

# DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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(OR. f)

CHARTE 4123/1/00  
REV 1

CONVENT 5

## **NOTE FROM THE PRAESIDIUM**

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Subject : Draft Charter of Fundamental Rights of the European Union  
– Draft articles

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*In accordance with the method of work agreed by the Convention, this document proposes draft wording for certain rights. The rights described in Part I of the document are those which featured at the head of the list submitted to the Convention at its last meeting. It should be considered whether these rights should feature in the Charter. If so, the Convention will examine the proposed wording. Each right is the subject of a commentary, which indicates sources and highlights certain editorial questions. The articles set out in Part II of the document relate to horizontal aspects. They give examples of solutions to some of the horizontal problems which might be raised by an examination of Part I.*

*I. Articles submitted for the Convention to consider*

**Article 1. Dignity of the human person**

- 1. Human dignity shall be inviolable.**
- 2. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.**
- 3. No one shall be required to perform forced or compulsory labour.**

*Commentary*

*Paragraph 1 is inspired by the principles common to the constitutional traditions of Member States and by Article 1 of the 1989 Declaration of the European Parliament.*

*Paragraph 2 is taken from Article 3 of the European Convention on Human Rights.*

*Paragraph 3 is the same as Article 4(2) of the European Convention on Human Rights. It did not seem useful to repeat the definition of forced labour which is contained in paragraph 3 of the Article, as that definition is in any case brought in by Article 6 of the TEU and would lead to over-lengthy wording. That was also the solution used by the European Parliament in 1989. Is it still necessary today to include the prohibition on slavery and servitude ("**No one shall be held in slavery or servitude**") in an explicit fashion as in the European Convention, since this is in any case covered by paragraph 1? Must the ban on forced and compulsory labour be retained here?*

**Article 2. Right to life**

- 1. Everyone shall have the right to life.**
- 2. Everyone shall have the right to the respect of his physical, psychological and genetic integrity.**
- 3. The death penalty shall be abolished.**

*Alternative wording for paragraph 2:*

- 2. Everyone shall have the right to the respect of his physical, psychological and genetic integrity. In the field of medicine and biology, the following principles must be respected:**
- An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.**
  - Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited.**
  - Predictive genetic tests may only be carried out for medical purposes or for medical research, subject to appropriate genetic counselling. An intervention to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce modifications in the genome of any descendants.**
  - Medical research must respect the dignity of the human person and the principle of free and informed consent.**
  - The human body and its parts shall not, as such, give rise to financial gain.**
  - The removal of organs from a living donor for transplantation purposes may be carried out solely with the free and informed consent of the donor and for therapeutic benefit where there is no other alternative therapeutic method.**
  - The cloning of human beings is forbidden.**

*Commentary*

*Paragraph 1 reproduces Article 2 of the European Convention on Human Rights using other wording, namely that of Article 2 of the 1989 Declaration of the European Parliament.*

*Paragraph 2 deals with bioethical questions. It would be possible to mention other points, in particular consent to medical treatment, a prohibition on cloning etc. – but would not a general text which could always be adapted to technical progress, be better? Alternative 2 illustrates what a list of rights in this area might be. This list is inspired by the Council of Europe Convention on Human Rights and Biomedicine. This Convention is not in force and will be supplemented by protocols as technical progress is made. The disadvantage is that this considerably lengthens the text and that the list will never be complete because of technical developments in the bioethics field.*

*The wording of paragraph 3 poses a delicate question. On the one hand, all Member States have ratified Protocol No 6 of the European Convention on Human Rights, and as Declaration No 1 adopted by the conference and attached to the Final Act of the Amsterdam Treaty indicates, they do not apply the death penalty. However, currently, the legal systems of the Union cannot of course condemn anyone to the death penalty. The abolition of the death penalty therefore seems rather to be an objective of the Union to be realised through CFSP, but may also have a role to play with regard to cooperation in criminal matters (Title VI of the TEU). The 1998 Declaration of the Council on the death penalty indicates that the Union is working towards the universal abolition of the death penalty. The wording set out in the text is that of Protocol No 6. If one wished to avoid giving the impression that the Union is abolishing a penalty which has already been abolished by all the Member States, one could also simply take over the second sentence of Protocol No 6: "No one shall be condemned to the death penalty, or executed."*

### **Article 3. Liberty and security**

- 1. Everyone has the right to liberty and security of person.**
- 2. No one shall be arrested or detained save in the cases prescribed by law.**
- 3. Everyone arrested or detained on reasonable suspicion of having committed an offence shall be brought before a judge and shall be entitled to trial within a reasonable time or be released pending trial.**
- 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.**
- 5. Everyone who has been the victim of arrest or detention in contravention of the above provisions shall have an enforceable right to compensation.**

### Commentary

*This text is drawn from Article 5 of the European Convention on Human Rights. Paragraph 1 states the principle. As the Union does not have penal jurisdiction, it cannot be directly responsible for the respect of these rights in the practical implementation of penal activity. On the other hand, in the context of the work accomplished on the basis of Title VI of the TEU, it has the obligation to ensure that measures taken in this context, particularly with regard to the harmonisation of penal legislation, do not infringe those rights. Article 2 of the 1989 Declaration of the European Parliament restricted itself to mentioning the principle of liberty and security, but at that time the TEU did not exist and it was not deemed necessary to develop the principle. This solution is no longer possible today, given the development of the Union's powers.*

*The question should be carefully examined in conjunction with the Article 1 or preamble proposed as part of the horizontal provisions. It must be clear that the obligation of compliance with fundamental rights devolves upon the Union when it adopts measures within the framework of Title VI, i.e. within the framework of its own tasks, and not upon the Member States within the framework of their national penal systems, which are outside the scope of Community law. The same remark applies also in the cases of Articles 5 and 6.*

#### **Article 4. Right to an effective remedy**

**Everyone whose rights and freedoms are violated shall have the right to bring an action before a court or tribunal specified by law.**

### Commentary

*This article follows Article 13 of the European Convention on Human Rights and Article 19 of the 1989 Declaration of the European Parliament. The Court of Justice enshrined the principle in Community law in its judgment of 15 May 1986 (Case 222/84, Johnston, ECR I651), National Constitutions.*

## **Article 5. Right to a fair trial**

- 1. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.**
- 2. Access to justice shall be effective. Legal aid shall be provided to those who lack sufficient resources [*insofar as such aid is indispensable to ensure the effectiveness of access to justice*].**
- 3. Everyone charged with an offence has the following minimum rights:**
  - (a) to be presumed innocent until proved guilty according to law;**
  - (b) to be informed promptly, in a language which he understands and in detail, of the accusation against him, and to have adequate time and facilities for the preparation of his defence;**
  - (c) to defend himself in person or through legal assistance of his own choosing or to be given it free, and to have the free assistance of an interpreter if he cannot speak the language of the proceedings;**
  - (d) to have access to the dossier; to examine or have examined under the same conditions witnesses on his behalf and witnesses against him.**

### Commentary

*Paragraphs 1 and 2 concern justice in general and are therefore applicable to the Union's own judicial system. Paragraph 3 concerns criminal procedure and the same form of presentation has been used as in the preceding Article. These rights are taken from Article 6 of the European Convention on Human Rights and Article 19 of the 1989 Declaration of the European Parliament. It should be noted that, in accordance with the case law of the European Court of Human Rights, no State is under any absolute obligation to introduce a system of legal aid for all civil cases. States must only provide legal aid where the lack of such aid would invalidate the guarantee of an effective remedy (ECHR judgment of 9.10.1979, Airey, Series A, Volume 32, 11). Nor are there any principles common to the Member States in this field.*

## **Article 6. No punishment without law**

**No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence in law at the time when it was committed. No heavier penalty than the one applicable at the time of committing the offence shall be imposed. If, subsequent to the commission of the offence, the law provides for a lighter penalty, that penalty shall be applicable.**

### Commentary

*This article adopts the classic principle of non-retroactivity of laws and penalties in criminal matters. The principle of retroactive application of the lighter penalty, existing in many Member States and to be found in Article 15 of the Covenant on Civil and Political Rights, has been added. See Article 7 of the European Convention on Human Rights and Article 21 of the 1989 European Parliament Declaration.*

## **Article 7. Non bis in idem**

**No one shall be tried or convicted for offences for which they have already been finally acquitted or convicted.**

### Commentary

*See Article 4 of Protocol No 7 to the European Convention on Human Rights and Article 20 of the 1989 Declaration of the European Parliament.*

## **Article 8. Respect for private and family life**

- 1. Everyone shall have the right to respect and protection for their identity.**
- 2. Respect for privacy and family life, reputation, the home and the confidentiality of correspondence, irrespective of the medium, shall be guaranteed.**

### Commentary

*This article follows Article 8 of the European Convention on Human Rights. The reason for the use of the expression "irrespective of the medium" in paragraph 2 is to make clear the fact that this paragraph applies equally to the Internet. A specific Article will cover data protection, which therefore is not referred to here. See also Article 6 of the 1989 Declaration of the European Parliament.*

## **Article 9. Family life**

- 1. Everyone shall have the right to found a family.**
- 2. The Union shall ensure the legal, economic and social protection of the family.**
- 3. The Union shall ensure the protection of children.**

### Commentary

*The inspiration for this article is Article 12 of the European Convention on Human Rights and Article 7 of the 1989 Declaration of the European Parliament. In paragraph 1, there should perhaps be a restrictive clause, as not everyone can found a family under all circumstances (cf. restrictions as a result of minimum age requirements or prohibition of certain marriages within families), but in this case it is difficult to imagine a solution other than reference to national law as in Article 12. Would not the best solution be to allow the operation of the general limitation clause (cf. Article Y below)? Concerning children, the phrase "in accordance with the United Nations*

*Convention on the Rights of the Child of 20 November 1989" could be added to paragraph 3. But need reference be made to an instrument external to the Union which may develop independently? The question is not the same for the European Convention on Human Rights, which is specifically mentioned in the Treaty.*

## **II. HORIZONTAL ARTICLES**

*These articles are not submitted for discussion. They are intended merely to provide an illustration of a possible way of solving certain horizontal problems which are closely linked to matters to be examined when drafting provisions on specific rights.*

### **Preamble or Article 1**

**The following provisions are applicable to the Institutions and bodies of the European Union within the framework of the powers and tasks assigned to them by the Treaties. They are binding on the Member States only where the latter transpose or apply the law of the Union. The Charter does not introduce new tasks or powers, nor does it extend existing tasks or powers.**

#### Commentary

*This general article should either be placed in the preamble or become the first article of the Charter. It is intended to indicate clearly that the Charter's scope is restricted to the European Union and to avoid any application to the Member States when they are acting within their own jurisdiction. It adopts the case law of the Court of Justice as set out in the Cinéthèque case (judgment of 11 July 1985, Joined Cases 60 and 61/84, ECR p. 2618, paragraph 26) and more recently in the Kremzow Case (judgment of 29 May 1997, Case C-299/95, ECR p. I-2629). It*

*also indicates that, while the Union must guarantee respect for fundamental rights within the framework of its own areas of jurisdiction, the Charter cannot have the effect of extending the powers of the Union, which is the express result of the Court's Opinion of 28 March 1996 on the accession of the Community to the European Convention on Human Rights (point 27 in particular). According to the Court's reasoning, although the Community has the obligation to respect fundamental rights, it does not follow that it thereby acquires competence to act in this field, except where this is expressly provided for in the Treaties. In other words, the obligation to respect fundamental rights is a constraint on the Community's action and not a licence to legislate in this field.*

## **Article X**

- 1. Certain rights shall be reserved for citizens of the European Union. *[It may be decided to extend the enjoyment of such rights wholly or partly to other persons.]***

### Commentary

*This paragraph enshrines the fact that certain rights may be reserved for citizens of the Union. These rights will be identified on a case-by-case basis (using the formula of "all persons" or "the citizens of the Union" to identify those entitled). Concerning the possibility of an extension, the guarantee of this depends less on a reference in the Charter than on the existence of a legal basis in the Treaty. Extension may be effected by unilateral acts of the Union or by international conventions. It needs to be considered whether the possibility of an extension should be mentioned.*

## **Article Y. Limitations**

**Without prejudice to provisions affording more protection than this Charter, no limitation on respect for the rights and freedoms which it recognises shall be admitted except under a rule of law which is not an implementing rule, does not infringe the essential content of the rights in question and, subject to the principle of proportionality, remains within the limits necessary for the protection of legitimate interests in a democratic society.**

### Commentary

*A model for a possible general limitation clause, suggested as an example if the question of limitations is taken up in relation to a specific right. It does not exclude the existence of specific clauses for particular rights. There is a problem with regard to the nature of the act limiting fundamental rights. The term "rule of law" may be considered too broad, as it includes implementing measures, but "a law" is not appropriate since it has no meaning in Community law at present, unless understood as in the European Convention on Human Rights in the sense of a general and abstract rule without implying the source of the rule. The present formula eliminates the possibility of limiting rights by means of implementing measures. It leaves this option to the legislator alone, acting on the appropriate legal basis.*

### **Article Z. Level of protection**

**No provision of the this Charter may be interpreted as placing restrictions on the protection afforded, in conformity with Article 6 of the Treaty on European Union, by the European Convention on Human Rights.**

### Commentary

*The purpose of this article, a suggested wording for which is given by way of example, is to ensure that, in conformity with Article 6 of the Treaty on European Union, the level of protection of human rights in the Union cannot be inferior to that afforded by the European Convention on Human Rights, regardless of the wording of the Charter. This article makes it possible to depart from the wording of the Convention without altering the standard of protection afforded to the individual.*

# New .eu Domain

## Changed Web and E-Mail Addresses

The introduction of the .eu domain also required the web and e-mail addresses of the European institutions to be adapted. Below please find a list of addresses found in the document at hand which have been changed after the document was created. The list shows the old and new address, a reference to the page where the address was found and the type of address: http: and https: for web addresses, mailto: for e-mail addresses etc.

**Page:** 1            **Old:** mailto:fundamental.rights@consilium.eu.int  
**Type:** *mailto*    **New:** mailto:fundamental.rights@consilium.europa.eu

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