Rescue Package for Fundamental Rights: Comments by PETER LINDSETH

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I'd like to thank Alexandra, Max, and Christoph for inviting me to participate in this fascinating exchange. As an American, I feel like the outsider here. Moreover, I have just written a book (in part from an American perspective, but also deeply grounded in integration history) that argues that the EU is best understood as 'administrative, not constitutional'. So it should perhaps be unsurprising that I am reluctant to endorse the deeply constitutionalist 'reverse *Solange*' proposal of Armin von Bogdandy and his team. I generally join in the cogent reservations already expressed by several commenters (notably by Pál Sonnevend, Anna Katharina Mangold, and Daniel Thym), but allow me to add a few additional thoughts.

The 'reverse *Solange*' proposal undoubtedly constitutes a creative way of augmenting the role of the CJEU as a commitment mechanism in the area of fundamental rights beyond the implementation of Union law, i.e., by circumventing the limitation specified in Article 51 CFREU via a teleological linkage to Union citizenship. To argue against the proposal would seem, in American parlance, like arguing against 'mom and apple pie'—and who wants to do that?

Particularly in view of the deep concerns we all share over the current Hungarian regime (about which my colleagues Kim Scheppele and Jan-Werner Müller have been struggling mightily to highlight), I am deeply sympathetic to the desire to develop effective mechanisms to combat any member state's descent into authoritarianism. But I have reservations about whether this proposal is even necessary as a tool against the disturbing slippage of the Hungarian regime. What it will accomplish, rather, is a potentially profound change in the nature European public law, while adding only marginally to the legal arsenal in the struggle to vindicate fundamental rights.

Bogdandy and his team claim that their 'approach neither creates new and unexpected obligations for the Member States nor adds new competences for the Union as such; only the *Organkompetenz* of the CJEU, but not the *Verbandskompetenz* of the EU is affected'. It is more than a little ironic, however, that in support of this statement, they then claim their proposal 'resembles the famous *Van Gend en Loos* line of jurisprudence inasmuch as it complements a centralized enforcement mechanism with "the vigilance of individuals concerned to protect their rights" and interjudicial cooperation'. This is ironic precisely because *Van Gend en Loos* is almost certainly the most significant (because most fundamental) of the Court's arrogation of institutional power in its history: the right to police member state compliance via the preliminary reference mechanism, rather than limiting itself to the infringement procedure. This step was taken on the basis

of just the sort of heroic legal logic and teleological reasoning that is also evident in this proposal. From an American perspective, this proposal thus seems, well, so . . . European.

Insofar as *Van Gend en Loos* was itself concerned, despite the evident textual weakness in the Court's reasoning there, the member states long ago acquiesced in the Court's effort to augment its commitment function in the context of free-movement obligations under supranational law. And perhaps for good reason: To put it in the jargon of modern principal-agent theory, the *Van Gend en Loos* Court recognized the need for 'fire alarms' (preliminary references) in addition to 'police patrols' (infringement actions) to police member state compliance in this area.

But there is a key difference between the free-movement context and the fundamental-rights focus of this proposal. One can understand why the *Van Gend en Loos* Court felt the infringement procedure was inadequate to police the manifold ways in which a member state might violate free-movement obligations in the nooks and crannies of its legislative or regulatory apparatus. But the sorts of 'systemic failures' in the protection of fundamental rights that this proposal purports to target are a lot more difficult to hide. Indeed, Bogdandy and his team explicitly reject the use of 'reverse *Solange*' to target 'simple and isolated fundamental rights infringements'. Moreover, the Commission's 'accelerated infringement procedure' against Hungary would suggest that the existing 'police patrols' in European public law are proving adequate to the task of monitoring member state compliance where 'systemic failures' occur. There is little need to resort to the creative lawyering represented by this proposal; in fact, by excluding 'simple and isolated fundamental rights infringements' from its coverage, Bogdandy and his team greatly undermine the analogy to *Van Gend en Loos* on which they ultimately come to rely.

More troubling to me, however, is the mindset toward European public law, and more particularly toward the role of courts and litigation vis-à-vis politics, that this proposal seems to reflect. If there is an autonomous supranational 'constitutionalism' in the EU (which I am normally hesitant to acknowledge), it is undoubtedly grounded in fundamental rights, i.e., in the 'sovereignty of the individual' against public authority, wherever located. The institutional means for realizing this form of autonomous constitutionalism is necessarily adjudicative power, whether national or supranational, something with deep roots in Western conceptions of the rule of law. When properly tailored to the task of protecting individual rights in specific cases—avoiding spillover into the realm of broad-gauged regulatory power—the claims of this sort of supranational constitutionalism are generally plausible to me.

But this proposal seems much more indicative of a less plausible (but more ambitious) claim to 'multilevel' or 'plural' constitutionalism in the EU. It is grounded, in effect, in an autonomous sovereignty over and above the member states (despite the fact that multilevel or plural constitutionalists generally like to avoid the language of sovereignty, which normally seems so passé). From this perspective, although supranational institutions are *formally* created by a treaty, they necessarily come to enjoy, by virtue of functional demand or legal logic divorced from intent, a normative legitimacy independent of any treaty commitments plausibly made by the member states themselves. In this sort of supranational constitutionalism, we are no longer

talking about protecting the sovereignty of the individual against states or other kinds of public authority; rather, we are, in effect, talking about the sovereignty of a new political community *above* the member states, whose authority is ultimately not grounded in treaty commitments but in the inexorable logic or normative attractiveness of the integration process itself.

Despite the efforts of many 'constitutional pluralists' in the EU over the last several years, the evolution of European public law seems clearly to repudiate the existence of this second, more ambitious sort of supranational constitutionalism in the integration process. This is most clearly reflected in the principle of conferral in Article 5 TEU, as well as the *Kompetenz-Kompetenz* jurisprudence of national high courts. And yet, by stressing that their 'approach neither creates new and unexpected obligations for the Member States nor adds new competences for the Union as such', Bogdandy and his team are clearly alive to this limitation. But I do not think they successfully overcome it. Rather, they engage, as I said, in precisely the sort of heroic legal logic and teleological reasoning that is so indicative of the CJEU over its history (it's for that reason that I have little doubt this proposal will be taken very seriously in Luxembourg).

But that does not change the fact that this proposal will be perceived, by national high courts at the very least, as an effort to circumvent limitations that the member states have inserted, for better or worse, into European public law. This proposal ultimately reminds me of one of the most famous statements on unconstitutional delegation in American jurisprudence, which rejected a similar claim to broad-gauged normative power because it was 'not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . . This is delegation running riot. No such plenitude of power is susceptible of transfer'. *A.L.A. Schechter Poultry Corp. v. United States*, 295 US 495, 550, 553 (1935) (Cardozo, J., concurring).

As Antje Wiener points out in her comments, the 'reverse *Solange*' proposal really is about 'changing stateness' in the integration process. But the point of the *Kompetenz-Kompetenz* jurisprudence of the national high courts over the last two decades has been to strike a balance in that process of change. On the one hand, integration has clearly demanded the delegation of normative power to supranational bodies; on the other hand, democratic and constitutional legitimacy has remained fundamentally national (subject, of course, to the demands of human rights). The issue really is: What 'plenitude of power is [in fact] susceptible of transfer' while maintaining some semblance of constitutional democracy on the national level in a historically recognizable sense? No doubt, as I have written about Greece in the Eurozone crisis, modern governance entails significant limitations on 'sovereignty' as a consequence of legal commitments, whether national or suprantional (although for important qualifications of that argument, see here). But recognizing the changing nature of sovereignty based in legal commitments is not a license to allow supranational adjudicators to make 'unconfined and vagrant' claims to normative power. This must be true no matter how heroically logical these claims are, or however much they appear based in a teleological understanding of the substance of, say, Union citizenship.

We should recall that ‘not all legal problems are can be solved legally’, as the late Neil MacCormick once rightly warned, and that ‘[r]esolving such problems . . . is matter for circumspection and for political as much as legal judgment’. In this instance, European lawyers and judges would do much better to respect the political limitations on the enforcement of fundamental rights that are expressed in Article 51 CFREU and not allow them to be circumvented legally by way of teleological linkage to Union citizenship. Otherwise, by way of creative lawyering, integration would run the risk of ‘delegation running riot’, effectuating a fundamental change in the nature of European public law without the requisite democratic and constitutional underpinnings.

Peter Lindseth is a professor for international and comparative law at University of Connecticut and currently a Daimler Fellow at the American Academy in Berlin.
