

# What constitutional future for Europe?

It has long been held that only states can have democratic constitutions. What then about the European Union? Many strongly deny that the EU has a constitution. But if the Union does not have a constitution, it becomes very difficult to explain how the Union was established, and how it has become such an important player in Europe, and indeed in the world. How could such an organisation that has such a direct impact on the member states' constitutional arrangements endure without a constitution to operate through? And yet, it is obvious that there is no text or set of norms that is widely and uncontroversially referred to as the European Constitution.

In the EU we see efforts to develop a democratic constitution as well as a process whereby national constitutions are becoming Europeanised. One of the questions asked by RECON is if these processes are likely to foster democracy at the European level, and if so, how? Can the EU develop a democratic constitution? If not, can the EU become a viable democracy without a democratic constitution? Equally important, will the EU undermine or consolidate national democracy?

Addressing these questions, RECON researchers have investigated the history of European constitutional law and politics and have developed a theory of 'constitutional synthesis', which captures the distinctive traits of EU constitutionalism. Moreover, RECON has examined national constitutional adaptations to European integration. The Constitutional Treaty and process and the Lisbon Treaty and process have been evaluated and compared, including party-political behaviour in EU treaty referendums in 2005.

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## Selected findings

- **The Lisbon Treaty did not clarify the EU's constitutional character, but has rather caused more uncertainty and ambiguity**
- **Further rounds of reforms and EU citizens' explicit consent are needed for the EU constitution to be legitimate and sustainable over time**
- **European integration has made national constitutions more transnational**
- **The ratification procedures used for EU constitution-making remain determined at the national level**
- **The EU's constitutional processes – as is also the case in Canada – have been closed and executive-driven: in both cases the problem is the lack of openness and democratically accountable processes**
- **The ability of governing parties to secure the support of their own constituencies remains crucial in winning national referendums on EU Treaties**



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**Read more on the findings in the following pages**

More details and publications from the research field 'The Constitutionalisation of the EU, the Europeanisation of National Constitutions, and Constitutionalism Compared', including all RECON reports and working papers mentioned in the below, are available at:

[www.reconproject.eu](http://www.reconproject.eu)

## A new theory of EU constitutionalism

Although the Lisbon Treaty was framed by the European Council as not being a constitution, RECON finds that the EU has a *material constitution*. This means that in social practice it works as a constitution, but it does not qualify as a democratic constitution.

Democratic constitution-making is at stake after the Lisbon process, which reverted back to diplomatic procedures. A distinguishing feature of the EU's material constitution is that it is conditioned on compliance with the common constitutional traditions of the member states and their democratic norms. Whereas the Lisbon Treaty contains democratic reforms, it has increased uncertainty about the status of this constitutional-democratic license from the member states by explicitly stating that Lisbon is a *treaty* and not a *constitution*.

RECON researchers have analysed the EU's constitutional developments and developed a theory of 'constitutional synthesis'. This is set out in a book which explains why and how the European Communities were established as the first constitutional union of constitutional states wherein integration would be steered by constitutional law, not power politics or imperialism. It explains why the process of forging the Lisbon Treaty should be seen as a new beginning of the EU's constitutional season, not its end, as well as the constitutional problems the EU is currently facing.

### Read more

*The Constitution's Gift*, John Erik Fossum/Agustín José Menéndez, Rowman and Littlefield, 2011

## The Lisbon Treaty – at the cost of democracy?

**Evaluating the Treaty of Lisbon in comparison with the original Constitutional Treaty, and analysing the importance of the people's consent, it is fair to ask if saving the treaty came at the cost of democracy.**

The negative results of referendums on the EU Constitutional Treaty in France and the Netherlands, and subsequent low-key adoption of the Treaty of Lisbon raise complex questions about the possible democratisation of the EU. Drawing on the Convention on the Future of Europe, which drafted the Constitutional Treaty, and the referendum in the Netherlands, an original political theory of democratic constitutionalisation beyond the nation state has been outlined within RECON. Providing a full analysis of the EU

Constitutional Treaty process, it is argued that international organisations can be put on democratic foundations, but only by properly engaging national political structures.

### Read more

*Learning from the EU Constitutional Treaty*, Ben Crum, Routledge, 2012



## Party-political behaviour in Treaty ratification

**How was the party-political behaviour around the referendums on the EU Constitutional Treaty?**

In the four countries which held a referendum on the Constitutional Treaty in 2005 (France, Luxembourg, The Netherlands and Spain), the electorates turned out to be considerably more sceptical about the Constitutional Treaty than their parliamentary representatives were. RECON has studied the domestic government-opposition dynamics in these countries, as well as in six member states where a referendum was anticipated in 2005. With the exception of some

### Read more

'Party stances in the referendums on the EU Constitution', Ben Crum, *European Union Politics*, 2007

right-conservative parties, all mainstream political parties endorsed the Constitutional Treaty. However, opposition party supporters were bound to be divided on the issue. This study demonstrates that the ability of government parties to secure the support of their own constituencies was crucial in securing a majority in favour of EU Treaty ratification.

## Still national over transnational democracy?

**National constitutions have not merely responded to European integration in a defensive way; to some extent they have also been transformed to become more transnational in their content.**

The Europeanisation of national constitutions supplements and completes the unfinished process of constitutionalisation of the EU. But the ratification procedures in EU constitution-making conform more to a view of democracy as associated with the national level. Legitimacy derives from national processes of will formation, and states, not citizens, are part of a contractual order. Thus, ratification procedures are determined domestically and their democratic quality is assessed at the national level. Despite the involvement of citizens through referendums on the EU constitution, there is little evidence of more structured patterns of transnational discourse and deliberation.

### Read more

*The Lisbon Treaty and national constitutions*, Carlos Closa (ed.), RECON Report 9, 2009

RECON has set up a **Website on the Europeanisation of National Constitutions**, which offers a comprehensive overview of how national constitutions are adapting to the process of European integration (*see more on p. 39*).

## Lessons from other constitutional processes

**RECON has found interesting parallels between the EU and Canada, where the province of Quebec has refused to sign the Constitution Act 1982.**



Currently the important difference is that in Canada there is disagreement over *what kind* of constitution; whereas in the EU there is disagreement over whether the EU *should or could* develop a democratic constitution. Nevertheless, the EU and Canada followed the same pattern. First, a closed executive-led process failed to find agreement. Then there was an opening up to a broader and more democratic process, but also this failed. Finally, the process was again closed, but the outcome was either rejected or significantly downscaled in constitutional symbolic terms. The efforts to open the process took place within a framework of executive-led constitution making. These were complex and set up to harmonise the

needs and requirements of multiple constitutional *demoi*, or peoples.

These processes show that the EU and Canada, both of which have highly complex systems of rule can hardly rely on a stable agreed-upon constitutional framework. Instead, their viability depends on a set of procedures that ensure ongoing accommodation of difference and diversity in a manner consistent with democratic norms.

In the case of the EU constitution, there are weighty normative and empirical reasons for doubting that it will be sustainable, rather than defaulting to a traditional form of international cooperation, without securing the explicit consent of its citizens. In contrast, the Canadian polity has the democratic institutions to sustain a constitutional structure.

### Read more

'Constitutional patriotism', John Erik Fossum, in *Constituting communities*, Mouritsen/Jørgensen (eds), Palgrave Macmillan, 2007

'On democratizing European constitution-making', John Erik Fossum, *Supreme Court Law Review*, 2007