Prorogued until October?

How the Prorogation Act 1867 could be used to sideline Parliament for good

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29.08.2019 doi: 10.17176/20190829-201022-0

The British government under Prime Minister Boris Johnson yesterday secured a prorogation of Parliament from the Queen. Barring an intervention from the courts, Parliament will stand prorogued no earlier than Monday 9th September and no later than Thursday 12th September 2019 to Monday 14th October 2019. The Cabinet Manual defines prorogation as the conclusion of the parliamentary session and a recess causing an effective suspension of the parliamentary process. Prorogation is related to a further concept that should be distinguished in this context: adjournment. Adjournment refers to the right of each House of Parliament to interrupt and continue at a later time its current session, for instance at the end of each day and for periods of time determined by resolution. This typically occurs during 'conference season' as MPs adjourn Parliament in order to give members time to attend their respective party conferences. The crucial difference is that Parliament remains in control of the process, not the government.

As I laid out in an earlier contribution to this blog, prorogation effectively eliminates Parliament as a constitutional actor for the relevant time period. Given the events of yesterday, I will have to revisit my characterisation of the constitutional convention on prorogation. I still believe that achieving a no deal Brexit by silencing and marginalising Parliament is fundamentally at odds with British parliamentary democracy, especially principles of democracy and representative and responsible government. Prorogation deprives Parliament of any ability to fulfil its deliberative and legislative function, and crucially to hold the government to account for its exercise of prerogative powers. However, in this post I will not attempt to restate that argument or develop it further. Instead, I want to draw attention to a constitutional threat lurking in the background of the prorogation.

Progogation act 1867

Much attention yesterday focused on the timing of the prorogation. The government evidently sought to avoid the impression that the sole, or indeed primary goal of the prorogation was to cut short the time for parliamentary debate of Brexit. For many commentators the weeks from now until 12 September and from 14 October to 31 October (the day the United Kingdom exits the European Union) were crucial. It tipped the balance of the prorogation from blindingly unconstitutional to constitutionally dubious, but permissible. Regardless of whether one finds this line of reasoning convincing, there is a threat that this prorogation can be extended indefinitely that has been largely overlooked: the Prorogation Act 1867.

Section 1 of the Act specifies that the recess period may be extended for at least a further fourteen days after the date of the proclamation by the Monarch on the advice of the Privy Council. This provision effectively permits the government to extend the prorogation of Parliament in the same manner that it secured the original prorogation. Historically, this last occurred in 1950, when Parliament was prorogued to a later day while in recess by George VI. Section 2 appears to limit this power by stating that 'This Act shall not apply to the case of the prorogation of Parliament at the close of a session.' A session is a parliamentary year and normally commences in spring, lasting for about 12 months and ending with a prorogation. Typically, there are five sessions in each Parliament.

Is the prorogation secured by the government under PM Johnson 'at the close of a session' and hence

of the type covered by section 2 of the Prorogation Act? In purely technical terms the answer is yes, but that is because any prorogation by definition closes a session and is therefore 'at the close of a session'. This is regardless of how long it has lasted and whether it facilitates a general election. It appears this interpretation captures too much as all prorogations would be covered and section 1 would therefore have no sphere of application. A purely technical interpretation then does not clarify matters as it cannot account for the extension that occurred in 1950. Therefore, we require alternative interpretations of section 2 of the Prorogation Act and I suggest there are at least two, with different legal implications.

One interpretation is that section 1 of the Prorogation Act only applies to a prorogation brought about in preparation for a general election. A prorogation for the purposes of a general election is different from a typical prorogation because it can arise at any point during the parliamentary year. It does not, or at least not necessarily, arise 'at the close of a session', nor is closing the session its primary motivation. In the past, a general election would be held at the discretion of the government as shaped by constitutional convention and now additionally tempered through the provisions of the Fixed Term Parliament Act. Section 2 may have been designed to prevent section 1 of the Prorogation Act from applying in the scenario we are currently facing. The prorogation sought by the government was clearly not meant to facilitate a general election, even though it may well lead the UK down that path. Instead, the government has claimed that it is primarily concerned with closing the session of Parliament and laying out a legislative agenda in the Queen's speech.

However, there is an alternative interpretation of section 2 that only excludes the application of section 1 to a prorogation sought at the end of a parliamentary year, after roughly twelve months. This interpretation would leave any prorogation that does not arise at the end of a parliamentary year unaffected: including one facilitating a general election, but also a prorogation effected during the ordinary course of a parliamentary session for other political ends. Applying this interpretation to our situation is complicated by the fact that the current session of Parliament has already lasted for more than twelve months, an unusually long two years. One could argue that as it is not an ordinary prorogation, in the sense of arising after twelve months and primarily motivated by closing a parliamentary session and is therefore not covered by section 2 of the Prorogation Act.

This may not strike everyone as the most convincing interpretation, I myself have doubts, but this uncertainty over whether the application of the Prorogation Act is excluded by section 2 in our circumstances may be enough to secure an extension. The danger is not primarily grounded in the legal power potentially given to the government: indeed, whether or not section 2 applies may in the end not be decisive as long as the government can make an arguable case to the Queen that it has these powers. This is because any legal challenge against an extension under the Prorogation Act would face the same difficulties experienced by the current litigation against prorogation. While it is possible to challenge the ministerial advice offered to the Queen, the exercise of prerogative powers through the Monarch is not amenable to juridical review. Should the Queen act on the ministerial advice (even if it is unlawful) and extend the prorogation period it will be extremely difficult to undo.

The threat of prorogation to parliamentary democracy is obvious. There is no legal guarantee that the government will allow Parliament to sit again following prorogation in September. It seems at least possible for the government to argue that it can legally seek an extension of the recess period beyond 14 October. I make no prediction whether such an extension is politically feasible or indeed likely.

Hopefully, once the current crisis has settled down, a debate can begin about whether prorogation is still needed in the constitutional framework of the UK and whether it should be put on a statutory footing to temper the political abuse we have recently witnessed. In any case, it would appear that prorogation has morphed from a politically uncontroversial and predictable formality into a blunt tool that enables

politically opportune silencing of Parliament in service of the government agenda.

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SUGGESTED CITATION

Theil, Stefan: Prorogued until October?: How the Prorogation Act 1867 could be used to sideline Parliament for good, Verfassungsblog, 29.08.2019, doi: 10.17176/20190829-201022-0.

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