

Brexit and the UK Political and Constitutional Crisis: Prorogation and the Case for Constitutional Reform

The Government's decision to prorogue Parliament on 9 September (the Brexit Prorogation) has exposed an uncomfortable truth: the UK constitution does not provide strong legal limits on some of the executive's most constitutionally significant powers. The legality of the government's decision to request a prorogation will be determined by the Supreme Court on 19 September. Whether or not the Supreme Court decides that the government's decision was unlawful, the Brexit prorogation has highlighted the fact that the government holds a significant power over Parliament which can be used without the consent of the House of Commons. Arguments for constitutional reform in the UK often seem to lack political bite, but the Brexit prorogation should focus minds on the question of whether some of the core elements of the relationship between Parliament and the government should be subject to more stringent legal limits.

Political vs legal accountability

The case for the reliance on non-legal rules to regulate the relationship between Parliament and the government rests on the idea that accountability of the executive should be secured by political rather than legal means. The case for laws, either in the form of a codified constitution or legislation, to govern political relationships is often rejected in the UK on the basis that it is better for politics, rather than law, to shape the political process. The Fixed-term Parliaments Act 2011 (FTPA) is often cited as an example of the dangers of using legislation rather than convention to constrain executive power. The FTPA is often [criticised](#) for creating a distinct statutory form of no confidence vote, which has distorted the operation of the underlying, and arguably more significant, confidence convention.

Whether or not those claims are correct, the FTPA has also demonstrated the value of creating clear legal rules to regulate the relationship between the Government and Parliament. The FTPA provides that in order to trigger an early general election (and to dissolve Parliament) more than two thirds of MPs must approve a resolution: "That there shall be an early parliamentary general election". On 4 September 2019 and 9 September 2019, the House of Commons used this power to reject the Government's request for an early General Election (and dissolution). This provision has empowered the House of Commons against the Government of the day. The provision creates a mechanism which allows MPs to test the Government's case for an early General Election, and ultimately subject the decision to democratic scrutiny. At the heart of the controversy over the Brexit prorogation is the sense of injustice created by the decision to use the prerogative power to circumvent the right that MPs would have had to vote on whether the House of Commons should adjourn, at a time of political crisis, for the conference recess. This sense of injustice is reinforced by the fact that the Commons has a statutory right to block dissolution, but that the House of Commons does not have a say on the question of prorogation. Prorogation and dissolution are clearly very different, but the absence of any control over the former seems constitutionally incongruous.

A statutory limit on the power to prorogue?

The absence of any statutory right for the House of Commons to have a say over prorogation is no accident. When the FTPA was going through Parliament, [MPs raised the issue of prorogation](#) in the context of the concern that the Government of the day could use the power to circumvent to trigger a general election. In response [the Government Minister responsible for the Bill, Mark Harper MP, said](#)

"if a Prime Minister behaved in an absolutely unconstitutional fashion, there would always be the ultimate long stop: Her Majesty the Queen could dismiss the said Prime Minister". He added that legal rules to deal with such a scenario were not needed because "a Prime Minister would not behave in a way that stretched constitutional convention to breaking point". More broadly, the Government's approach was that the provisions in the FTPA should not cover more than what was strictly required to achieve the Government's aim: to extinguish the Government's ability to bring about a dissolution without the approval of the House of Commons. The Brexit prorogation has shown the problems with this minimalist approach, and the assumption that relying on conventions to regulate the use of prorogation was sufficient. There is arguably now a strong case for creating a statutory requirement that the House Commons approve prorogation by agreeing a specified form of resolution (analogous to the mechanisms for triggering an early general election in the FTPA). Such a statutory mechanism might also enable the House of Commons to have some supervision over the length of the prorogation (one of the weaknesses of the early general election provisions of the FTPA is that it allows the Government to decide the date of the General Election).

Brexit checks and balances

The prorogation controversy should be seen in the context of a range of other constitutional decisions that have highlighted the limited effectiveness of the UK's system of checks and balances. There are a number of elements the relationship between government and Parliament which have been shown to be ill-suited to the era of Brexit and minority government. At the start of the Brexit process, Parliament's limited ability to supervise the treaty negotiations became increasingly evident. The Constitutional Reform and Government Act 2010 provides for very limited parliamentary input. Eventually the Government responded to pressure by granting the House of Commons a statutory veto over the Withdrawal Agreement. The problem was that by the point this was enacted, in July 2018, it was too late for the practical effect of this legislative veto to influence the scrutiny of the negotiations.

In December 2018, Theresa May's Government decided at the last minute to delay the meaningful vote until January 2019. This highlighted the fact that the Government's control of the timetable in the House of Commons could be used to limit the effectiveness of parliamentary scrutiny. The subsequent battle for control of the order paper has highlighted the unsustainability of complete government control in an era of minority Government.

In order to prepare the statute book for Brexit, the Government has introduced a number of Bills with extensive delegated powers, many of which Parliament has accepted and enacted, to enable legislative changes to be made quickly in order to prepare for a range of Brexit scenarios. The problem is that there are relatively few accessible and clear rules regulating how and when such powers are justified. In an era of minority Government, where it is much more difficult to get significant Bills through the House of Commons without significant amendments, the reliance on delegated powers could become increasingly politicised.

Conclusion

In each of these areas discussed above, clear and enforceable constitutional rules are needed to enable Parliament to supervise the exercise of executive power. Writing in May 2019, Nikki Da Costa, the government's current director of legislative affairs, [observed](#) that when it came to prorogation and setting the date for the Queen's Speech "there are no rules". Future governments and Parliaments will have to ponder whether this state of affairs, in relation to prorogation and other elements of the constitution, is good enough. The incremental approach to constitutional reform that has dominated in Westminster is to be sufficient to cope with the era of political populism. The uncomfortable truth for those deploring the Brexit prorogation is that up to this point successive Parliaments and governments of all stripes have failed to take these constitutional questions seriously. It is ultimately Parliament's, rather than the courts, responsibility to ensure that the rules that constrain the government's powers are fit for

purpose.

This comment has been [cross-posted](#) from the [DCU Brexit Institute blog](#).

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