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Reconnecting European Law to European Societies

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Abstract

This is a collection of two pieces concerned with the question of the relationship between European law and social reality but within a specific context in which, on the one hand, it is assumed that EU law has produced a form of disconnect with the reality of European societies while, on the other hand, today's European societies are seen as sites for irreconcilable divisions and production of distorted representations of reality. The first piece is about the method of EU legal studies and EU law in the current context of polarization of European societies. The second piece is an illustration of the 'disconnect' and 'distortion' in the area of security. It analyses shifts in Member States and the EU's conceptions of security, making the case that legal scholars should pay greater attention to these.

The two pieces have been published in a slightly different version. The first is published on the Verfassungsblog dated 19 March 2024 (https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/). The second was published in the form of Editorial comments in the second issue of the 2024 volume of the Common Market Law Review (https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/61.undefined/COLA2024022).

Keywords

EU law - Method - Social - Society - Critique – Security

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Loïc Azoulai holds the Chair in Law and Social Europe at the European University Institute, on leave from Sciences Po Law School. His work is devoted to Europe and its law, and to the ways different kinds of life people manage to live – or do not manage to live, given the laws of Europe. His main area of expertise is EU law, both institutional and substantive. His current matters of concern are migration, state domination and security, the ecological and digital transformations and the ways in which they reconfigure the social space, the place of religion in European society, as well as issues related to work and social suffering.

Introduction

This Working Paper is a collection of two short pieces. The first one is a contribution to a symposium on EU law methods organised by Vincent Réveillère (Aix-Marseille University). It was published on the Verfassungsblog on 19 March 2024 (https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/). In this series, EU law scholars were invited to engage in a reflexive exercise: I used it as a kind of self-critique. The other piece is in the form of Editorial comments, and it is published in the second issue of the 2024 volume of the Common Market Law Review (https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/61.undefined/COLA2024022). This piece has benefited from comments by my colleagues from the Editorial board of the CMLR. Moreover, both pieces have benefited from the comments of Claire Kilpatrick. Of course, all mistakes and confusions are mine alone.

These two pieces are concerned with the intractable question of the relationship between law and social reality but within a specific context in which, on the one hand, it should be acknowledged that EU law has produced a form of disconnect with contemporary reality while, on the other hand, social reality itself seems to be affected by a process of de-realisation in today's Europe.

The reference to a 'disconnect' may be disconcerting. It is not a way to advance that EU law was at any point more adjusted to reality and less involved in conflictive patterns of domination, alienation, and exploitation in society. It is just a way to account for a particular discomfort with traditional EU legal techniques and underlying conceptions that appear to be reductionist of matters of concern that people care about in today's Europe. It is also a way to orient EU legal scholarship towards a task that does not content itself with an external critique of EU legal structures but embarks, immanently, on thicker, broader, finer descriptions of social reality through law.

'Social reality' is not an easy reference either. It is used here as a kind of "vanishing reference", in order to point to the many current forms of distorting/dismantling/duplicating reality experienced through the complex eco-technological and techno-political system in which our lives are presently embedded. It is also used to refer to the psycho-sociological fact that many Europeans relate to their own conditions of existence in terms of loss of social standing, loss of control, loss of way of life, loss of soil, so that they reject any form of institutional representation of 'their' reality (distrust) and so that they seem to lose sight of the historical and structural preconditions on which their existence and peaceful coexistence depend (disaffiliation).

In this context, I wonder about the capacity of law, in particular EU law, to reconnect with social reality, being reflective of people's negative social experiences and perceptions; and, in turn, to contribute to the increase in critical reflexivity of European societies, with their fellow members being clearer on their structural chains of dependence and distinct forms of agency.

Is it realistic to expect this from law, EU law in particular? What kind of approaches and tools may help elaborate such a legal framework? I do not address these questions here. I merely point to them. There are many areas where these questions are worth investigating. Security is one of them. It is an area where EU law is struggling with a social and political discourse that claims to come to grips with the 'true reality' whilst giving rise to instrumentalisation and all sorts of phantasmagorias.

I

Reconnecting EU Legal Studies to European Societies

I should like to suggest that EU legal studies suffer from a disconnect with social reality. If we need a method, it is one that allows us to reconnect with European societies as a bustle of unsettled forms of life, from both an existential and social perspective. Departing from traditional institutional and constitutional approaches to EU law, while endorsing the critical turn in the EU legal studies, I will argue in favour of a new perspective.

No method. For a long time I would simply disregard discussions on method. I found myself implicitly endorsing Mauss' rather blunt statement: "Who is not able to do science, does the history of it, discusses method or critiques its real impact." I am not suggesting that I envisioned myself as a producer of scientific statements about law, as if I were able to cognize the 'laws' of European law. Rather, I was engaged in a theoretical-practical endeavour that consisted in providing the set of concepts and techniques on which the whole European construction could be based, striving to dissect as well as perfect them – driven, as it were, by the notion that European law was an element, even if limited and constantly thwarted, of emancipation from closed national order and confined political and legal thinking. There was no time or space for a characterization of method. Moreover, early on, I assumed that if we were to be serious about this original task, we – academics of my generation – had to learn and speak the language of the treaties, and more specifically the language of the Court of Justice, just as did the previous generation, but this time in a way that would allow us to dig deep into this language in order to recast it in a more consistent fashion. EU law was 'imagined' as this special language, reconciling abstract knowledge and institutional practice, having the capacity to embed the bustle of chaotic political, economic and social relations into simple legal formulas. This did not preclude us from importing other languages, including broad conceptions from philosophy, theories of justice and political theory. But it meant that method was to be understood as a kind of 'bricolage', relying on a heterogeneous repertoire of tools and concepts, developed as the result of all the occasions there have been to deal with the insurmountable contradictions European integration is based upon. My present interest in method arises out of a failure, following this path, in making sense of European integration not just as a grand political project but also as a genuine (largely damaged) 'form of existence'.

A quasi-transcendental system. European integration was originally conceived as an order-building enterprise. Its purpose was to build a new socio-economic order based on rooted domestic orders with a view to deeply affecting their conditions of reproduction, opening them and making them compatible with each other. What we have come to know as 'EU law' is the set of concepts, techniques and actors that would make this possible. This practically meant erecting a viewpoint above the fray of inter-states relationships, distant from the chaotic terrain of power relationships, social conflicts and cultural struggles while shaping them. From its inception, EU law was concerned with setting up a quasi-transcendental system, a sort of duplication of the 'real' process of integration – another version of it that would make it real and sustainable. The law of integration, as described by Pescatore, is not rooted in the grounded and chaotic experience of inter-states relations; it is "a world in itself". This world consists of conceptual building blocks, i.e. systems of meaning freed from any domestic or international legal anchors and, instead, referred to "a system, that is to say a structured, organised, finalised whole." Two basic operations are typical of it. On the one hand, nothing is alien to this world: any kind of issue may fall within the scope of EU law and come into its

terms. On the other hand, all issues are potentially divisible and commensurable in EU law terms.

A 'reality deficit'. Our scholarly work was devoted to explore this system, its underpinning assumptions, inherent inconsistencies and inner forms of transformation. What came out of this investigation is a sort of abstract world based on three main figures: a rights-based and self-organised individual, a value-based and ordered society and a rule-based multilateral world. It should be clear that these figures have helped improve Europeans' living conditions as well as their mutual ties and, even further, offer them a promise of individual emancipation and social harmony. However, the subsequent crises of Europe and the catastrophes we are experiencing, whether imminent or underway (climate change, pandemic, war), have revealed the limits of this construction. What has come clear is that this construction is a reduction of the real world. To be sure, any legal construction is reductionist in nature. It brings thick social and political issues back to thin legal questions. However, what is significant about EU law is that its basic concepts and techniques are designed so as to occlude an essential part of reality. Rights say very little about the real modes of existence and coexistence of Europeans, and they obscure their struggles to form what Guattari once called "existential territories". Values operate as a refuge against the crises of the everyday that manifest in a number of ways in today's Europe, from conflict to protest, from disillusion to resentment. Ruling the world is a way of distancing ourselves from our critical dependencies and essential vulnerability, and from the tears and injustices of the past. No doubt this system is largely responsible for the sense of unsettledness widely shared across social groups and individuals in today's Europe.

Matters of concern. What we need is a clear acknowledgment of this disconnect. We need a method that allows us to reconnect with European societies. The problem with EU legal studies is not so much that we have too much law and too little reality; it is that we have too little 'real' matters of concerns in our approach to law. By matters of concern, I mean salient societal issues that result from basic conflicts affecting Europe's interdependent societies. They concern conflicts about the material production of European societies (issues such as reproduction of life on earth, the socio-economic conditions of production, the maintenance of critical infrastructures) as well as conflicts about the self-understanding of society as a whole (issues such as the respective role of labour and care, the place of minority groups, the coexistence of citizens and aliens). How to recapture these matters in our field? This presupposes a clearer view of Europe's social setting. We are still lacking a refined comparative analysis of European societies. One thing is clear, however: European societies are enmeshed in ever greater and more complex webs of interdependence, including economic, technological, social, cultural and legal interdependencies. This generates the feeling that opportunities (to move, act, interact, think) have exponentially increased. Yet, on the other hand, these societies are ever more dependent upon complex techno-social systems, external resources and beyond-control natural processes. This may be experienced as a threat and generate a sense of insecurity or dispossession. The socio-historical structure of Europe has massive psycho-sociological effects on Europeans. Such effects shape Europe's social space in turn. The analysis of European societies should be carried on this twofold level, both socio-historical and psycho-social.

Place vs Condition. At the psycho-social level, Europeans seem to be struggling with a torn consciousness. On the one hand, they feel strongly about Europe's situated condition. Europe is a historically, culturally and politically situated entity. It is bound to its colonial past and structured in such a way that it is deemed to perpetuate unjust structures of power globally

and produce dominative, exploitative and destructive practices on its soil and elsewhere. On the other hand, there is the strong feeling that Europe does not provide the structure and meaning which may help each to find her own place in society, in the world and on earth. Many Europeans perceive their economic, social and moral position to be threatened by processes such as globalization, deindustrialization, mass migration, global warming or depopulation that Europe and its law seem to reflect and foster. This triggers powerful imaginaries about socio-economic downgrading and ecological collapse as well as destructive phantasmagorias about cultural displacement or demographic replacement. In other words, two spectres haunt Europe: an anxiety about its dominating condition and an anxiety about "placelessness". This may seem to manifest itself as a polarization between progressive groups (focusing on domination) and conservative groups (concerned about place). The present condition of Europe is that of an extreme polarization of all social relations, especially along this divide. However, both matters of concern reflect an existential rupture of meaning that affects all of the actors in society. Our scholarly work needs not be partisan. It should take into account anxieties on both sides. This question is thus: how to turn this existential crisis into critical knowledge?

"A way of critique". If we accept that the inner and everyday life of societies, and their current state of polarization, should become our focus, then we must give up on the project of providing constitutional or theoretical foundations to EU law. Our goal, instead, should be to critically engage with EU law. This requires both a theory of social reality adjusted to the current state of polarization of European societies and a theory of law that situates law within societies, as a reflective form of society. Such a move follows in the footsteps of critical approaches to law. A 'traditional' critical endeavour, but one that only recently been embraced by EU legal studies, is to examine EU law – its rules and doctrines as well as imaginaries and framings – as a device that intervenes in a social field that is already structured around power struggles and asymmetries. It presupposes that EU law legitimates and accentuates the asymmetrical terms of social ordering. Its inherent indeterminacy as knowledge and practice is bounded to a broader institutional and normative dispositive that is determined to set the terms of domination. The task of critique is then to discern in EU law various forms of domination, which may be theorized in terms of gender, racialist, classist or extractivist domination. This calls for new approaches based on distributive analysis as promoted by the 'law and political economy' movement or structural analysis as advocated by 'post-marxist' theories. It calls for analytical tools such as anti-essentialism and intersectionality as developed by feminist and race theories. This way of critique opens our eyes to some troubling implications of EU legal constructions: the sorts of economic, social and cultural injustices these may produce or perpetuate. However, it may not suffice. Whereas it timely responds to the concern about our concretely situated condition, it seems to be less equipped to address the other concern, the sense of "placelessness" that widely affects European societies. The latter dimension presupposes a renewed attention not just to the EU's dysfunctional structure and its social pathological effects, but also to the forms of life that persist in their being despite EU law's failure to grasp them and make sense of them. Another form of critical thinking emerges out of this attention.

An "anti-transcendental" perspective. The crux of the experience of European integration is no longer its institutional structures but the different kinds of life, real or virtual, people manage to live – or do not manage to live –, given the infrastructures, institutions, imaginaries and laws of Europe. Our work should attend to the lived experiences of people subject to Europe and its law. This draws from the "anti-transcendental" perspective that Amartya Sen developed in a different context. As for EU legal studies, this essentially means shifting the

focus from traditional questions concerning constitutional foundations, institutional design and forms of governance to questions about how social groups and individuals experience their concrete conditions of existence in Europe. Yet, it cannot be our aim to observe these lives as they unfold, not even to offer a description on how EU legal rules and concepts are experienced in the thick social world – this would require tools we do not possess, which are in the domains of sociology and ethnography. Rather, our aim is to investigate the ways in which EU law frames forms of life that exceed its current categories, and the debate on forms of life that goes with its framing. This implies a reorientation of the legal enquiry: we do not quit the legal text and its interpretation – as lawyers, we do not have 'real' objects to work with, but mainly textual materials – but, within text, we look for 'forms of existence' (social practices, cultural formations and modes of being) beyond 'structures of discourse' (conceptual frames, oppositions and underlying conceptions). It is a question of re-routing the analysis. The central issue is not the nexus between the indeterminacy of law and an over-determined social field, saturated with power relations. Our interest is now in the ambivalence that is to be found in social forms of life and how it is transcribed in ambiguous law. Europe's social setting is home to opposing imaginaries, contrasting ideas of justice, divided feelings, torn perceptions and ambivalent deeds. This is reflected in the proliferation of legal disputes, where conflicts are not just conflicts of interest or opinion but involve opposing ways of picturing reality. This concerns issues such as social suffering and destitution, state domination and coercion, migration, the place of minorities and religious faith, as well as questions concerning the coexistence of human and non-human forms of life. These are matters related to failed processes of socialisation, contested forms of identification and damaged ways of inhabiting the earth. In relation to such issues, political and legal claims are usually presented as "non-negotiable". They are not easily subsumable under the conciliatory language of EU law, framed in terms of rights and balancing of interests. We should not be anxious to suppress this polarisation just because it is challenging our pre-existing normative views.

Receptivity and reflectivity. How to make home to these claims and how to make them negotiable again? This seems to me the main methodological challenges we are facing now. Two bold moves are required. One is to increase the receptivity of EU law to individuals' and social groups' negative social experiences, whether these experiences come into the terms of EU law, avoid them altogether or strive to resist and subvert them. The other is to increase the reflectivity of EU law. The problem is not just to reflexively consider the ideological choices that are underpinning the conceptual schemes and techniques we rely upon; it is to make these schemes and techniques sensitive to individuals' lived experiences and critical understanding of own condition. The task that should occupy us is that of elaborating a proper legal framework that would allow picturing the broad range of lives lived in Europe and Europeans' own critical understandings of Europe. This would be one way to give a footing to these lives, hold them together and help each of these to regain a sense of her own place in society, in the world and on earth.

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II

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, 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

[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).

[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.

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 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

[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>.

[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).

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 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 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]

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[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 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.

[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.

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 fields that come from different institutional fields, based on a distinct sense of threat. One meaning 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 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 at both national and EU level, 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]

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[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*.

[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

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 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.

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 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.

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 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]

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*

[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.

[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.

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. 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]

[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.

[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.

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

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[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 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".

This is repeated at the borders. In *M.A.*, the point of contention was just 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 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

[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.

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

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 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.

[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.

[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).