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Furthering Equality, especially Gender Equality, in the European Union

Contribution by the German Women Lawyers' Association to the European Convention – explanatory memorandum

1. The German Women Lawyers' Association (djB) wishes to contribute to the European Convention, since two preliminary drafts of a Constitutional Treaty and of a Constitution of the European Union respectively have been tabled¹. By its statutes the djB is dedicated to ensure equality of women and men and especially to the fight against disadvantages for women. Accordingly, this contribution concentrates on the gender dimension of the future Constitution of Europe, with a special focus on overcoming disadvantages for women.

2. In this respect, the djB would have expected that the process of composing a Constitution for the European Union builds on the *acquis communautaire* achieved as regards gender equality. Community law as part of the law of the European Union has greatly contributed to removing barriers to legal and factual equality within the Member States, including Germany. Starting with incorporating the principle of equal pay for equal work as early as 1957, the Community has proceeded from 1975 onwards with a bundle of legislation towards gender equality in employment, which is indeed at the heart of Community employment law. Within the administration of its social funds the Community was among the first to recognize "gender mainstreaming" not only as a policy development principle but also as a legal obligation for the Member States. With the Treaty of Amsterdam, this principle became part of primary Community law and binding for all Community institutions (Article 3 (2) EC). At the same time, gender equality and the combat of inequality became aims of the Community (Article 2 EC). Acknowledging that gender equality is not only disturbed in the employment market, but also on other markets, the Treaty foresees a general competence for the Community to combat discrimination (Article 13 EU). The

¹ Praesidium of the Convention, Preliminary draft Constitutional Treaty, 28 October 2002, CONV 369/02, Lamoureux Francois et al, Feasibility Study: Contribution to a Preliminary draft Constitution of the European Union, Working Document, 4 December 2002

Commission has started the preparatory works for legislation to overcome discrimination against women in the distribution of services and goods based on this provision.

3. Outside the Community framework, the European Union has been less consequent in its commitment to gender equality. As regards the Treaty of the European Union, the combat against discrimination and positive action towards equality in is not explicitly mentioned (see Article 6 (2) EU); neither in relation to equality of women and men nor in relation to other characteristics which have served to justify social exclusion of persons, female and male, in the past. The Charter of Fundamental Rights for the European Union, while addressing gender equality through a specific article, does not explicitly commit the European Union towards furthering gender equality in fact and to overcome disadvantages for women. Such obligation would mirror not only the *acquis communautaire* and most constitutions of the Member States, but also their common obligations under the UN CEDAW. As it stands, the charter falls short of the richness entailed in the Member States constitutions, which no longer restrict themselves to a guarantee of formal equality, but explicitly embrace equality in fact as well.

4. Merging the EC Treaty, the EU Treaty and the Charter of Fundamental Rights for the European Union into a single constitutional treaty for the European Union thus implies a decisive step for the future of gender equality as a legal concept within the European Union: Is the process dedicated to maintaining the *acquis communautaire* on gender equality, will it deepen and widen its achievements by reference to the most progressive constitutional traditions of the Member States, in accordance with their international obligations under the said UN Convention? Or will constitutionalisation proceed on the road chosen by the European Union outside the Community framework and abandon the gender equality impetus maintained by the Community?

5. The djb expresses its disappointment that the suggestions for a future Constitution(al Treaty) for the European Union appear to abandon much of the Community tradition in favour of gender equality. Among the aims of the European Union, combating discrimination and furthering gender equality are no longer mentioned. It follows, that there is no longer a gender mainstreaming clause, which requires all the policies of the European Union to integrate the gender dimension and to contribute to greater equality in fact between women and men. Accordingly, the text of the Charter of the European Union is not improved in line with the most progressive constitutions of the Member States. The opportunity to expand the commitment to gender equality beyond the former confines of Community policy, especially in the human rights policy of the European Union or co-operation in the areas of police and justice, is in danger of being missed.

6. The djb urges the Convention not to let the opportunity pass and to create a Constitution of Europe which integrates gender equality as one of the prime aims of the Union. We demand that women in their diversity are accepted as fully worthy citizens of the European Union. To this end, the Constitution of the European Union shall respond to modern achievements in equality law in general and gender equality law in particular, to which the Community has hitherto greatly contributed.

7. In particular, the djb proposes the following points to be integrated in the future Constitution:

7.1. Combating discrimination and in particular furthering gender equality as an aim for the European

In order to maintain the *acquis communautaire*, equality between persons and gender equality in particular should be addressed in several instances in a future constitution or constitutional treaty: (1) As a foundation of the European Union, (2) as a reference to international obligations under CEDAW (as well as CERD), (3) as an objective of the European Union and (4) the principle of mainstreaming equality, especially gender equality, needs to be retained as a clear obligation for all Union institutions and the Union itself.

7.1.1. It is rightly suggested to start the future Constitution(al Treaty) with a reference to its values (see Article 2 *Praesidium* draft and Article 1 feasibility study). However; it is proposed to build upon Article 6 (1) TEU. As is apparent from the foregoing, this would mean giving up part of the *acquis communautaire*, which meant that the Community, over and above Article 6 (1) TEU, was committed to equality, especially gender equality. Accordingly, the values of the European Union should include a clear commitment to equality of all humankind, possibly stressing especially gender equality.

7.1.2 It is also proposed that the future Constitution(al Treaty) refers to international obligations in the area of human rights, both of the Union and its Member States. Such reference is now contained in Article 6 (2) EU. Again, retaining the wording of this Article in a future Constitution(al Treaty) would mean a retrograde in equality law, especially as regards gender equality: In this area all Member States are signatories to the CEDAW, which confers the principle of factual equality and an asymmetrical commitment to further the situation of women, as they have been denied the full enjoyment of fundamental freedoms and human rights in the past. If Article 6 (2) EU is widened by new principles, the opportunity should be used, to integrate the other human rights instruments of the UN. This is mirrored in the proposal towards Article 2 of the Constitution (praesidium draft)

7.1.3. The former objectives of the Community under Article 2 EC must not be reduced by the new Constitution(al Treaty). The djb strongly demands that equality of persons, especially between women and men, remains one of the European Unions objectives and is not lost in the process of merging Communities and Union to one Union. This is mirrored in the proposed addendum to Article 3 Constitution (praesidium draft)

7.1.4 This process would in fact pose an opportunity to elevate the issue of personal equality, especially gender equality, to the same status as is currently enjoyed by environmental protection. Accordingly, the djb demands that a commitment for all actions of the EU to the combat of discrimination and to ensuring full equality in fact between women and men is to be introduced in the future constitution (mainstreaming clause). This is mirrored in another addendum to Article 3 of the Constitution (praesidium draft)

7.2. Including the Charter of Fundamental Rights, adapted to modern gender equality law.

The djb strongly supports the proposal to fully integrate the Charter of fundamental rights into the future Treaty (see articles II-1 to II-55 of the feasibility study, which, however, leaves unresolved the ambiguous scope of application of its articles). However, this positive achievement also poses a challenging task for the Convention. It must integrate the *acquis communautaire* as well as modern developments of equality law, which are based on the acknowledgements of differences not only between women and men, but also between women. This cannot be achieved by adopting the Charter text as it stands. On the one hand, Article 23 of the Charter falls short of modern developments of equality law, on the other hands, Article 33 and 34 of the Charter convey traditional images of proper activities for mothers and fathers respectively, which have proved a barrier to full gender equality in practice in the past. Accordingly, these articles should be changed in the process of their integration into a Constitution(al Treaty) for the European Union. As regards Article 23, its first paragraph should be amended by a reference to the most important differences between women. This would also correspond better to Article 21 of the Charter than the present text. The second paragraph shall integrate an acknowledgement that positive action does not constitute a deviance from equality principles, but that such policy is necessary to achieve equality as guaranteed by the first paragraph. Article 33 and 34 should be re-drafted in such a way that they provide for parental leave as well as for maternity and paternity leave and that they clarify the Union's support for all forms of family life. (see suggestions for redrafting the relevant articles of the Charter)

Should, contrary to our the expectations, the Charter provisions not attain direct effect in the process of constitutionalization, the above mentioned Article 23 should be integrated together with Article 21 Charter in the first chapter of the Union, as equality and non-discrimination are indeed areas of community policy of outstanding relevance. Articles 33 and 34 of the Charter should be integrated into the social policy chapter.

7.3. Including a special title for equality policies and a special chapter for gender equality

If equality policy becomes an area of heightened importance within the social policy chapter, there remains the question whether a special chapter on equality politics is needed. Including such special chapter has its pros and cons. In favour of such special chapter it could be argued that thus gender equality policy receives its special GD (subdivision) as well. Against such inclusion, one could argue, that the principle of gender mainstreaming requires gender equality to be integrated into each and every area of the European Union's policy. Both arguments can be met. As has been the case in environmental and consumer policy, the equality chapter is capable of being drafted as an umbrella chapter, requiring the Union to consider equality between women and men in all its actions and, in addition, empowering the Union to adapt European Laws which are needed to bring about greater gender equality in fact and cannot be categorized in one of the sub areas of the Union's policies. Among the policy aims to be pursued within this special chapter is equal representation of women and men in the institutions, committees and other bodies of the European Union.

The djb requires such a specific policy area to be included in the new Treaty. Although the conditions for Union policies in general are not yet really clear, a few suggestions to this end are included in our proposal.

7.4. Including equality policy, especially equality between women and men as a proper policy area

Both drafts do not include equality policy, and especially policy towards equality between women and men, as a specific policy area of the European Union. Here, the feasibility study seems a little more progressed, while mentioning "equal treatment for women and men" as an element of the Union's social and employment policy (Article 19) and empowering the Union to lay down by European Law measures to combat any discrimination as referred to in Article II-21 (1), which includes gender discrimination (Article II-46). However, in contrast to other policy areas, the feasibility study does not dedicate a separate Article to this important task. Instead, there is one Article for social and employment policy as well as equal treatment for women and men. This would lend itself to the conclusion that equal treatment for women and men only matters in relation to social policy and employment policy. While this would allow for separate chapters on social policy, employment policy and equality policy within the broad area of improving working and living conditions, this is still a rather restrictive approach.

A more inclusive approach would not restrict the combat of inequality must to the narrow confines of social policy. The principle of gender mainstreaming, as addressed above, builds on the assumption that (gender) equality matters to each and every area of Union policy. Accordingly, equality, including gender equality, should be a policy area separate from social policy.

At the same time, within social policy gender equality policy is now most advanced. Accordingly, the European Union should go beyond equal pay in this area. Engendering equality in fact in employment and furthering the reconciliation of employed work and care for both women and men should not only be policy areas in which the Union has competences to regulate, but also specific norms within the social policy chapter. These areas should remain within the social policy chapter, as they are – according to the gender mainstreaming principle – a central element of social policy. Therefore, they should also be subject to the specific legislative procedure under participation of the European social partners, which the European Union will probably retain, given its achievements in the past. Any other course of action would resolve the social partners from their responsibility towards gender equality.