



Select Committee on the Constitution

Corrected oral evidence: Fixed-term Parliaments Act 2011

Wednesday 4 September 2019

10.30 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Baroness Fookes; Lord Wallace of Tankerness.

Evidence Session No. 1

Heard in Public

Questions 1 - 8

Witnesses

[I](#): Professor the Lord Norton of Louth; Dr Ruth Fox.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Lord Norton of Louth and Dr Ruth Fox.

Q1 The Chairman: Welcome. You are both very familiar with this Committee and, indeed, with this particular issue, having written, spoken and done quite a lot on it. This review that we are doing was started some time ago because the Act itself is due for review next year. It has, of course, become rather more topical than we perhaps envisaged when we started this inquiry. We will try to separate the actual workings of the Act from current situations, but it might be difficult at times to do so. Perhaps the best thing to do is to start with your overall view of the Act itself, what its advantages and disadvantages are, and whether it has led to any meaningful transfer of power from the Prime Minister to Parliament. As I say, it is difficult to separate it from current circumstances but, as that was the specific intention of the Act, perhaps that is a good starting point.

Lord Norton of Louth: It depends on the criteria for what you assess as achievements. The way to look at it is what the Act intended to do and what have been the consequences of the Act. There is a sharp difference between the two, because in terms of intention the prime purpose, as Nick Clegg put it at the time, was to deprive the Prime Minister of the opportunity to call an election at a politically propitious time. A secondary benefit was seen in producing some element of predictability of a five-year term and avoiding such things as the wash-up.

Those have not been the consequences. What has happened has been the unintended consequence in relation to the capacity of the Prime Minister to attach confidence to a vote and then being able to say in the event of a defeat the Government will either resign or request a Dissolution, the normal expectation being that it would be a Dissolution. The original intention was that the conventions governing confidence would be maintained, but the result is they have not been, so it deprives the Prime Minister of the potential for doing that.

The two elements of Section 2, the two Motions that can be triggered, were an attempt to try to preserve that, but they have not achieved it, so, in effect, what the Act has done has made both the Opposition and general Back-Benchers veto players. In other words, they can deny the Prime Minister the opportunity to trigger an election through a two-thirds vote, and it is up to the Opposition, essentially, whether it moves a vote of no confidence, so it can prevent that happening. It leaves the situation in which we find ourselves at the moment where the Prime Minister may wish to trigger an election but is denied the opportunity so to do.

Dr Ruth Fox: I broadly endorse all that. Clearly, it has achieved the objective of removing the power in respect of Dissolution by the Prime Minister in a unilateral way. Clearly, at the time of the Bill being brought forward, that was largely because of the coalition Government context, but there had been quite a considerable degree of political support prior to that for the idea of fixed terms and of removing the prerogative power

in that respect. It has achieved that, but it has, as Lord Norton said, had the unintended consequence of empowering Back-Benchers to behave in such a way that creates the kind of gridlock that we are seeing, and I do not think that was the intention of the Act.

Lord Norton of Louth: May I add a point I did not make previously? I am not sure it delivered in terms of denying the Prime Minister that opportunity in practice because, as we saw in 2017, if a Prime Minister decides this is the time, it makes it difficult for the Opposition to say, "No, we don't want an election". If you think about what it was intended to achieve, in 2017 it did not so we had an election at the time that the Prime Minister wanted and lost the certainty of the five-year Parliament and there was a rush and there was a wash-up. I would add as an aside that, even with the five-year term, we have only had one five-year Parliament and at the end of that I am not sure the 2014-15 Session was particularly productive.

The Chairman: Of course, most people have assumed, and it was probably a reasonable assumption, that an Opposition would always have to vote for an election and it is only the exceptional circumstances that we are in at the moment that mean that potentially will not happen.

Lord Norton of Louth: Yes. The circumstances can be exceptional, but that is the point. The key point is it puts the power in the hands of the Opposition and Back-Benchers because they can deny the Prime Minister that opportunity. It depends on the political circumstances. To some extent, it will depend on the nature of the Opposition and what it is seeking to achieve. I was reflecting to Dr Fox a few moments ago that you can imagine a wily politician, such as Harold Wilson, saying, "In principle it is a very good idea and we support it, but for practical reasons we can't vote for it". You should bear in mind, of course, with the two-thirds requirement it is two-thirds of all Members, so abstention is sufficient.

The Chairman: That is a point that has not always come through that it is a positive two-thirds, not just two-thirds of those voting. Lord Beith.

Lord Beith: Lord Norton, do you recognise that there is value in Parliaments generally running for a period of years fairly predictably? Although circumstances might arise in which the only solution to a problem is to have a general election, from the point of view of having a legislative programme of dealing with major Bills which have to carry over from one session to another on issues such as HS2 and things of this kind, there are practical advantages, and would you still seek those advantages with an amended version of the legislation?

Lord Norton of Louth: That might be difficult to achieve because, when you think about what has happened since 2011, and what used to be the practice, there has not been a fantastic difference. In effect, if the Government had an overall majority, the Parliament would last for four or five years. It was only in exceptional circumstances that you would have a short Parliament. I am not sure how much difference it would make by

trying to legislate for the situation you have identified. You should bear in mind that we have a Fixed-term Parliaments Act, but it does not prescribe fixed-term Parliaments, it is a semi Fixed-term Parliaments Act, so once you try to keep in those provisions for early elections, the difference between now and pre-2011 is not that great.

Lord Beith: I would put it to you, Dr Fox and Lord Norton, as a Chairman of a Select Committee, as I was in that period of the five-year Parliament, that the ability of the Committee to scrutinise the Government was much greater when it could decide which aspects of policy we were going to deal with in what year and we could develop a programme and we were not in a situation that, for example, Select Committees in the Commons have been in during the last three or four years where anything embarked upon was likely to be cut short by a general election. Are there advantages from the point of view of parliamentary accountability and parliamentary scrutiny of a degree of predictability about the length of Sessions?

Dr Ruth Fox: It is valuable in the final year if it is going to run to the full five years. As Lord Norton said, there is the get-out of the two-thirds option that could be utilised, but if it is to run for the five-year term, having that certainty about the final Session is useful both for legislative and non-legislative purposes, because in the House of Commons allocation of time for things such as Back-Bench business debates, Opposition day debates and so on is managed on a sessional basis. The allocation of them over the course of the Session can be quite useful, whereas they could be manipulated in that final Session in the run-up to an election if a Government know when it is going or is planning.

Having said that, we all have a general sense of when the election might come but it enables the Government to manage that to their advantage in terms of how they allocate time, and, as you say, for Select Committees being able to plan across that final year has always been quite useful, particularly for the publication of reports.

Lord Beith: Not just in the fifth year of the sequence but throughout the Parliament you can plan, can you not?

Lord Norton of Louth: You could plan and if the Government have been returned with an overall majority you are usually on a fairly safe assumption that you will have four full Sessions and potentially go into a fifth. If you go into a fifth it might help for planning with Select Committees, but it may not benefit the Chamber because Members are basically treading water if they are looking towards the election, and quite often not a lot of serious business is done during that fifth Session. As I say, in 2014 I was checking what got through and it was not a very full Session.

The Chairman: It is a wind-down Session anyway.

Lord Norton of Louth: Yes.

Baroness Foakes: Does not the underlying problem in all this occur when a Government do not have a convincing majority or are in coalition? If the Government have a really good majority they can sail on, can they not?

The Chairman: Which is also part of the reason for the introduction of the Fixed-term Parliaments Act and the 14 days following a vote of no confidence, to allow a new coalition potentially to be put together. That was one of the driving forces.

Lord Norton of Louth: Potentially, that is one of the problems because it derives from the attempt to maintain the old convention governing confidence. The Act demonstrates the problems you have if you try to translate a convention into statute, which is why it is done so rarely and rarely successfully.

If you think about the two provisions for triggering an election, a two-thirds majority and the 14-day provision, under the old convention a Prime Minister who lost the confidence of the House could either go for Dissolution or resign, as with Callaghan, and the assumption is Dissolution, but the alternative is to resign which means handing over to the Opposition and giving it the opportunity. I think that was what the provision was meant to do—to give somebody else the opportunity—but at the same time they would need to show they had the confidence of the House, hence the 14-day provision, which is not the best way of providing for it, but I think that was the motivation to try to replicate what had gone before.

Q2 **Baroness Corston:** May we turn to the issue of confidence now? What impact has the Act had on the whole question of confidence in a Government?

Dr Ruth Fox: I think it has muddled the waters somewhat, particularly in the House of Commons among MPs as to their understanding. That is not to say that they all understood the pre-FTPA provisions, but I think it has muddled the waters and, particularly among Ministers, the grounds have shifted compared to what was being said at the time the Bill was brought forward and what has been said in recent times in terms of their view of it. In recent times, the focus among Ministers has been that the application of the wording in the statutory Motion applies only in respect of confidence and nothing else. That was not the intention of Ministers as stated at the time the Bill was brought forward. It is not the position that was endorsed by the Public Administration and Constitutional Affairs Committee last December in its report when it looked at these issues. That is the first issue. Obviously it has affected the consequences of a loss of confidence in the Government in terms of what happens, which we have just discussed.

Lord Norton of Louth: Yes, I agree. The original intention of the Bill was to retain the convention regarding confidence, including if the Government brought forward a Motion of confidence in themselves and that was lost—the House would have demonstrated it did not have

confidence in the Government. If that happens, the only part of the convention that is retained is an ability for the Prime Minister to resign. It does not trigger an election. That is now only provided for by an explicit Motion "That this House has no confidence in Her Majesty's Government".

As Lord Wallace will remember from the debate on the Bill at the time, the Government accepted the amendment to achieve greater clarity and to avoid justiciability in terms of what was happening. Of course, the point as well is that if the Government moved a Motion of confidence in themselves and it was defeated then the House will not have passed a Motion and there would be no Motion passed at all. That was the problem and that is why the Act is as it is, but it denies the Prime Minister the opportunity to test the confidence of the House through putting down a Motion of confidence in the Government.

Q3 **Baroness Corston:** Would you suggest that the Act itself has strengthened Parliament over the Government in that it removes the ability of the Government to make a policy issue a matter of confidence?

Lord Norton of Louth: It denies the Prime Minister the opportunity to do that. It used to be the case that if the Government were defeated on a major issue, they might interpret that in such a way that they required the confidence of the House and would put down a Motion of confidence, which they can still do, but if they lose that, of course, that does not by itself trigger an election. It would have to be followed by an explicit Motion of no confidence or the Government bringing forward a Motion for an early general election for a two-thirds vote by the House. In that respect, it has limited the Prime Minister because, as I said earlier, it makes both the Opposition and Bank-Benchers, as we are seeing at the moment, potential veto players.

Baroness Corston: Is it desirable or sustainable for a majority of MPs to have confidence in the Government and yet the Government not have a majority to deliver on perhaps their most significant policy?

Dr Ruth Fox: We have been grappling with this over recent months. It is a pretty extraordinary situation to be in where, in effect, the Government have had over the course of the last year roughly a third of their MPs who do not support their fundamental purpose and prime policy, and who are supported by another party through a confidence and supply agreement which only grants them confidence as long as the Government's prime policy is not implemented. That confidence would be lost the moment that policy was accepted by the House of Commons and the withdrawal agreement had been approved. It is a pretty extraordinary situation to be in.

The fact that the Government cannot move ahead to get a general election in those circumstances and cannot threaten the Bank-Benchers with the weapon that the Prime Minister would have had, for example Ted Heath in the European debate that if they did not approve the Second Reading there would be a Dissolution, is one of the problems that arises.

Lord Norton of Louth: To reinforce that, as Dr Fox says, in the past it was the case that the Government were able to attach confidence to a Motion and say, "If defeated on this", as Heath did in 1972, "this Parliament cannot sensibly continue", or do what John Major did over the Social Chapter of the Maastricht Bill when that was voted down, to bring it back and say, "This is a confidence vote in the Government", and therefore got it through.

Q4 **Baroness Fookes:** I wanted to ask about the issue of the Section 2(2) provision regarding the support of two-thirds of MPs. To some extent you have answered points on that. I was about to ask if there might be any circumstances in which the Government were unable to get such a Motion passed, but perhaps let us wait 24 hours and see. Perhaps we could look to see if there were any lessons from the use of this by the previous Prime Minister Theresa May when she was able to get this and trigger an early election. Are there any lessons to be drawn from that?

Lord Norton of Louth: Only that in what you might call normal circumstances the Prime Minister may bring that forward and it would be difficult for the Opposition to say no, but, as has been mentioned, we are in exceptional circumstances, so we are seeing it in operation. It should be borne in mind that it was always there anyway prospectively, so a Prime Minister would have to bear in mind, "Will I get that majority?", whereas previously, of course, it would not have been an issue.

Dr Ruth Fox: I would agree with Lord Norton. If the Government want the election and feel confident that the Opposition will vote for it—and in normal circumstances it would be extraordinary for a leader of the Opposition not to support that—they can go forward and seek that vote if they think that they are going to secure it.

Baroness Fookes: If we kept roughly to this formula, is there any merit in having a different ratio, so not two-thirds of all Members, or is that just tinkering?

Lord Norton of Louth: We will probably come on to what to do in the future because it strikes me there is a range of options. I have thought of four that cover the point.

The Chairman: We will come on to that later.

Lord Norton of Louth: Do you want to come on to those? There are different options that would do that, but, in effect, it is a question of doing some tweaking, as you are suggesting, or going in for something slightly more fundamental. If you are tweaking it in terms of the majority, the same problem intrinsically remains. I am not sure whether making it a supermajority or the size of the supermajority would make a great difference.

Q5 **Lord Wallace of Tankerness:** What obligation is there for the Government to make time available in the Commons for a Motion of no confidence? It is convention but is it an obligatory convention?

Lord Norton of Louth: Yes, I think in this case we can fall back on *Erskine May* and they have carried it on when Jeremy Corbyn put down the Motion of no confidence. The convention is if it is the Leader of the Opposition by virtue of being the Leader of the Opposition—in other words the alternative Government—the Government will find the time fairly quickly for confidence to be tested, and that has been complied with including in present circumstances, but, as I say, it is only the Leader of the Opposition by virtue of leading the alternative Government.

If anybody else puts it down the Government are under no obligation to find the time. Indeed, that has happened recently when a third party put down a Motion under the terms of the Act and time was not found. If it is the Leader of the Opposition, the convention applies and *Erskine May* makes the point it is in their own interests to demonstrate they have the confidence of the House.

The Chairman: We are in exceptional times so you can never be sure what might happen.

Lord Wallace of Tankerness: You made the point, Lord Norton, that in spite of the intention that it might be things such as using the Queen's Speech, it was issues of justiciability which were very much being pressed upon us, and therefore there is a need for clarity. You give the example of John Major and the Social Chapter. If my memory is correct, in July 1993 he lost a couple of Divisions and then he called a Motion of confidence. It was not the loss of the Motions on the Maastricht Treaty that caused that, but he tabled a Motion of confidence.

Lord Norton of Louth: Sorry, confidence attached to the Social Chapter to get it through.

Lord Wallace of Tankerness: You pointed out that a Government can table a Motion of confidence in themselves, but losing it does not have the consequence of losing a Motion of no confidence. Do you think there would be advantage, bearing in mind the need for certainty, that the House of Commons negating a vote of confidence would actually be helpful?

Lord Norton of Louth: You could provide for that. The argument that was used at the time by the Government Minister, who I believe was one Lord Wallace of Tankerness—

Lord Wallace of Tankerness: Can you remind me of what my argument was? I cannot immediately remember.

Lord Norton of Louth: Your argument was, and I remember it because it was in response to an amendment from me, trying to achieve what you are talking about, that the Government could then manipulate it.

Lord Wallace of Tankerness: To lose.

Lord Norton of Louth: Yes, so to put it beyond doubt it had to be an explicit Motion of no confidence. That was the argument, but, you are

right, you could stipulate that if the Motion "That this House has confidence in Her Majesty's Government" is negated, that would trigger an election.

The Chairman: Dr Fox, do you want to add anything on this one?

Dr Ruth Fox: Going back to the *Erskine May* point, as Lord Norton said, it was tested last December by the smaller parties and time was not found. It does not have to be done immediately, i.e. the next day. There is still scope within the exigencies of business for that to run a bit longer. The Government could go 48 hours, say, and have done on occasion, but I think it is fairly clear that if the perception is that the Government may have lost the authority of the House, they are obviously in difficult waters and it is in their interests to test it as soon as possible. I do not think that has changed anything in terms of the Act.

Q6 **Lord Beith:** If we go back to how things were before the Fixed-term Parliaments Act, it was not uncommon for Whips to indicate to Members of their party that the Prime Minister regarded this as a matter of confidence and not doing so in a formal public way. There was uncertainty there and there was uncertainty also about what the consequences might be. There is certainty today that, if you voted against the Government line yesterday as a Conservative MP, not only was the Whip withdrawn but the consequence of that was that in any early election you would not be an official Conservative candidate—a fact which is also bolstered by what I always think of as the Howard Flight provision, because he was the first person against whom it was used, whereby the leaders of the party can decide whether someone can carry the Conservative banner or not. Was it not better to try to address some of these ways in which the Government could, without really putting themselves on the line, try to induce the same degree of fear in voting against it?

Lord Norton of Louth: Yes, I agree. Obviously, the Government can threaten to withdraw the Whip. That is not unusual because John Major used it on a somewhat industrial scale over the EC (Finance) Bill, but in terms of then saying, "We will make this a vote of confidence", of course that has gone for the reasons we have just discussed. It limits it because obviously it was always in the gift of the Prime Minister to say, "If this is not carried I shall make it a Motion of confidence", with the consequence there will be an election with all the political fallout that that would produce.

Lord Beith: In part we have greater clarity and Back-Bench Members know whether this is genuinely a vote of confidence or not.

Lord Norton of Louth: They know the Prime Minister cannot threaten a vote of confidence in the sense that an election will therefore automatically follow, so it limits the Prime Minister's capacity to achieve that, yes.

Lord Beith: Turning to the 14-day period, should there be scope for use

of indicative votes to establish whether someone can command a majority in the Commons who is not currently the Prime Minister?

Dr Ruth Fox: That is one of the options and, potentially, one of the difficulties we face if we have to confront the terms of the Act in respect of the 14 days in the coming weeks. There is that procedural gap. The Act is silent, I think rightly, but we do not have procedures in place to be clear about exactly how the identity of an alternative Administration would come about. You can say that it is not dissimilar to what might happen in the aftermath of a general election, as happened in 2010, where through the negotiations and through the raw politics something will emerge, but the problem is if there is a potential Administration and it is not exactly clear who it might be, there needs to be clarity on the part of Buckingham Palace in terms of next steps. It would have been better if, for example, the House of Commons, knowing that these provisions were in the Act, had looked at this and determined what the range of options might be, if needed, in order that the procedural rules of the game are clear before they had to be confronted and dealt with once the circumstances arise.

One option is indicative votes. Another option might be something such as an Early Day Motion signed by the MPs who would support an alternative Administration led by X. There may be other options, but, at the moment, if and when we have to confront that situation, it will effectively have to be decided during the course of the 14 days, and it would have been better if it had been clearer beforehand and the House of Commons could have looked at it and has not.

Lord Norton of Louth: It complicates it enormously given you have the 14-day provision. It may be that one wants to address the 14-day provision rather than adding to complications of what you do within those 14 days to find an alternative. At least pre-2011 the position was relatively clear, as we found in 2010, that with an uncertain outcome you leave it to the politicians to negotiate to see who could command the majority in the House and then you present to Her Majesty the person who could command that majority.

Lord Beith: There would be little to prevent the House from using its existing procedures to hold a vote which gave an indication that a Government under Mr or Mrs X could command a majority, would there?

Dr Ruth Fox: Although indicative votes have not perhaps had the best record in recent times in terms of how they have been held.

Lord Norton of Louth: You can find out what Members are against, not necessarily what they are for.

The Chairman: In a hypothetical situation, if there were not to be a general election in the immediate future and we were to have a Queen's Speech on the 14th or 16th, whenever it has been announced, and that Queen's Speech was to be voted down as a tactic to stop this Prime Minister leaving with no deal, you could have the House having indicative

votes either in favour of the Leader of the Opposition, perhaps only for 14 days, and then at the end of those 14 days not having a majority or it disintegrating, but it would allow Parliament to apply for an extension or something.

Lord Norton of Louth: Do not forget, of course, if you vote down the Queen's Speech, no part of the Fixed-term Parliaments Act is engaged by that act, so 14 days would not kick in anyway and you would have discussions or horse-trading or whatever.

The Chairman: Yes, but it would see you through that period that might be critical in other respects, or you could endorse the Queen's Speech and then have an immediate election. It causes a lot of difficulty. Sorry, that was a diversion. Baroness Drake.

Q7 **Baroness Drake:** Following a Government defeat in a Motion of no confidence we then move into the 14-day period where, arguably, there is some ambiguity in the legislation, which may well be tested. What do you say, as opposed to what do you prefer, although I would be interested to hear also what you prefer, are the constitutional and legal obligations the Prime Minister is under in that 14-day period?

Dr Ruth Fox: The *Cabinet Manual* is fairly clear on this. There is an explicit reference in the event of a Prime Minister having lost a vote of confidence and the 14 days kicking in to the provisions that apply to a Government having sought a Dissolution in the general election period. Those are, in effect, the caretaker conventions, and they would apply until such time as the Government secured confidence through a Motion of confidence within those 14 days. Those caretaker conventions are in respect of decisions of a long-term nature, senior appointments to the Civil Service, spending significant sums of public money.

Were this to arise prior to 31 October, there would be questions about the status of no-deal planning and whether that is covered by the convention as a necessity. The outcome in respect of 31 October, or a forthcoming date for exit if it is not 31 October, and whether planning, spending and so on for that had to continue, because until the law changes that is still the legal outcome, may be where the conflict arises, but the *Cabinet Manual* is very clear about the status of what the Government can and cannot do.

Lord Norton of Louth: On Baroness Drake's point about there being some ambiguity, I am not quite sure why there is "some". What Dr Fox has said is premised on the existing Government seeing the 14 days out and acting as caretaker.

Dr Ruth Fox: During the 14 days.

Lord Norton of Louth: The real ambiguity is the point about within the 14 days unless there is the Motion "That this House has confidence in Her Majesty's Government". For that Motion to be put there has to be a Government, so what happens within that period of 14 days? It is worth stressing that it is 14 calendar days. There is no allowance for weekends

or bank holidays, so if a Motion of no confidence was carried just before Christmas, literally you would have 14 days to try to resolve it if you want an alternative. That is where it is silent as to what happens within those 14 days.

As I say, it derives from if the Government decide to resign, as one of the alternatives an alternative Government would try to be formed, but of course you would have to have a new Prime Minister in place to form an Administration to be able to put the Motion, "That this House has confidence in Her Majesty's Government". There must be a Government. The problems there are on such a scale that I presume the presumption is it would just be a case of seeing out the 14 days on the part of the Government so an election is triggered and, of course, there is nothing to stop the Government just seeing out those 14 days and staying in place until the 14-day clock is up. There is nothing in the Act that requires a Motion "That this House has confidence in Her Majesty's Government" be put. It is just there in case the current Government want to have a second stab at it, or there may be an alternative and give it a chance to gain the confidence of the House.

Baroness Drake: What does that mean for the caretaker convention during those 14 days? Does it mean the caretaker convention kicks in straightaway when the Government experience a defeat in a confidence Motion, or does it kick in at the end of the 14 days?

Dr Ruth Fox: The *Cabinet Manual* says during the 14-day period the restrictions in paragraphs 2.27 to 2.29 apply and they are the provisions in respect of a general election period.

The Chairman: Purdah. There has been a lot of criticism recently that that has not been observed anyway, but that is another issue. Lord Wallace.

Lord Wallace of Tankerness: If, despite reservations about indicative votes, the House of Commons during the 14 days agreed on a Motion that Ms X would have the confidence of the House if the Queen invited her to form an Administration and the sitting Prime Minister refused to resign, do you think it would be proper for the sovereign, perhaps in response to an humble Address from the Commons, to dismiss the Prime Minister and appoint the person in whom she has confidence knowing that the House of Commons has confidence? Would the difficulty for the Queen be if she did not do it when the House of Commons had expressed confidence in a particular person?

Lord Norton of Louth: I would have thought it would put the monarch in an impossible position, which is why there is an onus on politicians to avoid that situation ever arising. One would expect there to be, as in 2010, negotiations to demonstrate who can form a Government and an agreed name to be put to the Queen, because that is implicit and it is in the *Cabinet Manual*.

Dr Ruth Fox: The onus is on the Prime Minister to resign if it is clear that there is an alternative figure. Clearly, if you had had an indicative vote or something, that would be clear. The Prime Minister has discretion in judging the time at which he or she goes, having determined whether they think there is an alternative. Thus there is a degree of discretion on the exact timing, but there is no discretion around whether they should go if an alternative is clear. An indicative vote would be very clear and very public and impossible to gainsay, whereas if it were a product of private negotiations and there were timing issues behind the scenes about transfers of power, which there were at the time of the coalition, there might be understandable questions about whether the Prime Minister waits an hour or two. In an indicative vote there would be no reason to do so.

The Chairman: Lord Wallace was asking about the mechanism not the onus.

Lord Wallace of Tankerness: Both, yes.

Lord Norton of Louth: As somebody said, the mechanism seems to be based on who rather than which in terms of party, because presumably the negotiations would take place between parties and it would not be Members thinking which individual would make the best Prime Minister or should lead a Government. It should be which party and therefore which party leader should be called to the palace. One would assume that it would be negotiations between the parties rather than Members deciding on X.

The Chairman: But in these exceptional times there has been some discussion about non-party leaders. Baroness Fookes.

Baroness Fookes: Am I right in thinking that the convention is that a Prime Minister does not just resign and leave a vacancy and nothingness and that he or she should remain in office until it is clear that a successor has been found?

Lord Norton of Louth: Correct.

Dr Ruth Fox: Yes, absolutely.

Lord Norton of Louth: That is the convention. A Prime Minister could simply say, "I'm off", but the convention embodied in the *Cabinet Manual* is that the Prime Minister remains in post until a successor is appointed, whether that is through losing a confidence vote or simply the Prime Minister resigning. It takes time for a new leader to be elected so during that time the Prime Minister stays in place, yes.

Baroness Drake: May I ask a quick question? The discussions could be just within a party, on the assumption that if you replace the individual who is the Prime Minister you could have another go by saying there was a different person there. They could spend the whole 14 days just talking to themselves.

Lord Norton of Louth: Potentially. Obviously, there are all sorts of configurations both in the governing party, but I think the point was being made on the Opposition side as well. It is a question of whether you have indicative votes or you simply leave it to each party to come up with the person they support and take it from there.

Dr Ruth Fox: There is also the outstanding question of whether the opposition parties, if they were trying to put something together, would have the support of the Civil Service in doing so, as they did in 2010. Again, the assumption is yes, but that is at the discretion of the Prime Minister and he would have to agree, which may become an issue in the 14-day period.

Lord Norton of Louth: There is also the political point of course that some parties might like to have the discussions internally rather than publicly through the medium of an indicative vote.

The Chairman: There has been speculation today that the Prime Minister might suddenly try to repeal this Act if he cannot get his way this afternoon. Lord Wallace, do you want to follow up on that?

Q8 **Lord Wallace of Tankerness:** Not necessarily. I am trying to divorce some of the current situation from the generic. More generally, when we go towards a review in this inquiry, what are the arguments for (a) repeal or (b) amendment? If it is repeal, what would have to be in a repeal Bill and if it is amendment, what would your prime candidates for amendment be?

Lord Norton of Louth: If I may make a point on what the Lord Chairman was saying that it would not be the Prime Minister seeking to repeal the Bill; it would be, "Notwithstanding the Act" or something of that nature for this one-off, although the Bill to amend it would of course be a Bill and have to go through the normal stages.

It strikes me that, to clarify that, you might want to think in terms of what I have called the four Rs: retain, repeal, rejig and replace. They are distinct so, if you retain it, you keep it as it is. There is a danger if you are simply saying repeal it. Lord Grocott introduced a Private Member's Bill which simply said the Fixed-term Parliaments Act is repealed. The problem with that is that the prerogative might come back, and there is a discussion about that, but of course the Septennial Act is gone, it is repealed as amended by the Parliament Act. If you simply repealed it, Parliament carries on in perpetuity, unless the Crown is advised to call an election, and the Prime Minister might think in 10 or 20 years that is quite acceptable. Therefore, you have the problem you cannot simply repeal.

It would have to be either an amendment, so a Fixed-term Parliaments (Amendment) Act or a replacement so that you rejig it in terms of amending it or you replace it with, say, a parliamentary terms Act. The amendment would be to take what you have at the moment and clarify the 14 days and make those sorts of changes, or a replacement, for

example trying to put things back to what they were before, but to achieve that you would have to embody it and make statutory provision. Then, of course, you would have all sorts of arguments as to how you achieve that: should it be a five-year Parliament, a four-year Parliament that you could provide through a replacement Act, or that again it reverts to the discretion of the Prime Minister as to when to advise the sovereign that there should be a Dissolution? Those are the options and I think it is between rejigging it, trying to amend the current Act, or replacing it, given the problems that we have identified.

Dr Ruth Fox: I broadly agree. If you are going to amend it, it is a question of what the chief mischief is that you want to address, and there are a number, so it could be a fairly substantial rejig, or you could repeal it. I revert back to the previous provisions. The Hansard Society was not a fan of it at the time the Bill was introduced in 2010-11. On balance, given the difficulties with it, we would probably recommend repealing it and reverting back to what we had, which would require the provisions of the Septennial Act as amended by the Parliament Act to be reintroduced, but that would be our approach.

Lord Wallace of Tankerness: Under the premise of free rein as to when even for party political advantage an election is called? Is that the view of the Hansard Society?

Dr Ruth Fox: As an alternative to the situation we have now, it is not ideal, but in terms of the number of times that was a problem in the past, we counted four occasions when we did the original evidence where it had been problematic and I do not think it was the biggest problem facing the democratic system that we had. It was a pretty minor issue. If the Government have a majority for what they want, they will continue and if they have not, the best thing is to go to the electorate.

Lord Norton of Louth: I would remind the Committee that, in its report on the Bill when it was first introduced, it made the point that it was not the result of mature assessment of enduring constitutional principles. Thus, there may be a case for reverting to thinking about what the constitutional principles are that should underpin it and start from there in thinking about what shape a replacement Act should take and whether you want to revert to pre-2011. One of the points this Committee was concerned with and raised the query over is, essentially: why is it a Fixed-term Parliaments Act and not a Fixed-term Parliament Act? It was introduced, as the Committee noted, to deal with a particular circumstance but the solution was made an enduring one.

The Chairman: And that is why we got the review.

Lord Norton of Louth: We got the review—

The Chairman: Because you had an amendment.

Lord Norton of Louth: Because this House looked as if it would pass a sunset clause, so to see that off the Government accepted, if you like in lieu, that the Act should be reviewed in 2020.

Baroness Fookes: Dr Fox, if I understood you correctly, you would prefer this to be repealed and revert to the situation as it was pre-2011. Would that include a five-year Parliament or, if you are going back to something, would you suggest a four-year Parliament, for example?

Dr Ruth Fox: Yes, you could have a five-year Parliament and leave the option as it was previously to run to the five. The more normal situation was that Parliaments generally went to four, so I would revert to it as it was without specifying and reducing the term to four. That would be my preference.

Baroness Fookes: Basically you would be happy to accept the five-year programme.

Dr Ruth Fox: Yes.

Lord Norton of Louth: If you want to revert to what it was, it would be instigating a five-year maximum of course and leaving it within that, but you have the problem that even if you simply want to revert to what went before, what went before was governed by convention which would now have to be translated into statute.

The Chairman: Lord Norton, would your starting point be the same as Dr Fox's in terms of repeal and then creating an infrastructure?

Lord Norton of Louth: As I say, it would have to be replaced in a straight repeal. That is my point because if you simply said a repeal, then yes. It is when you think about how you replace it that you get exactly the sort of question that Baroness Fookes is raising, whether it should be a four or five-year maximum and all the problems of translating convention into statute. What is the position of the Prime Minister? Can you simply stipulate that within that period it is entirely at the disposal of the Prime Minister, leave it at that and assume that there will be a resumption or new convention that would cover confidence?

Lord Wallace of Tankerness: The Act specifically preserves the prerogative power in relation to Prorogation. There has been some discussion about Prorogation in the last week or so. If there was amendment, do you think the opportunity would be taken to make the prerogative power on Prorogation statutory or subject to a vote of the House of Commons? Have you any view on Prorogation?

Lord Norton of Louth: I recall the debate at the time because this was raised: "Should we do anything about Prorogation?" and the response was, "Oh no, it has not been a problem and we cannot envisage it being misused". My view is it would be a legitimate part of the review that takes place next year because, as you say, it is explicitly provided in the Act that the power of Prorogation is not affected. In the light of circumstances, that would be something for review and perhaps there

should be some limits placed on the circumstances in which it can be triggered or the length of the period for which Parliament is prorogued.

Dr Ruth Fox: Conceivably, we might face the circumstance in which the Government having got the Prorogation, the vote of no confidence taking place before Prorogation actually happens, and the 14 days running out after Prorogation has happened and then the whole concept of what happens in the 14 days would be difficult.

Lord Norton of Louth: It shows all the problems associated with it, because you have that combination of Prorogation and the fact the 14-day provision is simply 14 days regardless.

The Chairman: Thank you both very much indeed for your evidence. No doubt we will be hearing from you in the future as well on this and other inquiries.