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The Charter of fundamental rights

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1. The Charter of Fundamental Rights of the European Union can be regarded, first and foremost, as an ambitious political, institutional and social model. Indeed, the drafting process for the Charter started with Koeln European Council in June 1999, when a decision was made on the basis of a major commitment: „The protection of fundamental rights is a founding principle of the European Union and the necessary prerequisite for its legitimation. The Union's duty to respect fundamental rights has been reaffirmed and specified in the case-law of the European Court of Justice. 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".

The flaws in the current institutional framework are thereby expressly pointed out – such flaws affecting exactly a matter that has been acknowledged to be fundamental for the very legitimation of the Union. Market integration and single currency in themselves are unable to confer this legitimation. Monetary and economic integration must be accompanied by the integration of rights. As long as this target is not achieved in full, the democracy gap already highlighted in respect of the European Union will be actually accompanied by a legitimation gap. Thus, it is not merely a matter of showing greater resolution in implementing the necessary reformation of European institutions, but rather of providing the latter with sounder foundations based on the thorough revision of their relationships with citizens.

The legitimation gap – according to the model adopted in the decision of Koeln European Council – must be bridged by means of fundamental rights. The Charter is therefore at the very heart of a major debate in which fundamental rights have been actually attached opposite significance and importance. Indeed, it has been argued that the very foundations of democracy should not be looked for exclusively in people's sovereignty – as is the case with a long-standing tradition – but in the individual's fundamental rights. On the other hand, the emphasis put on this category of right has been regarded as a sort of ideological reflection; therefore it has been pointed out that there is the risk for this emphasis to transform fundamental rights into „insatiable" rights which, on account of their predominance allegedly resulting from *ius naturalis*, would end up by dispossessing citizens of their right to amend laws exactly as regards rights.

The Charter would rather appear to draw inspiration from the remote yet vital indication included in Article 16 of the 1789 Déclaration des droits de l'homme et du citoyen – namely, that „Toute societé dans laquelle la garantie des droits n'est pas assurée, ni la separation de pouvoirs déterminée, n'a point de Constitution". This is therefore a mandatory step

for the „constitutionalisation" of the European Union: the Charter of Fundamental Rights is also meant to set the limit for the exercise of power by European institutions. Still, fundamental rights are not to be regarded as a vehicle of occult jusnaturalistic concepts, as is the case, for instance, with the German Grundgesetz: in fact, the system of fundamental rights should be regarded as a necessary balancing tool in a world where globalisation is above all the outcome of business logic.

This approach actually challenges many of the assumptions underlying political and institutional activities as well as scholarly analysis of European issues of the past few years. The concept of a linear development of the European structure based exclusively on small advancements has proved inadequate; this also applies to the opinion, resulting from the above assumptions, according to which a European constitution already exists as a mobile, diffuse, continuously evolving instrument. It is being acknowledged that integration by way of market logic cannot be in itself a source of legitimation for the Union.

Indeed, the Charter of Fundamental Rights points to discontinuity, if not of an actual breaking point in the process of building Europe: the focus has shifted from exclusively business-oriented logic to rights, and therefore from businesses to citizens. The Charter is the core for a future, full-blown European constitution. From this standpoint it has been a catalyst by precipitating a state of affairs that has long been in the air – that is to say, it has called upon Europe to make the re-consideration of its own foundations item no. 1 on its agenda. This has therefore opened up the path to a constitution-drafting process: indeed, laying down fundamental rights is a typical constitutional activity.

It is undoubtedly difficult for the time being to foresee whether the EU will finally adopt a veritable constitution or rather develop a sort of Bill-of-Rights instrument. However, a major step has been taken and no U-turn is now possible.

It may be argued – as it has been the case – that all this was unnecessary because the European Court of Justice has repeatedly stated that fundamental rights are already a part of Community law, and because the legitimation of the Union by way of re-affirming such rights could be achieved more conveniently by the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. I will not refer here to the formal argument, which can be easily derived from the aforementioned decision of Koeln European Council, that establishing a direct relationship between Charter and Union legitimation cannot but lead one to conclude that the existing instruments – including the European Convention – have not been considered enough with a view to that legiti-

mation. I would rather refer to the fact that the European Court of Justice has highlighted the formal hindrances preventing the Court from acceding to the Convention.

On the other hand, the European Convention does not include social rights, nor could it possibly refer to the so-called „new rights"; additionally, it was quite unclear whether social rights could be made to fall under the scope of Community law by having regard exclusively to the reference to social charters included in the Treaties (Preamble to the EU Treaty; Article 136 of the Treaty Establishing the European Communities). This uncertainty was compounded by the fact that, apart from the generic statement of „respect" for social rights, Article 6 of the EU Treaty only refers expressly to the fundamental rights enshrined in the European Convention; therefore, the „common constitutional traditions of Member States" referred to subsequently should be construed not to include social rights.

The proclamation of the Charter of Fundamental Rights can undoubtedly contribute to overcoming these interpretation dilemmas; in any case, it marks a change in Europe's institutional framework for the very reason that the Charter is an instrument requiring consideration irrespective of the institutional activities envisaged for the future. On the other hand, it should be pointed out that in the first direct confrontation between Charter and Convention the former was the winner: a few days before the proclamation of the Charter in Nice, Protocol no. 12 to the European Convention – on discrimination – was signed in Rome. By comparing Article 21 of the Charter with Article 1 of the Protocol it can be immediately realised that the former is more deep-ranging and modern as regards the list of the grounds for discrimination.

2. This initial assessment of the Charter within the European institutional framework shows that its significance cannot be grasped if one only considers, from an abstract viewpoint, the dichotomy political instrument – legally binding declaration. It is more appropriate to follow up the effects already resulting from its proclamation – even though the status of the Charter has yet to be defined, as set out in Nice Final Declaration.

In his speech given on 12 November 2000 before the European Parliament in Strasbourg, Romano Prodi pointed out that „Parliament and Commission have already declared that, for their part, they intend to fully implement the Charter". This declaration was followed by a concrete step, namely the Communication of the President of the Commission and Commissioner Antonio Vitorino on the implementation of the Charter. Starting from the „founding" nature of the latter, the Communication lays out a *binding* procedure that should be followed by the Commission in the exercise „of its right to initiate legislation and of its regulatory powers".

The first step is the mandatory *a priori* verification of compatibility with the Charter as regards any draft legislative or regulatory instrument. Whenever these instruments are clearly related to fundamental rights, they should include the following „formal compatibility declaration": „this instrument is compliant with fundamental rights and the principles laid down, in particular, in the Charter of Fundamental Rights of the European Union" (the wording may be supplemented by referring specifically to individual articles or principles). In the Communication the commitment is finally re-affirmed towards respecting the Charter as also related to external relationships.

Thus, the *political* paper takes on clearly a *binding* nature, which confirms that the Charter is also meant to set the limit for the activity of European institutions; this raises, in turn, the issue of how to check that the provisions made in the Communication are complied with. Even though the latest draft of the Communication does not refer to the possibility for individual citizens to formally point out the connection between an instrument issued by the Community and a fundamental right, there is no doubt as to the fact that any report expressly referring to this connection could never be ignored. Accordingly, it can be argued that a new power is developing as regards citizens – the power to intervene in the process leading to the issue of instruments by the Commission in order to ensure respect for the Charter of Fundamental Rights.

However, the progress made by the Charter in the European institutional framework has already been marked by other significant steps. The Charter, specific principles and rights laid down in the Charter, have been referred to in the Three Wise Men's Report on the situation in Austria as well as in papers of the Group for Ethics of Science and New Technologies and by the Working Party set up by Directive 95/46 on the protection of personal data. Above all, the Charter was referred to in the Opinion delivered on 8 February 2001 in case C-173/99 (BECTU v. Secretary of State for Trade and Industry) before the European Court of Justice – concerning the entitlement to annual paid leave. The Advocate General remarked that „Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union (...) Admittedly, like some of the instruments cited above, the Charter of Fundamental Rights of the European Union has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large

measure to reaffirm rights which are enshrined in other instruments. (...) I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right." This opinion by the Advocate General's office was re-affirmed in many other cases.

A significant piece was added to the new institutional mosaic which is being created – namely the amendment to Article 7 of the EU Treaty introduced by Nice European Council. Under the new wording of that Article, the Council has been granted the power to impose sanctions whenever it finds that „there is an evident risk of a serious infringement by a Member State of the principles referred to in Article 6.1" – i.e., „freedom, democracy, respect for human rights and fundamental freedoms and the rule of law, such principles being shared by all Member States". These principles are now specified expressly in the Charter, which makes it easier for EU bodies to establish any infringement and for Europe's public opinion to keep under control the stance taken by the individual Member States. Thus, it has been argued that the Charter is producing „basically constitutional" effects in this context. Indeed, how could a State object to a sanction by making the (merely) formal allegation that the Charter is not legally binding yet, when that same State has acknowledged its political validity?

There is an increasingly large number of cases in which the Charter mandates a „consistency test" between the conduct of the Union and Member States and the rights enshrined in it. Additionally, the Charter is being referred to in an increasing number of cases concerning exclusively national law. For instance, Spain's Constitutional Court, in its decision no. 292/2000 of 30 November 2000 (well in advance of the formal proclamation of the Charter), expressly referred to Article 8 in order to uphold the argument against an Act in breach of the fundamental right to personal data protection. The Charter is therefore proving a suitable tool in order to directly influence national laws and enhance the constitutional safeguards laid down in the individual States.

In any case, even considering the Charter a „mere" political declaration does not diminish its considerable importance. A few examples may better clarify this statement.

In a few States reference is often made to the freedom of dismissal. Now, under Article 30 of the Charter „every worker has the right to protection against unjustified dismissal". Hence, how could one politically justify the support for legislation doing away with this fundamental right? Another example: in the never ending debate concerning therapeutic cloning, a Recommendation by the European Parliament is often quoted as opposed to this type of research. However, this Recommendation – which is of exclusively political relevance – has been outdated by the vote with which Parliament has approved the Charter of Fundamental Rights by an overwhelming majority – and the Charter only prohibits reproductive cloning. During last summer, the European Commission reached an agreement with the US Administration despite the dissenting opinion delivered by the European Parliament; this agreement weakens the protection of personal data transferred to the USA from an EU country. After Mrs Fontaine and Mr Prodi have undertaken to fully implement the Charter, this type of agreement would be politically in conflict with their statements as it would not be in line with Article 8 of the Charter.

Many more examples could be made, but the cases mentioned show that the policies of European institutions, and the relevant national policies, can already be the subject of a consistency test with the Charter of Fundamental Rights. This test is to be attached special importance with a view to the enlargement of the Union following the inclusion of other countries, for which the Charter is already a substantive point of reference in order to gauge their adhesion to the founding values of the Union. It would be inadmissible, for instance, to include into the EU a country where the death penalty were still in force (as it is banned by Article 2(2) of the Charter); additionally, if a candidate country were to perform an execution this could be regarded – even more than in the past, exactly on account of the Charter – as a politically decisive fact such as to mandate the political objection to adhesion of that country.

Thus, including the Charter into an exclusively „political" sphere should not lead one to conclude that it is irrelevant or incapable to produce effects on Europe's institutional mechanisms.

3. There is a factor, both political and institutional, that prevents us from giving the Charter the capacity of providing the European Union with the legitimation the Koeln Council explicitly referred to. Basically, the Charter is a document similar to the '800 *octroyée* constitutions, with an evident regression vis à vis last century's democratic constitutionalism. This is clearly shown by the estrangement of the citizens and, at any rate, of any representative body from the Charter's development process.

In order to assess this undoubtedly significant fact, we should start by trying to indicate the Charter's different facets and how it presents itself as:

- A historical product;
- An institutional experiment;
- A political document;
- A technical paper.

On the whole, this means that the Carter has to be assessed in its real context, which highlights a series of elements that cannot be easily taken back to past experiences, and that dictate less schematic comparisons than the ones occasionally suggested.

If we consider the institutional procedures used so far for building Europe, we can immediately notice the greater democratic nature of the process in which the „Convention" played a leading role in the development of the draft Charter of rights compared with the procedures usually followed by the European institutions. Even at the most recent Intergovernmental Conference in Nice, in fact, the working out of the texts – all of great importance, considering that drastic changes in the treaties being proposed – was entrusted exclusively to officials of national governments, who worked in complete secrecy. If we consider the Convention's composition and way of functioning, there is a radical gap between it and this very consolidated practice.

Whatever our opinion, the Convention is already a considerable institutional innovation, as for the first time within the Union's experience, a body was set up where national Parliaments, the European Parliament, governments and the Commission all worked and co-operated together. Certainly, we can say that none of the 62 members of the Convention has been elected, but designated by the chairman of an assembly or by the head of the executive. However, it is not negligible that three quarters of the members of the Convention (46/62) are Members of Parliament, thus representatives elected by European citizens, even though as members of bodies other than the one which has the task of working out the Charter.

There is a clear cut gap with preceding practices as far as the individuals who have the task of working out the institutional reform texts and the working method are concerned. An absolute transparency has taken the place of the usual opacity: the Convention's meetings are public; all its working documents can be freely looked up in Internet; tens of associations and groups from all over Europe are heard; the representatives of the candidate countries for entry in the Union can intervene.

Without these important innovations, for example, it would not have been possible to make the significant changes in the draft Chart from July

to September 2000, also due to the considerable pressures coming from different social entities, the trade unions in the first place. Furthermore, unlike the texts prepared by the governmental *sherpa* (always changeable in that lacking any public and official character), the draft Charter was strongly and politically binding for the Heads of State and Government, who had to openly justify their objections to any one article. The case of the Charter also being formally binding was suggested, with the Charter's text changed by the Heads of State and Government: but, in that case, would the Convention have to be convened again to consider the changes made, or not?

Nor can the time factor be ignored. While the preliminary negotiations of the intergovernmental conferences dragged on for years, at times with poor results, such a committing text as the one of the charter of rights was worked out in only nine months. The whole of these elements induced more then one person, for example the President of the European Parliament and the President of the German Federal Republic, to suggest resorting to the Convention's method also for the working out of the European draft constitution.

The issue of the legitimation of a text which is not destined to be immediately submitted to parliamentary vote or popular referendum would at any rate remains unsolved. This consideration leads us to a more general question: can we have a constitution without the people? Can we have a declaration of rights aimed at a *demos* that does not exist?

If we look at these questions from the point of view of traditional political and legal theory, they seem to make sense. But we should ask ourselves another question: can a matter like the one of the Charter of rights, and more in general, the whole building of Europe, be considered and assessed by the categories of the past? Or aren't we facing a case that does not fit in those categories? We already have a currency without a State: it is really unthinkable to build a Europe that does not have the form of a State, thus one of the founding categories of modern political organisation.

But if we can do without the State as a necessary reference, can we say the same of the people? Certainly not. Here too, though, it is indispensable to dispense with a kind of naturalistic view of a people, as if it were a static reality, to be recorded passively.

A new process has been launched, which cannot be assessed by past criteria. A *demos*, a European people does not exist yet, but we cannot expect it to come to life and take decisive steps towards a real European constitution. The new aspect lies in the fact that the Charter can make the citizens become the protagonist of the building of Europe, calling them to action by the rights, rallying them around the rights. Through these rights, the

foundations will be laid for setting up a European public space and the conditions will be set, thus, for the birth of such *demos*. So the Charter shall launch the building of the entity that will give it its full legitimation.

4. The above considerations show the difficulties not only encountered during the Charter's development process, but that can still jeopardise its future. Three aspects of conservatism have to be defeated: political, social and legal. Three traps have to be avoided: constitutional minimalism, economic reductionism and pure political spontaneism. Let's consider them separately.

Legal conservatism hides behind its old certainties, and is thus incline to deny the possibility that what is actually happening can take place. The outcome of the process – as I was saying at the beginning – cannot be taken for granted. But the logic of intergovernmental conferences is threadbare, its functionalism is inadequate and a new process seems to be taking shape under our very eyes.

Are jurists capable of frequenting this new dimension, which is not that of the unknown? They do not, in fact have to tread on unknown territory. Rather, they have to work with the materials submitted by reality, avoiding one of their old habits, that form of methodological inversion by which facts are subordinated to the concept, and which also arises from intellectual laziness and the fear of having to depart from a safe conceptual port they have landed on.

I can see this risk also in the way some undoubtedly important problems are faced, such as those linked to the changes in the balances between the European Court of Justice and national constitutional courts. We are obviously dealing with technically difficult and politically committing matters, on which we seriously have to ponder. Though, without making the problems and difficulties impossible to overcome. What would have happened if certain attitudes of „technical" rejection of the Charter of rights had been manifested when community law and the activity of the Court of Justice started to upset the old constitutional assets, starting, though, an entirely new phase in the history of Europe?

Political conservatism is more evident in the refusal shared by the different nationalisms, and also feeds on small electoral expediencies and shrewdness. It is nurtured by selfishness, which in turn nurtures it. It goes hand in hand with social conservatism, featured by the fear of losing privileges, the ideologies of a market without rules and, again, legal conservatism that denies social rights the quality itself of rights.

The Union's prospect cannot be to proceed a piece at a time, as if tiredly composing a mosaic. Whatever the times and steps, the institutional unification processes will, sooner or later, call for the development of a

common document, not sectional like the treaties of Rome, Maastricht and Amsterdam. By habit and tradition, we are calling this document „a constitution": but this does not mean it will have to meet all the characteristics of the constitutions we have known so far.

In order to continue this discussion sensibly, we have to avoid the traps I have already mentioned – constitutional minimalism, economic reductionism and pure political spontaneism. These three attitudes have a deceitful common denominator, which hides under a mask of realism, and warns us against the pretence of putting on the agenda a subject matter, i.e. the constitution of Europe, which is a difficult, far away and maybe unnecessary target. Having followed this advice so far, which is wise only to a certain extent, the European ideal has flagged, and a broad constitution, like the English one, has not stood out at the horizon. The result seems rather to be a constitutionalism without a constitution, or as Jurgen Habermas more radically says „a constitutional state without democracy."

Constitutional minimalism is affirmed by those who believe that Europe already has a constitution, born from the treaties of Maastricht and Amsterdam, which brings about a slow growth of the role of Parliament, gets its strength from the European Bank and could be further enriched by initiatives like the accession of the Union to the European Convention of Human Rights. Although it is believed that the only practicable way is that of small steps or advancements, today it can only make sense if the objective and draft constitution to be accomplished are clearly indicated. If this is not done, it will always be difficult not only to respond to the slowdowns and back steps in the constitutionalisation process, but the existence of an involutionary phase will be perceived more and more.

To be more precise, constitutional minimalism is also the result of the economic logic to which the building of Europe has basically been tied. The choice of entrusting the slow building of Europe to the mechanisms of the economy can be shared, or understood. But an economic reductionism that wants to entrust the constitutional building of Europe to a spontaneous game of forces that should mime the market procedures in the world of institutions is unacceptable. So the process is made slower and random, and the only strong constitutional element left is the one linked to the economy, which only tends to impose its principles and trample all the rights not immediately connected with the functioning of the market. Economic reductionism becomes the source of a dangerous institutional distortion.

Redemption, however, cannot come from a pure political flare. Within the institutional dimension, politics manages to win back its supremacy only when it supports a draft it can identify itself in, and in which a large

number of people can identify themselves. Today politics needs the idea of a European constitution, and can certainly not rely on a tired institutional routine. Having reached the objective of a single currency, the idea of a constitution is the only one that has enough symbolic strength to give back momentum to a European policy in which European citizens can identify themselves, finding in the European institutions an „added value" that has not always been perceived and that, in fact, in recent time has risked being set aside by the idea that Europe is the cause of many of the current difficulties.

But it is for this very reason that just any constitution would not suffice; nor would it suffice to have a constitution entrapped in a reductionism making it the tool of the institutions entrusted with the growth of supranational integration and the representative and political force of Parliament. The deficit in democracy shall not be crossed out only by reducing technocratic powers and boosting the responsibility of the Union's government before Parliament.

A constitution is such if, together with the institutional machinery, it has a real and strong declaration of rights. In fact, modern constitutionalism has set up institutions (government, parliament, administration, judiciary, constitutional court) as tools for implementing the principles, rights and fundamental freedoms. Not only would a constitution that ignored the declaration of rights lack a soul, but it wouldn't even be a constitution.

The above considerations help clear the context and enable to better assess the scope of the Charter of fundamental rights. Another consideration, however, needs to be made, so as to give the right importance to the new meaning given to fundamental rights.

The growing attention on this subject matter is changing the institutional context, within individual States and globally around the world. I mentioned at the beginning that we are moving between extreme polarities. It is believed, on the one hand, that the acknowledged crisis in the traditional notion of sovereignty obliges us to find the founding and legitimating element of democracy in the fundamental rights. On the other hand, fundamental rights are becoming „insatiable", jeopardising the autonomy of citizens and their right to change the institutional framework: we are shifting from an „occult jusnaturalism" to a real „fundamentalism" of fundamental rights.

In fact, the invocation of such rights has been strengthened by the progressive concentration of substantial decision-making powers in the hands of entities with low democratic legitimation or none at all: international bodies operating in the field of the economy (World Bank, International Monetary Fund, WTO) and the system of transnational corporations. Until

the globalisation process can be governed by democratically legitimated entities, and not only by the protagonists of economic activities, fundamental rights are the best possible tool to try and re-establish a balance and shift towards a new system of checks and balances.

At this point, we can quote the mandate of the European Koeln Council, which points to a legitimation of the Union based on the recognition of fundamental rights. Furthermore, the question of fundamental rights is being tackled while two models for developing rules and citizenship are faced in Europe and elsewhere. The European Union's decision to focus on fundamental rights, recognised in a specific text and to be „constitutionalised" in the future, is a choice of discontinuity with the model entrusted solely to the logic of the market.

By the Charter, we have reached the adoption of an integration model through the rights, which takes on a meaning that goes beyond the European Union's specific requirements. Basically, it meets a general need: to identify a system of values; make the powers of citizens effective; reconstruct the ground conditions of democratic legitimacy. In Europe, we talk of integration through rights; in the world, the perspective has to be globalisation through rights.

5. If we consider its 54 articles as a whole, we can say that the Charter could have spoken with a more direct language and a more explicit wording to the minds and hearts of European citizens, the people who live and work within the Union and those who look at it as the first declaration of rights of the new millennium. The continent where the two biggest and more bloody world wars arose could have given a more distinct recognition of the right to peace. It was chosen not to talk more explicitly of the right to self determination and freedom of choice of every woman and man. The affirmation of many rights is surrounded by too much cautiousness.

This prudence may seem surprising. In its long history Europe has never suffered from too many rights, but from the restraint, breach and denial of rights.

However, I do not think we can talk of having lost a chance, or even of a regression. Thanks to the Charter, and in spite of its limitations, Europe has left its economic and financial dimension, which has characterised it so far, and is about to become the largest transnational space of rights. At a time when there is a large number of people working hard to make the market logic remain the only reference value, the Charter reiterates the value of equality, solidarity and social links, and tries to strengthen the citizens' individual and collective powers.

In the Charter, traditional rights intertwine with the rights arising from new cultural and moral sensitivities, from the strength of scientific and technological innovations, from our responsibilities towards the environment and future generations. At a time when the denial of social rights has become stronger than the nature itself of rights, not only does the Charter proclaim and even enrich them, but it makes the barrier between the different categories or generations of rights drop, proclaiming their indivisibility and making them all part of the same and strong nature of fundamental rights. At a time when efforts are being made to try and make the logic of exclusion of a „European fortress" and a „European apartheid" prevail, often violently, we face the affirmation of universalism, the recognition that all those found within the Union are entitled to all those rights (with very limited exceptions). The idea itself of a European citizenship is spreading. Not only does it project the citizens of each member State beyond their national boundaries, but it also welcomes the people who are not citizens of the States of the Union.

Is this an apologia of the Charter? Or rather a realistic assessment of the features that can already be recognised in it, and that may be better specified and enriched if we believe in it and work to highlight its potentialities as much as possible? Only officially does the Charter appear as an accomplished act. In actual fact, it appears the daughter of an unsettled ideal and political clash: it will be what the European citizens will want it to be. Thus, the political actions concerning the institutional fate of the Charter within the framework of the Union's future constitutional asset have become essential. All the social activities aimed at providing the maximum formal importance to the Charter and its maximum effectiveness become decisive. The jurists' construing operations to increase or reduce the opportunities set out in each article and, thus, the overall reconstruction of this new „system" of rights become important.

The Charter, in fact, has been and is being radically criticised especially by those who wanted it to give even more importance to social rights. The validity of some of these criticisms, however, has caused the excessive rejection of the Charter instead of enhancing the many elements that enable wide interpretations. The choices made by the Convention and the overall system set out by the Charter, rather, oblige us to interpret it as a whole to enhance its innovative characters and detect a picture of values not connected solely to the market logic.

6. To reconstruct the system of rights typical of the Charter, we have to refer to two elements, one concerning its external history, the other concerning its structure. The Convention, in fact worked by mandate of the Koeln European Council, which assigned it a solely recognitive function

of what was stated in a series of principles and existing constitutional documents.

Even a quick look at the Charter shows that the various aspects of the mandate have been twisted, and that the Charter has a richer content than what it should have had pursuant to the mandate. Certainly, we should be sorry of the fact that it was not possible to go even further and that, for this reason, the Charter has omissions that weaken its scope and meaning. We have to be fully aware of this, not only to avoid unjustified triumphalist interpretations of the text, but especially to operate in such a way as to make it possible to enhance the current text as much as possible and to permanently underscore the need for its improvement.

We should keep in mind that during the works of the Convention, the experts continuously came up against ideological narrow-mindedness, cultural small-mindedness and political short-sightedness. All too often the demons of old Europe materialised – nationalism, xenophobia, sexism, racism and classism. In particular, something even more insidious was evident: the temptation of a mediocre Europe, lacking horizons and ambitions, entrapped in a logic of small advancements that no longer embodied the realism of the persons who at any rate wanted to go far, rather the curtailing of every far-reaching project.

This tendency turned up especially during the discussions on social rights, where great efforts were made to leave these rights out of the Charter or cut down on them in such a way as to deprive them of any meaning. These efforts were made during all the works of the Convention, basically with the aim of reproducing the European Convention of Human Rights, in which, not by chance, social rights had been left out.

Restraints, short-sightedness and mediocrity. Facing all this, wouldn't it have been better, and more realistic, to acknowledge a series of commitments that suggested abandoning the project of the Charter, or at least postponing it to hopefully better times?

Instead, realism was to induce to the opposite decision. At a time of restraints and difficulties in the building of Europe, the Charter offered an unexpected opportunity to shift attention to a different institutional dimension and affirm different reference values.

I would like to draw your attention again to the fact that the Charter's „simple" political proclamation sets out the path to be followed for the constitutional building of Europe according to old schemes. Besides this discontinuity, and in an even more significant way, we have the discontinuity concerning the inclusion of social rights, the specification of rights in respect of specific and new groups of individuals (children, old people, disabled, future generations), and the inclusion in the fundamental rights

of situations previously classified as political objectives of the Union (the environment, sustainable development).

If we consider the works of the Convention, and its final result, we can see that discontinuity and continuity intertwine. Discontinuity appears to be indisputable if we consider that the building of Europe was previously basically entrusted to the economic and monetary dimensions. Continuity can be seen in the opening towards fundamental rights found in Article 6 of the Treaty of the Union and in the case-law of the Court of Justice, in respect of which the Charter can be presented as a necessary development, rather than a continuation.

But here we also have strong discontinuity, because we are not simply facing the strengthening and analytic clarification of the indications set out in Article 6. The fact of having specified, broadened and enriched the catalogue of fundamental rights, in fact, has proposed, once again, the committing subject of a „European social model" within the building of the Union; a subject which seemed to have been deleted by the prevailing logic of the Treaties. The fact of having proposed it again today, after far from slight frictions during the works of the Convention, takes on an undoubtedly polemic meaning vis à vis other existing, and so far hegemonic, models in the „global" world. Thus, the beneficial sign of a contradiction, if not of an antagonism, may be noticed in the European Charter.

This view is not shared by those who consider the procedure of the Charter and its contents the result of a scheme that also embodies the fundamental rights within an institutional framework marked by the dominion of economic compatibilities. This however does not seem to be the logic of the system defined by the Charter, which enhances different coordinates.

So far the reference point has been Article 6 of the Treaty of the Union. Paragraph 1 reads that „the Union is based on the principles of liberty, democracy, respect of the human rights and fundamental freedoms and the rule of law, principles common to the Member States". This wording is further defined and explained in the subsequent paragraph, which in fact identifies the fundamental rights as those „guaranteed by the European Convention for the protection of human rights and fundamental freedoms", and gives great importance to those resulting „from the common constitutional traditions of member States, in as much as general principles of community law".

The Preamble of the Charter has thoroughly changed this picture. Although resorting to the same linguistic scheme as Article 6, however, it significantly integrates its content: „the Union is founded 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". These references then become the underlying theme of the Charter, whose chapters are entitled: dignity, freedoms, equality, solidarity, citizens' rights and justice.

And these changes are far from being insignificant, as the catalogue set out in Article 6 has been integrated by explicitly referring to dignity, equality and solidarity. And we are well aware that it was just equality and solidarity that were harshly criticised over the years, to the extent of being rebuffed. The very fact of having reintroduced these principles in the Preamble is very important for the reconstruction of the Charter's overall system.

The importance of this innovation is confirmed by the opposition it still faces. It is worth mentioning the opposition coming from „the Economist", which persistently expressed hostility at the Charter. This initiative, typical of many milieu in the United Kingdom, deeply affected the stance of the British representatives at the Convention. When the Heads of State and Government had already consented to the Charter, the Economist published its own draft European constitution: the text of article 6 was proposed once again and any reference to dignity, equality and solidarity had been crossed out.

However, compared to rules such as Article 3 of the Italian Constitution, Article 20 of the Charter on equality has been considered poor, as it only makes the traditional statement that „everyone is equal before the law". This criticism certainly highlights a limitation of the Charter's provisions, which may be considered a setback if compared with the richer content of the corresponding articles of this or that European constitution. It was however indispensable for such a complex and conditioned initiative (last but not least conditioned by the mandate of the Convention) to work out a text consisting in a sort of *summa* of the culturally and socially more advanced provisions of national constitutions. Even in respect of the Charter we face a constitutional compromise that, as it always happens in these cases, has to be assessed by referring to the politico-cultural milieu and internal balances of the document.

It is the awareness that it is impossible to instantly bridge the deep cultural gaps, and differently expressed in the various legal systems, has lead to the introduction of a protection clause in the Charter: Article 53 protects existing rights. Thus, the Charter cannot cause a setback in the levels of protection any person is entitled to. But this gives rise to a debate between the Charter's system and the other systems of rights that will significantly affect future developments, and thus calls for special attention.

The criticism to Article 20 expresses an additional general reason of unease. The wording used seems to reflect the will to evade the truth on actual inequalities, hide again behind a pure statement of formal equality and neglect the need for mindful public action aimed at removing actual inequalities. Once again, the reference is transparent and brings us back to paragraph 2 of Article 3 of the Italian Constitution. Once again though, although not denying the importance of this criticism, we have to consider the Charter as a whole, in respect to the various links it establishes.

The differences in sex, age and social condition, apart from their specific importance for the purposes of prohibiting discrimination (Art. 21), are explicitly taken into consideration to establish relations with specific legal situations and to foresee ways for public entities, starting from the European Union itself, to act.

Articles 23 and 25 aim at this, and the provisions in Articles 34 to 38 do so even more explicitly. Certainly, we again face the problem concerning the ambiguity of the wording „the Union recognises and respects the rights…", in respect to which, however, we have to face the problem of choosing between a logic that enables a wide construction of the scope of the rights and that which instead favours a restrictive construction. I think that the Charter embodies principles and legal indexes that enable to opt in favour of the first choice, thus giving a decisive indication of the overall building of the European system of protection of rights.

I have already mentioned some of these principles, which are worth looking at more thoroughly. The aim of combating „social exclusion and poverty" becomes the basis of „the right to social and housing assistance", in a framework in which the guarantee to a „decent existence" acquires separate importance. I am well aware how unpleasant, and under certain aspects, revealing it is to resort to words like „assistance". But, perhaps, this linguistic usage will appear less unpleasant within a context marked by rather strong, and generally uncommon, expressions in European constitutional texts, such as the fight against social exclusion and poverty and the right to a decent existence. These very exacting wordings, may be better enhanced and made more incisive if presented as the materialisation of the principles of dignity, equality and solidarity, thus divesting themselves of the suspicion of only being declamations.

Brought back to reality, they oblige us to ponder on the instruments to be used to make rights effective. Thanks to them, in today's difficult European context, we can, in fact we have to, pose the question of a minimum income as a pre-requisite of a decent existence. Here, in fact, we can consider more thoroughly the contradiction rooted in the liberal theory itself, and which is rarely brought to the surface as clearly as would be the

case. If, as this theory professes, there is an inseparable link between liberty and property, and an individual lacks the required means to have a decent existence, said individual's liberty is impaired, and the need arises to develop public policies that eliminate this unacceptable condition.

The need for these policies has been explicitly declared in respect of the right to health care (Article 35), the access to services of general economic interest (Article 36), environmental protection (Article 36) and consumer protection (Article 37). The shift from the dimension of objectives to that of rights thus connotes the relationship between citizens and public powers, within a framework in which „social and territorial cohesion" also appears in the part dedicated to solidarity (Article 36), further underlining the importance of social ties.

In order to fully underscore the features of this system of rights, we should again refer to the questions of work and property. The thesis of a waning of work guarantees and a decline in the rights envisaged by national constitutions has some hold in the wordings of some articles, but we cannot say that it is grounded if we consider the Charter as a whole.

I think that it is fully evident, in fact, that the subject of work, and its relevant rights, cannot be separated from social exclusion, a decent existence and social cohesion, within a framework marked by the inseparability of rights. The right to work is inseparable from individuals, who are at the „heart" of the Union's activities, as specified in the Preamble: we cannot separate the right to work if we want to free individuals from poverty, social exclusion and unacceptable living conditions.

This interpretation has been confirmed by the strengthening of the stances of workers in critical fields, where certain situations – which were not considered as rights by national constitutions – have finally been recognised as rights. An example is the workers' right to information and consultation within a company (Article 27), which is particularly important at a stage in which the thesis that businessmen should have indisputable power and democracy should end at the threshold of a company has pressingly come to the forefront. Similarly, while the requests for flexibility of work translate all too often in requests for freedom of dismissal, it becomes very important to recognise „the right to protection against unjustified dismissal" (Article 30).

Furthermore, such a system finds its closing rule in Article 52, which establishes that „any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms". The system will thus develop pursuant to the criteria of as much protection as possible, since individuals en-

joy both the broader guarantees prescribed by other sources referred to in Article 53, and those introduced by the Charter.

A dissonant note can be found in Article 17 on the right to property, where there is no trace of a reference to the right's social function. That, in fact, is an element shared by most European constitutions. Truth to tell, as to property – and business that has long been the most important element in the economic process – we can point to all the commitments obtainable from different principles and criteria, the dignity to sustainable development and environmental protection, health protection and the right to housing, which help specify its scope within individual situations and define the scope of the reference made to the general interest set out in the article. Within the debate generated by the Charter between market logic and non-property logic, the guideline that tends to define categories of goods and situations placed outside the market and thus completely estranged from property logic, may take on particular importance, and may at times be more incisive than a reference to the social function that to some extent appears to be worn out. An example is the human body and its parts that cannot become a source of financial gain (Article 3); compulsory education (Article 14) and free placement services (Article 29).

A choice between two possible declarations of rights emerges quite clearly from this systematic interpretation. We do not only have the refusal of a minimalist and traditional declaration to the advantage of one that looks to the future and considers the fullness and inseparability of the dimension of rights. The real conflict lies between a molecular view of rights, which closes each person in a small fortress of selfish powers, and a model joining strong individual power and social link and making both the individual and the institutions take on responsibility when called to face the reasons of the others and the general interests. The Charter has moved in this latter direction.

7. This conclusion is confirmed by the fact that the Charter has opened up in two different directions. With an evident innovative force the so-called „new rights" have been included in it: from the more consolidated rights, such as environmental protection (Article 37) to those deriving from all the scientific and technological innovations, which concern the human body of the individual (Right to the integrity, Article 3) and the „electronic body" of the individual (protection of personal data, Article 8).

Not least important is the opening up of the Charter towards the individual. The enjoyment of rights is associated, starting from the Preamble, with the responsibilities and duties towards „other persons", the „human community" and „future generations". And the inclusion of other persons

is fully acknowledged in Article 22, which in a direct way points that „the Union shall respect cultural, religious and linguistic diversity".

The idea of a tie thus takes shape, reiterating the Charter's refusal of a molecular concept of society. And all this highlights another particular aspect of the European constitutional model itself: not a separation, or even an opposition, between rights and duties, but the notion that the rights are constantly in relation with the reasons of other persons.

The Charter thus presents itself as a tool of unification of the European institutional system, so far run by a prevalent market logic and only a painful opening towards the logic of rights. It presents a table of values and also indicates the criteria by which to definitely develop the Union.

These values comprise the recognition of the religious factor, however deprived of any suspicion of confessionalism. During the works of the Convention, the catholic milieu exercised strong pressure to have the Charter mention God; make explicit reference to „religious traditions", as was written in the second last version of the draft; prohibit any form of cloning; word Article 9 in such a way as to exclude any possibility of recognising *de facto* families and those made up of persons of the same sex; to give special status to religious associationism. These pressures were all rejected, also thanks to the clear cut position of the French Government, which declared that it would not sign a text that, with reference to religious traditions, was in contradiction with the „lay" character of the Republic, set out in Article 2 of its Constitution. Mention was made of „a moral and spiritual heritage" and the Charter thus took on a wholly lay character, which resulted in John Paul II's complaints.

This high sense of laicity has inspired the full recognition of diversity (Article 22), thus the refusal of any ghetto. It paves the way for a real and continuous dialogue between believers and non-believers, at a time marked by a return to more or less cruel religious intolerance. Here too the Charter provides a model and sets an example.

In this higher and richer context, integration through rights only appears as a kind of requirement imposed by the evident inadequacy of integration through the market and monetary dimension. It is not a remedy, it is a highway.

This road will not be easy. As the Charter is not an end product but the starting point of a new process, many individual will have to participate in it and jurists must not oppose a *non possum* based on their old certainties and reassuring categories that the Charter disputes especially because of the new institutional balances that will have to be defined in respect of the legal bodies entrusted with making the proclaimed rights effective. They

cannot avoid facing the challenge of the unknown, the progressive building of the European constitutional system.

The Charter proposes a new axiological model. Even if we only want to underscore the recognitive aspects of already recognised rights, and this would at any rate be an improper and reductive interpretation, known rights make up a different picture from the one typical of the different legal instrument from which they have been derived. The Charter is certainly a new catalogue of rights. But it is especially a system of values from where to draw reconstructive elements needed to give each right a meaning in harmony with to the new phase of the building of Europe.

The Charter of fundamental rights

STEFANO RODOTÀ

Summary

1. The Charter ascertains and illustrates an ambitious political, institutional and social model. It brides the actual legitimisation gap and provides the EU with sounder foundations through a thorough revision of the relationship to its citizens.

2. The Charter is a mandatory step towards the constitutionalization of Europe. It guarantees the citizens fundamental rights and sets at the same time limits to the exercise of power by European institutions.

3. The concept of a linear development of the European structure based exclusively on small advancements has proved inadequate. The Chapter is the core for a future full-blown European Constitution. It calls upon Europe to reconsider its own foundations and opens up the path to a constitutional drafting process. It is certainly difficult to foresee what the exact outcome will be, but a U-turn is no more possible.

4. The Charter's importance cannot be grasped by the dichotomy political instrument – legally binding declaration. It is definitely more appropriate to follow up the effects already resulting from its adoption. Thus the President of the Commission pointed out that it intends t fully implement the Charter an in a joint communication with Commissioner Vitorino laid out a binding procedure to be followed by the Commission that provides for an a priori verification of the compatibility of the Commission's actions with the Charter. Thus the Advocate General ha in a pending case before the European Court of Justice explicitly referred to the Charter. And thus national courts as the Spanish Constitutional Court expressly invoked the Charter in order to uphold an argument against an Act in breach of the fundamental right to personal data protection.

5. Doubts on the Charter's capacity to overcome the legitimisation gap may result from the estrangement of citizens as well as of any representative body from the Charter's development process. One has however to note the roe the Convention played in comparison to the procedures usually followed. The Convention was an essential institutional innovation that guaranteed an absolute transparency. Public meetings, generally accessible documents, hearings with associations and groups were cornerstones of openness that led to significant changes in the draft charter.

6. More than ever the question arises whether we have a constitution without the people, a declaration of rights at the address of a demos that does not exist. From a traditional point of a view the answer risks to be negative. But we must ask ourselves whether the building of Europe ca be assessed by the categories of the past. The Charter can make the citizens protagonists of the building of Europe and thus establish the foundations for the demos.

7. The traps to be avoided are constitutional minimalism, economic reductionism and pure political spontancism. We must neither operate under the mask of a realism culminating in the warning against putting on the agenda a difficult far away and unnecessary matter, nor should we entrust the building of Europe to a slow development determined by the market forces and thus bar the way to the only idea that can give back the European politics the momentum in which the citizens can identify themselves with Europe accepting it as an „added value": a European Constitution.

8. The Constitution does however not suffice in itself. It needs a strong declaration of rights that as the Charter identifies as system of common values, makes the power of citizens effective and sets the ground conditions of democratic legitimacy.

9. It can be argued that the Charter should have spoken a more explicit language to the citizens of Europe and to those who live and work in Europe. But thanks to the Charter Europe has transgressed its economic and financial dimension and is about to become the largest transnational space of rights. Traditional rights interweave with rights arising from the cultural and moral sensitivities, from the strength of scientific and technological innovations, as well as from our responsibilities towards future generations and the environment.

Moreover, at a time when the denial of social rights has become stronger, the Charter proclaims and enriches them. Finally, at a time when Europe increasingly risks to be perceived as fortress, the Charter explicitly reaffirms universalism.

10. The content of the Charter is richer than what it should have had been pursuant to the mandate that led to its adoption. We should keep in mind that the Convention came up against ideological narrow mindedness, cultural small mindedness and political short sightedness. It is against this background that for instance both the inclusion of social rights and of situations previously classified as mere political objectives of the Union, such as environment ad sustainable development, should be seen. The Charter is thus far more a necessary development than a more continuation.

11. It can nevertheless be said that the Charter is the result of a constitutional compromise. The Convention has however, for instance as far as equality is concerned, not confined itself to the traditional abstracts statements but explicitly included a both precise and detailed article on discrimination, and also addressed social exclusion, thus materializing the principles of dignity and solidarity.

12. The Charter is not an end product but the starting point of a new process. It is a system of values providing the elements needed to give each right a meaning in harmony with the new phase of the building of Europe.

La Charte des droits fondamentaux

STEFANO RODOTÀ

Résumé

1. La Charte établit et illustre un modèle politique, institutionnel et social ambitieux. Elle comble un vide réel en termes de légitimisation et offre à l'UE des bases plus saines grâce à un examen approfondi des relations existant avec ses citoyens.

2. La Charte constitue une étape obligatoire sur la voie de la constitutionalisation de l'Europe. Elle garantit les droits fondamentaux des citoyens et fixe en même temps les limites de l'exercice de leur pouvoir par les institutions européennes.

3. Le concept de développement linéaire de la structure européenne fondé exclusivement sur de petits avancements s'est révélé inadéquat. La Charte constitue le cœur d'une future constitution européenne à part entière. Elle invite l'Europe à reconsidérer ses propres fondements et ouvre la voie à un processus de rédaction constitutionnel. Il est certainement difficile d'en prévoir l'issue, mais il est impossible de faire demi-tour.

4. Il est impossible de saisir l'importance de la Charte au moyen d'un instrument politique dichotomique – une déclaration légalement liant les parties. Il convient davantage de tirer parti des conséquences qui résultent déjà de son adoption. Le Président de la Commission a dès lors souligné qu'il a l'intention d'appliquer pleinement la Charte et, dans une communication conjointe avec le Commissaire Vitorino, il a exposé une procédure obligatoire, que la Commission doit suivre, et qui prévoit une vérification a priori de la compatibilité des mesures de la Commission avec la Charte. C'est ainsi que, dans une affaire en instance devant la Cour européenne de Justice, l'Avocat général s'est explicitement référé à la Charte. Et les tribunaux nationaux, tels que la Cour constitutionnelle espagnole, ont expressément invoqué la Charte afin de soutenir une argumentation contre une loi violant le droit fondamental à la protection des données personnelles.

5. Les doutes pesant sur la capacité de la Charte à surmonter le vide en matière de légitimisation peut provenir de la marginalisation des citoyens ainsi que de n'importe quel organe représentatif émanant du processus de développement de la Charte. Il convient cependant de noter le rôle joué par la Convention par rapport aux procédures suivies généralement. La Convention était une innovation institutionnelle essentielle qui garantissait

une transparence absolue. Les réunions publiques, les documents généralement accessibles, les auditions d'associations et de groupes constituaient des éléments d'ouverture essentiels qui ont engendré des modifications importantes dans le projet de charte.

6. Se pose dès lors avec d'autant plus d'acuité la question de savoir si une constitution existe sans peuple – une déclaration de droits à l'attention d'un ensemble de citoyens qui n'existe pas. D'un point de vue traditionnel, la réponse risque d'être négative. Mais nous devons nous demander si la constitution de l'Europe peut être évaluée en se fondant sur des catégories datant du passé. La Charte peut associer les citoyens à la constitution de l'Europe et donc établir les fondements de la citoyenneté.

7. Les pièges à éviter sont le minimalisme constitutionnel, le réductionnisme économique et la spontanéité politique pure. Nous ne devons ni agir sous le déguisement d'un réalisme culminant dans la mise en garde contre la mise à l'ordre du jour d'une question difficile, lointaine et inutile, ni considérer la création de l'Europe comme un processus lent, déterminé par les forces du marché. Et dès lors, nous ne devons pas barrer la voie à la seule idée capable de rendre à la politique européenne le dynamisme auquel les citoyens peuvent s'identifier et que l'Europe considère comme une „valeur ajoutée": une constitution européenne.

8. La Constitution n'est cependant pas une fin en soi. Elle a besoin d'une forte déclaration des droits qui, comme la Charte, identifie un système de valeurs communes, rend le pouvoir des citoyens effectif et fixe les conditions de base de la légitimité démocratique.

9. On peut affirmer que la Charte aurait dû parler un langage plus explicite aux citoyens européens et à ceux qui vivent et travaillent en Europe. Mais, grâce à la Charte, l'Europe a transgressé sa dimension économique et financière et est sur le point de devenir le plus vaste espace de droits transnational. Les droits traditionnels s'entrelacent avec les droits résultant des sensibilités culturelles et morales et de la force des innovations scientifiques et technologiques ainsi que de nos responsabilités à l'égard des générations futures et de l'environnement. De plus, à un moment où la contestation des droits sociaux s'intensifie, la Charte les proclame et les enrichit. Enfin, au moment où l'Europe risque de plus en plus d'être perçue comme une forteresse, la Charte réaffirme explicitement l'universalisme.

10. Le contenu de la Charte est plus riche que ce qu'il aurait été en vertu du mandat qui a conduit à son adoption. Nous ne devons pas oublier que la Convention s'est heurtée à l'étroitesse d'esprit idéologique, à la mesquinerie culturelle et au manque de vision politique. C'est dans ce contexte que l'inclusion de droits sociaux et de situations préalablement classées

comme de simples objectifs politiques de l'Union, tels que l'environnement et le développement durable, devrait être examinée. La Charte est donc bien plus un développement nécessaire qu'une simple continuation.

11. On peut néanmoins affirmer que la Charte est le résultat d'un compromis constitutionnel. Cependant, en ce qui concerne l'égalité, la Convention ne s'est pas limitée aux déclarations abstraites traditionnelles mais elle a explicitement inclus un article précis et détaillé sur la discrimination et a également abordé l'exclusion sociale, matérialisant ainsi les principes de dignité et de solidarité.

12. La Charte n'est pas un produit fini, mais le point de départ d'un nouveau processus. C'est un système de valeurs constitué d'éléments qui donnent son sens à chaque droit, en harmonie avec la nouvelle phase de création de l'Europe.

Die Charta der Grundrechte

STEFANO RODOTÀ

Zusammenfassung

1. Die Charta illustriert und hält ein ehrgeiziges politisches, institutionelles und soziales Modell fest. Sie überbrückt die herrschende Legitimationskluft und bringt der EU durch eine gründliche Revidierung der Beziehungen zu ihren Bürgern eine stabile Grundlage.

2. Die Charta ist ein verpflichtender Schritt auf dem Weg zur Konstitutionalisierung Europas. Sie garantiert den Bürgern Grundrechte und setzt zugleich der Machtausübung der Europäischen Institutionen Grenzen.

3. Das Konzept einer linearen Entwicklung der Europäischen Struktur ausschließlich in kleinen Schritten hat sich als ungeeignet erwiesen. Die Charta ist das Kernstück einer zukünftigen vollwertigen Europäischen Verfassung. Sie fordert Europa dazu auf, seine eigenen Grundlagen zu überdenken und ebnet den Weg eines Prozesses zur Erarbeitung einer Verfassung. Natürlich ist es schwierig vorherzusagen, was genau dabei heraus kommen wird, aber eine Umkehr ist nicht mehr möglich.

4. Die Bedeutung der Charta kann durch die Dichotomie politisches Instrument – gesetzlich bindende Erklärung – nicht erfasst werden. Es empfiehlt sich viel eher, die Auswirkungen, die sich bereits aus ihrer Annahme ergeben haben, genau im Auge zu behalten. So erläuterte der Vorsitzende der Kommission, dass es deren Absicht wäre, die Charta zur Gänze zu implementieren, und erklärte in einer mit Kommissar Vittorini gemeinsam verfassten Mitteilung, dass es ein verbindliches Verfahren für die Kommission geben würde, das a priori die Kompatibilität der Handlungen der Kommission mit der Charta überprüfen würde. So verwies der Generalanwalt in einem laufenden Verfahren vor dem Europäischen Gerichtshof explizit auf die Charta. Und so beriefen sich nationale Gerichtshöfe wie der spanische Verfassungsgerichtshof ausdrücklich auf die Charta, um ein Argument gegen ein Gesetz zu untermauern, das im Widerspruch mit dem Grundrecht des Schutzes persönlicher Daten stand.

5. Zweifel an der Fähigkeit der Charta, die Legitimationskluft zu überbrücken, ergeben sich wahrscheinlich aus der Entfremdung der Bürger und anderer repräsentativer Körperschaften vom Entwicklungsverfahren der Charta. Es ist jedoch die Rolle zu beachten, die die Verfassung verglichen mit den normalerweise angewendeten Verfahren spielte. Die Verfassung war eine wesentliche institutionelle Innovation, die absolute Transparenz

garantierte. Öffentliche Sitzungen, allgemein zugängliche Dokumente, Anhörungen mit Vereinigungen und Gruppen wurden zu Eckpfeilern der Offenheit, die zu einer bedeutenden Veränderung im Entwurf der Charta führten.

6. Immer häufiger wird die Frage gestellt, ob wir eine Verfassung ohne Volk haben, eine Erklärung von Rechten für einen Demos, den es gar nicht gibt. Von einem traditionellen Standpunkt aus betrachtet droht eine negative Antwort. Aber wir müssen uns fragen, ob der Aufbau Europas mit den Kategorien der Vergangenheit beurteilt werden kann. Die Charta kann die Bürger zu Protagonisten des Aufbau Europas machen und so die Fundamente für den Demos schaffen.

7. Die Fallen, die zu vermeiden sind, sind konstitutioneller Minimalismus, ökonomischer Reduktionismus und rein politische Spontaneität. Wir dürfen weder hinter der Maske eines Realismus verstecken, der darin gipfelt, davor zu warnen, ein schwieriges, uns fernes und unnötiges Thema auf die Tagesordnung zu setzen, noch dürfen wir den Aufbau Europas einer langsamen Entwicklung überlassen, die durch die Marktkräfte bestimmt wird, wodurch der Weg zur einzigen Idee verbaut wird, die den Europäischen Politikern die Dynamik zurückbringen kann, in der die Bürger sich mit Europa identifizieren können und es als „Mehrwert" akzeptieren können: eine Europäische Verfassung.

8. Die Verfassung allein ist jedoch nicht genug. Sie braucht eine starke Erklärung der Rechte, die wie die Charta ein System gemeinsamer Werte identifiziert, die Macht der Bürger wirksam macht und die Grundvoraussetzungen demokratischer Legitimität schafft.

9. Es kann argumentiert werden, dass die Charta in einer deutlicheren Sprache zu den Bürgern Europas und zu denen, die in Europa leben und arbeiten, hätte sprechen müssen. Aber dank der Charta ist Europa über seine ökonomische und finanzielle Dimension hinaus gewachsen und ist dabei, zum größten grenzüberschreitenden Rechtsraum zu werden. Traditionelle Rechte verweben sich mit Rechten, die sich aus kulturellen und moralischen Sensibiltitäten, aus der Stärke wissenschaftlicher und technologischer Innovationen sowie aus der Verantwortung gegenüber zukünftigen Generationen und der Umwelt ergeben. Darüber hinaus proklamiert und bereichert die Charta die sozialen Rechte, und das in einer Zeit, in der diese immer stärker unter Druck zu stehen kommen. Und schließlich betont die Charta Universalismus in einer Zeit, in der Europa immer stärker als Festung erfahren wird.

10. Der Inhalt der Charta ist umfassender, als in dem Mandat festgeschrieben war, das zu ihrer Annahme geführt hat. Wir müssen daran denken, dass die Verfassung sich gegen ideologische Kleingeistigkeit, kultu-

relle Kleingeistigkeit und politische Kurzsichtigkeit stellte. Vor diesem Hintergrund müssen zum Beispiel die Einbeziehung von sozialen Rechten und von Situationen gesehen werden, die zuvor als rein politische Ziele der Union betrachtet wurden, wie zum Beispiel Umwelt und nachhaltige Entwicklung. Die Charta ist also viel eher eine notwendige Entwicklung, als nur eine Fortsetzung.

11. Dennoch kann gesagt werden, dass die Charta das Ergebnis eines konstitutionellen Kompromisses ist. Aber die Verfassung hat sich, zum Beispiel im Bereich der Gleichheit, nicht auf die traditionellen abstrakten Aussagen beschränkt, sondern einen präzisen und detaillierten Artikel zur Diskriminierung aufgenommen und auch soziale Ausgrenzung angesprochen und so die Prinzipien von Würde und Solidarität umgesetzt.

12. Die Charta ist kein Endprodukt, sondern der Ausgangspunkt eines neuen Prozesses. Sie ist ein Wertesystem, das die Elemente bietet, die dazu erforderlich sind, jedem Recht eine Bedeutung zu geben, die mit der neuen Phase des Aufbaus Europas harmoniert.