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The Breakdown of the Rule of Law in the Euro-Crisis: Implications for the Reform of the Court of Justice of the European Union

Roland Vaubel
Universität Mannheim

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I. Introduction

“'We can only achieve political union if we have a crisis', Mr. Schäuble said" (New York Times, 18 November, 2011). For him, the sovereign debt crisis was and still is a welcome opportunity to confer new competences on the European Union and build additional European institutions. He has been supported by the EU actors who have a vested interest in the centralisation of economic policy at the European level. However, since amendments of the European treaties would have required the assent of the British conservatives and of Irish voters, the governments of the euro-area have tried to base their actions on existing treaty provisions or circumvent the European Treaties altogether by concluding new separate treaties among themselves. In the process, the meaning of several Treaty provisions has been stretched beyond recognition. The rule of law has collapsed at the EU level, and the Court of Justice of the European Union has not prevented it from doing so. Therefore, the European sovereign debt crisis highlights the importance and urgency of reforming the Court.

II. The breakdown of the rule of law in the wake of the European sovereign debt crisis

1. The bailout

The best known and most obvious infringement of the European treaties concerns Art. 125 Sect. 1 TFEU:

> “A member state shall not be liable for or assume the commitments of central governments … of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.”

The initial EU loans to Greece and the establishment of the European Financial Stability Facility (EFSF) by the euro-zone were flagrant breaches of the no-bailout rule enshrined in Art. 125. This was openly admitted by the French ministers Lagarde, Lellouche and Wauquiez, EU commissioner de Gucht and the former prime minister of Greece Simitis.[1] The German chancellor Merkel called it an “ultima ratio” decision. It is true that the euro states did not directly buy or guarantee Greek, Irish, Portuguese and Cypriot government debt. They assumed liability for the EFSF which in turn borrowed in the market and lent to these governments, enabling them to service and retire their debt. But through the intermediary of the EFSF, they assumed the commitments of the central governments of other member states. Credits used to retire outstanding government bonds and purchases of outstanding government bonds are strictly equivalent forms of assuming the debt of another government.

The EFSF has been perpetuated under the name European Stability Mechanism (ESM). Moreover, on 25 March 2011, the EU Council adopted a decision amending Art. 136 TFEU to provide a legal

[1] Lagarde: Wall Street Journal, 17 December 2010; Lellouche: Financial Times, 27 May, 2010; Wauquiez: Le Monde, 16 January, 2011; de Gucht: Belgian television channel VRT, 21 June 2010; Simitis: Frankfurter Allgemeine Zeitung, 28 December, 2012. See also Seidel (2012 a, b), Siekmann (2013) and the sources quoted there.

base for the ESM. For this, the simplified revision procedure of Art. 48 Sect. 6 TEU has been used. However, according to this clause, an amendment based on this clause “shall not increase the competences conferred on the Union in the Treaties”. The permission to establish a stability mechanism does increase the competences of the monetary union, the monetary union is part of the European Union and enshrined in the European treaties, and the European Commission and the ECB nominate two of the three members of the "Troika". Thus, Art. 48 Sect. 6 TEU has been abused.

The CJEU, in its preliminary reference of 26 November 2012, has upheld the ESM on the grounds that “the granting of financial assistance to an ESM Member in the form of a credit line … or in the form of loans … in no way implies that the ESM will assume the debts of the recipient Member State”.[2] However, the loans were used to retire the outstanding government bonds. Debt to the ESM was substituted for debt to private creditors, notably banks. The Court’s preliminary reference of 26 November 2012 qualifies as one of the most flagrant breaches of law in the history of European integration.

Commission and Council have based the EU loan to Greece on Art. 122 Sect. 2 TFEU:

> “Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal of the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned”.

However, the debt servicing problems of the Greek government were not due to occurrences beyond its control, as the example of the other member states shows. The Greek government did not even have to support banks in the financial market crisis of 2008/09. The Greek government had exceeded the 3 per cent limit for budget deficits long before the financial market crisis – in each year since joining the euro area. Moreover, Art. 122 does not relate to the euro-area. It is neither part of the chapter on “member states whose currency is the euro” (Chapter 3a) nor part of the chapter on “monetary policy” (Chapter 2). It comes under the heading “economic policy” (Chapter 1). Art. 122 Sect. 2 does not authorize the EU to raise money in the capital market to finance such credits.[3]

In March 2013, the governments of the euro area agreed to bail out Cyprus, pledging 10 bn. euros under the auspices of the ESM. This was inconsistent with the amendment of Art. 136 TFEU which reads as follows:

> “The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.”

Virtually all non-bank economists agree that the Cypriot banks were too small to be systemically relevant for the financial stability of the euro area as a whole. The sum of the balance sheets of the Cypriot banks was smaller than the balance sheet of the Hamburg Savings Bank. Even Wolfgang Schäuble, the German minister of finance, admitted that the initial rejection of the deal by the Cypriot

[2] Case C-370/12 Thomas Pringle v Government of Ireland, The Attorney General. For a critique see also Beck (2012, pp. 446f.).
[3] Seidel (2012 a, b) presents the same objection.

parliament did not endanger the stability of the eurozone (Frankfurter Allgemeine Zeitung, 22 January 2013 and 13 March 2013). By contrast, the European Central Bank (ECB) – more specifically, Jörg Asmussen, the director in charge – declared that Cyprus might be systemically relevant (Frankfurter Allgemeine Zeitung, 22 January 2013). This, however, is inconsistent with the fact that the ECB threatened to terminate its emergency liquidity assistance to the Cypriot banks if Cyprus did not accept the conditions attached to the ESM loan.

2. Conditionality

The bailout loans to Greece, Ireland, Portugal and Cyprus have been subject to policy conditions. The conditions have been negotiated by the Troika and finally approved by the Council. In the case of Greece, the Council decision was based on the excessive deficit procedure of the Stability and Growth Pact (Council Decision 2011/734 EU). The conditions were further specified in a "Memorandum of Economic and Financial Policies", a "Memorandum of Understanding on Specific Economic Policy Conditionality" and a "Technical Memorandum of Understanding". In the case of Ireland and Portugal, the Council adopted its decisions (2011/77 EU and 2011/344 EU, respectively) on the basis of Regulation EU 407/2010 establishing the European Financial Stabilisation Mechanism (EFSM) and again specified its conditions in various memoranda. The conditions concern budgetary appropriations for solidarity allowances, the indexation of pensions, pay rates for overtime work, the reform of the health care system etc. for Greece, social protection expenditure, public service pensions, the minimum wage etc. for Ireland and public sector wages and employment, pensions, education and health spending etc. in Portugal. However, the European Union is not entitled to impose or negotiate any of these policy measures. If this were accepted as legal, the European Union could determine any national policy simply by offering money in exchange.

3. Macroeconomic policy co-ordination

In December 2011, five regulations and one directive on fiscal and macroeconomic surveillance went into force which have become known as the "Sixpack". They include a regulation on the preventive and corrective arm of the Stability and Growth Pact (1173/2011/EU) and a regulation establishing a Macroeconomic Imbalance Procedure (1174/2011/EU). Both regulations enable the European Union to impose far-reaching sanctions (non-interest bearing deposits and fines) on the individual member states.[4] Both have been based on Art. 136 TFEU in combination with Art. 121 Sect. 6 TFEU. There is almost complete agreement in the German juridical literature that this is ultra vires and that a Treaty amendment would have been required.[5] Art. 136 Sect. 1 empowers the Council to

[4] Under the Macroeconomic Imbalance Procedure, member states may be punished for "excessive" current account surpluses or deficits. From an economic point of view, this cannot be justified. The current account balance indicates the international net capital flows required by world capital market equilibrium. It is the result of the optimising decisions of savers and investors and ought not to be interfered with. Nor is it possible for a government to steer the current account balance with any degree of accuracy. Thus, governments cannot be held responsible for the evolution of the current account balance.

[5] Cf. Ohler (2010, p. 338), Frenz, Ehlenz (2010, p. 212), Häde (2011a, pp. 334ff.; 2011b, p. 25), Fischer-

> "adopt measures specific to those Member States whose currency is the Euro
> (a) to strengthen the co-ordination and surveillance of their budgetary discipline;
> (b) to set out economic policy guidelines."

Art. 136 states that these measures must be within the limits of Art. 121 TFEU. According to Art. 121, all EU "Member States regard their economic policies as a matter of common concern and shall co-ordinate them within the Council". For this purpose, it empowers the Council to issue recommendations and make them public. However, the imposition of monetary sanctions goes far beyond recommendations.

4. The purchase of government bonds by the European Central Bank

On 10 May 2010, the European Central Bank began to buy Greek government bonds in the secondary market. On 7 and 8 May, ECB President Trichet had lectured to the European Council and listened to the wishes of its members. According to Art. 130 TFEU, "the Union institutions and bodies and the governments of the Member States undertake … not to seek to influence the members of the decision – making bodies of the European Central Bank …"

There is clear-cut evidence that this prohibition was also ignored by the euro-area summit on 29 June 2012 which, as usual, was attended by ECB President Mario Draghi.[6] In an interview with a Dutch newspaper, Mario Monti, Prime Minister of Italy at the time, said the following:

> "At the euro summit in June 2012, I have exploited all my bargaining power – including the threat of veto – to get approval for an apparently boring paragraph [added to the Euro-Area Summit Statement]. At four o'clock in the morning, all leaders had signed it… The paragraph reported briefly that euro countries, which had done their homework – like Italy – were ensured of the support of the European Central Bank… [This was] a crucial change in the rules of the Eurozone."[7]

Less than three months later, after Draghi had visited Schäuble on the island of Sylt in August, the ECB announced that it would buy the bonds of any eurozone government in difficulties in unlimited quantities, if necessary (so-called OMT decision). This was on 6 September 2012, one week before the preliminary ESM decision of the German Constitutional Court. By this time, the ECB had already bought large amounts of Greek, Irish, Portuguese, Spanish and Italian government bonds.

Lescano, Kommer (2011, p. 15), Bast, Rödl (2012, pp. 41, 47) and Pilz, Dittmann (2012, pp. 12, 19). For a dissenting view see Antpöhler (2012).

[6] According to para. 2.3 of the Rules for the Organization of the Proceedings of the Euro Summits adopted on 14 March 2013, "the President of the European Central Bank may be invited". Since being appointed, Draghi has attended at least 15 euro-group meetings and at least seven meetings of the European Council. Before the introduction of the euro, it was extremely unusual that, say, the President of the German Bundesbank would be invited to attend a meeting of the cabinet (there was one instance before the introduction of the European Monetary System in 1979 and one before the introduction of the euro in 1998). This shows how much the ECB has been politicized.

[7] Volkskrant, 13 April 2014, "Interview met Mario Monti, de man die Europa redde", my translation. The paragraph in the Euro-Area Summit Statement of 29 June 2012 reads as follows: "We affirm our strong commitment to do what is necessary to ensure the financial stability of the euro area, in particular by using the existing EFSF/ESM instruments in a flexible and efficient manner in order to stabilise markets for Member States respecting their Country Specific Recommendations and their other commitments including their respective timelines, under the European Semester, the Stability and Growth Pact and the Macroeconomic Imbalances Procedure. These conditions should be reflected in a Memorandum of Understanding. We welcome that the ECB has agreed to serve as an agent to EFSF/ESM in conducting market operations in an effective and efficient manner.

According to Art. 123 TFEU, any “credit facility with the European Central Bank … in favour of … central governments … of Member States shall be prohibited, as shall the purchase directly from them by the ECB or national central banks of debt instruments.” The purpose of this clause is to prevent the ECB and the national central banks from financing the budget deficits of the governments of the member states. It follows that the ECB and the national central banks are also prohibited from financing government deficits by purchasing government bonds in the secondary market. Indeed, the preamble of Council Regulation EC 3603/93 makes exactly this point: “purchases made on the secondary market must not be used to circumvent the objective of that Article”. The German Federal Constitutional Court, in its preliminary decision on the ESM (BVerf 62, BVR 1390/12, dated 12 September, 2012, No. 278), quoted this Regulation and declared that “the purchase of government bonds by the ECB in the secondary market, which is intended to finance the budgets of the Member States independently of the capital market, is prohibited as a circumvention of the ban on monetary budget financing” (my translation). In September 2013, 136 German professors of economics issued a declaration saying that they considered the bond purchases of the ECB "illegal and economically mistaken" (Frankfurter Allgemeine Zeitung, 11.09.13). They argued that, if the bond purchases had been necessary for monetary policy purposes, the ECB would have bought a more or less representative portfolio of government bonds or possibly corporate bonds. In a prior declaration, 43 German professors of economics and a large number of "practicing economists" (including bank economists) from all over the world had defended the OMT announcement. The German Federal Constitutional Court, in its preliminary reference decision of 18 March 2014, suggested that "the OMT decision does not appear to be covered by the mandate of the European Central Bank" (official translation).

The ECB has claimed that its bond purchases (which it calls “outright monetary transactions” – OMTs) are not intended to finance the budgets of the member states but that they are exclusively motivated by monetary policy considerations:

> “OMTs aim at safeguarding the transmission mechanism in all euro-area countries and the singleness of the monetary policy. OMTs will enable the Eurosystem to address severe distortions in government bond markets which originate, in particular, from unfounded fears on the part of investors of the reversibility of the euro, as reflected, inter alia, in widening differences in the pricing of short term sovereign debt … In such an environment, OMTs will provide a fully effective backstop to avoid destructive scenarios with potentially severe challenges for price stability in the euro-area” (ECB Monthly Bulletin, September 2012, p. 7).

However, this justification is self-contradictory and invalid. If interest rates on bonds issued by, say, the Greek government rise because investors expect that Greece will abandon the euro and devalue, then market agents find it less attractive to hold non-interest bearing money rather than interest bearing bonds. As the increase of the interest rate thus reduces the demand for money, price stability requires a reduction of the supply of (central bank) money. However, purchases of government bonds, in exchange for central bank money, augment the supply of (central bank) money. The OMTs are the exact opposite of what price stability would require when interest rates rise in the bond market. The ECB, it is true, has so far offset ("sterilised") the OMTs' effect on central bank money. But this merely removes the counterproductive effect, it does not mean that the OMTs may be positively justified by the aim of maintaining price stability.

Art. 127 TFEU, it is true, does not confine the ECB to the "primary objective" of price stability:

> "Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty of the European Union".

Art 3 TEU mentions dozens of objectives, including "social cohesion", "solidarity among Member States" and "monetary union". But Sect. 6 adds that "the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties", and Art. 123 TFEU prohibits the ECB from financing government deficits. This may explain why ECB President Draghi, at his press conference on 3 November 2011, told the journalists: "What leads you to think that the ECB is to become a lender of last resort to keep the euro-zone together? No, I do not think that this is within the task of the ECB" (ECB Homepage).

The ECB has added that "a necessary condition for OMTs is strict and effective conditionality attached to an appropriate European Financial Stability Facility/ European Stability Mechanism (EFSF/ ESM) programme" (ECB Monthly Bulletin, September 2012, p. 10). This is inconsistent with the requirement of central bank independence. Art. 130 TFEU stipulates:

> "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body."

If, for example, the Governing Council of the EFSF or ESM decides that some country is not eligible for an EFSF or ESM program, it would automatically follow that it is also ineligible for OMTs of the ECB. In this way, the ECB would "seek and take instructions" from the finance ministers constituting the Governing Council of the EFSF or ESM, respectively. The ECB is not entitled to give up its independence in this or any other way.

Perhaps in response to these legal problems, ECB president Mario Draghi added on 7 March 2013, that to be eligible for OMTs, eurozone countries must not only be under an EFSF or ESM rescue program – they must also have regained "full access to sovereign bond markets" (Financial Times, 8 March 2013). This makes sure that the OMT program will never be activated. But the ECB's announcement of OMTs remains a breach of Art. 130 TFEU.

5. The supervision of euro-area banks by the ECB

In December 2012, the European Council has decided unanimously that the ECB shall be fully responsible for the supervision of each bank with a balance sheet amounting to

- at least 30 billion euro,
- at least one fifth of GDP of its home country or
- one of the country’s three largest bank balance sheets.

Moreover, the ECB may intervene in the supervision of all other banks if it is of the opinion that the national supervisory authority is not fulfilling its task.

The Supervisory Board consists of the chairman (nominated by the Council of Ministers, not being a member of the ECB Governing Council), his deputy (delegated from the Executive Board of the ECB), four members nominated by the ECB Governing Council and, for each member state, one member nominated by the member state. If the ECB Governing Council objects to a decision of the Supervisory Board, it is referred to an intermediation committee whose members shall be selected by the governments of the member states either from the ECB Governing Council or from the Supervisory Board. According to Wolfgang Schäuble, the final decision rests with this committee (Handelsblatt, 08.04.13).

The Council of Ministers has based its Regulation on Art. 127 Sect. 6 TFEU:

> “The Council … may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.”

This is not an adequate legal base because “specific tasks” in the terminology of Art. 127 Sect. 6 TFEU do not refer to the supervision of a specific group of banks but to specific aspects of supervising all banks. This clause was never intended for the general supervision all major banks.[8]

Second, according to Art. 9.2 of the Statute of the European System of Central Banks and the European Central Bank, “the decision-making bodies of the ECB shall be the Governing Council and the Executive Board”. Thus, ultimate responsibility for bank supervision cannot rest with an intermediation committee that includes persons – in the extreme case exclusively persons – who are not members of the ECB Governing Council. This has been stressed in an expertise which the legal services of the EU Council have submitted at the request of Ecofin (Financial Times, 18 October, 2012) and by Deutsche Bundesbank (Monatsbericht, July 2013, p. 25).

Third, supervision by the ECB is also incompatible with its independent status because, according to Regulation 1093/2010/EU, the European Banking Authority (EBA) would be entitled to interfere with, and override, the decisions of the ECB in several respects. EBA may set technical standards (Art. 10) which bind the ECB. EBA may also give direct orders to particular banks if it is of the opinion that the ECB is breaching European law (Art. 17) or if the Council of Ministers calls an emergency (Art. 18). The revision of the EBA Regulation does not remove this problem. The effect of such overrides is equivalent to EBA requiring the ECB to take these actions.

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[8] This has been emphasized by Gunter Baer who negotiated this clause in the Maastricht Treaty.

The last infringement of the Treaties which I shall mention in this context is the choice of Art. 114 TFEU as a legal basis for the EBA Regulation, the Regulation concerning the Single Resolution Mechanism (SRM) and the Regulation establishing the European Securities and Market Authority (ESMA). Art. 114 Sect. 1 empowers the European Parliament and the Council to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market", "using the ordinary legislative procedure". For the definition of the internal market, Art. 114 Sect. 1 refers explicitly to Art. 26 TFEU. Sect. 2 of this article defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured …" However, international differences in the regulation and resolution of banks are perfectly consistent with "the free movement of … capital". Art. 114 TFEU concerns product regulations – not process regulations. Thus, it was a breach of law to base the EBA Regulation, the ESMA Regulation and the SRM Regulation on Art. 114 TFEU, permitting qualified majority voting. However, the CJEU has rejected the British complaint that Art. 114 TFEU is not the correct legal basis for the ESMA regulation even though the Finnish rapporteur had suggested otherwise.[9]

6. Transparency at the ECB

Finally, the CJEU passed a dubious judgement upholding the ECB's refusal to release two analyses entitled "The Impact on Government Deficit and Debt from Off-market Swaps. The Greek Case" and "The Titlos Transaction and Possible Existence of Similar Transactions Impacting on the Euro Area Government Debt or Deficit Levels".[10] These documents analyzed the fudging of the Greek budget deficit statistics in 2001 when Greece applied for membership in the European monetary union. The Court declared that the ECB enjoys "wide discretion" in refusing public access and that it is not obliged to weigh up its reasons against even an "overriding public interest" in disclosure. As Beck (2012, p. 448) points out, "this effectively means that the ECB is subject to practically no judicial oversight in the application of its transparency policy."

7. Explaining the breakdown of the rule of law

Why has the rule of law collapsed on such a large scale? Several explanations come to mind:

- The difficulties of ratifying the abortive Constitutional Treaty and the Reform Treaty of Lisbon have taught the EU political class to avoid ordinary Treaty amendments.
- All political actors assume that the Court of Justice of the European Union would back the Commission in disputes over the interpretation of the Treaties. With these expectations, they are not likely to complain with the CJEU.

[9] Judgement in Case C-270/12, published on 22 January 2014. The British complaint concerned Art. 28 of the ESMA Regulation.

[10] Case T-590/10 Thesing and Bloomberg Finance v ECB.

- In matters of objective union legislation, only the EU institutions and the member states are granted the right to take legal action – not individual citizens.
- Up to now, the German Federal Constitutional Court has always, in the last resort, shied away from outlawing EU policies.

The key to restoring the rule of law at the EU level is the reform of the CJEU.

III. Reforming the Court of Justice of the European Union

1. The status quo

The CJEU is composed of one judge from each member state. The judges are appointed by common accord of the governments for a term of six years. Reappointment is admissible and frequent. The mean term length has been 9.3 years (Voigt 2003). Every three years, some of the judges are replaced. Cases are decided by the full court (27 judges), the Grand Chamber (11 judges) or chambers of three or five judges. Decisions are taken by simple majority except in chambers of three judges or concerning the expulsion of judges. Dissenting opinions are neither written nor published. The Court interprets the European treaties and the secondary legislation of the European Union at the initiative of i) the other EU institutions, ii) national governments, iii) national courts (in "preliminary rulings"), iv) national parliaments, or chambers thereof, if they claim that the principle of subsidiarity has been infringed by a legislative act, v) the staff of the EU institutions and vi) a natural or legal person if a specific act is addressed, or is of direct and individual concern, to that person or if a regulatory act which is of direct concern does not entail implementing measures. There is also a General Court which, in some cases, serves as a court of first instance. Further details are set out in Art. 19 TEU, Articles 251-281 TFEU and the Protocol on the Statute of the Court of Justice of the European Union.

The Court has often been called a "motor of integration" – both with respect to market integration and political integration, i.e., centralization. This general impression has been confirmed by several empirical studies. Stein (1981), in a seminal paper, showed that none of the signatories of the Rome Treaty filed an observation in favour of any of the Court's major centralising moves, while each of the member states opposed the Court in at least one of them. Jupille (2004, 98f.) demonstrated that the Court significantly favours the Commission at the expense of the Council. In 2008, Carruba, Gabel and Hankla (CGH) analysed the distribution and effects of such observations in a sample of 3.176 issues over a period of eleven years. Their data shows that the Commission and the net balance of the Council disagreed on 199 (6.3 per cent) of the issues and that the Court sided with the Commission rather than the Council on 137 (68.8 per cent) of these issues (Sweet, Brunell 2010: 28). Indeed, comparing the coefficients in CGH's regressions (Table 2), the probability of a ruling in favour of the plaintiff is *significantly* higher when the Commission is the plaintiff or submits an observation favouring the plaintiff, and *significantly* lower when the Commission is the defendant or submits an observation favouring the defendant (Vaubel 2009a: 216f.). Using the CGH data, Sweet and Brunell

(2010) also show that, regardless of the net position of the Council, the Commission's observations significantly affect the Court's decision in the desired direction. By contrast, if the Commission does not file an observation, the balance of the Council does not have a significant effect.

The Court's centralist and centralising bias has been criticised by many scholars (e.g., Schermers 1974, Stein 1981, Philip 1982, Rasmussen 1986, Weiler 1991, 1999, Bzdera 1992, Burley, Mattli 1993, Garrett 1993, Neill 1995, Bednar et al. 1996, De Búrca 1998, Garrett et al. 1998, Pitarakis, Tridimas 2003, Voigt 2003, Josselin, Marciano 2007, Höreth 2008, Vaubel 2009 a,b,c, Beck 2012, Horsley 2012). A court should not propagate a political program. It ought to be an impartial and objective interpreter of the law.

2. Explaining the Court’s centralising bias

How can the Court's bias towards centralisation be explained? The economic approach to law distinguishes between preferences and constraints. Is the Court constrained to decide as it does? The independence of the judges is protected in many ways:

- They are free to decide as they like.
- They enjoy immunity from legal proceedings even after they have left the Court. The immunity of an individual judge may not be waived except by the full Court (Art. 3 Statute).
- "A judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the judges and advocates-general of the Court of Justice, he (!) no longer fulfils the requisite conditions or meets the obligations arising from his (!) office" (Art. 6 Statute).
- The number of judges can only be increased by adding new member states or amending the Treaties (Art. 19 TEU).
- The Court's independence cannot be abolished or reduced except by amending the Treaties and the Statute, i.e., by a unanimous decision of the member states including their parliaments and/or electorates.

As for potential conflicts of interest, the Treaties emphasize that judges "shall be chosen from persons whose independence is beyond doubt" (Art. 19 TEU and Art. 253 TFEU). The Statute (Art. 4) adds that "the judges may not hold any political or administrative office" and "may not engage in any occupation, whether gainful or not". Moreover, "before taking up his (!) duties each judge shall, before the Court of Justice sitting in open court, take an oath to perform his (!) duties impartially" (Art. 2 Statute). The fact that the judges are biased in favour of centralisation is a violation of their oath.

The sole constraint which may affect their behaviour is the provision that, to be reappointed, they require the support of their home government and the common accord of all member governments (Art. 19 TEU and Art. 253 TFEU). Term limitations and reappointments are extremely unusual for the judges of a supreme or constitutional court. Do they constrain the Court? The governments may not know how the individual judges – especially their own appointee – have voted in the chamber. The oath which the judges have to take also obliges them "to preserve the secrecy of the deliberations of the Court". However, if one or more governments dislike the Court's decisions, they may refuse to reappoint all judges seeking reappointment.

If the reappointment constraint were effective, it would favour the Council rather than the Commission. It would be a barrier to centralisation, not a centralising force. Thus, the Court's centralising bias cannot be explained by a lack of independence. Moreover, a cross-section analysis of 41 national constitutional or supreme courts (Vaubel 2009a) shows that the share of central government in public expenditure is significantly larger in federal states if the independence of these supreme judges is strongly protected by the constitution. Constitutional judges do not centralise because they are dependent but because they are independent. They are an independent centralising force, preferring to centralise.

In the same vein, the study shows that public expenditure is significantly more centralised when constitutional amendment is difficult, requiring a supermajority in parliament or several votes. Thus, the courts are more centralist than the constitutional legislator. They centralise more than the people or their parliamentary representatives want.

The only effective constraint on the centralising tendencies of constitutional or supreme courts is legislative override. This has been advocated by De Búrca (1998), for example. However, as Vaubel (2009a) and Sweet/Brunell (2010) have argued in some detail, legislative override is extremely difficult in the European Union. Treaty amendments require unanimity among the member governments and ratification by all parliaments of the member states. Revisions of secondary legislation always require a proposal from the Commission and usually the assent of the European Parliament, both of which share the centralist preferences of the judges. Moreover, the Council has to muster a qualified majority, in some cases even a unanimous vote. So far, there has been only one case of legislative override in the EU – the "Barber Protocol" in the Treaty of Maastricht (Vaubel 2009a, Sweet, Brunell 2010).

Finally, is the Court effectively constrained by the threat of non-compliance as some authors think? Sweet and Brunell (2010) reject this view: "The EU's legal system is organised to deal with non-compliance: member state non-compliance will generate legal actions and non-compliance with any important ECJ ruling will generate new litigation, and new findings of non-compliance" (p. 9).

If the centralist bias of the judges is neither effectively constrained nor due to constraints, it must be attributed to their preferences. Why do they prefer more centralisation than the governments, the national parliaments and the voters do? Two explanations have been discussed (Vaubel 2009a).

The first is the self-selection hypothesis: The experts eligible for appointment to the EU Court are lawyers who believe in centralisation rather than subsidiarity. That is why they have been specialising in EU law. They have studied what they cherish, not what they detest.

The second explanation is the vested interest hypothesis: The EU judges, like the Commission and the members of the European Parliament, are interested in centralisation at the EU level because it increases their influence and prestige. The larger the powers of the European institutions and the larger therefore the extent of EU legislation, regulation and administration, the more important and interesting are the cases that the EU judges will be entitled to decide. For example, constitutional courts have to adjudicate inter-institutional disputes at the same level of government. As long as the policy competence belongs to the member states, these disputes are not decided by the EU Court but by the national constitutional courts. But once the competence is transferred to the European level, the European Court is in charge.

These explanations are compatible with each other, and both are compatible with the evidence.

3. Reforming the CJEU

What can be done against centralisation by the Court? There are three possible avenues for reform: facilitate legislative override, impose effective constraints on the judges, or alter the preferences of the judges.

Posner and Yoo (2005) argue that independent courts "can be effective only in an institutional setting where external agents such as executive and legislative branches of government … correct their errors" (p. 56). Thus, whenever the European Court reinterprets secondary law, the Council may be given the right to reverse the decision without a proposal from the Commission and without the assent of the European Parliament. Alternatively, if a second chamber consisting of delegates of the national parliaments is added, as the European Constitutional Group (1993) has suggested[11], this chamber may be given the right of legislative override. Whenever the Court reinterprets the Treaties, the parliaments of the member states or this second chamber may be entitled to correct the judgement.

Could the judges be prevented from passing centralising judgements in the first place? Again, three proposals come to mind.

First, as Weiler (1999: 131) suggests, a qualified majority of the judges may be required to overturn the legislation of the member states.

Second, the Court could be required to publish its voting record or any dissenting opinions. This would enable the governments to better evaluate the performance of their judges. However, judges ought to be independent.

Third, the judges might not be proposed and appointed by the governments of the member states. A survey of 18 modern democracies (Brouard, Hönnige 2010, Table 1) shows that not a single one has a constitutional court whose judges are exclusively selected by government(s). In four countries, all judges are exclusively chosen by elected parliamentarians, in five countries the majority of the judges is chosen in this way, in six countries all judges have to be accepted by parliament, in one country (Germany) one half of the judges is selected by elected parliamentarians, and in the remaining two a minority of the judges is chosen in this way. In a supranational organisation like the European Union,

[11] For summaries see Bernholz et al. (2004) and Vaubel (2009c).

selection by a committee of the national parliaments or by a second chamber of the European Parliament might be appropriate.

How can the preferences of the judges be changed? Self-selection may be reduced by requiring judicial experience. In the past, only a minority of the lawyers appointed to the Court had previously served in a judicial function in their home country (Kuhn 1993: 195). This is still the case. The President of the Court is a former professor and cabinet minister from Greece. According to the Treaties, the judges shall be chosen from persons "who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence" (Art. 253 TFEU). Moreover, "a panel shall be set up in order to give an opinion on the candidates' suitability to perform the duties of Judge … The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament" (Art. 255 TFEU). But this panel has merely a consultative role (Art. 253 TFEU).

The European Constitutional Group (1993) suggests that the EU judges should not only have judicial experience in their home country but also be drawn from its highest court (provided that they have gained judicial experience before being appointed to it). They would be delegated for a term of eight years after which they would return to their national constitutional court. This would not only minimize self-selection but also improve the competence of the European judges and the integration of EU and national constitutional law. At present, cooperation between the EU Court and the national constitutional courts is also undermined by the preliminary reference procedure (Art. 267 TFEU) which enables the lower courts of the member states to appeal directly to the European Court, bypassing the highest national courts.

The Court's vested interest in centralisation is due to the fact that it is responsible for two tasks at the same time: (i) the task of allocating powers between the member states and the European Union, and (ii) the task of interpreting EU law within those powers. The solution, therefore, is to separate these tasks and to have two European courts: one court that has no power other than adjudicating cases concerning the division of labour between the member states and the EU – call it the Subsidiarity Court[12] – and one court that decides all other cases. This, too, has been suggested by the European Constitutional Group (1993). The judges of the Subsidiarity Court would be delegated from the highest courts of the member states. This arrangement would neither invalidate the Court's decisions nor deprive the judges of their independence. It would correct their biased incentives. This is the economic approach.

Finally, individual citizens who are affected must be given the right to take legal action against breaches of the principles of subsidiarity and proportionality.

[12] Of course, this court of review would apply both the principle of subsidiarity and the principle of proportionality.

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