Ultra Vires

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Remember the campaign, conducted by the European Commission (EC) and the EU Parliament (EP) with the help of the Court of Justice (CJEU), to teach Poland the rule of law by withholding its share in Ursula von der Leyen's precious, the Next Generation EU (NGEU) Corona Recovery Fund? EU legalese being not by accident notoriously difficult to understand for anyone but the Court itself, hard thinking reveals that 'rule of law' means two things here: independence of the national judiciary from the national executive, and recognition by both of the supremacy of European over national law, including national constitutional law, whatever the European law may be, which in case of doubt is a matter for the CJEU to determine, and the CJEU alone.

Poland, according to Brussels, needs to be taught a lesson, and not just because of the government's packing of the constitutional court with judges dear to the heart of the majority party. Both the constitutional court and the government believe in a narrow interpretation of European legal supremacy, rather than the broad one preferred by the EC, EP and CJEU. As a result, the Polish constitutional court is likely to find certain, but not all, legal commands emerging from Brussels to be *ultra vires*, transgressing the limits of European jurisdiction, thereby violating not only Polish law but also the European Treaties to the extent that EU member countries have in the Treaties ceded only some but not all legal powers to the Union.

Making it worse and ringing alarm bells all over Brussels among right-thinking 'pro-European' Europeans, is that in order to legitimate their lack of obedience to the rule of law as defined by Brussels, the Polish constitutional court, supported by the 'anti-European' Polish government, likes to invoke a recent decision by the German constitutional court, the Bundesverfassungsgericht (BVG). Having long been seen as a paragon of both political independence (thanks to its careful appearance management) and EU loyalty, the BVG recently declared the CJEU *ultra vires* for finding the BVG in breach of European law, in particular for failing to affirm loud and clear its general supremacy over national law on an issue relating to the powers of the ECB to commit national central banks to support specific supranational monetary policies. Embarrassed by itself, the German court declared itself satisfied that the ECB had stayed within its competence and would refrain from pursuing the matter further.

This, however, did not satisfy the EC. Under pressure in particular from Green German MEPs, it declared Germany to be in breach of the Treaties for its constitutional court having suggested that the EU's *vires* may perhaps have at least some limits after all. To set an example, the EC started a Treaty infringement procedure against Germany – parallel to the several infringement procedures against Poland and Hungary – to let everyone know that invoking the German court won't get them their money, and that in any case Brussels applies the rule of law even-handedly, to rich and poor, big and small alike. Infringement procedures can end up at the CJEU if the country in question fails to satisfy the Commission that it has mended its ways and forthwith renounced its life of sin.

So far, so good. Then, on December 2, a few days before the new German government was to be sworn in, the Commission all of a sudden dropped its case against Germany, without much ado and so inconspicuously that the German press hardly noticed, or could pretend not to notice. Germany, according to a Commission press release – the only available official document – had formally recognized 'the autonomy, the supremacy, the effectiveness and

the uniform applicability of the law of the Union', together with 'the values anchored in the treaties, especially the rule of law'. Germany had also 'acknowledged the authority of the European Court of Justice' and the principle that 'the legality of actions of the Union's organs … can be reviewed only by the Court of the European Union'. Above all, the German government had 'committed itself to use all means available to actively avoid *(aktiv zu vermeiden)* a future repetition of an *ultra vires* finding (*eine Wiederholung einer Ultra-vires-Feststellung*)'.

It is symptomatic of German politics, and of European integration today, that the Commission and the German government managed to shield the settlement of the infringement procedure and its terms from public attention. The only response in Germany up to now has been a draft question submitted to the government by a member of the Bundestag, asking whether it was true that the government had undertaken to influence the future jurisdiction of the constitutional court; which legal means the government believes to have at its disposition for the purpose; whether the government considers such influence compatible with the principle of separation of powers; and whether it considers it generally illegitimate for the constitutional court to review legal acts of the CJEU. The fate of the draft is not yet decided.

The case, however, may be closed anyway. In June 2020 the ten-year long tenure of Andreas Voßkuhle as president of the BVG came to its scheduled end. Voßkuhle, a law professor with a mind of his own, had widely been seen as a driving force behind the court's *ultra vires* decision. He was replaced, on a proposal of the Bundestag, by Stephan Harbarth, who had been appointed to the court at the end of 2018, initially as Voßkuhle's vice president. In March 2020 Harbarth let it be known that he expected to be Voßkuhle's successor. He was elected the same year, and appointed by the Bundespräsident after Voßkuhle's term had ended. Publicly Harbarth was presented, and welcomed, as the first practicing lawyer on the court. While he had been a partner in a big, American-owned law firm since 2006, however, he had

also been a Bundestag member for the CDU from 2009 to 2018, when he resigned from both the law firm and the Bundestag to move to the BVG. In his time as an MP he held influential positions in the CDU, the party as well as the parliamentary party, a mover and shaker mostly behind the scenes, while remaining a partner at his law firm. Harbarth became known largely for being one of the Bundestag members with the highest outside income, at the end of his time in parliament reporting more than 400,000 euros per year (then members did not have to report exact figures, having only to assign themselves to discrete income categories, of which 400,000 and above was the highest). Harbarth's additional earnings on a few occasions became a matter of public debate, as political opponents and journalists questioned how his additional income could have possibly been payment for work done, given his duties as a member of parliament.

That the BVG should stop throwing spanners into the wheels of the rule of European over national law is no minor matter, and apparently the expectation is that an experienced politician, Merkel mainstay and world-wise practicing lawyer like Harbarth understands this better than an academic who only understands the law. What is at stake here is what has been called 'integration by law', which has over time evolved, more or less by default, into the most important mechanism for bringing about the Treaties' 'ever closer union among the peoples of Europe'. This is because the now 27 member states are unlikely to unanimously agree on a revision of the Treaties to extend the power of the Union, not least because some would need to have the revision approved by popular vote. Thus, an alternative route to supranational state or empire-building has to be found, bypassing the need for a formal Treaty revision and in particular circumventing Article 5 of the Treaty on European Union, which states that 'the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality', and that 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member

States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

Originally this was understood narrowly and specifically, referring mostly to issues of the common market and of competition law, and later extending for example to the regulation of European arrest warrants. As political integration got stuck, however, Commission, Parliament and Court began to read a less specific conferral of competences into general declarations in the Treaties of intentions and 'values', like those committing the EU to democracy, human rights and the rule of law. On this basis, Commission and Parliament claimed a right to intervene deeply in the national politics and legal orders of member states if they determined this to be necessary in pursuit of European values. Moreover, in case countries objected in defence of their own interpretation or of their national sovereignty, it was to be for the CJEU to decide under yet another principle, that of the supremacy of European law – a principle, by the way, that is not set out in the Treaties but was posited long ago by none other than the CJEU itself. Retooled like this, integration by law became a *passe-partout* for deep EU interventions into the domestic orders of member states, to make them adhere to general principles like democracy and the rule of law as interpreted by the EU, and to cooperate with European integration as directed, again, by the Union.

The way this works can be seen by comparing the cases of Poland and Germany. Germany was accused because its constitution allowed its constitutional court enough independence to rule against the national government – in other words, for its government not preventing the court taking a view different from that of the government, thereby upholding the rule of law. When, upon pressure from Brussels, the German government promised that it would see to it that the court would from now on rule in line with the national government, thereby committing itself to curtailing the independence of the court, and with it the rule of law, proceedings were ended on the grounds that the country

had promised to respect the supremacy of European law. Poland, on the other hand, is accused of, and is already being punished for, *not* allowing its court enough independence to rule against the national government, thereby curtailing the rule of law, this time however by allowing the national court to challenge the doctrine of the universal supremacy of European over national law.

As a remedy, Brussels expects the Polish government to change the composition of the constitutional court so that it will rule in favour of European law supremacy in future, in which case it will pass the rule of law test, which in fact is a cooperation-in-integration-by-law test. Until it does so, the EU will withhold the financial support to which the country is entitled under the Treaties, breaking the law in defence of the law – a Schmittian *Notstand*. As a side effect, hardly unintended, the domestic opposition to the Polish government, led by a former Polish prime minister voted out of office for strict adherence to EU neoliberal economic recipes and compensated by his Brussels friends with one of the five EU presidencies, will be able to claim that by voting for them and for the supremacy of European law, Polish citizens will again benefit from EU financial support. In effect this turns the battle over the rule of law into an instrument of imperial elite management aimed at national regime change.

To recapitulate: under current EU doctrine, protecting the rule of law requires in some countries repression of national courts by national governments, while in others it requires their liberation. The German government satisfied the Commission by promising to 'actively' discourage anti-European, pro-national tendencies on its highest court, thereby undermining domestic in favour of supranational rule of law; while the Polish government drew the ire of the Commission by encouraging anti-European, pro-national tendencies on the part of its constitutional court, thereby undermining domestic but also European rule of law, as interpreted by the CJEU. Whereas German undermining of domestic rule of law is forgivable because it serves European rule of law, Polish undermining of domestic rule of law is not because

it undermines European rule of law.

How does integration by law fit the worldview of the new German government, and what are its prospects for the future of the 'European project'? The coalition agreement's section on Europe, which comes at the very end of a very long document, reveals the handwriting of the Greens and their Foreign Minister, Annalena Baerbock, in calling for nothing less than a constitutional convention to open the way into, in literal translation, 'a federal European federal state' (*einen föderalen europäischen Bundesstaat*). Nobody in Europe aside from the German Greens wants this in earnest, and Baerbock was told so in no uncertain terms on her inaugural visits to Warsaw and Paris. Baerbock will also have to learn that for Germany, integration by law rather than by convention is the ideal method to build a German-dominated European state or empire: rule-based rather than politics-driven, proceeding through juridical authority instead of political legitimacy, based on 'values' and derived, with juridical expertise and authority, from norms rather than interests, drawing for legitimacy on obedience to the law instead of political consent, and engineered behind closed doors by academically trained specialists. It also makes it possible to single out individual dissenting countries for correctional punishment, something difficult to do at a constitutional convention. The only problem is that Germany's indispensable European co-hegemon, France, has little enthusiasm for this approach, historically and culturally preferring politics over legalism, discretionary over rule-bound decision-making, and personal leadership over the impersonal application of legal norms.

In fact, the French political class seems increasingly disillusioned with the preferred German route to 'Europe', which it sees less and less as leading toward a 'European sovereignty' modelled on the French that can be projected worldwide. Instead the impression is growing that integration by law would end in nothing better than government by bureaucracy supervised by a supranational legal expertocracy – suited perhaps to building an international neoliberal market but unable to found an imperial

state capable of acting on a global scale. Indications are that recent political pronunciamientos in the run-up to the French presidential elections on the value of national as distinguished from European sovereignty are related to growing doubts over German-style integration by law.

And there are further signs of fracture. Shortly before the holidays, two weeks after discontinuing the infringement procedure against Germany, the European Commission started several additional such procedures against Poland. At issue were various judgments of the Polish constitutional court that insist on the primacy of Polish constitutional law over European law where in the Treaties member states had not conferred specific competences to the EU and by implication the CJEU. Preparing the decision, von der Leyen was quoted by the EU's PR office as saying that 'EU law has priority over national law, including constitutional law', a principle which according to her 'had been accepted by all EU member states as members of the European Union'. Rhetoric like this has the potential of waking up hordes of sleeping dogs in national capitals, as it offers a taste of what a prominent, politically unsuspicious German European law specialist – a profession with a deeply rooted *déformation professionnelle* making it condone even the most daring deployment of law in furtherance of 'ever closer union' – has found himself prompted to call a '*coup d'état* from above', by means of integration by law in its new, extended version.

Even the Frankfurter Allgemeine Zeitung, usually a faithful foot soldier for EU-Europe, took issue with the new infringement procedures against Poland. On December 23 it asked, under the title of 'Political Justice', and an extended quote seems justified here: 'If the Polish constitutional court was in reality as independent as it is supposed to be, what should the Polish government then do against the court decision that is now the occasion for yet another infringement procedure? The government is after all not allowed to dismiss a decision of the constitutional court or to influence its future jurisdiction.' And further: 'Basically the EU Commission urges the Polish

government to do that for which it rightly criticizes it sharply: to exert political influence on the judiciary, now only in the opposite direction'. It is indicative of the rotten state of the political public in the biggest and most important country of the EU that there is no mention in this comment of the amazing parallels with the infringement procedure against Germany that had been dropped only a few weeks ago, on assurances by the German government to the Commission that it will 'actively prevent' another *ultra vires* verdict of the constitutional court.