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EDITORIAL COMMENTS

The passion for security in European societies

Reductio ad securitatem

In societies continuously experiencing real or perceived crises, and dominated by persisting accounts of catastrophe, whether past, imminent or underway (terrorism, climate change, pandemic, war), collective consciousness is distinctly determined by fear and a widespread sense of insecurity and dispossession. This determination brings about a profound alteration in the apprehension of reality. A large number of people feel they are under threat. Reflected in the public arena and then widely exploited by the media, the business sector, and a segment of the political class, this sense of threat is turned into a pressing demand for security. Today, there is hardly any issue of concern that is not addressed in terms of security, be it migration, food, health, environment, energy, communications, the media, digital technologies, in addition to persistent military threats and recent stormy events that take us back to Europe's dark wartime past. Security has become a matter of concern in the everyday life of individuals as well as a way of framing any collective issues.[1] States invest massively in public security instruments and the private security sector is growing exponentially.[2] The passion for equality, as famously expressed by Alexis de Tocqueville in *Democracy in America*, has made way for a passion for security in European societies.

This passion has colonized the public sphere and the media. People are constantly exposed to "figures of disorder", i.e. abstract figures incarnated in concrete characters that news and media events provide on a daily basis. Generally speaking, these are: the terrorist suspect, seen as a threat to the State and its institutions; the migrant, who is presented as a security threat, potentially undermining Europeans' positions in society and ways of life; minorities, especially religious minorities, accused of separating themselves from common rules in society; offenders, especially child and sexual abusers, who upset the social order; the foreign intruder, coming from China or Russia,

1. The latter is usually referred to as the process of "securitization". See, from a vast body of literature, Wæver, "Securitization and desecuritization" in Lipschutz (Ed.), *On Security* (Columbia University Press, 1995); Huysmans, "Security! What do you mean? From concept to thick signifier", (1998) *European Journal of International Relations*, 226–255; Markiewicz, "The vulnerability of securitisation: The missing link of critical security studies", (2023) *Contemporary Politics*, 1–22.

2. Albertini, "Au salon Milipol, le marché de la sécurité surfe sur le chaos du monde", *Le Monde* (18 Nov. 2023).

who seeks to destabilize our economic and value system. These figures are part of a "continuum of threats", with the threat regularly shifting from one figure to the other. Moreover, in the EU, security is often framed within a discourse that blurs the distinction between the inside and the outside. Thus, Russia's war of aggression against Ukraine is interpreted in terms of the EU's own structural insecurities: its energy dependencies, fragile economic base, vulnerable information systems, and unstable public opinions.[3] In illiberal States, the discourse on protecting society against external threats is constantly at risk of morphing into a discourse on protecting people against threats from within society. This was shown in the Court of Justice's judgment in *Commission* v. *Hungary* issued in June 2020.[4] At stake was the so-called "Transparency Law", adopted by the Hungarian Government in 2017, which imposed obligations of registration, declaration and publication on non-governmental organizations receiving funds from abroad. Relying on a loose external threat, the Hungarian Government invoked public security to target certain civil society organizations. That justification was firmly rejected by the Court.

This is not just about discourse, however. The concern is socially and psychologically rooted in widespread perceptions of vulnerabilities. This is evident from surveys showing that Europeans do not feel safe, with fears and anxieties constantly on the rise in recent years. It is important to note that opinion polls also show a clear disconnection between actual facts and perceptions. People tend to overestimate the reality of insecurity and criminality rates in the society in which they live and in the world around them.[5] As Advocate General Jacobs pointed out in *Commission* v. *Greece*, concerning the prohibition of trade between Greece and the former Yugoslav Republic of Macedonia, security is often "a matter of perception rather than hard facts".[6] But there is more: such disconnection is related to a pervasive element in today's European societies, namely the loss of the authority of facts. "Facts don't work", insisted Aaron Banks, a major Leave donor, during the Brexit campaign.[7] Preferences and opinions are based on perceptions and

3. See Informal meeting of the Heads of State or Government, *Versailles Declaration* (10 and 11 March 2022). See also Council Regulation 2022/350 of 1 March 2022 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine and Case T-125/22, *RT France* v. *Council*, EU:T:2022:483, paras. 53 et seq.

4. Case 78/ 18, *Commission* v. *Hungary (Transparency of Associations)*, EU:C:2020:476.

5. See <www.praeventionstag.de/html/download.cms?id=1036&datei=Factsheet_Feelings-of-Insecurity_English-1036.pdfsurvey>.

6. Opinion in Case C-120/94, *Commission* v. *Greece (FYROM),* EU:C:1995:109, para 54.

7. See <www.newstatesman.com/politics/2016/10/arron-banks-the-man-who-bought-brexit>.

feelings rather than objective facts and figures.[8] It seems that post-pandemic collective concerns are dominated by a desire for limits, a drive towards boundaries, and a need for full protection.[9] Fences are being erected everywhere in Europe, at the external as well as internal borders, in public as well as private spaces, in urban as well as rural areas. Fences inhabit Europeans' consciousness. They surround a void, made up of shared fears and feelings of loss.[10]

The EU as a major zone of protection

How is this changing context reflected in the EU? It has recently been argued that the European State is gradually being transformed into a "security State".[11] This refers to the fact that in addition to the traditional provision of operational security capacities, European States are taking on a new regulatory function which consists of incentivizing the provision of collective security goods by non-State and sub-State actors. Moreover, they are relying massively on private expert knowledge and technological innovation to enhance their capacities. This expression also refers to a conceptual transformation of the State. The State can no longer be reduced to a "security provider" protecting individuals from imminent threats to their physical integrity and defending basic liberties, as in classic Weberian terms. It is to be seen as an organ endowed with the mission to protect the population against individual as well as systemic threats. Such a mission justifies far-reaching prerogatives in terms of intelligence and surveillance, and even the suspension of the basic liberties order in the case of exceptional circumstances. This is expressed somewhat in a phrase such as "security is the first freedom", famously pronounced in 1980 at the French National Assembly by the Minister of Justice, Alain Peyrefitte, in the context of the adoption of a law on security and liberty. This resonates with the concept of the "right to security" developed by the German constitutional doctrine in the 1980s.[12] This concept was recently adopted by the French Council of State, considering the new risks

8. See Zafarani et al., "Introduction on recent trends and perspectives in fake news research", 2 *Digital Threats: Research and Practice* (2021), Art. 13, 1–3.

9. See Butler, *What World Is This? A Pandemic Phenomenology* (Columbia University Press, 2022).

10. "Et les murs, ma foi, c'est fait pour entourer un vide" (Lacan, *Je parle aux murs,* Seuil, 2011); Kinnvall, Manners and Mitzen (Eds.), *Ontological Security in the European Union* (Routledge, 2020).

11. See Kruck and Weiss, "The regulatory security State in Europe"; and Genschel and Jachtenfuchs, "The security State in Europe: Regulatory or positive?" in *Journal of European Public Policy* (Special Issue 2023).

12. The concept has been developed by Isensee, *Das Grundrecht auf Sicherheit* (de Gruyter, 1983). This concept was based on a rather bold interpretation of the case law of the German Constitutional Court. See, on this case law, Miller, "Balancing security and liberty in

of Islamic terrorism.[13] It is now spreading throughout many jurisdictions. It should be noted, however, that this concept does not coincide with the right to security as enshrined in Article 5 of the European Convention on Human Rights and in Article 6 of the EU Charter of Fundamental Rights, and as interpreted by both the European Court of Human Rights and the Court of Justice. According to their case law, this right cannot be read in isolation from the "right to liberty": it is intended to ensure that individuals are protected from arbitrary deprivations of liberty.[14] The new concept of the "right to security" clearly challenges this traditional liberal conception. It turns law into a tool responsive to the expectations of citizens who feel they are under a polymorphous threat.[15]

In the EU, it is widely acknowledged that law enforcement as well as security issues are the primary responsibility of the State. This is clear from the Treaty of Lisbon language, in Article 4(2) TEU. This is also related to a specific cycle. Following a long period in which European integration put Member States on the spot, and at times left them feeling somewhat humiliated, the State re-emerged as a key security actor in the context of the pandemic. It wore the uniform of the "survival unit", responsible for taking care of the population. This was endorsed by the Union, on the basis of its long-standing mantra according to which "the health and life of humans rank foremost among the assets and interests protected by the Treaty".[16] In relation to national security, the mantra is more recent, and it is a different one: "the objective of safeguarding national security corresponds to the primary interest in protecting the essential function of the State and the fundamental interests

Germany", (2010) *Journal of National Security Law & Policy*, 369–396. See, on the concept itself, the report published in 2008 by the research service of the Bundestag: <www.bundestag.de/resource/blob/423604/6bc141a9713732fc4bb4334b6d02693b/wd-3-180-08-pdf-data.pdf>.

13. Conseil d'Etat, 21 April 2021, *French Data Network et autres,* No. 393099.

14. See, to that effect, ECtHR, *Ladent* v. *Poland*, Appl. No. 11036/03, judgment of 18 March 2008, paras. 45 and 46; ECtHR, *Medvedyev and Others* v. *France*, Appl. No. 3394/03, judgment of 29 March 2010, paras. 76 and 77; and Joined Cases C-511, 512 & 520/18, *La Quadrature du Net and Others*, EU:C:2020:791, para 125. See, however, Digital Rights Ireland judgment, para 42, where the Court referred to Art. 6 of the Charter as part of the legitimate objectives capable of justifying interference with the rights guaranteed in Arts. 7 and 8 of the Charter. Yet, in this particular context, this was not to suggest that it recognized a right to public security that could justify any security policy.

15. Waldron traces this conception back to Hobbes and calls it the "pure conception of safety"; "Safety and Security", (2006) *Nebraska Law Review*, 454–507.

16. Joined Cases C-171 & 172/07, *Apothekerkammer des Saarlandes and Others*, EU:C:2008:729, para 19. See already Case 104/75, *de Peiper*, EU:C:1976:67, para 15.

of society".[17] While human health is regarded as a primary *Union* interest, national security is portrayed as an essential *State* interest. This terminological difference should not be read strictly, in the narrow terms of the division of competences. Union competences are limited in relation to the protection of health.[18] Conversely, the exercise of competences retained by the State in the field of security is traditionally subject to EU law.[19] Rather, this terminological shift reflects a broader shift in the self-understanding of the Union. The notion that the Union has as its main purpose the establishment of a sort of "domestic utopia", in the form of an area of individual rights and freedoms devoted to the pursuit of common goods and values, no longer holds. It is now supplemented by a notion of the Union as a "major zone of protection" committed to the defence of Member States' territories and societies.[20]

In parallel, the Union is developing its own security discourse. The Commission is determined to build a "security ecosystem". In its words, "citizens cannot be protected only through Member States acting on their own"; Union action is required to address systemic and cross-border threats as well as threats affecting "the whole of society".[21] In the "EU Security Strategy", the concept of security takes on a broad meaning. It brings together two fields that come from different institutional fields and based on a distinct sense of threat. One relates to the material reproduction of European society which would be constantly at risk of being disrupted due to the dependency and vulnerability affecting Europe's critical infrastructures such as information, energy, transport, financial, and digital infrastructures, as well as natural ecosystems. These fields are typically framed as security-related issues. This is manifested in the discourse about "strategic autonomy" and "resilient Europe".[22] The other concern is about the cohesion of society, i.e. its symbolic reproduction. In that regard, European society would be constantly at risk of being destabilized and fragmented due to cross-border and more

17. See Joined Cases C-5118, 512 & 520/18, *La Quadrature du Net*, para 135; Joined Cases C-793 & 794/19, *SpaceNet and Telekom Deutschland*, EU:C:2022:702, para 92; Case C-365/21, *MR*, EU:C:2023:236, para 55.

18. As clear from Art. 6 and Art. 168 TFEU.

19. Case C-742/19, *B.K.* v. *Republika Slovenija*, EU:C:2021:597, para 40; Case C-823/21, *Commission* v. *Hungary*, EU:C:2023:504, para 67.

20. The notion of "domestic utopia" is borrowed from Roland Barthes in *How to Live Together: Novelistic Simulations of Some Everyday Spaces* (Columbia University Press, 2013). The notion of "major zone of protection" was coined by Gaston Bachelard in *The Poetics of Space* (Beacon Press, 1964).

21. European Commission, *Communication on the EU Security Union* Strategy, COM(2020)605, final of 24 July 2020, p. 1.

22. See McNamara, "Transforming Europe? The EU's industrial policy and geopolitical turn", (2023) *Journal of European Public Policy*.

local threats such as radicalization, organized crime, corruption, domestic violence, child sexual abuse, and, according to this narrative, uncontrolled migration. This manifests itself in the discourse about the defence of "the European way of life" and "a Europe that protects". The response of the EU institutions involves adopting legislation regulating States as well as non-State actors, in particular intermediaries, enhancing coordination of Member States at EU level through collaborative platforms and exchange of information, and steering defence and law enforcement capacity-building at the State level.[23]

As a result of this shift towards security, the Union is struggling with a contradiction. It defends a more "resilient" society, but it thereby increases the risk of domination of the State and private powers over society.[24] The weaponization of the State in the name of security is liable to lend to a regression to sovereigntist and protectionist claims.[25] The devotion of public and private actors to the building of a "vigilant society" spreads and legitimates the "culture of control" ingrained in the police organization and public administration.[26] This may result in the concept of security assuming an independent meaning, detached from the basic liberties of individuals and minority groups, supporting instead the desire of the people to be protected and undisturbed. It might go even further, turning the right to protect the population into a right of the State to protect itself against any form of social protest or uprising.[27] The rise of the passion for security in European societies

23. See the list of legislation adopted and proposed in European Commission, *Sixth Report on the implementation of the EU Security Union Strategy*, COM(2023)665, final of 18 Oct. 2023. One piece of legislation drew special attention. In March 2022, the Commission proposed a Directive to combat violence against women and domestic violence (COM(2022)105 final of 8 March 2022). The co-legislators entered inter-institutional negotiations in July 2023. However, Member States still appear divided over this proposal (<www.euractiv.com/section/health-consumers/news/eu-countries-divided-over-the-inclusion-of-rape-in-violence-against-women-directive/>).

24. See, on domination, Lüdtke (Ed.), *Herrschaft als soziale Praxis* (Vandenhoeck und Ruprecht, 1991).

25. See, by way of illustration, Case C-106/22, *Xella Magyarország*, EU:C:2023:568. Relying on a security-oriented reading of the EU foreign investment screening mechanism (FDI Screening Regulation 2019/452), the Hungarian Government was arguing that investment by an EU company in Hungary should be seen as "foreign" if the EU company is controlled by a third-country company. The Court rejected that argument.

26. Garland, *The Culture of Control* (OUP, 2001); Gardenier, *Towards a Vigilant Society* (OUP, 2022).

27. To give an example: by decree of 21 June 2023, the French Government ordered the dissolution of the climate activist group *Les Soulèvements de la Terre* (Earth Uprising group). On appeal, the Conseil d'État overturned the decree, considering that the dissolution "did not constitute an appropriate, necessary and proportionate measure to the seriousness of the disturbances likely to be caused to public order" (Conseil d'Etat, 9 Nov. 2023, *Les Soulèvements de la Terre et autres*, No. 476384). See the op-ed by the UN Special Rapporteur on Environmental Defenders under the Aarhus Convention, Michel Forst, "The criminalisation of environmental

and its endorsement by national and EU authorities confront us with a vexing question: how to secure the undisturbed development of society as a whole, in a context of increasing real and perceived violence surrounding us, whilst not giving in to a form of regression with regard to the Union's ideals of a liberal and open society?

A legal framework under pressure

Issues of security are not new to EU law and in adjudication. They have long been raised in cases relating to the internal market, Union citizenship and external relations. The Court of Justice has usually addressed them in two basic terms. On the one hand, when faced with arguments defending the autonomy of States with respect to public security, it made it clear that there is no "inherent general exception" excluding national measures or international acts taken for reasons of law and order or public security from the scope of EU law.[28] It is true that the Treaty provides for derogations from EU law based on public security. However, these derogations cannot be determined unilaterally. They remain under the control of EU institutions, and they must be interpreted strictly.[29] On the other hand, when it comes to assessing the merits of a measure justified on grounds of security, the Court relies on its traditional framework based on proportionality analysis. In practice, this means that the Member State concerned should demonstrate that effectively protecting security could not be carried out by means other than setting aside EU law.[30] It also requires that the measure be compatible with fundamental rights and all "the principles that form part of the very foundations of the [EU] legal order".[31] Admittedly, considering the peculiar sensitive nature of security interests for Member States, the Court may, at times, have been more lenient as to its application of the proportionality test.[32] Yet, the general legal framework stood firm.

This framework is currently under pressure. On the one hand, relying on the statements in Article 4(2) TEU that the Union shall respect essential State

defenders is not an adequate response to civil disobedience" (11 April 2023, online). See also Case C-333/22, *Ligue des droits humains,* EU:C:2023:874.

28. Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Hungary, and the Czech Republic*, EU:C:2020:257, para 143.

29. Case C-461/05, *Commission* v. *Denmark*, EU:C:2009:783, para 52; Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Hungary, and the Czech Republic*, para 144.

30. Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Hungary, and the Czech Republic*, para 170.

31. Joined Cases C-402 & 415/05 P, *Kadi I*, EU:C:2008:461, para 304.

32. See Snell and Aalto, "Security and integration in the context of the internal market" in Amtenbrink, Davies, Kochenov and Lindeboom (Eds.), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press, 2019), pp. 561–577.

functions and "national security remains the sole responsibility of each Member State", and through increasing reliance on Article 72 TFEU or Article 346 TFEU, Member States' governments argue that security, in particular national security, is an area of reserved competence of States, governed by national law only. This was already reflected in the pre-Brexit decision concerning a new settlement for the United Kingdom of February 2016. The heads of State and government clearly stated that, in their view, Article 4(2) TEU on national security "does not constitute a derogation from Union law and should therefore not be interpreted restrictively".[33] Moreover, Member States have striven to include all kinds of issues in the field of public or national security, including energy supply, road safety, criminality or migration.[34] This is generally justified on the grounds that, in such domains, any deed may affect society as a whole.[35] On the other hand, Member States' governments regularly maintain that their prerogatives in the field of law and order and security take absolute precedence over their obligations under EU law. In this sense, the Polish Government took the view that Article 72 TFEU "is a rule comparable to a conflict-of-law rule".[36] This approach assumes more than a reversed hierarchy between EU and national law: a form of separation. More clearly, it presupposes that EU law is structurally incapable of ever responding to the State's concern for security. On this view, the EU framework based on proportionality, balancing internal security against EU objectives and subjecting it to the protection of EU individual rights, is inadequate, "simply not comprehensible".[37]

33. A New Settlement for the United Kingdom within the European Union, O.J. 2016, C 69I/1–16.

34. See e.g. Case C-118/20*, J.Y.* v. *WienerLandesregierung* (road safety), EU:C:2022:34; Case C-162/22, *Lietuvos Respublikos generalinė prokuratūra* (misconduct in office), EU:C: 2023:631; Case C-365/21, *MR* (financial crime); pending Case C-178/22, *Procura della Repubblica presso il Tribunale di Bolzano* (aggravated theft of a mobile telephone). This inflation in the classification of any issue in terms of security was clearly pointed out by the Constitutional Tribunal of Spain in a judgment of 6 May 1985, stating that "not all security of persons and property, nor all regulations aimed at achieving it, or preserving its maintenance, can be included in the competence title of 'public security', because if this were the case, practically all the rules of the legal system would be rules of public security" (No. 59/1985, ES:TC: 1985:59).

35. See the argument from Ireland in pending Case C-178/22, *Procura della Repubblica presso il Tribunale di Bolzano* (Opinion of A.G. Collins, EU:C:2023:463, para 17).

36. Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Hungary, and the Czech Republic*, para 137. This argument is reminiscent of the conflictual doctrine developed by the Supreme Court of Appeal of Virginia in *Martin* v. *Hunter's Lessee* (1816) in the context of US federalism.

37. This is an allusion to the *PSPP* judgment of the German Federal Constitutional Court arguing that German citizens are structurally threatened by EU monetary policy as interpreted by the Court of Justice in Case C-493/17 *Weiss and Others*, EU:C:2018:1000. See 2 BvR 859 /15 of 5 May 2020.

This pressure has encountered resistance in the Court of Justice. In the energy sector, the defence of national measures in terms of public security is long established. Framed as derogation from the principle of free movement, it is typically subject to a proportionality assessment, yet with a certain sense of deference towards the security concerns of Member States.[38] The question is whether the new framing of energy supply in broad security terms within the "strategic autonomy" discourse has resulted in a change of framework. In *Hidroelectrica*, the Court made it clear that broad security concerns relating to self-sufficiency and affordability of energy at reasonable prices are not to be considered as grounds of public security within the strict meaning of Article 36 TFEU.[39] In the more recent *Xella Magyarország* case, the Court stated that the objective of seeking to ensure security of supply "in particular at the local level, as regards certain basic raw materials", cannot be held to be a "fundamental interest of society" and therefore a legitimate public security interest within the meaning of internal market law.[40] This means that ensuring a sound functioning of the internal market is the best way to secure energy supply in the Union. The Court deviates from this approach only in the event of crisis and in relation to what it considers to be genuine threats to critical resources and infrastructures, as the *OPAL* case illustrates.[41] This is the only case where the Court accepts endorsing a broad security conception, and it does so in the name of solidarity.[42]

Data retention is another area where the Court of Justice has held its ground, despite huge pressure to change its framework. Here, this is not on the basis of market functioning but on the basis of individual rights protection. The Court requires that techniques for collecting and accessing personal data be subjected to strict substantive and procedural guarantees.[43] Broad security concerns yield to the rights of data subjects. This case law has prompted strong opposition. Member States claim it is too protective of individuals to the detriment of collective security, and clearly inadequate in operational and efficiency terms. In its recent case law, the Court has responded by making a concession, acknowledging that "the importance of the objective of safeguarding national security" exceeds that of the objectives of combating crime in general, even serious crime, and of safeguarding public security.

38. Huhta, "The evolution of the public security defence in EU free movement law: Lessons from the energy sector", 24 CYELS (2022), 1–22.

39. Case C-648/18, *Hidroelectrica*, EU:C:2020:723.

40. Case C-106/22, *Xella Magyarország,* para 69. See, on this point, the diverging opinion of A.G. Ćapeta in Case C-106/22, *Xella Magyarország*, EU:C:2023:267, para 82.

41. Case C-848/19 P, *Germany* v. *Poland*, EU:C:2021:598.

42. See Editorial comments, "A jurisprudence of distribution for the EU", 59 CML Rev. (2022), 957–968.

43. See Case C-140/20, *G.D.* v. *Commissioner of the Garda Síochána*, EU:C:2022:258.

Therefore, such an objective is "capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives". This means that general data retention is permitted for national security purposes. Yet, the Court insisted that it retains the prerogative of defining the notion of safeguarding national security and its contours.[44] A clear distinction is to be made between the concept of national security and that of public security and public policy.[45] The Court wants to make sure that the most intrusive regime of national security cannot be used in relation to public security or public policy functions. In other words, it is for the Court to develop the conceptual framework within which Member States may conduct their data retention policies. For the Court, this framework matters because it structures individuals' forms of life. Data retention "is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance".[46] It affects the way people relate to themselves as well as to others.[47] The feeling of constant surveillance is alien to a proper social life in Europe. It should be noted, however, that this struggle for conceptual autonomy has not yet been settled; it is still active, including within the Court itself.[48]

Coping with reality

In a recent Opinion on a case concerning access to civil identity data by an administrative authority entrusted with the protection of copyright and related rights, Advocate General Szpunar suggests an analogy between the Internet and "the real world". In the real world, he states, "a person suspected of having committed theft cannot rely on his or her right to protection of his or her private life to prevent those responsible for prosecuting that offence from ascertaining what the content stolen is".[49] He then proposes a relaxation of the case law of the Court on data protection, "with a view to a certain pragmatism".[50] A few years ago, in his Opinion on a data retention case with

44. Joined Cases C-511, 512 & 520/18, *La Quadrature du Net*, paras. 135–137.

45. See recently Case C-8/22, *Commissaire général aux réfugiés and aux apatrides*, EU:C:2023:542, para 41. The conceptual distinction between public security and public policy has its origins in free movement and Union citizenship law. See Nic Shuibhne, *EU Citizenship Law* (OUP, 2023), esp. Ch. 10.

46. Joined Cases C-203 & 698/15, *Tele2 Sverige and Tom Watson and Others*, EU:C:2016:970, para 100.

47. Joined Cases C-511, 512 & 520/18, *La Quadrature du Net*, para 117.

48. See, on this point, the differing views of A.G. Szpunar in Case C-470/21, *La Quadrature du Net and Others,* EU:C:2023:711, and A.G. Collins in Case C-178/22, *Procura della Repubblica presso il Tribunale di Bolzano*, EU:C:2023:463.

49. Opinion in Case C-470/21, *La Quadrature du Net and Others,* para 52.

50. In this case, the issue is whether an administrative authority enjoys the power to release the IP addresses of users making available on Internet content infringing copyright. In the

the French Council of State, the rapporteur public asserted that the State is on the side of the "true life of citizens" who have expressed a clear need for protection against "criminals and offenders, the true ones". He then proposed to break with the "European model" developed by the Court of Justice.[51] This reference to the violence of the "real world" is framed as an argument to fight impunity. This argument has found a basis in EU law. Article 72 TFEU stating that the Treaty "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" has been increasingly relied on by Member States in the recent case law.[52] This is particularly true in two distinct fields: migration and law enforcement.

One of the first cases mentioning Article 72 TFEU in the field of migration is *Fahimian*.[53] The issue was whether the concept of public security under Directive 2004/114 on the admission of foreign students in Europe had the same scope and meaning as the concept of public security under Directive 2004/38 on Union citizenship. The Advocate General argued that Article 72 TFEU, upon which Directive 2004/114 was indirectly based, pointed to a difference of meaning, resulting in granting a wide margin of discretion to the Member States with regard to admission.[54] The Court did not refer to Article 72. However, it reasoned along the same line that the Directive does not expressly require the personal conduct of the individual concerned to represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" in order for that individual to be capable of being regarded as a threat to public security. A mere potential threat, established on the basis of an overall assessment of the situation, may be enough to refuse to issue a visa. The public security approach leans towards a national security regime: it allows for preventive action aimed at countering threats and, under certain conditions, a serious interference with individuals'

Court's established case law, infringements of copyright and related rights do not seem to be considered to be a sufficiently serious threat to public security to justify general data retention. However, in this case, the A.G. suggests the possibility to retain IP addresses for a limited period of time for the purposes of detecting and prosecuting online criminal offences.

51. Opinion of Rapporteur public on Conseil d'Etat (France), *French Data Network*, No. 393099.

52. See already Thym, "Article 72 [clause on maintaining internal security by Member States]" in Blanke and Mangiameli (Eds.), *Treaty on the Functioning of the European Union – A Commentary* (Springer, 2021), pp. 1407–1409.

53. Case C-544/15, *Fahimian*, EU:C:2017:255.

54. See Opinion of A.G. Szpunar in Case C-544/15, *Fahimian*, EU:C:2016:908, para 59. According to the A.G., in the migration field, a threat to public security is not to be regarded as an exception to the right of entry, as in the field of free movement, but as a "negative condition governing a right to entry".

rights. It seems that the conceptual boundary does not hold in this case – hence the fence.

This is repeated at the borders. In *M.A.*, the point of contention was about the nature of "true reality".[55] M.A. is a Syrian national who fled Syria, flew to Belarus and was then taken to Lithuania. He was arrested in Poland on his way to Germany and sent back to Lithuania. His counsel urged the Court to take into account the "real situation" of aliens in the Lithuanian Kybartai registration centre. The government replied that the reality was one of a "hybrid attack" launched by Belarus against the EU, and justified its regime of exception on the basis of Article 72 TFEU. The Court rejected this legal basis as a ground for a regime of general exception from EU law guarantees in case of "exceptional circumstances". However, it admitted that there are "specific circumstances" in which migrants may be seen as a danger to society. This means that broad considerations reducing illegal migration to geopolitical security risks are dismissed. Still, Member States are allowed to respond to local and individual threats. The *N.W.* and *ADEE* judgments tell the same story about internal borders.[56] The Court maintained that Article 72 TFEU is not a "sovereignty clause", granting a power to unilaterally reintroduce internal border controls or disapply the Return Directive, even in case of "exceptional circumstances". However, it did not exclude that illegal migrants located in the border area represent a genuine threat to public policy or domestic security. This seems to allude to the fact that the border area is more exposed to offences than the rest of the territory.[57] This is not "securitization" in the migration studies sense of framing migrants as a threat to the security of the State, deprived of any legal protection. This is securitization in the sense of a special legal regime that frames migrants as potentially "dangerous" for the social order.[58]

This framing in terms of dangerousness and social ordering is sweeping. It is not restricted to migrants. This has become clear in the field of law enforcement and police use of data.[59] In *VS*, the person concerned, accused of tax fraud, refused to consent to the collection of her biometric and genetic data for the purpose of creating her DNA profile and in order to be entered in the

55. Case C-72/22 PPU, *M.A.* v. *Valstybės sienos apsaugos tarnyba*, EU:C:2022:505.

56. Joined Cases C-368 & 369/20, *N.W.* v. *Landespolizeidirektion*, EU:C:2022:298; Case C-143/22, *ADEE and Others*, EU:C:2023:689.

57. See also, in this sense, Commission Recommendation 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area, Recital (7).

58. See Gundhus and Franko, "Global policing and mobility: Identity, territory, sovereignty" in Bradford, Jauregui, Loader and Steinberg (Eds.), *The SAGE Handbook of Global Policing* (Sage, 2016).

59. See, for the context, Brayne, "The criminal law and law enforcement implications of big data", 14 *Annual Review of Law and Social Science* (2018), 293–308.

police records of Bulgaria.[60] The Court did not object to the compulsory collection of sensitive data concerning persons in respect of whom sufficient evidence is gathered that they are guilty of an intentional offence. This is not contrary to Directive 2016/680 on the processing of personal data for criminal law enforcement purposes. However, it insisted that there should be a "specific necessity" to collect this data. Otherwise, the legislation concerned is liable to lead, "in an indiscriminate and generalized manner", to a collection of sensitive data for a large number of criminal offences, irrespective of their nature and gravity. Therefore, account is to be taken of the "specific importance of the objective" that such processing is intended to achieve. This is not a reference to "the importance of the objective of safeguarding national security", fashioned as a very special case allowing for a relaxed regime of protection in the data retention case law. In the police domain, it is enough that the processing serves "a specific objective connected with the prevention of criminal offences or threats to public security displaying a certain degree of seriousness, the punishment of such offences or protection against such threats", in the light of the "specific circumstances" in which that processing is carried out. The result is that the propensity of Member States to refer to "exceptional circumstances" and their technological aspirations to extensive securitization is indeed constrained. Yet, they are offered much leeway to define criminal offences and the "specific circumstances" in which the police's processing of sensitive data is authorized.

Passion and concept

The passion for security is pervasive in our societies. The classical EU law approach, based on internal market principles, individual rights and liberal values, certainly helps to challenge the securitarization tendencies and the regimes of exception that are spreading throughout Europe. It helps to various degrees. The internal market field is a strong legal and political field that seems to resist these tendencies.[61] In fields subject to high social pressure, such as migration and law enforcement, the Court of Justice seems to be prone to making concessions. Now, the question is whether the new Union discourse on security, framed in the language of "resilience", "strategic autonomy" or "a Europe that protects", and its associated policies, will have a supportive or, on the contrary, a taming effect on Member States' regressive tendencies.

There is no simple answer to this question. We shall have to consider the actual role of EU law in these different areas. So far, the Court of Justice has

60. Case C-205/21, *Ministerstvo na vatreshnite raboti*, EU:C:2023:49.

61. Compare with the dynamics in international economic law; see Benton Health, "The new national security challenge to the economic order", *The Yale Law Journal* (2020), 1020–1098.

been mainly reactive, relying on its own concepts and methodologies, i.e. individual rights and guarantees, the logic of derogation and conceptual autonomy of EU law. The time may be ripe for the introduction of a proper concept of security in European law and society, addressing the role of the State, the place of private powers, and notions such as "exceptional circumstances". Only this might allow us to contain the tendency to reduce the mission of the State to the right to provide security to society as a whole or to the State itself. As it is spreading throughout many jurisdictions in Europe today, the right to security does not seem to be bound up with the real life of individuals and social groups, but to follow its own "specific necessity".[62] It is undoubtedly one of the tasks of European lawyers to track this development and to reconnect, through law, security with reality.

62. This echoes Hannah Arendt's thoughts in "What is freedom?" in *Between Past and Future: Six Exercises in Political Thought* (The Viking Press, 1961).