

Great Britain and Switzerland: Circumventing EU Supranationality ?

Jürg Martin Gabriel
Professor Emeritus ETHZ
Swiss Federal Institute of Technology
Zurich, Switzerland

Table of Contents

Introduction 1

Defining Politics 2

Great Britain 4

Parliamentary Sovereignty 4

The Brexit Process 6

An Assessment 8

Switzerland 10

Popular Sovereignty 10

Bilateralism 12

An Assessment 14

Conclusions 16

Introduction

As far as European integration is concerned, Great Britain and Switzerland are moving in different directions. Whereas the British intend to leave the European Union, the Swiss, in small pragmatic steps, continue to move closer. The two efforts appear to have nothing in common. But there is an interesting parallel: Both try to circumvent EU supranationality by opting for solutions that respect national independence. The strategy, by maximizing state sovereignty, touches the heart of politics. No wonder it is hotly contested, as the arguments of opponents and proponents show.

Those favoring supranational avoidance maintain that the gain in sovereignty more than compensates for the loss in EU decision-making. Critics disagree. For them the advantages of supranational participation, in legislative, executive and judicial terms, outweigh the loss of national sovereignty. Compensation is possible – but it works in the opposite direction.

The argument is anything but new. In the 1950s already, when the foundation of the European Economic Community (EEC) was discussed, the UK and Switzerland were doubtful whether gains in supranational decision-making could make up for the loss in national sovereignty. It was a major reason why they decided against joining and instead founded the European Free Trade Association (EFTA), a traditional organization respecting national sovereignty.

The loss of national sovereignty, as EU critics see it, happens both inside and outside a country. On the inside it weakens a state's legislative, executive, and judicial power. Toward the outside it restricts foreign policy options, mainly – but not only – in the area of economics. EU members, among other things, can no longer enter into bilateral Free Trade Agreements (FTAs).

Many British and Swiss decision-makers disagree, but in the past and today, they tend to be a minority. The dominant conviction in both countries is that the circumvention of supranationality is possible and attractive. UK Brexiteers want to return to the situation that existed before EU membership, whereas the Swiss prefer 'bilateral' EU agreements, as they call them. Small wonder that a Framework Agreement, recently submitted by the EU and containing supranational features, is anything but popular. In both Britain and Switzerland, the issue is as controversial as ever.

The purpose of this article is to discuss the disagreement in some detail and to draw certain conclusions. In part these are bound to be provisional and speculative, because the process is ongoing. The UK's withdrawal is incomplete, and the Framework Agreement is waiting in the wings. It is also important to add that I am presenting a political science perspective. Constitutional lawyers would have much to add, might use different language and come to different conclusions.

The article starts with general remarks on basic terms, with explicit definitions of politics and sovereignty. I then turn to questions of substance and begin with Great Britain. The focus is on parliamentary sovereignty and the fight between Brexiteers and their critics. A presentation of the Swiss situation follows next. It begins with a few words about the peculiarities of popular sovereignty, of 'bilateralism' and the proposed Framework Agreement. The article ends with a number of conclusions.

Defining Politics

David Easton defines politics as 'authoritative value allocation.'¹ A few words of clarification are useful. As Easton sees it, political authority is associated with collectivities ranging from traditional tribes to Greek city states known as 'polis,' all the way to empires and modern nation-states. Political authority, therefore, revolves around the allocation of public rather than private values and goods. Furthermore, actors in possession of political authority have the ultimate say when allocating such goods. From a legal perspective, ultimate authority is often identified with sovereignty.²

¹ David Easton, *A Framework for Political Analysis*, Prentice-Hall, Inc., Englewood Cliffs, N.J., p. 50. For a more detailed discussion of Easton's notion of authoritative value allocation, see Jürg Martin Gabriel, *Political Science Concept Formation (Part II) - David Easton's 'Authoritative Value Allocation'* (June 17, 2013), available at SSRN: <https://ssrn.com/abstract=2280252>; Jürg Martin Gabriel, *David Easton's 'Authoritative Value Allocation' - Activating the Definition's Potential* (February 1, 2017), available at SSRN: <https://ssrn.com/abstract=2909910>

² For an interesting recent article on the evolution of sovereignty written by a Swiss specialist on international economic law, see Thomas Cottier, *Souveränität im Wandel*, Bern, 12 September 2019, <https://suisse-en-europe.ch/wp-content/uploads/2019/09/Souver%C3%A4nit%C3%A4t-im-Wandel-0919fin.pdf>

The structure of sovereign authority can vary. When shared with others it is co-decisional; when concentrated in the hands of a single actor it is centralized or monopolistic. In a democracy it is usually exercised by a number of different actors, by local, regional or federal governments, and by the legislative, the executive, and the judicial branch. Public sovereignty in such cases is divided or cooperative. And, last but not least, ultimate authority is shared among large numbers of citizens when electing and voting.³

Toward the outside, the structure of national sovereignty tends to be monopolistic. The decentralized nature of the international system reflects it, and the United Nations Charter demands it. According to the Charter, the respect of sovereign independence is the cornerstone of civilized world politics.

The European Union, too, features both shared and monopolistic authority. Toward the inside, co-decisional patterns dominate. All member states participate in one way or another in the decision-making of the EU Parliament, the Commission, the Council, and the Court of Justice. Toward the outside, in relation to other international actors, Brussels has the possibility to speak with one voice for a single actor – the European Union.

Contextual dimensions matter, too. To be truly sovereign, actors must enjoy the independence to say yes or no. If they lack the necessary freedom, sovereignty is restricted. Some settings permit it; others do not. Modern developments can be a hindrance. How free are citizens, towns, or entire nations to decide on issues of air transportation or electronic networks, given the global and complex interdependence of mobility and communication?

Tight interdependence was one of the reasons why after two catastrophic World Wars half a dozen European states decided integrate, first in the realm of coal and steel, then more generally in economics, and as time went on, in many other fields.⁴ The Single Market, as it turned out, became the core area of supranational integration and is based on four freedoms – the free movement of goods, services, capital, and labor. As said, the UK at first decided to avoid

³ Cottier distinguishes between absolute and *geteilte oder kooperative Souveränität*; the German term *geteilt* can stand for both dividing and sharing, an idea also implied in 'checks-and-balances'; see Cottier op. cit., p. 3, 15.

⁴ The Area of Freedom, Security and Justice (AFSJ) is an example; see https://en.wikipedia.org/wiki/Area_of_freedom,_security_and_justice

membership but, in 1973, changed its mind and joined. In a 2016 referendum that decision was reversed.

Finally, a word about the allocation of public values. This aspect, too, has two dimensions. On one hand, authoritative decisions are formulated or 'produced'; on the other hand, they are meant to be followed or 'consumed.' In other words, there is an active and a passive side to sovereign allocations. Ideally, the two dimensions go hand in hand, but at times, there is a gap between them.

What is true for sovereignty can also apply to supranationality. EU members may actively participate in the 'production' of integrated goods and of EU directives and regulations, but they may fail to implement or 'consume' them. However, the opposite is possible as well. Non-members do not participate in the formulation of supranational rules and regulations but, for various reasons, apply or 'consume' them. The latter amounts to a *de facto* limitation of state sovereignty and eliminates the possibility of circumvention. More about this later on.⁵

Great Britain

Parliamentary Sovereignty

To understand the Brexit process, and to appreciate possible losses and gains when joining or leaving the EU, it is necessary to take a closer look at British sovereignty. It differs in important ways from that of other countries, especially that of Switzerland.

When the British speak of 'the sovereign' they mean the crown, more precisely the queen. It is a reminder that sovereignty was once in the hands of an absolute monarch. That changed over time. In various pragmatic steps sovereignty was transferred to the Parliament of Westminster.⁶ Although Britain lacks a

⁵ For a general discussion on sovereignty, see Jürg Martin Gabriel, *Political Science Concept Formation (Part I) - Definitions Matter* (June 17, 2013), available at SSRN: <https://ssrn.com/abstract=1958766>; Jürg Martin Gabriel, *Political Science Concept Formation (Part III) - Different Approaches & Different Definitions* (June 17, 2013), available at SSRN: <https://ssrn.com/abstract=2280253>

⁶ A major step was taken in 1689 with the Glorious Revolution and the Bill of Rights.

unified constitutional document, experts are agreed that Britain is a country with parliamentary sovereignty.⁷

Let me begin with some general remarks about the nature of Westminster. The institution reflects to a large degree the British tradition of two-party politics resulting mainly (but not only) from elections in 650 single-member districts where a relative majority of votes is sufficient to win a seat.⁸

The winner of an election, ideally the party with a parliamentary majority, forms the government and names the prime minister. Cross-party politics are the exception. And, as a rule, legislative and executive power is in the same hands. Organizationally speaking, Westminster is different from 10 Downing Street, but there is no systemic separation of power, no explicit American checks-and-balances.

It follows that the party with a parliamentary majority is the chief sovereign actor. Or, differently put, *de facto* parliamentary sovereignty is usually (but not always) in the hands of a single party. And, to successfully manage the authoritative allocation of values, the governing party needs to be well organized and united. When discipline is lacking, sovereignty suffers, as the confusing Brexit process demonstrates.

Given the Brexit divisions, both major parties suffered from a lack of discipline. The Conservative party, or Tories, because running the government, felt it most. At times the impact on sovereignty was obvious. The situation is not entirely new. EU membership was never popular among right-wing Conservatives. It was the reason Cameron decided to have a referendum, hoping that an EU-friendly result might close Tory ranks.

The calculation failed. The referendum result was tight and reflected a chasm dividing not only the Tories but the entire country. The fact that the Scots and Northern Irish favored EU membership made the situation even more problematic. Referendums are rare in the UK, and as the Brexit process showed, they

⁷ Gillian Peele, *Governing the UK*, Blackwell, Oxford 1995, pp. 17-50; Roland Sturm, 'Das Politische System Grossbritanniens,' in Wolfgang Ismayr (ed.), *Die politischen Systeme Westeuropas*, Leske & Budrich, Opladen 1999, pp. 217-253.

⁸ The system is associated with terms like 'first past the post' or 'winner takes all.'

can weaken parliamentary sovereignty.⁹ The effect was felt at home and abroad. Negotiations with Brussels are difficult.

The Brexit Process

Theresa May inherited a difficult situation. In an effort to strengthen her position, she called for elections, hoping to close party ranks. The move is in line with parliamentary logic and can work – but she failed. The Tories lost their slim majority, and to stay in power, they had to enter into a coalition with the Northern Irish DUP.¹⁰ As said, coalitions are rare in Westminster politics, and as it turned out, the marriage did not simplify the authoritative allocation of an extremely important public good – the reorganization of Britain's relations with Europe.

It showed in May's EU negotiations. She agreed to a two-stage process that, as a first step, provides for a withdrawal deal and, in a second step, is meant to settle the post-Brexit relation with the Union. The problem, for the moment, was the withdrawal deal, which contained among other things the 'backstop' provision meant to solve a thorny border problem.

The British and the EU agreed that a boundary separating the Republic of Ireland and British Northern Ireland should be avoided. It might endanger the Good Friday Agreement of 1998, which ended years of conflict by providing, among other things, for the abolition of borders. The decision was facilitated by the fact that both the UK and Ireland were EU members.¹¹

However, there was also a need to protect the outer border of the EU Single Market that in the future might run between the Republic of Ireland and British Northern Ireland. Some kind of control was necessary. To solve the intricate matter, May and the EU agreed that until a more perfect solution was found, the entire UK would remain in the EU Customs Union. Hardcore Tory Brexiteers rejected the idea, arguing that the arrangement continued EU 'colonization,' possibly for an unlimited period of time.

⁹ The 1975 EU referendum succeeded and did not weaken the government.

¹⁰ May won 317 of 650 districts, Labour 262, and the Lib-Dems 12.

¹¹ For details on the Good Friday Agreement, see https://en.wikipedia.org/wiki/Good_Friday_Agreement

May's effort to get the deal through Parliament failed in three 'indicative' votes. In a fourth attempt she held talks with Labour and came up with a compromise.¹² What in other democracies would have been seen as normal (and limited) coalition building was considered by hardcore Conservatives as a betrayal of their party. In an internal selection process, Theresa May was replaced by Boris Johnson.

Johnson set about restoring party discipline. First, he formed a government composed entirely of ministers supporting his line. Then he cleansed the Tory's Parliamentary representation. To the surprise of many he eliminated 21 of his own MPs, all of them considered to be soft Brexiteers and allies of Theresa May. Although the move was dramatic, Johnson's legislative position did not improve. More than ever he led a minority government.

As Parliamentary defeats continued, Johnson decided to attack Westminster as a whole – by what is known as 'proroguing'.¹³ Parliament, he declared, would be suspended for a period of five weeks. Many considered the move to be unconstitutional – which it was. The Supreme Court decided unanimously that "suspending Parliament was unlawful."¹⁴ Had Johnson succeeded, parliamentary sovereignty would have been redefined – to the disadvantage of the legislative and to the benefit of the executive. The judiciary prevented the power play.

Having lost many battles in and out of Parliament, Johnson decided to turn to Brussels and to negotiate a new deal. His main goal was to eliminate May's 'backstop.' Which he did. To protect both the Single Market and the peace of Northern Ireland a new border would be created in the Irish Sea, with the advantage of freeing the UK from the EU Customs Union.¹⁵

The positive effects would be felt quickly, Johnson argued, because the new withdrawal deal makes it possible to start immediately with FTA negotiations. As Brexiteers had always envisaged, it would allow the UK to regain its

¹² In a non-binding addition to the Withdrawal Bill she mentioned the possibility of considering a second referendum and of a temporary stay in the EU Customs Union after phase two.

¹³ A painful defeat was the Benn Act of 4 September, which made a (third) Brexit extension (until 31 January) possible, although it was tied to certain conditions (see footnote 16).

¹⁴ For details, see <https://www.bbc.com/news/uk-politics-49810261>

¹⁵ For details, see <https://www.bbc.com/news/uk-50083026>; see also <https://www.bbc.com/news/the-reporters-50712835>

traditional sovereignty in foreign affairs and, on top of that, to compensate for the co-decisional authority lost in Brussels.

But Johnson failed to get his deal through Parliament quickly, and to prevent a no-deal departure, he was forced to seek a third Brexit extension, which Brussels granted. It was a painful step because for months he had vociferously rejected the idea.¹⁶ Having run out of options, he decided to call for elections scheduled for 12 December – and Parliament agreed. He hoped to win where May had lost, to strengthen party discipline, and to obtain a Tory majority. The strategy was in line with parliamentary tradition – and it worked.

An Assessment

What, seen as a whole, is the impact of the complicated Brexit process on parliamentary sovereignty? The split among Tories, by weakening the authority of both Cameron and May, was no doubt detrimental. Both prime ministers had to operate with a weakened party, and May's attempt to solidify her parliamentary majority with elections failed. Johnson's move to expel nearly two dozen of his own MPs did not improve the situation either. And, finally, May's effort to get a majority by seeking a (limited) cross-party coalition with Labour made the situation even worse, leading, as it did, to her removal.

Johnson's proroguing was meant to strengthen the executive's position, but it failed as well. As the Supreme Court unanimously declared, it would have weakened the legislative and was therefore unconstitutional. But the affair had a positive side. The court's decision, by re-establishing traditional parliamentary authority, clarified the ill-defined British checks-and-balances among the legislative, the executive, and the judiciary.

Seen as a whole, therefore, the Brexit process – so far – has had positive and negative effects because parliamentary sovereignty was both weakened and strengthened. Hardcore Brexiteers must not have been pleased, but as they had argued, true sovereignty gains would come in phase two when leaving the Single Market and negotiating FTAs with numerous countries but, of course, mainly with the EU. And, as Brexiteers promised, the change would

¹⁶ The step, known as the Letwin motion, became necessary because the Benn Act provided that an extension would be unnecessary should a new deal succeed – which it did.

compensate for the loss of co-decisional authority in EU organs and, on top of that, result in the circumvention of supranationality.

The negotiation of FTAs, as said, can begin immediately once the withdrawal has taken place. However, since the second phase has yet to come, we do not know what the overall outcome will be. Given the length of FTA negotiations, it might take years to see results. For the moment we can only speculate and ask questions.

Some things are clear. Negotiations with the EU come first, and the quantitative impact is rather obvious. British government officials and Westminster MPs will be confronted with an enormous amount of work. Departing from some EU institutions will be relatively simple but as said, it takes years of intensive and complicated negotiations to produce FTAs. Add to this the fact that those British administrators familiar with FTA negotiations still sit in Brussels. Whether additional work, given such circumstances, amounts to a meaningful gain in sovereignty remains to be seen.¹⁷

The qualitative dimension of is more difficult to assess, because sovereignty is not easy to measure. What is a truly sovereign gain or loss, and what is not? Will the British in their negotiations be completely free to say yes or no? To what extent will a lack of independence and the Union's sheer weight force them to accept existing EU rules?

Let me become more concrete. As said, the Single Market embraces four areas, the free movement of goods, services, capital, and labor. Some issues are intricate, and interdependence is tight. Take automobile parts, pharmaceuticals and agricultural products as an example. In all these fields it is no longer tariffs that are the main hindrance but all kinds of qualitative standards.

Several questions arise. Will the British be in a position to alter established EU standards, or will they simply have to accept them? And, if the latter should be the case, will it still be the EU that in its supranational agencies conducts the relevant studies and tests? The EU runs dozens of such agencies in which the

¹⁷ For more information about the complexity involved, see <https://www.cer.eu/in-sights/what-boris-johnson-eu-uk-free-trade-agreement-means-business>

UK participates, but given the Brexit withdrawal, will the country continue to cooperate and have a say?¹⁸

Compromise solutions are likely, not least because EU standards often enjoy acceptance by other major countries and are written into numerous FTAs. Given such interdependence, the UK will hardly be free to say yes or no and, having quit the EU, it will no longer be a 'producer' but merely a 'consumer' of supranational rules and regulations.

The process simplifies the work of Westminster MPs but does not result in an expansion of parliamentary authority. When present in Brussels the British had a say in defining such issues, but that is no longer the case, and it diminishes the possibility for sovereignty compensation. The reverse is true. The loss of co-decisional EU authority is heightened by the adoption of EU standards.

Needless to add, accepting secondhand rules also weakens the likelihood of circumventing supranationality or, as Brexiteers like to say, of shedding the 'chains' of Brussels. If FTA negotiations are conducted with respect for national sovereignty, then supranationality is indeed outflanked. But if the sovereignty gained is merely 'consumptive,' true circumvention is impossible. As said, we are not sure as yet what the situation will be, but the Swiss experience tells an interesting story, as I show next.¹⁹

Switzerland

Popular Sovereignty

To understand the Swiss-EU relation it is also necessary to take a brief look at the country's political system and its conception of sovereignty.²⁰ Both Switzerland and Great Britain are functioning democracies, but there are important differences when it comes to the authoritative allocation of public goods. To

¹⁸ In some agencies, as the Swiss have experienced, non-EU members are allowed to participate but without full power of decision-making.

¹⁹ For two critical Brexit assessments, see Jürg Martin Gabriel, *Brexit: Weighing Sovereign Gains and Losses* (October 29, 2016), available at SSRN: <https://ssrn.com/abstract=2861106>; Jürg Martin Gabriel, *Brexit - Road to Sovereign Independence?* (January 18, 2018), available at SSRN: <https://ssrn.com/abstract=3104390>

²⁰ Ulrich Klöti et al., *Handbook of Swiss Politics*, Neue Zürcher Zeitung, Zurich 2004; Wolf Linder, *Swiss Democracy, Possible Solutions to Conflict in Multicultural Societies*, St. Martin's Press, London 1994.

begin with, the Swiss system, for historical reasons, is heavily federalist. It shows, among other things, in the constitution, which still refers to the cantons as sovereign entities.

Secondly, and at all levels, collegial executives are the rule, consisting of five to seven (at times nine) members from the major parties. The composition reflects the situation in the legislative, where proportional elections produce a sizeable number of parties that, when handling legislation, are used to constantly form new coalitions. Collegial governments, by virtue of their composition, are in fact grand coalitions meant to stabilize the fluidity of multiparty legislatures. It is therefore not surprising that some classify Switzerland as a 'consensus democracy'.²¹

The contrast to the British system could hardly be greater. In Switzerland MPs are not elected in single-member districts, the legislature is not dominated by two parties and is not bipolar, there is no majority party naming the prime minister and forming the government to exercise *de facto* sovereignty, and coalition building is the rule. Add to this the fact that public votes are frequent and of crucial importance.

Which takes us to direct democracy. At all levels of government Swiss citizens not only take part in elections but also in regular votes on public issues.²² It is the people that often have the last say in the allocation of public goods. When the Swiss speak of the 'sovereign' they mean the people as a whole and not a specific body or institution. It is no doubt fitting to identify direct democracy with popular sovereignty, or in German *Volkssouveränität*.

The spectrum of questions put before the people is extremely broad. Some matters are of minor, others of major importance; some deal with narrowly domestic, others with broadly foreign affairs. It is completely normal that several votes on Swiss-EU relations took place and that more will follow.

²¹ Hanspeter Kriesi and Alexander H. Trechsel, *The Politics of Switzerland, Continuity and Change in a Consensus Democracy*, Cambridge University Press, Cambridge UK 2008.

²² Votes come about either by referendums or initiatives, in some cases automatically, in other cases by collecting signatures. Initiatives are particularly important, because when approved, they become part of the constitution.

Bilateralism

To safeguard their sovereign independence, including direct democracy, the Swiss embarked on what they chose to call 'bilateralism.' It began in 1972, when they signed a traditional FTA, followed in the 1990s by two bilateral packages touching a dozen different fields. The Bilaterals I, signed in 1999, covered seven areas and, in May of the following year, were approved by 67.2% of the voters. The Bilaterals II followed in 2004 and dealt with nine more fields. Additional agreements have since been added. All told, and depending on the definition of the formalities involved, between 120 and 210 different treaties were signed.²³

The Bilaterals II included the Schengen Agreement. As is well-known, it provides for the free movement of people by the abolition of internal borders. The UK never joined Schengen, but the Swiss did – and they liked it. The advantages for those travelling abroad are for everyone to see. The popularity showed in a referendum held in 2005, when 54.6% of the voters backed the arrangement, although in fact, but not on paper, Swiss sovereignty was curtailed in various ways. More about this later on.

But the government also suffered setbacks. Beginning in the late 1980s, Berne participated in the planning of the European Economic Area (EEA) and in May 1992 presented the final document. Feeling encouraged, the federal government submitted an application for full EU membership in the same year. It was an unusually bold move – with negative consequences. In a referendum held in December 1992, 50.3% of the voters rejected EEA participation.²⁴ It was a heavy blow. The Federal Council decided to stop membership negotiations and withdrew the application later on.

²³ For a general view of bilateralism, see https://en.wikipedia.org/wiki/Switzerland%E2%80%93European_Union_relations; for an official government listing, see <https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen/ueberblick.html>

²⁴ For more details on EEA and Switzerland, see <https://www.europarl.europa.eu/factsheets/en/sheet/169/the-european-economic-area-eea-switzerland-and-the-north>

The defeats went hand in hand with the rise of the Swiss People's Party (SVP), a nationalist and Euro-skeptical movement.²⁵ The party was highly successful. It became the largest grouping in the Federal Parliament's lower chamber, where it conquered a third of the seats. Supranationality, for them, meant an intolerable loss of national sovereignty and, more generally, a threat to the entire Swiss style of politics, including neutrality. And most of all, it would limit the scope of popular sovereignty.²⁶

But the needs for closer EU relations remained, and more Bilaterals were needed. Experience also showed that the two existing packages suffered from certain weaknesses. A first problem was rule adaptation. The process was cumbersome and often resulted in gaps between EU and Swiss legislation. Conflict resolution was a second problem. The work of mixed commissions, tied to consensual agreement, was slow and often ineffective. Talks about remedying these and other problems began in 2014. In December 2018 the Framework Agreement, meant to improve the situation, was on the table.

As the domestic consultation process showed, the agreement had little support. Criticism, in many cases, centered on two points. The first concerned the handling of Single Market rule adaptations. In the future the procedure would be 'dynamic' – meaning automatic. And, second, the conflict resolution mechanism could involve both a new Court of Arbitration and, if necessary, the European Court of Justice (ECJ). Here, too, supranational implications cannot be avoided. The involvement of the ECJ angers nationalists the most. As they see it, the institution is dominated by 'alien' judges.²⁷

The government realized that another referendum defeat was likely and decided to procrastinate. Switzerland, so the official line, needed more time, and on top of that, some points required additional negotiations. Brussels was anything but pleased and threatened punitive measures.²⁸ But for the moment, the

²⁵ SVP stands for *Schweizerische Volkspartei*; for more information, see https://en.wikipedia.org/wiki/Swiss_People%27s_Party

²⁶ See Jürg Martin Gabriel, *Swiss Neutrality: How Classical is it Today?* (May 4, 2018), available at SSRN: <https://ssrn.com/abstract=3173668>

²⁷ In German *fremde Richter*, a term that implies the idea both of 'foreign' and 'strange'; see Cottier, *op. cit.*, p. 4.

²⁸ Stock exchange equivalence was terminated but with minor effects.

Swiss strategy succeeded. Given the personnel changes at the head of the Commission, the EU was in no hurry either.

An Assessment

Many criticize the Framework Agreement as weakening Swiss sovereignty and independence. It is an argument that is popular with a good part of the public, as previous debates have shown. The Bilaterals are seen as the way of the future. But a closer look at the legislative, executive, and judicial reality revealed that the experience was anything but perfect.

Take Schengen as an example.²⁹ As an associate member, the Swiss are allowed to attend meetings of the EU Council of Interior Ministers and can participate in policy formulation or what the EU calls decision-shaping. However, they are excluded from decision-making or, more precisely, from having a last say. The country's participation in the process of authoritative value allocation is therefore incomplete. Switzerland 'consumes' supranational decisions but is only partly involved in their 'production.' Sovereignty is not exercised in full, and supranationality, too, is circumvented only in part.

That is not all, however. The Schengen Information System (SIS) is another example. It is used by practically all European border guards (and or police agents) and helps in the identification of persons and vehicles sought throughout the Schengen area. The system is produced by an EU agency with supranational character – and with Swiss participation at various levels and in various ways. On paper, Swiss independence is preserved, but the usefulness of the device is so obvious that the sovereignty claim is rather theoretical. Security, after all, is a top national priority.³⁰

²⁹ For an official Swiss comment on Schengen, see <https://www.fdfa.admin.ch/dea/en/home/bilaterale-abkommen/ueberblick/bilaterale-abkommen-2/schengen.html>

³⁰ For more on this and other such agencies, see Jürg Martin Gabriel, *Swiss Neutrality: How Classical is it Today?* op. cit., pp. 13-14.

As mentioned earlier with respect to Brexit, the EU runs dozens of such agencies in areas of high importance and sensibility.³¹ It is rather unlikely that either Switzerland or the UK will withdraw from all of these institutions. Once more, interdependence stands in the way of traditional sovereign independence.

The work of the Federal Parliament, too, is at times anything but sovereign. It shows when formulating new rules and regulations paralleling EU legislation. To avoid problems and to minimize the work of bilateral commissions it has become routine to assure compliance from the very beginning.³² Sarcastic commentators refer to the procedure as 'anticipatory obedience'.³³ Some also speak of pseudo-sovereignty.

On the judicial side the situation is somewhat different. So far there is no direct involvement of the ECJ, but one would assume that Swiss judges, like lawmakers, take a careful look at Luxembourg decisions. For them, too, 'anticipatory obedience' helps to prevent problems.

The situation is somewhat different regarding the so-called EFTA court, but the results are similar. The court was set up when Norway, Iceland, and Liechtenstein joined the EEA. Its main function is to make sure that EEA decisions are in conformity with EU rules. It is true that Switzerland is not an EEA member, but together with the other three it belongs to EFTA. Given the close link between these institutions, it would be surprising if Swiss judges did not look at the EFTA court as well.³⁴

And, as experience shows, serious limitations of Swiss sovereignty need not originate with the EU. The Organization for Economic Cooperation and Development (OECD) is an example. It deals, among other things, with matters related to international finance. To limit tax evasion, it decided some years ago that governments had to share tax information internationally – with the effect of weakening the famous Swiss banking secrecy. The OECD is not a supranational organization, but in the realm of finance global interdependence is often

³¹ For a list of the agencies, see https://en.wikipedia.org/wiki/Agencies_of_the_European_Union

³² Cottier, op. cit., p. 17.

³³ In German known as *vorausseilender Gehorsam*.

³⁴ At a subnational level, the acceptance of foreign judges is not uncommon. In their contracts regulating exports, Swiss firms regularly accept the judgements of non-Swiss courts including, ironically, the company of Christoph Blocher, the driving SVP force.

so tight that even an important player like Switzerland cannot afford to ignore it.

CONCLUSIONS

The verdict is clear: Efforts to circumvent EU supranationality encounter various limitations. The Swiss have experienced it, and the British are likely to do so as well. The optimistic sovereignty promises made by EU critics will hardly materialize. But the Swiss strategy is more realistic than the British. Moving closer to the EU in small and pragmatic steps, however controversial and difficult that may be, is less awkward than trying to opt for a total exit and then having to retreat. It is very unlikely that a majority of Swiss would vote for a referendum terminating all Bilaterals.

Of course, the Brexit process is still ongoing and the final EU-UK situation uncertain. Whatever its shape, it will not be a classical FTA, not result in EEA membership, and not be a copy of Swiss bilateralism. Most likely the UK wants to profit from a number of Single Market advantages, and like the Swiss, it will have to accept some kind of Framework Agreement, explicitly or tacitly.

Whatever the final solution, both countries will have to live with less than traditional sovereignty, because Europe, as said, is in the process of becoming a multilayered entity. The authoritative allocation of public goods will be shared in many different ways and at many different levels.³⁵

The emerging system will be a reflection of modern needs accompanied by complex and innovative structures. As a result, Europe will be a more effective actor, toward the inside and the outside. Internationally it has the potential to become one of the major actors, and in some areas it already is. To believe that Great Britain, by returning to traditional national sovereignty, can play a similar role is an illusion. As Donald Tusk said, if the British fail to realize this they run the danger of becoming a 'second-rate' nation.³⁶

The EU's internal development is difficult to predict. As said, it will be a multi-layered entity with a character of its own but the exact institutional outcome is

³⁵ Cottier, op. cit., p. 3, pp. 8-9.

³⁶ See <https://www.reuters.com/article/uk-britain-eu-tusk/britain-to-become-second-rate-in-the-world-after-brexit-eus-tusk-idUSKBN1XN2MS>

yet uncertain. What we do know is that it will not be a copy of British parliamentarianism, Swiss direct democracy, or French presidentialism. The EU continues to grow in various pragmatic steps, some of which will be truly different.

Given the ethnic and linguistic diversity characterizing Europe it is likely that new public actors will emerge. It will most certainly be the case when minorities demand greater autonomy. Belgium comes to mind, but there are other examples as well. It even happens in federalist states like Switzerland, as was the case when the French-speaking Jura separated from predominantly German-speaking Berne.³⁷

In traditionally centralized nations, autonomy demands tend to be especially unpopular and encounter serious difficulties, as developments in Catalonia and Scotland show. In the past, such efforts were often accompanied by war. In a multilayered Europe no longer dominated by traditional sovereignty conceptions, that should be less likely, one would assume. Let us hope that after his election victory, Johnson will handle the Scottish demand with caution.

³⁷ See https://en.wikipedia.org/wiki/Canton_of_Jura