

State-building by stealth?

Wolfgang Streeck

The PSPP (Public Sector Purchasing Program) ruling of the German Constitutional Court (GCC) has laid bare yet another fault line in the edifice of the European Union, that between legal systems with different concepts of constitutional law. There are parallels here to the UK, where the EU kind of a constitution written step by step by a court of last instance clashed with a deeply rooted tradition of government by parliament, contributing to Brexit. In the conflict between the GCC and the European Court of Justice (ECJ), we observe a fight between two powerful courts of last instance over which is the last of the last, raising the general issue of the nature of the EU as either an international organization or a federal state.

The strong position of the GCC in Germany is an essential part of the country's post-war political heritage. It is comparable to the provision in the German constitution that German troops, even if under international command, cannot be deployed without a narrowly defined parliamentary mandate. Both limit the discretion of the federal executive, and neither sits easily with another constitutional obligation for the German government, which is to pursue international cooperation as a national objective.

Generally the extensive powers of the GCC constitute an uncomfortable veto point for German governments, in both foreign and domestic policy. This is so although sometimes reference to the court as a potential spoilsport can improve the country's international bargaining position. On the other hand, the court mostly does its best to accommodate the government in power. This it did also in the PSPP case, in that it refrained from barring the German central bank from participating in the ECB's bond purchasing program. What it insists upon, however, is its authority to decide if actions of organs of the German state, here the Bundesbank, might infringe on democratic and political constitutional rights of German citi-

zens, on the ground that they are not covered by German constitutional law or by international treaties lawfully ratified by the German state.

The implications are far-reaching. Sticking to its constitutional mandate, the court insisted that EU, ECB and ECJ cannot extend their jurisdiction to the constitutional rights of German citizens vis-a-vis the German state. While this may seem trivial, it implies that the European Union is not (yet) a federal state, but depends on specific powers delegated by its member states. (One of the judges in an interview: “As long as we are not living in a European state, the membership of a country is governed by that country’s constitutional law.”) The ruling also implies that constitutions, including the *de facto* constitution of the EU, cannot be amended on the side. Nor can they be ignored under the pressure of a crisis, following Carl Schmitt’s infamous verdict, *Der Notstand ist die Stunde der Exekutive* (the hour of need is the hour of the executive), not to mention the infamous German saying, found also in English and Spanish, *Not kennt kein Gebot* (need knows no law). So if you want the EU to be sovereign, the court says, you are free to seek a formal revision of the treaties, followed by referenda where constitutionally required for treaty changes to become law. Federalism, why not, but in bright daylight please, not as a side-effect of ECB crisis management sanctioned by an activist European court. (Of course a federalist revision of the treaties, in fact any revision, is for all practical purposes out of the question, now and in any foreseeable future.)

It is interesting that the commentariat, right and left, fails to understand how embarrassed the German executive is about the GCC’s PSPP ruling, at a time when Germany is to take over the presidency of the Union for the second half of 2020. Cooling down the rhetorical excitement over German tightfistedness may require the German state to pay more for its European hegemony than it can extract from its crisis-battered citizen-voters. Worse, the ruling has raised the question of all questions which European governments have learned painfully to avoid, which is about the true nature and the real *finalité* of the EU. The temptation for the German political class to use the European outcry over the GCC to get rid of it must be

enormous. That this would expand the political leeway of the executive would be in line with a general tendency everywhere in capitalist democracies, remarkably paralleling developments for example in Poland and Hungary.

Cutting the powers of the GCC would not be easy since its prestige among the German public is high. Still, a constitutional amendment turning the GCC to a court of second-to-last instance behind the ECJ might go through, especially if the impression can somehow be created that it will help against Corona and the economic disaster that might follow it. The necessary two-thirds majority in the parliament might be there, with the SPD and the Greens filling in for those CDU/CSU deputies refusing to vote in favor. Would this not be a nice present for Merkel to offer the European Council as Germany takes over the EU presidency on July 1?

A downgrading of the German constitutional court should also be welcome to those who, like the philosopher Jürgen Habermas, call for a European army as a vehicle towards a European state. The need to get a mandate from the Bundestag has often been a problem when Germany was asked to contribute troops to „missions“ in places like Iraq, Libya, Syria, Mali, or Afghanistan. With the constitutional court out of the way, at least for foreign policy and international cooperation, the government would find it easier to override parliamentary opposition. Ursula von der Leyen, now President of the European Commission, should in her previous capacity as German defense minister have been in more than one situation in which she couldn't do the Americans or the French a favor because of predictable objections in the Bundestag.

In any case, immediately after the court had announced its ruling, German Green European Parliament members called upon the Commission to start formal infringement proceedings against Germany, although the German government had done nothing to implement the judgment, and it wasn't clear at all if it ever would. Von der Leyen, an old Merkel loyalist, immediately followed suit, expressing fear that Eastern European countries like Poland might otherwise feel encouraged also to disobey the ECJ. On the occasion, she parenthetically re-

ferred to the PSPP ruling as a violation of “European sovereignty”. Infringement proceedings take time and in any case there will be quite a few member states wondering what it would do to their sovereignty if the EU managed to claim sovereignty for itself; they may be waiting until the last minute to speak up, hoping that the Germans will slug it out for them. Very likely, the proceedings will be ended, or never be started, in exchange for Germany paying more into the next European budget, perhaps after having slaughtered its constitutional court as a sacrificial lamb on the altars of Europeanism.

Whatever else may happen, count on two things. One, the German government will find ways to allow the ECB to carry on doing “whatever it takes” to keep the euro alive. (If this will ultimately be successful is a different matter.) The euro is the ultimate German bonanza, and while it is far from clear why Italy and Spain and France are so eager to hang on to it, for Germany it is its lifeline in these times of secular capitalist stagnation. And two, while the ECB and the Brussels budget and the European investment bank *e tutti quanti* may for a few more years find the means to keep the political classes of the Euroland’s declining southern periphery in power, through injections of European cash and skillfully staged German symbolic capitulations, this will do nothing to halt the economic devastation of the Mediterranean countries. That devastation is structural, rooted in their abdication of monetary sovereignty, and so profound that it cannot be remedied by whatever transfer German governments can economically or politically cough up. The result will be growing inequality, between countries and within, and even faster growing international hostility. The hour of truth is arriving for German empty promises, made in the reckless hope that they will never have to be redeemed, and the disappointment will be poisonous to the extreme.