Constitutional Life and Europe's Area of Freedom, Security and Justice

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Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focused on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom Campbell
Series Editor
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Charles Sturt University, Canberra.

Preface

The origins of this book lie in research undertaken at the European Institute, in Florence. I arrived in Florence immediately following the French and Dutch referenda when the populace of these founding countries of the Treaty of Rome voted against ratification of the Constitutional Treaty. Up until this point it had seemed that the Constitutional Treaty would be the foundation stone for a new European Union, in which the political controversies over its democratic pedigree, which had been over-shadowing discussion over increased integration after the Treaty of Maastricht, could be laid to rest. The rejection of the Constitutional Treaty seemed to provoke a complete reassessment concerning the appropriate place of constitutionalism and constitutional theory within our understanding of Europe and European integration. This led to an increasing sense of unease, both in political and academic circles, about whether advancing a theoretical account of Europe in constitutional terms could lead back to a conventional form of constitutionalism in which the relationship between the Union and its constituent Member States is characterised by a formal, hierarchical and monistic account. My own approach to the questions and difficulties of European constitutionalism came via a different route and perspective. Rather than the point of entry being how to conceive, or conceptualise, the relationship between different legal orders as a means of attempting to grapple with what makes the European project coherent despite its clear diversity and plurality, my own research began with the experiences, practices and problems of a specific and highly important aspect of European integration – namely, internal security policy. Therefore, constitutionalism emerged as a way of thinking about the meaning of the integration which was taking place and which formed the basis of a common, European, political activity. I did not approach constitutionalism, or constitutional theory, with a sense that it had a prior and rigid set of meanings or conventions. In this way the book has attempted to contribute to the way we understand a specific area of European integration but in so doing also to bring to light crucial possibilities for the study of constitutionalism.

The principal consideration is to understand the area of freedom, security and justice, in constitutional terms, by pointing to the need to reflect upon common commitments to a political way of life which can sustain the practices of integration. I do not intend to offer a prescriptive sense as to the appropriate limits of integration on internal security policy but rather to indicate that what is taking place must be accompanied by serious constitutional consideration as to what become the dimensions of a common constitutional life. It may be that this does place limitations on integration but it was not my intention to start from such a premise, instead I wanted to encourage a genuine engagement with constitutional

thinking about the area of freedom, security and justice as forming part of how the EU is understood as a political community.

This approach to understanding the practices of integration in the area of freedom, security and justice reveals elements of my commitment towards constitutional understanding more generally. The dominant approach to constitutionalism is one in which questions of legitimacy rest upon the rationality of the restraint of sovereign power, by the constituted legal order, and also the converse form in which primary political authority becomes the symbolic power which induces, or compels, a 'we feeling' of compliance and adherence. In each instance constitutionalism rationalises power and compliance within the political order in order to make a claim about the legitimacy of that order. I have attempted to explore a different possibility of thinking through the problem of constitutional legitimacy, and its relationship with 'authority' and 'identity', which emphasises that relational ways of living in political community must be approached as first and foremost practical involvements in the common commitments of a political community and enfolded to us over time. Such an attempt to draw near to what is most essential about the *being with* of political community cannot be driven by the notion that constitutionalism must *master* the question of authority and identity. Such mastery, or at least the very gesture towards mastery, can be most clearly discerned by the desire to search for representations of 'authority' and 'identifications' within the institutions and procedures of the political. The task of thinking through what kind of calling is in constitutional thinking entails abandoning this gesture towards the mastery of the fundamental terms of 'authority' and 'identity'. Instead, constitutional thinking about authority and fundamental belonging become intrinsic, and situational, elements of the common constitutional life. In short, constitutional thinking is concerned with exploring the possibilities of authentic relational ways of living and crucial in this respect, particularly for the European Union, is that it does not seek to arbitrarily fix such an effort through the appeal to the concept of the 'state' or even the 'post state'. We must proceed with care and attentiveness in the task of exploring the meaning, and indeed the strangeness, of the constitutional practices themselves.

Finally, I would like to offer some guidance to the reader concerning the text itself. The Treaty of Lisbon, which came into force during the writing of this book, creates crucial reforms to European Union law, in general, and the area of freedom, security and justice in particular. This book is not intended to be an up-to-date doctrinal account of the law in this area – rather it is written as an interpretation of the constitutional implications of the development of an area of freedom, security and justice as part of our integration towards understanding the European Union as a common political way of life. To this extent the book does not undertake to consider directly the constitutional implications of the Lisbon Treaty on the area of freedom, security and justice even if I have attempted to reflect upon the most recent legal developments. In addition, I considered that it was important to preserve, when discussing the pre-Lisbon law, the old terminology or numbering as this gives a sense of the overall historical development of the AFSJ.

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My personal gratitude is for the loving support of my family and Cláudia Rath.

Alun Howard Gibbs
Southampton University, 2011

Introduction

In 1997, at the signing of the Amsterdam Treaty, it would have taken a particularly far-sighted policy maker to have envisaged quite how significant the new 'area of freedom, security and justice' (AFSJ) would become for European integration in the coming decade. At the inception of the AFSJ internal security measures appear, at first glance, to be a classical instance of a form of functional 'spill-over' from the integration of the internal market; in particular, the objective of freedom of movement and the open internal borders of the Schengen area.[1] However, over the next decade internal security acquired a crucial autonomy from simply being thought of as an adjunct to the internal market-related concerns of fetters to the free movement of persons and the eradication of internal border controls. For example, the Stockholm Programme, published by the Commission of the European Union in December 2009, outlines the policy commitments of the AFSJ from 2010 to 2014, and it illustrates the ambitious long-term policy plans for the AFSJ. Readers of this document can be under no doubt that the AFSJ has developed in such a way as to go beyond a notion of integration 'spill-over' from other, specifically internal market, sectors but rather has emerged as policy area sufficiently successfully to pose a fundamental question about the place of internal security in our understanding of the political union of the EU.

One common way of approaching the question of the emerging autonomy of internal security as part of the political integration taking place at the European level is to refer to the significant events of history as an explanation. The terrorist attacks on 11 September 2001 undoubtedly altered the perception of global risks and threats amongst policy makers, particularly for the allies of America in Europe. Two terrorist attacks in Europe, Madrid (2004) and London (2005), brought to the attention of European policy makers the importance of security provision and the significance of an institutional structure of cooperation and resource sharing in the AFSJ. The connections between internal security integration, in the European Union (EU), and the nature of the current concerns over threats emanating from outside, or inside, the EU are considered to be a legitimate way to understand the trajectory of the AFSJ over the last decade.

Even so, to view the political significance of the AFSJ simply as a consequence of responding to security events, and even its success in so doing, would be to miss a fundamental aspect of its importance as part of the wider political development of

1 A connection which can be illustrated by the fact that the AFSJ actually composed two legal regimes: the first pillar with responsibility for borders and migration and the third pillar with competence in criminal justice, police and judicial co-operation.

the EU. Part of the way to understand this relationship would be to appreciate that as well as being a common market the EU also increasingly understands itself to be a common 'area of freedom, security and justice', or, as Neil Walker succinctly remarks, the AFSJ has become part of the 'polity building' exercise of the EU.[2] This link between the AFSJ and the understanding of the EU as a distinctive political activity, existing alongside those of the state, becomes the principal issue for this book to address as it seems to locate precisely the way in which we might begin to think about the AFSJ in constitutional terms. We might phrase this question in the following terms: how does designating an area of freedom, security and justice become bound up in the deeper issues over the status of the EU as a 'polity'? As I have intimated, this question calls for a different kind of thinking; namely, it calls for a consideration of the AFSJ in constitutional terms.

However, this question masks a much deeper and more significant problem. The question presupposes that the answer to the question lies ready to hand to use or employ within some kind of pre-existing idea about constitutions, perhaps, the stock of knowledge that we call constitutional theory. But the relationship may not be as simple as this. What if the attempt to uncover the relationship between the commitments to an area freedom, security and justice and the understanding of the EU as a political community entails in addition an exploration of the scope of thinking that conventionally we term 'constitutional'? In such circumstances not only must our inquiry be to consider a crucial aspect of EU integration, as important as this is, but, in addition, this task prompts us to explore the possibilities of thinking in constitutional terms itself. Hence, the relationship between the AFSJ and the notion of 'polity building' in the EU manifests itself as a fundamental connection between a consideration of the practices of the AFSJ and the scope of constitutional thinking, with both playing a role in advancing the paths of the other.

As a way of introducing the main argument, before outlining in more detail how this appears in the different chapters, I would like to indicate how the term 'constitution' is developed in the course of the book. It is apparent that the word 'constitution' is found in a family of words – for example, 'constitutional' and 'constitutionalism' – which broadly aim to refer to the practices related, or connected, to the constitution of a political community. As I have already indicated, what emerges as a particular concern are those practices of the AFSJ which indicate the relationship to the understanding of the EU as a political community – it is in this sense that I will be employing the term 'constitutional'. The broader claim that I make, in this respect, is that constitutionalism, as a form of study and scholarship, entails the challenge to consider anew relational ways of living as a political community rather than seeking a stable, or fixed, definition of constitutionalism. It is this mode of thinking that lies behind that part of the title of the book, 'constitutional life'.

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2 Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in *Europe's Area of Freedom, Security and Justice*, edited by Neil Walker (Oxford: Oxford University Press, 2004), p. 11.

Considering the scope of possibilities of thinking about 'constitutional life', which is prompted by the practices of the area of freedom, security and justice, becomes the challenge of addressing and conveying constitutional concerns beyond those conventionally used in constitutional theory. Bound up with the effort to consider 'constitutional life' is the challenge to preserve the *distinctiveness* of thinking about political community and the relationship to constitutional authority. In this way I do not propose, or set out to critique, oppose or defeat conventional ways of thinking about constitutions as such efforts of deliberate critical thinking often end in superficiality, or worse still, maintaining the status quo one has sought to oppose. If the account of constitutional thinking does reveal the limitations or difficulties of conventional constitutional thinking it does so not through a deliberate act of opposition, but rather by the necessity of thinking through the difficulties that we confront in our encounter with the practices of the AFSJ, and the EU.

In order to look at the ways in which freedom, security and justice relate to our understanding of the EU as a political community we need to establish a meaningful distinction between constitutionalism and the intention of policy makers to meet the demands that the EU is to be at the forefront of measures to ensure that individual interests concerning security can be met, and balanced, with measures designed to promote freedom and justice. In other words, in this book I attempt to distinguish between a constitutional claim to represent freedom, security and justice and an understanding which sees these goods to be instrumentally provided or delivered in terms of substantive measures or policy.

Part of the task of thinking about constitutionalism, in such a way as to preserve its distinctiveness, is to deepen and explore the language of constitutionalism. In the course of this book I often refer to 'constitutional life' as being part of the 'common commitments of a political way of life over time' or of advocating a form of constitutionalism which entails an 'ontological turn'. I will consider what I mean by these terms and descriptions throughout the book, and particularly in Chapter 2, but broadly they form part of the overall trajectory of this effort towards thinking about the constitutional as a mode of involvement or participation in a practice in such a way as to reveal the way we understand ourselves as committed to a constitutional way of life, including those practices related to the AFSJ.

Having briefly considered the approach of this book towards the idea of carrying out a constitutional study of the AFSJ I would like to introduce the themes taken up by the different chapters and how the overall argument of the book is developed in each chapter. Chapter 1 explores the practices and developmental history of the AFSJ as part of the wider understanding of the EU as a political community or polity. The articulation that the EU constitutes an area of freedom, security and justice becomes intimately bound up not only with the attempts to deepen integration at the European level but also with concerns about the constitutional legitimacy of such practices. This apparent paradox between the depth of integration, which presupposes a common political way of life in the EU, and the concerns about how to understand such a political community beyond

the state becomes the concern over the constitutional legitimacy of that which is taking place.

The issue over how to understand what we might mean by constitutional legitimacy in such a way as not to presuppose any particular form, or structure, of political community becomes the focus of Chapter 2. In this chapter constitutional legitimacy is interpreted to mean the common commitments of a political community over time whereby notions of 'authority' and 'identification' are not means of inducing or compelling compliance with a constituted order, or indeed products of it, but instead become ways of relating and transforming our common commitments to a political way of life. This chapter draws on hermeneutics, particularly the deep interpretative approach of Hans-Georg Gadamer, in order to show how different relational ways of living require us to become interpreters of our common commitments so as to be able to acknowledge how they are enfolded to us over time and are inherently valuable, as opposed to realising particular or delivering specified needs.

Chapter 3 extends this work by suggesting that the representation of freedom, security and justice, as the public goods of the EU, must be considered as constitutional commitments – or as I also write, 'constitutional public goods'. The aim of this chapter is to highlight the distinction between an instrumental and a constitutional way of understanding public goods. The purpose behind this chapter is to suggest that questions of constitutional legitimacy cannot be explored if we only consider freedom, security and justice to be instrumental public goods and fail to consider how they can form part of the constitutional commitments of the EU.

The potential problems of assuming public goods to be instrumental rather than as having the capacity to become the constitutional commitments of a political way of life are developed further in Chapter 4 when I consider the specific example of security as a constitutional public good. It is in this chapter that we begin to encounter the unique difficulties facing the AFSJ as furthering a political and constitutional understanding of the EU more generally. It is argued that security seems to provide the most apparent sense of constitutional legitimacy for the practices of the AFSJ whilst paradoxically tending towards an instrumentality which covers over or conceals its own constitutional pedigree and crucially the call for constitutional thinking. I explore these aspects of security by drawing on the work of Michel Foucault, in particular, his notion of 'governmentality'. I argue that placing limits, or restraining, such practices entails reinvigorating a common language which can allow us to express and interpret common constitutional commitments in a non-instrumental way, including the good of 'security', and that by doing so we can reconcile ourselves as to the limitations of instrumental modes of understanding public goods and the dependency on constitutional life.

The last two substantive chapters of the book, Chapters 5 and 6, mark something of a shift in emphasis towards exploring the actual practices of the AFSJ in terms of how free movement of persons is evoked as part of a common *area* of freedom, security and justice (Chapter 5), and also how criminal law asserts a common *area* of justice to the European Union. In both instances

it is acknowledged that the practices of the AFSJ must be grounded on the commitment to a constitutional life if the AFSJ is to be part of way we think about the EU as a legitimate political community. However, both in studies of a common area of justice and in the practices of free movement it is apparent that the approach taken is that constitutional legitimacy can be established not through thinking about constitutional life but rather about perfecting the procedures of the instrumental delivery of goods and, in particular, the instrumental good of security. Finally, in Chapter 7, there are concluding reflections on what the notion of constitutional life might hold for us in the way we think about the site of justice of a political community. The chapter considers what might lie behind the message of hermeneutics and the call to learning that it evokes.

Contents

Chapter 1
Constitutional Life and the Area of Freedom, Security and Justice

Introduction: Why a Constitutional Account?

The task which has been undertaken is to begin to understand why constitutional thinking becomes an appropriate lens to bring to awareness the European Union's policy developments in the area of freedom, security and justice. Embarking on such a line of enquiry is not confined to positing justifications for 'using' constitutionalism in a policy field which lacks, in some important senses, the strong 'supranational' components of policy making which are to be found in the internal market domain. And neither can our constitutional analysis set itself the goal of presuming to identify, or confirm, a normative framework for the continued expansion, and primacy, of EU legal norms on internal security. In turning towards constitutional thinking, to explore the implications of the AFSJ, the task becomes a more subtle one than we might immediately assume since the difficulty, and the challenge to constitutionalism, is in being able to reveal how the AFSJ brings to light certain aspects of constitutionalism that have been neglected, or that have not been at the forefront of our concerns. It is this requirement to embark upon an exploration as to what is going on in the AFSJ which will help us to draw near to a way of uncovering what is most essential about constitutionalism. It is this close inter-connection between constitutional thinking and the requirement to consider the practices of the AFSJ that becomes the important path for this book to take. Therefore, the success of this task will be to what extent it enables the developments of the AFSJ to prompt us to question our presuppositions about what constitutional thinking *is*.

In order to attempt to locate a means of exploring this more challenging relationship between constitutional theory and the AFSJ it is worthwhile to begin by examining the principal reasons for a shift in which a constitutional understanding of the AFSJ becomes plausible in the first place. At this stage the analysis will be confined to introductory remarks preparing the way for a more detailed scrutiny of these developments later in the chapter. Each of the three headings below set out the development of the AFSJ in terms of: (i) policy, (ii) institutions and (iii) critical commentary. The intention is to introduce the practices and developmental stages of the AFSJ in such a way as to demonstrate the relationship between the AFSJ and its wider connection with the wider political integration of the EU.

Policy Expansion

This justification cites the continued growth and centrality of internal security as a policy goal since the Member States first began to cooperate with one another on such matters over 30 years ago. The earliest cooperation became known as 'Trevi' and from the outset such meetings were envisaged to be a flexible and highly specialised form of technical cooperation, on a purely inter-governmental basis.[1] Certainly the genesis of Trevi seems to be as a direct consequence of the increasing level of violence and organised criminality in Europe during the early 1970s, which had also taken on a transnational character. It was understood that these emerging and complex international crime networks required a more sophisticated and coordinated response by states and other policing and law-enforcement agencies.[2] The kind of subject matter under consideration within the Trevi structure entirely reflected the emerging security concerns of the participating states and the expertise that the specialist agencies felt able to share with each other. The emerging policies can be understood as falling under the following subject areas: the assessments of terrorist threats to important civil resources such as aircraft and power stations; the coordination of policing matters, for instance, tactics, training and information regarding the deployment of certain specialist equipment; and finally cooperation over technical matters in other areas of serious organised crime, such as drug-trafficking, arms smuggling and large-scale bank robberies.

Over the next 30 years the dimensions of these policy areas expanded to include the vital matters of asylum, immigration and border control. At such a point it could be considered that the policy had arisen from the spill-over of measures required to augment the internal market. However, there was increasing penetration of these policy objectives into the national sphere which has led to both an enhanced awareness of the significance of the AFSJ in national politics and that these measures have become distinct from the efforts to complete the internal market.[3] For instance, by the early 2000s the European Union had ambitious plans for the common development of criminal justice systems, including the mutual recognition of judicial decisions, which took legislative shape with the European Arrest Warrant (EAW)[4] providing a shared scheme for the extradition of suspects

1 Although Trevi started with a meeting, in Rome, of the Ministers of Justice Home Affairs from each of the Members of the EC, the co-operation did not take place within the institutional form of the EC.

2 See Anderson et al., *Policing in the European Union* (Oxford: Clarendon Press, 1995), p. 24.

3 Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in *Europe's Area of Freedom, Security and Justice* edited by Neil Walker (Oxford: Oxford University Press, 2004) at p. 16.

4 2002/584/JHA: 'Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures', OJ L190 (18 July 2002), pp. 1–20.

between Member States.[5] In recent years it has become clear that a paramount reason why internal security has acquired the policy dynamism that has resulted in the ambitious and extensive proposals apparent, particularly with the Hague, and most recently the Stockholm Programme, is '9/11'.[6] The alteration of global security, perceived or actual, following the unprecedented nature of the terrorist attacks, gave the EU a united and common interest to pursue and strengthen measures relating to internal security. The policy area which was organised, by the Treaty of Amsterdam, into the 'area of freedom, security and justice', in 1997, has subsequently acquired a clear sense of its purpose and the importance of its place in developing the wider dimensions of political integration.

Institutional Developments

Policy expansion has gone hand-in-hand with institutional developments over the course of the same period of time. As outlined above, cooperation began at an inter-governmental level in Trevi and, although there was a measure of institutional organisation through the various specialist Working Groups, the organisation of policy took place on the flexible and informal basis of soft-law recommendations, opinions and declarations. However, the narrative of institutional development is one of a gradual but definite shift from the purely inter-governmental to the supranational; where the institutional organisation of justice and home affairs gradually reflects the increased significance of the collective EU institutions in the development of policy.

The Maastricht Treaty (1992) saw the creation of the third pillar, which was called 'Cooperation in the Fields of Justice and Home Affairs'. The provisions of the third pillar were not part of the three Treaties establishing the European Communities and, therefore, were not part of European Community law; in consequence, the general legal acts of the EC – regulations, directives and decisions – were not applicable to the third pillar. In fact, the most formal legal instrument available to Member States was still the multilateral Treaty, or Convention, which would be governed by the principles of public international law, although there was also the possibility of employing the declaration of 'joint positions'. The entire tenor of the approach taken in transposing Trevi to the EU seems to have been an attempt to preserve the inter-governmental character of the cooperation already developed in Trevi. This is further evidenced by the fact that the roles of

5 The European Arrest Warrant also applies to the execution of custodial sentences between Member States.

6 Communication from the Commission to the European Council and Parliament of 10 May 2005, 'The Hague Programme: Ten priorities for the next five years – the partnership for European renewal in the field of Freedom, Security and Justice', COM (2005) 184. Also, see the joint statement by the Council and the Commission on the Action Plan for the implementation of the Hague Programme, OJ L198 (12.8.2005), pp. 1–22. European Commission: 'Action Plan Implementing the Stockholm Programme', COM (2010)171.

the main EC institutions – Parliament, Commission and European Court of Justice – were heavily circumscribed. The Commission was not granted exclusive right to initiate measures, which it enjoyed in the first pillar; instead, it was to share this privilege with the Member States. Furthermore, it was emphasised that matters relating to internal security, law and order were to remain the exclusive domain of the Member States.[7] The European Parliament (EP) was given a modicum of scrutiny powers under the co-decision procedure as it was required to be consulted and informed on a regular basis about the various activities of the third pillar and was also able to ask questions and make recommendations to the Council or Commission.[8] However, in reality, the scrutiny provided by the EP was *ex post facto* regarding the legislative process, that is to say, it was not involved in the development of third pillar measures. The role of the ECJ was also severely limited, no doubt as a consequence of the significance of ECJ jurisprudence in the early development of the EC. The ECJ could only hear a case concerning a Member State about a third pillar matter if that Member State had first consented to this.[9] The institutional motor of the third pillar, during the Maastricht era, was the Council and the co-ordinating committee, K4, named after the article in the Treaty that established it. Composed of the Member States, it was in the Council that the principal policy goals were formulated. Desirous of preserving an inter-governmental character to the running of the third pillar, unanimity was required amongst the Member States for a measure to be agreed and also the ultimate right of initiative resided with the Council. The K4 committee preserved much of the technical apparatus developed under the Trevi regime, including the use of Working Groups to harness a range of expertise to tackle the policy areas of JHA.[10]

In 1997 the Treaty of Amsterdam offered an opportunity to reassess the achievements of the JHA pillar. In the period since TEU there had been increasing awareness, primarily by policy makers at the European level, of deficiencies concerning the institutional framework of the third pillar.[11] The legal framework appeared inadequate to support and effectively deliver the policy goals of the

7 Article K.2 TEU(M); 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

8 Article K.6 TEU.

9 Article K.3 TEU.

10 Monica den Boer notes that a complex relationship developed between the working parties and experts of the K4 Committee and COREPER, the main administrative centre in the EU structure. This leads den Boer to describe the procedure as involving 'a circus of actors, who compete for policy space, forms a perfect breeding ground for rivalry and friction. The tensions between the swift-acting COREPER and the loose congregation of individuals in the K4 Committee have become legendary'. See Monica den Boer, 'Europe and the Art of International Police Co-operation: Free Fall or Measured Scenario?' in O'Keeffe and Twomey (eds), at p. 306.

11 See, in particular, the article by David O'Keeffe, 'Reforming the Third Pillar: Transparency and Structural Reform in the Long-Term Perspective', in *Justice and Home*