

CONV 465/02

CONTRIB 175

COVER NOTE

from Secretariat

to The Convention

Subject : **Contribution by Mr Andrew Duff, member of the Convention**

"The preliminary draft constitutional treaty (CONV 369/02): a comment"

The Secretary-General of the Convention has received the attached contribution from
Mr Andrew Duff, member of the Convention.

**THE PRELIMINARY DRAFT CONSTITUTIONAL TREATY (CONV 369/02):
A COMMENT**

The publication of the Preliminary Draft Constitution is very welcome. The skeleton provides the Convention with an important object for reflection and subject for debate.

My specific comments are as follows:-

PART ONE

Article 1

The dual legitimacy of the Constitution should be recognised, of states and citizens.

Articles 7-8

It would be helpful to have early on in the Constitution a clear description of where power lies in the Union. This may be achieved by contrasting in broad terms the executive function of the Commission, notably to ensure the implementation of EU law and policy at European level, with that of the Member States, whose responsibilities for the same lie mainly at national level.¹ As it stands, **Article 8** is inaccurate to say that "the acts of the institutions are implemented by the Member States".

The Convention has determined to make a greater contrast than exists at present between executive and legislative power. Achievement of this objective could be assisted in a neat clause laying down that the Union legislature comprises the Council and Parliament, and that the executive comprises the Commission with the exception of certain actions in the fields of economic policy, CFSP and police, where the Council has executive functions.² The more specific provisions about the instruments at the disposal of the EU, how laws are made and by whom, how measures are implemented and how the process is monitored find their proper place later on (**Articles 24-32**). But people will tend to read the Constitution from the beginning, and deserve to be able to see the overall picture of who's in charge up front.

Articles 9-13

Are we reverting here to something close to the very catalogue of competences that the plenary has firmly rejected?

I do not find that the rigid categorisation suggested in these articles helps one to understand how competent the Union is to act effectively at home and abroad in the common interests of member states and citizens - especially when the Convention has been concerned, quite properly, to enhance competency rather than to restrict it.

¹ See for example Articles V & X in my contribution CONV 423/02.

² See for example Article 7 in my contribution CONV 234/02.

In general the Constitution should not give the impression that some competences are more important than others. All that has to be made clear is that the Union's responsibilities differ from one competence to another.

I am particularly uneasy about the concept of 'exclusive competence'. This was introduced in Article 5 TEC by Maastricht but is nowhere defined. A legalistic definition of what the exclusive competences of the Union are gives no true impression of what the Union is really for or what its capabilities are.

Surely the constitutionalisation of the Union allows us to adopt a more permissive approach to the delimitation of competences? Naturally, the EU has its major or principal competences, but it should also be enabled to act in most other areas as and when a perceived need arises. Article 152, for example, restricts the actions of the Union in the field of public health. However, faced with the threat of bio-terrorism, can these provisions be deemed truly sufficient? At any rate, **Article 12** is surely at fault in saying that EU legislation is not possible in the field of complementary competences.

In **Article 13** one must not give the impression that foreign, security and defence policies are not Union common policies. Member States may indeed be in the driving seat, but they are still acting on behalf of the Union.

Title IV

The question of inter-institutional concordats has to feature somewhere. In particular, there needs to be a definition of the multi-annual policy strategy and of the annual legislative programme, and of where responsibility lies in establishing them. This issue relates directly to the powers of the presidencies of the European Council, Council and Commission.

In **Article 14**, the institutions should be made responsible for their own working methods and arrangements.

Reference in **Article 16** should be made to the Ombudsman.

Article 23

It should be made clear that these advisory Committees are not fully-fledged institutions of the Union. They are not privileged litigants at the Court of Justice other than in defence of their own constitutional prerogatives.

Article 28

As a result of the Christophersen and Amato Working Groups and the ensuing debates in plenary, this clause is now redundant.

Articles 29, 30, 31

As a results of the Amato Working Group these clauses could be amalgamated into one.

Article 32

I have yet to be persuaded that we need to retain the general provisions for 'enhanced cooperation' in anything like their present form. Instead, the possibility of an associate membership of the Union could be considered. This would obviate the need for a separate Title IX on the Union's neighbourhood.

Title VI

This section on 'democratic life' is surely the place to refer to the importance of sub-state tiers of government, and to the important relationship between EU institutions on the one hand and regional authorities with legislative powers and municipal authorities on the other.

The role of national parliaments might also feature here, with the possibility of their establishing a code of conduct with the EU institutions.¹

Title VII

Reference must be made somewhere to the fact that the Union is competent to defend its own financial interests.

Article 43

I am not sure it is felicitous to insist on a European location as a precondition for EU membership. Thresholds for accession could be better defined in terms of liberal democracy and market economics rather than of geography, culture, religion or history.

PART TWO

The compilation and ordering of the list of policy sectors needs more discussion in the Convention. From the present draft, however, I note in particular the absence of any reference to energy policy.

The heading 'Internal Security' should be coupled with 'Justice' to signal that judicial cooperation is a vital part of European integration.

PART THREE

Article x + 3

Provision should also be made for a separate amendment procedure for Part Two.

¹ See CONV 326/02.