Verfassungsblog
ON MATTERS CONSTITUTIONAL

Not Madness nor Treason

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Among the many things I love about Britain, near the top of the list are its old ladies. There is, of course, the 93-year-old Queen, who, after 67 years of strictest adherence to the advice of her various prime ministers, is now perhaps for the first time in her long life being brought into the situation of having to save the rule of law from the current incumbent and assume political responsibility for it. But there are also, on a purely affective level, the ordinary English middle class old ladies with their undyed grey hair and their raincoats and their melodic way of saying "absolutely not!" Earlier this week I met several of them in London, near the Westminster Parliament. It was raining cats and dogs, and Parliament Square was roped off by the police. Apparently someone had doused himself with petrol and tried to set himself on fire a few minutes ago. A protest against the Hindu nationalist crackdown in Kashmir, I hear. "A mental health issue," according to an unfazed policewoman. Nobody was hurt, I'm told.



The Leave and Remain demonstrators are standing a little further south, opposite the main ceremonial gate of the parliament. There are not many of them on this rainy day, no more than a handful in each camp. First I pass the blue yellow-starred Euro flags. Two old ladies carrying big umbrellas, one of them with a self-painted cardboard poster: "There's a Lunatic Cult in Charge – Damn them", the other waving an Irish flag. It's all madness, says one, all that verbal militarization, all that hate, all those broken friendships and families at war. Recently, says the other, a neighbour called her a "domestic terrorist". Because she's fighting Brexit. She is over 80 years old, she says, her eyes wide with disbelief. A domestic terrorist! And that was not a joke!



The Leave camp is only a few steps away. Unions Jacks, Brexit Now, and another old lady with another home-made cardboard poster: "The EU is Deceptive", it says, "Undemocratic, Unfixable". Ah, deceptive, a passer-by bristles, really? So what about Boris Johnson and his lies, then? To which the old lady tilts her head and blinks in a friendly way. The people have decided and must get their will. Everything else is undemocratic, don't you think? The lady smiles, while the rain soaks her cardboard sign. "Remainers are Traitors", is written on one of the flags waving above her head.

Constitutionally trapped

Get Brexit done: for more than three years now this country has been chewing and choking on this indigestible lump and can neither swallow it nor spit it out. There are, of course, valid policy reasons to explain this fact, first and foremost the border on the

Irish island, which, as an EU external border, would once again divide the Irish into citizens of the Republic and subjects of the Crown, thus making the reemergence of civil war most horribly likely. But if a state which increasingly appears to be drawing towards civil war itself – domestic terrorists, for Christ's sake! – turns out to be unable to make a collectively binding decision about its own preferences, that is not just a difficult policy situation. That is a constitutional system failure.

The use of a constitution is to facilitate collectively binding decisions and plurality of opinions and interests at the same time: Some prefer A, others prefer B, and the constitution gives them institutions and procedures to settle their disputes in a way that makes it expectable that in the end each part will accept the outcome as binding even if they lose. Which is precisely what the unwritten, but nevertheless very much existent British constitution spectacularly failed to achieve with Brexit.

The 2016 referendum didn't make it expectable at all that the losing side would accept its result as valid: not just because of the tremendous amount of lies in the campaign, but because so much was still unresolved at the time of the referendum. How binding would the result be for Parliament? What exactly happens after one side or the other wins? Instead of settling these matters before, under the veil of ignorance, they were tackled only afterwards, if at all, when all answers inevitably appear as an attempt to manipulate the outcome in one direction or another. Thus, the output of that decision process was both too weak to make it collectively binding and not weak enough to just dump it. No swallowing, no spitting out, just chewing and choking and gagging on and on and on…



Some people try to resolve this dilemma by immunizing themselves against the recognition of the gaping flaws of this result and outsourcing the problem to the critics of the referendum: it is them there's something wrong with. They are traitors.

Others try to resolve the dilemma by pathologizing the conflict and pretending that it is only a phenomenon of distorted perception and that the decision between leave and remain is just a matter of reason, outsourcing the problem to those who refuse to see that. It is them there's something wrong with. They are lunatics.

In fact, however, neither of them are. They are all just stuck in a constitutional trap. The good thing, however, is that constitutions can be changed. They are adaptive. And none more so than the British.

Putting it in writing?

One of the particularly odd things about Great Britain, from a continental constitutional lawyer's point of view, is the way in which a distinction is made between law and constitution: Unconstitutional does not necessarily mean illegal here. Something can be unconstitutional in a completely legal way.

This is because the rules according to which collectively binding decisions are made are mostly not rules of law, but conventions. You don't do things that way because you have to, but because it's just how things are done. And if you don't, it is not a violation of the law for which you can be taken to court, but at most a political scandal for which you have to pay at the ballot box, and in many cases simply a sign that the convention is in need of a change. In this way, the

Constitution remains wonderfully pragmatic and adaptive, keeping open the possibility that some prefer A and others prefer B, without always pretending that the answer to the A or B question can be looked up in some legal statute.

Within these three years, the Brexit dilemma has worked as a tremendously effective catalyst on the constitutional chemistry of Britain, that venerable set of conventions which has grown over so many centuries, at a pace and to an extent that has been truly mind-blowing and still is. A government that governs without a majority in parliament and without the power to dissolve it. A parliament that denies the government its authority to conclude international treaties and to control legislation. The Supreme Court that suddenly discovers in common law constitutional principles to measure the government's doings against like any old ordinary constitutional court. The much admired and copied Westminster model is hardly recognizable any more, with so much change going on. And whether that's for the better or for the worse is anything but certain.



Indeed, I have heard this repeatedly in my conversations over the last few days: the adaptivity of the British constitution does come at a hefty price. To be able to change the constitution by making it up as they go along is, for all its flexibility, occasionally also terribly risky. Suddenly Parliament has the last word on the Brexit deal, but no majority for any version of it – who would have chosen such a thing? Also, isn't this actually a rather non-transparent and undemocratic way of dealing with the Constitution? Four and a half million people have watched the hearing of the Miller II/Cherry case before the Supreme Court on live stream. People take notice when their constitution changes. They care. Maybe they should be given a voice about it? Isn't it their constitution, too?

So far, the expectation was that most British would reject the idea of having a great, organized debate about their constitution as horribly un-British. And presumably that is still true for many people. But for many perhaps not, after all that has happened. And it's far from over. The worst is maybe still to come. "Most written constitutions have arisen from catastrophes," one of my interlocutors said. "This could be the British catastrophe."

Thanks for invaluable input go to Jeff King, Conor Gearty, Jo Murkens, Kai Möller, Alison Young, Kenneth Armstrong, Cathryn Costello, Stephen Weatherill, Dorota Leczykiewicz, Josef Weinzierl and Kalypso Nicolaidis. Mistakes and misjudgements are entirely mine, of course.

No one can say we didn't try

This editorial comes a bit later than usual, please forgive me. The whole thing is still very much a moving target, and next week a decision will be made as to whether the Scottish Court of Session can request an extension of the Article 50 deadline in a kind of substitute action if Boris Johnson refuses to do so in violation of the law. This will be very exciting, so I guess I won't be able to spare you another Brexit-related editorial next week. Be brave.

Last week, most but not all posts on Verfassungsblog were, unsurprisingly, about Brexit. Another creative proposal on how the EU and the **UK** could solve the dilemma of the Northern Ireland backstop was presented last week by GIORGIO SACERDOTI and NIALL MORAN after Joseph Weiler, Daniel Sarmiento and Jonathan Faull as well as Kalypso Nicolaidis. If no-deal Brexit actually occurs, it won't be our fault. Nobody can say we didn't try.

DAGMAR SCHIEK investigates the possibilities of the EU to hold Boris Johnson as "rogue PM" at bay while the **UK** is still a member state.

JOELLE GROGAN analyses the **UK** Supreme Court ruling on prorogation of Parliament. (It's seems to be ages ago, doesn't it, but it's really just been a week!)

RALF MICHAELS takes issue with Emanuel Towfigh's law-and-economics defense of the rationality behind Boris Johnson's "Game of Chicken".

In matters non-Brexit: MARK TUSHNET explains what can be expected from an impeachment case against **US** President Trump from a comparative constitutionalist perspective.

ALI YILDIZ examines how the **Turkish** government dealt with constitutional and international individual rights under the state of emergency.

ANDREAS FISCHER-LESCANO warns against the right-wing penetration of legal discourse in **Germany**.

EROL POHLREICH critically examines the verdict of the Berlin Regional Court on the insultability of the Green politician Renate Künast from the point of view of freedom of opinion.

In **Latvia**, the Constitutional Court has opened a case on the constitutionality of school reform in terms of Russian minority rights. KIRYL KASCIAN has little hope that the lawsuit will be successful, given the Court's case law.

Our online symposium this week, organised together with Christian Boulanger and "Law in Context"/Humboldt University, deals with autonomous software agents and GUNTHER TEUBNER's proposal to regard them as legal entities – critically discussed by MARIETTA AUER, ALFONS BORA, CATRIN MISSELHORN and JAN-ERIK SCHIRMER.

Elsewhere

I'll be brief, this editorial is already way too long.

RORY O'CONNELL finds Boris Johnson's **Northern Ireland** proposal to the EU very worrying from the point of view of the Good Friday Agreement and peace on the Irish island.

ROBERT HAZELL warns that a renewed prorogation of the **British** Parliament would put the Queen in an embarrassing position.

ROBERT BASEDOW believes that the ECJ could end up with the last word on a hard **Brexit**.

ALAN S. REID compares the **British** Parliament, awakened from its prorogation sleep, with Bobby Ewing from Dallas taking a shower (don't worry if that doesn't mean anything to you: it's a generational thing).

JOSÉ TUDELA ARANDA explains the current constitutional power struggle between president and parliament in **Peru**, and GABRIEL LEONARDO NEGRETTO calls for new elections as a way to resolve it.

MARY McCORD sees right-wing militias in the **USA** preparing for civil war in the event of an impeachment of Trump.

So much for this week. All the best and even better if you support us on Steady!

Max Steinbeis

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