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Observations on the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill

Introduction

1. This note draws attention to some technical aspects of the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill ("the Draft Bill")[1].

Clause 2(1): Revival of prerogative powers

2. Clause 2(1) says that the Royal prerogative powers of dissolution of Parliament "are exercisable again, as if the Fixed-term Parliaments Act 2011 had never been enacted".

3. It is an open question, ultimately for the courts, whether this proposition can as a matter of law achieve exactly what it says.

4. When the Fixed-term Parliaments Act 2011 ("the 2011 Act") stated in section 3(2) that "Parliament cannot otherwise be dissolved" it did, as a matter of law, remove part of the Royal prerogative (expressly saving the prerogative power of prorogation in section 6(1)).

5. So what is the effect of the repeal of that provision?

6. Were the original prerogative power statutory, and had the 2011 Act repealed it, the effect of the Draft Bill in repealing the repeal would not be to revive the previously repealed enactment without express words, by virtue of section 15 of the Interpretation Act 1978; but the express words of clause 2(1) would undoubtedly be enough to rebut the presumption of section 15 and to revive the original enactment.

7. But the prerogative is not an enactment and therefore one is driven back to a purposive interpretation of the Draft Bill[2]. As to that, the Draft Bill is clear as to the policy desire: to re-establish the prerogative of dissolution as if it had never been interfered with.

8. But there is still a problem. As a matter of fact and constitutional history, Parliament excised a piece of the Royal prerogative in 2011. Parliament now wishes to repair the damage caused by that excision, and asks the courts and other readers to treat

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[1] December 2020, CP 322.

[2] Possibly informed or supplemented, should the matter come before the courts, by the common-law rule that section 15 of the 1978 Act (and its successor in the 1889 Act) were designed to reverse (see *Craies on Legislation*, D Greenberg, 12th Edition (2020), p.815).

the prerogative powers "as if the Fixed-term Parliament Act 2011 had never been enacted".

9. But it **was** enacted.

10. It is well-established that an Act of Parliament can do "anything that Parliament chooses"[3]: but it cannot defy reality and expect to succeed in changing it. Nor can it change fact or history. Deeming something to have happened, or in this case not to have happened, can never be quite the same as actually changing reality or turning back the clock:—

> "There are, of course, limits on the efficacy of the deeming which Parliament may choose to indulge in: as a draftsman once put it in connection with a privatisation exercise, 'A United Kingdom statute can, at least as a proposition of United Kingdom law, deem there to be an apple tree in Trafalgar Square: but it is unlikely that there will be much of a market for the deemed apples'." [4]

11. The reality is that the restored prerogative powers of dissolution of Parliament will now owe their continued life to a statute, namely section 2(1) of the Draft Bill. That Bill if enacted will direct the courts to behave as if the prerogative power were not converted into a statutory one but had never been diminished. But as a matter of incontrovertible historical fact the continued power of dissolution vested in the Crown **will** now be owed to statute, simply because it was previously diminished, and then restored, by statute.

12. How much difference that will make to the courts, and, in particular, whether the courts will feel able to treat the power of dissolution as if its constitutional status were that of an aspect of the prerogative that owes nothing to Parliament, remains to be seen.

13. There is also another problem in taking at face value the proposition that the prerogative of dissolution is restored as if it had never been interfered with: the problem is that despite the breadth and certainty of the proposition in clause 2(1) of the Draft Bill, it becomes clear that the Draft Bill does not actually intend to restore the prerogative of dissolution in its entirety. As soon as one reaches clause 4 one finds that there is to be a new mechanism for automatic statutory dissolution every five years. So clause 1 is not a complete re-establishment of the Royal prerogative, but a limited re-establishment of the prerogative power subject to a statutory "sunset clause" for each Parliament. That too may affect the constitutional status of the "restored prerogative" power in ways that are difficult to predict.

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[3] *Craies*, para. 2.2.1; and see examples and authorities cited pp.116-122.

[4] *Craies*, para 8.2.21, footnote 156.

Clause 2(1): Power to call a new parliament

14. Clause 2(1) refers to "powers relating to … the calling of a new Parliament".

15. The 2011 Act did not, of course, contain any reference to the concept of "calling" a Parliament.

16. The references in that Act are to the traditional action of "summoning" a new Parliament, and related procedures.

17. Given the considerable potential for confusion in relation to the inter-relationship of the Draft Bill and the 2011 Act, it would probably be as well for the Draft Bill to use terms which correspond rigorously to the terms of the 2011 Act itself.

Clause 3: Ouster of judicial jurisdiction

18. Clause 3 purports to oust judicial jurisdiction in relation to the revived prerogative powers.

19. There is, of course, a strong presumption against the removal of judicial jurisdiction[5].

20. As a result of this presumption the House of Lords laid down (or, better, confirmed) the *Anisminic*[6] principle "that a provision ousting the ordinary jurisdiction of the court must be construed strictly".

21. The expression "or purported exercise" in clause 3(a) appears to be an attempt to avoid the application of an *Anisminic*–based test as to whether the clause 2 powers have actually been exercised, where the Crown "purports" to exercise them.

22. It is likely, however, that this attempt can only be, at best, partially successful. As I say above, the reality is that the revival of the prerogative powers by the Draft Bill is a statutory action taken by Parliament, and it simply **is** for the courts to exercise a supervisory jurisdiction in relation to the application of the statute, a constitutional function from which the courts could not abdicate even if they wanted to.

23. It may be that a combination of an ouster by reference to "purported exercise" and "purported decision", taken together with the direction to the courts and other readers to consider the statutory revival of the prerogative "as if the Fixed-term Parliaments Act 2011 had never been enacted" will mean that the courts consider themselves inhibited from considering any challenge to actions taken in connection with dissolution of Parliament.

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[5] *Craies* paras. 19.1.17 – 19.1.22.3.

[6] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170 HL.

24. But it is impossible to ignore the possibility that a situation may arise in which the courts feel bound to treat, for example, something that is presented as if it were a decision in relation to dissolution as being so far from what might have been expected as not even to fall within the legislative intention of the expression a "purported decision". [7]

25. It is difficult to imagine what such a case might look like: but it would have been equally difficult to imagine in advance the circumstances of *Miller No. 2*[8] in relation to prorogation.

Clause 3(b): "decision relating to those powers"

26. It also remains to be seen what will be adjudged as the parameters of the expression "decision relating to those powers" in clause 3(b).

27. Will the courts consider that the express list of ancillary or incidental powers in clause 2(2) flavours the meaning of "relating to those powers" in clause 3(b), whether by application of a *noscitur a sociis* rule or something similar or by a simple cross-contextual construction[9]?

28. And will the courts consider that questions of prorogation could be treated as questions "relating to" dissolution, noting the fact that section 6(1) of the 2011 Act expressly mentioned prorogation and the Draft Bill does not?

Clause 4: Automatic dissolution of Parliament after five years

29. Clause 4 contains a simple proposition that Parliament dissolves at the end of five years if not dissolved earlier by the prerogative.

30. Apart from this shedding doubt on the completeness of the restoration of the prerogative as discussed above, one might have thought that the supplementary provisions of section 3 of the 2011 Act, at least, required to be replicated in order to make it clear what is and is not to be done in the case of a statutory dissolution.

31. Since even the Draft Bill does not purport to describe automatic dissolutions under clause 4 "as if" they were under the prerogative, this will be a statutory form of dissolution, and the Clerk of the Crown and other public authorities will need explicit

[7] The word "purported" possibly has as many potential questions up its sleeve as it does answers: does a mouse become a "purported tiger" because somebody puts a label on its cage saying "Beware of the Tiger"?

[8] *R (Miller) v Prime Minister* [2019] UKSC 41.

[9] *Craies*, Chapter 20.

directions as to which of the incidental and supplementary functions they should or should not exercise as a consequence of the statutory dissolution "trigger", and precisely when and how those functions are to be exercised.

Conclusion

32. I have set down here a couple of thoughts which occurred to me on a first glance at the Draft Bill.

33. I will be happy to answer questions on any other points of detail that would be helpful.

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