The Fixed Term Parliaments Bill:
A Theoretical and Comparative Analysis

By W. E. Bulmer

The Conservative Liberal-Democrat coalition which came to power after the May 2010 UK general elections promised a broad package of institutional reforms. The programme was, on the face of it, quite impressive: a referendum on voting reform for the Commons; a "wholly or mainly" elected second chamber; a Freedom Bill to roll back the "surveillance State" and to restore traditional civil liberties; elected Mayors for English cities; elected Police Commissioners for English counties; and some steps towards direct democracy, in the form of recall elections and local tax referendums.

These reforms, it was hoped, would restore the public's trust in the British political system, which had been so badly damaged by the banking crisis and the parliamentary expenses scandal. According to the Government's rhetoric, it would amount to the most radical set of reforms since the Great Reform Act of 1832.

The comparison with the Great Reform Act is notable. The Great Reform Act was not an act of constitutional radicalism – although of course, at the time, the old Tories prophesied the end of the world as they knew it. Rather, it was a splendid example of Burkean conservatism in action. It granted just enough reform to get the principal interests on board, to divide the reformist movement, to isolate and outflank the democratic radicals, and so to avoid the "danger" of truly democratic change.

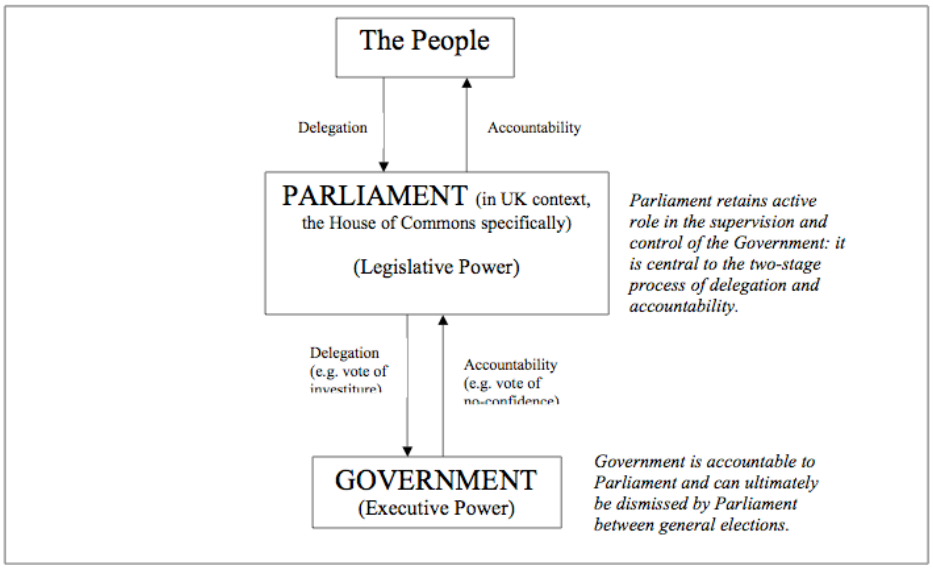
In the same way, the coalition's package of institutional reforms is ameliorative rather than fundamental. It is designed to patch up the façade of the old gothic pile of stones which is our so-called "constitution", rather than to address the underlying structural issues. Yet, while the externally visible, cosmetic reforms, like the referendum on the voting system, are likely to steal the headlines, there is one proposal in the coalition's package which does have the potential to cause radical change: the Fixed Term Parliaments Bill. This bill, alone amongst the coalitions proposals, goes beyond a patching-up exercise, and has the capacity to revitalise parliamentary democracy.

Fixed term Parliaments have been on the democratic reformist agenda for decades. They were insisted upon by Charter 88 – and of course have been incorporated into the Scotland Act. Often, however, the importance of fixed term Parliaments is not understood. A fixed term is seen, primarily, as a way of providing certainty and of preventing the incumbent Government from manipulating election dates for its own partisan advantage. It is true that fixed terms do have that effect. The real importance of fixed terms, however, lies in the effect they have on executive-legislative relations, and on the position of Parliament as the central institution of the political system.

To understand this, it is necessary to consider two alternative conceptions of parliamentary democracy. The first is shown in figure 1. The people delegate authority to an elected Parliament. Parliament itself retains legislative power (and, often, certain other powers, such as the power to ratify treaties and declare war). Parliament delegates the executive power to a Government, headed by a Prime Minister, who is elected by the Parliament – usually from amongst members of the majority party or coalition. The Government is then accountable to Parliament. This

accountability is exercised, on an on-going basis, through instruments of oversight and control such as committees, ombudsmen, auditors, and parliamentary questions and debates. It is ultimately enforced, at crucial moments, by votes of no-confidence: if Parliament passes a vote of no-confidence in the Government, then the Government must resign, or be dismissed. The Parliament must then appoint a new Government. Parliament, for its part, is accountable to the people, at regular intervals, at the ballot box. This is how the Scottish Parliament was set up. This is how many European forms of parliamentary democracy operate. The crucial element is that there is a two-step process of delegation and accountability: firstly a delegation of legislative power from the people to Parliament, and secondly a delegation of executive power from Parliament to the Government; firstly the Government is accountable to Parliament, and secondly Parliament is accountable to the people. Parliament is an active and responsive decision-maker in this arrangement: it can choose Governments and can dismiss them. Parliament remains an active legislative and supervising chamber; it retains a controlling influence, and ultimate veto, over public policy and legislation.

Figure 1. Parliamentary Democracy

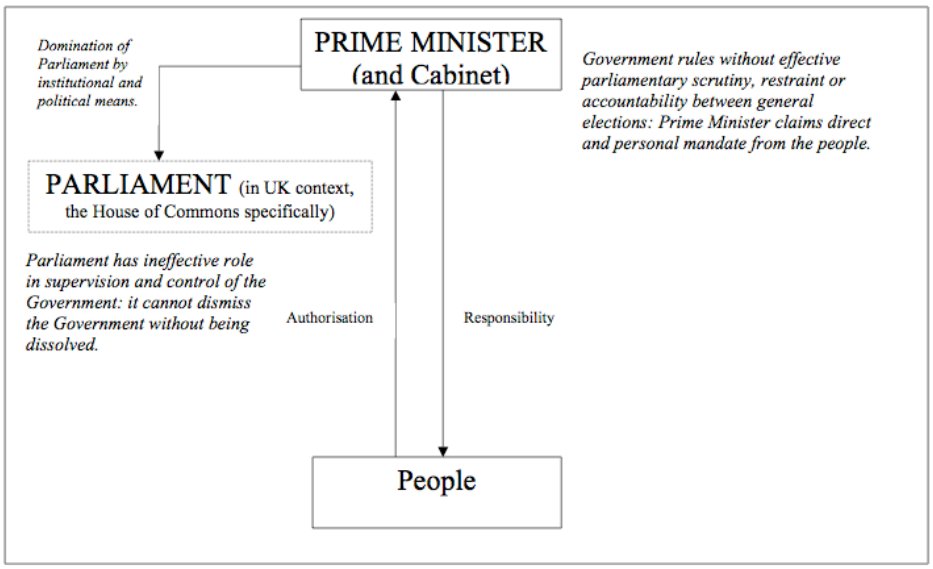


In order for this model of parliamentary democracy to be effective, Parliament must be able to dismiss and replace the Government, at no threat or cost to itself, whenever there is a sustained disagreement between Government and Parliament. Parliament, in other words, must be immune from dissolution at the whim of a Government which has lost the confidence of the parliamentary majority (whether this loss of confidence is caused by the breakdown of a coalition, by the erosion of a majority due to by-elections or crossing the floor, or by internal opposition from the Government's own backbenchers). If Parliament is not immune from dissolution in such circumstances, then the Government can use the threat of dissolution to keep Parliament in line, or can appeal over the heads of Parliament, to the people, to endorse the Government's line.

This is the key to fixed term Parliaments: they take away the right of the Government to dissolve Parliament when the Government has lost the confidence of Parliament,

and so guarantee the place of Parliament at the centre of the two-stage process of delegation and accountability. If this is lacking, and the Government has the power to dissolve Parliament at will, then the system of government is transformed into that shown in figure 2. This might better be described as Prime Ministerial democracy, rather than parliamentary democracy. In this model, Parliament's role in the selection and dismissal of Governments has become purely notional: the people, in effect, are the selectors of the Government – the Government derives its mandate directly from the people, and is directly accountable to them, while Parliament is little more than a passive register and sounding-chamber for the people's votes. The result is a sort of elective monarchy, where a dominant executive tramples upon a weak Parliament.

Figure 2. Prime Ministerial Democracy



At stake here are two very different approaches to politics. In one, the people choose a Parliament, which in turn appoints, and can dismiss, a Government to act as its "executive committee". In the other, the people choose a Government, which governs *through* Parliament. The advantage of the first approach is that it places a functioning deliberative, legislative and representative assembly as a circuit-breaker between the people and the Government. Ultimately, it drags power out of Downing Street and places it before the mace on the floor of the House. This means that perspectives, interests, opinions and ideas can come from a range of MPs and parties, and not just from the secretive cabal of the Prime Ministers' friends and officials. It brings us closer to an open and deliberative style of politics, in which the Commons is more than just a rubber stamp. It might not look like much, but the Fixed Term Parliaments Bill has the potential to restore a more genuinely parliamentary form of government, and to act as an effective restraint against the personal and quasi-despotic rule of a Thatcher or a Blair. To that extent it should be welcomed.

The bill, as currently drafted, would deny the crown (that is, in effect, the Prime Minister), the ability to dissolve the House of Commons at will. By default, the House of Commons would continue for a fixed term of five years. It would be capable of being dissolved under two circumstances: firstly, if the House passes a

vote of no confidence in the Government, and does not grant its confidence to another Government within fourteen days; secondly, if a resolution calling for a dissolution is passed by a two-thirds majority of the House. Compared with Scotland and many other European Constitutions, these provisions are quite unremarkable. In the context of the Westminster-Whitehall system, they are potentially revolutionary.

To see how this would work, let us imagine the same scenario played out twice, once under the existing rules, and once under the rules which will come into effect if the Fixed Term Parliaments Bill is passed in its current form. Let us imagine that the British Government is about to go to war, in a far-off part of the world, for reasons which are spurious, on evidence which is doubtful, and on legal grounds which are flimsy. Let us imagine that certain senior members of the cabinet are disquietened by this decision, and would join the opposition in opposing it, taking a large slice of the Government's backbenchers with them. Under the present rules, if a rebellion breaks out, such that the Government loses, or appears as if it might be about to lose, the confidence of the House of Commons, then the Prime Minister can dissolve the House, or threaten to dissolve it. Such threats generally work wonders. Dissident ministers retire sullenly to the backbenches, bit-chomping backbenchers growl and sneer, but dare not bite. The Prime Minister, and not the House of Commons as a whole, is the interpreter and articulator of public authority – since the members of the House of Commons hold their seats only at the Prime Ministers' pleasure. Of course, it might happen that the Prime Minister's own party would be the principal victim of such a dissolution, but that does not detract from the fact that the Prime Minister can always appeal, as it were, "over the heads" of Parliament. If the same scenario were to be replayed under the terms envisaged by the Fixed Term Parliaments Bill, it would lead to a very different outcome. If a vote of no-confidence were to be passed, the Government would resign, and the House of Commons would then have fourteen days in which to find support for a new Government, before the House could be dissolved. This could potentially mean, in the event of a balanced Parliament in which no one party has an overall majority, that the Government could change hands during the lifetime of the Parliament – no bad thing, if the House of Commons as a whole, and not the Government, is regarded as the people's elected representative.

The myth – or misunderstanding – about fixed term Parliaments is that they shut out all flexibility, and so do not account for situations in which a dissolution is needed in order to resolve a crisis or deadlock. In fact, only one Parliament in Europe has a completely fixed term: the Norwegian Storting. The most basic requirement is that a Government defeated by the House should not have the right to dissolve the House until the House have had an opportunity to form an alternative Government: in other words, that the tenure of the Government depends upon the House, and not the tenure of the House upon the Government. If we survey the constitutions of European nations, past and present, we discover that there are many ways in which this central requirement of fixed terms can be achieved, while still allowing some flexibility.

The Constitution of Latvia, for example, gives the President, rather than the Prime Minister, the authority to propose a dissolution of Parliament. This proposal must be supported by the people in a referendum. If a majority of those voting support the President's decision to dissolve, then new general elections are held. If not, then the President must resign. This latter provision acts as a strong incentive against the abuse of this power, while still allowing a means of breaking a serious deadlock.

The Constitution of Ireland has an even more minimal approach. The Dáil is simply "summoned and dissolved by the President on the advice of the Taoiseach (Prime Minister)". So long as the Taoiseach commands a majority in the Dáil, the President has no discretionary ability to refuse a dissolution. This gives the Taoiseach the ability to call a general election at will, so as to maximise the tactical electoral advantage to his own party. Article 13.2.2 nevertheless allows the President, at her absolute discretion, to refuse a dissolution of Parliament when requested by a Prime Minister who has "ceased to retain the support of a majority of the Dáil" This has the effect of interposing the President between the Government, the Dáil, and the voters. Therefore a defeated Government cannot *automatically* appeal from the Dáil to the people, especially if the President believes that an alternative Government could be formed without a dissolution. In practice, the President's right to refuse a dissolution has never been exercised, although situations have arisen in which this discretionary power might legitimately have been used, and the existence of this power can still be politically important. For example, in January 1982 the coalition Government was defeated on the Budget in the Dáil. President Hillery granted the Taoiseach's request for a dissolution, despite the fact that the opposition apparently requested him to refuse it. If satisfied that an alternative Government could have been formed, the President would have been quite within his rights to refuse a dissolution (Casey, 1992: 72-73). Conversely, when Labour pulled out of a coalition with Fianna Fáil in 1994, President Robinson "let it be known" that she would refuse a dissolution. The rump Fianna Fáil Government resigned, rather than face defeat in a vote of no-confidence, but the outgoing Prime Minister chose not seek a dissolution, and a new Government was formed without an election (Garry, 1995, in Gallagher, 2007: 217).

The Latvian and Irish models are difficult to apply to the UK case, primarily because an elected President can be entrusted with much wider discretionary powers than are appropriate for a hereditary monarch. Indeed, part of the problem with the current system UK is that it gives the Head of State, in theory, a power to refuse a dissolution which she dare not legitimately exercise in practice – with the result that the royal prerogative has become a Prime Ministerial prerogative. The Scotland Act found an excellent way around this. The Scottish Parliament serves for a fixed term and cannot be dissolved at will by the First Minister. However, if the Scottish Parliament cannot agree upon the nomination of a First Minister – i.e. if there is an irreconcilable deadlock which prevents the formation of a stable Government, then the Presiding Officer (not, it is worth noting, the First Minister) can advise that an extraordinary election be held. Likewise, the Scottish Parliament can vote, by a two-thirds majority, to hold an extraordinary election – this might be used, for example, at the agreement of both Government and Opposition, as an alternative to putting a divisive issue to a referendum. An advantage of this arrangement is that it keeps decision-making on the floor of the House, not in the private drawing rooms of Buckingham Palace.

The provisions of the UK Fixed Term Parliaments Bill are almost as good as those of the Scotland Act. I say "almost", because the Fixed Term Parliament Bill has three flaws, which ought to be addressed. The first flaw is that the period of fourteen days for the formation of a government is a little on the short side. The Scotland Act allows twice this period. It is better for coalition partners not to marry in haste, and allowing a month, rather than two weeks, leaves more room for detailed coalition negotiations (and therefore, it may reasonably be hoped, a better relationship between

the coalition partners). The second is that the bill envisages a term of five years, which is rather long: four years, as applied in the Scotland Act, would have been better – there is also a risk that, in Scotland, holding the 2015 UK and Scottish Parliament elections on the same day could cause some confusion amongst the voters. The third flaw is that, although the bill gives formal, albeit implicit, recognition to the process of votes of no-confidence (for the first time indicating in statute that the Government is responsible to the Commons), it does not include a mechanism for the appointment of Governments in the first place, so it is unclear exactly how we will know when a Government enjoying the confidence of the House has been appointed. In the Scotland Act, this is avoided by instituting a mechanism of parliamentary nomination, whereby the Scottish Parliament actually votes for the First Minister in what might be termed a "vote of investiture"; in Westminster there is no equivalent provision.

Even considering these flaws, the Fixed Term Parliaments Bill is a worthy piece of legislation. It remains, however, just that: an ordinary law amongst ordinary laws, capable of being repealed by a future majority. The crucial weakness of the bill is that, in an unwritten and unentrenched constitution, it has no way of being upheld in the face of a determined Government: if a Government wishes to go to the polls, in defiance of the fixed term rules, all it has to do is to use its majority to change the law – this fundamental problem is irresolvable without more radical constitutional reform.