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Author(s): Stephen Coutts

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REVIEW

of Alun Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Ashgate, 2011)

By Stephen Coutts*

* PhD Researcher, Department of Law, European University Institute (Florence).

1. INTRODUCTION

Most work on the Area of Freedom, Security and Justice (AFSJ) is sectoral and concentrates on particular policy areas. Recent years have seen a long overdue move to develop a more theoretical and coherent approach and to assess the potential contribution of the AFSJ as a distinct area of integration to the constitutional and political development of the European Union.¹ *Constitutional Life and Europe's Area of Freedom, Security and Justice* forms part of this general trend to 'theorize' the AFSJ and in doing so attempts to establish a new means of understanding constitutionalism itself. It offers a rich and varied set of methodological tools ranging from hermeneutics, linguistics and moral and ethical theory and constitutes a highly original approach to the AFSJ and constitutionalism itself. However in adopting such a variety of perspectives it engages in theoretical detours that detract from the argumentative clarity necessary to meet its ambition.

2. SUMMARY

The main aims and objects of study are first introduced. The author is prompted by certain developments, in terms of policy expansion, institutional structure and critical commentary to 'think constitutionally' about the AFSJ. However in doing so he arrives at a classic problem of constitutionalism in the European Union legal studies – the novelty of the EU as a political entity and its lack of a distinctive political community or other source of sovereignty that might justify and legitimise its activities. Considering legitimacy, Gibbs is sceptical about conceiving it solely as a 'deliverable good' – produced through techniques and procedures. Such an approach ignores the more fundamental publicness of legitimacy and its relationship to 'constitutional life', a problem that is thrown into sharp relief by developments in the AFSJ. Thus from considering the AFSJ constitutionally we are led to reflect on the nature of constitutionalism itself.

In chapter two the author attempts a reworking of 'constitutionalism' itself by introducing the notion of 'constitutional life' and relating it to 'legitimacy'. For Gibbs traditional constitutional thought is too concerned with establishing legitimacy by techniques of *constraining* power rather than the prior question of *founding* power that he terms the ontological question. In seeking to avoid a Schmittian 'state of exception' he turns to classic Roman notions of '*auctoritas*' and the historic experience of the American revolution and the founding a constitutional document based on 'commitments to rightness over time.' Legitimacy it would seem is therefore based not (only) on a historic act of foundation but is an on-going process of engagement, deliberation, reflection and ultimately transformation of those original commitments. Such an engagement takes place through the medium of language and it is here that hermeneutics is employed in a rather lengthy and technical exposition of Gadamer's 'fusion of horizons'. By such a meaningful engagement the distinction between subject (the individual) and object (constitutional commitments) is collapsed or at least blurred and both undergo transformation. Thus

¹ See Hans Lindahl (ed) *A Right to Inclusion and Exclusion? Normative Faultlines in the EU's Area of Freedom, Security and Justice* (Hart 2009). For a notable earlier attempt see Neil Walker (ed) *Europe's Area of Freedom, Security and Justice* (OUP 2004), in particular the thorough assessment of the introduction, Neil Walker, 'Introduction: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (OUP 2004).

the common commitments which are inherently valuable and participation in disclosing their meaning, which changes over time is the basis of constitutional life [...] in this way the hermeneutic understanding of the question of constitutional legitimacy strikes a different note to those which area conventionally adopted in constitutional theory.²

The author conceives such constitutional commitments over time as ‘constitutional public goods’. Gibbs therefore takes up the notion of ‘public goods’ and attempts to adapt this term for use in the type of constitutionalism he proposes. Thus classic ‘public goods’, as originally developed in the literature of economics, are termed ‘instrumental’. They are not valuable in themselves, or even inherently public but rather serve the interests, however aggregated, of individuals. Similarly their ‘publicness’ is not inherent but is contingent on the effectiveness of their delivery as public. Opposed to this instrumental type of public goods Gibbs outlines a theory of ‘constitutional public goods’. That is those goods where:

the relationship between “good” and “public” [is] one of meaning rather than cause...by addressing public as inherently valuable and not just because it delivers, through its institutional structures, goods which are needed by individuals. It [the constitutional public good] must be valued intrinsically as the site where we involve ourselves as constituting the “good” as a “good”. In such a way the “public” is a site where meaning is constituted³

It would seem that ‘public’ and the role we ascribe to the term ‘public’ is what distinguishes instrumental from constitutional public goods. However the ‘publicness’ of a good is not something that stands alone, independent from the actions of individuals. Rather it is the agency of individuals, a particular form of engagement and participation in shaping the meaning of these goods, that makes them ‘public’ in this constitutional sense and hence the foundations of ‘common commitments’.

In outlining exactly what this engagement might entail Gibbs turns to theories of linguistics (primarily of Saussure) and their application to political philosophy by Charles Taylor. As with language where our involvement with the social practice through individual acts further shapes the meaning and hence content of that social practice, our continued engagement with ‘constitutional commitments’ is both drawn from a pre-existing social understanding of those commitments and helps to shape them for the future. Similarly as with language the very act of engagement with the social practice modifies the individual actor involved. However language and linguistics is not used simply as an analogy in Gibbs’ analysis. Rather ‘constitutional life’ (as he terms this continuous engagement) is itself a linguistic practice. Our public life, as expressed through the linguistic practice of constitutional life, enjoys a permanently open-ended quality. And while goods, such as security, freedom and justice, may be both instrumental and constitutional it is important to ensure that their instrumental character is shaped and limited by our engagement with their collective meaning through treating them as constitutional public goods.

Gibbs now moves on to applying this theory to the AFSJ itself and introduces the topic by an abstract consideration of security as a public good. Security, we are told, is a ‘super public good’ – one that to some extent acts as a prerequisite for all other public goods. Relying on Foucault Gibbs describes security as being at the heart of the modern state and its attendant ‘governmentality’. Yet its very necessity to the conditions of modern social and political life

² Alun Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Ashgate 2011), 43.

³ *ibid* 53.

and its role in governance mean that it is potentially an inherently instrumental public good rather than constitutional. Security is provided to (and indeed acts upon) passive individuals thereby potentially excluding the possibility of individual agency and participation needed to constitute it as a 'constitutional public good'. This is particularly the case where security as a discourse becomes increasingly dominant. Thus 'we potentially encounter the paradox of security in its fullest sense: the need to deliver security becomes more paramount than the political life which must under-grid its own meaning'⁴ We are rescued from this paradox by the work of Loader and Walker, *Civilising Security*,⁵ that draws out the inherently social nature of security, or more accurately our construction and hence experience of it as inherently social. Such a view of security necessarily implies a degree of reflection and hence reflexivity on the part of individuals. Security experienced reflexively may (it is never quite made clear if it is in fact sufficient) constitute a constitutional public good as such. This reflection, in the form of critical engagement, may indeed hold the key to restraining an overly instrumental (and hence repressive) deployment of a security discourse.

Such an overly instrumentalised construction of security lies at the heart of the construction of the EU as an *area* of freedom, security and justice. The dominance of security is an oft-told story in discussions of the AFSJ,⁶ and Gibbs applies this critique to the means by which the AFSJ constitutes an 'area' as such. It is through security, in particular a security overly focused on technology and operational practice, that the common area is constructed. This instrumentalised vision of security is therefore overshadowing, supplanting or even 'reconfiguring' our understanding of freedom. Furthermore a look at the manner in which internal political actors, notably the Council and Commission view the constitutional dimension of the AFSJ, reveals a classic concern with restraining power rather than addressing the more fundamental question of the ontology of constitutional authority.

A thoughtful discussion follows on the role of the Union in criminal law and in particular criminal procedural cooperation. Identifying the link between mutual recognition and the presupposition of mutual trust, Gibbs provides an insightful discussion of this rather ambiguous concept as it is employed in the AFSJ. Using the case studies of the European Arrest Warrant⁷ and the application of the *ne bis in idem* principle we are introduced to the role that criminal law may play in supporting and reflecting the political community by drawing out a relational vision of criminal law as described by Foqué. Criminal law is moved beyond an instrument of (mere) coercion to reflect how we relate to each other and our common commitments. An increasing emphasis on measures designed to reinforce 'mutual trust' and the language of the Stockholm programme offer some hope in the eyes of the author that the AFSJ may be moving in this direction. However he also cautions against adopting a purely operational or instrumental vision of mutual trust such that it 'eclipse[s] the more complex and difficult understanding of political trust.'⁸

⁴ *ibid* 72.

⁵ Ian Loader and Neil Walker, *Civilizing Security* (CUP 2007).

⁶ See Dora Kostakopoulou, 'The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited* (OUP 2007) who speaks of a 'discursive chain of freedom, security and justice [leading to] the emergence of a value laden hierarchy, whereby security was promoted at the expense of freedom' on p 174f. See also Sionaidh Douglas-Scott, 'The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice' (2004) 29 *EL Rev* 219.

⁷ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

⁸ Gibbs (n 2) 124.

In the conclusion Gibbs moves from the particulars of the AFSJ back to the generalities of 'constitutional life'. Departing from the premise that 'at root the EU employs an understanding of security that is intended to offer the basis, or grounding, for the constitutional legitimacy of the activities of the AFSJ'⁹ he calls for a reinvigoration of the 'language of constitutionalism by which we can confront the meaning of territory, authority, belonging, participation and the commitments for the sake of which we come together as a political peoples.'¹⁰ And while efforts to increase and improve popular participation in the European political processes should not be dismissed, these purely institutional measures are not, in themselves, sufficient. Indeed to the extent that they mask the underlying problem, they may in fact be damaging. Rather we must engage in a process of *learning* constitutional life and developing 'the disposition to be involved in the very activity of collective life.'¹¹ Such a disposition consists of a number of elements namely an openness to its transformative nature, humility, mutuality and lastly restfulness.

3. COMMENT

Constitutional Life in Europe's Area of Freedom, Security and Justice is an ambitious work dealing with matters of both theory and practice. As such it is to be welcomed as part of the general trend to explain and consider the AFSJ as whole rather than its constituent parts. It attempts to theorise both the AFSJ and 'constitutional life' itself. However unfortunately in attempting both it succeeds fully at neither.

In discussing constitutional life, Gibb's draws a distinction between the two roles of constitutionalism; the foundation of legitimate political power (what he terms the ontological problem) and the on-going legitimate exercise of political power and its restraint. 'Constitutional life' is intended to address the first of these functions, the foundation of legitimate political power, through a discursive practice whereby common commitments are entered into and continuously renewed and transformed. To look at constitutionalism through a discursive lens is a fresh perspective in the context of the AFSJ.¹² The problem arises when attempting to import a discussion on 'public goods' into this discursive practice of 'constitutional life'.¹³ His argument here seems to be that as such goods are public and understood socially they somehow become necessarily constitutional in his sense of 'constitutional life'. At least the practice of publicly deliberating on their common understanding gives them a constitutional character, an argument that amounts to stating that an evolving, common understanding of a particular policy through public discourse is, in and of itself, constitutional. However in doing so it perhaps conflates the constitution and constitutional values with the political community and its on-going politics.

Naturally the two are related and difficult to disentangle. However, unfortunately Gibbs seems either unaware of the problem or unable to solve it. A common understanding of matters of general concern and a communal practice in creating and continuously modifying that understanding are all conditions for a political community; itself a prerequisite for the foundation of legitimate power and therefore a constitution. Similarly the conditions laid

⁹ *ibid* 127.

¹⁰ *ibid* 128.

¹¹ *ibid* 133.

¹² If not necessarily generally for example Habermas theory of constitutional patriotism is explicitly concerned with developing certain discursive practices. Furthermore he has applied this to the problem of founding a legitimate polity see ex. Jurgen Habermas, 'On the Relation between the Nation, the Rule of Law and Democracy' in Jurgen Habermas (ed), *The Inclusion of the Other* (MIT Press 1998).

¹³ A move that one assumes became necessary in the context of a discussion on 'freedom', 'security' and 'justice'.

down by a constitution provide the framework for and shape any continuing discussion of those original commitments. Such a discourse is expressed or contextualised in matters of high (and sometimes low) politics. Furthermore a continual discussion of constitutional values and institutions and how they are understood is essential to a healthy political community. After all it is true that we speak of ‘constitutional politics.’

Politics and a political community are therefore prerequisites for a constitution and are subsequently shaped by a constitution. The question raised by Gibbs is whether the practice of politics itself (albeit on an abstract level) can be equated to constitutionalism? If it can be then what is the purpose of such a distinction? Gibb’s would possibly have been better served in identifying more clearly why public goods fall into the category of the constitutional rather than the political or alternatively to refute the very distinction between the constitutional and political. As it stands the work at best argues for a more thoughtful deliberation and treatment of the politics of security (and to some extent immigration) in the EU and considering them in the context of the Union as a political community. It might therefore be seen as call for a common European political discourse on the meaning of security and thereby found a common political community. Though this process we may certainly discover common constitutional values. Indeed such a constitutional dimension may be inevitable given the nature of the subject matter. The link to constitutionalism is certainly there, but it is indirect and not clearly identified by the author. Instead obtuse and overlong discussions on ethics, linguistics and hermeneutics obscure the central question of how deliberation of matters of public concern translate into constructing what might be termed the constitution of the Union.

Similarly the work fails to identify exactly what the author considers the nature of the AFSJ to be, what role it plays in our understanding of the Union as a constitutional and/or political project (accepting that there might be an overlap or a connection between the two) and lastly what implications we might draw from such an understanding for the future construction of the AFSJ. There does seem to be a broad concern with a deeper engagement on behalf of the public with the AFSJ and the possible meanings it might have and the hope that this engagement itself may lead to restraint on public power. However arguing for a greater balance between ‘freedom’, ‘justice’ and ‘security’ is hardly a novel normative position and one does not need to appeal to theories of hermeneutics in order to be convincing, classic constitutional theories being perfectly serviceable. From a descriptive level there is no evidence provided that greater public discourse on matters of public security will lead to restraint on behalf of the state. On the contrary populist reactions to exaggerated perceived threats may have the opposite result. Having said that, there are some good discussions on particular policy fields of the AFSJ. The discussion on the instrumental treatment of the AFSJ as a territorial construct and the potential of criminal law in reflecting and possibly constituting a political community are instructive and worthwhile. Furthermore as becomes increasingly evident, the work is more concerned with constitutional thought than with the AFSJ itself. In fact the AFSJ is employed as an interesting case study justified by its peculiar non-state character despite covering policy fields that traditionally lie at the core of state sovereignty. Given its status as a case-study (albeit a case study that is treated throughout) rather than the focus of the work the failure to give a satisfactory account of the AFSJ should not be criticised too harshly. Nonetheless the limits of the analysis in terms of the AFSJ itself could have been more clearly identified.