Verfassungsblog
ON MATTERS CONSTITUTIONAL

As You Like It

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According to Douglas Adams' "Hitchhiker's Guide to the Galaxy", it took the supercomputer Deep Thought seven and a half million years to determine the answer to the "ultimate question of Life, the Universe and Everything": 42. The so-called "meaningful vote" of the UK Parliament in Westminster about Brexit this week had in many respects the appearance of an Adams brainchild as well. For two and a half years, the increasingly appalled EU has been waiting for the answer to the question of how the proud United Kingdom, once the envy of the world for the alleged calm and reasonable equanimity of its political class, imagines its post-Brexit future in Europe. A meaningful vote – but what does it mean? The answer could as well be: 42.

It is no fun to watch what is going on in the UK these days. The oldest and supposedly most robust parliamentary democracy in the world seems to be incapable of making a collectively binding decision about itself. The stunned public tries in vain to calm its nerves by explaining the disaster with the personal shortcomings of the politicians involved. But no matter how well or badly one thinks of Theresa May's, Jacob Rees-Mogg's, Jeremy Corbyn's aptitude and character – that is merely a distraction. The problem is constitutional.

Avoiding the paradoxical loop

The use of constitutions is to make collectively binding decisions possible: they provide institutions, procedures and limitations to make it expectable that a decision will be binding even on those who have not agreed to them. Constitutions get into trouble when they become the object of a collectively binding decision-making themselves and thus threaten to end up in a paradoxical loop. To avoid that, they usually provide for special institutions, procedures and limitations for this type of decision – supermajorities, referenda, eternity clauses, etc.

Many British citizens, rightly proud of the long-standing stable democracy and rule of law in the UK, regard the binding of parliament to higher-ranking constitutional norms as cumbersome humbuggery which pedantic Germans and fidgety French deem necessary for themselves as a result of their deplorable lack of common sense. The British, however, possess an abundance of common sense as a matter of national character, which is why, in contrast to the continent, all they need in terms of constitutional constraint is the possibility to hold the respective majority in parliament responsible for what they are doing and deciding and, if necessary, to vote the proverbial rascals out. What is accepted as collectively binding is what the sovereign parliament decides, which can be in principle pretty much everything with only one, single exception: to bind its successors. That is the famous doctrine of parliamentary sovereignty, so inimitably British in its reasonable, evenminded arrogance. Indeed, it is hard to deny that, in terms of containment of political arbitrariness, it has by and large been no less or even more effective than the constitutional norms that the rest of the world relies on.

Now, constitutional norms serve not only as constraints, but also have an enabling and legitimising function: if a higher-ranking law determines what a parliamentary majority is allowed to do and what it isn't, that is something to fall back on if you meet with contestation. And they have a stabilising function, too: what has been decided by a supermajority can be expected to stand even if the majorities change. That leaves a gap in certain situations which parliamentary sovereignty can't fill by itself. From the 1970s onwards, the recalibration of the competences between Westminster and Scotland, Wales and Northern Ireland became a political project. You can't do devolution as a

matter of simple, shifting majorities. In order to fill that gap, referenda were used: Parliament can't be bound by Parliament, but it can be bound by the direct will of the people.

In the case of devolution, this worked quite well: The government supported by a parliamentary majority legitimised and stabilised the transfer of powers to the regional level by means of referenda and was then able to fill in the details in the usual way by parliamentary law. In the event that the Scottish, Welsh and Northern Irish should make too much trouble, Westminster at least in theory always retained the opportunity to withdraw to its fortress of parliamentary sovereignty: Fine, we tried, but if you don't want to, please yourself. Then we'll just call the whole party off.

Trapped

In the case of Brexit, however, this model became a trap. Not only because the referendum turned out differently than the parliamentary majority intended. In the EU withdrawal procedure, unlike devolution, there is no default rule that keeps the status quo intact if those who want to change it make too much trouble. With devolution, "no deal" meant you stay in and everything stays the same. With Brexit, "no deal" means you're out all the same but without a deal, mostly to your own peril. I suppose that is why so many hardcore Brexiteers unflinchingly keep praising the obvious catastrophe that is "no deal" as a super-valuable trump card in the hand of the UK and a huge asset that mustn't be taken off the table ever in the negotiations with those bloody Eurocrats. That empty gesture of suppositious power and agency seems to be sufficiently potent to endure even the pain of a shot-through foot.

In addition, the stability effect of the referendum in this case turns into its opposite: irresponsibility. There never was a majority for Leave in Parliament, most MPs wanted no part of it. It was the People's decision. But the People is notoriously hard to hold responsible. And it was Parliament that initiated the referendum by law in 2015, so it does own the process and thereby it's outcome, too. To keep the executive branch at bay, Parliament successfully reasserted its sovereignty over Brexit in the *Miller* case. The result, however, is that it is now trapped in a double-bind. It's his and it isn't. It can neither swallow all the government dishes up as a fulfillment of the people's will, nor can it walk away from the whole thing altogether and simply scrap the Article 50 notification. It is responsible and not responsible, and it is responsible for that. Not.

Generally, the most appalling things keep happening all the time which nobody seems to be responsible for. Least of all the governing Tory party. The lies and manipulations in the referendum campaign were just the start. Now the Prime Minister is defeated on an unprecedented scale in Parliament which, only a day after, expresses confidence in her as if nothing extraordinary had happened at all. The Speaker of the House of Commons, who controls the legislative agenda and therefore needs to be strictly neutral, gets politicized over the Brexit conflict, with unforeseeable consequences for the stability of the entire system. Parliament, insisting on its sovereignty and control, pushes the country towards the edge of a no-deal Brexit, which at best a minority in Parliament actually wants in the first place. Weeping and teeth-gnashing abounds, but nobody is responsible. And that is fatal in a constitutional system that relies as much on the responsibility of the parliamentary majority as the British.

The only hope seems to come from the prospect of a second referendum, the so-called *People's Vote*. This reminds me of Douglas Adams again: To find out what exactly was the question to which "42" was the answer, another supercomputer was built, called Earth, and it keeps calculating to this very day. As much as I respect the desperate will of the PV proponents to avert damage from their country, I don't see how the poisonous effect of the first referendum should be neutralized by the serum of a second referendum. As if that would change anything about the non-allocation of responsibility – on the contrary. I think the argument that the second referendum has a stronger claim to represent the "true will of the people" than the first is rather weak. The fact that over the last two years many may have reconsidered is true of those who did

reconsider, but those who haven't will say: I had already won this conflict, and a second round was not what we had agreed upon. And they would be right.

If ultimately it comes to a no-deal Brexit, then this might, for better or worse, lead to a crisis fundamental enough to rethink the whole constitutional setup of the United Kingdom (or what then is left of it). As Vernon Bogdanor, the constitutional law czar of King's College, recently put it in the Guardian: "Might not the very nakedness of our post-Brexit condition provide an impetus for Britain to follow almost every other democracy by enacting a constitution?

Eurozenship

When the Brexit becomes real on 29 March, more than 60 million UK citizens will lose their **EU** citizenship. Together with Liav Orgad (WZB/EUI) we have launched an online symposium this week to discuss a controversial thesis in pro and contra form: Should Union citizenship as "Eurozenship" be detached from national citizenship in the Member State and developed into an independent status? Yes, says THEODORA KOSTAKOPOULOU. Absolutely not, says RICHARD BELLAMY. DIMITRIS CHRISTOPOULOS, DANIEL THYM have so far positioned themselves, with others to follow.

In the **USA**, there is also a fundamental constitutional crisis looming in the shape of the government shutdown, the dimensions of which are traced by KATHARINE YOUNG.

Exactly three years ago, the EU Commission began to scold **Poland** on the subject of the rule of law. LAURENT PECH and PATRYK WACHOWIEC summarize in a two-part post how desperately little result this "dialogue" has brought.

In **Germany**, the Federal Office for the Protection of the Constitution has announced that parts of the far-right AfD party will be placed under observation. KLAUS FERDINAND GÄRDITZ considers this decision to be consistent and in line with the duty to effectively protect all citizens "who want to shape their common future independent of origin, ethnicity, faith, gender and individual abilities in equal freedom as well as in mutual respect of inviolable dignity". TIM WIHL asks whether state security has developed from protecting majesty to protecting the republic and finally to protecting human beings, and whether it would not be better to split the Federal Office into a research institute on threats to democracy and a security authority for the prevention of terror and violence (both German).

SEBASTIAN GOLLA takes the shock following the publication of private data on hundreds of politicians and celebrities in **Germany** as an opportunity to reflect on the need for reform in IT security law (German).

This week, the **German** Federal Constitutional Court has held a hearing on the question whether the minimum subsistence level guaranteed by social security may be further reduced to sanction failures to comply with obligations. My report on the hearing is here (German).

In **Baden-Württemberg**, two AfD members of parliament were excluded from the session and escorted by the police off the premises. According to JAN BENJAMIN DANIELS, that was unconstitutional.

In the debate on a women's quota in the **German** Bundestag, EDWARD MARTIN and MATHIAS HONER respond to Cara Röhner's appeal from last week and find her proposal questionable on the basis of liberal constitutional and democratic theory.

Elsewhere

This week, the JUWISS blog is hosting an interesting discussion on the mandate and financing of public broadcasting in **Germany** (German).

CARL VANDER MAELEN points to a ruling from Strasbourg in a **Hungarian** case, which creates legal certainty for setting hyperlinks to illegal content.

LISE ESTHER HERMAN denies **Hungary's** government the right to justify its handling of liberal rights by invoking the sovereignty of the people.

JAN VAN ZYL SMIT proposes to use the case of **Poland** as an occasion to articulate international standards for post-authoritarian states' reforms of the judiciary (Parts 1 and 2).

LEONID SIROTA comments on the **Canadian** Supreme Court's decision to declare the disenfranchisement of citizens abroad unconstitutional.

JEAN-JACQUES URVOAS is inspired by the decision of the UK Parliament to hold the government in "Contempt of Parliament" to consider whether such a thing should also exist in **France**.

ALONSO GURMENDI examines how the international community should deal with the new "National Assembly" in authoritarian **Venezuela**.

That's it for this week. All the best for you!

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