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THE GIFTS OF SYNTHESIS: INTEGRATION AND CONSTITUTIONALIZATION

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Review of: Agustin Menéndez, 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.

Even though it cannot yet be compared to its American counterpart for quantity and quality, European constitutional theory is rapidly flourishing and it has almost developed into a genre with its own jargon and categories. This important book can be hailed as one of the most elaborated fruits of the season of European constitutional self-reflection. Given the much contested nature of the European Union as a political entity, constitutionalists have had to struggle in order to capture it and to explain its constitutional value. By not succumbing to the intoxicating rhetoric of the 'sui generis' polity, the authors engage with European constitutional history and theory with a view of clarifying what is the nature of the European polity, how to explain certain constitutional riddles like the supremacy principle and how to put forward principles in order to assess the legitimacy of this constitutional order. Overall, it is an extremely useful operation both for constitutional and European lawyers.

The presupposition underlying the approach advocated in this book is the

idea that the traditional categories of modern constitutionalism still represent the main toolbox to tackle with European constitutional problems. In this way, the contribution made by this book has a double nature: it entails both a general effort at explaining the European constitution and it also sets normative standards to be used as a yardstick against which judging the legitimacy of the European constitutional polity.
Fossum and Menéndez make clear from the beginning that their work has to be seen as a reconstruction of a practice (in this case, a constitutional practice), with the aim of making its point or purpose visible. Seen from this perspective, their enterprise is an internal one, that is, it comes from participants in the practice. Moreover, the theory advanced in this book is quite ambitious because it is conceived, in Dworkinean terms, as the best possible reconstruction of European constitutionalism under the light of democratic theory, but it is also supposed to be applicable beyond the European constitutional experience. The authors devote the last chapter to Canada's constitutional history in order to show that Canada too is what they define as a 'synthetic polity'. This particular claim, as many others included in this dense book, will not be discussed here (For a different take on the similarities between the European Union and Canada see Giuseppe Martinico, 'Constitutional Failure or Constitutional Odyssey?', in Perspectives on Federalism, vol. 3, 2011, http://www.on-federalism.eu/index.php/component/content/article/94-constitutional-failure-or-constitutional-odyssey-what-can-we-learn-from-comparative-law-). The major focus of this review will be on the thrust and most original bit of Fossum's and Menéndez's theory: the idea of constitutional synthesis as the engine of European integration. This represents the most important contribution of this book to European studies. Moreover, if proved to be a correct interpretation of European constitutionalism, the idea of constitutional synthesis would also represent a significant input for comparative public law because it would introduce in the debate a new form of constitution-making.
Two intuitions lie at the heart of constitutional synthesis. The first one is that constitutional law has been critical for European integration. This means that the nature of European integration has been mainly legal and

it has been realized by sharing a common constitutional law. The constitution of the Union was not written by the European people, but defined by an implicit reference to the six national constitutions of the founding Member States. From the recognition of this fact descends 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 takes seriously the fact that the Union is a constitutional polity of already established constitutional states. To these presuppositions, one must add that constitutional synthesis refers specifically to processes of constitution-making.

This is not surprising, given that the purpose of the book is to reconstruct a specific practice and in order to do that an analysis of the processes which brought about some of the most fundamental changes in Europe is unavoidable. It would not probably be inaccurate to note that democratic processes form the ground of this approach, or, to translate this into the language of contemporary debate, the authors are more concerned with input reasons, that is, reasons for adopting certain procedures, rather than output reasons, that is, reasons concerned with the content of the outcome of processes (For the distinction between input and output reasons, applied to the European Union, see Richard Bellamy, Democracy without Democracy? Can the EU's Democratic 'Outputs' Be Separated from the Democratic 'Inputs' Provided by Competitive Parties and Majority Rule?, 17 Journal of European Public Policy, 2010, p. 2.). From this vantage point, polities are understood from the perspective of how they have been constitutionalised. For this reason, for example, the authors pass a different judgment on the quality of the last two constitutional processes of Laeken and Lisbon. As known, the difference in content between the outputs of these two constitutional moments is not enormous. However, Menéndez and Fossum believe that the Lisbon Treaty is unlikely to increase the legitimacy credentials of the European Union. Even though the Treaty reproduces most of the content of Laeken, it cannot be affirmed that Lisbon is Laeken by other means. This is because the 'dignity

of constitutional law depends on the process through which it is approved, the explicit denial of constitutional ambitions that characterized Lisbon cannot be without effects on the actual legal force of the provisions enshrined in the treaty' (p. 161).

Obviously, the constitutionalization of the European Union has been marked from its inception by special features. It was clearly not the output of a conscious movement or the slow ex post recognition by the people. Constitutional synthesis has to be seen as a specific model of constitution making which should be kept separated from the other most traditional systems, like the revolutionary and the evolutionary constitution-making experiences. 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 (like, 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 that proves their efficiency in social integration and through the endorsement by citizens at critical junctures of national constitutional history. Constitutional synthesis shares some common traits of both systems, because it takes into account the constitutional origin of the Union and the sustained constitutional dynamic over time. For what concerns 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, but it does not require the same deliberative quality. 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.

In light of these remarks, constitutional synthesis turns out to be a tertium genus among constitution-making processes. Two different layers form its

basic structure. One 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 it should be clear by now, 'constitutional synthesis refers to a process in which already established constitutional states integrate through constitutional law' (45). European integration has been authorised by the national constitutions of the six founding Member States. At this stage, one can already grasp one of the potential meanings the title of the book is pointing to. The openness of the six constitutions which allowed the founding of the Community escapes to the logic of modern popular sovereignty

because it recognizes the necessity for constitutional democracies to integrate if they want to preserve a stable democracy. In a very interesting twist of Milward's famous thesis (Alan Milward, The Rescue of the European Nation-State, London 1992), the authors affirm that by opening up to further constitutional integration, national constitutions not only preserve themselves from obsolescence or corruption, but they consolidate their respective democratic orders. From this moment, national constitutions started living a double constitutional life; they were both the higher law of their respective countries and part and parcel of the common European constitutional law. Since integration is achieved through common constitutional law, the latter represents the regulatory ideal of the European Union. This can be obtained by placing national constitutions into what the authors define as a 'constitutional field'. In their words, 'with the unleashing of the process of integration, they willingly placed themselves in a common constitutional field' (p. 47). National constitutions not only acquired a collective identity (as members of the common field of European constitutional law), but they have also started to look to one another. In virtue of being part of a common field, their identities have slowly begun to transform through binding cooperation. The second layer of constitutional synthesis is made of the institutional pluralism that grows out of the constitutional field. Member States have not lost their autonomous political structures because (and not despite) of integration. Institutions proliferate 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 enter into a conflict when normative synthesis proceeds, while institutional consolidation is not fostered. In this way, harsh conflicts among institutions may be fed.

These remarks point also 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 in one single order, institutions are not structured according to a single hierarchy. Constitutional synthesis is also pluralistic in the explanation of the nature of supranational institutions. The creation of supranational institutions has been done in a patchy manner because different institutional actors have tried, in different moments, to gain a hold over it. However, despite its pluralist features, constitutional synthesis cannot be deemed to be part of the larger family of constitutional pluralism (For an extensive treatment of this theory, see M. Avbelj and Jan Komárek (eds), Constitutional Pluralism in Europe and Beyond, Oxford, Hart 2012). The difference is crucial. The pluralists tend to emphasise the absence of any 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. To the contrary, Fossum and Menéndez stress the relevance of a common constitutional law because only equality before the law can guarantee integration. In other words, 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. As the logic of enlargements shows, entrance requirements for every new applicant, which have tightened as the process of integration has unfolded, shall not be expected from a

pluralist polity. In this sense, the closest theory to synthesis is multilevel constitutionalism (Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 Columbia Journal of European Law, 2009, p. 349). 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. It does not come as a surprise, then, that citizenship under the Lisbon Treaty is defined as an expression of multilevel constitutionalism, without putting into question the quality of representativeness and accountability, not to say anything about the process which forged the Treaty itself.

Constitutional synthesis is also relevant for applied constitutional law, and in particular for adjudicating hard cases, as proved by the authors' treatment of the primacy's issue. As known, primacy is the principle established by Costa v Enel through which conflict of laws between European and national laws are resolved. The difficulty in the primacy's riddle is evident. Even 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 the exception of a category of cases delimited by 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? The authors propose a particular take on this issue. Constitutional synthesis claims that European constitutional law and national constitutional laws cannot be portrayed as being potentially in conflict for two reasons: European constitutionalism is an offspring of national constitutions and the latter share a common constitutional field. 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, the shape of 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 not anymore understood as

always vertical, but most of the times they come to be characterized as mixed conflicts. The only problematic constitutional aspect of primacy arises 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 case of Viking. The case involve an emancipated European constitutional norm in conflict with the collective 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, 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 national constitutions.

One of the strongest underlying claims of constitutional synthesis is that it accounts for the sense of citizenship's ownership for the whole constitutional edifice. As already mentioned, constitutional synthesis claims to have the resources to secure the democratic legitimacy of constitutional decisions without resorting to the intensity of constitutional moments. For clear reasons this is a crucial claim for this theory. And if pro
ved to be correct, it would make constitutional synthesis not only a solid explanatory device, but an attractive normative one. However, one is left wondering what kind of constitutional politics is entailed by constitutional synthesis. In particular which kind of politics, and which kind of deliberative politics (a type of politics favoured by the authors), is prescribed by constitutional synthesis. The requirements that can be entailed from 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 a political constitutionalism to the political life of the

European Union, therefore bringing party competition and majority rule to the core of its constitutional dynamics, it may end up by shaking the foundations of the whole 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, both to endogenous and exogenous factors. Yet, they seem convinced that once the constitutional process has been set in motion, European institutions and citizens become confronted with 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 to be too confident on the promise of constitutional synthesis. On one level, 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 relative unsuccessful electoral process that takes place in 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 debate should at best be left to diplomatic or technocratic intervention. Most telling among all, is the authors' assessment of comitology as a successful experiment in the development of the institutional supranational structure, which sounds as 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 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. This dimension of publicity which should inform both constitutional processes and the nature of the institutions set up by these same processes, 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 constrain for this kind of problems. 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 full-fledged federation, something which the authors believe to be an unrealistic option for the moment. However, it is not clear what is the status of the relationship between constitutional synthesis and federalism. In other words, it is hard to say whether synthesis can 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 is an issue the authors might want to clarify at a later moment.

To do justice to the authors' efforts, the book's conclusions are everything but a celebration of democracy in Europe. It is fair to note that constitutional synthesis should not be understood as an apology for European constitutionalism. Be that as it may, constitutional synthesis represents an important contribution also to the field of comparative public law. Given the large number of constitutional States already established in the world, a theory that is able to explain how a constitutional polity that emerges out of the integration of already constitutionalised entities without resorting to federalism will certainly prove to be valuable for constitutional lawyers engaged with supranational constitutionalism. But this is hardly the only feature that makes this book an essential reading for every constitutional and

European lawyer.