

CONV 758/03

CONTRIB 335

COVER NOTE

from Secretariat

to The Convention

Subject : Contribution by Mr Andrew Duff, member of the Convention and Lord MacLennan of Rogart, alternate member of the Convention :
“The Constitutional Court System”

The Secretary-General of the Convention has received the contribution annexed hereto from Mr Andrew Duff, member of the Convention and Lord MacLennan of Rogart, alternate member of the Convention.

Contribution by Mr Andrew Duff, Member of the Convention**THE CONSTITUTIONAL COURT SYSTEM**

This contribution is a reaction to the Praesidium's paper CONV 734/03 on the Court of Justice and the High Court. It challenges the paucity of the reforms proposed, first in respect of the rights of the individual to approach the Court, and, second, with regard to the scope of the Court's supervision.

We urge the Convention to follow the logic of its decision to constitutionalise the European Union, and to provide legal certainty and adequate means of judicial redress for all concerned as the competences of the Union and the powers of its institutions grow.

Article 230.4

The judicial construction accorded to the fourth paragraph of Article 230 has been strongly criticised in the Convention, in the academic literature and by members of the Union's judiciary. The problem was well described in Working Document I of the Discussion Circle on the Court of Justice.

As things stand, it is extremely difficult for an individual to challenge directly a Union act, which is not addressed directly to him, even though the act may have direct and serious consequences for him. There are moreover a number of difficulties, practical, procedural and substantive, in challenging such acts indirectly through Article 234.

The Praesidium's proposed version of Article 230(4) does little to alleviate the difficulties faced by those who seek directly to challenge the legality of Union action. It leaves the existing law in place, subject only to a relatively minor modification for regulatory acts that do not require implementing measures.

The proposed amendment would provide a test for direct access under Article 230(4) that is much closer to the rules pertaining in the Member States. It would lead to a more rational distribution of case-load between the Court of Justice and the High Court. It would enhance the legitimacy of the Union by strengthening the rule of law, in respect of challenges to acts on the grounds listed in Article 230(2), including challenges for breach of Charter rights.

It should be borne in mind that the possibility of cases being joined will prevent the 'floodgates' from opening. Once the Court of Justice or the High Court has pronounced on the legality of the contested measure in relation to a claim brought by an applicant who was deemed to have his interests essentially affected, that would be the end of the matter. The Court's decision would resolve the issue in relation to any other possible claimant unless he could raise some new legal argument that had not been addressed in the earlier case.

Moreover, providing citizens with greater direct access before the Court of Justice and High Court would lead to a decrease in the number of preliminary references raised via Article 234 TEC.

Arguments about limited resources should not be allowed to affect the question of how best to guarantee effective judicial protection for Europe's citizens.

Proposed new draft for Article 230:

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4. Any natural or legal person may, under the same conditions, institute proceedings against **an act addressed to that person or which is of direct concern to him, and *has, or is likely to have, a substantial adverse effect on his interests.***

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Article 240a

The decisions of the Convention to seek a legal personality for the Union and to install the Charter of Fundamental Rights within the Constitution have important implications for the scope of the supervision of the Court of Justice. Certainly there can be no a priori reason why common foreign, security and defence policy should enjoy a derogation from judicial oversight - especially in circumstances where the salience of Union activity in this area is set to increase.

The Union must establish a judicial regime that covers the full spectrum of its competences (whether exclusive or shared) and the exercise of all its powers. Examples of Union action in the field of CFSP will include political sanctions against individuals, the actions of the Union's relevant agencies (including the Agency for Armaments and Strategic Research), and the actions of EU police or armed forces in the field. The Union also has employment and resource responsibilities in CFSDP.

Under the existing Treaty on European Union, and despite the general prohibition of the supervision of the Court in CFSP matters (Article 47), the Court has the right to ensure that CFSP agreements do not encroach on first pillar prerogatives (Article 46). As the Praesidium itself states:

"Currently, where action in the CFSP sphere provides for economic sanctions against a third country, implementing measures at Community level are required; these are taken on the basis of Articles 60 and 301 TEC. In the case of economic sanctions against individuals Article 308 TEC is used. However, the Council has interpreted Articles 60 and 301 TEC broadly, using them as a legal basis for adopting sanctions against persons or associations which actually exercised control over a country or part of a country. The Court already exercises its judicial control with regard to all such implementing acts in accordance with the EC Treaty."

We welcome the Praesidium's proposal to allow the Court the jurisdiction to give a preliminary opinion on the compatibility of a proposed international agreement under CFSP (Article 300(6)).

We also note the Praesidium's proposal to explicitly permit the adoption of economic sanctions against individuals in Article 31 of Chapter 4 of Title B (External action). Clearly, in the cases covered by this provision, the Court exercises judicial control. However, the question of whether there could be actions brought by individuals against political sanctions adopted on the basis of CFSP decisions, such as the prohibition of entry into the Union, the free movement of persons or the refusal of visas, is left open. In our view, the possibility should be established for persons directly and individually affected by, say, a visa ban, to challenge the decision before the Court of Justice, and to seek both damages and the annulment of the measure in question.

We would also wish, at the very least, to permit a member state or an institution to bring an action for annulment against CFSP acts adopted in "infringement of an essential procedural requirement" (Article 230.2).

Given the special, governmental nature of foreign policy and security matters, we do not advocate that the Court should have precisely the same powers over CFSDP as it has over the areas currently covered by the Treaty establishing the European Community. For example, it would be stretching credulity to allow an application to the Court for an alleged failure to act in CFSP (Article 232).

However, it strikes us as axiomatic that the Court should be able to strike down any action of the Union, at home or abroad, that was taken in violation of the Constitution.

We also want to extend the Court's powers to rule over breaches of international law agreed by the Union's member states. It would be anomalous that the European Court of Human Rights at Strasbourg could exercise external scrutiny on the foreign policy actions of the Union, but that its own home-grown courts at Luxembourg were forbidden from doing so.

Article 240b

We apply much the same argument to the question of the Courts' supervision of the Union's activities in the area of freedom, security and justice as we do to CFSDP (Article 240a).

The decision to merge the third pillar with the first absolutely requires the suppression of Article 35.5 TEU. Nobody would understand why the Convention had sought to restrict the supervisory scope of the European Court of Justice over matters so sensitive to the citizen. How is it possible to justify the exclusion of Europol, for example, from judicial supervision?

Already, Articles 1 and 9 of Part One, as well as the horizontal provisions of the Charter, insist on respect for both Union competence and national law. Together they comprise an adequate constitutional safeguard.

We have already put in an amendment to delete this provision from the Title in Part II on the Area of Freedom, Security and Justice (Article 9).
