

HELLENIC REPUBLIC
GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

Neofytou Vamva 6 (3rd floor), GR 106 74 Athens, Greece, Tel: +30 210 7233221-2;
fax: +30 210 7233217; e-mail: info@nchr.gr, website: www.nchr.gr

Proposals to the European Convention for the Constitutional Treaty of the European Union

We have the honour to present to you the following proposals for the reformulation and completion of provisions of the Draft Constitutional Treaty of the E.U.:¹

PART I

Article 2: Values of the Union

- Add: "*peace*", as the first value; "*equality, in particular equality between men and women*".

Article 3: Objectives of the Union

- Add: "*maintaining in full the acquis communautaire and building on it*", "*improvement of the quality of life and employment*", "*improvement and protection of health*", "*combating violence and trafficking in persons*", "*combating racism and xenophobia*".

- Add a 6th paragraph repeating current Art. 3(2) TEC: "*In all its activities, the Union shall aim to eliminate inequalities, and promote equality, between men and women*".

- Add a 7th paragraph: "*The Union shall integrate the protection and improvement of the natural and cultural environment into the definition and implementation of all its policies and activities (mainstreaming), in a*

¹ This paper is mainly concerned with the Drafts of Articles 1-16 that had appeared when it was drafted (CONV 528/03, 6.2.2003).

way that will ensure the best possible conditions of corporal and mental health and the fullest possible development of the personality of each individual.”

Article 5

1. *The Charter of Fundamental Rights shall be an integral part of the Constitution. The Charter is set out in a **Protocol** annexed to this Constitution.*

2. *The Union may accede **to international human rights treaties, in particular** to the European Convention on Human Rights.*

3. *The Union respects and applies fundamental rights, as guaranteed in the Charter of Fundamental Rights of the Union, the other provisions and principles of Union law and the international treaties to which the Union or Member States are parties, including the European Convention on Human Rights, and as they result from constitutional traditions common to the Member States.*

Note: Irrespective of the modality of “*incorporation*”² of the Charter in the Constitution, it is absolutely necessary that the “*drafting adjustments*” proposed by the competent working group be rejected, as they will give rise to great confusion and to a serious risk of further restriction of the rights included in the Charter, and of other rights that constitute an *acquis*.

Following Article 6 (prohibition of discrimination on grounds of nationality):

Article 6A (new)

1. *Any direct or indirect discrimination based on any ground, such as sex, racial, ethnic or social origin, genetic features, language, religion or belief,*

² I.e. whether it will be included in a chapter of or in a Protocol annexed to the Constitution.

political or other opinion, membership of national minority, property, birth, disability, age or sexual orientation, is prohibited. Everybody has a right to equal opportunities, without discrimination.

2. The Council and the European Parliament shall, according to the procedure provided in Article [co-decision, majority of Council], adopt European laws and framework laws for the implementation of the 1st paragraph of this Article.

Article 6 B (new)

1. Women and men have equal rights in all fields.

2. With a view to ensuring full equality in practice between men and women, positive measures should be adopted, in all fields, aiming in the first instance at improving the situation of women, including for ensuring the balanced participation of women and men in decision making.-

3. The Council and the European Parliament shall, according to the procedure provided in Article [co-decision, majority of Council,] adopt European laws and framework laws for the implementation of the 1st and 2nd paragraphs of this Article.

Article 6C (new)

1. The protection of maternity and paternity, natural or stemming from an adoption, as well as the reconciling of family and professional life by men and women, shall be ensured. Any unfavourable treatment, in any field, directly or indirectly related to pregnancy, maternity, paternity, or the reconciling of family and professional life is prohibited.

2. The Council and the European Parliament shall, according to the procedure provided in Article [co-decision, majority of Council,] adopt European laws and framework laws for the implementation of the 1st paragraph of this Article.

Article 6C (new)

- 1. Everyone has the right to a healthy and ecologically balanced environment, apt to ensure the development of his/her personality.*
- 2. The above right includes in particular the right to environmental information and the right to access to justice.*
- 3. The Council and the European Parliament shall, according to the procedure provided in Article [co-decision, majority of Council,] adopt European laws and framework laws for the implementation of the 1st and second paragraphs of this Article.*

Article 12. Shared Competences

Add: “equality between men and women”, “protection of maternity and paternity”, “reconciling of family and working life, “combating discrimination”,
“employment”.

PART II

Article corresponding to current Article 152(4)(c) (public health).

Delete the sentence “[...] excluding any harmonisation of the laws and regulations of the Member States”.

The Protocol on the application of the principles of subsidiarity and proportionality must require that the application of these principles should respect the *acquis communautaire*, as currently required by the Protocol on the same subject, which is annexed to the Amsterdam Treaty, and should repeat the criteria of application of these principles which the current Protocol provides for.

Explanatory note

PART I

A. The Values of the EU

a) We consider it necessary for “*peace*” to be the first value of the EU, since it constitutes a precondition for the realization of all values and fundamental rights. Moreover, both the European Community and the United Nations had as their primary inspirational value the establishment and the preservation of peace in the world.

Today’s dangers of suppression of peace with a series of wars, which have already begun, with devastating consequences on humans, material possessions, and cultural goods, demand it.

It must be noted that nations have proclaimed their commitment to the preservation of peace both in the UN Charter, where it is considered as a fundamental objective of the Organization, and in the Universal Declaration of Fundamental Rights and Freedoms.

The tight bond and the interdependence between human rights and peace is recognized in the preambles of the International Treaties for the protection of human rights ratified by all the EU member – states and in particular the ICCPR, ICECSR and the CEDAW.

It also has to be noted that, on the European level, the members of the Council of Europe recognize in the ECHR preamble that peace is a value that is closely related to respect of human rights.

The commitment towards peace is confirmed in the UN Millennium Declaration of the UN and in the recent resolution 61/2003 of the UN Human Rights Committee (59th Session, 24.4.2003), where it is considered to be a basic condition for the effective respect of all human rights. Equally, the General Assembly of the UN in its resolution 39/11 (12.11.1984) had already declared the **right of peoples to peace**.

b) We consider it equally necessary that “equality, especially equality between men and women”, is added to the values of the EU as it has been recommended by the “Social Europe” working group of the

Convention. Although it is undoubtedly a basic value and a fundamental element of Europe's cultural identity, suggestions have been made to include only the word "equality" without specific reference to gender equality. However, this does not suffice.

i) It is argued that the reference to "equality" is sufficient since it also includes gender equality. It is, however, historically proven that "equality" by itself is not sufficient for the suppression of inequality on the grounds of sex – particularly against women – and the establishment of gender equality. For that reason gender equality, and in particular substantial gender equality, is expressly required and continuously reinforced through international treaties, Community legislation, and a continuously increasing number of national constitutions.³ International and European developments, as well as the fact that CEDAW is the second most ratified UN convention, show that gender equality is a universal fundamental value.

ii) It is equally argued that gender equality is not a clear legal concept. It is, however, known that it constitutes one of the most clearly and specifically delineated concepts of Community law, at least as clear as than "values" included in Article 2. The concept of gender equality has been elaborated by the European Court of Justice (ECJ), in about 200 cases, while it is clearly defined in the CEDAW with respect to all areas of social, economic, and political life. Moreover, a definition of gender equality is included in Directive 2002/73/EC.

iii) It is argued, finally, that it is sufficient that gender equality is quoted as an objective of the EU and that it is not necessary for it to be included in the EU's values. It is, of course, essential that gender equality constitutes an EU objective, especially a horizontal one, as it is today on the basis of Article 3(2) of the EC Treaty. But this is not enough. According to the "Explanatory Note" accompanying the Draft of Articles 1-

³ See Constitutions of Austria (Art. 7(1) and (2)), Belgium (Article 10(3), 10 bis), Finland (Article 6(4)), France (Preamble with constitutional value, Articles 3(5), 4(3)), Germany (Article 3(2) and (3)), Greece (Article 4(2), 22(1)(b), 116(2)), Italy (Article 51), Luxembourg (draft), Portugal (Article 9 (h)), Sweden (1st Chapter, Section 2(3)), Finland (Article 6(4)).

16 of the Constitutional Treaty “while Article 2 enshrines the basic values which make the peoples of Europe feel part of the same ‘union’, Article 3 sets out the main aims justifying the creation of the Union for the exercise of certain powers in common at European level” Therefore, the legal value and function of “values” and “objectives” are different and it is obvious that gender equality belongs to both the aforementioned Articles.

B. The Union’s objectives (Article 3)

a) We consider it necessary that the general objectives of the EU are completed with the addition of social objectives that are currently proclaimed in the EC Treaty and the EU Treaty. Such objectives that are ignored by art. 3 are especially “social and economic progress” (1st general aim of the EU since its establishment – Article 2 TEU) “to maintain in full the *acquis communautaire* (horizontal objective of the Union – Article 2 TEU) “the raising of the standard of living and quality of life” and “a high level of employment and of social protection” (general objectives in force – Article 2 TEC, Lisbon strategy).

b) The “battle against violence and trafficking in persons” must also be a general objective. These issues constitute well-known wide-spread and growing concerns in the Union. It is crucial that legislative measures are taken on a European level for their efficient confrontation. Finally, it is necessary that the “fight against racism and xenophobia” is also included. It is at least odd that the Draft, in contrast with the TEC in force, nowhere includes the words “xenophobia” and “racism.”

c) We consider it equally necessary to maintain the provision of Article 3(2) TEC, that proclaims **gender equality as a horizontal objective**. This provision concerns substantive gender equality, which constitutes a fundamental *acquis communautaire*. It imposes on the Union the positive obligation to eliminate all inequalities (not only formal forms of discrimination, but also discrimination in practice) and to promote substantive gender equality in all fields (mainstreaming).

C. Provisions Related to the Environment

a) We consider as necessary the addition of a 7th paragraph to Article 3 which will proclaim the protection and improvement of the environment as a horizontal objective of the EU (mainstreaming) and will establish, with Constitutional force, the principle of integration of environmental protection in all policies and actions of the EU. The principle of integration constitutes one of the most important principles of Community law and is already included in Article 6 of the TEC. This principle means that environmental protection must be taken into account even within the framework of commercial and regional policy, and in all other policies and actions, for example transport policy, development policy, agricultural policy, etc.

The suggested provision combines environmental protection with the protection of health and the development of the personality, thereby including in the concept of environmental protection both the ecological and the human dimension. The insertion of the aforementioned provision is necessary for the effective fulfilment of the obligations undertaken by the Union by its accession to the international Treaty of Aarhus.

b) We also consider it necessary that the fundamental right to a healthy and ecologically balanced environment is expressly established, since it constitutes an important factor for the formation and the development of the personality and the safeguarding of an adequate standard of living. The importance of the abovementioned right is recognized by numerous international and regional texts. But above all, well-known facts, especially during the last few years, clearly prove the devastating consequences of the serious damage on the natural environment with repercussions obvious in international climatological conditions, on human health and on social conditions of living.

In the Millennium Declaration the member - states of the UN have recognized the importance of environmental protection.

In the context of the Council of Europe, environment is recognized as a value that must be protected. Towards this aim two conventions have been adopted: the Lugano Convention of 1993 concerning state liability for actions dangerous to the environment and the Strasbourg Convention of 1998 for the protection of the environment through criminal law, which is not yet in force.

According to the TEC the achievement of a high standard of improvement and protection of the environment constitutes a task of the Community (art. 2 TEC), while according to Article 6 of the TEC, environmental protection requirements must be integrated into the definition and implementation of all Community policies and activities (principle of integration). Articles 174 s. refer in detail to the policy of the Community in the field of the environment.

At national level, most of the member - states of the EU have included in their constitutions provisions guaranteeing the right to the environment and its protection. As an example we mention art. 66 of the Portuguese Constitution, 45 of the Spanish, 24 of the Greek, 21 of the Constitution of the Netherlands, 23 of the Belgian Constitution, 2 and 73-80 of the Swiss Constitution, 20A of the German, 14A of the Constitution of Finland and 110B of the Constitution of Norway. Even where such a right is not expressly provided at Constitutional level, it is provided by other legal provisions such as Article L-110-2 of the French Environmental code. All these constitutional provisions recognise the right of every person to live in a healthy and ecologically balanced environment. The enrichment of environmental protection with a constitutional fundamental right, at Union level, enables persons to have recourse to justice in case they risk suffering environmental harm or in any case environmental goods are in danger. For the exercise of such a right it is of course necessary that everyone has free access to environmental information, a right established by the EC Directive 2003/4/EC of 28 January 2003.

Moreover, the right to environmental information as well as the right to access to justice are in conformity with the fundamental principles of preservation and protection, laid down in Article 174 of the European Convention.

Finally, it must be emphasised that these rights are regulated in detail in the Aarhus Treaty, to which the EU has acceded.

We note that the suggested provisions assure the protection of the environment **in particular as a directly effective right**.

We consider that environmental protection, as a process of continuous progress, is not satisfactory, for the reason that an economic - mainly, if not exclusively - dimension is often attributed to progress, as it ought not to be, despite general trends. Consequently, the environment remains without adequate protection when its damage serves economic profits. Actually, almost every reaction against its effective protection is motivated by profiteering reasons, concealed under the “decent” mantle of progress.

Besides, everyone knows that progress in reality follows a process that has broadened and deepened the gap between rich and poor countries and peoples. “Environment” should stop being used as a facilitating factor of this process.

We consider that all the aforementioned reasons sufficiently justify our suggestion to protect the right to a healthy and ecologically balanced environment as a directly effective right, which will be respected by the EU in all policies and activities.

c) For the effective protection of the suggested fundamental right we propose an unambiguous ***legal basis*** for the adoption of legislative measures by the EU (according to Articles 24 and 25 of the Draft, “European laws” correspond to present regulations, while “European framework laws” will correspond to directives).

These proposals are also necessary for the effective fulfillment of the obligations undertaken when the EU adhered to the international treaty of Aarhus. It is obvious that diverse and very serious problems

concerning the environment can be dealt with only by European legal rules.

D. Fundamental Rights (Article 5)

a) We believe that the Charter of Fundamental Rights should obtain constitutional status. This will be achieved either by introducing it in the Constitutional Treaty, or by including it in a Protocol annexed to the Constitutional Treaty. Article 5 of the Draft alternatively proposes two solutions stipulating that in both cases the Charter will obtain the same force. This is in accordance with the case law of the ECJ on the status of protocols.⁴ Many experts express the opinion that, while the adoption of the second solution will ensure that the legal status of the Charter is not reduced, it will also help avoid legal uncertainty regarding certain rights in the Charter which are limited as compared to the *acquis communautaire*. At the same time, experts contend that the second solution will help prevent confusion and further limitation of the Charter's scope that would arise from the "drafting adjustments" that have been suggested by a Working Group of the Convention.⁵

Irrespective of the method by which the Charter will be incorporated, it is of utmost importance that the "drafting adjustments" proposed by the competent working group of the Convention are not accepted, as they limit the scope of the Charter and create confusion and legal uncertainty, which may well lead to regression in human rights protection.

b) We consider that it is important that the EU has the possibility to accede to any international human rights treaty, besides the ECHR.

⁴ See D. Simon, *Le système juridique communautaire*, 3e édition, PUF, No. 243, where reference to relevant ECJ case law is made.

⁵ See Conclusions of the Congress Jean Monnet, Brussels, 4 March 2003, and their explanation: <http://www.europa.eu.int/comm/education/ajm/equality/index.html>, and Conclusions of the European Conference of Athens, 2 April 2003, on "Social Rights, a Lever for Equality. Proposals for the European Constitution", *Woman's Struggle*, Journal of the Greek League for Women's Rights, No. 74, June 2003.

c) It is essential that all human rights sources are mentioned in Article 5(3), so that the entire *acquis communautaire* can be preserved.

E. Prohibition of any form of discrimination – requisition for equal opportunities without any discrimination (new Article 6A)

a) It is indispensable that the Constitutional Treaty includes, according to the model of international human rights treaties ratified by all Member-States, a directly effective Article prohibiting any discrimination. This prohibition is, however, not sufficient for the effective elimination of discrimination. This is why equal opportunities for all people should be also ensured without any discrimination.

b) The Constitutional Treaty should also include *a legal basis* for adopting EU legislation for the implementation of the aforementioned provisions (last para. of the Article, see *supra* C. (c)).

F. Provisions for gender equality, the protection of maternity and paternity as well as the reconciling of family and professional life (new Articles 6B and 6C)

a) It is essential that the Constitutional Treaty, in line with human rights treaties and most of the constitutions of member-states, requires expressly *equal rights for women and men* in all fields, and provides for the necessity to adopt *positive measures* for ensuring effective equality, in particular in favour of women, who are the main victims of discrimination and inequalities in practice. The necessity of these measures, as well as the fact that they do not constitute discrimination or derogations from the principle of gender equality, but on the contrary, means for promoting substantive equality, are recognized by the ECJ, under Community Law,⁶ as well as by the CEDAW and other

⁶ See especially ECJ C-158/97, *Badeck*, Coll. 2000, I-1875, and C-409-95, *Marshall*, Coll. 1997, I-6363.

international treaties. The proposed Article constitutes an application of Article 3(2) of TEC and it is inspired by Article 141, para. 4 of TEC and Declaration 28 annexed to the Amsterdam Treaty. Moreover it corresponds to provisions of international treaties ratified by all member-States⁷ and provisions of many national Constitutions.⁸

b) It is also indispensable that an Article be included ensuring the protection of maternity, paternity and the reconciling of family and professional life, which are corollaries to gender equality and constitute necessary prerequisites for substantive equality, while they are extremely important for the future of Europe, indeed its very survival and the quality of life of its population, including children.

c) The Constitutional Treaty should also include a *legal basis* for the adoption of EU legislation for the implementation of the above provisions (last para. of both Articles, see also *supra* C', c).

G. Shared competences of the EU (Article 12)

a) In order for the EU to be able to legislate with regard to *gender equality*, the *protection of maternity and paternity and the reconciling of family and professional life* as well as *combating discrimination* (proposed Articles 6A-6B), relevant issues should fall into shared competences.

b) The Draft classifies *employment* in a general and absolute manner in the areas of “*supporting actions*” of the EU (Article 15), where harmonization of national legislations will be excluded. In this way, it will not be possible for employment legislation, which constitutes a source of workers’ rights, to continue. Furthermore, it will not be possible to improve existing employment EC legislation, on the basis of experience and ECJ case law, as it is done now and this will create a risk of deregulation of employment relationships. Employment should be

⁷ Article 3 of the ICCPR, Article 3 of the ICESCR, Article 4, para. 1 of the CEDAW.

⁸ See note 2.

included in the areas of “*shared competences*”, in which the EU will continue to legislate. Multiple problems of employment can be handled effectively only by European laws. However, this does not exclude the adoption of other, non-legislative measures, such as guidelines on employment policy.

PART II

Provisions relevant to public health in States-members of the EU

In light of constantly increasing health problems, the confrontation of which, in order to be effective should be made at European level, it is indispensable that the harmonization of legislative provisions and regulations of member-States is included in the Article that will correspond to the current Article 125(4) (c) of TEU.

It is essential also for the future that the harmonization of national legislations is not excluded on this extremely important issue and we consider that in view of the very serious dangers that have to be dealt with, difficulties that appear today will be overcome.

PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

The Protocol in force on the application of the principle of subsidiarity and proportionality, which is annexed to the Amsterdam Treaty, demands that the application of these principles should respect the *acquis communautaire*, and provides criteria for the application of these principles. The Draft Protocol determines only the procedures for the application of these principles and does not refer to the *acquis communautaire*, nor does it include any criteria for their application. This implies serious risks of regression and deregulation in many fields. For

that reason, the Protocol should reiterate the criteria of the current Protocol and require the respect of the *acquis communautaire*.

Athens, 23 May 2003