

# Does the House of Commons have power without influence?

*The impasse over the Withdrawal Agreement has highlighted the inability of the House of Commons to shape the substance of the Brexit deal. There is a growing sense of frustration at the apparent unwillingness of MPs to face up to the limited choices before them, writes **Jack Simson Caird**. A key lesson from the Article 50 process is that the UK needs a parliamentary system which is more oriented towards consensus and that is less adversarial, he concludes.*



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Since the Withdrawal Agreement and the Political Declaration were published in November 2018, the House of Commons has been a central actor in the Brexit process. On Friday, 29 March, MPs rejected the Withdrawal Agreement for a third time. MPs' refusal to approve the Withdrawal Agreement and the Political Declaration has delayed exit day – a result that neither the UK government nor the EU wanted. However, the impasse resulting in the delay has highlighted the inability of the House of Commons to shape the substance of either elements of the deal before they were finalised. There is a growing sense of frustration at the apparent unwillingness of MPs to face up to the limited choices before them.

Once (or if) the dust settles on the Article 50 process, MPs will need to learn from this tumultuous period. There have been failures on both sides of the relationship between government and the Commons which will need to be urgently addressed in readiness for the next stage of the negotiations on the future relationship. However, amid all the sound and fury it is worth taking stock of the way in which MPs' actions have strengthened the democratic legitimacy of the Article 50 process. This post seeks to identify the factors that have shaped the successes and failures of the House of Commons during the Article 50 process so far.

## Barriers to influence: MPs and treaty negotiations

The constitutional and parliamentary rules that regulate the relationship between the House of Commons and the government were not designed to enable MPs to influence treaty negotiations. Through the prerogative, the UK constitution grants the government authority to conduct treaty negotiations. MPs have limited powers to supervise, scrutinise and to be informed of the government's approach to treaty negotiations. The European Parliament has a right 'to be immediately and fully informed at all stages' – which, in practice, includes a right to be involved in the process of determining the negotiating objectives. In September 2016, David Davis, then the Brexit Secretary, famously told the House of Lords EU committee that the UK government would 'certainly match and, hopefully, improve on what the European Parliament sees'. This promise was not delivered on and many MPs complained that insufficient information was made available. Such complaints were evident in MPs' battles to secure the release of the government's 'Brexit impact assessments' and the Attorney General's legal advice on the deal.

MPs' limited access to information on the negotiations was not helped by Standing Order Number 14 (1), which grants the government the right to almost total control of the Order Paper. This rule meant that even after the general election in 2017, the minority government was able to limit opportunities for MPs to scrutinise its approach to the negotiations. MPs have still found ways to debate the government's negotiation position, but Brexit legislation and debates on statements did not enable MPs to give their verdict on May's red lines while they were still in play.

## Barriers to influence: the constitutional and legal framework

The Constitutional Reform and Governance Act 2010 gives the Commons a theoretical power to delay the ratification of a treaty, but in practice this statutory power has proved largely irrelevant to the Article 50 negotiations. As a result, a significant proportion of MPs' Brexit efforts have been dedicated to creating a legislative framework for a 'meaningful vote' (culminating in section 13 of the EU (Withdrawal) Act 2018) and most recently to creating a legislative framework to avert a no deal (led by Yvette Cooper). A number of expert commentators have argued that MPs had the opportunity of the EU (Notification of Withdrawal) Bill, which was passed by Parliament in 2017, to change the rules to give the Commons a more significant role in the process. However, in early 2017 the government still had a majority and many MPs accepted the idea that the government's 'hands should not be tied' in the negotiations with the EU.

Perhaps another contributing factor was the way in which the doctrine of parliamentary sovereignty gave MPs a false sense of confidence that through the legislative process, the House of Commons would be able to shape the legal framework that took the UK out of the EU. This sort of thinking made it very difficult for MPs to get to grips with the interrelationship between domestic law, EU law and the Article 50 process. The Brady amendment, passed on 29 January 2019, which sought to change the Withdrawal Agreement after the negotiations had finished, something which both sides of the negotiations had consistently maintained was impossible, was emblematic of this problem. Brexit revealed a profound disconnect between law and politics at the heart of the UK constitution.

## Barriers to influence: the referendum and select committees

The 2016 referendum created (or has at least since highlighted) deep divisions within the main parties in the Commons on the question of the UK's relationship with the EU. Thus, even if the existing rules had enabled MPs to influence the government's negotiating position, MPs are so divided within their own parties that it is not a given that they would have been able to unite around any one position in order to shift the government's red lines.

One of the Commons' principal mechanisms for encouraging cross-party cooperation is through its select committees. Select committees have done a huge amount of valuable work on Brexit, extracting vital information from the government and producing reports that provide high-level analysis on the policy and legal implications of Brexit. Despite these undoubted strengths, the select committee system has not provided a way for MPs to advance proposals that could help to build a cross-party consensus on the substance of the Brexit agreements. Institutional tweaks to committee structures could not have overcome the fundamental political disagreements over Brexit. However, Brexit arguably should have prompted a more radical rethink of how committees operate. Committees could, and perhaps should, have cooperated more – to pool resources, to avoid duplication, and to see if consensus could be achieved across a larger number of MPs. The challenge facing MPs, in terms of the complexity and significance of the negotiations, is that the barriers to engagement were so great that in retrospect a new approach would have been justifiable.

## Avenues of influence

The House of Commons' contribution to the Brexit process does not seem to be particularly popular. Worse than that, the reputation of MPs and the institution of Parliament itself seems to plummet every day. The level of conflict and uncertainty surrounding the Brexit process is on a scale unprecedented in recent political history and MPs appear to bear the brunt of the blame for the situation.

A good chunk of the drama has been caused by a number of MPs deciding (fairly late on in the Article 50 process) that radical steps were needed to put the Commons in a stronger position in relation to the government so as to a) avoid a no-deal exit, and b) shape the nature of the future relationship. Even with a minority government, taking such radical steps has proved difficult, not least because of some of the barriers identified above. MPs have shown considerable skill, ingenuity and determination to come up with proposals that have either persuaded the government to change its position (e.g. creating the legal framework that underpins the meaningful votes at section 13 of the EU (Withdrawal Act) or by convincing a majority of MPs to defeat the government (e.g. the Letwin amendment to allow for indicative votes).

The combination of the UK's flexible constitutional framework, and the ability of certain MPs to create a cross-party consensus, has been shown to be particularly valuable. Many of these changes seem to have come across as rather messy, which is in part a product of the extreme time pressure under the ticking clock of Article 50 and the tense political atmosphere. Some of this messiness is unavoidable, and may indeed be seen as desirable: it is a product of a system of parliamentary democracy which does not prioritise efficiency over democratic legitimacy.

## Conclusion

There has been dysfunction on both sides of the relationship between the Commons and the government. Many MPs on both sides of the debate probably thought that they could do more than they actually could; some reckoned they could force changes to the Withdrawal Agreement; others thought they could avoid a no-deal exit. On the other hand, the government clearly estimated that the existing institutional arrangements would be adequate for the purposes of the Article 50 negotiations. Yet, at this present moment, both sides appear to be stuck on how to give MPs a say over the future relationship before exit day.

If the UK is to be a reliable partner in future treaty negotiations, many of the institutional issues highlighted here will need to be addressed. Constitutional reform and procedural changes will not be sufficient to overcome the divisions created by the Brexit process. However, I would argue that a key lesson from the Article 50 process is that the UK needs a parliamentary system which is more oriented towards consensus and that is less adversarial. Further, there is a strong case for new constitutional and legislative frameworks to provide MPs with more rights in relation to treaty negotiations. Ideally, these ought to be established before the relevant negotiations begin.

*This post represents the views of the author and not those of Democratic Audit.*

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