HOUSE OF COMMONS

Joint Committee on the Fixed-term Parliaments Act

Oral evidence: Review of the Fixed-term Parliaments Act, HC 1046

Thursday 10 December 2020

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Watch the meeting

Members present: Lord McLoughlin (Chair); Lord Beith; Aaron Bell; Chris Bryant; Jackie Doyle-Price; Ms Angela Eagle; Maria Eagle; Peter Gibson; Robert Goodwill; Lord Grocott; Lord Jay of Ewelme; Baroness Lawrence of Clarendon; Lord Mancroft; Maria Miller; John Spellar; Mr Shailesh Vara; Craig Whittaker.

Questions 1 - 36

Witnesses: **Sir Stephen Laws**, First Parliamentary Counsel, 2006-12; Senior Fellow, Policy Exchange, 2018-present; and **Professor Alison Young**, Sir David Williams Professor of Public Law, University of Cambridge, gave evidence.

Chair: Welcome, everybody, to the meeting, and a very warm welcome to Professor Alison Young and Sir Stephen Laws, who are going to be giving us evidence this morning. To start the questions on this subject, I would like to ask Maria Eagle to start with her points.

Q1 **Maria Eagle:** Thank you, Chair, and a welcome to Sir Stephen and to Professor Young. Sir Stephen, you have said that the Fixed-term Parliaments Act abolished the Dissolution prerogative, but you have also said that the question of abolition was a bit of a red herring—essentially, I think, because of the sovereignty of Parliament. However, the Government have said that the purpose of the draft Bill is to revive the prerogatives of Dissolution, so do clauses 1 and 2 revive the prerogative power?

Sir Stephen Laws: There is an interesting academic question about whether, if the Bill passes and becomes an Act, what you have is a power that has its origins in statute or in the prerogative. That is a red herring, because for practical purposes, it is perfectly plain that the intention of the Act is to restore the situation to what it was before the 2011 Act, and therefore the law will then be indistinguishable from what it was before, when all the incidents of a prerogative were attached to the Dissolution. Acts of Parliament ought to be construed in accordance with what practical outcome they are intended to produce by the legislatures. They do not have to fit any conceptual framework. The sovereignty of Parliament means that Parliament has the power to modify or make exception to every

constitutional framework. The practical question is, "Is this power the same as the one that existed before 2011?" That is clearly the intention of Parliament and it is clearly the duty of the courts to construe it that way.

Q2 **Ms Eagle:** Thank you. Professor Young, do you have a view about this?

Professor Young: I have, thank you. In some senses, my view is different because I am one of the academics, so I will go away and look at this in more depth. In doing so, we have to think very carefully about the aim. I agree that the aim is to ensure that we revive the content of the prerogative powers. I agree with Sir Stephen that the aim will ensure that the content of the prerogative prior to the Fixed-term Parliaments Act will become the content of how the law is regulated now.

I know that, in some senses, whether it is a statutory or prerogative power may seem an academic issue, but my argument would be that it is not 100% clear that the Bill will necessarily revive the prior prerogative power as a prerogative power, so although the content may be that of what the prerogative was prior to the Fixed-term Parliaments Act, what is revived may be a statutory power with that content, as opposed to a prerogative power with that content. I would argue that for two reasons.

First, the aim of clause 1 is to extinguish—or repeal—the Fixed-term Parliaments Act. One argument is that that will then revive the former prerogative power, because all the Fixed-term Parliaments Act did was to put it in abeyance, so it is still there but you use legislation rather than the prerogative. However, another argument is that the Fixed-term Parliaments Act actually extinguished the earlier prerogative power. That is because of that Act's provisions, which state that the intention is to ensure that Parliament cannot be dissolved in any way other than through the provisions in the Act. That could be interpreted as meaning that the intention was to extinguish the earlier prerogative power, so there is no prerogative to be revived. We want to ensure that you do not end up in that particular situation.

Secondly, clause 2 refers to "the powers relating to the dissolution of Parliament…that were exercisable by virtue of Her Majesty's prerogative", which could be interpreted as meaning the content but not necessarily the source as a prerogative power. Again, you could be in a situation where you have the content of the prerogative, but its source is deemed to be statutory, not prerogative-based. There are difficulties in how you interpret that. Although the long title refers to the revival of the prerogative power, that could be the revival of the content but not necessarily its revival as a prerogative power.

I know that it sounds terribly technical and awful to discuss whether this is a prerogative or a statutory power, but that does have consequences, because even if the content is the same, the courts will deal with statutory powers and prerogative powers in slightly different ways. That is because when the courts are dealing with a statutory power, they often have legislation setting out the way in which a particular power is meant to be exercised. By definition, that legislation is not there when you are dealing with a prerogative power, because the prerogative's source is in the common law. That means that, for example, the principle of legality may apply slightly differently. There is also case law suggesting that judicial review, when looking at fettering of discretion, for example, applies differently, because there is no legislation setting out a discretionary power when we are looking at a prerogative.

Although it sounds academic and technical, it is important for the Committee to think very carefully about whether we want this to come back as a prerogative power or a statutory power given those slight differences, and if so to make it clear precisely what the new Act will do when it comes into force.

Q3 **Maria Eagle:** You are saying, Professor Young, that there are practical implications going forward depending on the nature of the power that is being revived, or put into statute, whichever it is. If in reality what is happening is the creation of statutory powers that replicate the prerogative powers that existed prior to the 2011 Act, what are the legal limits of that power? You have explained some of the differences. Also, later in the Bill there is an ouster clause, so who decides what they are?

Professor Young: I will set out the limits and we will come, potentially, to the ouster clause later. Normally if we are looking at a statutory-based power, the idea would be that Parliament in legislation would set out the definition of that power, its potential limits, and the conditions under which it may be exercised. The courts will then go away and look at those statutory provisions, so you end up with a situation where legislation will set out very clearly what the scope of the power is and the court will go away and interpret that legislation in order to work out how to interpret the scope and extent of that particular power, obviously subject to any particular ouster clause that you then find, as in this particular draft provision, which may remove the power of the court to decide these particular issues.

Normally, if you have a statutory-based power, you would expect legislation to set out very clearly what its requirement is. The oddity here is that it is saying, "We're going to revive the power that we used to have." That obviously leaves an element of uncertainty and a lack of clarity because you then have to go away and say, "What was this power prior to the enactment of the Fixed-term Parliaments Act?" rather than being able to say, "The legislation has set out very clearly what the Dissolution power is in these particular circumstances."

Q4 **Maria Eagle:** Thank you. Finally, Sir Stephen, if it is all a red herring and it does not matter whether or not the prerogative is revived, does that mean that there are differences in practical reality, as Professor Young has suggested, and what do you think, if this is a statutory power, are the legal limits of it, and who decides what they are?

Sir Stephen Laws: Well, I don't think that there are any differences because the way to analyse this is by reference to what the Bill says, not by reference to what it is. What it says trumps everything else, and it says unequivocally that the situation after the Bill becomes law is to be the same as it was before the Fixed-term Parliaments Act. Maybe that is as a result of the exercise of parliamentary sovereignty and part of an Act of Parliament, but the outcome has to be same as before. There are no differences because the Act says that there are to be no differences.

On a small point, I disagree entirely with what Professor Young said about "by virtue of". That expression is quite often used in connection with a legal power, and it is quite often contrasted with "under". What it actually means is that there is a looser causal connection. If you say that something is done under an Act it is because the Act requires it to be done. If you say that it is done by virtue of an Act, it may be because the Act requires A to be done, and doing A produces A. There is a looser connection, so you say that is "by virtue of".

When the connection is direct you say "under". I think she is reading too much into that difference of words.

Maria Eagle: I am not going to get into the niceties of statutory interpretation. That is all from me, thank you.

Q5 **Baroness Lawrence of Clarendon:** If the purpose of the Bill is to give the monarch the power to dissolve Parliament, not set this out explicitly in the statute?

Chair: Stephen, do you want to try that one first?

Sir Stephen Laws: Yes. I think what the Government is trying to do, as we have discussed, is reproduce the position before the 2011 Act was passed, and the securest way to do that is not to try to do something else that might be neater but would be different. The provision says exactly what it wants: to go back to where we started. Setting out expressly what that is thought to be only creates the room for somebody to argue that what the new Act says is different in some way from what the position was before. I have always thought the best way to draft anything is to say exactly what you mean, and that is what this clause does. It says, "The position is to be the same as it was before," as if it had never been changed.

Chair: Professor Young, do you have any points on that?

Professor Young: I agree that it would, in a lot of senses, be clearer to set out in the statute what the aim is here. If the aim is to return the power, setting it out clearly in statute makes it clearer. I understand that the intention may well be to revive the content of the earlier prerogative power, and I agree that that is what the provision of the legislation does, but there is still the possibility of legal argument as to what its potential form is. To avoid problems that might arise because of that, saying very clearly on the legislation what it is doing makes it easier for future interpretation. It also makes it easier when we are looking at legislation such as the Fixed-term Parliaments Act originally and this, its possible replacement.

This is an important constitutional piece of legislation. It is important not just for people like me, who spend a lot of time looking at aspects of the constitution, but for everybody who has an interest in understanding how the constitution works, to understand how these provisions work. To set that out very clearly on the legislation would make it very clear to the general public what the powers for the Dissolution of Parliament are and how they operate, which is not as clear when you say, "The powers as they were, exercised under a prerogative power that you may or may not know about in 2010, are to be revived." For me, it also has the advantage of transparency: it informs the public more generally as to how we dissolve Parliament and how it operates.

Chair: Doreen, does that answer your points?

Q6 **Baroness Lawrence of Clarendon:** Not quite. Professor Young is bringing in the public, but I think this is still very confusing for the public. It needs to be set out a lot more clearly, so that the public can understand exactly what the Prime Minister's intentions are. I would still find it very confusing if you stopped bringing the public into that.

Professor Young: I agree. If I were to bear that in mind, it does make sense to think more clearly—not just that you are reviving the powers of the monarch to dissolve, but to set out clearly how that operates and when it operates. That would make it much clearer to the public as to how this works.

Chair: Thank you. Let's move on to Robert Goodwill, please.

Q7 **Mr Goodwill:** Thank you, Chair. I would like to start with Sir Stephen on this question. We all enjoy the constitutional theatre of the Prime Minister driving down the Mall with the Sky News helicopter in the background. Has this always been just a piece of theatre, or is there a reason why we have the royal prerogative? Is it that, for example, the Lascelles principles could be brought into force in a situation in which the Prime Minister was facing a revolt within his or her own party and went to country rather than face the PLP or the 1922 committee? Does Dissolution have to be a legal power of the monarch, or is it something that we should give to the Prime Minister directly?

Sir Stephen Laws: Part of the answer to that is the one I have already given: if you want to get back to a situation that it is thought worked before, the best way to do it is to restore exactly what we had before. There is also a risk that we end up discussing who has the power to dissolve Parliament, as if that were the question. Actually, all these questions devolve to: who should have the ability to stop there being an election? It is often phrased as, "Who should be able to call an election?" The more people you involve in it, the more people you give the power to stop an election.

The pre-2011 position effectively meant that the only person who could stop there being an election was the monarch. If you restore that position, there is a residual power to do that. The Lascelles principles are a pretty good test of when it should be possible to stop there being an election.

There are two conditions where you would have to have an election. You would have to have an election if the Parliament that existed could no longer operate, so one of the Lascelles principles is that you should refuse a Dissolution only if Parliament can still operate. You could not refuse an election if nobody could form a Government that would command the confidence of the House of Commons, so the second Lascelles principle for refusing a Dissolution and stopping an election—

Q8 **Mr Goodwill:** Are the Lascelles principles a bit like the nuclear button—everybody knows it is there, but it is unlikely to be pressed?

Sir Stephen Laws: The third one is that there is a good reason for not having an election. Most of the time, if the Government that best represented the will of the electorate at the last election finds it can no longer govern, the institution or body that ought to decide how you resolve that position is the electorate. Should it be the Supreme Court? No. Should it be the monarch? No. Should it be a lot of parliamentarians in a room doing a deal? Well—I think—no. If the Government elected by the electorate cannot carry on, the electorate should be given the right to decide how the matter is resolved.

The circumstances where it might be inappropriate to do so would be, for example, if a Prime Minister stayed on after an election then met the House and lost a vote of confidence and

said, "Well, in that case, we'll have another election straight after the last one." That is the main situation where you would expect the monarch—and she would have the right—to refuse the Prime Minister. Refusing the Prime Minister an election and refusing the electorate a vote, which is the same thing, should be a very exceptional circumstance, and rightly so.

Q9 **Mr Goodwill:** Professor Young, do you agree? Would it not be tidier to give that power to the Prime Minister and not involve the palace at all?

Professor Young: The danger of giving the power just to the Prime Minister and not involving any aspect of the monarch is to remove the possibility—as you mentioned, it may be a nuclear-button power, but you have to be wary of the fact that there may be circumstances in which it would not be the right thing constitutionally to allow a new general election. We mentioned situations such as if there was a vote of no confidence immediately after, but there might still be the ability to gather confidence in the Government in the long term, and there would be a great amount of instability if you were to immediately have another general election having just had one.

There are situations that we can imagine where it would be wise, for constitutional reasons, not to have a general election. Placing it in the hands of the monarch enables an idea of a constitutional backdrop, where it would be used only in those exceptional circumstances, because there would need to be very good reasons for the monarch to decide not to allow a general election in certain circumstances.

The Lascelles principles recognise those exceptional circumstances and, because of the constitutional position of the monarch and the desire not to involve the monarch in politics, that ensures that the monarch will be exercising those powers only under the Lascelles principles when there are good constitutional reasons for doing so, such as maintaining the stability of the country or where there is a possibility of a viable Government. In that case, there is no need to have a general election, because there is a possibility of a Government that would have the confidence of the House.

It is important to ensure that we have a form of constitutional backdrop. To place it just in the hands of the Prime Minister, without a constitutional backstop, in case there is a possibility of abuse in certain circumstances, will raise the possibility of whether it would be better to put the powers clearly on a legislative basis and involve the courts in interpreting them instead. That is a choice that you need to make in this Committee and in Parliament, as to whether you prefer to remain with the monarch having them in constitutionally exceptional circumstances, or to try to set them out clearly in legislation, and then have the court enforcing them.

Q10 **Mr Goodwill:** It seems to be that if it involves the monarch, it is a case of, "If it ain't broke, why try to mend it?" However, if we did go down the route of giving the Prime Minister that power, how would that look? Would that just be the Prime Minister outside Downing Street announcing an election, or would the House of Commons need to be involved, and the courts, which as we have seen from attempts to get elections and to prorogue Parliament in the past has often been very messy?

Professor Young: If you were to give it only to the Prime Minister, I would prefer there to be a vote in the House of Commons as well. In most situations in which we would call for a new general election, I think the House of Commons would vote in favour of a general election in

those circumstances. If there were exceptional circumstances where there might not be good constitutional reasons for a general election, having and passing a Commons vote—if the power were only in the hands of the Prime Minister and not in the hands of the monarch as well—could provide another mechanism for ensuring that there was not an element of Dissolution where this might give rise to constitutional problems. Obviously, the problem with that is that it could then be used for political purposes in different ways.

Mr Goodwill: Thank you very much. Back to you, Chair.

Chair: Chris, you wanted to come in on this.

Q11 **Chris Bryant:** I am a bit exercised about this business of going from common law to statute law and then going back again. That, in essence, is what we are doing, is it not? Maybe you have more knowledge than me, but I cannot think of a single historical instance where we have done that. My second anxiety is around the Lascelles principles, which are well known by everybody in the Dog and Duck. Every single one of the elements that you just laid out, Sir Stephen, is a matter of interpretation—whether Parliament can operate or not and so on. Most importantly, the matter of what constitutes a vote of no confidence was a matter of convention, all of which was torn up by the statute law.

Sir Stephen Laws: Those are issues of interpretation. In the circumstances in which you are dealing with the high politics of whether to have an election, it seems to me that the best test of whether those tests are satisfied is the one that will be decided by the electorate in the subsequent election. The way these things work is that if a Prime Minister dissolves Parliament and goes to the country in circumstances in which the country thinks he or she should not, he or she is likely to be punished by the electorate, as Mr Heath was in 1974 and, arguably, as Mrs May was in 2017. The electorate are able to judge whether they are being consulted properly and in the right circumstances. That seems to me wholly proper.

Chair: Alison, do you have any points on that?

Professor Young: I share the concerns and confusion of going from a common law power to a statutory power and back to a common law power, but again, I am an academic, so maybe I see things in a more theoretical way, and I am concerned with possibilities and ensuring against risk. I share Sir Stephen's point that there are differences when dealing with the prerogative power of dissolving Parliament and calling a general election and the prerogative power of, for example, Prorogation. If you are calling a general election, you have the element of going to the electorate, and Sir Stephen is right that that can provide a form of self-correcting mechanism, because it gives the general electorate the opportunity to decide whether there were good or bad reasons for dissolving in those circumstances.

We also have to think about Dissolution where it is not just the normal dissolving of Parliament when coming towards the end of a term. It obviously gives a political advantage to whichever political party is in power at the time to choose the timing of the general election. That can obviously, in some senses, not necessarily be corrected by the electorate, and could also mean that we do not have the same element of stability and certainty that we have with fixed terms. That could have knock-on consequences for your ability to enact legislation, which obviously you might have to do through a very quick wash-up process.

There are other aspects of calling a general election that may not necessarily be corrected by the electorate.

Sir Stephen Laws: Just on the point about going back to common law from statute, it sounds messy and, in most circumstances, it would be messy, because it would mean going from something that was relatively certain to something that was uncertain. However, in this case, I think setting out the powers anew would create more uncertainty than going back to where we were before, because we know where we were before and we know, from the Fixed-term Parliaments Act, that having something new in statute is likely to lead to all sorts of new arguments about what the law is.

Chris Bryant: I think my argument would be that we don't know what we had before anymore, because we don't know what a vote of no confidence is anymore. But anyway, I will leave it there.

Chair: Thank you. Alan Beith, can we move on to you, please?

Q12 **Lord Beith:** Arguments about what the law is seem to be a necessary consequence of this legislation, and one can see historians parading through the courts, trying to explain what the law was, prior to the Fixed-term Parliaments Act, on matters such as the refusal of a Dissolution.

On that point, does the Bill adequately recognise that the refusal of a Dissolution is a possibility, as Sir Stephen clearly recognised in his references to the Lascelles principles? The only reference I can find to it in the "Dissolution Principles" document that the Government have produced is a passing reference that says that a request for a Dissolution "would usually be granted", which I think broadly sums up what we would all assume was the case. But if this legislation is passed, does that not put us in a situation in which some people will think that there had been a change to the principles governing refusal of a Dissolution, while others will believe that, if the previous situation has been restored, that is what it is? I don't know who wants to go first.

Chair: Stephen, do you want to go first? And then we will come to you, Alison, to follow up.

Sir Stephen Laws: Some people may think it's different, but the Bill seems to me to say, as plainly as possible, that things are to be treated as they were before. I do think that the monarch has a residual power to refuse a request for a Dissolution. I think the Lascelles principles aren't just the Lascelles principles as articulated in a letter to *The Times*—they are common sense. You have to have an election if Parliament no longer works; you have to have an election if nobody else can form a Government; and you should not have an election if having one is going to be more damaging. But the circumstances in which having an election is going to be more damaging are very difficult to imagine, so it's highly unlikely.

I think it is also a mistake to think that the relationship between the Prime Minister and the monarch is somehow transactional. The Prime Minister should not be asking the monarch to dissolve Parliament in circumstances in which she would refuse the thing, and one would expect him or her to be persuaded not to do so. You would also expect a Prime Minister to suffer damage at the subsequent election, whenever it came, if he forced the monarch into a

position of doing something that brought her into politics. The governance principles make it very clear that politicians should not bring the monarch into politics, but what that means is that politicians on all sides should sort things out, not that one side should say, "If you don't do what we want, we will bring the monarch into politics."

Q13 **Lord Beith:** Indeed, that was how the system was supposed to—and did—work before, in that the Prime Minister would be very, very strongly advised not to ask the monarch for something that the monarch would find it difficult to grant. That system worked, but it is quite hard to envisage by statute restoring those assumptions about how the system should operate, isn't it? Perhaps Professor Young has some thoughts about that.

Sir Stephen Laws: Can I just say this? I don't think it is difficult at all, because the system worked because it was compatible and in harmony with the political imperatives, and the political imperatives will not change in future. The Prime Minister behaves as he does in relation to the monarch because he will suffer political damage if he behaves in a way that was not accepted before, and that will continue to be the case. Sorry, I must hand over to Alison.

Professor Young: Am I allowed to talk now? *[Laughter.]* To split your question up and deal with it, I agree there will be political circumstances and it would be unwise for the Prime Minister to request a Dissolution in circumstances in which the monarch could refuse that. But you must recognise that politics, situations and background constitutional principles change as society evolves and the way we deal with legitimacy issues changes.

This is one issue that arises when we ask whether the Lascelles principles will come back. I would argue that they would, but then we are back to the difficulty of this content and form situation. The Lascelles principles are conventions, and conventions are there to help us understand how we exercise various powers. Normally, there is a particular prerogative power and there will be conventions that determine how you exercise that particular prerogative power. If we look at this as being no longer a prerogative power to be exercised under aspects of conventions—as conventions change, society evolves and political circumstances evolve—but instead as a quasi-prerogative power, meaning that it has the content of the prerogative but a basis in legislation, one of the possible consequences is that you will fix its content as it was in 2011, understood in terms of the prerogative as it would have been exercised according to the Lascelles principles, and it would then be fixed at that definition without the same possibility to evolve as political circumstances evolve.

We must think carefully about whether that could be a consequence of this and whether we want a situation—as we have with the combination of prerogative power and convention—where conventions evolve over time as political circumstances and constitutional principles change. The possible consequence is that this becomes fixed. That might not be a problem if we are happy that that the Lascelles principles cover every possible situation. I would argue that, for the most part, they do, although there could be problems as to when it is or is not in the best interest of the country not to call a particular general election. For example, the Lascelles principles refer to situations where that could cause great economic damage, but as we have seen recently with the coronavirus pandemic, there could also be circumstances where there might be not great economic damage but other forms of damage. It might be important to ensure there is that element of flexibility for other aspects where holding a general election could cause damage to the country.

Chair: Thank you. Angela, do you want to move us on to the next area?

Q14 **Ms Angela Eagle:** Sir Stephen, the Lascelles principles are very sensible. They have never been tested in anger, as far as we know. Does that mean that they apply or not? We thought we had reasonable, gentlemanly approaches to Prorogation and not dragging the monarch into politics over that, but we did see the monarch dragged into politics over the attempt to have a very long Prorogation of Parliament, and the Supreme Court then had to intervene. To what extent has that self-restraint that we have always assumed Prime Ministers would exercise towards asking the monarch things that are inappropriate survived to the present day? I am not sure that it has.

Sir Stephen Laws: I am in a difficult position. As well as writing about this for Policy Exchange, I also wrote about the Prorogation. I think that what happened last year was an example of just the sort of restraint that the system is supposed to produce, because the Prorogation that the Government actually asked for was calibrated: it wasn't to avoid a vote of confidence or kill off a Bill that would have postponed the final reckoning on the European Union business; it was for a few weeks. I think that that showed that the system did work to mitigate the extreme versions of Prorogation that could have been asked for, so I don't accept that premise.

Q15 **Ms Angela Eagle:** But they were asked for. Indeed, the monarch did not feel she could refuse, and it was not until the Supreme Court intervened that it was found that what the Leader of the House had done was actually illegal.

Sir Stephen Laws: I disagree about that.

Q16 **Ms Angela Eagle**: If the old system had been working, that length of time would never have been asked for in the first place, because it would have dragged the monarch into politics, which is what happened.

Sir Stephen Laws: My view is that the Supreme Court changed the law in a way that was unwise from their point of view and wrong from a legal point of view, and that the Prorogation that was asked for was a calibrated, restrained Prorogation, but we are obviously going to differ on that. So far as the Lascelles principles are concerned, yes, they have not been tested. None of this has been tested, but all these issues arose under the Fixed-term Parliaments Act. I wrote a long paper for Policy Exchange about whether the Prime Minister could or should resign, or whether he should hand over to someone else or could continue to pursue the option of a Dissolution, and referred to the Lascelles principles in that. There is only one example of questions about Dissolution arising in the past 100 years, and that was almost 100 years ago, so there is no precedent.

Alison calls these things conventions, but I have always thought that the whole concept of constitutional conventions was a device for convincing lawyers that the way the constitution operates looks a bit like the law. What actually determines and regulates the behaviour of politicians and parliamentarians is other political imperatives, and what the Lascelles principles represent is the political imperatives in a situation where Government has broken down because of the relationship between Government and Parliament having broken down. I do not think you have to ask, "Have they been tested?". They are just manifest.

Q17 **Ms Angela Eagle**: Thank you, Sir Stephen. Professor Young, do you have a view on this issue of whether constitutional checks or safeguards should exist on the power to

dissolve Parliament, to try to make the Lascelles principles—or, at least, the kind of approaches that need to be taken—more manifest and clear?

Professor Young: I do have a lot of disagreement with Sir Stephen on the impact of the Prorogation case judgment, which I will not get into here, because it might take over the entire Committee hearing, which would not be very wise. However, I agree that the Lascelles principles have not necessarily been tested. I also agree that for the most part, they do reflect sound background constitutional principles and sound aspects of political expediency.

The question we have to ask ourselves, essentially, is what kind of constitutional background we prefer at the moment, because that is the question we are looking at. Do we, in those scenarios, prefer to leave this as it was—in the hands of the monarch—to recognise situations where there could be abuse, particularly given that unlike Prorogation, when you are looking at Dissolution, that does go to the electorate, and there can be a self-checking mechanism? Or do we think it would be clearer and more sensible to set these principles up more clearly, perhaps by putting them on a legislative basis?

There are mechanisms by which you could put those principles in legislation that could mean that they would not necessarily be determined by the courts. For example, you find the Sewel convention in section 2 of the Scotland Act 2016 and section 2 of the Wales Act 2017, which says that it is recognised that the Westminster Parliament will not normally legislate on a matter that touches on devolved powers without the consent of the devolved bodies. You could have something similar here that would make it clear that, if you were recognising that, you would not normally dissolve in these particular circumstances.

That might also send the same message that we are recognising what the convention was, in the same kind of way we did with the Sewel convention, which the court in the first Miller decision interpreted as an intention to entrench this as a convention—so, not something the courts would be legally enforcing. That would give you an element of clarity. It might also give an aspect of clarity with regard to the general public understanding of how this works. It would not necessarily make it legally enforceable, but it would give it some kind of greater constitutional weight, because you would have this discussion and deliberation, and an element of clarity as to what these principles might do.

Ms Angela Eagle: Thank you, Chair. That is a very interesting suggestion that we might want to pursue in future.

Chair: Thank you, Angela. Michael Jay, can we move on to your section, please?

Q18 **Lord Jay of Ewelme:** Thank you, Chair. I have a question on the note on Dissolution principles that has been distributed by the Government, which is—if I can put it this way—commendably brief. Do you think that the Government's document is an accurate and exhaustive statement of the principles that governed Dissolution, the calling of new Parliaments and Government formation before the passage of the Fixed-term Parliaments Act? If you do not, how does it differ from what the position was before, as you understand it? Who would like to go first on that?

Sir Stephen Laws: Shall I go first? I have some reservations about these principles.

My first reservation is something that I have been banging on about for some while, which is that it appears to mis-state the confidence principle, at least in one place. The confidence principle is that the Government has to have the confidence of the House of Commons, not the Prime Minister. The devolution legislation in the devolved legislatures gives the First Minister as the person in whom there must be confidence, but it is absolutely clear that at Westminster, it is the Government that has to have the confidence of the House of Commons, not the Prime Minister.

Secondly, the principles seem to suggest that the right of the Prime Minister to ask for a Dissolution of Parliament—this may pre-empt someone's later question—depends on the fact that he or she, or his or her Government, has the confidence of the House of Commons. I do not think that is right at all. I think Mr Callaghan in 1979 had the absolute right to expect the monarch to accede to his request for a Dissolution, notwithstanding the fact that he had, by definition, lost the confidence of the House of Commons.

You cannot create a system in which a Prime Minister who has lost the confidence of the House of Commons cannot ask for a Dissolution because he has lost the confidence of the House of Commons. There were people arguing that last year, and it was absurd. I question it on those two grounds in particular. It does not set out the Lascelles principles, but it is, I think, trying to set out the principles that will apply to the Government. To that extent, it probably makes sense. The way it states that the duty of all politicians, particularly the Prime Minister, is to keep the monarch out of politics, is right, but that proposition was abused in the events of last year by people saying, "Well, we'll do this, and if you respond to us, we will pull the monarch into politics." That happened on both sides, and I think that was wrong. It would be better if it made it absolutely clear that that means that it is the responsibility of politicians to enter into discussions with each other and resolve the matter without having to ask the monarch to resolve it. I would like to see more emphasis on that.

Q19 **Lord Jay of Ewelme:** Thank you. Alison Young, do you have thoughts on that?

Professor Young: I agree with all the points that Sir Stephen has raised. I emphasise that the reason why the devolved legislatures look at confidence in the First Minister is because, obviously, when we are looking at the Senedd Cymru and Holyrood—the Scottish Parliament—it is for those Parliaments, those devolved legislatures, to agree to the appointment of the First Minister. You have a different system from the one in Westminster, where there is no vote of the House of Commons for a particular Prime Minister. Instead, by convention, the Prime Minister is the leader of the political party that has the confidence of the House. That is why there is that disparity, and why it becomes particularly problematic to shift away from having confidence in the Government towards the suggestion that it might be confidence in a particular Prime Minister.

Q20 **Lord Jay of Ewelme:** Can I go back to Sir Stephen Laws for a moment? Is there not a bit of a contradiction between the desire to, quite properly, keep the monarch out of politics, and to give her a role? Is there not a basic contradiction there, and how is that resolved?

Sir Stephen Laws: Giving her the role is part of the incentive to keep her out of politics, because it is what provides the political imperative for politicians to discuss things with each other, rather than say, "We'll let somebody else decide." They don't want to have the responsibility not to ask the monarch to decide. People might be a lot more willing to ask

the Supreme Court to decide, and then the Supreme Court would not arrive at a solution that was a compromise between all parties, which is what you would hope for. They would decide who was the winner and who was the loser, as they did last year, and that would bring them into politics in a much more dangerous way and would probably lead to more political contention as well.

Professor Young said something that made me want to come back slightly on the difference between the Prime Minister and the Government. There is a current weakness, and was a weakness before 2011, in the way that the confidence principle works because of the way it is disrupted by the methods of selecting leaders in the different parties. What puts the Prime Minister in a much stronger position than he or she was in before 2011 is the fact that it is so difficult for a party in government to change the Prime Minister because it requires three or four months to do so.

There was a stage, at least, when the Labour party had a different method for selecting a new leader when it was in government from the one it had when it was in opposition. It would be much better for the whole system, it seems to me, if all the parties had a system that enables the leader to be chosen, at least when they were in government, by a majority of the MPs, because what determines who can lead the Government is who commands the confidence of the House of Commons.

Chair: That is very interesting, Stephen. I think we are treading a bit wider than we dare risk on this subject, if you don't mind me saying so. It is an interesting point of view and I can see that a number of people might like it. Michael, does that cover the points you want to say?

Lord Jay of Ewelme: That's fine. Thank you.

Chair: Bruce Grocott, can we come to your questions please?

Q21 **Lord Grocott:** Thanks, Patrick. On to the issues of what is justiciable and what is not justiciable, with some trepidation. There was more than enough discussion about that among the higher echelons of the judiciary 18 months or so ago. I know that Prorogation isn't the same as Dissolution, but I would like to ask this of Professor Young and Sir Stephen: do you think that clause 3 achieves its objective without ambiguity and providing complete clarity?

Professor Young: I will try my best to answer this. Unfortunately, this requires a lot of discussion of complex case law, which you have alluded to yourselves.

I will start by looking at the broad aim of clause 3 and whether it is able to achieve this. One of the difficulties that we have, first of all, with the aim of clause 3 is the use of non-justiciability itself. The reason this could give rise to issues is because normally, from the perspective of English law, there are two main examples of what we mean by non-justiciable.

One is to say that something is not justiciable because of aspects of the separation of powers that mean a matter is not something the court is able to deliberate on. The classic example of that is article 9 of the Bill of Rights. There are very good constitutional reasons for making sure that we have freedom of speech in Parliament, and that what is said in Parliament cannot be questioned in the courts, to ensure we enhance democracy. There are good, sound

constitutional reasons on the separation of powers for making sure that the court does not look at and does not question what is said in Parliament.

The other aspect of non-justiciability is when we talk of this as being an area where there is no law to attach to it, so there is no real aspect of private law; or, in regard to public law, we would say, "This is something that cannot be subject to judicial review." That is normally how we would look at prerogative powers.

The situation has always been that the common law can tell you whether the prerogative power exists, as was confirmed in the recent Prorogation case and in the first Miller decision, which looked at the issue of triggering article 50. The court has the ability to tell you whether the prerogative power exists, and it also has the ability to tell you the limit and extent of all prerogative powers, but then it would say, "When we are looking at how it is exercised and at other aspects of judicial review"—for example, whether the discretion had been exercised in a rational or unreasonable manner—"that applies only to certain justiciable prerogative powers." That was the situation we were used to having.

The difficulty of then saying this becomes non-justiciable is that we start asking the question of whether this means the intention is to make this non-justiciable—almost a separation of powers issue—rather than saying it is a form of prerogative power that would have been justiciable as to its existence and its extent, but not necessarily as to its exercise, because we would have to go and ask whether it was a justiciable prerogative power.

I know this sounds a bit circular and confusing, but these are the problems with trying to understand what the intentions of this clause would be. You have the issue of trying to work out what it is trying to do. Its intention is to remove all aspects of judicial review, but there are issues as to whether that means it is making it even less reviewable than it was under the provisions prior to the enactment of the Fixed-term Parliaments Act, or whether it is trying to return to that particular situation, which I can explain in more depth later—I think that it one of the further questions.

We also have questions about whether the clause would actually succeed in removing all aspects of judicial review. Again, I can come to that in more detailed questions later. I can see that the aim is to remove all aspects of judicial review. Whether it achieves that is problematic, and whether that essentially restores us to the situation prior to 2010 is also problematic. I would argue that it is not necessarily clear that that would be the case in both points.

Sir Stephen Laws: If it is clear that the aim is to remove all aspects of judicial review—it seems to me that the words are clear on that—the obligation is on the courts to construe it as having that effect. I am a person who believes that all aspects of the relationship between Parliament and Government should be outside the purview of the courts. Parliament has its own remedies if it falls out with Government—it can change the legislation. Ultimately, the House of Commons can vote for an absence of confidence in the Government, and the Government must then either resign or submit the issue to the electorate. It is right that Parliament and Government should conduct their relationship as equals and should not put the Supreme Court or any other judicial body above that relationship in order to decide between them. On that basis, this clause is appropriate and does what it intends to do.

In this specific context, what does giving the court some jurisdiction over these matters mean? It means giving the Supreme Court the power to stop an election being held. It would be very foolish of the Supreme Court to want that to happen, so I do not think there is anything wrong with having such a provision. The provision is drafted somewhat widely, but not as widely as it might be—partly because the system of reinstating the status quo ante, when there was at least a clear understanding by most lawyers that Dissolution was outside the jurisdiction of the courts, reinforces what the clause is going to say. But in the light of the Prorogation judgment, it is obvious why something needs to be said.

The drafter of this is obviously confronted with the reluctance of the courts to accept ouster clauses. As I think I said in evidence to another Committee in relation to the internal market Bill, these ouster clauses tend to become larger and larger sledgehammers as a result, because it is clear that the courts will find any device that they can to circumvent them.

Drafters are compelled to draft them in an extremely wide way. It would be nice to have neatly focused ouster clauses that you could justify in relation to what they actually apply to. But that is not a thing that is possible any more, because if you try and draw some distinction as to where the ouster clause will or will not apply, you will end up with the courts using that distinction in order to circumvent the ouster you are intending to create.

Chair: Bruce, do you want to come back on that? That ties in with a later point that you wanted to make.

Lord Grocott: There is so much more I could say about this, but I will not at the moment.

Chair: I am mindful of the time. Stephen, I think you are under a bit of time pressure as far as today's meeting is concerned, so I am mindful of trying to cover the ground that we need to. Alan, you have a point on clause 3.

Q22 **Lord Beith:** On what was being discussed then. It is the use of the "purported exercise" phrase. We are in a rather strange position. The Government are trying to re-establish the situation as it was before the Fixed-term Parliaments Act, but before that Act it was not considered necessary to have statutory limitation of the court's ability to enter into any part of this area, because most of the time the courts would not have any reason or need to. But here we have a situation where the purported exercise and the power, which might include the attempt to use the power in ways that Parliament did not intend in the first place, and never intended, is specifically referred to as something that cannot be justiciable. Can either of you indicate whether you think that that is a reasonable position?

Professor Young: I will try my best and try to explain why "purported" is there. As Sir Stephen has suggested, the courts will interpret ouster provisions narrowly, mostly because they see it as their job to maintain and uphold the rule of law, and are very concerned if they feel that aspects that should be subject to judicial review are removed from judicial review. The element of putting in "purported" is to deal with a situation in a very classic case of administrative law called Anisminic. This is what it is there for. On the idea of a decision not being questioned, the courts went around that and said, "But this might be a purported decision rather than a real decision, because there could be sufficient legal errors in that particular decision, or you might have misunderstood your particular powers, your

jurisdiction, such that this is not really a decision; it is only a purported decision." So the idea of putting "purported" in is to stop the courts saying, "This is not really a decision to prorogue. It is something else. It is a purported decision to prorogue." The question is whether that succeeds or not, because the "purported" is as to the use or the decision. It is not as to the relevant power, so you do not have the decision after the purported relevant power, for example. That gives the court the ability to say that the power is to dissolve Parliament in certain situations. The power is not, for example, to dissolve Senedd Cymru or to dissolve something other than the Westminster Parliament. Obviously, it is highly unlikely that this would happen, but you have to think about what is the scope of the particular power, what is this particular power that is preserved through 2010, and what if you were to try and do something that was beyond the scope of that power in those circumstances and therefore beyond the power that Parliament had given you in those circumstances? Would you want the courts in that situation to be able to say, "That is not the Dissolution power, and therefore this is not really something that we can say you have actually exercised"? The "purported" is trying to cut that off, and the question is whether you want to do that or whether you want the courts to be able to say, "That was not actually the Dissolution power that we had at that time, and so therefore you cannot use that."

Sir Stephen Laws: I think I had answered this question in anticipation. Discussing whether or not this power could be used to dissolve a body other than Parliament is absurd. On drafting for absurd permutations, it is difficult enough to draft laws for the permutations that happen in the real world. If you draft for the ones that are absurd, you often end up with absurd solutions for the ones that are real. So I am not in the least bit moved by that. I agree with Alison: the "purported" is there is no way around that in exclusion. This applies only to Dissolution. For the rules that ought to apply to all proceedings in Parliament, article 9 of the Bill of Rights is there, I think, to separate Parliament and the relationship between Parliament and the courts, among other things—not that that was necessarily intended in 1689. That is the effect of the provision, and this is just an extension of that notion to the Dissolution procedure.

Chair: Does that cover your points, Alan?

Lord Beith: Yes.

Chair: Stephen, I don't think we will ask for a list of the draft legislation that has caused you to draw on that experience. Let us move on to Aaron Bell.

Q23 **Aaron Bell:** Thank you, Chair. To go back to the "Dissolution Principles"—Sir Stephen touched on this earlier—we have just said that we want to keep the courts out and that Parliament and Government should be treated as equals, but the Bill transfers a lot of power from the legislature back to the Executive. Should a Prime Minister, under the principles being set out, be able to call a general election even if a majority of MPs make it clear that they oppose it in some way, whether by a vote in the Commons or another parliamentary mechanism, such as an early-day motion? Should the PM still have that power, Sir Stephen?

Sir Stephen Laws: I think so, yes. I go back to what I said before: the power that we are talking about is the power to stop an election, not to hold one. The House of Commons can guarantee an election by voting no confidence in the Government and, if the Prime Minister

still does not want an election and resigns instead, by voting no confidence in the next Government. The House of Commons had the power to produce an election under the old system and would do under this.

If Government and Parliament cannot work, and one party to that breakdown thinks that the matter should be resolved by the electorate, I think that the electorate should have the right to be consulted, except in the most extreme circumstances covered by the Lascelles principles.

Q24 **Aaron Bell:** I understand what you said earlier in reference to the 2017-19 Parliament, but what you have just said implies that the Prime Minister is entitled to call an election by virtue of being the head of the Government, and not because his Government commands the confidence of the House at that particular point. Is that a fair assessment?

Sir Stephen Laws: Yes, and that was certainly the position before. Mr Callaghan asked for an election in 1979 after he had lost a vote of confidence; he got one and no one would have said that he should not have had one.

Q25 **Aaron Bell:** Professor Young, do you agree with Sir Stephen or do you think that the Dissolution principles that have been set out require some way for Parliament to override the Prime Minister?

Professor Young: We have to go back to and recognise that the whole point of those Dissolution principles is to recognise two key constitutional aspects. One element is that the Government hold power to the extent that they have the confidence of the House. You have to recognise that if you give that power just to the Prime Minister and not necessarily to the Government, it amounts to an aspect of divergence in the understanding of whether the confidence of the House is in the Prime Minister or in the Government run by the particular Prime Minister who is in power at the time.

You also have to recognise different scenarios. Sir Stephen is referring to a scenario in which a Prime Minister has lost the confidence of the House and then wants to call a general election. Normally, in those situations, I can understand that you would want the Prime Minister to be able to call the election because they do not have the confidence of the House, and the ideal way of resolving that, normally, is to put it to the electorate, to elect a different Government or bring back the same Government if that is what the electorate wishes, and to form another Parliament.

However, there can also be scenarios in which a Prime Minister—even one with the confidence of the House—wishes to call a general election, but the House is not happy that it is the right time for a general election in those particular circumstances. That could occasionally give rise to divergence, as we saw in 2019. In those scenarios, when we have that aspect of divergence—when the Prime Minister wishes to call a general election but the House of Commons does not think it the right time—there should be a possibility for the House of Commons to have a vote against the Prime Minister. Again, eventually, in a general election, the electorate would be able to call the House to account, as well as the Prime Minister, for how they acted in those circumstances and in that situation.

Q26 **Aaron Bell:** Should the vote be binding or just an informative vote of the House that the sovereign should take account of?

Professor Young: I like your idea of this being an informative vote for the sovereign to take account of. It would also enable the sovereign to be aware of what the situation was when they were asked to dissolve Parliament.

Sir Stephen Laws: I disagree. I do not think that is right, because giving the House of Commons the opportunity to withdraw confidence from the Government but to keep them in office and not submit itself and the Government to an election produces the situation we had at the end of last year—a Parliament that is unable to operate, that is paralysed. It is difficult to draw strict lines between a Government that think they can no longer operate with the Parliament that exists and that the electorate should be given the opportunity to decide whether a different House of Commons should be constituted, and the case of a Government—as most of them do towards the end of their term in office—deciding that they would be able to get more done and carry on government better if they renewed their mandate. Trying to draw a legal line that tells you the difference between those two cases seems to me to be a nightmare, and still more a nightmare for the Supreme Court if it was ever asked to try to construe it.

Q27 **Aaron Bell:** Thank you. You have been referring to situations where Governments have come to the end of their lives. What about the situation at the beginning of a Parliament where it is not necessarily clear who can command that confidence? The Prime Minister obviously continues in office, but is there a role for the Commons in some mechanism to ascertain who might command that confidence? At the moment, that is all done between the parties. If the result had been, say, 10 seats different in 2010, we could have had a prolonged period where it was not clear who should be the Prime Minister. Is there scope for the House of Commons to be involved in making an indication so that the sovereign can understand where confidence might lie?

Sir Stephen Laws: I think the system worked relatively well in 2010. The way it works is that if the decisions of the electorate have not given a clearcut answer, all the parties must work out the solution themselves and submit it to the monarch. I do not think that formal votes in the House of Commons would make that process any easier; they would probably make it more difficult. One issue, which obviously was an issue in 2010, is how long the Prime Minister should remain in office to allow those negotiations to come to an end. There is an obvious incentive or desire—for historical purposes, if no other—for a Prime Minister who has effectively lost the election to want to decamp as soon as possible and to be seen to do the honourable thing. On the other hand, if the other parties are still in negotiations, decamping has the effect of putting the monarch in a position of having to choose. That has to be balanced.

I think it seemed to work in 2010. Some people said the Prime Minister should remain in office until the deal had been sealed between the various parties, because that would produce more stable government, but at the point where it became obvious that the only alternative to Mr Brown was Mr Cameron, Mr Brown resigned and Her Majesty sent for Mr Cameron. That seemed to work out well. The negotiations went on in private. That seemed to me to be an effective way of resolving the difficulty.

Q28 **Aaron Bell:** Professor Young, do you have any thoughts about the post-election period?

Professor Young: I refer back to a point that Baroness Lawrence made earlier about recognising the importance of making things clear to the public. A lot of the discussions that go in a situation of a hung Parliament or leading to some form of coalition take place behind closed doors. Although the electorate may have voted for a particular political party, once you have a certain coalition deal, there is no ability for the electorate to vote on that particular deal, so having some kind of element of an indicative vote within the House of Commons would at least give some kind of assurance that there is some consensus from those MPs who have recently been elected in favour of that particular coalition situation. I think that would add extra legitimacy in those circumstances.

Chair: Aaron, can we move on a bit now? I am slightly worried about trying to finish relatively on time. Chris, did you want to come in briefly on that?

Q29 **Chris Bryant:** I will be very brief. The Fixed-term Parliaments Act has a very clear definition of a no confidence vote, and it is now, I guess, the accepted concept. Previously, however, all sorts of things were thought of as no confidence votes: a vote against the Queen's Speech, a vote against the Government's policy on going to war or deploying troops, and a vote against the Budget or even an amendment to the Budget. The other bit of the convention was always that if the Opposition tabled a motion of no confidence, it was automatically taken the next day. That no longer obtains, so how do we write all of that back?

Sir Stephen Laws: I come back to my concept of a political imperative. I think what a vote of confidence is is determined by the political imperatives. If the House of Commons votes that it has no confidence in the Government, it seems to me that a Prime Minister would be taking a very great risk if he did not accept that as an instruction to resign or—

Q30 **Chris Bryant:** Sorry, Sir Stephen, but because the Government deploy time in the House, the only way the House can vote on a motion of no confidence, whether in those specific terms or in any others, is if the Government grant the time.

Sir Stephen Laws: I understood that the convention was that if it is tabled by the official Opposition, it will be granted.

Q31 **Chris Bryant:** Conventionally.

Sir Stephen Laws: A convention that is adhered to.

Q32 **Chris Bryant:** It isn't.

Sir Stephen Laws: With respect, I understood that it had been so far as the official Opposition is concerned—but in the Government, not in the Prime Minister, obviously. I think it is clear what would happen, because it would be clear to the electorate whether or not the Prime Minister was hanging on having been dismissed by the House of Commons.

Chair: Alison, do you have a point on that?

Professor Young: Very quickly, two points. First, I think what Chris Bryant is raising is that often there can be unintended consequences if you enact legislation quite quickly and have not taken the time to think very clearly about what the possible consequences might be. One of the consequences of the Fixed-term Parliaments Act is that it set what would happen with regard to a particular type of vote of no confidence that would trigger a general election, but

it was not necessarily clear what would happen to other types of votes of no confidence that were not in the wording of the Act. That has led to these aspects and difficulties. Again, it is very important when you are thinking about replacing it that you think very carefully about these different permutations.

Secondly, I draw to your attention that the Cabinet manual is, we are told, in the process of being revised because it has to deal with aspects that refer to elements of EU law, which will obviously not be relevant going forward, particularly after the end of IP completion day. This could be a circumstance in which you want to think very carefully about how you deal with votes of no confidence, and how they should be timetabled. There will be the opportunity to set that out quite clearly in the Cabinet manual, which would give some element of clarity on how that might operate within the House.

Q33 **Mr Vara:** Professor Young, I believe you suggested that you believe that the draft Bill as drafted would inadvertently extend the life of the Parliament beyond five years. Could you kindly explain why you take that view? Also, if there is to be an extension, how long would that be for?

Professor Young: I will try my best. This is to do with aspects of the differences between the situation prior to the Fixed-term Parliaments Act and the Fixed-term Parliaments Act as to how you define terms. What the Fixed-term Parliaments Act did was set terms from election day to election day. What this replacement will do is what would happen before, which was setting terms with regard to the anniversary of where you first meet. There are no precise aspects of how it works as to when you first meet, so there are possibilities of potentially extending it. There are legal elements in the background so that Parliament has to meet every three years. Obviously, you have to meet on a regular basis to raise finance as well.

The other difficulty that arises is that we have been talking about the prerogative power of Dissolution, but it is not just the prerogative power of Dissolution; it is also the prerogative power of calling the new Parliament. This Bill is dealing with dissolving, but it is not necessarily dealing with calling a new Parliament.

Section 3(4) of the current Fixed-term Parliaments Act states clearly: "Once Parliament dissolves, Her Majesty may issue the proclamation summoning the new Parliament". I presume that, unlike with regard to the prerogative power of Dissolution, that may be one of those prerogatives that is put in abeyance and comes back. Again, however, we would have to think carefully about whether we were then in a situation where we have a quasi-prerogative to dissolve and a prerogative to call the new Parliament, and to think of how we would resolve that.

There is an easy solution to that potential problem, which is, in the schedule of the Bill, to say that, instead of it returning to the previous position, you will try to tally the elements of dissolving and calling a new Parliament at the same time, so you do not end up with too big a gap in those circumstances. There is a simple solution. I would be happy to send that to the Clerks for you to go away and peruse, to see if it is a solution that you would like to take. I do not think it is the intention to do that deliberately, which is why I said "inadvertently", but I think you need to be aware to make sure that there are not those disparities and to make sure that is very clear as to what the intention of the new Bill is.

Q34 **Mr Vara:** Before Sir Stephen comes back, could I come back to you Professor

Young? In the current draft Bill, clause 4 says: "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." So the previous Act is repealed: which bit of that is not absolutely clear that it is a five-year Parliament? From my understanding, you do not have to be a lawyer; I believe that the man on the Clapham omnibus would be able to understand what that means. Which bit of that is a problem? I would be happy for you to comment on that, Professor Young, and then certainly, Sir Stephen, you can come back.

Sir Stephen Laws: Please can I come in now, because I am out of time? I am afraid this will have to be my last answer. A Parliament begins on the day it meets. That was the rule before 2011 and it is the rule after 2011. This Parliament will not be extended beyond five years from the time when it met. The Parliament Act does not apply. It did apply to exclude the Fixed-term Parliaments Act when it was made, because there was a power in there to extend Parliament by six months, but that power has gone. This Parliament will not be extended by more than five years.

The proclamation summoning a new Parliament will, as ever, be issued after—usually immediately after—the proclamation of the Dissolution. It has to be issued afterwards, because otherwise there is a three-year period before another one has to be summoned. It will be issued by the outgoing Government and not, as I think Professor Young said in an article, the incoming Government. It will last for five years.

I want to say that there is one aspect of the Fixed-term Parliaments Act that I regret, which is that the five years ran from the end of the old Parliament, so you could always have elections at the same time of year. As a civil servant, it was nice to think that there was at least one aspect of the system that created a default position that a Government would run its course. You are not going to have a Government running its course when you are constantly shifting the period forward by two months every time you have an election, because you do not start it until Parliament comes back, then you dissolve it and you have two months and you start again.

I regret that, but I think it is wholly understandable that the Government have done what they have done, for the reason I have given before, which is, if you want to make sure that you go back to where you started, you do not want to have too many variations in the new system from the old system, because it will all provide excuses for saying that the new system is different and needs to be applied differently. I think the Government is right to do it that way, but it does not seem to me that there is any way that the Bill extends Parliament by more than five years. With that, if I may, Chairman—

Chair: Yes. Can I thank you very much, Sir Stephen? This is our first session of taking evidence directly. I thank you very much for giving us your time. I know that this was set up at short notice and that you had to leave at 12.30 pm, so thank you.

Sir Stephen Laws: Thank you.

Q35 **Chair:** Alison, do you want to comment on that?

Professor Young: With my constitutional lawyer hat on, my concern is always that if you are going to make these constitutional changes, you should think about the possible permutations

and the possible consequences. Sir Stephen is right to say that normally you have the element of dissolving Parliament and the prerogative power to call for the new Parliament at more or less the same time, but, again, we are going back to convention. The question is whether you want to think very carefully about tallying them to cut off—I am not necessarily saying it is unclear, but you have to think very carefully about making sure that there is not the possibility of potential abuse. Again, I am not suggesting that anybody in the current Government or in the Opposition would want to abuse these powers, but when you are thinking very carefully about issues of constitutional design, you want to make sure that it is as clear as you can make it. You also want to make sure that there is not a possibility of a potential gap between when you dissolve Parliament and when you issue the writ to call the new Parliament coming forward. It is just a case of being careful and making sure you cut off that possibility. As I have said, that is very easy to do by ensuring that you put it on the basis that you are calculating it from dissolving and calling at the same time, or you calculate it from when you dissolve, as opposed to when you call the next Parliament.

Q36 **Mr Vara:** Mr Chairman, may I briefly come back? Professor Young, given the way in which the draft Bill is currently drafted, if this were to come to an issue of interpretation and it went to a court of law to determine whether that means five years from the date of the last election, from a practical point of view is a court likely to interpret that the way it is written, as opposed to all the permutations that you have put in from, with respect, an academic perspective? How do you feel that a court would decide on the wording as it is at the moment?

Professor Young: I think you are asking me a slightly different question, which I am happy to answer. The question you are asking me is whether it is clear, given clause 4 of the draft Bill, that Parliament dissolves at the beginning of the day that is the fifth anniversary of the day on which it first met. Of course that is clear; it is very clearly worded. The problem I am drawing your attention to is the possible disparity. It would come to an end when it dissolves, but what do you do in the gap between the Dissolution and the calling of the new Parliament? To tie those two together would be the sensible thing to do. The problem would be what you would do if you dissolved using these provisions but then were not sure what has happened with regard to the prerogative power to call the new Parliament. Do you want to make sure there is no possibility of a potential gap between the two, or are you happy to rely on convention to deal with that situation?

Mr Vara: Thank you, Professor Young.

Chair: Professor Young, thank you very much for your evidence this morning. Again, I repeat that you were able to respond very quickly to our programme and timetable. We are very grateful to you and look forward to the points that you said you might send to the Clerk, so that they can be distributed to the rest of the Committee.

I say to the members of the Committee that if there are any points that you want to raise with me over the next few days, please feel free to do so either through WhatsApp or by directly contacting me. On that point, I close the meeting. Thank you very much.