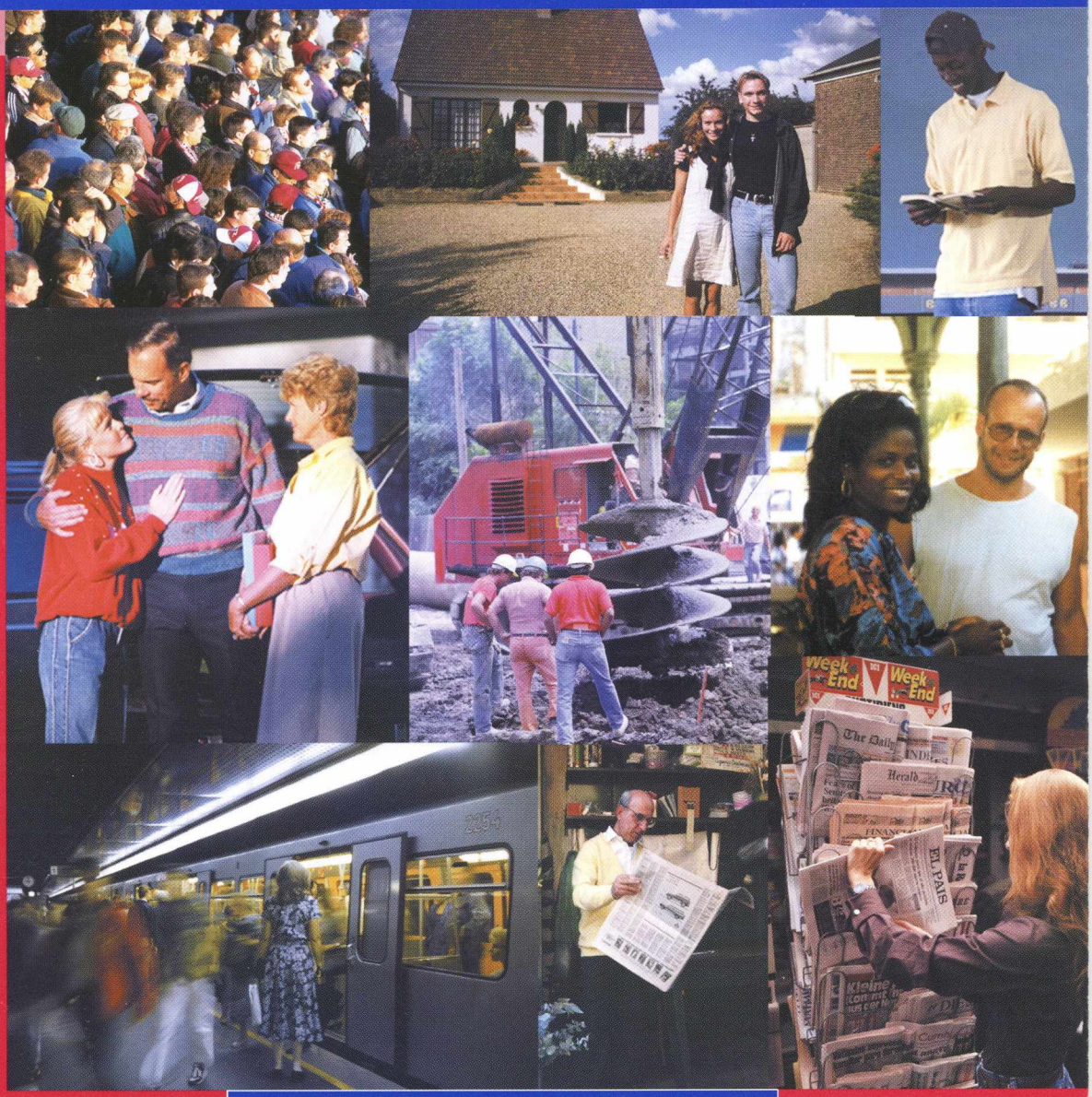
Affirming fundamental rights in the European Union

Report of the Expert Group on Fundamental Rights

Fundamental rights & anti-discrimination



Employment & social affairs

European Commission

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Time to act

Report of the Expert Group on Fundamental Rights

Employment & social affairs

Fundamental rights and anti-discrimination

European Commission
Directorate-General for Employment, Industrial Relations
and Social Affairs
Unit V/D.2

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It can be accessed through the Europa server (http://europa.eu.int).

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Foreword

In its social action programme 1998-2000, the Commission has announced its intention of carrying forward the debate on the question of fundamental rights in the European Union.

This debate was launched by the report of the 'Comité des Sages' presented at the first Social Policy Forum in March 1996. In 1997 a follow-up process took place to advance the debate on the conclusions of this report and promote civil dialogue on fundamental rights. One theme which emerged strongly from this was the possible establishment of the fundamental social rights as a constitutional element of the European Union.

The Commission believes that it is worth having this question studied in greater detail. Therefore, DG V established an independent expert group on fundamental rights to consider this area further. The group was composed of eight academic experts in the field, chaired by Professor S. Simitis.

The group was asked to review the status of fundamental social rights in the treaties, in particular in the new Treaty of Amsterdam, possible lacunae and related legal and constitutional matters. Special consideration should also be given to the possible inclusion of a Bill of Rights in the next revision of the Treaties. The expert group's report has put forward 10 recommendations to achieve an explicit recognition of fundamental rights in the European Union.

I should like to thank the members of the expert group for their excellent work which will contribute to broadening the debate on this issue within the European Union in the coming months.

Odile Quintin
Acting Deputy Director-General
DG V

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Executive summary

The arguments demonstrating the need for a reformulation of fundamental rights have been exhaustively discussed. What is now needed is not new deliberation but a clear decision.

A comprehensive approach to the guarantee of fundamental rights is urgently required. Fundamental rights must be visible. Therefore, an express guarantee should be included in the Treaties.

While judicial protection is undoubtedly a crucial element in the effective safeguarding of fundamental rights, it is by no means its only prerequisite. It is vital to establish rights which are genuinely justiciable, and which entail more than a passive obligation of non-violation.

The recognition of fundamental rights should be based, in particular, on the European Convention on Human Rights (ECHR), which has become, through the case law of its organs, a common European Bill of Rights.

The rights of ECHR, including those in its Protocols, should be incorporated in their entirety into Union/Community law. At the same time, clauses detailing and complementing the ECHR must be added.

As imperative as an explicit recognition of fundamental rights is, attention must also be paid to furthering the protection of rights through policies and related organisational changes.

The guarantee of rights must be seen as an open process, based on dialogue within civil society, and capable of responding to new challenges. This process should include both civil and social rights.

The text enumerating the rights should be inserted into a special part or a particular title of the Treaties. The place chosen should clearly illustrate the paramount importance of fundamental rights.

I. Remit

In March 1996 a 'Comité des Sages' appointed by the European Commission presented its report on the need to recognise a series of fundamental civil and social rights, and incorporate them into the Amsterdam Treaty. The Comité suggested that the European Union should first include in the Treaty a minimum core of rights and at a later stage set in motion a consultation process which would update and complete the list of civil, political and social rights and duties. The Comité complemented these more general objectives by 26 specific recommendations. They stressed the need to strengthen the sense of citizenship and democracy in the European Union by treating civil and social rights as indivisible, as well as the importance of formulating rights that reflect technological change, the growing awareness of the environment, and the demographic developments.

The Comité's proposals were intensively discussed in the course of 1997 in numerous meetings organised in particular by non-governmental organisations (NGOs) dealing with human rights and social problems in the various Member States. The result was a clear approval of the Comité's position, especially with regard to the incorporation of social and civil rights in the Treaties.

More recently, the European University Institute presented, together with a report on its 'Project on the European Union and human rights', a 'human rights agenda for the European Union for the year 2000'. Both documents re-emphasise the urgency of explicit recognition of fundamental rights by the European Union. However, neither stops at general consideration of the significance of such a decision. They also insist on the need to place all further efforts in an institutional and administrative framework which would secure the persistent promotion of fundamental rights and their consistent integration into the ongoing activities and policies of the European Union.

Despite the appeal of the Comité de Sages and the wide support it was given, the Amsterdam Treaty, notwithstanding its intention to consolidate and advance the unification process, does not contain a basic set of fundamental civil and social rights in the form of a Bill of Rights. Nor does it fulfil the expectations articulated in the report of the Comité des Sages, by clearly detailing and expanding the recognition of fundamental rights.

The quest for explicit recognition of fundamental rights is therefore still of immediate importance. In fact, the very adoption of the Amsterdam Treaty has made the need even more apparent. The enlargement of the European Union's tasks demonstrates that recognition of fundamental rights is not a long-term policy but a short-term necessity.

This is especially illustrated by the increasing relevance of issues such as a judicial cooperation in criminal matters, police cooperation for the purposes of preventing and combating serious international crimes, or a common policy with regard to immigration and nationals of third countries. In addition, concerns

raised by the structural changes of the labour market and the ensuing reflection on common activities have drawn fresh attention to the acute need for fundamental social rights. Finally, the globalisation of the economy, and in particular its consequences for the external relations of the European Union, has accentuated the significance of efforts to protect fundamental rights, already exemplified by the clauses inserted in numerous agreements concluded between the Community and third countries. It has further underlined the need to clarify and specify within the European Union the rights upon which such actions are based.

It is against this background that the Commission decided to entrust a new Group of Experts to analyse and assess the opportunities and constraints of an explicit recognition of fundamental rights. The Commission pointed to a series of questions that in its view merited particular consideration: evaluation of the provisions concerning fundamental rights included in the Amsterdam Treaty; the implications of the indivisibility principle; the possible content of new rights mirroring the challenges of an information society; the justiciability of fundamental rights; the relation to the protection of fundamental rights provided by the Council of Europe; and the role of fundamental rights in the development of the European Union.

The Group of Experts debated these questions in six meetings held since March 1998 and presented its report in February 1999. In the course of these meetings, the Group discussed issues concerning the recognition of fundamental rights with representatives of the Platform of European Social NGOs and of the European social partners.

The report deals first with the Amsterdam Treaty and its consequences. It then addresses the factors and conditions that ought to be considered by any future attempt to promote the explicit recognition of fundamental rights. Finally, the report makes a series of recommendations for achieving an express recognition, and for the improvement of fundamental rights protection.

II. The Amsterdam Treaty

The Amsterdam Treaty may not have led to an explicit recognition of particular fundamental rights. It nevertheless marked a decisive step on the way to an ever clearer recognition of the principle of fundamental rights protection by the European Union. The Treaty affirms the European Union's commitment to human rights and fundamental freedoms (Art. 6 (1)) and explicitly confirms the Union's attachment to fundamental social rights (Preamble, fourth recital). It does this, however, by maintaining the previously adopted system of references. Thus, the Treaty stresses the respect of the fundamental rights guaranteed by the 1950 European Convention on Human Rights (ECHR) and as determined by the common constitutional traditions of the Member States and hence by the general principles of Community law (Art. 6 (2)). Similarly, both the Preamble and Art. 136 of the EC Treaty refer to the fundamental social rights by pointing to the 1961 European Social Charter (Council of Europe) and the 1989 Community Charter.

Rather than listing fundamental rights, the Amsterdam Treaty establishes procedures intended to secure their protection. Art. 13 of the EC Treaty, for instance, empowers the Council to take appropriate action to combat discrimination, after consultation of the European Parliament. The possible grounds of intervention are explicitly indicated in Art. 13 and range from discrimination concerning sex, racial or ethnic origin to discrimination regarding religion, belief, disability, age or sexual orientation. The Community is therefore given the opportunity to develop policies and proposals intended to prevent these discriminations. Moreover, provisions such as Art. 3 (2) and 141 (4) of the EC Treaty lay the grounds for measures designed to achieve an effective equality of men and women including positive action.

In a far more general way but still along the same lines, Art. 136 of the EC Treaty qualifies the fundamental social rights, as determined by the European Social Charter and the Community Charter, as guidelines for activities of both the Community and the Member States. These are intended to promote employment, improve living and working conditions in order to make possible their harmonisation while the improvement is being maintained, ensure proper social protection, secure a dialogue between management and labour and develop human resources in a way permitting to obtain a lasting high employment and to eliminate social exclusion.

Finally, Art. 7 provides that the Council may, in the event of a serious and persistent breach of the principles mentioned in Art. 6 (1), suspend a Member State from its Treaty rights.

The Amsterdam Treaty has also led to changes in the jurisdiction of the European Court of Justice (ECJ) that in turn affect the protection of fundamental rights. Thus, according to Art. 46 of the EU Treaty it is now within the Court's powers to ensure that Art. 6 (2) is observed by the institutions of the European Union. However, the Court's jurisdiction is in principle restricted to Community law. As

a result, with the exceptions of Articles 35 and 40 of the EU Treaty, the Court's jurisdiction does not cover actions regarding the second and third pillars.

Another equally relevant but no less limited expansion of the Court's jurisdiction occurs in connection with 'common actions' of the Member States as specified in Title VI of the EU Treaty. The activities referred to concern the prevention, detection and investigation of crime as well as extradition and are intended to achieve, in the interest of the citizens, 'a high level of safety within an area of freedom, security and justice' (Art. 29). According to Art. 46 lit. b of the EU Treaty the Court has jurisdiction in these cases as long as the conditions of Art. 35 are fulfilled. The Court can, therefore, at the request of national courts or tribunals, give preliminary rulings on the validity or the interpretation of Council instruments adopted in the context of Art. 29, provided the Member State concerned has declared that it accepts such jurisdiction. The Court can also review the legality of Council decisions and rule on any dispute between Member States concerning the interpretation or application of acts adopted under Art. 34 (2).

III. Deficits and inconsistencies

As important as the changes brought about by the Amsterdam Treaty are, none of them offers a lasting and satisfactory answer to the issues addressed, both in the report of the Comité des Sages, and the ensuing discussion.

1. There is increasing uneasiness and confusion due to the differences and contradictions in the perception and application of the European Union's commitment to the fundamental rights across the three pillars.

The Amsterdam Treaty and especially the modifications of the EC Treaty undoubtedly have far-reaching effects in the first pillar through the impact of Community law. The second (common foreign and security policy) and third (justice and home affairs) pillars are, however, based on traditional intergovernmental relations. Thus, the manifest effort of the Community law to develop and implement the protection of fundamental rights corresponds to equally manifest attempts to limit their influence in the second and third pillars.

A characteristic example is the reaction to the quest for improvement of the protection of personal data in the various pillars. While Parliament, Council and Commission, in connection with the adoption of the 1995 data protection directive, unanimously pointed to the direct link between data protection and fundamental rights, the Member States followed a restrictive policy in the two other pillars. The very principles and measures that had been accepted in the case of the directive in order to respect fundamental rights were thus questioned and to a large extent abandoned in agreements such as the Europol Treaty.

If the European Union's commitment to the fundamental rights, as expressed in the Amsterdam Treaty, is to be taken seriously, both the Member States and the European Union's institutions must act under the same premises in all three pillars. In other words, fundamental rights should remain the primary and decisive criteria of the compatibility of the activities of all institutions and bodies with the European Union's guiding principles.

2. The actual system of references is confusing and counter-productive. While, for instance, the ECHR is cited twice in the EU Treaty, there is not a single mention in the EC Treaty. In contrast, both the European Social Charter and the Community Charter are quoted in each of these documents. But their explicit mention in the Preamble of the EU Treaty is not followed by an equally outspoken reference in Art. 6 where only the ECHR is cited. The opposite is the case in Art. 136 of the EC Treaty. It cites the European Social Charter and the Community Charter but not the ECHR, despite the impact of fundamental rights, such as freedom of association, respect for private and family life, or freedom of expression, on employment relationships.

Moreover, the general references suggest that fundamental rights are put on the same level irrespective of the document they are defined in. But the main sources

of fundamental social rights, the European Social Charter and the Community Charter, are in fact only seen as a basis of Community policies. The result is, inevitably, the impression of a selective approach to fundamental rights implying an equally selective significance. Some of the rights are guaranteed the highest possible degree of protection, in part due to their justiciable character. Others, however, such as social rights, risk being relegated to the status of mere aspirations of both the European Union institutions and its Member States.

Although Art. 136 expressly and emphatically refers to the European Social Charter and to the Community Charter, one article later (Art. 137 (6)) the EC Treaty explicitly excludes the right of association, as well as the right to strike and the right to impose lock-outs, from the duty to support and complete the efforts of the Member States designed to implement the social policy aims defined in Art. 136.

In other words, the European Union is prevented from acting on its own to protect better those rights that traditionally belong to the core of social rights, and that over and again have been affirmed by both national laws and international treaties. The seemingly general inclusion of social rights into the principles governing the policies and activities of the European Union is in fact only partial.

Finally, the restriction of the references to a few international documents raises questions as to the exact status of other Conventions, in particular those of the International Labour Organisation (ILO). While their importance in abstract terms may be undisputed, as long as they are not mentioned, both their role and their impact remain uncertain. This is all the more so given that the ECJ seems to distinguish between the ECHR and other Conventions. Whereas the first 'forms part' of Community law, the latter operate merely as guidelines for the interpretation and application of Community law.

In sum, the references may at first suggest a clear commitment to a set of specific rules. In reality, they neither delimit the applicable rules in a sufficiently precise way, nor do they secure an equal respect for all fundamental rights.

3. Fundamental rights are dealt with in a way that complicates and even imperils the role of the ECJ. The Court has not only stressed the importance of the ECHR but also repeatedly confirmed that the Convention is an essential element of Community law. The least that under these circumstances could have been expected at Amsterdam was therefore an amendment of the EC Treaty affirming the Court's position and simultaneously substituting the Court's abstract system of references by provisions permitting better discernment and delimitation of the rules that have to be considered in order to make certain the respect of fundamental rights.

Furthermore, the Court's role in the second and third pillars has not been sufficiently clarified. It could be argued that the predominantly intergovernmental character of the rules governing these two pillars implies that they do not directly impact on EU citizens. But as the example of Europol demonstrates, regulations adopted in the frame of both pillars do indeed profoundly impinge on the fundamental rights of individuals. To disregard the interplay of national and

supranational jurisdiction and, in particular, to deny the ECJ jurisdiction, not only hinders efficient protection in fields in which the ECJ must secure the respect of fundamental rights, as, for instance, in the case of the rules determining the use of personal data; it also counteracts the development of a common constitutional order of an 'ever closer union' of European peoples. Hence, if the European Union, in the interest of both its citizens and other persons within its jurisdiction, wants to ensure consistent application of the principles guiding its activities, the jurisdiction of the Court has to be defined in a way which guarantees rather than undermines this consistency.

IV. Recommendations

The role of the Amsterdam Treaty should certainly not be underestimated. It reiterates the commitment of the European Union to fundamental rights and invigorates the obligation to develop and implement policies securing protection of these rights. However, deficiencies and inconsistencies such as those just described cannot be ignored. On the contrary, their existence should intensify efforts to achieve explicit and unequivocal recognition of fundamental rights.

1. A comprehensive approach

Future reflections on fundamental rights should focus on their double function. Fundamental rights delineate the foundations of a society based on the elements mentioned in both the Preamble and Art. 6 (2) of the EU Treaty and, at the same time, guarantee the individuals' self-determination and chances of participation. The degree to which the European Union will be able to contribute to the establishment of a society corresponding to its aspirations depends essentially on the ability of its citizens to realise and exercise their fundamental rights. Therefore, the obligation to respect and implement fundamental rights, as already mentioned, cannot be split up. It is not only a primary duty of the European Union, but also a common responsibility of the Member States together with the Union, to make certain that fundamental rights are safeguarded irrespective of which matter or pillar is at stake.

In short, while the objectives pursued by the European Union may vary, the protection of fundamental rights must nevertheless be guaranteed. The European Union should therefore move to correct the present situation.

2. Range of application

Furthermore, the extension of the European Union's activities, as sanctioned by the Amsterdam Treaty, draws attention to the range of application of fundamental rights. Rights which were obviously connected with traditional EC issues, such as equality of sexes or the free movement of workers, were often perceived as rights of the EC citizens and therefore were addressed as an essential element of an EC citizenship. But, as the case of third country nationals illustrates, such a restriction is inconsistent with the universality of at least a substantial number of fundamental rights. Similarly, asylum-seekers cannot be exempted from the European Union's duty to respect fundamental rights.

The urgency of a clear reaction is underscored by the decisions of both the ECJ and the European Court of Human Rights. In this context, it can be noted that in 1997 the Commission proposed to extend some provisions of Regulation (EEC) 1408/71 on social security for migrant workers to nationals of third countries. Any further reflection on fundamental rights must address their scope of application as far as non-citizens of the EU are concerned.

The issue of 'range of application' also implicates the European Union's external relations. A union that claims to be bound and guided in its internal policies by the duty to respect fundamental rights must, if its credibility is not to be challenged, consider those same rights as a leading principle in its external relations. This is a matter in which action has, of course, already taken place. Thus, for example, Art. 177 (2) of the EC Treaty explicitly states that Community policies in the area of development cooperation must contribute to respect of human rights. Also, a human rights clause is now a common element of agreements concluded between the Community and third countries.

3. Visibility

Fundamental rights can only fulfil their function if citizens are aware of their existence and conscious of the ability to enforce them. It is, consequently, crucial to express and present fundamental rights in a way that permits the individual to know and access them: fundamental rights must be visible.

Their current lack of visibility not only violates the principle of transparency, it also discredits the effort to create a 'Europe of citizens'. Clearly ascertainable fundamental rights stimulate the readiness to accept the European Union and to identify with its growing intensification and expanding remits.

It could be argued that most fundamental rights can be found in national constitutions and international treaties, and that an explicit enumeration of these rights by the European Union would therefore add very little. This, however, does not justify a system of citations that conceals the fundamental rights and makes them thus incomprehensible to the individuals. Where rights are concerned, ways and means must be found to make them as visible as possible. This involves spelling rights out at the risk of repetition, rather than merely referring to them in general terms as contained in other documents.

4. Justiciability

Clear statements determining the fundamental rights are, however, not sufficient. In order for rights to have any real impact, those seeking to assert them within the European Union have to know who is exactly covered and whether the right is justiciable. Efficient safeguard of fundamental rights as a rule presupposes judicial protection. It is, however, important to note that justiciability can have different meanings in different contexts, as the example of 'social rights' demonstrates. Social rights can involve straightforward justiciable rights, as the case of non-discrimination illustrates, both in general and specifically with regard to the equality of sexes. Or, they can involve 'rights' that are in fact 'fundamental policy purposes', as, for instance, the demand for a life-long education, vocational guidance and training or the quest for health and safety in the working environment.

Both justiciable rights and fundamental policy purposes require the European Union, as well as national legislators, to provide the necessary framework for their implementation. This is certainly obvious where the EC Treaty, as in Art. 136 and 137 (1), expressly names policy objectives such as the information and

consultation of the workers, the improvement of the working environment to protect workers' health and safety, or the integration of persons excluded from the labour market. In each of these cases the significance of particular measures has, over and over again, been demonstrated by the adoption of relevant directives which transform abstract policy ends into concrete duties of legislators.

The same applies to the areas of discrimination referred to in Art. 13 of the EC Treaty. Once again the Treaty empowers the Community to seek and adopt rules to combat discrimination. Concrete measures, legislative or otherwise are now required to implement Article 13.

While judicial protection is undoubtedly a crucial element in safeguarding fundamental rights, it is by no means its only prerequisite. Legal remedies have to be complemented by legislative or administrative activities intended to implement and secure individual rights. As, for example, experience in the field of sex discrimination shows, equality of men and women can be achieved only by specific policies eliminating, in particular, the conditions of structural discrimination. Judicial protection and corrective action must be seen as part of one regulatory system which integrates both approaches. To dissociate them is to reduce the individual's chance of exercising his or her rights.

It is therefore vital to establish genuine justiciable rights that entail more than a passive obligation of non-violation. Therefore, both the justiciability and the obligation to ensure specific rights by supporting their application through a series of regulatory actions should be underscored. The best way of achieving this is probably to choose a wording that places a duty on the European Union to guarantee a given right.

5. Competence of the European Union and its Member States

As helpful as a rule affirming the obligation to guarantee fundamental rights is, it also exemplifies the limits of the European Union's efforts to recognise and safeguard these rights. It cannot be disputed that the European Union is perfectly competent to secure fundamental rights within the limits of its jurisdiction. To the extent that the European Union addresses matters covered by Community law it may hence use its regulatory powers to affirm and implement fundamental rights. In both the equality and the data protection field the Community linked its regulatory framework to the need to ensure the respect of fundamental rights.

Restricting the European Union's competence as regards fundamental rights contrasts with the paramount relevance of these rights. To combine their recognition with a proviso expressly restricting their application impairs the credibility of the commitment to fundamental rights. The readiness to respect and implement them risks remaining unconvincing as long as an equal degree of acceptance in fields not subject to Community law – either in the European Union's or the Member States' area – is not secured.

However, convincing as such an aspiration may appear, it should also be clear that a consistent protection of fundamental rights can be achieved only through a long and surely cumbersome process marked by the parallel existence of regu-

latory systems at the Union and the Member States level. The emphasis must therefore primarily lie in careful and persistent coordination with the help of common standards such as those developed in the context of the ECHR.

6. Role of the European Court of Justice – Relationship to the European Court of Human Rights

The quest for provisions explicitly defining fundamental rights must not obscure the role of the ECJ. It was the Court which first integrated the ECHR into Community law and it is also the Court which, regardless of the means chosen to articulate and affirm fundamental rights, will exert paramount influence on their future interpretation and application.

A text enabling individuals to ascertain their rights is imperative for affirming fundamental rights in the European Union. However, the living law will ultimately be determined by the decisions of the ECJ. The actual fragmented and partially unclear rules delineating its jurisdiction are deemed to prevent the ECJ from fully fulfilling its functions. Any attempt, however, to extend its competence must take into account the Court's relationship to the European Court of Human Rights.

In addressing this question, the context in which the ECJ renders its decisions should not be overlooked. It is outlined by the EU and the EC Treaties. The ECJ has against this background strengthened the protection of fundamental rights step by step. A coherent and efficient protection can be best achieved with full knowledge of the expectations and demands expressed in the Treaties.

Moreover, as the European Union undergoes far-reaching structural changes that underscore the significance of its commitment to fundamental rights, the more the need to secure protection consistent with the European Union's principles and aspirations will become evident. The growing impact of the second and third pillar and the example of Europol demonstrate how crucial the role of the ECJ is.

Therefore, the clearly independent jurisdictions of the ECJ and the ECHR should be maintained. As in the past, it must be up to the ECJ to carefully consider and integrate the decisions of the European Court of Human Rights into the law of the European Union, a practice which will assume increased importance after fundamental rights have been recognised in a more explicit and detailed way by the European Union.

There may, of course, be other ways to safeguard a coherent application of the principles developed by both Courts, and to ensure consistency in the development of fundamental rights at European level. One of the possible options is a system of references by which the ECJ could, similarly to the mechanism under Art. 234 of the EC Treaty, refer questions of interpretation to the European Court of Human Rights. A final appeal to the European Court of Human Rights could also be considered. Further discussion of either of these approaches would, at least for the moment, be inappropriate, not only in view of the considerable changes of the existing procedural structures which they would require, on the part of both the European Union and the Council of Europe, but primarily be-

cause of the particular context which determines the judicial resolution of conflicts concerning fundamental rights within the European Union. Informal cooperation between the ECJ and the ECHR jurisdictions, which has existed for many years, should, nevertheless, be continued and strengthened.

7. Organisational measures

As significant as the role of the ECJ is, efficient implementation of fundamental rights also depends on the establishment of other mechanisms designed to ensure the coherence of the European Union's fundamental rights policies and to control their application. The Amsterdam Treaty has already taken a first step in this direction. According to Art. 286 (2) of the EC Treaty, the processing of personal data by the various institutions and bodies of the European Union must be supervised by an independent control agency. The European Union has, in a field that directly implicates fundamental rights, acknowledged the need to install procedures which will enable the impact of rules securing these rights to be monitored and to detect and correct possible deficiencies in a timely fashion.

Art. 286 of the EC Treaty also demonstrates the fact that the European Union's commitment to fundamental rights does not concern any one institution or body. It impacts on all its activities. Mechanisms securing an internal coordination of fundamental rights' policies must therefore be provided for.

Experience shows, however, that the development of both credible and efficient fundamental rights policies depends to a decisive extent on continuous dialogue with those whose rights are to be guaranteed. Traditional interlocutors such as the social partners together with non-governmental organisations can, particularly in the area of fundamental rights, offer critical advice and also help to locate and identify areas of conflict.

For precisely the same reason, such a dialogue should not be confined to preliminary reflections only, but continued and intensified once fundamental rights have been expressly recognised and specific policies worked out. In other words, internal coordination must be complemented by procedures intended to establish a regular exchange of views and experiences with the social partners and non-governmental organisations.

8. Indivisibility

Any attempt to explicitly recognise fundamental rights must include both civil and social rights. To ignore their interdependence questions the protection of both. It is in this sense that their indivisibility has over and again been affirmed. Their separation in part has historical reasons. It reflects the late 'discovery' of social rights, as compared to civil and political rights. The more the attention concentrated on specific aspects of social rights, the more they were perceived as a different type of right, that had to be treated differently.

As important as it was, especially in the early years of discussions on social rights, to understand and stress their special character, the separation from civil and political rights led increasingly to a binary classification of fundamental rights and legitimated long-standing attempts to grant social rights a distinct and clearly inferior status. The history of the European Communities offers many examples of the efforts to regard social rights as a group of rights with less relevance than traditional civil and political rights. The quest for 'indivisibility' counters all attempts to maintain the separation and to deny social rights the rank conceded to civil and political rights.

It should nevertheless be clear that 'indivisibility' does not imply a simple juxtaposition of social and civil rights. Equality of sexes or non-discrimination on grounds of age may have acquired a particular significance in the case of labour relationships. But both originated from the general equality principle and must, if their meaning and range are to be correctly appreciated, be seen and discussed against the background of the reflections and aspirations that guided the application of the equality principle. Similarly, the relevance of rules restricting the use of employee data and guaranteeing employees' privacy may be obvious, but they can be accurately formulated only in connection with an explicit recognition of individuals' right to determine the processing of their data. In short, there is, in the words of the European Court of Human Rights, no 'water-tight division' between civil and social rights.

'Indivisibility' therefore demands, first and foremost, a meticulous review of civil rights in order to address and incorporate matters traditionally dealt with in a closed category of social rights. Where adaptation and completion of civil rights is not possible, formulation of new rights will be needed, as is particularly the case with collective rights, such as the right to resort to collective actions.

Irrespective, however, of whether the recognition of social rights is effected by reinterpreting traditional civil rights, or by enlarging the list of fundamental rights, the inclusion of social rights does not fully cover fundamental social policies. All such policies must therefore, as in the past, be separately addressed as essential elements of the European Union's general policy goals.

9. The explicit recognition of fundamental rights: an open process

A comprehensive and thorough review of fundamental rights, so as to secure their best possible integration into the law of the European Union and take into account their function in a modern society would seem to be the most appropriate reaction to the foregoing considerations. The risk, however, of formulating a new and genuine Community-specific set of fundamental rights is considerable. Such an attempt would in fact reopen and prolong a debate that has already lasted far too long.

Both the arguments for a reformulation, and the possible content of the rights to be recognised, have by now been exhaustively discussed. Moreover, the far-reaching changes of the European Union, the expansion of its activities and not the least its growing international role in a globalised society, as stressed at the

beginning of this report, speak strongly against further adjournment of an explicit recognition of fundamental rights.

What, more than ever, is needed, is not new deliberation but a clear decision. Instead of concentrating all efforts on the formulation of a new Bill of Rights, the recognition of rights should build in particular on the ECHR, which has become, through the case law of its organs, a common European Bill of Rights.

This should, however, not be understood as an incitement to pick and choose only those rights that seem especially relevant to the European Union's own history and tasks. On the contrary, the acceptance of the ECHR must be guided by the fact that the European Union is in a process of structural modifications, as particularly illustrated by the increasing importance of the second and third pillar. Rights which, therefore, may at first appear to be perfectly alien to the European Union, may become increasingly significant, as more attention focuses on new aspects of the European Union, such as judicial and police cooperation in criminal matters.

The rights provided in Articles 2 to 13 of the ECHR should hence be incorporated in their entirety into Community law, together with the relevant rights in the Protocols to the ECHR. These are:

- the right to life;
- the prohibition of torture, inhuman or degrading treatment or punishment;
- the prohibition of slavery, servitude and forced or compulsory labour;
- the right to liberty and security;
- the right to a fair and public hearing by an independent and impartial tribunal;
- the right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed;
- the right to respect for private and family life;
- the right to freedom of thought, conscience and religion;
- the right to freedom of expression;
- the right to freedom of peaceful assembly and to freedom of association;
- the right to marry and to found a family;
- the right to have an effective remedy in case of a violation of any of these rights and freedoms;
- the right to property;
- the right to vote; and
- the right to free movement.

Secondly, clauses detailing and complementing the ECHR must be added as it appears necessary. Among the most obvious examples are:

- the right to equality of opportunity and treatment, without any distinction such as race, colour, ethnic, national or social origin, culture or language, religion, conscience, belief, political opinion, sex, marital status, family responsibilities, sexual orientation, age or disability;
- the freedom of choice of occupation;
- the right to determine the use of personal data;
- the right to family reunion;
- the right to bargain collectively, and to resort to collective action in the event of a conflict of interests; and
- the right to information, consultation and participation, in respect of decisions affecting the interests of workers.

In some cases, this latter list extends rights already included in the ECHR or in the Protocols to the ECHR, for example non-discrimination and freedom of association. In other cases it enshrines rights long accepted as fundamental social rights.

In defining fundamental rights, other international human rights treaties should also be taken into consideration. Particular attention should also, in view of the social rights, be given to the conventions of the ILO, especially those on the freedom of association (Nos 87 and 98) and on the discrimination in employment relationships (No 111) as well as to the tripartite ILO Declaration on fundamental principles and rights at work adopted in June 1998.

The specification of fundamental rights is, however, only an intermediary act. It reflects the status quo but at the same time paves the way for further completion: the inclusion of rights addressing in particular, protection of the environment and the effects of a rapidly developing biotechnology on the individual's personal integrity and self-determination. Here the European Union should use the procedure followed in the case of the information and communication technology field, where broad discussion of the characteristics and consequences of the 'information society' took place in a special forum established by the Commission. This raised awareness for the need for rules safeguarding fundamental rights, and promoted a readiness to adopt required measures. Similarly, an equally intensive debate on the relevance and the repercussions of biotechnology should be initiated in order to discern and formulate the appropriate additions to the list of fundamental rights.

In sum, the recognition of fundamental rights must be understood as a process that in its first phase should lead to the enumeration of a set of rights incorporating and expanding the ECHR, but which, in particular against the background of the decisions of the ECJ and the European Court of Human Rights, should ultimately result in a reformulation of fundamental rights adapted to the experiences

and exigencies of the European Union. However, even in the long term, the process of ascertaining and determining fundamental rights should remain an open one, if the European Union is not to be deprived of the opportunity to adjust its leading principles to the needs of a society marked by constant changes that will continue to pose new challenges for fundamental rights, as experience with information and communication technology and with biotechnology illustrates.

As imperative as an explicit recognition of fundamental rights is, the European Union must not neglect the equally significant fundamental policies, as, for instance, outlined in Articles 136 and 137 of the EC Treaty. Both rights and policies are integral and closely interlinked components of the single system of fundamental rules which governs the activities of the European Union. The applicability of both rights and policies may be ensured through different mechanisms, but nevertheless, they cannot be separated. Hence, the insistence on a formulation of fundamental rights must not lead to a neglect of fundamental policies.

10. Form and location

All rights should be set out in a single text. Both the present dispersion throughout the Treaties and the widespread references to various international and supranational sources must be abandoned in order to secure the degree of clarity that the fundamental character of these rights necessitates. Therefore, even where a substantial number of rights is, as in the case of the ECHR, included in a specific document, the rights must be expressly listed.

The text enumerating the rights should be inserted into a special part, or a particular Title of the Treaties. The place chosen should clearly illustrate the paramount importance of fundamental rights and unmistakably indicate that the activities of the European Union must at all times, and under all circumstances, be guided by respect for these rights.

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