

Essays for civil liberties and democracy in Europe

Switzerland votes in favour of accession to Schengen: A defeat for civil liberties

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The issues in the referendum should have been straightforward:

- Are we in favour of closing the borders of Europe to refugees and immigrants?
- Are we in favour of a police super-computer which serves primarily as an instrument to implement this policy of exclusion?
- Are we in favour of uncontrolled information exchange between the police and security services?
- Are we in favour of giving police and border guards powers to carry out arbitrary “non-suspect related” controls (stops and searches) inland?
- Do we want even fewer asylum seekers to have the right for their claim to be assessed in Switzerland?

These should have been the questions raised by the Left with regard to the accession to Schengen and Dublin Agreements, which a majority of the Swiss population voted in favour of on 5 June. The reply by the Left should have been a resounding “No”,

Only a minority on the left posed these questions: a few Green Party members and fewer Social Democratic dissidents, the *A Gauche Toute* coalition (the Workers’ Party - PdA, *Solidarites* and Alternative Lists), a few civil liberties organisations and migrant support groups and the extra-parliamentary left.

The parliamentary left (the Social Democratic Party (SP) and the Green Party) failed to defend civil liberties in the debate on Schengen and abandoned positions it had defended for many years. Instead, it supported a yes vote for Schengen alongside the bourgeois “centre” parties (the liberal FDP and the christian democratic CVP), the police and their political representatives and the employers’ organisations which financed much

of the Yes campaign. There are two interrelated for the left’s change of position: firstly, concern over the conservative-nationalist Swiss People’s Party (SVP) and secondly, the EU. The SP’s and the Green’s Yes to Schengen is largely motivated by a strong-anti SVP reflex. The SVP had seized on the referendum to promote its racist/xenophobic policies and attempted to exploit those parts of the Swiss population who losing out in the process of globalisation: “Schengen = unprotected border, more illegals, more criminals, more violence, more foreigners, more unemployed Swiss people, lower wages, foreign law, EU accession.” The chain of associations implied made here are well known: the fairy-tale idyll of the small state with its tight and “secure” borders which, it is claimed, will protect its inhabitants from the dangers of the outside world.

For the SP and the Greens, who have tried for years to establish themselves as pro-European parties, Schengen represented another step towards the EU. Whilst one part of the SP, led by foreign secretary Micheline Calmy-Rey and party president Hans-Jürg Fehr, went as far as selling Schengen and Dublin as a “social-democratic project”, the rest of the parliamentary left became experts in “swallowing frogs” (i.e. accepting something that is awkward, because it is necessary). Although Schengen could not be described as a “social democratic project”, it was one that “opened up” avenues, Hilde Fässler, head of the SP parliamentary group, announced at the end of February to the delegates’ meeting of the Young Socialists.

Schengen - not an open door but a police project

Anyone taking a closer look at the history of Schengen cooperation will find it hard to comprehend the SP and Green positions. The

beginnings of Schengen are to be found in the "completion" of the Single Market, which the then EC set as its goal at the beginning of the 1980s. The EC propagated the Single Market as an "area without internal borders", which guaranteed the "four freedoms": the free circulation of goods, capital, services and persons. At first, the lifting of internal border controls only played a symbolic role in this gigantic project of liberalisation and privatisation: citizens should be able to experience the borderless new Europe in a concrete way, the EC Commission has said since 1985 (in its six-monthly reports on the progress made in the creation of the Single Market). After the terror hysteria of the 1970s had died down, only spot checks were carried out at internal borders. Besides, in view of increasingly dense cross-border traffic, it was impossible to implement more controls.

Nonetheless, the question of border controls became the centre of much controversy. Not only the UK and Ireland, who refused to join the project altogether, started voicing security concerns, but also the Schengen countries representing the 'Core Europe' - France, Germany and the Benelux. Their line was: the abolition of internal border controls would create a loss of security which would have to be compensated by security measures. By the time of the Schengen Implementation Agreement (SIA) of 1990 it became apparent how imbalanced the 'free movement vs. compensatory measures' argument really was:

In fact, Article 2 (1) SIA lays down that everybody may cross internal borders anywhere, at any time without control. Paragraph 2 of the same Article, however, contains the disclaimer that in case of a threat against "national security" or "public order", controls may be "temporarily" introduced. The Schengen states have made ample use of this exceptional clause since the Convention came into force in March 1995, not only for big football matches or anti-summit protests but also in "normal" times. In addition to this, there are compensatory internal controls, which, although not explicitly laid down in the SIA, are carried out by all Schengen states in one form or another. In Germany, these were introduced as special police powers in the Länder police laws as well as the Federal Border Guards law under name of *Schleierfahndung*, i.e. arbitrary stop and search operations (Hernkind, 2002, Kant 2004).

The remaining 142 Articles of the SIA concern themselves with compensatory measures:

- systematically intensifying control and surveillance at external borders,
- creating a common and necessarily more restrictive visa policy,
- banning renewed asylum applications and introducing the first country rule, whereby asylum applications could only be lodged in the first EU country the asylum seekers arrived in. This was taken over by the Dublin Convention in an almost identical form. It was already clear with the signing of the SIA that asylum politics would be determined at EU level. In 2000, the Justice and Home Affairs Council of Ministers replaced the Dublin Convention with a slightly more precise EU Regulation. The fingerprinting system Eurodac, the technical support that enabled the implementation of the first country rule, has been in place since 2003.
- intensifying cross-border police cooperation, which encompasses firstly, comprehensive information exchange with and without a request, secondly, cross-border "hot pursuit" and thirdly, a series of cross-border undercover methodologies (surveillance, controlled deliveries),
- creating the Schengen Information System (SIS) as the core mechanism for cooperation: since the system came online in March 1995, data on individuals with an outstanding arrest warrant has never constituted more than 2 percent of SIS data. Data on persons to be refused entry at borders, however, constituted between 80 and 90 percent.

Schengen cooperation developed into a true "police laboratory". Prior to its formal integration into EU structures by the Treaty of Amsterdam (which came into force in May 1999) the Schengen Executive Committee had passed around 170 Decisions that became part of the Schengen *acquis*. The published parts of the *acquis* amount to 473 pages in the *Official Journal of the European Community*, and often only the summary Decisions were published, not the corresponding background documents. Comprehensive documentation continues to remain unpublished (*Schengen acquis*, 2000). Also after 1999, Schengen cooperation remained firmly under the control of the executive, that is by the JHA Council as well as the Commission (Holzberger/Schubert, 1998). Meanwhile, all EU Member States (UK and Ireland only partially) as well as Iceland and Norway have joined the Schengen club. The Schengen *acquis*, is still the essential criterion for

the accession of central and eastern European states (Leuthardt, 1999; Dietrich, 2002). It is continually extended and the EU is currently in the process of creating a second generation Schengen Information System (SIS II) as well as a Visa Information System (Statewatch, 2005).

Schengen and Switzerland

The Swiss Government (Federal Council), especially the Federal Justice and Police Department (EJPD), had shown an interest in joining Schengen since 1990. In October 1990, the then Federal councillor for Justice and Police, the Christian Democrat Arnold Koller established an "Expert Commission on Border Controls" (*Expertenkommission Grenzpolizeiliche Personenkontrollen - EGPK*) led by François Leuba, a right-wing Liberal Member of the National Council (the lower chamber of the Parliament). In its intermediate report of 1991 the commission began singing the Swiss Schengen tune: without accession, it was argued, Switzerland would degenerate into an "island of insecurity" and become the "country of last asylum" for asylum seekers whose applications were refused in EC/EU countries (Rechsteiner, 1991). The final report of the Leuba commission from October 1993 became a blueprint for the core elements of Switzerland's police and justice politics after the Fichen-scandal¹. Internally, the EGPK recommended "extended state security", externally, it reiterated its commitment to Schengen. Even though there were never plans to abolish controls at Switzerland's borders, the EGPK farcically adopted the Schengen rhetoric of "loss of security" and "compensatory measures".

Throughout the 1990s, Switzerland maintained a peculiarly contradictory position. On the one hand, it shared the aims of the EU's Justice and Home Affairs policy, or rather, of Schengen cooperation: in the area of police and intelligence services, Switzerland adopted the threat of "organised crime", which subsequently spawned the entire modernisation and reorganization process that followed the Fichen-scandal. With its policies of three (or rather two) concentric circles - excluding immigration from the outer, non-EU-circle -, and with the "fight against the abuse of the asylum system", Switzerland followed the Schengen line also in matters of asylum and migration. On the other hand, the accession to Schengen failed for two reasons: firstly, because Switzerland was not a member of the EU, which for a long time was an imperative for being accepted

in the illustrious club; secondly, because strict border controls - including the additional deployment of military forces in Tessin - did, at least on paper, contradict the Schengen principles, as Article 2 SIA demands the abolition of internal border controls.

Because direct Schengen accession was not possible, the EJPD sought convergence in three ways:

- by means of regular consultation: back in 1992, during one of his first excursions to the EC Justice and Interior Ministers' meetings, then EJPD chief Arnold Koller (CVP) offered his European colleagues a common automated fingerprinting system for asylum seekers (BFF, 1992). The EC ministers declined the offer, called "Eurasyl", not because they were not interested in such a system but because they wanted to set up their own system, called Eurodac,
- by means of the independent national implementation of EU, or rather, Schengen regulations, particularly in the area of visa policy,
- by means of bilateral agreements with its neighbouring Schengen states, which would, at least partially, implement the Schengen acquis.

The first step in this bilateral approach was a readmission agreement with Germany, signed in 1993. On the occasion of its coming into force in November 1995, the EJPD and the German federal interior ministry agreed to start talks on the creation of a "cooperative security system" (Press Release EJPD, 27.11.95), initially covering the common borders.

In the second half of 1997, Austria took over the presidency of the Schengen Executive Committee and declared the intensification of police cooperation with Switzerland as one of the focal points of its working programme (Schengen, 1997). The first fruits of this negotiation process were seen by the end of 1997: the EJPD and Germany's and Austria's interior ministries signed "memoranda of understanding" on cooperation at the borders (Busch, 1998). In 1998, treaties followed with France and Italy, which passed through parliament without much debate. In April 1999, federal councillor Arnold Koller was able to sign police treaties with Germany and Austria, which went much further in scope and remit than the earlier agreements (ASS, 1999). This was one of his last official acts before transferring his position in the

EJPD to his party friend Ruth Metzler (CVP).

By now, Switzerland had signed readmission agreements with all neighbouring Schengen states and had negotiated common methods of police cooperation which essentially mirrored those contained in the Schengen Agreement. This included the creation of common police offices at the borders and/or fast communication channels to the police offices on the other side of the border, cross-border hot pursuit and surveillance, including the use of new surveillance technologies. The agreement with France largely repeated the Schengen wording, while the agreements with Germany and Austria considerably extended this framework: hot pursuit and surveillance remained unlimited with regard to time and space. Further, persons not suspected of having committed an offence could be put under surveillance. Cross-border undercover police actions were explicitly made legal. In particular, the regulation on granting mutual support in the case of a "threat against public security and order" was visible during the anti-WEF protests in Davos and the anti-G8 protests in Geneva in 2003.

Furthermore, the treaty with Germany foresaw the introduction of automated information exchange between both countries' police forces, heavily leaning on the data categories of the SIS outlined in the SIA. In contrast to the remaining treaty regulations, these regulations were, however, not put into force, because the EJPD was already steering towards full accession to Schengen.

At the beginning of 2001, the then EJPD chair Metzler surprised the public with the announcement that the Federal Council intended to make accession to Schengen and Dublin the subject of the second series of bilateral negotiations with the EU. In order to achieve it, he was willing to abolish border controls between Switzerland and its neighbouring Schengen states.

By then, however, it had become obvious that this announcement would not imply the abolition of border controls *per se*. The Border Guard Corps had already argued that the abolition of static controls at the "direct border line" would release resources that could be used for the more efficient, unpredictable, inland mobile controls (WOZ, 3.5.01). The EJPD proposed that German-style arbitrary stop and search operations (*Schleierfahndung*) were a necessary measure. A 30 km "rear border region" around the state borders was to be created and laid down in

custom's law. More precise deliberations on the division of remits between the federal authorities and the cantons took place in the framework of a common project by the EJPD and the Cantons' Ministers of Police Conference, entitled USIS - Examination of the System for Internal Security (*Überprüfung des Systems der Inneren Sicherheit*). The initial plan of incorporating the Border Guard, which is part of the Federal Finance Department, in the EJPD and turn it into a "security police reserve force of the Confederation", (or a central security police force), did not work out. The Cantons insisted on retaining their sovereignty over policing matters. However, arbitrary stop and search operations are far from being abandoned: the latest USIS report no longer contains geographical limitations but calls for arbitrary controls to be carried out on a north-south and east-west axis. The Border Guard and the Cantons' police forces are to adopt respective cooperation agreements on control operations.² In the wake of the Schengen referendum, representatives of the "yes" vote said that nothing would change with regard to Switzerland's border. It was argued that because Switzerland was not part of the EU's customs union, controls of goods would stay intact, which in turn could not exist without the control of persons.

The treaties have been signed and Switzerland has taken a seat in the various "mixed committees", where it is not allowed to vote, but where representatives of its executive can take part in negotiations. The parliament might, of course, reject legal changes brought about by a further extension of the Schengen *acquis*. But even if the "people" did reject such legal changes by means of a referendum, the Federal Council would not consider leaving Schengen but would opt for a "pragmatic solution".

The self-deception of the left

It is difficult to conceive of a reason why the Swiss parliamentary left supported Schengen and Dublin and why they celebrated Switzerland's accession as a success. The parliamentary fractions of the SP and the Greens exercised considerable pressure on their members. The only SP member who dared to abstain in the final vote in the National Council, the lower chamber of Parliament, was Valerie Garbani; the only no vote from the Green party came from Geri Müller. Both fractions attempted to force their members into a left-wing yes-committee. Concerning the SP, such internal disciplinary measures could be explained by the

fact that on taking office in December 2002, its own Federal Councillor, Foreign secretary Micheline Calmy-Rey, had inherited the bilateral negotiations with the EU - including the dossier of the Schengen and Dublin accession -, which she had to support. The Greens however are not represented in Government and thus had no obligations of loyalty.

The categorical “yes” to Schengen had a cost. In the referendum the issue debated was not the effect the Schengen accession would have on civil liberties, but whether Switzerland would become less or more “secure”. The SVP retained a considerable advantage as it could not only build on the symbolic force of borders but also the dominant security discourse, which it shares with the bourgeois “centre” parties, the CVP and FDP. The SP and Greens could not withdraw from this security debate in their fight with the SVP. They had to affirm - as Markus Notter, justice minister of the canton of Zurich, announced in the TV show *Arena* on 13 May 2005 - that border controls would not be abolished, that the SIS would create more security and that Schengen would mean a more efficient fight against child pornography, the trafficking of women or organised crime. The defence led to absurd highlights: Andreas Gross, social democratic member of the National Council, for example, stated at a panel discussion in Embach on 10 May that it was a “success” that Switzerland had been able to negotiate a special arrangement that allowed it to retain the possibility of tax evasion: “the EU has given Switzerland a present”, he declared. How much self-denial of one’s own party history does it take for a social democrat to celebrate Switzerland’s protection of tax evaders whilst the state continues to encroach on the rights of refugees?

But the Schengen debate proved even more difficult for those within the parliamentary left who not so long ago were critical or totally opposed to Schengen:

In 2002, Remo Gysin, SP member of the National Council’s foreign policy commission had demanded the withdrawal of the government’s negotiating mandate for Schengen accession. In a guest contribution to the weekly newspaper WOZ he now declared that it was a success that the originally planned 30 km corridor around the borders could be averted. He did not point out, though, that as a result of Schengen, arbitrary stop and search can be carried out without any boundaries (WOZ, 5.5.05).

Hanspeter Uster, the Green police minister in the canton of Zug, is of the opinion that “the whole [Schengen] area will become an area of control” and that “security is increasingly seen to occur as a result of controls and deterrence ... let us not forget: Schengen/Dublin is, after all, the product of Fortress Europe” (Greenfo 1/05, p.5). He justified his yes vote with the argument, that “Fortress Switzerland” is no alternative to “Fortress Europe”. With regard to the campaign on the Schengen vote he advised the Green party to put more emphasis on the restrictive effect Schengen would have on the right to bear firearms. However, he did not point out that the arms law under Schengen does not reach the standards proposed in the failed legislative proposals of 2002, nor did he reveal that Schengen does not prevent the Swiss army selling firearms to its retiring soldiers for 100 Swiss Franks.

The parliamentary left called on two ‘crown witnesses’ to support two delicate issues:

In a long-winded interview in *Le Temps* (9.4.05), the federal data protection officer and former Green Party president Hanspeter Thür whitewashed the SIS: he claimed that Schengen would improve “transparency” as Switzerland would have to implement the EUs data protection standards and argued some Cantons would even be forced to improve existing data protection regulations. Thür should have known, however, that data protection under the SIS is heavily dependent on national regulations and therefore not legally comprehensive (Schefer, 2005). He should certainly have been aware of the fact that the existence of their legal regulations by no means guarantees implementation and that data protection in practice is far more difficult under a supranational system than in a national framework Thür did not even consider the SIS II or the VIS.

The Swiss Refugee Council (SFH) absolved both parties for supporting the Dublin package. The SFH repeatedly declared that the drop in asylum applications expected on accession to Dublin would relax national asylum politics - neglecting the fact that the current restrictions in asylum legislation and practice are taking place at a time that asylum application numbers are at an all-time low. The SFH expects the accession to Dublin to increase the pressure on Switzerland to implement the EUs minimum standards in asylum procedures. It thereby propagates a bizarre illusion, because firstly, these minimum standards are expressly excluded from the Dublin acquis which Switzerland

is adopting and secondly, they are indeed only minimum standards: although they recognise gender specific and non-state persecution as far as there are no "internal flight alternatives", they also contain two serious regulations that top the miserable Swiss asylum law, namely, the possibility to deport asylum seekers after a negative first instance decision as well as a third country regulation that allows the EU to declare regions within countries plagued by civil war and repression 'safe'.

The SP and the Greens abandoned their defence of civil liberties for the expectation that Schengen/Dublin accession would bring Switzerland closer to the EU, a political aim which is a burden to both parties so long as they are unable to explain how, and with which aims and alliance partners, they want to act politically within the EU. Rather than a quasi-religious avowal of the EU, political action now should be two-fold:

Firstly, transparency is necessary with regard to how Switzerland will act in the framework of Schengen, both politically in the "mixed committees" and also in its police activities at the borders and inland.

Secondly, the left, now more than ever, needs to initiate a debate on the EU which also deals with the latter's exclusionist policies directed against refugees and migrants and the extension of police and security surveillance.

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Further material:

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<http://www.schengen.ch>

WOZ-Schengen: Supplement to the weekly paper
WOZ, 22.4.2005 (edited by WOZ and *Solidarité sans frontières*)

Footnotes

1 In November 1989, a parliamentary enquiry commission published the fact, that the political police had records on 900 000 persons and organizations. The commission's report was the starting point of the Fichenskandal (literally: record cards scandal), which did not lead to abolishing the political police (as the left had demanded), but to major reorganizations and modernization of the country's whole police system.

2 All four USIS reports are published under www.usis.ch. The fourth report is of particular interest here, as it deals with border controls and "national compensatory measures" (p. 57 ff.), that is arbitrary stop and stop operations and discusses four different models. The EJPD and the Cantons' Chiefs of Police Conference have agreed on the "mix version".

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