

## Guest Commentary

# Liberty, Security and Power: Some Reflections on Transatlantic Relations

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THE LEITMOTIV OF THE TENSIONS BETWEEN SECURITY AND LIBERTY IS RECURRENT IN democratic debate – especially in connection with wars, but also in relation to other cases where internal or external threats are seen as requiring the sacrifice of liberty to guarantee survival. Such tension can hardly arise in non-democracies, where liberties are seen as a threat themselves by those in power, while a democracy cannot survive as such without safeguarding liberty – including to criticise and ‘send back home’ those in power. Following the terrorist attacks of 11 September 2001 the issue became especially acute, and heavily reflected on policies in the European Union (EU) as well as in the relation between the EU and the USA. The changes taking place in the USA with the election of President Obama and those, admittedly less visible, taking place in the EU – including the election of the new European Parliament and the fate of the Lisbon Treaty – provide an interesting occasion for some reflection on the kind of continuity or change that may be expected in EU-US relations in handling the relations between security and liberty.

### The metaphor of the balance and taming power

The widely used – and often criticised – metaphor of the balance is borrowed from the imagery of justice to visualise the relations between security and liberty as an exercise of determining the relative weight of two connected but contradictory priorities, and do so according to some established rules. Whether one finds such a metaphor useful to illustrate a tragic dilemma experienced by democracies or misleading by posing liberty and security as alternatives, the issue of who chooses whether to use the balance and, if so, how to make it tip, is one that deserves serious attention. Who chooses is a matter of politics and power – with interests, partisanship and bargains that are very distant from the image of blind and impartial justice equal for all citizens; at the same time much of the debate on the nature of democracy itself is about how power is tamed by rule of law.

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\* The opinions expressed are those of the author and do not necessarily represent the views of the European Commission

In recent times, the issue of the relations between liberty and security, and the very working of democracies, has been experienced and debated in connection to the attacks of 11 September 2001 and the diverse responses to them, ranging from war to reinforced surveillance and from legal prosecution to torture and extraordinary renditions. What made the recurrent leitmotiv of liberty/security tensions especially acute and partly unique was its global dimension (no part of the world was spared by the discourses and policies that followed 11 September 2001 – with important asymmetries), a strong convergence on the selected aspect of response (namely on increased resort to surveillance) and, at the same time, the degree of polarisation between and within countries (with different positions among traditional allies, notably within Europe and between the EU and the USA, and mass demonstration against governmental policies in various countries).

The analysis of convergence and divergence of EU and USA policies in relation to security and liberty deserves attention as it is instrumental to the understanding of international trends and of the working of democracy in both contexts. Asymmetry is a core feature of international relations, as well as between the EU and the USA. Asymmetry also points to power relations and involves the question of whether the most powerful countries can or should be tamed. Again rule of law is invoked, this time at the international level, but the correlation one may expect between respect of international law and existence of domestic rule of law provisions is not always straight: some countries may apply the rule of law domestically but not feel bound to important aspects of international law (the debate on the International Criminal Court being a case in point), others may not apply the rule of law internally but invoke international law where they have a say (e.g. in the context of the UN and its Security Council), and at times exceptions to the rule of law are proposed as necessary both internally and internationally in face of threats considered exceptional (such as in the case of Guantanamo).

Power relations in the international as well as domestic sphere, and interactions between them, are the object of extensive literature ranging from the study of the sources (including various types of resources as well as the influence of ideas) and types (e.g. civilian, military, soft, hard, smart) of power. Among the aspects of power that shape the relations between liberty and security, and contribute in explaining EU and USA converging or diverging positions, the first and most obvious is the concentration or diffusion of power and the second regards the resources available to set own goals and set them for others.

### **Pluralism and its merits**

In terms of concentration and diffusion of power, at first glance the difference between the EU and the US is clear. Who is in power in the USA is quite obvious: the President, with the concentration provided by the prerogatives of a strong presidential system, and the key figures and departments of the Administration; who is in power in the EU multilevel and multiplayer governance system is less straightforward and concentrated due to the mix of intergovernmental decision-making and Community competence in key aspects of the areas of justice, liberty, security and foreign policy. If one looks deeper at the nature of the polity however, a strong degree of pluralism is usually characterises the USA and is also significant in Europe – while in different forms and degrees in the different European countries. An aspect that made the case of the response to 9/11 striking was the reduction of pluralism and of the ‘marketplace of ideas’ in the USA – with the policy and ideological paradigm of the Bush Administration being strongly dominant, while under check of some minority voices from media, civil liberty organisation, think tanks and the intervention of the Supreme Court (notably on Guantanamo). In the case of the European Union, the diversity within and among member states proved challenging in terms of effective and ‘one voice’ decision-making, but had the merit of making the minority/majority dynamic,

vibrant (what was a governmental majority position in one country was a minority one in another, and public debate was quite strong everywhere, for example, on the war on Iraq) and of multiple cross-checks being provided through the inter-institutional debate between Council of Ministers, European Commission and European Parliament – eventually involving the European Court of Justice, as in the case of the EU-USA agreement on the Passenger Name Record (PNR). In such situations, some divergence emerged between the EU and the USA on the stand towards multilateral institutions, international law and the resort to force. While EU member states were divided on the war on Iraq and proved partly ambiguous on the stance towards extraordinary renditions (all EU countries condemning it, but some collaborating with the US on such practice), they were united on the condemnation of Guantanamo and on the preference for a legal prosecution approach to fighting terrorism. The USA and the EU converged, on the other hand, on the resort to enhanced surveillance, namely through the introduction of biometrics. This was the subject of strong debate, and even some inter-institutional clash in the case of the PNR agreement and the regulation on data retention, in the EU, but was perceived as being mostly within the scope of rule of law – differently from issues such as torture or extraordinary detention.

### **Knowledge and democracy**

How a policy is made and whether it is socially accepted or otherwise is not only a matter of who can participate in its making and the degree of pluralism reflected in the policy process: it is also a matter of which resources can be mobilised. Concerning resources, attention is often, and understandably, focused on economic and, in the case of security and foreign policy, military resources. Explanations about wars being initiated to gain access to resources ranging from oil to minerals, land or water have been offered in past and present times and, on the positive side, the influence of economic development in mitigating some of the roots of violence have been also documented. An aspect that has been less focused on is the importance of another key resource: knowledge. One of the factors that may limit or facilitate the abuse of power – including in the form of undue exceptions – is the concentration of knowledge and its fencing off from contestation and verification. The amplification of some threats (e.g. the lies on Iraq's nuclear weapons) to justify a war or otherwise unacceptable restrictions of civil liberties, or, conversely, the unwillingness to hear early warning signals that may allow the prevention of violent conflict or other disasters (the financial crisis may be considered as one of such predictable disasters) point to the importance of a well-functioning 'marketplace of ideas' with different 'knowledge holders' to be able to cross-check and argue with each other. Indeed, knowing what one is talking about is usually considered a precondition for a person's credibility, and surely being able to master some 'basics' as well as the more complex technological, legal, economic, ethical, social issues pertaining to biometrics, PNR, profiling and other options under discussion is a pre-requisite for being able to participate in the policy debate concerning their robustness, usefulness, acceptability, effectiveness, proportionality, short and long-term impacts.

In both the EU and the USA contexts, the role of professionals involved in security-related issues (from intelligence to border management to technological development) proved important in handling knowledge. Expertise – that is, specialised knowledge with the function of providing advice to decision makers – is a crucial component of regulatory capacity and tends to be quite narrowly based; for example, with biometrics expertise based in some professional communities (e.g. IT specialists) plus some practical expertise (e.g. of border guards, police, airport personnel) in the public and private sectors. A broadening of expertise is however taking place in many areas, including on surveillance technologies, adding legal, social and other types of expertise to the technical one, with critical perspectives being developed within the technical expert communities and

'counter-expertise' being provided by non-governmental and non-industrial organisations. The case of threat assessment is also relevant : while its bulk is provided by secret intelligence agencies, the resort to open intelligence and the role of independent think tanks and research organisations in developing assessment techniques and in debating assessments by governmental organisations is becoming more visible. This broadening could allow a 'democratisation of expertise' – in the sense of pluralistic and open debate, and quality control, on the knowledge available – and mitigate the risk of unaccountable and secretive 'guardianship'. This is another important lesson from 11 September 2001: even in face of hard security issues, the number of those who have relevant knowledge to understand the problem at hand and the possible response options is larger than a small circle of professionals, and the latter should not be left acting without scrutiny and the confrontation of ideas.

### **Patterns of convergence and divergence: continuity or change?**

To sum up, in the aftermath of the attacks of 11 September 2001 and related responses by the Bush Administration, both convergence and divergence framed EU/USA security related policies. A general convergence was related to broad features of threat assessment and the resort to surveillance as one of the means to tackle terrorism. At the same time, divergence occurred with regard to the stance towards multilateralism, the use of force and the protection of certain fundamental rights. As briefly discussed above, the degree of pluralism to be found in the USA and the EU post 11 September 2001 and knowledge, economic and other resources available, contribute to explaining both instances of convergence and of divergence. From a normative standpoint, some unsettling issues are raised for attention. These include the difference between exceptions granted by law and exceptions to law, and the risk these pose for the legitimacy of democracies, for their internal social cohesion and their external credibility. In addition, the implications for the international system are to be considered: a more stable international order can be expected by an increased convergence between the EU and the USA, but such order will only be legitimate if international law and the protection of fundamental rights are taken seriously.

With the election of President Obama in the USA, and his explicit distancing of his Administration from the Bush Administration with regard to the bulk of the response to 11 September 2001, a key change in the USA power structure took place. In the EU, the Lisbon Treaty (still pending at the time of writing) would tackle some of the questions on who is in charge – including on Common Foreign and Security Policy – and would enhance coherence and accountability in the field of justice and home affairs. Shall we then expect continuity or change in the above mentioned pattern of convergence and divergence between the EU and the USA on security/and liberty related policies?

Security has always been at the core of transatlantic relations. The end of the Cold War and related redefinition of geopolitics led to a change in how security cooperation is conceived, rather than to its decrease in importance: the responses to 11 September 2001 being the most prominent case in point. At the same time, transatlantic relations are also embedded in broader international cooperation on issues that range from trade to environment protection. All these cases have been analysed in depth by other authors, are reiterated at bilateral high level meetings between the USA and the EU and are recalled here as important contextual elements to avoid the risk of looking at 11 September 2001 and related developments as isolated or self-standing. For obvious reasons of space and focus they cannot be examined here. However, it is useful to note that transatlantic cooperation is punctuated by different perspectives on multilateralism and the role of international law in as diverse areas as environment, trade and security.

A change of discourse and style is taking place in the USA where the Obama Administration is explicitly calling for dialogue (including with former 'axis of evil' countries), for more inclusiveness in multilateral fora (including the expansion of G8 on financial issues), for a more constructive stand on international negotiations (notably on climate change) and for a clear refocusing on rule of law and respect for fundamental rights, exemplified by the immediate decision to close Guantanamo (even if the implementation of such decision is unlikely to be fulfilled by January 2010, as initially planned).

All these aspects point to more convergence with the EU, which strongly advocated the above. At the same time, the degree of such new convergence (or perhaps 'renewed', as some of such aspects partly build on the Clinton Administration) should not be overestimated. The willingness of the Obama Administration to nurture dialogue and multilateralism (the latter being hardly mentioned as such in the official discourse) and allegiance to international law is strongly articulated with two elements: leadership and effectiveness. Together with the sharp condemnation of the previous Administration's policies, comes the strong emphasis on the need for a new USA leadership in world affairs – and how much such leadership may be constrained seems to depend on the effectiveness in reaching certain goals: here the debate on Afghanistan (with the USA request for a stronger EU involvement) or on climate change (with the different emphasis on the need for binding international targets) can be seen as illustrations of the USA accepting being 'tamed' if this still enables it to reach its aims. This may seem to involve no major difference with a 'menu à la carte' approach to the UN framework – but a difference that seems significant is about the willingness to discuss aims and options with other countries and with an in principle allegiance to international law, and draw lessons from the past. From the EU side, the pride in some of its long-advocated positions being recognised needs to be linked to realism about its capacity to deliver. More clarity on the handling of Common Foreign and Security Policy, more accountability on this as well as in the field of justice and home affairs and a binding statute of the Charter of Fundamental Rights are expected with the ratification of the Lisbon Treaty, but some improvement in institutional engineering will not be enough to respond to citizens' expectations in these and other areas (the further decline in participation in the EP elections in 2009 being an important signal of the paradox of the increasing power of the EP and decreasing interest in it by the electorate). This is an element to be especially considered in times of the re-emergence of populist discourses and organisations that tend to manipulate fears and over-securitise the policy agenda –with important implications for the liberty/security tension discussed above.

In this respect, it is also important to note that both the EU and the USA are focusing on democracy as part of their own identity as well as a value to be further diffused in the world. Again, divergence on whether democracy can be facilitated or also imposed characterised the relation between the majority of EU countries – and official EU discourse – and the Bush Administration, and is an element of renewed convergence with the Obama Administration. This requires a sustained consistency in upholding the rule of law and respect for fundamental rights also under difficult circumstances. The infringement of fundamental rights by democratic countries calls into question their normative value base and internal social cohesion (with certain social groups submitted to profiling, stereotyping and discrimination on ethnic, religious, sexual or other grounds), and also their credibility in the eyes of people outside, including in those countries where democracy should be promoted, or to whom it should be 'exported'. The roles of international human rights law and criminal justice need to be strengthened to allow for the international, on top of national, rule of law to be applied, and exceptions or abuses limited or punished. It is to be hoped that the EU and the USA will be capable of standing firm on such task and able to persuade other international partners accordingly, starting



by example and avoiding double standards – a powerful reproach, even when issued by countries with a less than enviable record on respect for fundamental rights.

By way of conclusion, it can be argued that a more stable international order can be expected by an increased convergence between the EU and the USA, and that such an order will be more legitimate – and also more secure in terms of being less vulnerable to undermining democracy – by strengthening international law and the protection of fundamental rights.

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