Brexit and the Speaker of the House of the Commons: Do the Ends Justify the Means?

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Yesterday, the Speaker of the House of Commons, John Bercow MP, decided to allow an amendment to the Brexit timetable to be selected and voted upon by the Commons, in flat contradiction of the Commons' rules and against the advice of his senior clerks. The amendment itself sought to require the Government, in the event that the Commons rejects the deal when the meaningful vote concludes on 15 January, to return to the Commons with a fresh motion within three days. The Commons subsequently decided to approve the amendment by 308 to 297. The Speaker's decision has provoked outrage, principally as it has damaged trust in the impartiality of his office, undermined the predictability of Commons procedure, and heightened the political tension in the Commons at a time of crisis. This makes it very difficult to defend the Speaker's decision to select the amendment. In this post, I outline the constitutional context which helps to explain why the Speaker took his decision, even if it does not justify the way in which the decision was taken.

The start of the debate on Brexit deal: the Business of the House Motion on 4 December 2018

On 4 December 2018, the Commons began its debate on both elements of the Brexit deal: the *Withdrawal Agreement* and the *Framework on the Future Relationship*. The first task for the Government and the Commons was to agree a *Business of the House Motion*, which sets out the rules and arrangements governing the debate. This particular *Business of the House Motion* was the product of a lengthy scrutiny process. The Procedure Committee had recommended a particular set of arrangements: most notably that the debate should take place over five days, and that the Commons should be able to amend the Government's approval motion on the deal before deciding on whether to accept the Government's motion itself. To their credit, on 4 December the Government put forward a *Business of the House Motion* which reflected a consensus among MPs as to how the debate should proceed. The Government's positive approach to the *Business of House of Motion* was welcome as it indicated that after the long struggle for a meaningful vote on the deal, the Government had finally grasped that to get this deal through it would have to seek a cross-party consensus.

Despite the Government's consensual approach, on 4 December the Commons decided to amend the *Business of the House Motion*. The Commons voted to accept an amendment to the *Business of the House Motion*, tabled by Dominic Grieve MP, to change the procedural arrangements for subsequent debates arising from Section 13 of the *European Union (Withdrawal) Act 2018*, which regulates the meaningful vote, and crucially, sets out a set of arrangements for how the Government should respond to a defeat of its Brexit deal. Section 13 provided that the Government was under a duty to table a motion 'in neutral terms' to respond to the Commons' rejection of the deal. The Commons' own non-statutory rules provide that motions in neutral terms are not subject to amendment. The Grieve amendment on 4 December provided that despite the words of the statute, this motion would be subject to amendment. The effect of the amendment was fairly remarkable in that it did two things that are constitutionally innovative: it used a *Business of the House Motion* for one debate to change the arrangements for a subsequent debate, and it sought to counteract the effect of a statute.

A number of procedural experts had assumed that this amendment was out of scope and were surprised

that the Speaker selected it for debate on 4 December 2018. In selecting this amendment, the Speaker demonstrated that he was willing to bend the rules of interpretation in order to strengthen the Commons' position in relation to the Government. There was not the outrage witnessed yesterday because the Speaker had more interpretative leeway, in that there was no rule that contradicted his innovative interpretation of the scope of the *Business of the House Motion*. Further, the Speaker was on strong constitutional ground in terms of boosting the power of the Commons. The Government's decision to include the words ,in neutral terms' in section 13 of the *European Union (Withdrawal) Act 2018*, was widely seen as an unnecessary, and fairly cynical, restriction on the power of the Commons to put forward amendments to what in all circumstances would be an important debate.

There are two elements of the *Business of the House Motion* agreed by the Commons on 4 December that should be highlighted at this stage. The first is that, rather unusually, it specified the dates on which the debate would take place, and the final day of the debate was to be 11 December. The second is that paragraph 9 contained a power for the Government to amend the *Business of the House Motion* by order. Orders made under this power 'shall be put forthwith'. This is parliamentary parlance for without debate or amendment. However, such orders are subject to the Commons approval.

The Government's decision to delay on 10 December 2018

On Monday 10 December 2018, after three days of the debate on the meaningful vote in the Commons, the Government made an extraordinary decision. The Government decided to suspend the debate. The Government could have given effect to this decision in two ways. The first is that the Government could have used the power in paragraph 9 to vary the *Business of the House Motion* by order. This would have required the Commons approval, and would have required the Government to specify how they intended to change the arrangements for the conclusion of the vote. The second is to use the Government's power to delay the relevant Commons business to be held on a particular day by simply appointing a future day for the business by saying 'tomorrow' when the business for the day is read out by Clerk of the House at the beginning of the day. The Government opted for the second way. The Government knew that had it put the delay to a vote, the likelihood is that they would have lost.

The fact that the Government was able to delay the conclusion of the debate on the meaningful vote on 10 December without the Commons' approval is at the heart of the events that occurred yesterday.

The Government has had nearly a month, since the decision to delay on 10 December, to outline how the resumption of the meaningful vote would work. If it wanted to win back the trust of MPs there are many steps it could have taken, assurances it could have given. The Government elected not to do so. The Grieve amendment and the Speaker's extraordinary decision to select it was borne out of frustration with a Government that has repeatedly failed to demonstrate a willingness to enable the Commons to express its view on the question of how the UK intends to leave the EU. Nevertheless, this does not change the fact that the Speaker departed from the Commons' established rules, and at a time where the rules are under extreme pressure, this is highly regrettable.

Had the Speaker made the right procedural decision and not selected the amendment to the *Business of the House Motion*, the House could have expressed its dissatisfaction with the Government's timetable by voting against the order to vary the *Business of the House Motion*. Arguably this would have been the better approach in that the House would be able to register its position without undermining the Commons' rules. However, the decision to reject the order would have provoked further procedural and constitutional uncertainty.

The effect of the Grieve amendment

The mischief that the Grieve amendment is designed to address is that under the terms of section 13 of the *European Union (Withdrawal) Act*, the Government has 21 days to respond to the Commons' rejection of the deal. After this statement, the Government then has a

further seven sitting days to move a motion in the Commons on this statement. If the Commons rejects the deal on 15 January, the Government could in theory use the leeway afforded by section 13 to avoid further meaningful engagement with the Commons.

The amendment provides that if the Commons rejects the deal, the Government 'shall table within three sitting days a motion under section 13'. The intended effect of the motion was to accelerate the statutory timetable, and require the Government's statement and the motion to be introduced within 3 days as opposed to within 28 days. There is a potential issue with the wording of the amendment in that in technical terms a requirement 'to table' a motion does not require the Government to instigate a debate on the motion. Further, the amendment is rather ambiguous as to the nature of the motion in question. In any event, if the Commons rejects the deal, it is expected that the Government would respond much more quickly than the statute allows for. The point of principle, which was right in my view, was that the Commons should be able to decide the timetable for response to the rejection of the deal.

Conclusion

The UK Parliament may be sovereign in legal terms, but in terms of the practical day-to-day business of the Commons the executive dominates. This works fine when the Government has a majority. When the majority of MPs don't support the Government, and an even bigger majority don't support the Government's principal policy aim it doesn't. To survive, minority governments must build a relationship with the Commons based on trust. The Speaker of the House of Commons also relies on commanding the trust of MPs and the Commons officials. Unfortunately we are now in a situation where trust in both the Government and the Speaker is diminishing at the very moment when it is needed most.

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