Rescue Package for Fundamental Rights: Further Comments from PETER LINDSETH

Peter Lindseth 2012-02-28T07:52:58

It is a tribute to the thoughtfulness of the Heidelberg proposal that it has stimulated such a provocative exchange of views so far. It is quite obvious that, regardless of one's position vis-à-vis the merits of 'reverse *Solange*', there is widely shared concern regarding the evolution of the Hungarian regime. Therefore, at least on an instrumental level, the debate is primarily over the proper balance between judicial and political approaches in challenging that evolution, a debate that the Heidelberg proposal has stimulated quite nicely.

But on a deeper level—one of principle—the debate has been over the character of European integration itself. It is on that level that I'd like to engage the views expressed by my American colleague, Daniel Halberstam, in particular. I see the disagreement between Daniel and myself as revealing of some of the deeper stakes for European public law that the 'reverse *Solange*' proposal potentially involves.

Daniel expresses some surprise that my initial comments on the Heidelberg proposal alluded to the nondelegation doctrine in the US. He argues that nondelegation has 'not proven a full-fledged workable doctrine of containment', even though he acknowledges that 'remnants persist here and there of the doctrine'. Those 'remnants', alas, are precisely what are relevant here, and they arguably have direct analogies in German constitutional law.

Constitutional delegation constraints in the US operate, not as a basis for a frontal attack, but as a canon of construction where, as here, someone is offering an interpretation that raises nondelegation concerns. (On this point, see Cass Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000); see also John Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223.) German constitutional lawyers might perhaps recognize a similar principle in their law, operating at the intersection of the idea of *verfassungskonforme Auslegung*, the *Wesentlichkeitstheorie*, and the *Vorbehalt des Gesetzes*. The American and German approaches are reflective, I would say, of a constitutional preference for interpretations of positive law that facilitate fundamental normative decisions in the political process itself. It is a preference for political over judicial decision-making where possible; indeed, this preference is arguably grounded in broader commitments to representative democracy as a cornerstone of modern constitutionalism.

It was with this interpretive dimension of the nondelegation doctrine in mind that I raised concerns about the 'reverse *Solange*' proposal. Specifically troubling to me was the way the proposal seemed designed to circumvent, quite openly, the

limitations specified in Article 51 CFREU and in Article 7 TEU. It achieves this circumvention by way of a posited teleological linkage between fundamental rights and the protean concept of Union citizenship, thus greatly expanding the jurisdiction of the CJEU vis-à-vis the member states. It is precisely for this reason that I found unpersuasive the claim that the proposal '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, indeed, precisely *because* the proposal seeks to shift these normative decisions out of the political process and into the realm of judicial decision-making, without any clear sense of the substantive bounds of the idea of 'citizenship', that the proposal evoked Justice Cardozo's classic concern of 'delegation running riot'.

In the absence of a clear statement in the treaties that the CJEU is supposed to possess this jurisdiction (indeed, all indications are to the contrary), I believe the judges in Luxembourg should be hesitant to seize this power via the Heidelberg proposal.

But Daniel seeks to take his support of the 'reverse *Solange*' proposal one step further, citing it as a way of 'emancipat[ing]' European public law 'from delegation' itself. I applaud Daniel's honesty here, because his admission on this point seems to support rather than undermine my nondelegation critique of the proposal. Here Daniel claims support in the work of Bruce Ackerman on American constitutional history, albeit omitting a crucial dimension of Bruce's theory (as I'll explain below). Daniel writes:

> If we think back to the U.S. Amendments that guarantee citizenship, equality, and fundamental rights against component state infringement in the United States, we notice (with Bruce Ackerman) that these Amendments did not come about in a regular manner. Southern states were coerced into their adoption. This is why the reconstruction amendments are often seen as a second Founding. They have the whiff of illegality about them – just as the original Founding did. Constitutional moves – big and small – usually do. Legality and legitimacy run together as we stretch or recalibrate the former in the service of the latter.

This passage is revealing as much for what it contains as for what it omits. First, it seems to be analogizing the CFREU as well as the provisions on Union citizenship in the treaties to the Fourteenth Amendment to the US Constitution, providing a general 'guarantee [of] citizenship, equality, and fundamental rights against component state infringement'. This will no doubt come as news to the member states, at least beyond the implementation of EU law. Second, the passage openly acknowledges that the broad claim to general constitutional transformation involved here has a 'whiff of illegality' about it, but that this is acceptable because '[c]onstitutional moves – big and small – usually do'.

What is missing? If we look to Bruce Ackerman's work (to which Daniel alludes parenthetically), we see the omission: the 'consolidating election'. According to Ackerman, what ultimately legitimized both the American Founding and the second Founding after the Civil War was *the democratic process*. Ackerman roots his theory of constitutional change firmly in a process of 'higher lawmaking' by the 'people

themselves', whether in the ratification of the Constitution and in the election of 1868. Constitutional change was not solely the product of a legal elite, as Daniel seems to be suggesting is possible for Europe. 'Legality and legitimacy' ran together in the US *because* the people mobilized at crucial points in American history to effectuate constitutional change that might have otherwise been illegal.

Where is the corresponding democratic mobilization in the European case? The interesting thing about Daniel's conception of 'European constitutionalism' is the extent to which it is an utterly elite-driven process, and more importantly a *legal and judicial* elite-driven process. In this regard, it is very much in keeping with the evolution of 'European constitutionalism' to date (as the work of Morten Rasmussen on the historical roots of this idea has done much to reveal). It dispenses with the need for democratic consolidation except in the most indirect—indeed almost hypothetical—sense (as to what a European 'people' should perhaps want if they were not in the grips of a kind of nationally-grounded, and hence delegation-based, false consciousness). The problem is that, when actually asked, the peoples of the various member states have generally been unwilling to buy into the broad-gauged theory of 'European constitutionalism' advanced by Daniel and other advocates of constitutional pluralism in its strongest form.

European integration faces a number of democratic and constitutional challenges, no doubt. These result not least from the polycentric character of democratic legitimacy flowing from the member states severally, without any correspondingly strong legitimacy at the EU level. This is something that the Eurozone crisis has repeatedly revealed, quite excruciatingly. Mattias Kumm, in his own contribution here, is quite right to point out that, to date, national executives have dominated the process of European integration. This is evidence, as my book describes in some detail, of how much integration has been built on the constitutional foundations of administrative governance on the national level. But one cannot simply waive a normative magic wand and make these foundations, or the limitations they impose, go away. Yes, one can hypothesize a rights-based constitutionalism in the EU, as many have done and as the CJEU has long tried to construct. But such a judicial construct will do little to turn the EU into a genuine constitutional polity in its own right. What is needed, rather, is the sort of consolidating democratic mobilization on a transnational scale that Europe has, to this point in its history, clearly lacked. Until that time, 'European constitutionalism', such as it is, will remain very 'weak' indeed.
