

# ON CONSTITUTIONAL LAW PARAMETERS AND EUROPEAN SECURITY REGULATION

Ester Herlin-Karnell\*

## ABSTRACT

*The claim of this paper is that constitutional law is of crucial importance for the progression of EU security regulation and how it ought to develop. This paper offers an overview of some of the main constitutional challenges in contemporary EU security practices and the impact of constitutionalism in this area. Specifically, this paper considers several intertwined questions of central importance for our understanding of the European policy area “Freedom, Security and Justice” and its development.*

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## I. INTRODUCTION

This paper explores the impact of constitutional law reasoning for understanding European security regulation. When the European Union (EU) seeks to ensure a high level of security in Europe, it does so mainly through measures taken within a policy area called the “*Area of Freedom, Security and Justice*” (AFSJ).<sup>1</sup> This political and legal area aims to

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\* University Research Chair and Professor of EU Constitutional Law and Justice, Vrije Universiteit Amsterdam. Thanks to Diana Tao and Mary Griffith of the Boston Journal of International Law for their excellent editorial support and to Chris Engert for help with proofreading. The usual disclaimer applies.

<sup>1</sup> Article 3 (2) Treaty of the European Union; Article 67 Treaty of the Functioning of

safeguard free movement, migration and asylum policy while developing, maintaining and adjusting criminal law and anti-terrorism strategies in cooperation with non-EU states.<sup>2</sup> Specifically, the EU seeks to achieve security through approximating the law of the Member States in various related fields, such as criminal law, counter-terrorism measures, and asylum and immigration law, as stated in Article 67 Treaty of the Functioning of the European Union (TFEU). The external dimension of security in an EU context is also very central to the EU's security ambitions, and concerns the EU security towards third countries.<sup>3</sup> Here, the EU acts as one legal entity, with legal personality in its relationship with the rest of the world.<sup>4</sup> The main difference between the internal and external security agenda is, roughly speaking, that the AFSJ is subject to the same constitutional framework as the internal market both within the EU, with ordinary legislative procedure, and within the EU Court's jurisdiction, while the foreign policy area is still largely subject to intergovernmental cooperation.<sup>5</sup> Nevertheless, the EU's security mission follows from the ambitions set out in the Treaty, since the EU promises to ensure a high level of security as mentioned above.

Moreover, the EU has increasingly become a global security project. This is because the constant response to security concerns from border control and migration management to counter-terrorism strategies are largely global questions and where that the EU is largely following the international law norms.<sup>6</sup> For example, the EU has numerous agreements with the United States and is, *inter alia*, engaged in the on-going establishment of a transatlantic terrorism tracking system as well as that of a far-reaching cybercrime regulation.<sup>7</sup> Yet, in AFSJ matters and border control, such as

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the European Union.

<sup>2</sup> Title V of the Treaty of the Functioning of the European Union.

<sup>3</sup> The Common Foreign Security Policy. On the external dimension of the AFSJ, *see, e.g.*, Claudio Matera et al. *The External Dimension of the EU's Area of Freedom, Security and Justice*, in *CRIME WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE. A EUROPEAN PUBLIC ORDER* 272-300 (C. Eckes & T. Konstadinides eds., 2011).

<sup>4</sup> *See, e.g.*, Henri de Waele & Jan-Jaap Kuipers, *The Emerging International Identity of the European Union – Some Preliminary Observations*, in *THE EUROPEAN UNION'S EMERGING INTERNATIONAL IDENTITY* 1-19 (de Waele & Kuipers eds., 2013).

<sup>5</sup> *See, e.g.*, PAUL CRAIG, *THE LISBON TREATY, LAW, POLITICS AND TREATY REFORM* ch. 9-10 (Oxford University Press ed. 2010).

<sup>6</sup> *See, e.g.*, HANS MERKET, *THE EU AND THE SECURITY-DEVELOPMENT NEXUS* 1-23 (Martinus Nijhoff ed. 2016).

<sup>7</sup> Directive 2013/40, on attacks against information systems of the European Parliament and repealing of the Council of 12 August 2013 on Attacks Against Information Systems and Replacing Council Framework Decision 2005/222/JHA., 2013 O.J. (L 218) 8. *See, e.g.*, for a general discussion of these questions D. Cole and F. Frabboni, *Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across*

Schengen and the European border-free zone, the area is largely marked by *ad hoc* approaches to co-operation, in which not all the Member States are moving in the same direction (the so-called multi-speed phenomenon where not all states participate in legislative measures or co-operation).<sup>8</sup> Moreover, the EU security strategy is largely centered on the monitoring of its borders, and knowing who is entering and leaving Europe, with Schengen (a passport free zone in Europe) representing a milestone for EU free movement but at the same time, naturally, challenging the effectiveness of EU security cooperation.<sup>9</sup>

This paper is mainly focused on the constitutional dimension of the AFSJ and the idea that the EU is actively engaged in European security matters which have global implications. The paper looks at the impact of constitutionalism in the AFSJ by considering several intertwined questions in the domain of counter-terrorism, data protection, and tensions with surveillance matters. The paper will also tentatively discuss the idea of judicial review, and thereby discuss the obligations and function of constitutional courts for monitoring security regulation in contemporary Europe. For example, a move towards pluralism has started a trend which challenges the traditional judicial hierarchical order, which sees the EU Court of Justice at the apex of the EU law integration chain.<sup>10</sup> The paper will tentatively expand on this idea of pluralism by linking it to the question of the justification of decision-making in EU context, especially the AFSJ, which offers a salient example of the contemporary challenges in constitutional law. For example, the on-going Brexit debate poses a challenge to the EU's future integration model.<sup>11</sup> Moreover, the paper is concerned with how a constitutional environment is constructed in AFSJ matters.

This paper is structured as follows: The paper begins by discussing what we mean by EU security regulation, what we are debating, and why it matters. Thereafter, the paper will look at the implications of a

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*Borders*, 14 ICON 220, 220 (2016).

<sup>8</sup> See, e.g., L. ARMATI & A. ROSAS, EU CONSTITUTIONAL LAW ch. 5 (Hart Publishing eds., 3<sup>rd</sup> ed. 2018).

<sup>9</sup> See, e.g., Regulation No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System, *OJ L 381*, 28.12.2006, p. 4–23

<sup>10</sup> See, e.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN LAW REVIEW 317, 317 (2002); D. Halberstam, *Local, Global and Plural Constitutionalism: Europe Meets the World*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 150 (G de Búrca & J.H.H. Weiler eds., Cambridge University Press, ed., 2012).

<sup>11</sup> Michael Dougan, “*The institutional consequences of a bespoke agreement with the UK based on a ‘close co-operation’ model*” [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604962/IPOL\\_STU\(2018\)604962\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604962/IPOL_STU(2018)604962_EN.pdf) [<https://perma.cc/SY4P-YVB9>].

constitutional structure for understanding the AFSJ, and the importance of constitutionalism in this process. This section also discusses the idea of subsidiarity, and why it is that the matter of security is regulated at EU level and not at Member State level. Subsequently, the paper will look at the EU Court of Justice as well as, more specifically, the role of national courts in securing human rights protection within the AFSJ.

## II. EU SECURITY REGULATION AND SOME ASSOCIATED QUESTIONS

One might of course question why the EU is involved at all in security matters.<sup>12</sup> While the EU was, in the early days, an economic endeavour to unite Europe through co-operation and trade as a mechanism designed to prevent the possibility of another war on the continent, the EU rapidly became a lot more ambitious than limiting itself to regulating free movement and economics.<sup>13</sup> To date, it has largely evolved as an enterprise of risk regulation, one which has been largely influenced and shaped by the administrative practices and market construction ambitions of the EU.<sup>14</sup> While security is predominantly a national competence (Article 4 Treaty of the European Union, which reads that national security remains the sole responsibility of each Member State), the EU has, in fact, adopted a number of security measures that severely blurs the distinction between the EU and national security, and even global security.<sup>15</sup> Consequently, the EU is currently facing numerous interrelated challenges that are related to security governance: from the recent migration crisis, the fight against terrorism to the Brexit trajectory and the increased challenge to democracy and the rule

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<sup>12</sup> Ever since the Maastricht Treaty in 1993, the EU has had security and police co-operation and migration policies in place. This security co-operation has been intensified over time, first with the Amsterdam Treaty in 1999 and subsequently with the Lisbon Treaty entering into force in 2009. *See generally* on the history of EU security cooperation, S. PEER, *EU JUSTICE & HOME AFFAIRS* ch. 1 (Oxford University Press ed. 2015).

<sup>13</sup> *See, e.g.*, from a legal perspective, PAUL CRAIG, *THE EVOLUTION OF EU LAW* 43-44 (G. de Búrca & P. Craig eds., 2nd ed. 2011).

<sup>14</sup> *See, e.g.*, the Directive 2018/843, of the European Parliament and of the Council of 30 May 2018 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43-74. On regulatory practices, risk and market construction, *see, e.g.*, NIAMH MOLONEY, *EU SECURITIES AND FINANCIAL MARKETS REGULATION* (3rd Edition, Oxford University Press 2014), at pages 855-858.

<sup>15</sup> Directive 2017/541, of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA OJ L 88, 31.3.2017, at 6. *See, also, e.g.* Directive 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43-74.

of law in a number of member states and associated fears of disintegration and non-compliance with the rule of law and EU values.<sup>16</sup>

In the light of the EU's promise to establish an AFSJ, the increased need to maintain security while, at the same time, ensuring freedom and justice may appear highly problematic from a practical point of view. For example, the recently adopted Directive on the Fight against Terrorism states that: 'The objectives of fighting crime and terrorism cannot be sufficiently achieved by Member States acting alone, since legislation only at the national level would not have the effect of establishing minimum rules on the definitions of and penalties for terrorist offences applicable throughout the EU.'<sup>17</sup>

As is sometimes pointed out, security has functioned as an identity-building power which has largely shaped Europe with regard to security governance.<sup>18</sup> Indeed, security regulation in the EU is constantly challenged and evolving, the Money Laundering Directives and the new Directive on the fight against terrorism being recent examples of risk-based approaches to security in the EU in emergency contexts.<sup>19</sup> The focus on security has however, overshadowed the need to ensure due process rights within the EU.<sup>20</sup> Although the EU is currently improving the situation in the AFSJ, by adopting legal safeguards, and the Court of Justice has, from time to time, handed down rulings in favour of the individual, it currently does not live up to the promises of the AFSJ, which places equal value on *all* of the components of freedom, security and justice.<sup>21</sup>

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<sup>16</sup> For more on this, see E. Herlin-Karnell & P.F. Kjaer, *Dimensions of Justice and Justification in EU and Transnational Contexts*, in *TRANSNATIONAL LEGAL THEORY* 1-7 (2017) and on the rule of law and current challenges in the EU, see L. Pech, Laurent & Kim Lane Scheppelle, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *19 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 3-47 (2017).

<sup>17</sup> Directive 2017/541, *supra* note 15.

<sup>18</sup> See, e.g., K. Tuori, *A European Security Constitution?*, in *THE LONG DECADE: HOW 9/11 CHANGED THE LAW* 103-120 (Oxford University Press, ed., 2014).

<sup>19</sup> Directive 2018/843, of the European Parliament and of the Council of 30 May 2018 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43-74.

<sup>20</sup> See, e.g., ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* 182 (Oxford University Press ed., 2014); L. Zedner, *Seeking Security by Eroding Rights: The Side-stepping of Due Process*, in *SECURITY AND HUMAN RIGHTS* 264-265 (B. Goold & L. Lazarous Hart eds., 2007); Cian C. Murphy, *Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the 'Wars on Terror'*, in *TRANSNATIONAL LEGAL THEORY* 31, 48 (2015); and S. Poli, *The EU External Anti-terrorism Policy in its External AFSJ Policy*, in Fletcher & Herlin-Karnell, *infra* note 40, at 389-416.

<sup>21</sup> See, e.g., joined Cases C-404/15 and C-659/15 PPU, judgment of 5 April 2016. See also Case C-578/16 PPU, Directive on the right of access to a lawyer in criminal proceedings

On the other hand, it remains a complex project in that not all EU Member States have opted to join in wholeheartedly (Denmark is not participating in the AFSJ, although it is a member of Schengen, and Ireland and the UK were never part of Schengen, and, in addition, already had the so-called opt out/opt in arrangement before the Brexit negotiations started).<sup>22</sup> This means that the Republic of Ireland would be the “only” Member State with the default position of not participating in the AFSJ but having the possibility to “opt-in” according to Protocol 21 as attached to the Lisbon Treaty. Moreover, the UK’s withdrawal (and thereby the triggering of Article 50 TEU) from the EU raises some intriguing constitutional law questions ranging from, *inter alia*, how to deal with current legislation in the UK that mirrors and implements EU law and which is existing law in the UK to the how to deal with the Northern Ireland question.<sup>23</sup> For example, the border between the Irish Republic and Northern Ireland and associated security questions is regulated by the Belfast-Good Friday Agreement of 1998.<sup>24</sup> One of the key issues is now whether Northern Ireland can, at least, stay part of the EU customs union, despite the position of the UK, which currently seems to be heading for a “hard Brexit.”<sup>25</sup> The discussion has, moreover, focused on the possible security threat (in terms of the old Northern Ireland dispute) of re-instating border controls between Northern Ireland and the Republic.<sup>26</sup>

Furthermore, the recent migration and refugee crisis in Europe has

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and on the right to communicate upon arrest COM (2011) 326, adopted by JHA Council 2013.

<sup>22</sup> Protocol No 22, as attached to the Lisbon Treaty, allows Denmark a special position by granting it the right to remain outside the project. The UK and the Republic of Ireland, Protocol Number 21 grant these Member States have the opportunity to opt out of criminal law co-operation provisions. They can later opt in under the conditions set out in the said Protocol.

<sup>23</sup> Chris MacCrudden & Daniel Halberstam, *Miller and Northern Ireland: A Critical Constitutional Response*, in UNIVERSITY OF MICHIGAN PUBLIC LAW RESEARCH PAPER NO. 575 (2017).

<sup>24</sup> The Belfast-Good Friday Agreement comprises two treaties: a Multi-Party Agreement involving most of the political parties in Northern Ireland, and the British-Irish Agreement, the accord between the governments of the UK and the Republic of Ireland. See EUROPA, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL\\_BRI\(2017\)583116\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf) [<https://perma.cc/S69Z-GYLX>]; also MacCrudden & Halberstam, *supra* note 23.

<sup>25</sup> Hard Brexit means that UK would leave not only the EU but also the EU’s Single Market and the EU Customs Union. See <http://ukandeu.ac.uk/fact-figures/what-is-hard-brexite/> [<https://perma.cc/62SW-VPUB>].

<sup>26</sup> See *Northern Ireland has become an Unexpected Hurdle for Brexit*, WASHINGTON POST, [https://www.washingtonpost.com/world/northern-ireland-has-become-an-unexpected-hurdle-for-brexite/2018/02/28/7efd54e4-1c94-11e8-98f5-ceecfa8741b6\\_story.html?utm\\_term=.68e55caed4f6](https://www.washingtonpost.com/world/northern-ireland-has-become-an-unexpected-hurdle-for-brexite/2018/02/28/7efd54e4-1c94-11e8-98f5-ceecfa8741b6_story.html?utm_term=.68e55caed4f6) [<https://perma.cc/7FZL-Z5UA>].

demonstrated that the legal framework for addressing and tackling the issues of freedom, security and justice within a European space are increasingly difficult.<sup>27</sup> For example, the EU criminalises the trafficking and smuggling of human beings (although it asserts the protection of the trafficked victim), but trafficking also occurs in parallel with asylum-seekers and smuggled humans.<sup>28</sup> The EU has singled out smuggling in human beings as something that must be stopped and criminalised in order to halt the stream of migrants arriving in Europe through illegal and dangerous routes.<sup>29</sup> But the actual practice on the part of the EU for ensuring justice seems largely undermined as there is very seldom a proper debate as to what justice entails.<sup>30</sup>

Of considerable importance for understanding EU security regulation at present is the European Agenda on Migration 2015-2020.<sup>31</sup> This policy agenda states that the EU has a duty to contribute in helping displaced persons in clear need of international protection, and that their smugglers ought to have been already criminalised before they reach the shores of the EU. This agenda also contains the promise that the EU must continue to engage beyond its borders and strengthen co-operation with its global partners, address root causes, and promote modalities of legal migration that foster circular growth and development in both the countries of origin and destination.<sup>32</sup>

Moreover, the aforementioned EU's Security Agenda 2015-2020 is especially important as it identifies three priorities for the EU in the near future, namely: fighting terrorism, including radicalisation, organised crime, and the suppression of cybercrime.<sup>33</sup> To address these threats, EU Security Agenda 2015-2020 claims to strengthen and increase the effectiveness of information exchange and operational co-operation between Member States, EU agencies, and the IT sector.<sup>34</sup> Significantly, however, terrorism also encompasses online activity, not necessarily just physical movement across the EU. In this context, the Security Agenda affirms that tackling the

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<sup>27</sup> See e.g., CATHRYN COSTELLO, *THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW* 41-60 (Oxford ed. 2016), ITAMAR MANN, *HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW* (Cambridge ed. 2016).

<sup>28</sup> See the European Agenda on Migration, May 2015, COM (2015) 240 final.

<sup>29</sup> *Id.*

<sup>30</sup> See e.g., S. Douglas-Scott, *Human Rights as a Basis for Justice in the European Union*, 8 *TRANSNATIONAL LEGAL THEORY*, 59-78 (2017).

<sup>31</sup> European Agenda on Migration, *supra* note 28, at fn. 24.

<sup>32</sup> *Id.*

<sup>33</sup> *Supra* note 16, at 185.

<sup>34</sup> EU Security Agenda 2015-2020, COM (2015) 185 final.

risk of radicalisation is one of its main priorities.<sup>35</sup> While this remains an important task, what is still lacking, however, is a critical debate on how the EU could construct an AFSJ that integrates the EU values of human rights and the promotion of justice.

Interestingly for our purposes, both the Security and the Migration agenda have a security focus, a fundamental rights concern, and a strong digital element at their core, concerning how to protect data in a robust way in various EU activities across the field.<sup>36</sup> However, this expansion of legal responsibilities beyond borders poses questions about legitimacy and human rights protection.<sup>37</sup> One such question that seems essential from a constitutionalism perspective, and, as such, is crucial for discussing the corpus of the AFSJ, is what justifies the EU's expanding action, and is the EU better suited as a collective – unilateral – actor, compared to the Member States acting for themselves? Recently, the EU Commissioner for security stated, “When it comes to security, national authorities remain the first line of responsibility, and the first line of defence.”<sup>38</sup> The EU Commission has also stated that, “[t]oughened EU anti-terror laws mean those travelling to Syria to fight for Isis or those receiving terrorist training face criminal prosecution.”<sup>39</sup> These EU policy documents form an important role in scrutinising the underlying politics and background to the EU's motivation. These documents can be viewed as exemplifying an individual rights-oriented attitude that justifies a restriction of state sovereignty.

Finally, the EU has of course also multiple ties with the non-EU states, especially the USA.<sup>40</sup> Take, for example, the Terrorist Finance Tracking Programme, a central bilateral EU-U.S. agreement in the security domain that was created to address European legal concerns arising out of revelations that the CIA was secretly monitoring financial messaging data in order to track terrorism financing.<sup>41</sup> Moreover, in the context of data

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<sup>35</sup> *Id.*

<sup>36</sup> *Supra* note 16.

<sup>37</sup> A. Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 *LEGAL THEORY* 39-70 (Cambridge University Press ed. 2008).

<sup>38</sup> Julian King, *Terrorists do not sit still, and nor should we*, EU COMMISSION FOR SECURITY <https://euobserver.com/opinion/138785> [<https://perma.cc/8N2G-NU5K>].

<sup>39</sup> *Id.*

<sup>40</sup> See e.g., Maria Fletcher & Ester Herlin-Karnell, *Is there a Transatlantic Security Strategy? Area of Freedom, Security and Justice Law and its Global Dimension*, in *THE EUROPEAN UNION AS AN AREA OF FREEDOM, SECURITY AND JUSTICE* 417, 418 (Fletcher et al. eds. 2017).

<sup>41</sup> Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, 27 July 2010 OJ L 195/5

protection and security regulation, the EU-USA Umbrella Agreement is one of the key measures in the EU fight against terrorism. The Umbrella Agreement supplements data protection safeguards in existing and future data transfer agreements and national provisions authorising such transfers.<sup>42</sup> In the U.S. context, the Judicial Redress Act grants non-U.S. citizens certain rights, including a private right of action for alleged privacy violations that occur in the United States.<sup>43</sup>

#### A. *Risk and Emergency*

The AFSJ is an area in which the EU had, until recently, almost exclusively focused on preventive measures to address certain risks of emergencies stemming from the unknown.<sup>44</sup> Hence, by using the emergency provisions to fight terrorism, the “normal” criminal law framework is often set aside, and measures are adopted under administrative procedures without the full package of procedural safeguards in criminal law.<sup>45</sup> As Cian Murphy argues, there has been a rise in the use of administrative law measures to address terrorism, as a form of socio-political deviance, alongside the rise in the use of administrative law measures against deviance in general.<sup>46</sup> The rights of due process, the burden of proof, and other procedural rules in the operation of these administrative systems tend to offer inferior protections to those found in criminal justice systems.<sup>47</sup>

For instance in the area of criminal law much of the current discussion in an EU context is whether there is currently an over-criminalisation or

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and Council Decision of 28 June 2010 on the signing on behalf of the Union of the agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (TFTP) 2010/411/EU 2010 OJ L 195/1. Fletcher & Herlin-Karnell, *supra* note 40 at 417-438.

<sup>42</sup> Fact Sheet, European Commission, Questions and Answers on the EU-U.S. Data Protection “Umbrella Agreement” (Dec. 1, 2016), available at [http://europa.eu/rapid/press-release\\_MEMO-16-4183\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-16-4183_en.htm?locale=en). [http://europa.eu/rapid/press-release\\_MEMO-16-4183\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-16-4183_en.htm?locale=en) [https://perma.cc/DP9X-7AG3].

<sup>43</sup> See EU PRESS RELEASE, [http://europa.eu/rapid/press-release\\_MEMO-16-4183\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4183_en.htm) [https://perma.cc/U7K5-4GT4].

<sup>44</sup> See, e.g., DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 17 (Cambridge University Press ed. 2006) (discussing emergency laws).

<sup>45</sup> Ester Herlin-Karnell, *The EU as a Promoter of Preventive Criminal Justice and the Internal Security Context*, in 17 *EUROPEAN POLITICS AND SOCIETY* 215-225 (2016).

<sup>46</sup> See Cian Murphy, *Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the ‘Wars on Terror’*, 6 *TRANSNATIONAL LEGAL THEORY* 31-54 (2015); See also C. Walker, *Terrorism and Criminal Justice: Past, Present and Future*, 50 *CRIM. L. REV.* 311 (2004).

<sup>47</sup> Murphy, *supra* note 46.

undercriminalization in EU legal practice.<sup>48</sup> However, as Lucia Zedner and Andrew Ashworth stress, the phenomenon of decriminalisation could create problems as such an approach can cause for the guarantees of due process provided for under Article 6 of the European Convention of Human Rights.<sup>49</sup>

Interestingly, the new Counter Terrorism Directive at EU level adopted in 2017 mainly would use the criminal law framework, and not the administrative framework.<sup>50</sup> In short, this means that countries cannot derogate from their obligations to ensure a fair trial, and have, in any case, to comply with proportionality.<sup>51</sup>

The ECHR emergency provision Article 15 is relevant here. Article 15 ECHR reads:

[I]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

As national security is a national competence, (but, as noted above, almost all security situations these days have a cross-border impact) one could argue that, although the EU has no specific regulation for a state of emergency, thus leaving the national security of an emerging state to the Member States, the values set out in the Lisbon Treaty and the EU Charter of Fundamental Rights (to wit, the rule of law, dignity and human rights protection) still need to be respected. As noted above, in the context of the French counter-terrorism strategies and the state of emergency that were recently brought to an end (in force since the Paris attacks in November 2015): “What is the criteria for an emergency to become an ‘absolute’ emergency?”<sup>52</sup> The French Intelligence Act raises the difficult constitutional question of balance between the respect for freedom and the safeguarding of public order.<sup>53</sup> The new French counter-terrorism bill now absorbs the exceptional powers used under the state of emergency into

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<sup>48</sup> See, e.g., Valsamis Mitsilegas, *From Overcriminalisation to Decriminalisation The Many Faces of effectiveness in European Criminal Law*, 5 *NEW J. OF EUROPEAN CRIM. L.* 416, 416-426 (2014).

<sup>49</sup> See A. ASHWORTH AND L. ZEDNER, *supra* note 20, at 10-14.

<sup>50</sup> Directive 2017/541, *supra* note 15, at 6-21.

<sup>51</sup> Directive 2017/541, *supra* note 15.

<sup>52</sup> See, e.g., ALAN GREENE, *PERMANENT STATE OF EMERGENCY AND THE RULE OF LAW* 33 (Hart Publishing ed. 2018).

<sup>53</sup> Wanda Mastor, *The French Intelligence Act: The French Surveillance State?*, 23 *EUROPEAN PUBLIC LAW* 707 (2017).

ordinary law.<sup>54</sup>

What, then, of the constitutional dimension? The idea of a constitutional structure for understanding legal systems is paramount to any public use of coercion and the shaping of the criminal law process, a central part of EU security regulation. Such a structure also needs to fulfil basic notions of justice and fairness. Too much security-focused legislation without the accompanying due process rights would amount to domination.<sup>55</sup> 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. Because of the rapid development of the AFSJ in recent years and its crisis-driven agenda (for example, the fight against terrorism and the management of migration flows to Europe), a serious awareness and critical reflection as to how the EU could construct a just order of security regulation is warranted.<sup>56</sup>

This brings us back to the earlier question of why the EU has a power to act at all, when so much security regulation concerns national security law. Why the EU, and, by extension, the global level, as opposed to the national forum? How do we decide when EU action is more effective than national law? Interestingly, such assessments are often done with little empirical data provided in the EU legislative assessments.<sup>57</sup> Perhaps, the usefulness of subsidiarity does not lie in providing a definitive answer in any specific context. Instead, this concept's usefulness is the way in which it helps to structure decision-making that is likely to be sensitive to the relevant empirical and normative concerns.<sup>58</sup> Subsidiarity-related concerns may, in certain contexts, strengthen, rather than weaken, the legitimacy of EU law. If there are good reasons for deciding an issue at international level, because the concerns addressed are question best addressed by a larger community, then some would claim international level courts enjoys greater jurisdictional legitimacy.<sup>59</sup> Against this background, what, if any, is the

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<sup>54</sup> The A-S Chassany, *France: The Permanent State of Emergency*, THE FINANCIAL TIMES (Oct. 2, 2017), <https://www.ft.com/content/f5309ff8-a521-11e7-9e4f-7f5e6a7c98a2>. See also Pasquino Pasquale, "Constitutionalizing Emergency Power in a Time of Jihadist Terrorism: France 2016 as a Case of Misunderstanding and Failure", 19 GERMAN LAW JOURNAL 251-265 (2018).

<sup>55</sup> Herlin-Karnell & Kjaer, *supra* note 16, at 87.

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., *Better Regulation: Why and How*, EUROPEAN COMMISSION [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en) [<https://perma.cc/U4RN-MVBS>], even if the acts are getting more sophisticated in comparison to earlier years.

<sup>58</sup> Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-positivist Law*, 14 INT'L J. CONST. L. 697, 697-711 (2016).

<sup>59</sup> *Id.*

function of subsidiarity in the EU security-related context? Subsidiarity, as Mattias Kumm points out, is a jurisdictional principle which amounts to the proposition that the most local unit should have the jurisdiction to regulate an issue, unless there are good reasons for the overarching, more central level to step in.<sup>60</sup> In many ways, one could argue that the principle of subsidiarity has now replaced the debate on sovereignty, perhaps even more so than the debate on competence. It is also one which asks some difficult questions about the idea of justifications at the meta-level. In general terms, the task of subsidiarity is, therefore, to function as a justificatory mechanism: if there is no sufficiently good reason in terms of a sound justification for adopting the measure in question and to legislate at the EU level, then legislation should be done at Member State level.<sup>61</sup> Yet the concept of subsidiarity is more easily expressed in legal terms than applied, and remains both a rather contested EU legal concept and an example of a mixture between law in the books and law in action. Given the strong inter-state dimension to security regulation, the EU has increasingly extended its powers to regulate this area and the judiciary plays a strong role here.

### III. JUDICIAL REVIEW, CONSTITUTIONALISM AND EU SECURITY MATTERS

A central player in EU security regulation is the EU Court of Justice, which has been a prominent game changer in the AFSJ, especially in the area of mutual recognition.<sup>62</sup> The idea of mutual recognition in the EU context is that European states should mutually trust one another and recognise, *inter alia*, a judgment, product, qualification or an arrest warrant from another EU state.<sup>63</sup> The application of mutual recognition and trust in the AFSJ raises familiar questions about the implications of free movement within, for example, the area of EU criminal law co-operation as well as the constitutional dimension of citizenship in EU criminal law.<sup>64</sup> One could argue that the most essential aspect of the operation of mutual recognition has been of a symbolic nature, *i.e.*, simply recognising the relevance of citizenship. After all, one could also argue that there was a need to recognise that a system based upon enforcement and mutual recognition also needed the other side of the coin, namely, the substantial principles of

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<sup>60</sup> Mattias Kumm, *Sovereignty and the Right to be Left Alone: Subsidiarity, Justice-sensitive Externalities and the Proper Domain of the Consent Requirement in International Law*, 79 L. & CONTEMP. PROBS. 239 (2016).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Koen Lenaerts & Jose A.J. Gutiérrez-Fons, *The European Court of Justice and Fundamental Rights in the Field of Criminal Law*, in RESEARCH HANDBOOK ON EU CRIMINAL LAW 7-28 (Maria Bergstrom et al. eds. 2016).

<sup>63</sup> See, e.g., CHRISTINE JANSSENS, THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW 11-23 (Oxford ed. 2013).

<sup>64</sup> *Id.*

non-discrimination and the recognition of citizenship rights.<sup>65</sup>

Yet, when discussing the role of courts in a constitutional setting, it is necessary to adopt a wider outlook. The idea of judicial review is commonly seen as the hallmark of a constitutionalist way of thinking about law.<sup>66</sup> A common republican argument in favour of courts taking account of power differentials in certain contexts would remain sceptical as to whether judicial power can reduce power differentials in society at large.<sup>67</sup> Rainer Forst, for example, argues for a context-based approach, in which it is necessary to pay attention to the perceived experience of freedom and unfreedom on the part of citizens.<sup>68</sup>

Also important for understanding the EU security scheme is the EU's relationship with the European Convention on Human Rights (ECHR). The EU has an obligation to accede to the ECHR, as is stipulated in the Lisbon Treaty Article 6 TEU. Nonetheless, in its *Opinion 2/13* on the EU's accession to the ECHR, the Court of Justice rejected the possibility of EU accession to the ECHR partly on the grounds that as "EU law imposes an obligation of mutual trust between those Member States, accession is liable to . . . undermine the autonomy of EU law."<sup>69</sup> In addition, the Court has adopted a "yo-yo-like" approach with regard to its relationship with national courts.<sup>70</sup> Sometimes, the Court has maintained its *Solange* doctrine,<sup>71</sup> in which Member States are guaranteed some leeway in their compliance with EU law and the EU promises that human-rights concerns are first principles, and, at other times, simply focused on the enforcement of EU law at all costs.<sup>72</sup> The case law remains contextualised, if you like,

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<sup>65</sup> If we consider how the EU criminal law cooperation developed. *See, e.g.*, ESTER HERLIN-KARNELL, *THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW* (2012).

<sup>66</sup> *See, e.g.*, ALON HAREL, *WHY LAW MATTERS* 191-225 (2014) (emphasis added) (explaining why judicial review is central for a constitutional understanding of law).

<sup>67</sup> Eoin Daly, *Freedom as Non-domination in the Jurisprudence of Constitutional Rights*, 28 *CANADIAN J. L. & JURIS.* 289, 289-316 (2015).

<sup>68</sup> Rainer Forst, *The Justification of Basic Rights: A Discourse-Theoretical Approach*, 45 *NETHERLANDS J. OF LEGAL PHILOSOPHY* 7-28 (2016).

<sup>69</sup> Case C-2/13, *Opinion 2/13* of the Court, *EUR LEX* (Dec. 18, 2014). For comments, *see*, for example, Daniel Halberstam, "It's the Autonomy, Stupid!" *A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 *GERMAN L. J.* 105 (2016).

<sup>70</sup> *See, e.g.*, Iris Canor, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"*, 50 *COMMON MKT. L. REV.* 383, 383-421 (2013).

<sup>71</sup> Case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für GetreideVorratsstelle für Getreide und Futtermittel*, 1970 *E.C.R.* 1125 (also known as *Solange I*); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L. J.* 2400 (1990-91). *See also* Herlin-Karnell, n. 51.

<sup>72</sup> *See, e.g.*, Ester Herlin-Karnell, *The European Court of Justice as a Game changer: fiduciary obligations in the area of freedom, security and justice*, in *ROUTLEDGE HANDBOOK*

albeit sometimes unclearly, as to why some cases are different from others. Apart from the importance of consistency as a value in shaping legal drafting, and, as such, a prominent theme in the case law of the Court of Justice, consistency - theoretically - plays an important part in judicial decision-making.<sup>73</sup>

What, then, of the relationship between the EU Court of Justice and the European Human Rights Court? The EU Court has to ensure consistency between the rights under the EU Charter of Fundamental Rights and the ECHR system.<sup>74</sup> This means that it often looks at the case law of the Strasbourg court (ECtHR) for guidance. For example, in 2011, the European Court of Human Rights, in the case *M.S.S. v Belgium and Greece*,<sup>75</sup> held that the conditions of detention and the living conditions of asylum-seekers in Greece were to be regarded as a violation of Article 3 of the ECHR.<sup>76</sup> Likewise, in the area of EU criminal law, the Court of Justice often “copies” the ECHR with regard to the minimum standard adopted, which was both the case in *Melloni* (in which the ECHR did not give a wider protection but left it open to the margin of appreciation test whether to allow trial in *absentia*) and in *Aranyosi and Căldăraru* (cases both concerned with the prohibition of degrading treatment).<sup>77</sup>

Therefore, it is a challenge for the EU Court of Justice to convince Europe’s highest national courts that, despite the non-accession, the EU system of rights is, at a minimum, as good as that offered by the ECHR. In a recent article, Anneli Albi has argued that what is needed in AFSJ matters (and more generally in EU constitutional law) is a turn to “substantive co-

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OF JUSTICE AND HOME AFFAIRS RESEARCH 396-408, 403 (Adrinne Ripoll Servent & Florian Trauner, eds. 2017).

<sup>73</sup> In Opinion 2/13, *supra* note 69, at paragraph 194, the Court of Justice held that: “In so far as the ECHR would require a EU Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession [to the ECHR] is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.”

<sup>74</sup> See Charter of Fundamental Rights of the European Union, art. 52(3), 2000 OJ C364/01: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

<sup>75</sup> *M.S.S. v Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R. (2011), available at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103050&filename=001-103050.pdf&TID=cwvzdogrzt> [<https://perma.cc/XL69-PX4G>].

<sup>76</sup> As stated in Art. 3 of the ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>77</sup> See Case C-399/11, Criminal proceedings against Stefano Melloni, judgment of 26 February 2013 (not yet reported); Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of the Court of Justice (Grand Chamber) of 5 April 2016.

operative constitutionalism.”<sup>78</sup> With this, Albi means that the Court needs to adopt a conceptual approach, through which scholars, courts, and national and transnational institutions would be able to explore how to develop European and global governance in a way that would seek to uphold and enhance the achieved standards of the classic, substantive, more “guarantistic” and democratically-responsive version of constitutionalism. It is also an area in which the Court of Justice is likely to continue to be a game changer in the future, with either more co-operation on the table, or by promoting a “closed door” approach.<sup>79</sup> Indeed, there is wide-ranging literature in EU constitutional law, in pluralism and in the cosmopolitan legal movement.<sup>80</sup> Much of this debate has been constructed around the possibility of Member States derogating from EU law and the possibility of national constitutional courts acting to rebut EU law when national constitutional values are endangered (which would be against “supremacy” in classic EU law doctrine).<sup>81</sup>

Furthermore, the Court of Justice considers itself to be not only the top of the judicial integration chain, but also a court with fiduciary obligations to protect EU law rights in all Member States in the autonomous European legal order, which is largely based upon trust between the Member States.<sup>82</sup> Therefore, for example, according to Alec Stone-Sweet and Thomas Brunel, the Court of Justice is not a simple agent of the Member States; instead, it is the latter that are the trustees of its regimes, *i.e.*, of EU law at large. In reaching this conclusion, the authors mention three criteria. First, that the court is recognised as the authoritative interpreter of the law of the regime, which is the case of the EU Court of Justice. Secondly, that the Court’s jurisdiction, with regard to state compliance, is compulsory; and, thirdly, that it is virtually impossible, in practice, for contracting states to reverse the Court’s important rulings on treaty law. A trustee court is a kind of “super agent,” empowered to enforce the law against the Member States themselves.<sup>83</sup>

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<sup>78</sup> Anneli Albi, *Erosion of Constitutional Rights in EU Law: A Call for “Substantive Co-operative Constitutionalism”*, 9 VIENNA J. INT’L. 151 (2015).

<sup>79</sup> Canor, *supra* note 70.

<sup>80</sup> See Sionaidh Douglas-Scott, *Justice and Pluralism in the EU*, 65 CURRENT LEGAL PROBS. 83, 83-118 (2012); *see also* KLEMEN JAKLIC, CONSTITUTIONAL PLURALISM IN THE EU (2014).

<sup>81</sup> JAKLIC, *supra* note 80 at 11-25.

<sup>82</sup> The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, COM (2014) 144 final (Mar. 11, 2014).

<sup>83</sup> Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO* (Yale Fac. Scholarship Ser. Paper No. 4625, 2013), [http://digitalcommons.law.yale.edu/fss\\_papers/4625](http://digitalcommons.law.yale.edu/fss_papers/4625) [<https://perma.cc/2PY8-QUJ4>]; *See also*

But what sort of argument would hold in a court in the AFSJ context with its emphasis on security? And what justifies giving so much power to courts? In order to determine more precisely when the competence of courts is supported by democratic legitimacy, we may, following Matthias Klatt, employ the “three key values” of democracy, namely, accountability, participation, and equality.<sup>84</sup> This would require an elaborate reasoning on the part of the Court. However – and this is the important point – courts provide individuals with an opportunity to raise their grievances and challenge what individuals perceive (justifiably or unjustifiably) to be violations of their rights.<sup>85</sup> In this way, courts engage in reasoned deliberation and provide explanations for the alleged violations. Institutions that operate in this way thereby inevitably become institutions that operate in a judicial manner.<sup>86</sup> Therefore, what the *political* process cannot possibly *guarantee*, the *legal* process typically does: the right of the individual to a fair hearing in which explicit, reasoned justifications for and against a contested statute become publicly available for political deliberation.<sup>87</sup> In practical terms, national courts are closer to the “scene”; they are better at knowing the situation in the concrete case. In those cases where the EU protection is not robust enough and where national law offers stronger protection, the latter should prevail.

#### IV. DUE PROCESS RIGHTS IN PRACTICE THROUGH A PROPORTIONALITY TEST?

Due process guarantees are especially relevant in AFSJ law with its strong public law nature. The presumption of innocence, for example, is the baseline of due process guarantees in criminal law, and, as such, a core expression of the rule of law.<sup>88</sup> In the European context, Article 6(2)-(3) ECHR states, *inter alia*, that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law,” and shall have the right “to examine or have examined any witnesses against him.” This is also confirmed in the EU Charter of Fundamental Rights, Articles

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EVAN J.E CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY* (2016).

<sup>84</sup> Matthias Klatt, *Positive Rights: Who Decides? Judicial Review in Balance*, 13 INT’L. J. CONST. L. 354 (2015).

<sup>85</sup> HAREL, *supra* note 66, at 2.

<sup>86</sup> Daly, *supra* note 67, at 289.

<sup>87</sup> Christina Lafont, *Philosophical Foundations of Judicial Review*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* ch. 15, 10 (David Dyzenhaus & Malcom Thorburn eds. 2016), *available at* <https://www.philosophy.northwestern.edu/documents/cv-resume/lafont-cristina/Cristina%20Lafont.Judicial%20Review.pdf> [https://perma.cc/H59L-QF4E].

<sup>88</sup> See, e.g., Elies van Sliedregt, *A Contemporary Reflection on the Presumption of Innocence*, 80 *Revue Internationale de Droit Pénal* 247 (2009).

47-49.

Moreover, there is a strong connection between due process rights and proportionality in constitutional law.<sup>89</sup> Before looking at the idea of proportionality specifically at the AFSJ judicial space, we should ask what proportionality is. It is often said that the concept of proportionality is central to any transnational constitutionalism.<sup>90</sup> Generally, proportionality in EU law is taken to representing a balancing of means and ends and where the notion of ‘appropriateness’ constitutes the golden thread for deciding on the desirability and need for EU action in a given area. As Bernhard Schlink states:

Once it is understood that an authority’s reach is extensive but also limited, without the limits being specified, the principle of proportionality serves as an instrument for reconciling both: the extensive reach with the unspecified limits.<sup>91</sup>

As Vicki Jackson points out, one of the benefits of proportionality is that it could enhance judicial reasoning by clarifying justifications for limitations on freedoms.<sup>92</sup> As she argues, proportionality might also improve the outcomes of adjudication by bringing constitutional law closer to what she described as varied conceptions of justice, in ways that are consistent with the demands of effective government.

For Aharon Barak, the boundaries of the zone of proportionality are the lines separating the legislator from the judge, connected to the question of the separation of powers.<sup>93</sup> According to him, the zone of proportionality is the legislator’s kingdom, while keeping the boundaries intact is that of the judge. According to Barak, the judge’s “only” role is to maintain the boundaries of proportionality and to prevent the selection of disproportional means.<sup>94</sup> Moreover, it could be argued that the rights in the EU Charter of Fundamental Rights and the ECHR, by themselves, work as a buffer against state domination of the individual.<sup>95</sup> And the problem here is arguably what

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<sup>89</sup> See e.g., AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 17-42 (2012).

<sup>90</sup> Jud Mathews & Alec Stone Sweet, *All Things in Proportion - American Rights Review and the Problem of Balancing*, 60 EMORY L. J. 797 (2011).

<sup>91</sup> Bernhard B Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. COMPARATIVE & INT’L. L. 292 (2012).

<sup>92</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094 (2015).

<sup>93</sup> BARAK, *supra* note 89, at ch. 14 (2012).

<sup>94</sup> *Id.*

<sup>95</sup> Matthias Kumm, *Human Rights and the Turn to Justification: On the Structure and Domain of Human Rights Practice*, in HUMAN RIGHTS: MORAL OR POLITICAL? (Adam Etinson ed., 2018).

we make of the proportionality test as either a sword or a shield. As Barak has pointed out, “democracy is a multi-dimensional concept. It requires recognition of the power of the majority and limitations on the power of the majority.”<sup>96</sup> For him, the principle of proportionality serves as a tool, making sure that the law is upheld even in the worst of times.<sup>97</sup> It therefore seems close to the heart of any EU constitutional scholar to think that the principle of proportionality, when understood critically, offers the best available constitutional solution for establishing solidarity as a workable legal principle through the key of proportionality reasoning. Therefore, proportionality can be interpreted as a mechanism for ensuring that coercive state interference remains non-arbitrary in the republican sense.<sup>98</sup>

Proportionality has, of course, always played a pivotal role in EU law (both legislative and judicial) and rule-making. Specifically, and as mentioned, one need to ask what sort of argument would hold in a court in the AFSJ context with its emphasis on security? What justifies giving so much power to courts? An example of the Court of Justice acting as a successful guardian of the AFSJ can be found in the recent case of *Digital Rights*,<sup>99</sup> which is instructive as a touchstone of justice-inspired reasoning in the European Court.<sup>100</sup> 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.<sup>101</sup> It concluded that the measure breached proportionality on the grounds that the Directive had a sweeping generality that therefore violated, *inter alia*, the basic right of data protection as set out in Article 8 of the Charter of Fundamental Rights. The Court pointed out that the access by the competent national authorities to the data retained 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 the Directive lay down a specific

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<sup>96</sup> Aharon Barak, *The Role of a Supreme Court in a Democracy and the Fight Against Terrorism*, 35 HONG KONG L. J. 287 (2005).

<sup>97</sup> Mathews & Sweet, *supra* note 90; In the U.S. context, *see, e.g.*, Jackson, *supra* note 92, at 3094.

<sup>98</sup> Daly, *supra* note 67.

<sup>99</sup> Case C-293/12, *Digital Rights Ireland Ltd. v. Minister for Communications and Others*, 2014 ECJ (Apr. 8, 2014).

<sup>100</sup> *See also* Ester Herlin-Karnell, *The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe’s “Area of Freedom, Security and Justice”*, 8 TRANSNAT’L LEGAL THEORY 79, §§ 5-6 (2017).

<sup>101</sup> Directive 2006/24/EC, of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

obligation on Member States designed to establish such limits. According to the Court, there was not a sufficiently good enough justification provided by the EU legislator.<sup>102</sup>

Subsequently, in *Schrems*,<sup>103</sup> the Court ruled, in effect, that U.S. law allowed U.S. intelligence services to access the personal data of EU citizens without sufficient privacy safeguards in terms of EU law which undermined the right to privacy as guaranteed by the Charter. Therefore, the Court declared the Adequacy Decision invalid.<sup>104</sup> This approach was confirmed in the recent *Telia 2 Sverige* case concerning the retention of the traffic and location of data in relation to subscribers and registered users, which was in breach of the Charter.<sup>105</sup> The Swedish Post and Telecom Authority required Telia 2 to retain traffic and location data in relation to its subscribers and registered users. The measure was found to be disproportionate and in breach of data protection (para.s 95–96 of the judgment).

The idea of balancing mechanisms of state action has for a long time been a touchstone for the EU and, as such, has been elevated to a golden rule in EU law-making, in terms of the proportionality principle. Thus, the potential for the Court to act as a trustee court could, arguably, be found in an ambitious reading of the proportionality principle, and one such avenue, if read in the light of the fundamental rights, could be seen as being safeguarded by the Charter of Fundamental Rights. This is particularly important for the construction of the AFSJ.

## V. CONCLUDING REMARKS

The EU is currently facing one of the most difficult questions in its lifespan concerning, *inter alia*, how to deal with the increased security threat while ensuring due process rights for citizens of Europe and thereby achieving an area of freedom, security and justice. Regardless of the political dimension of this area, the principle of proportionality could serve the purpose of ensuring constitutional rights protection. Allowing more flexibility in the judicial hierarchy chain between the EU Court of Justice and national courts when it concerns due process rights and human right protection in emergency contexts would also increase the legitimacy of the AFSJ project. Increasing human rights protection by looking at it from a (global) constitutionalism perspective, rather than technical differences and

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<sup>102</sup> Case C-293/12, *supra* note 99, at paras. 58-72.

<sup>103</sup> Case C-362/14, *Schrems v. Data Protection Commissioner* Judgment of Court (2015) (not yet reported).

<sup>104</sup> *Id.* at 97.

<sup>105</sup> Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others*, EUR Lex 62015CJ0203 (Dec. 21, 2016).

administrative practices in EU security regulation, appears a more workable solution for the construction of an AFSJ. At any rate, and in line with political theory concepts such as reasonableness and reciprocity, (which are often given loose, context-dependent definitions)<sup>106</sup> a simplification of something inherently complex is perhaps bound to be a failure. The question may also illuminate the limits of centralisation and where sometimes local practices are more effective, as well as the contribution of national courts to ensure judicial review in practice. The paper has also sought to demonstrate how central a constitutional law framework is for our understanding of what the AFSJ project entails and how it ought to develop.

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<sup>106</sup> Simone Chambers, *Theories of Political Justification*, 5 *PHILOSOPHY COMPASS* 893 (2010).