International Law and the Rule of Law under Extreme Conditions

An Economic Perspective

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Comment on *Roland Vaubel*

by

Martin Nettesheim

My highly esteemed colleague Prof. Vaubel has presented a provocative, far reaching, and highly critical paper. He uses words that a legal scholar would use very carefully, and, indeed, I have never used them at all. A "complete breakdown" or a "collapse" of the rule of law is something one would expect to see in times of revolutionary turmoil or the uprising of a suppressed population against a dictatorial regime. If Prof. Vaubel attributes such an – alleged – disrespect for the legal constraints set forth by the EU treaties to the institutions involved in the reconstruction of the Euro zone, he has shouldered a heavy burden of proof. I am not sure whether the groundwork he lays is in fact strong enough to support his claims.

Let me point out at the outset that the paper contains two arguments that are somewhat related but do not depend on each other. On the one hand, Prof. Vaubel argues that the measures undertaken in the wake of the financial crises and the sovereign debt crisis are illegal. On the other hand, he confers upon the European Court of Justice a long-standing "bias toward centralization", again with the provocative addendum that this bias violates the legal obligations of the judges. While both claims lead us into the sometimes difficult discussion on issues of legality and illegality, they are not directly connected. Prof. Vaubel attempts to link them by arguing that a reform of the (currently deficient) EU court system would restore the rule of law. It is quite obvious, however, that measures undertaken to reverse a "centralizing bias" of the Court would not automatically correct the alleged transgressions of the law undertaken by the Member States in their effort to save the Euro zone. The first claim relates to the distribution of power between the EU and the Member States. At the core of the latter claim – i.e. the illegality of the support and guarantee measures undertaken by the Member States – lies the horizontal relationship between the Member States of the EU. It seems to me that Prof. Vaubel is struggling with two separate issues: the substantive issue of the reconstruction of the Monetary Union and the institutional issue of the ongoing power transfer onto the EU.

I.

I have not undertaken to count the number of treaty violations that Prof. Vaubel claims to have uncovered. The number may almost reach a low double digit figure. My point here is that the lengthy sequence of accusations is not supported by an underlying argument that would satisfy the normal standards of legal reasoning. While I am fully aware of the ongoing discussions about how to define (good) legal scholarship and jurisprudence, I would like to stress that the Western legal systems have developed argumentative cultures that provide guidance on how to frame a legal argument. I am not aware of a single system in which legal reasoning *de lege artis* is limited to an analysis of the wording of a provision. Genesis and history are as important as the purpose of the provision; its institutional environment will have to be taken into account, as well as legal precedent. It is obvious that the rules on the administration of a land title register warrant a different approach from constitutional law provisions on fundamental rights.

Skillful legal reasoning thus requires that the jurist simultaneously engages in a whole set of considerations. In light of the concrete legal problem and its underlying legal-cultural context, it can then be deduced whether the position taken by the participant in a legal discourse is compelling, convincing, arguable or simply not persuasive. While the jurist is – in "difficult cases" – confronted with interpretative leeway, her approach must not translate into methodological arbitrariness.

Of course, there is also the literary genre of the writings of the attorney in court and a use of legal arguments in a political debate. It is agreed that attorneys can – with the intention of helping their clients – raise arguments that are challenging the limits of jurisprudential conventions, or even go beyond that. It is then left to the judge to decide whether she wants to follow.

I will refrain from going through all the legal claims raised by Prof. Vaubel. Strikingly, he is oscillating between a rather strict reading of the provisions of the treaty in some cases and an expansive, purpose-driven reading in other cases. This difference is not explained. Again and again, Prof. Vaubel implicates that the understanding of the legal provisions he examines is self-evident. I beg to differ. The legality of these measures is the subject of an ongoing, sometimes heated debate, in which a considerable number of highly regarded legal scholars disagree. I am not sure whether his critique of the measures undertaken to re-stabilize the Euro zone is intended as a contribution to the jurisprudential discourse. In this case, it would clearly be deficient. If intended to influence the public political discourse, his contribution might be more effective.

II.

The most important measures undertaken to reconstruct the Euro zone governance structures were authored by the Member States. The EU institutions did contribute their share, and Prof. Vaubel rightly observes that the European Court of Justice (ECJ) did not hinder the political decision makers. I might add that I am rather convinced that the ECJ will also not declare the OMT program of the European Central Bank (ECB) void. In the second part of the paper, Prof. Vaubel claims that the Members of the ECJ are showing a "bias toward centralization" so strong that it even constitutes an infringement of the oath taken by the judges.

Prof. Vaubel never explains what he means by "centralization". Obviously, this concept is quite ambivalent and open to various interpretations. Do we already speak of "centralization" when the EU courts take any decision at all? Or should the meaning of the term be limited to instances in which the distribution of political power is affected? If we were to use the term in such a broad sense: How can this be measured? Obviously, in some cases this dimension is evident, as, for example, when an expansionist understanding of the EU competences by the EU Commission is challenged. But can the issue of the distribution of power be assessed when the EU court engages in the interpretation of substantive EU law? Obviously, it is not possible to posit a clear-cut relationship between a broad or narrow understanding of EU law provisions and the relationship between the EU and the Member States. Would the Court's opting for a broad reading of the EU fundamental freedoms imply a centralization of power? While such a reading limits the Member States' room for political maneuver, it does increase the political powers of the EU institutions. Does limiting the freedom of the Member States already amount to "centralization"? I would suggest that it is imperative to first clarify the understanding of "centralization". A critique of Prof. Vaubel's allegations is difficult while the hypothesis is so vague.

Even if ECJ jurisprudence did exhibit a tilt towards centralization, it would still be methodologically unsound to automatically blame the judges. It could well be that the judges are simply applying the law. Prof. Vaubel does not consider the possibility that the treaty itself – and the numerous treaty amendments – create a legal framework whose application necessitates the Court to extend the reach of EU law. If this were the case, a reformulation of the substantive provisions of the EU treaties would rather be warranted, as would an institutional reshuffling of the EU Court system. And one would have to add: The treaty-making Member States would be well advised to prevent explicit or implicit biases toward centralization from "sneaking" into the treaty. As long as the treaty-making Member States use language that invites the Court to broaden the scope of application of EU law ("ever closer union") or to flesh out vague legal concepts ("Union citizenship"), they face

the risk of ECJ activism. Such a judicial approach will then be well within the judicative powers and will certainly not violate the judges' oath.

I do not deny that there are areas and cases in which the court could have decided in favor of the Member States' political freedom, but decided otherwise. Do these instances warrant the reorganization of the Court? I doubt it. Whoever does not like the result should advocate a reformulation of the substantive law. For a skillful jurist, this should not be an insurmountable obstacle. Prof. Vaubel is not considering the possibility that the Member States are embracing the Court's approach by deliberately creating legal provisions with openness and ambiguity. Is he struggling with the political decisions of the 28 democratically elected Member State treaty-making institutions?

III.

I want to conclude by looking briefly at the concrete suggestions made by Prof. Vaubel. First, he advocates a decisional quorum for the Court if it intends to "overturn" national legislation. More specifically, a qualified majority ought to be reached. This suggestion hinges on the misguided assumption that the EU Courts have the power to "overturn" national legislation. They do not. Their task is the interpretation of EU law, and they only have the power to void acts of the EU institutions. Obviously, the Courts might adopt an understanding of EU law that will – as a consequence – limit the political or legislative freedom of the Member States. Also conceivably, a specific provision of Member State law might become inapplicable as a consequence of the Court's understanding. It is, however, not always evident to the Court what legal acts are affected by a possible outcome of a case in the 28 Member States. Prof. Vaubel does not elaborate on the question whether the qualified majority requirement should apply only when the law of a party to the proceedings will possibly become inapplicable or also in cases where other Member States are affected. Would it be enough to demonstrate that one Member State will be affected or is a quorum required? Moreover, it is also unclear whether the requirement should apply only when parliamentary statutes become inapplicable or also when a Member State regulation or other types of norms are affected. Why should the law-making techniques of Member States (some use parliamentary legislation, others use governmental decrees) determine the procedure of the Court? Most importantly, Prof. Vaubel's proposal fails to envision the common case in which it remains unclear at the ECJ stage whether the Court's view can be accommodated within the national legal order through interpretative means ("gemeinschaftsrechtskonforme Auslegung") or whether it will result in the inapplicability of a national provision. The EU Courts interpret EU law, and

it is left to the Member State courts to draw the consequences. Prof. Vaubel's proposal might simply not be operational. There is no need to go further and engage in the question of efficient institutional organization.

Second, he argues in favor of creating a new court that deals with issues of competence. I would counter that this is neither efficient or sufficiently operational. Questions relating to the distribution of power and to the substantive interpretation of EU law are typically intertwined. Obviously, such overlap will not exist in areas in which the exclusive competence of the EU is established. However, even there, questions could arise regarding the breadth and scope of the competences of the EU. In the typical case in which the EU and the Member States have concurring powers, any interpretation of substantive EU law (wide or narrow) will always affect the power position of the Member States. Prof. Vaubel's proposal would thus almost completely shift the power from the ECJ to the newly established "competence court". In a move that is not explained, Prof. Vaubel also elaborates on the creation of a "Subsidiarity Court" charged with the enforcement of subsidiarity and proportionality. This, of course, would be possible. The question would then be whether the Court would be able to develop a material concept of a "just" or "effective" division of power between the EU and the Member States. Any attempt to develop such a vision would lead the Court into highly politicized terrain. I have discussed these questions elsewhere.[1]

Third, Prof. Vaubel is taking the position that individuals should be granted standing to challenge possible infringements of the subsidiarity principle. I am not sure that easier access to the Court would induce its Members to adopt a more activist approach to subsidiarity. The opposite could well ensue. Moreover, the proposal raises systematic problems. If the principle of subsidiarity protects the legislative (or political) freedom of Member States, it is unclear why an individual should become the procurator of such common interests. In addition, the proposal would create severe practical problems of handling a flood of complaints in a Court system that does not correspond structurally to those of the national court systems. If Prof. Vaubel's aim is to paralyze the EU Courts, he has found an excellent approach.

[1] *Nettesheim*, „Subsidiarität durch politische Verhandlung – Art. 5 Abs. 3 EUV als entmaterialisierte Verfahrensnorm", D. König/D. Uwer (Hrsg.), Grenzen europäischer Normgebung, Bucerius Law School Press, Hamburg 2015.