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**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**

**Discussion Paper**

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Abstract

## **Europe's Area of Freedom, Security and Justice Through the Prism of Constitutionalism\***

by Ester Herlin-Karnell

The idea of justice in the EU legal setting has become a new lens for viewing the European enterprise and is as such largely inspired by the greater debate in political theory on how to imagine a just society. This paper explores the meaning and function of justice-oriented reasoning in the EU legal discourse by deconstructing it from a perspective of legitimacy and asking what justice can add to the debate on EU constitutionalism in the specific area of freedom, security and justice (AFSJ). I argue that, despite the complicated relationship between the notions of justice and legitimacy, this linkage is closely associated in an EU context and thereby relevant to the bigger question of how the EU could, and should, become a just system, and that the key to understanding this synergetic relationship is to view justice as a European process. In examining these questions I start by investigating the justice and legitimacy symbiosis in the framework of the contested notion of democracy beyond the nation state. In addition, I suggest that using justice as a tool for developing new policy fields, such as the AFSJ, will help to take it beyond a mere administrative slogan and towards a critical concept.

*Keywords: Justice, EU, justice-oriented, area of freedom, security and justice, legitimacy*

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## 1. Introduction

The concept of 'justice' has recently had a renaissance in EU legal doctrine.<sup>1</sup> The discussion of justice in contemporary EU legal discourse takes place beyond the traditional debate on the European Court of Justice's jurisdiction and the question of access to justice. Justice as a critical concept then has become more than the classical question of 'what is law'.<sup>2</sup> In this regard, justice is neither simply an analytical concept for deciding on the correct interpretation of legal cases nor a purely political issue but one that relates to the interdisciplinary nature of the EU polity as such.<sup>3</sup> Accordingly, the idea of justice forms part of the self-constructing exercise of the EU in the current uncertain political times of European integration. One of the eternal questions in legal theory is, of course, the question of what empowers the legislator to enact laws and what makes these laws effective.<sup>4</sup> This paper does not delve into the well-trodden legal theory terrain of the philosophical characterization of law.<sup>5</sup> However, while these questions have largely been taken for granted in the EU law discourse and while EU law is neither international nor national law, but with its *sui generis* character firmly grounded 'in between', we still have to answer the fundamental question of how EU law should be understood when faced with the theoretical question of the impact of justice theory. Such an ambition forms part of the EU's grander endeavour to become a 'just' project, which is particularly relevant in the AFSJ context, with crime, security and human rights protection at its core.

The basic claim of this paper is that a turn to justice theory in the specific AFSJ context helps framing the questions the EU ought to be asking. The contention is that what is needed in the current debate on the future of the AFSJ includes a query into the nature of the EU constitutional canon that is currently forming the AFSJ as well as a foray into the extent to which 'justice' could operate as a golden rule for bridging the AFSJ policy field with the rest of the constitutional legal landscape. Yet justice brings its own problems as it

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<sup>1</sup> E.g. S Douglas-Scott, 'The Problem of Justice in the European Union' in: J Dickson & P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford: Oxford University Press 2012), ch. 16.

<sup>2</sup> J Rawls, *A Theory of Justice* (Harvard 1999 edition).

<sup>3</sup> See also N Walker, 'Justice in and of the European Union', University of Edinburgh working paper, 2014/10, available at [ssrn](#).

<sup>4</sup> See most recently, S Douglas-Scott, *Law After Modernity* (Hart 2013).

<sup>5</sup> J Waldron, *Law and Disagreement* (Oxford University Press 1999).

casts light on some burning, albeit difficult governance questions in the EU. More specifically, the notion of justice illuminates 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 a very broadly defined field of law dealing with a wide EU policy area that ranges from security and criminal law to border control and civil law cooperation. While asylum, immigration and civil law cooperation were subject to communitarisation with the entry into force of the Treaty of Amsterdam in 1999, criminal law cooperation and security remained under the third pillar.<sup>6</sup> The Lisbon Treaty has of course recast this whole framework by incorporating the AFSJ *acquis* into the Treaty of the Functioning of the European Union (TFEU). 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 an AFSJ is of paramount importance to the question of where the concept of justice ought to guide the EU as a constitutional compass.

The starting point of this paper is that we need to place the development of the AFSJ in the broader context of the development of EU integration in general rather than seeing it as an isolated area. 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 not particularly helpful to view the Member States as on a road to serfdom<sup>7</sup> dominated by the superpower of the EU. Rather there is a need to conceptualize the notion of justice in the European space so as to foster mutual resonance from within. In creating such an EU polity, the question of how best to tackle the current financial turmoil and the associated constitutional crisis<sup>8</sup> 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

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<sup>6</sup> See S Peers, *EU Justice and Home Affairs* (Oxford, OUP, 2011) for an extensive overview of the history of the third pillar, ch 1.

<sup>7</sup> F Hayek, *The Road to Serfdom* (1944).

<sup>8</sup> J Habermas, *The Crisis of the European Union: A Response* (Polity 2013); A J Menendez, 'The Existential Crises of the European Union', *German Law Journal* (2013) 453; P Kjaer et al (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011) 223; G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

political and its impact on the legal architecture.<sup>9</sup> 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.<sup>10</sup> Yet, as Nicolaidis points out, the EU needs to set aside the Schmittian temptation to define itself against 'others', or any other identification of an enemy or outsider, and to focus on its own shortcomings.<sup>11</sup> 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 have arrived at the constitutional movement where the question of legitimacy has to be placed on the EU legal table. As Teubner, however, argues, whatever we can learn from constitutional theorists in the previous century, the societal framework is still as important as ever. This means we cannot simply transpose 'old' theories onto the contemporary debate; instead we need to think harder – and more innovatively – about how to contextualize them into timeless concepts. The key point Teubner makes is that the origins of the constitutional question can be found in processes of societal differentiation.<sup>12</sup> Borrowing from Kjaer, the norms of EU law processes are relevant to the broader and constantly changing societal settings in which they operate.<sup>13</sup> There is then no such thing as a static law.<sup>14</sup>

Whilst keeping the greater debate on constitutionalism beyond the nation state in mind, the paper tries to highlight and explain why the general discussion on EU integration and a clarification of the different strands of constitutionalism is necessary for the construction of the AFSJ space. The AFSJ is still a novel area and the constitutional contours of it are currently taking shape. Therefore, the contention of this paper is that we need to understand the AFSJ in three stages and that those phases are related to the core of the EU constitutional story. Those stages, as developed in this paper, involve a pinning down of the nature of EU constitutionalism and why it matters to AFSJ law, a look into the notorious democratic deficit debate and finally a discussion of the concept of legitimacy as such and how these notions are related to justice theory. In seeking to verify this claim I

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<sup>9</sup> A Somek, 'What is a Political Union', *German Law Journal* (2013) 561.

<sup>10</sup> M Loughlin, 'The concept of constituent power', *European Journal of Political Theory* (2013); Carl Schmitt, *The concept of the political* 26, 38 (G Schwab trans., 2007).

<sup>11</sup> K Nicolaidis, 'European Democracy and Its Crisis', *JCMS* (2013).

<sup>12</sup> *Ibid.*

<sup>13</sup> P Kjaer, 'Between integration and compatibility' in: P. Kjaer et al., *Regulatory Hybridization in the Transnational Sphere* (Nijhoff 2013).

<sup>14</sup> *Ibid.*

will investigate the constitutional dynamics of the AFSJ by firstly painting the background picture with regard to the constitutionally fragmented landscape in the EU. In doing so the paper starts by setting out some well-known constitutional law axioms that deserve repeating as they cannot and should not be taken for granted, namely the foundational question of constitutionalism beyond the nation state and how it relates to the wider question of legitimacy. Thereafter, I set out to explain the need for a critical notion of justice in the EU policy area of freedom, security and justice, which is linked to the basic right of justification as a countermeasure to domination. I begin by outlining the main characteristics of the concept of legitimacy in EU legal theory in order to paint the background picture for how, arguably, one ought to understand AFSJ law, i.e. as not divorced from mainstream constitutional law issues. In doing so, I consider the classical dogmas of non-coercion, the ‘no demos’ question and the longstanding debate on democracy. I go on to argue that the question of legitimacy is deeply connected to the question of what kind of justification and justice can reasonably be required when exploring and seeking to explain the EU project and that this is particularly important in the AFSJ setting where legitimacy forms part of the EU’s justification for action in the first place. Finally, I examine the AFSJ by turning to some practical examples. I argue that the AFSJ represents a particularly sensitive testing field for European integration (given that it concerns security-related issues, criminal law policy and the protection of human rights at its core) and one where the notion of justice needs to be seen beyond the mantra of ‘justice’ as a purely administrative matter.

## **2. Constitutionalism matters: setting the scene for how to understand the underlying constitutional issues facing the future of the AFSJ**

‘One state, one people’ has always been the foundation stone for any construction of modern statehood and its constitution, as pioneered by the American and French revolutions.<sup>15</sup> However, a notorious problem when debating the characterization of the EU legal structure and its source of legitimation is the fact that the EU has no single demos, but rather a people of 28 different Member States. The well-known EU motto – ‘united in diversity’ – has of course sought to tackle this problem.

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<sup>15</sup> M Kumm, ‘Constitutionalism and the Cosmopolitan State’, available on ssrn.

In line with this European theme, Nicolaides has long advocated a solution to the much debated 'absence of a demos' theory: in her view, democracy is at best an illusion in the EU context, and what is needed is a 'new' version of it.<sup>16</sup> As she sees it, therefore, it would be better to seek recourse to the notion of 'demoicracy' as 'a Union of peoples', understood both as states and as citizens who govern together, but not as one. EU lawyers may argue that the imaginative creation of citizenship, as developed in European Court of Justice case law, has to some extent resolved the 'no demos' problem.<sup>17</sup> The point for lawyers, accordingly, is that the law can be used in a strategic way that, in combination with participation rights<sup>18</sup> and citizen initiatives (Article 18 TEU), puts some flesh on the bare European skeleton. While in the past the EU was constantly moving forward, with no clear direction other than the Community mantra of more integration, the situation today seems a lot more complex. Rather than there being a single destination, the trend is likely to become one of multiple choice: in other words, a Europe at different speeds. The task of identifying a demos has therefore become multi-dimensional.

The second problem when debating the supranational structure of the EU is that of the lack of a monopoly of force, the 'coercion' question. The EU is not a state, even though it increasingly comprises state-like features, and the very lack of coercive power is often highlighted as one of the criteria distinguishing the EU from a nation state.<sup>19</sup> Despite the EU's lack of traditional coercive powers, the entry into force of the Lisbon Treaty, and thereby the increased role of the Union legislator, means the EU has gained increased sanctioning powers because of being entrusted with some monopoly of force. Yet, perhaps it is worth asking if the theory of coercion as the benchmark for assessing legitimacy of the nation state<sup>20</sup> really matters to the EU. From the start, the EU has been built on a decentralized system, in which the Member States act as gatekeepers and enforcers of EU law on the national stage. Not only do the Member States run the risk of infringement procedures being initiated by the EU Commission, but their national courts have been

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<sup>16</sup> K Nicolaides, 'European Demoicracy and its crisis', *JCMS* (2013).

<sup>17</sup> Case C-85/96, ECR 1998, I-02691.

<sup>18</sup> See, for example, J Mendes, *Participation in EU Rulemaking: A Rights-Based Approach* (Oxford University Press 2011).

<sup>19</sup> J Neyer, *The Justification of Europe, a political theory of supranational integration*, (Oxford University Press 2012).

<sup>20</sup> A Follesdal & S Hix, 'Why there is a Democratic deficit in the EU: A response to Majone and Moravcsik', *JCMS* (2006), 533.



turned into infiltrators by the Court of Justice and are required to enforce EU law in the domestic setting. Coercion in the EU context therefore involves the use of arbitrary powers and can be traced back, for example, to poorly drafted legislation and deficient legal reasoning in the Court of Justice. As a result, domination was not wiped off the agenda by the creation of the EU and its genesis as a peace project; instead, a different form of domination developed: that of the extraordinary powers of the Court of Justice and the Commission, the two strongest EU institutions. The ambitious reading of EU law by the Court of Justice is well documented,<sup>21</sup> while the Court has also long been an active player with regard to determining the values to be promoted by the EU.<sup>22</sup> In addition to the more overarching goal of creating an autonomous European legal order that provides adequate safeguards of fundamental rights and grants individuals rights in national courts,<sup>23</sup> the Court of Justice has read values into the idea of loyalty as a holistic mechanism for maintaining and establishing continuing European integration.

The third point to be addressed when discussing the features of non-state law and supranational organizations such as the EU is the pillar of democracy, which, despite its seemingly basic characteristic, seems tricky for the EU to live up to. In other words, the essential requirement of democracy is in practice the Achilles heel of the Union. Yet the basic question of democracy forms part of the straightforward – from a legal perspective – allocation of powers in the Union (Articles 5 TEU and 7 TFEU). The point is that there can be no proper account of justice in the EU without firstly addressing the political issue of power relations in the Union,<sup>24</sup> which means that we need to address the issue of democracy, notwithstanding its limits, in the EU context. The next section considers this issue in more detail.

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<sup>21</sup> See, for example, K Alter, *The European Court's Political Power* (Oxford University Press 2009).

<sup>22</sup> See, for example, Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. v Grogan* [1991] ECR 4685; Case C-36/02 *Omega* [2004] ECR I-9609; Case C-208/09 *Sayn-Wittgenstein v Von Wien* [2011] ECR I-13693.

<sup>23</sup> Case C-6/64 *Costa v ENEL* [1964] ECR 585.

<sup>24</sup> Cf. R Forst, 'First things first, Redistribution, recognition and justice', *European Journal of Political Theory* (2007) 291.

## 2.1 Democracy, justice and the rule of law: the bridlemway to legitimacy and relevance for the AFSJ

The purpose of the EU, as stated in the Treaty, is to create an ever-closer Union among the peoples of Europe: a democratic idea. The debate on the democratic deficit in the EU has by now become epic and can essentially be summarized by the arguments set out below. Authors such as Majone and Moravcsik have argued that the problem in the EU is not so much one of democracy itself. Rather, in their view, there is a real lack of credibility in Union activity.<sup>25</sup> More 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. Neyer has argued, more specifically, that the EU as a transnational feature cannot live up to democratic credentials and that the main democratic deficit lies with the Member States, not with the EU. In trying to cure this seemingly terminate illness of the EU, 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.<sup>26</sup> 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' state measurements.<sup>27</sup> In response to Neyer's view of Europe, Forst recently and forcefully entered the EU integration discourse<sup>28</sup> by arguing, in essence, that Neyer's reading of democracy in Europe is an oversimplified view and that the EU project – whether local, international or supranational – has to observe the basics of democracy. Consequently, even an 'amended' version of the EU project, ergonomically designed for post-national law, still has to comply with basic democratic principles.

The right to justification and non-arbitrariness is indeed one of the main tenets of any democratic society, including in the case of the EU. I have chosen to take this debate as my

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<sup>25</sup> A Follesdal & S Hix, 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', *JCMS* (2006) 533; A Moravcsik 'The EU Ain't Broke', *Prospect* (March 2003) 38-45; G Majone 'Europe's "Democratic Deficit": The Question of Standards', *4/1 European Law Journal* (1998) 5-28.

<sup>26</sup> J Neyer, *The Justification of Europe* (Oxford University Press 2012).

<sup>27</sup> *Ibid.*

<sup>28</sup> R Forst, 'Justice, democracy and the right to justification. A reply to Neyer', forthcoming paper (on file with the author) in: G de Burca et al, *Europe's Justice Deficit*.

starting point and to seek to broaden the discussion by applying it to the EU constitutional project and looking at it through the lens of law. Centuries ago, Hobbes defended the concept of a state dependent on the notion of justice in the *Leviathan*, while the desire to achieve justice was obviously also one of the main purposes in the Aristotelian notion of good governance referred to above.<sup>29</sup> The primary issue here is whether justice can appropriately be debated in the supranational sphere or whether it is predominantly a local phenomenon. As Forst argues, there is good reason to believe that Rawls' theory of justice could be extended beyond the nation state, providing we have the right legal toolkit for doing so.<sup>30</sup> This paper consequently perceives justice in a normative Rawlsian manner, while adding a significant Forstian touch by applying the conception of 'context' and critical interpretation as the main yardstick for understanding it. Part of this exercise involves pinning down exactly what legitimacy means in the EU setting as this concept is so closely linked to that of 'justice'. At the core of the question of legitimacy is, of course, the wider issue of democracy, as mentioned above.

It is useful to clarify why legitimacy is needed in EU law and why it is linked to the debate on EU constitutionalism.<sup>31</sup> When examining the legitimacy of EU action, we initially have to consider whether there is a move away from constitutionalist thinking at an EU level. Some scholars have argued that the EU's supranational framework has failed to achieve constitutional legitimacy in its own right and that it would consequently be better to revert to the less pretentious administrative law project.<sup>32</sup> Nicolaidis, for example, has long argued against constitutionalism as the appropriate analytical take on global governance because this has failed to deliver what it promises.<sup>33</sup> Kumm, however, explains why constitutionalism as a term is useful in the specific framework of legitimacy: when viewing constitutionalism as a process, there is no actual need to make a clear-cut choice

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<sup>29</sup> J Olsthoorn, 'Why justice and injustice have no place outside the Hobbesian State' advance access, *European Journal of Political Theory* (forthcoming).

<sup>30</sup> R Forst, *Transnational Justice and Democracy, overcoming Three Dogmas of Political Theory* (draft paper on file with the author). On justice, see J Rawls, *A Theory of Justice* (1999 edition Harvard University Press). See also N Walker, 'Justice in and of the European Union', University of Edinburgh working paper, 2014/10, available at SSRN.

<sup>31</sup> On legitimacy in EU law, see e.g. J Weiler, 'The Transformation of Europe' (1990-91) 100 *Yale Law Journal* (2004); P Craig, 'Integration, Democracy and Legitimacy', in: P Craig & G de Burca, *The Evolution of EU law* (Oxford University Press 2011), ch. 1; and A Arnall & D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002).

<sup>32</sup> P Lindseth, *Power and Legitimacy, Reconciling Europe and the Nation-State* (Oxford University Press 2010).

<sup>33</sup> K Nicolaidis, 'The idea of European democracy' in: J Dickson and P Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press 2012), ch. 10.

as to how to characterize it.<sup>34</sup> There is in any case clearly something very sensitive about the term 'constitutional', probably because it is so closely associated with the elastic case law of the Court of Justice and the expanding nature of EU law. Although this is well-explored territory, it could still be argued that the debate in contemporary EU constitutional law has to a large extent been overly focused on the *sui generis* character of EU law and has to some degree ignored its foundational question. In other words, much of EU legal scholarship has focused to date on charting the new legal order and on how the ECJ has contributed to this European tapestry by building layer upon layer of claimed legitimacy for the EU project, which to some extent constituted sham legitimacy until it was excerpted through practice.

In any case, according to Kjaer – and in line with Kumm – the issue of constitutionalization as a process can serve as a strategy for enabling a given order, be it territorially or functionally defined, to address the question of the transfer of power from the nation state to the EU.<sup>35</sup> During much of the EU's history this process has been a one-way street, with the phenomenon of 'constitutionalization' enabling the EU to ring-fence or monopolize many formally national areas, which have become colonized as EU territory. Nevertheless, recent studies in global administrative law, such as those by Lindseth and Krish, have emphasized the difficulties involved in securing legitimacy for any system situated beyond the nation state. In addition they argue that there is an accountability deficit in the transnational realm, rather than a deficit of legitimacy as such.<sup>36</sup> I would argue that legitimacy is connected to the rule of law and therefore crucial for the debate on EU action and, by extension, the transnational sphere. The question of legitimacy is consequently one of the most fundamental issues for any legal and democratic system as it constitutes the foundation stone on which to build a successful regime, whether national, transnational or supranational.

What then is 'legitimacy' in legal language? Rawls defined legitimacy in terms of what is

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<sup>34</sup> M Kumm, *Constitutionalism and the Cosmopolitan State*, available at ssrn.

<sup>35</sup> P Kjaer, 'Between integration and compatibility' in: P Kjaer et al *Regulatory Hybridization in the Transnational Sphere* (Nijhoff 2013).

<sup>36</sup> P Lindseth, *Equilibrium, Democracy, and Delegation: On the 'Administrative, not Constitutional' Legitimacy of European Integration*, Jean Monnet working paper 07/13. See also N Krish, *Beyond constitutionalism* (Oxford University Press 2010).

justifiable to the citizen.<sup>37</sup> According to his ‘liberal principle of legitimacy’, the use of political power is fully proper only when ‘it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason.’<sup>38</sup> A European notion of legitimacy must surely subscribe to societal concerns *à la* Max Weber. Weber suggested that constituent power derives from the emergence of the concept of what he referred to as rational legitimacy.<sup>39</sup> As he saw it, rational legitimacy is the belief in the rightful nature of a ruler to make law and presents itself as a modern, “rational concept”.<sup>40</sup>

In a traditional EU constitutionalist world, the EU has its own constitutional structure in its commitment to human rights, democracy and the rule of law, and this commitment would be at its heart. The debate about the constitutional character of EU law should therefore be seen as a debate about how to understand the conditions of constitutional legitimacy and European authority.<sup>41</sup> The continuing search for legitimacy, when related to the political theory debate, seems to turn on the EU’s need to reinvent its ambitions, and narrative, from within. When discussing the EU’s legitimacy, the starting point – from an EU legal perspective – is the democratic credentials of the EU, which are also connected to legitimacy and the rule of law. The latter is a constitutional principle of the EU, as recognized in Article 2 EU, and is listed as one of the principles that inspired the creation of the EU. As pointed out by Kumm, central to the rule of law is the idea of bounded government restrained by law from acting outside its powers.<sup>42</sup> Moreover, the rule of law is also deeply connected to the constitutional question regarding the objectives the EU should safeguard and the limits set by the Treaty. Therefore, it also forms a core element

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<sup>37</sup> J Rawls, *Political Liberalism* (Harvard University Press 2005).

<sup>38</sup> *Ibid.*

<sup>39</sup> J Colon-Rios, ‘The Legitimacy of the Juridical’, 48, *Osgoode Hall Law Journal* (2010), 199.

<sup>40</sup> M Weber, *The Vocation Lectures* in: D Owen and T B Strong (eds) (Cambridge: Hackett, 2004), cited in M Sleaf, ‘Legitimacy in Realist Thought: Between Moralism and Realpolitik’, *Political Theory*, online advance access (2014).

<sup>41</sup> Case C-294/83, *Les Verts* [1986] ECR 1339. Famously the Court of Justice declared that the Community had a basic constitutional charter based on the rule of law.

<sup>42</sup> See M Kumm, ‘Constitutionalism and the Moral Point of Constitutional Pluralism’ in: P Eleftheriadis and J Dickson (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012), ch. 9.

of the principle of conferral of powers.<sup>43</sup> Yet the rule of law is wider than the notion of legality as such in that it presupposes a democratic and just system, indicating a certain quality of the law.<sup>44</sup> Hence, 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 controlling coercive power and respecting human rights. For one thing, the question 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.<sup>45</sup> The rule of law presupposes, therefore, that both of these criteria are fulfilled. It is here, as elaborated below, that critical justice enters the picture. Douglas-Scott recently argued that the rule of law could be reflected in the EU justice paradigm by taking the meaning of it beyond its Treaty-based assertion.<sup>46</sup> 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 it embodies. If interpreted as a critical legal concept, justice will form a core part of the rule of law. As Eleftheriadis observes, the legitimacy of the EU institutions must be vindicated both by a theory of international justice and a theory of European law, with both theories capable of accommodating the virtues of institutional fairness and integrity. Therefore, Eleftheriadis argues, in line with Forst, the only possible reading of justice in the context of the EU is a political reading.<sup>47</sup> 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.<sup>48</sup> In a broader EU and transnational context, the question of conferral of powers, for example, is so much more than the mere consideration of whether a law was enacted legitimately.<sup>49</sup> This is because the whole existence of EU law builds and relies on the Member States' willingness to accept the supranational structure of the 'EU beast'. The EU project and its

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<sup>43</sup> A von Bogdandy, 'Founding principles' in: A von Bogdandy & J Bast (eds) *Principles of European Constitutional Law* (Hart/Nomos/Beck 2010) 11.

<sup>44</sup> See, for example, J Raz, *The Authority of Law: essays on law and morality* (Oxford: Clarendon Press 1979).

<sup>45</sup> C Larmore, 'What is Political Philosophy?', 10:3 *Journal of Moral Philosophy* (2013) 276-306.

<sup>46</sup> S Douglas-Scott, 'The Problem of Justice in the European Union' in: J Dickson & P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press 2012), ch. 16.

<sup>47</sup> P Eleftheriadis, 'The Moral Distinctiveness of the European Union', *International Journal of Constitutional Law* (2011), 695.

<sup>48</sup> On the difficulties with global justice, see T Nagel, 'The Problem of Global Justice', 33 *Philosophy and Public Affairs* (2005), 113. On justice in legal theory discourse, see J Rawls, *A Theory of Justice* (Harvard University Press 1971), 171.

<sup>49</sup> J Colon-Rios, *The Legitimacy of the Juridical: Weak Constitutionalism, Democracy, and Constituent Power* (Routledge 2012), ch. 6.

legal framework have therefore developed on 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 project and its ideas.

Not everyone, however, celebrates legitimacy in relation to law. Constitutionalist theorists such as Bobbitt have structurally argued against the need for legitimacy as a legal concept as this would enhance an external effect to the law. In Bobbitt's view, the law has an autonomous function,<sup>50</sup> whereby resorting to a theory of legitimacy serves only to ask the question about law from the perspective of another enterprise, such as moral philosophy or political theory. This he sees as irrelevant as it is not about legal propositions.<sup>51</sup> Moreover, he believes that all attempts to find a normative foundation outside the conventions of legal argument misunderstand the nature of legitimacy of law because what is at stake is, instead, a faithful following of a set of legal modalities.

As indicated, while much of the current debate on legitimacy has focused on the notorious democratic deficit within the EU and the need to move away from state templates, lawyers have tended to avoid the associated issue of legitimacy. A debate has recently, however, emerged on the need to conceptualize justice at the EU level. In this debate, justice is seen as the key to understanding the EU project and, as such, as a unifying value of the EU. A connection is then required between the aspiration for justice and that of the overall legal architecture, or governance ambition of securing legitimacy for the European system. Thus, although Rawls locates justice in the national arena, his conception of justice is not as state-centred as it may initially appear.<sup>52</sup>

As hopefully shown above, legitimacy although contested is and should be a useful concept in transnational law also. It is argued that without a common European sense of legitimacy at the EU level it is difficult for the EU to develop its AFSJ agenda. In the following I argue that Europe's area of freedom, security and justice offers an illustration of arbitrariness and injustice, while also cautiously suggesting that the EU Charter of Fundamental Rights could be the turning point in showing how this justice deficit could be remedied if lived up

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<sup>50</sup> P Bobbitt, *Constitutional interpretation* (1991), discussed in D Patterson, *Law and truth* (Oxford University Press 1996), ch. 7.

<sup>51</sup> D Patterson, *ibid.*

<sup>52</sup> R Forst, *Justification and critique* (Polity press 2014)

to by the EU Member States and the EU's institutions. I ground this argument in the claim that theory and practice ought not to be divorced when discussing the development of the AFSJ and that a turn to theory could help the EU developing its policies in the right direction. If adhering to the Lisbon Treaty for one moment, according to Art. 68 TFEU, the European Council "shall define the strategic guidelines for legislative and operational planning"; part of this planning involves the drawing up of a multi-annual agenda of points to be achieved in the future AFSJ. The intention is to agree on the new multi-annual Programme (2015-2020) and may be called the "Rome Programme".<sup>53</sup> But in order for this programme to draw up a successful future agenda for the EU to develop its justice plan, the EU needs to positively add to the debate by helping the Member States to structure their national laws. Thereby, the EU has a chance to remedy the claim that there is just not enough *justice* in the discussion on the AFSJ as it so far has for a long time had been an overly strong focus on security ever since the events of 9/11 and the number of security related measures that have been adopted not accompanied by procedural safeguards.

### **3. Manifestations of (in)justice in the EU legal context: snapshot from AFSJ case law**

As noted in the introduction, the AFSJ is currently one of the fastest-expanding EU policy areas. It is a very broadly defined field of law and governs a wide policy area, ranging from security issues and criminal law to border controls and civil law cooperation. It is also an area where the EU until recently has focused almost exclusively on preventive measures.<sup>54</sup> This section contends that justice framed as a justification could help safeguard against domination in the most sensitive EU public law field of all, AFSJ. Justice in the context of AFSJ law is mostly conceived of as an administrative notion, while the question of how to create a European culture is seen as a judicial assessment in terms of the legal classification of 'rightness' in concrete court cases. But can justice be conceived of as a theoretical core of the EU's deeper mission within the AFSJ? What is the core of AFSJ law?

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<sup>53</sup> For an analysis, see S Peers, 'The next multi-year EU Justice and Home Affairs programme Views of the Commission and the Member States', available at [statewatch.org](http://statewatch.org). See also letters from Commissioners C Malmstrom and V Reading, available at <http://www.statewatch.org/news/2014/mar/eu-com-post-stockholm.pdf>.

<sup>54</sup> E.g. J Monar, 'The Area of Freedom, Security and Justice' in: A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing 2010) 551.



In the following I set out to argue that the core of this law should properly be framed as a question of how a just AFSJ can be constructed if justice is taken as a critical political concept. As explained above, one of the conundrums when discussing the features of a nation state has always been how the nation state can justify the use of coercive power. It was concluded above that although the EU is not a nation state, it still has some state-like features.

The notion of justice is however not simply a theoretical concept but one to be found in the Charter of Fundamental Rights which sets out a very ambitious plan for human rights protection in the AFSJ. Apart from Article 47 and its general insistence on the right to an effective remedy, the Charter as a justice tool has arguably a larger impact for the architecture of the AFSJ. It consequently represents the by far most important justice document drawn up by EU institutions in the history of the EU. Nonetheless, there is one important, general exception to the EU's human rights programme. The restrictions imposed by Article 51 of the Charter of Fundamental Rights disappoint those who were hoping for an all-encompassing EU competence in these matters. Article 51 of the Charter makes it clear that the document applies to Member States only when they are implementing EU law. In addition, Article 52(1) of the Charter grants some important exceptions to the application of the Charter as a whole. Subject to the principle of proportionality, limitations may be made if they are necessary and genuinely meet objectives of general interest recognized by the Union or meet the need to protect the rights and freedoms of others.<sup>55</sup> If interpreted literally, this severely restricts the reach of the Charter. While, therefore, the scope of EU human rights protection internally seems to turn on the meaning of proportionality, the story told externally is different.<sup>56</sup> Nevertheless, there are examples of a generous reading of the Charter, where the Court of Justice attempts to remedy the alleged justice deficit. A classic example of a broader use of the Charter is the case of *Åkerberg Fransson* concerning compatibility with the principle of *ne bis in idem* (Article 50 of the Charter)<sup>57</sup> and in which the ECJ adopted a very broad

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<sup>55</sup> The explanations relating to the Charter of Fundamental Rights, *OJ* (2007) C83/2. See also the discussion in P Craig, *EU Administrative Law* (Oxford University Press 2012) 473.

<sup>56</sup> It is of course true that the Charter refers to the ECHR in Article 52 (3) in pointing out that the ECHR is always the minimum standard of protection.

<sup>57</sup> Case C-617/10 *Åkerberg Fransson* [2013], not yet reported.

reading of the Charter in favour of the individual and expanding the EU polity.<sup>58</sup> It specifically held that although the national rules in question did not *stricto sensu* involve any implementation, it was clear from Article 325 TFEU that Member States were required to counter fraud against the EU and thereby impose the same level of sanctions for EU fraud as for domestic fraud. The ECJ also observed that EU law precludes a judicial practice whereby an obligation for a national court not to apply a provision contrary to a fundamental right guaranteed by the Charter is conditional upon the infringement being clear from the text of the Charter or the case law relating to it. According to the ECJ, such an interpretation would withhold from the national court the power to assess fully whether the provision in question was compatible with the Charter.<sup>59</sup> On the one hand, the ECJ constructed a very narrow definition of *ne bis in idem*, while on the other hand it expanded the reach of the Charter, and this could have significant repercussions for the future of the fundamental protection of rights in EU law.

In its recent decision in *Stefano Melloni*,<sup>60</sup> concerning the validity of the amendments made to the European Arrest Warrant by Framework Decision 2009/299/JHA<sup>61</sup> and addressing the application of the principle of mutual recognition to trial *in absentia*, the Court stated that where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided this does not compromise the level of protection provided for by the Charter, as interpreted by the ECJ, and the primacy, unity and effectiveness of EU law.<sup>62</sup> It could be argued, though, that Article 53 also enables the EU to adopt a higher standard. The interesting question in the present context is what would happen if the ECHR provides for a higher standard with regard to human rights protection? The disappointing news is that it does not seem to allow for a broader protection. Yet this insistence on not allowing the Charter a character as a derogation tool from EU law obligations, seems to run counter with the *NS*<sup>63</sup> case in the context of the EU asylum system, where the Court of Justice asserted that if there are substantial grounds for believing that there are systematic flaws

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid., para. 48.

<sup>60</sup> Opinion of AG Bot in Case C-399/11 *Criminal proceedings against Stefano Melloni*.

<sup>61</sup> Council Framework Decision 2009/299/JHA.

<sup>62</sup> Case C-399/11 *Criminal proceedings against Stefano Melloni*, para. 60.

<sup>63</sup> C-411/10 and C-493 [2011].

in the asylum procedure in the Member State responsible, then the transfer of asylum seekers to that territory would be incompatible with the Charter.

The general impact of the Charter as a justice tool was furthermore highlighted in the *Radu*<sup>64</sup> case where Advocate General Sharpston went as far as suggesting that the Charter should constitute the template for deciding on the scope of mutual recognition. According to Advocate General Sharpston, the attribution of binding force to the Charter is an expression of a political move towards enhancing the visibility of human rights and merely confirms the human-rights oriented approach which had already been enshrined in the Framework Decision in question (the EAW in this case) prior to the entry into force of the Treaty of Lisbon.<sup>65</sup> The Court of Justice in its recent judgment did not elaborate on this aspect.<sup>66</sup> Accordingly, while mutual recognition plays a key role in the establishment of an AFSJ, it is no longer a blind insistence of mutual trust, but such trust has to fit within what is acceptable from a fundamental rights perspective. Yet if the EU wants to make a difference, a uniform approach to safeguards at the highest level might be worth the price of allowing for less flexibility in for example criminal law.<sup>67</sup> Future cases must clarify to what extent it is desirable to extend the scope of the Charter and increase rights against the possible will of the Member States. In future, the principle of proportionality as an expression of justice will perhaps develop as a driving principle in this area by balancing the Member States' interests and the obligations set by the Charter.<sup>68</sup>

#### **4.1 Data protection: justice as balance?**

As mentioned earlier, Rawls famously identified reasonableness as a good yardstick for a just (albeit utopian) legal system.<sup>69</sup> Perhaps the most sensitive testing field for the enterprise of ensuring a 'just' EU space is that of data protection, with the increasing threat posed by cyber-related criminality and the apparent need to safeguard security

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<sup>64</sup> Opinion of Advocate General Sharpston in Case C-396/11 *Radu*, Judgment of 29 January 2013, not yet reported.

<sup>65</sup> Opinion of Advocate General Sharpston, *ibid*

<sup>66</sup> Case C-396/11 *Radu*.

<sup>67</sup> M Fichera & E Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?', *European Public Law* (2013) 759.

<sup>68</sup> See also E Herlin-Karnell, 'EU criminal law as an exercise in EU experimental constitutional law', *Maastricht Journal of European and Comparative Law* (2013) 442.

<sup>69</sup> J Rawls, *Justice as fairness* (2001 edition).

having to be balanced against the need to protect fundamental rights. The EU has become an active player in fighting criminality in the digital space, following the increased cybersecurity threat and recent bugging scandals. The recent Directive designed to deal with attacks against information systems seems closely linked to the EU's fight against organized crime.<sup>70</sup> This Directive is based on Article 83(1) TFEU, which covers computer crime in a broad sense.<sup>71</sup> For the past ten years the EU has been making significant efforts to develop a framework capable of dealing with cybersecurity in the EU space. At the core of the debate, however, is the sensitive relationship between the protection of human rights and effective fighting of crime. The recent case of *Digital Rights*<sup>72</sup> is instructive as a touchstone of justice-inspired reasoning in the European Court. The Court annulled the 2006 Data Retention Directive, which was aimed at fighting crime and terrorism and which allowed data to be stored for up to two years. It concluded that the measure breached proportionality on the grounds that the Directive had a too sweeping generality and therefore violated, *inter alia*, the basic right of data protection as set out in Article 8 of the Charter of Fundamental Rights. If the Court is to develop criteria for the increasing use of proportionality as a balancing principle in connection with the Charter, this will arguably confirm a tentative version of a contextual justice approach. We just have to make sure that it lives up to a critical and holistic view of this. Such a justice framework should recognize the sensitive and divergent nature of AFSJ law while at the same time acknowledging its mainstreaming with the rest of the EU acquis. It would confirm a strengthening not a weakening of this area.

#### **4. Towards a justice-oriented approach, borrowing from Forst**

As explained above, the AFSJ is an area that is currently marked by too little justice-oriented reasoning in the EU's institutions and where security related measures have tilted the balance in the AFSJ. As indicated, the notion of access to justice has always played a vital role in the ongoing construction of Europe, but this paper has elaborated on justice as a theoretical concept. However, in line with Larmore, 'justice, freedom, rights, equality, and so on, are no less contentious and complex subjects than the nature of the

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<sup>70</sup> Directive 2013/40/EU.

<sup>71</sup> Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.

<sup>72</sup> Case C-293/12, opinion of AG Cruz Villon delivered on 12 December 2013 [2014].

good life.’ At this intersection between moral and political aspects of the legal framework, the EU is still looking to find a common theme.<sup>73</sup> Arguably, the question of the EU’s political structure is, deep down, a question concerning the common good.<sup>74</sup> This paper seeks to highlight the need for a reading of legitimacy that goes one step further than the classical discussion of how to legitimize the post-nationalism aspect of the project in EU law. It tries to show that the debate on EU constitutionalism is, in essence, a debate on legitimacy and on ensuring justice. This present section seeks to go one step further by arguing that the EU could learn from the political theory debate on justice as pioneered by Forst. It claims that the justice movement, and the basic right to justification, is readily transferable to the transnational level since it concerns a political concept of justice. In the EU context, justice must be politically grounded, assuming we start from a common justice platform, where fundamental rights are fully respected in practice. Seen in Forstian terms, the concept is about the basic right to justification. As Maffettone, however, observes, the question of justification is clearly a normative one: it seeks to ground the conception of what justice is in the moral and metaphysical bases of a specific culture. Legitimacy on the other hand, Maffettone continues, is normally based on what is considered to be successful practice in procedural and factual terms.<sup>75</sup> Yet it could be argued that it is not possible to separate procedural and substantive justice in EU law so sharply. After all, the debate on justice in EU law arguably concerns how to justify the EU project and is, therefore, also a question about quality. Applying a Rawlsian account to the theory of justice would in any case imply using reasonableness as an adequate standard for measuring legitimacy at an EU level and for linking it to the broader debate on justice. Clearly, the principle of proportionality can be viewed as pointing in the same direction as ‘reasonableness’; in other words, as a yardstick for legal reasoning.

Accordingly, it could be argued that the EU legal system encompasses a broader notion of ‘justice’ than the basic constitutional principle on which other EU principles are based. For all these reasons, therefore, there has to be a connection between the aspiration for justice and that of the overall legal architecture, or governance ambition of securing legitimacy in the European system. In order, however, to be legitimate, a regime must not only aim to

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<sup>73</sup> C Larmore, ‘What is Political Philosophy?’, 10:3 *Journal of Moral Philosophy* (2013) 276–306, 289.

<sup>74</sup> See, for example, A Somek, ‘Is There a European Common Good?’, available at [ssrn](https://ssrn.com/abstract=2011111).

<sup>75</sup> S Maffettone, Global Legitimation and Reasonableness in: G Bongiovanni et al. (eds), *Reasonableness and law* (Springer 2009) 147.

be just, but also to demonstrate a level of justice that defines the conditions under which the state may rightly justify its coercive power.<sup>76</sup> This would seem particularly important in an EU context. What then does domination, if properly understood, comprise in an EU context? Thinly reasoned judgments by the Court of Justice or badly drafted legislation are candidates for what could conceivably be viewed as domination in an EU context, in which such arbitrariness can be seen in a lack of proportionate reasoning by EU agents, overriding Member States' concerns.

## **5. Conclusion: the AFSJ as more than a hollow justice space**

This paper has examined the commitment to justice in the EU context and has argued that the EU needs to embrace this commitment beyond mere administration and as one of the pillars on which to base successful cooperation as a touchstone of political theory for EU integration. While I used the AFSJ as a snapshot and as an illuminating example of concrete justice reasoning in an EU context, my ambition was greater in that I sought to explain why a political and contextualized reading of justice matters to the EU as a whole and why practical examples, such as those from the AFSJ, help to illustrate many of the problems the EU faces with regard to the future of European integration.

This paper started from the assumption that in order to move forward, we first need to take a step back. The EU may not have been Forst's primary concern when he developed his justice theory.<sup>77</sup> Nonetheless this paper has used his theory as a device to open up a broader debate, while acknowledging the need to get back to basics. The first thing the EU needs to do is to get serious: not only about how to solve the economic crisis, but also about what it wants to achieve in the AFSJ sphere and how to deal with the likelihood of a multi-speed Europe; in other words, an EU of differentiation. Similarly, EU scholars need to intensify the constitutional debate on the principles that they believe should drive EU involvement in newly colonized European areas such as the AFSJ, and on how increased legitimacy could improve the state of play.

The French and American revolutions brought the principles of legality and

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<sup>76</sup> R Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Polity 2013).

<sup>77</sup> R Forst, 'First things first, Redistribution, recognition and justice', *European Journal of Political Theory* (2007) 291.

proportionality to the fore of the constitutional agenda and constituted a core message of the Enlightenment. It is now time for the EU to deliver what it promises: justice as a critical legal concept. Political theory helps EU law scholars understand what we are actually debating and why and this would be particularly useful for the future of the AFSJ. While self-reflection may not solve the immediate crisis, it will provide us with a solid foundation for understanding what is actually at stake by digging deeper into the EU soul and tentatively remedying the accusation that the EU cathedral has been built on too shaky grounds.