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Subject : Contribution from M. Andrew Duff and M. Alain Lamassoure, M. Olivier Duhamel, M. Karel De Gucht, Mme Sylvia Kaufmann, M. Josef Zieleniec, members of the Convention, and Mme Pervenche Berès, alternate member.

"Issues of competence and subsidiarity, and confusion arising therefrom"

The Secretary General of the Convention has received the contribution annexed hereto.

JOINT CONTRIBUTION ON THE ISSUES OF COMPETENCE
AND SUBSIDIARITY, AND CONFUSION ARISING
THEREFROM.

From M Andrew Duff and M Alain Lamassoure, Mme Pervenche Berès, M Olivier Duhamel, M Karel De Gucht, Mme Sylvia Kaufmann, M Josef Zieleniec.

As the debate unfolds about the division of competence in the future Union, we offer this contribution to the Convention. It reacts in particular to CONTRIB 46 (CONV 88/02) from Mr Glotz, Mr Hain, Mrs Hübner, Mr McSharry and Mr Moscovici, of 14 June, in which a new parliamentary body is proposed.

We agree with our colleagues that the Convention should deliver to the Intergovernmental Conference a large consensus on a text that establishes "a clear and sensible division of labour". We also agree that a classical catalogue of competences is not the answer. We, like them, prefer a looser categorisation.

The principles

Nobody contests the fact that the European Union lacks the power of constitutional self-determination. Only the member states, and their peoples, are empowered to give the Union its Constitution. Nevertheless, while it is important to make it explicit that the rights of member states are guaranteed in the Constitution, it is equally important to achieve an equilibrium between the rights of the states on the one hand and the rights of the Union on the other. The Constitution, after all, will be addressed to, and bind, not only the Union (and its citizens) but also its member states.

No set of constitutional principles on how competences should be exercised would be balanced, or therefore complete, without a comprehensive statement to the effect that:

1. The Union must be empowered to govern in pursuit of its constitutional objectives.
2. The Union will respect the national identities of the member states.
3. The actions of the Union shall not go beyond what is necessary to achieve its objectives.
4. The Union shall fulfil its objectives in a manner demonstrating consistency, openness and solidarity.
5. Decisions will be taken as closely as possible to the citizen without impairing the effective operation of the Union.
6. Member states shall not jeopardise the Union's efforts to achieve its objectives, and they shall refrain from actions contrary to the interests of the Union.
7. The constitutional prerogatives of the member states shall apply except where they are inconsistent with the Constitution of the Union.¹

Checks and balances

In their contribution, our colleagues advocate "a procedural strengthening of control ... by national parliamentarians acting collectively, being those close to the citizens, or by some form of body mandated by the Council".

Let us leave aside, for the moment, the claim that national parliaments are close to the citizens when it comes to EU affairs.

But are new checks and balances really needed to ensure that the constitutional allocation of competences is not abused and that the EU applies in practice the principle of subsidiarity?

Do national parliamentarians use fully either the scrutiny powers they have under the Treaty or their own, domestic accountability procedures? ² What precisely is the great wrong that the imposition of a new institutional body of national parliamentarians at EU level is expected to right?

¹ These principles of governance are drawn largely and adapted from existing Treaty texts, notably Articles 1, 3, 4, 6.3, 6.4 & 11.2 TEU and Articles 5 & 10 TEC.

² Protocol on the role of national parliaments in the European Union, Treaty of Amsterdam.

The Council is the pre-eminent institution of the Union. It has the power to stop action being taken at the Union level that would damage states' rights. The Council is composed of government ministers who not only share an interest in self-preservation but who also represent the collective interest of national parliaments.

Are national parliaments really that disgruntled at the performance of the Council that they would seek to second-guess and even undermine it?

If national MPs cannot comprehend what the Council is doing, it is no doubt because of the lack of openness in the Council's legislative proceedings. Nothing will make a more dramatic contribution to 'policing subsidiarity' than open law-making and the publication of what ministers say and how they vote in Council.

While the relevant Working Groups will be making proposals to enhance the role of national parliaments and to better apply the principle of subsidiarity, there are several important objections which must be raised at this juncture about the establishment of a specific new body of national parliamentarians to intervene in the decision-making processes of the Union. They are as follows:

1. It would offend the principle of the separation of powers by treading on the prerogatives of the European Parliament. As a throw-back to the pre-1979 European Parliament, it would be a reactionary step.
2. It would quickly prove to be highly impracticable, as the gathering of national MPs, suffering 25 or so different mandates, timetables and work-loads tried to cope with the large volume of complex draft EU law.¹
3. The representative capability of the national MPs in their new forum would be highly suspect. Those from Europe's stronger parliaments would struggle to articulate a single coherent view, while those from weaker parliaments would be likely to become mere puppets of their governments.
4. Given that the EU already enjoys, in the Council and the Parliament, a bicameral legislature, the creation of a third chamber would be an unaffordable luxury. The political system would become even more slow, opaque and confusing than it is now.

¹ How often would they be able or willing to meet? Mr Hain has suggested six times a year. And would the MPs sit in national delegations, as in the Council, or in party political groups, as in the European Parliament?

Our firm rejection of the idea of a new EU parliamentary body does not mean that there are not several imaginative ways, including possible new procedures, in which national and, indeed, sub-national parliaments can be better integrated into the fabric of transnational, even post-national parliamentary democracy.

Judicial remedies

Moreover, there are vital judicial checks on the Constitution through the operation of the European Court of Justice. The Court enjoys a range of powers for ex-post constitutional control. These include the rights to annul an act in breach of the Treaty (Article 231), to insist on rectification of a fault in the act or failure to act (Article 233), to settle damages (Article 235), to arbitrate a dispute (Article 239), and to suspend an act (Article 242). The existing judicial remedies could be supplemented with others, such as the right to issue an injunction, and they could be made more generally available to a wider range of parties.¹

It is also essential to extend the purview of the Court across the whole spectrum of Union competence. Granting legal effect to the Charter of Fundamental Rights, the acquisition of international legal personality and the abolition of the three pillar system of Maastricht would further significantly develop the Court's role as the supreme constitutional judicature.

Article 308 revised

Our colleagues propose that "the mechanism of Article 308 TEC could be used to allow for competences to be restored to member states". But Article 308 does not give the Union a power of general competence, *kompetenz-kompetenz*. The clause, which is often misrepresented, explicitly allows the Community to "take the appropriate measures" for the attainment of its objectives "in the course of the operation of the common market" if the Treaty "has not provided the necessary powers". In other words, Article 308 is only to be used to expand the range of attributed competences in order to meet some presumed necessity for action stemming from existing Treaty objectives.² Only a Treaty amendment can redistribute competences in a general fashion.

¹ Especially by the revision of Article 230(4).

² Certain other competences have been attributed as a consequence of the implicit parallelism between the Union's external and internal duties. But both methods of assuming more competence by the Union have had to be justified in functional terms and legitimated by a democratic decision.

The choice of Article 308 to appropriate powers is deliberate and not capricious. The Council has had to act by unanimity to make the specific choice of legal base, and has done so over 700 times. One may wonder at the performance of government ministers in Council who allege some unstoppable, creeping aggrandisement on behalf of the Union while at the same time being themselves content to exploit Article 308.

However, in order to meet criticisms about the use and form of the existing Article 308, one could broaden its scope by removing the constraint of the common market and widen its level of protection to ensure that the appropriated measures, once having attained the necessary objective, could be dropped thereafter.¹

As far as the decision making procedure is concerned, it is essential, in the more democratic Union, to up-grade the role of the European Parliament. It might also be sensible to grant to national parliaments the right to be consulted, as follows:-

"If action by the Union should prove necessary to attain one of the objectives of the Union and this Constitution has not provided the necessary powers, the Council and Parliament, on a proposal of the Commission [and after consulting national parliaments], shall take the appropriate measures.

"Where such action has attained the said objectives of the Union, the appropriated powers may be relinquished according to the same procedure."

¹ See CONTRIB 52 (CONVENT 123) of Mr Dini.