

Junade Ali – written evidence (FPA0011)

Summary

Constitutional authorities historically described the prerogative power of dissolution not only as a mechanism for achieving harmony between legislative and executive powers, but as a necessary democratic safeguard in systems where sovereignty specifically rests with Parliament. Despite this, there has been very little information presented on the impact of the Fixed Term Parliament Act on democratic accountability of Parliament itself and dramatic changes in the separation of legislative and executive powers. The very legislative chamber subject to dissolution being, in all circumstances, required to consent to such dissolution removes essential oversight in a sovereign Parliament that can make or unmake any law whatsoever.

This submission to the Constitution Committee of the House of Lords is made in respect to a Call for Evidence on the Fixed Term Parliament Act 2011. It seeks to provide information on changes to the relationship of power between the executive and Parliament (and the contextual constitutional impact), the effectiveness of the legislation, the appropriateness of the mechanisms of calling an election and potential provisions in the event of repeal.

1. Constitutional Basis for the Prerogative Power of Dissolution

In *Introduction to the Study of the Law of the Constitution*, A. V. Dicey stated: "The necessity for dissolutions stands in close connection with the existence of Parliamentary sovereignty"... "Where Parliament is supreme, some further security for such harmony is necessary, and this security is given by the right of dissolution, which enables the Crown or the Ministry to appeal from the legislature to the nation".

Dicey also refers to examples of dissolution in 1784 and 1834 as examples of such a convention and argues this is a democratic necessity in a sovereign parliament, stating: "the Cabinet, when supported by the Crown, and therefore possessing the power of dissolution, can defy the will of a House of Commons if the House is not supported by the electors."

The [Fixed Term Parliament Act 2011](#), abrogated the Royal Prerogative to dissolve Parliament in Section 3(2), stating: "Parliament cannot otherwise be dissolved." The Act instead provided two mechanisms for an early parliamentary general election, with Parliamentary Sovereignty additionally allowing elections to be triggered by subsequent statute. All options to call an early general election therefore now require the consent of the House of Commons as a whole, the very legislative chamber that is the subject of a general election.

2. Effect of the Legislation

Since the Fixed Term Parliament Act received Royal Assent, there have been three. If one were to believe that the first May ministry successfully sought to [call an election in 2017](#) as it was political opportune but recently prevented elections or a new administration [in September 2019](#) when the Johnson ministry

was unable to control Commons business; it could be argued that the Act worked directly contrary to its purpose.

Regardless, it is logically clear that Her Majesty's Government losing confidence of the House of Commons clearly does not always mean the House of Commons will be willing to agree to an early parliamentary general election.

3. Effect on the Relationship of Powers

In 2014, Petra Schleiter, who has comparatively studied Fixed Term Parliaments around the world, [wrote a blog post](#) arguing why the Fixed Term Parliament Act should not be repealed. She noted: "this change moves the UK considerably closer to the practices and norms that predominate in most European countries concerning parliamentary dissolution".

A critical point is misunderstood here – unlike the vast majority of other countries, the UK has a sovereign Parliament in an uncodified constitutional settlement. In the words of Dicey, Parliament has "the right to make or unmake any law whatever", with the Commons having dominant power in this arrangement. Executive power to dissolve the chamber provides the most democratic and publicly palatable mechanism for oversight. Rigid statutory tests for exercising dissolution powers risks preventing action in a potential unforeseen constitutional crisis where such conditions aren't met.

Walter Bagehot elegantly described the relationship of executive and legislative power in *The English Constitution*:

The English system, therefore, is not an absorption of the executive power by the legislative power; it is a fusion of the two. Either the cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. It was made, but it can unmake; it was derivative in its origin, but it is destructive in its action.

The Fixed Term Parliament Act has certainly changed this relationship to one where such powers are no longer a fusion but are instead closer to an absorption of executive power by the legislature.

4. Effect on the Role of the Sovereign and Associated Prerogative Powers

As dissolution results in an election, it is a palatable way to resolve deadlocks in power structures; with such power no longer available, it is important to understand what alternative powers are available for the executive to exercise on Parliament in lieu of this.

Whilst the prerogative power for dissolution was removed, the Fixed Term Parliament Act explicitly avoided the topic of prorogation of parliament, as Section 6(1) [explicitly states](#): "This Act does not affect Her Majesty's power to prorogue Parliament."

In September 2019, the Supreme Court unanimously held advice from the Prime Minister to Her Majesty on the exercise of prerogative powers of prorogation to be justiciable (see [\[2019\] UKSC 41](#)). This, in itself, raised further profound questions on the relationship of the judiciary to both those of the executive and the legislature. There is much still to be learned of the impact of this judgement and it is too early to assess the impact of this.

However, in lieu of both dissolution and prorogation; in a future constitutional crisis, the executive may resort to advising the sovereign to refuse Royal Assent to legislation. For example, if ministers were to advise Her Majesty to refuse Royal Assent to any Bill until the House of Commons agreed to call an early general election under the Fixed Term Parliament Act. In September 2019, prorogation was widely accused of being undemocratic but a requesting refusal of Royal Assent has potential to cause even greater popular outrage.

Whilst dissolution results in an election; use of other prerogative powers against the legislature could compound public fears of undermining democracy. Similarly, a zombie government in a Parliament that refuses to dissolve can cause great public distrust of the democratic system. By transferring dissolution power from the executive to the House of Commons, democratic oversight may have ironically become more distant from the voters.

It is fundamental within the precepts of the principles of Parliamentary Sovereignty that a chamber of the legislature is not sovereign, it is instead the Queen-in-Parliament which is sovereign. Recent developments have reduced the power the monarch (and therefore the executive) in the sovereign Parliament. It is worth consideration as to whether this is an intentional direction of travel, instead of an accidental change with smaller components of constitutional reform. Do we intend for the ceremonial mace in the House of Commons to continue to symbolise royal authority, or for do we aim for it to simply be a golden ornament?

5. Repeal of the Fixed Term Parliament Act

Dissolution remains a feature in other Commonwealth realms; for example, each governor-general holds dissolution powers (normally exercised on advice of the Prime Minister) in Australia, Canada and New Zealand. The Constitution of Australia does have mechanism of "Double Dissolution", but this is only used for dissolving the Senate. The lower house (the House of Representatives) may be dissolved without specific criteria being met. Double Dissolution is not relevant to the British context as the members of the British upper chamber (the House of Lords) retain their positions during dissolution. Further, there is a far greater differentiation in power between the House of Commons and the House of Lords (such as by the Parliament Acts) than the Australian system (where both chambers have more equal legislative powers).

Resolution of crisis situations is complicated when the House of Commons is solely able to control its own destiny. As constitutional crisis situations are often unforeseen, strict legislative tests are unlikely to be suitable. Established mechanisms exist for there to be democratic accountability (with such powers ordinarily exercised by the Prime Minister, save grave situations) and further systems ensuring there is continuity in the powers vested in the sovereign (such

as the Regency Acts). Legislation would likely not only need to repeal the Fixed Term Parliament Act, but specifically reintroduce prerogative powers of dissolution and further firmly place such powers in the political realm such that their status is clear to the judiciary if challenged.

About the Author

Junade Ali edited the 2014 book "A Federal Constitution for a Federal Britain", authored by Graham Allen and the late Stephen Haesler which described modern challenges of prerogative powers from the authors perspective. He has served as a volunteer in a number of organisations seeking to improve constitutional understanding. His views likely deviate from those of these organisations and individuals, this submission solely represents his views on this matter as an individual.

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