeht.
Der nunmehr in Art. 8 aufgenommene Schutz personenbezogener Daten ist zu begrüßen, aber nicht ausreichend

Die Menschenwürde stellt eine absolute Tabugrenze dar, die klassisch mit Bereichen wie Menschenhandel, Folter, Todesstrafe oder Euthanasie verbunden wird.

Die neuere Rechtsentwicklung und die durch sie reflektierte rasante Entwicklung im technologischen Bereich haben jedoch gezeigt, dass auch Fälle wie die Verwendbarkeit von Tagebucheintragungen, der Schutz des Namens, das Recht auf Kenntnis der eigenen Abstammung etc. den Kernbereich sowohl der allgemeinen Handlungsfreiheit als auch der Menschenwürde berühren. Eine ausdrückliche grundrechtliche Absicherung ist deshalb geboten.

Die Formulierung „Achtung ihres Familienlebens“ in Art. 7 dagegen deutet auf eine Begrenzung des Persönlichkeitsschutzes auf den Bereich außerhalb des Berufs, des öffentlichen Lebens, kurz innerhalb der eigenen vier Wände hin, der zwar notwendig, aber nicht ausreichend ist.

2. Recht, eine Ehe einzugehen und eine Familie zu gründen (Artikel 9)

Der djb schlägt vor, an den bisher einzigen Satz folgenden Satz 2 anzufügen:

Artikel 9 Recht, eine Ehe einzugehen und eine Familie zu gründen

Das Recht, eine Ehe einzugehen, und das Recht, eine Familie zu gründen, werden nach den einzelstaatlichen Gesetzen gewährleistet, welche die Ausübung dieser Rechte regeln. *Niemand darf zur Eheschließung gezwungen werden.*

Begründung:
Das Recht, eine Ehe einzugehen, ist unvollständig, wenn nicht ausdrücklich der Zwang zur Eheschließung ausgeschlossen wird. Dieser Aspekt ist im Präsidiumsvorschlag nicht berücksichtigt und sollte ergänzt werden.

3. Asylrecht (Artikel 18)

Der djb schlägt vor, den Asylartikel wie folgt neu zu fassen:

Artikel 18 Asylrecht

(1) Jede nicht der Union angehörende Person, die politisch, aus religiösen oder rassistischen Gründen verfolgt wird oder unmenschlicher oder erniedrigender Bestrafung oder Behandlung ausgesetzt ist, hat ein Recht auf Asyl in der Union. Sie hat das Bleiberecht bis zum Abschluss des Verfahrens.
(2) *Kollektivabschiebungen von Ausländerinnen und Ausländern sind nicht zulässig.*

Begründung:
Das Asylrecht im Präsidiumsvorschlag ist differenzierter zu fassen. Die vorgeschlagene Formulierung ermöglicht die Anerkennung religiöser, rassistischer und frauenspezifischer Fluchtgründe. Der notwendige Abschiebungsschutz ist als Absatz 2 angefügt.

Die Grundrechtscharta hat die Rahmenbedingungen konkret zu formulieren, um dem Erfordernis der Transparenz zu genügen. Es sollte deshalb keine Verweisung auf geltende internationale Abkommen und Verträge im übrigen erfolgen.

4. Gleichheit und Nichtdiskriminierung (Artikel 21)

Der djb schlägt vor, Absatz 1 des Nichtdiskriminierungsartikels wie folgt neu zu fassen:

Artikel 21 Gleichheit und Nichtdiskriminierung

(1) Unterscheidungen nach der ethnischen oder sozialen Herkunft, der Hautfarbe, der Religion, der politischen Anschauung, der sexuellen Identität oder der Behinderung sind untersagt, sofern sie nicht zum Ausgleich bestehender Nachteile erforderlich sind.

Begründung:
Der hier vorgeschlagene Abs. 1 entspricht im Kern dem vom Präsidium vorgeschlagenen Art. 21 Abs. 1. Die Rechtsgleichheit wird hier im Sinne genereller rechtlicher Differenzierungsverbote konkretisiert. Kompensatorische Maßnahmen sind ausdrücklich zulässig. Allerdings müssen diese auch erforderlich sein. Die vorgeschlagene Umschreibung des Benachteiligungsverbotes ist klarer und juristisch eindeutiger als ein Diskriminierungsverbot. Es sind wesentliche Merkmale ausgewählt worden, die elementaren Unrechtserfahrungen entsprechen. Das vom Präsidium auf der Grundlage der EMRK vorgeschlagene Unterscheidungsverbot nach dem Alter oder dem Vermögen wird abgelehnt. In beiden Fällen existieren vielfältige und allgemein akzeptierte gesetzliche Differenzierungen (Altersgrenzen; Steuer- und Leistungsgesetze), die ein generelles Differenzierungsverbot nicht sachgerecht erscheinen lassen. Der in Artikel 20 verankerte allgemeine Gleichheitssatz bietet hier einen ausreichenden Schutz.

5. Gleichheit von Männern und Frauen (Artikel 22)

Der djb begrüßt die Verankerung der Gleichstellung von Frauen und Männern in einem eigenständigen Artikel. Mehr als die Hälfte der Bevölkerung in den Mitgliedstaaten sind Frauen. Die Rechte von Frauen sind deshalb nicht als ein Aspekt des Minderheitenschutzes zu betrachten.

Der djb schlägt wegen der zu engen Fassung des Präsidiumsvorschlages folgende Neufassung von Artikel 22 vor:

Artikel 22 Gleichstellung von Frauen und Männern

(1) Die Union ist verpflichtet, die Bedingungen für die Gleichstellung von Frauen und Männern in allen Bereichen zu schaffen und bei allen ihren Maßnahmen die Geschlechtergleichstellung mit einzubeziehen.
(2) Neben der Ungleichbehandlung nach dem Geschlecht ist die Verwendung von Kriterien untersagt, die formal geschlechtsneutral sind, jedoch einen erheblich höheren Anteil der Angehörigen eines Geschlechtes betreffen, ohne dass sie durch wichtige Gründe, die nicht auf das Geschlecht bezogen sind, gerechtfertigt werden können.
(3) Zur Herstellung tatsächlicher Gleichberechtigung sind Maßnahmen zur Förderung des benachteiligten Geschlechts zulässig.

Begründung:
Artikelbezeichnung:
Der gebräuchliche Terminus im vorliegenden Politikbereich ist „Gleichstellung“. „Frauen“ sollten vor „Männern“ aufgeführt werden, um der alphabetischen Reihenfolge zu genügen.

Abs. 1:
Die Voraussetzungen der tatsächlichen Gleichberechtigung können von der Union in ihren Zuständigkeitsbereichen verwirklicht werden. Das Ergebnis selbst, wie z.B. die gleiche Teilhabe auf allen Ebenen des Erwerbslebens kann nicht von der Union hergestellt werden. Im zweiten Teilsatz ist der gender-mainstreaming-Ansatz formuliert. Die Union muss die Geschlechtergleichstellung überall mit einbeziehen. Das ergibt sich bereits jetzt aus Artikel 2, 3 Abs. 2 EG-Vertrag. Der Präsidiumsvorschlag engt die Geschlechtergleichstellung auf den Beschäftigungsbereich ein. Eine wie hier vorgeschlagene umfassende Formulierung ist vorzuziehen.

Abs. 2:
Das unmittelbare Diskriminierungsverbot ist in einer Grundrechtscharta festzuschreiben. Dazu gehören auch verdeckte Benachteiligungen, die nur ein Geschlecht betreffen. Die Verankerung eines qualifizierten mittelbaren Diskriminierungsverbotes ist gleichfalls notwendig. Das entspricht der bisherigen Rechtslage.

Abs. 3:
Die Wirklichkeit zeigt deutlich notwendigen Handlungsbedarf, nicht nur im Beschäftigungsbereich. Frauen nehmen anders als Männer am öffentlichen Leben und am Erwerbsarbeitsleben teil. Sie sind in Entscheidungspositionen im wirtschaftlichen und politischen Bereich deutlich unterrepräsentiert, wenn überhaupt vertreten. Im Hinblick auf die effektive Gewährleistung der vollen Gleichberechtigung von Frauen und Männern sind deshalb spezifische Vergünstigungen des benachteiligten Geschlechts beizubehalten oder zu beschließen. Eine Kompensationsklausel, wie hier vorgeschlagen, ist deshalb in die Grundrechtscharta aufzunehmen.

6. Einklang von Familien- und Berufsleben (Artikel 31)

Der djb begrüßt grundsätzlich die Einbeziehung und Weiterentwicklung des Aspektes der Vereinbarkeit des Familien- und Berufslebens und die Überarbeitung der anfänglich vorgeschlagenen Regelungen zu Mutterschutz und Elternurlaub.

Der djb schlägt aber wegen der zu engen Fassung des Präsidiumsvorschlages folgende Neufassung von Artikel 31 vor:

Artikel 31 Vereinbarkeit von Familien- und Berufsleben

(1) Jede Person hat das Recht auf rechtlichen, wirtschaftlichen und sozialen Schutz ihres Familienlebens.
(2) Die Vereinbarkeit von Familien- und Berufsleben ist zu gewährleisten.
(3) Arbeitnehmerinnen und Arbeitnehmer genießen als Eltern besonderen Schutz. Den Belangen von schwangeren Arbeitnehmerinnen ist besonders Rechnung zu tragen.

Begründung:
Artikelbezeichnung:
Der gebräuchliche Terminus im vorliegenden Politikbereich ist „Vereinbarkeit“.

Abs. 1:
Die Formulierung eines subjektiven Rechts ist gegenüber dem vom Präsidium vorgeschlagenen Gewährleistungsrecht vorzuziehen.

Abs. 2:
Die Vereinbarkeit von Familien- und Berufsleben ist von besonderer Bedeutung und sollte deshalb in einem eigenständigen Absatz als Gewährleistungsrecht formuliert werden, denn Frauen und Männer sind in der Regel Erwerbstätige und tragen zugleich Familienverantwortung.

Abs. 3:
Elternschaft ist Aufgabe von Müttern und Vätern, die in der Regel gleichzeitig Arbeitnehmerinnen und Arbeitnehmer sind. Um ihren gesellschaftlich wichtigen Betreuungs- und Erziehungsaufgaben nachkommen zu können, benötigen sie einen besonderen Schutz. Um die gemeinsame Verantwortung herauszustellen, wird in Abs. 3 S. 2 ein Elternschutz formuliert.

Dieser notwendige besondere Schutz beschränkt sich nicht auf Mutterschutz und Elternurlaub. Dies kommt in der vom Präsidium vorgeschlagenen Formulierung in Abs. 2 Satz 2 „umfasst insbesondere“ zwar zum Ausdruck. Die hier vorgeschlagene Formulierung in Abs. 3 S. 1 ist allerdings offener für jedwede Weiterentwicklung. In einer Grundrechtscharta sollten nicht beispielhaft Maßnahmen aufgezählt werden, die beschränkend wirken können.

7. Sprache

Der djb begrüßt, dass der vom Präsidium vorgeschlagene Text der Charta überwiegend geschlechtsneutral formuliert ist. Soweit dies nicht möglich ist, wird allerdings auf das generische Maskulinum zurückgegriffen, wie z.B. „Unionsbürger“[1]. Frauen stehen der Union oft kritisch gegenüber. Sie sollten als „Unionsbürgerinnen“ direkt angesprochen werden. Der djb empfiehlt die sprachliche Überarbeitung des deutschen Textes mit dem Ziel, in den Fällen, in denen eine geschlechtsneutrale Formulierung nicht möglich ist, eine geschlechtsdifferenzierte Formulierung einzufügen.

gez. Sabine Overkämping
Vorsitzende der Kommission Europa des djb

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1 „Unionsbürger“ in Art. 12 II; 15 II, III; 37 I; 38; 40; 41; 42; 43 I; 44 und „Arbeitnehmer“/“Arbeitnehmer“/“Vertreter“ in Art. 25; 26; 28; 29 I, II; 32 II sowie „Verbraucher“ in Art. 36; im übrigen: Streichung von „ihm“ in Art. 19 II; „Bürgerbeauftrager“ in Art. 41

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

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Brüssel, den 1. September 2000

CHARTE 4441/00

CONTRIB 295

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend zwei Beiträge von der österreichischen Gewerkschaft Bau-Holz. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Sehr geehrte Damen und Herren!

Die Gewerkschaft Bau-Holz erlaubt sich im Namen der österreichischen Bau- und HolzarbeiterInnen zum Entwurf der Charta der Grundrechte der Europäischen Union Stellung zu nehmen. Die Gewerkschaft Bau-Holz begrüßt es, dass die Art der Charta der Grundrechte zu den zentralen Anliegen der französischen EU-Präsidentschaft zählen.

Wir teilen die Hoffnung Frankreichs, dass diese Charta bereits in Nizza angenommen wird, weil es sich bei diesem Thema um eine der zentralen Fragen für die Entwicklung der Europäischen Union handelt.

Wir halten es für äußerst wichtig, dass der deutsche Außenminister Joschka Fischer diese Diskussion wesentlich in Gang gesetzt hat und können ihm auch bei seiner Anregung anläßlich seiner Rede am 12. Mai 2000 in der Humboldt-Universität in Berlin folgen, wenn er dort meinte, dass die Föderation sich auf einen Verfassungsvertrag zu gründen habe.

Aus Sicht der Gewerkschaft Bau-Holz ist es die konsequente Fortentwicklung einer Diskussion über die Grundrechte auch über eine Verfassung der Europäischen Union zu diskutieren. Insoweit wird der Beschluss des Europäischen Rates von Köln im Juni 1999 über die Erarbeitung einer Grundrechtscharta und die Fixierung der Zusammensetzung und des Verfahrens anläßlich des Europäischen Rates von Tampere im Oktober 1999 von uns positiv bewertet.

Für sehr wesentlich halten wir auch den Beitrag, den der deutsche Alt-Bundespräsident und Alt-Bundesverfassungsgerichtshofpräsident, Roman Herzog, durch seine Vorsitzarbeit und die Kombination der politischen und juristischen Aspekte geleistet hat.

Es ist bedauerlich, dass dieses wesentliche Thema in Österreich mit Ausnahme von einigen wenigen Politikern, wie etwa Minister a.D. Caspar Einem kaum behandelt wird. So findet sich etwa in den österreichischen Grundsatzpositionen betreffend der Regierungskonferenz zu den institutionellen Fragen nur ein knapper Hinweis darauf, dass die Charta der Grundrechte der Europäischen Union Vertragsänderungen erfordern könnte.

Wir bedauern es, dass sich die österreichische Außenministerin beim Europäischen Rat von Santa Maria da Feira am 19. und 20. Juni 2000 darauf beschränkt hat, zu fordern, an die Frage der Aufnahme sozialer Grundrechte kreativ heranzugehen; aber diese Kreativität gleich damit kontakariert hat, dass sie ebenfalls forderte, dass durch die Charta nicht neue Unionskompetenzen "durch die Hintertür" begründet werden dürfen. Aus Sicht der Gewerkschaft Bau-Holz ist die Forderung nach Kreativität durchaus zu unterstützen, wesentlich für uns ist jedoch, dass eine insgesamt zweckmäßige Grundrechtscharta erstellt wird, die auch die Positionen der arbeitenden Menschen und insbesondere die sozialen Grundrechte ausreichend berücksichtigt.

Innerösterreichisch hat, wie oben erwähnt bis jetzt noch keine fundierte Debatte die Charta der Grundrechte der Europäischen Union oder gar über die Verfassungsfrage zustande gekommen. Alle die Europäische Union betreffende Fragen, aber leider auch wesentliche innenpolitische Themen, wie etwa die Verschlechterungen im Pensions-, Urlaubs- und Arbeitsrecht werden von der sogenannten Sanktionenfrage überschattet.

Die Bundesregierung nutzt die sogenannten Sanktionen geschickt, um jede Verärgerung gegen die europäische Union und die anderen Mitgliedsstaaten umzulenken. Artikel 6 EUV ist ein wesentlicher Ansatz für Grundrechte in der Europäischen Union. Die Union beruht auf den

Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedsstaaten gemeinsam.

In Übereinstimmung mit dem österreichischen Abgeordneten der Grünen zum Europäischen Parlament, Johann Voggenhuber (vgl. die Zeitschrift: Die Presse vom 3.3.2000) sehen auch wir einen gewissen Zusammenhang der Situation in Österreich und der Arbeit an der Charta.

Klarzustellen ist jedenfalls, dass die Sanktionen der anderen 14 EU Staaten nicht auf Artikel 7 EUV gestützt wurden, und dass unserer Meinung nach keine Sanktionen gegen Österreich vorliegen, sondern nur eine grobe Verletzung der Courtoisie ("comitas gentium") gegenüber den Regierungsverantwortlichen vorliegt. Klarzustellen ist jedoch auch, dass selbst diese Maßnahmen von der Regierung zur Überdeckung ihres Sozialabbauprogrammes und zum Schüren der Ablehnung gegen die EU genützt werden, und daher kontraproduktiv sind.

Verschärft wird diese problematische Situation noch dadurch, dass die Bundesregierung durch ihre angedrohte Volksbefragung Millionen Schillinge beim Fenster hinauswirft und gleichzeitig bei den ArbeitnehmerInnen und sozial Schwachen Kürzungen vornimmt.

Für die Gewerkschaft Bau-Holz sind nicht zuletzt deshalb die Fragen der sozialen Rechte in einer solchen Charta von eminenter Bedeutung. Wir erinnern an den vor einigen Monaten unter anderem von ÖGB- und GB Präsidenten, Fritz Verzetnitsch, in seiner Eigenschaft als österreichischer Nationalratsabgeordneter eingebrachte Entwurf von sozialen Rechten für das österreichische Bundesverfassungsrecht. Es ist uns durchaus bewusst, dass nicht zuletzt in Österreich große Teile der Lehre gegenüber sozialen Grundrechten Bedenken hat, weil schwankende wirtschaftliche Verhältnisse, deren Einhaltung vor Probleme stellen könnten. Dennoch sind unserer Meinung nach soziale Grundrechte zumindest in der Form von Mindeststandards jener Teil der Grundrechte, der in Österreich äußerst unterentwickelt ist. Die Gewerkschaft Bau-Holz fordert daher mit entsprechendem Nachdruck die Einführung und die Einhaltung von sozialen Grundrechten. Aufgrund des Binnenmarktes und der damit verbundenen Grundfreiheiten innerhalb der Europäischen Union ist es aus unserer Sicht geradezu unerläßlich, auch entsprechende soziale Grundrechte im gesamten Raum der Europäischen Union vorzusehen, damit das Schlagwort von der Sozialen Union nicht ein Schlagwort bleibt, sondern Realität werden kann.

Wir sehen uns in dieser Position auch durch die Forderungen von Chirac und Kok beim Europäischen Rat von Santa Maria de Feira bestätigt, die gefordert haben, so wichtige Themen wie wirtschaftliche und soziale Rechte, Umweltschutz oder Bioethik jedenfalls in die Charta aufzunehmen.

Abgesehen von der hier zur Diskussion stehenden Angelegenheit der Charta der Grundrechte der Europäischen Union, ist auch noch immer die Frage des Beitritts der EU zur EMRK ungeklärt. Uns ist durchaus bewusst, dass es Bedenken hinsichtlich der Rechtsnatur der Europäischen Union gibt, diese dürfen jedoch nicht dazu führen, dass deshalb dieser wichtige, auch symbolische Schritt noch länger verzögert wird. Auch wir vertreten die Meinung, dass die Charta der Grundrechte der Europäischen Union, wenngleich sie in weiten Passagen mit der EMRK deckungsgleich sein wird, diese nicht ersetzen soll, aber auch nicht die Rechte der Bürger schmälern darf, oder die EMRK untergraben darf; diese Diskussion wird regelmäßig unter dem Schlagwort "Achtung des Besitzstandes". In diesem Punkt verweisen wir auf die Ausführungen des Berichts von Andrew Duff und Johannes Voggenhuber an das Europäische Parlament, dem wir uns in diesem Punkt anschließen. Wir sind jedoch auch der Meinung, dass wie in demselben Bericht festgehalten, die Gerichtsbarkeit des EuGH für Menschenrechtsfragen flexibler ausgelegt werden muss, um den individuellen Zugang der EU Bürger zu verbessern.

Im Einzelnen erscheinen uns folgende Punkte diskussionsfähig:

- Zu Artikel 1 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die ausdrückliche Aufnahme eines Gleichheitsgrundsatzes in Absatz 2 dieses Artikels ist positiv zu bewerten. Es ist für uns wesentlich, dass diese Bestimmung im Unterschied zu Artikel 7 des österreichischen B-VG und Artikel 2 StGG auf alle Menschen und nicht nur auf Unionsbürger abstellt. In diesem Zusammenhang verweisen wir darauf, dass es für uns wesentlich ist, dass die Charta nicht nur die Europäische Union selbst, sondern auch ihre Mitglieder bindet.

- Zu Artikel 2 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Gewerkschaft Bau-Holz unterstützt prinzipiell die gewählte Formulierung. Wir regen jedoch an, auch diesen Artikel nach Muster seines Vorbildes dem Artikel 2 EMRK wesentlich konkreter zu gestalten. Der nun vorliegende Text ist unserer Meinung nach zu sehr deklaratorisch formuliert und bietet daher zu wenig konkreten Schutz.

Die Umwandlung des Absatzes 2 in einen eigenen Artikel erscheint uns wegen dessen Bedeutung gerechtfertigt, er sollte jedoch nicht in Form einer Zwischennummer (1a) gekennzeichnet werden, sondern die gesamt Charta sollte nach ihrer Fertigstellung durchlaufend numeriert werden.

- Zu Artikel 3 des Entwurfes der Charta der Grundrechte der Europäischen Union

Es wird von uns positiv bewertet, dass in die Neufassung dieses Artikels auch die genetische Unversehrtheit als ein aktueller Themenbereich aufgenommen wird, Äußerst positiv bewerten wir auch das ausdrückliche Verbot, den menschlichen Körper und Teile davon zur Erzielung von Gewinnen zu nützen. Wir erinnern in diesem Zusammenhang daran, dass es noch immer Staaten gibt, die systematisch die Organe von Hingerichteten für die Organspende exportieren. Diese Praktiken sind zu verurteilen

- Zu Artikel 4 des Entwurfes der Charta der Grundrechte der Europäischen Union

Positiv bewerten wir vor allem den der Rechtssprechung folgenden zweiten Satz dieses Artikels, die neue Ergänzung wird ebenfalls positiv bewertet.

- Zu Artikel 5 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Neufassung von Absatz 2 erscheint uns prinzipiell akzeptabel, die Formulierung, dass nicht als Zwangsarbeit oder Pflichtarbeit Leistungen zählen, die von einer Person verlangt wird, der die Freiheit entzogen worden ist, erscheint uns zu unkonkret.

- Zu Artikel 6 des Entwurfes der Charta der Grundrechte der Europäischen Union

Das zu Artikel 2 Ausgeführte, gilt auch hier sinngemäß, wir regen eine konkretere Ausgestaltung nach dem Vorbild des Artikel 5 EMRK an.

- Zu Artikel 8 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Forderung nach einem unabhängigen und unparteiischen auf Gesetz beruhenden Gericht, im Sinne des Artikel 6, Abs. 1, EMRK vor dem ein Verfahren stattzufinden hat, hat gerade in den letzten Jahren in Österreich zu einer deutlichen Verbesserung des Rechtsschutzes etwa durch die Einführung der unabhängigen Verwaltungssenate geführt. Die Übernahme dieser Bestimmung ist daher aus österreichischer Sicht wesentlich.

Wir unterstützen die Überlegungen, die zur Anfügung eines Abs. 2 geführt haben. Prozesskostenhilfe ist eine wesentliche Voraussetzung, damit ein faires Verfahren überhaupt genützt werden kann. Das Ersetzen des Wortes unerlässlich durch erforderlich ist aus unserer Sicht positiv.

- Zu Artikel 9 des Entwurfes der Charta der Grundrechte der Europäischen Union

Entgegen den Überlegungen, die zu der äußerst knappen Formulierung des Abs. 2 geführt haben, treten wir aus Gründen der Rechtssicherheit für eine ausführliche Formulierung nach dem Muster des Artikel 6, Abs. 3, EMRK ein.

- Zu Artikel 10 des Entwurfes der Charta der Grundrechte der Europäischen Union

Das Rückwirkungsverbot insbesondere im Bereich des Strafrechts ist ein wichtiges Grundrecht. Die gewählte Formulierung wird von uns akzeptiert, auch der neue Abs. 3.

- Zu Artikel 11 des Entwurfes der Charta der Grundrechte der Europäischen Union

Diese Bestimmung wird von uns prinzipiell positiv bewertet, es liegt die Vermutung nahe, dass damit ein im angloamerikanischen Recht geltender Grundsatz auch bei uns übernommen wird. Dies wäre prinzipiell positiv.

- Zu Artikel 12 des Entwurfes der Charta der Grundrechte der Europäischen Union

Diese im wesentlichen dem Artikel 8 EMRK entsprechende Bestimmung ist in seiner neuen Ausformulierung unserer Meinung nach auch auf die neuen Kommunikationsmittel wie Internet anzuwenden. Der Begriff Korrespondenz wird daher von uns in diesem Sinne positiv bewertet.

- Zu Artikel 13 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die vorgeschlagene Streichung des Abs. 1 erscheint uns nicht akzeptabel. Wir sehen hierfür keine Begründung.

Der Verweis auf die innerstaatlichen Gesetze in Abs. 2 ist unserer Meinung nach nicht erforderlich, da die in der Begründung angeführten unterschiedlichen Verhältnisse in den Mitgliedsstaaten mittelfristig zu einer Annäherung kommen sollen.

- Zu Artikel 14 des Entwurfes der Charta der Grundrechte der Europäischen Union

Das zu Artikel 2 Ausgeführte, gilt auch hier sinngemäß, wir regen eine konkretere Ausgestaltung nach dem Vorbild des Artikel 9 EMRK an. Die neu vorgeschlagene Formulierung ist jedoch deutlich besser als die zuletzt vorgeschlagene, die nur aus 10 Worten bestanden hat.

- Zu Artikel 15 des Entwurfes der Charta der Grundrechte der Europäischen Union

Auch hier gilt das zu Artikel 2 ausgeführte sinngemäß. Eine konkretere Formulierung wäre wünschenswert. Positiv ist jedenfalls der neu angefügte Abs. 2, und hier besonders der Aspekt der Pluralismus

- Zu Artikel 17 des Entwurfes der Charta der Grundrechte der Europäischen Union

Auch hier gilt das zu Artikel 2 ausgeführte sinngemäß, eine konkrete Ausgestaltung nach dem Vorbild des Artikel 11 EMRK wird vorgeschlagen. Nicht akzeptabel ist für uns, dass das Recht, Gewerkschaften oder politische Parteien zu gründen oder diesen beizutreten, nicht mehr in der neuen Textierung vorkommt. Es ist für uns nicht eindeutig klargestellt, dass dies vom Begriff zusammenschließen ausreichend mitumfasst wird.

- Zu Artikel 19 des Entwurfes der Charta der Grundrechte der Europäischen Union

Das Recht auf Datenschutz ist für uns wesentlich, wir regen jedoch an, nach dem Vorbild des österreichischen Datenschutzgesetzes jedermann auch ein Recht auf Auskunft darüber, wer welche Daten über ihn verarbeitet, woher die Daten stammen und wozu sie verwendet werden, insbesondere auch, an wen sie übermittelt werden; ein Recht auf Richtigstellung unrichtiger Daten und das Recht auf Löschung unzulässigerweise verarbeiteter Daten zu geben.

- Zu Artikel 21 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die gewählte Formulierung ist aus Sicht der GBH prinzipiell in Ordnung. Der Verweis auf andere einschlägige Verträge jedoch zu unkonkret.

- Zu Artikel 21a des Entwurfes der Charta der Grundrechte der Europäischen Union

Wie schon zu Artikel 1a ausgeführt wird, plädieren wir für eine durchgehende Numerierung.

Wie sehen in der uns übermittelten Textfassung einen gewissen Widerspruch zu Artikel 4. Die gewählte Formulierung des Artikel 21a wird von uns positiv gewertet, um aber wie bei der uns übermittelten Fassung eine Wiederholung zu vermeiden, sollten die Artikel 4 und 21a wie offensichtlich in einer früheren Fassung vorgesehen, wieder zu einem Artikel zusammengeführt werden.

- Zu Artikel 22 des Entwurfes der Charta der Grundrechte der Europäischen Union

Gleichstellung und Nichtdiskriminierung gehören zu den wesentlichen Forderungen der GBH. Dieser Artikel ist für uns nicht nur wegen dem Recht auf Festsetzung gleicher Arbeitsentgelte und sonstiger Arbeitsbedingungen für die Geschlechter, sondern auch wegen dem Verbot von Diskriminierungen, dass wie vorschlagen, ihn unmittelbar in Artikel 1 nach dem Gleichheitsgrundsatz zu integrieren, oder doch zumindest an vorderer Stelle auszunehmen.

- Zu Artikel 23 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Aufnahme von Kinderrechten wird von uns äußerst positiv bewertet.

- Zu Artikel 24 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die in diesem Artikel gewährleisteten Rechte sollten insgesamt jeder Person zustehen, das heißt, auch das Recht eine Partei zu gründen, sollte nicht Unionsbürgern gewährleistet werden. Die Differenzierung zwischen Staatsbürger und Nichtstaatsbürger, Unionsbürger und Nichtunionsbürger erscheint in diesem Bereich nicht erforderlich.

- Zu Artikel 25 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die neu vorgeschlagene Einschränkung des Abs. 2 auf Wahlen zum Europäischen Parlament erscheint uns zumindest diskussionswürdig. Es ist zu überlegen, hier im Zuge der verstärkten Integration großzügiger zu sein.

- Zu Artikel 26 des Entwurfes der Charta der Grundrechte der Europäischen Union

Diese Bestimmung erscheint uns in engem Zusammenhang mit der des Artikel 25. Es ist mittelfristig zu überlegen, die Differenzierung des Wahlrechts zwischen Kommunalwahlen, Wahlen auf nationaler Ebene und Wahlen auf europäischer Ebene zu vereinheitlichen.

- Zu Artikel 29 des Entwurfes der Charta der Grundrechte der Europäischen Union

Es ist zu überlegen, dieses Petitionsrecht nicht nur auf das Europäische Parlament zu beschränken, sondern auch auf andere Organe der Europäischen Union auszudehnen und dieses Recht auch für nationale Organe in der Charta festzuschreiben.

- Zu Artikel 31 des Entwurfes der Charta der Grundrechte der Europäischen Union

Aus Sicht der GBH ist eine Drittwirkung der sozialen Grundrechte auch auf die Sozialpartner prinzipiell eine wesentliche Frage, die unserer Meinung nach auch innerhalb der Gewerkschaftsbewegung noch nicht ausreichend diskutiert wurde. Nach unseren bisherigen Überlegungen sind wir jedoch zum Schluss gekommen, die gewählte Formulierung zu unterstützen und auch die Sozialpartner zur Einhaltung der sozialen Grundrechte zu verpflichten.

Insoweit haben wir zwar nach der österreichischen Rechtstradition Verständnis für den Vorschlag Neissers, den Verweis auf die Sozialpartner zu streichen, kommen jedoch nach unseren bisherigen Beratungen zum gegenteiligen Ergebnis. Auch die Sozialpartner sollen mittels Drittwirkung wie im vorliegenden Entwurf vorgesehen zur Einhaltung des Sozialbereiches dieser Charta verpflichtet werden.

- Zu Artikel 31a des Entwurfes der Charta der Grundrechte der Europäischen Union

Wie schon zu Artikel 22 ausgeführt, ist für uns die Gleichheit von Männern und Frauen wesentlich. Wir treten jedoch dafür ein, diese Bestimmung umfassender auszugestalten und mit der konkreter formulierten Bestimmung des Artikels 22 ohne diesen zu verwässern, zu verschmelzen.

- Zu Artikel 32 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir unterstützen einerseits die hier vorliegende Formulierung, treten jedoch gleichzeitig dafür ein, auch ein Recht auf Arbeit in die Charta einzufügen und dieses auch ausreichen, das heißt zumindest mit Mindeststandards auszugestalten. Der neue Vorschlag des Präsidiums ist deutlich besser als die ursprünglich Formulierung, jedoch unserer Meinung noch nicht ausreichend.

- Zu Artikel 32a des Entwurfes der Charta der Grundrechte der Europäischen Union

Der neu vorgeschlagene Artikel wird von uns insgesamt unterstützt, alle Unterpunkte sollten aufgenommen werden. Wie jedoch schon zu Artikel 1a ausgeführt treten wir jedoch dafür ein, keine Zwischennummern bei den Artikeln vorzusehen.

- Zu Artikel 33 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir unterstützen die Vorschläge nach Präzisierung des Wortlautes und nach Hinzufügung eines verstärkten Anhörungsrechts im Fall von Umstrukturierungen, wie dies vom Abg. Voggenhuber eingebracht wurde. Eine Reduzierung oder Streichung wird von uns abgelehnt.

- Zu Artikel 33a des Entwurfes der Charta der Grundrechte der Europäischen Union

Dieser neue Artikel wird von uns prinzipiell positiv bewertet, sollte jedoch unserer Meinung nach noch näher ausgestaltet werden, und mit dem ebenfalls neuen Artikel 32a verschmolzen werden.

- Zu Artikel 34 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Ausweitung und vor allem die ausdrückliche Anführung des Streikrechts wird von uns unterstützt, wir sprechen uns gegen eine Streichung aus, weil gerade das Recht auf KV Verhandlungen zu den wesentlichen Gewerkschaftsrechten zählt.

- Zu Artikel 34a des Entwurfes der Charta der Grundrechte der Europäischen Union

Auch diese Vorschläge werden von uns positiv bewertet, aber auch hier schlagen wir eine Integration in den Artikel 32a vor.

- Zu Artikel 35 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir sehen auch in der Festschreibung des Rechts auf Ruhezeit und Jahresurlaub einen wesentlichen Aspekt und fordern im Sinne des Vorschlages von Voggenhuber die Festsetzung einer Mindestdauer des Jahresurlaubes. Diese sollte jedoch mit 5 Wochen festgesetzt werden. Der neue Vorschlag des Präsidiums erscheint uns hier nicht ausreichend.

- Zu Artikel 36 des Entwurfes der Charta der Grundrechte der Europäischen Union

Der Gesundheitsschutz und sichere Arbeitsbedingungen ist gerade für Bau- und Holzarbeiter von eminenter Bedeutung. Diese Berufsgruppen sind enormen gesundheitlichen Risken ausgesetzt.

Es ist für uns unverständlich, wie Abgeordnete die Streichung oder auch nur die Reduzierung eines solchen Rechtes fordern können. Im Gegenteil: Wir fordern eine bessere Ausgestaltung dieses Artikels.

- Zu Artikel 36a des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir regen die Integration dieses positiven Vorschlages in Artikel 32a an.

- Zu Artikel 37 des Entwurfes der Charta der Grundrechte der Europäischen Union

Jugendschutz gehört für die GBH ebenfalls zu den zentralen Forderungen, wir unterstützen die Forderung nach Präzisierung dieses Vorschlages. Der Vorschlag des Präsidiums erscheint uns akzeptabel.

- Zu Artikel 37a des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir regen hier eine Integration des Abs. 1 in Artikel 22 und eine Integration des Abs. 2 in Artikel 32a an.

- Zu Artikel 38 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir unterstützen den vorliegenden Textvorschlag, sind jedoch gegen die Einschränkung im Titel auf Fälle mißbräuchliche Entlassung.

- Zu Artikel 38a des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir regen auch hier eine Integration dieses positiven Vorschlages in Artikel 32a an.

- Zu Artikel 39 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Vereinbarkeit von Familie und Beruf ist gerade für die Gewerkschaft Bau-Holz ein besonderes Anliegen. Wir versuchen durch Arbeitszeitregelungen, die sowohl den Bedürfnissen der Firmen gerecht werden, aber vor allem die Bedürfnisse der Arbeitnehmer nach Familienleben und Teilnahme am gesellschaftlichen Leben gerecht werden.

- Zu Artikel 40 des Entwurfes der Charta der Grundrechte der Europäischen Union

Der Änderungsvorschlag des Präsidiums wird von uns prinzipiell positiv bewertet, erscheint jedoch noch nicht ausreichend. Eine Harmonisierung mit der Entsenderichtlinie ist anzustreben.

- Zu Artikel 41 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Gewährleistung einer ausreichenden sozialen Sicherheit ist wesentlich, die vorgeschlagene Formulierung regelt jedoch weder in der ursprünglichen Variante, noch in dem neuen Vorschlag des Präsidiums ausreichende Mindeststandards dafür. In der gegebenen politischen Situation erscheint der vorgeschlagene Text, auch wenn er vorwiegend deklaratorisch ist, zunächst akzeptabel.

- Zu Artikel 41a des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir bewerten diese Ergänzungen prinzipiell äußerst positiv, treten jedoch dafür ein, dass Absatz 1 in Artikel 32a integriert wird. Absatz 4 sollte in Artikel 22 integriert werden, die Absätze 2 und 3 sollten ausgebaut und in einem eigenen Artikel zusammengefasst werden.

- Zu Artikel 42 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir unterstützen in der Frage des Gesundheitsschutzes den Vorschlag auf Streichung des Verweises auf die Gegebenheiten der einzelnen Mitgliedstaaten. Wir erinnern in diesem Zusammenhang daran, dass die Österreichische Regierungsmehrheit erst vor kurzem eine Ambulanzgebühr von bis zu S 1000.- jährlich eingeführt hat, eine Maßnahme, die gerade für sozial Schwächere den

Zugang zur ärztlichen Versorgung deutlich erschwert. Eine Verschärfung solcher Regelungen stellt für uns eines der Problemfelder dar, die durch eine solches Grundrecht verhindert werden müßten.

- Zu Artikel 42a des Entwurfes der Charta der Grundrechte der Europäischen Union

Dieser Vorschlag sollte gemeinsam mit Absatz 2 und 3 des Artikel 41a ausgebaut und zu einem eigenen Artikel ausgestaltet werden.

- Zu Artikel 43 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir unterstützen die Forderung nach Ausgestaltung dieses Rechts zu einem subjektiven Recht, sehen jedoch im Vorschlag des Präsidiums zumindest einen Schritt in die richtige Richtung. Da für uns die Benachteiligung von Menschen mit Handicap oder wie hier formuliert "Behinderten" vor allem eine Frage der Diskriminierung ist, treten wir für den Ausbau dieser Bestimmung und die Integration in Artikel 22 ein.

- Zu Artikel 43a des Entwurfes der Charta der Grundrechte der Europäischen Union

Absatz 1 sollte in Artikel 22 integriert werden, es sollte auch versucht werden Absatz 2 in entsprechenden anderen Bestimmungen zu integrieren.

- Zu Artikel 44 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir unterstützen die Forderung nach einer nachdrücklicheren Formulierung im Sinne eines Rechtsanspruches, sind jedoch der Meinung, eine Verhältnismäßigkeitsklausel im Hinblick auf die Rechte der ArbeitnehmerInnen vorzusehen, das heißt, es muss sichergestellt werden, dass notwendige Verbesserungen im Bereich des Umweltschutzes nicht dazu führen, dass die Arbeitsbedingungen für ArbeitnehmerInnen gefährlicher oder gesundheitsschädlicher werden.

Wir bewerten im neuen Vorschlag des Präsidiums positiv, dass der Begriff der nachhaltigen Entwicklung aufgenommen wurde, bemängeln jedoch, dass die rationelle Verwendung der natürlichen Ressourcen nunmehr fehlt. Dies deckt sich unserer Meinung nach nur zum Teil mit dem Begriff der Nachhaltigkeit.

- Zu Artikel 45 des Entwurfes der Charta der Grundrechte der Europäischen Union

Es ist uns unverständlich, wie hier die völlige Streichung einer so wichtigen Bestimmung gefordert werden kann.

- Zu Artikel 45a des Entwurfes der Charta der Grundrechte der Europäischen Union

Absatz 1 sollte wie Absatz 2 des Artikel 43a behandelt werden. Absatz 2 sollte ausgebaut und mit den Absätzen 2 und 3 des Artikel 41a zusammengefaßt werden. Die restlichen Absätze könnten eventuell in Artikel 22 integriert werden.

- Zu Artikel 46 des Entwurfes der Charta der Grundrechte der Europäischen Union

Wir treten gegen eine zu enge Fassung des Anwendungsbereiches dieser Charta ein und sind deshalb etwa für die Streichung des vorgeschlagenen Absatz 2, also des Absatz 3 nach Vorschlag des Präsidiums. Absatz 2 des Präsidiumsvorschlags scheint uns ebenfalls nicht ausgereift genug.

- Zu Artikel 47 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Einschränkung, der in dieser Charta anerkannten Rechte und Freiheiten sollte möglichst gering gehalten werden, dabei sollte auf die in der EMRK gewährleisteten Rechte Bedacht genommen werden, wie dies im Absatz 2 des Vorschlags des Präsidiums vorgesehen ist. Der Begriff des Wesensgehaltes im letzten Satz des Absatz 1 des Vorschlags des Präsidiums, erscheint uns für eine so zentrale Bestimmung zu ungenau.

- Zu Artikel 48 des Entwurfes der Charta der Grundrechte der Europäischen Union

Die Integration dieser Bestimmung in Artikel 45 ist prinzipiell positiv, wir treten jedoch dafür ein, dass klargestellt werden sollte, dass es keine Verschlechterung der einmal festgelegten Grundrechte geben darf.

- Zu Artikel 49 des Entwurfes der Charta der Grundrechte der Europäischen Union

Diese Klarstellung des 1. Halbsatzes ist für die Gewerkschaft Bau-Holz wesentlich.

- Zu Artikel 50 des Entwurfes der Charta der Grundrechte der Europäischen Union

Das zu Artikel 49, 1. Halbsatz ausgeführte gilt auch hier. Eine solche Missbrauchsregelung muss in einem Grundrechtskatalog selbstverständlich sein.

- Zu Artikel 50a des Entwurfes der Charta der Grundrechte der Europäischen Union

Absatz 1 ist unserer Meinung nach durch Artikel 8 der Charta abgedeckt, wenn unsere Vorschläge berücksichtigt werden, Absatz 2 sollte wie Artikel 43a Absatz 2 behandelt werden.

Insgesamt unterstützt die Gewerkschaft Bau-Holz daher die Bemühungen, mit einer Charta der Grundrechte der Europäischen Union erstmals in der Geschichte des internationalen Organisationsrechtes einen nicht-staatlichen Organismus mit Grundrechten auszustatten. Wir sehen darin, wie schon eingangs ausgeführt, einen ersten Schritt in Richtung Europäische Verfassung. Prinzipiell bewerten wir diese Entwicklung positiv, fordern jedoch eine ausreichende Berücksichtigung der Interessen der ArbeitnehmerInnen und der sozial Schwächeren.

Mir freundlichen Grüßen

Johann Driemer
Bundesvorsitzender

Stefan Mann
Sekretär

Sehr geehrte Damen und Herren!

Die Gewerkschaft Bau-Holz hat nunmehr im Zuge des innerösterreichischen Begutachtungsverfahrens einen aktuellen Gesamtentwurf der Charta der Grundrechte der Europäischen Union übermittelt erhalten.

Wir bedauern, dass die Diskussion zu diesem wichtigen Thema – ohne ausreichender innerösterreichischer Diskussion – bereits so weit fortgeschritten ist, dass nunmehr eine substanzielle Stellungnahme nicht mehr erwünscht ist. Wir verweisen daher auf unsere Stellungnahme vom 28.07. d.J.

Zur Information übermitteln wir Ihnen jedoch auch unsere neue Stellungnahme.

Es ist uns durchaus bewusst, dass nicht zuletzt in Österreich große Teile der Lehre gegenüber sozialen Grundrechten Bedenken hat, weil schwankende wirtschaftliche Verhältnisse, deren Einhaltung vor Probleme stellen könnten. Dennoch sind unserer Meinung nach soziale Grundrechte zumindest in der Form von Mindeststandards jener Zwei an Grundrechten, der in Österreich äußerst unterentwickelt ist. Die Gewerkschaft Bau-Holz fordert daher mit entsprechendem Nachdruck die Einführung und die Einhaltung von sozialen Grundrechten. Aufgrund des Binnenmarktes und der damit verbundenen Grundfreiheiten innerhalb der Europäischen Union ist es aus unserer Sicht geradezu unerläßlich, auch entsprechende soziale Grundrechte im gesamten Raum der Europäischen Union vorzusehen, damit das Schlagwort von der Sozialen Union nicht ein Schlagwort bleibt, sondern Realität werden kann.

Abgesehen von der hier zur Diskussion stehenden Angelegenheit der Charta der Grundrechte der Europäischen Union, ist auch noch immer die Frage des Beitritts der EU zur EMRK ungeklärt. Uns ist durchaus bewusst, dass es Bedenken hinsichtlich der Rechtsnatur der Europäischen Union gibt, diese dürfen jedoch nicht dazu führen, dass deshalb dieser wichtige, auch symbolische Schritt noch länger verzögert wird. Auch wir vertreten die Meinung, dass die Charta der Grundrechte der Europäischen Union, wenngleich sie in weiten Passagen mit der EMRK deckungsgleich sein wird, diese nicht ersetzen soll, aber auch nicht die Rechte der Bürger schmälern darf, oder die EMRK untergraben darf; diese Diskussion wird regelmäßig unter dem Schlagwort "Achtung des Besitzstandes".

Wir kritisieren, dass die im Artikel 1 des Vorentwurfes vorgesehene Drittwirkung der sozialen Grundrechte auch auf die Sozialpartner – obwohl diese Bestimmung durchaus diskussionswürdig war – nunmehr gestrichen wurde. Dies bedeutet für uns einen wesentlichen Rückschritt und eine wesentliche Verwässerung des nunmehr vorliegenden Entwurfs.

Auch bei den einzelnen Textentwürfen für die Artikel beschränken wir uns wie gewünscht auf Änderungsvorschläge, wir bedauern jedoch die mangelnde Diskussionsmöglichkeit über die anderen Punkte:

- Zu Artikel 1 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern die Wiederaufnahme des Textes "*Alle Menschen sind vor dem Gesetz gleich.*" an dieser Stelle. Artikel 20 sollte also wieder vorverlagert werden.

- Zu Artikel 4 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern erneut die Ergänzung eines 2. Absatzes mit dem Text "*Niemand darf in einen Staat ausgewiesen oder abgeschoben werden, in dem er durch die Todesstrafe, durch Folter oder durch andere unmenschliche Behandlung bedroht ist.*".

- Zu Artikel 6 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern die Ergänzung des restlichen Textes des Artikel 5 EMRK. Das heißt der Text soll nunmehr lauten: "(1) *Jeder Person hat das Recht auf Freiheit und Sicherheit. Die Freiheit darf einem Menschen nur in den folgenden Fällen ... Anspruch auf Schadenersatz.*"

- Zu Artikel 6 bis 7 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir kritisieren den Entfall der im Vorentwurf enthaltenen Bestimmungen bis zum Artikel 12 der dem nunmehrigen Artikel 7 entspricht und fordern die Wiederaufnahme dieser Bestimmungen am Beginn der Charta. Wenngleich Teile – wie etwa das Rückwirkungsverbot, das nunmehr im Artikel 47 aufgenommen wurde – in Kapitel 6 wieder aufgenommen wurde.

- Zu Artikel 12 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern folgende Ergänzung in Absatz 1: "*Dies umfasst auch das Recht zum Schutz ihrer Interessen Gewerkschaften zu bilden und diesen beizutreten.*"

- Zu Artikel 16 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Die Neuaufnahme des Rechts auf unternehmerische Freiheit erscheint für uns so lange nicht akzeptabel, so lange nicht auch ein Recht auf Arbeit aufgenommen wird.

- Zu Artikel 25 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern die Streichung der Worte "*…nach dem Gemeinschaftsrecht und nach den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten…*" und die Ergänzung der Worte "*…nsbesondere bei allen Arten der Umstrukturierungen…*".

- Zu Artikel 29 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern zumindest die Ergänzung in Absatz 2 (letzter Halbsatz) "*... sowie auf bezahlten Jahresurlaub im Ausmaß von mindestens 5 Wochen.*"

- Zu Artikel 31 bis 32 des Entwurfes der Charta der Grundrechte der Europäischen Union:

  Wir fordern die Wiederaufnahme des im Vorentwurf enthaltenen Artikel 40 "*Recht der Wanderarbeiter auf Gleichbehandlung*", wie vom Präsidium im letzten Entwurf vorgeschlagen. Der Text sollte also lauten: "*Arbeitnehmer, die nicht die Staatsangehörigkeit der Europäischen Union besitzen und rechtmäßig im Hoheitsgebiet der Mitgliedsstaaten arbeiten, haben Anspruch auf Arbeitsbedingungen, die nicht weniger günstig sind als die Bedingungen unter denen die Arbeitnehmer der Europäischen Union arbeiten.*" Dies ist deshalb notwendig um die WanderarbeiterInnen vor Ausbeutung und die lokal beschäftigten ArbeitnehmerInnen vor Sozialdumping zu schützen.

Abschließend verweisen wir nochmals auf unsere wesentlich ausführlichere Stellungnahme vom 28.07. d.J. Wenngleich sich der Aufbau der Charta nunmehr gravierend verändert hat, bleiben unsere, zu den einzelnen Themen geäußerten, Bedenken und Anregungen sinngemäß bestehen.

Insgesamt ist in vielen neuen Bestimmungen eine rückschrittliche Tendenz gegenüber dem Vorentwurf zu erkennen.

Mit freundlichen Grüßen

LAbg.Johann Driemer
Bundesvorsitzender

Stefan Mann
Sekretär

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 1 September 2000

CHARTE 4442/00

CONTRIB 296

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution by the European Children's Network (Euronet), with a letter to Mr. Roman Herzog, the President of the Convention, including comments on the rights of the child. (Reference document: CHARTE 4422/00 CONVENT 45). [1]

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[1] This text has been submitted in English language only.

EURONET
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30 August 2000

To: The Convention to draft the EU Charter of Fundamental Rights
Mr Roman Herzog, Chair of the Convention
C/o European Council of Ministers
175 Rue de la Loi
1048 Bruxelles

Dear Mr Herzog,

Re: Presidency Note, complete text of the Charter proposed by the Praesidium: CONVENT 45

The members of Euronet, the European Children's Network, attach great importance to the work of the Convention on the EU Charter of Fundamental Rights and have actively contributed to the drafting process. We understand that at the next meeting of the Convention on 11-13 September, members will consider general comments on Convent 45 of 28 July 2000. It is in this spirit that Euronet is submitting the following comments on points of principle.

Articles on children
Europe's children are Europe's future. Children are vulnerable, have specific needs different from adults and are unable to protect themselves. For these reasons, Euronet welcomes the inclusion in the latest version of the Charter on Fundamental Rights (Convent 45 of 28 July 2000) of a specific article on children - Article 23 (the protection of children). This would help ensure that the EU is in line with international commitments made by member states when ratifying the UN Convention on the Rights of the Child 1989. Euronet believes that the guiding principles of this Article must be the **UN Convention on the Rights of the Child**, with particular emphasis on the following :

- the primary consideration shall be the best interests of the child
- children's rights shall be respected and ensured without discrimination of any kind
- children must be allowed to express their views freely in all matters affecting them
- children shall be afforded the protection and care necessary for their well-being

In order to make that the article on children's rights is not only focussing on the protection of children we would prefer to change the title of the Article.
Moreover, to underline the primacy of the best interests of the child, we would prefer to see the order of the paragraphs in Article 23 reversed.
In addition, we would like to have a stronger expression of children's rights to express their views freely than the word may, according to Article 12 of the UN Convention on the Rights of the Child.
With these considerations taken into account Article 23 would be changed to:

Article 23 – Rights of children

1. In all actions relating to children, whether taken by public or private institutions, the child's best interests must be a primary consideration. The rights of the child shall be respected and ensured without discrimination of any kind.

2. Children shall have the right to such protection and care as is necessary for their well-being. They shall be assured the right to express their views freely in all matters affecting the child. Such views shall be given due weight in accordance with their age and maturity.

Article 14 - Right to Education

Euronet believes that every child has the right to education. Euronet believes that the following text, based on Articles 28, 29 and 30 of the UN Convention on the Rights of the Child should be added to this Article:
"Children of minority communities and indigenous populations have the right to enjoy their own culture and to practise their own religion and language".

Article 18 - Right to Asylum

Euronet believes that this Article should include the right of the child to claim its own asylum reasons.

Article 30 - Protection of young people at work

Euronet believes that this Article should include a reference to ILO Convention 182 which aims to ban the worst forms of child labour.

Chapter VII: General Provisions

Euronet is concerned that the current text of the Charter does not contain an explicit reference to the *UN Convention on the Rights of the Child* which is the fullest expression of children's rights and to which all EU Member States are signatories.
This could be remedied by reference to the **UN Convention on the Rights of the Child** in Article 51.

Article 51
Article 51 (Level of Protection) cites " international law and international agreements to which the UN, the Community or all the Member States are party." **The UN Convention of the Rights of the Child** should be included in this list as all EU Member States are party to it.

Euronet recognises the difficult but invaluable task with which the members of the drafting Convention have been entrusted. Euronet remains at the disposal of the members of the Convention to provide further information or clarification.

Yours sincerely,

Mieke Schuurman
Euronet Co-ordinator

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 4 septembre 2000

CHARTE 4443/00

CONTRIB 297

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Secrétariat Général d'Action Extérieure du Gouvernement Basque. [1]

[1] Ce texte à été soumis en langues française et espagnole.

A l'attention des Membres de la Convention

Vitoria-Gasteiz, le 27 juillet 2000

Concerne: **Contribution du Secrétariat Général d'Action Extérieure du Gouvernement Basque, à l'élaboration de la Charte de Droits Fondamentaux.**

Aux Membres de la Convention,

Le Gouvernement Basque, concrètement, son Secrétariat Général d'Action Extérieure, considère de grande transcendance pour le processus de construction européenne, l'élaboration de la Charte de Droits Fondamentaux. Pour cette raison, nous suivons avec le plus grand intérêt les travaux de la Convention.

Le Gouvernement Basque représente une des régions d'Europe, qui de par son origine historique, a le plus de compétences législatives, avec une langue et culture différenciées, comme ils en existent d'autres dans l'Union. Sachant que nos inquiétudes sont partagées par beaucoup de peuples et régions d'Europe, nous vous faisons parvenir notre contribution au projet de Charte des Droits Fondamentaux :

- Substitution de l'actuel point 2 du Préambule par le paragraphe suivant :

"L'Union Européenne et ses Institutions se fondent sur les principes de liberté, de démocratie, d'État de Droit, de respect des Droits de l'Homme et des Droits fondamentaux, tant individuels que collectifs, des peuples de l'Union Européenne, principes tous communs aux Etats membres"

Arguments: Nous considérons que le Préambule de la Charte des Droits Fondamentaux de l'Union Européenne doit constater de la façon la plus compréhensive possible l'acquis des Droits Fondamentaux et principes directeurs que tant les Etats Membres comme les Institutions européennes ont reconnus. De là, la nécessité d'inclure dans le Préambule la mention aux droits tant individuels que collectifs des peuples de l'Union Européenne.

- Modification de l'article 42: Protection de l'Environnement

"Les politiques de l'Union garantiront le droit des générations futures à un environnement sain et écologiquement équilibré, moyennant la conservation, protection et amélioration de la qualité et diversité de l'environnement, l'utilisation rationnelle des ressources naturelles et l'éducation et sensibilisation sur l'environnement".

Arguments: Nous considérons que la protection de l'environnement se fonde notamment sur le droit des générations futures à un environnement sain et équilibré dont il garantit la durabilité. Les moyens pour protéger l'environnement doivent tenir compte, notamment, de l'éducation et sensibilisation des citoyens pour le protéger, ainsi que le reste des mesures mentionnés dans cet article.

-Insérer un nouvel article relatif aux : Droits Linguistiques

«Toute personne a le droit de disposer d'une liberté d'action suffisante pour utiliser et promouvoir, seul ou avec d´autres, une langue même non officielle au sein des Institutions de l´Union Européenne, mais officielle dans tout ou partie du territoire d´un des États membre en se servant à cette fin des libertés définies dans la présente Charte.

L'Union respecte ce droit, notamment en tenant compte, dans l'élaboration et l'exercice des politiques communautaires, de l'existence de ces langues.

Tout citoyen de l'Union qui réside dans un État membre autre que celui dont il a la nationalité, a droit à la promotion de l'enseignement de la langue maternelle de ses enfants».

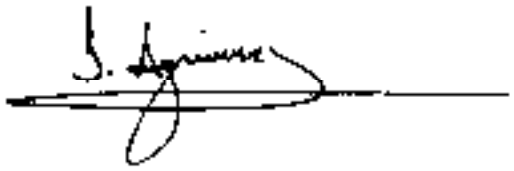
Arguments: Si tous les États membres se font un devoir de respecter les droits de leurs citoyens parlant une langue autre que la langue officielle, les situations concrètes varient beaucoup, chaque Etat ayant ses propres sensibilités en la matière. Il n'est donc pas question de rejeter telle ou telle restriction concrète, mais d'éviter que la superposition de nombreuses restrictions n'ait pour conséquence un effet d'étranglement.

Le deuxième alinéa précise l'obligation de l'Union à l'égard des langues non officielles.

Le troisième alinéa découle de la directive 77/486/CEE visant à la scolarisation des enfants des travailleurs migrants

Pour conclure, nous voudrions féliciter les membres de la Convention pour leur travail consciencieux et fécond. Nous espérons que nos contributions seront utiles et qu'elles seront examinées par les membres avec la plus grande attention puisque nous considérons qu'elles recueillent ou complètent des aspects nécessaires à tenir en compte dans la future Charte des Droits Fondamentaux.

Veuillez agréer, Cher Membres de la Convention, l'expression de mes sentiments les plus distingués.



Iñaki Aguirre
Secrétaire Général d'Action Extérieure

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 4 septembre 2000

CHARTE 4444/00

CONTRIB 298

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de l'Association pour le Développement de l'Économie et du Droit de l'Environment (ADEDE), avec un bref commentaire sur le projet de Charte. [1]

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[1] Ce texte à été soumis en langue française seulement.

ASSOCIATION POUR LE DÉVELOPPEMENT DE L'ÉCONOMIE ET DU DROIT DE L'ENVIRONNEMENT (ADEDE)

Association de la loi de 1901

Le 15 août 2000

Monsieur,

Projet de Charte des droits fondamentaux de l'Union Européenne

Au nom de l'ADEDE, j'ai l'honneur de porter à votre attention un bref commentaire sur le projet de Charte.

L'ADEDE est très satisfaite de l'introduction d'un Art. 35 sur la protection de l'environnement. Toutefois il nous paraît que la rédaction actuelle de cet article est trop programmatoire et reflète trop le texte du Traité. Selon nous, il manque une référence à un "droit" ou à ce qu'une "personne" peut attendre dans le domaine de l'environnement puisqu'il s'agit d'une charte des droits fondamentaux.

Une manière plus appropriée d'aborder ce sujet pourrait consister à aligner la rédaction de l'art.35 sur celle de l'art.32.3 et d'ajouter dans l'art.35 la phrase introductive suivante:

"L'Union reconnaît et respecte le droit à la protection d'un environnement sain."

Monsieur J.P Jacque
Conseil
Union européenne
Bruxelles

de la même manière que l'Union reconnaît et respecte le droit à une aide au logement.

Un texte semblable se trouve dans la Constitution belge (art.23).

Veuillez agréer, Monsieur, l' assurance de ma plus parfaite considération.

Henri Smets
Directeur

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 4 September 2000

CHARTE 4445/00

CONTRIB 299

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter the position by the Association of Finnish Local and Regional Authorities on the Charter of Fundamental Rights of the European Union, unanimously adopted by the Board on the 7 June 2000. [1]

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[1] This text has been submitted in English, Finnish and Swedish languages.

POSITION
Unanimously adopted by the Board of the Association of Finnish Local and Regional Authorities
7 June 2000

POSITION OF THE ASSOCIATION OF FINNISH LOCAL AND REGIONAL AUTHORITIES ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The drafting of a Charter of Fundamental Rights of the European Union is an extremely important reform project. The views of the Finnish government, parliament and of the Finnish representatives participating in the drafting of the Charter about a document legally binding the Member States have been reserved.

The adoption of the Charter does not pose a problem to the municipalities as far as it concerns traditional liberties or other rights guaranteed by the European Convention on Human Rights. However, the Charter of Fundamental Rights of the European Union is to include such economic, social and cultural rights (so called ESC rights), whose implementation falls under the competence of the Member States and is the responsibility of the municipalities in Finland.

A so-called law reservation applies to most ESC rights in Finland; *i.e.* parliament enacts a detailed law on the contents and scope of the right. In addition, for Finland it centrally is a question about taking the Finnish welfare society model into account and about the protection of municipal self-government. Therefore the Association of Finnish Local and Regional Authorities is extremely reserved as regards the adoption of a legally binding Charter of Fundamental Rights, and would like to draw attention to some issues that have come up during the drafting of the Charter.

A key factor in the assessment of the provisions of the Charter is the partial flexibility of EU competence in *e.g.* the regulation of welfare services. The competence pursuant to the treaties possesses both a legal and a political dimension. The provision and financing of social, health care and education services for instance fall outside EU competence, whereas the coordination of social security and some issues within social policy and education do not *(e.g.* the coordination regulation 1408/71 and Articles 136 – 152 of the Treaty of Amsterdam).

Characteristic of the Finnish welfare society model is to finance basic services mainly with tax revenues and to offer these services to everybody (universalism). The municipalities provide and finance most welfare services. In several other Member States social security benefits are insurance based. Thus the social security of for instance a family member of an employee is based on the insurance of the employee.

A uniform European regulation of fundamental rights and the interpretation of legal and political norms of the European Court of Justice might not pay attention to the characteristics of the Finnish and other Nordic welfare systems. Therefore, the reactions have often been reserved as regards the extension of EU competence to include the regulation of basic social, health care and education services. As far as the municipality as an employer is concerned, the draft Charter also contains some problematic provisions. If the Charter of Fundamental Rights includes economic, social and cultural fundamental rights within fields that at present do not fall under EU competence or in which it mostly is political, Union competence is expanded using a so to say roundabout method.

The Association of Finnish Local and Regional Authorities particularly regards the following points as important:

The Association supports measures to strengthen fundamental rights in the European Union. These rights should not be laid down in a legally binding document – they should be included in a Charter of Fundamental Rights with the character of a political declaration. The basis should be the fundamental and human rights of the European Human Rights Convention, which already are observed as general principles within the EU. Moreover, a parallel goal could be that the European Union accedes to the Human Rights Convention.

The provisions on the fundamental rights and their reasons should be written thus that the level of protection of fundamental rights in the legislations of the Member States is not lowered in consequence of the provisions or their interpretation. Neither should the Charter of Fundamental Rights lead to that Finnish fundamental rights provisions are interpreted in a foreign way in Finland.

The final Charter of Fundamental Rights should include the law reservation of the draft, according to which the legislator of a Member State may restrict the rights guaranteed by the Charter. The Charter should take the protection of municipal self-government into account in accordance with the Charter of Local Self-Government adopted by the Council of Europe.

EU competence should not be expanded through the adoption of the Charter. The provision and maintenance of welfare services should remain within national competence. The Charter of Fundamental Rights and through it EU competence should not include such economic, social and cultural rights whose regulation currently belongs to the Member States. The Member States themselves should have the right to decide on their social security, health care and educational systems as well as on which activities are publicly financed. The supply, sufficiency and financing of vocational training should fall under national competence in the future too.

The Charter articles on the regulation of working life include factors, which especially require that the differences between the Member States be taken into account, including the varying national practices and the technical regulation in force in each Member State. Additionally, it has to be noted that *e.g.* industrial actions cannot be

regarded as part of community legislative competence. As provisions on the protection of property are drafted it has to be remembered that if these are not clearly formulated they may complicate the application of the Finnish land-use and redemption legislation.

The Charter of Fundamental Rights should include an as comprehensive principle as possible emphasising the right to information and transparency. The Charter should expressly provide that its objective or consequence is not to amend the Member State provisions on access to official documents, and that the loyalty principle may not be interpreted thus that access to documents is restricted in the activities of the national authorities.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 4 September 2000

CHARTE 4446/00

CONTRIB 300

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution by Amnesty International, with some further comments and recommendations in the light of the forthcoming discussions on the complete text of the Charter. [1]

[1] This text has been submitted in English language only.

AMNESTY INTERNATIONAL

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Brussels, 22 August 2000 B152

Dear Convention Members,

In light of the forthcoming discussions on the complete text of the Charter proposed by the Presidium on 28 July (document CHARTE 4422/00), Amnesty International would like to recall its position on the European Charter of Fundamental Rights and ask the Members of the Convention drafting the Charter to take the necessary action in order to ensure that this instrument achieves the goal set out in paragraph 4 of the Preamble, namely to "enhance the protection of fundamental rights".

Amnesty International is concerned that despite the contributions presented by the organisation[1] and by other international organisations, as well as the debates held by the Convention and the amendments presented by its members to previous drafts, the current wording of the Charter still falls short of international law and standards as it does not reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation.

[1] The organisation presented its contributions on the European Charter in March (document CHARTE 4173/00), April (document CHARTE 4290/00) and May 2000 (document CHARTE 4331/00).

Horizontal clauses have been the subject of much debate by the Convention. Although they aim at, *inter alia*, ensuring that at least the current level of protection of fundamental rights is guaranteed, they do not achieve this goal in their current form[1]. This is the reason for Amnesty International to reiterate below a number of recommendations made in its earlier contributions.

Amnesty International calls for the following changes in the text of the European Charter.

Paragraph 2 of the Preamble: the importance of the principle of non-discrimination warrants inclusion in the Preamble

Paragraph 5 of the Preamble: in cataloguing the origins of the rights as they are to be reaffirmed in the Charter, this paragraph should also make reference to international law generally, and specifically include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.

Article 2: this provision should include express wording on the principles that the right to life shall be protected by law and that no one shall be arbitrarily deprived of life; it should affirm the abolition of the death penalty and include the prohibition of enacting or retaining any law which provides for the death penalty as a possible punishment.

Article 4: this article should read "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and so be brought in line with Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR. A European Charter which fails to prohibit "cruel treatment or punishment" would be ensuring a lower level of protection than the ICCPR, to which all Member States are parties.

Article 6: this article no longer contains even a general reference to safeguards necessary in case of deprivation of liberty. Amnesty International strongly reiterates its call for this article to prohibit arbitrary arrest and detention, and to include at least the following safeguards:
-the right to be promptly informed of one's rights, including the right to counsel and the right to lodge complaints about one's treatment;
-the right to be brought promptly before a judicial authority after being deprived of one's liberty;
-the right to prompt access to a lawyer and to family or friends;
-the right to have a lawyer present during questioning;
-the right to challenge or have challenged the lawfulness of detention;
-the principle that it should not be the general rule that people are detained prior to trial;
-the principle that for juveniles, detention should only be used as a measure of last resort and for the shortest appropriate time, as enshrined in Article 9(3) of the ICCPR and Article 37(b) of the Convention on the Rights of the Child, respectively;
-the right to trial within a reasonable time or release from detention.

Article 10: this article should include the right to conscientious objection and the right not to hold any religious beliefs or to practice any religion.

[1] On this issue, please see the text of the intervention made by M. Marc Fischbach, observer of the Council of Europe, in the debate on the horizontal provisions (document CHARTE 4411/00).

Article 18: this right should be expressly recognized to everyone. It should not only refer to the UN Refugee Convention, but also to other international human rights treaties, as the treatment of asylum-seekers and refugees is also ruled by international human rights law.

Article 19: this provision should be brought in line with Article 4 ("…torture or cruel, inhuman or degrading treatment or punishment"). It should also include unfair trial.

Amnesty International calls for an express provision on the guarantees for a fair procedure and due process for any person facing expulsion, extradition or any other form of forced removal procedures that they may be subjected to. Such provision would be in line with Article 32 of the UN Refugee Convention and Article 13 of the International Covenant on Civil and Political Rights.

Article 21: the non-discrimination provision should include an affirmative action clause to the effect that prohibition of discrimination does not prevent taking measures designed to promote full and effective equality. Such provision would be in line with Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 4 (1) of the Convention on the Elimination of All Forms of Discrimination against Women.
It should also reflect the positive obligations of the EU to the effect that all Union policies should ensure equality and the equal enjoyment of the rights enshrined in the Charter by taking all appropriate measures to eliminate discrimination by any person, organization or enterprise.

Article 22: this provision should not be limited to gender only, and should be extended also to other relevant spheres of life.

Article 23: this provision should make reference to the Convention on the Rights of the Child.

Article 45: this provision should include the right to a fair and public hearing within a reasonable time by a competent tribunal, the right not the be compelled to testify or admit guilt, the right to remain silent without such silence being a consideration in the determination of guilt or innocence, the right not to be questioned in the absence of counsel unless the person has voluntarily waived his or her right to counsel, the right to equality of arms, and the right to a reasoned and public judgment.
Paragraph 3 should provide that legal aid be made available in any case where the interests of justice so require and without payment for those who lack sufficient resources, as set out in Article 14(3)(d) of the ICCPR.

Article 46: this provision should include the right to defend oneself in person and/or through legal counsel of one's own choosing.

Article 48: this provision should be limited to the jurisdiction of the same state, in line with Article 4(1) of Protocol 7 to the European Convention on Human Rights.

Article 50: the current wording of this article fails to recognize that certain rights, notably the right to life and freedom from torture, are not derogable under any circumstances. Furthermore, by providing a general limitation clause, Article 50 is in fact allowing for the limitation of rights included in the European Charter which are not derogable under international law.

Paragraph 3 should use wording to establish that the meaning and scope of the rights in question shall be "no lower than" those conferred on them by the Convention.

As a final comment Amnesty International notes with concern that the current wording of the Charter still is not gender-neutral, and insists that this be remedied throughout the text and carried through in all language versions.

We hope that these observations will be taken into account in the final phase of drafting the Charter.

Yours sincerely,

Dick Oosting
Director

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 5 septembre 2000

CHARTE 4447/00

CONTRIB 301

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Syndicat Libre du Danemark et Mouvement Populaire pour les Syndicats Libres, concernant la liberté syndicale. [1]

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[1] Ce texte à été soumis en français, allemand et danois. (l'annexe existe en anglais seulement).

Herr Roman Herzog
President of the Convention Charter of Fundamental Rights of European Union
Council of the European Union
175, rue de la Loi
B-1048 Brussels

Århus, Danemark, 17. August 2000

Lettre adressée à la convention qui travaille avec la charte sur les droits fondamentaux des citoyens de l'UE

Liberté syndicale

"*Les employeurs et les employés ont le droit de se syndiquer, entre autres dans le domaine de l'UE, afin d'établir des confédérations patronales et des confédérations syndicats de leur propre choix pour s'occuper des intérêts économiques et sociaux.*
Tout employeur et tout employé a la liberté d'adhérer ou de non adhérer à des organisations de ce genre, sans que cela cause des préjudices à celui-ci, ni à titre personnel, ni à titre professionnel."

Ainsi était conçu l'article 4, alinéa 1 de l'esquisse du 27 mars 2000 pour les droits économiques et sociaux de la charte de l'UE. Le paragraphe est d'ailleurs une copie de la charte de l'UE sur "the Fundamental Social Rights of Workers (1989), article 5.

Nous avons appris que le paragraphe ci-dessus a disparu de l'esquisse globale de la charte. En même temps nous avons appris que le représentant du gouvernement danois, le social-démocrate Erling Olsen, dans les réunions de la convention du 3 et du 4 avril s'est prononcé contre cet article.A la lueur de cela nous voudrions vous informer sur la situation du marché du travail danois.

Au Danemark les accords exclusifs sont permis. Un accord exclusif veut dire que l'appartenance à un certain syndicat est obligatoire pour obtenir un travail dans une entreprise. Puisque les syndicats socialistes au Danemark, les syndicats LO, ont un objectif clairement politique, cela implique que beaucoup d'employés danois sont obligés – contre leur conviction – de subventionner un certain mouvement politique. On estime que plus de 200.000 employés danois travaillent dans le cadre d'un accord exclusif.

Si un employé se retire d'un syndicat, non seulement il risque d'être licencié,mais il risque aussi d'être condamné à une suspension des indemnités journalières de chômage pendant 5 semaines, puisque les caisses de chômage considèrent le licenciement comme un licenciement mérité.

Les conséquences sont considérables. En 1998 durant la période précédant les élections législatives au Danemark, la Confédération des syndicats LO a dépensé des millions de couronnes pour des campagnes publicitaires figurant dans tous les journaux du pays en faveur du gouvernement social-

démocrate actuel. Les observateurs des élections sont d'accord sur le fait que c'est grâce à cette campagne publicitaire que le gouvernement et ses partis de soutien ont gardé de justesse la majorité (90 contre 89). Pour protester contre cela, un grand nombre de syndiqués de LO n'a pas eu la possibilité de se retirer du syndicat, puisque cela leur aurait coûté leur travail et les indemnités journalières de chômage.

Au Danemark, les accords exclusifs sont souvent établis contre la volonté des employés et à l'aide des blocus. Plusieurs blocus de grande envergure ont été amorcés au Danemark ces dernières années parce que les syndicats de LO n'ont pas voulu accepter que les salariés adhèrent à des syndicats alternatifs.

La sujétion syndicale est bien renforcée par le système des caisses de chômage au Danemark. L'Etat a donne aux syndicats de LO le monopole de gérer les caisses de chômage, et ce monopole est utilisé – souvent illégalement – pour amener des membres au syndicat. Les syndicats interprofessionnels ne peuvent pas obtenir le droit d'établir des Caisses de chômage – exception faite à un unique syndicat chrétien interprofessionnel.

Des études danoises démontrent que la plupart des salariés danois adhèrent à un syndicat pour être membre d'une caisse de chômage; ainsi le gouvernement – par la voie législative des caisses de chômage – contribue à réprimer les syndicats interprofessionnels.

Le Syndicat Libre du Danemark et Le Mouvement Populaire pour les Syndicats Libres trouvent que la situation du marché du travail danois constitue une violation des droits de l'homme internationaux, entre autres la déclaration mondiale de l'O.N.U., article 10, alinéa 2, qui dit: "Personne ne peut être obligé d' adhérer à une association".

De notre point de vue, la sujétion syndicale est à l'opposition de la Convention Européenne des Droits de l'Homme, et par conséquent le Syndicat Libre du Danemark a déféré le Danemark devant le tribunal de Strasbourg (voir pièce jointe).

Nous insistons pour que la convention – malgré les protestations du gouvernement danois – maintienne la Charte de l'UE "of the Fundamental Social Rights of Workers"(1989) , article 5, comme une partie de la charte.

Si vous souhaitez obtenir des informations supplémentaires sur la situation au Danemark ou sur le procès au Tribunal Européen des Droits de l'Homme, nous vous prions de contacter les soussignés..

Je vous prie d'agréer mes sincères salutations

Président du
Syndicat Libre du Danemark
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Le Syndicat Libre du Danemark, DFF, a été fondé le 3 septembre 1983 comme un syndicat apolitique et indépendant. Dès le début DFF a été au centre des grands conflits où les syndicats socialistes ont tout fait pour lutter contre l'organisation. Pour des renseignements supplémentaires: www.dff.net.

Le Mouvement Populaire pour les Syndicats Libres, 4F, est un groupement interpolitique qui travaille pour la liberté syndicale au Danemark. 4F essaie d'arriver à ses fins, en informant le public et les hommes politiques. Pour des renseignements supplémentaires: www.ffff.dk.

Annexe

See Explanatory Note

EUROPEAN COURT OF HUMAN RIGHTS

Strasbourg, France

APPLICATION

under article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of Court

IMPORTANT: *This application is a formal legal document and may effect your rights and obligations.*

I- *THE PARTIES*

A. THE APPLICANT

1. *Surname*: Sørensen 2. *First name(s):* Morten

Sex: male/~~female~~

3. *Nationality:* Danish 4. *Occupation:* Stud. scient

5. Date and place of Birth: January, 3, 1975, Horsens, Denmark

6. *Permanent address:*

7. *Tel. N°:*

8. *Present address (if different from 6.):*

9. *Name of representative*:* Carsten Munk-Hansen

10. *Occupation of representative:* Afvocate

11. Address of representative: Kaj Munks Vej 4, DK-7400 Herning, Denmark

12. *Tel. N°:* ++ 45 9712 6699

B. THE HIGH CONTRACTING PARTY

(Fill in the name of the State(s) against which the application is directed)

13. Denmark

** A form of authority signed by the applicant should be submitted if a representative is appointed.*

II- *Statement of the facts*

14.

The Danish company „FDB distribution" employed the applicant from May 10, 1996. As a condition for his employment, he had to sign a statement which bound him to be a member of a trade union under the Danish „LO" (= the central Danish organisation of trade unions). Also, in his letter of employment it was stated that there exists an agreement between his employer, FDB, and the Danish trade union SID (a Danish trade union of unskilled workers) under the „LO" - obliging his employer FDB only to employ persons being menbers of the SID.

On his first pay slip, the applicant could see that he was now a member of the SID, although he had never personally registered as such. In a letter og June 23, 1996, he wrote to his shop steward that he had been registeres without knowing so, and that he did not want membership of the SID. The fact was that he had to pay subscription to the SID without being accepted as a full member of the SID, because he was only on holiday relief. Consequently, he had to pay for a membership of the trade union, without being able to benefit from the normal rights as a member of the SID. He protested against this, and stated that he did not at all want to be a member of this trade union.

His employer, FDB, immediately dismissed him. In a letter dated June 24, 1996, his employer, FDB, stated that he was sacked because he did not want to be a member of a trade union under the Danish LO.

On December 17, 1996, the applicant filed a claim against his former employer, FDB, demanding a compensation of DKK 20,000, which is the amount that the applicant would have reccived for the rest of his period as holiday relief, had he not been sacked by the FDB.

The case was brought before Vestre Landsret (The Western Appeal Court of Denmark). The applicant Morten Sørensen argued that article 11 of the Convention of Human Rights guarantees him both positive and negative freedom of association. It must be interpreted in the following way: It constituted a breach of Convention that he was sacked due to the fact that he was not a member of a trade union (or of a certain trade union). He admits that Danish law allowed his employer FDB to sack him for this reason, but he argued that the Danish legislation on this point was contrary to article 11. He also argued that the Convention at least on this point must have Drittwirkung on the horizontal level between him and his employer.

In its judgement of November 18, 1998, Vestre Landsret ruled that the judgements in cases Sigurjónsson (1993) and Gústafsson (1996) could not with certainty be interpreted in such a way that the present state of law in Denmark is contrary to article 11 of the Convention. Consequently, the employer, FDB, was acquitted.

The applicant appealed the judgement to Denmarks Højesteret (Supreme Court), where he repeated his arguments, but on June 8, 1999, Højesteret confirmed the judgement of Vestre Landsret. Højesteret ruled that the present Danish state of law was introduced in 1982 in order to respect the judgement in „British rail" (1981), and that judgements pronounced by the European Court of Human Rights since then do not give sufficient grounds to assume that article 11 guarantees a negative freedom of associations in a case like the present.

III- *Statement of alleged violation(s) of the convention and/or protocols and of relevant arguments*

(See part III of the Explanatory Note)

15.

The applicant argues - just as he did before Vestre Landsret and Højesteret in Denmark - that article 11 of the Convention guarantees him both his positive and his negative freedom of association, and that it is contrary to the Convention to force him to pay contributions to a trade union (or to a certain trade union), although he signed a statement on this behalf as a condition for his employment with the FDB.

He argues that such a written statement - signed by a job applicant as a condition to get the job - is signed under circumstances where he cannot with binding force renounce on his right under the Convention. Consequently, the Court should disregard the legal relevance of such a „forced" statement.

Furthermore, he argues that the positive right of association - i.e. the right to be member of a trade union - can be seriously circumvented, if one allows employers to disregard the negative right of association, i.e. the right of an employee not to be member of a trade union. If one did not accept the existence of a negative right of association, the employer could demand membership of a certain trade union which was „friendly" and slack towards this employer. Thus, the freedom to organise could be seriously undermined. Also, the personal freedom of speech under article 10 of the Convention would be endangered. Any statement from the employee contrary to the internal rules of the trade union where he was forced to be a member, could cause his exclution from the trade union, and thus cause the loss of his job. Consequently, his freedom of speech would be seriously endangered, if one demanded his membership of a certain trade union as a condition for his employment with this employer.

The applicant reads the development in the judgements of the Court - especially the judgement in the cases Sigurjónssón and Gustafsson - as sign of a dynamic development in article 11, giving justified reason to assume that the negative aspect of the freedom of association is sufficiently guaranteed by article 11 today.

The absurdity of the applicant´s dismissal is emphasiaed by the fact that he was not even accepted as a full member of the trade union, SID. He had to pay contributions to the trade union - and he was fired for refusing to do so - but he was not allowed a full membership, because he was only a holiday relief in the company, and thus he was not offered full protection and full rights under the SiD-membership. This fact emphasises the violation of article 11.

IV- *Statement relative to article 35 § 1 of the convention*

(See Part IV of the Explanatory Note. If necassory give the details mentioned below under points 16 to 18 on a seperate sheet for each seperate compiant)

16. *Final decision (date, court or authority and nature of decision).*

Judgement of June 8, 1999, from Højesteret (Supreme Court) of Denmark, case number 524/1998,

17. *Other decisions (list in chronological order, giving date, court or authority and nature of decision for each of them)*

Judgement of November 18, 1998, from Vestre Landsret (Western Appeal court), which judgement was confirmed by Højesteret. The facts of the case are mostly contained in Vestre Landsrets judgement.

18. *Is there or was there other appeal or other remedy available to you which you have not used? If so, explain why you have used it.*

NO. Højesteret is the ultimate and final appeal or remedy in Danish legal system.

V- *STATEMENT OF THE OBJECT OF APPLICATION AND PROVISIONAL CLAIMS FOR JUST SATISFACTION*

(See Part V of the Explanatory Note)

19.

The object of the apllication is (1) that the Court rules that a violation of the Convention has taken place, and (2) that the applicant is awarded a just satisfaction under article 41 of the Convention. The provisional claim for just satisfaction amounts to DKK 100,000,, including the DKK 20,000, which the applicant has lost because he was sacked before expiration of his period as holiday relief.

VI- *STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS*

(See Part VI of the Explanatory Note)

20. *Have you submitted the above complains to any other procedure of international investigation or settlement? If so, give full details.*

NO.

VII- *LIST OF DOCUMENTS - (NO ORIGINAL DOCUMENTS; ONLY PHOTOCOPIES)*

(See Part VII of the Explanatory Note. Include copies of all decisions referred ti in Parts IV and VI above. If you do not have copies, you do not have copies, you should obtain them. If you cannot obtain them, explain why not. No documents will be returned to you.)

21.

a) Judgement by the Danish Højesteret (Supreme Court) dated June 8, 1999, case number 524/1998, consisting of 2 pages.

b) Judgement of November 18, 1998, by the Danish Vestre Landsret (Western Appeal Court, first chamber) case B-1022/97, consisting 9 pages.

c) Power of Attorney for the applicant to his legal representative, advocate Carsten Munk-Hansen

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VIII- *DECLARATION AND SIGNATURE*

(See Part VIII of the Explanatory Note)

22. *I herby declare that to the best and belief the information I have given in the present application form is correct.*

Place: DK-7400 Herning, Denmark

Date: October 1999

Carsten Munk-Hansen, advocate

Please see document C, which is a power of Attorney form the applicant Morten Sørensen to his legal representativ, advocate Carsten Munk-Hansen, authorising the latter to represent the applicant before the Court of Human Rights in Strasbourg.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 September 2000

CHARTE 4448/00

CONTRIB 302

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a contribution by the UK Engineering Employers' Federation, with comments on the document CHARTE 4422/00 CONVENT 45. [1]

[1] This text has been submitted in English language only.

DRAFT EU CHARTER OF FUNDAMENTAL RIGHTS

EEF COMMENTS ON THE LATEST TEXT OF THE CHARTER PROPOSED BY THE PRAESIDIUM (CHARTER 4422/00, CONVENT 34)

1. This paper responds to the latest text of the draft EU Charter of Fundamental Rights. It is the third position paper on the Charter submitted by the Engineering Employers' Federation (EEF), which represents over 5,700 companies in the United Kingdom engineering sector employing some 900,000 people.

2. The EEF and its members have a particular interest in the economic and social provisions of the draft Charter.

General Comments

3. The EEF believes that the new draft again represents some improvement on its predecessor (Convent 34). We welcome in particular the inclusion of new provisions reflecting existing rights on:

   a) the freedom to conduct a business (Article 16),

   b) the protection of intellectual property (Article 17.2)

   and

   c) the strengthening of the provision on the right to work in any Member State (Article 15.2).

4. ln addition Article 25 represents some improvement on the previous version in that it qualifies the right to information and consultation by referring to the need for such a right to be "in accordance with Community law and national laws and practices."

5. **Nonetheless the proposed Charter continues to cause the EEF considerable difficulty.** Rather than fulfilling its express aim of making existing rights more visible to citizens, the text still:

   a) creates new rights (eg Article 28 on protection from unjustified dismissal),

   b) maintains the expansionist technique of seeking to create new general rights out of more limited and specific rights (eg Article 25 on information and consultation, Article 31 on reconciling family and professional life)

   and

   c) pre-empts negotiations currently taking place on draft Directives, (eg Article 21 on equal treatment and Article 25 on information and consultation.).

6. This undermining of existing decision-making procedures is extremely worrying.

7. In addition, it is easy to foresee these new and expanded rights being used by the Commission to justify the development of further legislation, even where they are reined in by explicit reference to Community and national laws and practices. Indeed organisations such as the International Federation of Human Rights see one of the advantages of the Charter as the fact that it will effectively provide guidance on the content of future Community legislation.

8. The EEF would suggest that the word "*existing"* should be added before "Community and national laws and practices" if the statement buried in Article 49.2 to the effect that the Charter "does not establish any new power or task for the Community" is to be at all convincing. As it stands, the wording could be read as extending rather than limiting EU intervention.

9. In addition the EEF would welcome greater clarification of certain rights where the meaning is currently unclear (eg Articles 27 and 34).

10. The EEF would also reiterate its concerns regarding:

    a) the way in which the Charter will interact with the European Convention of Human Rights

    and

    b) its eventual status.

11. The Charter is currently written in a way that suggests that it will have full legal status, although the EEF understands that this issue will be decided subsequent to agreement on the content. If it was written in a way that did not assume full legal status, the Charter could be drafted so as to be more intelligible to the EU citizen.

12. The EEF's detailed comments on the new text are attached in the Annex.

August 2000

Annex

DRAFT EU CHARTER OF FUNDAMENTAL RIGHTS

EEF COMMENTS ON THE LATEST TEXT OF THE CHARTER PROPOSED BY THE PRAESIDIUM (CHARTER 4422/00, CONVENT 34)

Detailed comments

Preamble

1. "Solidarity" (paragraph 2) sounds rather strange in English. If another word cannot be found then it should at least be explained.

2. The words "in the light of …….developments" in paragraph 4 seem superfluous and only serve to detract from the clarity of the sentence.

3. Presumably paragraph 5 will depend on the eventual legal status of the Charter.

4. The words "to the human community and to future generations" in paragraph 6 raise questions as to who has rights and who has duties. They should perhaps be left out. Alternatively the issue should be dealt with in greater detail, clarifying which rights are owed to living individuals and which to others including companies.

5. Paragraph 7 should state who is guaranteeing the rights - presumably the EU.

Article 14 - Right to education

6. Whilst we welcome this right in general terms, it is unclear whether the word "access" narrows or extends the right to vocational training. The EEF could not accept any universal requirement for employers to pay for vocational training for their employees, for example, particularly where such training is not related to the job being undertaken. This must remain voluntary.

7. The EEF is also concerned that the inclusion of the right of access to vocational training may be used to justify the extension of Commission competence to this area, which the EEF believes should be the preserve of national law and practice.

Article 15 - Freedom to choose an occupation

8. The previous text referred only to the freedom to move and reside in any Member State. The extension of Article 15.2 to cover freedom to work etc reaffirms freedom of movement within the EU and recognises the importance of mobility of labour. This is an improvement.

Article 16 - Freedom to conduct a business

9. This is a new and welcome reaffirmation of the freedom of establishment.

Article 17 - Right to property

10. The recognition of existing rights regarding the protection of intellectual property is welcome.

Article 21 - Equality and non-discrimination

11. This pre-empts agreement on, and extends the scope of, the draft Directive on equal treatment in employment. Discrimination in employment matters on grounds such as religion, belief, disability, age or sexual orientation is not yet illegal in an EU context, although there are national provisions in this area (eg the UK Disability Discrimination Act). Furthermore the existing text of the draft Directive makes no mention of discrimination on grounds of genetic features, language, political belief, membership of a national minority, property or birth.

12. In addition the right is unqualified, whereas Community and national law on discrimination is often subject to qualification or subject to derogations where justification can be made. The words "such as" should be deleted

Article 22 - Equality between men and women

13. The loosely worded phrase " equal pay for ….work of equal value" has re-appeared. This should be tightened up by adding "in the same employment".

14. The second paragraph seems to allow positive discrimination such as quota systems, which goes beyond existing UK and EU law. The existence of this clause could provide the justification for future EU legislation in this area.

Article 24 - Integration of persons with disabilities

15. As far as occupational integration is concerned, this should be qualified by reference to practicality and cost.

Article 25 - Workers' right to information and consultation within the undertaking

16. This inclusion of "in accordance with Community law and national laws and practices" represents an improvement, but this Article still seeks to make a general right out of a limited and qualified right. It thus pre-empts the outcome of discussions on national information and consultation. This is unacceptable.

17. In addition, the phrase "on matters which concern them" is susceptible to widely differing interpretations and thus likely to be a source of litigation. It could be said that raising a subject in the first place is evidence of concern.

Article 26 - Right of collective bargaining and action

18. This Article still includes the right not only to negotiate but also to conclude collective agreements, thus going beyond the European Convention on Human Rights and UK law. This is of concern, despite the inclusion of "in accordance with Community law and national laws and practices", which could be read as extending rather than limiting EU intervention in this area.

Article 27 - Right of access to placement services

19. The meaning of this new provision is unclear.

Article 28 - Protection in the event of unjustified dismissal

20. This right does not currently exist under EU law. The inclusion of this new general right is unacceptable. Even under existing UK law on unfair dismissal, there is, in most cases, a qualifying period of service. This is not reflected in the Charter proposal.

Article 29 - Fair and just working conditions

21. The former title of "Safe and healthy working conditions" (old article 36) was clearer. Reference to "just" working conditions could imply an interest in, for example, renumeration, which would clearly exceed the scope of Community competence. Presumably the reference to workers' dignity in Article 29.1 is intended to cover harrassment etc, though again this is not clear.

22. We suggested in our previous submission that the Article on working time be subsumed under this broader Article as the Working Time Directive was brought forward as a health and safety measure. We note that this has now been done via Article 29.2. As drafted , however, this could be used to justify removing the opt-out with regard to working time. We would prefer the right to be qualified by reference to the need to be in accordance with Community and national law.

Article 31 - Reconciling family and professional life

23. The unqualified right for everyone "to reconcile their family and professional lives" potentially goes much further than existing agreed rights and is unacceptable as it stands.

Article 34 - Access to services of general economic interest

24. This has no meaning in English. "Services of general economic interest" requires definition or illustration.

Article 35 - Environmental Protection

25. Reference should also be made to the need for proportionality, ie the avoidance of excessive cost for minimal environmental gain.

26. The EEF would argue that "sustainable development" is a process rather than a principle.

27. The Article is drafted without any mention of rights, although we assume they are implied by what is said about "a good quality living environment" etc. If this is the case, it is noteworthy that the Praesidium believes that all existing rights pertaining to the environment can be dealt with in two sentences, while the Charter's social provisions are much lengthier. Does this really reflect the balance of public concern within the EU?

Article 49 - Scope

28. Whilst on the face of it the limitation of the Charter's scope represented by Article 49.2 is welcome, the EEF finds it hard to believe that the Charter will not provide a springboard or justification for further Community activity in the fields it covers.

August 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 September 2000

CHARTE 4449/00

CONTRIB 303

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Centre of the International Council of Women (ECICW). [1]

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[1] This text exists in English language only.

AMENDMENTS ON THE DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Brussels, 24 August 2000

Subject: Draft Charter of Fundamental Rights of the European Union

Please find hereafter the amendments made by the European Centre of the International Council of Women (ECICW)[1].

In my capacity of president of the European Council of Women I am forwarding to the Praesidium the comments of this organisation fully aware of the fact that because of the shortage of time to introduce comments, this document will be far from perfect and incomplete[2].

[1] ECICW: Boulevard du Triomphe 109, bte 2, B-1160 Brussels.
Tel: +32-2-648 4976 +32-2-646 4927.
Fax: +32-2-648 4976
E-mail: lily.boeykens@skynet.be

[2] We refer at the first comments the ECICW made: CONTRIB 227, CHARTE 4364/00, Brussels, 14th of June, 2000.

AMENDMENTS

PREAMBLE

5. *Comments:* As the term 'the principle of subsidiarity' is rather new, we would like to know what exactly is meant in this paragraph. Does it mean that the decisions are taken on different levels, in other words, 'decentralisation'.

6. "Enjoyment of these rights entails responsibilities and duties..."
Comments: Responsibilities and duties for whom? For the member states of the union, for the European Commission...?

7. "Each person is therefore guaranteed the rights and freedoms set out hereafter."
Comments: We would like to drop the word '*therefore'*. If this document is really a defence of fundamental rights, there must be no complementary reason to grant these rights to each person.

CHAPTER I: DIGNITY

Article 3: Right to the integrity of the person

1. "Everyone has the right to respect for his '*physical and mental integrity'*.

Comments: Does the word 'integrity' cover the intentions of the drafters of this text? Does it mean the attempts of attacks by third persons, organisations or state authorities? Or should we add integrity and *self-determination*?
The Charter rightly speaks of *the person,* which is neutral. However in several articles the text speaks of *his* or *him* (see also e.g. art. 17, art. 19, art. 39 and others). This is of course not in conformity with the articles on *gender equality*. Therefore we propose a neutral phraseology.

Proposal: "Everyone has the right to respect for the person's physical and mental integrity and self-determination".

2. *Comments:* We fear that this article is in contradiction with article 13 or at least it shows limitations of article 13.
What for example about medical treatment, intervention or tests on children? Very often the parents and/or the guardians, take the decisions. Are these decisions always in the interest of the child? With informed consent? From what age on does the child respond to article 3.1. See also article 23.

CHAPTER II. FREEDOMS

Article 7. Respect for private and family life.

Comments: Seems to be conceived for men only?
Proposal: Drop the gender definition and to keep the text neutral:
"*Everyone has the right to respect for private and family life, home and confidentiality of communications*".

Article 8. Protection of personal data

Comments: Same remarks as on article 7.

Article 9. Right to marry and right to found a family

Comments: The right to marry is independent and different from the right to found a family.
We read "*shall be guaranteed in accordance with the national laws governing the exercise of these rights*". What if the national laws are infringing the fundamental rights?
Proposal: is to stop the phrase after "*shall be guaranteed*" and to drop the rest.

Article 10. Freedom of thought, conscience and religion

Comments: The title of this article is not so complete as the text of this article. Indeed, the title dropped the word "*believe*". This is also the case in the first phrase of this article. The rest of the text is ok.
Proposal: for the title of article 10 is: "Freedom of thought, conscience, religion and belief". The same remark for the first sentence.
Proposal: to add to the last phrase: "to manifest religion or belief, in worship, teaching, practice and observance, ***with due respect for pluralism***" (see article 11.2).

Article 11. Freedom of expression and information

1. "... to receive and impart information and ideas without interference by *public authority* and regardless of frontiers".
Comments: The interference is not always coming from public authorities, but also from persons in authority (members of the family, religious people etc.)
Proposal: Interference by public authority or private persons in authority.

Article 12. Freedom of assembly and of association

Comments: What does '*peaceful assembly*' mean? Fear for physical violence? For moral pressure?

"... and to freedom of association, in particular in political, trade union and civic matters".
Comments: We want to stop the phrase after "freedom of association" as the rest of the phrase is too restrictive in the view of numerous conflicts based on racial, national or philosophical ideas.

"Political parties at European level contribute to expressing the political will of the citizens of the Union"

Comments: We are disappointed that the political parties only *contribute* to expressing the political will of citizens. At least they *should* contribute to expressing that. Several inter-governmental bodies like the UN, the Council of Europe ... are recommending and pleading for actions to pay attention to the will of civil society. What was the cause of the clash in Seattle?

Article 13. Freedom of research

Comments: We feel that this is in contradiction with article 3.2.

Article 14. Right to education

1. "... This right includes the right to receive *free compulsory education*".
   Comments: Is this not a contradictio in terminis?

2. "... to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be guaranteed, in accordance with the national laws governing the exercise of such freedom and right".
   Comments: Same remarks as on article 10: with due respect for pluralism.

"... in accordance with the national laws governing the exercise of such freedom and right".
Comments: Again: as long as they respect the universal human rights.
Proposal: The phrase should stop after 'shall be guaranteed'.

Article 17. Right to property

1. *Comments:* See remarks on article 3. We are pleading for a gender neutral text.
   Proposal: "Every person has the right to own, use, dispose of and bequeath **personal** lawfully acquired possessions. No one may be deprived of **these** possessions ..."

Article 19. Protection in the event of removal, expulsion or extradition

2. "No one may be removed, expelled, or extradited to a State where **he** could be subjected to the death penalty, torture or other inhuman or degrading treatment".
   Comments: This sentence is really shocking. What about rape, can **he** be raped? Indeed he can be sexually abused and maltreated but women are more often subject of rape. So this situation should be considered and added to the violence enumerated in this paragraph. Moreover it is recognised by the UN and other intergovernmental bodies that in armed conflicts the 'rape of women' became a **weapon of war**.
   Proposal: In this sentence it should be clearly stated that "***he** and **she** could be subjected to ...*"

CHAPTER III. EQUALITY

Article 22. Equality between men and women

"Equal opportunities and equal treatment for men and women as regards employment and work, including equal pay for equal work or for work of equal value, must be ensured".

Comments: "Equality between men and women" is here only defended in the framework of work and employment.

Proposal: The title of article 22 should be "*Equality between men and women* ***in employment and work***".
Moreover, in juridical texts we do not use the word "equality" but "*equal rights*".
Here again I regret not to have the time to explain why it is necessary to change the wording.

"The principle of equal treatment shall not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

Comments: This paragraph needs a long text to explain to those who created this draft charter, what the correct language is, normally used by the UN and the Council of Europe for juridical texts. The World Conferences of the last decade prove a totally different attitude towards the promotion of equal rights between men and women. In 1993 the final declaration of the Vienna Conference on Human Rights, was adopted by the member states, and only a small number of states formulated reservations, mainly based on religious convictions. In the Declaration of Vienna we find the famous statement: "*Women's rights are human rights and human rights are women's rights*".

Comments: The authors of this Draft Charter only mention "*equal treatment*" and further "*specific advantages*". Again only speaking of vocational activities ... in professional careers. The fundamental human rights are dealing with many situations in life, not only with "vocational activities" and "compensation in professional careers". Quid with family, education, nutrition, medical care etc.?
Over the last decade there has been a great deal of change in the promotion of equal rights for all human beings. Another proof of this is that we no longer speak about 'positive discrimination' but about 'positive action'. How can we repair discrimination of certain groups by discriminating others? In order to obtain equal rights? Therefore we also protest against the wording of "specific advantages"!!!
The human race and all individuals are not identical not only regarding physical constitution, but in many other ways too. For this reason, referring to the paragraph in article 22, "specific measures", not "advantages!", should be used and be inserted for pregnancy, giving birth, breastfeeding, etc. This will not be specific advantages 'for women', but also for the child to be born and for society.

Article 23. Protection of children

1. *Comment:* This paragraph should state that the children are entitled to claim the same human rights as all human beings in the world. However we are fully aware that children need protection. In doing so, we should be more precise in defining this protection.
According to article 1 of the Convention of Children's Rights every human being, younger than eighteen years old is considered as a child.

Comment: The wording of this paragraph is open not only to many points of view, but also for a lot of misunderstanding.
"Children may express their views freely". Thus no longer 'SHUT UP'?.
"Such views shall be taken into consideration on matters which concern them ..." Of course not something which concerns their teachers, their parents, their friends.
"... in accordance with their age and maturity". Ok, but who and on what basis will 'maturity' be defined? So e.g. when they are sexually mature, this does not mean that they are mature enough to judge about the situations and consequences of having sex.

2. *Comment:* The only request we have is a definition and an indication of what is considered as 'private institutions'? What is considered as an institution? Schools, religious or philosophical institutions ...? Do they have to conform to laws in order to be considered and accepted as institutions? And what about the family? In 1994 during the International Year of the Family, there was a huge discussion about 'The Rights of the Family as a Unit'. The Human Rights Conventions and Treaties are dealing with rights of individuals, not of groups. For this reason the idea of the 'family as a unit' was rejected. Is it possible to have, within article 23, a paragraph about the relation between child and family?

CHAPTER IV. SOLIDARITY

Article 25 to Article 32

Comments: These articles are only dealing with the professional life of workers.
A similar chapter is probably needed for solidarity in Civil Society. Every citizen within the Community has rights and obligations "to promote social and territorial cohesion".

Proposal: Chapter four should be entitled "Solidarity in Labour Force or Labour Organisations".

Article 33 Health care

Comments: In our opinion the following part should be dropped: "under the conditions established by national laws and practices". Reason: everyone also includes migrants, refugees, persons in need ...

Proposal: Every human being in Europe has the right to access to preventive health care and the right to benefit from medical treatment.

Article 36. Consumer protection

"Union policies shall ensure a high level of protection as regards the health, safety and interest of consumers".

Proposal: Add at the end of the sentence: "... consumers *living in Europe*".

Article 39. Right to good administration

1. *Comments:* We repeat our remarks about the use of *his* and *him* in this text.
Proposal: "*Every person has the right to have personal/individual affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*". Indeed this right is granted to every person.

2. "This right includes:"

- "the right of every person to be heard before any individual measure which would affect him adversely is taken in relation to him"
Comment: We would like to drop "*of every person*" and again the use of "*him*".
Proposal: "*The right to be heard before any individual measure which would affect a* ***person*** *adversely is taken in relation to this individual person"*

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 September 2000

CHARTE 4450/00

CONTRIB 304

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from the European Landowner's Organisation (ELO), regarding Article 17 on ownership rights. [1]

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[1] This text exists in English language only.

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O/Ref. JN-767/00

To the Presidium of the Convention

Re Article 17 on ownership rights

The ELO (European Landowners' Organisation), the GEFI (Groupement Européen des Fédérations Immobilières) and the CEPF (Propriété Forestière), have with great interest studied the new draft of the Article on ownership rights (now Article 17).

A. We note with great satisfaction that the Article now clarifies that it also protects intellectual property. As can be seen from our previous interventions we have of course anticipated that all property, including intellectual property, should be protected, but as one of the purposes of the Charter is to make the rights more clear to the citizens it is good that it is now explicitly mentioned.

B. It is regrettable, however, that in the latest (July 28) draft Article has been added a new sentence (p 1, sentence number 3) which rather makes the legal situation for ownership rights unclear. Does this sentence overtake sentence number 1 and 2? Or is it only an explanation of these other sentences? As far as we understand the new wording will invite to innumerable legal interpretation problems, and of course also to uncertainty for the citizens.

In our opinion the previous wordings of the article presented by the Presidium were considerably more clear and understandable.

Our basic standpoint is thus, that the Convention should revert to the previous wordings (although we still maintain our suggestions for a change of a couple of the words; see C below).

If, however, the Convention finds it necessary to include elements of sentence number 3 in the article, we suggest a compromise where those elements are instead incorporated in sentence number 2 , which would to a great extent eliminate the risk for an unclear legal situation. We suggest that the article p 1 then be given the following wording:

1. Every person has the right to own, use, dispose of and bequeath his lawfully acquired possessions. No one may be deprived of his possessions or regulated in their use, except insofar as it is necessary for the general interest and in the cases and under the conditions provided for by law, subject to prior guarantee of fair compensation.

C. We maintain our previous suggestion to use the word "full" instead of "fair" compensation. "Fair" could invite to too much subjective interpretations and could give the citizens a feeling of not being objectively protected - "full" would give the citizens a far better sense of real protection of their rights.

We have understood that there is, however, some objection to the word "full". It has been pointed out, for instance, that there could well be anticipated situations where government intervention do not lead to losses for the owner or could even lead to economic gains for him.

In order to find a solution we suggest a compromise where the wording instead of "fair compensation" should be only "compensation for his loss".

Johan Nordenfalk
President

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Brussels, 4 September 2000

CHARTE 4451/00

CONTRIB 305

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter enclosed a contribution from The Advisory Council on International Affairs (AIV) [1], with an advisory report on the developments in the context of the Convention. [2]

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[1] Independent advisory body to the Dutch Government and Parliament.

[2] This text has been submitted in English language only.

A EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS?

No. 15, May 2000

Advisory Council on International Affairs

Members of the Advisory Council on International Affairs

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Foreword

In its meeting on 3-4 June 1999 the Cologne European Council decided to draft a Charter of Fundamental Rights for the European Union following an initiative of the German EU presidency in 1999. The conclusions of the Cologne Council stated that the EU had reached a stage in its development at which it was desirable to formulate the rights that applied in the Union in a Charter, the primary aim being to make them more visible to the Union's citizens. The Council also stated that the new Charter should in no way detract from the fundamental rights that already applied within the Union, as set forth e.g. in the European Convention on Human Rights.

The Tampere European Council, meeting on 15 and 16 October 1999, reached agreement on the composition, working methods and practical arrangements of the Forum responsible for drafting a Charter of Fundamental Rights. This Forum (known since February 2000 as the Convention) consists of Members of the European Parliament, the legislative bodies of Member States, authorised government representatives and representatives of the European Commission. It has undertaken to complete an interim report before the European Council in June 2000 and to submit a draft Charter to the Council in Paris/Nice on 7-8 December 2000.

On 14 January 2000 the Minister of Foreign Affairs asked the Advisory Council on International Affairs (AIV) to prepare an advisory report on the proposed Charter. In its request for advice, which was formulated at the request of the General Committee on European Affairs of the Lower House of Parliament, the Minister emphasised that the AIV was not being asked to supply a blueprint for a Charter. What he wanted was an answer to questions concerning the legal status of such a Charter, its relationship to existing conventions and other agreements under international law, the consequences for members of the public and possible appeal proceedings that should be attached to it. These are the so-called ‘horizontal’ questions (see Annexe I for the text of the request for advice). In the light of the rapid developments surrounding the Charter, the Government found itself obliged to adopt a position while the advisory report was still under preparation. The AIV briefly considered responding to this position, but decided against it, as the advisory report and the Government position paper would be appearing at roughly the same time.

In preparing this advisory report, the AIV studied many reports and documents written about the proposed Charter, and had several discussions with experts responsible for drafting it (a list of persons consulted appears in Annexe II). The AIV is grateful to all persons and bodies consulted for their assistance, and wishes to express its special appreciation for the support it received from J.H.M. van Bonzel and I. Henneken of the Permanent Mission in Brussels for arranging the programme for the visit to the Convention meeting in Brussels on 27 April 2000. While the advisory report was being prepared, good ties were maintained at secretarial level with the Ad Hoc group on the EU Charter of the International Economic and Social Affairs Committee of the Dutch Socio-Economic Council (SER).

The advisory report was prepared in a special AIV Committee on the Charter of Fundamental Rights (CHV), comprising the following persons: Professor F.H.J.J. Andriessen* (CEI), Dr A. Bloed* (CVV), T. Etty (CMR), Professor C. Flinterman (CMR), Professor W.J.M. van Genugten (Chairman/CMR), C. Hak (CMR), F. Kuitenbrouwer (CMR), H.C. Posthumus Meyjes (CEI), Professor N.J. Schrijver* (COS) and M.G. Wezenbeek-Geuke (CEI). The members whose names are marked with an asterisk took part primarily by correspondence.

The preparation of the advisory report benefited from the special advice and support of A.R. Westerink (European Integration Affairs Department, Ministry of Foreign Affairs). The CHV's secretariat was in the hands of T.D.J. Oostenbrink (secretary of the CMR) and trainees A. Schueler and E. van Zimmeren.

The advisory report was discussed during the plenary session of the Human Rights Committee on 18 May 2000 and subsequently adopted by the AIV on 29 May 2000.

I Long-term perspective

Since the Maastricht Treaty (1992), the European Union (EU) has had three 'pillars'.[1] The first and most comprehensive pillar, which has existed for many decades, is the European Community (EC). In the EC, the protection of human rights has acquired form and content largely in the case law of the European Court of Justice (ECJ). This case law is largely based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, to which all Member States are party, and on the common constitutional traditions of the Member States.[2] Sometimes, however, the Court will allow an appeal to other human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR, 1966).[3] The EC Treaty itself, though several times revised, contains few provisions in the realm of human rights.

The Treaties on European Union (Maastricht, 7 February 1992 and Amsterdam, 2 October 1997) build on the established case law of the ECJ. Article F, paragraph 2 of the Maastricht Treaty (Article 6, paragraph 2 of the Treaty of Amsterdam) provides that the European Union shall respect human rights as guaranteed by the ECHR, including the acquis, and as they result from the constitutional traditions common to the
Member States. Furthermore, the Treaty of Amsterdam contains the additional provision, in Article 6, paragraph 1, that the EU is founded on the principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which the Member States have in common. Article 7 has a sanction/suspension clause. Article 46 provides for the exercise of judicial control over respect for human rights.

As already noted in the request for advice, the former Advisory Committee on Human Rights and Foreign Policy (ACM), in its 1996 advisory report on the European Union and Human Rights,[4] elaborated three suggestions relating to the protection of human rights within the framework of the Union, viz.:

- the accession of the EC or possibly the EU to the ECHR;
- the EU's adoption of its own 'Bill of Rights';
- a gradual increase in the number of specific human rights provisions in de EU Treaties.

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1 These pillars are the European Community (EC), the Common Foreign and Security Policy (CFSP) and cooperation in the area of Justice and Home Affairs (JHA).

2 See e.g. ECJ Stauder judgment (29/69) of 12 November 1969; ECJ 2nd Nold judgment (4/73) of 14 May 1974; ECJ Hoechst judgment (46/87) of 26 March 1987 and ECJ Orkem judgment (374/87) of 18 October 1989.

3 The ECJ Orkem judgment (374/87) of 18 October 1989 refers explicitly to the ICCPR.

4 See Advisory Committee on Human Rights and Foreign Policy, 'The European Union and Human Rights', advisory report no. 21, The Hague, 1996.

The ACM concluded that a 'step-by-step', 'one right at a time' approach was the most realistic in the short term. In the longer term, however, efforts should be made to achieve the accession of the EC or EU to the ECHR or the drafting of the EU's own Bill of Rights.

Now it has been decided to draft an EU Charter and the situation described above has completely changed, the AIV has deliberated at length, as the ACM did before, on the human rights protection that should ultimately be realised within the Union. The AIV sees 'Operation Drafting a Charter' as an intermediate stage, whose direction can best be determined once it is clear what the long-term perspective is. This is even more to the point if it emerges in the course of 2000 that no satisfactory consensus can be achieved on the text of a Charter.

Before answering the Minister's questions at length, the AIV wishes to set out the points of departure adopted in this advisory report. The AIV envisages a Europe characterised by:

1. the realisation of civil and political rights within the meaning of the ECHR, but also the ICCPR, and of economic, social and cultural rights within the meaning of the European Social Charter (Revised) (ESC, 1961; ESC (Revised), 1996), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) and the 'human rights conventions' of the ILO;[5]
2. the explicit commitment of administrators and officials, both at national level and in Brussels, to respect for fundamental human rights;
3. the visibility and clarity of the rights referred to in point 1 to the citizens of the Union and third-country nationals,[6] as well as members of the legal profession;
4. a system of controllability and legal protection, that provides *inter alia* for the possibility of taking legal action against EU institutions whose actions violate fundamental human rights.

Taking these basic principles as its points of departure, the AIV would stress that where it comes to the protection of civil and political rights, the accession of the EU to the ECHR is by far the most preferable option. The AIV is unconvinced by the argument, frequently voiced, that it is already too late for such accession. The following comments may serve to explain this position.

As already noted, the European Court of Justice (ECJ) has incorporated the rights enshrined in the ECHR into the general principles of Community law, which law has been ratified by all Member States of the EC/EU through the inclusion of relevant Articles in the EU Treaties (see above). It is therefore still a logical sequel for the EU itself to accede to the ECHR. In this way the ECHR would acquire significance for all three pillars of the EU, which the AIV believes to be the most desirable outcome. It would also prevent the ECJ interpreting fundamental rights in a manner that would either provide less protection than Strasbourg case law or diverge from it significantly in some other way. At the same time it would mean that the ECHR would become the common human rights

5 Viz. ILO conventions nos. 87 and 98; 29 and 105; 100 and 111; 138 and 182.

6 The phrase derives from the Treaty of Amsterdam.

basis for the whole of Europe, including EU institutions, thus warding off the threat of a divided Europe. Furthermore, such accession would make it possible for the actions of EU institutions in specific situations to be examined by the Strasbourg Court in response to complaints about human rights violations.

The AIV is well aware that accession to the ECHR – and the same would apply *mutatis mutandis* to acceptance of the obligations following from the ESC (Revised), in relation to which it should be borne in mind that not all the obligations following from it could be declared equally applicable to the EU – would not be easy to achieve. Differences of opinion exist between the Member States; nor do all parties agree, whether in political or in legal circles, on the possible legal obstacles. It will be recalled that as long ago as 1979 the European Commission proposed that the EC should accede to the ECHR, with a view to reinforcing human rights protection within the Community. This proposal elicited the ECJ's advisory ruling of 28 March 1996, which stated that the Community did not possess the competence to accede to the ECHR. According to the ECJ, such accession could not take place without an amendment to the EC Treaty. Moreover, the question of whether the ECHR itself and its Protocols would have to be amended in this case would also have to be looked at. The question to be answered is whether new reasons may now be advanced for urging reconsideration of the ECJ's advice.

The request issued to the ECJ to advise on the accession of the EC to the ECHR was to a large extent inspired, at the time, by the political opposition of some EU Member States to an extensive interpretation of Article 235 (old) of the EC Treaty ('If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'). Since the entry into force of the Treaty of Amsterdam, with the new Title IV included in the first pillar, the protection of human rights has moved closer towards definition as one of the Union's core objectives. The provisions to this end formulated in Article 6, paragraph 1 transform the comment that systems of government should be based on democratic principles into an absolute condition.[7] This is clear, for instance, from the fact that Article O (old) of the EU Treaty (now Article 49) has been amended such that any European state which respects the said principles may apply to become a member of the Union. Furthermore, Article 6, paragraph 4 of the EU Treaty states that the Union 'shall provide itself with the means necessary' to pursue the principles of the rule of law on which the Union is based. Basically, Article 6, paragraph 1 encapsulates the obligation that any state wishing to accede to the EU must be party to the ECHR. As far as fundamental rights are concerned, the Treaty of Amsterdam clearly states that the Union possesses certain qualities of constitutional law. The principles concerned are no longer the

[7] This is a quotation from Professor R. Barents in *Het Verdrag van Amsterdam*, Kluwer, Deventer, 1997, pp. 24-27.

exclusive prerogative of Member States, but now also affect the Union as a whole.[8] Furthermore, the Strasbourg Court has made it clear in a number of recent judgments that it too wishes to step up the pressure to make Union institutions accountable for the implementation of decisions – as far as the consequences of the application of Community law within the national legal orders of Member States are concerned, in any case.[9] In addition, we may cite the decision-making during the Tampere summit of 15 and 16 October 1999. The Presidency's conclusions dwelt at length in the chapter 'Towards a Union of freedom, security and justice', on the common values that are of essential importance to the EU, and the procedure for drafting a Charter on fundamental rights was further elaborated.[10]

As matters now stand, the EU does not possess the competence to conclude international human rights conventions or to accede to any such conventions. This is often explained by stating that the EU lacks the legal personality that would be necessary for such actions. In the AIV's view, however, there is nothing to stop the Member States deciding, for instance within the framework of the current IGC negotiations, to have the EC/EU accede to the ECHR. All that is needed is the will to do it, and for this will to be expressed: if all fifteen EU Member States decide that such accession is desirable and affirm their support for it, the process can be set in motion.[11] There is no need to create a separate, absolute legal personality for the Union, by analogy with Article 281 of the EC Treaty, which affirms that the Community possesses legal personality. The general debate on legal personality should be separated from the actual willingness to effect accession to the ECHR. According to the AIV, this willingness is in itself the decisive factor. All this applies to the Union side of the equation. On the ECHR side, separate problems present themselves, such as the necessary amendment of the Statute of the Council of Europe and of the ECHR itself. These too can be resolved, however, provided there is the political will to do so. It should be borne in mind, however, that the Council of Europe consists of another 26 Member States besides the fifteen partners in the Union, each with its own views on these matters.

Another possibility, where accession to the ECHR is concerned, is the application of the doctrine of

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8 Ibid.

9 See e.g. European Court of Human Rights, 19 February 1999, Matthews – United Kingdom, in R.A. Lawson & H. Schermers, *Leading cases of the Court of Human Rights* (2nd ed., Ars Aqui, 1999, p. 671), and European Court of Human Rights, 17 March 2000, T.I. – United Kingdom, (*Nederlands Juristenblad*, no. 19, 12 May 2000, pp. 981-982).

10 On this subject, see e.g. the letter from the Minister of Foreign Affairs to the Speaker of the Lower House, of 26 October 1999, concerning a Forum to prepare an EU Charter of Fundamental Rights (DIE/676/99).

11 By way of comparison: the legal personality of the United Nations under international law is also not explicitly regulated; see however the Reparations for Injuries in the Service of the United Nations, Advisory Opinion of the ICJ, 11 April 1949, p. 174 ff.

'implied powers'. This doctrine deals in general terms with the question of whether an organisation in which competence has been vested internally within a particular area may also take on external responsibilities that are necessary for the adequate fulfilment of that competence. Although the doctrine of 'implied powers' is also acknowledged within the framework of the Union – see e.g. the 1956 Fédéchar ruling – it plays a minor role in the EU, because many of the Union's powers have been explicitly regulated by the Member States, for the sake of caution. One exception, however, is the power to conclude external conventions. In this area the doctrine is invoked with some regularity, one example being the Community's accession to the WTO Treaty. The AIV would recommend that, now that the Union's powers in the realm of human rights and related matters are to be gradually expanded (cf. Title IV of the Treaty of Amsterdam), the government investigate whether the situation has changed sufficiently, or will have changed sufficiently after the adoption of the Charter, for the doctrine of implied powers to be deemed applicable.

Taking all these considerations and trends into account, the AIV recommends that the government explore the climate of opinion among the present Member States in the near future, or that it endeavour to procure a fresh ruling from the ECJ on the question of accession, in the light of the latest developments and on the basis of specific questions.[12]

The AIV has also reflected on what action should be taken if neither of the above recommendations is followed. In this event, a number of possible approaches still remain, as described above. The least dramatic approach would be to try to bring about a political declaration. Such a declaration, however, runs a great risk of becoming 'all things to all Member States', given the way the Convention is working. After all, the compilers would be at liberty to add new rights (for more on this point see below) without states being bound by the declaration and without citizens acquiring any added legal protection. The AIV would view this latter situation as undesirable. It would arouse false expectations among the general public. It is clear from the developments thus far within the Convention, however, and from the talks that the CHV has conducted in this context, that the Convention appears to be aiming for a formulation of the Charter that would make it legally binding, either now or in the long term. This can be achieved in various ways. One option would be to integrate the Charter into the EU Treaty or a Protocol to the Treaty, according to the preference of the European Council. In this regard the AIV has a mild preference for the former option, as it would emphasise the fundamental importance of the EU Treaty to the further integration of Europe. The AIV favours the adoption of a binding Charter as the best alternative to the EU's accession to the ECHR, and will therefore now turn to a detailed discussion of this option.

[12] See e.g. Professor E.M.H. Hirsch Ballin: 'Commentaar bij Advies 2/94 van het Hof van Justitie van 28 maart 1996 inzake de toetreding van de Gemeenschap tot het EVRM', in SEW, *Tijdschrift voor Europees en economisch recht*, vol. 45, no. 1, January 1997, pp. 21-23.

II Essential criteria

Given the long-term perspective already outlined by the AIV, and taking into account that no objective goal appears to have been defined as to what the Charter must achieve, the AIV believes that the following factors should be taken into account in shaping the Charter.

Interrelationship and indivisibility of classical and social human rights

The AIV is aware that the Convention is giving serious consideration to the possibility of including only civil and political rights, with a view to arriving ultimately at a binding Charter. This approach is based on the argument that economic, social and cultural rights, given that these are in the nature of 'normative instructions', cannot be included in a binding text. The AIV believes that to act on this basis is to adopt an approach that is wrong in principle.

The EU too has constantly emphasised the interrelationship and indivisibility of civil and political rights on the one hand, and economic, social and cultural rights on the other, in its human rights policy. This point of departure, that finds its origins partly in President Roosevelt's Four Freedoms Speech of 1941, was confirmed during the Second World Conference on Human Rights in 1993, with the full support of the Member States of the EU. It should be added that terms such as interrelationship and indivisibility (or 'interdependence' or another equivalent) have since become common currency internationally. To separate the two kinds of rights again would send the wrong message to large parts of the world community of states and the non-governmental world. Mary Robinson, UN High Commissioner for Human Rights, also recently defined the interrelationship and indivisibility of human rights as an important point requiring action.[13] Moreover, it is clear from developments on the international legal front that the classic distinction between legally enforceable and legally non-enforceable does not correspond to the distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. To uphold an absolute distinction of this kind is no longer tenable.[14]

The Convention should therefore assert that in Europe too, human rights constitute an indivisible package of rights, consisting of specific claims in each of the two areas. The AIV would therefore strongly urge that the proposed Charter make no distinction between the way classical and social human rights are presented. The mere fact of grouping the two kinds of rights together does not automatically imply, however, that all rights have the same legal force. But that they are all binding – about that there should be no doubt. Even those rights, for instance, that are now enshrined in the ESC (Revised) are binding on states that have ratified it. The significance of these rights in legal

[13] See also e.g.: Advisory Council on International Affairs, 'The functioning of the United Nations Commission on Human Rights', report no. 11, The Hague, 1999, section IIb.

[14] Reference may also be made to the collective complaints procedure that has since entered into force – and that is used – under the ESC (Revised).

proceedings instituted by individual members of the public, however, may differ.[15] In some cases, legislation and the decisions of government and public authorities may be subject to direct scrutiny for compatibility with these rights, and perhaps declared non-binding. In other cases these rights can help in the interpretation of vaguely formulated national norms. In the Netherlands, for instance, courts are under an obligation to interpret and apply domestic legislation in the light of international obligations. This applies not only in the realm of civil and political rights, but also to economic, social and cultural rights such as equal treatment for women and men, the protection of children from economic and social exploitation, parents' right to choose their children's schools freely, and the right to form trade unions.

This said, some economic, social and cultural rights lend themselves less than others to judicial scrutiny or enforcement through the courts. People complaining of an infringement of these rights, or an aspect of such, would have to resort primarily to other mechanisms, such as appeals to governments and political parties and public campaigns. The AIV is aware that many Member States are not yet willing to go any further down the path of invoking economic, social and cultural rights before courts of law than can be done at present. Though this is regrettable, the AIV does not consider the Convention to be the appropriate forum for promoting further developments in that area. Any radical proposal would deal a sure deathblow to the entire Charter operation. The point is that the adoption of the Charter should send out a clear message to the citizens of the Union that they possess a number of human rights, by which the Union too is bound, but that these rights may not all have equal status in a court of law.

New rights

This brings the AIV to the issue of whether it would be wise to include a number of new rights in the Charter, as some members (of the Convention) and several non-governmental organisations have suggested. Possible examples include the right to a clean environment and the right to good governance. Understandable though such impulses may be, trying to impart the desired added value to the Charter in that way would be fraught with danger. Instead the AIV believes, as it indicates in its basic points of departure, that it would be better to achieve this added value by strengthening the legal accountability of the Union's institutions in respect of fundamental rights that are already recognised within Europe (see the section below on expanding existing legal remedies). In the light of this key objective, it could be hazardous to add new rights to the Charter, for the simple reason that some states could view them as a reason for rejecting the Charter, either when the Convention is finalising its draft or in the subsequent stage of formal adoption by the IGC and European Council. It could be a case of 'biting off more than one can chew' and spell death for the whole project. The AIV therefore advocates that any new rights be dealt with in separate treaty

[15] It is indeed a situation that may also differ from one country to the next; cf. developments in national legal practices in South Africa and India.

negotiations, possibly – though not necessarily – culminating in a separate Protocol to the ECHR, the ESC (Revised) or the Treaty on European Union.

Visibility and clarity

As already noted, one of the objectives of the Charter project is to enhance the visibility of rights. In this regard, a distinction is often made between lawyers and ordinary citizens: the former are supposedly fully abreast of existing rights, while the latter have no clear picture of them. However, this distinction is flawed in several respects. The AIV would mention just two. First, 'even' lawyers often lack detailed knowledge of the human rights situation within the Union – that is, of the Treaty component supplemented by a series of judgments handed down by the Luxembourg Court. A degree of specialisation is needed that is certainly not possessed by the entire legal profession. Only recently, complaints emanated from 'Luxembourg' (the ECJ) that many European lawyers were unfamiliar with European law, and the same complaint would be applicable here.

As far as ordinary citizens are concerned, not all people are ignorant of their rights, although it would certainly be wrong to generalise from the proverbial exceptions such as specialised non-governmental organisations (including, in the Netherlands, the Dutch section of the International Commission of Jurists). Both Strasbourg and Brussels are in many respects remote, and this affects issues of fundamental rights. There is much room for improvement, on the part of both national authorities and the institutions themselves. A well-formulated Charter could help a great deal, by improving visibility and clarity. In this connection it is important to give a wide interpretation to the concept of 'citizens': at issue are not only ordinary members of the public and non-governmental organisations, but also companies and other private actors such as the media, which operate within and from Europe.

EU citizens and third-country nationals

An important point in the debate, and a separate area of concern for the AIV, concerns the fundamental rights of third-country nationals, people from countries outside the EU. The AIV would begin by commenting in general that human rights apply to everyone within the territory of the EU, including third-country nationals. The nature of human rights is such that they are not dependent on being a national of an EU Member State, but apply to everyone. This is true not only of internationally recognised human rights such as the right to freedom of expression and the right of association and peaceful assembly, but also to the right to health care and to education.

In practice, however, the legal status of third-country nationals within the EU is highly complex. This is mainly because their rights derive from different legal sources. Aside from rights based on the EC Treaty (as revised several times), they also have rights based on guidelines on discrimination, equal treatment, part-time work, family reunification and anti-racism measures. In other cases, rights accorded third-country nationals are largely determined by their nationality and/or country of residence. Rights that third-country nationals enjoy on the basis of their

nationality may even derive, for instance, from Association Agreements, which are limited in scope to the nationals of Contracting States. The same applies, in another context, to the distinction between EU citizens and third-country nationals on the basis of the Schengen Agreements, where the Member State of residence is the decisive factor.[16]

When the rights of third-country nationals are compared with those of the nationals of a Member State, several differences emerge. The main differences relate not so much to civil rights but to political, social and economic rights, though in political rights too, the division between EU citizens and third-country nationals is growing less strict. This applies, for instance, to the right of petition and the right to submit a complaint to the European Ombudsman.[17] Although states are allowed under the terms of Article 16 of the ECHR to impose restrictions on the activities of aliens, this provision has seen little application.[18] The general point of departure should be that third-country nationals enjoy the same rights as EU citizens, unless there are objective and reasonable grounds for departing from this general rule, as is done in practice regarding the right to vote and to be elected.[19] The same applies to the right to diplomatic and consular protection and eligibility for positions in EU institutions.

As the protection of human rights of all those who find themselves within the EU should be of paramount importance, the narrower problem of European citizenship should also be approached in that light. Article 8 (old) of the EC Treaty provides that every person holding the nationality of a Member State is a citizen of the Union, and that the citizens of the Union enjoy the rights conferred by the EC Treaty and are subject to the duties it imposes. Some of these rights are enshrined in Articles 8a-d (old), while others occur in various places in the EC Treaty. Even so, it is clear that European citizenship, which is supplementary to citizenship of a Member State (and hence does not replace it), is as yet of very limited scope. Thus in a number of cases regulations that apply in one country (e.g. relating to discrimination on the grounds of race or the legal status of partnerships) do not apply elsewhere. Furthermore, in some cases the ways and means of using existing rights effectively are inadequate – the right to publication of all European decision-making and access to

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16 See esp. the doctoral dissertation by Helen Staples, 'The Legal Status of Third Country Nationals Resident in the European Union', Utrecht, 13 October 1999, pp. 422-429.

17 See the article by the National Ombudsman, 'Memorandum ten behoeve van de Europese Ombudsman', 12 April 2000.

18 See European Court of Human Rights, 27 April 1995, Piermont-France (Series A, vol. 314), section 64.

19 See also European Court of Human Rights, 16 September 1996, Gaygusuz-Austria (Reports 1996, p. 1129), section 42.

documents being a case in point.[20] The AIV considers that the government, proceeding on the assumption of the basic equality of EU citizens and third-country nationals who have resided in the Union for more than five years, should flesh out the concept of EU citizenship unless there are 'objective and reasonable grounds' for making a distinction.

Tensions between the ECJ and the European Court of Human Rights

In the discussions on the Charter, the question frequently arises of the tensions that the new Charter might generate between the Strasbourg and Luxembourg Courts.

The Strasbourg Court currently dispenses justice in cases brought before it by citizens of any of the 41 States that are party to the ECHR, while the Luxembourg Court will in future be competent to rule, extrapolating from existing procedures, in cases in which one of the EU's institutions has violated a human right as formulated in the Charter. This raises a number of questions.

First, the question may be asked of how great the risk is of the Luxembourg Court adopting a different, substantially divergent interpretation of a particular human right compared to Strasbourg. A clause will probably be included in the Charter to the effect that the Luxembourg Court should consider itself bound by the Strasbourg acquis, but this ignores the fact that as an independent tribunal, the Luxembourg Court is within its rights to ignore such a provision. More generally, it may be assumed that the Luxembourg Court will have little inclination to accept as a foregone conclusion the interpretation of rights as agreed in Strasbourg. Furthermore, the law is not a static phenomenon, and substantially different ideas may arise concerning the development of new law. The crucial point is whether or not this would have an adverse effect. Would it in general be a problem if the two courts were to arrive at different interpretations of certain provisions? From the present vantage-point the AIV sees a certain risk, but feels, especially in view of the independence of the judges in the two Courts, that it can and should be accepted. However, mindful of this risk, the AIV would add the express proviso that within at most ten years of adopting a Charter, a serious review should determine whether significant differences of interpretation have indeed arisen. If such be the case, the EU and the Council of Europe would be obliged to make further conventional agreements or to decide after all to accede to the ECHR and to accept the corresponding obligations deriving from the ESC (Revised).

In the short term, one option already suggested would be to create the possibility of appealing to Strasbourg from judgments handed down by Luxembourg, provided these lie within the scope of the ECHR. The AIV believes that despite the benefits to be gained, in maximising the scope for action for citizens whose rights have been undermined – and in strengthening legal certainty – this is undesirable from the vantage-point of process economy. After first exhausting domestic remedies

[20] Although Art. 255 of the EU Treaty provides for the right to inspect documents of the European Parliament, the Commission and the Council, the number of grounds on which this inspection may be refused are so numerous that the right has little substance.

the petitioner could take his or her case to two international courts, which, partly in light of both Courts' present workload, would appear to be 'too much of a good thing'. In this connection the AIV would point to the parallel that exists in that millions of European citizens may choose, in the event of a violation of their rights, to take their cases to both Strasbourg and the UN Human Rights Committee in Geneva. Although this possibility exists on paper, many countries have restricted it by entering reservations to either the ECHR or the ICCPR at the time of accession or ratification.

A different point is the division of labour between the two Courts. The misapprehension appears to be abroad that citizens will be entirely free in future to decide whether to take their cases to Strasbourg or Luxembourg, depending on where they believe their best chances lie. The AIV believes this would be undesirable. To prevent it, it should be emphasised that the Strasbourg Court should in essence carry on doing what it is doing now, whereas bringing a case before 'Luxembourg' will be possible only in relation to violations resulting from the actions of the EU's institutions. Examples would include the EU's promulgation of a Regulation undermining the right of ownership, or a decision made without respecting the elementary right to have both sides of a case heard. Only in such cases would the Luxembourg Court be the proper tribunal to apply to, though where a case lends itself in terms of substance to being heard by either Court, the choice would be up to the petitioner. This is in accordance with international legal practice.

Expansion of existing legal remedies

As noted in Chapter I of this report, the AIV believes that one of the most important principles in the Charter operation should be that it should clarify and strengthen the existing system of controllability and legal protection. Citizens are entitled not to be on the receiving end of empty promises on the part of their governments. In this context it is important to acknowledge that as things now stand, it is difficult for individual members of the public to gain access to the Court in Luxembourg. The classical criteria of an action taken by one of the EU's institutions being of 'direct and individual concern'[21] in practice throws up a considerable obstacle and seriously impedes the controllability of decision-making.[22] The AIV therefore believes that citizens should be given wider – and more realistic – opportunities to complain about violations of their rights by one of the EU's institutions. It is counter-productive to place too many obstacles in their path. In this connection the AIV advises taking existing procedures as the point of departure and adjusting them. Where admissibility is concerned, the criteria of the ECHR could be used, as recently reaffirmed (in

[21] Art. 230 of the EC Treaty provides for a similar qualified right of appeal for natural and legal persons.

[22] See e.g. ECJ Plaumann judgment (25/62) of 15 July 1963; ECJ Toepfer judgment (joined cases 106 and 107/63) of 1 July 1965; ECJ Eridania judgment (joined cases 10 and 18/68) of 10 December 1969; ECJ International Fruit Company I judgment (joined cases 41-44/70) of 13 May 1971; and ECJ Kwekerij Gebroeders Van der Kooy BV et al. judgment (joined cases 67, 68 and 70/85) of 2 February 1988.

the context of the 11th Protocol, which embodied fundamental revisions of the Strasbourg system) and honed by the Strasbourg monitoring bodies. These requirements of admissibility, varying from the time limit for submitting a complaint to the requirement that a petitioner must claim to be the victim of a violation himself, have by now proven their worth. It is also clear that they do indeed function as obstacles, but not as insuperable ones.

As far as defining who is entitled to submit a complaint is concerned, the ECHR again provides useful criteria. It refers to 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation'. It would be appropriate for the Charter to include such a formula, again under the caveat that any change to the admissibility criteria or the use of two different systems is more likely to raise new questions than to help produce a clear and coherent whole. In the discussions on the Charter it has been acknowledged that it would be wrong for the Charter to send a message that there is a Strasbourg 'speed' and a higher or different 'speed', applicable to EU Member States. Adding new rights to the Charter (see above) and introducing a complaints system that differed from Strasbourg in terms of admissibility criteria would also send out the wrong message in that respect.

At the same time it is of great importance to include a provision in the Charter forbidding the invocation of the Charter to give a restrictive interpretation or application to existing national and international provisions and obligations in the area of human rights. A provision of this kind could be formulated by analogy with Article 53 of the ECHR and Article 5, paragraph 2 of the ICCPR.[23]

Concluding remarks

Should it turn out, after careful examination of the text of a Charter as agreed by the Convention for compatibility with the acquis of Strasbourg and Luxembourg,[24] that the efforts to arrive at a well-formulated and legally binding Charter have not produced the desired outcome, there is still the option of a 'political' declaration, which could be made legally binding in due course. In that case the 'step-by-step', 'one right at a time' approach described above would be applicable, as the IGC could emphasise. If the most significant steps forward, such as accession to the ECHR and *mutatis mutandis* to the ESC (Revised), or the drafting of a legally binding Charter, prove impossible or unfeasible, this should not be seized upon as an excuse to do nothing. In the past a piecemeal approach has often produced positive results, even generating a certain dynamism in the integration process. On balance, human rights already enjoy a considerable degree of protection in the EU,

[23] See e.g. the opinion of L.F.M. Besselink in *Nederlands Juristenblad*, vol. 17, 28 April 2000, pp. 887-888.

[24] In this report the AIV proceeds on the assumption that the Convention will succeed in presenting a text of the Charter during the Lisbon summit in June 2000. In the ensuing months, but before the Nice summit, the text could undergo the examination referred to here.

although this protection is not always sufficiently clear. Carrying on along this path would be the last option in attempting to strengthen the legal protection of the citizens of the EU.

A final word. The AIV wishes to emphasise the close relationship that must exist between the standards that are imposed internally and those that are urged upon other countries in the framework of external policy. Although this report primarily focuses on internal policy, it is of great importance to recognise that internal and external human rights policy cannot be viewed in isolation from each other. The EU cannot urge norms upon others in the context of external policy unless it has already achieved them itself.

III Recommendations

On the basis of the above considerations, the AIV makes the following recommendations to the Government of the Netherlands:

1. The AIV emphasises that the EU's accession to the ECHR is by far the most preferable option. The government should therefore give serious consideration to investigating whether such accession may not be feasible in the changed political circumstances. The same applies *mutatis mutandis* to accession to the ESC (Revised) and the ILO 'human rights' conventions.
2. If accession appears not to be feasible in the short term, efforts should be made to achieve a legally binding Charter of Fundamental Rights, incorporating economic, social and cultural rights as well as civil and political rights. The inclusion of these two types of rights in the same text does not automatically mean that they would all have the same legal force in all cases. Their significance in legal proceedings instituted by members of the public may differ.
3. The Government should try to make the rights included in a Charter both visible and clear, both for members of the public and even (!) for members of the legal profession.
4. The added value of the Charter should lie in the increased legal protection it affords citizens in the area of human rights, including access to the courts, in the application of European legislation. Its added value should not lie in the inclusion of new rights.
5. The AIV notes that great differences remain between the fundamental rights enjoyed by EU citizens and by third-country nationals. The AIV urges the government to introduce distinctions only in cases in which it is reasonable and objectively justified, and in other cases to proceed on the basis that EU citizens and third-country nationals who have been resident for five years or longer within the territory of the EU possess equal rights.
6. The AIV recognises the risk that the Courts in Strasbourg and Luxembourg may in some cases arrive at different interpretations of human rights norms. It considers that in the present circumstances this is an acceptable and inevitable risk, and recommends that in the event of significant differences, further conventional agreements be made within the framework of the EU and the Council of Europe, or alternatively that the decision be made for the EU to accede to the ECHR. In this connection, the AIV proposes that within ten years at most, a review be conducted to examine to what extent significant differences have arisen. In the AIV's view, it would be undesirable to create a possibility of appeal in Strasbourg against judgments handed down by the Court in Luxembourg.
7. In order to make it easier for members of the public to submit complaints about human rights violations by EU institutions and to prevent the growth of two divergent systems of admissibility, the admissibility requirements set forth and standardised in the context of the ECHR should be used as the basis. The question of who is entitled to submit a complaint should likewise be decided by reference to the ECHR criteria. Steps must be taken to ensure

that existing national and international provisions of fundamental rights cannot be interpreted restrictively.

8. As soon as an initial draft of the Charter is finished, a meticulous examination of the text should follow to check compatibility with the acquis of Strasbourg and Luxembourg.

9. If the efforts to bring about a Charter do not lead to a well-formulated and legally binding result, the strengthening of the protection of human rights within the EU should proceed by way of a 'step-by-step', 'one right at a time' approach.

10. In conclusion, the AIV emphasises once again that the EU cannot urge norms upon others in its external policy that it has not achieved internally.

Annexe I

Chairman of the Advisory Council
on International Affairs
Prof. R.F.M. Lubbers
P.O. Box 20061
2500 EB The Hague

The Hague, 14 January 2000

Dear Professor Lubbers,

Mr Michiel Patijn has asked me, on behalf of the General Committee on European Affairs of the Lower House, to request from your Advisory Committee a report on the Charter of Fundamental Rights, or Bill of Rights, for the European Union. Mr Patijn chairs this Committee, and he also represents the Lower House in the Forum* that will be drafting the Charter. Professor Ernst Hirsch Ballin has been appointed to represent the Upper House. The Government is represented by Mr Frederik Korthals Altes.

The decision to draft a Bill of Rights for the European Union was taken by the European Council meeting in Cologne on 3-4 June 1999. A Forum consisting of members of the European Parliament and the parliaments of the member states and authorised representatives of governments and of the European Commission will prepare the Charter. This Forum must submit a draft of the proposed Charter to the Council before the European Council in December 2000. The Forum met on 17 December 1999 for the first time.

The General Committee on European Affairs of the Lower House indicated that it would like the Committee's advisory report to deal with the following points:

- What relationship will the new Bill of Rights have with existing national legislation (in particular the Constitution), European Conventions (in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social

Charter) and international conventions (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights)?

- What subjects should this Bill of Rights address that are not already included in existing legislation and regulations?
- How would such a Bill of Rights affect members of the public?
- How should this Bill of Rights be arrived at procedurally?
- What appeal proceedings should be applicable to the Bill of Rights? What legal institutions play a role here? How should the relations between these institutions be regulated?

The General Committee on European Affairs has pointed out that the subject of the Bill of Rights is already included in the Advisory Committee's programme, and has therefore expressed the hope that the report might be made available within three months.

As you are no doubt aware, the Interministerial Committee on European Law issued a report to the State Secretary for Foreign Affairs on 10 September 1999, which dealt with some of the points raised above. This report is enclosed for your information. Also enclosed is a memorandum on the Charter that I sent to the Speaker of the Lower House on 3 December 1999.

I am familiar with the report 'The European Union and Human Rights', published by the Advisory Committee on Human Rights and Foreign Policy on 25 September 1996. The report now requested could perhaps build on this.

I share the hope expressed by the General Committee on European Affairs that the Advisory Committee's advisory report can be made available within three months, and I am convinced that it will be of great benefit to those representing both Parliament and the Government in helping to formulate their contributions to the Forum.

Yours sincerely,

Jozias van Aartsen,
Minister of Foreign Affairs
* In February 2000 the name 'Forum' was changed in 'Convention'.

Annexe II

List of persons consulted

P. Altmeyer (Member of German *Bundestag*)

G. Braibant (representative of the French Government in the Convention)

K.M. Buitenweg (Group of Greens, European Parliament)

I. van den Burg (Group of European Social Democrats, European Parliament)

R. van Dam (Group of Democracies and Diversities, European Parliament)

R. Fernhout (National Ombudsman)

Lord Goldsmith QC (representative of the British Government in the Convention)

R. Herzog (chair of the Convention)

F. Korthals Altes (Speaker of the Upper House of Parliament)

J.R.H. Maij-Weggen (Group of European People's Party and European Democrats, European Parliament)

M. Patijn (chair of the General Committee on European Affairs of the Lower House)

Mr Rodriguez Berejo (representative of the Spanish Government in the Convention)

P.B.C.D.F. van Sasse van Ysselt (Chairperson of the Dutch section of the International Commission of Jurists)

Also consulted was Professor E.M.H. Hirsch Ballin (member of the Upper House and Professor of International Law, Tilburg University); and

official advisors:

R.A.A. Böcker (International Law Division, Ministry of Foreign Affairs)

I. van der Steen (European Law Division, Ministry of Foreign Affairs)

Annexe III

List of abbreviations

ACM	Advisory Committee on Human Rights and Foreign Policy
AIV	Advisory Council on International Affairs
CEI	European Integration Committee
CFSP	Common Foreign and Security Policy
Charter	EU Charter of Fundamental Rights
CHV	Committee on the Charter of Fundamental Rights of the AIV
CMR	Human Rights Committee
Commission	European Commission
Convention	Forum responsible for drafting a Charter of Fundamental Rights
COS	Development Cooperation Committee
CVV	Peace and Security Committee
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice in Luxembourg
ESC	European Social Charter
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
IGC	Intergovernmental conference
ILO	International Labour Organisation
JHA	Justice and Home Affairs
NJCM	Dutch section of the International Commission of Jurists
SER	Socio-Economic Council
UN	United Nations
Union	European Union
WTO	World Trade Organisation

Previous reports published by the Advisory Council on International Affairs
(available in English)

1 *A*n inclusive Europe, October 1997
2 *Conventional* a*rms* c*ontrol: urgent* n*eed,* l*imited* o*pportunities*, April 1998
3 *Capital punishment and* h*uman* r*ights; recent* d*evelopments*, April 1998
4 *Universality of human rights and cultural diversity*, June 1998
5 *An inclusive Europe II*, November 1998
6 *Humanitarian aid: redefining the limits*, November 1998
7 *Comments on the criteria for structural bilateral aid*, November 1998
8 *Asylum information and the European Union*, July 1999
9 *Towards calmer waters: a report on relations between Turkey and the European Union*, July 1999
10 *Developments in the international security situation in the 1990s: from unsafe security to insecure safety, September 1999*
11 *The functioning of the United Nations Commission on Human Rights*, September 1999
12 *The IGC and beyond: towards a European Union of thirty Member States,* January 2000
13 *Humanitarian intervention,* April 2000*
14 *Key lessons from the financial crises of 1997 and 1998,* May 2000

* Issued jointly by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV)

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 September 2000

CHARTE 4452/00

CONTRIB 306

COVER NOTE

Subject : Draft Charter of fundamental rights of the European Union

Please find hereafter a statement by Mr. Karl Hermann HAACK, member of the German Bundestag, regarding the document CHARTE 4422/00 CONVENT 45. [1]

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[1] This text has been submitted in German, French and English languages.

Statement concerning Convent 45

Dear Professor Herzog,

As Federal Government Commissioner for the Disabled, I would like to supplement my letter of 26 July 2000 by making the following statement concerning the Presidium draft now presented.

I would ask you to forward this statement to the members of the Convent and also make it accessible to the public.

Kind regards,

Karl-Hermann Haack

Statement of the Federal Government Commissioner for the Disabled concerning Convent 45

Article 32 Social security and social support

(1) The Union recognises and respects the right of access to the benefits of social security and to the social services that guarantee protection in the event of maternity, sickness, **disability**, an occupational accident, a need for long-term care or in old age, as well as after becoming unemployed, in accordance with Community law and the legal provisions and customs of the individual Member States.

Reasons:

Disability is an independent criterion that is not covered by the above-mentioned categories of "sickness" and "need for long-term care".
An addition to this article would strengthen Articles 21 and 24 and give them the necessary support in terms of social policy.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 5 September 2000

CHARTE 4453/00

CONTRIB 307

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution from The Union of Professional Engineers in Finland, "Insinööirliitto IL ry". [1]

[1] This text has been submitted in English language only.

1st September 2000

Jean-Paul Jacque

Dear Sir,

FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

The Union of Professional Engineers in Finland, Insinööriliitto IL ry, is the interest group representing professional engineers. Its objective is to contribute to the professional development of engineers and to enhance their opportunities to pursue their profession and utilize their skills.

Insinööriliitto has followed the discussion concerning the Charter of Fundamental Rights of the European Union with a positive mind and wishes to communicate its view of their contents. As it is the aim to create a document which makes clear the rights of the individual, social responsibility and issues of justice, it is appropriate to set forth a few issues related to the engineering profession.

As the right of free movement of labour, capital, services and goods has been defined in the Treaty of the European Union, the possibility for the free movement of labour should be genuinely ensured.

This should apply to all citizens regardless of their education and employment.

Comparability of diplomas

The right to education is a citizen's fundamental right. This should also include a qualitative dimension where the central factors are the scope of education and the comparability of diplomas. Through this the minimum standards of skills of people with a certain diploma can be defined from the viewpoint of a member state. The level of diplomas can be considered, among other things, as

an issue of safety in services and trade between individuals and corporations. Suitable examples in the technical field include design, production and inspection procedures for electrical appliances, lifts and pressure vessels. There are many other examples.

Consumer protection should also be taken into account when considering fundamental rights. The consumer must be able to rely on the quality and safety of products and services and on the fact that those selling products and offering services have the necessary knowledge.

Irrespective of the fact that the freedom to move, work, offer services, and trade have been recognized within the EU, there have been numerous obstacles in practice. It has, for instance, proved impossible or almost impossible for Finnish engineers to work in certain European countries (e.g. Italy, Portugal, and Greece).

The level classification of engineering education covering the whole EU area and almost the whole rest of Europe has already been carried through by FEANI (Fédération Européenne d'Associations Nationales d'Ingeénierus). This European umbrella organization of engineers defines the education in the technical field which is to be classified as engineering education. We suggest that this completed basic work be used as the starting point for mapping out the comparability of engineering diplomas.

We propose that the following amendment concerning the comparability of diplomas be made to article 14 (Right to Education), section 2 (Liberties) of the Charter of Fundamental Rights:

"Education must be of high quality and it shall be possible to compare diplomas obtained in various countries."

Further, we propose that the Amendment of the Charter of Fundamental Rights concerning directions for maintaining the rights would include a definition of the diplomas which have an important impact on the rights, equality, and safety of citizens.

Agreements on prohibition of competition

The rights of professional freedom and freedom of trade should be genuinely ensured for people who earn a living. Companies increasingly demand that their employees sign so-called agreements on prohibition of competition in order to prevent the employee from taking up employment in a competing company within a certain period of time after the termination of employment. National legislation generally allows these kinds of agreements. The sanctions for breaking the agreement are usually undue and in many cases prevent the individual from pursuing his/her profession freely. Agreements on prohibition of competition are required of employees the in metal and electronics industry, particularly in design and product development and in marketing and sales, not only of people in management positions. The period for prohibition of competition can last several years after the termination of employment and the contractual penalty can amount to hundreds of thousands of Finnish marks. These kinds of agreements are an obstacle to the free movement of employees from one company to another and also from one country to another and are therefore against the EU principles of free movement of labour.

National legislation should not allow undue restrictions and liabilities for damages from the viewpoint of an individual in conjunction with the freedom of utilizing skills, the right to work and change his/her employer. Undue restrictions will result in a new type of slave labour if the sanctions

applied to an individual exceed reasonable time limits or other limitations or if they completely prohibit one from working and utlilizing one's skills.

We propose that articles 15 and 16, section 2 of the Charter be amended to include the following limitation for concluding an agreement on prohibition of competition:

"The right of an individual to pursue his/her profession may not be limited by unreasonable agreements."

Also the Amendment clarifying this point should define what may be considered a reasonable restriction for prohibition of competition. This would create a framework for definitions in national legislation of maximum measures prohibiting competition.

Social security

Free movement of labour as defined in the Treaty of the EU also requires practical measures concerning the transferability of social security. When an individual takes employment in one member state, he must be able to trust that his rights to social security will be transferable to other member states. For instance, she/he must have the right to pension security and to enjoy it in his/her home country or place of residence anywhere within the EU area. In addition to pensions, also the rights to unemployment compensation, health care, and other social benefits should be ensured equally for all.

At the moment directive 1408/71 determines the principle for applying the social security systems to employees moving within the Community. However, compliance with the directive has turned out to be difficult. The basic principle is that an employee is insured in the country of employment. In certain cases the person can still remain insured in the country where she/he works normally, e.g. if employment in another country is temporary. The benefits earned in another country can be maintained. Pensions, for instance, are paid to a person residing in another member state. Also periods of work or pension insurance in another member state can be taken into consideration when calculating the benefits.

Forms standardized by the EU are used for transferring social benefits. Acquiring the necessary forms is bureaucratic and systems vary from country to country. It is difficult to acquire information on the systems of various member states. Unawareness of a minor detail of a regulation or filling in the wrong form may result in loosing the entire benefit. Pension payments to a bank account in another country may be impossible according to the national legislation. This has also often caused additional costs for the pensioner, e.g. in the form of bank transfer costs.

Insinööriliitto is of the opinion that in order to secure the rights of the individual, the contents of the social security directive should be clarified and simplified in connection with the revision of the Treaty. National procedures should be standardized, but without harmonizing the social security systems themselves.

Further we propose that the importance of the above issues be emphasized in section 4 of the Treaty concerning social responsibility.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 5. September 2000

CHARTE 4454/00

CONTRIB 308

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag des Europabüros der deutschen kommunalen Selbstverwaltung, mit einer Stellungnahme des Deutschen Städetags (DST). [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Europabüro der deutschen
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An den
Rat der Europäischen Union
M. Jean-Paul Jacqué
Convention Secretariat
Council Legal service
175 Rue de la loi
B – 1048 Brüssel

Per E-Mail

Sehr geehrter Herr Jacqué,

nachfolgend übermittle ich Ihnen im Auftrag des DST seine Stellungnahme zum Entwurf der Charta der Grundrechte in Form eines Beschlussvorschlages für das Präsidium des Deutschen Städtetages, über den dieses in Kürze beschließen wird.

Beschlussvorschlag:

1 Das Präsidium begrüßt im Grundsatz den Entwurf der Charta der Grundrechte der Europäischen Union, der am 28. Juli 2000 vom Präsidium des Konvents zur Festlegung eines Grundrechtskataloges vorgeschlagen worden ist.

2 Das Präsidium teilt ausdrücklich die in Art. 49 Abs. 2 des Entwurfes niedergelegte Position, dass durch diese Grundrechte-Charta keine neuen Zuständigkeiten der Europäischen Union oder der Gemeinschaft begründet werden sollen. Es bekräftigt darüber hinaus, dass auch bestehende Zuständigkeiten nicht erweitert werden dürfen.

3 Das Präsidium hält dennoch eine Veränderung der Grundrechte-Charta in erster Linie in zwei Punkten im deutschen kommunalen Interesse für erforderlich:

3.1 In der Präambel sollte in Ziffer 3, in der von der Achtung der nationalen Identität der Mitgliedstaaten und der Organisation ihrer staatlichen Gewalt auf nationaler, regionaler und lokaler Ebene die Rede ist, auch die lokale Selbstverwaltung abgesichert werden.
Deshalb sollte Ziffer 3 der Präambel durch folgenden Satz erweitert werden:

„Die bestehenden Entscheidungsrechte demokratisch gewählter Vertretungskörperschaf-ten auf regionaler und lokaler Ebene werden bei der Setzung und Umsetzung europäischen Rechts gewährleistet."

3.2 Art. 34 des Entwurfes (Zugang zu Diensten von allgemeinem wirtschaftlichen Interesse) sollte folgenden Nachsatz erhalten:

„Dieser (soziale und territoriale) Zusammenhalt der Union wird besonders durch Entscheidungsrechte der demokratisch legitimierten regionalen und lokalen Gebietskörperschaften im Bereich der Dienste von allgemeinem wirtschaftlichen und bürgerschaftlichen Interesse gewährleistet." Die Union hält diese Rechte mit dem gemeinsamen Markt für vereinbar."

Insbesondere erlauben wir uns zu **Ziff. 3.2.** des oben stehenden Beschlussvorschlages folgendes auszuführen:

In Art. 34 des Entwurfes ist im Kontext mit dem Zugang der Bürger zu den Diensten von allgemeinem wirtschaftlichen Interesse der soziale und territoriale Zusammenhalt der Union genannt, den es zu schützen und zu wahren gilt.

Der Wortlaut des Textes bezieht sich auf den ausschließlich in Art. 16 EGV verwendeten Begriff "sozialer und territorialer Zusammenhalt." Der Zusammenhalt der Union erfordert zunächst Stabilität in den einzelnen Mitgliedstaaten. In Deutschland wiederum ist Voraussetzung für die Wahrung dieser sozialen und territorialen Stabilität der Erhalt der Städte und Gemeinden sowohl in Bezug auf ihr Gebiet als auch hinsichtlich ihrer Funktion als Garanten für die Grundsicherung der elementaren Lebensbedürfnisse der Einwohner. Dienste von allgemeinem wirtschaftlichen Interesse dienen in der Regel der Grundsicherung der Lebensbedürfnisse der Bürger. Deshalb sind sie nicht nur von allgemeinem wirtschaftlichen, sondern ebenso auch von allgemeinem bürgerschaftlichen Interesse. Der Erhalt von Entscheidungsrechten bei den Anforderungen an diese Dienste im Rahmen der lokalen Demokratie ist damit als eine essentielle Voraussetzung anzusehen. Denn Selbsterwaltung bedeutet auch die Möglichkeit eigenverantwortlicher Wahrnehmung und Erfüllung eigener öffentlicher Angelegenheiten durch eigene Organe in eigenem Namen und auf eigene Kosten. Diese Organisationshoheit lokaler Gebietskörperschaften ist durch die Politik der Europäischen Union in Frage gestellt, insbesondere hinsichtlich der Dienste von allgemeinem wirtschaftlichen Interesse, die zugleich im bürgerschaftlichem Interesse liegen. Es bedarf daher einer Ergänzung des Art. 34 der Charta.

Im übrigen regen wir folgende zusätzliche Änderungsvorschläge an:

Zu Art. 14:

In Art. 14 Recht auf Bildung Abs. 1 sollte der zweite Satz gestrichen werden.

Die Forderung, unentgeltlich am Pflichtschulunterricht teilnehmen zu können, stellt einen Eingriff in die Hoheit der Mitgliedstaaten dar und widerspricht u. E. Art. 149 Abs. 1 des EG-Vertrages.

Der Begriff der Unentgeltlichkeit des Pflichtschulunterrichts ist interpretationsbedürftig bzw. kann unterschiedlich interpretiert werden. Neben einer Befreiung der Zahlung von Schulgeld könnte dazu auch die kostenlose Bereitstellung von Unterrichtsmitteln und von Beförderungskosten zur Schule fallen. Regelungen hierzu müssen den Mitgliedstaaten vorbehalten bleiben.

Zu Art. 13:

Darauf hinzuweisen wäre noch, dass die Europäische Union im Forschungsbereich ebenso wenig Kompetenzen wie im Bereich von Kunst und Wissenschaft hat (außer einem begrenzten, die Hoheit der Mitgliedstaaten achtenden Förderungsauftrag). Wenn dennoch in Art. 13 die Freiheit der Forschung in den Entwurf aufgenommen werden soll, erschiene es richtig, diesen Artikel analog zu Art. 5 Abs. 3 Grundgesetz um Kunst, Wissenschaft und Lehre zu erweitern.

Entgegen der Auffassung einiger Kulturorganisationen und Kulturverbände unterstützt nach dem gegenwärtigen Stand der Diskussion die Hauptgeschäftsstelle nicht die Forderung, in einem eigenen Artikel ein Recht auf Kultur in die Charta aufzunehmen. Es würde vollkommen genügen, wenn Art. 13 im Sinne von Art. 5 Grundgesetz um die "Kunst" erweitert würde. Jedenfalls nach gängiger deutscher Auffassung und Rechtsprechung würde dies auch den Auftrag zur Förderung der Kunst beinhalten.

Wir würden es im Interesse der vom Deutschen Städtetag vertretenen deutschen Städte begrüßen, wenn die oben angeführten Anregungen Berücksichtigung finden könnten.

Selbstverständlich stehen Ihnen der Unterzeichner sowie die Geschäftsstelle des DST bei Rückfragen jederzeit zur Verfügung.

Mit freundlichem Gruß

Dr. Ralf von Ameln
Direktor

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 8. September 2000

CHARTE 4455/00

CONTRIB 309

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Alternativvorschlag von der IG Eurovision, zur vorliegenden Präambel des Entwurfs der Grundrechtscharta. [1] [2]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

[2] Text vorgelegt von Dr. Christoph Strawe, Initiative "Netzwerk Dreigliederung", Haußstr. 44a, D-70188 Stuttgart. Tel. +49-0711-23 68 950. Fax: +49-0711-23 60218. Email: BueroStrawe@t-online.de

PRÄAMBEL **Entwurf des Konvents (28. 7. 2000)**	**PRÄAMBEL** **Alternativentwurf der IG-EuroVision**
1. Die Völker Europas haben untereinander eine immer engere Union begründet und beschlossen, auf der Grundlage gemeinsamer Werte eine friedliche Zukunft zu teilen.	**1.** Die Europäische Union ist eine Gemeinschaft der Völker Europas, die auf der Grundlage gemeinsamer Werte eine friedliche soziale Zukunft gestalten wollen.
2. Die Union gründet sich auf die unteilbaren und universellen Grundsätze der Würde der Männer und der Frauen, der Freiheit, der Gleichheit und der Solidarität; sie beruht auf dem Grundsatz der Demokratie und der Rechtsstaatlichkeit.	**2.** Die Union gründet auf der Achtung vor der Würde des Menschen. Sie orientiert ihre Aufga ben und Ziele an den unteilbaren und universellen Idealen der Freiheit, Gleichheit und Solidarität und gestaltet ihre Rechtsordnungen nach demokratischen und rechtsstaatlichen Prinzipien.
3. Die Union trägt zur Entwicklung dieser gemeinsamen Werte unter Achtung der Vielfalt der Kulturen und Traditionen der Völker Europas sowie der nationalen Identität der Mitgliedstaaten und der Organisation ihrer staatlichen Gewalt auf nationaler, regionaler und lokaler Ebene bei; sie stellt durch den freien Personen-, Waren-, Kapital- und Dienstleistungsverkehr eine ausgewogene und nachhaltige Entwicklung sicher.	**3.** Die Union trägt zur Entfaltung dieser gemeinsamen Werte unter Achtung der Vielfalt der Kulturen und Traditionen der Völker Europas sowie der nationalen Identität der Mitgliedstaaten und der Organisation ihrer staatlichen Gewalt auf nationaler, regionaler und lokaler Ebene bei; sie will durch freien Personen-, Informations-, Kultur-, Kapital-, Waren- und Dienstleistungsverkehr einer ausgewogenen und nachhaltigen Entwicklung dienen.
4. Mit der Annahme dieser Charta möchte die Union die Grundrechte sichtbarer machen und dadurch ihren Schutz angesichts der Entwicklung der Gesellschaft, des sozialen Fortschritts und der wissen-schaftlichen und technologischen Entwicklungen verstärken.	**4.** Mit der Annahme dieser Charta möchte die Union die Grundrechte der Menschen, der Bürger und der Völker bewußter machen und dadurch ihren Schutz angesichts der gesellschaftlichen Veränderungen, des sozialen Wandels und des wissenschaftlichen und technologischen Fortschritts verstärken.
5. Diese Charta bekräftigt unter Achtung der Befugnisse und Aufgaben der Gemeinschaft und der Union und des Subsidiaritätsprinzips die Rechte, die sich vor allem aus den gemeinsamen Verfassungstraditionen der Mitgliedstaaten, aus dem Vertrag über die Europäische Union und aus den Gemeinschaftsverträgen, aus der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, aus den von der Gemeinschaft und dem Europarat beschlossenen Sozialchartas sowie aus der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften und des Europäischen Gerichtshofs für Menschenrechte ergeben.	**5.** (unverändert)
6. Die Inanspruchnahme dieser Rechte ist mit Verantwortlichkeiten und Pflichten sowohl gegenüber den Mitmenschen als auch gegenüber der menschlichen Gemeinschaft und den künftigen Generationen verbunden.	**6.** (unverändert)
7. Daher sind jeder Person die nachstehend aufgeführten Rechte und Freiheiten garantiert.	**7.** Die nachstehend aufgeführten Grundrechte sind für die Europäische Union und ihre Mitglieder Grundlage aller rechtlich-politischen Entscheidungen und bei Verstößen einklagbar.

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 7. September 2000

CHARTE 4456/00

CONTRIB 310

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend einen Beitrag des Deutschen Paritätischen Wohlfahrtsverbandes Gesamtverband. [1] [2]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

[2] Deutschen Paritätischen Wohlfahrtsverbandes Gesamtverband: Heinrich-Hoffmann-Str. 3 60528 Frankfurt am Main. Tel: 069-6706-0. Fax: 069-67-06204.

Rat der Europäischen Union
Generalsekretariat
175, rue de la Loi
Herrn Jean-Paul Jacqué

B-1048 Brüssel

31.08.00
sekretariat: doris.winkowski@paritaet.org

Sehr geehrter Herr Jacqué,

am 28. Juli 2000 hat das Präsidium des Konvents zur Erarbeitung der geplanten Charta der Grundrechte der Europäischen Union einen vollständigen Entwurf für eine solche Charta veröffentlicht.

Als deutscher Spitzenverband der Freien Wohlfahrtspflege, dem an die 10.000 rechtlich selbständige Organisationen und Vereine angeschlossen sind, möchten wir zu diesem Entwurf Stellung nehmen und insbesondere konstruktive Anregungen geben.

Aus unserer Sicht enthält der Entwurf bereits viel Begrüßenswertes und stellt vor dem Hintergrund der unterschiedlichen Interessen im Konvent eine beachtliche Zwischenleistung dar.

An folgenden Punkten ist der Entwurf aus unserer Sicht jedoch noch nachbesserungsbedürftig:

- Zu Artikel 9 (Recht, eine Ehe einzugehen und eine Familie zu gründen) schlagen wir vor, einen zweiten Absatz wie folgt einzufügen: “Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die primär ihnen obliegende Pflicht. Die staatliche Gemeinschaft schützt und fördert darüber hinaus jede Lebensgemeinschaft, in der Kinder und Jugendliche aufwachsen, bei ihrer selbstverantwortlichen Aufgabenerfüllung”.

  Aus unserer Sicht gebietet sich ein solcher zweiter Absatz, um der derzeitigen Diskussion um einen modernen Familienbegriff mit seinen sozialpolitischen Implikationen in zukunftsgerichteter Weise gerecht zu werden.

- Zu Artikel 14 (Recht auf Bildung) halten wir die Aussage, wonach eine jede Person das Recht hat, unentgeltlich am Pflichtschulunterricht teilzunehmen, für unzulänglich. Im Interesse der Chancengleichheit der Bürgerinnen und Bürger in Europa, aber auch im Interesse der wirtschaftlichen Entwicklung in Europa halten wir vielmehr eine Formulierung für notwendig, wonach eine jede Person das Recht auf Bildung und Ausbildung gemäß ihrer Fähigkeiten hat.

- Zu Artikel 32 (Soziale Sicherheit und soziale Unterstützung) Satz 1 ist aus unserer Sicht der Lebensumstand der Behinderung zwingend mit aufzuführen, da er durch den Begriff der Krankheit nicht mit abgedeckt wird. Die Formulierung “die Union anerkennt und achtet das Recht...” ist aus unserer Sicht zudem zu defensiv formuliert, da sie Interpretationsmöglichkeiten offenläßt, ob damit ein Grundrecht tatsächlich formuliert ist.

- Artikel 32 (Soziale Sicherheit und soziale Unterstützung) Satz 2: Auch hierbei handelt es sich um keine klare Formulierung eines Grundrechtes. Aus unserer Sicht muß es heißen: "Wer in Not gerät, hat Anspruch auf Hilfe und Betreuung und auf die Mittel, die für ein menschenwürdiges Dasein und für eine Teilhabe an der Gesellschaft unerläßlich sind."

- Die Formulierung in Artikel 33 (Gesundheitsschutz) halten wir mit Blick auf in der Zukunft nicht auszuschließende Diskussion über Rationierungen in der gesundheitlichen Versorgung für unzulänglich. Der Verweis auf die einzelstaatlichen Vorschriften wirft die Frage auf, wie weit ein solcher Passus in einer EU-Charta der sozialen Grundrechte überhaupt noch Sinn macht. Wir schlagen statt dessen folgende Formulierung vor: "Jede Person hat ein Recht auf gesundheitliche Versorgung. Niemandem dürfen wegen seiner wirtschaftlichen Situation oder aus anderen Gründen notwendige Leistungen der gesundheitlichen Versorgung vorenthalten werden."

- Eine EU-Charta der sozialen Grundrechte hat aus unserer Sicht in besonderer Weise das Verhältnis von Staat und Bürgerinnen und Bürgern in diesem Sektor zu definieren. Ein Europa als ein Bündnis von lebendigen Zivilgesellschaften, getragen durch aktives Bürgerengagement, muß sich insoweit auch in einer EU-Charta der sozialen Grundrechte wiederfinden, in dem dem bürgerlichen Engagement ein Vorrecht vor staatlichem Engagement definitiv eingeräumt wird. Für den Sozialbereich trifft der vorgelegte Entwurf dazu jedoch keinerlei Aussage.

Ergänzend schlagen wir daher folgende Formulierung vor:

- Stellung freier Vereinigungen in Bildung, Erziehung, Versorgung mit sozialen Diensten

  1. Das Initiativrecht freier Vereinigungen im Bereich der Bildung, der Erziehung und Versorgung mit sozialen Diensten wird geachtet.

  2. Öffentliche Schulen in freier Trägerschaft sind staatlichen Schulen unbeschadet der staatlichen Planungs- und Versorgungsverantwortung gleichgestellt.

  3. Die Vorrangstellung der Wohlfahrtsverbände und anderer freier dem Gemeinwohl verpflichteter Träger im Bereich der Wohlfahrtspflege und der Erziehung gegenüber staatlich vorgehaltenen sozialen Diensten ist unbeschadet der staatlichen Planungs- und Versorgungsverantwortung zu achten.

  4. Die Verbände der freien Träger von Einrichtungen der Bildung, Erziehung und der Wohlfahrtspflege sind bei der politischen Gestaltung der Bereiche Bildung, Erziehung und soziale Dienste einzubeziehen."

Wir würden uns sehr freuen, könnten unsere Anregungen in die weiteren Beratungen mit einfließen und verbleiben

mit freundlichen Grüßen

Dr. Ulrich Schneider
Hauptgeschäftsführer

Anlage

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 7. September 2000

CHARTE 4457/00

CONTRIB 311

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme des Österreichischen Gewerkschaftsbundes, zur Grundrechtscharta. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Bundeskanzleramt
zHd. Dr. Harald DOSSI

Ballhausplatz 2
1014 Wien

30.08.2000

EU-Grundrechte-Charta

Auf dem EU-Gipfel im Jahr 1999 wurde beschlossen, eine Charta der Grundrechte der Europäischen Union zu erarbeiten. Dazu wurde ein Gremium (Konvent) aus Regierungsvertretern, Mitgliedern der nationalen Parlamente und des Europaparlamentes eingesetzt, um bis zum Oktober dieses Jahres einen Entwurf zu erarbeiten. Dieser Entwurf soll von der Europäischen Union im Dezember verabschiedet werden.

1. Grundsätzliches

Der Österreichische Gewerkschaftsbund begrüßt die Bestrebungen eine umfassende Grundrechtscharta auf Europäischer Ebene zu schaffen. Zwischen der zunehmenden wirtschaftlichen Liberalisierung sowie den Zielen der wirtschaftlichen Wettbewerbsfähigkeit einerseits und den sozialpolitischen sowie anderen gesellschaftlichen Zielsetzungen andererseits muss ein Gleichgewicht in der Europäischen Union hergestellt werden. Aus unserer Sicht muss dabei insbesondere der lohnabhängigen Bevölkerung der Zugang zu grundlegenden sozialen Rechten und zu Wohlstand ermöglicht und garantiert werden. In der Schaffung einer Charta der Grundrechte der Europäischen Union ist dabei ein wesentliches Element zu sehen. Die alleinige Existenz der Europäischen Menschenrechtskonvention und der Europäischen Sozialcharta ist nicht ausreichend, denn diese bieten zum Beispiel keinen Schutz gegen Maßnahmen im Rahmen des Tätigkeitsfeldes der Europäischen Union, weil die Europäische Union selbst nicht der Menschenrechtskonvention oder Sozialcharta beigetreten ist.

- Die sozialen Grundrechte müssen Bestandteil der Charta werden

Die sozialen Grundrechte sind dabei ein unverzichtbarer Bestandteil des Aufbaues einer Sozialunion. Insbesondere die sozialen Auswirkungen der Vollendung der Wirtschafts- und Währungsunion, vor allem im Hinblick auf die Erweiterung, macht die Aufnahme der sozialen Grundrechte dringend notwendig, denn sonst droht mit der Erweiterung eine Entwicklung in Richtung Freihandelszone. Es ist nicht länger zu tolerieren, dass es strenge einklagbare Regeln für Waren, aber keine sozialen Grundrechte für die Arbeitnehmer in der Europäischen Union gibt. Die Aufnahme von sozialen Grundrechten in den Vertrag ist ausschlaggebend, damit die Europäische Union auch Realität für die Arbeitnehmer wird.

- Die Grundrechte müssen rechtsverbindlich und einklagbar werden

Aus unserer Sicht ist die fehlende Rechtsverbindlichkeit, insbesondere bei den sozialen Grundrechten, nicht länger tolerierbar. Die Grundrechte müssen einklagbar werden. Für die garantierten sozialen Grundrechte muss dabei ein Klagerecht für die Gewerkschaften zur Vertretung der Arbeitnehmerinteressen gewährleistet werden.

Die Schaffung eines Kataloges von Grundrechten, wie es zurzeit in der Form einer EU-Grundrechtscharta diskutiert wird, ist nicht zielführend, weil diese Charta rechtlich gesehen weiterhin unverbindlich bleibt. Die Grundrechte müssen einschließlich der sozialen Grundrechte und Gewerkschaftsrechte in den EU-Vertrag verankert werden, damit sichergestellt wird, dass sie einklagbares Recht werden. Ein Abschluss der Regierungskonferenz kann daher für die Gewerkschaften nur dann akzeptabel werden, wenn die Grundrechte einschließlich der sozialen Rechte in den Vertrag verankert werden. Dabei muss auch ein entsprechendes Verfahren zur Umsetzung und Durchsetzung geschaffen werden.

2. Folgende Rechte müssen in der Charta umfasst werden

Neben den allgemeinen politischen Rechten - die in der Allgemeine Erklärung über Menschenrechte (UN, 1948), Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten (Europarat, 1950), UN-Übereinkommen zur Beseitigung der Diskriminierung der Frau, UN-Übereinkommen über die Rechte des Kindes und im Abkommen über die Rechtsstellung der Flüchtlinge verankert sind - müssen die sozialen und wirtschaftlichen Rechte sowie Rechte der Arbeitswelt, festgelegt in der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer, der Europäischen Sozialcharta und die einschlägigen IAO-Normen in die Charta aufgenommen werden.

Zu den Bestimmungen im Einzelnen:

Artikel 6

Der ÖGB fordert die Ergänzung des restlichen Textes des Artikel 5 EMRK, um den Personen, die entgegen des Artikel 5 EMRK von einer Festnahme oder Haft betroffen waren, einen Anspruch auf Schadenersatz zu gewährleisten. Das heißt, der Text soll nunmehr lauten „(1) Jede Person hat das Recht auf Freiheit und Sicherheit. Die Freiheit darf einem Menschen nur in den folgenden Fällen ... Anspruch auf Schadenersatz."

Artikel 22

Da die Chancengleichheit von Männern und Frauen ohne flächendeckende Kinderbetreuungseinrichtungen nicht erreicht werden kann, fordert der ÖGB die Hinzufügung eines Absatzes 3 zu Artikel 22: Die Mitgliedsstaaten fördern die Errichtung von flächendeckenden Kinderbetreuungseinrichtungen.
Der ÖGB begrüßt die Klarstellung des Absatzes 2 bezüglich der Möglichkeit der positiven Diskriminierung.

Artikel 25

Für den ÖGB ist es unerlässlich, dass die Arbeitnehmer und ihre Vertreter, in Bezug auf sie betreffende Fragen, auch Mitwirkungsmöglichkeiten haben. Weiters müssen die Unterrichtungs-,

Anhörungs- und Mitwirkungsmöglichkeiten auf allen Ebenen, sowie auf nationaler und grenzüberschreitenden Ebene gegeben sein. Weiters fordert der ÖGB die Streichung der Worte „... nach dem Gemeinschaftsrecht und nach den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten...“. Der neu gefasste Artikel sollte nach Ansicht des ÖGB somit lauten: Für die Arbeitnehmer und ihre Vertreter muss eine rechtzeitige Unterrichtung, Anhörung und Mitwirkung auf allen Ebenen zu den sie betreffenden Fragen, sowohl national als auch grenzüberschreitend, gewährleistet sein.

Artikel 26

Arbeitgeber und Arbeitnehmer haben das Recht Tarifverträge auszuhandeln und zu schließen sowie bei Interessenskonflikten kollektive Maßnahmen einschließlich des Rechts grenzübergreifender Solidaritätsaktionen und Streiks zur Verteidigung ihrer Interessen zu ergreifen.

Artikel 27

Der ÖGB tritt für eine Ergänzung des betreffenden Artikels ein, um Unklarheiten zu vermeiden: Jede Person hat das Recht auf Zugang zu einem unentgeltlichen Arbeitsvermittlungsdienst.

Artikel 28

Der ÖGB tritt auch bei diesem Artikel für eine Ergänzung ein. Satz 2 sollte lauten: Im Falle einer ungerechtfertigten Entlassung, hat der Arbeitnehmer Anspruch auf eine angemessene Entschädigung oder einen anderen zweckmäßigen Ausgleich.

Artikel 29

Da unter „gerechten und angemessenen Arbeitsbedingungen“ auch ein angemessener Lohn zu verstehen ist, tritt der ÖGB – in Anlehnung an Artikel 4 der Europäischen Sozialcharta – für die Hinzufügung eines neuen Absatzes ein: Jeder Arbeitnehmer hat einen Anspruch auf einen gerechten Lohn, der ihm und seiner Familie einen angemessenen Lebensstandard sichert. Wie bereits oben erwähnt, fordert der ÖGB, dass die Europäische Sozialcharta in die Grundrechtscharta aufgenommen wird. Sollte dies jedoch nicht geschehen, fordert der ÖGB, dass zumindest die vorgeschlagene Ergänzung in die Grundrechtscharta aufgenommen wird.
Weiters fordert der ÖGB eine Ergänzung in Absatz 2 (letzter Halbsatz) „ ... sowie auf bezahlten Jahresurlaub im Ausmass von mindestens 5 Wochen.“

Artikel 30

Nach Ansicht des ÖGB sind die begrenzten Ausnahmen näher zu definieren, um Unklarheiten zu vermeiden. Der ÖGB schlägt vor, dass die begrenzten Ausnahmen laut § 5a KJBG definiert werden: Begrenzte Ausnahmen dürfen nur Kinder betreffen, die das 12. Lebensjahr vollendet haben ... .

Artikel 31

Der ÖGB tritt für die Ergänzung „Schutz vor Entlassung und Kündigung“ ein. Die derzeit gewählte Formulierung steht im Widerspruch zur Mutterschutzrichtlinie 92/85/EWG.

Art 39

Das Wort „behandelt“ sollte durch „abgehandelt“ ersetzt werden, da es dem Einzelnen nichts hilft, wenn seine Angelegenheiten in angemessener Frist nur behandelt, jedoch nicht entschieden wird.

Ehemaliger Artikel 40

Der ÖGB fordert die Wiederaufnahme des im Vorentwurf enthaltenen Artikel 40 „Recht der Wanderarbeiter auf Gleichbehandlung“, wie vom Präsidium im letzten Entwurf vorgeschlagen. Der Text sollte also lauten: Arbeitnehmer, die nicht die Staatsangehörigkeit der Europäischen Union besitzen und rechtmäßig im Hoheitsgebiet der Mitgliedsstaaten arbeiten, haben Anspruch auf Arbeitsbedingungen, die nicht weniger günstig sind als die Bedingungen unter denen die Arbeitnehmer der Europäischen Union arbeiten. Dies ist deshalb notwendig um die Wanderarbeiter vor Ausbeutung und die lokal beschäftigten Arbeitnehmer vor Sozialdumping zu schützen.

Artikel 45

In (2) sollte das Wort „verhandelt“ durch „abgeschlossen“ geändert werden.

Artikel 49

Da der ÖGB dafür eintritt, dass die Grundrechte im EU-Vertrag verankert werden, um einklagbares Recht zu werden, treten wir für die komplette Streichung des Absatzes 1 ein.
Wie bereits oben erwähnt ist der ÖGB der Ansicht, dass für die garantierten sozialen Grundrechte ein Klagerecht für die Gewerkschaften zur Vertretung der Arbeitnehmerinteressen gewährleistet sein muss. Der neue Absatz sollte lauten: „Bezüglich der Rechte in der Charta, die die Interessen der Arbeitnehmer betreffen, haben die Gewerkschaften mit Einverständnis der betreffenden Person ein Klags- und Vertretungsrecht.“

Artikel 51

Der ÖGB tritt für einen Ergänzung des Artikel 51 ein, da gewährleistet sein muss, dass strengere nationale gesetzliche und kollektivvertragliche Regelungen unbedingt erhalten bleiben und auch zu jedem Zeitpunkt neu eingeführt werden können. Absatz 2 des Artikel 51 sollte daher lauten: „Die Grundrechtscharta steht nicht im Widerspruch zu strengeren nationalen gesetzlichen und kollektivvertraglichen Regelungen und verhindert auch nicht deren Einführung zu einem späteren Zeitpunkt.“

Zusätzlich fordert der Österreichische Gewerkschaftsbund die Verankerung der folgenden zentralen politischen Handlungsziele:

- Verankerung der Vollbeschäftigung im EU-Vertrag als vorrangige Zielsetzung
- Recht auf gleichen Lohn für gleiche Arbeit
- Schutz der Gesundheit und Sicherheit am Arbeitsplatz
- Recht der Unterrichtung und Anhörung der Arbeitnehmer
- Recht der Mitbestimmung der Arbeitnehmer
- Recht auf Förderung von Jugendlichen, Frauen, älteren Arbeitnehmern und Behinderten
- Errichtung von flächendeckenden Kinderbetreuungseinrichtungen

- Förderung der beruflichen Eingliederung aller aus dem Arbeitsmarkt ausgegrenzten Personen
- Recht auf Bildung und lebenslanges Lernen
- Recht auf Zugang zu Diensten von allgemeinen Interesse

Der Österreichische Gewerkschaftsbund ersucht um Berücksichtigung seiner Stellungnahme.

Fritz Verzetnitsch
Präsident

Karl Drochter
Leitender Sekretär

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 7 September 2000

CHARTE 4458/00

CONTRIB 312

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Permanent Forum of Civil Society, with its position regarding the Draft Charter. [1]

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[1] This text has been submitted in English and French languages.

An uncompleted charter, a minimalist approach, an unsatisfied debate :

The Permanent Forum of Civil Society says "No !" to the draft Charter and suggest to the french Presidency a process to let the"Europe for citizens" make progress.

The draft Charter of fundamental Rights proposed by the Presidium of the Convention ("Convent 45"- 28 July 2000) is a necessary but not sufficient basis to contribute to the progress of the European Union and to the essential readjustment of its political, economic and social model. This draft is still not a reply to the XXIst century' stakes.

If we examine the draft Charter from the " common good " point of view, we are obliged to note that it does not put the "human person" in the heart of the european building and of its project of development, it does not commit itself in a readjustment "institutions/market/civil society" in favour of the citizens, it is not opening up to the outside world, it is not a motor of changes, it does not contribute to a lasting development and, in this, is not conform to the Amsterdam's Treaty targets.

The draft Charter suggests clauses that, at constant right, would like to be pictures of a selection of rights having a double characteristic : on one hand, to exist at the XXth century and on the other hand to be common to all the member States.

To be worthy to propose a new vision at the beginning of the third millenium, such a Charter should be a motor of a real progress and should take in consideration the new developments that reply to the following requirements :

* to assert the place of the " common good" in the context of a world economy marked by the growing importance of global groups : firms, financial market, civil society ;
* to contribute to hinder the four threats hanging over the european project: the extreme right, the ethnic withdrawal, the islamism and the merchandising ;
* to want to build an economic and social development with the human person at its center;
* to guarantee the parity man/woman ;
* to contribute to the elimination of poverty and social exclusion ;
* to give a place to the migrants;
* to let the Europe being the avant-garde of the future without frontiers' democracy that will exist in the XXIst century.

The European Council in Biarritz, and just after in Nice, will deal with the Charter of fundamental Rights elaborated by the Convention. For the Permanent Forum of Civil Society, this text should play a "re-founding" role in:

* reconciliating the citizens with the european project that gave, till now, the market and not the human person its priority;
* fixing the values that, in application of the criteriums established by the European Council of Copenhague, will be imposed to all the member States and to all the applicant Countries ;
* defining a "pluriannual programme" for the realization and the progress of rights within the Union.

The Forum thinks that, in its version of 28 July 2000, the draft Charter doesn't meet yet these goals in an adequate manner.
Some whole chapters are poor (the european citizenship) or completely missing (the participatory democracy, the local democracy, the democracy based on parity, the collective rights, the right to culture…).
Some retreats about Treaties and Conventions are even noted in the social field (right of striking, right to housing, right to a preliminary consultation ...) and in the environmental field.
The goal of the project - indeed asserted in the preamble - seems limited to guarantee the visibility of certain rights and not to guarantee their progress.

Moreover, neither the Convention nor the intergovernmental Conference treated those crucial questions like:

- the constraining character of the future charter ;
- its relationship with the future european constitution ;
- the necessary communauty procedures to guarantee the justiciability of the there-written rights,
- the relations between the Charter, the Convention of Rome and the other european and international instruments protecting the fundamental rights;
- the responsibility of member States in the respect of fundamental rights within the Union.

If, as proposed by a member of the Convention, this draft Charter should be submitted to referendum (a method of participatory democracy asked by an important number of NGOs), the Permanent Forum of Civil Society would be obliged to claim for a "NO".

That's why we suggest an approach in which the french Presidency of the Council would be required to play an important role for an historic progress towards an "Europe of citizenship".

The European Council of Nice would welcome the text presented by the Convention as a "draft" and would decide to submit it to a " public poll" in all the countries of the Union - and this for a period of six months - to testify its willing to associate the citizens and to build an "Europe of citizenship". Citizens, national parliaments, trade unions and firms, non governmental organizations and associations, local and regional authorities would be invited to have a debate about this text and to submit proposals:
* The European Council of Nice would entrust the Convention with the task of collecting those proposals and of submitting to its attention a final text, in december 2001, at the latest.
* The European Council of Nice would decide to ask the member States to take the necessary constitutional dispositions in order to make possible the convocation of a referendum/consultation of peoples of the Union on the final text during the year 2002.
* The European Council of Nice would express that the text of the Charter, if approved in codecision by the European Parlement and the Council, would come into force as a integral part of the treaties. The Charter would be, this way, an essential step on the way to the European Constitution.

We think that this agenda could :

-make the reflexion more mature on themes like civic, political, economic and social rights;
-resolve the question of the competence of the Court of Human Rights in Strasbourg;
-complete the Charter after the debates held in the member States;
-rally the public opinion in order to make that the adoption of this Charter becomes "its" own affair.

The Forum will ask to the french Presidency to meet a representative delegation of the european civil society in order to propose the above expressed requirements.

Bruxelles, 30 August 2000.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 13 septembre 2000

CHARTE 4459/00

CONTRIB 313

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de "Stichting Living Together in a New Europe". [1]

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[1] Ce texte à été soumis comme un document multilingue F/NL.

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Chère Madame,

À la suite de notre conversation téléphonique de ce matin je me présente chez vous comme le Président de la Fondation LIVING TOGETHER in a NEW EUROPE.

Au nom de notre Comité je vous présente la lettre suivante concernant la Charte Européenne en préparation pour la Conférence Intergouvernementale à Nice les 7 et 8 décembre prochain.

Nous vous présentons dans le courant de la semaine prochaine un commentaire approfondi, pour mieux comprendre le but de notre proposition.

Nous vous remercions d'avance de votre coopération et nous vous prions d'agréer, Chère Madame, l'expression de nos sentiments les meilleurs.

STICHTING "L I V I N G T O G E T H E R"

In a new E u r o p e

30-8-2000

Aan het secretariaat Ontwerp - Handvest van de Grondrechten van

de EUROPESE UNIE

B R U S S E L

Ter attentie van de heer Jean Paul Jacque

Geachte heer,

De bovengenoemde Stichting is bijzonder geïnteresseerd in het Ontwerp waarover U het secretariaat voert.
Uit Uw brief van 28 juli 2000 (OR. fr) CHARTE 4422/00 hebben wij begrepen dat opmerkingen over dit onderwerp voor 1 september a.s. bij U moeten worden ingeleverd. Wij behoren niet tot de vertegenwoordigers van de nationale parlementen of tot de delegatie van het Europees Parlement, maar hopen dat wij als persoonlijke vertegenwoordigers onze stem kunnen laten horen. T.a.t. de heer Braibant.

Daartoe laten wij hieronder een voorstel tot aanvulling van de tekst van het EG-Verdrag d.d. 25-3-1957 Rome, tweede deel: "Het burgerschap van de Unie", artikel 17, volgen.
De par. 1 en 2 blijven ongewijzigd. Toegevoegd wordt een par. 3.

Iedere Burger van de Unie verkrijgt ter identificatie, een door de lidstaat op haar voorwaarden uit te geven, EURO PASPOORT.
Door de ondertekening van dit Paspoort verklaart de Burger dat hij bekend is met de rechten die hij geniet en de plichten waaraan hij zich onderwerpt.

STICHTING LIVING TOGETHER

p.a. de Jong, Voorzitter.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 September 2000

CHARTE 4460/00

CONTRIB 314

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution of the European Trade Union Confederation and the Platform of European Social NGOs, with comments and a working paper to the document CHARTE 4422/00 CONVENT 45. [1]

[1] These texts has been submitted in English language only.

Platform of European Social NGOs *CES*
Plate-forme des ONG européennes du secteur social

Dr Roman Herzog
President
Convention on the Charter of Fundamental Rights

1st September 2000

Re: Comments on Convention document 45

Dear Dr Herzog,

The European Trade Union Confederation and the Platform of European Social NGOs are jointly campaigning for the inclusion of fundamental rights in the EU Treaty.

Following national meetings in the EU Member States and many candidate countries in the period from March to August, a final European-level conference bringing together around 140 participants from across Europe took place in Brussels on 31st August and 1st September.

Both the Social Platform and the ETUC have already forwarded you their official positions and contributions to the Convention, including their joint campaign paper: "Fundamental Rights - the Heart of Europe".

At this time, we would also like to bring the analysis and general conclusions of our European conference to the attention of the members of the Convention. These reflect the discussions and concerns expressed at the conference. Although these conclusions are not statutory positions of the ETUC and the Social Platform as such, they do however highlight the clear need to improve the draft Charter text of Convention document n°45 in order to make it acceptable for the trade unions and the social NGOs.

We hope that the conclusions of our conference will lend support to initiatives to improve and strengthen the present Charter text.

Given the vital importance of the outcome of the Convention's work for European citizens, we should like to recommend that the spirit of transparency practiced by the Convention will also be applied when deciding on the final draft, i.e. that the voting of the individual Convention members is registered and made public.

Yours sincerely,

Emilio Gabaglio
General Secretary, ETUC

Giampiero Alhadeff
President, Platform of European Social NGOs

Platform of European Social NGOs ETUC *CES*
Plate-forme des ONG européennes du secteur social

Working paper on the draft of the
EU Charter of Fundamental Rights (Convent n° 45)

Preliminary analysis carried out during the Conference organised by the ETUC and the Platform on 31st August and 1st September 2000

Although it is important to recognise the importance of the work carried out by the Convention and the fact that many fundamental rights can already be found in the text of Convent 45, the text does not meet the expectations of a significant part of organised civil society represented by members of the European Trade Union Confederation and the Platform of European Social NGOs. If this text is not improved, it must be rejected because of **its deficiencies, its regressions and its ambiguities**:

- deficiencies: some fundamental rights are missing from this text
- regressions: some of the rights set out are a step back as compared to national or international norms (especially those of the Council of Europe and the European Union)
- ambiguities: some of the rights are formulated in a weak or ambiguous manner.

1. Important rights missing from the text of Convent 45

1.1 Article 12 does not include:
- the recognition of the social partners at European level in the framework of a system of European industrial relations
- the right of consultation of European NGOs in the framework of a structured civil dialogue.

1.2 Article 15 (freedom to choose an occupation) does not include the *right to work and engage in a freely chosen occupation* (which is found in the Revised European Social Charter and the Community Charter of Workers Fundamental Social Rights).

1.3 Missing from Chapter III (Equality) is:
- an article on the rights to equal opportunity and treatment in all fields of life and work between men and women
- an article on the right to the respect of cultural diversity.

1.4 Art. 21.1 (Equality and non-discrimination) must include a second paragraph providing for the adoption of positive measures, as in art. 22 (Equality between men and women).

1.5 The Articles 25 (Workers' rights to information and consultation within the undertaking) and 26 (Right of collective bargaining and action) do not include trade union rights such as:
- national and transnational rights of association, collective bargaining, trade union action including cross-border sympathy action and the right to strike
- national and transnational rights of workers in enterprises to information and consultation and participation, prior to decision-making.

1.6 Chapter IV (Solidarity) and in particular Article 32 (Social security and social assistance) do not include:
- the right of all individuals, regardless of status, to a decent minimum income, enabling them and their family to live in dignity, to ensure their health and well-being (which is found in the Community Charter of Workers Fundamental Social Rights, 1989)
- the right to housing (Revised European Social Charter)
- the right to retirement (Revised European Social Charter)
- the right of older people to a decent income enabling them to live a dignified life (which is found in several social Charters)
- the right to protection against poverty and social exclusion (which is found in the Revised European Social Charter)
- the right to social services of a high quality (Revised European Social Charter)
- the right of all third country nationals (men, women and children) finding themselves on the territory of the European Union, without being legally resident, to a basic level of protection as set out in the Geneva Convention of 1951 and its protocol of 1967.
- the right to social security for people with a disability.

1.7 Article 43 does not include *the right to family regrouping for third country nationals working in the European Union* (which is found in the Revised European Social Chapter).

1.8 Chapter VII (JUSTICE) does not include an article on the enforceability of the Charter nor on the means of guaranteeing *the right to rights*.

1.9 This draft text does not refer to the responsibilities of the European Union to promote human rights and the ILO's basic international norms vis-à-vis third countries, and to the international institutions covered by the European Union. These requirements should also apply to European enterprises based in third countries.

2. Convent 45 is a step backwards on several grounds

Here are some examples:

2.1 In general, several articles state that the rights mentioned are guaranteed "in accordance with Community law and national laws". This is the case for numerous social rights (articles 25, 26, 32, 33, 34). This represents a step backwards, going against the momentum established in the Treaty for upward social harmonisation.

2.2 Paragraph 5 of the Preamble must have an explicit reference to the Revised European Social Charter, to its Protocols and to the Community Charter of Workers Fundamental Social Rights.

2.3 Article 14 (Right to education) does not take into account the *right to lifelong learning* (which is found in the Treaty of the European Community).

2.4 Article 27 (Right of access to placement services) must guarantee that this right is free of charge (as in the Revised European Social Charter).

2.5 Article 28 (Protection in the event of unjustified dismissal) must be entitled: "Protection in the event of dismissal" and provide protection against all forms of dismissal.

2.6 Article 51 (Level of protection) must include a clause of non-regression in relation to rights recognised at national level, in such a way as to ensure that this Charter cannot be used to justify a step backwards as regards these rights. In addition this article must explicitly refer to the Revised European Social Charter, the Community Charter of Workers Fundamental Social Rights, the Declaration on Fundamental Principles and Rights at Work (ILO, 1998), the Convention on the Elimination of All Forms of Discrimination Against Women (UN, 1979), the Convention on the Rights of the Child (UN, 1989).

3. Convent 45 is weak and ambiguous on a number of points

Here are some examples:

3.1 Point 2 of the Preamble should refer not only to men and women, but also to children.

3.2 Point 7 of the Preamble guarantees "the rights and freedoms set out hereafter are guaranteed to each person". Does this guarantee include third country nationals whether legally resident or not?

3.3 Articles 13 (Freedom of research) and 17.2 (Intellectual property) should include, as is the case for Article 17.1 (the Right to Property), an explicit reference to the public interest as well as the respect of dignity. Likewise, Article 16 (Freedom to conduct a business) should include a reference to the social reponsibilities of businesses.

3.4 Article 29 should refer to *the rights to health and safety protection in the workplace* (as does the Treaty of the European Community).

3.5 The formulation of Articles 32 (Social security and social assistance) and 34 (Access to services of general economic interest) is weak. Instead of setting out that "Everyone has access to…" like for example Article 33 (Healthcare), these two Articles state "The Union recognises and respects the entitlement to.." (Art. 32) or "The Union respects the access to…"(Art. 34).

3.6 Article 43.2 is drafted as follows, "Freedom of movement may be granted to…third country nationals". The word "may" is very ambiguous.

3.7 Article 49 (Scope) should make a reference to the social partners in the bodies to which the Charter is addressed, given that the Treaty of the European Community has conferred powers upon them in the framework of Social policy.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

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Bruxelles, le 18 septembre 2000

CHARTE 4460/00 ADD 1

CONTRIB 314

ADDENDUM 1 A LA
NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après la version française d'une contribution de la Confédération européenne des Syndicats et de la Plate-forme des ONGs, sur le document CHARTE 4422/00 CONVENT 45. [1]

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[1] Ce texte à été soumis en langues anglaise et française.

Platform of European Social NGOs
Plate-forme des ONG européennes du secteur social

ETUC *CES*

Document de travail sur le projet de Charte des Droits fondamentaux de l'Union européenne (Convent n°45)

première analyse réalisée lors de la Conférence organisée par la CES et la Plate-forme les 31 août et 1er septembre 2000

Bien qu'il convienne de **reconnaître l'importance du travail effectué par la Convention et le fait qu'un grand nombre de droits fondamentaux soient déjà inclus dans le texte Convent 45**, celui-ci ne répond pas aux attentes d'une partie importante de la société civile organisée représentée par les membres de la Confédération européenne des syndicats et la Plate-forme des ONG européennes du secteur social. Si le texte n'est pas modifié, il doit être rejeté à cause de **ses lacunes, de ses régressions et de ses ambiguïtés** :

- lacunes : des droits fondamentaux manquent dans ce texte
- régressions : des droits sont en retrait par rapport aux normes existantes au niveau national ou international (notamment de l'Union européenne ou du Conseil de l'Europe)
- ambiguïtés : des droits sont formulés de façon faible ou ambiguë.

1. Des droits importants manquent dans le texte Convent 45

1.1 L'article 12 (Liberté de réunion et d'association) ne comprend pas :
- la reconnaissance des partenaires sociaux à un niveau européen dans le cadre d'un véritable système européen de relations collectives de travail
- le droit de consultation des ONG européennes dans le cadre d'un dialogue civil structuré.

1.2 L'article 15 (Liberté professionnelle) ne comprend pas le *droit au travail librement choisi* (qui figure dans la Charte sociale européenne (révisée) et la Charte communautaire des droits fondamentaux des travailleurs).

1.3 Dans le chapitre III (Egalité), manquent :
- un article sur le droit à l'égalité des chances et de traitement entre les femmes et les hommes dans tous les domaines de la vie
- un article sur *le droit au respect à la diversité culturelle.*

1.4 L'article 21.1 (Egalité et non-discrimination) doit comporter un deuxième paragraphe permettant de prévoir, comme à l'article 22 (Egalité hommes et femmes) l'adoption de mesures positives.

1.5 Les articles 25 (droit à l'information et à la consultation des travailleurs dans l'entreprise) et 26 (droit de négociation et actions collectives) ne comprennent pas les droits syndicaux tels que :
- les droits nationaux et transnationaux d'association, de négociation collective, d'action syndicale, y compris les actions de solidarité transfrontalières et la grève
- les droits nationaux et transnationaux préalables d'information, de consultation et de participation des travailleurs dans les entreprises.

1.6 Le chapitre IV (Solidarité) et notamment l'article 32 (Sécurité sociale et aide sociale) ne comprennent pas :
- le droit pour toute personne, quel que soit son statut, à un revenu minimum décent lui permettant de vivre dans la dignité (qui se trouve dans la Charte communautaire des droits fondamentaux des travailleurs)
- le droit au logement (qui se trouve dans la Charte sociale européenne révisée)
- le droit à la retraite (qui se trouve dans la Charte sociale européenne révisée)
- le droit des personnes âgées à une vie et un revenu dignes et décents (qui se trouve dans plusieurs Chartes sociales)
- le droit à la protection contre la pauvreté et l'exclusion sociale (qui se trouve dans la Charte sociale européenne révisée)
- le droit à des services sociaux de qualité (Charte sociale européenne révisée)
- le droit des ressortissants des pays tiers (femmes, hommes, enfants) se trouvant sur le territoire de l'Union européenne sans y résider légalement à une protection de base prévue par la Convention de Genève de 1951 et son Protocole de 1967
- le droit à la sécurité sociale pour les personnes ayant un handicap.

1.7 L'article 43 ne comprend pas *le droit au regroupement familial pour les ressortissants de pays tiers travaillant dans l'Union européenne* (qui se trouve dans la Charte sociale européenne révisée).

1.8 Le chapitre VII (Justice) ne comprend aucun article sur la justiciabilité de la Charte et sur sa façon de prévoir *le droit aux droits*.

1.9 Ce projet de Charte ne traite pas des responsabilités de l'Union dans la promotion des droits humains et des normes internationales fondamentales de l'OIT vis-à-vis de pays tiers, comme au sein des institutions internationales où l'Union européenne a des compétences. Ces exigences devraient s'étendre aux entreprises européennes installées dans des pays tiers.

2. Convent 45 constitue une régression sur de nombreux points

En voici quelques exemples :

2.1 De façon générale, de nombreux articles prévoient que les droits énoncés sont garantis « conformément aux législations nationales et au droit communautaire ». C'est notamment le cas pour de nombreux droits sociaux (articles 25, 26, 32, 33, 34). Ceci constitue une régression par rapport à la dynamique inscrite dans le Traité et visant à une harmonisation sociale vers le haut.

2.2 Le Préambule, paragraphe 5, doit contenir une référence explicite à la Charte sociale européenne révisée, à ses Protocoles et à la Charte communautaire des droits fondamentaux des travailleurs.

2.3 L'article 14 (droit à l'éducation) ne prend pas en compte le *droit à la formation tout au long de la vie* (qui se trouve dans le Traité de la Communauté européenne).

2.4 L'article 27 (droit d'accès au service de placement) doit prévoir (comme la Charte sociale européenne révisée) que ce droit est gratuit.

2.5 L'article 28 (Protection en cas de licenciement injustifié) doit avoir comme titre : « Protection en cas de licenciements » et prévoir une protection contre tout licenciement.

2.6 L'article 51 (Niveau de protection) doit prévoir une clause de non régression par rapport aux droits reconnus à un niveau national, de façon à assurer que cette Charte ne puisse être utilisée pour justifier un recul de ces droits. Cet article doit également mentionner explicitement la Charte sociale européenne révisée, la Charte communautaire des droits sociaux fondamentaux des travailleurs, la Déclaration relative aux principes et droits fondamentaux du travail (OIT, 1998), la Convention sur l'élimination de toutes les formes de discriminations à l'encontre des femmes (ONU, 1979), la Convention relative aux droits de l'enfant (ONU, 1989).

3. Le Convent 45 est faible et ambigu sur de nombreux points

En voici quelques exemples :

3.1 Le Préambule, point 2, pourrait utilement mentionner non seulement les hommes et les femmes, mais aussi les enfants.

3.2 Le Préambule, point 7 prévoit que « les droits et libertés énoncés ci-après sont garantis à chacun ». Cela concerne-t-il également les ressortissants de pays tiers, qu'ils aient ou non un statut de résident légal ?

3.3 Les articles 13 (Liberté de la recherche), 17.2 (Propriété intellectuelle) devraient comporter comme l'article 17.1 (Droit de propriété) une référence explicite à l'intérêt général, ainsi qu'au respect de la dignité. De même l'article 16 (Liberté d'entreprendre) devrait prévoir une référence aux responsabilités sociales des entreprises.

3.4 L'article 29 doit prévoir (comme le fait le Traité de la Communauté européenne) *le droit à la protection de la santé et de la sécurité sur les lieux de travail.*

3.5 Les articles 32 (Sécurité sociale et aide sociale) et 34 (Accès aux services d'intérêt économique général) sont rédigés de façon faible. A la place de prévoir, comme par exemple l'article 33 (Protection de la santé), « Toute personne a le droit de … », ces deux articles prévoient que « l'Union reconnaît et respecte le droit d'accès à … » (art. 32) ou « l'Union respecte l'accès à … » (art. 34).

3.6 L'article 43.2 est ainsi rédigé : « La liberté de circulation peut être accordée … aux ressortissants de pays tiers ». Le mot « peut » est tout à fait ambigu.

3.7 L'article 49 (Champ d'application) devrait inclure les partenaires sociaux dans les organisations auxquelles s'adresse la Charte, puisque le Traité de la Communauté européenne leur confère des compétences dans le cadre de la Politique sociale.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 8 September 2000

CHARTE 4461/00

CONTRIB 315

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution of the European Women's Lobby (EWL), with the position paper to the document CHARTE 4422/00 CONVENT 45. [1]

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[1] This text has been submitted in English and French languages.

LOBBY EUROPEEN DES FEMMES
EUROPEAN WOMEN'S LOBBY

August 2000

POSITION PAPER OF THE EUROPEAN WOMEN'S LOBBY ON THE DRAFT EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

At the 1995 World Conference on women, 189 countries agree, "Governments must not only refrain from violating human rights of all women, but must work actively to promote and protect these rights. (…) The gap between the existence of rights and their effective enjoyment derives from a lack of commitment by governments to promoting and protecting these rights" (Beijing Platform for action, 215 & 217).
Women in Europe would consider it a disgrace if European decision-makers fail to comply with this international commitment by simply ignoring them

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Having read through the text of the draft Charter proposed by the Praesidium at the end of July (Convent 45), the European Women's Lobby notes once again the lack of consideration of gender equality by the authors of the Charter.
The EWL reiterates the demands formulated in its previous written contributions, urging political leaders to integrate gender equality in the Charter in order to ensure the protection of half the population's interests. The EWL would like to stress that this contribution constitutes the absolute minimum platform of rights of a Charter respectful of women's rights and integrating a gender perspective.

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Furthermore, the Charter in some linguistic versions uses sexist languages, for example in article 3(1) "Everyone has the right to respect for *his* physical and mental integrity". The EWL stresses that one form of gender discrimination is the use of sexist language. The use of sexist language, though sometimes unintentional, is nonetheless damaging in excluding women and in rendering our reality and our experience invisible. **The EWL demands therefore that all linguistic versions of the EU Charter are checked carefully and sexist language removed and replaced by gender neutral terms**.

CHAPTER I DIGNITY

Prohibition of gender related violence and persecutions:

The provision condemning torture and inhuman treatment should explicitly state that gender related violence or persecution is a form of torture.

Sexual mutilation, whose first victims are women and girls, still take place on European territory. This inhuman treatment is a form of torture and should thus be considered as such, as well as other kinds of gender related violence such as rape, domestic violence, forced marriage, prostitution, "honour" killing, including those which take place within the family.

Proposal of the EWL :

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Chapter I 'Dignity', amend article 4: Prohibition of torture and inhuman treatment
No one shall be subjected to torture or to inhuman and degrading treatment. This refers to any kind of physical or moral violence, including any kind of gender related violence such as among others female genital mutilations, rape, violence in the home, forced marriage, prostitution, "honour" killings, also when executed within the family.

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CHAPTER II FREEDOMS

Gender-sensitive asylum policy:

The particular kind of gender related violence mostly suffered by women refugees and asylum seekers must be referred to clearly and considered as a violation of women's fundamental human rights on the ground of which asylum can be granted.

Treatments threatening or harming women's physical or psychological integrity must be considered as a form of torture whether they are enforced by legal norms, committed by state agents or imposed by social or religious norms.

Proposal of the EWL:

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Article 18 'Right to asylum', add the following paragraph:
"Gender persecution including sexual mutilations or other gender related violence such as rape, forced marriage, violence in the home, honour killing, shall be given particular attention within the grounds for seeking asylum.

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CHAPTER III EQUALITY

The principle of equality between women and men in *all* fields:

A provision exclusively dedicated to the unconditional principle of gender equality must be introduced in the Charter. It must prohibit direct and indirect discrimination and provide explicitly and precisely for the adoption of positive measures by Member States.

The general principle of non discrimination as proposed in article 21 does not lead to substantive equality between women and men, as *gender discrimination is of a particular and structural nature, affecting women who represent half of the population and not a minority*. Women are likely to face different forms of discriminations, on the ground of ethnic origin or disability for example, added to the structural discrimination on the ground of sex. The inclusion of a separate provision prohibiting gender discrimination would also enable a clear focus on the issue of multiple discriminations and would indicate a commitment to ensuring that women enjoy effectively all fundamental rights and freedoms and to be full citizens in all areas.

Proposal of the EWL:

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Chapter III "Equality", new article after article 20: General principle of equality between women and men in all areas

1. The Union shall promote respect for the unconditional and fundamental principle of equality between women and men in all areas of its jurisdiction.

2. Substantive equality between women and men must be established and direct or indirect discrimination on the grounds of sex must be prohibited. Moreover, a gender dimension should be adopted while combating all forms of discrimination in order to eradicate multiple discrimination that many women face.

3. Positive measures should be implemented to improve women's situation until substantive and effective equality between women and men is achieved.

Amend article 21 Para. 1 : delete the word "sex"

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At this stage, it is not appropriate to specify that this provision should be applicable to the area of work, since the principle of equality between women and men in the area of working conditions and salaries must constitute a separate provision in the chapter on solidarity.

CHAPTER IV SOLIDARITY

Equality between women and men in the areas of working conditions and salaries:

The fundamental principle of equality between women and men in the areas of working conditions, salaries and social protection must be stated in the part dedicated to workers' rights.

The general provision on non-discrimination must be completed by a more specific article tackling the *de facto* inequality between women and men in the area of work.
The current article 22 should be reformulated as below (in particular stating clearly the concept of positive measures aimed at improving women's situation in the field of work).

Proposal of the EWL:

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Chapter IV "Solidarity", new article (replacing article 22) : Equal treatment between women and men

1. Equal treatment between women and men must be ensured and any kind of inequalities must be eliminated with regard to work, employment, social protection and social services. This mainly includes the equal right to freely chose or accept to work, the right to the same working conditions, the right to fair and equal pay for work of equal value, and the equal right to social security and assistance for themselves and their family.

2. Any direct or indirect discrimination on the ground of sex is prohibited in the fields quoted in paragraph 1.

3. Positive measures should be implemented to improve women's situation until substantive and effective equality between women and men is achieved in this particular field of employment.

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Reconciling family and professional life:

Women and men workers have the right to paid parental leave following the birth or adoption of a child.

In order to increase women's independence through their labour market participation and to achieve effective gender equality, family responsibilities and parental leave should be equally distributed between women and men. Legal protection and paid parental leave should be provided for in order to achieve an equal sharing of child caring responsibilities between women and men.

Proposal of the EWL:

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Article 31, amend as follow:

- add 'paid' before parental leave.
- Add the following paragraph: "Quality and affordable child care should be made available to anyone in need of such services"

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Social security and social assistance:

A provision on social protection should be inserted in the Charter, providing for individualisation of the rights to social security.

Social protection should be regarded as a social investment for the European states that made a commitment to societal responsibility for all citizens. Nevertheless, a large number of women lack individual security and are dependant on their family and/or spouse. Therefore, women's access to individual social security rights must be ensured.

Proposal of the EWL:

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Article 32, amend paragraph 1 as follows:

1. The Union recognises and respects the entitlement to an adequate level of individual social security benefits and social services providing protection to all, in the event of maternity, paternity, illness, (*remove industrial*) accidents, dependency or old age and in the event of loss employment, in accordance with the rules laid down by Community law and national laws and practices.

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Health care:

In order to ensure that the health needs of the entire population are tackled, specific care that responds to women's special health needs should be taken into account

Reproductive health, gynaecological and obstetrical services must be kept accessible for every woman, as well as all preventive and screening services which meet the needs of women as patients and consumers.

Proposal of the EWL:

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Article 33, add the following paragraph:
'Within the right to appropriate health care, women's specific needs must be taken into consideration and provided for'.

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CHAPTER V CITIZENSHIP

Principle of PARITY democracy:

A provision on parity democracy in the Charter is essential to achieve a balanced representation of women and men in decision-making positions.

The problem of under representation of women in decision-making positions persists and must be tackled with concrete measures such as the ones already adopted in some Member States. This principle must be integrated in the Charter through a clear and separate provision.

Proposal of the EWL :

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Chapter V "Citizenship", new article: "Parity Democracy"

1. Every citizen of the Union, without any discrimination, has the right provided by the law of the Union and national law, of an equal access to candidacy for elections and the exercise of the corresponding functions.

2. A parity democracy, meaning an equal representation of women and men in all the organs and institutions of the Union, constitutes a fundamental principle for both the European integration and the institutions of the Union.

3. Positive measures should be taken in order to favour equal access of women and men in the governmental and EU bodies as well as in political parties.
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ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 8. September 2000

CHARTE 4462/00

CONTRIB 316

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Finden Sie bitte nachstehend eine Stellungnahme der Österreichischen Bundeskammer für Arbeiter und Angestellte (BAK). [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

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Stellungnahme
der Bundesarbeitskammer zur EU-Grundrechte-Charta

Die Bundeskammer für Arbeiter und Angestellte (Bundesarbeitskammer/BAK) ist eine gesetzliche Interessenvertretung österreichischen Rechts. Sie ist als Körperschaft öffentlichen Rechts organisiert und gesetzlich berufen, die sozialen, wirtschaftlichen, beruflichen und kulturellen Interessen der österreichischen Arbeitnehmerinnen und Arbeitnehmer zu vertreten und zu fördern. Dies geschieht insbesondere durch Stellungnahmen zu Gesetzesvorhaben, auch auf der Ebene der Europäischen Union.

Die Bundesarbeitskammer erlaubt sich daher, zum Vorhaben, eine Charta der Grundrechte der Europöischen Union zu schaffen, Stellung zu nehmen, und ersucht, ihre Ausführungen im weiteren Entstehungsprozeß der Charta zu berücksichtigen.

Das Vorhaben, einen Grundrechtskatalog der Europäischen Union zu schaffen, wird nachdrücklich begrüßt und unterstützt. Gerade angesichts der bevorstehenden Vertiefung und Erweiterung der Europäischen Union und der damit in Zusammenhang stehenden Strukturreformen ist die Schaffung zusätzlicher Angebote an die Bevölkerungen in den Mitgliedsstaaten, sich mit dieser vertieften und erweiterten Europäischen Union zu identifizieren, unerläßlich. Ein solches positives Identifikationsangebot stellt aus unserer Sicht eine europäische Grundrechts-Charta dar. Wenn

einige der wichtigsten Ansprüche, die Menschen an Staat und Gesellschaft richten können – Schutz der persönlichen Integrität und Freiheit vor staatlichen Übergriffen, Garantie der sozialen Existenzgrundlagen – auf europäischer Ebene erlebbar verbrieft werden, ist dies ein entscheidender Beitrag zur Ausbildung des Bewußtseins der Bürgerinnen und Bürger in den Mitgliedsstaaten, gleichzeitig auch Bürgerinnen und Bürger der Europäischen Union zu sein und sich mit dieser zu identifizieren.

Voraussetzung dafür ist allerdings zweierlei:

- Die Grundrechts-Charta darf sich nicht auf eine bloße feierliche Proklamation ohne jede Rechtswirkung beschränken, sondern muß im Rahmen des Primärrechts der Europäischen Union Normwirkung entfalten. Eine bloße feierliche Proklamation stünde aus unserer Sicht auch im Widerspruch zu dem in den Schlußfolgerungen des Europäischen Rates von Köln enthaltenen Bekenntnis, dass „die Wahrung der Grundrechte (...) ein Gründungsprinzip der EU und unerläßliche Voraussetzung für ihre Legitimität“ (sei). Die Normwirkung wird bedauerlicherweise nicht bei allen Grundrechten in Form subjektiver Rechte der europäischen Bürgerinnen und Bürger erreicht werden können. Es wäre jedoch jedenfalls darauf zu drängen, daß in den Fällen, bei denen keine subjektiven Rechte der EU-BürgerInnen durchsetzbar sind, zumindest die normative Wirkung dieser Grundrechte durch Programmsätze und Staatszielbestimmungen sichergestellt wird, die sich an die Organe der Europäischen Union, aber auch an Gesetzgeber und Verwaltung in den Mitgliedsstaaten richten. Ein für die Bürgerinnen und Bürger erlebbarer Rechtsschutz gegenüber europäischen Organen oder Mitgliedsstaaten, die in ihrer Tätigkeit den grundrechtlichen Rahmen nicht ausreichend beachten, könnte über die innerstaatliche Verfassungsgerichtsbarkeit und den Europäischen Gerichtshof geboten werden.

- Ein zweiter wesentlicher Punkt, der gerade aus Sicht der Österreichischen Bundesarbeitskammer für die Fähigkeit eines europäischen Grundrechtskataloges, das europäische Bewußtsein zu stärken und zu vertiefen, wesentlich wäre, ist die Aufnahme eines Kataloges sozialer Grundrechte in die Grundrechts-Charta, wie dies nach den bisherigen Entwürfen des Konvents ohnehin intendiert ist. Österreich hat hier Nachholbedarf, denn es ist einer der wenigen Mitgliedsstaaten der Europäischen Union, in dessen Verfassung die

bürgerlichen Freiheitsrechte nicht durch soziale Grundrechte ergänzt werden. Es wäre äußerst begrüßenswert, wenn diese verfassungspolitische Schieflage, zu deren Beseitigung die Bundesarbeitskammer wiederholt große Anstrengungen unternommen hat, durch eine gemeinsame europäische Entwicklung bereinigt würde.

Dafür, daß ein gewisses Ausmaß an Rechtsverbindlichkeit einer neuen europäischen Grundrechts-Charta absolut sinnvoll und wichtig wäre, spricht auch noch folgendes Argument: Schon jetzt existieren sowohl feierliche Proklamationen (die Gemeinschaftscharta der sozialen Grundrechte) also auch etliche Verweise in den EU-Verträgen auf andere Grundrechtskataloge (insbesondere die Europäische Menschrechtskonvention und die Europäische Sozialcharta, beides im Rahmen des Europarates). Die bloße Schaffung einer feierlichen Deklaration würde erstens diesen Bekenntnissen – insbesondere im Bereich der sozialen Grundrechte – keinen entscheidenden Mehrwert hinzufügen, sodaß die Sinnhaftigkeit des gesamten Vorhabens einer EU-Grundrechtscharta in einer Weise hinterfragt werden könnte, die mehr Schaden als Nutzen bringen würde, und zweitens wäre das Verhältnis der verschiedenen feierlichen, aber nicht rechtsverbindlichen Grundrechtskatalaoge und der diversen Verweise auf andere Grundrechtskataloge zueinander so unklar, dass eher Rechtsunsicherheit gefördert, als das Vertrauen in die Rechtsstaatlichkeit der Europäischen Union, ihrer Institutionen und der Mitgliedstaaten gefestigt würde.

Zu den bisher im Konvent diskutierten sozialen Grundrechten möchte die Bundesarbeitskammer noch folgendes ergänzen: Die im Artikel 46 vorgeschlagene Einschränkung der Wirksamkeit der sozialen Grundrechte auf den „Geltungsbereich des Gemeinschaftsrechts“ ist nicht unproblematisch. Grundrechte werden an sich von den Rechtsadressaten als unteilbar empfunden. Wenn nun zB ein Bürger eines Mitgliedsstaats geltend macht, die Gesetzgebung seines Staates sehe keine Wohnungsbeihilfe vor, und er betrachte dies – auch unter Berücksichtigung seiner individuellen Einkommensverhältnisse und der auf dem Markt herrschenden Miethöhen – als Nichterfüllung des Auftrages gemäß Artikel 41 der Europäischen Grundrechtscharta durch seinen Mitgliedsstaat, wäre trotz des besagten Artikels 41 wegen des Artikel 46 wohl keine Kompetenz der Europäischen Union gegeben. So aber werden Erwartungshaltungen an einen Europäischen Grundrechtskatalog massiv enttäuscht. Über weite Strecken wird zwischen dem Grundrechtskatalog

und dem bisherigen Gemeinschaftsrecht keine unmittelbare Verbindung herstellbar sein. Es sollte daher zumindest mittel- und langfristig sehr wohl eine Kompetenz der Verfassungsgerichte in den Mitgliedsstaaten sowie des Europäischen Gerichtshofes zur Kontrolle der Einhaltung des Grundrechtskataloges angestrebt werden, auch wenn ein Grundrecht nicht im Zusammenhang mit sonstigem EU-Recht – wie zB der Ausübung einer der Grundfreiheiten des Binnenmarktes – relevant wird. Die Europäische Union würde dabei freilich in eine gewisse Konkurrenz mit dem Europarat – dessen Grundrechtssystem einen vergleichbaren Rechtsschutz bietet – treten. Dieses Konkurrenzverhältnis müßte geklärt werden.

Was den Inhalt des Kataloges sozialer Grundrechte betrifft, unterstützt die Bundesarbeitskammer den im Verlauf der Tätigkeit des Konvents gegenüber den Anfängen deutlich erweiterten Katalog, wie er etwa aus dem Vermerk des Präsidiums des Konvents vom 3. Juli 2000 („Convent 41“) hervorgeht.

Die Österreichische Bundesarbeitskammer wünscht dem Konvent ein gutes Gelingen bei seiner für die europäischen Bürgerinnen und Bürger und die Weiterentwicklung der Europäischen Union so eminent wichtigen Aufgabe.

Der Präsident:
iV

VP der BAK Josef Quantschnig

Der Direktor:
iV

Mag Georg Ziniel

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 8. September 2000

CHARTE 4463/00

CONTRIB 317

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Bitte finden Sie nachstehend eine Stellungnahme des Deutschen Gewerkschaftsbundes (DGB), zu Dokument CHARTE 4422/00 CONVENT 45. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Abteilung
Arbeitsmarktpolitik und Internationale Sozialpolitik

Deutscher Gewerkschaftsbund

Bundesvorstand

Berlin, 29.08.2000

Stellungnahme des Deutschen Gewerkschaftsbundes

zum Entwurf der Charta der Grundrechte der Europäischen Union (CONVENT 45) vom 28.07.2000

1. Grundsätzliche Bemerkungen

Der DGB bewertet den nunmehr vom Präsidium vorgelegten vollständigen Entwurf einer Grundrechtecharta der Europäischen Union grundsätzlich positiv. Die sozialen Grundrechte bleiben jedoch hinter dem Mandat von Köln zurück. Insbesondere einige der geplanten zentralen Normen zu den sozialen Grundrechten geben Anlass zu großer Sorge.

Gegenüber dem Entwurf des Präsidiums zur Aufnahme sozialer Rechte (CONVENT 34) wurden zwar erkennbar Änderungsvorschläge aufgegriffen; bezüglich einiger zentraler Artikel muss der DGB jedoch seine grundsätzliche Kritik aufrechterhalten und bittet hier nachdrücklich um Änderungen bzw. inhaltliche Präzisierungen entsprechend seinen früheren Vorschlägen und dieser Stellungnahme.

1.1 Grundsätzliche Fragen zentraler Artikel

In **Artikel 12** ist das Betätigungsrecht der Gewerkschaften auch auf europäischer Ebene abzusichern. Auch bei anderen Rechten wird der grenzüberschreitenden Dimension nicht ausreichend Rechnung getragen, z.B. im Datenschutz.

In **Artikel 25** geht es um den grundlegenden Anspruch der Arbeitnehmer und ihrer Interessenvertretungen auf Unterrichtung und Anhörung. Der DGB bekräftigt seine

Forderung, dieses Recht um die **Mitwirkung** zu erweitern. Bereits die EU-Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer, eine wesentliche Grundlage für die Arbeiten des Konvents, sieht das Recht auf Mitwirkung in den Artikeln 17 und 18 ausdrücklich vor.

Artikel 26 enthält das Recht auf Kollektivverhandlungen und Kollektivmaßnahmen. Auch hier unterstreicht der DGB erneut seine Forderung nach ausdrücklicher Anerkennung des **Streikrechts** wie es sowohl in der Europäischen Sozialcharta (ESC) als auch in den einschlägigen internationalen Konventionen und Übereinkommen enthalten ist, sowie nach einem Benachteiligungsverbot bei gewerkschaftlicher Betätigung. Die ausdrückliche Garantie des Streikrechts ist fundamentale Voraussetzung für die Wahrnehmung anderer sozialer Grundrechte.

In bezug auf das **Schutzniveau**, das die EU-Grundrechtecharta gewährt, ist es für den DGB unerlässlich, dass dieses nicht nur der Europäischen Menschenrechtskonvention (EMRK), sondern gleichermaßen der Revidierten Europäischen Sozialcharta (RESC) entspricht. Für den DGB ist nicht nachvollziehbar, dass die Bezugnahme auf die RESC in **Artikel 50 (Tragweite der garantierten Rechte)** und in **Artikel 51 (Schutzniveau)** fehlt. Gleichwertigkeit zwischen EMRK und der RESC ist bisher nicht zweifelsfrei sichergestellt. Bisher gilt jedoch der Grundsatz der Unteilbarkeit der Grundrechte; bürgerliche, politische und soziale Grundrechte sind als unteilbare Einheit anzusehen.

Der DGB hält daher einen ausdrücklichen Verweis auch auf die RESC in Artikel 50 und 51 für erforderlich. Dies würde die Gleichwertigkeit der EMRK mit der RESC für das Schutzniveau und die Tragweite der garantierten sozialen Rechte klar zum Ausdruck bringen.

In **Artikel 16** wird erstmals in internationalen und europäischen Rechtsnormen die unternehmerische Freiheit über die Berufsfreiheit und das Eigentumsrecht hinaus anerkannt. Dies wirft große Interpretationsfragen auf. Dieser Artikel sollte daher gestrichen oder es sollte zumindest klargestellt werden, dass diese Norm nicht gegen soziale Grundrechte als grundsätzliches Einschränkungspotential verwendet werden kann. Der DGB tritt nachdrücklich dafür ein, die **Nichtdiskriminierung in Artikel 21** auf den Gebrauch der Rechte aus dieser Charta auszudehnen; die Wahrnehmung der in der Charta garantierten bürgerlichen, politischen und sozialen Rechte darf nicht zu Benachteiligungen führen.

1.2 Zur Rechtsverbindlichkeit und Rechtsdurchsetzung

Die Grundrechtecharta kann nur dann Rechtsverbindlichkeit erlangen, wenn sie unmittelbarer Bestandteil sowohl des Unions- als auch des Gemeinschaftsrechts ist. Um Zweifel auszuschließen, ist die Charta in die **Gründungsverträge aufzunehmen**. Auch der EuGH muss – nach Erfüllung besonderer Voraussetzungen – direkt angerufen werden können, um die einheitliche und wirksame Anwendung der Grundrechte sicherzustellen.

Auch ein **Verschlechterungsverbot** sollte für das innerstaatliche Recht zumindest sicherstellen, dass ein einmal garantiertes Recht nur unter eng gefassten Bedingungen eingeschränkt werden kann.

1.3 Fehlende soziale Normen

Einen **Mangel** sieht der DGB darin, dass ein Recht auf Arbeit im Sinne einer Verpflichtung, dem Ziel der Vollbeschäftigung, Vorrang einzuräumen fehlt. Dieses aus Artikel 1 ESC entnommene Recht war in der ersten „Liste“ noch enthalten und wurde in CONVENT 40 noch einmal aufgegriffen. Jetzt fehlt es – mit Ausnahme des Elements der Berufsfreiheit. Das Recht auf unternehmerische Freiheit fand sich nicht in den Vorentwürfen, soll jetzt aber garantiert werden. Auch das Recht der
Beschäftigten auf Schutz bei Zahlungsunfähigkeit ihres Arbeitgebers fehlt. Dieses in Artikel 25 der revidierten ESC enthaltene Recht lehnt sich nicht nur an IAO-Normen an, sondern vor allem an die Richtlinie 80/987/EWG. Es sollte daher aufgenommen werden. Ebenso sollte das Recht auf gerechtes Arbeitsentgelt aufgenommen werden. Aus dem in der ESC enthaltenen Recht war noch im CONVENT 18 ein gewisses Element aufgenommen worden.

2. Bemerkungen zu einzelnen Artikeln

Artikel 12: Versammlungs- und Vereinigungsfreiheit

Nach Absatz 2 sollte eingefügt werden: *„Gewerkschaften haben auch auf europäischer Ebene das Recht, sich frei zu betätigen.“* Die Ergänzung um das europäische Element erscheint im Hinblick auf den Gleichklang zu Absatz 2 dieser Vorschrift sowie zur Absicherung europäischer Gewerkschaften notwendig.

Artikel 16: Unternehmerische Freiheit

Die unternehmerische Freiheit wird über die Berufsfreiheit und das Eigentumsrecht explizit anerkannt. Um Fehlinterpretationen und eine weitere Rechtsgrundlage zur Einschränkung sozialer Rechte zu vermeiden, sollte der Artikel möglichst gestrichen werden.

Artikel 21: Gleichheit und Nichtdiskriminierung

Um Benachteiligungen wegen der Wahrnehmung der in der Charta garantierten bürgerlichen, politischen und sozialen Rechten zu verhindern, sollte Artikel 21 Absatz 1 wie folgt lauten: *„Diskriminierungen insbesondere wegen .... des Alters, der sexuellen Ausrichtung oder **wegen des Gebrauchs der Rechte aus dieser Charta** sind verboten.“*

Artikel 22: Gleichheit von Männern und Frauen

Bisher kommt die Pflicht zur positiven Diskriminierung nicht ausreichend zum Ausdruck. Absatz 2 sollte möglichst wie folgt ergänzt werden: *„Er beinhaltet die Pflicht zur Förderung der Gleichstellung."*

Artikel 24: Integration von behinderten Menschen

Der DGB sieht die vorliegende Formulierung als erhebliche Verbesserung an, da der Förder- und Integrationsaspekt nun klar zum Ausdruck kommt.

Artikel 25: Recht auf Unterrichtung und Anhörung der Arbeitnehmer im Unternehmen

Der DGB fordert nachhaltig, dieses Recht um die **Mitwirkung** zu erweitern. Mitwirkung beinhaltet, dass beide Seiten ihren jeweiligen Standpunkt nicht nur austauschen, sondern soll gewährleisten, dass bestimmte unternehmerische Maßnahmen nicht ohne vorherige Information der und Beratung mit der Arbeitnehmerseite getroffen werden können. Eine solche Form der Beteiligung, die sich unterhalb der Ebene der echten Mitbestimmung und Zustimmungspflicht der betrieblichen Interessenvertretung bewegt, erlangt gerade im Zusammenhang mit der fortschreitenden Internationalisierung der Unternehmen und der zunehmenden Zahl von Unternehmenszusammenschlüssen wachsende Bedeutung. Bereits die EU-Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer, eine wesentliche Grundlage für die Arbeiten des Konvents, sieht das Recht auf Mitwirkung in den Artikeln 17 und 18 ausdrücklich vor.

Artikel 26: Recht auf Kollektivverhandlungen und Kollektivmaßnahmen

Der DGB sieht in den vorgenommenen Änderungen eine gravierende Verschlechterung früherer Vorschläge (CONVENT 34). Die Herausnahme des Zusatzes *„auch auf der Ebene der Union"* im Zusammenhang mit kollektiven Maßnahmen zur Interessenwahrnehmung stellt eine aus Arbeitnehmersicht nicht hinnehmbare Einschränkung der Ausübung dieses Rechtes auf grenzüberschreitender Ebene dar. Die neu aufgenommene Bezugnahme auf das Gemeinschaftsrecht neben den einzelstaatlichen Rechtsvorschriften kann diesen Mangel aus Sicht des DGB nicht ausgleichen, sondern vielmehr als zusätzliche Einschränkung ausgelegt werden.

Auch die Streichung des Zusatzes *„wirtschaftliche und soziale"* bei Interessen ist nicht nachvollziehbar, präzisiert sie doch gerade die Rolle der Wirtschafts- und Sozialpartner in angemessener Weise. Der DGB plädiert daher nachdrücklich dafür, die frühere Formulierung (CONVENT 34) wiederherzustellen und zusätzlich ein **ausdrückliches Recht auf Streik** sowie ein **Verbot von Benachteiligungen** wegen gewerkschaftlicher Betätigung aufzunehmen. Die ausdrückliche Erwähnung des Streikrechts entspricht den europäischen (Kölner Mandat: ESC Art. 6 Abs. 4) und internationalen Vorgaben (Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte, Art. 8 d. (Eine

Erwähnung der Aussperrung ist in den genannten Instrumenten nicht erfolgt und insoweit – will man nicht die derzeitigen Standards verschlechtern – auch nicht möglich; s. auch Begründung unter 1.1.)

Er erneuert daher seinen früheren Vorschlag, dieses Grundrecht wie folgt zu formulieren:

„(1) Arbeitgeberverbände und Gewerkschaften haben das Recht, die wirtschaftlichen und sozialen Interessen ihrer Mitglieder zu vertreten. Sie haben das Recht, nach Maßgabe der geltenden Rechtsvorschriften und Gepflogenheiten Tarifverträge auszuhandeln und zu schließen sowie bei Interessenkonflikten auch auf der Ebene der Union kollektive Maßnahmen einschließlich des Streiks zu ergreifen.

(2) Arbeitnehmer dürfen wegen gewerkschaftlicher Betätigung einschließlich einer Teilnahme an einem Streik nicht benachteiligt werden.“

Artikel 27: Recht auf Zugang zu einem Arbeitsvermittlungsdienst

Die Aufnahme eines solchen Grundrechtes wird vom DGB ausdrücklich befürwortet. Es muss jedoch präziser gefasst werden. Das Fehlen der in den Vorentwürfen enthaltenen „Unentgeltlichkeit“ beruht wohl auf einem Redaktionsversehen.

Der DGB schlägt daher folgende Formulierung vor: *„Jede Person hat das Recht auf Zugang zu einem unentgeltlichen öffentlichen Berufsberatungs- und Arbeitsvermittlungsdienst.“*

Artikel 28: Schutz bei ungerechtfertigter Entlassung

Der DGB unterstützt die vorgeschlagene Formulierung.

Artikel 29: Gerechte und angemessene Arbeitsbedingungen

Die Würde des Menschen wird in Artikel 1 des Entwurfs der Grundrechtecharta geschützt. Sie sollte gleichermaßen im Zusammenhang mit den Arbeitsbedingungen ausdrücklich aufgeführt werden. Der DGB schlägt daher folgende Formulierung vor: *„Jeder Arbeitnehmer hat das Recht auf angemessene, insbesondere gesunde, sichere und würdige Arbeitsbedingungen.“*

In Abs. 2 erscheint eine Begrenzung der Höchstarbeitszeit nicht ausreichend. Wenn schon keine Verpflichtung zur Verkürzung der Arbeitszeit (vgl. Art. 2 Abs. 1 ESC) aufgenommen wird, sollte zumindest deutlich gemacht werden, dass nicht nur Höchstgrenzen, sondern „angemessene“ Arbeitszeiten der Maßstab sein sollten. Abs. 2 dieses Artikels sollte daher lauten: *„Jeder Arbeitnehmer hat das Recht auf gerechte Arbeitsbedingungen, das insbesondere das Recht auf angemessene tägliche und wöchentliche Arbeits- und Ruhezeiten sowie auf bezahlten Jahresurlaub umfasst.“*

Artikel 30: Schutz der Jugendlichen am Arbeitsplatz

Der DGB unterstützt nachdrücklich das ausdrückliche Verbot der Kinderarbeit. Allerdings sollte die 15-Jahre-Mindestgrenze wieder aufgenommen werden, ebenso wie die Ergänzung der *„eng begrenzten Ausnahmen für leichte Arbeit“*, die sich aus den Formulierungen internationaler und europäischer Standards ergibt. Der 2. Satz sollte daher lauten: *„Abgesehen von eng begrenzten Ausnahmen für leichte Arbeit darf das Mindestalter für den Eintritt in das Arbeitsleben das Alter, in dem die Schulpflicht endet, auf jeden Fall aber 15 Jahre nicht unterschreiten.“*

Artikel 31: Einklang von Familien- und Berufsleben

Der DGB befürwortet die vorgenommenen Ergänzungen in diesem Artikel, insbesondere den ausdrücklichen Kündigungsschutz von Schwangeren. Ergänzend sollte jedoch ein Benachteiligungsverbot vorgesehen werden. Der DGB schlägt hierfür vor: *„Arbeitnehmer mit Familienpflichten dürfen in der Arbeitswelt nicht benachteiligt werden.“* Diese spezielle Nichtdiskriminierungsregel kann bei Umsetzung der Forderung zu Art. 21 (Gleichheit und Nichtdiskriminierung) entfallen.

Artikel 32: Soziale Sicherheit und soziale Unterstützung

Der DGB unterstützt den vorliegenden Vorschlag grundsätzlich, möchte jedoch durch entsprechende Präzisierungen den Umfang und die Dynamik bei der Weiterentwicklung sozialer Leistungen stärker berücksichtigt sehen.
Durch den Zusatz „Zugang zu *angemessenen* Leistungen“ sollte ein Bezug zum jeweiligen Lebensstandard hergestellt werden. Durch die Einleitung der Aufzählung durch das Wort *„insbesondere“* sollte der Dynamik sozialer Leistungen im Hinblick auf die zukünftige Entwicklung Rechnung getragen werden.

Zwar sind in der Neuformulierung Leistungen bei Arbeitsunfällen aufgenommen worden, es fehlen jedoch nach wie vor die Elemente: **Schutz bei Berufskrankheiten und bei Berufs- und Erwerbsunfähigkeit**. Diese Elemente sollten nach Auffassung des DGB in die Aufzählung im ersten Absatz aufgenommen werden. Der DGB befürwortet ausdrücklich die Aufnahme des Rechts der Wanderarbeitnehmer auf gleiche Leistungen der sozialen Sicherheit.

Artikel 50: Tragweite der garantierten Rechte und Artikel 51 Schutzniveau

Der Grundgedanke, dass Einschränkungen und Schutzniveau der in der Charta garantierten Rechte nicht über diejenigen Einschränkungen hinausgehen können, die in der EMRK vorgesehen sind, ist entsprechend auch auf die Revidierte ESC anzuwenden.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 September 2000

CHARTE 4464/00

CONTRIB 318

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Country Landowner's Association of England and Wales, with comments on Article 17 in document CHARTE 4422/00 CONVENT 45. [1]

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[1] This text has been submitted in English language only.

Comments of the CLA on Article 17 of the draft Charter of Fundamental Rights for the European Union

Article 17: Ownership Rights – need for changes

On behalf of the CLA, may I refer you to **Article 17** (of the 28 July draft, Charte 4422/00, Convent 45), which defines rights of ownership. In our view the current draft needs some amendments. These are not extensive, but would make a significant and beneficial difference to the way the institutions of the EU – and the member states – operate their rural policies.

Reasons

As an organisation representing 50,000 farming and other rural businesses, the CLA is concerned that a secure framework of ownership rights is essential for long term investment in agriculture, forestry and non land based rural businesses, for these businesses to be able to manage their assets effectively, to enter into contracts with public bodies and others to deliver environmental and other land management services and to grow for the benefit of local employment and the wider rural economy. The CLA fully supported the submission of the European Landowning Organisation (ELO) to the Convention (on the basis of an earlier draft) which set out these arguments more fully (copy attached for ease of reference).

Current text

Whilst some of draft **Article 17** provides such a framework other provisions then weaken it. As a result, the development of agriculture and of positive rural development policy will, in the CLA's view, be held back in those countries aspiring to join the EU (and aligning their practices with the Charter) and the development throughout the EU of a positive relationship between enterprising rural businesses, employment and incomes on the one hand, and the health of the rural economy and environment on the other, will be impeded.

The current text (Charte 4422/00) reads:

1. Every person has the right to own, use, dispose of and bequeath his lawfully acquired possessions. No one may be deprived of his possessions except in the public interest and in the cases and under the conditions provided by law, subject to fair compensation. The use of property may be regulated insofar as it is necessary for the general interest.

2. Intellectual property shall be protected.

There is no problem with the first sentence of Paragraph 1 or with Paragraph 2.

The CLA believes the following amendments should be made:

(i) In the second line, after "possessions", add: "or regulated in their use"

(ii) Delete the third sentence: "The use…interest".

Ownership includes not only holding property but also management of its use. Regulations that restrict the economically viable uses of say, land, may amount to partial deprivation. Such restrictions should not be made without their need being justified, and without the other protections for ownership, including compensation, being applicable.

(i) Accordingly, we urge the Convention to add these suggested words to the text, which would not prevent governments or the EU from imposing restrictions on the use of property, but would apply the same disciplines to potential restrictions as apply to other forms of deprivation.

If this change were made, there would be no need for the inclusion – which is new – of the third sentence of Paragraph 1, "The use…interest", because the possibility to regulate use would be explicitly provided for in the body of the Article.

Furthermore, this new third sentence, which was not in earlier drafts, contains two undesirable provisions. The first is to exempt regulation of use from the disciplines applying to deprivation in the rest of the Article, in particular in relation to the provision of compensation. The second is to apply a weaker test, "general interest", rather than "public interest", in respect of regulation of use. Neither of these can be justified, in view of the higher level of protection for ownership in the rest of the Article, and given that regulations of use can amount, in effect, to deprivation of ownership.
(ii) We urge the Convention to delete this sentence.

(iii) After "except in", add: "sofar as it is necessary for"

The draft includes no test of the scale of the public interest. Deprivation of possessions should be the last resort, and wherever possible the public interest should be met by negotiated, agreed initiatives that also protect the position of private individuals and businesses. **(iii) Accordingly, we urge the Convention to add these words,** as this would require the authority depriving the person of his possessions to justify the scale of the public interest and the impracticality of it being met in any other way.

(iv) After "subject to", delete "fair compensation.", and insert: "compensation (for his loss) to be paid without undue delay."

Whereas "fair" is capable of wide interpretation, "compensation (for his loss)" defines the level of compensation more objectively, and may reduce the amount of time consuming and costly dispute that surrounds the award of compensation.

In addition, however certain or accurately calculated the level of compensation may be, it will not serve its objective if its payment is unreasonably delayed. It is not unknown for individual householders or businesses to be made to wait ten years or more for compensation. In the meantime such compensation is not available to them for the adjustment of their lives or businesses to respond to the deprivation of their possessions.

(iv) Accordingly, we urge the Convention to make this amendment to text.

Nick Way
Chief Political Adviser, CLA

Nick Way
Chief Political Adviser

Enc.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 14 September 2000

CHARTE 4465/00

CONTRIB 319

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a report from the Committee on Legal Affairs and Human Rights Council in the Parlamentary Assembly of the Council of Europe. [1]

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[1] This text has been submitted in English and French languages.

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Doc. 8819
11 September 2000

Charter of Fundamental Rights of the European Union

Report*
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Göran Magnusson, Sweden, Socialist Group

Summary

The preparatory work on the Charter of Fundamental Rights of the European Union is now entering its final stage. Both the Parliamentary Assembly and the Committee of Ministers have drawn attention to the risks posed by having two sets of fundamental rights in Europe, and have pointed out that the Charter should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention of Human Rights (ECHR), to all citizens of the Council of Europe's member States, including those of the European Union.

The Assembly, together with the European Parliament, the European Commission and the European Court of Human Rights, continues to believe that the aim of the draft Charter can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights.

* The Committee on Legal Affairs and Human Rights adopted this report on 7 September 2000, on the basis of the information available that day. The Committee will have to revise the text to take into account new developments after the meetings of the "Convention" in charge of drafting the Charter which are scheduled between the adoption of this report and the debate in the Assembly. Members of the Assembly are therefore kindly requested to wait with the tabling of amendments until the revised version of this report is available.

The Assembly should thus invite the European Union and its member states to extend the protection afforded by the ECHR and the Strasbourg Court to acts of the European Union and its institutions, by making the necessary amendments to the treaties in question and accede to the ECHR at the same time as deciding upon the proposed Charter. The Assembly should also strongly recommend that the Committee of Ministers support this accession and prepare the appropriate amendments to the ECHR without further delay.

I. Draft resolution

1. Following the adoption of Resolution 1210 (2000) on the Charter of Fundamental Rights of the European Union on 25 January 2000, the Assembly has continued to follow with great interest the preparatory work on the Charter, which is now entering its final stage.

2. Already in January, the Assembly had drawn attention to the risks posed by having two sets of fundamental rights in Europe, and thus called upon the European Union to do its utmost to safeguard the consistency of the protection of human rights in Europe and to avoid diverging interpretations of those rights. In particular, it invited the European Union to pronounce itself in favour of accession to the European Convention on Human Rights of the Council of Europe (ECHR) and to make the necessary amendments to the Community treaties.

3. The Assembly regrets that there is apparently not yet a consensus concerning the accession of the Union to the ECHR, an approach which, despite the technical objections of the Court of Justice in Luxembourg some years ago (which can easily be solved), has repeatedly received the backing of the other institutions concerned: the European Parliament, the European Commission and the European Court of Human Rights. The Assembly maintains that only through this accession can new dividing lines in Europe be avoided, as well as a weakening of human rights protection across the continent.

4. In this connection, the Assembly welcomes the Resolution of the European Parliament, adopted on 16 March 2000, in which the Parliament invites the Intergovernmental Conference (IGC) to enable the Union to become a party to the European Convention on Human Rights.

5. The Assembly realises that it is not within the powers of the "Convention" which has been entrusted with the drafting of the Charter to decide upon accession to the ECHR, or even upon the legal nature of the Charter (a legally binding and justiciable text or one of declaratory character). The Assembly congratulates the "Convention" on the vast work it has undertaken, and, subject to the observations in paragraphs 7 to 10, expresses its satisfaction with the provisional text of the Charter proposed by the Praesidium (Convent 45).

6. The draft Charter as proposed by the Praesidium reaffirms *inter alia* the ECHR, the Social Charter of the Council of Europe and the case-law of the European Court of Human Rights. Laudably, the draft also includes some new rights and freedoms, such as the right to respect for physical and mental integrity - including the prohibition of eugenic practices and of reproductive cloning of human beings – (draft Article 3), the prohibition of trafficking in human beings (draft Article 5.3.), the protection of personal data (draft Article 8), the right to asylum (draft Article 18), and the right to good administration (draft Article 39).

7. Nevertheless, the Assembly is concerned that not all guarantees afforded by the ECHR have been included in the draft text. In particular, Article 1 of the ECHR, which secures to everyone within the jurisdiction of the High Contracting Parties the rights and freedoms defined in the ECHR, is not reflected in the same way in the draft Charter: Indeed, at times the draft seems to be striking an uneasy compromise between rights guaranteed to everyone, and rights guaranteed only to European Union citizens. Similarly, there is no obligation in the draft Charter to protect everyone's right to life by law; and draft Article 46 on the presumption of innocence and right of defence does not explicitly make reference to all the guarantees afforded by Article 6 of the ECHR.

8. The Assembly supports the proposal to introduce an Article 21 bis in the Charter, to guarantee the rights of persons belonging to ethnic, religious or linguistic minorities.

9. The Assembly is also concerned that some provisions are drafted too widely, such as draft Article 13, which liberates scientific research from any constraint – by implication also from restraint of an ethical nature - and draft Article 50.1., which allows for a wide range of limitations on the exercise of the rights and freedoms recognised by the Charter as long as they are provided for by the competent legislative authority and "genuinely meet objectives of general interest being pursued by the Union".

10. Other articles might turn out to be difficult to enforce judicially, such as the right to have access to vocational and continuing training (draft Article 14), the right to engage in a freely chosen occupation (draft Article 15.1.), and the freedom to conduct a business (draft Article 16). Draft Article 32 on social security and social assistance might pose similar problems in this area. One might also ask whether some newly introduced rights, such as the right of access to placement services (draft Article 27) and to services of general economic interest (draft Article 34) are as fundamental as some more "traditional", universally recognised human rights (such as the right to be protected from torture, the freedom of expression and assembly, etc.), and should stand side by side with these, implying equal weight and importance.

11. In the interest of avoiding differing interpretations of the same human rights, it is also important that the meaning and scope of those rights contained in the draft charter which correspond to rights guaranteed by the ECHR shall be the same as those conferred on them by the ECHR, including the case-law of the Court in Strasbourg.

12. The Assembly is convinced that the aim of the draft Charter, which is to enhance and make more visible the protection of fundamental rights in EU member states, can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights. In a democratic society, a system of checks and balances is essential. All member states of the European Union, honouring this democratic principle, have submitted themselves to the external supervision of the European Court of Human Rights under this Convention, without endangering national sovereignty or the principle of subsidiarity. There is no legitimate reason why acts carried out on behalf of the European Union should be exempt from this fundamental external control mechanism, thus in effect withdrawing the protection of the ECHR from persons adversely affected in their fundamental rights and freedoms by Community law.

13. The Assembly therefore reiterates its appeal to the European Union do its utmost to safeguard the consistency of human rights protection in Europe. It thus invites the European Union and its member states to:

i. ensure that both the text of the proposed Charter and its ultimate application fully reflect and preserve the protection extended by the European Convention on Human Rights and the European Court of Human Rights to every person within the jurisdiction of European Union member States;

ii. extend the protection afforded by the ECHR and the Strasbourg Court to acts of the European Union and its institutions, by making the necessary amendments to the treaties in question and accede to the European Convention on Human Rights at the same time as deciding upon the proposed Charter.

II. Draft recommendation

1. The Assembly draws attention to its Recommendation 1439 (2000) on the Charter of Fundamental Rights of the European Union, adopted on 25 January 2000, in which it recommended that the Committee of Ministers of the Council of Europe support the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to this treaty.

2. It notes that, at its 106th session (10-11 May 2000), the Committee of Ministers stressed the need to ensure that, whatever decision the Institutions of the Union might take concerning the Charter, it did not lead to new dividing lines in Europe. The Charter should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention, to all citizens of the Council of Europe's member States, including those of the European Union.

3. Although the Assembly welcomes the fact that the Committee of Ministers shares its concern that there should be no rivalry between the two systems of human rights protection in Europe, it regrets that it has not yet reached a consensus concerning the accession of the Union to the European Convention on Human Rights, an approach which, despite the technical objections of the Court of Justice in Luxembourg a few years ago (which can easily be solved), has repeatedly received the backing of the other institutions concerned: the European Parliament, the European Commission and the European Court of Human Rights.

4. The Assembly is not aware of any factor opposing accession from a legal point of view. It thus fervently hopes that the political will which, up to now, has prevented the process from going ahead, can be mustered soon.

5. In addition, the Assembly draws the attention of the Committee of Ministers to the necessity to support the proposal to introduce an Article 21 bis in the Charter, to guarantee the rights of persons belonging to ethnic, religious or linguistic minorities.

6. With reference to Resolution … (2000) on the Charter of Fundamental Rights of the European Union, the Assembly therefore once again strongly recommends that the Committee of Ministers support the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to this Convention without further delay.

III. Draft order

The Assembly draws attention to its Resolution … (2000) and Recommendation … (2000) on the Charter of Fundamental Rights of the European Union and instructs its Committee on Legal Affairs and Human Rights, in co-operation with the Political Affairs Committee and the Social, Health and Family Affairs Committee, to closely follow the preparatory work on the Charter and the results of that work, and to report to it in due course.

IV. Explanatory memorandum by Mr Magnusson, Rapporteur

A. THE COUNCIL OF EUROPE AND THE EU CHARTER: NEW DEVELOPMENTS

1. On 25 January 2000 the Assembly adopted Resolution 1210 (2000) on the Charter of Fundamental Rights of the European Union, in which it invited the European Union:

i. to incorporate the rights guaranteed in the European Convention on Human Rights and the protocols to it into the Charter of Fundamental Rights and to do its utmost to safeguard the consistency of the protection of human rights in Europe and to avoid diverging interpretations of those rights;

ii. to decide in favour of accession to the European Convention on Human Rights of the Council of Europe and to make the necessary amendments to the Community treaties;

iii. to make sure that when social rights are referred to the revised European Social Charter of the Council of Europe is taken into account.

2. At the same time it adopted Recommendation 1439 (2000), in which it recommended that the Committee of Ministers of the Council of Europe support the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to this treaty.

3. Finally, in Order No. 561 (2000), it instructed its Committee on Legal Affairs and Human Rights, and its Social, Health and Family Affairs Committee, which was asked for an opinion, to carefully follow and monitor the outcome of the drafting work on the Charter of Fundamental Rights of the European Union, and to report back to it in due course.

4. The time has now come to take stock of the action taken on these texts. Since, by late May 2000, the Committee of Ministers of the Council of Europe had not replied to Recommendation 1439, I submitted a written question, No. 387, to the Committee of Ministers on behalf of the Committee on Legal Affairs and Human Rights, asking what follow-up the Committee of Ministers intended to give to Recommendation 1439 before the adoption of the Charter.

5. On 31 May 2000, the Committee of Ministers adopted a reply in which it referred to the Communiqué which it had adopted at the end of its 106th Session (Strasbourg, 10-11 May 2000):

> "With regard to the proposed European Charter of Fundamental Rights, the Ministers underlined the need to ensure that, whatever decision the Institutions of the Union may take concerning the Charter, it does not lead to new dividing lines in Europe. The Charter should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention, to all citizens of the Council of Europe's member States, including those of the European Union."

6. It appended to its reply the statement made before the Ministers' Deputies on 7 March 2000 by Mr Wildhaber, President of the European Court of Human Rights, in which he set forth the

arguments in favour of the European Union's accession to the Convention, pointing out that the debate on the Charter offered an excellent opportunity to reopen the whole question of the Community's accession to the Convention and that the Council of Europe ought to have no misgivings about seizing this opportunity without hesitation.

7. I nevertheless regretted that the Committee of Ministers had not replied to the main question addressed to it in Recommendation 1439, and so once again put a question to the Chair of the Committee of Ministers on 27 June 2000, asking him to state clearly whether the Committee of Ministers intended to come out in favour of accession.

8. The Chair of the Committee of Ministers replied that if there was no consensus among the fifteen member states of the European Union, there could be no consensus on this question within the Committee of Ministers either.

9. It should be noted, however, that the European Parliament adopted a resolution on 16 March 2000, in which it invited the Intergovernmental Conference (IGC) to enable the Union to become a party to the European Convention on Human Rights (ECHR). With the exception of the Court of Justice in Luxembourg, which raised some technical objections a few years ago (that can easily be solved), the proposal that the Union accedes to the ECHR has thus repeatedly received the backing of all the other institutions concerned: the European Parliament, the European Commission, the European Court of Human Rights and, of course, the Assembly. I would indeed maintain that only through this accession can new dividing lines in Europe be avoided, as well as a weakening of human rights protection across the continent.

B. Developments within the European Union

10. Within the European Union, the “Convention”, the name adopted by the body set up at the European Council meeting in Tampere, has nearly finished drafting the Charter. The “Convention” is made up of fifteen representatives of the Heads of State or Government, one representative of the European Commission, sixteen members of the European Parliament and thirty representatives of national parliaments. Two representatives of the Court of Justice of the European Communities and two representatives of the Council of Europe, one of whom is a judge at the European Court of Human Rights, have observer status.

11. The “Convention” worked very intensively, with several meetings per month, and invited the Economic and Social Committee, the Committee of the Regions and the European Ombudsman to give their views. Countries applying for accession to the Union were also invited to a hearing and NGOs had the opportunity to make their views known. This shows that there is, within the “Convention”, a determination to ensure the transparency of the discussions.

12. The “Convention” is chaired by Mr Roman Herzog, former President of the Federal Republic of Germany. As Vice-Chair, the group of representatives of Heads of State or Government elected the representative of the rotating presidency of the Council of the European Union. The group of representatives of the European Parliament elected Mr Mendes de Vigo and the Group of National Parliaments elected Mr Gunnar Jansson, Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

13. The Praesidium of the "Convention" has proposed a draft Charter (Convent 45) and an explanatory memorandum (Convent 46), which will be examined by the plenary "Convention" at its next meeting on 11-13 September 2000 in Brussels.

14. The draft Charter is composed of a Preamble, and seven Chapters: Chapter I "Dignity", Chapter II "Freedoms", Chapter III "Equality", Chapter IV "Solidarity", Chapter V "Citizenship", Chapter VI "Justice", and Chapter VII "General Provisions". Not counting the preamble, there are 52 articles all in all.

15. The draft Charter does reaffirm *inter alia* the ECHR, the Social Charter of the Council of Europe and the case-law of the European Court of Human Rights. Laudably, the draft also includes some new rights and freedoms, such as the right to respect for physical and mental integrity - including the prohibition of eugenic practices and of reproductive cloning of human beings – (draft Article 3), the prohibition of trafficking in human beings (draft Article 5.3.), the protection of personal data (draft Article 8), the right to asylum (draft Article 18), and the right to good administration (draft Article 39).

16. In fact, there seems to be a general consensus in the "Convention" on what constitutes civil and political rights (rightly, the provisions of the ECHR are often taken as a basis for the most "traditional" human rights). However, it is much more difficult to reach agreement on the exact substance of economic and social rights. This is hardly surprising if one considers that the International Covenant on Economic, Social and Cultural Rights, adopted in 1966 at the same time as the Covenant on Civil and Political Rights, never came into force and that not even the Council of Europe gives economic and social rights the same level of protection as civil and political rights.

17. The draft of the Praesidium does confer a number of social and economic rights on the citizens of the European Union. Some of the articles concerned might turn out to be difficult to enforce judicially, such as the right to have access to vocational and continuing training (draft Article 14), the right to engage in a freely chosen occupation (draft Article 15.1.), the freedom to conduct a business (draft Article 16), as well as the whole of draft Article 32 on social security and social assistance. However, this is not a reason not to include them. I am more reticent as concerns some other newly introduced rights, such as the right of access to placement services (draft Article 27) and to services of general economic interest (draft Article 34). Are these rights really so fundamental that they should stand side by side with such universally recognised human rights as the right to be protected from torture and the freedom of expression and assembly, implying their equal weight and importance?

18. In fact, the inclusion of these rights in this manner has led to an uneasy balance between "traditional" fundamental human rights, which must apply to every person within the jurisdiction of the European Union, and these social and economic rights, which, in many cases, are only conferred upon citizens of the Union. Worryingly, the outcome is that, for example Article 1 of the ECHR, which secures to everyone within the jurisdiction of the High Contracting Parties the rights and freedoms defined in the ECHR, is not reflected in the same way in the draft Charter. Indeed, some economic and social rights are elaborated at more length in the Charter than "traditional" human rights. Thus, to take two more examples, the draft Charter contains no obligation to protect everyone's right to life by law, nor does draft Article 46 of the Charter on the presumption of innocence and right of defence explicitly make reference to all the guarantees afforded by Article 6 of the ECHR.

19. In a way, this is quite surprising, since other provisions are drafted exceedingly widely. Draft Article 13, which liberates scientific research from any constraint – by implication also from restraint of an ethical nature – could serve as a random example. More far-reaching and potentially dangerous is the wide and inexact drafting of the general provisions in the last chapter, the so-called "horizontal clauses". Article 50.1., for example, allows for any limitations on even the most fundamental human rights, as long as they are provided for by the competent legislative authority, and "are necessary and genuinely meet objectives of general interest being pursued by the Union, other legitimate interests in a democratic society or the need to protect the rights and freedoms of others". Considering that the ECHR allows for no derogations, even in wartime, from the right to life, the protection from torture, the prohibition of slavery and servitude, and the principle of no punishment without law, and allows for only very limited derogations for many other rights, the legitimacy of limitations on the grounds of them "genuinely meeting objectives of general interest being pursued by the Union" must be called into question.

20. The potential danger posed by Article 50.1. is only partly assuaged by Article 50.3., which reads "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be similar to those conferred on them by the said Convention unless this Charter affords greater or more extensive protection." First, since the meaning and scope must be only "similar", and not "the same", this Article contains no guard against differing interpretations of these rights, which could fall below even the ECHR standard if this clause is not amended. Second, even if this amendment should be made, it would only restrict limitations on rights covered by the ECHR (and, possibly, the case-law of the Strasbourg Court). New rights not contained in the ECHR – some of them very important, such as the protection of the dignity of the person, or the right to asylum, or even data protection – could be limited practically at will in accordance with Article 50.1. (in the interest of "objectives of general interest" being pursued by the Union), making them almost meaningless.

21. There is also a discussion in the "Convention" on whether the draft Charter should confer new rights, or only reaffirm existing ones. Personally, I would interpret the mandate of the Cologne decision as the latter, but there are diverging views in the "Convention" on this matter. I think that the ECHR should not only be the "floor" of human rights protection in Europe, but also the "ceiling".

22. Of course, this text is not yet final, as it will continue to be discussed during the upcoming meetings of the "Convention". After the European Parliament has given its opinion on the final version, it will then be the task of the Nice Intergovernmental Conference (IGC) to solemnly proclaim the Charter in December 2000, and to decide upon its legal nature. However, without anticipating the ICG's decision, the Chair of the "Convention" has opted for a form of wording which makes it possible for the Charter to become a binding instrument.

C. Accession of the European Union to the ECHR

23. It has always been the Council of Europe's – and this Assembly's – stance that the best way to guarantee universal and comprehensive human rights' protection across Europe would be the accession of the European Union to the European Convention on Human Rights.

24. The European Parliament, for its part, came out in favour of accession to the European Convention on Human Rights in a Resolution adopted as recently as on 16 March 2000, in which it invited the IGC to:

a. put the incorporation into the Treaty of the Charter of Fundamental Rights on its agenda;

b. enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights;

c. add a reference to the European Social Charter and to the appropriate ILO and UN conventions to the reference to the European Convention on Human Rights in Article 6 of the Treaty on European Union.

25. It is now up to the IGC to give its opinion on accession to the European Convention on Human Rights, whether the Charter is adopted or not and irrespective of whether it is binding. It should be pointed out that there is nothing to prevent the European Union from adopting stricter standards than those set by the Convention. What applies to the member States can apply to the Community.

26. There is no need at this point to repeat all the reasons for acceding, which were examined in the previous report (Doc. 8611), and there has been absolutely nothing to show that this is not the right approach. Suffice it to say that I am convinced that the aim of the draft Charter, which is to enhance and make more visible the protection of fundamental rights in Europe, can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights. In a democratic society, a system of checks and balances is essential. All member states of the European Union, honouring this democratic principle, have submitted themselves to the external supervision of the European Court of Human Rights under this Convention, without endangering national sovereignty or the principle of subsidiarity. There is no legitimate reason why acts carried out on behalf of the European Union should be exempt from this fundamental external control mechanism, thus in effect withdrawing the protection of the ECHR from persons adversely affected in their fundamental rights and freedoms by Community law.

27. The two official observers of the Council of Europe to the "Convention", Deputy Secretary General Krüger and Judge Fischbach, have also emphasised that accession to the ECHR would have the advantage of ensuring consistency in the protection of fundamental rights in Europe without lessening the Charter's usefulness. Firstly, the Charter would be seen as complementing, not being an alternative, to the ECHR, in keeping with Article 53 of the ECHR. That would underscore the fact that the Charter did not affect the universality of human rights or uniformity of standards in Europe. Secondly, the European Court of Human Rights would be able to review the interpretation of those provisions of the Charter that were borrowed from the ECHR, thus ensuring perfect consonance between the two instruments in the interests of the clarity and legal certainty to which European citizens aspire. Lastly, it would enable Community institutions to be a party to proceedings before the European Court of Human Rights that concerned the effects of Community provisions in the legal orders of member States.

28. In short, I would find it difficult to accept the European Union's claims that it wishes to improve the protection of European citizens' rights while it refuses to submit its own institutions to scrutiny and opens up the possibility of diverging interpretations of human rights by two different Courts. In fact, only the decision of the Court of Justice of Luxembourg in 1996 continues to be used as an argument for not ratifying the Convention. Yet there is nothing to prevent the European Council from remedying the situation by deciding to amend the Treaty on European Union to enable ratification to take place.

29. That is what the Assembly proposes, for the sole purpose of ensuring that Europe does not have two systems of human rights protection and to avoid the inconsistency which would inevitably ensue.

Reporting committee: Committee on Legal Affairs and Human Rights

Budgetary implications for the Assembly: none

Reference to committee: Order No. 561 (2000)

Draft resolution, draft recommendation and draft order unanimously adopted by the committee on 7 September 2000

Members of the committee: MM *Jansson* (*Chairperson*), *Bindig*, *Frunda*, Mrs Err (*Vice-Chairpersons*), Mrs *Aguiar*, MM Akçali (alternate: Mrs *Gülek*), de Aristegui, Arzilli, Attard Montalto (alternate: Mr *Asciak*), Bal, Bartumeu Cassany, Bruce (alternate: Mr *Lloyd*), *Bulavinov*, *Clerfayt*, *Contestabile*, Demetriou, Derycke, *Dimas*, *Enright*, *Floros*, Mrs Frimansdóttir, MM Fyodorov (alternate: Mr *Shishlov*), Gustafsson (alternate: Mr *von der Esch*), Holovaty, Mrs Hren-Vencelj, Mrs *Imbrasiene*, MM *Jaskiernia*, *Jurgens*, Kelemen, Lord *Kirkhill*, MM S. Kovalev (alternate: Mr N. *Kovalev*), *Kresák*, Mrs Krzyzanowska, Mr Le Guen, Mrs Libane, MM *Lintner*, Lippelt, *Loutfi*, *Magnusson*, Mrs Markovic-Dimova, MM *Marty*, *McNamara*, Moeller (alternate: Mrs *Auken*), Nastase (alternate: Mrs *Ionescu*), Mrs Ninoshvili, MM Pavlov, Pollo, Mrs Pourtaud, MM Rodeghiero (alternate: Mr *Provera*), Mrs Roudy, Mrs Serafini (alternate: Mr *Lauricella*), MM *Simonsen*, Skrabalo, Solé Tura (alternate: Mrs *Lopez Gonzalez*), Solonari, Spindelegger, *Svoboda*, Symonenko, *Tabajdi*, *Tallo*, Vera Jardim, Verhagen, Mrs Vermot-Mangold (alternate: Mrs *Nabholz-Haidegger*), Mr Vyvadil, Mrs *Wohlwend*, Mrs Wurm (alternate: Mrs *Stoisits*)

N.B. The names of those members who were present at the meeting are printed in italics.

Secretaries to the committee: Mr Plate, Ms Coin and Ms Kleinsorge

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ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 13. September 2000

CHARTE 4466/00

CONTRIB 320

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Bitte finden Sie nachstehend drei Beiträge von Herrn Horst PREM, Vizepräsident des Dachverbandes Freier Weltanschauungsgemeinschaften. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Horst Prem, Prinz-Otto-Str.9, 85521 Ottobrunn

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Ottobrunn, den 22.02.2000

Menschenrechte sind Souveränitätsrechten der Staaten übergeordnet

- Der DFW appelliert an die Bundesregierung das Statut des permanenten "Internationalen Strafgerichtshofes" (IStGH) in Den Haag ohne Einschränkungen (Artikel 124) zu ratifizieren.

- Die Errichtung des IStGH, der die Straftatbestände
  Völkermord
  Verbrechen gegen die Menschlichkeit
  Kriegsverbrechen
  Aggressionskrieg
  ahnden kann, schließt die Lücke einer derzeit nicht existierenden globalen Judikative und trägt dazu bei, Menschenrechte über die Souveränitätsrechte der Staaten zu stellen.

- Dies erscheint um so dringender notwendig zu sein, da heute 90 Prozent der Leidtragenden kriegerischer Auseinandersetzungen Zivilisten sind, weil Kriege nur noch selten zwischen Staaten und ihren Armeen auf dem Schlachtfeld geführt werden. Heute handelt es sich zunehmend um blutige Konflikte innerhalb einzelner Staaten.

- Insofern muß das Völkerrecht in ein Weltrecht auf demokratischer Basis weiterentwickelt werden. Diesem Ziel dient auch das Statut des IStGH. Da Frieden und Stabilität eines Landes entscheidend für seine ökonomische und ökologische Entwicklung sind und die Nicht-Ratifizierung des IStGH-Statutes mit Nichtanerkennung globaler rechtsstaatlicher Prinzipien gleichzusetzen ist, sollte die Bundesregierung ihren Einfluß bei den internationalen Finanzinstitutionen (World Bank, International Monetary Fund etc.) geltend machen, nur noch Länder zu unterstützen, die das Statut ratifiziert haben.

- Aufgrund der Erfahrungen der vergangenen Jahre (z.B. Kosovo-Konflikt) erwarten wir von der Bundesregierung, Waffenproduktion und Waffenexport grundsätzlich zu überdenken. Auf keinen Fall sollen zukünftig Waffen in Länder exportiert werden, die das Statut des IStGH nicht ratifiziert haben.

- Darüberhinaus wird empfohlen, einen Dialog zwischen Regierung, Wirtschaft und Zivilgesellschaften zu den Grundprinzipien einer Weltdemokratie zu beginnen, der Basis für eine weitere Demokratisierung der UNO werden kann. Zumindest sollten die nachfolgend aufgeführten Prinzipien enthalten sein:
  Rechtsstaatlichkeit
  Souveränität des Volkes durch direkte oder repräsentative Demokratie
  Souveränität des Einzelnen
  Institutionelle Transparenz
  Subsidiarität
  Nichtdiskriminierung nach Artikel 2 der Allgemeinen Erklärung der Menschenrechte
  Friedliche Konfliktlösung
  Diesem Ziel dient die im Mai 1999 in Den Haag ins Leben gerufene "Globale Koalition für Weltdemokratie 2010", die für die Mitwirkung von Zivilgesellschaften, Regierungen, Unternehmen und Einzelnen offen ist.

gez. Dr. Volker Mueller)
Präsident des Dachverbandes
Freier Weltanschauungsgemeinschaften

gez. Horst Prem
Vizepräsident des Dachverbandes
Freier
Weltanschauungsgemeinschaften

gez. Helge Frank
Präsident des Bundes Freireligiöser
Gemeinden Deutschlands

gez. Adi Meister
Vorsitzender des Bundes für
Geistesfreiheit Bayern

gez. Eike Möller)
Präsident der Deutschen
Unitarier

gez. Fritz Bode
Vorsitzender der Gesellschaft
für freigeistige Kultur

gez. Wolfgang Fleischer
Vorsitzender des Fach-
verbandes für weltliche
Bestattungs- und
Trauerkultur

gez. Dr. Peter Jäckel
Vorsitzender des Freigeistigen
Lebenshilfswerkes

gez. Dr. Volker Mueller
Vorsitzender des Humanistischen
Freidenkerbundes Brandenburg

gez. Ernst Mohnike
Vorsitzender des Verbandes
freier Weltanschaungs-
gemeinschaften Hamburg

gez. Stephan Mögle-Stadel
Vorsitzender der Weltföderalisten in Deutschland

gez. Troy Davis
Präsident der Weltbürgerstiftung

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Ottobrunn, den 26.6.2000

Grundrechtscharta für Europa - Minimalforderungen

Um Bürgernähe für eine Grundrechtscharta zu erreichen, fordert der DFW von Politikern in der Bundesrepublik und in der EU, folgende Minimalforderungen einzuhalten:

1. Eine Grundrechtscharta zum heutigen Zeitpunkt darf nicht nur die Freiheits- und Demokratiewerte enthalten, die im Nachgang zur Aufklärung in die Verfassungen aufgenommen wurden.
2. Sie muß endlich den Zustand überwinden helfen, die Menschenrechte nur als moralische Werte im Völkerrecht zu betrachten, die im Falle innerstaatlicher Konflikte nicht durchsetzbar sind, da die Souveränitätsrechte eines Staates verletzt werden müssen.
3. Eine Grundrechtscharta für die Bürger Europas muß die Menschenrechte über die Souveränitätsrechte der Staaten stellen. Nur dann kann sie auch entscheidend zur Friedenssicherung beitragen. Dies sind die Lehren aus den blutigen Bürgerkriegskonflikten in Ruanda, Kosovo und Tschetschenien. (Siehe hierzu die entsprechende DFW-Erklärung vom 22.02.2000)
4. Eine derartige Charta kommt daher nicht umhin, Bezug zu nehmen auf das UN-Statut zur Errichtung eines "Internationalen Strafgerichtshofes" in Den Haag. (Rome Statute of the International Criminal Court, 12 July 1999, UNO Document).
5. Sie muß sich außerdem beziehen auf die Erklärung von Rio 1992 und die Nachfolgekonferenzen, die alle eine nachhaltige Entwicklung unserer Erde angemahnt haben.
6. Die Grundrechtscharta für die Bürger Europas soll per Volksentscheid in allen EU-Mitgliedsländern in Kraft gesetzt werden.

Horst Prem

Horst Prem, Prinz-Otto-Str.9, 85521 Ottobrunn

Herrn
Jean-Paul Jacques
EU Fundamental Rights
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Brüssel

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Ottobrunn, den 25.8.2000

Internationaler Strafgerichtshof / Grundrechtscharta für Europa

Sehr geehrter Herr Jacque,

wir beobachten mit Sorge wie die Diskussion um die Grundrechtscharta für Europa ohne Bezug auf das Statut des geplanten Internationalen Strafgerichtshofes in Den Haag geführt wird.

U.E. hätten die Mitgliedsstaaten der EU die Möglichkeit innerhalb ihres Hoheitsbereiches die Menschenrechte völkerrechtsverbindlich über die Souveränitätsrechte der Nationalstaaten zu stellen. Wenn dies in der Grundrechtscharta für Europa festgeschrieben würde, dann würde diese Charta aus der Diskussion um Kompetenzenabgrenzung auf der Ebene EU und Mitgliedsstaaten herausführen. Sie würde dann zu einem Instrument der innovativen Weiterentwicklung des Völkerrechtes und würde auch Maßstäbe für den Beitritt neuer Mitglieder setzen, die über die vor 200 Jahren erkämpften Freiheitswerte hinausgehen.

Wir haben als Dachverband Freier Weltanschauungsgemeinschaften diese Kommentare an die Fraktionen des Deutschen Bundestages gegeben, da NGO's offensichtlich keine Möglichkeit mehr haben Kommentare einzureichen. Wir haben uns erlaubt zwei Positionspapiere anzufügen, die unsere Minimalforderungen zusammenfassen.

Mit freundlichen Grüßen

(Horst Prem)

PROGETTO DI CARTA DEI DIRITTI FONDAMENTALI DELL'UNIONE EUROPEA

fundamental.rights@consilium.eu.int

Bruxelles, 13 settembre 2000 (18.09)

CHARTE 4467/00

CONTRIB 321

NOTA DI TRASMISSIONE

Oggetto: Progetto di Carta dei diritti fondamentali dell'Unione europea

Si trasmette in allegato un contributo della "Lega italiana dei Diritti dell'Animale" (LIDA) [1].

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[1] Questo testo è stato presentato unicamente in italiano.

L. I. D. A.
LEGA ITALIANA
DEI DIRITTI DELL'ANIMALE

ASSOCIAZIONE
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Carta dei diritti fondamentali dell'Unione Europea

 # Emendamento della LIDA = Art. 5 (nuovo punto 4)

Capo I. Dignità

Articolo 1. Dignità della persona
La dignità della persona deve essere rispettata e tutelata.

Articolo 2. Diritto alla vita
1. Ogni individuo ha diritto alla vita.
2. Nessuno può essere condannato alla pena di morte, né giustiziato.

Articolo 3. Diritto all'integrità della persona
1. Ogni individuo ha diritto alla propria integrità fisica e psichica.
2. Nell'ambito della medicina e della biologia devono essere in particolare rispettati i seguenti principi :
- consenso libero e informato della persona interessata
- divieto delle pratiche eugenetiche, in particolare di quelle aventi come scopo la selezione delle persone
- divieto di fare del corpo umano e delle sue parti una fonte di lucro
- divieto della clonazione riproduttiva degli esseri umani.

Articolo 4. Proibizione della tortura e delle pene o trattamenti inumani o degradanti
Nessuno può essere sottoposto a tortura, né a pene o trattamenti inumani o degradanti.

Articolo 5. Proibizione della schiavitù e del lavoro forzato
1. Nessuno può essere tenuto in condizioni di schiavitù o di servitù;.
2. Nessuno può essere costretto a compiere un lavoro forzato o obbligatorio.
3. E' proibita la tratta degli esseri umani.
 # 4. I non umani (gli animali) non debbono essere considerati e usati come schiavi.

Carta dei diritti fondamentali dell'Unione Europea

 # *Emendamento della LIDA = Artt. 10, 13, 15, 17*

Capo II. Libertà

Articolo 6. Diritto alla libertà e alla sicurezza
Ogni individuo ha diritto alla libertà e alla sicurezza

Articolo 7. Rispetto della vita privata e della vita familiare
Ogni individuo ha diritto al rispetto della propria vita privata e familiare, del proprio domicilio e della riservatezza delle sue comunicazioni.

Articolo 8. Protezione dei dati di carattere personale
Ogni individuo ha diritto alla protezione dei dati di carattere personale che lo riguardano. Tali dati devono essere trattati secondo il principio di lealtà, per finalità determinate e in base al consenso della persona interessata o ad un altro fondamento legittimo previsto dalla legge. Ogni individuo ha il diritto di accedere ai dati raccolti che lo riguardano e di ottenerne la rettifica. Il rispetto di tali regole è soggetto al controllo di un'autorità indipendente.

Articolo 9. Diritto di sposarsi e di costituire una famiglia
Il diritto di sposarsi e il diritto di costituire una famiglia sono garantiti secondo le leggi nazionali che ne disciplinano l'esercizio.

 # Articolo 10. Libertà di pensiero, di coscienza e di religione
Ogni individuo ha diritto alla libertà di pensiero, di coscienza e di religione. Tale diritto include la libertà di cambiare religione o credo, così come la libertà di manifestare la propria religione o il proprio credo individualmente o collettivamente, in pubblico o in privato, mediante il culto, l'insegnamento,le pratiche e l'osservanza dei riti **purché non siano lesivi dell'integrità e della dignità di umani e non umani.**

Articolo 11. Libertà di espressione e d'informazione
1. Ogni individuo ha diritto alla libertà di espressione. Tale diritto include la libertà di opinione e la libertà di ricevere o di comunicare informazioni o idee senza che vi possa essere \ingerenza da parte delle autorità pubbliche e senza limiti di frontiera
2. La libertà dei media e la libertà d'informazione sono garantite nel rispetto del pluralismo e della trasparenza.

Articolo 12. Libertà di riunione e di associazione
Ogni individuo ha diritto alla libertà di riunione pacifica e alla libertà di associazione, in particolare nei settori politico, sindacale e civico.

I partiti politici a livello europeo contribuiscono a esprimere la volontà politica dei cittadini dell'Unione.

 # Articolo 13. Libertà della ricerca
La ricerca scientifica è libera**.**
La ricerca nel campo biologico è controllata da un comitato etico.

Articolo 14. Diritto all'istruzione

Ogni individuo ha diritto all'istruzione e all'accesso alla formazione professionale e continua.
Questo diritto comporta la facoltà di accedere gratuitamente all'istruzione obbligatoria.
La libertà di creare istituti di insegnamento nel rispetto dei principi democratici, così come il diritto dei genitori di provvedere all'educazione e all'istruzione dei loro figli secondo le loro convinzioni religiose, filosofiche e pedagogiche, sono garantiti secondo le norme nazionali che ne disciplinano l'esercizio.

Articolo 15. Libertà professionale
1. Per guadagnarsi di che vivere, ogni individuo ha il diritto di esercitare una professione liberamente scelta.
2. Ogni cittadino dell'Unione ha la libertà di cercare un lavoro, di lavorare, di stabilirsi o di prestare o ricevere servizi in qualunque Stato membro **e di poter esercitare l'obiezione di coscienza in ogni settore lavorativo.**
3. I cittadini dei paesi terzi che soggiornano regolarmente nel territorio degli Stati membri hanno diritto a condizioni di lavoro equivalenti a quelle di cui godono i cittadini dell'Unione.

Articolo 16. Libertà d'impresa
E' riconosciuta la libertà d'impresa.

Articolo 17. Diritto di proprietà
1. Ogni individuo ha il diritto di godere della proprietà dei beni che ha acquistato legalmente, di usarli, di disporne e di lasciarli in eredità. Nessuno può essere privato della proprietà se non per causa di pubblico interesse, nei casi e nei modi previsti dalla legge e contro il pagamento di una giusta indennità. L'uso dei beni può essere regolamentato nei limiti imposti dall'interesse generale.
 # 1bis. Sia a livello individuale che industriale gli animali non sono considerati proprietà assoluta, beni o/e merce e deve essere rispettato il loro diritto a non soffrire.
2. La proprietà intellettuale è protetta.

Articolo 18. Diritto di asilo
Il diritto di asilo è garantito nel rispetto delle norme stabilite dalla convenzione di Ginevra del 28 luglio 1951 e dal protocollo del 31 gennaio 1967, relativi allo status dei rifugiati, e a norma del trattato che istituisce la Comunità europea.

Articolo 19. Protezione in caso di allontanamento, di espulsione e di estradizione
1. Le espulsioni collettive sono vietate.
2. Nessuno può essere allontanato, espulso o estradato verso uno Stato in cui rischia di essere sottoposto alla pena di morte, alla tortura o ad altre pene o trattamenti inumani o degradanti.

Carta dei diritti fondamentali dell'Unione Europea

 # *Emendamento della LIDA = Articolo nuovo (dopo art. 24)*

Capo III. Uguaglianza

Articolo 20. Uguaglianza davanti alla legge
Tutti, uomini e donne, sono uguali davanti alla legge.

Articolo 21. Uguaglianza e non discriminazione
1. E' vietata qualsiasi forma di discriminazione fondata, in particolare, sul sesso, la razza, il colore della pelle o l'origine etnica o sociale, le caratteristiche genetiche, la lingua, la religione o le convinzioni personali, le opinioni politiche o di qualsiasi altra natura, l'appartenenza ad una minoranza nazionale, il patrimonio, la nascita, gli handicap, l'età o le tendenze sessuali.
2. Nell'ambito d'applicazione del trattato che istituisce la Comunità europea e del trattato sull'Unione europea è vietata qualsiasi discriminazione fondata sulla cittadinanza, fatte salve le disposizioni particolari contenute nei trattati stessi.

Articolo 22. Parità tra uomini e donne
Devono essere garantite le pari opportunità e la parità di trattamento tra uomini e donne in materia di occupazione e impiego, ivi compresa la parità delle retribuzioni per uno stesso lavoro o per un lavoro di pari valore.

Il principio della parità di trattamento non osta al mantenimento o all'adozione di misure che prevedano vantaggi specifici diretti a facilitare l'esercizio di un'attività professionale da parte del sesso sottorappresentato oppure a evitare o compensare svantaggi nelle carriere professionali.

Articolo 23. Protezione dei minori
1. I minori hanno diritto alla protezione ed alle cure necessarie per il loro benessere. Essi possono esprimere liberamente la propria opinione; questa viene presa in considerazione sulle questioni che li riguardano in funzione della loro età e della loro maturità
2. In tutti gli atti relativi ai minori, siano essi compiuti da autorità pubbliche o da istituzioni private, l'interesse superiore del minore deve essere considerato preminente.

Articolo 24. Inserimento dei disabili
I disabili hanno il diritto di beneficiare di misure intese a garantirne l'autonomia, l'inserimento sociale e professionale e la partecipazione alla vita della comunità

 # Articolo nuovo. Tutela ecologica
Cittadini e associazioni hanno diritto ad essere tutori di esseri viventi che non sono soggetti di diritto.

Carta dei diritti fondamentali dell'Unione Europea

 # *Emendamento della LIDA = Artt. 26, 29, 33, 35*

Capo IV. Solidarietà

Articolo 25. Diritto dei lavoratori all'informazione e alla consultazione nell'ambito dell'impresa
Ai lavoratori e ai loro rappresentanti devono essere garantite l'informazione e la consultazione in tempo utile sulle questioni che li riguardano nell'ambito dell'impresa, conformemente al diritto comunitario e alle legislazioni e prassi nazionali.

Articolo 26. Diritto di negoziazione e di azioni collettive
I datori di lavoro e i lavoratori **nonché le associazioni per i diritti dell'ambiente e degli animali** hanno il diritto di negoziare e di concludere contratti collettivi e di ricorrere, in caso di conflitti di interessi, ad azioni collettive per la difesa dei loro interessi, conformemente al diritto comunitario e alle legislazioni e prassi nazionali.

Articolo 27. Diritto di accesso ai servizi di collocamento
Ogni individuo ha il diritto di accedere ad un servizio di collocamento.

Articolo 28. Tutela in caso di licenziamento ingiustificato
Ogni lavoratore ha il diritto alla tutela contro ogni licenziamento ingiustificato.

Articolo 29. Condizioni di lavoro giuste ed eque
1. Ogni lavoratore ha diritto a condizioni di lavoro sane, sicure e dignitose.
2. Ogni lavoratore ha diritto a una limitazione della durata massima del lavoro e a periodi di riposo giornalieri e settimanali e a ferie annuali retribuite.
 # 3. L'animale che lavora ha diritto a ragionevoli limitazioni di durata e intensità di lavoro, ad un'alimentazione adeguata e al riposo.

Articolo 30. Protezione dei giovani sul luogo di lavoro
Il lavoro minorile è vietato. L'età minima per l'ammissione al lavoro non deve essere inferiore all'età in cui termina la scuola dell'obbligo, fatte salve le norme più favorevoli ai giovani ed eccettuate deroghe limitate.

I giovani ammessi al lavoro devono beneficiare di condizioni di lavoro appropriate alla loro età ed essere protetti contro lo sfruttamento economico o contro ogni lavoro che possa minarne la sicurezza, la salute, lo sviluppo fisico, mentale, morale o sociale o che possa mettere a rischio la loro istruzione.

Articolo 31. Conciliazione della vita familiare e della vita professionale
E' garantita la protezione della famiglia sul piano giuridico, economico e sociale.

Ogni individuo deve poter conciliare vita familiare e vita professionale; ciò comporta in particolare il diritto di essere tutelato contro il licenziamento in occasione di una maternità ed il diritto a un congedo di maternità retribuito e a un congedo parentale dopo la nascita o l'adozione di un figlio.

Articolo 32. Sicurezza sociale e assistenza sociale
L'Unione riconosce e rispetta il diritto di accesso alle prestazioni di sicurezza sociale e ai servizi sociali che assicurano protezione in caso di maternità, malattia, infortunio sul lavoro, dipendenzavecchiaia, oltre che in caso di perdita del posto di lavoro, secondo le modalità stabilite dal diritto comunitario e le legislazioni e prassi nazionali.
2. I lavoratori cittadini di uno Stato membro e residenti in un altro Stato membro e i loro familiari hanno diritto alle stesse prestazioni di sicurezza sociale, agli stessi benefici sociali e allo stesso accesso all'assistenza sanitaria dei cittadini dello Stato in questione.
3. L'Unione riconosce e rispetta il diritto all'assistenza sociale e all'assistenza abitativa volte a garantire un'esistenza dignitosa a chiunque non disponga di risorse sufficienti, secondo le modalità stabilite dal diritto comunitario e le legislazioni e prassi nazionali.

*Articolo 33. Protezione della salute*
Ogni individuo ha diritto a vivere in un ambiente in cui si prevengano i fattori nocivi alla salute individuale e collettiva (prevenzione primaria), alla prevenzione sanitaria (prevenzione secondaria) e ad ottenere cure mediche alle condizioni stabilite dalle legislazioni e prassi nazionali

Articolo 34. Accesso ai servizi d'interesse economico generale
L'Unione rispetta l'accesso ai servizi d'interesse economico generale quale previsto dalle legislazioni e prassi nazionali, ai sensi delle disposizioni del trattato che istituisce la Comunità europea, al fine di promuovere la coesione sociale e territoriale dell'Unione.

*Articolo 35. Tutela dell'ambiente*
In tutte le politiche dell'Unione sono garantiti **dunque** la tutela e la salvaguardia di un ambiente di vita di buona qualità ed il miglioramento della qualità dell'ambiente nel rispetto del principio dello sviluppo sostenibile **e delle diversità biologiche.**

Articolo 36. Protezione dei consumatori
Nelle politiche dell'Unione è garantito un livello elevato di protezione della salute, della sicurezza e degli interessi dei consumatori.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 September 2000

CHARTE 4468/00

CONTRIB 322

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Contribution submitted by the World Union of Catholic Women's Organisations

Please find hereafter a contribution by the World Union of Catholic Women's Organisations (WUCWO), with a letter to Mr. Roman HERZOG, the President of the Convention. [1]

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[1] This text has been submitted in French, German and English languages.

WUCWO

Union Mondiale des Organisations Féminines Catholiques
World Union of Catholic Women's Organisations
Unión Mundial de las Organizaciones Femeninas Católicas
Weltunion der Katholischen Frauenverbände

Regional President for Europe: Drs. M.-L. van Wijk-van de Ven
Burg. s'Jacoblaan 63, 1401 BP Bussum, Netherlands
Tel./Fax: +31.35.6931532 • E-Mail: wucwo@wxs.nl

UMOFC

To the President of the Convention for the Elaboration of the Charter of Fondamental Rights of the European Union,
Mr. Prof. Dr. Dr. hc.mult Roman Herzog,
ex President of the German Federal Republic
Council of the European Union
Secretariat of the Convention
175 rue de la Loi
B - 1048 Brussels

5 September, 2000

Dear Mr. Herzog,

We write to you on behalf of the representatives of Catholic women's organizations from 24 countries of Europe and the European members of the World Union of Catholic Women's Organizations (WUCWO), who have just assembled in Prague at a Conference on *"Equal opportunities for women and men"*.

We discussed with great interest the Draft *"Charter of Fundamental Rights of the European Union"*. We welcome the Charter and we are hopeful that it might serve as the basis of a better understanding of the common values and unalienable fundamental rights which should shape Europe.

Positive aspect: equal opportunities
It is highly positive that equal opportunities and the equal treatment of women and men are explicitly mentioned as fundamental rights in Article 22. Other positive aspects could also be quoted.

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Tel.: +33.1.45442765 • Fax: +33.1.42840480 • E-Mail: WUCWOPARIS@wanadoo.fr
Member of: Conference of International Catholic Organizations; Conference of Non-Governmental Organizations
Consultative Status: ECOSOC (Cat. II) • FAO • UNESCO (Cat. B) • ILO (Special List) • Council of Europe

Negative aspects
We feel it necessary, however, to draw your attention particularly to two shortcomings which need to be amended:

No reference to God
In view of the spiritual and historical roots of Europe and given the significance of the Christian faith in the development of our system of values, we regard as unacceptable that in the Preamble of the standing Draft any explicit reference to God is missing. Whatever the system of values set by the European Community, it would lack its appropriate foundation if it were not related to God. This recognition is reflected in many European Constitutions.

No support for families
Also we worried that in the existing Draft the position of the family is further weakened. The importance of the family for the development of children and for the future of our society is not appreciated and there is no explicit mention of the need of special support for families.

We earnestly ask you, Mr. Herzog, that during the subsequent work on the Charter you ensure that the discussion on the above mentioned issues is reopened and that our concerns are taken into consideration.

Yours sincerely,

On behalf of the World Union of Catholic Women's Organizations - Region Europe

(signed)
drs. Marie-Louise van Wijk-van de Ven
Regional President for WUCWO Europe

On behalf of the organizers and participants of the Conference

(signed)
Dr. Markéta Koronthályová
President of the Union of Catholic Women
in the Czech Republic

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 13 September 2000

CHARTE 4469/00

CONTRIB 323

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union
– Audition of the candidate countries on 19 June 2000

Please find hereafter the list of the representatives of the candidate countries and the statement by the **Republic of Hungary.**

Participants à l'audition des pays candidats le 19 juin 2000

République de Chypre/Republik Zypern:
M. Theophilos V. THEOPHILOU, Ambassadeur, Délégué Permanent de la République Chypre auprès de l'UE
Mme Maro CLERIDES-TSIAPPA, Senior Attorney of the Republic
M. Marios LYSIOTIS, Counsellor at the Permanent délégation of Cyprus to the EU

Malte/Malta
M. (Dr.) Michel FRENDO, membre du Parlement maltais
Mme Elena GRECH, Premier secrétaire à l'Ambassade de Malte

République de Hongrie/Republik Ungarn:
M. Béla SZOMBATI, Chef adjoint du Secrétariat d'Etat d'Intégration, Ministère des Affaires étrangères
Mme Eszter ORGOVÁN, Ministère des Affaires Etrangères
Mme Zsuzsanna MÁTRAI, Ministère des Affaires Etrangères (salle d'écoute)
Mme Éva TÖRÖK, Mission de la Hongrie auprès de CE (salle d'écoute)
m. Tamas SZÜCS, Mission de la Hongrie auprès de CE (salle d'écoute)

République de Pologne/Polnische Republik
M. Jerzy KRANZ, Undersecretary of State, Ministry of Foreign Affairs
M. Jan BARCZ, Directeur, European Union Department, Ministry of Foreign Affairs
M. Jerzy JASKIERNIA, Member of Parliament
M. Michael CZYZ, Minister Counsellor, Polish Mission to the EU
Mme Marta CYGAN, Cousellor, Polish Mission to the EU

Roumanie/Rumänien:
M. Eugen DIJMARESCU, Secrétaire d'Etat, Ministère des Affaires Etrangères
Mme Cristina TARCEA, Directeur au Ministère de la Justice
Mme Brandusa PREDESCU, Directeur au Ministère des Affaires Etrangères
M. Ion JINGA, Ministre-conseiller, Mission de la Roumanie auprès de l'UE
M. Viorel ARDELEANU, Ministre conseiller, Mission de la Roumanie auprès de l'UE
Mme Maria CIUCA-LIGOR, Troisième Secrétaire, Mission de la Roumanie auprès de l'UE

République Slovaque/Slowakische Republik
M. Daniel LIPSIC, Chef de l'office du Ministère de la Justice
Mme Jarmila BADIKOVA, Deuxième secrétaire de la mission slovaque auprès de l'UE
M. Juraj MIGAS, Ambassadeur
Mlle Andrea MATIZOVA, deuxième secrétaire.

République d'Estonie/Republik Estland
M. Meelis TIGIMÄE, Mission d'Estonie auprès de l'EU
Mme Kai KAARELSON, Ministère des Affaires Etrangères

Republique de Lettonie/Republik Lettland
M. Andris PIEBALGS, Ambassador of Latvia to EU
Mme Inese BIRZNIECE, Member of the European Affaires Committee, Parliamant of Latvia
Mme Katrina KOSA, Deputy Head, EU Policy Division, Ministry of Foreign Affairs
M. Aris VIGANTS, Second Secretary, Mission of Latvia to EU
M. Eriks FLAUMANIS, Attaché, Mission of Latvia to EU

République de Lithuanie/Republik Litauen:
M. Vilenas VADAPALAS, Director of the european Law Department under the Gouvernement of Lituania
M. Dainoras ZIUKAS, II Secdretary, Lithuanian Mission to the EC

République de Bulgarie/Republik Bulgarien:
Mme Antoinetta PRIMATAROVA, Ambassador
M. Mario MILOUCHEV, Counsellor in the Bulgarian Mission to the EC
M. Peter STEFANOV }
M. Vesselin VALKANOV } Counsellors in the Bulgarian Mission (salle d'écoute)
M. Ognyan CHAMPEOV }

République tchèque/Tschechische Republik
M. Martin PALOUS, Ministre-adjoint des Affaires Etrangères
M. Karel HEJC, Directeur, Département des droits de l'homme, Ministère Affaires Etrangères
Mlle Veronika STROMSIKOVÁ, Département des droits de l'homme, Min. Affaires Etrangères
M. Ludek STAVINOHA, Conseiller-Ambassadeur de la Mission tchèque auprès des CE
M. Michael STROUHAL, Premier Secrétaire de la Mission tchèque auprès des CE

République de Slovénie/Slowenische Republik
M. Mitja DROBNIC, State Secretary, Ministy of Foreign Affairs
M. Marcel KOPROL, Minister Plenitpotentiary, Deputy Head of Mission of Slovenia to the EU
M. Andraz ZIDAR, Counsellor, Ministy of Foreign Affairs
M. Bostjan JERMAN, Second Secretary, Mission of Slovenia to the EU

République de Turquie/Türkische Republik
M. Nihat AKYOL, Ambassadeur, Délégué permanent auprès de l'UE
M. (Prof.) Haluk KABAALIOGLU, Conseiller à la délégation turque auprès de l'UE
M. Ismail Hakki MUSA, Premier secrétaire à la délégation turque auprès de l'UE.

Statement on the Charter of Fundamental Rights by Béla Szombati, Deputy Head of the State Secretariat for Integration of the Ministry for Foreign Affairs of the Republic of Hungary

Brussels, 19 June, 2000

Mr Chairman, Ladies and Gentlemen,

Hungary welcomes this opportunity to express its opinion on the Charter of Fundamental Rights of the European Union. We would like to stress the importance of consulting the candidate countries and hope to have further opportunities to exchange views with the members of the Convention as well as the representatives of member states and other candidate countries.

Hungary, like any other democratic country based on the rule of law, pays particular attention to the assertion and protection of human rights and fundamental freedoms.

We attach great importance that efficiently functioning institutions ensure the protection of human rights and fundamental freedoms in Europe.

Being a candidate country and imminent member of the European Union, Hungary agrees to strengthening the Union's role in the protection of human rights and fundamental freedoms, therefore we support the elaboration of the EU Charter of Fundamental Rights.

Concerning the status of the Charter, Hungary is ready to accept the document in its form as elaborated and adopted by the Member States, whether as a political declaration or a legally binding document included in the Treaties.

Hungary appreciates the intention of establishing a "catalogue" of rights, including the exploring of several new notions, in the Charter. We would also appreciate the inclusion of provisions for the protection of minority rights into the document, their being part of the Copenhagen criteria for accession to the EU, demonstrating perfectly well the significance of these rights for the Union, its current and future members.

We also deem it necessary to maintain the existing and efficiently functioning systems of protection of human rights and acknowledge the 50-year jurisprudence of the Council of Europe. Our wish is to see institutions interested and active in this field in Europe to complement and assist, not to compete with each other.

To avoid any inconsistency between the European Court of Justice and the European Court of Human Rights their respective powers and competencies are to be arranged during the period of the elaboration of the Charter.

As a candidate country, Hungary follows with great interest the ongoing institutional reforms of the European Union, wishing to see the intergovernmental Conference conclude its work by the end of this year as planned. We would of course welcome a political decision in Nice on this Charter if its concept and contents are elaborated and enjoy the support of the Member States, and we would, of course, rather not see highly controversial issues over burdening the work of the Conference to an extent endangering its termination and the entry into force of its decision.

To conclude, may I once again reiterate my country's willingness to participate in consultations on the Charter.

Thank you for you attention.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 September 2000

CHARTE 4472/00

CONTRIB 324

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Association of Women of Southern Europe (AFEM), with comments regarding document CHARTE 4422/00 CONVENT 45. [1]

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[1] This text has been submitted in French and English languages.

AFEM
ASSOCIATION DES FEMMES DE L' EUROPE MÉRIDIONALE
ASSOCIATION OF WOMEN OF SOUTHERN EUROPE

COMMENTS ON THE DRAFT CHARTER (CONVENT 45)

To the President Mr. Roman HERZOG, to the Vice-Presidents Mr. Guy BRAIBANT, Mr. Gunnar JANSSON, Mr. Inigo MENDES DE VIGO and to the members of the Convention.

Mr President, Messrs Vice-Presidents, Ladies and Gentlemen,

AFEM, which has been among the first NGOs to submit to you concrete proposals[1], wishes to thank you for your efforts to guarantee fundamental rights and is glad to see some advances in CONVENT 45, particularly in respect of the prohibition of trafficking in human beings (Article 5), the extension to EU citizens of the right to asylum (Article 18), the proclamation that "everyone, man or woman, is equal before the law" (article 20), and certain social rights. However, AFEM allows itself to point out several serious insufficiencies of this draft on fundamental questions, such as equality between women and men, social rights, citizens' rights and certain general provisions. It thus considers it necessary to recall some of its proposals (the additions and modifications proposed are underlined):

PREAMBLE

- **Point 2**: « The Union is founded on the indivisible, universal principles of the dignity **and equality** of men and women, freedom, and solidarity; […]».

Explanation: ***Equality between men and women constitutes, according to the EC Treaty [Articles 2 et 3(2)], a fundamental principle, task and objective of the Community. It should thus be proclaimed by the Preamble.***

- **Point 5**: Add: « **international law and international agreements to which the Union, the Community or all the Member States are party** ».

Explanation: *This addition is necessary in order that coherence with Article 51 of the Draft be ensured.*

CHAPITER I. DIGNITY

Article 4. Prohibition of torture and inhuman or degrading treatment and punishment

« No one shall be subjected to torture or to inhuman or degrading treatment or punishment, **such as sexual mutilation, or any other kind of physical or moral violence, including domestic violence»**.

[1] See in particular CONTRIB 42, 105 and 181.

Explanation: *The treatment, which we propose to add and whose victims are mostly women and children, is a major concern of the EU*[2].

CHAPTER II. FREEDOMS

Article 14. Right to education

2. «[…] and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be guaranteed, **to the extent that the latter do not contravene the principles and rights recognised by this Charter**, in accordance with the national laws governing the exercise of such freedom and right; **in exercising this right parents shall act in the child's best interest**». (see A. BENAKI-PSAROUDA, CONTRIB 251, G. PAPADIMITRIOU CONTRIB 97).

Explanation: *The duty of parents to respect and demand the respect of fundamental rights, within the framework of the education and teaching of their children, as well as their duty to teach their children these rights are more than obvious and are among the «duties» proclaimed by the Preamble (point 6). Moreover, the guatantee of the child's best interest is required by the Convention on the Rights of the Child, which is ratified by all member States.*

Article 18. Right to asylum

Add at the end: **«This right belongs also to any person who is unable to freely dispose of him/herself or whose freedom or fundamental rights or physical or psychological or genetic integrity are threatened».**

Explanation: *Asylum cannot be refused in the above cases (which are not covered by the Geneva Convention and the Protocol of 31.1.1967) without fundamental principles and rights guaranteed by the Charter to everyone (dignity, integrity, solidarity etc.) being infringed.*

CHAPTER III. EQUALITY

Article 22. Equality between men and women. Text proposed:

1. "Substantive equality between women and men is ensured in all fields. Any direct or indirect discrimination on the ground of sex is prohibited in any field."

Explanation: Substantive equality between women and men is a fundamental principle of Community law and a fundamental human right, according to well-established ECJ case-law and Articles 2 and 3(2) EC Treaty. The latter provisions make it a **task** and an **objective** of the Union to **promote** this equality **in all fields**[3].

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2 See the impressive and well-documented speech of Commissioner Ms Anna Diamantopoulou to the International Conference "Violence against women: zero tolerence", Lisbon 4-6, May 2000. See also European Commission, Report 1998 on Equal Opportunities for Women and Men (COM(1999)106 final), Section 4, Report 1999 (COM(2000)123 final), Section 1; EU Annual Report on Human Rights (1999), point 5.12.

3 See ECJ Case 149/77 *Defrenne III* [1978] ECR 1509; Case C-270/97 *Sievers* (10.2.2000). See also EU Annual Report on Human Rights (1999), point 5.12.

A special Article is indispensable and we are glad for that. However, in spite of the fact that several members of the Convention made proposals in the above direction (see CONTRIB 90 and 188 by Mr. BRAIBANT, CONTRIB 72 by Ms KAUFMANN, CONTRIB 252 by Ms BENAKI-PSAROUDA, Amendments 436 by Mr. FAYOT, 434 by Mr. DUFF, 466 by Mr. GNAUCK, 470 by Messrs. EINEM and HOLOUBEK), ***Article 22 does not guarantee substantive equality in all fields and constitutes a regression*** *in relation to the "acquis communautaire" and even in relation to previous drafts. This provision disregards the above "acquis" and imperatives and is limited to only a part of the equality rights that Community law guarantees.*

See the Proposals relating to CONVENT 45, which were submitted by 16 women members of the Convention and by Ms A. BENAKI-PSAROUDA.

2. "*With a view to ensuring full equality in practice between women and men, temporary positive measures are indicated, in order to improve, in the first instance, the position of women*."

Explanation: *A provision on positive action is indispensable. However, Article 22(2) constitutes a regression in relation to the "acquis communautaire", and in particular in relation to:*

- *Articles 2 and 3(2) EC Treaty, which make it* ***a positive obligation*** *for the Union to "**promote**" equality between women and men* ***in all fields*** *and not only in the field of employment and work.*
- *Article 141(4) EC Treaty, in conjunction with Declaration No 28 annexed to the Treaty of Amsterdam: the 1st sentence of Article 141(4), which specifies the aim of positive action ("With a view to ensuring full equality in practice between women and men") is omitted by Article 22(2). Furthermore, Declaration No 28 specifies that positive action should «improve, in the first instance, the position of women».*

The wording we propose is in accordance with the Community "acquis" and imperatives as well as with the international obligations of member States (article 4(1) UN Convention on the Elimination of Discrimination against Women, Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights).

See aforementioned Proposal of 16 women members of the Convention, as complemented by the aforementioned Proposal of Ms BENAKI-PSAROUDA on CONVENT 45.

Article 23. Protection of children
2. "In all actions relating to children, whether taken by public authorities or private institutions **or individuals** the child's best interests must be a primary consideration."

CHAPTER IV. SOLIDARITY

Article 31. Reconciling family and professional life

The right to maternity protection should be guaranteed by a special Article as follows:

Maternity protection
"Every woman, without distinction, has a right to protection of pregnancy and maternity, including the rights to paid maternity leave, not to be refused access to employment and not to be treated unfavourably during this period and when she returns to work, as well as to be

guaranteed protection against employment conditions that may harm her and/or her child and against ailments, which have their origin in pregnancy, confinement or breast-feeding. She has also the right to family planning."

Explanation: *The 2nd paragraph of Article 31 constitutes a regression in relation to the Community and international "acquis" (Directives 76/207, 92/85, Articles 137 and 152(1) EC Treaty; ECJ case-law, Article 8 European Social Charter, Article 10 Covenant on Economic, Social and Cultural Rights). See CONTRIB 143 by Mr. G. BRAIBANT and aforementioned Proposal of Ms A. BENAKI-PSAROUDA on CONVENT 45.*

The right to maternity protection is, according to Community and international law, an autonomous right, which does not belong only to women workers and is not limited to the rights mentioned in Article 31(2). It is an expression not only of Article 137 EC Treaty (protection of workers' health and safety), but also of Article 152 EC Treaty (high level of human health protection) as well as of the principles of dignity and integrity of the person.

CHAPTER V. CITIZENSHIP

The first Article of this Chapter must proclaim that: **"The Union is based on the parity of women and men citizens".**

CHAPTER VI. GENERAL PROVISIONS

Article 49. Scope

We do not understand why the expression "***within the scope of Union law",*** which appeared in CONVENT 34 (article 46 i.f.) and was conform to the "*acquis*" of the Union, has been replaced, without any justification, by the expression "*when they are implementing Union law*", which is restrictive and not conform to this "*acquis",* will create dangerous confusion and will affect legal certainty. See the Proposal of Mr. C. EINEM on CONVENT 45.

The expression that has been replaced is constantly used by ECJ case-law. See e.g. the judgments in *ERT* and *Karlsson* mentioned in the Explanation of Article 49 (the latter judgment refers to the judgment in *Bostock*, which contains the expression that has been replaced), as well as those in *Demirel* (C-12/86), *Kremzow* (C-299/95), *Annibaldi* (C-309/96). Moreover, the Explanation of Article 49 is also in favour of the replaced expression.

Article 51. Level of protection.

We do not understand why "***Union law***", which appeared in CONVENT 27 (Article H.4) and which ensured the respect of the Community and Union "acquis" in all fields, has been omitted, without any justificaion, the more so as the expression that has been omitted appears in the Preamble (point 5) and in the Explanation of Article 51. This is a serious regression in relation to Community and Union law, which nobody must have wished. Is it a typing error?

LANGUAGE

All expressions and terms used should be gender-neutral or refer to both genders. See CONTRIB 262 by Ms KAUFMANN and the aforementioned Proposal of 16 women members of the Convention on CONVENT 45.

Mr. President, Messrs Vice-Presidents, Ladies and Gentlemen,
AFEM thanks you for your kind attention and wishes you successful completion of your task.

AFEM: 5, rue Villaret de Joyeuse - 75017 Paris. Tel: 33-1-45 72 12 03. Fax: 33-1-45 72 15 03.
E-mail: assafem@aol.com

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 September 2000

CHARTE 4474/00

CONTRIB 325

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution by the European Round Table of Charitable Social Welfare Associations (ETWelfare), with a proposal regarding Article 32 - Social Security and Social Assistance.[1]

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[1] These texts has been submitted in English language only.

European Round Table of **Charitable SOCIAL WELFARE ASSOCIATIONS E.E.I.G.**

MAASTRICHT TREATY
DECLARATION NR: 23

CO-OPERATION WITH CHARITABLE SOCIAL WELFARE ASSOCIATIONS

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Website:
www.ETWelfare.com

Proposal by the ETWelfare for amending the draft Charter of Fundamental Rights of the EU (version of 28 July 2000)

Article 32 Social Security and Social Assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection **in particular** in the event of maternity, illness, industrial accidents, dependency or old age and in the event of loss of employment, in accordance with the rules laid down by Community law and national laws and practices. **The services may also be provided by voluntary welfare organisations.**

2. [unchanged]

3. [unchanged]

Reasons :

We welcome the inclusion of social rights in the Charter. This refers especially to Article 32 and the entitlement to social security benefits and social services enshrined therein.

But there is no reason why the right to benefit from social services should be linked to certain situations alone and thus limited in scope without any need to do so. Including social rights will guarantee the future of the Charter of Fundamental Rights. For this reason the Charter must be worded in such a way that it allows for possible additions to and developments of Community law and national laws and practices in the field of social rights and access to corresponding social services. This is the only way to avoid any necessity for amending the Charter again and again.

The aforementioned request could be met by choosing an appropriate legal wording that gives entitlement to all social services and highlights the urgency in selected cases by the expression "in particular",.

This should be accompanied by the clarification that social services may be provided by charitable welfare organisations. In principle, this reflects Article 14 of the European Social Charter, which remains the most important legal source for numerous social rights in the Charter of Fundamental Rights anyway. Article 14 stipulates the right to benefit from social services and adds a clarification in the matter. The Social Charter speaks of "voluntary […] organisations" and this wording should be maintained in conjunction with the expression "welfare" so that the use of this additional word can be understood as an updated version of what the Social Charter says.

Brussels, 24 August 2000
Bernd-Otto Kuper

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 19. September 2000

CHARTE 4476/00

CONTRIB 327

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Bitte finden Sie nachstehend eine Stellungnahme der Wirtschaftskammer Österreich zu Dokument CHARTE 4422/00 CONVENT 45. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Wirtschaftskammer Österreich, 1045 Wien, PF 108

Abteilung für Bildungspolitik und Wissenschaft

Wiedner Hauptstraße 63
Postfach 108
A-1045 Wien
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An den
Rat der Europäischen Union
Generalsekretariat
zHd Herrn Jean Paul Jacqué

175, rue de la Loi
B-1048 Brüssel

Ihr Zeichen, Ihre Nachricht vom	Unser Zeichen, Sachbearbeiter	Durchwahl	Datum
	Wiss 296/00/DrRo/SM Dr Claudia Rosenmayr-Klemenz	3215	15.9.2000

Stellungnahme der Wirtschaftskammer Österreich zum Entwurf der Charta der Grundrechte der Europäischen Union (Konvent 45)

Sehr geehrte Damen und Herren!

Die Wirtschaftskammer Österreich teilt zum aktuellen Gesamtentwurf der EU-Grundrechte-Charta folgendes mit:

1. Allgemeine Problembereiche:

1.1. Die Grundrechte-Charta soll sich nach ihrem Konzept und ihren eigenen Bestimmungen über den Anwendungsbereich (Art 49) im Rahmen der gegebenen Kompetenzen der EU bewegen. Diesen Vorgaben und Zielen bleibt der Entwurf jedoch in mancherlei Bereichen nicht treu, was insbesondere die Art 2, 47 und 48 aber auch manche Formulierungen im Kapitel IV (Solidarität) zeigen.

1.2. Da die Arbeiten des Konvents davon getragen sind, rechtliche Formulierungen zu schaffen, scheint jedenfalls die Verbindlichkeit der Charta angestrebt zu werden. Nicht nur in diesem Fall stellt sich jedoch die Frage des Verhältnisses der Grundrechte-Charta zur EMRK. Die textlichen Variationen im Vergleich zur EMRK und die Tatsache, dass in manchen Bereichen (die aber im Einzelnen nicht näher bezeichnet sind) ein höherer und umfassenderer Schutz gewährleistet werden soll, müssen ungeachtet des Art 50 Abs 3 im Hinblick auf die Rechtsprechung und Rechtsentwicklung als sehr problematisch betrachtet werden.

1.3. Im Zusammenhang mit diesen genannten Erwägungen steht auch die zu befürchtende unterschiedliche Rechtsprechung zwischen EGMR und EuGH. Auch das Verhältnis dieser beiden Gerichtshöfe untereinander wird einer eingehenden Klärung bedürfen.

1.4. Klärungsbedürftig ist nicht zuletzt auch das Verhältnis der (allenfalls verbindlichen) Grundrechte-Charta zu innerstaatlichen Grundrechten und ihre Einordnung in das österreichische Rechtssystem. Nicht nur ihre Stellung im Stufenbau der Rechtsordnung, sondern auch die Frage welches innerstaatliche (Höchst-)Gericht die in der Grundrechte-Charta verbürgten Rechte zu judizieren haben wird, sind bislang nicht beantwortet.

1.5. Erhebliche Auslegungsschwierigkeiten könnten sich durch die Formulierung des allgemeinen Gesetzesvorbehalts in Art 50 ergeben. Jeweils definierte Einschränkungsvorbehalte der Grundrechte nach dem Vorbild der EMRK würden die Rechtsklarheit fördern.

1.6. Die allgemeine Problematik der Aufnahme sozialer Grundrechte in die Grundrechte-Charta kann auch durch den vorliegenden Entwurf nicht vollständig entschärft werden. Die vorliegenden Formulierungen schließen es vielmehr in manchen Bereichen nicht aus, dass der Rahmen der gegebenen Kompetenzen der EU gesprengt wird; jedenfalls haben soziale Grundrechte stets eine vorgeprägte Tendenz zum Erfordernis vermehrter hoheitlicher Tätigkeit und damit eine Einengung der gesellschaftlichen Freiheit zur Folge. Diese Bedenken werden auch durch die vorgeschlagenen Regelungen über den Anwendungsbereich der Charta (Art 49) nicht zur Gänze beseitigt und betreffen insb auch weite Bereiche des Wirtschaftslebens.

1.7. Das Fehlen von Erläuterungen im aktuellen Gesamtentwurf erschwert die Beurteilung einzelner vorliegender Grundrechte, soweit erwartet werden kann, dass zu einzelnen Detailfragen klärende Feststellungen in entsprechenden Erläuterungen getroffen werden. Es wird daher großer Wert darauf gelegt, dass iS der Aussagen beim informellen Treffen des Konvents vom 17. - 19. Juli 2000 jedenfalls Erläuterungen mit indikativem Charakter ausgearbeitet werden.

2. Zu den Bestimmungen im Einzelnen:

Zu Art 3 (Recht auf Unversehrtheit):
Das Verbot in Abs 2, "den menschlichen Körper und Teile davon zur Erzielung von Gewinnen zu nutzen" bringt weiterhin nicht zum Ausdruck, dass dieses Verbot nicht auf "Produkte" des Körpers, wie etwa Blut, bezogen ist. Zwar betonte der Vorsitzende Jansson beim informellen Treffen des Konvents am 18. und 19. Juni 2000, dass diese "Produkte" des Körpers vom Gewinnerzielungsverbot ausgenommen seien (so etwa die Blutplasma-Industrie), die zitierte Bestimmung lässt dies jedoch nicht eindeutig ableiten. Eine entsprechende Klarstellung, möglichst im Text selbst, jedenfalls aber in den Erläuterungen ist daher unbedingt notwendig.

Zu Art 15 (Berufsfreiheit) und Art 16 (Unternehmerische Freiheit):
Es wird begrüßt, dass auch die "unternehmerische Freiheit" in der Grundrechte-Charta ausdrücklich Erwähnung findet. Die knappe Formulierung ("Die unternehmerische Freiheit wird anerkannt.") scheint jedoch inhaltsleer und wenig aussagekräftig. Sollte eine nähere inhaltliche Umschreibung der "unternehmerischen Freiheit" aus Zeitgründen nicht mehr möglich sein, wird angeregt, die Art 15 und 16 zusammenzufassen. In Art 15 wird nämlich "Beruf" nicht nur als unselbständige Tätigkeit verstanden, sondern umfasst - was insbesondere Abs 2 deutlich macht - auch die selbständige Tätigkeit. Es wäre daher denkbar, Art 15 als "Berufsfreiheit und unternehmerische Freiheit" zu übertiteln und einen eigenen Abs 4 mit dem Wortlaut des vorgeschlagenen Art 16 anzufügen.

Zu Art 21 (Gleichheit und Nichtdiskriminierung):
Das Verständnis der "genetischen Merkmale" sollte in Erläuterungen dargelegt werden.

Zu Art 22 (Gleichheit von Männern und Frauen):
Die Überschrift dieses Art müsste auf ihr Verhältnis zu Art 20 nochmals überdacht werden und könnte etwa lauten "Gleichheit von Männern und Frauen in den Bereichen Arbeit und Beschäftigung".

Zu Art 25 (Recht auf Unterrichtung und Anhörung der Arbeitnehmer im Unternehmen):
Der österreichischen Arbeitsrechtssituation entsprechend wäre es angemessen, dieses Recht nur den "Vertretern der Arbeitnehmer" zukommen zu lassen. Jedenfalls muss sichergestellt sein, dass die in österreichischen Rechtsvorschriften diesbezüglich enthaltenen Regelungen (vgl insbesondere §§ 98, 108 ArbVG) der Erfüllung dieses Rechts Genüge tun.

Zu Art 26 (Recht auf Kollektivverhandlungen und Kollektivmaßnahmen):
Es muss klargestellt werden, dass nicht nur "Arbeitgeber und Arbeitnehmer" das Recht haben, Tarifverträge auszuhandeln und zu schließen, sondern dass von dieser Bestimmung auch deren Interessenvertretungen umfasst sind.
Der letzte Halbsatz dieser Bestimmung "sowie bei Interessenkonflikten kollektive Maßnahmen zur Verteidigung ihrer Interessen zu ergreifen" wird abgelehnt, sofern damit mehr als die Tätigkeiten der Betriebsversammlung gem §§ 41 ff ArbVG angesprochen ist. Gegenstand eines Grundrechts sollte nicht sein, was einen Rechtsbruch - und sei es auch einen kollektiven Rechtsbruch - darstellen könnte. Die Wirtschaftskammer Österreich lehnt die Schaffung eines europarechtlichen Streikrechts nachdrücklich ab.

Zu Art 27 (Recht auf Zugang zu einem Arbeitsvermittlungsdienst):
In den Erläuterungen müsste dargelegt werden, was unter "Zugang zu einem Arbeitsvermittlungsdienst" zu verstehen ist. Jedenfalls kann damit kein Anspruch auf Vermittlung gewährleistet werden.

Zu Art 28 (Schutz bei ungerechtfertigter Entlassung):
Dieser Bestimmung kann nur zugestimmt werden, wenn "Entlassung" iS der österreichischen innerstaatlichen Terminologie zu verstehen ist. Ein Schutz vor ungerechtfertigter "Kündigung", der umfassendere Regelungen als den geltenden § 105 ArbVG erfordern würde, darf in dieser grundrechtlichen Gewährleistung nicht enthalten sein.
Hingewiesen sei auf die unterschiedliche Textierung der Überschrift ("Schutz bei ungerechtfertigter Entlassung") und im Text ("Schutz vor ungerechtfertigter Entlassung").

Zu Art 29 (Gerechte und angemessene Arbeitsbedingungen):
Da unserem arbeitsrechtlichen Verständnis der Begriff "würdige Arbeitsbedingungen" unbekannt ist und die Aufnahme von derart unbestimmten Begriffen in die Grundrechte-Charta als sehr problematisch erachtet wird, schlagen wir vor, Abs 1 wie folgt zu formulieren: "Jeder Arbeitnehmer hat das Recht auf gesunde und sichere Arbeitsbedingungen".

Zu Art 30 (Schutz der Jugendlichen am Arbeitsplatz):
Es müsste klargestellt werden, dass das österreichische Mindestlohnsystem und das System der Lehrlingsentschädigungen dem Gebot des Schutzes "vor wirtschaftlicher Ausbeutung" Genüge tut. Andernfalls treten wir für den Entfall dieser Formulierung ein.

Zu Art 31 (Einklang von Familien- und Berufsleben):
Als problematisch wird nach wie vor der 1. Satz des Abs 2 angesehen. Die Problematik könnte dadurch entschärft werden, dass das Wort "insbesondere" im zweiten Satz der Bestimmung entfällt.

Zu Art 34 (Zugang zu Diensten von allgemeinem wirtschaftlichen Interesse):
Abgesehen davon, dass bei einem Leser der Grundrechte-Charta nicht automatisch die Kenntnis des Art 16 EGV vorausgesetzt werden kann und daher die Bedeutung dieser Bestimmung größte Un klarheiten hervorrufen dürfte, ist darauf hinzuweisen, dass Art 16 EGV selbst jedenfalls kein subjektives Recht der EG-Bürger auf Versorgung mit einem Mindeststandard an Leistungen begründet. Er wird vor allem als politische Absichtserklärung und Handlungsaufforderung mit geringen rechtlichen Auswirkungen verstanden (vgl zB Calliess/Ruffert (Hrsg.), Kommentar zu EU-Vertrag und EG-Vertrag, RZ 11 ff zu Art 16). Zumal, wie auch die Diskussion im Konvent gezeigt hat, keine gemeinsame Verfassungstradition in diesem Bereich besteht, die Mitgliedsstaaten vielmehr sehr unterschiedliche Regelungen zu diesen Diensten aufweisen und die Regelung daher erhebliche Rechtsunsicherheit und auch Eingriffe in private Wirtschaftsbereiche mit sich bringen könnte, wird die ersatzlose Streichung dieses Art angeregt.

Zu Art 40 (Recht auf Zugang zu Dokumenten):
In Erläuterungen sollte dargelegt werden, dass dieses Recht auf Zugang zu den Dokumenten des europäischen Parlaments, des Rates und der Kommission auch im Wege des Internets erfüllt werden kann.

Zu Art 49 (Anwendungsbereich):
Auf die allgemeinen Bemerkungen unter Pkt 1.1. wird hingewiesen.

Mit freundlichen Grüßen

Dr. Christoph Leitl
Präsident

Dr. Reinhold Mitterlehner
Generalsekretär-Stv.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 21 September 2000

CHARTE 4478/00

CONTRIB 329

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution by the Minority Rights Group International (MRG). [1]

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[1] This text has been submitted in English language only.

MINORITY RIGHTS GROUP INTERNATIONAL

The European Union Charter of Fundamental Rights and Ethnic, Religious and Linguistic Minorities

Minority Rights Group International (MRG) is an international non-governmental organisation, which works to secure the rights of ethnic, religious and linguistic minorities and acts as an advocate of the rights of minorities worldwide. MRG has consultative status with the UN (ECOSOC). Its International Secretariat is based in London.

With regard to the content of the draft Charter, in the version issued on 28th July 2000, MRG has a number of concerns, both of a structural nature and specifically concerning the rights of ethnic, religious and linguistic minorities.

As you will be aware, the European Parliament has stated that "the future EU Charter of Fundamental Rights must as a matter of course include binding protection of minorities and their languages" (Annual Report on Respect for Human Rights in the EU 1998-99).

MRG is concerned to see that the EUCFR does not mark a regressive step in international standards for the protection and the promotion of minority rights, standards which have in most cases positively evolved globally and at regional level in the past few years.

The following are areas in which we feel that adjustments could be made to the Draft Charter; in each case we have proposed an adapted version, in italics, of the clause in question, or an additional clause.

The rights of minorities

MRG is concerned that the Draft Charter contains virtually no reference to the rights of minorities, either individual or collective. Considering that national, ethnic or linguistic minorities in any country may be in a vulnerable position and are often subject to prejudice and discrimination, both from sectors of the public or the State, MRG feels that it is important to place *positive* obligations upon States and the Union to *actively* protect the rights of minorities. We also feel that it is important to guarantee the right of individuals to exercise rights in community, as has long been recognised within the international legal framework. We therefore propose that the following texts (adapted to suit the context of the EU) from the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (Art. 4 (2), (3) and (4), and Art. 3 (1)) be incorporated into the Draft Charter as a new article, in between Articles 22 and 23, under the heading "Protection of Minorities":

Protection of Minorities

1. The Union and Member States shall enable persons belonging to minorities to express their characteristics and to enjoy and develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

2. The Union and Member States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction through the medium of their mother tongue.
3. The Union and Member States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within the territory concerned. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society in which they live.
4. Persons belonging to minorities may exercise their rights, including those set forth in the present Charter, individually as well as in community with other members of their group, without any discrimination.

MRG also proposes that an 'affirmative action' clause, similar to that relating to gender in Article 22 of the Draft Charter of Fundamental Rights, be included with regard to minorities:

5. The principle of equal treatment shall not prevent the maintenance or adoption of measures providing for specific advantages in order to facilitate the enjoyment by persons belonging to minorities of the rights enshrined in this Charter.

Level of Protection

While welcoming the drafting of an EU Charter of Fundamental Rights in principle, MRG is concerned that the Charter, when finally agreed, will be a 'lowest common denominator' document. As such, it may set a new benchmark in international human rights protection at a *lower* level than that currently enshrined in existing instruments. For example, Article 51 of the draft mentions that the Charter cannot be used to lower existing international standards to which all member states are party. There is a danger then that Article 51 could be used to reduce the level of protection offered by, for example, the Framework Convention on National Minorities, which has not been ratified by all States, in the States which have ratified it. MRG proposes that the wording of article 51 be changed as follows, to include agreements or treaties to which member States are Parties:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by international law and standards to which the Union, the Community or Member States are Parties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The right to non-discrimination and third country nationals

The right to non-discrimination is a cornerstone in the protection of all human rights, not just minority rights. MRG therefore expresses a reservation about draft Article 21, which fails to outlaw discrimination on the grounds of nationality.

We therefore propose that Art. 21 (1) be amended as follows:
Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, language, religion or belief, political or any other opinion, nationality, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

MRG trusts that Members of the Convention drafting the European Union Charter of Fundamental Rights will take note of its concerns.

30th August 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 25 September 2000

CHARTE 4480/00

CONTRIB 331

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution by the Young European Federalists (JEF). [1]

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[1] This text has been submitted English language only.

Jeunes Européens Fédéralistes
Young European Federalists

International Organisation

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JEF position on the Draft of the Charter of Fundamental Rights of the European Union

Still A Long Way to Go on the Front of the Rights of the European Citizens

At the beginning of this year, the Young European Federalists (JEF) welcomed enthusiastically the initiative of the establishment of a Charter of the Fundamental Rights of the European citizens. JEF stressed that this initiative, aside being a crucial and novel achievement, was the first step on the way to a real European Constitution. Moreover, the establishment of the Charter could have marked for JEF the start of a new Europe focussed on the citizens and moving forward to a real Political Union.

The Convention, as a result of seven months of intensive work, made public the Draft of "Charter of Fundamental Rights of the European Union" on 28 July. **JEF welcomes this Draft of the Charter of Fundamental Rights of the European Union and stresses the following points:**

1. The Draft provides the existing jurisdiction on the fundamental rights both of the European Union's institutions and that of its Member States with a clearer orientation. It also tackles the issues of modern fundamental rights. JEF considers work done on this document highly important, especially keeping in mind intensive work over a period of seven months and modest support from the Council of the European Union. This Draft is a further evidence of the strength and effectiveness of the "new democratic method" that the Convention implemented in its distinctly open and transparent proceedings. This feature is manifest in the fact that the Convention involved the representatives of the citizens in the European Parliament and in the national parliaments, on the foot of parity with the representatives of the Member States, as well as civil society organisations.

2. **However, the Draft is still very far from being sufficient to mark the start of a new Union focussed on the European citizens and not only on the economic dimension of the Union**. This document does not yet provide the Union with a vision for the new challenges facing European democracy, economy, society and culture in the new millennium. It is not sufficient to win back the lost trust and passion of the European citizens for the European Union.

3. Moreover, it is highly regrettable that despite the extensive part dedicated to political and civil rights and citizens' rights, the Draft Charter ignores that the "European citizenship" is unfortunately condemned to remain an empty word as long as the citizens are deprived of the fundamental right of citizenship: the power to decide the Government and the policies of the Union. The historic fundamental principle that states that "**sovereignty lies in the people**" is today not implemented in the European Union. Therefore, the Union - even with the Charter - is not yet a democracy.

JEF comments also on the following important specific provisions of the Draft Charter:

1. JEF states that if the Charter were integrated in the Treaties, **it should not be granted a separate preamble**, which would mainly echo existing Treaty provisions or provisions of the Charter text itself. Instead, JEF proposes to delete the preamble completely or avoid at least superfluous provisions.
2. JEF insists on the provisions on **European political parties** to be strengthened, as these political parties can play an important role in the democratisation of the European Union and the creation of real political life on the European level.
3. JEF welcomes the important **new right of good administration**.
4. JEF stresses the importance of the idea of subsidiarity, but the meaning of this principle in the context of the Draft Charter is unambiguous.
5. JEF wants to see the **role of the European Parliament** in deciding on limitations of the Charter rights laid down more clearly than it is done in the Draft Charter.
6. JEF would like to see the **right to an alternative from a military service** to be included expressively in the Charter.

JEF also believes that the two principal problems concerning the Charter are still the question of its **legally binding character** for the European Union's institutions and the Member States, and its role in **paving a way to establishing a real European Constitution :**

1. A Charter of Fundamental Rights which does not give the European citizens the right to claim for the respect of their fundamental rights in courts will widen the gap between the citizens and the European Union and would be a betrayal of expectations raised with the establishment of the Charter. Likewise, a Charter that applies only to the institutions of the Union but not to the Member States would result in disillusion of the citizens. Therefore JEF still presses for the **inclusion of the Charter in the Treaties as integral part of the Treaties, binding for the European Union's institutions and Member States** in applying EU legislation. The Treaties should be modified so as to allow the citizens of the Union access to the European Court of Justice in the issues tackled by the Charter.

2. The Charter can unfold all its potential only if the Union is given a real Government and democratic institutions, i.e. the capacity to pursue effectively the values and goals that the Charter will solemnly enshrine. The Charter should become an important **part of a European federal Constitution**, which should be the result of the next round of reforms starting after the Nice Treaty.

JEF urges the European Council to welcome the Draft of Charter of Fundamental Rights but at the same time to decide to continue work on the Draft and launch a public debate on the issue among the European citizens.

In particular, JEF calls upon the European Council in Nice to launch a real "constituent initiative" and therefore mandate an inter-institutional Convention similar to the Fundamental Rights Convention, and not an Intergovernmental Conference, to prepare a comprehensive proposal for a European federal Constitution including a Charter of Fundamental Rights of the European citizens.

Editors' note to CHARTE 4481/1/00 REV 1, **Projet de Résolution sur la Charte de la Commission Parlementaire des Affaires Européennes du Parlement Portugais (daté 07/09/2000)**:

REV 1 identical to initial version.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 29 septembre 2000

CHARTE 4481/1/00 REV 1

CONTRIB 332

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après un projet de Résolution sur la Charte, de la Commission Parlementaire des Affaires européennes du Parlement portugais. [1]

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[1] Ce texte à été soumis en langue française seulement.

Projet de Résolution
sur la Charte des Droits Fondamentaux de l'Union Européenne
(à l'abri de l'article 5, alinéa 5 de la Loi. 20/94)

La Commission Parlementaire des Affaires Européennes, en réunion conjointe avec les Commissions des Droits, Libertés et Garanties et de la Parité, Egalité des Chances et Famille, sans porter préjudice à une appréciation ultérieure du projet final de la Charte des Droits Fondamentaux élaboré par Convention, et à l'abri de l'article 5, alinéa 5 de la Loi 20/94, présente le projet de résolution suivant:

Considérant que l'Assemblée de la République a participé activement, par le biais des deux députés qui la représentent, à la Convention chargée d'élaborer le projet de la Charte des Droits Fondamentaux de l'Union Européenne;

Considérant que, par l'initiative des Commissions des Affaires Européennes et des Droits, Libertés et Garanties, l'Assemblée de la République a promu un débat ouvert à toute la société, avec une vaste participation d'organisations économiques, sociales et culturelles, alimenté par les avis de la communauté scientifique et dont le point culminant sera une grande séance publique qui se tiendra le 21 septembre à Coimbra;

Considérant que la Convention discutera, à partir du 11 septembre, le projet qui correspond à l'accord du Praesidium en se basant sur les résultats des débats réalisés et que la décision finale sera, en principe, prise le 25 septembre de manière à permettre la présentation du Projet de Charte au Conseil Européen de Biarritz;

1. Prennent note des contributions, propositions et observations générales de leurs représentants à la Convention et approuvent le sens fondamental de cette intervention;

2. Croient que la tendance à conditionner les travaux de la Convention au calendrier de la Présidence française doit être contrariée car cela porte préjudice à un travail approfondi dans le délai établi par les Conseils Européens de Colonne et de Tempere qui ne terminera qu'à la fin de cette année.

3. Se déclarent pour une Charte des Droits Fondamentaux qui puisse être approuvée par les Gouvernements et les Parlementaires des Etats membres comme instrument d'engagement, ayant une valeur de droit originaire, dont les normes sont garanties moyennant une tutelle juridictionnelle.

4. Considèrent que la fonction principale de la Charte devra être de donner aux droits fondamentaux, découlants de l'ordre juridique communautaire dans le respect du principe de l'indivisibilité et de l'importance des droits civils et politiques et des droits économiques, sociaux et culturels - la dignité formelle et matérielle correspondante, densifiant et actualisant, par le biais de normes, la protection des droits fondamentaux consacrée à l'article 6 du Traité de l'UE, par référence aux principes généraux de droit définis à la lumière de la Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales (CEDH) et

des traditions constitutionnelles communes aux Etats membres, bien comme de la Charte Sociale Européenne et du droit international en général. Donc, la Charte renforcera la légitimité politique et morale d'une organisation singulière telle que l'Union Européenne qui, par attribution des Traités constitutifs, exerce déjà de vastes pouvoirs à caractère politique qui se répercutent sur la sphère juridique des personnes.

5. Considèrent que la Charte devrait également définir les devoirs et les responsabilités des citoyens face à l'Union Européenne.

6. Défendent que cette révision des Traités viabilise l'adhésion de l'Union à la Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales;

7. Manifestent leur engagement afin de poursuivre et d'approfondir le débat sur la Charte - expérience innovante avec des leçons importantes - appelant à l'intervention active des citoyens et de leurs organisations représentatives.

Palácio de São Bento, le 7 septembre 2000

Le Président

(Manuel dos Santos)

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 25 septembre 2000

CHARTE 4482/00

CONTRIB 333

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Congrès des Pouvoirs Locaux et Régionaux de l'Europe (CPLRE), avec une lettre à M. Roman HERZOG, le Président de la Convention. [1] [2]

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[1] Ce texte à été soumis en langue française seulement.

[2] CPLRE: F-67075 Strasbourg Cedex - Tél.: + 33 (0)3 88 41 20 00 - Fax: + 33 (0)3 88 41 27 51 / 37 47 - Internet: http://www.coe.fr/cplre

CONGRES DES POUVOIRS LOCAUX ET REGIONAUX DE L'EUROPE

Référence à rappeler : CPLRE/as

Le Président

Strasbourg, le 15 septembre 2000

Monsieur le Président,

Le Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe, organe représentant les collectivités territoriales des 41 Etats membres de l'Organisation, suit avec beaucoup d'intérêt les activités préparatoires de la Charte des Droits Fondamentaux de l'Union Européenne.

Compte tenu de cet intérêt, je souhaite soumettre à votre attention, au nom du Congrès, quelques observations concernant le projet de Charte afin que la Convention que vous présidez puisse en tenir compte dans la phase conclusive de ses travaux.

Le Congrès souhaite en particulier que la partie du projet de Charte concernant les droits politiques puisse inclure *le droit à l'autonomie locale et régionale*, *le droit de vote des citoyens concernés aux élections aux niveaux local et régional* ainsi que le principe de subsidiarité.
La prise en compte de ces droits par la future Charte a d'ailleurs déjà fait l'objet de recommandations du Comité des Régions de l'Union Européenne.

Le souhait du Congrès est fondé sur les principes contenus dans la Charte européenne de l'autonomie locale du Conseil de l'Europe, qui définit également le principe de subsidiarité. D'ailleurs, ce principe a été clairement établi dans la Recommandation 19 (1995) du Comité des Ministres du Conseil de l'Europe.

Par ailleurs, le Congrès espère qu'également les principes contenus dans d'autres importants traités adoptés au sein du Conseil de l'Europe dans ce domaine - tels que la Charte européenne des langues régionales ou minoritaires – puissent inspirer les travaux de la Convention.

Le Secrétariat Général du Conseil de l'Europe - et plus particulièrement le Secrétariat du Congrès - se tiennent à la disposition de votre Administration pour tout renseignement complémentaire à cet égard (M. Rinaldo Locatelli, Chef du Secrétariat du Congrès, tél. +33 3 88 41 22 39, fax +33 3 88 41 37 47 ou 27 51, email : rinaldo.locatelli@coe.int).

Espérant vivement que la Convention sera en mesure de tenir compte des souhaits du Congrès, je vous prie d'agréer, Monsieur le Président, l'expression de ma considération très distinguée.

Llibert CUATRECASAS

M. Roman HERZOG
Président de la Convention pour l'élaboration
De la Charte de Droits Fondamentaux de
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C/o Conseil de l'Union Européenne
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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 26 September 2000

CHARTE 4483/00

CONTRIB 334

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution by the Social, Health and Family Affairs Committee of the Council of Europe, with a letter to Mr. Roman HERZOG, the President of the Convention, and the Resolution 1210. [1]

[1] This text has been submitted in English language only.

PARLIAMENTARY ASSEMBLY
ASSEMBLÉE PARLEMENTAIRE

Social, Health and Family Affairs Committee

The Chairman

Strasbourg, 20 September 2000

Dear Chairman,

It has come to my attention that the report on the Charter of Fundamental Rights of the European Union, adopted on 7 September 2000 by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (Rapporteur: Mr Magnusson), has been circulated to members of the Convention.

The Committee on Legal Affairs and Human Rights will revise its report in the light of the discussions to take place in Brussels on Monday and Tuesday next and then present a revised version to the Parliamentary Assembly which will debate this report, but also the opinions of the Political Affairs Committee (Rapporteur: Mr Clerfayt) and of the Social, Health and Family Affairs Committee (Rapporteur: Mr Evin), on Friday 29 September 2000.

At this juncture, and without prejudice to the outcome of the debate next week, I would like to emphasise that in its Resolution 1210 on the Charter of Fundamental Rights of the European Union adopted following the debate it held in January 2000 (cf. copy enclosed), the Parliamentary Assembly invited the European Union, *inter alia*, "to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account".

I would be grateful if you would kindly bring this letter to the attention of the Convention.

Yours sincerely,

Tom Cox

Dr Roman HERZOG
Bundespräsident a. D.
Chairman of the Convention on the Charter of
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Resolution 1210 (2000)

Charter of fundamental rights of the European Union

1. The Assembly considers it necessary to make a number of observations following the decision by the EU European Council in Cologne, on 3 and 4 June, 1999 to draw up a charter of fundamental rights of the European Union, to be submitted to the European Council in December 2000.

2. At this stage, without knowing the charter's content, the Assembly wishes to bring a number of matters to the attention of those responsible for drafting this instrument, that is to say the "body" established to that end in Tampere, and may have occasion to make observations on the substance of the charter in due course.

3. The European institutions, first the Communities and then the European Union, have for some time past shown an interest in human rights, in particular the European Convention on Human Rights, and have mentioned those rights as the foundation of democracy in their successive treaties. The European Parliament and the Commission have on a number of occasions come out in favour of the Union's accession to the Convention. The Parliamentary Assembly has itself welcomed this proposal. However, it has not yet been translated into action, following an opinion by the Court of Justice in Luxembourg on whether accession to the European Convention on Human Rights was compatible with the Community treaties, in which the Court found that, as Community law stood at the time, the Community had no competence to accede.

4. At a time when it is reinforcing its powers, the Union wishes to make the importance of human rights more visible to its citizens, as stated in the decision taken in Cologne, and to bring these currently scattered rights together in a single text. The Assembly welcomes this initiative as a sign of a resolve to strengthen further the cause of human rights in Europe.

5. The Assembly nonetheless considers that, in adopting a charter of fundamental rights, the achievements of the European Convention on Human Rights and the body of its case-law established over almost fifty years, which has had far-reaching effects on the law of the member states of the Council of Europe, and therefore of the European Union, cannot be disregarded. It further draws attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights.

6. In this connection, the Assembly recalls the communication of 19 November 1990 issued by the Commission of the European Communities on accession to the European Convention on Human Rights, in which it stated that accession did not rule out the option of a set of fundamental rights specific to the Community. The opposite inference can therefore be made, namely that adoption of a charter does not rule out accession to the European Convention on Human Rights.

7. The European Union and the Council of Europe undeniably guarantee a number of rights which are not contained in the European Convention on Human Rights, particularly economic and social rights, and the charter should therefore include these rights, adding to them others now accepted as fundamental rights. The Assembly draws attention to the other instruments for the protection of

human rights on which the charter could draw, in particular the revised European Social Charter, which guarantees economic and social rights and is an instrument to which the Assembly has invited the Union to accede. It recalls that, following the Treaty of Amsterdam, a reference to the Social Charter of the Council of Europe was included in the Treaty on European Union.

8. The Assembly refers to the European Union report, prepared in February 1999 by an expert group chaired by Professor Simitis, which recommends that Article 2 to Article 13 of the European Convention on Human Rights be incorporated into Community law, together with the rights secured in the protocols to the Convention. The inclusion of rights guaranteed by the Convention would be a means of avoiding having two different sets of rights in Europe, thus creating two categories of citizens enjoying different rights.

9. The Assembly believes that there can be no discrimination in the application of fundamental rights and that everyone coming under the jurisdiction of a Council of Europe member state must enjoy the protection of such rights, as provided for in Article 1 and Article 14 of the European Convention on Human Rights.

10. In conclusion, in the light of the above, the Assembly invites the European Union:

i. to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols into the charter of fundamental rights and to do its utmost to safeguard the consistency of the protection of human rights in Europe and to avoid diverging interpretations of those rights;

ii. to pronounce itself in favour of accession to the European Convention on Human Rights of the Council of Europe and to make the necessary amendments to the Community treaties;

iii. to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account.

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1. Assembly debate on 25 January 2000 (3rd Sitting) (see Doc. 8611, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Magnusson; Doc. 8615, opinion of the Political Affairs Committee, rapporteur: Mr Clerfayt; and Doc. 8627, opinion of the Social, Health and Family Affairs Committee, rapporteur: Mr Evin).

   Text adopted by the Assembly on 25 January 2000 (3rd Sitting).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 26 September 2000

CHARTE 4484/00

CONTRIB 335

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution by the "Universität der Bundeswehr", Germany, submitted by Mr. Nikolaus SCHULTZ, regarding Article 51 in document CHARTE 4470 CONVENT 47. [1]

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[1] This text has been submitted in English language only.

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Hamburg, 20th September 2000

Essential content of rights and freedoms

Dear President of the Convention Prof. Herzog, Dear Members,

With great interest I have studied the latest draft of a Charter of Fundamental Rights of the European Union (CHARTE 4470/00), hereinafter ”the Draft Charter”, and I deem it appropriate to make one comment concerning draft Art. 51 (1).

I submit to **omit** the phrase ”**and respect the essential content of those rights and freedoms**” completely from this article.

Reasons:

In contrast to corresponding articles in earlier drafts, notably Art. 50 (1) of CHARTE 4422/00 and Art. 47 (1) (45 (1)) of CHARTE SN 3340/00, and, however, in lieu with Art. 47 cl. 2 of CHARTE 4383, Art. 47 cl. 2 of CHARTE 4316/00, Art. H.2 (2) cl. 2 of CHARTE 4235/00 and Art. Y of CHARTE 4123/1/00 REV 1 the doctrine of the prohibition of negating the ”essential content of a basic right and freedom” has found its way back into the Draft Charter.

We all know that this doctrine draws on Art. 19 (2) of the German Basic Law (hereinafter ”the GG”) with its so-called “*Wesensgehaltsgarantie*”. However, this principle has not served any fruitful purpose in the history of German constitutional jurisprudence. To my knowledge, the

German Federal Constitutional Court (hereinafter ”the BVerfG”), has struck down law or declared unconstitutional other state conduct, *inter alia*, on the grounds of a violation of Art. 19 (2) GG only on one early occasion (Decisions of the German Federal Constitutional Court [hereinafter BVerfGE] Vol. 22, p. 180, 220; *cf.* BVerfGE 2, 266, 285; 7, 377, 411; 15, 126, 144; 16, 194, 201; 30, 47, 53; 58, 300, 348; 61, 82, 113; 80, 367, 373), however, it has attempted to circumvent a definite answer and largely solved appropriate cases by applying the principle of proportionality. After all, neither the BVerfG nor German scholars have managed to give this clause substantial meaning. In case one considers the essential content of a right as what is left of the respective right after it has been limited in accordance with the principle of proportionality the provision is superfluous. If one tries to determine the essential content of each right independently one has great difficulties to do so. Both observations apply to the opinion that Art. 19 (2) GG entrenches the inviolable core of dignity of each right. The right to human dignity is already protected elsewhere in the GG (Art. (1) GG) and its actual scope of protection still gives rise to disputes. In any event, the GG allows for a deprivation of life (see Art. 2 (2) cl. 3 GG) and the affected person feels challenged to question what is left from the right to life if s/he is deprived of it. Or must one follow an objective approach? That means if a person´s life is taken away the right to life itself still serves to protect others.

The German experience also caused our South African friends to omit the doctrine of the essential content of a right in South Africa`s so-called Final Constitution, Act 108 of 1996 as amended, whereas it had been provided for in Section 33 (1) (b) of the so-called Interim Constitution, Act 200 of 1993 as amended. The South African Constitutional Assembly, the body entrusted with drafting the Republic´s Final Constitution, in full consideration of German constitutional law in general and Art. 19 (2) GG in particular, followed the approach of the South African Constitutional Court, which, from the outset, had been hesitant to apply this concept and had been troubled to canvass on a thorough evaluation (see for example[1] *S v Makwanyane and another* 1995 (6) BCLR 665 (CC) paras 132- 134 [per Chaskalson P], 167 [per Ackermann J], 175 [per Didcott J], 193, 195 [per Kentridge AJ], 283, 298 [per Mahomed J], 313 [per Mokgoro J] and 343 [per O’Regan J]); *Coetzee v Government of the Republic of South Africa and others* 1995 (10)

[1] The decisions of the Constitutional Court of South Africa are available on the homepage of the University of the Witwatersrand, Johannesburg, R.S.A., under http://www.law.wits.ac.za/lawrepal.html.

BCLR 1382 (CC) paras 20 [per Didcott J] and 47-8 [per Sachs J]; *Ferreira and Levin NO and others* 1996 (1) BCLR 1 (CC) paras 127 and 153 [per Ackermann J] and *S v Mbatha* 1996 (3) BCLR 293 (CC) para 27 [per Langa J].

Most strikingly, criticism was expressed by the late Didcott J in the decision of the *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others* 1996 (8) BCLR 1015 (CC). His legacy certainly warrants quotation (*ibid.*, at para 66): "[...] But for one problem posed by section 33(1) [of the Interim Constitution], which strikes me as wellnigh intractable ... **Negating the essential content of a constitutional right is, however, a concept that I have never understood.** Nor can I fathom how one applies it to a host of imaginable situations. Baffled as I am by both conundrums, I would have been at a loss to hold that the denial of the right in question either had or had not negated its essential content. It is therefore with a sigh of relief that I find myself free to say, as I end this judgment, that my reliance on sub-section (2) of section 33 [of the Interim Constitution] dispenses altogether with the need for me to bother about sub-section (1)."

With all due respect, for these reasons, I believe, the Convent is invited to avoid similar difficulties by omitting the abovementioned provision from Art. 51 (1) of the Draft Charter.

Thank you.

Sincerely Yours

Nikolaus Schultz[2]

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[2] The author had the privilege of working in the Chambers of Justice Ackermann at the Constitutional Court of South Africa in 1999 and followed up the debates in the Convention while being *Stagiaire* at the European Commission in the year 2000.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 26 September 2000

CHARTE 4485/00

CONTRIB 336

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find enclosed a contribution by the European Union of House Builders and Developers (UEPC), with comments on document CHARTE 4470 CONVENT 47. [1]

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[1] This text has been submitted in English and French languages.

Restoring the Past U.E.P.C. Building the Future

POSITION OF THE UEPC ON THE DRAFT EUROPEAN CHARTER ON FUNDAMENTAL RIGHTS (CHARTE 4470/00 - CONVENT 47)

The UEPC has examined the text of the draft European Charter of fundamental Rights and in particular article 17 relating to the right to ownership of property.

It wishes to draw attention to the universality of the right to ownership of property affirmed in the Universal Declaration on Human Rights proclaimed 10th December 1948 and included in article 1 of the Additional Protocol to the European Convention on Human Rights and in the national laws of the majority of the member states of the European Union.

Furthermore it wishes to draw attention to the fact that the right to ownership of property is at the basis of democratic societies and that the strong social aspirations to property ownership of the vast majority of the members of the Union are a driving force in economic activity and social progress.

The UEPC affirms that any infringement of this right and its use must be based on a legal measure and will legally require a fair and pre-paid compensation. It estimates that any abusive taxation must be regarded as an infringement of the right to ownership of property.

September 2000

UEPC (European Union of House Builders and Developers) represents more than 30,000 developers or firms involved in house building and development which are members of federations from the 15 constituent countries. Either directly or indirectly the activities of the house builders and developers affect 10% of the gross national product and of the total European employment. Together they annually build and develop around 700.000 new homes and several millions m² of offices and shopping centres.

UNION EUROPEENNE DES PROMOTEURS-CONSTRUCTEURS
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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 27 September 2000

CHARTE 4486/00

CONTRIB 337

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Association of Women of Southern Europe (AFEM), with comments regarding document CHARTE 4470/00 CONVENT 47. [1]

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[1] This text has been submitted in French and English languages.

AFEM: ASSOCIATION DES FEMMES DE L' EUROPE MÉRIDIONALE
ASSOCIATION OF WOMEN OF SOUTHERN EUROPE

COMMENTS ON CONVENT 47

To the President Mr. Roman HERZOG, to the Vice-Presidents Mr. Guy BRAIBANT, Mr. Gunnar JANSSON, Mr. Inigo MENDES DE VIGO and to the members of the Convention.

Mr President, Messrs Vice-Presidents, Ladies and Gentlemen members of the Convention,

afem welcomes and rejoices at the advances realised in CONVENT 47, and in particular rejoices to see that, at last, **gender equality is ensured in all areas** (Article 23). AFEM thanks all those who have contributed thereto, and more particularly the 16 women members of the Convention whose amendment has been adopted, the members who had opened the way to this important development, and in *particular Mr. G. Braibant, Ms S. Kaufmann, Ms A.Benaki-Psarouda, Ms C.Lalumière, Messrs. B.Fayot, A.Duff, J.Gnauck, C.Einem, M. Holoubek*, those members who have supported these amendments, as well as *Mr. J.-P. Jacqué* whose contribution to the work of the Convention is widely known and appreciated.

Explanation of Article 23: We propose the following explanation, which clarifies the nature and purpose of "positive action", for the benefit of national courts more particularly:

"This Article takes into account the Community "acquis" and imperatives relating to gender equality, and more particularly Articles 2 et 3§2 ECTreaty, which impose on the Union as a task and an objective to promote this equality in all areas. The second paragraph concerns the so-called "positive action" or "positive measures", which, according to the Treaty and ECJ case law (in particular judgment of 28 March 2000, C-158/97, Badeck), as well as according to the Convention on the elimination of discrimination against women, ratified by all member States, do not constitute discrimination or derogations to the principle of gender equality, but means which are necessary for achieving real and effective gender equality. Article 141§4 ECTreaty should also be recalled, as well as Declaration No 28 annexed to the Treaty which specifies that these measures "in the first instance aim at improving the situation of women".

Explanation of Article 3. In order to clarify the 1st paragraph and remind that sexual mutilation is practiced even on our territory, as it is shown by cases before courts (which, of course, show only the tip of the iceberg), add: "*The 1st paragraph aims at prohibiting any form of physical or mental violence, including sexual mutilation*."

Explanation of Article 14. Add: «*It is obvious that the parents' convictions are respected in so far as they do not conflict with the principles and rights recognised by this Charter and that parents should always act in the child's best interest*».

Article 24. The rights of the child.

2. "In all actions relating to children, whether taken by public authorities or private institutions **or individuals** the child's best interests must be a primary consideration."

Explanation: The necessity of this addition is so obvious that it does not need any explanation.

THE DUTY TO SAGEGUARD THE «ACQUIS COMMUNAUTAIRE»

AFEM realises the big difficulty of the task entrusted to the Convention and the necessity of compromise in order to reach a complete text. It welcomes the originality of the incorporation of social right in the draft. However, **there can be no compromise on the «acquis communautaire»,** the more so as **it is a fundamental objective of the Union «to maintain in full and build on» this acquis** (article 2 Traité UE). Examples:

Article 32. Family and professionnal life

Paragraph 2 constitutes a regression in relation to the acquis communautaire. Proposal:

«2. Men and women, without discrimination on the ground of sex, have a right to reconcile family and working life.»

Explanation: *This provision repeats the 5th Consideration of Council Resolution of 29.7. 2000 on the balanced participation of women and men of women and men in family and working life (OJ C218/5 of 31.7.2000). This right is much larger than the tights to maternity protection and parental leave, as it results from the Resolution.*

«3. Every woman has the right to pregnancy and maternity protection, including the rights not to be treated unfavourably on the ground of these situations in respect of access to and conditions of employment, to paid maternity leave, to protection against conditions of employment that may harm her and/or her child and against ailments which have their source in pregnancy, confinement or breast-feeding. She has also the right to family planning.»

Explanation: *This is an autonomous right recognised and protcted by binding norms (Directives 92/85, 76/207, articles 137 and 152§1 EC; ECJ case law). See CONTRIB 143 by Mr. Braibant and Proposal by Ms BENAKI-PSAROUDA on CONVENT 47. See also Article 8 European Social Charter, Article 10 Covenant on Economic, Social and Cultural Rights. This protection aims at guaranteeing not only reconciliation of family and working life, but also the physical and mental health of the mother and the child.*

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«4. Every father and mother has the right to parental leave following the birth or adoption of a child and to the maintenance of rights relating to employment during this leave.»

Explanation: *This is also an autonomous right, recognised and protected by binding norms (Directives 96/34, 76/207, ECJ case law).*

Article 50. Scope

Why has the standard expression of *ECJ* case law "**in the field of application"**[1] been replaced by the restrictive expression "*implementing*"?

[1] See e.g. *ERT,* mentioned in the explanation; 24.3. 1994, C-2/92, *Bostock*, [1994] ECR. I-955; 29.5.1997, C-299/95, *Kremzow*, [1995] ECR I-2629; 18.12.1997, C-309/96, *Annibaldi,* [1997] ECR I-7493.

It is an "**acquis"** that member States have the duty to **respect fundamental rights not only when they implement community or Union law, but also when they act within the field of application of this right, i.e. in the fields of Community and Union jurisdiction.** A typical example of the latter situation is to be found in the case ERT mentioned in the explanation. The expression used in CONVENT 47 will prejudice legal certainty. See also Mr. EINEM's Proposal on convent 45.

Article 52. Level of protection.

Why has **"Union law**", which appeared in CONVENT 27 (Article H.4) and which ensured the respect of the "acquis" been deleted? Point 5 of the Preamble is insufficient, since it refers only to the Treaties, omitting secondary and unwritten (case-law) Community law, which are important sources of fundamental rights. In any event, the Preamble cannot fill the gaps of the Charter provisions. This constitutes a serious regression, which cannot have been wished by anybody. Is it a typing error?

LANGUAGE. AFEM rejoices at the considerable advances in respect of the language of the draft, but wishes to recall that the use of neutral expressions or expressions referring to both genders should be ensured in all languages.

Mr. President, Messrs Vice-Presidents, Ladies and Gentlemen members of the Convention, AFEM thanks you for your attention and for your efforts to guarantee fundamental rights and wishes you successful completion of your task..

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 29 September 2000

CHARTE 4488/00

CONTRIB 338

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the opinion of the Economic and Social Committee, "Towards an EU Charter of Fundamental Rights". [1]

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[1] This text has been submitted in English, German and French languages.

SOC/013

"Towards an EU Charter of Fundamental Rights"

Brussels, 20 September 2000

OPINION
of the
Economic and Social Committee
on
"Towards an EU Charter of Fundamental Rights"

On 25 February 1999 the Economic and Social Committee, acting under Rule 23(3) of its Rules of Procedure, decided to draw up an opinion on:

"Towards an EU Charter of Fundamental Rights".

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 25 July 2000. The rapporteur was **Mrs Sigmund** and the co-rapporteur was **Mr Briesch**.

At its 375th plenary session held on 20 and 21 September 2000 (meeting of 20 September), the Economic and Social Committee adopted the following opinion by 122 votes to 19, with nine abstentions.

1. Introduction

At the European Council held in Cologne on 3 and 4 June 1999, it was decided to draw up an **EU Charter of Fundamental Rights**. In its conclusions, the Council justified this by the need *"to make their overriding importance and relevance more visible to the Union's citizens".*

The European Council of Cologne felt that *"this Charter should*

1. *contain the fundamental rights and freedoms, as well as the basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms"* and

2. *"... also include the fundamental rights that pertain only to the Union's citizens"*

3. and finally that *"account should ... 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 ..., insofar as they do not merely establish objectives for action by the Union."*

The European Council also decided that this Charter should be drawn up by *"a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments".*

1.2 The European Council in Tampere held on 15 and 16 October 1999 laid down the definitive composition of the body and its working methods. The European Council called for the working methods to be based on the principle of consensus, authorising the chairman to forward the draft to the European Council only on condition that the *"draft Charter ... can eventually be subscribed to by all the parties".*

1.3 Both the German and the Finnish presidencies emphasised repeatedly that this Charter of Fundamental Rights should also be an instrument that enables Europe's citizens to be more clearly involved in Europe and makes them more aware of their rights. The Committee naturally

welcomes the practice of civil society organisations being consulted by the drafting body, which has now been named a Convention. As the European institution whose members are called upon in the Treaty to represent the interests of Europe's citizens, the Committee thinks it should have been involved to a greater extent[1].

1.4 The **tasks of the Convention** are defined by the mandates of Cologne and Tampere, four points being of particular importance:

- The Convention is not an intergovernmental conference within the meaning of the EU Treaty.
- This means that it is not authorised to change the remit of the European Union.
- Its task is to draw up a draft Charter of Fundamental Rights within the terms of reference of the Union. When drawing up the Charter it must therefore bear in mind that it will be applied both in the framework of the European Union Treaty and in the framework of the Treaties establishing the European Communities. In other words, the Charter must also apply to Title V (CFSP) and Title VI (JHA) of the European Union Treaty. The ESC sees this comprehensive application of the Charter as very important because not only the EC Treaty affects citizens' interests with regard to their freedom and equality.
- The Charter of Fundamental Rights is thus addressed to the institutions of the EU and not to the Member States in the context of their own powers. But the Member States are of course bound by the Charter when they apply, implement or transpose Community law.

1.5 **Whether or not the Charter should be legally binding** was not made clear by the European Council in Cologne. The conclusions state only that it *"will propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights.* ***It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties****."*

1.5.1 The chairman of the Convention, **Roman Herzog**, made it clear that the Convention would draw up the Charter on the assumption that it will be legally binding. Since the Spinelli draft, the European Parliament advocated such a binding document and it was even more explicit on this point in its resolution of 16 March where it said that its endorsement of the Charter would be dependent on such a charter being legally binding.

1.6 As far as **the content of the Charter of Fundamental Rights** is concerned, the European Council in Cologne set only minimum standards, though it went explicitly beyond the European Convention on Human Rights (ECHR) in its mandate. In his introductory address to the Convention, **Roman Herzog** said that it was time to stipulate that the obligations of the European Union towards its citizens must not be any less rigorous than those recognised by the Member States under their own constitutional law.

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[1] Cf. Article 257 of the EC Treaty: "The Committee shall consist of representatives of the various categories of economic and social activity, in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and representatives of the general public."

1.6.1 The "breakdown" of the list of fundamental rights to be drawn up by the Convention is based on the consensus on three key individual rights Europe-wide (human dignity, self-determination and equality) on the one hand and on the principle of indivisibility of fundamental rights on the other. The draft Charter is divided into:

- dignity
- freedoms
- equality
- solidarity
- citizenship
- justice
- general provisions.[1]

2. General comments

2.1 The process of European integration was launched by **Robert Schuman** 50 years ago as a peace initiative; at first this naturally spawned mainly economic measures, but later a social dimension developed. The European Union is also described today as *"an area of freedom, security and justice",* centred on people or citizens. In this connection, the drawing-up of an EU Charter of Fundamental Rights is a milestone in the European integration process. It formalises the pact founding an original and new political entity, and is also an expression of an identity based on free will, cooperation, democracy and non-violence. Individuals with the same rights and duties will develop a feeling of belonging, a common identity. If, moreover, civil society is also involved as much as possible in drafting such a catalogue of rights, this contact with grassroots opinion will also help to ensure that individuals do not perceive such legal provisions as being imposed from above, with penalties applied for non-compliance, but that they accept the need to respect them as a personal duty.

2.2 A Charter of Fundamental Rights based on ethics, moral standards and solidarity does not merely codify rights and duties, it also represents a common set of values. It thus supports the European Union as it moves from being a "Community of law" to a "Community of values" within which a European identity also has a chance to develop. In this way, the Charter can help ensure that Union citizenship is no longer perceived only in an abstract sense as the sum of all national citizenships, but is felt to provide practical "added value". The Charter also implies that every citizen should exercise his or her rights in a spirit of responsibility within the framework of organised civil society based on dialogue and mutual respect for rights and freedoms.

3. Specific comments

3.1 Content of the Charter

As a matter of principle, the Committee considers that civil and political rights, on the one hand, and fundamental social, economic and cultural rights, on the other hand, cannot be dealt with in isolation from each other. The common understanding in Europe is that fundamental rights

[1] Convent 47, CHARTE 4470/00 of 14/9/2000

are indivisible, related and interdependent; they may be the right to be defended, the right to be protected or entitlements. The Committee believes at all events that in a modern charter of fundamental rights it would be inconceivable to omit social, economic and cultural rights and that this would contradict the Cologne mandate.

3.1.2 However, the brief of the Convention for drawing up the Charter precludes any altering of the current division of responsibilities between the European Communities or the Union and the Member States.

3.1.3 For another thing, the affirmation of fundamental social rights in the EU Charter of Fundamental Rights does not prejudge the identity of the issuer of the act - whether European Union institution or State authority - against which claims for enjoyment of a right or respect of a principle may be lodged. The inclusion of social rights and principles in the European Union Charter of Fundamental Rights - in accordance with the Cologne mandate - does not in any way invest the European Community or the European Union with responsibilities which it did not already hold. It simply signifies that acts issued by the EU institutions or State acts adopted within the scope of Community law must :

– respect the social rights set out in the Charter;

– not constitute measures which would lessen the degree to which principles have already been put into effect;

– and in particular respect the requirement for non-discrimination, particularly with regard to the implementation of social rights.

3.1.4 The Committee warns that people's expectations will be disappointed if they are given a Charter of Fundamental Rights that cannot be enforced and which they would therefore have to see as pure rhetoric. However, the declaration that a right is justiciable, under the conditions suggested above, does not in any way presuppose at which level - Community or State - the right to benefit from that right may be invoked by the persons who enjoy it. In particular, where the Community and the Member States have rival powers, these powers must be exercised with due regard for the principle of subsidiarity (Article 5 TEC), without the adoption of the EU Charter of Fundamental Rights creating an exception to this principle.

3.2 **Legal nature of the Charter of Fundamental Rights:** such a charter can only be fully effective if it is clearly formulated and if procedures exist for applying it. The Committee believes that for political and legal reasons the Charter should be incorporated into the EU Treaty subject to the following conditions:

– in accordance with the Cologne mandate, the Charter may not change the Community's remit;

– the distinction must be maintained between directly applicable rights and rights that can be invoked by individuals, on the one hand, and programmatic rights on the other, in order to preserve the legal nature of existing competences[1];

- it must therefore be made clear that certain principles require the adoption of implementing measures.

It will depend very much on the final content of the Charter, which must be consistent with the Cologne mandate, the Charter or parts of it, and if so which parts, are to be incorporated into the Treaty. The Charter must be more than a solemn declaration; it must constitute a genuine political, social and civic commitment.

3.2.1 The announcement of an EU Charter of Fundamental Rights raised expectations and hopes; these must not be disappointed. People in Europe will better understand and accept a "Citizens' Europe" if they know that, within that Europe, they have enforceable rights, and that duties also exist with which they have to comply. Apart from its legal significance, therefore, the Charter is also highly relevant in political and cultural terms.

3.2.2 A binding Charter of Fundamental Rights adds a further dimension to the European Union as "an area of freedom, security and justice" in that the Union is formally committed to a clear "Community of values". Such a formal commitment is all the more significant against the backdrop of forthcoming enlargement and in the context of globalisation.

3.3.3 **Application of the Charter**

3.3.1 The Committee sees another possibility as far as applying the Charter is concerned, namely that those fundamental rights which the Convention agrees can be integrated become legally binding as part of the EU Treaty (cf. Article 6). The Council could then take measures under Article 7 against a Member State that seriously violates the principles listed in Article 6 (1). A ruling by the European Court of Justice would not be required in such cases. A binding procedural provision in the form of a monitoring system could be established to integrate the remaining rights. Such an approach is not incompatible with the principle of indivisibility of fundamental rights, since the Committee believes that the process of defining and revising fundamental rights at European level must anyway remain open-ended in order to allow for relevant developments. This applies for example to "new" fundamental rights (in gene technology, bioethics, data protection, etc.), which in some cases are already covered in the EU Treaties (e.g. right to the protection of personal data).

3.3.2 The Committee therefore feels it would be vital to provide for an open-ended revision procedure for the future processing of the catalogue of fundamental rights. This procedure would

[1] The Committee refers here to its opinion of 22/2/1989, in which it notes: "In the Committee's view, the instruments and procedures specified in the Treaty are the ones to be deployed to ensure that basic social rights are protected under the Member States' legal systems ... ."

exist alongside the integration procedure ("monitoring" system), as described in point 3.3.1. It would make sense to give the Convention the task of mapping out such an integration and revision procedure for submission to the Council. The revision procedure could be also provide for evaluation programmes to be carried out at specific intervals.

3.3.3 Since it has not yet been finally decided how the Charter of Fundamental Rights is to be applied, the Committee cannot at the moment give its views on the issue of effective legal protection. This would involve discussion of any need for additional legal redress options (e.g. legal redress in respect of fundamental rights, action in the general interest, class action, and the right to express an opinion). The Committee reserves the right to present an additional opinion on this matter at the appropriate point.

3.4 **The Charter and civil society organisations**

3.4.1 The development of fundamental rights reflects changing social, economic and scientific trends. Hence, the Committee also expressly welcomes the fact that the Convention proposal includes so-called "new" fundamental rights and goes beyond the wording of the ECHR, which would not have been the case had the Union simply signed the ECHR, as has been proposed on many occasions. The European Court of Justice has also pointed out that ratifying the ECHR would require revision of the EU Treaty.

3.4.2 In this context and with reference to the Cologne mandate, the Committee particularly welcomes the fact that the Convention has included in the Charter the concept of human dignity, which is not yet in the ECHR. In so doing it is not just following the complex approach adopted in the UN Universal Declaration of Human Rights, but is also giving a signal that the Committee considers to be imperative, i.e. that as well as having a legal function the Charter should be provide a shared scale of values for the EU.

3.4.3 For the emergence of civil society structures in particular it is fundamentally important that as well as establishing joint objectives, basic existing values are recognised as worthy of protection and adoption in a spirit of dialogue and responsibility by civil society players.

3.4.4 The Committee believes that the existing Charter concept therefore presents a highly appropriate framework, in terms of its legal philosophy and legal order, for the development of civil society organisations.

3.4.5 In 1996, the Comité des Sages report entitled *For a Europe of civic and social rights*[1] stressed that a Europe close to its citizens required that a "wide spectrum" of expertise (political, economic and social) to be involved in the European Union project .

The fact that the fifth paragraph of the preamble of Convent 47 refers to the Social Charters adopted by the Community and the Council of Europe as well as the ECHR is to be welcomed in this context.

[1] European Commission, DG V, ISBN 92-827-7697-2

3.4.6 Representatives of civil society organisations were involved on a very informal, ad hoc basis in drawing up the Charter of Fundamental Rights. Their opinions - some of which were extremely constructive - lacked any coordination, with the result that both clarity and potential synergy suffered. In the interests of developing a European "model of democracy", civil society organisations must be included in this process - both formally and at an institutional level. It must be emphasised that the basic democratic challenge is to reconcile unity and diversity. Among the institutions, the ESC represents civil society organisations at European level. Its members are in direct and constant touch with civil society organisations[1], and are thus able to provide added value by bringing their expertise to bear in a way that is wholly consistent with participatory democracy. The Committee comprises representatives of the various economic and social interest groups in civil society and should therefore be formally accorded advisory status in line with its remit - in such an integration and revision procedure.

Brussels, 20 September 2000

The President of the Economic and Social Committee	The Secretary-General of the Economic and Social Committee
Beatrice Rangoni Machiavelli	**Patrick Venturini**

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N.B.: Appendix overleaf.

[1] see the ESC Opinion of 22 September 1999, CES 851/99

APPENDIX

The paper currently under discussion in the Convention has the following titles[1]:

Article 1: Human dignity
Article 2: Right to life
Article 3: Right to the integrity of the person
Article 4: Prohibition of torture and inhuman or degrading treatment and punishment
Article 5: Prohibition of slavery and forced labour
Article 6: Right to liberty and security
Article 7: Respect for private and family life
Article 8: Protection of personal data
Article 9: Right to marry and right to found a family
Article 10: Freedom of thought, conscience and religion
Article 11: Freedom of expression and information
Article 12: Freedom of assembly and association
Article 13: Freedom of the arts and sciences
Article 14: Right to education
Article 15: Freedom to choose an occupation
Article 16: Freedom to conduct a business
Article 17: Right to property
Article 18: Right to asylum
Article 19: Protection in the event of removal, expulsion, or extradition
Article 20: Equality before the law
Article 21: Non-discrimination
Article 22: Cultural, religious and linguistic diversity
Article 23: Equality between men and women
Article 24: The rights of the child
Article 25: Integration of persons with disabilities
Article 26: Workers' right to information and consultation within the undertaking
Article 27: Rights of collective bargaining and action
Article 28: Right of access to placement services
Article 29: Protection in the event of unjustified dismissal
Article 30: Fair and just working conditions
Article 31: Prohibition of child labour and protection of young people at work
Article 32: Family and professional life
Article 33: Social security and social assistance
Article 34: Health care
Article 35: Access to services of general economic interest
Article 36: Environmental protection
Article 37: Consumer protection
Article 38: Right to vote and to stand as a candidate in elections to the European Parliament
Article 39: Right to vote and to stand as a candidate at municipal elections
Article 40: Right to good administration

[1] Convent 47 op.cit.

Article 41: Right of access to documents
Article 42: Ombudsman
Article 43: Right to petition
Article 44: Freedom of movement and of residence
Article 45: Diplomatic and consular protection
Article 46: Right to effective remedy and to a fair trial
Article 47: Presumption of innocence and right of defence
Article 48: Principles of legality and proportionality of criminal offences and penalties
Article 49: Right not to be tried or punished twice in criminal proceedings for the same criminal offence
Article 50: Scope
Article 51: Scope of guaranteed rights
Article 52: Level of protection
Article 53: Prohibition of abuse of rights

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 29 September 2000

CHARTE 4489/00

CONTRIB 339

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Federation of German Industries (BDI) and the Confederation of German Employers' Associations (BDA). [1]

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[1] This text has been submitted in English and German languages.

Bundesverband der Deutschen Industrie (BDI)
Federation of German Industries

Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA)
Confederation of German Employers´ Associations

Draft Charter of Fundamental Rights of the European Union

Position of German business and industry

In their first position (March 2000), the German business community welcomed the EU Charter of fundamental rights as a recognition of a shared European system of values and as a step towards a Europe of Citizens.

After decades of the European Court of Justice guarantees a standard of protection which does not take second place behind the provisions of the German Constitution ('Grundgesetz'). Nevertheless, the German business community unreservedly supports the goal of further strengthening the idea of integration in the European Union through greater transparency and a clear commitment among the European bodies to an EU-wide standard of fundamental rights.

The drafting of the Charter of fundamental rights is one of the most important legislative initiatives for many years. The Charter will be one of the cornerstones of the European Union. In addition, even as a mere declaration by the Member States, it will be binding in law because, as a shared view, it will be used by the European Court of Justice as a yardstick for its future jurisprudence.

For that reason, the draft Charter should not be assessed against the same criteria that apply for European secondary law. Rather, great care must be taken to ensure that, with all the necessary openness of a constitutional text and expression of the will of the creators of the Charter, it won't be possible to reach interpretations which could substantially alter the traditional balance of freedoms and civic obligations.

A. General comments

1. Beneficiaries of the Charter

Point 7 of the preamble states that each "person" is guaranteed the rights and freedoms set out thereafter. This raises the question about the beneficiaries of the Charter.

In the version currently available, the draft differentiates at various points between "citizens of the Union", "nationals of third countries" and "persons" (e.g. in article 15). All the articles should be checked again carefully to establish who exactly should benefit from the protection of the Charter. Similarly, point 7 of the preamble should be made more explicit.

It still needs to be clarified whether legal persons also enjoy the protection of the Charter. Only article 40 explicitly refers to legal persons as beneficiaries of the Charter. Yet, this must also apply for those fundamental rights which are applicable to legal persons by virtue of their substance. An example of this is freedom of expression in article 11.

The same applies for article 13, freedom of research. Companies which carry out research must be able to fall back on this fundamental right. Lastly, at least the right to property (article 17) and the right to good administration should also be mentioned. Appeals to the bodies and institutions of the European Union are made not only by natural persons but also precisely by legal persons, so that they must also be eligible for the protection of fundamental rights.

Hence, the beneficiaries of the Charter should be expressly defined in the preamble.

2. Limitations

Most fundamental rights are not guaranteed without limitation in the constitutions of the Member States. The Charter also makes provisions for limitations: first a general limitation applicable to all fundamental rights in article 50 and second a partial limitation for individual fundamental rights, as for instance in article 9 (right to marry) and in article 17 (right to property). In addition, article 51 sets a lower limit: fundamental rights may not be restricted to such an extent that they fall below the level of protection provided by the European Convention of Human Rights and Fundamental Freedoms (ECHR).

The German Constitution maintains that at least one fundamental right – human dignity – may not in any way be restricted by state intervention, a fundamental right which also underlies the immutability guarantee of article 79.3 of the German Constitution.

However, article 50 of the present draft creates the possibility of allowing the protection of the Charter to be subordinated to "objectives of general interest" or "legitimate interests in a democratic society". In practice, that means that fundamental rights are in the hands of the state, which determines what these objectives and interests will be. Such a sweeping right to interfere, which has no counterpart in either the German constitution or in ECHR, is a striking weakness of the Charter which may also be unhelpful for gaining citizen acceptance.

3. Extension of competences

German business and industry welcomes the fact that the Charter neither establishes "any new power or task for the Community or the Union" nor modifies "powers and tasks defined by the Treaties", as explicitly stipulated in article 49. According to the draft, the principle of subsidiarity should by all means be taken into account in the application of the Charter. Compliance with this principle must be a decisive element for policy-making and application of law in a European Union which in future could be enlarged to include up to thirty Member States.

However, the present draft also makes provision for rights which could be used to justify claims which go far beyond the present competences of the EU/EC. These include the fundamental right of collective bargaining and collective action formulated in article 26. Article 137 of the EC Treaty excludes legislative competence for the EU in these areas. The danger cannot be ruled out that, with the Charter, even more competences will ultimately be transferred to the EU with the inclusion of a series of other vaguely worded articles. Hence, the present draft is not consistent with the provisions of article 49.

4. Horizontal effects

Also unclear is the question of horizontal effects (e.g. applicability between employers and employees) in a whole series of articles in the present draft. Although, according to article 49, the Charter is binding only upon the institutions and bodies of the EU and the Member States when applying Community law, it cannot be ruled out that the European Court of Justice, as an EU institution, may also apply the Charter to private legal relationships, e.g. work relationships. Clarity is urgently needed on this point.

B. Individual articles

By taking over individual articles of ECHR word for word, the authors of the Charter have failed to create a simplified Charter of fundamental rights which is comprehensible to every EU citizen. In many cases, the wording could be more precise and easier to understand.

The structure and balance of rights contained in the Charter should also be re-examined. Furthermore, some of the provisions at the end of the Charter ought to be at the beginning because of their fundamental importance. These include the whole of chapter V, citizenship. Citizenship should be placed before the rights linked to the theme of work (chapter IV, solidarity) since EU citizens define themselves as such in the first place through their citizenship rights.

It is equally important to place EU citizens' freedom of movement and residence (article 43) earlier in the text, and mention it in chapter II – freedoms – in order to emphasise the importance of this right.

Article 3 – Right to the integrity of the person

Article 3.2 third indent places an unrestricted prohibition on "making the human body and its parts a source of financial gain". Under this expansive wording, the marketing of many pharmaceuticals and also the patenting of human biological material could be affected. Thus, this wording goes well beyond the Bioethics Convention and the Biotechnology Patent Directive.

The note on article 3 explains that the prohibition is included in the Convention on Human Rights and Biomedicine and that the Charter does not wish to depart from this provision. Article 21 of the Convention on Human Rights and Biomedicine specifies that only the human body and its parts "as such" may not be used as a source of financial gain. Article 3 should not go further than this provision.

Article 8 – Protection of personal data

Every person should have the right to the protection of personal data concerning him. These data may only be "processed" under certain conditions. The type of data processing referred to here remains open. This cannot cover all types of data processing. In that case, even such things as record cards or private deeds would be included. This can only refer to electronic data processing, as is the case in the EU Directive on Data Protection. This should be made clear. In addition, with a view to self-determination regarding information, the fundamental right should be extended to make it possible to have personal data deleted. The level at which the "independent authority" is to be located also needs to be clarified.

Article 16 – Freedom to conduct a business

Business and industry appreciates the fact that freedom to conduct a business is included in the Charter as a separate right and does not merely have to be deduced from other fundamental rights. However, the wording raises doubts as to whether a fundamental right is genuinely guaranteed here. Rather, all that is recognised is the freedom to conduct a business, as stated in the title, without any further elaboration. However, this is a long way from being a positive guarantee of this freedom, which business and industry expressly endorses. This needs improvement.

Chapter IV – Solidarity: general comments

Social fundamental rights, too, should primarily provide the right of protection, and under no circum-stances the entitlement of an individual to a specific social benefit.

In this context, one area that is in particular need of clarification is the possibility of individual fundamental rights being applicable between private parties (horizontal effect). On the basis of the draft as it currently stands, it cannot be ruled out that the European Court of Justice will also apply the Charter to private legal relationships, e.g. work relationships, even though this should not be possible by virtue of article 49.

Some articles comprise provisions or rights similar to goals and principles of the state which, while generally acknowledged, should not be given this status since this will contribute to a downgrading of the notion of fundamental rights (e.g. article 32 – social security and social assistance and article 33 – health care). Whether and how the bodies of the European Union and the Member States can live up to these guarantees depends on individual economic performance. Not every social achievement of the EU Member States can or should be raised to the quality of an inalienable right which can continue to exist independently of the economic performance of the Member States.

Furthermore, chapter IV contains rights for whose application the EU has no competence. This is in contradiction with article 49 which rules out any extension of competences. The impression cannot be avoided that extensions of competences could be introduced through the back door here. An example is article 26 which contains the right of collective bargaining and action also at EU level. EU legislative competence in this area is ruled out in article 137 of the EC Treaty.

Lastly, the Charter contains rights which, although generally accepted as political goals, are wrongly given the status of fundamental rights. This results in inflation and subsequent devaluation of the concept of fundamental rights (e.g. article 24 – integration of persons with disabilities, article 25 – workers' rights to information and consultation within the undertaking, article 26 – right of collective action and bargaining, article 28 – protection in the event of unjustified dismissal, article 29 – fair and just working conditions).

In addition, the formulation of such general principles as fundamental rights means that the differences between the legislation of individual Member States (e.g. article 15 – freedom to choose an occupation/working conditions for nationals of third countries) are not taken into account. If the Convention were to insist on including this article, the Charter would have to be supplemented with an explicit reference to the applicability of national legislation.

Article 21 – Equality and non-discrimination

Discrimination is unequal treatment which is not objectively justified. It is right that it should be prohibited. Alongside other types of discrimination set out in article 21 is unequal treatment on the ground of "property" which is open to a wide range of interpretations. In the event of article 21 becoming applicable to relations between third parties, its application could be extended to include private legal relationships (horizontal effect). The scope of this passage should be carefully rethought. On this point, article 14 of ECHR is more precise since it states that the rights are guaranteed, *inter alia*, without distinction of property, which is right and self-evident.

Article 25 – Workers' right to information and consultation within the undertaking

Article 25 postulates a fundamental right to worker information and consultation. This right is generally accepted in EU Member States and is also enshrined in article 137.2 of the EC Treaty. However, aside from the question of whether a classical fundamental right can be derived from this aspect, the wording chosen is too far-reaching and opens up the way for rights to have secondary effects.

Article 28 – Protection in the event of unjustified dismissal

This article completely fails to take account of different national protection mechanisms in civil and labour law. Its application could lead to the introduction of arrangements regardless of the size of the undertaking. This would place start-ups and smaller businesses in particular at a disadvantage. Accordingly, article 28 should be worded as follows: "Every worker has the right to protection against unjustified dismissal, in accordance with the applicable national law".

Article 29 – Fair and just working conditions

Article 29 stipulates the right of every worker "to working conditions which respect his or her health, safety and dignity". The question of how the concept of "dignity" is to be understood at this point remains open and is an invitation to a wide range of interpretations. Since the Charter early on places particular emphasis on protection of human dignity, it is sufficient to take the wording that has already been discussed: "Every worker has the right to working conditions which respect his or her health and safety".

Article 34 – Access to services of general economic interest

Against the background of the recent debate on services of general economic interest, the provisions of article 34 are also questionable. This article, which expressly guarantees "access to services of general interest" in the form of a fundamental right, could undermine efforts to achieve greater liberalisation of service and infrastructure markets. There is no definition of the services to which this fundamental right refers, nor is any account taken of the consumer's justified interest in receiving these services as cost-effectively as possible through good economic performance and competition. Article 34 is clearly a political statement and not a classical fundamental right for citizens of the EU.

Article 49 – Scope

According to article 49, the Charter - with due regard for the principle of subsidiarity - is addressed exclusively to the institutions and bodies of the EU and to the Member States only when they are engaged in implementing Community law. Business and industry expressly welcomes this objective. Experience in the past has shown that the concept of subsidiarity can be implemented only with difficulty even in article 5 of the EC Treaty. Even greater attention will have to be paid to this concept if the applicability of national or European catalogues of fundamental rights is involved.

Hence, the Charter of fundamental rights should be seen as an opportunity to define and delimit the concept of subsidiarity in such a precise manner that it can be a guideline for the actions of European bodies. The present draft does not achieve this.

Article 52 – Prohibition of abuse of rights

Article 52 does not help to make the Charter transparent for and comprehensible to the citizen. When can it be possible to interpret anything in the Charter as implying the right to destroy rights of freedom through deliberate acts? It cannot be the case that this article can only be understood by reference to material underlying article 17 ECHR if the aim of moving closer to the citizen and transparency is to be achieved.

Berlin, August 2000

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Brussels, 29 September 2000

CHARTE 4490/00

CONTRIB 340

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Church and Society Commission of the Conference of European Churches, with a letter to Mr. Roman HERZOG, the President of the Convention. [1]

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[1] This text has been submitted in English language only.

CONFERENCE OF EUROPEAN CHURCHES

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Ref: DIR/3.3.2

25 September 2000

Mr. Roman Herzog,
President,
Convention on Human Rights,
Council Secretariat,
rue de la Loi 175,
1048 Bruxelles

Dear Mr. President,

Various working groups of the Church and Society Commission of the Conference of European Churches have examined the latest drafts of the EU Charter on Fundamental Rights and, although our Executive Committee has not yet had the chance to examine the results of these discussions, I am sending you the following comments as the Convention is about to hold what will probably be its last meeting before the European Council meets in Biarritz next month. This letter follows on from the statement which I forwarded to you on 18 May 2000 and which appears on the Convention web site. The references to specific articles relate to the numbering in the document Charter 47.

I would first of all like to congratulate the Convention on the achievement of a considerable amount of work which will, I am sure, be of great importance to people in Member States of the European Union. It is particularly important that a text exists which brings together a range of rights relating to politics , economics, the social and environmental and cultural dimensions in one document. It is an important expression of the search to express common values on which the process of European integration is built and will continue.

May I also say that participants in our working groups welcomed the various references to religion which appear in the current text both the important reference in the Preamble to the Acultural, humanist and religious inheritance@ which give inspiration to the Union and the more specific references to freedom of religion (article 10), education in accordance with the religious convictions of parents (article 14) and respect for religious diversity (article 22). I would, however, want to make some more specific comments on some of these and some other articles later.

It seems important that the Convention has taken up the idea of a preamble, which our Commission supported in its submission of May 2000. It gives scope for a wider public discussion on the objectives of European integration in coming years and will be a valuable aid to that debate which is necessary if people are to identify with the European integration process. I believe that many of us would also, however, have welcomed the use of the word Apeace@ in among the values mentioned in the Preamble.

The Preamble is also helpful in the technical way in which it gives prominence to the horizontal clauses of the Charter at an early stage. Given though that the Charter comprises a variety of rights, it might be useful to a wider understanding, especially in European countries beyond the European Union, if the Preamble made explicit reference to defining the civil rights of citizens of the European Union so that it is clear and explicit that this is not an attempt to provide a different standard of fundamental rights in one part of Europe.

Turning to specific articles, I would want to say that while it is good that the main wording of article 9 of the European Convention on Human Rights on freedom of thought, conscience and religion has been taken up in preference to the truncated version of earlier drafts, there is disappointment that the corporate dimension of religious freedom has not been expressly addressed as our earlier submission requested. A statement that AThe right of freedom of religion includes the right of churches and religious communities to organise and administer their own affairs according to the laws of Member States@ would have been helpful or, if this was felt not totally to reflect the precise situation in all Member States AThe right of freedom of religion includes the rights of churches and religious communities according to the laws of Member States@.

The draft Charter now includes recognition of the right to conscientious objection (article 10(2)). The Conference of European Churches has long supported the right of conscientious objection to military service and, if this is what is intended by this addition, it is very welcome and a specific mention of military service would be welcomed. If, however, it is meant to be something wider, questions have been raised as to where the limits to recognising conscientious objection lie and to what extent, if the right was recognised within national laws regarding its implementation, it differs from freedom of conscience.

There is also concern about the first part of article 13. On theological grounds, churches value creativity and the search for truth. There is however a problem about the potential licence resulting from such matters being Aunrestrained@ and it is not clear how far the limitations provisions of article 51(1) would deal with this.

On the question of discrimination (article 21), there is concern that, whereas article 14 of the European Convention on Human Rights relates to the fact that the rights and freedoms granted by that Convention are to be enjoyed without discrimination and article 13 of the European Community Treaty empowers but does not oblige the European Community to take measures to combat discrimination, article 21 is a sweeping provision which, so far as religious discrimination is concerned, could bring the anti-discrimination principle into conflict with religious freedom. It has, therefore, a potentially different effect from the two sources from which it is drawn.

Migration into the Member States and the prospect of the adhesion of new members of the European Union mean that ethnic and national minorities will be an important component of the European Union in the future. The Council of Europe has done substantial work towards defining rights of national minorities in its Framework Convention. In this respect, there is no reference to minorities in the draft Charter and only the reference to the Union respecting Acultural, religious and linguistic diversity@ which can, of course, serve as a starting point for further development of an effective minorities policy. Nevertheless, extra strength could be given if the article had the words Aand seek to maintain@ after the word Arespect@.

The Conference of European Churches thanks the Convention for the continued attention which it gives to voices from civil society and will follow with great attention the future development of the draft Charter.

Yours sincerely

ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 29. September 2000

CHARTE 4491/00

CONTRIB 341

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Bitte finden Sie nachstehend einen Beitrag der Evangelischen Kirche A.B. in Österreich. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Εωανγελισχηε Κιρχηε ιν √στερρειχη

Οβερκιρχηενρατ Α. υνδ Η.Β.

An den
Konvent zur Erarbeitung einer
Grundrechts-Charta der Europäischen Union
zu Händen des Vorsitzenden

Wien, 12.02.2020

Zahl: EU 001; 7294/2000
Bitte auf allen Schreiben immer die Geschäftszahl des Kirchenamtes anführen.

Betr: **Charta der Grundrechte der Europäischen Union**

Sehr geehrter Herr Präsident Prof. Dr. Herzog !
Sehr geehrte Damen und Herren !

Namens der Evangelischen Kirche A.u.H.B. in Österreich erlaubt sich der Evangelische Oberkirchenrat A.u.H.B., Ihnen folgende Anliegen nochmals zur Kenntnis zu bringen, mit dem höflichen Ersuchen und der dringenden Bitte, diese bei der Fertigstellung der Grundrechts-Charta der Europäischen Union allenfalls zu berücksichtigen:

1. Nach den uns bislang bekannten Entwürfen der Grundrechts-Charta der Europäischen Union enthält der Artikel 10 der Charta der Grundrechte der EU (Gedanken-, Gewissens- und Religionsfreiheit) entgegen den offiziellen Stellungnahmen der Konferenz Europäischer Kirchen und der Römisch-katholischen Kommission der Bischofskonferenzen der Europäischen Gemeinschaften – sohin aller christlichen Kirchen Europas – k e i n e Bestimmung, wonach die Kirchen und Religionsgesellschaften ihre inneren (eigenen) Angelegenheiten gemäß dem Recht der Mitgliedsstaaten selbst regeln können. Die Aufnahme einer solchen Bestimmung ist zur Wahrung des Staatskirchenrechtssystems in jedem Mitgliedsstaat und zur Wahrung der inneren Autonomie der Kirchen und Religionsgesellschaften unbedingt notwendig, weil andernfalls das vorrangige Gemeinschaftsrecht, vor allem Arbeitsrecht, in die inneren Belange der Kirchen und Religionsgemeinschaften eingreift. Unserer Meinung nach sollte daher der Artikel 10 der Charta um den folgenden Satz ergänzt werden:

„**Das Recht auf Religionsfreiheit beinhaltet das Recht der Kirchen und Religionsgesellschaften, sich selbst zu organisieren und ihre eigenen, inneren Angelegenheiten in Übereinstimmung mit dem Recht der Mitgliedsstaaten selbst zu regeln.**“

2. In der Charta der Grundrechte der EU fehlen in den bisherigen Bestimmungen grundrechtliche Bestimmungen zum Schutz von Volksgruppen und Minderheiten (ethnische, religiöse und sprachliche) in Richtung deren Rechte, wie Gebrauch der Muttersprache und dergleichen, obwohl solche Bestimmungen gemäß dem Staatsvertrag von St. Germain und dem Staatsvertrag von Wien zum Verfassungs-rechtsbestand gehören und szt. von Frankreich und Großbritannien begehrt worden waren. Nicht zuletzt im Zusammenhang mit den Beitrittsverhandlungen mittel- und osteuropäischer Staaten sollte daher folgende Grundrechtsbestimmung in die Charta der Grundrechte aufgenommen werden:

„**Die Erhaltung von Volksgruppen und ethnischer, religiöser und sprachlicher Minderheiten und die Sicherung ihres Bestandes wird gewährleistet. Ihnen steht das Recht auf Wahrung ihrer Sprache, Volkstum und Religion zu**.“

Der Evangelischen Kirche in Österreich als einer Minderheit, die mehr als hundert Jahre der Gegenreformation erleiden mußte, erscheinen diese Schutzbestimmungen für Minderheiten unverzichtbar wichtig.

3. Bislang war in den Entwürfen einer Grundrechts-Charta der EU das Recht auf Wehrdienst-(Kriegsdienst-)verweigerung aus Gewissensgründen bei Leistung eines Ersatzdienstes (Zivildienstes) nicht vorgesehen. Nach Mitteilung des österreichischen Regierungsbeauftragten, Univ.Prof. Dr. Heinrich Neisser, soll eine solche Bestimmung noch in die Grundrechtscharta der Europäischen Union aufgenommen werden. Die Aufnahme einer solchen Bestimmung wird ausdrücklich begrüßt.

Wir danken Ihnen, sehr geehrter Herr Präsident, für Ihre Bemühungen betreffend der Erarbeitung einer Charta der Grundrechte der Europäischen Union und wünschen Ihnen für Ihre weitere Tätigkeit, aber auch Ihr persönliches Leben Gottes reichen Segen.

Mit vorzüglicher Hochachtung

Bischof Mag. Herwig Sturm	Landessuperintendent HR Mag. Peter Karner
Vorsitzender	Vorsitzenderstellvertreter

F.d.R.d.A.:

Oberkirchenrat MMag. Robert Kauer

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 29 septembre 2000

CHARTE 4492/00

CONTRIB 342

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution de la Plate-forme des ONG européennes du secteur social, avec une lettre ouverte aux membres de la Convention. [1]

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[1] Ce texte à été soumis en langue française seulement.

Platform of European Social NGOs
Plate-forme des ONG européennes du secteur social

Lettre ouverte aux membres de la Convention chargée de l'élaboration d'une Charte des droits fondamentaux dans l'Union européenne.

Bruxelles le 23 septembre 2000

Monsieur le Président, Mesdames et Messieurs,

Au nom de la Plate-forme des ONG européennes du secteur social, je tiens à vous remercier de nous avoir consultés à plusieurs reprises lors de l'élaboration de la Charte et de l'attention que vous avez accordée à nos préoccupations. Comme vous le savez, les organisations membres de la Plate-forme sociale ont joint leur forces à celles de la Confédération européenne des Syndicats depuis plusieurs années et mènent campagne dans les quinze Etats membres de l'Union européenne pour l'obtention d'une Charte des droits fondamentaux juridiquement contraignante et garantissant un niveau élevé de protection des droits, notamment économiques et sociaux, pour tous.

La Plate-forme sociale observe que le projet Convent 47 en date du 14 septembre a apporté plusieurs améliorations au texte précédent, mais considère que des droits essentiels (qui se trouvent pour la plupart dans la Charte sociale européenne révisée) devraient y être ajoutés. Il s'agit :

- du droit de **consultation des ONG** au niveau de l'Union européenne (à ajouter à l'article 12 sur la liberté de réunion et d'association)

- du **droit au travail** (à ajouter à l'article 15 sur la liberté professionnelle)

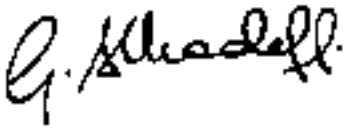
- du droit des **personnes âgées** à une existence décente et indépendante, et à une pleine participation à la vie publique, sociale et culturelle (à ajouter dans un nouvel article)

- du droit au **logement** et du droit à **un revenu minimum** permettant de vivre dans la dignité, ainsi que d'une référence à la **lutte contre la pauvreté et l'exclusion sociale** (à ajouter à l'article 33 sur la sécurité sociale et aide sociale)

- de l'introduction d'une référence explicite dans l'article 52 (Niveau de protection) aux **Chartes sociales du Conseil de l'Europe**.

J'ai toute confiance en le fait que vous prendrez ces remarques en considération afin de répondre à l'attente des millions de personnes qui, en Europe, sont membres de nos associations et demandent à l'Union de placer les droits fondamentaux au coeur de sa construction.

Je vous prie d'agréer, Monsieur le Président, Mesdames, Messieurs, l'assurance de ma haute considération.



Giampiero Alhadeff
Président de la Plate-forme sociale

La Plate-forme des ONG européennes du secteur social regroupe 30 organisations non-gouvernementales, fédérations ou réseaux européens qui travaillent dans le secteur social et défendent les intérêts d'un large éventail de la société civile européenne. On y retrouve notamment des organisations de femmes, de personnes âgées, de personnes handicapées, sans emploi, de migrants, de personnes en situation de pauvreté et sans abri, d'homosexuels et de lesbiennes, de jeunes, d'enfants et de familles. Les organisations membres incluent aussi des ONG travaillant sur des questions sociales, telles que la justice sociale, la santé et le racisme.

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PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 29 septembre 2000

CHARTE 4493/00

CONTRIB 343

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Veuillez trouver ci-après une contribution du Carrefour pour une Europe civique et sociale (CAFECS), avec observations sur le préambule. [1]

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[1] Ce texte à été soumis en langue française seulement.

Carrefour pour une Europe civique et sociale

CAFECS

Observations sur le préambule de la Charte des droits fondamentaux

Les membres de CAFECS réunis ce jour saluent les progrès du texte de la Charte des droits fondamentaux entre la rédaction du Convent 45 et celle du Convent 47. Toutefois ils souhaitent attirer l'attention des membres de la Convention sur la rédaction du deuxième paragraphe du préambule de la Charte.

Il est positif que la question des fondements des valeurs européennes soit abordée dans le préambule. Mais la formulation du Convent 47, qui met en parallèle les mots « humanistes » et « religieux », peut porter à malentendu, ne permettant pas de situer suffisamment qu'il s'agit d'une mention des sources « laïques » ou « philosophiques » d'une part, et « religieuses » d'autre part, mais toutes « humanistes ».

CAFECS propose plusieurs rédactions possibles :

1 – Puisant dans la diversité de ses sources humanistes, l'Union se fonde ……

2 – Puisant dans la diversité de ses sources spirituelles, l'Union se fonde ……

3 – Riche d'un humanisme pluriel issu de ses différentes traditions spirituelles, l'Union se fonde…….

25.09.00

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ENTWURF DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

fundamental.rights@consilium.eu.int

Brüssel, den 3. Oktober 2000

CHARTE 4494/00

CONTRIB 344

ÜBERMITTLUNGSVERMERK

Betr.: Entwurf der Charta der Grundrechte der Europäischen Union

Bitte finden Sie nachstehend einen Beitrag von Herrn Dr. Marten BRAUER. [1]

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[1] Dieser Text wurde uns nur in deutscher Sprache übermittelt.

Dr. Marten Breuer
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Dr. Marten Breuer - Domerschulstraße 16 - 97070 Würzburg

Würzburg, den 25.09.2000

Sehr geehrte Damen und Herren,

da ich mir nicht im klaren darüber bin, ob mein an Bundespräsident a.D. Roman Herzog gerichtetes Schreiben vom 3. August dieses Jahres Sie erreicht hat, wende ich mich heute direkt an Sie. Bezugnehmend auf den Entwurf der Charta der Grundrechte der Europäischen Union vom 21. September dieses Jahres (CHARTE 4470/1/00), erlauben Sie mir eine kurze Stellungnahme:

Art. 38 des Entwurfs hat den folgenden Wortlaut:

> „Aktives und passives Wahlrecht bei den Wahlen zum Europäischen Parlament
> (1) Die Unionsbürgerinnen und Unionsbürger besitzen in dem Mitgliedstaat, in dem sie ihren Wohnsitz haben, das aktive und passive Wahlrecht bei den Wahlen zum Europäischen Parlament, wobei für sie dieselben Bedingungen gelten wie für die Angehörigen des betreffenden Mitgliedstaats.
> (2) Die Mitglieder des Europäischen Parlaments werden in allgemeiner, unmittelbarer, freier und geheimer Wahl gewählt."

Diese Regelung würde, sollte sie in dieser Form verwirklicht werden, zu Konsequenzen führen, die m.E. so nicht beabsichtigt sein können. Denn der Wortlaut des Absatzes 1 erweckt den Eindruck, als solle das Wahlrecht zum Europäischen Parlament *nur* den in den Mitgliedstaaten der EU ansässigen Unionsbürgern zustehen, nicht aber denjenigen Unionsbürgern, die in einem Staat außerhalb der Europäischen Union leben.

Ein solches Ergebnis stünde jedoch bereits im Widerspruch zur derzeitigen einfachen Rechtslage: Nicht nur nach dem deutschen Europawahlgesetz (i.d.F. vom 8. März 1994, BGBl. I S. 419), auch nach den Wahlrechtsbestimmungen nahezu aller übrigen EG-Mitgliedstaaten steht das Wahlrecht zum Europäischen Parlament neben den im Inland ansässigen Unionsbürgern auch den eigenen Staatsangehörigen zu, die zum Zeitpunkt der Wahl im Ausland leben, und zwar unabhängig davon, ob es sich dabei um europäisches oder außereuropäisches Ausland handelt (vgl. Haag/Bieber, in: von der Groeben/Thiesing/Ehler-mann [Hrsg.], Kommentar zum EU-/EG-Vertrag, Band 4, 5. Aufl., Baden-Baden 1997, Art. 138, Anhang Rn. 44).

Um die dargestellten Probleme zu vermeiden, bieten sich aus meiner Sicht zwei Möglichkeiten an:

1. die Ergänzung des Absatzes 1 um einen Satz 2, wonach das Wahlrecht für Unionsbürger mit Wohnsitz im Ausland außerhalb der Europäischen Union *vorbehalten bzw. unberührt bleibt*. Vorbilder hierfür finden sich z.B. in Art. 54 Abs. 1 der niederländischen Verfassung oder Art. 50 Abs. 2 der norwegischen Verfassung.

2. die Ergänzung des Absatzes 1 um einen Satz 2, der das Wahlrecht für Unionsbürger mit Wohnsitz im Ausland außerhalb der Europäischen Union *garantiert*. Eine vergleichbare Regelung enthält z.B. Art. 68 Abs. 5 Satz 2 der spanischen Verfassung, indem dort die „Ausübung des Wahlrechts durch Spanier, die sich außerhalb des spanischen Hoheitsgebietes befinden, [...] vom Gesetz anerkannt und vom Staat ermöglicht“ wird. Ob eine derartige „Garantieklausel“ auf europäischer Ebene konsensfähig wäre, erscheint zwar fraglich, angesichts der nahezu allseitigen Verbreitung des Wahlrechts für Auslandsstaatsbürger aber auch nicht ausgeschlossen. Insbesondere wäre in diesem Zusammenhang zu berücksichtigen, daß Auslandsstaatsbürger zwar nach der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte aus der EMRK bzw. ihren Zusatzprotokollen keinen Anspruch auf Teilnahme an Parlamentswahlen ihres Heimatstaats herleiten können (vgl. *Hilbe* ./. Liechtenstein, Entscheidung des EGMR vom 7. September 1999, Az. 31981/96), andererseits aber die Parlamentarische Versammlung des Europarats erst kürzlich erneut eine Wahlbeteiligung von Auslandsstaatsbürgern gerade auch auf europäischer Ebene gefordert hat (vgl. Recommendation 1410 (1999) “Links between Europeans living abroad and their countries of origin” vom 26. Mai 1999, insbes. Ziff. 5 V d vi). Durch die Aufnahme einer „Garantieklausel“ in die europäische Grundrechte-Charta könnte dieser Forderung für den Bereich der Europäischen Union zusätzliches Gewicht verliehen werden.

Ich wäre Ihnen sehr verbunden, wenn Sie die von mir angeregten Änderungen einer näheren Prüfung unterziehen würden.

Hochachtungsvoll

Dr. Marten Breuer, wiss. Mitarbeiter

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 3 October 2000

CHARTE 4495/00

CONTRIB 345

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the Quaker Council for European Affairs. [1]

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[1] This text has been submitted in English language only.

Quaker Council For European Affairs (23/09/00 15:50):

Dear Friends

I feel apologetic about offering a commentary on the Charter so late, but CONVENT 47 raises textual problems which I hope Convention Members will consider.

Our standpoint at the Quaker Council for European Affairs is that (1) the EU owes a duty of respect to ALL persons legally or illegally within its boundaries, and also to those outside affected by its aid, trade, JHA and CFSP policies. The Charter will presumably govern the behaviour of officials and decision makers regardless of whether or not it becomes binding; and (2) the EU with enlargement facing it, will risk causing damage to 'civility' among its populations if it loses their confidence and fails to protect the basic workings of the EU from (a) separatists and (b) racists. I mention this second issue because of the risk of dissension or confusion that could be engendered by a defective Charter or failure to agree a Charter.

1. Article 50(1) says that the Charter applies only to Union bodies and to member states implementing EU law. What then is the implication of including rights such as 2(2), no death penalty, and 10(2), conscientious objection, where there is no likelihood of EU legislation? Is it to ensure that the EU's external policies promote these in the rest of the world? If so, this should be stated in the preamble. It may be that 2(1), the right to life, implies that the EU cannot authorise acts of war. This would please Quakers, but see below.

2. Article 51(3) says that where the Charter follows articles in the 1950 Council of Europe Convention, the meaning and scope are the same as these, unless the new Charter offers more protection. But the 1950 articles go on to include exceptions. For example, under 2(2) life may be taken to stop crime; under 4(3) certain activities do not count as forced labour; and in particular under 15(2) death may result from 'lawful acts of war'. If these apply to the present Charter, they should appear on its face as in the 1950 Convention. Otherwise it may be claimed (and I hope it is) that the present Charter offers more protection. How is the citizen reader to know, and who decides? The explanations in CONVENT 46 do not look as if they are being offered for formal adoption by Convention members.

3. As for the non-horizontal articles of CONVENT 47, our main concern is for undocumented migrants, both known to the authorities and clandestine. Article 4 (torture) sems to cover them, as indeed it should. Article 5(1) on slavery seems also to protect them, which is necessary to avoid trafficking. But Article 15(3) on conditions of work seems rather to protect those who exploit illegal immigrants. Is Article 31 on child labour universal? Article 19 as amended seems to breach the non-refoulement language of the 1951 UN Convention. Finally, the English words of 33(2) 'residing and moving legally' look bizarre. Is it envisaged that someone may be permitted to reside but not move - or vice versa?

The Council of Europe invites new member states to implement its human rights legislation with a better grace than has been shown by some of the existing ones. I wish we could adopt a similar stance with the EU candidate countries. The fact that the Social Charter (Revised) is more than some EU member states can swallow is no reason for not recognising it as a target for the EU of the incoming century.

In peace

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 4 October 2000

CHARTE 4496/00

CONTRIB 346

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter two motions by the Non-Governmental Organisations (NGOs) enjoying consultative status with the Council of Europe. [1]

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[1] This text has been submitted in English and French languages.

LIAISON COMMITTEE OF THE
NON-GOVERNMENTAL ORGANISATIONS (NGOs)
enjoying consultative status
with the COUNCIL OF EUROPE
COMMISSION DE LIAISON DES
ORGANISATIONS NON GOUVERNEMENTALES (ONG)
dotées du statut consultatif
auprès du CONSEIL DE L'EUROPE

27 June 2000

Motion of INGOs having consultative status with the Council of Europe

407 international non-governmental organisations representing,
in the 41-nation Council of Europe, all aspects of life and tens of millions of people

The international non-governmental organisations meeting on 27 June at the Palais d'Europe in Strasbourg unanimously call on the Convention drawing up the draft Charter of Fundamental Rights of the European Union and the member states which shall be deciding upon it, to ensure that:

1. the principle of solidarity be included at the beginning of the Charter on a par with the principle of equality and the affirmation of the dignity of the human being;

2. the indivisibility of human rights be confirmed by the contents of the Charter and expressed in its structure, and that the universality of these economic, social, cultural, civil and political rights be acknowledged;

3. the European Union accede to the two Council of Europe instruments which implement the Universal Declaration of Human Rights, namely the European Convention on Human Rights and the revised European Social Charter, including their additional protocols;

4. the Charter of Fundamental Rights be incorporated into the treaties of the European Union, thereby acquiring a binding force;

5. the new risks and needs concerning protection of citizens in our society be covered by the Charter, including in the field of bioethics, the environment and information technology;

6. the principle of participatory democracy be strengthened in the Charter by including recognition of the right to civil dialogue granting organised civil society the right to information, communication and consultation in order to participate, propose, negotiate and verify political processes.

The INGOs having consultative status with the Council of Europe call for the opening of a transparent, democratic and participatory process on the future constitution of the European Union, independently of the drafting of the Charter of Fundamental Rights.

LIAISON COMMITTEE OF THE
NON-GOVERNMENTAL ORGANISATIONS (NGOs)
enjoying consultative status
with the COUNCIL OF EUROPE
COMMISSION DE LIAISON DES
ORGANISATIONS NON GOUVERNEMENTALES (ONG)
dotées du statut consultatif
auprès du CONSEIL DE L'EUROPE

NGO
ONG

26 September 2000

VERY URGENT

Motion of INGOs having consultative status with the Council of Europe

407 international non-governmental organisations representing,
in the 41-nation Council of Europe, tens of millions of people

The international non-governmental organisations meeting on 26 September 2000 in the Palais d'Europe in Strasbourg **most urgently** call on the Convention drawing up the draft Charter of Fundamental Rights of the European Union and the member states which shall be deciding upon it, to ensure that:

- **the principle of participatory democracy be strengthened in the Charter by including in Article 12, as new paragraph 3 (Convent 47), recognition of the right to civil dialogue granting organised civil society the right to information, communication and consultation in order to participate, propose, negotiate and verify political processes**, as already requested in our motion of 27 June 2000 (enclosed).

  This insistent demand is strongly shared by organised civil society at large in Europe as a fundamental expression of citizens' commitment, will, needs and hopes.

- Furthermore, the above mentioned INGOs demand that the word **"religious"** in line 2 of paragraph 2 in the Preamble (Convent 47) be replaced by **"spiritual".**

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 3 October 2000

CHARTE 4497/00

CONTRIB 347

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the observations of the British Medical Association (BMA), on document CHARTE 4420/00 CONVENT 45. [1]

[1] This text has been submitted in English language only.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
BMA RESPONSE

The British Medical Association is a voluntary professional association and trade union for doctors. It speaks on behalf of doctors both at home and abroad and actively promotes the profession's views on health policy in the United Kingdom.

The BMA's response to this document is inevitably dependent upon its legal status – on whether it is merely a 'wish list' or it is intended to be binding on member states. If it is not intended to be binding then this raises questions about the aim of the exercise. It states in the introduction that it brings together a number of existing rights set out in various Conventions and Declarations. However, it does so in a less than comprehensive way by summarising rights that are elaborated more fully elsewhere (see comments on Article 6 for example). If it is to be binding it needs additional work to make it useful.

Without further guidance and explanation, serious problems of interpretation might arise. The potential for such problems has been illustrated recently by the introduction of the Human Rights Act incorporating the European Convention on Human Rights into UK law. Even with a large body of case law from the European Court there is considerable uncertainty about how the Articles will be applied.

Some of the difficulties that could arise are set out below:

Article 3 para 2

How are 'eugenic practices' to be defined? Some people say that all prenatal diagnosis is 'eugenic' because it is aimed at avoiding the birth of people with disabilities. Does this mean that all prenatal diagnosis must be stopped?

The prohibition on making the human body and its parts a source of financial gain could outlaw the offer of payments for gametes (ovum and spermatazoon). The BMA's view is that payment for gametes should be phased out and replaced by reimbursement of expenses, so this would not cause problems for us but it would require a change in practice and policy for the Human Fertilisation and Embryology Authority in the UK.

The prohibition of cloning is subject to questions of interpretation. It may be unhelpful to have a blanket ban without considering the arguments. In our comments on the UNESCO Declaration on the Human Genome, which also sought a blanket ban on reproductive cloning, we said:

'Whilst some forms of cloning would certainly be considered contrary to human dignity, this is not necessarily the case with all techniques which could come within the definition of 'reproductive cloning of human beings'. Although the BMA is currently opposed to the deliberate creation of genetically identical individuals, it recognises the potential benefits of embryo splitting in *in vitro* fertilisation and it is possible that this limited use of the technology might, with certain safeguards, be regarded as acceptable practice at some time in the future.'

In our understanding, 'reproductive cloning' refers to those techniques that involve the deliberate creation of genetically identical individuals, which would include embryo splitting but would not include techniques used to create compatible tissue for transplantation. Are others using the same definition?

Article 6 – Right to liberty and security of person

Without qualification this could prove difficult to uphold. The same right is given in the European Convention on Human Rights but it is qualified to permit the lawful detention of a person convicted of an offence, to prevent the spread of infectious disease or those suffering from mental disorders. Without these qualifications it appears that nobody must ever be detained. Is this the intention?

Article 7 – Respect for private and family life

The statement regarding the confidentiality of communications is not in consistent with the Regulation of Investigatory Powers Bill 2000 (UK) which deals with the interception and decryption of communications.

Article 11 – Freedom of expression and information

Paragraph 1 refers to the 'right to hold opinions and to receive and impart information and ideas without interference by public authority'. Given the resurgence of far-right politics in some parts of Europe such a right might come into conflict with other undeniable social goods, such as the respect for persons and the maintenance of public order.

Article 13 – Freedom of research

This simply states that 'scientific research shall be free of constraint'. Such a bold statement is unhelpful. Presumably it will still be necessary to seek ethical approval and informed consent for scientific research yet these could be considered 'constraint'. The Council of Europe's Convention on Human Rights and Biomedicine states that 'scientific research in the field of biology and medicine shall be carried out freely *subject to the provisions of this Convention and the other legal provisions ensuring the protection of the human being*' (emphasis added). Such qualifications are necessary for this to provide meaningful guidance.

Article 14

Paragraph 1 refers to the right of 'access to vocational and continuing training'. Such a blanket statement requires qualification. Access to training in medicine can depend on a variety of factors including qualifications, resources and individual merit. It therefore needs to be set in the context of national educational and training systems.

Article 21 – Equality and non-discrimination

The BMA recognises the importance of the rights outlined in this article. However, in the context of the practice of medicine certain practical questions need to be addressed. Certain disabilities may affect a doctor's capacity to perform essential tasks. Furthermore it is generally understood that

communication skills are vital to the therapeutic relationship. If employers request that doctors have an adequate command of the national language, are they being discriminatory? Recent comments in the UK by Dr Liam Fox, Opposition health spokesman have highlighted this issue. In the United Kingdom there is also a statutory retirement age. Is this also a discrimination issue?

Article 27 – Right of access to placement services

It would be useful to have some explanation about what this means, practically and in the abstract.

In light of these concerns the status of this document is crucial. If it is intended to be an amalgamation of existing rights, then they should be set out in full in the same terms as the original document. If it is more than this and new 'rights' are being added then these need to be highlighted and properly debated. There also needs to be an explanatory note that clarifies issues of interpretation, again using the exact text of existing documents.

PROJET DE CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

fundamental.rights@consilium.eu.int

Bruxelles, le 4 octobre 2000

CHARTE 4498/00

CONTRIB 348

NOTE DE TRANSMISSION

Objet : Projet de Charte des droits fondamentaux de l'Union européenne

Position du Carrefour pour une Europe civique et sociale (CAFECS):

Veuillez trouver ci-après la prise de position du Carrefour pour une Europe civique et sociale (CAFECS): "Un point de départ". [1]

[1] Ce texte à été soumis en langue française seulement.

Carrefour pour une Europe civique et sociale

CAFECS

29.09.00

Le projet de Charte des droits fondamentaux de l'Union européenne : un point de départ

La Convention de soixante-deux membres, mise en place à la demande du Conseil européen pour élaborer un projet de Charte des droits fondamentaux de l'Union européenne, est parvenue à élaborer un texte (" Convent 45 " puis, après d'incontestables améliorations, " Convent 47 " du 21.09.00) qui sera soumis au Conseil européen de Biarritz, puis de Nice. Que faut-il en penser ? Quelle attitude adopter ?

Des points positifs peuvent être soulignés :

1 - Une méthode d'élaboration nouvelle a été mise en place avec cette Convention, composée de trente représentants des parlements nationaux, de seize parlementaires européens, de quinze représentants des chefs d'Etat ou de gouvernements et d'un représentant du président de la Commission : on est enfin sorti de la méthode intergouvernementale dans laquelle la construction européenne ne cesse de s'engluer, et on a associé les parlements nationaux. La société civile a été consultée, certes dans des délais trop courts. La transparence de l'élaboration a été assurée, grâce au site internet de la Convention. Il y a là un changement novateur qui peut et doit s'avérer porteur d'avenir.

2 - Un compromis entre des positions très différentes, qui reflète l'état réel de l'Europe, que l'on a trop tendance, nous Français, à oublier, a pu être trouvé. Pour la première fois, les droits politiques, économiques et sociaux sont regroupés dans un même texte pour exprimer leur complémentarité et leur indivisibilité.

3 - La Charte n'est pas utilisée pour construire l'Europe à la sauvette, par un processus de centralisation rampante et opaque qui entraînerait un rejet immédiat de ceux qui sont attachés à la souveraineté de l'État : elle ne modifie pas les compétences actuelles de l'Union, ne lui transfère aucun pouvoir nouveau, reconnaît - la chose est nouvelle - la diversité (article 22). Elle s'impose aux actes communautaires et aux actes pris par les États en application de ceux-ci.

Ces éléments positifs suffisent pour que le projet, malgré ses prudences, ne soit pas purement et simplement rejeté, dans une attitude maximaliste qui, finalement, desservirait une Europe qui se construit pas à pas.

Ce n'est pas, pour autant, que le projet actuel ne soit pas critiquable en raison de **plusieurs insuffisances grave**s.

1 - Il ne fait que rassembler des droits et responsabilités déjà affirmés, sans véritablement progresser, ni faire face aux nouveaux défis, sauf sur un nombre limité de points. Il est vrai que le mandat de la Convention avait été strictement limité à un " rassemblement " des textes existants. Mais cela laisse insatisfait, notamment par rapport aux propositions que CAFECS s'était efforcé de faire en liaison avec les associations qui y participent [1] .

2 - Les droits sociaux sont insuffisamment affirmés si on les compare à la Charte sociale européenne révisée du Conseil de l'Europe. D'une part, l'Union se contente de reconnaître le droit au travail et à la sécurité sociale, à l'aide sociale, alors qu'elle devrait les promouvoir. D'autre part, il n'est pas suffisamment tenu compte des problèmes sociaux nouveaux, comme le chômage ou l'exclusion, tandis que le droit à un revenu décent n'est pas mentionné en tant que tel. Le droit des personnes âgées à une existence décente n'est pas évoqué. Enfin, le texte passe à côté de beaucoup d'innovations qu'il eut été possible de faire apparaître, par exemple le droit à l'accès aux droits ou, dans un autre domaine, le droit au temps choisi pour concilier vie familiale et professionnelle.

3 - Le projet de Charte est **également beaucoup trop timide en matière de participation de la société civil**e, **de dialogue civil** et de droit d'association au niveau européen. Le droit de consultation des ONG au niveau de l'Union européenne n'a pas été proclamé.

4 - Enfin, le texte actuel laisse insatisfait, en ce sens qu**'il ne débouche pas vraiment sur un projet de société europée**n, et qu'il **est timide en matière de droits programmatiques** qui ont besoin du support de politiques actives, par exemple en matière de droit au logement ou du droit au développement durable. En un mot, il correspond bien à l'état actuel de la construction européenne qu'il contribue à rééquilibrer. Il rassure ceux qui craignent les effets de la centralisation et de l'uniformité, aussi bien que ceux qui craignent un nivellement progressif des droits sociaux selon la pente du moins disant social. Mais il a un faible pouvoir anticipateur et est loin des progrès qu'il faut faire réaliser à l'Union européenne pour qu'elle émerge comme acteur nouveau dans la mondialisation, avec son propre modèle socio-économique. Face aux puissantes entreprises multinationales, l'Union européenne continue à offrir des droits sociaux nationaux inégaux qui risquent de conduire le modèle social européen vers le bas.

Il faut donc considérer le projet actuel non comme un point d'arrivée, mais comme un point de départ et une étape dans un processus à poursuivre.

Dans ces conditions, CAFECS :

1 - souhaite que le travail d'amélioration ponctuelle mené efficacement ces tous derniers jours, pour remédier aux insuffisances constatées par les représentants de la société civile, **soit activement poursuiv**i.

2 - demande au Conseil européen d'adopter cette Charte, sans l'intégrer à ce stade aux Traités existants, (donc sans avoir à la faire ratifier par chacun des États membres) mais **d'y faire référence à l'article 6 des Traités actuels** qui seront modifiés par l'actuelle CIG et soumis à ratification par les États membres. Ainsi le juge européen sera très logiquement amené à prendre la Charte en considération, de façon éminente, pour arrêter ses décisions au même titre qu'il prend en considération la convention européenne des droits de l'homme.

3 – demande que l'action engagée ne s'arrête pas là et que dans une démarche de citoyenneté active, la société civile puisse s'exprimer à partir de cette Charte en prenant le temps et les méthodes appropriées. Le débat à ouvrir devra se situer dans le cadre du processus constituant qui devra être mis en place par le Conseil européen de Nice afin de renforcer la dimension politique de l'Union. Le moment venu, l'ensemble de ces débats publics pourra être repris par les parlements nationaux et les institutions européennes pour être intégré aux Traités ou à la future Constitution de l'Union en ayant bénéficié de la participation active des citoyens. Il faut que cette Charte joue un rôle fondateur pour le lancement de la démocratie participative européenne avec les peuples de l'Union et les peuples candidats à l'Union.✿

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 October 2000

CHARTE 4499/00

CONTRIB 349

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a report from the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. [1]

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[1] This text has been submitted in English and French languages.

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Doc. 8819 revised
27 September 2000

Charter of Fundamental Rights of the European Union

Revised report*
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Göran Magnusson, Sweden, Socialist Group

Summary

The preparatory work on the Charter of Fundamental Rights of the European Union is now entering its final stage. Led by its wish to ensure the full enjoyment of human rights and fundamental freedoms for all persons within the jurisdiction of European Union member States, the Assembly should encourage progress in this field made by the European Union. Its main concern must, however, be to avoid the emergence of new dividing lines in Europe by defending the consistency of human rights protection across the continent and avoiding diverging interpretations of these rights.

The Assembly, together with the European Parliament, the European Commission and the European Court of Human Rights, continues to believe that the aim of the draft Charter, which is to enhance and make more visible the protection of fundamental rights in EU member states, can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights.

The Assembly should thus invite the European Union and its member states to ensure that both the text of the proposed Charter and its ultimate application fully reflect and preserve the protection extended by the European Convention on Human Rights and the European Court of Human Rights to every person within the jurisdiction of European Union member states. It should further propose the beginning of negotiations between the European Union and the Council of Europe without delay in order to enable the European Union to accede to the ECHR.

* This report replaces the report adopted on 7 September 2000 (Doc 8819).

I. (Revised) Draft resolution

1. Following the adoption of Resolution 1210 (2000) on the Charter of Fundamental Rights of the European Union on 25 January 2000, the Assembly has continued to follow with great interest the preparatory work on the Charter, which is now entering its final stage.

2. The Assembly is led by its concern to ensure the full enjoyment of human rights and fundamental freedoms for all persons within the jurisdiction of European Union member States. The Assembly wants to encourage progress in this field made by the European Union. Its main concern is to avoid the emergence of new dividing lines in Europe by defending the consistency of human rights protection across the continent and avoiding diverging interpretations of these rights.

3. The Assembly welcomes the efforts undertaken by the European Union to enhance and make more visible the protection of human rights through the Charter. The draft Charter proposed by the Praesidium at the meeting of the "Convention" on 25 and 26 September 2000 reaffirms *inter alia* the European Convention on Human Rights (ECHR), the Social Charter of the Council of Europe, and the case-law of the European Court of Human Rights. Insofar as the draft Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope shall be the same as those laid down by the said Covention, thus guaranteeing that the draft Charter's level of protection will not fall below that of the ECHR.

4. The Assembly further welcomes the fact that the draft Charter recognises a number of rights and freedoms not included *expressis verbis* in the ECHR, such as the right to respect for physical and mental integrity, the prohibition of trafficking in human beings, the right to asylum, and a number of important social and economic rights. However, the Assembly regrets that the level of protection recognised by the draft Charter does not always reach the level of protection afforded by the corresponding Council of Europe instruments, in particular the Revised Social Charter and the Convention on Human Rights and Biomedicine.

5. The Assembly also regrets that the draft Charter makes no express reference to the rights of persons belonging to ethnic, religious or linguistic minorities, or indeed to the right to local and regional self-government – rights which are protected by Council of Europe instruments such as the Framework Convention for the Protection of National Minorities and the European Charter of Local Self-Government.

6. The Assembly is convinced that the aim of the draft Charter, which is to enhance and make more visible the protection of fundamental rights in EU member states, can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights. In a democratic society, a system of checks and balances is essential. All member states of the European Union, honouring this democratic principle, have submitted themselves to the external supervision of the European Court of Human Rights under this Convention, without endangering national sovereignty or the principle of subsidiarity. There is no legitimate reason why acts carried out on behalf of the European Union should be exempt from this fundamental external control mechanism, thus in effect withdrawing the protection of the ECHR from persons adversely affected in their fundamental rights and freedoms by Community law. As the European Commission has pointed out, the existence of a Charter does not diminish the interest in acceding to the ECHR for exactly these reasons.

7. In this connection, the Assembly welcomes the Resolution of the European Parliament, adopted on 16 March 2000, in which the European Parliament invites the Intergovernmental Conference (IGC) to enable the European Union to become a party to the European Convention on Human Rights. The Assembly further agrees with the European Commission that the drafting of the Charter does not preclude the accession of the European Union to the ECHR, and that, indeed, this accession would in no way lessen the importance of the Charter.

8. The Assembly therefore reiterates its appeal to the European Union do its utmost to safeguard the consistency of human rights protection in Europe. It thus invites the European Union and its member states to:

i. ensure that both the text of the proposed Charter and its ultimate application fully reflect and preserve the protection extended by the European Convention on Human Rights and the European Court of Human Rights to every person within the jurisdiction of European Union member states;

ii. enter into negotiations with the Council of Europe without delay in order to enable the European Union to accede to the ECHR as soon as possible by drawing up the necessary amendments to both the European Union treaties and the European Convention on Human Rights.

II. (Revised) Draft recommendation

1. The Assembly draws attention to its Recommendation 1439 (2000) on the Charter of Fundamental Rights of the European Union, adopted on 25 January 2000, in which it recommended that the Committee of Ministers of the Council of Europe support the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to this treaty.

2. It notes that, at its 106th session (10-11 May 2000), the Committee of Ministers stressed the need to ensure that, whatever decision the Institutions of the Union might take concerning the Charter, it did not lead to new dividing lines in Europe. The Charter should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention, to all citizens of the Council of Europe's member States, including those of the European Union.

3. Although the Assembly welcomes the fact that the Committee of Ministers shares its concern that there should be no rivalry between the two systems of human rights protection in Europe, it regrets that it has not yet reached a consensus concerning the accession of the Union to the European Convention on Human Rights, an approach which, despite the technical objections of the Court of Justice in Luxembourg a few years ago (which can easily be solved), has repeatedly received the backing of the other institutions concerned: the European Parliament, the European Commission and the European Court of Human Rights.

4. The Assembly is not aware of any factor opposing accession from a legal point of view. It thus fervently hopes that the political will which, up to now, has prevented the process from going ahead, can be mustered soon.

5. With reference to Resolution … (2000) on the Charter of Fundamental Rights of the European Union the Assembly therefore recommends that the Committee of Ministers enter into negotiations with the European Union without delay in order to enable the Union to accede to the ECHR as soon as possible by drawing up the necessary amendments to both the European Union treaties and the European Convention on Human Rights.

III. (Revised) Draft order

The Assembly draws attention to its Resolution … (2000) and Recommendation … (2000) on the Charter of Fundamental Rights of the European Union and instructs its Committee on Legal Affairs and Human Rights, in co-operation with the Political Affairs Committee and the Social, Health and Family Affairs Committee, to closely follow developments regarding the Charter, and to report to it in due course.

IV. Explanatory memorandum by Mr Magnusson, Rapporteur

A. The Council of Europe and the EU Charter: new developments

1. On 25 January 2000 the Assembly adopted Resolution 1210 (2000) on the Charter of Fundamental Rights of the European Union, in which it invited the European Union:

i. to incorporate the rights guaranteed in the European Convention on Human Rights and the protocols to it into the Charter of Fundamental Rights and to do its utmost to safeguard the consistency of the protection of human rights in Europe and to avoid diverging interpretations of those rights;

ii. to decide in favour of accession to the European Convention on Human Rights of the Council of Europe and to make the necessary amendments to the Community treaties;

iii. to make sure that when social rights are referred to the revised European Social Charter of the Council of Europe is taken into account.

2. At the same time it adopted Recommendation 1439 (2000), in which it recommended that the Committee of Ministers of the Council of Europe support the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to this treaty.

3. Finally, in Order No. 561 (2000), it instructed its Committee on Legal Affairs and Human Rights, and its Social, Health and Family Affairs Committee, which was asked for an opinion, to carefully follow and monitor the outcome of the drafting work on the Charter of Fundamental Rights of the European Union, and to report back to it in due course.

4. The time has now come to take stock of the action taken on these texts. Since, by late May 2000, the Committee of Ministers of the Council of Europe had not replied to Recommendation 1439, I submitted a written question, No. 387, to the Committee of Ministers on behalf of the Committee on Legal Affairs and Human Rights, asking what follow-up the Committee of Ministers intended to give to Recommendation 1439 before the adoption of the Charter.

5. On 31 May 2000, the Committee of Ministers adopted a reply in which it referred to the Communiqué which it had adopted at the end of its 106th Session (Strasbourg, 10-11 May 2000):

"With regard to the proposed European Charter of Fundamental Rights, the Ministers underlined the need to ensure that, whatever decision the Institutions of the Union may take concerning the Charter, it does not lead to new dividing lines in Europe. The Charter should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention, to all citizens of the Council of Europe's member States, including those of the European Union."

6. It appended to its reply the statement made before the Ministers' Deputies on 7 March 2000 by Mr Wildhaber, President of the European Court of Human Rights, in which he set forth the arguments in favour of the European Union's accession to the Convention, pointing out that the debate on the Charter offered an excellent opportunity to reopen the whole question of the Community's accession to the Convention and that the Council of Europe ought to have no misgivings about seizing this opportunity without hesitation.

7. I nevertheless regretted that the Committee of Ministers had not replied to the main question addressed to it in Recommendation 1439, and so once again put a question to the Chair of the Committee of Ministers on 27 June 2000, asking him to state clearly whether the Committee of Ministers intended to come out in favour of accession.

8. The Chair of the Committee of Ministers replied that if there was no consensus among the fifteen member states of the European Union, there could be no consensus on this question within the Committee of Ministers either.

9. It should be noted, however, that the European Parliament adopted a resolution on 16 March 2000, in which it invited the Intergovernmental Conference (IGC) to enable the Union to become a party to the European Convention on Human Rights (ECHR). With the exception of the Court of Justice in Luxembourg, which raised some technical objections a few years ago (that can easily be solved), the proposal that the Union accedes to the ECHR has thus repeatedly received the backing of all the other institutions concerned: the European Parliament, the European Commission, the European Court of Human Rights and, of course, the Assembly. I would indeed maintain that only through this accession can new dividing lines in Europe be avoided, as well as a weakening of human rights protection across the continent.

B. Developments within the European Union

10. Within the European Union, the "Convention", the name adopted by the body set up at the European Council meeting in Tampere, has nearly finished drafting the Charter. The "Convention" is made up of fifteen representatives of the Heads of State or Government, one representative of the European Commission, sixteen members of the European Parliament and thirty representatives of national parliaments. Two representatives of the Court of Justice of the European Communities and two representatives of the Council of Europe, one of whom is a judge at the European Court of Human Rights, have observer status.

11. The "Convention" worked very intensively, with several meetings per month, and invited the Economic and Social Committee, the Committee of the Regions and the European Ombudsman to give their views. Countries applying for accession to the Union were also invited to a hearing and NGOs had the opportunity to make their views known. This shows that there is, within the "Convention", a determination to ensure the transparency of the discussions.

12. The "Convention" is chaired by Mr Roman Herzog, former President of the Federal Republic of Germany. As Vice-Chair, the group of representatives of Heads of State or Government elected the representative of the rotating presidency of the Council of the European Union. The group of representatives of the European Parliament elected Mr Mendes de Vigo and the Group of National Parliaments elected Mr Gunnar Jansson, Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

13. The Praesidium of the "Convention" proposed a draft Charter (Convent 47) with an addendum and an explanatory memorandum (Convent 48)[1], which was discussed by the plenary "Convention" at its last meeting on 25-26 September 2000 in Brussels, and is due to be formally approved at its final meeting on 2 October 2000 in Brussels.

[1] The explanatory memorandum will probably not be formally approved by the Convention.

14. The draft Charter is composed of a Preamble, and seven Chapters: Chapter I "Dignity", Chapter II "Freedoms", Chapter III "Equality", Chapter IV "Solidarity", Chapter V "Citizenship", Chapter VI "Justice", and Chapter VII "General Provisions". Not counting the preamble, there are 53 articles all in all.

15. The draft Charter reaffirms *inter alia* the ECHR, the Social Charter of the Council of Europe and the case-law of the European Court of Human Rights. Laudably, the draft Charter recognises a number of rights and freedoms which are not included *expressis verbis* in the ECHR, such as the right to respect for physical and mental integrity, the prohibition of trafficking in human beings, the right to asylum, and a number of important social and economic rights. However, it is regrettable that the level of protection recognised by the draft Charter does not always reach the level of protection afforded by the corresponding Council of Europe instruments, in particular the Revised Social Charter and the Convention on Human Rights and Biomedicine.

16. I also find it very regrettable that the draft Charter makes no express reference to the rights of persons belonging to ethnic, religious or linguistic minorities, or indeed to the right to local and regional self-government – rights which are protected by Council of Europe instruments such as the Framework Convention for the Protection of National Minorities and the European Charter of Local Self-Government.

17. Indeed, while I would support the draft Charter as a whole – and I think that consecutive drafts have improved considerably - I am still somewhat reticent on the balance struck between "traditional" human rights and more modern, social and economic rights. The latter are often elaborated at great length and detail in the draft Charter, while such important "traditional" human rights as the right to life, the presumption of innocence and the right of defence are kept extremely short, with all detail relegated to the explanatory memorandum. With certain rights, such as the right of access to free placement services and to services of general economic interest, I do ask myself if they are really so fundamental that they should stand side by side with such universally recognised human rights as the right to be protected from torture and the freedom of expression and assembly, implying their equal weight and importance.

18. In my first version of this report, I severely criticised the general provisions in the last chapter, the so-called "horizontal clauses" for having been drafted exceedingly widely. In fact, I still harbour some doubts on the exact meaning of "objectives of general interest being pursued by the Union" in draft Article 51.1. However, the potential danger posed by this very wide formulation is now fully assuaged by draft Article 51.3., which reads "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. …". Draft Article 52 plays an equally important role in this respect. I think it is fair to say that the level of protection recognised by the draft Charter as it currently stands should not fall below the standards of the ECHR.

19. Of course, this text is not yet final, as it remains to be formally approved by the "Convention". After the European Parliament has given its opinion on the final version, it will then be the task of the European Council, Parliament and Commission to solemnly proclaim the Charter in December 2000 in Nice, and to decide upon its legal nature. However, without anticipating the ICG's decision, the Chair of the "Convention" has opted for a form of wording which makes it possible for the Charter to become a binding instrument.

C. Accession of the European Union to the ECHR

20. It has always been the Council of Europe's – and this Assembly's – stance that the best way to guarantee universal and comprehensive human rights' protection across Europe would be the accession of the European Union to the European Convention on Human Rights[2].

21. The European Parliament, for its part, came out in favour of accession to the European Convention on Human Rights in a Resolution adopted as recently as on 16 March 2000, in which it invited the IGC to:

a. put the incorporation into the Treaty of the Charter of Fundamental Rights on its agenda;

b. enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights;

c. add a reference to the European Social Charter and to the appropriate ILO and UN conventions to the reference to the European Convention on Human Rights in Article 6 of the Treaty on European Union.

22. On 13 September 2000, the European Commission issued a communication on the Charter of Fundamental Rights, in which it stated that the Charter neither required nor precluded accession to the European Convention on Human Rights. It noted that the existence of a Charter did not diminish the interest in joining, as accession would effectively establish external supervision of fundamental rights at Union level. Moreover, accession to the ECHR would in no way lessen the importance of drawing up a European Union Charter. The question of the Union's accession to the ECHR not being covered by the mandate of the "Convention", most recently the government of Finland made an official proposal to the Intergovernmental Conference (IGC) to amend the European Community Treaty to grant the Community the competence to accede.

23. It is now up to the European Union to give its opinion on accession to the European Convention on Human Rights, whether the Charter is adopted or not and irrespective of whether it is binding.

24. There is no need at this point to repeat all the reasons for acceding, which were examined in the previous report (Doc 8611), and there has been absolutely nothing to show that this is not the right approach. Suffice it to say that I am convinced that the aim of the draft Charter, which is to enhance and make more visible the protection of fundamental rights in Europe, can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights. In a democratic society, a system of checks and

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[2] I have deliberately chosen the word "European Union" and not "European Community" or "European Communities". While I am aware of the debate on the powers and the legal identity (or non-identity) of the Union, personally I am convinced that if the European Union does not already have a legal identity, it will acquire it sooner or later. I thus see no reason why the process of negotiating and adopting the necessary amendments to European treaties should be gone through twice, only to make it possible for first the "Community/ties" and then the "Union" to accede. If, however, this is the Union's wish, so be it. In that case, "European Union" should be read to encompass "European Community/ties" in this text.

balances is essential. All member states of the European Union, honouring this democratic principle, have submitted themselves to the external supervision of the European Court of Human Rights under this Convention, without endangering national sovereignty or the principle of subsidiarity. There is no legitimate reason why acts carried out on behalf of the European Union should be exempt from this fundamental external control mechanism, thus in effect withdrawing the protection of the ECHR from persons adversely affected in their fundamental rights and freedoms by Community law.

25. The two official observers of the Council of Europe to the "Convention", Deputy Secretary General Krüger and Judge Fischbach, have also emphasised that accession to the ECHR would have the advantage of ensuring consistency in the protection of fundamental rights in Europe without lessening the Charter's usefulness. Firstly, the Charter would be seen as complementing, not being an alternative, to the ECHR, in keeping with Article 53 of the ECHR. That would underscore the fact that the Charter did not affect the universality of human rights or uniformity of standards in Europe. Secondly, the European Court of Human Rights would be able to review the interpretation of those provisions of the Charter that were based on the ECHR, thus ensuring perfect consonance between the two instruments in the interests of the clarity and legal certainty to which European citizens aspire. Lastly, it would enable Community institutions to be a party to proceedings before the European Court of Human Rights that concerned the effects of Community provisions in the legal orders of member States.

26. Some people argue that the Charter of the European Union as an autonomous legal text will make the accession of the European Union to the ECHR superfluous. I do not think that is the case. Many national constitutions also recognise human rights and fundamental freedoms, but their existence has not made it meaningless for the member States to become parties to the ECHR.

27.In short, I would find it difficult to accept the European Union's claims that it wishes to improve the protection of European citizens' rights while it refuses to submit its own institutions to scrutiny and opens up the possibility of diverging interpretations of human rights by two different Courts. In fact, only the decision of the Court of Justice of Luxembourg in 1996 continues to be used as an argument for not ratifying the Convention. Yet there is nothing to prevent the European Council from remedying the situation by deciding to amend the Treaty on European Union to enable ratification to take place.

28. This is why the Assembly should propose, for the sole purpose of ensuring that Europe does not have two systems of human rights protection and to avoid the inconsistency which would inevitably ensue, that the European Union and its member states be invited to:

i. ensure that both the text of the proposed Charter and its ultimate application fully reflect and preserve the protection extended by the European Convention on Human Rights and the European Court of Human Rights to every person within the jurisdiction of European Union member states;

ii. enter into negotiations with the Council of Europe without delay in order to enable the European Union to accede to the ECHR as soon as possible by drawing up the necessary amendments to both the European Union treaties and the European Convention on Human Rights.

Reporting committee: Committee on Legal Affairs and Human Rights

Budgetary implications for the Assembly: none

Reference to committee: Order No 561 (2000)

Draft resolution, draft recommendation and draft order adopted unanimously by the Committee on 27 September 2000

Members of the committee: MM *Jansson* (*Chairperson*), *Bindig*, Frunda, Mrs *Err* (*Vice-Chairpersons*), Mrs *Aguiar*, MM *Akçali*, Mrs van Ardenne-van der Hoeven, MM de Aristegui, Arzilli, Attard Montalto, *Bal*, *Bartumeu Cassany*, *Bruce*, Bulavinov, *Clerfayt*, Contestabile, Demetriou, Derycke (alternate: *Vanoost*), Dimas, Enright, *Floros*, Mrs *Frimansdóttir*, MM Fyodorov, *Gustafsson*, *Holovaty*, Mrs Hren-Vencelj, Mrs *Imbrasiene*, MM *Jaskiernia*, *Jurgens*, Kelemen, Lord *Kirkhill*, MM S. *Kovalev*, *Kresák*, Mrs Krzyzanowska, Mr Le Guen, Mrs Libane (alternate: Mr *Cilevics*), MM Lintner, Lippelt, Loutfi, *Magnusson*, Mrs *Markovic-Dimova*, MM Marty (alternate: Mrs *Nabholz-Haidegger*), *McNamara*, *Moeller*, Nastase, Mrs Ninoshvili, MM Pavlov, Pollo, Mrs Pourtaud (alternate: Mr *Bordas*), MM Rodeghiero, Mrs Roudy, Mrs Serafini, MM *Simonsen*, *Skrabalo*, Solé Tura (alternate: Mrs *Lopez Gonzalez*), *Solonari*, *Spindelegger*, Svoboda, Symonenko (alternate: Mr *Khunov*), *Tabajdi*, Tallo, Vera Jardim, Mrs Vermot-Mangold, Mr Vyvadil, Mrs *Wohlwend*, Mrs Wurm

N.B. The names of those members who were present at the meeting are printed in italics.

Secretaries to the committee: Mr Plate, Ms Coin and Ms Kleinsorge

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 October 2000

CHARTE 4500/00

CONTRIB 350

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the texts adopted by the Parlamentary Assembly of the Council of Europe the 29 September 2000. [1]

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[1] This text has been submitted in English and French languages.

Parliamentary Assembly
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Provisional edition

Charter of Fundamental Rights of the European Union

Resolution 1228 (2000)[1]

1. Following the adoption of Resolution 1210 (2000) on the Charter of Fundamental Rights of the European Union on 25 January 2000, the Assembly has continued to follow with great interest the preparatory work on the charter, which is now entering its final stage.

2. The Assembly is led by its concern to ensure the full enjoyment of human rights and fundamental freedoms for all persons within the jurisdiction of European Union member states. The Assembly wants to encourage progress in this field made by the European Union. Its main concern is to avoid the emergence of new dividing lines in Europe by defending the consistency of human rights protection across the continent and avoiding diverging interpretations of these rights.

3. The Assembly recalls Recommendation 1415 (1999), according to which "economic and social rights are inherent aspects of human dignity and are clearly human rights, in the same way as are civil and political rights. These two categories of rights are interdependent and cannot be dealt with differently".

4. The Assembly welcomes the efforts undertaken by the European Union to enhance and make more visible the protection of human rights through the charter. The draft charter proposed by the Praesidium at the meeting of the "Convention" on 25 and 26 September 2000 reaffirms *inter*

1. Assembly debate on 29 September 2000 (32nd Sitting). See Doc. 8819, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Magnusson), Doc. 8846, opinion of the Political Affairs Committee (rapporteur: Mr Clerfayt) and Doc. 8847, opinion of the Social, Health and Family Affairs Committee (rapporteur: Mr Evin). Text adopted by the Assembly on 29 September 2000 (32nd Sitting).

alia the European Convention on Human Rights (ECHR), the Social Charter of the Council of Europe, and the case-law of the European Court of Human Rights. Insofar as the draft charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope shall be the same as those laid down by the said Convention, thus guaranteeing that the draft charter's level of protection will not fall below that of the ECHR.

5. The Assembly further welcomes the fact that the draft charter recognises a number of rights and freedoms not included *expressis verbis* in the ECHR, such as the right to respect for physical and mental integrity, the prohibition of trafficking in human beings, the right to asylum, and a number of important social and economic rights. However, the Assembly considers that the level of protection recognised by the draft charter should fully correspond to the level of protection afforded by the corresponding Council of Europe instruments, in particular the Revised Social Charter and the Convention on Human Rights and Biomedicine.

6. The Assembly also regrets that the draft charter makes no express reference to the rights of persons belonging to ethnic, religious or linguistic minorities, or indeed to the right to local and regional self-government – rights which are protected by Council of Europe instruments such as the Framework Convention for the Protection of National Minorities and the European Charter of Local Self-Government.

7. The Assembly is convinced that the aim of the draft charter, which is to enhance and make more visible the protection of fundamental rights in EU member states, can only be reached if institutions and bodies of the European Union are bound not only by the draft charter, but also by the European Convention on Human Rights. In a democratic society, a system of checks and balances is essential. All member states of the European Union, honouring this democratic principle, have submitted themselves to the external supervision of the European Court of Human Rights under this Convention, without endangering national sovereignty or the principle of subsidiarity. There is no legitimate reason why acts carried out on behalf of the European Union should be exempt from this fundamental external control mechanism, thus in effect withdrawing the protection of the ECHR from persons adversely affected in their fundamental rights and freedoms by Community law. As the European Commission has pointed out, the existence of a charter does not diminish the interest in acceding to the ECHR for exactly these reasons.

8. The new internal legal system that the Union wishes to create should reflect its global role. It must help to offset trends towards a "fortress Europe" and be at the forefront of combating racism, xenophobia and ethnic violence. In this context, consideration ought to be given to the question of the political rights of nationals of third parties established in the Union.

9. In this connection, the Assembly welcomes the resolution of the European Parliament, adopted on 16 March 2000, in which the European Parliament invites the Intergovernmental Conference (IGC) to enable the European Union to become a party to the European Convention on Human Rights. The Assembly further agrees with the European Commission that the drafting of the charter does not preclude the accession of the European Union to the ECHR, and that, indeed, this accession would in no way lessen the importance of the charter.

10. The Assembly therefore reiterates its appeal to the European Union do its utmost to safeguard the consistency of human rights protection in Europe. It thus invites the European Union and its member states to:

i. ensure that both the text of the proposed charter and its ultimate application fully reflect and preserve the protection extended by the European Convention on Human Rights and the European Court of Human Rights to every person within the jurisdiction of European Union member states;

ii.ensure that the social rights guaranteed by the charter correspond to those set forth in the Revised European Social Charter;

iii. enter into negotiations with the Council of Europe without delay in order to enable the European Union to accede to the ECHR as soon as possible by drawing up the necessary amendments to both the European Union treaties and the European Convention on Human Rights.

Provisional edition

Charter of Fundamental Rights of the European Union

Recommendation 1479 (2000)[2]

1.The Assembly draws attention to its Recommendation 1439 (2000) on the Charter of Fundamental Rights of the European Union, adopted on 25 January 2000, in which it recommended that the Committee of Ministers of the Council of Europe support the accession of the European Union to the European Convention on Human Rights and prepare the appropriate amendments to this treaty.

2.It notes that, at its 106th Session (10-11 May 2000), the Committee of Ministers stressed the need to ensure that, whatever decision the institutions of the Union might take concerning the charter, it did not lead to new dividing lines in Europe. The charter should be fully consistent with, and not weaken, the system for the protection of human rights provided, under the European Convention, to all citizens of the Council of Europe's member states, including those of the European Union.

3.Although the Assembly welcomes the fact that the Committee of Ministers shares its concern that there should be no rivalry between the two systems of human rights protection in Europe, it regrets that it has not yet reached a consensus concerning the accession of the Union to the European Convention on Human Rights, an approach which, despite the technical objections of the Court of Justice in Luxembourg a few years ago (which can easily be solved), has repeatedly received the backing of the other institutions concerned: the European Parliament, the European Commission and the European Court of Human Rights.

4. The Assembly is not aware of any factor opposing accession from a legal point of view. It thus fervently hopes that the political will which, up to now, has prevented the process from going ahead, can be mustered soon.

5. The Assembly also recommends that the Committee of Ministers bear in mind that Europe will always be larger than the Union and will always include a certain number of non-member states of the Union. There is therefore a need for practical, organic relations between the Council of Europe and the European Union, based on complementarity and co-operation, which take account of the Council of Europe's role and distinctive features.

6.The Assembly urges the Committee of Ministers to support the principle whereby the social rights guaranteed by the charter as adopted by the European Council must correspond to those set forth in

1. Assembly debate on 29 September 2000 (32nd Sitting). See Doc. 8819, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Magnusson), Doc. 8846, opinion of the Political Affairs Committee (rapporteur: Mr Clerfayt) and Doc. 8847, opinion of the Social, Health and Family Affairs Committee (rapporteur: Mr Evin). Text adopted by the Assembly on 29 September 2000 (32nd Sitting).

the Revised European Social Charter, the Council of Europe instrument which sets the standard where fundamental social rights are concerned and is one of the pillars of the European social model.

7.With reference to Resolution 1228 (2000) on the Charter of Fundamental Rights of the European Union the Assembly therefore recommends that the Committee of Ministers enter into negotiations with the European Union without delay in order to enable the Union to accede to the ECHR as soon as possible by drawing up the necessary amendments to both the European Union treaties and the European Convention on Human Rights.

Provisional edition

Charter of Fundamental Rights of the European Union

Order No. 567 (2000)[3]

The Assembly draws attention to its Resolution 1228 (2000) and Recommendation 1479 (2000) on the Charter of Fundamental Rights of the European Union and instructs its Committee on Legal Affairs and Human Rights, in co-operation with the Political Affairs Committee and the Social, Health and Family Affairs Committee, to closely follow developments regarding the charter, and to report to it in due course.

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1. Assembly debate on 29 September 2000 (32nd Sitting). See Doc. 8819, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Magnusson), Doc. 8846, opinion of the Political Affairs Committee (rapporteur: Mr Clerfayt) and Doc. 8847, opinion of the Social, Health and Family Affairs Committee (rapporteur: Mr Evin). Text adopted by the Assembly on 29 September 2000 (32nd Sitting).

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 4 October 2000 (05.10)
(OR. fr)

CHARTE 4951/00

CONTRIB 351

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find attached the European Parliament Resolution on the Charter of Fundamental Rights of the European Union. [1]

[1] Submitted in all languages.

10. Charter of fundamental rights

B5-0767/2000-10-05

European Parliament Resolution on the European Union Charter of Fundamental Rights

The European Parliament

– having regard to its Resolution of 16 March 2000 on the drafting of a European Union Charter of Fundamental Rights [1],

A. whereas the Convention retains sole responsibility for drafting the Charter up until the moment when it is proclaimed,

1. proposes, in line with the position it expounded when the Convention began its work, that, at its meeting in Biarritz, the European Council call on the Intergovernmental Conference to consider the text of the Charter adopted by the Convention and ways of incorporating it into the Treaty with a view to a decision being taken at the European Council meeting in Nice;

2. instructs its President to forward this Resolution to the Council, the governments and parliaments of the Member States, the Commission, the Convention and the other Community institutions.

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[1] Texts adopted, Item 4.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 17 October 2000

CHARTE 4954/00

CONTRIB 354

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a contribution by the European Council on Environmental Law, with the Resolution on the Right to the Protection of Environment, adopted on 22 September 2000 and submitted on 26 September 2000. [1]

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[1] This text has been submitted in English and French languages.

Conseil européen du droit de l'environnement
European Council on Environmental Law

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Resolution on the Right to the Protection of Environment

adopted on 22.9.2000

The European Council on Environmental Law

Having considered the draft of the Charter of Fundamental Rights of the European Union (September 2000);

Noting that Article 36 of the draft dealing with "Environmental protection"[1] does not impose any direct obligation on the member States of the Union which must ensure its implementation but deals only with programmatic requirements concerning the environmental policy of the European Union;

Considering that other articles of the draft Charter guarantee rights which States must recognise in relation to every person within the territory of the European Union and that this is particularly the case in relation to other economic and social rights such as the right to health, the right to social assistance and housing assistance;

Recalling Resolution 45/94(1990) of the General Assembly of the United Nations according to which "all individuals are entitled to live in an environment adequate for their health and well-being";

Recalling that all States of the Union have recognised in many international fora the right to a clean environment or to the protection of a clean environment and that they have introduced this right explicitly or implicitly in their legal system;

Recalling that all States of the Union as well as the European Community itself have signed the Aarhus Convention (1998) which recognises "the right of every person to live in an environment adequate to his or her health and well-being";

1 Art. 36 : Protection de l'environnement. Un niveau élevé de protection de l'environnement et l'amélioration de sa qualité doivent être intégrées dans les politiques de l'Union, et assurées conformément au principe du développement durable.
Art. 36 : Environmental protection. A high level of environmental protection and the improvement of the quality of the environment shall be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

CONCLUDES that the present formulation of Article 36 on the protection of the environment which places no obligation upon States and which does not recognise any individual right, is an unjustifiable step backwards from the commitments undertaken by States of the Union at national and international levels and does not reflect the evolution of law during the last decade;

PROPOSES to the Presidium of the Convention that the text of Article 36 of the Charter be drafted in terms that ensure that the Union recognises and respects the right of every person to protection of the environment in order to secure the right of each person to live in an environment adequate for maintenance of their physical and mental health, the enhancement of their dignity and their personal achievement.

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

Brussels, 18 October 2000 (23.10)

CHARTE 4956/00

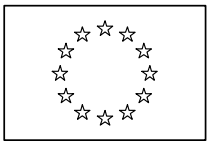
CONTRIB 355

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find attached a communication (COM(2000) 644 final) from the Commission of the European Communities entitled "On the Legal Nature of the Charter of Fundamental Rights of the European Union". [1]

[1] This communication was submitted in all the languages.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.10.2000
COM(2000) 644 final

COMMUNICATION FROM THE COMMISSION

ON THE LEGAL NATURE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

COMMUNICATION FROM THE COMMISSION

ON THE LEGAL NATURE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

THE CHARACTERISTICS OF THE DRAFT CHARTER

1. The challenge of preparing the draft Charter has been taken up: at the formal session of the Convention on 2 October 2000, the President of the Convention responsible for preparing it recorded that there was broad consensus on the draft and sent it to the President of the European Council. [2]

   The draft Charter offers great potential value added. By bringing together in a single instrument the rights hitherto scattered over a range of national and international instruments, it enshrines the very essence of the European acquis regarding fundamental rights.

2. This is a balanced text that makes ambitious innovations:

   – all personal rights – civil, political, economic and social rights and the rights of citizens of the European Union – are brought together in a single instrument. It thus throws into the sharpest relief the principle of the indivisibility of rights. The draft Charter breaks with the distinction hitherto made in both European and international documents between civil and political rights on the one side and economic and social rights on the other, enumerating all rights around a few major principles: human dignity, fundamental freedoms, equality, solidarity, citizenship and justice:

   – in respect for the principle of universalism, the rights set forth in the draft are generally given to all persons, irrespective of their nationality or residence. The position is different for the rights that are most directly bound up with citizenship of the Union, which are given only to citizens (such as participation in elections to the European Parliament or in local elections), and for certain rights that are related to a particular status (rights of children, certain social rights of workers, for example);

   – the draft is decidedly contemporary in that it sets forth rights which, without being strictly new, such as data protection and rights linked to bioethics, are designed to meet the challenges of current and future development of information technologies and genetic engineering;

   – the draft also meets the strong and legitimate contemporary demand for transparency and impartiality in the operation of the Community administration, incorporating the rights of access to administrative documents of the Community institutions and the right to sound administration that sum up the tenor of the decisions of the Court of Justice;

[2] Document CHARTE 4487/00 (CONVENT 50), 28 September 2000.

– the gender-neutral language used in the text also deserves highlighting. The draft is addressed to everybody, with no predominance of one gender over the other;

– in formal terms, it is drafted clearly and concisely and it will be easy for all those to whom it is addressed to understand. This was the first condition that had to be met in order to satisfy the demand from the Cologne European Council for "a Charter of fundamental rights ... to make their overriding importance and relevance more visible to the Union's citizens". It is also a condition for the enjoyment of all the benefits of certainty as to the law that the Charter must offer in areas where Union law applies.

3. In the light of the characteristics of the draft – which satisfies the requests made by the Commission in its Communication of 13 September [3] – the Commission representative was able to indicate his full approval of the draft Charter.

The Commission is convinced that the value added by the draft is real and that this value added is the basis for the future success of the Charter, irrespective of its ultimate legal nature.

THE NATURE AND EFFECTS OF THE CHARTER

4. The question of the nature of the Charter has been at the centre of the debate ever since the Cologne European Council decided to prepare a draft Charter. The Heads of State or Government decided to answer this question in two stages:

– first, the Charter should be solemnly proclaimed by the European Parliament, the Commission and the Council,

– then, *"It will then have to be considered whether and, if so, how the Charter should be* integrated *into the treaties"* [4]

5. There have been a number of expressions of opinion on the question.

The European Parliament, in two resolutions passed on 16 March [5] and 2 October 2000, [6] resolutely supported a mandatory Charter incorporated in the Treaties. So did the Economic and Social Committee [7] and the Committee of the Regions [8] in opinions given at their September 2000 sessions.

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3 Document COM (2000) 559.

4 Conclusions of the Presidency of the Cologne European Council, 3 and 4 June 1999, Annex IV.

5 Resolution A5-0064/2000 of the European Parliament on the elaboration of a Charter of Fundamental Rights of the European Union: minutes of the plenary session of 16 March 2000.

6 Resolution B5-767/2000 of the European Parliament on the Charter of Fundamental Rights: minutes of the plenary session of 3 October 2000.

7 Economic and Social Committee Resolution 1005/2000, adopted on 20 September 2000.

8 Committee of the Regions Resolution 140/2000, adopted on 20 September 2000.

The same call was made virtually unanimously by the representatives of civil society at the hearings organised by the Convention. It is unlikely that the expectations aroused in public opinion by the decision to prepare the Charter could be satisfied by mere proclamation by the Community institutions without incorporation of the Charter in the Treaties.

Many members of the Convention, belonging to different component groups and political trends, supported a Charter incorporated in the Treaties.

Lastly, the Commission, in its Communication of 13 September, undertook to present a Communication on the nature of the Charter.

6. The Commission had an opportunity to express an opinion on the nature of the Charter when answering an oral question in the European Parliament last December. [9] It stated that the Convention, both during its proceedings and in its final outcome, should leave open the two options as to the Charter's final status, as envisaged by the Heads of State or Government – a legally mandatory instrument incorporated in the Treaties or a solemn political declaration.

The Commission also stated that the draft Charter should meet two fundamental objectives: visibility for the citizen and the certainty as to the law that the Charter must offer in areas where Union law applies.

7. It is in this spirit, notably at the instigation of the President of the Convention, Mr Herzog, that from the very outset the Convention's proceedings were directed towards producing a text "as if" it were to be incorporated in the Treaties, thus leaving the final choice to the European Council.

8. This "as if" doctrine clearly inspired the Convention. If a Charter had been prepared solely for presentation as a political declaration, the general provisions of the draft, which are the most important and the most difficult ones (Chapter VII), would have been superfluous.

The importance of these clauses must be emphasised: they are the guarantee of the Charter's future success.

They are the place where it is specified just what the Charter is – an instrument to verify respect for fundamental rights by the institutions and the Member States when they act under Union law. This is made clear by Article 51(?), which provides that the Charter is addressed to the Union institutions and bodies and to the Member States, when they give effect to Union law.

[9] Oral question 0-0698/99 by Mr David Martin.

9. But these provisions also seek to offer an appropriate response to the highly important questions that will arise in the event of incorporation of the Charter in the Treaties.

The Commission considers that the draft Charter offers an acceptable response:

– **respect for the autonomy of Union law**: it is also important that the Charter be incorporated harmoniously into the Union legal system and that its underlying legal principles be respected. This applies in particular to the autonomy of the Community legal order in relation to international law and the national law of the Member States; the Charter is drafted in such a way as to respect that autonomy. In particular, the explicit recognition by the last sentence of Article 52(3) is perfectly satisfactory: there is nothing to preclude Union law from giving more extensive protection than the European Convention;

– **the relationship between the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms**: the risk of disparity between the rights and freedoms secured by the European Convention and those set forth in the Charter, and the risk of the case-law of the Luxembourg and Strasbourg courts diverging, was carefully analysed while the draft Charter was being prepared. The solutions adopted by Article 52(3) of the draft are entirely satisfactory; there was the same broad consensus on them as on the other provisions of the draft, and the Council of Europe observers in the Convention also supported them: the rights set forth in the Charter correspond in their meaning and scope to rights already secured by the European Convention, without prejudice to the principle of the autonomy of Union law. The risk of the case-law of the European Court of Human Rights diverging from that of the Court of Justice of the European Communities should thereby be removed. If the draft Charter is silent on the question of Union accession to the European Convention, of course, it must be acknowledged that the question remains open. The existence of the Charter will not render the question of accession any less interesting, the effect being to introduce external monitoring of fundamental rights at Union level; by the same token accession to the Convention would not make the preparation of the Union Charter any less valuable;

– **the relationship between the Charter and the Union's powers, and respect for the principle of subsidiarity**: in no case will the Charter be a means of extending the Community's powers and the Union's tasks. And the subsidiarity principle must be respected. Article 51 of the draft is perfectly clear; this is borne out by paragraph 5 of the Preamble, stating, "just in case", how attentive the authors of the draft were to these points;

– **the relationship between the Charter and the national Constitutions**: it might have been feared that the Charter would make it necessary for Member States to amend their constitutions. This will manifestly not be the case, not just because of one of the general provisions of the draft but also because of the definition of the rights it sets forth. In any event, proper account has been taken of observations on the need to attain this objective, made throughout the Convention's proceedings, in particular by government representatives. At the end of the day it is clear that the Charter will not replace national Constitutions in the area

within its scope – respect for fundamental rights at national level. And it is clear that the relationship between Union primary law, which would include the Charter if it is incorporated in the Treaties, and national law will remain unchanged;

– **a major advance in certainty as to the law:** at this time it seems clear to the Commission that the Charter will not endanger certainty as to the law relating to fundamental rights. Quite the contrary: it will increase it in no small measure. The Charter will offer a clear guide for the interpretation of fundamental rights by the Court of Justice which in the current situation has to use disparate, sometimes uncertain, sources of inspiration. It must also be stressed that the Charter makes no change to the redress procedures and court architecture provided for by the Treaties, since it opens up no new procedures for seeking redress in the Community courts.

10. Consequently, given the foregoing considerations, it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. As the Commission said in the European Parliament on 3 October 2000, [10] it is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert.

Likewise, it is highly likely that the Court of Justice will seek inspiration in it, as it already does in other fundamental rights instruments. *It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law.*

11 The Commission considers that the Charter, by reason of its content, its tight drafting and its high political and symbolic value, ought properly to be incorporated in the Treaties sooner or later. For the Commission, this incorporation is not a question to be addressed in theoretical or doctrinal terms. It must be addressed in terms of legal effectiveness and common sense. *It is therefore preferable, for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation.*
In practice, the real question is when and how it should be incorporated in the Treaties.

WHAT SHOULD BE DECIDED TODAY?

12. The Commission is aware of the importance attached to the Charter being able to have full effect in the future. It does not wish to overload an already heavy political agenda. It will be for the Heads of State or Government to take up that challenge. But the Commission's political assessment is that any decision on the matter must be based on clear criteria that have already been put forward:

- evaluation of the content of the Charter,
- greater certainty as to the law,

[10] Oral question 0-0115/00 by Mr Giorgio Napolitano.

- visibility of rights for citizens,
- a firm foundation for the European venture in the values protected by fundamental rights.

Irrespective of all this, the Commission emphasises that the Heads of State or Government have a number of options regarding both the technicalities of incorporation in the Treaties and the timing.

Regarding timing, the European Council might consider entering the question on the agenda for the current Intergovernmental Conference. It could take a decision to that effect at the Biarritz meeting. But this question cannot be considered without regard for the scope of the proceedings as already defined by the European Council for the present Intergovernmental Conference or for the prospect of reorganising the Treaties as proposed by the Commission at that conference in its communication of 12 July 2000, "A Basic Treaty for the European Union". [11]

As the Commission sees it, there is a very close link between reorganisation of the Treaties and incorporation of the Charter in them. Consequently the Heads of State or Government should at the very least decide at Nice to launch some kind of process in this direction, clearly setting objectives and procedural and other details.

This is the only way forward that provided a basis for an effort to educate the citizen and give practical form to the technical details that will bring a sound result within reach.

Regarding the technical details, the European Council might in due course envisage, for example, straightforward incorporation of the articles of the Charter in the Treaty on European Union in a Title headed "Fundamental Rights", or incorporation of the Charter in a Protocol annexed to the Treaties.

In any event, the question arises whether Article 6(2) of the Treaty on European Union can be kept in its present form. At the very least it must be generally obvious that, while leaving open the possibility of future developments, there can be no question of pretending to ignore the Charter as a solemn political declaration, in the light of Article 6(2). The Commission considers that this question should be discussed by the Intergovernmental Conference after the Biarritz European Council. The point would be to consider the possibility of amending this provision of the Treaty on European Union, bearing in mind the sequence determined by the conclusions of the Cologne European Council: proclamation of the Charter by the European Council at Nice, then incorporation in the Treaties.

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[11] Document COM (2000) 434.