A Multitude of Constitutions?

European Constitutional Pluralism in Question

John Erik Fossum and
Agustín José Menéndez (eds)

ARENA Report No 4/12
RECON Report No 20

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ISBN (print) 978-82-93137-41-2
ISBN (online) 978-82-93137-91-7
ARENA Report Series (print) | ISSN 0807-3139
ARENA Report Series (online) | ISSN 1504-8152
RECON Report Series (print) | ISSN 1504-7253
RECON Report Series (online) | ISSN 1504-7261

Printed at ARENA
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http://www.reconproject.eu

Oslo, May 2012

Cover picture: One of a number of posters created by the Economic Cooperation Administration, a United States government agency, to promote the Marshall Plan in Europe, 1950.

Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA – Centre for European Studies at the University of Oslo.

RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's work package 2 'The Constitutionalisation of the EU, the Europeanisation of National Constitutions, and Constitutionalism Compared', which analyses the impact of the dual processes of EU constitutionalisation and Europeanisation of national constitutions on the reconstitution of democracy in Europe. The report contains the proceedings of a RECON workshop convened by John Erik Fossum and Agustín José Menéndez as part of the 2nd International Conference on Democracy as Idea and Practice at the University of Oslo on 13-14 January 2011. The workshop 'A Multitude of Constitutions?' discussed the merits of the theory of constitutional synthesis, as developed by Fossum and Menéndez in the book *The Constitution's Gift*.

Erik Oddvar Eriksen
RECON Scientific Coordinator

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Introduction

A multitude of constitutions? European constitutional pluralism in question

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The contributions to this report discuss the merits of the theory of constitutional synthesis, as developed in our book *The Constitution's Gift*.[1] The theory takes as its point of departure the postwar recognition among European citizens and political leaders that their states could only retain democracy through a form of binding co-operation that would also have direct constitutional-democratic implications. This gave rise to a new approach to democratic constitution-making which we have labelled under the heading of constitutional synthesis. Constitutional synthesis refers to how a new democratic constitutional order can be created out of a set of already existing (and persisting) democratic constitutional arrangements. The process is powered by a regulatory ideal, that of a common constitutional law, which forms the *leitmotif* for an 'ever closer' putting in common of national constitutional norms (normative

[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Lanham: Rowman and Littlefield, 2011). The core thesis of the book can be found in "The Theory of Constitutional Synthesis: A Constitutional Theory for a Democratic European Union", *RECON Online Working Paper,* 2010/25. Available at: <http://www.reconproject.eu/projectweb/portalproject/AbstractRECONwp1025.html>.

synthesis), and of the development of a supranational institutional structure (institutional development).

The constitutions of the participating states take on a new *seconded* role as a part of the emerging collective constitutional law of the new polity. Each national constitution then starts living a 'double constitutional life': Each continues as a national constitutional arrangement, whilst it also simultaneously forms a part of the collective – European – constitution. Constitutional synthesis therefore presumes a considerable substantive identity between national constitutional norms and Community constitutional norms, with the structure being very different from the one we find in cooperative constitutionalism.

Constitutional synthesis relies on the notion that the supranational structure (that is established at the EU-level) comes equipped with a *conditional* constitutional-democratic license from the member states. This democratic license necessarily has to be conditional (and based on the need for compliance with democratic norms). The licence covers the development of an own set of representative-democratic institutions that will be capable of establishing and sustaining a European democratic constituency, and it provides specific requirements for how European-level integration can redeem this in constitutional-democratic terms over time.

In the book we develop this theory and discuss it against the EU's constitutional development with particular emphasis on developments during the last decade. The book underlines the frail nature of this approach to constitution-making; an approach that might be even said to contain strong self-subversive elements and be prone to political short-circuits. Indeed we stress in the book that the synthetic character of the constitution of the Union has rendered the Union highly vulnerable to upsetting internal and external processes and events which in turn account for the growing constitutional and political crises since the 1970s. Indeed the path followed by European integration since has increasingly diverged from constitutional synthesis. In particular, we single out the Lisbon reform process of 2007 and 2008 as signalling the overcoming of constitutional synthesis by an executive-led form of constitutionalism with a murky democratic basis. We consider the book to provide the necessary backdrop to the analysis of the present crisis facing the Union, which

is not only financial, economic and fiscal, but also constitutional in nature.

We are delighted to have had the occasion to discuss the book with a broad and multidisciplinary range of scholars at the workshop 'A Multitude of Constitutions' as one of the parallel workshops organised within the 2nd International Conference on Democracy as Idea and Practice at the University of Oslo in January 2011. The remainder of this report consists of the written contributions (several of which have been updated and edited) that were presented at this workshop. To the participants we can only be extremely grateful for their critical engagement with the book. We started writing *The Constitution's Gift* because we felt there was a need of a democratic constitutional theory of the Union. We conclude writing it knowing this was perhaps a good enough result because it was at least the kind of theory that we thought was needed, but still we were conscious it was far from a final, concluded and satisfactory theory. We have learnt immensely from each of the chapters included here, which have revealed to us shortcomings in our argument, and in the process, how to come closer to a proper democratic constitutional theory of European integration. Whether we will be able to make a second try while the Union is still there remains an open question at the time of writing.

Part I

Chapter 1

The gifts of synthesis
Integration and constitutionalisation

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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 (EU) 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[1] 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[2]. 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

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[1] See J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Lanham: Rowman and Littlefield, 2011).

[2] For a different take on the similarities between the European Union and Canada see G. Martinico 'Constitutional Failure or Constitutional Odyssey?', (2011) 3 *Perspectives on Federalism*, pp. 52-77. Available at: <http://www.on-federalism.eu/index.php/component/content/article/94-constitutional-failure-or-constitutional-odyssey-what-can-we-learn-from-comparative-law->.

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.[3] 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, Fossum and Menéndez 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'[4].

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[3] For the distinction between input and output reasons, applied to the European Union, see R. Bellamy (2010) "Democracy without Democracy? Can the EU's Democratic 'Outputs' Be Separated from the Democratic 'Inputs' Provided by Competitive Parties and Majority Rule?", (2010) 17(1) *Journal of European Public Policy*, pp. 2-19.

[4] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra.*

Obviously, the constitutionalisation 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'[5]. 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 jargon of the European Court of Justice, 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

[5] Ibid., at 61.

constitutional law'[6]. 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[7], 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 [the national constitutions] willingly placed themselves in a common constitutional field'[8]. 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.

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[6] Ibid., at 45.
[7] See A. Milward, *The Rescue of the European Nation-State*, (London: Routledge, 1992).
[8] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 47.

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.[9] 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.[10] 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 constitutionalisation. 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

[9] For an extensive treatment of this theory, see M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in Europe and Beyond*, (Oxford: Hart Publishing, 2012).

[10] See I. Pernice "The Treaty of Lisbon: Multilevel Constitutionalism in Action", *Columbia Journal of European Law*, (2009) 15(3), pp. 349-407.

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'[11]. 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 involves an emancipated European constitutional norm in

[11] Fossum and Menéndez, The Constitution's Gift, note 1 *supra*, at 175.

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 favour 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 proved 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 constitutionalisation requires further decisions in order to distil 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 constitutionalisation 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 constitutionalisation 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 the status of the relationship between constitutional synthesis and federalism is. 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.

Chapter 2

The Constitution's Gift to the European Union
A donkey or a Trojan horse?

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The search for a constitutional theory of the European Union

The following ideas are based on the recent theory of European integration as a 'constitutional synthesis' by John Erik Fossum and Agustín José Menéndez,[1] but also on the theories of '*Verfassungsverbund*' or 'constitution compound' by Ingolf Pernice[2] and of a 'common European constitutional law' of Peter Häberle.[3] They describe the essence and development of a 'European

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[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Lanham: Rowman and Littlefield, 2011).

[2] I. Pernice and F. C. Mayer, "La Constitution composé de l'Europe", (2000) 36(4) *Revue trimestrelle de droit européen*, at 623; recently developed in I. Pernice, "La rete europea di costituzionalità: Der Europäische Verfassungsverbund und die Netzwerktheorie", (2010) 70(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, at 52**;** I. Pernice, "Does Europe Need a Constitution? Achievements and Challenges after Lisbon", in A. Arnull, C. Barnard, M. Dougan and E. Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood,* (Oxford: Hart Publishing, 2011).

[3] P. Häberle, "Gemeineuropäisches Verfassungsrecht", (1991) 18 *Europäische Grundrechte-Zeitschrift*, at 261; id., *Europäische Verfassungslehre,* 6th ed. (Baden-Baden: Nomos, 2009), at 111 *et seq*.

constitutional law' that is not necessarily based on a 'post-national constellation'. One common idea of these theories is that the European constitutional law has to be understood on the one hand as a distinctive part of the European Union (EU) law even after the Lisbon Treaty, and on the other hand as the comparative law of the national constitutions of European states.

We face not just an academic question and competition between international and constitutional lawyers, but the question whether the concept of 'constitution' can be helpful for the construction of the European Union. If 'constitution' means both a (material) form of government and community and its (formal) legal framework, not only a state but all political bodies could 'have' or can 'be in' a good or bad constitution. If we distinguish the desires and virtues expressed by written or unwritten norms from the reality of collective facts, all these bodies can be more or less 'in form' or 'out of form'.

The judges and professors of the German Constitutional Court should have addressed only the legal question in the Lisbon Treaty decision of 2009:

> In a functional sense, the source of Community authority, and *of the European constitution that constitutes it,* are the peoples of Europe with their democratic constitutions in their states. The 'Constitution of Europe', the law of international agreements or primary law, remains a derived fundamental order. It establishes a supranational autonomy which is quite far-reaching in political everyday life but is always limited factually.
>
> (Paragraph 231)

The doctrine made in Karlsruhe of course can not be binding for judges, teachers and citizens outside of Germany, but clearly aims to support the doctrine made in Luxemburg in the Les Verts case: '*that the European economic community is a community based on the rule of law; inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity*

with the basic constitutional charter, the treaty'.[4] The doctrine made in Luxemburg could be transferred to the Lisbon Treaty even if its original version and the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned.[5] Neither the revised treaties nor the Lisbon mandate imply a norm prohibiting any interpretation of the Charter of 2000 and of the Union Treaty of 2007 as sources of constitutional law. Moving from the Constitution Treaty to the Lisbon Treaty, the treaty makers did not resolve a question of science, but just answered to the demand for a better form of government for the Union.

The legal question whether the European Union – still or already – 'has' a constitution is thus not definitely resolved by the Lisbon Treaty and is entrenched with the political question how to develop and deepen the Union's treaties and practices in the present times of financial and monetary crisis.

The aim of this chapter cannot be to end the debate, but only to hold it open. In a first step, scholars and people should however face the new concept of 'Union'. I will here argue that the shift from Community to Union is not only a change of 'names' and an 'organisational simplification', but also a change of concepts that involves constitutional principles and implies duties. In a second step I will try to find in the history of comparative law a way out of the Babylonian confusion regarding the concept of 'constitution' in Europe. In a third step I will look at the concept of 'constitution' used by the Lisbon Treaty and question whether it could be applied to an implied constitution of the European Union. The last question is whether under the substantial order prospected by this constitution, the Union can live a good life or is threatened to suffer agony. Between euro-optimism and euro-pessimism, how can constitutional

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[4] Judgment of the Court of Justice of the European Communities, *Parti écologiste Les Verts v. European Parliament*, Case 294/83 (23 April 1986), European Court Reports 1986, at 1339.

[5] Council of the European Union, Brussels, 20 July 2007, 11177/1/07, REV 1 CONCL 2 "Presidency Conclusions of the Brussels European Council (21/22 June 2007)", IGC Mandate.

theories find the right way to survival and help to deepen the Union's democratic legitimacy?

The concept of 'Union' implies a duty of political solidarity

For a lawyer, the European Union is built by law and should be what the Lisbon Treaty prescribes. The treaties give a name to a legal body. The name European Union combines two denominations. We are most attracted by the name of Europe, a concept that can be construed and discussed on the basis of geography, history and other sciences of culture. The question of 'European' identity is discussed when we rely on natural territorial borders, the more or less long history, the multiculturalism, Christian religion, etc. But Europe is just the adjective. The more interesting question for the lawyer should be: what does 'Union' mean?

There is no legal definition of union in EU law. Is there then a common legal concept of 'Union' in the European legal cultures? The answer can not be given without an analysis of compared public law and has to take into account the existing differences of language and of context. With the significant exception of Baltic languages (Estonian: *Liit*, Latvian: *Savienibas*, Lithuanian: *Sajungos*[6]) and Bulgarian (*съюз*), using words more closed to 'conjunction', all the other European languages, including the Greek *Ενωσης* and the Irish *Aontas*, seem to have the same matrix and embrace both the act and the effect of a verb that can have a transitive or intransitive modus. Nevertheless, the word 'Union' is used by lawyers and citizens in different situations and therefore needs further disambiguation.

It has, first of all, a Latin background, being '*unio*' a numerical or symbolic unity, a pearl or an onion used as value. In the medieval tradition of canonical law documents we can find 'union' associated with 'league' ('*liga & unionis*') and the '*unio ecclesiarum*' as an objective of reintegration of the eastern churches. In secular terms, Machiavelli recognizes that politics can produce more or less '*unione*' or '*disunione*', both *inter principes* and *inter sudditos*.[7] Guicciardini's

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[6] *Sa-* means together, *jungas* derives from *jugum*, yoke.

[7] N. Machiavelli, *Il principe*, (1512), chapter VII: "De Principatibus novis". See also "Ritratti delle cose d'Alemagna" (1508): 'considerato tutte queste disunioni in

'history of Italy' (1540) tells the French people's '*unione alla Chiesa Romana*'.

The French etymology of union refers first of all to Christian theology ('*unité de Dieu en trois personnes*') and the league of Catholics against Protestantism (1587: '*Saincte Union des Catholiques Francois*'[8]), even marriage (*union conjugale* 1670). In a more secular sense, union means an objective of policies,[9] based on a spirit ('*esprit d'union*' 1694, '*l'union fait la force*' 1807) and on international treaty-making ('*traité de l'Union des princes chrétiennes pour rendre la paix perpetuelle en Europe*' 1715; '*union des douanes*' 1842, *Union française* 1946).

The Dutch history offers the first use of the term of '*Unie van de Landen*' in the Pacificatie of Gent (1576). Within this general Union was founded the union of Arras and the '*Unie von Utrecht*' (1579), '*eeuwich Verbondt ende Eentracht, tusschen de Landen, Provintien, Steden*' (eternal league and concord between the lands, provinces, cities), nowadays considered as the first confederation of Dutch provinces founded by a sort of constitutional treaty.[10]

In English, the word 'Union' means the action and result of joining objects, and since the 1540s[11] even of joining subjects in a composed

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communi, et aggiuntivi poi quelle, che sono tra l'un prencipe et l'altro, et l'una communità et l'altra, fanno difficile questa unione dell'imperio'.

[8] *Articles de la Saincte Union des Catholiques Francois*, (1588), 28: 'Voyla les quatre fondemens sur lesquels est bastie cette saincte union des Catholiques Francois qui ne tendent qu'à l'honneur de Dieu, prosperité & accroissèment de l'estat & soulagement du people'. See also: *Discours de ce qui s'est passé en Transsylvanie, de l'union des princes de Moldavye et duc de Valachie avec le Waivode pour la deffence de la chrestienté contre le Turc*, (Lyon, 1595).

[9] Henri III, Edict de Pacification, *Faict Par Le Roy pour mettre fin aux Troubles de son Royaume, & faire desormais vivre tous ses subjects en bonne paix, union & concorde, soubs son obeissance: Leu & publié en la Cour de Parlement le viiij jour d`Octobre, 1577*, (Paris: Morel, 1577); J. de LaMadeleine, *Discours de l'estat et police des royaulmes: Pour les maintenir heureusement en paix et union et tenir les subjects en obéssance*, (Paris, 1597).

[10] The *pacificatie* uses also the terms l 'Unie en Accoort'. See also *Lettres de Monseignevr le Prince d'Orange enuoyées aux Prouinces & villes des pais bas demeurées en l'Union généralle, sur le Traicté passé entre le Prince de Parme, & les Prouinces desunies: avec la copie dudit Traitté*, (1579); Anschläg Printz Henrich Friderichs von Uranien, *uber der Union Kriegs Verfassung*, (Oranje-Nassau, 1620).

[11] E. Hall, *The vnion of the two noble and illustre famelies of Lancastre [and] Yorke, beeyng long in continual discension for the croune of this noble realme: with all the actes done in both*

political body (Act of Union 1707) or social group (Trade Union 1833; Church Union 1860), therefore the United Kingdom is symbolised by the 'Union Jack' (1800).[12]

From the United Kingdom the concept migrated into the Constitution of the United States (Article 1 Section 8 'calling forth the Militia to execute the Laws of the Union'; Article 2 Section 3 'information of the State of the Union'). In the federal context even of Brazil, Union could be construed as an equivalent of 'nation' or as synonymous of a specific society within a composed political organisation.

In Ireland 'Unionism' acquired a specific historical and political meaning of 'nation', clearly referred to its relationship to Great Britain. Even in Greece, '*enosis*' means since nineteenth century a claim regarding the islands under Ottoman control and has been used still by the Greek Cypriot movement for uniting Cyprus with Greece through plebiscite. In the Spanish speaking world, '*Uniòn*' has become a territorial name for a specific city, district, province, etc.

Last but not least, in the German language, the legal term 'Union' is often getting confused with its false friends *Einigung* (agreement) and *Vereinigung* (unification, association). It has been used for agreements between the protestant estates of Bohemia[13] and between protestant princes under the Empire (1608), even in local statutes, for example in '*Union oder Verbunds-Brief der Stadt Cöln'* (ca. 1570). The denomination

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the tymes of the princes, bothe of the one linage and of the other, beginnyng at the tyme of kyng Henry the fowerth, the first aucthor of this deuision, and so successiuely proceadyng to the reigne of the high and prudent prince kyng Henry the eight, the vndubitate flower and very heire of both the sayd linages, (In officina Richardi Graftoni typis impress, 1548), available at: http://luna.folger.edu/luna/servlet/detail/FOLGERCM1~6~6~245561~116389:The-vnion-of-the-two-noble-and-illu?sort=Call_Number%2CAuthor%2CCD_-Title%2CImprint&qvq=w4s:/who/in officina Richardi Graftoni typis impress.],/when/1548;q:LIMIT%3A%2BFOLGERCM1~6~6;sort:Call_Number%2CAuthor%2CCD_Title%2CImprint;lc:FOLGERCM1~6~6&mi=0&trs=2.

[12] Preceeded by the Scottish Union Flag of 1606 and F. Bacon, *A Briefe Discourse, Touching the Happie Vnion of the Kingdomes of England, and Scotland: Dedicated in Private to His Maiestie*, (London: Printed for Fœlix Norton, 1603).

[13] *Vorbündtnüß und Union: So zwischen den Löblichen Evangelischen drey Ständen der Cron Böheimb, und den Herren Fürsten und Ständen inn Schlesien auffgericht, auffm Prager Schloß, den 25. Junij, Anno 1609*, (1609).

Union has been associated to the Prussian Church Union (1811) and occupied by the Christian parties CDU and CSU. These and other topics illustrate that the concept has received specific national interpretations and even translations. Nevertheless, the term has been adopted even in common European and international public law in a very large sense for the description of the building of new states (*unio per suppressionem, confusionem, novationem*) or of organisations between different states created with or without own organs (for example within the so-called international community).

The mixed constitution of the Holy Roman Empire was criticised by Pufendorf on the basis of his theory of '*systema civitatum*' as irregular and incompatible with his philosophy of '*pactum unionis*', a monster similar to what Bartolus defined the seventh '*forma regiminis*' of Rome based on regional tyrannies.[14] The European doctrine of eighteenth century public law distinguished 'personal' from 'real' unions and 'administrative' ones, considering the '*unio realis aequalis vel inaequalis jure*' a special case of (or closed to) confederations of states, created by an international treaty and based on the constitutional laws of member states, different from the American model of the federal state.[15] This attempt for classification reflected a common European

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[14] See P. P. Portinaro, *Il labirinto delle istituzioni nella storia europea*, (Bologna: Il Mulino, 2007), at 182; Bartolus, *Tractatus de regimine*, in Diego Quaglioni (ed.), *Politica e diritto nel Trecento italiano: il 'de tyranno' di Bartolo da Sassoferrato (1314-1357)* (Florence: Leo Olschki, 1983), volume 1, par. 65-75, at 153 *et seq.*: 'Est et septimus modus regiminis, qui nunc est in civitate Romana, pessimus. Ibi enim sunt multi tyranni per diversas regiones [...]. Certe monstrum esset. Appellatur ergo hoc regimen monstruosum.' (quoted in H. Mohnhaupt, "Antike Staatsformenlehre als Traditionselement im modernen Verfassungsbegriff", [2005] 9 *Giornale di Storia costituzionale,* at 21 *et seq.*).

[15] The most influent idea could has been J. Bluntschli, *Die Organisation des europäischen Staatenvereins*, (reprint, Darmstadt: WBG, 1962 [1878]). G. Jellinek, *Die Lehre von den Staatenverbindungen*, (Wien: Hölder, 1882), at 204, argued that not a single constitutional law but just an international treaty can produce a union of sovereign states. Similar A. Brunialti, *Unioni e combinazioni fa gli Stati*, (Torino: UTET, 1891). G. Jellinek, *Allgemeine Staatslehre*, 3rd ed. (Berlin: Springer, 1914), at 755, still criticised the theory of a 'constitutional Union' of Zachariae. Similarly H. Kelsen, *Allgemeine Staatslehre*, (Berlin: Springer, 1925), at 203 *et seq.*, argued that the difference between *Staatenbund* and *Bundesstaat* could not be based on the distinction between treaty and constitution. The best and most influent theory for the concept of '*Rechtsgemeinschaft*' used by Walter Hallstein and the concept of constitution in the Luxemburg jurisprudence was offered by J. Kunz, *Die Staatenverbindungen*, (Stuttgart:

institutional culture that conserved a plurality of historical models and experiences useful for political and legal innovations. In Northern Europe, people might remember for example the Kalmar Union (1397–1523), the *Unie van Utrecht* (1579) and the *Unionen mellom Norge og Sverige* (1814–1905);[16] in Latin America, Simon Bolivars proposal of a 'Treaty of Union, League, and Perpetual Confederation' (1826); in Western Europe, the Latin Monetary Union (1830) and the German Customs Union (1834) and the project of the Prussian–Austrian Union of Erfurt (1849); in Eastern Europe, the Union between the Austrian Empire and the Hungarian monarchy (1867–1918) and the Soviet Union (1922–1991).[17]

If we compare the European Union with these models, it is clearly more than an administrative union, unlike the international Postal Union (1874) or the Italian '*unione di comuni*' (2000) at the local level, but also new and different from the monarchical archetypes. The new idea of Union promoted by the 'Paneuropa-Union' of Richard Coudenhove-Kalergi (1927) and a commission of studies within the League of Nations (1930)[18] went beyond the republican model of the Pan-American Union (1890–1948), but one could here also bear in mind the failure of the Central American Court of Justice (1907–1918).[19]

Kohlhammer, 1929), at 457 *et seq*., who distinguishes confederation from federal state through the criterion of *Völkerrechtsunmittelbarkeit*, introducing the idea of a 'supranational community of law' (*überstaatliche Rechtsgemeinschaft*) founded on a 'treaty that is the constitution of the confederation' (at 462: '*Vertrag [...] ist die Verfassung des Staatenbundes*').

[16] See Jellinek, *Allgemeine Staatslehre*, note 15 *supra*, at 204, quoting Article 39 of the Norwegian constitution at that time on regency as an example of 'impossible' union through constitutional legislation.

[17] Regarding the confederation model in 19th century, Article 3 of the Final Act of the Vienna Conference in 1815 qualified the *Deutsche Bundesakte* 'fundamental treaty and first fundamental law of this association' (*der Grundvertrag und das erste Grundgesetz dieses Vereins*). The legal model was offered by the Napoleonic *Rheinbund* of 1806: 'Les états de Leurs Majestés [...] seront séparés à perpétuité du territoire de l'Empire Germanique et *unis* entr'eux par une confédération particulière sous le nom d'Etats confédérés du Rhin.' See T. Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozess*, (Berlin: Springer, 2003), at 29 *et seq*.

[18] B. Mirkine-Guetzévitch and G. Scelle, *Union européenne*, (Paris: Delagrave, 1931).

[19] The Organization of American States (OAS) Charter of 1947 avoided the term 'Union', but member states were 'persuaded that their welfare and their contribution to the progress and the civilization of the world will increasingly require intensive

European Union became the name of a German Resistance Movement and a 'European Federal Union' was the project of the European Resistance Movements in 1944. An 'ever closer Union' has then been prospected by the statute of the Council of Europe of 1949. The European Convention of Human Rights (ECHR) was a first step and has been perceived as a 'constitutional instrument of European public order'.[20]

The idea of a 'political Union' was again discussed in occasion of the UK-accession to the European Community in 1974 and at the European Council of 5–6 December 1977. The Spinelli project of 1983 explained:

> The new political body will be called the Union since this is the term which has been used since 1952 as a landmark for the construction of Europe. In order to preserve the Community patrimony the treaty will establish that the institutions, the aims and the competences of the Union will completely replace that the institutions, aims and competences of the Community, of political cooperation and the EMS […].[21]

The evolution of the communities and the revolution of 1989 have allowed the adoption of the Union concept by the Maastricht Treaty 1992. By virtue of the Lisbon Treaty, the Union has become one legal person no more founded on pillars but on treaties, values, objectives and reshaped relations to the member states and to the rest of the world (Articles 1 to 5 TEU). Union is not unity (*Einheit*) of a 'United Europe', but composition made by cooperation and synthesis in order to upheld pluralism, or if we want to explain it to the German public '*Verbundenheit*' among different peoples and their citizens, not

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continental cooperation'. Other models of Union at the international level for (ex)colonies has been experienced with the Union of South Africa (1910-1961), the Union of India (1947-50) and the Union of Burma (1948).

[20] See European Court of Human Rights, 23 March 1995, *Loizidou* vs. *Turkey,* appl. no. 15318/89, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695797&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

[21] A. Spinelli, *Una strategia per gli Stati Uniti d'Europa*, (Bologna, 1989), 236, in A. J. Menéndez (ed.), *Altiero Spinelli: From Ventotene to the European Constitution,* RECON Report No 1, (Oslo: ARENA, 2007), at 60.

only a V*erbund* between states. The Union is not simply a project of reason, but also a common desire of passion for peace[22] and for what is expressed by the preamble of the Lisbon Treaty:

> […] desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, desiring to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them […].

The name 'Union' itself expresses the most relevant social and political principle incorporated in and represented by the institutions and a specific citizenship with political rights and duties.

That is the reason why the European Union has become a legal model no more *sui generis* but transferred and adapted f. ex. in the African Union (2004) and the Unión de Naciones Suramericanas (UNASUR, 2008). This new model of a political Union between democratic constitutional states – republics and monarchies, federal and Unitarian states – 'shall establish an economic and monetary union' only if it is respectful of its common cultural heritage and if it produces solidarity. The Union is clearly an 'autonomous' legal body – insofar the doctrine of the Karlsruhe judgment on Lisbon is useful – but derived both from the 'constitutional traditions common to the Member States' and the mutual recognition of the primacy of international law. The Union is definitely not just a new name, but a new concept of public law and – notwithstanding further academic resistance – even of constitutional law.

The path towards a common concept of 'constitution' workable for European Union

But what would be the 'common concept' of constitution we could use in order to qualify the Union? If we today ask the new Union members, they would perhaps say that their 'constitution' is a

[22] The founding fathers passion is unrecognized by the thesis of the 'Union's birth from Reason', U. Haltern, "On Finality", in A. Bogdandy and J. Bast, *Principles of European Constitutional Law*, 2nd ed., (Oxford and Munich: Hart publishing, 2008), at 211.

certificate for the Copenhagen criteria on the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' or of what the Venice Commission of the Council of Europe said it has to be, but this would need a more specific research even on the positions taken by the representatives of the member states on the Council of Europe on this topic. If we ask historians, they would answer that no constitution could ever be identical to another, but also that every constitution has an idea of what it should be and the concept of constitution can not be separated from territory and time. Every national constitutional culture has in fact particular principles which concur to define its own concept of constitution, especially in relation to the historical memory and roots in natural law. Nevertheless we can not ignore that all these discourses on constitution and constitutionalism have their origin in enlightened practices of comparison.

From a comparative point of view, 'constitution' is first of all not necessarily and completely synonymous of '*Verfassung*', '*Alkotmany*', 's*yntagma*', '*grunnloven*', etc.[23] *Verfassung* seems closer to writing and discourse as well as *syntagma*, a key word for the sense of word combinations based on sequentiality.[24] Even between civil law and common law countries 'constitution' and 'constitution' can be false friends or can have different philological derivations, especially if we look at the pre-modern use of constitution for the fundamental order of a Church and for the relationship between state and church.[25]

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[23] C. Grewe and H. Ruiz-Fabri, *Droits constitutionnels européens*, (Paris: P.U.F., 1995), at 34; A. Weber, *Europäische Verfassungsvergleichung*, (München: C. H. Beck, 2010), at 18.

[24] See D. Tsatsos, *Syntagma, Hellēnikē politeia, Eurōpaikē sympoliteia: aphierōma ston*, (Athens: Ekdoseis Ant. N. Sakkoula, 2004).

[25] For the history of the concept see D. Grimm and H. Mohnhaupt, *Verfassung: Zur Geschichte des Begriffs von der Antike bis zur Gegenwart*, (Berlin: Duncker and Humblot, 1995); further religious roots in J. Luther, "Calvino ispiratore di un costituzionalismo protestante?", in C. Malandrino and L. Savarino (eds), *Calvino e il calvinismo politico dalle origini cinquecentesche all'età contemporanea*, (Torino: Claudiana, 2011), at 345 *et seq*. From a British sociological-historical point of view now C. Thornhill, *A sociology of Constitutions*, (Cambridge: Cambridge University Press, 2011), at 9: '[…] long before the advent of formally written constitutions, it was customary for societies to comprehend themselves as processing a distinctively normative constitutional shape which could not be exclusively reduced to a single body of written precepts'.

The universe of constitutions is more pluralistic than most constitutional theories would accept. It is not just a modern discourse based on revolutionary US and French constitutionalism, but signed by much more cultural traditions that have common patterns and divergent particular topics and historic constellations, all impressed in different textures.

The French concept of Constitution as an instrument of protection of rights and separation of powers in a society, provided by Article 16 of the Universal Declaration of 1789, is of course the best candidate for the illustration of the common patterns. A merely formal concept of constitution just based on scripture and primacy/rigidity without any ideal content of constitutionalism and without any real effect of constitutionalisation would not be a European one.

But there was even an older English concept of constitution well defined by Bolingbroke's *Dissertation Upon Parties* (1733) as: 'that assemblage of law, institutions and customs, derived from certain principles […] that compose the general system, according to which the community hath agreed to be governed'.[26] When Benjamin Constant in his *Cours de politique constitutionnelle* later confirmed that even England had a constitution, based on '*lois fondamentales*' and '*une législation formée par un long usage de la liberté*', he adopted a relative distinction of written and unwritten (elements of) constitution as well as of constitutions with more and constitutions with less 'constitutionalism'. From his point of view only a comparative discourse could help to find the 'good constitution', a constitution limited to the rule on what is 'truly constitutional', the warranties (*garantie*) for such universal principles that give a basis for the 'welfare of society' and 'the security of individuals'.[27]

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[26] This is the starting point of C. McIlwain, *Constitutionalism: Ancient and Modern*, (New York: Cornell University Press, 1947)

[27] B. Constant, *Cours de politique constitutionnelle*, (Brussels: Société typographique belge, 1851), at 158 *et seq.*: 'ce qui n'est pas constitutionnel'. The teaching was an answer to the conservative criticism of restauration, for example X. de Maistre, *Essai sur le principe générateur des constitutions politiques*, (Paris: Soc. Typ., 1814), at 13, who believed that the constitutional legislation could only be the development of pre-existing unwritten law: 'jamais Nation ne tenta efficacement de developer par ses lois fondamentales écrites d'autres droits que ceux qui existoient dans sa Constitution naturelle.' (préface VI) '1. Que les racines des Constitutions écrites existent avant

The Spanish Constitution of 1812 had already defined itself as a '*Constitución política para el buen gobierno y recta administración del Estado*'. At the same time Giandomenico Romagnosi in the Austrian part of Italy spoke of the 'essential functions of every constitution': The constitution has 'the immediate purpose to obtain through the moderation of governing powers a good legislation and a loyal administration'. The first of its essential functions is to 'establish such an order of objects, powers and interests that might generate presumptively a provident legislation'.[28]

The German Federation Act of 1815 (Article 19) prospected 'constitutions with representation' (*landständische Verfassung*) for a 'monarchical constitutionalism' that seemed for some time as a step backwards not forwards to democracy. For liberalism, all constitutions without a representation of the people were just 'a half or a quarter of a constitution'.[29] Hegel defined constitution as '*die entwickelte und verwirklichte Vernünftigkeit*' (evolved and realized reasonableness) within the concrete institutions of the State, the way 'the abstractness of the state comes into life and reality'. This broader concept of a constitution with reasonable ideas was incompatible only with Chinese theocratic despotism.[30]

Tocqueville's comparative studies of the 'democratic revolution' with their different path in France and in the United States and of the '*ancienne constitution de l'Europe*' focussed the stability and translated the differences between the French and the British concepts of revolu-

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toute loi écrite. 2. Qu'une loi constitutionnelle n'est, et ne peut être que le développement, ou la sanction d'un droit préexistant et non écrit. 3. Que ce qu'il y a de plus essential, de plus intrinséquement constitutionnel, et de véritablement fondamental, n'est jamais écrit, et même ne sauroit être, sans exposer l'Etat. 4. Que la faiblesse et fragilité d'une Constitution sont précisément en raison directe de la multiplicité des articles écrits.'

[28] G. D. Romagnosi, *Della costituzione di una monarchia rappresentativa*, (Filadelfia: [anonymous], 1815), at 2. The second function is to establish such 'powers and impulses that might generate presumptively a loyal and robust administration', the third to establish such 'powers and motives that might at least probably conserve the good legislation and correct of abuses of arbitrariness administrations'.

[29] F. C. Dahlmann, "Ein Wort über Verfassung", in H. Brandt (ed.), *Restauration und Frühliberalismus*, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1979), at 105.

[30] G. W.F. Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt am Main: Suhrkamp, 1976 [1821]), at 412 (§ 265).

tionary and evolutionary constitutionalism in a distinction that was later developed by Bryce in 'rigid' and 'flexible' constitutions[31] and by Dicey 'in constitutional laws' and 'constitutional conventions'.[32]

Under the Austrian Empire, Georg Jellinek defined in 1900 the Constitution as an 'order' needed by any 'permanent social organisation ['*Verband*'], being under this order it's volition formed and executed, its area defined, the condition of its member within and towards the organisation ruled'.[33] The comparative history of constitutions he depicted started from antiquity and was based on the distinction between a constitution in a 'formal' and in a 'material' sense, the idea that the constitutional foundations have a higher value than the institutions they derived from.

After the end of the Austrian Empire, Hans Kelsen favoured a formal concept. He distinguished between essential and accidental functions of a constitution, considering essential only the organisation of legislation and accidental fundamental rights.[34] During the Weimar constitutional crisis, Rudolf Smend focused more on the material aspect when he described flexibility and relativity of a written constitution of a process of integration, distinguishing between more rigid 'suprastatual-universal' principles and more individual properties of its substantial provisions.[35] Even Carl Schmitt's '*Verfassungslehre*' of 1928 was a comparative 'theory of constitutions' that reflected on the great variety of concepts and elements of constitutions that can be combined and are influenced by the 'awareness of

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[31] See A. de Tocqueville, *De la démocratie de l'Amérique*, (Paris: Gosselin, 1835); id., *L'ancien régime et la Révolution (*1856), (Paris: Gallimard, 1967); J. Bryce, "Flebile and Rigid Constitutions" (1884), in J. Bryce, *Studies in History and Jurisprudence*, (Oxford, 1901), at 145 *et seq*. See A. Pace, *La causa della rigidità costituzionale*, 2nd ed. (Padova: Cedam, 1996).

[32] A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 2nd ed. (London: Macmillan, 1886), at 28.

[33] Jellinek, *Allgemeine Staatslehre*, note 15 *supra*, at 505.

[34] An excellent historical reconstruction of the conceptualization of 'constitution' in Kelsen is offered by R. Alexy, "Hans Kelsens Verfassungsbegriff", in S. Paulson and M. Stolleis (eds), *Hans Kelsen: Staatsrechtslehrer und Rechtsheoretiker des 20. Jahrhunderts*, (Tübingen: Mohr Siebeck, 2005), at 333.

[35] R. Smend, *Verfassung und Verfassungsrecht*, (München: Duncker and Humblot, 1928), at 77.

political existence'.[36] The theory of the state of Hermann Heller concluded that the normativism of Kelsen and the substantial decisionism propagated by Schmitt could not face the problem of the legitimacy of the written constitution which needs a basis of ethical principles, being existence and normativity of a Constitution necessarily entrenched in the recognition of these principles.[37]

If we look at the state of the art, the European theories on constitutions produced under the first democratic constitutions of the last century are therefore mainly German or Austrian theories that could be perceived as the 'avant-garde' of a common European constitutional theory, nowadays perhaps still personified in Luhmann, Habermas, Grimm or Häberle.

Nevertheless, in the last decades' constitutional theory is becoming a global dialogue and a work in progress that reflects the new structures and functions of contemporary constitutions, specially the role of conventions of recognition and the need to protect societies from self-destruction, to render possible a democratic collective self-determination and to upheld a sustainable consensus on basic values and rights.[38]

Furthermore, the influence of German theories should not be confused with the hegemony of the German model of constitution in Europe. There are of course similarities insofar as the *Grundgesetz* is considered a constitution not made by a sovereign '*pouvoir constituant*', and, from the point of view of the majority in Germany, the Union of Germany did not need a new Constitution, just the export of the principles and models of occidental constitutionalism in

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[36] C. Schmitt, *Verfassungslehre,* (München: Duncker and Humblot, 1928), at 43.
[37] H. Heller, *Staatslehre*, (Leiden: Niemeyer, 1934), chapter X.
[38] For the German doctrine, see O. Depenheuer and C. Grabenwarter (eds), *Verfassungstheorie*, (Tübingen: Mohr Siebeck, 2010); T. Vesting and S. Korioth, *Der Eigenwert des Verfassungsrechts*, (Tübingen: Mohr Siebeck, 2011). For the Italian doctrine, see C. Mortati, *La Costituzione in senso materiale*, (Milano: Giuffré, 1940); further developpments in G. Zagrebelsky, *La legge e la sua giustizia*, (Bologna: Il Mulino, 2008), at 131; M. Dogliani, "Costituzione in senso formale, materiale, strutturale e funzionale", (2009) 2 *Diritto Pubblico*, pp. 295-316; A. Barbera, "Ordinamento costituzionale e carte costituzionali", (2010) 2 *Quaderni costituzionali,* pp. 311-60.

Eastern European countries. But this German *Sonderweg* could not identify the common concept of constitution.

If we look again at the constitutions themselves, one could say that under the formal aspect, more and more European countries (France, Italy, Austria, Spain, etc.) tend to say that democratic constitutions need specific forms of popular ratification.

On the other hand, the German denomination of *Grundgesetz* in the pre-revolutionary tradition of *fundamental laws* makes clear that in some countries 'constitution' is an act of procedurally specified constitutional legislation, in others a plurality of fundamental laws (Sweden: *grundlagar*) or an act of 'constitution-making' by a temporary '*pouvoir constituant*' that can be distinguished from and integrated by other acts of constitutional legislation (Italy, Austria[39]) or constitutional conventions (UK), all to be included in what the French doctrine defines as '*bloc de constitutionnalité*'. After the Second World War, the primacy of the written constitution has been strengthened by the development of the European models of constitutional review,[40] but this has not yet bridged the gap between civil law countries and other countries more close to British concepts of constitution or to the American model of diffuse control.

In order to the material aspect or concept, the European ideas of a good constitution certainly have changed already after the first world war, promoting new tendencies of constitutionalism and a new rationality in the evolution of constitutional law.[41] Nevertheless, there have been developed even specific European models of 'semantic' and totalitarian constitutions, from fascism to soviet-socialism, which ended only after 1989 when the European community became a Union.

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[39] See the sophisticated distinctions in *Staatsgrundgesetz*, *Bundes-Verfassungsgesetz* and *Bundesverfassungsgesetz*.

[40] J. Luther, "Giustizia costituzionale", in U. Pomarici (ed.), *Filosofia del diritto*, (Torino: G. Giappichelli, 2007), at 287. For Norway, see E. Smith (ed.), *Constitutional Justice under Old Constitutions*, (The Hague: Kluwer Law International, 1995).

[41] B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, (Paris: Delagrave, 1930).

Every nation has its own ideas and principles for what we consider – in form and substance – a good constitution, but they all have in common a search for substantial constitutional justice or 'constitutionalism'. Today a national constitution without constitutionalism is a 'false' one that could not be tolerated within the Union. The 'constitutional structures' of the Union's member states cannot be surrogated and absorbed only by 'political identity'. There is no European national constitution without a written or unwritten chapter on universal principles. European constitutions have become longer (especially in Portugal), because the ideas on constitutionalism outlined in 1789 have been enlarged both in the dimension of fundamental rights, including today social and political rights, and in the dimension of powers, including today more clearly infra-national, supranational and international levels. The Treaty establishing a 'Constitution for Europe' has been perceived both as a chance and as a threat for the principles of constitutionalism.

Nevertheless, these tendencies can be interpreted as a path towards a common and elastic European concept of constitution 'with constitutionalism' being able to integrate formal and material, written and unwritten, static and dynamic, sociological and normative elements. A 'synthetic constitutionalism' needs first of all a synthesis of the concepts and conceptions of constitution or, at least, the idea that when we speak about constitution, we can understand and translate each other. Notwithstanding the persisting variety of national constitutional cultures, the way out of Babylon is an on-going dialogue on the concepts of constitution and constitutionalism and a specific meeting ground for this dialogue, the Council of Europe and the European Union.

Why the Lisbon Treaty matters to constitutions

The Lisbon Treaty has been drafted on the basis of a clear mandate to 'not have a constitutional character'.[42] The denomination 'constitution' has been cancelled from the text elaborated by the Convention mandated in Laeken, the Charter is no more part of the treaty provisions and even the primacy of EU law has been symbolically relegated in a 'declaration'.

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[42] See the reconstruction in Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra*, at 152 *et seq*.

The deliberate choice to remove the name 'Constitution' has to be taken seriously by legal science, but the choice of silence can be interpreted both as a negative decision and as a non-decision. Similar choices were already made in nineteenth century monarchical constitutionalism. The King of Sardinia preferred the name 'statute', but he could not oppose the raise of conventional norms that recognized its value as a constitution of monarchical constitutionalism. Even the United Kingdom can teach the European countries that both written laws and unwritten conventions can form together an 'unwritten' constitution. Today we can be sure that the original intent of the Lisbon Treaty was to overrule the doctrine made in Luxemburg and that even the judges in Karlsruhe did wrong in supporting this doctrine. If the purpose was to reassure people that the Union is not and will not become a federal state and not to resolve a doctrinal dispute affirming the impossibility of a supranational constitution, we must deny a similar original intent.

Nevertheless, from a legal point of view, the negation of a negation is not necessarily a positive affirmation. We can not say that the Lisbon Treaty is a constitution because most of its rules are derived from a non-ratified treaty that classified itself as 'constitutional'. Therefore the question whether we can qualify both Treaties, or parts of them, as a written constitution or as pieces of a plurality of written and unwritten sources of a constitutional law of the European Union is still open.

In order to answer this legal question, we have to take into account that 'constitution' is a well-established legal term even in European law, being used by several clauses of the treaties which make clear reference to national constitutional law. We have therefore to distil elements of an 'autonomous' – but derived – concept of constitution within the treaties that could apply not only to the single states but also to the Union itself.

The first and most important is the well-known national identity respect clause under Article 4(2) TEU.[43] The concept of constitution

[43] Article 4(2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. See also

used in this clause of '*ordre constitutionnel national*' could be referred more to the framework of government of the member states, being the 'fundamental structures' not necessarily synonymous of the 'essential functions of the State' as mentioned in subsequent clause. But if the constitutional structure includes regional and local self-government, it could also be extended to the constitutional clauses that promote international law and allow or command to grant autonomy to a supranational government. The national identity can be defined – at least in some countries – by the will to join the Union and even to extend to the Union what the nation considers its own universal fundamentals. The Union shall respect them not only in its own action, but even in its own structure.

The constitutional structures of the European nations are embedded in their 'constitutional traditions'. Insofar as they regard fundamental rights and are 'common to the Member States', they 'shall constitute general principles of the Union's law' (Article 6.3 TEU; Article F Maastricht Treaty). The corresponding declarations of the Charter have to be 'interpreted in harmony with those traditions' (Article 52.4).[44] The constitutional traditions regarding fundamental rights have a more modern look and the recall of such traditions has been notoriously interpreted as an authorisation for a prudent judicial search for a synthesis and '*ius commune*' between the different forms of constitutionalism deriving from a past without any common Empire.[45] The European 'common law of fundamental rights'

Declaration n. 51 of the Kingdom of Belgium: '[…] in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.'

[44] See also the preamble of the Charter and Article 53: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.' Confirmed by Declaration n. 53 of the Czech Republic.

[45] For an idea of '*ius commune*' as a corrective of legal pluralism more than as a surrogate of 'imperial' legislation, see P. Grossi, *L'ordine giuridico medievale*, (Bari: Laterza, 1995), at 225. This is the contrary of the nationalsocialist '*Deutsches Gemeinrecht*'.

recognized and protected by the Charter can be perceived as a 'constitutional tradition' of the Union that has to prevail over the '*iura propria*' of the national constitutional frameworks of powers.

The common constitutional law of fundamental rights and the respect for the particular constitutional structures of the States are founded in values to be promoted together with peace and welfare as one of the objectives of an ever closer Union '*in which decisions are taken as openly as possible and as closely as possible to the citizen*' (Article 1.3 TEU). The concept of 'Constitution' used by the Lisbon Treaty could include these values as 'constitutional values' common to all member states. Already the preamble of the Charter pointed out that the Union's 'common values' that can be identified – from a legal point of view – with fundamental legal principles implied by the written or unwritten (parts of the) constitutions of the member states. The on Treaty of the European Union recalls most of them, but it prospects furthermore values of a new European society, not only as a declaration of 'constitutional soft law'.

Other articles of the Lisbon Treaty can be interpreted as clauses of safeguard for specific matters of national constitutional law, a sort of '*reserve de loi constitutionelle nationale*' or area of non-competence and no-primacy for the Union law created in order to respect the national constitution-making power (*Verfassungsvorbehalt*). From the point of view of European Union law, the national constitution can imply for example rules on the national policies of defence and security, including the relationship between civil and military powers (Article 42.2: '*decision in accordance with their respective constitutional requirements*'). Another example are the rules governing the ratification of international treaties, including specific rules for the Union treaties (Article 48.4 TEU: '*The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements*'[46]). The enlargement of the Union as well as the

[46] See also Article 48(6) TEU: 'The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.' See furthermore Article 357 TFEU and Article 40(2)

withdrawal from the Union can be a matter of further 'constitutional requirements' (Article 49.2; Article 50.2). The translations of the Treaty to the official languages of the member states, including minority languages that 'enjoy official status in all or part of their territory' (Article 55.2) have to respect the 'constitutional order'.
Specific clauses for the respect of national constitutional law are dealing with citizenship (Article 25 TFEU), accession to ECHR (Article 218 TFEU), electoral system (Article 223 TFEU), property rights jurisdiction (Article 262 TFEU), categories of own resources of the Union (Article 311 TFEU). If we put together all the pieces of the puzzle, the treaties have a clear idea of which constitutional matters that are common to most member states. Most of these rules are defined by the national lawmakers, but the treaties operate at least a *renvoi* and rules for coordination which is a sort of 'international constitutional law'.

Finally, the Protocol on the Role of National Parliaments in the European Union recalls 'that the way in which national Parliaments scrutinise their governments in relation to the activities of the European Union is a matter for the *particular constitutional* organisation and practice of each Member State' [emphasis added]. Compared with the Constitutional Treaty, the wording is unchanged and does not exclude to qualify the organisation and practice of the Union itself as a 'general' and 'constitutional' one.

In synthesis, the concept of 'constitution' used within the Lisbon Treaty refers mainly to national constitutions, but can apply also to the European Union itself, provided that the interpreters agree on the following three terms:

1) the concept of constitution is not or no more limited to States, but applies even to supranational unions;
2) the treaties (or parts of them) can be interpreted as written parts of a constitution integrated by other written and unwritten sources of constitutional law of the Union;

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regarding the amendments to the voting rule for the governing Council of the European Central Bank (ECB) in the Statute of the European System of Central Banks and the ECB.

3) the Union is not mandated nor authorised by this constitution to transform itself in a Federal State, but can prepare and promote transnational democracy and respect for international law.

The first condition is fulfilled if we do not opt exclusively for traditional modern and revolutionary concepts of constitution and constitutionalism. At the beginning of modernity, even Churches could have constitutions. Federalism has always extended constitutional autonomy to at least two levels of political organisations with legislative powers. Not only national states, even supranational and international communities have been already based on 'constitutions' or 'statutes' that serve constitutional functions.

Therefore, we should accept that the national constitution-making power can delegate to the national treaty-making power even the making of supra- or international sources of constitutional law. In fact, Constitutions can be based not only on single unilateral acts, but also on a plurality of facts (customs) and pacts produced by a divided or composed (participated) *pouvoir constituant.* From a theoretical point of view the national constitutions can be considered as the basis of legitimacy for the written and unwritten conventional rules of the constitutional law of the Union, a sort of common constitutional law in standby function. By virtue and in force of the authorisation implied in the national constitutions, the treaties 'constitute' all other sources of the Union law and separate them from the national legal order. From a historical point of view, the constitutions of the founding states implied a mandate for opening and represented preliminaries for a new political and legal or constitutional order in Europe.[47] This constitutional order has been framed through the

[47] J. Luther, "Per una comparazione federalista della Legge fondamentale e della Costituzione italiana in materia di Unione europea", *60 anni della legge fondamentale tra memoria e futuro / 60 Jahre Grundgesetz zwischen Herkunft und Zukunft*, (Milan: forthcoming, 2012). For a restrictive perspective, see C. Grabenwarter, "National Constitutional Law Relating to the EU", in A. v. Bogdandy and J. Bast, *Principles of European Constitutional Law*, 2nd ed. (Oxford and Munich: Hart publishing, 2008), at 126: 'Adaptations that are Receptive and Defensive towards Integration' only in a national perspective. The question whether national constitutional clauses for European integration have only permissive or mandatory character has not yet been clearly decided by the Lisbon judgment of the German Constitutional Court.

treaties in a way and the mandate of the national constitution has been fulfilled in a way that even the decision to leave the Union could necessitate the reactivation of the national *pouvoir constituant.* By virtue and in force of both the national constitutions and the Union treaties, even the primacy of the treaties over the other sources of Union law and the primacy of the Union law over national law has been recognized, at least within the limits of competencies (*intra vires*), fundamental rights and supreme principles of what can be considered a common constitutional law of both, the national States and their Union. This is a way to argue that a constitution of a supranational entity is not only a theoretical possibility, but also a working reality.

The second condition can be fulfilled if we accept that the texture of the Lisbon Treaty can not be used as a self-executing written Constitution. Even a symbolic use would be inconsistent with the decision to cancel the clause of recognition of the Union's symbols. Therefore, no one can say the Union has a written constitution, but it is not prohibited to recognize that the Union has a partially written and partially unwritten constitution in evolution, a more complex constitutional framework that comes perhaps closer to the legal order of the United Kingdom than to the constitutional traditions of France.

The Lisbon Treaty offers good reasons for accepting this description. The new prevision of a simplified revision procedure for the most articles (part three) of the Treaty on the Functioning of the European Union in matters of internal policies and actions implies a formal distinction within the primary sources of the Union laws. There are now primary sources with a more thick or fundamental character and others with a more thin one, being the first the fundamentals of the 'political and constitutional structures' of the Union and the second more similar to 'organic laws'. The thicker fundamental norms have been adopted and have to be amended through a procedure of 'organic revision' that involves a convention, reshaping the legal model of constitutional revision within the context of the Union law. The equal value clause (Article 1.3 TEU) excludes a hierarchy between the two treaties, but not within the treaties between the thicker and the thinner parts of the written constitutional law of the Union.

The other written or unwritten parts of the constitutional law of the European Union consist first of all in a 'common constitutional law'

forged by the national constitutions and recognized by the institutions, including principles of openness for supranational integration and respect for international *jus cogens*. The 'common constitutional law' can be written in some countries and unwritten in others, including both supreme principles and common ordinary rules of constitutional law, refer to fundamental rights and institutional powers. Furthermore, the common constitutional law can consist even in conventional rules, customs and practices which integrate the treaty law. The 'common constitutional law' can be partially codified by the treaties, partially acknowledged in instruments of 'soft law'. This 'mixed constitution' has more and less flexible parts and needs of course further studies from the point of view of the theory of the sources of law and of the relationship between national and supranational constitutional justice. Nevertheless, from a legal point of view we could no more conceive it as a merely descriptive and 'material constitution'.

The third condition is dictated by the original intent of the choice to renounce to the name and concept of constitution. The transformation of the Union to a federal state would require more than a monetary union and an own budget, it would need a democratically written federal constitution. The existing partially unwritten constitution of the Union, with principles of federalism and devolution of powers to the supranational level, is not yet synonymous to a federal state. The existing treaty revision power could not be transformed in a new constitution-making power. The future of an ever closer Union can consist in 'United States of Europe', but neither the national constitution nor the Lisbon Treaty do imply a similar mandate. A European federalist party would of course not be necessarily 'anti-constitutional' within the Union and its member states, but one should recognize that the sleeping '*pouvoir constituant européen*' is bound by the commitments and the highest principles of the common European constitutional law and needs a democratic procedure. Under this condition the European Union is not prevented from promoting transnational democracy and the respect of international law as the most relevant principle of a new constitutionalism.

Is the constitutionalism of the European Union living or dying after Lisbon?

The union of democratic states designed by the national constitutions and the Lisbon Treaty can have only a constitution with principles of democratic constitutionalism. The principle of democratic legitimacy can be fulfilled gradually, being more developed at the national level and less developed at the supranational one.

The controversial issue of the 'democratic deficit' is a vital question that tends to polarise euro-optimists and euro-pessimists. An overlapping consensus might exist for two reasons. The first is that the Union does not need democratic institutions similar to those of a democratic state and the second is that the institutions and laws of the Union need a minimum of democratic legitimacy based both on input and output, structures and functions as determined by its constitution.

With regard to the development of the Union, a low level of structural democratic legitimacy has been reached, but the Lisbon Treaty recognizes that more democracy is needed. The treaties have been negotiated by the national executive powers and ratified by the legislatures under the direct (through referendum) or indirect control of the citizens of the member states. The national legislatures acted as representatives of their national and European citizens, the '*pouvoir commettant*' in the French terminology.[48] The democratic legitimacy of the common constitutional principles is derived from the democratic ratification under the national constitutions. Even the constitutional conventions and customs can have a democratic legitimacy if the actors are elected and responsible or respect a principle of equal participation and equal consideration (Article 9 TEU).

The democratic legitimacy of the European Council derives from the national mechanisms of democracy, but can not be mediated exclusively by the national executive power (Article 12 TEU). According to the German Constitutional Court's decision, the principle of degressive proportionality governing the composition of the

[48] See P. Pasquino, *Sieyes et l'invention de la constitution en France*, (Paris: Odile Jacob, 1998), at 46 *et seq*.

European Parliament could not provide sufficient democratic legitimacy to the EU policies, but only a complementary and additional one. The Commission derives legitimacy from both institutions and from being the first recipient of citizen's initiatives (Article 11.3 TEU), but even comitology could not be the main practice of the 'open, transparent and regular dialogue with representative associations and civil society' (Article 11.2 TEU). The Commission's legitimacy could be raised if the electoral practice would give more clear indication on the candidates for the presidency. If the political parties will not spontaneously agree on conventional rules in this direction, the parliament could initiate a legislation procedure under Article 223 TFEU or citizens could make a petition for it.

As far as the functional aspects of democracy are regarded, Miguel Poiares Maduro has tried to define a more output oriented design of the democratic legitimacy of the Union.[49] He describes the integration process as a project of further rationalisation of national democracies by enlargement of interest representation. In fact, the Union could open national democracies to the interests of other citizens that are affected by the national decisions. EU law could be perceived in a role of reinstating the authority of national democracies over transnational forms of social and economic power. Finally, EU law could help correcting democratic malfunctions that cannot be corrected with purely domestic instruments, specially the capture of the political process by concentrated interests.

The reason of these 'services' offered to national democracies should be combined with a more functionalist than federalist passion made by new policies and politics. They should face challenges such as the popular demand for new powers at Union level measured by the Eurobarometer, the increasing majoritarian character of EU decisions, the need to have more balancing of European citizen's interests, and the accession of new members.

The 'yes we can' optimism of this vision of what is depicted as an 'existential crisis' of the Union could be easily contested by euro-

[49] M. P. Maduro, "Passion and Reason in European Integration", (lecture given at Humboldt University, Berlin, 10 February 2010). Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1709950>.

pessimism, but it helps to focalise the moment and the tendencies even without looking at the falling Eurobarometer. The ideal mix of 'passion and reason' needed for a democratic constitutionalism in Europe is perceived as threatened by a real mix of 'apathy and ignorance ', even more than by an increasing will to opt out from single obligations. The answer European constitutional theory can give is that ignorance can be faced *medio tempore* by a learning society and that the conservative impulse of 'apathy' can help to get a critical distance from calls on enthusiasm or panic, especially in times of 'emergency'. We can trust our common European constitutional culture because we do not necessarily need emergency and revolutionary forces for disruption in order to get the final solution of 'finality', but normalisation and evolutionary forces in order to consolidate an 'evolutionary constitutionalisation'.[50]

The simplified revision of Article 136 TFEU 'for a permanent mechanism to be established by the Member States of the euro area to safeguard the financial stability of the euro area as a whole (European Stability Mechanism)' is therefore the best remedy both for emergency and for the democratic deficit. Ordinary means of constitutional law-making will take the place of the use of emergency powers under Article 122(2) TFEU that can grant legitimacy only for a temporary

If both the solidity and flexibility of the European constitutional law are due to its principles deriving from a common constitutional law, one could of course object that nowadays principles need to be entrenched with values and that the values of the European society could have even less quotation than the euro. The theory of 'constitutional synthesis' helps to understand that what happens in today's crisis of financial markets is not just an external shock but might be also a result of inner contradictions within the national cultures of constitutionalism that have not yet faced the legitimacy and limits of European solidarity and responsibility in hard cases.

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[50] C. Moellers, "Pouvoir Constituant – Constitution – Constitutionalisation", in A. Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, 2nd ed. (Oxford and Munich: Hart publishing, 2008), at 198 *et seq*., remarks the danger of 'a development that can neither be fundamentally changed nor democratically answered for'. For a sceptical point of view, see, *inter alia*, S. Dellavalle, *Una costituzione senza popolo?*, (Milano: Giuffrè, 2002), at 57 *et seq*.

The constitutionalism at the national level has already registered diverging jurisprudence regarding the Lisbon Treaty (Karlsruhe vs. Prague) and *ultra-vires-/identity-* or fundamental rights-questions, partially corrected through the Mangold decision. Even the various foreign comments to the German Lisbon Treaty judgment show that the transnational dialogue among constitutional judges and scholars is still underdeveloped. When the new President of the German Constitutional Court relaunched the European '*Verfassungs-gerichtsverbund*', he spoke mainly about the triangle 'Strasburg-Luxemburg-Karlsruhe' and personal contacts with judges of 'other Constitutional courts' forgetting the existing 'association of European Constitutional Courts' and the creation of a new regional cooperation between the Italian, Spanish and Portuguese constitutional courts.[51] What happens when conflicts arise not within this triangle, but between different national constitutional courts?

The financial crisis of Greece and other EU countries have probably not been caused nor prevented by their constitutions,[52] but an assessment of the constitutional impact of the past decision of these countries to adopt the Euro and future decisions on unilateral 'sovereign' debt consolidation is still outstanding notwithstanding the decisions of the German Constitutional Court regarding the 'EU umbrella' for Greece.[53]

From an Italian point of view, the inner contradictions can be verified observing the tendencies of 'devolutionary federalism' in Belgium, Italy, Spain, and – last but not least – the United Kingdom. Even the recent constitutional reforms of France (parliamentarism) and Germany (federalism) could be not encouraging for the common

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[51] A. Vosskuhle, "Der europäische Verfassungsgerichtsverbund", (2010) 29 *Die Neue Zeitschrift für Verwaltungsrecht*, at 1. See also U. Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft*, (Tübingen: Mohr Siebeck, 2001), at 76 *et seq*.

[52] See Article 44(2) iv of the Constitution of Ireland: 'That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole'.

[53] See the decision to not grant an injunction BVerfG, 2 BvR 987/10, 7 May 2010, available at: <www.bverfg.de/entscheidungen/rs20100507_2bvr098710.html>, discussed by A. Fisahn, "Griechenland und die Perspektiven der Union", (2010) 43 *Kritische Justiz*, at 248. The final decision BVerfG, 2 BvR 987/10, 7 September 2011, available at: <http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710.html>.

European path of constitutionalism. And what about the Eastern European constitutionalism, for example the recent constitutional reform in Hungary that weakened the powers of the Constitutional Court or the presidential amendments proposed for the Polish constitution in order to prepare the accession to the monetary Union?[54]

Finally, when the national states seem to lose their social conscience, European citizens could themselves become alienated from democracy and Europe moves towards a 'Union of interests, travel, trade and consumption'.[55] A similar transformation of the material constitution can perhaps not be excluded, but is by no means intended by the Lisbon Treaty. The Union's constitution does not hand culture and politics over to the markets. But in order to promote democratisation, the Union has to face tendencies of oligarchy and populism, to manage the risks produced by post-secularism and multiculturalism common to the national democracies.

The constitution partially reframed by the Lisbon Treaty could be enough vital for making surviving a Union that has reached just the same age requested for the full exercise of citizenship rights and that has clearly abandoned the strange German desire for a final solution of its 'finality'.[56] Looking at the state of the Union, a German philosopher still hopes it will become a model for the future of humanity,[57] others could oppose to the optimism of the will the scepticism of reason. Nevertheless, this Union remains the gift of the national constitutions and therefore not a Trojan horse that could destroy the constitutional state, but a peaceful democratic donkey that can work for all people in an open pasture-ground.

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[54] See also, for example, P. Blokker, "Constitutionalism and Constitutional Anomie in the New Europe", (2010) 53 *Quaderno*, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719095>; A. Cantaro, *Il costituzionalismo asimmetrico dell'Unione*, (Torino: Giappichelli, 2010).

[55] U. Haltern, note 22 *supra*, at 234.

[56] See J. Luther, "La storia costituzionale europea non si conclude", (2007), in id., *Europa costituenda*, (Torino: Giappichelli, 2007), at 231 *et seq.*

[57] See now J. Habermas, *Zur Verfassung Europas*, (Frankfurt am Main: Suhrkamp, 2011), at 86: 'constitution making cooperation between citizens and states'.

Chapter 3

Taking pluralism seriously? The pluralistic underpinnings of European constitutional law

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In my brief response to *The Constitution's Gift*[1] I will focus on what I believe is the synthetic theory's deficiency with regard to the quest of establishing it as a comprehensive constitutional theory for the European Union (EU) in particular and constitutional processes beyond the state in general. These deficiencies of the theory come, in my opinion, to their full blossom in Chapter 5 in which the authors embark upon the attempt of 'untangling the knots by means of the theory of constitutional synthesis'.[2]

The universalist quest

As a first point I would like to elaborate a bit on the word 'synthesis' as in 'a theory of constitutional synthesis'. The authors describe their application of the words as 'a process in which already established constitutional states integrate through constitutional law'.[3] However, integration does, in my opinion, not cover the word 'synthesis' fully. The word synthesis suggests that the combination of two or more

[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, (Lanham: Rowman and Littlefield, 2011).
[2] Ibid., at 163.
[3] Ibid., at 45.

entities – national constitutions in this context – which when combined form something new, namely a synthesis. The authors have recognized this and the above cited sentence is followed up by the following: 'This is a process where participant states establish a supranational political community in which they become integrated without losing their institutional structure and identity.'[4] The product of the synthesis is thus a supranational political community, which has, one could hold, to a great degree already taken place in the EU. The question I raise here is whether the promise that the participating state shall not lose their institutional structure and in particular their 'identity' is sufficiently secured under the synthesis model. More precisely, the question is whether the promise of the continual existence of national institutional structures and identity is merely about form and not substance.

There are, in my opinion, features of the synthetic model which indicates that the former rather than the latter is the case. In constitutional terms the synthesis model is described in the following passage in Chapter 5 with reference to horizontal conflicts (i.e. conflicts between national constitutions):

> When national legal orders diverge but it is still necessary to have one single constitutional standard, then national constitutional norms enter into conflict. From the perspective of constitutional synthesis, this is done in a proper constitutional way, respectful of the common constitutional law and of each national constitution insofar as the chosen solution is supported by the better reasons, and is the one that better fits with the rest of European constitutional law.[5]

At the face of it, it appears that sufficient respect is granted each national constitution. However, one could clearly pose the question what it means that the chosen solution is supported by the 'better reason'? There appears to be a Habermasian discourse theoretical side to this argument, and as we all know, Habermas' discourse theory is about norms as well as facts: the discourse is more than about democratic procedures; the discourse also has to take place

[4] Ibid.
[5] Ibid., at 172.

within a normative framework.[6] The question is then: within what normative framework do the authors suggest that the 'constitutional discourse' should take place? If we read the reference to 'better reason' in light of Habermasian discourse theory one could clearly hold that the formulation has a universalist and even deontological flair to it. This universalist drive is enforced by the cumulative condition in the last part of the sentence which suggests that constitutional conflicts have to be solved in a way which 'fits best' with the rest of European constitutional law. This 'rest of European constitutional law' constitutes a 'single European standard'.[7]

The establishment or presupposition of a single constitutional standard one could suggest constitutes a kind of tyranny-of-the-majority-of-constitutions. The moderating aspect lies in the word 'necessary' in the first sentence. Thus, it is not always necessary to have one single constitutional standard. The question which rises in this regard is, obviously: when is it necessary to have one single constitutional standard; and who decides when it is necessary to have one constitutional standard? Would the Irish constitutionally enshrined ban on abortion survive the synthesis? And what about the Nordic welfare state model? The authors do not provide any clear answers.

Equality before the law

Another formulation or conceptualization of the European constitution, which I am going to discuss in the following, may be found a bit further down. The authors write that: *'equality before Community law cannot be guaranteed but by a single constitutional standard'*.[8]

The underlying premises of the quoted sentence appears to be that if the law is not applied in the same way all over Europe, this will constitute a breach of the idea of equality before the law. True, equality before the law is a forceful idea: intrinsic in the very

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[6] J. Habermas, *Between Facts and Norms*, (Cambridge: MIT Press, 1998): '[...] the morally grounded primordial human right to equal liberties is intertwined in the social contract with the principle of popular sovereignty', at 93-4. And as John Rawls points out in *The Law of the Peoples*, (Cambridge: Harvard University Press, 1999) at 142: 'political liberalism also admits Habermas' discourse conception of legitimacy'.

[7] Fossum and Menéndez, *The Constitution's Gift*, at 172.

[8] Ibid.

institution of law. However, we must not forget that the idea of equality before the law may have different meanings dependent, for example, on how one conceptualises the law. In the classical liberal sense the doctrine of equality before the law means that law should be applied equally to all in nominal terms. However, there is also another side to the doctrine of equality before the law, which takes into consideration that individuals may have different presuppositions. Whereas the former liberal understanding of the doctrine could be referred to as a formal understanding the latter could be referred to as a contextual meaning of the idea of equality before the law. In a class there may be pupils that are clever and pupils that are not so clever. Letting them all read a curriculum which accommodates the less clever pupils would satisfy the formal definition of equality. However, one could clearly question if this understanding of equality would do justice to the clever pupils. One could even question whether the pupils under such a regime are really treated equally. Similarly, one could argue that a statute forbidding the poor and rich alike to sleep under bridges and to beg on the streets, while equal in formal terms, certainly is not equal in real terms.[9] For, surely the rich will never be in the situation where begging or sleeping under bridges would constitute an option. Thus, for them the prohibition would have no impact, whereas it would potentially have serious implications for the poor, depriving them of their livelihood and their homes. According to theories of social justice, the doctrine of equality before the law has a positive and a negative, or antithetical, side to it suggesting firstly that equal cases should be treated equally and secondly that unequal cases should be treated unequally.

In light of this latter conceptualisation of the doctrine of equality before the law there is clearly room for divergences, meaning, that due consideration may be granted the context within which the norm is applied. In our case this means that if one accepts that Europe consists of a plurality of different societal entities with distinct cultural historical characters and if one recognized that the institution of law is (also) reflective of the societal context in which it is embedded, then one should also accept that in the effort to establish law on a supranational (European) level it is important to take these

[9] The example was formulated by A. France, *Le Lys Rouge* (Paris: Calmann-Lévy, 1894).

differences seriously. Consequently, one has to accept another '*Finalitaet der europaesischen Integration*'[10] than that of a quasi-European state entity.

Thus, instead of letting oneself be seduced by Kelsen's idea of a legal (and judicial) hierarchical order,[11] one should take the ideas of federalism seriously. This implies realising that the relationship between the supranational and the national level is one of permanent tension – both in factual and in normative terms.[12] This tension may be institutionalised through the principle of checks and balances. In lack of adequate checks and balances on the supranational level – between different branches of government (horizontal) in the EU, checks and balances between the different levels of government (vertical) becomes more important. In addition, the fact that EU democracy is deficient (this is why the EU is not trusted with so-called *Kompetenz-Kompetenz* powers) and the fact that there exist strong democratic institutions on the national level clearly underlines the importance of vertical checks and balances.

Federalism in Europe is more than formalities. It is also about substance. European federalism implies accepting that Europe consists of a plurality of societal and legal orders reflective of a variety of different societal, historical and cultural identities. A contextual conceptualisation of the doctrine of equality of law means taking seriously the plurality of histories, cultures and identities which truly makes Europe so unique and beloved.

Concluding remarks

To sum up: My major critique of the authors' proposed constitutional model is that it lacks proper considerations for the pluralism which clearly exist in Europe. It appears that the synthesis model presuppose – exactly – that the outcome of the European integration

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[10] J. Fischer, *Vom Staatenverbund zur Föderation: Gedanken über die Finalität der europäischen Integration*, speech at the Humboldt University in Berlin 12, Special Edition (Frankfurt am Main: Suhrkamp, 2000).

[11] H. Kelsen, *Allgemeine Staatslehre*, (Berlin: Springer, 1925); id., *Reine Rechtslehre*, (Leipzig: Franz Deutick, 1934).

[12] See, for example, C. Schönberger, "Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas", *Archiv des öffentlichen Rechts*, Band 129, (Tübingen: Mohr Siebeck, 2004), pp. 81-120.

process is a continual and everlasting process of constitutional synthesis. True, the authors do recognize that there may be conflicts between the European and national constitution. But they tend to phrase these conflicts as 'vertical conflicts',[13] i.e. between the national and the supranational level. However, this is, in my opinion, only half of the story. The authors appear to neglect the fact that there may also exist conflicts of an irreconcilable nature on a horizontal level – between nation states.

The authors appear to accept pluralism within the synthesis model with regards to institutions: 'The peculiar pluralism resulting from combining one single constitutional law […] with a pluralist institutional structure'.[14] Institutional pluralism is, according to the authors, necessary to render the EU project democratic legitimacy – after all it is still the nation states which are exponents of democratic legitimacy. The institutional pluralism serves the purpose of securing democratic legitimacy for the EU. However, if these (national) democratic legitimate bodies should enact substantial measures – for that sake constitutional measures – which happen to be contrary to the 'single constitutional standard' the democratic credentials of these measures should paradoxically not, according to the synthesis model, be taken very seriously.

In my opinion, the synthetic constitutional theory does not open up for the possibility of the existence of permanent or unsolvable constitutional conflicts in Europe. Intrinsic in the synthetic model appears to lay a permanent drive towards consensuses (synthesis). It is a model for a European federal state construction more than a model for a federation (*Bund*), the latter in which the idea of sovereignty or constitutional primacy is in a state of permanent '*Schwebezustand*'.[15] In my opinion the great challenge when constructing a constitutional theory for the European Union is not to construct a model with clear Kantian overtones, but rather a model which in a plausible way takes into account what makes Europe so unique: the historical and cultural differences between the member states.

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[13] Fossum and Menéndez, *The Constitution's Gift*, at 172.
[14] Ibid., at 10.
[15] Schönberger, "Die Europäische Union als Bund", note 12 *supra*.

Chapter 4

Between synthesis and modesty European constitutionalism in a state of uncertainty

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The following remarks are those of a benevolent, if not partisan, observer of the long-term striving for the democratic credentials of the European Union by two particularly prolific contributors to the RECON project: *The Constitution's Gift*[1] can safely be called a *summa* of their efforts; this book synthesises the historical reflections, the comparative studies and the debates within political theory and political science, constitutional theory and European law. This *summa*, however, cannot be understood nor was intended as some definite settlement of their agenda, because they are concerned with a moving target which got into troubled waters. The shadow of *Weimar* clouds the European Union not merely in that there is a sense of a crisis and a doubt about the viability of Europe's institutional design and accomplishments, but also because we find ourselves on an uncharted sea and have to operate in a state of uncertainty about the present state of the Union, let alone its future. Uncertainties may require precaution; they do not excuse either practical complacency or some theoretical 'anything-goes' pluralism. The proper response, it

[1] J. E. Fossum and A. J. Menéndez, *The Theory of Constitutional Synthesis: A Constitutional Theory for a Democratic European Union*, (Lanham: Rowman and Littlefield, 2011).

seems, is to invoke another legal category, i.e., the mutual recognition of our efforts to cope with the difficulties of a precious project. Mutual recognition of academic efforts pre-supposes the examination of the other, its critical discussion, the readiness to listen and to learn. This is the type of exercise which will be undertaken here in three steps. In the first step, I will outline the merits of the idea of a constitutional synthesis which I see, in particular, in the blending of normative commitments with analytical conceptualisations and a re-construction of experiences with the integration project. As will become apparent, we share a great range of normative aspirations, such as a commitment to the legacy of the law-mediated legitimacy of European governance and rule; these communalities, however, may be less stable than they appear at first sight, once we contrast our understanding of their background conditions. The move 'from norms to facts' will be undertaken in the second step. The objective here is by no means to invalidate the normative aspirations of the 'constitutional synthesis'. The second section will, instead, mirror normative concerns in the realm of economic governance and the law of the European economy which are not taken too seriously by political theorists and public law scholars. Such complementing and broadening of the study of Europe does not diminish, but, on the contrary, widens the range of our uncertainties about the state of the Union. The concluding section is about the conceptual implications of this *problématique*. As will be submitted there, the quest for a comprehensive constitutional synthesis may be overly ambitious.

Common aspirations: On common grounds?

'Constitutional synthesis entails the integration of separate constitutional systems through a common constitutional law'[2] – this brief formula synthesises the theoretical messages of a core chapter[3] of *The Constitution's Gift*: The constitutionalisation of Europe departed from a foundational act, but must then be understood as a process. This process is concerned with the forming of on new entity out of constituted states which are thereby not deprived of their identities.

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[2] J. E. Fossum and A. J. Menéndez, "The Theory of Constitutional Synthesis: A Constitutional Theory for a Democratic European Union", (2010) *RECON Online Working Paper* 2010/15, at 10.

[3] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra,* chapter 2 "The Theory of Constitutional Synthesis", pp. 45-76.

This formula mirrors the history of the European project and reminds us that the constitutional law which structures and consolidates this project should not be perceived as a supranational construction which would be imposed upon the member states and substitute their constitutions of the member states; these constitutions retain a legitimising function.[4] The positive messages which complement this negative delineation underline the pluralism in European constitutionalism, its evolutionary character, the function of horizontal learning processes, the institutional and political tensions inherent in the synthesising moves – *and* its fragility and vulnerability. All of these normative, in part, metaphorical, notions are underpinned by observations which this commentator is bound to appreciate: the member states of the Union and their societies have become highly interconnected and interdependent. 'Such a structure contains both efficiency and democracy deficits that can be overcome only by some form of mutual integration.'[5] The authors and their commentator fully agree also in the dependence of such constructive responses on the insights and awareness of those involved, on their political commitments and, last, but not least, on the vocation and potential of law to foster this type of integrating process. It is, then, unsurprising that the scope of our agreement includes the critical evaluation of competing political and legal theories of integration[6] – with one qualified exception, namely their remarks on their commentator.[7] I will defend the conflicts-law approach which they both take seriously and describe fairly, against the objection of being under-comprehensive and unduly disregarding the federal dimensions of the European polity. This discussion has to be postponed, however. We

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[4] It is unsurprising that both authors did not join in the chorus of devastating critiques of the recent judgment of Germany's constitutional court on the Treaty of Lisbon (Regarding the Ratification of the Treaty of Lisbon [2010] CMLR 13); see E. Chiti, A. J. Menéndez and P. Gustavo Teixeira, "The European Rescue of the European Union", in id. (eds), *The European Rescue of the European Union? The Existential Crisis of the European Political Project,* RECON Report 19, (Oslo: ARENA, 2012), pp. 391-428, at 409; E. O. Eriksen and J. E. Fossum, "Bringing European Democracy Back in or How to Read the German Constitutional Court's Lisbon Treaty Ruling?", (2010) *RECON Online Working Paper 2010/17* and (2011) 17(2) *European Law Journal*, pp. 153-71.

[5] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra*, at 55, emphasis in original.

[6] Ibid., at 69 *et seq.*

[7] Ibid., at 74-5.

have first to examine what I perceive as the background of our – partial – disagreement.

The difficulties of European constitutionalism with the European economy

Back in 2003, the Heidelberg Max Planck Institute for Comparative Public Law and International Law and the Jean Monnet Center at NYU School of Law organised a European law symposium on *The New German Scholarship*.[8] How come, I then observed somewhat disrespectfully in a working paper,[9] that the term 'economy' is mentioned only once in the contributions on the integration of what started out as the European Economic Community, which encompassed no less than 148 875 words. I omitted this remark in the subsequent publication of my paper because the contributions to the symposium were part of a book project with two additional chapters on 'Constitutional Aspects of Economic Law'.[10] And yet, there is more than a kernel of truth to my remark. The German debate is particularly illuminating because the country has inherited, from the Weimar Republic, a constitutional tradition that has inspired the *Sozialstaatsgebot* of the German Basic Law[11] and its inclusion into the 'eternity clause'.[12] The impact of this legacy, however, remained limited. The political constitution and the so-called economic constitution live separated lives at national, as well as at European, level. There the disregard of 'the economic' and 'the social' in constitutional deliberations was, until very recently, the firmly established state of the art.

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[8] A. von Bogdandy and J. H. H. Weiler (eds), "European Integration: The New German Scholarship", (2003) *Jean Monnet Working Paper* 9/03, available at: <http://www.mpil.de> and <http://www.jeanmonnetprogram.org>.

[9] "Working through 'Bitter Experiences' towards Constitutionalisation: A Critique of the Disregard for History in European Constitutional Theory", (2005) *EUI Working Paper* LAW 2005/14, note 21.

[10] A. Hatje, "The Economic Constitution", in A. v. Bogdandy and J. Bast (eds), *Principles of European Constitutional Law,* (Oxford: Hart Publishing, 2006), pp. 587-632; J. Drexl, "Competition Law as Part of the European Constitution", in A. v. Bogdandy and J. Bast (eds), *Principles of European Constitutional Law,* (Oxford: Hart Publishing, 2006), pp. 633-73.

[11] Article 20 (1) 'The Federal Republic of Germany is a democratic and social federal state'.

[12] Article 79 (3): 'Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

The authors of *The Constitution's Gift* have, jointly and individually, taken positions outside this type of fragmented constitutionalism. They have pleaded for a constitutional framing of the socio-economic order, 'which is reflective of citizens' mutual obligations' and should contain 'a strong element of redistribution at the European level'.[13] Menéndez has, in the context of his path-breaking work on taxation,[14] read Hermann Heller's 'Social *Rechtsstaat*' into Europe's constitutional commitments,[15] and, in his RECON research, he has very strongly underlined the linkages between social justice and democracy, and private and public autonomy.[16] It is precisely this line of argument that is taken up and substantiated in *The Constitution's Gift*. In particular, the critique of the recent labour law jurisprudence[17] seems fully compatible with the arguments of the German defenders of their Heller-Abendroth-Habermas tradition:[18] the ECJ, in this jurisprudence, did not respect the co-existence of private autonomy

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[13] J. E. Fossum and A. J. Menéndez, "Democracy and European Constitution-Making", in E. O. Eriksen and J. E. Fossum (eds), *RECON: Theory in Practice*, RECON Report No 8, (Oslo: ARENA, 2009), pp. 43-76.

[14] A. J. Menéndez, *Justifying Taxes: Some Elements for a General Theory of Democratic Tax Law*, (Dordrecht: Kluwer Academic Publishers, 2001).

[15] See A. J. Menéndez, "The Purse of the Polity", in E.O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU*, (London: Routledge, 2005), pp. 187-213 at 208-18.

[16] See, in particular, A. J. Menéndez, "When the Market is Political: The Socio-Economic Constitution of the European Union between Market-Making and Polity-Making", in R. Letelier and A. J. Menéndez (eds), *The Sinews of European Peace: Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, RECON Report No 10, (Oslo: ARENA, 2009), pp. 39-62 (for example, at 41 where democratic rule is defined by the potential to 'create the conditions under which *we the people* could realistically decide how and to what extent certain collective macro goals, such as stable growth and full employment, were to be aimed at').

[17] See Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union* v *Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05; *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case 346/06, *Dirk Rüffert* v *Land Niedersachsen* [2008] ECR I-1989, recently confirmed by the Court's Grand Chamber on 15 July 2010 in Case C-271/08, *European Commission* v *Federal Republic of Germany*.

[18] See C. Joerges and F. Rödl, "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*", (2009) 15(1) *European Law Journal*, pp. 1-19; C. Joerges, "*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process", (2010) 9(1) *Comparative Sociology*, pp. 65-85.

(economic liberties) and social rights, but has, instead, superimposed the former over the latter. The Court thereby did the opposite of what would have constituted a constitutional synthesis, namely, to form a constitutional shelter, in which the common welfare tradition of all the European democracies might survive the integration process. Equally straightforward is their critique of Monetary Union. The degree of autonomy which the ECB does, but which the German *Bundesbank* never did, 'enjoy',[19] has, indeed, decoupled monetary policy from fiscal policy, and, through the de-politicisation of the former and its halfway complementation by the Stability Pact, affected the functioning of the latter.[20] To cite a non-lawyer: 'In deciding to grant quasi-constitutional status to the independence of the European Central Bank, the framers of the TEU accepted a democratic and constitutional monstrosity – a central bank operating in a political vacuum – for the sake of 'deepening' the integration process, indeed, of making it irreversible.'[21] Such defences of the legacy of the European welfare state are in line with the concerns of prominent contemporary historians,[22] but are rare among European constitutionalists. Anxieties over the dismantling of governmental functions in the realm of monetary and fiscal policy were articulated even before the financial and fiscal crises, in particular by political economists, but hardly ever reached the agenda of European constitutionalists.

The authors of *The Constitution's Gift* are exceptional in both respects. Even more exceptional, in my view, is – among constitutional lawyers[23] – their insight that European law's disregard of this legacy

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[19] See, in more detail, C. Joerges, "States without a Market? Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses", (1996) *NISER Working Paper*, (Utrecht: *Netherlands Institute for Social and Economic Law Research*, 1996), available at: <http://eiop.or.at/eiop/texte/1997-020.htm>.

[20] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra*, at 121-2, 126.

[21] G. Majone, *Europe as the Would-be World Power: The EU at Fifty*, (Cambridge: Cambridge University Press, 2010), at 34, 162.

[22] See T. Judt, *Postwar: A History of Europe since 1945*, (New York: Penguin, 2005), at 791 *et seq.*; more recently, see his *Ill Fares the Land*, (New York: The Penguin Press, 2010), at 127-237, and *passim*; B. Stråth, "Europe's Social Questions in a Global and Historical Perspective", (lecture given at Bremen University, 7 February 2011), available at: <http://www.welfare-societies.de/h/events_5_en.php?id_rec=18>.

[23] There are, however, indicators of a new awareness and re-discovery of the 'Economy as Polity'; see, e.g., the contributions to C. Joerges, B. Stråth and P. Wagner

poses a threat to its legitimacy, and may even 'spur resistance'.[24] With this step, which seems to build upon their perception of vertical, horizontal and mixed conflict patterns in the Union,[25] they open the door to new inquiries into the sociological background and the social effects of Europeanisation processes which were first quite prominently addressed by Neil Fligstein,[26] and are by now becoming more generally visible in the renaissance of economic sociology and an increasing interest in the work of its founding father, Karl Polanyi.[27] In the famous analyses of the political and economic origins of his seminal *Great Transformation*,[28] Polanyi had identified three 'commodities' – labour, land and money – which he called 'fictitious' because they are not produced like ordinary commodities, and which, so he warned, if commodified and subjected to market governance would expose societies to social and economic risks.[29] There is a Polanyian touch to the remarks in *The Constitution's Gift* on the origin of the Common Agricultural Policy;[30] the affinities are stronger and hardly fortuitous when it comes to 'labour' and money'. What *The Constitution's Gift* observes and criticises with regard to the former is an exercise in commodification and social disembedding; what they observe and deplore with regard to the latter is the establishment of a false, only seemingly neutral and economically rational discipline, and the destruction of political authority and

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(eds), *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, (London: UCL Press, 2005); 'The Economic is the Political', explains A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law*, (Oxford: Oxford University Press, 2011), at 22-6.

[24] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra*, at 62.

[25] Ibid., at 176.

[26] See his prize-winning *Euro-clash: The EU, European Identity and the Future of Europe*, (Oxford: Oxford University Press, 2008).

[27] 'We are all Polanyians now', J. Beckert, "The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology", *MPIfG Discussion Paper* 07/1, Cologne 2007, at 7, available at: <http://www.mpifg.de>; for an 'application' to the EU, see J. Caporaso and S. Tarrow, "Polanyi in Brussels: European Institutions and the Embedding of Markets in Society", (2008) *RECON Online Working Paper* 2008/01, available at: <http://www.reconproject.eu>.

[28] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (Boston: Beacon Press, 2001 [1944]).

[29] See for a discussion A. Ebner, "Transnational Markets and the Polanyi Problem", in C. Joerges and J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford: Hart Publishing, 2011), pp. 19-40.

[30] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra,* at 251, note 47.

accountability. In both respects, there is no disagreement in principle. What I wonder about, however, is the potential of 'the theory of constitutional synthesis' to provide us with valid guidance out of these dilemmas.

Synthesis or modesty in the shadow of the 'faltering project'[31]

The last mentioned query rephrases the remarks made at the beginning of these comments on our uncertainties about the present state of the Union and Europe's apparent difficulties in coping with today's challenges. Whereas the authors of *The Constitution's Gift* plead for a strengthening of the constitutional synthesis as a response to this crisis, this commentator advocates a conceptual re-orientation which would foster precaution.

Does this summary of our disagreement downplay the differences between the theory of conceptual synthesis and the conflicts-law approach? It seems to me that our communalities are considerably stronger than the critical summary of the conflicts-law approach by Fossum and Menéndez,[32] which the latter's subsequent elaboration of this critique[33] both reveals and concedes. What I perceive as an inadequate reconstruction of my position can probably be explained by the emphasis of the conflicts-law approach on the compensation of nation-state failures and the potential of European law to compensate for the democracy deficits which stem from the external effects of unilateral decision-making in national democracies.[34] Fossum and Menéndez subscribe to this starting point,[35] but question the potential of the conflicts approach both to capture the broad range of European activities and to provide guidance for their legitimation. Their

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[31] The term is taken from J. Habermas, *Europe: The Faltering Project*, (Cambridge: Polity Press, 2009).

[32] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra,* at 74-5.

[33] See his "United they Diverge? From Conflict of Laws to Constitutional Theory?", in C. Joerges, P. F. Kjaer and T. Ralli (eds), *Conflicts Law as Constitutional Form in the Postnational Constellation,* (2011) 2(1) Special issue of *Transnational Legal Theory,* pp. 167-92.

[34] That argument was first developed in C. Joerges and J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3(3) *European Law Journal*, pp. 273-99, at 293.

[35] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra,* at 75.

critique seems to take the supranational aspirations of the conflicts-law approach not seriously enough and, even more so, to disregard or downplay the development of positive transnational regulatory patterns in its 'second' and its 'third dimension'. With their understanding of European constitutional law as a synthesis of national constitutions and the anchoring of European legitimacy in compensatory functions, we seem to share very similar intuitions. Both approaches do not understand European law as an autonomous insulated sphere, but, instead, see it generated by, and continuously interacting with, the legal systems of the member states and define the nature of the European project through these linkages. The *legal supranationalism* which the conflicts-law approach conceptualises as a new type of conflicts law departs with this vision quite radically from the traditions of private international law and conflict of laws. These traditions are nationalistic in that their principles and rules remain under the control of national legal orders, and remain one-sided in all spheres of regulatory politics. Any transnational legal structure outside international law and international agreements was simply inconceivable. The conflicts-law approach pleads, instead, for the establishment of such structures as a response to the whole range of inter-dependencies among the no-longer autonomous European economies and societies. It acknowledges that these responses must include the Europeanisation of administrative activities (the 'second dimension' of European conflicts law) and of transnational governance arrangements (the 'third dimension' of European conflicts law). It complements this acknowledgment of functional necessities by the plea for a 'constitutionalisation' of Europe's 'political administration' and of its governance practices. In both respects, the differences between the theory of constitutional synthesis and the project of a three-dimensional conflicts law as Europe's constitutional form seem to be more terminological that substantive.[36] It remains true that the former places strong hopes on the deepening of Europe's federal dimensions that are not shared at present in the conflicts-approach. This approach builds on a less ambitious complement to the compensatory function of European law, upon which the transformation of *comitas* among European nations into legal

[36] See Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra,* at 120, 126; C. Joerges, "Integration through De-Legalisation?", (2008) 33(3) *European Law Review*, pp. 219-312.

commitments[37] and Europe's mandate to develop transnational legal *Sachnormen*[38] (substantive rules) can be based; suffice it here to point to Christoph Schönberger's rediscovery of the category of the *Bund*.[39]

The communalities between the theory of constitutional synthesis and the conflicts-law approach seem, therefore, to be so considerable that most of their differences may be characterised as a 'family quarrel'.[40] One important discrepancy, however, which cannot be disregarded, concerns the responses to Europe's present difficulties and dilemmas. We should acknowledge that both the plea for a strengthening of Europe's federal elements and the plea for precaution have their *fundamentum in re* – and that both views take risks. How sure can one be, given our experiences with the Common Agricultural Policy and Monetary Union, that the federation will become democratic? How confident can we be that the *impasses* of the present institutional design will not only generate ever more extra-legal activities but also their constitutionalisation? The most reasonable response to such an insight would be the encouragement of the opponents to go ahead with the development of their approaches, explore their potential further and expose their efforts to the critique of the other. The European project is better served by such critical observation than practices of academic camouflage.

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[37] See J. Israël, *European Cross-Border Insolvency Regulation*, (Antwerp and Oxford: Intersentia, 2005), at 123, 150-2, 323-34.

[38] The first to venture this idea was E. Steindorff in his habilitation thesis on *Sachnormen im Internationalen Private* [Substantive law in private international law], (Frankfurt am Main: Klostermann, 1958).

[39] See "Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas", (2004) 129 *Archiv des öffentlichen Rechts*, p. 81 *et seq.*, at 88-120; on the conceptual history including the pertinent passages from Carl Schmitt's *Verfassungslehre*, see M. Avbelj, "Theory of European *Bund*", (PhD Thesis, EUI Florence, 2009), chapter 3, at 109 *et seq.*

[40] In the sense of F. I. Michelman, "Family Quarrel", (1996) 17 *Cardozo Law Review*, p. 1163 *et seq.* reviewing J. Habermas, *Faktiziät und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt am Main: SuhrkampVerlag, 1992).

Chapter 5

Two untidy remarks on the theory of constitutional synthesis as a general constitutional theory

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Introduction

The theory of constitutional synthesis, as presented in John Erik Fossum and Agustín José Menéndez' *The Constitution's Gift*,[1] has two different aims. On the one hand, it sets out to show that the process of European integration can, despite appearances to the contrary, be understood as a process of legitimate democratic constitution-making. To establish this point, on the other hand, the theory of constitutional synthesis aims to reconfigure our theoretical understanding of the process of legitimate democratic constitution-making, by emancipating that understanding from the assumption that democratic constitution-making can only take place in a national context. As a result, so the theory's promise, we will be able to see how democratic supranational constitutionalism can be combined with a preservation and even a strengthening of constitutional democracy on the national level. At the same time, the theory of constitutional synthesis works out the limits of democratically legitimate supranational constitutional integration, and thus provides

[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Lanham: Rowman and Littlefield, 2011).

a diagnosis of the problems of democratic legitimacy that plague the European Union (EU).

As a political philosopher, I lack the competence to evaluate the theory's success in achieving its descriptive aims with regard to the process of European integration. My remarks will therefore focus on the second aspect of the theory of constitutional synthesis: its claim to provide a general theory of legitimate democratic constitution-making. What is more, I am going to be concerned mostly with how the constitutional-theoretical questions that the theory of constitutional synthesis sets out to answer are framed in *The Constitution's Gift*, not so much with how the theory answer those questions. It seems to me that the theory of constitutional synthesis makes a number of assumptions about the questions that a democratic constitutional theory has to answer that might be open to criticism from the point of view of general legal theory and of general democratic constitutional theory.

I hasten to add that that the two questions I will try to ask are nothing more than untidy remarks that I am putting forward for the purpose of discussion. The greatest quality of *The Constitution's Gift*, in my view, is that the book forces the reader to reconsider his (or her) own assumptions about constitutional theory. For me, this process of rethinking my own assumptions on the basis of the questions raised by *The Constitution's Gift* promises to be very productive, though it has only just begun. I am very grateful for the inspiration.

Legal monism, institutional pluralism, and the identity of legal systems

The claim that constitutional synthesis can combine supranational democratic constitutionalism with the continuing existence and even a strengthening of democratic constitutionality on the national level seems to presuppose the truth of the claim that supranational constitutional integration can combine legal monism with institutional pluralism. Constitutional synthesis 'endorses the monistic logic of law as a means of social integration'[2] and it accepts the Kelsenian view that it is impossible from a perspective internal to

[2] Ibid., at 50.

law to assume that 'one and the same case can have different, even contradictory solutions'.[3] At the same time, constitutional synthesis welcomes the fact that the monism of European law goes hand in hand with a pluralist institutional structure, a structure that contains a large number of judicial and legislative institutions 'legitimately claiming to have a relevant word'[4] whose relations to one another are not hierarchically ordered.

All this raises the question whether it is possible to combine legal monism with institutional pluralism. Some modern theories of legal system, for instance those of H. L. A. Hart and Joseph Raz, take it that the identity of a legal system depends on there being an institution or an ordered system of institutions that can authoritatively and finally ascertain whether some norm belongs to the legal system or not.[5] Put crudely, if the identity of a legal system is defined by rules of recognition, and if rules of recognition exist only as social practices of judges and officials, we need to know who the relevant judges and officials are in order to determine the content of a rule of recognition. But the only plausible way to do so seems to be to refer to the criterion of membership in a certain institution or set of institutions. We will have to say, for instance, that the rule of recognition in Britain is given content by the practices of British officials. Perhaps we will say that the rule of recognition of the European legal system is given content by the practices of the members of the European Court of Justice (ECJ) and of other European institutions, at least as long as everyone else acquiesces in their determinations.

One might reply that legal monism can still be combined with institutional plurality, even if the identity of the legal system depends on institutional practices, on the condition that all institutions involved in the practice of making, interpreting, applying European law, as a matter of fact, use the same rule of recognition. The problem with this reply would appear to be that it might well be empirically false. It does not seem, for instance, that the German constitutional

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[3] Ibid., at 51.

[4] Ibid.

[5] See H. L. A. Hart, *The Concept of Law*, 2nd ed., edited by P. A. Bulloch and J. Raz, (Oxford: Oxford University Press, 1994), chapter VI; and J. Raz, *The Concept of Legal System*, 2nd ed. (Oxford: Oxford University Press, 1980).

court practices the same rule of recognition as the ECJ or that it would acknowledge a European rule of recognition as the supreme source of the validity of law that is applied in Germany.

The prospects for monism with institutional pluralism may appear to be better once one adopts Hans Kelsen's theory of the basic norm instead of a Hartian theory of the rule of recognition. Kelsen, after all, thinks that a basic norm could be presupposed even in a primitive legal system, like the classic system of public international law, which did not possess any authoritative judicial institutions.[6] Institutional factors, for Kelsen, place no direct constraints on the possibilities of monistic legal construction. However, Kelsen clearly agrees that a legal system is not going to function well without an ordered system of courts that can authoritatively apply the law. If the law must be monist in order to give unambiguous guidance, then, given the openness of legal interpretation, there has to be a system of authoritative institutions to give the law the required specificity to really do its job. For this reason, Kelsen was a fervent advocate of the introduction of authoritative judicial institutions in international law that would replace the pluralism of self-interested interpretations of the law on the part of individual states.

These remarks certainly do not establish that legal monism is incompatible with institutional pluralism, and the authors are of course perfectly aware that the combination may create problems of stability and legitimacy for synthetic integration in the longer run. But, given the leading theories of legal system, it is not altogether obvious that the combination is even possible to begin with or that it could ever be anything more than a highly defective and inherently transitional instance of legal order. It might therefore be interesting for the theory of constitutional synthesis to address the question of the very possibility of a combination of legal monism and institutional pluralism more directly.

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[6] See for example H. Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge: Harvard University Press, 1942).

Constitutional synthesis and democratic constitutionalism

The authors observe that the real problem in debates about whether the EU can be said to have a constitution is not the question whether it has a material or a formal constitution but rather the question whether it can be said to have a normative constitution, and in particular a democratic normative constitution.[7] But what is a democratic normative constitution?

The theory of constitutional synthesis appears to make a number of assumptions concerning this question:[8] First, the theory supposes that a legitimate constitution must have what I call a 'higher law-structure'. In other words, it must contain rules that substantively constrain the powers of the ordinary legislator and that are somehow shielded from being changed through the ordinary process of legislation. Second, the theory assumes that the rules that make up the higher law of the constitution, to be legitimate, must be based on exercises of constituent power or on some process sufficiently analogous to exercises of constituent power. Finally, there also seems to be the assumption that for a political system to count as a proper democracy it must be constitutional in the sense described by the first two assumptions.[9]

One might worry, I suppose, that this defines the notion of a democratic constitution too narrowly. A higher law structure, it seems, could exist where there is no democracy. Conversely, it seems that there can be legitimate democracy without a higher law structure. And finally, even where there is a political system that is both democratic and has a higher law structure, the structure, it would appear, needn't have been put in place by a popular sovereign to have constitutional force or to be legitimate.

To come to the first of these three observations, there seems to be no good reason to think that a higher law structure must always be democratic or that must have been brought about democratically. A

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[7] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 27-8.
[8] Ibid., at 19-27.
[9] For a similar view see B. Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991).

higher law structure might be created through a concession on the part of a monarchic sovereign, it might come about through a constitutional treaty between sovereign monarchs, or it might originate from a process of transformative constitutionalisation that does not have clear democratic credentials. A constitution created in any of these ways could be democratic in content, though of course it would not have to be. However, the higher law structure so created could still function in the legal system in much the same way as democratically created higher laws would, putting substantial restrictions on ordinary legislation. Perhaps the EU can be said to have a higher law structure in this functional sense, at least as long as the European institutions get away with imposing it, and this may be all that is needed to claim that the EU has a normative, and not just a material constitution.

The authors will doubtless reply that the EU may have a higher law constitution, but one whose democratic legitimacy is open to question, because the relevant higher law norms, or so it would seem, have not been enacted or endorsed by a popular sovereign or set of popular sovereigns. The theory of constitutional synthesis sets out to answer to this challenge. It tries to show that the appearance that European constitutional norms lack the legitimacy that results from an exercise of popular sovereignty is false. There has been a European synthetic constitutional moment that could draw on the legitimacy provided by exercises of popular sovereignty on national level.

Some readers will likely find that the idea of a constitutional moment is stretched rather far in the theory of constitutional synthesis. One might think, for instance, that for a political event to be a constitutional moment, the event in question must be recognizable as such to those who act in that moment. Otherwise it would be hard to see how the moment in question could express the constituent will of the people, even indirectly, and thus confer higher legitimacy. It seems to me that the theory of constitutional synthesis has the resources to answer to worries of this sort. But there is a more fundamental question here, in my view. It is whether we should accept the challenge, in the first place, that a functional constitution or higher law structure cannot be democratically legitimate unless it has been created, or can be referred back to, an exercise or a series of exercises of popular sovereignty. We need an explanation for why a legitimate

democratic constitution must have a higher law structure; and one that is not just democratic in content but that has been created or explicitly endorsed by a popular sovereign.

Arguably, there are some perfectly democratic polities whose constitutions do not meet that standard. The UK does not have (or at least did not have) a higher law structure, and the attempt to address this problem by arguing that constitutional conventions form a higher law structure in the UK does not strike me as fully convincing (though I cannot claim to be an expert on the British constitution). Albert Venn Dicey defined constitutional conventions as rules that govern the exercise of public power but that are not judicially enforceable. And Dicey's account, for what it is worth, clearly contradicts the claim that constitutional conventions are especially impervious to legislative change or that the change of a constitutional convention requires a 'we the people'-moment.[10] Undoubtedly, there are a number of norms, including written and unwritten rules, which are considered to be central to the identity of the British constitution as a liberal and democratic constitution and which are extremely unlikely to undergo fundamental change as long as British political culture is committed to liberal democracy. But those rules, it would appear, are still formally open to legislative change, and it has recently been argued, by Jeremy Waldron and Richard Bellamy, that they ought to remain open to legislative change in a democratic polity because their formal constitutionalisation in a higher law structure would unjustifiably restrict the present people's authority to determine and to interpret its own conditions of association.[11] Unless we are prepared to say that the British constitution is not democratically legitimate, it seems to constitute a counterexample to the claim that any legitimate democracy must have a higher-law structure.

(West-) Germany, on the other hand, did have a higher-law constitution since 1949, and one that is democratic in content, but the German constitution was not created by an exercise of popular

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[10] See A. V. Dicey, *Introduction the Study of the Law of the Constitution*, 6th ed. (London: Macmillan, 1902), at 22-9.

[11] See J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

sovereignty. Of course, it is true that the *Grundgesetz* acquired popular support over time. But one would be hard pressed to point to a particular moment in the political history of the Federal Republic of Germany at which the (West-) German people came around to endorsing the constitution as an implicit product of popular sovereignty, and I doubt that German constitutional scholars would accept the view that the higher law structure of the *Grundgesetz* lacked constitutional force in its beginning. In fact, many Germans today endorse the constitution because they believe that its substantive norms are morally correct and would have to form part, in one way or another, of the constitution of any legitimate political association, and not because they endorse theories of popular sovereignty which claim that constitutional norms are legitimate if and only if they happen to have been actually chosen by a people. Needless to say, something like that view is supported not just by German authors like Robert Alexy or Jürgen Habermas but also by influential American theorists such as John Rawls or Ronald Dworkin.[12] In any case, it is hard to see how the claim that the *Grundgesetz* came to be consciously endorsed by 'we the German people' at some point in time would help to justify the first stages of European integration, which took place only a few years after the *Grundgesetz* had been imposed on the (West-) German people, before the *Grundgesetz* had acquired the surplus of legitimacy it enjoys today.

These observations would appear to suggest that there might be more ways for a legitimate democratic constitution to come into being than the theory of constitutional synthesis can really allow for, at least if its assumptions about constitutional legitimacy are not to be watered down and stretched beyond recognition. The theory seems committed to an Ackermanian conception of popular sovereignty as the ground of constitutional legitimacy that might not fit the constitutional experience of important members in undoubted good standing of the family of democratic nations.

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[12] See R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard: Harvard University Press, 1996), at 1-38; S. Freeman, *Rawls* (Abingdon: Routledge, 2007), at 199-219.

Conclusion: Normative and descriptive problems in constitutional theory

My hunch (and it is not more than that) is that the theory is constraining because it tends to run questions of origin and questions of justification closely together. In describing the genesis and the primacy riddle, the authors repeatedly ask how it is possible that European norms, created through international treaties and seemingly dependent for their validity on national legal norms, could have come to form an autonomous legal order that successfully claims supremacy. 'How can this be so?'[13]

A cynic (or legal positivist) might reply that, in one sense, it is not at all difficult to explain how this can be so. European norms, s/he might argue, will have constitutional status (and not just in a material sense but also in some normative, though not necessarily a democratic sense) if they function, in fact, as higher law norms in the decisions of the relevant European institutions. The cynic could go on to argue that European norms will, as a matter of fact, enjoy supremacy as long as European institutions who claim that they enjoy supremacy get away with the claim. As Hart pointed out in *The Concept of Law*, in cases of conflicts of juridical supremacy, 'all that succeeds is success'.[14]

In a descriptive sense, then, we understand well enough how EU law can *successfully* claim constitutional status. What we want to know is how it can *legitimately* claim to have that status. I am not fully convinced that the only possible answer here is to refer to a legitimating origin that somehow connects the EU constitution to real exercises of popular sovereignty. Admittedly, if the normative issue is seen to be separate from the descriptive issue of explaining what makes certain European norms constitutional in a functional sense, this will likely lead to a bleaker descriptive assessment of the history of the European constitution as it exists. Europe's functional constitution may indeed be no more than the result of a successful power-grab. But at the same time, a perspective that separates descriptive questions of origin from normative questions of

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[13] Fossum and Menéndez, *The Constitution's Gift,* note 1 *supra,* at 166.
[14] Hart, *The Concept of Law*, note 5 *supra*, at 149.

justification will entail that such a factual history of the European constitution does not necessarily have to taint its legitimacy, since it allows for the possibility that an imposed constitution may, like the German *Grundgesetz*, nevertheless be legitimate, from the point of view of democratic constitutional theory, if it has a certain content and successfully provides certain results. This is not to say, of course, that the European constitution is indeed democratically legitimate. But the theory of constitutional synthesis could be strengthened by making more explicit why such an alternative approach to the justification of a constitution should not be on the theoretical menu.

Part II

Chapter 6

Dialectical constitutionalism?

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The obvious first-cut observation to be made about the elegant reflexion of *The Constitution's Gift* is that it places considerable pressure on common concepts of the *constitution*. Yet it does so on two distinct levels. Firstly, it presupposes, and to some extent joins, a rich debate in the scholarship of European construction about whether an organisation like the European Union, lacking the basic properties of a state, can be said to have a constitution. Secondly, it problematises even those conceptions of constitution and constitutionalism that already assume the basic tenets of statehood. Somewhat paradoxically it sets out to make a double argument, on the one hand asserting the constitutionality of the European polity in all its contentiousness and, on the other, introducing a fundamental re-configuring of constitutionality itself:

> […] constitutional synthesis unleashes twin processes of constitutionalization, in the sense of rendering explicit the constitutional nature of the polity and of its legal order, and in

> the sense of fleshing out the concrete normative contents of the regulatory ideal of the common constitutional law[…].[1]

This double approach is both necessary and redoubles the challenge addressed in the book. More interestingly, however, it also sets out the indispensable parameters for a conception of political, legal and cultural evolution that I would like to suggest calling dialectical constitutionalism.

This brief commentary chapter on Fossum and Menéndez's *The Constitution's Gift* suggests that the core concept of constitutional synthesis such as it is developed by the authors contains strong traits of what, in a Hegel vein, could be describe as 'dialectical constitutionalism'. It suggests, on the one hand, that Europeanization as constitutionalism takes place according to dialectical logic and, on the other, that such a dialectical logic lies only a few short theoretical steps away from the notion of synthetic constitutionalism advanced in the work. The comment has three brief sections. First, it critiques in a general way the concept of constitutional synthesis; second, it describes briefly the elements of a full-blown dialectical constitutionalism, linking it to and differentiating it from the Schmittian notion of decisionism; finally it suggest elements of proximity between 'synthetic' and 'dialectical' constitutionalism.

What is a constitutional synthesis?

'In essence', write Fossum and Menéndez,

> constitutional synthesis refers to a process in which already established constitutional states integrate through constitutional law. This is a process where participant states establish a supranational political community in which they become integrated without losing their institutional structure and identity.[2]

In strict conceptual terms a constitutional synthesis is thus a process whereby states come together, fuse or unify with one another in one

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[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, (Lanham: Rowman and Littlefield, 2011), at 11.
[2] Ibid, at 45.

way or another while at the same time retaining their 'institutional structure and identity'. A state that 'synthesizes' in this sense undergoes a double movement: It gives up something of itself in order to join the larger, unified entity, while at the same time retaining what it essential to it, its 'identity'. The contradiction is patent: in order for a state to synthesize, it simultaneously changes while remaining the same.

To this conceptual/ontological paradox must be added a paradox of agency: Given that a change 'takes place' in the component or 'original' state constitution and a different change takes place in the 'resulting' synthesized constitution, where is the 'actorness'? To put it simply, which changes which? Clearly, both entities are changed in the synthesis, but is this change structured? Is the resulting entity more an object of agency or is it more an agent? Is there a force of change-agency imposed by the 'original' constitution? Or is the process one of 'absorption'? These questions have significant consequence relative to the creation, transfer, or synthesis of legitimacy itself. Clearly, the structures, institutions and content of a constitutional change will be of great importance. But the question of the flow and/or crystallization of the legitimacy itself, its concentration in political-moral subject, and the theoretical question of whether it is procedural foundation or political substance that supports and drives the synthetic constitution.

In the English language, the term 'synthetic' has a double meaning:

1) Something *synthetic* is the result of a *synthesis* of one or more entities. In the famous Kantian conceptualisation, it is a combination where the subject and the predicate, the two things being combed, are not implicitly contained in one another. There is no necessity in the combination. In the assertion, 'My bicycle is red', for example, the link between 'bicycle' and 'red' is not a necessary, but rather a contingent or empirical one.[3]

[3] Kant, we recall, opposed to synthetic assertions analytic assertions for which the innateness or the relation between subject and predicate is so strong, that neither is thinkable without the other. Thus in the assertion 'all bachelors are unmarried' it is

2) Something *synthetic* is *artificial*. By virtue of there being no necessity or implicitness in the combination, no organic, natural, innate, or implicit relation in the combination, it could just as well be the case as not the case. It is superficial, inauthentic.

   This notion of *synthesis* at the heart of Fossum and Menéndez's synthetic constitutionalism resembles to a large degree the Kantian notion of synthesis as an amalgamation or simple combination of entities, a cooking-pot model of putting different things together that have common ground, which can co-mingle, cohabitate and grow together.

Dialectical constitutionalism

Hegel was critical to Kant on this very point. In his dialectical logic, he understood *synthesis* as a very particular relationship between two elements that are not identical. In a Hegelian synthesis, there is indeed a combination of sorts, but it is more. The combination of two entities in Hegel's logic comprises in effect *three* entities. It contains each of the two entities to be synthesized and a third, which is the meaning of their difference.

In a Hegelian optic, the concept of *difference*, the terms, logic and the substance of the way that two identities are not identical contributes to a higher understanding of the way a combination of them that is created and evolves. What would a dialectical 'synthetic constitutionalism' look like? In what way is it an alternative to an amalgamative synthesis? In my reading of the synthetic constitutionalism, I see value-added in a Hegelian understanding of synthesis.

This notion of a dialectic constitutionalism joins the revolutionary dimension at the core of the synthetic constitutionalism and distinguishes it from the evolutionary dimensions.[4] The legality–

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impossible to separate the one and the other, to think a bachelor who is not married, etc.

[4] As highlighted by Brunkhorst in Brunkhorst in his contribution to this volume, see the Epilogue.

legitimacy debate is particularly relevant in this regard.[5] The tension in the debate on legality and legitimacy following from elements of Schmitt's work is about the nature of synthesis – the question of what is produced by combining difference, different identities, political subjectivities, different political wills, into a unified community that in some sense is linked to the legitimacy of a constitution. The notions of heteronomy, heterogeneity, diversity are significantly in play in the question of identity, unity and the coherence of a constitutional legitimacy.

Yet while the notion of popular legitimacy might contribute to structuring and understanding the coherency in the legitimacy-legality tension, it cannot resolve the question of the how the political will and presumed political–moral substance (*demos*) at the core of both the synthesizing and synthesized constitutions can be amalgamated without destroying or irreversibly altering it. Synthetic constitutionalism is indeed *dialectical*, taking up difference into the force of legitimacy otherwise provided by homogeneity of values or will. In this regard it needs to be regarded as more or less in line with the basic principles of Schmittian decisionism, whereby the ultimate legitimacy and political authority of the constitution cannot be seen as somehow exterior to the constitution. Rather it stems from the dialectical dynamic at the heart of it.

A dialectical conception of synthesis would support the Schmittian idea that the truth of political authority is extra-political. Obviously, the Schmittian political subject differs from the Cartesian model of political subject that still dominates in political and legal theory of our time. The Schmittian political subject is not a finite, sovereign, autonomous, singular, rational, self-knowing, self-present, determinate form. Political authority is thus extra-political, yes, but not because of some wish for an authoritarian figure exempt from political control in the ordinary sense, it is rather because the subject position from which it originates (the subject of authority, of politics, of rights, of morality, or of humanity in general) precedes all political rationality, all substantial formulation of political 'positions'.

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[5] As applied in Lars Vinx's analysis of popular sovereignty, see Chapter 5 in this volume.

To be sure, the notion of dialectical constitutionalism is not at odds with synthetic constitutionalism. Rather it is represents the first step in it. From the perspective of a more or less Hegelian logic of dialectical change, a dialectical model of the constitution reflects Hegel's three-part transition of rational change (thesis, antithesis, synthesis). In terms so general that they do not begin to do honour to the nuance and detail of *The Constitution's Gift*, constitutional synthesis understood in a Hegelian vein would posit the 'original' or 'predominant' constitution (*thesis*) in opposition to the constitution with which it is to synthesize (*antithesis*). The synthesis itself then takes the form of a triple movement by virtue of the quasi-paradoxical logic of the dialectic: First, in order to synthesize, there must be a minimum of similarity, be it in practices, concept or being, between the two constitutions. With such a minimum similarity, the two would simply not be mutually recognizable as constitutions. Thus a certain homogeneity between them is required. Second, there is obviously also a minimum degree of *dissimilarity* between the constitutions as the basis of the impulse to synthesize them. Third, the synthesis, in the Hegelian dialectical sense, takes places as the absorption of both the similarity and the dissimilarity between the two constitutions. The synthesis is thus both identity and difference, both the same and something new. Most important with regard to the political consequences of the operation, the meaningfulness of the new synthetic constitution depends on the both the rationality of the similarity and difference, of continuity and discontinuity, of stability and revolution. A political awareness of this contradiction is the guarantee of the constitution's political coherence.

Three components of the dialectical constitutionalism

There is variation in the degree to which the three components of the Fossum and Menéndez's model is dialectical.

The synthetic constitutional moment

What Fossum and Menéndez speak of as the 'founding constitutional moment' is synthetic in the hard Kantian sense. It lies very close to what is described by Schmitt and others as 'revolutionary' constitutionalism. The distinctions made by the authors between a decisionist revolutionary moment, in which constitutional change, be it synthetic or other, takes place on the basis of an authority that is external to the overall logic of the constitution and a synthetic constitutionalism, whereby legitimacy is self-contained in the

principles and force of the constitution itself, is in the end a relatively soft one. This need not imply that it involves politically motivated violence, only that the synthesis or transition cannot be explained or rationalised by the principles or practices foreseen by the constitution itself. It is an opening toward a force or legitimacy or something otherwise extra-constitutional in the name of the constitution.

Transformative and simple constitutionalisation

As for the transformative aspect of synthetic constitutionalism, one can find strong traits of 'evolution', of the kind called for by Fossum and Menéndez of a dialectic synthesis. The transformation is 'about the full internalisation by institutional legal actors and citizens in general of the constitutional and the legal order that is being created'.[6] This internalization, to the degree that it encompasses and seeks to make sense of differences, will, in line with a dialectical conception, provide stronger and more meaningful cohesion.

Vulnerability of synthesis to external shocks and inner tensions

The third and last of the primary characteristics of the synthesis concerns the way that inner tensions are dealt with. It contains perhaps has the most potential for embodying a dialectical understanding of synthesis.[7] To the degree that exogenous shocks become internalized, integrated into the constitutional norm set and its institutionalization, the synthesis will be fully dialectical. Indeed for this reason, the vulnerability of the synthesis becomes a key characteristic, the presupposition for self-understanding, normative and political integrity.

Thus when Fossum and Menéndez speak of the normative dimension of constitutional synthesis as 'the process through which common constitutional law is fleshed out'[8], a dialectic approach to the same process would insist on a recognition of normative differences between the Member states involved in the synthesis. For the institutional synthesis, there is a need for some sort of recognition and institutionalisation of those parts of social and political life that

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[6] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 18.
[7] Ibid., at 19.
[8] Ibid., at 8.

fall outside, those that are neither assimilable to the one or the other of the combination of institutional arrangements.

To be sure, we are not thinking of some kind of pluralism or multi-legalism. We are referring to a constitutional logic that encompasses both common elements and the negation of this commonality itself – the 'homogenising logic of normative synthesis'.[9] Nor is it a question of some institution for minority rights. The 'negative' norms of the synthesis are not minorities in the sense of being excluded from the national group and then mixed like a salad with those excluded.

An account of this integration of difference would *strengthen* the theory of synthetic constitutionalism. It would provide concepts that would serve to explain, why the components of the synthesis are not simply held together by shared characteristics, but by the highly integrated conceptualisation of their way of dealing with differences, in political and moral values and in institutional cultures.

[9] Ibid., at 9.

Chapter 7

One in a million
Why constitutional synthesis is as normatively viable as extremely difficult to achieve

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The theory of constitutional synthesis articulated by John Erik Fossum and Agustín José Menéndez in *The Constitution's Gift*[1] constitutes a radical new approach to the European Union's (EU) constitutionalism. As such it cannot but be hailed as a refreshing and extremely interesting contribution to constitutional thinking, and to the European constitutional debate in particular. However, because of the very few pages at my disposal, this short comment will just focus on two questions suggested by the authors after the stimulating debate whose proceedings are published in this report. For the same reason, I will also avoid writing a *laudation* of the virtues of the book.

The first and major question is the theoretical relevance of constitutional synthesis. Does it constitute a whole theory by itself? A theory, by definition, is a coherent group of general propositions aiming to explain some phenomena on an encompassing way. Its account of reality, therefore, shall not depend on external, *heteronomous* elements, but has to be comprehensive enough to allow

[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, (Lanham: Rowman and Littlefield, 2011).

its full understanding. Is constitutional synthesis *autonomous* and thus worth of being considered a theory? Furthermore, even though it is beyond any doubt that constitutional synthesis provides an encompassing account of the constitutional developments the European Union has witnessed since its very inception, it still remains unclear whether it is a general and autonomous *theory* of which the EU is but an example, or just an *ad hoc explanation* of the European integration process as well as an astute answer to its main enigmas – the genesis and the primacy riddles, in the terminology coined by the authors. Fossum and Menéndez claim that constitutional synthesis is indeed a theory, and in order to prove so they devote one of the chapters of the book to apply its principles and propositions to the Canadian example. However, among the participants in the workshop some doubts remained about this particular point.

Constitutional theories on the one hand explain how a constitutional order is brought to life by the citizens of a political community and on the other hand – and that is perhaps even more relevant – are inextricably linked to the formation and consolidation of a state. Constitutional synthesis is about a constitutional pact agreed upon and ratified by citizens on a strict national basis, but with a supranational outcome. Whether the implicit (or at least the not-so-explicit) citizen's support given on that national basis is enough or not to consider constitutional synthesis a constitutional theory as such reflects, in my opinion, the conflict underlying the first question proposed by the authors, namely 'if the process of constitutional synthesis has to come to an end and manifest itself in some form of state for this to be deemed a normatively viable arrangement'. In other words, does it make sense to think of 'permanent synthesis' as a viable alternative to the other two main traditions of constitutional thought, namely the evolutionary and revolutionary ones?

My first, intuitive reply to this question would be that if the ratification of the synthetic constitutional clauses was explicit, then the synthesis could be permanent, whereas if it was not-so-explicit the traditional forms of constitutionalism still have a role to play, thus discarding the autonomy of constitutional synthesis. As a matter of fact, this lack of explicit support seems to be what led the authors to deem three preconditions for the constitutional synthesis necessary – preconditions which are not required for other forms of

constitutionalism. Such preconditions are: (1) a high degree of interdependence between member states; (2) awareness of their mutual interdependence; and (3) a high degree of constitutional affinity between them.[2] If we can explain the nature of these preconditions as the supplement of the lacking explicit acceptance of constitutional synthesis, as it is my claim, it then follows that it is possible to conceive constitutional synthesis in normative terms as a permanent situation, but it will always depend on whether the preconditions are considered immutable, or only required at the beginning of the process.

The fact seems to be that European integration has revealed itself as everything but immutable – something which, as a matter of fact, could be expected from any *process*. In its evolution from the Communities to the Union, the European project has not only increased the breadth and scope of the powers conferred to the supranational level, but has also enlarged the number of states which participate in the synthetic process. Of course, the authors take into account both developments in their explanation, even though perhaps undervaluing their constitutional impact. At this point their literal words are worth quoting:

> Each addition of a new member is a kind of institutional shock: with each new member, the system must be reconfigured. Given the Union's constitutional character, each addition of a new member entails a *round of reconstitutionalisation*. Here it should be added that the EU's democratic conditionality is conducive to constitutional synthesis: it ensures that only constitutional democracies become members; operating with democratic entrance criteria feeds back on the EU, whose own democratic credibility will be assessed in relation to its monitoring of applicant's democratic credentials, thus *reinforcing synthesis*.[3]

If we accept the postulates of constitutional synthesis, one cannot but agree on the fact that each treaty reform as well as each new accession to the Union alters the ingredients of the constitutional mix

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[2] Ibid., at 53-7.
[3] Ibid., at 120, emphasis added.

and, therefore, the resulting synthesis. The authors are right when saying that each enlargement implies a 'round of re-constitutionalisation', but the conditions they require for it to take place do not lead to 'reinforcing [the] synthesis', as they claim.[4] After reading this passage of the book, it is clear that in the European case the abovementioned preconditions for a constitutional synthesis (interdependence, awareness of such interdependence, and constitutional affinity) are only relevant for the foundational moment and not for each addition of members to the synthetic equation. For the latter, different preconditions are established, mainly related to their democratic credentials. The problem is that such new conditions are not enough to guarantee the perpetuation of the synthetic project. This explains why all enlargements, despite the clear commitment to the democratic principles of the new member states, had resulted in a dilution on the terms of the (synthetic) constitutional pact. And explained in these terms, it is easily understandable why the idea of the enlargement to Turkey is perceived as undesirable by a significant number of European citizens: despite of its Association Agreement and the constitutional homogenisation carried out through the European Convention of Human Rights (ECHR), there is still no interdependence, awareness of such interdependence and constitutional affinity enough (at least not in the scale required for the synthesis) between the EU and Turkey.

As a result, if the first question posed by the authors tries to determine if constitutional synthesis can be considered on equal footing with the other constitutional traditions, the answer should be that *normatively* it could be so, but *only as long as* the preconditions for its existence remain valid. The reason for this is that synthesis is 'genetically weaker' than either evolutionary or revolutionary constitutionalism. Indeed, the main deficiency of constitutional synthesis is that it is more sensitive that the other two conceptions of constitutionalism to any change in its 'genetic' structure. By this I mean that once a constitution is established by a revolutionary way, or exists as a result of an evolution, changes in the preconditions required for them to exist do not challenge the actual existence of the constitution, while this is precisely what happens in the synthetic

[4] Ibid.

theory: any change of the preconditions will imply the radical modification or even the end of its constitutional content.

However, even though constitutional synthesis is normatively viable, it must already at this point be said that in practical terms the synthesis has not happened in the European context – at least since the enlargement to United Kingdom, Ireland and Denmark in 1973. Fossum and Menéndez identify the Laeken and the Lisbon processes as the stage of European integration in which synthesis was *explicitly* rejected. This may be true, but from my point of view the story cannot be entirely understood if, for the reasons already explained, we do not consider that an *implicit* rejection of synthesis has taken place in each of the enlargements which have happened at a rate of once per decade since the 1970s.

The second issue I would like to raise in this comment concerns the authors' plea 'for empirical data, specific events or institutional arrangements that may corroborate or refute the synthetic argument'. In my contribution to the workshop an exploration of administrative developments engaging both national and supranational bureaucracies was deemed necessary in order to check if the constitutional synthesis had any impact on the administrative field. Conceiving the European synthetic constitution as the outcome of putting national constitutions on a common constitutional field and of interpreting the European treaties according to it, forces us to think about the resulting administrative structure: are national and European administrations independent from each other? Do the activities stemming from the synthetic constitution require them to somehow strengthen their relationship? Does this strengthening create a new 'common administrative field' leading in the long term towards a Weberian-type of administration, ruled by the principles of hierarchy, coherence and efficiency?

There is certainly no shortage of examples proving the existence of such a trend. As a matter of fact we can mention institutional developments as the (apparently new) distinction between delegated and implementing acts in the European legal order (articles 290 and 291 TFEU) or the establishment of new networks linking national and

supranational regulatory bodies (as the European Competition Network,[5] or the European Regulators Group),[6] to name but a few. But the important question is if these developments are the outcome, and thus the proof of the constitutional synthesis.

If, normatively, it is only possible to conceive the synthesis either by making it explicit or by observing its abovementioned (pre)conditions (especially when new members accede to the synthesis), the result is that in the long term constitutional synthesis will led to some sort of state-type configuration because of its inherent *constitutional dynamics* – and particularly its *transformative constitutionalisation* dynamic.[7] On the other hand, if we accept that synthetic constitutionalism is not possible once its preconditions are no longer met, a new example of evolutionary constitutionalism will take place if member states will respect the formal synthetic constitution while disregarding the fact that its preconditions are no longer there. Once again, as a result of such evolutionary constitutionalism, some institutional settings similar to those of a state will emerge and develop.

If it is true, as I think it is, that institutional developments exclusively related to constitutional synthesis could not exist, if the very same institutional developments could take place in both the constitutional synthesis and the *constitutional-synthesis-without-heart* (or post-synthetic evolutionary constitutionalism) examples, then it is not possible to find any empirical data confirming or discarding the correctness of the synthetic argument. Therefore, even if we are able to prove that some new developments are taking place in the European

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[5] Council Regulation (EC) No 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003), at. 1.

[6] Regulation (EC) No 1211/2009 of the European Parliament and of the Council, of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ L 337, 18.12.2009) at. 1.

[7] Fossum and Menéndez distinguish between constitutional theories (revolutionary, evolutionary, and synthetic) and constitutional dynamics (constitution-making, transformative constitutionalisation and simple constitutionalisation). Each constitutional example would be different depending on its particular blend of the constitutional dynamics. However, constitutional synthesis requires a peculiar and predetermined blend of constitutional dynamics (see Fossum and Menéndez, *Constitution's Gift*, note 1 *supra*, at 57-65).

administrative field, they will neither refute nor corroborate the constitutional synthesis theory. Hence, in my opinion the second question cannot be replied to.

Chapter 8

The soft normative underbelly of constitutional synthesis

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A comprehensive approach

Coping with new types of global policy issues such as immigration, climate change and terrorism, different theoretical proposals have questioned the conventional state-centred approach to politics. In the literature there are various standpoints defending post-parliamentarian policy, multi-level global governance, transnational communities, global citizenship and open borders. Although quite significant, I believe that there are several shortcomings in this over-emphasis on what could be called 'post-state' governance. While the global institutional developments are posing serious challenges to the traditional state-centric concepts, several recent theoretical proposals might progress too hastily and thereby neglect serious concerns related to the foundations of the national state. Challenging the state-centred approach to politics, representative democracy and the constitutional foundation of rights may simultaneously be contested. So conceived, the main contemporary challenge in international political theory is not the emancipation of our political understanding from the state institutions. Rather the present challenge enforces us to critically assess the possible tensions between the various models of post-state governance and traditional state institutions and furthermore to outline some balancing principles that take both sides

into consideration. In between global governance and traditional state institutions, the European Union (EU) constitutes a unique institutional body enabling new models for cooperation between governance and government. Yet, it is unclear to what extent we are facing a European state or something quite different.

In this context, I find it extremely stimulating that John Erik Fossum and Agustin José Menéndez in their recent book *The Constitution's Gift*[1] introduce a new framework that draws attention to the constitutional foundation of the European Union. Fossum and Menéndez offer an innovative interpretation of the constitutional framework of the Union from the Paris (1951) through Nice (2000) to Lisbon (2009) treaties. Although studies of the European Union relate to sociology, history, political science, philosophy and law, the academic debate about the Union has primarily appealed to lawyers and political scientists. Whereas lawyers have been occupied with the European Court of Justice (ECJ) and its juridical practice, political scientists have mostly been interested in the political processes and institutional developments. Noticeably, few scholars have been investigating the Union's constitutional foundation in a comprehensive way. With the work of Fossum and Menéndez, a fully, if not complete, categorisation of the Union as a multi-dimensional body is provided, which is supplemented by a thorough discussion of the Union's unique constitutional architecture. The main thesis of the book presents the Union's constitutional design as a 'constitutional synthesis' ensued by 'the collective of national constitutions' based on a 'simple constitutionalisation'. The theory of constitutional synthesis reveals several unsolved constitutional contradictions between the national and post-national policy levels, and we learn that numerous dilemmas and disagreements within the Union are not merely politically driven but rooted in the unique constitutional set-up.

In this chapter, however, I cannot possibly attend all of the issues that Fossum and Menéndez raise in the book. Indeed, it is remarkable how much complexity the authors convey into a useful conceptual framework. In the following, my attention is limited to two discussions for which the constitutional synthesis delivers a relevant

[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, (Lanham: Rowman and Littlefield, 2011)

theoretical and empirical framework. I approach the book from a political theoretical perspective. By doing so, I am not commenting on the historical and empirical findings but discuss to what extent the conceptual framework is sufficiently justified. I draw attention first to the concept of normativity, second, to the normative dilemma of balancing law and politics at the post-national and national level.

Normative principles

Let us begin by discussing the concept of normativity which Fossum and Menéndez construe. Fossum and Menéndez argue for a conceptualisation of the constitution in a formal, material and normative conception. Employing this typology on the European Union, it is shown that the Union only has a material constitution. The material constitution is composed by subsequent political treaties and secondary legislation. In the book The Constitution's Gift the material constitution is thoroughly analysed. Caused by the absence of a written founding document, the authors stress that the Union manifests no formal constitution. Perhaps more controversially, it is argued that the EU lacks a constitution in a normative sense. One argument for this non-appearance of a normative constitution is provided by the fact that democratic legitimacy is not given supremacy but is frequently trumped by supranational rights and economically related interests.[2]

Since the 1950s, this discussion of the normative foundation of the Union has been intensively discussed in the European scientific literature. The epicentre of the discussion is to what extent the European project is first and foremost an economic venture built on the European Coal and Steel Community (ECSC) or rather a value-based cooperation that aims at safeguarding peace and extended rights for the peoples of the member states. If we look into the postwar Schuman Declaration of 9 May 1950, presented by French foreign minister Robert Schuman, 'world peace' is declared as one of the main objectives. Another objective is a united Europe 'built through concrete achievements which first create a de facto solidarity'.[3] A concrete achievement was to pool the coal and steel

[2] Ibid., at 20-6.

[3] R. Schuman, *Declaration of 9 May 1950*, latest modified December 29, 2010. Available at <http://europa.eu/abc/symbols/9-may/decl_en.htm>.

production, vital resources in warfare at that time, which established not just symbolic friendship but cooperation between the previous warring countries France and Germany. Although ECSC in practice was a community that steers regulations for an economic 'common market', the mission of ECSC was to contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries' (Article 2 ECSC). The purpose of the treaty was in that sense not merely one of economics; the ECSC treaty attempted to create a social development as well. On this backdrop, it is reasonable to consider the European project as a normative project founded on specific political ends motivated by social, political and economic values.

Nonetheless, Fossum and Menéndez emphasise that these fundamental norms do not establish an independent normative constitution. Rather, the fundamental norms are anchored in the nation states that participate in the process of integration.[4] Consequently, the Union comprises a 'double constitutional pluralism', as it is eloquently put by the authors. Whereas the nation states in the wake of the Second World War mandate the development of supranational governance with a common constitutional law, they do not mandate a collapse of the plurality of national constitutional laws. The common constitutional law coexists with the plurality of national constitutional laws. Interestingly, however, the authors argue that this double constitutional pluralism constitutes not merely a difference in constitutional set-ups but different understandings of legal frameworks. While the national political norms are assumed to be deduced from the democratic decision processes, the case law of the Luxembourg judges has to an increasingly extent dislodged the common constitutional law from the national constitutional law.[5] As Fossum and Menéndez put it, the validity of the national legal norms is thereby subjected to the condition of being in compliance with the common principle of non-discrimination between European citizens.[6]

Before proceeding further, it is worth noting that the constitutional framework delivered by Fossum and Menéndez echoes a recent

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[4] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 47.
[5] Ibid., at 62.
[6] Ibid., at 69.

interest in the political theoretical literature. Since the 1990s, scholars of contemporary political theory have given priority to studies of democratic participation, democratic inclusion and democratic deficits. However, recent debates in the theoretical literature point to the necessity of enhancing the democratic analysis with a more profound institutional and constitutional understanding. Taking these debates and the theory of a constitutional synthesis into consideration, I propose we ask: what are the possible normative consequences of the absence of constitutional coherence within the Union's continuously developing institutions? To what extent it is feasible to steer a balance that establishes constitutional stability and sustainability? What is the causal and conceptual correlation between constitutional settings and democratic legitimacy? Stimulated by the comprehensive analysis delivered by Fossum and Menéndez, these and related questions require further examination.

Returning to the concept of normativity, one clarification may here be added. Fossum and Menéndez assume that national constitutions are logically, historically, and normatively prior to European Union law.[7] Historically, this is of course correct. However, without a further and more comprehensive political theory, it is normatively difficult to accept. It is possible to track the historical development of normative principles but that does not tell us anything about their validity or justification. Statements of normative supremacy require a solid theoretical explanation. The argument that national constitutions are normatively prior to European constitution presupposes a profound normative political theory. So far, as I understand the argument made by Fossum and Menéndez, their argument is built on the presumption that the national constitution is closer to democratic legitimacy. This statement refers to a tradition that prioritises the political principle of subsidiarity. The principle of subsidiarity argues that political decisions should be made as close as possible to the affected people. Although we may agree in the subsidiarity principle, it is wrong to argue that normativity is merely about democratic legitimacy and democratic liberal values.

Normativity is a broad term. In political theory, every idea that states have some general principles for how to establish a good society can

[7] Ibid., at 166.

be characterised as normative ideas. A substantive understanding of normativity depends on a normative political theory. For example, according to a liberal political theory stated by liberal theorists, economic freedom and interests can be considered as the highest normative principle for the every society. Fossum and Menéndez may disagree but they cannot argue against the normative quality of that principle. To argue against economic freedom as the highest normative principle for the Union require a comprehensive rejoinder of the liberal political theory. To be more specific, what Fossum and Menéndez argue cannot be a lack of normative constitution; rather, it must be a lack of a democratically legitimated constitution. The definition of normativity may seem to be a minor detail. However, by defining the normative foundation as a question of democratic legitimacy, I find the normative dilemmas within the Union insufficiently exposed. Limiting the discussion of normativity to a debate on democracy has implications for what conclusions we can draw. Thereby, Fossum and Menéndez re-establish on a second order level the dichotomy between the post-national and the national level within the Union, which they on a first order level intend to avoid by the idea of a constitutional synthesis. If democratically legitimated decision-making per definition has a higher normative status than other legal, economic and social considerations, there is no normative dilemma within the Union.

Having outlined the necessity of having a more profound and comprehensive understanding of normativity, I continue by identifying a normative dilemma between two different normative principles. Although the above discussion exposes scepticism about the concept of normativity, I agree with Fossum and Menéndez that there is a normative dilemma within the Union but for a different reason. In my opinion, the main problem is not that the Union lacks a normative constitutional foundation. Rather, the challenge is a lack of consistency between several normative principles. This challenge is caused by the Union's increasing political complexity, multi-level organisational structure, and diverse policy ideas. In my view, due to the double constitutional pluralism, more than one set of legal norms are continuously maintained and claimed legitimate within the Union. Whereas the institutions at the national level articulate their democratically legitimate interests and rights, the supranational institutions, e.g. the ECJ, initiate case law that is not democratic legitimate. However, they are validated by a different set of

normative principles derived from universal human rights. So conceived, the normative challenge is to launch consistency between the different normative principles and to establish a balanced segregation of power between the various institutions and governance levels. Let us in the following consider more closely the Union's lack of consistency or lack of robustness as Fossum and Menéndez put it.

Two equally important normative principles

Having considered the concept of normativity, let us now consider the question of normative consistency within the Union. I argue that there is a genuine dilemma between different normative principles. The challenge is to find the right balance. Fossum and Menéndez seems to neglect, that normative ideas such as human rights to an increasingly extent have become important as a legitimising foundation of the European project. By addressing human rights, the supranational institutions regain some of the legitimacy, which they are claimed to lack if seen from a democratic perspective. By elevating human rights as a main political principle, the political role of courts and judges gains furthermore an increasing significance in the policy-making processes which usually have been predominantly managed by parliaments and governments.

Hence, the dilemma between democratic legitimacy and concern for human rights is not merely a tension between national and post-national policy levels. Rather, it is a tension between judicial and political policy-making. Many scholars disregard this tension. The criticism of 'the so-called activism of the ECJ' usually discovers the subject from a nationalist sentiment that is worried more about 'the loss of national sovereignty to Europe' than of the loss of 'popular or parliamentary power to judges'.[8] In a similar line, Fossum and Menéndez note that the Union's constitutional set-up has fostered a structural democratic deficit leading to the disempowering of politics. Interestingly, they point to the fact that this political disempowerment

[8] J. Weiler, "Human Rights, Constitutionalism, and Integration: Iconography and Fetishism", in R. Kastoryano (ed.) *An Identity for Europe, the Relevance of Multiculturalism in EU Construction* (New York: Palgrave Macmillan, 2009), at 105.

is not a natural phenomenon but has deep roots in the constitutional law of the European Union.[9]

According to Fossum and Menéndez the Union's constitutional law is derivative from the national constitutional level. It is derivative both in terms of being created and mandated by the national states, and in terms of being fleshed out from national constitutions.[10] One main thesis of the book is that the European Union never obtained an independent constitutional foundation but remains a collective of national constitutions. Given the derivative character of the Union, Fossum and Menéndez argue that it is a paradox that the Union has attained supremacy in several controversies between the national and post-national level. However, as mentioned above, it is insufficient to understand the tensions within the Union merely in terms of the relationship of the national to the post-national level. The tension is also, so I claim, caused by a genuine conflict between two equally important normative principles: legal rights legitimated by ideas of universal human rights and democratically legitimated political decisions. To examine this genuine dilemma, I draw in the following attention to the directive of free movement that gives extended rights to every Union citizen.

[9] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 224-5.
[10] Ibid., at 61.

Chapter 9

On hermeneutics, heuristics and historical reconstructions
Comment on *The Constitution's Gift*

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Ambitious in scope and wide in erudition, Fossum and Menéndez' *The Constitution's Gift*[1] is a major contribution to the study of constitutionalism in the European Union (EU). It introduces the 'theory of constitutional synthesis,' a bold reinterpretation of the last sixty years of European legal integration, ultimately making the case for its essential democratic legitimacy. Constitutional synthesis, which they describe as the 'process in which already established constitutional states integrate through constitutional law',[2] is an alternative path of democratic constitutional development; it is different from – but, the authors insist, of comparable democratic legitimacy with – the paths most common within independent states. The story they tell is richly detailed, in that it covers not only legal but also institutional, democratic and policy developments. Their ability to weave together empirical and normative analysis into a single holistic theory is nothing less than inspiring. Without diminishing their achievement, my comments in this short response will engage what I take to be the central theoretical claims of the

[1] J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union,* (Lanham: Rowman and Littlefield, 2011).
[2] Ibid., at 45.

book. In the spirit of constructive debate, I will raise a few questions regarding the following: the complexity of the theory, and whether it helps or hinders its overall clarity, explanatory power, and applicability to cases beyond the EU; the status of this 'hermeneutic' theory as a post-hoc reconstruction of the EU's democratic constitutional development; the democratic standards applied to different stages of the constitutionalisation process; and the appropriateness of the notion of 'synthesis' for the phenomenon of European constitutionalism.

The argument of the book is difficult to summarize, as it is built upon a dizzyingly elaborate scaffolding of theoretical concepts. The authors aim to resolve the 'European enigma' defined initially as three puzzles (polity, constitution, legitimacy) which translate into two riddles (genesis and primacy). To this end they introduce a constitutional tool kit with no less than three sets of tools – three conceptions of the constitution (formal, material, normative) and three constitutional dynamics (constitution-making, transformative constitutionalisation, simple constitutionalisation), different blends of which produce two paths of democratic constitutionalism (revolutionary and evolutionary). Yet all of this is but a prelude to the actual theory. The theory, introduced with 'two key intuitions'[3] and 'three basic insights'[4], has 'four core elements', each of which features a number of sub-elements: the regulatory ideal of a common constitutional law that results from the synthesizing process, made up of two sub-processes (normative synthesis and institutional development) corresponding to the EU's 'double pluralism' (constitutional and institutional); three structural preconditions (interdependence, awareness of interdependence, constitutional affinity); the blend of constitutional dynamics peculiar to the synthetic path (constitutional moment, transformative and simple constitutionalisation, exogenous and endogenous constraints); and, finally, three modes of institutional development (replication, adaptation, experimentation). With such an abundance of moving parts, this is hardly a 'parsimonious' theory.

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[3] Ibid., at 9.
[4] Ibid., at 45.

But so what? Fair enough, you might say: it is a complex theory to describe a complex reality – i.e. the long process of European legal integration. And, it should be said, all the concepts are defined with great care and most are useful: it is a tribute to the authors' scrupulousness that a critic may *re-use* their concepts to take issue with some of their conclusions (as I do below with the notion of the 'material constitution'). Yet even an alert reader can have difficulty in keeping straight the various elements of the theory such as, say, the distinction between 'transformative constitutionalization'[5] and 'constitutional transformation'[6]. Moreover (and more seriously) it is unclear *what is at stake* in maintaining these distinctions. The theory employed in the book is hermeneutic rather than causal. The hermeneutic approach, I hasten to add, is scientifically sound, but it does lend itself to a form of explanation different from causal explanation. As a result, the components of the theory are not framed as, say, causal mechanisms, but rather as more loosely connected theoretical 'elements'. As a result, it is unclear which among the plethora of theoretical elements are essential to the theory and which are ancillary or contingent.

For example, among their many concepts the authors take pains to differentiate between a 'constitutional dynamic' and constitutional 'path' consisting of a blend (i.e. 'sequence') of constitutional dynamics. Constitutional synthesis represents not a unique constitutional dynamic but a new path. Unlike the mix of constitutional dynamics characterized by the revolutionary (constitutional moment, followed by simple constitutionalisation) or evolutionary (combination of transformative and simple constitutionalisation) paths, the synthetic path features a 'constitutional moment' (of sorts – in the case of the EU the 'moment' occurs over a 14-year period, between 1951–1965) followed by simultaneous processes of transformative and simple constitutionalisation and, later, constraints. Yet is this the simplest way to describe the essential difference between the paths? Surely the path of constitutional synthesis is different chiefly because it involves the coming-together of hitherto independent states, whereas the other two paths occur within existing sovereign states (France and the UK being the paradigm cases). But to put it this way

[5] Ibid., at 31-3.
[6] Ibid., at 35-41.

would thwart the authors' larger ambitions to put forward constitutional synthesis as generic theory of democratic constitutional development that is applicable to cases beyond the EU, including single states (e.g. Canada). Yet in the Canadian case, the authors do not explicitly argue that the same blend of constitutional dynamics was at work; rather, they acknowledge that 'synthesis can unfold in different ways'.[7] And so it is left unclear whether the blend of constitutional dynamics they identify is essential to the theory of constitutional synthesis or simply a reflection of how synthesis unfolded in the case of the EU.

Furthermore, on a deeper level, questions may be raised about how the authors employ the hermeneutic (interpretive) approach to retrospectively ascribe meaning to historical events – in particular, the founding of the Union. With this approach, the authors aim to give the 'best account of practices,' which is the account that 'the actors at the time would have been able to recognize or endorse had they formulated or explicitly articulated a critical theory of what they were doing'.[8] This kind of historical reconstruction allows them to solve the 'genesis riddle' by retrospectively reinterpreting the founding treaties as an act of constitution-making. Like the classical social contract theorists, they look at a current institutions and presume them to be grounded in a pact made sometime in the past; the problem, as with social contract theory, is that it is ambiguous whether the pact was real or hypothetical. (This ambiguity is apparent, for example, when they adjudge that synthetic constitutionalism is 'the idea that was struggling to be expressed'[9] in the early treaties.) The authors do not, and indeed cannot, make the more common claim that the founding treaties *evolved* into a constitution, or that they were in effect *constitutionalised* by an activist European Court of Justice (ECJ), or that national governments were unknowingly trapped into a process of integration by stealth; in this context, the hermeneutic theory *does not allow for unintended consequences*.

Another way to put this is that in a hermeneutic theory, the notion of a 'constitutional moment' cannot simply be a heuristic device. The

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[7] Ibid., at 193.
[8] Ibid., at 12.
[9] Ibid., at 58.

signatories of the founding treaties must have *really intended* – not just in retrospect but *at the time* – to make a constitution (notwithstanding the 'bits and pieces' to be 'fleshed out' later). Yet if that was their intention, then why didn't they explicitly make a constitution? The answer, it seems, is that this would not have been politically expedient: '[A]ny effort to launch an intense political debate as a prelude to a constitutional "big bang" would most likely have backfired badly'.[10] But if so, then didn't national leaders deceive their citizens when they signed mere treaties all the while intending to make a constitution? If the meaning of this act of 'constitution-making' was not revealed to the public, did it really receive democratic consent? The *hermeneutic* aspect of the theory requires there to be a fit between the political leaders' intentions and the outcome; the *democratic* aspect of the theory requires (or ought to) that there be a fit between the final outcome and public opinion (however defined). In sum, it seems to me that there are three implications of the book's argument regarding the genesis of the EU: (1) the founding treaties were in effect a 'constitution-making' act; (2) political leaders intended, according to the best account of practices, to make a constitution; and (3) the peoples of Europe *consented* to the making of a constitution. But not all three points can be true, because if they were there would have been a genuinely democratic and successful constitutional process during the foundational period.

As it happens there *was* an attempt at robust democratic constitutionalism during the foundational period. This was the process that produced the 1953 Draft Treaty on European Political Community, which the authors slyly allude to in a quote from Jean Monnet[11] but do not discuss in detail. This document was the product of a broadly democratic process: the *Ad Hoc* Assembly which drafted it – at the behest of the foreign ministers of the six European Coal and Steel Community (ECSC) governments – was the closest thing postwar Europe had to a constituent assembly; it was, arguably, the 'constitutional convention' of its day. Moreover, it was democratic in result, in that its institutional blueprint included a bicameral parliament with a directly elected lower house, for which the first elections were to have taken place immediately (within six months of

[10] Ibid., at 59.
[11] Ibid. at 129.

the treaty's entry into force) on the basis of proportional representation.[12] This initiative was abandoned after the European Defence Community treaty, to which it was connected, failed in the French parliament in 1954. Although a failure, this attempt at constitution-making was arguably more democratic in process and substance than the 'constitutional moment' that produced the treaties of 1951, 1957, and 1965. In a narrow sense this episode supports Fossum and Menéndez' contention that a fully democratic constitutional process was not expedient at the time. Yet the episode also raises broader questions about how they apply democratic standards to the constitutionalisation process in its early and late stages.

After all, the theory of synthetic constitutionalism requires that the process be not only minimally democratic but robustly so, based not merely on popular consent but on *popular authorship*. Yet when considering the founding 'constitutional moment' of the EU, the authors do not stop to mourn the lost promise of the one contemporary attempt at genuinely democratic constitution-making (i.e. the Draft Treaty of the European Political Community). Rather, they are content to endorse a minimally democratic process in which 'popular authorship is indirect'.[13] In fact, they wish to make a virtue of necessity, arguing that the avoidance of an intense political debate at the outset is an *advantage* of synthetic constitutionalism: it is 'economical in political resources'.[14] Note the strategic language: in the 1950s it was best to avoid a full-blown constitutional debate because it would have 'backfired'. This stands in stark contrast to their scathing and principled criticism, later in the book, of the hasty and secretive process that produced the Treaty of Lisbon, as compared to the more deliberative Laeken process. 'A democratic constitution is not only characterized by its substantive contents,' they write indignantly, but also '[…] by the way in which those subject to the fundamental law come to authorize it, thus creating public power in the first instance'.[15] But even taking into account that it comes at a later stage in the process, it is unclear why the Treaty of

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[12] B. Karp, 'The Draft Constitution for a European Political Community', (1954) 8 *International Organization*, pp. 181-202, at 192-5.
[13] Fossum and Menéndez, note 1 *supra,* at 61.
[14] Ibid., at 58.
[15] Ibid., at 156-7.

Lisbon process should be judged so harshly in comparison to the founding treaties. Shouldn't the authors admire the Lisbon process precisely because it was 'economical in political resources'?

Finally, there is the question of whether 'synthesis' – both the word and the concept behind it – is the best choice for describing the phenomenon in question. What exactly is being synthesized? The answer, it seems, is national constitutions – or at least the most basic elements thereof – which are coming together horizontally to merge into a common entity. The authors maintain that '[…] the structural and substantive core of European constitutional law was composed of and to a large extent keeps on being composed of the *common constitutional law* of the member states[16]; concomitantly, 'most of the constitutional law of the Union is not new'.[17] This may accurately reflect the Union's normative-democratic constitution (as the authors define it), but surely it is a radically incomplete picture of the Union's *material* constitution, even in its early stages of development. From the beginning, the founding treaties formed a material constitution in that they constituted the Union as a powerful and autonomous entity on the supranational plane, with a new legal order autonomous both from member state law and classical international law and a complex set of institutions with the capacity to generate new legal norms, regulations and directives, on an on-going basis; this is all abundantly clear in the book's historical narrative. Yet the concept of synthesis does not fundamentally come to terms with this major structural change; it seems better suited to describing the decentralized convergence of states around commonly held constitutional values within a *non*-supranational order – e.g. the human rights regime of the Council of Europe. Synthesis is very much a 'bottom-up' notion. As such it perhaps provides a necessary corrective to some of the excessively 'top-down' (i.e. ECJ-centric) narratives of European constitutional development which have come before. But, I would suggest, an approach that balanced the 'bottom-up' with the 'top-down' – e.g. constitutional pluralism – might better provide a comprehensive picture of the constitutional structure of the European Union and the member states joined together.

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[16] Ibid., at 9, emphasis in original.
[17] Ibid., at 50.

Epilogue

Revolutionary and evolutionary constitutionalisation in the evolution of the European Union

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In the centre of John Erik Fossum's and Agustín José Menéndez' book The *Constitution's Gift* is the newly invented notion of *synthetic constitutionalism*, and the thesis that the democratic legitimacy of the European Union (EU) can be derived from a *synthetic constitutional moment*.[1] I find the thesis fascinating, and I have no objections against it. But I think that we should not use it to replace the distinction between *revolutionary* and *evolutionary* constitutional processes but *revise* it.

The *revolutionary foundation* of European supranational power essentially was synthetic, including *formal* and *normative* constitutional elements which all are relying on the synthesis of the constitutional declarations of all founding members of the European Communities, to open themselves to international law, and to strive for a European unification. *Evolutionary constitutionalisation* then followed the path, opened by the founding, and it must be explained and differentiated in the Fossum-Menéndez categorical framework of

[1] J. E. Fossum and A. J. Menéndez, *The Constitutions Gift: Elements of a Constitutional Theory for a Democratic European Unio*n (Lanham: Rowman and Littlefield, 2011), at 45 *et seq*., 78 *et seq*., 91 *et seq*., at 126-7, 168 *et seq*., 174, at 209-10.

'material constitution', 'transformative' and 'simple constitutionalisation', 'replication', 'adaption' and 'experimentalism'.[2]

Therefore there is nothing *sui generis* with the European Union. The specific combination of (revolutionary or post-revolutionary) synthetic constitutionalism on the one hand, and evolutionary constitutionalisation on the other, fits not only, at least in some important respects, as Fossum has shown, the Canadian case but also, if we follow the path-breaking work of Christoph Schönberger on the repressed history of confederations or *Bünde*, the *Deutsche Bund*, the *Schweizer Eidgenossenschaft*, and the *American Confederation*. Furthermore, also the later German *Kaiserreich*,[3] and even still the United States of America are closer related to the EU Constitution than to that of Germany or Norway today. (Menéndez has earlier made an important contribution to this thesis, comparing the implementation of federal taxes in the US and the EU, demonstrating the striking parallels).[4] There was always a kind of *co-evolution of confederal and nation states*, and in a long historical perspective even between *cosmopolitan* and *territorial states*. In particular the ideological hegemony of German *Staatswillenspositivismus* (statuary positivism) led to a nearly total repression of that co-evolution, and only now it is beginning to be recalled.[5] If we do not buy the extremely narrow and ideological notion of the (Hobbesian) state of the *Neuzeit* that was propagated by the schools of Carl Schmitt and Reinhard Kosellek, then the EU is *one of many confederal projects of state formation*.

We should not drop but revise the old distinction between *revolutionary*, or *power-founding, constitutions* and *evolutionary*, or

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[2] Ibid., at 65 *et seq.*, 207.

[3] B. Fassbender, *Der offene Bundesstaat* (Tübingen: Mohr Siebeck, 2007).

[4] C. Schönberger, *Unionsbürger; Europas föderales Bürgerrecht in vergleichender Sicht* (Tübingen, Mohr Siebeck, 2005); see also M. G. Forsythe, *Unions of States: The Theory and Practice of Confederation* (Leicester: Leicester University Press, 1981).

[5] M. Albert „Politik der Weltgesellschaft und Politik der Globalisierung: Überlegungen zur Emergenz von Weltstaatlichkeit", (2005) 34 *Zeitschrift für Soziologie*, pp. 223-39; H. Brunkhorst „Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit", in M. Albert and R. Stichweh (eds) *Weltstaat und Weltstaatlichkeit: Beobachtungen globaler politischer Strukturbildung* (Wiesbaden: VS, 2007), pp. 63-108.

power-limiting, constitutions.[6] For that purpose it must be integrated into the categorical framework of the *theory of social evolution*. Great legal and constitutional revolutions such as the Papal Revolution of the 11th century, the Protestant revolutions of the 16th and 17th centuries, the constitutional revolutions of the 18th, or the social world revolutions of the 20th century consisted in comprehensive and massive legal and constitutional changes that *cannot be explained by gradual adaption and social structural selection alone*. But revolutionary change in the social evolution strongly resembles rapid and catalytic change by *punctuational bursts* and *punctuated equilibria* in the organic evolution. Punctual bursts engender a new species by rapid change of the *Bauplan* (blueprint) of a species. The *Bauplan* of the animals does not improve adaption but *constrains* and *directs* it.[7] The *organic fabrication plans,* for instance, direct the adaptive changes of the muscles of the arm in the direction of the muscles of the leg, hinder elephants from developing wings, and prevent humans from running 100 meters in less than five seconds. Here comes the parallel because the *great legal revolutions* also lead rapidly, and not by gradual

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[6] I. Maus, "Volkssouveränität vs. Konstitutionalismus: Zum Begriff einer demokratischen Verfassung", in G. Frankenberg, (ed.), *Auf der Suche nach der gerechten Gesellschaft* (Frankfurt: Fischer, 1994), pp. 74-83; C. Möllers, "Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung: Begriffe der Verfassung in Europa", in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht*: *Theoretische und dogmatische Grundlagen* (Berlin: Springer, 2003); Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 35 *et seq*.

[7] On the neo-Darwinist theory of *punctuated equilibria,* see S. J. Gould and R. C. Lewontin, "The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme", (1979) 205 *Proceedings of the Royal Society of London*, series B, p. 581, available at:<http://www.aaas.org/spp/dser/03_Areas/evolution/perspectives/Gould_Lewontin_1979.shtml>; N. Eldredge and S. J. Gould, "Punctuated Equilibria: An Alternative to Phyletic Gradualism", in T. J. M. Schopf (ed.), *Models in Paleobiology*, (San Francisco: Freeman-Cooper, 1972), pp. 82–115; E. Mayr, "Speciational Evolution or Punctuated Equilibria", in A. Somit and S. A. Peterson, (eds), *The Dynamics of Evolution (*Ithaca: Cornell University Press), pp. 21-48, at 21, available at: <http://www.stephenjaygould.org/library/mayr_punctuated.html>; S. J. Gould, "Episodic Change versus Gradualist Dogma", (1978) 2 *Science and Nature*, pp. 5-12; S. J. Gould, *The Structure of Evolutionary Theory* (Cambridge: Harvard University Press, 2002); C. J. G. Gersick, "Revolutionary Change Theories: A Multilevel Exploration of the Punctuated Equilibrium Paradigm", (1991) 16(1) *The Academic Management Review*, pp. 10-36; G. Kubon-Gilke and E. Schlicht, "Gerichtete Variationen in der biologischen und sozialen Evolution", (1998) 20(1) *Gestalt Theory*, pp. 48-77, at 68, available at: <http://www.semverteilung.vwl.uni-muenchen.de>.

adaption, to a new *Bauplan* (or *constitution* in a broad sense of material constitution) of the whole society. The new constitutional *Bauplan* does not improve but *directs* and *constrains* the adaptive evolutionary success *normatively*. The legally institutionalised corporative freedom of the Church in the 12th century did constrain the adaptive power of the worldly empires and kingdoms. The checks and balances of democratic constitutional law constrain the adaptive capacities of the executive power normatively, and disclose a new evolutionary path of democratic experimentalism. The constitutional principle of equal human dignity erects normative constraints against the use of torture, against the evolutionary success of slavery and concentration camps, against economic expropriation and totalitarian rule. In the terminology of Fossum and Menéndez: Founding and revolutionary 'normative constitutions' as well as 'transformative constitutionalisation' are *directing the evolution towards certain new paths*. But what the evolution in combination with the struggle of collective interests in the source of 'simple constitutionalisation' makes out of the (still *unlimited*) new possibilities it has disclosed, is beyond control, and can lead to new oppression and injustice, to the loss of freedom, devolution and regression, and even to a change of direction of the respective paths. Normative constraints are much weaker than the constraints of big bones.

The European Union was in a way also *founded revolutionary*. This for me is one of the most important insights of Fossum and Menéndez' theory of the synthetic constitutional moment. First of all, the European Communities founded in 1951 and expanded in 1957, were *a resultant effect of the massive revolutionary change* that occurred after the equilibrium of the long 19th century in the catastrophic decades between 1917 and 1945. The planned and unplanned results were not less massive and far-reaching than that of the French Revolution. They consisted in the emergence of a new *global legal system* and a *normatively integrated world society*.[8] Second, and in particular:

[8] See: T. Parsons,"Order and Community in the International Social System", in J. N. Rosenau (ed) *International Politics and Foreign Policy* (New York: The Free Press of Glencoe, 1961) pp. 120-9; R. Stichweh, "Der Zusammenhalt der Weltgesellschaft: Nicht-normative Integrationstheorien in der Soziologie", in J. Beckert, J. Eckert, M. Kohli, W. Streek (eds) *Transnationale Solidarität. Chancen und Grenzen*, (Frankfurt: Campus, 2004), pp. 236-45. The revolutionary change since the late 1940s was preceded by *100 years of world wide class struggles*, the *formation of the powerful workers*

1) All founding members of the European Communities reformulated the inheritance of the human and civic rights of the 'bourgeois' constitutional revolutions in the light of the new and revolutionary ideas of *egalitarian human dignity* (including social rights[9]) and the *universalisation and* internationalisation of human and civic rights.

2) All founding members of the European Communities designed their newly constituted states as *open states* – open for the access of international law and international cooperation.[10]

3) All founding members of the European Communities bound themselves to the constitutional project of European unification that then became constitutive for all European constitutional (or quasi-constitutional) treaties since Paris 1951: 'The normative encoding and the open-endedness of the field were critically important to the launch of the process of integration, and lent it democratic legitimacy precisely because it did *not predetermine the ultimate shape of the political community*'.[11] (But this is true also for the constitution not only of federal regimes, such as the US, but also for unitarian regimes, such as Norway or Germany).

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movement in the late 19th century, accompanied by other *world wide mass movements such as the women's movement or the diverse peace movements*, by the Great *Russian and the Chinese Revolutions*, by series of successful and unsuccessful smaller legal revolutions in other countries (including Austria and Germany after the First World War), by the two *World Wars* that at least partly were revolutionary in character and followed revolutionary (and counterrevolutionary) goals (for the good as well as for the bad), by massive and revolutionary *legal reforms such as the New Deal*, by the world wide *struggle against colonisation* that led in the 1950s and 1960s to a nearly complete decolonisation of the world and the global spread of the model of the national state, by struggles between, social classes, peoples and states for (or against) a complete new foundation of international law and the international community beginning immediately at the end of the First World War.

[9] See Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*

[10] R. Wahl *Verfassungsstaat, Europäisierung, Internationalisierung*, (Frankfurt: Suhrkamp, 2003); U. Di Fabio, *Das Recht offener Staaten*, (Tübingen: Mohr Siebeck, 1988).

[11] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 170.

Already the *Treaty of Paris* constituted a supranational community.[12] But its constitution was in a specific way *incomplete*. This specific way of incompleteness can be observed in all confederal (and truly[13] federal) projects of state formation. All these constitutional regimes go back to a kind of *Wandelverfassung* even if the wording is unchangeable as in the US case.[14] The *Wandelverfassung* follows (and I am generalising here an idea that Kaarlo Tuori has suggested for the reconstruction of the European constitutionalisation process[15]) an evolutionary process of the *step by step unfolding of functional spheres* ('transformative constitutionalisation') which are constitutionalised by a gradual and adaptive constitutional changes directed by social structural selection ('simple constitutionalisation').

Evolutionary or better: *gradual constitutional adaption* regularly follows after revolutionary change. At least in the confederal and federal cases it is usually carried out in *functionally differentiated steps*. When in 1820, after the French Revolution and under its new conceptual framework, *constitutionalisation had become unavoidable*,[16] the *German Bund* in a first step was constitutionalised by a *military* constitution under Prussian hegemony, then followed by an *economic* constitution (*Zollunion*) and finally supplemented by a reflexive *legal* constitution in 1871 that in the course of the late 19th century gradually turned into a *political* constitution (as a result of heavy class struggles, the alarming growth of social democracy, and a process of steady juridification driven by the courts: the evolution of *Verwaltungsrecht*).

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[12] H. Steiger, *Staatlichkeit und Überstaatlichkeit,* (Berlin: Duncker and Humblot, 1966); Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 98, 108.

[13] Truly federal are: US and Switzerland, but not Germany.

[14] H. P. Ipsen, "Die Verfassungsrolle des Europäischen Gerichtshofs für die Integration", in J. Schwarze (ed.), *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz*, (Baden-Baden: Nomos, 1983), pp. 29-47, at 32; G. F. Schuppert, "Anforderungen an eine Europäische Verfassung", in H. D. Klingmann and F. Neidhardt (eds), *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung*, (Berlin: Edition Sigma, 2000), pp. 237-262, at 246.

[15] For a functional differentiation in constitutional theory, see also K. Tuori "The Many Constitutions of Europe", in K. Tuori and S. Sankari (eds), *The Many Constitutions of Europe* (Oxford: Ashgate, 2010), pp. 3-30, and A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, (Frankfurt am Main: Suhrkamp, 2006).

[16] V. Sellin, *Die geraubte Revolution: Der Sturz Napoleons und die Restauration in Europa,* (Göttingen: Vandenhoeck und Ruprecht, 2001).

In the US the *political constitution* was invented first by the revolution, but then, as already the judgments of the Marshall Court nicely shows, it comes to a clear *functional priority* of an *economic constitution* of possessive individualism.[17] Only then followed the *constitution of the legal state* ('*Rechtsstaatsverfassung*') with no longer only nominal but normative *direct effect* of federal law, and much later then the *social and security constitution* after the New Deal.

Even if *transformative constitutionalisation* in the European Union was formally pushed by treaty changes, politics often only performed the function of a rear guard of codification after the simple constitutionalisation, in particular by the courts, had already done most of the job. It seems that Kelsen's evolutionary speculation that in (relatively) decentralised legal states the courts are the evolutionary vanguard is true, even if they are the vanguard of incremental and gradual change. At least the concretisation, implementation, refoundation and revision of the Treaties of Paris and Rome were not in the hands of the political leaders of Europe but in those of the *judges* and the *individual European citizens* who initiated an endless stream of legal actions. The evolution is not made by the elites but the masses. The 'hidden constitution' of Europe (Antje Wiener) primarily was the effect of *thousands and thousands of individual legal actions and innumerable decisions of lower courts*.[18] They were the basis of the *gradual adaption* of national to European and European to national law. In the course of this evolutionary development national finally became European, and European became national law. A '*gemeinsame europäische Verfassungsordnung*' emerged.[19]

To construct a useful categorical framework for the analysis of Europe's evolutionary constitutionalisation one should, as I have demonstrated it already in the cases of the *German Bund/ Reich* and the US briefly, combine *judicial (and political) incrementalism* with

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[17] See *Fletcher* v. *Peck*, 10 U.S. 87 (1810), *Martin* v. *Hunter's Lessee*, 14 U.S. 304 (1816), *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); and the last of the series, *Lochner* vs. *New York*, 198 U.S. 45 (1905)

[18] A. Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, (Cambridge:Cambridge University Press, 2008).

[19] T. Hitzel-Cassagnes, *Entgrenzung des Verfassungsbegriffs*, (Habilitationsschrift, University of Hannover, 2010), at 160; see also J. Schwarze (ed.), *Die Entstehung einer europäischen Verfassungsordnung*, (Baden-Baden: Nomos, 2000).

functional differentiation.[20] Whereas judicial incrementalism provides a mechanism for communicative *variation*, functional differentiation provides a sufficiently *selective structure* for the transformation of judicial variation into European constitutional law. This then is restabilised by the expanding *system* of the common European constitutional order. The adaptive evolutionary process follows a step by step programme of functional differentiation, and with Luhmann I presuppose here that systems in their reproduction must perform *services* for other systems, a *reflexive* turn of self-description, and a *function* for the society as a whole.

Economic Constitution

First the Treaty of Paris created a common economy on supranational basis. This step engendered immediately the need for *services* of a European legal system. The solution of this *systemic problem* resulted in the emergence of the European *economic constitution*. The economic constitution consisted in the structural *coupling of European law and the European economy*. This opened the evolutionary path to the expansion and autopoietic closure of the common European market, including now all national and transnational subsystems of the economy. It also secured the *priority of the economic system* which latest after the *Cassis de Dijon* decision of the European Court of Justice (ECJ) in 1979 led to a turn to the one-sided dominance of the four economic freedoms (commodities, capital, services, and persons).[21] Economic freedom of the Union has been emancipated from the national constitutional law of the social welfare state.[22]

Legal Constitution

At the latest the Treaty of Rome posed a new problem that was no longer a systemic problem alone but a problem that affected as well the *emancipatory dimension* of constitutional law. The emancipatory

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[20] I follow here a suggestion by Kaarlo Tuori.

[21] For a critical account, see A. Somek, *Individualism: An Essay on the Authority of the European Union*, (Oxford: Oxford University Press, 2008); on recent developments see S. Buckel and L. Oberndorfer, "Die lange Inkubationszeit des Wettbewerbs der Rechtsordnungen: Eine Genealogie der Rechtsfälle Viking/Laval/Rüffert/ Luxemburg aus der Perspektive einer materialistischen Europarechtstheorie", in: A. Fischer-Lescano, F. Rödl and C. U. Schmid (eds), *Europäische Gesellschaftsverfassung: Zur Konstitutionalisierung sozialer Demokratie in Europa,* (Baden-Baden: Nomos, 2009), at 277.

[22] Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 114 *et seq*.

problem of *civic self-determination* came to the fore when the court decided *van Gent* and *Costa* in 1963 and 1964. Here the judges created *European citizens' rights* in a risky and bold teleological interpretation of the Treaties. Yet the decisions of the court would have kept symbolic law if the many national courts of first instance would not have produced endless numbers of tiny decisions all over Europe, applying European law independent from political landmark decisions for or against Europe, such as in the cases of De Gaulle or Maggie Thatcher. It was the multitude of 'national judges who made judicial decisions as European judges'.[23] They saved themselves from revision by ordering reports from the ECJ as Karen Alter has shown in a couple of brilliant studies.[24] The symbolic cue marks of *direct effect* and *European law supremacy* (that were pointed out by the highest court) were *realized by the uncontrollable multitude of lowest courts* and – not to forget – *individual sues*. What they realized was nothing less than the *legal constitution* of Europe that solved the twofold problem of *emancipatory claims for individual European citizenship* (liberal rights) and the *structural coupling of law and law* that led to the *reflexive* (self-referential) closure of the European legal system. Because of the lack of a political constitution this again reinforced the *one-sided preference of the European Communities for private autonomy*. Therefore it is not accidental that the perfection of the legal constitution of the Communities in the end of the 1970s went hand in hand with the neoliberal turn. Europe proved itself open not only for international law but as well for the neoliberal paradigm shift of the world economy.

Political Constitution

Since the first direct election to the European Parliament 1979 the *political constitution* of Europe evolved. Again by an incremental and adaptive process of an endless stream of tiny changes, of deviant and negative communicative actions by the parliament and the courts, the parliament finally became a strong *controlling and law-shaping*

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[23] Hitzel-Cassagnes, *Entgrenzung des Verfassungsbegriffs*, note 19 *supra*, at 154 *et seq*.
[24] K. Alter, *European Court's Political Power*, (Oxford, Oxford University Press, 2009), chapters 5 and 6; S. Schmidt, *Die Liberalisierung Europas: Die Rolle der Europäischen Kommission*, (Frankfurt: Campus, 1998).

parliament.[25] Step by step and finally in the Lisbon Treaty a formal *parliamentary legislative procedure* was established.[26] This bridged the growing gap between the legal and the political system of the EU through the *structural coupling of law and politics*.

But in this case *technocratic politics that consisted in the bypassing and silencing of public opinion trumpet the emancipatory advances of parliamentary legislation, causing a growing gap between public opinion* (i.e. democratic legitimisation, in this case simply measured in the decreasing number of active voters[27]) *and parliamentary power*. The priority of technocratic politics was stabilised from the very beginning by the extra-parliamentary and executively dominated *Sonderregimes* (particular regimes) of the European Union from the EURATOM-regime to the nearly almighty and formally poorly legalised European Council:

> Besonders prekär ist […] die Aussage des Art. I-21 Abs. 1 S. 2 VVE, wonach, [d]er Europäische Rat nicht gesetzgebend tätig' wird. Angesichts der verfassungsmäßigen Befugnisse ist man versucht, diese Formulierung schlicht als unzutreffend, ja verschleiernd abzutun. Sie birgt indes eine hintersinnige normative Wahrheit: Weil der Europäische Rat keine Gesetze im Sinne des Verfassungsvertrags erlässt (sondern sog. Europäische Beschlüsse) unterliegt er bei seiner Rechtsetzung nicht den besonderen Kontroll-mechanismen, die der Verfassungsvertrag für Gesetzgebungsakte vorsieht.[28]

The point here is in one sentence: *Increasing informal power of the united executive bodies of Europe by bypassing public opinion, legal review and*

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[25] P. Dann, "Looking through the Federal Lens: The Semi-Parliamentary Democracy of the EU", (2002) *Jean-Monnet Working Paper* 5/02; see also Fossum and Menéndez, *The Constitution's Gift*, note 1 *supra*, at 123 *et seq*.

[26] J. Bast, "Europäische Gesetzgebung: Fünf Stationen in der Verfassungsentwicklung der EU", in: C. Franzius, F. C. Meyer and J. Neyer (eds), *Strukturfragen der Europäischen Union*, (Baden-Baden: Nomos, 2010), pp. 173-80.

[27] If the voters keep away from the ballots no deliberative, auditive or whatever new and fancy 'democracy' can save democracy.

[28] J. Bast "Einheit und Differenzierung der Europäischen Verfassung", in Y. Becker et al (eds), *Die Europäische Verfassung – Verfassungen in Europa*, (Baden-Baden: Nomos, 2005), pp. 34-60, at 44.

parliamentary control, and the mean for that is soft law production with hard law effects (paradigm: the Bologna process).[29]

If the voters keep away from the ballots, no deliberative, auditive, comitological or whatever new and fancy 'democracy' can save democracy (there is no deliberative democracy without normatively working egalitarian procedures of decision-making), and the outbreak of a *legitimisation crisis* becomes more and more likely. If a great financial crisis follows it becomes unavoidable.

Social and Security Constitution

Yet, evolutionary constitutionalisation goes on. Since Maastricht we can observe the emergence of a *social constitution* concerning in particular (the economically cheap) *emancipatory dimension* of anti-discrimination norms (but now, after the introduction of a *Rettungsschirm* suddenly redistribution emerges). Functionally the social constitution *couples law with the social structure* of the society (hence, leading towards an institutionalisation of social struggles). Already since Schengen, and latest since the turn of the century, the social constitution has been accomplished by a European *security constitution* consisting of the *structural coupling of the law with the police* (and administrative bio-politics).[30]

Conclusion

The functionally sequenced incremental evolution of a now already (or at least nearly) *full-fledged European constitutional system* still is relying on a post-democratic mix of (avant-garde) legal expertise and (rear-guard) technocratic politics. Therefore I can end with a simple thesis: This disastrous mix of procedural democratic structures and post-democratic politics must lead to a great crisis of legitimisation in

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[29] H. Brunkhorst, "Unbezähmbare Öffentlichkeit: Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung", (2007) 1 *Leviathan*, pp. 12-29; Zur Methode der technokratischen Mixtur aus *soft law* und bypassing generell: C. Möllers, "Transnationale Behördenkooperation: Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung", (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 351-89.

[30] S. Buckel and J. Wissel, "Entgrenzung der Europäischen Migrationskontrolle: Zur Produktion ex-territorialer Rechtsverhältnisse", (2009) *Soziale Welt,* special issue "Recht und Demokratie in der Weltgesellschaft", pp. 385-404.

the short time. Its outburst becomes more and more probable with every new step of evolutionary integration.

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This report discusses the merits of the theory of constitutional synthesis as a constitutional theory for a democratic European Union. The theory has been developed by John Erik Fossum and Agustín José Menéndez in *The Constitution's Gift* (Rowman and Littlefield, 2011).

The key component of the theory is the regulative ideal of a common constitutional law, of a constitution composed of a collection of national constitutions, which makes up the deep constitution of the European Union. Constitutional synthesis is comprised of normative integration and institutional consolidation which together constitute a distinct constitutional dynamic. In this report contributors from political science, sociology, law and history discuss the extent to which they find the theory promising, and the research agenda that the theory of constitutional synthesis has produced.

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Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research. The project has 21 partners in 13 European countries and New Zealand and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON runs for five years (2007-2011) and focuses on the conditions for democracy in the multilevel constellation that makes up the EU.

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