

Brexit meets trust law: If Boris was a trustee there'd be no unchecked prorogation

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Constitutional law 101 in the UK is that Parliament is supreme. An exception we have heard a lot about recently is that our Prime Minister has the power to temporarily suspend Parliament.

If such a power is not kept within bounds it means the Prime Minister is effectively supreme, above Parliament. That is serious.

Whatever Boris Johnson's purpose is held to be by the Supreme Court and whatever the proper limits of the power to suspend Parliament, one thing is certain: if that power can be used to undermine the supremacy of Parliament and to prevent Parliament from exercising the function for which it was created and, ultimately, from being supreme then, constitutional lawyers and philosophers have simply got it all wrong: Parliament is not supreme, the Prime Minister is.

It may be unlikely that the power to prorogue, if it is constitutionally sound and can be maintained in 2019, was created for this. It's more likely to be consistent with the supremacy of Parliament if it is no more than a procedural, logistical, timetabling power aimed at the orderly function of Parliament.

If politicians were trustees with their fiduciary considerations (ie disabled from acting in their own interests), any power they may wield would be something the courts could and should get involved in policing. Without real accountability of this kind there is no trust. That politicians are in a similar position to trustees is clear. We the people entrust them with our State for them to administer in our best interests.

Yet there is no question that trustees cannot use a power entrusted to them for an improper purpose. That would simply amount to nothing, a non-exercise of the power. This rule is not written into every trust; it is a creature of the courts developing common sense bounds on the powerful discretion of trustees. That beneficiaries under a trust can get together to collapse the trust and wrest back their assets (like the electorate can do, in theory, I'm referring to general elections rather than revolution) does not mean the court cannot also rule on the improper exercises of power.

It may seem odd if our trustees are held to higher standards than our politicians, the trustees of every aspect of our lives.

It is sometimes said that private law principles (such as trust law) should not be applied to public law circumstances (such as the decisions of government). This sounds cute but, when one considers that there tends to be much more at stake in the public realm, this jingle seems to lack melody and basic common sense.

Politics is discretion; as is the fiduciary status of trusteeship. The courts need not exercise political, or trustee, discretion. That is rightly a matter for politicians and trustees respectively. But policing the boundaries of discretion entrusted by others is as much at the heart of trust law as it is at the heart of a constitutional democracy – especially where that constitution remains unwritten.

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