



European Network Against Racism

Réseau européen contre le racisme

Europäisches Netz gegen Rassismus

THE EU CONSTITUTION AND RACISM: NEW LEGAL TOOLS



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The EU Constitution and Racism: New Legal Tools

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Preface

There are many good traits in the Draft Constitution relating to the protection of minorities. The European Network Against Racism (ENAR) requested the European Presidium to maintain the prevention and combating of racism and xenophobia high on the EU political agenda by giving it prominence in the Draft Constitution.

The inclusion of a Charter of Fundamental Rights in the Constitution and making it binding is a positive step. It gives minorities better protection compared to some Member States and its contents are broader than the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950). The Charter also covers social rights and protection of personal data. Rights under the Charter apply to every person in the EU unless otherwise stated, which means that it also protects the rights of residents, whether documented or not.

The Charter clearly states that no one should be subject to forced labour, torture, inhuman or degrading treatment; that everyone has the freedom to marry and establish a family; that everyone has a right to practice their religion, work, seek asylum and be protected in the event of expulsion; that everyone is equal before of the law; and that one cannot be discriminated against, and that everyone has the right to cultural, religious and linguistic diversity

Until now, the founding institutions and rules of the European Union had been based on six main treaties negotiated between the Member States at various times since 1951. With the passage of time, cooperation moved from coal and steel to free trade, to economic development and finally to the treaty on political union.

Since a political union is only possible with clearly defined roles and structures, questions had to be solved such as how power sharing would take place after enlargement, who would represent the EU in the outside world; what currency would be the common economic denominator; what powers would the European Parliament have; who would defend the EU's borders; who would make laws and take decisions; and what rights would EU citizens have. In short, a European Constitution was required.

To tackle this tricky but all-important issue, as well as the enlargement of EU, the Intergovernmental Conference approved the Nice Treaty in December 2000.

This Nice declaration obliged EU country leaders to pass a binding resolution in December 2001 in Laeken, Belgium. This agreed to a process of initiatives and to a continuation of in-depth debate regarding the future development of the EU. The Laeken declaration also set up the "Convention on the future of Europe". The Convention's mandate was to consider the key issues for an enlarged EU and to identify various possible responses.

EU Heads of State approved the concept of an "EU Constitution" in principle at its meeting in Thessaloniki, Greece on June 20 2003. The Convention on the future of Europe completed its work on July 10 2003 and presented its "Draft Treaty establishing a Constitution for Europe" to the Council of EU Ministers under the Italian Presidency on July 18 2003.

The EU Draft Constitution represented a consolidation and redrafting of all previous treaties and would also replace treaties accumulated over 50 years with a single, clearer, more readable new text.

A vote in favour of the Constitution was cast by the EU assembly in January 2004, making it possible for the Constitution to be sent to EU Member States to be ratified. This occurred despite several months of hesitation over issues such as the apportion of power between large and small states.

Many countries are set to have referendums, Spain already leading the way with a yes vote on 20 February 2005. A yes vote is far from certain however in several countries, including the UK, the Netherlands, Denmark and France. The Luxembourg EU presidency has said it is up to each government to make ratification a success.

Bashy Quraishy
Chairman ENAR

1. Introduction

1.1 Treaty change has played a very important role in the development of a portfolio of legal tools within the European Union which promote the fight against racism and xenophobia. The original EEC Treaty and the 1992 Treaty on European Union (TEU) provided no effective nor explicit tools for combating racism and xenophobia. EC and subsequently EU policy remained very weak in this area right into the 1990s. Any measures adopted were based on general provisions of the Treaties, or were established outside the confines of the Treaties and were of a largely informal and non-binding nature, such as European Parliament resolutions. However, the Treaty of Amsterdam marked a notable breakthrough in terms of both amendments to both the EC and EU Treaties and the removal of blockages in the policy-making process at the Union level, although these were perhaps only temporary for a few years around the time of the Treaty's entry into force.

The amendments introduced by the Treaty of Amsterdam constitute at the present time the principal reference point for the legal framework for combating racism and xenophobia within the EU. It is now clear from the EC Treaty that combating discrimination on the grounds of racial or ethnic origin is a competence of the European Union, as there is a legal basis under Article 13 EC for the Council to take measures to combat discrimination and such measures can include the harmonisation of national legislation. This is in the nature of a competence shared between the Member States and the Union. Article 29 TEU makes clear that preventing and combating racism and xenophobia is a central objective for the EU under the wider framework of the area of freedom, security and justice under what remains currently the third pillar of the Union. The TEU provides no specific legal bases or instruments for combating racism and xenophobia however.

1.2 Even before the Treaty actually came into force in 1999, introducing some very important amendments to both the EC and EU Treaties, Member States already started to take concrete actions in the field of anti-racism. Much of this was associated with the designation of 1997 as the European Year Against Racism.¹ In 1996, under the old 'Maastricht' third pillar, the Council of Ministers adopted a Joint Action to combat racism and xenophobia.² This was a relatively weak instrument encouraging the Member States to promote effective judicial cooperation in relation

to a range of offences associated with racism and xenophobia.³

The European Union Monitoring Centre on Racism and Xenophobia (EUMC) was established on the legal basis of what is now Article 308 EC at the conclusion of the European Year Against Racism.⁴ Article 308 is a residual legal basis allowing for the adoption of measures by the Council of Ministers acting unanimously and after consulting the European Parliament in order to attain the objectives of the Union and where the Treaty has not provided the appropriate powers. Within twelve months of its entry into force, Article 13 EC had been applied to enable the adoption of the Directive establishing a general framework for equal treatment in employment and occupation.⁵ The Directive was concerned specifically with race discrimination in a wider range of areas⁶ and the action programme for 2001-2006 to combat discrimination.⁷ Such was the strength of the initiative that lay behind the Treaty amendments introduced by the Treaty of Amsterdam and related developments associated with the European Year Against Racism.⁸

1.3 This Publication examines whether the Treaty establishing a Constitution for Europe, which was signed by the Member States in October 2004 and which is currently before the Member States for ratification,⁹ can make a similar contribution to the development of legal tools for combating racism and xenophobia as the Treaty of Amsterdam.

A definition of new legal instruments can be found in Annex I. Excerpts from all Draft Constitution Articles mentioned throughout this publication can be found in Annex II.

¹ Communication from the Commission on Racism, Xenophobia and Anti-Semitism and proposal for a Council Decision designating 1997 as European Year Against Racism, COM(95) 653.

² OJ 1996 L185/5.

³ For a brief analysis, see M. Bell, 'European Union Strategies to Combat Racism and Xenophobia as a Crime', in ENAR (ed.), *European Strategies to Combat Racism and Xenophobia as a Crime*, April 2003, 31, 33.

⁴ Council Regulation 1035/97 OJ 1997 L151/1.

⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

⁶ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

⁷ Council Decision 2000/750 establishing a Community action programme to combat discrimination (2001-2006), OJ 2000 L 303/23.

⁸ For a fuller review and analysis of developments up to 1999, see C. Gearty, 'The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe', in P. Alston (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999.

⁹ OJ 2004 C310/1.

2. The Constitutional Treaty: a general assessment of its effects in relation to racism and xenophobia

2.1 The treatment of issues of racism and xenophobia in the Constitutional Treaty needs to be placed in the wider context of the incremental evolution of aspects of the European Union's social dimension through the constitution-building process. This means beginning by looking at the values and objectives of the Union. In comparison to the existing Treaties, the Constitutional Treaty is rather clear on the values and objectives which are said to underpin the framework of the Union. Equality and non-discrimination principles, along with human dignity, appear prominently in these core provisions. However, in most issues of detail, especially in relation to the possibilities for adopting policies and legal measures, the Constitutional Treaty is largely identical to the existing Treaties.

2.2 At the very beginning of the text, the Preamble refers to the 'universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law' and 'the rights of each individual.' The Preamble also refers to the Union's motto of 'United in diversity,' which is repeated in Article I-8, as one of the symbols of the Union.

2.3 Article I-2, which articulates the Union's values, is similarly clear on the need for respect for individuals and, indeed, certain groups. It provides that:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

There were two notable victories for campaigners with regard to the statement of values set out in Article I-2, as the Presidency and Presidium of the Convention generally appeared to prefer a very brief and laconic statement of values, with little specifically spelt out references to human dignity and freedom. The inclusion of specific references to equality and non-discrimination was the result of a long struggle by a number of members of the Convention. There is also a reference to the 'rights of persons belonging to minorities,' which was added not by the Convention, but by the IGC, during the final phase of the Constitutional Treaty's negotiation. It is analysed in more detail in the next section. This provision builds significantly upon the existing references in Article 6 TEU on key foundational values of the Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, a provision which itself codifies (minus the reference to minority

rights) the political aspects of the Copenhagen criteria, articulated to manage the Union's post Cold War enlargements.

2.4 As regards the Union's objectives under Article I-3, these include inter alia the project of offering citizens 'an area of freedom, security and justice without internal frontiers,' of combating social exclusion and discrimination, and of promoting social justice and protection, as well as providing respect for cultural and linguistic diversity within Europe and, more globally, peace, security and mutual respect among peoples. The main 'sanction' in relation to the Union's adherence to its own objectives can be found in Article III-115, the first of a number of transversal clauses which will be analysed in more detail in the next section. This commits the Union to ensuring 'consistency between the policies and activities referred to in this Part, **taking all of its objectives into account**' (emphasis added). Even read in conjunction with the mandate in Article III-117, which requires the Union to take into account when formulating its policies 'requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health,' this amounts to little more than a non-binding political injunction.

It will be hard for citizens, residents and NGOs to hold the Union's institutions and the Member States effectively to account for their respect of these provisions, although they have an undoubted rhetorical force which can be exploited in advocacy work. Furthermore, with regard to 'cultural and linguistic diversity,' which is of paramount importance in relation to the combating of racism and xenophobia, the objective is phrased in the weakest possible terms for the Union, with a mere requirement to 'respect' such diversity, rather than to work proactively towards its flourishing. It reflects very closely the text of what is now Article II-82 of the Constitutional Treaty, the clause enshrined in the Charter of Fundamental Rights regarding respect for cultural, religious and linguistic diversity by the Union.

2.5 Thus, although the value statements and objectives enshrined in the Constitutional Treaty do in some areas represent an advance on the text of the existing Treaties, these provisions have only limited effect and like the existing foundational principles of the Union, carry few obvious sanctions for Member States.

For example, respect for the Union's values is a fundamental requirement for accession to the Union under Articles I-

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1(2) and I-58(1), but this changes little in comparison to the current position where the Copenhagen criteria make use of the existing statement of the founding values of the Union in Article 6(1) TEU, with the addition of minority rights for acceding states. Article I-59 lays down the possibility of suspending the membership rights of a Member State which is found in serious breach of the values referred to in Article I-2. This largely replicates the existing arrangements to be found in Article 7 TEU. Although a serious sanction, at least in principle, there has not yet been any sign that it might be invoked against a Member State, if one leaves aside the special circumstances of the case of Austria and Haider's Freedom Party in 2000 – which in any event occurred under a previous version of Article 7 TEU applicable before the Treaty of Nice came into force.

2.6 Article I-9 is concerned with the protection of fundamental rights and will receive close attention in this Publication. The Charter of Fundamental Rights is recognised as a fully legally binding source of law, as Part II of the Constitutional Treaty, under Article I-9(1). Part II includes therefore the equality chapter of the Charter of Rights, and this too is analysed in more detail in the next section. The Union is also encouraged to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article I-9(2)). This specific legal basis for accession is important, given that the Court of Justice concluded in its Opinion on Accession of the European Community to the ECHR that this was not possible under the Article 308 EC residual legal basis or any other provision of the EC Treaty as it stands.¹⁰ Finally, to complete the framework for the protection of fundamental rights, Article I-9(3) reiterates the language of Article 6(2) of the Treaty on European Union, providing that:

'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, shall constitute general principles of the Union's law.'

This provision continues to be very important for the judicial protection of fundamental rights, as it codifies and re-articulates the case law of the Court of Justice on fundamental rights dating back to the late 1960s.

2.7 As with previous Treaties, the principle of non-discrimination on grounds of nationality is given a privileged place in the Constitutional Treaty (Article I-4(2)). As ever however, this provides protection only against discrimination on grounds of nationality of one of the Member States in areas which are otherwise covered by the Constitutional

Treaty, with no specific protection against nationality discrimination against those with third country nationality.

2.8 Likewise, as with the EC Treaty, the Constitutional Treaty reserves the privileges of Citizenship of the Union to Member State nationals alone. There are no specific protections for third country nationals, except that Article III-257(2) requires the Union to frame a common policy on asylum, immigration and external border control which is 'fair towards third-country nationals.' Article III-210(1)(g) requires the Union to support and complement the activities of the Member States in relation to the conditions of employment for third-country nationals legally residing in Union territory, but any measures adopted under this heading require a unanimous vote in the Council of Ministers.

2.9 Overall, social policy is classed as an example of a competence shared between the Member States and the Union (Article I-14). However, in practice the detailed provisions on social policy in Part III of the Constitutional Treaty, which essentially replicate the existing provisions of the EC Treaty, in many cases amount to giving the Union merely a supplementary role in support of national policies.

2.10 There is no specific reference to anti-discrimination policy being an explicit area of shared competence however, although it is obvious from the text of Article III-124 that it is in fact an area of shared competence as the Union has formal legislative powers.¹¹ Article III-124 replicates Article 13 EC and provides a legal basis for the adoption of measures combating discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, which were introduced by the Treaty of Amsterdam. Article III-124(1) preserves the unanimity requirement laid down in Article 13, although the European Parliament is now given the right to consent to the adoption of such laws and so itself has veto powers along with each Member State. Article III-124(2) replicates the provision made in Article 13(2) for incentive measures to be adopted by the co-decision procedure.

After the Constitutional Treaty, the co-decision procedure becomes quite simply the ordinary (and default) legislative procedure. This allows for qualified majority voting – as is now the case since the amendment introduced by the Treaty of Nice – under the EC Treaty. In that respect, the Constitutional Treaty shows very little change in comparison to the existing Treaties.

¹⁰ Opinion 2/94 [1996] ECR I-1759.

¹¹ Shared competence is a residual category under the Constitutional Treaty. Areas of exclusive competence are explicitly enumerated and are very limited in number (Article I-13). Areas where the Union's action is of a supporting, coordinating or complementary nature are also enumerated (Article I-17), and in any event this is defined as an area where the Union's legally binding acts may not entail harmonisation of national laws or regulations (Article I-12(5)).

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2.11 Replicating in certain important respects Article 308 EC (the residual legal basis), Article I-18 provides for what is now termed the 'flexibility clause.' Despite attempts to limit the role of this clause even more tightly, the conditions under which Union institutions may exercise residual implied powers to achieve the objectives of the Union remain largely the same as under the EC Treaty. Significantly, as with Article III-124, the European Parliament is given the right to consent to any measures, whereas presently it is only consulted. However, the Council of Ministers will continue to vote by unanimity, giving each Member State a veto. The Commission continues to have the right of initiative under this provision, and in addition it is bound to draw the attention of the national Parliaments to any proposed measures. The general arrangements for national Parliaments to object to proposed Union legislation on grounds of proportionality and subsidiarity (under the Protocols on the role of national Parliaments in the European Union and on the application of the principles of subsidiarity and proportionality) will apply to any such measures - the so-called Early Warning System.

2.12 The flexibility clause will continue to be important in relation to measures taken to combat racism and xenophobia, notwithstanding the existence of specific provisions such as Article III-124. It was noted in paragraph 1.2 that the EUMC (European Union Monitoring Centre) Regulation was adopted on the primary legal basis of Article 308 EC. While any refounding or amendment to this Regulation could in the future be based in part on Article III-124 (as it

could already on Article 13 EC), the arguments developed by the Commission when it was considering the reform and recasting of the EUMC in 2003, led it to conclude that Article 13 EC alone would not be an adequate legal basis for the underlying legal instruments founding the Centre as it would not be 'sufficient on its own to deal with all aspects of racism, xenophobia and related intolerance.'¹²

In any event, it is proposed at the present time not to recast the EUMC, despite the Commission's expressed preference for sticking largely to the current formula, but to replace it with a much broader-based Fundamental Rights Agency which would subsume the work of the EUMC. The legal basis for this would have to be Article 308 EC (if it were adopted before the Constitutional Treaty comes into force) or Article I-18 (if the Constitutional Treaty had entered into force), perhaps supported by Articles 13 EC/III-124 of the Constitutional Treaty. The Commission acknowledges that precisely this question is delicate and needs to be looked at in the light of the EU's limited competence in the field of human rights.¹³

12 Commission Communication, *Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97*, COM(2003) 483, 5 August 2003, at 20.

13 See Commission Communication, *Fundamental Rights Agency. Public Consultation Document*, COM(2004) 693. This proposal is examined in detail in P. Alston and O. de Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford: Hart Publishing, 2005.

3. Key changes in respect of equality and non-discrimination, minority rights and racism: a close analysis

3.1 The previous section was limited to a brief overview of the main lines of change in relation to racism and xenophobia in the Constitutional Treaty, especially viewed in the wider context of the development of the social dimension. Although the rhetoric of the Constitutional Treaty is somewhat stronger than the previous EC and EU Treaties, it differs little from the type of rhetoric on the social dimension which has customarily been uttered by bodies such as the European Commission and even the European Council. It is evident that there has been no substantial movement in the area of competences, or indeed in relation to the institutions' powers (e.g. on the introduction of qualified majority voting). There are however a number of important innovations in the area of equality, ethnic minorities, anti-discrimination and racism, which demand closer analysis.

Equality mainstreaming

3.2 Brief reference was made in paragraph 2.4 to the transversal clauses included at the beginning of Part III of the Constitutional Treaty. These include a number of principles which are familiar from the EC Treaty, especially Article III-116, which replicates Article 3(2) EC and provides that 'the Union shall aim to eliminate inequalities, and to promote equality, between women and men.' While there was disappointment amongst NGOs campaigning on equality issues that the Convention did not alter the nature of the legal basis for the adoption of harmonisation measures in the field of anti-discrimination so that the ordinary legislative procedure and qualified majority voting would apply, in some respects this failure is offset by the inclusion of an

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equality mainstreaming clause which refers to each of the six grounds familiar from Article 13 EC. Article III-118 provides that:

'In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

This is an important constitutional innovation for the European Union, and it has already been the subject of detailed analysis in an ENAR publication.¹⁴

3.3 While the wording is rather stronger than Article III-117, which refers only to certain 'social' requirements being 'taken into account,' the wording does not go as far as Article III-116 which refers specifically to equality between women and men, and the aim of eliminating 'inequalities.' This seems to suggest a substantive vision of 'equality,' presumably extending not only to legal equality, but also economic, social and political equality. So far, with regards to the mainstreaming of racial equality concerns, Article III-118 covers the combating of 'discrimination,' which presumably covers instances of both direct and indirect discrimination as defined in the Racial Equality Directive.

The precise meaning of this provision inevitably remains unclear however, not least because the Court of Justice has not yet had an opportunity to interpret the terms of Article 1 of the Racial Equality Directive, and especially what is precisely meant by the reference to 'racial or ethnic origin.' These are new terms in EU law, and require interpretation by the Court of Justice because of the very varied social and legal constructions of racism in the Member States. In any event, Article III-118 clearly adds constitutional weight to the existing Commission practices in relation to the mainstreaming of anti-racism.

3.4 The mainstreaming of anti-racism has been an important element of Union policy since the publication of the Commission's 1998 Action Plan against Racism,¹⁵ which lists many areas where the fight against racism should be incorporated into policy considerations, including employment strategy, structural funds, education, training and youth, public procurement and external relations. On paper, this already amounts to a substantial commitment to a policy of mainstreaming anti-racism. It has also been followed up in a number of further documents, such as the Commission Report on the implementation of the

Action Plan against Racism, entitled *Mainstreaming the fight against racism*,¹⁶ as well as in documents prepared by the Commission before and since the Durban anti-racism Conference in 2001.¹⁷

3.5 Yet despite the rhetoric and these paper policies, there has been little solid action in practice to bring the fight against racism to the forefront of the EU's policy concerns. In fact, since the Laeken European Council in December 2001 (which took place not long after the terrorist attacks in the United States on 11 September 2001), racism and xenophobia have rarely appeared in the Presidency Conclusions associated with each of these set-piece political events. In contrast, from the date of the Amsterdam summit in June 1997 until the Laeken European Council, the fight against racism and xenophobia had always featured in the Presidency Conclusions. This coincided not only with the strengthening of the human rights and anti-discrimination provisions of the Treaty on European Union and the EC Treaty by the Treaty of Amsterdam (came into force: 1999), but also with the designation of 1997 as European Year Against Racism.

The late 1990s were an important era for intensive policy-making in the anti-racism sphere. In contrast, the 2000s appear to have been the era in which anti-racism policy-making has been watered down, even though the decade began with the adoption of the Racial Equality directive which undoubtedly requires the Member States to make substantial amendments to national legislation and the adoption of the Action Programme which enables the Commission to promote equality-focused activities proactively. This loss of focus on the specific question of racism also appears to be signalled by the European Council initiative in December 2003 to replace the European Union Monitoring Centre concerned with racism and xenophobia with a Fundamental Rights agency with a much wider vocation. The EUMC is very concerned that its transformation should not detract from 'the urgent fight against racism.'¹⁸ The

¹⁴ J. Shaw, *Mainstreaming Equality in European Union Law and Policy-making*, ENAR Publication, 2004.

¹⁵ COM(1998) 183, 25 March 1998.

¹⁶ Commission Report on the implementation of the Action Plan against Racism, *Mainstreaming the fight against racism*, January 2000.

¹⁷ Commission Communication, *Contribution to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, South Africa, 31 August – 7 September 2001, COM(2001) 291 of 1 June 2001; Follow-ups to the World Conference against Racism, Contributions from the European Commission, dated November 2002, June 2003 and December 2003. The documents mentioned in this and the previous footnote, along with other documentation on EU policies on anti-racism can be found on the Commission's Employment and Social Affairs DG Website. http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm.

¹⁸ EUMC Media Release, 15 March 2004, Issue: 194-03-04-03-01-EN, 'Future EU human rights agency must not detract from urgent fight against racism, says EUMC.'

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Commission itself admits that transforming the EUMC into a Fundamental Rights agency raises 'delicate questions'.¹⁹

In November 2004, in the context of the discussion of the new Hague Programme in the area of freedom, security and justice, the European Council did once again refer to racism and xenophobia in its conclusions, but particularly in the context of welcoming the steps taken by the Commission towards the transformation of the EUMC into a fundamental rights agency.

The only area of anti-racist work which has received specific high level political attention has been the particularly hostile social and economic conditions in which the Roma, especially in the new Member States of Central and Eastern Europe, find themselves. Consequently, the constitutionalisation of equality mainstreaming, including the mainstreaming of anti-racism, in the Constitutional Treaty, represents a significant strengthening of the existing legal basis for current practices and for policy-making.

3.6 Article III-118 is not limited to the mainstreaming of anti-racism however. It commits the Union to ensuring that a much wider range of equality of opportunity issues are given a central role in the formulation of policy. This is especially challenging as there may be circumstances in which taking into account one of the equality grounds (e.g. sexual orientation) in the formulation of policy under Article III-118 could come into conflict with another equality ground (e.g. religion and belief). Consequently, Article III-118 raises a substantial challenge for the Union in developing a policy of mainstreaming equality and diversity, especially in considering the effects of multiple disadvantage involving the accumulation of more than one ground of discrimination.

Exactly how it is interpreted and applied depends in part upon the result of deliberation within the Union's institutions, notably the Commission, about whether to put in place a comprehensive single approach to equality issues which covers gender issues, as well as the other grounds enumerated in Article 13 EC, as they are also in Article III-118. This issue is raised in the Commission's 2004 Green Paper on Anti-Discrimination,²⁰ but how it will be solved in the future is not yet clear.

At present, EU legislation and action programmes are somewhat truncated with a mixture of specialist legislation

on racial equality and gender equality, and separate action programmes for equality between women and men on the one hand, and for the other five grounds enumerated in Article 13 EC on the other. This creates a patchwork at the EU and the national level.

3.7 At the present time, Article III-118 is largely an empty vessel. A number of developments, reforms and experiments within the field of European governance can provide some clues as to how it might most effectively be implemented. The work of the Commission's Independent Network of Experts on Fundamental Rights, the proposals surrounding the creation of a Fundamental Rights Agency, and the so far rather limited academic commentary on different forms of mainstreaming, have together started an important debate about what constitutes effective 'mainstreaming.'

Although there is a substantial literature on gender mainstreaming, recently, the literature has concentrated on the mainstreaming of fundamental rights for the most part. Even so, it is worth considering how this might apply in the context of the mainstreaming of equality and diversity. For example, Olivier de Schutter makes some important distinctions about different elements of mainstreaming in a paper on fundamental rights:²¹

- a. He defines 'mainstreaming' as 'taking into account in the policy choices we make, the impact the different policy options we have at our disposal will produce on our capacity to further realise...rights.'²² This is however a more general directional process, rather than a fixed outcome, and not a target which policy-makers hit or miss.
- b. 'Compatibility assessments' test whether a specific piece of legislation is compatible or not with a particular standard, e.g. a given human rights instrument. It is a 'one-off' assessment, rather like an adjudication.
- c. De Schutter fears that the current 'impact assessments' undertaken by the services of the Commission confuse these two modes of evaluation and, in addition, are insufficiently participatory to be truly effective.²³
- d. Neither of these processes is necessarily pro-active however. In addition, de Schutter calls for Action Plans to be formulated by policy-makers, which indi-

¹⁹ *The Fundamental Rights Agency: Public consultation document*, SEC(2004) 1281, Brussels, 25 October 2004, COM(2004) 693, p3.

²⁰ *Equality and non-discrimination in an enlarged European Union*, COM(2004) 379, 28 May 2004.

²¹ O. de Schutter, 'Mainstreaming Human Rights in the European Union', in Alston and de Schutter, above n.13.

²² *Ibid*, at p55.

²³ Commission Communication, *Impact Assessment*, COM(2002) 276, 5 June 2002.

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cate what active steps they will take to ensure that policy-makers move towards the general goal which it is intended to bring into the mainstream.

3.8 Impact assessments and action plans primarily address compliance of Union institutions with the requirements of mainstreaming. In addition, Member State policies may be in need of adjustment to promote the goals which are to be brought into the mainstream. In this context, in addition to harmonisation legislation and Action Programmes, which are already in place in relation to racial and ethnic discrimination policy, it may be useful to engage as a supplement in an Open Method of Coordination. This has been proposed by de Schutter for the case of fundamental rights policies at the national level, to benchmark national policies and provide guidelines at the Union level leading to convergence.²⁴

In certain respects, the EUMC already engages in such a process – at least at the collection of information about national policies in relation to racism and xenophobia level – through its European Racism and Xenophobia Network (RAXEN). RAXEN is one of the central tools for the EUMC to achieve its goal in providing the European Union and its Member States with objective, reliable and comparable data (including examples of and models for 'good practice') at the European level on the phenomena of racism, xenophobia and anti-Semitism. The RAXEN network is composed of 25 National Focal Points – one in each Member State, which collect the information required by the EUMC to perform the functions assigned to it.

3.9 The implementation of these insights and principles could form a sound basis for the effective implementation of Article III-118. Article III-118 gives a more solid constitutional basis to all of these activities and objectives, and is therefore an important constitutional innovation.

Reference to minority rights in Article I-2

3.10 The phrase 'rights of persons belonging to minorities' in Article I-2 was added at the final stage of drafting and negotiation during the Intergovernmental Conference, rather than by the Convention. The text finally adopted in June 2004 emerged during the course of the Italian Presidency, which chaired the IGC from October to December 2003, the final phrasing is already present in the last text produced under that Presidency.²⁵

²⁴ O. de Schutter, *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, Jean Monnet Working Paper, No. 07/04, www.jeanmonnetprogram.org.

²⁵ CIG 60/03, Add 1, 9 December 2003.

Lobby pressure from Hungary helped to keep the phrase in place until the final agreement in June 2004.²⁶ It is a phrase drawn from international law on minority rights, and its inclusion was doubtless inspired by experience in dealing with the situation of the Roma in the context of enlargement towards Eastern Europe. However, such a phrase does not always resonate comfortably with the texts and values of all of the national constitutions. In France, notably it can come into conflict with the notion of the unitary nature of the human person and the difficulty which this raises with the constitutional recognition of different groups, including ethnic groups.²⁷

From the perspective of the new Member States however, it is symbolically important for them to see the formal constitutional inclusion in the Constitutional Treaty of norms against which they have been held to account, in particular by the European Commission, during the course of the accession process.²⁸ The difficulty with applying this provision will concern the absence of a single European standard in relation to minority rights which the Member States all adhere to, in particular because there is a notable lack of guidance from the case law on the ECHR, as Article 14 ECHR containing a reference to 'association with a national minority,' does not establish a freestanding right to non-discrimination. Moreover, does this refer only to so-called autochthonous 'national' minority groups, which are given special protections under a number of national constitutions in the Member States, including special electoral representation,²⁹ or does it also extend to so-called 'new minorities,' including groups of non-EU nationals who have migrated to the Member States since the second world war or indeed much more recently.³⁰ Does this phrase concern individual or group/collective rights?

It seems likely that the use of minority rights as a reference point for benchmarking national policies on human rights will continue to be a contested practice within the Union, notwithstanding the introduction of this phrase

²⁶ G. Sasse, 'Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?' in G. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward*, Budapest: Open Society Institute, p80.

²⁷ E.g. France has not yet signed the Council of European Framework Convention for the Protection of National Minorities, Feb 1 1998, ETS No. 157.

²⁸ On that process, see C. Hillion, 'Enlargement of the European Union The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities', (2003-2004) 27 *Fordham International Law Journal* 716.

²⁹ E.g. Danes in Germany and Italians in Slovenia.

³⁰ S. Peers, 'New Minorities: What Status for Third Country Nationals in the EU System?', in Toggenburg, above n.26.

in Article I-2.³¹ It will also be read in the future in the light of the Charter of Fundamental Rights' provisions which pertain to multiculturalism, anti-racism and the rights of minorities, which are discussed in more detail in Section 4 below.

The treatment of racist and xenophobic crime under the area of freedom, security and justice

3.11 The Treaty of Amsterdam marked a significant breakthrough for the European Union in the shape of the provisions of Title VI of the Treaty on European Union on police and judicial cooperation in criminal matters. Article 29 TEU makes specific reference to the prevention and combating of racism and xenophobia as an objective defined by reference to the area of freedom, security and justice.

In terms of constitutional development, the Constitutional Treaty takes this field of policy and policy-making an important step further, through the quasi-complete incorporation of policy-making on the area of freedom, security and justice into the standard rules on the institutions and law-making involving the EU institutions. There is no separate 'pillar' for police and judicial cooperation in criminal matters. There remains a residual right of legislative initiative for the Member States in this field,³² and there are a number of important fields in which qualified majority voting, supposedly the Union norm, continues to be excluded. Echoing Article 29 TEU, in the general provisions on the area of freedom, security and justice, Article III-257(3) lays down that:

'The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia...'

3.12 This is a rather deceptive provision, as it seems to suggest that further provisions on specifically focusing on combating racism and xenophobia will be found in later sections of the Constitutional Treaty. Any reference to racist

and xenophobic crime is omitted from the explicit list of areas of 'particularly serious crime with a cross-border dimension' however. In Article III-271(1), which mentions areas such as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, and so on. In fact, racism gets no further mention throughout the Constitutional Treaty, its Protocols and the Declarations appended to it.

In the light of this omission, it does not seem likely that the much delayed 2001 proposal for a Framework Decision on combating xenophobia through criminal law³³ is any more likely to be adopted in the era of the Constitutional Treaty than it has been under the existing EU Treaty, unless the de-pillarisation process which brings Justice and Home Affairs policy into the Union mainstream unblocks the legislative process to an unexpected extent.

3.13 The combating of racism and xenophobia through criminal law could be said, as per Article III-271(2), to be an area where 'the approximation of the criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.' In the first draft of these provisions, Article 17 referred to the adoption of framework laws (i.e. laws which would allow harmonisation of national laws) 'containing minimum rules concerning the definition of incriminations and sanctions... in areas of crime affecting a common interest which is the subject of a Union policy, if criminal sanctions prove essential to ensure the effective implementation of that policy.'

The explanations prepared by the Presidium referred specifically to racism and xenophobia: 'The second indent ("crime affecting a common interest which is the subject of a Union policy"), makes it possible to cover several areas in which there is already either an *acquis* adopted by virtue of Article 31 TEU, or negotiations under way, or plans for the near future. The following in particular are covered in this way: ...racism and xenophobia (given that Article 13 TEC allows the Community to take action to combat discrimination based on racial or ethnic origin).'³⁴

3.14 The phrasing eventually adopted is a little narrower than that proposed in March 2003, since it presupposes the prior adoption of harmonisation measures in a related field. By the time a full version of Part III of the Constitutional Treaty was issued by the Presidium on 27 May 2003, the

³¹ G. Schweltnus and A. Wiener, 'Contested Norms in the Process of EU Enlargement: Non-discrimination and minority rights', *Constitutionalism Web-Papers*, ConWEB, No. 2/2004.

³² Article III-264 requires any initiatives to come from one quarter of Member States. This would preclude initiatives such as that proposed by Sweden with a view to the adoption of a *Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts*, (OJ 2004 C281/4). Under this initiative Member States would be required to respond to requests for information and intelligence from other Member States in respect of a list of serious crimes, including crimes relating to issues of racism and xenophobia.

³³ COM(2001) 446, OJ 2002 C75E/269.

³⁴ See Conv 614/03, Draft Articles on Freedom, Security and Justice, 14 March 2003, Article 17, p25. See Bell, above n.3 at p32.

3. Key changes in respect of equality and non-discrimination, minority rights and racism: a close analysis

final version of what became Article III-271 was already in place.³⁵ Certainly it can be argued that a measure such as the draft Framework Decision (which would be recast as a Framework Law under the Constitutional Treaty), is necessary to complement and complete the policies begun with the 2000 Race Equality Directive. However, under Article III-271(2), any such measures must be adopted using the same legislative process used for the original harmonisation measures.

This was not envisaged in the original draft Article 17, which assumed that the ordinary legislative procedure would be used.³⁶ Thus this does not create a case for qualified majority voting in the Council of Ministers in relation to measures on racist and xenophobic crime, as the harmonisation measures themselves must be adopted under unanimity.

3.15 Alternatively, if the Council of Ministers wished to add racist and xenophobic crime to the list of areas covered by Article III-271(1), it would likewise have to act unanimously. But once this addition had been made, further European framework laws could be adopted by qualified majority voting using the ordinary legislative procedure. It would always be possible however for a Member State to pull the 'emergency brake' if it felt that a draft European framework law would affect fundamental aspects of its criminal justice system (Article III-271(3)). This leads to the suspension of the legislative procedure, and the referral of the proposed measure to the European Council.

3.16 Consequently, it cannot be concluded that the Constitutional Treaty offers substantial progress in relation to the treatment of racism and xenophobia as a crime within the Union, and the consequential need to harmonise national laws in accordance with a minimum standard of protection for victims.

³⁵ Conv. 725/03, 27 May 2003, Article III-167, p98.

³⁶ This was one of a number of amendments to the measures proposed by Convention members (see Conv. 664/03), 1 April 2003 (proposed by UK Convention members Hain and Tomlinson), although the general tenor of the amendments suggested in relation to racist and xenophobic crime would, if adopted, have increased the prominence of these issues within the provisions on freedom, security and justice.

Racism and xenophobia and the Union's external policies

3.17 Article III-292(1) lays down the general principles which guide the Union's action on the international scene. The internal and external spheres are explicitly linked, in that the article refers also to the same principles which have guided the Union's own creation. These principles include democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. It is clear therefore that policy on combating racism and xenophobia can and should play a role in the Union's relationships with third countries and international organisations.

More specifically, Article III-292(2) highlights as an objective of the Union's common policies and actions in the external sphere, consolidation and support for democracy, the rule of law, human rights and the principles of international law. Human rights conditionality, including issues concerned with racism and the rights of ethnic minority groups, have already played a significant part in the application of the principle of conditionality to the accession process, and in the EU's constantly evolving neighbourhood policies. While these texts are somewhat clearer and more focused on human rights issues than preceding texts in the existing treaties, they do not create any new actions or activities for the Union. The basis for the Union's participation in external action, such as the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, will remain the same in the future as in the past.

Conclusion

3.18 The Constitutional Treaty does not provide any new competences under Part III in relation to action to combat racism and xenophobia in comparison to the existing Treaties. In some respects therefore, the texts are disappointing, especially in relation to the absence of a specific focus on racism and xenophobic crime in the provisions on the area of freedom, security and justice. While the goal of combating discrimination under Article 13 EC is not changed, the addition of the transversal mainstreaming clause aimed at combating discrimination in Article III-118 of the Constitutional Treaty is a very important constitutional innovation, although it remains to be seen how it will be implemented in practice.

4. The Role of the Charter of Fundamental Rights in the context of fighting racism

4.1 The inclusion of the Charter of Rights as Part II of the Constitutional Treaty raises many important questions for the fight against racism and xenophobia. These questions include the scope and interpretation of the Charter in relation to principles of non-discrimination and equality in the field of race and ethnic origin, the possible legal effects of the inclusion of the Charter, and the wider political effects of the Charter. The general questions regarding the legal and political effects of the Charter are addressed first. This is followed by a discussion of the Equality provisions of the Charter, and the other respects in which the Charter addresses itself to a multicultural society.

4.2 In relation to the inclusion of the Charter of Rights as a legally binding instrument, the text of the Constitutional Treaty is deceptively simple at first sight. Article I-9(1)) provides that:

'The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitute Part II.'

In exactly the same terms as the existing Treaty on European Union, Part I also refers to fundamental rights as 'general principles of the Union's law' (Article I-9(3) ex Article 6(2) TEU). Reference is made in this context to '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.' This is precisely the same phrasing used in the TEU.

Since the TEU itself is a codification of the Court of Justice's case law dating back to the 1970s, this suggests continuity with the *acquis* and with the existing approach which the Court of Justice takes to fundamental rights questions so far as they affect the institutions and the Member States when they are acting within the scope of Community law. One of the first questions that the Court of Justice is likely to receive about the legal regime for the protection of fundamental rights under Union law after ratification and entry into force will be the relationship between Articles I-9(1) and I-9(3), and how they can be interpreted in a manner which achieves complementarity of the scope and manner of protection.

4.3 Likewise in need of urgent clarification is the precise scope of the Charter of Rights vis-à-vis national law. The infamous 'horizontal clauses' of the Charter provide that

'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States **only when they are implementing Union law**' (Article II-111(1), emphasis added). Has Article II-111(1) effectively given instructions to the Court of Justice which require the reversal of the existing approach of the Court, or will the Court be able to maintain and perhaps develop its existing approach?

The first reference point for interpreting this must be the Explanations 'drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights,' which were originally prepared for the Presidium of the Charter Convention in 2000, and which are now referred to both in the new Preamble to Part II of the Constitutional Treaty, and in Article II-112(7). 'Due regard' must be given to these by the courts of the Union and the Member States, according to Article II-112(7). With regard to the key phrase in Article II-111(1), the Explanations provide:

'As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the scope of Union law...³⁷ The Court of Justice confirmed this case law in the following terms [in the *Karlsson* case]: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...'³⁸ Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.'

It is worth pointing out that the *Karlsson* case from where originates the rather more restrictive term 'implementing' rather than the looser phrase 'acting within the scope of' was a case concerning the Common Agricultural Policy, where the practical effect of heavy and rather comprehensive Union level regulation of markets means that Member States have many obligations indeed to *implement* the law

³⁷ The text here refers to Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925; C-309/96 *Annibaldi* [1997] ECR I-7493.

³⁸ Case C-292/97, [2000] ECR 2737.

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of the Union. The majority of cases in fact, where the Court is asked to look at effects of fundamental rights, have emerged in single market cases where applicants are often contesting the capacity of the Member States to restrict their fundamental freedoms, using public interest justifications.

This was the case in *ERT*, for example. Such public interest justifications for restricting fundamental freedoms, although permitted in principle under the Treaties, in fact must not – according to the Court – infringe upon fundamental rights, in this case the fundamental right of freedom of expression. In the *Carpenter* case, it applied this doctrine in order to protect the right to enjoy family life in the face of the threat of deportation of the third country national spouse of a national of a Member State established in another Member State.³⁹

In very recent cases such as *Omega*,⁴⁰ the Court has used a very broad phrasing arguing that 'both the Community and its Member States are required to respect fundamental rights...'. This case however concerned the mirror image scenario to *Carpenter*, with the Member State invoking fundamental rights arguments in order to justify a restriction placed upon freedom of movement, against a market actor seeking greater economic freedom.

4.4 A number of other considerations also apply when one turns to consider the relationship between Union law and national law in relation to the position of many of the social and economic rights which are regarded as the Charter of Rights' most prominent innovation. The horizontal clauses have already tried to limit their effects by reasserting that there is no extension of the field of application of Union law beyond the powers of the Union and no establishment of new powers or tasks for the Union or modification of existing powers and tasks (Article II-111(2)). Moreover, Article II-112(5) declares that:

'the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

³⁹ Case C-60/00 [2002] ECR I-6279.

⁴⁰ Case C-36/02 *Omega v. Oberbürgermeisterin der Bundesstadt Bonn*, judgment of 14 October 2004.

There is no clear guidance as to how to distinguish 'rights' and 'rights in the nature of principles.' On the other hand, recent pertinent guidance as to how such rights might still permeate national law can be found in the recent Advocate General's Opinion in the *Pupino* case. This is the first case to come before the Court of Justice on the interpretation of a Framework Decision under the JHA third pillar (in this case on victims in the context of criminal procedure).⁴¹ AG Kokott argued that national courts are under an obligation to give an interpretation of national law in the light of the framework decision's requirements.⁴² In that specific context, this means pursuing a criminal procedure at national level with regard to the protection of vulnerable witnesses (in this case, a child), which must be, she argued, in accordance with the fundamental principles of the Union's legal order, including fundamental rights.

This suggests that principles embedded in Union law – and that may in fact include some of the social and economic rights in the Charter, especially if they are then re-articulated in the form of measures adopted under the Constitutional Treaty – may resonate out into the wider field of national law in ways which the Member States have not yet precisely foreseen.

4.5 It is also important to recall that the Charter has already played a prominent role in the context of the Union's courts as a whole, even though the Court of Justice has declined to refer to the Charter, at least so long as it retains its current declaratory status. However, the Advocates General, the Court of First Instance, and indeed some of the national courts when deliberating on matters relating to EU law, have already referred to the rights enshrined in the Charter. However, the essential thrust of this case law has been to refer to such rights in order to buttress arguments regarding rights which can already be found elsewhere in the system of EU fundamental rights and principles, such as the right to a safe working environment.⁴³

4.6 Since the Charter of Fundamental Rights is limited in its application to the Union and to the Member States,

⁴¹ Framework Decision 2001/220/JHA OJ 2001 L82/1.

⁴² Case C-105/03 *Pupino*, Opinion of AG Kokott of 11 November 2004.

⁴³ Case C-173/99 *R. v Secretary of State for Trade and Industry Ex p. Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR. I-4881, Opinion of AG Tizzano, at para. 28. See more generally D. Ashiagbor, 'Economic and Social Rights in the European Charter of Fundamental Rights', (2004) *European Human Rights Law Review*, issue 1, 62.

it seems unlikely that individuals will be able to base claims to equality rights directly on the Charter's provisions with regard to the actions of other private parties. In other words, it would not appear at first sight that the effect of the Charter will be to widen the application of the various equality directives, where the difficulty arises from time to time that provisions of directives are only enforceable directly against the organs of the Member States, and not against other private parties (i.e. no horizontal direct effect). However, other forms of incidental effect, including the 'equality-friendly interpretation' of national law, will be required of national courts, which in practice may amount to something quite similar to horizontal direct effect.

4.7 Finally, we should also mention a number of other possible effects which the Charter may have, not only in the field of litigation, but also in relation to legislative and policy-making activities of the Union and the Member States. These may be particularly important in relation to some of the equality rights contained in the Charter. Indeed, rather than through 'hard' judicial enforcement, which may in any event be restricted by the horizontal clauses if the interpretation given here is seen as overly optimistic, it has already been suggested by a number of commentators that so-called 'new governance' approaches such as the open method of coordination and mainstreaming, might be the most appropriate mechanisms for the enforcement of social rights under the Charter.⁴⁴ This raises many of the issues discussed in Section 3 above, in relation to Article III-118.

4.8 Alternatively, the provisions of the Charter could be seen as instructions to the legislatures at the national and EU levels in relation to the principles to be pursued in relation to social policy objectives, including as a minimum a standstill clause such as that there can be no reduction in existing social rights. This could place significant restraints upon certain types of possible future governmental programmes at both Union and national level in the future. Moreover, despite the restriction which prescribes that there are no new competences at Union level, and that Member States are only affected where they are implementing Union law/within the scope of Union law (whichever formulation one takes...), it may be that the existence of certain types of rights at the Union level, including rights to non-discrimination and equality, can have very significant effects in the long term.

⁴⁴ See N. Bernard, 'A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU', in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, Oxford: Hart Publishing, 2003 ; De Schutter, above n.21 ; De Schutter, above n.24.

4.9 As Mark Bell has observed,⁴⁵ the provisions relating to equality and non-discrimination are not confined to one part of the Constitutional Treaty, but are scattered throughout, appearing in Parts I, II and III. One difficulty that may arise concerns possible conflicts between the various equality provisions spread across Parts I-III of the Constitutional Treaty, so far as they may project different (formal and/or substantive) concepts of equality, and so far as they suggest different levels of obligation on the part of the Union, its institutions and its Member States. The range of rights within Part II – the Charter of Fundamental Rights – is already rather diverse.⁴⁶

So far as concerns the combating of racism and xenophobia, one important contribution of the inclusion of the Charter of Rights in the Constitutional Treaty is the unambiguous confirmation that the right to non-discrimination on grounds of racial or ethnic origin constitutes a fundamental right (Article II-81).

However, the relationship between this provision and the non-discrimination prohibition in the Article 13 directives, notably the Racial Equality Directive, may be difficult as Article II-81 does not contain any of the limitations or balancing tools included in the directives, such as the possibilities of adducing justifications for incidences of indirect discrimination. Moreover, the vision of the Charter in this respect is limited to non-discrimination in a formal sense, with no scope for positive action and no provision made for the possibility of indirect discrimination.

4.10 On the other hand, it is possible to read this clause in conjunction with the requirement in Article II-82 to respect cultural, religious and linguistic diversity, along with the provision on education in the Charter (Article II-74) as the possible seeds of a multicultural vision for the Union. This is particularly important after the conclusion of the Constitutional Treaty, with its additional reference to minority rights in Article I-2, a reference which was blocked by France during the drafting of the text of the Charter itself.⁴⁷ This addition creates a more complete vision, confirming what is implicit in the text of Article II-82 – namely that it envisages minority cultures which require respect.⁴⁸

⁴⁵ M. Bell, 'Equality and the European Union Constitution', (2004) 33 *Industrial Law Journal* 242 at 244.

⁴⁶ M. Bell, 'The Right to Equality and Non-Discrimination', in Hervey and Kenner, above n.44.

⁴⁷ Bell, above n.46, p108.

⁴⁸ Bell, above n.46, p108. See also C. Wallace and J. Shaw, 'Education, Multiculturalism and the Charter of Fundamental Rights of the European Union', in Hervey and Kenner, above n.44 for a more extended discussion.

5. The role of the European Parliament under the Constitutional Treaty

5.1 Turning now to the institutional dimension of the Constitutional Treaty, the most significant institutional gains have undoubtedly been made by the European Parliament. This is especially in relation to its increased role within the legislative procedure, as the co-decision procedure has been made the 'ordinary legislative procedure' from which special procedures must deviate. Furthermore, as noted in earlier sections, it has also been given veto rights in relation to legislative initiatives even in areas where the Member States have retained theirs, especially insofar as concerns the areas of policy discussed in this Publication in relation to the flexibility clause (Article I-18) and the adoption of anti-discrimination legislation (Article III-124(1)). Consequently, the European Parliament has a more important role within the political system of the Union, and as such will grow in importance as a strategic partner for advocacy

groups arguing for improved Union policies to combat racism and xenophobia.

Already in advance of the entry into force of the Constitutional Treaty, the European Parliament has demonstrated its increased level of politicisation through its management of the so-called Buttiglione affair during the process of approval of the new Barroso Commission in October and November 2004. Specifically, it was the issue of anti-discrimination policy which proved to be a political litmus test for an individual nominated for membership of the European Commission by a Member State, and consequently there is reason to believe that such matters will be given consistent salience by members of the European Parliament during the current parliamentary mandate, at least up to 2009.

6. The dialogue with civil society and participatory democracy

6.1 It is not only representative democracy which will be strengthened by the text of the Constitutional Treaty. The explicit adoption of a principle of participatory democracy is an extremely important innovation in the Constitutional Treaty from the perspective of advocacy groups working in the field of racism and xenophobia. Article I-47, which is entitled 'the principle of participatory democracy' forms part of the text of Part I of the Constitutional Treaty concerned with 'the democratic life of the Union' and provides for the following elements of democratic participation:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal

act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.

A conservative interpretation of the first three paragraphs might suggest that this merely codifies current practice, where the Commission is already quite open to consultations with civil society. It is often the case that new innovations in the Treaty texts merely reflect existing practices. A more radical interpretation would not only emphasise that this principle applies to all the Union's institutions and bodies, but would develop links between this text and others, such as the rather restrictive rules on standing before the Court of Justice to bring actions to challenge measures adopted by the Union.

The rules in Article III-365 (ex Article 230 EC) governing the circumstances in which so-called non-privileged applicants (i.e. ordinary natural or legal persons, including NGOs) can bring actions challenging the legality of Union measures before the Court of Justice have been barely widened under the Constitutional Treaty. It is conceivable however that NGOs may be able to benefit from the new opportunity to challenge 'regulatory acts' by which they are

'directly concerned', without the need to prove that they are 'individually concerned' (i.e. affected in some uniquely individual way). One circumstance in which such an action might be generated could be if the Commission were to ignore inputs from civil society groups in relation to a measure by which they could claim to be 'individually concerned.' Arguing, perhaps, that civil society has been 'consulted' via the mechanism of the Economic and Social Committee which is given a formal place within the legislative process in relation to many legal bases.

It is not possible however to give an unqualified welcome to the progress made by the Constitutional Treaty in relation to the position of civil society. The 'definition' of the Open Method of Coordination, given a number of provisions of the Constitutional Treaty, does not refer to the participation of civil society, although it does give a voice to the European Parliament. Thus, Article III-213 (ex Article 140 EC) for example covers the wider range of social policy areas where the Commission shall encourage cooperation between the Member States, and facilitate the coordination

of their action, including employment, labour law and working conditions, and social security. Some of these could have relevance to policy on combating racism and xenophobia.

This provision now contains the nearest thing in the Constitutional Treaty to a clause 'constitutionalising' the so-called Open Method of Coordination (OMC), as it refers to how the Commission can organise initiatives aimed at the establishment of guidelines and indicators, the exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.

Although the text in Article III-213 in some way crystallises the practice of OMC, providing for the European Parliament to be kept informed, it does not go as far as many NGOs would have wanted in setting out the obligations of the Commission or the national governments. It does not specifically refer to the role of civil society in relation to these processes, and thus provides no real mechanism for ensuring the accountability of the actors involved.

7. Citizens' initiatives

7.1 It is necessary to analyse in a little more detail the possibilities offered by the final paragraph: the one million signature initiative. Some see this as a 'second chance for democracy' – a means to move beyond popular dissatisfaction with party politics and electoral politics which challenge the legitimacy of the European Parliament as much as other parliaments, and a means to harness the increasingly widespread interest which citizens show in single issue politics and interest groups.

It is important to note that whatever the outcome it is likely that the usage of this provision will not be confined to social NGOs mounting campaigns for progressive and inclusive social policy measures, and that organisations which seek a more exclusive Union, such as those opposed to immigration or the fair treatment of immigrants and asylum-seekers, will be just as quick to take advantage of this new facility of direct democracy.

In that context, it may prove necessary to remind policy-makers in the Union's institutions of the foundation stones provided by the 'social thread' which runs through the Constitutional Treaty, both in relation to the issues of combating racism and xenophobia discussed in detail in this Publication, and in relation to the social dimension of the Union more generally. The requirement for consistency in policy-making referred to in Article III-115 may be significant in this context.⁴⁹

7.2 Some aspects of how this provision will work will remain unclear until the European laws which are necessary to define the details of its operation are adopted – or at least proposed by the European Commission. It is very unlikely that the Commission will wish to see itself bound to produce a draft proposal every time that Article I-47(4) is invoked, and it may well wish to introduce a filter mechanism to help it determine the genuine backing which an initiative has and its popular salience and importance.

It will be interesting to see what role the European Parliament may find in relation to the million signature initiative and its Committees might perhaps find a drafting role in relation to such popular initiatives. The role of the media in disseminating information on a trans-European basis about such initiatives will also be vital if they are to play a constructive role in the development of a new European 'public sphere'. As Wallis and Picard note,⁵⁰ this is an important initiative for 'direct democracy' European-style.

⁴⁹ See D. Wallis and S. Picard, 'The Citizens' Right of Initiative in the European Constitution: A Second Chance for Democracy?', OSI/EUMAP: Monitoring human rights and the rule of law in Europe, www.eumap.org/journal/features/2005/demodef/wallis, 2005.

⁵⁰ Above n.49.

8. Conclusions and comments

8.1 This Publication began by setting as a comparative reference point the progress made in the Treaty of Amsterdam in relation to policy instruments for combating racism and xenophobia. It is possible that in creating this comparative reference point the hurdle has been set too high in relation to the assessment of the more modest achievements of the Constitutional Treaty.

It was not only the text of the Treaty of Amsterdam which made a substantial difference however, but also the manner in which it was implemented, especially in the form of the Racial Equality Directive. There is real grounds for hope under the Constitutional Treaty that the European Parliament will evolve into a real democratic motor for the Union and for Union policy-making.

It is important not to lose sight however of the *acquis* and of the institutions which play a central role as guardians of that *acquis*, notably the European Commission which has already started enforcement actions against Member States which have not effectively implemented the Racial Equality directive by the time of its implementation date and the Court of Justice, which will not only adjudicate upon those actions in due course, but which will also receive references for preliminary rulings from national courts on the interpretation of the terms of the Directive which could at the present time cause particular confusion, such as the definition of racial and ethnic origin.

Moreover, it is equally important to recall that the terms in which the Member States applied Article 13 in the Racial Equality Directive made a more substantial contribution to the 'stretching' of the scope of Union competence than might realistically ever have been expected by those who lobbied for the inclusion of Article 13.⁵¹

8.2 In sum, the continuing role of advocacy groups in relation to the existing *acquis* may prove to be as important in the development of strategies for combating racism and xenophobia in the Union as their role in relation to the new possibilities opened up by the Constitutional Treaty. This Publication has charted some important new constitutional elements, notably the mainstreaming clause in Article III-118. For this to be implemented effectively, the full participation of civil society will be necessary and groups

will be able to point to the important conjunction of that provision and Article I-47 on the principle of participatory democracy.

Overall however, the Constitutional Treaty is little more than codification and steps taken on the margins. Although the inclusion of the Charter of Fundamental Rights is an important constitutional step, it is no more than a minimum step for the Member States to take if they are to make even a plausible case for calling their new document a *Constitutional Treaty*.

The document does indeed remain very much a Treaty and very little a Constitution. Advocacy strategies can call upon some new momentum and some evidence of positive rhetoric in the text of the Constitutional Treaty, especially during its preparatory phase in the Convention. However, the Constitutional Treaty must be treated as evolution, and not revolution.

⁵¹ See D. Chalmers, 'The Mistakes of the Good European?', in S. Fredman (ed.), *Discrimination and Human Rights. The Case of Racism*, Oxford: Oxford University Press, 2001.

ANNEX I

Definition of new legal instruments

EXERCISE OF UNION COMPETENCE COMMON PROVISIONS

Article I-33 The legal acts of the Union

1. To exercise the Union's competences the institutions shall use as legal instruments, in accordance with Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.

A **European law** shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A **European framework law** shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A **European regulation** shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A **European decision** shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and **opinions** shall have no binding force.

2. When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

Source:
http://europa.eu.int/constitution/en/ptoc7_en.htm

ANNEX II

EU Constitution Articles

Article I-1 (2)

Establishment of the Union

2. The Union shall be open to all European States which respect its values and are committed to promoting them together.

Article I-2

The Union's values

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article I-3 (1-5)

The Union's objectives

1. The Union's aim is to promote peace, its values and the well being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.

3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.

Article I-4 (2)

Fundamental freedoms and non-discrimination

2. Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article I-8

The symbols of the Union

The flag of the Union shall be a circle of twelve golden stars on a blue background.

The anthem of the Union shall be based on the 'Ode to Joy' from the Ninth Symphony by Ludwig van Beethoven.

The motto of the Union shall be: 'United in diversity'.

The currency of the Union shall be the euro.

Europe day shall be celebrated on 9 May throughout the Union.

Article I-9 (1-3)

Fundamental rights

1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

3. 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, shall constitute general principles of the Union's law.

Article I-12 (5)

Categories of competence

5. In certain areas and under the conditions laid down in the Constitution, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonisation of Member States' laws or regulations.

Article I-14 (1-4)

Areas of shared competence

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in Part III;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in Part III.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article I-17

Areas of supporting, coordinating or complementary action

The Union shall have competence to carry out supporting, coordinating or complementary action.

The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, youth, sport and vocational training;
- (f) civil protection;
- (g) administrative cooperation.

Article I-18 (1-3)

Flexibility clause

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11 (3), the European Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.

Article I-47 (1-4)

The principle of participatory democracy

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.

Article I-58 (1)

Conditions of eligibility and procedure for accession to the Union

1. The Union shall be open to all European States which respect the values referred to in Article I-2, and are committed to promoting them together.

Article I-59 (1-6)

Suspension of certain rights resulting from Union membership

1. On the reasoned initiative of one third of the Member States or the reasoned initiative of the European Parliament or on a proposal from the Commission, the Council may adopt a European decision determining that there is a clear risk of a serious breach by a Member State of the values referred to in Article I-2. The Council shall act by a majority of four fifths of its members after obtaining the consent of the European Parliament.

Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may address recommendations to that State.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, on the initiative of one third of the Member States or on a proposal from the Commission, may adopt a European decision determining the existence

of a serious and persistent breach by a Member State of the values mentioned in Article I-2, after inviting the Member State in question to submit its observations. The European Council shall act unanimously after obtaining the consent of the European Parliament.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may adopt a European decision suspending certain of the rights deriving from the application of the Constitution to the Member State in question, including the voting rights of the member of the Council representing that State. The Council shall take into account the possible consequences of such a suspension for the rights and obligations of natural and legal persons.

In any case, that State shall continue to be bound by its obligations under the Constitution.

4. The Council, acting by a qualified majority, may adopt a European decision varying or revoking measures adopted under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2. Abstentions by members present in person or represented shall not prevent the adoption of European decisions referred to in paragraph 2.

For the adoption of the European decisions referred to in paragraphs 3 and 4, a qualified majority shall be defined as at least 72 % of the members of the Council, representing the participating Member States, comprising at least 65 % of the population of these States.

Where, following a decision to suspend voting rights adopted pursuant to paragraph 3, the Council acts by a qualified majority on the basis of a provision of the Constitution, that qualified majority shall be defined as in the second subparagraph, or, where the Council acts on a proposal from the Commission or from the Union Minister for Foreign Affairs, as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States. In the latter case, a blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.

6. For the purposes of this Article, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component members.

Article II-74 (1-3) Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the Treaty establishing a Constitution for Europe 51 national laws governing the exercise of such freedom and right.

Article II-81 (1-2) Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article II-82 Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article II-111 (1-2) Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and

promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.

2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.

Article II-112 (5&7) Scope and interpretation of rights and principles

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.

They shall be judicially recognisable only in the interpretation of such acts and in the ruling on their legality.

7. The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.

Article III-115

The Union shall ensure consistency between the policies and activities referred to in this Part, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article III-116

In all the activities referred to in this Part, the Union shall aim to eliminate inequalities, and to promote equality, between women and men.

Article III-117

In defining and implementing the policies and actions referred to in this Part, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article III-124 (1-2)

1. Without prejudice to the other provisions of the Constitution and within the limits of the powers assigned by it to the Union, a European law or framework law of the Council may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council shall act unanimously after obtaining the consent of the European Parliament.

2. By way of derogation from paragraph 1, European laws or framework laws may establish basic principles for Union incentive measures and define such measures, to support action taken by Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, excluding any harmonisation of their laws and regulations.

Article III-167 (1-3)

1. Save as otherwise provided in the Constitution, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty establishing a Constitution for Europe, the Council, acting on a proposal from the Commission, may adopt a European decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article III-424, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by European regulations or decisions adopted by the Council on a proposal from the Commission.

Article III-210 (1) (g)

1. With a view to achieving the objectives of Article III-209, the Union shall support and complement the activities of the Member States in the following fields:

(g) conditions of employment for third-country nationals legally residing in Union territory.

Article III-213

With a view to achieving the objectives of Article III-209 and without prejudice to the other provisions of the Constitution, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Section, particularly in matters relating to:

(a) employment;

(b) labour law and working conditions;

(c) basic and advanced vocational training;

(d) social security;

(e) prevention of occupational accidents and diseases;

(f) occupational hygiene;

(g) the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

Article III-264

The acts referred to in Sections 4 and 5, together with the European regulations referred to in Article III-263 which ensure administrative cooperation in the areas covered by these Sections, shall be adopted:

- (a) on a proposal from the Commission, or
- (b) on the initiative of a quarter of the Member States.

Article III-257 (2-3)

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Chapter, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

Article III-271 (1-3)

1. European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a European decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such framework laws shall be adopted by the same procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article III-264.

3. Where a member of the Council considers that a draft European framework law as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council. In that case, where the procedure referred to in Article III-396 is applicable, it shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-396 where it is applicable, or
- (b) request the Commission or the group of Member States from which the draft originates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted.

Article III-292 (1-2)

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters;
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

Article III-365 (1-6)

1. The Court of Justice of the European Union shall review the legality of European laws and framework laws, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.
2. For the purposes of paragraph 1, the Court of Justice of the European Union shall have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers.
3. The Court of Justice of the European Union shall have jurisdiction under the conditions laid down in paragraphs 1 and 2 in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.
4. Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regula-

tory act which is of direct concern to him or her and does not entail implementing measures.

5. Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

6. The proceedings provided for in this Article shall be instituted within two months of the publication of the act, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the plaintiff's knowledge, as the case may be.

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