



How can we enhance our security without damaging our liberty?

For a Progressive and European Rehabilitation of Sovereignty

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How can we reinforce internal security without destroying basic freedoms? This dilemma will become increasingly topical in the context of rising terrorist threats and in view of some of the responses already put in place at the national level. Many observers have pointed out the threat that these measures pose to individual freedom. But few have highlighted their relative inefficiency. Indeed, if the right to security is one of the founding reasons for political government and one of its main sources of legitimacy, can states still guarantee this basic right? This article examines this dilemma and focuses more specifically on its implications for the notion and practice of sovereignty. It also sketches a strong, but nuanced, rescue of sovereignty at the European level in order to assure individual security while, at the same time, protecting our freedoms.

THE GUARANTEE OF SECURITY: A FOUNDING PRINCIPLE OF SOVEREIGN STATES

One of the first historical sources of legitimacy for sovereign rulers was their ability to guarantee peace and security: in his famous *Leviathan*, the philosopher Thomas Hobbes theorized this renunciation by individuals of some of their freedom in exchange for the protection of some fundamental freedoms, including the right to live in peace. The implementation of such a right supposed that only the state would dispose of the legitimate use of force, through police and military forces, in order to ensure internal peace would prevail on the territory over which it ruled. In this Hobbesian approach, the social contract has an instrumental and practical justification rather than an idealistic one: instead of defending the greatest good – as in the classical view of natural law – the government had to guarantee the minimal good of avoiding death. In this shift from classical natural law to modern natural rights, the root of justice is the fundamental right of self-preservation. And this is so because human beings are, by nature,

moved by passions such as competition, mistrust and desire for glory that will, if they are not impeded by an external agent, lead to war. The only way to tame these natural tendencies is by a rational acceptance of a common power protecting them all in exchange for a renunciation of part of their individual liberty.²

This guarantee of personal security is one of the defining features of states' sovereignty. If this notion entails various dimensions, its coercive aspect has always been essential to its existence. Even the ability to adopt legislations on a particular territory – perceived by Jean Bodin as the distinctive characteristic of sovereignty³ – cannot be said to grant effective sovereign power to a particular entity if it is not backed up by a potential use of force against those who violate the rules elaborated by the sovereign. In other words: the ability of public authorities to implement decisions on a given territory needs to be supported by a legitimate monopoly of the use of force. But, furthermore, the core of sovereignty – its coercive dimension – is also one of its most primary sources of legitimacy, since it gives public authorities the means to guarantee individual security. Without this dimension, individuals would never accept the renunciation of some of their freedoms to a central authority.

Historically, however, sovereign rulers then also started to derive their legitimacy from the guarantee of other basic freedoms – such as freedom of speech, expression and organization –, from the democratic elaboration of public decisions and from the principles of the rule of law.⁴ The latter not only established checks and balances and controls on the sovereign ruler himself, but also reinforced the protection of particular human rights. Even more recently, sovereign powers also included the ability to implement socio-economic interventions in order to mitigate economic crises and inequalities, thereby adding another, very powerful, element of 'output' legitimacy to the

decisions implemented by the state. The identity-based rhetoric that justified – sometimes simultaneously and sometimes *a posteriori* – the extension and reconfiguration of sovereign powers is, on the other hand, not related to actual sovereign powers as such. Indeed, nationalism, as a general doctrine rather than a fully fledged ideology, was always a way of legitimizing particular political actions rather than a specific interpretation of them.⁵ Thus, this symbolic dimension of sovereignty has never enhanced the content of the latter, but merely contributed to justifying it.

In practice, at least in the West, states have constituted the crystallisation of these layers of sovereignty on a particular territory: they became the holder of various competences that they could apply on a particular territory. With the process of democratization and the building of the welfare state, the source and area on which their sovereign power applied was expanded and transformed. At the same time, their source of legitimacy started residing as much in their link with the majority will ('input') as in the actual policies they implemented on their territory (the 'output'). With the triumph of liberalism and the rule of law, states had also become the main guarantors of fundamental rights, including against their own actions. And most of the time a strong national identity was used as one of the legitimizing tools for the implementation of political action by the sovereign.

THE SLOW DEMISE OF NATIONAL SOVEREIGNTIES

Nonetheless, national sovereignty has slowly been undermined in its various dimensions, and European integration is partly the cause. In an increasing number of fields, an incomplete Europeanisation has weakened national sovereignty without creating the bases for a properly European sovereignty. For instance, the liberalisation of the exchanges of goods,

services and capitals without harmonisation of social, tax and environmental standards has generated a ‘race to the bottom’ limiting the ability of social and political actors to act upon the level of these standards. Similarly, the creation of a common currency and financial institution was done without the support of a substantial budget which could offset the huge divergences between regions and states within the eurozone or fund demand-friendly investments. This partial Europeanisation also concerns immigration: the free movement of persons within Schengen has not yet been accompanied by a clear management of external borders. Member States have therefore lost the control over their own borders without being able to rely on an adequate European control over the EU’s external borders. As for democratic sovereignty, it has been more than troubled by European integration: more and more policies are being decided, directly or indirectly, at the European level, whereas political debates, media and public spaces – ‘politics’ – still take place at the national level. This discrepancy is one of the root causes for the loss of effectiveness experienced by national democracies. However, the EU decision-making procedure is still far from corresponding to the criteria of representative democracy: while the European Parliament is still not entitled to propose new legislations, the European Commission is still very far from being fully accountable to the legislative. Another example of this half-way Europeanisation and of its detrimental impact on national sovereignties concerns the military and police forces: Europol and the Common Security and Defence policy still constitute hybrid entities, partly intergovernmental and partly supranational, rather than proper European entities. And yet, national security institutions no longer seem fit to deal with current threats.

Let us now take a closer look at the coercive aspect of sovereignty – as noted earlier, the

minimal and *sine qua non* condition for its effectiveness as well as its legitimacy – in the light of the current context.

SECURITY VERSUS LIBERTY ?

The recent terrorist attacks in Paris and the one against the magazine *Charlie Hebdo* a year ago have blatantly revealed the fact that European citizens are no longer safe in their own countries. The terrorist menace is *the* new security threats faced by European populations. The discussion on the multifaceted causes of these threats is a complex and ongoing one that we will not tackle here. The point that we seek to address instead is their impact, on the one hand, on the fundamental right to peace that every citizen should enjoy and, on the other, on the actual effectiveness of sovereignty in one of its founding aspects, namely, the coercive one.

Currently, the debate seems to be split into two camps, particularly in France: on the one hand, those who are ready to give up fundamental freedoms, temporarily and in the long run, in exchange for a proposed increase in personal and collective security at the national level, and on the other, those who point to the potential dangers of restricting such freedoms for the whole population.

Let us first examine the arguments of the second camp. These sceptical observers are right to highlight the risks entailed in drastically limiting basic human freedoms. In that respect, possible dangers are exemplified by the French government project to strip of their nationality any bi-national French citizens who have committed terrorist acts. Such a constitutional change – aside from being merely symbolic and totally inefficient in struggling against terrorism – would lead to many problems, including that of creating two categories of French citizens and therefore institutionalising discrimination. The state of emergency put in place just after the attack last November and due to last until the

end of next February has also triggered numerous criticisms. The willingness of the French government to make some of these measures permanent through legislative change has also generated substantial worries. This scheme proposes an increased use of ministerial orders – passed by the executive rather than by the legislative power – which means that the penal law will depart from the realm of democratic rule. Furthermore, this draft project gives priority to the prosecutor over the judiciary judge and increases the coercive powers of the administrative police, including the prefect, under the control of administrative jurisdictions such as the *Conseil d'Etat*.⁶ As far as the police are concerned, the consequences of these proposed changes comprise relaxing the rules applied to the firing of weapons, enabling night-time raids and loosening limitations on searching and detaining suspected terrorists.⁷ These measures are consistent with the ones taken just after the attack against *Charlie Hebdo* and before that, of new penal legal frameworks such as Perben II. These reforms would certainly create an imbalance between the political and the judiciary powers, thereby opening the door to arbitrariness, the abuse of powers and ultimately, potential violations of basic human rights.

A LEGITIMATE PURPOSE BUT INEFFICIENT MEANS

Such measures could, at first glance, indicate the survival of sovereignty at the national level, at least in its coercive dimension. This is what the first camp welcomes: the strengthening of the coercive dimension of sovereignty in order to guarantee individual and collective security. Carl Schmitt, another, more recent theorist of sovereignty, defined the latter as the power to make and implement ultimate decisions in times of exception; and of course this power presupposed the ability to use force to back up such decisions. What some states, and the French one in particular, are doing with the

explicit aim of reassuring their citizens, seems to confirm this Schmittian aspect of sovereignty.⁸ Nonetheless, as many observers have mentioned, those emergency measures are more likely to decrease individual freedoms than to increase security. The threats these measures are targeting are indeed inherently European and trans-national. Deprived of practical effectiveness, it is difficult to maintain that sovereignty still exists, even in its purely coercive aspect.

The solution is not, however, to merely lament the dangers such measures entail for individual freedoms, but to elaborate and implement ways of actually guaranteeing citizens' security. Yet, it seems impossible to guarantee the security of citizens with purely national means. Recent attempts to revive the control of national borders and guarantee the security of citizens only through national means are bound to fail, particularly since they are likely to be implemented only in a partial way – for instance, the renationalization of the control of borders without adequate intelligence, police or military means. A lot of these attempts are actually political and cosmetic reactions imbued with a nationalist ethos, rather than credible solutions to the problem at hand.

FOR A EUROPEAN RESPONSE TO SECURITY CHALLENGES

The response must therefore take place directly at the European level. An adequate control on the external borders of the EU has to be implemented. In this respect, the Commission has taken a step in the right direction with its recent proposal to establish a European Border and Coast Guard to ensure a strong and shared management of the external borders and to introduce systematic checks against relevant databases for all people entering or exiting the Schengen area. As European Commission First

Vice-President Frans Timmermans put it: “*In an area of free movement without internal borders, managing Europe’s external borders must be a shared responsibility. The crisis has exposed clear weaknesses and gaps in existing mechanisms aimed at making sure that EU standards are upheld. Therefore, it is now time to move to a truly integrated system of border management.*”⁹

Moreover, a distinct, common European police force should be created. Europol now falls under the ordinary decision-making procedure but the commission shares the right of initiative with Member States, unanimity is maintained and the Parliament is only consulted. We also need a proper European Defence and Security policy. If the Lisbon Treaty goes a step further in the Europeanisation of this policy – through the mutual assistance and solidarity clause and the application of enhanced and structured cooperation to this field and through other means – it still remains partly intergovernmental in its content. There is still no European army, only civilian and military capacities provided by the Member States. The decision-making procedure detailed in the Lisbon Treaty is also only partly intergovernmental – decisions still require the unanimity of Member States after propositions by the high representative for foreign affairs and security policy and the European Parliament have been consulted. Yet, it is only by a deeper Europeanisation of security policies – in the broad sense – that the individual security of all EU citizens will be guaranteed. Finally, a European intelligence agency – similar to the US CIA – must be put in place, as several actors have demanded.¹⁰

Governments and civil societies should accept that traditional sovereign powers have, in practice, lost much of their effectiveness. The only way to guarantee one of the oldest rights of all, the right to internal peace and security, is indeed by rehabilitating sovereign authority, but at the European level.¹¹ Was it not the longing for peace, which, in the first place, triggered the

creation of the European Community? Why not reactivate this objective as one of the main sources of legitimacy for European integration?

A EUROPEAN SOVEREIGNTY SUBSERVIENT TO THE INTERESTS OF CITIZENS

If one is to generate a proper European sovereignty, however, it should be done by retaining the best of this notion and reality, without reproducing its potential dangers. Concerning the coercive dimension of sovereignty, this means that the creation of a European police, army, border management and intelligence services – provided with adequate resources – should go hand in hand with a democratisation of the EU decision-making process as well as with the implementation of the rule of law at the European level.

Certainly, many Europeanist scholars and experts have insisted on the ‘*sui generis*’ character of EU governance, highlighting that if it is democratic, it is only so in a new, horizontal, post-national and postmodern way. According to such a mantra, the EU decision-making procedures are not anti-democratic but rather represent a further and more advanced step in democracy. This argument is problematic in many ways.¹² In order to be democratic, the EU should be radically reformed. Chiefly, the European Parliament, the only European entity endowed with democratic legitimacy, should have the only right of initiative and should control the executive – a transformed Commission – which would derive from the political majority represented in the Parliament. And in order to become a democratic entity – in the minimal sense of representative democracy – the EU should be led less by the will of its Member States. This means that the Council and the European Council would, ultimately, disappear. In this dimension as in several others, sovereignty cannot be shared. If it is shared, it becomes divided and, in the end, ceases to exist.

Moreover, sharing sovereignty inevitably triggers fragmentation and secessions, sometimes violent ones, that tend to recreate the unity of sovereignty at other levels.¹³

On the question of the rule of law, it is important to mention that the current treaties (Article 7, TUE) allow the Council to act with a preventive mechanism or with possible sanctions if a Member State breaches the rule of law principles.¹⁴ Nonetheless, this article has never been used. Confronted with this situation, the Commission has so far only exerted political pressure or launched infringement proceedings.¹⁵ Besides, one can question the fact that control of compliance to the rule of law is granted to governments and to an unelected entity such as the Commission – in the procedure foreseen by Article 7, the European Parliament would only be consulted – rather than by an independent judicial authority. One can also wonder whether the actual content of these principles – which include the fundamental rights – should not be discussed and voted on by a democratic assembly before being enshrined in a fundamental text, such as a constitution. In this matter as in many others, the general concepts and terminology of liberal democracy are applied to the EU, while, in practice, this hybrid entity is very far from corresponding to this classical model. However, shouldn't the EU respect the rule of law principles itself before pretending to control them in individual Member States?

More generally, it is essential, in promoting sovereignty at the European level, to avoid the dangers revealed by the historical evolutions of national sovereignty. As Jürgen Habermas famously put it, the nation state, presenting a 'Janus face', was historically justified by very antagonistic principles.¹⁶ More precisely, there is a strong tension between the universalistic aspect of citizenship and the particularistic dimension of 'conventional' forms of patriotism. A European sovereignty, if it ever came about,

should not be justified by communitarian arguments – for instance, by a defence of European identity going hand in hand with an exclusivist discourse against some specific 'others'.¹⁷ Not only would this be potentially detrimental to individual freedoms and lead to many delusions, it is also totally unnecessary.¹⁸ There are indeed numerous, more instrumental, arguments to promote the creation of properly European sovereign powers. This is, in the end, in the interest of every European resident. For *'every man is desirous of what is good for him, and shuns what is evil, but chiefly the chiefest of natural evils, which is death'*.¹⁹ This right to security, however, should always be guaranteed within an institutional framework that preserves basic individual freedoms, rather than being used as a pretext to serve the will of a minority to dominate over others. As liberal thinkers have highlighted since at least the nineteenth century, absolute sovereignty can go against freedom. And it is not enough to democratize political government, because if this guarantees 'positive freedom', the latter can go against 'negative freedom': *'If I wish to preserve my liberty, it is not enough to say that it must not be violated unless someone or other – the absolute ruler or the popular assembly . . . – authorizes its violation. I must establish a society in which there must be some frontiers of freedom which nobody should be permitted to cross.'*²⁰

Democracy should not be an end in itself but merely a means to the preservation of individual freedoms. More generally, sovereignty has to be at the service of every citizen's interest to effective freedom. Nowadays, the only way to preserve and enhance our freedoms is by creating a strong, but nuanced and checked, European sovereignty. Political and philosophical liberalism can provide us with the intellectual means to conceptualise sovereignty at the European level in its more progressive aspects – democratic and socio-economic – while taming it in its more harmful – cultural and coercive – dimensions. For that purpose,

renewing the tradition of European federalism would be both conceptually and practically fruitful.

ENDNOTES

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² D Boucher and P Kelly (Ed.), *The social contract from Hobbes to Rousseau*, Taylor and Francis e-Library, London, 2005, p 41.

³ Before Hobbes, Jean Bodin was, in the sixteenth century, the first great theorist of sovereignty. T Berns, *Les origines théologico-politiques de l'humanisme européen*, Brussels, Ousia, 2004.

⁴ Authors such as Locke, Montesquieu and Rousseau theorized, each in their particular way, these evolutions of the 'social contract'.

⁵ M Freeden, 'Is Nationalism a Specific Ideology?', *Political Studies*, vol 46 (4), 1997.

⁶ S Faure, 'Loi antiterroriste: Un impressionnant renforcement du pouvoir exécutif', *Libération*, 7 January 2015

⁷ B Jacquin, 'Antiterrorisme: le gouvernement veut étendre les pouvoirs de la police', *Le Monde*, 5 January 2016.

⁸ Although Schmitt linked this definition to his theory of war, there is no intrinsic link between the two: E Tuchscherer, 'Le décisionnisme de Carl Schmitt: Théorie et rhétorique de la guerre', *Mots*, 73/2003.

⁹ European Commission, 'A European Border and Coast Guard to protect Europe's external Borders', Press Release, 15 December 2015

¹⁰ 'Paris attacks: EU ministers consider Europe-wide CIA-style intelligence agency and increased border security checks', *The Independent*, 20 Nov 2015

¹¹ Such a deepening of European integration could be done, at least in a first stage, among a small group of states in line with the 'multi-tier' method which would be the only realistic one in the current context.

¹² S Heine, 'A federalist rescue of sovereignty as a response the rise of populism and euroscepticism', *Studia Diplomatica*, 2014, 4.

¹³ Berns, op. cit.

¹⁴ Those principles include 'legality, a transparent, accountable, democratic and pluralistic process for enacting laws, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law', European Commission, 'College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions and Answers', 13 January 2016, http://europa.eu/rapid/press-release_MEMO-16-62_en.htm

¹⁵ The most recent case is Poland. Vice-President of the Commission Timmermans has been mandated to start a structured dialogue with this country on the rule of law framework, 'Rule of Law in Poland: Commission starts dialogue', http://ec.europa.eu/news/2016/01/20160113_en.htm, 13 January 2015.

¹⁶ J Habermas, “The European Nation-State : its achievements and its limits. On the past and future of Sovereignty and Citizenship”, in G. Balakrishnan (ed.), *Mapping the Nation*, London , Verso, 1996; S Heine, ‘Patriotisme constitutionnel’, *Dicopo*, 20 December 2007.

¹⁷ On this, I distinguish myself from Habermas who – somewhat contradictorily with his initial decoupling of citizenship and national identity – seemed, in the end, to abide by the view that the establishment of a European democracy and social justice would need some form of common identity – in the line of ‘constitutional patriotism’: S Heine, ‘Jürgen Habermas et le patriotisme constitutionnel’, *Politique*, September – October 2011.

¹⁸ S Heine, ‘The dangers and inanity of (euro-)nationalism: From nationalism to cosmopolitanism’, Egmont Paper 77, April 2015.

¹⁹ Hobbes quoted in : J B Schneewind (Ed.), *Moral Philosophy, from Montaigne to Kant*, Cambridge University Press, Cambridge, 2003, p 118.

²⁰ I Berlin, ‘Two Concepts of Liberty’ in *Liberty. Four Essays on Liberty*, p 210, Oxford, Oxford University Press, 2002.



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