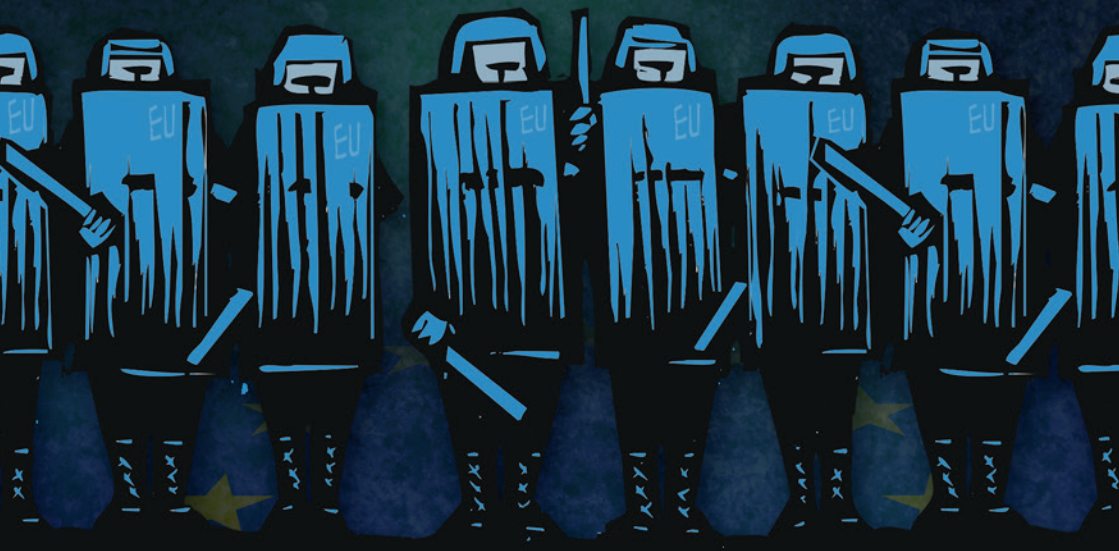
Dangers to National Security and Individual Freedom in Mrs May's "withdrawal" Agreement

Torquil Dick-Erikson



The Bruges Group
www.brugesgroup.com

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Published in December 2018 by

The Bruges Group, 246 Linen Hall, 162-168 Regent Street, London W1B 5TB
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About the Author

For the last 35 years Torquil has specialised as a legal journalist in comparative criminal procedure. He has been published in, amongst others, *The Independent, The Financial Times, The Wall Street Journal,* and *The New Law Journal.* He is the author of "The European Constitution against the British Constitution", with a Foreword by Nigel Farage MEP, and in 2010 another booklet "The Coming Tsunami" about the very different systems of criminal justice and of policing that the UK might have thrust upon it from Brussels, with a Foreword by Christopher Gill, Hon, President, the Freedom Association.

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Executive Summary

The Outline Political Declaration prefacing this “deal” says we share basic values with other EU nations and reaffirms our commitment to the ECHR. This is supposedly the ideological basis for the deal, which binds us closely to the EU for a “transition” period. However there are certain essential values that we do not share.

Our notion of personal freedom from arbitrary arrest and wrongful imprisonment is safeguarded by our Habeas Corpus laws. These are not shared by our EU partners and are not protected by the ECHR. This research gives a detailed explanation with reference to the articles of the ECHR and citing cases. Our system of criminal justice derives from Magna Carta, theirs from the Inquisition as adopted and adapted by Napoleon.

The ECHR even upheld a conviction in Austria for criticising Islam.

With the withdrawal agreement we remain subject to EU laws and the ECJ. Can we trust them not to abuse this power? They are in NATO, but not among the “Five Eyes” nations who share sensitive intelligence.

During transition we are subject to EU rules, but have no say in making them. The extension of the “transition” period as far as 2099 is up to the Joint Committee (art. 132). If no consent is reached, it must defer to Arbitration. The Arbitration Panel is subject to the ECJ, where the UK has no representation.

Can a new Parliament can repeal the agreement unilaterally, for “No Parliament Can Bind Its Successors”?

DANGERS TO NATIONAL SECURITY, AND INDIVIDUAL FREEDOM, IN THE "WITHDRAWAL" AGREEMENT

WARNING! IF VOTED THROUGH, THIS AGREEMENT WILL BE IRREVERSIBLE

PARLIAMENT WILL HAVE BOUND ITS SUCCESSORS TO THE EU, POSSIBLY INTO THE NEXT CENTURY.

I
"Shared Sovereignty", Based on "Shared Values"

Mrs Merkel, speaking to the Konrad Adenauer Foundation on Thursday 22nd November this year, said:

"In this day nation states must today – should today, I say – be ready to give up sovereignty."

This of course was always the idea at the root of the EU project. It has been called "sharing sovereignty" or "pooling sovereignty".

Some might say, What is wrong with that? After all, the UK can be called a "sharing of sovereignty between the peoples of England, Wales, Scotland and Northern Ireland".

Umm, er, yes, but…. could we share sovereignty with… just anybody?

Obviously not. The cultural and political make-up of some nations is so radically different from our own that it would have been unthinkable for us to share sovereignty with – say, Nazi Germany or Soviet Russia. Or Saudi Arabia today. Not that I am suggesting that the other member states' political cultures are as different from ours as that. However what I shall show is that they are more different from ours than is commonly appreciated.

Sovereignty can only be shared amongst peoples who share certain very basic values and principles.

Why am I dwelling on sovereignty and shared values when we are supposed to be leaving the EU anyway?

Well, this idea of "shared values" is announced in the opening paragraph of the Outline Political Declaration of Mrs May's draft "withdrawal agreement":

"1. Shared values including the respect for human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation, as essential prerequisites for the future relationship. Reaffirmation of the United Kingdom's commitment to the European Convention on Human Rights (ECHR), and the Union's and its Member States' to the Charter of Fundamental Rights of the Union. Support for effective multilateralism."

In passing we might say it is curious that a statement like this on "shared values" should precede a "withdrawal agreement", when it sounds more like the preface to a "joining agreement".

Be that as it may, this statement is unfortunately based on some misconceptions.

Of course when expressed in such vaguely general terms, we do share with our European neighbours a "respect for human rights and fundamental freedoms, democratic principles, the rule of law…". It is rather like when American politicians all say they are in favour of "motherhood and apple pie" (which is basically, a way of saying "we are in favour of … goodness"). Indeed we are partners together in NATO, formed after World War II to protect the "freedom and democracy" of Western nations against the threat from the East of Soviet totalitarian expansionism.

This Declaration goes on to reaffirm "the UK's commitment to the European Convention on Human Rights (ECHR)". This was signed in 1950 precisely to define some basic values, to be

asserted throughout Europe so as to prevent the monstrosities that arose in some European countries leading to the carnage of World War II.

We are indeed often told that it was "largely drawn up by British lawyers. So it must be OK for us."

The trouble is, for all countries in Europe to sign up to it, it had to accommodate very different traditions and ways of conceiving and ensuring "human rights". It is a minimum common denominator. Actually, as we shall see, sometimes very minimal indeed, especially when applied by the ECHR judges.

NOTE: Many British people who are not lawyers have a tendency for their eyes to glaze over and for them to "switch off" when legal matters are raised. However, it is important for you to please stay tuned and read on. If you care about matters of fundamental rights and liberties, you need to be aware that they are defined and decided by legal arguments and instruments. We must realise that these matters of law concern and affect us all, on issues that are fundamental to our lives. They are too important to be left to lawyers alone. Indeed it is MPs who actually create and amend the laws, and you do not need to be a lawyer to be an MP.

In fact one of the British legal system's great merits is that the essential decisions in criminal legal proceedings are not taken by lawyers or judges, but by ordinary citizens, sitting on juries or as lay magistrates, where they, and they alone, have the decisive say over whether the accused is guilty and should be punished, or not. This practice is enshrined in our Magna Carta, art. 39, "No free man shall be… punished … save by judgement of his peers…". Just as we entrust the choice, of who shall write the laws, to ordinary citizens when they elect members of Parliament, so, in our British conception of a democratic system, we ensure that ordinary citizens shall have the decisive say at the point where the laws impinge most violently on a person's life, by depriving them of their freedom. Our unique Magna Carta heritage LIMITS the power of the State, by taking away from it the power of deciding who shall and who shall not be punished.

Need I say that Brussels' proposal for a single criminal code for all Europe – the Corpus Juris project – envisages the abolition of both juries and lay magistrates (article 26.1, Corpus Juris, Ed. Economica 1997). Neither of these exists in recognisable form anywhere on the continent, as I shall show in greater detail below.

II
The European Convention and Court of Human Rights Does Not Protect the Right to Individual Freedom. It Does Not Include Habeas Corpus – Which Is a Right, Fundamental to Us, That Is Not Shared by Our European Neighbours.

Now, let us take a very basic human right – the right to individual freedom, freedom from arbitrary arrest and imprisonment. This is set out in the U.N.'s Universal Declaration of Human Rights, article 9:

ARTICLE 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Freedom from arbitrary arrest and detention is supposedly assured by the ECHR's articles 5 and 6:

The issue here is detention without trial, or lengthy pre-trial detention.

The ECHR article 5 says:

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

Various exceptions are then listed. The one that concerns us is:

5.1.(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

And article 6 says:

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

The aim should be to prevent an innocent person being whisked away into prison by the State, and kept there for long periods with no public hearing, and no serious grounds for doing so. If the State does have this arbitrary power, it can, and often does, use it to have political opponents put away.

Note that the European Convention, unlike the U.N. Declaration, does not use the word "arbitrary". We have an arbitrary arrest and detention when a person is arrested and imprisoned without any serious evidence of guilt having been previously collected.

The barrier against this happening is assured in Britain by our law of HABEAS CORPUS, under which persons who are deprived of their freedom can demand that EVIDENCE OF A PRIMA FACIE CASE TO ANSWER shall be exhibited in a public hearing before a court within HOURS or at the most DAYS after arrest. Traditionally this meant that the morning after arrest the prisoner should appear in a public hearing in a magistrates' court, where the prosecution could be called upon to exhibit the evidence already collected beforehand. If the magistrates are not convinced that the evidence is sufficient to warrant a trial, or if there is no evidence but merely a suspicion, based perhaps on clues, or evidence so flimsy as to be considered insufficient, the case is dismissed and the prisoner is freed there and then. The hearing and the debate on this matter is conducted in PUBLIC, since a fundamental maxim of British justice is that JUSTICE MUST NOT ONLY BE DONE, BUT BE SEEN TO BE DONE.

This provision of Habeas Corpus ensures that the investigators – the police – have to carry out their investigations BEFORE arresting a suspect, not after, as happens in continental jurisdictions.

There used to be an absolute time-limit, and only in cases of charges of terrorism, of seven days between arrest and this first appearance in a public hearing in open court. Some years ago there was a proposal to extend this limit to 90 days (three months). Battle was joined in Parliament over this controversial proposal.

David Davis MP argued most strongly against this extension and went as far as resigning his seat, and putting himself up for re-election on this very point. He was re-elected by his constituents. In the end a compromise was reached with the limit set at 28 days, and only for cases of terrorism.

This safeguard appears to be preserved by the European Convention's articles 5 and 6. However, it all hinges on what is understood by the word "reasonable", in the context of "reasonable suspicion" and "within a reasonable time".

For us in Britain a reasonable time would be a matter of hours, or at the very, very most, and only in extreme terrorist cases, 28 days. This provision of Habeas Corpus ensures that the police have to collect evidence of guilt before carrying out an arrest, since the arrest must be speedily followed by a formal charge and the charge must be based on evidence, and the evidence must be sufficiently substantial to convince a bench of magistrates that there really is a serious case to answer.

In continental Europe, in contrast, people are regularly arrested and held for months, and sometimes longer, in prison before their first public hearing. This is considered "reasonable" in those systems. The reason is that they can and often do prefer to arrest a suspect at the outset of their investigations, on the basis of mere clues, not evidence, and then they seek evidence of guilt to commit the suspect to trial afterwards, while he or she is safely under lock and key. We shall see that this inquisitorial, not to say inquisitional, method of investigation, with its total disregard of our basic Habeas Corpus rights is perfectly acceptable to the ECHR.

Of course an investigation can take several months, whether the suspect is in prison or not. Since many continental judiciaries prefer to investigate cases with the suspects in prison, they will have to sit in prison for all this time, pending conclusion of the investigation.

So this is why a six-month time limit, renewable for three months at a time, an unspecified number of times, is considered "reasonable" in the project for a single uniform embryo criminal code for the whole of Europe, called "Corpus Juris" (see CJ art. 20.3.g). The Corpus Juris project was devised at the behest of the Commission, and presented at a special seminar in Spain, which I attended, in April 1997.

During the seminar, I stood up and asked the assembled jurists why they had decided to adopt the Napoleonic-inquisitorial system of criminal justice for all Europe, rather than our own Magna Carta-based system. There was an embarrassed silence for about ninety seconds, an elderly Spanish judge mumbled something about juries being important for the English, and then they said "Next question please." So our 800 years of legal history and institutions defending individual freedom were to be written off with no debate nor explanation, by Brussels.

Luckily this proposal was rejected by – even – the very Europhile Blair government, for Kate Hoey MP, Home Office Minister at the time – bless her cotton socks! – promised Parliament they would veto it if it were ever formally proposed. This was followed by a weighty Report on Corpus Juris by a House of Lords Committee (1999 – HL62) , chaired by Lord Hope of Craighead, which rejected it. Since then the project has been put aside but not abandoned.

For further details on this project, readers may wish to view the debate I held in February 1999 against the British co-author of Corpus Juris, Law Professor John Spencer QC, of Selwyn College, Cambridge. The debate was held in Cambridge, on his home turf. I am glad to say that my motion, that "Corpus Juris is a threat to our civil liberties" was carried by 39 votes to 4. One of those voting for my motion was a stipendiary magistrate with long experience, Eric Crowther. The debate was videoed, and can be viewed on Youtube, at https://www.youtube.com/watch?v=UK1vZ0i79oc&t=11s.

The reason why people are arrested and imprisoned for such long periods with no public hearing in continental countries is that the first step in a criminal investigation over there is often to arrest and imprison the suspect, and then seek evidence to build a case against him (the hearing to decide on committal to trial is not held in public); rather than, as in Britain and other English-speaking countries, first to seek evidence and, only when enough evidence of guilt has been found, to arrest and charge the suspect, who at that point becomes a defendant.

The two methods of proceeding are diametrically opposed. Which does the European Convention and Court of Human Rights espouse?

There was a case in Italy in the early 1980s, of an Italian Law Professor, Luciano Ferrari Bravo, who was arrested (together with many members of the faculty of Political Science of Padua University) on suspicion of being the brains behind the left-wing terrorist group known as the Red Brigades. Many of them were kept in prison for five and a half years before their first verdict. This was allowed under Italian law at that time. After 4 years and 11 months in prison Prof. Luciano Ferrari Bravo took Italy to the European Court of Human Rights, to see if they considered such a long time in prison to be "reasonable" under the terms of article 5.1.c, which provides for "reasonable" suspicion being a requirement to hold someone in detention before trial, and article 6 which provides for not more than a "reasonable" time to elapse from the moment of arrest and imprisonment to the first appearance in court in a public hearing.

In English terms, the "reasonable suspicion" would be the production of sufficient evidence to show that there is a prima facie case to answer; and Habeas Corpus, by guaranteeing a very speedy

public hearing after arrest, where the grounds for "reasonable suspicion" are to be shown, ensures that the evidence is serious enough to show, not conclusive guilt, but that there is a serious case to answer.

The continental view is completely different.

The Court threw out his application.

The opening lines of the decision by the ECHR read:

Artlcle 5, paragraph 1(c), of the Conventfon : !t cannot be required in order to justify arrest and detention on remand that the existence and the nature of the offence of which the person concemed is suspected be established since that is the aim of the investigation the proper conduct of which is facilitated by the detention.

The applicant was also pleading that 4 years and 11 months was not a "reasonable" time:

This argument was also rejected by the Court:

In this connection, the Commission stresses that there can be no question of regarding arrest or detention on remand as being justified only when the reality and nature of the offences charged have been proved, since this is the purpose of the preliminary investigations, which detention is intended to facilitate (Decision No. 8339/78, Schertenleib v . Switzerland, D .R . 17 p . 180) .

(see APPLICATION N° 9627/8 1 Luciano FERRARI-BRAV O v/ ITALY DECISION of 14 March 1984 on the admissibiliry of the application Page 37)

Note: it says here that in the view of the European Court of Human Rights,

"detention is intended to facilitate … the preliminary investigation".

Now is this compatible with our idea of the presumption of innocence? It sounds like an echo of the old inquisitional method of holding someone in captivity and torturing him until he confesses. Indeed prison conditions, though not amounting to deliberate torture, can be highly stressful and damaging to a person's mental (not to mention physical) equilibrium, and can induce a person to say whatever he thinks the investigators want to hear. In any event, lengthy preliminary detention is surely a punishment that is being meted out prior to conviction, and therefore can only be justified if based on a de facto presumption, in advance, that the suspect is guilty.

This appears to us, in Britain, as not only unjust, but unfair and repugnant to our common sense.

The presumption of innocence is a value to which continental systems, and the ECHR itself, do pay lip service. The Italian and French constitutions, for example, do say that a suspect or defendant must be "considered" innocent until the final verdict of guilt has been pronounced. However none of this appears to prevent them from treating suspects as if they were guilty. The de jure presumption of innocence written into their laws can be flatly contradicted by a de facto presumption of guilt when the laws are applied.

It is worth noting in passing that the whole case was followed closely by Amnesty International which published a Black Paper with very serious criticisms and condemnations of various aspects of the conduct of this case by the Italian judicial authorities.

And it is worth recording that at the end of his years of trials and tribulations, Professor Ferrari Bravo was actually acquitted on all counts. So the Italian courts themselves did recognise in the end that he was innocent, and that he had suffered years of incarceration quite needlessly.

So how can we say that the presumption of innocence is one of the values that we share with our European neighbours, as the Political Declaration surely implies? If this kind of legal system can fit in with their notion of "respect for human rights and fundamental freedoms", it surely does not fit in with ours.

The truth is that the European Convention on Human Rights is a thin blanket, designed to cover systems that are radically different. The differences go back at least 800 years – when we had Magna Carta which limited the powers of the Authorities over the individual, they got the Holy Inquisition, which increased and deepened those powers, and the methods of which were swiftly adopted by the absolutist secular rulers of the time, all over the continent. The French Revolution swept away much of the old order, but it was soon taken in hand by Napoleon, whose codes – still the basis of many European countries' laws today – did not reject the inquisitorial basic principles, but adopted and adapted them from service of the church to service of the State. I give greater details in my essay "Magna Carta and Europe", on the official Magna Carta celebratory website: https://magnacarta800th.com/articles/magna-carta-europe-yesterday-today/

(My essay is prefaced by a disclaimer by the Trust and the Committee. I wrote and asked them for reasons why my contribution, alone, had been subjected to a disclaimer, but received no answer.)

III
Our Idea of "freedom of Speech" Is Not Shared by All Our EU Neighbours, and Is Not Protected by the ECHR.

Another "fundamental freedom" which is highly valued in the United Kingdom, and presumably is or ought to be amongst the "shared values" referred to in the Political Declaration is Freedom of Speech.

Freedom of speech has been abridged and curtailed to some extent even in the UK in recent years, with the controversial "hate speech" laws.

However, the European Court of Human Rights has gone further.

In Austria, in 2009, a woman, Ms Elisabeth Sabbaditsch-Wolff, said in a meeting that the prophet Mohammed married a girl aged six and had sex with her when she was nine. This is recorded in Islamic scripture and is not controversial as a historic fact. She added words to the effect that he was therefore a paedophile. Under the laws of most civilised modern states anybody who has sex with a child aged nine will indeed be condemned for paedophilia, or statutory rape. In Austria however there are laws protecting religious sensitivities, and they are evidently considered to be prevalent over the protection of freedom of speech. She was convicted. She appealed to the highest courts in Austria, where her conviction was upheld. She then applied to the ECHR, on grounds that her freedom of speech, supposedly protected by article 10 of the European Convention, had been violated by the Austrian courts. Her application was thrown out. The judges of the European Court of Human Rights agreed with the Austrian courts that her right to freedom of speech had to be limited by the right of Muslims to have their religious sensitivities "respected".

There is a major problem for those who wish to uphold the European Convention as a yardstick for measuring our basic values and conceptions on Human Rights. It is that the Convention is interpreted by the Court, which is made up of judges appointed by the governments of the 47 signatory countries. The judges are therefore political appointees. Many of these governments still have highly questionable records on human rights. Many, even of those in the European Union, grew up and learnt about Right and Wrong, and did their law school, under appalling dictatorships. And even those who have been democracies since 1945, have a very different historic tradition from ours, going back 800 years as I explained in my Magna Carta essay, linked on page 6 above.

Another problem is that the decisions of the European Court of Human Rights are final. There is no route of appeal against them.

Some argue that the UK should necessarily withdraw from the ECHR, as well as from the EU. Against that it has been said that this would place us alongside Byelorussia, "the last European dictatorship", which is not a signatory of the ECHR.

However it could also be said that it would place us alongside Australia, Canada, New Zealand, which are not signatories either. They are not eligible to sign up to the ECHR, although their standards of human rights are surely as high as anywhere in the world. But then they are not European.

IV
How Far Can We Trust Our EU Partners in the Long Term?

Theresa May's "withdrawal agreement" has been criticised for leaving the UK "half-in and half-out" of the EU.

Indeed it does. We get the worst of both worlds. The "half-in" is that we remain subject to all the EU's rules, regulations, laws and directives. The "half-out" is that we lose our present – albeit paltry – representation in the EU's council, Parliament and Commission, so we have no voice at all in deciding what the obligations shall be – not only as they stand at present, but also as they may be modified in future by decisions taken without our consent or participation.. This position as a mere rule-taker without also being a rule-giver, is what is meant by "vassal status". We will therefore be governed more or less like a colony.

So how far can we trust the other nations of the EU to treat us fairly, if we are going to grant them a right of governance over us?

I have shown that there are some values, in particular concerned with individual freedom, that they do not share with us. There are other nations, beyond Europe, with whom we do share these values, for we are bound by a shared history.

It might be of interest to consider in this regard the "Five Eyes" partnership. This consists of five independent countries – Australia, New Zealand, Canada, the UK and the USA. These five nations trust each other enough to share highly sensitive intelligence information. They fought side by side in World War II to defeat the Nazi-Fascist dictatorships that dominated continental Europe. They all speak English as their native, official, language. And they all share not only our

democratic values and traditions of universal suffrage, plurality and free competition of political parties and media, private property, and freedom of thought and speech, but also our specific and unique Magna Carta heritage, protecting innocent persons from arbitrary arrest and wrongful imprisonment, by means of trial by independent jury and Habeas Corpus, together with other important procedural safeguards.

They consist of Great Britain and four former British colonies. They used to be united politically in the British Empire and governed from London. With three of them we did not insist on remaining together in a political union. Australia, New Zealand and Canada were all granted independence with a peaceful transfer of sovereignty. The United States fought a war to gain its independence, some 250 years ago. That was independence from Britain, yes, but in the name of principles – such as No taxation without Representation, the inborn Rights of Man, and others – that had been developed in Britain and that the American colonists felt were not being observed by the mother country. Indeed the USA reveres Magna Carta to this day, and shares with us the traditions of Trial by independent jury and Habeas Corpus, which are not shared by our partners in continental Europe.

Most of our continental EU fellow-members belong to NATO. None of them belong to the Five Eyes.

V

How Long Will Our Subjection to EU Supremacy Last? – the Deceptive Mechanism in the Agreement Whereby This Subjection Can Be Extended Till the End of the Century, Without Our Consent.

It is true that under this "withdrawal agreement" our subjection to the powers and the decisions of our EU neighbours will persist for what appears to be a limited time – the so-called "transition period", and this is what enables Mrs May to go before the cameras and say, with a straight face, "We will … take back control of ours borders, our laws, our money…etc". The trouble is that this transition period can be extended, and we cannot resile from it unilaterally. "We will…" she says. OK but how soon? In the next century?

Let us look at some detail.

The "transition or implementation period" of the Agreement ends, according to article 126 (page 196), on 31st December 2020, so is to carry on for another 21 months after 29th March 2019, date of our formal exit from the EU as a full member.

During this transition period, the UK shall be in a state of rigorous subjection. We read on page 207:

ARTICLE 131

Supervision and enforcement

During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties.

The first paragraph shall also apply during the transition period as regards the interpretation and application of this Agreement.

But it does not even end necessarily in 2020. It may even be extended to the year "20XX" ie, we may continue to be in this state of subjection to Brussels as far ahead as into 2099.

We come to Article 132:

ARTICLE 132

Extension of the transition period

1. Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period up to [31 December 20XX].

Now, will we be able to veto a decision to extend this "transition period"?

Well, the decision will be up to a "Joint Committee" which is entrusted with the management and supervision of the implementation of the transition agreement itself. The Joint Committee is established in Article 164 (page 274):

ARTICLE 164

Joint Committee

1. A Joint Committee, comprising representatives of the Union and of the United Kingdom, is hereby established. The Joint Committee shall be co-chaired by the Union and the United Kingdom.

What are the tasks and powers of the Joint Committee?

ARTICLE 166

Decisions and recommendations

1. The Joint Committee shall, for the purposes of this Agreement, have the power to adopt decisions in respect of all matters for which this Agreement so provides and to make appropriate recommendations to the Union and the United Kingdom.

2. The decisions adopted by the Joint Committee shall be binding on the Union and the United Kingdom, and the Union and the United Kingdom shall implement those decisions. They shall have the same legal effect as this Agreement.

3. The Joint Committee shall adopt its decisions and make its recommendations by mutual consent.

Now, what happens if no mutual consent can be reached on a particular issue? Well, the parties must then have recourse to an Arbitration Panel (no other method is allowed, article 168 – Exclusivity):

ARTICLE 170

Initiation of the arbitration procedure

1. Without prejudice to Article 160 [refers to jurisdiction of the ECJ] , if no mutually agreed solution has been reached within 3 months after a written notice has been provided to the Joint Committee in accordance with Article 169(1) [refers to attempts in good faith etc], the Union or the United Kingdom may request the establishment of an arbitration panel.

The Arbitration Panel has five members, drawn from two lists of possible members each provided by the EU and by the UK, and a shorter list of possible chairmen chosen by joint agreement (Article 171). Any Panel will have two members from each list, and a chairman chosen by mutual agreement, or failing that by the Secretary General of the Permanent Court of Arbitration by lot from amongst the joint short list of possible chairmen.

Now, can the Arbitration Panel decide freely, according to its own judgement and no other?

NO, it cannot. We have Article 174 (page 286):

ARTICLE 174

Disputes raising questions of Union law

1. Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2) [Refers to Binding Force and Enforceability], the arbitration panel shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel. [Emphasis added]

Now the Joint Committee and the Arbitration Panel are bodies where the UK has an equal voice with that of the representatives of the EU. But in the European Court of Justice the only voice is that of the EU alone, of which the UK is no longer a part, having lost even its voice as a minority of one. And the ECJ is not an impartial body that decides solely according to the pre-established "law". Its mission statement enjoins it to further the interests of the EU in all cases, and the "ever-closer union of the peoples of Europe".

Since any dispute of any importance will inevitably involve a "question of interpretation of a concept of Union law", all cases will inevitably be referred to the ECJ. A court where the UK has no voice and no friends.

Thus the whole apparatus of Joint Committees and Arbitration Panels is in effect a façade, to mask the hard fact that the implementation of this whole Agreement will be decided by the EU side, and the UK will simply have to submit.

Not only the day to day matters, which supposedly will run out by the end of 2020; but the all-important matter of the extension of the implementation period, which can thus be extended, against our will, till the end of this century. We have seen that this extension is to be governed by the Joint Committee, which in case of disagreement has to submit to the Arbitration Panel, which on all matters concerning EU law must submit to the ECJ

Look again at article 132. Let us suppose that the EU side of the Joint Committee proposes that the transition be extended till 2099. The UK side objects and says No. The required "mutual consent" (Art. 166.3) is therefore lacking. So the matter then goes to arbitration. The Arbitration Panel refers the matter to the ECJ which says, "Yes, the transition shall be extended to 2099".

End of story. End of 1600 years of self-government of these islands. Restoration of our status as the subjugated Province of Britannia, which is what we were for 350 years, from the Roman conquest in the first century AD until the Legions left our shores in 410 AD.

VI
Can We Escape?

Ah, but, at that point, someone, it is hoped, in Westminster, will remember that the fundamental rule of our Constitution is that No Parliament Can Bind Its Successors.

If this Withdrawal Agreement comes into force its validity for the UK will rest on the fact that our Parliament will have passed an Act to approve it. Therefore, under our Constitution, the British people can elect a new Parliament that can pass another Act to repeal the Act of approval. This is the whole point of our idea of democracy: the People are sovereign, and if they do not like what one lot of politicians has done, they can kick the rascals out by electing a fresh lot, who must be free to undo the mischief done by their predecessors.

I remember several years ago discussing this matter with an Italian expert on EU law working for the Italian Senate. When I told him this was a basic rule of our Constitution, he said flatly he did not believe me. "It cannot be so" he said, "In each member state the treaties are signed by the government of that day and ratified by that Parliament, but they are binding on all the successive governments and parliaments of each signatory." He added, "If it were as you say, then the UK's adherence to the Treaty of Rome would have been invalid from the very beginning."

Indeed, this is the position of some British constitutionalists, that it was illegal for Heath to sign the Treaty of Rome in the first place. In that case, then all our contributions to the EU budget ever since were illegal, and should be given back to us! Absolutely no question of us having to pay them billions of pounds for an exit ticket…

Up until the Treaty of Lisbon the Treaties in fact made no provision for a member state to leave. It was always assumed in Britain, and occasionally stated in Parliament, that we could leave anyway under our own Constitution. Then with Lisbon we got Article 50 (originally this "Exit clause" was inserted into the draft European Constitution, which was ditched by the French and Dutch referendums, and then resurrected in substance and repackaged as the Lisbon Treaty).

After we voted to leave on 23rd June 2016, the government decided to follow the route indicated in Article 50 of Lisbon in order to implement the decision of the people. However, under the terms of our own Constitution, our Parliament was not legally obliged to follow this route. Our Parliament could have unilaterally rescinded the European Communities Act 1972 together with the subsequent amending Acts which incorporated subsequent Treaties, and could have decided that we should therefore leave the EU with immediate effect, not waiting two years as prescribed by Article 50.

It has also been argued that we were entitled to do this under the Vienna Convention's provisions on treaties signed in bad faith etc.

The ruling by the Appeal Court judges Laws and Crane in the Metric Martyrs' case, that constitutional provisions trump ordinary Acts of Parliament unless they are explicitly repealed in

the wording of an Act, is a precedent which applies to subsequent judgements. Since Parliament did not explicitly revoke its own supremacy when passing the ECA72, and indeed since the one thing it cannot do is to revoke its own supremacy according to several constitutional commentators, it maintains its supremacy "within the realm of England" (as the original 16th century Act of Supremacy says, later extended to the whole UK).

So under our own laws we could withdraw unilaterally even without invoking the Vienna Convention on Treaties.

The "Withdrawal Agreement" does not contain any clauses whereby Parliament has explicitly revoked its own supremacy. Therefore, even if Parliament is so foolhardy as to approve it now, it, or a future Parliament, remains free, under our constitution, to repeal the Act of Approval of the Agreement whenever it thinks fit.

And even if the present Parliament had explicitly revoked its own supremacy, a subsequent Parliament, if so minded, could repeal that Act in any case and restore the Act of Supremacy.

VII
However the EU Will Surely Object and Will Try to Stop Us.

At that point two basic principles and powers will collide.

On the one hand we will have the British constitutional position, under which our Parliament is always free to undo any Act passed by its predecessors.

Ranged against this will be the EU's position, promoted also by the EU's friends and supporters in Britain, which will say that the Withdrawal Agreement must be honoured. They may even quote the Latin tag "Pacta sunt servanda" ("Agreements Must Be Kept").

Who will win?

The British constitutionalists would take the matter to our Supreme Court, which would doubtless rule that, following Laws and Crane (see the Metric Martyrs case), since the Act ratifying the "Withdrawal Agreement" did not explicitly repeal our basic constitutional provision that No Parliament Can Bind Its Successors, a new Parliament is still free and sovereign and able to repeal that Act, with untrammelled power to do so unilaterally.

The supporters of the EU position will say that our Supreme Court is not competent to decide, the matter must go to the ECJ. Which would surely give an opposite ruling.

This is when the collision is resolved by the powers of enforceability available to each side.

The legal use of force, violent force, even lethal force, is and always has been a prerogative of sovereign bodies, whether Kings in days of yore, or modern States.

If a private person or body takes someone and locks them up against their will, manhandling them roughly if they resist, that is kidnapping.

If officers of the State do exactly that, under the criminal laws of the State, it is called justice.

VIII
The Crucial Role of Security in the Issue of Sovereignty

"Security" has two parts – internal security, assured by the criminal law and the police and prison system, and external security, assured by the armed forces. They both use enforcement powers, on behalf of the State. These two parts are usually distinct, but sometime they overlap, when the armed forces intervene to help the police with internal security (as in Northern Ireland during the "troubles").

Now, people in Britain see internal security as being about keeping people safe, from criminals and terrorists. And nothing else.

And we think of "Defence" as being about something that happens "overseas", of little concern to the man in the street.

Uniquely, in Britain (let us say, mainland Britain), we have had peaceful political development for centuries. Command of the State has been determined by elections, with an ever-expanding suffrage. We therefore think that gaining and keeping power is all about winning over hearts and minds, and therefore media air-time, column inches and votes are the keys to power.

In contrast, the peoples of continental Europe, have all, in living memory, witnessed violent changes in their governments. They are aware, far more than us, that the State is the sole body in society, that has a monopoly on the legal use of violent force on the citizens. Control the means of violent coercion in a State, and you control the country.

Indeed Mao Tse Tung is known to have said, "Power springs from the barrel of a gun". And Stalin, "You can run a country even if you have the support of only 10% of the citizens, provided your 10% have guns, and the other 90% do not."

The EU has always aimed to become a single State, a "country called Europe" as Helmut Kohl put it. Some years ago, Romano Prodi, President of the EU Commission, exclaimed: "We now have the currency. We need the sword!"

So what are the components of "State security", that make up the "sword"? They are:

1. **Armed forces**, commanded by the government, comprising army, navy, air force, etc, to defend the State from other hostile States and external enemies; they are obviously equipped with necessary weaponry – instruments of lethal force;
2. P**olice and prison systems**; these are instruments of coercion over the bodies of the citizens of the State, used to force citizens to do things against their will. Normally against criminals, but can be used against political opponents.
3. All the continental European countries have **centrally commanded, recruited and deployed, paramilitary, lethally-armed, riot-police batallions,** to be used for crowd control, and quelling strikes, rebellions or mass disobedience.
4. We in Britain have nothing like that. We have **over 40 local constabularies**, of policemen and women who, since their inception under Sir Robert Peel in the 1830s, are traditionally and normally unarmed, locally recruited and deployed, locally accountable, and tasked with crime detection and prevention.

5. All modern States have **criminal laws and legal procedures** to regulate the use of force on people within the country. Again the continental States follow a very different tradition from ours – theirs is the **Napoleonic-inquisitorial** tradition whereby the criminal laws are basically oriented to enable the central State power to impose its will on the populace; ours is the tradition of **Magna Carta** whereby the law is also used as a shield to protect the ordinary people against the otherwise overweening and potentially arbitrary powers of the State.

The EU does not yet have its "sword". It wants to get it. They have the single currency, but without EU fiscal powers to match, it will not work. Fiscal powers means the ability to make people pay taxes, against their will, by coercion. So they need the sword, for economic as well as political purposes.

In 1997 Brussels launched the Corpus Juris plan for a single criminal code for all Europe, on Napoleonic-inquisitorial principles. It would have jettisoned our own safeguards of Trial by Jury, Habeas Corpus and No double jeopardy. Luckily the UK stopped it.

However we accepted the European Arrest Warrant, which is the first step towards EU-wide coercive powers. The EAW can be used not just against criminal suspects, but against political opponents, e.g. Catalan separatist politicians.

In Scotland, Professor Clara Ponsati, a lecturer at St Andrews University who had been Education Minister in Mr Puigdemont's separatist Catalan cabinet, was the target of a Spanish EAW charging her with "violent" rebellion against the powers of the State, a charge which put her at risk of 30 years imprisonment. In Germany, Puigdemont himself was the target of another Spanish EAW. Ponsati's lawyer in Scotland was preparing to fight the EAW vigorously. He could have invoked the precedent set by Laws and Crane to have the EAW described as repugnant to the British Constitution and therefore struck down. We shall not know if this would have happened, for Spain withdrew the EAWs against the Catalans who had sought exile in other EU countries. Perhaps Madrid (or Brussels) wished to avoid the possible embarrassment of seeing the EAW struck down by a Scottish court.

Further details on why the EAW is repugnant to Magna Carta and to our constitution can be found here:

https://www.brugesgroup.com/blog/two-things-that-are-not-generally-known-about-the-european-arrest-warrant-and-how-it-could-be-struck-down

IX
The Danger of EU Enforcement Agents on British Streets

Mrs May wants to keep us in Europol, and in the EAW, as per Article 62 of the draft Agreement.

She has also stated, in Parliament, her willingness to "of course" welcome EU gendarmerie units onto British soil "if needed". This would be fatal. Here is the exact quotation from the Hansard of what she said, through her mouthpiece the Home Office Minister, when she was Home Secretary:

Criminal Proceedings: EU Law
(Hansard, written answers for 11/06/2012)

Mr Raab: To ask the Secretary of State for the Home Department with reference to EU Council Framework Decision 2008/675/JHA, in what circumstances she envisages that the **UK would request special intervention units from other EU member states to operate on UK soil.** [110125]

James Brokenshire: The United Kingdom's response to any incident will be individually tailored to the nature and scale of that incident. Should we identify the need to seek the support of our allies in managing a crisis situation, **we would of course do so.** [emphases added]

The main point about this incredible, reckless, statement, is that lethally-armed, paramilitary EU forces – for that is what the "special intervention units" will be – once allowed onto British soil, will not leave if asked to by a merely British authority, for they will acknowledge allegiance only to their Masters in Brussels.

If there arises a dispute before the ECJ as to the legitimacy of an Act by the Westminster Parliament, and the ECJ decides that the Act in question is illegitimate, the Eurogendarmerie, present on British soil by a foolhardy decision of our Prime Minister, will enforce the decision of the ECJ. We could see scenes in the Commons such as have not been seen since Cromwell's Ironsides marched in, or when King Charles I entered with his men-at-arms to arrest some Members.

More details on the dangers of EU gendarmerie on British soil, here:

https://www.brugesgroup.com/blog/eu-militia-on-british-streets

X
Defence, and Defence Procurement

The group Veterans for Britain, led by several high-ranking officers from our armed forces whose names are listed on their website, have done an excellent job in flagging up the project for a unified EU army which Mrs May appears to want us to join.

They have expressed their concerns in detail, here: http://veteransforbritain.uk/macroneuarmy/ , in a piece dated 10th November last, titled "EU MILITARY HAS STARTED AND WE MUST ESCAPE"

Most people in Britain fear that if the British army were amalgamated into an EU army, this would mean British soldiers being deployed in overseas conflicts decided in Brussels, not Westminster. This of course is one danger.

A greater danger, is that in a unified EU defence force, British units would be stationed, say, on the Ukrainian frontier, while Rumanian and Latvian tank units would be deployed in Aldershot and on Salisbury plain. There they would be, ready to move around Britain on the orders of

Brussels, to quell any anti-EU demonstrations or protests, "as and when needed". Together with the Eurogendarmerie, as Mrs May said she would "of course" call on.

I know this sounds outlandish to British ears. But if we grant any control over our security arrangements to bodies outside our land, we must be prepared for outlandish scenarios.

The military in any country clearly have the physical ability to take over the government of that country, dismissing the civilian government and imprisoning or even killing its members. In well-regulated democracies this is never expected to happen. In Europe it happened in Spain when General Franco rose up against the civilian Republican government, started the civil war in the 1930s, and won it, ruling Spain until his death forty years later; and in Greece the army Colonels took over the government and ruled the country for several years in the 1960s and '70s. It happened regularly in many Latin American countries for several decades, indeed the Spanish word Golpe is used as an equivalent of the French expression coup d'état.

If a foreign power with claims to rule a territory controls the military in that territory, it can be supposed that it will use this power to exercise its claim. For example, many in Catalonia want independence from Spain. The local government tried to hold a referendum to decide the matter on October 1st 2017. The central government of Spain claimed this was illegal, and we all saw how the Spanish paramilitary police force, the Guardia Civil, was sent in to physically assault the voters in the streets to stop them from voting. (Brussels by the way expressed no disapproval of this heavy-handed intervention by a member State). The ring-leaders, elected members of the local government, either sought refuge abroad, or have been in prison ever since (no Habeas Corpus in Spain) awaiting trial on charges which carry sentences of 25 years or more.

And by the way, the Guardia Civil are Spain's contribution to the European Gendarmerie Force.

In a debate with Nigel Farage a few years ago, Nick Clegg said that Farage's talk of a "European Army" was a "dangerous fantasy". Well dangerous, it is, but not a fantasy. Both French President Macron and German Chancellor Merkel are calling for one.

And on all evidence, Mrs May is willing to go along with them. She has spoken of a Security Treaty to be signed with the EU and to last indefinitely into the future, after Brexit. This will comprise our membership of Europol and acceptance of the European Arrest Warrant, as well as the eventual merging of our armed forces into the EU's Defence and Security Policy.

As Veterans for Britain say, the current debates focussing solely around trade and money are really a red herring, in comparison.

The withdrawal agreement currently being debated does not directly mention the merging of our armed forces with those of the EU. However, there is a Title in the Agreement on rules for Public Procurement.

The armed forces of a sovereign State serve to ensure the continuation of the sovereignty of that State, from possible attacks or encroachments from other States. It therefore needs security of supply of the materiel or military hardware and equipment it requires to carry out its tasks. This security of supply is best ensured when it can source its materiel from within its own borders.

If Parliament ratifies this Withdrawal Agreement this will not be possible. We will have handed over the keys to our armoury to the EU. They will be able to cut off our military supplies whenever they choose.

This will apply to military supply contracts, as specified in Article 75.1:

ARTICLE 75

Definition

For the purposes of this Title, "relevant rules" means the general principles of Union law applicable to the award of public contracts, Directives 2009/81/EC (1)…

Footnote (1): Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security,…

Article 76.2 states:

76.2. Without prejudice to the application of any restriction in accordance with Union law, the non-discrimination principle shall be complied with by contracting authorities and contracting entities with regard to tenderers or, as applicable, persons who are otherwise entitled to submit applications, from the Member States and the United Kingdom in relation to the procedures referred to in paragraph 1.

"Non-discrimination" means that any EU supplier may compete for defence contracts put out for tender by the UK, which is banned from excluding them or insisting that only UK firms, or say firms from Five Eyes countries, may compete.

XI
European Justice Will Rule Supreme

Lastly as a catch-all provision, we have a blanket authority entrusted to the ECJ:

TITLE X

UNION JUDICIAL AND ADMINISTRATIVE PROCEDURES

CHAPTER 1 JUDICIAL PROCEDURES

ARTICLE 86

Pending cases before the Court of Justice of the European Union.

1. The Court of Justice of the European Union shall continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period. Such jurisdiction shall apply to all stages of proceedings, including appeal proceedings before the Court of Justice and proceedings before the General Court where the case is referred back to the General Court.

2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period. [Emphasis added]

Since the EU side evidently anticipates that the UK will need extra disciplining, they have added the following:

ARTICLE 87

New cases before the Court of Justice

1.If the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties or under Part Four of this Agreement before the end of the transition period, the European Commission may, within 4 years after the end of the transition period, bring the matter before the Court of Justice of the European Union in accordance with the requirements laid down in Article 258 TFEU or the second subparagraph of Article 108(2) TFEU, as the case may be. The Court of Justice of the European Union shall have jurisdiction over such cases.

2. If the United Kingdom does not comply with a decision referred to in Article 95(1) of this Agreement, or fails to give legal effect in the United Kingdom's legal order to a decision, as referred to in that provision, that was addressed to a natural or legal person residing or established in the United Kingdom, the European Commission may, within 4 years from the date of the decision concerned, bring the matter to the Court of Justice of the European Union in accordance with the procedural requirements laid down in Article 258 TFEU or the second subparagraph of Article 108(2) TFEU, as the case may be. The Court of Justice of the European Union shall have jurisdiction over such cases

And by the way, Article 95(1) referred to above, says:

ARTICLE 95

Binding force and enforceability of decisions

1.Decisions adopted by institutions, bodies, offices and agencies of the Union before the end of the transition period, or adopted in the procedures referred to in Articles 92 and 93 after the end of the transition period, and addressed to the United Kingdom or to natural and legal persons residing or established in the United Kingdom, shall be binding on and in the United Kingdom.

3. The legality of a decision referred to in paragraph 1 of this Article shall be reviewed exclusively by the Court of Justice of the European Union in accordance with Article 263 TFEU. [Emphases added]

Note: The possibility that, in a dispute between the UK and the EU, the European Court of Justice might decide in favour of the UK and against the EU, is not even contemplated. We are clearly not to be considered equal parties before that court. So much for the EU's lop-sided idea of "impartial justice"! Cases where the UK might consider that the EU side has "failed to fulfil an obligation" are nowhere provided for. These articles spell out very clearly who is to be boss.

The EU Commission is the Headmaster, and we the Brits are the recalcitrant schoolboys who will surely need to bend over and feel the crack of the whip.

How Theresa May must have grovelled when she got down on her knees to sign this abject Act of Surrender.

If the Parliament elected by the British people ratifies it, we shall deserve to terminate our centuries as a proud independent country, for we shall have delivered ourselves to become once more the off-shore "Province of Britannia" ruled by a foreign power imposing alien laws on us, as we were two thousand years ago.

Shakespeare had it thus:

"England … is now bound in with shame,
With inky blots and rotten parchment bonds:
That England, that was wont to conquer others,
Hath made a shameful conquest of itself."

THE BRUGES GROUP

The Bruges Group is an independent all–party think tank. Set up in February 1989, its aim was to promote the idea of a less centralised European structure than that emerging in Brussels. Its inspiration was Margaret Thatcher's Bruges speech in September 1988, in which she remarked that "We have not successfully rolled back the frontiers of the state in Britain, only to see them re–imposed at a European level…". The Bruges Group has had a major effect on public opinion and forged links with Members of Parliament as well as with similarly minded groups in other countries. The Bruges Group spearheads the intellectual battle against the notion of "ever–closer Union" in Europe. Through its ground–breaking publications and wide–ranging discussions it will continue its fight against further integration and, above all, against British involvement in a single European state.

WHO WE ARE

BRUGES GROUP MEETINGS

The Bruges Group holds regular high–profile public meetings, seminars, debates and conferences. These enable influential speakers to contribute to the European debate. Speakers are selected purely by the contribution they can make to enhance the debate.

For further information about the Bruges Group, to attend our meetings, or join and receive our publications, please see the membership form at the end of this paper. Alternatively, you can visit our website www.brugesgroup.com or contact us at info@brugesgroup.com.

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