1

Rethinking Europe's Freedom, Security and Justice

CIAN C MURPHY AND DIEGO ACOSTA ARCARAZO*

> There is a precipice between two steep mountains: the city is over the void, bound to the two crests with ropes and chains and catwalks . . . suspended over the abyss . . . the net will last only so long.**

I. INTRODUCTION: CONSTITUTIONAL MOMENTS AND THE TEMPTATION OF THE NEW

THERE IS A tendency in EU law scholarship to over-emphasise novelty and to pronounce a new dawn with each new treaty. For EU law scholars it is always tempting to view the most recent European constitutional moment as the most significant. Yet it may well be more appropriate to accept the inevitable impermanence of any EU constitutional settlement. In counterpoint to the United States' claims of its striving for a 'more perfect Union', even as it perpetuates the fossilisation of its constitution, the EU engages in ongoing constitutional reinvention, while promising its people(s) that everything remains the same. It may be that Europe's constitutional progress may only take place when it denies it is taking place – slinking forward while convincing its citizens that there is nothing to see. Witness the demise of the Constitutional Treaty, agreed in Dublin but signed, in a self-conscious act of constitutional grandeur, in Rome. The Lisbon Treaty that later proved to be acceptable to the European people is very similar in its content and effects as the Constitutional Treaty. It is more different in appearance than it is in reality.

The European Union has seen four major revisions to its constitutional text in two decades (and several minor ones, and a further aborted attempt).[1] It has also

* We are grateful to Stephen Coutts and Christina Eckes for comments on an earlier draft. Any errors and all flights of imagination are our own.

** Italo Calvinho, *Invisible Cities* (London, Vintage Classics New Ed edn, 1997).

[1] Following the Maastricht Treaty (1992) are the Amsterdam Treaty (1997), the Nice Treaty (2001), and the Lisbon Treaty (2007). The failure of the Constitutional Treaty (2004) prompted the reversion

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seen the adoption of three programmes to develop its 'area of freedom, security and justice' in the past 15 years. These treaties and agreements are known by the cities in which they were adopted: Maastricht, Amsterdam, Nice, and Lisbon for the treaties, Tampere, The Hague, and Stockholm for the programmes. As scholars we refer to 'before Lisbon' and 'after Stockholm' when in our discussions of legal and policy developments. The naming practice seems to emphasise both the geographic dispersion of Europe's constitutional process and also the tendency to conceive of European constitutional history as progressing in a series of 'moments' at various European towns and cities. It is understandable, in seeking to better understand the nascent EU, for us to glance across the Atlantic at the United States (US). Yet Europe does not have a single moment of birth, such as the signing of the US Constitution in Philadelphia, but a succession of moments of lurching growth and development.

The Schumann Declaration, as foundational to Europe as Jefferson's Declaration of Independence is across the Atlantic, states that the purpose of this enterprise was no less than world peace.[2] This peace, the Schumann Declaration claims, 'cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it'.[3] Despite the rhetorical grandeur the aims of the Declaration were much more modest, focusing on control of the means of production and the fusion of European markets. Although peace was the aim its achievement was to be through economic rather than political or security integration. Therefore for almost half a century the European institutions did not have formal roles in relation to security and any such measures adopted were public international law rather than what would come to be known as supranational law.[4] The entry into force of the Maastricht Treaty in 1993 marked the beginning of the EU's formal involvement in security matters – both internal and external. The role of the EU in external security was through the common foreign and security policy, the Union's 'second pillar', while internal security, known as justice and home affairs, was the 'third pillar' of the new Union.[5]

Over the following decade, through a series of revisions of the treaties, this role was increased as more policy fields were made subject to supranational law-making and adjudication.[6] For instance, in 1999 the Amsterdam Treaty saw immigration and asylum law move from the third pillar to the first pillar and therefore to the

to amending treaties with the Lisbon Treaty. Minor amendments have been brought about by accession treaties, such as the Treaty concerning the Accession of the Republic of Croatia (2011) and the Irish Protocol on the Lisbon Treaty (2012). See in general P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford, Oxford University Press, 2010). The simplified revision procedure to the treaties was put into use for the first time in 2011 to allow for the European Stability Mechanism (amending Art 136 TFEU). See Council Decision 2011/199/EU of 25 March 2011, 2011 OJ L91/1.

[2] Robert Schuman Declaration of 9 May 1950.

[3] ibid.

[4] See, for an overview of the justice and home affairs area since its inception, S Peers, *EU Justice and Home Affairs Law*, 3rd edn (Oxford, Oxford University Press, 2011) ch 2.

[5] For the classic account, see E Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press, 2002).

[6] K Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) 35 *CML Rev* 1047.

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supranational legal sphere. Although this led to an increase in the EU's role in these fields, constraints on that role did remain.[7] Thus, there was the sharing of the right of legislative initiative between the Commission and the Member States, reliance on unanimity amongst the Member States in the Council, the limitation of the European Parliament to a consultative role, and significant limitations on the jurisdiction of the Court of Justice of the European Union (ECJ).[8] The Nice Treaty did little to develop this constitutional and institutional settlement. Now, the Lisbon Treaty has brought the pillar structure to an end. The remaining fields of justice and home affairs have been made subject to supranationalism. However, with each increase in integration comes a new reservation of power by the Member States, leading to greater complexity and, perhaps, the fragmentation of the Union's legal supranationalism.[9]

In the Union legislature, most fields are now, after Lisbon, subject to the ordinary legislative procedure, with proposals requiring the support of a qualified majority in the Council and with equal legislative powers for the European Parliament alongside the Council.[10] This supranationalisation of the legislative process through the Parliament's involvement, alongside the shift from unanimity to qualified majority voting in the Council,[11] may not necessarily result in a more open political process or, indeed, in better legislation.[12] Whether such improvements have been, or will be, brought about is a question that recurs throughout this book. Elsewhere scholars have identified 'a difficult relationship' between supranationalism and intergovernmental processes in relation to justice and home affairs.[13] Alongside the change in legislative process come some new powers to legislate. The Lisbon Treaty develops the Union's legislative power in the fields of criminal law and security law and consolidates its existing powers in immigration and asylum law.

There remain idiosyncratic arrangements for these precious policy fields in justice and home affairs that have so close an association with sovereign power. This is perhaps most notable in respect of criminal law and justice. Therefore, although the Commission now has principal responsibility for the initiation of legislation, a group of Member States (at least a quarter) may still propose criminal justice

[7] See, for a discussion on immigration and asylum after the Amsterdam Treaty, E Guild and C Harlow, *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart Publishing, 2001).

[8] J Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) 23 *EL Rev* 320.

[9] S Peers, 'Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon' (2011) 48 *CML Rev* 661, 661–62.

[10] In certain areas a more restrictive legislative process persists. See Peers, ibid, 665.

[11] According to Lewis, the Council rarely votes but always tries to find a consensus even if qualified majority applies. J Lewis, 'Informal Integration and the Supranational Construction of the Council' (2003) 10 *Journal of European Public Policy* 996.

[12] D Acosta, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)' (2009) 11 *European Journal of Migration and Law* 19.

[13] E Guild, S Carrera and T Balzacq, 'The Changing Dynamics of Security in an Enlarged European Union' in D Bigo, S Carrera, E Guild and RBJ Walker (eds), *Europe's 21st Century Challenge. Delivering Liberty* (Aldershot, Ashgate, 2010) 36.

legislation.[14] The ECJ has ordinary jurisdiction over all justice and home affairs but limitations remain on the exercise of that jurisdiction and operational matters are still exempt.[15] The extension of the Court's jurisdiction does further the development of the rule of law. The Court provides for effective remedies, ensures the right to a fair trial, and upholds the principle that any exercise of power should be subject to review.[16] The Court's ordinary jurisdiction now permits individuals to access the ECJ through references by all national courts and not merely courts of last instance (as was the case before Lisbon).[17] This better guarantees judicial protection and has already had an impact in the number of cases before the Court. This is essential for the correct interpretation of new legislative instruments and for the protection of rights in such a sensitive area.[18] A further consideration, of relevance to the work of the Parliament and especially the Court of Justice, is the coming into full force of the Charter of Fundamental Rights. For so long dependent on the Council of Europe's European Convention on Human Rights (ECHR), the Union now has its own Bill of Rights, a timely development for a Union that must 'offer its citizens' an 'area of freedom, security and justice'.

II. POLITICS FROM TAMPERE TO STOCKHOLM VIA THE HAGUE (AND NEW YORK)

Article 3(2) TEU now states that the Union

> shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

This is an objective of the EU, second only to the promotion of 'peace, its values and the well-being of its peoples' and is 'loaded with social contract connotations'.[19] The most recent articulation of this objective is not its first mention in a European treaty. Rather it was the Amsterdam Treaty that first sought to create an area of freedom, security and justice. However, since that first citation of the idea, the 'plurality of values in the headline' has led to much discussion as to their relative weight and the extent to which EU action to achieve this objective would require a balance between the three.[20]

[14] Art 76 TFEU.

[15] Peers (n 4) 666.

[16] FG Jacobs, *The Sovereignty of Law: The European Way* (Cambridge, Cambridge University Press, 2007) 62.

[17] The Court's jurisdiction over preliminary references on third pillar measures before the Lisbon Treaty was subject to a national declaration in accordance with the EU Treaty. See Art 35 TEU(L).

[18] D Acosta Arcarazo and A Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy' (2013) 51 *Journal of Common Market Studies* 179.

[19] See Eckes, ch 11.

[20] N Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford, Oxford University Press, 2004) 5.

If the process of legal integration leading to the area of freedom, security and justice through treaty developments is notable for its cautious approach to the transfer of power to EU institutions, the use of multi-annual programmes has proven to be much more ambitious. The first five-year programme for this field, the Tampere Programme of 1999, saw the main challenge of the Amsterdam Treaty as being to ensure that freedom, including the right to free movement, was enjoyed 'in conditions of security and justice accessible to all'.[21] In order to achieve this, the Tampere Programme identified four priorities to address. The first was the establishment of a Common European Asylum and Migration Policy, which would permit third-country nationals to enjoy certain freedoms, alongside measures to control external borders to prevent irregular migration and to combat related international crime.[22] The second priority was the creation of a genuine European area of justice allowing for the mutual recognition and enforcement of judgments and decisions throughout the Union.[23] The third priority sought to develop Union-wide efforts to coordinate action 'to prevent and fight crime and criminal organisations through the Union'.[24] The fourth priority made reference to the Union's need to develop a stronger external role so as to be recognised as an important partner in the international arena.[25] These priorities would prove to be too ambitious for the rudimentary post-Amsterdam legislative instruments, and too sensitive for Member State governments, for much to be done before the attacks in New York and Washington DC on September 11 2001.

The attacks by Al-Qaeda in New York, Washington DC, and Pennsylvania do not constitute a 'constitutional moment' in the sense of Amsterdam, Nice or Lisbon. However, they did have a profound effect on EU law and policy – an effect that was made greater by subsequent attacks in Europe.[26] Therefore it may be possible to speak of the area of freedom, security and justice 'after New York'. Alongside its Action Plan on Combating Terrorism, the European Council sought through the Hague Programme of 2004 to take with urgency stronger action on a series of cross-border challenges including terrorism and organised crime.[27] Therefore the Hague Programme addresses the same priorities as the Tampere Programme, such as migration and free movement of EU citizens, the strengthening of criminal justice and security cooperation and the development of a coherent external dimension of the Union policy in this area. Nevertheless, the later Programme is notable for its

[21] European Council (1999) Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999, para 2.

[22] ibid, para 3.

[23] ibid, para 5.

[24] ibid, para 6.

[25] ibid, para 8.

[26] See, in general, CC Murphy, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (Oxford, Hart Publishing, 2012). See further Murphy's chapter in this volume.

[27] Brussels European Council 4/5 November, Presidency conclusions, the Hague Programme, Brussels 8 December 2004, 14292/1/04 REV 1, 25.

stronger emphasis on security.[28] The Hague Programme fits with government action across the world in the 'war on terror' and the field of EU counter-terrorism law is just as problematic as US policy.[29] In the academy, works were written on the dangers of 'balancing' freedom with security,[30] on achieving justice when both freedom and security are at stake,[31] and on the position of the individual – both in terms of EU citizens and third-country nationals.[32] However, illiberalism has been in evidence in EU security law and policy since long before the September 11 attacks and the events of that day, and their effects, must be understood in broader historical context.[33]

If the Hague Programme was in part a product of the 'war on terror' then the Stockholm Programme belongs in the post-'war on terror' world. It gives prevalence to fundamental rights and the role of the EU citizen and largely discards the security rhetoric of its predecessor.[34] The principal challenge for the coming years, according to the Programme, 'will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe'. Hence, it is important to ensure that 'law enforcement measures and measures to safeguard individual rights, the rule of law, [and] international protection rules go hand in hand in the same direction and are mutually reinforced'.[35] In order to achieve its objectives, the Stockholm Programme benefits from the new constitutional and institutional framework after Lisbon, with the enhancement of the roles of the European Commission, European Parliament and the ECJ, as well as the new binding effect of the Charter of Fundamental Rights.

The Stockholm Programme represents a form of maturation in some respects. The Tampere Programme was too ambitious and the Hague Programme was reactionary. The Stockholm Programme promises, at least, a more considerate approach. One of the Hague Programme's failures, for example, was the inability of the Council to agree legislation to protect the rights of suspects. This led to criticism of criminal justice cooperation which was, the argument goes, taking place without

[28] T Balzacq and S Carrera, 'The Hague Programme: The Long Road to Freedom, Security and Justice' in T Balzacq and S Carrera (eds), *Security versus Freedom?: A Challenge for Europe's Future* (Aldershot, Ashgate, 2006).

[29] See, in general, Murphy (n 26).

[30] Bigo, Carrera, Guild and Walker (n 13).

[31] M Anderson and J Apap (eds), *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union* (Brussels, Centre for European Policy Studies, 2002); T Balzacq and S Carrera (eds), *Security versus Freedom?: A Challenge for Europe's Future* (Aldershot, Ashgate, 2006).

[32] A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford, Hart Publishing, 2007); C Kaunert, 'Liberty versus Security? EU Asylum Policy and the European Commission' (2009) 5 *Journal of Contemporary European Research* 148.

[33] For a classic critique, see T Bunyan, 'Towards an Authoritarian European State' (1991) 32 *Race & Class* 19.

[34] E Guild and S Carrera, 'The European Union's Area of Freedom, Security and Justice Ten Years On' in E Guild, S Carrera and A Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years On. Successes and Future Challenges under the Stockholm Programme* (Brussels, Centre for European Policy Studies, 2010).

[35] Council of the European Union, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 17024/09, Brussels, 2 December 2009, 3.

appropriate safeguards. Today the Stockholm Roadmap for Suspects' Rights, adopted at the same time as the Programme, calls for six legislative proposals to address six different aspects of the criminal justice process. Instead of an all-or-nothing approach to the legislation, the Council has thus taken an 'incrementalist' approach, which may yield better results.[36] This 'incrementalist' approach is not new and is similar to the one the Commission has taken when proposing legislation on regular migration.[37] Furthermore, the centrality of the citizen in the Stockholm Programme may, as the authors in this book discuss, play a legitimising function for the area of freedom, security and justice.[38] If the Hague Programme's overt obsession with security was the source of criticism then taking citizenship as the focus for the Stockholm Programme provides the Council and Commission with a degree of political capital in dealing with both Member States and the European Parliament. After all, it is difficult to be against action done in the name of the citizen.

Of course some Member States remain deeply sceptical about Schuman's European project. The position of the United Kingdom presents a particular political complication. The exercise of the opt-out in Protocol 36 to the Treaty of Lisbon will pose a critical, perhaps even a fatal, challenge to cooperation in this field.[39] It will, to borrow a metaphor, be akin to taking a mallet to the still-drying frieze of Europe's criminal justice mosaic. A picture will still emerge but its fragmentation will be even greater. The UK has also, as Peers notes in this volume, sought to increase the use of justice and home affairs legal bases so as to broaden the scope of its opt-out from EU law. Furthermore, at the time of writing the UK Government is debating holding a referendum on UK membership of the EU. Nevertheless, even if British opposition appears to be at a new height, it is merely the predictable consequence of the return to government of the Conservative Party. Margaret Thatcher was antipathetic, noting that she had not 'rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level, with a European super-state exercising a new dominance from Brussels'.[40] John Major's cabinet was torn asunder over European Monetary Union. The posturing by David Cameron appears to marry traditional Conservative Party anti-European ideology with a greater tendency towards populist grandstanding. This is in part because of the national political landscape. The strong showing of the UK Independence Party in the 2013 local elections heightens the pressure on the Prime Minister from his Eurosceptic supporters. However, he openly courts that support and so the rise of Euroscepticism is in part the product of his own actions (such as his refusal to sign the Fiscal Treaty in 2012). It would be hostage to fortune to guess as to how all of this will resolve itself but perhaps, today more so

[36] See ch 3 by Konstadinides and O'Meara in this volume.

[37] See ch 8 by Kostakopoulou, Acosta Arcarazo and Munk in this volume.

[38] See ch 6 by Coutts in this volume.

[39] For the leading discussion of the opt-out and its implications, see A Hinarejos, JR Spencer and S Peers, 'Opting out of EU Criminal Law: What is Actually Involved?' (2012) CELS Working Paper, New Series, No 1, Cambridge University, September 2012.

[40] M Thatcher, Speech to the College of Europe – 'The Bruges Speech' (Bruges, 20 September 1988).

than at any time in the past, there appears a risk that populism will outweigh the pragmatic advantages of EU membership for British political leaders.

The decade between the agreement of the Nice Treaty in 2001 and the eventual coming into force of the Lisbon Treaty in 2010 therefore gives lie to the view that the European Union is marching towards an inevitable federal unity. In some respects the outcome of the past decade has not been a Union that moves 'ever closer' but rather one that has become deeper and more intricate. Much of what follows from the Lisbon and Stockholm constitutional moments has not been new integration but rather the fulfilment of the promises of earlier integration (such as in respect of the rights of suspects). The developments that this book explores reflect the need to come to terms with the swing towards securitisation in the aftermath of the September 11 2001 attacks. The deepening of integration in relation to intra-European rendition, whether of suspects or refugees, has become essential because of the failure of national systems of justice to ensure adequate protection for those subject to that rendition. However, it has not, in most cases, been national political actors that have sought to force such change, but rather European and national judiciaries who have done so. The history of the EU is one of periodic progress by political institutions with the legal institutions – courts – needing to keep the engine ticking over between treaty revisions. It is therefore necessary not just to rethink the politics of freedom, security and justice, but also to rethink its law.

III. THE LAW OF FREEDOM, SECURITY AND JUSTICE

The history of the EU is one of political and legal action and reaction. The relationship between the treaty reform process and the jurisprudence of the Court of Justice is a reflexive one. The internal market was brought about as the Court sought to build on the broad foundations in the treaties. The decisions in cases such as *Dassonville*, *Cassis de Dijon*, and *Keck* are now part of the grammar of EU law and legal scholarship.[41] In recent years a similar dynamic is emerging in respect of the area of freedom, security and justice. Thus, the early foundational case of *Pupino* (criminal justice) sits alongside *Kadi I* (counter-terrorism) and *NS* (asylum) as touchstones of the Court's work on freedom, security and justice.[42] These cases may, over time, assume the same significance as *Van Gend en Loos* and *Costa v ENEL* have in relation to the European constitution.[43] They have certainly prompted political reaction. The decision in *Kadi I* saw a revision not just

[41] Case 8/74 *Dassonville* [1974] ECR 837; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[42] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 (*Kadi I*); C-411/10 *NS v Secretary of State for the Home Department* [2011] ECR I-0000 (*NS*).

[43] Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585.

of EU law, but also of the administrative practices of the UN Security Council.[44] Of course, the sanctions system at the core of the case blurs the line between internal and external security, a trait of recent action in this field. The European Commission was already taking action in the field of asylum policy even before the *NS* judgment as it sought to respond to the already crucial judgment in *MSS v Belgium and Greece* from the European Court of Human Rights (ECtHR).[45] There is therefore as salient a relationship between litigation before the European courts (national, supranational and international) and the political process at the EU level as there is in national constitutional systems.[46]

This relationship between law and politics was the subject of explicit acknowledgement in the Opinion of Advocate General Sharpston in the citizenship case of *Ruiz Zambrano*.[47] The Advocate General proposes in her Opinion a revolution in the law on EU citizenship and fundamental rights. However, she is mindful of the appropriate means to bring about such a change and notes that a revolution 'requires both an evolution in the case-law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU'.[48] There is a reflexive dynamic at work here that envisages progress in the development of the EU constitution emerging from cooperation between the Court and the Council.

Before we leave the reader believing that there is a healthy and happy relationship between the law and politics of European integration it is necessary to consider some caveats. There are at least two reasons to believe that the work of the Court of Justice will be more difficult in relation to freedom, security and justice than it was in respect of the internal market. First, when the Court of Justice sought to establish a new legal order and to build the internal market it was drawing on a blank slate. The treaties were less complex and the institutional arrangement subject to less contortion than they are now. Thus, whereas the Court was able to devise the doctrine of direct effect of directives using the *telos* of integration, it was told in plain terms that framework decisions under the Amsterdam Treaty 'shall not entail direct effect'.[49] The Member States, which had never before made reference to the doctrine in a treaty, sought to ensure that the Court did not engage in the same creative exercise that it had in relation to directives.

The absence of a blank slate is in part a consequence of the second reason to anticipate difficulties: the differences in ideology in Member States' attitudes to freedom, security and justice. The internal market was the common expression of a commitment to liberal economic principles (albeit subject to some tempering for welfarist reasons). The *telos* that the Court of Justice sought to pursue took

[44] See Murphy (n 26) ch 5.

[45] *MSS v Belgium and Greece* Judgment of the European Court of Human Rights Grand Chamber, 21 January 2011.

[46] For an early exploration of these ideas, see JHH Weiler, 'The Transformation of Europe' *The Yale Law Journal*, vol 100, no 8, Symposium International Law, 2403.

[47] Case C-34/09 *Gerardo Ruiz Zambrano v Office National de l'Emploi* [2011] ECR I-1177.

[48] ibid, para 173.

[49] Art 34 TEU(L).

this economic liberalism as its central tenet and built a common European market for labour, goods and services on this basis. The Member States were willing to acquiesce in this enterprise due to the peace, and perhaps more pertinently the prosperity that it brought. Since 2001 that peace has been subject to rupture – not by the actions of state actors but because of non-state networks and individuals.[50] However, even after September 11, there is not a common ideology on security amongst the Member States.

Taken together, the constraints of more complex treaties, and the political hesitancy of the Member States to cede control in a field where they have deep ideological differences, leave the dialogue between law and politics much more fractious than it was in the past. The decisions of the ECJ in cases such as *Kadi I*, *NS* and *Ruiz Zambrano*, are filling in the gaps of a system of integration after the political actors could only agree to sketch an outline. As with *Dassonville*, *Cassis de Dijon* and *Keck*, the three more recent judgments seek to empower people. However, unlike the earlier judgments, the more recent ones empower natural people, within and outside the EU, in social and political ways. They do not merely empower legal persons in economic ways. Is it for this reason that the political actors shudder in response? All three judgments are the subject of critique for the challenges they pose to the existing constitutional order. And yet, these challenges have their genesis not in judicial activism by the ECJ, but in the political activism by the Member States, which sought to enable political cooperation in fields that affect security. The Member States therefore find themselves facing the consequences of wish fulfilment.

Where does all of this leave law in the area of freedom, security and justice? In Europe, further integration and simplification often leads to complexity, dissonance and fragmentation.[51] Thus, the integration of the Schengen Agreement into EU law has led to more complex arrangements amongst the Schengen states and between those states and the non-Schengen members of the EU. As the legal reality becomes ever more complex, the tale of an 'ever-closer union' becomes even more of a fairy tale. The search for coherence is a common theme in relation to the area of freedom, security and justice. At a conceptual level the search entails grappling with the three ideas in the area's title. As Walker notes in his seminal

[50] Since 2007 the prosperity has also come to an end, with the embodiment of EU prosperity, Ireland, one of five PIIGS states in dire economic condition (Portugal, Ireland, Italy, Greece, Spain). The economic problems of Europe have begun to highlight dormant disagreements over fiscal policy that may, in time, demonstrate that the ideology of market economics was itself more hegemony than consensus. See, for example, the speech of the Irish President, Michael D Higgins, to the European Parliament on 17 April 2013 wherein he notes that European citizens feel 'the economic narrative of recent years has been driven by dry technical concerns; for example, by calculations that are abstract and not drawn from real problems, geared primarily by a consideration of the impact of such measures on speculative markets, rather than driven by sufficient compassion and empathy with the predicament of European citizens who are members of a union, and for whom all of the resources of Europe's capacity, political, social, economic and intellectual might have been drawn on, driven by the binding moral spirit of a union'.

[51] It is little surprise then that one of our authors, Steve Peers, is currently writing a monograph on *The Unravelling of EU Law* (Oxford, Hart Publishing, forthcoming 2014).

work, these three ideas tend to militate against coherence. Although his examination sought to consider various forms of coherence here the focus is on jurisprudential coherence: to what extent is the Court of Justice forging coherence in the law of the area of freedom, security and justice?[52]

The challenge of coherence applies both within and across fields of law. Thus, the ECJ is clearly struggling with the law on EU citizens. Its recent judgments in cases such as *Ruiz Zambrano*, *McCarthy* and *Dereci* stretch to breaking point principles such as the 'purely internal situation' rule.[53] The Court's difficulties in this field have led to a claim that it is suffering a constitutional crisis.[54] Because of recent ECJ case law, and because of the emphasis of the Stockholm Programme on the citizen, it is this concept more so than any other that may pose the greatest challenge in future years. There are difficulties of incoherence in law and policy apparent throughout this book – in citizenship but also in relation to constitutional principles in general and fundamental rights in particular.[55]

Some areas of Court jurisprudence may exhibit greater coherence. In respect of due process in the imposition and maintenance of restrictive measures, previously known as 'sanctions', the ECJ and ECtHR are developing complementary jurisprudence. There remains a struggle to articulate with precision rules on the right to be heard, the standard of proof that maintenance of restrictive measures requires, and the extent to which evidence must be subject to disclosure. However, following its judgment in *Kadi II*, it appears that the Court of Justice is holding firm.[56] The coherence of the law is subject to reinforcement from the ECtHR, which, in its *Nada v Switzerland* judgment, offered its approval of *Kadi I*, though its judgment is not as bold as that of its EU counterpart.

There has also been convergence of reasoning on asylum rights. The judgment of the Court of Justice in *NS* complements the judgment of the ECtHR in *MSS v Belgium and Greece* and offers protection for those seeking refuge. However, the achievement of coherence in some policy fields poses questions for the coherence of the law across policy fields. Thus, the path-breaking judgment in *NS* may herald difficulties for other fields of freedom, security and justice. If it is unacceptable to transfer an asylum seeker to a Member State with chronic problems with its reception conditions and application processing systems then is it also unacceptable to transfer a suspect or convict to a Member State with such problems in its criminal justice system? The *NS* judgment undermines the idea that EU law requires Members States to presume the existence of conditions for mutual trust

[52] N Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford, Oxford University Press, 2004).

[53] N Nic Shuibhne, 'Seven Questions for Seven Paragraphs' (2011) 36 *EL Rev* 161; *Ruiz Zambrano*, n 47; Case C-434/09 *McCarthy* [2011] ECR I-0000; Case C-256/11 *Dereci* [2011] ECR I-0000.

[54] P Eeckhout, 'EU Human Rights Law in 2012' 9 March 2012, available www.europeanideas.eu/pages/ human-rights/human-rights/eu-human-rights-law-in-2012.php, last accessed 16 May 2013.

[55] See ch 3 by Herlin-Karnell, ch 5 by Konstadinides and O'Meara, and ch 6 by Coutts, respectively.

[56] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* [2013] ECR I-0000. The Court's judgment of 18 July 2013 largely upheld its decision in *Kadi I* even though the Opinion of AG Bot of 19 March 2013 gives reason to believe that the wisdom of the *Kadi I* line of reasoning is subject to debate in at least some corridors of the Court of Justice. See also *Nada v Switzerland* (2013) 56 EHRR 18.

and thus casts doubt on the operation of mutual recognition in police and judicial cooperation in criminal matters.[57] If the ECJ seeks jurisprudential coherence then it may in the process cause further fragmentation of EU law. It may be for this reason that in *Radu* the Court declined the opportunity to transfer its *NS* reasoning to the operation of the European Arrest Warrant.[58]

Even at its best, there is cause for concern about the satisfactory operation of the European courts in respect of the area of freedom, security and justice. The judicial architecture of the EU is not necessarily suitable for litigation on these matters. First, cases tend to require speedy resolution as personal liberty, rather than financial interests, are often at stake. The design of the EU courts for an economic union has not been subject to significant revision in light of this new role. Although procedures for the speedy resolution of matters before the Court of Justice have been put in place these are extraordinary mechanisms whose operation is still not wholly satisfactory. Problems of delay may not be manifest to date but there is a serious risk that the Court will struggle in terms of its caseload. Second, the court faces a new role in the interpretation and application of fields of law that did not, in the past, feature on its docket. The more it moves beyond the market the more it engages substantive fields of law in which there is no classic EU law to apply and where the common constitutional traditions of the Member State offer differences both stark and subtle.[59] These differences are between common law and civil law systems, between accusatorial and investigatory criminal justice, and between different philosophies of crime and punishment. The emerging EU criminal justice system has the potential to either exacerbate or ameliorate the Member States' worst excesses and the ECJ will play a key role in shaping that system.[60]

The Court of Justice therefore has a rather difficult task ahead of it. Of course, the ECtHR has also had a pan-European jurisdiction this past half-century – even in relation to criminal justice and security matters. Yet the ECtHR operates as a last resort. For example, in relation to a criminal trial, the Court determines whether the proceedings as a whole comply with European human rights law.[61] This allows it to tailor rather broad principles to the specifics of each case and therefore to accommodate the idiosyncrasies of each criminal justice system. The ECJ is the constitutional court for the EU as a whole and may, through preliminary references, be a court of first instance in terms of the interpretation and application of the law under the emerging EU criminal justice system. This means

[57] See the discussion by Herlin-Karnell (ch 3) in this book, and see also V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Interstate Cooperation to the Slow Emergence of the Individual' (2012) 31 *Yearbook of European Law* 319.

[58] Case C-396/11 *Radu* [2013] ECR I-000. See further the discussion by Herlin-Karnell in ch 3 in this book.

[59] On the difficulties of applying classic principles of EU constitutional law to the area of freedom, security and justice, see ch 3 by Herlin-Karnell in this volume.

[60] See ch 7 by Mitsilegas in this volume.

[61] For a discussion, see SJ Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Oxford, Hart Publishing, 2007).

that it does not have the comfort of taking as broad an approach as the ECtHR. Its interpretation of EU law will, with some exceptions, be binding on all Member States. It is therefore in the difficult position of striving for coherence in an increasingly complex union of legal systems.

IV. THE PEOPLES OF EUROPE AND THEIR AREA

Our survey thus far has taken in the constitutional moments of the past two decades, political power struggles, and the jurisgenerative role of the courts. It is now necessary to consider for whom all this has been done. This question points to a philosophical challenge at the heart of the European project: in seeking a union of states and peoples that goes beyond the Westphalian settlement the EU is a challenge for political theory. To borrow from the title of another collection: *whose area of freedom, security and justice* is it?[62] The answer to that question, at least as far as the Lisbon Treaty and the Stockholm Programme make clear, is the citizens of the EU. The Union offers the area to its citizens who are, in turn, the centerpiece of the Stockholm Programme.

If the citizens are indeed the referent object for the area of freedom, security and justice then that would explain the persistence of heavy regulation of both regular and irregular migration. The idea of 'fortress Europe' may be trite and yet the barriers for those seeking entry continue to mount. The regulation of migration in Europe, both regular and irregular, has long been 'in the borderlands of law, politics and ideology'.[63] In the field of regular migration Kostakopoulou, Acosta Arcarazo and Munk argue that the EU is moving towards a comprehensive migration code that may constitute a liberalization of policy. Moreno-Lax unveils the structural causes of Europe's illiberalism in respect of irregular migration. Therefore, in contrast to the citizen, who is emerging as a participatory subject of EU law, asylum seekers remain mere objects of EU control.[64] Is this distinction the future of the Union–Westphalia writ large with the EU seeking to 'replicate injustices of misframing on a broader scale'?[65]

There may be reasons to hope for better. First, the crisis in, and incoherence of, EU citizenship law is a direct result of the Court's efforts to do justice in the face of an EU law that creates injustice (the purely internal situation rule). Therefore the judgment in *Ruiz Zambrano*, which may appeal more to the heart than to the head, stretches to the limits our existing understanding of what it means to be a European citizen.[66] Furthermore, the judgment was to the benefit of Mr Ruiz

[62] A Baldaccini, E Guild and H Toner, *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Oxford, Hart Publishing, 2007).

[63] See ch 8 by Kostakopolou, Acosta Arcarazo and Munk in this book.

[64] See ch 9 by Moreno-Lax and ch 6 by Coutts in this book.

[65] N Fraser, *Scales of Justice* (New York, Columbia University Press, 2009) 114.

[66] *Ruiz Zambrano* (n 47) above. See on this, D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 *EL Rev* 369.

Zambrano, who himself is a third-country national. Perhaps the greatest recent judgment in the field of European human rights law, *Kadi I*, did not concern EU citizens at all, but rather a third-country national who does not even reside in the EU. Although dealing with an external matter the Court's sleight of hand had its basis in the need, *within* the Union, to uphold constitutional principles.[67] There has long been something of a symbiotic relationship between the development of citizenship law and human rights in the EU. Yet citizenship, which seeks to draw boundaries on political community, and fundamental rights, which transcend boundaries in favour of common humanity, are in tension as much as they are in harmony. Thus, although the citizen is the focus of the Stockholm Programme it may well be that it is fundamental rights that seize the moment.

In this volume two authors note that the Treaty of Lisbon creates a 'surfeit of rights protection'.[68] Others refer to a 'consolidation effect' that a single code on migration rights might bring about.[69] It is also worth noting the reliance on the Charter of Fundamental Rights in the *NS* judgment on asylum law. Indeed, in discussions of EU litigation in London it is now common to hear barristers debate whether there is a 'Charter argument' applicable in the case. The overall standard of fundamental rights protection in Europe may not alter significantly as a result of the Charter, but in the hands of Europe's lawyers it may facilitate creative new arguments to be made. If this occurs it may not be our common citizenry, but our common humanity, that is most important.

Can fundamental rights help the Union forge a transnational 'imagined community'?[70] The challenge is not just to imagine a transnational political community for citizens, but also for those whose migration into and across Europe is subject to control by the Union.[71] The separation of citizenship, fundamental rights, and the area of freedom, security and justice was an exercise in power limitation by the Member States. Now, the coming together of those fields may present possibilities for a new dynamic of political belonging. Perhaps the idea that any of this is possible in a time of austerity is unrealistic. The Union may have gone beyond the 'neo-Hobbesian'[72] approach of the Hague Programme but it still struggles to articulate with any coherence its vision of freedom, security and justice. Such a vision remains essential if the area is not to continue a utopia beyond the reach of citizens and non-citizens alike.

[67] Yassin Abdullah Kadi is an Egyptian national who resides in Saudi Arabia.

[68] See ch 5 by Konstadinides and O'Meara.

[69] See ch 8 by Kostakopolou, Acosta Arcarazo and Munk.

[70] For a discussion of the creation of a political community in Europe, see ch 6 by Coutts and ch 11 by Eckes that concludes this volume. The term 'imagined community' is of course from the classic work by Benedict Anderson. See B Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism,* Rev Ed edn (London, Verso Books, 2006).

[71] This owes a debt to Fraser's idea of the all-subjected principle. See Fraser (n 65) 96.

[72] Coutts, ch 6.

V. SCHOLARSHIP, CASTLES AND INVISIBLE CITIES

All of this begs the question of the task for scholarship? In public international law scholarship can be a persuasive source of authority. This creative role of scholarship has been part of public international law since Grotius' *De Jure Belli ac Pacis*. In European law many scholars have sought to offer accounts of EU law that blur the line between descriptive and prescriptive accounts and thus that seek not just to observe but also to shape history. In this volume our authors do not seek to rewrite the laws of war and peace but rather to complete two modest tasks in the hope of improving our understanding of security and justice law today. The balance between these two tasks varies from author to author but both aspects are present in all of the accounts that follow.

The first task is simply to catalogue: to take note of the myriad legal developments and present them for consideration and debate. If the academy is to grapple with ongoing developments in law and policy then it is necessary to chronicle those developments and to describe them in as plain a language as possible. In a field such as justice and home affairs this requires Trojan work. Any reader familiar with the law will be aware of the work of Steve Peers to present his classic legal empirical research and render the area of freedom, security and justice accessible to all. Peers does the same in this book with his survey and critique of the law after the Lisbon Treaty and Stockholm Programme. But this work is too arduous for one scholar and all of our authors contribute to map the landscape.

The second task is to critique: to point to the achievements, and more often the shortcomings, in European law and policy. In doing so the authors offer different ways of imagining the future of the area of freedom, security and justice. In this volume we gather the thoughts of 15 scholars of European law. They range from leaders of the debate such as Kostakopolou, Mitsilegas and Peers, to new voices including Coutts, Herlin-Karnell, and Moreno-Lax. The authors have all had the opportunity to discuss and comment on each other's work and the conversation that follows ranges far and wide in its discussion.

The title of this book merits some explanation. Our work encompasses the law, politics and policy of the area of freedom, security and justice. The volume does not aim to be entirely comprehensive and nor is it coextensive with the field of justice and home affairs law (which is, in any event, already the subject of a canonical text of that title). Our choice of 'security and justice law' is therefore in part a pragmatic one. We have chosen to omit 'freedom' from our title. There are at least two elements of the 'law of freedom' missing from this volume. First, there are the classic fundamental freedoms of the internal market. These free movements are the subject of a rich literature and are distinct from our focus in this work.[73] Second, there is civil law cooperation, which might be seen as central to

[73] See, eg C Barnard, *The Substantive Law of the EU: The Fundamental Freedoms,* 3rd edn (Oxford, Oxford University Press, 2010).

both freedom and justice under the Stockholm Programme. This omission is difficult to defend in some respects. Civil law cooperation does feature in the Stockholm Programme and is part of the area of freedom, security and justice. However, it remains distinct in thematic terms. Such cooperation, unlike criminal justice and migration control, does not trigger the same concerns as security.[74] Perhaps similar dynamics are nonetheless at play, but if so, their examination is work for another day. In this book our focus is the rise of security as a field of EU law and the struggle to maintain a narrative of justice in that field. Peers' question is one with which all of our other authors engage: does the EU now offer a more liberal area of freedom, security and justice than it did before Lisbon and Stockholm? We would be wise not to rush to judgment. In this field political tensions are greater than ever, the law is increasingly complex, and in any event, the present constitutional moment too will pass.

It remains striking that the metaphors of choice for European lawyers are often architectural – we are still struggling for a blueprint. An earlier exploration of the area of freedom, security and justice carries on its cover a fortress in the sky.[75] The image resonates: fortress Europe is not built on solid foundations but is a lawyer's trick of conjuring something seemingly solid out of thin air. The challenges this poses have become all too clear in the decade since that volume. There has been change but much also remains the same. Then, as now, a debate was raging as to the coherence of this novel field of EU law. Then, as now, the very existence of an area of freedom, security and justice was open to debate. The fact that these concerns endure over 10 years after that text is salient. Perhaps it is simply a function of Europe's perpetual constitutional reinvention. It may also be that the area's existence becomes more precarious as it becomes more manifest. The constitutional history that has arisen from a series of moments in European cities might itself have given rise to one of Italo Calvinho's 'invisible cities'.[76] Perhaps the area of freedom, security and justice is strung across various precipices, hung between integration and fragmentation, between politics and law, between a philosophy of inclusion and exclusions born of fear. It persists despite, but also because of, the dynamic tension between the various peaks. It may be gone tomorrow – but today, for all of its existential doubt, it endures.

[74] Note though that Peers' overview of legislative proposals in ch 2 does capture the proposals in civil law and other chapters refer, in passing, to some matters of civil law cooperation.

[75] See Walker (n 52).

[76] The resonance is also visual – an early edition of Calvino's classic bore the same image on its cover.