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The Charter of Fundamental Rights of the European Union ** Seen from afar - Seen from within the EU

SUMMARY

The paper gives an assessment of the Charter of Fundamental Rights of the European Union as proclaimed by the Nice Summit in December 2000. It is argued that the Charter in spite of its lack of legally binding force and in spite of the fact that its contents, compared with other legal instruments dealing with human rights matters, essentially constitute nothing really new, is of great importance, both in substance and in the way is was developed by a "Convention". The Charter can be seen as the human rights part of a future Constitution of the European Union and thus form a crystallising core or catalyst for a new or continued discussion on such a Constitution. The many open questions in the European Union - competences between the Union, the member states and the regions; balance of power between the institutions of

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the Union; decision-making procedures, majority rules and vetoing-rights in an ever-growing Union - cry for new answers which at the same time can do something against a strongly felt democracy and legitimacy deficit. The Laeken Declaration, adopted by the European Summit in December 2001 and creating a new "Convention" to answer those questions, is very much influenced by the Charter experience and expressly mentions the possibility of a Constitution for the Union with the Charter as a part that Constitution.

Keywords: European Union, Charter of Fundamental Rights of the European Union, Nice Summit, Laeken Summit, Laeken Declaration, Future of the European Union, Constitution of the European Union, Convention, democracy and legitimacy deficit, values, Peace through integration

I The Charter - An Asset of the Nice Summit

On 7 December 2000, at the European Summit in Nice, the Charter of Fundamental Rights of the European Union was solemnly proclaimed in a joint declaration of the European Parliament, the Council of Ministers of the European Union and the EU Commission. That event was celebrated as a huge success, and rightly so: the Charter is concerned with the highest and most exalted human rights and articulates them in a way which opens up altogether new perspectives in the process of creating a Constitution for the European Union. The way the Charter was drawn up and the speed with which this happened were something quite new and unusual for the Union. The proclamation as such lent the Nice Summit a distinctive lustre which the other results achieved could not have imparted to it: the Summit, mainly concerned with the so-called "left-overs", i.e. the long-necessary adjustment of the founding treaties and procedures to the substantial enlargement of the EU, finally agreed on some rather modest, if not inadequate amendments of the treaties and institutional procedures.

Looking back at the Charter one year after its proclamation, it has lost nothing of its lustre. On the contrary: not only has it been endorsed by specialist congresses and academic circles, but much more importantly, it is regarded within the European Union by a wider public and by political reporters as one of the crystallising cores or catalysts for a constitutional debate on the central

issues for Europe: Where is the Union going? How will it develop? What is its aim? Actually, one year later on 14/15 December 2001 the European Summit in Laeken in its decision to convene a new "Convention" to give answers to the above mentioned and many more questions finally has accepted the view that the present state of the European Union affairs necessitates some very fundamental re-thinking of the Union's future, its competences, its decision-making process and its democratic organisation and legitimacy, which lastly could lead to a Constitution replacing, at least partly, the founding treaties and separated from them in a new basic instrument.

At the same time it is, nevertheless, clear that - leaving aside its lustre - what you seek and what you see in the Charter will vary depending upon whether it is viewed from afar, from outside the Union, or from within the Union. I shall endeavour to describe certain aspects perceived when viewing the Charter from within the Union and what strikes one when viewing it from outside, using binoculars so to speak. The view from outside is in principle not qualitatively inferior to the view from within: From a distance one has a better overview and what is important is thrown into sharper relief, but on the other hand one cannot see everything. I would therefore warn against the false conclusion that might easily be drawn from afar, namely that given the large number of legally binding international and European instruments guaranteeing human rights already in existence, it is really not necessary to have yet another catalogue of rights, especially one that is not fully binding and cannot be invoked by individuals, as is the case with the Charter. Let us therefore use both binoculars and a magnifying glass at the same time.

Before doing so I would like to make one further point: I very much hope that the present Yugoslav view of the Charter and internal Union affairs from afar will soon become a close-up and then a view from within. I admire all those who in the past, while aware of the risks and dangers, courageously and resolutely took to the streets against those who despised human rights, against the enemies of minorities and against those who merely paid lip service to the concept of the rule of law. It was they who made possible the great political changes which have taken place since 5 October 2000, changes which have led to the introduction of reforms to the State, society and the economy and which now open the prospect of a close-up view in the future and of a view from within thereafter. The terms "EU" and "Brussels" will, I hope, soon not only be heard in the context of donor conferences but will also become common currency

following a Stabilisation and Association Agreement and, finally, accession negotiations. The aim of the "EU compatibility" of new regulations so often referred to is not only concerned with the major economic freedoms laid down in the basic Treaties, the internal market, agricultural market organisations, common border arrangements, common economic and monetary policies and a common foreign and security policy, but must above all also serve the development of a community of values. The European Union, of which Yugoslavia also wishes to become a member in the future, is founded, as stated in the wording of the preamble to the Charter of Fundamental Rights,

> *on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*

These are values which sound very familiar. They are the values of the Universal Declaration of Human Rights of the United Nations of 1948; they are also the values of the European Human Rights Convention of 1950 and many other texts which everywhere are used to help right to achieve victory over might. However, these values alone would not have achieved victory over a power hostile to them had it not been for the ever-increasing protests and ever-stronger resistance against the old regime demonstrated on the streets and in elections. There is a certain paradox in the fact that the legally binding force of international human rights agreements or corresponding national rules can, on occasion, mean very little as regards the real human rights situation and any guarantee of the rule of law, whilst a Charter of Fundamental Rights of much more limited legal validity, may, whatever its particular shortcomings, be able to achieve much more in an environment where, as a basic premise, the protection of fundamental rights and the rule of law are actually anchored in every day life.

II The Charter - Not a Legally Binding Instrument

Lawyers, looking from afar or looking from within, are used to taking legal texts from the Official Journal. However, the Charter of Fundamental Rights is not to be found there. It is not contained in part "L" (Legislation) of the Official Journal but in part "C" (Information and Notices). Part "C" contains texts which either do not have or, as in the case of preparatory documents in the

legislative process, do not yet have legal status. Thus, even considered formally, the Charter is not a legally binding text. The fact that Article 51(1) restricts its scope to the institutions and bodies of the Union and to the Member States when implementing Union law and Article 51(2) states quite categorically that the Charter does not establish any new power or task or modify powers defined by the Treaties means that, in substantive terms also, the Charter does not extend beyond current Union law. On the other hand, even from afar it is clear that, despite its limited legal validity, as result of its solemn proclamation by the European Parliament, the Council of Ministers and the Commission, the Charter has an importance extending beyond the confines of the purely legal.

If we look at the content of the Charter a little more closely, we can see the following: it is clear that the Charter of Fundamental Rights involves a considerable degree of innovation compared with traditional international and regional human rights guarantees. In this context, I would refer above all to the social rights, the so-called "modern" rights or the "new generation" of human rights, such as the right to protection of personal data, protection of the environment and protection against excessive research and experiments with genetic materials and, finally, the very explicit comprehensive prohibition of discrimination. The Charter is also much easier to read than the language of the Human Rights Convention, which can barely be understood without a degree in law. Indeed, some articles of the Charter are formulated in an exemplary clear, simple, short and understandable manner, and this is a considerable achievement. However, as regards guarantees of the freedom of the individual and the citizen, the Charter in principle contains nothing new, and the other parts of the Charter contain much that is already familiar to us, in particular from the Social Charters of the Community and of the Council of Europe. The Charter thus basically repeats and reaffirms international standards valid in the individual member countries of the Community (now, since Maastricht and Amsterdam, the European Union) on the basis of their constitutions or their constitutional traditions, and also long applicable in the European Union. It is one of the major achievements of the Court of Justice of European Communities in Luxembourg that, on the basis of a Treaty provision (today Article 6(2) of the Treaty on European Union), which refers in very general terms to the constitutional traditions common to the Member States, it has developed fundamental rights in an extensive body of case-law in such a detailed and pronounced manner, that their comprehensive application in the European Union has long been beyond doubt.

I can well understand that this first look at the Charter of Fundamental Rights from afar might give rise to some perplexity or some surprise at the acclaimed importance throughout Europe of something which one might well simply consider to be scarcely anything more than a new compilation of basically very well-known principles or norms. However, I would warn against regarding the uniquely solemn proclamation of the Charter as merely a compensation for its lack of legally binding force. One should also not regard the whole as a typical, rather weak EU compromise between those who sought to create with the Charter a legally binding first part of a new, comprehensive Constitution of the Union, and thus wanted to achieve considerable innovation, and those Member States which on no account wanted this at the present time, for a wide variety of reasons. Undoubtedly, both in principle and in many of its individual provisions, to which I intend to return later in somewhat greater detail, the Charter bears the marks of such a compromise. In the Community and the Union, the Member States and institutions – depending on their vision of Europe and their respective objectives and depending also on the readiness of their citizens for integration – have always pursued quite different integration speeds, and the bigger the Union, with its present 15 and soon far more than 20 members, becomes, the more intensive will be the arguments between those who want to turn the Union into - let us say - a genuine federation or confederation of States and those who would prefer it to be a more or less loose pragmatic association of national states. Given this situation, a Charter of Fundamental Rights - in modern terms the equivalent of the more exalted part of any constitution, as against provisions on the organisation of the State - and the question of its legally binding force were bound to take on an extremely symbolic dimension and to remain subject to controversy. But in a democracy compromises are necessary and no bad thing. Grand objectives are seldom attained in a single giant leap, and a surge forward on the part of some must not be so violent as to leave the others behind and break the ranks of 15, and perhaps soon even 25, partners. A good compromise takes things forward, keeps everyone on board, is not too demanding on anybody and at the same time does not definitively dismiss anybody's intentions. Instead, seen in dialectical terms, it promotes further negotiations on differing views as to the objectives, precisely because they clearly continue to exist as antitheses or opposing poles, constantly there as a challenge pressing for resolution and synthesis.

III The Charter - Necessary Consequence of Progressive Integration and first Architectural Component of a Constitution for the Union

Let us now take a first, more detailed and precise look at the Charter from within and place it in the historical context of the almost 50-year long integration process of the Community.

Regardless of its considerable slowness at certain stages and the frequent occasions on which it has ground to a halt, regardless of many short-comings and frequent reasons for impatience or even despair, I basically regard this process as being one of progress: towards greater integration, towards the deepening of the Community and towards a constant extension of its competence. This cannot seriously be denied by anybody who on the one hand has European history and traditions in mind and on the other has seen the countless individual steps towards the creation of an internal market and the continuous further harmonisation of legal systems, who bears in mind freedom of movement, the fact of a fully common agricultural market and the common trade policy, who contemplates the cohesion policy fully implemented after enlargement towards the south and now no longer confined only to the south, who surveys the progression from a joint economic and monetary policy to a uniform currency in the case of the majority of Member States, who is now witness to the first steps of a common foreign and defence policy, and who accepts that the European Community of the Rome Treaties has, since Maastricht/Amsterdam, developed into the present European Union.

Without a doubt, the Charter of Fundamental Rights is part of this process of progressive integration. I would even go so far as to say that the Charter enterprise is a necessary consequence of the ever greater and more intensive intertwining of the Union. Leaving aside the fact of its lack of comprehensive legal validity, the Charter is, in terms of its form, clearly the fully completed and self-contained human rights section of a modern constitution and thus is the first architectural component of a future comprehensive constitution for the European Union (the other parts of such a constitution would deal with the institutions of the Union and the competence of the Union and its institutions in the light of the subsidiarity principle). It has developed in this form as a deliberate counter-balance to the increasing dissatisfaction with the fact that the ever-expanding sphere of action of the European Union, which will soon have

permeated all segments of life, is founded on such unclear, unwieldy basic texts intelligible only to experts and which contain so little in the way of principles. Doubts as to the proper legitimacy of the deepening of the Union and the expansion of its powers were becoming increasingly pronounced. In 1999, when, following a German proposal at the summit in Cologne, the mandate for the work on the Charter was drawn up, the integration process had reached a point where even the Council of Ministers felt that the legitimacy deficit within the Union was no longer tolerable. It took the Council of Ministers longer to realise this than the European Parliament. That is why its earlier efforts regarding a constitution for the Union failed to achieve majority support for such a long time and why many good drafts and much preliminary work remained more or less unnoticed. In Cologne, the Council of Ministers for the first time acknowledged the legitimacy deficit and expressly linked it to the stage of integration achieved:

> *The protection of fundamental rights is a founding principle of the European Union and the necessary pre-requisite for its legitimation. ... At the current stage of the Union's development, it is necessary to draft a Charter of these rights in order to visibly establish their fundamental importance and scope for all citizens in the Union.*

For now, let us note that, over and above the economic results to be obtained from uniform markets and a uniform currency, the Charter represents an attempt to legitimise the Union with respect to its achievements to date and in the future above all as a community committed to basic human rights.

IV The Charter - The Comprehensive Human Rights Part of a Constitution

At this point, a more detailed description of the content of the Charter is required. Because this entails comparisons that at least have to be touched on with Community law and the European Convention on Human Rights, which extends beyond the Community to embrace 40 Member States, it will involve a look both from within and from without. However, I can only deal with the content in abbreviated form in terms of a list because I feel that it is more important to say something concerning the general importance of the Charter and some of the problems involved.

At the beginning of this paper I quoted an important sentence from the preamble to the Charter. It contains concepts which, either literally or in terms of

their meaning, recur as the titles of chapters of the Charter: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and Justice. These chapters are followed by a further one containing the General Provisions, which deal with the legally very difficult questions of the scope of the Charter, the scope of the guaranteed rights, the level of protection and the prohibition of abuse of rights. They are thus concerned with very delicate issues. As an example, I would mention only the following ones: First, the conflict and concordance between the powers granted under the Community Treaties and the Treaty on European Union on the one hand and the matters regulated by the Charter on the other; second, the fact that, although the wording may of course vary, the rights in the Charter coincide with those of the European Convention on Human Rights, other international instruments or constitutions of the Member States; third, the pre-requisites and conditions governing restrictions on rights guaranteed by the Charter; fourth, ensuring that the level of protection does not fall below existing guarantees.

To begin Chapter I (*Dignity*) with a reference to human dignity as being inviolable and something to be protected as the central, over-arching human right is no new invention of the Charter - here one need only refer to the Universal Declaration of Human Rights or to the Basic Law of Germany. However, it is nevertheless a "strong beginning". It contains not only the traditional rights to life and the physical integrity of the person, the prohibition of the death penalty, of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery and trafficking in human beings, but also "modern" protection provisions in the medical and biological field, such as the express prohibition of the reproductive cloning of human beings. Human dignity is also central to the general principle of equality and the prohibitions of arbitrary conduct and discrimination which are dealt with later.

Chapter II (*Freedoms*) brings together in a very clear and simple form the traditional individual and collective rights to freedom with which we are already basically acquainted from the European Charter of Human Rights and the additional protocols thereto, the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers, other treaties, and the case-law of the Court of Justice of the European Communities. In particular, it places the "new generation" of rights, such as the protection of personal data and the freedom and pluralism of the media, in their proper overall context. On occasion, there are also extensions of traditional rights, for example the right to marry is no longer restricted to persons of opposing sexes, the right to education has been extended to vocational and continuing training, and the protection of

property has expressly been expanded to include intellectual property - a right endangered in many places. It is something of a weakness - both substantively and in terms of codification - that possible restrictions on the rights to freedom are at times expressly referred to in the relevant article, at times can only be found in the General Provisions, and, in other cases, are defined by reference to national provisions which, of course, vary. It also cannot be denied that certain "new" social fundamental rights - however much of an achievement and however progressive the fact of their inclusion in the Charter at all may be - are only guaranteed very weakly as a result of a compromise. Instead of a right *to work*, there is only a right *to engage in work* and, in the constant manoeuvring between employers and employees, it was only possible to include this right in the Charter by specifically guaranteeing the freedom to conduct a business in a counter-balancing article immediately afterwards, although no one would dispute that this right already ensues from the general freedom of action.

Of particular note in Chapter III (*Equality*), which begins with the basic but still not superfluous statement that everyone is equal before the law, is the specific article on non-discrimination which lists all forms of discrimination (here I would expressly refer to discrimination based on race, ethnic or social origin, language or religion, membership of a national minority or sexual orientation) which have still not disappeared even from Europe and in the south-east European region particularly. This is supplemented by the express commitment imposed on the Union in the following article to respect cultural, religious and linguistic diversity. The articles specifically dealing with the rights of the child, the rights of the elderly and the integration of persons with disabilities are clearly advances in terms of codification compared with older human rights agreements. However, the article dealing with equality between men and women, issues of equal pay and specific advantages in favour of the under-represented sex is considered by some to be something of a retrograde step compared with the EC Treaty.

In Chapter IV (*Solidarity*) we come to the basic social rights, an area in which the European Convention on Human Rights clearly no longer provided a sufficient basis, and in particular the norms contained in the various social charters had to be incorporated. I can only list these rights briefly: the right of workers to information, the right of collective bargaining and action, protection against dismissal, proper working conditions including an annual period of paid leave, the protection of children, young people, families and maternity, the right of access to free placement services, the entitlement to social security benefits

and social services and to health care and medical treatment. However qualified these rights may be, many consider that the particular value of the Charter is to be found here. These social rights far excel traditional lists of human rights since they are not only, as is the case with all human rights, "valuable" rights metaphorically speaking but also must be so categorised in a very material sense, being not only "valuable" but "expensive". This Chapter closes with two "modern" obligations concerning environmental protection and consumer protection.

In the citizens' rights it provides for within the Union (since the Maastricht Treaty there has been Union citizenship), Chapter V (*Citizens' Rights*) naturally goes beyond other human rights agreements, and is in this sense new. Existing law (for instance concerning elections to the European Parliament and municipal elections, freedom of movement and of residence) has in part been supplemented, for example by the particularly noteworthy right to good administration including the right to be heard and to have access to personal files, and has also been partly rearranged in order to give citizens of the Union a clearer idea of their rights. Here, I would refer to the general right of access to documents of the Institutions, the right to apply to the Ombudsman and the right to petition the European Parliament. There is also the fact that citizens of the Union have a right to diplomatic or consular protection which extends beyond the normal rights in this sphere in that every citizen of the Union may apply for protection to any Member State on the same conditions as the nationals of that Member State.

The last chapter before the General Provisions, Chapter VI (*Justice*), contains the standard principles with which we are acquainted in Europe as a result of the European Convention on Human Rights. These are the principles of the presumption of innocence, the principle of *nullum crimen, nulla poena sine lege* and the principle of *ne bis in idem*. In the case of the Union, they have been extended by an express stipulation that penalties must not be disproportionate and that the principle of *ne bis in idem* also applies between the jurisdictions of several Member States. Finally, the Charter also goes further than the Human Rights Convention in the case of the right to a remedy. In line with current Community law, provision is made not only for a right to a remedy before a (not further specified) national authority, but also before a tribunal, access to which must be guaranteed by legal aid where appropriate.

V The Charter - On its Way to Legally Binding Force

Let us now return to considering the Charter more from within. The attempt to bring together fundamental rights applicable to the Union, its Member States and each individual citizen from very different legal sources and to find a common denominator while remaining complete, and at the same time to draw up an easily readable text intelligible to the ordinary citizen and which can be used in everyday life and be absorbed into the political consciousness has, in general, proved a success. This alone was no easy task bearing in mind the multiplicity of legal sources involved: There are international conventions, with members extending well beyond the Union, concerning human rights in general, individual groups of such rights, or very limited specific areas; in addition we have the Treaties founding the Community and the Treaty on European Union; there are finally the written and unwritten constitutions of the Member States, the common constitutional traditions and the case-law of the Court of Human Rights, of the Court of Justice of the European Communities and of national constitutional courts.

Nevertheless, depending on one's point of view, shortcomings were unavoidable. Those who already consider all fundamental rights to be sufficiently secured *de lege lata* will dismiss the Charter as superfluous and irrelevant (this is the case of many who felt that the Union should simply accede to the European Convention on Human Rights). On the other hand, those who wanted *de lege ferenda* to create new rights through the Charter or extend existing ones will be disappointed that there has been no advance beyond the situation to date. Aware of all aspects of the issue, experts will find the brief Charter lacking in much which they consider to be essential, and citizens finding apparently ambitious, unrestricted rights in the Charter will be surprised or disappointed to discover extremely radical restrictions in the small print in other parts of the Charter or in national law.

Of greater importance are the irresolvable (or only formally resolvable) substantive contradictions or, more accurately, tensions. Two examples will suffice here. Any Union Charter of Fundamental Rights must of course contain a prohibition of the death penalty corresponding to Protocol No 6 of the Human Rights Convention and required of all candidates for accession. However, it is a fact that under the basic Treaties the Union has no powers to adopt rules in this sphere. The position is rather similar as regards the indispensable provisions in the context of the Charter concerning labour disputes, where the Union again

has no power to adopt rules. It would be too easy to dismiss such contradictions simply by pointing out that the Charter is in any case not legally binding. However, since its whole thrust implicitly aspires to legally binding force, these contradictions had to be resolved, at least formally; it was, quite simply, stipulated in the general provisions, with the tensions involved being clearly seen, that the Charter does not establish any new power or modify powers defined by the Treaties (Article 51(2)).

The conflicts of interpretation inevitably ensuing from the fact that the numerous legal sources are worded in different ways were resolved in similar manner. The Charter accords the European Convention on Human Rights clear priority in determining the meaning of those rights and, as a general principle, only allows more extensive protection (Article 52(3)). It is also expressly stipulated that nothing in the Charter may be in any way be interpreted as restricting existing rights (Article 53). Finally, in relation to Community law, there is a cautious and clear stipulation to the effect that rights recognised by the Charter may be exercised only under the conditions and within the limits defined by the Community Treaties or the Treaty on European Union (Article 52(2)).

Once again, all this will confirm those who only ever see half-empty glasses in their opinion that the Charter is really superfluous. I also realise very well that the point of having renewed guarantees as to the free movement of workers may be severely questioned when, at the same time, countries seeking accession find themselves subject to extremely strong pressure for long transitional periods in relation to this right. However, looked at from within, at least those who, when confronted with the same result, see half-full glasses, will regard the Charter as having initiated a dynamic and a process which will help the Union on in its difficult way forward. The fact that every effort has been made to avoid a conflict of laws and to bring legal sources into line with each other in a text which is not legally binding can only be seen as preparation for the attainment of its full legal validity. In this context of making a text binding without its actually being so, there are some further points which I would not wish to over-estimate as regards the legally binding nature of the Charter in the strict sense but also would not wish to leave unmentioned either. Even before the Nice Summit, the European Parliament and the EU Commission each stated their intention to fully implement the Charter. The Commission followed this up with a commitment to attach a formal compatibility declaration with respect to the Charter to all its proposals which are of clear relevance to fundamental rights. The Charter is also taken into account at the Court of Justice in Luxembourg.

Because it is not legally binding, a point on which five Member States expressly insisted, it has not been quoted, but all Advocates-General have referred to it in their (extremely important) conclusions, and one national constitutional court, namely the Spanish court, has even already mentioned it in a judgment. Whilst for some these may be trivial points, for others they are indicative of the inevitability of further development of the Charter towards a legally binding status.

VI The Charter - Medicine against Europe Fatigue and Remedy against Democracy and Legitimacy Deficits

In referring to all these problems of congruence, conflict and concordance I wanted to make clear, at least in outline, what the legal importance of the Charter is and how many open questions still remain unresolved. In doing so I have not even dealt with the subsequent conflict of legal protection systems (national constitutional courts, the Court of Justice of the European Communities, the European Court of Human Rights). Lawyers might even take the view that it is something of a plus that the Charter also represents a most demanding employment and employment-creation programme for professors, legal seminars and post-graduate students and one which will fill specialist periodicals and give rise to a book or two in Europe and the world. However, in this last section I do not wish to close with this point but rather with what is decisive for the citizens of the Union when looking at the Charter from within. The Charter has awakened new hopes at a time when the great ideas of the founding years of the Community after the Second World War have faded and the immense achievements of those ideas - here I will only mention the miracle that a war between the Member States is totally inconceivable and the fact that, whatever shortcomings there might still be, the level of prosperity of the Union's citizens has increased enormously - are taken for granted and no longer seem to be worth mentioning. It is also a time when the difficult processes of substantive harmonisation and the complexities of institutional procedures have resulted in people suffering from Europe fatigue. The purely material – however important it may be - is at least to some extent again being complemented by a return to reflection on more abstract values. Thus, the Charter will not only reduce the ever more strongly felt legitimacy deficit, but will also, at least in part, mitigate the Union's obvious democratic deficit and

reduce the remoteness of events in Strasbourg, Brussels and Luxembourg for the ordinary citizen.

Two things bring me to this conclusion:

I have already said that the Charter can be regarded as the first element in the architecture of a European Constitution. This first element cries out for completion. There is in the first place the point that there must be a new ordering of powers as between what will in future be permanently regulated at Union level and what will be the responsibility of individual Member States, the regions and the local authorities in the light of the subsidiarity principle, which will take on ever-increasing importance as the Community grows in size. As observers from the outside, you know what vehement arguments are being conducted on this issue in many places throughout the Union, or you will at least be able to imagine what the situation is when you consider comparable problems here in Yugoslavia at the level of the federation and the republics or where autonomy is set against decentralisation. There is also the further point that a constitution will only be complete if the relations between the institutions, that is to say the Parliament, the Council of Ministers and the Commission are ordered efficiently, clearly and, above all, democratically. Here again, you know that there are shortcomings and tensions. They have their roots in the purely intergovernmental process by which the Communities developed, which has only allowed the Parliament, which should really be the major legislative body, to gain ground slowly - too slowly in the opinion of many - against the all too powerful Council of Ministers and which is still far from equipping it with all the functions that full democratic criteria would require. I cannot deal with this point in detail here and do not want to go into the complexity of the opinion-forming processes and voting mechanisms in the Council and between the Parliament, the Council and the Commission which are no longer at all suited to an ever-growing Union. Here, I only wish to mention that, following the successful step forward achieved with the Charter, the pressure for the process of providing the Union with a constitution solving those question could only become greater.

The second important point in this context is the power of identification which a sound constitution properly evolved, in particular with the participation of the citizens it concerns, may possess. Even the discussions concerning the Charter of Fundamental Rights did not take place solely amongst experts but also involved the citizens concerned. This set in train a process of identification which, in view of people's Europe fatigue and their feeling that Europe is too remote from them, is extremely urgent and can only be intensified by further

discussion of those parts of the constitution still lacking. Ideally, this should result in a strong feeling of patriotism in relation to a strong European constitution based on secure, comprehensible and accepted foundations.

I do not feel that my optimistic view, which does not overlook the many problems still to be overcome but assesses them realistically, is utopian. Again, it is the Charter which, notwithstanding all its shortcomings and problems, gives grounds for hope. When work began following the Cologne Summit in the middle of 1999, no one would have considered it possible to achieve such a result in less than 18 months, to reconcile basic differences of view concerning the Charter or at least to find acceptable compromises, to discuss the issues concerned broadly and publicly and, at the same time, to produce swiftly a legally correctly worded text which the ordinary citizen would be able to understand. Without in any way wishing to detract from the particular achievement of those who worked on the Charter under the chairmanship of *Roman Herzog*, the former President of the Federal Republic of Germany and former President of the Federal Constitutional Court, I would make the following observation: the speed with which things were done would not have been possible if the substantive need for a convincing basic text and for a foundation of legitimacy for the present and the future had not been so urgent. The two parts of the constitution still lacking are no less urgent. This was sufficiently demonstrated by the large number of political ideas put forward at three-monthly intervals by senior and even the top politicians; it is now demonstrated by the Laeken decisions of the European Summit. Discussions on the aim of the Union and the proper vision for the Union can no longer continue indefinitely.

The way in which the Charter was drafted also demonstrates that the conventional method of intergovernmental preparation and consultations between governments and their bureaucracies is no longer sufficient for texts of this importance. The manner of its drafting was also a condition for success within such a short period of time. The Charter was drafted by a "Convention" which had not previously existed in this form. Unlike previous instances, the Parliament, governments and the Commission did not undertake the task alone. Instead, a highly efficient consultative body comprising 62 members and 4 observers was constituted, in which directly democratically legitimised representatives were particularly strongly represented. It was composed as follows: 15 representatives of the Member States and 1 EU Commissioner; 16 Members of the European Parliament; 30 members from the legislative bodies of the Member States, and, finally, 2 observers from the Court of Justice of the

European Communities and 2 observers from the Council of Europe, one of whom was a judge at the European Court of Human Rights. Obviously, such a body enjoyed a high degree of legitimacy and the majority positions established developed their own momentum and centripetal force which individual dissenting governments (in general it was in fact the case that the governments constituted the main retarding factor) could only evade with the greatest of difficulty, if at all. To this there should be added the fact that the official discussions of the convention were public and that the documents were accessible to the whole world via the internet, that 67 different social groups were heard and that more than 600 outside proposals and suggestions for changes were examined. This exercise thus marked the very first step in the drafting of a constitution on a grass roots, democratic basis and in thereby creating a feeling of identification with it.

I certainly would not wish to exaggerate the importance of what happened, given that the exercise fell far short of a genuine constitutional convention and that it was still a long way from meeting the supreme criterion of democratic legitimacy, namely a referendum on the Charter. But here again, the point should be made that the work on the Charter at least finally demonstrated new approaches for further work on a constitution for the Union to be followed in the future. It therefore was appropriate that in initiating the post-Nice process to take forward the basic questions concerning the future of the Union or its aim, as I have already referred to it on a number of occasions, very soon a kind of initial consensus was beginning to emerge that one or more such "Conventions" are needed if results are to be achieved. With its success in the case of the Charter and the rather modest results achieved as regards the left-overs, where preparatory work practically only took place at government level, the Nice Summit has had a major influence in persuading an increasing number of politicians, including those in government, to call for a new "Convention", taking the view that it alone may be able to bring about major changes and at the same time achieve the goals of legitimacy and the identification of citizens with the Union.

VII The Charter - Its Impact for the Laeken Declaration

Considerations of that kind have had their influence on the recent decisions in the Royal Palace of Laeken in Brussels. Since December 2002 the question-marks concerning the problem of a European Constitution perhaps can

be written a little bit smaller. The Summit has adopted the "Laeken Declaration on the Future of the European Union", a decision of great importance for the present Member States of the Union as well as for all future Member States, not only those States which are already "half in" in the ongoing process of enlargement, but also for those States which, as Yugoslavia, are knocking at the door, having the intention to become Member States in a further step of the Union's enlargement. The Laeken Declaration views Europe at a crossroads, mentions the democratic challenge and the expectations of Europe's citizens, and addresses all the questions mentioned above - better division and definition of competences in the Union, simplification of the Union's instruments, more democracy, transparency and efficiency in the Union - ; it finally raises the question whether this process of "simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union". With its success in the case of the Charter the Nice Summit furthermore has had a major influence in persuading the Laeken Summit to call for a new "Convention", taking the view that such Convention alone may be able to bring about major changes and at the same time achieve the goals of legitimacy and the identification of citizens with the Union. The Laeken Declaration, therefore, expressly on the one hand has opened the Convention, in the capacity of "active observers", also to those States which, due to the enlargement process, are already "half in", and, on the other hand, has invited the European public, in a specific "Forum" to be organised, to take part in the discussion on the future of the Union.

The Laeken declaration (which also expressly mentions the possibility to include the Charter of Fundamental Rights in this basic treaty) strengthens my hopes for a new principal legal text as described above. The mandate mentions all the main points and problems; and it gives the right direction - "Towards a Constitution for European Citizens" - to follow. But nevertheless, the uncertainties about the final result of the exercise remain. All the issues are formulated as questions only, and, as a matter of fact, one rarely has seen a text coming from a European summit so full of question-marks. Consequently, the Laeken Declaration is modest enough to expect from the preparatory body not only consensually agreed recommendations to solve the questions, but also different options with varying degrees of support. So, I would like to add, it may well be, that agreement about the Charter on Fundamental Rights with its recourse to well-established principles of human rights was far easier to reach than agreement can be reached about the questions of a new order of competences between the Union, the Member States and the regions, of a new

balance between the European Commission, the Council and the Parliament and, finally, of new methods of decision-making in a much bigger Union with the necessity of majority votes and the unavoidable reduction of vetoing-rights. The latter questions, as opposed to the fundamental rights, are all power- and money-related to a very high degree, and experience shows that agreement on such questions usually is much more difficult to reach. Seen thus, there is still more than enough justification for question-marks concerning a Constitution[1]. Let us hope that it will soon be possible to reverse the negative result of the Irish referendum on the outcome of the preceding Nice Summit, which has been attributed to a variety of different causes, including Europe fatigue and the feeling that Europe is too remote. For the time being, however, the Irish result stands in the way of the post-Nice process and the further development of a full constitution for Europe.

VIII The Charter - A Step towards Universal Positive Human Rights

It will have become clear that the author of this paper is someone who believes in the idea of the European Union and who considers that, in its present form, it has the ability, following its extension southwards, not only to cope with the eastward extension soon to take place but also, as a further stage, with extension towards the South East. This will not only change the view of European Union affairs from afar to a view from within, but will also enable this part of Europe to share in the Union's achievements. Following the experiences of the World Wars and the East-West conflict, I can say without any exaggeration that I consider the creation of *Peace through Integration* to be the

[1] When I use the word "Constitution" I am talking about questions of substance, not of semantics. So, the fact, that the notion "Constitution" is not mentioned in the Laeken Conclusions and only mentioned in a rather shy way in the Laeken Declaration does not make the question-marks any bigger or smaller. It only signifies that very sensible questions are touched and that it is sometimes better to be careful in terms of terminology. Even if a text, which in terms of substance is a constitution, is named only, let's say, "Statute", it still remains a constitution in real terms. My country, Germany, is a good example for that: Our constitution in 1949 was, out of certain historical reasons - "No final constitution for a divided country" - , given the name *Grundgesetz* ("Basic Law"); but nobody ever doubted that this Basic Law was and is the Constitution of the Federal Republic of Germany.

most important of these achievements, and this, of course, is most important and desperately needed also in this region.

Peace will not be attainable and peaceful coexistence in diversity will not be possible without respect for human rights. This is made perfectly clear by the Charter. And it makes no difference whether the Charter is regarded as a purely political declaration, as a legal text on the way to achieving binding force or, finally, as being equal in status to the major human rights conventions. At the beginning of this paper I made the point that the fact that a human rights agreement may have clear legal force does not exclude the grossest and most systematic abuse of human rights by the State while, conversely, a non-binding Charter can develop considerable legal force and awareness in this area. Seen thus, the Charter is even now a far from negligible chapter in the world history of fundamental rights, which, in the words of the great Italian legal philosopher *Norberto Bobbio*, are characterised by a tendency towards universality and multiplication and whose development he describes as follows:

> *Human rights originate as universal natural rights, they develop into specific positive rights and are finally realised as universal positive rights.* [2]

[2] Norberto Bobbio: *Presente e avvenire dei diritti dell'uomo* (The Present and Future of Human Rights).

Dr. Rainer FAUPEL, Ph.D.

The Charter of Fundamental Rights of the European Union Seen from afar - Seen from within the EU

SUMMARY

The solemn proclamation of the Charter of Fundamental Rights by the Nice Summit in December 2000 was celebrated as a huge success. Its substance, the way and speed of its elaboration opened new perspectives in the process of creating a Constitution for the EU.

In spite of the fact that the Charter, due to differing views in member states on the necessity of such a Charter and on new constitutional texts for the EU, was not given legally binding force, and in spite of the fact that the Charter does not go beyond current Union law and existing human rights protection, its adoption is of great importance. The text of the Charter, even if in substance not containing anything really new, is written in such exemplary clear, simple and understandable manner that it can be regarded – and is regarded by a wide European public – as the comprehensive human rights part of a future Constitution for the EU. It thus raised, against the hesitations of some member states, the many open questions concerning the future of the EU and within the EU – competences between the Union, the member states and the regions; balance of power between the Union's institutions; decision-making procedures, majority rule and vetoing-rights in an ever-growing Union – on a constitutional level with the possible consequence that the EU is brought nearer to the citizens and that the democracy and legitimacy deficit is reduced.

The language of the Charter, even if not legally binding, is drafted in a way that it, at least formally, creates concordance and avoids all contradictions with current Union law and existing international or national human rights texts and traditions, thus showing the intention to become a legally binding text. The Charter therefore can be seen also as a crystallising core or catalyst for the solution of the many other open questions of constitutional relevance and thus pave the way for a new basic legal instrument of the Union which duly reflects the progress the Union has made in the past both in terms of competence and of deepening the relations between member states, and which at the same time makes the Union fit for the enlargement.

The way to elaborate the Charter not by traditional inter-governmental negotiations but through a "Convention" with the possibility for the public to follow and take part in the discussions, as well as the success in such a short time, already brought

citizens nearer to the Union, thus helping to reduce the democracy and transparency deficit. In addition, it made clear that the other open questions of constitutional relevance could possibly best brought forward by calling a new "Convention". The Laeken Declaration of December 2001, in fact, drew that conclusion and mandated the new "Convention" to discuss and make proposals for all open questions; the Declaration expressly mentions the possibility of a Constitution for the EU and the inclusion of the Charter in this new basic instrument.

The Charter of Fundamental Rights has given the Union a new consciousness of its underlying values. The Laeken Declaration opens the full constitutional debate. This is important not only for the present member states of the Union but also for those of the on-going enlargement process (they are invited to take part as "active observers" in the new "Convention") and those countries who, like Yugoslavia, are wishing to become members in a later stage. Human rights, rule of law, economic welfare and social security in a market economy - these are the goals of the Union which have led, whatever shortcomings there still might be, to what can be called the Union's success story during the past decades. The greatest of these achievements is undoubtedly "Peace through Integration", which after World War II and the East-West-conflict was and is of outstanding importance for the present and future member states, and which after the experiences of the last decade is desperately needed in the south-east part of Europe.