Extraterritoriality and sovereignty – a Swiss perspective
by Andreas Abegg*

I. Switzerland’s sovereignty is at stake!

Clearly, in the argument between Switzerland and other countries concerning the business practices of Swiss banks, the question of Switzerland’s sovereignty is one that is raised on a regular basis. Two reactions from Neue Zürcher Zeitung (the “liberal-conservative conscience of Switzerland”), relating to negotiations aimed at reaching agreement with the USA, are quoted below:

“In Switzerland also, there is a sense of relief that for the time being there are to be no sanctions imposed on Swiss banks by the USA. ... After some serious errors, numerous measures have been taken in recent years which represent the maximum that can be required of the institutions [i.e. the Swiss banks] and a sovereign state.”

“There is seemingly no resolution ... to the inherent tension between ... protection of sovereignty and a possible interpretation of the “state of emergency” article (the greater the pressure from abroad, the sooner a state of emergency may arise). This increases the legal uncertainty.”

The first quotation dates from 1998 and relates to negotiations concerning the “forgotten” bank credit balances of persons who died in the Holocaust.¹ In the second quotation dating from 2014, the paper is referring to the negotiations between Switzerland and the USA concerning the surrender of bank customer data.² The USA had recently been pushing for the collection of taxes, an issue which has become increasingly important following the banking crisis and the consequent burdens on the state budget.³

It is notable that as far as NZZ is concerned it is the sovereignty of Switzerland that is at stake in both contexts. Or to put it another way: in both contexts, the paper is at pains to assert the sovereignty of Switzerland against the political interests of the USA, which are perceived as expansionary.

The “threat to our sovereignty” argument is also regularly aired in the Swiss Parliament. For example, a minority of the Committees for Economic Affairs and Taxation of the National Council proposed that no consideration should be given to the FATCA agreement bill, under which Swiss legal entities would be obliged to hand over data to the USA. The bill was re-

* Professor at Zurich University of Applied Sciences, Switzerland, and Lillehammer University College, Norway.
¹ NZZ 28 March 1998 no. 73, p. 23.
² NZZ 13 May 2014 no. 109, p. 23.
garded as detrimental to Switzerland’s sovereignty, and it was not considered acceptable for US law to be automatically taken over in this way.\(^4\) Again, in the discussions about the UBS agreement and the double taxation agreement between the USA and Switzerland, various parliamentary motions took up the argument of the threat to sovereignty. It was claimed that the sovereignty of the Swiss legal system would be affected by foreign administrative proceedings, if authorities and private individuals were forced by foreign authorities to adopt a mode of behaviour that was not compatible with the legal duties envisaged in Swiss law.\(^5\) The motions aimed to “fend off” and “neutralise” foreign “encroachments on the law” into Swiss “sovereign territory”.\(^6\) The debate culminated in the Federal Office of Justice having a “Sovereignty Protection Act” drawn up in 2011 at the request of both Parliamentary Councils.\(^7\)

Since then the dust has settled somewhat, and a few days ago, in a press release of 11 February 2015, the Federal Council “noted” that the Federal Department of Justice and Police had decided not to submit the draft Sovereignty Protection Act to the Council. The Department had apparently found that there had been a significant intensification of international cooperation, and that solutions for a “way of simplifying the cooperation” had now been found.

The question remains as to why the Swiss so often seem to feel that their sovereignty is under threat. How has sovereignty come to be regarded as such a highly prized asset in Switzerland, an asset which – to use the rhetoric of war – is deployed in the front line in the field of battle? There are two answers to this question, a legal answer and a cultural, national policy related answer.

II. Sovereignty from the legal perspective

An extraterritorial problem in the legal sense arises when a foreign administrative or justice authority carries out criminal, administrative or civil proceedings in accordance with the rules of its own law and these proceedings lead to repercussions for another territory. In principle, the authority is not permitted to carry out any official acts on foreign territory – even if no coercion is involved in the execution of such acts. The authority is dependent in such cases on the support provided by the foreign authorities, who carry out the necessary acts on their own territory.

If (as in the context of the aforementioned negotiations concerning the business practices of Swiss banks) the USA unilaterally envisages measures which would result in acts being performed by Swiss legal entities on Swiss territory, the threat of an extraterritorial effect arises.

Any such extraterritorial effect will then become a conflict of sovereignty if, as a result of the acts of the foreign authority, Swiss legal entities are obliged to violate applicable Swiss law. Usually the following norms are of central importance:

---

\(^4\) Cf. zsib) 2013, Aktuell Nr. 7e, Bilaterale Verträge und Doppelbesteuerungsabkommen.
\(^5\) Inter alia: Motion Baumann, 09.4335; Motion Bischof, 09.3319; Motion FDP-Liberale Fraktion, 09.3056 Motion WAK-N, 10.3341.
\(^6\) Motion Freysinger, 09.3452; Interpellation Reymond, 10.3810, Interpellation Freysinger, 11.3904.
\(^7\) Cf. Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz), Bern, 14 March 2011, p. 20.
According to the protection of the right to privacy which is anchored in Art. 13 of the Swiss Federal Constitution, there is a right to protection of one’s personal data. An exchange of information with foreign authorities which relates to personal information must therefore be founded on an express statutory basis and must preserve the rights and interests of the affected parties. In the context of such data exchanges, data are “processed”, so that the rules of the Data Protection Act also apply (Art. 3 lit. e of the Data Protection Act).

An exchange of information in favour of a foreign authority which is not supported by any statutory basis may constitute the offence of performing a prohibited act for a foreign state (Art. 271 of the Penal Code) or industrial espionage (Art. 273 of the Penal Code).

A regularly occurring conflict potential therefore arises in the context of evidence gathering, if the surrender of evidence is effected in “pre-trial discovery” or “subpoenas” by means of the threat of drastic sanctions, without any recourse to the administrative assistance route.

These problems are exacerbated by the fact that the content of existing state treaty and national law regulations, and the content of private law contracts and settlements, requires interpretation. Between the legal systems of common law and civil law there exist considerable discrepancies in the methods used to interpret such legal acts.

Thus the sovereignty conflict relates to the particular state’s territorial integrity as understood in international law, and above all that state’s sole right, on the basis of its integrity, to issue laws for its territory. This right (which is documented in international law) is at the very least called into question if foreign banks are forced (for example on the basis of the USA’s FATCA law, or under the threat of criminal proceedings) to carry out US tax reporting activities. These conflicts, which lead to the “sovereignty conflicts” we are speaking of, are indubitably due to the divergences that exist between the economy, which is transnationally orientated, and the national state, which is territorially organised. The norms we have referred to serve to defend the state against such extraterritorial acts of foreign states. However, the Swiss Federal Constitution also provides a possibility whereby applicable Swiss law which constitutes an obstacle to the extraterritorial effect can be overridden if the “pillars” on which Switzerland stands – neutrality and sovereignty – are threatened. According to Art. 185 of the Swiss Federal Constitution, the Federal Council (the Swiss Government) takes measures to preserve Switzerland’s external security, independence (in other words sovereignty) and neutrality (Art. 185 (1)). To this end, the Federal Council has the right, without any statutory basis (i.e. in circumvention of the legislative sovereign state), to counter any serious disturbances of public order or internal/external security which may have already occurred or which are imminent (Art. 185 (3)). Although the constitutional text expressly speaks of the possibility of summoning troops (Art. 185 (4)), the Federal Supreme Court, in the much disputed UBS decision (BGE 137 II 431 of 15 July 2011), extends the scope of application of this “state of emergency” clause beyond the protection of fundamental assets which come under

---

8 Article 2.4 of the Charter of the United Nations: All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
legal and police protection to include an *ordre économic*: the Department of Justice had threatened UBS with criminal prosecution if it did not hand over data relating to cross-border customer transactions. FINMA, as the directly acting regulatory authority, had responded by instructing UBS, on 18 February 2009, to hand over UBS bank customer data to the American authorities. If this instruction had not been issued, UBS would have been committing a criminal act in handing over the data. The Federal Administrative Court (judgement A-7789/2009), and subsequently the Federal Supreme Court also, did not see any statutory basis for any such instruction to be issued by FINMA. In this situation, however, the Federal Supreme Court decided that by way of exception, in light of the threat to the existence of a bank which was relevant to Switzerland’s financial system, the instruction issued by FINMA could be regarded as having a basis in constitutional “state of emergency” law.

The legal clarification concerning the question of why the Swiss perceive their sovereignty as being under threat thus makes reference to specific existing legal norms which come under pressure in consequence of extraterritorial official acts. These norms may be rendered ineffective under the application of “state of emergency” law, such a law being expressly directed towards sovereignty and neutrality in Switzerland. However, this does not provide any explanation of why sovereignty is regarded as such a highly prized asset in Switzerland. The answer to this question is not to be found in applicable law, but needs to be clarified from a perspective of legal culture, extending back to the period immediately before modern Switzerland was founded.

### III. Sovereignty as unity in diversity

In 1798 the Swiss Confederate towns were seized and occupied by Napoleon’s troops. Napoleon wanted to give Switzerland the benefit of the achievements of revolution and state unity, and to catapult the fragmented and backward country into the modern age. However, he soon realised that there was no hope of achieving a centralist sovereign unitary state in Switzerland in view of the huge linguistic, cultural and religious differences that existed. In 1803, therefore, Napoleon allowed the Confederation to return to a constitution with a federal structure. This was to have long-term consequences: right up until the revision of the Swiss Federal Constitution in 1999, Art. 1 of the Federal Constitution of 1874 stated that sovereignty rested primarily with the cantons.9

At the Congress of Vienna, which took place from 18 September 1814 to 9 June 1815, the major European powers negotiated the re-ordering of Europe. Among many items under discussion was the question of whether an independent small state should be formed in the heart of Europe out of the Swiss Confederate municipalities. The major powers were agreed that the Confederates, with their Alpine passes, should no longer be able to assist any of the major powers, France in particular. With the ‘neutrality in return for sovereignty’ solution, the Confederates won their modern Switzerland from the major European powers.10

---

9 Art. 1 of the Constitution of 1874: Together, the peoples of the 23 sovereign Cantons of Switzerland united by the present alliance, to wit: …

10 At the same day on 20 November 2015 that France and Great Britain, Austria, Prussia and Russia signed the treaty of Paris, they confirmed the neutrality of Switzerland.
Looked at in this way, Switzerland was not born out a moment of strength, but received its sovereignty from the great powers of Europe. This history of the country’s origin admittedly does not constitute much of a foundation myth as regards the formation of a single people and a single nation from the linguistic, cultural and religious diversity of the Confederates. Maybe this is why Switzerland is not celebrating 2015 as the bicentenary of its formation.

It follows that sovereignty, together with the neutrality imposed by the great powers in 1815, is closely linked to the creation of Switzerland but has not in this sense become embedded in the national consciousness. A possible reason why sovereignty nevertheless now forms an important part of Swiss national awareness is to be found elsewhere, in a modern theory of sovereignty and its social function, which differs in some essential points from the legal culture of common law:

*Bodin* is regarded as the founder of a theory of sovereignty which has gained acceptance particularly in Europe, and which states that society, having been torn apart as a result of religious wars, needs to be united, specifically by the focusing of power in the hands of the king (“majestas”) on the one hand, and on the other hand by the uniform application of this sovereign power over the people. Some striking differences immediately emerge by comparison with England, which overcame the religious confrontations of the 16th century more easily and did not put into practice the theories of state devised by Bodin and Hobbes. According to Bodin, the people (“le peuple”) hands over worldly power entirely and permanently to the monarch for his free and absolute disposal (“pour disposer … sans autre cause que de sa liberté”).11 In this sense the social “multitude” is unified in the body of the monarch, to whom is ascribed absolute power – majestas.12

In the course of revolutionary events this idea of “unity through sovereignty” together with the idea of democracy won through: the ruled and the rulers were no longer to be linked together by the king, but were to be bound together in a single entity in an organised national state, in enacted decisions (which thereby became the enacted law of the state) taken by representatives whom they themselves had elected.13

This idea of the law is substantially different from the concept of law in the Ancien Régime, which understood the law as a freely disposable instrument for the enforcement of the political programmes of the ruler of the country. Now, the law becomes a new expression and embodiment of the sovereignty of the democratic state.

In Switzerland in particular, there was widespread acceptance of the theory of Jean-Jacques Rousseau (1712–1778) which stated that all sovereignty without restriction rests with the people, and accordingly everything was quite simply at the sovereign’s disposal, as opposed to a theory which envisaged forms of natural law as a barrier.14

---

This is of decisive importance for the evolution of the political and legal institutions of Switzerland. For what Rousseau did was to transfer this “consistently bundled” sovereignty to the legislator. In the final instance it is the laws alone that define the purpose and means of the actions of the state that are directed by society at society. In the process of legislation, the law transforms the multitude of the people into a unified sovereign institution, and the law falls apart in the form of the application of law for the individualised use of power, by which the state responds to the diversity of the people.15

The 19th century and in particular the formation of the Swiss Federal State in 1848 was characterised by the unifying power of the civil solution: democratic diversity unified in the sovereign national state. In contrast with the evolutionary process that took place in America, this was an achievement hard-won by the citizenry against the persistent “losers” of the Revolution. Thus the function of Swiss sovereignty in its manifestation as democratic legislative sovereignty is political and nation-building rather than legal. To this day this finds expression in the fact that sovereignty is first and foremost a political battle cry, and that no constitutional jurisdiction exists in Switzerland.16

To summarise, then, the reason why sovereignty is a particularly highly prized and hotly defended asset in Switzerland is that on the one hand Switzerland was formed by the European major powers exactly 200 years ago and in this sense Swiss sovereignty in extremely precarious, and on the other hand that this precarious sovereignty, as a sovereignty of the people of the Cantons, has taken on a central and nation-forming significance, guaranteeing the cohesion of Switzerland’s diversity through the means provided by legislation.

16 Article 190 of the Constitution: The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.