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FUNDAMENTAL RIGHTS
THE KEY TO THE EUROPEAN UNION'S IDENTITY POLITICAL AND SOCIAL

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1. Amsterdam dispelled the last doubts, Cologne set the pace. The European Union has at last overcome the stage of general appeals and equally abstract references. The end of a long and cumbersome discussion seems thus nearer than ever, the adoption of a clear set of rights imminent. But as encouraging as the signs are, the obstacles still ahead should not be underestimated. The consent on the necessity to precisely indicate the fundamental rights that both guide and limit all activities of the European Union is by no means an agreement over the content of the list.

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The risk is therefore evident. A debate, the sole purpose of which apparently is, to determine the individual rights, can easily turn into a virtually interminable discussion that not only endangers all attempts to keep the dates fixed by the Cologne Summit but lastly undercuts the very intention to define the fundamental rights in an unambiguous and binding way. Caught between a defensive minimalism and a self-destructive maximalism fundamental rights are quickly flogged to death. What therefore is more than ever needed is a solid basis on which the European Union can found its own Charter of Fundamental Rights.

The answer is rather obvious. Both the Amsterdam Treaty and the decisions of the European Court of Justice point at what has by now become a common European Bill of Rights: the 1950 European Convention on Human Rights (ECHR). Complemented by the Protocols and interpreted by the European Court of Human Rights it has indeed developed into a generally acknowledged source of all reflections on the content and the range of fundamental rights within the European

Union. No other document offers therefore a better chance to outline the determinants of a Charter.

However, as central as the role of the ECHR is, it does not legitimate a mere duplication by the Charter. An explicit acknowledgment of fundamental rights was never considered to be a simple substitute of the ratification of the ECHR. The expectations went definitely further. Not only because subjects of paramount importance to the European Union have been hardly touched upon by the ECHR but also for another no less compelling reason: Fundamental rights may have a long tradition. Neither the ECHR nor any other document provides however a definitive list and even the most generous interpretation has its limits. Experience shows, on the contrary, that an efficient protection depends to a decisive extent on a timely reaction to the society's structural changes and therefore on the ability to rephrase and complement the list of fundamental rights. The adoption of the ECHR marks hence undoubtedly a crucial moment in the history of fundamental rights but certainly not the end of the debate. The Charter has consequently to be understood and treated as part of an open process that forces the European Union to ask whether the rights envisaged do really respond to the actual political, social and economic challenges.

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2. Social rights are the probably most salient example for the need to revise the traditional concept of fundamental rights. The European Union has time and again stressed the crucial role of social rights for its policies. Documents such as the 1989 Community Charter and the EC-Treaty (art. 136) as well as the European Commission's social action programmes illustrate both the importance attached to the social rights and their influence on the activities of the European Union. There is hence no alternative to the insertion of social rights in the Charter if the European Union wants to remain consistent with its principles and safeguard thus its credibility.

It is however not enough to simply put social and political rights together in a single document. They may traditionally have been kept apart. But their systematic separation has blurred their links and promoted a perception that grants social rights a definitely inferior status. Their incorporation in the Charter must consequently first and foremost restore the close relationship between social and political rights.

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Thus, employment relationships are certainly the paramount example for the importance of anti-discrimination clauses. But despite the long list of both national and supranational court decisions or provisions as art. 141 of the EC-Treaty none of these decisions and clauses addresses an exclusive social right. They on the contrary exemplify the relevance of the equality principle in a particular field. As far therefore as the Charter is concerned, equality and non-discrimination cannot be disconnected. They are parts of one and the same fundamental right the range of which can only be correctly expressed if equality is seen and phrased against the background of the experiences in the employment field. The equality provision must as a consequence include an explicit acknowledgement of the right to equality of opportunity and treatment, without any distinction such as race, origin, language, religion, belief, political opinion, sex, marital status, sexual orientation, age or disability.

Similarly, one of the by now classic social rights, the right to bargain collectively, and to resort to collective action in the event of a conflict of interests, is directly related to the of freedom association. In affirming the latter, the Charter must therefore also address the first. But as convincing the parallel appears, the consequences of an acknowledgment of these two rights are quite different. While non-discrimination fits perfectly into long-standing activities of the European Union, as alone the efforts to secure an equal treatment of men and women in the employment field demonstrate, collective bargaining has, contrary to the equality of sexes (EC-Treaty art. 141), been explicitly omitted from the competences of the EC (EC-Treaty art. 137 para. 6). Hence, a provision in the Charter expressly recognizing both the right to bargain collectively and to resort to collective actions would, strictly speaking, only apply to persons employed by the institutions and bodies of the European Union, an admittedly rather absurd result. It should therefore more than ever be clear, that the decision to adopt a Charter has inevitably structural consequences for the European Union.

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If a document acknowledging fundamental rights is to be taken seriously, it can indeed not be degraded to a mere internal instruction. Neither the European Parliament nor the Cologne Summit had those who work for the European Union in

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mind when they advocated a both explicit and substantiated recognition of fundamental rights by the Union. It was in the interest of the Union's citizens that the Charter was promoted and the procedure for its adoption fixed. And it is for precisely the same reason that the Maastricht and Amsterdam Treaties emphasized the European Union's duty to observe in all its activities the limits set by fundamental rights. To dispute therefore the duty to respect fundamental rights recognized by the Charter in the case of employment relationships not concluded with institutions or bodies of the European Union contravenes the very intention of the quest for a unionwide acknowledgment of the individual's basic rights. The lack of competence is hence in no case an argument against the inclusion of especially social rights in the Charter. On the contrary, where missing competence is thought to be an obstacle for the acknowledgement of fundamental rights, it is not their recognition that must be questioned but the distribution of competence.

The inclusion of social rights raises however an additional problem. "Social rights" is a term that traditionally covers not only fundamental "rights" stricto sensu but also equally fundamental social policies. While, for instance, the "right to equal treatment" is undoubtedly a right, not the least because it can be judicially enforced, the "right to fair remuneration" or to "social and medical care" describe goals of social policies. Title XI Chapter 1 of the EC-Treaty is a typical example for the mixture of both. But what appears acceptable in the case of the EC-Treaty cannot be repeated in the Charter. Its sole purpose is to enumerate a series of rights the free exercise and binding application of which is a conditio sine qua non of a democratic society and that therefore are guaranteed by the European Union and protected by the Courts. Fundamental social policies can hence despite their misleading denomination as "rights" only be mentioned in connection with all the other objectives of the European Union. In sum, the sharper the line between rights and policies is drawn, the easier the inclusion of social rights will prove to be.

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Finally, the acknowledgment of fundamental rights implies more than a passive duty of non-violation. The European Union is under the obligation to use its regulatory instruments in order to create conditions inhibiting discriminations and promoting the implementation of fundamental rights. In the past, equal treatment of men and women has been the main example for such an active guarantee. In future, the

accent will because of the changing conditions of work, the growing longevity and the demographic development increasingly shift to age discrimination. As in the case of women the European Union will especially have to prevent collective discriminations, such as mandatory age limits, deliberate reductions of social and medical benefits, or labour market policies attempting to combat unemployment by early retirement strategies. The Union must in other words accept and secure a prolongation of life-time work but simultaneously encourage work schedules offering different forms of part-time occupation that allow to take changing capacities as well as growing experiences into consideration.

3. Few developments have in the last three decades, as alone the example of the processing of personal data shows, affected fundamental rights as profoundly as the changes in information and communication technology. Irrespective of whether the data gathered concern employees, patients, bank customers or consumers in general, a more and more sophisticated technology has led to an unprecedented collection of personal information. Whoever thought that the end had been reached with the use of smart cards, was forced, once Internet was established, to admit that there are virtually no limits. Moreover, the processing gained a new dimension with the storage and retrieval of genetic data. Each of them is not only a databank in itself but provides also a multitude of extremely sensitive information, accentuating thus even more the vulnerability of the data subjects. They are increasingly the target of activities best described by terms like "data mining", the aim of which is to systematically exploit the vast amount of data by methodically arranging and rearranging them for an infinite number of purposes.

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Ever more meticulous profiles help thus to develop growingly personalized strategies in order, for instance, to better market certain products or services, conclude or refuse life or medical insurance, control, review and restrict medical costs, monitor and evaluate employees. As a result, privacy shrinks and the data subjects are merely seen and treated as objects of administrative measures and entrepreneurial policies. The more however individuals do not know who is using their data for what purposes and under what conditions, the more they tend, as the Federal German Constitutional Court put it in its 1983 landmark Census-decision, to renounce to their

fundamental rights and to adapt to the presumed expectations of the potential controllers of their data. The individuals' right to determine the access to their data and to control their use is hence a precondition of their capacity to communicate and to participate and thus a constitutive element of a democratic society.

For precisely this reason Parliament, Council and Commission considered the adoption of the 1995 Data Protection Directive as a direct consequence of the European Union's commitment to fundamental rights. If therefore the Charter is to reflect experiences and expectations of the European Union it cannot ignore its reaction to the processing of personal data. The 1995 Data Protection Directive and its complements, the 1997 Directive on the processing of personal data and the protection of privacy in the telecommunication sector, and the, accordingly to the Commission's repeatedly affirmed intention, projected Directive regulating the use of employee data, must, on the contrary be regarded as a clear vote for the inclusion of a provision explicitly acknowledging the need to protect privacy and thus to guarantee the individual's right to decide on the processing of her or his data.

Data protection underscores thus the importance of the European Union's activities as a, next to the ECHR, crucial source for determining the content of the Charter. Their knowledge and analysis offers in fact a double chance: to arrive at a document that not only genuinely reflects the European Union's specific aspirations and particular characteristics but also clearly faces the challenges of a society marked by the impact of a rapidly developing and constantly expanding information technology and a distinct globalisation of both the political and economic process.

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