

Constitutional change

The government's defence yesterday of its action to prorogue Parliament was simple. They thought their actions were entirely legal and based on precedent. This was confirmed by the English High Court. The Supreme Court then decided to create a new legal test over prorogation and change it from being a matter for government and sovereign to decide into a matter than is justiciable under the new rules of prorogation set out by the Court. The government accepts their ability to do this. It will fall to a future Parliament to decide if Parliament wishes to continue with the approach set out by the Supreme Court or if it wishes to legislate to change the approach.

The heart of our constitution rests on a series of checks and balances. Our constitution is written down in various Acts of Parliament, court decisions, the rules or Standing Orders of Parliament and precedents where executive power has traditionally been used. An activist Supreme Court can change our constitution. An Act of Parliament can change our constitution. Executive action can change our constitution, as with the decision to negotiate and enter into the EU Treaties, though these were also subject to confirmatory Acts of Parliament. Parliament often passed them under government guidance that we would be failing to meet out international obligations entered into by the executive at the end of the negotiation if the Bill was not passed.

There is a daily battle between the three elements of the constitution. Parliament regularly criticises the executive and seeks to amend or change its ways. Courts regularly review government decisions and sometimes find them wanting. Government seeks more discretionary power by seeking wide ranging powers in Acts of Parliament, or general approvals of spending with considerable freedom to decide the detail of programmes.

In two wide ranging prerogative areas, the power to declare war and the power to negotiate a treaty, Parliament increasingly asserts its right to approve or prevent the decision. Past great wars have been entered into on the basis of substantial cross party support. Other wars have proved more contentious and have needed Parliamentary majorities with votes.

The battles so far over Brexit have concerned the need for an Act of Parliament to send the letter of notification of withdrawal, and the refusal of prorogation owing to the importance of the Brexit issue. The biggest clash lies ahead. The government claims it has authority to take the UK out of the EU on 31 October. There are two Acts of Parliament to that effect, a referendum vote and the 2017 Election result. It is the government's job to negotiate a possible new Withdrawal Agreement and to decide on a No deal or a Withdrawal deal exit. Some in Parliament say its European Withdrawal Act No 2 trumps the other two pieces of legislation and expects the Courts to enforce its requirement of the Prime Minister to seek a further delay in our exit. Is it good law to demand a PM to do the opposite of his promises and Manifesto? How are its terms enforceable?