

Brexit : towards a constitutional crisis ?

Document 1 – The UK can't even have a proper constitutional crisis

Adapted from *CNN*, Luke McGee, August 7, 2019

Boris Johnson, the UK's new Prime Minister, has inherited an unprecedented constitutional mess from his predecessor, Theresa May. [...] At a glance, Johnson's Brexit plan is simpler than May's: get a new agreement with the EU or crash out on October 31 with no deal. Given that the EU has said numerous times that May's deal, formally known as the Withdrawal Agreement, is not open for renegotiation, no deal seems on the cards. The snag for Johnson is that among those rejected Brexit alternatives was, you guessed it, no deal. On paper, that leaves the UK in what would be commonly called a constitutional crisis.

The UK is unlike most Western nations in that it has no written constitution. Instead, it relies on constitutional precedent and convention set out in law or previous acts of Parliament. However, Brexit has thrown up so many political abnormalities that with no precedent or written constitution to fall back on, the political class has started trying to make it up as it goes along. [...]

This constitutional ambiguity has led to an almighty row about what should happen next. When Parliament returns from its summer holiday on September 3, Johnson could well face a motion of no confidence in his government. [...] And some of his own Conservative lawmakers have implied they will put blocking no deal ahead of party loyalty.

However, losing this vote wouldn't mean that Johnson gets stopped in his tracks. Nor would it mean that no deal is automatically avoided. After losing a confidence vote, the sitting government by law has 14 days to try to win back the confidence of the House of Commons and resume governing. If it fails to do so, then an early general election is called. Until the result of that election, a caretaker government (probably the sitting government) runs the country.

The problem with all of the above is that the law on which it relies, the Fixed Term Parliaments Act, only came into being in 2011, meaning there is no precedent in using it to kick out a government. [...]

The law itself doesn't specify exactly when this election would have to take place. This means that, despite losing a confidence vote, Johnson would effectively be able to sit in Downing Street for weeks, if not months. [...]

Even if Johnson does choose to sit tight, some lawmakers believe they can force his hand to delay Brexit. In recent days, those opposed to no deal have pointed to something called the Cabinet Manual, which advises a caretaker government on what it should and shouldn't do. Once crucial observation it makes is that a caretaker government doesn't have the confidence of the House of Commons. Therefore, as Haddon points out, one way it could be interpreted is that a caretaker government would be "restricted in what they can do and ought to act in the national interest with the opposition parties."

However, even this is just guidance. [...] Without a written constitution and no precedent for guidance, this all becomes a political battleground. In recent weeks, all sorts of wild suggestions have been made.

Some have even suggested that the Queen, the UK's conventionally apolitical head of state, could get involved. However ludicrous this seems, Blick says that "the only firm legal position in all of this is that, in theory, the Queen appoints and can dismiss a prime minister." And as Blick points out, "because there are such sharply diverging interpretations being advanced, it could become harder for the politicians to sort this out between themselves ... I'm sure the palace is concerned by this."

From squatting prime ministers to a writing letters to the EU and the Queen sacking Boris Johnson, Brexit can feel pretty surreal. However, with absolutely nothing to guide the UK's politicians through this mess, it's hard to see squabbling lawmakers ending this nightmare any time soon. [...]

Document 2 – Brexit Turmoil Intensifies as Court Rebukes Boris Johnson

Adapted from *The New York Times*, September 24, 2019, by Mark Handler

Britain's highest court, in an extraordinary rebuke that deepened the country's convulsive debate over Brexit, ruled on Tuesday that Prime Minister Boris Johnson had acted unlawfully when he suspended Parliament in his unyielding drive to pull Britain out of the European Union. [...]

[T]he British Supreme Court ruled unanimously that the prime minister had overstepped, and effectively declared Parliament back in session. As lawmakers prepared to reconvene on Wednesday, Mr. Johnson, facing calls to resign, said he would cut short a trip to the United Nations and return home.

The ruling was more than just another political blow to a leader who has suffered more than

his share of setbacks. It was a seminal legal moment in Britain, where the courts have historically steered clear of political disputes, and vivid evidence of how the anguished debate over Brexit has strained Britain's most hallowed public institutions.

Most immediately, the ruling raised questions about the future of Mr. Johnson, who was already reeling after multiple defeats in Parliament, a rebellion in his own Conservative Party, and new questions about his ties to a young businesswoman when he was mayor of London. [...]

Still, the debate over whether and how to leave the European Union, which voters agreed to do in a June 2016 referendum, proved the undoing of Mr. Johnson's two predecessors as divided Britons took to the street to protest. Now, he faces an uncertain future as he ventures back into Parliament. [...]

Mr. Johnson reiterated his call for a general election, but there were no signs he was any closer to winning the necessary two-thirds approval in Parliament to schedule a vote. Parliament seemed likely to lapse back into paralysis as the deadline for Britain's exit from the European Union — Oct. 31 — draws closer.

Defenders of the prime minister complained that the court ruling would weaken his hand in negotiating an exit deal with Brussels. That contention seemed debatable, given the deep gulf between the two sides, but the court's decision certainly tarnishes him at home, at a time when his other stumbles have yet to dent his popularity.

Unlike in the United States, there is little precedent in Britain for judicial review of government decisions. That had led political and legal analysts to speculate that the court might decide it had no authority to rule on the prime minister's actions, or to deliver a limited rebuke.

Instead, the court's 11 justices cast aside this tradition of restraint and delivered an unsparing denunciation of the government's actions, and an unequivocal victory for the prime ministers' opponents.

"The decision to advise Her Majesty to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification," said the court's president, Lady Hale, using the British term for suspending the body. [...]

The speaker of the House of Commons, John Bercow, [...] who has been a thorn in the government's side because of his habit of allowing backbenchers to influence the debate

over Brexit, said the justices “have vindicated the right and duty of Parliament to meet at this crucial time to scrutinize the executive and hold ministers to account.”

“As the embodiment of our parliamentary democracy,” he said, “the House of Commons must convene without delay.”

While the lawmakers scrambled to plot strategy for their unexpected parliamentary session, legal analysts pored over the court’s written opinion to determine just how much it changed the landscape of British constitutional law. On first glance, the answer seemed to be: a great deal. [...]

“There are some aspects of Parliament’s role in holding the executive to account that we previously thought were just established practice, or perhaps convention,” Mr. Hogarth said. “But what the Supreme Court has done today is rolled them into legal doctrine.” [...]

Document 3 – A royal mess: How Brexit has tarnished the crown

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Brexit has breached the gates of Buckingham Palace. The battle over the United Kingdom’s departure from the European Union has rocked some of the country’s most cherished institutions. It has dominated the political debate, paralyzed parliament, pitted Tory against Tory, Labour against Labour and threatened the integrity of the Union. Then late last month, it reached out and touched the queen.

Queen Elizabeth II is the least politically assuming of any sovereign before her. [...] [She] has spent her more than six decades on the throne cultivating a neutral and institutional role. “The queen’s personal view is to stay out of politics,” said Robert Lacey, a royal historian and historical consultant on Netflix series “The Crown.” “It’s her nature to be shy. It’s her nature not to intervene. She doesn’t believe it’s the constitutional monarch’s role to make interventions, to change the rules or change things.”

But when Boris Johnson — the 14th prime minister to serve under her reign — asked her to shut down parliament for four weeks, she couldn’t avoid being dragged into the political fray.

The queen had little choice in the matter. Tradition dictates she grant the prime minister his requests. But with Johnson’s move seen as an effort to prevent parliament from blocking a no-deal Brexit and the country so deeply divided between Leave and Remain, any answer she gave was bound to infuriate one side or the other.

And some of the reaction was, indeed, furious.

“The. Queen. Did. Not. Save. Us,” tweeted Labour MP and former frontbencher Kate Osamor. Shortly afterwards she added: “The queen should look at what happened to her cousin Tino ex-King of Greece when you enable a right-wing coup! Monarchy abolished!”

A petition launched by the anti-Brexit campaign group Best for Britain asking the queen to refuse the request from Johnson quickly racked up more than 50,000 signatures, and the sovereign was soon fielding requests from Labour leader Jeremy Corbyn and Liberal Democrat leader Jo Swinson to meet with them and hear their complaints about the decision.

“A lot of people half hoped that the queen would somehow come riding in on a stallion or one of her corgis to save the day,” said Adam Wagner, a human rights lawyer and expert on constitutional law. “But the idea that the sovereign plays any substantial role in this farce is complete nonsense.”

In another political context, Queen Elizabeth’s decision to follow with tradition and grant Johnson’s request would have passed unremarked. While the monarchy retains much of its medieval trappings, its power has been in decline ever since King John signed the Magna Carta in 1215.

According to protocol, the queen appoints the prime minister and accepts his or her resignation. She opens parliament almost every year with “the Queen’s Speech,” outlining the government’s program. [...]

But formalities like these aside, the British monarchy has lost almost all of its real authority. The queen neither writes, nor necessarily agrees with the contents of, the Queen’s Speech. The last monarch to dismiss a prime minister was [...] in 1834. [...] And the last time a British monarch refused to follow the advice of their government was in 1936. [...]

It is no longer acceptable for a modern monarch in a parliamentary democracy to have any political power. [...]

Because the country has no written constitution, the queen's role in public life and what her ceremonial powers really mean exist in a grey area. A small number of people clearly thought Elizabeth could have — and maybe should have — refused Johnson's request to suspend parliament. But had she done so, it would have triggered a constitutional crisis.

Constitutional experts have also been quizzed in recent weeks over whether the queen might have to intervene and dismiss the prime minister if Johnson lost a confidence vote but

refused to resign. The Commons would have to give a clear signal that another candidate could command a majority in order for her to do so.

Some Brexiteers have also suggested that the government neuter efforts by parliamentary rebels to delay Brexit by refusing to send their legislation for "Royal Assent," the process by which the queen agrees to turn a bill into law. The process once required the monarch's signature, but it is now a quick formality that does not involve her directly.

One legal expert said the constitution would be thrown into "crazy territory" if the government tried to pull such a move.

And so it's perhaps not surprising that Johnson's maneuver — and the queen's involvement in it — has fueled calls for putting the constitution down on paper. [...]

"We have a political constitution that is barely fit for the 19th century, let alone the 20th or 21st," Lewis said. "It's high time, once the dust has settled on Brexit, that this country really begins to understand that a democratic constitutional convention is necessary to work out what structure we are going to have for the United Kingdom."

One of the key questions in any such venture would be the role of the monarch. "I'm not sure what the appetite is for a republic but I think that should be on the agenda as something we should discuss," said Lewis.

While few are calling for an end of the monarchy, the creation of a written constitution could curtail its powers for good. [...]

Document 4 – Demonstrators rally in London against the move to suspend parliament in the final weeks before Brexit.

The Guardian, September 1, 2019



Document 5 – Brexit and Devolution

By Graeme MacKay, March 29, 2017

