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Introduction to me and the Centre for Crime, Justice and Security

I am a Senior Lecturer in Law in the Department of Law, and a member of the Centre for Crime, Justice and Security, at Staffordshire University. My teaching and research specialisms include all aspects of public law and legal theory and I have published extensively in these areas.

The Centre for Crime, Justice and Security aims for the promotion, development and implementation of justice in various forms. It leads on ground-breaking research, innovations and enterprise initiatives that are committed to human rights, global security and justice for all.

Executive summary

- This response refers to the Government's draft Fixed-term Parliaments Act 2011 (Repeal) Bill published on 1 December 2020.
- The Bill would increase the maximum possible length of a Parliament to five years and the maximum possible period between general elections to something greater than five years.
- The Bill contains an ouster clause; however:
    - the attempt by the Government in September 2019 to prorogue Parliament for five weeks demonstrates the importance of not excluding the courts;
    - the courts would only be likely to rule on the most egregious cases involving an abuse of the dissolution power and these are surely the very cases from which they should not be excluded;
    - such clauses put the relationship between the judiciary, the executive and the legislature under unnecessary strain and are contrary to the rule of law.
- The Government's claim that the prerogative power of dissolution was not subject to judicial supervision before the Fixed-term Parliaments Act 2011 is questionable.
- Excluding the courts from ruling on abuses of the power of dissolution – even in extremely exceptional cases – risks involving the Sovereign in politically contentious matters. It is surely preferable, in order to preserve the politically neutral position of the Monarchy, for such issues to be determined by the courts.

Full response

1. In this response to the Joint Committee's call for evidence, I address the Government's draft Fixed-term Parliaments Act 2011 (Repeal) Bill published on 1 December 2020.[1] I primarily focus on the ouster clause in clause 3 of the Bill though I also consider the maximum possible length of Parliaments and between general elections implicit in the Bill.

[1] CP 322. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940027/Draft-Fixed-term-Parliaments-Act-Repeal-Bill.pdf> accessed 14 January 2021.

2. The December 2020 Bill differs in content from that introduced to Parliament,[2] whose first reading took place in the House of Lords on 3 February 2020.

3. References to the 'Bill' in the following refer to the Government's draft Bill published on 1 December 2020.

Maximum length of Parliaments and period between general elections

4. The draft Bill would repeal the Fixed-term Parliaments Act 2011 and revert to the status quo ante whereby the power to dissolve Parliament is exercised by the Monarch, under the royal prerogative, on the advice of the Prime Minister. In effect, this gives the Prime Minister the power to set the date of the next general election.

5. This power is limited by clause 4 which reads: 'If it has not been dissolved earlier, a Parliament dissolves at the beginning of the day that is the fifth anniversary of the day on which it first met'. It is important to note that this refers to the maximum length of the Parliament;[3] consequently the maximum period between general elections could be greater than five years.

6. This is greater than that stated in the 2011 Act which specifies the normal maximum period between elections as five years. To deal with abnormal, unexpected situations, this may be extended by up to two months by the Prime Minister by an affirmative statutory instrument.[4] The 2011 Act also states that Parliament should be dissolved at 'the beginning of the 25th working day before the polling day for the next parliamentary general election'.[5]

7. In short, outwith an unexpected situation, under the 2011 Act the maximum length of a Parliament is at least 25 working days less than the maximum period of five years between elections whereas the draft Bill sets the maximum length of a Parliament at five years.

Ouster clause – the attempt by the Government in September 2019 to prorogue for five weeks demonstrates the importance of not excluding the courts

8. The reversion to the prerogative power of dissolution which existed before the 2011 Act is contained in clause 2 of the draft Bill. Clause 3 is an ouster clause which reads:

3 Non-justiciability of revived prerogative powers

[2] HL Bill (2019-21) 86.
[3] This was the position prior to the 2011 Act under the Septennial Act 1715 as amended by the Parliament Act 1911.
[4] Fixed-term Parliaments Act 2011, ss1(5)-1(7). The statutory instrument must be approved by both Houses and accompanied by a statement from the Prime Minister explaining the need for the delay.
[5] Fixed-term Parliaments Act 2011, s 3(1) (as amended by the Electoral Registration and Administration Act 2013).

> A court of law may not question—
> (a) the exercise or purported exercise of the powers referred to in section 2,
> (b) any decision or purported decision relating to those powers, or
> (c) the limits or extent of those powers.

Taken at face value, this would exclude the courts' jurisdiction to review the Monarch's power to dissolve Parliament or the Prime Minister's advice in relation to that power.

9. *The Times* reported that the Bill was

> presented as part of a wider roll-back of what [Boris Johnson] regards as improper judicial encroachment into politics following the Supreme Court ruling that his prorogation of parliament in September 2019 was illegal.[6]

10. Yet, the attempt to prorogue Parliament for five weeks, and the subsequent ruling by the Supreme Court in *Miller* that this was unlawful,[7] surely demonstrates the importance of not excluding the courts from such decisions.

11. This is because the 2019 attempt to prorogue Parliament suggests that governments may act for short term political advantage even when there is a very strong constitutional impetus to act otherwise.

12. It was widely rumoured that the real but unacknowledged reason for the Government attempting to prorogue Parliament for such a lengthy period was to avoid scrutiny by Parliament at a crucial stage in the UK's exit of the European Union.[8] Indeed, the Inner House of the Court of Session held that that was the principal reason for the unusually long prorogation.[9]

13. In short, the Government's behaviour leading to the judgment in *Miller* – its willingness to ignore constitutional and political expectations seemingly to attempt to prevent parliamentary scrutiny of its actions – does not so much demonstrate the danger of the courts being involved to rule on the legality of the use of prerogative powers as much as the necessity of the court as a final bulwark against abuse of these powers.

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[6] Francis Elliott, 'Boris Johnson will take back power to call elections' *The Times* (London, 1 December 2020) <https://www.thetimes.co.uk/edition/news/boris-johnson-will-take-back-power-to-call-elections-hlzn53nd9> accessed 14 January 2021.
[7] *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.
[8] For instance, the Speaker of the House of Commons, John Bercow, referred to the attempted prorogation as a 'constitutional outrage' and said 'However it is dressed up, it is blindingly obvious that the purpose of [suspending Parliament] now would be to stop [MPs] debating Brexit and performing its duty in shaping a course for the country', 'Parliament Suspension: Queen Approves PM's Plan' (*BBC News*, 28 August 2019) <https://www.bbc.co.uk/news/uk-politics-49493632> accessed 15 January 2021.
[9] *Cherry v Advocate General for Scotland* [2019] CSIH 48, 2019 SLT 1097 [89]-[90] (Lord Brodie).

Ouster clause – the courts would only be likely to rule on the most egregious cases involving an abuse of the dissolution power; these are surely the very cases from which they should not be excluded

14. If the final version of the Bill did not contain an ouster clause, the Government would only find itself defending a dissolution decision in the courts in extreme cases. This is for at least two reasons.

15. First, the courts are reluctant to become involved in decisions with a significant political element; they would become involved in only the most serious abuses of such power.

16. Second, the appropriate route for any challenge would be by bringing a claim in judicial review. All judicial review claims need the court's permission to proceed[10] – weak, unarguable or unmeritous cases would be filtered out at this stage and not progress to a full hearing.

17. Thus, it would only be in the most egregious cases involving a misuse of the prerogative power to dissolve Parliament (or advice to the monarch to do so) that would ever be before the courts. These seem to me to be the very cases which the courts should not be prevented from hearing.

Ouster clause – such clauses put the relationship between the judiciary, the executive and the legislature under unnecessary strain and are contrary to the rule of law.

18. Mostly, the courts decide that their jurisdiction to hear a particular case is not excluded by the ouster clause which seems to do this. This is usually explained as a matter of interpretation – that the words used in the provision in question are insufficient to overcome an assumption that Parliament does not intend to exclude the jurisdiction of the courts.

19. For example, in perhaps the most famous ouster clause case, *Anisminic v Foreign Compensation Commission*,[11] a provision which stated that the courts could not question a 'determination' of the Commission was held not to apply because the decision in question was a 'purported determination'. Lord Reid stated that if Parliament had intended to oust the jurisdiction of the courts, there would be 'something much more specific than the bald statement that a determination shall not be called in question in any court of law'.[12]

20. Incidentally, the finding in *Anisminic* that the decision being challenged was not a determination but a 'purported determination', and so not protected by the ouster clause, explains the wording of clause three in the draft Bill:

[10] Senior Courts Act 1981, s 31(3) and CPR 54.4.
[11] [1969] 2 AC 147 (HL).
[12] ibid 170.

> A court of law may not question—
> (a) the exercise or **purported exercise** of the powers referred to in section 2,
> (b) any decision or **purported decision** relating to those powers, or
> (c) the limits or extent of those powers.[13]

These references to a 'purported exercise' of power and a 'purported decision' mean that the clause is more extensive than that considered in *Anisminic*. It appears to be an attempt to avoid a future court adopting the *Anisminic* reasoning and finding that the ouster clause does not exclude the courts reviewing an exercise of, or decision relating to, the powers of dissolution.

21. Yet, such clauses, and the courts' usual reaction to them, puts the relationship between the three arms of state under unnecessary strain.

22. This point was made by Lord Woolf in relation to a similarly extensive ouster clause contained in, but later removed from, the 2004 Asylum and Immigration (Treatment of Claimants etc.) Bill. He said that the clause could 'bring the judiciary, the executive and the legislature into conflict' and that it was 'inconsistent with the spirit of mutual respect between the different arms of the government'.[14]

23. Indeed, the strength of his Lordship's feelings were such that he said that the extensive ouster clause contained in the Asylum Bill was 'fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law'.[15] Such clauses are an affront to the rule of law because they breach the principle that it should be possible for potentially unlawful action by the Government to be challenged and adjudicated in the courts.

24. Moreover, the strain that such clauses may engender between the three arms of state is exacerbated by the fact that the courts are often criticised for their treatment of them; they are accused of not simply engaging in interpretation but of disobeying Parliament.[16]

The Government's assertion that the prerogative power of dissolution was not subject to judicial supervision before the 2011 Act is questionable.

25. The foreword to the draft Bill states:

> The long standing position is that dissolution is not reviewable by the Courts and judgement on the Government's actions in such matters should be left to the electorate at the polling booth or, in extremely exceptional

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[13] Emphasis added.
[14] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63(2) CLJ 317, 328-329.
[15] ibid 328.
[16] For example, Wade and Forsyth write that 'The policy of the courts [with regard to ouster clauses] … becomes in effect one of disobedience to Parliament', William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 614.

> circumstances, to the Sovereign. In light of this, to ensure maximum certainty on the timing of a Parliamentary election, the Bill contains an ouster clause to make clear that the exercise of the prerogative powers to dissolve Parliament, and the extent of those powers is non-justiciable.

This claim, that the 'long standing position' that power of dissolution is not justiciable, is therefore being used to justify the inclusion of the ouster clause in the Bill. Yet, it is questionable whether the claim is correct.

26. Support for the claim may be found in Lord Roskill's statement in *Council of Civil Service Unions v Minister for the Civil Service*

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.[17]

27. Yet, the accuracy of Lord Roskill's statement is debateable, not least because powers which he claims are non-justiciable have been subject to judicial review.[18]

28. The correct approach, I suggest, is not to suppose that there is a checklist of powers, including the power of dissolution, that are never justiciable. Rather, it is to ask whether the limits of any particular power have been breached.

29. This is clear from the unanimous judgment of the Supreme Court in *R (Miller) v Prime Minister.* Drawing on the principle that 'the king hath no prerogative, but that which the law of the land allows him'[19] the Court stated 'every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie'.[20]

30. These limits are determined by, among other things, fundamental constitutional principles. Two principles which were decisive in the *Miller* case and which may also impose limits to the power of dissolution are those of parliamentary sovereignty and parliamentary accountability (that the Government is accountable to Parliament).[21]

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[17] [1985] AC 374 (HL) 418.
[18] For instance, Lord Denning had previously suggested that the courts may supervise the operation of the treaty making power to ensure that it is not exercised improperly: *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA) 706. And the prerogative of mercy has been held to be susceptible to judicial review; in *R v Secretary of State for the Home Department*, ex p Bentley [1994] QB 349 (DC) the Court held that while the exercise of the grant of mercy under the royal prerogative was generally non-justiciable, a failure by the Home Secretary to recognise that the prerogative could be exercised in a form other than by a free pardon was susceptible to judicial review.
[19] *Case of Proclamations* (1611) 12 Co Rep 74.
[20] *Miller* (n 7) [38].
[21] ibid [41]-[48].

31. In summary, the assertion that the power of dissolution was not subject to judicial supervision is incorrect. All prerogative powers are limited. These limits may be dictated by fundamental constitutional principles and the courts have the power to rule on whether these limits have been breached.

32. It is worth noting as an additional point here that clause 3 states: 'A court of law may not question … the limits or extent of those powers [of dissolution]'. This means that while, as held by the Supreme Court, 'every prerogative power has its limits', the courts would not be able to rule on whether those limits had been exceeded. This again conflicts with the rule of law requirement that the government should act lawfully and that the courts should have jurisdiction to rule on any unlawful act by the Government.

Excluding the courts from ruling on abuses of the power of dissolution, even in extremely exceptional cases, risks involving the Sovereign in politically contentious matters.

33. The foreword to the draft Bill states 'in extremely exceptional circumstances' judgement on the Government's actions with regard to dissolution should be left to the Sovereign. This risks involving the Monarch in politically controversial matters.

34. If such an extreme circumstance were to arise the situation would no doubt be highly contentious and subject to much political, media and public speculation. To require the Sovereign to enter into such a charged state of affairs would possibly harm her political neutrality. It is surely preferable, in order to preserve the politically neutral position of the Monarch, for such issues to be determined by the courts.

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