

What a Tangled Web...



By Professor Alex De Ruyter and David Hearne, Centre for Brexit Studies

So the prevarication and denial of reality continues at No 10, with the PM seemingly stating that another meaningful vote on the EU Withdrawal Agreement will not take place before February. Instead, Mrs May has used her statement containing six elements in today's session in Parliament to inform MPs of her latest dash to Brussels, to try yet again to extract concessions from the EU on the wording in the agreement on the Northern Ireland backstop – specifically the notion of trying to put a time-limit on it.

We have argued elsewhere that the EU have made it clear to the UK Government that the wording of the Withdrawal Agreement is not up for grabs and that the Northern Ireland backstop is the legally binding guarantee to support the all-Ireland economy, naturally underpinned

by the Good Friday Agreement. Similarly the Irish Government has robustly rebuffed any notion that it would sign a bilateral agreement with the UK to circumvent the backstop provisions of the EU agreement. It also almost goes without saying that any attempt to “reopen the Pandora’s Box” of the substantive provisions in the agreement could result in other member states imposing their own new demands (e.g., fishing rights) and risk the whole agreement collapsing.

Yet Mrs May continues to seek to have her deal, or no deal. In the end, Parliament could well attempt to take the decision out of her hands, as a succession of amendments that seek to prevent no deal from occurring aim to do. Widely expected are a series of “indicative votes” on what Brexit options could secure a majority in the Commons, for example, the Norway-plus proposal of EEA and Customs Union, or indeed another referendum.^[1] These amendments would not be legally binding, although Yvette Cooper (Labour) and Nick Boles (Con) are hoping to put forward a bill that seeks to bind Government to seeking an extension to the Article 50 period until the end of this year, should no deal have been agreed by the end of February. The government’s control of parliamentary time, however, means that this stands little chance of success as things stand.

As such, a group of MPs are seeking to weave a tangled constitutional web in order to enable the parliamentary spider to trap the governmental fly (if you’ll forgive the analogy). Perhaps unsurprisingly (in light of recent parliamentary manoeuvres), the former Attorney General Dominic Grieve appears to be at the centre of this. His proposed amendment would allegedly enable Parliament to temporarily suspend the government’s control of parliamentary time (specifically via an amendment to Standing Order 14).

This, in turn, would allow Cooper and Boles to table their bill and for MPs to push the legislation through parliament. This, however, could prove problematic. After all, it is the executive and not the legislature that has control of such foreign policy and such an approach (using the legislature to initiate and direct policy, rather than approving it, or not) would indicate a significant constitutional change. If the above course of action indeed takes place then it surely indicates that parliament has lost trust in the government and its agenda. However,

there is a well-established procedure to enable MPs to remove a government that they do not trust to govern: the no-confidence motion.

In this situation one pauses in wonder at the continuation of the “zombie government” state of affairs that we have in the UK – that is, of a Government in office that cannot get its legislation through Parliament, but one which the Opposition has not been able to force out through a no-confidence motion. We are thus in the bizarre situation of witnessing a series of backbench manoeuvres designed to direct a government whose proponents allegedly have full confidence in (and thus surely ought to be happy to allow to set the parliamentary agenda). One doesn’t need to have any particular view of Brexit or on the individuals involved to be concerned at this state of constitutional affairs. If, indeed, parliament does not wish this government to set the agenda then surely it does not have confidence in it and should vote as such.

Suffice to say this situation has been brought about because the Government cannot bring about a clean Brexit because it doesn’t have the numbers in Parliament on the right, but equally so it cannot bring about a softer Brexit because the Government remains beholden to the DUP to keep it in office and so must not negotiate any agreement that would result in a separate legal status for Northern Ireland to the rest of the UK.

In any event, the EU are unlikely to grant the UK Government an extension to Article 50 unless there is a good reason for doing so – in other words, something to break the deadlock in Parliament that an event such as another referendum or general election would provide. The latest tit-for-tat between the UK legislature and executive leaves me wondering whether we are now beginning to run out of road as the Brexit vehicle approaches the cliff edge of No Deal.

Indeed, therein is the crux, in the high-stakes game of chicken between the Government and Parliament, No Deal will happen by default if the UK Government and Parliament cannot agree and put forward a credible alternative to the EU to the withdrawal agreement on offer in time. The constitutional innovations that have accompanied it could live on long after the Brexit process has completed.

[1] <https://www.theguardian.com/politics/2019/jan/21/no-second-vote-on-brexit-deal-likely-before-february-says-no-10>