DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

fundamental.rights@consilium.eu.int

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Please find hereafter a contribution by Mr. Daniel TARSCHYS, representative of the Swedish government. [1]

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

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TOWARDS CONSENSUS

A Contribution by Daniel Tarschys

Time is short, and the Convention is still divided on a number of fundamental issues pertaining to the very architecture of the Charter. To move forwards and reach agreement on a forceful text, we must now urgently find a way of satisfying several seemingly contradictory demands on the Charter. In this paper, I seek to define some key tensions that must be resolved and outline the basis for a possible consensus.

1. Five Tensions in the Convention

There are above all five areas where we need to reconcile divergent positions:

(i) First of all, we need to find a common ground between those who insist on the exclusively political character of the Charter and those who have their eyes set mainly on a further stage at which the text might be integrated into the Treaties.

(ii) Secondly, we must agree on whether to draft a single text or to divide the substance into a part A and a part B, the former short and forceful and the latter specifying the conditions for exceptions and the links to the Treaties, the ECHR and eventually other legal instruments.

(iii) Linked to this issue is a third problem of reconciling the different requirements of the two audiences to which the Charter is addressed. To grasp the interest of the general public, the text should be crisp and concise. But to prevent confusion and satisfy the legal experts, it must also be comprehensive and conform with the various legal instruments in force.

(iv) We must also bridge the gap between the demand for an autonomous and innovative text and the plea for continuity and consistency with other instruments, particularly the ECHR.

(v) A final tension persists between, on the one hand, the ambition to draft an inclusive catalogue where no important rights are left out and, on the other, the apprehension that a text offering ample promises in its first 43 articles and then taking large chunks of them back at the end (where it is explained that the rights just proclaimed are valid only within the limits of Community competence, which is in no way extended through the Charter) might fuel cynicism and Euro-scepticism.

For some advice on how to resolve such conflicts, I propose first to consult the house philosopher of the Convention.

2. Kant revisited

The task of the Convention as defined by the Cologne Council is to draft a Charter that could be solemnly proclaimed by the European Council together with the European Parliament and the European Commission. Whether and, if so, how the Charter should be integrated into the treaties is as we know a matter for later consideration.

In recognition of this uncertainty about the ultimate status of the Charter, the Convention has adopted a "Kantian approach". In drafting the political declaration requested by the Cologne Council, it follows the "as if" principle, considering the eventuality that this text might later be translated into law.

The "as if" principle has been invoked in our discussions more frequently than faithfully. What Kant actually wrote in his *Critique of Practical Reason* was the following:

Handle so, dass die Maxime deines Willens jederzeit zugleich als Prinzip einer allgemeinen Gesetzgebung gelten könne.

What occupied Kant in this context was not so much the individual rules or laws but the *principle(s)* underlying general legislation. In our own discussions we have moved more and more towards recognising the importance of such principles as a source of inspiration for political action (first in the old draft article 31, now in the new draft article 44:2). I believe that we could proceed even further in this direction and base the Charter on the conviction that the acceptance of common European principles is a powerful stimulus to the successive extension of common rights and standards.

We must also recognise that this is a gradual, laborious and demanding process. A "Europe of Fundamental Rights" does not come about through Summit proclamations; it can only be built through a long chain of sustained efforts. It evolves step by step through institution-building, legislation and jurisprudence. While we have already come a long way in developing fundamental rights in Europe and have a great many *acquis* to be proud of, there also challenges in front of us, areas in which common principles have not yet been translated into homogeneous rights or efficient political action. These challenges will certainly take years and decades to meet rather than months and weeks.

"Statt Revolution Evolution" -- those were Kant's words in *Streit der Fakultäten* (1798) where he pleaded for reformism and the patient but determined *Fortschritt zum Besseren*. Following this idea we should recognise that the strengthening of fundamental rights in Europe is an on-going process and define the role of the Charter accordingly as (1) a concise guide for our citizens and as (2) an expression of firm commitment to a Europe of common values and an impetus to further action on the basis of shared principles.

One purpose of the Charter should thus be to *provide a succinct summary* of the fundamental rights that have been recognised by the Union and its Member States and to *lay down* principles for action, particularly in the social field. But the Convention should not compete with or seek to replace the constitutionally regulated and treaty-bound legislative processes. As members of the Convention, we have been appointed by Governments, National Parliaments, the European Parliament and the European Commission -- but we have not been asked to take over the functions of these august bodies. Respecting the established democratic procedures and division of competence, we should therefore regard ourselves not as a legislature but as an eminently political body tasked with the important mission of promoting fundamental rights through a clear, concise and forceful presentation of the rules scattered in different and not so easily accessible legal instruments.

A *second function* of the Charter should be to give a powerful impetus to further measures purporting to enhance the respect for fundamental rights and principles, through the solemn commitment of the Member States and through the support for the Charter that can be mobilised

among European citizens. The keen interest in our work demonstrated by many non-governmental organisations should give added impact to the effort. The Charter will serve to remind the European institutions and the Member States of important obligations that they will have to honour in their political practice.

3. A Forceful and Dynamic Charter

My proposal to reconcile the divergent positions outlined above goes as follows:

(i) In its form, the Charter is clearly a political declaration. In its substance, however, it is both an extensive index of legally binding rights and a resumé of common principles. Most of the articles cover rights that have already been given legal force. The dynamic character resides in the fact that in the future, the number of such articles may gradually grow through the normal legislative process in the EU. Other articles cover political principles on which the Union and its Member States are agreed.

(ii) The Charter can be a single and concise text, accompanied by a commentary or a "user's manual" which gives references to the legal instruments in which the specific rights and the conditions for exceptions to them are enshrined. While the division into a part A and a part B with equal status is an elegant solution if the Charter is construed as a *source of law*, this structure is not necessary if the text is clearly recognised to be a *guide to law*.

(iii) The text should be aimed at the general public. The legal experts will have to continue to consult the Treaties, and ECHR and other instruments where the details of the particular rights are specified. The Charter itself is not intended to compete with these instruments as a source of law. It is an overview, a guide and an index.

(iv) The Charter is a fully autonomous document, and it may very well refer to principles and rights not included in the Treaties and the ECHR if these are acceptable to the Member States.

(v) The Charter will be forceful only if it is truthful. It should therefore recognise that the strengthening of fundamental rights is a lengthy and unfinished process. It should not pretend that guarantees exist where they do not. In such cases, it is better to lay down principles or objectives. In view of the dualism introduced through draft article 44:2, it might be considered to call the final document of the Convention "The European Charter of Fundamental Rights and Principles".

To give leverage to the Charter, it is important to emphasise its dynamic and evolutionary dimension. We must not allow it to be dismissed as a one-shot event, a document required only in a particular political conjuncture and then forgotten as quickly as it was drafted. It should be presented to the Council explicitly as an agenda for action, "*la Charte comme chantier*".

The Charter should serve as a new departure and an important impulse to the process of making the European Union an area of common values. But it should not be seen as an attempt to replace the normal, treaty-bound legislative process by hasty improvisation and by attempts to settle thorny normative questions by shots from the hip. Not only would that compromise the whole enterprise we have embarked upon but it might also run counter to the very ends that we are seeking to pursue.

4. Implications for the Horizontal Articles

To express clearly that the Charter is a **forceful summary and presentation** of existing, legally binding rights and of important principles pursued by the European Union and its Member States, **not** an effort to reformulate these rights, we must redraft the horisontal articles. The Charter should not be addressed to the European institutions but to the European citizens. The relationship between the Charter and the ECHR would be less dramatic if it were obvious that each of these texts has it own specific purpose. Giving a succinct overview of fundamental rights recognised in Europe, the Charter would provide valuable guidance to the public, but to ascertain the precise substance of the many different rights covered in it the readers would have to consult the various legal texts (such as the Treaties, the secondary legislation, the ECHR) as well as the jurisprudence of the two Courts. In other words, the Charter should not duplicate or derogate existing legal instruments but provide a clear picture of the fundamental rights recognised in such texts.

A Testament from the Convention to Biarritz and Nice.

Words, words, words. Europeans are rightly suspicious of declarations not followed by action. A Charter adopted in Biarritz or Nice and then just shelved is worse than no Charter at all. The real measure of the our institutions' commitment to fundamental rights is not what they say but what they do -- and are prepared to pay for.

Many suggestions have been put forward to make additional rights justiciable. Before such ideas are considered it would seem imperative to assess how our European Courts are coping with the workload they already have. Waiting-times are growing unacceptably long both in Luxembourg and Strasbourg. The Strasbourg Court in particular is likely to face a dramatically mounting caseload as applications start coming in from the new member states in Central and Eastern Europe. Unless the resource needs of the two Courts are given adequate attention, there are reasons to expect a *sharp deterioration* of the system for fundamental rights protection in Europe, and even a collapse of the Strasbourg mechanism.

The Convention should alert the European Council of this threatening situation and recommend remedial action. It should also suggest further examination of the quarter-century old proposal to proceed to the ratification by the Community of the ECHR. Though the resistance to this idea is manifestly shrinking, the apprehensions expressed deserve serious analysis and the modalities of a ratification need to be clarified. A study of this issue could perhaps usefully be broadened to consider the non-hierarchical co-operation between the two Courts in the protection of European fundamental rights.
