'SHE'S DEAD OF COURSE!'

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'There was an old lady who swallowed a fly

I don't why she swallowed a fly.

Perhaps she'll die?'

Thus starts the old nursery rhyme that doubles as not only a scary bedtime tale for three year olds but also, I suggest, as a perfect morality tale for Brexit Britain. As many of you will recall I'm sure the story continues with increasingly horrific swallowing in pursuit of a solution to that initial, fatal ingestion and – spoiler alert! – ends badly. Well in our contemporary morality tale, it is the British people who have swallowed parliament, parliament that has swallowed the government, the government that has swallowed law and – okay giving it away entirely now - the result is the same as in the nursery rhyme when the horse gets swallowed: my title explained, 'She's dead of course!' (We have a pop-up-picture version of the story and that last page really is unsuitable for the target audience, as grotesque in appearance as the reality of Brexit is certain to prove to be.)

So how does this analogy work? Consider first the people, by which of course we mean primarily the expression of 'their' will via referendum. The European Union Referendum Act 2015 declared itself 'An Act to make provision for the holding of a referendum in the United Kingdom and Gibraltar on whether the United Kingdom should remain a member of the European Union.' Section one made clear that the holding of such a plebiscite was compulsory and set out the question that had to be asked. Section two identified who was entitled to vote, and various other sections and schedules deal with the detail, building on an earlier measure, the Political Parties, Elections and Referendums Act 2000, part seven of which had dealt specifically with referendums. Nowhere in the Bill or enacted measure is there any reference to the effect of such a vote one way or another. As a House of Commons Library briefing paper put it at the time of its introduction, the Bill 'does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions.'[1] There was plenty of learning in the textbooks[2] and among constitutional experts in Parliament[3] confirming this was the case. Indeed in the past when Parliament has wanted a referendum to be binding it has gone to the trouble of saying so, as was the case with the (defeated) referendum on changing the voting system in 2011.[4]

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[1] Elise Uberoi, *European Union Referendum Bill 2015-16* House of Commons Library, Briefing Paper 07212 3 June 2015, p 25: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7212
[2] Eg A W Bradley and K D Ewing, *Constitutional and Administrative Law* 15th edn (Harlow: Longman, 2011) p 76.
[3] House of Lords, Constitution Committee, *Referendums in the United Kingdom* 12th Report 2009-10, 17 March 2010: https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/9902.htm (accessed 25 May 2019).
[4] Parliamentary Voting System and Constituencies Act 2011 s 8.

We lawyers gathered here today may regard it as a sad fact, but it is a fact nonetheless, that law does not govern political practice. And whatever the precise legal position, the government of the day, first the one led by David Cameron before his resignation but thereafter and for our purposes mainly that led by Theresa May, have regarded it as binding. And in a system so rooted in constitutional conventions, thinking makes it so. Labour (led it is said by a closet Brexiteer) did not fight the assumption and the smaller (but after the 2017 election critical) Democratic Unionist Party of Northern Ireland shared this view. When the matter came before Parliament at the insistence of the courts,[5] the vote at second reading in the House of Commons to deliver on the Referendum result by sending a notification of departure to the EU was 498 to 114.[6] As the various arguments in favour of Brexit have drifted away so its protagonists have fallen back with ever-increasing levels of passion on a narrow procedural point with which to make their case: the people have spoken. None seem unduly disturbed by the fact that the people had already spoken – in 1975 – so there must be on their part some sense of a possible return to the issue, as they would surely have insisted had the result been the other way. But voting to live can be revisited whereas voting to commit suicide, if acted upon, is bound to be a one-off.

And so the people have set parliament off on its great Brexit escapade, and parliament has promptly sought to correct things by swallowing the government. The mismatch between what Mrs May's Conservative administration thought that it could achieve in negotiation with Europe and what is in fact the case was always bound to cause difficulties (as the incoming Prime Minister, whether it be Mr Hunt or Boris Johnson is sure also to find) - but these difficulties have been immensely compounded by the absolute determination of the governmental mouthpieces of the British people to refuse to admit to their weakness, like the famous Black Knight in Monty Python's Holy Grail as many (not least the Ditch prime minister Mark Rutte) have remarked.[7] Having promised for months that 'no deal is better than a bad deal'[8] Mrs May expressed surprise when her withdrawal agreement failed to command parliamentary support. The feisty Speaker of the lower House John Bercow eventually exercised his authority to deny the government the opportunity to put the withdrawal plan to yet another vote. This is how Mr Bercow explained his decision, taken on 18 March 2019:

The 24th edition of "Erskine May" states on page 397:

"A motion or an amendment which is the same, in substance, as a question which has been decided during a session may not be brought forward again during that same session."

It goes on to state:

"Attempts have been made to evade this rule by raising again, with verbal alterations, the essential portions of motions which have been negatived. Whether the second motion is substantially the same as the first is finally a matter for the judgment of the Chair."

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[5] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[6] See https://hansard.parliament.uk/commons/2017-02-01/debates/5B0251FC-94E6-4216-8830-4F85E0EC2250/EuropeanUnion(NotificationOfWithdrawal)Bill (accessed 25 May 2019). The Bill was enacted as the European Union (Notification of Withdrawal) Act 2017.

[7] https://www.youtube.com/watch?v=zKhEw7nD9C4 (accessed 24 May 2019). Those making the connection have included, embarrassingly, the Dutch Prime Minister Mark Rutte: https://www.theguardian.com/politics/2019/mar/17/dutch-pm-compares-theresa-may-to-monty-python-limbless-knight (accessed 20 May 2019).

[8] See in particular Mrs May's Lancaster House speech of 17 January 2017: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech (accessed 25 May 2019).

This convention is very strong and of long standing, dating back to 2 April 1604. Last Thursday, the hon. Member for Rhondda (Chris Bryant) quoted examples of occasions when the ruling had been reasserted by four different Speakers of this House, notably in 1864, 1870, 1882, 1891 and 1912. Each time, the Speaker of the day ruled that a motion could not be brought back because it had already been decided in that same Session of Parliament. Indeed, "Erskine May" makes reference to no fewer than 12 such rulings up to the year 1920.

One of the reasons why the rule has lasted so long is that it is a necessary rule to ensure the sensible use of the House's time and proper respect for the decisions that it takes. Decisions of the House matter. They have weight. In many cases, they have direct effects not only here but on the lives of our constituents. Absence of Speaker intervention since 1920 is attributable not to the discontinuation of the convention but to general compliance with it; thus, as "Erskine May" notes, the Public Bill Office has often disallowed Bills on the ground that a Bill with the same or very similar long title cannot be presented again in the same Session.' [9]

Interestingly, we can see from the Speaker's remarks that this is the first exercise of this particular discretion in the democratic era. In the decades since the universal franchise, Parliament has sought to combine two roles, deliverer of government legislation and holder of that same government to account. The power to initiate and drive through its own laws has been greatly restricted – to the occasional private member's bill – by government control of the business of the lower House. No more is this the case, as the administration's repeated failure to get its way on Mrs May's withdrawal agreement demonstrates.

Explained as the Speaker explained it, the ruling seemed fairly impeccable, and huff and puff though the government might (and did) there was no way around it, short of the prorogation of Parliament. Judicial review was of course not an option either: the bill of rights of 1688 had seen to that.[10] That Parliament was 'taking back control' in a way unforeseen by those whose campaigning genius invented this slogan became increasingly apparent as (an inevitable consequence of this government's swallowing one might say) various offerings emanating from within Parliament itself were then put to a series of indicative votes, as a way of the lower House feeling its way towards an instruction which government would be bound to follow. This is not how the UK parliament is supposed to act: the lapdog had turned on its owner. (We may observe in passing that a key reason for this is a second act of consumption by the people: not only have they eaten Parliament but subsets of them have swallowed the Party system as well – direct election of party leaders; recall of badly behaving MP's; mandatory reselection of the doubters; and so on.)

These indicative votes provided no clear guidance of course: there are reasons why a group of 650 men and women had never tried to run the country before. Eventually earlier this year and with the catastrophe of a no-deal Brexit around the corner, Lords, Commons and Queen combined to produce the remarkable European Union Withdrawal Act 2019, rooted in a seizure of the parliamentary timetable from the government and given its first reading in the House of Commons on 2 April 2019, receiving the Royal Assent just six days later, on 8 April 2019. (Efforts to persuade the Queen that she was under some kind of antique constitutional duty to refuse assent to the Bill proved unavailing.[11]) Sponsored by Commons backbencher Yvette Cooper and long-serving Labour peer Lord Rooker, this measure compelled the government to conduct its foreign policy in a particular way. Its only substantial provision, found in section one, was in the following terms:

1 Duties in connection with Article 50 extension

(1) On the day on which this Act receives Royal Assent or on the day after that day, a Minister of the Crown must move a motion in the House of Commons in the form set out in subsection (2).

[9] See the Speaker's statement at https://hansard.parliament.uk/commons/2019-03-18/debates/AB031E78-C906-4833-9ACF-291998FAC0E1/Speaker%E2%80%99SStatement (accessed 24 May 2019)
[10] See https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction (accessed 24 May 2019).
[11] The arguments are well reviewed by Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?': https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/ (accessed 24 May 2019).

(2) The form of the motion set out in this subsection is –

"That this House agrees for the purposes of section 1 of the European Union (Withdrawal) Act 2019 to the Prime Minister seeking an extension of the period specified in Article 50(3) of the Treaty on European Union to a period ending on […]"

(3) A motion in the form set out in subsection (2) must include a date in the position indicated by the brackets in that subsection.

(4) If the motion in the form set out in subsection (2) for the purposes of subsection (1) is agreed to without amendment, the Prime Minister must seek an extension of the period specified in Article 50(3) of the Treaty on European Union to a period ending on the date included in that motion.

(5) If the motion in the form set out in subsection (2) for the purposes of subsection (1) is agreed to with an amendment to change the date in the motion as moved to another date, the Prime Minister must seek an extension of the period specified in Article 50(3) of the Treaty on European Union for a period ending on the date included in the motion as agreed to.

(6) Nothing in this section prevents a Minister of the Crown from seeking, or agreeing to, an extension of the period specified in Article 50(3) of the Treaty on European Union otherwise than in accordance with this section provided that the extension cannot end earlier than 22 May 2019.

(7) In deciding for the purposes of subsection (6) whether an extension cannot end earlier than 22 May 2019, the earlier ending of the extension as a result of the entry into force of the withdrawal agreement (as provided for in Article 50(3) of the Treaty on European Union) is to be ignored.

As it happens the Prime Minister conceded the point of principle and so was able to deploy ss (6) to avoid compulsion. But this is a point of detail. Parliament has taken over the conduct of this vital aspect of foreign policy, and there is no reason to believe that – if given the chance - it will not do so again whoever might be living in No 10 Downing Street, calling him- or herself prime minister. The logic of this Act suggests that a parliamentary committee broadly representative of the lower House should conduct the relevant discussions with the European Union, a better plan surely than relying on a reluctant and perhaps even a hostile emissary. And just around the corner will of course be a similar measure mandating the revocation of Article 50 altogether. It is interesting to speculate about how – say - Mr Johnson (the pound shop Disraeli *de nous jours*) would react to such a command were he the occupant of no 10 at the time: there has been talk by people no longer considered mad – at the centre of government indeed – about proroguing Parliament in the weeks before the latest planned Brexit day so as to deprive it off the opportunity to act. (But of course over the Summer or in early Autumn, and almost certainly if a Johnson administration gleefully embraces a 'no-deal' Brexit as the rice the country must pay to realise this man's ambition, the Commons may simply have eaten the government whole, voting a motion of no confidence which will surely precipitate a general election unless the 14 day search for alternatives required under the Fixed Terms Parliament Act 2011 produces a national government – highly unlikely.[12])

Now we come to the final swallowing to be taken into account, one close to us as lawyers. In its effort to get Brexit done, Mrs May's administration has already had to consume large portions of the rule of law, which – as it were – remains in its stomach despite it itself being in the process of being

[12] See ss 2 (4) and (5).

swallowed by Parliament. (I know, I know the rhyme is being pushed a bit far by now and anyway the time-frame of the swallowings is all over the place.) When the May administration still believed it could get a deal, it secured enactment of the European Union Withdrawal Act 2018. Section 8 empowers the executive to make regulations to deal with 'deficiencies arising from withdrawal' from the EU[13] and – in advance of departure – under section 9 to do whatever 'the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.[14] Both provisions expressly allow ministers to 'make any provision that could be made by an Act of Parliament'[15] with, however, the important caveat that certain areas are specifically declared to be out-with this legislative power.[16] As introduced, clause 9(2) had envisaged the regulatory power under that section being used to amend the EU (Withdrawal) Act itself, but this has disappeared and anyway section 9 only kicks in if there is a Parliament-approved withdrawal agreement of which such sub-unicorn there is as yet not sight. But what of section 8, specifically designed to deal with departure from the EU and not contingent on a deal? As designed it is all-embracing in its implications so far as 'retained EU law' is concerned. I imagine that it will be a difficult vehicle on which to hang all no-deal executive planning. But it will be a precedent for exactly that, in mid-September when the panic sets in (and all this will only kick off again in September after the August holidays, and even then it will be dominated by the parochial but from a Conservative party perspective immensely important Party Conference at the end of the month, so really the start date for renewed panic is early October). Will parliament refuse to enact a no-deal law with the sweeping war-time-like powers that the Administration will unquestionably need? If Parliament refuses to pass such a measure will a no-deal Brexit administration fall back on section 8? Perhaps it will have to? We may be in for more momentous *Miller* cases.

Why the necessity for such broadly-based powers as were passed last year and are likely to be needed again this Autumn as Brexit hurtles closer? They are required in the absence of any clearly defined goal behind this whole adventure, other than the negative one of NO to the EU. Not knowing what they are doing the government must ensure it is able to do anything. The implications for human rights – the final element of my talk to be noticed this afternoon - are therefore profoundly uncertain. Obsession with the European Convention on Human Rights and the Human Rights Act has mainly ceased – hostility to this other Europe (the Council of Europe) was always a confected row, an attack on the near enemy as a means of getting at the true Continental opponent, now of course engaged in directly (to surely all observers would agree disastrous effect, like choosing to attack the US having engaged in a few successful skirmishes with Puerto Rico). Indeed if the Withdrawal Agreement or something like it is agreed, either before or after departure, then part of the UK's surrender terms may indeed be continued support for human rights (in the form of the Convention and possibly even the substance of the supposedly hated EU Charter, already only very ambiguously expunged in the 2018 Withdrawal Act).[17] The same will undoubtedly happen if a few weeks into their no-deal catastrophe the UK beg to return to the table (now a more complicated one of course, involving all Member States and a non-member) and will agree any terms to do so. But if the UK's revolutionary moment (and be under no illusions this is what we see happening right now) spirals into ever-greater isolation, we may find that a Belarus/North Korea option comes to take the place of the Norway, Canada ++ etc models currently doing the rounds. (Whatever happens, the disregard of the achievements of the Major/Blair years in bringing peace to Northern Ireland, and the total proud ignorance of the Brexiteers on all things Irish, is perhaps the greatest single disgrace in a campaign that has contained many.)

[13] s 8.
[14] s 9(1).
[15] s 8(5); s 9(2)
[16] s 8 (7); s 9 (3).
[17] European Union Withdrawal Act 2018, s 5(4), 5(5).

I end with that mystery at the core of it all: why? What on earth has been going on? In Britain, of all places! It is not possible to detect any underlying rationale behind the 'people's vote' – it is of the essence of populism of this sort – and as we all know Britain is not unique in its exposure to this kind of political engagement - that it knows what it does not like but has no clue as to what it wants. Depending on where you are, the vacuum gets filled by appeals to emotion that are rooted in any or all of nationalism, xenophobia and/or a personality cult. In the US right now it is all three. In Turkey it is probably the first and third (though the Istanbul mayoral election last month may have dented this somewhat). In the UK? I'd say mainly the first – nationalist daydreaming rooted in fantasy history – but also a fair bit of cult (Farage, with Johnson jostling him for space) and among a few a particular subset of xenophobia, the deeply unpleasant one that is rooted in traditional racism. The word 'traditional' is, I think, important here: I could just as easily have said 'long-standing' or 'resilient' or (even) ineradicable. We have had leaders with cult potential in the post-war period before as well of course – of the comically inept variety (Cecil King, in 1968[18]) but also the darker sort, Enoch Powell and his nascent working class movement.[19] The difference is that the state did not tolerate them. What would today be derided as the elites worked together to keep them firmly in their boxes (sacking them as Edward Heath did Enoch Powell, or disowning their ideas as the wider popular culture did to such powerful effect in the 1970s[20]).

Instead of keeping the box firmly closed and like Pandora before him, David Cameron chose to open it. And as my volume of Greek myths puts it, 'Jupiter had malignantly crammed into this box all the diseases, sorrows, vices, and crimes that afflict poor humanity; and the box was no sooner opened, than all these ills flew out, in the guise of horrid little brown-winged creatures, closely resembling moths.'[21] I think this way about the racist mutterings, the assaults on human dignity, the returning male chauvinism, the hatred that Brexit has unleashed, not to mention the deadbeat, failed politicians to whom it has given renewed energy, moths released from what had been a deserved political oblivion.

But then my book continues. 'It was well for Pandora that she opened the box a second time, for the gods with a sudden impulse of compassion, had concealed among the evil spirits one kindly creature, Hope, whose mission was to heal the wounds inflicted by her fellow prisoners.'[22] I resist the almost irresistible impulse to read this as a call for a second referendum. Without an overwhelming majority in favour, across all demographics and regions, such a vote will be anything but conclusive. My preferred option now is a recanting of Article 50, led by the Brexiteers, who explain it all to the British public – why they have failed so abjectly – and then at the same time a public Commission of Inquiry to run for months, televised, backed by statutory powers of discovery and command – a kind of state trial for all those responsible for where we are.

That is not going to happen: cults choose death over an admission of error. So I find myself reluctantly standing by the position I staked out over a year ago, that of a RETURNER rather than a REMAINER.[23] The UK needs to live, and its citizens need to experience, the loneliness and coldness of the bedsit in nowhere land that is the logical consequence of their taking back of control. Only then

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[18] Roy Greenslade, 'The day the Mirror's megalomaniac tried to launch a Political Coup' *Guardian* 16 September 2011: https://www.theguardian.com/media/greenslade/2011/sep/16/daily-mirror-bbc (accessed 31 May 2019).

[19] Richard Norton-Taylor, 'Racism: Extremists led Powell Marches': *Guardian* 1 January 1999: https://www.theguardian.com/uk/1999/jan/01/richardnortontaylor2 (accessed 31 May 2019).

[20] 'Rock against Racism: How an Artistic Movement Took on the National Front' *British Journal of Photography* 4 September 2015: https://www.bjp-online.com/2015/09/rock-against-racism-how-an-artistic-movement-took-on-the-national-front/ (accessed 31 May 2019).

[21] H A Guerber, *The Myths of Greece and Rome* (Worsdworth, 2000) p 30.

[22] Ibid p 31.

[23] 'Why we must all now be with Rees-Mogg: The Case Against a Sudden Reversal of Brexit': *LSE Brexit* https://blogs.lse.ac.uk/brexit/2018/09/11/why-we-must-all-now-be-with-rees-mogg/ [visited 27 June 2019].

can the illusion that the consequences of EU exit are a fabricated PROJECT FEAR be finally shattered. And only then can the fragments of the United Kingdom be slowly pieced together. And with it the British Constitution, the flexibility of which – once thought to be such a strength – has played a large part in destroying the country. She's dead of course – and I am bound to say – optimist though I am – that resurrection seems far away right now.

London, 27 June 2019