

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

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 is 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-

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'.

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 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 place 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 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

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.