

## EUROPEAN PARLIAMENT

### Public Seminar: Judges and legislators in a multi-level protection of fundamental rights in Europe.

#### PANEL 3: Rising awareness among national judges on fundamental rights.

##### I.- Purpose of the framework programme on Fundamental Rights and Justice

In April 2005 the European Commission proposed to the Council and the European Parliament a framework programme on Fundamental Rights and Justice to be developed during the period 2007-2013 by means of four specific sub-programmes: Fight against violence (Daphne) and drugs prevention and information, Fundamental rights and citizenship, Criminal justice and Civil justice.

The declared end of this Framework programme was to providing an adequate support to the area of freedom, security and justice, proclaimed in the Amsterdam Treaty, developing these three key objectives “in parallel and with the same degree of intensity”. Several months before the common recognition of these principles was qualified as “the cornerstone of integration for everyone living in the Union”<sup>1</sup>, and the Hague Programme recalled the “the creation of a Europe for citizens requires not only the full respect of Fundamental Rights, but in addition the active promotion of these rights”.

##### 2.- Position of MEDEL on the role of judges in protecting and promoting the Human Rights.

MEDEL fully share and support these declarations on developing the principles of freedom and justice with at least the same intensity than security and on not just respecting but *promoting actively* the Fundamental Rights

In our statutes we proclaim as our common purpose the protection of judicial independence, an unconditional respect for the values of democracy and the Rule of Law, and the promotion of the European democratic legal culture, including the *respect for the rights and freedoms of minorities and divergent groups, in particular the rights of immigrants and of the most impoverished, with a view to social emancipation of the weakest.*

Our documents and activities are consistent with these proclamations.

In a recent meeting hold in Porto, Portugal, with representatives of Associations

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<sup>1</sup> “A Project for the European Union”, COM (2002) 247

of Judges and Prosecutors of Latin America, we signed a common document in which we said as follows:

*In a constitutional State founded on the Rule of Law and the division of powers, the primacy of the Constitution implies the primacy of Human Rights over the opinion of the majority and therefore the autonomy and independence of those responsible of the guarantee of these rights, i.e., autonomy and independence of the jurisdictions from the political power.*

*Magistrates ought to take seriously their role and acquire the awareness of the meaning of this independence guaranteed by the Constitution and the international instruments, giving them the possibility of became and instrument to fulfil the rights of the citizens and also to control the legality of the exercise of every power, without immunities.*

*For this reason independence ought to be guaranteed, not as a privilege to the magistrate, but as a pre-requisite of the protection and realization of the rights of the citizens.*

Furthermore, in our conception, this narrow link between judicial independence and defence and promotion of Human Rights is just a consequence of the very concept of democracy, not only, and not principally, as a govern of the majority but, over all:

A system ruled by laws equal to everyone, included those having the power; and  
A system having on its top fundamental rights considered as inherent to human dignity and for this reason previous to any legal declaration and resistant to any abolition by contingent majorities.

From these roots, the application of laws imposed equally to everyone and the guarantee of fundamental rights recognized to everyone and susceptible to be opposed to everyone else demands as logical imperative that the Judiciary, to whom this application and this guarantee is attributed, ought to be independent and not subsidiary to any other power.

On the other hand, this binomial of fundamental rights-independent judiciary offers today an extent not easily imaginable a few decades ago. Citizens come increasingly before the courts claiming the recognition of rights that in our days are not just utopias, and this same phenomenon is showing new contents in a list of fundamental rights far larger than the limited freedoms of the first declarations. I am referring to aspects as the right to a life now enlisted in the Title of Dignity and including not just the prohibition of arbitrary deprivation of life by State organs but also far-reaching positive obligations to protect the life and to fulfill this right; or that the respect for private and family life includes not just the prohibition of undue interferences from public authorities, but also the State's positive obligation to facilitate the normal development of the personal life and the protection against serious environmental pollution when affecting the peaceful enjoyment of the home.

According to that, Courts have got today new and more complex functions rooted in the expansive force of fundamental rights that demands to all us firstly a full awareness or our responsibilities and secondly a solid technical training in Fundamental

Rights Law.

MEDEL is from its first steps fully engaged with this perspective of awareness and training and we have fulfilled both tasks within our possibilities.

### 3.- MEDEL and the Charter of Fundamental Right in the E.U.

When in the final years of the past century, after the European Councils in Cologne and Tampere, the *Body* established to elaborate a Draft Charter of Fundamental Rights in the EU began its work, MEDEL studied the texts and published an opinion in which we stressed several points that, as if prophetic (that was not our intention) has marked the posterior evolution.

In that occasion we said that in spite of the willing already exteriorized to proclaim the Charter to the only end of making fundamental rights “more visible”, the sole proclamation of such a Bill of Rights should give them a juridical force. We were having in mind the jurisprudence of the ECJ when ruled that fundamental rights were a part of the Community Law as common constitutional concepts of the Member States, and Art. 6 of the treaty of the European Union declaring that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the Member States as *general principles of Community Law*.

This declaration of Fundamental Rights being the “general principles” shall give to the new text where they became more “visible” an undeniable juridical effect as a written concretization of these principles.

The facts confirmed this opinion. My colleague Giuseppe Bronzini will speak more precisely of this fact, but I can add that not just the ECJ and the Court of First Instance but also many national courts of all levels are increasingly quoting the Charter in the motivation of their decisions as a concretization and update of the content of a given fundamental right. In a personal research in the jurisprudence of Spanish Constitutional, Supreme and Appeal Courts I found more than 500 quotations from 2001 till today.

Due to this reality we also said in that occasion, before the proclamation of the Charter, that it would be of the utmost importance that the text of the Charter were a way forward in the protection of Fundamental Rights, avoiding the risk of a short-minded declaration in the search of a minimum common.

### 4.- Concerns on the current situation on the Reform of the Treaties.

More recently, after the Constitutional Treaty has been dropped and the discussion has been reopened over the reform of the Treaties, MEDEL published a communiqué where we emphasised the need to establish de Charter al legally

enforceable and binding. We were also sharing in this appreciation many other opinions all around Europe and the European institutions, included the European Parliament resolution of 15 March 2007 on monitoring the compliance with the Charter in the Commission's legislative proposals.

Certainly, as previously said, even in the present legal situation we consider that the Charter is already legally enforceable as the written formulation of the general principles inspiring all the E.U legal system. Nevertheless, a specific declaration in this sense in the Reform Treaty should have very positive effects, the principal of them ensuring the legal security.

I would just recall the words contained in the Introduction Notes of the Communication to the Council and the Parliament in April 2005.

*“By integrating the Charter of Fundamental Rights, the Constitutional Treaty acknowledges the Union's values and objectives. Furthermore, accession to the European Convention for the Protection of the Human Rights and Fundamental Freedoms will strengthen the European commitment to protecting human rights by introducing judicial review of the European Union's respect for fundamental rights.”*

Furthermore, we cannot forget the symbolic meaning of this recognition of the Fundamental Rights enlisted in the Charter as legally binding. Surely the actual formulation is not achieved. No text could be considered as definitive, given the dynamic and expansive force of these rights for themselves. But the inclusion of the Charter in the Reform's Treaties should give a visible sign of the wiliness of the Member States to ensure the proclaimed central position of Fundamental Rights as cornerstone of the EU legal building, while denying this recognition should by the contrary put in question this wiliness and therefore weaken this central position.

For this reason MEDEL insists in the importance of this inclusion and support the Parliament's position in this way.

We also celebrate the birth of the Fundamental Rights Agency in June 2007 as another step in the positive way.

#### 6.- Specific training.

Concluding this short statement, I would stress the necessity of a specific training for Judges in the field of Fundamental Rights.

It is no good to repeat the narrow links existing between the very principle of jurisdiction and of independence with the position of Fundamental Rights as cornerstone of the legal system, both at European than at National level.

This sole idea would enlighten by itself the need of emphasizing the Human Rights Law in the training programmes of Judges, both initial than in-service. Many voices have already expressed this idea. I just recall the opinion n° 4 of the Consultative Council of European Judges of 2003 on appropriate initial and in-service training for

judges at national and European level

But further than this obvious conclusion, we would highlight the new phenomenon of globalization which is also taking place clearly in this field.

Fundamental Rights, by its own nature as inherent to human dignity had always had a vocation of universalism. But the current facilities for communication, the growing exchange of legal knowledge and scientific findings in legal matters, the existence of common texts on Human Rights in international instruments, and the feeling of being part of a same global community has given to Fundamental Rights a new perspective of globalization.

In recent times, it is increasingly frequent to find in the jurisprudence of Constitutional and other level Courts in many countries all over the world references to resolutions of other courts of different geographical spaces as a part of a common legal culture. The quotations are particularly frequent in the field of Fundamental Rights, whose contents are being constantly enriched by the progressive achievements found by the jurisprudence of Courts situated in the Five Continents. This practice is more intense among European Courts as a reflex of a stronger feeling of pertaining to the same juridical community.

This is the reason why we are involved in a project of storage, study and divulgation of this jurisprudence of different courts. My colleague Giuseppe Bronzini would speak precisely of this point.

But beside this work, this phenomenon stresses the need of a permanent exchange of ideas and experiences between judges of different European countries, putting in common solutions and answer to questions which became also increasingly common. MEDEL launched years ago the idea of a sort of “Judicial Erasmus” and we congratulate ourselves that a similar programme is a current reality.

Finally, let me say a few words on the role that Judicial Associations must play in this purposes. Coming back to CCJE’s Opinion 4 on training for judges, the participants in the meeting where this document was finally approved, in December 2003, discussed on the question of training as a right or an obligation for judges. The general agreement was to consider initial training as mandatory but that in-service training should normally be based on the voluntary participation and mandatory only in exceptional cases (new posts, crucial changes of legislation, etc.) On this basis, the participation of Judicial Associations in the elaboration and organization of the programmes would give an important contribution in extending of the idea that training is an ethical duty for judges and encouraging their participation.

We are fully aware of our ethical obligation in this point and we are open to every contribution that could be demanded to us with this end.