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The Many European Constitutions and the Future of European Constitutional Theory

Introduction

The future of constitutional theory lies at the crossroads of different disciplines. Constitutional theory provides an explanation of the nature of the constitution and constitutional practice, just as a theory of law is an explanation of the nature of law and legal practice[1]. As such, constitutional theory can offer different explanations of public life depending on the discipline that is chosen as the starting point. Constitutions do not mean the same whether one looks at them from a political, legal, sociological or an economic perspective. It is one of the goals of the contributions in the present volume to account for the multi-disciplinary nature of the concept of constitution[2]. Another pluralistic dimension of the concept of constitution that is worth emphasizing is its *territorial* fragmentation. The issue here is not so much *disciplinary* pluralism within the same political entity[3], but more the plurality of conceptions of the constitution within the same discipline, but within different political and territorial entities. This territorial pluralism of the concept of constitution constitutes the topic of the present paper, although the questions are closely connected[4].

For a long time, the territorial fragmentation of the concept of constitution matched the distribution of political and legal sovereignty. Each political and legal entity had a constitution, and the plurality of conceptions between those entities seemed perfectly natural. Political and legal globalization has changed all this. Its first consequence is

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1 See RAZ (2004), p. 324.

2 See the contributions by JÖRG PAUL MÜLLER and ANNE PETERS in the present volume. See also CASTIGLIONE (1996) on the grounds for this recent resurgence of multi-disciplinary perspectives in constitutional theory.

3 The paper's approach is resolutely one of legal theory. Constitutional theory lies at the core of legal theory, since the constitution is both the fundamental legal norm that constitutes and the legal order that is thus constituted. Without a constitution, there is no legal order. See e.g. KANT (1991) on the relationship between law and the constitution(s). This explains in particular why the existence of a European Constitution is a crucial step for the recognition of the autonomy of the European legal order: see e.g. the debate between SCHILLING (1996a); SCHILLING (1996b) and WEILER/HALTERN (1996). On constitutional theory being situated between legal and political theory, see also LOUGHLIN (2003a); LOUGHLIN (2003b).

4 Multidisciplinary perspectives are in order in cases where traditional territorial conceptions, and statist conceptions in particular, that stem from a single discipline cannot provide ready answers to post-national questions. It remains, however, that the answer to the theoretical challenge raised by post-national constitutions and the conceptual pluralism it gives rise to cannot be resolved only by multi-disciplinary yet statist conceptions of the constitution. More is needed, and it is the object of the present paper to determine it. On a similar brand of multidisciplinary constructivism in the theory of European integration, see SHAW/WIENER (2000) and SHAW (1999). Contra: e.g. HABERMAS (2004), p. 136 et seqq. who uses a traditional republican conception of the European constitution.

the development of a post-national[5] political and legal order[6] that cannot be explained according to the same conceptions of law as the national order; new modes of transnational and supra-national governance are generated that are comparable neither to national nor to international ones, but which are nevertheless accounted for in statist terms. One speaks, for instance, of the international constitution to refer to the constitutional structure and principles of the international community[7]. Closer to us, European citizens are about to ratify the Treaty establishing a Constitution for Europe[8], also called the European Constitution[9]. Secondly, the Westphalian conception of political sovereignty has started to fade away[10]. Territory and political membership are gradually growing apart, immigration and the development of post-national citizenship being only two of the many grounds for this decoupling of the political and the legal from the territorial[11]. This has implications for the concept of constitution[12]. What it means in particular is that constitutions, and thus political and legal orders, now overlap the same territory and population, thus jeopardizing traditional political and legal conceptions of the constitution. The unitary conception of the constitution, for instance, according to which there is one single constitution *per* political entity and territory is set in question[13]. So is the conception according t which constitutions are necessarily the ultimate or fundamental legal norms in a legal order.

These difficulties are particularly acute in the European Union (EU). The new constitutional order in Europe raises two sets of issues which will be addressed in this paper: issues pertaining to the *constitutional nature of the European Constitution* and the legal

5 I refer to the term 'post-national' as a generic term to mean non-strictly national, whether supra-national or merely post-national. It should not be taken to mean that post-national law supplants and replaces national law; it can well coexist with it. In fact, it is one of the objects of the present paper to determine what post-national can be taken to mean in the European context and how post-national the European Union really is. It is important indeed to avoid the tyranny of state-origined concepts and conceptions, but also of post-national assumptions and concepts. In the European context, it is interesting to refer to JOSEPH WEILER's taxonomy of the three levels of European post-national law and governance: international, supra-national and infranational (see WEILER, 1999).

6 For reasons of simplicity, I am not distinguishing here between the concept of law, the legal order and the legal system.

7 See e.g. HABERMAS (2004); HALTERN (2003a).

8 It is too early to say whether the European Constitution will be ratified by all European Member States. All this paper's argument requires to work is already given, however: the concept of a European constitution now exists, whether the actual Treaty is ratified or not and whether it is revised in case of failure in the ratification process or on the contrary definitively abandoned. Moreover, as we will see, European constitutional law and practice actually predate the new Constitution, at least in the 'thin' sense of constitution.

9 See http://europa.eu.int/constitution/index_en.htm.

10 See e.g. BESSON (2004a); BESSON (2005a).

11 See e.g. BENHABIB (2004), Ch. 4.

12 The present article is concerned with the *political* concept of constitution, as opposed to a legalistic concept as defined within a specific legal order only. This political concept can, however, encompass a legal as much as a political constitution. The constitution is indeed both a legal and a political reality; it is the necessary link or interface between these two sides of the same coin and as such neither of them can come first, as they both imply each other. While the latter distinction relates to the *object* of the concept, the former refers to its *nature*. Cf. WALKER (2003a); BELLAMY (2003); LOUGHLIN (2003c); BESSON (2004a); BESSON (2005a).

13 See WALKER (2003a) on unitary sovereignty. See also BESSON (2005a).

nature of European law[14] more generally[15], and issues pertaining to the *limits of European constitutional theory* and of conceptual analysis more particularly[16].

The first set of questions relates to the applicability of traditional constitutional theory and conceptions, that stem from a statist background[17], to the post-national nature of *European constitutional law*. We tend indeed to use traditional political and legal concepts to refer to and explain similar phenomena at the post-national level – or rather we tend to develop similar institutions at the post-national level and to explain them by using traditional concepts. The European Constitution cannot, however, be compared to a national constitution and our national conceptions cannot help us grasp it adequately. Not only is it not a (federal) state's constitution, but it does not rest on or even presuppose a European *demos*, nor does it rely on a European public sphere or European constitutional values, to mention just a few of the criteria traditionally used to determine the existence of a constitution. The European Constitution is the constitution of many European *demoi* and public spheres and it does not replace or even take priority over national constitutions.

Two further issues stem from this first set of questions. First, if we cannot apply our statist conceptions *per se* to the European Union, without taking the risk of corseting its legal and political development[18], should we cling to those concepts all the same, when trying to make sense of the European Constitution? Or should we, on the contrary, give up using what has clearly become a different concept of constitution and choose another *ad hoc* concept and maybe another term to refer to post-national constitutions like the European Constitution[19]? We might consider that we have no choice but to use current conceptual categories to make sense of new political and legal realities, thus also improving our very conceptions through the conceptual continuity implied by conceptual debates of this kind. This is the so-called dilemma of the *tyranny of concepts* and of the role of stationary concepts in new institutional settings[20]. Second, provided we keep using the concept of constitution in the European context, how should we then adapt our constitutional conceptions to apply them to the post-national context of European law and develop a post-national conception of the constitution? We need to generate new conceptions of law that account for the constitutionality of *both* European *and* national constitutional orders[21]. This is also what one refers to as *constitutional pluralism* or

14 In the present proposal, the terms 'European law' or 'EU law' refer to the law of the Treaties on the European Union, including the law of the European Community (EC). Although in many cases, European law will in fact be EC law, I will refer for reasons of clarity to European or EU law in general. For the same reasons, I will often refer to the European Union to talk about what has *now* become the Union.

15 The issues raised by post-national constitutionalism expand further than the EU, but scope precludes addressing them outside the latter's context. See e.g. Habermas (2004); Haltern (2003a).

16 The theoretical issues raised by post-national constitutionalism expand further than European constitutional theory, i.e. constitutional theory as it is done in Europe, both at the national and at the European levels, but scope precludes addressing them outside the latter's context.

17 See Shaw/Wiener (2000). The same questions can arise about other concepts that bear the so-called 'touch of stateness' like the concept of state, law, sovereignty, democracy or citizenship with which we try to theorize the law of a polity that is in practice clearly not a state.

18 See Harlow (2002), p. 179 on the idea of 'statal corset' or Magnette (2000) on the idea of 'state tropism'.

19 On 'concepts' and 'terms' in case of change in the concept's object, see below.

20 See Besson (2003) on the *stationary* concepts we need to refer to the new post-national institutional reality.

21 On the idea of *translation* in the European constitutional context, see Walker (2003d).

multilevel constitutionalism[22]. This second cluster of questions falls under the title of the *translation of concepts*[23].

This first concern gives rise to a second set of issues and in particular to the question of the potential integration of different conceptions of the constitution in the same political and legal order. What are the limits of the conceptual translations of the concept of constitution and when do we know we face a *new conception* of the constitution rather than a new concept altogether? Further, what does all this imply for the concept of constitution and our unitary conceptions of national constitutions in particular? The new European constitution applies to the same territories and populations as national constitutions and is part of national legal orders. Can there actually be, in the same legal order, a *theory of law* and the *constitution* that cannot account for different conceptions and uses of the concept of law and the constitution? The many European constitutions, referred to in this contribution's title, call for an encompassing constitutional theory that can explain national constitutions together with the European Constitution. But is this at all possible in the current state of European constitutional theory? What would this mean for the future of conceptual analysis within constitutional and legal theories? Both sets of questions constitute two sides of the same coin, but viewed from different perspectives. Constitutional theory calls for the theorization of the *sui generis* nature of European constitutional law[24] (I.), but the European Constitution also implies a Europeanization of European constitutional theory and hence a revision of its basic tenets (II.). For obvious reasons, scope precludes providing more in this paper than a short overview and discussion of these issues.

I. The many European constitutions

In this first section, I would like to assess the applicability of traditional constitutional theory and conceptions, that stem from a statist background, to the post-national nature of European constitutional law and practices. To do so, it is important to start by presenting a few traditional conceptions of the constitution (1.). A second step will take us to the potential application of those conceptions in the European context (2.). Finally, I will present the possibility of translating the concept of constitution to accommodate the specificities of the European Constitution and hence of developing a truly post-national conception of the constitution (3.).

I.1. Traditional concepts of constitution

The concept of constitution is a complex concept. It appeared towards the end of the 18th century in its modern and liberal form and has gradually become central to most Western legal and political orders. Albeit central, the concept remains essentially contested and the more definitions it receives, the more controversial it becomes[25].

There are two main dimensions of complexity to the concept of constitution one may dwell on. First of all, the concept of constitution may be used in either a *normative* or a *descriptive* way, to refer respectively either to what the constitution should be or to what it is. True, the concept of constitution is normative *per se* in that it encompasses an ultimate value and that it could not therefore be defined by the legal order it is supposed to constitute, but its use itself may be descriptive[26]. Thus, in order to be

22 See e.g. Walker (2002); Pernice (2002).

23 See Shaw (1999).

24 See MacCormick (2004).

25 On the historical complexity of the concept, see Castiglione (1996).

26 See the sections II.1. and II.2. below on the normative *cum* descriptive nature of the concept of constitution and constitutional theory.

complete, constitutional theory may encompass both normative elements and historical and sociological elements[27]. A second dimension of complexity, that is connected to the former, lies in the *origins* of the conceptions the constitution gives rise to[28]. Depending on whether the constitution is explained from a German, French or British perspective, its conception will differ. Very schematically, whereas the British conception of the constitution is pluralist and flexible, the German conception is more unitary and rigid[29]. It is important, however, to assess those different conceptions of the same concept of constitution, not to emphasize its relativity, but in order to get a better grasp of that common concept[30]. This is particularly important in the context of the European Constitution as it should be conceived along similar lines across Europe according to a truly European constitutional theory[31].

The complexity of the concept of constitution is confirmed by its multiple layers of descriptive and normative meaning. The concept of constitution is indeed a vague concept whose term is not very clear and which can be used to mean many different things. There are roughly five meanings or dimensions of meanings one may identify; most of them usually apply together[32]. First of all, the constitution is often referred to as a *text*. This is the most basic and literal use one may encounter. Secondly, and most commonly, the constitution is used to refer to a *legal norm*. One may speak of thin or thick constitutions, as we will see, depending on whether the constitution refers to the organizational rules any legal order must have or to a thicker substantive content such as fundamental rights, etc. A third meaning is that of a *process*, i.e. the constitutionalization of an entity. Thus, the constitution is at once the norm and the act of establishing this norm. Fourthly, one refers to the constitution to mean the *political order* or *regime* that results from the constitution. The constitution is therefore both the norm and the structure or the characteristic of what was constitutionalized. In fact, the constitutionalized outcome may either be constituted, in which case the constitution is actually *constitutive*, or it may be formalized or regulated, in which case the constitution merely endorses a *regulatory* function[33]. A final dimension of meaning is that of the constitution as *corpus of values* and hence as *source of legitimacy*. In this sense, the constitution is not only a norm, a process and an order, but it also has the legitimating function of that order. This is also what is meant by the related concept of constitutionalism that is usually closely identified with that of constitution, especially in the European context. There are many definitions of constitutionalism, which is a controversial concept; it can mean anything from a theoretical and philosophical model, a normative discourse, a creed or even an ideology that can take different

27 This may explain why constitutional issues have only recently been regarded as interesting by both philosophers and political scientists; whereas the former thought those issues to be purely contingent and relative, the latter regarded them as universal and hence as uninteresting. See Castiglione (1996).

28 On the national diversity of legal theories, more generally, see van Roermund (1997) and von Bogdandy (2001).

29 See Möllers (2003) on the diversity of conceptions between the French and German and the Anglo-American constitutional traditions.

30 See Raz (2001b), p. 153.

31 As I will explain in more detail later, this is not meant to exclude the possibility for non-Europeans to write about the philosophy of European law, but merely to argue for the heightened relevance and legitimacy of trans-European conceptions of the same European legal and political reality, by contrast to purely national ones in Europe.

32 See Castiglione (1996); Möllers (2003).

33 Usually it does both. See Möllers (2003); Walker (2004c).

forms, but according to which political and legal power can only be exercized within the limits of the constitution, such as the separation of powers, checks and balances, the rule of law, democracy or fundamental rights.

Within the second and most common dimension of meaning of the concept of constitution *qua* legal norm one finds two useful pairs of distinctions: first, the distinction between thin and thick constitutions and, second, the distinction between the procedural and the material elements of the thick constitution[34].

The first distinction opposes a *thin* constitution to a *thick* constitution. It corresponds roughly to the opposition between a 'constitution' and a 'Constitution'. The thin constitution is any legal norm that establishes and organizes the main political organs and their powers. Any legal order entails a thin constitution. The thick constitution is a thin constitution that also has a more elaborate content which encompasses procedural elements, such as revision clauses, and substantive elements, such as fundamental rights. More precisely, a thick constitution is a *superior legal norm* which is usually but not always laid down in a written document (i), which constitutes and defines the powers of the main organs of the different branches of government (ii) and which is in principle protected through specific revision rules against modification by an ulterior law, over which it therefore has priority (iii).

The second opposition is that between the *procedural* and the *material* elements of the thick constitution[35]. The procedural element of the superiority of the constitution lies, first of all, in the degree of difficulty of its revision process; in principle, it is more difficult to revise a constitution than ordinary legislation. The constitution hence ensures the stability of the political and legal order thus constituted. This procedural superiority flows, second, from the constitution's adoption procedure, as it is usually adopted by the people as constituent power or at least by an *ad hoc* constituent assembly. The procedural superiority of the constitution does not always match its denomination and some fundamental laws are entrenched, while so-called constitutions need not always be[36]. A third procedural element of the constitution is its justiciability; its violation can indeed usually be invoked in courts. The thick constitution's material content consists in fundamental elements of the political life and order, like the separation of powers, checks and balances, the rule of law, democracy and fundamental rights. Those elements may vary and all constitutions do not entail the same ones[37]. Through its material content, the thick constitution actually constitutes the political and legal order. It also guarantees those fundamental rights and principles which underlie the democratic and political order it constitutes and thus entrenches a common ideology.

I.2. Translation in the European Union

I.2.a. General

Since 1957, date of the creation of the first European Communities, a body of social rules that has been commonly referred to, by law-makers and legal subjects equally, as 'European law' or as the 'European legal order', has gradually gained paramount

34 See Raz (2001b), p. 152 et seqq. on these two distinctions albeit in different terms.

35 See Raz (2001b), p. 153 for a presentation of the seven criteria of the thick constitution.

36 In Israel, for instance, basic laws are entrenched although they are not called 'constitution', while the bill of rights of New Zealand is not entrenched.

37 In France, for instance, many of the material elements of the thick constitution are not part of the constitution, but of fundamental organic laws.

importance in Europe. The European Court of Justice (ECJ) itself actually established the autonomous and *sui generis* nature of the European legal order[38]. European law should be confused, says the Court, neither with national law nor with international law. In fact, the autonomous nature of European law has gradually been confirmed by the European legal order's quasi-constitutional characteristics such as the legal personality of the EU, the primacy of European law, qualified majority voting, the ECJ's case-law, EU citizenship, etc[39]. In 1991, the ECJ actually even considered the European Community (EC) Treaties as a 'constitutional charter'[40]. In 2001 the constitutional nature of the European legal order was further confirmed by the Laeken Declaration and the beginning of the constitutionalization process in the EU. This process has now given birth to the Treaty establishing a Constitution for Europe, which has been adopted in October 2004 and is currently being ratified by all Member States of the EU. But should we trust the European Court of Justice's judgement of the autonomous legal nature of 'European law' and, more generally, European institutions' perception of the constitutional nature of the European legal order?

After all, the European Union is not a (federal) state *stricto sensu*, since it lacks, among other things, coercive force. And law has traditionally been conceived as an ensemble of norms issued by a political and sovereign entity disposing of the monopoly of coercion, that is to say a state. Moreover, there has been no transfer of the Member States' traditional attributes to the Union[41]. Besides, many influential traditional conceptions of the law make a condition of the autonomy of a legal order that it be hierarchically organized, whereas the European legal order is rather polycentered and heterarchical. In fact, constitutions are traditionally understood as being the ultimate norm in a hierarchically organized legal order. Finally, the European Union has no *demos as* yet, and certainly no *ethnos*. It seems difficult therefore to talk of autonomous European law and of a European constitution without the conditions for its social integration and an independent and unified European political community. So, maybe European law is not autonomous after all and amounts to plain international law, that is to say the law that sovereign states issue to govern their relationships. But, again, European law does not quite fit the bill. True, the European Union was constituted by international law treaties and considered at first as an entity of international law. Gradually, however, European law was emancipated from traditional conceptions of international law[42]. The Union is no ordinary international organization or confederation of sovereign states, given its independent decision powers and direct relationship to its subjects[43]. In this respect, the recent 'constitutional moment', as people started to refer to the current constitutionalization process in Europe, and the Convention that drafted the Treaty establishing a Constitution for Europe have at least confirmed one thing: whether or not the so-called Constitution is really a constitution, European law can no longer be regarded as classic international law.

We seem therefore to face the dilemma Tocqueville once faced regarding American constitutional democracy[44]: *either* European constitutional law is constitutional

[38] Case 26/62 *Van Gend & Loos*, (1963) ECR I–1.
[39] See Weiler/Haltern (1996).
[40] Opinion 1/91, 14 December 1991, (1991) ECR I–6079.
[41] See von Bogdandy (2000); Schmitter (1996); Magnette (2000). See also the exchange between Weiler (1998) and Mancini (1998).
[42] See Weiler/Haltern (1996); Richmond (1997).
[43] See the exchange between Weiler/Haltern (1996) and Schilling (1996a); Schilling (1996b).
[44] See de Tocqueville (1994), p. 315 et seq.: 'When I compare the Greek and Roman republics with these American States; the manuscript libraries of the former, and their rude population, with the innumerable journals and the enlightened people of the latter; when I remember all the attempts that

law because it fits our national conceptions of a constitutional system *or* European constitutional law is not constitutional law according to our current conceptions of the constitution, but something completely different, and then the reason for such widespread confusion of concepts needs to explained. Neither horn of this dilemma looks more satisfactory now than it looked in Tocqueville's days. In fact, I would like to argue that our concept of constitution should be able to account for all those cases we regard as being paradigmatic of constitutional law, be they national constitutional law or European constitutional law. New conceptions of the constitution should therefore be generated to encompass national, international and European forms of constitutional law[45]. Before getting there, however, we need to check whether European constitutional law as it is fits traditional conceptions of the constitution. To do so, we need to reply to three questions: Does the EU have a constitution as it is? (b) Can it and should it have a Constitution? (c) And finally, is the new Constitution a Constitution in the traditional sense? (d).

I.2.b. Does the EU have a constitution?

In order to establish whether the EU currently has a constitution, it is important to distinguish between a thin (i) and a thick constitution (ii).

(i) The thin European constitution

The EU clearly has a thin constitution; its institutions are organized, they work according to the separation of powers, their competences are clearly attributed, the EU guarantees fundamental rights and principles such as democracy and the rule of law, etc[46]. Without a thin constitution, the European legal order could not function as the autonomous legal order it is, distinct from both national and international law. In fact, as said before, the ECJ actually even considers the EEC Treaties as a 'constitutional charter'[47].

(ii) The thick European Constitution

While there is clearly a thin European constitution, the thick Constitution is *prima facie* still missing. Not only is there no procedurally entrenched Constitution, but the Treaties still lack the material content required of a thick Constitution. With respect to the *procedural* element, first, the Treaties do not have priority over further EU legislation and even if they cannot be revised without the unanimous agreement of Member States, this can be explained in international law terms, since they were originally concluded as international treaties. Of course, the *material* content of the European constitution makes it very close to a thick one, but what is missing most is a proper European constitutionalism. Fundamental rights are now protected by the

are made to judge the modern republics by the aid of those of antiquity, and to infer what will happen in our time from what took place two thousand years ago, I am tempted to burn my books in order to apply none but novel ideas to so novel a condition of society.'
[45] It is important to emphasize, before entering the debate, that opponents and partisans of a European Constitution need not divide between those who defend traditional conceptions of the constitution and those who propound new conceptions of a post-national constitution. Grimm (1995); Grimm (2001) and Habermas (1995); Habermas (2002) use traditional conceptions of the constitution, but divide on the feasibility and desirability of a European Constitution. Similarly, Weiler (2003) and Craig (2001) reject the desirability of a European Constitution, while Walker (2004c) and Shaw (1999) regard it as desirable, although all of them develop a post-national conception of the European Constitution and regard it therefore at least as feasible.
[46] See Zuleeg (2003); Möllers (2003).
[47] Opinion 1/91, 14 December 1991, (1991) ECR I–6079.

European legal order, but only on Member States' instigation and not as an autonomous European competence[48]. Moreover, the gap between internal and external policies in human rights protection and democracy promotion matters shows how underdeveloped the EU still is in the substantive constitutional respect[49]. Finally, there is still no direct legitimation of the European legal order by reference to a European *demos*, whether one considers it should exist or at least be presupposed by the constitution[50].

I.2.c. Can and should the EU have a Constitution?

In order to establish whether the EU should have a thick Constitution (ii), it is important to establish, first, whether it could have one (i).

(i) Can the EU have a Constitution?

There are two main arguments against the EU's ability to have a Constitution: first, an argument from democracy and, second, an argument from sovereignty.

The first and main difficulty in establishing whether the EU can actually have a Constitution lies in the intrinsic relationship between the concepts of constitution and democracy in traditional conceptions of the constitution. The thick Constitution indeed draws its procedural and material superiority and hence its legitimacy from the constituent power, the *demos*, or at least from a delegation of its popular sovereignty to a constituent assembly, which then vests the State or constituted power with different competences and powers. In the current state of development of the EU, there is clearly no one and single European *demos* but many *demoi*. Some authors see in this situation the evidence of the impossibility of a European Constitution. This is the case whether one considers the European *demos* as necessarily depending on a European *ethnos* or not[51]. Others have objected that the *demos* need not in fact pre-exist the Constitution, but could be constituted by the latter. All it takes is that it is presupposed by the constitutionalization process[52]. The difficulty is that even this soft version of the constituent power cannot necessarily be verified in the EU. After all, even the new Constitution does not seem to refer expressly in its Preamble to a European people or even to the European peoples, but only to European citizens and European Member States[53].

The closely related argument of *sovereignty* claims that the EU cannot have a Constitution as it cannot be compared to a sovereign state and as its legal order cannot therefore be deemed sovereign. Although the EU is clearly not a state, and although Member States remain sovereign, the sovereignty of the EU cannot be entirely denied. It has an ultimate competence of decision on many matters and this has been confirmed recently by the express guarantee of the principle of primacy of European law in Art. 6 of the new Constitution. Of course, its sovereignty is neither absolute or unitary[54] nor

48 See von Bogdandy (2000).

49 See Alston/Weiler (1999); Alston/de Schutter (2005).

50 See Weiler (2003).

51 See Grimm (1995); Grimm (2001) by contrast to Habermas (1995); Habermas (2002).

52 See Weiler (2003).

53 Contrast the Preamble to the Treaty establishing a Constitution for Europe ('au nom des citoyens et des États d'Europe') and the Preamble to the Charter of Fundamental Rights in Part II of the Treaty ('les peuples d'Europe').

54 See among national sovereigntists, Grimm (1995); Grimm (2001). See among EU sovereigntists, Mancini (1998) and maybe Habermas (2002). See also MacCormick (1999), p. 113 et seqq. who seems to have moved away from post-sovereignty (compare MacCormick, 1993) to a more unitary conception of sovereignty under the influence of Richmond (1997) in defending his 'pluralist monism' or 'soft monism' which accommodates separate legal orders under the monist and sovereign umbrella of

completely divided between it and the Member States[55]. Even though it is true that our conceptions of sovereignty in Europe should not map unitary conceptions of sovereignty too closely[56], this need not imply a complete rejection of the concept but only a more adequate translation of the concept in the European post-national context[57]. Sovereignty in Europe could very well be conceived as both *ultimate* and *pluralistic* along the lines of the *cooperative model of sovereignty*[58]. According to this model, both national and European authorities retain their sovereignty but in having to be sovereign together, they cannot escape a certain degree of competition, emulation and cooperation which characterizes sovereignty in a pluralistic constitutional order, thus paradoxically fortifying rather than diminishing their individual sovereignties. European law should therefore be understood as the product of discourse and cooperation among the actors of a broad European legal community which encompasses both the European legal community *stricto sensu* and national legal communities[59]. It is important to emphasize at this stage that, contrary to what some have argued, the failure of the unitary model of sovereignty will not be redeemed by the European constitutional exercize. It is possible to reconcile the existence of a Constitutional Treaty and the consolidation of the constitutional legitimacy of the European polity, on the one hand, with constitutional pluralism and the co-existence of both European and national sovereignty, on the other[60]. Sovereignty has changed, but constitutionalism too: multiple and cooperative sovereignty is matched by constitutional pluralism.

(ii) Should the EU have a Constitution?

If the EU can have a thick Constitution, it still remains to be seen whether it should actually have one. Of course, the question is slightly obsolete given the current ratification process of the new Constitution. Because the constitutional nature of that Constitution is still open, however, it is worth enquiring whether the EU should have a thick Constitution in the traditional sense. Moreover, one should not judge a book by its cover and something cannot be deemed a Constitution just because it is called a constitution. In what follows, I will distinguish the various *pros* and *cons* from a theoretical perspective[61].

international law. See Pernice (2002's) multilevel constitutionalism in whose framework the ultimate authority remains EU-centred. Traces of unitary sovereignty may also be found in Joseph Weiler's idea of a European 'conseil constitutionnel' whose main flavour is resolutely European, thus *prima facie* contradicting his principle of constitutional tolerance (Weiler (1999); Weiler (2003)) or finally, in Mattias Kumm's and Victor Ferreres-Comella's idea of a legal framework of cooperation whose cooperative dimension is undermined by the legal and unitary nature of the framework of cooperation they propose to entrench in the European Constitutional Treaty (Kumm (2005c); Kumm/Ferreres-Comella (2004)).

55 See e.g. Pescatore (1970) in the EU and Pogge (1992) at the global level. See de Witte (1998), p. 303 on the contradictions of pooled sovereignty.

56 See Weiler (2004), p. 149–152 on these reactionary modern reactions to post-modern *Angst* about the European Union.

57 Contra: MacCormick (1993).

58 See on a similar conception, Magnette (2000), p. 155–159, 161–166; Besson (2004a); Besson (2005a).

59 Maduro (2003c), p. 511–520.

60 See Craig (2001); Walker (2004c). See also Kumm/Ferreres-Comella (2004) on the limits of Art. I–6. See also Walker (2004c) on the Draft Constitutional Treaty's limiting effect on the choice between intergovernmentalism (Art. I–5) and federalism (Art. I–6).

61 There are of course other perspectives from which these pros and cons may be assessed, such as a political viewpoint. It is in fact an interesting feature of the constitutional debates in the EU that both Europhiles and Eurosceptics have seen advantages in adopting a thick Constitution of the EU, either to reinforce the democratic foundations of the EU or (on the contrary) to limit its competence by clarifying them.

With respect to the *disadvantages* of a thick Constitution, first, it has been said that the new Constitution does not solve any of the real constitutional problems of the EU. One also encounters the argument that it is not actually desirable that a thick Constitution address these issues in the EU. Some authors do indeed privilege the existing thin constitution of the EU and its constitutional *status quo*[62]. The issues that are sensitive and would be in need of a formal constitutionalization are the distribution of competences between the EU and Member States and the protection of fundamental rights and social rights in particular[63]. The problem is, according to those same authors, that these matters cannot be solved satisfactorily and that they actually benefit from the indeterminacy that prevails in the EU. Flexibility and indeterminacy are beneficial in the EU, and a Constitution would just add rigidity or, worse, interpretation problems in areas where they are not needed[64]. In fact, some authors go as far as praising the current constitutional regime with its tolerance, its dialogue-based dynamic and overall coherence[65].

With respect to the *advantages* of a thick Constitution in the traditional sense, secondly, one may mention the advantages in terms of democratic legitimacy, institutional clarity, enlargement and policy coherence[66]. In terms of democratic legitimacy, first of all, a thick Constitution would reinforce the relationship between the EU and its citizens. Even if the text of the new Constitution does not change much in terms of daily democratic life in the EU, it has the potential of generating a new deliberative impulse in the EU[67]. Another advantage lies in the institutional clarity a thick Constitution could ensure. This is particularly important given the current enlargement process in the EU. Thirdly, the enlargement also implies the need to guarantee what has been achieved in the EU so far and this could be done by a thick Constitution. A fourth advantage lies in the policy coherence. A thick Constitution could indeed help ensure the unity of the EU *vis-à-vis* the outside world[68].

I.2.d. Is the new Constitution a Constitution?

Provided one accepts that the EU can and should have a thick Constitution, is the new Constitution or, more exactly, the Treaty establishing a Constitution for Europe a real thick Constitution in the traditional sense? As we saw before, a thick Constitution entails both a procedural and a material element. The latter is clearly given by the new Constitution. While the content has been a constant concern during the constitutionalization process, the procedure has, however, been neglected. The adoption and revision procedures matter a lot in an ordinary constitutionalization process. In fact, because there is nothing in the *content* of the new Constitution that could not have been adopted as a Treaty, the difference should have lain in the *process*[69]. There are two processual elements that need to be assessed: the adoption process and the revision process.

First of all, the *adoption* process of the new Constitution clearly amounts to a Treaty adoption or revision procedure with unanimity as a rule in the Convention *and* the Intergovernmental Conference[70]. No European referendum was organized and the

62 See Weiler (2003).
63 See Weiler (2003).
64 See Craig (2001).
65 See Weiler (2003).
66 See Weiler (2003).
67 See Maduro (2004); Walker (2004c).
68 See Habermas/Derrida (2003).
69 See Walker (2004b).
70 Some authors actually consider the European Constitution as a mere revision of an existing constitution or as a 're-constitutionalization' process. See e.g. Pfersmann (2004).

ratification of the Treaty has been left entirely to national procedures, just as in the case of ratification of an international treaty (Art. 48 ECT). Some authors have actually referred to it as a Treaty disguised as a Constitution[71]. Moreover, one may doubt at the existence of a *constitutional moment* in the EU. Constitutions are indeed usually the fruit of a political or social crisis and, more precisely, of a moment of transformation and discontinuity[72]. If there has been a constitutional moment in Europe, it will result from the reception of the new Constitution and will only be visible retrospectively. Some have actually argued that the constitutional moment has lasted for fifty years and that European constitutionalism is therefore serial or processual[73]. Finally, a closely related issue is that of the *constituent power*. The lack of constitutional moment may indeed stem from the lack of presupposition a European *demos* or of a 'we-feeling'; there is no common conception of what Europeans are constituting. More practically, European citizens have not been directly associated to the constitutionalization process and if they are now, it is in virtue of national ratification processes only.

Secondly, with respect to the *revision* process, one ought to distinguish between the procedural superiority of the Constitution over later legislation and the revision process of the Constitution *stricto sensu*. With respect to the former, first, the Constitution seems to be vested with a certain superiority over further legislation. This may be verified in particular after the new competence of constitutional review of the European Court of Justice. As to the revision process of the Constitution, second, it is arranged on the model of the revision of international treaties, i.e. on the basis of unanimous voting (Art. IV-443)[74].

I.3. Towards a post-national European constitution

If one comes to the conclusion that the new European Constitution does not quite fit traditional conceptions of a thick constitution, disparaging the constitutional discourse for a post-constitutional one and imagining a new concept need not be the only alternative. By reference to Tocqueville's dilemma mentioned before, many argue indeed that our concept of constitution should be able to account for all those cases we regard as being paradigmatic of constitutional law, without necessarily trying to fit new constitutional instances into traditional conceptions of the constitution and hence corset their development potential. New conceptions of constitutional law should therefore be generated to encompass *à la fois* national, international and European forms of constitutional law. Why indeed should the increasingly contested liberal models of constitutionalism that apply to national constitutions constrain the development of a new constitutional impulse at the post-national level[75]?

Different authors have attempted this effort of *translation* of the concept of constitution in the post-national context of the EU. They all try to provide an account of constitutional pluralism in Europe. This leads some to reject the necessity of adopting a thick Constitution in Europe on the model of the new Constitution[76], whereas others rely on this post-national conception of the European Constitution to argue for the desirability of a thick Constitution in the EU[77]. There are roughly four groups of post-national conceptions of the European Constitution: contextualists, serialists, proces-

71 Weiler (2003). See also Eleftheriadis (2004).
72 See Walker (2004b).
73 See de Witte (2002); Haltern (2003b); Shaw (1999).
74 See Diez-Picazo (2004).
75 See Shaw (1999); Walker (2002).
76 See Weiler (2003); Craig (2001); Haltern (2003b).
77 See Walker (2004c); Shaw (1999); de Witte (2002).

sualists and projectionists[78]. The distinction is in any case relatively fluid and all four conceptions complement each other by reflecting a dimension of the complex constitutional practice in the EU. First of all, contextualists contend that the constitutional nature of the EU lies in its legal practice, rather than in a thick Constitution of the kind we have in Member States. This idiosyncratic constitutional practice consists in coherent and tolerant modes of legal reasoning and dialogue adapted to the constitutional pluralism of the EU[79]. The second post-national conception of the constitution is that of constitutional serialism. According to this approach, the European constitution results from a semi-permanent dialogue and revision process. This process can be improved, especially in terms of democratic legitimacy, but it is worth realizing its specific input before transposing a national conception of the constitution onto a new constitutional reality too quickly[80]. Thirdly, the processualist approach conceives the post-national constitution as a process without a *finalité* and without rigidity[81]. It is constructive and reflexive and is grounded on discourse rather than text. Finally, the projectionist approach considers the European constitutional practice as a process which needs to be reconstructed *a posteriori*. According to WALKER, a post-national constitution both constitutes anew and reorganizes the existing constitutional practice[82]. It need not positively change existing structures, but it can be said to constitute them by excluding open alternatives such as pure intergovernmentalism through Art. 6 of the new Constitution or pure federalism through Art. 5 of the new Constitution.

II. The implications for European constitutional theory

European constitutional theory cannot remain untouched by the development of post-national constitutional law, and this as far as purely national constitutional matters are concerned as well[83]. There are two main implications of the co-existence of the many European constitutions for European constitutional theory and for conceptual analysis *qua* main method of legal theory in particular[84]: first, a *diachronic* implication and the possibility of conceptual continuity despite intensive changes in the constitutional reality (2) and, second, a *synchronic* implication and the possibility of conceptual unity despite constitutional pluralism (3). Before examining these two implications, it is worth expanding a little on concepts and conceptual analysis themselves[85] (1).

II.1. Concepts and conceptual analysis

Concepts, when they are objects of philosophical study, are taken to be a purely philosophical creation[86]. They are placed between the world, aspects of which they are concepts of, and words or phrases, which express those concepts and are used to talk about those aspects of the world[87]. Concepts should not therefore be associated too

78 See for a similar distinction, WALKER (2004b); WALKER (2004d).
79 See WEILER (2003); CRAIG (2001); HALTERN (2003b).
80 See DE WITTE (2002).
81 See SHAW (1999).
82 See WALKER (2004b).
83 See BENGOETXEA (1993); WALKER (2002).
84 See the legal theories of authors as diverse as MACCORMICK (1983); RAZ (1994); DWORKIN (2004); and RAZ (2004).
85 Interestingly, RAZ (2004's) recent contribution to conceptual analysis and the meta-theory of legal theory is structured as a reply to two objections very similar to the two challenges taken up in this section: the legal change objection and the universalism objection. His agenda is different, however, since he is defending a strict account of criterial semantics against the Charybdis of legal change and the Scylla of parochialism.
86 RAZ (1998), p. 254 et seq.
87 RAZ (2004), p. 325.

closely either with the nature of the objects they refer to in the world or with the meaning of the terms in which they are expressed. One usually opposes 'concepts' to 'conceptions'. A conception amounts to what the concept is more precisely, i.e. a definition or deployment[88]. DWORKIN's distinction between a concept and its conceptions, which I use here, opposes a 'more abstract idea' or 'plateau' to 'a particular substantive theory'[89]. Concepts and conceptions are just different levels at which more abstract or more concrete statements are made. It is important in sum to distinguish between an object, a concept of that object, our concept of that object and our conceptions of that object[90].

Legal theory is an explanation of the nature of law. Because the concept of law is part of people's perception of the nature of law, conceptual analysis has been regarded as a prime method of legal theory[91]. Like legal theory, constitutional theory is the explanation of the nature of the constitution. As such, one of its prime methods of inquiry is *conceptual analysis* and the explanation of the concept of constitution[92]. The concept of constitution indeed amounts to the way people perceive the constitution and this has an influence on the explanation of the nature of the constitution itself. The concepts that matter most in legal and constitutional theory are *normative concepts* that embody a normative standard or value and whose correct use by this very essence involves value judgements[93]. It is the case of the concept of constitution itself, as explained in the prior section. The relevant conceptual community whose concept it is, is usually taken to be the national legal community, and more particularly its legal actors such as legislative, executive and judicial authorities and/or all its legal subjects and political participants[94]. What is needed so that they have or share the concept of constitution is convergence on certain paradigms or central exemplars of this concept, which can evolve, and not an agreement in judgement on core criteria for the concept's correct application[95]. Reasonable disagreement over core elements of normative concepts shows just how one may share a concept and disagree over it without being accused of talking at cross-purposes, despite disagreeing over its so-called criteria of correct application[96].

Conceptual analysis as applied to the concept of constitution, even though it is a normative concept, and hence constitutional theory need not necessarily be universal. Some authors argue they are and that the concept of constitution is the same across the board, while others reject the value of a general theory of the constitution privileging a theory that applies only to a single legal system. More and more authors now choose a middle pathway that combines elements of both approaches. Under this

88 See FREEDEN (2003), p. 52 et seqq. I am following the standard Fregean picture of concepts: concepts have meanings (i.e. the information that speakers associate with the concept and use to specify its content) and the relevant concepts have extensions (i.e. objects falling under them).
89 DWORKIN (1991), p. 71; DWORKIN (2004), p. 7. See more generally, DWORKIN (1991), p. 90–101. See also BESSON (2005b), Ch. 3.
90 RAZ (2004's) distinction between 'law', 'the concept of law' and 'our concept of law' may be understood as replicating the distinction between 'law', the 'concept of law' and 'our conceptions of law' by taking it up a level in the ladder of generality. Raz's approach allows him to protect the concept of law in general from change.
91 RAZ (2004), p. 327 et seq.
92 RAZ (2004), p. 328.
93 On the concepts of 'normative concept' or 'value concept', see BERLIN (1969b), p. 6 et seq.; WALDRON (1994); WALDRON (2002); BESSON (2005b), Ch. 3.
94 See RAZ (2004), p. 331.
95 See WITTGENSTEIN (1991), p. 242: 'If language is to be a means of communication, there must be agreement not only in definitions, but also (queer as it may sound) in judgements'. See more recently, RAZ (1998) on criterial agreement.
96 See BESSON (2005b), Ch. 3.

alternative, legal theory is both a discussion of the concept of law in general and focused on a particular legal system[97]. It looks at a group of legal rules, but as a means of understanding better our own legal system[98]. According to Raz, for instance, the concept of law we investigate is 'our concept', the product of a specific culture. Since what counts as 'law' under our concept of law is independent of that concept, there can be cultures that do not have 'our concept', yet still have 'law' and could also have the 'concept of law'[99]. Translated in this paper's terms, constitutional theory looks at constitutional systems and the concept of constitution in general, but as a means to clarify our own conceptions of our constitutional system.

What this implies for constitutional theory is that there can be a general constitutional theory, although constitutional law varies from country to country and from period to period in a single country[100]. Constitutional theory can yield a vague concept of constitution, based on the elements discussed earlier in this paper[101], that is not meant to draw borderlines, but to focus discussion[102]. A good deal of constitutional development is autonomous and internal constitutional considerations play a large role in constitutional decisions. A theory of the constitution cannot therefore be derived entirely from extraneous considerations such as social or economic factors. It abstracts from the possible impact of those social conditions and provides the theoretical framework within which the effect of diverse social conditions can be assessed[103]. Constitutional theory can therefore both be normative and universal, on the one hand, and be descriptive and factor in basic realities of political life, on the other[104]. What remains to be seen now is whether there can be a constitutional theory that can accommodate the co-existence of many different constitutions or at least of different conceptions of the constitution within the same legal order[105].

II.2. Reality change and conceptual continuity

The first challenge raised by the co-existence of many European constitutions or conceptions of those constitutions for European constitutional theory lies in the flexibility this requires of concepts like that of the constitution across time and vis-à-vis reality changes. It is very important to clarify the relationship between a political concept like the constitution and the object to which it refers, when the perception of that object seems to differ a lot between the national or the post-national context and when those two contexts overlap in complex ways as a legal order *lato sensu*. The question is, in other words, that of the limits of the conceptual translations of the concept of constitution and of how we know we face a *new conception* of the constitution rather than a new concept altogether. Of course, a certain distance between the philosophical analysis of

97 Bix (2003), p. 11; Raz (2004), p. 331.
98 Raz (2004), p. 331.
99 Bix (2003), p. 16 et seq.; Raz (2004), p. 331 et seqq. See more generally on moral change and social relativism, Raz (2001a).
100 Raz (2001b), p. 152 et seqq.
101 See Raz (2001b), p. 153.
102 Raz (2001b), p. 154.
103 Raz (2001b), p. 156.
104 Raz (2001b), p. 156.
105 The plurality of constitutions in the same legal order is only problematic if some of them are conceived according to a unitary model of the constitution, which gives rise to conflicting conceptions of the constitution in the same legal order, hence the second problem of the multiplicity of conceptions of the constitution. If the national conception of the constitution is pluralistic and can accommodate a second constitution in the same legal order, the plurality of constitutions is no longer a problem.

a concept and its legal and political use is unavoidable. This paper's argument, however, is to claim that a minimal relationship must be maintained between a concept and its practice, or else political and legal analysis would become void[106]. The question is then to determine which one.

Until now, political and legal philosophers have not been very clear on what this relationship should be. A majority of authors argue that legal and political concepts are both descriptive in a first stage and *prescriptive* in a second stage when they constrain reality. Their function is to determine through observation and then to prescribe what the essential criteria of those concepts are. In the case of a constitution, for instance, conceptual analysis is about determining the essential qualities of a constitution by reference to its reality and then capturing them in conceptual criteria[107]. These in turn will entail certain prescriptions about what a constituted state or a constituted legal order can be. It remains of course possible to adapt and revise the meaning of concepts whose use fluctuates. Along the same lines, changes may occur in our understanding of law and our concept of law that need not flow from changes in the nature of law itself[108]. Once a concept has been reassessed, however, its function becomes prescriptive again and implies normative constraints on practice[109]. Other authors take a more realistic stance and regard legal concepts as mere reflections and *descriptions* of legal and political reality. Any other approach would amount to a purely metaphysical construction whose validity could not be tested in any objective way. According to legal realists, the task of legal philosophical concepts is to describe those institutions and principles on which positive law and political practice rely effectively[110].

Neither approach is entirely satisfactory, especially when taken to apply to the concept of constitution. Intensive recent developments in international and European law reveal the limits of both approaches of political and legal concepts and emphasize the importance of conceptual continuity. In fact, the co-existence of national and European constitutions in European constitutional pluralism undermines the plausibility of both views. While the prescriptive approach aims at testing legal and practical reality against a pre-existing model of law and the constitution, the descriptive one seeks to retrieve the content of the concepts of law and the constitution entirely from a new reality. Both approaches put the constitution at risk by, on the one hand, either corseting reality too tightly thus prematurely condemning new political and legal practices and cutting national constitutions off too early from the new post-national reality or, on the other, by emptying the concept from any content whatsoever and thus limiting any possibility of conceptual continuity between the national and the post-national political and legal realm. It follows therefore that the concept of constitution is not a merely prescriptive political concept that insists on constraining political and legal reality according to an abstract standard, thus allowing change in the concept only and not in its object[111]. Nor is it a purely descriptive political concept that merely reflects an independent and objective reality with all its changes. Constitution is more than what those entities which claim to be constituted actually *are*, but it is less than

106 See e.g. Waldron (2002), p. 138 et seqq. on the 'rule of law'. See also Besson (2004a).
107 On criterial semantics, see the debate between Raz (1998) and Dworkin (2004).
108 See Raz (2004), p. 328 et seqq. This argument does not suffice, however, to undermine the objection based on legal change and conceptual continuity, since post-national constitutional change is a general and radical change that is not limited to 'our' particular understanding of the constitution but affects many different conceptions of the constitution across Europe.
109 See Waldron (2002), p. 140.
110 See Troper (2002).
111 See e.g. Raz (2004), p. 328 et seqq. who holds that a seeming change in the nature of law is in fact a change in our concept of law, even though the new concept of law can share the same term.

what pre-existing abstract standards of the constitution may require it *should be*. Walker refers to these two ways of misunderstanding normative concepts like the constitution as the *descriptive fallacy*, on the one hand, and the *fallacy of abstraction*, on the other[112].

Like other legal and political concepts, the concept of constitution should account for political and legal reality and should therefore be able to fluctuate with it, although this mirror effect cannot always be perfect. This does not mean, however, that the concept of constitution should not retain a certain normative impact on political and legal reality, although this impact should not lead to fully corseting political reality[113]. A third and combined approach to legal and political concepts like the constitution is therefore needed to reconcile the normative role of constitution with the profound changes in political and legal reality. The constitution is therefore best understood as what one calls in philosophy of language an *essentially contestable concept*[114]. Because the concept expresses one or many values it aims at protecting, different evaluations and conceptions of it can be given and this contestable nature is one of its main features[115]. The concept of constitution should be entitled to remain the same concept and hence establish a conceptual framework in which debates can take place[116], while also fluctuating at the same time through changes of paradigms and hence of conceptions. The essential contestability of the constitution 'can account for both change and for continuity in change'[117]. Instead of understanding the constitution either as a mere fact or as a purely normative standard, the concept's essential contestability makes it possible to account for its institutional and discursive resilience in national as much as in post-national settings, while also respecting its normative input[118]. Some authors refer in this respect to the *double hermeneutic* of the concepts such as that of constitution[119] and to the fact that those concepts are not only an interpretation of the world, but that this interpretation is already part of that world and of its 'sedimented discourse'[120].

The recognition of the essentially contestable nature of a concept is an *analytical* statement. It implies the possibility of conceiving a concept as normative, that is to say as encompassing a contestable value. It does not therefore protect against analytical mistakes or errors of judgement[121]. In fact, what enables the parties to know that their disagreement about an essentially contestable concept pertains to the same concept of constitution, and not to two different concepts of the constitution, lies in the exemplars or *paradigms* they share before starting the discussion. These are provided by those central cases in which the concept clearly applies. What distinguishes paradigms from criteria and agreement over them, however, is the evolutive nature of the former; paradigms adapt to new circumstances and can be entirely ousted in favour of new paradigms in the course of discussion, provided these changes are made gradually and that some minimal paradigms are shared to start the discussion[122].

112 Walker (2003a), p. 6 et seq.
113 See Skinner (1989) and Farr (1989).
114 See on this concept: Gallie (1956); Waldron (1994); Waldron (2002); Dworkin (1991); Connolly (1983); MacIntyre (1973); Gray (1977); Gray (1978); Miller (1983). See in the European context, Bankowski/Christodoulidis (2000), p. 18.
115 See Dworkin (1991), p. 90–101. See also Besson (2005b), Ch. 3.
116 See Richmond (1997), p. 378 et seq.
117 Aalberts (2004), p. 39.
118 See also Walker (2003a) for a 'speech-act' account of sovereignty.
119 Walker (2003a), p. 16 et seq. See already Richmond (1997), p. 379–382.
120 Howarth (1995), p. 127 et seq., 132; Aalberts (2004), p. 40 et seq.
121 See Waldron (2002), p. 152.
122 See Dworkin (1991), p. 72.

II.3. Constitutional pluralism and conceptual unity

The latter concern gives rise to a second one and to the question of the potential integration of different conceptions of the constitution in the same political and legal order. If the concept of constitution should allow for a certain amount of conceptual flexibility across time and place, thus acknowledging the existence of a thick European Constitution *stricto sensu*, this has implications in turn for the co-existence of conflicting conceptions of the constitution at the same time and place and in the same legal order[123]. It is indeed a consequence of the mixed approach of concepts and conceptual analysis, which was adopted before, that concepts referring to a particular reality should be applicable across the board regarding that same reality. It is the very point of concepts to ensure a certain convergence in the reference to the same objects in a linguistic community. What this implies is a certain amount of conceptual unity or at least of conceptual coherence. Two alternative approaches may be chosen to prevent the co-existence of conflicting conceptions of the constitution in the same European legal order *lato sensu*[124]: either the idea of conceptual unity or coherence is defeated to the advantage of that of conceptual pluralism (a), or national and post-national conceptions of the constitution should be made to converge (b).

II.3.a. Towards conceptual pluralism in European constitutional theory

The first response to this challenge does not question the co-existence of conflicting conceptions of the constitution between the national and the post-national level, but adheres to a form of *conceptual pluralism in constitutional theory*. According to this view, the new pluralistic constitutional order would actually imply the end of the conceptual unity of concepts such as law and the constitution. However radical this alternative may seem, it is worth addressing its plausibility in more detail before disparaging it. For many authors, conceptual analysis and the brands of legal theory that use it as their primary method of inquiry need not be regarded as rigid nor as proof to conceptual diversity[125]. Because we can distinguish between our conception of law and that of other cultures or even between our concept of law and law *tout court*, it is possible to accommodate law's conceptual diversity. This is the case across 'cultures' or 'societies'[126]. What remains to be seen, however, is whether this applies within the same society and legal order.

This seems not to be the case according to Raz's theory, for instance. Conflicting conceptions of the concept of constitution within the same legal order could only occur through mistake. This is a consequence of Raz's *criterial semantics* and of his account of what needs to be shared and known to have or share a concept, i.e. criteria for the correct application of the concept[127]. This can be well illustrated by Raz's conception of conceptual disagreement. Raz argues indeed that most conceptual disputes are *criterial* disputes, i.e. disagreements over the criteria for the correct application of a concept[128]. Criterial disputes are disputes in which people share the common rules or criteria for the correct application of a concept only imperfectly and therefore disagree about its correct application. Although criterial disputes can extend to central parts of

123 This is not something Raz (2004), p. 328 et seqq.'s reply to the legal change objection accurately takes into account.
124 The European legal order *lato sensu* encompasses national legal orders and the European legal order *stricto sensu*. When seen from the perspective of national law, it encompasses the national legal order in question together with the European legal order *lato sensu*. See Besson (2004b) on the principle of European coherence or integrity.
125 See Raz (2004), p. 337 et seqq.
126 See Raz (2004), p. 337 et seqq.
127 See Raz (2004), 324 et seqq.
128 See Raz (1998).

the correct application of a concept, those who share the concept assume, at least in the version that has been given recently by Raz[129], that some minimal rules regarding its proper use, such as paradigms or analogies, are shared and *agreed upon*, or at least ought to be if people are not mistaken. They are therefore restricted to cases in which some people suffer from epistemological barriers and are making claims which others are entitled to regard as wrong[130]. What this means about Raz's conceptual theory is that it cannot accommodate conceptual pluralism at one and the same time and place.

If criterial theorists like Raz cannot accommodate conceptual pluralism, what of other legal theorists who use conceptual analysis but who regard normative concepts such as law or constitution as non-criterial[131]? I will only take one example here: Dworkin's *interpretivism*. According to Dworkin, the plurality of conflicting conceptions of law and the constitution are one of the main features of a healthy legal order. There are no criteria for the correct application of those concepts, but only paradigms, i.e. exemplars of those concepts. These paradigms may evolve and be ousted gradually in favour of new paradigms. This cannot, however, be done all at once and a certain conceptual unity at any single time and place has to remain. Moreover, competing but contradictory paradigms and hence conceptions cannot all be deemed correct at the same point in time within the same legal order. According to Dworkin, indeed, every single legal actor or authority has a duty of integrity and should therefore interpret the constitutional system in a coherent fashion so that it appears in its best light[132]. What this implies is that even in Dworkin's flexible conceptual framework, a certain amount of conceptual coherence should remain.

II.3.b. Towards new conceptions in European constitutional theory

A second and more plausible route is for *national conceptions of the constitution* to converge towards a more integrated conception of national constitutions within the European constitutional order. On this view, constitutional pluralism in Europe implies, first, a revision of traditional conceptions of national constitutions and constitutional law and, second, although these two steps are likely to be simultaneous, the development of an integrated post-national conception of constitutions and constitutional law in Europe.

First of all, the *revision of traditional conceptions of the national constitution*. Those unitary conceptions, according to which the constitution is the fundamental and final norm of a legal order[133], cannot *prima facie* accommodate the co-existence of different constitutions in the same legal order. The relationship between the European Constitution and the national constitution within this new European legal order *lato sensu* cannot indeed simply be explained by reference to the international legal order and to its relationship to the national legal order; they are much more interwoven and there is no hierarchy between them. As such, national conceptions need to be assessed in their ability to encompass the new format of the integrated national *and* European constitutional orders. Given the new constitutional reality in Europe, a constitutional theory that cannot explain national as well as the European constitutions cannot be deemed a complete constitutional theory. Moreover, national conceptions should not only be able to account for both the national and the European constitutions *in themselves*, but

[129] See Raz (1998), p. 269.
[130] This derives from Raz (1998), p. 263.
[131] We need no convergence in truth beliefs about normative concepts to share those concepts. See Besson (2005b), Ch. 3; Burge (1986); Burge (1989).
[132] See Dworkin (1991), p. 179 et seqq.
[133] See Walker (2003a) on unitary sovereignty. See also Besson (2005a).

they should also reach a certain level of coherence *among themselves* as they are all accounting for the same European constitution in the same European legal order *lato sensu* with all the consequences this may have on each other's national legal orders. A true theory of European constitutional law should by definition be trans-European rather than purely national[134]. In what follows, I will take up some of the conceptions of the constitution one finds in predominant legal theories, in order to assess their ability to explain both national *and* European constitutions[135].

With respect to *legal positivism*, first, it has been a common critique that its conception of law cannot account for the autonomy of a legal order that is as decentralized and heterarchical as the European legal order. There is indeed no rule of recognition or *Grundnorm* in the European legal order *lato sensu*, to take but two of the most important legal positivist brands: Hart's and Kelsen's. This shortcoming also applies to the inability of the legal positivist model to account for a European constitution that would not be the ultimate norm of the European legal order *lato sensu* and *a fortiori* for a national constitution that would no longer always be the ultimate norm in the national legal order[136]. As a reply, many contemporary legal positivists argue, albeit in different ways, for the possibility to found both the autonomy of the European constitutional order and that of the national constitutional order, and hence the co-existence of national and European constitutions in the same legal order in positivist terms. This is the case of the new Hartians who claim that the question of the ultimate rule of recognition may be bypassed by recognizing the rule of recognition's ability to reconcile conflicting norms; it is after all a social norm that results from the convergence of law-applying authorities[137]. Moreover, the Hartian hierarchy of norms should not be identified with a hierarchy of legal sources and the Hartian legal order could therefore accommodate many co-existing rules of recognition and hence many constitutions at once in the same European legal order[138]. New Kelsenians also defend their ability to accommodate the new European constitutional order[139]. They argue that the Kelsenian hierarchy of norms should not be confused with a hierarchy of legal sources which can relate horizontally and in many different ways. They also claim that the fictive nature of the Kelsenian *Grundnorm* makes it easier to assume its existence and hence to establish the autonomy of both the national and the European constitutional orders at the same time[140]. Its lack of contingent ties enables both the national and the European constitutions to assume ultimate authority at the same time and hence to co-exist[141]. Its external nature as

[134] This should not be understood as a rejection of a universal philosophy of European law, however unlikely that is given the diversity of legal cultures and conceptions. The point is mainly to draw the attention on the importance of the Europeanization of legal theory, and not only of substantive law. The legal and political dimensions of the European polity should be the same for all Europeans and they should be able to be conceived along roughly the same lines. And this even more so since the structures and contents of national legal orders, but also philosophical perspectives are bound to converge through European integration. This mutual translation of conceptions could be improved through comparative constitutional law in particular: see Möllers (2001), p. 53 et seqq. On the linguistic difficulty this implies, see van Roermund (1997); von Bogdandy (2001). See also the new European dictionary of 'untranslatable' philosophical concepts by Cassin (2004).
[135] The prevalence of some constitutional theories over others in the European context may in turn influence the latter's general credibility and impact at the national level.
[136] See e.g. Weiler (2003) on this Kelsenian or Schmittian *finalité*.
[137] See Richmond (1997); Gardner (2001).
[138] See Gardner (2001).
[139] See e.g. MacCormick (1993) and (1999) for an institutionalist account of European law; Richmond (1997). Contra: Schilling (1996a); Schilling (1996b).
[140] See Richmond (1997).
[141] See Richmond (1997).

opposed to the Hartian rule of recognition's internal nature also eases the proof of its existence.

What is common to both neo-Hartians and neo-Kelsenians is the idea of *standpoint*; conceptions of the national and the European constitutions can remain unitary, without, however, being in conflict, since what matters is the perspective of the competent authority, be it national or European, in each case. Each authority will indeed conceive the European legal order *lato sensu* in a way that gives the ultimate competence to its own constitution, but what matters for conceptual unity or coherence is that its own conception and decision only are coherent[142]. The problem is that legal coherence requires consistency in the European legal order as a whole. As I have explained elsewhere, national and European authorities are knitting the same legal web whose subjects are all European citizens and whose subjects should therefore be the reference in judging the coherence of legal norms[143]. This responsibility in turn implies a duty of cooperation among national and European authorities active in that order. This contradicts the absolute sovereignty of either one's or the other's constitution, even if it is only a sovereignty of standpoint and even if authorities take turns in exercizing it[144].

As to *discourse theory*, secondly, its applicability to national and European constitutional law seems *prima facie* less difficult. Discourse theory does not indeed foresee any hierarchical order of norms and can accommodate a heterarchical and decentralized legal order such as the European constitutional order[145]. The hidden premise of Habermasian discourse theory, however, is the existence of an ethico-political community of the type we are familiar with in the national context, in which rights and democracy can be grounded and the autonomy of the legal order can be socially integrated[146]. This implies that before the European Union has turned into a European constitutional super-state, its legal order will remain incomplete[147] or of a minor quality[148]. According to Habermas, the European Constitution, which is not a global state's constitution, should draw its legitimacy in the meantime from national constitutions, thus emphasizing the latter's democratic and constitutional superiority[149]. This approach, one may refer to as communitarian cosmopolitanism as opposed to global cosmopolitanism[150], denies therefore the necessity to revise current conceptions of national constitutions and to develop a new conception or concept of the European constitution.

With respect to *system theory*, finally, the accommodation of the new European constitutional reality seems even easier. System theorists' conception of law is not

142 See Richmond (1997); Gardner (2001).

143 See Besson (2004b).

144 The Federal Constitutional Court in the *Bananenurteil* (BVerfGE 2 BvL 1/97 7.6.2000, EuZW 2000, 702) or the ECJ in the *Kreil* case (C–285/98 *Tanja Kreil c. Federal Republic of Germany* [2000] ECR I–69) were doing more than conceiving the European legal order from their own unitary perspective; they were actually cooperating in recognizing each other's decisions. See Besson (2004b).

145 Habermas (2002) himself does not explain how the discursive account of law developed in his earlier work translates in the European context, but focuses on specific issues such as the need for a European Constitution, European citizenship, etc.

146 See Zürn/Wolf (1999).

147 This is at least what Habermas (2002) seems to be arguing.

148 See Zürn/Wolf (1999). See, however, for a recent attempt to adapt the Habermasian conception, Günther (2001).

149 Habermas (2004), p. 139.

150 See on this denomination, the exchange between Lacroix (2002), Bellamy/Castiglione (2004) and Lacroix (2004a). See also Lacroix (2004b).

founded on a hierarchy of norms, but on a function-based pluralist[151] organization of groups of norms[152]. As such, the co-existence of multiple non-ultimate European constitutions in the European legal order *lato sensu* can easily be accounted for by system theories. Moreover, system theory's dissociation between law and state makes it possible to recognize European law as an autonomous legal order despite the absence of coercive force backing up European legal rules. This also eases the recognition of a European constitution without a European state. One may ask, however, why, in a global and pluralist conception of law, should one want to recognize an intermediary type of law like European law or even national law, if all that matters is functionalism. This objection is even stronger in the context of European constitutions, both at the national and European levels, as their *raison d'être* is not entirely clear in a function-driven constellation of norms[153].

Second, the development of an *integrated conception of post-national constitutionalism*. If traditional conceptions of national constitutions have to be revised to accommodate constitutional pluralism, and the co-existence in the same legal order of a national and a European constitutions, the conceptions of post-national constitutions themselves should develop with them towards an integrated conception of constitutionalism in a multilevel legal order. The real challenge stems not only from the accommodation within traditional conceptions of national and European constitutions, but of their accommodation *together and at the same time*. In a nutshell, even if one recognizes the autonomy and co-existence of both the national and the European constitutions in a national legal order, one needs to explain how they relate. If neither is supreme, contrary to what would have been the case under the traditional conception of the constitution, then their potential conflicts need to be addressed. European legal practice has indeed demonstrated in fifty years how constitutional conflicts can arise between those constitutional orders[154]; these conflicts can be conflicts of norms or conflicts of competences.

Different authors have tried to provide an account of European constitutional pluralism and a framework for the relationships among constitutional orders. Scope precludes discussing them in full detail and a few remarks will suffice. Legal pluralism now prevails over legal monism, which once was the most widespread conception of the relations between legal orders[155]. Theories differ, however, as to how to best explain the pluralism of constitutional orders, while still accounting for constitutional sovereignty in Europe. *Radical pluralists* contend that the European constitutional order coexists with national constitutional orders without any form of subordination to one another[156]. In case of conflict, the only recourse is extra-legal and includes moral

151 It is important to distinguish between intra-legal and inter-legal pluralism: system theorists' pluralism has to do with intra-legal pluralism as opposed to legal positivists' hierarchical ordering of legal norms, while inter-legal pluralism has to do with the plurality of legal orders whether or not each of them is hierarchically organized internally. Theories of (inter-)legal pluralism need not therefore be reduced to post-modern or deconstructionist theories, such as the system theory of law, for instance, although theories of (intra-)legal pluralism are usually also theories of (inter-)legal pluralism. See e.g. MacCormick (1999) on legal pluralism; Walker (2002) on constitutional pluralism.

152 See e.g. Teubner (1997).

153 See, however, Maher (1998) for a system-theoretical attempt at reconstructing the functional legitimacy of the national constitutional order in the European constitutional order as a whole.

154 See on constitutional conflicts in the EU, Besson (2004b); Kumm (1999); Kumm (2005c); Kumm/Ferreres-Comella (2004).

155 See e.g. Schilling (1996a) in the European context.

156 See e.g. Walker (2002); Pernice (2002). See Schilling (1996a).

principles like coherence[157], toleration[158] or dialogue[159]. *Soft pluralists*, by contrast, contend that the European and national legal orders coexist and are not subordinated to one another. But they also consider them to be legally coordinated by rules of international law and international dispute settlement, hence what one may refer to as *pluralism in monism*[160]. One may legitimately fear, however, that conflict would also escalate about those international rules and mediation courts. As Maduro argues, it is important to leave the *Kompetenz Kompetenz* issue entirely open in the joint and cooperative enterprise of European constitutionalism[161], on the model of the supremacy clause formulated in Art. I-6 of the new Constitution.

Conclusion

The many constitutions of Europe and their co-existence within the same European legal order *lato sensu* raise two sets of issues which were addressed successively in this paper: issues pertaining to the *constitutional nature of the European Constitution* and issues pertaining to the *scope of European constitutional theory*. The hiatus between national theories of the constitution and post-national constitutional law, and hence between the theory and practice of European constitutional law constitutes what one may refer to as the *double paradox of theorizing European constitutional law* and of *Europeanizing constitutional theory*. Whatever comes out of the current ratification process of the European Constitution, constitutional reality has changed drastically in Europe and this raises a serious challenge for European constitutional theory. If we want the future to tell us what should be retained from the European Constitution and whether there has in fact been a European constitutional moment, then it is important to start thinking seriously about it now.

157 See e.g. Maduro (2003a); Besson (2004a) and (2005a); Magnette (2000).
158 See e.g. Weiler (2003).
159 See e.g. the early MacCormick (1993). See also Walker (2002); Kumm (1999). See Maduro (2003c)'s critique of Kumm (1999).
160 See e.g. the later MacCormick (1999); Richmond (1997). See also on a European 'Conseil constitutionnel', Weiler (1999).
161 Maduro (2003c), p. 522 et seq. See also Weiler (2003) and Pernice/Kanitz (2004) on European multi-level 'constitutional laboratories'.

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