

**JOINT SUGGESTED AMENDMENTS
TO THE DRAFT CONSTITUTIONAL ARTICLES
ON DEMOCRATIC LIFE**

BY

**THE STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL
IMMIGRATION, REFUGEE AND CRIMINAL LAW,**

AND

STATEWATCH,

TO

THE CONVENTION ON THE FUTURE OF EUROPE

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1. Introduction and summary

The *Standing Committee of Experts on International Immigration, Refugee and Criminal law*, was established in 1990 by five NGO's: the Dutch Bar Association, the Refugee Council, the Dutch section of the International Commission of Jurists, the Netherlands Centre for Immigrants/FORUM and the National Bureau against Racism (LBR). The Committee is independent. Most of its members are lawyers, working at Law Faculties in the Netherlands or in Belgium. They are experts in one of the three fields mentioned in the Committee's name. The Standing Committee monitors developments in the area of Justice and Home Affairs and presents its opinion to the Dutch Parliament, the European Parliament, or parliaments in other Member States (e.g. the House of Lords), to the Dutch government, the European Commission and to other public authorities and NGO's.

Statewatch monitors justice and home affairs and civil liberties in the EU. It was founded in 1991. Its contributor group of lawyers, researchers, journalists and academics is drawn from 12 European countries. It has two websites: www.statewatch.org and www.statewatch.org/semDOC (this is specialist site devoted to documentation on justice and home affairs in the EU and carries a "Legislative Observatory" on all measures since May 1999)

We would first take this opportunity to welcome the proposed draft articles of the Constitution relating to the "democratic life" of the EU, proposed by the Praesidium which will incorporate essential principles of democracy and accountability to citizens of EU rule-making activity into the proposed Constitution. In our view the incorporation of such basic principles into the fundamental constitutional text is essential to the legitimacy of the Convention. There are however a number of points in the draft chapter which leave room for improvement and refinement. We set out here in the following pages the main lines of our common concerns by immediately suggesting (underlined) amendments to the text. These concerns are inspired by the wish to ensure that executive and legislative power when exercised by the Council and other institutions, committees, agencies or independent bodies is subject to independent scrutiny and overall accountability to parliaments, the judicial system and ultimately to the citizen. Many of our proposed amendments attempt to ensure that such concerns are expressed in concrete form in the Treaty amendments itself and are self-explanatory for the most part. Where additional comment was required we have supplied it in the form of a brief explanatory note. For further detail on many of our common concerns we would refer the reader back to the joint submissions we already submitted to the Convention on the draft articles on justice and home affairs on 30 March 2003 as well as to our much more extensive comments to Working Group X and the Convention as a whole (together with our sister organisations, ILPA and ECRE) dated 4 November 2002.

2. Specific amendments:

GENERAL NOTE: ALL SUGGESTED AMENDMENTS TO SPECIFIC TREATY ARTICLES ARE UNDEFINED

ARTICLE 33: THE PRINCIPLE OF DEMOCRATIC EQUALITY

The Union's operation shall be founded on the principle of the equality of citizens and of natural or legal persons residing in a Member State, who shall receive equal attention from the Union's institutions.

ARTICLE 34: THE PRINCIPLE OF PARTICIPATORY DEMOCRACY

1. Every citizen shall have the right to participate in the democratic life of the Union.
2. The Union institutions, agencies and bodies shall, by appropriate means, give citizens, natural or legal persons residing in a Member State and representative and voluntary organisations, the opportunity to make known and publicly exchange their opinions on all areas of Union action.
3. The Union institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
4. In order to ensure the effective application of the principles in paragraphs 1 to 3, the Union institutions, agencies and bodies shall, without prejudice to Article 36:
 - indicate a public deadline for the submissions of the views of individuals and civil society;
 - make the proposals and background documents available to the public in sufficient time for civil society to consult and develop its views; and
 - list the evidence submitted to the institutions by individuals and civil society and make it publicly available;
 - establish an active information policy to ensure the effective application of the right of access to European Union information for individuals and civil society, which may entail creation of a single portal for information about Union policy and decision-making and interaction with the Union's institutions, agencies and bodies, including the views of national parliaments and of civil society.

COMMENTS:

The provisions in article 34 para 2 are welcome but there is no need to confine their scope to EU citizens only since EU activity affects all of its residents. It should be recalled that the ombudsman and the access to documents rules also apply already to residents of the Union.

Furthermore is it necessary to make clear that EU agencies are also covered by this provision. It should also be made clear that it is not for the EU institutions to establish an elitist system for determining whether they consider organisations to be 'representative'. The suggested new paragraph 4 would set out specific

obligations to ensure that the general principles set out in the first 3 paragraphs are actually applied in practice.

ARTICLE 35: THE EUROPEAN OMBUDSMAN

An Ombudsman shall be appointed to receive, investigate and report on complaints concerning instances of maladministration within the Union institutions, agencies and bodies, to contribute to the effective application of this Title and of the European Union Charter of Fundamental Rights. He or she shall also assist in ensuring the full application of Union law which establishes rights for individuals in the Member States, in conjunction with a network of Member States' ombudsmen.

COMMENTS:

The rule of the Ombudsman should be expanded, first of all expressly to cover agencies and bodies, rather than just 'institutions' (this is already the practice); secondly to assist with the application of the 'democratic life' Title in general in addition to a role involving maladministration only; thirdly to provide for non-judicial possibilities for individuals to complain about the non-application of the EU Charter of Rights; and fourthly to play a role in ensuring within the Member States the full application of rights for individuals set out in EU law. The main role in ensuring this application should however be left to a network of national ombudsmen.

ADD A NEW ARTICLE 35B: SCRUTINY BY THE NATIONAL PARLIAMENTS

- 1) Without prejudice to the other provisions of this Constitution on the rights of national parliaments, in particular the Protocols on national parliaments and on subsidiarity and proportionality, the Union's institutions, agencies and bodies shall ensure that national parliaments are able to exercise effective scrutiny of their policy development and their legislative and operational activities, including adoption of delegated legislation and implementing measures.
- 2) Any national parliament may, in accordance with the procedures set out in national law, invoke a scrutiny reserve in respect of any draft measure to be adopted by the Council. Such a scrutiny reserve shall prevent the relevant Member State from voting in favour of the adoption of that measure, or from participating in any form of informal agreement on that measure within the Council.
- 3) Any reservations in a national parliamentary report on the merits or legality of a draft Union measure shall be formally communicated to the Council, the Commission and the European Parliament.
- 4) The European Parliament shall formally record all general and specific reserves from national parliaments in its reports on Union measures.

COMMENTS:

It is necessary to include a specific provision in this Title concerning national parliaments' scrutiny of national executives' positions in the Council. This is the single most important role that national parliaments have in EU decision-making and so a specific Article on this issue setting out detailed obligations is essential. The proposed Article would ensure that scrutiny reserves applied in accordance with national law would prevent a Member State from participating in any informal or formal agreement in the Council and would also ensure publicity for those reserves.

In addition, a clause specifying that national parliaments have the right to obtain any background documents from the Commission or Council necessary for effective scrutiny should be added to the draft Protocol on the role of national parliaments.

ARTICLE 36: TRANSPARENCY OF THE PROCEEDINGS OF THE UNION'S INSTITUTIONS

1. In order to promote good governance and ensure the application of the principle of participatory democracy and effective scrutiny by national parliaments and the European Parliament, the Union institutions shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when it is discussing a legislative proposal.
3. Any citizen of the Union, man or woman, and any natural or legal person residing in a Member State, shall have a right of access to European Parliament, Council and Commission documents in whatever form they are produced, and to those of the agencies and bodies created by those institutions or established on the basis of this Constitutional Treaty.
4. General principles, conditions and limits which, on grounds of public or private interest, govern the right of access to documents shall be determined by the European Parliament and the Council in accordance with the legislative procedure.
5. To implement in further detail the legislation referred to in paragraph 4, [E]each institution, agency or body referred to in paragraph 2 shall determine in its own Rules of Procedure specific provisions regarding access to its documents.
6. In order to ensure the effective application of this Article and Article 34, each Union institution, agency or body shall establish a register of documents listing all documents held by them.

COMMENTS:

(Para 1:) Participation in the EU decision-making process by individuals and parliaments is also important, and the link between transparency and such broader participation and scrutiny should be strengthened. The revised reference still covers the role of civil society, since it is a major participant in participatory democracy.

(Para 3:) It is essential to apply these principles to all EU institutions or bodies, so that entities such as the European Council and the Court of Justice do not evade their obligations to ensure the right of access to documents as they do at present.

(Para 5:) The hierarchy between the general rules and their specific application should be clearly set out, to avoid any prospect that the implementation of the general rules will be frustrated by the institutions, agencies or bodies in practice.

(On new para 6:) An obligation to establish a register of documents is essential for the right of access to documents to function effectively. This register must apply to all documents, not a selected handful as in the case of the Commission's current register.

ARTICLE 36A PROTECTION OF PERSONAL DATA

1. Everyone has the right to the protection of personal data concerning him or her.
2. The Parliament and the Council, in accordance with the legislative procedure, shall adopt the rules relating to the protection of individuals, natural and legal persons with regard to the processing of personal data by the Union's institutions, agencies and bodies, and by the Member States when carrying out activities which come under the scope of Union law, and the rules relating to the free movement of such data.
3. The European Data Protection Supervisor and national data protection supervisors with effective powers to enforce the application of the law shall ensure, within their respective spheres of competence, the observance of the rights set out in paragraph 1.
4. Before the adoption of the legislation referred to in paragraph 2, Community legislation on the protection of individuals with regard to the processing of personal data and the free movement of such data will apply to any activity of the Member States falling within the scope of Union law and to all the Union's institutions, agencies and bodies, insofar as those acts did not apply before the entry into force of this Treaty.

COMMENT:

(Para 2:) This amendment makes clear that the power to make rules of the Council and the Parliament also apply to data processing by private organisations or persons falling within the scope of Union law. This is designed to prevent these private organisations, or the European Commission, making independent rules, without the participation of the Council or the European Parliament, on data processing or the transmission of data to third countries, as has recently happened in practice.

(On new paras. 3 and 4:) The European Data Protection Supervisor as established in the EC Regulation No 45/2001 of 18 December 2000 and his/her national counterparts should be mentioned expressly because the supervision provided by an independent body is an essential element of data protection rights, according to the EU Charter of Rights, the current Article 286 EC and the Protocol to the Council of Europe data protection convention. It is also necessary to specify that he/she must have effective powers, including the powers conferred on him/her by the EC Regulation 45/2001, as for example, the power to order blocking, erasure, correction etc of data to impose a temporary or definitive ban on processing and to refer issues to the European Court of Justice of the European Communities. The European Data Protection Supervisor must be given also the power to approve relevant international treaties. It is particularly necessary to give these supervisors such powers in the framework of the third pillar, where the current system for dealing with data protection issues is not remotely 'adequate' (as the working group on freedom, security and justice wrongly claimed) because the relevant EU bodies are merely advisory.

As for paragraph 4, it is necessary to address the interim position concerning the third pillar after entry into force of the new Treaty and before subsequent adoption of legislation. It is modelled on the transitional clause in the current Article 286 EC. It is also very important to confirm that the scope of the existing EC Directives applies fully to Member States in all spheres of EC activity, given two recent opinions by an Advocate-General in pending Court of Justice cases suggesting a very narrow scope of application of the Directives.