CENTRE FOR EUROPEAN RESEARCH & EDUCATION
FACULTY OF LAW UNIVERSITY OF PÉCS

Vol. 2024/I

PJIEL

Pécs Journal of International and European Law

The on-line journal of University of Pécs - Centre for European Research and Education
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PJIEL { Pécs Journal of International and European Law

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Table of Contents

EDITORIAL: In this Issue 4

SANDRA FABIJANIĆ GAGRO, MARISSABELL ŠKORIĆ: Violence against Women: Challenges in Fulfilling the 2030 Agenda for Sustainable Development and the Implemetaion of the 2011 Istanbul Convention in the Republic of Croatia 5

NGUYEN THI QUYNH: A comparison study of liability of the carrier in the International Conventions on the Carriage of Goods by Sea 30

JUDIT TÓTH, ERZSÉBET KARDOSNÉ KAPONYI: Homo Digitalis in the EU and in Hungary 48

NGUYEN THI KIM CUC: Fundamental Rights in the AFSJ: Strenthening or Impediment? 71

STJEPAN NOVAK: Constructive Absence: A Hungarian Maneuver or a New Institution of EU Law? 91

MÁTYÁS KISS: Christopher Whyte and Brian M. Mazanec: Understanding cyber warfare. Politics, Policy and Strategy. Second edition. Routledge, 2023. 104

Editorial

https://doi.org/10.15170/PJIEL.2024.1.1

In this issue

The editors are pleased to present issue 2024/I of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

In the *Articles* section, Sandra Fabijanić Gagro and Marissabell Škorić undertake an analysis of the implementation of the Istanbul Convention in the Republic of Croatia in light of SDG-5. Nguyen Thi Quynh provides a comparative study of carrier liability in international conventions on the carriage of goods by sea. Judit Tóth and Erzsébet Kardosné Kaponyi elaborate on the concept of a 'homo digitalis' in light of relevant EU and Hungarian legislative (and societal) developments. Nguyen Thi Kim Cuc looks at how the protection of fundamental rights corelates with the objectives of the EU's Area of Freedom, Security and Justice.

In the *Case Notes and Analysis* section, Stjepan Novak reflects on constructive absence in the decision-making process of the European Council, drawing broader conclusions from the practice as recently employed by Hungary.

In this issue's *Book Review*, Mátyás Kiss provides an evaluation of the second edition of Understanding Cyber Warfare. Politics, Policy and Strategy, published by Routledge in 2023.

As always, a word of sincere gratitude is due to the anonymous peer reviewers of the current issue.

As always, we encourage the reader to consider the PJIEL as a venue for your publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and EU law issues.

Violence against Women: Challenges in Fulfilling the 2030 Agenda for Sustainable Development and the Implemetaion of the 2011 Istanbul Convention in the Republic of Croatia

Sandra Fabijanić Gagro*
Marissabell Škorić **

https://doi.org/10.15170/PJIEL.2024.1.2

Contents

I. INTRODUTION....6
II. JUST HOW SUCCESSFUL IS THE IMPLMENTATION OF SDG 5?—REVEALING FIGURES....9
III. INTERNATIONAL LEGAL FRAMEWORK FOR VIOLENCE AGAINST WOEN....13
IV. GREVIO RECOMMENDATIONS FROM THE BASELINE EVALUATION REPORT ON THE IMPLEMENTATION OF THE ISTANBUL CONVENTION IN CROATIA....19
1. Preventive maes.... 20
2. Victim protection measures and provision of support services.... 22
3. Incrimination of various forms of violence against women.... 24
4. Integrated policies at the state level.... 26
V. CONCLUSION....28

Abstract

Year 2024 marks the tenth anniversary of the entry into force of the Istanbul Convention on preventing and combating violence against women and domestic violence. At the same time, the world has just passed the halfway point in the implementation of the Sustainable Development Goals (SDGs), which are enshrined in the 2030 Agenda for Sustainable Development. By comparing the re-

sults of both instruments, this paper aims to highlight current trends in universal and national efforts to combat violence against women. Based on the premise that violence against women, is unfortunately, still pervasive and can occur anytime and anywhere, this paper addresses three main topics: 1) the fundamental challenges for strengthening gender equality and women's empowerment in combating violence against women globally and the current results of the implementation of SDG 5; 2) the contribution of key international documents; and 3) the assessment of the implementation of the 2011 Istanbul Convention in the Republic of Croatia through the comments of the recent GREVIO report.

Keywords:gender-based violence against women, 2011 Istanbul Convention, GREVIO, Croatia, 2030 Agenda for Sustainable Development, SDG 5

I. INTRODUCTION

In September 2015, the United Nations adopted the document entitled Transforming our World: The 2030 Agenda for Sustainable Development (Agenda or 2030 Agenda).[1] As a blueprint for a better and more sustainable future, it addresses the most important challenges of mankind. Throughout the 17 Sustainable Development Goals (SDGs) and the 169 related targets, the Agenda is committed to a safe, healthy, and sustainable world capable of overcoming climate change, pollution, security and economic challenges, ineffective institutions, poverty, hunger, discrimination, gender inequalities, etc.

Gender equality and the empowerment of women are explicitly mentioned in Goal 5, which covers a wide range of topics that aim to a) end all forms of discrimination against women and girls (Goal 5.1.); b) eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation (Goal 5.2.); c) eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation (Goal 5.3.); d) recognise and value unpaid care and domestic work through the provision of public services, infrastructure, and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate (Goal 5.4.); e) ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic, and public life (Goal 5.5.); and f) ensure

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[1] GA Res. 70/1, 25 September 2015. (2030 Agenda).

universal access to sexual and reproductive health and reproductive rights (Goal 5.6.).

Given that gender equality and women's empowerment lie at the heart of all the commitments enshrined in the Agenda, the conclusion that the international community recognises them not as stand-alone aspirations but as cross-cutting goals of sustainable development in general,[2] is not surprising. Therefore, bridging the gender gap by systematically integrating a gender perspective into the implementation of the Agenda, combating discrimination and violence against women, and increasing support for institutions for gender equality and women's empowerment (at all levels) is essential.[3]

Violence against women is considered as part of the concept of gender-based violence. It refers to "violence directed against a person because of that person's gender, or violence that affects persons of a particular gender disproportionately."[4] It is an expression of historically unequal power relations between men and women, deeply rooted in gender-related factors, such as the societal norms of masculinity, the need to exert male control or power, discourage or punish female behaviour deemed unacceptable, etc.[5] In most cases, violence against women takes place in the domestic (family) environment in the form of physical, psychological, economic or sexual abuse by male (current or former) intimate partners, as its "the most challenging dimension."[6] As perceptions and behaviours are shaped from an early age and interpersonal relationships within the family, domestic violence and the perception of women as inferior or subordinate to men have devastating and long-lasting consequences for the society in general.

Despite the differences between societies and although the extent and forms of discrimination vary from one part of the world to another, its challenges and

[2] Input by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) to the 2022 High-Level Political Forum on Sustainable Development (HLPF), 6 April 2022. (CEDAW Committee Input 2022). para. 2.

[3] 2030 Agenda, para. 20.

[4] 'What is gender-based violence' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en> accessed 5 April 2024. (European Commission, 'What is gender-based violence').

[5] 'CEDAW General Recommendation No. 35: Gender-Based Violence Against Women, Updating General Recommendation No. 19' (*CEDAW,* 2017) para. 19. (CEDAW General Recommendation No. 35).

[6] 'SIGI 2023 Global Report: Gender Equality in Times of Crisis: Discrimination is the Highest within the Family Sphere at the Global Level' (*OECD*) <https://www.oecd-ilibrary.org/sites/4607b7c7-en/1/3/2/index.html?itemId=/content/publication/4607b7c7-en&_csp_=a6be4df33c99961512705b97977ea566&itemIGO=oecd&itemContentType=book#section-d1e4393-1e810585d2> accessed 5 April 2024 (SIGI 2023 Global Report).

roots are similar or even the same. Apart from deeply rooted traditional, religious or social norms, harmful practices against women can also be the result of discriminatory laws or the lack of comprehensive laws and effective institutions to protect women and punish perpetrators. Discriminatory laws affect women's lives, their position in the household, right to marry or apply for divorce, right to inherit on an equal basis with men, etc.[7] An astonishing 55% of countries lack laws that explicitly prohibit direct and indirect discrimination against women.[8] As it stands, it will take an estimated 286 years to eliminate gender gaps in legal protection and abolish discriminatory laws.[9] An estimated 40% of women and girls live in countries where the level of discrimination in social institutions is classified as high or very high.[10] The absence or inadequacy of services to which victims can turn (*e.g.* women's shelters or rehabilitation services, legal, psychosocial and economic support, etc.)[11] or significant cuts in public spending as part of 'austerity measures' during financial or other crises,[12] can weaken existing public policies. A lack of knowledge about protection laws and measures can pose an additional challenge.[13] All of these factors contribute to the prevalence of gender-based violence against women and consequently lead to a culture of impunity. The fact that certain crimes and assaults go unreported (and perpetrators unpunished) creates a major problem for the long-term healing and rehabilitation of women. Therefore, violence against women can be seen as one of the most important social mechanisms of discrimination.[14] At the same time, its social 'acceptance' is a major obstacle to achieving SDGs.

This article is divided into three main parts. The first part explains the fundamental challenges for strengthening gender equality and women's empowerment in combating violence against women worldwide in line with the commitments of the 2030 Agenda. Based on the premise that violence against women requires a strong and effective legal framework at both national and international levels, the second part elaborates on the contribution of the most important international documents. The third part deals with the specific aspects of the implementation

[7] European Commission, 'What is gender-based violence'.

[8] Therefore, one of the priority actions for 2025 is the adoption of laws and emergency plans to prevent and eliminate violence against women and girls. 'The Sustainable Development Goals Report 2023: Special edition Towards a Rescue Plan for People and Planet' (*DESA,* 2023) 23, 51 (The Sustainable Development Goals Report 2023).

[9] Report of the Secretary-General 78/80, 27 April 2023. para. 4. (Report of the Secretary-General 2023).

[10] SIGI 2023 Global Report.

[11] 'Manual on Human Rights Monitoring: Monitoring and Protecting the Human Rights of Women' (*OHCHR,* 2011) 4, 5. (OHCHR Manual 2011).

[12] CEDAW General Recommendation No. 35, para. 7.

[13] OHCHR Manual 2011, 4, 5.

[14] GA Res. 48/104, 20 December 1993.

of SDG 5.2 at the national level, taking into account the international document referring exclusively to violence against women and the efforts and challenges of the state concerned to fulfil the demands contained therein. Therefore, the evaluation of the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[15] in the Republic of Croatia and the resulting GREVIO report[16] are the focus of the third part of this paper.

II. JUST HOW SUCCESSFUL IS THE IMPLEMENTATION OF SDG 5?—REVEALING FIGURES

Given past and current challenges, support for Goal 5 could be seen as crucial for the remaining time in implementing SDGs. Unfortunately, on the halfway point in their implementation most of the indicators of Goal 5 are unlikely to be fulfilled; numbers reveal quite disturbing facts. Only 15.4% of the Goal 5 indicators for which data is available are 'on track'; 61.5% are moderately far away, and 23.1% are far or very far off from the targets.[17] Crises of various kinds, humanitarian emergencies caused by armed conflicts, natural disasters or the destruction of natural resources always exacerbate the existing situation on the ground. As it stands, one in 10 women live in extreme poverty (10.3%). It is estimated that by 2030, 8% of the world's female population—342.4 million women and girls—will still be living on less than 2.15 USD per day.[18] Global hunger is at

[15] 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No 210. The Convention was adopted in Istanbul on 11 May 2011, and entered into force on 1 August 2014. By April 2024, 39 states ratified the Convention, including 22 EU member states (out of 27, whereby in Latvia, the Convention will enter into force in May 2024) and the European Union itself. On the issue of whether the European Union can ratify a Convention that all its members have not previously ratified and what the effects of such ratification are, the Court of Justice of the European Union expressed its view in the opinion from October 2021. For details, see Case Avis 1/19 Opinion of the Court. Within the European Union, a political agreement between the European Parliament and the Council of the European Union on the Directive on combating violence against women and domestic violence was reached in February 2024. The Directive will be the EU's first comprehensive legal instrument to combat violence against women. It will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union (art. 51). For more see 'Commission welcomes political agreement on new rules to combat violence against women and domestic violence' (*European Commission Press Release,* 6 February 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_649> accessed 5 April 2024.

[16] 'GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Croatia (2023)' (*GREVIO,* 6 September 2023).

[17] The Sustainable Development Goals Report 2023, 22.

[18] Ginette Azcona and others, 'Progress on the Sustainable Development Goals – The Gender Snapshot 2023' (*UN Women and United Nations Department of Economic and Social Affairs,* 2023) 8.

its highest since 2005;[19] if current trends continue, one in four women will be at risk of moderate or severe food insecurity by 2030.[20] By 2050, in the worst-case scenario, the consequences of climate change could lead to up to 158.3 million more women worldwide being pushed into poverty.[21]

Violence against women is omnipresent—it can happen anytime and anywhere. Data on violence against women are often disturbing and there is a real concern that the figures presented do not reflect the reality on the ground. The difficulties associated with measuring violence against women (*e.g.* the fear of retribution and the lack of resources to escape) mean that the prevalence of violence against women is likely to be underreported.[22] Data on the prevalence of sexual violence against women are particularly worrying. At the global level, reports on sustainable development indicate that the number of cases of this form of violence is not decreasing; in recent decades, an average of one in three women have been affected by some form of violence from an intimate partner. In 2000, 35% of women between the ages of 15 and 49 worldwide who had ever had a partner were subjected to physical and/or sexual violence. By 2018, these figures had fallen to 31%. Nevertheless, an estimated 245 million women are victims of physical or sexual violence by an intimate partner every year.[23] In absolute terms, this means that, at some point in their lives, more than half a billion girls and women have experienced some sort of violence perpetrated by their partners.[24] Around 88,900 cases of female homicide were registered in 2022; approximately 48,800 women were killed by an intimate partner or other family members.[25]

Gender-based violence against women is the result of deeply rooted historical and traditional differences in the social, religious, economic or other status of women and men. Data collected in 2022 from 119 countries reveal inequalities in marriage and divorce in almost a quarter of countries. Despite some progress, the marriage of girls under the age of 18 is far from being eradicated. In three-quarters of countries, the minimum age for marriage is below 18 years. One in five women (19%) is married off before age 18. Although some progress

(Progress on the Sustainable Development Goals 2023).

[19] Report of the Secretary-General 2023, para. 5.

[20] The Sustainable Development Goals Report 2023, 9.

[21] Progress on the Sustainable Development Goals – The Gender Snapshot 2023, 22.

[22] SIGI 2023 Global Report.

[23] The Sustainable Development Goals Report 2023, 14, 23.

[24] SIGI 2023 Global Report.

[25] Angela Me and others, ‚Gender-related Killings of Women and Girls (Femicide/Feminicide): Global estimates of female intimate partner/family-related homicides in 2022' (*United Nations Office on Drugs and Crime and UN Women,* 2023) 8.

has been made,[26] it is not efficient enough. As it stands, it will take an estimated 300 years to abolish child marriage. According to data collected in 68 countries for the period 2007-2022, only 56% of women between the ages of 15 and 49 have been able to make decisions about their sexual and reproductive health and rights.[27] Around 12 million women have been affected by contraceptive dysfunction during the COVID-19 pandemic, the result of which is 1.4 million unwanted pregnancies. Harmful practices such as female genital mutilation also increased during the pandemic.[28] Female genital mutilation affects more than 200 million women, including at least 44 million girls under the age of 15. Around 600,000 women affected by female genital mutilation live in Europe.[29] It is estimated that the disruption of services during the COVID-19 pandemic could lead to 2 million more cases of female genital mutilation over the next ten years worldwide.[30]

The level of gender-based violence has unfortunately increased and intensified during COVID-19, triggering a 'shadow pandemic'.[31] Mandatory lockdowns kept victims of domestic violence trapped in their homes with their abusers, isolating them from resources that could help them.[32] Tensions raised by confinement, poor housing conditions, homeschooling, and changes in daily routines have undoubtedly affected the full and long-term implementation of relevant SDGs, including those connected with Goal 5. In 2020, women with children spent an average of 31 hours per week on childcare—five hours more than be-

[26] 25 years ago, one in four women (25%) was married off under the age of 18. Between 2019 and 2023, 21 countries enacted legislative reforms to combat child marriage. As a result, six countries have raised the minimum age of marriage for girls to 18, 13 countries have abolished the legal exceptions, and two countries have done both simultaneously. 'Is an End to Child Marriage within Reach?' (*UNICEF,* 5 May 2023) 3. See also SIGI 2023 Global Report.

[27] The Sustainable Development Goals Report 2023, 22-3.

[28] 'Global Sustainable Development Report 2023: Times of Crisis, Times of Change: Science for Accelerating Transformations to Sustainable Development' (*UN,* 2023) 12. (Times of Crisis, Times of Change 2023).

[29] 'International Day of Zero Tolerance for Female Genital Mutilation: Commission calls to end this crime, which violates human rights' (*European Commission,* 3 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_563> accessed 21 April 2024.

[30] Times of Crisis, Times of Change 2023, 12.

[31] 'Measuring the Shadow Pandemic: Violence against Women during COVID-19' (*UN Woman,* 2021).

[32] As the rise of the pandemic had put pressure on healthcare systems worldwide, resources had been diverted from other services (*e.g.* shelters for victims of violence against women or telephone helplines). At the same time, there were significantly more registered calls to emergency services about violence against women in 2020. 'Women as Leading Forces for the Achievement of the Sustainable Development Goals in the post-COVID-19 World' (*CEDAW,* 2021) 2. (CEDAW Women as Leading Force); Times of Crisis, Times of Change 2023, 12.

fore the pandemic.[33] When schools and preschools closed during COVID-19, women took on the majority of childcare, and nearly 60 % of countries took no steps to compensate for this increase in unpaid work. As a consequence of the pandemic, by the end of 2020, 1.7 times as many women as men were excluded from the labour market (321 million women compared to 182 million men).[34] It is estimated that, in 2022, due to the increasing pressure of unpaid care work, more than 2 million women left the workplace.[35]

The inequality between women and men is particularly evident in leadership positions and political representation. While women made up almost 40% of employees, they were only represented in 28.2% of managerial positions in 2021. That is particularly visible in the healthcare sector, where they comprise 70% of the workforce. Progress in increasing the proportion of women in managerial positions has been slow, with only a 1% since 2015. At the current rate, it would take more than 140 years to achieve gender parity in management positions.[36] Similarly, the overall share of women in the lower and single chambers of national parliaments reached 26.5%, which makes a slight improvement of 4.2% since 2015 but an average annual increase of only 0.5%. If these figures are compared over the last three decades, progress is slow but visible (*e.g.* in 1995, only 11.3% of all national parliamentarians were women). In 2023, women held 35.5% of local government seats, compared to 33.9% in 2020. If current trends continue, it will take more than almost five decades (47 years) to close the gender gap in national parliaments and three decades to achieve the same at the local level.[37]

In part, these figures can be seen as the result of the educational structure of societies. Even though overall access to education is increasing, in some parts of the world, women's right to education and life-long learning continue to be undermined by legal, social, security, religious, financial and other barriers. The disturbing situation of women in Afghanistan, who are deprived of education and are not allowed to receive any education beyond elementary school, is at the centre of worldwide attention. An estimated 80% (2.5 million) of Afghan girls and young women do not attend school. Around 100,000 female students are affected by the subsequent suspension of higher education for women.[38] In

[33] Even before the pandemic, women spent around three times as many hours on unpaid domestic and care work as men in the course of an average day. 'Whose Time to Care: Unpaid Care and Domestic Work during COVID-19' (*UN Women,* 2020) 1.

[34] ibid 8.

[35] Times of Crisis, Times of Change 2023, 12.

[36] CEDAW Women as Leading Force, 1-2.

[37] Times of Crisis, Times of Change 2023, 12.

[38] 'Women in Afghanistan: From almost everywhere to almost nowhere' (*UN Women,* 2023).

2022, 32.1% of young women aged 15 to 24 worldwide were not in education, employment or training, compared to 15.4% of young men.[39] It is estimated that between 84[40] and 110[41] million girls around the world will be out of school by 2030.

The statement that there is no progress and no development without the realisation of women's rights[42] can be readily agreed with. Women—equal to men in their rights—could be seen as "the driving force of sustainable development,"[43] as envisioned in the 2030 Agenda. Equal access to quality education, economic resources, political participation, and equal opportunities for women in employment, leadership and decision-making should become a reality. Unfortunately, as it seems now, the 2030 Agenda could "become an epitaph for a world that might have been."[44] However, despite disturbing figures, the Agenda remains the overarching roadmap for achieving sustainable development and overcoming the current global crisis. Several UN assessments and academic studies have shown that SDGs remain financially and technically feasible.[45] Strengthening effective national policies, successful political leadership, comprehensive policy reforms, enforceable legislation and, where appropriate, international support remain prerequisites for achieving these goals.

III. INTERNATIONAL LEGAL FRAMEWORK FOR VIOLENCE AGAINST WOMEN

The concept of 'violence against women,' as defined in several international documents, emphasises the fact that this type of violence is gender-based. Gender-based violence against women is a form of discrimination that seriously prevents women from enjoying rights and freedoms based on equality with men.[46] The term discrimination against women was introduced in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as "any distinction, exclusion or restriction made based on sex which has the

[39] Progress on the Sustainable Development Goals – The Gender Snapshot 2023, 11.

[40] Report of the Secretary-General 2023, para 4.

[41] Progress on the Sustainable Development Goals – The Gender Snapshot 2023, 11.

[42] 'Contribution to the 2030 Sustainable Development Goals in response to a call for inputs by the High-Level Political Forum on Sustainable Development (HLPF)' (*UN,* 27 April 2018) 1.

[43] CEDAW Committee Input 2022, para 2.

[44] Paraphrasing words from UN Secretary-General António Guterres: "Unless we act now, the 2030 Agenda could become an epitaph for a world that could have been." The Sustainable Development Goals Report 2023, 2.

[45] Guillaume Lafortune and others, 'European Elections, Europe's Future and the SDGs: Europe Sustainable Development Report 2023/24' (*Dublin University Press,* 2024) 2.

[46] 'CEDAW General Recommendation No. 19: Violence against women' (*CEDAW,* 1992) para. 1. (CEDAW General Recommendation No. 19).

effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, based on equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[47]

It is worth noting that CEDAW does not specifically refer to the terms 'gender-based violence' or 'violence against women.' However, according to the CEDAW Committee's General Recommendation No. 19 (1992), the definition of discrimination within CEDAW includes gender-based violence, *i.e.* violence that is directed against a woman because she is a woman or that disproportionately affects women.[48] In July 2017, the CEDAW Committee adopted Recommendation No. 35, marking the twenty-fifth Anniversary of General Recommendation No. 19's adoption.[49] The reason for its adoption was the ubiquity of gender-based violence as a continuum of transborder, multiple, interconnected and recurring forms in various situations all over the world. Recommendation No. 35 emphasises the term gender-based violence against women as a more precise term that highlights the gender-specific causes and effects of violence. It strengthens the understanding of violence as a societal rather than an individual problem, which requires comprehensive responses that go beyond specific events, individual victims and individual perpetrators. The prohibition of gender-based violence against women now represents customary international law.[50]

Traditional attitudes in which women are perceived as subordinate to men or as performing stereotypical roles perpetuate widespread practices associated with violence or coercion committed in different degrees or in different ways (*i.e.* domestic violence and abuse, forced marriage, female circumcision, etc.). The impact of this violence on the physical and/or mental integrity of women results in the denial of their equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.[51] The 1993 Vienna Declaration and Programme of Action[52] recognised violence against women as a human rights violation and called for the appointment of a Special Rapporteur on violence against wom-

[47] CEDAW, art. 1.

[48] CEDAW General Recommendation No. 19, para. 6. The same definition of gender-based violence will later be introduced in the Istanbul convention, art. 3d). It is also accepted within the UN. See, *e.g.* Report of the Secretary-General 61/122, 6 July 2006.

[49] For the source of CEDAW General Recommendation No. 35 see (n 5).

[50] General Recommendation No. 35, paras. 2, 6, 9, 15.

[51] General Recommendation No. 19, para. 11.

[52] Vienna Declaration and Programme of Action was adopted at the 1993 World Conference on Human Rights.

en.[53] The rapporteur was appointed a year later[54] by the United Nations Human Rights Council (HRC).[55] Its task is to cooperate in accordance with procedures and human rights mechanisms of HRC and treaty bodies to gather information from the field[56] and respond effectively by proposing measures to identify roots and eliminate all sorts of challenges in combating violence against women. In the context of this paper, given that violence against women is inextricably linked to the violation of various human rights, it is seen as a major obstacle to the effective realisation of SDGs.[57]

The first international document that contains the definition of violence against women is the Declaration on the Elimination of Violence against Women (1993).[58] It defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."[59] It encompasses, but is not limited to:

"a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."[60]

The same definition has been accepted by the Beijing Declaration and the Plat-

[53] ibid para. 40.

[54] UN Doc. E/CN.4/RES/1994/45, 4 March 1994. Current Special Rapporteur is Reem Alsalem.

[55] Until 2006: Commission on Human Rights.

[56] The Special Rapporteur receives information and relies on cooperation with national governments, governmental and non-governmental organisations, specialised agencies, and human rights organisations, especially those engaged in women's rights. See OHCHR resolution 1994/45, para 7.

[57] Over the past eight years (since 2016), the CEDAW Committee has regularly submitted contributions to the 2030 SDGs.

[58] GA Res. 48/104, 20 December 1993.

[59] ibid art. 1.

[60] ibid art. 2.

form of Action (1995)[61] as well as by the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994).[62] A similar definition was also introduced in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).[63] It defines violence against women as: "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or war."[64] The Istanbul Convention, the implementation of which in Croatia is the subject of Chapter IV of this article, defines violence against women as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or in private life."[65]

The Istanbul Convention is the first European legally binding document that provides a comprehensive legal framework to combat violence against women and domestic violence. It is particularly significant that this Convention, like the previously mentioned ones,[66] also establishes a mechanism for monitoring its implementation,[67] which is carried out by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO).[68]

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[61] UN Doc. A/CONF.177/20/Add.1, 15 September 1995. para. 113. Even though it was adopted almost three decades ago, it still represents one of the most comprehensive frameworks and inspiration for empowering women worldwide. The Platform for Action covers 12 critical issues that are as relevant today as they were 29 years ago (*e.g.* poverty, education, health, armed conflict, etc.), including violence against women.

[62] 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 33 ILM 1534**.** It is also known as the Belém do Para Convention.

[63] 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. It was adopted in Maputo, Mozambique, and is widely known as the Maputo Protocol.

[64] ibid art. 1(f).

[65] Istanbul Convention, art. 3a. A similar definition is contained in the proposal of the Directive of the European Parliament and of the Council of the European Union on combating violence against women and domestic violence as "gender-based violence, that is directed against a woman or a girl because she is a woman or a girl or that affects women or girls disproportionately, including all acts of such violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (art. 4a).

[66] See *e.g.* Belém do Para Convention, ch. IV; Maputo Protocol, art. XXVI in accordance with art. 62 of the African Charter on Human and People's Rights on the Rights of Women in Africa.

[67] See Istanbul Convention, ch. IX.

[68] GREVIO is an independent body consisting of 15 experts in the field of human rights, gender

The Istanbul Convention is also the first human rights document that defines 'gender.' Gender means "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men."[69] The definition of 'gender-based violence against women' is taken from General Recommendation No. 19 as "violence that is directed against a woman because she is a woman or that affects women disproportionately."[70] It is evident from these definitions that the creators of the Istanbul Convention underscored the role that society imposes on women as the main cause of domestic violence.[71] Gender roles are learned, stereotyped, socially conditioned and shaped norms of behaviour that are considered appropriate for people belonging to a certain sex, female or male. It is a variable category that can differ significantly from one country to another, between cultures, and is the source of numerous debates. On the other hand, sex as a biological characteristic that defines and differentiates women and men is not controversial, and its definition does not cause controversy among countries. The creators of the Convention do not deny sex as a biological characteristic that defines women and men, nor do they ascribe the cause of violence to sex differences, but rather to the submissive, subordinate role that society imposes on women in relation to men. To prevent violence against women, including domestic violence, it is therefore necessary to address the root causes and change social patterns of behaviour based on the idea of women's inferiority.[72] It is indisputable, and this follows from the definition of

equality, violence against women and/or assistance to victims and their protection. From June 2015 to December 2022, GREVIO conducted evaluation visits to the following state parties: Austria, Monaco, Albania, Denmark, Turkey, Montenegro, Portugal, Sweden, Finland, France, Serbia, the Netherlands, Italy, Spain, Belgium, Slovenia, Andorra, Malta, Poland and San Marino, Bosnia and Herzegovina, Georgia, Germany, Norway, and Romania, Croatia, Cyprus, Estonia, Iceland, Luxembourg, North Macedonia and Switzerland. See 'General Reports on GREVIO's activities' (*Council of Europe)* <https://www.coe.int/en/web/istanbul-convention/grevio-annual-reports> accessed 5 April 2024.

[69] Istanbul Convention, art. 3c.

[70] Istanbul Convention, art. 3d.

[71] It is important to point out that the Istanbul Convention deals with the issue of gender roles and not gender identity. These are terms that are not synonymous and whose meaning is fundamentally different. For more on gender identity, see Albert Joseph and others, 'Gender identity and the management of the transgender patient: a guide for non-specialists' (2017) 110 Journal of the Royal Society of Medicine 144, 145-52.

[72] In this context, it is necessary to observe the statements of those who strongly criticise the gender-neutral approach to solving the problem of domestic violence, considering that such a concept ignores reality and leads to the wrong conclusion that violence against men is also systematic violence that arose as a result of inequality and discrimination, that both men and women are potential victims of domestic violence to an equal extent and that these are vulnerable groups that seek the same type of protection. See 'Statement by Prof Rashida Manjoo SVRI Conference, Violence against Women – a human rights violation, Cape Town 15 September 2015' <https://www.svri.org/forums/forum2015/RashidaManjoo.pdf> accessed 5 April 2024. 4.

domestic violence contained in art. 3b of the Istanbul Convention, that men can be and are victims, but numerous studies confirm that women are the most frequent victims of domestic violence.[73] In view of the increasing number of murders of women who had previously been victims of domestic violence, it becomes clear that the intention behind the title of the Convention is to emphasise that violence against women in particular is systematic and most widespread.[74]

It is noticeable that the creators of the Istanbul Convention paid special attention to considering the causes of violence against women, and this particular segment proved to be a central problem and caused heated discussions in a number of European Union member states, including the Republic of Croatia.[75] Namely, emphasising gender stereotypes, traditions harmful to women and general manifestations of inequality between the sexes as the fundamental causes of violence against women, has proven unacceptable for certain countries. Emphasising the concept of 'gender' and distinguishing it from 'sex' is considered particularly controversial. According to the critics of the Convention, this introduces a gender theory that lacks scientific foundations and seeks to create the belief that an individual is born as a neutral being who can later choose whether to be a woman, a man or something else. In accordance with such attitudes, all this leads to the negation of tradition and family values as the foundation of society.[76] The issues of the application of the Istanbul Convention and even the

[73] See UN Doc. A/HRC/26/38, 28 May 2014. para. 61; 'Violence against women: an EU-wide survey, Main results' (*Publications Office of the European Union,* 2015).

[74] According to the Report of the Ombudsperson for Gender Equality in Croatia in 2022, out of a total of 13 women killed, as many as 12 were killed by close family members, of which six were by husbands, common-law husbands, and current or former intimate partners. On the other hand, not a single man was killed by his intimate partner. Republic of Croatia Ombudsperson for Gender Equality 'Izvješće o radu za 2022' [2022 Annual Report] (2023) 78-9.

[75] Pressures aimed at preventing the ratification of the Istanbul Convention proved unsuccessful. However, Croatia, along with the ratification, also attached an interpretive statement in which it expressly states that it believes that the provisions of the Convention do not contain an obligation to introduce gender ideology into the Croatian legal and educational system, nor an obligation to change the constitutional definition of marriage. In addition to the fact that the content and meaning of this statement are unclear, its legal effect is extremely questionable, given that the Istanbul Convention does not recognise the concept of an interpretive statement. It can be observed that this is, first of all, a political message aimed at appeasing part of the electorate. In addition to Croatia, Latvia also gave an interpretative declaration of similar content in which 'gender' is explicitly mentioned. At the same time, Poland and Lithuania declared that they would apply the Convention in accordance with the principles and the provisions of their Constitutions. For more on the interpretive statement and controversies related to gender ideology, see Daria Željko, 'Procjena prvih deset godina Konvencije Vijeća Europe o sprječavanju i borbi protiv nasilja nad ženama i nasilja u obitelji' [Assessment of the first ten years of the Council of Europe Convention on preventing and combating violence against women and domestic violence] (2021) 28 Croatian Annual of Criminal Sciences and Practice 382, 385-86;

[76] See, for example, 'Istina o Istanbulskoj' [The Truth about the Istanbul Convention] <http://

announcement of its denunciation are still topical, especially in the pre-election rhetoric of certain political parties. Nevertheless, the Republic of Croatia, in accordance with the assumed obligations and despite the existing challenges, has been trying to direct its activities, legislative, and policy framework towards achieving the set goals of the Convention, which is also evident from the latest GREVIO report.[77]

By ratifying the Istanbul Convention, the state parties undertook obligations to take appropriate measures that can be divided into four groups: preventive measures, victim protection measures and provision of support services, criminalisation of various forms of violence against women, and integrated policies at the state level as a necessary prerequisite for a complete and comprehensive response to violence against women. The Republic of Croatia's compliance with the Istanbul Convention, that is, the individual conclusions of GREVIO on the implementation of the Istanbul Convention in Croatia in relation to the measures taken, are explained in more detail below.[78]

IV. GREVIO RECOMMENDATIONS FROM THE BASELINE EVALUATION REPORT ON THE IMPLEMENTATION OF THE ISTANBUL CONVENTION IN CROATIA

The purpose of this part of the paper is not to provide a complete analysis of the GREVIO Report on Croatia[79], but rather to present a review of certain important recommendations in the implementation of the four groups of measures mentioned above, as well as the comments of the Republic of Croatia on the recommendations contained in the said Report.[80] The additional importance of this Report is also reflected in the fact that the documents on monitoring the

istinaoistanbulskoj.info/neprihvatljivo-u-istanbulskoj-konvenciji> accessed 5 April 2024.

[77] GREVIO Report, paras 340-41.

[78] The Republic of Croatia signed the Istanbul Convention on 22 January 2013 and ratified it five and a half years later, in June 2018. This lengthy process of ratification was accompanied by numerous discussions, mostly related to the unjustified connection of the Istanbul Convention with the so-called gender ideology. For more, see Martina Bosak and Maja Munivrana Vajda, 'The reality behind the Istanbul convention: Shattering conservative delusions' (2019) 74 Women's Studies International Forum 77, 78-83.

[79] For the text of the GREVIO Report, see *supra* footnote (n 16). The Republic of Croatia submitted its first state report in February 2022. 'Report submitted by Croatia pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)' (*GREVIO,* 24 February 2022) <https://rm.coe.int/grevvio-inf-2022-2-eng-state-report-croatia/1680a5a0e4> accessed 5 April 2024.

[80] 'Comments submitted by Croatia on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) (2023)' (Croatian Comments).

goals of sustainable development do not contain recent numerical data on certain forms of violence against women.[81] Therefore, undertaking and monitoring the measures prescribed by the Istanbul Convention through the associated monitoring system can certainly contribute to changing patriarchal attitudes and strengthening the position of women in society, thus suppressing gender-based violence. The GREVIO report contains a comprehensive analysis of the implementation of the activities undertaken to harmonise with the Istanbul Convention but also points to areas where there have been oversights and shortcomings in the effective application of the Convention, based on which certain recommendations were put forward to Croatia.

1. Preventive measures

The goal of preventive measures is to prevent all forms of violence against women. Among them, measures aimed at changing the mentality and attitudes of the general population that contribute to the justification of violence against women and solving structural inequalities between women and men as the root cause of such violence particularly stand out; this is also pointed out in the GREVIO report. In this context, education and the adoption of curricula, programmes, and materials that do not contain negative stereotypes about women and promote gender equality are especially important.[82] The correctness of these conclusions and the necessity of taking measures in this direction is also confirmed by the empirical research of young people in Croatia, which was conducted at the beginning of 2018 and whose goal was to establish and analyse some attitudes and behaviour patterns of young people in contemporary Croatian society. The survey included 1,500 participants aged 14 to 29 years from all over Croatia. The research results show that 40% of young people are undecided or do not agree that women and men should equally participate in household chores such as cooking, ironing and cleaning the house. The same percentage of young people agree with the statement that it is the man who should earn and support the family. In contrast, the same percentage (30%) are undecided on this issue or disagree with the stated statement. Economic independence is

[81] See more at 'Progress Towards Achieving Sustainable Development Goals 2023 (Croatia)' (*EUROSTAT,* 22 March 2023) <https://novi-web.dzs.hr/media/5vzpwm53/sdg-2023_eng.pdf> accessed 5 April 2024. The table (downloaded for the Eurostat database in March 2023) shows Croatia's progress in achieving the SDGs. The latest available values and the values at the beginning of the five-year period are given to assess the development over the five-year period. Some progress towards achieving Goal 5 is evident. Unfortunately, there are no reliable indicators of physical and sexual violence against women.

[82] In this regard, it is necessary to point out the current topic pointed out by Professor Đurđević, PhD, who warns of severe discriminatory and misogynistic education of eighth-grade children about female genitalia. <https://www.facebook.com/profile.php?id=1035291315&fref=nf&ref=embed_post> accessed 5 April 2024.

extremely important in partner relationships, and these data show that, in Croatian society, a significant number of those still support the idea of a man as the family breadwinner. Significantly, 23% of young people think that it is not beneficial when the traditional family roles change and the woman earns more than the man. As many as 38% of young people accept the stereotype that women are biologically predetermined to be teachers and caregivers, not to perform technical and IT jobs. The percentage of those who believe that more women are not needed in positions of power in society since a woman's primary role is to take care of the family should also not be overlooked (17%).[83]

GREVIO also urges the need for systematic and professional training of experts of various profiles to prevent and detect all forms of violence against women. This training should be based on the principles of non-discrimination and equality between men and women. In this context, GREVIO particularly emphasises the health sector, social workers and lawyers and the necessity of their cooperation with independent women's non-governmental organisations that provide support to women victims of violence. It follows from the reply of the Republic of Croatia that in the past period, a series of training sessions were held at different levels and for different stakeholders involved in the process of combating violence against women.[84]

GREVIO paid special attention to the need to ensure the implementation of programmes for perpetrators of domestic violence and ensure their evaluation, which would include the analysis of information on the possible repetition of criminal offences. It should be noted that at the normative level, Croatia has introduced a series of solutions aimed at preventing future violent behaviour and protecting its victims. Among other things, a safety measure of mandatory psychosocial treatment was introduced into the domestic criminal legislation in 2011, which is intended for perpetrators, primarily of domestic violence.[85] Unfortunately, however, legal solutions were not accompanied by appropriate conditions for their implementation in practice, so that challenges in the implementation of psychosocial treatment for perpetrators of violent crimes have

[83] Anja Gvozdanović and others, *Istraživanje mladih u Hrvatskoj 2018./2019 [Research on young people in Croatia 2018/2019]* (Zaklada Friedrich Ebert 2019) 16.

[84] More details can be found in the Croatian Comments 17-22.

[85] With the amendments to the Criminal Code from 2021, the imposition of this measure is no longer optional but rather mandatory in all cases when the court determines that the perpetrator has committed a criminal offence with features of violence and there is a risk that they will commit the same or similar offence again. For more on this security measure, see Petar Novoselec and Igor Martinović, *Komentar Kaznenog zakona, Opći dio [Commentary on the Criminal Code, General Part]* (Narodne novine 2019) 436-38, Marin Mrčela and Igor Vuletić, *Komentar Kaznenog zakona, Opći dio [Commentary on the Criminal Code, General Part]* (Libertin naklada 2021) 437-39.

been present for many years.[86] In this case, the main problems include an insufficient number of implementers of the measure, insufficient amount of compensation for them, the imposition of the measure on offenders who do not meet the criteria for inclusion in the treatment (*e.g.* they do not have sufficient intellectual capacity to follow the programme), offender's lack of participation in the treatment, for what in practice there is no adequate response,[87] and non-implementation of the measure in its entirety.[88] The lack of evaluation of psychosocial treatment is a problem already pointed out in domestic literature. Namely, the main indicator of the success of a treatment is that the participant has not repeated act of violence following the treatment. Therefore, information about the perpetrator's behaviour following the completed treatment is necessary in order to assess the expediency of imposing a security measure of mandatory psychosocial treatment.[89]

2. Victim protection measures and provision of support services

In addition to the general obligation related to the establishment of institutionalised cooperation mechanisms between all relevant institutions and non-governmental organisations to support women who are victims of violence, the GREVIO Report specifically emphasises the necessity of a proactive approach in informing victims about available support services and legal measures, especially in relation to their specific needs. One of such extremely important needs is residential care. Although some progress has been made in this regard, and a special measure of long-term housing solutions for victims of domestic violence has been prescribed by law,[90] due to the necessity of proving domestic violence by a final court judgement and the length of criminal proceedings, a significant number of victims of domestic violence cannot fulfil this requirement. An additional problem is the lack of suitable state-owned properties to accommodate victims, as private landlords have been observed to be unwilling

[86] For more details, see Ljiljana Antolović, Martina Barić and Sanja Devčić, 'Sigurnosna mjera obveznog psihosocijalnog tretmana – izazovi u izvršavanju' [The security measure of compulsory psychosocial treatment: challenges in implementation] (2021) 28 Croatian Annual of Criminal Sciences and Practice 569, 570-601.

[87] In such cases, the court may give a negative opinion on the prisoner's proposal for conditional release or propose additional measures in addition to conditional release; however, the prisoner's refusal to participate in treatment does not exclude the possibility of granting conditional release (Croatian Comments 23).

[88] The deadline for implementing the security measure of mandatory psychosocial treatment is linked to the deadline for implementing the imposed criminal sanction, so in practice, there are cases where the measure is not completed in full due to the expiration of the imposed sentence.

[89] Although Croatia pointed out that an external evaluation of the two programmes was carried out in 2022 and 2023, the results are still not available. See Croatian Comments 24.

[90] Art. 45 of the Act on Housing Care in Assisted Areas, Official Gazette 106/18, 98/19, 82/23.

to rent their properties to the state for this purpose.[91]

In relation to shelters for victims of violence, GREVIO urges that their number and capacities be increased and that they be geographically distributed so that they are accessible to all women, including women with disabilities, women from minority backgrounds, migrant women with irregular status and other women exposed to the risk of multiple discrimination.[92] From the Republic of Croatia's reply, it follows that the existing capacities correspond to the actual needs since the shelter's occupancy does not exceed 66% and that no conditions have been prescribed for user accommodation.[93]

Some progress has also been made in relation to helplines for victims of violence since the National Call Centre for Victims of Crime has been made available to all victims 24 hours a day, 365 days a year, since November 2023. It is important to point out that this service is provided by highly qualified employees who are additionally trained for counselling work with victims of all forms of violence: it is also planned for this service to be available to victims in English.[94]

In its report, GREVIO paid special attention to the obligation to report violence by professionals. For this purpose, GREVIO "strongly encourages the Croatian authorities to review the obligation for professionals, including those operating in NGOs, to report cases of violence against women and their children, other than in situations in which there are reasonable grounds to believe that a serious act of violence covered by the scope of the convention has been committed and further serious acts are to be expected."[95] It is further underscored that the aforementioned may require that the obligation to report depends on the prior consent of the victim unless the victim is a child or cannot protect themselves due to a disability.[96] A request for similar content is contained in relation to

[91] In 2022, 20 positive decisions were received, of which 18 were implemented. One beneficiary withdrew her application, and one was in the process of securing an adequate housing community. A total of EUR 96,854.28 was spent from the state budget in 2022 to provide housing for victims of domestic violence. Croatian Comments 28-9.

[92] GREVIO Report, para. 154.

[93] Currently, there are 25 shelters in Croatia with a capacity of 357 beds available in all counties of the Republic of Croatia. Croatian Comments 30-2.

[94] Croatian Comments 33-5. For more information on the National Call Centre's data on calls due to domestic violence and its role in providing support and assistance to victims in the era of the COVID-19 crisis, see Marissabell Škorić, Dalida Rittossa and Dejana Golenko, 'Obiteljsko nasilje u doba bolesti COVID-19 - Informacijski i kaznenopravni izazovi' [Family violence in the time of COVID-19 – Information and criminal law challenges] (2023) 14 Yearbook of the Croatian Academy of Legal Sciences 29, 40-6.

[95] GREVIO Report, para. 176.

[96] ibid.

victims of sexual violence.[97] Here, it is essential to note that competent judicial authorities can only decide on the severity of the violence and its qualification (as a misdemeanour or criminal offence). It is not clear how experts who work with victims could grade the severity of the committed offence and assess the danger of future violence and thus take responsibility for non-reporting, which can result in the most severe consequences for the victim.[98]

3. Incrimination of various forms of violence against women

Since 2015, domestic violence has been regulated threefold in the national legislation: as a misdemeanour, as an independent criminal offence and as a qualified form of certain criminal offences when they are committed against a close person.[99] This (over)normisation of domestic violence has caused a number of controversies in practice, primarily because of the unclear demarcation between domestic violence as a misdemeanour and as a criminal offence, which was also pointed out in the GREVIO Report.[100]

In relation to psychological violence, GREVIO highlighted as a special problem that these cases are mostly treated as misdemeanours. It also emphasised shortcomings in the data collection system, which made it impossible to accurately assess the prevalence of different forms of domestic violence. In its Comments on the recommendations, Croatia pointed out that the current legislation allows even one-off cases of psychological violence to be prosecuted as a criminal offence of domestic violence (Article 179a of the Criminal Code), provided that it is a serious case of violation of regulations on protection against domestic violence and that the legally prescribed consequences were caused. As for the data, it was pointed out that they are collected from the competent misdemeanour courts and refer, among other things, to the perpetrator's age and sex and the prevalence of psychological violence that caused the victim's violation of dignity or distress.[101]

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[97] GREVIO Report, para. 165.

[98] Croatian Comments 38–9.

[99] For the current legal regulations, see the Law on Protection Against Domestic Violence, Official Gazette 70/17, 126/19, 84/21, 114/22, 36/24 and Criminal Code, Official Gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/2., 114/22, 114/23.

[100] For more on demarcation problems, see Velinka Grozdanić, Marissabell Škorić and Ileana Vinja, 'Nasilje u obitelji u svjetlu promjena Kaznenog zakona' [Domestic Violence in light of the amendments to the Criminal Code] (2010) 17 Croatian Annual of Criminal Law and Practice 669, 670-98.

[101] In 2021, there were a total of 2,340 cases of psychological violence, with 82.7% of the perpetrators being men, while in 2022, there were 2,600 perpetrators, 81% of whom were men. Croatian Comments 45-6.

The GREVIO Report also warned of the prevalence of dual arrests in cases of domestic violence, when the police arrest and charge the victim as well as the perpetrator. Civil society organisations believe that the main reason for such practice is the interpretation according to which psychological and physical violence are equated so that a victim who acted in self-defence or verbally insulted the perpetrator is considered equally culpable and arrested together with him.[102] Croatia did not comment on this GREVIO conclusion or pay any attention to this problem in its Comments.

With regard to physical violence, GREVIO welcomed, on the one hand, the fact that certain crimes committed to the detriment of a close person are considered a qualified form. It also welcomed the recognition of children who witness violence between partners as victims of domestic violence. However, at the same time, it emphasised the lack of information on whether appropriate analyses were carried out and deficiencies identified in the actions of domestic authorities in cases where the victim reported violence after which she was killed and whether any measures were introduced to address the identified deficiencies. GREVIO highlighted the alarming findings of the investigation of 18 cases of aggravated murder committed by a close person in the period from 2013 to 2020, in which, in 17 cases, the victim was a woman, with the fact that, in 78% of cases, the perpetrator was the victim's current or former partner. This finding confirms that domestic violence with a fatal outcome is a gender-based issue. The data that GREVIO specifically points to is that almost 70% of the perpetrators had been previously convicted of committing domestic violence against the victim, most of them for a criminal offence, and that, in many cases, no convictions had been passed despite years of violent behaviour and reports of violence.[103] All of this seriously calls into question the efficiency of the domestic justice system, and GREVIO strongly encourages the domestic authorities to investigate cases of domestic violence that led to the death of the victim and to identify any shortcomings in the institutions' response to violence.[104] In relation to these very significant and valuable observations of GREVIO, Croatia did not give a concrete answer; only brief information was provided that the entire

[102] GREVIO Report, para. 201.

[103] GREVIO Report, para. 209-12.

[104] The European Court of Human Rights has already warned Croatia about these problems in cases against the Republic of Croatia related to domestic violence. See *Branko Tomašić and Others v Croatia* App no 46598/06 (ECtHR, 15 January 2009), *A v Croatia* App no 55164/08 (ECtHR, 14 October 2010), *M. and M. v Croatia* App no 10161/13 (ECtHR, 3 September 2015), *Ž.B. v Croatia* App no 47666/13 (ECtHR, 11 July 2017). For details, see Marissabell Škorić, 'Obiteljsko nasilje u praksi Europskog suda za ljudska prava s posebnim osvrtom na presude protiv Republike Hrvatske' *[Domestic violence in the case law of the European Court of Human Rights with special reference to judgments against the Republic of Croatia]* (2018) 25 Croatian Annual of Criminal Sciences and Practice 387, 388-415.

legislative framework would be analysed and possible changes to the regulations would be proposed.[105]

Regarding sexual violence, the GREVIO Report highlights as a special problem that the crime of rape is insufficiently reported and prosecuted and that, in cases of sexual violence, courts often apply mitigating circumstances in favour of the perpetrator, whereby the victim's behaviour is stereotypically interpreted as contributing to the crime. The problems of lengthy criminal proceedings in cases of sexual violence in which the victims are repeatedly traumatised and of sentences that do not have a deterrent effect are additionally emphasised.[106] Even in relation to these comments, Croatia did not present any observations.

4. Integrated policies at the state level

One of the requirements of the Istanbul Convention is the undertaking of comprehensive and coordinated policies throughout the country and effective cooperation between all relevant actors in order to prevent and combat all forms of violence against women. What the Convention insists is that the victims' rights should be at the very centre of interest at all times[107] and that the specific needs of different groups of victims should be taken into account, especially those who may be exposed to multiple forms of discrimination.

Croatia has so far adopted four National strategies for protection against domestic violence. In the latest one, the one adopted for the period from 2017 to 2022, the cooperation of state bodies, local and regional self-government units and civil society organisations that provide support and assistance to victims of domestic violence is particularly emphasised. However, on the other hand, GREVIO highlights the concern over the lack of comprehensive policies to address other forms of violence against women, such as rape and sexual violence outside of intimate relationships, sexual harassment, stalking, female genital mutilation,

[105] In April 2024, amendments to the Criminal Code entered into force, introducing a definition of gender-based violence against women. This term denotes 'violence directed at a woman because she is a woman or which disproportionately affects women,' and it is prescribed that such treatment will be taken as an aggravating circumstance if the Criminal Code does not already expressly prescribe a more severe punishment (art. 87 para. 32). In addition, aggravated murder of a female person was introduced as an independent criminal offence (art. 111a) and the legal criminal law policy of punishing crimes against sexual freedom and sexual abuse and exploitation of a child has been stricter.

[106] GREVIO Report, paras. 213-17.

[107] In the case of *A. v. Croatia*, the European Court highlighted that the state could have provided more effective protection against violence if the competent authorities had been able to look at the situation as a whole.

forced marriage, forced sterilisation and abortion.[108]

GREVIO paid special attention to the funding of non-governmental organisations that support victims. Although civil society organisations are today recognised as equal partners in the adoption and implementation of policies in the field of violence against women, a large number of them expressed their concern about inadequate financial support.[109] It is worth noting that such comments are fully in line with the demands of sustainable development and human rights documents. For example, the CEDAW Committee supports the efforts of States Parties to adopt comprehensive strategies in line with the 2030 Agenda and CEDAW and to accelerate the implementation of effective gender equality policies.[110] The lack of necessary financial support or significant cuts in public spending, which are often part of the so-called 'austerity measures' following economic and financial crises, undoubtedly weaken the efficiency of government action, regardless of how well these measures were previously designed.

In its report, GREVIO rightly emphasised the necessity of taking appropriate measures that would ensure the collection of all relevant data related to cases of domestic violence, including the sex and age of the victim and the perpetrator, their relationship, geographical location and different forms of violence covered by the Istanbul Convention, as well as data about whether children witnessed the violence.[111] Although today, various bodies keep statistics on cases of domestic violence in Croatia, there is no doubt that we do not have reliable and complete data on its prevalence.[112] There are various reasons for this,[113] and the GRE-

[108] GREVIO Report, paras. 29-33.

[109] Croatia has a long history of a strong movement for women's rights, the beginnings of which go back to the 1970s. Women's rights groups established the first helpline and shelter for women victims of violence in Eastern Europe in Zagreb in 1988 and 1990. GREVIO Report, paras. 38-43.

[110] CEDAW Women as Leading Force, 8.

[111] GREVIO Report, para. 59.

[112] When discussing the prevalence of domestic violence, it must be taken into account that, in reality, there are certainly more cases of domestic violence than what appears from official data. On the dark figure of domestic violence, see Marta Dragičević Prtenjača, 'Dihotomija pristupa u rješavanju nasilja u obitelji putem prekršajnopravne i kaznenopravne regulative' [The dichotomy of solving domestic violence through misdemeanour law and criminal law regulations] (2017) 24 Croatian Annual of Criminal Sciences and Practice 141, 162.

[113] Other authors also pointed out these reasons, see Petra Šprem, *Normativna i empirijska analiza obiteljskog nasilja u Hrvatskoj: kaznenopravni koncepti, kriminološki fenomeni, praktični izazovi i moguća rješenja [Normative and empirical analysis of domestic violence in Croatia: criminal law concepts, criminological phenomena, practical challenges and possible solutions, doctoral dissertation]* (University of Zagreb 2003) 198-202; Anna-Maria Getoš Kalac and Petra Šprem, 'Obiteljsko nasilje u doba pandemije – preliminarni rezultati kriminološke analize' [Domestic violence during the pandemic – preliminary results of criminological analysis] (2022) 72 Collected Papers of Zagreb Law Faculty 1037, 1047.

VIO report rightly highlights the importance and necessity of collecting data, especially those that would enable the recording of the number of violations of emergency barring, restraining orders and protection orders, the number of sanctions imposed due to such violations, and the number of cases in which the violations led to repeated violence or the death of the victim. It is generally known that domestic violence is not an isolated event but a systematic repetition of violence that ranges from relatively mild forms to much more severe and, in some cases, fatal for the victim.[114] Precisely because of this nature of domestic violence, monitoring the data indicated in the GREVIO report is a *conditio sine qua non* for the effective protection of victims, and it is necessary to immediately establish a system that will enable this.

V. CONCLUSION

When the CEDAW was adopted in 1979, the initiators of the Convention acknowledged in the preamble that "extensive discrimination against women continues to exist." In recent years, the elimination of gender-based violence against women has been recognised as increasingly important on all levels—national, regional and international. However, challenges remain. Despite the initiatives that have led to greater awareness of the impact of gender-based violence against women and the efforts that have been already undertaken, the full and effective implementation of binding international documents and the effectiveness of national measures are still insufficient. Achievements in the legal field, both at the national and international levels and the knowledge of effective prevention strategies have not met the expectations for reducing violence against women. The statistical indicators for Goal 5 are relentless and not overly optimistic. As it stands now, countries will not achieve the expected goals without targeted investments in effective measures and comprehensive services to combat violence.

However, despite the current pessimism in various areas regarding the achievement of the SDGs, the issue of women's empowerment remains of great importance. Vulnerability to gender-based violence against women fostered by traditions, social or religious norms based on discrimination and breach of human rights can occur in any culture at any time; no society is immune to violence against women. It is therefore necessary to support coordinated strategies that can contribute to strengthening the perception of women as equal to men, free from violence of any kind. The constitutional and legal framework for the protection of women, an effective judicial system, strong support for institutions that promote the idea of equality, compliance with international commitments and the subsequent monitoring and evaluation of the actions implemented with-

[114] Research confirms that earlier violent behaviour increases the risk of death in cases of domestic violence. See 'Statistical presentation of the results of research on the murder of women in Croatia in the period from 2016 to 2020' (*Republic of Croatia Ministry of the Interior,* 2021).

in this framework are just some of the steps that should continue to be supported and implemented efficiently. It is impossible to eliminate violence against women without political will and commitment at both national and international levels; only integrated and coordinated action, as long as it is required, can contribute to changing societies and deeply rooted traditions and cultures.

At the normative level, the Republic of Croatia has adopted a number of measures to promote women's rights and combat discrimination and violence against them. However, despite this, violence against women is still a constant in society. The cause of such a situation should certainly be sought in the fact that normative changes are not followed by changes in social patterns of behaviour in which there are still a number of prejudices, customs and traditions based on the stereotypical roles of women and men, with men occupying the dominant position. Recognising the causes of violence is the first step in combating it, and there is still a lot of room for progress in this area. For a successful fight against violence against women, it is necessary to provide various forms of support to the victims within an appropriate period of time in order to empower them. Equally, it is necessary to provide adequate financial resources so that normative solutions for the fight against domestic violence and the protection of its victims, which are largely in line with the highest international standards, could be successfully implemented in practice. It is crucial to analyse in detail each of the cases that ended with the death of a victim who had previously reported violence. Particular attention should also be paid to the reassessment of the personal responsibility of the officials in charge of implementing the existing rules for the protection of victims of domestic violence. Taking further steps in this direction must be imperative, as identifying and eliminating the cause can prevent a fatal outcome for future victims of domestic violence.

A comparison study of liability of the carrier in the International Conventions on the Carriage of Goods by Sea

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https://doi.org/10.15170/PJIEL.2024.1.3

Contents

I. INTRODUCTION....31
II. THE HAGUE RULES AND THE HAGUE VISBY RULES....32
1. *General principles*....32
2. *Liability exemptions*....33
3. *Deviation*....34
4. *Delivery and delay in delivery*....35
III. THE HAMBURG RULES....35
1. *General principles*....36
2. *Exceptions to liability*....37
3. *Division of loss—Article 10*....39
IV. THE ROTTERDAM RULES....39
1. *General principles*....39
2. *The carrier's exemptions from liability*....40
3. *Carrier's liability for other persons*....42
4. *Carrier's liability for delay*....42
5. *Live animals*....43
6. *Deviation*....43
7. *Deck cargo on ships*....43
V. STATUS OF THE CONVENTIONS AND THE QUESTION OF UNIFORMITY....44
VI. CONCLUSION....46

Abstract

The introduction of the four conventions, namely the Hague Rules, Hague Visby Rules, Hamburg Rules, and Rotterdam Rules is to establish a uniform and harmonized regime governing the international carriage of goods by sea. The rules on the carrier's liability are the central issues of these conventions which directly connect to the allocation of risks between the carrier and cargo interests. However, the solutions adopted in these Conventions are not likely to satisfy all parties in the international marine community and have faced various criticisms. This research will look at the liability of the carrier regime under these four Conventions. It will examine, by comparative analytical method, the regulation of carrier's liability in the four Conventions and the similarities and differences between them. It concludes among other things that the Rotterdam Rules deal with the liability of carrier rules better than the older conventions.

Keywords: liability of the carrier, Hague Rules, Hague-Visby Rules, Hamburg Rules, Rotterdam Rules.

I. INTRODUCTION

In the international carriage of goods by sea, the potential conflict between the carrier and cargo owner interests might raise the problem of risk allocation concerning damages to or loss of sea-borne cargo and balancing of rights and responsibilities. Therefore, it is beneficial to have uniform legislation and a fair distribution of risk to facilitate international maritime trade. With the domination of ocean freight shipments, the four conventions governing the issue of international carriage of goods by sea, namely the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature (Hague Rules), the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Visby Rules), International Convention on the Carriage of Goods by Sea (Hamburg Rules), and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), has been introduced for the purpose of uniformity and harmonization. The rules on the carrier's liability are the central issues regulated in the conventions because they affect the development of the international shipping industry and international trade. Each Convention deals with the liability of the carrier and its limitation which directly connect to the allocation of risks between the carrier and cargo interests. However, the solutions adopted in these Conventions are not likely to satisfy all parties in the international marine community and have faced various criticisms. This paper will look at the liability of the carrier regime under these four conventions to examine the similarities and differences between the four

Conventions governing the rules on liability of carrier.

II. THE HAGUE RULES AND THE HAGUE VISBY RULES

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature, generally known as the Hague Rules, became the first unified international maritime convention. The Hague Rules were adopted in 1924 in Brussels and entered into force in 1931. The introduction of the Hague Rules aims to provide a unified private international law concerning carriage of goods under bills of lading and to provide a minimum mandatory framework of obligations and liability of carriers and to protect cargo owners from widespread exclusion of liability by sea carriers.

After a long period of application, the Hague Rules were considered outdated. The Visby Protocol ('Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading') was first introduced in 1968 to amend some provisions of the Hague Rules and came into force in 1977. This combination of the Hague Rules and the Visby Protocol has formed the Hague Visby Rules. The Hague Visby Rules were further amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1979. The main advancement of this amendment was to change the basic accounting unit from 'poincaré gold francs' to the International Monetary Fund's 'Special Drawing Rights.'[1]

1. General principles

In both the Hague and the Hague Visby Rules, the liability of the carrier is on fault basis. The carrier is liable, due to his breach of duties, for the loss of or damages to the goods when they are under his control. The period of liabilities of the carrier is similar to the period of his obligations, i.e. from the time when the goods are loaded on the ship to the time of the completion of their discharge.[2]

The carrier's liabilities only arise when the claimant proves that the loss or damage to the cargo was caused by the carrier's fault during the voyage. The claimant may provide a clean bill of lading recording the condition of the goods to prove

[1] 'The Travaux Préparatroies of the Hague Rules and of the Hague Hague-Visby Rules' (*Comite Maritime International)* <https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf> accessed 8 April 2024, 32-75.

[2] Protocol amending the International Convention for the unification of certain rules of law relating to bills of lading, 25 August 1924, as amended by the Protocol of 23 February 1968, 1412 UNTS 380, (Hague/Hague Visby Rules) art. 1. (e).

that the loss or damages were the result of the fault of the carrier.[3] The carrier may defend himself against the claim by showing there was no breach of his duties during the voyage or bringing the cause of the damage within one of the exemptions listed in Article 4(2)(a)—(p).

2. Liability exemptions

Article 4.2 of the Hague and the Hague Visby Rules lists seventeen immunities that the carrier can rely on to exempt himself from a maritime claim. These exceptions are based on the four common law exceptions: Act of God, Queen's enemies, inherent vice and general average sacrifice. Among these exceptions, three anomalous exemptions cannot be found in any latter maritime Conventions, namely the exemption for navigation or management error, fire, and catch-all exceptions.

Navigational Fault—Article 4.2(a)

This is the carrier's main exemption and has become one of the most controversial topics. The carrier is not liable for the errors caused by his master, mariner, pilot or the servants in the navigation or the management of the ship. 'Navigation' means the art of sailing a ship safely from a known point to the required point along a prearranged route, and the term 'navigation errors' refers to a defect on the bridge of the ship during the navigation of the ship. Management of the ship embraces activities related to the ship's operation, except navigational activities. An error in the management of the ship refers to an error of act or omission of the management of the ship, not an act or omission to care for the cargo.

The root of this exemption is from the American Harter Act of 1893, in which the shipowner is exempted from liability for "damage or loss resulting from faults or errors in navigation or in the management of said vessel".[4] Because the carrier and the shipowner could not control and supervise all the masters, mariners, pilots or servants during the voyage, there was no reason for them to bear liabilities for the occurrence that was out of their control.[5] However, with the development of navigational technologies and communication devices today, it is unreasonable to maintain this exemption. The presence of this immunity brings unfairness of interests which is too in favor of carriers,[6] as the carrier may

[3] Hague/Hague Visby Rules, art. 3.

[4] See the Harter Act (1893), 46 USC § 30701.

[5] See statement of Dixon J in *Union Steamship Co of New Zealand Ltd v James Patrick & Co Ltd* [1938] 60 CLR 650, 672.

[6] Douglas A Werth, 'The Hamburg Rules Revisited – A Look at US Options' (1991) 22 Journal

be excused for its awful actions and put cargo interests at a disadvantage, forcing them to bear unnecessary risks.[7]

Fire—Article 4.2(b)

The carrier is not liable for loss or damages that occurred due to fire unless it is proven that the fire was caused by the actual fault or privity of the carrier. Thus, the carrier is excluded from liability for fire which was the consequence of the fault or negligence of his servants or agents. In this case, the claimant is responsible for providing proof.

The catch-all—Article 4.2(q)

This exemption is known as the 'catch-all' or 'q-clause' exception which the carrier may apply as the last resort when failing to invoke other exceptions to escape from liability. Accordingly, the carrier is excluded from liability for any loss or damages resulting from any other cause arising outside his fault as well as his servants or agents' fault. The burden of proof in this case belongs to the carrier, not the claimant, to prove that the cause of the damage was not a result of the fault or negligence of himself or his agents or servants. This burden of proof is non-shifting, it does not return to the claimant like other exceptions. It is said that this kind of proof is usually difficult to apply and the possibility to successfully invoke this clause is rare.[8]

Life salvage or property salvage—Article 4.2(l)

In addition to the above exemptions, the immunity in life salvage and property salvage is also noticeable. The carrier is not liable for loss or damages caused by his actions to save life or property.

3. Deviation

Article 4.4 sets forth the provision on deviation. The carrier bears no liability for loss or damages resulting from "any deviation in saving or attempting to save life or property at sea or any reasonable deviation." However, the Hague and the Hague Visby Rules fail to make clear what is 'reasonable deviation.' There was a

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of Maritime Law and Commerce 59, 72. See also Leslie Tomasello Weitz, 'The Nautical Fault debate (the Hamburg Rules, the US COGSA 95, the STCW 95 and the ISM Code)' (1998) 22 Tulane Maritime Law Journal 581, 587.

[7] ibid.

[8] NJ Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (University of Amsterdam 2008) 167.

prominent case in English law—*Stag Line v. Foscolo Mango & Co.,*[9] where the test was framed by Atkin LJ as "[a] deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test [of reasonable deviation] seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one".[10] According to Lord Atkin, at the very least, the voyage back was unreasonable. It seems the Hague and the Hague-Visby Rules provide a broader protection than the common law. However, it is argued that *Stag Line* does not clearly state the law and it would be erroneous to affirm that the Hague/Visby Rules offer a wide exception to the carrier's duty not to deviate.[11]

4. Delivery and delay in delivery

There is no provision in both the Hague and the Hague Visby Rules stipulating the responsibility of the carrier for cargo delivery to the consignee. The Hague Rules and Hague Visby Rules also fail to provide provision for delay in delivery. These shortcomings are also one of the reasons to consider the Hague and the Hague Visby Rules outdated.

III. THE HAMBURG RULES

The Hamburg Rules ('International Convention on the Carriage of Goods by Sea') were drafted under the auspices of the United Nations. They were adopted on March 31, 1978, and came into force on November 1, 1992. The purpose of the Hamburg Rules was to provide a uniform maritime framework that was both more modern and less biased in favour of ship-operators and to improve the

[9] In this case, a vessel carried a cargo of coal from Swansea to Constantinople made a detour into St Ives to land two engineers who had been sent on board to check her fuel-saving apparatus. Upon leaving St Ives, the ship ran aground, resulting in the loss of cargo. The House of Lords held that this deviation was not reasonable and declined to allow the shipowner to rely on the protection provided by the Hague Rules. See generally *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 (*Stag Line*)

[10] *Stag Line*, 343-344.

[11] Paul Todd, *Principles of carriage of goods by sea* (Routledge 2016) 74.

Hague and the Hague Visby Rules, which attracted a good deal of criticism for their uncertainties and ambiguities as well as the unbalanced allocation of risk between the carrier and cargo owner.[12] The Hamburg Rules also consider new technology, new cargos and new issues that can lead to losses being incurred. However, after a long time of being effective, the Hamburg Rules have not obtained great success. The Hamburg Rules have been ratified by 35 states without any ratification by major maritime nations.[13]

1. General principles

The Hamburg Rules regulate liability of the carrier based on the fault presumption. The carrier is liable for any loss of or damages to the goods or delay in delivery caused by him or his servants and agents during the time the goods were in charge of the carrier.

The carrier is liable for the goods during the period while he is in charge of the goods at the port of loading, during the carriage, until the goods are delivered at the port of discharge.[14] This means the responsibility of the carrier is from 'port to port' which is wider than the 'tackle to tackle' rule in the Hague and the Hague Visby Rules.

For the first time in an international maritime Convention, the carrier is bound to be liable for delay in delivery. This is considered one of the advancements of the Hamburg Rules. Delay in delivery is defined in Article 5.2 as occurring when the cargo has not been delivered at the port of discharge during the specific time expressed in the agreement. Because the carrier's obligation continues to the port of discharge, he is liable for his failure to deliver the goods at the time specified in the contract. Through this clause, the liability of the carrier in the Hamburg Rules is expanded compared to the Hague Rules and Hague Visby Rules. However, it is submitted that it is reasonable to add this duty as it is suitable for the development of carriage of goods.

While the allocation of the burden of proof in the Hague Rules and Hague Visby Rules is quite complicated, the Hamburg Rules simplify this issue by placing the burden of proof on the carrier. However, there are two exceptions, when the burden of proof is on the claimant to prove the damages or loss resulted from the fault of the carrier or his agent or servants. The first exception is fire. The carrier is liable for damages or loss caused by fire if the claimant success-

[12] GA Res. 31/100, 15 December 1976.

[13] 1978 Hamburg Convention on the Carriage of Goods by Sea, 1695 UNTS 3. (Hamburg Convention).

[14] Hamburg Convention, art. 4.

fully proves that the fire arose from fault or neglect of the carrier, his servants or agents.[15] In this case, the carrier may defend himself by proving that he and his colleagues took all reasonable measures to avoid the incident and its consequences. This provision is also vague in specifying what 'measures' the carrier could 'reasonably' take.[16] The requirement for the carrier to have knowledge of the risk in the Hague Rules and Hague Visby Rules is removed in the Hamburg Rules. It seems to be difficult for the claimant to bring the fire evidence, because the knowledge of the fact is on the party who is closest when the fire happened, and that is the carrier.

The second exception relates to live animals which is regulated in Article 5.5. Because carriage of live animals may raise risks that the carrier may not predict, such as sickness or infection, the carrier is not liable for the loss or damages caused by such risks if he has followed strictly the special instructions of the shipper. The claimant has to prove that the loss or damage resulted from the negligence of the carrier, his servants or agents.

Regarding deviation, the Hamburg Rules do not provide a specific definition. The only provision referring to deviation is Article 5.6. Accordingly, the carrier is excused, except in general average, from liability for loss, damage or delay in delivery resulting from measures to save life or from reasonable measures to save property at sea. The exemption for salvage of property only applies when it is conducted with 'reasonable measures.' The carrier cannot abuse this exception for the benefit of salvage to the detriment of the sea-borne goods.[17] Deviation stipulated in the Hamburg Rules is much narrower than in the Hague Rules and Hague Visby Rules. In case of deviation, the carrier is still liable for all loss, damages and delay in delivery that results after deviation. There is no regulation on the effect of negligence of carrier while conducting life-saving measures.[18]

In case the goods are carried on deck with no agreement with the shipper, the carrier becomes liable for loss of or damages to the goods or delay in delivery resulting from the carriage on deck.

2. Exceptions to liability

The carrier is exonerated from liability if he proves that he, his servants or agents, "took all measures that could reasonably be required to avoid the occur-

[15] Hamburg Convention, art. 5.4.

[16] David C. Frederick, 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules' (1991) 22 Journal of Maritime Law and Commerce 81, 114.

[17] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 219.

[18] Robert Force, 'A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)' (1996) 70 Tulane Law Review 2051, 2068.

rence and its consequences"[19] even if the loss or damage happened due to his servants or agents' fault. This provision is similar to the burden under Article 4.2 of the Hague Rules.[20]

The catalog of exceptions of liability of the carrier listed in the Hague Rules and Hague Visby Rules is eliminated in the Hamburg Rules. Also, the Hamburg Rules made a great change when eliminating the nautical and managerial fault exemption of the Hague Rules and Hague Visby Rules, which have been strongly criticized anyway.[21] This removal, on the one hand, improves the cargo interest; on the other hand, brings a substantial disadvantage for shipowner.[22] Furthermore, this deletion of nautical fault creates a unified concept of liability by providing a single chance of carrier exemption which is based on lack of negligence during the carriage.[23] However, this elimination has been under fierce criticism[24] resulting in some nations' decision to refrain from ratifying the Hamburg Rules.[25]

Although the list of exceptions in the Hague Rules and Hague Visby Rules is not repeated in the Hamburg Rules, it does not mean that the immunities listed from Article 4.2(d) to Article 4.2(p) no longer remain at the carrier's disposal in the Hamburg Rules. The exemption list (i.e. Article 4.2(d)—4.2(p) of the Hague Rules and Hague Visby Rules) does not involve faults on the part of the carrier and the carrier is only liable for his fault (presumed fault principle), therefore, the carrier may invoke the real cause which is beyond his control, such as an act of war, riots, public enemies or civil emotions, etc. to free himself from liability.

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[19] Hamburg Convention, art. 5.1.

[20] See Sze Ping-fat, *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules* (Kwel Law International 2002) 64.

[21] UNCTAD and the developing nations are keen to remove this exemption. They contend that the Hague and the Hague-Visby Rules impose severe disadvantages on states, in which the marine shipping industry is not strong. They consider if the nautical fault exemption remains applicable, the allocation of risks between the carrier and the cargo interest is unfair. See: Proposition to the SMC 1993/94:195, 139.

[22] 'The Economic and Commercial Implications of the Entry Into Force of the Hamburg Rules and the Multimodal Convention' (*UNCTAD,* 1991) 22.

[23] Rand R. Pixa, 'The Hamburg Rules Fault Concept and Common Carrier Liability Under US Law' (1979) 19 Virginia Journal of International Law 444.

[24] The majority of the opposition to the exemption came from some EU states and Scandinavian nations, whereas other influential nations like the USA, France, and Canada advocated for an even higher degree of accountability for carriers than was ultimately agreed upon. See: Rolf Herber, 'The Hamburg Rules: Origin and Need for the New Liability System' in F Berlingieri and others (eds), *The Hamburg Rules: A Choice for the E.E.C.?* (Maklu 1994) 41.

[25] ibid 17.

3. Division of loss—Article 10

The contractual carrier bears responsibility for the whole voyage, even if the performance is excised by the actual carrier. The actual carrier takes on liability for his performance of the carriage. In case both the carrier and the actual carrier share responsibility for carriage, their liability is joint and several. When loss, damages or delay in delivery resulting from the fault or negligence of the carrier, his servants or agents combined with other causes, the carrier is liable only to the part that occurred due to his fault or neglect. In this case, the burden of proof to prove that the loss, damages or delay is not attributable to his fault or negligence is on the carrier.

IV. THE ROTTERDAM RULES

Taking into account the critiques of the existing conventions and with the desire to introduce a consistency and uniformity framework, the United Nations sponsored the drafting of a new international maritime convention: The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly known as 'The Rotterdam Rules'. The Convention was adopted in 2008 and has been open for signature for states from 23 September 2009. The Rotterdam Rules are expected to unify and modernize international maritime law. They propose new international rules to revise the legal framework for maritime carriage, new transport liability regime and carriage of goods by sea. It also brings a new and improved legal regime for both maritime and combined transports. However, over a decade passed, the Rotterdam Rules have not come into force yet.[26]

1. General principles

Like the earlier Conventions, the Rotterdam Rules also maintained the presumed fault principle as the basis of the carrier's liability.

The Rotterdam Rules have a different approach to the period of the carrier's obligation. The duty of the carrier is extended from when the goods for carriage are received by the carrier to when they are delivered ('door-to-door principle').[27] This difference is important for multimodal transportation, where the carrier might receive the goods inland and have to transport the goods to the port before loading. This means that the carrier's period of responsibility begins earlier than under the 'tackle-to-tackle' and 'port-to-port' principle. However, the carrier might exclude this period in case he is required to hand over the goods to authorities. The carrier cannot be expected to be responsible for what happens to the goods if it is not in his custody. Another exception is the agreement of the

[26] GA Res. 63/122, 11 December 2008. (Rotteram Rules).

[27] Rotterdam Rules, art. 12.

parties on the time and location of receipt and delivery of the goods.[28] In this case, the agreed period of responsibility is not allowed to be less than it would have been in the 'tackle-to-tackle' principle of the Hague and the Hague Visby Rules.[29]

The carrier is liable for loss, damages or delay, if the claimant proves that the cause of loss, damages or delay occurred during the time of the carrier's responsibility.[30] The carrier may rebut the claim by disproving it or proving that the loss, damage or delay was caused by the excepted peril set out in Article 17(3).[31] The claimant may defeat the carrier's defense by indicating that the carrier was at fault that the excepted peril has arisen,[32] or there are other causes outside Article 17(3). In this case, the burden of proof is then shifted to the carrier to show that he has no fault involving the event or circumstance.[33] The claimant may also prove that the loss, damage or delay was due to the failure to provide the seaworthiness of the ship,[34] and that the burden is ordinary.[35] The carrier then may demonstrate that there is no causal link between such failure of seaworthiness and the loss or he complied to exercise due diligence in making and keeping the vessel seaworthy.[36]

It can be seen that the way liability arises and the burden of proof structured under Article 17 of the Rotterdam Rules appear complicated but logical and comprehensive. By providing a reversal of the burden of proof, the Rotterdam Rules differ from the Hamburg Rules which place the burden of proof only on the carrier, except for the loss, damage or delay caused by fire.

2. The carrier's exemptions from liability

The general exemption from liability is set out in Article 17.2 which is similar to Article 4(2)(q) of the Hague Rules and Hague Visby Rules. Accordingly, the carrier is not liable for loss, damages or delay if the cause of the damage to, loss or delay of the goods was neither his fault nor the fault of any other 'performing

[28] Rotterdam Rules, art. 12.2(a)-(b) and 12.3.

[29] Phillipe Delebecque, 'Obligations of the Carrier' in Alexander von Ziegler, Stefano Zunarella and Johan Schlein (eds), *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts for the International Carriage of Good Wholly or Partly By Sea* (Kluwer Law International 2010) 81.

[30] Rotterdam Rules, art. 17.1.

[31] Rotterdam Rules, art. 17.2 and 17.3.

[32] Rotterdam Rules, art. 17.4(a).

[33] Rotterdam Rules, art. 17.4(b).

[34] Rotterdam Rules, art. 17.5(a).

[35] Michael F Sturley, *The Rotterdam Rules: The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) 113.

[36] ibid 115.

party.' In the Rotterdam Rules, the carrier only has to pay a proportional part of the damage for the part caused by him, whereas, in the Hague Rules and Hague Visby Rules, the carrier is required not to be involved in the cause of the damages.

The Rotterdam Rules repeat almost the whole list of exceptions of liability for the carrier set out in Article 4.2 of the Hague Rules and Hague Visby Rules, with some noticeable changes. The errors in navigation and the 'catch-all' exception clauses stipulated in the Hague Rules and Hague Visby Rules are no longer mentioned in the Rotterdam Rules. This abolition increases the protection of shippers' interests and sets a unified cross-modal defense for liability of the carrier.[37] This elimination further affirms the view of the Hamburg Rules that the nautical fault exception is too favorable towards carriers. It also fits the growth of modern technology, such as satellites and computers.

The provision on immunity from liability of the carrier for fire set out in Article 17.3(f) of the Rotterdam Rules differs from the clause outlined in Article 4(2)(b) of the Hague Rules and Hague Visby Rules. There is no expression of actual fault and privity of the carrier as regulated in the Hague Rules and Hague Visby Rules, and fire is considered as the case of non-fault by the carrier.[38] The carrier, in the Hague Rules and Hague Visby Rules, bears no liability for loss or damage caused by fire (including fires caused by crewmen or other employees) unless loss or damage is due to the carrier's actual fault or privity of the carrier.[39] Under the Rotterdam Rules, the carrier is unable to invoke this fire exception if there is evidence of fault or negligence by the carrier or his servants or the performing party. Therefore, liability of the carrier is limited to his fault. This exemption only applies to the events of fires occurring during the carriage of goods.[40]

Like in the previous Conventions, the carrier is excused from liability for damages or loss resulting from its attempts to save life or property. The Rotterdam Rules keep this immunity of the Hamburg Rules, i.e. exoneration for all endeavors to save lives, but the exemption for attempts to save property stands only if it is conducted reasonably.[41] It is because life is so valued, whereas it is unreasonable to jeopardize a shipment of goods to salvage less valuable assets.[42]

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[37] Marel Katsivela, 'Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague Rules and Hague Visby Rules' (2010) 40 Revue Generale 413, 431.

[38] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in Alexander von Ziegler, Stefano Zunarella and Johan Schlein (eds), *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts for the International Carriage of Good Wholly or Partly By Sea* (Kluwer Law International 2010) 81.

[39] Hague-Visby Rules, art. 4.2(b).

[40] Alexander von Ziegler (n 38) 104.

[41] Rotterdam Rules, art. 17.3(l) and (m).

[42] Sturley (n 35) 106.

Besides, the Rotterdam Rules also add the exception for reasonable efforts to prevent damage to the environment.[43] This additional exemption stems from the devastating impact on the marine environment in this modern age.

The carrier is also excluded from liability in case the cargo was damaged during operations actually conducted by the shipper as agreed between parties under Article 13.2.[44] However, this exemption does not apply to the agreement to allocate the loading cost.

3. Carrier's liability for other persons

In addition to the liability for his own fault, the carrier is also liable for the fault caused by the acts or the omissions of any performing party, the employees of the carrier and of a performing party, the master and crew of the ship, or any other person who exercise the carrier's duties under the carriage contract, provided that that person's performance is under the carrier's agreement and supervision.[45] The maritime performing party shares similar duties like the carrier's duties for its performance part, therefore, he is also liable for his breach of obligation as well as has the right to apply the carrier's exceptions and limits of liability of the carrier, provided that certain conditions outlined in Article 19.1 are satisfied.

Under Article 19.2, the parties can make agreement on the carrier's obligations other than the scope of the Rotterdam Rules. However, such arrangement cannot bind the maritime performing party, unless it explicitly consents to such obligations.

If there is an overlapping obligation between the carrier and performing party, their liability will be joint and several, but in total it does not surpass the total limits stipulated by the Convention.[46]

4. Carrier's liability for delay

Like the Hamburg Rules, the Rotterdam Rules also regulate the liability of the carrier for delay. The carrier is not only liable for the damage or loss to the goods, but also the damage or loss due to delay in the delivery caused by the fault of the carrier, his servants or agents.[47] As interpreted in Article 21, a delay in

[43] Rotterdam Rules, art. 17.3(n).

[44] Rotterdam Rules, art. 17.3(i).

[45] Rotterdam Rules, art. 18.

[46] Rotterdam Rules, art. 20.

[47] Rotterdam Rules, art. 17.1.

delivery happens when the cargo is not delivered to the destination on a specific date agreed in the contract by the parties. If the delivery date is not indicated in the contract, no liability for delay arises. The claimant is required to prove that there was a failure to deliver within the agreed time which caused a loss to him.[48] The burden of proof is then shifted to the carrier to demonstrate that such delay was not attributable to his fault nor the performing party's fault, or that it occurred beyond his period of responsibility. It seems that the regulation for delay in the Rotterdam Rules is quite on the carrier's side.

5. Live animals

The Rotterdam Rules also adjust the live animals carriage as the Hamburg Rules do. Under Article 81a, the carrier is liable for the loss, damage, or delay if the claimant succeeds in demonstrating that such loss, damage, or delay resulted from acts or omissions of the carrier, or the intent or reckless performance of the maritime performing party who have the knowledge that such loss, damage or delay would probably result. However, there is a difference between the two Conventions: the Hamburg Rules regulate the liability of the carrier, whereas the Rotterdam Rules provide for the carrier's freedom of contract.[49]

6. Deviation

The Rotterdam Rules have a different approach regarding deviation from other maritime Conventions. The carrier (including the maritime performing party) still benefits from any of exemption and limitation, even when the deviation, according to the applicable law, constitutes a breach of the carrier's obligations.[50]

7. Deck cargo on ships

Under the Rotterdam Rules, goods on deck are treated as normal goods. The Rotterdam Rules keep the three situations of permitting the carriage of deck cargo in the Hamburg Rules,[51] and add the fourth one in Article 25.1: when the cargo is carried in or on containers or vehicles. This new condition is considered

[48] ibid.

[49] Francesco Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' <https://comitemaritime.org/wp-content/uploads/2018/05/Comparative-analysis-of-the-Hague-Visby-Rules-the-Hamburg-Rules-and-the-Rotterdam-Rules-1.pdf> accessed 12 May 2024. 44.

[50] Rotterdam Rules, art. 24.

[51] The three situations are when it is in accordance with usage of the particular trade, when it is required by statutory rules or regulations, and when it is in accordance with an agreement with the shipper.

to be suitable for the growth of modern container and vehicle carriages.[52] The containers or vehicles in this case are required to fit for deck carriage, and the decks must be adequate to carry them. The carrier is excluded from liability for loss, damage or delay in case of deck carriage caused by the special risk when the carriage is following Article 25(1)(a) and (c).[53] In case of the shipment on deck other than those four permitted situations, the carrier will not only be liable for loss, damage or delay, but also lose the protection from the defenses prescribed in Article 17.[54]

In case the deck carriage is contrary to an express agreement, the carrier will lose his benefit to limitation of liability.[55]

V. STATUS OF THE CONVENTIONS AND THE QUESTION OF UNIFORMITY

The Hague Rules are totally supported by the carrier community and ship owning states. Until now, the Hague Rules are the most successful international convention with widespread ratification,[56] while the amended Hague Visby Rules, unfortunately, are not welcomed by all nations.[57]

After a long time of implementation, the Hamburg Rules only get strong support from the developing states. The Hamburg Rules have a modest number of ratifications, 35 states, without any representative from maritime nations.[58] The Hamburg Rules have not been accepted by the international community as a marine cargo liability regime, worthy of implementation by mandatory international convention, to regulate the carriage of goods by sea in private maritime commerce.[59]

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[52] Berlingieri (n 49) 43.

[53] Rotterdam Rules, art. 25.2.

[54] Rotterdam Rules, art. 25.3.

[55] Rotterdam Rules, art. 25.5.

[56] For reference of the states of ratification, see: 'Status of the ratifications of and accessions to the Brussels international maritime law conventions' <https://comitemaritime.org/wp-content/uploads/2018/05/Status-of-the-Ratifications-of-and-Accessions-to-the-Brussels-International-Maritime-Law-Conventions.pdf> accessed 26 March 2024, 375-381

[57] Many states chose not to adopt the Hague-Visby Rules and stayed with the 1924 Hague Rules. Only a few states remained ratification of the 1979 SDR protocol. Source of states of ratification: <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800d54ea> accessed 26 March 2024.

[58] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-3&chapter=11&clang=_en.> accessed 26 March 2024.

[59] Brian Makins, 'Sea Carriage of Goods Liability: Which Route for Australia? The Case for the Hague-Visby Rules and SDR Protocol' (1987) Fourteenth International Trade Law Conference Report 22-24.

The Rotterdam Rules will come into force one year after ratification by twenty UN Member states. After over ten years, twenty-five states, including the US and eight EU Member States, have signed the convention, however, only five states (Benin, Cameroon, Spain, Togo and Congo) have ratified it.[60] Neither ASEAN member states nor North Asian states have signed this Convention, and only a few other states are expected to ratify it in the not-too-distant future. Although there is widespread support from various organizations,[61] the possibility of entering into force of the Rotterdam Rules seems rather slim. The first reason for the reluctance of states to ratify the Rotterdam Rules stems from their complication. While states are familiar with the previous regimes, the introduction of new rules with complicated structures and new terminologies may bring difficulties in application to states. If they ratify it, they need more time to adapt to this new regulation. Another reason comes from the possibility of ratification from the big economic states. The ratification from the developed economic states, such as the US or the EU Member states will urge the ratification from the other states. The ratification from China would encourage a large number of Asian states to ratify the Rotterdam Rules. However, China has no prospect of being a party anytime soon.[62] Most of the ratification of other states will depend on the US's ratification. In fact, the US did express its great interest in setting up a new legal regime that would cover "door to door" transport and took a leading role during the negotiation of the convention until the Convention was introduced in 2008. The reason behind the active participation of the US is that it is one of the largest importers and exporters of commodities in the world, and it is probably in favor of the cargo interests' side rather than the owners' side. Therefore, the US appears as if it has been willing to ratify the Rotterdam Rules. However, after over ten years of the Rotterdam Rules' announcement, there is no signal of the US's ratification. The objection of some US port authorities and terminal operators[63] prevents its submission to the Senate for consideration, and

[60] Source: 'Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the Rotterdam Rules)' <https://uncitral.un-.org/en/texts/transportgoods/conventions/rotterdam_rules/status> accessed 26 March 2024.

[61] The Rotterdam Rules are largely supported by the United Nations General Assembly; the Arab Academy for Science, Technology and Maritime Transport; the Comité Maritime International; the American Bar Association; the ICC Committee on Maritime Transport, the International Chamber of Shipping; the World Shipping Council; the European Community Shipowners' Association; and the National Industrial Transportation League (US). Source: 'Rotterdam Rules: On-line resources' <https://uncitral.un.org/en/en/library/online_resources/rotterdam_Rules> accessed 27 March 2024.

[62] Ingar Fuglevåg, 'The Rotterdam Rules – Another nail in the coffin?' (*Simonsen Vogt Wiig,* 27 March 2020) <https://svw.no/artikler/2168> accessed 14 December 2023.

[63] The ports and terminals fear that the liability on ports and terminals (Art. 19) of the Rotterdam Rules would impose them on potential risks of cargo damage liability. See: Ustav Mathur, 'Rotterdam rules - Ratification status in the US and effectiveness of choosing to apply them voluntarily' (*Norton Rose Fulbright,* 2016) <https://www.nortonrosefulbright.com/en/knowl-

the current composition of the US Senate makes it difficult to obtain two-thirds approval.[64] If there is no prospect for ratification from big economic states like the US or EU Member states, the entry into force of the Rotterdam Rules is still questionable. With the current situation from each country's position, the Rotterdam Rules seem unlikely to come into force.

The status of ratification of these Conventions shows an undetermined scenario. The most successful maritime convention with widespread ratification is the Hague Rules of 1924. The ratification of the Hague Rules does not imply the ratification of the amended Hague Visby Rules. Some states are members of both the Hague Rules and the Hamburg Rules, in this case, the latter convention is applicable. The most recent Convention, the Rotterdam Rules, satisfy the development of modern maritime transport, however, it has not come into force yet. Therefore, the issue of uniformity of these Conventions is still a question. No Convention obtains the total support from all states and this is a challenge for acquiring a uniform private international law in the field of carriage of goods by sea in the future.

VI. CONCLUSION

Generally, the system of liability in all Conventions is based on fault. The period of responsibility of the carrier tends to be widened in the latter conventions, from tackle-to-tackle in the Hague Rules and Hague Visby Rules to port-to-port in the Hamburg Rules, and to door-to-door in the Rotterdam Rules. The Hague and the Hague Visby Rules and Rotterdam Rules list the exception to liability of the carrier, whereas the Hamburg Rules contain no such enumeration list.

The Hamburg Rules and Rotterdam Rules, on the one hand, adopt new rules to fix existing problems that are under criticism in the Hague Rules and Hague Visby Rules, and update, on the other hand, the development of the seaborne carriage. It is submitted that the removal of the nautical error exemption provided in the Hague Rules and Hague Visby Rules of the both Hamburg and Rotterdam Rules is a positive development. Live animals and deck carriage are treated as normal cargo. The carrier's responsibilities are broader by imposing the duty to deliver goods to the receiver and deliver timely as indicated in the contract. The exception to property salvage is restricted to 'reasonable measures.'

The most recent Convention, the Rotterdam Rules, is a combination of the advancement of the previous Conventions and the development of modern maritime trade. On the one hand, it restores some benefits for the carrier as the

edge/publications/aacbaf04/rotterdam-rules---ratification-status-in-the-us-and-effectiveness-of-choosing-to-apply-them-voluntarily> accessed 7 April 2024.

[64] ibid.

Hague Rules and Hague Visby Rules. It adopts new rules that put the shipper to advantage. Furthermore, it also provides new rules (for example: the e-transport documents, multimodal transport, etc.) to fit with modern maritime transport.

From the above section's analysis, it is apparent that the Hague Rules and Hague Visby Rules favor the carrier and ship-owner interest, while the Hamburg Rules attempt to reach a balance between the interest of both carrier and shipper by abolishing significant benefits conferred on the carrier in the Hague/Visby, however, this turns the Hamburg Rules to be pro-shipper. As a merit, the Rotterdam Rules not only balance the interest between parties, but also update to modern trends and technologies. Therefore, in the author's opinion, although the Rotterdam Rules appear rather complicated, its regime is more outstanding than previous Conventions and suitable for the current growth of international marine trade.

Homo Digitalis in the EU and in Hungary

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https://doi.org/10.15170/PJIEL.2024.1.4

Contents

I. Introduction 49
II. The Fabrication of Homo Digitalis 50
III. Digitalisation in the vision of EU 55
IV. Digital Hungarians in the law 61
V. Digital Citizenship in Hungary 64
VI. Conclusions 68

Abstract

Digitization has such a complex impact on public and private life, fundamental rights, competitiveness and public services, of which the article only examines the implementation of the EU digital transformation in Hungary. In the context of digitalisation, a significant issue is that the criteria for technical-technological standardization and legislation following the principle of democratic constitutionality differ, so Homo Digitalis is born in the midst of these contradictions. Increasing economic and social competitiveness, strengthening the well-being and legal protection of citizens in the implementation of the decades-long Digital Citizenship programs are linked in the EU strategy documents, while creation of the digital world in Hungary differs to some extent: the provisions on digitization are set out in 996 legal sources in force (November 2023) but the development of the emerging institutional, service and public funding system is incoherent, it does not adapt to the real social needs, digital literacy of citizens and digital penetration. Based on government strategies, Digital Hungarians want the e-Administration, e-Payment system and e-Identification available on their mobile phone from comfort, as they are roaming in social media according to surveys. But in the background, the Hungarian path of digital transformation differs from the principles of EU Digital Citizenship, and the new Act on digital services, adopted in December 2023 without public debate, provides the fullest possible state control on citizens, serves to collect and sell their data, in addition to selectively strengthening the ICT corporate world in the country.

Keywords: digital citizenship, digitalization in legislation, Hungary, digital transformation, European Union

I. INTRODUCTION

As we move into the digital age and more and more live in the context of digital environment, many different aspects of life need to be re-regulated, both internationally and nationally. Many scholars, including the authors of this paper, have been exploring the relationship between digitisation and the public sphere for years with representatives from different disciplines. Thus the researchers at the University of Szeged have been investigating the interactions between digitalisation and the public sphere for several years,[1] involving lawyers, political scientists, historians and communication researchers. It became clear to us quite early on that we did not want to develop a comprehensive definition of either digitalisation or the digital society, but perhaps as an indirect result of empirical research, we could provide a definition of sorts by negation. Our ambition is rather to describe some of the characteristics of *Homo Digitalis*, not in psychological terms, but on the basis of its socialisation, mainly on the basis of what has happened in Hungary. Why? Because our hypothesis is that the digital universe wants to fulfil individual needs and desires in a way that dehumanises and depersonalizes. Since many other contradictions are present in this universe, national/regional/supranational and global norms and values coexist, we will only examine the following in this paper:

(a) what the relevance of Homo Digitalis is as created in the digital realm;
(b) in contemporary Hungarian law, what kind of person is the digital Hungarian;
(c) what idea of Digital Citizenship has been formed by the European Union documents, and
(d) how Digital Citizenship in reinterpreted by power and legislative technicians in Hungary.

These are seemingly different questions, yet the conclusions can provide inspiration for further research.

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[1] The research was supported by the ICT and Digital Society Competence Centre of the Humanities and Social Sciences Cluster of the Interdisciplinary Centre of Excellence for Research Development and Innovation of the University of Szeged. J. Tóth is a member of the research group 'Digitalisation and the Public Sphere'.

II. THE FABRICATION OF HOMO DIGITALIS

Three groups of people can be distinguished according to Kristóf Nyíri.[2] The first group includes those who *do not use the internet at all* (almost 1 million people in Hungary), the second group *communicates its own thoughts, when they reach a certain level of maturity*, to other isolated individuals who also have thoughts. The mature, thinking individual spends a certain period of time in the solitude of his books and thoughts, and then communicates out of it. They live off-line but occasionally go online. Finally, the third group, mainly the younger generation, has technical and financial *access to the web and lives on-line*, reading e-mails as soon as they enter their system, and is in fact in a state of continuous communication (the 'webbed individual'), which means a completely different structure of thought, based on socialisation. The networked individual can get by on the Internet because he has learnt it, because he has grown up with it, because he feels at home on it.

David Riesman understood the categories of 'tradition-directed', 'inner-directed' and 'other-directed' not as personality traits, but as the impact of the dominant culture on society and the individual.[3] The tradition-directed individual grows up in the oral society, the society of the printed book produces the typical inner-directed individual. Born in the age of mass communication, the individual is the externally directed type, with his or her contemporaries as the source of direction. Whether those he knows or those with whom he has only indirect contact, through friends or the mass media. This source is embedded in the individual's personality so that he relies on them for guidance, his tendency to follow closely the cues he receives from others is unchanged throughout life. This way of relating to others produces strict behavioural conformity, but not through the pressure of prescribed rules of behaviour, as in the tradition-driven character, but rather through extreme sensitivity to the wishes and actions of others.

The meeting of these three types results in a 'cultural clash', for example because the dominant teacher population in secondary schools and higher education today has been socialised in the Gutenberg world in a typically abstract, reflective direction. This type of teacher now encounters a population that feels comfortable in a different culture. But there has been no breakthrough in schools, especially at the stage of content development. Only few schools have integrated computers or e-mail into normal curricular practice. The majority of teachers and the wider society do not use, cannot use or do not

[2] 'Homo Digitalis – a 21. század embere. Nyíri Kristóffal beszélget Kőrösné Mikis Márta' (1999) 7-8 Új Pedagógia Szemle <https://ofi.oh.gov.hu/tudastar/homo-digitalis-21-szazad> accessed 29 April 2024 190.

[3] David Riesman, *The Lonely Crowd. A Study of the Changing American Character* (Yale University Press 1963).

want to use the new technology and methods, and in ten to twenty years' time Internet use will be part of everyday life. The current situation is partly due to a lack of technical connectivity and partly to high tariffs[4]. In OECD countries, a representative 2018 survey[5] found that 53 percent of teachers regularly use ICT tools in the teaching-learning process, compared to 39 percent in Europe. The survey indicated that 51 percent of teachers in Hungary had received some training in the use of digital tools for teaching, compared to 56 percent in the OECD. What was missing from the training was a more significant provision of the resources needed to develop the digital infrastructure, digital responsibility, ethics and motivation for pedagogy. But Covid-19 brought changes also in the use of digital tools in this area.[6]

It's a big turnaround that the internet has brought the world of work and the world of learning into the same place. When children play and roam on the Internet, they are in the same environment as adults working, doing business, shopping. Therefore, the boundaries between child/young person/adult are blurred, and although the institution of the separated school system will remain for some time, it will play a very different role in a world where the Internet provides an organic learning environment. The task of the separated school will be to keep alive and transmit the best cognitive traditions of book culture in a world where the dominant medium of communication is the Internet, which will work against book culture, and will have a very different relationship to the whole world of learning. Clearly, in the twilight years of authoritarian pedagogy, children who are able to navigate freely on the Internet and achieve effective results can outperform their teachers from a very young age. Those who know more, who set an example with their own cognitive success, can influence others—regardless of age. In short, "creative and innovative pedagogical work, as well as conscious technical and education planning of, are indispensable to the development of ICT infrastructure."[7]

The documents on the screen are simultaneous, always in the present, i.e. the digital world is a document of the moment, it does not carry its age, i.e. it has no temporal context. Nor does it have a spatial context, it is not possible, for example, to recall visually, as in the case of printed books, the evidence seen, say, at the "top of the page". In other words, it is knowledge segmented in time, space and content that one can assemble in the digital world. The problem of how to counteract knowledge fragmentation is a pedagogical, psychological

[4] (n 2) 193.

[5] OECD, *TALIS II Results of 2018* (OECD 2018) vol 2.

[6] Gabriella Kállai, 'IKT-eszközök az oktatásban' in Enikő Pásztor and László Varga (eds), *Neveléstudományi kaleidoszkóp.* (Soproni Egyetem Kiadó 2023) 75-83.

[7] Kállai (n 6) 81.

and epistemological one. Thinking, deeply internalised in book culture, sees big connections, strives for coherence, is able to form and follow longer linear lines of thought, to compare texts, to detect contradictions or coherence between them, to draw logical conclusions, to think in context. In the digital medium, on the screen, the organisation of thought is completely different, because long, linear lines of thought cannot be communicated, and anyone who tries to do so will not find a reader, even in scientific communications, which have to be organised in units per screen. In fact, from early childhood to adulthood, from kindergarten to postgraduate education, well-designed empirical studies should observe how the absence or presence of printed text leads to changes in learning and thinking performance.[8] We must seek the pedagogical environment that produces the most creative, innovative, politically and scientifically successful individuals in science and technology. Kristóf Nyíri's hypothesis is that this ideal environment will be *two-dimensional*: a *dual citizen* of the Gutenberg world and the McLuhan world[9] will make up the best performing elite of the future. Of course, an intelligent university system would also have a role to play in the creation of an intelligent educator society. For the moment, these trends do not seem to be adequately reflected in higher education, either intellectually or technically. The main reason behind the decline in socially engaged activities is the fall in the average time spent on gainful productive work. The average time spent on learning and training has increased among people in their twenties, thanks to the expansion of higher education and the resulting expansion of the extension economy, but people in this age group continue to spend most of their free time in front of a screen. In the 15-19 age group, 40 percent of leisure time was spent on this activity, and 50 percent in the 20-29 age group.[10] If teachers and trainers also have more free time, more time for self-learning, and good technical facilities and access, we can assume that their interest will be awakened, and their self-learning will become more intense. Although it is not possible to talk about a knowledge-based society and keep those who base knowledge in poverty at the same time—so without money, it is not possible.

A further element of the analysis is the regulatory environment and the role of the state in which the three types of people live.

News arrives fast, even from the other side of the world, and the technology behind it is not visible, nor is the Digital Society that is emerging with digital

[8] (n 2) 195.

[9] Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto University Press 1962) is a pioneering study in the fields of oral culture, print culture, cultural studies, and media ecology. McLuhan makes efforts to reveal how communication technology affects cognitive organization, which in turn has profound ramifications for social organization.

[10] Zoltán Bittner, *A 15-29 éves korosztály tevékenységszerkezete az időmérleg-vizsgálatok tükrében* (Pécsi Tudományegyetem Közgazdaságtudományi Kar 2013) 51.

devices, creating a new type of human network with different regulatory needs. From this perspective, digitalisation will have an impact on the legal system and legal thinking, not just on human relations.[11] Is it possible to have an effective regulatory impact on the digital universe through the tools of law without transforming them? Yes, if legal solutions that focus on the regulation of human behaviour cannot be applied to the digital world, because certain parts of the digital space are inaccessible, non-transparent and operate with legal instruments that are not created by democratic consensus. In contrast to the process management used in bureaucratic legislation, greater flexibility is needed, dynamic and managerial regulatory practices are required, technical standardisation, network dynamics. An example of this is the attempt to regulate Artificial Intelligence (AI).[12] A closer look reveals that the proposed legislation is twofold. One part is an evolution of existing legislation (consumer protection in the online space, product liability, reform of existing regulations in transport and other named areas). The other part is entirely new (rules on the incorporation of AI into products, software upgrades, machine learning, chain of liability, risk bearing from network interconnectivity). It follows that AI requires a renewal of the legal profession, an integrated, multi-disciplinary legal society. We cannot leave the responsibility for the operation of AI to researchers and engineers, but neither can we allow discrimination to increase because of AI applications. In other words, the very essence of purely technological regulation, the enforcement of behaviour by code and algorithms, will create systemic problems of coupling between traditional law and digital society.

A research difficulty is that there is a conflict between public and private interests: because people expect the state to actively protect them in cases of infringements between the public and the service provider, i.e. private parties, and the rule of law requires that the algorithms that facilitate the operation of platforms, for example, should be made accessible and controlled by those whose rights and obligations are affected.[13] The State is itself a public service provider (either through its own organisation or by contracting a private company) and must therefore play the role of both regulator and service provider, i.e. public and private. However, the regulatory role (what is lawful and what is not, which should be sanctioned) cannot be privatised and transferred to market players. In this dual role, the state therefore needs flexible, open regulation to adapt to innovation but effectively protecting intellectual property rights and consumers

[11] Tamás Gyekiczky, *A digitális társadalom és a jogrendszerek kapcsolata* (Wolters Kluwer 2020).

[12] Tamás Gyekiczky, 'System Error? A jog rendszere és a Digitális Társadalom' Szabad Piac (2021) 52.

[13] Attila Menyhárt, 'Az információs technológiai fejlődés hatása az állam szerepvállalásaira' in Bernát Török and Zsolt Ződi (eds), *A mesterséges intelligencia szabályozási kihívásai* (Ludovika Egyetemi Kiadó 2021).

from risks, while preserving freedom. This conflict of roles and interests is difficult to resolve in the field of digitalisation.

A further role conflict is that, in addition to compensation and sanctioning of infringements, prevention (e.g. filtering out harmful online content) entails restrictions on freedom, and the ex-post assessment of liability/compensation for these. In other words, the state has few real preventive regulatory instruments against online service providers, the content can in fact be controlled by the online service provider, which thus becomes an agent of the state, since the situation of the principal is dependent on the decisions of the agent. This means that the conflict of interests will be dominated by the interests of the agent rather than the consumer's legal protection, because the technologically rational solution will overshadow it. These asymmetries should be eliminated by legislation.

Algorithms should be optimised based on the interests of the online (market) service provider, thus almost eliminating discretion/evaluation in individual cases, the state essentially relinquishes direct control of social behaviour, leaving it to the online service provider, but expecting it to exercise this control. The state can only hold the online service provider to some extent accountable ex post. This leads to the privatisation of justice, and the transmission of legal policy and social values is replaced by the minimisation of risks for online service providers. This is how the responsibility for protecting private autonomy is transferred to online companies and service providers.

In the digital universe emerging from legislation, new actors, new public service methods, new languages are emerging, from digital public administration to health and education. As a kind of digital decade has begun in the European Union, this is facilitating the development of supranational regulation with the growth of international data/information flows and digitalisation, reinforcing the networking of law. However, traditional principles of law (e.g. human rights, equal treatment, respect for fair trial) and the functioning of the digital world cannot be reconciled by applying traditional legislative methods and principles (e.g. legislation should be democratic, transparent, fair, understandable), and technical regulation and standardisation can only partially meet the dual requirement. Should the regulatory concept of law be redefined, because it does not only regulate human behaviour, or should the scope of law be narrowed if it cannot embrace digitalisation? This is likely to lead to a hybridisation of the legal profession as well, because technical professionals will not be concerned with legal regulation, technological regulation will be the code/algorithm that will ultimately enforce behaviour in the digital/information society. In other words, it is clear that linking legal and digitisation systems can lead to systemic problems, given the different characteristics of the two systems.

And it is in this double squeeze, in this friction, that *Homo Digitalis* is born, who will soon be no longer at home in the Gutenberg galaxy, nor in the digital humanism with core principles[14] that once sought to create a democratic, egalitarian and free normative system.

III. DIGITALISATION IN THE VISION OF EU

The EU has no specific regulatory powers on ICT in the founding treaties but can take appropriate measures for specific horizontal and sectoral policies (e.g. industrial policy, space, trans-European networks).[15] The *Digital Agenda for Europe*, adopted in 2010, was the basis for creating a Digital Single Market through the coordinated development of elements of services and networks but it identifies 13 key performance targets.[16] This has led to dozens of directives and programmes, but the European Parliament is also pushing for a comprehensive ICT strategy, facilitating legislation through various background studies, reports and parliamentary committee papers, in particular in the areas of data protection and the functioning of the internal market.

Notably, the eIDAS Regulation, adopted in 2014, creates a framework for digital identity and authentication, providing a clear legal framework for citizens, businesses, and public administrations.[17] The eIDAS regulation was an important event in a series of EU regulations designed to help digitisation develop. Its main objective was to build trust and confidence in cross-border electronic transactions while improving the efficiency of online services and e-commerce platforms. This regulation is specifically targeted at providers of electronic identification (eID) and trust services and aims to remove existing barriers to the

[14] Digital technologies should be designed to promote democracy, inclusion, privacy and freedom of speech, free expression of opinion, the dissemination of information, effective regulation, fairness and equality, accountability, and transparency of software programs and algorithms; governments should not leave all decisions to markets, rights and decisions must continue to be made by responsible humans; scientific approaches in a complex collaboration with technological disciplines in academic freedom; practitioners everywhere ought to acknowledge their shared responsibility for the impact of information technologies; vision is needed for new educational curricula, combining knowledge from the humanities in the age of automated decision making and AI, students should learn to combine information-technology skills with awareness of the ethical and societal issues at stake. 'Manifesto on Digital Humanism' (Vienna 2019) <https://dighum.ec.tuwien.ac.at/wp-content/uploads/2019/05/manifesto.pdf> accessed 6 May 2024.

[15] See, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 Art. 28-30; 34-35; 45-66; 101-109; 114; 165-167; 173; 206-207; 179-190.

[16] Commission, 'A Digital Agenda for Europe Brussels' (Communication) COM (2010) 245 final.

[17] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257/73 (Regulation (EU) No 910/2014).

seamless use of trust services and eIDs across EU Member States. One of the key aspects of the eIDAS Regulation was the establishment of mutual recognition of eIDs issued by EU countries, provided that they meet the specified legal criteria and have been duly notified to the Commission. This recognition enables secure electronic transactions by ensuring that an eID issued in one Member State is valid and recognised in all other Member States. In particular, mutual recognition will be mandatory for eIDs that meet certain security levels, thus facilitating cross-border interactions and increasing trust in online services. The eIDAS Regulation provides for the interoperability of national eID schemes between EU Member States. This requires the development of a technology-neutral framework that does not favour any particular technical solution for the implementation of eIDs. The European Commission has adopted a number of measures defining procedural arrangements, technical specifications and operational requirements for electronic identification and trust services in line with the eIDAS Regulation. These measures include the specifications for the EU trust mark, the technical requirements for the assurance levels of eID means, the formats for trusted lists and the procedures for the notification of eID schemes. Such comprehensive guidelines are instrumental in promoting harmonisation and interoperability between the different national eID systems within the EU. In July 2020, the Commission opened a consultation to collect feedback on drivers and barriers to the development and uptake of eID trust services in the EU. The various stakeholders expressed support for measures to improve the effectiveness, accessibility and trustworthiness of digital identities across Europe. Following the consultation, the Commission proposed in 2021 a new Regulation establishing a framework for a European Digital Identity and amending the eIDAS Regulation. (EUDI regulation)[18] In March 2021, the Commission proposed a way forward for the Digital Decade. This policy programme is guided by the Digital Compass 2030—a plan to achieve the digital transformation of the EU economy and society.[19]

The Digital Transformation has produced an untold number of documents, such as the Digital Europe Programme, plans to reinforce Europe's preparedness and resilience against cyber attacks by creating a Cybersecurity competence centre and network, the adoption of the Data Governance Act (DGA) or MEPs call for significant investments to close the digital skills gap in European population.[20]

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[18] 'European Digital Identity (EUDI) Regulation' (*European Commission*, 30 April 2024) <https://digital-strategy.ec.europa.eu/en/policies/eudi-regulation> accessed 6 May 2024.

[19] Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 (Text with EEA relevance) [2022] OJ L 323/4.

[20] 'Digital Transformation' (*News of European Parliament,* 2 May 2022) <https://www.europarl.europa.eu/news/hu/press-room/20220502BKG28407/conference-on-the-future-of-europe-key-proposals-and-related-work-by-parliament/5/digital-transformation> accessed 6 May 2024.

But unless efforts are stepped up, the goals of the *Digital Decade* announced for 2021 are at risk.

The goals include broadband everywhere in Europe, 80% of basic digital skills, and the basic digital intensity of 90% of European SMEs. In July 2022, the European Commission published Digital Ecosystem Skills Partnerships as part of the EU's digital literacy goals for the digital decade, thus increasing the skills and retraining of workers in many digital sectors. But in 2022, there was an urgent need to significantly accelerate digital development to meet the EU's goals for the digital decade.[21] The problems are many: the differences between Member States in this area are very large, the progress of digital skills and infrastructure, and the number of IT professionals is far from sufficient to reach the 2030 target; the proportion of households covered by very high capacity networks (VHCN) is still 59% in 2021, but at high cost, in particular the extension of coverage in rural and remote areas, as well as, that 80% of the EU population has the basic digital skills that currently only 59% of adults have. And then we did not even say that the EU institutions were not sufficiently prepared for the growing number of cyber attacks, according to the European Court of Auditors' report. Another concern is that it is not possible to talk about digital transformation without digital inclusion, bridging the gap between rural and urban areas, is one of the most important aspects of digital inclusion.[22] In 2022, Europeans accounted for only 37% will have access to high-speed internet. Digitization is more concentrated in urban centres, where a highly skilled workforce is located, to the detriment of more remote areas. According to a 2019 G20 policy report, this will exacerbate global inequality while limiting social cohesion. The OECD has consistently warned of the risk of digital clusters, arguing that the concentration of innovation activities in some companies can reduce market competition and increase welfare inequalities. This is because digitalisation is not just about profitability, but it can increase equal opportunities in the EU if technologies are used intelligently to improve the quality of life of all citizens. The EU *Digital Education Action Plan*[23] is useful for this if digital skills are adapted to life, because work or school-related training is limited to formal education. (96 percent of young Europeans aged 16-29 years use the internet daily, including social media and networks most of the time. But more than a fifth do not have even basic

[21] Molly Killeen, 'Report: Digital Decade targets in jeopardy without scale-up of efforts' (*Euractive*, 30 March 2022) <https://www.euractiv.com/section/digital/news/report-digital-decade-targets-in-jeopardy-without-scale-up-of-efforts/> accessed 6 May 2024.

[22] Theó Bourgery-Gonse, 'No digital transformation without digital inclusion, MEP Says' (*Euractive*, 17 October 2022) <https://www.euractiv.com/section/digital-inclusion/news/no-digital-transformation-without-digital-inclusion-mep-says/> accessed 6 May 2024.

[23] EU Digital Citizenship Working Group: A multidisciplinary working group composed by EU Civil Society Organisations, Academics and think tank has been launched in January 2021 aiming to contribute to the debate around digital citizenship in the EU.

digital skills. It's no coincidence that the European Commission has set itself the goal of reducing this deficit, not just developing digital infrastructure, through its Digital Action Plan 2021-2027,[24] which builds on the 2018-2020 plan). Being digitally competent is more than being able to use the latest smart phone or computer software—it is about being able to use such digital technologies in a critical, collaborative and creative way. The European Digital Competence Framework for Citizens identifies 21 competences in five key areas, describing what it means to be digitally savvy. People need to have competences in each of these areas in order to achieve goals related to work, employability, learning, leisure and participation in society.[25]

It is also worth mentioning the digitisation of justice systems, which is one of the main objectives of the European Union. In 2018 the European Commission presented a package of a Communication on the Digitisation of Justice, a proposal for a Regulation on the mapping of the state of digitisation and a proposal for a Regulation on a computerised system for cross-border communications in civil and criminal matters.[26] The COVID-19 pandemic has been a catalyst for accelerating the digitisation of justice and, as a result, the EU has stepped up its efforts by proposing a toolbox to support the use of digital tools by Member States. In line with the principles of subsidiarity and proportionality, this toolkit focused on the following areas: making digital the default option in cross-border judicial cooperation; combating cross-border crime; and improving access to information and IT tools for cross-border cooperation. The European Union intended to implement the programme gradually as part of the new impetus for European democracy and in line with the political priority of a Europe fit for the digital age. The European Union's efforts in the 2020s are reflected in the proposals to bring cooperation between Member States up to 21st century standards.[27] On

[24] See, 'European Education Area' <https://education.ec.europa.eu/hu/focus-topics/digital-education/action-plan> accessed 6 May 2024.

[25] The European Digital Competence Framework for Citizens. Publications Office of the European Union, Luxemburg, 2016. It was developed by the EU's Joint Research Centre on behalf of the Directorate-General for Employment, Social Affairs and Inclusion. This framework and related assessment tools are being used across Europe to help jobseekers identify and describe the digital skills they have acquired, support employment services to match skills with job vacancies, reform educational curricula, improve learning outcomes and support educators. <https://ec.europa.eu/social/BlobServlet?docId=15688&langId=en> accessed 6 May 2024.

[26] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 COM (2020) 712 final.

[27] Commission, 'Digitalisation of justice in the European Union a toolbox of opportunities' (Communication) COM (2020) 710 final; Commission, 'Digitalisation of justice in the European Union a toolbox of opportunities' (Staff Working Document) SWD (2020) 540 final; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings

8-9 December 2021, recognising the potential of digital technologies to improve access to justice and the efficiency of judicial systems, the European Commission for the Efficiency of Justice (CEPEJ)[28] adopted an Action Plan on digitisation for better justice. The four-year plan aimed to reconcile the effectiveness of new technologies with respect for fundamental rights (in particular Article 6 ECHR)[29] to guide states and courts towards a successful transition to the digitalisation of justice. However, it should be noted that EU legislation, although quite dynamic, is a slower process when it comes to implementation, which is the responsibility of Member States. Despite all the efforts made, the European Union is currently still a place where judicial procedures, especially in cross-border relations, are mostly carried out in the traditional way.[30] The new rules,[31] came into force on 16 January 2024 on the digitisation of justice will hopefully change this situation and significantly improve the efficiency of judicial cooperation and access to justice for citizens and businesses, as well as the quality and transparency of justice. The new Regulation will allow citizens and businesses to make requests or communicate with judicial authorities in cross-border situations. The European electronic access point, an interface for bringing small claims against a defendant in another Member State, will be set up on the European e-Justice portal. This will make it easier for consumers to obtain redress. In addition, the Regulation will allow parties to a civil or criminal case to participate in a court hearing by videoconference; citizens and businesses will also be able to pay court fees electronically. The European Commission and Member States will start implementing the regulation in 2024. It's hoped that this process will be faster than the implementation processes of the past and will bring the EU up to the standards of the 21st century.

In recent years, the courts have also been confronted with cases relating to digital transformation. At the European level in particular, the Court of Justice of the European Union (ECJ) and the European Court of Human Rights (ECtHR)

(e-CODEX system), and amending Regulation (EU) 2018/1726 COM (2020) 712 final.

[28] See, 'Council of Europe European Commission for the efficiency of justice (CEPEJ)' <https://www.coe.int/en/web/cepej> accessed 6 May 2024.

[29] 'Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial' (*Council of Europe,* 2022) <http://www.echr.coe.int/documents/d/echr/guide_Art_6_eng> accessed 6 May 2024.

[30] The European Parliament is playing an active role in this process in its capacity as co-legislator. See: Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity COM (2021) 281 final.

[31] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation. [2023] OJ L2023/2844.

have ruled on several cases with a digital component.[32] The decisions of the ECJ on this issue, should be the subject of a separate study, as the ECJ closely follows the decisions of the ECtHR and in many cases relies on them.[33] Space does not permit an in-depth examination of this issue, but it is worth mentioning that the ECJ has addressed digitisation issues in several cases, including copyright jurisprudence,[34] case law on conflicts between privacy, data protection and freedom of expression,[35] jurisprudence on online publication requirements,[36] and jurisprudence on interception of online communications.[37] As in so many other areas, the ECJ's jurisprudence is increasingly focused on examining EU regulation in response to the challenges of the digital age, in particular how the European Union can ensure full protection of fundamental rights in the face of the challenges of digitalisation.

In summary, digitalisation is not only about markets, competitiveness and consumers, but also about social cohesion, democratisation and culture. As the Digitisation Handbook succinctly sums up for citizens in a triple slogan: Be online, Prosper online and Have rights online.[38] And anxious voices are calling for decisive action for a stronger (and) digital Europe to preserve European values and prosperity.[39] The EU's policy agenda for the *Digital Decade 2030* sets out a roadmap, milestones and a follow-up timetable for implementation, precisely so that we can enjoy the freedom to travel, work, study, live and do business in EU Member States. However, it also warns that "digital transformation can only be successful if it goes hand in hand with improvements in democracy, good

[32] See more: Stijn van Deursen and Thom Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49 International Review of Intellectual Property and Competition Law 1080; Tito Rendas, 'Fundamental Rights in EU Copyright Law: An Overview', in Eleonora Rosati (ed), *Routledge Handbook of EU Copyright Law* (Routledge 2021); Evangelia Psychogiopoulou, 'Judicial Dialogue and Digitalization: CJEU Engagement with ECtHR Case Law and Fundamental Rights Standards in the EU' (2022) 13 JIPITEC.

[33] Although Article 6(2) of the Treaty on European Union (TEU) requires the EU to accede to the ECHR, the EU has not yet done so. In this context, the Bosphorus Doctrine developed by the ECtHR also deserves special attention. *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

[34] Case C-469/17 *Funke Medien NRW v Bundesrepublik Deutschhland* [2019] ECLI:EU:C:2019:623; Case C-516/17 *Spiegel Online v.Volker Beck* [2019] ECLI:EU:C:2019:625; Case C-476/17 *Pelham and others* [2019] ECLI:EU:C:2019:624.

[35] Case C-307/22 *FT v DW* [2023] ECLI:EU:C:2023:315, Opinion of AG Emiliou.

[36] Case C-78/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:476.

[37] Case C-140/20 *G.D. v Commission of An Garda Síochána* [2022] ECLI:EU:C:2022:528.

[38] Janice Richardson and Elizabeth Milovidov, *Digital Citizenship Educational Handbook* (Council of Europe 2019) 144.

[39] 'A Stronger Digial Europe. Our Call to Action towards 2025' (*Digitaleurope,* 2019) <https://www.digitaleurope.org/policies/strongerdigitaleurope/> accessed 6 May 2024.

governance, social inclusion and better public services."[40]

IV. DIGITAL HUNGARIANS IN THE LAW

Long ahead of the European average, more than three-quarters of Hungarian consumers use Facebook every day, by far this is the most popular community platform among adult Internet users, according to a 2023 study by GWI and Publicis Groupe Hungary.[41] The proportion of mobile internet users has already preceded those of computer users, podcasts and streaming platforms are emerging, and TV has remained a key tool, especially in media consumption for older generations. Compared to the world average, social media channels are 20 percent more used to communicate with friends and family, and Hungarians also look at commercial offers on them. The world's largest research on digital consumers has been conducted in 52 countries, interviewing more than 2.7 billion Internet users, covering e-commerce, what consumers primarily look at when making a purchase, and what media types they are mainly informed about. Older people watch TV, young people use social media, so it is a clear pastime with a rate above 80% of daily internet use (nearly two-thirds of the total population is social media, nearly 40 percent are reading online news portals, 37% spend their internet time on music streaming and 35% on video streaming, complete with podcast listening). Recommendations between friends and personal acquaintances have the greatest impact on what brands and products they hear about and how they judge these, (35% discover new brands or products, especially those living in suburban areas, among high-income and baby boomers, but Generation Z's ad blocking use also leads the ranking worldwide, with nearly half of young people filtering ads that are considered unsolicited on the net. Thus, administrative or administrative administration and browsing of state and public service websites are marginal in the data.

It seems as if the robust expansion of government digitization in public administration and the judiciary does not meet the needs of the population. Therefore, there was no echo of the postponement of the introduction of a nationally unified e-Administration system on the last day of August 2023.[42] The government admitted that it could not write a generally applicable administrative program, and the outdated tax authority document filling program remained.[43]

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[40] Decision (EU) 2022/2481 of the European Parliament and the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 [2022] OJ L 323/4.

[41] 'A TV még tartja a versenyt a közösségi médiával' (*HVG*, June 21 2023) <https://hvg.hu/pr_cikkek/20230621_A_tv_meg_tartja_a_versenyt_a_kozossegi_mediaval> accessed 6 May 2024.

[42] Government Decrees No.420 of 31 August 2023 and No. 451 of 19 December 2016.

[43] 'Sandor Esik' <https://substack.com/@sandoresik> accessed 1 September 2023.

To what extent does domestic legislation serve the needs of the population, consumers and customers—adapted to the level of digital penetration and knowledge, also due to traditional personal administration? How does it follow the principles of the EU digital transformation? The research therefore reviewed the legislation at the national level in search of the provisions on digitization.

By the November 2023, a minimum of 996 pieces of legislation and public policy documents in force (e.g. government programme decisions, national strategies, regulations on the internal division of labour in public administrations, i.e. internal standards that are not generally binding but only apply to employees in certain organisations) include digitalisation in some form of expression or word combination. Of these, there are *at least 200 statutory laws, 185 government decrees and 190 government resolutions on digitalisation issues somehow.* This is a considerable number of standards and does not include those that have been repealed in the meantime, nor those of passed by local municipals and the European Union. These thousand items of law is comparable to the production of national lawmaking, which is passed and published 10,000-90,000 pages of new legal sources a year (in the Hungarian official periodical of 'Magyar Közlöny').

What is it like to be a man of the digital universe? A *Digital Hungarian* is a being who enjoys doing business, who finds it an experience, and who wants to access and participate in the digital world so as not to miss out on the benefits of digital developments. Although there are digitally illiterate, low-competent, mobile-device-owning, vulnerable, segregated, smart-device-less, net-connected and even electricity-less residents - they still have the *right to e-administration* as a fundamental citizen right under the Act CCXXII of 2015 (that will be replaced in September 2024 by the new Act on Digital Citizenship[44] with mainly the same technical provisions). Regardless of time and space, without touch, *for convenience*, everyone has accession to business, life events, public services, and has the right to be properly informed about this. Other guarantees for equal chances are missing.

Analysing the provisions of the Hungarian legal framework related to digitalisation, the main issues of regulation in force are the following:

(a) digital governance (e.g. provisions and strategy on digital threat mitigation, cybersecurity, sovereignty protection of the state and economic resilience);
(b) digital public services (e.g. information portal to meet the digital information needs of Hungarians living abroad in order to promote Hungarian national

[44] Article 1: The aim of this Act is to create digital citizenship by establishing a user-friendly basis for the administration and provision of services in the digital space. In order to create simple, convenient and efficient service provision in the digital space, this Act ensures.

values/national heritage, to preserve/protect Hungarian culture, to cultivate the Hungarian language, to facilitate the administration of public affairs in Hungary and to facilitate the participation of Hungarians living abroad in democratic public life);
(c) establishment of various digital/virtual spaces (e.g. entering the digital gateway to the digital branding and advertising spaces, reading the digital billboard advertising or digital media campaign, using the digital work system, i.e. education and training outside the classroom that is organised in a digital work system, or one can move to the Digital Collaboration Space as a module of the learning system, to digital community of Miskolc and its agglomeration, to digital marketplace with digital payment instruments or to the Digital Agricultural Academy);
(d) digitisation of various data and documents (e.g. digitised copy of a paper public document, any mail, parcel or EMS item consisting of written, mapped, drawn, printed or digital information, using the digital Covid certificate);
(e) knowledge is transformed through digitisation (e.g. digital knowledge carriers for the creation of digital content that is related to cultural heritage, so digital cultural heritage through digital data repositories, digital learning materials for teaching theoretical material in closed e-learning, video content management);
(f) digital tools and methods for the transmission of information (e.g. digitisation of broadcasting, interactive digital television services via reverse transmission systems up to digital water meters).

Moreover, Digital Hungarian has a highly developed sense of language and knowledge of digital jargon otherwise he will not be able to cope with the *linguistic monsters* of the digital universe. For example only: direct digital control energy management system with energy saving function (DDC—Direct Digital Control Energy Management System), in relation to networks and interconnections (ISDN—digital network of integrated services—and EDI—electronic data exchange); the single digital radio communication system (EDR) to provide a government-related communication service, or the building information model (BIM)—obviously is clear for a special professional circle. Similarly, work related to the export and development of national/international state digital solutions may be part of the international administrative expert activity for a limited team. The analysis has also shown that in many cases they are not drafted with a commitment to quality legislation, so no regulatory impact assessment has been carried out, and there has been a failure to reduce administrative burdens and to draft clearly. The provisions on digital issues are full of confusing, ambiguous terms that require considerable prior knowledge and concentration on the part of the reader. Not only is the overall quality of legislative work within governance generally poor according to various indicators, but the adaptability of the legal system to digital business models is also weak in Hungary compared to other

OECD countries.[45]

From 2015, the Digital Agenda for Well-being, a digital ecosystem-wide programme to ensure that all citizens and businesses are *digital winners* and avoid a digital divide in society, is a *public policy package for modernisation*.[46] This basic package was followed by the implementation measures and then the extension of the Digital Agenda and its action planning for 2017-2018. However, the grand vision of modernisation gradually evolved into strategies defining *digital (instrumental) development directions*, such as supports to digital start-ups, export development, child protection, a strategy for the digitisation of public collections, the digital health space or the Digital Education Strategy. The Programme as a series of public policy actions was discontinued at the end of July 2022 and replaced by the National Digital Citizenship Programme (2022-2026), the Public Administration and Public Services Development Strategy (2014-2020), the National Info-communication Strategy (2014-2020), but it is impossible to list them all. In fact, the *European Union's Digital Decade 2030* policy agenda (Digital Agenda) has been the driving force behind the instrumental (sometimes sectoral) documents, which prioritise access to key public services. This is how we arrived at a national strategic roadmap for 2023, with missing budget-calculations and a few days of public consultation.[47]

V. DIGITAL CITIZENSHIP IN HUNGARY

The process of putting Hungarian public administration on an electronic footing and making online administration possible started in 2003.[48] Since then it has become a gradually expanding body of law, with quite a few contradictions but basically referring back to EU standards in the closure part of national laws.[49]

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[45] Krisztián Kádár, 'A jogalkotás minőségének vizsgálata a nemzetközi 'governance' indikátorrendszerekben' in Miklós Sebők, György Gajduschek and Csaba Molnár (eds.), *A magyar jogalkotás minősége* (Gondolat Kiadó 2020) 93-117; 477; 484 and 493.

[46] 'Digitális jólét program – Kiemelt publikációk' <https://digitalisjoletprogram.hu/hu/kiadvanyaink> accessed 7 May 2024.

[47] Government Resolution No.1189 of 10 April 2017; No. 1308 of 8 June 2017; No. 1456 of 19 July 2017; No. 1536 of 13 October 2016; Government Decree No. 127 of 8 June 2017; No. 103 of 30 March 2023; No. 104 of 30 March 2023.

[48] 'Digitális állam: jövő szeptembertől indul az eAláírás és az eAzonosítás' (*Jogászvilág*, 14 December 2023) <https://jogaszvilag.hu/napi/digitalis-allam-jovo-szeptembertol-indul-az-ealairas-es-az-eazonositas> accessed 7 May 2024.

[49] Regulation (EU) No 910/2014; Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No 322/97 on Community Statistics, and Council Decision 89/382/ECC, Euratom establishing a Committee on the Statistical Programmes of the European

In 2024, the *Digital Citizenship* programme is launched, and all we see is that 13.9 billion HUF will be dedicated to experiential implementation in 2024 and 8.6 billion HUF per year from 2025.[50] The implementation of the many strategy documents is being carried out by an untold number of different agencies established by the government, which are being created, merged, subordinated to each other in a bogus. It is worth noting that the Digital Welfare Non-profit Ltd. has been replaced by the Digital Hungary Agency (as closed joint stock company) from 2023, with 12 subordinate Ltds, which is responsible for the programmes. The operative and responsible institutional basis has been yearly changed without transparent personnel and financial review.[51]

From September 2024, the *Digital Citizenship* programme will be extended, which will make it possible for everyone to manage their paperwork, ID cards and signatures on their mobile phones. According to Act CIII of 2023 on the digital state and certain rules for the provision of digital services, the Digital Citizenship will be implemented in several steps. Under the legislation, a central mobile application will be created and will be available to anyone, but its use will not be mandatory. Among the first things that will be possible will be birth and car registration, and later on moving, marriage, starting a business and obtaining a moral certificate. The aim is to make all administrative matters digital, so users will be able to prove their identity, settle their payments to the state with the click of a button, receive official letters later on the interface and receive public utility bills in the app. The law will gradually implement the framework application, the digital identity card service, e-Signature and e-Identification, which will be launched from 1 September 2024, the consent-based data service from 1 June 2025, and e-Post, e-Document Management and e-Payment from 1 January 2026.

What is the essence of *Digital Citizenship*? In the digital space, the digital citizen is given an identity and this user profile is used as the primary means of contact with the State. In other words, the number/code becomes the citizen behind which one can decide whether to use the services offered by digital citizenship, i.e. activate or inactivate one's user profile. (In the case of non-activation or inactivation, there is no provision on deleting the ID and linked personal data.) Digital Citizenship is based on the data managed in public registers, and the

Communities (Text with relevance for the EEA and for Switzerland [2009] OJ L087; Regulation (EU) No 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide acces to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 [2018] OJ L295/1.

[50] Government Resolution No.1344 of 31 July 2023 point 7.

[51] Government Resolution No.1665 of 23 December 2022 and Government Resolution No.1344 of 31 July 2023 point 1.

sub-systems cooperate and automatically provide data to the extent necessary to provide digital services in the framework application. A complete profile of a digital citizen is thus created. (Art.4-5) However, there are doubts about the voluntary nature of digital citizenship, not only in practice but also in regulation. For example, a natural person may be obliged by statutory law to do an electronic transaction, a legal representative of a client may be obliged by any legal provision to communicate electronically, and if a person is required by legal provision to make a declaration, a declaration not made electronically will only be valid by exception. (Art. 19 in the Act CIII of 2023).

The purpose of the law is to "digitalise the relationship between the state and society, creating modern government digital interfaces and services", according to the preamble, regardless of the fact that it will further deepen digital inequalities in society. The entire programme comes under the responsibility of the head of the Prime Minister's Office, the minister who also oversees the secret services. While the government says it is all for the *convenience* of citizens, experts warn that the scheme itself is unconstitutional and open to privacy abuses. For example, the Association for Civil Liberties, sees it as a serious threat that the government has given only 3 days for commenting on the 36-page draft legislation, which allows for the interconnection of different databases (e.g. addresses, ID cards, social security numbers), including the transfer of civil data to market service organisations. In other words, the Digital Citizen scheme, launched in 2015, could create an identity profile of citizens by 2026, which could violate privacy rights, make users' privacy transparent and create an unequal communication situation where the data subject is not aware of what the data processor knows about him/her. The parliamentary opposition also has criticised the fact that the digital citizenship service provider will not only transfer data to public bodies, but also to certain market players, such as banks and insurance companies, on a case-by-case basis[52]. Moreover, the NAIH (the Hungarian data protection authority) was not allowed to comment on the Bill, even though it should have been involved under the GDPR, and the programme without impact assessment has even led to amendment to the Fundamental Law,[53] stating that digital administration takes precedence and for digital citizenship the state will provide its citizens with a unique, permanent identifier (contrary to a long-respected ruling by the Constitutional Court).[54] It is a matter of concern that the Fundamental Law

[52] Cf. the records of the relevant debate in the Parliament of Hungary (*Országgyűlési Napló,* 23 November 2023) 13528-29;
'Az e-személyi veszélyei: nyitott könyv lesz az életünk?' (*HVG,* 14 May 2015) <https://hvg.hu/itthon/20150514_Az_eszemelyi_veszelyei_nyitott_konyv_les> accessed 7 May 2024.

[53] 12th Amendment of Fundamental Law.

[54] Constitutional Court Decision No. 15 of 13 April 1991: The exercise of the right of informational self-determination is subject to the condition and the most important guarantee of purpose limitation. This means that personal data may only be processed for a specified and

itself gives the power to create detailed rules at the level of government decrees in this regulatory area for the processing of personal and non-personal data, and that the conditions for data processing will not be regulated by Acts that is required on personal data processing. Of course, it could be a huge business opportunity for the domestic IT sector and software development companies, as there are almost 4,000 different applications used in the public sector alone, all of which will have to be redeveloped to be compatible with the Digital Citizenship Programme (up to 2026).

So *citizens'convenience* takes precedence over legal protection and privacy because digital administration will be essentially mandatory for all, if the whole programme is realized, instead of inconvenient paper-based administration.[55]

The whole programme will be overseen by a newly created body called the *Digital Services Supervisory Authority*, which will be governed by a government decree. However, the law also stipulates that anyone who makes a complaint to the Supervisory Authority will not have the usual rights of a client (e.g. no access to documents or evidence), and there will be no right of appeal against decisions taken in the official procedure. As the results of the system audit will not be known and the operational security of the digitisation of public administrations so far is poor (online administration of tax, vehicle registration, birth registration, etc. is often down for days), citizens' databases are not secure against sale or misuse.[56] The resulting data assets can be anonymised and legally

legitimate purpose. At all stages of processing, the purpose of the processing must be stated and authenticated. The purpose of the processing must be communicated to the data subject in such a way that he or she can assess the impact of the processing on his or her rights and make an informed choice as to whether to disclose the data; and exercise his or her rights in the event of a use other than for the purpose for which the data are intended. For the same reason, the data subject must also be informed of any change in the purpose of the processing. Without the consent of the data subject, processing for a new purpose is only lawful if it is expressly permitted by law for a specific data and processor. It follows from the purpose limitation that the collection and storage of data without a specific purpose, for 'stockpiling', for an unspecified future use, is unconstitutional. Thus, the Constitutional Court finds that the unrestricted use of a general and uniform personal identification number (ID number) is unconstitutional.

[55] "The aim is to create a new legal framework for the implementation of the National Digital Citizenship Programme, which will lay down the basic rules for the digitisation of the state, the provision of services and the use of services in the digital space, in order to provide citizens with simple, convenient and efficient online services." Reason for the Act. § 1.

[56] Just two examples: the new electronic system of birth registration in the country stopped working on its first day of operation. After 5 years of preparation, electronic birth registers replaced the traditional paper-based registers. Instead of four, events are now recorded in a single, personalised digital register. The Central Office for Public Administration and Electronic Public Services has implemented a 920 million forint upgrade with EU funding 'Leállt az anyakövezés' (*Népszava,* 3 July 2014) <https://nepszava.hu/1025943_leallt-az-anyakonyvezes> accessed 7 May 2024; The client gateway system has been shut down. The National Association

sold, and some personal data can currently be purchased from the civil registry.[57] If digital citizenship becomes operational and more and more services can be accessed through it, a very accurate profile of everyone's identity will be created, and this will have a significant market value.[58] It is no coincidence that the rules on electronic information security[59] and the use of national data assets[60] by public bodies have been comprehensively amended at the same time.

VI. CONCLUSIONS

The research has revealed that digitalization initially started as *a comprehensive social and modernization program*, but has now been transformed into a special, barely traceable range of tasks. Digitization has become an unspecified means of governance and administration, public service and market comfort, without public awareness of its social benefits, preconditions and effects on inequality in Hungary.

Although the Union has announced the Decade of Digitization and the Digital Citizenship Program and set a long time to implement their aims, the *public debate on the essence of regulation and digitization strategy* has not happened in Hungary. This is part of the hasty, power-technical legislation, in which a thorough analysis of the social and economic impact of the digitalisation in almost a thousand domestic laws was also lacking. Therefore, we do not know how the digital transformation

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of Hungarian Accountants is protesting because Idomsoft Zrt.—the developer of the client gateway—replaced it so that the new one does not work. The tarhely.gov.hu site, the most important place for communication between the state and businesses, has become so slow that it is unusable. The change was not preceded by any meaningful consultation or testing. 'Kiakadtak a könyvelők – leállt az ügyfélkapu' (*Portfolio,* 28 March 2024) <https://www.portfolio.hu/gazdasag/20240328/kiakadtak-a-konyvelok-leallt-az-ugyfelkapu-677543> accessed 7 May 2024.

[57] Providing data from the register of inhabitants and addresses at the government office. See Act CXIX of 1995 on the Processing of Name and Address Data for Research and Direct Business Purposes and Act LXVI of 1992 on the Register of Personal Data and Addresses of Citizens; the application see in 'Adaszolgáltatás a személyes adat- és lakcímnyilvántartásból' <https://www.nyilvantarto.hu/hu/adatszolgaltatas_szemelyi> accessed 7 May 2024.

[58] Pálma Fazekas, 'Több tízmilliárdos üzlet és tökéletes kampányeszköz – minden adatunk Rogán Antal felügyelete alá kerülhet' (*Szabad Európa*, 7 February 2024); <https://www.szabadeuropa.hu/a/sztoriban_digitalis_allampolgar_naih_rogan_antal_informatika_adatvedelem_kubatov/32805942.html> accessed 7 May 2024; Ákos Keller-Alánt, 'Rogán Antal beköltözni a mobilunkba: digitalis Kánaán vagy online rémálom?' (*Szabad Európa*, 6 February 2024) <https://www.szabadeuropa.hu/a/rogan-antal-kormany-digitalis-allampolgarsag-mobil-megfigyeles/32790080.html> accessed 7 May 2024.

[59] Act L of 2013 on the Electronic Information Security of State and Local Government Bodies.

[60] Act CI of 2023 on the System for the Utilisation of National Data Assets and on Certain Services. Accordingly, National Data Asset: the totality of public data, documents and cultural public data, as well as other personal and protected data held by public authorities, regardless of the form in which they are presented. (Art. 2.24).

affected customers' habits, access to law and public administration, how change administrative burdens, and the development of digital knowledge and skills are altered. Although residents, the elderly and young alike spend a lot of time on social media, most of them do not have a thorough digital knowledge, they have hardly shaped their general concepts of digital society, rather than digital devices and platforms are used as a substitute for the lack of human and community connections.

It is unfortunate that *digital governance* does not promote the exercise of democratic power, but the control of citizens, consumers and clients and further enhancement of the existing economic, social and cultural advantages of certain groups. There is no or minimal scope for the opportunities offered by digitalisation in the real publicity of data of public interest, in the context of referendums, electoral procedures, social consultations, professional debates, public strategies and draft legislation. Instead, letter-consultations and opinion polls out of the constitutional frames are preferred by government leaders. On the other hand, the digital transformation *does not promote access to existing fundamental rights and human rights*, as a fraction of all legal requirements deal with non-ideal or atypical digital consumers in terms of material, knowledge or lifestyle, and provides little resources to balance opportunities in digital knowledge, equipment, and equal treatment when accessing public services. At the same time, a perceptible goal is to collect and store the personal data as fully as possible and to connect the individual databases, and then to commercialize the national data assets. While there is no money for libraries as public spaces, for their digitization yes, there is no money for teachers, but for digital curriculum yes, there is no money for nurses, but there is for telemedicine. The *digital development is therefore incoherent* and does not necessarily respond to the needs of the population or business.

Digital Citizenship and Decade provides new market opportunities based on convenience services and government (software, network, app) orders for companies of digital services and ICT industry. But the *whole digitization process is less transparent*, especially in terms of the use of budgetary resources, because non-profit companies and private limited companies are not obliged *to account to the public for their operation*. These are in contractual relations with the ministers, so their developments (and tests, accreditation) are not accountable to the citizens, they cannot directly enforce any of their fundamental rights, as the agencies do not qualify as public service providers or authorities.

All these changes are incorporated into the text of the legislation *with such jargon* that it is hardly or not at all understood by non-professional, ordinary people. Although legal language is an artificial/technical language, the rules for clients, students or library visitors cannot be incomprehensible. If we take digital culture and governance seriously, it cannot be narrowed down to a pure issue of power

and public finance in the Member States, to deliver on a promise of convenience, because the *EU does not understand this in digital transformation*.

Fundamental Rights in the AFSJ: Strenthening or Impediment?

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https://doi.org/10.15170/PJIEL.2024.1.5

Contents

I. INTRODUCTION....72
II. OVERVIEW OF FUNDAMENTAL RIGHTS AND THE AFSJ....73
1. Fundamental Rights in the ECHR and the CFR....73
1.1. The ECHR....73
1.2. The CFR....75
2. The AFSJ....78
III. FUNDAMENTAL RIGHTS AND THEIR EFFECTIVENESS IN THE AFSJ....80
1. Scope of Fundamental Rights in the AFSJ....80
2. The protection of Fundamental Rights within the AFSJ: strengthening or impediment?....83
IV. RE-BALANCING BETWEEN PERSONAL RIGHTS AND PUBLIC INTERESTS....88
V. CONCLUDING REMARKS....89

Abstract

The Area of Freedom, Security and Justice was created with the entry into force of the 1997 Amsterdam Treaty. This Area, ten years later, has been improved when the 2007 Lisbon Treaty amended the Treaty Establishing the European Community and renamed it the Treaty on the Functioning of the European Union. The Area of Freedom, Security and Justice (AFSJ) is an extensive field of law covering many policies and there is hence an increased risk for fundamental rights violations. To describe the relevance of the protection of fundamental rights within this Area as well as evaluate the effectiveness of fundamental rights, by using the polemic-critical method and analytical-logical method, this paper will focus on the scope of fundamental rights in some of the EU human

rights instruments and the scope of these rights and freedoms in the AFSJ. As a result, this paper will answer the question related to the strengthening or impediment of fundamental rights as well as the balance between personal rights and collective interests such as security.

Keywords: fundamental rights, AFSJ, the European Convention on Human Rights, the EU Charter of Fundamental Rights, protection of fundamental rights.

I. INTRODUCTION

Fundamental rights are basic rights and freedoms belonging to every individual. These rights are consistent regardless of an individual's origin, beliefs, or lifestyle. In the European Union (EU) framework, fundamental rights are notably specified in the EU Charter of Fundamental Rights (CFR). This Charter enshrines a wide range of rights, including civil, political, economic, and social aspects. In addition, when it comes to human rights, it would be remiss not to mention the European Convention on Human Rights (ECHR). The ECHR is a crucial legal instrument in the protection of fundamental freedoms and human rights in Europe, distinct from the EU framework. However, the EU incorporates the ECHR into its legal framework as a source of inspiration for the general principles of law, providing an additional layer of protection for human rights within the EU. The boundaries of fundamental rights, nowadays, are still the subject of heated debates. Being at the heart of the European project, fundamental rights also receive great attention when considered in the context of the birth and development of the Area of Freedom, Security and Justice (AFSJ). The AFSJ is an EU policy area whose importance has grown immensely over the past two decades. Including policy domains related to immigration, asylum, borders, and judicial and police cooperation, the AFSJ goes to the heart of Europe's future. Therefore, this area represents a particularly apt testing ground for gauging the scope of EU fundamental rights.

To describe the relevance of the protection of fundamental rights in the context of the justice and home affairs policy of the EU, i.e., the AFSJ, as well as evaluate the effectiveness of fundamental rights in this area, this paper provides analysis in three parts. Firstly (Part II), it presents an overview of fundamental rights enshrined in the CFR and the ECHR in the context of the AFSJ. The scope of fundamental rights in the AFSJ will be discussed in the second part. Secondly (Part III), the question related to stimulating or impeding fundamental rights in this area will also be considered. In the final section (Part IV), the possibility of internal conflict between the three main elements of the AFSJ will be elaborated upon.

II. OVERVIEW OF FUNDAMENTAL RIGHTS AND THE AFSJ

1. Fundamental Rights in the ECHR and the CFR

1.1. The ECHR

The ECHR was drafted by the Council of Europe with the aim of protecting the human rights of individuals under the jurisdiction of the Member States of the Council of Europe. This Convention was the first instrument to give effect to and make binding several of the rights listed in the 1948 Universal Declaration of Human Rights[1]. The ECHR guarantees specific rights and freedoms and prohibits unfair and harmful practices. Divided into 14 articles, each of them representing a basic human right or freedom, this Convention protects the right to (i) life (Art. 2) and freedom and security (Art. 5); (iii) respect for private and family life (Art. 8); (iii) freedom of expression (Art. 10); (iv) freedom of thought, conscience, and religion (Art. 9); and (v) a fair trial in civil and criminal matters (Art. 6). It prohibits torture and cruel or degrading treatment (Art. 3), slavery (Art. 4), and discrimination (Art. 14). Since its creation, the ECHR has been amended several times, and further rights have been added by adopting protocols, notably the right to education (Art. 2 of Protocol No. 1), the right to vote in and stand for election (Art. 3 of Protocol No. 1), and the right to property and peaceful enjoyment of possessions (Art. 1 of Protocol No. 1).[2] In short, the ECHR focuses on the first generation of human rights, covering civil and political rights.

As mentioned previously, the ECHR is distinct from the EU framework. In other words, it is not formally part of the EU's primary law. However, in the context of EU law, the ECHR holds a significant position. While the ECHR itself is not a direct basis for EU fundamental rights, its principles significantly influence EU jurisprudence. The CFR, which has the same legal status as primary EU law[3], drew inspiration from the ECHR. The European Community and EU treaties, secondary legislation, Court of Justice case law, as well as some other international sources or constitutional traditions shared by the member states, served

[1] GA Res. 217 (III), 10 December 1948.

[2] These rights are not in the body of the ECHR but in the first Protocol thereto, signed on 20 February 1952. See at: Council of Europe, 'The European Convention on Human Rights. Protection of Property' (*Council of Europe*) <https://www.coe.int/en/web/human-rights-convention/property> accessed 28 November 2022.

[3] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 645.

as the CFR's main sources of inspiration.[4] The Charter has borrowed about half of its rights from the ECHR and itself establishes a strong link between its own fundamental rights and the ECHR.[5] This consistency between the two legal instruments is maintained by Art. 52(3) of the CFR. Accordingly, when the CFR includes rights that align with those guaranteed by the ECHR, their meaning and scope should be consistent with the ECHR. Indeed, rights in the CFR which are borrowed from the ECHR are to be given the same meaning and content as they have in the ECHR. Therefore, ECHR is considered to be a minimum standard of human rights in the EU and the CFR leads the EU to be indirectly bound by the ECHR, as it must always be followed when restricting fundamental rights in the EU to ensure the EU maintains the same level of protection.[6] In summary, although the ECHR is not directly binding in EU law, its impact is felt through the CFR and the fundamental rights provided for by the ECHR are unwritten principles of EU law.

The ECHR's influence on EU law is not only apparent through the CFR, but also as an obligation of the EU's accession to the ECHR. This planned accession comes from the introduction of the Treaty of Lisbon. This Treaty, which entered into force on December 1, 2009, amended the two treaties forming the constitutional basis of the EU, including the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The amended TEU, Art. 6(2), states that the EU shall accede to the ECHR and such accession will not impact the EU's existing competencies as defined in its treaties. The accession process is ongoing with an uncertain outcome due to the challenges and concerns presented in this accession. These challenges and concerns were pointed out in Opinion 2/13 of the Court of Justice of the European Union (CJEU) on the Accession of the EU to the ECHR, including the conflict with supremacy, the risk to autonomy and potential CJEU rulings. According to the Court, in case of the accession, the EU would be subject to external control to ensure the observance of the rights and freedoms enshrined in the ECHR, subjecting the EU and its institutions to the control mechanisms provided for by the ECHR and to the decisions and the judgments of the European Court of Human Rights (ECtHR).[7] In other words, for the first time, the EU would be subject to external control as regards the protection of fundamental rights.[8]

[4] Jacqueline Dutheil De La Rochere, 'Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty' (2011) 33 Fordham International Law Journal 1776, 1778.

[5] Douglas-Scott (n 4) 655.

[6] ibid.

[7] Ágoston Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case Note' (2015) 2015/I Pécs Journal of International and European Law 28, 31.

[8] ibid 36.

In addition, regarding the original draft accession agreement, the ECtHR would have been empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions arising in the context of the Common Foreign and Security Policy in which the CJEU has very limited competence.[9] As a result, the CJEU countered the accession by proclaiming that jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court falling outside the institutional and judicial framework of the EU.[10] In summary, there is a tension between the EU's desire to accede to the ECHR and the need to protect its unique legal framework as well as the need to maintain the CJEU's role as the primary arbiter of EU law within its institutional boundaries.

Despite challenges raised after the release of Opinion 2/13, the Member States reaffirmed their commitment to accession[11] and attempted to analyze the obstacles laid out in the Opinion to propose a new accession agreement. Both the European Commission and the Council of Europe remained steadfast in their intention to make EU accession to the ECHR possible[12]. Consequently, in September 2020, formal accession negotiations resumed after a period of deliberation. During the resumed negotiations, the EU has put forth a solution to bridge the gap in justiciability within the EU legal system with the hope of making the accession situation more feasible. At its 18th meeting held in March 2023, the CDDH Ad hoc Negotiation Group on accession reached a unanimous provisional agreement on solutions to the issues raised by Opinion 2/13, except the concern related to Common Foreign and Security Policy which the EU aims to solve internally.[13] In short, the EU is actively pursuing accession to the ECHR, despite encountering legal complexities within its Common Foreign and Security Policy. This endeavour reaffirms the ECHR's unequivocal position within the EU legal framework.

1.2. The CFR

The CFR was declared in 2000 and received binding force in 2009 via the Treaty of Lisbon.[14] The Treaty of Lisbon amended Article 6 of the TEU to provide

[9] Ágoston Mohay, 'Once More unto the Breach? The Resumption of Negotiations on the EU's Accession to the ECHR' (2021) 2021/I Pécs Journal of International and European Law 6, 6.

[10] ibid.

[11] Ágoston Mohay, 'Attribution and Responsibility Regarding CFSP Acts in Light of the Renegotiation of the EU's Accession to the ECHR' (2023) 19 Croatian Yearbook of European Law & Policy 281, 291.

[12] ibid 292.

[13] ibid 294.

[14] 'Fact Sheets on the European Union. The Treaty of Lisbon' (*European Parliament*) <https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon> accessed 22 November

for recognition of the Charter. Accordingly, Article 6 provided that the Charter has the same legal value as the EU treaties and is legally binding. This Charter was expected to bring together the fundamental rights enjoyed by the EU citizens into a single legally binding document as well as further promote human rights within the territory of the EU.[15] It enshrines rights found throughout many different sources such as (i) the ECHR, (ii) the constitutional traditions and international obligations common to the EU member states, (iii) the Social Charters adopted by the Union and by the Council of Europe, (iv) the case-law of the Court of Justice of the EU and the European Court of Human Rights.[16] In other words, prior to the Charter, fundamental rights were scattered across various legal instruments. By bringing the full range of civil, political, economic, and social rights together in a single comprehensive text, the CFR provides a unified legal framework for protecting and promoting fundamental rights within the EU, ensuring all these rights will be enjoyed by European citizens and persons resident in the EU.

The CFR contains 50 rights which are divided into six substantive sections, namely dignity, freedoms, equality, solidarity, citizens' rights, and justice. It covers a whole raft of basic human rights drawn from the ECHR and its Protocol, such as the right to life, freedom and security; the right to respect private and family life; freedom of expression; and freedom of assembly and association. Additionally, the Charter also comprises other fundamental rights in economic and social fields that were not envisaged at the time of the ECHR's introduction, such as the right to fair and just working conditions, the right to consumer protections, the right to access to services of general economic interest or the right to protection of young people at work. Thus, while the ECHR focuses only on the first generation of human rights, related to civil and political rights, the CFR has paid attention to human rights in the second generation, related to economic and social rights. Notably, the Charter also contains some third-generation rights attracting global concern, such as the right to a clean environment. Accordingly, a high level of environment and the improvement of the quality of the environment must be integrated into the policies of the EU in accordance with the principle of sustainable development.[17] Therefore, the Charter is considered an initiative to contain the rights of three generations in the same instrument as well as a great step in fundamental rights recognition. Specifically, while first- and

2022.

[15] Charter of Fundamental Rights' (*Citizens Information)* <https://www.citizensinformation.ie/en/government-in-ireland/european-government/eu-law/charter-of-fundamental-rights/#:~:text=Further%20information-,Introduction,with%20the%20Treaty%20of%20Lisbon.> accessed 28 November 2022.

[16] Preamble of Charter of Fundamental Rights of the European Union [2000] OJ C364/1 (Charter of Fundamental Rights).

[17] Charter of Fundamental Rights, art. 37.

second-generation rights are recognized by the majority of countries around the world through the ratification of the two conventions, namely the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR), third generation rights are often found in agreements that are classified as soft law, which means they are not legally binding.[18] Thus this generation of rights is challenged more often than the first and second generations.[19] However, the Charter, theoretically, tackles this challenge within the EU. The CFR integrates all three generations of rights into a single legal instrument. By doing so, it emphasizes that fundamental rights are interconnected and indivisible, as well as ensuring that all three generations of rights are enforceable and justiciable. The CFR seems to have reflected the EU's aspiration to create a society where all generations of rights are respected and protected, fostering a holistic approach to human dignity and well-being.

Fundamental rights are not absolute rights and limitations to these rights are set out in Art. 52 of the CFR. Accordingly, any restriction on the exercise of the rights and freedoms outlined in this Charter must be legal and respect the essence of those rights and freedoms. This wording is based on the judgment of the Court of Justice in Case C-292/97.[20] The requirement "(…) must be provided for by law"[21] aims to ensure transparency and prevent arbitrary restrictions; and "(…) must respect the essence of those rights"[22] aims to emphasize that certain core aspects of fundamental rights should remain inviolable even when limitations are imposed. For instance, while freedom of expression may be subject to restrictions, the essence of expressing one's thoughts and opinions remains sacrosanct. In other words, while freedom of expression may be restricted, the right to hold opinions is absolute.[23] Additionally, limitations are permissible only if they are necessary, proportionate, and serve objectives of general interest or protect the rights of others. The principle of proportionality ensures that restrictions are balanced and not excessive, and necessity emphasizes that restrictions must be justified, in other words, alternative measures that

[18] Lindsey Reid, 'The Generations of Human Rights' (*UAB Institute for Human Rights Blog*, 14 January 2019) <https://sites.uab.edu/humanrights/2019/01/14/the-generations-of-human-rights/> accessed 28 November 2022.

[19] ibid.

[20] 'EU Charter of Fundamental Rights. Title VII General provisions. Article 52-Scope and interpretation' (*European Union Agency for Fundamental Rights*) <https://fra.europa.eu/en/eu-charter/article/52-scope-and-interpretation-rights-and-principles#explanations> accessed 28 November 2022.

[21] Charter of Fundamental Rights, art. 52. 1.

[22] ibid.

[23] 'Briefing Note Series: Freedom of Expression' (*Centre for Law and Democracy*, July 2014) <https://www.mediasupport.org/wp-content/uploads/2015/02/foe-briefingnotes-ims-cld.pdf> accessed 05 December 2022.

interfere less with rights should be considered first. The reference to general interest recognized by the EU covers both the objectives mentioned in Art. 3 of the TEU and other interests protected by specific provisions of the Treaties such as Art. 4(1) of the TEU and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the EU.[24]

When it comes to the relationship between the CFR and the ECHR, Art.52.3 points out the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including limitations, are the same as those laid down by the ECHR.[25] This means in particular that the legislator, in laying down limitations on those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR.[26] This consistency ensures legal predictability allowing individuals and legal practitioners to reasonably predict how these rights will be interpreted and applied as well as allowing citizens, businesses and institutions to understand their rights and obligations within the EU legal framework. Furthermore, the alignment between the CFR and the ECHR also serves harmonization across jurisdictions. The EU consists of a diverse legal system across its member states. Harmonization ensures that fundamental rights are protected consistently regardless of the specific national legal context. Especially, the reference to the ECHR covers both the Convention and the Protocols to it. As a result, the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments but also by the case law of the European Court of Human Rights and by the Court of Justice of the EU. Therefore, the level of fundamental rights protection is designed to guarantee more extensive safeguards. In other words, the level of protection afforded by the CFR never be lower than that guaranteed by the ECHR.[27]

2. The AFSJ

The Area of Freedom, Security and Justice (AFSJ) was first introduced under this name when the 1997 Treaty of Amsterdam came into force, evolving the previous framework of the EU's Third Pillar, i.e., Cooperation in Justice and Home Affairs. The most important reason for the AFSJ's establishment is to ensure freedom, security and justice for the EU citizens. In other words, as the TEU currently proclaims, the EU's citizens shall be offered an area of freedom, security and justice without internal frontiers and their freedom of movement

[24] (n 21).

[25] ibid.

[26] ibid.

[27] ibid.

is ensured with respect to external border controls, asylum, immigration and the prevention and combating of crime.[28] Being at the heart of the AFSJ[29], fundamental rights serve as the very essence that sustains its existence. They are the bedrock upon which the AFSJ is built as well as guiding its policies, actions, and decisions. Fundamental rights ensure that even in the pursuit of security, justice, and cooperation, the dignity, autonomy, and liberties of every individual remain inviolable. They are not mere legal provisions; they represent the shared values of a union committed to upholding the rights of its citizens and residents. Without fundamental rights, the AFSJ would lose its very essence and purpose.

The AFSJ consists of four main policy areas, including (i) border checks, asylum and immigration; (ii) judicial cooperation in civil matters; (iii) judicial cooperation in criminal matters; and (iv) police cooperation. When applying measures in these policy areas, the impact on fundamental rights is inevitable. For instance, the establishment of the European Public Prosecutor's Office raised concerns about fundamental rights. While the European Public Prosecutor's Office Regulation addresses these rights[30], vigilance is necessary to prevent overreach. In particular, the efficiency of the European Public Prosecutor's Office is clearly supported by the mutual admissibility of evidence[31], this matter also raises concerns for some fundamental rights such as the right to privacy and data protection or the right to a fair trial, especially due to the lack of common standards for the collection of evidence. In this case, the AFSJ has to strike a delicate balance between criminal cooperation, aiming at ensuring security and the protection of fundamental rights at the same time.

The European arrest warrant (EAW) is one of the crucial elements of cooperation in criminal matters, yet even this measure has faced controversy since its adoption.[32] The EAW allows for the swift surrender of suspects between EU member states. However, differences in detention conditions across countries impact mutual trust. Accordingly, inadequate detention conditions can jeopardize fundamental rights.[33] As a result, occasionally, the refusal to execute an

[28] Consolidated Version of the Treaty on European Union [2012] OJ C 326/13. art. 3. 2.

[29] Iglesias Sánchez S and González Pascual M, 'Introduction. Fundamental Rights at the Core of the EU AFSJ' in Iglesias Sánchez S and González Pascual M (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021) 2.

[30] Art. 41 stipulates that the investigations and prosecutions of the European Public Prosecutor's Office should be carried out in full compliance with the fundamental rights of the suspects and accused persons in the proceedings of the European Public Prosecutor's Office.

[31] 'Towards a European Public Prosecutor's Office (EPPO)' (*European Parliament,* 2016) <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571399/IPOL_STU(2016)571399_EN.pdf> accessed 28 January 2024.

[32] Sánchez S and Pascual M (n 30) 15.

[33] Koen Bovend'Eerdt, 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual

EAW based on feared violations of fundamental rights is placed in the EU. Since 2016, the execution of an EAW has been delayed or refused on grounds of real risk of breach of fundamental rights in nearly 300 cases.[34] At the time of its adoption, there was a fear at the national level that the EAW would lead to a decline in domestic fundamental rights protection. This has been exemplified in cases with both courts and legislators invoking higher domestic fundamental rights standards as grounds for refusing EAWs.[35] Therefore, ensuring mutual trust among national judiciaries is crucial for successful EAW implementation. To achieve this, fair trial guarantees, including due process, must be upheld and balancing security imperatives with individual rights is required.

In short, the AFSJ's success lies in its ability to enhance security, as well as freedom and justice, while safeguarding fundamental rights. Striking the right balance remains an ongoing challenge, and much must be done to improve the protection of fundamental rights.

III. FUNDAMENTAL RIGHTS AND THEIR EFFECTIVENESS IN THE AFSJ

1. Scope of Fundamental Rights in the AFSJ

Before the entry into force of the Treaty of Lisbon in 2009, the AFSJ was split between four policy areas, including asylum, migration, border controls and judicial cooperation in civil matters, based on Title IV of the Treaty of European Community (TEC)[36] and two areas, namely judicial cooperation in criminal matters and police cooperation, based on Title VI of the TEU[37]. This separation meant that different legal instruments and different decision-making procedures had to be applied. The mentioned separation was put to an end by the birth of the Treaty of Lisbon.

Following the entry into force of the Treaty of Lisbon, the CFR has developed as a legally binding instrument, and EU fundamental rights have been codified and

Trust Presumption in the Area of Freedom, Security, and Justice?' (2016) 32 Utrecht Journal of International and European Law 112, 117.

[34] 'Press Corner. European Commission puts forward recommendations related to detention conditions' (*European Commission,* 8 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7570> accessed 28 January 2024.

[35] González Pascual M, 'A European Standard of Human Rights Protection?' in Iglesias Sánchez S and González Pascual M (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021) 41.

[36] Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community [2002] OJ C325/1.

[37] Consolidated Version of the Treaty on European Union [2016] OJ 202/1.

granted at the same level as provisions in TEU and TFEU. This recognition has gone hand in hand with the AFSJ link with two other important developments in the EU, including the increasingly developed system of fundamental rights and EU citizenship. Respect for fundamental rights is now explicitly linked with the AFSJ, as mentioned in the previous part, in the first article of Title VI on the AFSJ (the consolidated version), namely Article 67 of TFEU, whereby "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights (…)". This association of fundamental rights and citizenship with the AFSJ has gradually increased due to the enactment of strategic policy documents of the Commission and the European Council, notably the Tampere Programme[38], the Hague Programme[39] and the Stockholm Programme[40]. The Stockholm Programme contains guidelines for common politics on the topics of protection of fundamental rights, privacy, minority rights and the rights of groups of people in need of special protection, as well as the citizenship of the EU.[41] It also attaches great importance to how the EU should work to guarantee respect for fundamental freedoms, and privacy while guaranteeing security in Europe. It could be seen that, from a policy perspective, fundamental rights and citizenship are now incorporated into the AFSJ. The legal spheres covered by the AFSJ, including civil and criminal law, border control, migration, and asylum policies, by their nature, have touched directly on fundamental rights. This deep connection is already apparent in the CFR's Preamble, whereby the EU shall "place the individual at the heart of its activities, (…) by creating an Area of Freedom, Security and Justice". One could therefore say that creating the AFSJ is in the interest of protecting fundamental rights as well.

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[38] The Tampere Programme was adopted in October 1999. Following the entry into force of the Amsterdam Treaty, the European Council provided for the first time a multi-annual EU policy agenda for the progressive creation of an Area of Freedom, Security and Justice. See at: Sergio Carrera, 'The 20 years anniversary of the Tampere programme: Securitization, intergovernmentalism and informalization' (2020) 27 Maastricht Journal of European and Comparative Law 3, 3.

[39] The Hague Programme was approved by the European Council in November 2004. It follows the Tampere Programme and establishes general and political goals in the area of justice and home affairs between 2005 and 2009. See at: 'Multi-annual programme for Justice and Home Affairs' (*Ministry of the Interior of the Czech Republic*) <https://www.mvcr.cz/mvcren/article/agenda-of-the-eu-at-the-ministry-of-the-interior-hague-programme.aspx?q=Y2hudW09Mg%3D%3D> accessed accessed 28 January 2024.

[40] The Stockholm Programme is a political, strategic document describing the focus of cooperation in the policy areas rescue services, police and customs cooperation, criminal and civil law cooperation, asylum, migration, visas and external border controls, etc. over five years (2010-2014). See at: ibid.

[41] 'Stockholm Programme' (*European Commission*) <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/stockholm-programme_en> accessed 28 January 2024.

The thematic content of the AFSJ affects a number of EU fundamental rights as indeed many of its policies have "an inherent connection with fundamental rights"[42]. This connection does not merely exist between the AFSJ's policies and the fundamental rights of EU citizens and the AFSJ measures' implementation may be strongly connected to the rights of third-country nationals, for instance, in the case of border checks and asylum in relation to the right to freedom of movement. It could be summed up that border checks, asylum and immigration are mostly involved in the right to liberty and security (Art. 6 of the CFR), the right to respect for private and family life (Art. 7 of the CFR), freedom of movement and residence (Art. 45 of the CFR), the right to asylum or right to protection in the event of removal, expulsion, or extradition (Art. 19 of the CFR). In addition, the right to an effective remedy and a fair trial (Art. 47 of the CFR), presumption of innocence and right to defence (Art. 48 of the CFR), principles of legality and proportionality of criminal offences and penalties (Art. 49 of the CFR), and right not to be tried or punished twice in criminal proceedings for the same criminal offence (Art. 50 of the CFR) are also central to the AFSJ, in the fields of judicial cooperation in civil and criminal matters. In particular, besides some fundamental rights and freedoms listed in terms of judicial cooperation in civil and criminal matters, non-discrimination, or rights of certain vulnerable groups such as the child, the elderly or persons with disabilities are also partly involved in police cooperation to prevent, detect, and investigate criminal offences. As a result, one could argue that the CFR's relevance is reinforced in the AFSJ because some provisions of the CFR that would otherwise be dormant or rarely used in practice come into play in a reinforced way.[43]

While other human and fundamental rights documents due to their international or constitutional nature are designed for general application, the CFR is limited in its scope according to Article 51.1 of this Charter. Accordingly, the CFR's provisions are addressed to two subjects, namely the EU's institutions and bodies and the EU's member states, respectively. Whereas the former is subject to the Charter with no limitation regarding the principle of subsidiarity, the latter is bound by the CFR only when implementing EU law. Regarding the EU's institutions and bodies, the CFR has often been applied in the AFSJ as a parameter for assessing the validity and interpretation of acts of these institutions and bodies[44]. In addition, it also has been used when determining the legality of

[42] Viljam Engström and Mikaela Heikkilä, 'Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice' (*European Commission*, 29 September 2014) <https://repository.gchumanrights.org/server/api/core/bitstreams/98ecbc67-5259-4d48-a025-d3ce90abcebb/content> accessed 28 January 2024, 8.

[43] Iglesias Sánchez S, 'The Scope of EU Fundamental Rights in the Area of Freedom, Security and Justice' in Iglesias Sánchez S and González Pascual M (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021) 22.

[44] ibid 24.

draft EU international agreements in the AFSJ in order to make sure that these agreements will comply with the obligation to ensure fundamental rights. For instance, when being requested for an Opinion on the Agreement between Canada and the EU on the transfer and processing of Passenger Name Record Data in 2017, the Court concluded that this draft agreement was incompatible with Articles 7, 8 and 21 of CFR, related to the right to respect for the private and family life, the right to protection of personal data and the principle of non-discrimination, respectively.[45] The Charter, by contrast, applies to the EU's member states only when they are implementing EU law—and determining when they are implementing the Union law has proven to be no easy task.[46] In other words, it is complicated to assess the scope of application of the CFR to national measures and this assessment depends on the type of interest and area considered.[47] As Sánchez noted, situations in which EU law applies are mainly linked to the nature of the relationship between the national legal rule or practice at issue and a rule of EU law. These situations could be agency situations and derogation situations[48], or when directives are implemented[49]. In cases concerning the co-ordination of rules, as Eleanor argued[50], the CFR applies, if at all, only in extreme cases to national executing authorities. Co-ordinating legislation is only effective if all the states consider, based on mutual trust, adequate fundamental rights protection across the EU territory. Giving the executing authority the power to question the compliance of fundamental rights in other member states could potentially hinder this effectiveness. In short, there is a varied application of EU fundamental rights to national rules and to ensure the full effectiveness of EU rules, some cases limit the application of the Charter to national rules.

2. The protection of Fundamental Rights within the AFSJ: strengthening or impediment?

As mentioned above, the AFSJ was created to respect fundamental rights. In

[45] *Opinion 1/15 (EU-Canada PNR Agreement),* ECLI:EU:C:2017:592.

[46] Sánchez S (n 44) 27.

[47] Eleanor Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures' (*European Parliament,* 2016) <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU%282016%29556930_EN.pdf> accessed 28 January 2024 24.

[48] This classification has become marked by the addition of several layers of complexity. The agency situations encompass a wide range of scenarios related to the application, transportation, implementation, enforcement, remedies and procedural safeguards of EU legal rules. Meanwhile, the derogation situations refer to the temporary suspension of certain fundamental rights under specific circumstances. See at: Sánchez S (n 44) 27.

[49] Xavier Groussot, Laurent Pech, and Gunnar Thor Petursson, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (*Czech Society for European and Comparative Law*, 1 July 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936473> accessed 28 January 2024, 5.

[50] Spaventa (n 48) 14.

other words, the promotion of fundamental rights is a priority in the AFSJ and all measures in this area directly or indirectly, are related to the protection of these fundamental rights. As Engström & Heikkilä stated, each and every AFSJ policy raises its own set of fundamental rights concerns.[51] Similarly, most AFSJ actors, whether EU institutions, agencies or non-institutional actors, can be viewed as having an impact on and/or contributing to the protection of rights. The AFSJ, on the one hand, is subject to constitutional checks, including fundamental rights compliance[52]. This means that all policies outlined in the AFSJ should comply with the obligation to respect fundamental rights. On the other hand, the AFSJ is a policy area that displays many institutional peculiarities, and this characteristic gives rise to fundamental rights challenges.[53] Especially the principle of mutual recognition—the constitutional principle that pervades the entire AFSJ[54]—can lead to significant risks, particularly in relation to safeguarding fundamental rights. This is because the principle of mutual recognition prevents mutual oversight of national legal solutions[55]. Accordingly, member states are regularly called upon to recognize legal acts adopted by other member states, such as judgments, for example, without controlling their compliance with fundamental rights[56], raising the possibility of fundamental rights violations.

As all main EU bodies are involved in the AFSJ, their performance will be considered as the basis for evaluating the effectiveness of fundamental rights protection in the AFSJ. Take the Council of the European Union, for example. The Council of the European Union is the EU's main decision-making body. When acting as co-legislator in the AFSJ, the Council of the EU meets in the Council of Justice and Home Affairs configuration and this Council has the competence to adopt (subject to the rules of the legislative procedure applicable) legislation regarding the AFSJ. In terms of fundamental rights, the Council recently seems to be more engaged in human rights coherence.[57] Accordingly, the Council com-

[51] Viljam Engström and Mikaela Heikkilä, 'Challenges and complexities in the protection of fundamental rights in the EU's Area of Freedom, Security and Justice' (2015) 53/2015 Cuadernos Europeos de Deusto 107, 113.

[52] ibid.

[53] ibid.

[54] Koen Lenaerts, 'The principle of mutual recognition in the area of freedom, security and justice' (*The Fourth Annual Sir Jeremy Lever Lecture. All Souls College, University of Oxford,* 30 January 2015) <https://www.law.ox.ac.uk/sites/default/files/migrated/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf> accessed 28 January 2024, 6.

[55] Cecilia Rizcallah, 'The Principle of Mutual Trust and the Protection of Fundamental Rights in the Area of Freedom, Security and Justice: A Critical Look at the Court of Justice's Stone-by-Stone Approach' (2023) 30 Maastricht Journal of European and Comparative Law 255, 260.

[56] ibid.

[57] Tamara Lewis, 'Coherence of human rights policymaking in EU institutions and other EU agencies and bodies' (*European Commission* 29 September 2014) <https://repository.gchuman-

mitted to integrating fundamental rights throughout its internal decision-making procedures, particularly in different policy areas and again emphasizes its responsibility for the effective and systematic application of the CFR and as well as seeing the CFR as a key element to uphold the shared values of all EU member states and for the promotion of a consistent human rights policy.[58] Furthermore, the Council also asks the EU Agency for Fundamental Rights (AFR), one of the AFSJ agencies, to issue opinions and to undertake research on fundamental rights issues. For instance, in 2014, at the Council's request, the FRA undertook a survey on gender-based violence against women and this result was fed into the discussions of Council preparatory bodies.[59] Notably, the EU Agency for Fundamental Rights nowadays regularly consulted when important new AFSJ strategies are adopted to ensure their fundamental rights sensitivity.[60] It can be noted that the Council within the framework of the AFSJ has taken an active role by adopting reports on fundamental issues. In other words, fundamental rights, in some ways, have been promoted in the AFSJ.

Furthermore, case law regarding the interpretation of the AFSJ rules has greatly contributed to the refinement of the scope of the CFR. The recorded high number of cases in which the CFR has been applied in the AFSJ confirmed that the AFSJ is the leading area for the jurisprudential development of EU fundamental rights. According to the database of the Court of Justice of the EU, in the period from 2009 to 2021, among 662 judgements and orders regarding compliance with the Charter, 146 involved the AFSJ.[61] Moreover, AFSJ case law has affected the general development of the jurisprudential approach to the CFR's scope in several ways, especially in determining whether member states are implementing EU law when an EU law rule affords them a margin of appreciation. AFSJ case law has been crucial in establishing the importance of taking account of the CFR when interpreting acts of EU law before going on to determine whether or not a given situation falls within its scope. As clarified by Sánchez, in the *Kamberaj* case[62], by referring to Article 34.3 of the CFR, it was proven that the CFR has supported the interpretation of the content and scope of the provisions of EU law.[63] As a result, the CFR's role in interpreting the scope of secondary law

rights.org/server/api/core/bitstreams/6540b234-819b-4b50-b5c6-698668d3bcbb/content> accessed 28 January 2024, 8.

[58] ibid.

[59] European Union Agency for Fundamental Rights, *Violence against Women: An EU-Wide Survey. Main Results Report* (1st ed, Publications Office of the European Union 2015) 3.

[60] Engström and Heikkilä, 'Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice' (n 43) 24.

[61] Sánchez S (n 44) 28.

[62] Case C-571/10 *Servet Kamberaj v Instituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES)* [ECLI:EU:C:2012:233].

[63] Sánchez S (n 44) 29.

in the AFSJ could not be denied.

Cooperation and action within the EU to complete the AFSJ's objectives are essential to allow individuals to fully enjoy their fundamental rights as well as improve their well-being, thereby enhancing their trust in the EU. However, public trust in the EU seems to be undermined due to the lack of effective action in addressing the deficiencies exposed by the refugee crisis.[64] According to the intermediate results of the research conducted by the European Parliamentary Research Service, gaps and barriers in EU cooperation and action in the various areas covered by the AFSJ have been discovered.[65] The Common European Asylum System has revealed some weak points as evidenced by court rulings, including by the ECtHR and the European Court of Justice, and reports from the Fundamental Rights Agency.[66] Studies from the EU Fundamental Agency reported widespread hate crimes against migrants and the conditions for intra-EU mobility of third-country nationals legally resident in the EU's member states are not regulated coherently, thereby not offering them full access to the EU labour market.[67] As a result, free movement within the Schengen area has been undermined by the EU's inability to respond properly to the refugee crisis. Facing these challenges, more concerted action and cooperation at the EU level in the AFSJ areas such as border control and visa policy or migration are essential to a fully functioning Schengen Area, whilst taking into account fundamental rights and freedoms. Closing these current gaps and barriers will directly impact the protection of fundamental rights and freedoms.

As an important example of the EU's efforts in criminal matters, the European Investigation Order (EIO) is a significant legal instrument that facilitates judicial cooperation. Its main purpose is to enable the request for one or more investigative measures to gather evidence in an executing EU country.[68] In other words, the EIO improves cooperation between courts during the investigation phase of criminal cases by establishing the principle of mutual recognition. This lets competent judicial authorities make decisions that force other member states to take certain investigative actions. When applying the EIO, some concerns have arisen regarding the protection of fundamental rights. Accordingly, the EIO's horizontal scope of application and the automatic process of validating and ex-

[64] Wouter van Ballegooij, 'Area of Freedom, Security and Justice: Untapped Potential' (*European Parliament*, October 2017) < https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/611000/EPRS_BRI(2017)611000_EN.pdf> accessed 15 December 2023, 1.

[65] ibid.

[66] ibid 4.

[67] ibid 4.

[68] Cezary Karol, 'Issuance of the European investigation order at the stage of a preparatory proceeding for the purpose of obtaining information constituting bank secrecy' (2023) 17 Ius Novum 77, 79.

ecuting it can be harmful to the protection of fundamental rights.[69] In addition, some authors argue that the list of investigative actions that can be asked for in an EIO does not follow the rules for procedural legality set out by the ECtHR's case law because there is not a clear list of actions that can be expected to be taken based on an EIO[70]. Contrary to these concerns, Szijártó proposed that the EIO could actually enhance fundamental rights protection.[71] The reason for this optimism is based on the CJEU's jurisdiction over the EIO. Accordingly, the CJEU delivered a preliminary ruling regarding the right to legal remedies, which arguably has a greater impact on the current pending system of criminal cooperation. In other words, CJEU can enforce principles safeguarding individuals from excessive state action and its case law in the field of judicial cooperation in criminal matters can set a higher standard for fundamental rights protection. In short, while concerns exist, the EIO, coupled with the CJEU's oversight, has the potential to elevate fundamental rights protection across Europe during criminal investigations.

The AFSJ within the EU is a vital framework that balances freedom, security and justice. As emphasized earlier, fundamental rights are at the AFSJ's core, ensuring protection for all individuals. However, in the recent *WS & others v Frontex* case, Frontex as the EU's border management agency which operates within the AFSJ framework was claimed to breach fundamental rights under the CF[72], including human dignity (Art. 1), the right to asylum (Art. 18) and the rights of the child (Art. 24). Accordingly, several Syrian nationals, including children, sought international protection in Greece. After unsuccessful asylum attempts, they were removed by air to Turkey in a joint operation involving Frontex and Greece. The General Court rejected the claim and emphasizing that Frontex lacks the authority to assess return decisions or asylum applications directly causing the alleged damage.[73] As a result, Frontex cannot be held liable for any damage related to the removal of the applicants to Turkey. As can be seen, this ruling reaffirms the importance of respecting fundamental rights even in border management

[69] István Szijártó, 'The Implications of the European Investigation Order for the Protection of Fundamental Rights in Europe and the Role of the CJEU' (2021) 2021/I Pécs Journal of International and European Law 66, 67.

[70] ibid.

[71] ibid 72.

[72] Tamás Molnár, 'The EU General Court's Judgment in WS & Others v Frontex: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (*EJIL: Talk! Blog of the European Journal of International Law,* 18 October 2023) <https://www.ejiltalk.org/the-eu-general-courts-judgment-in-ws-others-v-frontex-what-could-international-law-on-the-responsibility-of-international-organizations-offer-in-grasping-frontex-responsibility/#:~:text=Despite%20the%20absence%20of%20the,14%20ARIO.> accessed 28 February 2024.

[73] ibid.

operations and underscores the need for Frontex to operate within legal boundaries and uphold human rights. However, the rejection of the compensation claim may raise concerns about accountability and the effectiveness of remedies for rights violations. In other words, this ruling highlights Frontex's limitations in directly impacting fundamental rights and Frontex should improve its operation to better align with fundamental rights standards when being considered as the EU's border management agency. In short, the *WS & others v Frontex* case underscores the challenges faced by Frontex (and more broadly, the EU) in balancing security imperatives with fundamental rights. Although ensuring security while safeguarding fundamental rights is important, exceptional circumstances should be acknowledged without compromising human dignity and the need for accountability in border management operations should be taken into account.

IV. RE-BALANCING BETWEEN PERSONAL RIGHTS AND PUBLIC INTERESTS

The AFSJ's aim is freedom, security and justice. As a large policy field with three main focus areas, the question is whether there is a conflict, within the AFSJ, between two of these three key elements. For instance, while focusing on security, such as national security and collective interests, the individual rights to freedom and justice could be overlooked. In this regard, Peers has pointed out that the central question in justice and home affairs is the "balance between protection of human rights and civil liberties on the one hand and the state interests in public order, security, or migration control on the other".[74] In addition, Bachmaier affirmed that "the need to strike the right balance" is considered a slogan representing the principle of proportionality in the AFSJ.[75] Accordingly, a balance needs to be found between efficiency in cooperation and prosecution of crimes (*security*) and protection of fundamental rights (*freedoms*). Notably, in terms of data protection in the field of the AFSJ, the line between ensuring law enforcement, and police cooperation and protecting the right to privacy and personal data is highly complex to define.

To ensure a proper balance within the AFSJ, security concerns should be reconciled with freedom and justice. The balance, however, should be properly assessed, or in other words, be considered to find their boundaries or limited purposes, rather than pushing them into tension and having to deal with it. This tension, if any, should be exposed as a clash between two strands of sovereign-

[74] Engström and Heikkilä, 'Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice' (n 43) 8.

[75] Lorena Bachmaier, 'Fundamental Rights and Effectiveness in the European AFSJ: The Continuous and Never Easy Challenge of Striking the Right Balance' (2018) 2018/1 The European Criminal Law Associations' Forum 56, 56.

ty, namely internal sovereignty (*the people*) and external (*the state*) sovereignty.[76] Fundamental rights and freedoms could also have a symbiotic relationship with security. Thus, rights can be limited as well as freedoms can be constrained or even abolished in the name of security, so it can also be enhanced in a context in which security is public goods, non-excludable and non-rivalrous goods. In other words, individuals are not entirely free unless enjoying security and yet an increase in the provision of security might curtail significantly their freedoms. Security from both internal and external threats will come at the expense of positive and negative freedoms.[77] However, it could be noted that security will boost a safe environment for individual development and could not be traded with any other goods. This means that it is impossible to completely eliminate security in order to replace it with absolute freedom.

V. CONCLUDING REMARKS

The boundaries of fundamental rights are determined by the European Convention on Human Rights and the Charter of Fundamental Rights. Both instruments have brought these rights to the fore in EU law, although in different ways. The Charter of Fundamental Rights provides a unified, binding legal framework for protecting and promoting fundamental rights within the EU. In other words, the Charter can be seen as an initiative for the recognition and development of fundamental rights. Meanwhile, although it is distinct from the EU framework, or, that is to say, not formally part of the EU's primary law, the impact of the Convention is felt through the Charter, and the fundamental rights provided for by the Convention are the basis of unwritten principles of EU law. Essentially all rights and freedoms guaranteed by the ECHR are also laid down in the CFR with the same meaning and scope.

The AFSJ is a broadly defined field of law dealing with a wide EU policy area that ranges from criminal law to border control and civil law cooperation. From a policy perspective, fundamental rights are incorporated into the AFSJ and lie at the heart of the policy. Being at the heart of the AFSJ, fundamental rights serve as the very essence that sustains its existence. They are the bedrock upon which the AFSJ is built as well as guiding its policies, actions, and decisions. Fundamental rights ensure that even in the pursuit of security, justice, and cooperation, the dignity, autonomy, and liberties of every individual remain inviolable. Creating the AFSJ is—among other, more specific policy goals—crucial for the sake of fundamental rights and all measures in this area *should* directly or indirectly be

[76] Elena E. Popa, 'A Game of Chance: The Future of the AFSJ' (2018) 2018/1 The European Criminal Law Associations' Forum 42, 44.

[77] Massimo Fichera, 'Criminal Law beyond the State: The European Model' (2013) 19 European Law Journal 174, 180.

related to the protection of these fundamental rights.

Not only do the AFSJ's policies respect and promote fundamental rights, but they also raise challenges to fundamental rights. In being subject to constitutional checks, the AFSJ demonstrates the promotion of human rights through a fundamental rights compliance mechanism. Meanwhile, the AFSJ is a policy area that displays many institutional peculiarities, and this characteristic gives rise to fundamental rights challenges. These challenges are revealed through the practical application of measures within the scope of AFSJ, such as the Common European Asylum System, the European Investigation Order and the European arrest warrant, or cases accepted by the court. As a result, the need for a balance between ensuring security and safeguarding individuals' rights and freedoms is created.

The primary goal of the AFSJ is to establish an area characterized by freedom, security, and justice while upholding fundamental rights. The cooperation and action within the European Union to achieve this purpose are founded on the constitutional concept of mutual recognition. To attain mutual recognition, the member states must possess mutual trust in one another and uphold the same fundamental principles, which encompass respect for, protecting, and promoting fundamental rights. Within the framework of the AFSJ, the principle of mutual recognition has the potential to restrict the rights and freedoms of individuals. When it comes to applying judicial rulings in civil and criminal cases, particularly when enforcing coercive measures to exercise public power, individual freedom will be restricted. To maintain equilibrium within the AFSJ, it is essential to harmonize security considerations with the principles of liberty and fairness. To choose the appropriate bounds or restricted aims, it is crucial to thoroughly evaluate and analyze the balance, rather than completely sacrificing security in favor of unlimited freedom or vice versa. The proposed steps should aim to prevent any systemic shortcomings, and it is crucial to differentiate between reciprocal trust and blind trust. The principle of mutual recognition should be implemented in accordance with the idea of proportionality while considering both national and European policy issues.

Constructive Absence: A Hungarian Maneuver or a New Institution of EU Law?

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https://doi.org/10.15170/PJIEL.2024.1.6

Contents

I. Introduction 92
II. Constructive absence in EU law – constructive abstention, simple abstention and sincere cooperation 93
III. The constructive absence in international law 97
IV. The advantages and disadvantages of constructive absence 99
1. Flexibility and lack of foundation 100
2. Simplicity and inefficiency 101
3. Cooperativeness and inauthenticity 101
V. Conclusion 102

Abstract

By exiting the room in the moment of voting about opening accession negotiations with Ukraine and Moldova, Hungarian representative had laid the foundations for the new institute in the diplomatic, but also institutional law of the EU, a constructive absence. By this agreed maneuver between EU member states leaders, one state expressed its disagreement with the majority without blocking the decision or even limiting its influence. Although, at the moment it cannot be predicted will this maneuver ever be used again, this paper aims to explore it by comparing it to the institutes of constructive and simple abstention and explained through the principle of sincere cooperation. Furthermore, it will be justified from both international law and EU law perspective. Finally, by highlighting its advantages and shortcomings it will be shown that if its exercise becomes more frequent and necessary its legitimacy will have to be ensured by appropriate implementation in the Treaties.

Keywords: constructive absence, constructive abstention, simple abstention, principle of sincere cooperation, customary international law, general principles of law

I. INTRODUCTION

On December 15, 2023, the European Council has decided to open accession negotiations with Ukraine and Moldova as well to grant the status of candidate country to Georgia[1] despite of the fact that Hungarian prime minister left the room at the moment of adopting the decision.

Hungary, obviously, did not wanted to derail the decision to open accession negotiations with Ukraine and Moldova as well to grant the status of candidate country to Georgia despite the fact that it could do so. This is precisely what it has done in case of the decision about EU aid for Ukraine. Moreover, it could have made a formal declaration provided by Article 31(2) of the Treaty on European Union (TEU) in which case, pragmatic consequences aside, it would not be obliged to apply the decision.[2] Finally, to show its symbolically disagreement with the decision it could have abstain in vote. Unexpectedly and unprecedentedly, it chose to leave the room, creating a new maneuver named—constructive absence.

The question arises what this maneuver in its essence is. Is it a form of constructive abstention, is it simply an abstention in vote or is this a new phenomenon created by diplomatic practice? This paper will explore these questions and analyze benefits and shortcomings of this possible future EU law institute.

Although not proscribed by Treaties, the constructive absence maneuver did not represent their breach. Its justification can be found both in EU law and in international law.

For this purpose, in the second part of this paper, after the introductory part, this maneuver will be compared to the institutes of constructive and simple abstention and explained through the principle of sincere cooperation. The third chapter will explore its justification from international law point of view. The fourth chapter will deal with advantages and disadvantages of this maneuver as a potential new institute of EU law. Finally, the conclusion remarks will follow.
At this point, it is of great importance to emphasize that this paper does not deal with concrete situation regarding Hungarian policy nor accession procedure of Ukraine to the EU. It deals only with the maneuver of the constructive absence

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[1] ‚European Council meeting (14 and 15 December 2023) – Conclusions' (*European Council)* <https://www.consilium.europa.eu/media/68967/europeancouncilconclusions-14-15-12-2023-en.pdf> accessed 29 January 2024.

[2] ME Bartoloni, ‚Simple Abstention and Constructive Abstention in the Context of International Economic Sanctions' (2023) 7 European Papers 1121, 1124.

itself, its characteristics and its grounds from the EU and international law point of view.

II.CONSTRUCTIVE ABSENCE IN EU LAW—CONSTRUCTIVE ABSTENTION, SIMPLE ABSTENTION AND SINCERE COOPERATION

The constructive absence is a novelty in EU law. Nevertheless, it is not, *ipso facto*, illegal. After all every practice has its beginning. The European Council itself was a formalization of an informal practice in 1974.[3] The ERTA principle, according to which "each time the community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules"[4] was also created by practice and confirmed by the Court of Justice of the European Union (CJEU).

In any case, before any research of this maneuver, its difference in relation to constructive abstention must be emphasized. The Treaty of Amsterdam introduced the constructive abstention institution precisely for abolishing the mandatory unanimity of the member states when making a decision.[5] In turbulent political conditions of today, the importance of this institution and its use is increasingly highlighted.[6] This institution requires the member state abstaining in a vote to qualify its abstention by making a formal declaration resulting in that member state right not to apply the decision and obligation to refrain from any action likely to conflict with or impede Union action based on that decision. In the case of Hungarian prime minister leaving the room no formal declaration was made, so Hungary is bound by the EU Council decision to open accession negotiations with Ukraine and with the Republic of Moldova. After all, Hungary

[3] Philippe de Schoutheete and Helen Wallace, ‚The European Council' (2002) 19 Research and European Issues 3; Emmanuel Mourlon-Druol, ‚Filling the EEC leadership vacuum? The creation of the European Council in 1974' (2010) 10 Cold War History 315.

[4] Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1972] ECLI:EU:C:1971:32, para 17.

[5] See D. Lapaš, ‚Zajednička vanjska i sigurnosna politika EU' in Ćapeta Rodin and Goldner Lang (eds.), *Reforma Europske unije, Lisabonski ugovor* (Narodne novine 2009) 283.

[6] RA Wessel and Viktor Szép, ‚The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting: Towards a more effective Common Foreign and Security Policy?' (*European Parliament,* 2022 <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(222)739139> accessed 29 January 2024, 61; Saban Yuksel, ‚Quick Overview of the Strategic Compass' (Beyond the Horizon, 6 April 2022) <https://behorizon.org/a-quick-overview-of-the-strategic-compass/> accessed 29 January 2024; Steven Blockmans, ‚Ukraine, Russia and the need for more flexibility in EU foreign policy-making' (2014) CEPS Policy Briefs No. 320 < https://core.ac.uk/download/pdf/33449689.pdf> accessed 29 January 2024, 2.

is one of the few states that has used constructive abstention[7] institution and is fully aware of its potential so it would not hesitate to use it if the decision wasn't in accordance with its national interests. Consequently, the difference between constructive absence and constructive abstention is enormous and the former can hardly be seen as variant of the later.

Furthermore, it is important to distinguish this maneuver from simple abstention when decision is being made within the EU Council. The TFEU establishes consensus as a main model of decision making in European Council as a Union most prominent institution[8] but it alleviates it by Article 235 (1), according to which abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity. Furthermore, unlike in a case of constructive abstention, decision adopted does create obligation for an abstained state. It can be argued that exiting a room equals abstention, but *in stricto sensu* the aforementioned Article 235 of TFEU clearly states that abstentions by members *present in person or represented* shall not prevent the adoption by the European Council of acts which require unanimity. At the present case, Hungarian prime minister was not present nor represented, but absent from the room in, as it is constantly emphasized, a pre-agreed and constructive manner. Hungary could stay absent from voting in which case the conditions from Article 235 of TFEU would apply.

Moreover, the situation in question, nor any other constructive absence manifestation, could not be considered as one of the situations when a member state can be excluded from discussion and decision-making.[9] This would be procedures based on Article 7(2) and Article 50(4) of the TEU. According to Article 7(2) of the TEU "the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2." Article 50(4) proscribes that the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the

[7] ‚Draft minutes, Council of the European Union (Foreign Affairs) 17 October 2022' (*Council of the European Union*, 27 October 2022) <https://data.consilium.europa.eu/doc/document/ST-13777-2022-ADD-1/en/pdf> accessed 29 January 2024; ‚Foreign Affairs Council: Press remarks by High Representative Josep Borrell after the meeting' (*European Union External Action,* 17 October 2022) <https://www.eeas.europa.eu/eeas/foreign-affairs-council-press-remarks-high-representative-josep-borrell-after-meeting-1_en> accessed 29 January 2024; Wessel and Szép (n 5) 63.

[8] Luuk van Middelaar and Uwe Puetter, ‚The European Council the Union's supreme decision-maker' in Dermot Hodson, Uwe Puetter, Sabine Saurugger and John Peterson (eds.), *Institutions of the European Union* (5 th edn, Oxford University Press 2021) 66.

[9] ibid 63.

discussions of the European Council or Council or in decisions concerning it. This means that rules regulating simple abstention do not govern the situation in question. Finally, this member state is the 'usual suspect',[10] the pioneer in blocking of decisions in the CFSP framework,[11] so it could have easily vote against opening accession negotiation.

Nevertheless, as it has been stated above, there is no reason to consider this maneuver illegal. Moreover, putting CJEU non-jurisdiction in CFSP questions aside,[12] CJEU could scrutinize this maneuver from the aspect of sincere cooperation obligation, without breaching the principle of conferral.[13] In the *Deutsche Grammophon* case the CJEU has explained that the obligation of member states "to abstain from any measure which could jeopardize the attainment of the objective of this treaty" forms a "general duty for the member states, the actual tenor of which depends in each individual case on the provisions of the treaty or on the rules derived from its general scheme."[14] With this extensive approach the CJEU has strengthened this obligation by giving it a strong momentum to the level of ubiquitous principle in all relations between EU and member states.[15] The CJEU has used same approach, for example, in the *Pupino* case to extend the principle of sincere cooperation to the ex-third pillar and in the *Segi* case to extend the same principle to the CFSP. The CJEU has considered that "it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law"[16] were not also binding even in areas in member states competences.

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[10] LNG Alonso, ‚La Unión Europea frente al desafío de la guerra en Ucrania:¿la ansiada ‚epifanía' de su política exterior y de seguridad común?' (2023) 27 Revista de Derecho Comunitario Europeo 35, 52.

[11] Wessel and Szép (n 5) 64; Nicole Koenig, ‚Towards QMV in EU Foreign Policy: Different Paths at Multiple Speeds' (*Hertie School Jacques Delors Centre,* 14 October 2022) <https://www.delorscentre.eu/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20221014_Koenig_QMV_V1.pdf> accessed 29 January 2024, 3.

[12] See the approach of AG Ćapeta: Joint Cases C-29/22P and C-44/22P *KS, KD v Council and Commission v KS, KD* [2023] ECLI:EU:C:2023:901, opinion of AG Capeta, para. 118.

[13] See e.g. Tomas Verellen, ‚AG Ćapeta's Opinion in KS and KD: Reading Away the Treaty Text?' (*Blog of Thomas Verellen, 30 November* 2023) <https://www.thomasverellen.com/blog/ag-capetas-opinion-in-ks-and-kd> accessed 29 January 2024.

[14] Case C-78/70 *Deutsche Grammophon v Metro SB* [1971] ECLI:EU:C:1971:59, para. 5.

[15] Desiree van Iersel and CG Ramaglia Mota, ‚Federalising Tendencies of the Principle of Sincere Cooperation in the Area of Common Foreign and Security Policy' (2016) 1 Warwick Undergraduate Law Journal 16.

[16] Case C-105/03, *Pupino* [2005] ECLI:EU:C:2005:386; C-355/04, *Segi and others v Council* [2007] ECLI:EU:C:2007:116.

According to the sincere cooperation principle, acknowledged by the CJEU,[17] the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Based on that principle of constitutional importance,[18] TEU creates certain obligations for member states regarding CFSP and each other, more precisely:

> - they shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives[19]
> - they shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area[20]
> - shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach.[21]

Member states obligation to refrain from any measure, which could jeopardize the attainment of the Union's objectives, or to put it otherwise obligation of abstention, strives to resolve conflicts[22] or search for a compromise in cases in which Union's objectives and national interests of member states do not coincide. Hungarian maneuver, putting external and internal policy of Hungary aside, was precisely that-a compromise. After all it was an agreement Hungarian prime minister and chancellor of Germany conceived to fill a new lacuna in EU law emerged as a result of specific political environment. The best way to fill this lacuna is duty of sincere cooperation as a legal principle whose purpose is, among other, "to fill lacunae of the EU law."[23]
The member states duty to give full effect to EU law as one of many face of

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[17] E.g. case C-78/70 *Deutsche Grammophon v Metro SB* [1971] ECLI:EU:C:1971:59, para. 5.

[18] JT Lang, ‚The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC' (2007) 31 Fordham International Law Journal 1483, 1530.

[19] Consolidated version of the Treaty on European Union [2012] OJ C326/1 art. 4.3. (Treaty on European Union)

[20] Treaty on European Union, art. 24.3.

[21] Treaty on European Union, art. 32.1.

[22] Marcus Klamert, ‚Article 3-5' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 61.

[23] Péter Budai, ‚Understanding the Principle of Sincere Cooperation Concerning the Ratification of Mixed Agreements: Obligation of Conduct, Obligation of Abstention and Obligation of Result' (2021) Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae 55, 57.

principle of sincere cooperation[24] could not apply in this contest. Of course, Commission's enlargement package of 8 November 2023[25] on which the European Council had decides to open accession negotiations with Ukraine and with the Republic of Moldova could not be considered as EU law nor as, at least not yet, as Union's objective or common approach. Nevertheless, as it has been explained above, constructive absence, as a result of political compromise, could be seen as a manifestation of sincere obligation principle. As the CJEU has stated the "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded."[26] Consequently, in the spirit of sincere cooperation, Hungary should not dispute adopted decision in anyway.

III. THE CONSTRUCTIVE ABSENCE IN INTERNATIONAL LAW

According to Article 38 of the Statute of the ICJ, the sources of international law are international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, international custom, as evidence of a general practice accepted as law and the general principles of law recognized by civilized nations. According to the CJEU, the EU as a "order of international law"[27] is bound by international custom, as evidence of a general practice accepted as law[28] or in other words, by customary international law.[29] General principles of law as a source of international law are as well a source of

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[24] Lang (n 18) 1499.

[25] Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement Policy (Communication) COM (2023) 690 final; ‚Commission adopsts 2023 Enlargement package, recommends to open negotiations with Ukraine and Moldova, to grant candidate status to Georgia and to open accession negotiations with BiH, once the necessary degree of compliance is achieved' (*European Commission Press Release,* 8 November 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5633> accessed 29 January 2024.

[26] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para. 30.

[27] Case C-26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1

28 Case T-115/94 *Opel Austria v Council of the European Union* [1997] ECLI:EU:T:1997:3, para. 90; Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para. 47; Case C-364/10 *Hungary v Slovakia* [2012] ECLI:EU:C:2012:630, para. 46; See Jens Dammann, ‚Paradise Lost: Can the European Union Expel Countries from the Eurozone?' (2016) 49 Vanderbilt Journal of Transnational Law 693, 718.

29 See e.g. Jörg Kammerhofer, ‚Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523, 541; LR Helfer and IB Wuerth, ‚Customary International Law: An Instrument Choice Perspective' (2016) 37 Michigan Journal of International Law 563, 569.

the EU law.[30]

Qui tacit consentire videtur si loqui debuisset ac potuisset or he who keeps silent is held to consent if he must and can[31] act and *nemo auditur propriam turpitudinem allegans* or no one may rely on his or her own wrongdoing,[32] could be considered as both, international custom and general principles of law.

The adage *qui tacit consentire videtur si loqui debuisset ac potuisset* is connected with a concept of acquiescence, "an equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent."[33] This means that if the state had knowledge about all the circumstances of a certain question and the consequences of its own non-reaction, its silence on a matter will result in a tacit agreement.[34] For example, in the *Temple of Preah Vihear Case* ICJ has concluded that since Thailand had remained silent for 50 years with regard the map according to which a certain territory was placed within the borders of Cambodia, the map had become binding and Thailand's silence on a matter must be understood as acquiesced. At the same place ICJ has cited the abovementioned adage.[35] According to Antunes, for silence to be considered as acceptance, four conditions have to be met: notoriety or the requirement that the facts of the case in question are (or ought to be) known by the acquiescing State, lapse of time, consistency and in cases in which the conduct is attributable to a relevant representative, provenance.[36]
For determination of Hungary's reaction and any future constructive absence cases as an acquiescence according to the abovementioned conclusions and

[30] Case 4/73 *Nold v Commission* [1974] ECLI:EU:C:1974:51, para. 13; Budislav Vukas, ‚Opća načela prava kao izvor prava Evropskih zajednica' (1992) 42 Zbornik Pravnog fakulteta u Zagrebu 253, 259; TC Hartley, *Temelji prava Europske zajednice* (Pravni fakultet Sveučilišta u Rijeci 2004) 133.

[31] DA Lewis, NK Modirzadeh and Gabriella Blum, ‚Quantum of Silence: Inaction and Jus ad Bellum' (2019) Harvard Law School Program on International Law and Armed Conflict <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420959> accessed 29 January 2024.

[32] Natalie Holvik, ‚Silence is consent Acquiescence and Estoppel in International Law' (Örebro University, School of Law, Psychology and Social Work 2018) <https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1199344&dswid=4002> accessed 29 January 2024, 4.

[33] *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* Judgment, ICJ Reports 1984, p. 246.

34 Holvik (n 32) 24.

[35] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Merits, Judgment of 15 June 1962: ICJ. Reports 1962, p. 6. See also e.g. *Land, Island and Maritime Frontier Dispute Case (El Salvador v Honduras: Nicaragua Intervening)* Judgment of 11 September 1992, p. 21; Lewis, Modirzadeh and Blum (n 31) 14.

[36] NSM Antunes, ‚Acquiescence' in *Max Planck Encyclopedia of Public International Law* (MPIL 2006) <https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/02.%20Legal%20Authorities/UAL-114.pdf> accessed 29 January 2024., para. 21.

views of ICJ, it is necessary to define it as a silence. As stated before, it cannot be considered as a simple abstention from Article 235 of the Treaty on the Functioning of the European Union (TFEU) nor as constructive one from Article 31 of the TEU. So as a new concept as it is, in its basis, it is a silence. Furthermore, if we apply Antunes conditions on this, or any other constructive absence maneuver, it is very probable that they would be met. In the present case, Hungarian prime minister as a relevant national representative was fully aware of all circumstances of the case as well as of the consequences of his reaction and it is hard to imagine that any other relevant national representative of member state who would reach for this mechanism would not be. This means that constructive mechanism maneuver fulfills the conditions of provenance and notoriety. Even the conditions of lapse of time and consistency could be satisfied if the state's representative absence is in line with that states policy regarding the specific subject for a longer period of time. Consequently, the exercise of *qui tacit consentire videtur* principle should not be disputable in the case of constructive absence.

Furthermore, since the Hungarian prime minister had knowingly left the room at the moment of voting, Hungary cannot dispute decision's binding effect. This means that this mechanism would be in accord with maxim *nemo auditur propriam turpitudinem allegans* also known as *estoppel* principle.[37] The CJEU has used this adage in *Ratti* case without mentioning the principle itself, by stating that "a member state which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails."[38] In its later case law the CJEU has explicitly referred to the principle *nemo auditur propriam turpitudinem allegans*,[39] confirming its status in EU law.

IV. THE ADVANTAGES AND DISADVANTAGES OF CONSTRUCTIVE ABSENCE

At this moment, at least three advantages of the constructive absence maneuver or institution, that can be recognized. Those advantages would be its flexibility, simplicity and cooperativeness. Each of them has its counterpart that can be detected as disadvantages of the same maneuver. Those would be the lack of a foundation in Treaties, inefficiency, and inauthenticity.

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[37] Marko Petrak, *Traditio Iuridica, Vol.I. Regulae Iuris* (Novi informator 2010) 86.

[38] Case C-148/78 *Ratti* [1979] ECLI:EU:C:1979:110, para 22; See Mirna Romić, ‚Obtaining Long-term Resident Status in the European Union' (2010) 6 Croatian Yearbook of European Law and Policy 153, 157.

[39] Case C-520/21 *Arkadiusz Szczesinak v. Bank M. SA.* [2023] ECLI:EU:C:2023:478, para 81; Case T-330/19 *PNB Banka v ECB* [2022] ECLI:EU:T:2022:775, para 231; Case T-301/19 *PNB Banka v ECB* [2022] ECLI:EU:T:2022:774, para 209.

ADVANTAGES	DISADVANTAGES
flexibility	lack of foundation in Treaties
simplicity	inefficiency
cooperativeness	inauthenticity

Table No. 1: *advantages and disadvantages of constructive absence*

1. Flexibility and lack of foundation

Flexibility is not only desirable in complex legal system such as the EU, but also necessary.[40] The Treaties themselves tend to flexibility mechanisms or clauses to avoid system paralysis when unanimity cannot be reached. From 'opt-outs' via 'passarelle' clauses to 'flexibility' clause from Article 352, Treaties have promoted flexibility over rigidity. After all, the constructive abstention is a 'flexibility clause' itself.[41] It is undoubtedly that the Hungarian maneuver has shown a high degree of flexibility in a situation where the stakes were high, and it was not in the interest of either side to rise tensions to unnecessarily high levels. It was a perfect example of ignoring the elephant in the room. Hungarian prime minister left the meeting, decision to open accession negotiations was adopted by European Council and the incident was not even mentioned in the published European Council conclusion. If this were to become a future practice, one could argue that a new flexibility mechanism has been created.

Nevertheless, the lack of genuine Treaties provision amounts to the legal uncertainty of the whole voting procedure in European Council but the Council as well. If the Hungarian maneuver would become the new institution only in practice, this would be a clear signal that each state in each situation could produce its own maneuver to which majority would have to adapt. It is indisputable that in this specific case, this was the most acceptable solution, but such arbitrary deviation from the Treaties should not become a 'new normal.' Scholz himself has called for limiting the use of constructive abstentions to exceptional cases.[42]

[40] Thomas Duttle et al, 'Opting out from European Union legislation: the differentiation of secondary law' (2017) 24 Journal of European Public Policy 406, 480.

[41] See more in Carlos Closa Montero, 'Flexibility Mechanisms in the Lisbon Treaty, A Study for the AFCO Committee' (European Parliament 2015) <https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536474/IPOL_STU(2015)536474_EN.pdf> accessed 29 January 2024, 13.

[42] Mared Gwyn Jones, 'Will EU leaders continue to sidestep Orbán by asking him to leave the room?' (Euronews, 19 December 2023) <https://www.euronews.com/my-europe/2023/12/19/will-eu-leaders-continue-to-sidestep-orban-by-asking-him-to-leave-the-room> accessed 29 January 2024

2. Simplicity and inefficiency

Besides being a manifestation of flexibility, simplicity is another characteristic of this potentially future EU law institution. If the constructive absence would be formalized in Treaties as suggested above, there would be no need for any kind a formal declaration as in the case of constructive abstention. This wouldn't even be necessary since the member state exploiting the constructive absence would still be bound by the decision in question. Nevertheless, it is as unambiguous as constructive abstention.

On the other hand, the constructive absence institution would be of questionable efficiency or even meaningfulness. In the cases of constructive absence, the state that has resorted to this mechanism remains bound by the decision in question. In the cases such as opening accession negotiations the constructive abstention would not have any sense nor could technically meant anything. It would not be possible to achieve such an arrangement in which the decision regarding accession negotiations or accession of a state to the EU itself would be binding for all states except for the one that decided to use constructive abstention. Constructive absence would be a suitable solution in these kinds of circumstances when state does not want to obstruct the decision-making, but it wants to send a stronger message than simply abstain in a vote. While this could even be considered as, an advantage of unambiguity, in a metaphysical sense, from a utilitarian point of view, is actually without any effect.

3. Cooperativeness and inauthenticity

Finally, the institution of constructive absence would be a clear example of member states cooperativeness, since it would be agreed, exercised, and reasoned in the spirit of sincere cooperation and mutual respect of member states. The exercise of constructive absence would demonstrate the commitment of the majority of member states to the same goal and respect for the different opinions of one or several of them. This institution would achieve a double goal: the decision of the majority would be passed and the member states that disagree would clearly express their stance without limiting decision's effect.
At the same time, however diplomatically innovative and pragmatic this maneuver was and could be in similar future cases, it would actually be a fraud. Just like Potemkin's villages, behind the guise of resourcefulness, diplomacy and commitment to a common goal, there would be a lack of unity that should characterize the adoption of key Union decisions. This issue would not be such a huge problem in the cases of decisions that are not as crucial as the opening of negotiations with a potentially new member state. But the fact that this maneuver is undefined in Treaties and not even mentioned in the European Council's documents contributes to this stance. Consequently, this disadvantage would

be amortized to some extent if the European Council itself would explain the maneuver itself and its exercise in each specific case. Otherwise, the European Council's conclusions like the one from 15 December would appear to cover up the failure of reaching necessary unanimity and failure of Union's policies.

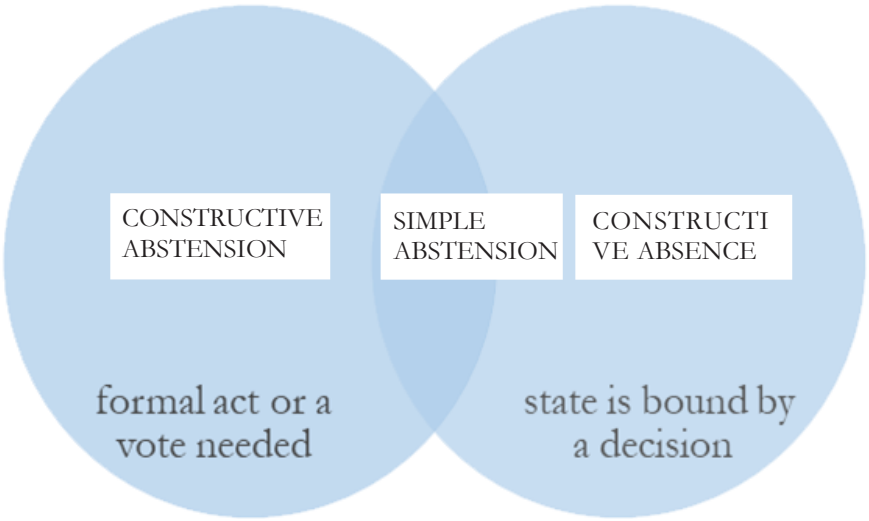
V. CONCLUSION

By exiting the room in the moment of voting about opening accession negotiations with Ukraine and Moldova, Hungarian representative had laid the foundations for the new institution in the diplomatic, but also institutional law of the EU. By this agreed maneuver between EU member states leaders, one state expressed its disagreement with the majority without blocking the decision or even limiting its influence. Shall this maneuver ever be used again, and will it really reach the status of a new institution side by side with, e.g., constructive abstention is impossible to know. In any case, the maneuver and its consequences can be justified in both international law and EU law as well.
The maneuver represents the *consentire videtur si loqui debuisset ac potuisset* and the Hungary like any other state that would resort to the use of the maneuver is bound by the decision in question according to the *nemo auditur propriam turpitudinem allegans*. Both adages reflect general principles of law and international custom which apply to the EU according to the CJEU case law.

When considering constructive absence from EU law point of view, it is of great importance not to confuse it with constructive abstention. There are three main differences between them. First, constructive abstention is a legal institution proscribed by Treaties, precisely by the Article 31 (2) of TEU. The constructive absence is still just a diplomatic maneuver. Secondly, for triggering the constructive abstention institution, a formal declaration needs to be made, while constructive absence is completely informal. Thirdly, while the member state that has resorted to the Article 31(2) of the TEU is not itself bound by a decision that was being voted on, in a case of a constructive absence the member state that has performed it, stays fully bound by it.

Furthermore, the constructive absence should not be equalized with the simple abstention from Article 235 (1) of TFEU. Simple abstention, similar to the constructive abstention, differs from constructive absence in fact that it has a legal foundation in Treaties and needs a formal expression. However, in both of these cases the state is bound by a decision that is being considered in the EU Council, of course if the decision was actually adopted in accordance with the Treaties (see Diagram 1).

Diagram No. 1: *Relationship between constructive abstention, simple abstention and constructive absence*



The maneuver itself is in line with the sincere cooperation principle. Hungary could have easily voted against opening accession negotiations but, putting the policy aside, it did refrain from a measure which could jeopardize the attainment of the Union's objectives. Any other member state that would, in the future, exercise this maneuver would show a certain degree of adherence to this principle. This form of cooperation, together with simplicity in execution and flexibility, which is necessary in complex system such as EU are most obvious advantages of this maneuver.

On the other hand, its main flaws are a lack of a foundation in the Treaties, inauthenticity, and practical inefficiency. Leaving the last one a side, these disadvantages could be mitigated by establishing the maneuver itself as an institution in Treaties. If a general consensus were to be reached, there is no reason not to, for example, amend Article 235 (1) so that its third subparagraph stipulates "Intentional absence or abstentions by one or more members shall not prevent the adoption by the European Council of acts which require unanimity." Of course, time and political future of EU policies will show if this will be necessary. It will be shown whether constructive absence stays just a Hungarian maneuver or whether it will rise to the level of a new institution of EU law. will be shown whether constructive absence stays just a Hungarian maneuver or whether it will rise to the level of a new institution of EU law.

Christopher Whyte and Brian M. Mazanec: Understanding cyber warfare. Politics, Policy and Strategy. Second edition. Routledge, 2023.

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https://doi.org/10.15170/PJIEL.2024.1.7

In recent years, the number of hostile, interstate cyber operations has significantly increased. While only a few dozen occurred a decade ago, nowadays more than a hundred such actions take place annually, according to reputable international organizations.[1] The ongoing Russian-Ukrainian war now entering its second year, is not only happening in the physical space, but also simultaneously in cyberspace, with the parties constantly attacking each other. As the authors put it in the book: "(…) the information revolution has necessarily (and controversially) changed the way in which future wars will be fought to such a degree that conventional military strategy will never be the same again." The authors are widely recognized as experts in the field. Both are university lecturers, as well as authors and co-authors of numerous works related to cyberspace. In addition, Brian Mazanec is a senior executive in the U.S. government.

The second edition of the book was published in 2023. In comparison to the first edition, which was released in 2018, the authors significantly renewed the chapter that dealt with the overview of some major cyber operations. This chapter has now been supplemented with descriptions of attacks that have occurred since the first edition. The role of the information environment is emphasized more prominently, resulting in a new chapter and numerous minor updates compared to the first edition. The updates presented in the second edition reflect advancements in research and practice in the field of national security. Furthermore, the second edition gives greater prominence to non-state actors. However, the authors emphasize that the manuscript was sent to press following the outbreak of the Russian-Ukrainian armed conflict, therefore it does not—nor

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[1] 'Significant Cyber Incidents' (*Center for Strategic and International Studies*) <www.csis.org/programs/strategic-technologies-program/significant-cyber-incidents> accessed 16 March 2024; 'Cyber Operations Tracker' (*Council on Foreign Relations*) <www.cfr.org/cyber-operations/>accessed 16 March 2024.

could it—include the long-term impacts of the conflict on cybersecurity and future cyber operations.
In terms of the structural layout, the book consists of fourteen standalone chapters, followed by a glossary and subject index, totaling over 340 pages. The book contains numerous text boxes, tables and figures that can help deepen the understanding of each topic.

In the first chapter of the book, the authors define the focus of the book. They emphasize that the main focus of it is not cybersecurity, but rather cyber conflicts and the associated historical, empirical, theoretical and political issues. The authors emphasize that cybersecurity extends beyond being solely a technical field. It is necessary to understand the historical context and the international and national environment. They adopt a more general definition, arguing that cybersecurity encompasses all processes, procedures, planning, and actions related to the security of social-technical systems. The authors aim to provide a comprehensive introduction to cyber conflicts, as well as key issues related to warfare in the digital domain. Besides defining additional fundamentals, the authors introduce the subsequent chapters of the book.

The second chapter is titled "the technological foundations of the insecurity in the digital age." In this chapter, readers first gain a comprehensive understanding of the history of the internet's development and the technical structure of computer networks. The chapter introduces techniques for ensuring the security of data transmission between computers, along with various threats to information security system. Additionally, this chapter presents the workings of various forms of malicious software and threats to network security.

The third chapter explores the relationship between cyberspace and international relations. Initially, it discusses how cyberspace began to gain prominence in global politics. The authors explain why cyberspace is important from the perspectives of international security and international relations. They shed light on the primary theories of international relations and demonstrate how they apply within the context of cyberspace. The authors express that liberalism in its various formats might be most useful for the research program on cyberspace and international security. Andrew Moravscik is mentioned, as the authors believe, his form of liberalism is closest to the interactions observed in cyberspace. Followers of liberal theories openly reject the notion that everything is about power politics and emphasize international cooperation. Though theoretically it is undeveloped yet, but the authors believe that states are relatively restrained when it comes to responding to major cyber-attacks speaks to the tenets of modern liberalism in that state behavior might be expected to emerge form configurations of political capacity and interests at both the domestic and interstate level. The neoliberal perspective on world politics also a useful framework for understanding how international cooperation might emerge on cybersecurity and other digital issues. According to the authors, when it comes to cyberspace, realism's

main problem lies in the common critique that its structural variants are overly simplistic. Finally, they mention that as the research program on cyberspace and international security continues to develop, it seems likely that researchers will increasingly turn to constructivism to elaborate on and explain patterns of interaction and political behavior in world politics in the digital age. Constructivism holds that the environment in which political actions takes place in social and that the social setting of internationals can essentially provide states and other actors with their core preferences, which is dramatically different from the perspectives of realism and liberalism.

The fourth, fifth, and sixth chapters are closely connected as they present various manifestations of cyber warfare. The fourth chapter begins by placing the emergence of cyberspace since the 1960s into historical context. The authors initiate this historical journey with a leap of over 100 years, dating back to the outbreak of the First World War. They mention Britain's efforts to decode the entire communication of the central powers. After discussing the Great War, the authors introduce the Enigma project and mention the computer famously created by Alan Turing. They showcase the collaboration between the USA and the United Kingdom after World War II and explain how this relationship guided and shaped the computer revolution in the following decades. The fifth chapter discusses offensive cyber operations from a strategic perspective. It presents two major groups of such operations: attacks against computer networks and operations carried out through the 'exploitation' of the computer systems. The sixth chapter points out that relatively few cyber operations resemble some form of traditional warfare. Cyber tools are highly versatile, multi-purpose instruments through which states and other actions can shape favorable conditions concerning their international affairs.

The seventh chapter provides an empirical overview of the history of cyber conflicts. This chapter, which is rich in detail, outlines the dynamics of conflicts occurring in cyberspace. They present the most significant cyber operations of recent times, starting from the early birds and extending to much more sophisticated operations. The authors pay special attention to countries such as the United States, China and Russia.

The eighth chapter discusses how national experiences related to cybersecurity have shaped various approaches to cyber conflicts. It is noted that in most countries around the world, responding to challenges posted by the digitalization of infrastructure and developing various regulations are still the most problematic issues. The chapter begins by outlining cyber policy efforts and then proceeds to present the experiences of countries at the forefront of the cybersecurity discourse. As for the United States, the authors mention that the history of the United States' effort to confront cyber threats to national security is one of a fragmentation and stuttering coordination between stakeholders both inside and outside of the government. The United Kingdom's experiences with cyber-

space roughly parallel those of other major American allies, like Japan, Germany, or France. The authors also highlight that authoritarian states represent a stark departure from the US in terms of how cybersecurity imperatives have been viewed and how cyber capabilities have been developed. While the experiences of the US have encouraged the national security establishment to think of information security in terms of militarized threats to networks, systems, and critical pieces of content, both China and Russia have for some years now viewed the implications of the information revolution for national security processes in remarkably different way. Specifically, both countries' notion of information security has more clearly embraced the ideas namely that the information revolution has been both about the digitization of infrastructure and fundamental changes in the dynamics of the global informational environment. Thus, information security policy that aims to address issues of both national security and political stability must address ideas as much as it must consider technical security.

The emphasis of the ninth chapter is on the national security aspects of cyber warfare. The authors examine elements of national security vulnerable to various forms of cyberwarfare. The tenth chapter describes conflicts that occur below the threshold of traditional warfare and explores why there is an increased occurrence of such disputes stemming from the effects of the information revolution. Moreover, the chapter discusses conflicts known as 'gray zone' conflicts. The eleventh chapter focuses on non-state actors. This chapter describes how the information revolution has altered the nature of activities by non-state actors, encompassing areas such as social activism and terrorism. At the beginning of the chapter, the authors help us navigate through various definitions, such as hackers, hacktivists, cyber terrorists, or proxies.

The twelfth chapter discusses how constraining norms for offensive cyber operations are developing and offers predictions for how they will develop in the future. The chapter accomplishes this by introducing key concepts regarding norms and international law. It also offers predictions and conclusions based on norm evolution theory for emerging-technology weapons. In the final two chapters, the authors look ahead. They examine how artificial intelligence and other not technologies could change the logic and nature of cyber conflicts.

The book is primarily intended for students interested in cybersecurity, defense policy, or international relations. However, I confidently recommend it to a wide audience, including students, experts, or laypersons. One of the major strengths of the work is its complexity. The authors examine various aspects of cyber warfare in a comprehensive manner, as readers can gain strategic, technical, and historical insights. Overall, the book may be an essential reading for those who are conducting research of cyberspace whether they are students, or experts.

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