THE CONCEPT OF CONSTITUTION IN EUROPE: INTERPRETATION *IN LIEU* OF TRANSLATION

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What do we expect from constitutionalism? The question raised by the panel's organisers is an important one.[1] What should we expect now, after we expected so much from a European Constitution with a big 'C' and that nothing seems to have changed? Was it after all a misconceived quest? In fact, the question has been made even more interesting by the addition of the term 'expectation' at the beginning of the question raised: (i) why should one be said to expect anything from concepts like 'constitution' and 'constitutionalism'[2] in Europe and (ii) who is the 'we'?

My concern in this short paper will concentrate more on the *conceptual* issues relative to our expectations from European constitutionalism, than to their substantive content. As a matter of fact, if certain conceptual issues had been clarified before, there are reasons to believe that the more substantive ones might also have become clearer sooner. As I have argued elsewhere (see Besson 2007), constitutional pluralism, i.e., the co-existence of many ultimate constitutional norms of different origins within the same European legal order *lato sensu* (see Walker 2002), needs to be matched by a pluralism of mechanisms to vest the latter with democratic legitimacy. If I am right that

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[1] The present paper was prepared for the discussion panel *What do we expect from constitutionalism?* that took place on the 30 September, 2006, in Helsinki. As such, its only aim was to focus discussion and its style has remained that of a panel presentation: it is brief and provocative and contains almost no references. A similar albeit more complete argument may be found in Besson 2006. I would like to thank all participants in the panel for a lively and thought-provoking discussion and in particular Joxerramon Bengoetxea, Bardo Fassbender, Miguel Maduro and Kaarlo Tuori. The ideas presented in this short paper were developed within the framework of the Project for a European Philosophy of European Law (PEOPEL, http://fns.unifr.ch/peopel).

[2] In short, I will take the concept of (formal) *constitution* to refer to a superior legal norm which is usually but not always laid down in a written document, which constitutes and defines the powers of the main organs of the different branches of government and which is in principle protected through specific revision rules against modification by an ulterior law, over which it therefore has priority. As to the concept of *constitutionalism*, it will be used to refer to the political conception according to which political and legal power can only be exercised within the limits of the constitution, such as the separation of powers, checks and balances, the rule of law, democracy or fundamental rights. On the many controversial meanings of both concepts, see Besson 2006, section I.1.

this legitimation process requires de-territorialisation, then conceptions of constitution and constitutionalism themselves need to be de-territorialised. Of course, this has a heavy theoretical price, but I would like to argue that we should be ready to pay it, if we want to go forward with European constitutionalism.

As a matter of fact, constitutions and constitutionalism are already largely de-territorialised or rather over-territorialised in Europe. For a long time, the territorial distribution of constitutions 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 globalisation has changed all this. The Westphalian conception of political sovereignty has started to fade. Territory and political membership are gradually growing apart, immigration and the development of post-national citizenship being only two of the many causes or signs of this decoupling of the political and the legal from the territorial. This has had implications for the concept of constitution, as well. One speaks, for instance, of the international constitution to refer to the constitutional structure and fundamental principles of the international community.[3] Closer to us, European citizens are still wondering about the future of the Treaty establishing a Constitution for Europe which some have affectionately called the 'European Constitution'. What this means is that constitutions, and thus political and legal orders, now overlap in the same territory and pertaining to the same population, thus jeopardising 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 questioned by the fact of European constitutional pluralism. So is the conception according to which constitutions are necessarily the ultimate or fundamental legal norms in a legal order. After all, for a long time, neither the supremacy of international law nor the primacy of EU law had managed to entirely undermine the idea that national constitutions retained an ultimate validity.[4] Recent years' post-national

[3] I am assuming, of course, that the terms 'constitution' and 'constitutionalism' are not used to refer to other concepts than those usually referred to by those terms in national law. Not only would this kind of talking at cross purposes be highly unlikely in a well established academic discourse, but the intentional differential use of such highly connotated normative terms would be counterproductive; why use this heavily loaded term to refer to something normatively less pregnant? See Besson 2006.

[4] It suffices to mention the case-law of the German Federal Constitutional Court and in particular BVerfGE 37, 271 – *Solange I*, BVerfGE 73, 339 - *Solange II*, and BVerfGE 89, 155 – *Brunner*. See also most recently, *Bananenurteil* BVerfGE 102, 147, 2 BvR 1/97 and BVerfGE, 2 BvR 2236/04. See also Kaarlo Tuori in this volume.

constitutional talk and, more importantly, global constitutionalising processes are about to change all this.

The many constitutions of Europe and their co-existence within the same European legal order *lato sensu* raise two sets of issues: 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 theorising European constitutional law and of Europeanising constitutional theory*. While the first issue has been addressed extensively, as the past few years have seen the development of all sorts of accounts of European and post-national constitutionalism,[5] it is the second issue that I would like to take up in these few remarks, i.e., the impact of the plurality of constitutions on what we should now expect from constitutionalism *tout court* in Europe.

Whatever comes out of the current ratification process of the European Constitution, constitutional reality has changed drastically in Europe. The new European Constitution, whichever shape it takes, will apply to the same territories and populations as national constitutions and become an integral part of national legal orders. The difficulty is that the conceptions of constitution and constitutionalism traditionally pertain to a single and unitary norm per legal order and polity, whether the latter is national or cosmopolitan. Translating them to fit the multi-layered European political structure is therefore necessary (see Walker 2003).[6] But is conceptual translation pertinent with respect to the concept of constitution, which is traditionally unitary, and to the pluralistic European legal order *lato sensu* in which the boundaries between national and European law *stricto sensu* can no longer be drawn? In other words, can we afford to have, in the same legal order, *a theory of law* and *a theory of the constitution* that cannot accommodate conflicting conceptions and uses of the concept of the constitution and that needs to translate the concept into the European context every time an issue arises in the latter?

The many European constitutions call for an encompassing constitutional theory that can explain both national constitutions and the European

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[5] See Besson 2006, section I on the translation of the concepts of constitution and constitutionalism in the EU context. See also Walker 2004; Walker 2002; Craig 2001. For different approaches, see Shaw 1999; De Witte 2002; Grimm 1995; Habermas 2001; Weiler 2003.

[6] See also Kaarlo Tuori in this volume.

Constitution. What the co-existence of many European constitutions requires in other words is not only a translation of the concept of constitution in another context, but a re-interpretation of the concept *per se*; translation leaves the pre-existing concept untouched, whereas European constitutionalism clearly puts the concept of constitution itself in question. Developing an encompassing constitutional theory requires addressing the two questions delineated at the outset of the paper: (1.) what should one expect from concepts like constitution and constitutionalism, and (2.) how do these expectations fare with the plurality of constitutions in Europe?

1. Constitutional theory and conceptual analysis

When they are objects of philosophical study, concepts are taken to be a purely philosophical creation. 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 discuss those aspects of the world. One usually opposes 'concepts' to 'conceptions'. A conception amounts to what the concept is more precisely, i.e., a definition or deployment. Concepts and conceptions are merely different levels at which more or less concrete statements are made. In a nutshell, it is important to distinguish between an object, a concept of that object, our concept of that object and our conceptions of that object.

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. 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. 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 the most in constitutional theory are *normative concepts* that embody a normative standard or value and whose correct use by this very essence involves value judgments. It is the case of the concept of constitutionalism itself. Conceptual analysis as applied to the concept of constitutionalism, even though it is a normative concept, is not necessarily universal and hence constitutional theory need not necessarily be universal. Some authors argue it is 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 path that combines elements of both

approaches. Under this alternative, legal theory is both a discussion of the concept of law in general and focussed on a particular legal system. It looks at a group of legal rules, but as a means of understanding our own legal system better. According to Joseph 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' (see Raz 2004; Raz 2001).

Mutatis mutandis, 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. Constitutional theory can yield a vague concept of constitution that is not meant to draw borderlines, but to focus discussion. 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. Constitutional theory can therefore be both normative and universal, on the one hand, and descriptive and able to accommodate in basic realities of political life, on the other. What remains to be seen, however, 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 and the same polity*.

2. Constitutional pluralism and conceptual unity

While 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* besides national constitutions, difficulties might arise with the co-existence of conflicting conceptions of the constitution at the same time and place, as in the context of the European legal order *lato sensu*. 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. In other words, the point of concepts is to ensure a certain convergence in the reference to the same objects in a linguistic

community. What this requires is a certain amount of conceptual unity or at least of conceptual coherence.

A solution to this important challenge to European constitutional theory might be for national conceptions of constitution and constitutionalism to converge towards a more integrated conception within the European constitutional order. On this view, realising constitutional pluralism in Europe implies, first, a revision of traditional conceptions of national constitutions and constitutional law and, second, although these two steps are simultaneous, the development of an integrated post-national conception of constitutions and constitutional law in Europe.

2.1 Revising traditional conceptions of constitution and constitutionalism

As alluded to before, those unitary conceptions, according to which the constitution is the fundamental and ultimate norm of a legal order, cannot *prima facie* accommodate the co-existence of different constitutions in the same legal order. The relationship between the European Constitution and the national constitutions within the European legal order *lato sensu* cannot therefore be explained by reference to those conceptions of constitution and constitutionalism. Nor can it be clarified by reference to the international legal order and to its alleged hierarchical relationship to the national legal order; national and European constitutional norms are deeply interwoven and there is no absolute hierarchy between them. As such, traditional conceptions are challenged in their ability to conceive of the new European constitutional order, and, in other words, to explain constitutional pluralism.

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 they should also reach a certain level of coherence *among themselves* as they all account 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 good theory of European constitutional law should, in other words, be (trans-)European rather than purely national.

In what follows, I would like to 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 and hence to test their resilience when faced with the European constitutional challenge.

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 decentralised and heterarchical as the European legal order. There is indeed no Hartian rule of recognition or Kelsenian *Grundnorm* in the European legal order *lato sensu*, to take but two of the most important legal positivist theories. Many contemporary legal positivists argue, however, albeit in different ways, for the possibility to base the autonomy of both the European constitutional norms and the national constitutional norms, and hence the co-existence of national and European constitutions within the same legal order. What is common to both these 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 in each case is the perspective of the competent authority, be it national or European. Each authority will indeed conceive of the European legal order *lato sensu* in a way that gives the ultimate competence to its own constitution, and all that matters for conceptual unity or coherence is that its own conceptions and decisions are coherent in themselves (see, e.g., MacCormick 1999, Ch. 7; Richmond 1997). 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 primary European citizens; the latter should be the reference in judging the coherence of all the legal norms that apply to them (see Besson 2004). If the authority of national and European law depends on their overall normative coherence, this implies a responsibility and a duty of cooperation among national and European authorities active in that order. The need for normative coherence contradicts the absolute sovereignty of either one's or the other's constitution, even if their sovereignty is only a sovereignty of standpoint and although authorities take turns in exercising it.

As to *discourse theory*, secondly, its ability to accommodate both national and European constitutional law seems *prima facie* higher. Discourse theory does not indeed foresee any hierarchical order of norms and can accommodate a heterarchical and de-centralised legal order such as the European constitutional order (see, e.g., Habermas 2004; Zürn and Wolf 1999). The hidden premise of 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. This would seem to imply that until the European Union has turned into a European constitutional super-state, its legal order will remain incomplete or of a minor quality. In the meantime, the European Constitution, which is not a global state's constitution, should draw its legitimacy from national constitutions, thus emphasising the latter's democratic and constitutional

superiority. This approach, which one may refer to as communitarian cosmopolitanism as opposed to global cosmopolitanism, therefore denies the necessity to revise current conceptions of national constitutions and to develop a new conception or concept of European constitutionalism, since both take turns.

As to *system theory*, finally, the accommodation of the new European constitutional reality seems even easier, at least *prima facie*. System theorists' conception of law is not founded on a hierarchy of norms, but on a function-based pluralist organisation of clusters of norms (see, e.g., Fischer-Lescano and Teubner 2006; Maher 1998). As such, the co-existence of multiple non-ultimate constitutions in the European legal order *lato sensu* can easily be accounted for. The dissociation between law and politics 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, one should want to recognise an intermediary type of law like European law or even national law, if all that matters is functionalism and not legitimacy. This objection is even stronger pertaining to European constitutional norms, both at the national and European levels, as their *raison d'être* is not entirely clear in a function-driven constellation of norms, in which legitimacy is not a concern and where normative hierarchy is disposable.

2.2 Developing an integrated conception of constitution and constitutionalism

If traditional conceptions of constitutions have to be revised to accommodate constitutional pluralism and the co-existence in the same legal order of national and European constitutional norms, then the conceptions of post-national constitutions themselves should be adapted in order to develop 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 recognises 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 traditional conceptions of the constitution, their potential conflicts need to be addressed. European legal practice has indeed demonstrated in fifty years of integration how constitutional conflicts can arise between those constitutional orders. True, these were often due to outdated unitary conceptions of constitution and constitutionalism and were to a great extent formal conflicts (of competence), but moral pluralism can lead to substantive

constitutional conflicts in pluralist legal orders as well, thus calling for solutions (see Besson 2004).

Different authors have tried to provide an account of European constitutional pluralism and a framework for the relationship among constitutional norms within the European legal order *lato sensu*. 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; it differs from the latter since, while it acknowledges that different legal orders are intermingled without transposition of one into the other, it recognises no clear hierarchy between them. Despite the plurality in its terms, legal pluralism should not, however, be confused with dualism, whose central take is to entrench a clear separation between legal orders; this approach has long been belied by invasive forms of international and European law and by the doctrine of direct effect in particular.

Theories differ, however, as to how to best explain the pluralism of constitutional orders, while still accounting for constitutional sovereignty in Europe and hence for the need for legitimate solutions to constitutional conflicts.

Radical pluralists contend that the European constitutional order coexists with national constitutional orders without any form of subordination between them. In case of conflict, the only settlement procedures are extra-legal and include moral principles like coherence, toleration or dialogue (see, e.g., Weiler 2003). One may also mention content-based or normative (as opposed to formal or wholesale legal) hierarchies such as binding international norms of *jus cogens*, as exemplified in the recent constitutional case-law of the Court of First Instance of the European Communities.[7]

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. One may coin this brand of pluralism as 'pluralism in monism', since it condones legal pluralism in the European legal order but founds it in monism at the international level (see, e.g., MacCormick 1999, Ch. 7; Richmond 1997). One may legitimately fear, however, that conflict might escalate and reach those international rules and mediation courts. Besides, it is not entirely clear why there should be constitutional pluralism in Europe and not beyond, and hence why the international legal order should remain

[7] See, e.g., T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, [2005] ECR II-3533.

hierarchically superior to the European and the national one. Evidence from the recent case-law of the Court of First Instance of the European Communities.[8]

Whatever the outcome of this debate, it is crucial that constitutional pluralism in Europe does not lead us to neglect the issue of legitimacy in a pluralist European constitutional order. The constitutional decisions should be vested with sufficient legitimacy to justify their claim to authority. Apparent coherence reached through legal *bricolage* of the kind suggested by some legal pluralists to date (see, e.g., Fischer-Lescano and Teubner 2006) does not quite put the legitimacy issue at rest; coherence amounts to only one of the conditions of legal authority (see Besson 2004). Addressing the legitimacy issue openly remains difficult, however, since constitutional pluralism has yet to be matched by a corresponding model of democratic legitimacy; European democracy remains largely conceived of in a statist fashion and hence in traditional constitutionalist terms. It is this traditional conception of constitutionalist democracy that might explain why the constitutionalisation of Europe was perceived as a threat by a majority of the European population. This makes it all the more urgent therefore to address the question of the democratic legitimacy of the European legal order by re-interpreting its constitutive elements in the light of the new political and constitutional circumstances in Europe (see Besson 2007). Otherwise, democracy will remain its own worst enemy, clinging to a largely *dépassé* conception of constitution and constitutionalism and hence undermining the first steps made towards the democratisation of European law.

To go back to the question raised at the outset of the paper, high expectations have been raised by the post-national constitutional discourse and rightly so. The time has come to face this constitutional revolution, and the fundamental paradigm shift in the organisation and legitimation processes of the national legal orders in Europe. True, the constitutional process has come to a halt at the European level, but the ball is now in the court of Member States where the key to the interpretation of European constitutionalism and democracy has always lain.

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[8] See, e.g., Cases T-253/02 *Chafiq Ayadi v Council of the European Union*, judgement of 12 July 2006, n.y.r., and T-49/04 *Faraj Hassan v Council of the European Union and Commission of the European Communities*, judgement of 12 July 2006, n.y.r.

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