

BORDERS AND DEMOCRACY: THE SCHENGEN TREATIES

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'We should defend the law like the city wall.'

Heraclitus

In the summer of 1992, uniformed French border police made their appearance at different train stations within the country, for the purpose of random checks on travelers. It was said to have the aim of familiarizing the public with the future operation of customs. Since customs controls at the French border are to be abolished in accordance with the Schengen treaty, it is necessary to check at other places, it was explained.¹ In Dutch parliamentary debates on ratification of the same treaty, a month previously, the wish was expressed to maintain a number of border police officials for the purpose of random checks not at the border itself, but in the frontier regions. The ministers of justice and of defence responded positively.²

In a nutshell these two facts present the problem addressed in the following pages. National borders, especially their physical appearance in the form of barriers and controls, are popular symbols of the stranglehold of the national state; their abolishment is consequently seen as a measure of liberalization. But in practice, their disappearance will not lead to a

¹ *Dauphiné Libéré*, 21 July, 1992.

² *Volkskrant*, 26 June 1992.

relaxation of national state control but only to a change (a negative change) in its character. This paradox will be presented here as a matter of impelling and far reaching logic, related to the *constitutional* and the *democratic* functions of the national frontier.

In common with many other durable phenomena, national boundaries may owe their shape to minor causes (a whim, the work of a ruler or some coincidence) and consequently acquire substance, functions, values etc., over time. One way of revealing all the functions and values of a border is trying to abolish it. This is what makes the recent article 8A EEC (introduced by the European Single Act of 1986) so interesting, with its envisaged creation of an 'internal market' among the EC-countries by the end of 1992. By defining the 'internal market' as 'an area without internal frontiers...' this article in fact orders the abolition of frontiers between the member states.

For our purposes article 8A EEC is even better than it appears. Taken literally, it would amount, not only to the abolition of the borders, but of the member states altogether, since a state without frontier is no state. But it was only taken to mean the abolishment of the border *controls* and thus to leave the states with unenforced borders; that amounts to an ideal experimental set-up for studying border functions.

The decision to clear the EC of border controls was intended as a gesture, advanced by the Eurocracy, to bring 'Europe' closer to what it considers as 'its citizens'. Thus seduced into viewing border controls as mainly symbolic aspects of their power, the member states adopted what was to be one of the most far reaching objectives in European co-operation so far. The national border is much more than a mere symbol: it is definer, filter, container, marker of passage, interface, trip-wire (as part of a security system) or, in a rather comprehensive metaphor, the 'skin' of the national state. Politically, it has developed into an essential part of the internal legal and political order. Now most of the different aspects of the border are in some way related to their controls and consequently will have to be to be redefined and reallocated (compensated for) if these controls are removed. This may suffice to indicate what revolutionary changes of perspective are brought on by the objective stated in article 8A EEC.

The Schengen Agreements

The removal of border controls was not the original objective of the EC-treaties; these only dealt with so called trade barriers among the member states. Now trade barriers may often have been identified with national borders, and indeed they often coincide, but they may exist independently from one another.³ However, the difference is more or less neglected in the slogan of the 'Internal Market', which in its very wording idealizes the national territory (without borders) as the optimal market situation.

This may be the reason why the abolition of controls was first conceived as a technical problem, related mainly to differences in national legislations and the territorial limitation of national law enforcement agencies' powers. The envisaged solution was to harmonize these rules, to have authorities co-operate and to shift the controls to the Market's external borders.

In anticipation of the Internal Market, the 'Schengen agreements' concerning the abolition of border controls were concluded in 1985 and 1990 between five member states of the EEC: Germany, France and the Benelux countries. Negotiations about compensatory measures for the removal of controls had started even before the internal market plan had been formalized. The Single European Act dates from 1984 (initiative) and 1986 (signature). But as soon as the idea was in the air, in 1984, an agreement was signed by France and the Federal Republic at Saarbrücken for the abolishment of their mutual border controls; the next year the Benelux Countries together with these two agreed at Schengen (Luxemburg) to abolish border controls by 1990. This preparatory agreement, 'Schengen I,' made the removal of border controls among the five countries conditional upon the satisfactory solution of a number of problems. The deadline has not been met, but by 1990 a treaty text, 'Schengen II', was signed addressing the problems. The treaty is open to accession by all EC-countries and has so far been signed by the original five plus Italy, Spain, Portugal and Greece. As the Schengen treaties provide my source material, I shall first survey the problems they indicate

³ For instance, when geographical or cultural discontinuities exist within a given national territory, then geography or culture can divide markets. National boundaries on the other hand have a much wider significance than being just obstacles to free movement of economic factors.

and comment upon some of these in the light of my present concern.

The first Schengen treaty of 14 June 1985 singled out the following problems originating from the levelling of controls: increased immigration and security threats (art. 7), differences in drugs legislation (art. 8), drugs and arms traffic, crime, smuggling, unauthorized entry of persons, fraud (art. 9) unlicensed transport (art. 11). The suggested solutions or compensatory measures in that stage pointed at increased cooperation of the parties' executive authorities (customs and police, art. 9 and 10), exchange of information (art. 9) and intensified national repressive measures (art. 8). In the long term, the parties undertook to

abolish the controls at their common frontiers and transfer them to their external frontiers. To that end, they shall endeavour *to harmonize in advance, where necessary, the laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls* and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the EC. (art. 17, my emphasis)

Such harmonization was especially called for in the areas of visa policy, immigration and aliens law (art. 20), drugs, arms and explosives and registration of travellers in hotels (art. 19). In view of the long term, the parties also agreed to open discussions on increased police cooperation for the prevention of delinquency and on search, judicial assistance and extradition, and the right of pursuit of policemen into neighbouring territories (art. 18). Apart from these politically sensitive matters there were provisions of secondary importance on liberalizing trade, increasing duty free allowances etc. It was obvious from the start that the 'free movement of persons' would be the heart of the matter.

Free movement of persons is the legal instrument which, economic in orientation, links and confronts the market ideal with political ideals. But the instrument is not only concerned with ideals. It has to do with the practical uncertainties and the anxieties provoked and the threats perceived in this freedom, the latter chiefly concerning national security, the national labour market and the national level of public welfare. The double challenge was, first, to harmonize rules and policies and underlying values and to pacify mutual anxieties within the Schengen territory; second, to move controls to the external borders. The next question was: to which extent can the market's external border shoulder the burden of those guarantees hitherto connected with national border controls, and which

remaining protective measures would have to be taken at other places than at border controls.

On 19 June 1990 Schengen II was officially signed: the 'Convention applying the Schengen Agreement of 14 June 1985 [...] on the gradual abolition of checks at their common borders', or 'The Schengen Application Convention' for short. The most striking feature of this Convention is its failure (despite some visa policy harmonization) to harmonize national legislation on criminal and security policies. I give two examples.

The Convention first concerns the common *external* borders. A primary and long-standing reason for restricting persons' entry into the national territory is to protect 'public policy'. The restriction serves to keep out suspect elements and is the legal expression (and sublimation) of xenophobia. This restriction was not harmonized. Instead the restrictive conditions were cumulated. A person's entry of the Schengen territory at the Dutch external border will thus not only be restricted by the requirements of this country's public policy but by those of all countries involved, cumulatively.

Something like the reverse happens with regard to the granting of asylum: the signatory states have failed to harmonize their individual criteria of granting asylum. Instead they have agreed that a refugee upon refusal by one member state has forfeited his rights to apply in another. The consequences of this are clearly regressive. In order to limit 'its' share of refugees, each party will be led individually to reduce the rights of asylum-seekers in its legislation.⁴

Within the Schengen territory, three fundamental innovations deserve emphasis: intensive co-operation between national police authorities (art. 39-47); the introduction of a 'Schengen Information System' (art. 92-119); and the establishment of an 'Executive Committee' consisting of national ministers (art. 131-133). The first and most intriguing novelty is that of increased police co-operation. Police functions exercised throughout the territory of each country individually need to be intensified to make up

⁴ Cf. art. 28-38. See J. Bolten, 'From Schengen to Dublin. The New Frontiers of Refugee Law', in *Schengen. Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police* (Alblasserdam: NJCM, 1992), pp. 8-36; and A. Cruz, 'Compatibility of Carrier Sanctions in Four Community States with International Civil Aviation and Human Rights Obligations', *ibid.*, pp. 179-188.

for the loss of control at the border; police powers at the borders will be mostly abolished or restricted to emergency situations (art. 2). There are mainly two ways of compensating for the loss of control involved in the abolition of border checks. The first is increased physical presence of the police generally, including (random) checks upon persons and goods by mobile units of 'territorial police'. The second is increased reliance upon non-physical 'data intelligence'. These tendencies, already visible before Schengen in response to 'the internationalization of crime', are officially recognized and reinforced in the convention. Art. 39, the key article on police cooperation, obliges police authorities to 'assist each other for the purposes of preventing and detecting criminal offences'; art. 46 brings up the exchange of information which is of interest in 'helping prevent future crime and to prevent offences against or threats to public order and security'. Short of a European Federal Police (Europol, nick-named Eurokohl to indicate German predilections), this European police cooperation will constitute a strongly computerized police force, operating remarkably autonomously from the judicial authorities in the respective countries, armed with large discretionary intelligence functions and legitimized by the need not only to combat but also to *prevent* crime and disorder.⁵ All this, one may be reminded, is intended to compensate for the disappearance of border checks. Preventive police powers are, of course, an Orwellian curse to democratic thinking. It is significant that they should be needed in the compensation of border checks which are by definition repressive (and as such easier to legitimize).

The second fundamental innovation in Schengen, taking up about a quarter of the text of the convention, is the 'Schengen information system'. Police authorities tend to call this 'the heart of the compensatory measures'. The system consists of a database which provides the police authorities in all the member states with access to search information on persons and objects circulated as wanted for the purpose of police controls and checks at external borders or within the country. Based on the data categories given, an estimated 800.000 personal data files and 6.7 million object data files are expected. The system also allows requests for arrest of persons to be processed and immediately included into the national

⁵ See A.H.J. Swart, 'Police and Security in the Schengen Agreement and Schengen Convention', in *Schengen (op. cit.)*, pp. 209-216.

'wanted index' by corresponding authorities in other member states. The traditional check by the receiving authority whether the case described offers sufficient ground for arrest and extradition according to its national law, has been delegated mainly to the requesting authority. The police authorities in the member states felt that otherwise the increased speed and efficiency would not be fully utilized and the system would fail to be a sufficient compensation for the loss of border control.⁶

This system is a novelty in international co-operation and entails a series of unfamiliar legal and organizational problems. Since it operates on the basis of standardized data and procedure, it exerts a strong harmonizing pressure on the fields of arrest, extradition law and data protection. Many aspects are intriguing from legal and constitutional points of view. Let me mention two fundamental matters. The first is the smooth transborder operation of police activity. The Schengen territory is considered not only as a single economic market, but also as a uniform criminological space;⁷ the response of anything short of a uniform policing space is considered insufficient. Two questions are in order: Where do we find compensation for the loss of territorial limitation formerly imposed on the national authorities' action by the border? And which judicial authority guards against autonomous action by the joint police authorities?

The second point raised by the SIS is the change from physical to abstract control. This is a crucial but elusive point. In what respect precisely does their *physical* character make traditional control mechanisms differ from the new data control mechanism? Exchanging human perceptive capacities involved in physical controls for the massive strength of computerized data is bound to have significant effects upon the nature of the controls and their constitutional quality; but we cannot foretell what precisely those effects will be. The one thing we do know is that the physical character and consequently the visibility of police operations is generally appreciated as an important and even necessary check on the

⁶ Cf. B. Schattenberg, 'Schengen Information System. Privacy and Legal Protection': paper read at Asser Institute Colloquium on Free Movement of Persons, The Hague, September, 1991 (proceedings to be published as *Free Movement of Persons*, Dordrecht: Nijhoff, 1993). The author, First director of the German Bundeskriminalamt, is also the auctor intellectualis of the system.

⁷ Schattenberg, p. 17.

work of police authority.

The third novelty of Schengen, next to increased police co-operation and the Schengen Information System is the Executive Committee (of national ministers), empowered to implement the convention. This instance has the power of taking binding decisions, without national parliamentary approval depending on the constitutional provisions, which, as is the case with treaties, have to be swallowed whole. The only reference to parliaments is to be found in a 'joint declaration concerning article 132', reading: 'The Contracting Parties shall inform their national Parliaments of the implementation of this Convention'.⁸

To summarize: the agreements in fact transfer a number of important areas of national power to intergovernmental agencies, create an international space of prosecution and prevention of crime, in which police work is supported by an extensive abstractly operated information system and covered by a new executive authority not subject to parliamentary control. The Schengen system enhances the protective levels of all countries involved cumulatively and increases the rôle of the executive not only in the international, but also in the national context (e.g. in the field of crime prevention). Obviously all this is brought about at the expense of national legislative and judiciary authorities' power.

Unsurprisingly, much criticism has been voiced against the individual provisions of Schengen for their humanitarian shortcomings (in the case of asylum), and for the dominant role of the executive authorities in their implementation ad execution. The Council of State, principal advisory body to the Dutch government in legislative matters, squarely asked the government not to submit the draft law to Parliament.⁹ The creation of structures intended to compensate for *police* deficit from the abolition of border controls has in fact created a *democratic* deficit. Some critics have called for substantial modification of certain articles, others for a change of nature of the regime: from intergovernmental to supranational. H. Meijers for example argues against the intergovernmental character of the

⁸ During the approval procedure of the Convention in the Dutch parliament, June 1992, the Second Chamber bound the Dutch government to inform Parliament of draft decisions in this Committee.

⁹ Report WO 2.92.0018 of 8 April 1991.

agreements for their lack of parliamentary and judicial control. In his view, the matter should be dealt with in the framework of EC, so that the EC-court and parliament get their say.¹⁰ Even that, however, fails by a long stretch to fully compensate for the democratic deficit of Schengen. No-one to my knowledge has called into question the abolition of borders as such. And no one has been using the evidence to reflect, as I propose to do, on the phenomenon of borders *per se*.

What is the evidence? The abolition of border controls leads not to relaxation of state or government control but rather, inevitably, to an increase in state control and a decrease in its subjection to democratic procedure and guarantees. There is nothing to prove that these events are special to the Schengen conventions; everything indicates that they will occur in any regulation in this field. I contend that these regressive mechanisms are to a great extent inherent in the very decision of abolishing border controls. Taken this way, the evidence in turn casts a fresh light at the phenomenon of the national border and its physical appearance: these have (rather: had) a function in *limiting* state control.

What was originally presented as an interesting paradox now turns out to be a pervasive but faulty premiss, i.e. the idea that border control is a mere function of state power. This mistaken notion is ingrained in a certain (federalist) tradition of considering the state only as a mechanism of power and control (and the borders as symbols and parts of that mechanism). Now it is true (as I stated at the outset) that borders are an element of the internal and external legal and political order of the state. But it is wrong to consider this legal and political order only as a control mechanism imposed by the state, and to disregard its *opposite* function: the conditioning, circumscription and checking of power and control. Border controls as part of the national legal order appear to be of superior *constitutional* quality compared to those mechanisms intended to compensate for their loss.

¹⁰ H. Meijers, 'Schengen: Introduction', in *Schengen (op. cit.)*, pp. 2-7. In the same vein C.W.A. Timmermans, 'Why do it the Intergovernmental Way?', paper read at the Asser Colloquium (cf. note 6). A sound defence of the intergovernmental approach was put forward on the same occasion by J.P.H. Donner, in his paper 'Abolition of Border Controls'.

Borders and Democracy

It is now possible and necessary to conceptualize the national border in such a way that the facts related to Schengen lose their paradoxical character and instead acquire a degree of logic. Obviously the concept of border as a constraint on individual freedom only, brandished by the authorities in the context of the internal market and Schengen, is as naive as it is rhetorically effective. (Indeed, one may safely assume that it is mainly used for publicity reasons.) But the concept of border as based on EC experience with trade barriers and serving as a frame of reference to the Brussels authorities is a different one. In the eyes of these authorities the border is to be understood as a dividing line between two territorial entities (states) which are basically similar but which happen to enforce different norms and whose authorities derive their powers from different charters. The dominant approach taken towards the end of abolishing border controls is '*harmonisation*' of norms and cross-border co-operation between the authorities.

The evidence collected from 'Schengen' not only contradicts the naive concept of border associated with constraint, it also contradicts this second, rather technical and bureaucratic concept of the border as a dividing line between similar entities. Most participants in the Schengen negotiations and in those conducted within the EC context have now come round to recognizing that what was originally conceived to be a technical ambition is in fact a deeply political one.¹¹

To understand and appraise the evidence, a third concept of borders appears to be in order. In historical terms, the exercise of state control over individuals through border control is probably of recent origin; the appearance of the border as a dividing line between coequal states is probably even more recent (I shall leave this topic to historians). But no doubt the oldest function of the state border is to isolate a certain territorial space for the purpose of establishing a proper area of a polity or political community in the sense of the Greek city wall (witness Heraclitus' dictum quoted at the head of this article). The wall is no passage from one state territory to another, but one from order to confusion, from civilization to

¹¹ The matter is very clearly set out in J.P.H. Donner's paper mentioned in the previous footnote.

barbarism. This border is a line (not necessarily a sharp line) of defence, not against a well-defined neighbouring entity, but against evil and disorder in general, whether of natural or human origin. The area is defined and defended so as to shelter the society's internal cultural and political development, and this would be impossible without the protection offered by this external barrier.

This 'archaic' concept of the border seems to have lost its appeal but seems to be worth recalling. It is intuitively present in the demand for the compensatory measures made by police authorities and by their actual establishment as discussed above. But, again, these corrective measures only see the border in terms of its control mechanism. I would propose to move this 'archaic' border concept back to the centre of stage in a modern guise: as an asset to the constitutional and democratic character of the modern nation-state. The evidence from the Schengen experience already indicated that one of the things to suffer from the 'compensatory measures' is the democratic quality of state control. It suffers on several counts, such as the shift from physical to abstract (invisible) administration and from repression to prevention, the loss of parliamentary and judicial control and the loss of territorial delimitation of state power. Where is the logic in these losses?

The Janus Face of State Power

In contrast to the technical, bureaucratic concept of the border, the archaic concept stresses its asymmetrical nature. It also stresses the Janus-faced asymmetry of state power, with the border as passage from one face of power to the other. *This applies particularly to the modern democratic state.*

When viewed from the border, democratic state power looks and operates differently into two directions. Inwardly state power puts on a gentle face, extraverted, moderate and subject to the rule of law; it is dynamic and enjoys a consolidated consensus, allowing majority vote and political change. It is two- or three-headed, according to the state's system of separation of powers.

Outwardly on the other hand, state power appears as monolithic, hard, secretive, defensive and static. It operates in an altogether different world, that of diplomacy, where communication is primitive and based on

acute intuition rather than reason, on interest rather than idea, where personal symbols and paraphernalia weigh heavily and above all, where state's power is undivided.¹²

Let us consider two phenomena related to the asymmetry of national frontiers and to the two faces of power. The first is well known: it shows in the change of status and of symbolic enhancement which a national government official acquires when crossing the border. The archaic function of the border explains why executive officials love to go abroad and also, when they want to impress the home audience, put on the more impressive outward face of authority; they may even be induced into concocting and entertaining foreign crises for this purpose. The asymmetrical image of power also explains the well-known turn of loyalty in the national audience, ever critical and divided in home affairs, in the face of external crisis. Internal divisions are then set aside in unanimous support of the leader. Unity in the face of the exterior reflects back upon internal affairs, although only temporarily and in emergencies. Thus, again, a president may gain home prestige from diplomatic success (Gorbatshev, Reagan, Bush) or even from openly belligerent behaviour (Thatcher). This is why states may be tempted to entertain war with their neighbours so as to maintain their own unity and *internal* survival (Sukarno, Israel and the Arab countries). All this fits into the image of the state as a two-faced power unit.

A second, less theatrical and symbolical but equally unmistakable phenomenon is that of the police. National police authorities usually have no power across the border. Still the cross-border counterpart of the national police force exists; it is the intelligence agency, operating almost purely under executive rule. The difference in operation of police authority nationally and abroad is obvious. Would we allow the police to function on the same charter within the borders as it does abroad, it would be called the secret police and we would find ourselves in a totalitarian state. But inasmuch as we have our intelligence agencies we do have our secret

¹² The difference may appear to become less sharp in the field of technical and economic international co-operation, in which the leading ministry (which in the US is called, significantly, the 'State department') has great difficulties to control ('co-ordinate') the many different operations in which the government is involved. But as soon as essential national interests crop up, the order is re-established.

police, and it dates back to the times and circumstances in which most police was secret; intelligence agencies are the most authentic survival of the way all police forces used to be. Nowadays, the secret face has been turned outward, relegated to the domain outside the border.

Borders still are, and should remain, lines separating order from threat. The remarkable thing is that this archaic function may have grown in importance along with the democratic quality of our societies. The threat is not only external in origin. There is an internal threat which has been externalized along with the creation of democratic conditions in the state. This threat is the state's monolithic and secretive executive power. The border is essential in keeping it out. It seems that this has become increasingly hard to understand for people raised in the secure and dynamic community of the national state. We are apt to consider matters such as of sovereign symbolism and secret police, of ritual and diplomacy, in which the executive takes on its most archaic appearance, as outmoded relicts of the past; to see democracy and a controlled executive as the normal and natural situation. This is the main shortcoming of the symmetrical border concept prevalent in EC's common market vision. It takes the soft-faced power structure within our national societies for granted and as fully 'compatible' with neighbouring democratic institutions. It forgets that these are, rather, a historical bonus, anxiously guarded by the hard-faced authority outside, with the borders separating the two different aspects.

Once we conceive of borders (again) in this way, it will come as less of a surprise to find the abolition of its controls to lead to a certain democratic and constitutional regression, and to see some executive styles and mechanisms which we had relegated to the cross-border domain filter back into our national power structure. The most obvious regression is the increase of executive power in some domains of public and private life, justified by what it considers to be the pursuit of 'international' dangers and threats. We can now understand why the executive branch of government prefers fighting 'international crime' to dealing with local crime, or rather: why the executive likes sticking an international label on whatever it fights.

Before I turn to the question whether anything can be done about this regression, it is good to pause and realize that the increase of executive power is no new phenomenon in our societies, and that it is not wholly a result of the undoing of frontier controls or lowering of control levels. We

have been willing to accept unchecked executive control in our modern societies for a while now, in order to defend us, not (or no longer) against physical threats perceived to be of foreign origin, but against those imperceptible threats (impossible to localize geographically) which are increasingly unleashed upon us by technology. This is a ransom we pay for progress and modern-style wealth. So there is nothing entirely new going on.

Now for the final question; what can be done? Insofar as this regressive increase in executive power is logically linked up with losing the border as passage (and separation) between two worlds, the process is difficult to reverse or remedy. One radical solution is to have our different political communities merge by force or by consent into a political unity in the form of a single State. It is not without reason, as I believe, that few people are prepared to take this step. Ultimately a democratic structure is grounded in the historically sedimented forms of life, kinship and common experience which we call, for want of a better term, the national consensus.¹³ It is often ignored that democratic conditions and the 'welfare state' have, if anything, embedded European societies more deeply into their national state than they were before. The new significance of old border functions I have analysed in the preceding pages will testify to this.

At some point we may need to exchange our dominant forms of political organisation for new forms or configurations. But this is not going to be a matter of gradual development; instead it will have to be forced on us by events and by the insight they offer. We should then be prepared to accept substantial regressive effects upon our different democratic heritages, of which the evidence here presented may serve as a foreboding.

¹³ See R. Dahl, *A Preface to Democratic Theory* (Chicago University Press, 1966), p. 132.