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RECON
Reconstituting Democracy in Europe

Integrated Project
Priority: 7 - Citizens and Governance in a Knowledge-Based Society

Deliverable No. 68
Workshop on ratification of the Lisbon Treaty

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Lead contractor for this deliverable:
Partner 22 CSIC
Spanish National Research Council, Spain

Final Version

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	
PP	Restricted to other programme participants (including the Commission Services)	
RE	Restricted to a group specified by the consortium (including the Commission Services)	X
CO	Confidential, only for members of the consortium (including the Commission Services)	

1. Introduction

RECON Deliverable No. 68 – *Workshop on ratification of the Lisbon Treaty* is part of work package 2 – The Constitutionalisation of the EU, the Europeanisation of National Constitutions, and Constitutionalism Compared. This WP analyses the impact of the dual processes of EU *constitutionalisation* and *Europeanisation* of national constitutions on the reconstitution of democracy in Europe. Are these processes likely to foster supranational democracy, and if so, how (i.e. along the state-based lines of Model II or along the cosmopolitan-based lines of Model III)? Will they undermine or consolidate national democracy? This WP also derives lessons from the likely defunct Laeken constitutional experience and sees this in light of relevant non-European cases of contemporary democratic constitution-making.

WP 2 tracks the development of the constitutional dimension as it unfolds at the EU and member state levels. With the main lessons from the Laeken process having been established in the previous reporting period, work in the final project year, on the one hand, would take stock of the eventual adoption and implementation of the Lisbon Treaty and, on the other hand, seek to evaluate implications of the EU constitutional experience from a broader, comparative and theoretical, perspective. On this basis, the WP would be able to conclude on: how RECON models allow the EU constitutionalisation process to be captured and evaluated; what this entails in constitutional terms, and; establish which RECON model the European constitutional edifice best reflects.

2. Presentation of the workshop

This two-day workshop entitled ‘European Constitutional Pluralism and the Constitution of the Union’ was the concluding workshop of RECON’s WP 2. It was organised by Carlos Closa (Spanish National Research Council, CSIC) and hosted at the Center for Political and Constitutional Studies in Madrid. The workshop gathered participants from RECON’s WP 2 on constitutional politics as well as other work packages. Among the 11 discussants and paper givers were also three external researchers – Paul Blokker, Bruno de Witte and Saskia Hollander.

RECON's work package 2 focuses upon three interconnected research themes: the constitutionalisation of the EU, the Europeanisation of national constitutions, and comparisons of constitutionalism in the EU and in other selected entities. This research endeavour provides necessary input to the assessment of how constitutional factors respectively increase or decrease the democratic legitimacy of the supranational and the national levels in relation to each of the RECON conceptions of democracy. The research also aims to identify which RECON model European constitutional practice approximates to and how well the processes and the results of European constitutional practice reflect democratic requirements.



From left: Bruno de Witte, Agustín José Menéndez, John Erik Fossum, Carlos Closa and Rainer Nickel

The key topic of this concluding RECON constitutional workshop was the question of how Europe understands and manages its underlying constitutional pluralism that stems from at least two important features of European constitutional practice. Firstly, the European Union should be properly described as a constitutional union of already existing constitutional states. Secondly, European integration would be realized through institution-building. The fledgling supranational institutional structure was not only incomplete, only to be completed over time, but was also not placed in a hierarchical relationship vis-à-vis national institutional structures. As a result, the European constitution is a regulatory ideal grounded in a pluralistic set of constitutional norms and in a plurality of institutional structures, without a vertical hierarchisation of them.

The workshop was organized around three sessions. The first session ‘Theorising EU constitutionalism’ opened with a co-authored paper by co-leader of WP 2, John Erik Fossum (ARENA, University of Oslo) and leader of WP 7 Agustín José Menéndez (University of León) on the theory of constitutional synthesis. They affirmed that it is impossible to understand the EU’s constitutional order without taking into account the national constitutional arrangements, which are the pillars of the EU constitutional order. In their opinion, the common constitutional norms at the EU level should not be understood as a hegemonic constitutional order but rather as a norm that relies on the constitutional traditions of the member states. They highlighted the fact that representative governments are a key factor in understanding the system of constitutional synthesis, a system that is based on imbrications and inter-dependence.



From left: Carlos Closa, John Erik Fossum and Saskia Hollander

Rainer Nickel (Johann Wolfgang Goethe University) presented a paper on conflict of laws and raised the question of how conflict of laws can contribute to the legitimation of the EU. Nickel asserted that institutions erected by international treaties often lack democratic legitimacy and accountability. In addition, he noted the role of international tribunals in the constitutionalisation of the international legal order and that the European Convention on Human Rights (ECHR) has become an important element of the European constitutional order. The case of Bosnia and Herzegovina was presented as an example of vertical constitutionalism as in 2009 the ECHR had to decide whether one provision of the Constitution of Bosnia violated higher laws, i.e. the ECHR. Rainer Nickel concluded by arguing for the need of constitutional pluralism in the EU due to the incomplete constitutionalisation in the European Union.

According to Paul Blokker (University of Trento), who acted as a discussant of the session, the idea of constitutional synthesis and the idea of conflicts of laws are both, albeit in different ways, looking for some kind of a monistic order. In his opinion, both papers focused on the democratic legitimacy, a debate that is missing in the literature. He sustained that the theory of constitutional synthesis is a way of overcoming conflicts and emphasized the need to reflect more over the domestic forms of pluralism and conflicts. Bruno De Witte (University of Maastricht) agreed that the EU has become a sophisticated institution with many

constitutional features taken from national constitutional traditions. However, he warned that it is also an international organization and concluded that the legal order of the EU has been built bottom-up but and that states continue to be the masters of the treaties. During the debates the relationship between WP 2 and WP 9 of the RECON project was discussed.

The second session 'EU democracy and the Lisbon Treaty changes' started with a paper by Christopher Lord (ARENA) who welcomed the idea of compound representation at the EU level but argued that this idea does not guarantee in itself a good representation – a form of representation that is democratic and controlled by citizens. He added that democracy is not distinctively defined by the satisfaction of desires/needs or preferences, but by the exercise by citizens of rights of control. Finally, he argued that lumping together different channels of representation may not automatically add up to good representation, and that so far the EU is configured in a way that is unlikely to deliver the benefits of compound for of representation.

Aleksandra Maatsch (CSIC) presented a paper in which she argued that citizen-related functions of national parliaments are central in fostering democratic control of EU policies. She discussed the way in which national parliaments' functions were challenged by the European integration process and how national parliaments have adapted to functioning in a multi-level polity. She also discussed national parliaments' role in the European Security and Defence Policy. In her opinion, the new mechanisms introduced by the Treaty of Lisbon create a possibility for national parliaments to strengthen their control of the early stages of policy-making not only by engaging in debates at the national level, but also within the framework of transnational organizations.



From left (facing): Ulrike Liebert, Aleksandra Maatsch, Christopher Lord, Ben Crum

Bruno de Witte expressed the challenge for national parliaments to control the decisions taken by their governments in 'grey areas'. In his opinion, the biggest advantage of the EU Council as compared to other institutions is that the EU Council can be split into groups by some gathering as heads of government to discuss a particular matter instead of as members of the EU Council. The EU Parliament does not exercise any control over such configurations, but the national parliaments can control the actions of their own governments in this way.

The third session 'Constitutional reform or treaty change?' was opened by a paper by Carlos Closa in which he discussed the rule of unanimity in the ratification of EU treaties. This line of research is part of a forthcoming book on EU treaty ratification. After presenting the origins and evolution of the rule of unanimity in bilateral and multilateral treaties he introduced four arguments against the rule of unanimity that were related to equality, efficiency and the character of EU constitutionalisation, fairness, and the use of consent, respectively. Closa argued that referendums in themselves cannot explain the failure of ratification, but rather the states and their size. He highlighted the possibilities for bargaining that the rule of unanimity creates since each state has a veto power. The maintenance of the unanimity rule is due to the

strict construction of the treaty amendment procedure, he claimed, before drawing three conclusions. First, the rule of unanimity shields national governments from the cost of failure of the treaties they have negotiated. Second, it allows for the potential externalization of courts, and third, it creates a highly specific constitution with a strong conservative bias.

Saskia Hollander (Radboud University Nijmegen) presented a co-authored paper with co-leader of WP 2 Ben Crum (Vrije Universiteit Amsterdam) on the drivers of the use of EU referendums. The authors exposed two arguments for the use of referendums: a constructivist one, based on the recognition that there are certain issues that go beyond the effective scope of established parliamentary procedures; and a rationalistic one which affirms that the decision to hold EU referendums is controlled by national political elites to pursue their electoral interests in national politics. They found limited evidence for a pure constructivist argument, and the evidence for normative arguments were not persuasive either since the decisions of holding a referendum result mainly from domestic electoral considerations. In conclusion they affirmed that referendums are a tool that governments may use whenever major EU decisions coincide with electoral challenges.

Bruno de Witte, acting as a discussant, raised the question as to whether a decline in EU referendum provides in itself conclusive evidence for rejecting the constructivist argument. He also wondered whether we are going to see Euro related referendums. As for Closa's paper he agreed that the unanimity rule has become increasingly problematic because of the increase in the number of member states, increasing controversies at the national level, and also due to the increase in the volume of the text and norms of the treaties.

The Madrid workshop provided ample room for debate on the question of constitutional pluralism in the EU and the nature of the EU constitutional order.

3. List of participants

Paola Andrea Acosta	<i>University Complutense of Madrid</i>
Paul Blokker	<i>University of Trento</i>
Carlos Closa	<i>Spanish National Research Council, CSIC (RECON WP 2)</i>
Ben Crum	<i>Vrije Universiteit Amsterdam (RECON WP 2)</i>
Bruno de Witte	<i>University of Maastricht</i>
Joaquín Sarrión Esteve	<i>National Distance Education University (UNED)</i>
John Erik Fossum	<i>ARENA, University of Oslo (RECON WP 2)</i>
Patricio Galella	<i>Spanish National Research Council</i>
Luis Bouza García	<i>University Complutense of Madrid</i>
Saskia Hollander	<i>Radboud University Nijmegen</i>
Ulrike Liebert	<i>University of Bremen (RECON WP 5)</i>
Christopher Lord	<i>ARENA, University of Oslo (RECON WP 3)</i>
Aleksandra Maatsch	<i>Spanish National Research Council, CSIC (RECON WP 5)</i>
Agustín José Menéndez	<i>University of León (RECON WP 2, WP 7)</i>
Rainer Nickel	<i>Johann Wolfgang Goethe University Frankfurt (RECON WP 9)</i>
Leocadia Díaz Romero	<i>University of Murcia</i>
Ana Alonso Villaley	<i>University Carlos III, Madrid</i>

4. Programme

See attachment.

Thursday, 10 November 2011

10:30-11:15 Registration

11:15-11:30 Opening remarks

First Session: Theorising EU Constitutionalism

11:30-12:00 The Theory of Constitutional Synthesis.

A Constitutional Theory for a Democratic European Union

Paper givers: John Erik Fossum, *ARENA, University of Oslo* and Agustín José Menéndez, *University of León*

12:00-12:30 Conflicting Constitutional Laws and Constitutional Pluralism in an Asymmetric World

Paper giver: Rainer Nickel, *Johann Wolfgang Goethe University, Frankfurt am Main*

12:30-13:00 Discussant: Paul Blokker, *University of Trento*

13:00-13:30 Debate

Second Session: EU Democracy and the Lisbon Treaty Changes

16:00-16:30 National parliaments in the European security policy: governments' allies, independent players or transnationally networked actors?

Paper giver: Aleksandra Maatsch, *Spanish National Research Council (CSIC)*

16:30-17:00 Problems of compound representation after Lisbon

Paper giver: Christopher Lord, *ARENA, University of Oslo*

17:00-17:30 Discussant: Ulrike Liebert, *CEuS, University of Bremen*

17:30-18:00 Debate

Friday, 11 November 2011

Third Session: Constitutional Reform or Treaty Change?

10:00-10:30 Unanimity: on the legitimacy of a locking rule

Paper giver: Carlos Closa, *Spanish National Research Council (CSIC)*

10:30-11:00 Can the EU referendum genie be put back in the bottle?

Paper givers: Ben Crum, *VU University Amsterdam* and Saskia Hollander, *Radboud University Nijmegen*

11:30-12:00 Discussant: Bruno de Witte, *University of Maastricht*

12:00-12:30 Debate

12:30-13:00 Closing panel

VENUE:
CENTER for Political and Constitutional Studies (CEPC)
PLAZA de la Marina Española, 9, Madrid

Information and Registration:
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RE/CON RECONSTITUTING
DEMOCRACY
IN EUROPE



Workshop

EUROPEAN CONSTITUTIONAL PLURALISM AND THE CONSTITUTION OF THE UNION

Madrid, 10-11 November 2011

Organized by Carlos Closa, Spanish National Research Council (CSIC), Madrid



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