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Weird things are going on in Brussels, and they are getting weirder by the day. The European Union, an international would-be superstate running an impressive democratic deficit, is gearing up to punish two of its democratic member states and their elected governments, together with the citizens that have elected them, for what it considers a democratic deficit.

Governing the EU is an unelected technocracy, a constitution without a people, consisting of unintelligible international treaties and the accumulated rulings of an international court, the Court of Justice of the European Union (CJEU) – treaties that cannot in practice be revised, and rulings that only the court itself can revise – with a parliament that is not allowed to legislate and knows no opposition.

The current issue is an old one but was long avoided, EU-style, in order not to wake sleeping dogs. To what extent does ‘European’ law, made by the national executives assembled in the back rooms of the European Council and the secret chambers of the CJEU, supersede national law, made by the EU’s democratic member states? The answer seems simple enough, for EU-unedicated simple minds: where, and only where, in the Treaties (spelled in Brussels with a capital T, presumably to indicate their sublime nature) member states have bestowed on the Union the right to make law that is binding on all member states, so that on the issues they have delegated to the EU all would have the same law and would have to stick to it, in order to allow the Union to

function smoothly.

Had it only ended there. Already in the early 1960s the Court discovered in the Treaties a general supremacy of EU law over national law. Note that to the naked eye, nothing like this is to be found in the Treaties; you need to be a member of the court to see it. At first, as long as the jurisdiction of the EU was still rather narrow, nobody bothered. Later, however, when the EU was increasingly used to open up national economies to the 'four freedoms' of the Single Market and then the common currency, the doctrine of the primacy of European law served as a convenient device to extend the Union's authority without rewriting the Treaties, especially as this became ever more difficult with the rising number of member states, from six to, before Brexit, 28. What at first was to be no more than a highly selective upward transfer of national sovereignty, gradually became the principal institutional engine for what came to be called 'integration by law', operated by the Union's central authorities and supported by varying coalitions of member states and governments – something considered by lawyers in particular to be normatively and technically superior to integration by politics.

While motives changed over time, integration by law always involved a deep reading of the Treaties to discover ever new reasons for subjecting democratic national polities to a post-democratic international technocracy. With Treaty revisions effectively blocked after the defeat in 2005 of a draft 'Treaty for a European constitution' in a French referendum (55.7% voting against it), the CJEU eventually became the EU's single most important legislative and indeed constitution-writing body. (Ironically, one of the likely reasons why the constitutional treaty was rejected was that it explicitly stipulated the primacy of European law.)

Nobody knows for sure what is hidden in the depths of the European Treaties as they now stand, hundreds, even thousands of pages depending on the typeface. The only exception is the

CJEU, and this is because what it says it *finds* in there is for all practical purposes what *is* in there, as the court always has the last word. So the CJEU, or in anticipation of it the European Central Bank or the European Commission, may read into the Treaties functional reasons for what the Germans call 'more Europe' – monetary policy must (!) today (!) encompass fiscal policy – or general intentions – hidden in the commitment of member states to an 'ever closer union among the peoples of Europe', reading people for peoples – or 'values' like 'democracy' and 'human rights' requiring, for example, more enlightened sex education in Hungarian state schools.

What precisely it will find in each case may be uncertain; what one can know for sure, however, is that the Court will never miss an opportunity to 'build Europe', meaning to confirm the supremacy of European over national law, as ultimately made by itself. Watching the CJEU go about its duties reminds one of a character in a Damon Runyon story called Rusty Charley, a small-time gangster working the 1940s Broadway who, when playing dice with his fellow-gangsters, rolls the dice inside his hat and then announces the result without letting the others take a look. Although he always won, nobody felt like asking inconvenient questions since Charley was 'such a guy as is apt to hate being called a liar'.

That the supremacy of European over national law has presently become a matter of high political drama is to do with the EU's politics of extension-turned-overextension. Facing conflicts and cleavages that they cannot politically contain, the 'pro-Europeans' are placing their hopes in the Court, to substitute the legitimacy of the law for the exhausted legitimacy of supranational politics. At the centre of the present controversy are Poland and Hungary with their 'illiberal' political regimes. Both countries insist on a strict interpretation of the Treaties, one that tightly limits the extent to which a member state's politics and European policy can be a matter of concern for other member states or for EU institutions.

In the so-called 'Treaty base', a country's legal system is subject to EU supervision to the extent that it may be needed to ensure the government's proper, non-corrupt use of EU funds. While in a literal reading this is all that is meant by the so-called 'rule of law' requirement, 'pro-Europeans' claim it extends to the status and organization of a country's highest court, in particular its independence from the executive. Member states are also expected by the treaties to conform to certain democratic and human rights standards; if they do not the Council can, by unanimous vote, take away their voting rights – not, however, expel them, which isn't an option for an international organization that considers membership irreversible.

Normally, corruption and the politicization of a country's highest court are not much of an issue in European politics. As to corruption, Poland is known to be largely clean (Hungary less so) while countries like Romania, Bulgaria, Slovenia, Slovakia and Malta are widely known as strongholds of cronyism and venality, not to mention, in some cases, the deeply entrenched abuse of minorities. Indeed, both Slovakia and Malta have recently witnessed the assassination, by criminal gangs connected to government circles, of independent journalists investigating corruption in high places. Still, nobody threatens to cut their European subsidies, and the liberal European press carefully abstains from comparing the Polish and Hungarian 'rule of law' to theirs.

There is reason to believe that this is because, unlike Poland and Hungary, they reciprocate for cash received by always voting with the Commission and otherwise keeping their mouths shut. Similarly, political influence on a country's high courts is something that EU bodies have good reason not to make too much fuss about: where there are constitutional courts at all, all of them are, in one way or other, politicized; for Spain see the recent case of Podemos MP Alberto Rodriguez. (Sometimes politicization is considered outright desirable: Note that the EU commission and Parliament are taking Germany to the CJEU for its government not having prevented its Constitutional Court

from forming an independent judgment, to the embarrassment not least of the German government itself, on the limits of European legal authority, in the case of the ECB's debt purchasing programs.) What is special about Poland and Hungary is not that their highest judges are appointed 'under the influence', but that their governments, like increasingly the German constitutional court, openly insist on a narrow interpretation of the primacy of European law and a correspondingly extensive interpretation of – their – national sovereignty, in open defiance of 'integration by law', or by empire, as conducted by the CJEU.

The story that is presently unfolding here, then, is not a legal but a political one. Its most recent episode started with the Council passing the multi-billion NGEU Corona recovery fund, with considerable sums allocated to Hungary and, in particular, Poland, even though they were only marginally affected by the virus. For the European Parliament (EP), which has to approve the measure, this was an opportunity to extend its efforts to bring about regime change in the two countries, by making disbursement of their recovery money dependent on political and legal concessions to the EU. Elections are upcoming in both countries, and the hope was that a loss of European funds, allegedly destined to enable Poles and Hungarians to have a better life, more resilient to capitalist crises in general and coronavirus in particular, would undermine the present governments, as would getting the funds by caving in to 'Europe'.

Hopefully this would, in the course of international elite management, put governments in place that are less responsive to their peoples and more to 'Europe', as constituted by the EU. It might also increase the number of liberal MEPs from the two countries, making the EP even more 'pro-European' than it already is. The problem for the Commission was that NGEU needed a unanimous vote in the Council, with Poland and Hungary set to vote against it if it came with any special clause directed against their governments. At the same time, the EP

made its approval conditional on the Commission accepting what came to be called a 'rule of law mechanism', forcing the Commission to withhold funds to countries not respecting the primacy of European law, as discovered by the Court.

To get its way, the Commission went along with the EP while, apparently, promising Hungary and Poland that the 'mechanism' would never be activated. Officially, it was announced that it would be used only after its approval by the CJEU, where Poland and Hungary would challenge its legality. This was understood to take time, longer than the disbursement of the NGEU funds. Meanwhile on the Council, the 'frugal' Northern Europeans, led by the Netherlands, insisted that Poland and Hungary be treated harshly – probably to make their national publics believe that they could save precious North European money by having the EU cut the Polish and Hungarian allotment, in punishment for insufficient adherence to the rule of law. The result was an unprecedented public row, with pressure on the Commission mounting to be strict with the two 'illiberal democracies', inviting the Court to move faster than expected. In response the Polish Constitutional Court issued a ruling, long in the making but held back for political reasons, which, invoking the precedent set by the German *Verfassungsgericht*, declared the Polish constitution generally to be above European law. More turmoil can safely be predicted.

Non-German observers find it hard to avoid the impression that the worst rabble-rousers in the battle over Poland's and Hungary's liberal-democratic deficit are the Germans. A leading figure here is one Katarina Barley, Social Democrat and a former Minister of Justice in the Grand Coalition, until her party made her its top national candidate for the 2019 European election. This ended in a veritable disaster, at 15.8% after 27.3% five years earlier. Having moved willy-nilly to Brussels, Barley managed to secure for herself one of the fourteen (!) posts of Vice-President of the EP. In the autumn of 2020, Barley let it be known on German radio that the 'rule of law mechanism' had to be applied to 'starve' (*aushungern*) Viktor Orbán in Hungary as well as Poland

generally. There are vivid memories in Poland, shared across generations, of the last German attempt to starve the country – memories apparently alien to ‘pro-European’ German politicians who, however, know for sure how neighbouring countries have to be governed: on the German model, as specified by the German government via Brussels.

Similarly Manfred Weber from the CSU, chief of the Christian Democrats in the EP and former candidate-in-vain for the presidency of the Commission, keeps threatening Poland and Hungary with ejection from the EU (which is not provided for in the Treaties). The German Foreign Minister, also a Social Democrat, welcomed the ‘rule of law’ statute for its capacity to ‘inflict pain’ on Hungary and Poland, and was applauded by a veritable army of German Greens in and out of the EP, cheered on by the German press, ‘quality’ or not, public broadcasting included. If you add von der Leyen, Polish citizens may be forgiven for believing that their country – whose government, like that of Hungary, has the support of more or less one half of its people – has again become an object of German aggression.

What is behind this, apart from the amazing historical amnesia, or sheer stupidity, of all-too-many German ‘pro-Europeans’? The money that goes to smaller EU member countries under NGEU must appear enormous to the average German taxpayer, especially as he or she begins to divine the huge costs of the impending ‘energy turn’, or of renovating the austerity-‘starved’ German infrastructure. The real object of the recovery fund – keeping national elites in Eastern Europe who are committed to the Internal Market and averse to alliances with Russia or China in power – is too delicate to talk about in public. So it needs to be demonstrated that the money buys something more uplifting than imperial stability: submission to Western European cultural leadership documented by the selection of leaders that suit Western European taste. One example would be the neoliberal Donald Tusk, a former Polish Prime Minister who was voted out of office after his government had ruined the national economy, only to be put in a holding pen in Brussels as one of the handful

of European Presidents, where he was groomed for a victorious return after putting an end to Kaczyński and his ilk.

Will Poland and Hungary learn to be like Romania or Bulgaria, if not Malta and Slovakia, and thereby placate their Brussels foes? If they refuse and the CJEU gets the last word, another this time Eastern hour of truth may strike. How the court will rule is as certain as that the number of pips on Rusty Charley's dice will be the number he needs to win. This may open the road to Polexit, just as Merkel's denial of concessions to Cameron on immigration added momentum to Brexit. While von der Leyen has increasingly adopted the rhetoric of Barley, Weber and the Greens, Merkel, in her last hours as Chancellor, urged the EU to exercise moderation and seek a political rather than a juridical solution. (Merkel may have been notified by the United States that they would not be amused to see Poland, their strongest and safely anti-Russian ally in Eastern Europe, leave the EU, where it is fed by Western Europe so that it can be armed by the U.S.)

In this context, note that there now seems to be a slow awakening in other member countries over the sheer presumptuousness of the EU's increasingly explicit insistence on the general primacy of its law over that of its member states, including their constitutional law. The battle of Poland and Hungary may put an end to the era when 'integration by law' could, thanks to its incrementalism, be treated by increasingly short-termist national governments with benevolent neglect. For example, French centrist politicians getting ready to run for the Presidency next year, like Valérie Pécresse (Les Républicains), Arnaud Montebourg (a former Socialist) and even Michel Barnier, the EU's militant Brexit negotiator, have begun to worry about what they now call French 'legal sovereignty' – some of them, including Barnier of all people, demanding a national referendum to establish once and for all the supremacy of French over European law.

While this is being written, out of the blue the CJEU sentenced Poland to a fine of one million euros per day for not having

abolished a chamber of its Supreme Court set up by legislation to oversee the Polish judiciary with the intention, it appears, to subject it to greater political control. (Poland has already stated its readiness to abolish the chamber by the end of the year.) Together with another fine of 500,000 euros per day previously imposed for continuing to operate a particularly dirty soft coal mine, this amounts to roughly half a billion euros per year. As much as this may seem, it is miniscule in comparison to the 36 billion Poland is due to get out of the recovery fund. Apparently, these are currently being held back by the Commission under pressure from the EP, until now without formal explanation.

Whether this kind of political hardball will bring about the desired regime change is, however, far from assured. The first line of the Polish national anthem, *Jeszcze Polska nie zginęła*, translates as 'Poland is not yet lost'; it expresses a strong appetite for fighting a battle, even a losing one, to the end, against the odds, in defence of the national honour. In part because of this, a political deal still seems possible, and perhaps the one million fine is no more than the last hurrah of a court that expects to be sidelined by politicians able to think twice before they invite another national exit. (The German commentariat is certain that Poland will give in, being for sale like everybody else.) Rumour has it that Donald Tusk, who recently appointed himself *Spitzenkandidat* of the Polish opposition for the 2023 national election, has behind the scenes sought and received assurances from the Commission that the first instalment of the Polish share in the recovery fund will soon be disbursed, probably fearing that if it were not, this would not help him but the government of Kaczyński.

Read on: Gavin Rae, 'In the Polish Mirror', NLR 124.