Law Society Centenary Lecture
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"A Union with several legal systems: the European experience"?[1]

Introduction

A centenary is a time for looking back and also for looking forward. Usually one looks back at the 100 years of the person or institution in question. It is typical of the broadmindedness of Hong Kong that you have asked me to talk about what is happening in Europe. I am very happy to do so because, as you will notice, I am actually rather excited by it – in so far as a judge is ever allowed to get excited about anything.

As I understand it, there are those in HK who are beginning to be concerned about what will happen commercially, legally and politically in 2047. I don't suppose that anyone, least of all I, can give you a definitive answer to that question. But what I can say is that there is no legal reason why one country two systems should not last and that the UK has demonstrated that in its history. Scottish law is quite different from English law. We have shared a monarch for 3 centuries and have been in political union for 2 centuries.

In the last decade central government in Westminster

[1] Inevitably much of the thought behind this talk has been stimulated by others. A full acknowledgement of these will be found in the forthcoming July 2007 edition of the International and Comparative Law Quarterly Review.

decided to ask the people of Scotland whether they would prefer to have a greater measure of devolution than had been the arrangement and whether they would like to have a parliament of their own. The Scots said yes and they have got what they asked for. But this was the result of political considerations not of legal ones. We simply have not found the coexistence of two legal systems in the same state to be a significant problem.

Some 35 years ago the UK joined the European Communities and thus became part of a political entity inside which several legal systems have flourished. There is a wide diversity of views as to how this entity should develop and what policies it should pursue but are no significant problems springing from the coexistence of several legal systems within the same political entity.

What I want to do this morning is to put forward the view that there is no reason in principle or practice why all power should be concentrated in one source which lays down the law for everything. On the contrary there are many theoretical and practical advantages for everyone in having several centres of power operating under differing but broadly compatible rules.

When a central authority legislates it exercises its decision making power in a uniform way. This is wonderful when the central decision turns out to be right. It is a disaster when it turns out to be wrong. Now, in the nature of things, a proportion of the decisions will inevitably be wrong. I recollect Lord Home, a former Prime Minister of the UK replying once in answer to a question as to whether he had not taken what, with the benefit of hindsight, could be seen to be a wrong decision: Yes it was a wrong decision. With

the benefit of hindsight, half my decisions were wrong decisions. But to get half right is not bad.

When power is diffused then different authorities will make different decisions in any particular field and, in the nature of things, it is probable again that some will be wrong. However, at least some will be right and then the others can learn, not merely what has been done wrong but how to do it better.

The European Union now comprises some 500 million citizens in 27 Countries – varying in size from little Luxembourg where I live with its 650,000 inhabitants to Germany next door with some 80 million. 27 countries: One system. Here in Hong Kong it is tempting to adopt such a description. Like most such slogans, it contains some truth and yet is misleading. These 27 countries do have many values in common which have grown out of our history. We play by a certain corpus of common social and economic rules. But the degree of socialisation in our economies varies between the Member States. None allow market forces free play but some countries regulate much more than others. Moreover, we still have 27 separate legal systems although each legal system accepts the common rules of the Union as part of its own.

What I would like to do in the next ¾ of an hour is to climb with you on top of a peak, as it were, and to look with a broad perspective at the astonishing change of Europe from a place where people were always killing one another in pursuit of some national or dynastic goal to a place where we seem to be able accommodate change without war or murder, a place where we continue to have many countries and many legal systems but yet work reasonably

harmoniously together. The unprecedented, astonishing and encouraging thing is that for the last 50 years we have had no war in western Europe, that we have not made war on our neighbours, that the rule of law has flourished and that we have become more prosperous.

I may not be a hundred years old but I am in my 70th year. This gives one a certain historical perspective. I have lived through the Second World War. During that time I lost both my parents and they lost most of their friends as a result of war with its shootings and bombings or as a result of Hitler's brutal dictatorship which involved concentration camps, torture and both mass and individual murder.

Europe, which in some ways has historically been a thoroughly bad influence on much of the rest of the world, seems to me to have stumbled across a way of organising its affairs which it is worth contemplating. So what I want to do is to look shortly at the rise of the idea of the nation state in Europe, then to share with you our sense of horror at what we had done, our diagnosis of the causes of that horror, the steps which have been taken to try and construct a more peaceful and wealthier society in Europe and to conclude by reflecting on whether this way of organising relations between states may not be a better model for the world than that which Europe imposed on much of it in the past few centuries.

The Nation State

In mediaeval Europe it was taken as perfectly natural for an individual simultaneously to have several loyalties, not merely to different persons and institutions, but to different legal systems. The mediaeval system of rule included lots of different legal systems. Different juridical instances were

geographically interwoven and stratified, and plural allegiances abounded.

Within England, not only were there courts other than the king's courts, but the relationships between Common Law, Equity and the Privy Council were not ones defined and delimited with the clarity which would please a schematic mind. For hundreds of years, if the Common Law gave the litigant what he regarded as an unsatisfactory answer he came to Equity for justice. The systems worked in parallel with each respecting the other.

The 16th century in Europe was marked by very bloody religious wars between Catholics and Protestants, each claiming a unique insight into Christian truth. Statesmen tried to secure peace and in 1555 concluded the Peace of Augsburg. The principle which was the basis of this peace – that whoever was king could prescribe the religion which was to be followed in his kingdom - transformed this multilateral treaty into a sort of constitution for a new society of states. It implied a theory of sovereignty by the states of Europe that permitted no distinction in law between a Catholic and a Protestant country. It carried, as a corollary, another principle which rulers readily acknowledged and proclaimed, although they did not always scrupulously observe it: non interference by one state in the affairs of another. Thus the basis of a comprehensive society of states was formed.

However, the 'sovereign' only *gradually* turned into the ultimate source of authority from which all legal rules should originate. What characterised Europe in the first half of the 17th century was not rulers with exclusive powers, that is, rulers encapsulated by well-defined

territorial boundaries, capabilities and functions as we now know them, but on the contrary rather diffuse power relations.

Then gradually the word 'sovereign', instead of being associated with feudal duties owed to a king who ruled certain territories came to be associated with the nation state. The sovereignty of the nation state became the catchword.

What happened was that the historical image of the European nation state was transformed, from an empirical fact that shaped life in Europe from the 17th Century onwards, into a metaphysical entity with its own soul and volition. This state became taken for granted as the prime actor in political discourse – both inside that state and in relations with the outside world. I think this can now be seen as an unhappy development.

From 1789, the year of the French Revolution which turned Europe upside down, the idea of the nation became a powerful metaphysical focus of social identity, social unity and social purpose, something to live for and die for collectively. Millions died in the pursuit of goals set by their respective states. The idea of the nation was seen as setting the framework of identity, unity and purpose for all human effort, not merely the practical framework but also the aspirational framework. People realised that the economy of the nation could harness the overwhelming power of collectivized energy in the self-developing of a society internally, and externally in competition and conflict with other societies which had undergone the same kind of development.

So Europe in the 19th century became a collection of highly nationalistic states each fighting to expand or at least maintain their boundaries. You in Hong Kong, or at any event your ancestors, know something about this. Perfectly foreseeably, great strife and loss of life resulted. Dictators came to power – particularly when economic conditions for the mass of the population were appalling and involved mass unemployment and starvation. Dictators – Hitler, Mussolini and Stalin spring to mind – had no regard for anything which stood in the way of what they regarded as their nation's destiny. There was no freedom of speech, no rule of law; there was torture, political assassination, and the murder by the state of millions. After the Second World War there was a widespread feeling in Europe that there must be a better way. People recognised that somehow the sense of reverence and respect for the individual human being had got lost in the pursuit of aggrandisement by the state.

Three great political aims have dominated Western Europe since 1945. The first was a desire to safeguard the physical person and the spiritual liberty of the individual – his rights as a human being - against attacks by the majority or by the state. This was a reaction to the murder and torture of the concentration camps and to the fact that the emotions of the people had been whipped up into hatred of various minorities. The second aim was to secure the material wellbeing of the individual. This was a reaction against the poverty which in the 1930s had induced the despair which had led to the dictators coming to power. There was a desire to construct an economic system which would increase gross domestic product and ensure that at least a certain minimum of economic welfare was available to each individual. The third aim which has dominated Europe

during the last 50 years has been the desire to prevent Europe being torn apart once more by war. It is the interaction of the steps taken to achieve these three aims which has resulted in the European Union of today. Let me look at them in turn.

The first aim: the safeguarding of the human personality

A first development was the creation of the Council of Europe followed in 1950 by the signing of the European Convention on Human Rights. The Council now comprises some 46 states, running from the Russian Federation in the North and East to Portugal in the West and Greece in the South. It operates more or less on the traditional model of inter state cooperation being a committee of foreign ministers although it also has a parliamentary assembly. However the European Convention on Human Rights signed by each member state of the Council, is in many ways what is of most interest to lawyers and, I suspect to politicians.

The Convention, as one would expect, starts with a catalogue of human rights. There have, of course, been catalogues of Human Rights for centuries. While they differ in detail as to the rights enumerated, as catalogues they have much in common. Many states have them as part of their constitution. What has distinguished most of them is that they are solemn declarations often with no clear means of enforcement. Such methods of enforcement as do exist are internal to the state concerned. A problem which regularly appears is that all states from time to time face emergencies and then decide to suspend or ignore the rights so solemnly proclaimed.

Although a catalogue of rights is common enough, the European Convention of Human Rights mapped out a new path. It not merely catalogues the rights but provides an international court whose task it is to establish whether an enumerated right has been violated. That Court is known as the European Court of Human rights. It has one judge from each signatory state. It is not the court of which I am currently a judge but I have sat as a judge there. Decisions are taken by a majority. The Convention provides that any signatory state may bring any other signatory state before that court and accuse it of a violation of human rights. So Ireland can accuse the United Kingdom of failing to observe its Convention obligations and indeed has done so. But the Convention goes further. It provides that any individual who claims that his human rights have been violated by any signatory state may bring that state before the Court which, if it finds the case proved, can award compensation.

So what is new here is the acceptance in advance by each member state of the Council of the jurisdiction of the Court and their acceptance of the right of access to that court of individuals. What that means is that the process of asserting one's rights against, in particular, one's own nation is in effect uncontrollable by diplomatic or other means. It has a life of its own.

Moreover, what has happened is that, over the last few decades, the member states have agreed on a number of changes, all in the direction of expanding those rights. Thus the death penalty has been abolished and the catalogue of rights has been gradually expanded so as to include now a right to the peaceful enjoyment of property, a right to education, a right to free elections, a right to freedom of movement within the state in which a person is

lawfully resident, a right to leave a country including your own, a right not to be expelled from your own country, a prohibition of the collective expulsion of aliens, various procedural safeguards on the expulsion of aliens, a right not to be imprisoned for debt, a right to equality between spouses, a right not to be punished twice for the same offence, a right to compensation in the event of a wrongful conviction, and a general prohibition of discrimination on grounds of sex, race etc.. These rights are regularly asserted before the Court.

Examples

Let me give you a couple of examples where the United Kingdom has found itself in the dock as it were. They will show you how the court works in practice. The first is a case called McCann v UK[2] which concerned the shooting by British soldiers in Gibraltar of three persons believed to be Irish Republican Army terrorists who had entered Gibraltar with the intention of planting a bomb. The cases were brought by their next of kin.

The applicants alleged that the killing of the three by the armed forces constituted a violation of Article 2 of the Convention which read at the time:

> 1. Everyone's right to life shall be protected by law. …
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;

[2] (1995) 21 EHRR 97

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The Court said this.

192. In carrying out its examination under Article 2 of the Convention, the Court must bear in mind, that the information that the United Kingdom authorities received, that there would be a terrorist attack in Gibraltar, presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.

193. Several other factors must also be taken into consideration.

In the first place, the authorities were confronted by an active service unit of the IRA composed of persons who had been convicted of bombing offences and a known explosives expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.

Secondly, the authorities had had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction and, in co-ordination with the local Gibraltar authorities, to take measures

to foil the attack and arrest the suspects. Inevitably, however, the security authorities could [not] have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses.

194. Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, …, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.

Having looked in detail at the actions of the soldiers the court concluded

200. … that the soldiers honestly believed, in the light of the information that they had been given that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

The Court considered that the use of force by agents of the State in pursuit of one of the aims delineated in Article 2(2) of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic

burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.

So far, so good for the UK. The Court continued

201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

After a detailed examination which I will spare you, the Court concluded that

… having regard to the decision not to prevent the suspects from traveling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention.

214. Accordingly, it finds that there has been a breach of Article 2 of the Convention.

The Court was divided 10:9 and the end result was not widely welcomed in the UK but the significant thing is that the UK, like every other country against which the ECtHR has given judgment took the result on the chin. As a footnote let me add that the court held that it was not appropriate to award compensation having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar.

Let me give you one other example of the reach of this Convention. In Hilal v UK[3] the applicant complained that he would be placed at risk of torture or inhuman or degrading treatment contrary to Article 3 if he were expelled from the United Kingdom to Tanzania.

Article 3 of the Convention provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

You should note that it was not alleged that he had been tortured in the UK or that he would be tortured in the UK. The complaint was that the UK would be in breach of its obligations under the Convention if it were to send him to a country where, it was alleged, he would be tortured.

The Court recalled that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and

[3] (2001) 33 EHRR 31

expulsion of aliens. It continued as follows. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country

60. In determining whether it has been shown that the applicant runs a real risk, if deported to Tanzania, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained [by the Court itself]. Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3, which assessment is relative, depending on all the circumstances of the case.

After a careful examination of all the material before it the Court concluded that the applicant's deportation to Tanzania would breach Article 3 as he would face a serious risk of being subjected to torture or inhuman or degrading treatment there.

This Convention which, in different respects in different European countries, goes beyond what had been their internal law has now been accepted as part of the corpus of law which binds everyone who wishes to remain in or enter the European Union. So what has happened is that a number of states where human

rights were widely ignored have reformed their practices - partly no doubt for ideological reasons but partly also because they wished to become members of the Union which, as they saw it, provided them with substantial economic benefits. So let me now turn to that Union.

The Second aim: economic well being and The European Union

The European Union has grown from the initial 6 states to what are now 27, with others waiting in the wings wanting to join the club. It too is an unusual organization. It started conventionally enough by treaties signed between representatives of the Member States. The first Treaty governed merely Coal and Steel and was designed to regulate the market in relation to these two commodities which, at the time, were the materials essential to the prosecution of any war and also to prevent secrecy on the part of any Member State in relation to those two commodities. In a few years the States learned to be open with each other. This led to trust in one another and we found that creating a larger market than any of them could provide on their own brought economic benefits to us all. In 1957 they embarked together on a much greater enterprise which in effect governed all economic activity – not just coal and steel. As is well known, the Treaties abolish barriers to the freedom of movement of goods, of persons, services and capital within the area of what became known as the Common Market. So a very large market was created which by now is considerably larger covering nearly 500 million

people – not a figure which astounds the Chinese, but from a European perspective this is quite unprecedented. I suppose that the older ones among you who grew up before Hong Kong was rejoined with China will have some idea of how significant a change this was.

But one should note that, while the arrangements for the creation of this large market can be looked at as being typically capitalist, there has long been in Europe a strong strand of opinion which has insisted on various social measures to safeguard the vulnerable from abuse and to help the weak against exploitation by the strong. Such measures can be found in the legislation and legal practices of the various Member States but can also be found in legislation emanating from the Union. Inevitably there are frequent tensions between the principles of freedom of movement of persons, goods, services and capital on the one hand and the desire to safeguard the weak on the other.

Most Treaties regulate various points of dispute and that is the end of the matter provided that the parties abide by the agreement. However the Treaties governing the Union go much further. They not only laid down various broad principles which weto govern our relations one with another but also, and unusually, created institutions for enacting detailed laws and policing their observance. In the present context it is enough to mention the European Parliament (which is directly elected), the Council (which consists of a representative of each Member State at ministerial level), the Commission (which consists one Commissioner for each Member State who

is appointed by the Council) and the Court of Justice (which consists of one judge per Member State nominated by his government but whose appointment is made by common accord of all the governments of the Member States). The Council, the Commission and the Parliament enact legislation sometimes on their own, sometimes in combination with one another. Union law now consists not merely of what is laid down in the treaties but also of millions of words of secondary legislation. To that may be added the judgments of the ECJ which has interpreted the Treaties and the secondary legislation made under them. Although the Court is not bound to follow its own previous judgments in practice it does so save in the rarest of circumstances.

Three questions repeatedly pose themselves and have to be answered by us. The first is "Is this a matter which is to be regulated by national law or by the law of the Union?" The second question is "Has this piece of Union legislation been lawfully enacted?" The third question is "What does this piece of Union legislation mean?"

These questions come before the ECJ in a number of different ways. The most original and interesting of these is the so-called Preliminary Reference procedure. The Treaties provide that when a case comes before a national court which raises one or more of these three questions then the national court may, and if it is the final court must, refer the question to the ECJ for its opinion. Thus it comes about that the UK House of Lords will refer questions of Community law to the ECJ, the ECJ will give its opinion and the House of

Lords will then incorporate that opinion into its judgment. The same thing happens with courts in France, Italy and so on. About half of our cases come to us in this way. I understand that Article 158 of your Basic Law was inspired by this procedure although, under the Basic Law, the definitive interpretation is given not by a court but by the Standing Committee of the National People's Congress.

Most of the rest of our work consists of complaints by a Member State or by one of the Union's institutions that something which has been done by another Member State or by another of the Union's institutions is illegal. The remainder of the work consists of appeals from the European Court of First Instance which actually tries a number of cases, such as competition cases, and hears appeals from a number of other bodies.

Inevitably, within the Union, as within any state, there are regular tensions. Some of these tensions can be resolved at the political level others, but many have been left, either deliberately or by lack of foresight, to be solved by the Court of Justice on which I sit. So here again you see the same phenomenon which we have already observed with the European Court of Human Rights, and indeed to a degree can see at the World Trade Organisation, which of course China joined not long ago, the judicialisation of the mechanisms for resolving disputes.

At the ECJ we frequently hear arguments as to whether a particular matter is within the Union's exclusive competence, within a Member State's

exclusive competence or whether it is a matter which either can regulate. Immigration and taxation are classic examples of areas where, as seen from the perspective of the Union, in principle Member States are free to act as they will provided, and this is important, they do not infringe Community law. Thus problems arise for instance when the particular immigration or taxation dispositions of a national law or practice are in conflict with one of the freedoms which the Treaties announce.

Of course situations will arise when there is no clear answer to the question 'Does this fall within the limits of Community competence'. Of course, also, inevitably and frequently there will be secondary legislation which prescribes something which someone does not like. That is a feature of any legislation by anybody on practically anything. The same goes for judgments of the Court. The extraordinary achievement of the Union however is that in practice the Member States do follow the judgments of the Court and if, they in a particular case have failed to do so, the Court is empowered to impose a fine. This indeed it does from time to time and the Member State concerned pays up. We are talking here of tens of millions of Euros.

The Third Aim: the avoidance of war

We have now had more than 50 years without an internal war in Western Europe. Unless my history has let me down this is unprecedented for a thousand years. Recently further countries have joined the Union, countries which had in the not too distant past been at war with the existing members. After the Second World War the founders of the Union felt that if

nations could be encouraged to work together on a daily basis for their economic well being and if their economies could be totally enmeshed then the chances of war breaking out between them would be significantly diminished. This is what has happened. I once asked a former Irish ambassador to Luxembourg whether he considered that the improvement in relations between the UK and Ireland was in any way attributable to the Union. He said he had no doubt that it was. Not because of anything that the Union had done but because of the regular contacts between civil servants and politicians which membership of the Union makes inevitable and because if one nation oversteps the line then there is the Court which can rule on the matter.

Europe has a long history of interfering with the world outside Europe. However, I think it is fair to say that in the last 50 years Europe has been less of a threat to the outside world than was the case for much of its history. I would like in the last part of this talk to spend a few moments reflecting on why this might be so.

What we see in the Union is a process whereby Member States have each agreed not to act on their own in some fields but rather to act together and to be governed by the rule of law enforced by an international court which consists of truly independent judges. Because of our history, we have a tremendously hard time conceiving of political systems where territory, identity and power are separated, functionally and/or spatially. We thus continue ending up with the federal or national model as the only

conceivable outcomes of international transformation. There is in my view no particular reason why this should be so. In any event I think the European Union shows that such a model is not essential.

Most of us have been brought up with the image of the modern state. Two propositions have seemed self-evident. First, that political systems have to be hierarchically organised and, second, that there should be a final arbiter of law – a sovereign – over which no other authorities can decide. I am not persuaded that either of these propositions is necessarily right.

It seems to me that, certainly in the context of present day Europe, it is artificial to assume the nation state as the natural jurisdiction for full representation and participation. It is artificial to conceive of interests as divided according to national borders. It is artificial to make institutional choices on the basis of a single institutional analysis

I see no reason to accept as immutable the classic legal dogma that legal systems need to be unified, coherent and hierarchical and I see no need to accept the hierarchical territorial state as the only viable building block of international society.

Sovereignty, as the word is now used, is historically a relatively recent concept. It comprehends an alleged right of a state to organise affairs within its borders as it pleases and an alleged right to be free from interference by other states.

It is still difficult for anyone in public life in Europe to

accept, still less advocate, a loss of sovereignty. Sovereignty is one of those words that go straight to your gut. Asking questions about the sovereignty of states produces in the United Kingdom, and not only in the United Kingdom, much the same instinctive defensive reactions as asking questions about a man's virility. Any suggestion that the government of the day of a particular state should in any respect bend its will to some entity outside that state is one which leaves many people uneasy – at any event if the government of the day is their own. I am not qualified to speak about the situation in China but it would not surprise me if reactions here were rather similar.

But, on an occasion such as this, it is perhaps worth pausing. Totemic words such as sovereignty and phrases such as liberty, equality, fraternity can be dangerous. They produce powerful, and sometimes unreasoned and unreasonable reactions in our hearts and thus shape our actions and decisions. One must allow for the heart and not be too intellectual about all this. One has to accept that some areas, and sovereignty is one of them, are peculiarly likely to be felt as part of an unchallengeable heritage and I am very conscious that our feelings about sovereignty are, as a result of history, deeply engrained in us. A challenge to a man's virility may result in a bloody nose. A challenge to a country's sovereignty may result in a war with millions of dead. So it is worth reflecting on the concept of sovereignty whose magic seems to imprison us all.

<u>Practical limitations to all-encompassing sovereignty</u>

In the nature of things, a state has never been totally free to do whatever it wants, since what one state wants is frequently wholly inconsistent with what another state wants. They can not both be free to do what they want. It has always been true, although the point has gained force as a result of modern technical and commercial developments, that a state is profoundly affected, not only by states, but also by decisions made by people, over whose decisions it has no direct control and by events over which it also has no control. When asked what he most feared Prime Minister Macmillan once replied "Events, dear boy, events." That is an expression of the essential vulnerability of the politician in charge of our destinies to matters and people outside his control.

It is clear that if nation A imposes economic sanctions directly on nation B then B may be profoundly affected. But the same is true if A does not impose sanctions but is itself undergoing a depression: if there is a significant amount of commerce in goods and services between nation A and nation B then B again will be affected by the depression in A. Further, if nation A invades nation C, the response of nation C may well have adverse consequences for nation B which has done nothing to irritate nation C or indeed nation A.

There are, it seems to me, strong arguments in favour of broader and more complex constitutional arrangements than those provided by a purely state centred view based on the concept of sovereignty. Since nation states can not contain the impact of outside policies inside their borders, it is in their interest to

acquire forms of constitutional control over decision-making which takes place outside their own borders but which has the potentiality of affecting the states concerned.

Our political institutions and the behaviour of our markets seriously affect others whom our political institutions do not even claim to represent. Conversely, the political institutions and market forces of those abroad affect us, although we will not have been consulted about many of them and consultation is in the nature of things impossible in the case of others.

In an ideal world universal harmony would reign. Yet, it seems that the achievement of the desires which we all have in common is not sufficient at the present stage of human development to persuade us to forego those of our own desires which prevent harmony. Nevertheless, a start is to find the largest area possible within which such a voluntary sacrifice of individual desires is acceptable in order to achieve what we have in common.

We have to agree the areas in respect of which we are prepared to make this sacrifice. The more we have in common with other parties to the agreement the easier it is to expand the number and size of the areas in which we are prepared to give up our own power of decision. It is worth noting that where in practice we have no power of decision the sacrifice is not great.

The treaty establishing the European Community recites that the signatories are determined to lay the foundations for an ever closer union among the

peoples of Europe. But the fact is that people are uneasy with any idea of Europe as a super-state. The greater the enlargement of the Union the more that is likely to be the case. Many Europeans and certainly many English people, simply as a matter of instinct, do not feel themselves to be part of a European, still less world-wide, political entity or polity. The United Nations certainly but also the European Union, seem to many, too large to provide that degree of cultural, ethnic, or historical cohesion which might be regarded as essential to any polity.

In some countries even the existing nation state seems too large or too diverse. Certainly, many are already worried that, as a result of globalisation and various other changes, the peoples inhabiting the nation state no longer share those common religious and cultural beliefs which used to define it, and that the nation state is loosing some of the cohesion it had.

All of these worries are readily understandable. But any refusal to think beyond the nation state is not the answer. This seems to me to be obvious. Yet the nation state is still the paradigm in most people's minds.

The great variety of traditions and values in Europe is such that the adoption in an all Europe context of a purely majoritarian system, in which decisions can be taken by a majority of representatives of the people, is difficult to conceive. The lack of any strong collective identity makes it difficult to believe that minorities would easily accept that their fate be decided against their will. Already now it is far from rare to hear the EU being accused of ignoring some national tradition or

interests within the Union, in spite of the many safeguards that exist in the decision-making process to protect Member States' interests.

As a contribution towards solving this tension between the large EU and the smaller bodies within it we have evolved the doctrine of subsidiarity. This requires decision-making to be attributed to the lowest appropriate level. In that context the best democracy is perhaps one that insists on levels of democracy appropriate to the decision requiring to be made. The tendency to overcentralise at the level of member states, many think, is as much to be countered as is any over centralisation by the Union. The demise of sovereignty in the classical sense truly opens up opportunities for subsidiarity and democracy as essential complements. Indeed since the 1950s we have seen in a number of member States, including the Unite Kingdom a gradual granting of powers to component parts of those states.

Article 5 of the EC Treaty sets out the broad guidelines.

> "The Community shall act within the limits of the powers conferred upon it by this treaty and the objectives assigned to it therein.
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the proposed action be better

achieved by the Community.
Any action by the Community shall not go beyond what is necessary to achieve the objects of the Treaty."

All this is untidy. But this untidiness corresponds to reality. People fight for their interests, and the grouping to which they naturally belong depends on the interest at stake. If, one wished to alter the hours in which a local library in London is open neither the European Union nor the UK government would be the natural interest groups to consult or the natural legislative body. One would look to London or even a subdivision thereof. But the converse is surely also true. There are times when the larger body is the more appropriate regulator. There really is not much point in London declaring itself to be a nuclear free zone. There are areas in which regulation is ineffective when done by a smaller body. There are fields in which standardisation brings greater benefits than variety. Of course there will always exist borderline cases but we accept that insisting on one supreme regulatory authority in respect of every aspect of human affairs is pointlessly restrictive.

What one has to recognise is that our thoughts and instincts are to a degree shaped by our history and by the received ideas of our age. But ideas change over time and one of the purposes of a talk on a centenary such as this is to stimulate thought about what is valuable and what is not.

One great desideratum of political life is to provide

order and prevent the mayhem which can result from each man being in a position to give free reign to his private passions. This consideration has weighed heavily with jurists, philosophers and statesmen over the centuries. Many thought absolute state power, absolute sovereignty, was the necessary condition for stable politics and indeed for human safety.

But there is a rival desideratum. This is so to organise society that the exercise of the power given to achieve stability does not result in unnecessary inhibitions to the free development of every man's wisdom and personality; or to put it more graphically, does not result in murder, torture and the suppression of any freedom thought to be dangerous.

Much political discourse in Europe has been concerned with the inevitable tension between these two desiderata. The task of any constitution is to see the degree of lack of freedom of the individual which is necessary in order to secure a broad measure of freedom for each. The same basic problem confronts states in their relations with each other.

The 20th century saw state organised mass slaughter – in Europe, in the Soviet Union, in Africa and elsewhere. This slaughter has been brought increasingly to the notice of those not on the spot. One thing has become clear and increasingly widely accepted in Europe - even by those to whom the concept of state sovereignty is intuitively attractive. Faced with mass murder within a state's boundaries – whether that murder be instigated by the state itself or be the result of a state's inability to exercise effective

control within its own borders – a theory of sovereignty which insists on the impermeability of the state should not stand in the way of attempts by outsiders, even against the will of the state concerned, to limit that mass murder.

We have come to believe that some limits should be imposed on a state's freedom of action against an individual even within its own borders. Local passions can be very understandable and can be very strong. We have seen in Europe several examples of what is a world wide phenomenon. A country faced with internal insurrection or other difficulties tends to depart from values which in principle it holds dear but which it feels have to give way to other considerations. So one found suppression free speech, moves away from normal trial processes, confiscation of property, inhuman treatment or torture of those who were thought to know of plans to blow up buildings and people or threaten the very existence of the state.

In order to avoid these horrors a number of mechanisms have been deployed to provide the individual with some safeguards. There are *national* laws and constitutions which set out individual freedoms which can be safeguarded by national courts. But there are also various *international* bodies which have been empowered to pronounce on whether an action taken against, or by, an individual is lawful. This is something very new. It has been recognised that the task of safeguarding of individual freedom can usefully be given to a body outside the state: a body which is not caught up in the local passions of the moment.

The Hope ahead

From an outsider's point of view, the interesting question to ask about the constitutional arrangements of the European Union is perhaps the following. Does the EU offer the hope of transcending the sovereign state rather than simply replicating it in some new superstate, some new repository of absolute sovereignty? Does it create new possibilities of imagining, and thus of subsequently realising, political order on the basis of a pluralistic rather than a monolithic conception of the exercise of political power and legal authority.

It seems to me that one should see the Community as constituting the first truly 'multi-centred' polity since the emergence of the European State system. Instead of a new hierarchically organised sovereign construct modelled after the nation state, we are confronting a situation where different authoritative orders and circles overlap, compete and collaborate. … if we look at the Community's most fundamental constitutional principles such as human rights, democracy and the rule of law, these are not that easy to undermine and will most likely also in the future constitute a solid common basis for integration.

Normally it is only within a polity which regards itself as being constituted of one people that we demand democratic discipline, that is, accepting the authority of the majority over the minority. A majority demanding obedience from a minority, which does *not* regard itself as belonging to the same people, is usually

regarded as subjugation. This is even more so in relation to constitutional discipline. And yet, in the European Union, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to accept being bound by precepts articulated not by 'my people' but by a community composed of distinct political communities: a people, if you wish, of others. I compromise my self-determination in this fashion as an *expression* of this kind of ... tolerance. ... Constitutional actors in the Member States accept the European constitutional discipline, not because as a matter of legal doctrine, as is the case in a federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos. They accept it as an autonomous voluntary act, endlessly renewed on each occasion of subordination, in the discrete areas governed by Europe, to a norm which is the aggregate expression of other wills, other political identities, other political communities. Of course, to do so creates in itself a different type of political community, one unique feature of which is that very willingness to accept as binding, discipline which is rooted in and derives from a community of others. ... When acceptance and subordination are voluntary, and repeated, they constitute an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance.

[This principle of Constitutional tolerance is] most present in the habits and practices it instils in the

purveyors of public power in European polities, from the most mundane to the most august. At the most mundane administrative level, immigration officials overturning practices of decades and centuries learn to examine the passport of Union nationals in the same form, the same queue, with the same scrutiny as their own nationals. And a similar discipline is practiced by customs officials, housing officers, educational officials and many more subject to the disciplines of the European constitutional order. Likewise, a similar discipline is becoming routine in policy-setting forums. In myriad areas – whether a local council or Parliament itself –norms are subject to an unofficial European impact study. So many policies in the public realm can no longer be adopted without examining their consonance with the interest of others, the interest of Europe. … So also in the context of the exercise of judicial functions, whether it be by a justice of the peace, by the House of Lords, by the top French or German courts. European law, the interest of others, is part of the judicial normative matrix. … This process operates also at Community level. The European judge or the European public official understands that, in the peculiar constitutional compact of Europe, his decision will take effect only if obeyed by national courts, if executed faithfully by a national public official … This too instils a measure of caution and tolerance. … thus in his daily practice the public official is invited and habituated to deal with a very distinct 'other', but to treat him or her as if he/she was his own. One should not be starry-eyed or overly naive; but the hope and expectation is that there will be a spill over effect: a gradual habituation to various forms of tolerance and with it a gradual change in the ethos

of public administration which can be extended to Europeans and non-European alike.

Conclusion

> The modern state has been portrayed as the stark alternative to anarchy at home and abroad. The absolute power of the sovereign state has been the foundational doctrine for political theory and practice. … It seems to me, as it seems to others, that we may at last be witnessing its demise in Europe, through the development of a new and not-yet-well-theorised legal and political order in the form of the European Union and the Council of Europe.
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> The key question becomes whether there can be a loss of sovereignty at one level without its inevitable and resultant re-creation at another. Is sovereignty like property, which can be given up only when another person gains it? Or should we think of it more like virginity, something which can be lost by one without another gaining it – and whose loss in apt circumstances can even be a matter for celebration? … The idea of subsidiarity points us to better visions than all-purpose sovereignty ever did. This is a possible future reality preferable to the past of nostalgic mythology.
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> So what is the relevance of all this to Hong Kong? It is surely that we must not be imprisoned by thought categories and political forms developed centuries ago. We must learn to be flexible while retaining what we regard as indispensable values. We must be open to the ideas and experiences of others. We must strive to

prevent economic deprivation which can lead to bloody revolution. We must value the individual but be careful that the emphasis on individual freedom does not lead to the crushing of the weak.

Since reunion with the mainland you have been engaged in a huge adventure. It seems to be going well, All over the world we are experimenting with new forms and new ideas. We move gradually, step by step. I hope that the European Union has added something new and valuable. I trust that China also will find forms of power sharing which will help mankind flourish and develop. Mankind is a grand concept. Allow me to end with this thought. Mankind is made up of individual human beings who find their highest fulfilment voluntarily union with others.