

Can the UK parliament take control of Brexit?

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Summary

As Brexit reaches a critical point, the UK parliament and the UK government seem poised to start a high-stakes battle over the future of the UK's constitution. Parliament is set to reject the prime minister's negotiated treaty and strongly opposes the idea of exiting the EU without a negotiated agreement. The government insists that this is what will happen without support from MPs. Convention says that parliament's ability to stop the prime minister is heavily constrained, not least by its inability to table the necessary legislation. The prime minister's opponents - assisted by the speaker of the Commons - have started to seek ways to change this. The consequence is potential constitutional reform on the fly, and under intense pressure. This note reviews the choices for parliament and some of the key consequences.

The current phase of the Brexit process has taken an interesting and important turn. It has been clear for a while that there is currently no majority in the UK's lower house for the prime minister's proposed withdrawal agreement with the EU. But there is also no majority for the idea of the UK leaving the EU without any deal at all.

The question has been - and remains - how this conundrum might be resolved, given that in the British system parliament is generally subordinate to the executive. The two most powerful pillars of the British state have been fused together for over three hundred years. Those in government are drawn from parliament. Parliament has little or no power to direct government without the support or connivance of the executive. This differs significantly to countries where the key branches of government are separate, such as the USA. The UK does not experience 'government shut downs' when the executive and legislature cannot agree on a budget. Ultimately, if the parties in government in the UK cannot pass a budget through parliament then an election is triggered, and parliament is dissolved.

It is on this point the Brexit problem is now playing out. At the centre of this is the question of the government's control over business that is conducted in parliament. The government has had almost exclusive possession of this control since the 1880s, when the minority government of William Gladstone voted to give itself precedence

over all other parliamentary business in the face of obstructionism from Irish MPs. Gladstone's government amended the standing orders of the Commons in such a way as to ensure that only a minister representing the government could change them in the future. Whilst it is a British maxim that no parliament can bind a successor, it has nonetheless been the case that the rules governing the way in which MPs arrange their business has firmly been a matter for the government of the day. This innovation of Gladstone's has been scrupulously enforced by its speakers who are the impartial arbiters of debate and clerks who have advised them on the proper procedure to use for over two centuries. It is for this reason that minority governments throughout the 20th and 21st century have been able to offer a semblance of stability and advance their legislative agendas.

Until last week. Then, speaker of the Commons John Bercow decided that a precedent on the unamendable nature of a government motion relating to Brexit need not apply. He told MPs that "If we only went by precedent, manifestly nothing would ever change." Bercow backed critics of the governing Conservative party to allow the tabling of an amendment to a motion that should not have been amendable. This amendment - subsequently voted in favour of by MPs - obligates the government to introduce a motion to the Commons within three days of losing a vote on its Brexit deal negotiated with the EU.

This small innovation has big potential consequences. The government insists that in lieu of MPs passing its Brexit deal the UK will leave the EU without one. MPs have already passed the withdrawal act which legislates to take the UK out of the EU on 29th March 2019. Only a further piece of legislation can overturn this. Precedent suggests - and ministers insist - that this is exclusively in the government's gift. And yet, Bercow's decision implies that this is no longer the case. That implies that MPs could take control of the Brexit process, if they can agree how to do so.

Why MPs' current powers cannot stop a no deal Brexit

Before assessing whether and how parliament's rules might be amended to enable MPs to stop a no deal Brexit, it is first worth assessing the ineffectiveness of the existing mechanisms at their disposal and why they could proceed with this radical approach.

Motions under the withdrawal act 2018

Under the 2018 withdrawal act, a government minister - within the period of 21 days beginning with the day on which the Commons decides not to pass the Brexit deal - must make a statement setting out how the government proposes to proceed. Then - within seven sitting days of the Commons - a motion in neutral terms to the effect that the Commons has considered the matter of the statement must be voted on.

A motion on neutral terms could not generally be amended by a majority in the Commons. However, the speaker allowed MPs to propose an additional amendment to the business motion underpinning the Brexit vote which places an obligation on the government to introduce a motion on its intended next steps three days after its Brexit deal has been defeated. However, even if MPs were to use these sorts of motions under the withdrawal act to vote to suspend Article 50 or support a second referendum, they would not be binding on the government, and thus they could in principle be ignored by the government.

Opposition day debates

In accordance with standing orders, government business has precedence at every sitting save for 20 days reserved for opposition parties, 25 days for backbench business and 13 Fridays' worth of private members' legislation (encompassing Commons private members' bills, Lords private members' bills and 10-minute rule motions).

The days reserved for the opposition cannot be used to create legislation and are exclusively for

votes on motions and 'humble addresses'. Humble addresses are binding petitions to the government to produce specified documents, such as we saw when the attorney general was compelled to publish the cabinet's Brexit legal advice. However, humble addresses cannot be used to legislate. It is, therefore, not possible to use opposition day time to stop a no deal Brexit.

Private members' legislation

Private members' legislation has precedence over government business on 13 Fridays in each session. The current parliamentary session lasts two years rather than one and so additional private members' bill days were allocated by the government to occur on 25 January 2019, 8 February 2019 and 8 March 2019. A ballot has already been conducted to decide which 20 MPs should be allocated a private members' bill and each of the successful MPs have introduced their bills. It would, therefore, not be possible for them to drop their current bills and instead attempt to use their bill to stop a no deal Brexit.

The queue of existing private members' bills is so long that it would be impractical for MPs to successfully vote through all the necessary stages of a bill to deliver a second referendum or cancel article 50 between now and 'Brexit Day'. In addition, even if it were possible to pass a private members' bill to stop a no deal Brexit, it would almost certainly require the expenditure of public money to fund the cost of holding a second referendum or continuing to pay EU budget contributions that would stem from cancelling article 50. Money resolutions of the Commons are required to authorise this and standing orders make clear that only ministers can introduce them.

Backbench business time

The backbench business committee of the Commons has 25 days outside government control in which it can schedule subjects for debate suggested by backbench MPs. Many of these debates occur in Westminster Hall, outside of the main Commons chamber. The government decides which days of the week will be allocated to the committee for its debates and the amount of time available varies each month.

Motions relating to the subject chosen for the debate are occasionally voted on by MPs at the end. The speaker asks the Commons to decide on any amendments to the motion beforehand and so it is possible that this mechanism could be used to indicate that there is a majority in favour of a referendum or the rescinding of article 50, for example. However, as set out in standing orders, such backbench motions would not be binding on the government or have any legislative effect.

Could MPs give themselves new powers to stop a no deal Brexit?

It should be clear from the above that existing standing orders of the Commons are a key barrier preventing backbench MPs from stopping a no deal Brexit. In particular, the government having precedent over all other business of the Commons prevents them from being able to introduce the legislation that would be required to remove March 29th as the day the UK leaves the EU in the withdrawal act, hold a second referendum or rescind article 50. In accordance with the existing rules, only the government is empowered to take such action.

It has been suggested that backbench MPs might be able to amend a motion on the government's Brexit deal or any motions that come subsequent to it in order to change these standing orders that are preventing them from legislating. The clerk of the Commons is said to have informed MPs that putting aside existing standing orders for a "specific event" is within order but others have argued - including government minister Jesse Norman - that stripping the government of its ability to have precedent over all other business would be constitutionally improper, and respected former Labour speaker Baroness Boothroyd described Bercow's recent procedural decision as an "Absolute and utter disgrace."

In practice, if the government refused to provide backbenchers with the necessary parliamentary time to legislate to stop no deal they could potentially consider amending the motion on the government's Brexit deal or any motions that come subsequent to it in order to temporarily disapply standing order 14 which gives the government precedence over all other business. The disapplication of this standing order could be oriented around giving a specific committee of the Commons - perhaps the Liaison Committee - the ability to introduce legislation to stop a no deal Brexit unless the government agrees to do so itself. The government could continue to have control over the order of business in the Commons outside of the specific event provided for by the amendment. This would prevent a free for all amongst backbench MPs seeking to schedule their own business.

Impediments to these potential new powers

Even if MPs were able to give themselves a mechanism to control parliamentary time and introduce legislation to prevent a no deal Brexit, a number of barriers would still present blockages:

- Under standing order 48, any legislation requiring the dispensing of public money requires a minister to introduce a money

resolution. A second referendum or the rescinding of article 50 would likely require this as the former requires around £150m to conduct the ballot and the latter could mandate the Treasury to account for additional EU budgetary contributions. It would be more arduous procedurally to disapply this standing order as it would be so contrary to the fundamental constitutional makeup of the UK, given the prime minister's other role as 'First Lord of the Treasury'.

- Government ministers or loyal backbenchers could filibuster the backbench legislation intended to stop a no deal Brexit. Whilst an allocation of time motion could be introduced to guillotine the debate and prevent filibustering, only a minister can introduce one under current standing orders.
- The speaker could permit MPs to disapply the proceeding two obstacles, but he would not be able to stop government ministers and loyalists from filibustering in the House of Lords. This chamber is self-regulating and so the government could disrupt the passage of any legislation going through it to prevent a no deal Brexit.
- Even if backbenchers managed to change the standing orders and navigate a piece of legislation to stop a no deal Brexit through parliament, it would still require Royal assent to become law. As a prerogative power this process is entirely within the control of the government acting on behalf of the monarch, and ministers could refuse to arrange for her to sign it into law.

Much of the above boils down to the same question: when does the expression of parliament's will become impossible for a prime minister to ignore, even if parliament's mandate for its choice of action is uncertain. The current incumbent of that office seems to suggest the Brexit referendum result trumps parliament's will by recently contending that "The government is a servant of the people, not the House of Commons."

This would seem to suggest that prime minister Theresa May is prepared to play a game of chicken with parliament. It is also possible, however, that she is putting on a front before her deal is voted on. Once its defeated, she could make overtures to the opposition Labour party, whose leader Jeremy Corbyn indicated that he might support an amended deal that involved the UK remaining in a permanent customs union with the EU. However, if no majority can be found for a deal, we still face the fundamental reality of a no deal Brexit unless the government or parliament steps in and stops it.

Implications

One immediate implication of MPs potentially seeking to wrestle control of parliamentary business out of ministers' hands is that a general election becomes more probable. The government might regard losing control of business in the Commons - even if oriented around a specific event - as an existential threat. Conservative MPs supporting such a move to stop a no deal Brexit in the face of government intransigence might be suspended from the party, and this could potentially increase the chances of the government losing a vote of no confidence tabled by the opposition.

On the flipside, it could be argued that the government using procedure to prevent backbench MPs seeking to stop a no deal Brexit will make a general election more likely. The question for Conservative MPs if they were being blocked by the government from stopping a no deal scenario would be whether removing the government through a vote of no confidence is a justifiable means to seek to prevent this. If they thought it was, this would also raise the likelihood of an early election.

The wider possible constitutional implications are important to consider too. Unlike most democracies in Europe the UK has invariably had single party governments. This allows the voters to apportion responsibility for a particular policy relatively accurately. If a cross-party majority of MPs with the same view on a single issue can cast the government aside and pursue their own agenda, then the UK's party system could be seriously undermined. This would be a big potential change.

UK politicians and observers will of course debate whether it is appropriate to change the rules that govern parliament in order to advance a single issue. The last time standing orders were amended entailed a lengthy consideration by parliament's procedure committee and extensive debate on the floor of the Commons. A decision to put aside many of the most important rules governing parliamentary business through an amendment with just a few hours' worth of reflection is a very different approach. It is true, however, that reforms designed to give parliament a greater measure of initiative are not new. The Coalition Government of 2010 said it would introduce such measures but ultimately failed to do so.

Even in a democracy as enamoured with its ancient institutions as the UK, questions of parliamentary protocol and precedent are clearly not going to be fixed for all time. Given the situation MPs presently find themselves in, it is probably inevitable that an assessment of the government's dominance over business in the Commons would eventually be considered. Conducting that assessment under the intense time and political pressures of Brexit may

not be ideal. But it is those same tensions that are encouraging some MPs to argue that now is the time for constitutional innovation. Any possible short- and long-term implications remain to be seen.

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