

The Contest to “Take Control” of Brexit



A Policy Exchange Research Note

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About the Author

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The notion that the norm in UK constitutional politics is a contest for power between the executive and Parliament originates in the 17th century, and in analogies drawn from foreign, written constitutions. As a model for the UK constitution, it has been out of date, and so incorrect, probably since before the beginning of the 19th century.

Certainly, over the more than 200 years since then, our constitution has developed into one that now clearly both encourages and enforces a collaboration, rather than an adversarial relationship, between government and Parliament. It is the political imperatives created by the referendum result that have put the collaboration at risk; but they have not undone 200 years of history. To proceed as if they had would be to build on an ill-informed myth.

Current proposals for Parliament to “take over the process” are based on fundamental misconceptions about the UK constitution, and that makes them both dangerous and wrong.

Of course, Parliament is sovereign and can change the balance of influence in its collaboration with government if it chooses. Nevertheless, it would be contrary to the national interest and disastrous for our constitutional settlement for Parliament to take over functions that more appropriately belong to the executive, such as the initiation and co-ordination of policy formulation and the management of public finances. They are functions that Parliament is ill-equipped to perform effectively and for which it is incapable, as a body, of being held democratically accountable in the same way as a government can be. To do so just to solve a short-term political crisis or in order to win a particular political argument - however important it is thought to be - is quite unjustifiable.

In practice, it would be impossible for Parliament to perform those executive functions, and so to govern the UK, without also having direct control of the day to day management of the departmental machinery of government. Furthermore, it remains important, unless we really want to reverse 200 years of history, for government departments to be under the direct control of democratically accountable parliamentarians who are part of a government ultimately answerable to the electorate. Any idea that Parliament could take over Brexit policy and leave the rest to government to be managed in the normal way is manifestly absurd. Brexit policy cuts across nearly all other government policy, as well as its practical implementation and administration in all areas.

The suggestion has been reported that, say, the Liaison Committee takes over the direction of government policy on Brexit, and a Bill has been published in that connection.¹ Although the Bill operates principally by enforcing an attempt to postpone exit day, its ultimate purpose does appear to be to give the Liaison Committee the job of deciding, more generally, where Brexit policy goes from here. It gives the Committee control of the process, and so inevitably of the substance; and it would also necessitate very considerable amounts of government expenditure. Any extension of the UK's EU membership in pursuance of the Bill would, while the extension lasted, preserve the effect of section 2(3) of the European Communities Act 1972, which (but for the Bill) will be repealed on 29th March 2019 and, until it is repealed, provides for the UK's financial obligations to the EU as a member State to be a charge on the Consolidated Fund.

What if these proposals were made a reality? The logical, constitutional implication of transferring control of such an all-embracing item of policy-making from government to the Liaison Committee would be that the Prime Minister would need to resign and to advise the Crown to appoint the chair of the Liaison Committee as her successor. Ministerial positions would then need to be filled on the advice of the Committee or its Prime Ministerial chair, and the Committee would need to become the Cabinet. The new government thus created could remain in office for just as long as it, in its turn, continued to retain the confidence of the House of Commons.

In this way, the UK constitutional system does, perhaps, have an internal political logic that could reassert itself and “auto correct” if Parliament tried to take over government. But at what cost? The UK electoral system, for example, only works on the assumption that there is a majority in the House of Commons that is willing to accept electoral responsibility for what government does.

Some may be attracted by the idea of a “government of national unity” in current circumstances. I'm not one of them, though I did think something more inclusive should have been attempted by all sides immediately after the 2017 election. It is too late for that; and there appears to be no one in Parliament who could now act as a mediator to bring all sides together. The Speaker, who in some countries would be the natural candidate for the role, has clearly disqualified himself.

However, if the current government needs to be replaced by a new coalition without an election, it is difficult to think of a more bizarre or ham-fisted way of achieving it than by replacing it with a select committee of the House of Commons, nor (however great the talents and other qualities of the chair of

whatever committee is chosen), one less likely to produce a stable government with any prospect of retaining the confidence of the Commons for very long.

The current crisis exists because MPs on all sides have persuaded themselves that they can act irresponsibly because responsibility for the policy of leaving the EU has been assumed directly by the electorate. This is despite the fact that they have themselves, on numerous occasions, already accepted responsibility for ratifying the electorate's choice, and so remain accountable to the electorate for implementing it. The roots of this crisis do not lie in the existence of an alternative that would be better able, in those circumstances, to secure the confidence of the House of Commons than the current government. Seeking to identify such an alternative will not solve it.

Any case for constitutional reform needs to be based on the lessons to be drawn from that. Abandoning, in haste and in a panic, other aspects of the subtle balance in the collaborative relationship between government and Parliament that have taken centuries to be refined, and which work well in normal conditions, would be reckless and harmful.

Any major constitutional change of the sort that has been suggested could only be acceptable and “stick” if it were effected in a way that respected the principles of good governance and sound leadership that can be found, for example, in the concept of the rule of law. In some ways, that is a contestable concept that has occasionally (in my view wrongly) been extrapolated to justify transfers of political power from elected politicians to the judiciary. But, whatever your views on that, everyone accepts that the concept does involve the broader principle (which, at a pragmatic and ethical level, binds even a sovereign Parliament) that those who assert a constitutional authority to make rules for others need to adhere to the equivalent rules that apply to themselves.

In that context, it is very unfortunate that those who are now seeking to direct the government with Orders of the House of Commons, including indeed some who have championed the rule of law in the past, have only been able to procure the inclusion of directions in such an Order by themselves relying on contraventions of other provisions of the very same Order – about how it could be amended.

In addition, on two occasions, the Speaker has allowed resolutions of the House to dispense with or modify the intended effect of an Act of Parliament agreed after lengthy debate in both Houses. In both cases this related to what section 13 of the European Union (Withdrawal) Act 2018 provided should happen in the event of a failure by the House to approve the withdrawal agreement and

proposed framework for a future relationship. The resolutions of the House allowed by the Speaker changed the nature of the motion the Act required the Government to propose in those circumstances and then effectively modified the statutory timetable for the steps leading up to it. This innovation of using a resolution of the House to change primary legislation is not something anyone who values our constitution should feel happy about, whatever their views on Brexit; and it is clearly contrary to well established principles.

It seems too that it is being suggested that a similarly “cavalier” approach by the Speaker to equally unambiguous rules of the House, and the constitutional norms that govern its business, is expected to continue and will be needed for the Bill mentioned above to make progress. That is the very opposite of a process that is likely to cause the losers from the change to reconcile themselves to it.

The Speaker has opened a Pandora’s box that now leaves him with a choice between two very risky courses of action. On the one hand, he could embark on a series of further decisions for which, and for the outcomes from which, respect amongst the uncommitted and those the decisions do not favour will increasingly diminish – as the bias in them becomes increasingly obvious. On the other, he could continue by remaining consistent with his “creative” interpretation of existing rules. The chaos likely to be released by the former approach is obvious. The chaos likely to result from the latter is obvious to anyone who searches the Commons Standing Orders for motions that have to be put “forthwith”, but consistency would now make amendable. Several have their origins in responses to Parnell’s tactics of “systematic obstruction”. The renewed opportunities for that which would be created by the Speaker’s ruling would be more likely, in practice, to favour those who prefer what is still legally the default option.

The ingenious “circumvention” or evasion of clear, existing rules would be objectionable and “revolutionary” even if there were no other remedy; but there is. If collaboration between the House of Commons and the government has truly broken down completely, then the government has lost the confidence of the House, and the House needs to vote accordingly. If it will not, the House’s constitutional duty is to make the collaboration work in a way that does not involve undermining or corrupting fundamental constitutional principles. The foundation of democracy and constitutionalism is that you accept outcomes produced by the established system, however unwelcome, without trying to destabilise or destroy it.

It may be that Parliament's own decisions have made a change of course at this stage, or indeed an election, a very difficult or unattractive proposition to many. It was Parliament, wisely or not, that legislated no deal as the default option, and it was Parliament, at the behest mainly of those opposed to UK withdrawal from the EU, that created the further legal obstacles in that legislation to a withdrawal with a deal.

It would be neither constitutional nor likely to heal the divisions in public opinion outside Westminster now to rely on "too clever by half" procedural devices, and a Speaker who seems to have abandoned any desire to appear impartial, to overturn the clear effect of decisions already sanctioned by an Act of Parliament. Subject to the very considerable freedom already granted by our constitution, Parliament does need to show that it is able to accept the consequences of its own previous decisions, however uncongenial – just as the rest of us always have to.

Endnotes

¹ <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0314/18314.pdf>