

The Constitutional
Structure of Europe's Area
of 'Freedom, Security
and Justice' and the Right
to Justification

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Introduction

I. THE IDEA OF THE BOOK

THIS BOOK¹ EXPLORES the implications of freedom as a non-domination-oriented view for understanding EU security regulation and its constitutional implications. When I began writing this book, the European Schengen system was under extreme pressure, from recent terrorist attacks across Europe to the refugee and migration ‘crisis’ which escalated in 2015 and has developed into an extreme challenge both to tackle and to resolve. It seemed as if the idea of exploring a constitutional theory for the Area of Freedom, Security and Justice (AFSJ), would be something of a utopian project. Yet the expanding EU security agenda is at present often advanced through the path of administrative law, in contrast to the constitutional trajectory. Add to this the prolonged financial crisis that began in 2007/08, which continues to cast a long shadow on the future development of EU integration, and which suggests that Europe needs to ‘re-invent itself’ beyond the sphere of economics. Therefore, it is precisely because of the current uncertainties regarding the progress of the EU and the constitutional law project that a constitutional take on the AFSJ is of particular importance. This book zooms in on the concepts of non-domination and justice theory in the context of the trajectory of the AFSJ. The book discusses what the AFSJ means, and why it represents a fascinating example of contemporary constitutional law with interacting layers of security regulation, human rights law and transnational legal theory at its core.

Specifically, the book takes as its starting point the claim that the European AFSJ is currently being constructed through the notion of security, while simultaneously being mainstreamed with the EU legal constitutional framework.

¹Some of the early thoughts of what is now this book have appeared in Ester Herlin-Karnell, ‘The Concepts of Non-Domination and Justification in EU security-related context’ in Ester Herlin-Karnell and Matthias Klatt (eds), *Constitutionalism Justified* (Oxford, Oxford University Press, 2019), forthcoming; Ester Herlin-Karnell, ‘The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe’s “Area of Freedom, Security and Justice”’ (2017) *Transnational Legal Theory* 79, Ester Herlin-Karnell, ‘Two Conceptions of Justice in EU Constitutionalism. The shaping of security law in Europe’ (Amsterdam, VU University of Amsterdam, 2014; and Ester Herlin-Karnell, ‘Europe’s Area of Freedom, Security and Justice Through the Prism of Constitutionalism: Why the EU Needs a Grammar of Justice to Improve Its Legitimacy WZB’, discussion paper, SP IV 2014–801, Berlin (2014).

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This poses challenges as to what kind of security the EU specifically sets out to establish, and how it can be reconciled with the notions of freedom and justice. The book serves the purpose of critically examining and exploring the impact of a justice-oriented approach in the AFSJ sphere by linking the long-standing debate on justice to what specific justification the EU owes to both the citizens and the Member States when enacting new security-dominated legislation. But first I should explain what I mean by an AFSJ. In legal terms, the EU sets out to establish an AFSJ (Article 3 TEU and Article 67 TFEU) and this domain concerns security issues, border control, anti-terrorism law and crime, and hence embodies a new and sensitive field in the EU, one which is currently being transformed from largely being an isolated justice and home affairs space, to that of a European security regulation hub. The work assesses the AFSJ through the lens of constitutionalism, by firstly constructing the building-blocks for understanding security regulation in Europe and, secondly, by looking at the practical legal examples of security regulation, counter-terrorism and criminal law, and migration law, as representing salient examples of policy areas that need to be tackled through the prism of justice. The book sets out to argue that the balance between freedom, security and justice, and how this balance is being struck, is a question that is best approached through the framework of constitutionalism.² I will try to tell the story of the development of the AFSJ, and why a theoretical and legal theory understanding of it is lacking, and go on to address the issue of how it could be improved and/or achieved.

The book suggests, borrowing from Alon Harel and others, that the republican vision of freedom as non-domination is in line with the global constitutionalism project individuals do not live ‘at the mercy’ of national constitutions.³ In Harel’s view, freedom does not merely require that rights be not violated; it also demands that these rights be publicly recognised, in which the global norm contributes to freedom from static constitutions. This book sets out to use a similar template of the value of constitutionalism as its starting point. It does this by adopting the benchmark of freedom as non-domination in order to view justice as ‘non-domination’ in the AFSJ context, and how it could be achieved through attention to a right to justification in the AFSJ setting. The right to justification, then, and in line with Rainer Forst’s theory, is intimately connected to justice-centred reasoning, and allows individuals equality and the right to justification for any decisions that concern them.⁴ The book builds on this and goes on to argue that there is a connection between the notions of justice and justification, and explains why their full comprehension enhances the legitimacy of the EU’s AFSJ project. It argues that the notion of justice, despite its contested nature, offers a helpful lens for viewing the AFSJ as part of

² Alon Harel, *Why Law Matters* (Oxford, Oxford University Press, 2014).

³ *ibid.*

⁴ Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Cambridge-Malden MA, Polity Press, 2014).

the EU constitutional landscape. In addition, it contends that we need to analyse the notion of justice in the AFSJ by starting from the position of security as domination.

But what does it mean to refer to the concept of justice in this context? For John Rawls, justice is a condition that requires that everyone be allocated a fair share of the benefits in society if people are to be bound by an obligation of a fair share (the ‘Duty of Fair Play’).⁵ According to this view, the beneficiary has an obligation to provide a fair return.⁶ However, Rawls argued that only when the system is just can obligations of fair play apply. For him, we can never be bound to support or comply with unjust arrangements.⁷ Thus, while justice is a highly contested concept, this book argues that it is nonetheless still a useful one. After all, how could the EU construct an AFSJ space without a shared sense of justice and solidarity? Why should justice be debated at EU level at all, rather than in the different spheres of justice of the Member States themselves, one may legitimately ask? It is true that Rawls, when constructing his basic structure of society, did not explicitly discuss justice in the global, or even in the international, arena. As Forst argues, though, there is good reason to believe that Rawls’ theory of justice could be extended beyond the nation state, provided that we have the right constitutional toolkit to do so.⁸ Central to this tool kit is the link not only between justice and justification, but also with that of legitimacy. Hence, the question of legitimacy will run like a thread throughout the book and it will be suggested that the constitutional structure – properly understood – could be anchored in a holistic reading of the AFSJ in which it is seen as part of the EU constitutional venture and with several global elements. Moreover, by looking at the meaning of ‘non-domination’ as a realisation of justice, as I argue throughout this book, this will help us to link the rather abstract right to justification to the more ‘concrete’ proportionality test, and will confirm the need for both ex ante and ex post checks of the EU legislative domain.

II. THE STRUCTURE OF THE BOOK

In this section, I will set out the structure and underlying idea of the book in more detail. The book seeks to construct a normative framework for understanding

⁵ John Rawls, *A Theory of Justice* (Cambridge MA, Harvard University Press, 1971) discussed in John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge, Cambridge University Press, 2001) 5–8.

⁶ Simmons (ibid), and see, also, Andrea Sangiovanni, ‘On the Relation Between Justice and Legitimacy: A Framework for the EU’, paper presented at the workshop Towards a Grammar of Justice in EU Law, 6–7 November 2014, at the VU Centre for European Legal Studies and Access Europe Workshop.

⁷ Simmons, *Justification and Legitimacy* (2001) 5–6.

⁸ Rainer Forst, ‘Transnational Justice and Democracy: Overcoming Three Dogmas of Political Theory’ in Eva Erman and Sofia Näsström (eds), *Political Equality in Transnational Democracy* (Basingstoke, Palgrave Macmillan, 2013) 41–59.

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the parameters of the AFSJ. As already mentioned, in so doing, the book aims to use the notion of non-domination as the normative grounding by which to understand the emerging AFSJ space by linking it to the function of justification in the EU security context. Hence, the book charts the broader contexts of justifications beyond the nation state, and asks what conclusions we can draw from them in the setting of the AFSJ. In doing so, the book critically examines and explores the impact of a justice-oriented approach to the AFSJ.

A constitutional structure, as Aharon Barak explains, creates the required nexus between constitutional language and the implications inferred from it.⁹ The constitutional structure is then based upon a constitution's architecture. At its heart, the EU has its constitutional construction in its commitment to human rights, democracy and the rule of law. As Mattias Kumm has argued, the constitutional character of EU law should be understood as a debate about how to understand the conditions of constitutional legitimacy and European authority.¹⁰ Moreover, a constitutional thinking of justice goes to the heart of the question of how to address the current EU crisis and the increasing demands for an improved democratic yardstick and 'better regulation'. But most importantly for this project, it explores the constitutional structure of the AFSJ and what justice means in a security-related context.

A. Part I

Part I of the book explains the constitutional make-up of the EU and places the AFSJ project within the wider EU constitutional context. It does so by briefly outlining how much of the EU venture is crisis-driven, and how the many layers of EU integration are interrelated and overlapping. It situates the book within both the context of the broader European political landscape and the many constitutional challenges that the EU is currently facing. This part of the book is theory-oriented in that it uses the EU security discourse to demonstrate that, when measuring freedom against the benchmark of non-domination, the EU's security measures are presently close to what could be characterised as 'domination'. This is necessary in order to supply the normative base upon which the AFSJ components follow. After all, much of the EU's action is grounded in a preventive approach through the use of a security vocabulary.¹¹

⁹ Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge, Cambridge University Press, 2015).

¹⁰ See Mattias Kumm, 'Constitutionalism and the Cosmopolitan State, An Integrated Conception of Public Law' (2013) 20 *Indiana Journal of Global Legal Studies* 605–28.

¹¹ See, for example, Kaarlo Tuori, 'A European Security Constitution?' in David Jenkins, Amanda Jacobsen and Anders Henriksen (eds), *The Long Decade: How 9/11 Changed the Law* (Oxford, Oxford University Press, 2014); Christian Kaunert, Sarah Léonard and Patryk Pawlak (eds), *European Homeland Security: A European Strategy in the Making?* (Abingdon, Routledge, 2012); Massimo Fichera and Jens Kramer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Cambridge, Intersentia, 2013), Cian C Murphy, *EU Counter-Terrorism: Pre-Emption and the Rule of Law* (Oxford, Hart Publishing, 2012).

This is achieved by setting out the key concepts in, predominantly, republican theory as being particularly relevant in the security context.¹² This introductory part then discusses what this means in both the concrete AFSJ context and in the EU setting more broadly by discussing the question of non-domination in the specific setting of legitimacy, and addresses how the two questions are related. The introduction sets out the legal and political set-up of the AFSJ and the broader questions that it asks. The second chapter looks at the theoretical parameters for understanding non-domination in political theory, and how it could be translated to the EU-AFSJ context by turning to security regulation. These chapters lay the groundwork for the Part II, which looks at why the question of justice is tied to the right to justification and the legitimacy process.

B. Part II

Part II scrutinises what it means to speak of an AFSJ area that both respects and fosters a common sense of justice. It explains why justice, both in the AFSJ context and beyond, should be seen as a constitutional question and not merely as an administrative concept of the right to access to justice in concrete court cases.¹³ In other words, the chapter argues that justice, as an overall ambition, should be reflected in the overall architecture of the AFSJ project. In doing so, the chapter looks at the contested concept of justice and discusses the question as to how justice could become more than simply an administrative notion. In addition, the chapter investigate the idea of a constitutional concept of justice, and explores it in the context of rights-based judicial review and explains why constitutionalism matters for the construction of an AFSJ. Moreover, this part of the book examines the connection between justice and justification, and explains why their full comprehension enhances the legitimacy of the AFSJ project. This part is, admittedly, fairly abstract, in that it scans the main theoretical issues and scholarship¹⁴ for understanding justice and justification (details in chapter three), but the questions outlined in this part of the book will be applied to the practical examples supplied in Part III. Chapter four looks more concretely at the link between justice and justification, and how these could be translated in the idea of proportionality. In particular, this part sets out to argue that the theoretical grounding of the right to justification, and its clear link to

¹²See, for example, Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

¹³On critical justice in legal context, see Sionaidh Douglas-Scott, *Law after Modernity* (Oxford, Hart Publishing, 2013) and Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge, Cambridge University Press, 2010); see, also, Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Chichester-New York, Columbia University Press, 2012).

¹⁴See, for example, John Rawls, *A Theory of Justice*, rev edn (Cambridge MA, Harvard University Press, 1999), and see below for further literature review in ch 3.

justice reasoning in the AFSJ context, could and should be linked to the practical use of the principle of proportionality in EU law (which is practice-dependent). In addition, it argues that proportionality – in broader constitutional terms – is best seen as an overarching principle for understanding the constitutional conundrums facing the AFSJ. The AFSJ security focus is assessed against the yardstick of reasonable disagreement and the question of which justifications are ‘good enough’ by turning to the principle of proportionality. Hence, the book looks at proportionality both as a mechanism and as a method, and, as such, one which is closely associated with the rule of law – in order to understand good governance and the underlying architectural balance. In advancing this argument, I set out to demonstrate the actual implications and need for an increased use of proportionality in AFSJ cases, which unites the desire for justice as an expression of the general right of justification with the EU regulatory endeavour to ensure good governance in a broad sense.

C. Part III

Part III looks explicitly at how the EU principle of proportionality might serve as a principle for balancing freedom, security and justice, by examining the recent important cases that add to the understanding of the AFSJ and its constitutional significance.

Specifically, this part uses proportionality as a method for testing the robustness of the reasons given in decision-making, in terms of both legislation and adjudication. Chapter five explores these questions through a mixed normative and empirical approach. It uses a case study (or hands-on approach). In doing so and thereby testing the propositions outlined in this project, the book turns to two areas as useful testing grounds for the implications of constitutional justice in the AFSJ. It examines two areas, admittedly moving targets, of particular importance: the EU’s response to the refugee/migration crisis, and the ongoing EU fight against terrorism and crime. The practical cases are supplied as illuminating examples of the delicate question of justice and justification, and the quest for legitimacy.

Both examples seriously challenge the EU’s legitimacy claim. The chapter also tentatively discusses the extent to which the Charter of Fundamental Rights successfully provides the groundwork for a right to justification in EU decision-making, particularly with regard to how the proportionality principle is applied.

Chapter six addresses the difficult question of how the constitutional framework outlined in this book works when applied in the multi-speed context, in which not all the Member States are on board the EU ship of integration. This means that AFSJ co-operation operates in an archipelago-like landscape. For example, the UK and the Republic of Ireland have an option to opt into the AFSJ legislation, but have, as their default choice, an exemption from AFSJ legislation (although the UK is leaving the whole EU project, it has signalled its

interest in remaining in security co-operation).¹⁵ Denmark has opted out from the whole AFSJ acquis. How can this fragmented landscape be kept (and hang) together and contribute to the establishing of an AFSJ area within a constituent framework of constitutional rights? There are two concerns here: legitimacy; and constitutional rights. Does constitutionalism pre-suppose a global or European environment? Expressed differently, the chapter briefly assesses the distinctive character of proportionality in this regard as a balancing mechanism. It discusses it in the broader framework of differentiated integration looking at it in order to place the AFSJ in context.

Chapter seven sums up the argument.

III. WHY CONSTITUTIONALISM MATTERS FOR CONSTRUCTING THE AFSJ SPHERE

Before exploring the questions as outlined above, perhaps it is warranted to discuss briefly why constitutionalism is important here. This section sets out the development of the AFSJ by exploring it from the perspective of constitutional law and the need for a clarification of what kind of AFSJ space could adequately ensure justice. The hope is to demonstrate that a turn to justice as a theoretical concept could help the EU in framing the questions that it ought to be asking and, as such, are needed for the development of the AFSJ domain. A constitutional reading of justice would then be one that integrates Treaty-based values, such as a high level of human rights, with a critical reading of the rule of law.¹⁶ This could usefully be referred to as a constitutionalised vision of justice for the AFSJ. At its core, the question relates to the connection between a theoretical understanding of justice and the practical implications that it has as a governance device for AFSJ matters, via, for example, the operation of the mutual recognition and the assumption of EU mutual values and trust which carries the AFSJ forward in the integration process. However, perhaps it should be mentioned that some scholars, such as Martti Koskenniemi, largely reject the terminology of values and argue that, instead of assuming that values exist, such values must be reached through public political discourse.¹⁷ The risk of a kind of *jus cogens*-related (that certain legal rules cannot be contracted out)

¹⁵The United Kingdom's exit and the new partnership with the European Union available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.

¹⁶Douglas-Scott, *Law after Modernity* (2012) and on the history of the AFSJ, e.g. Massimo Ficiera, "Sketches of a Theory of Europe as an Area of Freedom, Security and Justice", in M. Fletcher, E. Herlin-Karnell and C. Matera (eds), *The EU as an Area of Freedom, Security and Justice*, (Abingdon: Routledge, 2016), Chapter 3, pp. 34–56.

¹⁷Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge, Cambridge University Press 2016); Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law*, 9, 35–36.

vocabulary of human rights, as Itamar Mann observes, is that dominant actors could use such a framework to impose their own values. Mann still argues that the very existence of human rights imposes on members of humanity the duty to enforce human rights. But when responsibility falls on everyone's shoulders, as he points out, no one ends up accepting individual responsibility.¹⁸ Ironically, and despite the solidarity principle in EU law, in the European context, only some Member States have shown a political willingness to solve the migration crises at EU level, and thus solidarity in an EU context remains extremely vague.

What, then, is the point of constitutionalism in a security-dominated AFSJ? Should we not focus more on accountability as inherent in the administrative law project of the EU, which is undoubtedly an extremely important task for the EU? Perhaps this would fit the current model of EU security regulation better than that of a constitutionalist world view of the EU?¹⁹

Before addressing the meta level, however, we need to know what constitutionalism is proper. It is often said that national constitutionalism is justified for at least two reasons.²⁰ First, it is based upon consent and hence the decision to become a citizen of a particular state means that one accepts the constitutional essentials of that state. Secondly, the idea of constitutionalism is based upon fairness, democratic values, the rule of law and protection of human rights.²¹ A constitution in this context means a set of fundamental principles and institutions according to which a state is organised. In the EU context, which is a supranational organisation, constitutional essentials are coupled to the constitutional structure of the EU.²² Moreover, the idea of justice forms an integral part of the constitutional structure of the AFSJ. Specifically, the idea of justice within the AFSJ is coupled with the notion of justice seen as non-domination, as will be explored in more detail in chapter two below.

Justice, then, is, from this perspective, the new key to understanding the very survival of the EU venture. But, while justice, according to Rawls, is the first virtue of the basic structure of society,²³ Hegel famously said that the clash of justice with justice defined tragedy.²⁴ While the EU is facing an ongoing drama

¹⁸ Mann (ibid) 223–25.

¹⁹ Peter L Lindseth, *Power and Legitimacy, Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010).

²⁰ Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford, Oxford University Press, 2015) 212–13.

²¹ John Rawls, *Justice as Fairness: A Restatement* (Cambridge MA, Harvard University Press, 2001). And see Alon Harel, *Why Law Matters* (2014).

²² Arthur Ripstein would describe this as the obligations of individuals who go to another state to recognise that state as a de facto rightful condition in Kantian terms: Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge MA, Harvard University Press, 2009) 298; see also John Simmons, 'Human Rights World Citizenship', in Simmons (n 5) 195–96, also discussed in Ripstein.

²³ Rawls, *Justice as Fairness* (2001); see, also, Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Cambridge-Malden MA, Polity Press, 2014) 3.

²⁴ Yirmiyahu Yovel, *Spinoza and Other Heretics: The Marrano of Reason*, Vol 1 (Princeton NJ, Princeton University Press, 1989) 13.

in terms of various constitutional crises, Europe has had to tackle serious injustices throughout its history.²⁵ The phenomenon of EU justice would, by and large, seem to be an evolving process.

IV. INTRODUCTION TO THE CONTESTED CONCEPT OF JUSTICE AND THE EU SECURITY STATUS QUO

The importance of a secure society is undeniable but, if there is too much security, can there still be justice? For about a decade now, the EU's internal security mission, in line with global trends, has dominated the policies of the AFSJ as an expression of the fight against terrorism. The significance of achieving security has spilled over to the more general ambition of a market-based approach to the EU's fight against crime and the financing of terrorism, which, in turn, has led to a preventive approach, a coupling of the market-based approach within the internal market with that of the AFSJ and the achieving of security through penal measures.²⁶ These are only brief examples, but at their core there is an innate need for the EU to work out a strategy for the AFSJ. It is true that the EU's multi-annual AFSJ programmes and the plans set out in these ambitious agendas reflect a wish among EU institutions to be firm about the future application of the rule of law.²⁷ However, there is a striking absence in the political discussion on how to shape this area and what justice can add to the debate.

As indicated above, Forst argues that there is good reason to believe that Rawls' theory of justice could be extended beyond the nation state, provided that we have the right constitutional toolkit to do so.²⁸ While it might seem politically naïve, in the current European climate, to claim a cosmopolitan-based justice,²⁹ and while some 'old' Member States still have problems with 'new' Member States, the conception of justice could still inform the European Treaty-based interpretation of what it means to refer to solidarity. It is precisely here that a justice deficit exists, and it is here that the question of what kind of justification the EU owes to those on its territory becomes a burning issue. The impact of a constitutional meaning of justice and the extent to which it could function as a visualising tool for remedying some of the problems facing the EU in the current wave of populism and disintegrative tendencies in the

²⁵ On the role of statehood and the formation of EU and global regime, see Poul F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Abingdon, Routledge, 2014).

²⁶ See for example, Directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, *OJ L 156, 19.6.2018, p. 43–74*.

²⁷ COM(2015) 185 final, The European Agenda on Security, and COM(2014) 158 final, Communication from the Commission, A new EU framework to strengthen the Rule of Law.

²⁸ Forst, 'Transnational Justice and Democracy' (2013).

²⁹ See, however, Mathias Risse, 'Taking up Space on Earth: Theorizing Territorial Rights, the Justification of States and Immigration from a Global Standpoint' (2015) 4 *Global Constitutionalism* 81–113.

Member States remains a considerable challenge and dilemma for the construction of the AFSJ.³⁰ Justice, in this sense, is critical, in that it insists on more than an empty assertion of justice and involves more than mere procedure.³¹ In legal terms, these values may be deduced from the Charter and the preamble of the EU Treaty.

Recently, a debate has taken shape with regard to the application of ‘justice’ as a possible substitute for the lack of democratic credentials in the EU space. Jürgen Neyer has argued, more specifically, that the EU, as a transnational feature, cannot live up to its democratic credentials, and that the main democratic deficit lies with the Member States, not with the EU. In trying to cure this seemingly terminate EU illness, Neyer sets out to ‘borrow’ concepts from Forst’s theory of the right to justification and justice philosophy as a better template for non-state law than that of democracy.³² In Neyer’s view, the EU would be better off by not focusing so much on the basic demand for democracy, which is something it cannot live up to anyway, and, instead, leaving it to the Member States to ‘tick that box’. He argues that the EU does not have a monopoly on power and has no political equality, which makes it fundamentally flawed as a state entity and hence able to ‘escape’ or avoid state measurements.³³ Yet even an ‘amended’ version of the EU project, ergonomically designed for post-national law, still has to comply with basic democratic principles.

In the light of the EU’s promise to establish an AFSJ, too strong a focus on security appears to be highly problematical. Nevertheless, the EU’s security mission equally follows from the ambitions set out in the Treaty, since the EU promises to ensure a high level of security even where there is no clear division between internal and external security (Article 3 TEU and Article 67 TFEU). The focus on security, has to a great extent overshadowed the need to ensure due process rights within the EU. And, although the EU is currently improving the situation for suspects by adopting legal safeguards, and the Court of Justice has from time to time handed down rulings in favour of the individual, this is currently not enough for the AFSJ, which places equal value on all of its components of freedom, security and justice. Security has largely functioned as an identity-building power, which has largely shaped Europe with regard to security governance. As Karlo Tuorli puts it: war and crime, external and internal security, are hard to keep separate in combating terrorism, which leads to the emergence of a security constitution.³⁴ Similarly, I have previously pointed to

³⁰ TRS Allan, *Constitutional Justice: A Liberal Theory of The Rule of Law* (Oxford, Oxford University Press, 2003). See, also, Aharon Barak, ‘On Constitutional Implications and Constitutional Structure’ in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford, Oxford University Press, 2015) ch 3.

³¹ For example, Douglas-Scott (n 13) above.

³² Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford, Oxford University Press, 2012).

³³ *ibid.*

³⁴ Kaarlo Tuori, ‘Ultima Ratio as a Constitutional Principle’ (2013) 3 *Oñati Socio-legal Series* 6–20.

the emergence of a preventive regime, increasingly mainstreamed with EU law on general market construction.³⁵ Indeed, much of the EU's involvement has been centred on the need to secure a high level of security, which is reflected in the basic market rationale in the EU in which the achievement of security is part of the market focus. It is a confirmation of the many different layers that underlie the AFSJ; how the external and internal security features interact – making the application of mainstream constitutional principles in the AFSJ a particularly difficult task for the EU legislator. The latter concern is shared by many political scientists, who have described the EU state of play as one of a European homeland security in the making.³⁶

So security seems currently to dominate the AFSJ project.³⁷ Indeed, famously, for Hobbes, the whole point of the political enterprise is security. It is for security against each other and security against outsiders that we set up the sovereign.³⁸

V. JUSTICE, EU LEGAL DEBATE AND THE EXTERNAL ASPECT

The idea of justice brings its own problems, as it casts light on some burning, albeit difficult, governance questions in the EU. More specifically, the notion of justice highlights the difficulty of reconciling the issue of how to solve the democratic deficit with the EU's greater aspiration of becoming a just, modern and effective actor on the international scene. Furthermore, the AFSJ is, in itself, as mentioned above, a very broadly defined field of law which deals with a wide EU policy area that ranges from security and criminal law to border control and civil law co-operation. Therefore, although the AFSJ is identified as one policy area, it is quite obvious that the task of identifying the underlying values in this divergent area, and how these values drive the development of the AFSJ, is of paramount importance, and it is precisely here that the concept of justice ought to guide the EU as a constitutional compass.

Moreover, while it is sometimes suggested that the EU has lost its grand narrative, when trying to navigate back to the European trajectory, it is arguably not particularly helpful to view the Member States as on a road to serfdom,³⁹

³⁵Ester Herlin-Karnell, 'The Development of EU Precautionary Criminalization' (2011) 2 *European Criminal Law Review* 149.

³⁶Eg Christian Kaunert, Sarah Léonard and Patryk Pawlak (eds), *European Homeland Security* (2012); Fichera and Kramer (eds), *Law and Security in Europe* (2013); Marieke de Goede, 'The SWIFT Affair and the Global Politics of European Security' (2012) 50 *Journal of Common Market Studies* 214–30.

³⁷On the concept of security in international law, see, for example, Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (Oxford, Oxford University Press, 2015), ch 23. On emergency laws, see, for example, David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, Cambridge University Press, 2006).

³⁸On Hobbes and security see eg, Jeremy Waldron, 'Safety and Security' (2006) 85 *Nebraska Law Review* 454–507.

³⁹Friedrich A von Hayek, *The Road to Serfdom* (Chicago IL, Chicago University Press, 1944).

dominated by the superpower of the EU. Rather, there is a need to conceptualise the notion of justice in the European space so as to foster mutual resonance from within. In creating such a EU polity, the question of how best to tackle the various crises in the EU today and the associated constitutional crisis⁴⁰ is increasingly being placed at the top of the European agenda. Nevertheless, the political nature of the EU enterprise – in the contemporary discussion of European integration – often points in the direction of Carl Schmitt’s theory of the political and its impact on the legal architecture.⁴¹ The key to understanding the concept of ‘political’ in Schmittian thought is often said to lie in the fact that the state is not a static entity.⁴² Whereas the evolving character of European law is a well-known feature of the Union as a non-static entity, the integrationist vision has always been the driving force for the EU and we now clearly seem to have arrived at the constitutional movement where the question of legitimacy has to be placed on the EU legal table. It has been argued that, independently of what we can learn from constitutional theorists in the previous century, the societal framework is still as important as ever.⁴³ This (arguably) means we cannot simply transpose old theories onto the contemporary debate; instead, we need to think harder – and more innovatively – about how to contextualise them into timeless concepts. The key point that scholars such as Gunther Teubner make is that the origins of the constitutional question can be found in processes of societal differentiation.⁴⁴ The norms of EU law processes are relevant to the broader and constantly changing societal settings in which they operate. In this complex structure of the EU, in upholding its constitutional standards, the rule of law and the principle of legality are a *sine qua non* for any discussions of legitimacy, given the public law nature of much of the EU’s activities in the controlling of coercive power and respecting human rights. This raises questions. For one thing, the notion of legitimacy and the aspiration to achieve justice are not necessarily the same thing. After all, law may be just without having been legitimately enacted, and legitimate while failing to be just.⁴⁵ The rule of law pre-supposes, therefore, that both of these criteria are fulfilled. And it is here, as will be

⁴⁰ Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge, Polity Press, 2013); Marc Amstutz, ‘Eroding Boundaries: On Financial Crisis and an Evolutionary Concept of Regulatory Reform’ in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford, Hart Publishing, 2011) 223–68; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford, Oxford University Press, 2012).

⁴¹ Alexander Somek, ‘What is a Political Union’ (2013) 14 *German Law Journal* 561.

⁴² Martin Loughlin, ‘The Concept of Constituent Power’ (2013) 13 *European Journal of Political Theory* 218–37; Carl Schmitt, *The Concept of the Political* (Chicago, Chicago University Press, 2007, G Schwab trans) 26 and 38.

⁴³ Teubner, *Constitutional Fragments* (2012). Poul F Kjaer, ‘Between Integration and Compatibility’ in Paulius Jurčys, Poul F Kjaer and Ren Yatsunami (eds), *Regulatory Hybridization in the Transnational Sphere* (Leiden, Nijhoff, 2013).

⁴⁴ *ibid.*

⁴⁵ Charles Larmore, ‘What is Political Philosophy?’ (2013) 10 *Journal of Moral Philosophy* 276–306.

elaborated below, that critical justice enters the picture. Sionaidh Douglas-Scott, for example, has argued that the rule of law could be reflected in the EU justice paradigm beyond its Treaty-based assertion.⁴⁶ The key to understanding justice is to take a holistic view of it; this makes it more than an empty notion, and substantiates the democratic values that it embodies. If interpreted as a critical legal concept, justice must form a core part of the rule of law.

This political dimension of the EU's view of justice is crucial for understanding the EU's communication with the international sphere and the role of law in this dialogue.⁴⁷ In a broader EU and transnational context, the question of the conferral of powers, for example, is so much more than the mere consideration of whether a law was enacted legitimately.⁴⁸ This is because the whole existence of EU law builds and relies on the willingness of the Member States to accept the supranational structure of the 'EU beast'. The EU project and its legal framework have therefore developed upon a slightly schizophrenic basis: the EU has always had to balance its own powers with those of the Member States, while at the same time seeking to advance the European project and its ideas.

In the context of the normative foundation for human rights, Allen Buchanan has asked what it would take to produce reliable factual information of the sort that is likely to be relevant for specifying and justifying claims about human rights.⁴⁹ Could we translate this statement into the constitutional AFSJ context? Justice, then, in the AFSJ, seems central to the ambition of realising freedom and thereby ensuring rights. Accordingly, it could be argued that the EU legal system encompasses a broader notion of justice than the basic constitutional principle upon which other EU principles are based (the rule of law⁵⁰). For all these reasons, therefore, there has to be a connection between the aspiration for justice and that of the overall legal architecture or, to put it differently, the governance ambition of securing legitimacy in the European system. This would seem particularly important in an AFSJ context, considering that it is a sensitive area.

VI. CONCLUSION

As will be explored below, while Rawls anchored justice in the basic structure of society as a response to the question of how government action could be

⁴⁶ Sionaidh Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism, and Critical Legal Justice' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford, Oxford University Press, 2012) 412–48.

⁴⁷ On the difficulties with global justice, see Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113–47. On justice in legal theory discourse, see Rawls, *A Theory of Justice* (1999) 171.

⁴⁸ Joel Colón-Rios, *Weak Constitutionalism: Democratic Legitimacy, and the Question of Constituent Power* (Abingdon, Routledge, 2012) 102–25.

⁴⁹ Allen Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39–70.

⁵⁰ On the rule of law fundamentals, see, for example, Lon L Fuller, *The Morality of Law* (New Haven CT, Yale University Press, 1969).

justified and designed,⁵¹ a broader discourse on what public reasoning means in the context of the relationship between the individual and the state has emerged at the transnational level and with great relevance for the EU. As such, it is intimately connected to what kind of justification citizens are entitled to as the EU project expands. Because of the rapid development of the AFSJ in recent years and its crisis-driven agenda a serious awareness and critical reflection as to how the EU could construct a just order of security regulation is warranted.

The book will try to show why we need more than a conception of justice in the EU that is simply centred on the administration in concrete court cases, but one that operates as part of the EU's constitutional governance endeavour, which is part of the constitutional structure of the EU, not a rival theory. The book does this by demonstrating the uniqueness of the constitutional structure of the AFSJ and why it is a particularly useful testing-field of 'justifications' as one of the most urgent and dynamic domains at present, and where the idea of justice as non-domination will add to a grammar of justice and thereby help improve the EU's credibility.

While security concerns have dictated the AFSJ discourse as an EU crisis-management tool for tackling terrorism since 9/11, the general security mission within the AFSJ has now had to deal with the increasing migration and refugee crisis (which started in 2015), which has had the effect of jeopardising the legitimacy of the EU as an AFSJ space. Regardless of whether one is a consequentialist focusing on outcome, or whether one cares about the law as such,⁵² justice seen as non-domination has important implications for how we think about the AFSJ. This is why a serious reflection on what 'freedom, security and justice' really means for Europe and the rest of the world is so important. This book embarks on an exercise in tracing the reasons as to why this is the case.

⁵¹ Rawls (n 14). See, also, Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16 *Journal of Political Philosophy* 137–64.

⁵² Harel (n 2) ch 2.