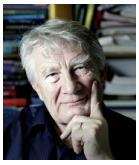
Repealing the Fixed-Term Parliaments Act is a tidying-up exercise, not a major constitutional change


The 2011 Fixed-Term Parliaments Act was the most successful of the constitutional reform measures championed by the Liberal Democrats during their period in coalition with the Conservatives. Nine years after the Act was passed, a new bill seeks to repeal it. But, argue ***Charles Pattie****,* ***Ron Johnston****, and* ***David Rossiter****, the Act was in many respects a dead letter long before the official repeal process began.*

On 3 February 2020, the Fixed-term Parliaments Act 2011 (Repeal) Bill – a Private Member's Bill – had its first reading in the House of Lords. Repealing the 2011 Act was also a Conservative manifesto commitment in the 2019 General Election, and had featured in the new government's first Queen's Speech. Given the party's very substantial parliamentary majority following that election, the repeal of the 2011 Act in the near future seems assured. Spare a thought for the Liberal Democrats, however. Legislation for fixed-term parliaments had been something they had insisted on as part of their 2010 coalition agreement with the Conservatives, who had accepted it as part of the price of forming a government. Repealing the 2011 Act will remove one of the few tangible legacies from their ill-fated period in government as part of the 2010-2015 coalition. But in truth, that legacy was already, if not quite dead, certainly very shaky.

The 2011 Act had a clear reforming purpose. It set a strict timetable for Westminster elections. The next general election, it stipulated, was to be held on 7 May 2015, and each subsequent election was to take place five years after the last, on the first Thursday in May. By legislating for a fixed electoral cycle, the Act removed an important prerogative power enjoyed by previous prime ministers – their ability to call a general election at any point within the lifetime of a parliament (subject to the monarch's approval – which is very unlikely to be withheld). Previous legislation had controlled the maximum length of time a parliament could sit between elections (the *Septennial Act 1715* set that maximum at seven years, and the *Parliament Act 1911* reduced it to five). As long as he or she could command a majority in parliament, quite when within that period an election was called was the Prime Minister's call.

Not surprisingly, successive prime ministers used that power to hold elections at times they thought were most propitious for them and their parties. Where conditions looked good for their party (perhaps a run of good opinion polls, or local and by-election results) many prime ministers opted to go to the country early, often around four years after the previous election. But when their party seemed to be in trouble (adverse polls, poor economic conditions, scandals), they held on longer in the Micawber-esque hope that something might turn up to improve their lot.

By and large (though there were exceptions), PMs' instincts on whether to go early or not were well-founded. On average, governments forced to continue through their full term were less likely to be re-elected than those which sought re-election early. Between 1945 and 2010, the average parliament lasted for 45.8 months. Only four out of the 17 contests (1959-1964, 1987-1992, 1992-1997 and 2005-2010) went virtually the full five years, give or take a month or so. Strikingly, the incumbent party lost power at the end of three of these. Of the 13 parliaments over the same period which ended before reaching the five-year deadline, incumbents won re-election after nine. The average lifetime of a parliament which ended with the incumbent being defeated was 50.1 months, while parliaments which ended in the re-election of the government lasted an average of 42.7 months.

The option of choosing an early election when conditions looked promising clearly gave governments a potential advantage over oppositions, which were largely unable to force an election. By removing PMs' discretionary power to fight an election at a time of their choosing, therefore, the Fixed-term Parliaments Act sought to level the playing field between governments and oppositions. (It also had a less principled purpose, as an insurance policy against David Cameron trying to ditch his junior coalition partners by calling an early election.)

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But in practice, things have not worked out as planned. We have had three Parliaments since the Act was passed eleven years ago. Only one of them (the 2010-2015 Parliament) went full term. The other two were among the shortest parliaments since 1945. The 2015-2017 Parliament lasted just over two years, and the 2017-2019 Parliament two and a half years. Only the 1950-51 (20 months), 1964-66 (17 months) and February-October 1974 (8 months) parliaments were shorter. The average lifespan of the three parliaments affected by the Act was 38.3 months – almost 8 months shorter than the average for post-war parliaments before the Act.

So what happened? The answer lies in a loophole in the legislation. If no government could command the confidence of the House of Commons, waiting out the full parliamentary term before an election could be called would be very undesirable. A means was therefore needed to bring an early end to parliaments in which no government could get its business through. Section 2 of the 2011 Act contained two mechanisms for achieving this:

- A motion for an early election could be put to the Commons, which would then need the support of a supermajority to pass; or
- A new election would also be triggered if a government lost a vote of no confidence, and no alternative government capable of holding the confidence of the Commons managed to form within 14 days of that vote.

However, this raised the risk of prime ministers choosing to manufacture an early dissolution. One – slightly bizarre – route would be for a PM to force a vote of no confidence in his or her own government (losing which might necessitate whipping some of the government's MPs to vote against it – try explaining that to the voters!).

But such contortions were not, in fact, really needed. As noted by Chris Bryant MP (then Labour's Shadow Constitutional Reform Minister) during the 2011 Act's passage, the first mechanism offered an entirely viable means for governments to obtain early elections if they wished. The supermajority requirement sounds on paper like a difficult hurdle, but in practice was always likely to be easily met. The practical politics are clear. A Prime Minister would be unlikely to put a motion calling for an early general election unless quite confident there was something to gain electorally from doing so. And despite this, opposition parties would find it practically very hard not to support such a motion: if they opposed it, they would face the potentially damaging accusation of being afraid to face the voters – a position few opposition leaders would want to be put in. Section 2, in other words, restored the PM's room for discretionary action – without having to go for the odd expedient of forcing a vote of no confidence in his or her own government.

And so it has proved. Mrs May used this aspect of the Act to call an early election when she first became PM with a narrow majority. Enough of her own MPs were restive on the main business facing the government (managing Brexit) to make her feel that a larger majority was desirable. And the polls looked (very) promising: a much larger majority seemed a certainty. She therefore put and comfortably won a motion for an early election – and then squandered her opportunity, increasing her vote share but losing her majority. Her successor, struggling to 'get Brexit done' without a majority, introduced a new piece of legislation, overriding the Fixed-Term Parliaments Act and requiring only a simple majority in order to pass. The election was called, and Johnson promptly won it (and then some), transforming both his own position and the Brexit debate.

In effect, therefore, the 2011 Act failed in its primary function. It has not restricted the PM's capacity to choose when, within the lifetime of a parliament, to go to the country. All it has done, in reality, is to make that decision more visible. Where it once took place behind closed doors, and involved only the PM and the PM's advisors (and the notional approval of the monarch), under the Act it has to also involve a public discussion in the Commons. But that parliamentary debate has proved, in effect, a 'ceremonial' rather than a 'useful' part of the British constitution. No PM will voluntarily move for an early election if conditions are not favourable. And no opposition is likely to risk being seen to turn down the opportunity for such an election.

Repealing the Act will be a tidying-up exercise removing ineffective legislation, not a major constitutional change. It will merely bring the *de jure* situation back into alignment with the *de facto*. Supporters of fixed-term parliaments may regret the Act's demise. But in truth, it has proved largely toothless, containing the means by which it could readily be circumvented. Those wishing to curb prime ministerial discretion over election timing need to go back to the drawing board – and may now have to wait a long time before they have another opportunity to legislate.

About the Authors

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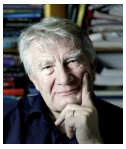

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