

Our democracy will be enhanced by the Supreme Court's prorogation ruling

The fact that the Supreme Court is scrutinising the legality of a decision taken by the prime minister is unusual. For some observers, its role this week in the latest Brexit drama is a sign that things have gone wrong with the UK constitution: judges should stay out of politics and stick to the law.

The problem with this view is that it is premised on a rigid and outdated dichotomy between a "political" and a "legal" constitution. That crude distinction fundamentally misunderstands the dynamic nature of the relationship between the courts, parliament and the government under our constitutional arrangements. It should not be characterised as a conflict, with each competing for the right to decide.

Each branch is tasked with complementary functions, and the Supreme Court's role is to decide the hardest constitutional questions. Brexit has given rise to plenty of those and it is unsurprising that big constitutional questions, such as those in the Miller Two and Cherry case, occasionally go to the Supreme Court.

Whether or not there are applicable legal rules that regulate how the government's power to prorogue parliament should be exercised is undeniably a question that needs to be answered. It is a question on which reasonable people (including judges) disagree, and in these highly politicised times, it is entirely appropriate that the highest court in the UK, composed of the most senior independent judges, should make a decision.

As Lord Bingham, one of the UK's most celebrated judges, made clear in the *Belmarsh* case in 2004, it is wrong to argue that judges are somehow "undemocratic" simply because they are unelected or asked to assess the legality of government decisions. On the contrary, he said, "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself". In short, our conception of democracy includes an important role for courts.

The Supreme Court's role is to provide an authoritative ruling on the legality of the prime minister's decision. Already this week, the constitutional value of testing the legality of prorogation in court has been evident. Thanks to the litigation, the government has had to justify its decision, and make public the process that led to it.

Further, the disagreement between the two legal teams and the contrasting approach of the High Court in London and the Court of Session in Edinburgh have revealed radically different interpretations of some constitutional fundamentals. Does parliamentary supremacy limit how the government uses its prerogative powers? Is limiting parliamentary scrutiny of the government a legitimate reason for seeking to prorogue parliament? In the midst of the constitutional upheaval that is Brexit, we need to know which of these interpretations is correct.

One of the main reasons that the prorogation question has arrived in the Supreme Court is that the rules that govern how the process works are unclear. Brexit keeps throwing a spotlight on to areas of the constitution that seem out of date and ripe for reform. It is only natural that in such difficult constitutional times, we see the constitution as we want it to be rather than how it

actually is.

When the Supreme Court gives its judgment, we will know what the law actually says. Whatever the answer, our democracy will be richer for having the question tested before an independent judiciary and subject to an authoritative determination. It will then be for parliament to decide whether legislative action is needed to ensure that the law is as it should be.

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