Security and Liberty in the European Union: Foreword

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WHY DO LIBERTY AND SECURITY MATTER? WHY HAVE THEY BEEN SEEN AS POLAR opposites? And why is the tension in reconciling individual and collective liberty with collective security so problematic? Without security, liberty is impossible. Without liberty, as we understand it in the European Union (EU), democracy is jeopardised. There are many facets to understanding how the domesticisation of security and the securitisation of policy arenas, previously seen as domestic politics, challenge our understanding of the meaning of liberty, democracy, fundamental human rights and open governance. The EU has increasingly taken initiatives in the area of freedom, security and justice that expand the reach of cross-border cooperation by law enforcement agencies in ways that compromise the ability of the elected representatives of the people – national parliaments and the European Parliament – to hold national governments accountable for their decisions.

Soft law and bilateral agreements side-step traditional institutions, sometimes inevitably determined by compelling operational imperatives. Governments typically justify these in the name of security – both private and collective. Simultaneously, governments deploy new technologies of surveillance and automated information exchange in seemingly unthinking ways, again in the name of enhancing individual and collective security. Paradoxically, this has not led to a boost in citizens' trust in government and its ability to maintain core values and minimise threats and insecurity. Instead, there is suspicion and cynicism. This arises from the logic of the multi-purpose use of the technologies and the way in which they can be mined without the citizen knowing or being required to give consent. It arises also because many different strands of policymaking have become mired in a discourse of securitisation where new 'security' measures such as biometric radio-frequency identification (RFID) smart cards have been adopted by governments in ways that raise the spectre of centralised data bases of everyone's fingerprints.

In many states, fingerprinting is associated with criminal activity rather than with the verification of the authenticity of the identity of the person providing that fingerprint. In the context of the EU's emerging migration and asylum policies, fingerprinting is clearly associated with a discourse of 'them' and 'us'. This in turn underscores concepts of risk, insecurities, trusted insiders and not-trusted outsiders. In brief, over the past five years, deliberation on liberty and security reveals that these concepts need to be disaggregated to be better appreciated and in order to better understand how and what appropriate measures might be implemented in the name of security for liberty.

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This special issue focuses on some of the issues arising in Europe as member states and the EU Commission, Council and European Parliament have struggled with a welter of external pressures to securitise the management of the EU's external border. In so doing, older internal borders have been resurrected, and newer insecurities have arisen as cross border information exchanges in digi-space have proceeded. Arguably the European Parliament, EU Ombudsman and data protection supervisor and his national counterparts have responded strongly in order to assert the cause of liberty, individual freedom, collective fundamental rights and data protection. National parliaments have lagged behind and legal regulation continues to be outpaced by accelerating change and the challenges to liberty posed by the 'security' technologies. Why and how this has happened is addressed in this special issue.

The special issue itself was inspired by and reflects many of the core concerns of the CHALLENGE Framework Six Research Programme. CHALLENGE (The Changing Landscape of European Liberty and Security).[1] It began in 2004, after the Convention on the Future of Europe had deliberated, and ended just before the seventh direct elections to the European Parliament in June 2009. CHALLENGE focused on the scientific discourse around policy recommendations and the challenges confronting the EU in developing its territory as an area of freedom, security and justice subject to democratic accountability, respecting the EU Charter on Fundamental Rights and rooted in the shared values espoused by the concept of four freedoms (movement of persons, goods, services and capital) and boosted by the fifth freedom – that of knowledge. As suggested by the scientific officer for the project, Angela Liberatore (2007), the "paradoxical, two-sided nature of a number of technologies – namely surveillance technologies – and the different modes of using knowledge and expertise in democratic decision-making are at the core of the relations and tensions between liberty and security".

CHALLENGE was funded by the Directorate General for Research of the European Commission. Its aim was to promote and facilitate a more responsive and responsible assessment of the rules and practices of security in Europe and beyond. It focused on the implications of these practices for civil liberties, human rights and social responsibility. Twenty-three universities and research centres from all across Europe participated in the project which concluded with an art exhibition 'State of the Heart' held in Brussels (See Annex of this special issue pages.

When CHALLENGE began working in 2004, security concerns were reflected primarily through the lens of border management, making it more effective – through Frontex, Europol, rapid reaction forces and better information sharing across borders. The tools for realising this, many of which used new technologies, were largely uncontested but quickly became mired in fears about ubiquitous surveillance, Big Brother and the end of liberty. Reconciling operational needs and tools with political security goals is difficult and traditionally bound up with border controls on the flow of people, surveillance of other (hostile) countries, and internal identity checks on citizens and foreigners within a country's borders. The vision of security has been transformed by technology, transnationalisation and globalisation and has thus come to be seen not merely as a form of protection, but as (increasingly privatised) risk management.

For sociologists, this has been interpreted as a great transformation rooted in modernity but realised after the Cold War as security controls switched from borders to people, and technological advances were presented as border technologies of control to anticipate and prevent future disasters by monitoring the future. Accordingly, the CHALLENGE project juxtaposed philosophical discourse and pan-optican visions with a pragmatic

[1] The archived website for the CHALLENGE Project can be found at http://www.libertysecurity.org.

mapping of the reality of securitisation and linkage of law enforcement agencies. It scrutinised the growth of exceptionalism that curtailed the exercise of liberty. It explored how this in turn eluded democratic controls, how (then) new biometric technologies redefined identity, how they evolved as part of a strategy to promote interoperability among European databases for border and immigration control purposes and also as a tool for combating international organised crime and terrorism. The Prüm Treaty (2006) allowed EU authorities to exchange information (including DNA) and afforded mutual access to criminal files. Whereas the power of national authorities to collect personal information is limited by obligations to protect individual rights based on EC law, privacy, non-discrimination and data protection, many principles regarding purpose limitation and 'proportionality' of 'information' were soon called into question by the use of the term 'security' as a justification for measures having potentially far-reaching effects, including those that compromise democratic practice, ethical values and legitimacy.

From 2004 steps were taken to boost information exchanges under the Visa Information System (SIS) and Schengen Information systems (SIS II). From October 2006, EU nationals travelling to the USA and lacking machine readable passports had to apply for a visa, and be finger printed at the US border. The management of an entry-exit system was on the EU's agenda in 2007, along with amending and expanding Frontex's remit and the position of Europol and Eurojust. The European Data Protection Supervisor's office made several important interventions to highlight risks. CHALLENGE members appeared before the LIBE Committee (on Civil Liberties, Justice and Home Affairs) of the European Parliament and national parliamentary scrutiny committees to highlight dangers inherent in outsourcing data processing, and stressed the need for proportionality and respect for the law. Simultaneously, border management strategies proceeded apace as border controls were externalised to neighbouring states (as at Eurostar terminals and in North Africa) and illegal migration, trafficking and asylum pressures grew. The movement of people within the EU (including the Roma, for example) also created problems in different member states which CHALLENGE partners explored. The security technologies for cross-border cooperation and information exchange are neither risk nor value-free, and liberty can be compromised inadvertently or using the argumentation of exceptionalism and the practices of risk management.

In short, the CHALLENGE project focused on major contemporary issues affecting the international community but reflected particularly in the EU where these pressures required, but outstripped, the capacity of member governments to re-appraise their goals. CHALLENGE engaged actively with policymakers at all levels in constructive and sometimes highly charged and heated debate. Through this debate and the academic scientific research carried out, interest was fostered among younger scholars seeking to develop knowledge about some of the most urgent problems confronting society today. Its visualisation was captured by young artists in an exhibition at the Berlaymont at the end of the project in May 2009. The artists sought to provide a space for exploring the contested terrain on which liberty and security are approached in a context framed by discourses of threat and danger. The exhibition featured the works of Charlesworth, Lewandowski & Mann; Charlie Coffey; Richard Hards; Ilias Poulos and Mark Titchner (see annex at the end of this special issue).

This special issue reflects but a fraction of the CHALLENGE endeavour. The development of critical knowledge and insight is essential to promote informed, joined-up thinking about the underlying scientific, technological, ethical and socio-politico-legal assumptions that challenge us to rethink how we define ourselves and how we visualise, value and protect liberty and security. The papers in this special issue, moreover, address not only the risks to liberty and security posed and managed by those responsible for border issues, but expose the problematic nature of trying to manage potentially uncontrollable risks to

liberty and security posed by climate change, and by the dependence of our critical infrastructures and ambient environments on external energy supplies. The special issue takes the challenges to liberty and security beyond the parameters of institutions and authorities within the EU to those that are unseen (weather patterns) and those that may be unpredictable.

The special issue therefore seeks to provide insight into some of the issues that pre-occupy those whose view of security is exemplified by border management. But is also seeks to show that the strategy has inevitably been informed by an appreciation of risk that is territorially bounded. Over the past few years, awareness of the risks associated with cyber/digi-space and climate change have escalated. Those responsible for the management of security and both domestic and trans-border civil emergencies have to deal with other types of risks that may also precipitate greater flows of people from within, as well as outside. These risks are far less amenable to the kind of tools and thinking that has determined much of the EU's and its member governments' responses to security this decade.

The special issue EU begins with the more traditional approach to understanding the drivers of security dangers, vulnerabilities and responses to the identification of threats to liberty and security.

Christian Kaunert addresses the issue of the emerging EU common European asylum regime from the time of the 1999 Tampere summit which was a critical milestone in the history of the realisation of an area of freedom, security and justice. His paper focuses on the four main directives after first exploring the politico-legal background to the establishment of the asylum policy which had its origins in the pre-2001 period. He pays particular attention to the role of the Commission in navigating the challenges of the 'war on terror' which permeates much of the member governments' discourse in order to ensure that the asylum policy remained within the purview of the Geneva Convention.

Hannah Morgan Cross reflects on the development of EU border and immigration policy. She describes the impact of the EU migration regime on West African clandestine migrants. She shows how security and justice issues in the construction and implementation of asylum rules by the EU have been managed, revealing that an implicit securitisation has been prioritised, notably by Frontex. Along with the externalisation of border controls, she detects a security rationale where migrants from this part of Africa are concerned. In analysing the economic realities as the migration driver for clandestine West African migrants (notably from Senegal) across the sea route from the West African coast to the Canary Islands, she discusses the impact of EU repatriation measures and steps to prevent migration.

Chris Baker-Beall examines the discursive construction of terrorism and counter-terrorism. His argument focuses on the issue of using the construction of a discourse of fear, predicated on terrorism, which he suggests is used to legitimise the EU's security role and to 'control' society. He deploys critical discourse analysis (CDA) as a method through which to analyse the EU's official counter-terrorism policy documents. The focus of the article is on the construction of two meta-narratives linked to the production of fear. The first is the construction of the 'terrorist other' as a threat to European 'identity, 'society' or 'civilisation' and linked to the risk represented by living in an 'open' or 'globalised' society. The second is the construction of the terrorist threat as 'new' and 'imminent' which, he argues, leads to the introduction of special measures. This in turn, he suggests, has led to the conflation of the 'immigrant other', the 'Muslim other' and the 'terrorist other', into a single 'threat' and so led to the securitisation of EU migration and immigration policy, something which the CHALLENGE researchers have systematically probed from socio-legal and political

perspectives over the duration of the project. Beaker Beall concludes that the discursive construction of counter-terrorism policy in turn raises serious questions about the balance between liberty and security within the EU.

Following on from Baker-Beall's article, Rut Bermejo examines the discourse on immigration control and securitisation with a view to detecting the impact of the latter on the former. She addresses the perception that immigration controls have been boosted owing to the threat of terrorism and uses the analogy of 'fortress Europe'. The 1980-1992 period is crucial for understanding EU action on terrorism and migration. The term 'fortress Europe' was first used in the late 1980s and early 1990s within the EU (then known as European Community) to justify the removal of the internal borders and restrictions that added administrative and financial costs to the free movement of goods, services, persons and capital; and the associated reinforcement of a common external border around the then much smaller EU perimeter. Steps to create common customs and more controversially border controls (like passports, migration, refugees, asylum and policing) for the common external frontier grew. Even then, measures to promote cooperation among EC member governments to combat indigenous and international terrorism go back to the 1970s: Ireland/UK (IRA), the Netherlands (the Moluccans), Germany (Baader-Meinhof and the Red Army Faction), Italy (Black and Red terrorism) and Spain (ETA) all faced indigenous violence. Today's agencies like Europol, Eurojust, Frontex and the Rapid reaction teams, and joint investigation teams had their origins in deliberations twenty years ago when the mere suggestion of cooperation, let along integration, in these matters provoked anxiety over the implications for national sovereignty, and scorn from those who saw such steps as nascent federalism. Cooperation on migration, asylum and refugees also has a long history: Eurodac is not a recent innovation. The problems over extraditing and prosecuting indigenous as well as international terrorist suspects and criminals led states to create the Dublin Convention. Schengen was presaged by other developments then : for example by the Kangaroo Group in the European Parliament and by others, like Altiero Spinelli creating counterpart treaty amendments (culminating in the European Parliament's Draft treaty establishing the European Union in 1984) to expedite the removal of internal borders to realise and Single European Market, a critical debate between economic liberalisation and constitutional federalism that was sometimes lost in the discussions of two-speed Europe. Bermejo shows how during this decade, policy to develop border controls, primarily around the longer external border, has developed - first impelled by migration from the East as the Soviet Union disintegrated, and second from the South-East and South. She concludes that the absence of clear progress towards a common immigration policy cannot be directly linked to the terrorist threat but to states' reluctance to develop it.

Ariadna Ripoll Servent examines the tensions between what the European Parliament wants to achieve in terms of substantive change to draft EU legislation in the Area for Freedom Security and Justice (AFSJ). She compares the European Parliament's actual impact on the Returns Directive and Data Retention directives. She does so using the example of policy-image as a way to understand change in policy-making. Policy-images are defined as perceptions or understandings of factual information. Policy-images conflate information with emotive responses. She shows how the European Parliament and its central committee in the AFSJ area – the LIBE committee – have tried to influence policy in a given direction, and so exercise the constitutionally embedded right of the European Parliament to play a role as part of co-decision in these fields. However, the results are mixed owing to machinations that relate to relative power struggles between states and parties and different European Parliamentary committees rather than to the perceived merits or otherwise of the original proposals. As a result, the ability of the European Parliament to be as influential as might be assumed is moderated just as much

by MEPs as it is by Council indifference which characterized the Council's attitude to the European Parliament before it acquired rights to co-decision in the AFSJ area.

The institutional focus of the special issue is also supplemented by a range of EU/country specific (Austria, UK, France and Russia) case-studies. In the first of these case-study articles, Alexandra Schwell takes up the theme of the communication of identity and security. Her article examines the impact on identity and perceptions of security of the incorporation of a former security risk (the Central and East European countries, CEECs) into the EU and the resultant securitization of Schengen. The abolition of border controls in the course of the Schengen enlargement, she suggests, led to ambivalence on the part of older EU members who equated criminal activity and transfrontier crime as security risks with "located in 'the East'". The article argues that the construction of security risks does not necessarily correspond to their threat potential, but that they can be instrumentalised and utilised by competing actors for various aims. By scrutinising the Austrian Ministry of the Interior, Schwell shows how West European security-political and professional actors reacted to the challenges of the 2007 Schengen enlargement. She also highlights how the sudden downplay of 'the East' as a security risk, immediately after the opening of formerly communist societies in Eastern Europe that had previously been key threats to Austria, was expressed differentially in public and media discourse. Drawing on the concepts of securitisation and desecuritisation, and comparing the Austrian Ministry of the Interior and the Austrian tabloid press, the article shows how the tabloids' securitising strategy proved to be more successful than the Ministry's desecuritising strategy.

Identity and risk are at the heart of David Murakrami Wood and William Webster's article on surveillance for security. They address the issue of how securitisation practices and the domestication of security normalise surveillance, something previously closely linked with measures to track and combat external security threats. The result, they suggest, alters the landscape of liberty and security. They argue that the abundance of hazards in late-modern society change how risk and security are viewed and the extent to which individuals are prepared to sacrifice or see constrained liberty and its associated values and practices in order to minimize the risks that jeopardise their personal and collective security. Their empirical data is based on video-surveillance and electronic public registers in Britain (the 'bad example' influencing EU policy). The more de-contextualised a risk is, the more likely a security technological response (such as camera surveillance) appears to be accepted. This is something commonly presented in the discourse on the securitisation of domestic matters, such a vandalism. They show that because links between that response and the storage of surveillance data for use in other contexts are not clearly made, so the way in which liberty becomes 'securitised' and further constrained is not immediately obvious.

Paul Stephenson and Edward Hunter Christie show how EU security is endangered not by people crossing borders but by unpredicatability in the atmosphere and unpredictability in respect of the supply of a commodity on which EU states are dependent – energy. Christie scrutinises in detail EU-Russia energy supply issues and concludes with a suggestion to strengthen the EU's collective bargaining power vis-à-vis supply countries. His argument proceeds from the proposition that rational energy vulnerability measurement and modelling should inform policy; and that there should be legislation to deter member states from developing energy infrastructure projects by one or more states that have the effect of increasing the energy vulnerability of one of more other member states.

By contrast, Stephenson looks at climate change. With reference to how France coped with the heatwave of 2003; an event considered to be the greatest natural catastrophe in Europe for 50 years. He argues that failure to adequately protect the most vulnerable of

citizens was aggravated by political mismanagement and other politico-cultural, societal and psychological factors. From this he deduces 20 obstacles to ensuring effective response in the face of environmental or weather-related threats, distinguishing between state-institutional, mediated and individual-community barriers, most of which have a cultural dimension. Raising questions about crisis management, he suggests that policy-makers take these factors into account in order to improve preparedness for environmental threats in the EU and to strengthen community capacity to respond to crises. Stephenson shows how human security is no longer principally about military, but also environmental threats. He argues that security is not just about protection against terrorist threat but embraces all aspects of physical safety. Rather than arguing that this is a consequence of the internalisation and domestication of a securitisation rationale and debate, he shows the role of human agency in creating and minimising risk and managing security risks. He calls for a broader definition of EU internal security to include the management of human protection, collectively and individually, from environmental rather than military threat. He develops this in relation to the idea of 'active welfare' based on the idea of *individual sovereignty,* individual responsibility and action, changing culturally-embedded attitudes towards heat, risk, state protection and the elderly, and re-appraising civil emergency response and critical infrastructures in relation to the vulnerabilities of society.

The special issue also contains two commentary pieces, the first of which by Angela Liberatore, from the European Commission Directorate General for Research and scientific officer for the CHALLENGE project, reflects on transatlantic relations between the EU and the USA in the context of liberty, security and power. Liberatore suggests that there needs to be a degree of convergence between the policy and attitude of the EU and the USA to ensure that the international order stabilises and that values such as democracy and fundamental rights are not undermined. The second commentary, written by Matteo Pallaver, starts off by asserting that the Lisbon Treaty, as it was first negotiated, is dead and the resulting institutional stalemate has the potential to kill the entire integration process. He argues that the European Security and Defence Policy (ESDP) needs effective institutions, shared rules and clear priorities. In making his case, he derives his arguments from contrasting positions taken by a policymaker, former EU Commission President at the time of the ESDP's launch, and former Italian Prime Minister, Romano Prodi, and an academic, Professor Jolyon Howorth. The question is, can the ESDP realise the EU's ambition to be a reliable and effective player in world politics by acquiring greater resources, capabilities and stronger alliances, or will politics forever inhibit its realisation?

The special issue concludes with 3 book reviews examining a range of recent publications in the field of liberty and security, including Andrew Geddes, *Immigration and European Integration: Beyond Fortress Europe* (2008); Stephen Castles and Mark J. Miller, *The Age of Migration* (2009) and Maria Fletcher, Robin Lööf and Bill Gilmore, *EU Criminal Law and Justice* (2008).

As the guest editor, I have been privileged to work with an assiduous and talented editorial team without whom, this special issue would not materialised. My thanks to them, to Eamonn Butler especially, and to all the contributors for making it possible and for showing how much the issues of liberty and security impel us to rethink the kind of societies we are creating.

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