Verfassungsblog
ON MATTERS CONSTITUTIONAL

Majority is a Legal Concept

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Dear Friends of Verfassungsblog,

The Dutch, as is well known, do not have a constitutional court. An old and well founded democracy, the Netherlands prefer to entrust constitutional questions to politics and not to judges. The majority is not allowed to do everything, particularly with respect to international human rights law, but what exactly it should be allowed to do is ultimately its own responsibility. This is how things work in the Netherlands as well as in many other European countries, e.g. in Scandinavia. Does it work? It does, mostly. It has been working for a long time. Longer than most democracies with constitutional courts even exist.

It worked last Wednesday, too. Four out of five voters cast their votes at the Parliamentary elections in the Netherlands, and of them six out of seven voted in a sense to which all friends of Verfassungsblog can probably agree, which is: not for Geert Wilders. 13.1 percent is a number that should deflate the right-wing populist claim of representing the true people for some time. The wind of history does no longer fill the sails of the populists as it appeared to do with Brexit and Trump, but instead has blown off the layer of dust that caked and covered democracy not just in the Netherlands and laid bare the truth about right-wing populism: Most people want no part of it.

Now, before we get too boisterous with our enthusiasm for majoritarian democracy' resilience in all sorts of political storm and send all lawyers home packing, I would like to make two caveats.

Firstly, a majority is not something you will find in nature. It is an artifact of law. You need legal rules to determine who counts, and in which way. You need legal safeguards of liberty, equality and diversity of opinion. You also need legal rules to determine what the majority will be able to do, which necessarily implies that the majority gets told what she is *not* allowed to do. In short, you need constitutional law.

In a constitutional state, without legal guidance even the most powerful majority is neither powerful nor a majority. Theresa May had to learn through the *Miller* judgment of the UK Supreme Court that even the "will of the people" expressed in a referendum did not authorize her to launch Brexit without parliamentary consent, in a system that does not even have a written constitution, let alone a constitutional court. Donald Trump, for the time being, is powerless to enforce his second-edition Muslim Ban as long as constitutional law prohibits religious discrimination and federal judges in Hawaii or elsewhere are prepared to say so.

This dependency of power on constitutional law, and this is my second caveat, can eventually become unstable. Power conferred by constitutional law can be turned against constitutional law and erode it from the inside out. The power to change laws (e.g. the procedure of the constitutional court) and institutions (e.g. the judges on the constitutional court) can be sufficient to change the face of constitutional law, without changing a single letter of the constitutional text, beyond recognition. As constitutional constraints go out of the window, so does constitutional empowerment. At the end of that erosion process, power is powerful only as far as it is powerful enough to assert its power: a classic autocracy, a hollow shell with a tautological emptiness where the legitimatory heart should be, ready to be toppled over once fear subsides.

Law v. Autocracy

The prime example for this kind of constitutional erosion, unsurprisingly for any reader of this blog, is Poland. AGNIESZKA GRZELAK describes the absurd results produced by Constitutional Tribunal after its subjection by the government: three of the judges who are now in office are actually sitting on posts already occupied by others – which means that whatever they

ordain is null and void. Now a chamber including two of these "quasi-judges" has declared a law (in a politically relatively harmless case) unconstitutional – and the Ombudsman, who had just applied for that verdict, can not recognize it!

An even more advanced sort of *reductio ad absurdum* of power was on display in South Korea, where the democratically elected President, daughter of a former autocrat, had installed an obscure Rasputin figure as inofficial but effective supreme power-wielder of the state. Mass protests on the street and a parliamentary impeachment process were the result, but it was for the Constitutional Court to carry out the actual act of dismissing the President. The whole fascinating story is told by YOON JIN SHIN and MATTIAS KUMM.

In Turkey, autocratic President Erdogan is no longer satisfied with changes on the subconstitutional level but aims to adapt the constitutional text itself to his crave for power, and to legitimize this by popular vote. His attempts to mobilize Turks in Germany, France and the above-mentioned Netherlands have met with much popular resistance, most of all by the likewise campaigning Dutch government. Why do we all so unanimously assume that Turkish election campaigns on German or Dutch soil need per se be prevented in order to preserve our sovereignty? MATTHIAS GOLDMANN is unimpressed by these claims for both legal and political reasons, the praised chamber decision of the Federal Constitutional Court last week expressly included. The German Constitutional Court had (without need) stated that the German government is free to exert its discretion in matters of foreign policy in a way that prevents campaigning by Turkish government members on German soil, but at the same time the Court kept silent on the freedom of assembly rights of their Turkish audience. This, according to Goldmann, is not a very convincing way to assert the authority of constitutional law against autocrats.

A People of Many

No state is as monolithic as the owners of power would like it to be. In Great Britain, much to the wrath of Theresa May, the Scottish government has announced its intent to hold a second independence referendum in order to save the Scots from the indignity of following their English compatriots along the Brexit path out of the European Union against their will. TOBIAS LOCK analyzes how this would work according to British constitutional and European law.

In Donald Trump's USA, there has been much talk about so-called Sanctuary Cities who refuse to help the Washington government deporting undocumented foreigners. HELENE HEUSER draws a comparison to similar movements in Germany and elsewhere and is exploring the possibilities for municipalities to disrupt the deportation policy of the federal government.

No polity is farther away from being a monolith than the European Union. GIUSEPPE MARTINICO takes the White Paper of President Jean-Claude Juncker as an opportunity to discuss the option of an asymmetric Europe, with different degrees of autonomy and integration from one Member State to another, and finds much to like from the perspective of federalism research and comparative constitutional law, with certain precautions.

In France, the Socialist Presidential candidate Benoît Hanon has worked out a proposal with economist Thomas Piketty and political scientist Antoine Vauchez and others to provide more democratic legitimacy to the Euro zone by means of a parliamentary assembly. SÉBASTIEN PLATON criticizes that this would pull the carpet from underneath the European Parliament. Antoine Vauchez has promised a reply to Platon's critique, so there will soon be more on this matter.

A lot of excitement has been triggered this week by the CJEU with its two landmark judgments on workplace headscarf bans. ELKE CLOOTS wonders whether there might have been other possibilities for the Court than to dictate in such a detailed way how the EU Member States should balance the right of the employees to exercise their religion and that of the employer to conduct their business – especially since the *Melloni* judgment has left Member States little room to establish higher standards of protection on one side or the other than those recognized by the CJEU.

The no less striking CJEU judgment on humanitarian visas for Syrian refugees last week is examined by MICHAL OVÁDEK who is also not very happy with the way the Luxembourg court handles fundamental rights. His conclusion: "It is understandable why the Court would want to stay away from the currently toxic migration politics. But it is worrying that it is willing to further limit the scope of the Charter (of Fundamental Rights) when it might be needed the most."

THORSTEN KINGREEN has tracked down a peculiar example of legislative creativity with respect to obstacles of European law. The German Federal Ministry of Finance had drafted a law to reduce child benefits for EU citizens with children not living in Germany. Recognizing that the envisaged scheme would be incompatible with EU law, the law makers had introduced a sort of suspensive condition whereby the scheme is to take effect only after the entry into force of a respective change in EU law. Kingreens's question: "Has there ever been such a clumsy attempt of legislative blame-shifting in Germany?"

Elsewhere

- MARTIN HEIDEBACH calls legislative plans in the state of Bavaria to introduce preventive detention of possibly dangerous people for an indefinite time by its proper name: Guantanamo,
- RONAN McCREA finds the CJEU's "caution" in the workplace headscarf ban cases understandable, while ROSELINE LETTERON observes that the Court's approach is fairly similar to the French legal answers to the headscarf dilemma and does not hide her satisfaction about that,
- ILYA SOMIN finds the latest verdicts against Trump's renewed Muslim ban convincing,
- RUSS MILLER explains to the Lawfare readers how the German legal mind works in matters of privacy and security and expresses the hope that Chancellor Merkel might convey to President Trump some sense of proportionality.
- Some four dozen of constitutional lawyers have joined in a highly laudable new blog project under the name TAKE CARE with the aim to scrutinize the constitutionality of all sorts of doings of President Trump.
- In Turkey, there are also plenty of excellent constitutional lawyers whose expertise should be much in demand right now but who are, for good reasons, too afraid to speak up. KEMAL GÖZLER's harrowing report *de profundis* and passionate appeal to his colleagues to overcome their fright and make themselves heard in defense of Turkey as a constitutional state is arguably the most important read you will find this week:

> *"To tell the truth, an important part of us, Turkish constitutionalists, regret being constitutionalists today. (...) Apart from exceptional examples such as Marie Curie, probably no subject has impaired the scientist examining it more than constitutional law impairs the constitutional lawyer. Being a constitutional lawyer in this country is an occupation as dangerous as being a bomb disposal expert. (...) We can do this. In this regard, especially members of the field with the title of professor have a lot to undertake. We, Turkish constitutional law professors, must speak up now! How many years do we have left? What is it that we are so afraid to lose? Let us speak up today. Tomorrow may be too late!"*

All best, and take care,
Max Steinbeis

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