

DISSOLUTION AND CALLING OF PARLIAMENT BILL
AMENDMENTS TO BE MOVED IN COMMITTEE

Clause 3, page 1, line 17 Leave out “or purported exercise”

Effect

This amendment ensures that the ouster provision in clause 3 will not apply to the purported exercise of the powers to dissolve Parliament contained in clause 2.

Reason

Clause 3 provides: “A court or tribunal may not question— (a) the exercise or purported exercise of the powers referred to in section 2, (b) any decision or purported decision relating to those powers, or (c) the limits or extent of those powers.

This clause attempts to create an ouster provision which excludes questioning the exercise (or purported exercise) of the powers in clause 2, any decision (or purported decision) relating to them (such as the Prime Minister’s advice to Her Majesty) and even the limits or extent of those powers. Clause 3 attempts to protect the exercise of the dissolution powers from judicial review.

Paragraph 21 of the Explanatory Notes to the Bill states that this provision is for “the avoidance of any doubt” that may arise and to preserve the long standing and generally accepted position.

This is meant to confirm: “the long standing position...that the exercise of the prerogative powers to dissolve Parliament is not justiciable (see Council of Civil Service Unions v Minister of State for the Civil Service 1985 AC 374 per Lord Roskill).” However, it goes further than “the pre-2011 status quo ante” because, as paragraph 23 of the Explanatory Notes acknowledges the purpose of clause 3(c) is to ‘to address the distinction drawn by the Supreme Court in [Miller II] ... as regards the court’s role in reviewing the scope of a prerogative power, as opposed to its exercise’.

Several commentators have raised doubts as to whether even this ouster clause would be sufficient to prevent a court from reviewing the scope or nature of the powers in an appropriate case. The Joint Committee on the Fixed-Term Parliaments Act stated in its report at para 156: “The Law Society of Scotland noted the Government’s stated intention of returning to the status quo ante was belied by the inclusion of the ouster clause and highlighted the Government’s acceptance of this by the acknowledgement in the Explanatory Notes that the ouster clause was a response to the Miller and Cherry cases”:
<https://committees.parliament.uk/publications/5190/documents/52402/default/>

The Joint Committee noted “that views differ [in the Joint Committee] as to whether the Government’s approach on justiciability is the best one.” (paragraph 160).

We consider that extending the ouster to “purported” exercise of the section 2 powers or a “purported” decision in relation to those powers may go beyond the bounds of the previous law as expressed in Council of Civil Service Unions v Minister of State for the Civil Service 1985 AC 374. We take the view that the inclusion of ‘purported’ appears to be designed to

address the decision in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, where the absence of the word ‘purported’ was treated as significant by some of the judges. It might also be noted that such an extensive ouster might risk provoking a confrontation between the courts and parliament, given the obiter dicta from some of the judges in *Privacy International* that even a watertight ouster clause would not be effective. In our uncodified constitution the expectation is that the courts should be able to hold the Government to account under the rule of law.

We agree with the concerns expressed by Baroness Hale in the Joint Committee report at paragraph 166: Baroness Hale explained the particular concern about the word ‘purported’: “I completely understand his [Lord Sumption’s] view that the use of the words ‘or purported’ rather look as if it is saying, ‘Well, even if what we did was not within the power that you have been given by the statute, the courts can’t do anything about it.’ “If that is the case, the courts would be very worried about that, because it would mean that the Government—the Prime Minister—had done something that was, at least arguably, not within its powers. Can a Parliament be happy about giving the Executive the power to do something that is not within its powers? The courts are not primarily the people who should be worried about this. Parliament, as the representatives of the people and the law, should be worried about it.”.

This issue was raised in the Second Reading Debate in the House of Commons on the 13 September 2021. In response to a question by Alistair Carmichael MP, the Minister, Chloe Smith MP stated: “This has been included to take account of previous judicial decisions—in particular the cases of *Anisminic Ltd v. the Foreign Compensation Commission* 1969, and *Privacy International v. the Investigatory Powers Tribunal* 2019. In the latter, the expectation was expressed that the drafting legislation would have regard to the case law and ensure that the drafting made it clear if ‘purported’ decisions—that is decisions that would be considered by a court to be invalid—were intended to be outside the jurisdiction of the courts. What clause 3 does is present an opportunity to Parliament to be absolutely clear on whether it thinks that such things should be outside the jurisdiction of the courts. It is the Government’s position and presentation that they ought to be...”. Later in the debate the Minister expanded on the Government’s reasoning for including purported decisions in the ouster clause: “The decision in front of us is whether purported decisions relating to this area should or should not be included in clause 3. It is our contention that they should be, because we believe that the entire area of dissolution and the calling of Parliament is intended to be outside the jurisdiction of the courts. That is a perfectly legitimate question to put to Parliament. It is for us here in this Chamber to decide on that, and the reason for doing so would be that we think that such decisions are political rather than judicial in their nature. Fundamentally, the check on the exercise of power is for the electorate to decide on rather than the courts” (Official Report, col 724) The Government’s argument is not persuasive. What is the entire area of dissolution and calling of Parliament? Why does the Government need to include ‘purported’ decisions, that is to say, decisions which exceed Government’s powers? Such decisions may contravene the rule of law. How are the electorate able to express a view on the exercise of powers on a day-to-day basis?

This probing amendment is designed to test the argument for including the ‘purported’ exercise of the dissolution power in the ouster provision in clause 3.

Clause 3, page 1, line 19 Leave out “or purported decision”

Effect

This amendment is a consequential amendment following on from the previous amendment.