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Senior parliamentarians have asserted that the Northern Ireland (Executive Formation etc) Act 2019 was enacted to prevent prorogation of Parliament in the autumn. This understanding of the Act's legal effect was very widely reported. Closer analysis suggests that the true position is otherwise. This is relevant to the lawfulness of yesterday's Order of Her Majesty in Council that Parliament be prorogued from a date no earlier than Monday 9 September and no later than Thursday 12 September to Monday 14 October, when the next session will begin with a new Queen's Speech. While the Act limits the practical effects of prorogation in certain circumstances, nothing in the Act prevents prorogation in the autumn, including from the second week in September. The Government can comply with the requirements of the Act before the prorogation begins and the Act does not require Parliament to be recalled in these circumstances before 14 October. Indeed, the Act would not even have prevented the current session of Parliament having been brought to an end on 15 October and the next session commencing on 1 November, after the UK is due to leave the EU.

The Northern Ireland (Executive Formation) Bill as first introduced by the Government required the Secretary of State, on or before 21 October 2019, to lay a report before Parliament on progress towards the formation of an Executive in Northern Ireland. This reporting requirement (clause 3 of the Bill) was extensively amended in both Houses of Parliament, not it seems for any reason relating to the Bill's nominal purpose – formation of an Executive in Northern Ireland – but rather to preserve parliamentary time in the autumn to block a no-deal Brexit. This parliamentary time might be used by a coalition of MPs and peers to attempt to pass legislation against the wishes of the Government – similar to the European Union (Withdrawal) Act 2019, enacted in March this year – requiring the Prime Minister to request the EU to agree to an extension of the Article 50 process or even to revoke unilaterally the UK's Article 50 notice.

Dominic Grieve QC MP introduced amendments to the Bill, one of which was accepted and requires the Secretary of State to lay an initial report before Parliament on 4 September 2019 (section 3(1)) and then a further report “on or before 9 October 2019 and at least every fourteen calendar days thereafter until either an Executive is formed or until 18 December 2019, whichever is the sooner” (section 3(5)). Whatever

Dominic Grieve may have intended, on which more below, this ongoing reporting requirement does not make prorogation unlawful. In imposing a reporting requirement on a Secretary of State, Parliament does not thereby articulate an intention to limit the prerogative power to prorogue, especially since any Bill to this effect would, according to the rules of each House, require Queen's Consent (not just royal assent) to have been obtained in respect of the amendment.

In the House of Lords, the Bill was amended further, introducing two new subsections. Section 3(2) requires the Secretary of State to make arrangements for (a) a copy of each report to be laid before each House of Parliament on the day that it is published, (b) a motion in neutral terms (that is, an unamendable motion), to the effect that the House of Commons has considered the report, to be moved in the Commons, and (c) a motion for the House of Lords to take note of the report to be moved in the Lords. Section 3(3) requires these motions to be moved within five calendar days beginning with the end of the day on which the report is laid before Parliament.

The Bill then returned to the Commons where a further amendment was made. Section 3(4) provides that if as a result of Parliament being prorogued or adjourned a Minister could not comply with these obligations, then a proclamation under the Meeting of Parliament Act 1797 shall require Parliament to meet on a specified day within which compliance with subsection (3) is required and to meet for the following five working days to allow for compliance with subsection (2): that is, for a copy of the report to be laid and motions moved. The amendment was approved by the House of Lords and the Bill has now received royal assent and has become an Act of Parliament.

A proclamation under section 1 of the 1797 Act gives notice that Her Majesty requires Parliament to “meet and be holden for the dispatch of business” on the day in question, with the proclamation being notice of the intention of Her Majesty that Parliament shall stand prorogued to the day therein declared, notwithstanding any previous prorogation of Parliament to any later day, or any law or practice to the contrary.

In the course of deliberation about subsection (4), Sir Oliver Letwin MP said to Dominic Grieve:

“I hope my right hon. and learned Friend might be willing, particularly as he is a former Attorney General, to join me in stating specifically, for Pepper v. Hart purposes, that the intention of those who have been involved in the preparation of the amendment is uniformly to ensure that it absolutely and explicitly blocks the use of the prerogative power to prorogue our Parliament.”

To which Grieve replied:

“Yes, I am entirely happy to make that assertion, because when I realised that it was an issue, I also realised that it was a threat to the good governance of this country and, indeed, to the good governance of Northern Ireland in the run-up to setting up the Executive, which I very much hope will come into being very

quickly. That is precisely why we have endeavoured to do it in a manner that is wholly compatible with the Meeting of Parliament Act 1797, as was pointed out, while making it clear that, in the particular context of this legislation, this House wishes to emphasise that Prorogation is not a reason why it should not be meeting to consider these matters on the day appointed.”

Under the *Pepper v Hart* test, especially as refined by subsequent decisions of the courts, these assertions would not be considered relevant to the interpretation of the Act. In any case, it is constitutionally dubious for a Minister or anyone else to use *Pepper v Hart* in an overt attempt to give their statements in the House legislative force. One would expect the Law Officers of the Crown to strongly advise against any Minister adopting that course. So, it is worth considering how closely the assertions track the terms of the Act and whether, or how, it limits prorogation.

No doubt Dominic Grieve is sincere in his hope that an Executive will soon be formed in Northern Ireland and it is unfortunate that the amendments may well have the perverse effect of incentivising some parties in the negotiations to prolong them. However, note that if an Executive is formed then on the Act’s own terms its reporting requirements will fall away (so too for the Act’s provision for same-sex marriage and abortion). That is, if an Executive is formed, then unquestionably the Act will not prevent prorogation at any time during the autumn.

But what if, as is likely (especially in view of the Act’s provision for same-sex marriage and abortion), an Executive in Northern Ireland is not formed? Then ministers will remain under a duty to lay reports before the Houses of Parliament and to move motions in relation to them. These reporting requirements do not straightforwardly prevent prorogation. Indeed, on its face, section 3(4) expressly contemplates that Parliament may have been prorogued and to that extent disavows any intention to limit prorogation, thus undermining any argument of an ambiguity in the Act that would fall to be clarified using *Pepper v Hart*. The significance of the Act is not that it implicitly limits this prerogative power – let alone explicitly limits it as Sir Oliver Letwin says – but that it makes provision to shorten a prorogation that has otherwise already happened perfectly legitimately.

In other words, nothing in the Act would have prevented Parliament from having been prorogued from as early as 5 September 2019, the Secretary of State having complied with the Act’s terms across the previous two days. Likewise, nothing in the Act prevents prorogation on 10 September, as the Government intends, with the motions required under section 3(4) having been moved on Monday 9 September. The Act requires any prorogation that on its terms goes beyond 10 October 2019 to be brought short by way of a proclamation under the 1797 Act. However, this proclamation might return the Houses of Parliament to session on 10 October, which is the first of the five calendar days during which compliance with section 3(3) was required, or on any day up to and including 14 October, which it seems is what the Government intends. (Recall that section 3(4) requires a proclamation that “shall require Parliament to meet on a specified

day within the period within which compliance with subsection (3) is required”, which means five calendar days after the day on which the report is [or rather, but for prorogation would otherwise have been required to have been] laid before Parliament.) Section 3(4) requires Parliament to sit at least on this specified day and for five further working days, or perhaps for sufficient further working days, up to a maximum of five, for a report to be laid and motions moved. (The Act is open to the construction that the recall is required to be limited to the conduct of the business for which it is made.) Nothing in the Act would prevent Parliament from being prorogued again from this point, even if this would be very unlikely in practice.

Strictly speaking, it would have been (and still is) open to the Government to lay its second report, which is required to be tabled on or before 9 October 2019, immediately after its first report in early September and then to move the relevant motions. This might all take place in the first sitting week in September, at which point the Act would not have required a third report to be tabled until 23 October at latest. And if Parliament had still been prorogued on that date, it would have been open to the Government to appoint a date within five subsequent calendar days for Parliament to be recalled. That is, the Act left open effective prorogation from 5 September until 28 October. It seems that the Government plans to move motions on the first report on 9 September, in which case Parliament must be recalled by 14 October at latest. Nothing in the Act makes it unlawful for the current session of Parliament to end on 9 September and the next session to begin on 14 October.

The supporters of amendments in the Houses of Parliament seem to have reasoned that prorogation in late October was more likely, and/or more objectionable, than prorogation in early September, hence the significance of the 9 October date and the fortnightly schedule thereafter. Prorogation in mid-late October would have been consistent with past practice – up until 2010, sessions of Parliament tended to begin in November. It would also have brought to an end the current, extremely long session of Parliament, beginning a new session of Parliament, and a new Queen’s Speech, relatively promptly after the formation of a new Government and immediately after the UK’s exit from the EU. If the UK Government had by mid-October agreed a deal with the EU, which the Houses of Parliament had accepted and legislated for, then prorogation at this time might even have been thought appropriate and uncontroversial. If the UK had not agreed a deal, such that the legal default remained leaving without a deal, such a prorogation would have been intensely controversial.

But would it have been unlawful? Not for any reason to be found in the Act. Section 3(5) requires the Secretary of State to table a report “on or before 9 October 2019 and at least every fourteen calendar days thereafter”. Within five calendar days of laying the report before Parliament he or she must also arrange for motions to be moved. It is unclear whether the 14 days runs from the specified date, 9 October, or from the date of the report, if this is earlier. The natural reading and intention would certainly seem to

be that it should run from 9 October, in which case a report would need to be filed within each of the fortnightly periods that follow. That is, a further report would need to have been filed on *or before* 23 October (and motions then moved in each House of Parliament) and the next report on *or before* 6 November. In this case, it would have been open to the Secretary of State, had Parliament then been in session, to have laid a report before Parliament on 10 October and moved motions on 11 October. Parliament might then have been prorogued from 12 October until 5 November (or even later: any proclamation required under section 3(4) might specify that Parliament should meet on 11 November, the fifth calendar day after the reporting date).

If instead the 14 day period runs from the date on which the report is laid before Parliament, then if a report had been tabled on 9 October the next report would have to have been tabled no later than 23 October. However, the next report could certainly have been tabled before 23 October. The Secretary of State might have chosen to table his or her next report as early as Monday 14 October and then arranged for the relevant motions to be moved in both Houses of Parliament the following day. Parliament might then have been prorogued from 16 October until 1 November. The Secretary of State would have had a duty to table his or her next report on 28 October, 14 days after the previous report, but this duty would not have been possible to perform due to prorogation. Section 3(4) would then have required a proclamation requiring Parliament to meet within five calendar days after the report would otherwise have been laid. The fifth day would have been 2 November.

At a minimum, on the Act's own terms, prorogation from 16 October to 1 November was always legally open. Indeed, one might say that the Act expressly contemplated such prorogation and did nothing to prevent it. The Act does not prevent the current session of Parliament being brought to an end on 10 September, with the next session beginning on 14 October. Indeed, the Act does not even rule out a further prorogation of Parliament from 22 October until after 31 October, even if such a prorogation, bringing to an end a session of Parliament that is only eight days old, must be very unlikely.



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