

WZB

Berlin Social Science Center



Ester Herlin-Karnell

Justice and Justification in Europe's "Area of Freedom, Security and Justice"

Discussion Paper

SP IV 2015–805

September 2015

Center for Global
Constitutionalism

WZB 

WZB Berlin Social Science Center

WZB Berlin Social Science Center
Reichpietschufer 50
10785 Berlin
Germany
www.wzb.eu

Copyright remains with the author(s).

Discussion papers of the WZB serve to disseminate the research results of work in progress prior to publication to encourage the exchange of ideas and academic debate. Inclusion of a paper in the discussion paper series does not constitute publication and should not limit publication in any other venue. The discussion papers published by the WZB represent the views of the respective author(s) and not of the institute as a whole.

Wissenschaftszentrum Berlin für Sozialforschung (2015)

Ester Herlin-Karnell

Justice and Justification in Europe's "Area of Freedom, Security and Justice"

Discussion Paper SP IV 2015–805

Affiliation of the authors other than WZB:

Ester Herlin-Karnell

VU University Amsterdam, Faculty of Law, De Boelelaan 1105, 1081 HV
Amsterdam, The Netherlands

Abstract

Justice and Justification in Europe's "Area of Freedom, Security and Justice"

by Ester Herlin-Karnell¹

The paper explores the connection between the notions of justice and justification, and explains why their full comprehension enhances the legitimacy of the EU's 'Area of Freedom, Security and Justice' (AFSJ) project. The paper argues that the notion of justice, despite its contested nature, offers a helpful lens for viewing the AFSJ as part of the EU constitutional landscape. Nevertheless, we need to go further when investigating its potential as a theoretical device for navigating the future of AFSJ law. This paper contends that we need to analyse the notion of justice in the AFSJ by starting from the position of security as domination. Only by doing so, can we understand the capabilities of the EU for realizing justice and freedom in a largely security driven site. In an attempt to marry these abstract claims with the reality of security regulation in contemporary European law, and as part of the process for establishing democratic credentials within the AFSJ, the paper sets out to link the larger question of justice to one of justification and ultimately that of proportionality in AFSJ law.

This discussion paper is part of a series of contributions to the conference "Towards a Grammar of Justice in EU Law", which took place on 6-7 November 2014 at VU University Amsterdam, sponsored by ACCESS EUROPE Amsterdam, VU Centre for European Legal Studies and the Dutch Research Council VENI grant.

Key words: Area of Freedom, Security, Justice, Justification, Justice, Security, Non-domination, proportionality.

¹ This paper was written during my time as a visiting researcher in the WZB Centre for Global Constitutionalism spring 2015 with the kind support from the Dutch Research Council. I thank Claudio Cordaretti, Rainer Forst, Poul F Kjaer, Mattias Kumm, Enzo Rossi and Jonathan Yovel as well as the participants at the "Towards a Grammar of Justice" conference in Amsterdam 6-7 November 2014 for very useful comments on a previous versions of this paper. The usual disclaimer applies of course.

1. Introduction

The striving for justice is one of the foremost aims of any democratic society. So should it be for the EU with the rule of law, democracy and human rights as foundational core values.² While Rawls anchored justice³ in the basic structure of society for answering the question of how government action could be justified, 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.⁴ The EU offers a tailor-made example for testing the power of justice and justification not only at the EU supranational – vertical – level (Member State-EU bond) but also as regards the (horizontal) Member State stage and its relationship to its citizens when explaining public reason. But how could ‘justice’ become an integral part of the EU’s constitutional vocabulary as something more than the mere administration of justice in concrete court cases? The ‘Area of Freedom Security and Justice’ (AFSJ) provides a fascinating example of a clash between due process concerns of the individual and security driven preventive measures and where the EU is currently carving out its security agenda.⁵ As relevant background information for the present paper, and setting the scene, it seems appropriate to start by briefly saying what the AFSJ policy domain represents in legal and political terms. The AFSJ deals with, inter alia, security regulation, 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 that of largely being an isolated justice and home affairs space to that of a European hub. While security concerns had for a long time dominated the AFSJ discourse as EU crisis management tool in the for tackling terrorism since 9/11, the general security mission within the AFSJ has now joined up with the increasing migration crisis, seriously

² On ‘justice’ in the EU context, see G de Burca, D Kochenov and A Williams (eds), *Europe’s Justice Deficit* (Hart publishing 2015), especially the contribution of N Walker, ‘Justice in and of the European Union’. See also J Neyer, *The Justification of Europe* (OUP 2012).

³ J Rawls, *A Theory of Justice* (Harvard edition 1999).

⁴ S Gardbaum, ‘Proportionality and Democratic Constitutionalism’ in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014), 259. M Kumm, ‘Democracy is not enough: rights, proportionality and the point of judicial review’ (2009) NYU School of Law, Public Law Research Paper, No 09-10, and more broadly on justifications M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (CUP 2013).

⁵ On the emerging AFSJ, e.g.: N Walker (ed), *Europe’s Area of Freedom, Security and Justice* (OUP 2004), D Acosta & C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm*, (Hart publishing 2014), C Kaunert & P Pawlak (eds), *European Homeland Security: A European Strategy in the Making?* (Routledge, 2012).

jeopardizing the legitimacy of the EU as an AFSJ project. The legal framework is set out in Article 67 Treaty of the Functioning of the European Union (TFEU), which links different AFSJ parameters to the overall ambition of ensuring a high level of security in the EU. In addition, Article 68 TFEU, stipulating that the European Council “shall define the strategic guidelines for legislative and operational planning”, mandates the political program. Part of this projection involves the drawing up agendas of points to be achieved in the AFSJ, and where the focus so far has been almost exclusively on security.⁶

On that background, the paper takes as its starting point the claim that a) the concept of justice plays an important role in the European process of establishing a culture of fairness in AFSJ matters which could help balancing the current security focus; b) justice offers a helpful lens for understanding and debating the question of what justification the Member States and the citizens of the EU could reasonably ask for as the EU project expands. In other words, the paper discusses the merits of using justice as a compass for achieving a successful pathway for future European integration in AFSJ matters. This contribution will build on existing scholarship and practice of security (e.g. anti-terrorism related measures) and argue that what is needed in the debate on AFSJ law is a conceptualization of justice as a tool which helps ensuring a structure of AFSJ law that integrates the EU's Treaty based promise of delivering justice with a critical reading of it.⁷ In doing so the paper argues that the notion of justice in the EU is best viewed as a process, not a static enterprise, in line with the development of European integration, and with a firm commitment to a high human rights' standard.⁸ Furthermore, this should be distinguished from the slippery slope debate on security regulation as a process and where exceptional times would justify Draconian measures. The key point here is that an integrated constitutional reading of justice averts it from becoming an empty notion and makes it one that is linked to the governance structure of the AFSJ, indicating a level of fairness and integrity.⁹ For such realization to take place, a turn to justification – the argument goes – offers a more fruitful venue in an EU context than the classic debate on what exactly justice entails.

⁶ COM (2014) 144 final, ‘The EU Justice Agenda for 2020 – strengthening trust, mobility and growth within the Union’, The Stockholm programme—An open and secure Europe serving and protecting the citizen (Council of the European Union Brussels, 2 December 2009),

⁷ On critical justice, S Douglas-Scott *Law After Modernity* (Hart publishing 2013).

⁸ See contribution by S Douglas-Scott in this special issue.

⁹ R Dworkin, *Law's Empire* (Hart publishing 1999) 225

Consequently, the paper investigates the link between justice and justification¹⁰, and explains why an understanding of them enhances the legitimacy of the AFSJ project. In doing so, the paper turns to the empirical domain, and applies the legal principle of proportionality as a particularly useful device for analysing the AFSJ by providing a case study of a number of recent cases that are set to change the dynamics of AFSJ law. Specifically, these cases demonstrate the potentials of ‘justice’ reasoning in practice and thereby address the greater question of ‘justifications’ beyond the state. In Dworkinian terms, the conception of justification then is the golden rule for deciding on what principles of justice, fairness and procedural due process provide the best constructive interpretation of a specific claim.¹¹

2. Constructing the argument: AFSJ and the culture of (in)justice

While the concept of justice is often heralded as an essentially contested concept¹², this contribution argues that it can still be a useful notion for gauging fairness in AFSJ law if applied in a contextualized manner.¹³ This becomes especially clear in a legal context, where the question of justification is reflected in the level of sophistication of the legal reasoning supplied in every concrete case.¹⁴

In contemporary political thought, the debate on justice has largely become one of debate between Rawls’ distributive model of it and Cohen’s attempt to rescue equality from what he claimed represented a distorted picture of justice. Cohen criticized Rawls model of justice as the structure of society on the basis that his difference principle would permit inequality.¹⁵ He also rejected the idea that justice is the basic structure of society on the basis that it is not enough for justice to be built into societies institutional design but it

¹⁰ On the compatibility of the combination of the two see E Rossi and M Sleat, ‘Realism in Normative Political Theory’, *Philosophy Compass*, 9/10 (2014), 689.

¹¹ Dworkin *ibid*

¹² E.g. J Neyer, *The Justification of Europe* (Oxford University Press 2012), and contributions in J. Neyer and A. Wiener (eds) *Political theory of the European Union*. (New York: Oxford University 2010) Press, 111–138.

¹³ See R Forst, *The Right to Justification*, (Columbia University Press 2012)

¹⁴ M Kumm, Human Rights and the turn to justification: On the structure and domain of human rights practice, chapter in A Etinson (Ed.), *Human Rights: Moral or Political?* (OUP 2015), forthcoming

¹⁵ Ga Cohen, *Rescuing Justice & Equality*, (Harvard 2008).

must also be an imperative for individuals.¹⁶ According to Cohen there must be 'pure' justice. Others like Sen attempted to shift attention away from notions of 'ideal justice' to the more practical questions of advancing justice by eliminating at least the worst forms of existing injustice.¹⁷ In short, justice discourse today, and its implications for law, spans from what some would – very simplistically summarized here– call moralism to realist views¹⁸ and ideal versus non ideal theory¹⁹, to a capability approach most famously advocated by Nussbaum.²⁰ Nussbaum argues that what is needed in the debate on justice is a minimum level of justice in accordance with a list of basic capabilities that must be protected. On this background, and fitting for the present paper, Forst has developed a political and critical understanding of justice.²¹ In his view what is at stake when debating justice is that it is not about a distribution machine, but his point is rather that the argument about justice-centered reasoning is that it allows individuals equality and the right to justification for decisions taken against them.²² This appears similar to the debate in legal discourse on proportionality: that there can be no simple formula but what is required is a multifaceted understanding. The picture is more complex and requires a political understanding of the specific context in which it operates.

Much of EU involvement in AFSJ matters has been built on the concept of European security as a device for achieving further integration. This trend has been visible not only in the EU counter terrorism movement but also in other areas such as immigration and asylum law, where securitization has formed much of the main justification for involvement in the AFSJ domain. While the EU's heavy reliance on security as a justificatory tool for the EU's presence both on the internal and external scene has been criticized by academics in the last decade, it still plays an important role as the main drive for the furthering of the EU security agenda.²³ Hence, a large majority of the measures

¹⁶ J Donald Moon, 'Cohen vs Rawls on justice and equality', (2015) *Critical Review of International Social and Political Philosophy*, 40.

¹⁷ A Sen, *The Idea of Justice* (Belknap Press 2011 edition).

¹⁸ See E Rossi, Justice, legitimacy and (normative) authority for political realists' (2012), *Critical Review of International Social and Political Philosophy*, 149.

¹⁹ *ibid*

²⁰ M Nussbaum, *Frontiers of justice* (Harvard University Press 2007)

²¹ R Forst, *The right to justification* (Columbia 2012)

²² R Forst *Justification and critique* (Polity press 2014)

²³ See 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.

adopted in the EU's suppression of terrorism have been characterized by a strong preventive focus closely related to that of market creation. It confirms a precautionary approach to the fight against crime. From the perspective of 'justice', such an approach has been problematic since basic due process fundamentals were not given significant weight in the supranational state of security. However, as the EU is taking on more state-like features, unavoidably, it has to address some of the core old nation state questions: the need to justify any use of coercive powers and tackling what it means to refer to justice within a Union of 28 Member States. So, as the EU pushes forward with deterrent measures to ensuring a high level of security, the status quo in AFSJ law has become one of a too preventive regime, where the safeguards of the individual are lost despite the grand treaty values. Perhaps it could even be argued that the rights in the Charter of Fundamental Rights (Charter) and the European Convention on Human Rights at present appear empty assertions in so far that not enough is being done at the political level for ensuring a European culture of due process when the nation state no longer supplies the adequate legal safeguards.²⁴ A main theme running through this paper is therefore the question of the function of justifications for the shaping of the EU and, more concretely, the level of the justification that Member States could reasonably demand as the EU project expands.

Perhaps it needs, cautiously, to be asked if the conception of justice and its links to the question of justification, in AFSJ context, pre-supposes a contractualist ideal. With Rawls a contractualist conception of justice is based on a notion of public justification.²⁵ According to this view, 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.'²⁶ In this view a well-ordered society is a fair system of social and political cooperation which is effectively regulated by a public conception of justice. But as argued by Hinsch the requirement of public justification means that basic norms of a well-ordered society must secure the consent of citizens whose moral, philosophical, and religious views are at least partially incompatible. It is, therefore, not inconceivable that

²⁴ See contribution by Douglas-Scott in this special issue.

²⁵ J Rawls, *Political liberalism* (1993 Columbia University Press.) , discussed in W Hinsch, *Justice, legitimacy, and constitutional rights*, *Critical Review of International Social and Political Philosophy* (2010) 39

²⁶ See also contribution by Ben Crum in this special issue

no publicly justified political principles can be found.²⁷ There will always be reasonable disagreement in some areas, and the AFSJ seems likely to belong to such area due to its sensitive subject matter. However, there is a plausible way out of this dilemma or at least, a shortcut. As Benhabib points out, the question of normative justification is also about democratic legitimacy since the transnational law project cannot sacrifice discursive deliberation.²⁸ As noted by Kjaer though, the question of justification has largely become one of a substitute debate for democracy beyond the state proper.²⁹ The more seriously the EU mission of establishing an AFSJ develops, the more problematic the lack of a credible public justification becomes in the current strong emphasis on security within the AFSJ.³⁰

Against this backdrop, the argument of the paper proceeds as follows. First the paper assesses the theoretical framework for the AFSJ and why the security paradigm has always constituted its driving principle, and largely dominated the agenda. It explains the problems with the current security structure within the AFSJ field. Secondly, the paper looks at how the security focus could successfully be shifted by exploring the impact of justice-based reasoning as a balancing (legal) mechanism. In so doing the paper investigates the link between proportionality and justice: both being concerned with justifications. In other words, the paper turns to look at how the question of justification is linked to proportionality reasoning in concrete court cases. The paper explains how justice has a dual function here: a classic legal device for deciding on “rightness” in concrete court cases but also a larger function for integrating justice, in terms of fairness, into the structure of the AFSJ. It sounds obvious that the EU should strive for a justice space in the AFSJ, but given the current security focus it is in imminent need for radical change of navigation - even a radical view of justice - in order to save it from becoming an empty formalistic term. An integrated notion of justice, therefore, as part of the EU constitutional grammar asks how the application of proportionality could help to foster fairness of the overall system. Therefore, in legal terms, the classic proportionality test comes close to that of the right to justification and non-arbitrariness in decision-making. And that this is the most evident expression of justice in the terms of the right to justification.

²⁷ Hinsch *ibid*

²⁸ S Benhabib, *Democratic Sovereignty and Transnational Law. On Legal Utopianism and Democratic Skepticism*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455436

²⁹ See contribution by Poul F Kjaer in this special issue

³⁰ Draws on a parallel argument with regard to human rights and the international fora in A Buchanan, ‘Human Rights and the Legitimacy of the International Order’, (2008) *Legal Theory* 39.

3. The relevance of justice and the domination of security

For justice to work as a concept in AFSJ law, we first need to establish the extent to which justice can appropriately be debated in the supranational sphere or whether it is predominantly a local (national) phenomenon. As Forst argues, there is good reason to believe that, for example, Rawls' theory of justice could be extended beyond the nation state, providing we have the right toolkit for doing so.³¹ Essential to that toolkit is the conception of 'context' and critical interpretation as the main yardstick for understanding justice. When discussing justice in the AFSJ context we therefore need to recognize 'justice' as a concept closely related to the governance structure of the AFSJ as such. Central to this argument, as noted above, is the importance of viewing justice as a process not a static phenomenon.³² The question of justice appears to have become a question closely associated with that of legitimacy in EU legal context.³³

Yet, we have here then a first challenge to the argument. After all, the 'process' based lens as seen in security theory is generally considered to be highly problematic.³⁴ The claim is that security is often being deployed and manipulated through strategies of security process, which are easily corrupted. The problem with the interlinked relationship of security and the political is that there is obvious lack of guarantee that the discursive framework of security will be used for good purposes.³⁵ The classic problem with the EU's governance endeavor with regard to the AFSJ is that it is tilted towards an overly strong security dogma. Security theorists, beyond the EU sphere, in keeping with Foucault, have asked what it is that is positive about the state of the exception in international law, and, when discovering its current flaws, asked how its broken surface could be fixed.³⁶ But while security is discursive and too much of it is problematic from a human rights perspective, justice is also then useful, not as an all or nothing concept but as an umbrella concept for measuring fairness. There is thus a well-known dichotomy between the different components of the AFSJ. While it is certainly not an innovative statement to

³¹ R Forst, *The Right to Justification* (Columbia 2012).

³² See contribution by Poul F Kajer in this special issue

³³ J Neyer, *The Justification of Europe, a political theory of supranational integration*, (Oxford University Press 2012).

³⁴ A Neal, 'Foucault in Guantanamo: Towards an Archaeology of the Exception', *Security dialogue* (2006).

³⁵ Ibid.

³⁶ Ibid

point to the current and long-standing imbalance in the AFSJ, apparently focussing mainly on security as long standing repercussion of the events of 9/11, it is arguably a considerably more ambitious endeavor to question the fundamental structure that is the skeleton of the AFSJ. The argument as presented here, though, is that the merit of viewing something as a process rather than a static enterprise is different when it comes to justice as compared to the slippery concept of security.³⁷ And the reason for this is the linkage of justice and legitimacy in an EU context; it is an evolving – normatively and functionally – but necessary ‘process’.

Given the strong emphasis of security for the construction of the AFSJ, we need to take a step back and reflect on the level of justice (call it a culture of fairness) that could be achieved. In other words, the concept of justice draws up a baseline for AFSJ law.³⁸ A constitutional reading of justice would then be one that integrates Treaty based values such a high level of human rights with a critical reading of the rule of law. This could usefully be referred to as a constitutionalized vision of justice for the AFSJ as it tackles fundamental questions of sovereignty and due process. Yet the question of power, as Forst points out, is the first question of justice and the right to justification³⁹, and is at the heart of a non-domination oriented conception of law and justice.⁴⁰ Therefore, we need to place the question of justice in the AFSJ in the context of what non-domination means proper. One question that automatically arises when discussing the EU’s security mission is how it is related to the identity of the AFSJ and the extent to which this identity mission is more broadly tied to the EU’s symbolic function. This is because just like ‘security’ terms such as ‘symbolic’ are at risk of being used in an overly-broad way. Added to this is the tendency for ill-defined legislation, and concealment⁴¹ in the legislative process, arguably constituting domination at the expense of adequate high human rights protection. A critical notion of justice within the AFSJ is therefore linked to the basic right of justification as a countermeasure to domination.

³⁷ C Schmitt, *Political theology, Four chapters on the concept of sovereignty*, (transl 1985 MIT Press).

³⁸ On legal culture and justice, M Rosenfeld, *Law, Justice, Democracy and the clash of cultures*, (2011, CUP).

³⁹ R Forst, *The Right to Justification* (Columbia 2012).

⁴⁰ P Pettit, ‘A Republican Law of Peoples’ (2010) *European Journal of Political Theory*, 70.

⁴¹ D Curtin, “Overseeing Secrets in the EU: A Democratic Perspective.” (2014) *Journal of Common Market Studies*, 684

Justice as Non-Domination

The idea of non-domination as the foremost yardstick for testing the level of freedom in a society is well documented and the starting point for any discussion of the use of criminal law.⁴² In the EU context, the question non-domination is usually framed as a question of equality among Member States. Moreover, coercive powers are often held to be the key characteristic that distinguishes an institution such as the EU from that of a nation state.⁴³ Indeed, Weber famously defined the nation state as one of legitimate monopoly of force and power.⁴⁴ In addition, non-domination is of course the republican benchmark or key for understanding justice and by some considered to be incentive-compatible rather than ideal.⁴⁵

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 and achieving security through penal measures.⁴⁶ Recent examples include criminal law measures in the area of financial crimes and that of cyber-crime related criminality that amounts a combined threat of the financing of terrorism and the EU endeavors to stabilize the market by getting tough on white-collar crime.⁴⁷ These are only brief examples, but at their core there is an innate need for the EU to working out a strategy for the AFSJ. It is true that the next multi annual AFSJ program and the ambitions set out in this ambitious agenda, reflect a wish among the EU's institution to be firm on

⁴² See e.g. A.P. Simester & A. von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalization* (Oxford: Hart Publishing 2011), pp 3-7.

⁴³ See e.g. J Neyer, *The Justification of Europe* (OUP 2012).

⁴⁴ M Weber , *Economy and Society* vol 1 (University of California edition 2013), see also R Forst, 'Noumenal power' (2015) *The Journal of Political Philosophy*, 111

⁴⁵ P Pettit, 'A Republican Law of Peoples' (2010) *European Journal of Political Theory*, 70.

⁴⁶ See e.g. Directive 2013/40/EU, L 218/8 directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA.

⁴⁷ *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing.*

the future application of the rule of law. However, there is a striking absence in the political discussion on how to shape this area and what justice can add to the debate.

In conclusion, as explained, in the decade following 9/11, the AFSJ sphere is becoming ever more securitized. In short, the focus on international security has overshadowed the need to ensure the right of due process. Thus, it seems easy to conclude that security discourse requires a more elaborate vocabulary and a more nuanced approach to what is actually at stake when invoking its blanket term. It could be argued that the sweeping generality, in which the concept of security is being used, echoes domination, seriously hampering freedom and justice.

4. Justice within the Area of Freedom, Security and Justice

For anyone trying to construct the AFSJ to a justice space, such an endeavor might appear overly theoretical against the background of the present, almost daily, occurrence of migrants drowning on the coast of Europe. In other words, the present paper's analytical endeavor of establishing justice as a key concept in the AFSJ might seem ironic and, as such, utterly utopian. The EU migration crisis has hardly escaped anyone and casts dark shadows regarding what it means to refer to a common European solidarity.⁴⁸ Unavoidably, it begs the question if it is legitimate to claim that the EU should create a justice space within the AFSJ, which excludes third country nationals. Should we accept a Cosmopolitan claim of a duty of justice towards outsiders?⁴⁹ While it would seem politically naive in the current European climate to claim a cosmopolitan based justice,⁵⁰ 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. Increasingly, the EU invokes criminal sanctions as a preventive strategy in dealing with migrants put in detention as part of the

⁴⁸ A Sangiovanni, 'Solidarity in the European Union' (2013) *Oxford Journal of Legal Studies* 33: 2.

⁴⁹ see e.g. M Kumm, 'Constitutionalism and the Cosmopolitan State, An Integrated Conception of Public Law, (2013) *Indiana Journal of Global Legal Studies* 605, A Somek, *The Cosmopolitan constitution* (OUP 2014), D Halberstam, "Local, Global and Plural Constitutionalism: Europe Meets the World," in G. De Búrca and J Weiler (eds), (CUP 2012), *The Worlds of European Constitutionalism* 150, C Cordaretti Cosmopolitan Authority (paper presented at the WZB Rule of Law colloquium, May 2015, on file with the author),

⁵⁰ see however M Risse, 'Taking up space on earth: theorizing territorial rights, the justification of states and immigration from a global standpoint', (2015) *Global Constitutionalism* 81

securitization of the AFSJ. It is precisely here that a justice deficit exists and where the question of what kind of justification the EU owes those on its territory turns into a burning question.

Consequently, we need to connect the vocabulary of justice with the right of justification as identified in EU legal reasoning as more than a question of the breadth of the European Court of Justice's jurisdiction and the width of the general right to effective judicial protection. The impact of a constitutional meaning of justice and to the extent it could function as a visualizing tool for remedying some of the problems facing the EU in the current wave of populism and disintegrative wishes in the Member States remains a considerable challenge and dilemma for the construction of the AFSJ. Justice, in this sense, is critical in that it insists on more than an empty assertion of justice and involves more than simply procedure.⁵¹ In other words, what is needed in the AFSJ is a conception of justice which takes it beyond mere administration.⁵² In legal terms, these values may be deduced from the Charter and the preamble of the EU Treaty.

However, elements of adjudication are not enough; the question is really one that should be high up on the EU political agenda and where a constitutionalized conception of justice adds to the integrity of Area of Freedom, Security and Justice Law.

In the context of the normative foundation for human rights, Buchanan has asked what it takes to produce reliable factual information of the sort that is likely to be relevant for specifying and justifying claims about human rights.⁵³ Could we translate this statement to the AFSJ context? Justice then, in the AFSJ, seems central to the ambition of realizing freedom and thereby ensuring rights.

Realizing the freedom component?

The AFSJ sets out to secure justice and freedom through a high level of security. The notion of 'freedom' as stipulated in the AFSJ paradigm does not really promise any philosophical statement but rather a reaffirming of the right to free movement, i.e.

⁵¹On justice as a critical concept in law, S Douglas-Scott, *Law After Modernity* (Hart publishing 2013).

⁵² See on justice and administration, A Williams, *The Ethos of Europe* (CUP 2012).

⁵³ A Buchanan, 'Human Rights and the Legitimacy of the International Order', (2008) *Legal Theory* 39.

fundamental freedoms and the safeguarding of the rule of law. Yet the idea of freedom, if aspiring for the AFSJ to become a justice space, must be tied to the striving for non-domination as discussed above. This is where the link between justice and freedom is visible. The idea of the EU constructing an area of freedom and justice, while at the same time ensuring security, might at first sight signify a striking imbalance between the different parameters of freedom, security and justice. As mentioned, the AFSJ is currently one of the most dynamic EU integration areas and as such one of the newest EU policy areas at present and how it develops in the future is of great importance not only for the Member States but also the citizens of the EU. The construction of a true AFSJ space presupposes a balance, but how this balance is to be achieved is a messy task for the EU. Therefore, it could be argued that it is not justice in any administrative sense that is being balanced but a broader conception of 'justice' as a European notion of fairness and as proclaimed in the Lisbon Treaty values.

It could be argued, however, that the notion of justification is deeply associated with the question of how to create a European legal culture in AFSJ matters that genuinely cares for the individual. What is the core of AFSJ law? In the following I propose that the core of AFSJ law should properly be framed as a question of how the EU justifies its endeavors. It is contended that the freedom component, when viewed against the current domination of security, is a reasonable expectation.

5. The turn to justification: proportionality as reasonable disagreement

As is well known, Rawls constructed justice as fairness on the basis of fundamental ideas that he believed are generally accepted in contemporary liberal democracies.⁵⁴ Indeed, 'reasonable disagreement' has become the guiding dictum for deciding when something is just. Applying a Rawlsian account to the theory of justice would, in any case, imply using reasonableness as an adequate standard for measuring legitimacy at the EU level and linking it to the broader debate on justice.

In legal context, an effective way of dealing with reasonable disagreement is through the proportionality test which is a legal construction tool. It is also, as Barak explains a more

⁵⁴ J Rawls *Justice as Fairness a Restatement* (Harvard edition 2001)

specific methodological device.⁵⁵ The idea of ‘proportionality’ is made up of four components: proper purpose, rationale connection, necessary means, and a proper relation between the rationale gained by realizing the proper purpose and the harm caused to the constitutional right.⁵⁶ The core message is that the limiting law must uphold these four components in order to pass constitutional muster.⁵⁷ The use and importance of proportionality in EU law is of course far from new and has constituted one of its driving principles since early days. Yet, the AFSJ seems to have been largely excluded from it, where the preventive approach has outweighed other values such as most prominently the basics of due process and the full package of defense rights for those accused of terrorism and other security related offenses.

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. Nevertheless, it is also about how to create a European culture as a judicial weighing mechanism in terms of the legal classification of ‘rightness’ in concrete court cases. In the following, I examine the practical implications of justice as reflected in the legal right to justification as manifested in the proportionality test.

In doing so, it is fitting to turn to what Kumm has referred to as ‘Socratic contestation’ and which refers to the practice of critically engaging authorities, in order to assess whether the claims they make are based on good reason.⁵⁸ As Kumm argues ‘One important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claimant.’ This then seems particularly important in the transnational EU context and of relevance for the AFSJ, where the democracy concept as noted always has been a strained notion. The point of justification is that individuals have a right to reasoned decisions and the function of Courts is to assess if the public authority taking the decision in question can be justified on public policy. So the question of good reason is perhaps most clearly identified in the principle of proportionality which functions as a

⁵⁵ A Barak, *Proportionality, Constitutional rights and their limitations* (CUP 2012),

⁵⁶ Ibid

⁵⁷ Barak, p 131.

⁵⁸ M. Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review’ (2010) 4 *Law & Ethics of Human Rights* 141

justification tool.⁵⁹ But, who decides what reasons are ‘good’ enough? A way out of this well-known problem would be to anchor those ‘good’ reasons in the Charter. Indeed, the principle of proportionality appears to play a key role with regard to the scope and limit of the Charter. Nonetheless, Article 52(1) of the Charter sets out some important exceptions to the application of the Charter as a whole. This provision makes it clear that:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Thus, the scope of EU human rights protection in legal terms seems to turn on the elasticity of the proportionality principle, easily accused of paving the way for circular reasoning. It would seem then, that for the AFSJ to constitute a justice space it requires a critical reading of not only justice but also proportionality (as the right to justification) in order not to simply constitute a utopian concept but one that adds to the real lives of Europeans. So, a general adherent to justice would mean that there are limits to what the Member States may deny its citizens on the basis of proportionality. Of course, in the EU context, the Member States have also a right to justification if adhering to the basics of power granting for Union action. The notion of proportionality in EU law in general is certainly a well-explored legal axiom, but the Socratic model adds to this well-trodden debate by going one step further and investigating the actual impact of requiring reasoned action from both the EU and the Member States. It is a true umbrella concept underlying all Union activity in all field of law and points in the direction of a federal balance.

While the principle of proportionality is part of the EU’s arsenal for deciding on legislative authority for the EU legislator, it is also a principle that is addressed to individuals in the free movement context. This is usually called the strict proportionality aspect of the otherwise rather state-centric proportionality test. The problem – so far – is that the AFSJ

⁵⁹ For a recent studies of proportionality see A Barak, *Proportionality, Constitutional rights and their limitations* (CUP 2012), V Jackson ‘Constitutional Law in an Age of Proportionality’ (2015) *Yale Law Journal* 3094, M Klatt & Meister, *The Constitutional Structure of Proportionality*, (OUP 2012), A Stone-Sweet, ‘All Things in Proportion? American Rights Doctrine and the Problem of Balancing’ available at [ssrn](https://ssrn.com/abstract=2541111), K Moller, *The Global Model of Constitutional Rights* (OUP 2012), and contributions in G Husracft, Bw Miller and G Webber (eds), *Proportionality and the rule of law* (CUP 2014).

seems to have been largely exempted from this golden rule of balancing. Remarkably, the proportionality principle has not been applied to any greater extent in this legally thorny terrain, with complex ties between the EU, Member States and their citizens; despite this being an area closely connected to national sovereignty and protection of human rights. Important legal measures in this area on arrest warrants which introduced the concept of mutual recognition in the fight against crime seemed to exclude such a proportionality test.⁶⁰

With regard to the possible usefulness of balancing in concrete cases and if applying Barak's view of proportionality as inherent in the balancing test, it is useful to turn to the mutual recognition arena.⁶¹ Crucial for the development of mutual recognition i.e. that no additional barriers should exist between the Member States in AFSJ law, has been the notion of "trust".⁶² The assumption being that Member States trust each other enough so as not to insist on additional legal safeguards or checks. The most radical example of this is of course the examples of the European Arrest Warrant which still poses controversies in the national legal system, as it abolished the requirement of dual criminality as a precondition for extradition.⁶³ As one Advocate General has put it: "(...) the principle of mutual recognition which lies at the heart of the mechanism behind the European arrest warrant cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification or a driving license issued by another Member State".⁶⁴ The Court confirmed this view by asserting that there is not an absolute obligation to execute arrest warrants but at the same time it emphasized the duty of national courts to ensure the full effectiveness of the actual application of the EAW framework decision.⁶⁵ Further, in the NS⁶⁶ case in the context of the EU asylum system, the Court of Justice asserted that if there are substantial grounds for believing that there are systematic flaws in the asylum procedure in the Member State responsible, then the

⁶⁰ /584/JHA [2002] OJ L190/1, on the EAW framework decision

⁶¹ A Barak, *Proportionality, Constitutional rights and their limitations* (CUP 2012).

⁶² see e.g. C Jansen, *Mutual recognition* (OUP 2013).

⁶³ E.g. K Lenearts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', talk delivered at the Fourth Annual sir Jeremy Lever lecture All Souls College, University of Oxford, 30 January 2015 (on file with the author).

⁶⁴ Case C-42/11, *Da Silva Jorge* judgment 5 September nyr, opinion delivered by AG Mengozzi on 20 March 2012. Para 28

⁶⁵ *ibid*

⁶⁶ C-411/10 and C-493, judgment of 21 December 2011

transfer of asylum seekers to that territory would be incompatible with the Charter of Fundamental Rights. The Court held that there was no doubt that, where there is a serious risk that the applicant's rights, as guaranteed by the Charter of Fundamental Rights, may be breached, Member States should enjoy a wide "margin of discretion".⁶⁷

The crucial point here is that the proper application of proportionality functions as a rebuttal of the previous assumption that there were no or very few limits, to mutual recognition in this area. When human rights are at stake there needs to be a good justification for relying on trust. The following section aims to draw on some further examples from practice and argue that these examples represent an important testing ground for the resilience of justice based reasoning and explain why this matters in the context of security.

6. Practice dependence or context: the question of good enough justification.

By investigating the impact of proportionality in the context of mutual recognition, in particular, the paper seeks to demonstrate the force and power of proportionality as a governing principle and why it is needed as a device for constructing the AFSJ space.

For example, in the much debated Melloni⁶⁸ ruling, concerning the validity of the amendments made to the European Arrest Warrant by Framework Decision 2009/299/JHA⁶⁹ 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.⁷⁰ It could be argued, though, that Article 53 also enables the EU to adopt a higher standard if it would so wish. If the national constitution provides for a higher standard and if the objective of the EU is to establish an AFSJ with a high level

⁶⁷ 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?' (2013) *European Public Law* 759

⁶⁸ Case C-399/11 *Criminal proceedings against Stefano Melloni*.

⁶⁹ Council Framework Decision 2009/299/JHA.

⁷⁰ *Melloni ibid*, para. 60.

of human rights protection such an increase in standard may be adopted. 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*⁷¹ 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 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 point is that the Court has in some cases agreed that mutual recognition is not absolute and in other cases seems more concerned with upholding the effectiveness of the instrument.

Despite the seemingly bleak picture painted above, there is reason to be hopeful regarding the potential of the Court of Justice to be a successful guardian of the AFSJ and the breeding of justice. After all, the recent case of *Digital Rights*⁷² is instructive as a touchstone of justice-inspired reasoning in the 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. The Court pointed out that the access by the competent national authorities to the retained data was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data to what was strictly necessary for the purpose of attaining the objective pursued. Nor did it lay down a specific obligation on Member States designed to establish such limits. The EU legislator had provided insufficient justification – it was not good enough.

Regardless of the attractiveness as a judicial principle, proportionality is often attacked on the grounds that it involves judicial weighing of incommensurables and thereby erodes rights. Moreover, it is often accused of being a far too pragmatic and thereby simply too mechanical as a legal principle. The argument hinges on the concern that moral values cannot be adequately balanced as the interests at stake cannot actually be weighed on any

⁷¹ C-411/10 and C-493, judgment of 21 December 2011

⁷² Case C-293/12, opinion of AG Cruz Villon delivered on 12 December 2013, judgment of 8 April 2014.

sort of scale.⁷³ In short, critics argue that there is too much ambiguity with the pathologies of proportionality test and that it fails to deliver what it promises: namely that contrary to what some scholars argue, it does not increase transparency, rationality nor transparency and thereby neither its legitimacy. Justice then, just like the principle of proportionality, is vulnerable to the critique that its political dimension means that it is not amenable to judicial review.⁷⁴

As explained above, Kumm has tied the discussion on proportionality to the right to justification in human rights law.⁷⁵ By requiring the EU to think through its AFSJ vision and to guarantee its citizen a right to good governance (e.g. Article 41 the Charter) justice in terms of justification serves not only a political function but also a legal method. This appears particularly important in the case of the European Arrest Warrant, where an individual could be deprived basic legal rights depending on what Member States s/he is located and where the Charter will serve the function as a balancing mechanism for ensuring a high AFSJ standard through the Union. The debate on the future of AFSJ law begs the fundamental yet difficult question of what exactly is Europe's *raison d'être* with regard to the AFSJ? While this question remains largely unanswered, the commitment to consistency between the EU's pursuit of justice is often considered a paramount concern in the European process.

While this paper has provided a rather sketchy view of the AFSJ and its current shaping while discussing what justice reasoning can add to the debate, its main ambition was to illuminate how a critical reading of justice helps to balance the AFSJ towards a justice space and away from the overly securitized focus. So just how useful is a justice-oriented approach in AFSJ law? As was hopefully shown in this paper, serious attention to justice as a critical legal concept could add democratic credibility to the AFSJ by reading it as a basic right of justification, which safeguards due process rights and helps the EU to successfully achieve its agenda in this policy field. Its usefulness then, lies in its potential to place the

⁷³ T Endicott, 'Proportionality and Incommensurability', Oxford legal research papers, Paper No 40/2012

⁷⁴ on subsidiarity, P Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72

⁷⁵ M Kumm, 'Democracy is not enough: Proportionality and the point of Judicial review', available at <http://www.law.harvard.edu/faculty/faculty-workshops/kumm.paper.i.pdf> (last accessed 1 July 2015)

individual at the center of the stage and by requiring a sufficiently coherent system which guarantees adequate human rights protection in an area where they are most needed.

7. Concluding remarks

The argument of the paper can be summarized as follows. A reading of justice which is linked to the question of justification – as a key idea of the overall structure and fairness of the AFSJ-EU system, could help with constructing a fair AFSJ playing field which fully takes into account just how delicate this area is. A turn to justification via the legal tool of proportionality could help to turn the debate on the future of the AFSJ into a fruitful one, helping to ensure a balance in the AFSJ as a force of good governance. Such an understanding presupposes a political reading of justice which takes it beyond mere moralism or what it means to be a good European, and forces the EU to work out a sufficiently thought through policy agenda as the leader of the pack, with the Member States to follow, and the concerns of the individuals being part of this agenda. This does not mean, however, that national law is outdated once and for all; if it can offer the EU something with regard to the interpretation of new concepts in AFSJ law then the EU would be very wise to keep it for the time being.⁷⁶ ‘United in diversity’ can only work if a shared sense of legal culture also means a grammar of justice, and thereby elevating the AFSJ to more than ideal theory but a policy area which set the concerns of the individual as its main priority and ensures a balance against the current domination trend of security.

⁷⁶ Along the same lines, A Albi ‘Erosion of constitutional rights in EU law: A call for ‘substantive co-operative constitutionalism’, conference paper presented at VU Amsterdam 6-7 Nov 2014.

Discussion Papers of the Center for Global Constitutionalism 2015

Ester Herlin-Karnell and Poul F. Kjaer Dimensions of Justice & Justification in EU and Transnational Contexts	SP IV 2015-801
Jan Pieter Beetz and Enzo Rossi EU Legitimacy in a Realist Key	SP IV 2015-802
Ben Crum From Public Reason to Multi-Layered Justice	SP IV 2015-803
Sionaidh Douglas-Scott Human Rights as a Basis for Justice in the European Union	SP IV 2015-804
Ester Herlin-Karnell Justice and Justification in Europe's "Area of Freedom, Security and Justice"	SP IV 2015-805
Lyn K.L. Tjon Soei-Len The Moral Limits of EU Internal Market Exchange Equal Respect and Capabilities	SP IV 2015-806
Sivan Shlomo-Agon Noncompliance, Renegotiation, and Justice in International Adjudication: A WTO-EU Perspective	SP IV 2015-807
Poul F. Kjaer The Function of Justification in Transnational Governance	SP IV 2015-808