



Europe and the old Constitution

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This lecture is on Europe and the constitution. Perhaps I should say at this point that this is probably the most sensitive and controversial of the subjects that I have dealt with so far, and I shall regard this lecture as a success if at the end of it you don't know whether I'm a Europhile or a Euro-sceptic, but whether I'll achieve that, I don't know – it's for you to judge!

I think we can't understand the impact of Europe on our constitution unless we look at the history of our relationship with the continent, so I want to deal with that first and then explain how that affects our different attitudes towards Europe, because in essence, we have a history of constitutional stability, but most of the countries on the continent have a history of constitutional instability.

Since the War, we have played an important part in inter-governmental organisations in Europe which don't affect British sovereignty, like for example the Council of Europe, but we've been very unhappy about playing a full part in supra-national organisations like the European Union, where you do have to surrender sovereignty, even though we were asked by the other countries to play an important role and perhaps could have played a leadership role in the European Union, but we've always been unwilling to do so. I think all this results from very deep rooted factors in our history, and I think when you consider what our attitude should be towards the continent, you have to ask yourself whether these deep rooted factors are permanent and unchangeable or whether they can be changed and whether they ought to be changed.

Let me give a very obvious example of how we differ so much from the continent. If you ask yourselves what the key dates in British history are, I suppose most of us would begin with 1066 with the Norman Conquest, because that was the last date on which a British government was overthrown by force. Then some people might say 1660, because that was when the monarchy was restored after the Civil War, and then a little later in the 17th Century, 1688/1689, the Glorious Revolution, which confirmed that we were a parliamentary monarchy and that the king could only rule with the consent and authority of parliament. But since then, since the 17th Century, our political system has remained basically unchanged and highly stable. We've got the same basic institutions we had then: we've got a monarchy, we've got the House of Lords, and we've got the House of Commons. Of course their roles are quite different, but they've evolved through time, they've changed, been adaptable, and so on.

If you compare that with the continent and ask yourself what are the key dates: 1789, the French Revolution; 1848, the year of liberal revolutions, most of which failed; and 1917, the Russian Revolution, two revolutions really, the second of which was the Communist Revolution. We didn't have any of these revolutions. There were a few reverberations in Britain, but on the whole fairly small, and this didn't impact upon us. So you can see the basic contrast between the instability of the continent and the stability of British institutions.

In the first lecture, I talked about countries with different constitutions, and I mentioned that the French had had 16 constitutions since 1789. There used to be a joke in France that someone went into a shop and asked for a copy of the French Constitution, and the reply was "I'm sorry, we don't sell periodicals here"! The current fifth republic constitution was set up in 1958; that's really only 46 years, within the lifetime of some of us here. It's been the second longest of all the French constitutions since the Revolution. If you look at Germany, their constitution dates from 1949 after the defeat of the Nazis in the Second World War. Italy dates from 1947 after the defeat of Mussolini in the Second World War. And so you can understand if on the continent they do believe, in a sense, in the importance of constitutions and constitutional change as being central, and the European constitution perhaps is one example of that belief in constitutional change.

We in Britain tend to be rather sceptical of that. We say let institutions evolve, let the procedures evolve, as they are, let them adapt, don't keep changing your system, don't draw up new sets of rules all the time, but just let institutions evolve. If you want your House of Commons to change in nature, let that happen, but you don't draw up a new set of rules every few years.

This basic difference between the stability of Britain and the instability of the continent, was exacerbated by the Second World War, because our own experiences in that war were very different from that of most continental countries. All the countries involved in the war suffered from Fascism, Nazism (a variant of Fascism if you like), occupation or conquest, and we alone of the European combatants did not have any of these diseases. We didn't have a Fascist regime, we weren't occupied, we weren't conquered, and we retained our democratic system, which seemed to have proved its worth in wartime. No change in our institutions was needed, and it's not surprising that when the war ended, we thought that our system was rather better than those of the continent, that we had a very well, firmly established democratic system. So we thought that our democratic institutions were superior, and we also thought, because our experience had been so different from that of the continent, that we were separate from the continent. Winston Churchill, in wartime, would often use the phrase "our island home" about Britain, and that I think emphasised the fact that we were not part of Europe. In a sense it strengthened British patriotism, it's fair to say, for obvious reasons.

On the continent, the reaction was quite different. Many people on the continent said to themselves that Europe has been involved for many centuries in terrible wars, one country against another, and in this the Second World War just the most horrendous of all. They asked themselves why do these wars occur, and they said this isn't just a war of France against Germany, and Italy and so on, it's a war caused by the very concept of the nation state, caused by nationalism. Nazism is really nationalism in very, very extreme forms, and they said as long as we have nationalism, we're going to have war, and therefore the way to avoid future wars is to try somehow to overcome nationalism and national feeling, and in particular, to begin by overcoming this very serious and long lasting hostility between France and Germany, which had gone on since the Napoleonic Wars, and caused one war after another.

They said if you just appeal to people's ideals, you probably won't get anywhere, and therefore why can't we produce the economic incentives that will show that cooperation is better than fighting? So in 1950, they proposed that Germany and France pool their coal and steel production into one entity, called a coal and steel community. They said any other country that wishes to join it can do so, to pool their coal and steel resources in one common market – the origins of the Common Market. Four other countries decided to do so – Italy, and the Benelux countries, which were Belgium, Netherlands and Luxembourg. They were the six that began with that. We were asked if we were interested, but we said we weren't and we didn't join. This led in 1958 to the formation of the European Community, which was a customs union of the six member states that had formed the coal and steel community – the beginnings of the Common Market, now called the European Union.

Its first name was the European Community, but it was always known as the Common Market in Britain, and now known as the European Union. They said that the economics of it were important of course, but it was a means to an end, and that end was political. In the preamble to the Treaty of Rome of 1957, which set up the European Community, it was described as "the ever closer union of the peoples of Europe". That's an ambiguous phrase and can be interpreted in many different ways, and has been by many politicians, but what is clear from that phrase is that the economics was a means to an end of some form of political union, leaving aside how that's defined, so as to make war between the countries in that union impossible, to transcend nationalism. Again, we were asked to join that, but we said we wouldn't do so.

I hope you can see, from the historical background that I've described, why we wouldn't do so. Some people, pro-European people, have criticised British governments for not joining. They said perhaps we could have been the leaders of Europe, but if you look back, it is understandable, because after all Germany had a new and untried democratic system then. It had begun after the War and people still thought, well, we don't know what might happen, the Nazis may come back, and similarly in Italy, the fascists might come back. It was new and untried. France was highly unstable until De Gaulle took over in 1958. Before 1958, the Communists were the largest party in the French parliament, so people said France is also unstable. They said our experience from the War and so on is very different from that of these countries. We've still got our empire, we're still a great power, and we're much more than a European power. This may not succeed, it may not get off the ground, but even if it does, it's not the sort of thing we want to get involved with. I think you can see, in a sense, that our whole history predisposed us not to get involved with that arrangement.

However, by 1961, and I think this was largely a result of Britain's seemingly poor economic record, the then Conservative government, led by Harold MacMillan, had changed its mind and applied to join the European Community. But by then, it was established, and the French, led by President De Gaulle, vetoed the British application on a number of grounds. He said we were too pro-American, we weren't really committed to Europe, that the Commonwealth, as it then was, was a barrier, and all sorts of reasons that we couldn't be admitted. Then the succeeding Labour government under Harold Wilson in 1964 tried again, but was again vetoed by De Gaulle. In fact, we didn't get in until De Gaulle had left the presidency of France in 1969, and then it was another Conservative government, led by Edward Heath, that finally secured satisfactory terms and overcame the French veto, and so we joined the European Union, we were a late member, and we joined in 1973.

But even then the argument wasn't over, and you may say it's still not over as to whether we ought to be in or not, and there are a lot of people who think we shouldn't be, but Edward Heath was the Conservative Prime Minister, but the Labour opposition of the time said that Edward Heath hadn't negotiated satisfactory terms, and they said a Labour government would renegotiate the treaty and, even more important, put it to the British people in a referendum for acceptance. They said, it was such a major issue, parliament couldn't itself be relied upon to decide, that it should be put as a unique issue as they thought to the British people. As a result, we had our first national referendum, our only one so far, though more are promised, in 1975 on the issue of whether we wished to remain in the European Community or not. That led to a large majority in favour of staying in by two to one. It's fair to say that we were already in the European Union and our economic situation was very, very difficult then indeed, so that you may say the forces of conservatism, with a small "c", were allied to the cause of keeping us in. It doesn't follow that if the referendum had been held in 1973, before we'd entered, that there would then have been a majority for entering, for making this change, but once we were in, people may have been rather frightened of leaving. One Conservative ex-minister, Sir Christopher Soames, said that our economic situation was so difficult that he wouldn't advocate Britain leaving a Christmas club let alone the European Community, and so we stayed in! After this referendum, Harold Wilson, the Prime Minister, said this is the end of a great national argument that's gone on for a long time, but now the British people have spoken and the whole thing is settled and we are in Europe, but of course that was a very premature statement to make because it's still a very powerful issue in politics.

When Margaret Thatcher came to power in 1979, she proceeded to a further renegotiation of the treaty because she said that Britain was contributing too much to the European budget, and this was unfair. This led to five years of squabbling before she, on the whole, won her point, as she tended to do, by 1984, so there were five more years of difficulty. But even then, the dispute wasn't over, because the Labour Party in opposition moved to a hostile attitude towards Europe, and under Michael Foot's leadership in the 1983 General Election, it committed itself to a position of that we should leave the European Community. That hostility led to a split in the Labour Party and the formation of a new party, the SDP, which later merged with the Liberals to become the Liberal Democrats – there was a split, a breakaway. You can see at the present time, it's fair to say I think, and really through the time of John Major's government in the 90s, that Europe was an issue which split the Conservative Party pretty badly, and could still split it. Indeed the Conservatives are now worried about the United Kingdom Independence Party taking votes from them. So in the 80s, Europe split the Labour Party, and more recently, it's the Tory Party, so it's still a difficult issue for us.

But on the level of governments, even after Margaret Thatcher's renegotiation, that wasn't the end, because in 1992, John Major, as Prime Minister, agreed to the Maastricht Treaty, but he secured two crucial opt-outs to Britain from that treaty, without which I think he wouldn't have signed it. The first and most important was from the Euro, the common currency which has now been established. There are three countries out of that at the moment, Britain, Sweden and Norway, but the other 12 of the 15, until this year, are in it. But John Major got the opt-out, and it said we needn't join until parliament decides to join, we're not committed to joining, that was an opt-out, and John Major, and later Tony Blair, have also said well parliament won't join until the people say in a referendum they want to join. The second opt-out was from a series of provisions regulating primarily companies called the Social Chapter of the European Union. John Major got an opt-out from that, and Tony Blair has opted-in, he's accepted the Social Chapter, though the Conservatives now say they want to opt out again if they win an election. That's also a key issue, and that brings us up to the present day. I think you'll all agree that we are the bad boys of Europe, that we have caused, from our continental partners' point of view, endless trouble by not making up our mind whether we want to go in, then going in and saying we're not sure the terms are right, renegotiating them, having a

referendum, then another renegotiation under Margaret Thatcher, further opt-outs under John Major – I think if you were a continental leader, you might say these British are a bit difficult.

Because we entered Europe late, the basic arrangements were made without us. It's like joining with a club when you haven't helped to draw up the rules, and we had to enter an arrangement which we hadn't designed, and which in many respects didn't suit our interests. The other member states are very different from us, because the European countries, as I've said, all have constitutions which we don't; they all have different political practices; most of them have proportional representation electoral systems and we don't; they have different legal systems from ours; they had different arrangements for taxation, for supporting agriculture, and different political systems, most of them. For example, Germany and Italy have Christian Democrat parties, which we don't. The structures are different. These differences all stem, I think, from history.

Looking at the constitutional problems that arise, the first problem is that unlike the continental countries, we don't have a written, or as I prefer to say, a codified constitution. We have no constitution in the sense in which the French, the Germans and so on have them. There's a basic reason for that, which I outlined in my first lecture, but our basic principle is the sovereignty of parliament, that parliament can do what it likes. If parliament can do what it likes, there's no point in having a constitution, because the constitution would just say parliament can do what it likes, and the point of a constitution is to limit the parliament, and we don't have that. So this differentiates us from continental countries. And also, because we think in that way about sovereignty, we say sovereignty must be concentrated in one particular place. With us, it's concentrated at Westminster, but you could say it could be concentrated somewhere else, like Brussels.

But continental people tend not to think like that. They say, like the Americans, that sovereignty can be divided. For example, Germany is a federal state, and sovereignty is divided between the capital in Berlin and the provincial governments in, for example, Bavaria, Baden-Württemberg, and Hamburg and Bremen and so on, I think 17 of them, just as in America sovereignty is divided between Washington DC, the federal government, and the 50 states. They all have governments of their own with law making powers. So they don't say sovereignty must be concentrated in one place; they say, why can't it be divided? Why can't there be power sharing? This is the basic principle of the European Union that power is not concentrated in Brussels, but it's shared between the European level and the member state level – Germany, Italy, France, whatever it is. Obviously it's easier for a state which is federal internally, like Germany, which divides power inside, to understand how you can divide power between Germany and Europe. It's very difficult for us because we don't have a division of power of that kind in Britain. We have a concentrated sovereign in one particular place, so we can't understand very easily how a federal system can work.

The continental powers, on the whole, understand power sharing in two different ways: firstly, the way I've described, in terms of territory, the division between Europe and the member state, that's one; but secondly, the power is not concentrated even at the centre in one single parliament, it's divided even at the centre. For example, power in Germany is divided between the two houses in a much stronger way than it is here. The upper house in Germany, which is called the Bundesrat, is a very, very powerful body which can veto legislation in a way in which the House of Lords hardly ever does. The institutions of the European Union exemplify that principle, because you've got a Council of Ministers, you've got a Commission, and you've got a Court of Justice and a Parliament, and they all divide power between them. Power is not concentrated in any of those bodies, it's divided, they each have a share of the power, and you can't ask the question where is power actually concentrated.

Moreover, and this is I think a very crucial point, the laws of the European Union can, if they go against the constitution of the European Union, be struck down by the European Court of Justice. It's rather like the American Supreme Court. Any law which goes against the constitution of the European Union, the Court of Justice will strike down. For example, to take a crude example, suppose the European Union were to pass a law saying that Britain could set up tariffs against France, customs duties. That would be struck down by the Court of Justice as going against what the European Union stands for. Of course we don't have that in this country.

But there is further, and I think even more crucial point, which is that European law is superior to the law of the member states. In Britain, what central government does is superior to what local government does. If a local authority tried to do something which goes against the law, then the courts will rule that illegal. A local authority has strict controls on what it can do and what it can't do. Now I don't want to draw the analogy between a member state and a local authority, but member states are subordinate to the European Union.

If a member state passes a law which goes against the European Union law, that law, from the point of view of the European Union, is unconstitutional and will be struck down.

Let me give an example. This was the case that established this principle, and it was established before we entered the European Community in 1973, and it was a case in Italy. The Italian government in 1964 nationalised the electricity industry. One of the shareholders in that industry, a man called Mr Costa, and he gave his name to the case, the Costa case, he refused to pay his electricity bill, which was about a pound. It wasn't a heavy bill, but it was the principle, because he said that nationalisation, although it was legal under Italian law, was illegal under European law because it was setting up a monopoly and preventing competition. The European Court of Justice said that Mr Costa was right, that it's legal under Italian law, but illegal under European law, and European law is superior to Italian law and therefore that law must be struck down. That is a very, very fundamental point.

Let me give a second example of a case which some of you may find perhaps some sympathy with. There was a French liqueur called Cassis, Cassis de Dijon, and a German firm wanted to import this liqueur. It was a blackcurrant-based liqueur with a very low alcoholic content. Its maximum strength is 20%. The German government said that the drink could be imported but not sold because there was a German law which forbade the marketing of liqueurs of such a small alcoholic content. So you could buy it, but you couldn't sell it. The European Union said you can't do that, that goes against free competition, that law is unconstitutional, you cannot restrict competition in that way, that there must be free competition with all the countries and you cannot restrict it in that way.

There's one interesting case coming in which may interest some people that the European Union has passed a little while ago: a directive, prohibiting retirement on grounds of age. This is coming in in Britain in 2006 I think it is and this means that all the European governments independently, individually, whatever their views, have to make provision for that. They will not be able to retire people on grounds of age after that year. It will clearly have very great consequences, something the British government may or may not want, but it's certainly a highly important principle.

I want to elaborate on this point, it is very fundamental about Europe, that although we talk about the Treaty of Rome and the European Constitutional Treaty, this is much more than a treaty. When we talk about a treaty, we're talking about a treaty between member states which retain their independence entirely, but this is much more than that, because what Europe has done is create a new legal order which is binding on all the member states in it. It's not like joining, for example, NATO, the United Nations or any other treaty you want to think about, because there's a single legal order, the European legal order, which is superior to the order of every member state in it, just as a legal order of the federal government in America is superior to the legal order of New York, Wisconsin, Texas and so on. We are therefore bound by it. Whatever parliament says, we are bound by the laws coming from the European Union, and this is a permanent limitation, you may say, of our sovereign rights as a nation, for better or worse.

Some people criticise the European constitution for this. They say that it would make European law superior to our law, but it's actually been a principle since before we joined. The European constitution just codifies that principle and makes it absolutely clear. Following all this, the European Union has direct effect on us as citizens and it gives us various rights, and also of course duties. For example, Mr Costa in my case about the electricity, he had the right that the electricity industry not be nationalised. The people who made Cassis de Dijon had the right to sell it in Germany and everywhere else under exactly the same conditions as in France. It couldn't be discriminated against. We've got all sorts of rights of that kind.

To give another illustration, there was a case in 1995 concerning equal opportunities in the European Union. It dealt with the question of unfair dismissal and redundancy pay in Britain. Our laws had distinguished between unfair dismissal and redundancy pay between full-time workers and part-time workers. The European Union said, the majority of part-time workers are female, they're women, and this is an unfair discrimination against part-time workers, it's contrary to the European treaty. So they said you can't do that in Britain, you can't make that distinction, because it implies a distinction between men and women, it goes against equal opportunities.

I think you can see the difficulty this causes for a country which says that its parliament is sovereign, because if you look at it from our point of view, parliament is sovereign and it can do what it likes, but if you look at it from the European point of view, parliament is not sovereign, it's bound by European law. So you've got two different views, two different interpretations. You may say it's like two incompatible computers; the two principles are not, I think, compatible.

All this came out in a very interesting and fundamental case in 1991 called the *Factor Tame* case. The *Factor Tame* case were fishing companies controlled by Spain, which alleged that our Merchant Shipping Act of 1988 was discriminatory because it prevented them fishing in British waters. The European Court of Justice said that was right, it went against the common fisheries policy of the European Union, and that we had to do something about it. Now here we have something very interesting indeed. The view of the European Court is absolutely clear, but what about our courts, what are they going to do? This went up to the House of Lords in its judicial capacity, the highest court in the land, and they said, and this I think is remarkable, it's a revolutionary statement in a way, that if a British statute, a British law was incompatible with the European law, they would not apply it. In other words, parliament wasn't as sovereign as it seemed because they wouldn't apply this law, because they said that we knew when we joined the European Community, as it then was, that the European Community law had priority over British law, and that therefore parliament couldn't have intended to do something illegal by discriminating against Spanish fishermen. So parliament isn't so sovereign after all. There are certain things it can't do. It can't discriminate against Spanish fishermen, and couldn't, on *Cassis de Dijon*, whatever other issue you like to take, there are lots of things now parliament can't do. It can't discriminate between full and part-time workers, it can't impose a retirement age, and so on. You have a long list.

This is, I think, a constitutional revolution. We used to say if parliament was sovereign there can't be a superior law maker – parliament is the superior one. But the Europeans say the European Union is that superior law maker. It's a new legal order, superior to that here and in other member states. The sovereignty of parliament used to mean we thought that no court can refuse to apply parliamentary legislation; the courts couldn't inquire into anything except that parliaments pass the law. You may have heard this issue about hunting, the question about the Parliament Act, and was it legal? There was a rather arcane argument saying that it was wrongly passed, this Act, but I will predict to you the courts will not look at it, they will not look behind what happens in parliament. But here, they have to look at something other than parliament because there's a higher authority over the British parliament, which is that from Europe.

You can see the ambiguity of constitutional treaty, because in one sense it's a treaty between member states, in another sense it's more than that because it codifies and consolidates this single legal order, which if you like has authority over us all. In one sense, it does no more than codify what already exists, but what it does perhaps is reveal the true position to people who perhaps weren't aware of what it was about. It's fair to say that a lot of the Euro sceptics want to claw back powers which we've given to Europe in the past – perhaps they didn't realise what they were doing - and particularly this principle of the superiority of European law. I think that is why Europe causes this country so much difficulty is it brings into play our most fundamental beliefs about sovereignty and nationhood, British identity, and so on, and this is why it's proved so difficult to resolve and has divided the parties. Our sense of identity, Britishness if you like, reinforced by the War, is a very different and arguably a deeper sense of national identity than on the continent, where they're rather frightened of national identity, because after all, if you're German, you may say well look where national identity led, into Nazism, and if you're Italian, into Mussolini, and so on, and be rather worried about it.

Because of all this, people don't trust parliament to make the decision on their behalf. Many people say, and this was why we had the referendum in the 1970s, it's not for parliament to decide, it's for us to decide whether we wish to transfer sovereignty or not, and that's why we're having a referendum on the constitution, and a referendum also on the Euro, it's for us to decide. It's a fundamental question which we still have to answer.

There are two schools. The first says that the historical analysis that I've given is still absolutely fundamental, that we are different and separate from the continent, that's a fundamental feature of our existence, it won't change, and it ought not to change. Other people say no it's a product of historical circumstances which have now disappeared, that we had a large maritime empire, we were a global power, a world power, all that ended when India became independent in 1947, the empire no longer exists, we're no longer an imperial power, we now ought to come to terms with the fact that we're a European power. They may say, well, although we had a grand empire, it didn't stop us getting sucked into European quarrels, twice in the 20th Century, the First World War, Second World War. They began, the First World War, an obscure quarrel in Serbia, and then the Second World War, problems with Nazi Germany and Poland and so on, and the British Prime Minister in 1938, Neville Chamberlain, spoke of Czechoslovakia as a faraway country of which we know nothing, but then the year later we were at war between Poland, another faraway country, and some way away from us. So these people say no, what happens in Europe will affect us, we can't remain isolated from European affairs.

This divides not only people but also the political parties. If you want to look at the two sides, if you list the politicians on the first side, who say we're permanently separated from the continent – both Margaret Thatcher and Michael Foot would accept that view, and you couldn't have two more different politicians than that. Enoch Powell would have taken that view. The late Peter Shore would have taken that view. Now John Redwood would take that view, Robert Kilroy-Silk – all different sorts of people. On the other side, you'd have Edward Heath, Roy Jenkins, and Tony Blair – again, very different politicians, very different views, three different political parties. At some time, we will have to give an answer to that question. It may be in the referendums that come and the General Election, but you'll see if we give a yes answer, it will fundamentally affect our constitution, because a yes answer, a permanent yes answer, means that our parliament will no longer be sovereign. Some of you may think that's a good thing, and some of you may think that's a bad thing, but I think it is the case.

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