

Fundamental Rights in the AFSJ: Strengthening or Impediment?

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ABSTRACT

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

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

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

I. INTRODUCTION

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

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

II. OVERVIEW OF FUNDAMENTAL RIGHTS AND THE AFSJ

1. *Fundamental Rights in the ECHR and the CFR*

1.1. The ECHR

The ECHR was drafted by the Council of Europe with the aim of protecting the human rights of individuals under the jurisdiction of the Member States of the Council of Europe. This Convention was the first instrument to give effect to and make binding several of the rights listed in the 1948 Universal Declaration of Human Rights¹. The ECHR guarantees specific rights and freedoms and prohibits unfair and harmful practices. Divided into 14 articles, each of them representing a basic human right or freedom, this Convention protects the right to (i) life (Art. 2) and freedom and security (Art. 5); (ii) respect for private and family life (Art. 8); (iii) freedom of expression (Art. 10); (iv) freedom of thought, conscience, and religion (Art. 9); and (v) a fair trial in civil and criminal matters (Art. 6). It prohibits torture and cruel or degrading treatment (Art. 3), slavery (Art. 4), and discrimination (Art. 14). Since its creation, the ECHR has been amended several times, and further rights have been added by adopting protocols, notably the right to education (Art. 2 of Protocol No. 1), the right to vote in and stand for election (Art. 3 of Protocol No. 1), and the right to property and peaceful enjoyment of possessions (Art. 1 of Protocol No. 1).² In short, the ECHR focuses on the first generation of human rights, covering civil and political rights.

As mentioned previously, the ECHR is distinct from the EU framework. In other words, it is not formally part of the EU's primary law. However, in the context of EU law, the ECHR holds a significant position. While the ECHR itself is not a direct basis for EU fundamental rights, its principles significantly influence EU jurisprudence. The CFR, which has the same legal status as primary EU law³, drew inspiration from the ECHR. The European Community and EU treaties, secondary legislation, Court of Justice case law, as well as some other international sources or constitutional traditions shared by the member states, served

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

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

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

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

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

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

⁵ Douglas-Scott (n 4) 655.

⁶ *ibid.*

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

⁸ *ibid.* 36.

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

Despite challenges raised after the release of Opinion 2/13, the Member States reaffirmed their commitment to accession¹¹ and attempted to analyze the obstacles laid out in the Opinion to propose a new accession agreement. Both the European Commission and the Council of Europe remained steadfast in their intention to make EU accession to the ECHR possible¹². Consequently, in September 2020, formal accession negotiations resumed after a period of deliberation. During the resumed negotiations, the EU has put forth a solution to bridge the gap in justiciability within the EU legal system with the hope of making the accession situation more feasible. At its 18th meeting held in March 2023, the CDDH Ad hoc Negotiation Group on accession reached a unanimous provisional agreement on solutions to the issues raised by Opinion 2/13, except the concern related to Common Foreign and Security Policy which the EU aims to solve internally.¹³ In short, the EU is actively pursuing accession to the ECHR, despite encountering legal complexities within its Common Foreign and Security Policy. This endeavour reaffirms the ECHR's unequivocal position within the EU legal framework.

1.2. The CFR

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

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

¹⁰ *ibid.*

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

¹² *ibid.* 292.

¹³ *ibid.* 294.

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

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

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

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

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

¹⁷ Charter of Fundamental Rights, art. 37.

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

Fundamental rights are not absolute rights and limitations to these rights are set out in Art. 52 of the CFR. Accordingly, any restriction on the exercise of the rights and freedoms outlined in this Charter must be legal and respect the essence of those rights and freedoms. This wording is based on the judgment of the Court of Justice in Case C-292/97.²⁰ The requirement “(...) must be provided for by law”²¹ aims to ensure transparency and prevent arbitrary restrictions; and “(...) must respect the essence of those rights”²² aims to emphasize that certain core aspects of fundamental rights should remain inviolable even when limitations are imposed. For instance, while freedom of expression may be subject to restrictions, the essence of expressing one's thoughts and opinions remains sacrosanct. In other words, while freedom of expression may be restricted, the right to hold opinions is absolute.²³ Additionally, limitations are permissible only if they are necessary, proportionate, and serve objectives of general interest or protect the rights of others. The principle of proportionality ensures that restrictions are balanced and not excessive, and necessity emphasizes that restrictions must be justified, in other words, alternative measures that

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

¹⁹ *ibid.*

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

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

²² *ibid.*

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

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

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

2. *The AFSJ*

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

²⁴ (n 21).

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.*

is ensured with respect to external border controls, asylum, immigration and the prevention and combating of crime.²⁸ Being at the heart of the AFSJ²⁹, fundamental rights serve as the very essence that sustains its existence. They are the bedrock upon which the AFSJ is built as well as guiding its policies, actions, and decisions. Fundamental rights ensure that even in the pursuit of security, justice, and cooperation, the dignity, autonomy, and liberties of every individual remain inviolable. They are not mere legal provisions; they represent the shared values of a union committed to upholding the rights of its citizens and residents. Without fundamental rights, the AFSJ would lose its very essence and purpose.

The AFSJ consists of four main policy areas, including (i) border checks, asylum and immigration; (ii) judicial cooperation in civil matters; (iii) judicial cooperation in criminal matters; and (iv) police cooperation. When applying measures in these policy areas, the impact on fundamental rights is inevitable. For instance, the establishment of the European Public Prosecutor's Office raised concerns about fundamental rights. While the European Public Prosecutor's Office Regulation addresses these rights³⁰, vigilance is necessary to prevent overreach. In particular, the efficiency of the European Public Prosecutor's Office is clearly supported by the mutual admissibility of evidence³¹, this matter also raises concerns for some fundamental rights such as the right to privacy and data protection or the right to a fair trial, especially due to the lack of common standards for the collection of evidence. In this case, the AFSJ has to strike a delicate balance between criminal cooperation, aiming at ensuring security and the protection of fundamental rights at the same time.

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

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

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

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

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

³² Sánchez S and Pascual M (n 30) 15.

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

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

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

III. FUNDAMENTAL RIGHTS AND THEIR EFFECTIVENESS IN THE AFSJ

1. Scope of Fundamental Rights in the AFSJ

Before the entry into force of the Treaty of Lisbon in 2009, the AFSJ was split between four policy areas, including asylum, migration, border controls and judicial cooperation in civil matters, based on Title IV of the Treaty of European Community (TEC)³⁶ and two areas, namely judicial cooperation in criminal matters and police cooperation, based on Title VI of the TEU³⁷. This separation meant that different legal instruments and different decision-making procedures had to be applied. The mentioned separation was put to an end by the birth of the Treaty of Lisbon.

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

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

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

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

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

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

granted at the same level as provisions in TEU and TFEU. This recognition has gone hand in hand with the AFSJ link with two other important developments in the EU, including the increasingly developed system of fundamental rights and EU citizenship. Respect for fundamental rights is now explicitly linked with the AFSJ, as mentioned in the previous part, in the first article of Title VI on the AFSJ (the consolidated version), namely Article 67 of TFEU, whereby “the Union shall constitute an area of freedom, security and justice with respect for fundamental rights (...)”. This association of fundamental rights and citizenship with the AFSJ has gradually increased due to the enactment of strategic policy documents of the Commission and the European Council, notably the Tampere Programme³⁸, the Hague Programme³⁹ and the Stockholm Programme⁴⁰. The Stockholm Programme contains guidelines for common politics on the topics of protection of fundamental rights, privacy, minority rights and the rights of groups of people in need of special protection, as well as the citizenship of the EU.⁴¹ It also attaches great importance to how the EU should work to guarantee respect for fundamental freedoms, and privacy while guaranteeing security in Europe. It could be seen that, from a policy perspective, fundamental rights and citizenship are now incorporated into the AFSJ. The legal spheres covered by the AFSJ, including civil and criminal law, border control, migration, and asylum policies, by their nature, have touched directly on fundamental rights. This deep connection is already apparent in the CFR’s Preamble, whereby the EU shall “place the individual at the heart of its activities, (...) by creating an Area of Freedom, Security and Justice”. One could therefore say that creating the AFSJ is in the interest of protecting fundamental rights as well.

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

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

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

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

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

While other human and fundamental rights documents due to their international or constitutional nature are designed for general application, the CFR is limited in its scope according to Article 51.1 of this Charter. Accordingly, the CFR’s provisions are addressed to two subjects, namely the EU’s institutions and bodies and the EU’s member states, respectively. Whereas the former is subject to the Charter with no limitation regarding the principle of subsidiarity, the latter is bound by the CFR only when implementing EU law. Regarding the EU’s institutions and bodies, the CFR has often been applied in the AFSJ as a parameter for assessing the validity and interpretation of acts of these institutions and bodies⁴⁴. In addition, it also has been used when determining the legality of

⁴² Viljam Engström and Mikaela Heikkilä, ‘Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice’ (*European Commission*, 29 September 2014) <<https://repository.gchumanrights.org/server/api/core/bitstreams/98ecbc67-5259-4d48-a025-d3ce-90abcebb/content>> accessed 28 January 2024, 8.

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

⁴⁴ *ibid* 24.

draft EU international agreements in the AFSJ in order to make sure that these agreements will comply with the obligation to ensure fundamental rights. For instance, when being requested for an Opinion on the Agreement between Canada and the EU on the transfer and processing of Passenger Name Record Data in 2017, the Court concluded that this draft agreement was incompatible with Articles 7, 8 and 21 of CFR, related to the right to respect for the private and family life, the right to protection of personal data and the principle of non-discrimination, respectively.⁴⁵ The Charter, by contrast, applies to the EU's member states only when they are implementing EU law—and determining when they are implementing the Union law has proven to be no easy task.⁴⁶ In other words, it is complicated to assess the scope of application of the CFR to national measures and this assessment depends on the type of interest and area considered.⁴⁷ As Sánchez noted, situations in which EU law applies are mainly linked to the nature of the relationship between the national legal rule or practice at issue and a rule of EU law. These situations could be agency situations and derogation situations⁴⁸, or when directives are implemented⁴⁹. In cases concerning the co-ordination of rules, as Eleanor argued⁵⁰, the CFR applies, if at all, only in extreme cases to national executing authorities. Co-ordinating legislation is only effective if all the states consider, based on mutual trust, adequate fundamental rights protection across the EU territory. Giving the executing authority the power to question the compliance of fundamental rights in other member states could potentially hinder this effectiveness. In short, there is a varied application of EU fundamental rights to national rules and to ensure the full effectiveness of EU rules, some cases limit the application of the Charter to national rules.

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

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

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

⁴⁶ Sánchez S (n 44) 27.

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

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

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

⁵⁰ Spaventa (n 48) 14.

other words, the promotion of fundamental rights is a priority in the AFSJ and all measures in this area directly or indirectly, are related to the protection of these fundamental rights. As Engström & Heikkilä stated, each and every AFSJ policy raises its own set of fundamental rights concerns.⁵¹ Similarly, most AFSJ actors, whether EU institutions, agencies or non-institutional actors, can be viewed as having an impact on and/or contributing to the protection of rights. The AFSJ, on the one hand, is subject to constitutional checks, including fundamental rights compliance⁵². This means that all policies outlined in the AFSJ should comply with the obligation to respect fundamental rights. On the other hand, the AFSJ is a policy area that displays many institutional peculiarities, and this characteristic gives rise to fundamental rights challenges.⁵³ Especially the principle of mutual recognition—the constitutional principle that pervades the entire AFSJ⁵⁴—can lead to significant risks, particularly in relation to safeguarding fundamental rights. This is because the principle of mutual recognition prevents mutual oversight of national legal solutions⁵⁵. Accordingly, member states are regularly called upon to recognize legal acts adopted by other member states, such as judgments, for example, without controlling their compliance with fundamental rights⁵⁶, raising the possibility of fundamental rights violations.

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

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

⁵² *ibid.*

⁵³ *ibid.*

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

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

⁵⁶ *ibid.*

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

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

Furthermore, case law regarding the interpretation of the AFSJ rules has greatly contributed to the refinement of the scope of the CFR. The recorded high number of cases in which the CFR has been applied in the AFSJ confirmed that the AFSJ is the leading area for the jurisprudential development of EU fundamental rights. According to the database of the Court of Justice of the EU, in the period from 2009 to 2021, among 662 judgements and orders regarding compliance with the Charter, 146 involved the AFSJ.⁶¹ Moreover, AFSJ case law has affected the general development of the jurisprudential approach to the CFR's scope in several ways, especially in determining whether member states are implementing EU law when an EU law rule affords them a margin of appreciation. AFSJ case law has been crucial in establishing the importance of taking account of the CFR when interpreting acts of EU law before going on to determine whether or not a given situation falls within its scope. As clarified by Sánchez, in the *Kamberaj* case⁶², by referring to Article 34.3 of the CFR, it was proven that the CFR has supported the interpretation of the content and scope of the provisions of EU law.⁶³ As a result, the CFR's role in interpreting the scope of secondary law

[rights.org/server/api/core/bitstreams/6540b234-819b-4b50-b5c6-698668d3bcbb/content](https://eur-lex.europa.eu/legislation/servlet/api/core/bitstreams/6540b234-819b-4b50-b5c6-698668d3bcbb/content)> accessed 28 January 2024, 8.

⁵⁸ *ibid.*

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

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

⁶¹ Sánchez S (n 44) 28.

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

⁶³ Sánchez S (n 44) 29.

in the AFSJ could not be denied.

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

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

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

⁶⁵ *ibid.*

⁶⁶ *ibid.* 4.

⁶⁷ *ibid.* 4.

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

cluding it can be harmful to the protection of fundamental rights.⁶⁹ In addition, some authors argue that the list of investigative actions that can be asked for in an EIO does not follow the rules for procedural legality set out by the ECtHR's case law because there is not a clear list of actions that can be expected to be taken based on an EIO⁷⁰. Contrary to these concerns, Szijártó proposed that the EIO could actually enhance fundamental rights protection.⁷¹ The reason for this optimism is based on the CJEU's jurisdiction over the EIO. Accordingly, the CJEU delivered a preliminary ruling regarding the right to legal remedies, which arguably has a greater impact on the current pending system of criminal cooperation. In other words, CJEU can enforce principles safeguarding individuals from excessive state action and its case law in the field of judicial cooperation in criminal matters can set a higher standard for fundamental rights protection. In short, while concerns exist, the EIO, coupled with the CJEU's oversight, has the potential to elevate fundamental rights protection across Europe during criminal investigations.

The AFSJ within the EU is a vital framework that balances freedom, security and justice. As emphasized earlier, fundamental rights are at the AFSJ's core, ensuring protection for all individuals. However, in the recent *WS & others v Frontex* case, Frontex as the EU's border management agency which operates within the AFSJ framework was claimed to breach fundamental rights under the CF⁷², including human dignity (Art. 1), the right to asylum (Art. 18) and the rights of the child (Art. 24). Accordingly, several Syrian nationals, including children, sought international protection in Greece. After unsuccessful asylum attempts, they were removed by air to Turkey in a joint operation involving Frontex and Greece. The General Court rejected the claim and emphasizing that Frontex lacks the authority to assess return decisions or asylum applications directly causing the alleged damage.⁷³ As a result, Frontex cannot be held liable for any damage related to the removal of the applicants to Turkey. As can be seen, this ruling reaffirms the importance of respecting fundamental rights even in border management

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

⁷⁰ *ibid.*

⁷¹ *ibid.* 72.

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

⁷³ *ibid.*

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

IV. RE-BALANCING BETWEEN PERSONAL RIGHTS AND PUBLIC INTERESTS

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

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

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

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

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

V. CONCLUDING REMARKS

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

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

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

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

related to the protection of these fundamental rights.

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

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