

Letter from Lord Kilmuir to Edward Heath on file. Inevitable “loss of sovereignty”. December 1960.

My Dear Ted,

You wrote to me on the 30th November [1960] about the constitutional implications of our becoming a party to the Treaty of Rome. I have now had an opportunity of considering what you say in your letter and have studied the memoranda you sent me. I agree with you that there are important constitutional issues involved.

I have no doubt that if we do sign the Treaty, we shall suffer some loss of sovereignty, but before attempting to define or evaluate the loss I wish to make one general observation. At the end of the day, the issue whether or not to join the European Economic Community must be decided on broad political grounds and if it appears from what follows in this letter that I find the constitutional objections serious that does not mean that I consider them conclusive. I do, however, think it important that we should appreciate clearly from the outset exactly what, from the constitutional point of view, is involved if we sign the treaty, and it is with that consideration in mind that I have addressed myself to the questions you have raised.

He is clear that if we do sign the agreement with the EEC we will suffer some loss of Sovereignty. This is clearly an act of Treason because our Constitution allows no surrender of any part of our Constitution to a foreign power beyond the control of the Queen in parliament. This is evidenced by the convention which says:

(Parliament may do many things but what it may not do is surrender any of its rights to govern unless we have been defeated in war).

*And the ruling given to King Edward 3rd in 1366 in which he was told that King John's action in surrendering England to the Pope, and ruling England as a Vassal King to Rome was **illegal** because England did not belong to John he only held it in trust for those who followed on. The Money the Pope was demanding as tribute was not to be paid. Because England's Kings were not vassal Kings to the Pope and the money was not owed.*

Adherence to the Treaty of Rome would, in my opinion, affect our sovereignty in three ways:-

Parliament would be required to surrender some of its functions to the organs of the community;

Answer as above.

The Crown would be called on to transfer part of its treaty-making power to those organs of the community;

The Constitution confers treaty making powers only on the Sovereign and the Sovereign cannot transfer those powers to a foreign power or even our own parliament because they are not the incumbent Sovereigns to give away as they only hold those powers in trust for those who follow on.

Our courts of law would sacrifice some degree of independence by becoming subordinate in certain respects to the European Court of Justice.

*It is a **Praemunire to allow any case to be taken to a foreign court not under the control of the Sovereign. The European Court Justice or the European court of Human rights are foreign courts not under the control of our Sovereign. Praemunire is a crime akin to Treason.*

The position of Parliament

It is clear that the memorandum prepared by your Legal Advisers that the Council of could eventually (after the system of qualified majority voting had come into force) make regulations which would be binding on us even against our wishes, and which would in fact become for us part of the law of the land.

There are two ways in which this requirement of the Treaty could in practice be implemented:-

It is a Praemunire to allow any laws or regulations not made by the Sovereign in parliament to take effect as law in England. This is illegal under the Acts of Treason 1351, the Act of Praemunire 1392, The Act of Supremacy 1559, and the Declaration and Bill of Rights 1688/9.

Parliament could legislate ad hoc on each occasion that the Council make regulations requiring action by us. The difficulty would be that, since Parliament can bind neither itself nor its successors, we could only comply with our obligations under the Treaty if Parliament abandoned its right of passing independent judgement on the legislative proposals put before it. A parallel is the constitutional convention whereby Parliament passes British North American Bills without question at the request of the Parliament of Canada, in this respect Parliament here has substance, if not in form, abdicated its sovereign position, and it would have pro tanto, to do the same for the Community.

No such power exists for parliament to do this. This would be an Act of Treason under the 1351 Treason Act, A Praemunire under the 1392 Act of Praemunire, an Act of Treason under the 1559 Act of Supremacy, and the 1688/9 Declaration and Bill of Rights.

It would in theory be possible for parliament to enact at the outset legislation which would give automatic force of law to any existing or future regulations made by the appropriate organs of the Community. For Parliament to do this would go far beyond the most extensive delegation of powers even in wartime that we have ever experienced and I do not think there is any likelihood of this being acceptable to the House of Commons. Whichever course were adopted, Parliament would retain in theory the liberty to repeal the relevant Act or Acts, but I would agree with you that we must act on the assumption that entry into the Community would be irrevocable, we should therefore to accept a position where Parliament had no more power to repeal us own enactments than it has in practice to abrogate the statute of Westminster. In short. Parliament would have to transfer to the Council, or other appropriate organ of the Community, its substantive powers of legislating over the whole of a very important field.

There is no constitutionally acceptable method of doing this because it would be tantamount to a total abrogation of their duty to govern us according to our laws and customs. And it would be an Act of Treason under the 1351 Treason Act, A Praemunire under the 1392 Act of Praemunire, and Treason under the 1559 Act of Supremacy, and the Declaration and Bill of Rights 1688/9.

Treaty-making Powers

The proposition that every treaty entered into by the United Kingdom does to some extent fetter our freedom of action is plainly true. Some treaties such as GATT and O.E.E.C. restrict severely our liberty to make agreements with third parties and I should not regard it as detrimental to our sovereign that, by signing the Treaty of Rome, we undertook not to make tariff or trade agreements without the Council's approval. But to transfer to the council or the Commission the power to make such treaties on our behalf, and even against our will, is an entirely different proposition. There seems to me to be a clear distinction between the exercise of sovereignty involved in the conscious acceptance by us of obligations under treaty-making powers and the total or partial surrender of sovereignty involved in our cession of these powers to some other body. To confer a sovereign state's treaty-making powers on an international organisation is the first step on the road which leads by way of confederation to the fully federal state. I do not suggest that what is involved would necessarily carry us very far in this direction, but it would be a most significant step and one for which there is no precedent in our case. Moreover, a further surrender of sovereignty of parliamentary supremacy would necessarily be involved: as you know although the treaty-making power is vested in the Crown. Parliamentary sanction is required for any treaty which involves a change in the law or the imposition of taxation to take two examples and we cannot ratify such a treaty unless Parliament consents. But if binding treaties are to be entered into on our behalf, Parliament must surrender this function and either resign itself to becoming a rubber stamp or give the Community, in effect, the power to amend our domestic laws.

This is a surrender of our Sovereignty a clear Act of Treason under the 1351 Treason Act and a Praemunire, under the 1392 Act of Praemunire; it is Treason under the 1559 Act of Supremacy and the 1688/9 Declaration and Bill of Rights.

Independence of the Courts

There is no precedent for our final appellate tribunal being required to refer questions of law (even in a limited field) to another court and as I assume to be the implication of 'refer' - to accept that court's decision. You will remember that when a similar proposal was considered in connection with the Council of Europe we felt strong objection to it. I have no doubt that the whole of the legal profession in this country would share my dislike for such a proposal which must inevitably detract from the independence and authority of our courts.

Of those three objections, the first two are by far the more important. I must emphasise that in my view the surrenders of sovereignty involved are serious ones and I think that as a matter of practical politics, it will not be easy to persuade Parliament or the public to accept them. I am sure that it would be a great mistake to under-estimate the force of objections to them. But these objections ought to be brought out into the open now because, if we attempt to gloss over them at this stage those who are opposed to the whole idea of our joining the Community will certainly seize on them with more damaging effect later on. Having said this, I would emphasise once again that, although those constitutional considerations must be given their full weight when we come to balance the arguments on either side, I do not for one moment wish to convey the impression that they must necessarily tip the scale. In the long run we shall have to decide whether economic factors require us to make some sacrifices of sovereignty: my concern is to ensure that we should see exactly what it is that we are being called on to sacrifice, and how serious our loss would be.

***It is a Praemunire to subject Her Majesty's Courts of law to the domination of a foreign court outside of Her Majesty's control.*