

How Matters Now Stand

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How Matters Now Stand

NOW THAT ALL the powers which were transferred to the European Community by the Heath and subsequent governments are to be back in the hands of Parliament in March 2019, Parliament should heed what John Locke said (in his *Second Treatise of Government* (1690) para. 141): “The Legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others”. This Article considers whether the power of making laws, delegated by the People to parliament, is capable of being transferred away from Parliament as part of any agreement being concluded between the European Union and the United Kingdom.

The foundation of our democracy lies in the answer to the question: where is the origin of power? The answer is that all power is vested in, and consequently derived from, the people. The power to make laws belongs to the people: it is lent to each Member of Parliament by the electors in each constituency for a known length of time and is to be returned undiminished to the electors at the dissolution of that Parliament.

This learning goes back to Richard Hooker (1553 – 1600) in his work “Of the Laws of Ecclesiastical polity”¹ where he writes:

‘the lawful power of making laws to command whole politic societies of men belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth to exercise the same for himself, and not either by express commission immediately or personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is not better than mere tyranny’.

The author of “Law, the State, and the International Community”, James Brown Scott², writes that Hooker’s views are fundamental to the philosophy of government; he conveniently sets out Hooker conclusions in a series of paragraphs:

1. Laws do not take their constraining force from the quality of such as devise them, but from that power which doth give them the strength of laws (‘Law, the State, and the International Community’.
2. By the natural law... the lawful power of making laws to command whole politic societies of men belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny.

1 “Of the Laws of Ecclesiastical polity” Book 1, Chap x, 9.

2 James Brown Scott, ‘Law, the State, and the International Community’, 58 (1970).

3. Laws they are not therefore which public approbation hath not made so.
4. But approbation not only they give who personally declare their assent by voice, sign, or act, but also when others do it in their names by right originally at the least derived from them.
5. As in Parliaments, councils, and the like assemblies, although we be not personally ourselves present, notwithstanding our assent is, by reason of others, agents there in our behalf. And what we do by others, no reason but that it should stand as our deed, no less effectually to bind us than if ourselves had done it in person.
6. Sith[since]men naturally have no full and perfect power to command whole politic multitudes of men, therefore utterly without our consent we could in such sort be at no man's commandment living. And to be commanded we do consent, when that society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement.
7. Wherefore as any man's deed past is as good as long as himself continueth; so the act of a public society of men done five hundred years sithence [since] standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they in our successors do live still". (My emphasis.)

The Levellers, as Professor Alfred Rahilly says³:

“were the first post-Reformation political theorists in England. .. According to [John] Lilburne, men ‘are and were by nature all equal and alike in power, dignity, authority and majesty’, and all magisterial power is exercised ‘merely by institution or donation, that is to say, by mutual agreement or consent’⁴. Still more emphatically he says elsewhere⁵: ‘The only and sole legislative law-making power is originally inherent in the people and derivatively in their commissions chosen by themselves by common consent, and no other. In which the poorest that lives hath as true a right to give a vote as well as the richest and greatest’.

‘Tyranny is tyranny,’ said Lilburne, ‘exercised by whomsoever, yea though it be by members of parliament as well as by the king. And they themselves have taught us by their declarations and practices that tyranny is resistible.’ He proceeds to threaten ‘forthwith to make a formal appeal to all the commons of the kingdom of England.’”

In the pamphlet “The Case of the Armie⁶” it was declared that “all power is originally and essentially in the whole body of the people of this Nation”.

3 Alfred Rahilly, “Democracy, Parliament and Cromwell”; *Studies: An Irish Quarterly Review*, Vol. 7, No. 28 pp. 564-583 (Dec. 1918) hereinafter “Democracy, Parliament and Cromwell”.

4 The Freeman's Freedom Vindicated, June 1646, p. 11.

5 The Charters of London, 1646, p. 4.

6 “The Case of the Armie Truly Stated and the Petition” of January 1648.

“The Agreement of the Free People of England”⁷ was drafted by John Lilburne (1614 – 1657), William Walwyn (1600 – 1681); Thomas Prince (1630 – 1657) and Richard Overton (1640 – 1664) whilst they were prisoners: they wrote “From our causeless captivity in the Tower”. Of this Agreement, J W Gough⁸ writes:

“The Agreement of the People’, therefore, premising that the power of parliaments is inferior to the power of the people, from which it is derived, contains a list of fundamental rights of matter specifically reserved, which parliament was incapable of touching. Though not actually so called, this was in effect a list of fundamental rights”.

On such reservation was introduced by the words:

“having by woeful experience found the prevalence of corrupt interests powerfully inclining most men once entrusted with authority, to pervert the same to their own domination ...” (my emphasis). Specific limitation as to what Representatives would be allowed to do by way of making law, including the following: “That we do not inpower or entrust our said representatives to continue in force, or to make any Lawes, Oaths, or Covenants, whereby to compel... any person to anything in or about matters of faith ...”(Clause X).

The power which is vested in, and derived from, the people to make law is entrusted, delegated to the persons who act for and on behalf of the people in making law, and for a limited length of time: the term of Parliament.

William Penn (1644 – 1718) highlighted the position of a Representative in relation to his electors in 1675 when he applied by analogy the common law rule that, in the case of a landlord and his tenant, neither may deny the title of the other: the Representative cannot deny the origin of the Representative’s power to make law. Penn declared⁹:

“Every Representative may be call’d, the Creature of the People, because the People make them, and to them they owe their Being. Here is no Transessentiating or Transubstantiating of Being, from People to Representative, no more than there is an absolute Transferring of a Title in a Letter of Attorney. The very Term Representative is enough to the contrary... In short, I would fain know of any Man how the Branches can cut up the Root of the Tree that bears them? How any Representative, that has not only a meer Trust to preserve Fundamentals, the People’s Inheritance; but that is a Representative that makes Laws, by Virtue of this Fundamental Law, viz. that the People have a Power in Legislation (the 2d Principle provd by me) can have a Right to remove or destroy that Fundamental? The Fundamental makes the People Free, this Free People makes a Representative; Can this Creature unqualify its Creator? What Spring ever rose higher than its Head? The Representative is at best but a true Copy, an Exemplification;

7 The Agreement of the Free People of England, (1st May, 1649).

8 JW Gough, *Fundament Law in English Constitutional History* 113 (1955).

9 “England’s Present Interest Considered, with Honour to the Prince, and Safety to the People”, III.: The People have an Influence upon, and a Great Share in the Judicatory Power, &c., IV, (1675) from William Penn, *The Political Writings of William Penn*, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002)

the Free People are the Original, not cancellable by a Transcript: And if that Fundamental which gives to the People a Power of Legislation, be not nullable by that Representative, because it makes them what they are; much less can that Representative dispossess Men of their Liberty and Property, the first Great Fundamental, that is, Parent of this Other; and which intitles to a Share in making Laws for the preserving of the first Inviolable". (My emphasis.)

There arises, through consent, a relation of trust between the people and those chosen to represent them in the making of law and it is, according to Dr Horst P Ehmke:

“the participation of the people (through their representatives) that validates legislation and the burdens which the legislature may place upon the citizenry”¹⁰

This notion had found expression in *Mercurius Militaris* in 1648, cited by John Rees in “The Leveller Revolution”¹¹ 2016 at page 257:

“Parliaments were in any case ‘but a delegated or entrusted power themselves, and therefore cannot delegate or transmit their power over to another’ ...”.

William Ball of Barkham wrote in the Leveller tract “The Power of Kings Discussed: or an Examen of the Fundamental Constitution of the Free-born people of England ...”:

“... the parliament cannot deliver over the free people of England to a foreign government, or to laws imposed by foreigners ...; nor can the parliament... deprive the free people of England of their innate rights of electing knights, citizens and burgesses for parliament. In these things, and things of the nature of theses, tending to the fundamental rights and laws of the people, the parliament cannot nor ought not any way to violate the people or nation”¹²

John Locke put it thus¹³:

“This Legislative is not only the supreme power of the Commonwealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed. For without this the Law could not have that, which is absolutely necessary to its being a Law, the consent of the Society, over whom no Body can have a power to make Laws, but by their own consent, and by Authority received from them; and therefore all the Obedience, which by the most solemn Ties any one can be obliged to pay, ultimately terminates in this Supreme Power, and is direct by those Laws which it enacts §134 (Ibid). The Legislative cannot transfer the Power of Making

10 Dr Horst P Ehmke, ‘Delegata potestas non potest delegari’ A maxim of American Constitutional Law” (hereinafter “A Maxim of American Constitutional Law”).

11 John Rees, “The Leveller Revolution” 2016 at page 257:

12 “The Power of Kings Discussed: or an Examen of the Fundamental Constitution of the Free-born people of England, in Answer to the Several Tenets of Mr David Jenkins” 1649; printed in Somers Tracts (ed W.Scott).

13 John Locke, Second Treatise of Civil Government para. 141 (1690).

Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it on to others". (My emphasis.)

Dr Louis Fisher¹⁴ in "The Law of the Executive Branch: Presidential Power" 2014 page 156 writes:

"It is a fundamental principle of constitutional government that the legislature may not delegate its power to another branch. John Locke said the legislature "cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it on to others". This concept finds expression in the ancient maxim *Delegata potest non delagari* (delegated power cannot be delegated). Although Congress may not surrender its basic legislative power entrusted to it by the Constitution, it regularly gives substantial discretionary authority to executive agencies to implement the law".

Gilbert L. Finnell, Jr¹⁵ writes:

"The nondelegation doctrine is based on several of the great ideas of democratic government: the "rule of law": the principle of separation of powers, due process of law, and the common law maxim of *delegata potestas non potest delegari*. These ideas remain as valid today as when they were incorporated into our constitutions".

It would never be permissible and it would be a serious breach of trust, for Parliament, the legislature, to delegate its power to make laws (which is a power belonging to the People, delegated by the People to Parliament) to a foreign entity with no genuine democratic control; in particular where there is absent the type of democratic control as shown by the constitution of the United States and where such delegation overrides the inalienable right of each and every person of the United Kingdom to be governed only with his or her consent (such consent to be ascertained by genuine and periodic elections of the person undertaking the task of governing).

The result would that the people would be governed by an entity without their consent and the inalienable rights of each of us were transferred away from the protection of Parliament by those, namely the Members of Parliament, who were the very persons entrusted not only with our power and inalienable rights but also with the obligation to protect that power and those rights. If Members of Parliament were to do so, thereby eliminating the inalienable right which each of us has, could any (or all) of us raise that complaint in Court, notwithstanding Parliamentary Sovereignty? Perhaps on this issue, Parliamentary Sovereignty will be required to yield to Popular Sovereignty?

JW Gough in "John Locke's Political Philosophy"¹⁶ writes:

"Government by consent, may remain, therefore, as an historic and serviceable, if loose, description of a constitutional type of government, not because individuals ever personally

14 Dr Louis Fisher, "The Law of the Executive Branch: Presidential Power" 156, (2014).

15 Gilbert L. Finnell, Jr, *American Bar Foundation Research Journal*, Vol. 5, No. 2, 353 to 354, (Spring, 1980).

16 JW Gough, "John Locke's Political Philosophy" 72, (1950).

agreed to accept it, but because it is sensitive to public opinion, with which it is kept in touch by representative institutions and a free press, and does not have to stifle opposition by force”; and he notes: “In this modified, non-individualist sense the consent which supports and maintains a government is ¹⁷present consent, and this is the kind of consent which can support a government ...”.

Ascertaining “present consent” includes, of course, periodic and genuine elections (two essential elements which are manifestly absent in the European Community). The importance of this is underscored on the last page¹⁸ of Cecil Emden’s 1956 book (“The People and the Constitution”), where he writes:

“If the people’s mandate is not organized so as to provide the people with a genuine opportunity to express their views on the broad outlines of policy, democracy will suffer a serious set-back. An electorate like ours, growing rapidly in ability to understand political factors, must not be allowed to discover that their alleged influence on politics is ineffective because it is too frequently disclosed as indefinite and disputable. Democracy is too frail a system to survive such a shock. The present makeshift means of enabling the people to have some influence on affairs of State might, even though left unreformed, continue haltingly for a period. But eventually the people’s growing disillusionment would probably result in their insufficient co-operation with their rulers. Politicians often say that the people must be made partners in government if there is to be maximum efficiency, welfare and happiness. But we have not yet gone very far towards achieving this ideal. We must confront the facts. If we should allow the people’s part in government to lapse into futility, we might lose democracy beyond recall”.

Joseph Story, who served as a Justice of the Supreme Court of the United States from 1811 to 1845, in his work¹⁹ “Commentaries on the Constitution of the United States”, writes:

“But in a representative republic all power emanates from the people, and is exercised by their choice, and never extends beyond the lives of the individuals, to whom it is entrusted. It may be entrusted for any shorter period ; and then it returns to them again, to be again delegated by a new choice” (My emphasis).

When Parliament is dissolved, every seat in the House of Commons becomes vacant. All business in the House comes to an end. There are no Members of Parliament. MPs revert to being ordinary members of the public and they lose privileges associated with being a Member of Parliament. The power to make law which had been lent to Members of Parliament is returned to the electors. Until a new Parliament is elected, there are no MPs. Those members of the public who wish to be elected Members of Parliament, including former MPs, must stand as candidates for election.²⁰ In other words, at the end of the Parliament, those persons (who held the power to make law for and on behalf of the people) return, to the electorate, the power which had been

17 The emphasis of the italics of this word “is” is that of the author.

18 The People and the Constitution by Cecil Emden 316 (1956).

19 Joseph Story, Commentaries on the Constitution of the United States, (2 Story, § 517, 1st Edition (1833).

20 Taken largely from the ‘Dissolution of Parliament’, House of Commons.

lent to them for the duration of that Parliament; fresh elections then take place and a choice is made by the electors for new Representatives for the new Parliament.

This has been underscored in the modern era. Tony Benn said:

“Members of Parliament are lent the powers of their constituents and they have to return those powers undiminished at the end. It is not for Members of Parliament to give away the powers which were lent to them because they don’t belong to Members of Parliament: they belong to the electorate” and “With all the defects of our democracy, the reason Governments listen to people is because you get your power from the people”.

Similarly, on 4th February 2016, Hansard shows: ²¹

“We sometimes get into the idea that parliamentary sovereignty comes out of a vacuum, but in fact it is a means to an end; it is not an end in itself. It is the way we represent the sovereignty of the British people. They delegate to us, for five years, the right to make laws in their name, but at the end of those five years they expect to have the sovereignty returned to them intact, so that they can decide how it should be used in future”.

*

Our democracy is based on the same liberalism as that of the United States. As Jonathan Freedland points out: “... America describes itself as the land of the free, yet liberty is a British creed. The founders of liberalism... were all British²². In Charles Beard’s forward to the book “Leveller Manifestoes of the Puritan Revolution” by Don Wolfe, Charles Beard wrote: ²³

“What is not generally known is that nearly all the fundamentals of government and liberty had been set forth or foreshadowed in the declarations of English Levellers long before John Locke published his celebrated treatise on government. In support of this contention a few citations from Mr Wolf’s pages may be made:

‘Originally men and women “were by nature all equall and alike in power, digny [sic], authority, and majesty”, no one possessing any right of dominance except by mutual consent’ (p 8)

‘So ought the whole nation to be free therein even to alter and change the publique forme, as may best stand with the safety and freedome of the people’ (p 7)

‘By naturall birth, all men are equally and alike borne to like propriety, liberty, and freedom’ (p 11)

‘We are resolu’ed upon our Natural Rights and Freedoms’ (p 11)

21 Mr Rees-Mogg MP, Hansard, 4 February 2016 at 2.24pm.

22 Jonathan Freedland, “Bring Home the Revolution”, 240 (1998).

23 Don M Wolfe, “Leveller Manifestoes of the Puritan Revolution”, viii (1944).

‘The only and sole legislative Law-making power is originally inherent in the people and derivatively in their Commissions chosen by themselves by common consent and no other’ (p 14).

On such statements no comment is needed. By comparing them with the opening passages of the Declaration of Independence anyone can see that levelling ideas of 1646-49 were in fact self-evident truths in 1776”.

Thomas Jefferson, George Mason, James Madison, Alexander Hamilton and the other founding fathers of the United States adopted the learning of the founders of liberalism: Sidney’s ‘Discourses Concerning Government’ has been called “the textbook of the American revolution.”²⁴ (Algernon Sidney (1623 – 1683) was executed by Charles II).

Apart from Sidney (who quoted at length from the work of Richard Hooker (1553 – 1600)), the founding fathers read the works of George Lawson (who died in 1678) of John Locke FRS (1632 – 1704), of Thomas Hobbes of Malmesbury (1588 – 1679), of James Harrington (1611 – 1677) and of David Hume (1711 – 1776). This liberalism not only informed all those who were engaged in the American Revolution but was codified in certain of their constitutional documents, including the Constitution of Virginia (12th June 1776), the Declaration of Independence (4th July 1776) and the Constitution of the United States (17th September 1787). We can look to the American material as reflecting the liberalism that underpinned politics in Britain then and today.

John Locke wrote²⁵ in 1690:

“The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

As Louis Henkin writes in “Rights of Man Today”²⁶:

“Locke gave us the essential ideas out of the English antecedents including probably those of the Levellers. Some go back to the hallowed Great Charter, to Magna Carta Although the eighteenth century drew immediately on the seventeenth, more or less authentic antecedents for the several doctrines reflected in the Declaration of Independence have been traced back to old sources” including “government as based on the consent of the governed... in St Augustine; natural, inalienable rights in Cicero and the Roman jurists Gaius and Ulpian”.

Thomas Jefferson drafted the following words²⁷ in a boarding house²⁸ in Philadelphia in 1776:

24 Caroline Robbins, “Algernon Sidney’s Discourses Concerning Government: Textbook of Revolution,” William and Mary Quarterly, 3rd Series, 4:266-296 (1947).

25 John Locke, Second Treatise Chap 2: The State of Nature, para 6.

26 Louis Henkin, “The Rights of Man Today”, 9, (1978).

27 Declaration of Independence 4th July 1776.

28 <https://www.monticello.org/site/research-and-collections/declaration-independence>.

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”.

The 1948 UN Declaration of Human Rights provides:

“Preamble: Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ...

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience ...”.

The OED defines ‘inalienable’ thus: “Not alienable; that cannot be transferred from its present ownership or relation ...” . Another definition “not transferable to another or not capable of being taken away or denied; not alienable ...” (<http://www.dictionary.com/browse/inalienable>).

“What is Unalienable? Incapable of being alienated, that is, sold and transferred”. See

(<https://thelawdictionary.org/unalienable/>) .

The Virginia Declaration of Rights provides:

1. “All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity [future generations]; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. (My emphasis.)
2. That all power is vested in, and consequently derived from, the people; that magistrates [those who govern] are their trustees and servants, and at all times amenable to them.”

The Constitution of Virginia²⁹ 12th June 1776 (Article 1; Bill of Rights, Section 2 People the source of power) provides: “That all power is vested in, and consequently derived from, the people...”.

“The individual was autonomous, sovereign, before government was established, and he, and other individuals taken together – “the people” – remain sovereign under any government, for their sovereignty is inalienable, and government is only by the consent of the governed... Some rights, indeed, could not be subordinated to government even if the people wished, because these rights are inalienable” (The Rights of Man Today page 7) (My emphasis).

Accordingly, inalienable rights (or, as Thomas Jefferson drafted, ‘unalienable rights’) are rights which are incapable of being transferred from its present holder. Inalienable rights “cannot be transferred, forfeited or waived; they are ‘imprescriptible’, that is, they cannot be lost by having been usurped or by failure to exercise or assert them, no matter for how long” (“The Rights of

29 The Constitution of Virginia was drafted by George Mason and James Madison in June 1776.

Man Today³⁰). A people “cannot, by any compact, deprive or divest their posterity”, that is future generations, of the right to be ruled without our consent or the consent of those future generations. ‘People should not be bound by agreements made by their ancestors, with king or parliament: “The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies”’ (Thomas Paine’s “The Rights of Man” 1791, Part 1) (cited in “The Rights of Man Today” ³¹).

Richard Hooker wrote³²:

“It is impossible that any should have a compleat lawful power over a multitude consisting of so many families, as every politick society doth, but by consent of men.

John Milton (1608 – 1674) wrote³³ in 1649:

“The power of kings and magistrates is nothing else, but what is only derivative, transferred and committed to them in trust from the people, to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken from them, without a violation of their natural birth right”.

David Hume³⁴ wrote in 1748:

“The people... are the source of all power”. Samuel Johnson³⁵ defined democracy in 1755 thus: “One of the three forms of government; that in which the sovereign power is neither lodged in one man, nor in the nobles, but in the collective body of the people”: the sovereignty of the people; the popular sovereignty.

Professor Dicey³⁶ writes:

“The plain truth is that as a matter of law, Parliament is the sovereign power in the state It is, however, equally true that in a political sense the electors are the most important part of, we may even say are actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience... The electors are a part of and the predominant part of the politically sovereign power”.

In the United Kingdom and in the United States alike, the inalienable rights of life, liberty and the pursuit of happiness are enforced by governments deriving their powers from the consent of the governed. In England, at the trial in England of Thomas Paine for treason (a charge that arose out of liberty, the freedom of speech, in the publication of Thomas Paine’s Rights of Man in 1791), Thomas Erskine³⁷ told the jury “... it is lawful to address the English nation on these

30 Louis Henkin, *The Rights of Many Today*, 3, (1978).

31 At 8.

32 quoted by Sidney in ‘Discussions Concerning Government’ written in 1680 but published in 1698 in London.

33 John Milton, “The Tenure of Kings and Magistrates” (1649).

34 *Of the Original Contract* (1748).

35 Samuel Johnson, *A Dictionary of the English Language*, (1755).

36 AV Dicey, “Lectures Introductory to the Study of the Law of the Constitution”, 75, (1885).

37 Thomas Erskine’s address to the Jury on the 18 December 1792 (reprinted in *The Penguin Book of Historic Speeches*, 165, (1996).

momentous subjects; for had it not been for this inalienable right (thanks be to God and our fathers for establishing it!), how should we have had this Constitution which we so loudly boast of?"

Elizabeth Lilburne, a Leveller, in an effort to obtain the release of her husband, John Lilburne, from prison, petitioned members of the Commons in September 1646 and wrote³⁸:

"THat [sic] you only and alone, are chosen by the COMMONS OF ENGLAND [meaning the people of England] to maintain their Lawes, and Liberties, and to do them justice and Right which you have often before God and the World sworne to do yea, and in divers of your Declarations declared, it is your duty (in regard of the trust reposed in you) so to do... (... you either do or intend to subvert the Lawes, Liberties, and Freedomes of the people, which freedomes &c you your selves call, the COMMON BIRTHRIGHT OF ENGLISH-MEN, who are borne equally free, and to whom the Law of the Land is an equall inheritance) and therefore you confesse in your Declaration of 23. Octob. 1642. It is your duty to use your best endeavours, that the meanest of the Commonalty, may enjoy their own birth-right, freedome, and liberty of the Lawes of the Land, being equally (as you say) intituled thereunto with the greatest subject ...".

John Locke put the matter thus:

"MEN being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent (Second Treatise Chap 8: Of the Beginning of Political Societies Para. 95).

Abraham Lincoln³⁹:

"When the white man governs himself that is self-government; but when he governs himself, and also governs another man, that is more than self-government---that is despotism... No man is good enough to govern another man, without that other's consent. ...Allow ALL the governed an equal voice in the government, and that, and that only is self-government."

Robin Cook⁴⁰ said:

"... political authority belongs only to those who secure the consent through elections of those over whom they exercise power".

So sound is this principle that it finds expression in the Universal Declaration of Human Rights thus⁴¹:

38 Elizabeth Lilburne's petition was reprinted in "Londons Liberty in Chains Discovered" 65-70 (October 1646)

39 Abraham Lincoln in his Peoria Speech, 16th October 1854.

40 Robin Cook, "Point of Departure", 33, (2003).

41 The Universal Declaration of Human Rights, Article 21(3).

“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”.

The people of the United Kingdom have the inalienable right to be governed only with their consent. The will of the people is ascertained by “periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”. It is in this way that those who govern who “are their trustees and servants” are (to quote again the Virginian Declaration of Rights) “at all times amenable to them [the people]”. If persons purport to govern without the will of the people having been established by ‘periodic and genuine elections’, then those persons have no authority to govern. In the “A Remonstrance of Many Thousand Citizens, and other Free-born People of England”⁴², Richard Overton, the Leveller, addressed the House of Commons:

“...calling these their commissioners in parliament to an account: how they (since the beginning of their session to this present) have discharged their duties to the universality of the people, their sovereign lord, from whom their power and strength is derived, and by whom (ad bene placitum [so long as the grantor, the people, wishes]) it is continued... Ye are not to reckon that ye have any longer time to effect the great work we have entrusted unto you; for we must not lose our free choice of a parliament once every year, fresh and fresh for a continual parliament... The Worke yee must note is ours, and not your owne...”.

The persons in the Executive of the European Union, including the European Commission and the Council, who govern the people of this country over almost every aspect of our lives, has never sought the consent of the people by periodic and genuine elections: those persons have never conducted an election; they have never been ‘amenable to’ the people; they have never been accountable to the people. A visual metaphor of European accountability is the photograph of Junker with his fingers placed in his ears walking past a crowd of journalist on the day after the referendum.

David Marquand, who, according to the biographical details in his book “Parliament for Europe” was a British delegate to the Council of Europe from 1970 to 1973 and Chief Adviser in the Secretariat General of the Commission, writes⁴³:

“The Democratic Deficit

As things are at present [1979], moreover, there are also strong arguments of democratic principle, against transferring power from the national to the Community level in the way which has been advocated here. There can be no democracy without accountability. In a democratic system, someone must always be in a position to use Harry Truman’s motto ‘the buck stops here’; decision-makers must be answerable to, and removable by, those in whose name the decisions were made. In the Community system, no one is

42 “A Remonstrance of Many Thousand Citizens, and other Free-born People of England”, London (1646).

43 David Marquand, “Parliament for Europe”, 64, (1979).

unambiguously answerable for anything. The buck is never seen to stop; it is hidden from view, in an endless scrimmage of consultation and bargaining. This may not matter much when the Community's competences are restricted as they are at present. If they are extended sufficiently to overcome the challenges described above, it would matter a great deal" (Page 64) (My emphasis).

The Community's power has since 1979 been increased so that it extends to almost every aspect of our lives. In the European Community, to paraphrase Harry Truman, the buck gets buried.

"Although the European Council of Ministers now holds public sessions, the elected governments of the member states are not keen to grant access to debates in the Council, which are held behind closed doors – and where most important decisions are made. These meetings can't be watched online and minutes are not made public. Not even representatives of the European Parliament can attend".⁴⁴ There has been an effete attempt give the European Union some outward signs (but no more) associated with a parliament; but democratic reform always seems beyond European capability.

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John Locke, as already mentioned, wrote⁴⁵:

"The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands").

From "A Maxim of American Constitutional Law"⁴⁶, Dr Ehmke writes:

"It is Locke, therefore, on whom American courts really rely when they apply the prohibition against subdelegation of legislative power. The decisive reason for the prohibition is that it is the participation of the people (through their representatives) that validates legislation and the burdens which the legislature may place upon the citizenry (my emphasis).

44 From <http://theconversation.com/how-democratic-is-the-european-union-59419>.

45 John Locke, Second Treatise of Government, para. 141.

46 At 57 to 58.

Where there is proposed a wholesale transfer of the power to make laws (which is vested in and belongs to the electors) to a body which is not the legislative body chosen by the people by periodic and genuine elections, then such a transfer is not permitted. Furthermore, as already mentioned, all the power which the electors lend to their Members of Parliament for the duration of the Parliament must be returned to the electors at the end of the Parliament undiminished.

Did the Heath Government consider Popular Sovereignty?

The Foreign Office file FCO 30/1048 is entitled "LEGAL & CONSTITUTIONAL IMPLICATIONS OF ENTRY OF UK INTO EEC": it is stamped '1971'. (The separate paper entitled "The Heath government file on the Constitutional Implications of UK entry into the EEC" analyses this file and sets out the steps which Heath took to deceive the public: it is sent with this paper.) It contains a long advice which is undated and which shows no name as author. It is marked confidential. The advice (which I will call the Rippon Advice) deals in detail with the basis of State Sovereignty and Parliamentary Sovereignty; but no consideration whatever, it appears, was given to the sovereignty of the People: the Popular Sovereignty. As is clear from the materials set out above, all power is vested in and derives from the People. The right to liberty and to be governed by consent of the People are inalienable rights: they cannot be transferred to another. The Heath government transferred power belonging to the People to the (using the words contained in the Rippon Advice) 'unelected', 'unaccountable', 'powerful', 'remote' and 'strange' bureaucracy which then made rules and regulations (namely, laws) in the following areas of government: set out in the Rippon Advice thus:

Annex

AREAS IN WHICH PARLIAMENT'S FREEDOM OF LEGISLATIVE ACTION WILL BE SIGNIFICANTLY RESTRAINED

The following are then listed:

Customs duties and all other matters incidental to the formation of a customs union; Agriculture; Free movement of labour; Free movement of services; Free movement of capital; Transport; Monopolies and restrictive practices; State aid for Industry; Coal and Steel; Nuclear Energy industry; Company Law; Insurance Law; Fisheries; Value Added Tax; Social Security for migrant workers .

Tony Benn is recorded at <https://www.youtube.com/watch?v=dQY2CHx4d3U> saying in Parliament:

“Are the British People, when they vote in a general election, to be able to change the policies of the Government that has previously been there? And it is already a fact that whatever Government is in power, Agricultural policy is now controlled from Brussels, our Trade policy is controlled from Brussels, our Industrial policy is controlled from Brussels. This is a democratic and NOT a nationalistic argument.”

Later, he said during the time of the concern over the proposed Maastricht Treaty, at <https://www.youtube.com/watch?v=RrzfgUv3ZKk>

“What is proposed now is the handing over the power to people we don't elect and can't remove. You see, the important thing about democracy... you have got to be able to defeat the people who govern you. You can get rid of Mr Major like you got rid of Jim Callaghan: but you can't get rid of Jack Delors... I don't think you can make capitalism work over the whole of Western Europe controlled by Commissioners who govern you without your consent any more than you can make communism work... Whatever you do, you have got to ask the people whether they want it or not, because I don't own the powers given to me by my electors: I borrow them and I hand them back at the end. And if when I go back to the election and say “I am sorry but the country is now going to be governed by the Commissioners in Brussels, they will say “What have you done?”” (My emphasis.)

A spokesman from the Department for Exiting the EU (DExEU) said, in August 2018, “... as we've already made clear, individual departments are preparing specific technical notices to help citizens, businesses and consumers to prepare for March 2019 in the unlikely event of a 'no-deal' scenario”. The papers cover 84 separate policy areas touching life in the United Kingdom. This list is an indication as to the extent to which policies derived from the European Union directly affect the lives of the British People; and they also reflect the extent, to a varying degree, of the powers belonging to the People that have been transferred away from the People by the Members of Parliament to the bureaucrats of the European Union since 1972. They are:

Air services; Animal breeding; Aviation safety; Aviation security; Batch testing of medicine; Blood safety; Broadcasting; Chemicals regulation; Civil judicial cooperation; Civil nuclear; Climate; Commercial road haulage; Common Travel Area; Company law; Competition; Consumer protection; Cross-border gas trading; Customs and borders; Data; Driver licensing; Drugs; e-Commerce and geo-blocking; Electricity trading; Environmental standards; Equine movements; Erasmus; EU citizens in the UK; EU programmes and structural funds; EU space programmes; European regional development fund; European social fund; Export control regulation; Fertilisers; Financial services; Firearms; Fisheries, fish and seafood; Fluorinated gases and Ozone depleting substances; Food labelling; Genetically modified organisms; Geographical indicators; Health and identification marks for products of animal origin; Horizon 2020; Imports of food and feed; Insolvency; Intellectual property; Life sciences; Live animals and animal products; Maritime security; Motor insurance; New car and van CO2 emissions; NGOs; Nuclear research; Objects of cultural interest; Oil and gas; Organic food production; Organs, tissue, and cells; Passports; Payments to farmers; Pesticides regulations; Pet travel; Plants and seeds; Procurement; Product regulation; Registration of veterinary medicines; Renewable electricity issues; Rural Development Programme for England; Seafarer certification; Services; State aid; Telecoms; Timber trade; Tobacco; Trade agreements continuity; Trade in endangered species; Trade remedies; Trans-European energy infrastructure; UK citizens in the EU; UK LIFE projects; UK trade tariff; Upholding industrial emissions; VAT; Vehicle standards; Veterinary medicine products; Workplace rights.

This represents an enormous swathe of government: there has been no election of the persons who governed or govern in these areas; such persons have not accounted to the British People for their actions in respect of such government. This state of affairs has carried on for over 43 years. The British People have been and are (and will be until March 2019) governed without their consent by persons (bureaucrats) in Brussels who are unelected and unaccountable to the British People and indeed are largely unknown to the electors of the United Kingdom.

This list, as I have said, encompasses an extremely large part of the activities and policies which the government presided over before 1972 and in respect of which Parliament exercised control on behalf of the people. The extent of the change in the governing of the British people is graphically described by Lord Denning MR in *Bulmer v Bollinger SA* (in 1974):

‘But when we come to matters with a European element, the Treaty [of Rome] is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back’.

(Since 1972, in the event of there being any conflict between the laws of the European Union and a Statute passed by Parliament, the Courts of the United Kingdom are required to overrule the Statute. Parliament may, of course, debate the European Union laws but a refusal to implement such laws would place the United Kingdom in breach of its obligations under one or more of the European Treaties: in practice, Parliament implements these laws without any change.)

In respect of all these matters listed above, before 1973, we exercised our democratic control (through expressing our intentions by way of our votes leading to the election of Members of Parliament) and we governed ourselves. There was democratic accountability. In respect of all

these matters listed above since 1973 there have been no periodic and genuine elections, by which the persons making the rules and regulations of the Executive of the European Community have stood before the British public and (a) accounted directly to the electorate for their misconduct and conduct and (b) offered themselves for election. There was and is no democratic control; the British people were and are governed without their consent. The way the European Community operates, to paraphrase Abraham Lincoln, enables the few to deprive the many of a free exercise of the right of self-government.

Tony Benn, after he had retired from the Commons said at a meeting — <https://www.youtube.com/watch?v=nWnpbEMMsNw> :

“And then I was on the Council of Ministers; and that was the most shattering experience I have ever had in my life. Because, I was the representative of Britain (and for 6 months I was the President of the Council of Energy Ministers) and I wasn’t allowed to submit a document. Only the Commission who are bureaucrats could submit a document. I could say ‘yes’ or ‘no’ (a sort of constitutional monarch if you like) – they controlled it. It [the EU Commission] met in secret; it made laws for Britain and everywhere else: it met in secret. And when I suggested that we met in public, well they nearly strangled me because all their dirty little deals would have come out. And so, the more I thought about it, and this is what it is about now: it is about democracy.

Remember this (I was a Member of Parliament for 51 years): Members of Parliament are lent the powers of their constituents and they have to return those powers undiminished at the end. It is not for Members of Parliament to give away the powers which were lent to them because they don’t belong to Members of Parliament: they belong to the electorate. That is a critical matter. (My emphasis.)

*

The American Founding Fathers passed powers that belonged to the People to their new entity, the United States of America, but still preserved the democratic rights of the people. Daniel Webster, a Senator for Massachusetts, described the Union in a speech in the Senate on the 26th January 1830⁴⁷ thus:

“I hold it [namely the origin of this government and of the foundation on which it stands] to be a popular government, erected by the people; those who administer it, responsible to the people; and itself capable of being amended and modified, just as the people may choose it should be. It is as popular, just as truly emanating from the people, as the state governments. It is created for one purpose; the state government for another. It has its own powers; they have theirs... We are here to administer a Constitution emanating immediately from the people, and trusted by them to our administration. It is not the creature of the state governments... this whole government, President, Senate and House of Representatives, is a popular government. It leaves it still all its popular character... This government, sir, is the independent offspring of the popular will. It is not the creature of state legislatures ...”

⁴⁷ Daniel Webster, Senator for Massachusetts, Speech 26 January 1830, (reprinted in *The Penguin Book of Historic Speeches*, 228, (1996).

The unanimous judgment in 1819 of the Supreme Court in *McCulloch v. Maryland*⁴⁸ declared:

“The government proceeds directly from the people; is “ordained and established” in the name of the people; and is declared to be ordained, “in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity... The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. The government of the Union then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit”. (My emphasis.)

The European Community was not constructed so as to preserve and retain the sovereignty of the people (as the United States did). The EU is utterly different from the democratic structure of the United States of America. In the case of the European Union, the people are not governed with their consent and the European Community government is not representative government: Thomas Paine said⁴⁹ “... representative government is freedom”.

No Member of Parliament can properly use the powers lent to them by the electorate to destroy the peoples’ right to be governed with the consent of the people: no Member of Parliament should do so. Government must be the servant of the people: Government must never be the master of the people. The European Union in practice and in fact is the master of the people.

There is no halfway house. Government with consent of the people and with proper accountability and periodic and genuine elections – that is democracy. Government without consent of the people, without accountability and without periodic and genuine elections – that is not freedom.

*

Since (a) all power, including the power to make laws, resides in, and hence is derived from, the people; and (b) the right to be governed by consent is inalienable, it follows that any transfer of the power to make law must preserve the inalienable rights of each of us and such transfer must be to an entity and government which is as soundly based in democracy; where the present consent of the people are ascertained by periodic and genuine elections: any such entity must govern by consent. The United States of America is such a democracy.

All the powers which the Heath and successive governments transferred to the European Community will have been returned to Parliament by March 2019. The Heath government did not appear to consider the sovereignty of the people and their inalienable rights, including the right to be governed by the consent of the people. As appears from the attached paper, the Heath government achieved its purpose by, amongst other things, deceiving the people.

Further, at the time of the Parliamentary events leading up to the vote upon the European Communities Bill, there appears to have been some unseemly dealing between those Members of

48 *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819).

49 Thomas Paine, “The Rights of Man”, 65 (1791).

Parliament of both main parties who were Pro-European so as to get the vote for the Bill through. As the authors put it in “The Great Deception:”⁵⁰

“The story of how the government came through the ordeal [of the committee stage] was not to emerge for more than 20 years, when several MPs involved took part in a BBC documentary⁵¹. They recounted an unprecedented secret collaboration between the Conservative Whips and Labour ‘pro-marketeters’, who arranged, when necessary, to find pressing engagements elsewhere which would mean their absence from the division lobby. In the words of Shirley Williams:

‘... people disappeared. They went to the films, they just didn’t show up, and so forth... There was quite a bit of quiet understanding that there were certain amendments where it was better for people to just find themselves... you know, speaking at a meeting at Little Ainsborough⁵² or something, so they wouldn’t be there’⁵³.

At the heart of the plot, according to *The Poisoned Chalice*, was a red book kept by the Labour whip John Roper, a committed European⁵⁴. He guaranteed there would be just enough Labour abstentions for the government to win every vote. But to stop vote-rigging being noticed, and creating embarrassment for the Labour Party, the voting record was kept in Roper’s red book so he could vary the abstentions. Francis Pym recalled, looking somewhat uncomfortable:

‘It was a secret arrangement. Everybody knew it was happening . How it was happening, nobody quite knew. And that seemed to me⁵⁵ very satisfactory’.

At that part of the programme “*The Poisoned Chalice*” (part 2) which appears at 24.01 minutes onwards, (in particular at 27.35 minutes), Tony Benn characterises that conduct thus:

“It was a coup d’état by a political class who did not believe in popular sovereignty. That was what it was; it was a coup d’état: power was seized by Parliamentarians, the seized power did not belong to them; they used it to take away the rights of those they represented. That’s how I saw it”. (My emphasis.)

Is Parliament now going to do the same as it did in 1972?

Parliament in 2018 and 2019 is faced with the fact that Parliament decided that the people (and not Parliament) were to decide the issue as to whether we remain in the European Community (which we now know carries with it the fact of government of our people by unelected and unaccountable bureaucrats in Brussels). The matter was put in the clearest of terms: the Prime Minister, on behalf of the whole government, told the British People before the Referendum:

50 157.

51 *The Poisoned Chalice* at <https://www.youtube.com/watch?v=K9GhIDvoF44> shown in 1996, hereinafter “*The Poisoned Chalice*”.

52 There is, it appears, no such place in the UK.

53 *The Poisoned Chalice*.

54 Heath, “*The Course Of My Life*”, 384, (1989).

55 You will see from *The Poisoned Chalice Part 2* at <https://www.youtube.com/watch?v=K9GhIDvoF44> just how smug Pym looks.

“It will be your decision whether to remain in the EU on the basis of the reforms we secure, or whether we leave. Your decision. Nobody else’s. Not politicians’, not Parliament’s. Not lobby groups’. Not mine. Just you. You, the British people, will decide.”⁵⁶

The people decided that they wanted to leave – which in effect meant that they wanted all the powers that had been transferred to the European Community since 1972 to be brought back to Parliament and that they wanted to be governed in the same way as they were before 1972 (emphatically not by the European Union). Parliament has seen to it that all those powers will have been brought back to Parliament in March 2019. Is Parliament now going to agree to the transfer to the European Union of all or any of the powers in the 84 areas so that the European Union, and not the British People, through their Representatives in Parliament, has the final and decisive say? Ian Dunt has written⁵⁷ in Politics.co.uk:

“At the heart of the Brexit [Chequers] white paper proposals — and of the whole future relationship negotiation really — is a simple question: who is in charge? The EU wants to remain the boss of how trade operates”.

Under the Chequers White Paper, the present Government intends to transfer the power to make laws belonging to the people to the European Union by which the European Union will govern the people in the 84 areas of government. Such governing by the European Union would be (a) without the consent of the people; (b) for an indeterminable period of time; (c) without periodic and genuine elections; and (d) without the benefit of the checks and balances upon which a democratic society is based.

In 1972, the people had delegated to and entrusted their Members of Parliament with the power to make laws which belonged to the people and the Members of Parliament then, in breach of their obligations towards their electors, delegated those powers to makes laws (which belonged to the people) to bureaucrats in Brussels. “The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it on to others” (John Locke, Second Treatise of Civil Government (1690) para. 141. (My emphasis.)

These, then, are the principles, fundamental rights to which JW Gough referred (supra) and which underpin our democracy and that of the United States:

1. It is self-evident that all men are created equal, that they are endowed with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness; that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed;
2. Inalienable rights, including the right to make laws and the right to be governed with consent of the governed, are incapable of being alienated, that is to say, sold or transferred; and they cannot be lost by having been usurped or by failure to exercise or assert them, no matter for how long ;

⁵⁶ The Prime Minister’s speech on Europe at Chatham House on 10 November 2015.

⁵⁷ Ian Dunt, www.politics.co.uk › Blogs › Ian Dunt, (12 July 2018).

3. All power, including the power to make laws, is vested in, and consequently derived from, the people. All the power which the electors have entrusted to Members of Parliament must be returned to the electors at the dissolution of the Parliament undiminished;
4. The Legislative, Parliament, cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they, the Members of Parliament, who have it, cannot pass it on to others.

Our predecessors, including John Lilburne and Elizabeth Lilburne, regarded these principles as fundamental and they were prepared to put their lives at risk in order to secure them for posterity: for Heath's generation and the present generation. "It was under Charles I and during the Interregnum that parliament first succeeded in asserting its sovereignty, not only against the King, as our histories tell us, but also against the people."⁵⁸ In the three cornered fight, between the Charles I, parliament and the people, parliament "seized power [that] did not belong to them; they used it to take away the rights of those they represented"⁵⁹ and defeated the people.⁶⁰ In 1972, Parliament seized the power belonging to the people and gave it away to others, namely the European Community. Are the present Parliamentarians going to do the same again? Are they going to seize power belonging to the people and defeat the rights of those that they represent — in the very face of the people's decision in the referendum?

Ian Geering QC

58 Rahilly, *Democracy, Parliament and Cromwell*, 565, (1918).

59 Tony Benn, *supra*.

60 Parliament identified the Levellers as a real threat which Parliament met with cruelty. Professor Rahilly (*Democracy, Parliament and Cromwell* at 19n) writes: "On 28 March, 1649, Lilburne and the others were examined before the Council of State. "I laid my ear to their door," he says, " and heard Lieut.-General Cromwell-I am sure of it-very loud thumping his fist upon the Council table till it rang again, and heard him speak in these very words or to this effect : I tell you, Sir, you have no other way to deal with these men but to break them in pieces." -*The Picture of the Council of State, 1649*, pp. 141".

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.

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