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Balancing Morality and Policy: Recreational Drug Dynamics in the United Kingdom

ABSTRACT: This critical analysis examines the landscape of recreational drug use within the context of prohibition policies in the UK. It scrutinises the moral foundations of punitive measures, challenges assumptions about the immorality of drug use, and evaluates the effectiveness of the 10-year drug strategy 'From Harm to Hope.' Highlighting significant deficiencies in the current approach, particularly regarding disproportionate measures and perpetuation of stigma, the study advocates for alternative regulatory models like legalisation and decriminalisation. It argues that such a shift is imperative for redirecting resources, enhancing control, and fostering a more equitable, effective, and compassionate approach to addressing the complexities of drug use. The paper focuses on ethical considerations, evidence-based analysis, and the need for comprehensive policy reevaluation within the UK's drug regulation framework.

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I. Introduction

The recreational use of drugs, often without medical justification, is a prevalent practice with over three million individuals in the UK reporting drug use within the last two years.[2] This critical analysis delves into the landscape of recreational drug use within the context of prohibition policies. The first section scrutinises the moral foundations of punitive measures, challenging assumptions about the inherent immorality of such use.[3] Acknowledging that the law is influenced by societal beliefs and morality, this examination is crucial in shaping perceptions of both drugs and their users. Shifting to a factual perspective, the following section scrutinises the 'From Harm to Hope' 10-year drug strategy and additional legislation. While aiming to reduce drug-related issues, the strategy reveals shortcomings, especially in the realm of recreational drugs, emphasising the need for refinement to enhance efficacy. The paper concludes with a discussion on the adequacy of prohibitionism and advocates for alternative regulatory models. A key emphasis is placed on the potential benefits of legal regulation in controlling drug quality,[4] reallocating funds,[5] and limiting inequalities.[6]

II. The immorality of (some) drugs

In the realm of drug prohibition policy-making, morality stands out as a pivotal force influencing legislative decisions.[7] A question naturally arises: why do countries typically allow the legal recreational use of certain substances like caffeine, nicotine, and alcohol, while simultaneously prohibiting others like cocaine, heroin, ecstasy, and often marijuana? The answer transcends mere

[2] P Jones, 'Drug Misuse in England and Wales: Year Ending June 2022' (*Drug misuse in England and Wales - Office for National Statistics*, 15 December 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/drugmisuseinenglandandwales/yearendingjune2022> accessed 1 January 2024.

[3] DN Husak, *Legalise This!: The Case for Decriminalizing Drugs* (Verso 2002).

[4] R Stevenson and J Merry, *Winning the War on Drugs: To Legalise or Not?* (Institute of economic affairs 1994).

[5] F Godlee , 'Drugs Should Be Legalised, Regulated, and Taxed' [2018] BMJ.

[6] M Shiner et al, 'The Colour of Injustice: 'Race', Drugs and Law Enforcement in England and Wales (Stopwatch, Release and LSE, 2018).

[7] A Reiman, 'Moral Philosophy and Social Work Policy' (2009) 6(3) *Journal of Social Work Values and Ethics* 136, 136.

considerations of potential harm and delves into the perceived immorality associated with their use.[8]

Numerous arguments have been presented to endorse and justify punitive drug policies. However, it is crucial to meticulously scrutinise and qualify these assertions.[9]

A Paternalistic perspective asserts that the recreational use of drugs is inherently immoral and should therefore be punished.[10] This perspective is often supported by the presumption that the government has a duty to preserve traditional values upheld by the majority.[11] Moreover, it is argued that the immorality of drug consumption rests on the fact that it holds the potential to inflict harm, not only on the individual user but also on society at large through indirect consequences.[12] Proponents of this viewpoint contend that the government carries a responsibility to guide and safeguard those perceived as having "lost their way" due to drug use.[13] Moreover, the moral condemnation extends to the notion that purchasing illegal drugs is deemed morally wrong because it contributes to the funding of criminal organisations.[14] This perspective suggests that users, by engaging in such transactions, are not entirely free from harm and shoulder partial responsibility for the violent and exploitative conditions in which many drugs are produced and distributed.[15]

Firstly, the argument that people should be criminally punished for their behaviour, solely based on the fact that it is immoral is deeply problematic as it risks getting caught in a slippery slope.[16] The dynamic nature of societal perspectives on morality and traditions underscores the inherent instability of relying on such criteria for legal consequences.[17] The presumption that the government bears a duty to preserve traditional values raises questions about the

[8] Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* (Yale University Press 2006) 181.

[9] P Smith, 'Drugs, Morality and the Law' (2002) 19 Journal of Applied Philosophy 233.

[10] S Duke, 'Review of Legalize This! The Case for Decriminalizing Drugs by D Husak' (2003) 13(1) *Development in Practice* 121-123.

[11] P Smith (n 8).

[12] R Lovering, *A Moral Defense of Recreational Drug Use* (Palgrave Macmillan 2015).

[13] CL Reid, *Choice and Action: An Introduction to Ethics* (Macmillan 1981).

[14] A Holland, 'An Ethical Analysis of UK Drug Policy as an Example of a Criminal Justice Approach to Drugs: A Commentary on the Short Film Putting UK Drug Policy into Focus' (2020) 17 *Harm Reduct J* 97.

[15] Home Office, *Swift, Certain, Tough: New Consequences for Drug Possession* (White Paper, CP 723, 2022) 3.

[16] DN Husak, *Legalize This!: The Case for Decriminalizing Drugs* (Verso 2002).

[17] *ibid*.

intrinsic righteousness of these traditions.[18] This becomes particularly relevant when considering the fluid nature of what is deemed moral or traditional over time.[19] The selective acceptance of certain substances, such as coffee or alcohol, while stigmatising others, is not an inherent or inevitable state.[20] Present-day perspectives challenge the idea of labelling activities as immoral based solely on the pursuit of pleasure.[21] The current stance is largely shaped by historical figures[22] and lacks universal support.[23]

Secondly, not all harm to others is universally deemed wrong; justified punishment and legitimate competition involve harm without being inherently immoral.[24] Additionally, not all wrongful harm is subject to criminalization.[25] Prohibiting all forms of indirect harm would extend beyond illegal drugs to encompass alcohol and tobacco use, other unhealthy lifestyles, diets, and even dangerous sports.[26] Many individuals willingly engage in activities that pose indirect harm, yet society does not advocate making such harms universally illegal.[27] In this respect, Mill would respond that the application of the harm principle must be qualified by considerations of individual liberty rights, stating that "over himself, over his own body and mind, the individual is sovereign," and coercion is only justified to prevent harm to others, not harm to oneself.[28] Furthermore, even if one were to accept the premise that putting oneself in harm's way is morally objectionable and should determine the legal status of drugs, current policies often fail to align with this rationale.[29] The legal classification of

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[18] P Smith (n 8).
[19] N Haslam et al. 'Changing Morals: We're More Compassionate than 100 Years Ago, but More Judgmental Too' (*The Conversation*, 19 October 2023) <https://theconversation.com/changing-morals-were-more-compassionate-than-100-years-ago-but-more-judgmental-too-112504> accessed 23 December 2023.
[20] A Holland (n 13).
[21] DN Husak (n 15).
[22] N Lee and J Bartle, 'History, not harm, dictates why some drugs are legal and others aren't', (*The Conversation*, 30 January 2019) <https://theconversation.com/history-not-harm-dictates-why-somedrugs-are-legal-and-others-arent-110564> accessed 28 December 2023.
[23] R Geuss, *Philosophy and Real Politics* (Princeton University Press, Oxford 2008).
[24] P Smith (n 8).
[25] R Lovering, 'On Moral Arguments against Recreational Drug Use' (*Philosophy Now: a magazine of ideas*) <https://philosophynow.org/issues/113/On_Moral_Arguments_Against_Recreational_Drug_Use> accessed 28 December 2023.
[26] *ibid*.
[27] A Holland (n 13).
[28] JS Mill, *On Liberty* (various editions) ch 1, para 9.
[29] 2006 (Drug classification, making a hash of it?: Fifth report session).

drugs does not consistently reflect their actual harm levels.[30] Despite acknowledged harms associated with recreational drug use, some illegal substances may, in certain instances, be less harmful than their legal counterparts, such as alcohol and tobacco, which account for almost 99% of drug-related deaths and pose a high risk of addiction.[31]

Thirdly, the term 'drugs' encompasses a broad spectrum, ranging from legal substances like prescription medications and over-the-counter drugs to illegal substances.[32] The critical distinction often lies in their legal status rather than inherent properties.[33] This dynamic introduces a circular argument: drugs are deemed immoral because they are illegal, and conversely, they are illegal because they are considered immoral.[34] This circularity is particularly evident in the argument suggesting that purchasing illegal drugs is morally wrong because it contributes to the funding of criminal organisations.[35] The reasoning appears to circle back to the initial justification for the illegality of drugs: possession is deemed morally wrong because of the illegality of buying, and buying is considered morally wrong as it is perceived to fund criminal organisations.[36]

In conclusion, the intersection of morality and drug prohibition policies reflects a complex and evolving landscape.[37] The Paternalistic perspective, rooted in preserving traditional values, faces challenges in its stability and universality.[38] Moreover, the moral argument for criminalization based on harm is critiqued for its selective application and failure to align with actual harm levels.[39] The circular nature of the legality-morality relationship surrounding drugs adds another layer of complexity.[40] As societies reevaluate their perspectives on morality and

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[30] D Nutt et al, 'Drug Harms in the UK: A Multicriteria Decision Analysis' (2010) 376(9752) *The Lancet* 1558–1565.
[31] DN Husak, *Drugs and Rights* (p 95).
[32] Cambridge Dictionary, '*drug*', <https://dictionary.cambridge.org/dictionary/english/drug> accessed 30 December 2023; Ibid (n 13).
[33] Fifth report session (n 28).
[34] S O'Brien, 'Ignoring Evidence, Looking Tough, and the Need for Harm Reduction in UK Drug Policy' (*IPR blog*, 23 November 2021) <https://blogs.bath.ac.uk/iprblog/2021/11/23/ignoring-evidence-looking-tough-and-the-need-for-harm-reduction-in-uk-drug-policy/> accessed 30 December 2023.
[35] A Holland (n 13).
[36] S O'Brien (n 33).
[37] A Reiman (n 6).
[38] DN Husak (n 15).
[39] D Nutt, L King, L Phillips (n 29).
[40] S O'Brien (n 33).

individual autonomy, the need for nuanced, evidence-based drug policies becomes increasingly evident.[41]

III. Evaluating UK Drug Policy: A Critical Examination of the Legislative Framework

Acknowledging the sweeping and often incoherent nature of moral objections to recreational drug use underscores the necessity for a shift in the trajectory of drug policy towards ethical considerations rather than rigid beliefs.[42] The prevalent notion of inherent immorality requires reevaluation, giving way to a unified, evidence-based system aimed at minimising societal harm.[43] This section will scrutinise the effectiveness of current UK drug policies in reducing harm within the realm of recreational drug use and assess whether their claims are substantiated by sufficient evidence.

In 2021 the UK Government published its 10-year drug strategy 'From Harm to Hope' (hereinafter: the Strategy)[44], detailing a ten-year plan with the aim of reducing drug-related crime, death, harm and overall drug use,[45] to deliver a safe, healthy and more productive country.[46] The Strategy initiates its discussion on recreational drug use in Chapter 4, emphasising a stance of 'no implicit tolerance' towards users.[47] A concerning aspect of the Strategy's rhetoric is its strident and demanding tone, showing little regard for the individuals labelled as "so-called recreational drug users."[48] These individuals are urged to "face up to their behaviour" and are portrayed as complicit in ruining lives.[49] Additionally, the strategy claims to impose "tougher and more meaningful consequences" to

[41] *ibid.*
[42] J Beck, '100 Years of "Just Say No" versus "Just Say Know"' (1998) 22 *Evaluation Review* 15; For further exploration into the evolving attitudes towards recreational drug use see: H Parker, 'Normalization as a Barometer: Recreational Drug Use and the Consumption of Leisure by Younger Britons' (2005) 13 *Addiction Research & Theory* 205.
[43] Jonathan Brown and David Langton, 'Legalise all drugs: chief constable demands end to 'immoral laws'' (October 2007) *The Independent* <https://www.independent.co.uk/news/uk/politics/legalise-all-drugs-chief-constable-demands-end-to-immoral-laws-396884.html> accessed 30 December 2023.
[44] HM Government, *From harm to hope: A 10-year drugs plan to cut crime and save lives* (December 2021).
[45] *ibid* 7.
[46] *ibid* 10.
[47] *ibid* 4.
[48] A Ritter, 'Words Matter: A Commentary on the New UK Drug Strategy' (2022) 109 International *Journal of Drug Policy* 103846.
[49] *ibid* 47.

discourage drug use.[50] In line with this, on July 18, 2022, the Government released the White Paper titled 'Swift, Certain, Tough: New Consequences for Drug Possession,' proposing a series of escalating sanctions through a public consultation on the policy.[51] However, this tiered system exhibits significant issues and shortcomings.

Tier 1 proposes a drug awareness course (DAC) for a first drug offence[52], with a fixed penalty notice called a Drug Enforcement Notice for non-compliance.[53] Failure to pay would result in enforcement proceedings or prosecution for the original offence.[54] Frequent and problematic drug use, posing the highest risk of harm, often emerges within the backdrop of adverse childhood experiences[55] and socioeconomic hardship.[56] This creates challenges for socioeconomically disadvantaged individuals in affording the required course, increasing their likelihood of getting caught, and consequently, widening the gap.[57] This provision disproportionately affects ethnic minority groups, highlighting a significant failure of the strategy to address racial disparities.[58] For those who use drugs recreationally one of the main risks concerns the unknown drug quality[59] and

[50] *ibid* 49.
[51] Home Office, Swift, Certain, Tough: New Consequences for Drug Possession (White Paper, CP 723, 2022).
[52] *ibid* para 28-29
[53] *ibid* para 35.
[54] Home Office n (50), para 28-29.
[55] M Bellis and K Ashton (*Adverse childhood experiences and associations with health-harming behaviours in the Welsh adult population*, 2015)
<https://www.ljmu.ac.uk/~/media/phi-reports/pdf/2014_06_the_impact_of_adverse_childhood_experiences_aces_in_eastern_europe.pdf> accessed 1 January 2024.
[56] A Karamanos et al, 'Adverse Childhood Experiences and Adolescent Drug Use in the UK: The Moderating Role of Socioeconomic Position and Ethnicity' (*SSM - population health*, 14 June 2022) <https://pubmed.ncbi.nlm.nih.gov/35733836/> accessed 2 January 2024;
Amaro H and others, 'Social Vulnerabilities for Substance Use: Stressors, Socially Toxic Environments, and Discrimination and Racism' (2021) 188 *Neuropharmacology* 108518;
Rhodes T and others, 'Risk Factors Associated with Drug Use: The Importance of "Risk Environment"' (2003) *10 Drugs: Education, Prevention and Policy* 303.
[57] A Holland et al, 'Analysis of the UK Government's 10-year Drugs Strategy – a resource for practitioners and policymakers' (2022) *Journal of Public Health* < https://academic.oup.com/jpubhealth/advance-article/doi/10.1093/pubmed/fdac114/6779883> accessed 2 January 2024.
[58] M Shiner et al, 'The Colour of Injustice: 'Race', Drugs and Law Enforcement in England and Wales (Stopwatch, Release and LSE, 2018).
[59] For additional insights into trends in drug strength, refer to: Office H, 'Review of Drugs: evidence relating to drug use, supply and effects, including current trends and future risks' (*GOV.UK*, February 2020)
<https://assets.publishing.service.gov.uk/media/5eafffedd3bf7f65363e4fda/Review_of_Drugs_Evidence_Pack.pdf> accessed 3 January 2024.

criminal records associated with drug use, aspects overlooked by the White Paper.[60] Allocating resources towards focused interventions, such as drug-testing services in nightlife settings, could prove more effective.[61] This is particularly crucial considering the growing numbers of young MDMA users, a prevalent substance in nightlife scenarios.[62] Moreover, there's little evidence that DACs improve health outcomes[63], potentially straining already limited resources.[64]

Tier 2 proposes diversionary caution with mandatory drug testing coupled with a further behaviour change intervention (such as other drug awareness course) for second-time drug possession offences[65], delivered through an out-of-court disposal framework.[66] However, these measures are disproportionate, potentially causing social harm, and lack substantial evidence for reducing drug-related problems. Concerns are raised regarding racial discrimination, as individuals of colour are less likely to benefit from these dispositions, increasing their susceptibility to prosecution.[67] The White Paper asserts that these measures act as deterrents for future drug use; however, the supporting evidence for this claim lacks persuasiveness.[68] It is crucial to emphasise that even incarceration, considered the most extreme form of liberty deprivation, does not consistently deter drug use.[69] Importantly, the decision to resort to incarceration should not be arbitrary, as it can profoundly affect an individual's mental health, family dynamics, and life opportunities.[70] Most illicit drug users are

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[60] Release and Transform, Responding to the Home Office's 'Swift, Certain, Tough: New Consequences for Drug Possession' White Paper (22 September 2022) 4-5.

[61] T Brunt, Drug Checking as a Harm Reduction Tool for Recreational Drug Users: Opportunities and Challenges (EMCDDA, 2017) 14.

[62] J Johnston and others, 'A Survey of Regular Ecstasy Users' Knowledge and Practices around Determining Pill Content and Purity: Implications for Policy and Practice' (2006) 17 International Journal of Drug Policy 464.

[63] Drug Science, 'Swiftly scrapped, certainly a failure and tough to enforce - Consequences of the recent Home Office White Paper' (18 October 2022) <https://www.drugscience.org.uk/swift-certain-tough/> accessed 23 December 2023.

[64] Release and Transform (n 59), 5.

[65] Home Office (n 50), para 39.

[66] Ibid. paras 40, 47 and 49.

[67] M Shiner et al (n 57).

[68] Release and Transform (n 59).

[69] 'Prisons and Drugs: Health and Social Responses' (*European Monitoring Centre for Drugs and Drug Addiction*) <https://www.emcdda.europa.eu/publications/mini-guides/prisons-and-drugs-health-and-social-responses_en> accessed 1 January 2024.

[70] Catherine Cox and Hilary Marland, ''We Are Recreating Bedlam': A History of Mental Illness and Prison Systems in England and Ireland' in Alice Mills and Kathleen Kendall (eds.), *Mental Health in Prisons* (Springer 2018).

infrequent, and the cumulative risk suggests that the negative consequences of criminalising people who do not use drugs often outweigh the risks they face from drug use itself.[71] Regarding mandatory drug testing, much of the evidence relates to those who are drug dependent, so this may not translate to the purpose of testing recreational users.[72] Furthermore, a potential outcome of this measure is that it may encourage low-level drug users to take riskier drugs as cannabis remains detectable in urine for longer than other drugs.[73]

Finally, Tier 3 suggests that for a third offence, a person would be charged.[74] If convicted for the offence, the court would have discretion to impose a newly proposed civil Drug Reduction Order if it could reasonably prevent further drug possession offences and/or associated harms.[75] Further conditions may, where appropriate, be attached for specified periods such as the confiscation of a person's passport or disqualification of their driving licence.[76] Firstly, being apprehended for a third time suggests a reasonable likelihood that the individual may have a dependency on drugs. Since the framework does not extend to those with drug dependence, the implications of this provision are unclear. There are no specified procedures for expunging records from Tiers 1 or 2 if an individual is identified as having a drug dependence, and there is no mention of diversion into treatment at this stage.[77] Furthermore, if the individual is not drug-dependent, this scenario might suggest an instance of potential over-policing, imposing significant restrictions on bodily autonomy.[78] Specifically, the failure to dispose of a driving licence could diminish employment prospects, a factor associated with increased drug use, a result contrary to the intended goals of the framework.[79]

In summary, the assessment of the 10-year drug strategy 'From Harm to Hope' reveals notable deficiencies. The strategy's strident tone[80], potential for

[71] B Corken (*Written evidence*) <https://committees.parliament.uk/writtenevidence/106541/pdf/> accessed 2 January 2024; A Holland (n 13).
[72] Release and Transform (n 59), 8.
[73] For a comprehensive exploration of the potential adverse effects of mandatory drug testing in a prison context, see: Rob Ralphs, Lisa Williams et al 'Adding Spice to the Porridge: The development of a synthetic cannabinoid market in an English prison' (2016) *International Journal of Drug Policy* 40.
[74] Home Office (n 50) para 53.
[75] Home Office (n 50) para 55-57.
[76] Home Office (n 50) para 63-66.
[77] Release and Transform (n 59), 10.
[78] A Holland et al (n 51); See further: United Nations Human Rights Committee, General Comment No. 16.
[79] Gera E Nagelhouta et al., 'How economic recessions and unemployment affect illegal drug use: A systematic realist literature review' (2017) *International Journal of Drug Policy* 44.
[80] A Ritter (n 47).

over-policing[81], and disproportionate measures risk perpetuating stigma[82] and exacerbating social disparities.[83] The tiered system's challenges, especially in accessibility and the oversight of recreational drug use, underscore the need for improvement. Acknowledging and addressing the nuances of recreational drug use should be a priority for a more effective and equitable strategy. Overall, there is a clear imperative for refinement to ensure the strategy aligns better with the realities of drug use, particularly within recreational contexts.

IV. Rethinking Drug Policy: Beyond Prohibition

The policy document and subsequent legislative proposal emphasise the government's commitment to a prohibitionist approach, underscoring the central role of the criminal justice system in drug policy. Despite decades of this approach, a significant number of individuals continue to use illegal drugs, notwithstanding the associated risks of criminal conviction, imprisonment, addiction, overdose, and death.[84] Moreover, the prevalence of illegal drug use has consistently risen over the years.[85] This raises a critical question regarding the optimal allocation of government resources to maximise benefits and minimise harm for those affected.[86] The adequacy of prohibition as the sole approach comes into question, prompting a thoughtful examination of alternative regulatory models such as legalisation and decriminalisation.[87]

Addressing concerns about the legal regulation of drugs, the fear of a perceived 'free-for-all' where unrestricted access becomes the norm is a

[81] A Holland et al (n 56).
[82] Andre Gomes et al, 'Release's take on the Government's new Drug Strategy' (Release, 8 December 2021) <https://www.release.org.uk/blog/release's-take-government's-new-drug-strategy> accessed 22 December 2023.
[83] M Shiner et al (n 57).
[84] Office H (n 58)
[85] P Jones (n 1).
[86] Home Affairs Committee, *Third Report Session: Drugs* (31 August 2023) <https://publications.parliament.uk/pa/cm5803/cmselect/cmhaff/198/report.html#footnote-447> accessed 1 January 2024.
[87] For a more in-depth exploration of the nuanced differences between legalization and decriminalization, refer to: 'Overview: Decriminalisation vs Legalisation' (*Alcohol and Drug Foundation*) <https://adf.org.au/talking-about-drugs/law/decriminalisation/overview-decriminalisation-legalisation/> accessed 3 January 2024.

significant worry.[88] Contrary to this perception, the legal regulation of drugs should not be viewed as the liberalisation or relaxation of the law; rather, it aims to bring the drug trade under legal oversight, enabling stringent controls to be implemented. Prohibition, in contrast, renders the imposition of such controls practically impossible.[89] An illustrative example is the current situation under prohibition, where criminals exert influence over the quality, purity, pricing, and profits associated with drugs.[90] In a legal market, akin to those for alcohol or tobacco, the government could institute licensing for sellers.[91] This would facilitate the enforcement of regulations ensuring the quality and purity of drugs, preventing adulteration with harmful substances.[92] Additionally, a legal market would enable the implementation of compulsory health warnings and advice on the least harmful use, similar to regulations for medicinal products.[93] In this respect, governments would have the potential to leverage taxation on the drug trade, redirecting funds currently lining the pockets of criminal entities towards more constructive endeavours, such as harm reduction strategies, treatment facilities, and educational programs.[94]

Another apprehension revolves around the notion that without criminalization to act as a deterrent, there would be a significant surge in drug use.[95] However, international comparative studies on drug laws contradict this assumption, revealing no clear correlation between stringent enforcement and lower levels of drug use.[96] The theory that criminalisation serves as a potent deterrent, a cornerstone of the prohibition policy, lacks empirical support.[97] An illustrative case is Portugal, which decriminalised all drug possession in 2001.

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[88] 'Debating Drugs: How to Make the Case for Legal Regulation' (*Transform*, 2015) <https://transformdrugs.org/publications/debating-drugs-how-to-make-the-case-for-legal-regulation> accessed 22 December 2023.

[89] *ibid.*

[90] P Smith (n 8), p 241.

[91] *ibid.*

[92] R Stevenson and J Merry , *Winning the War on Drugs: To Legalise or Not?* (Institute of economic affairs 1994).

[93] *ibid.*

[94] F Godlee , 'Drugs Should Be Legalised, Regulated, and Taxed' [2018] BMJ; Rolles S, 'A Comparison of the Cost-Effectiveness of Prohibition and Regulation of Drugs' (2009) *Transform Drug Policy Foundation* 1, 43.

[95] Debating Drugs (n 87)

[96] L Degenhardt and others, 'Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys' (2008) 5 PLoS Medicine.

[97] N Eastwood, E Fox, and A Rosmarin, A Quiet Revolution: Drug Decriminalisation Across the Globe (Release 2016).

Contrary to fears of a dramatic increase in drug use, the data shows otherwise. In fact, drug-related deaths in the UK are now twenty-two times higher than in Portugal.[98] Similarly, the Netherlands, where the possession and retail supply of cannabis are effectively legal up to a specific limit, provides another example.[99] According to a 2009 annual report by the European Monitoring Centre for Drugs and Drug Addiction, the Dutch rank among the lowest users of marijuana or cannabis in Europe, despite having one of the most liberal policies on soft drugs.[100] It is imperative to note that a legalised system, with licensed sellers adhering to strict regulations, is less likely to supply drugs to minors, with legalisation having the potential to reduce availability of drugs to underaged individuals. This contrasts starkly with the illicit market, where illegal sellers may not exercise the same level of caution.[101]

Ultimately, a critical point emerges from the claim that prohibition protects the most vulnerable in society, positing that legal regulation may escalate their risks.[102] Contrary to this perspective, studies indicate that prohibition exacerbates the marginalisation of vulnerable individuals, particularly impacting economically disadvantaged communities and ethnic minorities.[103] A stark illustration is the evident racial disparity in drug-related law enforcement, where black people are disproportionately arrested, prosecuted, and incarcerated despite drug use rates being almost identical between black and white persons.[104] In the UK, data reveals significant ethnic disparities in stop and search activities, with black individuals being stopped almost nine times more frequently for drug-related searches compared to white individuals in 2016/17.[105]This trend persists in prosecution, conviction, and sentencing, contributing to the

[98] European Monitoring Centre for Drugs and Drug Addiction, 'Drug policy profiles, Portugal' (2011) p 20 <https://www.emcdda.europa.eu/publications/drug-policy-profiles/portugal_en> accessed 28 December 2023.

[99] N Eastwood, E Fox, and A Rosmarin (n 91), p 25.

[100] European Monitoring Centre on Drugs and Drug Addiction, 'Prevalence maps, prevalence of drug use in Europe' (2013) <https://idpc.net/publications/2013/06/prevalence-maps-on-drug-use-in-europe> accessed 28 December 2023.

[101] P Smith (n 8), p 242.

[102] Debating Drugs (n 87).

[103] M Shiner et al (n 57).

[104] Release, 'The Numbers In Black And White: Ethnic Disparities In The Policing And Prosecution Of Drug Offences In England And Wales' (2013) <https://www.release.org.uk/publications/numbers-black-and-white-ethnic-disparities-policing-and-prosecution-drug-offences> accessed 29 December 2023.

[105] M Shiner et al (n 57).

overrepresentation of black and minority ethnic (BME) groups in the prison population: 27% of prisoners are from a BME background, exceeding their 13% representation in the general population.[106]

In conclusion, the current emphasis on a prohibitionist approach in drug policy, relying heavily on criminalization, faces significant challenges. The evidence presented underscores the inadequacy of prohibition in achieving its intended goals and highlights the potential for exacerbating harm, especially within vulnerable communities. Advocating for a shift towards alternative regulatory models, such as legalisation and decriminalisation, emerges as a rational response. By embracing a legal framework, governments can not only enhance control over the drug trade but also redirect resources towards harm reduction, treatment, and education. This reevaluation is crucial to fostering a more equitable, effective, and compassionate approach to addressing the complex issue of drug use.

V. Conclusion

The examination of recreational drug prohibition and the current UK drug policy reveals a complex landscape fraught with moral, factual, and pragmatic challenges. The moral foundations of punitive measures are scrutinised, highlighting the inconsistencies and pitfalls associated with criminalising drug use based on perceived immorality.[107] The evaluation of the 10-year drug strategy 'From Harm to Hope' exposes significant deficiencies, particularly in addressing the nuanced realities of recreational drug use and the potential perpetuation of stigma and social disparities.[108] Criminalising drug possession, as emphasised in the strategy, raises concerns about disproportionate measures and the risk of exacerbating existing inequalities. The prohibitionist approach, central to current policies, faces criticism for its inability to achieve intended goals, evident in the persistent rise of illegal drug use and its collateral impact on vulnerable communities. Advocacy for alternative regulatory models, such as legalisation and decriminalisation, emerges as a pragmatic response to redirect resources, enhance control, and foster a more equitable, effective, and compassionate approach to addressing the complexities of

[106] House of Commons, UK Prison Population Statistics (25 October 2022) 13; See further HM Inspectorate of Prisons, Minority ethnic prisoners' experiences of rehabilitation and release planning (October 2020).
[107] DN Husak (n 15).
[108] A Ritter (n 47); M Shiner et al (n 57).

drug use.[109] The imperative for refinement and a shift towards evidence-based, ethical policies is clear, which emphasises the need for a comprehensive and thoughtful reevaluation of the approach to drug regulation in the UK.

[109] United Nations Office on Drugs and Crime, 'Approaches to Decriminalizing Drug Use & Possession' (February 2015) <https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2015_1.pdf> accessed 2 January 2024.

BÁRA LÍBAL[110]

Decoding Greenwashing: Navigating EU's Green Directives and Your Right to Know

Consumer Rights vs Greenwashing

ABSTRACT: This paper examines the intersection of consumer rights, environmental integrity, and corporate responsibility in addressing greenwashing within the European Union (EU). Greenwashing, the deceptive marketing of products as environmentally friendly, undermines consumer trust and environmental goals. Existing EU regulations, such as the Unfair Commercial Practices Directive and the Corporate Sustainability Reporting Directive, fall short in effectively combating greenwashing due to limited enforcement and legislative coverage. To address these gaps, the EU proposes two directives: the Green Claims Directive and the Corporate Sustainability Due Diligence Directive. The former aims to establish rigorous standards for substantiating environmental claims, while the latter mandates comprehensive due diligence on environmental and human rights impacts. While these proposals represent progress, concerns remain regarding their effectiveness and applicability, especially concerning corporate influence and exemptions for smaller enterprises. Nevertheless, they hold potential to curb greenwashing, promote genuine sustainability practices, and safeguard consumer rights. By evaluating these directives, this paper highlights their potential in shaping EU regulation to combat greenwashing and advance consumer rights and environmental integrity.

Introduction

Combating greenwashing is an issue where consumer rights, human rights, and climate goals meet.[111] Greenwashing is the practice of providing inaccurate or misleading information on how environmentally friendly a company's products are; it frequently entails using dishonest marketing or advertising strategies to persuade the public that the firm is environmentally conscious in terms of its

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[111] European Agency For Fundamental Rights, 'Enforcing Consumer Rights to Combat Greenwashing' (2024) FRA <https://fra.europa.eu/en/publication/2024/enforcing-consumer-rights-combat-greenwashing> accessed 7 May 2024.

objectives, policies, and products.[112] Corporations employ greenwashing as a tactic to persuade consumers to purchase their goods and thus take advantage of the expanding market for environmentally conscious goods. Thus, deceiving customers and eventually causing environmental damage. Moreover, customers frequently learn afterwards that they have been deceived by these falsehoods and lies. This eventually results in a diminished level of trust in regulators and the companies themselves. Thus, the consequences of 'greenwashing' inadvertently infringe consumers' rights to information, namely their capacity to get specific information before making a purchase.[113] Hence, to prevent any further irreversible damage to our environment, there is a pressing need for an effective regulatory framework to address this issue.

Current EU Legislation

The current EU regulatory framework is not sufficient to address the issue at hand. The absence of CJEU case law on greenwashing serves as proof of this. The majority of disputes that did go to court are presently ongoing at the Member State level. It is debatable, nevertheless, why such is the case given the escalating environmental concerns as well as the increased consumer activism and knowledge. It should be mentioned that inadequate legislative coverage contributes to the scarcity of instances. Currently, the only EU laws to address consumers' right to information and sustainability, are the Unfair Commercial Practices Directive and the Corporate Sustainability Reporting Directive.

The Unfair Commercial Practices Directive is a broad piece of legislation, the purpose of which is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection.[114] Additionally, unfair commercial practices are generally prohibited, and the broad definition of commercial practices, enshrined in Article 2(d), makes it possible to address greenwashing practices in the Member States.[115]

Moreover, the Corporate Sustainability Reporting Directive introduced significant advancements regarding the disclosure of social and environmental information by companies. The most important article in regard to the consumers' right to

[112] *ibid.*
[113] 'Your consumer rights' (Citizens Information) <https://www.citizensinformation.ie/en/consumer/consumer-laws/your-consumer-rights/> accessed 7 May 2023.
[114] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L149/22, Art.1.
[115] *ibid*, Article 2.

information is Article 19(1).[116] Specifically, it obliges large undertakings and SMEs to share information that is necessary to understand the undertaking's impact on sustainability matters. Thus, ensuring that the information shall be clearly identifiable within the management report and contains a brief description of the undertaking's business model and strategy.[117]

Nevertheless, the obligations for companies stemming from these current rules do not encompass a need for substantiation of these claims, therefore, indirectly allowing for misinformation.

The EU's New Hope? Proposals for Directives

In response to the growing environmental concerns and increasing consumer advocacy a need for the evolution of the existing greenwashing legislation is needed.

Firstly, the Green Claims Directive is a proposal that complements the already existing Unfair Commercial Practices Directive, by setting minimal standards and rules for substantiating, verifying, and communicating environmental claims and eco-labels in the EU internal market.[118] The proposal addresses specific statements that companies voluntarily make on behalf of customers on a product's or trader's own performance, environmental effect, or other features.[119] Ultimately, this will allow greenwashing to be tackled with greater effectiveness, including the inclusion of certain persistent greenwashing techniques on a blacklist and their complete prohibition under all conditions.[120] The most important articles include Articles 3-8, which encompass the substantiation of the environmental claims[121],

[116] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15, Art.19(1).

[117] *ibid*, Art. 19(2).

[118] **Ilse Bakker, Mariska Nijenhof-Wolters, 'Proposal European Directive on sustainability claims and Dutch Code for sustainability advertising (Van Benthem & Keulen, 11 May 2023) < https://www.vbk.nl/en/legalupdate/proposal-european-directive-sustainability-claims-and-dutch-code-sustainability> accessed 7 May 2023.**

[119] European Commission, 'Questions and Answers on European Green Claims' (European Commission, 2023)<https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_1693> accessed 24 April 2024.

[120] **Ilse Bakker, Mariska Nijenhof-Wolters, 'Proposal European Directive on sustainability claims and Dutch Code for sustainability advertising (Van Benthem & Keulen, 11 May 2023) < https://www.vbk.nl/en/legalupdate/proposal-european-directive-sustainability-claims-and-dutch-code-sustainability> accessed 7 May 2023.**

[121] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)' COM (2023) 166 final, Art.3.

substantiation of comparative explicit environmental claims[122], communication of these claims[123], to environmental labels.[124]

The Proposal, however, is a contentious one seeing as the corporate lobby regards it as a victory.[125] Article 2 of the proposal stipulates that the Directive would apply to EU companies with (a) more than 500 employees and more than EUR 150 million in annual turnover or (b) more than 250 employees, more than EUR 40 million in annual turnover and operating mainly in any of several high-risk sectors.[126] Therefore, as publications swiftly noted, this implies that only the largest EU enterprises will be impacted by the Directive, with no more than 1% of them actually being so. This conclusion is due to the fact that the Commission exempted small and medium-sized enterprises from the Directive's scope, unless they want to apply the rules themselves; as stated in the explanatory memorandum.[127] On the other hand, it should be pointed out that from an environmental perspective, the proposal should still prove to be effective.[128] Nevertheless, focusing on the major players is instrumental to transform the market structure; only a plethora of global businesses are accountable for the disproportionate quantities of plastic pollution, deforestation, or greenhouse gas emissions.[129]

Secondly, the Commission also introduced a proposal for a Corporate Sustainability Due Diligence Directive. Briefly summarized, the CSDDD would compel large companies to conduct due diligence on their own activities and that of their suppliers, and to identify[130], prevent and mitigate[131], and account for any actual or potential adverse impacts on human rights and the environment in the company's activities. Therefore, offering an additional civil law tool to hold businesses responsible and liable for violations of human rights and

[122] *ibid*, Art. 4.
[123] *ibid*, Arts. 5-6.
[124] *ibid*, Arts. 7-8.
[125] Daniel Bertram, 'Green(wash)ing Global Commodity Chains: Light and Shadow in the EU Commission's Due Diligence Proposal' (Verfassungsblog, 24 February 2022)< https://verfassungsblog.de/greenwashing-global-commodity-chains/> accessed 7 May 2024.
[126] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)' COM (2023) 166 final, Art.2.
[127] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)' COM (2023) 166 final.
[128] Daniel Bertram, 'Green(wash)ing Global Commodity Chains: Light and Shadow in the EU Commission's Due Diligence Proposal' (Verfassungsblog, 24 February 2022)< https://verfassungsblog.de/greenwashing-global-commodity-chains/> accessed 7 May 2024.
[129] Ibid.
[130] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final, Art.6.
[131] *ibid*, Arts. 7-8.

environmental degradation, both inside and outside the EU.[132] Additionally, following the precedent set by the ongoing *Fossielvrij against the Royal Dutch Airlines (KLM) case*, which is currently pending, and the introduction of CSDDD, further class action litigation against companies on the violations of the consumers' right to information can be anticipated. The KLM case draws attention to the responsibility and legal risks associated with making 'sustainable' or 'green' statements, should it turn out that these assertions are false or unsubstantiated, and thus deceptive and directly infringing on the consumers' right to information.

Approving and enforcing these proposals would not only make the comprehensive EU legal framework on greenwashing more effective but would aid in combating the lack of CJEU case law in this field.

Evaluating the Promises

Conclusively, both of the proposed directives could be useful weapons in the EU's fight against greenwashing. They support genuine sustainability practices, prevent companies from using misleading marketing strategies, and help to foster confidence between businesses and consumers by establishing clear rules and procedures for environmental claims and reporting. Therefore, analogously, they also have the potential to become effective tools for the future of consumers' right to information.

[132] Marit Bosselaar, Irene Bloemen, Sjoerd Tiddo Pennink, 'The Corporate Sustainability Due Diligence Directive (CSDDD): The Position of the European Parliament and Potential Impact (Loyens Loeff Law & Tax, 7 June 2023)< https://www.loyensloeff.com/insights/news--events/news/the-corporate-sustainability-due-diligence-directive-csddd-the-position-of-the-european-parliament-and-the-impact/> accessed 7 May 2024.

ROBERT-RAUL NEDELCU[133]

Rape as an Act of Genocide: The Tragedy of Female Prisoners of War

ABSTRACT: This topic is as horrendous and terrifying as it is important. Rape and other forms of sexual violence are committed against women on a very frequent basis. The problem is exacerbated in the case of female prisoners of war (POWs) who are at the mercy of their captors who often have no regard for the Geneva Conventions. Moreover, the link between rape and genocide has insufficiently been explored from a legal perspective outside of the cases of Yugoslavia and Rwanda and continues to be under-analysed to this day in spite of its very pressing nature. The aim of this essay is to start a dialogue on the topic and to redress the attention of future lawyers in this direction.

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1. Introduction

Rape is not just one of the many weapons of war but the ultimate weapon of war. It is the murder of the soul.[134] Often misguidedly deemed as a normal part of war, rape is common among the most vulnerable group in International Humanitarian Law: female *Prisoners of War* (POWs). In spite of the widespread recognition of the phenomenon, action in the international legal sphere remains shockingly limited and severely insufficient for addressing its wide-scale effects.

This article will analyse the link between genocide and sexual violence, as well as the mental and physical damages suffered by female victims as a result, with a particular focus on prisoners of war.

2. Captivity and Gender

When approaching the issue of POWs, legal scholars tend to concentrate mostly on male prisoners.[135] There are, however, certain important studies which explore the unique struggles of female POWs, such as the British Special Operations Executive agents who fell into the hands of the Nazis[136] and the female American POWs and Australian Army Nursing Service nurses held by the Japanese.[137,138] These studies portray the three often conflicted identities of the female POWs: woman, fighter and prisoner.[139]

Prisoners of war are especially vulnerable to rape, as they are at the mercy of their captors. They are, in theory, protected by Articles 12 of the First and Second Geneva Conventions, Articles 14 and 16 of Geneva Convention III, Article 27 of the Fourth Convention, Articles 75 and 76 of Additional Protocol I and Article 4 of Additional Protocol II.[140] However, as is evident from the very limited number of cases where

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[134] D. Herzog, *Sex after Fascism: Memory and Morality in Twentieth-Century Germany* (Princeton University Press 2005) 3.

[135] L. Rosenberg-Friedman, 'Captivity and Gender: The Experience of Female Prisoners of War during Israel's War of Independence' (2018) 33(4) *Nashim: A Journal of Jewish Women's Studies & Gender Issues* 64, 64 [hereinafter Rosenberg-Friedman (2018)].

[136] J. Pattinson, 'Playing the Saft Lassie with Them: Gender, Captivity and the Special Operations Executive during the Second World War'(2006) 13(2) *European Review of History* 267, 267 [hereinafter Pattinson (2006)].

[137] T. Kaminsky, *Prisoners in Paradise: American Women in the Wartime South Pacific* (University of Kansas Press 2000) 35.

[138] C. Twomey, 'Australian Nurse POWs' (2004) 36(124) *AHS* 255, 255.

[139] Pattinson (2006) 271–92; Rosenberg-Friedman (2018).

[140] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention) art. 12; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and

sexual assault was analyzed properly, the enforcement of the apparent existing legal framework is heavily lacking.

A tragic recent example would be the invasion of Ukraine by the Russian forces, where female POWs have been subjected to heavily degrading treatment that is deeply tied to their gender, such as being forced to run around naked in the presence of the guards.[141] Sexual violence often has the inherent role of further subjugating the prisoners, not only physically but also mentally. It is a tool for destroying their willpower and their dignity.

3. Relationship between Sexual Violence and Genocide

What needs to be established first and foremost is the role of sexual violence in genocide, which has been analysed in literature as having three possible answers: being one of the many forms of sexual violence, being a coordinate of genocide and being integral to the genocide itself.[142] Another distinction can be made between the sexist approach, in which the emphasis lies on the women themselves as the principal target, and the genocide approach, in which the sexual assaults are caused primarily by the race and ethnicity of the woman in question.[143]

It is essential for the development of international law to further analyse the approach of MacKinnon, who argued that sexual assault was integral to genocide.[144] This is due to the uniquely detrimental effects that rape has on a group from a psychological and sociological point of view. She describes it as a special

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Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention) art. 12; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) art. 14, 16; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art. 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) arts. 75-76; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art. 4.

[141] United Nations, 'Ukraine/Russia: Prisoners of war' (Office of the High Commissioner, 15 November 2022), available at: <https://www.ohchr.org/en/press-briefing-notes/2022/11/ukraine-russia-prisoners-war> accessed 17 May 2024.

[142] R. M. Schott, 'What is the Sex Doing in the Genocide?' A Feminist Philosophical Response' (2015) 22(4) *EJWS* 397, 397.

[143] P. R. Bos, 'Feminists Interpreting the Politics of Wartime Rape: Berlin, 1945; Yugoslavia, 1992–1993' (2006) 31(4) *Journal of Women in Culture and Society* 995, 995 [hereinafter: Bos (2006)].

[144] C. A. Mackinnon, 'Genocide's Sexuality' in C. A. Mackinnon (ed), *Are Women Human? And Other International Dialogues* (Harvard University Press 2006).

tool of domination which carries a distinct message of power over the vulnerable community.[145] Sexual assault is thus seen as a question of power, structure and control. The act itself is merely the chosen vehicle through which to inflict harm on a woman rather than the motive for the act.[146] Pascale R. Bos warns, however, against viewing wartime rape as simply an expression of the patriarchal male-on-women violence, as an ahistorical oversimplification based solely on gender factors erases the principle ethnic or racial dimension of genocide.[147]

4. Legal framework and case study of Yugoslavia and Rwanda

Article 2 of the Genocide Convention lists *dolus specialis* as an inherent characteristic of genocide; it is a special intent to destroy 'in whole or in part, a national, ethnical, racial or religious group, as such'[148] Death is rampant among cases of rape during wartimes: either through direct killing or inflicting grievous body harm or through transmission of sexually transmitted diseases such as HIV during the Rwanda genocide.[149] The physical and mental scars left by sexual violence often impede victims, who are most often POWs, from further engaging in sexual activity and conceiving children. It also often leads to social exclusion and fragmentation of the group, destroying the shared identity of the group. In both the conflicts in Yugoslavia and Rwanda, sexual violence against women was used to "humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group."[150] Two cases from Rwanda that helped shape the precedent for prosecuting rape in genocide are Prosecutor v. Jean-Paul Akayesu[151] and Prosecutor v. Pauline

[145] *ibid.*
[146] Bos (2006), 995–1025.
[147] *ibid.*
[148] Convention on the Prevention and Punishment of the Crime of Genocide (Approved and proposed for signature and ratification or accession on 9 December 1948, entered into force: 12 January 1951) 78 UNTS 277 art. II.
[149] L. Boet, 'AIDS As A Weapon Of War: The Trauma Of The Rwandan Genocide' (2021) *Human Rights Pulse*, available at <https://www.humanrightspulse.com/mastercontentblog/aids-as-a-weapon-of-war-the-trauma-of-the-rwandan-genocide> accessed 17 May 2024.
[150] J. M. H. Short, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8(2) *MJRL* 503, 503; *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1 (10 December 1998).
[151] *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-A 2001 (1 June 2001).

Nyriamasuhuko.[152] It was not until the International Criminal Tribunal of Rwanda prosecuted Jean-Paul Akayesu that rape was officially considered a genocidal act.[153] Since the trials in the 1990s, there have been fewer than fifty convictions of sexual violence in relation to genocide, crimes against humanity, or war crimes and fewer than one hundred charges brought against people for these crimes. [154] This is proof of the negligence that international law has demonstrated towards the topic of sexual violence: on the one hand, scholars recognise that war and rape have always been interlinked, while on the other, no crime is being prosecuted. The precedents previously set by the international tribunals in Rwanda and Yugoslavia need to become part of international criminal law once more.

5. Conclusion

Sexual violence is routinely utilised against female POWs. Its role can be understood as integral to genocide through the physical and mental harm inflicted on both the individual and the community. A general, wrongful understanding of war where 'everything is permitted' prolonged by the general inaction of international law on the topic leads to the inhuman treatment of POWs and of the proliferation of a 'culture of rape' during armed conflicts and especially during genocides.

[152] *Prosecutor v. Pauline Nyiramasuhuko et al*, Judgement and Sentence, ICTR-98-42-T (June 24, 2011).
[153] B. Fairbanks, 'Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda' (2019) 23(1) *Historical Perspectives: Santa Clara University Undergraduate Journal of History* 1, 1.
[154] *ibid.*

EMMA MINERVA BRAMBILLA[155]

The Harm of Transnational Corporate Activities on the Environment:

A Brief Analysis on the Limitations of Conventional Legal Remedies and Emerging International Environmental Approaches Addressing Corporate Accountability Following Transnational Environmental Harm

ABSTRACT: Transnational corporate accountability, following environmental harm, constitutes a hot topic in the academic discourse. This Research conducts a concise yet comprehensive examination of the inadequacies inherent in traditional legal frameworks when addressing transnational environmental harm caused by corporate activities. With globalisation facilitating the expansion of legal entities' operations across borders, the shortcomings of jurisdiction-bound legal systems have become increasingly apparent. For instance, a lack of resources and information on the Host State side as well as sovereignty concerns the Home State may face when transnationally applying national environmental standards. Drawing upon emerging approaches in international environmental law, such as environmental integration and precaution, this Research explores their effectiveness and limitations. This is particularly done through an analysis of the landmark English case Vedanta v Lungowe.

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1. Introduction

Over the past few years, the challenges related to climate change and global warming have gained prominence in the academic discourse, underscoring their heightened significance owing to their capacity to induce irreversible environmental transformations. The prevailing alterations observed in our planet are predominantly ascribed to anthropogenic activities, with multinational legal entities playing a pivotal role.[156] Importantly, the harm of such entities transcends their national boundaries of incorporation: foreign-domiciled subsidiary branches not only compromise ecosystems but also have far-reaching consequences on communities worldwide.[157] For instance, in the mid-1960s, Texaco Inc, an American oil company, initiated oil drilling operations in the Ecuadorian rainforest.[158] Subsequently, noxious smells started emanating from the river relied upon by indigenous communities for drinking and daily activities, negatively affecting their lifestyle.[159] It was determined that the river had been contaminated due to Texaco's runoff system. The case was firstly dismissed by the United States on grounds of *forum non conveniens*, however, an Ecuadorian court ruled in favour of the plaintiffs granting them a compensation amounting to $8.6 billion.[160]

In this realm, there are emerging academic and institutional perspectives on *corporate accountability*.[161] These frameworks involve assigning responsibility to specific legal entities, highlighting *answerability* and *redress* as fundamental components.[162] States have an overarching duty to guarantee that operations under their jurisdiction or control do not cause harm to other States or regions outside their jurisdiction.[163] Environmental accountability functions as a mechanism for engaging stakeholders in environmental matters. It facilitates a collective

[156] P. Gailhofer et al, *Corporate Liability for Transboundary Environmental Harm* (Springer 2023) 3.
[157] M. Mason, 'The Governance of Transnational Environmental Harm: Addressing New Modes of Accountability/Responsibility' (2008) 8(3) *Global Environmental Politics* 8, 8.
[158] S. Romero and C. Krauss, 'Ecuador Judge Orders Chevron to Pay $9 Billion' *The New York Times* (New York, 14 February 2011) <https://www.nytimes.com/2011/02/15/world/americas/15ecuador.html> accessed 12 December 2023.
[159] *ibid.*
[160] *ibid.*
[161] M. Mason, 'The Governance of Transnational Environmental Harm: Addressing New Modes of Accountability/Responsibility' (2008) 8(3) *Global Environmental Politics* 8, 10.
[162] *ibid.*
[163] *ibid.*

evaluation of identified and potential corporate actions that may pose environmental risks.[164] This implies that these corporate entities are being held responsible for their (in)actions and they could potentially face sanctions for violating both national and international environmental standards.[165]

In light of this background, this research seeks to analyse the limitations of conventional legal remedies and the emerging international environmental approaches addressing corporate accountability following transnational environmental harm.

2. The Limitations of Conventional Legal Remedies

Despite increased efforts both by governmental and non-governmental bodies following the approval of the UN Guiding Principles on Business and Human Rights in 2011, the suggestion to establish a new international treaty in 2014 indicates a persistent dissatisfaction with existing approaches at the national level.[166] Indeed, owing to the fact that '*corporations are present nowhere; their activities through their agents may be present everywhere and the location of these activities may change almost instantaneously,*' control and accountability — both by the Host State as well as the Home State — of legal entities operating cross-borders has been ineffective.[167]

On the one hand, the legal framework that is most instinctively designed to ensure an environmentally responsible conduct behaviour of multinational entities is that of the Host State where the entity is operating. Host State control is divided into two phases: prior to the entry of a foreign entity into the State whereby an environmental impact assessment is conducted and after its establishment on the territory whereby the entity has to comply with national environmental

[164] J. Mfon and K. W. Beta, 'The Role of Accountability in Corporate Environmental Sustainability Framework' in Samuel Adomako, Albert Danso and Agyenim Boateng (eds), *Corporate Sustainability in Africa* (Palgrave Macmillan 2023) 350.
[165] M. Mason, 'The Governance of Transnational Environmental Harm: Addressing New Modes of Accountability/Responsibility' (2008) 8(3) *Global Environmental Politics* 8, 10.
[166] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020) 24.
[167] V. Lowe, 'Corporations as International Actors and International Law Makers' (2004) 14(1) *Italian Yearbook of International Law* 23.

regulations.[168] However, the Host State faces a plethora of shortcomings in effectively regulating the environmental conduct of such entities. Firstly, national environmental laws are rarely enforced due to an absence of financial and human resources.[169] Secondly, a lack of information about the risks of corporate activities in the Host State's territory hinder their oversight.[170] Thirdly, the particular structure of the entity may hamper the Host State from securing complete compensation and redress for victims — this is the effect of the '*corporate veil.*'[171]

On the other hand, control and accountability of multinational legal entities can be exercised by the Home State, that is where the entity is incorporated or headquartered, by applying the Home State's national standards extraterritorially.[172] However, the primary limitation associated with this strategy is that it raises a significant concern regarding the respect for the national sovereignty of the Host State.[173] Particularly, concerning the extraterritorial safeguard of the environment, academics have recognised the potential for 'normative competency conflicts' between the Home and the Host State.[174] As well, this strategy may result in the imposition of varied environmental laws on distinct entities operating in the same industry and foreign nation.[175] This variation is contingent on their State of origin, potentially providing a competitive advantage to multinationals from countries with less stringent environmental standards.[176]

Under international environmental law, systems for civil liability are commonly adopted, setting minimum standards of environmental liability under

[168] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020) 25.
[169] M. Taylor, 'Putting *OK Tedi* in Perspective' in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: Issues, Outcomes and Implications* (Canberra National Centre for Development Studies and Resource Management 1997) 12.
[170] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020) 26.
[171] T. Scovazzi, 'Industrial Accidents and the Veil of Transnational Corporations' in Francesco Francioni and Tullio Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham & Trotman 1991) 395.
[172] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) Chapter 3; P. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 2007) Chapter 5.
[173] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020) 29.
[174] *ibid.*
[175] J. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal* 261, 276.
[176] *ibid.*

national law to deter corporations from committing harmful acts and remedy environmental damage.[177] However, these systems are sector-specific and their scope is too narrow to provide a comprehensive solution.[178] Furthermore, the limited adoption and absence of implementation of these regimes do not provide a significant stimulus to the legal entity to implement rigorous preventive measures.

3. Emerging International Environmental Approaches

In the 1990s the United Nations had already enacted a series of initiatives — such as Resolution 1991/55 — aimed at addressing the conduct of multinational legal entities in regard to the protection of the environment.[179] Nowadays, two principal international environmental approaches serve as procedural standards for corporate environmental accountability: *environmental integration* and *precaution*.

The first approach, environmental integration, entails a commitment by nations and international entities to incorporate environmental aspects into economic development and sectoral policies, forming a robust foundation for the idea of corporate environmental accountability.[180] This approach extends to the overarching anticipation that legal entities integrate environmental matters into their decision-making processes, serving as a prerequisite for additional corporate environmental accountability standards such as precaution.[181] Environmental integration is divided into two procedural tools: (self-)impact assessment and environmental management systems. The former includes integrating scientific evidence, conducting a comprehensive analysis of potential environmental adverse effects, and reporting the findings to the relevant authorities.[182] Importantly, the International Court of Justice acknowledged these assessments for potential transboundary impacts as a customary rule of international law.[183] While the latter,

[177] A. Kiss and D. Shelton, *International Environmental Law* (Transnational Publishers 2004) 225–241.
[178] M. Fitzmaurice, 'Liability and Compensation' in Jorge Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 379–380.
[179] United Nations Economic and Social Council, Resolution 1991/55 (26 July 1991), paras 28(c) and (i).
[180] D. Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) 12 *European Journal of International Law* 685, 695.
[181] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020), 147.
[182] *Ibid.*
[183] International Court of Justice (ICJ), *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment (20 April 2010), para 205

through pollution control, may function as regulators for both the direct and indirect environmental harm caused by corporate activities.[184] Moreover, environmental management systems enable legal entities to continuously improve the standard of their environmental performance.[185] This is primarily achieved through the assessment of information alongside the monitoring environmental objectives and targets.[186] However, one may argue that, evaluating the extent to which a corporate entity has thoroughly considered environmental factors in its (future) conduct may pose practical challenges. For instance, indirect environmental consequences or long-term effects, can be challenging to predict. Moreover, as there is no quantifiable threshold of risk within the environmental integration approach, economic interests of multinational entities may prevail over environmental considerations.

The second approach, precaution, entails a comprehensive cost-benefit analysis of corporate activities, ensuring informed decision-making.[187] It can be affirmed that the significance of precaution for legal entities' due diligence lies in the proactive anticipation and mitigation of potential environmental risks.[188] According to the Rio Declaration, the lack of scientific certainty should not serve as a justification for States for delaying cost-effective actions aimed at preventing environmental degradation.[189] As Khokhryakova pointed out, the most significant effect on legal entities, following the implementation of precautionary measures, is the (possible) *ex ante* prohibition of hazardous activities.[190] This prevents actual

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<https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-EN.pdf> accessed 13 December 2023.

[184] OECD, *Guidelines for Multinational Enterprises* (OECD Publishing 2011), Commentary, 30.

[185] OECD, 'Roundtable on Corporate Responsibility: Encouraging the positive contribution of business to environment through the OECD Guidelines for Multinational Enterprises: Summary of the Roundtable Discussion' (16 June 2004), 4 <http://www.oecd.org/document/1/0,2340,en_2649_34889_ 31711425_1_1_1_1,00.html> accessed 13 December 2023.

[186] UNCTAD, *Environment* (United Nations Publications 2001), 56 <https://unctad.org/system/files/official-document/psiteiitd23.en.pdf> accessed 13 December 2023.

[187] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020), 165.

[188] *ibid.*

[189] United Nations, 'Rio Declaration on Environment and Development' (13 June 1992) UN Doc. A/CONF.151/6/ Rev.1 (Rio Declaration), Principle 15 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> accessed 13 December 2023.

[190] A. Khokhryakova, 'Beanal v. Freeport-Mcmoran, Inc.: Liability of a Private Actor for an

environmental harm from occurring. Moreover, nearly all recent international initiatives incorporate a corporate environmental accountability standard rooted in the principle of precaution. Firstly, the United Nations Global Compact' guide affirms that the precautionary approach within the European Union constitutes an integral element of international environmental law.[191] Secondly, it is also included in the OECD Guidelines which intend to apply the precautionary approach to discourage multinational entities from postponing efforts to prevent or mitigate significant environmental harm.[192] These instances show the ever-increasing importance that the international community places on safeguarding the environment, especially in light of the sustainable development direction more-and-more adopted by governments worldwide.

4. Close-Up on the United Kingdom: *Vedanta v Lungowe*

Zooming-in on the United Kingdom (hereinafter: UK), a 2019 landmark case *Vedanta v Lungowe* delivered by the UK Supreme Court precisely delves into the intricacies of transnational corporate accountability following environmental harm.[193] The plaintiffs, Zambian villagers, levelled accusations against Vedanta Resources, a UK-domiciled mining company operating, through a subsidiary branch, in Zambia's Nchanga Copper Mine. They issued proceedings in England alleging permanent environmental harm and health issues stemming following the discharge of toxic substances from the Mine into local watercourses over a 15-year period.[194] The claimants contend that Vedanta, exercising significant control over the Mine, owned a *direct* duty of care to them.[195] The Supreme Court, relying on principles of tort law, ruled in favour of the Zambian villagers.[196]

International Environmental Tort under the Alien Tort Claims Act' (1998) 9(2) *Colorado Journal of International Environmental Law* 463, 463.

[191] E. Morgera, *Corporate Environmental Accountability In International Law* (Oxford University Press 2020) 166.
[192] OECD, *Guidelines for Multinational Enterprises* (OECD Publishing 2011), Chapter V, para. 4.
[193] *Vedanta Resources Plc and Anor v Lungowe and Ors* [2019] UKSC 20, on appeal from [2017] EWCA Civ 1528 (Vedanta).
[194] *ibid.*
[195] *ibid.*
[196] *ibid.*

The *Vedanta* ruling can, in two ways, serve as a stepping stone on the path to transnational corporate accountability following environmental harm. Firstly, it can be argued that *Vedanta* has expanded the scope of the duty of care for subsidiary branches beyond what was previously established, potentially extending it even beyond the purview of the corporate group.[197] Moreover, it acknowledged the possibility of Home State courts having jurisdiction to adjudicate such matters, even in cases where a Host State court might seem more suitable for the trial.[198] Secondly, *Vedanta* potentially sets a 'straightforward line of liability' whereby a legal entity voluntarily assumes responsibility.[199] However, it is challenging to argue that responsibility has been willingly undertaken when the fundamental objective of a corporate group is to restrict such liability. Nonetheless, *Vedanta* can be seen as filling a void in a jurisdictional and regulatory vacuum.

5. Conclusion and Recommendations

In conclusion, transnational accountability for corporate activities causing environmental harm stands at the forefront of contemporary discourse. The deficiencies inherent in traditional legal solutions underscore the urgent need for a paradigm shift in addressing the multifaceted challenges of environmental justice and sustainable development. On the one hand, the struggles faced by Host States in enforcing national environmental regimes, exacerbated by resource constraints and information gaps, underscore the pressing demand for more effective oversight mechanisms.

On the other hand, the extraterritorial application of Home State environmental standards encounters national sovereignty concerns in the Host State. Simultaneously, the limited embrace of international civil liability regimes amplifies the call for novel international environmental approaches. Presently, environmental integration and precaution emerge as vital procedural safety standards, anchoring the idea of corporate environmental accountability.

[197] C. Bradshaw, 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) 32 *Journal of Environmental Law* 139, 147.
[198] S. Varvastian and F. Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe' (2020) 9(2) *Transnational Environmental Law* 323, 335.
[199] C. Bradshaw, 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) 32 *Journal of Environmental Law* 139, 147.

Environmental integration entails a commitment by nations and international entities to incorporate environmental considerations into economic development and sectoral policies, forming a robust foundation for the idea of corporate environmental accountability.[200] While precaution implies a comprehensive cost-benefit analysis of corporate activities, ensuring informed decision-making. However, in the *Vedanta* case, which perfectly encapsulates the issue at hand of this Research, a shortcoming of environmental management systems, a procedural tool for environmental integration, becomes apparent. In fact, despite the existence of such a system, the Nchanga Mine witnessed a severe environmental catastrophe, constituting a breach of duty of care. It is evident that this situation underscores the necessity for a transformative approach in future endeavours. A more effective strategy may involve codifying robust management systems and due diligence requirements into the law, with enforcement entrusted to a well-equipped and impartial public agency, rather than relying on private individuals — often economically disadvantaged — seeking redress through tort law, which may only incidentally benefit the environment, if at all. Regulating environmental management systems, possibly through directors' duties in company law, alongside the prospect of extraterritorial accountability, could establish a substantive environmental protocol within corporate decision-making, enabling company law to proactively contribute to environmental preservation.

[200] D. Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) 12 *European Journal of International Law* 685, 695.

RACHEL DEASY[201]

Are 'soft law' sources a more effective way of influencing State behaviour than binding international law?

ABSTRACT: This essay assesses the effectiveness of soft law sources at influencing State behaviour. It sets out what qualifies as soft law while providing specific examples of soft law sources. It also outlines how we should measure efficacy in influencing State behaviour. In assessing the effectiveness of soft law at influencing State behaviour, the author assesses the strengths and weaknesses of soft law. The essay also addresses the recent trend of States either refusing to engage with, or abide by, international law whether it be binding or non-binding.

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1. Introduction

In recent years we have seen a significant rise in the use of soft law sources of international law, with the "...volume of international delegated legislation [probably rivalling] the volume of primary treaty-law."[202] However, this increased popularity of soft law in the international legal system has been subject to mixed reviews and has raised questions regarding the effectiveness of these non-binding sources. This essay shall attempt to assess how effective soft law sources are at influencing State behaviour. The essay shall first consider what qualifies as soft law while providing specific examples of soft law sources. Next it shall address how we should measure efficacy in influencing State behaviour. In assessing the effectiveness of soft law at influencing State behaviour, the author shall assess the strengths and weaknesses of soft law. This author in concluding their assessment of the effectiveness of soft law verses hard law in the international legal system will also address the recent trend of States either refusing to engage with/abide by international law whether it be binding or non-binding. The essay shall conclude by demonstrating how situations like the Russian invasion of Ukraine undermine Henkin's famous quote that "[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[203]

2. Definition of Soft Law

Difficulties often arise when trying to provide a precise definition of what qualifies as soft law, and the term is often criticised for being too broad and for blurring the lines between law and not law. Therefore, "[s]oft law is usually defined more after what it is not..."[204] and essentially includes any source of law which does not fall into the categories of treaties or customary international law. They are internationally authoritative sources but do not have binding force; essentially, they are relevant due to their close connection to the law or through their exertion of influence on the international legal system. Ellis suggests that soft law can be divided into three categories: "...binding legal norms that are vague and

[202] P. Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, 45 [hereinafter Allott].
[203] L. Henkin, *How Nations Behave* (Columbia University Press, 1979), 34.
[204] S. I.. Karlsson-Vinkhuyzen and A. Vihma, 'Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework' (2009) 3(4) *Regulation and Governance* 400, 402 [hereinafter Karlosson-Vinkhuyzen et al].

open-ended and therefore (arguably) neither justiciable nor enforceable; non-binding norms, such as political or moral obligations, adopted by states; and norms promulgated by non-state actors."[205] These categories are also vague which only adds to the confusion surrounding the definition of soft law.

This author finds the best description of soft law to be that provided by Allott who states that soft law was "...developed organically to be something other than treaties, giving rise to legitimate expectations about the implementation of legal relations rather than themselves giving rise to legal relations."[206] Thus, international soft law should be seen as a persuasive source of law similar to decisions of courts from other jurisdictions in our national legal system. Another persuasive interpretation of soft law is the conception of soft law as a tool to influence and create binding treaties and customary law which will be discussed in further detail subsequently. There are many examples of soft law sources of international law, but this essay shall focus specifically on the Sendai Framework[207], the ILC Draft Articles on the Protection of Persons in the Event of Disaster[208], and the Guiding Principles on Internal Displacement[209] when assessing the effectiveness of soft law in influencing State behaviour. But first, the author shall consider how we should measure the efficacy of both soft and hard law in influencing State behaviour.

3. How should we measure efficacy in influencing State behaviour?

According to certain academics, international law is only as effective as to the "...extent that it shapes behaviour towards its prescribed terms."[210] Thus, the method used to assess how international law influences State behaviour is actually assessing the effectiveness of international law itself. International law is ineffective when States ignore their obligations, violate its terms, and/or fail to uphold the rights provided for by international law. Hence, we can conclude that

[205] J. Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) *Leiden Journal of International Law* 25, 315 [hereinafter Ellis].
[206] Allott, 45.
[207] *Sendai Framework for Disaster Risk Reduction* 2015-30 [hereinafter the Sendai Framework].
[208] International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters*, 2016 [hereinafter the ILC Draft Articles].
[209] UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, 22 July 1998, ADM 1.1,PRL 12.1, PR00/98/109 [hereinafter the Guiding Principles].
[210] M. Hakimi, 'The Work of International Law' (2017) 58(1) *Harvard International Law Journal* 1, 18 [hereinafter Hakimi]

accountability is an essential element in how we measure the effectiveness of international law. Though many academics view accountability as the overarching principle encompassing "...standards which shape expectations of behaviour"[211], it is submitted that the principle of accountability actually is one of the standards which influences State behaviour as it is a form of deterrent. However, accountability is just one of the elements which needs to be considered when assessing the effectiveness of international law.

International law also needs to achieve significant buy-in from states or else it cannot be said to be *international* and will only be of limited impact. International law must be allowed to grow and change with society as society becomes more globalised. We also must consider that States are not the only relevant actors in international law as we have seen expansions in who can be subject to international law in recent years, e.g., the possibility of the extension of the doctrine of self-defence to against third party actors.[212] Another criterion that should be included in the assessment of effectiveness of international law is how precise the rule is. It is important to note that the precision of the rule does impact its effectiveness but does not necessarily deprive the "...rule of its rule-ness."[213] All of these criteria must be balanced against each other, however, some academics describe this as "...attempting to strike a difficult balance that remains vexing even today...".[214]

It is submitted that from these criteria one overarching test can be distilled, and that is the test proposed by Wanner. They propose that the effectiveness of international law can be understood as compliance with international law which they also refer to as "...the change in behaviour, in relation to the achieved and continued participation."[215] This test is broad enough to allow for all of the criteria to be considered however, still places emphasis on accountability. This essay shall

[211] D. Cubie & M. Hesselman, 'Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight' (2015) 33(1) *Netherlands Quarterly of Human Rights* 9, 21-2 [hereinafter Cubie & Hesselman]
[212] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment. I.C.J. Reports 1986*, p. 14.
[213] Ellis, 319.
[214] K. N. Bookmiller, 'Closing "the Yawning Gap?" International Disaster Response Law at Fifteen' in S. Breau & K. Samuel, (eds.), *Research Handbook on Disasters and International Law* (Edgar Elgar 2016) 46, 54 [hereinafter Bookmiller].
[215] M. S. T. Wanner, 'The Effectiveness of Soft Law in International Environmental Regimes: Participation and Compliance in the Hyogo Framework for Action' (2020) 21(1) *International Environmental Agreements* 113, 121 [hereinafter Wanner].

now consider the strengths and weaknesses of soft law keeping this test and the criteria outlined prior in mind.

4. Strengths of Soft Law

It is submitted that the strengths of soft law can be divided into two categories: independent strengths and the ability for soft law to shape and create new hard law. The author shall consider these separately. Firstly, soft law often provides more effective guidance than binding international law in relation to specific issues such as in the context of disaster response activities where many of these instruments "...tend to reflect a more principled and consistent approach useful for general application, rather than simply addressing the needs of one specific disaster situation or topic.'"[216] It is also much easier and faster to adopt soft law than it is to create and implement treaties or identify a principle of customary international law as the formal procedures associated with other forms of international law can be dispensed with. However, that is not necessarily to say that soft law is considered to be less important or given less consideration, for example, "[i]t is frequently observed that states negotiate non-binding declarations, and even press releases, with almost as much care as they do binding instruments."[217]

It is for the reasons listed above that soft law is sometimes considered as a means to address areas which hard law has either yet to address in cases where there have been rapid developments or has failed to address in cases where there is a lack of consensus across States. An example of this is in 1990 when INSARAG made the decision to pursue a UNGA resolution over a treaty due to government resistance, and this option was considered achievable if not ideal.[218] Some critics suggested that the group had settled for a distant second place, however, many consider the resolution to have had immense beneficial effects and argue that it has provided a master key to open doors in governments.[219] A similar view has been taken to the IDRL Guidelines[220] which have been adopted domestically at a significant pace. It

[216] Bookmiller, 58.
[217] Ellis, 320.
[218] Bookmiller, 63.
[219] *Ibid.*
[220] *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.*

has been suggested that it could have taken up to a decade for a convention instead of the guidelines to have been adopted and few States have shown interest in taking such a route.[221]

Soft law has further notable advantages over binding international law including but not limited to "...flexibility when dealing with uncertainty, enabling learning processes, accommodating power differentials and retaining decision-making power, lower probability of violation and thus audience cost, as well as higher attainability and compliance...".[222] For example, many States are reluctant to accept binding obligations in relation to disaster law, however, 187 countries have signed the Sendai Framework which provides guidance on how to deal with disasters and has an improved focus on human rights. The Sendai Framework represents a potentially huge step forward in international disaster law, although its effectiveness has yet to have been examined in immense detail due to how recently it was adopted. It should also be noted that the Sendai Framework has also referenced the IDRL Guidelines which were mentioned prior. Another example is how Article 6 of the ILC Draft Articles refers not only to binding sources of international law, but also best practices for the protection of human rights in international non-binding texts[223] which could allow for more soft law instruments to be applied in a human rights context thus providing greater protection for those less powerful if they were adopted.

Turning to the second type of strengths associated with soft law: "...soft law is often used as a first step toward development of international hard law...".[224] Soft law can form the basis of a treaty or can influence state practice to such an extent that a new principle of customary international law emerges as a result. Soft law also allows for international law to remain dynamic and encourages the international legal system to evolve, when necessary, both through pushing for more profound and rapid changes internationally and domestically in negotiations among states, and through influencing other actors within the domestic legal systems who increase internal pressure on governments.[225]

[221] Bookmiller, 63.
[222] Wanner, 116.
[223] Cubie & Hesselman, 19.
[224] Karlosson-Vinkhuyzen et al, 414.
[225] Mukhatayeva et al, 36.

While soft law can allow for the evolution of international law to meet new challenges, soft law can also be used in a more conservative way to interpret a treaty or to provide evidence of *opinio juris* when trying to prove the existence of a custom. Therefore, some sources of soft law take existing principles of international law and apply them in contexts where they may not have been applied before. In doing so, international soft law respects the need for state consent in the creation of norms and rules in the international legal system.

Ferris highlights how the Guiding Principles on Internal Displacement are "...based on and draw out the relative norms of international human rights and humanitarian law (and by analogy, refugee law) and apply them to situations of internal displacement."[226] The Guiding Principles received wide acceptance in 1998 because they were non-binding and based on principles which States had already consented to under other conventions. However, as alluded to, state consent is often considered vital in the making of international law and some sources of soft law severely lack state consent. How can soft law be considered effective at influencing State behaviour if States do not consent to it influencing them and when international law relies heavily on state consent?

5. Weaknesses of Soft Law

Much of this essay's analysis of soft law has been based in humanitarianism and human rights-based law, and it is important to note that the vast majority of humanitarian and human rights-based regimes emphasise state consent as humanitarian actors cannot provide relief to the stricken population without it.[227] The need for state consent is based on the concept of sovereignty which is considered to be one of the most fundamental tenets of international law. A more contemporary view of sovereignty considers it not as a right of the State, but a duty owed by the State to its citizens, although this has not received much support. In situations where a State either is unwilling or unable to protect its population international law must be "...robust enough to promote compliance with human rights norms and hold States accountable for actions or omissions which result in

[226] E. Ferris, 'How can International Human Rights Law Protect Us from Disasters?' (2014) 108 *Proceedings of the Annual Meeting – American Society of International Law* 177, 186 [hereinafter Ferris].
[227] Bookmiller, 50.

rights violations, while also elaborating the normative frameworks against which conduct can be tested and potentially challenged."[228]

Although soft law does have the potential to crystallise into hard law, "[e]merging principles of soft law can also soften existing hard law by undermining its legitimacy…".[229] Soft law also raises concerns regarding clarity and predictability which greatly undermines its effectiveness. Regardless of how well thought out they are, "…soft law instruments are not binding on States, and their impact has, overall, been very limited."[230] This major drawback has led many international actors and activists to the conclusion that the creation of a treaty is essential to ensure that obligations are upheld, and individuals' rights are protected.

Although it has been previously argued in this essay that soft law can assist in the creation of hard law, there has been no real evidence that certain forms of soft law such as comments by UN treaty bodies trigger the formation of "…any binding norms either through treaty conclusion or evolvement of any custom."[231] And although soft law instruments can be successful in achieving significant State participation and in providing guidance in specific areas, soft law has a tendency to fall short in terms of ensuring accountability and compliance, two of the core elements in measuring effectiveness. An example of this is how "…soft law did not seem to be effective in spurring compliance or change across all member states in the case of the HFA. Accordingly, it might be questionable whether soft law regimes offer indeed the prospects of effectiveness."[232]

It is important to also consider the weaknesses of the examples illustrated in the previous section as well. Despite the benefits of the IDRL Guidelines, they have not been successful in addressing the challenges which international law faced before they were introduced as the challenges remain remarkably similar.[233] The ILC Draft Articles have also been of limited effect because of their soft law status however, States in the UN General Assembly Sixth Committee highlight another downside of soft law and warn against the dangers of crystallising the Draft Articles into hard

[228] Cubie & Hesselman, 33.
[229] Karlosson-Vinkhuyzen et al, 414.
[230] R Kayess & P French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1, 16 [hereinafter Kayess & French].
[231] Mukhatayeva et al, 38.
[232] Wanner, 128.
[233] Bookmiller, 61.

law. Cubie and Hesselman discuss in their article how States underline "...the potential risks of dilution should the draft articles be sent forward to a diplomatic conference for conclusion as a multi-lateral treaty."[234]

The Guiding Principles are another example of soft law which is not as successful as binding international law. Although there is no international binding instrument on internally displaced people, there is a regional treaty which provides a suitable comparison: the Kampala Convention.[235] This convention has one core advantage over the Guiding Principles in that it is legally-binding and therefore, "...establishes the obligations of states to prevent displacement, protect and assist those who have been displaced, and support solutions to displacement [and States are] obligated to protect and assist those displaced by disasters, including by climate change." The Kampala Convention also requires States to make reparations to internally displaced persons when they fail to protect and assist them in the event of disasters. This clearly highlights how binding international law is far more effective at ensuring compliance and accountability than soft law, and thus, it can be concluded that binding international law is better equipped to have a real influence on State behaviour.

All in all, the general consensus of academics and scholars regarding soft law is that it "...poses serious challenges to the binary distinction between law and not-law and, in the eyes of many, to international law itself." So, while soft law provides activists with opportunities to attempt to influence the creation of binding international law, States and scholars generally view soft law as harming international law through creating a lack of clarity and predictability. However, it should be noted that some activists may not be satisfied with soft law given the lack of compliance with soft law currently being demonstrated by the international community, not to mention the current trend of States ignoring or failing to engage with binding international law.

[234] Cubie & Hesselman, 20–21.
[235] African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* ("Kampala Convention"), 23 October 2009.

6. Conclusion

Many people view soft law as a "...compensatory alternative..."[236] to binding international law and therefore, imply that it is less effective than binding international law at influencing State behaviour. Now if this author had been writing this essay last year, they would have argued that despite the non-binding nature of soft law it still has a great many advantages as outlined above, however, given recent developments in international society generally, the authors and others confidence in international law has been impacted. It seems that the realist's view of international law is becoming more popular; international law is merely "...a tool of the powerful to impose their will on the less powerful in pursuit of their national interests..."[237], while Henkins assessment of compliance with international law can no longer be said to apply.

Despite the reasonably well accepted legal definitions of hard law, and the provision of state consent to be legally bound by it, some States still refuse to consider themselves to be bound by treaties/custom. A current dynamic example of this is how due to the ICC's lack of jurisdiction to prosecute the crime of aggression and the insanely high threshold for proving war crimes and crimes against humanity, concerns have been raised, that Putin and his military and defence leaders will be left unscathed despite the horrors they have orchestrated in Ukraine. Meanwhile the majority of cases heard by the ICC are from Africa indicating that the realist view is at least somewhat accurate.

Therefore, this author must conclude that soft law has the capacity to be an effective way of influencing State behaviour in certain limited capacities, however, until more States adopt a more contemporary approach to sovereignty binding international law will remain the dominant method of influencing State behaviour on the international stage. However, that being said, the effectiveness of both hard and soft law is currently being undermined by a general lack of engagement with international law by some of the most powerful States.

[236] Kayess & French, 16.
[237] Mukhatayeva et al, 36.

NINA JENDZA[238]

Human Rights Lawyers without a Chance of Defence: How the Azerbaijani Government Violates the European Convention on Human Rights against Political Opposition

ABSTRACT: This paper provides insight into the reasons behind frequent cases of violations of human rights by Azerbaijani authorities, in particular the right to a fair trial and the right to private life protected by Articles 6 and 8 of the ECHR. It analyses arbitrariness of the judicial system in the Republic and tries to show what the impact of politics is on public prosecution and judges. It exemplifies this by the ECtHR's judgement in *Namazov v. Azerbaijan,* which depicts unfair punishment of a human rights lawyer who was disbarred by public authorities based on his opposition activity. Furthermore, this paper tries to outline possible reasons behind poor implementation of the ECtHR's judgments into domestic law by the Government, and analyses what measures have been undertaken so far to enforce the rule of law and implement international obligations into the national legislation of Azerbaijan. It finalises reflections through an analysis of known actions that were launched in 2023 by the Council of Europe, aiming to achieve better compliance of the Azerbaijani laws with the Convention.

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1. Introduction

It is difficult to contradict the fact that the adoption of the European Convention on Human Rights (ECHR, the Convention) in 1950 reflected the great importance of human rights for European states. It put on a pedestal the unquestionable values of equality and dignity and established a set of minimum rights that every state must respect. It is therefore no coincidence that most countries include elements of the Convention's provisions in their own constitutions, drawing attention to the importance of respecting and protecting those rights. Such a narrative, while obviously vital, does not represent a complete picture of reality, where these rights are often violated.

For this reason, in this article, I have chosen to address an internal problem of Azerbaijan – the country that is known for its frequent violations of the ECHR. I will focus primarily on several high-profile cases of convicted activists and political opponents punished by domestic authorities for their human rights activism. As such, I will try to outline the political and legislative background of the Republic of Azerbaijan and explain what the repercussions of a highly politicised judicial system for the implementation of the Court's judgements might look. To exemplify this, I decided to comment on the ECtHR's judgement in *Namazov v. Azerbaijan*,[239] which sets the stage for discussing the enforcement of ECtHR case law in a country with a prominent history of violations of human rights.

2. Methodology

In the course of this research, I resorted mainly to doctrinal legal research. Thus, I analysed publications of scholars, as well as those of political institutions, mainly the Council of Europe, and other independent bodies – for instance, the International Commission of Jurists. However, to illustrate the complexity of the issue at hand, I added elements of multidisciplinary research, borrowing logical arguments particularly from the fields of international relations and political science. Their inclusion proves that holistic approaches to complex issues provide more diverse and profound answers. These methods, naturally, have their limitations – for the purposes of further exploration of the topic, it would be interesting to contrast empirical legal research with the outcomes of this study. Nevertheless, for the sake of the conciseness of this paper, I decided to follow a simpler methodology, which still allowed me to tackle my research question.

3. The Legal and Political Background of Azerbaijan

To begin with, it is important to explain the context in which violations of human rights in Azerbaijan occur. One of the aspects crucial to understanding reasons behind continuous violations of human rights in Azerbaijan, especially concerning the right to privacy, is the structure of the Azerbaijani Bar Association (ABA). This

[239] *Namazov v. Azerbaijan*, app. no. 74354/13, 30 January 2020.

is the main organ governing legal activities in the country which, being established under domestic law,[240] is a key to regulating the profession.[241] It compromises all the advocates of Azerbaijan and, at least in theory, is a non-governmental, independent, and self-governing organisation.

3.1. The Law on Advocates and Advocates' Activity

The key document prescribing ABA's mandate is the *Law on Advocates and Advocates' Activity*, stating in Art. 1(1) that: "legal profession is an independent legal institution which professionally carries out legal defence".[242] Even more crucial for this paper is Art. 1(2), outlining that all activities of ABA shall be in accordance with "principles of the Rule of Law, independence, democracy, humanism, fairness, publicity, and confidentiality".[243] Despite outlining the legal basis for the association's activities, this regulation impels the Bar Association to protect lawyers from interference of the prosecution, judiciary, or other authorities by creating independent decisions – as a self-governing organization does.[244] However, the document lacks clear and strict language when it comes to what exactly ABA can do regarding lawyers apart from "defending the rights of its members",[245] which is clearly a vague norm. Nevertheless, on paper, ABA's objectives do not raise major concerns. Its main duty is to:

> "Defend rights and freedoms and interests of people protected by law, to provide high quality professional legal assistance with honour and to improve the image of the profession".[246]

Lastly, it provides insight into the functions of the organisation. They include, among others, managing admission to the legal profession, disciplinary supervision, giving opinions on legal questions, supervisory control over the lawyers, and "resolution of other issues".[247] This unclear addition to the provision seems to cause many issues, as it does not clearly define the scope of possible activities of ABA.

3.2. Arbitrariness of ABA

Although in theory ABA promotes democratic vision and actions pursuant to the Rule of Law, in reality, there are explicit signs of its inability or lack of will to uphold its independent status. It has serious institutional weaknesses[248] and acts in cooperation with the Ministry of Justice, which comprises its non-governmental status.[249] Additionally, the recurring opinions of lawyers label the ABA as a

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[240] *Law of the Republic of Azerbaijan On Advocates and Advocates' Activity*, of 28 December 1999, No. 783IQ, article 9 (III).
[241] 'Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan', ICJ Mission Report 2016, p. 12.
[242] *Law of the Republic of Azerbaijan On Advocates and Advocates' Activity, op. cit.*, Article 9.I; *Charter of the Bar Association,* Article 1.1.
[243] *ibid,* Article 1(I)
[244] *Charter of the Bar Association, op. cit.,* Article 1.2.
[245] *Law of the Republic of Azerbaijan On Advocates and Advocates' Activity, op. cit.,* Article 1(III).
[246] *Charter of the Bar Association,* article, *op. cit.,* Article 3.1.
[247] *Law of the Republic of Azerbaijan On Advocates and Advocates' Activity, op. cit.,* Article 9(V).
[248] 'Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan', *op. cit.,* p. 13.
[249] *ibid,* p. 13.

"Soviet-style bureaucracy" due to its "authoritarian way of management" and organisation being a "decoration for the justice system" in Azerbaijan.[250] It is worth mentioning that the reason behind it may be – as outlined in the 2002 report of the International Commission of Jurists (ICJ) – the constant influence of the executive branch and advocates' work and pay being controlled by the Bar Association.[251]

The structure of ABA is quite complex, as there are five main organs within the organisation. It is worth to explain the operation of the governing body – Presidium of the Bar Association - since it plays the main role in setting the policy of the institution. It consists of advocates with at least three years of legal experience.[252] All members are elected for a period of five years and "an advocate that has gained respect among colleagues" can be chosen to be a member of the Presidium. What is concerning is that it is highly unclear what, firstly, respect means and what measures exist to evaluate it.[253]

One of the key functions of the Presidium is to ensure that the profession of lawyers is independent. This objective has been carried out under Article 23(2) of the *Law on Advocates and Advocates' Activity,* which states that an advocate may be disbarred only because of the Presidium or its' opinion. What seems to be an unavoidable issue is that the President of the Presidium is known to have both high influence on other members as well as strong connections with the Ministry of Justice. It has been observed in the ICJ's findings from 2002, and, though they were done a long time ago, the actions of ABA seem to be unchanged:

> "Although the Ministry of Justice does not micromanage the day-to-day operations the Bar Association leadership it is said to give high consideration to what is politically acceptable to the Presidential Administration or the Ministry of Justice".[254]

Apart from the apparent connections of the Presidium, the person of the ABA's President himself seems to have aroused no less controversy. He has been residing in the office for sixteen years though, under the Charter of ABA, his term of office has long ago expired. It is not only a threat to the democratic view of the organisation, but also a breach of the principles of free elections present in international norms. All signs mentioned above contribute to the feeling of political dependence, lack of real authority and absence of legality among legal practitioners in Azerbaijan.

3.3. Disciplinary Measures of ABA

In addition to everything mentioned before, what seems to be the most concerning about ABA – hence causing international distress – are the variety of tools that

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[250] *ibid,* p. 13; A. Hajibayli, *The State of Advokatura in Azerbaijan*, HDIM. NGO/0112/14, http://www.osce .org/ru/odihr/124151?download=true, 24.09.2014, p. 1.
[251] ICJ, *Azerbaijan — Attacks on Justice*, http://icj2. wpengine .com/wpcontent/uploads/2012/03/ azerbaijan_attacks_justice_27_08_2002 .pdf, p. 37.
[252] 'Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan', *op. cit.,* p. 15.
[253] *Ibid,* p. 15.
[254] ICJ, *Azerbaijan — Attacks on Justice*, http://icj2. wpengine .com/wpcontent/uploads/2012/03/ azerbaijan_attacks_justice_27_08_2002 .pdf, p. 37.

ABA uses to *combat* opposition lawyers and political activists. The crucial parts of this anti-democratic policy are as follows: the introduction of the *Code of Ethics*, provisions of the *Law on Advocates and Advocates' Activity*, and the presence of the Disciplinary Commission in ABA.

Firstly, introduced in 2017, the *Code of Ethics* serves as a regulation concerning the professional ethics of lawyers.[255] Although it might seem normal to have such recommendations, the document contains multiple provisions standing in opposition to the Bar's independence. An example of this can be Article 2.13 of the Code, banning lawyers from dissemination of "misleading information about decisions of the bodies of the Bar Association, which undermines its authority" together with the rule that "a lawyer must not allow any dissemination of ungrounded slanderous information about the state".[256] What happens in daily practice is the broad, extensive interpretation of this provision, which results in unjustified interference of ABA with lawyers' freedom of expression. Moreover, the Azerbaijani case law shows that authorities do not make a distinction between stating this information in public or to defend a client – this is the reason why the disciplinary punishments have been inflicted to, e.g., human rights advocates.

Secondly, disciplinary processes are imposed by the Disciplinary Commission, which draws its legal basis in the *Law on the Advocates and Advocates' Actions*. It acts as a subsidiary body together with the General Meeting of the Bar Association in, among others, participation in the investigations, obtaining information and reviewing of the applications.[257] It is unknown how many lawyers suffered from such disciplinary procedures, since the numbers remain confidential. However, one might suspect that it is abnormally high.[258] Especially that concerning the fact that all legal practitioners who were involved in the procedure have undertaken the representation of *sensitive cases* in the view of the Bar.[259] What seems to contradict the ABA's statement about being a non-governmental organisation is the fact that in all cases against lawyers by public authorities ABA has openly supported the side of the state penalising members of the association. Moreover, obtaining documentation about proceedings is no less of a problem, as in all ECHR cases concerning the political activity of applicants, they raised the issue of getting documents relating to the case.[260]

Finally, the level of invigilation by the state over lawyers' private lives can be seen at the point when they want to enter ABA. One of the stages of admission to the bar is an oral interview, which is not regulated by concrete norms.[261] In this part cooperation with human rights NGOs or "opposition lawyers" can be a factor

[255] I. Aliyev, 'The Bar and lawyers in Azerbaijan', Human Rights Institute 2021, p. 17.
[256] 'The Bar and lawyers in Azerbaijan', *op. cit.*, p. 16.
[257] 'Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan', *op. cit.*, p. 19.
[258] 'The Bar and lawyers in Azerbaijan', *op. cit.*, p. 10.
[259] G. Gogia, 'Lawyer Disbarred in Azerbaijan after Filing Torture Complaint', Human Rights Watch, 27 November 2017, www. hr w.org/news/2017/11/28/lawyer-disbarred-azerbaijan-after-filing-torture-complaint; 'Disbarred, suspended, or criminally prosecuted: Azerbaijani human rights lawyers', *EHRAC*, 25 January 2021, https://ehrac. org.uk/resources/disbarred-suspended-or-criminally-prosecuted-azerbaijani-human-rights-lawyers.
[260] 'The Bar and lawyers in Azerbaijan', *op. cit.*, p. 10.
[261] *ibid*, p. 5.

turning down a candidate's membership. This all contributes to the persistent harassment of lawyers who actively stand up against the government's misconduct in Azerbaijan. To exemplify this issue, it is worth to analyse one of the most crucially relevant decisions of the ECtHR – *Namazov v. Azerbaijan* - as it shows violations of human rights by ABA in practice.

4. Namazov v. Azerbaijan

Elchin Namazov, an Azerbaijani lawyer, was disbarred by the Bar Association on 16 September 2011 on the grounds that he allegedly *disrespected* the judge at Nasimi District Court.[262] Mr. Namazov specialised in protection of human rights and had represented many people related to the opposition. In a case brought by the ECtHR he acted for R.H., who was accused of organising actions leading to public disorder, which in practice meant participation in a demonstration. Since he wanted to defend his client, he engaged in argument with the judge who refused to clarify charges brought against R.H. Judge decided to inform ABA about alleged breach of lawyer ethics by Namazov, which lead to the conclusion that he indeed violated Articles 14, 16 (1), and 18 of the *Law on Advocates and Advocates' Activity*. Subsequently, the Presidium of ABA lodged the application with the Fuzuli District Court asking for the disbarment of Namazov.

In January 2020 it was the first case regarding this type of penalty to a lawyer in Azerbaijan brought before the ECtHR.[263] Elchin Namazov stated that his disbarment violated his right to private life protected under Article 8(1) ECHR, since it appeared that he was punished for his activist work. During trial he added that he repeatedly had issues with obtaining documentation of the proceedings and that the decision of the court was merely substantiated with alleged *disrespect* towards the judge. Though the ECtHR found that there was a violation of Article 8 of the Convention, Azerbaijani authorities did not change the status of Namazov in ABA.[264]

Elchin Namazov is not the only example of political disbarment of lawyers in Azerbaijan. On an international scale, Azerbaijan is known to have the worst record of countries which fail to enforce the ECtHR judgements, since only 16% of them entered into force.[265] There are about 15 pending cases before the Court regarding illegal disbarment or suspension.[266] Recently, the Execution Department of the Council of Europe visited Azerbaijan, but there are little signs that the Azerbaijani government is interested in proper implementation of its human rights obligations.[267] It brings up the question – to what extent are the ECtHR's verdicts

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[262] 'Protectionline, Elchin Namazov, Human Rights Defender Lawyer: Disbarred and Facing Imprisonment', 9 October 2011, http://protectionline .org/2011/10/09/elchinnamazovhumanrightsdefenderlawyer disbarredandfacingimprisonment/.

[263]http://ehrac.org.uk/en_gb/key-ehrac-cases/disbarred-suspended-or-criminally-prosecuted-azerbaijani-human-rights-lawyers/ accessed 15.12.2023.

[264]https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Human_right_portal/Petition-11th-DAY-OF-THE-ENDANGERED-LAWYER-Azerbaijan.pdf, accessed 15.12.2023.

[265] Council of Europe, Country Factsheet: Azerbaijan, https://rm.coe.int/168070973e, accessed 15.12.2023.

[266] *ibid.*

[267] https://www.coe.int/en/web/execution/-/visit-to-azerbaijan-on-execution-of-echr-judgments,accessed 15.12.2023.

applied in national legislations of the Council of Europe members that have struggled to uphold democratic standards of the Council?

5. Enforcing the ECtHR's judgements domestically in Azerbaijan

As of December 2023, in last year, the Court dealt with 23 judgements for Azerbaijan, in 22 of which it found at least one violation of the Convention.[268] 16 of those decisions concerned breaches of Articles 6 and 8(1) ECHR, whereas in the period of last five years the Court issued 79 decisions stating that the Azerbaijani government failed to respect these provisions (excluding 2107 pending decisions brought before the Court in that period).[269] These data show that the issue of mass violations of the right to fair trial and privacy has persisted since the beginning of the 21st century, despite Azerbaijan having ratified the Convention in 2002.[270] In this context, it is reasonable to ask what are the means of implementing the ECtHR decisions and what are the possible reasons why most judgements have still not entered national legislation.

5.1. Means of implementations

According to Article 46 ECHR, after the ratification of the document (which Azerbaijan did in 2002), states must comply with the final judgements of the Court and ensure that the rights of people enshrined in the Convention are protected.[271] Moreover, the Court acts as an original and competent interpreter of the ECHR. Therefore, its case law should be considered as a direct source of law.[272] There are three main steps that a state has to undertake to implement international law into its domestic legal framework:

- Accepting and ratifying international pieces of legislation with respective comments and/or reservations;
- Adjusting national legislation and adopting new law (including preparation of guidelines or any other needed measures);
- Checking the status of implementation of newly introduced law (depending on the system in which country is – either ad hoc or periodic basis).[273]

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[268] https://www.echr.coe.int/documents/d/echr/cp_azerbaijan_eng, accessed 15.12.2023.

[269] https://hudoc.echr.coe.int/#{%22respondent%22:[%22AZE%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22kpdate%22:[%222022-12-13T00:00:00.0Z%22,%222023-12-13T00:00:00.0Z%22],%22violation%22:[%226%22,%228%22,%228-1%22]} , accessed 15.12.2023.

[270] https://bakuresearchinstitute.org/en/implementation-problems-of-the-european-convention-on-human-rights-in-azerbaijan/, accessed 15.12.2023.

[271] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Human_right_portal/Petition-11th-DAY-OF-THE-ENDANGERED-LAWYER-Azerbaijan.pdf, accessed 15.12.2023.

[272] https://bakuresearchinstitute.org/en/implementation-problems-of-the-european-convention-on-human-rights-in, accessed 15.12.2023.

[273] https://bakuresearchinstitute.org/en/implementation-problems-of-the-european-convention-on-human-rights-in, accessed 15.12.2023.

What is interesting about Azerbaijan's legislative system is that it follows the requirements of a monist model of implementation of international law, meaning that all international agreements that it ratifies are treated as a part of national legislation and are superior to national law in case of a conflict.[274] Additionally, Article 12 of the Azerbaijani Constitution prescribes that international agreements in the field of human rights protection have equal status to the Constitution.[275]

Though in national law horizontal relationship between human rights and domestic codes exists, adopting legislation is not the only measure to ensure compliance with the ECtHR's jurisprudence by Azerbaijan. In 2003, the position of the Representative of the Republic of Azerbaijan to ECtHR was created to advise the government on how to amend national legislation to comply with the Convention's standards.[276] Finally, a programme launched in 2011 called "National Action Plan" actively encouraged Ministers (in particular, Minister of Justice and Foreign Affairs) to be involved in the process of implementation of the Court's judgements.[277]

However, it must be mentioned that there is not a single site or public platform where people can get information about the progress with regard to enforcing those judgements or new measures taken by the government to develop domestic law. It seems like ministerial actions are relatively shallow and, though they adopt new legislation and create positions to satisfy the requirements of the Council of Europe, the means themselves can be considered superficial and not in accordance with the Council's democratic standards. Nevertheless, it would be untrue to say that the government has done nothing to implement the ECtHR's case law.

5.2. Possible reasons for noncompliance with the Court's judgements

It appears that there are two main reasons why Azerbaijan has failed to comply with multiple judgements of the Court. The first one may be considered simple but has a general effect on policy of the country in general – mainly lack of political will to implement decisions of the Court. Though it is not a legal issue it penetrates problems with international law obligations of Azerbaijan since one of the prime components of international law are relations between states. From databases of the ECtHR as well as reports of the Council of Europe it can be concluded that Azerbaijan was not interested in implementing human rights obligations which was possibly influenced by the government's non-democratic political direction.[278]

Secondly, an aspect that directly derives from the different political vision of Azerbaijan is the inadequacy of legal instruments used by the state to implement binding international decisions. Most Council of Europe states introduced laws that empower national courts to review cases based on the ECtHR judgements in addition to parliamentary regulations establishing a pre-control mechanism in

[274] Except the Constitution and referendum. https://bakuresearchinstitute.org/en/implementation-problems-of-the-european-convention-on-human-rights-in, accessed 15.12.2023.
[275] *ibid.*
[276] *ibid.*
[277] *ibid.*
[278] *ibid.*

legislative procedure.[279] Because of that, states can ensure the harmonisation of their laws – on both judicial and legislative level – to be in compliance with the ECtHR's case law. However, in the case of Azerbaijan, judicial mechanisms, and not parliamentary, were introduced.[280] It gives rise to higher risk of new laws being not in line with international obligations, which may lead to more violations of the Convention since the law adopted domestically will be incompatible with it.

5.3. Future actions of Azerbaijan

The remaining question following the previous section concerns the future of enforcement of international law in Azerbaijan. The European Implementation Network together with other NGOs has already acted in highlighting the issue of non-compliance with the ECtHR - mainly regarding the use of criminal law as a tool silencing human rights defenders. In 2020 Azerbaijan acquitted two applicants – Ilgar Mammadov and Rasul Jafarov – who were victims of politically motivated prosecutions violating Article 18 ECHR.[281] This resulted in the ending of infringement proceedings against the republic by the Committee of Ministers of the Council of Europe which expressed satisfaction in Azerbaijani actions. They additionally called for *restitutio in integrum* for remaining applicants who bore the consequences of arbitrariness of criminal proceedings.[282] Nevertheless, human rights groups do not share such a positive attitude and compiled a list of political prisoners, which, in 2020, included 108 people. It seems that their actions were severely limited after political rallies in Baku resulting in prosecution of opposition leaders and supporters who were subjected to financial penalties.[283]

This approach was challenged by the 2023 Working Group meeting on the National Execution Strategy and Action Plan for the Executions and Decisions of the ECtHR by the Republic of Azerbaijan governed by the Council of Europe.[284] This initiative looks very promising as it was concluded for the first time and aims at discussion on the Draft National Execution Strategy and Action plan which establishes framework and enhances domestic monitoring to improve national application of human rights standards.[285]

Though the response of Azerbaijan is yet unknown, multiple missions and increased cooperation with the Council of Europe suggest that there is a chance of improving democratic standards and Rule of Law in the republic. Nevertheless, it is fair to state that without major change in the political mindset of the country, there is little chance of satisfactory difference within the enforcement of ECtHR case law.

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[279] *ibid.*

[280] Law on Approval of the Internal Regulations of the Milli Majlis of the Republic of Azerbaijan, https://www.e-qanun.az/framework/4029 accessed 15.12.2023.

[281] https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR5533512020ENGLISH.pdf, accessed 15.12.2023.

[282] *ibid.*

[283] *ibid.*

[284] https://www.coe.int/en/web/execution/-/working-group-meeting-on-national-strategy-for-the-execution-of-judgments-by-azerbaijan, accessed 15.12.2023.

[285] *ibid.*

6. Concluding Remarks

Conclusively, it seems like the actions of the Azerbaijani Government are full of contradictions. On the one hand, it implements new measures aiming at the development of national legislation in order to comply with the standards of the Council of Europe and the European Court of Human Rights by cooperating with the Council of Europe's working groups and acquitting two falsely accused activists.

On the other hand, however, the majority of steps taken by the authorities still seem insufficient to keep up with other Council members' progress. It is fair to say that Azerbaijan starts to respect the judgements of the Court and implement those that either tackle individual cases – as in the case of Ilgar Mammadov – or are considered correct in line with the governmental political course.

Nevertheless, any action towards achieving the Rule of Law is always preceded by repeated alerts from the Council of Europe that raise doubts about the will of the state to voluntarily comply with the ECtHR's verdicts. The aspect that seems to penetrate major issues in clashes between international obligations and domestic law is, as mentioned before, lack of political will and non-democratic tendencies present in the executive branch of Azerbaijan. This gives rise to the lack of pre-control mechanisms in the parliamentary sector which is a risk for adopting laws violating the Convention.

However, looking at the current measures undertaken by the Council of Europe and the Committee of Ministers, one may conclude that the change in domestic law is far more likely than a few years ago. It will be interesting to observe new implementations following the 2023 Working Groups, which hopefully lead to better execution of human rights and acquittal of falsely accused activists.

JAN ANDRZEJ KARPIUK[286]

The External Sentinel of Democracy: Decoding the Material Scope of the ECHR and Establishing a Subsidiary Protection of Democratic Frameworks

Expansions and Frameworks: A Reasoned Critique of the Eurosceptic and Populist Approaches to the ECHR

Abstract: The European Convention on Human Rights (ECHR) is recognized by the international community as one of the most effective regional legal instruments aimed at vindicating human rights. However, with the proliferation of transnational populism, the increasing State polarization, and the process of growing eurosceptic sentiments among the European States, illustrated by the reinvigoration of national sovereignty movements after the migration crisis of 2015 and the Brexit referendum of 2016, the legitimacy of the ECHR *régime* is progressively questioned. The present article undertakes to demonstrate that while the European Court of Human Rights (ECtHR) has, indeed, expanded the material scope of the ECHR, the Court achieved this by employing effectiveness-oriented and evolutive interpretations, which were required by the nature of the text, and not by inventing new substantive rights as a result of excessive judicial activism. Similarly, the present article stipulates that the expansion of the material scope of the Convention is compatible with the liberal republican conception of democracy insofar as the ECHR constitutes the external and subsidiary framework of the legal protection of the democratic axioms, such as pluralism, tolerance, and the rule of law.

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1. Introduction

On the 4th of November, 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed by 12 Member States of the Council of Europe (CoE).[287] Initially, the Convention was intended to be a charter vindicating democratic values and safeguarding human rights—a shield protecting Contracting Parties from the dangers of totalitarian communism and the resurrection of national socialism.[288] However, with the progressive legalization of the field of human rights and the enlargement of the CoE after the end of the Cold War, the Convention's *raison d'etre* shifted from a State-centric paradigm of "reciprocal obligations" to a system of "collective and effective enforcement" of individual human rights rooted in "objective obligations".[289] Consequently, the Convention became the constitutional cornerstone of the "European public order",[290] with its *sentinel*, the European Court of Human Rights (ECtHR), guarding its text under Article 32(1) ECHR. Nonetheless, with the increasing State polarization and the proliferation of populism in Europe, the legitimacy of the ECtHR and, connectedly, the ECHR *régime* has been vehemently criticized for intrusive legislative instincts.[291] Noteworthily, the eurosceptic stance contends that the ECtHR expanded the Convention's original scope by "inventing" contentious rights, which, consequently, amounts to non-consensual legislation driven by judicial activism and a limitation on democratic decision-making in the form of

[287] Steeven Greer and Lewis Graham, 'Europe' in Daneil Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (4th ed, Oxford University Press 2022) 463, 469-479.

[288] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 2889 UNTS 221, Preamble; For explanation of the Convention's spirit see William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 3-10.

[289] *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), paras 23 and 239; *Soering v the United Kingdom* App no 14038/88 (ECtHR, 07 July 1989), paras 34 and 87; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016), para 122; *Fedotova v Russia* App no 40792/10 (ECtHR, 13 July 2021), para 52; For explanation of the shift see Virginia Mantouvalou and Panayotis Voyatzis, 'The Council of Europe and the protection of human rights: a system in need of reform' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010) 326, 326-335.

[290] *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996), paras 75 and 93.

[291] For defending views, see Françoise Tulkens, 'Judicial Activism *v* Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights' (2022) 3(1) *European Convention on Human Rights Law Review* 293, 294-299; Marko Bosnjak and Kacper Zajac, 'Judicial Activism and Judge-Made Law at the ECtHR' (2023) 23(1) *Human Rights Law Review* 1, 2-4; For critical views see Marc Bossuyt, 'Judicial Activism in Strasbourg' in Karel Wellens (ed), *International Law in Silver Perspective: Challenges Ahead* (Brill Nijhoff 2015) 31, 32-36; Robert Blackburn, 'Current Developments, Assessment, and Prospects' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press 2001) 77, 81-83.

external constraints.[292] The present article shall polemicize with such views by illustrating how the ECtHR has expanded the material scope of the Convention through effectiveness-oriented and evolutive interpretations of the text — and not by inventing rights — with the effect of fortifying, not undermining, the democratic frameworks of Contracting Parties.

2. Inventing or Merely Decoding Human Rights? The Relative Expansion of the Convention's Material Scope

Admittedly, the ECtHR has expanded the protective scope of the Convention beyond its *prima facie* textual limitations by increasing the range of substantive matters covered by it.[293] Specifically, after the ECtHR established, in the *Airey* case, that the Convention rights cannot be "merely theoretical and illusory [but must be] practical and effective",[294] the Convention's center of gravity shifted towards the principle of effectiveness that required the full realization ("furthering") of human rights in their substance, not form.[295] This paradigmatic shift underlies positive obligations, which implicitly impose ancillary duties on States,[296] and supports the living instrument doctrine, which requires evolutive interpretation of the Convention.[297] Connectedly, these tools, as the present article shall illustrate, broadened the ambit of the Convention by imposing subtextual obligations on States and, as a corollary, knitted a patchwork of dynamic, rather than static, rights.

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[292] For example, see Lord Jonathan Sumption, 'Third Lecture: Human Rights and Wrongs' (Reith Lectures, 8 November 2023) (13:30-14:30 and 15:00-16:00); Notably, the Lord upholds his view, see The Spectator, 'Jonathan Sumption: Britain should quit the intrusive ECHR | SpectatorTV' (2 October 2023) (06:20-10:07; 15:42-18:50) <https://www.youtube.com/watch?v=eEMG-fV1GfU> accessed 11 November 2023. ; For Judge Spano's Rebuttal of Lord Sumption's view, see Oxford Law Faculty, 'The Inaugural Annual Bonavero Human Rights Lecture - February 2020' (25 March 2020) (03:30-44:15) <https://www.youtube.com/watch?v=ppJT1SyH1io> accessed 9 November 2023.

[293] Monika Florczak-Wątor, 'The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State' (2017) 17(2) *International and Comparative Law Review* 39, 51.

[294] See the gradual development of this reasoning in *Case "relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium* App no 1474/62 (ECtHR, 23 July 1968) page 28; *National Union of Belgian Police v Belgium* App no 4464/70 (ECtHR, 27 October 1975), para 39; *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979), para 31; See crystallization of the doctrine in *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), paras 25-26; *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980), para 33. ; See the consolidation of the doctrine in *Soering* (n 3), para 87; *Stichting Mothers of Srebrenica v the Netherlands* App no 65542/12 (ECtHR, 11 June 2013), para 139.

[295] For explanation of this teleological approach, David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th ed, Oxford University Press 2018) 24-27; *ECHR* (n 2) Preamble; *Loizidou* (n 4) para 72.

[296] Vladislava Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete' (2023) 23(1) *Human Rights Law Review* 1, 1-5.

[297] *Tyrer v the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 31; *Cf. Marckx* (n 8) para 41.

2.1. The Nature of Positive Obligations: Not Merely Theoretical and Illusory Rights

With the atrocities of national socialism still overshadowing Europe, the Contracting Parties decided to embrace civil and political rights by enshrining them in the Convention.[298] These rights, such as the right to life, prohibition on torture, and freedom of expression, protected by Articles 2, 3, and 10 ECHR respectively, impose negative obligations on States to respect the citizens' rights by refraining from unjustified interferences therewith.[299] Meanwhile, as a corollary to negative obligations, the ECtHR developed, based on the principle of effectiveness, an extensive web of positive obligations that require States to *protect*, besides merely *respecting*, Convention rights.[300] The legal basis for this multi-layered onus, which requires States to undertake measures to effectively secure rights,[301] derives from the formulation of Article 1 ECHR:

> "The High Contracting Parties shall *secure to everyone within their jurisdiction* the rights [defined in the Convention]."[302]

Conceptually, positive obligations can be *general*, for example, a State might be obliged to enact a regulatory framework to ensure a safe living environment or a legal system with effective machinery that deters crime;[303] alternatively, positive obligations can be *specific*, for instance, a State might be bound to undertake operational measures to ensure peaceful demonstrations,[304] or to pursue effective investigation into complaints of human rights violations, such as human

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[298] Schabas (n 2) 3-5.
[299] Johan Wibye, 'Beyond Acts and Omissions — Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) 23(1) *Human Rights Review* 479, 479-484.
[300] Richard Clayton and Hugh Tomlinson, *The Law on Human Rights* (Oxford University Press 2000) 272; Natasa Mavronicola, 'Positive Obligations in Crisis' (*Strasbourg Observers*, 7 April 2020), <https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis/> accessed 18 October 2023.
[301] Florczak-Wątor (n 7) 41; *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004), para 137; Note that the precise boundary between negative and positive obligations "does not lend itself to precise definition" as evidenced by *White v Sweden* App no 42435/02 (ECtHR, 19 September 2006), para 20. ; *Gül v Switzerland* App no 23218/94 (ECtHR, 19 February 1996), para 38; *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994), para 49.
[302] ECHR (n 2) art.1. [*emphasis added*]
[303] For positive environmental obligations see *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005), para 96; *Budayeva and others v Russia* App no 15339/02 (ECtHR, 20 March 2008), para 128-138; *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004), para 107; For positive criminal law obligations see *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985), paras 23-30; *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), paras 149-153.
[304] *Plattform "Ärzte für das Leben" v Austria* App no 10126/82 (ECtHR, 21 June 1988), paras 32-34; *Appleby and others v the United Kingdom* App no 44306/98 (ECtHR, 6 May 2003), para 39-40.

trafficking,[305] domestic violence,[306] or threat to life.[307] While none of these specific obligations exist *expressis verbis* in the Convention, the substance of the ECHR rights would be unattainable, in contemporary complex societies, without the State facilitating their achievement.[308] Therefore, the existence of the State's positive obligations stems from the ECtHR "decoding" already existing – albeit implied – facets of ECHR rights.[309] Specifically, *insofar as* the Court pursues the full teleological realization of enshrined rights, by rendering them materially exercisable by citizens rather than theoretically intangible, the material scope of the Convention is expanded onto previously unperceived subject matters — thus, the ECHR rights remain unaltered, yet become fully utilized.[310] Illustratively, the *Jivan* case demonstrates this *full actualization* of rights, whereby the ECtHR identified the positive obligation on Romania to undertake measures securing, under Article 8 ECHR, respect for an individual's private life, specifically, to ensure "appropriate level of care and dignity" to a 90-years-old amputee by providing him with social assistance.[311] Accordingly, the ECtHR elucidated the implied *content* of the existing obligation in a new situation (i.e. ensuring proper care for the vulnerable elderly), while affording a wide margin of appreciation to the State on the manner of performing that obligation.[312]

[305] *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), paras 288-297; *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005), para 148.
[306] *Kurt v Austria* App no 62903/15 (ECtHR, 15 June 2021), paras 167-172; *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009), paras 128-130.
[307] *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), paras 115-117; *Smiljanić v Croatia* App no 35983/14 (ECtHR, 25 March 2021), para 87.
[308] Brice Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61(3) *Northern Ireland Legal Quarterly* 203, 204-208; Note, the *Airey* test, whereby a positive obligation arises if the rightholder's *effective exercise* of the right is precluded by the *absence* of State measure.
[309] Florczak-Wątor (n 7) 42. ; For an archetypical example of such "decoding" see *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), para 36; *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005), para 105.
[310] Clayton and Tomlinson (n 14) 272-273; Harris (n 9) 24-26; Dimitris Xenos, *The Positive Obligations of the State Under the European Convention of Human Rights* (Routledge 2013) 3-5; Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 221-223; Laurens Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (Intersentia 2016) 343-345.
[311] *Jivan v Romania* App no 62250/19 (ECtHR, 8 February 2022), paras 49-52.
[312] For a view supporting this dichotomy see Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87(1) *Nordic Journal of International Law* 344, 344-348; For a dissenting view see Laurens Lavrysen, 'Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova' (2018) 18(1) *Human Rights Law Review* 705, 705-707.

2.2. A Living Instrument or a Static Monolith? The Evolutive Interpretation of the European Convention on Human Rights

The ECHR's material scope is further extended by the *living instrument* doctrine, whereby the Convention must be construed in "the light of present-day conditions".[313] The ECtHR's teleological-evolutive interpretation, combined with the European consensus doctrine as a calibrating mechanism,[314] frames the ECHR as a text responsive to gradual attitudinal shifts in relation to social developments, such as the change in perception of inhuman and degrading treatment,[315] classification of human trafficking as slavery,[316] or the acceptance of homosexual conduct,[317] under Articles 3, 4, and 8 ECHR respectively.[318] Illustratively, in the *Christine Goodwin* case, the ECtHR noted that the United Kingdom's (UK) refusal to recognize the legal status of post-operative transsexuals violated Article 8 ECHR.[319] While the Court examined the UK's ambiguous scientific evidence and its inconsistent administrative framework, it was the "*evolving* convergence of standards" with evidence of "clear and uncontested [...] international *trend*" of increased social acceptance of transsexuals that mandated a dynamic approach.[320] Therefore, the ECtHR merely extended the material scope of Article 8 ECHR to new, socially normativized, facts and did not invent novel rights.[321] Similarly, the *Al-Saadoon* case of 2000, which involved a war prisoner being transferred from the

[313] *Tyrer* (n 11) para 31; *Marckx* (n 8) para 41; *Inze v Austria* App no 8695/79 (ECtHR, 28 October 1987), para 41; For the limitations of evolutive interpretation *cf. Johnston and others v Ireland* App no 9697/82 (ECtHR, 18 December 1986), para 53; *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), paras 39-41.

[314] For examples of the ECtHR ascertaining social acceptance of new developments, by employing the European consensus doctrine in different ways, see *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996), para 57; *A, B, C v Ireland* App no 25579/05 (ECtHR, 16 December 2010), paras 234-237; *Sheffield and Horsham v UK* App no 22985/93 (ECtHR, 30 July 1998), paras 57-58.

[315] *Tyrer* (n 11), para 31. ; *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999), para 101; *Ipso facto*, the evolutive process of increasing human rights standards in "greater firmness in assessing breaches of fundamental values of democratic societies" by expanding the conduct that can be qualified as inhuman.

[316] *Rantsev* (n 19) paras 276 and 288-297; *Siliadin* (n 19) para 148.

[317] See a notable line of cases concerning evolving social attitudes towards homosexuals *Dudgeon v the United Kingdom* App No 7525/76 (ECtHR, 22 October 1981), para 60; *Norris v Ireland* App no 10581/83 (ECtHR, 26 October 1988), para 46; *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010), paras 93-94.

[318] Philip Leach, *Taking a Case to the European Court of Human Rights* (4th ed, Oxford University Press 2017) 189-190.

[319] See gradual shift of social attitudes in transsexual cases, *Rees v the United Kingdom* App no 9532/81 (ECtHR, 17 October 1986), paras 37-38; *Cossey v the United Kingdom* App no 10843/84 (ECtHR, 27 September 1990), paras 35-40; *Sheffield* (n 28), para 60; *X, Y, and Z v the United Kingdom* App no 21830/93 (ECtHR, 22 April 1997), paras 44 and 52.

[320] *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), paras 74-75 [*emphasis added*].

[321] Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (5th ed, Sweet & Maxwell 2015) 79-80.

UK-Coalition penitentiary facility to Iraqi authorities, without the assurance of disapplication of capital punishment, illustrated that subsequent practice of *generalized* abolition of capital punishment, among CoE States, implicitly removed "the textual limitation [of Article 2(1) ECHR] on the *scope* of evolutive interpretation of Article 3 ECHR".[322] In other words, the change in social perception of capital punishment, relative to the 1989 *Soering* case, supported by State practice in the form of uniform ratification of Protocols 6 and 12, abrogated the exception of Article 2(1) ECHR and, hence, extended the protective scope of Article 3 ECHR by qualifying capital punishment as inhuman treatment.[323] Consequently, the Convention is not a static monolith of initial consent to a particular unresponsive formulation of specific rules but a living instrument that accommodates the changing social sensitivities.[324] Connectedly, this means that the catalog of protected rights is not increased by the invention of rights, but rather the adaptation of open-ended norms necessarily implies, to accommodate social developments, a web of ancillary entitlements to the existing rights.[325]

Therefore, the scope of the ECHR has been materially expanded relative to its initial perception, specifically, by the ECtHR ascertaining implied positive obligations and employing the evolutive interpretation of the text. However, the eurosceptic stances err in contending that the Court invented new rights, whereas the ECtHR only fully *actualizes* existing rights by decoding implied claims — without which the rights cannot be exercised — while accommodating continuously morphing social conventions.

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[322] *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 2 March 2010), para 119-121 [*emphasis added*]; *Cf. Soering* (n 3) 102; *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005), paras 162-165.
[323] *Al-Saadoon* (n 36) para 120. *Cf. Siliadin* (n 19) para 148.
[324] Leach (n 32) 189-190; Eirik Bjorge, 'The Convention as a Living Instrument: Rooted in the Past, Looking to the Future' (2016) 36(7) *Human Rights Law Journal* 243, 244-248.
[325] Clayton and Tomlinson (n 14) 266 and 270-271. ; Reid (n 35) 80; The Court, itself, noted that its interpretation cannot create new substantive rights without an already existing legal basis, see *Stichting Mothers of Srebrenica v the Netherlands* (n 8) para 168; *Roche v the United Kingdom* App no 32555/96 (ECtHR, 19 October 2005), paras 119-120; *Boulois v Luxembourg* App no 37575/04 (ECtHR, 3 April 2012), para 91.

3. The Relationship between the Convention and Democracy

3.1. What is in a Name? The Conceptual Definition of Democracy

Before refuting the eurosceptic premise that the expansion of the ECHR's material scope undermines democracy, one must understand the definition of democracy. Thus, democracy is a system of government in which the *people as a whole* possess sovereign power.[326] The current European conception of democracy is rooted in notions of classical liberalism, whereby democracy exists to preserve individual liberties,[327] and civic republicanism, whereby *volonté générale* accommodates diverse interests within a society.[328] Correspondingly, contrary to the inherently majoritarian arguments of eurosceptics, democracy is not merely a "constitutional mechanism for collective decision-making",[329] nor is it merely a "system of [imposed] values",[330] but rather democracy is an apparatus of interdependent institutionalized safeguards that reconcile diverse interests and *liberties of the people as a whole*.[331] Accordingly, democracy intrinsically presupposes the *axioms* of "pluralism, tolerance, broadmindedness",[332] and embedded institutionalized *constraints* within and on itself, in the form of the rule of law, to maintain these democratic characteristics against majoritarian decisions engendered by human foibles and short-lived passions.[333] In this context, the ECHR is an institutionalized legal safeguard; an external and subsidiary mechanism constraining the exercise of State authority that has been ingrained,[334] through its deliberate ratification by

[326] Democracy derives from two Greek words: dēmos (common people) and kratos (rule); Ross Harrison, *Democracy* (Routledge 1995) 3-7; Stefan Oeter, 'Democracy – Fundamental Building- Block of the International Order?' in Daniel Erasmus Khan and others (eds), *Democracy and Sovereignty: Rethinking the Legitimacy of Public International Law* (Brill Nijhoff 2023) 1, 2-3.
[327] For a classic Lockean argument see Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) 69-81.
[328] For classical definition of civic republicanism, and crucial definition of *volonté générale,* see Jean-Jacques Rousseau, *The Social Contract Or, The Principles of Political Rights* (reprinted by G.P. Putnam's sons 1893) 22.
[329] Lord Sumption (n 6) 26:35-26:55
[330] Lord Sumption (n 6) 26:35-26:55
[331] For a supporting view see Charles Tilly, *Democracy* (1st ed, Cambridge University Press 2007) 7-10.
[332] *Dudgeon* (n 31) para 53; *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49; To ascertain the limits of such pluralism *Cf. Laskey and others v UK* App no 21627/93 (ECtHR, 19 February 1997), paras 44-45.
[333] Martin Loughlin, 'Rights, Democracy, Law' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 41, 42-46; Loughlin makes a pertinent allegory, based on pre-commitment argument, that institutional constraints are established to prevent humans from acting purely out of passion in times of weakness, similarly to Odysseus (from Homer's Odyssey) who preemptively tied himself to the mast before approaching the sirens.
[334] See Spano (n 6); ECHR (n 2) Preamble; Note this spirit in the light of the Interlaken, Brighton, and Reykjavík Declarations.

Contracting States,[335] into the fabric of national legal systems in order to maintain democratic character thereof.[336] Therefore, contrary to the eurosceptic view, insofar as liberal democracy is rooted in the protection of human liberties, the Convention, even if it temporarily limits democratic decision-making, is inherently democratic because it sustains the framework for democratic decision-making.[337] *A fortiori*, the expansion of the scope of the ECHR does not undermine democracy because the Convention is an inbuilt constraint that upholds democratic axioms of the system *a priori*.[338]

3.2. Axioms of Democracy: The Protection of Pluralism and Tolerance by the ECtHR

Notably, the Convention preserves democratic axioms of a national system by enabling the manifestation of differences in a society (i.e. pluralization) and by requiring passive acceptance thereof (i.e. tolerance) through the protection of, *inter alia*, the freedom of expression and the right to private life, under Articles 10 and 8 ECHR respectively.[339]

Illustratively, the ECtHR fortifies pluralism, that is a "genuine recognition of and respect for [societal] diversity",[340] by protecting political speech. For example, in the *Perinçek* case, which involved the prosecution of a Turkish politician for publicly denying the Armenian Genocide of 1915, the ECtHR observed that pluralism of democratic societies *demands* the protection of individual expressions, even if they "offend, shock, or disturb" and, especially, when they pertain to matters of public interest.[341] This enables individual differences to be manifested in a society and, thereby, collectively internalized as a result of the

[335] A State binding itself with a treaty (e.g. ECHR as an institutional constraint) is not undermining its (democratic) sovereignty but rather is the highest manifestation thereof, see *Case Concerning the S.S. "Wimbledon"* (Great Britain v Germany) (Merits) PCIJ Rep Series A No 1, page 25; Cambridge University, 'Votes for Prisoners? Democracy and the European Convention on Human Rights' (22 November 2012) (11:05-18:30) <https://www.youtube.com/watch?v=GuORTUCHoTw> accessed 11 November 2023.

[336] Helen Keller and Alec Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 677, 681 and 686.

[337] Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press 2013) 196-198.

[338] Conor Gearty, 'Incorporation of the European Convention on Human Rights: Some Guesses about the Future' in Frances Butler (ed), *Human Rights for the New Millennium* (Kluwer Law International 2000) 33, 38-45.

[339] See *Gorzelik and others v Poland* App no 44158/98 (ECtHR, 17 February 2004), para 88-93; *Bączkowski and others v Poland* App no 1543/06 (ECtHR, 3 May 2007), para 61-64; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013), paras 111-112.

[340] *Gorzelik* (n 53) para 92; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012), para 48.

[341] *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 196; *Oberschlick v Austria* App 11662/85 (ECtHR, 23 May 1991), para 57.

reconciliation of divergent perspectives during the process of continuous public discourse. Similarly, in the *Vajnai* case, which involved a Hungarian politician who publicly displayed the communist symbol of a red star, the ECtHR pronounced that "legal systems [that restrict individual] human rights to satisfy the *dictates of public feeling* [do not pursue] pressing social needs recognized in a democratic society".[342] In other words, the existence of the Convention un-relativizes the legal possibility of expressing differences and, hence, refutes the majoritarian conception of democracy in favor of a liberal republican model of inbuilt constraints that, through vindicating individual human rights, protect democracies *a priori*.[343] Consequently, the ECtHR protects expressions of divergent views, however unconventional, by prohibiting their conditionality on the permission of the majority.[344] Otherwise, this would de-pluralize the public discourse by disenfranchising minorities, a component of *the people as a whole*,[345] and would do a "disservice" to democracy.[346] Therefore, there is no democracy without genuine pluralism, which the Convention protects.[347]

As a corollary to pluralism, the Convention requires tolerance of divergent views, insofar as they respect democratic axioms,[348] to sustain the democratic framework of States.[349] Notably, the ECtHR pronounced that while homosexual conduct,[350] the process of transsexual transition,[351] or manifestation of religious convictions may be contrary to prevailing social mores, qualified tolerance thereof

[342] *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008), para 57 [*emphasis added*]; *Bayev and others v Russia* App no 67667/09 (ECtHR, 20 June 2017), para 68-70.
[343] *Cf*. Loughlin (n 47) 41-47.
[344] *Bayev* (n 56), paras 69-71; *Barankevich v Russia* App no 10519/03 (ECtHR, 26 July 2007), para 30-31.
[345] Upendra Baxi, 'Politics of Reading Human Rights: Inclusion and Exclusion within the Production of Human Rights' in Saladin Meckled-García and Başak Çali (eds), *The legalization of Human Rights: Multidisciplinary perspectives on human rights and human rights law* (Routledge: Taylor and Francis 2006) 182, 183.
[346] Reid (n 35) 73-74; By analogy, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* App no 29221/95 (ECtHR, 2 October 2001), para 97.
[347] *Refah Partisi (the Welfare Party) and Others v Turkey* App no 41340/98 (ECtHR, 13 February 2003), para 89.
[348] Nonetheless, certain permutations of pluralism, such as the systemic negation of Holocaust or the endorsement of national socialist policies, endanger the very existence of democratic pluralism through the rights, ironically, available as a result of the existence of democratic pluralism in the first place. Therefore, the ECHR protects only iterations of pluralism that do not seek to destroy the rights of others and underlying values enshrined in the Convention, as highlighted by article 17 ECHR. As a corollary, iterations of pluralism that eliminate "the harmonious interaction of persons with varied identities" and that impair the possibility of "living together" in a democratic society, must be limited insofar they are incompatible with the values underlying democracy itself. That is, pluralism that refutes pluralism cannot be conceived as democratic and, hence, worth protection. See, *Bączkowski* (n 44) para 62. *Refah Partisi* (n 61) para 99 ; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 122; *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998), paras 47-53. ; *Garaudy v France* App no 65831/01 (ECtHR, 24 June 2003), pages 22-23; *M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015), paras 32-33.
[349] *Eweida and others* App no 48420/10 (ECtHR, 15 January 2013), para 94.
[350] *Dudgeon* (n 31) para
[351] *Goodwin* (n 34) para 91.

is demanded by the very existence of democracy.[352] Illustratively, in the *Alekseyev* case, which involved persistent refusals of demonstration permits to Moscovite LGBTQ activists, the ECtHR held that while "individual interests must on occasion be subordinated to those of a group",[353] democracy connotes a continuous search for balance between individual and collective — minority and majority — interests and does not entail a majoritarian dictate.[354] Thus, the need to tolerate minorities, as vindicated by the Court, requires respecting their interests in the decision-making process and in the functioning of the society; this being a precondition for the existence of democracies, not limitation thereof.[355] The lack of such respect is illustrated by the *Fedotova* case, in which Russian legislation prohibiting legal protection of homosexual partnerships embodied a "predisposed bias of the heterosexual majority" and reinforced prejudice against the homosexual minority in contravention of the "notion of [rudimentary] tolerance inherent in a democratic society".[356] Consequently, a majoritarian dictate that does not tolerate minorities' rights is undemocratic *a priori*. These cases illustrate that, by protecting political speech and minority rights, the Court requires pluralism and tolerance thereof, thereby safeguarding these democratic axioms against majoritarian passions.[357]

3.3. An Inbuilt Constraint of Democracy: The Vindication of the Rule of Law by the ECtHR

Democracy, as outlined by the CoE Statute,[358] implies the existence of the rule of law, encapsulated in implicit legal safeguards, such as independent judiciary or procedural soundness of decision-making processes, that constrain the exercise of State authority in the short-term, even by democratic legislatures,[359] to sustain the democratic character of national systems in the long-term.[360] The significance of judicial independence, for maintaining the integrity of judicial review of State actions, was illustrated by the *Assanidze* case, which pertained to a parliamentary committee ordering the Georgian Supreme Court to reopen pardon-related proceedings.[361] Accordingly, the ECtHR protected the separation of powers, an

[352] *Bayev* (n 56) paras 65-70.
[353] *Alekseyev v Russia* App no 4916/07 (ECtHR, 21 October 2010), para 70.
[354] *Rees* (n 33) para 37; *Young, James and Webster* App no 7601/76 (ECtHR, 13 August 1981), para 63.
[355] *Alekseyev v Russia* App no 4916/07 (ECtHR, 21 October 2010), para 80-85.
[356] *Fedotova v Russia* App no 40792/10 (ECtHR, 13 July 2021) para 222.
[357] *Kjeldsen, Busk Madsen and Pedersen v Denmark* App no *5095/71* (ECtHR, 7 December 1976), para 53.
[358] Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) 87 UNTS 103, Preamble and Article 3.
[359] *Hirst v the United Kingdom (No. 2)* App no 74025/01 (ECtHR, 6 October 2005), para 79-82.
[360] Lautenbach (n 51) 198-200.
[361] *Assanidze* (n 15) paras 128-130; *Cf. Golder* (n 23) paras 34-35.

implicit rule of law safeguard mechanism, by pronouncing that no "non-judicial authority, no matter how legitimate, [can] interfere in court proceedings" without contravening the rule of law.[362] Otherwise, the legality of State actions, including the proper observance of human rights, could not be verified and, connectedly, the democratic character of the system could be eroded.[363] This reasoning is supported by the *Ástráðsson* case, concerning the arbitrary appointment of judges by the Icelandic Minister of Justice, whereby the rule of law, an inbuilt constraint of democracy that necessitates the separation of powers, was breached because the possibility of the independent judicial review of the correctness of the State's enforcement of the law was compromised.[364] Moreover, the ECtHR stipulated that the rule of law requires procedural soundness of executive decisions to avoid the arbitrary exercise of State power.[365] Illustratively, in the *Lashmankin* case, concerning a blanket ban on demonstrations in the vicinity of Russian courthouses, the ECtHR held that legal rules "granting unfettered power" to the executive would be contrary to the rule of law,[366] specifically, because the law's application would be unpredictable and incapable of being reviewed for its legality by the judiciary.[367] In other words, the discretion enjoyed by the State in performing its functions cannot be unlimited because, otherwise, State actions would transcend the framework of the rule of law presupposed by liberal democracies (*rechtsstaat*). Therefore, in protecting judicial independence and procedural safeguards of decisions, the ECtHR ensures a rule of law framework within which the protection of democratic axioms, including human rights, is ensured.[368]

Consequently, contrary to eurosceptic contentions, the protection that the ECtHR affords to *pluralism*, by enabling the manifestation of social differences through political speech, and to *tolerance*, by protecting minorities, fosters democracy *insofar as* the ECtHR is an inbuilt rule of law mechanism that preserves

[362] *Assanidze* (n 15) para 129.
[363] Derry Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' in Frances Butler (ed), *Human Rights for the New Millennium* (Kluwer Law International 2000) 1, 17-18 and 20.
[364] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020), paras 239-240 and 283; *Cf. Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018), para 63.
[365] *Winterwerp v the Netherlands* App no 6301/73 (ECtHR, 24 October 1979), para 39.
[366] *Lashmankin and others v Russia* App no 57818/09 (ECtHR, 7 February 2017), paras 410-411; For further examples see *Big Brother Watch and Others v the United Kingdom* App no 58170/13 (ECtHR, 25 May 2021), paras 252, 332, and 425; *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015), paras 228-230.
[367] *Klass and others v Germany* App no 5029/71 (ECtHR, 6 September 1978), para 55.
[368] Jeffrey Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 61, 78.

the democratic character of national systems by enabling, but simultaneously regulating,[369] individual differences within the respective societies.

4. Concluding Remarks

Ultimately, while the material scope of the Convention has been expanded by the ECtHR, relative to its initial perception, the eurosceptic stance errs in the classification of this development as an illegitimate "invention of novel rights",[370] whereas this progression should be construed as the ECtHR fully actualizing the existing Convention rights by rendering them effective in the light of contemporary social developments. Moreover, many populists fundamentally misconstrue the concept of democracy as a mere instrument for political decision-making rather than a mechanism of interdependent institutions that accommodate individual liberties through inbuilt safeguards. A view akin to the majoritarian republicanism of the 19th century, rather than the modern view of democratic needs that emerged from the ashes of the Second World War.[371] Accordingly, the ECtHR's extensive protection of democratic axioms, such as pluralism, tolerance, and the rule of law, serves as an inbuilt subsidiary mechanism – an external *sentinel* – constraining the exercise of State authority to maintain the democratic character of the society *a priori*, and not to undermine it. In a visual metaphor, advocating for withdrawal from the ECHR, without offering an equivalent alternative that could serve as an inbuilt legal safeguard of democracy, amounts to removing brakes from a moving car, thereby permitting, inevitably, the occurrence of a fatal accident motivated by a short-lived passion.

[369] For democratic axioms to function properly they must be protected, but also regulated in compliance with their *raison d'etre*, hence, the improper exercise of axioms undermines them and must be restricted see *S.A.S.* (n 62) para 122; *Refah Partisi* (n 61) paras 99, 102-103, and 123; *Ždanoka v Latvia* App no 58278/00 (ECtHR, 16 March 2006), paras 98-101.
[370] Lord Sumption (n 6) 13:30-14:30.
[371] Spano (n 6).

LUCIJA LUBINA[372]

The Price of Desperation: Human Trafficking and Prostitution

Abstract: Human trafficking is one of the most profitable criminal operations, second only to drug and weapon trafficking. It includes forced or illegal transportation of people for exploitation and continues to be a serious and pervasive problem in the twenty-first century. This study's main goal is to examine the complex system that underlies the phenomena of human trafficking and clarify how it connects with prostitution. Additionally, the idea is to prove that the legalisation of the use of prostitution is associated with an increase in the prevalence of human trafficking while also undertaking an extensive examination of relevant countries' policies and case law.

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1. Introduction

Human trafficking is one of the most profitable criminal operations, second only to drug and weapon trafficking. It includes forced or illegal transportation of people for exploitation and continues to be a serious and pervasive problem in the twenty-first century. The victims, who often happen to be women and children, go through horrific anguish, putting into question the ideals of equality and freedom upheld by modern governments. Victims are drawn into this dark realm through deception, which strips them of their rights and authority. One example is prostitution, as it leaves its victims completely powerless and in an overpowered position. Socio-economic variables influence how vulnerable a person is and considerably influence their decision-making when it comes to obtaining financial resources. [373] This study's main goal is to examine the complex system that underlies the phenomena of human trafficking and clarify how it connects with prostitution. Additionally, the idea is to prove that the legalisation of the use of prostitution is associated with an increase in the prevalence of human trafficking while also undertaking an extensive examination of relevant countries' policies and case law.

2. Pros and Cons of Legalised Prostitution

To begin with, legalising the use of prostitution often leads the prostitute market to grow in scope or size. Correspondingly, this suggests that the sex industry may be expanding generally, with the market's size growing, more people, even outsiders, may get interested in the sector.[374] According to this, it gives more opportunities for human traffickers to exploit individuals for remuneration. As an example, in the infamous *Sneep case*,[375] a number of women travelled to Amsterdam with a group of German pimps. Over time, they had the majority of the neighbourhood. Eventually, a great deal of women—the majority being related to the pimps—came to work for this group as prostitutes, giving up a large amount of their wages in the process. The idea that human trafficking may affect sex workers,

[373] L. Edlund and E. Korn, 'A Theory of Prostitution' (2002) 110(1) *Journal of Political Economy* 181, 181.
[374] S. Cho and others, 'Does Legalized Prostitution Increase Human Trafficking?' (2013) 41(1) *World Development* 67, 82.
[375] I. Schepers, 'Operation Sneep:"The Frayed Edges of Licensed Prostitution"' (2011) National Public Prosecutors' Office Rotterdam, available at: <https://www.osce.org/files/f/documents/c/3/84652.pdf> accessed 17 May 2024.

as well as women in close relationships with their procurers, is difficult for some people to comprehend.[376] However, the *Sneep case* provides a clear example of how certain pimps use personal relationships and family networks in addition to brutal force to control their victims. Moreover, cited from the Prosecutor's Office: "Victims were dehumanised and degenerated into mere production factors."[377] The case served as an example of how prostitution that has been legalised may nevertheless harbour sex trafficking.

Another argument in favour of this assumption may be found in Sweden's and Croatia's differing policies, as shown in the Global Slavery Index. The Index provided a comprehensive explanation of contemporary forms of slavery, including forced work, debt bondage, forced marriage, and human trafficking. Article 3(a) of the Trafficking in Persons Protocol, which defines human trafficking according to the United Nations, was used.[378] It states: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation (...)."[379] Although the sale of sexual services is lawful in Sweden,[380] acquiring them is prohibited and punishable by law. In Croatia, however, the sale itself is unlawful, with no repercussions for buyers. When the respective index scores are compared, a notable disparity appears, with Sweden scoring a low 0.6 compared to Croatia's dramatically higher total of 5.2. This would then, in turn, be an explanation of why human trafficking is a much bigger problem in Croatia than it is in Sweden. The clash of these opposing policy frameworks emphasises how the complex interplay of legal measures, socio-cultural dynamics, and enforcement mechanisms can significantly influence the prevalence of such societal issues, demonstrating the critical importance of well-crafted policies in addressing this persistent global challenge.

On the other hand, some say that legalising prostitution is beneficial since it allows authorities to institute control and monitoring inside this industry. According to this viewpoint, such regulatory measures can improve sex workers' access to health care, as demonstrated by the Dutch prostitution policy. Nevertheless, it

[376] W. Huisman and E. R. Kleemans, 'The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands' (2014) 61(1) *Crime, Law and Social Change* 215, 215.
[377] Schepers (no 4).
[378] The Global Slavery Index 2023 Report, 194.
[379] UN Trafficking in Persons Protocol, Article 3(a).
[380] N. Vuolajärvi, 'Criminalising the Sex Buyer: Experiences from the Nordic Region' (2022) *Women, Peace and Security LSE* 7, 7.

becomes apparent that while the notion behind this approach may be sound, the practical execution often falls short of the desired outcomes. Human trafficking persists even when prostitution is legalised, as proven by the *Sneep case*, where two procurers, along with 30 accomplices, were sentenced for their involvement in the exploitation and violence against over 100 women.[381] A parallel incident took place in Australia. Sometimes, attempts to reduce the market for prostitution by legalising it—as Australia's experience has shown—have inadvertently increased the demand for these services. Two Thai women in 2004-2005 arrived in Australia to do sex work; however, they were coerced into the trade by a man known as *Chang*, who threatened to expose explicit photos of them if they tried to escape. They worked long hours in Sydney brothels, with their earnings going towards a supposed $45,000 debt.[382] This result, which is counterinitiative to the original plan, highlights how complex and multidimensional the problem is.

3. Causality between Prostitution and Human Trafficking

Furthermore, some think that the distinction between correlation and causality should be emphasised. While there may be a statistical link between legalised prostitution and an increase in human trafficking, this does not always imply causality. In order to debunk this viewpoint, it is essential to recognise the complexity of human trafficking, which has numerous contributing variables. Analysing the countries that have implemented similar laws directly is a more persuasive way to evaluate the effectiveness of these legislative measures. Consistently, whenever a country legalises prostitution, human trafficking increases. This example can be found in the Netherlands; ever since they legalised prostitution in 2000, the number of human trafficking victims has been steadily increasing, reaching nearly 1,000 in 2010, and according to some data, the annual count of victims ranges from 1,000 to 7,000, with many brothels closed due to suspected criminal activity in recent years.[383] Using Sweden as a positive example,

[381] W. Huisman and ER Kleemans (no 5).
[382] A. L. A. Baxter and N. Chazal, 'It's About Survival: Court Constructions of Socio-Economic Constraints on Women Offenders in Australian Human Trafficking for Sexual Exploitation Cases' (2022) 18 *Anti-Trafficking Review* 121, 121.
[383] Š. Matak and A. Vargek, 'Trgovanje ljudima u svrhu seksualnog iskorištavanja – utječe li legalizacija prostitucije na smanjenje trgovanja ljudima?' (2012) 46(92) *Pravnik* 59, 59.

where the use of prostitution is illegal, we can see a low number of modern slavery cases, which would imply that their strategy was successful in addressing the issue.

4. Conclusion

In conclusion, the data in this study provides credence to the claim that, despite some possible benefits, legalising prostitution does not always have the desired effect. Instead, it may make the issue of human trafficking worse. Sweden's policy, which forbids the use of prostitution, is a notable illustration of how to decrease the level of human trafficking in a country. Therefore, combating human trafficking requires a sophisticated comprehension of the complex dynamics involved, as well as the adoption of laws that prohibit the use of prostitution rather than legalising it.

NIKOL MIHOVA[384]

Exploring Innovation Facilitation in Fintech: Regulatory Sandboxes and Their Implications for Technological Development, Consumer Protection, and Civil Liability

ABSTRACT: The academic paper explores the phenomenon of regulatory sandboxes in the financial technology (fintech) industry. Sandboxes are testing environments adopted by oversight bodies that allow for the launch of experimental products or services that are not yet fully compliant with existing legal frameworks in a limited part of the market and for a limited period. This creates opportunities for collaboration between private actors and public bodies, providing unique benefits for both sides. Regulators gain valuable insight into the rapidly developing industry, understanding its needs and inherent risks, thus ensuring regulation evolves to allow growth while safeguarding vulnerable actors. Fintech businesses receive guidance on compliance, helping them navigate the industry and reducing legal and enforcement costs. The paper explores the mechanics of regulatory sandboxes and discusses the advantages and concerns of their wider implementation. It identifies areas needing more constructive regulation, such as consumer protection and civil liability, to balance competing regulatory objectives. Lastly, the paper identifies relevant areas for further research, like comparing the effectiveness of regulatory sandboxes to other innovation-facilitating facilities such as innovation hubs or accelerators.

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I. Introduction

High regulatory standards are blamed by many financial technology (fintech) entrepreneurs as a primary hurdle for innovation and industry growth.[385] The reason is that stringent requirements demand serious investments of both time and economic resources by firms to ensure compliance, which may preclude or delay the launch of new technology that has the potential to benefit millions of consumers. While adopting tech entrepreneurs' position and blaming oversight authorities for stagnating growth is tempting, it is important to consider the rationale behind exercising governmental control and supervision in the financial sector. The complexity of this field, its central role on a micro- and macroeconomic level, and the magnitude of the economic and societal damage in the events of failure caused by systemic risk-taking (exemplified by the global financial crisis in 2007-2008) are all sound justifications for regulatory intervention.[386] Such intervention is necessary for the sake of consumer protection, market stability, and long-term growth. To effectively balance innovation-led economic development with competing policy objectives, regulators worldwide have adopted various approaches, including risk-based and principles-based regulation.[387] In recent years, a variety of structures have also emerged to ensure the cooperation between various public and private stakeholders in the fintech field. Examples are innovation hubs, accelerators, and regulatory sandboxes,[388] with the latter being the primary focus of this academic paper.

Regulatory sandboxes are supervised environments in which enterprises are allowed to conduct real-life testing of innovative products and services for a limited period of time with the guidance of regulators and without being subject to the entirety of the strict governance framework.[389] They are mostly associated with the financial technology (fintech) industry due to the rapid innovation in this sector like digital and cryptocurrencies, blockchain, and artificial intelligence.[390] Sandboxes are a considerably recent phenomenon, with the first one being implemented in 2016 in the United Kingdom by the Financial Conduct Authority (FCA).[391] Since then, they have been introduced in more than fifty jurisdictions

[385] Laura Zoboli and Cristina Poncibo, 'Sandboxes and Consumer Protection: The European Perspective' (2020) 8 *International Journal on Consumer Law and Practice* 1, 2.
[386] Emilios Avgouleas, 'Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy' (2009) 9 *Journal of Corporate Law Studies* 23, 55.
[387] Alexis Collomb, Primavera Filippi and Klara Sok, 'Blockchain Technology and Financial Regulation: A Risk-Based Approach to the Regulation of ICOs' (2019) 10 *European Journal of Risk Regulation* 263, 263.
[388] Ross Buckley, Douglas Arner, Robin Veidt and Dirk Zetzsche, 'Building Fintech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond' (2020) 61 *Washington University Journal of Law & Policy* 55, 57.
[389] David Srier and Oliver Goodenough, *Global Fintech: Financial Innovation in the Connected World* (MIT Press 2022) 204.
[390] Maximilian Palmie, Joakim Wincent, Vinit Parida, Umur Caglar, 'The Evolution of the Financial Technology Ecosystem: An Introduction and Agenda for Future Research on Disruptive Innovations in Ecosystems' (2020) 151 *Technological Forecasting & Social Change* 1, 4-6.
[391] Hilary Allen, 'Regulatory Sandboxes' (2019) 87 *George Washington Law Review* 579, 580.

globally.[392] Sandboxes' speculated potential to stimulate innovation and economic growth, which comes at the expense of significant governmental resources, prompts a thorough examination of their mechanics.[393] Being a novel phenomenon, they have not yet been extensively investigated in academic literature. With the overarching aim of providing a comprehensive overview, this academic paper will thus explore the functioning of regulatory sandboxes and try to elucidate both potential advantages and concerns associated with their implementation. To do so, the research question that the paper would try to answer is:

How are regulatory sandboxes designed to facilitate innovation in the fintech industry and what are observable benefits and legitimate considerations associated with their implementation?

It is self-evident that this research inquiry integrates two distinct legal questions – in the author's view this is necessitated by the correlation between them, which demands joint consideration. The in-depth analysis of the functioning of regulatory sandboxes forms the cornerstone for the subsequent discussion of the balance struck between their positive implications for innovation and the potential concerns for consumer protection, market stability, and cost efficiency. To answer the research question, the article will adopt a descriptive and analytical legal research approach, while focusing on exploring secondary sources like academic literature and regulatory guidelines and reports. These methods are employed in outlining the characteristics of regulatory sandboxes, the rationale for their development, and possible implications.

II. The Mechanics of Regulatory Sandboxes

Regulatory sandboxes are usually initiated by a country's executive branch acting together with a monetary or regulatory body.[394] To participate in the experimental regime, a fintech company must meet a series of conditions. To ensure fairness and transparency, the entry criteria are both uniform and public.[395] Some of the most common ones include demonstrating that the company meaningfully contributes to the financial sector, that it provides truly innovative products and services, and that it benefits end consumers.[396] The type of consumers, which a product or service affects, may also play a role in the eligibility of a firm.[397] Usually, regulators

[392] Buckley (n 4) 57.
[393] Igor Ponkin, Vasily Kupriyanovsky and Dmitry Ponkin, 'Fintech, Regtech and Regulatory Sandboxes: Concept, Digital Ontology, Perspectives' (2020) 16 *Современные информационные технологии и IT-образование* 224, 226.
[394] Ahmad Alaassar, Anne-Laure Mention and Tor Helge Aas, 'Exploring How Social Interactions Influence Regulators and Innovators: The Case of Regulatory Sandboxes' (2020) 160 *Technological Forecasting & Social Change* 120257, 120259.
[395] Dirk Zetzsche, Ross Buckley, Janos Barberis, Douglas Arner, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) 23 *Fordham Journal of Corporate and Financial Law* 31, 45-46.
[396] Buckley (n 4) 61-62.
[397] *ibid* 67.

have a preference for monitoring innovation that primarily impacts retail consumers. This is because they are considered the most vulnerable stakeholders in the financial sector due to information and expertise asymmetries.[398] Thus, innovation directly concerning them enjoys regulatory priority. Closely observing such fintech firms allows regulators to detect misconduct or systemic risks that can undermine consumer confidence in financial markets and thus affect market integrity. The types of entities allowed to participate in sandboxes vary per country – in the United Kingdom, both fintech startups and authorised financial institutions are permitted to participate, while in the Netherlands, only the former group may join the regimes.[399] An additional characteristic of sandboxes is that firms can benefit from regulatory concessions and guidance only for a limited time. While this period varies between jurisdictions, it usually lies within the range of 6 and 24 months.[400] Lastly, such experimental regimes are extremely resource-intensive – the World Bank has estimated the operational costs to vary between $25,000 and $1 million, which is a very high budget to dedicate to monitoring a sole industry.[401] Besides an economic investment, sandboxes require a human capital investment – for instance, the United Kingdom's Financial Conduct Authority (FCA) employs about 100 people to supervise and guide its regulatory sandbox in the fintech field.[402] Therefore, while there is usually no official limit on the number of eligible companies, in actuality the participants are only a few due to budget constraints.[403] For example, since August 2021, FCA's sandbox has in total approved only 22 fintech firms.[404] Given that the overall quantity of such businesses in the UK is 3,168 (data from March 2024),[405] the sandbox has enabled a mere 0.69% of the industry to benefit from regulatory guidance delivered through this specific facility for the past 3 years.

Once a firm has passed through the application stage and has been approved to participate in the sandbox, it progresses through three subsequent stages: a

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[398] George Benston, 'Consumer Protection as Justification for Regulating Financial-Services Firms and Products' (2000) 17 *Journal of Financial Services Research* 277, 278-282.
[399] *ibid* 66.
[400] *ibid* 68.
[401] World Bank's Finance, Competitiveness & Innovation Global Practice, *Global Experiences from Regulatory Sandboxes* (2020) 20 <http://documents1.worldbank.org/curated/en/912001605241080935/pdf/Global-Experiences-from-Regulatory-Sandboxes.pdf > accessed 12 March 2024; Sharmista Appaya and Ivo Jeník, 'Running a Sandbox May Cost Over $1M, Survey Shows' (*CGAP*, 1 August 2019) <https://www.cgap.org/blog/running-sandbox-may-cost-over-1m-survey-shows > accessed 15 March 2024.
[402] *ibid*.
[403] European Securities and Markets Authority, *Joint ESAs Report on Innovation Facilitators 2023* (11 December 2023) 32 <https://www.esma.europa.eu/sites/default/files/2023-12/ESA_2023_27_Joint_ESAs_Report_on_Innovation_Facilitators_2023.pdf > accessed 1 April 2024.
[404] Financial Conduct Authority, 'Regulatory Sandbox accepted firms' (*Financial Conduct Authority*, 15 January 2024) <https://www.fca.org.uk/firms/innovation/regulatory-sandbox/accepted-firms> accessed 28 March 2024.
[405] Statista Research Department, 'Number of fintechs in the UK 2012-2024' (*Statista*, 4 March 2024) <https://www.statista.com/statistics/1453770/uk-number-of-fintechs/> accessed 4 April 2024.

preparation phase, a testing phase, and an evaluation and exit phase.[406] In the preparation period, the conditions for testing are established and the regulatory authority imposes any limitations or restrictions it considers necessary to safeguard consumers or other affected parties.[407] Besides restrictions, the public agency also establishes the concessions from which the fintech business can benefit during its participation in the sandbox. These concessions are generally granted in the form of safe harbour provisions, which prevent or at least reduce liability to which a firm may be exposed.[408] This effectively shields participants from enforcement action from public institutions but is not considered to extend to provide immunity from civil liability.[409] This means that sandbox participants may still be liable to consumers for various misconduct such as fraud, misrepresentation, damage, etc. Additionally, during the preparation phase, the fintech firm needs to apply for relevant licences if it intends to conduct regulated activities.[410] The company then proceeds to test its innovative products or services under close monitoring from various governmental bodies. In the last stage, upon the expiration of the set time period, the results from the testing stage are inspected.[411] The regulatory body can then either withdraw the given operating licence in the event of a negative evaluation or lift the imposed constraints, allowing the firm to proceed with the launch of its technology on the open market without restrictions.[412]

III. Rationale for Regulatory Sandboxes and Existing Consideration

A. Regulatory Rationale

The rationale for the growing popularity of sandboxes is connected to the swift development of the fintech field and the significant increase in market participants.[413] In the past two decades, the industry has witnessed the emergence of cryptocurrencies, blockchain technologies, electronic payment, crowdfunding, electronic money, biometric authentication, and many more.[414] This has posed an ever-present challenge for regulators to understand the sector and for regulation

[406] European Securities and Markets Authority, *Joint ESA report on Regulatory sandboxes and innovation hubs* (2018) 22 <https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf> accessed 4 May 2024.
[407] World Bank Group, *How to Build a Regulatory Sandbox: A Practical Guide for Policy Makers* (September 2020) 29-30 <http://documents1.worldbank.org/curated/en/126281625136122935/pdf/How-to-Build-a-Regulatory-Sandbox-A-Practical-Guide-for-Policy-Makers.pdf > accessed 16 April 2024.
[408] Ross Buckley (n 4) 83.
[409] Dirk Zetzsche (n 11) 87.
[410] World Bank Group (n 23).
[411] *ibid* 30.
[412] *ibid* 31.
[413] Hilary Allen (n 7) 631.
[414] Ivo Jeník, Schan Duff and Sean de Montfort, 'Do Regulatory Sandboxes Impact Financial Inclusion? A Look at the Data' (*CGAP*, 30 April 2019) <https://www.cgap.org/blog/do-regulatory-sandboxes-impact-financial-inclusion-look-data> accessed 30 April 2024.

to evolve so that it remains relevant and does not prevent growth.[415] In light of that, regulatory sandboxes present a unique opportunity for collaboration between fintech players and regulators, benefiting both sides. On the one hand, oversight bodies are enabled to closely observe the functioning of a new product or service and gain insight into its practical risks and actual performance in a given market.[416] This allows them to understand the field better and appropriately adjust regulatory barriers in order to concurrently encourage technological advancement and shield vulnerable actors from possible negative consequences.[417] Furthermore, reducing governance burdens when plausible, has the potential to lower market entry barriers, thereby encouraging competition and further innovation in the sector.[418] On the other hand, sandboxes are also favourable for fintech firms as they receive extensive and costless guidance from regulators regarding the relevant standards they must uphold to ensure compliance.[419] In light of the complexity of navigating regulatory expectations in this industry, such guidance undoubtedly reduces legal costs and assists firms in avoiding enforcement action in the future. Furthermore, as sandboxes constitute a fast track for getting approval to access the market, the process of launching given technology is expedited, which is an additional benefit for participating enterprises.[420] Last but not least, on a more general level, adopting regulatory sandboxes serves to promote a jurisdiction as innovation-friendly. This has the effect of attracting more fintech enterprises contributing to both technology-led economic development and tax revenues.[421]

B. Implemented Safeguards

Despite these numerous positives, the adoption of such controlled testing environments nevertheless raises a variety of concerns regarding their effectiveness and appropriateness. As was already hinted at, the adoption of regulatory sandboxes comes at high costs as it demands extensive human and economic capital to ensure effective supervision, guidance, and evaluation.[422] Due to the imperative for significant resource investment, they usually operate on a smaller scale, involving a limited number of enterprises.[423] This naturally means that their overall effect on the industry may be marginal, especially in jurisdictions where governmental resources are scarcer. Additional concerns pertain to the possibility of regulatory arbitrage due to the selective participation in sandboxes.[424] This means that some firms may be driven to participate for reasons of exploiting

[415] Ahmad Alaassar (n 10) 120260-120262.
[416] David Srier and Oliver Goodenough (n 5) 205.
[417] *ibid*.
[418] Jacob Sherkow, 'Regulatory Sandboxes and the Public Health' (2022) *Regulatory Sandboxes and the Public Health* 357, 362.
[419] Joshua Durham, 'Regulatory Sandboxes Enable Pragmatic Blockchain Regulation' (2023) 18 *Washington Journal of Law, Technology & Arts* 27, 50.
[420] Ross Buckley (n 4) 77.
[421] *ibid*.
[422] *ibid* 207.
[423] Dirk Zetzsche (n 11) 91.
[424] Hilary Allen (n 7) 609.

regulatory leniency to gain an unfair market advantage.[425] Arguably the most paramount consideration regarding such experimental regimes pertains to consumer protection.[426] As regulatory sandboxes allow for the real-life testing of innovation that is not yet compliant with the relevant governmental frameworks, there is a material risk of product or service failure, misrepresentation, tort, or many other types of misconduct.[427] This naturally raises numerous questions regarding the protection of both consumers and third parties, as well as the adequacy of the remedies available to them in case the previously described scenarios indeed occur. To address these concerns, regulatory authorities do not exempt firms from the entirety of the applicable standards and choose to enforce critical aspects of financial regulation to safeguard vulnerable stakeholders. A survey conducted in 2019 by the World Bank and CGAP, taking into account data from 12 regulatory sandboxes globally, looked at the most common safeguards relied on by governance bodies.[428] Almost 80% of sandboxes were found to still provide for the applicability of disclosure requirements to fintech firms. Thus, they demand that businesses communicate their participation in the experimental regimes and their lack of a full licence to their customers and other relevant agencies such as data or consumer protection authorities.[429] This informs consumers of the risks involved in engaging with such products or services, thereby helping them make more informed decisions.[430] Involving other agencies also provides for additional monitoring over the testing period, foreseeing a prompt intervention if issues arise. Another common measure that almost 70% of sandboxes were found to enforce is a limit on the number of clients that may adopt the experimental service.[431] This has the potential to ensure the provided quality, increase accountability, and mitigate the damage in the event of an unfortunate outcome from the testing stage. The survey established four other measures equal in prevalence (slightly above 40%):[432] restrictions on the volume of transactions a firm may engage in, as well as on the volume of funding provided by customers; applicability of anti-money laundering (AML) and countering the financing of terrorism (CFT) rules; and a mandatory establishment of a complaints mechanism. These measures aim to mitigate the risks to the overall stability and efficiency of the financial markets while safeguarding consumers accordingly. Notably, less than 20% of the surveyed sandboxes imposed minimum capital requirements on the eligible companies.[433] Such requirements are one of the

[425] Elizabeth Pollman, 'Tech, Regulatory Arbitrage, and Limits' (2019) 20(3) *European Business Organization Law Review* 567, 587.
[426] Hilary Allen (n 7) 611.
[427] Laura Zoboli (n 1) 17-19; Brian Knight and Trace Mitchell, 'The Sandbox Paradox: Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege' (2020)72 *South Carolina Law Review* 445, 460-470.
[428] World Bank (n 17) 25.
[429] European Securities and Markets Authority (n 19) 24.
[430] Niamh Moloney, *The Oxford Handbook of Financial Regulation* (OUP 2015) 511-516.
[431] World Bank (n 17) 25.
[432] *ibid.*
[433] *ibid*; James Chen, 'Capital Requirements: Definition and Examples' (*Investopedia*, 31 October 2023) <https://www.investopedia.com/terms/c/capitalrequirement.asp> accessed 30 April 2024; MED

primary tools of prudential regulation, which aims to ensure actors in financial markets are prevented from engaging in too-risky operations and are prepared to meet unexpected losses or shocks.[434] While the choice not to apply them is likely motivated by the desire to promote innovation and to be more inclusive, a manifestation of the previously mentioned concerns is possible and necessitates a diligent balancing of objectives by regulators.

C. The matter of liability

Despite the implementation of these safeguards, misconduct or harm may still occur in light of the experimental nature of the products and services under consideration, which prompts an investigation into the question of liability. As was previously mentioned, safe harbour provisions have the effect of exempting fintech companies from enforcement action from regulators such as sanctions, injunctions, etc.[435] However, they are not viewed as granting immunity from civil litigation initiated by affected consumers.[436] In the event of a civil liability claim, confusion can naturally arise in the process of establishing responsibility due to the very nature of such testing environments. For example, uncertainty may be caused if damages occur as a result of a failure of the company to meet a certain regulatory standard, even though it was legitimately exempted from this standard through its participation in the sandbox. Guidance on such questions is unfortunately not yet provided by regulators in the context of the fintech industry. However, sandboxes launched in other technology-related fields have demonstrated a tendency to treat participating firms as fully exposed to civil liability claims. For example, in Germany, an experimental environment in the field of robotics went as far as demanding firms to demonstrate a liability insurance contract during the application stage in order to prove their preparedness to render compensation in the event of civil liability.[437] It is plausible that such a condition may in the future be adopted in the context of fintech sandboxes. However, its feasibility should be carefully examined by future research. A central question in this exploration should be the actual availability of insurers willing to undertake the significant risk of financially backing an experimental service and how this availability may impact the access of fintech startups to regulatory sandboxes. This question is particularly relevant due to the complexity of calculating the potential hazards by insurers and the fact that liability claims in the financial industry are often for substantial amounts.

MSMEs, *Guide for Launching Regulatory Sandboxes for Innovative Finance* (September 2020) 22 <https://south.euneighbours.eu/publication/med-msmes-guide-launching-regulatory-sandboxes-innovative-finance/ > accessed 29 April 2024.

[434] James Chen (n 49).

[435] Willie Almack, 'Fostering Responsible Innovation in Fintech' (2023) 56 *Loyola of Los Angeles Law Review* 227, 250.

[436] Dirk Zetzsche (n 11) 87.

[437] Federal Ministry for Economic Affairs and Energy, *Making space for innovation: The handbook for regulatory sandboxes* (1 July 2019) 46 <https://www.bmwk.de/Redaktion/EN/Publikationen/Digitale-Welt/handbook-regulatory-sandboxes.html > accessed 1 May 2024.

IV. Conclusion

In conclusion, regulatory sandboxes have emerged as a unique phenomenon within the financial technology industry, aiming to foster innovation and economic growth. While their implementation presents a variety of opportunities for collaboration between private actors and public agencies, it also prompts inquiries into their effectiveness and impact due to their resource intensiveness. The enforcement of some crucial aspects of financial regulation such as disclosure requirements, quantitative limits, and AML/ CFT provisions is utilised by regulatory authorities globally in order to safeguard consumers from harm, prevent regulatory arbitrage, and ensure market stability.[438] However, due to the very nature of the tested products and lack of uniform application of the listed safeguards, concerns regarding consumer protection and abuse of governance leniency remain valid and harm may nevertheless arise.[439] This necessitates a closer look at the extent of civil liability to which companies are exposed during their participation in sandboxes. While it is widely accepted that they bear full responsibility regarding civil claims, mechanisms for ensuring compensation can in fact be provided have not yet been implemented in the fintech industry. Last but not least, in order to further explore whether sandboxes strike a fair balance between the variety of competing objectives outlined in this paper, further research may be conducted into the actual contribution of such testing environments to the innovation industry as a whole, especially when compared to other facilitators such as innovation hubs or accelerators.

[438] World Bank (n 17) 25.
[439] Brian Knight (n 43).

SINA PLATZBECKER[440]

Whistleblower Protection: A Comparative Study of the EU and US

ABSTRACT: This paper analyses subjective narratives of whistleblowers in different cultural contexts influencing the law in the European Union and the United States. The study compares the EU's recently implemented Whistleblower Directive, in which whistleblowers are viewed as protectors of societal welfare, with the US's complex network of legislation closely connected to ideals of patriotism, heroism, and liberty. Despite the US's emphasis on freedom of speech, this paper found frequent restrictions on whistleblowing through national security. The paper highlights the EU's focus on legal conformity and the challenges of balancing interests, contrasting with the US's inconsistent practical protections for whistleblowers. This comparative study reveals the intricate relationship between law, societal values, and whistleblower protection.

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1. Introduction and Literature Review

After years of Whistleblower scandals in the news, such as around Julian Assange and Edward Snowden, public attention for the aftermath of their revelations seems to have moved on. This seems a peculiar trend considering that the phenomenon of whistleblowers has by no means ceased to exist or lost its importance. Although whistleblowers' disclosures might only be able to reveal a fraction of the actual misconduct, they may still lead to wide ranging changes in public perception of an issue. Stanger for example mentions the Me-Too campaign that brought forth a whole social phenomenon of re-evaluating gendered power structures and abuse.[441]

This example shows that change can be slow and painful and those who are heroes for some, will be seen as traitors and hypersensitive by others. The case highlights the subjectivity of the issue of whistleblowers. This subjectivity and ambiguity of the issue is reflected in the academic discourse surrounding whistleblowers. Much of it focuses on developing definitions of the whistleblowing and comparing different legal contexts.

In her empirical study on the effects of whistleblowing, Krambia-Kapardis for example points towards the many different definitions that the literature has produced.[442] The article presents several dividing lines between definitions, like whether whistleblowers report misconduct to their superiors or go public in more general terms, the character of the workplace where the misconduct happens or the nature of the misconduct reported.[443]

A quite broad, but workable definition seems to be the one by Jubb, who defines whistleblowing as a 'deliberate, non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having the potential to rectify the wrongdoing'.[444] This definition is suitable for the purpose of this paper because it

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[441] Allison Stanger, *Whistleblowers: Honesty in America from Washington to Trump* (Yale University Press 2019) 6.
[442] Maria Krambia-Kapardis, 'An Exploratory Empirical study of Whistleblowing and Whistleblowers' (2020) 27(3) *Journal of Financial Crime* 756, 757.
[443] *ibid.*
[444] Peter Jubb, 'Whistleblowing: A Restrictive Definition and Interpretation' (1999) 21(1) *Journal of Business Ethics* 78, 78.

can be applied to a variety of sectors and is thus most apt to cover the gray-areas in which the misconduct that whistleblowers bring to light often occurs.

Moreover, while many definitions focus only on authorities or the press as the addressees of disclosures, Jubb's definition leaves the space to include disclosures via social media. This is a welcome extension in an age where anyone has access to social media and is able to spread information anonymously to the broad public – a feature that facilitates whistleblowing. Another aspect of the definition that should be highlighted is its non-ideological approach. As Stanger notes, whistleblowers' reasons for bringing attention to an issue do not matter.[445] This premise is important to be emphasized in order to be able to take distance from idealizing and romanticizing perspectives on whistleblowers that would distort any analysis.

More important than the motives of whistleblowers, is the nature of the information one discloses. Stanger makes a clear distinction between whistleblowers, leakers, dissenters and civil-disobedients. Whereas leakers for instance merely expose any secret, whistleblowers reveal secrets of an illegal or immoral nature, such as corruption.[446] While civil-disobedients highlight the illegitimacy of certain laws in their eyes and base their conduct on this, whistleblowers doubt the legality and/or morality of certain conduct, taking the law that disobedients question as the basis of their claims.[447] So it could be concluded that whistleblowers are fundamentally interested in the rule of law and, for whatever reason, submit an issue to a third channel that they expect to bring about justice and adherence to the law. Considering all of the above, this paper will try to take a perspective on whistleblowing not as an idealized venture in the pursuit of truth, but rather as a result of an interest in legal conformity, based on whatever motives.

The variety of definitions and subjective narratives around whistleblowers begs the question of *how the different subjective narratives around whistleblowers influence the law on whistleblower protection.*

To answer this question, I will first justify my methodological choices in the following section, to then apply these in the subsequent case studies of

[445] Stanger (n 1) 3.
[446] *ibid* 4.
[447] *ibid* 4.

whistleblower protection in the EU and the US. The two will then be compared, before ending on the conclusion.

2. Methodology

This paper will examine how different subjective narratives in different cultural contexts influence the law. To do so, it will employ a functional approach, meaning that it will use an interdisciplinary and non-doctrinal approach.[448] The aim of this is not just to describe two sets of laws that have the same function of protecting whistleblowers in a descriptive way, but to also consider the societal context in which these laws have been developed and gaining an understanding of the respective logic they follow.

While whistleblowing is a common phenomenon all around the world, the two cases considered in this paper are the US and the EU. Both of these cases have previously been studied – so why choose to compare these two now? The case of the EU was the starting point, as its first law for whistleblower protection has been adopted and implemented in recent years and the last deadline for national implementation in the member states passed during the time this paper was written. The reasons for studying the EU laws now are thus twofold – on the one hand this paper is written at a Dutch university, and therefore in a country in which these laws had to be implemented, and on the other hand, because of the renewed relevance since the implementation deadline has passed.

It is important to keep paying attention to these laws and assess whether they keep the standards they aim to set. For this, I want to look at the definition of whistleblowing adopted in the EU legislation, the purpose it ascribes to whistleblowing and thus the logic behind protecting them, and critical views on the venture. The same will be done in the case of US whistleblower protection. This is a classical, but nevertheless interesting example because of its longstanding tradition of protecting and idealizing whistleblowers. The US has a rich network of whistleblower protection legislation that will also be assessed by the definition(s) it provides, the purposes and logic it follows in protecting whistleblowers and the critique that could be voiced. The following section will start this comparison introducing the case of the EU whistleblower protection legislation.

[448] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019) 348.

3. The European Union

Whistleblower protection from retaliation in the EU is regulated through EU Directive 2019/1937, also known as the Whistleblower Directive.[449] It is to be implemented into national law by 2021 or 2023, depending on the size of corporations.[450] It is unclear from primary and secondary literature what exactly triggered the initiation of the document. Abazi does not answer this question either, but at least mentions the path and the issues that led up the directive's entering into force, such as the EU Commission's doubts of whether it had the legal basis for such legislation and the Council's non-interest in the topic.[451] The article concludes that this first piece of EU legislation on whistleblower protection grants a high degree of protection by providing an extensive definition of whistleblowing covering both the private and public sector. As such, the Directive defines whistleblowers as 'natural persons who report or publicly disclose information on breaches acquired in the context of his or her work-related activities'.[452]

Abazi evaluates whether the EU Whistleblower directive is a 'game changer'[453] of whistleblower protection[454] and raises concerns that, despite the broad definition, the directive's effectiveness is largely dependent on its national implementation.[455] This definition coincides with Jubb's on many levels through their broadness. A striking difference though is that Jubb presupposes that disclosures by whistleblowers have to be made to any external entity that may be able effect change,[456] while the EU Directive seems to be particularly interested in motivating people to disclose breaches of EU law to the EU.[457] Another difference is that the EU Directive is strictly about breaches of Union Law, rather than broader wrongdoings or immoral acts that are included in Jubb's and other definitions of whistleblowing.[458]

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[449] European Parliament and Council Directive 2019/1937 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.
[450] Alja Poler De Zwart, 'EU Whistleblowing Rules to change in favor of Whistleblowers' (2020) 21(1) *Journal of Investment Compliance* 55, 55.
[451] *ibid*.
[452] EU Directive 2019/1937 (n 7) Art. 5(7).
[453] EU Directive 2019/1937 (n 7).
[454] Vigjilenca Abazi, 'The European Union Whistleblower Directive: A "Game Changer" for Whistleblowing Protection?' (2020) 49(4) *Industrial Law Journal* 640, 640.
[455] Abazi (n 10) 656.
[456] Jubb (n 4).
[457] *ibid.*
[458] *ibid.*

These differences hint at the specific context in which the EU whistleblower protection has been adopted and the purpose and logic it follows. As such, the Directive explicitly states that it sees the disclosures encouraged there as part of its law enforcement system.[459] The Directive states that it wants to establish a path to enforce its laws, even if the respective area is not criminalized under national law, to ensure societal welfare.[460] The EU Directive seems to view its laws as the source of societal welfare and whistleblowers, by protecting the laws, as protectors of societal welfare.

Teichmann and Wittmann raise some critique of the directive, discussing the potential shortcomings of the document when it comes to its national implementation.[461] They criticize in particular the extensiveness of the directive, claiming that it does not succeed in its endeavor to balance employers' and employees' interests, creating potential to be abused by employees.[462] The authors conclude that the directive provides a 'get-out-of-jail-free card' to disgruntled employees that leak corporate secrets. [463] This would hint at a failure of the Directive to serve public welfare, by protecting whistleblowers too much, creating an imbalance in society.

This claim seems curious, considering that the aim of whistleblower protection should, in fact, be to protect them from retaliation and jail time. It appears from the literature that the directive represents an honest (and arguably overly shielding) effort to protect whistleblowers, even if it might be based on the interest to protect functioning of the EU's legal system, rather than on the protection of the freedom of expression as such. This concludes the overview of the definition, purpose and critique of the EU Directive on whistleblower protection that will now be followed by the case study of the US protection of whistleblowers.

[459] EU Directive 2019/1937 (n 7) Art. 3.
[460] *ibid.*
[461] Fabian M Teichmann and Chiara Wittmann, 'Whistleblowing: Procedural and Dogmatic Problems in the Implementation of Directive (EU) 2019/1937' (2022) 30(5) *Journal of Financial Regulation and Compliance* 563, 563.
[462] *ibid.*
[463] *ibid.*

4. US

Diving into the US American discourse around whistleblowers reveals its strong connection to with US history and culture specific to this context - Stanger for example reviews the history of the concept of whistleblowing in the US and traces the emergence of the term to the 1970s,[464] while the concept in accordance with the meaning defined above (even if not named so) has even been an issue of public discourse since the Revolutionary War.[465]

In her extensive book on whistleblowing in the US, Stanger sheds light on the disconnect of US American 'ideals and practice' concerning whistleblowers.[466] She notes that reformed legislation has had the effect that '[f]ederal employees today are more likely to report corruption, yet more vulnerable to retaliation', despite whistleblowers being particularly idealized in the US as defenders of free speech.[467] The author explains that while there is more legislation than ever dedicated to the protection of whistleblowers in the US, it has become such a complex network that it is barely possible to navigate as a lay of US law and make out one particular definition.

As Stanger shows, the US government has a history of interpreting the concept of whistleblowing through legislation in such a way as to exclude leaks of national security from the realm of protection and by classifying the leaking of certain information as espionage, it is automatically taken out of the sphere of legitimacy that the public interest in the leak would otherwise create.[468]

The legal definition of what constitutes whistleblowing and who deserves protection, determines whether individuals calculate the risk of their disclosures to turn out in their favor. These legal definitions have changed throughout the years in the US. It is clear from the literature that the framing of whistleblowing, through legal or non-legal channels, is closely connected to national ideals of patriotism, heroism and liberty.[469]

From Stanger's accounts it seems like patriotism and heroism are crucial grounds of public support, but this appears to be based on superficial idealist views of whistleblowing in general rather than on support for the individual subject matter.

[464] Stanger (n 1) 5.
[465] *ibid* 8.
[466] *ibid* 9.
[467] *ibid* 10.
[468] Stanger (n 1) 8.
[469] *ibid* 9.

The appeal of whistleblowers in the eyes of the US public is derived from form over substance so to say. It loves the hero that fits within the narrative of a free country, but will not protect him from prosecution once he disappears from the spotlight of the news.

Even more important than heroism and patriotism is the concept of liberty in this context. Looking at the utilization of this concept by the US government from a dialectical perspective reveals the paradox of the US approach toward whistleblowing. National security and liberty have become so strongly connected that the former is now understood as an imperative to protect the latter. The notion of liberty in the US is deeply ingrained in the freedom of speech, which explains why whistleblowing, as one of the most extreme expressions of the freedom of speech, would be on a pedestal of national idealism.

The perplexing aspect of US logic is then that the government claims to protect national security, and thus liberty and the freedom of speech as a national ideal, by limiting their practice by individuals through legal means. Although the amount of protective legislation conforms with the national ideal of freedom of speech, the government has taken it upon itself to move whistleblowing toward the legal paradigm of national security, under the guise of protecting freedom, thereby making whistleblowing more risky than ever. This oddity exemplifies the inconsistency of ideals and practice mentioned above that characterizes the US approach to whistleblower protection.

5. Analysis: Differences and Commonalities

Having gained some insights into the nature of whistleblowing protection in the EU and US, it is now time to present some differences and commonalities of the two systems. A clear difference to start with is the amount of legislation that the systems build upon. While the EU Whistleblower Directive is the main piece of legislation that is then reflected in the national implementation, the US has a complicated net of legislation that reaches much further back in history than the Directive. While the US approach to whistleblowers is influenced by a long tradition of emphasizing the freedom of speech and anti-establishment heroes and patriots, the EU Directive seems to be mainly a result of the EU Commission's efforts to create another instance of EU law enforcement.

Both the Whistleblower Directive[470] and the US Whistleblower Protection Act that protects federal employees have implemented the element of honest belief, which employees have to exhibit. This standard is not defined further and thus introduces a broad requirement that is to be interpreted by authorities. This could have the advantage of contributing to the acceptability of whistleblower protection, as it introduces an element that highlights that whistleblowers are more than just disgruntled employees and thus anticipates delegitimizing arguments. It could however also be an arbitrary element that may set an unclear standard for the concerned persons who may then not be certain about whether they will be protected by the law. While this would be in line with the US system that supposedly creates protection through the sheer amount of legislation, but then cannot be navigated with certainty by individuals, the standard is inconsistent with the EU interest of motivating potential whistleblowers to come forth and protect EU law.

Another common element of whistleblower protection in the EU and US are whistleblower rewards that have been implemented into the legal frameworks. While retaliation against whistleblowers puts them at quite a high risk, those rewards give an incentive to leak information in the state interest nonetheless. The system of whistleblower rewards in the US was established through the Dodd-Frank Act,[471] which served as an example for the later EU regulations.[472] It is interesting to note that this incentive for whistleblowing in the EU was not given within the scope of the Whistleblowing Directive, but within a legal act that aims at combating market abuse. Both systems thus appear to support, even incentivize, whistleblowing for the purpose of financial interests of the US government and the EU market system respectively.

Incentivizing the disclosure of the right information that is of use to the authority issuing the reward in this way, makes the impression on me that whistleblowers are mainly protected when in the authority's interest, rather than in the interest of freedom of speech as would be the idea one has in mind when thinking of whistleblowers. While the EU is so open and honest to say that its protection of whistleblowers serves the protections of its laws and interests as mentioned in the

[470] EU Directive 2019/1937 (n 7) Art. 6(1).
[471] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203.
[472] Holger Fleischer and Klaus Ulrich Schmolke, 'Financial Incentives for Whistleblowers in European Capital Markets Law' (2012) 9(5) *European Company Law* 1, 2.

above sections, the US seems to disguise this aspect through an incredible amount of legislation and the added layer of national idealism and supposed liberty.

By doing so, and submitting the concept of liberty to the paradigm of national security, the US approach to whistleblower protection aims at portraying state interests (protecting its legal systems and national security) and societal interests (freedom of speech and liberty) as one unit. Through this the high degree of control the government holds over whistleblowers, the high scrutiny over the freedom of speech and the financial interests in whistleblower protection, can be swept under the rug – something that is not necessary in the EU context in the first place for a lack of pretense about the intentions behind whistleblower protection. The only idealism found in the EU context, if even, seems its equation of the protection of EU law with societal interests.

6. Conclusion

It seems to lie in human nature to want to believe the promises of trustworthiness the system makes to the public and to break out of that system upon feeling betrayed. It is only logical to then try to appeal to instances we want to see on our side and deliver justice - the public and the law. It is only sensible then that systems that create hope in the truth and betrayal of this hope simultaneously, would produce individuals who feel compelled to reveal, or make profit off, this two-sided coin - as whistleblowers do.

We can sum up that whistleblowers are paradoxical and idealized beings. They are evidence on the one hand that misconduct (even in high ranks) can be exposed and brought to justice, and give us hope that the pursuit of truth can be victorious, even when it is up against Goliath. On the other hand, they are just as much proof of the failures of the system and give a glimpse of the intransparent shadow world the public barely has access to. In any case, they fulfill important functions that arise from the failures and hypocrisies of the system we live in. Their preventive protection through the law and shielding them from retaliation is therefore of utter importance and we should revive the discourse around the correlation of state interests and the effective protection of whistleblowers.

It is clear from the discussion above that neither the US nor the EU framework are perfect for this purpose. The US system can be criticized for its complexity,

ineffectiveness and hypocrisy, the EU framework possibly to a lesser extent for its dependence on the national implementation and arguably its extensive definition of whistleblowers. Further comparative research could be done on the national implementations of the EU Directive and their effectiveness. Sadly, this would exceed the scope of this paper and can only really be assessed in the future, since the deadline for the last implementations of the Directive are due around the time this paper is written.

To end with, it has become clear that the protection granted to whistleblowers against retaliation is to a large extent based on state interests in both cases, and I would challenge any claim that this would change through national implementations. This grim view is based to a large extent on the unwillingness of EU states to protect Julian Assange in the past and the lack of attention to his case ever since his imprisonment. This has highlighted the need for public attention to state interests and the specifics of a case, rather than reliance on the short-lived surges of attention that come with pure idealism.

JAKUB SUCHNICKI

Money Claims as Money
Understanding the Legal Framework and Functions of Monetary Claims in the United Kingdom

ABSTRACT: This article examines the legal framework governing monetary claims in the United Kingdom (UK) and their fulfillment of money's fundamental functions: store of value, unit of account, and medium of exchange. Through analysis of legal tender status, property rights, and the principle of nominalism, it demonstrates how the law implicitly recognises monetary claims as equivalent to physical money. Ultimately, it argues that while monetary systems built on claims are a social construct, their functionality relies on collective belief, presenting novel challenges at the intersection of psychology, law, and economics.

1. Introduction

Money is a ubiquitous and essential part of modern society, serving as the driving force of economies and the cornerstone of financial transactions. Despite its omnipresence, relatively little can be considered as certain about money. The recent global embracement of incorporeal money further complicates the concept's understanding, shrouding its forms, functions, or characteristics in academic and legislative doubt.

This essay will explore how UK law enables claims to the payment of money to function as money itself. The focus will be put on the *functions* of money - store of value, medium of exchange, and unit of account – and how they are fulfilled by money claims. The analysis will, first, describe monetary claims' unique legal position, focusing on the nature of such instruments. Subsequently, the operation of the claims will be examined *vis-à-vis* the three functions of money, proving how such choses in action manage to fulfil the characteristics. Lastly, a conclusion will be offered, with final thoughts and remarks.

2. Monetary claims

Claims for the payment of money, or money claims, are a specific type of claim necessarily existing in relation to a monetary obligation: a debt. What distinguishes such claims is that they are satisfied by payment of money only; a debt cannot be discharged by recovering a different remedy.[473] They together create a legal relationship of obligation, with a claim being its active side and a debt – the passive.[474]

Money claims exist in the current economy in primarily two forms: banknotes, being promissory notes payable on demand by a state's central bank – the Bank of England (BoE) in the UK – constituting a physical manifestation of the

[473] 'Money Claim' (*Thomson Reuters Practical Law: Glossary*) <http://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I3f4a480ce8db11e398db8b09b4f043e0?transitionType=Default&contextData=(sc.Default)&comp=pluk&navId=D199E716BCF30C2B1E4C664609C4A6AB> accessed 29 October 2023.
[474] Andreas Rahmatian, 'Money as a Legally Enforceable Debt' (2018) 29 *European Business Law Review* 205, 208-209.

institution's debt to the holder,[475] and bank (credit) money. Credit money, created by commercial banks and the central bank through the issuance of loans, is the debt owed by such institutions to its creditors, represented by balance sheet entries. As a general rule, only accredited banks can have accounts with the central bank. Individuals, therefore, primarily operate with commercial bank money.[476]

3. The three functions of money

a. Money claims as store of value

The store of value function assumes that for a thing to qualify as money, it must have the capacity of representing its owner's affluence in a liquid state and, to some degree, maintaining their future purchasing power.[477] The 'value' of money can be represented in a multitude of ways. One can think of value in terms of how much of a given thing money can buy – the purchasing power, or how much of another currency can one currency be exchanged for – the exchange rate. Every unit of account, however, has a fixed value: the nominal value.

The principle of nominalism provides that "a monetary obligation has no other 'value' than the nominal value which it expresses".[478] In England, the principle was recognised in the famous *Case of Mixt Monies* as applying to coins regardless of their intrinsic worth;[479] nevertheless, it is not exclusive to this medium. A central bank note, as stated by Lord Macmillan in the *Banco de Portugal* case, "becomes by the mere fact of its issue legal tender for the sum which it bears on its face".[480] The reference to the aforementioned principle is evident; any claim represented by a BoE banknote is a store of nominal value.

Importantly, nominalism stems from a common intention to treat money at face value.[481] Considering that bank money is purely a social concept, relying on the general belief that the incorporeal legitimately exists and functions in everyday

[475] Simon Gleeson, *The Legal Concept of Money* (Oxford University Press 2018) 1.26.
[476] *ibid* 95-96.
[477] Mervyn Lewis and Paul Mizen, *Monetary Economics* (Oxford University Press 2000) 11-12.
[478] Charles Proctor, *Mann and Proctor on the Law of Money* (8th edn, Oxford University Press 2022) 249.
[479] *Gilbert v Brett* (1605) Davis 18.
[480] *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 (HL), 508-511 (Macmillan J).
[481] Proctor (n 6) 249-250.

life,[482] it is not an overreach to argue that the same principle allowing for commodity money to store value also applies to imaginary accounts, so long as the public considers it valid.

Other legal tools also support money claims to store value. For example, the BoE does not have absolute discretion when it comes to the issuance of promissory notes; instead, it complies with a statutory duty to stay within constraints as to the nominal value of all notes issued. The Currency Act 1983 sets that limit at £13,500 million,[483] thereby preventing the GBP from losing purchasing power due to inflationary pressures if the BoE was to issue notes indiscriminately. Most importantly, however, central banks regulate a currency's purchasing power through monetary policy[484] influencing how money is lent and thereby created. The BoE, tasked with the dual objective of ensuring monetary and financial stability,[485] uses instruments at its disposal in managing the UK's monetary system. Legislation, albeit not directly capable of fixing the purchase price, nevertheless provides for the central bank's independence in acting to keep the pound valuable, subject to some public oversight.[486] Monetary policy may influence the currency's foreign exchange rate in a similar fashion.

b. Money claims as unit of account

The unit of account function requires that money be capable of serving as a common unit of value for the purpose of measuring or comparing the prices of goods and services. The necessary quality of such a yardstick is numerical denomination serving as the nominal value of money, with each state being free to decide about its unit's particular characteristics.[487] In the UK, the unit of account, and simultaneously the currency, is the pound sterling (GBP), established under the Coinage Act 1971. An essential feature of a unit of account is its status as the

[482] Geoffrey Ingham, 'Money Is a Social Relation' (1996) 54 *Review of Social Economy* 507, 524.
[483] Currency Act 1983, s 2(2).
[484] Sáinz de Vicuña, 'An Institutional Theory of Money' in Mario Giovanoli and Diego Devos (eds), *International Monetary and Financial Law: The Global Crisis* (Oxford University Press 2010) 524-527.
[485] Bank of England Act 1998, s 2A & 11(a). Also see: François Gianviti, 'The Objectives of Central Banks' in Mario Giovanoli and Diego Devos (eds), *International Monetary and Financial Law: The Global Crisis* (Oxford University Press 2010) 461-462.
[486] See, for instance: Ibid., s 30A.
[487] Proctor (n 6) 27-28.

central bank's liability.[488] Banknotes clearly fulfil that requirement: indeed, they are no more than a physical manifestation of such a monetary obligation.

An argument can be put forward that bank money does act as a unit of account since an individual can, in theory, exercise their claim against the lending institution at any point in time and exchange one credit, that against the commercial bank, for a claim against the central bank represented via a banknote. This view follows the institutional theory of money, according to which all money is a claim on the central bank precisely for the reason stated above.[489]

As will be shown in the following section, the legal framework of enforcement, property rights in bank money, and implicitly recognised social practice surrounding the use of bank money only reinforce the view that even private credit should be considered a unit of account.

c. Money claims as medium of exchange

The law's facilitation of money claims being able to function as money is perhaps most evident when analysing how such claims are able to function as a medium of exchange. In simple terms, a medium of exchange is an asset which is used in transactions for purchasing goods and paying for services, and to which property rights attach.[490]

It is here where the concepts of legal tender and payment should be stressed. Legal tender is a thing which the law mandates to be accepted for the discharge of debts, thereby explicitly having it fulfil all functions of money.[491] A payment is a bilateral act, requiring money to be tendered by the debtor and subsequently accepted by the creditor. An unconditional offer to discharge debts with relevant legal tender for the right amount which is rejected by the creditor bars the latter from bringing a claim for non-performance,[492] the debtor "hav[ing] done the only thing they could"[493] to satisfy their obligation.

[488] *ibid* 28.
[489] de Vicuña (n 12) 523-524.
[490] David Fox, *Property Rights in Money* (Oxford University Press 2008) 7.
[491] Proctor (n 6) 77-78.
[492] Simon Firth, *Firth on Derivatives Law and Practice* (Sweet & Maxwell 2023) 12.059.
[493] *Griffith v Ystradyfodwg School Board* (1890) 24 QBD 307 (QB), 308 (Denman J).

The law of the UK confers legal tender status on coins; however, not without reservations. Under the Coinage Act 1971, only gold coins can be used to discharge debts of any amount. Coins of smaller denomination and composed of different materials can be refused by the creditor with no consequences if the outstanding debt is high enough.[494] BoE banknotes gained the legal tender designation under the Currency and Bank Notes Act 1954, section 1(2)[495] and are capable of discharging debt of any value.

The classification of choses in action, embodied by banknotes, as legal tender is the most obvious example of the law enabling money claims to function as money. However, large monetary obligations are rather uncommonly settled in cash, given the availability of alternative modes of transaction such as bank transfers. While bank money is not designated as legal tender under UK laws, the social fact of its widespread use in modern-day commercial transactions must be seen as fulfilling the function in question, even if not mandated from top-down.

Moreover, a state's private law regime, especially regarding property rights, is paramount for enabling money claims to function as money. Banknotes, although in theory individually identifiable, are not treated as such in mixtures; instead, the law recognises that such promissory notes are fungible only, with property rights to them extinguished when mixed.[496] This consideration is crucial when considering the negotiability of money, an attribute which holds that the *nemo plus* principle does not apply to transfers of title and that ownership passes by mere change in possession of the medium.[497] If banknotes in a mixture were subject to claims for recovery of a specific thing, their social acceptance as a medium of exchange would drastically decrease, possibly leading to the medium's abandonment.

The property law regime for bank money is in many ways similar, therefore supportive of its use as means of exchange. The leading principle from *Foley v. Hill*

[494] Coinage Act 1971, s 2(1) and (1A).
[495] Currency and Bank Notes Act 1954, s 1(2).
[496] To this effect, see: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL), 572 (Goff J).
[497] Fox (n 17) 266-267.

contends that while money deposited to the bank becomes the bank's property, the depositor grants a legally enforceable chose in action for the equivalent of all the deposits they made,[498] which becomes a part of their assets. However, the chose in action refers to the total mixture of all deposits held by a bank, and not the specific amounts initially credited by an individual. As imaginary money is likewise fungible, the bank draws on its total balance when satisfying a creditor's claim, without having to specifically identify the exact money owed.[499] This, combined with the fact that no property right is transferred during a bank 'transfer',[500] reduces the potential legal challenges to payment processes.

The "depersonalised medium of exchange"[501] character of money should be recognised as applying not only to cash but also to bank money. The *sui generis* property law framework applicable to claims allows for their smooth circulation in transactions as a means of exchange, contingent on public belief and acceptance of the system.

An additional way in which the law enables bank money to fulfil the function in question is by providing for the claims' legal enforceability under punitive threat for non-performance. The fact that a bank's default on the debt owed to its clients may lead to insolvency proceedings during which physical assets – undeniably holding non-imaginary value – are seized and distributed to creditors is evidence of the law's implicit recognition of money claims as being more than just an abstract concept.[502] Another parallel is drawn between corporeal and incorporeal money. As social trust builds around the banking system due to legal protections, individuals start harbouring an expectation that their bank money will have value in exchange. People begin transacting using such claims for payment, thereby using them as a medium of exchange.

[498] *Foley v Hill* (1848) 2 HLC 28 (QB), [36]-[37].
[499] Alastair Berg, 'The Identity, Fungibility and Anonymity of Money' (2020) 39 *Economic Papers: A Journal of Applied Economics and Policy* 104, 107-108.
[500] *R. v Preddy* [1996] AC 815 (HL), Goff J.
[501] *North v Brown* [2012] EWCA Civ 223, [2012] 2 WLUK 165, [6].
[502] Rahmatian (n 2) 228-229.

4. Conclusion

The United Kingdom's legal framework effectively enables money claims to fulfil the three functions of money. The principle of nominalism, evident in banknotes, and the BoE's price stability-maintaining powers underscore the legal recognition of money claims as a store of value. The unit of account function is upheld through banknotes being denominated in GBP and, as the institutional theory of money suggests, the theoretical convertibility of commercial bank money into central bank money on demand. Promissory notes' legal tender status confirms that money claims function as a medium of exchange, supported by a unique property rights regime enabling a constant use of money claims in currency. The law implicitly recognises that bank claims should be treated on par with physical money.

In the end, however, the functioning of monetary systems built on claims is a social construct, fundamentally reliant on the collective belief in the system's continued operation. Functioning on the frontiers between psychology, law, and economics, money claims present novel challenges for those trying to understand them. The move from a physical medium to an imaginary one removes money's conceptual constraints, rendering such a designation potentially limitless.

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To what extent are the legal frameworks contained within the European Green Deal compliant with the very principles theorised as fundamental to the EGD (affordable, interconnected and efficient energy)?

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1. Introduction

1.1 Introduction to the EGD and its legal/political context

Climate change is a phenomenon increasingly acknowledged, realised, and reconciled globally. As it affects humanity indiscriminately, efforts to mitigate it must, without a doubt, be undertaken via coordinated approaches. These approaches include municipal, regional, provincial and national frameworks; yet binding, international responses have been limited and so far, in vain.[504]

1.1.1 EGD Objectives

The European Green Deal ('EGD') is a collection of policy initiatives that aim to represent the European Union's ('EU') effort to alter this. Its overarching aim is EU climate neutrality by 2050[505], conformant with its obligations under the Paris Agreement[506]. Within it lay several objectives spanning multiple policy areas, including energy - the focus of this research paper - sustainable industry, and sustainable mobility and transportation, as primary examples.

1.1.2 Legal Manifestation of the EGD

These objectives will be legally manifested in a twofold manner: (1) a *revision*[507] of existing legislation - such as on directives concerning renewable energy, and buildings' energy performance - and (2) an *introduction* of new legislation on previously unregulated areas - including a circular economy action plan, a strategy on offshore renewable energy, as examples.

1.2 The EGD primary principles; general understanding

As the production and use of energy accounts for 75% of the EU's greenhouse gas emissions[508], its decarbonisation remains the most

[504] International Monetary Fund, 'World Needs More Policy Ambition, Private Funds, and Innovation to Meet Climate Goals' (IMF Blog 2023) .<https://www.imf.org/en/Blogs/Articles/2023/11/27/world-needs-more-policy-ambition-private-funds-and-innovation-to-meet-climate-goals> accessed 19/04/2024.
[505] European Council Conclusions (EUCO 29/19) – 12 December 2019 [2019] OJ Spec Ed /2.
[506] Paris Agreement, Prologue, 2015.
[507] Communication from the Commission - The European Green Deal [2019] COM/2019/640 final.
[508] International Energy Agency, 'European Union 2020 Energy Policy Review' [2020] 7, 11.

important of all sectors in regard to its overall impact. The sector is thus primed for a renewable transformation, whereby the current 60%+ influence of non-renewables[509] is challenged by the aim of reducing greenhouse gas emissions.[510]
In setting this goal, the EU has established three guiding principles for the transition to clean energy; firstly, ensuring a secure and affordable EU energy supply ('Affordable Energy'); secondly, developing a fully integrated, interconnected and digitalised EU energy market ('Interconnected Energy'); and thirdly, prioritising energy efficiency, improving the energy performance of buildings and developing a power sector based largely on renewable sources ('Efficient Energy').[511]

This research paper thus attempts to understand the extent to which the legal frameworks contained within the EGD are compliant with these very principles. To this end, the focus extends to theorise on their effectiveness, and hypothesise their ability to achieve their outcomes. It must be emphasised that, by the very nature of the research question, the principles *themselves* are not the central point of analysis; instead, their value is already assumed.

1.3 Methodology

This research will be undertaken via a doctrinal methodology, due to the nature of the question examined. This is due in part to the effectiveness of the EGD itself not comprising the focus of the analysis, nor the principles; instead, the internal consistency of the EGD's frameworks in regard to their application of the principles, and their establishment of enforcement/supervision mechanisms, form the predominant line of inquiry. As such, several sub-questions can immediately be formulated, *inter alia* 'Do the legal frameworks give comprehensive administration as to the fulfilment of their goals?', 'Do the legal frameworks themselves include formal mechanisms as to their own self-evaluation and periodic review?' and 'Do the legal frameworks facilitate and lay the foundations for an environment - political, social and economic - that permits the fulfilment of its goals (for example periodic consultation with citizen, public and

[509] Eurostat, 'Net electricity generation by type of fuel - monthly data' (Eurostat Data Browser 2024) <https://ec.europa.eu/eurostat/databrowser/view/NRG_CB_PEM___custom_5180368/default/table?lang=en> accessed 20/04/2024.
[510] European Commission, 'Press Release - Commission welcomes completion of key 'Fit for 55' legislation, putting EU on track to exceed 2030 targets' (European Commission Press Corner 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4754> accessed 19/04/2024.
[511] Communication from the Commission - The European Green Deal [2019] COM/2019/640 final.

private stakeholders)?'. These questions align directly with the paper's doctrinal methodology, as they dissect the primary law constituting the EGD.

In accordance with the 'self-assessment' nature of the proposed research question - whereby EU legal frameworks are assessed by the very standards they themselves advocate - the EGD must be scrutinised by the EU's own Better Regulation Toolbox.[512] Designed under an acknowledgement of the responsibility of high-quality legislation vested in the three EU institutions, this toolbox - and the guidelines expounded within - serve as an extra metric by which the principles of the EGD legal frameworks can be measured against. In as such, the principles will be weighed against dimensions of: 'participatory/open to stakeholder views', 'respect for the principles of subsidiarity and proportionality', 'transparent', and crucially, 'sustainable'.[513] The above-formulated sub-questions have been formulated in consideration of these very dimensions posed by the EU's Better Regulation Toolbox. These form a sound foundational background by which the three EGD energy-transition principles - affordable, interconnected and efficient energy - will be measured.

1.4 Three principles in closer examination; manifestation in the EU law frameworks

Before commencing an analysis of legal frameworks forming the EGD acquis, the three principles comprised within must first be introduced. The first, 'Affordable Energy', aims to address issues such as energy poverty, whereby households are directly confronted by the cost-of-living crisis. However, Energy Affordability represents an important pillar in the clean energy transition not merely for purposes relating to household economics; it also represents the continued support imperative to a sustained effort - "building mutual trust with all stakeholders is essential to make the energy and low-carbon transition socially acceptable".[514] Frameworks under analysis in regard to affordable energy include the Energy Efficiency Directive ('EED', amended 2023) and the Energy Performance of Buildings Directive ('EPBD').

[512] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123/4.
[513] Ibid, 9.
[514] European Economic and Social Committee, 'What conditions are needed for the energy and low-carbon transition to be socially acceptable?- Opinion TEN/760-EESC-2021' [2022] 1/1.

The second principle is 'Interconnected Energy'. This entails, primarily, the harmonisation of existing energy markets and systems via a process of standardisation, in accordance with EU's foundational internal markets. As a principle, Interconnected Energy has also led to proposals for a Carbon Border Adjustment Mechanism ('CBAM'), in an effort to reduce carbon leakage and incentivise the import and production of non-carbon-intensive goods. The CBAM is a tool that prices goods in regard to the carbon emitted during their production, and is intended to incentivise cleaner production both within and outside of the EU - conformant to World Trade Organisation ('WTO') rules. Furthermore, Interconnected Energy will be examined in EU initiatives *inter alia* the Sustainable Europe Investment Plan and the Farm to Fork Strategy.[515]

Finally, Energy Efficiency comprises the third principle of the EGD's clean energy transition. Energy Efficiency is intended to complement EU action to ensure that 'only the energy really needed is produced', 'investments in stranded assets are avoided' and 'demand for energy is reduced and managed in a cost-effective way'.[516] Key policy areas targeted by Energy Efficiency include labelling requirements, buildings, heating and cooling (in both household and non-household senses), and financing. It has been legally anchored in the revised Energy Efficiency Directive[517], in addition to the Construction Product Regulation and Energy Performance of Buildings Directives, and the EU Emissions Trading System, as primary examples.

These above-mentioned legal frameworks will form the substantial basis of this research paper. With the EGD as their legal basis, these frameworks span existing, newly-reviewed/updated legislation, as well as novel legislation - with some borne from the 'Fit for 55' package.[518] In assessing these and their conformity to the three principles, the paper aims to address the challenges and problems in implementation/enforcement, and provide suggestions/proposals based on existing topical literature.

[515] Communication from the Commission - The European Green Deal [2019] COM/2019/640 final.
[516] S Fawkes, S Sweatman, P. Bedford, 'Launch and facilitate the implementation of new EEFIG Working Group "Applying the Energy Efficiency First principle in sustainable finance" – Final report' [2023] POEU 1, 4.
[517] Council Directive (EC) Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 [2023] OJ L OJ L 231/82.
[518] Ibid, 7.

2. The principle of affordable energy

2.1 Importance of affordability in the energy context

The principle of ensuring access to affordable energy has been a longstanding consideration within European energy policy. It is one of its pillars, as together with secure, sustainable, and competitive energy, it was at the forefront of the Energy Union strategy published in February 2015. The strategy is the base of the current energy policy in the EU, on which the European legislators have built with the goal of achieving climate neutrality. For instance, Affordable and Clean energy is one of the Sustainable Development Goals introduced in the United Nations 2030 Agenda for Sustainable Development. In addition, energy affordability is one of the most prioritized areas in the EU's sustainability agenda in the context of the EGD.[519]

It is widely recognized that energy affordability is a necessary condition to ensure universal access to energy services. This is why energy affordability is strongly related to energy security, as access to basic energy services such as heating, light, and cooling is better ensured when individuals have the means to afford them. Affordable access to energy is an important element in providing a proper standard of living, maintaining public health, and ensuring effective participation in society of all social groups.[520]

2.2 Energy Poverty

One key aspect in ensuring energy affordability is to address the problem of energy poverty. Energy poverty is particularly relevant because it is a direct consequence of failing to ensure energy affordability. In the last few years, it has become an increasingly pressing issue in the EU. While energy prices were constantly increasing in the last years, the War in Ukraine caused a major spike in overall inflation, which also impacted the costs and affordability of essential services. In 2022, households within the lowest income decile in Europe experienced an estimated average rise in costs equivalent to 20% of their total household expenditure, whereas those

[519] Phoebe Koundouri, Angelos Alamanos, Angelos Plataniotis et al. 'Assessing the sustainability of the European Green Deal and its interlin kages with the SDGs' npj Clim. Action 3, 23 (2024). <https://doi.org/10.1038/s44168-024-00104-6> accessed 07 April 2024.

[520] Gordon Walker, Neil Simcock, Rosie Day, 'Necessary energy uses and a minimum standard of living in the United Kingdom: Energy justice or escalating expectations?', Energy Research & Social Science 18, (2016) <(https://www.sciencedirect.com/science/article/pii/S2214629616300184)> accessed 12 April 2024.

within the highest income decile saw a figure of 13%.[521] As a consequence of the increase in prices, 9.3% of the EU population said they could not afford to heat their homes sufficiently in 2022.[522] Such a situation in which households do not have access to essential energy services is referred to as energy poverty.[523] The 2023 Amended Energy Efficiency Directive offers a more specific definition.[524] It refers to a situation where a household lacks access to vital energy services that are essential for maintaining basic standards of living and health. These services include sufficient heating, hot water, cooling, lighting, and energy to operate appliances.

Aside from the increase in energy costs, energy poverty can also be caused by low household incomes and energy-inefficient buildings.[525] When it comes to the former, undoubtedly, there is a strong correlation between income poverty and energy poverty. However, these two problems are separate from each other, as only up to 30% of those impacted by energy poverty are also classified as economically poor.[526] This highlights the unique nature of the issue and the need for tailored solutions, given that the factors contributing to energy poverty cannot be tackled by employing measures aimed at economic hardship. Regarding the energy efficiency of buildings, the housing quality of individuals has a major impact. Around 15% of Europeans live in poorly insulated homes with a leaking roof, damp walls, floors, or foundations.[527] This increases the costs needed to ensure proper heating and exacerbates the issues of high energy prices and lack of income that were already problematic. By addressing these factors and energy affordability in general, countries can mitigate energy poverty and improve overall energy security.

Energy poverty is a multidimensional issue which makes it difficult to measure. To aid the MS in identifying energy-vulnerable households, several guidance documents were issued, such as the Commission's

[521] Eurofund, "Unaffordable and inadequate housing in Europe", Publications Office of the European Union, Luxembourg (2023)<Unaffordable and inadequate housing in Europe (europa.eu)> accessed 07 April 2024.
[522] Eurostat, "Inability to keep home adequatly warm - EU-SILC survey" <Statistics | Eurostat (europa.eu)> accessed 07 April 2024.
[523] Commission Recommendation (EU) 2020/1563 of 14 October 2020 on energy poverty, OJ L 357/35.
[524] Directive on energy efficiency (n 14) art 2.
[525] Eurodiaconia, "Energy Poverty in Europe" (2023) <*Energy-poverty-final-MB-review.pdf (eurodiaconia.org)> accessed 08 April 2024.
[526] Dominik Owczarek, Agata Miazga, 'Ubóstwo energetyczne w Polsce – definicja i charakterystyka społeczna grupy', (2015).
[527] LIFE Unify, "Tackling energy poverty through National Energy and Climate Plans : Priority or empty promise?" (2020) <*Energy-poverty-report- FInal December-2020.pdf (caneurope.org)> accessed 08 April 2024.

recommendation on energy poverty[528] or the methodology guidebook by the EU Energy Poverty Observatory.[529] The revised Energy Efficiency Directive also has a list of indicators. Generally, the main indicators employed are related to the ability to keep a house sufficiently warm, the shares of expenditure and income and other related factors (e.g: arrears on utility bills, housing quality).

2.3 Legal Frameworks Promoting Affordable Energy in the European Green Deal

This section examines the key legal frameworks and measures introduced under the European Green Deal to promote affordable energy, focusing on energy efficiency policies, social measures, and support for renewable energy. Through these initiatives, the EU aims to mitigate the impacts of rising energy prices, enhance energy efficiency, and reduce dependency on imported fossil fuels, ultimately ensuring fair and affordable energy prices for all EU citizens.

2.3.1 Energy efficiency policies

A way to achieve energy affordability in the long term is to focus on the efficiency of the energy sources.[530] Using energy more efficiently will contribute to reducing the EU's overall energy consumption, which will, in turn, enhance future energy security and affordability.[531] The revised Energy Efficiency Directive (EED) raises the efficiency target for the Member States and sets the goal of reducing EU final energy consumption by 11.7% by 2030, compared to the projected energy use for 2030. This new target highlights the EU's increased ambition on energy efficiency, surpassing the 9% target proposed by the Commission in July 2021, as part of the 'Fit for 55' package.[532]

The directive puts a lot of emphasis on alleviating energy poverty. It introduces provisions aimed at enhancing energy efficiency support to energy-poor households in line with the aim of the EGD to 'leave no one

[528] Commission Recommendation on energy poverty (n 20).
[529] Johannes Thema, Florin Vondung, 'EPOV Indicator Dashboard: Methodology Guidebook', Wuppertal Institut für Klima (2020).
[530] Directive on energy efficiency (n 14), recital 14.
[531] European Commission, "Energy Efficiency Directive" <Energy Efficiency Directive (europa.eu)> accessed 09 April 2024.
[532] European Commission, "Energy efficiency targets" <Energy efficiency targets (europa.eu)> accessed 08 April 2024.

behind'. The preamble of the directive specifies that efficiency improvement measures need to be implemented as a priority among people affected by energy poverty, vulnerable customers, and final users. While implementing the energy efficiency schemes, the MS are required to consider the energy-poor households in the development of national policies aimed at achieving the efficiency target and ensure that they do not negatively impact consumers.[533] In addition, a percentage of the energy savings target is dedicated to priority households. This also includes an obligation to report which measures have delivered the savings and who were the beneficiaries. This will improve the visibility of energy efficiency measures and show the real extent of alleviating energy poverty.[534] A newly introduced article 22 imposes the obligation of the MS to provide information regarding efficiency measures to consumers and raise awareness on the efficient use of energy.[535]

As previously mentioned, the energy inefficiency of buildings can also have an impact on the increased costs spent on energy. In this sense, as part of the "Fit for 55" package, the European Commission adopted a major revision (recast) of the Energy Performance of Buildings Directive (EPBD).[536] It is meant to address the renovations needed to ensure a better performance of buildings. In this sense, minimum energy performance standards are put in place to accelerate the renovation rates of buildings with the view of decreasing energy costs and alleviating energy poverty in the long run.

2.3.2 Social measures

Social measures are important as they are meant to provide access to energy services in an affordable way to all members of society and support those who are particularly disadvantaged. In this context, the EED also includes some social measures, such as the obligation to assist vulnerable customers through access to grants and subsidies.[537]

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[533] Directive on energy efficiency (n 14) art 5(6).
[534] SocialWat, "Implementing the new Energy Efficiency Directive to alleviate energy poverty", (2023) <EED Briefing_Implementing_the_new_Energy_Efficiency_Directive_to_alleviate_energy_poverty_FINAL.pdf (socialwatt.eu)> accessed 08 April 2024.
[535] Directive on energy efficiency (n 14) , art 22.
[536] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast), amended by Directive (EU) 2018/844 and last revised in 2021, OJ L 153/13.
[537] ibid, art 24.

Considering the circumstances of high energy prices, in October 2021, the Commission adopted the Communication 'Tackling rising energy prices: a toolbox for action and support'.[538] This acted as guidance to MS to implement measures aimed at addressing the high energy prices and providing emergency income support to vulnerable customers and energy-poor users. In addition, the Commission established the Social Climate Fund (SCF) with the objective of supporting "households, micro-enterprises, and transport users, which are vulnerable and particularly affected by the" extension of the Emission Trading System.[539]In pursuit of this objective, the Commission proposes temporary income support. It is meant to serve as social compensation amidst increasing prices of fossil fuels resulting from the inclusion of greenhouse gas emissions from buildings and road transport within the scope of the Emission Trading Directive.[540] It also requires that the social climate plans include an estimate of the increase in price and on the incidence of energy poverty.[541] In this way, it will be easier to predict the amount of funds needed to ensure the satisfaction of the fund's objective.

2.3.3 Renewable energy support

There are good reasons to anticipate that transitioning to clean energy will reduce the overall expenses of the energy system in the long term.[542] This can be done by investing in renewable energy, adopting innovative technology, and limiting the dependence on imported fossil fuels. The transition may be particularly difficult for low-income households, as they have fewer means to invest in efficient appliances, LED light bulbs, and solar panels. The inability to invest in sustainable energy and the continuous dependence on traditional energy sources are causing rising energy costs.

Under the EGD, renewable energy is a pillar of the clean energy transition. It is less costly in the long term and is domestically sourced, which reduces

[538] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling rising energy prices: a toolbox for action and support COM/2021/660.
[539] Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, OJ L 130/1, art 1.
[540] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32.
[541] Regulation establishing a Social Climate Fund (n 30), art 4.
[542] Andre Faaij, Ruud van den Brink, 'Energie wordt goedkoper', TNO, (2019).

Europe's dependency on external suppliers.[543] The newly revised Renewable Energy Directive aims at accelerating the green transition. In this way, the dependence on imported fossil fuels will be reduced, promoting fair and affordable prices for Union citizens and undertakings in all sectors of the economy. The directive mentions that using more renewable energy can reduce exposure to price shocks and is a key element in tackling energy poverty.[544] It does not have any specific provisions on energy affordability or on tackling energy poverty, but it contains provisions on access to renewables in heating and cooling for low-income and vulnerable consumers.[545] Therefore, it can be inferred that the provisions of the directive are indirectly aimed at ensuring energy affordability.

2.4 Challenges related to the implementation of affordability measures

The affordability measures pose several challenges when it comes to their implementation and enforcement. One significant aspect is the difference between the various socio-economic contexts across the EU. It is difficult to ensure the same level of energy affordability for consumers when each country has its own energy market structure, policy priorities, and economic conditions. For instance, when it comes to energy poverty, some European countries (Cyprus, France, Ireland) define energy poverty as an issue of affordability, while other countries (Austria, Italy, and Malta) do not even have an official definition.[546] In addition, even if there are indicators to measure energy poverty at the EU level, there are still differences in the way MS are approaching its assessment. Depending on the indicator employed, different results are reached in the assessment of the extent of energy poverty, which indicates an inconsistency in its evaluation across the EU.

In addition, while the main objective of the Green Deal is to reach climate neutrality, more accent could have been put on other aspects of the energy policy. Changes intended or already adopted in the context of the Green Deal

[543] European Commission, "Renewable Energy Directive" <Renewable Energy Directive (europa.eu)> accessed 09 April 2024.
[544] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, recital 2.
[545] ibid, art 23.
[546] Dlzar Al Kez, Aoife Foley, Christopher Lowans, Dylan Furszyfer Del Rio, "Energy poverty assessment: Indicators and implications for developing and developed countries", Energy Conversion and Management, vol 307 (2024).

are primarily addressed at reinforcement of aspects of clean energy, while issues related to affordable energy receive less degree of attention. Undoubtedly, investing in more renewable clean energy is beneficial in the long term, but there should also be more focus on how affordability is ensured. For example, in the Renewable Energy Directive, there are no specific provisions on how energy affordability is ensured in the context of the transition to new types of energy. It is easy to notice that the EU climate policy supports renewable energy sources, but because of their high initial cost and other technical reasons, the EU's renewable energy capacity remains insufficient to fully replace conventional sources. At the same time, rising costs of meeting increasingly stringent greenhouse gas emission reduction targets translate into rising energy prices. To alleviate the burden of high prices, the Social Climate Fund attempts to offer support to vulnerable customers. However, it is not enough to ensure that low-income households are empowered in the transition to carbon neutrality and zero pollution.[547] The SCF needs to be combined with other measures that address the root cause of why people struggle to pay their bills, for instance, more social protection.[548]

3. The principle of interconnected energy

3.1 The principle in the European Green Deal

Another fundamental principle enshrined in the Green Deal's legal framework is that of interconnected energy. In this context, interconnected energy entails an integration and digitalization of the current energy markets and systems through regional cooperation and national energy and climate plans (NECPs). In this way, the European Union aims to combat climate crises through standard, controlled energy practices that promote a low-carbon future and renewable energy sectors such as solar, wind, and hydro.[549]

This principle relates closely to the European Union's practice of the harmonisation of Community law enshrined in Article 114 of the Treaty on the Functioning of the European Union. Harmonisation involves the

[547] European Environmental Bureau, Mid-term assessment of the European Green Deal (2020) <*Midterm-Assessment-August22.pdf (eeb.org)> accessed on 11 April 2024.
[548] ibid.
[549] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal)l' COM (2019) 640 final.

creation of a unified legal framework to ensure common standards across Member States and the internal market. The EGD's approach to interconnected energy supports the EU harmonisation of law as it promotes the development of a cohesive and integrated energy market, fostering cooperation among Member States, and advancing common goals related to energy sustainability and climate action. This is further outlined in the 'Fit for 55' package, which emphasises a defining principle of solidarity amongst member states and community institutions. It states that the "European Union is built on the premise of developing common policies to achieve our common interests [and] it requires solidarity between its Member States and between its citizens to achieve these goals".[550] In sharing efforts and objectives, and realistically addressing challenges and differences that come from uniting different national legal and energy systems, the package wishes to mitigate climate change and promote sustainable development.

3.2 Legal framework to achieve interconnected energy

An essential aspect of interconnection involves establishing a robust legal framework that defines sustainability goals and individual action plans. While the European Green Deal serves as a vehicle for setting overarching goals and fostering sustainability, it falls upon Member States to codify these principles and objectives into law and enforce their implementation. This process takes the form of NECPs, which Member States were required to submit to the Commission by the end of 2019 in compliance with the Regulation on the Governance of the Energy Union and Climate Action.[551]These plans not only included setting national objectives and legislative initiatives but also outlined their contributions to the five dimensions of the Energy Union which include the security of supply, the internal energy market, energy efficiency, decarbonization, and innovation.[552] Subsequently, the Commission evaluates the ambitions outlined in these plans and their alignment with EU-wide targets, proposing revisions or additional measures as necessary. Upon approval and

[550] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (Fit for 55)' COM (2021) 550 final.
[551] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal)l' COM (2019) 640 final, 2.1.2.
[552] Commission Implementing Regulation (EU) 2022/2299 of 15 November 2022 laying down rules for the application of Regulation (EU) 2018/1999 of the European Parliament and of the Council as regards the structure, format, technical details and process for the integrated national energy and climate progress reports [2022] OJ L306/1.

incorporation of this legislation into domestic law, the Commission maintains an active role in overseeing the enforcement of all climate plans. Member States are then required to biennially report their national climate progress and any of the "renewable fuels of non-biological origin they expect to import or export in their integrated energy and climate plans" to the Commission, as dictated in the Renewable Energy Directive of 2023.[553]

Legislation plays a crucial role in advancing the principle of interconnected energy and integrating the energy systems of member states. For instance, initiatives like the Farm to Fork Strategy[554] and Sustainable Europe Investment Plan[555] promote greater coordination within the European Union. These efforts aim to reward farmers for enhanced environmental and climate performance while addressing any additional funding needs to support sustainability objectives. In line with this approach, the Commission has proposed a Carbon Border Adjustment Mechanism as a climate action instrument. This mechanism introduces a market dynamic to uphold the integrity of EU and global climate policies by reducing greenhouse gas emissions both within the EU and globally. It incentivizes relevant sectors to modernise, improve sustainability, and reduce their carbon footprint.[556] This shift strengthens incentives for both EU and foreign industries to coordinate energy practices and lower emissions. Additionally, policy reforms such as those outlined in the European Strategic Energy Technology Plan further contribute to the transition towards a climate-neutral energy system by prioritising research and innovation in sustainably and ethically incorporating technology to achieve the set objectives.[557] The ETS aims to ensure effective carbon pricing throughout the economy, driving changes in consumer and business

[553] EU Directive 2023/2413 of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 [2023] OJ L__/1.
[554] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal)l' COM (2019) 640 final, 2.1.6.
[555] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal)l' COM (2019) 640 final, 2.2.1.
[556] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (Fit for 55)' COM (2021) 550 final.
[557] EU Directive 2023/2413 of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 [2023] OJ L__/1, para 7.

behaviour and facilitating increased sustainable investment, thus providing a coherent policy framework.[558]

3.3 Importance of regional cooperation of member states

The EGD not only cultivates a close collaborative relationship between the Commission and Member States to actively ensure the attainment of its principles and objectives but also underscores the significance of regional cooperation to achieve interconnectivity. This is a unified effort within the union so it is imperative that Member States enact legislation, foster alliances, and establish agreements to better actualize the Green Deal's objectives.

In 2020 and 2023, the Commission conducted assessments and issued reports on the state of the Energy Union and NECPs of Member States. These evaluations provided valuable insights into the progress made by member states towards meeting their renewable energy targets and other climate objectives. An analysis of the NECPs and Eurostat figures from 2018 suggests that the EU is on track to reach a renewable energy share of between 22.5% and 22.7%, with the majority of member states projected to meet their national binding targets.[559] Most member states have reported progress in implementing regional cooperation initiatives across various dimensions, including energy security, internal energy market integration, and decarbonization. Notable examples include joint auctions for offshore wind projects between countries like Estonia and Latvia, as well as collaborations in the offshore renewable energy sector around the North and Baltic Seas. Practical utilisation of regional cooperation mechanisms has been observed among member states, exemplified by the establishment of collaborative groups such as the Pentalateral and Central and South Eastern Europe energy connectivity, the Northern Seas initiative, and cooperative efforts among Baltic countries.[560] Moreover, regional cooperation in the offshore renewable energy sector is witnessing remarkable progress, with cooperations such as the North Seas Energy

[558] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (The European Green Deal)l' COM (2019) 640 final, 2.1.1.
[559] Commission, 'An EU-wide assessment of National Energy and Climate Plans Driving forward the green transition and promoting economic recovery through integrated energy and climate planning' COM (2020) 564 final, 2.1.1.
[560] Commission, 'An EU-wide assessment of National Energy and Climate Plans Driving forward the green transition and promoting economic recovery through integrated energy and climate planning' COM (2020) 564 final, 2.4.1.

Cooperation (NSEC) and the Baltic Energy Market Interconnection Plan (BEMIP) which are designed to jointly develop offshore energy resources of basins.[561] The Commission was also proud to report the numerous conventions of European energy ministers to deliberate on collaborative strategies, underscoring the commitment towards regional energy integration.[562]

3.4 Challenges in interconnectivity

Achieving energy interconnectivity between member states within the European Union poses significant challenges that stem from disparities in economic needs, industries, natural resources, and existing energy systems. These divergences hinder the harmonisation and unification of energy objectives and plans across member states, complicating efforts to establish a cohesive energy landscape. Despite understanding the importance of regional cooperation, many member states have yet to fully seize its potential. While some have set ambitious sectoral targets for renewables, such as Austria and Sweden aiming for 100% renewable electricity by 2030 and 2040,[563] others struggle to align sectoral trajectories with the requirements stipulated in the Renewable Directive. Seven member states, including Ireland, Greece, Spain, France, Italy, Cyprus, and Romania, were found to be below the 2030 interconnection target, with four of them also remaining below the 2020 target.[564] This discrepancy underscores the challenge of achieving consensus and coherence in energy transition strategies among member states and highlights the need for sustained efforts to bridge the gap. To address this, further investment and timely delivery of cross-border projects are required.

The European Commission's assessment underscores the importance of addressing these challenges to achieve full energy interconnectivity. While member states have enacted national legislation and initiatives, there remains untapped potential for regional cooperation. Building on the foundational framework laid by the NECPs, Member States ought to harness

[561] Commission, 'State of the Energy Union Report 2023 (pursuant to Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action)' COM (2023) 650 final, 2.3.
[562] Commission, 'State of the Energy Union Report 2023 (pursuant to Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action)' COM (2023) 650 final, 2.3.
[563] Commission, 'An EU-wide assessment of National Energy and Climate Plans Driving forward the green transition and promoting economic recovery through integrated energy and climate planning' COM (2020) 564 final, 2.1.1.
[564] Commission, 'State of the Energy Union Report 2023 (pursuant to Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action)' COM (2023) 650 final, 2.2.

regional cooperation more effectively. This entails leveraging existing forums to collectively address shared energy transition priorities, such as enhancing energy efficiency, modernising transport, advancing smart grid technologies, and scaling up renewable energy installations.[565] Enhancing regional cooperation is deemed vital for fostering collaboration, sharing best practices, and overcoming shared challenges, such as skills shortages in renewable energy sectors and deficiencies in energy efficiency measures. Moving forward, member states must capitalise on regional opportunities and make practical use of regional cooperation to enhance the energy transition and meet interconnection objectives.

Thus, while progress has been made towards energy interconnectivity within the EU through comprehensive legal frameworks such as the 'Fit for 55' package, the Renewable Energy Directive, NECPS, and the Implementing Act, significant challenges persist. Bridging the disparities between member states, aligning sectoral trajectories with EU directives, and optimising regional cooperation is imperative for advancing toward a unified and sustainable energy landscape in Europe. Only through concerted efforts and enhanced collaboration can member states effectively address these challenges and realise the full potential of energy interconnectivity within the EU.

4. The Principle of efficient energy

The principle of 'Energy Efficiency First' lies in the EGD, highlighting the importance of optimizing energy use as a cornerstone of sustainable development. The principle is the guiding principle in the EGD and energy policies.[566] The core of this principle means that only using the needed energy to produce, invest, avoid investments in stranded assets, reduce the demand for energy, and manage it in a cost-effective way.[567] This principle has been incorporated in the Regulation on Governance of the Energy Union and the Energy Efficiency Directive (EED).[568]

[565] Commission, 'An EU-wide assessment of National Energy and Climate Plans Driving forward the green transition and promoting economic recovery through integrated energy and climate planning' COM (2020) 564 final, 2.4.1.
[566] European Commission, 'Energy Efficiency First Principle' <https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-first-principle_en> accessed 8 April 2024.
[567] Ibid.
[568] European Council for an Energy Efficient Economy, 'Energy Efficiency First Principle' (21 February 2023) <https://www.eceee.org/policy-areas/energy-efficiency-first/> accessed 8 Apri 2024.

Energy Efficiency Firs aims to improve current and future energy security and affordability while assisting in the reduction of overall energy use, making it essential to fulfilling the EU's climate ambition.[569] Energy Efficiency First plays an important role in the 'Fit for 55' package to contribute to reducing greenhouse gas emissions by at least 55% by 2030 compared to 1990.[570] It aims to prioritize cost-effective energy efficiency measures over investments in energy supply infrastructure whenever possible. At its essence, it seeks to maximize the output obtained from energy consumption while minimizing waste and emissions. Pursuant to the EGD Article 2.12, the collaboration and integration of renewable energy, energy efficiency, and other sustainable solutions will also help to achieve decarbonization at the lowest cost.

4.1. Frameworks of energy efficiency

The implementation of the principle within the EGD involves a multifaceted approach encompassing legislative frameworks, financial mechanisms, and building construction. Pursuant to the EGD, energy efficiency is prioritized, especially in building and renovating.[571] The implementation of the Energy Efficiency First principle is supported by the Commission' Recommendation on Energy Efficiency First. It applies to planning, policy, and investment decisions that have an impact on energy consumption and energy supply.[572] On the other hand, the EED plays a pivotal role in promoting energy efficiency across the European Union. It sets binding targets for improving energy efficiency and mandates measures to achieve these objectives. The amended EED significantly reflects the EU's ambition for energy efficiency which gives the energy efficiency first principle legal strength for the first time despite introduced in the EED since 2012.[573] Measures to accelerate energy efficiency were also introduced.
New targets on the EU's energy efficiency target was introduced in the amended EED.[574] Total energy consumption of all public bodies combined

[569] European Commission, 'Energy Efficiency Directive' <https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-directive_en#:~:text=EU%20countries%20are%20required%20to,1.9%25%20in%202028%2D2030.> accessed 8 April 2024.
[570] Ibid.
[571] Commission Recommendation (EU) 2021/1749 of 28 September 2021 on Energy Efficiency First: from principes to practice – Guidelines and examples for its implementation in decision-making in the energy sector and beyond, OJ L 350, Whereas (18).
[572] Commission Recommendation (EU) 2021/1749 (n68) 2.1.2.
[573] European Commission, 'Energy Efficiency Directive' (n 66).
[574] EU Directives 2023/1971 of the European Parliament and of the Council of 13 September 2023 on energy efficiency amending Regulation (EU) 2023/955, OJ L 231, Whereas (28).

should be reduced by a minimum of 1.9% each year.[575] To achieve this target, the Member States are required to set an indicative national contribution based on their own national circumstances and if the national contributions can not help to achieve the target, an ambition gap mechanism will be applied by the Commission.[576] In addition, the new EED increases the annual energy savings from 0.8% (present) to 1.3% (for 2024-2025), 1.5% (for 2026-2027), and 1.9% (from 2028 onwards).[577] Several other points were also made to reflect the commitment to realize Energy Efficiency. The EED also introduced a different approach for businesses to have a management system for energy consumption, including energy audits. To fully ensure decarbonised district heating and cooling supply by 2050, the efficient district heating and cooling definition is revised.[578] The minimum requirements will also be adapted for the progressive integration of renewable energy and waste in the system.[579] Energy necessary to be used in buildings–construction or renovation–accounts for 40% of energy consumption.[580] The effort to prioritise energy efficiency in the performance of buildings is supported by Renovation Wave, Construction Product Regulation (CPR), and Energy Performance of Buildings Directives (EPBD). The Renovation Wave is a strategy to increase energy efficiency through renovating buildings by prioritizing decarbonization of heating and cooling.[581] Energy efficiency is a priority and the EU Commission will be exploring the possibility of adding building emissions in the EU Emissions Trading System.[582] Meanwhile, the CPR sets requirements for the environmental performance of construction materials and products. At the same time, it encourages the use of energy-efficient building materials. The EPBD laid down mandates for energy performance certificates and requirements for buildings, encouraging energy efficiency through improved insulation and renewable energy integration. On 7 December 2023, the new revision of the EPBD reached a provisional

[575] Ibid, Article 5(1).
[576] Directorate-General for Energy, 'New Energy Efficiency Directive Published' (European Commission, 20 September 2023) <https://energy.ec.europa.eu/news/new-energy-efficiency-directive-published-2023-09-20_en> accessed 14 April 2024.
[577] EU Directives 2023/1971(n71) Whereas (62).
[578] European Commission, 'Energy Efficiency Directive' (n 66).
[579] ibid.
[580] Ibid, para 2.1.4.
[581] 'The EU Green Deal Explained' (Norton Rose Fulbright, April 2021) <https://www.nortonrosefulbright.com/en-nl/knowledge/publications/c50c4cd9/the-eu-green-deal-explained#> accessed 8 April 2024.
[582] Ibid.

agreement and will go through formal adoption in 2024.[583] However, up until April 2024, no adoption has been made. The revised EPBD increases the rate of renovation, especially in the worst-performing building, while also supporting the digitalization of energy systems for buildings and better air quality.[584] This mean that renovation for building will be increase, focusing more toward buildings with insufficient energy efficiency.

The Member States will have to reduce energy use for residential buildings and 20-22% by 2035, while 16% of the worst-performing non-residential buildings must to be renovated.[585] The EPBD also states that all new buildings –residential and non-residential– must be zero-emission buildings by 2028 for public-owned buildings and by 2030 for other buildings, with possible exemptions in certain cases.[586]

4.2. Challenges in energy efficiency

The Energy Efficiency First Principle highlights that the main approach to addressing energy needs is prioritizing energy efficiency measures rather than increasing energy supply. However, the road to this principle's broad acceptance is fraught with difficulties. On one side, rapid technological development can create uncertainty and hesitation among potential adopters.[587] The uncertainty and hesitation mainly resulting from the lack of understanding in keeping up with the latest developments and how the new technologies actually work. As the technologies advance rapidly, people may also be hesitant to adopt the new technologies as it could quickly become outdated by the next innovation. Meanwhile, inadequate technological capabilities and limited access to clean energy sources can hinder the deployment of energy-efficient technologies. Technological capabilities are essential to create and improve energy-efficient technologies. In areas with limited technological capabilities, there may be less investment in it and leading to fewer advancements in energy efficiency.

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[583] European Commission, 'Energy Performance of Buidings Directive' <https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficient-buildings/energy-performance-buildings-directive_en> accessed 14 Aprill 2024.
[584] Ibid.
[585] European Commission, 'Questions and Answers on the revised Energy Performance of Buildings Directive (EPBD)' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_1966> accessed 14 April 2024.
[586] Ibid.
[587] 'Commercial Energy Efficiency: Top 10 Challenges to Achieve Climate Goals and How and EPC Can Help' (*Eco Engineering News*, 16 October 2023) <https://ecoengineering.com/blog-commercial-energy-efficiency-top-ten-challenges-with-climate-esg-goals-how-epc-can-help/> accessed 13 April 2024.

The hurdle can also be understood from an investment point of view. Innovative approaches to financing energy efficiency investments are at the center of the EU energy efficiency policy, legislation, and funding.[588] Investment is highly required to promote energy efficiency. Many energy-efficient technologies and practices are believed to entail higher upfront costs but promise long-term savings.[589] This often discourages individuals, businesses, and governments from pursuing energy efficiency measures. The initial capital/investment needed can be a significant barrier, especially for small and medium-sized enterprises (SMEs) and households.[590] Innovative financing strategies like green bonds, tax breaks, and subsidies can be used to address this issue by increasing the financial appeal of energy efficiency initiatives.[591]

The energy efficiency market is highly fragmented, with diverse stakeholders, including consumers, businesses, policymakers, and technology providers, which can lead to behavioral and cultural differences.[592] These behavioral and cultural differences play a significant role, as ingrained consumption habits and resistance to change impede the adoption of energy-efficient behaviors. Related to market fragmentation from behavioral and cultural differences is the lack of awareness and information. A lack of knowledge and comprehension of the advantages of energy efficiency among enterprises, customers, and legislators may impede the implementation of energy-efficient practices.[593] In order to overcome those challenges, governments, corporations, academic institutions, and civil society organizations must work together to simplify regulations, encourage information exchange, and develop an energy-conscious culture through campaigns for education and awareness.

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[588] 'Innovative Financing' (European Commission) <https://energy.ec.europa.eu/topics/energy-efficiency/financing/innovative-financing_en> accessed 13 April 2024.

[589] 'Decoding the Myth: Why Energy Efficiency Homes Aren't Allways Seen as Financially Viable in the Property Market' (Ezzi UK) <https://www.ezzi.uk/news/energy-efficiency-isnt-financially-viable/> accessed 13 May 2024.

[590] Roberto G. Aiello, 'What are some of the main barriers for energy efficiency programs in the power sector in Latin America?' (*IDB*, 1 November 2016) <https://blogs.iadb.org/energia/en/what-are-some-of-the-main-barriers-for-energy-efficiency-programs-in-the-power-sector-in-latin-america-2/> accessed 13 April 2024.

[591] Alexandra Rusu, Esther Mot & Arjan Trinks, 'Green Innovation Policies: A Literature and Poicy Review' (CPB Netherlands Bureau for Economic Policy Analysis, 2021) <https://www.cpb.nl/sites/default/files/omnidownload/CPB-Background-Document-Green-innovation-policies.pdf> accessed 13 May 2024.

[592] Eco Engineering News (n85).

[593] **Roberto G. Aiello (n88).**

The most important thing is that while many countries have implemented policies and regulations to promote energy efficiency, challenges often arise in their effectiveness and enforcement. Implementing consistent and enforceable policies can help overcome these barriers and accelerate the transition toward a more energy-efficient future. Inconsistencies in regulations and lack of harmonizations among different policies can hinder the adoption of energy-efficient measures.[594] Strategies by providing financial incentives, raising awareness through education and outreach programs, and promoting research and development of energy-efficient technologies can create awareness helping people to overcome these barriers.

5. Conclusion

It can be understood that a diverse level of regulatory soundness can be examined across the legal frameworks encompassing the EGD acquis. This conclusion will attempt to concisely summarise the conclusions reached in the above sections of the paper, and jointly bridge the three analyses into an understanding of the means by which the three principles interact with each other.

Energy affordability has been addressed through various EU measures, yet gaps within the frameworks it has been implemented in prevent it from a comprehensive status. Included primarily in the Energy Efficiency Directive and Energy Performance of Buildings Directive, this principle has also been a large focus of the Social Climate Fund (SCF). However, its status as a temporary instrument, which is directed at MS - not MS citizens directly - has subjected it to scepticism over its effectiveness. This scepticism, owing to the SCF's status as an instrument currently not paired with other measures, has been directed at its poor social protection and inadequate address of labour conditions. Furthermore, the varied socio-economic contexts forming the EU have been left largely unanswered, and proper distribution methods of the SCF has thus been unanswered.

The principle of interconnected energy is being actively integrated into the framework of the European Green Deal (EGD) acquis to differing extents. Leveraging key instruments such as the National Energy and Climate Plans (NECPs) and the Regulation on the Governance of the Energy Union and Climate Action, the European Union (EU) is steering towards a more

[594] Ibid.

interconnected energy landscape. The Renewable Energy Directive of 2023 introduced stringent reporting requirements, aiming to synchronise sectoral trajectories with uniform, aligned renewable energy targets. However, challenges persist, as evidenced by several MS falling short of interconnection targets - signalling the need for intensified efforts to prevent arbitrage in this respect. Moreover, maximizing existing forums to collectively address shared energy transition priorities, including enhancing energy efficiency, modernizing transport, advancing smart grid technologies, and scaling up renewable energy installations, is essential. By embracing regional cooperation and strategic investments, the EU can propel itself towards a more interconnected and sustainable energy future.

Despite significant efforts to prioritise energy efficiency within the EGD frameworks, several challenges persist in its implementation. The requirement for Member States to prioritise vulnerable groups and social housing residents in energy savings measures is commendable but can encounter difficulties in execution due to varying capabilities and resources that remain unaddressed. Additionally, while energy audits for businesses are mandated, enforcement is also questionable, undermining their effectiveness. The integration of Energy Efficiency into building performance, supported by initiatives like the Renovation Wave and directives such as the Construction Product Regulation and Energy Performance of Buildings Directives, holds promise but may face resistance or limitations due to inadequate technological capabilities and limited access to clean energy sources. Furthermore, navigating the fragmented stakeholder landscape, which includes consumers, businesses, policymakers, and technology providers, presents a formidable challenge that requires collaborative efforts to streamline regulations, facilitate information exchange, and foster an energy-conscious culture through education and awareness campaigns. Addressing these challenges is essential to unlocking the full potential of energy efficiency and advancing the goals of the European Green Deal.

In conclusion, while examining the implementation of the principles of energy affordability, interconnected energy, and efficient energy within the European Green Deal (EGD) acquis, it becomes evident that a diverse level of regulatory comprehensiveness exists across the legal frameworks. Each principle interacts with the others in complex ways, posing interlinear questions about their mutual impact and influence. Overcoming these challenges requires collaborative efforts to streamline regulations, foster

innovation, and promote an energy-conscious culture, ultimately advancing the EU's goals towards a more sustainable and interconnected energy future.

APPENDIX

CARLA-ELENA SAVA, SZOFI MÉSZÁROS, KAMILLA ZITA HAJDU[595]

What are the legal challenges developers of sustainable agricultural technology has to overcome to be active in the EU market? A comparative study between the Netherlands and Hungary

ABSTRACT: This research is the result of the ELSA Legal Research Group 2022-2023, which had the broad theme of sustainability. The three researchers chose to conduct a comparative study between the Netherlands and Hungary with regard to the legal challenges that developers of sustainable agricultural technology face in the European Union's market.

[595] Members of the ELSA Law Research Group 2022-2023, Students at the University of Groningen.

I. INTRODUCTION

Since the establishment of the European Economic Community (EEC) agriculture has been at the core of European integration. Agriculture needs to be regulated at an EU level to coordinate food production in the area of the EU, since this sector is responsible for providing around 44 million jobs in the Union, in addition to the food supply of all EU citizens. Furthermore, scientists estimate that the world's food production must be doubled by 2050 to cater for a growing population with evolving eating habits.[596] Agriculture and fisheries are a shared competence of the EU and Member States (MS), meaning that both can adopt legally binding acts in these fields.[597] The EU's legal framework for agriculture is the Common Agricultural Policy (CAP) established in 1962, which is the longest-standing EU policy still in operation.[598] The CAP is a set of laws established by the EU to unify agricultural policy within the area of the European Union. As the CAP consists mainly of regulations, it does not require legislative transformation by the MSs. It works intertwined with the Farm to Fork Strategy and the Biodiversity Strategy for 2030, both of which fall under the scope of the European Green Deal. In this section, I will provide a general overview of how the EU approaches new sustainable agricultural technologies, by introducing the history and development of the above-mentioned initiatives, as well as analysing the regulations and directives that construct them.

A. DEFINITIONS

First, to gain a thorough understanding of the EU's approach to sustainable agriculture it is imperative to clarify the meaning of these terms. The worldwide accepted definition of the term 'sustainable development,' also supported by the EU, was drawn up in the 1987 Brundtland report 'Our Common Future' by the World Commission on Environment and Development.[599] This report defines

[596] European Commission, 'Agriculture – EU Action' (*European Union*, 2017) <https://european-union.europa.eu/priorities-and-actions/actions-topic/agriculture_en> accessed 26 June 2023.
[597] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 4(d) (Treaty on the Functioning of the European Union).
[598] European Council, 'Common Agricultural Policy' (*consilium.europa.eu*, 2023) <https://www.consilium.europa.eu/en/policies/cap-introduction/> accessed 26 June 2023.
[599] Publications Office of the European Union, 'Sustainable Development' (*EUR*, 2017) <https://eur-lex.europa.eu/EN/legal-content/glossary/sustainable-development.html> accessed 26 June 2023.

sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[600] With this definition in mind, sustainability formally became a long-term goal of the EU under Article 3 of the Treaty of the European Union (TEU) with the entry into force of the document in 2009.[601] This article lays down the aims of the Union with subparagraph 5 specifying that the Union shall "contribute to peace, security, the sustainable development of the Earth," etc.

A widely recognized definition of agriculture is that it is "the art and science of cultivating the soil, growing crops and raising livestock."[602] The EU also defines agricultural products as the "products of the soil, or stock farming and of fisheries and products of first-stage processing directly related to these products."[603] This autonomous interpretation is to ensure the MSs use the same definitions, and all included products are listed in Annex I to the TEU and Treaty on the Functioning of the European Union (TFEU), so that the internal market can operate without confusion.[604]

Technological development in agriculture both domestically and internationally is needed to achieve the purpose of "sustainable intensification". To understand how the EU approaches new agricultural development one must consider sustainable intensification (SI) as the goal to strive for. SI does not favour any particular agricultural processes, it simply sets the goal of increasing agricultural products without compromising the environment or converting any additional non-agricultural land. [605]

[600] Brundtland, G.H. Our Common Future Report of the World Commission on Environment and Development (20 March 1987) UN Doc A/42/427.
[601] Consolidated version of the Treaty on the European Union [2012] OJ C 326/13 (Treaty on the European Union).
[602] National Geographic Society, 'The Art and Science of Agriculture' (*Education*, 2022) <https://education.nationalgeographic.org/resource/agriculture/> accessed 26 June 2023.
[603] Treaty on the Functioning of the European Union, art 38.
[604] Kellerbauer M, Klamert M and Tomkin J, 'Article 38 TFEU', *The EU treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019).
[605] Pretty J and Bharucha ZP, 'Sustainable Intensification in Agricultural Systems' (2014) 114 *Annals of Botany* 1571.

B. HISTORICAL OVERVIEW OF THE COMMON AGRICULTURAL POLICY

Agriculture and fisheries are currently areas of shared competence between the EU and the MSs as established in Article 4 (2)(d) TFEU. The CAP was originally established in 1962 in Article 38 TEC, which can now be found as Article 38 TFEU. The legal basis for all regulations under the scope of the CAP lies in Articles 41-44 TFEU.

The CAP is the set of laws of the EU that deals with agriculture. Since its establishment it has greatly expanded both in its focus and its toolset, and now comprises three main regulations.[606] The CAP was born in 1962 out of a dire need for a common approach to agriculture, due to post-war low food production, hence difficult access to food, low income for farmers, and differences in competition conditions between the countries. The six founding countries of what is now the EU, the European Communities (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) introduced an economic system of price and market support to achieve the following aims: increasing agricultural productivity; ensuring a fair standard of living for farmers; guaranteeing the availability of supplies; stabilising the markets; establishing a secure supply chain with reasonable prices; and harmonising competition rules across all countries. [607] Simply put, the European Communities introduced the CAP to organise the common market, and these then-introduced market measures still form the first pillar of the policy.

The first reform of the CAP took place in 1970, upon the proposal of Sicco Mansholt, the European Commissioner for Agriculture.[608] This reform was prompted by the stagnant income of farmers, despite an increase in food productivity and availability, which predicted market imbalances and over-production. [609] To solve this problem Mansholt proposed a wide-scale modernisation of the agricultural sector with the aims of optimising the cultivated

[606] *European Commission* (n 1).
[607] ibid.
[608] European Council, 'Timeline - History of the Cap - Consilium' (*consilium.europa.eu*, 2023) <https://www.consilium.europa.eu/en/policies/cap-introduction/timeline-history/> accessed 26 June 2023.
[609] Centre virtuel de la connaissance sur l'Europe, 'Reform of the Cap - Historical Events in the European Integration Process (1945–2009)' (*Centre virtuel de la connaissance sur l'Europe*, 2016) <https://www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/9180e790-2f28-4b7b-b627-9f18688a123d> accessed 26 June 2023.

land area and merging farms to create larger units. Mansholt's original proposals had included the objective for nearly 5 million farmers to quit farming, but these were abandoned following public outrage.

The still unresolved issue of surplus in agricultural production and low farmer income led to a quota system introduced in 1984.[610] Producers were not allowed to produce more food than the quota assigned them, so that the market would not overflow with unused products. This could not become a long-term solution, as the EU was accused of over-protectionism, for imposing too strict restrictions on the farmers. The 1992 MacSharry reforms represented an entirely different approach. Instead of trying to enforce guaranteed prices for customers, the policy was now aimed to issue direct income support for farmers. Direct income support for farmers is still a mandatory policy in all MSs, because it functions as a safety net, making farming a more profitable profession, and it compensates farmers for the usually non-profitable work they do, such as taking care of the countryside.[611]Additionally, from 1992 onwards, farmers have an obligation not to damage the environment from their practices, in other words, this is when environmental sustainability was introduced as part of the CAP.[612]

Before the millennium, European agriculture yet again faced a crisis. Forty years after its introduction, the CAP's budget still took up almost 50% of the EU's entire budget, while not providing as many job possibilities as other sectors. The Agenda 2000 programme, was drafted to improve agricultural competitiveness and it introduced what we now know as the second pillar of the CAP, the aim of rural development. It was a legislative package comprising about 20 legislative measures, covering four main, closely-related areas: the reform of the common agricultural policy, structural policy reform, pre-accession instruments for the 10 Central and Eastern European countries joining the EU, and the new financial framework. [613] The measures for the reform of the CAP mainly follow the path set

[610] *European Council* (n 13).
[611] European Commission, 'Income Support Explained' (*Agriculture and rural development*, 2023) <https://agriculture.ec.europa.eu/common-agricultural-policy/income-support/income-support-explained_en#:~:text=The%20European%20Union%20provides%20farmers,guarantee%20food%20security%20in%20Europe%3B&text=reward%20farmers%20for%20delivering%20public,the%20countryside%20and%20the%20environment.> accessed 26 June 2023.
[612] ibid.
[613] European Commission, Agenda 2000 - Volume I - Communication: FOR A STRONGER AND WIDER UNION (15 July 1997) DOC/97/6.

by the previous reforms. Two types of measures can be differentiated: first, new regulations amending the common organisations of the markets in wine, arable crops, beef, veal, and milk; and second, measures of a more horizontal nature.[614] One horizontal regulation urges MSs to consider the farmers' respect for the EU's environmental aims when granting direct payment support.[615] The decentralisation of the EAGGF also took place under a horizontal measure of the Agenda 2000 programme, giving MSs the opportunity to regulate their share of the funds, under certain Community criteria set out in the same regulation.[616] The Agenda 2000 programme emphasised once again the importance of sustainability in all three of its aspects - social, environmental and economic - but it did not yet introduce an emphasis on supporting sustainable agricultural development. [617] [618]

The next big reform took place in 2013 with the aim to achieve a more equal distribution of support, providing additional support for smaller farms and incentivising young people to choose a career in farming. As the CAP 2014-2020 is the first large-scale modern reform of the CAP, adopted by ordinary legislative procedure, the next chapter will analyse it in greater depth as well as compare it with the transitional period, and the CAP 2023-2027 that will follow it.

C. COMPARISON OF THE CAP 2014-2020 AND THE CAP 2023-2027

The CAP 2014-2020, accepted in 2013 to finally give the long-yearned common approach to agriculture a proper framework, consisted of four regulations issued through the ordinary legislative procedure, on the legal basis of Articles 41-44 TFEU.

The financing of the CAP 2014-2020 was to be done by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). [619] The total agricultural expenditure of the EU amounted to 408.313

[614] ibid.
[615] ibid.
[616] ibid.
[617] ibid.
[618] European Council (n 13).
[619] European Parliament and Council Regulation (EU) 1306/2013 of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 [2013] OJ L347, art.3.

billion euros for this period.[620] 71.3% of this budget (EUR 291.273 billion) was used to issue direct payment for farmers, 4.3% (EUR 17.453 billion) for market measures (so a total of 75.6% for the first pillar of the CAP, managed by the EAGF), and 24.4% (EUR 99.587 billion) for rural development, which is the second pillar managed by the EAFRD.[621] The main difference in the budget of the CAP 2023-2027 is the increasing commitment to combat the climate crisis. 40% of the new CAP budget is reserved for climate-relevant action, and 10% of the EU's budget shall be dedicated to biodiversity objectives by the end of the EU's 2021-2027 multiannual financial framework.[622] In the new CAP period EUR 291.1 billion are allocated to the EAGF and EUR 95.5 billion for the EAFRD, with a fund amounting to at least EUR 450 million per year set aside for crisis intervention.

The common organisation of agricultural markets in the EU is aimed to stabilise markets; improve quantity and quality of production; and encourage cooperation between the different actors of the food supply chain.[623] The original regulation for the 2014-2020 period has been amended several times to include new agricultural products or respond to the current financial situation, but has not changed in substance. It lays down market standards (quality requirement for both the product and production) and sets the rules on trade and specific competition rules in agriculture.[624] These are necessary to ensure that the EU's internal market is an asset for improving the quality of life of EU citizens rather than a burden. Each sector and product has a regulation that sets concrete rules for quality, production means and trade. For some products the regulation was created before 2014, and these were carried on to the new policies, when deemed still relevant.[625]

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[620] François Nègre, 'Financing of the Cap: Fact Sheets on the European Union: European Parliament' (*Fact Sheets on the European Union | European Parliament*, 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/106/financing-of-the-cap> accessed 26 June 2023.
[621] Implementing Regulation (EU) No 2015/141 (OJ L 24, 30.1.2015).
[622] European Parliament and Council Regulation (EU) 2021/2115 of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013 [2021] OJ L 435.
[623] European Parliament and Council Regulation (EU) 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347.
[624] ibid.
[625] See, e.g., Commission Regulation (EC) 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs [2008] OJ L 163.

Direct payments for farmers is the first pillar of the CAP, and is one of the most straightforward ways for the EU to support agriculture, and those working in the sector. These payments are carried out together by the EU (the EAGF), and the MSs. Direct payments are payments made directly to the farmers in full, but are subject to conditions, known as cross-compliance, set out in Regulation (EU) No 1306/2013. This regulation has been amended most recently in 2020 to fit into the new CAP, but which concern the work done by the farmers have remained the same.[626] These conditions are related to the environment; climate change; agricultural conditions of the land; human, animal and plant health standards; and animal welfare. The MSs have some flexibility in issuing these payments, and consider the characteristics of the country's agriculture and the extent to which the farmer has met the conditions laid down in EU regulation.[627]

D. AGRICULTURAL TECHNOLOGY AND THE FARM TO FORK STRATEGY

The Farm to Fork Strategy stands on the belief that society can restore vital ecosystems and produce enough food for the growing population if it develops food and agriculture systems in line with the United Nations Sustainable Development Goals (SDGs).[628] Among these 17 goals are No Poverty; Zero Hunger; Good Health and Well-being; Responsible Consumption and Production; Climate Action; and Life on Land. [629] The European Commission (Commission) plans to achieve these goals partially or in whole through the Farm to Fork Strategy, which is an all-encompassing approach to sustainable food practices. [630] The strategy works intertwined with the CAP, as their goals often overlap, and both were developed as legislative tools to uniformise the EU's agriculture. The Farm to Fork Strategy is

[626] European Parliament and Council Regulation (EU) 2020/2220 of 23 December 2020 laying down certain transitional provisions for support from the European Agricultural Fund for Rural Development (EAFRD) and from the European Agricultural Guarantee Fund (EAGF) in the years 2021 and 2022 and amending Regulations (EU) No 1305/2013, (EU) No 1306/2013 and (EU) No 1307/2013 as regards resources and application in the years 2021 and 2022 and Regulation (EU) No 1308/2013 as regards resources and the distribution of such support in respect of the years 2021 and 2022 [2020] OJ L 437.
[627] European Parliament and Council Regulation (EU) 1307/2013 of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 [2013] OJ L 347.
[628] Business and Sustainable Development Commission (2017), Better business, better world.
[629] United Nations General Assembly A/Res/70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015).
[630] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, 20 May 2020, Section 1.

not in itself a legislative framework, but the Commission is planning to pass a legislative framework for a sustainable food system under the scope of the Strategy, by the end of 2023. The difference between the two lies in the broadness of their scope. The CAP covers the entire agricultural sector, and its main aim is to ensure the functioning of the common market and a uniform stable living for farmers in all MSs. [631] On the other hand, the Farm to Fork Strategy focuses solely on food production and consumption, in other words, the narrower agricultural sector.[632] Research and Innovation (R&I) are essential parts of the Strategy, as they are inevitable necessities to transition to "healthy and inclusive food systems from primary production to consumption."[633]

E. INTERMEDIARY CONCLUSION

In conclusion, the EU has tried several approaches to the regulation of agriculture throughout its existence. Currently, the CAP, which has been changed and reformed numerous times, and is expected to be amended again in 2027, covers all aspects of the sector. The CAP aims to support sustainable agricultural practices, and fulfil the SDGs of the UN. However, with each new reform of the CAP some new shortcomings come to life. Moreover, the CAP needs to be regularly revisited not only because policymakers came up with more viable legislative solutions to already known problems, but to accommodate the different conditions in MSs, under rapidly changing circumstances. Next to the CAP, the Farm to Fork Strategy works towards SI to meet the need for food supply of a growing population. Many instruments work to encourage MSs of the EU to support sustainable farming practices, and to motivate farmers to adopt such practices. Nevertheless, whether the current instruments will be sufficient to meet the goals of the EU is yet to be seen.

II. COMPARATIVE STUDY: THE NETHERLANDS

[631] Treaty on the Functioning of the European Union (no 8) art.38.
[632] European Commission , 'Reinforcing Europe's Resilience: Halting Biodiversity Loss and Building a Healthy and Sustainable Food System' (*European Commission*, 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_884> accessed 26 June 2023
[633] European Commission, COMMISSION STAFF WORKING DOCUMENT European Research and Innovation for Food and Nutrition Security (21 September 2016) SWD(2016) 319 final.

A. OVERVIEW OF THE DUTCH AGRI-FOOD SECTOR

The Netherlands, a country with only 17,53 million inhabitants (2021) and currently ranked as the 15th largest economy in the world in terms of Gross Domestic Product (GDP)[634] has been at the forefront of technological advancements in agriculture for the last decades. The well-known national commitment to sustainable agriculture: '*Twice as much food using half as many resources*'[635] is representative of the country that became the world's second largest food producer and exporter, after the US.[636]

As a whole, the agri-food sector in the Netherlands is particularly developed and accounts for around 8.5% of the total GDP and employment.[637] The Dutch economy's estimated 49.6 billion euro in agricultural goods exports in 2022[638] can be attributed to the strengths of their agricultural sector: from the favourable natural conditions, to a primary production structure dominated by family-owned companies, well-trained labour force and a pronounced global outlook. To gain a more accurate understanding of this sector, it is essential to highlight the significance of the fruit and vegetable sub-sector (€3.5 billion in exports in 2019).[639] The Netherlands produces approximately 25% of the EU pears production, other well-developed crops being: apple crops (353.000 tonnes in 2014)[640],

[634] Forbes, 2022.
[635] National Geographic, 'This tiny country feeds the world Agricultural giant Holland is changing the way we farm' (*Invest in Holland*, September 2017) <https://investinholland.com/wp-content/uploads/2019/06/NFIA-National-Geographic-Article_final-A4.pdf> accessed 13 April 2023.
[636] Laura Reiley Kvan Lnoor, 'Cutting-Edge Tech Made This Tiny Country a Major Exporter of Food' (*The Washington Post*, 21 November 2022) <https://www.washingtonpost.com/business/interactive/2022/netherlands-agriculture-technology/> accessed 16 April 2023.
[637] European Parliament, Directorate-General for Internal Policies, 'Research for Agri Committee-'Agriculture and the EU's Common Agricultural Policy in the Netherlands' (January 2016) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/563421/IPOL_IDA(2016)563421_EN.pdf > accessed 16 April 2023.
[638] Statistics Netherlands, 'Agricultural Exports Hit Record Value Due to Price Hikes' (24 January 2023) <https://www.cbs.nl/en-gb/news/2023/04/agricultural-exports-hit-record-value-due-to-price-hikes> accessed 15 April 2023.
[639] Government of the Netherlands, 'Dutch Agricultural Exports Worth €94.5 Billion in 2019' <https://www.government.nl/latest/news/2020/01/17/dutch-agricultural-exports-worth-%E2%82%AC94.5-billion-in-2019> accessed 18 April 2023.
[640] *European Parliament, Directorate-General for Internal Policies* (n 42).

cucumbers (16.5% of the total EU production in 2016)[641], cereals, flower bulbs and plants (EUR 5.8 billion in exports in 2019)[642] and potatoes (13% of the total EU output in value, 2016).[643] Additionally, the dairy products sector is one of the most profitable ones, the Dutch milk sector representing cca 9% of the EU total output.[644] In 2019, dairy products and eggs brought the Netherlands EUR 4.3 billion.[645]

Part of the agri-food sector in the Netherlands are farmers, too. An ageing trend among farmers has been, however, present in the Netherlands over the past decades, according to the Central Bureau of Statistics (CBS). Almost two-thirds of farms are managed by farmers over 51 years.[646] What's more, due to the COVID-19 pandemic, the shortage of labour in the agricultural sector has increased and 18% of the Dutch farms experienced this issue as migrant workers were forced to return home.[647] Given the prevailing scarcity of labour and seasonal workers in particular, together with the emerging sustainability trend led to investment in automation and robotization as viable alternatives.

B. THE VIEW ON SUSTAINABILITY & SUSTAINABLE AGRICULTURAL PRACTICES

Those above-mentioned profit figures cannot be achieved without their constant inclination towards agricultural progress in terms of sustainability and technological development. While the research and development expenditure in the Netherlands has more than tripled in the last decades (from EUR 5.041 million

[641] Eurostat News, 'Where Are Our Fruit and Veg Produced?' (*Eurostat News*, 28 July 2017) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20170728-1> accessed 17 April 2023.
[642] *Government of the Netherlands* (n 44).
[643] *European Parliament, Directorate-General for Internal Policies* (n 42).
[644] ibid.
[645] *Government of the Netherlands* (n 44);
[646] Fi-compass, 'Financial needs in the agriculture and agri-food sectors in The Netherlands' (2020) <https://www.fi-compass.eu/sites/default/files/publications/financial_needs_agriculture_agrifood_sectors_Netherlands.pdf> accessed 15 April 2023.
[647] ABN AMRO, 'Battle for agricultural robots begins' (August 2020) <https://assets.ctfassets.net/1u811bvgvthc/58JKNzsLmV7DUdhiCKklyg/126d7f4097ecbfc33fc253cc3ffa2921/ABN_AMRO_Report_Agritech_2020___EN_.pdf> accessed 16 April 2023.

in 1990 to over EUR 19 million now)[648], the agricultural sector was impacted as well by those forward-looking changes.

Additionally, the ambitious view of the Netherlands towards combating climate change can be seen in their commitments to achieve a circular economy and reduce greenhouse gas (GHG) emissions by 95% by 2050.[649] Since the establishment of the UN sustainable development goals (SDGs) in 2015, the Netherlands has made important contributions and worked on, relevant for the subject matter in question, SDG 2, 11, 12, 13. In relation to SDG 2, the Netherlands has set targets for reducing emissions of phosphate, nitrogen, and ammonia, while promoting sustainable food production, facilitating the transition to organic farming, and supporting research and innovation in practices such as permaculture[650]. Also, among the 12 key areas that are prioritised under SDG 11, the Kingdom included sustainable land use and climate adaptation, further addressing the latter as part of SDG 13 by reducing GHG emissions. [651]

All these theoretical aims are exemplarily reflected in the advanced infrastructure in the Dutch agricultural sector, following the transition from a labour-intensive system to a highly intensive farming system with potentially relevant damage to the environment. Although agricultural lands account for approximately 53% of the total Dutch land area[652],the PBL Netherlands Environmental Assessment Agency estimated that approximately 6,000 square metres of agricultural land per inhabitant is necessary to maintain present Dutch consumption, six times more than the available land that the Netherlands has.[653] That is partly why the majority of Dutch farms are now not traditionally horizontal, but 'vertical systems',

[648] Rathenau Instituut, 'Funding and Performance of R&D in the Netherlands' (16 December 2022) <https://www.rathenau.nl/en/science-figures/investments/how-much-does-netherlands-spend-rd/funding-and-performance-rd> accessed 16 April 2023.
[649] Government of the Netherlands, 'Climate Policy' <https://www.government.nl/topics/climate-change/climate-policy> accessed 20 April 2023.
[650] Kingdom of the Netherlands, 2017.
[651] European Environment Agency, 'The Netherlands Country Profile - SDGs and the Environment' (2 December 2020)<https://www.eea.europa.eu/themes/sustainability-transitions/sustainable-development-goals-and-the/country-profiles/the-netherlands-country-profile-sdgs> accessed 17 April 2023.
[652] Trading Economics, 'Netherlands - Agricultural Land (% of Land Area)', <https://tradingeconomics.com/netherlands/agricultural-land-percent-of-land-area-wb-data.html> accessed 20 April 2023.
[653] *ABN AMRO* (n 52).

allowing for conservation in space.[654] This vertical technology also implies controlling the environment and climate in which the crops are raised, optimising also the resources such as pesticide, water, etc.[655]

Precision farming is another widely used technique in the Netherlands, for its advantage to effectively track diseases and pests. The quality of the crops in the greenhouses are therefore constantly monitored not by farmers but by drones equipped with Global Positioning Systems (GPS). This sensor-based technology allows for efficiently monitoring, planting and spraying the crops. These technologies are closely linked to other smart farming technologies, such as the use of Internet of Things devices and drones for automated irrigation and livestock monitoring.[656] Currently, such drones for land inspection are used in 12.3% large operations (large areas of more than 100 ha)[657] and it is predicted that almost 1500 drones will be used in the Dutch agricultural sector by 2050.[658] Agricultural robots are another significant tool for technological development. Not only do robotics play a role in milking and harvesting, but they also help replace heavier mechanisation thus contributing to the reduction of soil compaction- a current problem of the Dutch agricultural sector.[659]

Moreover, the central focus on sustainability lies in the Dutch circular approach to nutrient management. Because the Netherlands struggles with the nitrogen crisis, the Dutch government's Vision on Circular Agriculture seems to offer the solution by aiming to transform organic waste into fertilisers and food waste into bioenergy.[660] Lastly, agroecology, which encompasses inter alia the circular type

[654] *Laura Reiley Kvan Lnoor* (n 41).
[655] Ian Morrell, 'Benefits of Vertical Farming' (*Greenhouse Automation Systems*, 15 February 2022) <https://www.climatecontrol.com/blog/benefits-of-vertical-farming/> accessed 20 April 2023.
[656] Konica Minolta, 'Dutch Precision Farming with Digital Agriculture' <https://www.konicaminolta.eu/eu-en/rethink-work/business/digital-agriculture-how-dutch-farmers-use-precision-farming-for-floriculture> accessed 19 April 2023.
[657] Hugo Claver, 'Use of Drones Doubled in Dutch Arable Farming'(*Future Farming* , 28 May 2019) <https://www.futurefarming.com/smart-farming/tools-data/use-of-drones-doubled-in-dutch-arable-farming/> accessed 20 April 2023.
[658] Jeroen Verheul, 'Study: All Dutch Growers to Use Spraying Drones' (*Future Farming*, 2 May 2022) <https://www.futurefarming.com/tech-in-focus/drones/study-all-dutch-growers-to-use-spraying-drones/> accessed 20 April 2023.
[659]*ABN AMRO* (n 52).
[660] Government of the Netherlands, 'Plan of action The Dutch government's plan to support the transition to circular agriculture'<https://www.government.nl/binaries/government/documenten/policy-notes/2019/11/3

agriculture explained above, has recently gained strength in the Netherlands as an innovative alternative that takes into account the socio-economic and ecological sustainability of farming activities.[661]

C. *TECHNOLOGICAL ADVANCEMENTS AND STAKEHOLDERS*

In the Netherlands, the so-called 'AgriTech Market' is instrumental from an economic viewpoint, generating estimated revenue at EUR 6.2 billion and is expected to double in 5 years because of labour shortages and sustainability goals set by the Dutch government.[662] Many ambitious projects and initiatives display innovative sustainable practices and technological advancements. Among them, there is National Proeftuin Precisielandbouw' (NPPL), meaning National Experimental Garden for Precision Farming led by Wageningen University experts that aims to support farmers to embrace precision farming techniques.[663] For the last decade, the Duijvestijn Tomatoes project has used geothermal energy to heat its greenhouses, thereby reducing water consumption with a hydroponic system.[664] Moreover, the 2019 'Bollenrevolutie 4.0' programme (Bulb Revolution 4.0) is gathering entrepreneurs to improve the flower bulb horticulture sector by implementing advanced digitalisation: soil sensors and AI robotics to precisely detect diseases and pests.[665]

The growth of the Dutch agricultural robotization market is led by start-ups and firms that are supported by technical universities such as TUe and European subsidies. Milking and feeding robots are the leaders on this market, being developed by Dutch companies such as Boreco or Peecon. The company Lely with its headquarters in the Netherlands, has experienced a 50% increase in revenue in

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0/plan-of-action---supporting-transition-to-circular-agriculture/Plan+of+action+-+supporting+transition+to+circular+agriculture.pdf> accessed 15 April 2023.

[661] Jeannette Oppedijk van Veen and others, 'A Living Countryside: The Land Politics behind the Dutch Agroecology Movement' (*Resilience*, 16 December 2019) <https://www.resilience.org/stories/2019-12-16/a-living-countryside-the-land-politics-behind-the-dutch-agroecology-movement/> accessed 16 April 2023.

[662] *ABN AMRO* (n 52).

[663] Salomé and others, 'National Field Lab for Precision Farming' (*WUR*) <https://www.wur.nl/en/research-results/research-funded-by-the-ministry-of-lnv/expertisegebieden/kennisonline/national-field-lab-for-precision-farming-1.htm> accessed 18 April 2023.

[664] Duijvestijn Tomaten, 'Innovations' (27 June 2022) <https://duijvestijntomaten.nl/en/innovations/> accessed 16 April 2023.

[665] *Konica Minolta* (n 61).

2019, this success being attributed to the performance of their Astronaut A5 milking robot. The Dutch livestock farmers now have access to the 'Connecting Agri & Food platform', which provides sensors which can monitor temperature and CO2 values.[666]

The overall revenue of the Dutch AgriTech market has steadily grown, even in less developed market sectors where Dutch manufacturers have not been very active such as: software, sensors, data analysis services. Furthermore, even though the leaders in drone-building and drone-operation are Chinese, Japanese and US companies, this market is emerging in the Netherlands as well with start-ups such as DroneWerkers. Lastly, all types of field robots are expected to be extensively used by 2030 on the Dutch agricultural market: from weed control robots to land inspection ones, from autonomous tractors to seeding mechanisms, these machines developed by companies such as Pixelfarming Robotics or Saia promise to solve labour-related issues.[667]

D. THE DUTCH POSITION TOWARDS SUSTAINABILITY AND RELEVANT INITIATIVES & LEGISLATION

In the 2019 Climate Act, The Dutch government stated one main goal: reduce the GHG emissions by 49% by 2030.[668] As a response to this Act, together with the famous Urgenda Supreme Court ruling to already reduce GHG emissions by 25% by 2020[669], the Dutch government released the necessary policies to attain the sustainable goals in three documents: the Climate Plan, which was submitted to the Commission in 2019, the National Energy and Climate Plan (NECP) and the National Climate Agreement.[670] Within those plans, a significant sector was the improvement of sustainable agriculture. In relation to the SGD goals, Dutch progress is effectively and constantly monitored in annual reports.[671]

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[666] *ABN AMRO* (n 52).
[667] ibid.
[668] Government of the Netherlands, Long term strategy on climate mitigation (December 2019) <https://ec.europa.eu/clima/sites/lts/lts_nl_en.pdf> accessed 15 April 2023.
[669] Dutch Supreme Court (Hoge Raad), Urgenda Foundation v. The Netherlands, Judgment of 20 December 2019, No. 19/00135, ECLI:NL:HR:2019:2006.
[670] *Government of the Netherlands* (n 54).
[671] Edwin Horlings and others, 'SDGs in the Netherlands: Status Report 2020' (July 2020) <https://www.cbs.nl/-/media/_pdf/2020/27/sdg-report-2020.pdf> accessed 19 April 2023.

At the EU level, it is important to underline the key priorities of the past 2016 Dutch Presidency for the Council of the European Union, which are representative of the Dutch direction towards sustainability. Throughout their mandate, the Dutch Presidency focused on, inter alia, a simplification of the Common Agricultural Policy (CAP) and a discussion on this policy, which will be the subject discussed in the following chapter.[672] Regarding the environmental concerns which are likely to be obstacles to sustainable agricultural developers, the Netherlands stated that the EU needs more feasible environmental directives.[673] Specifically for the Netherlands, there is the Activities Decree act, compiled by the administration and oversight of policies and regulations within the Ministry of Infrastructure and the Environment. The Activities Decree contains environmental regulations that Dutch-based companies likely to have an impact on the environment need to comply with.[674]

Moreover, the regulation of Agri-Tech robots falls under relevant EU legislation pertaining to the specific subject matter. On 15 December 2022, the EU co-legislators decided that the current Machinery Directive will be reviewed and updated to address the evolving risks and challenges posed by new technologies in machinery products, with the aim of ensuring their safe operation.[675] This newly-adopted plan stems from the 2020 Commission Report on safety and liability implications of AI, the Internet of Things and Robotics.[676] In this report, the Commission stresses the idea that although the EU has established a strong regulatory framework for safety and product liability and comprehensive safety standards at EU and national level, the evolving landscape of AI and robotics is

[672] Erste Lesung, 'Dutch Presidency of the Council of the European Union'<https://erstelesung.de/wp-content/uploads/2020/06/2016_Dutch-EU-Council-Presidency.pdf> accessed 19 April 2023.
[673] *European Parliament, Directorate-General for Internal Policies* (n 42).
[674] Rijkswaterstaat Environment, 'Activities Decree' <https://rwsenvironment.eu/subjects/environmental-0/activities-decree/> accessed 17 April 2023.
[675] The Machinery Directive has been, in the meanwhile, replaced by Regulation (EU) 2023/1230 on machinery. This Regulation applies from 20 January 2027. Guillaume Ragonnaud, 'Ensuring machine safety in the digital age: Revision of the Machinery Directive' (*European Parliament*, March 2023) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733576/EPRS_BRI(2022)733576_EN.pdf> accessed 15 April 2023.
[676] European Commission, 'Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics' (COM/2020/64, 19 February 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0064> accessed 13cApril 2023.

changing the nature of many products and services, presenting new challenges and opportunities in terms of safety and liability to enhance consumer protection.

E. HOW THE NETHERLANDS IMPLEMENTED THE CAP AND THE FUTURE CAP

Launched in 1962, the EU Common Agricultural Policy (CAP) seeks to financially support European farmers, by acting as a safety net for making farming profitable and viable.[677] The income support for farmers under the CAP is mandatory across all Member States and it depends on the farm size, sustainable farming practices ('greening') and the age of farmers.[678] On 2 December 2021, the CAP was revised and a reform agreement was reached to set the stage for a more equitable, environmentally sustainable, and results-oriented CAP starting in 2023.[679] In December 2022, the Commission approved the New CAP Strategic Plan of the Netherlands, which was set to start in January 2023. The new Common Agricultural Policy will receive €270 billion in EU funding for the period of 2023-2027 and promises robust support for the distinctive European farming model. The plan proposes a shift towards a sustainable and modern EU agricultural sector, by financially supporting farms, particularly small and medium ones, and encouraging farmers to develop innovative agricultural technological practices.[680] The Dutch CAP plan, prepared by the Government and lower institutional bodies such as the Provinces and Water Boards has been in line with national policies and legislation, and in accordance with the Farm to Fork Commission Strategy and, thus, approved in 2022 by the Commission. [681]

[677] European Commission, 'CAP at a Glance' <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-glance_en> accessed 15 April 2023.
[678] ibid.
[679] European Commission, 'Cap 2023-27' <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27_en> accessed 15 April 2023.
[680] European Commission, 'Common Agricultural Policy 2023-2027: the Commission Approves the First CAP Strategic Plans' <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5183> accessed 14 April 2023.
[681] European Commission, 'The Commission Approves the CAP Strategic Plan of the Netherlands' (13 December 2022) <https://agriculture.ec.europa.eu/news/commission-approves-cap-strategic-plan-netherlands-2022-12-13_en> accessed 16 April 2023.

According to this new strategy, Dutch farmers will have access to higher funds per hectare for the first 40 hectares.[682] The transition towards digitalisation and modernisation of the agricultural sector is also present in the plan. Because of the labour shortages and ageing of farmers, the Netherlands' plan supports young farmers and establishment of new agricultural enterprises on the market. With regards to innovation, possible challenges on the market and new agricultural practices, an advisory system is aimed to be implemented to provide environmentally-related training to approximately 55 000 farmers and sustainable agricultural developers.[683] Key highlights of the updated CAP include strengthened "conditionality" criteria for recipients of CAP funding, as well as a significant 25% increase in investments for Eco-schemes that promote sustainable agricultural practices such as agroecology and organic farming.[684]

F. POSSIBLE LEGAL CHALLENGES FOR THE DUTCH-BASED SUSTAINABLE AGRICULTURAL DEVELOPERS

a. Restrictions on the use of agricultural robots because of safety requirements and other regulatory rules

i. Compliance with Machinery Directive/Regulation[685], Radio Equipment Directive[686] and Product Liability Directive[687]

The use of automatic machines and robots in the Agri-Tech Market is likely to be restricted and limited by Dutch and EU regulations. Developers of sustainable agriculture technological equipment are required to comply with harmonised EU standards, which include mandatory safety requirements involving technical

[682] ibid.
[683] ibid.
[684] *European Commission* (n 84).
[685] Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC [2006] OJ L157/24.
[686] Consolidated Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC [2014] OJ L153.
[687] Consolidated Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210.

specifications.[688] This is the responsibility of the producer (manufacturer designer of the machine). If the product complies with the relevant EU legislation in place on safety and certification requirements, the respective product will be issued with a CE (CE stands for 'Conformité Européenne') marking and will be eligible to enter into the market.[689]

Compliance with a number of directives for a technological agricultural equipment to be placed on the European product market is needed: The soon-to-enter-into-force Machinery Regulation (Regulation (EU) 2023/1230)[690] and Radio Equipment Directive (Directive 2014/53/EU)[691] are relevant instruments that need to be adhered to. The latter is relevant insofar the agricultural robots have sensors through which they transmit and retain information. The past Machinery Directive has been incorporated into national law in the Netherlands through the 'Warenwetbesluit machines' and 'Warenwetregeling machines', which encompass various regulations related to machine safety, and distribution of liability.[692]

However, in December 2022, the Commission issued a press release and called for the implementation of new rules to ensure the safety of machinery and robots, this change being justified because of the emerging field of AI robots and systems.[693] This new regulation, while aiming to foster legal certainty and establish uniform and proportional rules, represents for the time being an impediment for sustainable technology developers: They operate in a grey area from the legal framework viewpoint. In addition to this, the CE marking system laid down by the in-place machinery directive requires the manufacturer to have a technical file for

[688] European Commission,'Commission welcomes political agreement on new rules to ensure the safety of machinery and robots' <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7741> accessed 17 April 2023.
[689] Your Europe, 'CE Marking – Obtaining the Certificate, EU Requirements' <https://europa.eu/youreurope/business/product-requirements/labels-markings/ce-marking/index_en.htm> accessed 18 April 2023.
[690] Regulation (EU) 2023/1230 of the European Parliament and of the Council of 14 June 2023 on machinery and repealing Directive 2006/42/EC of the European Parliament and of the Council and Council Directive 73/361/EEC [2023] OJ L165; This Regulation is not applicable yet; See (n 80).
[691] *Consolidated Directive 2014/53/EU* (n 91).
[692] Mark van Wereen, 'CE Marking (for Machines) in the Netherlands' (*Blenheim*, 28 September 2022) <https://www.blenheim.nl/en/blog/everything-about-the-machinery-directive-200642-machine-safety-and-ce-marking-for-machines-in-the-netherlands/> accessed 19 April 2023.
[693] *European Commission* (n 90).

the Declaration of Conformity to be issued.[694] The problem is that there is no centralised authority or product list that clearly identifies which products require CE marking. Instead, it is the responsibility of manufacturers to research the applicable requirements for their products. This could potentially pose a significant hurdle, particularly when overlapping with rapidly evolving technological advancements that need to be introduced to the market and obtain CE marking.

ii. Compliance with Product Liability Directive- Safety Liability implications

Also, when it comes to liability in tort, it is important to mention Council Directive 85/374/EEC (Product Liability Directive)[695], which includes all types of products including agricultural products. If an agricultural robot causes damage or personal injury, the manufacturer (producer, supplier or importer) is liable to the injured parties and must make reparations in tort.[696] All these directives mentioned above are transposed under Dutch Law: art 6:185 through art 6:193 Dutch Civil Code represent the implementation of the Product Liability Directive.[697]

iii. A grey regulatory area for agricultural AI robots

Due to the rapidly evolving field of AI, an updated legal framework for AI products, including robots, is still being discussed at the EU level. As a result, developers of sustainable agricultural AI tools may currently operate in a regulatory grey area, with rules that are not yet fully established or subject to frequent revisions due to the rapidly advancing technology involved. One example of a company affected by regulatory restrictions is the Dutch orchard sprayer manufacturer H.S.S., which is

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[694] Your Europe, 'Technical Documentation and EU Declaration of Conformity' <https://europa.eu/youreurope/business/product-requirements/compliance/technical-documentation-conformity/index_en.htm> accessed 17 April 2023.
[695] *Consolidated Council Directive 85/374/EEC* (n 92).
[696] Aysegul Bugra, 'Room for Compulsory Product Liability Insurance in the European Union for Smart Robots? Reflections on the Compelling Challenges' in Pierpalo Marano and Kyriaki Noussia. (eds), I*nsurTech: A Legal and Regulatory View. AIDA Europe Research Series on Insurance Law and Regulation*, (Springer 2019).
[697] Daan Beenders and Machteld Jansen, 'The International Comparative Legal Guide to: Product Liability 2013 - Arbitration & Dispute Resolution - Netherlands' (7 June 2013) <https://www.mondaq.com/arbitration-dispute-resolution/243792/the-international-comparative-legal-guide-to-product-liability-2013> accessed 16 April 2023.

hindered by restrictive dosage rules and cannot therefore explore new and sustainable technologies as they seem fit.[698]

Another layer of regulations to the Agri-tech market is represented by the newly implemented drone regulation under Dutch law in accordance with the EU Regulation 2019/947.[699] Organs such as the European Union Aviation Safety Agency (EASA) or at national level, the Netherlands Civil Aviation Authority (CAA) supervised if commercial drones, even for agricultural purposes, respect several criteria such as: category of drone (open, specific, certified with a different permit needed), maximum altitude and weight and permitted geographical zones to fly over).[700]

iv. Compliance with Environmental Directives: EU Nitrate Directive 91/676/EC[701], EU Directive 2000/60/EC (Water Framework)[702] and Directive 2004/35/EC on Environmental Liability regarding Prevention and Remedying of Environmental Damage[703]

Regulations pertaining to environmental concerns may be imposed by legislation on the utilisation of robots in AgriTech, including limitations on the use of specific chemicals or pesticides, as well as requirements for waste management and disposal in relation to robot operations.[704] Because of these restrictions, agricultural robots may create the sustainability and environmental-related

[698] *ABN AMRO* (n 52).
[699] Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft [2019] OJ L152; EASA, 'Commission Implementing Regulation (EU) 2019/947' (11 June 2019) <https://www.easa.europa.eu/en/document-library/regulations/commission-implementing-regulation-eu-2019947> accessed 17 April 2023.
[700] Government of the Netherlands, 'Rules for Flying Drones' <https://business.gov.nl/regulation/drones/> accessed 17 April 2023.
[701] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375.
[702] Consolidated Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327.
[703] Consolidated Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143.
[704] Subhajit Basu and others, 'Legal Framework for Small Autonomous Agricultural Robots' (2020) 35(1–2) AI & Society<https://www.researchgate.net/publication/324819538_Legal_Framework_for_Small_Autonomous_Agricultural_Robots> accessed 18 April 2023.

problems they aim to solve in the first place. This aspect is relevant when agricultural robots are used in applying fertilisers and pesticides, as, if not operated correctly according to the legislation, they may have potential impacts on the human food chain, water supply, neighbouring farms, and farm personnel.[705]

The Environmental Liability Directive (2004/35/EC)[706] was fully implemented into Dutch Law through the Environmental Management Act and is of administrative nature, not private/ civil one.[707] The aim of this act is to impose strict liability for a company causing environmental damage that must take remedial action. This applies when a company provoked damage to water, soil or air while manufacturing, storing, realising and transporting plant protection products. This type of harm can be done easily by trivial defects in the agricultural robots.[708] Agricultural machines used for irrigation or other water-related tasks may fall under the Water Framework Directive 2000/60/EC[709] if they are used in activities that impact water quality or quantity. Thus, the developers of sustainable technology need to consider the restrictions on the allowable levels of chemicals that can enter public water systems. Also, there are specific regulations that govern fertilisers, under the EU Nitrate Directive 91/676/EC.[710] For the agricultural machines that are used to label and sell fertilisers in the form of robotic packages, the aforementioned directive is particularly relevant.[711]

b. Lack of training to operate such technology

As per the legislation described above, both small autonomous robots and automated large tractors may be required to obtain specialized licence or certifications that validate their competency in operating this technology. This could entail participation in training programs, assessments, and ongoing education to ensure responsible and proficient operation of robots in agricultural

[705] ibid.
[706] *Consolidated Directive 2004/35/CE* (n 108).
[707] Munnik Nde, 'Dutch Implementation of the EU Environmental Liability Directive' (*Lexology,* 23 March 2009) <https://www.lexology.com/commentary/environment-climate-change/netherlands/nautadutilh/dutch-implementation-of-the-eu-environmental-liability-directive> accessed 16 April 2023.
[708] *Subhajit Basu and others* (n 103).
[709] *Consolidated Directive 2000/60/EC* (n 107).
[710] *Council Directive 91/676/EEC* (n 106).
[711] *Subhajit Basu and others* (n 103).

settings.[712] There is this tension created by the lack of proper training and knowledge to operate such advanced agricultural robots and the high-paced discoveries in the field. The operation of agricultural robots may entail intricate tasks, such as AI programming, data analysis, and troubleshooting, which demand a comprehensive understanding of the technology in the agricultural domain. Dutch farmers, who are showing interest in adopting sustainable technological infrastructure, could benefit from proper training in the future so as not to struggle to maximise the potential of these machines and effectively integrate them into their farm practices.[713]

Although the former CAP 2014-2020 implemented training bodies such as the Farm Advisory System and the agricultural European Innovation Partnership (EIP-AGRI), the innovation and digitalisation targets have not been fully achieved[714], and the new CAP 2023-2027 promises to foster knowledge and support training in sustainable practices as one of its ten objectives.[715] The new CAP 2023-2027 is expected to be more ambitious in exchanging knowledge within the Agricultural Knowledge and Information System (AKIS).[716] In the new CAP budget, there are several peer-to-peer activities and mobility learning programs to facilitate training for farmers and researchers in the field.

c. Data Privacy, faults in Data Processing and Data Security

Agribots are generally collecting data by monitoring soil and plant conditions, while also creating farm maps for navigation. Therefore, privacy and data protection implications impact the liability regime, and the technological

[712] TU Delft, 'Robotics in the Netherlands' <https://www.tudelft.nl/innovatie-impact/home-of-innovation/special/home-of-innovation-robotics-special-april-2017/robotics-in-the-netherlands> accessed 16 April 2023.
[713] Yulin Wang, 'What Is Holding Back Agricultural Robotics?' (*IDTechEx*, 15 February 2022) <https://www.idtechex.com/en/research-article/what-is-holding-back-agricultural-robotics/25931> accessed 16 April 2023.
[714] Desira, 'More Farmers Received Advice and Training Thanks to the Cap'(13 May 2022) <https://desira2020.eu/2022/05/16/news-more-farmers-received-advice-and-training-thanks-to-the-cap/> accessed 17 April 2023.
[715] European Commission, 'Key Policy Objectives of the CAP 2023-27' <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27/key-policy-objectives-cap-2023-27_en> accessed 17 April 2023.
[716] EIP-Agri, 'EIP-Agri Seminar 'Cap Strategic Plans: The Key Role of Akis in Member States' (2020) <https://ec.europa.eu/eip/agriculture/en/event/eip-agri-seminar-cap-strategic-plans-key-role-akis.html> accessed 17 April 2023.

developers need to adopt data encryption and secure data storage practices.[717] This is because in the agricultural sector there are multiple stakeholders with a financial interest to conduct large-scale data analysis. In this regard, the relevant legislation is the EU General Data Protection Regulation (GDPR)[718], which applies to the processing of 'personal data'.[719] Therefore, when agricultural robots engage in automated decision-making, the legal gaps concerning data accuracy, storage limitation, data transfer restrictions and accountability are even more visible. An issue that arises is the requirement for explicit and unmistakable consent from data subjects, which cannot be resolved through human action alone, as agricultural robots often encounter situations where it is uncertain whether the collected data is 'personal data' (for example, most of the times robots need to collect geolocation data, thus it requires explicit consent from the company that owns the land).[720]

Accountability, transparency and reliability need to be ensured by agricultural technological systems in the decision-making process. Humans should be able to understand their behaviour and interpret the robot's output and recommendations, and, moreover, these developers should bear the responsibility for mismanagement errors leading to data breaches, economic and environmental consequences. Furthermore, autonomy of robots may lead to unforeseen results and a reassessment of the product by the developers is required. Due to the rapid pace of technological advancements in this field, biassed outcomes or the risk of faulty data are prevalent, as robots may not achieve a 100% success rate in their tasks. If an algorithm used by robots falls short of a 100% success rate, it could indicate that there is a risk of poor decision-making, which may result in harm to animals or people.[721]

[717] *Subhajit Basu and others* (n 103).
[718]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119.
[719] Nick Ismail, 'Prepare for GDPR with Robotic Process Automation' (*Information Age,* 1 December 2022) <https://www.information-age.com/prepare-gdpr-robotic-process-automation-8766/> accessed 15 April 2023.
[720] *Subhajit Basu and others* (n 103).
[721] *European Commission* (n 81).

d. Lack of knowledge and high-paced advancements in a young field

Because the field of Agritech is relatively young and changing very fast, the knowledge does not always reach the farmers and the other stakeholders in the agricultural field. Currently, there is a current fragmentation[722] in research and lack of uniform strategies, as the legislation regulating this field is still to be established or updated. Dutch companies in the industry are emphasising the need for intensive research and knowledge exchange between business, start-ups and researchers. Professor Jakub de Vlieg at TU Eindhoven stresses this needs to expand sustainable technological strategies and opportunities not only to collect, but to share data among stakeholders within the limits of GDPR protocols.[723]

At EU level, the initiative called 'Code of Conduct'[724] aims to share such data between stakeholders to advance innovation. At Dutch national level, there is the Jheronimus Academy[725] of Data Science (JADS) initiative between municipality of 's-Hertogenbosch and Tilburg and Eindhoven Universities for research and application of data science for various ecosystems. Additionally, there are national-based endeavours such as JoinData, FrieslandCampina, and LTO Netherlands, which aim to foster responsible data sharing practices within the agricultural industry.[726]

e. Access to Capital and Subsidies in Agriculture

Despite the EU initiatives and funds that are expected to improve the agri-tech market, Dutch stakeholders claim that there is a lack of capital that prevents them from scaling up robot development. For instance, Marcel Van Haren of GMV claims that because the subsidies are often awarded to longer-term projects, companies

[722] *ABN AMRO* (n 52).
[723] ibid.
[724] CEMA, 'EU Code of Conduct on Agricultural Data Sharing' <https://www.cema-agri.org/publication/brochures/37-eu-code-of-conduct-on-agricultural-data-sharing> accessed 18 April 2023.
[725] Jheronimus Academy of Data Science (JADS), <https://netwerk.wijzijnkatapult.nl/detail/382/jheronimus-academy-of-data-science-28jads-29/netwerk-cove-connect/> accessed 16 April 2023.
[726] *ABN AMRO* (n 52).

cannot innovate quickly and keep up with the advancements.[727] Criticism has been brought by ing. EJ Pekkeriet from the Wageningen University & Research to the EU Horizon 2020 project, claiming that it only supports a limited type of initiatives to innovate, among others, the Agri Tech sectors and support technological manufacturers. Lack of access to private and venture capital may also be considered a problem in the Netherlands despite some already set up innovation centres like Lely and Kubota. Conversely, there have been some improvements to raise capital due to the collaboration between companies and government agencies and institutes: RoboCrops in Naaldwijk, and the Farm of the Future initiative Lelystad are just a few examples of good practices that prove the potential of robots.[728]

G. CONCLUSIONS: THE NETHERLANDS CASE STUDY

In conclusion, sustainable agricultural developers in the Netherlands still face significant challenges when promoting and implementing sustainable agriculture practices. These challenges include navigating complex regulations, ensuring compliance with environmental and data privacy laws, securing access to subsidies at EU and national level, addressing fragmentation in knowledge, and dealing with the uncertainty of future policies, such as the CAP 2023-2027.[729] While progress has been made in certain areas and there is great potential for the Netherlands to become an active leader on the Agri-tech market, there are still impediments that prevent sustainable agricultural developers from effectively planning and implementing their initiatives.

Additionally, collaboration between national stakeholders is highly needed. Common efforts from policymakers, government agencies, research institutes, and farmers could address the gaps in the legal framework, foster knowledge sharing and keep up with a high-paced industry. Sustainable agricultural developers in the Netherlands have shown through some successful initiatives that they can

[727] ibid.
[728] ibid.
[729] Magdalena Pistorius, 'Farmers Will Not 'Sit around and Wait' amid Uncertainty over Cap Strategic Plans' (*Euractiv*, 28 October 2021) <https://www.euractiv.com/section/agriculture-food/news/farmers-will-not-sit-around-and-wait-amid-uncertainty-over-cap-strategic-plans/> accessed 15 April 2023.

contribute to the transition towards more environmentally responsible agricultural practices, ensuring a sustainable future for the agri-food sector. If these challenges are overcome, the AgriTech market in the Netherlands can become stronger, and the use of agribots and AI machines would become more appealing and affordable to businesses. This is accelerated by the other competitive advantages that the Dutch agricultural sector already has: the land, climate and overall farming conditions, diverse and high-quality product range, circular economy, effective supply chain and large exports. These factors, together with the technological innovation developed by companies and businesses, could help the Dutch agri-food sector establish a strong presence as a leader in global markets and maintain their competitive edge.[730] After all, it has become clear that the Dutch motto *'Twice as much food using half as many resources'* can only be achieved through the development of sustainable technological innovations in the field of agriculture.

III. COMPARATIVE STUDY: HUNGARY

A. INTRODUCTION

'Hungary has an agriculture full of lucrative opportunities and business incentives, which accounts for a resilient, export-driven economy.' – reports the official website of the US International Trade Administration.[731] While this description is factually correct, it appears to miss the historical significance of agriculture in the country, and how recent years' statistics show a concerning contrast with the glorious past.

In 2022, the World Bank estimated a 3.2% GDP share of agriculture in Hungary,[732] which amounts to an astonishing decrease from the 7.26% data in 1995.[733] Similarly, the European Commission [Commission] found the total number of

[730] 'The Future of Farming: Why the World Should Admire the Dutch Approach to Agriculture' (*NFIA,* 9 September 2022)<https://investinholland.com/news/the-future-of-farming-why-the-world-should-admire-the-dutch-approach-to-agriculture/> accessed 19 April 2023.
[731] Gellert Golya, 'Hungary – Agricultural Sectors' (*International Trade Administration*, 25 November 2022) <https://www.trade.gov/country-commercial-guides/hungary-agricultural-sectors> accessed 4 May 2023.
[732] Data for 2023 and 2024 is unavailable yet. Source: https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?name_desc=true.
[733] World Bank, OECD, 'Agriculture, forestry, and fishing, value added (% of GDP) – Hungary' (*The World Bank*) <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=HU> accessed 4 May 2023.

Hungarian farms decreasing from 715,000 to 430,000 between 2005 and 2016, with a vast majority of them now comprising less than five hectares.[734]

The agricultural sector is immensely important in Hungary. According to the most recent available statistics from 2021, 55.3% of all Hungarian lands were under agricultural activities.[735] In line with this, the country received 12.4 billion euro, and 3.19% of the total Common Agricultural Policy [CAP] funds in the period from 2014 – 2020, one of the highest shares within the Union.[736]

According to its traditions, Hungary is still a leading Member State in keeping livestock,[737] producing and exporting wheat and other grains,[738] excelling at fruits and vegetables,[739] as well as having a world-wide sought after viticulture.[740] Nonetheless, a significant decline in quality and effectiveness of agriculture is recognised by contemporary scholarship, experts in the field, and most significantly, the Commission.[741]

There are various components to this systematic issue. One of them is posed by the generational renewal of EU agriculture, especially relevant in the case of Hungary.[742] This issue manifests itself in unemployment among young men and women in the countryside, a generally low rural employment rate, and the average

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[734] Chris Lyddon, 'Focus on Hungary: Country modernizing agriculture, food supply sectors' (*World-Grain.com*, 25 March 2022) <https://www.world-grain.com/articles/16681-focus-on-hungary-country-modernizing-agriculture-food-supply-sectors> accessed 4 May 2023.
[735] 'Hungary – Agricultural Land (% of Land Area)' (*Trading Economics*, 2023) <https://data.worldbank.org/indicator/AG.LND.AGRI.ZS> accessed 10 May 2023.
[736] Noémi Gonda, 'Land grabbing and the making of an authoritarian populist regime in Hungary' (2019) 46(3) *The Journal of Peasant Studies* 611.
[737] European Commission, 'At a glance: HUNGARY'S CAP STRATEGIC PLAN' (24 April 2023) <https://agriculture.ec.europa.eu/system/files/2023-04/csp-at-a-glance-hungary_en.pdf> accessed 6 May 2023 2.
[738] Ministry of Foreign Affairs and Trade – Hungarian National Trading House, 'Hungarian Agriculture: The potential of tradition & innovation' (2019) <https://www.hepaoffice.gr/wp-content/uploads/Hungarian-Agriculture-MNKH.pdf> accessed 5 May 2023 8.
[739] ibid 40.
[740] Z. Sz., 'From noble rot to bull's blood: Wine in Hungary' *Landbouwattachénetwerk* (6 October 2020) <https://www.agroberichtenbuitenland.nl/actueel/nieuws/2020/10/06/wine-in-hungary> accessed 5 May 2023.
[741] European Commission, 'Factsheet on 2014-2020 Rural Development Programme for Hungary' (October 2022) < https://agriculture.ec.europa.eu/system/files/2022-10/rdp-factsheet-hungary_en.pdf> accessed 5 May 2023.
[742] Kovács I and others, 'Sustainability and Agricultural Regeneration in Hungarian Agriculture' (2022) 14 *Sustainability* 969.

age of active farmers being close to 60.[743] These conditions necessitate a refreshment of employment in the sector, in order to keep farming alive.

On the other hand, preventing the continuously worsening effects of climate change and protecting biodiversity of Hungarian rural areas is by all means the priority of the Commission.[744] Climate change has been mercilessly harming the natural environment of the countryside, causing economic damage in the country.[745] A significant emphasis was put on restoring, preserving and enhancing ecosystems related to agriculture and forestry in the past years.[746] Therefore, economic and climate aspects must be linked, to create adaptation strategies that will sufficiently mitigate natural environmental harm.[747]

After all, the ultimate goal of the CAP, which is essentially creating a sustainable agriculture within the Union, is not more than a desired future outcome in contemporary Hungary.[748] While each contributing issue is worthy of discussion on their individual merits, they gain a collective, special importance under the concept of sustainability.

In the following, the paper will introduce a second, widely different approach from the Dutch one, to uncover which legal challenges developers of agricultures have to tackle in the EU market. In particular, the two most pressing issues are going to be addressed in light of sustainability: one as a socio-economic problem, and the other one as a natural environmental issue.

A conclusion will be reached that agricultural crises could be collectively mitigated by modernising the sector under EU agricultural visions. Hopefully, the most recently introduced Strategic Plan of Hungary for the 2023-2027 period will bring a

[743] European Commission, 'Factsheet on 2014-2020 Rural Development Programme for Hungary' (n 9) 2.
[744] ibid.
[745] Márta Gaál and others, 'Potential impacts of climate change on agricultural land use suitability of the Hungarian counties' (2014) 14 *Reg Environ Change* 597, 598.
[746] European Commission, 'Factsheet on 2014-2020 Rural Development Programme for Hungary' (n 9; 13) 2.
[747] Gaál (no 150) 597.
[748] European Commission, 'At a glance: HUNGARY'S CAP STRATEGIC PLAN' (n 5).

new era for Hungarian agriculture.[749] For this, legal tools must be tailored to the unique situation of the country.

B. THE ROLE OF SUSTAINABILITY AND TECHNOLOGY IN HUNGARY

a. Sustainability

Generally speaking, there are a great number of domestic strategies and programmes supporting the achievement of UN Sustainable Development Goals [SDGs] in Hungary.[750] Most importantly, the National Environmental Programme [NEP] and the National Framework Strategy on Sustainable Development [NFSSD] are being developed with the involvement of various stakeholders.[751] This group of stakeholders is composed of companies, civil society groups and scientific groups, who indirectly contribute with their expertise and are also often members of national sustainability councils.[752]

To express Hungarian commitment to sustainability, a new Directorate for Environmental Sustainability of the Presidential office was established in 2015.[753] Its main responsibility is maintaining contact with national and international bodies, institutions and organisations, and facilitating the President's office in its work on sustainable matters.[754]

In practice, action for SDGs is taken by line ministries within their own respective domains.[755] To enhance cooperation between them, an Interministerial Coordination Mechanism was set up in 2017.[756] For the same purpose, the NFSSD advises municipalities on the sustainable development of cities,[757] however, this is of little importance for agriculture due to the sector's rural nature.

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[749] Directorate-General for Agriculture and Rural Development, 'The Commission approves the CAP Strategic Plan for Hungary' (*European Union, European Commission*, 7 November 2022) <https://agriculture.ec.europa.eu/news/commission-approves-cap-strategic-plan-hungary-2022-11-07_en> accessed 6 May 2023.
[750] European Environment Agency, 'Hungary country profile – SDGs and the environment' (2020) European Union <https://www.eea.europa.eu/themes/sustainability-transitions/sustainable-development-goals-and-the/country-profiles/hungary-country-profile-sdgs-and> accessed 7 May 2023.
[751] ibid.
[752] *Ibid.*
[753] NFFT, 'Hungary has developed a complex, well-balanced institution system for the implementation of sustainable development laws and policies, including international agreements' <https://www.parlament.hu/web/ncsd/institutions> accessed 7 May 2023.
[754] *Ibid.*
[755] European Environment Agency, 'Hungary country profile – SDGs and the environment' (n 16).
[756] *Ibid.*
[757] *Ibid.*

The Ministry of Foreign Affairs and Trade, in collaboration with the Interministerial Coordination Mechanism, issued the Voluntary National Review [VNR] in 2018.[758] The VNR summarises the country's execution plans in regards to each individual SDG. It established access to clean water and sanitation (SDG 6) as the primary step of Hungary's sustainability plan.[759] Besides, tackling climate change (SDG 13),[760] increasing biodiversity (SDG 15)[761] and the management of renewable and non-renewable resources (SDGs 7 and 12)[762] were deemed as the main targets. In spite of this narrowed down scope of SDGs, *sustainable development indicators*, issued every two years by the Hungarian Central Statistical Office, show that data is available for 75% of SDGs,[763] inspiring hope for a more comprehensive inclusion of all goals. Nonetheless, it is interesting to note how much attention is paid to SGD 15 on biodiversity in the VNR, despite the area being severely neglected within Hungarian agriculture, as argued later in this paper.

Finally, Prime Minister Viktor Orbán announced the Climate and Environmental Protection Action Plan in January 2020, foreshadowing Hungarian environmental plans in eight points.[764] However, the Plan demonstrates very little care for agricultural change. With the exception of reforestation plans (point V of the Plan), the proposal mostly focused on energy and waste management, as well as green transportation.

Despite the progress outlined above, facts suggest a different reality for sustainability in the country. It is a recurring topic of both national and international news channels how the land privatisation and grabbing process of the 2010s has resulted in undermining real sustainability goals.[765] Until 2014, the

[758] Ministry of Foreign Affairs and Trade of Hungary, 'Voluntary National Review of Hungary on the Sustainable Development Goals of the 2030 agenda' (2018) Ministry of Foreign Affairs and Trade of Hungary <https://sustainabledevelopment.un.org/content/documents/20137Voluntary_National_Review_of_Hungary_v2.pdf> accessed 7 May 2023.
[759] *Ibid* 3.
[760] *Ibid* 49–51.
[761] *Ibid* 54-57.
[762] *Ibid* 30-33; 46-49.
[763] European Environment Agency, 'Hungary country profile – SDGs and the environment' (n 16; 21).
[764] Xinhua, 'Hungary's Orban announces new climate action plan' *Nhan Dan* (17 February 2020) <https://en.nhandan.vn/hungary-s-orban-announces-new-climate-action-plan-post83233.html> accessed 7 May 2023.
[765] Selam Gebrekidan, Matt Apuzzo, Benjamin Novak, 'The Money Farmers: How Oligarchs and Populists Milk the E.U. for Millions' *The New York Times* (3 November 2019) <https://www.nytimes.com/2019/11/03/world/europe/eu-farm-subsidy-hungary.html> accessed 7 May 2023.

State still owned approximately 23% of all lands in Hungary, amounting to 1.7 million hectares.[766] In August 2015, the government initiated the so-called 'thunderstorm' process, in which it sold huge chunks of state farmland to political allies and oligarchs in a short period of time.[767] By doing so, they excluded small-and medium sized farmers from the land auction, but allowed the new landowners to receive funds from EU subsidies that were intended for small-scale farmers.[768] The system operates under the wide margin of freedom in CAP policies granted to Member States.[769] Particularly, landowners exploit loopholes of the new land lease legislation that was passed during these times.

The controversial approach of the government towards sustainability is also evidenced in their political communications. The oppositional Mayor of Budapest, Gergely Karácsony frequently receives criticism from the government for his green politics.[770] In 2016, Mr Karácsony encountered great backlash after objecting to a project which aims to urbanise and deforest public parks. [771] In 2019, he was again criticised for supporting an issue concerning the reduction of air pollution caused by large vehicles.[772] In general, there is huge tension around environmentalism in Hungarian politics, which questions the true dedication of the government to sustainability.

After all, Hungary has various institutions and projects in place to implement sustainability, but it is contested whether the country's leadership is genuinely pursuing these goals. Even if we believe so, agriculture is still marginalised among other environment-focused initiatives, and there is much space for further development.

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[766] Gonda (no 6) 610.
[767] *Ibid* 611.
[768] Jack Coulton, 'A broken system: how EU farming subsidies lead to land grabbing in Hungary' (*Slow Food*, 27 January 2020) <https://www.slowfood.com/a-broken-system-how-eu-farming-subsidies-lead-to-land-grabbing-in-hungary/> accessed 7 May 2023.
[769] *Ibid*.
[770] Balázs Zsuzsanna, Bodnár Zsolt 'Karácsony Gergely: Pénz nélkül se zöld politikát nem lehet csinálni, se narancssárgát' *Qubit* (Budapest, 16 December 2021) <https://qubit.hu/2021/12/16/karacsony-gergely-penz-nelkul-se-zold-politikat-nem-lehet-csinalni-se-narancssargat> accessed 7 May 2023.
[771] Haszán Zoltán, 'A Fidesz és az MSZP nagykoalícióban kényszeríti a Liget Projekt támogatására Karácsony Gergely polgármestert' *444* (Budapest, 22 April 2016) <https://444.hu/2016/04/22/a-fidesz-es-az-mszp-nagykoalicioban-kenyszeriti-a-liget-projekt-tamogatasara-karacsony-gergely-polgarmestert> accessed 7 May 2023.
[772] Balázs Zsuzsanna, Bodnár Zsolt 'Karácsony Gergely: Pénz nélkül se zöld politikát nem lehet csinálni, se narancssárgát' (n 31).

b. Technology

i. Precision agriculture [PA]/smart farming/precision farming

The most important prerequisite of achieving agriculture-related SDGs is the presence of technological modernisation. In the case of Hungary, PA has been an especially highlighted topic.[773]

PA farming is an extensive phenomenon, and ranges from devices capable of physically assessing farmable lands and navigating vehicles, to simply analysing data.[774] In essence, any development that pursues the optimisation of agricultural production processes falls under the concept of PA.[775]

The special need for PA in Hungary is rooted in the country's vulnerability against negative externalities, such as natural disasters, inflation or the ongoing war in Ukraine.[776] As recent times' tendencies show, these unstable times lead to low productivity rates, which Hungary is unable to overcome with its traditional agricultural methods.[777]

Besides providing an optimal defence against said externalities, PA is believed to utilise the country's true agricultural potential. Despite its weaknesses, Hungary has optimal climate and soil conditions, as well as mandatory consulting services that new farm owners must employ.[778] Without optimisation though, these gifts remain unused by farmers.

PA is proven to be profitable for farmer families by improving their day-to-day production, as well as to mitigate the adverse effects of climate change in the long run.[779] Dr Márton Vona of the Hungarian agro-consulting company Csernozjom,

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[773] Ministry of Foreign Affairs of the Netherlands, *Precision Agriculture in Hungary* (2022), <https://www.rvo.nl/sites/default/files/2022-12/Precision-agriculture-in-Hungary.pdf> accessed 7 May 2023, p 4.
[774] *Ibid* 11.
[775] Mihalis Kritikos (European Parliamentary Research Service), 'Precision agriculture in Europe: Legal, social and ethical considerations' (2017) PE 603.207 Scientific Foresight Unit <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603207/EPRS_STU(2017)603207_EN.pdf> accessed 7 May 2023, p 4.
[776] Ministry of Foreign Affairs of the Netherlands, *Precision Agriculture in Hungary*, (n 41), p 13.
[777] *Ibid.*
[778] *Ibid.*
[779] Ministry of Agriculture, Nature and Food Quality of the Netherlands, 'Sectoral cross-pollination and new frontiers for business in Hungary – Report from the Farminar' (*Ministry of Agriculture, Nature and Food Quality of the Netherlands*, 13 January 2021) <http://web.archive.org/web/20220708063559/https://www.agroberichtenbuitenland.nl/landeninformatie/hongarije/nieuws/2021/01/13/farminar-2> accessed 7 May 2023.

previously addressed how PA technologies in irrigation development could significantly mitigate local droughts, a leading issue in rural areas.[780] This view was shared by Dr Tibor András Cseh of the Association of Hungarian Farmers' Clubs and Farmers' Cooperatives, who added that developments are the most necessary in water retaining, catchment basins and water channels.[781]

So far, however, PA technologies have been rarely adopted in practice. While usage of the technology has been steadily increasing for the past five years, only 9.9% of all Hungarian farmers applied some level of PA solutions in their work according to 2022 data.[782] This calls for a more widespread application of PA in the country.

ii. Robotisation

Another significant aspect of agriculture modernisation is robotisation and the general use of digital technology.[783] While PA is not a synonym for digital technology, they are both viewed as horizontally applicable to different farming methods.[784]

According to the latest report on the 2010 – 2020 period issued by the Hungarian Central Statistical Office, robotisation is still in its infancy in Hungary.[785] The use of digital solutions is the most prevalent among young farmers, primarily for online banking, management and governmental e-administration activities.[786] Given the high average age of farmers in the country, the general lack of technological awareness in the sector is of no surprise.

Similarly, using more advanced systems, such as plant health assessment or self-driving machines, was not established for more than 6% of all farmers, presumably representing the younger generations.[787]

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[780] *Ibid.*
[781] *Ibid.*
[782] Scott Trimble, 'Precision Agriculture Policy & Adoption Outlook 2023' (CID Bio-Science, 7 April 2022) <https://cid-inc.com/blog/precision-agriculture-policy-adoption-outlook-2023/> accessed 7 May 2024.
[783] Ministry of Agriculture, Nature and Food Quality of the Netherlands, 'Hungary: Quick sectoral statistics – Digital agriculture & precision farming' (*Ministry of Agriculture, Nature and Food Quality of the Netherlands*, 21 May 2021) <https://www.agroberichtenbuitenland.nl/actueel/nieuws/2021/05/21/hungary-quick-news-ksh> accessed 7 May 2023.
[784] Mihalis Kritikos (European Parliamentary Research Service), 'Precision agriculture in Europe: Legal, social and ethical considerations' (n 45), p 6.
[785] *Ibid.*
[786] *Ibid.*
[787] *Ibid.*

Nevertheless, the two most common answers to why farmers refuse new technology in their work is firstly, that they believe they do not require it, and secondly, that they lack sufficient information on the proper usage of the devices.[788] Accordingly, sharing knowledge and familiarising actors in the sector with innovation could motivate them to adapt.

iii. EU technology incentives

In terms of technology incentives, the EU has previously introduced the DIGITAL programme for all industries where research and development play a crucial role.[789] Within agriculture, the programme aims to create a common EU data space, provide AI testing facilities, and develop digital skills.[790]

Besides, the Horizon 2020 initiative incentivised the implementation of AI, robotics and other modern technologies into agriculture.[791] However, no significant progress was detected due to the program in the country. A possible explanation is that Hungary is still in a transitionary period from being efficiency-driven into becoming innovation-driven, and the overly innovation-centred Horizon 2020 did not set realistic development goals for less progressed European countries, such as Hungary.[792]

iv. Hungarian technology incentives

First of all, Hungary has introduced the Digital Agricultural Strategy [DAS] in 2019, facilitating the popularisation of digital technology and PA methods.[793] The DAS encourages data processing supported by AI and decisions made by automated machines. In relation to the latter, the separate Artificial Intelligence Strategy sets goals for the achievement of an AI-based economy by 2030.[794]

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[788] *Ibid.*
[789] Ministry of Foreign Affairs of the Netherlands, *Precision Agriculture in Hungary* (n 41; 40), p 8.
[790] Ibid.
[791] Ibid.
[792] Michele Cincera, Rainer Frietsch, Jos Leijten et al, 'The Impact of Horizon 2020 on Innovation in Europe' (2015) 50(1) *Intereconomics* 15.
[793] Ministry of Foreign Affairs of the Netherlands, *Precision Agriculture in Hungary* (n 41; 40; 55), p 10.
[794] Ibid.

Secondly, the Digital Producer Market aims to develop and operate logistics and quality assuring services, which would ensure the movement of goods between cooperatives and consumers.[795]

Finally, the Digital Food Industry Strategy [DFIS] targets the domestic food industry, and increases its efficiency and competitiveness.[796] It also introduces new educational methods for raising technological awareness among farmers.

C. *NATIONAL STEPS FOR SUSTAINABLE AGRICULTURE BEFORE AND AFTER THE CAP STRATEGIC PLAN*

a. Before the plan

Hungary's agricultural policies were first shaped to EU sustainability standards after the country requested accession to the Union in 1994.[797] A series of Acts and Decrees demonstrated how Hungary was trying to adopt the EU's sustainable approach to agriculture.[798]

Act No. LIII was passed in 1996 and regulated the protection and environmentally friendly use of rural landscapes, which was a ground-breaking realisation at the time.[799] Then, Act No. CXIV of 1997 laid down the comprehensive reform for the accession of Hungary to the EU.[800] The Act revolved around competitiveness of agricultural production, and introduced new concepts to Hungarian agriculture, such as harmonising production with environmental interests.[801] Another Act, namely No. XLVI of 1999, was passed on general agricultural census.[802] Interestingly, the preamble of the original Hungarian law even mentions that the intention of the Act was to adequate agriculture to EU requisites.

The remaining time until the final accession of Hungary to the EU in 2004 did not bring new agricultural regulation. Then, legislation started to reflect the CAP

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[795] Ibid.
[796] Ibid.
[797] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas, 'Policy Gaps Related to Sustainability in Hungarian Agribusiness Development' (2022) 12(9) *Agronomy* 4.
[798] In Hungarian law, there is a general distinction between Acts/Laws, the most powerful legislation, passed by the Parliament, and Decrees that are only passed by the Government or certain Ministries. Some Decrees still bear full legal power similar to Acts.
[799] Law No. LIII of 1996 on Nature Conservation.
[800] Law No. CXIV of 1997 on the development of the agrarian economy.
[801] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas, 'Policy Gaps Related to Sustainability in Hungarian Agribusiness Development' (n 63), 4.
[802] Act No. XLVI of 1999 on general agricultural census.

sustainability goals even more clearly. For instance, Act No. XVII of 2007 addressed rural development, a crucial component of the policy, as well as fishery regulations.[803] In 2011, Act No. CXXVIII recognised the importance of disaster management in the country, and dedicated a great part to natural disasters occurring in rural areas. [804] In the same year, Act No. CLXVIII further regulated weather-related risks of production.[805] These laws were again, most probably influenced by EU encouragement that every Member State should focus its legislation according to its own circumstances.

To complement primary legislation, a number of more nuanced Decrees were passed by the Government and Ministries throughout these years. Most notably, Decree No. 4 of 2004 (I. 13.) laid down requirements for 'Good Agricultural and Environmental Condition', known as GAEC, to comply with EU minimum standards.[806] The GAEC criteria have been frequently used in agricultural law ever since.

b. After the plan

The recent CAP Strategic Plan of Hungary for the 2023 – 2027 period was approved by the Commission in November 2022, and entered into force on 1 January 2023.[807] After the rudimentary progress Hungarian agriculture has demonstrated in the past decades, the Plan is expected to finally reach up to the desired EU sustainability standards.

The Hungarian Plan will receive a total of 8.4 billion euro from the 270 billion EU funding dedicated to the CAP.[808] The two most highlighted issues by the Commission will be allocated the highest funds: the shortage of young farmers and the environmental crisis.

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[803] Act No. XVII of 2007 on certain issues of procedures in relation to support for agricultural, rural development and fisheries and to other measures.
[804] Act No. CXXVIII of 2011 on concerning disaster management and amending certain related acts.
[805] Act No. CLXVIII of 2011 on handling weather-related and other natural risks affecting agricultural production.
[806] Decree No. 4 of 2004 (I. 13.) FVM of the Ministry of Agriculture and Rural Development.
[807] Directorate-General for Agriculture and Rural Development, 'The Commission approves the CAP Strategic Plan for Hungary' (*European Union, European Commission*, 7 November 2022) <https://agriculture.ec.europa.eu/news/commission-approves-cap-strategic-plan-hungary-2022-11-07_en> accessed 6 May 2023.
[808] *Ibid.*

Firstly, the Plan offers various interventions to secure a fair income for young farmers, as well as creating a fairer distribution system of financial support amongst them.[809] In total, 186 million will be spent on supporting young farmers.[810] A particular measure was created to set up 8 800 new farm workers,[811] as Hungary may have realised that passively encouraging the youth for farming has not brought results.

Secondly, an approximate of 38% of the EU funds was dedicated to agri-environmental interventions.[812] Another 8% will be spent on organic farming, and 5% on the protection of nationally recognised sites.[813] In total, these environmental and climate objectives, including eco-schemes, will receive 2 billion euro.[814]

The government has welcomed the Plan with great positivism. Gergely Gulyás, Minister of the Prime Minister's Office, commented that the agricultural sector will now receive 'greater support than before.'[815] Moreover, Nagy István, Minister of Agriculture called the acceptance of the Plan 'a historic opportunity' that will bring 'support to rural development and farmers'.[816]

While it is uncertain how fast legislative results can be expected, a condition for approval of each national Plan was that they were complete and compatible with the CAP, as well as ambitious enough to deliver on its objectives.[817] This gives hope for a positive change.

[809] *Ibid.*
[810] Ministry of Agriculture, Nature and Food Quality of the Netherlands, 'Hungary: CAP National Strategic Plan, food inflation, price caps' (*Ministry of Agriculture, Nature and Food Quality of the Netherlands*, 11 November 2022) <https://www.agroberichtenbuitenland.nl/actueel/nieuws/2022/11/11/hungary-food-inflation> accessed 10 May 2023.
[811] Directorate-General for Agriculture and Rural Development, 'The Commission approves the CAP Strategic Plan for Hungary' (n 77).
[812] Ministry of Agriculture, Nature and Food Quality of the Netherlands (n 80).
[813] *Ibid.*
[814] Directorate-General for Agriculture and Rural Development (n 77; 81).
[815] Ministry of Agriculture, Nature and Food Quality of the Netherlands (n 80; 82).
[816] *Ibid.*
[817] *Ibid.*

D. LEGAL CHALLENGES FOR DEVELOPERS OF SUSTAINABLE AGRICULTURE

a. Ageing crisis in farming

One of the most commonly addressed issues of Hungarian agriculture is the ageing of the farmer community and further problems arising out of this tendency. While this is a general phenomenon across the EU, with only 11% of farmers being under the age of 40,[818] it reached overly problematic levels in Hungary. Every ten years, the ratio of 65-year-old farmers to under 35-year-old ones grows significantly.[819] While this is primarily the result of younger generations preferring other professions than farming, a considerable amount of previously active farmers left agriculture as well.[820]

Generational renewal is at the intersection of various – material, social, economic, legal - factors. Thus, it is necessary to observe the issue from multiple perspectives.

The Commission's Factsheet on the Rural Development Programme for Hungary (2014 – 2020) mentions three signs of the ageing crisis.[821] Firstly, the average farm size in Hungary is below ideal with lands being fragmented into smaller parcels. Secondly, the average age of active farmers is 57.9. Thirdly, there are also employment inefficiencies in the sector, with the general rural employment rate being low, and the unemployment rate for young people and women much higher than in other sectors. At first glance, these pieces of information might seem unrelated to each other. From a legal point of view, however, they form an interconnected system of disadvantages.

The underlying phenomenon is the continuous ageing of the farming community, which is the consequence of various factors that will be explained below.[822] As a result, legal attempts to popularise digitalisation are not feasible with the current, generally older workforce, because older generations display neither the required

[818] Kovács et al (n 12) 1.
[819] *Ibid.*
[820] *Ibid.*
[821] European Commission, 'Factsheet on 2014-2020 Rural Development Programme for Hungary' (October 2022) <https://agriculture.ec.europa.eu/system/files/2022-10/rdp-factsheet-hungary_en.pdf> accessed 5 May 2023, 2.
[822] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67) 10.

qualifications nor the willingness to adapt to new technology.[823] Finally, there are overly stringent laws on accessing proper-sized land for young farmers, which itself is one of the reasons for the ageing crisis, as it discourages the youth from pursuing this profession and creates an ageing population for farming.[824]

In the following, three different policy gaps of this vicious circle will be discussed, which developers of sustainable agriculture should pay great attention to.

i. First challenge: Increasingly ageing farmers

As mentioned above, fewer young people choose the farming profession for a living than ideal, resulting in a farmers' community dominated by older generations and an average age of 57.9 years.[825] This phenomenon is argued to have multiple causes.

Firstly, agricultural work and the intensive lifestyle thereof are simply not attractive to young people anymore.[826] While there is no specific data for this on a Hungarian level, the 2016 Youth Agribusiness, Leadership, and Entrepreneurship Summit on Innovation established that the youth is uninterested in pursuing farming largely due to their perception of it as 'antiquated and unprofitable'.[827]

Secondly, the mental element of family traditions is an important factor for people choosing their occupations.[828] While studies find that in the majority of cases, farmer families tend to play a positive role in their offspring following the same path,[829] there are constraints as well. Most commonly, the distribution of workload between parents and their heirs causes conflicts, and this disheartens the latter from pursuing farming.[830] In other cases, young generations would like to pursue a different occupation, and they find breaking out particularly hard due to the family's farming history.[831]

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[823] *Ibid.*
[824] Imre Kovács and others (n 12; 73) 7.
[825] This is data from 2020 that might be outdated now.
[826] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67) 10.
[827] IFAD, 'Why are rural youth leaving farming?' (United Nations – Office of the Secretary General's Envoy on Youth) <https://www.un.org/youthenvoy/2016/04/why-are-rural-youth-leaving-farming/> accessed 7 May 2023.
[828] Imre Kovács and others (n 12; 73) 5.
[829] *Ibid.*
[830] *Ibid* 6.
[831] *Ibid* 7.

Thirdly, a certain number of previously active farmers have left the sector in the past two decades. In 2003, about 1.5 million people were working on farms, and this decreased to 1.1 million by 2010.[832] Presumably, some of these profession changers might have been of younger generations, in line with the general ageing of farmers. Nonetheless, the effect of older farmers leaving the sector for retirement must also be considered.

Last but not least, a significant contributor to the generational challenge is the difficult regulatory environment for young people to acquire land. This will be addressed in Point 3.

To conclude the first challenge this paper argues, there is a significant number of young farmers missing from the current agricultural workforce in Hungary, increasingly ageing the farming community. A possible solution to this could be setting up young farmers to put a halt on the age increase, such as the new Strategic Plan is intending to do.

ii. Second challenge: Lack of qualifications

There seems to be a direct link between age and qualifications of farmers.[833] Older farmers tend to rely on their experiences and perhaps family anecdotes in their farming, while young farmers are increasingly educated on the science of agriculture.[834] This link suggests that young farmers are more suitable for modern farming, as standard production output correlates with qualifications of the workers involved.[835] While older farmers tend to have good equipment handling skills, the use of computer and data analytics is proving to be more efficient in agricultural production these days.[836]

More significantly, the whole task of agricultural digitalization becomes far more difficult with this connection in mind.[837] As older farmers did not receive sufficient education on how modern technologies could be beneficial for increasing

[832] 'Archive: Agricultural census in Hungary' (*Eurostat*, 5 October 2018) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Agricultural_census_in_Hungary> accessed 10 May 2023.
[833] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96) 10.
[834] *Ibid.*
[835] *Ibid.*
[836] Ministry of Foreign Affairs of the Netherlands, *Precision Agriculture in Hungary,* 18.
[837] *Ibid.*

agricultural productivity, they are reluctant to accept digital solutions in their work.[838] This is because they may fear new technologies and intelligent tools, and underestimate their relevance in agriculture.[839]

To resolve this educational shortage, the above mentioned DAS (2019) and the DFIS (2021) proposed solutions.[840] The DAS was targeted at setting higher educational standards for farmers via introducing digital and PA methods in agriculture.[841] To increase their digital competence, it invented a 'Digital Agricultural Academy', a 'Smart Farmer Program', and argued for the general improvement of agricultural tertiary education and consulting services.[842] A large percentage of the proposed strategies were, however, focused on educating the youth. The DFIS intended to increase effectiveness in food production by implementing digitalisation.[843] The second pillar of the Strategy focused entirely on educational tools to achieve this. Among others, it recommended launching novel university degrees in food digitalisation engineering (both BSc and MSc), as well as introducing digital topics in secondary education.[844] Similarly, this approach reflects the willingness to educate mainly the youth.

For their discrepancies, both the DSA and the DFIS received great criticism.[845] Namely, they were argued to be too unrealistic in terms of their outlined development for Hungarian agriculture.[846] In light of the ageing crisis, even if young farmers receive a more technology-centred agricultural education and manage to reach up to Western agricultural standards in their work, their numbers are likely to remain concerningly low within the total farming community. In regard to older farmers that are currently in the workforce, it is unrealistic to assume that they would switch to technology once they undergo mandatory training, due to their unfamiliarity with it.

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[838] *Ibid*.
[839] *Ibid*.
[840] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103), 12.
[841] Magyar Kormány, 'Digitális Jólét Program – Magyarország Digitális Agrár Stratégiája' (2019) <https://2015-2019.kormany.hu/download/3/fb/a1000/Magyarorsz%C3%A1g%20Digit%C3%A1lis%20Agr%C3%A1r%20Strat%C3%A9gi%C3%A1ja.pdf> accessed 10 May 2023, 8.
[842] *Ibid* 55ff.
[843] Magyar Kormány, 'Magyarország Digitális Élelmiszeripari Stratégiája' (2022) <https://cdn.kormany.hu/uploads/document/8/84/84d/84ddc0b48dca12b97b1c911f11dbe96920b30a5c.pdf> accessed 10 May 2023.
[844] *Ibid* 64.
[845] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 12.
[846] *Ibid* 13.

After all, the DAS and DFIS handled digitalisation as a purely educational matter, and did not consider the underlying ageing crisis as a primary obstacle. Without tackling the increasing average age of farmers at first, no extent of raising technological awareness will significantly aid in spreading digital and PA farming solutions. Developers of sustainable agriculture shall find a novel solution for this challenge.

iii. Third challenge: Difficult access to land

Finally, even for those young people who receive the respective EU funds to launch their own agricultural business, land is highly inaccessible. This land inequality between younger and older farmers is based in an outdated regulatory framework.[847]

According to said framework, the State provides on average a maximum of 10 million Hungarian Forints (EUR 28,000) in a tender contract, for farmers who would like to enter the sector proprio motu.[848] This amounts to the price of a 7 – 10 hectares-big land, which is insufficient to start farming due to other, conflicting regulatory restrictions.[849] Thus, farmers must supplement the 10 million Forints with their own funds to get started, which many cannot afford or are not willing to pay for this purpose.[850] At the same time, the State supports those farmers that are already actively working and only need additional income, who - generally speaking - are of the older farming generations.[851]

Krisztina Hantos, Hungarian agriculturist summarised it as the following: 'while supporting young farmer's agricultural activities has been happening in the country, making land more accessible is *the most important* precondition for their entrepreneurship.'[852] She also pointed out that applying for and obtaining new land puts a great administrative burden on young farmers, on top of their initial costs.[853] She recommends adopting the Czech model for this issue, where young farmers can apply for grants to cover administrative costs.[854]

[847] Imre Kovács and others (n 12; 73) 7.
[848] *Ibid.*
[849] *Ibid.*
[850] Krisztina Hantos, 'A hatékony generációváltás elősegítése a mezőgazdaságban – A fiatal gazdák támogatása' (Ph.D. thesis, Corvinus University of Budapest 2010) 13.
[851] Imre Kovács and others (n 12; 73) 7.
[852] Krisztina Hantos (n 120) 5.
[853] *Ibid* 12.
[854] *Ibid.*

Therefore, the legal challenge in regard to easing access to land for young farmers is amending the regulatory framework for the benefit of young farmers. In this regard, Ms Hantos advocates for following the American system in which young farmers repay land loans in more favourable instalments.[855]

b. Unprotected environment: climate change and biodiversity

Both the Commission and Hungary have identified a second, equally burning group of issues of agriculture, which the Strategic Plan is expected to address. Generally speaking, the Hungarian countryside is a highly unprotected natural environment, where the adverse effects of climate change are not sufficiently combated, and biodiversity is at constant risk.[856]

Academic scholarship calls this inactivity to protect the environment a lack of ecologisation.[857] In essence, ecologisation means the true realisation and involvement of environmental interests within agricultural policies and practices.[858] The idea stems from a deeper understanding of efficient production over a longer period. While all developers of agriculture realise that increasing inputs into production are instantly beneficial for them, many of them neglect or underestimate that climate change might much more affect their production in the long run.[859]

Thus, the question is how agricultural regulations shall approach climate change in an effective way. Ironically, not even the CAP is a perfect solution to the climate crisis, as argued by many. While it puts great emphasis on carbon footprint reduction in theory, its direct agricultural support payments are proven to contribute to Greenhouse Gas Emissions [GHGs].[860] Furthermore, various MEPs argue that the CAP is incapable of reaching its goals in practice, as Member States

[855] *Ibid* 20.
[856] European Commission, 'Factsheet on 2014-2020 Rural Development Programme for Hungary' (October 2022) < https://agriculture.ec.europa.eu/system/files/2022-10/rdp-factsheet-hungary_en.pdf> accessed 5 May 2023, 2.
[857] Éléonore Schnebelin, 'Linking the diversity of ecologisation models to farmers' digital use profiles' (2022) 196 *Ecological Economics* 1.
[858] *Ibid.*
[859] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 16.
[860] *Ibid* 2.

have a too wide margin of freedom in implementation.[861] As a consequence, authors have been debating whether the sustainability sentiment of the CAP is merely 'greenwashing', or genuinely greening.[862]

As the most severe repercussion of climate change in Hungary, natural disasters frequently occur and irreversibly harm the environment.[863] Time has shown that droughts pose the highest danger to food production.[864] Between 1901 and 2019, precipitation decreased by 24%, while the average annual temperature increased by 26%.[865] On average, this results in an annual GDP decrease of 1% according to Cambridge Econometrics,[866] which explains the remarkable decrease in agricultural GDP mentioned in the Introduction. The extreme weather conditions worsen certain seasons' output to the extent that Hungarian agriculture cannot recover from it, which makes the matter irreversible as well.[867]

Finally, the most pressing issue within natural environmental protection is the continuously disappearing biodiversity. Hungary carries a wide variety of natural resources, including 851 protected areas, 210 species and 47 habitats under Natura 2000 sites.[868] According to the Commission's most recent estimations, however, 83% of these habitats are in poor condition[869], and 62% of species are in an unfavourable state, according to a 2018 review.[870] Unsurprisingly, agricultural intensification is one of the main contributors to worsening biodiversity, which creates an endless loop for sustainable goals.[871] Thus, a better mainstreaming of biodiversity protection into sectoral economic policies, and especially agricultural

[861] 'Greening the CAP or greenwashing?' *Euractiv* (17 February 2016) <https://www.euractiv.com/section/agriculture-food/news/greening-the-cap-or-greenwashing/> accessed 11 May 2023.
[862] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 3.
[863] *Ibid* 7.
[864] *Ibid*.
[865] *Ibid*.
[866] 'Komoly pofont adhatott a magyar gazdaságnak az aszály' (*Menedzsment Fórum*, 1 September 2022) <https://mfor.hu/cikkek/makro/komoly-pofont-adhatott-a-magyar-gazdasagnak-az-aszaly.html> accessed 11 May 2023.
[867] Ibid.
[868] 'Hungary' (Biodiversity Information System for Europe).
[869] European Commission, 'Factsheet on 2014-2020 Rural Development Programme for Hungary' (October 2022) <https://agriculture.ec.europa.eu/system/files/2022-10/rdp-factsheet-hungary_en.pdf> accessed 5 May 2023, 2.
[870] OECD, 'Biodiversity' (*OECD Environmental Performance Reviews*, 2018) <https://www.oecd-ilibrary.org/environment/oecd-environmental-performance-reviews-hungary-2018/biodiversity_9789264298613-12-en> accessed 11 May 2023.
[871] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 2.

regulation is needed in order to provide an effective shield and mitigate detriments to the highest possible extent.[872]

Based on the critical condition of Hungary's natural environment, two policy gaps can be identified which developers must tackle in the sustainable EU market.

i. First challenge: Climate change mitigation other than PA

Without a doubt, PA is becoming more environmentally considerate, and thus, also more climate friendly.[873] Furthermore, PA methods cover technologies that might more or less mitigate the effects of certain environmental events. By employing a high level of optimisation, PA can reduce the agricultural sector's vulnerability against natural disasters, as well as climate-related pests and diseases.[874] For instance, innovative irrigation systems have increased water holding capacity, which traditional sprinklers cannot compete with.[875]

However, PA solely decreases the need for further interventions, and certainly does not eliminate the underlying climate causes. With consideration of the complexity and costs of PA, even its general use requires great time and effort.[876] Essentially, it cannot provide a permanent and sustainable remedy to natural disasters caused by climate change.[877] After all, it is merely the band-aid to minimise short-term agricultural losses, not the medicine for the global climate crisis.

In the case of Hungary, developers of sustainable agriculture thus face a difficult situation. They must balance on the one hand, combating the regularly occurring natural disasters that immensely damage the countryside, and on the other hand, the popularisation of PA technologies as a fundamental CAP goal. After a certain extent, the expensive deployment and operation of PA systems[878] will necessitate other, more permanent and steady modes of climate change mitigation.

[872] OECD, 'Biodiversity' (*OECD Environmental Performance Reviews*, 2018) (n 141).
[873] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas(n 63; 67; 96; 103; 110) 14.
[874] 'Precision Agriculture' (*Climate-ADAPT*, 20 March 2023) <https://climateadapt.eea.europa.eu/en/metadata/adaptation-options/precision-agriculture> accessed 11 May 2023.
[875] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 15.
[876] 'Precision Agriculture' (n 144).
[877] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 14-15.
[878] 'Precision Agriculture' (n 144; 146).

ii. Second challenge: Missing *complex landscape management approach* to protect biodiversity[879]

While rural lands' functions can be categorised in dozens of ways,[880] land serves two fundamental purposes in the current context: natural and anthropogenic activities.[881]

On the one hand, Hungarian biodiversity is world-wide renowned and shall be protected at all costs, due to its richness in natural gifts. In spite of this, various anthropogenic activities have been affecting these areas to the detriment of nature. The most significant contributor is, unsurprisingly, agriculture itself, as it takes up physical space from natural habitats and species, and chemically alters these environments' initial and natural state.[882]

Of course, the complete abolishment of agriculture on all rural lands would be unrealistic and against the common good. However, *a complex landscape management approach* might create a bridge between various activities, and allow performance of agriculture tested against certain limits.[883] Essentially, the approach imagines a legislative framework that balances competing demands and integrates policies for multiple land uses within a given area.[884] Academic literature highlights the element of strengthening measures that mitigate and adapt to climate change.[885] In particular, biodiversity conservation has been addressed since the 1980s.[886]

To conclude, it is of utmost importance for developers of sustainable agriculture to recognise the need for *the complex landscape management approach*. As Hungary has an express conflict between biodiversity conservation and agricultural activities,[887] a guiding, explanatory framework is especially necessary.

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[879] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 15
[880] Eugeniusz Niedzielski, 'Functions of Rural Areas and Their Development' (research paper, University of Warmia and Mazury 2015), 85.
[881] *Ibid*.
[882] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 15
[883] *Ibid*.
[884] James Reed, Liz Deakin, Terry Sunderland, 'What are 'Integrated Landscape Approaches' and how effectively have they been implemented in the tropics: a systematic map protocol' (2014) 4 *Environmental Evidence* 1, 1.
[885] *Ibid*.
[886] *Ibid* 2.
[887] Edit Hoyk, Ádám Szalai, András Palkovics, Jeno Zsolt Farkas (n 63; 67; 96; 103; 110) 15

E. CONCLUSIONS: THE HUNGARIAN CASE STUDY

The current paper aimed to provide an insight into the two most prevalent issues of modern Hungarian agriculture, the increasing age of farmers in the workforce and rural areas' decaying natural environment. In relation to these two central crises, a number of further, legal challenges were outlined which developers of sustainable agriculture shall find innovative and creative solutions for.

In light of the general CAP sustainability goals, the country's position requires tailored solutions to its unique circumstances, such as its vulnerability against natural disasters and excessive shortage of farmers. In particular, lawmakers shall consider the regulatory constraints currently in force that might hinder sustainable agriculture, for instance the difficult access to land for new farmers desiring to enter the sector. Moreover, the use of PA poses further difficulties in the country, as it must balance its intentions to reach up to EU standards and the widespread application of PA with its special proneness to climate change, often worsened by PA itself.

Overall, while Hungary has been impressively advertising its pro-sustainability approach, it is far from reaching up to the CAP standards in practice. Digital technologies and precision farming methods are in their infancy, and this prevents the country from advancing into an innovation-driven agriculture. Nonetheless, the now operative National Strategic Plan seems promising and realistic in terms of the country's current position. It is expected that Hungarian agriculture might finally progress into its following era, which agricultural workers, experts in the field, Member States and lastly, the Commission are curiously awaiting.

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