Einführung

Sovereignty: From Independence to Responsibility

On asking the right question in Switzerland

SAMANTHA BESSON*

Introduction

Sovereignty and independence are often used as synonymous in the national, but even more so in the international legal context. One usually finds them paired in debates, presumably to reinforce the idea of an exclusive national sphere of power, competence and authority. The idea of Swiss independence lies at the core of traditional conceptions of Swiss political identity and hence is usually thought to be the paradigm case of Swiss sovereignty. This is not, however, as this paper will claim, the way sovereignty should be understood, be it in general, in the European Union (EU) or in the Swiss context.

Even though sovereignty might once have been conceived as mere independence or even power on the part of the State, this definition is far too limited to account for its increasingly normative use in multi-levelled polities where different authorities overlap on the same territory and issue norms that bind the same population. Sovereignty amounts not only to power or immunity, but also to an ensemble of duties, which are generally captured by the term responsibility. This responsibility applies as much on the inside, between the sovereign State

---

* Professor of Public International Law and European Law and Co-Director of the BENEFRI European Law Institute, University of Fribourg (Switzerland). This is a summary, without any references and without a full length statement of the argument, of a longer paper delivered at the 12th May, 2006 *Forum für Universität und Gesellschaft* workshop in Berne. Thanks to Rachel Liechti for her help in drafting the present summary. A full account of some of the arguments alluded to in this summary, and further references, may be found in Besson S., Sovereignty in Conflict, (2004) 8:15 *European Integration online Papers*, http://eiop.or.at/eiop/texte/2004-015a.htm, reprinted in Tierney/Warbrick (eds.), *The Sovereignty of States and the Sovereignty of International Law*, London: BIICL 2006, 129. On the relationship between the account of sovereignty proposed in this summary and Swiss neutrality, see Besson S., Souveränität, Verantwortung und Neutralität. Aktive Neutralität als Prokustes-Bett?, in G. Kreis (ed.), *Die Schweizer Neutralität: Beibehalten, umgestalten oder doch abschaffen?*, Zürich: Werd 2007, 95. For a discussion of European demoi-cracy and the consolidation of national democracies within the EU, see: Besson S., Deliberative *demoi*-cracy in the European Union. Towards the deterritorialization of democracy, in Besson/Martí Marmol (eds), *Deliberative Democracy and Its Discontents*, Aldershot: Ashgate 2006, 188.

and its subjects, as on the outside, between the sovereign State, on the one hand, and other States and the latter's subjects, on the other. The paper's first aim is to argue for this understanding of sovereignty in general. A concrete application of this new understanding of sovereignty is to be found in the EU where an unprecedented challenge on national sovereignty has been set. Sovereignty in the EU should be understood as cooperative sovereignty. It is the paper's second aim to argue for this new understanding of cooperative sovereignty in Europe.

These common points about sovereignty in general and in the EU have particular implications in Switzerland and more precisely for the debate surrounding a potential Swiss accession to the EU. The difficulty lies, indeed, in the imprecision of the terms used; if the economic consequences of a Swiss accession to the EU are now widely known, its political consequences are usually analyzed in very general terms without much questioning of the traditional categories that are used. Here lies the whole problem with the sovereignty obstacle to a Swiss accession to the EU. Once sovereignty is understood as responsibility rather than mere independence, the whole question appears in a rather different light. This paper's third aim is to reassess the compatibility between Swiss sovereignty and accession. It is only by asking the right question about the future of Swiss sovereignty that one may hope to bring forward potential right answers.

Sovereignty in general

The concept of sovereignty has had a transient and controversial meaning in the history of political ideas. In fact, authors usually do not spend much time elaborating on what they take sovereignty to mean in general. One finds limited and not very refined references to supreme authority or ultimate power. In the international legal practice, sovereignty is generally defined as legal independence by opposition to factual domination. In legal terms, sovereignty traditionally equates therefore to power or immunity from the power of others. One also finds, however, definitions of sovereignty that refer to its normative dimension, as when sovereignty is equated to authority stricto sensu or to responsibility. Definitions one finds in the history of the concept of sovereignty often refer to this dual facet of sovereignty: they refer simultaneously to the normative dimension of sovereignty, as with sovereignty as ultimate authority or jurisdiction, and to its empirical dimension, as with sovereignty as effective power. Both have been

present at different times in the evolution of the concept and their tension underlies most of the concept's history, today even more than yesterday.

Besides the historically complex nature of the concept per se, globalization and the multi-level nature of current global governance have generated an important challenge to sovereignty. For a long time, the concept or principle of (state) sovereignty was regarded as the cornerstone of both national and international political and legal organization, on the one hand, and of modern political thought, on the other; it was the state's 'normal' condition to be the supreme power or ultimate authority in political and legal matters, whether internally or externally. Over the last fifty years or so, however, lawyers have become more and more divided on the issue of state sovereignty and sovereignty in general. With the shift in authority away from the state to new sub-national, supra-national, post-national and non-state entities, the question is whether the concept of ultimate national authority or sovereignty is to be abandoned or, on the contrary, retained and, if so, in which form. The time has come to offer a new reading of the concept of sovereignty. It should indeed be possible to retain the concept while allowing it to fluctuate along the lines of current changes in the international community and in Europe.

As a matter of fact, this challenge to sovereignty constitutes an opportunity. This becomes clear if one understands sovereignty as the normative and hence essentially contestable concept its history has confirmed it to be. Sovereignty is not a merely descriptive political concept that refers to an independent and objective reality. Nor is it a purely prescriptive political concept that insists on constructing political and legal reality according to an abstract standard.

In relation to this ambivalent feature of the concept of sovereignty, I have argued elsewhere that sovereignty is best understood as an *essentially contestable concept*. As such, the concept of sovereignty is a normative concept that expresses and incorporates one or many values such as democracy or human rights that it seeks to implement in practice. Understood along these lines, sovereignty is not an empirical end in itself, but should be exercised to protect the different values which constitute its justification, but also therefore its inherent limitation. The normative dimension of sovereignty implies the accountability of any sovereign authority to the values protected by sovereignty *qua* power or immunity, and, in the case of democracy, to the democratic will. This in turn equates to *responsibility*, that is to say an ensemble of duties connected to the exercise of sovereignty *qua* power or immunity.

Thus, sovereignty is at once a power or immunity, and a responsibility when exercising that power or immunity.

Given the contestability of the values protected by sovereignty and to which sovereign authorities can be held accountable, the exercise of sovereignty is itself constantly put into question in order to provide the best protection of the values it encompasses. In cases where many sovereign authorities overlap over the same territory and population, the sovereign authority will be that authority which can realize the objectives they share, such as democracy or human rights, in the most efficient way. What this means is that gradually the exercise of sovereignty has turned from an individual exercise into a *cooperative* enterprise. In those circumstances, common responsibility over the same people implies cooperation in the exercise of sovereignty. This cooperative understanding of sovereignty has recently been confirmed by the major shift of paradigm one may identify in global reports on sovereignty and humanitarian intervention. There is a shift from sovereignty *qua* control to sovereignty *qua* responsibility. True, this shift may currently still belong to the realm of soft law at the global level, but there is a place in the world where it has already become hard law and that is the European Union.

Sovereignty in the EU

In the European context, the question of sovereignty has triggered heavy controversies for the past twenty years or so. This is hardly surprising given that, in fifty years, the European economic integration project has progressively turned into a political and legal construction whose nature is still indeterminate and unprecedented in political and legal history. The problem is that both the Union and the Member States have adopted very clear positions on the issue of the primacy of European law, but their conceptions do not match each other; each of them regards its own authority as absolute, original and supreme and hence as having the *Kompetenz-Kompetenz*.

So far, and very schematically, there have been three major alternative conceptions of sovereignty in Europe. To start with, some authors still propound an *absolute and unitary conception of sovereignty* that would belong either to the EU or to Member States, with a delegation of the exercise of sovereignty to the other authority in each case. However, this conception does not really fit the pluralist European legal reality. In response to the failure of the unitary sovereignty model in the EU, a second group of conceptions of sovereignty has emerged that

claims that sovereignty has been *pooled or shared* in Europe. However, by being everywhere, sovereignty seems to be nowhere particularly important and this cannot be right. A third approach therefore dispenses entirely with the concept of sovereignty. The difficulty with these claims to *post-sovereignty*, however, lies in their blindness to the resilience of the concept of sovereignty in political discourse, and to the essential epistemic and normative role of sovereignty, whether it is attached to states or other sub-national or post-national political entities.

It is true that our conceptions of sovereignty in Europe should not map unitary conceptions of sovereignty too closely. However, this need not imply a complete rejection of the concept but only a more adequate re-interpretation of the concept in the European post-national context. Sovereignty in Europe should be conceived, I argue, as both *ultimate* and *pluralistic* along the lines of the *cooperative model of sovereignty* presented in the previous section. On this model, both national and European authorities retain their sovereignty but in having to be sovereign together, they cannot escape a certain degree of competition, emulation and cooperation which characterizes sovereignty in a pluralistic constitutional order, thus paradoxically fortifying rather than diminishing their individual sovereignties.

Cooperative sovereignty presents important advantages for the emerging legitimacy of the European Union. A key illustration of the significance of cooperative sovereignty for polity-legitimacy in Europe lies in the competition and cooperation that should prevail among *democratic authorities*. Since democratic rule is one of the values protected by sovereignty, the exercise of sovereignty *qua* responsibility implies looking for the best level of decision to endow those affected by that decision with the strongest voice and hearing in Europe. A differentiated but cooperative exercise of national popular sovereignty might therefore lead to an increase in democratic legitimacy, both at the national and European levels, thanks to the competition that prevails among democratic authorities. This *cooperative and trans-European exercise of popular sovereignty* may in turn lead to the reinforcement of European democracy. This is particularly important as it undermines many of the myths pertaining to the EU's 'democratic deficit'.

Swiss sovereignty and the EU

Swiss sovereignty tout court

Swiss accession to the EU is often alleged to be *prima facie* incompatible with Swiss sovereignty. This has to do as much with the EU and the important strain it places on national sovereignty, as with the specificities of Swiss sovereignty itself.

Swiss sovereignty is unusual in many ways due to its federal and direct democratic structure. Besides, it is currently in intense transformation due to the globalization of governance and law-making in Europe in general. If one is to understand how Swiss sovereignty will be affected by an EU accession, it is important to describe some of the specificities of Swiss sovereignty with respect to three distinctions: internal v. external sovereignty, divided v. unitary sovereignty, and limited v. absolute sovereignty.

In all three respects, and contrary to common beliefs, Swiss sovereignty is already such that it is *prima facie* compatible with an accession to the EU. First of all, Swiss external sovereignty is organized in line with its internal sovereignty; it respects direct democratic channels and the federal division of labour, and in this sense this makes further externalization of Swiss sovereign duties in Europe possible. Secondly, external and internal sovereignty are inherently divided through the multi-layered nature of Swiss governance and they are as a result compatible with further transfers of competences to the EU. And, finally, external and internal sovereignty are inherently limited constitutionally and are hence compatible with the limits imposed by an accession to the EU.

Swiss sovereignty outside the EU

The current state of Swiss sovereignty vis-à-vis EU law

Although Swiss sovereignty has traditionally been held a *prima facie* obstacle to EU integration, legal practice shows Swiss sovereignty is already being affected by EU law much more than one may think.

It is useful, in this context, to refer to two major examples of EU legal norms which are deemed as authoritative in the Swiss legal order independently of a conventional agreement. First of all, the *'acquis communautaire'* brought into the Swiss legal order by Bilateral Agreements becomes part of Swiss law in two important ways: first, by reference to secondary law and, second, by reference to the ECJ's case law. In principle, of course, the 'acquis communautaire' in Bilateral Agreements is not dynamic and does not therefore encompass all posterior secondary legislation nor all ECJ's decisions posterior to

the signature of the Agreements. The problem is that it is difficult in practice to drive a wedge between legislation and case law prior to the signature of the Agreements and their dynamic evolution after the signature; principles evolve, sometimes in decisive ways. Besides the open reception of secondary law and the ECJ's case law into Swiss law, a particular and more covert phenomenon of autonomous adaptation of Swiss law to EU law has taken place over the past few years. Without abiding by any conventional obligation in this respect, Swiss law is progressively *autonomously adapting* to EC law either through legislation or adjudication.

It is the latter form of autonomous adaptation that is most problematic. To start with, one may question the separate harmonization of Swiss private law *per se* in the absence of any obligation for Switzerland to do so. Some may, of course, consider this as a sovereign decision to abide by foreign law in cases where this may prove more efficient. Even if one grants this objection, the critique remains that it is not a competence of the Swiss judiciary to decide to interpret Swiss private law norms according to EU law, even though the latter was the source of inspiration of the former. The Legislator may indeed borrow a foreign institution without, however, allowing the Judiciary to interpret it dynamically according to its conceptual evolution in foreign law. Some have argued, however, that once an area of private law has been Europeanized, its legal interpretation needs to be dynamic and hence conform to EU law, by analogy to the interpretation of the 'acquis communautaire' of the Bilateral Agreements in conformity to EU law. The problem is that there was no international obligation comparable to those of the Bilateral Agreements to enact those private law norms in the first place, nor therefore to interpret them according to prior or ulterior ECJ case-law.

The increasing alienation of Swiss sovereignty outside the EU

Two consequences follow from these examples of the growing Europeanization of Swiss law: first, the alienation of Swiss internal sovereignty, and, secondly, the alienation of Swiss external sovereignty.

Despite not being a member of the EU, Switzerland has clearly lost much of its *internal sovereignty* through the gradual Europeanization of its laws. These various processes of Europeanization have circumvented the usual channels of internal sovereignty, that preserve the different values protected by the latter, including democracy and federalism.

With respect to *democracy*, first of all, recent mechanisms of Europeanization of Swiss law through the Executive, when it takes place through Mixed Committees, but also mostly through the Judiciary, when it takes place through internal adjudication mechanisms, are clearly at odds with the direct-democratic mechanisms that characterize Swiss law-making. Not only is there hardly any consultation of the Swiss Legislature, either in the bilateral negotiation process or in the adjudication process, but there are even fewer opportunities of a direct democratic control over the norms that are thus made part of Swiss law. The gradual Europeanization of Swiss Law may also be criticized from the vantage point of *federalism*, secondly, and more precisely the weight of cantons in the democratic law-making process. Cantons are largely circumvented by negotiation, legislation and adjudication mechanisms which concentrate at the federal level.

Of course, one may argue that the Europeanization of Swiss law is inescapable given its position in the middle of Europe and its economic insertion in the European market in particular. While all this may be true from an economic perspective, this functional argument that is widespread among private lawyers, does not cut any ice. To start with, by Europeanizing areas of the law as they deem functionally most efficient, executive and judicial authorities are secluding these areas from the legal order as a whole, and in particular from public law. This disrupts the overall and necessary coherence of the legal order, usually in the name of local coherence in a specific Europeanized domain of the law. Coherence is a necessary condition for legal authority and legitimacy, but not a sufficient one. Legitimacy to date also implies respecting democracy and this is therefore the sole responsible exercise of sovereignty one should sign up for in Europe.

Swiss sovereignty is also gradually being alienated in its *external dimension* vis-à-vis other international legal subjects, and States in particular. Switzerland's economic policy is greatly affected by European decisions, and not only practically but also in a binding legal way. This in turn limits its margin of manoeuvre in other non-European multilateral arenas, such as the WTO, for instance. This would *per se* not be a problem if Switzerland had a say in enacting those EU legal norms which it has bound itself to respect through different agreements or to which it adapts autonomously. But this is not the case.

Swiss sovereignty within the EU

A sovereignty-based argument for accession to the EU

Global responsibility that goes with a dutiful exercise of sovereignty by Switzerland implies acceding to the EU. The current state of the relations between Switzerland and the EU, and the legal obligations that follow autonomously or compulsorily from them, generate a duty to accede completely to the EU. This duty pertains to Switzerland's responsibility towards the *Swiss people* and cantons, but also to Europeans.

First of all, Swiss sovereignty should be linked back to the Swiss people and it is therefore to the latter that Swiss authorities are to be held accountable. In a confederation, original sovereignty is as popular as cantonal. As I explained before, the situation is at this stage profoundly undemocratic and the Swiss people can no longer be deemed as the author of its laws. Of course, one may argue that democratic guarantees in the EU are by far not ideal and would not guarantee those principles that make the pride of Swiss democracy. It is clearly more desirable, however, from a democratic point of view to be able to take part in decision-making processes in the EU and reform its institutions from within, than to abide by its laws without having a say.

Secondly, a Swiss duty of accession to the EU also flows from the exercise of sovereignty in Europe vis-à-vis *Europeans*. Due to globalization, many of the decisions and laws adopted in Switzerland have an impact on Europeans outside Switzerland. This is the case, for instance, in the economic sector, but also in many social areas. This implies therefore, by reference to the principle of democratic inclusion, that Swiss democratic authorities pay heed in their exercise of sovereignty to the interests of all those affected, including Europeans. And this can best be done, by belonging politically and legally to the EU.

A sovereignty-based argument for participation in the EU

The exercise of cooperative sovereignty within the EU implies risks and advantages at the same time.

Among the risks and advantages for *internal sovereignty*, one may mention dangers and benefits for democracy, fundamental rights and federalism. Scope precludes addressing them all in the present summary and I will concentrate on democracy as a guiding value of sovereignty.

The primary concern lies in the primacy and direct effect of EU law in the Swiss legal order that circumvents direct democratic channels. The latter would indeed only apply in areas where there is no EU exclusive competence. What one should emphasize, however, is that direct democracy is already jeopardized in Switzerland with or without accession

to the EU. The crisis of national democracy and the need to factor in the post-national layer are a general phenomenon in Europe. Notwithstanding, there is little evidence of the actual extent of the erosion of democratic rights in Member States. In fact, one may actually conceive that a Swiss participation in EU law-making processes might lead to an extension of Swiss democratic rights rather than to their erosion. As I explained before, the *cooperative and trans-European exercise of popular sovereignty* would reinforce democracy in Europe.

First of all, one should emphasize the increase in *direct democratic legitimacy* in some Member States of the EU where direct democratic mechanisms were unknown before their integration in the EU. This is evidence that one may hope for a reinforcement of Swiss democratic rights in the EU. This may take place in areas where the EU and national competences are concurrent, but also, and most likely, in areas of national competence. In this sense, this evolution is not very different from the one that took place in Switzerland after the 1874 Federal Constitution transferred many cantonal competences to federal authorities; the people was then vested with more direct rights to hold cantons accountable in federal authorities. Moreover, the many layers of EU democracy imply new local and national elections to elect representatives who will participate in EU level deliberations. This in turn will reinforce national democratic channels and public sphere by creating a new round of election and in return new channels of accountability over the same issues.

A second example is the increasing *inclusion of the democratic franchise* itself in EU Member States with the gradual extension of political rights to non-Europeans after having extended them to non-national Europeans. Switzerland could benefit from these reforms. It needs indeed to become more inclusive of all those affected by its decisions inside and outside Switzerland be they European or non-European. In fact, this trend is already at work in some cantons where foreign residents have been granted voting and electoral rights at municipal level, but it would be enhanced by an EU membership, just as it has been in other countries like Belgium or the Netherlands. Switzerland also needs to make sure Swiss legal subjects are democratically represented in other national, transnational and supranational fora in Europe where decisions which affect them are taken. And this would be ensured were it a member of the EU.

Among fears for Switzerland's *external sovereignty* once it has become a Member of the EU, one finds the idea that Switzerland will become even more *isolated* as a small State in a larger European context.

The problem is that the erosion of external sovereignty through the internationalization of governance and law-making is already at work and is affecting Switzerland despite it not being a member of the EU. Moreover, the positive Swiss experience at the UN has belied many of the fears prevalent before the 2002 accession. The EU could provide the same kind of international platform to Switzerland and hence benefit its economic and political sovereignty towards the outside. Switzerland would be able to make its voice heard on the EU level, which was not the case before, and this could boost Swiss confidence and credibility in Europe. At a time when Europe is becoming a beacon for global justice and responsibility, this will be an advantage for Switzerland's active engagement abroad.

A sovereignty-based argument for reforming the EU

If sovereignty qua responsibility requires Switzerland's accession to the EU, it is important to assess not only how sovereignty would fare within the EU, but also how it could help reform the EU from within. As a responsible Member State, Switzerland would have to take part in the reform of EU institutions and would actually be able to benefit the latter. For instance, Switzerland could help the EU mend its democratic deficit, but also its human rights deficit from the inside, based on its multi-level democratic and human rights experience at the national level.

Conclusion

Very often, controversies regarding foreign policy in Switzerland pertain not so much to the policy itself, but to a static and monolithic perception of Swiss political identity and that of others. It was the case with the discussion pertaining to Switzerland's accession to the UN in 2000, amidst a debate loaded with obsolete conceptions of global politics, and it is very much the case today with respect to Switzerland's accession to the EU. Things are changing on both sides of the equation, however, and the problems one may identify for Swiss sovereignty in the EU might well lie in the fact that one is not looking for the right thing: sovereignty has changed at a global level and even more so in the EU, but so has sovereignty in Switzerland itself. Since asking the right question is the first step to finding the right answer, it is crucial to rethink sovereignty before condemning Switzerland's accession to the EU on erroneous grounds.