

The Attorney General's secrets. Where is the legal advice?

*Despite being found in contempt of Parliament, the government has – incredibly – managed to worm its way out of publishing the Attorney General's full legal advice on Theresa May's deal. The UK's history of joining the European project has taught us just how much Parliament and the public are deceived when government legal advice is kept secret. Yet Parliament and the media now seem happy for us to be deceived once again, write political scientist **Dr Anna Bailey** and **CIB Chairman Edward Spalton**.*

In December 1960 the then Lord Chancellor, Lord Kilmuir, wrote to the then Lord Privy Seal, Edward Heath, to draw his attention to the surrender of parliamentary sovereignty which membership of the then EEC would incur. Here are just a few excerpts:

"...the Council of Ministers could... make regulations which would be binding on us even against our will..."

*"...we could comply with our obligations under the treaty if Parliament abandoned its right of passing independent judgement on the legislative proposals... **Parliament here has in substance if not in form abdicated its sovereign position...** For Parliament to do this would go far beyond the most extensive delegation of powers even in war time that we have experienced... I do not think there is any likelihood of this being acceptable to the House of Commons..." [emphasis ours]*

"We must act on the assumption that entry into the Community would be irrevocable... Parliament must surrender this function and either resign itself to being a rubber stamp or

give the Community in effect the power to amend our domestic law..."

Kilmuir's advice on the loss of parliamentary sovereignty that EEC membership would involve could not have been clearer. And yet Heath was able to lie to us and MPs in the 1971 White Paper (sent to every home in the UK) that "there is no question of Britain losing essential sovereignty".

Parliament and the public were deceived. Shockingly, MPs did not get to read the treaty of accession to the EEC before they voted on it. Heath could lie with confidence because Lord Kilmuir's advice was kept as an official secret for thirty years.

On 3 December 2018, Parliament debated whether the Attorney General's advice to the government on the legal effects of Mrs May's Brexit deal should be published. Without a dissenting vote, Parliament passed a resolution requiring that a copy of the advice should be made available for MPs to consider.

Very politely Geoffrey Cox QC, the Attorney General, refused. He answered all sorts of questions with apparent frankness, but would not agree to surrender the actual document. It was confidential advice from him to his client (the government), and it was "not in the public interest" that it should be disclosed.

But there was a contradiction at the heart of his argument. He would answer any questions MPs asked him but, of the document itself, he said there was "nothing to see". Then he said it was not the sort of thing to be made public during negotiations and therefore "not in the public interest" for it to be disclosed. If there was indeed "nothing to see", why the secrecy? Where was the threat to the public interest?

Parliament decided not to stand for this. The next day, on 4 December, the Commons passed a motion finding the government in contempt of Parliament for refusing to publish the Attorney

General's legal advice as requested. The motion condemned the decision not to release the "full and final" legal advice and ordered "its immediate publication".

A victory for Parliament and transparency, then? Not so fast. The government responded to being found in contempt of Parliament by publishing *some* of the Attorney General's legal advice, but not all: only the legal advice relating to the backstop. It has not released the "full and final" legal advice as demanded by Parliament. In other words, the government acted like a defiant schoolboy, giving a half-hearted pretence of obeying the headmaster while sticking two fingers up at him behind his back.

What is most incredible of all is that Parliament has let the government get away with defying it. Sir Bill Cash MP alone has pursued the matter, but May has simply swatted aside his repeated enquiries about the rest of the legal advice that must surely exist. Nor has there been the slightest hint of media outrage that the government remains in contempt of Parliament. So much for the press being the watchdog of democracy.

The legal advice relating to the backstop was damning enough. It confirmed what was already widely feared: that the backstop could potentially continue indefinitely; it would not be possible for the UK to escape from it without EU approval. Who knows what other legal nasties are lurking in May's deal? Independent lawyers and researchers have warned of plenty, but any legal advice the government has received on them looks set to be kept under wraps for another thirty years.

By allowing the government to fob it off with incomplete legal advice – even when it has passed a motion of contempt demanding the full advice – Parliament has shown that it is happy to continue as the passive EU rubber stamp that Lord Kilmuir warned of. Indeed, MPs' antics last week suggested that many of them are more concerned with trying to stop

Brexit than ensuring the public and Parliament are fully informed on the legal consequences of the deal – one that will be enshrined in international law and from which there is therefore no escape.

It seems that the Attorney General will get to keep most of his secrets. If this enables the public to be deceived once again, it is not only the government that will be culpable – Parliament and the media will have been fully complicit.