Special Issue: *Lisbon vs. Lisbon*

Security and the Transformation of the EU Public Order

By Matej Avbelj[*]

A. Setting the Scene: Security and the EU Public Order

The purpose of this paper is to illustrate the changing character of the European Union ("EU") public order under the impact of security concerns. The EU public order has long been characterized by a tension between a more market-oriented, neo-liberal Union and a more socio-political Union. The former would be driven by the EU's four fundamental freedoms, whereas the latter would be achieved and safeguarded through the language and practice of fundamental rights. As other scholarly contributions to the issue have demonstrated, the relationship between fundamental freedoms and fundamental rights is anything but settled. It continues to be subject to many, sometimes potent, legal and political controversies. However, while the EU public order is still in pursuit of the right balance between economic freedoms and socio-political rights, it also has to reckon with another fundamental value: The value of security.

The following will demonstrate how the ascending relevance of security has impinged upon the emerging balance between the economic and socio-political values in the Union and thereby transformed its public order. More specifically, this discussion shall reveal how the intensification of security concerns affects the relationship between fundamental rights and fundamental freedoms on the common market. Accordingly, the article will begin by tracing the evolution of the EU public order, which is necessary for the understanding of its present state of affairs and, in particular, for coming to grips with the special role of security in it. Security has become an important internal as well as external factor of the Union's operation. The paper will therefore continue by touching briefly upon the Area of Freedom, Security and Justice ("AFSJ"). The AFSJ is an example of a systematic and comprehensive response to the Union's internal security challenges, which has had an important bearing upon the scale of Union values. Finally, the discussion will conclude with a short case study of the Court of Justice of the European Union ("CJEU") ruling in *Kadi and*

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Al Barakaat International Foundation v. Council and Commission.[1] Not only is this case one of the best known examples of the Union's response to its external security challenges, it also aptly and rather uniquely involves a conflict between the three central values, which are of concern here: The fundamental rights of an individual, the fundamental freedoms of the common market, and security interests.

B. The Evolutionary Character of the EU Public Order

This paper espouses a positive rather than a negative conception of a public order.[2] *Public order* stands for a balance or equilibrium of fundamental values of a polity. It encompasses a comprehensive set of values in a given polity and orders them in terms of their importance to that polity. A public order could be also described as a scheme of justice of a particular polity. To paraphrase Rawls, it draws together the polity's political and social institutions as one system of cooperation, which is publicly known to rely on principles of justice that all polity members consider just and therefore generally comply with.[3] It is a central choice about the fundamental values in a polity that the latter arrives at autonomously.[4]

Each state, as a prototype of a polity, has its own balance of values that reflects and defines its constitutional and socio-political character. This balance is necessarily contextual or *polity-specific*, and therefore varies from one polity to another. It is always settled to a degree and simultaneously subject to constant—even if subtle—change. A public order is therefore never immutable. It is always evolving as a response to a variety of internal and external factors. Nevertheless, despite its unavoidable evolutionary character, a public order is also marked by constancy, by a structure that it has gained through the socio-political and legal evolution of a polity. The longer the evolution, the

[1] Kadi & Al Barakaar Int'l Found. v. Council & Comm'n , CJEU Cases C-402/05 P & C-415-05 P, 2008 E.C.R. I-6351. Please note that this paper has been finalized before the final decision of the CJEU in the Kadi affair has been handed down. *See* Comm'n v. Kadi, CJEU Cases C-584/10, C-593/10 P & C-595/10 P (July 18, 2013).

[2] A negative conception of a public order stands for minimal mandatory rules that set a limitation both on the private and public conduct within a particular polity. As such, it determines the scope of what is still legally permissible in a given polity. This conception is most common in the conflict of laws field. Its aim there is to protect the essence of a polity's legal and political order against the adverse legal institutes or policies of another polity claiming the effects in the former one. The negative conception is also used within the meaning of a public policy when the latter is relied upon as a justification for curtailment of individuals' human rights. *See*, *e.g.*, Roel de Lange, *The European Public Order, Constitutional Principles and Fundamental Rights*, 1 ERASMUS L. REV. 3, 8, 11 (2007).

[3] JOHN RAWLS, POLITICAL LIBERALISM 35 (1993).

[4] In this sense, a public order corresponds to what Weiler has labeled as a fundamental boundary. *See* J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, *in* THE EUROPEAN UNION AND HUMAN RIGHTS 51, 52–53 (Nanette Nuewahl & Allan Rosas eds., 1995) ("Fundamental boundaries are about the autonomy and self-determination of the communities.").

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more the public order is settled and the harder it is to change. The content of a public order is therefore more pronounced and more easily identifiable in a state with a long and stable socio-political and legal tradition.

Accordingly, specifying a public order in a non-statist polity, such as the European Union, is more demanding. As I have argued elsewhere, the European Union is best understood as a union—a pluralist polity that consists of three levels: Member States, the supranational level (the EU *stricto sensu*), and the common whole (the EU *lato sensu)*.[5] Each of these levels lays claim to its own public order. In what follows, I shall focus on the public order of the EU *stricto sensu*.

As we know, the CJEU, more than any other European authoritative body, has persistently been building an autonomous supranational legal order. Thanks to the overall acceptance by Member States, this legal order has incrementally developed its own substantive balance of fundamental values. This is, in turn, protected through the form of supranational law. It is for this balance of fundamental values that the autonomy of EU law is required and simultaneously justified. In the absence of legal form and sanction there is no way of protecting one's fundamental choices about the key values that constitute a distinctive polity.[6] In short, the supranational law's formal autonomy has enabled the development of the EU public order, whose existence in turn bolsters and justifies a formal claim to the supranational law's autonomy. The substantive dimension of a public order and the formal dimension of an autonomous legal order are thus inseparable. They are two sides of the same coin.

The EU public order is closely tied to the development of the process of European integration. Its character is therefore profoundly evolutionary, much more so than is the case with statist public orders. Not only the specific balance of fundamental values, but also their contents have been changing with time because of the widening—as well as the deepening—of the integration. Initially, the EU public order was marked by the primacy of the economic values and, indeed, for several decades it has been like this. It suffices to recall that the three founding treaties were all of an exclusively economic character, being first dedicated only to coal and steel and expanding later to a customs union and a common market plus the European Atomic Energy Community ("EURATOM").[7] After the failure of the European Political Union and the European Defense Union, the development of the political character of the Union was stalled and the decision was taken to proceed

[5] *See* Matej Avbelj, *Theory of European Union*, 36 EUR. L. REV. 818, 818–36 (2011).

[6] *See id.* at 833.

[7] It has been, perhaps, best described by J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991).

more carefully and mainly in economic terms.[8] Consequently, as the Union was to be limited to the economic field of development, the social, redistributive, and human rights policies were to be left to the Member States, or in case of human rights also to other specialized international organizations, such as the Council of Europe.[9]

The development of the common market, however, took a markedly deregulatory course also known as *negative integration*.[10] The Court lent full effect to four fundamental economic freedoms; in particular to the freedom of movement of goods, but also to the freedoms of movement of capital, workers, and services. This resulted in a removal of any national obstacles to trade that the Member States were unable to justify. At the same time, this Court-driven market deregulation was not counterbalanced by the development of supranational regulation. The Council, acting under the shadow of the veto,[11] and in the absence of consensus between the Member States, was unable to execute its regulatory function. The Member States' regulatory autonomy, consisting of the essentially socio-political component of their public orders,[12] was thus subjected to the primacy of the supranational ordo-liberal economic interests related to the common market while it was, simultaneously, exposed to a double erosion.

It was eroded, firstly, through the Court's overly expansive Dassonville formula, which required the removal of any national regulatory measure that could not be justified from the point of view of EU law.[13] Secondly, under the Dassonville formula, a national regulation could be eroded even when justified. A justified national limitation of free movement of goods namely provided an impulse for the activation of the Council's legislative function.[14] Since the adoption of the Single European Act, the Council has been

[8] Of course, the economy has never been a goal in itself. Rather it was, at least on an ideological level, in service of a lasting peace. For a critique of the economy as an EU myth, see Erik Jones, *The Economic Mythology of European Integration*,48 J. COMMON MKT. STUD., 89, 89–109 (2010).

[9] This division of labor is also often quoted as a reason for the non-inclusion of human rights provisions in the Community founding treaties. However, for an insightful critique of this traditional narrative, see, for example, Grainne de Burca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649, 649–93 (2011).

[10] For a recent account of this process with a specific focus on fundamental rights protection in the EU, see Stephen Weatherill, *From Economic Rights to Fundamental Rights*, *in* THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON 11, 11–36 (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., 2013).

[11] *See* Weiler, *supra* note 7, at 2451.

[12] For a more detailed discussion, see J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, *in* THE EVOLUTION OF EU LAW 353 (Paul Craig & Grainne de Burca eds., 1999).

[13] *See* Procureur du Roi v. Dassonville, CJEU Case 8/74, 1974 E.C.R. 837.

[14] *See* Weiler, *supra* note 12, at 362. Weiler called this a constitutional consequence of the Dassonville formula:

legislating in the field of free movement of goods with a qualified majority and thus potentially against the regulatory wishes of several Member States.

C. The Emerging Equilibrium of Fundamental Freedoms and Fundamental Rights

By way of primacy of EU law, the supranational judicial and legislative deregulatory outcomes required precedence over national laws and therein contained national value choices. This has raised severe concerns,[15] especially with the highest national judicial authorities threatening to trigger constitutional conflicts.[16] This threat materialized first in the field of fundamental rights protection.[17] As is well known, at the outset of the integration process, fundamental human rights were entirely absent from the Community founding treaties. This meant that the then-Community institutions were not bound to any Community standards of human rights protection. And yet, their regulations required primacy over the national rules of whatever character, including human rights contained in the national constitutions.[18]

This problem might be evaded if fundamental freedoms could be subsumed under fundamental human rights. This could at least lend plausibility to an argument that fundamental rights in the Community are not devoid of any protection, since the Court is protecting them through fundamental freedoms. However, to do so, the fundamental freedoms and fundamental rights would need to be part of the same genus,[19] sharing an individual as their common object of protection, differing only as to which aspect of her existence they emphasize, economic or socio-political respectively.

> [W]hen a state measure on its face violates the Dassonville formula, the Member State is required to justify it by reference to European law criteria—ex Article 36 (30) or as a mandatory requirement ex Cassis de Dijon often before the European Court of Justice. If the measure cannot be justified it is inapplicable or must be modified appropriately. Critically, when it is justified and can, thus, be upheld, Article 100 (94) or 100a (95) comes into play. . . . Put it differently, the Community legislative competence ex Articles 100 (94) or 100a (95) is triggered each time there is a finding of prima facie transgression by a state measure of the Dassonville formula, even when, necessarily, the state measure in question is justified.

[15] *See* Weatherill, *supra* note 10, at 12 (calling this "[T]he anxiety: [T]oo much EU law, too little local autonomy").

[16] On constitutional conflicts, see Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262, 262–307 (2005).

[17] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvG 52/71, 2013 BVERFGE 271 (May 29, 1974) [hereinafter Solange I].

[18] *See* Matej Avbelj, *European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Freedom of Movement of Goods* 25–30 (N.Y.U. Jean Monnet Working Paper 06/04, 2004).

[19] *See id*. at 68–69.

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However, contrary to the claims of some institutional[20] and academic voices, the Court's jurisprudence has thus far failed to lend decisive support to this.[21] Despite using a similar language, the two "fundamentals" have different objects of protection.[22] Fundamental freedoms have been, in the words of the current president of the CJEU, "the driving force of the realization of the internal market";[23] a means of advancement of European integration;[24] and a guarantee of effectiveness of EU law.[25] They have furthered the EU economic interests in the achievement of a common market against the Member States. They have been a means of liberalization of the common market in the sense of removing the national obstacles to trade.[26] For this they have made use of individuals engaging in trade, turning them more into a means to an essentially economic end, rather than making them part of their object of protection.[27] On the other hand, fundamental human rights, be they political, economic or social, protect the individual's liberty and overall well-being as ends in themselves, against public authority.

In short, primacy of fundamental freedoms over fundamental rights meant primacy of the economic over the broader socio-political interests of the individuals and of the Member States' societies. A complete lack of a Community standard of fundamental rights protection only made this situation worse. While the CJEU at first disregarded the

[20] *See* Opinion of Advocate General Stix-Hackl at para. 50, Omega Spielhallen & Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, CJEU Case C-36/02, 2004 E.C.R. I-9609 (arguing that, "fundamental freedoms themselves can . . . perfectly well be materially categorized as fundamental rights—at least in certain respects: [I]n so far as they lay down prohibitions on discrimination . . . they are to be considered a specific means of expression of the general principle of equality before the law").

[21] *See* Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1322–23 (2000).

[22] For some additional analytic treatment of the relationship between fundamental freedoms and fundamental rights, see Lubos Tichy, *Fundamental Rights and Fundamental Freedoms: Short Remarks*, *in* 5 EUROPEAN CONSTITUTIONAL LAW NETWORK SERIES, A CONSTITUTION FOR EUROPE: THE IGC, THE RATIFICATION PROCESS AND BEYOND 51 (Ingolf Pernice & Jiri Zemanek eds., 2005).

[23] Vassilios Skouris, *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*, 17 EUR. BUS. L. REV. 225, 226 (2006).

[24] *See id.* at 229.

[25] *See id.* at 233.

[26] *See id.* at 229.

[27] *See* Avbelj, *supra* note 18, at 68–71. *See also* Skouris, *supra* note 23, at 235 (claiming that "[i]t was only in the course of time that their [fundamental freedoms'] primary role became to protect individuals which made them resemble more to civil rights than anything else"). Finally, the essentially instrumentalist conception of an individual as an economic agent on the common market becomes apparent when contrasted with a later-developed EU citizenship. For the most famous pronunciation in this regard, see Opinion of Advocate Gen. Jacobs at para. 46, Konstantinidis v. Altensteig, CJEU Case 168/91, 1993 E.C.R. I-1191.

problem,[28] it gradually had to address it, largely under the pressure of national constitutional courts.[29] In several steps[30] the Court developed its own human rights jurisprudence, protecting human rights in the EU as unwritten general principles of EU law. In so doing, it prevented a situation whereby supranational legal acts, not subject to any human rights protection, would claim primacy over national laws that were protecting human rights. This has been done to the general satisfaction of the highest national judicial authorities.[31] Simultaneously, this judicial interaction also provided the impetus for a legislative development, which eventually resulted in written standards of EU human rights protection, which are now contained in the Charter of EU Fundamental Rights and Freedoms.

While fundamental human rights have thereby gradually been incorporated into the EU public order, it took several more years and Court cases for the balance between fundamental freedoms and fundamental rights to start to emerge. Things did not go as smoothly as expected. The CJEU, staying faithful to its immodest jurisprudence, expanded EU human rights protection *ratione materiae* as well as *ratione personae*.[32] Surprisingly, not only the EU institutions but also the Member States were now, in certain cases, required to abide by EU, rather than national, standards of human rights protection.[33] Once again, even with the help of the just-established EU fundamental rights protection, the balance between the national and supranational value choices was tipped in favor of

[28] Stork & Co. v. High Auth. of the Eur. Coal & Steel Cmty., CJEU Case C-1/58, 1959 E.C.R. I-17. In this case, the ECJ refused to engage in judicial review based on fundamental human rights by claiming that it was required only to ensure that the law is observed in the interpretation and application of the Treaty and of rules laid down for implementation thereof, and that it was normally not required to rule on provisions of national law.

[29] Weiler, *supra* note 4, at 56. As Weiler observed, soon the protection of human rights became a joint legal and political imperative.

[30] The landmark decisions include J. Nold, Kohlen-und Baustoffgrosshandlung v. Comm'n, CJEU Case C-4/73, 1974 E.C.R. I-491, 507 and Hauer v. Land Rheinland-Pfalz, CJEU Case C-44/79, 1979 E.C.R. I-3727.

[31] See the landmark decision, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 197/83, 73 BVERFGE 339 (Oct. 22, 1986) (Ger.) [hereinafter *Solange II*]. The other national constitutional courts have followed suit. For an overview of the judicial responses in the old, but especially in the new Member States, see Wojciech Sadurski, *Solange Chapter 3: Constitutional Courts in Central Europe - Democracy - European Union*, 14 EUR. L.J. 1, 1-35 (2008).

[32] See the *Wachauf* and *ERT* line of cases: Elliniki Radiofonia Tileorasi – Anonimi Etairia (ERT-AE) v. Dimotiki Etairia Pliroforissis, CJEU Case C-260/89, 1991-6 E.C.R. I-2925 and Wachauf v. Germany, CJEU Case C-5/88, 1989 E.C.R. I-2609.

[33] According to the Charter, the Member States are bound to the EU fundamental rights standards when they implement EU law and therefore act as part of the EU executive branch. The Court's jurisprudence is, however, broader and subjects the Member States to the EU fundamental rights standards of protection even when they derogate from the EU law's four fundamental freedoms. *See* Avbelj, *supra* note 18, at 28-30.

the latter, sparking a new controversy as to the appropriate standard of fundamental rights protection.[34]

This controversy, combined with continuous erosion of the national regulatory autonomy, did not make the search for balance between the fundamental freedoms and political human rights any easier. To the contrary, while the Court managed to avoid a direct interface between the fundamental freedoms and political human rights for a relatively long time, it had to rule on it in the *Schmidberger*[35] and *Omega*[36] line of cases. It ruled that the Member States are allowed a wide degree of discretion when derogating from the four economic freedoms in order to protect fundamental political rights, such as freedom of speech,[37] freedom of assembly,[38] and human dignity.[39] In this way, without establishing any hierarchy between fundamental rights and fundamental freedoms, the jurisdictional and substantive equilibrium between the economic imperatives of the common market and the requirements of human rights protection has gradually been achieved in the European Union. As one commentator has argued, the initial primacy of transnational economic integration has been counterbalanced by political human rights, including the development of EU citizenship, as a means of supranational legitimation.[40]

However, this equilibrium has been perceived by many as incomplete, limited to a relatively sound balance between fundamental freedoms and human rights of political and civic nature only. The so-called social rights of a welfare state are still widely perceived as subordinate to the fundamental economic freedoms.[41] This conclusion has been reinforced

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[34] This sparked a well-known, but to date still unresolved controversy about the minimum or maximum standard of human rights protection in the Union. See the exchange between Weiler, *supra* note 4, at 9 and Leonard F.M. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 COMMON MKT. L. REV. 629 (1998). Also, for a similar line of arguments opposing the maximalist approach advocated by Besselink, see Von Bogdandy, *supra* note 21, at 1322–23 and Bruno de Witte, *The Role of the ECJ in the Protection of Human Rights, in* THE EU AND HUMAN RIGHTS 881 (Philip Alston ed.).

[35] Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich, CJEU Case C-112/00, 2003 E.C.R. I-5695 [hereinafter Schmidberger].

[36] Omega Spiellhallen und Automatenaufstellungs GmbH v. Bonn, CJEU Case C-36/02, 2004 E.C.R. I-9609 [hereinafter Omega].

[37] Vereinigte Familiapress Zeitungsverlags-Und Vertriebs GmbH v. Heinrich Bauer Verlag, CJEU Case C-368/95, 1997 E.C.R. I-3689.

[38] *See* Schmidberger, *supra* note 35.

[39] *See* Omega, *supra* note 36.

[40] Thorsten Kingreen, *Fundamental Freedoms in Bogdany*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 530 (Armin von Bogdandy & Jürgen Bast eds., 2009).

[41] For a brief overview of the arguments and their critique, see Hans Micklitz, *Three Questions to the Opponents of the Viking and Laval Judgments*, *in* OSC PAPER SERIES (2012).

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since the CJEU rulings in the *Viking*[42] and *Laval* cases.[43] In a nutshell, in those cases the Court held that a trade union's right to a collective action had to give way to the economic freedoms of services and establishment. This has been widely regarded as a confirmation of the EU's general and the CJEU's particular bias in favor of free market policies, resulting in a public order openly tilted against the values of the welfare state. The CJEU has thus been accused of subjecting the European social standards to a race to the bottom, eventually leading to a destruction of Europe's cherished welfare state model.[44]

In terms of the EU public order, this means that while the equilibrium has been reached between the economic and political Europe, there remains disequilibrium between the economic and social Europe. The content of the EU public order and the exact ordering of its constitutive values thus remain contested even in the present value constellation: Between the economic, political and social values.[45] However, what happens when yet another value, that of security, enters the already contested original value equation?

D. Security and Remaking of the EU Public Order

In the last couple of years security has made significant inroads into the EU public order. This has been a result of factors both internal as well as external to the EU. Internally, the common market has resulted in lifting border controls, easing not just the exchange of economic means, but also of potentially criminal activities.[46] The external factors, however, are related to the global security concerns which have escalated since the 9/11 events, especially because of the resurgence of international terrorism. The EU response to the increasing prominence of the value of security in the balance of values constituting the EU public order has been two-fold. But before we study it in some more detail, let us examine the values that security consists of and promotes in the first place.

The answer to this question depends on the approach one takes toward security. A more conservative approach to security—usually associated with the Copenhagen school—posits the state as its object, i.e., as a value of protection.[47] Conversely, a more progressive

[42] Int'l Transp. Workers' Fed'n & Finnish Seamen's Union, CJEU Case C-438/05, 2007 E.C.R. I-10779.

[43] Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, CJEU Case C-341/05, 2007 E.C.R. I-11767.

[44] For an overview and critique, see Micklitz, *supra* note 41.

[45] Weatherill, *supra* note 10, at 13. Weatherill has thus argued that even with the adoption of the Treaty of Lisbon—which shows greater respect for social and cultural concerns—these have remained more rhetorical than real.

[46] *See, e.g.*, Andrew Rettman, *Criminals Exploiting EU Travel Freedoms, Dutch Data Shows*, EUOBSERVER, (2013), http://euobserver.com/justice/119440.

[47] *See* Rhonda Louise Powell, Security and the Right to Security of Person (2008) (DPhil thesis, University of Oxford) (referring to P. Hough, *Security and Securitization*, *in* UNDERSTANDING GLOBAL SECURITY (2004)).

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approach promoted by the Welsh school privileges the protection of individuals over that of the state.[48] Irrespective of the object of protection, it is evident that the values of security are best described as aggregated values of the many. Thus, security may be regarded—not exclusively but certainly primarily—as a collectivist and a utilitarian concept. As an answer to the question of security for what or for whom,[49] the value of security is not an individualized human being, but individuals as members of a group, community, society, or state. Security privileges the protection of the whole rather the protection of its constitutive parts. Its utilitarian character becomes most explicit—as well as controversial—in cases involving clear and present danger to the group, especially in extreme circumstances where individual members of a group might be even sacrificed for its well-being.[50]

With that in mind, let us examine the Union's dual response to security challenges mentioned above. The internal challenges have been treated in a comprehensive and systematic manner through the development of the Area of Freedom of Security and Justice (AFSJ).[51] This comprises three sets of policies: Border control and asylum;[52] police and judicial co-operation in criminal matters, including harmonization of laws in criminal matters;[53] and access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.[54]
While the AFSJ—as follows from its name—emphasizes three core sets of values: freedom, security, and justice, several commentators have pointed out the primacy of security among them.[55] As Monar has argued:

[48] *Id.*

[49] *Id.* at 79.

[50] In general terms this has been known in philosophy as the trolley problem. For the actual cases and more legally specific debates, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], 59 NJW 751, 2006 (Ger.); Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, 7 GERMAN L.J. 733, 761–76 (2006).

[51] Consolidated Version of the Treaty on the Functioning of the European Union art. 67/1, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[52] *Id.* at art. 67/2.

[53] *Id.* at art. 67/3.

[54] *Id.* at art. 67/4.

[55] Sandra Lavenex & Wolfgang Wagner, *Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice*, 16 EUR. SECURITY 225, 229 (2007).

> If one looks at the three concepts of freedom, security and justice together, one can clearly see that security is the main linking element: it is part of the rationale of the justice concept of the AFSJ and at the same time an essential condition of its concept of freedom.[56]

This conclusion is in line with other authors who have warned of the so-called securitization with the very emergence of the AFSJ.[57] An increasing amount of social and political issues have been cast into security language. They were not addressed in the language of the agents involved but immediately put to the binary public order test: threat or no-threat. Any threat would call for a security response.[58] The resurgence of global terrorism has accentuated this trend further, leading to a potential over-securitization of European societies, partly in response to similar security concerns from national states world-wide.[59] As a result, the EU has incrementally been privileging the aggregate security interests over the interests of individuals. The same effect for the individuals' rights and liberties has ensued from the deregulatory process in the common market, described above. As deregulation in the common market has strengthened the aggregate economic interests, so has the AFSJ augmented aggregate security interests.[60] When taken together, their combined outcome appears even more damaging to the individual interests. This is reflected in the *Kadi* case, which is the finest example of the EU response to the external security concerns on a case by case basis.

E. The Case of *Kadi*

The facts of the case date back to 2000 when the UN Security Council adopted resolution 1333 (2000), *inter alia*, calling on all states to freeze without delay funds and other financial assets of Osama bin Laden and individuals and entities associated with him.[61] For that purpose a special UN Sanctions Committee produced a list of individuals and entities suspected of financially aiding and abetting terrorism. The list served as a legal basis for

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[56] Joerg Monar, *The Area of Freedom, Security and Justice*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, at 562 (Armin von Bogdandy & Jürgen Bast eds., 2009).

[57] Lavenex & Wagner, *supra* note 55, at 228.

[58] See Jef Huymans, *The European Union and Securitization of Migration,* 38 J. COMMON MKT. STUD. 5, 751-777 (discussing securitization in the field of migration).

[59] Malcolm Anderson & Joanna Apap, STRIKING A BALANCE BETWEEN FREEDOM, SECURITY AND JUSTICE IN AN ENLARGED EUROPEAN UNION 78 (2002).

[60] Lavenex & Wagner, *supra* note 55, at 226.

[61] S.C. Res. 1333, para. 8c, U.N. Doc. S/INF/1333 (Dec. 19, 2000), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1333(2000).

the so-called smart sanctions against the individuals listed in it. The sanctions ought to be implemented and executed by the UN Member States. The Member States of the European Union decided to implement them on the supranational level by adopting a Council regulation to guarantee their uniform and direct application across the Union.[62] The list of the names of individuals whose funds should have been frozen was annexed to the regulation, authorizing the Commission to add new names if applicable.

In October 2001, Mr. Kadi's name was entered on the Sanctions Committee's list and the said EU regulation was amended accordingly.[63] As a result, Mr. Kadi's funds in the UK were frozen. He claimed that this had been done in violation of his right to a fair hearing, of the right to respect for property, and of the right to effective judicial review.[64] Indeed, Mr. Kadi was included on the list without any formal notice, let alone justification. Furthermore, he was unable to have the Sanctions Committee decision reviewed before an independent international court or tribunal. So he challenged the EU regulation as an implementing measure before the then Court of First Instance (CFI) of the EU. However, this was of little help to him.

While the CFI recognized that all the rights relied upon by Mr. Kadi do enjoy protection under EU law,[65] it found that the supremacy of the UN Charter over the EU law prevented it from providing a remedy to Mr. Kadi. Ruling in favor of Mr. Kadi would result in the invalidation of the contested regulation, leaving the Security Council resolution unimplemented,[66] and the Union in breach of its international obligations.[67] This conclusion could only be altered in the event case the contested regulation was in violation of *jus cogens*, which the CFI denied.[68]

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[62] Initially the Council adopted a Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1) and Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect to the Taliban of Afghanistan (OJ 2000 L 43, p. 1). Following the Resolution 1333/2000, the Council on March 2001 adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, which repealed the previous Regulation No 337/2000. The Regulation (EC) No 467/2001 was repealed by Regulation No 881/2002 leaving, however, the previously established sanctioning regime basically unchanged.

[63] Commission Regulation 2062/2001, 2001 J.O. (L 277) (EC).

[64] Kadi v. Comm'n, CJEU Case T-315/01, para. 136 (Sept. 21, 2005),

[65] *Id.* at para. 209.

[66] *Id.* at para. 204.

[67] *Id.*

[68] *Id.* para. 226, para. 292.

This ruling was reversed on appeal by the CJEU.[69] Taking a less positivistic and formalist approach to international law, the Court—having found Mr. Kadi's rights violated—invalidated the contested regulation. Simultaneously, the Court limited the scope of its ruling by ordering the regulation to stay in effect against Mr. Kadi for three more months.[70] This allowed the Commission to adopt a new implementing measure, putting Mr. Kadi back on the list.[71] A new case was soon brought to what was now the General Court. This time it ruled, albeit reluctantly, in Mr. Kadi's favor.[72] But since the Commission and the intervening parties appealed, Mr. Kadi's name remained on the list. It stayed there until it was finally delisted by the Sanctions Committee in October 2012.[73] The political part of Mr. Kadi's saga thus ended after more than a decade, while the legal epilogue is still anticipated with his case again pending before the Court.[74]

Most academic attention has been devoted to the external dimensions of the case, most prominently the ruling's effect on the legal relationship between the EU and the international law.[75] Much less attention has been paid to the internal dimensions of the case. In particular the question how the ruling affects the balance of public values in the Union and through that impacts the internal structure of the EU public order has been left unexamined. This is unfortunate, for the *Kadi* case represents a great opportunity to study the tension inside the EU value-based equilibrium. It poses a challenge of finding the right balance between the fundamental rights of Mr. Kadi, the fundamental freedoms of the common market, and the requirements of security stemming from the global war against terrorism.

It follows from the case that the value of security was granted priority over Mr. Kadi's fundamental rights. The EU judiciary, except for the initial reluctance of the CFI, did protect Mr. Kadi's rights *de jure*, but in practice, *de facto*, these remained unprotected. Mr. Kadi lacked any tangible legal means to have his name removed from the Sanctions Committee

[69] Kadi v. Commission, CJEU Case C-402/05 P, 2008 E.C.R. para. 380.

[70] *Id.*

[71] Commission Implementing Regulation 933/2012, 2012 J.O. (L 278) (EU).

[72] Kadi v. Commission at para. 197.

[73] *See* Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from its List, U.N. Press Release SC/10785 (Oct. 5, 2012); Commission Implementing Regulation 933/2012, 2012 J.O. (L 278) (EU).

[74] *See* Commission v. Kadi, CJEU Joined Cases C-584/10 P, C-593/10 P & C-595/10 P. (Please note that this paper was finalized before the final decision of the CJEU in the Kadi affair has been handed down).

[75] Most recently, see, e.g., Juliane Kokott & Christoph Sobotta, *The Kadi Case–Constitutional Core Values and International Law–Finding the Balance*, 23 EUR. J. INTL. L. 4*;* Takis Tridimas*, Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments*, 12 CAMBRIDGE Y.B. EUR. L. 455-490.

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list. The pressure mounted by the EU and other courts admittedly led to the establishment of the Ombudsperson, whose formal competences to assist the listed individuals before the Sanctions Committee are very limited.[76] Most importantly, Mr. Kadi's funds remained frozen for more than a decade since the EU judiciary explicitly left room for that.[77] This proves that security has been given at least a *de facto* priority over Mr. Kadi's fundamental rights.

A similar conclusion emerges from the relationship between the value of security and the fundamental freedoms of the common market. The common market played a central role in this case. It provided a legal basis for the adoption of the regulation implementing the UN sanctioning mechanism. According to the Court, the objectives of the protection of the common market required that a sanctioning mechanism of this kind is established as a uniform regulation at Union level, rather than as a collection of unilateral national measures. Unilateral fund-freezing of individuals like Mr. Kadi by every single Member State rather than by the Union acting together could hurt the operation of the common market and distort the competition.[78]

However, this rationale is question-begging for a number of reasons. Firstly, can the objectives of the common market really be relied upon as a legal basis to limit the common market, e.g., of capital and establishment? In other words, can a legal basis be used in a way to defeat its very purpose?[79] Secondly, did the Security Council resolution leave any room for national discretion in the adoption of the implementing measures so that the feared negative consequences for the common market could take place at all? Also, how could potential differences in the implementation measures between Member States hurt the common market more than a uniform regulation, which in relation to individuals such

[76] Louis Charbonneau, *Saudi Man Dropped from U.N. Al Quaeda Sanctions List*, REUTERS, Oct. 5, 2012, *available at* http://www.reuters.com/article/2012/10/06/us-alqaeda-sanctions-un-idUSBRE89501K20121006.

[77] *See* Comm'n v. Kadi, CJEU Cases C-584/10 P, C-593/10 P, and C-595/10 P, 2013 E.C.R. paras. 342-344.

[78] *Id.* at para. 230. As the CJEU explained:

> Such measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right to establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operations although there were no economic reasons for that advantage or disadvantage.

[79] *See id.* at para. 235 (the Court appears to be of such opinion: "[…] that regulation could legitimately be regarded as designed to attain an objective of the Community and as, furthermore, linked to the operation of the common market within the meaning of Article 308 EC").

as Mr. Kadi prohibits any movement of capital and excludes any freedom of establishment? Finally, it would also seem that a ban on an economic activity —required by the contested regulation—rules out any competition, rather than just distorting it as would be the case with disparate implementing measures whose prevention was sought by the Court.[80]

All these questions raised suggest that the common market legal basis was not relied upon genuinely, but only nominally. In fact the common market legal basis was made instrumental to another, yet unstated objective of security. The UN sanctioning mechanism was a security measure *par excellence*, for whose implementation the EU lacked a particular and explicit legal basis. However, the Court failed to acknowledge this and refrained from making not an entirely implausible legal step which would result in the invalidation of the contested regulation already on the grounds of the lack of competence. By (deliberately?) neglecting the security dimension of the case, the Court also did not engage in balancing the common market objectives against security concerns. While the absence of balancing could be interpreted in many ways, it could also signify that the prevalence of security over the objectives of the common market was simply assumed by the Court. Either way, the fact remains that as the Court *de facto* prioritized the value of security over fundamental rights of Mr. Kadi, it did the same against the fundamental freedoms of the common market.

F. Where Do We Stand Now?

The discussion above was designed to illustrate the changing character of the EU public order under the impact of security. So, where does the EU public order stand now? With the intensification of security concerns, the previously two-layered EU public order has seen the emergence of another layer. The EU public order is now composed of three core pillars of EU public values represented by the fundamental freedoms, fundamental rights, and security. The relationship between them is dynamic and growingly complex. It still has a pronounced economic character. Fundamental freedoms of the common market continue to present the backbone of the Union, but the latter has long ceased to be just an economic entity. Its object and purpose have been complemented by the concerns for fundamental rights: civic, political and social. Finally, both fundamental freedoms and fundamental rights have had to accommodate the national, supranational, and global security concerns. This process of accommodation and consequent settlement of the EU public order is still underway. Nevertheless, two trends have so far emerged from it.

First, we have observed gradual predominance of the aggregate values over the values of an individual. This is revealed as one focuses more closely on the exact value objects of protection of the three pillars of EU public values. Fundamental freedoms are economic

[80] *Id.* at para. 230.

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means for the achievement of the economic ends of the common market. Fundamental rights, irrespective of their exact character, are in service of the overall wellbeing of an individual. The system of AFSJ, however, is a means towards the achievement of the national, supranational, and global security ends. Among the three pillars of the EU public values, only fundamental rights posit an individual as its value object of protection, whereas the other two stress the collective (interests): be it of the common market or of the security of the relevant community. To put it differently, while fundamental rights are instrumental to the wellbeing of an individual, this individual is (or can be made) instrumental to the full realization of fundamental freedoms and security.

This trend is rather disquieting because it reveals that the overall constellation of values in the European Union appears to be privileging not an individual, but collective economic and security interests. These are, as already stressed above, of a utilitarian character by their very nature and they tend to turn an individual into a utility of the many. An individual and her fundamental rights thus appear to be already in principle in a subordinate position when compared with the competing values. Through the intensification of the economic and security concerns, typical of times of crises such as ours, the position of an individual is subject to deteriorate even further. The case of Mr. Kadi is an illustrative example of that.

Its analysis has revealed a subtle, but definite prioritization of the value of security by EU institutions, including the Court. This has meant grave consequences for the individual's fundamental rights and it has also adversely affected the common market. On the one hand, several fundamental rights of Mr. Kadi have been suspended for more than ten years. On the other, the fundamental freedoms of establishment and capital movement have been abridged and the common market tacitly instrumentalized, all in favor of security. While the recent evolution of the case before the CJEU—especially in light of the latest General Court's ruling—foreshadowed a possible retreat of security in favor of fundamental rights and fundamental freedoms, the AG Bot's opinion points into the opposite direction. It wastes no time turning security into a paramount value, as part of a globally coordinated prevention of terrorism, and calls for "a highly flexible approach," e. g., for a high degree of deference to the decisions taken by the Sanctions Committee.[81]

If the judicial epilogue to the case is going to follow the AG's opinion, the balance between fundamental rights, fundamental freedoms and security will be significantly decided in favor of the latter. However, already at this stage it is clear that security, prompted both by internal and external concerns, has not only entered the EU public order, but has importantly counterbalanced its pre-existing economic and socio-political values. The EU is definitely no longer a mere economic actor, and it has never been primarily a human rights agent, while it is taking over an increasing number of security competences that used to

[81] Comm'n v. Kadi, CJEU Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, 2013 E.C.R. paras. 3–8.

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belong and were exercised at the level of its Member States. This trend may be irreversible, and because of that, we must ensure that the EU security objectives are achieved in accordance with the law and through an institutional framework that will substantively strike a proportionate balance between both competing and complementing values of fundamental rights and fundamental freedoms.

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