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The domination of security and the promise of justice: on justification and proportionality in Europe's 'Area of Freedom, Security and Justice'*

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ABSTRACT
In this paper, I explore the connection between the notions of justice and justification in an European Union (EU) security-related context. I argue that a full comprehension of these notions enhances the legitimacy of the EU's 'Area of Freedom, Security and Justice' (AFSJ) project. However, we still need to go further when investigating justice's potential as a theoretical device for navigating the future of AFSJ law. This paper contends that we need to analyse 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 realising justice and freedom in a largely security-driven site. Marrying these abstract claims with the empirical reality of security regulation in contemporary European law helps to establish democratic credentials within the AFSJ and links the question of justice to that of justification and ultimately proportionality in AFSJ law.

KEYWORDS EU; justice; justification; security; non-domination; proportionality

1. Introduction

The quest for justice is one of the foremost aims of any democratic society. So it should be for the European Union (EU) with the rule of law, democracy and human rights as its foundational and core values.[1] Yet, while Rawls anchored justice in the basic structure of society as a response to the question of how

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*All websites accessed were updated in January 2017.
[1] On 'justice' in the EU context, see, eg, Sionaidh Douglas-Scott 'Human Rights as a Basis for Justice in the European Union' in this special issue of *Transnational Legal Theory*, doi:10.1080/20414005.2017.1321907. See also Sionaidh Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism, and Critical Legal Justice' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012), ch 16; Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015), especially the contribution of Neil Walker, 'Justice in and of the European Union', ch 17; Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) *Oxford Journal of Legal Studies* 213; Jürgen Neyer, *The Justification of Europe: A Political Theory of*

government action could be justified and designed,[2] 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.[3] While justice is often proclaimed as an essentially contested concept,[4] this contribution argues that it can still be a vital and useful notion for gauging fairness when applied contextually.[5] This becomes especially evident in legal settings where the level of sophistication of the legal reasoning that grounds each concrete court case reflects the question of how to achieve a just order.[6]

Although justice is a highly controversial notion, with Dworkin, its conceptualisation depends on the underlying interpretation and competing rationales behind it.[7] Therefore, it is not the abstract notion of justice but the particular conception—'justificatory', as I claim below—that needs bearing out in the EU context. The particular conception of justice is especially important in the framework of the progressing area of EU security regulation. Moreover, conceptions of justice offer a compelling perspective for understanding the wider governance structure of the EU.[8] Rather than merely anchoring the individual's array of legal rights and the access to justice that expresses it—that is, a basically administrative concept—justice would then constitute a broader normative as well as institutional principle for arranging the values underlying the EU's 'Area of Freedom, Security and Justice' (AFSJ). Such a conception of the AFSJ would not only value security, but equally strive to ensure freedom and justice—and thereby the overall fairness of the system.

Supranational Integration (Oxford University Press, 2012). See also most recently Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2016).

[2] John Rawls, *A Theory of Justice* (Harvard University Press, 1999). See also Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16(2) *The Journal of Political Philosophy* 137.

[3] For example, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012); Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002); Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 2680, 3094; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 142; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012); Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012). See also the contributions in Grant Huscroft, Bradley W Miller and Grégoire CN Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); and Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009), Malcolm Thorburn, 'Proportionality', in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016), ch 15 and Arthur Ripstein, 'Reclaiming Proportionality' (2017) 34(1) *Journal of Applied Philosophy* 1.

[4] See, eg, contributions in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (Oxford University Press, 2010) 111–38.

[5] See Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, 2012).

[6] Mattias Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in Adam Etinson (ed), *Human Rights: Moral or Political?* (forthcoming, Oxford University Press) (on file with the author).

[7] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 98–99.

[8] On the role of transnational law in this process more generally, see Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21(2) *Transnational Law and Contemporary Problems* 305.

The EU is an interesting case in that it is tailor-made for testing the discursive potency of justice and justification not only at the supranational (vertical) level (ie with respect to the member state-EU bond), but also with regard to the (horizontal) member state-member state level as well as the competences between the EU's institutions. In particular, the relationship between the nation state, the individual and the EU is complex, which makes explaining EU action and entrenched forms of public reasoning a challenge. This complex relationship is also intimately connected to what kind of justification citizens are entitled to as the EU project expands.[9] Because of the rapid development of the AFSJ in recent years and its crisis-driven agenda (eg the fight against terrorism and the management of the migration crisis), a serious awareness and critical reflection as to how the EU could construct a just order of security regulation is warranted.

But what conception of justice should become an integral part of the EU's constitutional vocabulary? This paper seeks to elucidate why it is helpful to analyse EU security regulation through the lens of justice as 'non-domination'[10] and how constitutionalism offers a useful framework for this process. This paper then focuses on the broader theoretical and normative understanding of the EU security project. In doing so, it explores the link between justice and justification and explains how it may enhance the legitimacy of the EU's AFSJ project.[11]

Before developing this question further, however, I will briefly set out the general EU framework in which we need to understand EU security law. The EU is a supranational organisation consisting at present of 28 member states (alas with one core member state, the U.K., about to leave through its 'Brexit' process, which started in 2016), with constitutional values and aspirations set out in the Lisbon Treaty (ie the Treaty of the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU)). The EU has its own legal system, which has largely been developed by the Court of Justice of the European Union (CJEU) and which focuses on the direct effect and supremacy of EU law. EU law has supremacy over national law unless otherwise endorsed by EU case law or if there are good reasons listed in the Lisbon Treaty for it not to. The EU is not a state, even though it increasingly comprises state-like features and functions by legislating on, *inter alia*, criminal law, tax law and migration governance. Yet the EU's lack of coercive power—for example, the absence of an EU police force and the lack of a full set of enforcement powers comparable to those possessed by member states—is often

[9] On public reason in legal context see Wojciech Sadurski, 'Reason of State and Public Reason' (2014) 27(1) *Ratio Juris* 21. See also the paper by Ben Crum 'Public Reason and Multi-Layered Justice' in this special issue of *Transnational Legal Theory*, doi:10.1080/20414005.2017.1299537.

[10] On freedom as non-domination, see Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2013).

[11] On the compatibility of the combination of justice and justification, see Enzo Rossi and Matthew Sleat, 'Realism in Normative Political Theory' (2014) 9(10) *Philosophy Compass* 689.

highlighted as one of the criteria distinguishing it from a fully formed nation state.[12] The CJEU has an overarching goal of creating an autonomous European legal order that provides adequate safeguards for fundamental rights and grants individuals rights in national courts.[13] Additionally, the CJEU has expounded the classic EU loyalty principle into a holistic mechanism for establishing and maintaining European integration in the member states and thereby guaranteeing the effectiveness of EU law.[14]

The EU also regulates security-related issues: the fight against terrorism, the suppression of crime, the governance of asylum seekers and migration, etc. These issues are dealt with under the policy domain of the AFSJ. This policy domain is one of the fastest expanding in contemporary EU integration and deals with, *inter alia*, security, border control, anti-terrorism law and crime. Thus, it embodies a new and sensitive field in the EU, one that is being transformed from a largely isolated 'justice and home affairs' domain to that of a European hub for security co-operation. Specifically, the AFSJ's policy domain provides a fascinating example of a clash between the due process concerns of the individual and security-driven preventive measures, for which the EU is carving out its security agenda.[15] The tasks of identifying the underlying values in this divergent area, how these values drive the development of an AFSJ, and identifying where the concept of justice ought to guide the EU as a constitutional compass, are of paramount importance. The legal framework for the construction of the AFSJ is set out in Article 67 of the TFEU, which links different AFSJ parameters to the overall ambition of ensuring a high level of security in the EU.[16] In addition, Article 68 of the TFEU, which stipulates that the European Council 'shall define the strategic guidelines for legislative and operational planning',[17] mandates that the political programme establish future security co-operation within the EU. Part of this projection involves drawing up the agenda points to be achieved in the AFSJ, where the focus, to date, has been almost exclusively on security.[18]

[12] Neyer (n 1).
[13] Case C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585.
[14] For example, see Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014); Stephen Wetherill, *Law and Values in the European Union* (Oxford University Press, 2016).
[15] On the emerging AFSJ, see, eg, Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press, 2004); Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, 2014); Christian Kaunert, Sarah Léonard and Patryk Pawlak (eds), *European Homeland Security: A European Strategy in the Making?* (Routledge, 2012); and the contributions in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge, 2016).
[16] *Treaty on the Functioning of the European Union*, 13 December 2007, C115/47, online: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT>.
[17] *Ibid*.
[18] See European Commission, *The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union* (2014), COM (2014) 144 final, online: <http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf>; Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens* (2009), 17024/09, online: <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf>.

Recently, the EU security and border enterprise has been severely strained by the EU migration and refugee crisis that has escalated since 2015 and the concomitant need to fight terrorism and monitor movement across Europe. This new reality begs the question: what does it actually mean to refer to a Europe of solidarity and justice? While the idea of open borders may be one of the hallmarks of EU integration, as established by the Schengen Agreement of 1985, its future is uncertain and hotly debated. The EU's strong internal security agenda over the last decade is by now well-documented, especially in political science literature.[19] What seems much less explored—both in law and other related disciplines—is the EU security mission and its trajectory viewed through the prism of political theory and understood as a question of constitutionalism.[20] In addition, the question of justice appears to have become closely associated with that of legitimacy in the EU legal context.[21]

1.1. The structure and argument of the paper

This paper charts how conceptions of justification become the golden rules for deciding which principles of justice, fairness and procedural due process provide the best constructive interpretation of a specific claim. The aim is then to explain how justice has a dual function here: it is both a classic legal device for deciding on 'rightness' in concrete court cases and, more broadly, a tool for integrating 'fairness' into the structure of the AFSJ. It may sound obvious that the EU should strive for justice within the AFSJ. But, given the current security focus of AFSJ discourse, there is an urgent need for a radical change of navigation—even a radical view of justice—in order to save the AFSJ's stipulated normative commitments from deteriorating into an empty formalistic shell. An integrated notion of justice, therefore, as part of the EU constitutional 'grammar', its structure if you will, asks how the application of proportionality could help to foster fairness throughout the overall system. Consequently, in legal terms, the classic proportionality test comes close to that of the right both to justification *and* to non-arbitrariness in decision-making, which in turn is the most compelling expression of justice conceived of in terms of the right to justification. For justice in such terms to be realised in an EU context, a turn to justification, rather than engaging in traditional debates over what justice exactly entails, may be more fruitful.

[19] For example, see Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia, 2013); and Cian C Murphy 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"' (2015) 6(1) *Transnational Legal Theory* 31.

[20] For a recent contribution on the constitutional dimension of EU migration governance, see German Law Journal, *Special Issue: Constitutional Dimensions of the Refugee Crisis* (2016), volume 18, issue 6, online: <www.germanlawjournal.com/s/Full-Issue-PDF_Vol_18_No_01.pdf>.

[21] Neyer (n 1).

The next section sets out to explain the relevance of justice theory (as well as explaining its salient contexts) for understanding the AFSJ project and its evolution. It outlines the main debate over the conception of justice and discusses why the classic debate in political theory and jurisprudence is particularly relevant in the context of EU security regulation and the AFSJ. It elucidates why the security paradigm has always constituted the AFSJ's driving principle, largely dominating its agenda. The third section argues that justice properly understood in the AFSJ should be interpreted as a non-domination principle. In other words, there is merit to using justice as a compass for finding a successful pathway for future European integration in AFSJ matters. The fourth section examines how the security focus could successfully be shifted by exploring the impact of justice-based reasoning as a balancing mechanism towards successful EU integration. In so doing, the paper investigates the link between proportionality and justice, their mutual dependence on justification, and the discursive and institutional conditions for justification. The cases examined are set to change the dynamics of AFSJ law since they demonstrate the potential of justice reasoning in practice, and thereby address the greater question of justification beyond the state. The analysis attempts to demonstrate why practice matters in AFSJ law and how justification is helpful here as a manifestation of justice in context.[22]

In sum, this paper will attempt to demonstrate that: (1) the concept of justice must play an essential role in the process of establishing a culture of fairness in AFSJ matters, which could help to balance the current security focus; and (2) 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 require as the EU project expands.

2. Justice as a contested concept—what we are debating and why

Justice is often considered a self-evident political objective. Surely, no civic-minded person would argue against justice as a normative benchmark for a decent society. However, the concept of justice is at risk of losing any concrete meaning, of becoming no more than a metaphor for the political process.[23] Given the EU's strong emphasis on security such that it is now dominant, the idea of justice is of crucial importance as EU security law is shaped for the future. Justice within the AFJS ought to be seen as an expression of non-domination.

[22] See, eg, Andrea Sangiovanni, 'How Practices Matter' (2016) 24(1) *The Journal of Political Philosophy* 3.
[23] See, eg, Philip Pettit, 'Justice' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy* (Oxford University Press, 2015) vol 1, chapter 1.

One of the most helpful debates over justice in contemporary political thought is between Rawls' justice model and Cohen's attempt to rescue equality from what he claimed represented a distorted picture of justice. As is well known, Cohen criticised Rawls' model of justice on the basis that his difference principle[24] would permit inequality.[25] He also rejected Rawls' idea that justice is the basic structure of society by arguing that it is not enough for justice to be built into the institutional design of societies, but it must also be an imperative for individuals.[26] According to Cohen, there must be 'pure' justice, not mixed with any other components (such as empirical facts). Cohen's theory is idealistic, as his version of justice cannot reflect any other virtue than 'justice'.[27] Others, like Amartya 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 injustice.[28] Justice discourse today, and its implications for law, spans from what some would characterise—simplistically summarised here—as 'moralism to realist' views[29] and 'ideal versus non-ideal' theories,[30] to the capability approach advocated by Martha Nussbaum,[31] who argues that what is needed is a minimum level of justice in accordance with a list of basic capabilities that must be protected.

On this background, Rainer Forst has developed a political and critical understanding of justice.[32] In his view, instead of imagining justice as a distribution machine which allocates various goods in a just way, justice allows individuals equality and the right to justification for any decisions that concern them and form part of the very idea of human dignity.[33] This appears similar to the debate in legal discourse on proportionality: both suggest that there can be no simple formula, but that what is required is a multifaceted understanding of justification. The picture is more complex and requires a political understanding of the specific context in which it operates. Arguably in line with this contextualised approach, Michael Walzer noted

[24] In short, the principle that each person has an equal claim to an adequate scheme of basic rights and liberties and that any inequality must still enjoy the greatest benefits of the advantaged members of society.
[25] Gerald A Cohen, *Rescuing Justice and Equality* (Harvard University Press, 2008). J Rawls, *A Theory of Justice* (Harvard University Press, 1971).
[26] J Donald Moon, 'Cohen vs. Rawls on Justice and Equality' (2015) 18(1) *Critical Review of International Social and Political Philosophy* 40.
[27] Eliane Sadee, *The Concept of Justice and Equality: On the dispute between John Rawls and Gerald Cohen* (De Gruyter, 2015).
[28] See also the contribution by Douglas-Scott (n 1) of this special issue of *Transnational Legal Theory*; and Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009)
[29] See Enzo Rossi, 'Justice, Legitimacy and (Normative) Authority for Political Realists' (2012) 15(2) *Critical Review of International Social and Political Philosophy* 149.
[30] *Ibid*.
[31] Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2007).
[32] Forst (n 5).
[33] Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Polity Press, 2014).

that the concept of justice is a human construction and it is therefore doubtful that it can be used in one single way.[34] For Walzer, there are different 'spheres' of justice linked to a faithful understanding of the wishes of the members of a society.[35]

While different spheres of justice would seem to challenge the idea of a single culture of justice in the EU domain, this paper acknowledges these difficulties and nonetheless argues that 'justice' *matters* as a concept in AFSJ law. This is because much of the EU's involvement in the AFSJ has been built on the concept that European security is a device for achieving further integration across the member states. Consequently, a large majority of the measures adopted by the EU in order to suppress terrorism have been characterised by a strong precautionary focus closely related to that of risk regulation and the need to boost consumer confidence in the EU market. 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 securitisation has provided much of the main justification for the EU's involvement in the AFSJ domain.[36] In the migration context, for example, justice may be very relevant in cases where the EU invokes criminal sanctions but through administrative procedures as a strategy for preventing migration as part of the securitisation of the AFSJ.[37]

Perhaps it needs to be asked whether the concept of justice and its links to the question of justification, in the AFSJ context, pre-supposes a contractualist ideal. For Rawls, a contractualist conception of justice is based upon a notion of public justification.[38] 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'. Consequently, a well-ordered society is a fair system of social and political co-operation which is effectively regulated by a public conception of justice. But, as argued by Wilfried Hinsch, the requirement of public justification means that the basic norms of a well-ordered society must secure the consent of citizens whose moral, philosophical and religious

[34] Michael Walzer famously addressed the question of membership in a political community for theories of distributive justice (what people owe to one another) as well as for theories of democracy. See Michael Walzer, *Spheres of Justice: A Defence of Pluralism & Equality* (Wiley-Blackwell, 1983). See also the discussion in Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004) 117.

[35] Walzer (n 34).

[36] Ester Herlin-Karnell, 'The EU as a Promoter of Preventive Criminal Justice and the Internal Security Context' (2016) 17 *European Politics and Society* 215.

[37] For example, see Jennifer M Chacón, '*Immigration Detention: No Turning Back?*' (2014) 113(3) *South Atlantic Quarterly* 621; Andrew Ashworth and Lucia Zedner (eds), *Preventive Justice* (Oxford University Press, 2014).

[38] John Rawls, *Political Liberalism* (Columbia University Press, 1993) as discussed in Wilfried Hinsch, 'Justice, Legitimacy, and Constitutional Rights' (2010) 13(1) *Critical Review of International Social and Political Philosophy* 39. Also see Sadurski (n 9) and Crum (n 9).

views are, at least partially, incompatible. It is, therefore, conceivable that no publicly justified political principles can be found.[39] There will always be reasonable disagreement in some areas. The AFSJ seems likely to belong to such an area, given the sensitive nature of its subject matter. However, there is a plausible way out of this dilemma, or at least a shortcut. As Selya Benhabib points out, the question of normative justification is also about democratic legitimacy, since the transnational law project cannot sacrifice discursive deliberation.[40] As noted by Poul Kjaer, though, the question of justification has largely become one of a substitute debate for democracy beyond the state proper.[41] The more problematic the lack of a credible public justification becomes in the EU, the more visible the democratic deficit appears.[42] In order to address this question of justification in greater depth, it seems as though we need to explain the significance of justice in the specific framework of security regulation.

3. The relevance of justice and the domination of security

It is through seeing security as domination that we will understand the EU's strategy in AFSJ matters. Specifically, looking at the meaning of 'non-domination' as a realisation of justice will help us to link the rather abstract right to justification to the more 'graspable' proportionality test, and will confirm the need for both *ex ante* and *ex post* checks of EU law measures in the security-related area. This section will elaborate on the implications of domination and non-domination in AFSJ law, while the specific question of justification and a proportionality test will be explored in further detail below. While the EU's heavy reliance on security as a justificatory tool for its presence both internally and beyond its borders has been criticised by academics in the last decade, it still plays a fundamental role in furthering its security agenda.[43] As noted above, from the perspective of 'justice', such an approach is problematic since the fundamental elements of due process have not been given sufficient weight.[44]

However, as the EU is taking on more state-like features, it inevitably has to address some of the core questions that traditional nation states have had to answer, namely the need to justify any use of coercive power and to tackle the issue of what it means to refer to justice across the EU. Thus, as the EU pushes

[39] Hinsch (n 38).
[40] Seyla Benhabib, 'Democratic Sovereignty and Transnational Law. On Legal Utopianism and Democratic Skepticism' (2014), APSA 2014 Annual Meeting Paper, online: <https://ssrn.com/abstract=2455436>.
[41] Poul F Kjaer, 'Why Justification? The Structure of Public Power in Transnational Contexts' in this special issue of *Transnational Legal Theory*, doi:10.1080/20414005.2017.1329248.
[42] For a parallel argument on human rights and the international forum, see Allen Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14(1) *Legal Theory* 39.
[43] See Douglas-Scott, 'The Problem of Justice in the European Union' (n 1).
[44] For example, see Fichera and Kremer (n 19).

forward with deterrent measures to ensure a high level of security and to fight terrorism and the financing of it, the status quo in AFSJ law has become 'too preventive' a regime, in which the safeguards of the individual are lost, despite the grand treaty values set out in Article 2 of the TEU. It could even be argued that the rights in the EU Charter of Fundamental Rights (EU Charter) and the European Convention on Human Rights (ECHR) are, at present, almost empty assertions, in the sense that not enough is being done at a political level to ensure a European culture of due process across all member states.

For justice to work as a concept in AFSJ law, however, we 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 Rainer Forst argues, there is good reason to believe that, for example, Rawls' theory of justice could be extended beyond the nation state, provided we have the right toolkit for doing so.[45] Essential tools in this toolkit are a conception of context and critical interpretation as the main yardsticks for understanding justice. When discussing justice in the AFSJ setting, we therefore need to recognise 'justice' as a concept closely related to the governance structure of the AFSJ as such. Central to this argument is the importance of viewing justice as a process and not as a static phenomenon.

Yet, here we have what amounts to the first challenge to the argument. After all, as seen in security theory, the 'process'-based lens is generally considered to be highly problematic.[46] The claim is that security is often deployed and manipulated through strategies of power, which are easily corrupted through a 'process'. The problem with the interlinked relationship of security and the political realm is that there is no guarantee that the discursive framework of security will be used for 'just' purposes.[47] My argument, however, is that the merit of viewing something as a process, rather than as a static enterprise, is different when it comes to justice than with the concept of security.[48] This is because there is a link between justice and legitimacy in an EU context; it is an evolving—normatively and functionally—but necessary 'process'.

Justice as an umbrella principle for structuring the AFSJ is also linked to the question of non-domination. The idea of non-domination seems especially relevant in an AFSJ context which is 'dominated' by security. The notion of non-domination could then be formulated as a constitutional 'right' to freedom and justice, in that nobody is to be subject to arbitrary power.[49] Yet in legal language the notion of domination is often addressed

[45] Forst (n 5).
[46] Andrew W Neal, 'Foucault in Guantánamo: Towards an Archaeology of the Exception' (2006) 37(1) *Security Dialogue* 31.
[47] *Ibid*.
[48] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2006).
[49] Eoin Daly, 'Freedom as Non-Domination in the Jurisprudence of Constitutional Rights' (2015) 28(2) *Canadian Journal of Law and Jurisprudence* 289.

through the concept of coercion. Specifically, the notion of coercion is often regarded as a form of domination. Indeed, any textbook on criminal law starts with the question of coercion, and explains how it is an obstacle to freedom as well as a means to achieving it. A state is said to coerce its citizens because it issues commands (laws) backed by the threat of sanctions.[50] The coercive power of the state may well be needed to deter malefactors and to assure citizens of one another's compliance with the law. For Dworkin, any conception of law must explain why law is the legitimate authority for coercion.[51] For Rawls, political power is always coercive power and always backed by the government's use of sanctions.[52] Coercive power is also about the legitimacy of the general structure of authority. Perhaps this is in line with Dworkin's reasoning that fundamental values of equal concern and respect are interpreted in light of their role in a coercive order.[53] After all, it was Dworkin who argued that 'the various standards governing the state's use of coercion against its citizens be consistent in the sense that they express a single and comprehensive vision of justice'.[54] Dworkin argued further that coercive political organisations undermine the dignity of their members unless each accepts a reciprocal responsibility to the others to respect collective decisions, provided that these decisions meet the appropriate conditions. Dworkin famously linked the general justification for the exercise of the coercive power of the state with that of the moral obligation of citizens to obey the law. So every conception, in Dworkin's terms, therefore faces the same dilemma of whether anything can justify coercion in ordinary politics. For Rawls' the question of justification is about the boundaries of coercion coupled to the question of the extent to which coercion is a necessary price to pay for people living in a state together.[55]

While certainly not doing 'justice' to the rich political theory debate on non-domination, this paper has schematically tried to illustrate the strong link between justification, non-domination and the question of coercion. The point is that the EU's emphasis on security in the construction of the AFSJ calls for reflection upon the level of justice (call this a culture of fairness) that could be achieved. The question of power, as Forst points out, is the first question of justice and the right to justification,[56] and is at the very heart of a non-domination-oriented conception of law and justice.[57] Therefore, we need

[50] Laura Valentini, *Justice in a Globalized World: A Normative Framework* (Oxford University Press, 2012).
[51] Dworkin (n 7) 190.
[52] Rawls (n 37).
[53] Dworkin (n 7) 190–1. See also A John Simmons, 'Justification and Legitimacy' (1999) 109(4) *Ethics* 739.
[54] Dworkin (n 7). See also Simmons (n 52).
[55] Andrea Sangiovanni, 'Taking Institutions as They Are, or as They Ideally Ought To Be?' available at <https://www.wzb.eu/sites/default/files/u32/a_sangiovanni_ccfls_2013_practice-dependence.pdf>.
[56] Forst (n 5).
[57] Philip Pettit, 'A Republican Law of Peoples' (2010) 9(1) *European Journal of Political Theory* 70; Ian Shapiro, 'On Non-Domination' (2012) 62 *University of Toronto Law Journal* 293, 311.

to place the question of justice in the AFSJ in the context of non-domination (as it is properly meant). Furthermore, the EU's security mission and how it could be safeguarded against domination poses the question of how the security mission is related to the identity of the AFSJ. One of the EU's core objectives is to establish a secure Union. But the term 'security' runs the risk of being used in an overly broad way. Added to this is the tendency for ill-defined legislation and concealment[58] in the legislative process when the EU deals with security threats, as much of the resulting legislation is emergency-based and could result in domination at the expense of adequate human rights protection and the rule of law. A critical notion of justice within the AFSJ is therefore linked to the basic right of justification as a counter-measure to domination. But the right of justification does not tell us much about the concrete meaning of non-domination. At a macro level, 'domination' may be identified in the way the EU uses security to extend its objectives to new areas. At a micro level, domination may be identified in the way in which the security dogma deprives individuals of some of their basic due process rights, which were traditionally guaranteed by the nation state.

4. Justice as non-domination: specifically in the AFSJ

I will now try to marry the abstract contours of the notion of freedom as non-domination with a reading of it as an expression of justice and clarify its meaning further. As explained above, the idea of non-domination as the yardstick for testing the level of freedom in a society is well-documented, and remains the starting point for any discussion of the use of criminal law.[59] In order to identify the notion of domination, Philip Pettit uses the well-known master–slave relationship as the prime example of 'unfreedom'.[60] As Adam Tomkins points out, however, while the master–slave example is the most obvious instance of domination, it is far from the only one.[61] There are more recent examples, and the difficulty with identifying them is that it requires translating the 'domination' criterion, as a device for measuring freedom, to the meta level. In the EU context, the question of non-domination is usually framed as a question of equality among member states. Moreover, as noted above coercive power is often held to be the key characteristic that distinguishes an institution such as the EU from that of a nation state.[62] Indeed, Max Weber famously defined the nation state as possessing a legitimate

[58] Deirdre Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52(3) *Journal of Common Market Studies* 684.
[59] For example, see Andrew P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 3–7.
[60] Pettit (n 57).
[61] Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005) 46–52.
[62] For example, see Neyer (n 1).

monopoly on force and power.[63] In addition, non-domination is the republican theory benchmark or key for understanding justice in a free and democratic state, and is considered by some to be incentive-compatible, that is to say that people would rather pursue their own advantages than ideal aspirations for any genuinely non-dominating order.[64]

The importance of a secure society is undeniable in the EU. However, if there is too much security, can there still be justice? How the balance should be struck between security needs and the need to ensure adequately high human rights standards and thereby guarantee fairness and justice is a longstanding question, one that is best asked through the framework of constitutionalism and the notion of justice. For about a decade now, the EU's internal security mission, in line with global trends, has dominated the policies of the AFSJ, and has been expressed as part of the fight against terrorism. For example, the market-based approach to the EU's fight against crime and the financing of terrorism has led to a preventive approach, a coupling of the market and the effort to achieve security through penal measures and with EU agencies acting as imposers of sanctions, often under very unclear guidelines.[65] For instance, the EU has imposed criminal law sanctions for financial crime and cybercrime that amounts to a combined threat of financing terrorism as part of an effort to stabilise the market by getting tough on white-collar crime.[66] These are only brief illustrations, but at their core there is an innate need for the EU to work out a strategy for the AFSJ. It is true that the EU's multi-annual AFSJ programmes and the plans set out in the ambitious agendas of the European Commission reflect a wish among EU institutions to be firm about the future application of the rule of law.[67] However, there is a striking absence in the political discussion of concern over how to shape this area and what justice can add to the debate.

Perhaps it could be asked what domination comprises in EU law. Thinly reasoned judgments by the CJEU or badly drafted legislation—where arbitrariness manifests itself in a lack of proportionate reasoning by EU agents, overriding member state concerns—are candidates. Thus, the security discourse requires a more elaborate vocabulary and a more nuanced approach to what is actually at stake when it is invoked as a blanket term. The sweeping

[63] Max Weber, *Economy and Society*, Guenther Roth and Claus Wittich (eds) (University of California Press, 2013) vol 1. See also Rainer Forst, 'Noumenal Power' (2015) 23(2) *The Journal of Political Philosophy* 111.
[64] Pettit (n 56).
[65] Ester Herlin-Karnell, 'Constructing Europe's Area of Freedom, Security, and Justice through the Framework of "Regulation": A Cascade of Market-Based Challenges in the EU's Fight Against Financial Crime' (2015) *German Law Journal* 171.
[66] For example, see Fourth Anti-Money Laundering Directive 2015/849 [2015] OJ L141/73; Directive 2013/40/EU On Attacks Against Information Systems [2013] OJ L218/8.
[67] European Commission, *A New EU Framework to Strengthen the Rule of Law* (2014), COM (2014) 158 final, online: <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf>.

generality in which the concept of security is being used could be an instantiation of domination, thereby seriously hampering freedom and justice.

4.1. Realising the freedom component? Key challenges in AFSJ law and on the burden of justification

For anyone trying to construct the AFSJ by looking at the components of 'freedom, security and justice', and in particular its implications as a conceptual space for justice, such an endeavour might appear overly theoretical (or even ironic or utopian) against the background of the present, almost daily, occurrence of migrants drowning off the coasts of Europe. The EU migration crisis has hardly escaped anyone's notice and casts dark shadows over the concept of a common European solidarity.[68] The inevitable question is whether it is legitimate to claim that the EU should create a justice space within the AFSJ, one which excludes third country nationals. Should we accept the cosmopolitan claim of a duty of justice towards outsiders?[69] While it would seem politically naïve in the current European climate to claim a cosmopolitan-based justice,[70] and while some 'old' member states still have problems with 'new' member states, the conception of justice could still inform the interpretation of European treaties when they refer to ideas such as solidarity. It is precisely here that a justice deficit exists and it is here that the question of what kind of justification the EU owes to those on its territory becomes a burning issue. The impact of a constitutional meaning of justice that could be grounded in the EU Charter and EU treaty values, and the extent to which it could function as a visualising tool for remedying some of the problems facing the EU in the current wave of populism and isolationism in some member states, remains a considerable challenge and dilemma for the construction of the AFSJ.[71] Justice, in the constitutional sense of providing a justification, is critical in that it insists on more than an empty assertion of justice and involves more than simply procedure.[72] In legal terms, these values may be deduced from the EU Charter and the preamble of the TEU. As suggested above, the AFSJ is an area currently marked by too

[68] Sangiovanni (n 1).

[69] For example, see Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism and the Cosmopolitan State: An Integrated Conception of Public Law' (2013) 20(2) *Indiana Journal of Global Legal Studies* 605; Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014); Daniel Halberstam, 'Local, Global and Plural Constitutionalism: Europe Meets the World' in Gráinne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012) 150; Claudio Corradetti, 'Judicial Cosmopolitan Authority' (2016) 7(1) *Transnational Legal Theory* 29.

[70] See, however, Mathias Risse, 'Taking up Space on Earth: Theorizing Territorial Rights, the Justification of States and Immigration from a Global Standpoint' (2015) 4(1) *Global Constitutionalism* 81.

[71] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003). See also Aharon Barak, 'On Constitutional Implications and Constitutional Structure' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations Of Constitutional Law* (Oxford University Press, 2016) ch 3.

[72] For example, see Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing, 2013).

little justice-oriented reasoning in its institutions, and is a space where security-related measures have tilted the balance in favour of pre-emption.[73]

As stipulated in Article 67 of the TFEU, the AFSJ sets out to secure justice and freedom through a high level of security. The notion of 'freedom', as stated in the AFSJ paradigm, is not defined philosophically but is rather a re-affirming of the right to free movement, ie through the EU's fundamental freedoms and the safeguarding of the rule of law. Yet the idea of freedom, if the aspiration is for the AFSJ to become a justice space, must be tied to the quest for non-domination. This is where the link between justice and freedom becomes 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. The construction of a true AFSJ space requires a balance, though achieving it is a messy task for the EU. Therefore, as noted above, it may not be justice in any administrative sense that is being balanced, but a broader conception of' 'justice' as a European notion of fairness, which is central to the constitutional architecture of the EU.

Indeed, lawyers may propose that the imaginative creation of citizenship, as developed in CJEU case law, has to some extent resolved the democratic problem in the EU and ensures a European concept of freedom.[74] In light of this, they may use the law strategically, in combination with participation rights and citizen initiatives (see Article 18 of the TEU), to put some flesh on the bare European skeleton. However, this seems to place the burden of justification for attaining freedom on citizens and not on the EU or its member states when they are determining AFSJ policies such as security regulation. This apparent revised burden of justification is highly problematic in a security-related context since the notion of justification may be deeply relevant to the question of how to create a European legal culture in AFSJ matters that genuinely cares for the individual and confirms the idea of due process.

In the context of the normative foundation for human rights, Allen Buchanan has asked what it would take to produce reliable factual information *of the sort* that is likely to be relevant for specifying and justifying claims about human rights.[75] If one were to translate this into the AFSJ context, access to justice would seem central to the ambition of realising freedom and thereby ensuring rights. But it is not enough, as the facts are also contingent on the 'robustness' of the system as a whole, thus highlighting the need for a normative debate in AFSJ matters. Accordingly, the EU legal system might encompass a broader notion of 'justice' than that subsumed by the basic constitutional principle upon which other EU principles are based, namely the

[73] See also Murphy (n 19).
[74] Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I–02691.
[75] Buchanan (n 42).

rule of law. For all these reasons, 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. However, in order to be legitimate, a regime must not only aim to be just, it must also aim to demonstrate a level of justice that defines the conditions under which the state may rightly justify its coercive power.[76] This is particularly important in the context of the AFSJ and as will be explained in the following section, the idea of proportionality might help us achieving this.

5. The turn to justification: proportionality as reasonable disagreement

Arguably, the question of what the EU's political structure ought to look like is one that fundamentally concerns the common good.[77] Taking for granted such an idea, the justice movement, and the basic right to justification, is readily transferable to the transnational level, since it concerns a political concept of justice. Assuming we start from a common justice platform where fundamental rights are fully respected in practice, justice must be politically grounded. Yet, it may not be possible to precisely separate procedural and substantive justice in EU law. After all, the debate on justice in EU law arguably concerns how to justify the EU project as a whole, and it is therefore also a question about the quality of EU decision-making and what is considered '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 an EU level and for linking it to the broader debate on justice. The principle of proportionality can be viewed as pointing in the same direction as 'reasonableness'; in other words, it can be a yardstick for legal reasoning.

However, elements of adjudication are not sufficient, and the question of the robustness of the AFSJ and the justifications it requires is one that should be high on the EU's political agenda and embraced by the EU's political institutions, where a constitutionalised concept of justice adds to the integrity of AFSJ law. For Forst, as explained, the notion of justice is grounded in the principle of justification and is the first and overriding virtue in moral, political and social contexts.[78] The question of justification is reflected in the legal notion of proportionality. Proportionality constitutes an important value in AFSJ law by insisting on a reasonableness element in the law. At a more theoretical level, the very notion of proportionality—the question of balance—is about ensuring fairness.[79] This connects the argument back to

[76] Forst (n 32).
[77] Sangiovanni (n 1).
[78] Forst (n 32).
[79] See Dworkin (n 7).

the question of justice discussed above, as Rawls constructed justice as fairness upon the basis of fundamental ideas that are generally accepted in contemporary liberal democracies.[80] Indeed, 'reasonable disagreement' has become the guiding dictum for deciding when something is just and thereby connected to the basic right of justification. The elements of 'reasonable' and 'disagreement' are what courts are asked to rule on when they discuss the proportionality of disputed measures. There is a conflict of rights, or a limitation of a specific right in question, and there is a disagreement as to whether the infringement is reasonable or not.[81] The point of justification is that individuals have a right to reasoned decisions, and the function of courts is to assess whether the public authority taking the decision in question can be justified by public policy. Thus, the question of 'good reason' is perhaps most clearly identified in the principle of proportionality, which functions as a justification tool.[82]

In the legal context, an effective way of dealing with reasonable disagreement is through the proportionality test, which is a legally constructed tool. It is also, as Aharon Barak explains, a more specific methodological device.[83] Proportionality is made up of four components: proper purpose, rational connection, necessary means and proper relation between the rationale gained by realising the proper purpose and the harm caused to the constitutional right.[84] The core message is that the limiting law must uphold these four components in order to withstand constitutional scrutiny.[85] The use and importance of proportionality in EU law is far from new, and has been one of its driving principles since its early days. Yet, the AFSJ seems to have been largely excluded from it as the preventive approach it has taken has outweighed other values, such as, most prominently, the basic right of due process and the full package of defence rights (access to a lawyer, the presumption of innocence, etc.) for those accused of terrorism and other security-related offences.

Proportionality 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 manifested in the proportionality test. In doing so, it is fitting to turn to what Mattias Kumm has referred to as 'Socratic contestation', which is the practice of critically

[80] John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly (ed) (Harvard University Press, 2001).
[81] On the rights model and proportionality, see eg Kai Möller, *The Global Model of Rights* (Oxford University Press, 2012).
[82] For recent studies of proportionality, see Barak (n 3); Jackson (n 3); Klatt and Meister (n 3); Jud Matthews and Alec Stone-Sweet, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing' (2010) 60(4) *Emory Law Journal* 799; Möller (n 3); and the contributions in Huscroft, Miller and Webber (n 3).
[83] Barak (n 3).
[84] *Ibid*.
[85] *Ibid*, 131.

engaging authorities in order to assess whether the claims that they make are based upon good reason.[86] 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'.[87] But, who decides which reasons are 'good' enough? One way to resolve this problem would be to anchor 'good' reasons in the EU Charter. Indeed, the principle of proportionality appears to play a key role in both its scope and limit. Nonetheless, Article 52(1) of the EU Charter sets out some important exceptions to its application. It provides:

> 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 the EU's human rights protection in legal terms seems to turn on the elasticity of the proportionality principle, which could pave the way for circular reasoning if a limitation of rights could also be justified on the basis of proportionality. For the AFSJ to constitute a justice space, it is necessary to employ a critical reading of not only justice but also proportionality (as the right to justification) in order that these ideas not take on a utopian character, but become capable of improving the real lives of Europeans. So, a general consequence of justice would mean that there are limits to what member states may deny their citizens upon the basis of proportionality. It is also important to note that member states also have a right to justification if they oppose EU action. With Kumm, a Socratic model that investigates the actual impact of a system that requires reasoned action from both the EU and the member states points in the direction of a federal balance.[88] Such a model would also result in a nuanced proportionality test which focuses on reasons for EU action.

While the principle of proportionality is part of the EU's arsenal for deciding on the degree of legislative authority given to the EU legislator, it is also a principle that is applicable 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—for a long time—has been that the AFSJ seems to have been largely exempted from this golden rule of balancing. This may be because the AFSJ is legally thorny terrain, with complex ties between the EU, member states and citizens, despite it also being closely

[86] Kumm (n 3).
[87] *Ibid.*
[88] *Ibid.*Kumm (n 3).

connected to national sovereignty and the protection of human rights. For example, important legal measures in this area with regard to arrest warrants, which introduced the concept of mutual recognition in the fight against crime, seem to have excluded such a proportionality test.[89] Yet, in the very recent case of *Aranyosi and Căldăraru*,[90] the CJEU held that the judicial authority executing an arrest warrant must respect the requirement of proportionality laid down in Article 52(1) of the EU Charter, with respect to the limitation of any right or freedom recognised by the EU Charter. The CJEU held that '[t]he issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time'.[91] The CJEU also stated that the consequence of the execution of such a warrant must not be that that individual suffers inhumane or degrading treatment (Article 4 of the EU Charter). This sounds self-evident, but the case was handed down in 2016, indicating that there was a somewhat bizarre situation with regard to arrest warrants in Europe where mutual trust was still largely considered a blind concept.

With regard to the possible usefulness of balancing in concrete cases and of applying Barak's view of proportionality as inherent in the balancing test, it is useful to turn to the mutual recognition arena.[92] The notion of 'trust' has been crucial for the development of mutual recognition, ie that no additional barriers should exist between the Member States in AFSJ law.[93] The assumption inherent in the AFSJ is that Member States trust each other sufficiently to not insist on additional legal safeguards or checks. The most radical example of this is, as mentioned above, the European Arrest Warrant (EAW), which remains controversial in member state legal systems because it abolishes the requirement of dual criminality (that an offence is punishable in both states concerned) as a pre-condition for extradition.[94] As one Advocate General put it:

> … the principle of mutual recognition which lies at the heart of the mechanism behind the [EAW] cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification or a driving licence issued by another [m]ember [s]tate.[95]

[89] Council Framework Decision of 13 June 2002 on *The European Arrest Warrant and the Surrender Procedures Between Member States* 2002/584/JHA [2002] OJ L190/1.
[90] Joined Cases C-404/15 and C-659/15 PPU, *Judgement of the Court (Grand Chamber) of 5 April 2016* [2016] OJ C211/21.
[91] *Ibid* [101]–[3].
[92] Barak (n 3).
[93] For example, see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013).
[94] For example, Koen Lenearts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (Sir Jeremy Lever Lecture 2015, Oxford University, Oxford, 30 January 2015), online: <https://perma.cc/NTZ3-5GGM>.
[95] Case C-42/11, *Da Silva Jorge* judgment 5 September nyr, opinion delivered by AG Mengozzi on 20 March 2012. Para 28.

The CJEU confirmed this view by asserting that there is not an absolute obligation to execute arrest warrants, while at the same time it emphasised the duty of national courts to ensure the full effectiveness of the actual application of the EAW framework decision.[96] Furthermore, in *NS*,[97] a case concerning the EU asylum system, the ECJ 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 EU Charter. The CJEU further held that, where there is a serious risk of breaching the applicant's rights as guaranteed by the EU Charter, member states should enjoy a wide 'margin of discretion'.[98]

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

This section aims to draw on some further examples from practice, and argues that these examples represent an important testing ground for the resilience of justice-based reasoning. It also explains why this matters in the context of security. By investigating the impact of proportionality in the context of mutual recognition, I seek 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. 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, the CJEU must provide good justification for relying on trust. For example, in the much debated *Melloni* ruling,[99] which concerned the validity of the amendments made to the EAW by Framework Decision 2009/299/JHA[100] and addressed the application of the principle of mutual recognition to trials *in absentia*, the CJEU 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 that this does not compromise the level of protection provided for by the EU Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law.[101] It could also be argued, however, that Article 53 enables the EU to adopt a higher standard of fundamental rights protection if it so wished. If the national constitution provides for a higher

[96] *Ibid*.
[97] C-411/10 and C-493, judgment of 21 December 2011 [*NS*].
[98] Massimo Fichera and Ester 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) 19(4) *European Public Law* 759.
[99] Case C-399/11, *Criminal Proceedings Against Stefano Melloni* [Melloni].
[100] Council Framework Decision 2009/299/JHA [2009] OJ L81/24.
[101] *Melloni* (n 99) [60].

standard and if the objective of the EU is to establish an AFSJ with a high level 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 European Court of Human Rights (ECtHR) were to provide for a higher standard of human rights protection? As the rights set out in the ECHR are also general principles of EU law, it seems likely that the CJEU would then allow for a higher level of protection of human rights in line with the ECtHR. So the CJEU is generally not willing to go any further than the ECHR and is also not willing to let the member states carry out any free standing checks if EU law is in compliance with the ECHR. Yet, the concern as expressed by the CJEU in its ruling in Opinion 2/13 and the insistence on not allowing the EU Charter to be used as a tool to derogate from EU law obligations seems to run counter to *NS*.[102] The point is that the CJEU 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 bleak picture painted above, there is reason to be hopeful that the CJEU can be a successful guardian of the AFSJ and foster justice. One reason for optimism is the recent case of *Digital Rights*,[103] which is a touchstone of justice-inspired reasoning by the Court. In that case, the CJEU 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 was disproportionate on the grounds that it had a too sweeping generality and therefore violated, *inter alia*, the basic right of data protection as set out in Article 8 of the EU Charter. The CJEU pointed out that 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 to establish such limits. The EU legislator had provided insufficient justification for the EU Charter breach—it was simply not good enough from the perspective of EU fundamental rights protection. The same approach was confirmed in the recent *Schrems*[104] and *Tele 2 Sverige*[105] cases, where the Court held that:

> legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.[106]

[102] *NS* (n 94).
[103] Case C-293/12, opinion of AG Cruz Villalón delivered on 12 December 2013, judgment of 8 April 2014.
[104] Case C-362/14, *Schrems*, judgment delivered on 6 October 2015, nyr.
[105] Joined Cases C-203/15 and C-698/15, *Telia 2 Sverige*, judgment of 21 December 2016.
[106] Case C-293/12, *Digital Rights*, judgment of 8 April 2014.

Regardless of its attractiveness as a judicial principle, proportionality is often attacked on the ground that it involves judicial weighing of incommensurables. Moreover, it is often accused of being a far too pragmatic and thus 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 sort of scale.[107] In short, critics argue that there is too much ambiguity with the proportionality test, and that it fails to deliver what it promises: transparency and rationality. It is therefore seen as lacking legitimacy and granting judges too much power.

As explained above, Kumm has tied the principle of proportionality to the right to justification in human rights law.[108] Requiring the EU to think through its AFSJ vision and to guarantee its citizens justice, in terms of justification, serves not only a political function but also as a legal method. This appears particularly important in the case of the EAW, where an individual could be deprived of his or her basic legal rights depending on what member state he or she is located in, and where the EU Charter will function as a balancing mechanism for ensuring a high AFSJ standard of justice throughout the EU. The debate on the future of AFSJ law must address the question of what exactly is the AFSJ's *raison d'être*. While this question remains largely unanswered, the commitment to consistency in the EU's pursuit of justice is often considered a paramount concern in the European process. The idea of proportionality for ensuring justification and ultimately justice seems a very valuable principle.

While this paper has provided a rather abstract view of the AFSJ while discussing what justice reasoning can add to the debate, its main ambition has been to highlight how a critical reading of justice helps to tilt the AFSJ towards a better balance between being a justice space and being too security-focused. How useful is a justice-oriented approach in AFSJ law? As I attempted to show, serious attention to justice as a critical legal concept could add democratic credibility to the AFSJ if it is read as a basic right to justification, which safeguards due process rights and helps the EU to achieve its agenda in this policy field. Its usefulness thus lies in its potential to place the focus on the individual by requiring a sufficiently coherent system which guarantees adequate human rights protection in an area where it is most needed. Justice as non-domination is also intrinsic to the constitutional structure of the AFSJ.

[107] Timothy AO Endicott, 'Proportionality and Incommensurability' (2012) Oxford Legal Studies Research Paper No 40/2012, online: <https://ssrn.com/abstract=2086622>; and Webber, *The Negotiable Constitution* (n 3).

[108] Mattias Kumm, 'Democracy is Not Enough: Proportionality and the Point of Judicial Review' (2009) NYU School of Law, Public Law Research Paper No 09-10, online: <https://ssrn.com/abstract=1356793>.

7. Concluding remarks

A turn to the (neo-republican) notion of freedom as non-domination can help us to understand EU security regulation and to view it as part of the EU constitutional trajectory towards justice. The next challenge will be to explore the right to justification. This is possible if non-domination is seen as *justice*. I adopted the Forst-inspired view that justice and justification are interlinked. The right to justification as developed in political theory can be mapped on to the EU's constitutional legal framework. The question of justice and justification in the EU security-related context is ultimately a question of providing 'good enough reasons' and the establishment of the AFSJ is a question of constitutionalism as such.[109] The critic may well ask what is the added value of this view? I have argued that viewing justice as non-domination informs and shapes the constitutional structure of the AFSJ in the direction of a culture of fairness.

A reading of justice that is linked to the question of justification—as a key idea of the overall structure and fairness of the AFSJ-EU system—could help construct a fair AFSJ which fully takes into account how sensitive this area is. A turn to justification via the legal tool of proportionality could help benefit the debate on the future of the AFSJ in the sense that it offers a better chance for justice to inform the outcome, helping to ensure a balance in the AFSJ as a force of good governance. Such an understanding pre-supposes a political reading of justice that 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 project, with the member states to follow, and with 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.[110] 'United in diversity', as is stated in the TEU, can only work if a shared sense of legal culture also means a grammar of justice,[111] and thereby elevates the AFSJ to more than mere ideal theory. The AFSJ instead needs to be a policy area that sets the concerns of the individual as its main priority, and ensures a balance against the current domination trend of security.

While security concerns have dictated the AFSJ discourse as an EU crisis-management tool for tackling terrorism since 9/11, the general security mission within the AFSJ has now had to deal with the increasing migration

[109] On constitutionalism and why it matters, see Alon Harel, *Why Law Matters* (Oxford University Press, 2014) ch 2.

[110] Along the same lines in the context of co-operative constitutionalism, see Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism" Part 1' (2015) 9(2) *Vienna Journal of International Constitutional Law* 151. On plural constitutionalism, see Halberstam (n 68).

[111] Rainer Forst, on the Grammar of Justice, see *Justification and Critique* (Polity Press, 2014).

and refugee crisis of 2015–2016, which has had the effect of jeopardising the legitimacy of the EU as an AFSJ space. Regardless of whether one is a consequentialist focusing on outcome, or if one cares about the law as such,[112] justice seen as non-domination has important implications for how we think about the AFSJ. This is why a serious reflection on what 'freedom, security and justice' really means for Europe and the rest of the world is so important.

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[112] Harel (n 106).