

# NOT IN OUR NAME

## Democracy and foreign affairs in the UK



### ‘Executive dominance’ and foreign affairs

The UK Parliamentary system has for a long time had a problem of dominance of parliament by the government (‘executive dominance’). As Lord Hailsham famously put it in the 1970s, the British system was, in effect, an ‘elective dictatorship’ in which ‘the government controls Parliament and not Parliament the government’.

Britain’s torturous Brexit process has shown how dangerous this can be. Notably, it revealed that even a government without a parliamentary majority still has at its disposal key levers of executive power that do not require parliamentary oversight and approval. While the prorogation case brought more public attention to this, the power of the executive over the legislature had been present in every aspect of Brexit. The process of leaving the EU is an

international treaty negotiation. And – like all similar international negotiations carried out by in the UK – the power of Parliament to scrutinise and control the executive is extremely limited.

The UK’s current system is based on a 19th century approach to foreign policy. In the days of empire foreign treaties had little or no impact on domestic rights and policy. That is no longer the case. In today’s globalised world, international treaties impact on us in a manner similar to primary legislation. Now is, therefore, the time to bring the principle of democratic scrutiny into the conduct of foreign affairs.

There are three major problems requiring reform:

1. **Secrecy.** There is a lack of transparency over the negotiations and the UK government position, which take place in secret.
2. **Mandate.** There is no procedure

within Parliament to mandate particular negotiating positions taken in the international negotiations.

3. **Final say.** There is no right for a ‘final say’ for Parliament over the outcome of negotiations. The government has free reign to make and break international treaties without any need for parliamentary ratification.

## Meaningful vote: the ‘Grieve amendment’

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Currently, Parliament does not have an automatic right to a final say on the ratification of international treaties. This gives the government – and particularly the Prime Minister, not even the Cabinet as a whole – exceptional power over Parliament.

In the Brexit process, the ‘Grieve amendment’ (December, 2017) was required to ensure that Parliament had a legally-binding meaningful vote on the final outcome of the negotiation. This was not the only special intervention that was required in order to wrestle back control for Parliament from the executive. And together they underlined a key constitutional problem: Parliament had only limited mechanisms at its disposal to democratically control the executive in international treaty making.

## Royal prerogative over foreign affairs

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The power of executive in the UK comes from the archaic principle of the ‘royal prerogative’. This refers to the power of the ‘Crown in Parliament’ and its origins lie in the pre-democratic era of European politics based on hereditary monarchy. Today the monarch now longer exercises these powers, but the Prime Minister

does on their behalf. The use of these prerogative powers was central to the prorogation court case.

The use of the royal prerogative is particularly sweeping in foreign affairs. It allows the government to sign international treaties, declare war and peace and conduct other international negotiations with virtually no need to consult Parliament.

## Role in the rise of Euroscepticism

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The use of the royal prerogative in foreign affairs affects how British political institutions relate to the European level. There are two core European forums where the British government makes use of its powers in foreign affairs with little oversight: the European Council (that bring together heads of governments of EU member states) and the Council of Ministers (that brings together ministers of national governments). While the UK government will report back to Parliament on these meetings, it does not have to seek a mandate from Parliament for its negotiating positions. While far from the only factor in the rise of British euroscepticism, this does foster the mentality that the EU is a monolithic force that does things to Britain when in fact the opposite is true. British government positions have traditionally carried a lot of weight and have played a major role in shaping European legislation.

## An alternative approach: the best practice examples

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Britain is extreme in the level of secrecy and control the government has over international negotiations and

international treaties. There are other best practice examples:

### **Denmark**

The executive must seek and obtain a mandate from a specially constituted committee of parliament prior to developing positions in the European Council. It must return and seek a revised mandate if the adopted position changes.

### **USA**

The executive publishes both its negotiating mandate and impact assessments. The power to ratify treaties lies with congress. In certain cases congress may also demand amendments to treaties.

## **‘Not in Our Name’: a principle that can give Parliament real power**

The ‘Not In Our Name’ principle is based on a simple idea: Parliament should have more power to scrutinise and mandate the executive when it is carrying out international treaty negotiations, including making new rules at the European level.

**1. Statutory definition.** We recommend adopting a statutory definition for what constitutes an ‘international treaty negotiation’, which is as broad as practicable. When this definition is met it will activate a system of Parliamentary powers to control and scrutinise the executive. This would ensure it was pursuing a position consistent with the will of parliament.

**2. International Treaties Committee.** Given the complexity and range of international negotiations, we propose a new body formed out of both houses of Parliament that will determine which issues require scrutiny of the full house.

**3. Principle of disclosure.** A statutory presumption should require the disclosure of all documents within certain classes unless specific permission is given to withhold. This will go beyond the Freedom of Information Act 2000 (which contains, in effect, a presumption of disclosure but allows government to withhold documents without first seeking permission). It will contain a more limited list of exemptions to the presumption and such exemptions could only be applied with permission from the Parliamentary Committee. A government department wishing to withhold qualifying information would apply to the committee to either withhold the document completely or publish it just to MPs. Members of the committee could be security vetted (in a similar manner to members of the ISC) to facilitate this.

**4. Scrutiny and approval of negotiating mandate.** The negotiating mandate must be approved and, if necessary, amended by parliament. Both can be achieved by simple motion of each house. It is likely that some treaties will be relatively uncontroversial. With this in mind, and to streamline the process, the parliamentary committee should have a “triage” function, to refer mandates for further consideration if a certain threshold is reached.

**5. Positive approval before ratification** – both houses of parliament must give final approval to a treaty before it can be ratified (this will likely require amendments to part II of the Constitutional Reform and Governance Act 2010). This could involve a similar procedure to the US fast-track/slow-track, which means that relatively uncontroversial treaties can be approved by a straight up or down vote while those which raise more serious issues can be subject to amendment.

**6. Special European procedure.** If Brexit

happens the above system will apply to future international negotiations; particularly, over trade policy with the EU, the United States and other countries. However, if Brexit is stopped and Britain remains inside the EU, we recommend the creation of a special European procedure. Negotiations within the EU are more continuous and faster paced than other international negotiations. The scrutiny committee should, therefore, have a power to monitor the government's actions in the EU on a continuous basis and, where necessary, refer specific issues for the consideration of the full house(s).

## Could this system have changed Brexit?

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If the Not In Our Name principle had been in place during Britain's negotiations with the EU we can identify several ways it would have radically changed the process:

- **A mandating vote, not just a final vote.** The government would have needed to win parliamentary support for its negotiating position at the outset of the talks. This may have brought the political crisis to a head sooner or created greater pressure for a compromise position acceptable to both sides. It could also have created a procedure for the kind

of 'indicative votes' over Brexit options, which took place post-negotiation, to happen at the outset of talks.

- **Transparency in negotiations.**

The system would have forced the UK government to be as transparent in the negotiations as the EU side. Instead the UK government was highly secretive in its actual positioning throughout.

- **Greater clarity and honesty on the trade offs.** By requiring a parliamentary debate at the outset this may have incentivised a more mature approach to the Brexit process, which was honest about the trade offs it entailed and how they might be dealt with.

## Authors

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**Dr Luke Cooper** is an associate researcher at the LSE Conflict and Civil Society Research Unit, a co-founder of Another Europe Is Possible and co-host the Another Europe podcast.

**Dr Sam Fowles** is a barrister at Cornerstone Barristers and a fellow of the Foreign Policy Centre. He appeared for the successful claimants in Miller/Cherry v PM (the prorogation case).

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