The Gift of Synthesis

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Agustin Menéndez and Erik John Fossum, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union* (Lanham, ML, Rowman & Littlefield 2011), 303 p., ISBN 978-0-74255311-8.

A central premise of this book is that the traditional categories of modern constitutionalism still make up the toolbox to tackle questions of European integration. At a higher level, a theory of European integration must be one of constitutional law. The authors present their own theory of 'constitutional synthesis' as custom-made for Europe and superior to the others. Their theory is an attempt to explain the European constitution and at the same time to set a yardstick against which to judge the legitimacy of the European constitutional polity.

Two intuitions lie at the heart of constitutional synthesis. The first is that constitutional law has been critical for European integration. The nature of European integration has been mainly legal and it has been realized by sharing a common constitutional law among the states. Unlike national constitutions, 'the constitution of the Union was not written by *we the European people*, but was defined by an implicit reference to the six national constitutions of the founding member states' (p. 9). From this springs the second intuition, according to which national constitutions represent the building blocks of European constitutionalism upon which a supranational institutional structure has been superimposed without following a particular design or plan.

Constitutional synthesis has to be seen as a specific model of constitution-making for the Union. Unlike most constitutions, it is neither revolutionary nor evolutionary. *Revolutionary* constitutionalism is marked by a conscious moment or period of rupture by the people in order to change fundamental aspects of a polity. The constitution enacted from this process is usually understood as a new beginning and it resembles a plan (as, for example, in the French and the Italian cases). *Evolutionary* constitution-making puts the accent on time as the key legitimating factor. In this case, constitutional norms are legitimated by a long record

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that proves their efficiency in social integration and by the endorsement of citizens at critical junctures of national constitutional history.

Constitutional synthesis shares some common traits of both systems, because it takes into account both the constitutional origin of the Union and the sustained constitutional dynamic over time. Concerning the first, synthesis still implies 'a reference to *popular authorship* as the legitimating principle' (p. 61). As in revolutionary constitutionalism, constitutional synthesis is launched by an explicit decision, in this case the EC Treaties of the Fifties. As in evolutionary constitutionalism, constitutional norms are developed and fleshed out over time, but in constitutional synthesis this development is framed by the collective of national constitutions. In this sense, the constitution is the result of a process of progressive evolution, but under constitutional synthesis there are clear positive constitutional norms that serve as the essential point of reference.

Constitutional synthesis then turns out to be a *tertium genus* among constitution-making processes. Two different layers form its basic structure. The first layer is the common constitutional law of member states (or, to use the ECJ jargon, the common constitutional traditions), which is not radically different from the core of many national constitutional laws. As should be clear by now, 'constitutional synthesis refers to a process in which already established constitutional states integrate through constitutional law' (p. 45). European integration has been intentionally authorised by the national constitutions of the six founding Member States. At this stage, one can already grasp one of the potential meanings of the book's title. The 'Gift' comes from member states' constitutions in the form of their openness through mandates, which allowed the founding of the Community. This allows an escape from the logic of modern popular sovereignty because it recognizes the necessity for constitutional democracies to integrate if they want to preserve stability. In a twist on Milward's famous thesis,[1] the authors affirm that by opening up to constitutional integration, national constitutions not only preserve themselves from obsolescence or corruption, but they consolidate and develop their respective democratic orders.

From this moment, national constitutions started living a double constitutional life. First, they were both the higher laws of their respective countries and part and parcel of the common European constitutional law. In the authors' words, 'with the unleashing of the process of integration, they [the national constitutions] willingly placed themselves in a common constitutional field' (p. 47). By virtue of being part of a common field, they each have slowly begun a transformation.

The second layer of constitutional synthesis is that of the institutional pluralism that grows out of the constitutional field. Member states have not lost their autonomous political structures because of integration. Instead, institutions prolifer-

[1] Alan Milward, *The Rescue of the European Nation-State* (London, Routledge 1992).

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ate in the European Union, both at the national and supranational level, and they all claim to express their voices and concerns over common European issues. The homogenizing logic of the common constitutional ideal and the logic of institutional pluralism may, however, enter into conflict when normative synthesis proceeds beyond institutional consolidation, leading to conflicts among institutions.

These remarks point to another difference between traditional processes of constitution-making and the European *Sonderweg*, which has to be seen in the pluralistic nature of the latter. Constitutional synthesis accounts for the pluralist element of the European Union in at least two senses. First, a plurality of institutions is called to interpret and apply European constitutional law. While the law is integrated into a single order, institutions are not structured according to a single hierarchy. The creation of supranational institutions has happened in a patchy manner, as different institutional actors have tried, at different moments, to gain a hold over it.

However, despite its pluralist features, the theory of constitutional synthesis cannot be deemed to be part of the larger family of constitutional pluralism.[2] The difference is crucial. The pluralists tend to emphasize the absence of a monistic element in European constitutionalism and extol the epistemic virtues of a dialogue between different interpreters of European laws, with an accent on the dialogue between courts.

Fossum and Menéndez instead stress the relevance of a common constitutional law, because only equality before the law can guarantee integration. For them, the monistic core of constitutional synthesis is necessary to make constitutional law the main engine of European integration. In fact, if the European Union were a truly and completely pluralistic polity, there would have never been any requirement of similarity between the constitutional traditions of the Member States. Entrance requirements for every new applicant, which have tightened as the process of integration has unfolded, would not be expected in a truly pluralist polity. In this sense, the closest theory to synthesis is multilevel constitutionalism.[3] Both approaches have the same point of departure: national institutions authorizing European integration. However, multilevel constitutionalism does not provide for a clear normative yardstick against which to assess processes of constitutionalization.

This is shown by the authors' treatment of the primacy issue. As is well known, primacy is the principle established by *Costa* v. *ENEL,* through which conflict between European and national laws are resolved. The difficulty is evident. Even

[2] For an extensive treatment of this theory, see Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in Europe and Beyond* (Oxford, Hart 2012).

[3] Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 *Columbia Journal of European Law* (2009) p. 349.

though national constitutions are logically, historically and normatively prior to European Union law (as constitutional synthesis acknowledges), European law prevails over conflicting national provisions, with maybe the exception of a category of cases under the doctrine of so called counter limits. How is it possible that the primacy of Community law is recognized together with the still-affirmed primacy of national constitutional laws? Constitutional synthesis claims that European constitutional law and national constitutional laws cannot be portrayed as being potentially in conflict for two reasons: first, European constitutionalism is an offspring of national constitutions and, second, these constitutions share a common constitutional field.

In this context, the only way to realize the ideal of integration through constitutional law is through primacy. In fact, equality before European law is a necessary requirement to realize this ideal and it can be achieved only by a single constitutional standard. However, primacy is not conceived as the elevation of one law above others as the higher law of the land, but as the overarching synthesis between many constitutional norms. Conflicts between constitutional laws are no longer understood as always vertical, but most of the times they can be seen as mixed or horizontal conflicts, between two versions of the common constitutional tradition.

Primacy is only problematic when a *vertical* conflict between European and national constitutions is the result of the emancipation of European law '*against* the substantive contents of national constitutional standards' (p. 175). This kind of vertical conflicts represent the European hard cases because they create a real contrast between the European and the national levels.

The authors illustrate the nature of these hard cases with a challenging interpretation of the much discussed *Viking* case. The case involved an emancipated European constitutional norm in conflict with the common norm of national constitutions. In fact, hardly any of the national constitutions could be said to support the solution put forward by the European Court of Justice, which solved the conflict in favor of the freedom of establishment of the employer. In this case, according to the authors, the homogenizing effects of the decision of the Court should have been stopped by making a reference to the first constitutional layer of the Union, that is, the content of the national constitutions.

The reader of this book is left with some questions. One of the claims of constitutional synthesis is that it accounts for the sense of citizenship's ownership of the whole constitutional edifice. As already mentioned, constitutional synthesis claims to secure the democratic legitimacy of constitutional decisions without resorting to the intensity of constitutional moments. For obvious reasons, this is a crucial claim for this theory. And if proved correct, it would make constitutional synthesis not only a solid explanatory device, but also an attractive normative one.

However, one is left wondering what kind of constitutional politics is commended by constitutional synthesis. The requirements that can be found in the book do not look very stringent. The role and place of essential political phenomena, like conflict and disagreement, is not taken into account. This could be for good reasons. After all, if one should apply the principles of political constitutionalism to the political life of the European Union, therefore bringing party competition and majority rule to the core of its dynamics, it could end up shaking the foundations of the whole constitutional edifice. Constitutional synthesis secures both the maintenance of a common core made of constitutional law, and at the same time the preservation and respect of national constitutional identities.

The authors are well aware of the vulnerabilities of a synthetic polity. Yet, they seem convinced that once the constitutional process has been set in motion, European institutions and citizens will be given the option of engaging in European politics. This is the second meaning one can give to the 'gift' mentioned in the book's title. The coming together of several national constitutions brings with it certain possibilities, because constitutionalization requires further decisions in order to distill the normative content from the set of shared national constitutions. It is left to the political and constitutional cultures of the European Union to take up the challenge.

It is at this stage that the authors appear too confident with the promise of constitutional synthesis. The record of the institutional developments necessary to cope with the mismatch between a common constitutional law and a pluralist constitutional structure presents mixed evidence. While the creation of a European Parliament, with a relatively unsuccessful electoral process that takes place on the whole continent at the same time, has certainly enhanced political life in Europe, other institutions have indeed confirmed the impression of a polity where conflict and deliberation should at best be left to diplomatic or technocratic intervention. Most telling is the authors' assessment of comitology as a successful experimentation in the development of the institutional supranational structure, which sounds disproportionately generous for a constitutional theory that claims to secure democratic values.

On the level of normative constitutional theory, this is the main risk behind constitutional synthesis: for structural reasons, it may not be able to deliver some of the democratic goods it is supposed to foster. It also does not seem able to avoid the idea of processes of constitutionalization by stealth. As a modern doctrine, constitutionalism has not only been identified as a device for limiting and constraining power. It has also been understood as a public process of constituting institutions which make it possible for the people to govern themselves. Without these public institutions, a common, but not homogenous, political life (a precondition for developing a common constitutional law), cannot be possible because there is no visible common political world.

The publicity which should inform both constitutional processes and the nature of the institutions created has often been absent from the history of the European Union, a fact that is also recognized by the authors. Constitutional synthesis does not impose any normative demand in this respect. One may reply, at this stage, that a more public process of constitutionalization and the creation of perfectly democratic institutions would have transformed the Union into a fully-fledged federation, something which the authors believe to be an unrealistic option for the moment.

It is not clear how the relationship between constitutional synthesis and federalism should be understood. Can synthesis be interpreted as a preliminary phase to federalism or as a device for preventing a complete federalization of the polity and the preservation of national constitutional identities? This remains an open issue the authors might want to clarify.

Be that as it may, constitutional synthesis represents an important contribution to the field of comparative public law as well. Given the large number of constitutional States already established in the world, a theory that is able to explain how a constitutional polity may emerge out of the integration of already constitutionalized entities without resorting to a federal State will certainly appeal to constitutional lawyers interested in supranational constitutionalism.

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