

What is at stake in the British Supreme Court's ruling on the proroguing of Parliament?

By Thomas Scripps
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On Tuesday, the UK's Supreme Court began its hearing into the legality of Prime Minister Boris Johnson's proroguing of parliament for five weeks from September 10. A ruling is expected by Friday or early next week.

This extraordinary legal and political event is testament to the full-blown constitutional crisis provoked by Brexit. The Supreme Court only hears cases that raise what its judges consider to be a vital point about how the UK's laws should be interpreted and applied.

Even then, this is only the second time in the Court's 10-year history that the maximum number of eleven judges will sit and come to a decision. The first time was in 2017, in another Brexit-related hearing, where it was successfully argued by a legal team for pro-European Union forces that ministers could not trigger Article 50—beginning the process of withdrawal from the EU—without a vote in parliament.

At the opening of this week's case, BBC legal correspondent Clive Coleman said, "We're kind of through the looking glass as far as constitutional law is concerned." This was echoed by Dr Joelle Grogan, a senior law lecturer from Middlesex University, who stated, "We are in unprecedented, uncharted territory."

Speaking outside the court, political commentator David Dimbleby told reporters, "I lived through Suez, the miners' strike, I lived through the poll tax debate and the trouble then. I lived through the Iraq demonstrations; I've never seen the country so divided as this."

Media commentators from across the political spectrum have been forced to go back nearly 370 years to the reign of Charles I—which preceded a devastating civil war during which the king lost his head—for a suitable parallel. The queen herself has been dragged in, as she formally prorogued Parliament, as is convention, on the advice of the Privy Council and after receiving advice from the

sitting prime minister.

The Supreme Court hearing follows, and seeks to reconcile, opposed rulings given in separate courts in England and Northern Ireland, and in Scotland.

On September 6, the High Court in England dismissed an argument that Johnson's prorogation was "an unlawful abuse of power." The judges said in their judgement, published September 11, that they believed Johnson's decisions "were inherently political in nature and there are no legal standards against which to judge their legitimacy." They concluded, "the decision of the Prime Minister was not justiciable. It is not a matter for the courts."

The Scottish Court of Session ruling, delivered on September 11—overturning the decision of a lower Scottish court—declared that Johnson's suspension of parliament was "unlawful" because its purpose was to obstruct "parliamentary scrutiny of the executive." The judges held that the courts had the power to intervene in this way because that scrutiny is "a central pillar of the good governance principle enshrined in the constitution" following from "principles of democracy and the rule of law." They added that proroguing parliament was "an egregious case of a failure to comply with generally accepted standards of behaviour of public authorities."

The next day, the Belfast High Court in Northern Ireland rejected an argument challenging the legality of a no-deal Brexit on the grounds that it would violate the 1998 Good Friday Agreement, which the European Union (Withdrawal) Act 2018 promises to protect.

It was revealed in the government's no-deal contingency planning that promises not to establish a politically inflammatory "hard" border between Northern Ireland and the rest of Ireland were considered "unsustainable due to significant economic, legal and

biosecurity risks... no effective unilateral mitigations to address this will be available.”

The judges rejected the argument on the basis that the main aspects of the case “were inherently and unmistakably political.” Lord Justice Bernard McCloskey threw out the argument against prorogation within the case, stating that it was already at the centre of the legal challenges in England and Scotland.

The central legal issues the Supreme Court will therefore decide on are whether the courts can legitimately pass judgement on prorogation and, if so, whether Johnson’s suspension of parliament was legal.

There are three possible rulings which the judges can reach. If the Scottish ruling is upheld and the English ruling overturned, then Johnson’s proroguing of parliament will be declared unlawful. This would be a major victory for the pro-EU opposition, used to push for the recall of parliament and even Johnson’s resignation. If the English ruling is upheld against the Scottish, then Johnson will face no censure from the courts and continue with his plans to enforce a no-deal Brexit against parliamentary opposition and in the face of possible legal sanction.

It is also possible for the Supreme Court judges to uphold both rulings, since Scotland and England have different legal systems. The English and Welsh parliament passed a bill of rights in 1688, which states only that “parliaments ought to be held frequently.” The 1689 Scottish claim of right goes further, requiring that “parliaments ought to be frequently called and allowed to sit.”

Endless references throughout this case to “democracy,” “sovereignty” and “the rule of law” are employed by the warring factions of the bourgeoisie as their lawyers pull together bits and pieces of the UK’s arcane constitutional law (Britain has no formal written constitution) to present their wing as the legitimate representatives of “the people.”

Nonetheless, this legal battle has immense political implications. The Supreme Court case will play a major part in determining the UK’s domestic and foreign policy orientation in the coming period. Its decision either way will also set a precedent with grave anti-democratic consequences: Either the judiciary will grant itself the power to direct an elected body, or the government will be allowed to suspend that elected body at will for its own political ends.

More immediately, the case threatens to produce huge fissures in the UK and threatens its break-up. The United

Kingdom consists of a union of England, Wales, Scotland and Northern Ireland. The opposed prior rulings in the English High Court and the Scottish Court of Session rest on a legal difference going back to the so-called 1688 Glorious Revolution, which resulted in the accession of a new royal dynasty. But the division has been brought to life by the irreconcilable political differences between the ruling elite in Scotland (which backs remaining in the EU) and the section of the bourgeoisie represented by Johnson, who see British imperialism’s best interests being outside the bloc in an alliance with the United States.

The next days’ events will only strengthen these divisions, with the Scottish National Party ever more vocal about a second independence referendum to bring about their programme of an independent Scotland within the EU.

The situation is even more explosive in Northern Ireland, where Brexit threatens to reanimate the political tensions and violence that were largely contained by the Good Friday Agreement two decades ago. This is under conditions where the Northern Irish Assembly has not sat for two and a half years, leading to de-facto direct rule from Britain, and where the call is being made by the republicans Sinn Fein for a poll on unification with the Republic of Ireland. At the appeal of the Belfast High Court decision, which is now underway, one applicant declared that Brexit has “lit a fuse to a stick of dynamite.”

Johnson’s legal representatives said the prime minister will “take the necessary steps to comply with the terms of any declaration made by the court,” but during the hearing, the lawyer for the government, Lord Keen, refused to be drawn on what the specific steps would be if the case is decided against Johnson.

In addition, both Johnson and Justice Secretary Robert Buckland have refused to rule out suspending parliament a second time after October 14, when asked directly. Buckland said, “For me to sit here and imagine what might happen at the end of October, I think, is idle.”

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