

# A Matter of Confidence

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I have spent a considerable part of this week watching British Parliament TV. That was indeed a show of almost netflixy addictiveness, wasn't it? But what sort of show? A dark tragedy about Macboris and his murderous ambitions, who cannot buckle his distempered cause within the belt of rule in the face of the unstopably approaching forest of West Dorset? Or rather an *opera buffa* about Master Corbyn, Mistress Swinson and the 21 "Tory rebels" as the Merry Wives of Westminster who expose Sir Boris Falstaff and his roguish machinations to the laughter of the public? Or is it a play about Parliament as it restlessly wanders about between the pinnacles and pillars of its palace, haunted by the spirit of the referendum and unable to decide between Hard Brexit and Irish Backstop and People's Vote and whatnot, until in the end the whole sorry lot of them lie dead in their blood?

I don't know, probably all of the above and a lot more, particularly since the show is still going on and we still don't know about the final denouement, if there ever will be any. For constitutional law nerds like me, however, one episode that was aired on Tuesday evening was especially interesting.

## Parliament governs?

Let me briefly recapitulate: the previous week, Her Majesty's Prime Minister, the Right Honorable Boris Johnson MP, had advised the Queen to shut down Parliament for five of the remaining eight weeks until no-deal Brexit date on 31 October. The immediate effect of this was to unite the entire opposition and a not insignificant part of his own party behind the decision to not let this encroachment on Parliament's constitutional role stand. A law was drafted that obliges the government to seek another extension of the Brexit deadline in Brussels before it lets a no-deal Brexit happen – also motivated by a slightly Dantesque notion of meting out justice to Boris in a rather cruel way, I presume.

But in order to be able to vote on this bill, Parliament first had to seize control of its agenda, which is normally in the hands of the government. Parliament can schedule an emergency debate under [Standing Order No. 24](#), but this competence was hitherto only used to have a debate, not to decide by majority vote. Parliament has now deviated from this convention and decided on Tuesday evening against raucous protest by the government minority to put the law on the agenda.

Enter Jacob Rees-Mogg, cartoonish performer of aristocratic haughtiness and "Leader of the House", i.e. a kind of Tory parliamentary group leader cum cabinet minister: According to him, it's not the government but Parliament who acts unconstitutionally by taking control over its own agenda and tying the government's hands for the negotiations in Brussels. Only the government has the democratic mandate to actually do things – negotiate, execute, set the agenda, in short: govern

– whereas Parliament’s job is to scrutinize the government’s governing, to approve or to reject it.

+++++A Note from University of Gdansk+++++

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If the parliament does not agree with the current government's agenda, Rees-Mogg continued, then it must withdraw its confidence and transfer it to another one. But keeping it in office and restricting its room for manoeuvre instead – that's an outrage, a piece of "legislative legerdemain" that serves only the purpose of undermining Brexit and frustrating the "will of the people". Such tricks could backfire badly if one day a "less benevolent government" drew its conclusions from this precedent and used its majority to push through every law it likes in an emergency debate.

## The absence of a deal

Apart from the equally expectable and malicious assumption that this is all just another Remainer conspiracy – doesn't that actually sound quite plausible?

Well, it isn't.

What is peculiar about no-deal Brexit – I already wrote about that last week – is that it is not something anyone *does*. It is not something that the government has to laboriously draft and sign and introduce into parliament and organise a majority for. No, it just... happens. Wham, 31 October, Brexit delivered. By mere lapse of time.

For Johnson's followers, it is the fatefulness of this process that makes No-Deal Brexit so attractive. But for Johnson himself and for his government it is something completely different: that you can bring about Brexit without having to take responsibility for it.

It is *not* the case that the government is taking responsibility for a controversial and contested plan that it strives to carry through the legislative process on the basis of the confidence on which its power is grounded upon. That is the opposite of what the government wants to do.

This reveals a strategy which goes far beyond Brexit, and possibly also holds the explanation for its notorious mendaciousness. What a heap of lies it has piled up in this week only, about negotiations in Brussels taking place, about making progress there, about a Queen's Speech being the motive for prorogation, each and every one of them a deliberate, systematical and purposeful lie. But does this embarrass the government in any way? Oh no, not in the least! On the contrary. The Prime Minister gambols and guffaws in his usual boisterous manner that seems to signal that he doesn't even expect you to believe that he himself believes that you should seriously believe him.

Lying is one thing. Lying and not even trying to make people believe you is quite another. That's what you do when you want to make a statement. When you want to demonstrate that you will get away with everything and don't have to answer to anyone, that a Boris Johnson, a Michael Gove, a Jacob Rees-Mogg don't give three blind damns about the confidence of Parliament or of anybody really, for no other reason than because they can. A demonstration that you are the kind of fellow who does things because he can, and therefore deserves to govern: this is what this was about.

It is a token of the strength and resilience of the unwritten British Constitution that Parliament has indeed not let Johnson and his ilk get away with this, for the time being. It took a truly sovereign Parliament to thwart that crude and perfidious plan. Again: for the time being. What's further down the road? A whole lot more of contemporary Shakespeare, I suppose.

## Avoidable or not

While these horrifying things are taking place, there is still policy, and in this case one of Shakespearean fatefulness in itself, namely no-deal Brexit and the question of whether and how it could still be avoided. [KALYPSO NICOLAIDIS](#) is undeterred to work on alternative routes to settle the **Irish backstop** conflict at the 11th hour, with a passionate counter-proposal to the Weiler/Sarmiento/Faull proposal published on these pages the week before.

[JOELLE GROGAN](#) deals with the prorogation of the **British** Parliament and its constitutional admissibility. The fact that Boris Johnson has a role model for this in the former **Canadian** Prime Minister Stephen Harper is illustrated by [CARISSIMA MATHEN](#).

In these times, a new book by the former Supreme Court Justice Jonathan Sumption has stirred quite a lot of debate in the **UK**. It's thesis: law has taken up too much space at the expense of politics. [KLAUS FERDINAND GÄRDITZ](#) reviews the volume and is on the whole rather unconvinced.

In **Germany**, the "equivalence of living conditions" in the federal state has constitutional status. The Federal Government wants to promote social cohesion with a twelve-step plan which is critically examined by [STEPHAN RIXEN](#).

The emerging EU Commission under Ursula von der Leyen has presented a paper describing how it intends to struggle for the rule of law in the Union. [LAURENT PECH](#), [DIMITRY KOCHENOV](#), [BARBARA GRABOWSKA-MOROZ](#) and [JOELLE GROGAN](#) criticise its lack of willingness to acknowledge reality.

The election of a new Ombudsman in the EU is up and incumbent Emily O'Reilly is running for another term. [TORSTEN STEIN](#) accuses her of overstepping the legal limits of her competences during her first.

The German Federal Constitutional Court, largely unnoticed, has handed down an interesting decision about the prohibition of discrimination in private law, as is reported by [FABIAN MICHL](#).

What international law can do to defend the environment and biodiversity against the destructive power of **US** and **Brazilian** Presidents and their like is highlighted by [ROMY KLIMKE](#).

Finally, on the occasion of the 10th anniversary of Verfassungsblog [FRANZ MAYER](#) takes look back from the perspective of European constitutional law at what change we have achieved and what we haven't during this decade.

## Elsewhere

[PHILIP ALLOT](#) argues that a no-deal Brexit would also be highly questionable under European law. [PAUL CRAIG](#) elegantly shows why the British government's justification of the prorogation of Parliament by the need for a Queen's speech is a non-sequitur. [ALEXANDRA SINCLAIR and JOE TOMLINSON](#) point to an additional prorogation problem, namely the lack of control over secondary legislation already insufficiently controlled by Parliament. [DEREK O'BRIEN](#) examines from a post-colonial perspective how the former British colonies in the Caribbean deal with the issue of Prorogation of Parliament.

[ANNA WÓJCIK](#) points to the recent ECJ referral of a judge in **Poland** who questions the powers of the Minister of Justice under European law.

++++++A Note from MPIL++++++



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[CONSTANTIN COJOCARIU](#) is concerned about the line recently taken by the ECtHR in a **Romanian** case on the rights of people with disabilities.

[NICOLE BÜRLI](#) criticises, also in a **Romanian** case, the Strasbourg Court's restrictive stance on protection against inhuman treatment by non-state actors.

[PAOLA TIFFER](#) considers the case law of the **Inter-American** Court of Human Rights on state responsibility for climate change.

[BERTA HERRERO](#) looks from **Spain**, plagued by government formation problems, to **Bosnia-Herzegovina**, plagued by government formation problems.

[LORENZO COTULA](#) describes how land grabbing works in **Ghana**.

[PAUL ROSENZWEIG](#) asks whether **US** President Trump could use the promise of pardons to push through deliberately illegal seizures of land for the construction of the border wall with Mexico.

And finally, as an exception, a reference to a newspaper article, namely one written by myself: the liberal national newspaper *Süddeutsche Zeitung* has thankfully let me fill a whole page with a scenario of how in Germany a "[People's Chancellor](#)" could exploit the Basic Law for his own abolition, quite legally, quite normally, quite inevitably. After all, nobody should fool him- or herself with the pathetic belief that what befalls the Brits right is because of the fact that they are less smart, less democratic or less constitutionally polished than we are, right?

Oh yes, before I end: [Steady](#). Remember? It's a bit of a nuisance and you keep putting it off, I totally get that. Which is why I keep reminding you.

All best, and take care,

Max Steinbeis

