

RESEARCH PAPER 10/79

Appendix 2 Letter to Edward Heath from Lord Kilmuir, December 1960

I have no doubt that if we do sign the Treaty, we shall suffer some loss of sovereignty [...] 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; The Crown would be called on to transfer part of its treaty-making power to those organs; Our courts of law would sacrifice some degree of independence by becoming subordinate in certain respects to the European Court of Justice.

(a) The position of Parliament

It is clear from the memorandum prepared by your Legal Advisers that the Council of Ministers 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:-

Parliament could legislate ad hoc on each occasion that the Council made 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 judgment on the legislative proposals put before it. A parallel is the constitutional convention whereby Parliament passes British North America Bills without question at the request of the Parliament of Canada; in this respect Parliament here has in substance, if not in form, abdicated its sovereign position, and it would have, pro tanto, to do the same for the Community.

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 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 have therefore to accept a position where Parliament had no more power to repeal its 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.

(b) 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 sovereignty 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 use of obligations under our 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 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 only 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.

(c) 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 these 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 the objections to them. But those 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 these 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 sacrifice 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.

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