

The Brexit Prorogation: an unsustainable constitutional confrontation

Dr Jack Simson Caird

Jack Simson Caird explains the strategic logic of the decision to prorogue Parliament. He writes that the government seems to be seeking confrontation with Parliament not just over Brexit, but over different visions of the constitution and democracy. So, unlike May's Government, Johnson's is willing to deploy all the means at its disposal in order to realise its visions.

The government's decision to prorogue Parliament between 9-12 September to 14 October is based on overlapping strategic and ideological reasoning. The 'business as usual' narrative used to justify the decision cannot hide the fact that the government, by revealing a key element of its parliamentary strategy to deliver Brexit, has demonstrated that it is willing to engage in a full-scale confrontation. A confrontation not just over Brexit, but over different visions of parliamentary government, the constitution, and ultimately democracy.

Earlier this year, Theresa May's Government opposed those MPs that sought to take control of the order paper and enact legislation to put pressure on the government to force an extension. However, May's Government was not willing to engage in a full-blown confrontation with MPs over their right to direct government policy. The decision to seek a prorogation shows that the Johnson Government wants that confrontation and is prepared to take radical steps to make sure it emerges victorious.

In terms of the strategic logic of prorogation, the basic idea is to make it as difficult as possible for MPs to legislate to force an extension. The length of the prorogation is carefully calibrated. It allows enough parliamentary time to potentially insulate it from a successful legal challenge and in order to claim that there is sufficient time for a deal to be ratified before 31 October. The prorogation means that legislating to force an extension has become an even more difficult task. The key point to stress is that the events that led to the Cooper Bill - facilitating an extension of the Article 50 period - were exceptional. Further, the success of MPs' efforts was connected to the government's unwillingness to engage in a full-blown confrontation or to leave the EU without a deal. On both counts, MPs aiming to force an extension now face an entirely different opponent. The government's decision to prorogue shows that those hoping to legislate to stop no deal face two main challenges.

In terms of the parliamentary tactics needed to get the Bill through the parliamentary process, the government is going to try everything in its power to stop the Bill receiving Royal Assent. When the Cooper Bill was going through Parliament, the true extent of the government's control of Parliament was hidden. May's Government was not prepared to use every parliamentary option available to stop the Cooper Bill. The decision to prorogue suggests that Johnson's Government will be willing to deploy all the means at its disposal. This will make getting controversial constitutional legislation in a narrow time window extremely difficult.

In terms of the substance of the legislation that MPs intend to enact to force an extension, MPs face an even bigger problem. The Cooper Bill was cleverly drafted to ensure maximum support in the Commons and place sufficient pressure on the government to seek an extension. As a result, the Cooper Bill left considerable wiggle room for the government, in recognition that it was for them to negotiate the terms of any extension with the EU, and because it was recognised that MPs would be reluctant to tie the hands of the government.

Today's circumstances are completely different, and the increase in intensity on both sides of the Brexit debate will make drafting legislation that can be effective in forcing the government to seek and accept an extension much more difficult. The current government is unlikely to respond to the political pressure generated by legislation in the same way as the May Government did. Johnson's Government is likely to be willing to test the legal effectiveness of the legislation. In order to force an extension, MPs won't be able to repeat the balanced approach seen in the Cooper Bill. Instead the proposed Bill will have to be bolder and legally watertight. Bolder legislation will risk losing support from MPs unwilling to be seen to take radical action. But even radical legislative action could rely upon the courts' willingness to intervene in a fierce political battle with the Government.

The increase in the intensity in both the parliamentary and legal confrontation reflects the strength of disagreement that underlies the debate over Parliament's ability to stop a no-deal Brexit. A no-deal Brexit represents a constitutional change to which a majority of MPs are opposed. Since the referendum, the government has not presented legislation which would enable MPs to either expressly consent to the proposition that the UK should leave the EU without a deal. The flagship pieces of Brexit legislation enacted by Parliament were expressly ambiguous as to the outcome of the negotiations. It is a matter of fact that no deal does not, by virtue of the terms of Article 50, require the express consent of the departing state. However, since the UK Government firmly committed to no deal, MPs have indicated that they are prepared to legislate to force the Prime Minister to seek and accept an extension and to avoid no deal. The question therefore becomes whether it is constitutionally legitimate for a government to take measures to prevent MPs from legislating to avoid a change to the constitution which they do not support.

The government believes that MPs, acting independently of government, should not be able to use the legislative process to prevent a constitutional change that is based on a decision of the UK electorate in a referendum and subsequent legislation enacted by Parliament. However, there is no constitutional principle to support the idea that the government should be able to prevent Parliament from legislating. On the contrary, the norms of the constitution are designed to enable the government and Parliament to cooperate in the process of making law. The main example is the principle that the government must have the confidence of the House of Commons. This means that even if MPs and peers are able to reject government bills, in practice the government does not introduce legislation it knows that MPs will reject because doing so would risk losing the confidence of the Commons. Another example of this is the way in which the government normally puts forward legislative concessions to avoid defeats. Our constitutional system is not designed to sustain prolonged confrontation between the Commons and the government.

Theresa May's government recognised this and avoided escalating the confrontation by seeking two extensions. The Johnson Government is likely to argue that MPs seeking to legislate in the face of government opposition are responsible for causing this confrontation. However, the reason MPs are legislating is because of the particular legal and constitutional circumstances of Brexit which mean that legislative inaction will result in a major constitutional change that does not have the support of Parliament. If the relationship between the government and Parliament were operating on a cooperative basis, the government would itself be proposing to legislate to avoid a no-deal Brexit. But by escalating the confrontation rather than diffusing it, the government is showing that it is willing to prioritise delivering a particular form of Brexit over maintaining the institutional relationship which is at the heart of the UK's system of parliamentary government.

The problem with choosing confrontation over cooperation is that it is not sustainable. If the Government delivers no deal in the face of opposition of a majority of MPs, then what happens? The Government will not be able to deliver its legislative programme after such a major breakdown in trust with the Commons, and the case for an immediate General Election would be overwhelming. But the Government needs a degree of cooperation with the Commons to be able to trigger an early General Election under the Fixed-term Parliaments Act 2011. Ultimately, if the Government of the day cannot get a majority of MPs to

support a constitutional change that it intends to enact, then it can either abandon that change, find a compromise that can get MPs' support or resign. Escalating the confrontation with the Commons risks causing a breakdown in the relationship between Government and Parliament from which it will be difficult to recover.

This Comment has been [cross-posted](#) from the LSE British Politics and Policy Blog.

URL: <https://binghamcentre.biicl.org/comments/53/the-brexit-prorogation-an-unsustainable-constitutional-confrontation>