Rescue Package for Fundamental Rights: Further Comments by DANIEL HALBERSTAM

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03.04.2012 doi: 10.17176/20181008-100648-0

Peter Lindseth's post directed at my own intervention on the Heidelberg proposal deserves a response, if only because it opens up debate about a basic divide in scholarship on the European Union. Do we understand the Union as an administrative or a constitutional construct? This has important consequences for both democracy and how we understand the "reverse-Solange" approach.

The Lens of Judicial Interpretation: Administrative or Constitutional?

Peter points to the non-delegation doctrine in the United States. It no longer declares administrative delegation unconstitutional but provides a canon of interpretation to limit authority from shifting away from the U.S. Congress towards agencies and courts. So far, so good. Those are exactly the "remnants" of the non-delegation doctrine I had in mind in my last post. But this is not the place to debate the success of this doctrine in the United States. Our focus, after all, is Europe. And the trouble with Peter's argument is that – regardless of whether and how that canon of construction has operated in the United States or elsewhere – such a canon of construction has not been in operation at the European Court of Justice.

The foundational decisions of the European Court of Justice have resisted the idea of delegation, at least delegation in the administrative sense. There is no doubt the ECJ/CJEU construes the Union as one of enumerated powers. But this is delegation in a "constitutional register" to use Neil Walker's felicitous phrase, not in the register of administrative law.

Had the ECJ been applying Peter's administrative canon of construction, the Court would scarcely have ruled the way it did in Van Gend, Costa, Simmenthal, Les Verts, Martinez Sala, Chen, Zambrano, or Kadi – to name to just a few decisions. The Court would not likely have held, for example, that the Member States had "limited their sovereign rights" as a way to "create a new legal order" with rights and obligations for individuals "independent of the legislation" that the Member States subsequently enact and with supremacy even over Member State constitutional law. In each of these decisions the Court read the treaty as a constitutional charter, not a document of administrative delegation. At times (e.g., Les Verts) the Court even said so.

Constitutionalism and Democracy

Now you might argue that the European Court of Justice was acting ultra vires from the start. But that would be too facile. The decisions were not implausible on their own terms as Haltern and Weiler argued long ago in their notable debate with Schilling. Plus, Member State governments – and citizens – have played along with the Court for long enough that these foundational decisions have become a social, and ultimately legal, reality.

Not least, Member State Governments have time and again ratified the Court's basic jurisprudential architecture after the fact. And before Peter now interjects that the Member States thereby prove their position as principal in this principal-agent game, we should remember something important. These same Member State Governments often – one might even say usually – had officially opposed these moves when filing their briefs with the Court. Only after the fact, in the new decisional space that was created by the Court, did they come around to supporting the Court's position.

To be sure, the "people" or "peoples" have not spoken in the way any committed democrat would like.

Nonetheless, the people in a more scattered way have lived with, participated in, and availed themselves of the Union's functions over many years. And in most Member States, there is no serious national movement to withdraw from the Union, not even as French and Dutch voters rejected the constitutional treaty.

This is not the place for an intricate debate about consent in a democratic regime. But Peter's insistence on Ackerman's particular choreography of a "consolidating election" seems ill-placed. (I would say this equally to Bruce Ackerman with regard to his theory as it applies in the United States.) Constitutional change expressing the people's shared understanding and mutual commitment can happen far more gradually and with equal depth than Ackerman's highly stylized dance would lead you to believe.

Germany's constitution, for instance, was never ratified by the people in the way the U.S. Constitution was in the United States. The *Grundgesetz* was ratified – much as successive EU treaties were – only by the existing parliaments of the component states. (And in Bavaria, not at all.) As any German constitutional patriot living today will tell you, the Basic Law's democratic legitimacy derives as much or more from democratic life within and through the German Basic Law over the many years of its existence as in any "consolidating" events (that were contingent on the Allied Forces' consent) back in 1949.

In making such arguments, the constitutional vision of the Union does not deny the existence of a democratic deficit. It does not seek to provide legitimacy by normative fiat or elite process. Quite the contrary is true.

Ever since Eric Stein pioneered the constitutional approach in 1981, the constitutional vision has acknowledged the magnitude of the shift in power as a way to call for commensurate democratic legitimation. Eric's piece, in an important sense, blew the whistle on what he described as an elite driven process. A decade later, Joseph Weiler's article embraced constitutionalism while focusing attention even more concretely on the problem of the democratic deficit of the Union.

Rich demo(i)cratic life within the EU governance structure was missing then and is still missing today. Constitutionalists do not deny this. Instead, we find the chief proponent of a delegation theory of the Union, Andy Moravcsik, as the main advocate against the existence of a democratic deficit at the European level of governance. The constitutionalists, by contrast, have been pointing to democratic difficulties wherever they may lie – whether at the level of the Union or that of the Member States.

Here we need to take an important point from Moravcsik (even if we disagree with him on other counts). In judging the democratic legitimacy of any governance structure, we must always ask: "compared to what?" And if we ask that question, as Miguel Maduro and I have separately argued, we find that the Union can sometimes even serve as an antidote to democratic failures at the level of the Member State.

Constitutional Heterarchy and Reverse-Solange

Now Peter is right that constitutionalism is the key to the reverse *Solange* approach. But only when you consider constitutionalism's plural character in Europe. As those of us writing in the still emerging tradition of constitutional pluralism have been arguing in one way or another (Kumm, MacCormick, Maduro, Walker, and myself included), multiple claims of ultimate authority can and do coexist in the Union. This turns out to be central to the "reverse-*Solange*" idea.

Because of constitutional pluralism in the European Union, the mutual supervision of rights protection in the Union and the Member States would look different from its more hierarchical counterpart in the United States. I did not draw on the U.S. analogy to make the claim that reverse *Solange* would amount to a Fourteenth Amendment or an incorporation doctrine as we have seen it in the United States. That would have been a huge mistake. Here's why.

The traditional *Solange* doctrine has depended on *three crucial elements*.

First, Member States get out of the business of what I like to call the "retail" review of rights in favor of "wholesale" review. The idea here is that Member

States do not investigate whether the Union has breached fundamental rights in a particular case. Instead, Member States only engage in a more general review of the Union's track record on rights protection across a number of cases.

Second, the *Solange* idea has not meant review for compliance with rights at a specific level, but only for rights compliance within a broad margin of appreciation. This idea is simple and needs no further explanation.

Third, the range of acceptable rights protection is not dictated unilaterally by the reviewing court, but determined in a process of mutual accommodation. Because the multiple claims to final legal authority form a constitutional heterarchy, neither side can claim easy victory. Accordingly, reciprocal accommodation leads the reviewer and the reviewed to come to a truce on a mutually acceptable range of obligation and compliance.

These three elements of *Solange* – *wholesale* review with a *margin of appreciation* as *mutually accepted* by all parties – forms the core of the approach that can be reversed to allow for ECJ review of rights protection in the Member States. And it can be done within the bound of reasonable interpretation of current law.

A Member State that systematically fails to protect fundamental rights at a basic level will be one in which EU rights and, in particular, EU rights of citizenship, will be in peril. And that gives the EU – and the ECJ – jurisdiction and reason to intervene. And, indeed, as I pointed out in my last post and back in my *Constitutional Heterarchy* piece of 2008, this kind of reverse-*Solange* approach already seems to be at work in the Court's jurisprudence for quite some time.

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SUGGESTED CITATION

Halberstam, Daniel: Rescue Package for Fundamental Rights: Further Comments by DANIEL HALBERSTAM, Verfassungsblog, 03.04.2012, doi: 10.17176/20181008-100648-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20181008-100648-0.