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Constructivism, Constitutionalism and EU's AFSJ post-Lisbon

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Abstract

This essay addresses the fundamental conceptual challenges which face the development of the Area of Freedom Security and Justice (AFSJ) in the post-Lisbon Treaty era. It argues that Onuf style constructivism is a valid lens with which to examine the development of the AFSJ to date, involving as it does the development of a shared understanding by practitioners, predominantly law enforcement and prosecution professionals, within the structures provided for them, in order to develop a completely new area of law and practice. While this approach will continue to need to be deployed in the development of further new operational areas, such as cybercrime, a new approach is now required, that of constitutionalism. A variety of forms of constitutionalism are then examined in order to establish their suitability as a mode of analysis for these developments.

Introduction

It is the argument of this paper that the approach of the former Police and Judicial Cooperation in Criminal Matters (PJCCM) policy area, that of constructivism, has served us well during its construction phase, but it is now time, or even beyond time, that a constitutionalist approach is taken to the development of its *corpus juris*. Equally, the constitutionalist approach being advocated by many legal academics, particularly when it comes to former PJCCM measures, needs to acknowledge the Treaty based limitations to its

development, and the need for an ongoing reflexive relationship between constitutionalism and constructivism, going forward.

This author would be of the view that constructivism, particularly following Onuf,¹ with its approach to the construction of understandings in transnational settings where agents, such as justice and law enforcement personnel, and structures, interact with each other in the development of that understanding, is key to understanding the development of the former PJCCM policy area to date. This will be an approach which will be called upon again in the future in addressing emerging challenges to the EU's internal security.

With the post Lisbon legal framework coming fully into force after the expiration of the five year phase in period of the Lisbon Treaty, it is important to review the perspectives that have been brought to the development of law and practice in this area. The former PJCCM pillar, which includes not only justice provisions but also cross-border law enforcement, and the particularly sensitive issue of counter-terrorism, has undergone the most radical changes under the Lisbon Treaty. The pre-Lisbon PJCCM pillar, which was intergovernmental in nature, is currently part of the unitary supranational post-Lisbon EU legal framework, subject to the well-recognised principles of supremacy and direct effect. While the legal nature of the pre-Lisbon PJCCM pillar threw up its own issues when it came to enacting laws and policies, it is noticeable that its security provisions are much more highly developed than the anticipated corresponding freedom and justice provisions. It is arguable that this is as a consequence of the constructivist approach taken by both policy makers and law enforcement practitioners in the pre-Lisbon era, at the expense of the then

¹ N. Onuf, *World of Our Making*, (Columbia: University of South Carolina, 1989).

lacking constitutionalist approach, which is (better) facilitated post-Lisbon both by the increasing engagement of the justice professionals in the process, and by the changed legal structure of this policy area post-Lisbon. The former third pillar PJCCM has been re-integrated with the pre-Lisbon first pillar provisions on Visas, Asylum and Immigration, forming the new Area of Freedom Security and Justice (AFSJ). The Council, the driver of the pre-Lisbon PJCCM pillar, has been joined by the Commission and the European Parliament as the engines for development, with the ordinary legislative procedure having been adopted for most of the post-Lisbon AFSJ. This will also be relevant in rebalancing the freedom and justice provisions with the reasonably well developed security provisions of the AFSJ.

The Lisbon Treaty changes to the EU's AFSJ legal framework require the above analysis. The transfer of the PJCCM policy area from the third pillar to the new unitary structure has embedded the principles of supremacy and direct effect into this area of law. In addition the new role of the Court of Justice of the EU (in the AFSJ, with its almost full review powers after the now expired five year phase in period of the Lisbon Treaty (post December 2014),² together with the upgrade in legal status of the EU Charter of Fundamental Rights (CFR) 2000, which is now fully judiciable, and the intended accession of the EU to the European Convention on Human Rights (ECHR), despite the recent ruling of the Court of Justice in *Opinion 2/13*,³ have all improved the prospect for a constitutional analysis of this area of law.

² After the expiry of the five year phase in period of the Lisbon Treaty, pursuant to Protocol no. (No 36) on Transitional Provisions.

³ *Opinion 2/13* of the Court (Full Court), 18 December 2014, OJ C 65, 23/02/2015 p.2.

Current academic legal debate is focusing on analysing the EU through the lens of constitutionalism. This analysis, however, needs to recognise issues of attribution and sovereignty, together with Treaty based red lines, particularly in the context of the security provisions in the former PJCCM policy area. These are in particular Article 4.2 of the Treaty on the Functioning of the European Union (TFEU), which provides that the EU “shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” Article 72 TFEU goes on to provide that it is up to individual Member States to deal with their own law and order issues, and to safeguard their own internal security. Article 73 TFEU provides that transnational aspects of an otherwise undefined “national security” are a matter for Member States to organise between themselves, and therefore, not a matter for the EU to lead on. Some of the security provisions, in particular the placing of police officers across borders, remain subject to the special legislative procedure,⁴ thereby retaining control in the hands of the Interior/ Home Office Ministers in the Council. The AFSJ is additionally a matter of shared competence between the EU and its Member States,⁵ and therefore subject to the principle of subsidiarity. In addition the AFSJ is subject to a variety of opt in and opt out provisions, applicable to individual Member States. The evolving constitutionalism argument being used for the post-Lisbon AFSJ needs to acknowledge these limitations in the EU competence in order to maintain its relevance.

In addition to the above changes within the EU level of governance, the interaction of the legal frameworks at the different levels of governance will also pose challenges. As Dine

⁴ Article 87.3 TFEU.

⁵ Article 4.2.j TFEU.

has pointed out, when writing in the pre-Lisbon era, the “relationship between national criminal law, EU criminal provisions, the jurisprudence of the European Court of Human Rights and the impact of the Charter [is] likely to fuel a highly complex debate.”⁶ The anticipated complex debate, and the search for workable solutions, has now begun. The question arises as to how best to conceptualise these developments, in order to better understand the underlying legal dynamic and anticipate and direct its future development.

Constructivism

Constructivism is a tool of analysis developed in the 1990s, emerging from International Relations theory, but is increasingly being used in legal analysis. Located between rationalists and interpretivists, constructivists examined not so much objects, but the meaning that was attributed to those objects, with social constructs or understandings informing how meaning is so attributed.⁷ Constructivism, which has been classified as “an approach to social inquiry”, is based on two premises, “the environment in which agents take action is social as well as material” and that the setting which provides the actors “with understandings of their interests ([it] “constitutes” them).”⁸ There is therefore “a process of interaction” between the structures and the individuals which are operating within those

⁶ J. Dine, “Criminal Law and the Privilege Against Self-Incrimination,” in S. Peers and A. Ward (eds.) *The EU Charter of Fundamental Rights Politics, Law and Policy, Essays in European Law*, (Oxford: Hart Publishing, 2004), p.270.

⁷ J. Cristol, Constructivism, Oxford Bibliographies (online).

<http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0061.xml>.

⁸ J. Jupille, J.A. Caporaso, J.T. Checkel, Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union, *Comparative Political Studies* 2003 36: 7, 14.

structures.⁹ As constructivism was developed in the field of International Relations it examined the meanings that societies, or states, attributed to international treaties or other arrangements. Much of the academic discourse to date focusing on constructivism in the EU has focused on the EU-Member State relationship, missing much of the detail involved in the construction of completely new areas of operation, such as transnational law enforcement, to include counter-terrorism, where the individual has had a major impact in designing what were essentially ground up initiatives, which only later were adopted by the Member States, and legislated for in a top down fashion.

Onuf developed a strand of constructivism which advocated that “constructivism is a universal experience”¹⁰ and one that we cannot avoid, as we are located within one type of society or another. Therefore Onuf’s constructivism applies “not simply to the level of states, but to humans in any dimension of their social activity, international relations being merely one, albeit an extremely important one, among many”.¹¹ Whether this mutual construction of understanding has happened at the level of either the individual, following Onuf’s approach,¹² or the institution, both are highly relevant in the construction of a completely new law and practice framework for cross-border law enforcement.

Cardwell, writing from a legal perspective has stated that “constructivists claim that social realities only exist by human agreement through intersubjective understanding, and are

⁹ Above, p.14.

¹⁰ V. Kubáková, “The Twenty Years’ Catharsis: E.H. Carr and IR” in V. Kubáková, N. Onuf and P. Kowert, (eds), *International Relations in a Constructed World*. (New York: M.E. Sharpe, 1998), p.72.

¹¹ Above.

¹² Above.

therefore susceptible to change.”¹³ In areas where there was no pre-existing legal and practice framework, such as in former PJCCM matters, when practitioners were asked to build a new legal and practice jurisdiction they necessarily brought their own socialised understandings of how to, for example, conduct law enforcement operations, and through interaction with their counterparts from other jurisdictions, negotiate a shared understanding as to how a transnational law enforcement operation was to work. It is the human being at the interface between the relevant jurisdictions who has “constructed”, with his counterparts, a new social reality. The activities of the Police Working Group on Terrorism and TREVI were cases in point, as was the original construction of the Europol Drugs Unit, which started operating before its underpinning legislation was enacted, and which eventually developed into today’s Europol. The susceptibility to change,¹⁴ however, referred to in the above quote from Cardwell, is a key issue when it comes to the issue of fundamental and human rights, particularly in the context of justice and law enforcement, to include counter-terrorism. The traditional constructivist approach to the development of EU law enforcement and security strategies is now encountering an increasing constitutionalism within the EU legal framework, highlighting significant legal tensions. Less constructivist, and more grounded in individual Member States norms, has been judicial cooperation in criminal matters. Judicial co-operation, and justice issues generally, have lagged behind the development of cross border law enforcement provisions, leading to the acknowledged imbalance between the security, justice and freedom elements of the AFSJ, which now needs to be addressed. However a constructivist approach can be also traced through these developments, with

¹³ P.J. Cardwell, *EU External Relations and System of Governance The CFSP, Euro-Mediterranean Partnership and Migration*, (Abingdon: Routledge, 2009), p. 75.

¹⁴ Above, p.5.

Walker and Tierney referring to “the infiltration of criminal law into the European transnational constitutional mosaic” as being “gradual and ‘bottom up’.”¹⁵

Constructivism as an approach can also be traced in areas where one would expect constitutional norms to be the defining discourse, such as in the context of mutual meaning making at the highest judicial level. For example, references can be taken from other courts to explain how law is created in a transnational/ international setting. Lord Neuberger, currently president of the UK Supreme Court, one of the persons best placed to address the issue of how judges work, in a speech given in Australia in 2014,¹⁶ has referred to the UK Supreme Court engaging “in dialogue, in the form of giving a detailed judgment” with the European Court of Human Rights in Strasbourg.¹⁷ He also speaks about UK Supreme Court being “successful in getting Strasbourg to change its mind”.¹⁸ He goes on to say that “the development of pan-European law after centuries, indeed millennia, of separate development and frequent wars, and with different political and legal traditions, and different historical experiences and different traditions, was never going to be easy.”¹⁹ All of these points are equally applicable to the UK, and other Member State’s Supreme and Constitutional Courts’ relationship with the Court of Justice, the well analysed spat between the then European

¹⁵ N. Walker and S. Tierney, “Introduction”, in N. Walker and S. Tierney (eds.) *A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism*, (Oxford: Hart Publishing, 2011), p.17.

¹⁶ Lord Neuberger at a conference at the Supreme Court of Victoria, Melbourne, The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience, 8 August 2014, available at <https://www.supremecourt.uk/docs/speech-140808.pdf>.

¹⁷ Above, paragraph 34.

¹⁸ Above, paragraph 34.

¹⁹ Above, paragraph 43.

Court of Justice (ECJ) and the German Bundesverfassungsgericht following the *Internationale Handelsgesellschaft* line of cases in the 1970s and 80's being a case in point.²⁰

As stated by Wiener, “the context in which norms evolve matters in a significant way”.²¹ The creation and development of a shared identity is the key to the development of these norms. While EU Member States have developed a shared understanding of the role of “the rule of law, democracy and fundamental freedoms and human rights”,²² the EU Member State law enforcement communities, in particular, being task orientated, have, at least at the transnational level, developed a shared understanding of the tasks to be undertaken, and a shared identity and community, negotiating their own Member States structural and operational differences in order to achieve their objectives. Member States prosecutors and judges are also adjusting to these developments, with “interaction .. taking place within the legal realm”,²³ with a number of transnational norms being adopted into the legal structures, such as the effect that can be clearly seen of the recent directive on trafficking of human

²⁰ *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* (Case 11/70) [1970] ECR 1125, *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratstelle für Getreide und Futtermittel* (Case 2 B. V L 52/71) C.M.L. Rep. 1974 Vol 2, p. 540, *Re the Application of Wünsche Handelsgesellschaft* (Case 2 B.v. R 197/83) and *Hoechst v Commission* (Case 46/87) [1989] ECR 2859.

²¹ A. Wiener, *Contested Compliance: Interventions on the Normative Structure of World Politics*, *European Journal of International Relations* (2004) 10: 189, 195.

²² Above, p.195.

²³ Above, p.197.

beings,²⁴ a process that Wiener refers to as “interaction, interpretation, internalization.”²⁵ She goes on to hypothesize that legal rules are “embedded in a set of beliefs which is created through the rule of law *as a social practice*”, a process which should lead to high levels of compliance with those laws.²⁶

Constitutionalism

In contrast to constructivism, constitutionalism has a longer, and varied, pedigree. There are many schools of thought housed under the umbrella term, “constitutionalism”, with the European Court of Justice having previously characterised the commercially focused EC Treaty as being of a “constitutional character”, in *Partie Ecologiste “Les Verts”*,²⁷ and being of “constitutional character” in *Opinion 1/91*.²⁸ In contrast, however, to the law and practice deriving from the old EC pillar, the AFSJ “raises important challenges for human rights”,²⁹ in

²⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15/04/2011 p. 1.

²⁵ Wiener, above, p.197.

²⁶ Above, p.197.

²⁷ *Parti Ecologiste “Les Verts” v European Parliament* (Case 294/83) [1986] ECR 1339, para 23 of the judgment.

²⁸ *Opinion 1/9, Draft Agreement relating to the creation of the European Economic Area*, [1991] ECR I-6079, 6102, para. 21.

²⁹ S. Douglas Scott, “Europe’s Constitutional Mosaic: Human Rights and the European Legal Space – Utopia, Dystopia, Monotopia or Polytopia?”, in N. Walker and S. Tierney (eds.) *A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism*, (Oxford: Hart Publishing, 2011), p.123.

particular given the operation of the European Arrest Warrant,³⁰ the European Investigation Order,³¹ the various cross border intelligence sharing and analysis provisions, and the various provisions on the transfer of prisoners. These all need greater clarity to be developed in the constitutional character of what is now the post-Lisbon Treaty framework, for law enforcement in general, and counter-terrorism in particular.

The development of a constitutionalism approach in the AFSJ, however, requires further clarification. As Shaw has argued, “constitutionalism ... is troubling to the EU”,³² particularly in light of the failure of the “Draft European Constitution”, and the clear understanding that the EU is not heading towards a United States of Europe. Traditionally a Constitution is seen as comprising two to three parts, the first “the structure composition, functions and other inter-relationships of the principal organs of state”,³³ secondly, fundamental rights, which although “these rights may be invoked against a private individual, in fact .. they are [usually] opposed to some organ” of the state.³⁴ The third element, which may or may not be present, is a statement of “national beliefs, ideals and aspirations”.³⁵ The first two of these elements are clearly set out at an EU level, with the EC and EU treaties historically, and Treaty on European Union (TEU) and TFEU more recently, setting out the

³⁰ Council Framework Decision 2002/584/JHA on the European Arrest Warrant, OJ L 190, 18/07/2002 pp. 1 – 20.

³¹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 01/05/2014 p. 1.

³² J. Shaw, Postnational Constitutionalism in the European Union, *Journal of European Public Policy* (1999) 6:4 Special Issue: 579-97, 582.

³³ D.G. Morgan, *Constitutional Law of Ireland*, (Dublin: The Round Hall Press, 1985), p.11.

³⁴ Above.

³⁵ Above. p.12.

structure, composition, function and inter-relationships of the organs of the EU, and their interaction with individual EU Member States. More recently, in particular post-Lisbon, the fundamental rights of the individual, in particular *vis á vis* the organs of the EU, have been set out in the EU CFR, and the role of the ECHR has been concretised in EU law in the proposed accession of the EU to the ECHR. Although based in secondary law rather than in primary law, the development of the Procedural Rights road map³⁶ can also be added to this mix.

The Procedural Rights road map³⁷ has been drafted, with a number of its proposals already in force. At the time of writing there is a directive in place giving the right to translation and interpretation services,³⁸ and a proposed directive on the right to access to a lawyer in criminal proceedings, and the right to communicate with one on arrest.³⁹ The right to legal aid in cross border civil and commercial matters⁴⁰ has already been recognised. It can be expected that one will follow for criminal matters. Some of the procedural rights of

³⁶ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, and incorporated in the Stockholm Action Plan, COM (2010) 171 of 20.04.2010.

³⁷ Above.

³⁸ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26/10/2010, p.1.

³⁹ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326.

⁴⁰ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31/01/2003, p.41.

individuals, in the absence of the person concerned at the trial, are already provided for.⁴¹ Current proposals for legislation of relevance to the investigation/ pre-trial proceedings include a green paper on the *ne bis in idem* (double jeopardy) principle,⁴² a green paper on procedural safeguards for suspects and defendants in criminal proceedings,⁴³ and what was a proposal for a Council Framework decision on procedural rights.⁴⁴ This latter document will probably re-emerge as a proposed directive, post-Lisbon. There is also some work on-going on “the feasibility of an index of third-country nationals convicted in the European Union”.⁴⁵ Other provisions at, and post-conviction, are also in the pipeline. The recent directive on victims’ rights⁴⁶ is also likely to have a profound effect. Other EU case law will prove useful in filling in some of the gaps in the only partially enacted road map on procedural rights. Lenaerts has undertaken a study of pre-existing rights under the then ECJ case law which

⁴¹ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27/03/2009, p.24.

⁴² Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in criminal proceedings, COM (2005) 696 final.

⁴³ Green paper from the Commission, Procedural Safeguard for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75.

⁴⁴ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

⁴⁵ Commission working document on the feasibility of an index of third-country nationals convicted in the European Union, COM (2006) 359 final.

⁴⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.

could be used.⁴⁷ As Herlin-Karnell has pointed out, the principle of legality and proportionality of criminal offences and penalties, while “codified in Article 49 of the Charter”,⁴⁸ has already appeared in a number of pre-Lisbon cases, such as *Pupino*.⁴⁹ She has said that “the issue is far more complicated when dealing with procedural legality in the context of criminal law cooperation,”⁵⁰ expressing concern over the high level of development of the EU’s security provisions in comparison to its freedom and justice provisions.

Some may argue that the failure of the Draft Constitutional Treaty means that the EU operates in a non-Constitutional way. The term “Constitution” in political and legal matters has two different uses, one is in a “wide and abstract sense” referring to a “system of laws, customs and conventions which create and validate the organs of government and which regulate the interaction of those organs with one another and with the individual”,⁵¹ much as the UK Constitution has traditionally been referred to. In a more “narrow and concrete sense” the term “Constitution” also refers to “the document or documents in which the basic legal rules of the constitution are authoritatively declared”.⁵² While the EU may well lack a document labelled “Constitution”, it clearly has a “document or documents” which set out

⁴⁷ K. Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, *International & Comparative Law Quarterly*, (2010), I.C.L.Q., 59(2), 255-301.

⁴⁸ E. Herlin-Karnell, *The Constitutional dimension of European Criminal Law*, (Oxford: Hart Publishing Ltd. 2012), p.54.

⁴⁹ *Criminal proceedings against Maria Pupino* (Case C-105/03) [2005] ECR 2005 p. I-05285.

⁵⁰ Herlin-Karnell, above, p.38.

⁵¹ B. Doolan, *Constitutional Law and its Constitutional Rights in Ireland*, 3rd edn, (Dublin: Gill & Macmillan Ltd. 1994), p.1.

⁵² Above.

rights which may be invoked both against other private individuals and against organs of the EU “state”. The role of a senior court, normally a Supreme Court or Constitutional Court in protecting those individual rights, can be seen reflected in the approach of the Court of Justice to these “Constitutional documents” of the EU, even if the Court also has other roles to perform in the EU legal structure. Equally, if there is a perception of a lack of clear “static legal hierarchies”, as is often seen in the legal relationships between Member States courts, between the Court of Justice and the European Court of Human Rights, it is possible to use the conception of “constitutionalism in term[s] of a process”.⁵³

This lack of static legal hierarchies between Member States Constitutional courts with both the European Court of Human Rights and the Court of Justice has been analysed by academics. Academics have been pointing out that the automatic supremacy of European Court of Human Rights law, for example, is not guaranteed within EU Member States, in the same way as EU law is recognised as being supreme,⁵⁴ with the EU institutions, to include the Court, being “given a mandate to unify the laws of Europe.”⁵⁵ No such mandate was given to the Council of Europe and the European Court of Human Rights.⁵⁶ While Constitutional courts do make efforts to accommodate EU law into national law, there are however, occasional problems with the supremacy of EU law at the Constitutional Court

⁵³ C. Mac Amhlaigh, “The European Union’s Constitutional Mosaic: Big “C” or small “c”, Is that the Question?,” in N. Walker and S. Tierney (eds.) *A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism*, (Oxford: Hart Publishing, 2011), p.28.

⁵⁴ G. Martinico and O. Pollicino, *The Interaction between Europe’s Legal Systems; Judicial Dialogue and the Creation of Supranational Laws*, (Cheltenham: Edward Elgar 2010).

⁵⁵ G. Martinico, Is the European Convention going to be “supreme”? A comparative-constitutional overview of ECHR and EU law before national courts, (2012) *European Journal of International Law*, 402.

⁵⁶ Above, p. 402.

level of the EU Member States. The lack of hierarchical clarity is likely to continue between the Court of Justice and the European Court of Human Rights post EU accession to the ECHR. In addition, there appears already to be “a partial convergence in the application of EU and ECHR’s norms”, independent of the actual accession of the EU to the ECHR.⁵⁷ The actual accession has now been deferred, with the Court of Justice in *Opinion 2/13* ruling that the draft placed before it for consideration was in breach of Article 6(2) TEU, as it affected “the Union’s competences as defined in the Treaties”, and Protocol no 8.⁵⁸

At the Court of Justice/European Court of Human Rights level Martinico and Pollicino have developed the “impression that we are dealing with a sort of cooperative climate between judges,” particularly with the aim of protecting fundamental rights.⁵⁹ They also point out that “[m]any fundamental judgments of the ECJ are [already] very rich in references to the judgments of the ECtHR or to the provisions of the ECHR”.⁶⁰ This analysis of a cooperative climate in the context of fundamental rights is likely to also be relevant in the context of these courts relationships with the Constitutional/ Supreme Courts of individual Member States.

Constitutionalism is clearly forming part of the developing EU, through the role of the Court of Justice in interpreting treaties and similar documents, which may or may not be regarded as the “Constitutional documents” of the EU. However the new legal framework of the EU post Lisbon requires the further development of this approach, constitutionalism, to dovetail with the pre-existing constructivist approach, which has far from run its course. In

⁵⁷ Above, p.402.

⁵⁸ *Opinion 2/13*, ruling of the CJEU, paragraph 258.

⁵⁹ Martinico and Pollicino, above, p.16.

⁶⁰ Above, p.7.

the context of the AFSJ, Gibbs has stated that constitutionalism sets “the challenge to consider ... relational ways of living as a political community”, rather than “seeking a stable, or fixed, definition of constitutionalism”.⁶¹ This is clearly a challenge for the developing EU, particularly in the context of the AFSJ, many of its themes going to the core of political life, and the construction of the societies of the EU’s Member States. However, as pointed out by Jupille *et. al*, the EU’s “identity as a political system [is] problematic”.⁶²

As Gibbs, writing during the early stages of the development of the AFSJ, pointed out that there is an “apparent paradox between the [then] depth of integration” at the EU level, which “presupposes a common political way of life in the EU”, which may well appear in broad brush strokes, but can be quite different when individual Member States are examined in detail, and “concerns about how to understand such a political community”, particularly leading to concerns “over the constitutional legitimacy of that which is taking place”.⁶³ The same can still be said today. Equally, if the EU is in fact a political community, the issue arises as to who comprises the community, and if it is meant to be the citizens of the different EU Member States, where and how are those citizens’ rights clearly expressed and implemented. Principles which underpin individual Member States of the EU, to include the balance between the state and the individual in the context of law enforcement and counter-terrorism, have been shaped over centuries, perhaps as a result of political upheaval, war or other hard fought fights between the state and the individual, or between different social groups within states. Such principles will not be easily compromised. There is a need for us

⁶¹ A. H. Gibbs, *Constitutional Life and Europe’s Area of Freedom, Security and Justice*, (Farnham: Ashgate, 2011), p.xiv.

⁶² Jupille, Caporaso, Checkel, above, p.8.

⁶³ Gibbs, above, page xv.

to examine the “legitimate basis, or foundation”,⁶⁴ not only of the shift itself from the Member States to the EU of the deliberation of these issues, but also the nature of the principles subsequently developed at the EU level, and the balance between the supra-national EU and the individual.

It must be recognised that the EU is only operating “within the powers granted to it by the Member States”,⁶⁵ as expressly provided for post Lisbon in Article 4.1 TEU, with the principle of conferral applying, as set out in Article 5 TEU. In addition there have been clear examples of excluding “certain fields of action from Union competence” which has been “particularly prevalent in the field of security”.⁶⁶ In particular, in the AFSJ, as discussed above, the EU has clearly limited competence to engage in issues which are central to individual Member State sovereignty and identity, such as national security,⁶⁷ which has yet to be defined,⁶⁸ and the maintenance of internal security of individual Member States.⁶⁹ In addition, as discussed above, the balance of the activities of the AFSJ are subject to the principle of subsidiarity,⁷⁰ further limiting the activities of the EU, and the Court of Justice in these areas. An issue arises then whether a clear boundary can be established between EU law and Member State law in AFSJ matters, or whether that boundary, will, in practice, be fluid.

⁶⁴ Above, p.9.

⁶⁵ P. Craig, *Competence: Clarity, Conferral, Containment and Consideration* (2004) *European Law Review*, 29 (3), 323-334, 324.

⁶⁶ V. Mitsilegas, *European Criminal Law and Resistance to Communitarisation after Lisbon*, *New Journal of European Criminal Law*, (2010) 1(4), 458 – 480, p.461.

⁶⁷ Article 73 TFEU.

⁶⁸ Mitsilegas, above, p.461.

⁶⁹ Article 72 TFEU.

⁷⁰ Article 4.2(j) TFEU.

Nevertheless, there is a need for the EU to establish its values in the area of criminal law and cross border law enforcement, to include counter-terrorism, given that it is active in this area. As Nuotio has stated, criminal law, “is replete with values and ideologies, which are hard to avoid wherever and however the field is addressed.”⁷¹ These values and ideologies are not yet fixed at the EU level. The basic principles of the EU, set out in particular in the EU Charter, but also in the ECHR and the shared Constitutional traditions of the EU Member States, still need to be robustly built into the EU AFSJ legal framework. Mac Amhlaigh uses an interesting term of constitutionalism, referring to it as “as a forum for contestation regarding the values of the political community, where reasonable disagreement is articulated and debated.”⁷² The term “political community” is also contested, and whether one exists at the EU level is also debatable. It is arguable that at the level of the EU this constitutional contestation and debate is only now really getting started.

Onuf’s constructivist approach, of the constant making sense of the world, and negotiating that understanding, greatly assists the development of structures from new. A number of initiatives are still on the EU drawing board. However, novel threats in the on-line world, such as cyber-facilitated terrorism, continue to require Onuf’s constructivist approach. As a counter-point to technologically based threats, public disquiet at recent revelations dealing with mass data processing and surveillance on behalf of the security and law enforcement services, particularly in the context of counter-terrorism, also need to be addressed from a constitutionalist perspective. To the extent that EU law applies, these need

⁷¹ K. Nuotio, “European Criminal Law under the Developing Constitutional Setting of the European Union,” in N. Walker and S. Tierney (eds.) *A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism*, (Oxford: Hart Publishing, 2011), p.332.

⁷² Mac Amhlaigh, above, p.29.

to be examined in light of Article 8 CFR, which covers the protection of personal data.⁷³ Constructivism will not assist in the protection of individual rights, which require a more concrete, and less fungible understanding of standards and norms. This relationship between the preceding constructivist model, subsequently followed by constitutionalism, in the rebalancing of the AFSJ between its freedom, security and justice provisions, leads to a reflexive relationship. The constitutionalism of standards and norms by the courts, in particular under the post Lisbon legal framework, may well lead to further construction of shared understandings of what should be covered by the EU's AFSJ, and how it is to operate. Nevertheless there is a need for the constitutionalism of the AFSJ to now come to the fore. Some academics have already approached the AFSJ "as part of the constitutional authority of the EU",⁷⁴ although Gibb's argument, writing in 2011, is that there is a "precarious" balance "between an instrumental and a constitutional understanding of the public goods of freedom, security and justice". Some clarity now needs to be brought to this issue.

The development of the new AFSJ legal framework

The EU is in need of a constitutionalist approach to the AFSJ, as one of the most important aspects of constitutionalism is the "limitation of public power,"⁷⁵ with a

⁷³ See further *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources* (Joined Cases C-293/12 and 594/12) [2014] ECR 000 and *Maximillian Schrems v. Data Protection Commissioner* (Case C-362/14) [2015] ECR page 000.

⁷⁴ Gibb, above, p.83.

⁷⁵ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, (Oxford: Oxford University Press, 2010), p.40.

constitutional approach required in order to “produce criminal law in a legitimate fashion”,⁷⁶ whatever the effect that that criminal law might have on “European constitutionality” itself.⁷⁷ The arrival at that constitutionality, at some point short of an actual Constitution, will require much Onuf style constructivism amongst the policy and legal communities within the EU, taking the plural rather than the singular approach, in light of Gibbs argument, above, about political community.

Given the multi-level structure of governance in the EU, as it affects EU Member States, Krisch speaks about “the Enmeshment of Laws”.⁷⁸ This then gives rise to the issue of how to construct and navigate what he also refers to as a “pluralist web of legal orders.”⁷⁹ The networked governance approach adopted by Krisch for developing a “bridge between different supremacy”⁸⁰ is, however, not suitable when dealing with issues going to the core of fundamental rights issues, such as arrest and detention, nor is it likely that he envisaged its use in this way. Krisch examines constitutionalism and pluralism as competing prisms in the context of global integration, both assuming that there is a “clear separation between domestic and international law”,⁸¹ the focus of his work, rather than the supranational law of the EU. There is no such clear separation in the context of Member State/EU/ECHR relations, which lie at the core of the AFSJ debate. Krisch does however point out that pluralism

⁷⁶ K. Nuotio, “European Criminal Law under the Developing Constitutional Setting of the European Union,” in N. Walker and S. Tierney (eds.) *A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism*, (Oxford: Hart Publishing, 2011), p.337.

⁷⁷ Above, p.337.

⁷⁸ Krisch, above, p.160.

⁷⁹ Above, p.165.

⁸⁰ Above, p.228.

⁸¹ Above, p.235.

“remains vulnerable to exploitation in certain circumstances.” He argues that a “constitutionalist model [might prove to be] a stronger bulwark against abuse by the powerful”,⁸² a point taken in this paper. While the political conditions might prove very challenging for the development of a constitutionalist model at the global level, the conditions for its development within the EU, an issue which Krisch does not address directly, are much more favourable.

Von Bogdandy, as reported by Kumm, has blended the two themes of this paper, constitutionalism and constructivism, suggesting “that ‘doctrinal constructivism’” “is at the heart of constitutional scholarship in Europe.”⁸³ This author would regard Von Bogdandy’s constructivism as being narrower than the one which needs to be adopted in order to build understanding in the broader societal sense of the actual development of the AFSJ by practitioners. As Kumm has added, it is possible that the term “doctrinal constructivism” may well turn out “to be a relatively capacious term.”⁸⁴ Kumm also informs us that Von Bogdandy’s use of the term “doctrinal constructivism” is a compromise between the Anglo-Saxon and Continental European legal traditions, with the English speaking world viewing law more as a craft or business, and the Continental legal systems viewing law more as a science.⁸⁵ However law is viewed, these legal jurisdictions need to interact with each other, both in the context of the EU generally, and in the context of the more politically sensitive AFSJ in particular. These issues will have to be addressed if the EU is to effectively develop

⁸² Above, p.259.

⁸³ M. Kumm, On the Past and Future of European Constitutional Scholarship, I • CON, (2009) Volume 7, Number 3, pp. 401 – 415, 402.

⁸⁴ Above, p.402.

⁸⁵ A. Somek, The Indelible Science of Law, I • CON, (2009) Volume 7, Number 3, pp. 424 – 441, p. 428.

and operate the AFSJ, to include the supranational EU criminal law, which will go to the core of the issues of human and fundamental rights through its arrest and detention provisions. As Nuotio states “criminal law carries certain heightened expectations of legitimacy within itself”,⁸⁶ a challenge which the EU transnational legal system will have to address.

Conclusion

Walker has opened up a debate about post-national constitutionalism and post-national public law at the international/global level.⁸⁷ However, the constructivism-constitutionalism argument can be seen in starker relief in the context of the EU with its supra-national legal framework, and its rapidly developing AFSJ, which is having a direct impact on how national law enforcement personnel, prosecutors and judiciary operate. Mac Amhlaigh’s constitutionalism in the context of “a forum for contestation” needs to be brought to the fore in legal academic discourse. The values of the EU political community, and its disagreements on justice and security issues in the context of fundamental/human and due process rights, need to be properly articulated and debated.⁸⁸ This level of analysis is overdue. The issue of potential gaps in judicial oversight of cross border law enforcement and by extension, counter-terrorism provisions, has already been addressed by Hinarejos. She has stated that that any gaps would “be considered unsatisfactory” by all concerned parties,

⁸⁶ Nuotio, above, pp. 336/7.

⁸⁷ N. Walker, “The Post-national Horizon of Constitutionalism and Public Law: Paradigm Extension or Paradigm Exhaustion?” in C. Mac Amhlaigh, C. Michelon, and N. Walker (eds.), *After Public Law*, (Oxford: Oxford University Press, 2013).

⁸⁸ Mac Amhlaigh, above, p.29.

pointing out that there is a need for the Court of Justice and the national courts to “strive to cooperate”⁸⁹ in practice. They need to ensure that there is, in fact, no gap in the judicial oversight of cross-border law enforcement and prosecution activity. This brings us back to the construction of the constitutional approach.

While there is still room for Onuf style constructivism in the AFSJ, this should be reserved to new areas of law enforcement, such as cyber-facilitated terrorism, where the development of a mutual understanding at the practitioner level is still required. Constitutionalism however, should now be the dominant theme, with both current and new provisions increasingly being brought within the legal framework of the CFR, and the EU’s other “Constitutional documents” and traditions. This will be done by the legislators, and should they fail to do so, by the Court of Justice. Peters is clearly of the view that the “EU is a constitutional and constitutionalist system on the ground that individuals enjoy constitutional protection against the organisation itself, and are empowered to enforce that protection.”⁹⁰ This will increasingly be seen in the Court of Justice judgments going forward, now that the five year phase in period of the Lisbon Treaty has expired. As Nuotio has stated, there needs now to be a “‘taming’ of politics”, with the stakes in the construction of a transnational criminal framework being “very high”.⁹¹ There is an “ongoing transformation of

⁸⁹ A. Hinarejos, “Law and Order and Internal Security Provisions in the Area of Freedom, Security and Justice: Before and After Lisbon,” in C. Eckes and T. Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice, A European Public Order*, (Cambridge: Cambridge University Press, 2011,) p.270.

⁹⁰ A. Peters, “The Constitutionalisation of International Organisations,” in N. Walker and S. Tierney (eds.), *A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism*, (Oxford: Hart Publishing, 2011,), p.268.

⁹¹ Nuotio, above, p.332.

criminal law” at the EU level. This transformation needs to take a constitutionalism approach, with the “full impact” of these post-Lisbon changes not yet being obvious.⁹²

⁹² Above, p.312.