Verfassungsblog
ON MATTERS CONSTITUTIONAL

Getting Rid of Them

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Frankly, I find it not easy to keep my countenance this week. This is not alone because of the devastating fact that Jews have to fear for their lives when celebrating their highest holiday in Germany 2019.

In the United Kingdom, the Prime Minister's aides announce that he'd challenge the Queen to dismiss him in the event of a vote of no confidence in Parliament. In the United States, the President's counsel denies the House of Representative the right to investigate his misconduct. Both, Johnson and Trump, are hardly trying to keep up the appearance of constitutional justification while going out of their way to show that they are prepared to throw what has so far generally and beyond all political preferences and sympathies been held for binding constitutional law right out of the window.

Politics of the finger

The impeachment procedure initiated by the Democrat-dominated House against President Donald Trump consists of two parts, roughly comparable to preliminary proceedings and trial in criminal law: The House of Representatives plays the role of the public prosecutor, issuing subpoenas, interviewing witnesses etc., and once it is satisfied that there is sufficient evidence to go to trial, it decides to bring charges. The Senate's role, on the other hand, is hold a trial and to decide if there is indeed sufficient evidence to prove the guilt of the impeached. This division of labour has its roots in ancient English common law, long obsolete in the meantime, according to which the House of Commons will indict devious members of Her Majesty's Government, but passing judgment is reserved to the House of Lords. A two-thirds majority is required in the Senate for a guilty verdict which provides some protection against the use of this procedure as a mere political cudgel. (All this in theory, at least.)

Like any prosecutor's office, the House majority takes a considerable risk if it decides to impeach. If they fail to get a conviction, that is a defeat for which there will be a political price to pay, as the Republicans found out after the collapse of their impeachment trial against Bill Clinton. Thus, there is a robust incentive to initiate this procedure only if there is hope for a dynamic which will ultimately bring the political camps together in the course of the investigation to form some sort of a non-partisan opposition towards the exposed and mortified President. Whether or not that is likely to succeed with Republicans in their current state seems rather doubtful, of course, but to find out and kick that dynamic off the House must start to investigate first, which is what they are doing and what the eight-page letter of Trump's lawyer Pat Cipollone to Nancy Pelosi and her committee chairmen is about, in which he describes the investigation as a violation of "fundamental fairness and constitutionally mandated due process" and announces that Trump will neither cooperate with the investigation himself nor allow his administration to do so.

The argument of Trump's lawyer, if you like to call it that, is that the impeachment investigation was not initiated by a majority vote, and the defendant was deprived of the possibility of questioning the witnesses themselves. It does not take much to see that a majority decision is the end and not the beginning of the impeachment investigation and that cross examinations are part of the trial before the Senate but not of the preliminary proceedings by the House.

Trump's lawyer, however, declares the whole impeachment investigation "invalid". If the President got away with that, and on such a flimsy basis, the constitutional damage would obviously be tremendous. In a presidential system where the executive does not depend on the confidence of the people's representatives in Parliament, an impeachment trial is

the only democratically innocuous way to get rid of a criminal but nevertheless democratically elected president.

"Sack me if you dare!"

In the United Kingdom, impeachment has become uncommon since the middle of the 19th century because the British Parliament can get rid of the Prime Minister at any time by political means: if need be, a vote of no confidence against him and vote of confidence for his successor is all it takes to make him go away. Or that's what people thought.

In fact, it turns out, it is remarkably difficult to get rid of an unwanted Prime Minister who is unwilling to shove off by himself. The UK had already discovered this under Theresa May: After an internal attempt to overthrow her had failed in December 2018, the Tories' party regulations banned any further attempt for a year. Had she been as unshameable as Boris Johnson and not resigned herself in the end, maybe she would still be in Nr 10 today.

Perhaps all that swashbuckling braggadocio Johnson and his people went to such pains to display last weekend – that he'll challenge the queen to sack him if she dares; that even with a new transitory government in place he'd just squat in 10 Downing Street, that the police would have to come and drag him out of there, etc. – was mostly about keeping his hard-core Brexiteer followers happy and not to be taken at face value. But even in that case, to make such an announcement is already causing immense constitutional damage. Above all, it damages the Queen. Her function as the supreme hook the entire weight of the state is suspended from depends existentially on the fact that she will *never ever* have to take responsibility for any political decision of her own. Well, madam, Boris Johnson is telling his 93-year-old hostage: in deciding to sack me, Her Majesty unfortunately does not have a prime minister supported by a parliamentary majority at her side who relieves her of the political responsibility for that. Quite an awful situation to be in, isn't it? Such a beautiful crown she wears on her head. We wouldn't want anything to happen to it, do we? For that alone he'd have deserved to be impeached unconscious.

Legally, as JEFF KING shows, the queen would be on safe ground if she did boot him out. The Fixed Term Parliaments Act, Section 2, stipulates that Parliament can elect a new government within 14 days of a vote of no confidence in order to avoid early elections. This rule would be frustrated if Johnson could simply refuse to leave. And against that you could go to court. Then, of course, Johnson would have achieved what he wants in the first place: that the police carries him out of office and he could then blame the opposition all the more effectively for the absence of Brexit after 31 October, and mount his surfboard and ride the inevitable huge wave of frustration and indignation all the way right back into his old office in 10 Downing Street.

The noble duty

Next week it will be decided whether Boris Johnson will get a deal after all and the UK will finally leave the EU in an orderly manner. At the moment there are rather encouraging signals from London and Dublin, but I won't believe in the existence of the deal until I see it. If there is none, the Benn Act requires Johnson to apply by 19 October for an extension of the negotiating deadline to 31 January 2020, which might give a possible transitional government time to initiate a second referendum or even to revoke the Brexit notification altogether. If Johnson does not comply with that duty the Scottish Court of Sessions might do it for him, using a very special feature of Scottish law with goes by the lovely name *nobile officium*. Last Wednesday, the court did not dismiss a motion to this effect out of hand, at least, but postponed the decision until 21 October.

If the *nobile officium* is fulfilled and the application duly received in Brussels, will the EU 27 accept it? Lately there have been rumours that the government might have persuaded their Hungarian colleagues to block the extension decision in the Council with their veto. PIET EECKHOUT argues, however, that the EU and all its member states wouldn't have much choice but to grant the extension under EU law: The **UK** does

not want a no-deal Brexit, according to its parliament, and the EU is obliged to respect this sovereign will.

If no deal is possible by 31 October 2019, why should one be possible by 31 January 2020? Even for a second referendum time would be extremely short. DAMJAN KUKOVEC explains that the **British** should nevertheless be given the opportunity to reconsider their choice of 2016 in principle.

At the core of the impeachment proceedings in the **USA** is the accusation of corruption. MATTHIAS ROSSBACH illuminates the key role that the fight against corruption (in a wider sense of the term) has played for the American understanding of republicanism.

Poland will vote on Sunday, and the PiS is apparently likely to win. Its chairman Jaroslaw Kaczynski makes no secret of what he intends to do with a renewed mandate: Then the entire court system of the country will be reorganized and those pesky judges once and for all brought into line or gotten rid of. At the ECJ, Advocate General Tanchev recently rejected as inadmissible referrals by Polish judges to review the independence of the Polish judiciary. PAWEL MARCISZ disagrees with the Polish government's interpretation that this is a kind of acquittal for them, but nevertheless considers the AG's opinion and the lack of knowledge about what is happening in Poland it reveals to be extremely problematic.

In **Israel**, after the Knesset election, a coalition between Likud and Blue-White seems to be in the making. ALON HAREL suspects that this alliance will bring little progress in resolving the conflict over the occupied Palestinian territories, but at least it will slow down or maybe even stop the country's slide into authoritarianism.

In its ruling *Glawischnig v.* ***Facebook***, the European Court of Justice has once again made it clear that it intends to play a major part in the global dispute over the regulation of content on the Internet. MATTHIAS KETTEMANN and ANNA SOPHIA TIEDEKE don't necessarily think this is good news, "because the verdict clearly shows that the supranational court can set bad law.

In **India**, MEDHA SRIVASTAVA sees the independence of the judiciary in danger, not least because of the Indian Supreme Court itself.

GAURAV MUKHERJEE draws parallels from the ruling of the UK Supreme Court in *Miller 2/Cherry* to the current case before the **Indian** Supreme Court in Kashmir.

Turkey has invaded Northern Syria, allegedly to exercise its right of self-defence against Kurdish terrorists. ALEXANDER SCHWARZ shows that this argumentation does not hold any water at all under international law.

Elsewhere

Besides the already mentioned post by JEFF KING (part 1 here, part 2 here) I warmly recommend DANIEL HALBERSTAM's article which reminds the UK government that, for the time being, EU law still requires loyal cooperation from them, and in a legally enforceable way. JEFFERI HAMZAH SENDUT analyses to what extent the **UK** Supreme Court has adopted a proportionality test in *Miller 2/Cherry*.

ALAN WHYSALL warns against too much enthusiasm about the prospect of a border poll on the **Irish** island.

KEITH E. WHITTINGTON does not have much trouble dismantling the **US** President's arguments against impeachment investigations, nor does FRANK O. BOWMAN. Here is a survey among a number of eminent constitutional lawyers whose conclusions are pretty much the same, with only slight disagreement on whether or not this already counts as a constitutional crisis. MICHAEL C. DORF explains what follows from the fact that Trump's position is legally untenable.

In a two-part blog post, BJÖRN SCHIFFBAUER examines the effects of the recent decision of the **German** Federal Constitutional Court in the matter of military deployment against ISIS and the role of parliament in it.

This has once again become an exhaustingly lengthy piece of prose, I have to admit. Well, what what are you going to do in times like these…

On another note: this editorial would have had room for three shiny beautiful advertisements. If you have job offers, book launches, events or call for papers to advertise, we'd be most happy to help you get the attention you deserve. For 300 € you can reach the entire constitutionalism community in Europe and beyond. And you'd help us to finance our independent and professional editorial staff, which unfortunately costs quite a sum of money every month. So if you have an ad to place and a budget to spend, please let us know and send us an email (info@verfassungsblog.de). Thank you very much!

And besides that, we'd ask, as always, for your support on Steady. If you regard this editorial as a valuable resource, then please consider giving a very moderate monthly sum. Much appreciated!

Thanks for most valuable input go to Catherine Barnard and Sionaidh Douglas-Scott.

All the best, and take care,

Max Steinbeis

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