

“They have not invented the ....words.”

***By John Clancy, Visiting Professor at the Centre for Brexit Studies, former Leader of Birmingham City Council and Labour Councillor for Quinton.***

Peaky Blinders Season 5, episode 2 dropped as the other high drama of our age was playing out in parliament.

Stephen Knight pre-captured the sense of now in his screenplay as Thomas Shelby, Birmingham M.P. Speaks to the chamber of the House of Commons. Even as Shelby eloquently makes words fly like a bird in the house, later, at home, he cannot form the words to explain the existential chaos of his life.

“Do you want me to write a .....letter? Me and Arthur can’t write it down. They have not invented the ..... words. We don’t have the ..... words.”

The M.P.’s loss for words, and his explanation for that loss of words (expletives deleted in this family blog) summed up where we all are with Brexit. Ironically it was about sending a letter.

Words actually fail us. We have not yet even invented the kinds of words through which to explain the chaos. It whirls in front of us and all we can do is watch. To come up with the words to allow us to describe, let alone explain, is actually currently beyond us. History will, perhaps, come to explain.

Not disheartened, though, we may go a little lighter in tone to draw on Edmund Blackadder in Blackadder III to at least assist. He says to Baldrick: “If you don’t answer, then the booted bony thing with five toes at the end of my leg will soon connect sharply with the soft dangly collection of objects in your trousers.”

That helps me, at least, to make some little sense of the legal and constitutional position at the moment. Where we look for certainty in our constitution we find a soft dangly collection of objects instead. And legally now a booted bony thing of the law is being required through

politics to come into contact with it. Little good can come of it. And a lot of pain.

As I pointed out at the [Centre for Brexit Studies Conference](#) at The RSA in London, the one thing that must come out of this current constitutional mess is a constitutional convention to dump the soft dangly collection of objects for good.

As I also said there, what was strikingly obvious to most political, legal or constitutional observers was the sudden tendency for constitutional and legal rules and/or conventions to magically apparate, Harry Potter style, apparently from nowhere. The 'Who Knew?' responses of learned folk schooled in history, the constitution and law were legion.

Whichever way Brexit goes we need the most significant reset of our constitution since the 1700s.

It really is not an acceptable position, wherever your political sympathies lie, to have reached a position where even legal 'experts' are genuinely suggesting that the Prime Minister could be committed to prison. The lack of any real certainty of the constitutional position and the lack of certainty of the consequences of 'breaking' it are dangerous.

We should not have reached a position where either The Speaker of the House or The Prime Minister could actually even try (as they both have) to make it up as they go along.

When the "lock him up" suggestions began we knew we weren't dealing with certainty. They were unwise without that certainty; and I noticed from a legal and political point of view that there was a certain amount of stepping back from that Trumpian world after its first outing.

If you believe the Prime Minister not sending a letter to the EU Commission means he goes to prison, you have to be certain of your immediate ground and it should not be the end of a complex concatenation of legal and constitutional events that it just "might" happen. Because that's all that could be said.

The fact that we couldn't be certain was the problem itself: it should be certain.

When a constitution is amended, that's what it should be: an agreed amendment to the constitution.

I'm not suggesting that those nations with written constitutions don't end up in constitutional disputes in the courts and wide ongoing debate about what the words mean. But we do at least have a starting point. We can't even agree what does and does not go to court. We end up with Judges who quite rightly want to be far from political territory skirting the edge and encroaching upon it.

So we go to court on powers of prorogation and the integrity of the advice to the Sovereign to do it. We look at WhatsApp messages and texts. We shouldn't be looking at messages and texts, we should be looking at clauses in a constitution.

So we assert that Parliament is sovereign – or is it?

The very fact that the EU cannot or will not actually deal with or negotiate with a member state's parliamentarians (understandably at the moment) is why we are here in the first place.

Nevertheless, parliament has legislated that the Prime Minister must (a) **seek** and also (b) **agree** to an extension, either to 31 January 2020 or another date suggested by the EU27, subject to that itself being approved by parliament. The previous parliamentary instruction to Prime Minister May did not include (b).

Can a parliament instruct the executive to do something against its will whether in a confidence majority or not? Is contempt of parliament the result? Or has the executive broken "the law of the land" and its top legal entity (and who he/she is) goes to prison?"

If the government intends to obey the law but "test it" in the courts, in which ways "test"?

I can only assume that the government has a few lines of legal attack here. That just because a parliament passes a law instructing an entity in the executive to do something it doesn't mean that entity has to do it, and then not until that entity chooses to. They might argue that, even when in a minority, it is the government until dismissed that actually is in charge of deciding when to enact or bring into

commencement this 'law of the letter', as with any other pieces of legislation.

It will clearly test the internal procedures of the house and whether the possible novations brought into being by the speaker are valid. Indeed, whether the speaker is the ultimate arbiter of the house's rules and thence the legislation that emerges from that decision.

The original decision to create Letwin Days to allow something other than the government to run the business of the house was, interestingly, never tested. That was because the constitutional rights and wrongs didn't then matter because Prime Minister May agreed on behalf of the government that she would send it anyway.

And when it was sent it did not require Royal Assent (nor did Letwin-Cooper) because the Prime Minister was acting under a prerogative power because only (a) and not (b) above was in the legislation. But because of (b) this one needed Royal Assent. (Who knew?)

Here was another Prime Minister, by the way, whose government was found to be in contempt of parliament.

Were Letwin Days legal? If not, does that then throw light on whether Standing Order 24 was legally used to introduce the latest 'law of the letter' legislation?

The Speaker stated that if Parliament was always **bound** by precedent "nothing would change and things do change". At the time the BBC's parliamentary correspondent Mark D'Arcy said it was a "massive ruling", made 'reportedly' against the advice of the Commons Clerk, Sir David Natzler. Speaker Bercow's attempted defence that MPs could always vote against the amendments was hardly a constitutional argument. So the Speaker may allegedly ignore the advice of his officials to do something. Is the Prime Minister now similarly so dispensed?

The problem is that none of this will get us much further. The constitution will be no clearer. Because it really is not upto the law and lawyers and judges to do that.

We need a constitution which takes into account the vast changes in our society and economy and culture. If we do not then I do not believe that the basic protections and expectations of a British citizen (or subject) have any certainty of protection. A new Magna Carta should be before us.

The lack of a proper 21st Century constitution means that our society and economy are fundamentally unbalanced. In our nations and our regions, there needs to be an understanding that our constitution, government and law are not ones designed by and for London and the South East. There need to be Regions' rights in a new constitution too.

Parliament itself should ultimately agree the new constitution.

Putting it to a referendum may not be the best option.

But it is now time to invent the ..... words.