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TECHNOLOGY AND THE RULE OF LAW

Rainer ARNOLD[1]

Abstract:

Progress in science and technology is essential for overcoming global challenges. Legal issues arise in a variety of ways. Under constitutional law, it is important to assume that the State has an obligation to promote the development of technology, but also to protect against its dangers. This obligation arises from various points of view, in particular from the State's obligation to protect the values enshrined in fundamental rights and also to ensure the development of society. This a particular concern of the principle of the social State or, in some constitutions, the idea of fundamental social rights. However, the principle of the rule of law and its individual elements are also essential for the legal assessment of technology. The aspects of the certainty of the law are of great relevance, as is the requirement that important technological decisions are not made by the administration, but only by the legislator, and also that detailed questions are decided by the administration, but on the basis of certain authorizations by parliament or, in some systems, on the basis of the autonomous normative power of the executive. Prognosis decisions are also important, as the development of technological facilities is dynamic and not all future effects can be foreseen in the present.

Keywords: *technology; the State's obligation to protect; social State principle; concept of essentiality; certainty of law.*

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Introduction

Our world is characterized by technological progress. Science and technology are the pillars of our prosperity. The search for new knowledge in the real world is inherent to man himself in his thirst for knowledge and his inner striving to recognize more and more and new insights.

Art, philosophy and science in general are areas in which people are active because of their humanity and their never-ending quest to master the challenges of the world around them.

As a means of organizing the human community, the law must also establish rules for these areas to give them order and offer them the greatest possible scope for development.

These rules must promote and restrict at the same time. Promotion consists of granting the freedom to research and develop as well as active support. The restriction should prevent possible dangers and also protect other important legal interests of the community.

It is in the nature of scientific and technological development that it progresses on the basis of innovative impetus, while legal adjustments to this development can often only be made with a delay.

1. Science and technology and the finality of law

This problem arises with great clarity in a State based on the rule of law.

Some thoughts on this will be given here, but in relative brevity in view of the limited space available.

The first question that arises is: what is the relationship between science and technology on the one hand and law, in particular constitutional law, on the other?

Law has a twofold objective: firstly, an organizational, order-creating finality. This means creating an orderly community from a number of people, i.e. establishing a stable, reliable, binding and therefore normative community order for the members of the community.

Secondly, law has a value-determining finality. The values inherent in human beings should be upheld in this community, they should become its basis; the organizational union into a community should not result in a technocratic, value-neutral union, but should uphold the dignity, freedom and equality - the anthropocentric basic values - of the people involved and make them the ideal basis of the community (Arnold, 1990, p. 1 ss. - on the Constitution which is based on the same aspects as law itself but has the rank and function of the basic legal order of the community called State; Arnold, (a cura di) G. Caravale, S.Cecanti, L.Frosina,P. Picciacchia, A. Zei, 2022 p.41-56).

This twofold objective applies to law *per se*, including constitutional law. It draws the basic lines of the State order in organizational - institutional terms and in relation to the value orientation of this community. The ordinary law details these goals, concretizes them and thus realizes them in detail.

Law, including constitutional law, has an overall purpose beyond these two objectives: it aims to protect and promote the human being.

2. Progress in science and technology and the overall purpose of the law

This overall purpose presupposes that the means are provided for the protection and promotion of human beings. This is where the special importance of science and technology comes into play, without whose progress the diverse and threatening challenges of our time could not be overcome.

All of humanity's major crises are technology-related: the development of vaccines to ward off pandemics, rapid global interaction using new communication technologies, combating cross-border crime using efficient investigation technology, halting environmental destruction through new scientific knowledge and technological progress and much more.

Enabling science and promoting the development of technology means meeting the basic objectives of the law to protect and promote

people. However, this must be done from a comprehensive perspective. Promoting technological development alone and without barriers, but ignoring the dangers that emanate from it, not researching them and not protecting against them, does not correspond to this. Science without ethical boundaries, technology development without legal restrictions with the aim of protecting the fundamental values of man, dignity, freedom and equality, would not mean progress, but regression.

A first question arises in a twofold sense: Is a State obliged to promote science, research and technology development and is it obliged to take precautions against potential dangers arising from this?

3. The State's duty to protect and promote

Both are to be affirmed, based on the idea of the State's duty to protect. This duty is of a constitutional nature (For Germany see the rich jurisprudence on this topic of the Federal Constitutional Court FCC, vol. 1, 97 [104]; vol. 39, 1 ,42 f.; vol. 77, 381, 404; vol. 88, 203 ,251 f.; vol. 96, 56 , 64; vol. 99, 185 ,194; vol. 125, 175 , 222 f.; vol. 130, 240 [252]; vol. 158, 170, 185 f.,199 f.; vol. 149, 126 ,142. f.; vol. 149, 126 ,142. However the concept of the State's obligation to protect constitutional values is in tendency a general phenomenon. See for the European Convention of Human rights Sudre, 2019, p.470 ss., 502 ss.) and is one of the foundations of the human community that has organized itself into a State.

Human freedom prohibits excessive, disproportionate interference with freedom. Such interference is no longer legitimate. However, freedom and the restriction of freedom are closely linked. Freedom as a principle is a necessary consequence of human dignity, which at the same time also means the freedom of other members of the community. As the German Federal Constitutional Court has formulated it, the individual is not an isolated individual, but a "community-related and community-bound individual" (FCC vol. 4, 7, 15/16). Inherent in the principle of freedom is the restriction in favor of the legitimate interests of other community members.

It is from this idea that the State's obligation to protect freedom is

derived precisely from the restriction of freedom. Thus, the freedom of one person must be restricted in order to adequately protect the freedom of another. Fundamental rights, which are concretizations of the principle of freedom, therefore protect the individual not only against excessive interference by public authorities, but also against interference by other individuals. In order for this to be realized, the State must establish this protection through adequate legislation. This is a constitutional obligation that is inherent to the principle of freedom. The State's obligation to guarantee this protection exists towards itself and also towards other individuals. The State must therefore establish this protection to a sufficient extent, through guarantees of substantive, procedural (FCC vol. 90, 60, 96; vol. 124, 43, 70) and organizational (BeckOK GG/Schemmer, 56th ed. 15.8.2023, GG Art. 5 para. 78) standards.

The idea of the duty to protect is based on the idea of a necessarily comprehensive protection of freedom. The fundamental right as a concretization of the right to freedom has at its core the value to be protected: life, health, personality, property and so on. It is intrinsic to a constitution that freedom, the consequence of the central value of human dignity, is efficiently protected and realized. This is the task of the State, which can be called upon directly by the person to be protected to fulfill this protection. It would be an obvious deficit if the State were to withdraw to the role of not intervening in freedom itself. Efficiency also means helping to ward off attacks on freedom by other persons, i.e. not only by the State itself, and protecting against them. Protecting the value enshrined in the fundamental right against other persons is a complementary part of one and the same fundamental right. This protection is also a defense, this time not against the State, but against other private persons, i.e. on a horizontal level. The only difference to the defense against a State intervention is that the person to be protected uses the State as an assistant.

This is a logical consequence of the basic instrumental nature of the legal norm, including the constitutional norm: it is aimed at the full realization of its normative objective, only then is it efficient (Arnold, *in:* Geis, Winkler, Bickenbach, 2015, p.3 – 10). This applies to the norm as a

legal *rule*, which has an unrestricted objective. In contrast, the constitutional *principle*, for example a fundamental right, has a limited objective that must be weighed against other fundamental rights and other constitutional principles. This limited objective consists in the fact that it realizes its normative value in the process of balancing as far as objectively appropriate, i.e. optimally (Alexy, 2018, p.75-76). This overall purpose presupposes that the means are provided for the protection and promotion of human beings. This is where the special importance of science and technology comes into play, without whose progress the diverse and threatening challenges of our time could not be overcome. Therein lies the efficiency of the constitutional principle.

If we relate these considerations to our starting point, we can see that fundamental rights have the normative objective of efficiently protecting the freedom of the individual. It is therefore logical that in the German constitutional system the traditional view of fundamental rights as subjective defensive rights against State interference was further developed to the extent that they were then recognized as objective values that permeate the entire legal system and later, with great practical relevance, were also developed into the basis of the State's duty to protect.

Recently, this has been supplemented in German constitutional case law by the idea of intertemporal protection of liberty by fundamental rights, thus recognizing that an excessive restriction of liberty occurring in the future can already be a violation of the right to liberty in the present. This is the case when restrictions of liberty (in the specific case of the FCC decision on the Climate Protection Act, restrictions on liberty due to the reduction of activities that generate greenhouse gases) that would be necessary in the present are postponed to a later point in time and are then excessive in the future because of this cumulation of the restriction of liberty (FCC vol. 157, 30, 102, 131).

We therefore see a dynamic in the development of the constitutional protection of freedom, a dynamic that is inherent to the constitution as a "living instrument" that stands in time (Arnold, 2023, p.485 ss.)

It follows from all this that research and development in the field

of technology must be free and that there is also a right - albeit limited - to state promotion. The freedom of science and the right to research as constitutionally guaranteed rights must be realized efficiently. For example, in the field of medical research and the development of medical technology, the requirements of data protection must be adequately taken into account. Both fundamental values, freedom of research (which leads to progress in medicine) on the one hand and data protection on the other, must be adequately weighed up against each other, particularly in the area of biobanks. In this area, the constitutional protection of health and life is not only a right of defense against interference by the state, but also a right to legal protection and appropriate promotion.

This is not just a task for politicians in the context of parliamentary legislation, but is rooted in constitutional law. However, this also applies to other areas of research and technology development. The constitutional anchoring can be found in the fundamental rights themselves or in objective State objectives such as the social State principle (Article 20.1) in the German constitutional order.

One example is provided by the case law of the Federal Constitutional Court in the well-known ruling of March 2021, in which the Federal Climate Protection Act was declared partially unconstitutional. It states that the restriction of freedom in favor of climate protection is absolutely necessary, but that the reduction of climate-damaging activities must be defined as precisely as possible by the legislator in its individual time phases until the final goal of climate neutrality is achieved. This reduction must be adequately distributed in the individual phases so that no disproportionate burden occurs in later phases. In addition, the content of these phases must be predictable. This must give the polluting people, whose activities such as participation in transport, building homes, farming and so on are restricted, the opportunity to initiate technological developments that make it possible to restrict freedom less, but achieve the same result of reducing CO2 gases. The State must also provide incentives for such technological developments. This says something crucial: on the one hand, the protection of freedom includes restrictions, on the other hand it also

includes the obligation of the State to provide impetus for technological developments that facilitate the protection of the environment and at the same time are able to reduce the restrictions on freedom. This means that the guarantee of freedom, i.e. the protection of fundamental rights, and technological progress serve to make life easier and are a means to greater enjoyment of freedom.

Let us take a brief look at the relevant passage of the Federal Constitutional Court's decision on the Climate Protection Act, in which it developed the concept of "intertemporal protection of fundamental rights". This concept is also related to the State's constitutional duty to promote technology.

"The Basic Law does not specify in detail what needs to be regulated in order to create the conditions and incentives for the development of climate-neutral alternatives. However, it is fundamental for this and thus for a forward-looking protection of future freedom that the legislator *provides orientation for the necessary development and implementation processes for the period after 2030 as early as possible and* thus at *the same time provides* them *with a sufficient degree of development pressure and planning security*. The necessary development pressure arises when it becomes foreseeable that and which products, services, infrastructure, administrative and cultural facilities, consumer habits or other structures that are still CO2-relevant today will soon have to be significantly redesigned. If, for example, the legislator stipulates at an early stage that the transport sector will only be able to emit small annual quantities of emissions from a certain point in time, this could create *incentives and pressure for the development and dissemination of alternative technologies and the necessary infrastructure. ...*" (FCC https://www.bverfg.de/e/rs20210324_1bvr265618.html para. 249 Italics by the author).

Certainly, there are limits to the freedom of research and the State's obligation to provide funding, especially if central values such as human dignity are compromised.

5. Obligation to protect against technical hazards

While the State's obligation to promote the further development of science and technology in order to protect the values enshrined in fundamental rights, life and health through advances in medical technology, environmental protection through the further development of environmental technology, human safety through advances in the development of police information technology, etc., the State's duty to protect is also and in particular required when it comes to the prevention, assessment and avoidance of dangers arising from new technologies.

We therefore see a double face of the obligation to protect: the duty to promote the protection of fundamental values and the duty to limit and prevent technological dangers. These dangers can emanate from the State itself or be caused by other private individuals. Today, dangers in communication technology are concentrated in large private companies that operate globally. The dangers are manifold.

Certainly, the duty to prevent, assess and forecast the development of risks in the future and to constantly monitor the application initially falls to the developer, and is probably a duty under civil law to avoid or minimize damage or, if damage occurs, to compensate for it. However, the State, specifically the legislator, has a duty to set out the private developer's and user's obligation to protect by law. This legal fixation must be sufficient. German constitutional jurisprudence has coined the term "*Untermaßverbot" (prohibition of inadequacy of protection).*

This legal requirement of fixation also applies when the State itself either develops and uses technology or uses technology developed by private individuals. Certainly, the essential limit can already be derived from fundamental rights, such as the right to privacy, the right to liberty in general, the right to inviolability of the home, the principle of proportionality and other constitutional requirements and many others. Nevertheless, for reasons of legal clarity, it is up to the State to define the details of protection in parliamentary law. In this way, the legislator implements the constitutional requirements.

6. The Rule of law requirements: the theory of essentiality and the link with democracy

The so-called essentiality concept, as developed by German constitutional case law, is also important in this context, but should have general validity, as it arises from the principles of democracy and the rule of law that exist in all authentic constitutions. According to this concept, important decisions are to be made by the legislature itself and not by the administration, not even on the basis of parliamentary authorization. An example of this is the decision by German politicians to introduce the use of nuclear energy and to end it again later - this important technological decision must be made in public parliamentary debate by the direct representatives of the people (FCC 49, 89-147). Otherwise, one of the foundations of democracy would be emptied, the concentration of important decisions affecting the people in the hands of the people, represented by the members of the freely elected parliament.

The same applies to ending the use of an important technology, as was done with the so-called phase-out legislation in Germany. Here, however, the debate focused on the fact that this legislation had already been predetermined by the government, i.e. it was “pact legislation” that had not been given its essential form in a free parliamentary debate (Kloepfer, 2012, p.41 ss).

However, if it is not a matter of determining particularly important circumstances relevant to technology, this can be done by the administration, but only ever, at least in German law, on the basis of authorization by the formal legislature (The central norm in German constitutional law is Article 80.1 of the Basic Law). In legal systems in which the executive has an autonomous right to issue regulations, this can probably also be done independently of authorization from parliament (However, this is also subject to the restrictions laid down in the respective constitutional system – Hamon & Troper, 2019-2020, p. 145 ss.; De Vergottini, 2022, p. 620 ss.-Cap. II/26: La funzione normativa dell'esecutivo). Individual technical data in the area of environmental protection, but also in other areas, cannot be determined by parliament due to their particular nature. Here, only the executive can

take over the determination of these details. However, the democratic legitimacy link between the people, parliament and the executive must be expressed as clearly as possible. This means that the parliamentary act that grants the authorization to the executive clearly defines the purpose and scope of the authorization so that the “normative programme” to be carried out by the administration becomes clear (FCC vol.1, 14,60; vol. 2, 307, 334; vol. 4, 7,22; vol. 7, 282,301; vol.58, 257, 278; vol. 85, 386, 403/404). This greatest possible precision (FCC vol.8, 274, 312) is required by the principles of democracy and the rule of law; both principles complement each other here.

However, it is recognized that even if these principles are observed, there is a need for the legislator to use undefined legal terms (FCC vol. 49, 89, 134 ss.,136 ss) .

The phrase "in accordance with the state of the art in science and technology" is particularly common in the field of technology (FCC vol. 109, 190, 240/241; vol. 115, 320, 360/361). On the one hand, this means that the legislator and the executive administration must be guided by the state of scientific knowledge. This shows the necessary link between science, technology and legislation. However, a second element is also expressed here, which is also generally valid: especially in the area of dynamically developing technology, the law must adapt to changes, i.e. it must take account of this dynamism. Therefore, the legislator must always make a prognosis in order to assess the further development of what it is now technically regulating and, if possible, take precautions in the present to promote these developments as soon as they are positive or to counter foreseeable or suspected dangers as early as possible.

The rules on the possibilities and scope of a prognosis and the possible reactions to it are of great importance in a legal system that is fundamentally oriented towards what already exists.

This applies to security law and health law (think of prognoses in the fight against a pandemic!) and is also of the utmost importance in technology law. Prognoses are permissible and necessary. They must be substantiated with all available means. Their research must be as comprehensive as possible. The legislative or administrative response to

this must be comprehensible, must not be arbitrary and must respect constitutional values such as human dignity, the principle of individual freedom, equality and the principle of proportionality.

Conclusions

We can therefore conclude that the dynamically developing field of technology requires regulation that is in line with the constitutional and administrative standards of a legal system. While these issues were examined in the previous study with a particular focus on German law, they are of a general nature and, with certain variations, also have significance for other legal systems.

In summary, it can be said that the State has a constitutional obligation to promote technological development in order to protect and further develop its constitutionally protected legal interests, to grant freedom to science and research for this purpose (albeit with certain extreme limits) and to constantly monitor, predict and, by exhausting all possibilities, eliminate or at least limit the dangers posed by technology.

Both the promotion of technological development and the limitation of its risks is a fundamental constitutional obligation, which also stems from the duty to protect fundamental values that is now recognized in the constitutional law of many countries and also in international law. This is also necessitated by the principle of the social State, which is either an autonomous State objective laid down in the constitutions or exists normatively as the constitutional basis for the idea of fundamental social rights.

The reference to fundamental rights is also an important element of the rule of law, which includes the realization of fundamental rights as a material dimension and thus also includes the State's duty to promote technological development for the realization of fundamental rights.

The individual elements of the rule of law, as they have developed in national constitutional law, are of particular importance for technology law: the nature and scope of the certainty of technology-relevant regulations, and the requirement, essentially resulting from the principle of democracy, that fundamental decisions in the field of

technology should also be made by the legislature. However, it is necessary for the executive to make detailed regulations based on the dynamic development of technological progress, which the legislator cannot do itself. It is also important to determine the extent to which it is constitutionally permissible to make prognoses regarding the future development of a technical facility.

All of this shows how important the freedom of technological development is, on the one hand, and its limitation by the rule of law, on the other.

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THE RELATIVITY OF THE IDEA OF CONSISTENCY OF LEGAL SYSTEMS

Laura MIRAUT MARTÍN[1]

Abstract:

The principles of unity, coherence and completeness represent the traditional idea of a legal system. The principle of coherence presents practical difficulties, because the criteria for resolving normative antinomies do not always offer an unambiguous solution. The problem goes deeper. These criteria, far from being inherent to legal reality, are relative and circumstantial. Its acceptance as a way of solving antinomies hides the real representation of the legal norm as the attribution of meaning to normative provisions. It also hides the real representation of the idea of the legal system as an expression of the dominant legal culture.

Key words: *Normative antinomy; legal rule; legal system; legal interpretation; ideology; legislator.*

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Introduction

The traditional representation of the idea of the legal system on the basis of the principles of unity, coherence and completeness provides an image of solidity which contrasts with the interpretative difficulties of the normative statements, with the alteration of the systems themselves that induce the procedures of expansion, contraction and revision of the same, and, in general, with the inherent complexity of the problem of legal decision. The operability of these principles is, moreover, heterogeneous, having to resort to mechanisms for solving the problems posed by coherence and completeness. This is, however, a highly generalised image in the legal community. In this paper, we intend to highlight the implications that this schematic vision of the legal system could have as an instrument for concealing the real keys that govern the directive function that law performs in different social environments.

1. Meaning and limits of traditional principles of legal system theory

The law fulfils its directive function through a set of rules of different natures, some of which are immediately intended to provoke the action of the addressees by proposing compulsory models of behaviour, while others point to elements that are not directly prescriptive, but which nevertheless make it possible, in different ways, to carry out this directive function. The consideration of law as a combination of primary and secondary norms expresses precisely this idea (Hart, 1990). This involvement of primary and secondary norms in the realisation of a common goal explains the complexity of the implementation of the directive function, because it allows us to understand the idea of the whole that lies behind the representation of law as a system in which the norms are not presented separately as independent units, but on the contrary, as a total reality with different normative elements that contribute to the function of the whole through their mutual involvement. It is very common to understand this idea of the legal system as represented by the principles of unity, coherence and completeness, which some elevate to the status of dogmas of the aforementioned theory.

The identification of the legal system on the basis of the principle of unity does not pose any problem in principle because it is clear that each and every rule in the system has a common referent, the ultimate referent, in the rule of identification, which is precisely what makes it possible to understand that the legal rule in question belongs to a specific legal system and not to a different one. Raz expresses in this sense the notion of the systematic nature of law, from the presupposed idea that "every legal rule necessarily belongs to a legal system (English, German, Roman, canonical, or some other legal system)" (Raz, 1986, p. 17). A reference which, logically, is unitary because it constitutes the single point of reference for the different rules of the system. The principle of unity of the legal system acquires a certain self-evident character at this point, “the legal system is a system of rules united by some organising and unifying element” (Ferrajoli, 2011, p. 430).

The idea of coherence is much more problematic, because it is obvious that there are contradictions between the rules that are supposed to make up the different legal systems, which make the judicial response to legal problems much more difficult, accentuating their unpredictable nature. And yet it is precisely the idea of coherence that many consider to be the most specific of the aforementioned principles of the legal system, understanding that any system is by definition consistent, closed, coherent and finished. A legal order that would leave open the possibility of opting for one or another rule for the solution of legal questions would in principle fit badly with its systematic representation. The identification of different criteria for the solution of these contradictions only partly diminishes the seriousness of the problem, precisely because it is a question of different criteria, each of them competing with each other in order to justify their preferential application over the others. The legal system is here largely dominated by the principle of normative coherence, i.e. the absence of contradictions between the solutions offered by the legal rules that cannot be overcome with the help of logical instruments. This idea is categorically represented by the words of Perelman, for whom the idea of coherence defines the system (Perelman, 1984, p. 70). However, this opinion is not shared by the majority of

scientific doctrine, as can be seen in Villar Palasí's criticism of this thesis, denouncing the "inapplicability to law" of the principle of non-contradiction (Villar Palasí, 1975, p. 221). The help that the tools of logic have given to scholars of other scientific disciplines, which are not related to it in principle, such as linguistics or psychology, have made legal theorists value very favourably their contribution to the analysis of the presence of legal norms and the relations between them.

The problem with any positive assessment is that it can be overemphasised in its importance, leading to a mistaken view of the reality that is presented to the viewer. We believe that the same thing happens with the consideration, very widespread nowadays, of the legal order as a set of systematised norms, or, in any case, systematisable in an organic totality characterised by the inexistence of insoluble antinomies between the answers that each one of them provides to the body responsible for issuing the corresponding resolution. The analysis of legal reality allows us to verify, on the contrary, what has generally been understood as the "evil to be eliminated" (Bobbio, 1994, p. 207), the presence of continuous normative antinomies. It can therefore be said that the postulate of coherence is more of an ideal, a desideratum than a characteristic that can be predicted of legal systems. All this apart from the inevitably cultural nature of the reference to the idea of the legal system as a legal system. As Giovanni Tarello has rightly pointed out, "to conceive a legal organisation as a system (and this is what happens in all modern cultures) means that in modern organisations a structure has been determined (on a cultural basis) for which there can be no conflict between valid normative rules (that is, if two rules of the same law are found to be in conflict, such conflict is merely apparent and it is necessary to find a way of resolving it)" (Tarello, 2002, p. 182).

The questioning of the significance of the principle of normative coherence as a dogma of the legal system is of course much more significant than any objection to the principle of normative completeness. At most, one could refer to the necessary link between the principle of completeness and the idea of the legal system from the consideration of the normative provision which obliges the judge to solve in any case the problem presented to him by applying the existing law. In our legal

system, article 1.7 of the Civil Code expresses this idea by stating that: "Judges and Courts have the inexcusable duty to resolve in all cases the matters before them, abiding by the established system of sources". Certainly, this obligation to give an answer in accordance with the law when the law does not offer a normative provision in this respect could, in the short term, be understood as a contradiction between an implicit rule that declares the problem unregulated, leaving the judge the possibility of leaving it without a solution or with the non-legal solution that he himself deems appropriate, and the explicit rule that indicates that he must resolve the question by applying the established system of sources, that is, in accordance with the law in force at that specific moment in time. It is, however, a very forced interpretation that does not identify the contradiction between two positions expressly assumed by the legislator, but in a legislative non-action incompatible with a general normative provision concerning the role of the judiciary.

It is, of course, logically inconsistent for the judge to be obliged to make his decision always in accordance with a criterion that may be non-existent. But it is somewhat debatable to understand this lack of regulation as a normative contradiction, even if we believe that this interpretation has good grounds in its favour. It is especially debatable because, furthermore, this rule of closure which obliges the judge to rule in any case in accordance with the established system of sources does not necessarily have to be found in all legal systems. As is the case with the legal provision that states that ignorance of the law does not exempt from compliance with it, the obligation to rule in accordance with the established system of sources is a requirement of the operability of the legal order as a social instrument, but not necessarily a requirement inherent in the internal identification of that same legal order as a normative system.

This special relevance of the principle of normative coherence from the perspective of the theory of the legal system contrasts in any case with the difficulty of implementing the requirements inherent in the principle in question in their strictest terms. The proliferation of norms in our world makes it even more difficult to find coherent solutions to

different legal problems, in the sense that coherence is normally predicated as a characteristic of the legal system. Currently, the world of rules is increasing in the countries of our area as a result of four different blocks of rule production: the European Union's regulatory block; the block of state legislation at different levels (laws, regulations, etc.); the block of autonomous regional legislation; and the block of local legislation, which includes municipal ordinances and, in general, rules of local entities. These four blocks have led to a multiplication of regulations unknown only a few decades ago, which poses serious problems for knowledge of the law due to the difficulty of storing them (even the most complex computers are overwhelmed by their storage capacity) and due to the incessant rhythm of the succession of regulations which leads to the tacit repeal of many of the legal rules.

Moreover, the multiplication of the number of legal rules also leads to a parallel increase in the number of normative contradictions or antinomies within the existing law itself. The general theory of law has developed some criteria for the solution of the problems posed by normative antinomies, which can be summarised in three classic formulas[1] that already appeared in Roman law. Two of them aim at the elimination of the legal life of the norms: the later law repeals the earlier law and the higher law repeals the lower law. And the third, which is not of repeal but of preferential applicability, is based on the principle of speciality: the special law remains in force, it continues to be applicable despite the existence of an earlier or later general law.

Scientific doctrine tends to distinguish between conflict and concurrence (Villar Palasí, 1975, p. 64), pointing out that conflict implies the life and death struggle between two rules and concurrence the collaboration between them. Thus, the rules of the competition of norms require that the normative material available to the interpreter has first

[1] To these three criteria is often added a fourth criterion that some confuse with the criterion of speciality: the criterion of competence, also known as the criterion of reserved matter.

been purified, indicating which norms are in force and eliminating the false starting point that there is only one single applicable norm. Once it has been ascertained which are the living rules of the legal system, the next step will be to check how these rules cooperate in each of the specific cases, always bearing in mind that cooperation between rules in such cases also involves cooperation between various competent authorities, the authorities from which the legal rules themselves emanate.

It should be noted in this respect that concurrence goes beyond the level of legal rules to a broader level. Thus, it has sometimes been observed that it occurs between legal documents containing a set of normative statements that may not be of the same nature, that is, it occurs between bodies of law[1] (Hernández Marín, 1989, p. 51). This thesis is unsatisfactory because nothing guarantees the unity of regulation of the different bodies of law[2]. It seems more correct to understand that concurrence occurs between normative groups, understanding by normative group the set of legal rules that coincide in the typical regulation of an abstract case (Villar Palasí, 1975, p. 56). The idea of a normative group is not self-sufficient for the resolution of the cases that arise in practice, it is simply limited to regulating institutions, the solution requiring the connection of the normative group in question with others that make its application operative, such as the normative groups that contain the rules referring to legal capacity or capacity to act in relation to the normative group of purchase and sale, adoption, etc...

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[1] On this point, we agree with Professor Hernández Marín when he prefers the term "legal body" or "body of law" to "legal provision" or "legal document" because of the greater precision it offers compared to the confusion and versatility that can result from these terms.

[2] It is quite normal for the same body of law to regulate completely different institutions, which have no direct connecting elements between them. For example, the Civil Code regulates the effects of the defects of the thing sold, the form of wills, the content of the usufruct, etc.

Villar Palasí uses in this respect the concept of normative class to refer to the normative groups required by the application of the law in relation to a certain legal institution. He says: "Naturally, the normative group includes not only legal rules of different rank, but cannot directly resolve the case without the help of other normative groups that refer to the capacity to contract, to the control of expenditure, to the system of selection of contractors, etc. The set of normative groups that includes the specific rules for regulating an abstract factual situation with all the connecting elements is a normative class. Here the idea of class has an extensive, quantitative and not a qualitative character" (Villar Palasí, 1975, p. 57).

It must be made clear that when we speak of concurrence of normative groups, we are not referring precisely to the necessary connection between normative groups containing complementary or related elements with a view to the application of the law, but to the presence of groups made up of rules of normally heterogeneous hierarchical rank that discipline the same legal situation from different perspectives.

2. Normative groups, normative blocks and competition problems

The concurrence of rules thus takes two different forms. It can be a competition between groups of rules that have as their object the same situation relevant to the law, which gives rise to the existence of a plurality of legal figures generated by the same fact or situation, as many legal figures as there are groups of rules. And it may be a competition between rules emanating from different centres of production, which happens, as we saw earlier, in the case of rules emanating from the European Union, the State, the autonomous communities or local corporations; some authors refer to these conflicts as intrasystemic conflicts, thereby drawing attention to the unity of the decision-making body (Vernengo, 1988, p. 315). In the first case, we say that we are faced with a competition between groups of regulations, and in the second with a competition between blocks of regulations. The matter becomes even more complicated because it is also possible for each of the regulatory

blocs to create its own regulatory groups. This may lead to the creation of new legal concepts by each regulatory bloc or to the consideration of the problem from the perspective offered by different and independent legal concepts in relation to each of the regulatory blocks.

Whatever the type of normative competition in question, whether it is a competition between normative groups or between normative blocks, or a competition between normative blocks with their own normative groups, the concept of normative competition requires the imputation of different legal consequences according to each of the normative groups or normative blocks that enter into competition. Alongside this element, there are those who require the need to opt for only one of the consequences imputable to the problem and those who consider that the concurrence of rules exists regardless of whether the logic of the legal system itself prohibits or permits the accumulation of imputations to the fact or legally relevant situation which constitutes the object of the concurrence of rules. In the first case, we are dealing with a strict or restricted concept of concurrence of norms, in the second with a broad concept. Be that as it may, it is accepted that, although the concurrence of rules may not require the choice of one of the legal solutions over the other or others, it is possible that when juxtaposed, they end up mutually modulating each other, acquiring a different physiognomy to that which each of these solutions would have if it did not enter into concurrence with that which can be provided by the legal rule which concurred with it.

There are some authors who call competition between legal systems what we have called competition between regulatory blocks. This would recognise the coincidence of the regulation of the Community legal system, the State legal system, the autonomous legal system of a given region and the municipal legal system of a given locality on the same factual situation. The choice of this denomination focuses more on the basis or formal point of reference of the legal regulation (the Community, state, autonomous or local authority that issues the rule) than on the element of the regulatory extension, according to which the Spanish legal system would include the whole set

of legal rules that it itself recognises as legally operative within its sphere of action. In this case, we will say that the legal system is open because it recognises as legally operative within its sphere of action a set of legal rules originating from other systems, whatever the procedure used for their adoption. That is, “a normative system is an open system insofar as it contains rules whose purpose is to give binding force within the system to rules that do not belong to it. The more foreign rules are adopted by the system, the more open the system is. It is characteristic of legal systems that they support and sustain other forms of social groupings. Legal systems achieve this by upholding and enforcing contracts, agreements, rules and customs of individuals and associations, and by enforcing, through their rules of conflict of norms, legal provisions of other countries, etc…" (Raz, 1991, p. 175). The procedure of normative self-degradation for the adoption of the Community legal system, as article 96.1 of the Spanish Constitution provides that: "Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, modified or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law". The regulatory authorisation procedure in the case of the autonomous legal system, with article 147.1 of the Spanish Constitution stating that: "Within the terms of this Constitution, the Statutes shall be the basic institutional rule of each Autonomous Community and the State shall recognise and protect them as an integral part of its legal system", and in the case of the local legal system, with article 140 of the Constitution recognising that: "The Constitution guarantees the autonomy of the municipalities". The difference between these two types of procedures highlights the imprecision of the very concept of legal system. Authors such as Carlos Santiago Nino include five possible conditions for distinguishing one legal system from another: the territorial criterion, the criterion of origin in a certain legislator, the criterion of the fundamental rule, the criterion based on the rule of recognition and the criterion based on the recognition of the primary organs (Nino, 1987, p. 118).

For this reason, we prefer to use the term concurrence of regulatory blocks, despite the problems that can sometimes arise from its confusion

with the concurrence of regulatory groups, on the understanding that the aforementioned regulatory blocks can be considered to make up the legal system in a broad sense. In any case, our concept of legal system in a broad sense understands the legal system as a set of rules existing in a given place and at a given time, distinguishing it from the concept of legal order which they describe (Alchourrón Bulygin, 1987, pp. 121 et seq.) as the succession of the different individualised legal systems.

3. The reform of legal systems as a means of deciding problems of regulatory concurrence

In this light, it is recognised that legal systems can undergo changes. These can be adopted following three different types of procedures: a) expansion of the system, which occurs when some rule is added to the system; b) contraction of the system, which consists of the elimination of some of the rules that compose it; and e) revision of the system, which takes place when some of the rules of the system are eliminated and other rules are added that are incompatible with them (Alchourrón, 1991, p. 301). By acting in this way, the system is changing its consistency and it can be said that, in a certain sense, we are faced with a new legal system or to a reform of the regulatory system (Alchourrón, 1991, p. 301).

If we start from the ideas that we have advanced in the previous pages, we can see that: 1) the legal system in the broad sense is made up of different normative blocks; 2) the norms of the legal system can be grouped into different normative groups characterised by their regulative connection; 3) concurrences of normative groups normally occur in every legal system, the number of which increases due to the greater number of normative blocks that attend to the regulation of social facts and situations; 4) the legal systems in which these concurrences between normative groups occur are continually altered in their consistency through the procedures of expansion, contraction and revision of the aforementioned systems.

Although at first sight it may seem that this last statement does not have much to do with the three previous ones, the truth is that it is the key to the solution to the problem of regulatory concurrence. By this we do not mean that regulatory concurrence must necessarily be solved through the method of adding or deleting bodies of law. In this way, the legal system can be modified, perhaps putting the regulatory concurrence that has been detected in it on a new basis. But the procedures of expansion, contraction and revision of normative systems can achieve the same effect without the need to add or delete the bodies of law that make up the system. In order to do so, we need to review the function that rules perform in different legal systems.

When we define legal systems as sets of rules with certain characteristics we may be saying very different things because the expression legal rule has been used to refer to such varied things as legal documents containing directives for action alongside other expressions that may not have directive force, legal statements expressed in directive form, legal statements expressed in indicative form, feelings of obligation experienced by the addressees of certain linguistic statements contained in normative documents, and so on. These different meanings usually given to the expression legal norm can be divided into two groups: those that attend to the formal characteristics of certain legal statements and those that attend to the binding effect felt by the addressees of these legal statements. The first group describes the traditional conception of the legal rule. The second is the doctrinal conception that is presented as an alternative for a better understanding of the daily functioning of the law.

The function of norms in legal systems is logically different for each conception. If we take the point of view of the traditional conception of legal norms, we will see that legal systems are not composed only of legal norms; moreover, for a normative system to exist it is enough for the set of legal statements to have some statement in directive form (Alchourrón-Bulygin, 1987), regardless of the form that the other linguistic statements that make up the system may have, some of which must necessarily have a non-directive form as they are intended to perform the functions of identification and organisation of the legal system. This is why it is said that alongside the primary rules regulating

behaviour, every legal system must have secondary rules, or that the law is made up of rules and other rules or provisions. If we take the point of view of the alternative conception that focuses on the reception of the normative message, we will call the result obtained by interpreting the legal statement a legal norm. This implies conceiving the legal system as a set of interpretations of the linguistic statements contained in legal bodies carried out by the addressees of the law. In a way, there will be as many legal systems as there are persons willing to interpret linguistic statements in the bodies of law, because the legal system will be modified in each case according to the person who interprets the linguistic statements contained in the bodies of law. In this sense it can be said that "the norm does not precede as a given, but follows as a product, the interpretative process" (Tarello, 1974, p. 395).

We believe that this last meaning of the expressions legal norm and legal system is the one that best suits the analysis of the problem of the coherence of the legal system in relation to the presence of concurrence between norms and normative groups because it is not possible to speak of antinomies or normative coherence if it is not based on the interpretation of the normative statements. It makes no sense to say that there is a legal antinomy if we have not first understood what the legal statements at stake mean. Nor does it make sense to speak of the non-existence of a legal rule applicable to the case if the aforementioned legal operation has not taken place beforehand. It could even be said that the adequacy of a legal rule to the rule that operates as a criterion for identifying the rules of the system will also depend on the full attribution of meaning to the different normative statements. In short, the classic principles of unity, coherence and completeness of the law are called into question, at least in their traditional version.

In this sense, it would be necessary to speak of an authentic reformulation of the very concept of legal system, which would result from the operations commonly carried out by jurists in their daily activity. Riccardo Guastini's consideration makes sense at this point when he points out that "the system appears not as a factual datum (prior to dogmatics and jurisprudence) but as the result of dogmatic and

jurisprudential work, in short, the legal system is nothing other than the fruit of the systematising activities of jurists" (Guastini, 2016, p. 204-205). In short, they would be the architects of any representation that we could make of a given legal system, thus breaking with the traditional conception of the legislator as the democratically legitimised author of the legal system.

We would thus like to say that the problem of concurrence between norms and normative groups is absolutely a problem of interpretation of the statements contained in legal bodies ((Kelsen, 1985, p. 367)[1]. Interpretation will obviously be carried out by all legal operators, but there is no doubt that it offers a special force due to its enormous sedimenting capacity that is fulfilled both by legal scientists, who prescribe the ideal meaning of the normative statements, and by judicial bodies. It is therefore only in the interpretative sphere that operations of expansion, contraction or revision of the legal system can be carried out by adding and deleting rules with a view to determining the solution to be applied. Moreover, these operations may concern not only the rules of the system, but even entire groups of rules. In this way, the fact or situation with legal relevance is placed in a legal figure to the exclusion of other normative possibilities. It is also possible that the interpretative process leads to a mutual modulation of the different normative groups through a corresponding revision of the system. It is thus recognised that the concurrence of rules does not always lead to the complete choice of one

[1] Against all of them, while assuming the particular foundations of their thesis: 'To the erroneous assumption that the logical principle of non-contradiction is applicable to a conflict of norms is connected the view that the solution of this conflict, in particular of a conflict between legal norms, can take place by means of interpretation. Since the interpretation of legal norms is knowledge of law and knowledge of law can neither produce legal norms, i.e. put them into effect, nor abolish the validity of legal norms, interpretation cannot provide a solution to a conflict of norms. What the law-applying organ can do in the case of a conflict between two general legal rules is only to decide by an act of will to apply one or the other of the two rules, as long as the conflict between the two general legal rules remains".

of the alternatives presented, and that intermediate solutions are also possible.

4. The ideological substratum of the solution to the concurrence of legal rules

To say that the problem of concurrence is an interpretative problem is the same as saying that it is an ideological problem because ideology is present in the whole process of legal interpretation and largely shapes its results (Prieto Sanchís, 1987). In this interpretative operation, the interpreter is conditioned by the social context that surrounds his activity and also by the text that is going to serve as justification for the decision he is going to take in the specific resolution of the problem. This is why it is pointed out that the changes affecting the texts contained in bodies of law also influence the expansion, contraction and revision of the legal system. They do not solve the problem of regulatory concurrence. What they do is to restate the problem on a new basis. And it will be on these bases that the ideological operation consisting of the solution to the issue of normative concurrence will be projected.

There is no proper legal reason to use any of the criteria coined for the resolution of antinomies or for the ascription of the solution on the basis of a particular normative group. The classical criteria for resolving normative conflicts only have legal value because the legal texts themselves formulate them, but there is no metaphysical need for these criteria to be adopted. That the jurist operates with them as if they were inseparably solidified to the legal reality itself is an ideological choice whose diffusion is due firstly to its customary reception in legal texts and secondly to the chain effect of the affirmation of this principle by jurists.

It goes without saying that in the emergence of this chain of influence, and the very reception of the criteria established by the normative texts, the interest of scholars and operators of the legal phenomenon in upholding the theses that contribute most to improving the image of their profession, and above all in satisfying the explicit or

implicit interests of the legal culture as far as possible, plays a very important role (Ara Pinilla, 2019, pp. 285-305). The naturalness with which the general public has accepted these criteria, to the point of considering them inherent to any representation that could be made of the legal phenomenon, is further proof of the enormous expansive force of legal culture. An expansive force that thus tends to absolutise and present as self-evident what is basically something circumstantial and relative.

This is not to deny the importance of legal axioms in the argumentative process of legal decision-making in the face of normative concurrence. What we do is to point out that the use of these axioms is a strictly ideological choice conditioned by many factors. These factors form the context of the decision and among them the very recognition of the criteria by the texts that make up the legal bodies stands out. The methods of resolving the problems of normative concurrence are resolved by the law itself, and therefore do not obey any logic superior to the existence of legal documents. The law cannot, however, foresee absolutely everything, because it is often not possible to automatically apply these methods because there are contradictions between them with no apparent solution. And the fact is that "it is evident that when two contradictory rules are both valid and can be applied indistinctly one or the other according to the criterion of the judge who is called upon to apply them, two fundamental requirements on which legal systems are inspired or tend to be inspired are violated: the requirement of certainty (which corresponds to the values of peace or order) and that of justice (which corresponds to the value of equality). When there are two antinomian rules, both valid and therefore applicable, the legal system does not succeed in guaranteeing certainty, understood as the possibility for the citizen to foresee exactly the legal consequence of his own conduct, nor justice, understood as equal treatment of persons belonging to the same category" (Bobbio, 1994, p. 207).

Moreover, the legal recognition of these methods does not in any case guarantee their definitive application by the interpreter. It must therefore be recognised that any problem of normative concurrence is resolved by the ultimate intervention of a specific human being who takes the decision he considers reasonable from his own ideological-

valuative position. In any case, it is an ideological-valuative position that often has to be assumed consciously, because there is no lack of cases in which none of the criteria for the solution of normative antinomies is applicable because they are confronted with rules that have an identical hierarchical level and speciality, having entered into force at the same time. In these cases, the applying body cannot find support in any of the established criteria, and consequently the system of values comes into play which leads it to consider the application of one of the conflicting rules to be preferable.

Conclusions

The classical notes of unity, completeness and coherence of the legal system are incapable of explaining all the complexity of the legal reality. What They do precisely confuse it by not adequately reflecting the ineliminable uncertainty involved in human intervention in the decision of the problem through the expansion, contraction and revision of the legal system itself. It is thus recognised as a key feature of this issue that the consistency of the legal system can only be understood from the assumption of principles external to the very structure of the legal system itself. The fading of this idea has endowed the theory of the legal system with an enormous functionality as an instrument for concealing the power relations that so often lie behind the presentation of legal problems and the search for supposedly rational solutions to them. And it is at this point that the very idea of rationality itself often represents the veneer of a particularly subtle form of ideology. The ideology that in fact manifests itself on a daily basis in the very functioning of legal life and in the representation of law as the ideal form of organisation of social coexistence.

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THE FULL EXERCISE OF INDIVIDUAL IMMIGRANT AUTONOMY FOR A BETTER DEFENCE OF HUMAN RIGHTS

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Abstract:

This paper analyses how human rights serve as a basis so that the complex phenomenon of immigration, which has been affecting our societies for some time now, can unfold its full potential, in accordance with the higher values on which they are based. In this sense, he highlights the figure of the free development of the personality as an operative means of the new phenomenon of immigration and its repercussions as a limit to individual autonomy.

In a study of this type, the analysis of the figure of legal paternalism as opposed to the free development of the personality must be reinforced, with special incidence in matters of foreigners, more specifically, in the figure of the immigrant, which leads us to focus the study of this figure on the phenomenon of immigration for various reasons.

Of course, the social and political uproar that this issue is causing is not surprising. Apart from being an issue that affects various aspects, immigration must be analysed in all the facets in which it has repercussions, such as not only the limitation it implies for the free development of the personality of an individual who decides to move to a place other than that of his nationality as a way to freely develop his personality,

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but also as a social, legal, economic and cultural fact, which gives rise to population problems of discrimination, integration and xenophobia, and many other aspects that have repercussions on essential aspects of the human being.

Key words: *Human rights; individual autonomy; immigration; paternalism; society; culture.*

Introduction

The public attitude in the face of conflict between higher values or between these and other principles cannot be by imperative of the Constitution, but must necessarily be active. Thus, Article 9.2 of the Spanish Constitution states that it is the responsibility of the public authorities to promote the conditions for the real and effective freedom and equality of citizens and the groups of which they form part, to remove obstacles that prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, social and cultural life. Perhaps this is the main difficulty that the reality of migration presents in the purely legal sphere, the possible presence in a state of practical conflict of values, goods or rights. A presence in a situation of cultural homogeneity such as the one experienced so far is exceptional today, because it produces insecurities in the field of law and has the virtue of polarising personal positions.

On the other hand, constitutional terminology, when developing the higher values and the foundations of political order and social peace, draws open objects and realities which are extremely general and at the same time rich in nuances, which means that the legal operator frequently turns to them as a formula to ratify an ideological position already taken, that is, to confirm his previous representation in search of a solution which would be an attitude coinciding with that expressed by the principles and processes of knowledge of the law. In this way, the higher values of the legal system and the foundations of political order and social peace will lead to the same conclusion. The difficulty of

establishing fixed rules for the solution of these conflicts in the absence of a clear hierarchical gradation between values and the richness of the nuances with which these conflictive phenomena can present themselves and that constant interpretation with different positions, makes any decision that may be taken in this respect questionable in practice (Castro, 1981, p. 23). The non-absolute nature of human rights is well known, since the confrontation between one and the other is a palpable reality that sometimes occurs more frequently than desired, which means that "in human rights we observe that there is often an undermining of the right in question that is often directly violated or not realised to the extent that the legal system itself provides" (Perez González, 2002, p. 497).

1. Human Riguts as the basis of the migration phenomenon

With regard to the confrontation of rights, we can give as an example the right of parents to give their children the religious or moral education that is in accordance with their own convictions (Article 27.3 of the Spanish Constitution) and that same equality between the sexes, the dignity of the person, the rights that are inherent to them or the free development of the personality. In short, and with regard to this conflictive relationship on a complementary level of concreteness, that manifestation of educational freedom which consists of the right of parents to give their children the religious or moral training that is in accordance with their own beliefs, may clash with the purpose that should inspire the educational processes in our environment, according to Article 27.2 of the Spanish Constitution, that is to say with the full development of the human personality in respect for the democratic principles of coexistence and fundamental rights and freedoms. Human rights are recognised as "the set of faculties and institutions which, at each historical moment, give concrete expression to the demands of human dignity, freedom and equality; which must be positively recognised by the legal systems at a national and international level" (Pérez Luño, 1991, p. 48). To deny that these connections are present or to postpone their analysis in favour of a supposed prevalence of a state of

absolute freedom that would be entrusted with the task of resolving conflicts would be to close one's eyes to the evidence and fail to fulfil public duties, and would certainly be manifestly irresponsible.

One of the values to which it is necessary to refer is the higher value of solidarity, because the reality of migration has undoubtedly beneficial aspects, such as the positive economic influences that the labour force that is incorporated into the productive process brings to the host countries, thus requiring a detailed analysis, since solidarity is understood in this sense as aid to the most disadvantaged. Moreover, "it is precisely solidarity that carries with it the idea of acting in society, which makes it the paradigm of what is known as social dignity" (Pérez González, 2002, p. 168). Certainly, this principle or value is not expressly contained in our Constitution, however, it is likely that this value of solidarity should and can be deduced as implicit in others that are, such as the principles of justice, equality, etc. This value of solidarity, which is also legal, can be highlighted as a starting point for the effects of the higher values on the phenomenon of foreigners. For example, it is clearly this value that has been present in the Global Programme for the Regulation and Coordination of Foreigners and Immigration in Spain (Greco), which was implemented in the 2000s when the phenomenon began to gain relevance in our country.

Another superior value that must be weighed when studying the phenomenon of immigration is the value of freedom (Mill, 1988, p. 9). This principle is referred to in the preamble of our Magna Carta and in Article 1, explicitly assigning it the rank of a superior value. Article 10 of the same constitutional text also includes it again in the climate of the minimums to be maintained, i.e. in those basic social conditions. Article 17 refers to freedom when it speaks of its core in the face of unlawful detentions. Freedom is also, by its attitude and character, to a large extent a matrix right that conditions the other fundamental rights. This freedom in its rich nuances acquires, from its position as a superior value, singular connotations when it refers to foreigners, thus this value is projected onto the right of foreigners to move freely within the national territory, although this right is restricted to those who have the right to freedom of

movement, this right is restricted to those who are in a situation of illegality or even legality, as is the case with Article 5 of the Aliens Act when it provides exceptionally that, for reasons of public utility, specific measures limiting the freedom of movement of foreigners may be established by resolution of the Ministry of the Interior on an individualised and reasoned basis and in proportion to the circumstances of each case.

The higher value of justice is one of the most unknown values, but nevertheless it includes not only the principles that inspire the regulations so that they conform to the canons of justice, but also a certain material aspect of redistribution. When speaking of justice in the matter at hand, immigration, the term positive discrimination is often mentioned in order to achieve criteria of application that are more inspired by this principle of justice. By means of distributive justice, measures are adopted to equalise unequal situations, in such a way that "such measures, and especially those of reverse discrimination, only make sense insofar as they are necessary to help such groups to reach the common starting line, that is, insofar as there are real social differences that need to be compensated" (Fernández Ruíz-Gálvez, 1995, p. 119).

Another higher value to be considered is the value of equality, which is more problematic on a practical level because of its proximity to the revolutionary values embodied in the Declaration of the Rights of Man and of the Citizen of 1789. This value is also problematic if it is put in relation to the highest degree manifestations of freedom (García San Miguel, 2000, p. 111) or pluralism, such as those that come to fruition in the so-called multiculturalism. For when a person moves to a place different from that of his or her origin, there is a transport to the land of arrival of some of the areas of management that until then disciplined his or her existence. The immigrant brings with him his way of understanding certain aspects of his existence, such as his idea of family, his customs, etc. In this situation of arrival in the host country of elements from the country of origin, different legal regimes that are applicable to a group of immigrants can be derived from the country of origin. The penetration of these regimes can occur through the play of the personal law that is studied in private international law referred to in

Article 9.1 of the Spanish Civil Code, according to which this law governs the capacity and civil status of family rights and duties and succession by cause of death. Well, especially in this area of family rights, giving primacy to the value of equality and by effect of the rights to free development of the personality, the dignity of the person and the rights inherent to it can and must be claimed by pure freedom, as for example can happen with the family organisation that transports from the country of origin to the place of reception. But sometimes it will even be necessary to resort to the public order clause provided for in Article 12 of the Spanish Civil Code, by means of which a limitation of the application of foreign law will be applied when it collides with higher values of the legal system, with fundamental rights or with imperative and binding rules of the national legal system.

Political pluralism allows us to face the phenomenon of immigration with certain communicating elements such as the ability to freely express and receive ideas and opinions. Pluralism is not equivalent to the mere recognition of plurality, that is to say, of the differences that may exist, but refers to an active behaviour, committed if you will, to the defence of diversity and the intermingling of opinions. The multicultural reality is a reality to which the territory of Spain in particular is no stranger, since for a long time there has been this variability of nationalities among its inhabitants.

Finally, tolerance should be understood in relation to the immigration phenomenon as a minimum requirement of respect for the convictions of others and the particularities of their form of organisation (Abad, L., Cucó, A., Izquierdo, A. 1993, p. 95). It is a minimum basis for everything that is different. As with solidarity, tolerance has not been expressly regulated in our legal system. It has, however, been constantly linked by the Constitutional Court and the European Court of Human Rights with pluralism and even with the spirit of openness, without which it is said that a democratic society does not exist (see the Constitutional Court's judgments of 28 January 2002, 5 May 2003 and the European Court of Human Rights' judgment of 23 April 1992). Thus, with this idea of tolerance, the examination of the migratory process

penetrates indirectly from other values and it can be said that, being part of our constitutional system and integrating constitutional values and the value of tolerance as the backbone of the plurality of ideas and objectives that our constitution protects, it should be used as such a value in the resolution of conflicts that the migratory phenomenon may produce. Thus "tolerance is a component of the constitutional value of pluralism which, as such, must prevail in all areas of a democratic society. It is clear that tolerance does not imply indifference, nor is it an aseptic value. Thus, the degree of tolerance that a democratic society can offer with respect to individual and collective behaviour cannot, of course, be unlimited" (Carrillo López, 2003, p. 80).

Tolerance was also dealt with in the Greco programme in Spain, which states that the framework for coexistence will in any case be that formed by the Constitution and the laws. It is evident that Spanish society is a democratic society in which respect, tolerance and equality are values on which all social organisation is based. Therefore, among the policies outlined in this programme is the fight against xenophobia, racism and the approach to immigrants through knowledge of the culture and history of their countries of origin, and the transmission of positive messages about their contribution to the society that receives them from the human point of view.

There is no doubt that immigration is a phenomenon of extreme difficulty and that it is in the process of transforming even our society, so that major problems and tensions will arise, which means that it is necessary to adapt structures to this changing reality. To this end, we have our constitution, which is a piece of legislation that establishes a framework of peaceful coexistence that also protects the rights and freedoms of foreigners and which contains the values, principles and fundamental rights that the structure guarantees and which will allow us in the future to find solutions to any problems that may arise, such as the phenomenon of immigration.

2. Human Rights are innate to the individual

The natural rights inherent to the human being, such as the right

to life, freedom and equality among all men "must be strongly protected" (García San Miguel, 1994, p. 260). Every man is free and has the right to seek a better quality of life. We see how the legal norm that regulates these values is of a local character, unlike natural law, which is of a universal character, and sometimes this restricts its full application.

There are rights that are fully recognised for everyone, such as the basic rights fully recognised for foreigners as human beings and based on their dignity, such as the right to life, the right to personal liberty and security, the right to judicial protection of rights, etc. The fact that these rights are recognised for foreigners obviously does not mean that they have always been respected (the same applies to Spaniards), because what we understand by authentic autonomy implies that "full freedom must in principle be the freedom to choose without restrictions, and certainly to choose without being predetermined by the need to assume a certain sense of the personality of the individual, however complete or integral this may be" (Miraut, 2023, p. 32).

On the other hand, there are rights that are recognised, but not fully, such as rights that are characterised by some limitation for foreigners, for example: the right to freedom of movement and choice of residence. Each State is free to establish requirements for foreigners to enter its territory, including discretionary requirements (such as visas), but if these conditions are met, the Administration cannot deny the right to enter.

Finally, rights governed by the principle of exclusion, which are rights that, in principle, are not recognised for foreigners unless and to the extent that the Spanish legislator wishes to recognise them, such as political rights (to elect and be elected in local, regional and general elections), which are a very important element in the integration of foreigners, as has been highlighted on several occasions (Perotti, 1989, p. 16). In Spanish law, foreigners do not enjoy political rights, as they are only entitled to exercise the right to vote and stand for election in municipal elections on the basis of reciprocity.

It has been the doctrine of the Constitutional Court which has established the criterion on the ownership and exercise of rights by

foreigners by stating that "there are rights which correspond equally to Spaniards and foreigners and whose regulation must be the same for both; there are rights which in no way belong to foreigners (those recognised in Article 23 of the Spanish Constitution, as stipulated in Article 13. 2 and with the proviso contained therein); there are others which do or do not belong to foreigners according to the provisions of treaties and laws, and therefore a difference in treatment with Spaniards in terms of their exercise is admissible" (Constitutional Court Judgment of 23 November 1984, First Chamber).

Spanish legislation on foreigners establishes, in a similar way to that of other European states, a hierarchy of rights according to the political and administrative status of the person. A distinction is thus made between nationals, resident immigrants and illegal immigrants. Constitutional Court Ruling 107/1984 (STC 107/1984) formulates this threefold distinction by distinguishing three types of rights. The rights that correspond to every person, as such, proper to human dignity. The rights of legal modulation, depending on the provisions of treaties and laws. And finally, the exclusive rights of Spaniards, of which the Constitutional Court highlighted the right to vote. The border of citizenship tends to be presented and legitimised as something natural when it is merely the sign of a form of social organisation and identity linked to the state model. The contradiction between a more globalised world, the universalist discourse of rights and citizenship as a frontier of exclusion of immigrants seems increasingly evident. Unlike what happened at the origin of modern states, citizenship, far from constituting a factor of inclusion and equality, is today "the ultimate privilege of status, (...) a factor of exclusion and discrimination" Ferrajoli, 1999, p. 32). The citizenship denied to immigrants has a double dimension that should be emphasised. On the one hand, citizenship as status, a title that legitimises and enables access to rights on equal terms with other nationals. On the other, citizenship as participation, as the capacity and legitimacy to be one of the group of equals who decide on the laws that affect everyone. Since that ruling, there has been an evolution of constitutional doctrine in an inclusive sense, so that from the "initial tripartite classification, it has come to be held that (immigrants) are

entitled to all constitutional rights, except for Article 23 EC" (Aja, 1998, p. 18), i.e. the right to vote and access to the civil service.

The fundamental rights of the Spanish Constitution can be exercised by immigrants in two main types of situations. When the person is in a regular situation, especially after several years of residence, the exercise of rights and freedoms will be carried out as in the case of any other citizen, Spanish or EU citizen, to protect a right to which they are entitled and which, for whatever reason, the public authorities seek to infringe. But fundamental rights are really decisive for immigrants in a different situation, when they protect them in their very status as immigrants, i.e. when their freedom or their stay in the country is in danger because the administration considers that they do not have the right they claim to remain in Spain or denies them the exercise of any right, precisely because they are immigrants. In this second type of situation, which is often dramatic, fundamental rights take on their full importance. Generally, these situations arise in relation to the main conditions of immigration, such as entry into Spain and work and residence permits, as well as the sanctions that may be imposed for non-compliance with legislation.

Those most exposed to the curtailment of rights are those who have fled from other countries where conditions are worse. Immigrants in the first world find themselves, in addition to poverty and marginalisation, on the margins of legality, with difficulties in obtaining documentation, residency and work, which place them in a situation of labour exploitation, without health care, unable to rent a home, etc. All of this places them in identity ghettos, as the environment requires them to renounce their identity in order to integrate. This exposes them to racism and xenophobia, which often appear in the territory where they are welcomed, forgetting the wealth they generate. Institutional discrimination between nationals and foreigners is the great human rights challenge presented by migratory flows.

Within the European Union, the right framework must be created to prevent being a non-European citizen from being an element of discrimination against other citizens. The fight for the rights of foreign

immigrants is the great challenge on the continent. They are the large group of the dispossessed, who are denied the right to integration. The xenophobic behaviour that continues to be generated in Europe and beyond, the aggressions and social rejections question our capacity for intercultural coexistence, a necessary prelude to any process of integration of differences.

3. Possible interventions on the autonomous sphre of the individual which limit the free development of the personality

Within the analysis of the figure of paternalism, the doctrine that analyses this matter faces the impossibility of giving a unique and unequivocal concept of paternalism, so each author describes and identifies it with concepts and characteristics that allow justifying the paternalistic intervention based on this dogmatic variability. From this variety of authors it is necessary to highlight Dworkin who in his essay entitled "Paternalism" defines it as "interference in the freedom of action of a person justified by reasons that refer exclusively to the well-being, good, happiness, needs, interests or values of the coerced person" (Dworkin, 1990, p. 148).

On the other hand, there are individuals, immigrants, who have certain needs due to the situation in which they find themselves, and who join together to form organised groups that participate in political life and demand rights that by their very nature correspond to each individual. On this premise, the social inequalities existing today are increased by the migratory phenomenon which, as Dieterlen says, try to be compensated with the establishment of a basic formula which has some essential aspects, since, by means of this Welfare State, a redistribution is attempted which lessens the economic inequalities which exist between citizens, nationals and foreigners who live in a country (Dieterlen, 1989, p. 176).

Taking as a reference the title Camps has chosen for his article, Paternalism and the Common Good, we see that he is relating it to the idea of good, since "paternalism in principle and by definition is justified: someone's freedom is limited with a view to their good. This makes it

possible to assume that certain people possess a knowledge or competence that authorises them to intervene in a happiness that is not their own" (Camps, 1989, p. 197).

Individual autonomy has been analysed in different fields, but one issue should be perfectly clear, whenever we talk about the free development of personality, we must necessarily refer to autonomy, which, in turn, is linked to the idea of capacity. There are many analysts who, when outlining a concept of individual autonomy or when describing its characteristics, include it, as does Feinberg, who, when analysing autonomy, believes that it has several meanings, among which is that of "man's capacity to regulate or govern by himself the matters that concern him" (Feinberg, 1986, p. 28).

Directly related to this concept of autonomy are connected different terms, to which we must logically join that of freedom, "since freedom is a requirement for autonomy and the development of one's own individuality" (Feinberg, 1986, p. 18), a condition without which personal autonomy could not be fully exercised and reach the levels marked in its development, and thus, consider individual autonomy as "the ideal of free and conscious self-creation" (Raz, 1986, p. 389). Full freedom in actions that concern only the person, as opposed to legal paternalism, is the standard of free development of the personality so that the individual acts within the parameters that correspond to him or her within the value that represents the dignity of the person.

The coincidence of the different legal systems in the world that contain statements that determine the formulation of the free development of the personality with others that legalise and even impose paternalistic practices, obliges us to consider the problem from a systematic perspective in which both models are interconnected. The formula of the free development of the personality has been moderately incorporated into legal texts as one of the principles that is understood to govern the very configuration of the legal order, and, consequently, the controversies that judicial bodies have to deal with when sentencing illegal practices of entry of immigrants into Spanish territory. An example of this is Article 10.1 of our constitutional text, which considers

the free development of the personality as the basis of political order and social peace.

The legal model of autonomy that favours the realisation of the free development of the personality is understood in this sense as opposed to legal paternalism. However, there is no lack of opinions that understand that certain paternalistic actions are, above all in the field of personality formation, indispensable in order to optimise the realisation of the free development of the personality, as they are the only means through which the individual's freedom of choice can be developed to a greater extent (Miraut, 2000, p. 201).

In this respect, García San Miguel, analysing the different authors who have studied the subject in depth, establishes a series of criteria that have been used in practice. We will highlight here only the first of these, which states that "the redistributive criterion, according to which rights must be granted to the disadvantaged because their situation is unjust", the disadvantaged being any individual who is in a situation of inferiority with respect to their peers (García San Miguel, 1995, p. 14). This criterion is directly applicable to the issue at hand, as there are many immigrants who come to Spain and find themselves in a situation of misery (without a home, house, family, job, etc.). An attempt is being made to correct this by recognising rights through the current Law on Foreigners.

4. Social relations are the basis for the development of individual autonomy

Social relations constitute the formal framework in which individuals develop their autonomy by relating to their peers. Individuals tend to live in society, but it is necessary to respect their individuality, of which they cannot be deprived. Relationships with others around them become a characteristic of their condition as human beings, since communication between the members of a community is an indispensable requirement for the good functioning of the community. In all this social framework, guidelines of conduct are established which its members must carry out in order to relate to each other and to

institutionalised organisations, as well as the prohibition of carrying out other actions which are considered undesirable for society, thus configuring the whole system of rights and duties.

Mill in his study on Utilitarianism (Mill, 1984, p. 83) analyses this phenomenon of man's sociability, coming to the conclusion that "the desire to remain in union with our fellows, which is already a powerful principle in human nature, and happily one of those which tend to be strengthened, even without express inculcation, by the influences of advancing civilisation, is a reality", i.e. in the social fabric it is felt as a necessity.

The existence of society is beneficial to the human being; apart from the fact that sociability is a natural tendency, it allows the guiding principles of human nature to be developed to a greater extent and all the values that identify man as a rational being with the highest degree of dignity to be enshrined. Belonging to this social organisation inevitably entails an involvement with the general interests of society and, in many cases, a total or partial reduction of one's own interests. Consequently, this results in an intervention by society in general or by another individual in particular in the private sphere of a person, limiting his or her individual autonomy, based in many cases on the possible harm or damage caused to a third party or to society itself. This social nature raises the question of whether man is already a member of that society from the moment of his birth, and by the mere fact that he is born in a certain place, or whether he is born with a tendency towards sociability.

When an individual assumes the standards of conduct set in a society, they are normally those established in the place where he lives and on the basis of which he orients his behaviour. In this process, which goes from birth to adulthood, there are a series of stages, each of which is marked by certain characteristics. Of these, we are interested in when the individual has reached the degree of maturity required of a mature person, being then a being who enjoys autonomy and has the capacity to make decisions. In the specific case of immigration, if an individual was born in a certain country, it is normal that he or she has adopted the culture and customs of the society of that country and, therefore, has

integrated into it as a member in line with the others. But it may happen that once this individual has reached full autonomy, where he is fully free to make decisions that are his responsibility, he decides to move to a country other than his country of origin, which consequently leads to a change in his environment, i.e. a change in the society in which he has been living until then, in fact, "immigrants normally occupy a subsidiary position with respect to the citizens of the receiving society, carrying out jobs that are generally not to the latter's liking" (Miraut, 2023, p. 129).

This new circumstance, especially in countries with an enormous cultural difference, entails the assimilation of this new culture by the new member who is introduced, thus producing a resounding affirmation of what Berger and Lukmann stated in this respect, when they pointed out that the individual is born with a predisposition to sociality, because in this case the immigrant must assume the consequences of his action, being among them, notably, the obligation to integrate in the places of reception of immigrants (Berger and Lukmann, 1986, p. 164). Faced with this new situation, coexistence between nationals and foreigners must be consensual. This should not be understood as a denial of the existence of multiculturalism, meaning the existence of different cultures in the same society, since integration into a new culture should not necessarily entail the loss of the previous culture; on the contrary, the existence of several cultures is desirable and beneficial because it enriches the society itself.

5. Possible limits to the free exercise of individual autonomy

The formula of the free development of the personality has been incorporated over time into some of the world's legal systems, becoming a relevant aspect in the analysis of the individual as a member of a legally structured organisation, in which all actions that refer to a person and are binding for the legal system have a corresponding legal configuration. What the law is concerned with here is simply to ensure that the individual can act in social life in accordance with the attributes of his personality. No action is demanded of it in relation to the process that leads the individual to form his or her personality, and in this respect the limitations that a given country places on entry into its territory are a

limitation on the free development of the personality. For, depending on the individual autonomy of each individual, this can be a form of development of his or her personality, going to a country other than his or her own for various reasons, not only employment, economic and social, but also for personal reasons or for the development of his or her personality.

The legal system must guarantee the possibilities for individuals to act by establishing a whole operative system of acts that can be carried out by the subject and which will be within the established mould of conduct. In such a way that the individual who wishes to develop his or her personality can do so freely without any ties. However, this full freedom of which we speak is logically not as absolutely full as it might at first appear, since what is done is to establish parameters of conduct within which individuals can carry out any activity in the development of their individual autonomy without any kind of limitation from their peers or from those who hold power.

If we were to reach a situation in which this individual freedom we have been talking about were so absolute that the individual could do whatever he wanted without any kind of limitation and without having to respect any system within which he could act and move, we would reach the situation known as radical liberalism, where individual freedom reaches its maximum apogee above all other existing values (García San Miguel, 1995, p. 21).

The development of the person in freedom must therefore go hand in hand with the elements that act as a parapet of human dignity, in such a way that the exercise of freedom cannot break with the basic criteria provided by the value that dignity represents. As Robles says, "the Constitution and the laws cannot limit the dignity of the person, but only recognise it as a value around which the whole constitutional system revolves", consequently establishing that "the general freedom of action, proper to the free development of the personality, must take place within this framework of peaceful and ordered coexistence under the laws" (Robles, 1995, p. 56). Hence, respect for the free development of the personality is a maxim to be followed and, with the arrival of new

developments, it has to be accommodated to real situations. Our legal system, through the Spanish Constitution, "only establishes some restrictions in those extreme cases in which freedom runs the risk of destroying itself and of seriously undermining other values such as dignity and life" (García San Miguel, 1995, p 43).

In turn, apart from framing the inspiring principles of the human being, life and dignity cannot become limits to the exercise of freedom. However, sometimes it is the same values of which the individual is the bearer that can act as a limit to the freedom of action of another subject. Something similar occurs with fundamental rights, where one of their limits is precisely that, respect for the rights of others. These limits that we have mentioned cannot, in any way, be taken to the extreme, since otherwise, in the eagerness to try to defend the rights of the individual by establishing the limitations of others, we could fall into the error of leaving the recognition of the free development of the personality empty of content, in such a way that "for the personality to reach the desirable levels of development, it is necessary to frame the individual in a context in which the satisfaction of his basic needs is guaranteed and he can project his action in the plenitude of the enjoyment of commonly recognised rights" (Espinar, 1995, p. 75).

If subjects are framed within a social system that has established parameters of conduct, the consequence of a social consensus, individuals can act in accordance with them and feel that they are free beings with the capacity to direct their lives towards their preferences. Freedom, as has been proclaimed, is an essential value for the human being that is in direct connection with the dogma of dignity. This cardinal character means that it is always being analysed from the point of view of its recognition and full exercise, in which there is no limitation of any kind. However, this premise is not entirely true, since the restrictions it may have are a reality that not only come from outside the agent who holds the right, but sometimes even come from the holder himself, through the imposition of self-limitations on the exercise of the right.

Conclusions

Foreigners are constitutionally equal to Spaniards as far as certain basic rights are concerned. In relation to other rights, the equality is not entirely complete and there are rights that, unless the regulations state otherwise, are denied to foreigners. Individuals who decide to leave their country of origin and join the migratory flows for various reasons, be they political, economic, social, family or cultural, do so by exercising and developing the free exercise of their autonomy and consider that living in the host country they will be able to develop their personality more freely. This phenomenon comes up against the restrictions established by the countries receiving immigrants through the fulfilment of certain conditions and requirements for entry into their territory, as well as the establishment of a quota that determines the maximum number of people who can be received and other structural elements required in terms of foreigners.

Human beings act in their lives to give satisfaction to their preferences and desires, which sometimes leads to consequences that are not consistent with correct behaviour in social life. The problem arises from the fact that legal systems feel a kind of moral duty through which they try to channel the lives and behaviour of individuals towards the achievement of the good in which their needs, preferences and desires are satisfied, and negative consequences are avoided on the basis of which they are caused harm or damage to their person. In this respect, in the case of foreigners, if an individual decides to move to another place, this freely taken decision may have negative consequences for him, such as health, social or economic consequences, or any other result that does not meet the expectations he had when he took this free decision, through which he intends to develop his personality by moving to a country other than his country of origin, because in his inner self he believes that this is the best thing for him.

Today, however, the old criteria that marked the margins within which individuals developed their actions have been modified. These changes, of course, have not been produced exclusively as a consequence

of voluntary acts of individuals, but have been influenced by a whole series of conditioning factors, circumstances and the current global environment that have determined a new trajectory. The existence in a given territory of a variety of individuals with important differences in their integral development as persons makes it even more difficult to find a solution in accordance with the claims of all members, because each one of them will demand full respect in all aspects that are their own, thus producing a clash between different cultures that is currently being resolved by exalting the principles of universal recognition such as equality and non-discrimination, as well as solidarity between human beings.

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ETHICS, TECHNOLOGY AND RIGHTS: CHALLENGES TO JUSTICIABILITY IN THE DIGITAL ENVIRONMENT

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Abstract:

Ethics, artificial intelligence and human rights are undoubtedly three interconnected concepts that present challenges in today's times. Through artificial intelligence, the way we live and work is being transformed, but it is not far from important ethical and/or legal dilemmas.
Ethics is very relevant in artificial intelligence as the technology can be used for good or bad, so it is necessary to ensure that it is used responsibly. The same goes for human rights, as they must be respected in any context, including in artificial intelligence, as it can be used to monitor people, collect data, etc., which can and do have a high impact on human rights.

Key words: *ethics; artificial intelligence; human rights.*

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Introduction

One of the great challenges presented by artificial intelligence is that of significantly improving human life. However, it is well known that it also poses a number of challenges in terms of the protection of human rights and also fundamental rights. We are dealing with a type of intelligence that not only stores and collects information, but also analyzes it, which undoubtedly makes it something extraordinary, and generates a series of concerns such as, for example, identity theft, discrimination, respect for the dignity of the person, among others.

We believe that it is essentially important that regulations and legal standards are established to ensure that artificial intelligence is used in a responsible manner and that, in any case, human rights and the fundamental rights of citizens are respected. Thus, it is essential to provide an adequate system of supervision and regulation to ensure that emerging technologies respect the ethical and legal standards that already exist. One possible solution would be to pass new legislation or new specific rules on artificial intelligence, or even to create independent bodies responsible for supervising and regulating its use.

There is no doubt that everything related to digital, artificial intelligence, and even the protection of personal data are particularly relevant issues that require attention in terms of ethics and law, as it must be ensured that technology is used responsibly and that citizens' rights are respected.

1. The projection of rights: discourse in the age of artificial intelligence

The projection of human rights in the framework of today's society faces a great challenge; a challenge that, up to now, still does not have solid and guaranteeing answers such as one would expect the law to offer. Perhaps, as stated by Luigi Ferrajoli, we are going through a moment of “crisis of law” that may trigger a crisis of democracy (Ferrajoli, 1994, p. 120). In this sense, reference is made to what not so long ago might have seemed unthinkable and which, at present, is present

in all aspects of our daily life: the technological society and, of course, its accelerated progression. It can be said that the dynamism with which the field of ICTs is evolving reveals the impossibility of law to comply with the due guarantees that are required of it. Against this background, the ethical discourse on the challenges posed by this new technological era arises and, consequently, the recognition of the rights that may be affected.

In order to legally address artificial intelligence, it is necessary to understand the basic, elementary and functional foundations of the same in order to provide a deep knowledge regarding this cutting-edge technology. In this sense, it was created as a transformation tool that can operate without depending on any specific person, surpassing the human being in many procedures and cognitive capacities (Miranda, 2021, p. 49).

One of the main starting points to be addressed is to define the true meaning of artificial intelligence. However, before doing so, it is essential to make a brief exegesis pointing out its beginnings. Some date the beginning of artificial intelligence to 1950 when Alan Turing, considered the father of artificial intelligence, published an article entitled "Computing machinery and intelligence" in which he hypothesized that if a machine behaves in all respects as intelligent, then it must be intelligent (Turin, 1950, p. 433).

Years later, in 1956, as a result of a conference on Computer Artificial Intelligence, given by the scientist J. McCarthy, the term of what we know today as modern artificial intelligence was coined for the first time (McCarthy, 2007). One of the definitions that could be provided on artificial intelligence would be the one proposed by Thomas Hardy, who states that it is that which "aims at the study and analysis of human behavior in the fields of understanding, perception, problem solving and decision making in order to be able to reproduce them with the help of a computer. Thus, AI applications are mainly focused on the simulation of human intellectual activities. That is, to imitate by means of machines, usually electronic, as many mental activities as possible, and

perhaps to improve human capabilities in these aspects" (Hardy, 2001, p. 12).

From the above it follows that artificial intelligence refers to the study, analysis and human behavior in areas such as understanding, perception, problem solving and decision making, presenting itself "as a novel technological tool for decision making, which is structured from a database and machine learning, and requires the existence of hardware, software, natural language processing and algorithms to work" (Belloso, 2021, p. 328). The goal is to reproduce these skills through the use of technology, in order to simulate human intellectual activities to provide autonomy to machines to replicate human reasoning.

A search on the univocal conceptualization of artificial intelligence allows us to verify that there is a plurality of meanings depending on the different perspectives in which it is intended to be projected. We can also bring up the definition offered by professors Raúl Pino Díez, Alberto Gómez Gómez and Nicolás De Abajo Martínez, who state that artificial intelligence "is a field of science and engineering that deals with the understanding, from the computational point of view, of what is commonly called intelligent behavior. It also deals with the creation of artifacts that exhibit this behavior" (Pino, 2001, p. 1), being able to be programmed to execute a motorized behavior and to be recognized as capable of carrying out any intelligent activity that an individual can perform.

Artificial intelligence works through algorithms that are implemented by a programmer, that is, the algorithm becomes the "procedure to find the solution to a problem by reducing it to a set of rules" (Benítez, 2013, p. 11), in this way, to execute a program through artificial intelligence requires a series of algorithms that will constitute "the algorithmic structure of the artificial intelligence system" (Benítez, 2013, p. 11).

The permanent technological changes imply an uncertainty in terms of the adaptation of the responses that are intended to be given to the social structure in relation to the implementation of artificial intelligence resources. The dilemma of the implementation of artificial intelligence, as we shall see below, is not exempt from controversy, since

programming through algorithms can harm and, in fact, has harmed fundamental rights. An example of this could be the applications that monitor consumer behavior for advertising purposes, also known as profiling, which consists of an automated processing of personal data and whose purpose is to evaluate aspects related to the behavior, attitudes, interests, etc., of a person, allowing to discover, understand, organize and elaborate a user profile to subsequently predict their behavior or preferences, something allowed by the General Data Protection Regulation (EU Regulation 2016/679, 2016) currently in force in Europe.

In this way, the person in charge of managing the profiling of a user will be able to identify to a greater or lesser extent the user's preferences and income level depending on the response, their geophysical location, their academic background and, of course, can also exclude those users who, in theory, are not attractive for the purpose being sought. This example, in principle, would not harm third parties, but the questions we must ask ourselves are the following: is personal identity guaranteed, could it be identified and go beyond consumer preferences? We therefore ask ourselves to what extent personal identity and all that is implicit in it, such as dignity, image and honor, are protected.

By profiling a user who is not aware of it, a situation of discrimination may arise, and we would be dealing with an invisible victim. At this point, respect for personal identity acquires all its importance insofar as it is configured as a clear response to the recognition of the dignity of the person. Dignity has its immediate projection in the consideration of human identity, that is, in the biological meaning of the human being. In this sense, the contribution offered by Professor Piñar Mañas is relevant when he states that “to a large extent history has oscillated between the attempts of power to control, define and distort the identity of people and the struggle of human beings to achieve their own identity” (Piñar, 2018, p. 98). This is also the opinion of Professor De Asís Roig when he recognizes that identity “starts from an idea of human being composed of a series of attributes that singularize him and that are expressed in terms of identity” (De Asís, 2022, p. 25). In

the case at hand, identifying identity is complex, since there is no doubt that it can assume different projections, for example, identifying it with cultural, genetic, etc. aspects.

In line with the above, the European Union has emphasized for presenting seven indispensable requirements to be taken into account to guide the development and use of artificial intelligence in Europe, which can be summarized as follows: human action and oversight; technical soundness and security; privacy and data management; transparency; diversity, non-discrimination and equity; social and environmental well-being; and finally, accountability (European Commission, 2019, p. 18).

There is no doubt that in the scenario in which we are working, determining the projection of artificial intelligence as a guarantee is not simple. What can be asserted is that, since we are dealing with values inherent to human beings that are extremely sensitive, such as the value of human dignity, the right to honor or the right to privacy, we must carefully analyze who would be held responsible in the event that a machine is programmed incorrectly or for a fraudulent purpose. In this guaranteeing line that we have been defending, it would have to be a reliable and safe tool, without causing damage to third parties or the environment and, in the event of liability, its developers, suppliers or users would be liable.

Likewise, artificial intelligence must respect privacy and fundamental rights, including the protection of personal data, since "there is a constant concern regarding the massive use of AI systems that for their operation require information that identifies or makes identifiable the person behind the data" (Mendoza, 2021, p. 180); artificial intelligence must be developed and used in a way that respects diversity and does not discriminate against any group of people, as nothing prevents sexist or racist results due to the use or processing of inappropriate data (Castilla, 2022, pp. 12-13); artificial intelligence must be accessible to all, regardless of their abilities or disabilities; and finally, the development and use of artificial intelligence must foster innovation and sustainable development.

Inevitably, when dealing with an issue such as artificial intelligence, the philosophical and legal aspects involved, the protection

of personal data and cybersecurity or cybersecurity cannot be excluded from the discussion. We are facing a framework in which the States and the international community in general must join all their efforts in the realization of public policies that guarantee in any case the rights of individuals; it is also necessary that the authorities approve regulations not only at the state level, but rather at the international level to put an end to the legal vacuum in which we find ourselves and thus establish effective mechanisms for the protection of human rights that may be violated as a result of the use and application of artificial intelligence.

2. The impact of artificial intelligence on human rights

The irruption of artificial intelligence in society is a reality that cannot be ignored. The rights on which it is projected are encompassing in the essence of the human being, that is, in the support of the inherent rights of the same. The simple allusion to the technological era and the concerns surrounding it are disparate, since there is no unanimous acceptance, and in many sectors there is great concern. This is made clear by Professor De Asís Roig when, in the face of the dilemma that radiates from the new technologies, he argues that, on the one hand, we find those who understand "technological advances as remedies that manage to reduce the effects of deficiencies or even put an end to them. On the other hand, there are those who emphasize how new technologies can be another instrument of discrimination against these people in terms of accessibility" (De Asís, 2020).

The new challenges facing the recognition of rights have also been defended by Laura Miraut when she states that "technological advances imply a rethinking of many relevant issues" (Miraut, 2022, p. 1) and that they have given rise to "new risks requiring society and the legal systems that govern it to adapt to the new scenarios" (Miraut, 2022, p. 2).

Unquestionably, as we have been pointing out so far, we are immersed in a technological evolution that has brought about a transformation that was previously defended by Yuval Noah Harari as a model of union between dogmatism and "post-humanist" dogma (Noah,

2015, p. 171). As a result of this lucubration, we must analyze the scenario before which civil societies must face, a framework that develops between the human and the artificial and it is there, precisely, where we must ask ourselves the question about the projection that personal freedom, dignity and human life will assume in the face of the interference of the tools used by artificial intelligence.

Initially, it cannot be said that the inalienable rights of the individual are guaranteed, since the monitoring of personal data and the use of algorithms executed through artificial intelligence can seriously infringe fundamental rights. This is recognized by Professor Nuria Belloso when she states that "the "algorithmic condition" is affecting human rights, which prescribe equality and prohibit discrimination -among other conditions, on the grounds of biological sex and gender-. In a society in which everything we do is transformed into data, processed, digested and mediated by algorithms that contribute to critical decisions, rights depend on how these advances are regulated" (Belloso, 2022, p. 67).

In this regard, Professor Antonio Diéguez also pronounces on transhumanism, stating that it entails the use of artificial intelligence as "the attempt to substantially transform human beings through the direct application of technology" (Diéguez, 2017, p. 19). Thus, transhumanism is currently envisioned as a phenomenon that is complicated to say the least, as it can be projected from different perspectives. The debate that awakens the dehumanization of the dignity of the person can be found, for example, in Sophia, a robot manufactured by the company Hanson Robotics of Hong Kong and what is curious to say the least is that she has obtained the nationality in Saudi Arabia, positioning herself as a non-human citizen robot woman who presents herself to the world without the veil and without abaya, which gives her a different status than that held by Saudi women.

The discriminatory situation referred to in the previous assumption highlights the gender culture that prevails in the country. We are not going to dwell on this cultural context; rather, the purpose of this approach is to show how, in this specific case, robotics has surpassed the human. This notorious discrimination between woman-robot and human

person is discouraging. At present, the debate on artificial intelligence versus human dignity is presented as the starting point. In this same line, Professor Pérez Luño also supports that human rights are "a set of faculties and institutions that, in each historical moment, concretize the demands of human dignity, freedom and equality" (Pérez, 1988, p. 46). The foundation of human rights would be, as Professor Peces-Barba rightly pointed out, through their connection "with the idea that human rights are not complete until they are positivized" (Peces-Barba, 1989, p. 267).

It is also very relevant the defense made by Professor Ara Pinilla when he recognizes the faculties defended by Pérez Luño as faculties directly attributable to the person as an inherent value, since he defends that "they are already reflected in the social consensus reached from the realization of the demands of liberation from the conditioning factors that may affect the formation and expression of the will of individuals" (Ara, 1991, p. 63) or as "natural rights" (Peces-Barba, 1991, p. 26). In this sense, it is absolutely necessary to clarify the nature of dignity and its projection on the technological era in general and in particular in the field of robotics, especially with regard to the responsibility that must be taken into account when handling it. As we have already seen on some occasions, its handling has not always been based on the protection of people.

One of the dangers that can arise from the transformations we are referring to is precisely dehumanization. At present, we can already observe how, through artificial intelligence, relevant decisions that directly affect the population are adopted; for example, the granting of a bank loan or the rejection of a selection process for a job position through machine learning algorithms. Authors such as Bauman recognize this procedure as "adiaphorization" (González, 2018, p. 174), artificial intelligence acts without humanization mechanism having only algorithms as a guideline. At this point, we could keep in mind the economic crisis that occurred in 2008 as a result of indiscriminate stock trades that were carried out through artificial intelligence by banking systems. It is necessary a comprehensive assumption of human rights in

the scenario in which we find ourselves and that these are recognized as unavoidable guarantees.

The defense we are making is not trivial, because if we want an advance in artificial intelligence, this cannot be separated under any circumstances from the guarantees offered by the postulate of human rights in the technological field, since the rights that come into play must involve a challenge of public policies in terms of guarantees by the States. Therefore, from an efficient point of view, any advance in technological matters must have as a prerequisite the recognition of moral and ethical values as a priority issue. The immediate response to the recognition of human rights takes on its full meaning in the unavoidable guidelines that translate into the minimum required of States, insofar as they must make every effort to ensure programs that guarantee human rights.

This work intends, in an axiomatic way, to respond to the need for the recognition of the values that emanate from the Universal Declaration of Human Rights and their effective representation, and this undoubtedly compels the obligation on the part of the States to commit themselves to their full implementation, especially with regard to their moral and legal aspects (López, 1990, p. 72). The values radiated by the Universal Declaration of Human Rights itself should not be understood as a mere declaration of intentions, but, as Benito De Castro points out, should be located in "the empirical factors" (De Castro, 2003, p. 138) of the resulting organization and functioning of society. The author himself recognizes human rights "not in the abstract" (De Castro, 2003, p. 138), but as a response to the rational logic that identifies human beings from other species.

This moral dimension is endorsed by Professor José García Añón when he understands that human rights are configured as "ethical demands, goods, values, reasons or moral principles of special importance that all human beings enjoy just because they are human beings, in such a way that they can represent a demand or requirement vis-à-vis the rest of society" (García, 1992, pp. 61-85). 61-85), and Professor Ara Pinilla also refers to this moral dimension when he points out that "it is their moral content which, in short, gives human rights their

pre-eminent value in the face of any decision (legal, political or social in the strict sense) that could contradict their validity" (Ara, 2003, p. 83).

When dealing with human rights such as privacy or honor, it is necessary to take into consideration the rights that are recognized within the first generation. Likewise, when their dogma is framed within the generality, it must be understood what Professor Perez Luño defends in relation to the enjoyment of the same, since their enjoyment corresponds to "all men and without being, therefore, reduced to a certain group of people" (Pérez, 2013, p. 40) since their recognition "concretize the demands of human dignity, freedom and equality, which must be positively recognized by the legal systems at national and international level" (Pérez, 2003, p. 42).

The Toronto Declaration already provides a glimpse of the worrying scenario in which the Declaration is moving, obliging States to comply with the due guarantees of the rights that are based on the value of equality in order to avoid discrimination. The guidelines offered in this document are the result of work carried out by numerous experts in the field, guided by the value assumed by the Universal Declaration of Human Rights. This Declaration is configured as one of the greatest challenges of guarantees in the process of automatic learning in which it is insisted that for an effective execution the value of human rights is assumed as a priority objective in any of the circumstances in which artificial intelligence has its field of action.

The content of the Toronto Declaration is divided into three parts: the first deals with the requirement and duty of States to guarantee equality and non-discrimination, since it should not be forgotten that they are projected on rights such as freedom of expression, the right to privacy or the right to honor, among others, which, for their part, cannot be ignored as rights recognized as subjective rights in our constitutional model; The second part is concerned with reflecting the possible responsibilities of the actors, whether public or private, who violate the contents of this Declaration through the handling or application of artificial intelligence systems. Finally, the third part focuses on the establishment of remedies applicable to parties who violate the guidelines

of the Declaration and, once detected, proceed to repair the damage caused.

According to Professor Emilio Suñé Llinás, the individual as a human species "may be displaced in its centrality by technology, and not only by biotechnology -especially genetic engineering- but also by computer science and, in particular, artificial intelligence" (Suñé, 2020, p. 213). The consideration of the inseparable relationship between artificial intelligence and the new challenges facing the recognition of rights would require the full recognition of the human person and that science be at the service of the human person.

What is not admissible is that the tools used through artificial intelligence undermine the inherent rights of the individual, but should be considered as a tool for social welfare. On these dangers that threaten the new era of cyber-rights, Professor Belloso has also stated that "the discriminations and biases that often preside over human decisions and actions -sometimes unconsciously-, are also projected on the network through software and Artificial Intelligence systems" (Belloso, 2022, p. 45).

As we have indicated above, the incorrect use of artificial intelligence can violate human rights. Among these rights we can highlight the right to privacy, freedom of expression, the right not to be discriminated against, among others, all of which are represented as a maxim in autonomy and the exercise of the free development of personality (Miraut, 2001, pp. 193-204). By way of example, the excessive or inappropriate use of artificial intelligence can infringe on the privacy of individuals by collecting and analyzing at the same time a large amount of information without necessarily obtaining consent or knowledge of what we are providing.

The worrying dilemma that arises in the phenomenon of the digital society is arousing debates in various sectors such as scientific, educational, social, economic or political. At the ethical level, this concern is not foreign either, since there is a dilemma when determining who is responsible for programming, transparency in the automated decision-making process where discrimination and security of personal data are not seen.

There are several ethical questions that arise about automation, as they can lead to discrimination based on the choice of specific parameters, so it is necessary to "establish what should be the ethical principles in the use of artificial intelligence" (Ester, 2023, p. 127). This is one of the reasons that have prompted the European Union to take this phenomenon into consideration and thus propose a guaranteeing legislation that is effective, because, as has been defended throughout this study, the inherent rights of the person are at stake. From this ethical viewpoint, what cannot be justified under any circumstances is to put the machine before the human being (Miranda, 2021, pp. 48-76), as some private sectors defend purely on the basis of economic interests. Hence, one of the challenges facing the law is, precisely, to put in place guarantee mechanisms that offer solutions that address common interests between the machine and the person.

3. The disruptive reality around artificial intelligence

One of the characteristics of the philosophy of law is none other than the questioning that inspires deliberation on the different aspects surrounding the individual. Therefore, as stated by Alexy "the most general property of the concept of philosophy is reflexivity" (Alexy, 2003, p. 147) since it is conceived as "reasoning about reasoning, because its object, the human practice of conceiving the world, by oneself and by others, on the one hand, and human action, on the other, is essentially determined by reasons" (Alexy, 2003, p. 147). In this line, Martínez also pronounces himself when he recognizes that "legal thought needs to constantly receive conceptual stimuli and some of the most powerful ones may come from the contemporary debate around intelligence" (Martínez, 2018, p. 96).

A brief analysis of the state of the art leads us to the imaginary relationship between machine and man. In this scenario, there is no doubt that it would be illogical to think that a machine could function on its own without human intervention. However, a sector of the doctrine has

been warning of the dangers of robotics if machines were to become more intelligent than their programmers.

In this respect, artificial intelligence is nothing more than the response offered by man to the machine, through algorithmic information, the processed macroinformation will be the result of the knowledge of artificial intelligence. Therefore, one could not make the mistake of confusing a neural network with what results from an artificial network. It is interesting, in this sense, the contribution offered by the Norwegian philosopher Bostrom, when he points out that "algorithmic improvements allow engineers to build neural networks good enough to be useful in a practical sense in many applications" (Bostrom, 2016, p. 5). It follows, therefore, that robotic engineering is nothing more than the science that is executed through artificial intelligence for the manufacture of programmed machinery.

In a first moment, we could affirm that artificial intelligence is, in principle, a technological tool created by the human being to facilitate better conditions from the different spectrums where it is projected. This is what Professor López Moratalla also understands when, in a defense of the intelligent robot, she understands that these lack an autonomous capacity to develop by themselves, but that, on the contrary, they are programmed by the human with the objective of serving and responding to the functions for which they are programmed (López, 2017, p. 50); hence, it is not possible to think about the possible capacity of understanding or ethical assessment in front of the learning fields for which they are programmed.

The design of future societies marks a difference in relation to the expectations of the present, especially taking into account the transformation and evolution in terms of data processing of digital tools and their ability to enhance the different algorithms to, as Rodríguez understands, achieve "digital immortality" by being able to transfer our brain memories to the computer cloud and thus keep them eternal (Rodríguez, 2018, p. 120).

This statement opens the debate on data protection and the dangers of providing personal information to a machine that, in principle, depending on the quality of the programming performed, there is no

guarantee that the inherent rights of the individual are guaranteed (Churdin, 2012, p. 78). Thus, artificial intelligence is considered by some authors as a set "of processes and technologies that allow computers to complement or replace specific tasks that would otherwise be performed by humans, such as decision making and problem solving" (Corvalán, 2020, p. 78).

This reasoning could well derive from a sophistic circumspection where the possibility is raised of creating devices with intelligent life that provide human beings with ex novo experiences through programming with the corresponding artificial neural network designed and programmed for that purpose (Lacruz, 2019, p. 85). However, given this scenario, it is completely illogical to think that present or future technological advances will provide rationality or autonomy to the machinery used by artificial intelligence, since it should not be forgotten that the learning capacity of the different systems will depend on the information and programming that, in any case, is incorporated by the programmers of that machine. Hence, as already rightly defended by Rogel Vide, when we speak of intelligence we refer to a natural condition of the human being (Rogel Vide, 2018, p. 9).

This approach leads us to the necessary formulation that asks whether in the not too distant future, human intelligence will be diminished by machines. This question, which in principle should not be an answer to think about, makes us realize that it is not easy to provide an answer, since what we are dealing with is, in short, to measure the capacity of human intelligence and, of course, to know how this capacity will be measured. By way of example, today, with the advantages offered not only by new technologies but also by the tools to be able to execute constructions such as those resulting from skyscrapers, in Egyptian times could we have built those pyramids?

In this sense, the question arises as to whether human beings today have the intelligence to build pyramids under the same conditions in which the ancient Egyptians built them. Without wishing to defocus the initial approach in the framework that concerns us, measuring intelligence between machines and human beings offers a simple answer,

since today there are machines that surpass human beings. It is clear that they are programmed for a specific purpose, but, of course, it is much easier to solve this approach than the initial one.

The analysis of artificial intelligence leads us to reflect on the technological paradigm shift that is currently taking place. We have been arguing that we are facing a new technological era that some authors already recognize as a "paradigm shift"; and it is true, because we are facing new technologies, new challenges not only in the recognition of rights, but also challenges in the social collective. This transformation in the social change that we defend provokes a remodeling in the psychic and rational structure of the individual.

Classics such as Weber already defended that the activity of an Administration can be "rationally calculated on the basis of fixed general rules, just as the foreseeable performance of a machine is calculated" (Weber, 1985, p. 129), admitting machinery as an advantageous instrument. Pérez Luño rightly pointed out that, in the case of artificial intelligence, it should be analyzed from a protectionist point of view, taking into account, above all, the risks involved (Pérez, 1996, p. 181).

At this point, what is being questioned is the role that the individual is going to play as a subject of inherent rights before the disquisition that is generated in relation to the theory of intelligence recognizing it as a "common stock" (Rawls, 1993, p. 124). In the same sense, Professor Belloso states that digital tools have "a certain degree of autonomy in their operation" (Belloso, 2018, p. 86) and, therefore, "with the ability to cause physical harm, which opens a new stage in the interaction between human beings and technology, opening a new normative challenge" (Belloso, 2018, p. 86). Hence the need for a normative regulation that integrates the inescapable and futuristic relationship that is established between robotics and the person in its natural biological meaning.

In relation to the above, it is not surprising that engineering laymen do not make a distinction between the two concepts, between artificial intelligence and robotics. What must be kept in mind is that robotics focuses on the mechanism, on the articulation of the body through artificial intelligence. Let us take as an example what is defended by García-Prieto when, in an attempt to conceptualize the robot as a

machine, he recognizes that it is “provided with certain complexity both in its components and in its design or behavior” (García-Prieto, 2018, p. 38), encompassing in this context any robot as is the one resulting from surgical assistance, diagnostic robots, robots for patient assistance, etc.

The prevailing reality responds to the various opinions that, on many occasions, are based on a lack of knowledge about artificial intelligence. Evidently, they have their genesis as a discipline of computer engineering and aim to offer tools that influence the welfare of the social collective, but what must be kept in mind is that technology cannot be configured as a magic dose to solve the problems that occur in the world.

It must be kept in mind that artificial intelligence can emulate human behavior, but it is not in any case an entity that has emotions or an ethical or moral trait in decision making, but executes its responses according to the algorithms that are implemented. This fact, certainly, can generate a discriminatory classification, especially if the data provided are biased, since they originate a social inequality if there is no effective control, since it must be remembered that automated algorithms are used.

In the words of Professor Belloso, technological advances imply an optimization for social welfare, highlighting the dangers that threaten their management. To this end, and from a purely guaranteeing vision, the author argues that a design and language of algorithms is necessary, since “due to their technical complexity and planned obscurantism, they can have a negative impact on human rights, giving rise to breaches of the principle of equality” (Belloso, 2022, p. 92). It would be a matter, in any case, of providing an ethical response in the response offered in the specific case and therefore must prove that the algorithms used comply with the principle of equality and respect for the dignity of the person, not being able to incur in any way to a discrimination based on race, sex, religion, sexual choice, or any of the manifestations that make a discriminatory differentiation (Miranda, 2020, p. 148).

We are in the presence of a global society and this requires that the social structure be equally plural and, in turn, demands that society has a

capacity for thought and concrete rationality in the face of the new challenges in the technological ethics in which we are immersed. Derived from this approach, it could be thought that social intelligence resides in its own institutional bodies (Popper, 2019, p. 49), whose main function is none other than "the constant common regulation of the important problems of life" (Luckmann, 1996, p. 138). That is why the new problems faced by society must delve into guaranteeing the rights that radiate human rights in the face of "the potential media with big data, machine learning, and behavioral sciences" (Pelayo, 2020, p. 57), which allow the creation of a profile through algorithms classifying an individual with a specific objective and can even influence his or her decision making.

The need for an ethical framework in the face of this digitizing phenomenon requires the development of instruments whose objective is centered on respect for the rights that derive from the dignity of the person as the center and purpose of law. This is how García-Prieto understands it when he refers to robotics as "the applied part of ethics whose objective is the development of technical-scientific and cultural tools that promote robotics as a cause of advancement of human society and its individuals and that help prevent a wrong use of this against the human species itself" (García-Prieto, 2018, p. 56) and application of artificial intelligence. The importance that adds ethics in the digitalization process is configured as one of the great challenges in the sciences in general and, in particular, in the social sciences as it tries to provide the due importance in the implementation of guiding principles based on ethical values in decision making by autonomous instruments.

These values that we defend would only have a place in a democratic state insofar as freedom, justice, equality, security, among others, are advocated as superior values of the legal system. In the Spanish case, for example, Article 1.1 of the Spanish Constitution makes it clear that Spain, as a social and democratic State governed by the rule of law, upholds freedom, equality and political pluralism as superior values.

Professor Pérez Luño has already warned that "ICTs and NTs have produced new ways of living democratic values, but, as a counterpoint,

they have also generated new risks for the exercise and protection of freedoms" (Pérez, 2013, p. 119). Therefore, it would not be possible to speak of democratic values if the use of new technologies does not include a fair and accessible design for all those who may be interested, thus guaranteeing the real inclusion of artificial intelligence systems.

Conclusions

The prevailing reality is none other than the implementation of technologies in all fields of our life, hence it can be said that we are immersed in a technological evolution and revolution that has led to a transformation at an incalculable level. Given the speed with which this transforming phenomenon is advancing, the legal reality shows how it is not possible for the law to cover the protection of the rights or protectable legal assets that come into play in this equation. In this sense, it can be stated that, although it is true that artificial intelligence has made people's lives easier, it is also true that, on other occasions, it puts human rights such as privacy, honor, data protection, freedom, security, etc., at risk.

The ethical and moral dilemma is projected in the fact that an algorithm is configured as a guide for action in digital systems and it is precisely the human being who directs them to execute the action. We wonder then, who should take care of this human intervention not only in the ability to decide, to process, to connect and take decisions through the execution of programs that affect the course of humanity.

As technology advances and algorithms are used to make decisions automatically, we run the risk of these decisions being discriminatory, which leads to the immediate response of a violation of human rights. Furthermore, as cybernetic challenges become increasingly complex, it is necessary to recognize that there is insufficient legislation at the legal level to respond to each and every one of the problems posed by artificial intelligence, and it is therefore necessary to ensure that human rights and individual freedoms are respected.

This paper aims to highlight, on the one hand, the rights that can be protected and, on the other hand, the lack of legislative agreements

that advocate due guarantees at all levels, because, of course, it is not only a question of protectable goods, it is a question of reaching an agreement that is projected on all people and, in particular, on the especially vulnerable group.

The fact that machines have supplanted man in many fields obliges us to have a guaranteeing and protectionist response, especially when it comes to the dignity of the person, a value that must be overprotected precisely because of the rights it radiates.

It must be guaranteed that the organizations that use artificial intelligence are responsible for each and every one of the decisions they make and timely information must be provided to society so that citizens become familiar with this issue, strengthening the culture of technology based on ethics and human rights.

This study has defended the need for a code of ethics in the implementation and use of artificial intelligence, but not ethics as a value, since what is sought is to institute a code whose priority objective is no more than an ethical action of the use of algorithms that will be used to select or resolve relevant issues and that, in case of non-compliance, a punishable response will be derived.

Certainly, this is a risky and almost utopian aspiration because, as we have been able to verify in the development of this research, cultural issues and recognition of rights are not projected in the same way in the different legal systems, which leads us to the idea that protection on the ethical responsibility of use will depend, in any case, on the objectivity offered by the rights in each case.

In this sense, a global commitment is required to establish guaranteeing policies that contemplate a framework of technologies aimed at satisfying the interests of humanity. We will only be in the presence of a good use of digital systems when they are guided by the value of dignity and an ethical framework as a sine qua non condition, otherwise, we could witness what many authors have been warning about when they assert about the technological empowerment of humanity.

We are facing a complex issue that must be evaluated without any doubt from a legal and philosophical perspective, since it is necessary to ask questions about the nature, effectiveness and efficiency offered by

the use and, in many cases, the abuse of artificial intelligence, ethics, freedom or responsibility in an increasingly digitized world. We must reflect on these issues and create spaces in schools, universities and organizations to better understand how technology affects society, what is its impact and what are its risks, in order to seek ethical and sustainable solutions that address current challenges with solutions for the future.

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THE NEED TO INTEGRATE ETHICAL VALUES IN THE PROFESSIONAL ACTIVITY OF THE MAGISTRATE

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Abstract:

In a democratic society, it is essential that the courts, in exercising their jurisdictional powers, enjoy independence.

One of the guarantees of the rule of law is the independence of judges and of the judiciary as a whole.

For the proper functioning of a society governed by the rule of law, cases must be decided independently of any influence.

Key words: *independence; integrity; impartiality; magistrate; court.*

General aspects regarding the independence and impartiality of the magistrate

The ethics of the magistrate is the totality of rules governing the conduct of the magistrate as an exponent of the judiciary.

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Ethical rules govern judges' conduct in and outside professional activity, while legal rules govern the rights and obligations of participants in the entire judicial process. The need to codify ethical rules led to adopting the Code of Ethics for Judges and Prosecutors[1].

Thus, the ethical rules of the judiciary are stated in Chapter II, entitled "Independence of Justice," which provides for the obligation of judges to uphold the independence of justice, as well as the obligation to exercise their functions objectively, impartially and exclusively based on the law.

At the same time, judges can appeal to the Superior Council of Magistracy for any act likely to affect their independence, impartiality, and professional reputation.

Some legal provisions on incompatibilities and prohibitions are also included.

Chapter IV, entitled "Impartiality of Judges and Prosecutors," contains legal provisions designed to preserve the objectivity of judges.

The provisions of Chapter VI, with the marginal title "Dignity and honour of the profession of judge or prosecutor", which specifies the conduct and relations that must be observed, align with the abovementioned provisions, cultivate both within the judicial profession and in society.

Using legal rules governing relations between judges and the judiciary, relations between judges and each other, relations between judges and members of the Public Prosecutor's Office, with lawyers, experts, other participants in the act of justice, and, last but not least, with society as a whole, the rules of professional conduct of judges are established.

The role of the judiciary is to achieve a balance in the exercise of powers in the state.

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[1] Superior Council of Magistracy, Decision no 328/2005 for the approval of the Deontological Code of judges and prosecutors, published in the Official Gazette of Romania, Part 1, no 815/8 September 2005

The principle of the independence of the judiciary is concerned with the independence of the judiciary in the State from the other powers (legislative and executive) and the independence of judges.

Art 1 Para 4 of the Romanian Constitution stipulates that the state is organized according to the principle of the separation and balance of powers – legislative, executive, and judicial.

The independence of judges is governed by Article 124 Para 3 of the Romanian Constitution, which states that judges are independent and subject only to the law. This independence must be analyzed from the perspective of functional (system) independence and personal independence.

Regarding functional independence, the courts must be independent from the other state authorities and also from litigants or other persons.

Given that justice is carried out in the name of the law, functional independence does not mean independence from the law, since all judicial activity is carried out in the name of the law.

Independence also does not preclude review by higher courts of judgments handed down by lower courts.

Guarantees designed to ensure personal independence are stated by the law, significant in this respect being those relating to how judges are recruited, immovability, determination of remuneration, freedom of expression, continuous professional training, establishment of incompatibilities and prohibitions, and liability of judges.

Also, the continuous professional training of magistrates is a guarantee of independence and impartiality in the performance of the judicial act.

All these guarantees must be backed up by a judge's conduct that respects the law.

Impartiality and public perception of impartiality are, together with independence, essential for a fair trial.

A balance must be struck between his rights and obligations so that the judge is impartial.

The judge has an obligation of reserve, so he will refrain from commenting on judgments he has delivered even if they are criticized by

the media or members of the academic community and even if they are annulled, quashed or modified by the court of judicial review.

The duty of reserve must also be reflected in his private life in that he must act cautiously to avoid undermining his office's dignity and ability to perform it.

In Romanian law, the impartiality of justice is enshrined as a constitutional principle, Art 124 Para 2 of the Romanian Constitution stipulating that "Justice is unique, impartial and equal for all".

The essence of the principle of impartiality lies in the judge's obligation not to adopt an attitude toward the participants in the trial that is prejudicial to the spirit of objectivity, impartiality, and fairness.

Case law on the independence and impartiality of the judiciary

The role of the judge is to ensure a balance between the literal meaning of the legal rule, on the one hand, and the will of the legislator, on the other hand, to achieve justice, the constitutional legitimacy of the interpretation of the law deriving precisely from the provisions of Art 129 Para 3 of the Constitution.

Therefore, the intimate conviction that the judge has formed as a result of the interpretation of the facts in issue and the specific meaning that he attributes to the legal rule in question is not such as to impart a lack of impartiality to the judicial activity[1].

According to the case law of the Constitutional Court, the provisions of the fundamental law on the independence of the judiciary and the status of magistrates cannot only be of a declaratory nature but constitute binding rules for the legislature, which is obliged to establish appropriate measures to ensure, in a real and effective manner, the independence of the judiciary, without which the existence of the rule of law is inconceivable.

[1] Decision no 64/11 February 2014, published in the Official Gazette of Romania, Part 1, no 314/29 April 2014

The independence of the judiciary implies certain safeguards, since if the function and role of the judiciary were diminished, the character of the rule of law would be called into question, with all its consequences.

By Decision No 421/4 July 2019[1], the Constitutional Court held that "The independence of judges implies their freedom to settle disputes within their jurisdiction without any external pressure or influence, in conditions of complete impartiality and objectivity, the law establishing a series of guarantees to ensure the avoidance of any pressure to distort the fairness and equity of the judicial act". The immovability – whereby judges may be transferred, delegated, seconded or promoted only with their consent and may be suspended or released from office under the conditions laid down by law – is one of the strongest such guarantees. However, the judge's independence cannot confer absolute impunity on the judge. On the contrary, judges must strictly comply with the law, including rules whose disregard is qualified by law as disciplinary misconduct.

In the same vein, on the issue of the independence of judges, the Court found in its case law, represented by Decision No 2/11 January 2012, published in the Official Journal of Romania, Part I, No 131/23 February 2012, that the constituent legislator has enshrined it in Art 124 Para 3 to protect the judge from the influence of the political authorities and, in particular, the executive power. However, the Court held that this guarantee cannot mean that the judge is not responsible. The fundamental law not only confers prerogatives which fall within the concept of "independence" but also sets limits on the exercise of those prerogatives – which, in this case, fall within the phrase "subject only to the law" contained in that constitutional text. The Court pointed out that the institutionalization of certain forms of accountability of judges gives expression to these limits by the requirements of the principle of separation and balance of powers in the State, enshrined in Art 1 Para 4 of the Constitution. One of the forms of legal, personal, and direct

[1] Published in the Official Gazette of Romania, Part 1, no 854/22 October 2019

liability of the judge is disciplinary liability, which derives from the judge's duty of loyalty to his role and function and from the requirement that he must demonstrate in fulfilling his obligations to the public and to the State. At the same time, the Court held that the constitutional principle of the independence of judges necessarily implies another principle, accountability. Thus, the judge's independence does not constitute and cannot be interpreted as a discretionary power of the judge or as an obstacle to the judge's liability under the law, whether criminal, civil, or disciplinary.

The entire career path of judges, from appointment to dismissal, is beyond the influence of the executive.

The oath taken by judges when they are sworn in is one of the sources of disciplinary liability, given that the assumption by judges of the obligations included in this solemn act has, on the one hand, ethical significance and, on the other, the value of an act with content and effects specific to the exercise of this profession.

The purpose of introducing disciplinary offenses is to prevent and, if necessary, curb actions aimed at satisfying particular interests other than those regulated by the legal provisions.

Applying the case law of the Constitutional Court according to which the essential aspects of the termination of the legal employment relationship of magistrates must be regulated by organic law, by Decision No 121/10 March 2020[1], it was found that the organic law on the status of judges and prosecutors – Law No 304/2004 – does not provide for essential aspects of the competition for admission to the judiciary, such as the stages and tests of the competition, the method of determining the results and the possibility of challenging each test, is contrary to the provisions of Art 73 Para 3 Let l) of the Constitution, according to which the organization and functioning of the Superior Council of the Magistracy and the organization of the courts shall be regulated by organic law. Thus, the essential aspects of admission to the judiciary

[1] Published in the Official Gazette of Romania, Part 1, no 487/9 June 2020

must be laid down in Law No 303/2004, and the Regulation approved by decision of the Superior Council of the Magistracy and published in the Official Gazette of Romania, Part I, need only detail the procedure for organizing and conducting the competition for admission to the judiciary.

About the status of judges and prosecutors, the Court found that it is constitutionally enshrined in Art 125 – Status of Judges and Art 132 – Status of Prosecutors, the essential elements relating to the conclusion, execution, modification, suspension, and termination of their legal employment relationship must be regulated by law, and not by an act of inferior legal force. Thus, both the conditions for secondment and the conditions for its termination must be expressly laid down in the statute of judges and prosecutors, namely in Law No 303/2004 [Decision No 588/21 September 2017, published in the Official Journal of Romania, Part I, No 835/20 October 2017, Para 23].

Moreover, about the present case, the Court notes a specific element of the case, namely that Art 125 Para 2 of the Constitution establishes that the "Proposals for an appointment, as well as promotion, transfer, and sanctioning of judges are the competence of the Superior Council of Magistracy, under the conditions of its organic law." Thus, the constitutional text *expressis verbis* states that the transfer of judges is carried out by the Superior Council of Magistracy, thus indicating both the authority competent to transfer judges and the nature of the law by which the transfer of judges is carried out, i.e., under the terms of the organic law of the Superior Council of Magistracy, which means that it is this law that regulates the procedure by which the transfer is carried out. The legislator should, therefore, have regulated, on the one hand, the institution of the transfer in Law No 303/2004, indicating the criteria to be met, and, on the other hand, the procedure for carrying it out in Law No 317/2004.

Given the above, the Court finds that the legislative solution contained in Art 60 of Law No 303/2004, which does not specify the

conditions for the transfer of judges, violates Art 125 Para 2 of the Constitution[1].

As a public service, justice must support the citizen to restore violated rights. The independence of judges is a constitutional attribute that signifies their total capacity to perform the jurisdictional act in the absence of any external influences that distort the fairness of the process.

To ensure a high-performing justice system, values that contribute to achieving this objective are necessary, such as the magistrates' independence, integrity, and responsibility. Added to these is the need to adopt transparent and predictable laws, continuous professional training, judge specialization, compliance with the principle of continuity of the panel, evaluation of professional activity, the pronouncement of well-reasoned judicial decisions, the existence of a unified jurisprudence, a volume of activity that allows the performance of an act quality justice.

Related to the previously described state of facts and the vast jurisdiction of the Constitutional Court, the new justice laws were adopted, respectively Law no. 303/2022[2], on the status of judges and prosecutors, Law no. 304/2022[3] on judicial organization and Law no. 305 /2022 regarding the Superior Council of Magistracy[4].

Regarding the distribution of judges from one section to another within the Supreme Court, the Court found that the text is not likely to affect the independence and impartiality of the judges, as no external pressure/influence is exerted on them to affect these values. The distribution from one section to another is justified by the need to ensure speedy resolution of cases; despite a high volume of activity at the level of one of the sections, the duration for which it is done is strictly

[1] Decision no 454/24 June 2020, published in the Official Gazette of Romania, Part 1, no 655/24 July 2020
[2] Published in the Official Gazette of Romania, Part I, no..1102 of 16 november 2022
[3] Published in the Official Gazette of Romania, Part I, no. 1104 of November 16, 2022
[4] Published in the Official Gazette of Romania, Part I, no. 1105 of November 16, 2022

determined, a maximum of one year. Also, it is done only with the consent of the judge.

At the same time, the Court held that the criticized legal texts are likely to lead to something other than the abusive change of judges from the panel composition, contrary to what was claimed in the formulated criticism. This is because both articles in question impose a triple conditionality, specifying that this approach is carried out: (i) only "exceptionally"; (ii) based on objective criteria; (iii) these objective criteria will be likely to exclude the arbitrary replacement of judges from the panel - defining mention for the qualification of this approach. Such a firm clarification at the level of the law leads to the conclusion that the criticized provisions of the law do not affect the independence of the judges, the change being by no means discretionary but based on objective reasons, so the hypothesis that the change in the panel's composition was made could not be discussed to influence the solution pronounced in the case by the court decision.[1]

Referred to the benchmarks resulting from the jurisprudence of the constitutional court, based on the principle of judicial independence, regarding the institutional component of judicial independence, the Court ruled that it covers the judicial system in its entirety and implies the existence of guarantees, such as: the status of magistrates (the conditions of access, the appointment procedure, solid guarantees that ensure the transparency of the procedures by which magistrates are appointed, promotion and transfer, suspension and termination of office), their stability or immovability, financial guarantees, the administrative independence of magistrates, as well as the independence of the judiciary from the other powers in the state, financial security, which also implies

[1] Decision of the Constitutional Court of Romania no. 522 of November 9, 2022, Published in the Official Gazette of Romania, Part I, no. 1,101 of November 15, 2022

the provision of a social guarantee, such as the service pension of the magistrates.[1]

About his role in a state of law, the judge must be provided with guarantees such as independence and impartiality.

In this sense, it was noted that any regulation related to the salary and the establishment of the magistrates' pensions must respect the two principles of judicial independence and the rule of law, the current constitutional framework underpinning the financial security of magistrates.

Conclusions

Affirming fundamental ethical values for judges strengthens public confidence in the act of justice and enables a better understanding of the judge's role in society.

Confidence in justice is not only guaranteed by an independent, impartial, honest judge but this confidence is equally earned by a judge who independently manifests his or her role with wisdom, humanity, seriousness, attentiveness, and listening and communication skills.

Judges need the public's confidence because if that confidence were damaged, their integrity and impartiality would be questioned.

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[1] Decision of the Constitutional Court of Romania no. 467 of August 2, 2023, published in the Official Gazette of Romania, Part I, no. 727 of August 7, 2023

Decision of the Constitutional Court of Romania no 588/21 September 2017, published in the Official Gazette of Romania, Part 1, no 835/20 October 2017.
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JUSTICE AND ECONOMIC ACTIVITY

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Abstract:

The countries that have achieved the greatest material prosperity are those that have enjoyed freedom of initiative, freedom of association, freedom of labor, and freedom to use and trade acquired property. Economic freedom is an inseparable part of individual freedom, together with political freedom and civil liberty. It is true that the free initiative of individuals is the first key to progress, but institutions cannot be absent. Institutions are important because we need rules to regulate, for the benefit of all, the activity of individuals and companies, and an authority to enforce them.

Key words: *Economic freedom; market; institutions; justice; economy.*

Introduction

The first condition for achieving a dynamic of economic growth and job creation is economic freedom. There is no doubt that the countries that have achieved the greatest material prosperity are those

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that have enjoyed freedom of initiative, freedom of association, freedom to work, and freedom to use and trade acquired property. Economic freedom is an inseparable part of individual freedom, together with political freedom and civil liberty. The mutual relationship between the different forms of freedom can be seen in the numerous processes of transition that are taking place in the world from authoritarian regimes to liberal democratic systems. Some countries are starting first with political reform, others with economic reform, but both paths lead to the same place. One freedom calls for the other because both arise from the same background.

Economic freedom is, in principle, a personal attribute, but it develops, naturally, in the social relationship. In the free market there is an exchange of convenience between those who buy and those who sell, but from this activity useful information is obtained not only for the seller and the buyer, but also for others. This is the prices (Von Mises, 2009). Through the price of things, the degree of scarcity of each product in each place and time is known, and thus the reaction of the supply is provoked, which goes where there is the greatest demand. In this way, the free market acts as an efficient mechanism for the allocation of goods and services. Each actor seeks to make the greatest profit in the market, but together they all contribute to the formation of prices, which are the indicators that best guide economic activity according to needs. Thus a part of the powerful energy of individual selfishness is channeled to cover the needs of others, until the price decrease indicates the proximity of their satisfaction. From the dialogue of the market we obtain an answer, at least partial, to the apparent paradox of economic liberalism, that "invisible hand" that transforms the search for personal profit into the economic system that has brought about the greatest material prosperity in societies (Smith, 1983).

The reality of the market teaches us that economic freedom, like other freedoms, needs institutional ways to develop and combine in social coexistence, although the institution is always a subordinate, instrumental reality, because the ultimate meaning of economic or political action is once again found in individual persons, in their

greater well-being or in the enrichment of their rights and freedoms, because outside the person there is no other subject with truly autonomous reality, nor, therefore, any other equivalent real support to whom to attribute values, rights or responsibilities, nor to whom tomake the repository of material and moral progress. To use the words of the philosopher of economics, Ludwig von Mises (Von Mises,1983):

"Only the individual thinks. Only the individual reasons. Only the individual acts (...) Society does not exist independently of the thoughts and actions of individuals. It has no interests and aspires to nothing. And this is true for all other collectives".

It is true that the free initiative of individuals is the first key to progress, but institutions cannot be absent. Institutions are important, firstly, because we need rules to regulate, for the benefit of all, the activities of individuals and companies, and an authority to enforce them. Secondly, because not everyone has direct access to the benefits of the market and some redistribution of income is necessary. Thirdly, because economic progress and peaceful coexistence require security, justice, social protection and, in certain circumstances, economic activity by the public sector in education, infrastructure, etc.

It is not a question of whether institutions are strong or weak. Nor is it a question of whether the State is large or small. It is only a question of correctly defining institutional functions. A regulation that respects, and even stimulates, the economic initiative of individuals is adequate. On the other hand, only exceptionally can regulations that seek to direct or plan the economic activity of citizens be adequate. A regulation that respects private property is correct. If, on the other hand, the legislation easily allows recourse to expropriation, it is not correct. A moderate tax legislation is beneficial. However, a confiscatory tax law is an unbearable burden for economic growth. But what actually happens is that both adequate and inadequate institutions can be found mixed in many countries, even in democratic countries with liberal constitutions and a long history of market economy.

The Spanish example is very interesting for studying the influence of institutions on economic development and job creation. Forty-five years ago, with the new Constitution, an institutional reform

was initiated in Spain that was more concerned with reinforcing the political stability of our country than with stimulating economic efficiency. It was appropriate for that moment of change to a democratic regime. It was necessary to establish new rules for political participation and representation at home, and to define Spain's new place in international relations and institutions. Time passed, the institutional framework continued to develop, but the Spanish economy and employment were unable to take off. It was not until 1996 that the Spanish economy made its "transition". For almost twenty years, the institutional reform of democracy was unable to provide consistent positive stimuli to Spanish economic development and job creation.

From 1996 onwards, Spain undertook important reforms in the field of economic policy, mainly affecting budgetary, tax, market regulationand antitrust, labor, financial and monetary laws, privatization and administrative decentralization. The common character of these reforms was liberalization, i.e., expanding economic freedom for private economic agents and facilitating access to financial resources (De Empresarios, 1998).

The conclusion I draw from this brief history of the Spanish economy under democracy is that institutions are indeed important for economic development and job creation, but they do not always help. They can even be detrimental when they limit (for legitimate reasons,no doubt, although sometimes with little evidence) the initiative of the private sector. Thus, public resources are also eroded and, in the end, the means to give content to institutional statements are lacking. For example, the Constitution proclaims the right to work (Spanish Constitution: art. 35) , but we can see the number of unemployed at the present time. It is clear that there is no magic wand capable of creating jobs just by saying so.

But, above all, the laws must be good and there must be an adequate institutional structure to stimulate economic activity and organize it realistically and equitably. The rule of law and an independent judiciary are the basic guarantees of legal certainty, which has an economic value in itself, because it marks a more objective and

predictable playing field for economic actors and limits the risk of investments and contracts (García Collantes).

The natural complement to an adequate institutional structure, and tolegal certainty based on the rule of law and an independent judiciary, is an efficient administration of justice.

Justice and Economy

The legal framework and the judicial and institutional system are not ancillary or complementary aspects of economic policy, but fundamental requirements for the functioning of a market economy. Therefore, it is of the utmost importance to have an appropriate justice system to ensure not only the rule of law in a state governed by the rule of law, but also to guarantee the existence of a modern and efficient market economy. A malfunctioning of Justice generates diffuse or hidden costs, which are difficult to quantify, but relevant, and which fall on society as a whole, and not only on those affectedby judicial proceedings. A malfunctioning justice system, in particular, has a negative impact on business behavior and decisions (Circle of Entrepreneurs, 2003).

The situation of Justice and, in particular, judicial reform, always pending, are popular topics in a good number of countries. Their improvement is part of the broader process of State reform. The complaints that motivate the need for improvement or reform usually allude to its dysfunctional nature, visible in the excessive delay, its ineffectiveness, its costly nature, the poor quality of judicial decisions and the unnecessarily obscure and incomprehensible jargon of its pronouncements.

Only part of the aforementioned problems are attributable to the Administration of Justice itself. Another part has to do with the role played by lawyers, prosecutors, police, penitentiary system, attorneys, etc., or is attributable to procedural and substantive laws. For the same reason, the responsibility and solutions mainly involve the legislative and executive bodies at both the central and regional levels.

In my opinion, the central problems of justice in Spain, in its

relationship with economic activity, lie in the incentive structure that governs judicial work and in the divorce that exists today between the world of justice and the world of business. The fact is that there is often a remarkable disconnection between the business world and the administration of justice, which seem not only to operate with very different criteria, but also to speak very different languages. If the administration of justice is a mechanism for allocating productive resources in a society, the efficiency of this mechanism would require the courts to arrive at results similar to those that would have been achieved if it had been possible to apply the principles of free contract and free negotiation between the parties. Hence, it is important for judges to be well versed not only in the legal regulation of economic institutions, but also in the very rationality of the functioning of markets and firms.

If judges do not feel comfortable when they have to make decisions on some complex economic and business issues, neither do businessmen feel safe and confident before the courts of justice. On the contrary, their reaction every time they are involved in a lawsuit, as plaintiffs or defendants, is one of distrust, even if they are convinced that they are right.

It is true that a large part of the problems encountered by companies when they go to the Administration of Justice cannot be attributed strictly to the functioning of the Courts, but to the nature of the legislation they apply. It is, therefore, a matter that concerns the sphere of politics and the legislature. In the first place, the trend towards excessive interventionism on the part of the administrations, with their propensity to replace the free will of the parties with an endless number of mandatory regulations, must also be reiterated here. Labor legislation and urban leasing legislation are, among many others, clear examples of this, with their inevitable consequences of generating unemployment and a shortage of rental housing, respectively. Secondly, and as a consequence of the proliferation of regulations and their low quality, sometimes imposed by haste, convenience or political transactions, an additional source of uncertainty and confusion is generated by the

difficulties of interpretation and application that the Courts themselves encounter.

However, this brief reference should not be an obstacle to highlight its importance and the responsibility of the world of Politics - Governments and Parliament - to achieve in all fields a simpler and more efficient legislation with a less interventionist content, in line with a free market economy in a country as developed as Spain.

In any case, the slowness or delay of Justice is undoubtedly the most outstanding negative characteristic of its functioning. Particularly serious is the delay in criminal cases involving economic crimes, in which an unjustified sanction is added to the defendants ("*the procedure is the penalty*", said an important Italian jurist) and, in addition, if those affected are company executives or board members, institutions and not only individuals are punished, to the extent that their normal functioning and image are also negatively affected.

To this must be added the feeling of randomness in the final outcome of the procedure, which in turn is the result of various factors (regulatory deficiencies, contradictory rulings, errors or over-interpretations by judges, etc.). In short, and paradoxically, the final effect is legal uncertainty. Insecurity of substance, not of form, which is what counts. It can be said, then, that a slow and random justice is not justice properly speaking, and this is a relevant factor for the functioning of the economic system.

Slowness can be explained by several factors, of which insufficient resources (judges and non-judges) is only one of them. In judicial procedures there are still unnecessary or redundant steps and excessive and anachronistic formalisms, which respond to mentalities far removed from the search for efficiency and unfit for the modern world.

The courts follow a highly formalized model of action, whose procedures are subject to very rigid criteria, which often surprise those who come into contact with the world of the courts of justice for the first time. These requirements are intended to provide those who litigate with guarantees of objectivity and impartiality; but they also entail significant costs, since, in addition to the complexity of the substantive rules that each party argues in its favor, there is the complexity of the procedure

itself, for which the services of specialized persons must be hired.

If the Administration of Justice is necessary for the proper functioning of an economic system, it is not because it has no costs, but because its costs are lower than its expected benefits (Prada Presa, Hernando Santiago, Cabrillo, Pires Jiménez & Martín Jiménez, 2007) .

The introduction of costs in the model is of great importance for the purpose of determining the optimal level of guarantees to be applied in judicial processes. An economist's answer would be that whether or not to add new safeguards and checks on legality, such as longer trial periods, the possibility of appealing decisions taken by the judge throughout the process or the existence of a new instance before higher courts will depend on the costs and benefits of the measure adopted. More specifically, only if the marginal benefit of the new requirement exceeds its marginal cost will it have net positive welfare effects. The logic of the argument is easily understood by the absurdity of taking into account the benefits and not considering the costs. In such a case the optimal equilibrium would be obtained with an infinite level of resources and legality control. Since the marginal benefits of adopting greater safeguards are decreasing (note that these are marginal benefits and not total benefits) and the marginal costs of such measures are, however, increasing, each new increase in procedural safeguards implies -after a certain point- a net cost for society as a whole, and would therefore be inefficient. And despite the complexity of determining the exact content of this optimal level of guarantees, it is worth seriously considering whether we have not already exceeded it in many cases, with the social cost that this would represent.

We cannot fail to mention, in another order, a complaint that is often heard among those of us who have to go regularly to court, which is the great uncertainty that we harbor when we are a party to a proceeding, representing our client. It is argued, in fact, that very similar cases are decided differently and, what is even more striking, on the basis of very different interpretations of a given legal precept.

This situation poses many problems. On the one hand, it creates a feeling of insecurity that is clearly harmful to business activity. When

deciding on an investment or designing a certain strategy for the company, it is important to know whether it can be carried out without problems or higher costs than planned. Uncertainty as to what might happen with a lawsuit from individuals or other companies or with an administrative authorization can dissuade more than one company from continuing with its plans, with the costs that this implies not only for the company in question, but also for society as a whole.

The negative effects of this uncertainty do not end there. Uncertainty regarding the resolution of a case is also a clear incentive for increased litigation. In principle - and leaving aside purely dilatory strategies to avoid paying certain amounts or meeting certain obligations - a company will litigate in court when the expected benefit of winning a case exceeds its cost, the former being defined as the product of the discounted value of the disputed right times the (subjective) probability of winning the case. A situation in which the direction of the judgment is hardly predictable will substantially increase the probability interval; or, in other words, the potential litigant will have much less certainty as to what the judge or court may decide. As a result, companies that with a low probability of success in an environment of greater certainty would forgo litigation will now accept it. And this litigation will not only increase in the first instance. Appeals to higher courts will also increase, in this case for two reasons. Firstly, for the same reasons mentioned above; but also because, since there is the impression that uncertainty is greater in lower courts, it is to be expected that a high number of judgments will be reversed after being appealed, which increases the incentive to appeal to a higher court. And this may also explain the reluctance to reduce the possibilities of appeals shown by employers, referred to above (Prada, 2007).

Sometimes, the margins of interpretation of laws are so wide that they give rise to contradictory rulings on the same matter. But, frequently, this is due to the interpretative capacity of a judge, under the protection of a misunderstood principle of "independence", whereby he makes decisions that are "possible" from the legal-formal point of view, but which substantially contradict what would be the dominant opinion, doctrine or jurisprudence. There are no effective mechanisms to solve

these problems: many judgments are not subject to appeal because they are contradictory, nor are judges corrected when they exceed their interpretative capacity. If judges do not bear costs for their errors (citizens do), they bear even less for interpretative issues or for issuing contradictory rulings. But the important thing to emphasize is that all these situations not only generate costs for those affected, but for society as a whole, insofar as they accentuate the feeling of uncertainty or randomness in the final outcome of the cases. In short, they increase the impression of legal insecurity.

As A. Ollero rightly states, perhaps the time has come to put an end to the divorce between what the law really is and the vision of it provided by an ideological legal positivism, which disguises legitimizing and self-interestedly, the reality, hiding the authentic avatars of the laborious process of positivization that is shaping it (Ollero, 2007, p. 219).

More than a century has passed since one of the most prestigious American jurists of all time, Justice Oliver Wendell Holmes, wrote that "In the rational study of law, the man of letters is surely the man of the present; but the man of the future will be he who masters economics and statistics"(Arjona Sebastiá, 2006). It seems clear, however, that Spanish judges are still being trained much more to be the men and women of letters of the nineteenth century than to be the jurists of today's world of whom Holmes spoke. And if their economic knowledge is based on commonplaces of the past, it will be difficult for them to adopt a positive attitude towards today's economic institutions. It is certainly not the case that every judge is an expert in business economics. But it must be recognized that better economic training would contribute significantly to reducing the disconnection between the world of the courts and the world of business referred to above, which would in turn reduce the costs and distortions that exist today in the operation of companies and, therefore, in general economic activity.

If we accept that the best mechanism for allocating resources is the market, it would be desirable that the courts, in their adjudicatory activity, arrive at results similar to those that would have

been achieved by applying the principles of free contract and free negotiation between the parties. This is the thesis formulated many years ago by Judge Richard A. Posner (economist and justice since 1981 of the U.S. Supreme Court, which he presided over from 1993 to 2000) and which is today the most widely used criterion for determining the influence of the courts of justice on the course of the economy. According to this view of the problem, adequate justice would require judges to have a good knowledge not only of the legal regulation of economic institutions, but also of the very rationality of the functioning of markets and companies.

It should not be forgotten that what the courts do every day will be the oxygen that companies breathe. And it should also be remembered that every decision of a Judge, every Judgment, every Order in a dispute of economic content becomes a specific rule of regulation added to the law that companies will use in their decisions.

In any case, it is interesting to note, finally, that the attitude described above is not always linked to a particular political orientation of the judges, but seems to be conditioned, rather, by a system of values, which does not place primacy on the search for efficiency and pursues, instead, other objectives, usually of income redistribution. In this sense, the attitude of those who administer justice can only be a reflection of the majority opinion of the people. The relationship between the world of economics and law is thus reciprocal. On the one hand, laws and the administration of justiceare very important factors in explaining the greater or lesser level of development of a society. But, on the other hand, the content of the rules and sentences of the courts is often an image of the values of that same society.

The above considerations have not only tried to deal with the relevance that the judicial system has for the commercial world, I have also resorted to the economic criteria themselves to judge the efficiency of the legislation and of the administration of justice. Those who are accustomed to approaching the question of justice with a merely formal legal treatment may find my opinions strange; enclosed in legal dogmatics, the prism of efficiency may even provoke rejection. The existence of objectives linked to the limitation of resources is not,

however, a circumstance exclusive to mercantile exchange, but is unavoidably present in all human action, including that of dispensing justice. There is a mania, as disastrous as it is stubborn, of necessarily presenting efficiency as invalid for justice, which, if true, would enshrine an absurd incompatibility of moral values. Since inefficiency generates delays, the well-known maxim that "slow justice is not justice" would only be a manifestation of the fact that both values are consubstantial.

Conclusions

One of the institutional elements with a great impact on business activity is legal certainty, understood as the existence of clear, stable and transparent laws, whose compliance is guaranteed by the judicial system. Indeed, for many authors, legal certainty is one of the most important institutions for progress and prosperity. And in the absence of a sufficient level of legal certainty protection, the right to free enterprise and entrepreneurship in general face high transaction costs. Thus, the injustices of an insecure legal system adversely affect not only those who suffer directly, but society as a whole, whose progress is jeopardized.

In this sense, the modernization of Justice towards parameters of greater agility, security, efficiency and quality is a necessary condition to advance in social welfare and progress. The direction to take is none other than:

-The defense of Justice as the foundation of the Rule of Law of a democratic society, in which rights and freedoms are guaranteed, providing sufficient resources to preserve this threshold of protection.

-The full assumption of the concept of public service of the Administration of Justice, where the very growth of the legal system has led to a culture of increased litigation. A public service that must meet the requirements of accountability, transparency, efficiency and agility of a developed society.

-A more efficient justice system in terms of costs and duration of proceedings, and legal certainty and predictability, facilitates decision-making by companies and reduces their transaction costs. Regardless of their complexity and importance, procedural formalities are a means that must be placed at the service of the ultimate goal, legal certainty.

Legal security is diluted in the absence of sufficient and well-trained judges. Achieving well-trained judges requires good selection processes, adequate continuing education systems, the guarantee of a judicial career and professional stability. It is a matter of improving society's assessment of judges and the credibility of the judiciary.

Perhaps, for this very reason, because the selection and training of judges is a fundamental issue for the true independence of the Judiciary, it should be outside the competencies of the Ministry of Justice.

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STRENGTHENING THE STARTUP ECOSYSTEM TO DEVELOP AN INNOVATIVE ECONOMY IN GEORGIA

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Abstract:

Startups provide an opportunity to create a product that society needs. Innovation requires ideas based on everyday life. The development of innovation requires conditions that are usually combined into a startup ecosystem, an environment in which seemingly simple ideas are transformed into innovative startups, and then transformed into a business. Startups are realized ideas created with the goal of producing products that consumers need. Risky ideas, if successful, can become businesses that generate significant income. Each of us knows startups such as Facebook, Amazon, Apple, Netflix, Google very well. Founders, now already angel investors, once took the risk to create them, now they are successful ideas that turned into giants.

Key words: *start up ecosystem; incubators; acceleration; innovations; founder; angel investors; governmental support.*

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Introduction

The relevance of the startup ecosystem study issue and government support comes from the need to create innovations and develop the economy in modern conditions. Startups as a concept and process are relatively new in the Georgian economy and are subject to intensive research and encouragement. The creation of new products and services, innovations in various sectors of the economy is quite important for the domestic market. This area should be highlighted in a separate category, as it helps to create innovative approaches for solving modern problems in a short time with less costs. Government support is important aspect here and Georgia's government actively participates and makes contribution in startup ecosystem development.

The startup ecosystem and Government support in Georgia

Georgian startups have proven in a short time that they can be competitive in the global market. You may just have an original idea or a product that is important for the customer's success, but when we want to create a startup, it is difficult to imagine its formation and development without the right ecosystem. The ecosystem includes the necessary infrastructure, educational programs, mentoring, accelerators, incubators, lectures, and master classes, which are quite expensive and may not be available to a startup. That is why government support issue remains so vital.

This support can be financial, tax incentives and access to resources that are critical to the success of new ideas - mentoring, training and network expansion. The purpose of government support is to help startups overcome the challenges they face, to create a favorable environment for innovation and growth.

The most common types of government support include[1]:

[1] https://aicontentfy.com/en/blog/impact-of-government-support-on-startups

1. **Financial support**. May be considered in the form of grants, loans, or tax breaks. Financial support can help startups secure the funding they need to get started and grow their business.
2. **Regulatory and legal support**, includes reducing bureaucracy, simplifying the process of obtaining necessary licenses and permits, and providing guidance on compliance with various regulations.
3. **Tax benefits.** Through incentives or loans, the government can reduce the financial burden on startups, making them more attractive to private investors, who may view tax breaks as a form of risk reduction.
4. **Research and development initiatives.** Government assistance in funding research or creating partnerships between start-ups and universities or research institutes.
5. **Entering foreign markets:** Governments can help startups enter new markets, both domestically and internationally. They can enter into trade agreements that will make it easier for startups to export their products or help foreign investors and customers.
6. **Mentoring and training.** Such programs can help entrepreneurs develop the skills needed to succeed, connect with experienced business leaders, and build a support network.
7. **Access to resources -** office space, technology, and network capabilities. These resources will help startups save money and focus on growing their business.

According to the decree of the Government of Georgia, in June 2016, the country launched a venture investment program – "Startup Georgia", which is part of the government's 4-point plan. It provided financial support for innovative business ideas, which includes various components: financing, simplification of tax and legal procedures, promotion of relevant education. The project coordinators are the Partnership Fund and the Georgian Agency for Innovation and Technology. The venture investment project is intended for startups in the field of high technologies, including areas as artificial intelligence, biotechnology, bioinformatics, computer engineering, computer science, information technology, nanotechnology, nuclear physics, electromagnetic radiation, robotics, semiconductors, and

telecommunications. High-tech projects were appreciated by venture investors from Silicon Valley. The Georgian Innovation and Technology Agency also ensures that successful projects are presented to international investors for additional investment.[1]

The mission of the Georgian Innovation and Technology Agency (GITA) is to create the necessary ecosystem for the development of innovation and technology in Georgia, promote the commercialization of knowledge and innovation, stimulate the use of innovation and technology in all sectors of the economy, create the necessary conditions for the growth of exports of innovative and high-tech products, as well as develop high-speed Internet throughout the country. To achieve these goals, the agency is constantly working to expand the infrastructure for the development of innovation and technology.

To effectively implement the mission, GITA gives priority to investments in the development of infrastructure necessary for innovation, which is manifested in the opening of technology parks, innovation centers and industrial laboratories, creating tools to promote innovation and commercialization of technology, achieving high levels of Internet access throughout the country, providing training to improve competitiveness in the labor market, and initiating legislative packages to stimulate innovation and technology development. In order to develop the startup ecosystem, GITA has developed a plan to make Georgia one of the best places to create startups in the region. For this purpose, the "Innovation Startup Boot Camps" project was launched, the main goal of which is for citizens of the whole world and Georgia to create a team to work together and jointly find solutions.

Business Incubator is a promotion program that allows entrepreneurs to go through the process of forming and developing their own business ideas. The goal of the program is to support participating teams and develop their innovative business ideas into successful

[1] https://www.economy.ge/?page=projects&s=29

businesses. As part of the program, each team will receive free products and services worth up to USD 11,000, will undergo training in project management, marketing, business plan formation and others. They will be advised on financial, legal issues, intellectual property protection and other issues; The teams will be provided with a common workspace in the Technopark and will receive programmatic, intellectual, and material support from the Agency, members of the mentor network and the Agency's partner organizations. In addition, each team will receive a cash grant from the agency in the amount of up to $2000 for prototype.

In 2016 National Innovation Ecosystem (GENIE) Project, the Georgian government and the International Bank for Reconstruction and Development (IBRD) signed a five-year loan agreement to provide Georgia with US$40 million to implement the National Innovation Ecosystem. The main goal of the GENIE project was to increase the innovative activity in Georgia and ensure [1]participation in the digital economy. To achieve this, it was planned to form regional and public innovation centers, expand access to the Internet for socially vulnerable families and small businesses, develop the skills and capabilities of digital and electronic literacy of entrepreneurs, and provide access to financing for high-tech and innovative projects.

Georgian Innovation and Technology Agency (GITA) of the Ministry of Economy and Sustainable Development offers co-financing grants in the amount of K60 USD, K20 USD and K240 USD to startups to support innovation.

It's worth to mention such programs as: **500** Global - presented in Georgia since 2020 and is held twice a year. Several Georgian startups have already found their place within its framework. 500 Global attracts startups to a multi-stage acceleration program, during which aspiring

[1] https://forbes.ge/georgian-startups-rankings-with-the-volume-of-attracted-investments/

entrepreneurs, together with leading specialists, develop their business model, acquire new contacts, and participate in a demo day, where they present a prepared presentation and can find both investors and business partners. Supporters of this acceleration program in Georgia are GITA and Bank of Georgia. During 2020-2021, 500 Global conducted two acceleration programs in Georgia, which attracted a total of 30 Georgian and international technology startups. Four of these startups—CARDEAL, Cargon, Payze, Agrolabs—traveled to Silicon Valley for the final component of the program, which included investor networking activities. This program was so successful that in August 2022 a contract was signed for another 4 years of cooperation. Startups participating in the 500 Georgia program participated in the 2023 International Web Summit in Lisbon[1].

“Startuper" is a program of TBC Bank, which is also focused on the development of the startup sector. The bank supports small entrepreneurs and makes various offers for them - these are different leasing and lending opportunities depending on the field of activity of startups. In addition to financial benefits, startups can take a course specially designed for them and gain knowledge on how to develop a startup.

Shark Tank Georgia - The Georgian analogue of the popular TV show, whose investors have already financed several ideas and provided the opportunity to implement them. There have been two seasons of the TV show so far. In it, participants pitch their idea to several investors and try to convince them to invest in their business.

Startup Drive - another program that supports a specific sector of startups. This is a transport category, a project of the Tegeta holding, which has already financed several different small enterprises for K35, K25 and K15 USD.

[1] https://bankofgeorgia.ge/ka/about/news/details/62f109b612c31f18c08f4d84

There are 3 tech parks in Georgia and 2 innovation centers. Techno parks represent a modern space, equipped according to the latest requirements, where technological, educational, and professional resources are collected. It is a combination of incubators, training centers and laboratories, co-working, and entertainment spaces, and provides access to training centers and exhibition halls. As for innovation centers, they are mini-techno parks and offer identical services to local users. Currently, there are 22 FabLab in Georgia, they have to date implemented more than 800 projects.

Within the framework of the grant program "Innovation grants up to 25,000 GEL for regions", 80 projects were financed. Throughout the country, all tech parks are operating at full capacity, in innovation and technology they offer several programs, trainings, master classes.

As a result of the establishment of tax benefits for IT companies by the Georgian government, 113 international IT companies entered Georgia, which, based on the results of the 10th month of 2023, paid 830 million Gel in wages or more, and more than 10,000 jobs were created[1].

To promote the development of the technology sector in Georgia, Agency for Innovation and Technology has launched an EU-funded project "Do IT with the EU". The goal of the project is to promote innovation and job growth in the Georgian IT sector. As part of the project, over 2 years, with the support of the European Union, more than 1,300 Georgian citizens will be trained in the most demanded and highly paid professions on the global market, such as cybersecurity, data science, project management and cloud technologies. 1,000 IT specialists will have the opportunity to obtain international certification, and 300 IT specialists will receive a unique employment opportunity to become competitive in the international market.

[1] https://gita.gov.ge/news/gita-s-tavmjdomare-avtandil-kasradze-sakartvelos-parlamentis-dargobrivi-ekonomikisa-da-ekonomikuri-politikis-komitetis-4qb_VQs3T

Conclusions

To summarize, we can say that processes related to supporting innovation in Georgia and creating a startup ecosystem are actively supported by the state. The Georgian government is taking many steps to improve the direction of development in this area. The support we currently see is quite active and at a high level. The government, together with interested parties, makes a great contribution to the emergence of new ideas, their development, and entry into domestic and foreign markets. This assistance is necessary for economic development, job creation and improvement of the socio-economic situation in the country.

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RESPECTING HUMAN RIGHTS AND FREEDOMS IN APPLICATION OF COERCIVE MEASURES IN THE CRIMINAL PROCESS

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Abstract:

The problem of criminal procedural coercion can be viewed from several points of view, which touches the most diverse aspects of regulating the behavior of subjects in the criminal process. Criminal procedural coercion penetrates not only into the sphere of legal relations, rights and personal interests guaranteed by the state through the Constitution of the Republic of Moldova, but also into the sphere of psychological and ethical relations.

Keywords: *criminal process; coercion; criminal justice; inviolability; safety; human rights; freedoms; sequestration.*

Introduction

In the long process of the democratization of society, which requires increased care of the state towards the protection of human rights in the criminal process, on the one hand, and the need to ensure the

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criminological security of society, on the other hand, it proposes special requirements regarding the procedural coercion measures applied by judicial bodies.

The interests of criminal justice are largely determined by the principle of the inevitability of punishment for the crime committed. In order to achieve the given goal, the state ensures the organization and activity of criminal prosecution bodies with criminal procedural coercion measures.

Criminal procedural coercion is a means of state influence, which manifests itself in the legitimate limitation of the personality, with a patrimonial or organizational character, of participants in criminal proceedings, which presents a danger to the administration of justice in order to ensure the resolution of the criminal case.

According to art. 25 of the Constitution of the Republic of Moldova, individual freedom and personal safety are inviolable. At the same time, the state establishes a series of measures aimed at guaranteeing a fair criminal trial. This fact leads to coercive measures in the criminal process being carried out based on a complex system of principles.

Individuals being the subjects of the criminal process have a wide range of rights. The criminal investigation bodies have in turn the obligation to take all the necessary measures to prevent and solve the crime and respect the rights of the participants in the criminal process.

For most individuals (persons) involved in the criminal process, it is usually an unpleasant and undesirable situation. Namely, their real participation in the case investigation process can be ensured by two conditions:

1. Legislative consolidation of cooperation obligations with criminal investigation bodies by establishing influence measures;
2. Providing the criminal investigation bodies with real procedural means to overcome the opposition.

Analyzing the role and place of coercive measures in the professional activity of criminal investigation bodies, we agree with the opinion of the author Șeifera S.A, regarding the fact that any

investigative action is based to some extent on state coercion (Sheifer, 1981, pp.104-105). At the same time, coercion as a criminal procedural measure in a general sense can be defined as the influence of the state on a subject with the aim of subsequently bringing his behavior in accordance with the law.

Taking into account that coercive measures in the criminal process to the greatest extent are aimed at limiting fundamental human rights and freedoms, the conditions for their application are of particular importance.

In this context, it should be noted that coercive procedural measures can be applied:

-Only in criminal cases, under procedural action;

-In the cases and grounds provided by the Criminal Procedure Code of the Republic of Moldova;

-To achieve the goal set before the criminal process;

-Only by the criminal investigation bodies, the prosecutor, the investigating judge or the court according to its competence;

-Regarding the persons participating in the criminal process, whose illegal behavior prevents the criminal process from proceeding;

-Regardless of the will or desire of the person to whom they are applied.

Coercive measures can be classified according to different criteria. In the context of the analysis carried out in the given article, it will be beneficial to complete the classification given by the Code of Criminal Procedure of the Republic of Moldova in art.197, with a sub-criterion related to the intensity of the limitation of the rights and freedoms of the persons against whom they are applied. Such measures must be assigned: detention, preventive measures, forced bringing, seizure, coercive measures of a medical nature.

In order to respect the rights and freedoms of the persons involved in the criminal process, the criminal investigation body is obliged to carry out the investigation under all aspects, complete and objective, of the circumstances of the case in order to formulate conclusions regarding the necessity of applying these measures.

In our research, we do not aim to carry out a deep analysis of the

application of each coercive procedural-criminal measure, but the problem of establishing the complete circumstances necessary for the application of the measure aimed at limiting the person's freedom.

Speaking about the measure of coercion in the form of detention when applying it, the criminal investigation body must verify all the information on which the decision regarding the application of a measure limiting the person's freedom is based. In this context, we can not agree with the opinion of the savant I.L.Petruhin, who claims that there is a reciprocal relationship between the seriousness of the crime committed and the probability of making a mistake when detaining the person (Petruhin, 1989, p.19).

In our opinion, the obvious manifestation of the signs of a crime can indeed serve as a reason for detaining a person, however, this fact does not release the criminal investigation bodies from the obligation to investigate as fully as possible the grounds of detention in the criminal case.

Analyzing the preventive measures, it must be emphasized that the basis for the application of any of the measures is the existence of real evidence confirming that the suspect/accused being free will commit one of the following actions: to hide of the criminal prosecution or court, will prevent the discovery of the truth or will commit other crimes.

There are other opinions on the grounds necessary for making a decision on the application of the coercive measure. Thus, a group of authors attributes to them grounds and actions of the suspect/accused related to the inappropriate behavior expressed by violating his procedural obligations (Dolea, Roman & Sedlețchi, 2005). Analyzing the mentioned opinions from the point of view of respecting the rights and freedoms of the participants in the criminal process, we observetheir disadvantage, which is the use of not evidence as a basis for issuing a decision regarding the application of a coercive measure, but only the suspicion of the possibility of negative behavior of the suspected/accused person.

Preventive arrest is the measure that most significantly limits the freedom of the person against whom it was applied. Precisely for this

reason, the legislator established a series of guarantees against the unjustified application of this coercive measure.

As it was also mentioned that the prosecutor's decision regarding the application of the coercive measure largely depends on the existing evidence in the criminal case that is the basis of the accusation. At the same time, we agree with the opinion of the author Z.F. Covriga, who claims that, based on the law of logical thinking, the legislator does not accept the possibility of applying the preventive measure in the case of a probable conclusion regarding certain circumstances (Covriga, 1987, p.37).

The basic circumstances necessary for making a decision regarding the application of a preventive measure in the form of arrest are specific evidence, which confirms the criminal act and the person's guilt, as well as other circumstances provided by the Code of Criminal Procedure.

In the given context, we should note that in paragraph 1 of art. 176 CPP RM the wording "...to assume that the suspect, the accused, the defendant could hide[1]..." fails to fully identify cases of real need to apply the preventive measure.

The key word in the given wording is without a doubt "to assume", a fact which indicates that in the given norm the reasons for the applied decision are listed and not grounds. And the wording"...there are sufficient reasonable grounds..." establishes that the reasons for applying the preventive measure must be based on concrete evidence reflected in the criminal case.

All the mentioned circumstances are also current in the case of the application of other preventive measures, which are not related to deprivation of liberty. The main question that arises when applying the preventive measure is, in our opinion, that in practice there are cases of applying these measures as a method of psychological influence on the suspect/accused, with the aim of forcing him to testify.

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[1] The Code of Criminal Procedure of the Republic of Moldova, no. 122 of 14.03.2003. In: Official Gazette of the Republic of Moldova, no. 104-110 of 07.06.2003 (with amendments and additions until 19.04.2022).

In this context, the author I.L.Petruhin, claims that a person being under psychological influence due to the fact that preventive measures will be applied to him, can falsify the information. (Petruhin, 1989, p.19)

Pronounced character of procedural coercion has such a measure as forced bringing. Compulsory bringing consists in forcibly bringing the person to the criminal investigation body or to the court if he, being summoned, in the manner established by law, did not appear without good reasons and did not inform the body that summoned him about the impossibility of appearing his, and her presence was necessary.

The basic rule of compliance with the legality and justified application of this measure consists in the obligation to demonstrate the fact of the lack of valid reasons for non-appearance at the criminal investigation bodies or the court.

An important point regarding the respect of human rights and freedoms when applying the analyzed measure is the fact that:

- the person subject to forced bringing must be compulsoryparticipant in the process;
- the person cannot be subjected to forced transportation during the night;
- minors under the age of 14, pregnant women and sick people cannot be subjected to forced transportation.

In the context of our research, we can not overlook the sequestration as a coercive measure that in its essence limits fundamental human rights. **Sequestration** of assets is a coercive procedural measure, which consists in inventorying the assets and prohibiting the owner or possessor from disposing of them, and in case of necessity, from using these assets.

After the **sequestration** of bank accounts and deposits, any operations regarding them are terminated.

The application of this measure consists in taking during the criminal process bya the ex officio criminal investigation body or the court, at the request of the parties for some insurance measures to repair the damage caused by the crime, for the eventual special confiscation or

extended confiscation of the goods, as well as to guarantee the execution of the fine.

We fully support the assertions that the reparation of material damage caused by a crime is possible only if the person who committed the crime is identified and entrusted with the obligation to repair this damage.

Consequently, for the sequestration of assets, a set of evidence is also needed to confirm the fact that the act was committed by a certain person. Moreover, as a complement to the current legislation, this measure also limits the rights of the accused such as the right to secrecy of deposits, the right to secrecy of transactions with goods and securities. Undoubtedly, such actions on the part of the criminal investigation body are necessary to achieve the purpose of the criminal process.

In addition, it is necessary to point out the circumstances that remove the assets from seizure. According to art. 210 CPP of the Republic of Moldova, some are removed from sequestration by the decision of the criminal investigation body or the court if, following the withdrawal of the civil action, the change in the legal classification of the crime charged to the suspect, the accused, the defendant or for other reasons, the need to keep the assets under sequestration has ceased.

The court, the investigating judge or the prosecutor, within the limits of their competence, lift the sequestration of the goods in cases where they find the illegality of placing them under sequestration by the criminal investigation bodies without the respective authorization.

Conclusions

In the Conclusion, we mention that the preventive measures do not constitute a punishment, but only some actions taken by the criminal investigation bodies to exclude the antisocial behavior of the suspect or the accused, which through his actions could prevent the criminal process from proceeding, a fact that will lead to the impossibility of establishing the truth . We emphasize that preventive measures are not only coercive but also prophylactic, which is a determining factor in the fight against criminality.

All the actions of the judicial bodies are aimed at discovering the crimes, establishing the person guilty of committing them and accumulating the evidence that confirms the guilt of the suspected person so that later the court can examine the case and issue a sentence of conviction or acquittal. The criminal investigation bodies performing their functions must respect the rights and freedoms of the suspect and the one accused of committing a crime and allow the limitation of these rights and freedoms only within the limits provided by the legislation in force.

According to the Criminal Procedure Code, the interests of the suspect, the accused and the defendant are diametrically opposed to the purpose of the criminal investigation bodies. More than that, the purpose of criminal investigation bodies is not only to identify and convict the criminal, but also to ensure guarantees and immunities, such as the right to be free from self-incrimination, the right to defense, the right to free movement and others.

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INTERNATIONAL CONSOLIDATION OF THE PERSONAL DATA PROTECTION SYSTEM

Alejandro RODRÍGUEZ ROCA[1]

Abstract:

This paper studies the development process of the personal data protection system that deepens its roots in privacy rights and extends its scope towards the free development of personality. All this from a global and historical evolutionary perspective with the intention of contributing to a solution to the problem of mass processing of personal information that affects the extension and limits of other fundamental rights.

Key words: *personal data; privacy; fundamental right; global law.*

Introduction

In today's globally interconnected technological landscape, the protection of personal data has emerged as a paramount concern, shaping the contours of privacy and individual rights. The rapid evolution of digital technologies, coupled with the widespread use of the internet and

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advanced data-driven systems, has ushered in an era where personal information is a valuable currency. This paradigm shift necessitates a profound understanding of the importance of safeguarding individuals' data in the face of emerging challenges and unprecedented opportunities.

The increasing digitization of personal information, from financial details to healthcare records, has heightened the need for robust frameworks that balance innovation with the protection of privacy. As individuals engage with online platforms, smart devices, and cutting-edge technologies, the sheer volume and sensitivity of data collected underscore the critical role that data protection plays in preserving fundamental human rights.

Moreover, the globalization of technology transcends borders, requiring collaborative efforts on an international scale to address the complex web of legal, ethical, and societal implications. The interplay between data-driven innovations and the preservation of privacy underscores the delicate balance that must be struck to ensure responsible and ethical use of personal information.

Against this backdrop, the significance of data protection extends beyond individual rights; it encompasses broader societal implications, economic considerations, and the trust individuals place in digital ecosystems. Issues such as identity theft, unauthorized surveillance, and the potential misuse of personal data underscore the urgency for comprehensive legal frameworks and ethical standards to safeguard against these risks.

In this dynamic environment, understanding the multifaceted dimensions of data protection is crucial for individuals, businesses, and policymakers alike. As the global community navigates the intricate landscape of data privacy, striking the right equilibrium will be pivotal in fostering a digital environment where innovation flourishes without compromising the integrity and rights of individuals. This exploration delves into the evolving landscape of data protection, examining its international dimensions and the imperative for a comprehensive, adaptive framework in our interconnected world.

1. Development of the right to data protection in a global scenario

The right to privacy has been enshrined as a human right both in the Universal Human Rights System and in regional systems. The Universal Declaration of Human Rights of 1948 (Article 12), the International Covenant on Civil and Political Rights of 1966 (Article 17), the International Convention on the Protection of the Rights of All Migrant Workers and Their Families of 1990 (Article 14), and the Convention on the Rights of the Child of 1989 (Article 16), all include it in practically the same terms. Likewise, the right to privacy enjoys explicit recognition both in the inter-American context, through Article 11.2 of the American Convention on Human Rights, and in the European context, through the European Convention on Human Rights (Article 8). A different issue arises regarding the right to the protection of personal data, as these international instruments lack explicit reference to it. This would take a few more years to materialize (Maqueo Ramírez, 2017, p. 80).

During the 1960s and 1970s, study committees or commissions on privacy proliferated in practically all advanced countries, as well as in the most relevant international organizations. These were structures under the formula of a committee, commission, or working group with the aim of studying the threats that the development of communication and information technologies could pose to the right to privacy, and issuing reports or recommendations (Herrero Higueras, 1996, pp. 11-24). These committees were the precedent for today's personal data protection authorities, which exist in most European countries. Since then, countries such as France, the United Kingdom, Sweden, Germany, Canada, Norway, Denmark, the Netherlands, Switzerland, and Australia have passed data protection laws (Hondius, 1975, pp. 39-40).

There is a precedent in European law related to the aforementioned, which is the Conference of Nordic Jurists held in Stockholm on May 22 and 23, 1967, organized by the Swedish section of the International Commission of Jurists (Novoa Monreal, 1979, p. 30). This scientific meeting referred to international texts such as the

Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. Its significance lies in recognizing that the right to privacy is an individual's right to be left alone, to live their own life with a minimum of external interference (Urabayen, 1977, pp. 311-315). Representatives from eleven countries attended, in addition to those from the Nordic countries, along with observers from various national and international organizations (Herrán Ortiz, 1998, p. 55).

There were other significant meetings and scientific gatherings in different locations, including the International Conference on Human Rights held in 1968 in Tehran. This conference had an impact on European law as it acknowledged the possibility that electronics could affect personal rights related to privacy, emphasizing the need to limit such intrusion (De Miguel Castaño, 1973, p. 91) Therefore, it recommends to the United Nations that it undertake a study of the issues raised regarding human rights that may be affected by the development of technologies. Finally, on December 19, 1968, the UN adopted Resolution 2450, which establishes the need to set limits on the applications of the electronic network due to its potential interference with personal rights. It requested the Secretary-General to prepare a report detailing the studies conducted or underway on the matter. Thus, an intense period of work begins on the challenges posed by the impact of scientific and technological progress on human rights, culminating in 1983 with the approval by the Human Rights Commission of a report on the study of relevant guiding principles on the use of computerized personal data files.

2. The role of international organizations in regulatory evolution

As has been evident, the regulation of personal data protection has by no means been uniform across different countries. Therefore, international instruments known as soft law have greatly contributed to establishing minimum guarantees that should be respected, as well as to developing a minimum set of concepts, principles, rights, and obligations (Blas, 2009, núm, 23, p. 63). Therefore, the recommendations and

guidelines of international organizations such as the UN, APEC, OECD, or the Ibero-American Data Protection Network have been particularly important in promoting a system for the protection of personal data (Benett, 1992, pp. 61-65).

The OECD developed guidelines on the protection of privacy and the transborder flows of personal data, which prompted significant reforms in the domestic legislations of states to prevent the unlawful storage of personal data, as well as unauthorized disclosure. They focus on the protection of individual freedoms concerning privacy, specifically with personal data, although there is no explicit reference to the right to data protection. The guidelines apply to personal data that, due to the way they are processed, their nature, or the context in which they are used, pose a risk to privacy and individual freedoms. They define the concept of personal data, conceiving it as any information related to an identified or identifiable individual, regardless of whether its processing is carried out in the public or private sector, or whether it is done automatically or manually (Martínez López-Saez, 2018, p. 64).

The Guidelines of September 23, 1980, on the Protection of Privacy and the Cross-Border Flow of Personal Data established the essential principles of the current protection system (Herrán Ortiz, 1998, p. 58). Given the disparate regulation on data protection in the member states, the exchange of information was hindered, thereby impeding growth opportunities, as it is considered a crucial element of socio-economic development. For these reasons, the OECD developed guidelines to harmonize regulations and attempt to avoid obstacles to the international transfer of data. These guidelines resulted from the work of the working groups on Databases in the Public Sector, eventually forming a group of experts on the subject. The guidelines were implemented through three main international instruments. Firstly, the Recommendation of September 23, 1980, urging states to consider their domestic legislation; secondly, the Guidelines on the Protection of Privacy and the Cross-Border Flow of Data; and the Declaration of April 11, 1985, on Cross-Border Data Flows. The principles outlined in these declarations and recommendations represent a consensus on basic

principles, many of which have been incorporated into national legislations, serving as a model for countries that do not yet have such regulations.

The aim was to establish a catalog of privacy principles so that if respected by all states, a legitimate cross-border flow of information would be guaranteed (Guerro Picó, 2006, p. 50). The principles are: data collection limitation, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation, and the principle of accountability. Regarding the international transmission of data, the basic principle is that all member states must ensure the security of information traffic, and as a prerequisite, states are required to substantially observe these guidelines. It allows for individual restrictions, particularly in the case of restrictions on sensitive data and when the destination country does not provide an equivalent level of protection, always considering that these restrictions must be compatible with the principle of proportionality to the purposes pursued.

The broad and flexible nature of the principles, from a technological standpoint, has facilitated their endurance, consolidating a certain agreement in the international community on this matter. The guidelines aim to secure a commitment from Member States to respect the right to privacy and legal certainty in the face of technological development, thus avoiding undue obstacles to information exchanges.

In 1990, the United Nations General Assembly adopted the Guidelines for the Regulation of Computerized Personal Data Files outlined in Resolution 45/95 of December 14, 1990. One notable aspect was its contribution to the development of essential principles for the protection of personal data through a list that member states were expected to incorporate into their respective domestic legal systems. Therefore, it represents the first universally applicable document in this field.

They lack binding force for member states, as is the case with OECD Guidelines, and therefore can only be regarded as guidelines. The procedures to be implemented for the computerized filing of personal data are at the discretion of each state, subject to a set of guidelines and principles: the principle of fair and lawful collection and processing; the

principle of accuracy and updating of processed data; the principle of specifying the purpose and proportionality in processing, whereby data should only be retained as long as necessary for the purpose that led to its collection; the principle of access by the data subject, entailing the right to promptly and at no excessive cost, know the processed data and its potential recipients, and to request rectification or deletion of unlawfully, unjustifiably, or inaccurately processed data; the non-discrimination principle, establishing a general prohibition on the processing of data related to racial origin, sexual life, religious or political opinions, or membership in associations or unions; it also establishes limitations to exceptions to the principles, based on the protection of national security, public order, health or public morality, and the rights and freedoms of third parties; the security principle, aiming to protect processing against natural risks or accidental loss; supervision and imposition of sanctions: each party should appoint an impartial and independent authority to oversee compliance with the principles and have the power to impose criminal or similar sanctions for their violation; and concerning international transfers, there should be an exchange of personal data that establishes equivalent safeguards (Ortega Giménez, 2015, p. 41).

Regarding compliance with the Guidelines, it is stipulated that each country appoints the authority, in accordance with its regulations, responsible for overseeing compliance with the aforementioned principles. This authority must provide assurances of impartiality and independence. As for their scope, it is established that the principles apply, first and foremost, to all computerized files, whether public or private, as well as manual files. Special, optional provisions may be enacted to apply the principles to files related to legal entities, especially when they contain information about individuals.

The second part of the UN Guidelines pertains to computerized personal data files maintained by International Governmental Organizations. Each organization must designate the legally competent authority to monitor compliance. A humanitarian exclusion or exception clause for the application of these principles is also considered in the following cases: when the purpose of the file is the protection of Human

Rights and Fundamental Freedoms of the affected person or humanitarian aid. A similar exception should also be provided in national legislation in favor of International Governmental Organizations (Figari Costa, 2012, p. 128).

The Asia-Pacific Economic Cooperation (APEC) forum was established in 1989 as a mechanism for economic and technical cooperation to facilitate regional trade and investment among its member countries in the Pacific Ocean basin. APEC does not have a formal treaty; therefore, its decisions are made by consensus, and its statements are not binding on member countries. Nevertheless, its agreements and declarations serve as a guide for member countries regarding regulatory policies to be followed in various topics related to their objectives. One of these purposes is related to trade and data protection. APEC recognized that a significant part of efforts to enhance consumer trust and ensure the growth of e-commerce should focus on establishing minimum standards for effective privacy protection. In this way, it promotes the free flow of personal information throughout the Asia-Pacific region, resulting in improvements in cross-border business.

In 2004, APEC approved its "Privacy Framework" with the goal of strengthening privacy protection and enabling international information flows. However, it positions the issue of privacy as an obstacle to e-commerce. For APEC, consumer distrust in the privacy and security of electronic transactions can hinder growth opportunities for the economies of member states. As privacy is respected to a greater extent, consumer confidence increases, leading to greater economic growth. Protecting rights and freedoms is a byproduct of the need to eliminate barriers to free trade (Ortega Giménez, 2015, p. 51).

Regarding the scope of the principles outlined in this APEC Privacy Framework, it is established that it applies only to personal information of individuals. Personal information is understood as information that can be used to identify an individual or make them identifiable. In other words, while it may not, on its own, allow for the identification of an individual, in conjunction with other information, it can enable the identification of the person. This regulation excludes the processing of data related to legal entities, information collected and used

solely for domestic purposes, as well as information voluntarily made available to the public by individuals, official documents in the public domain, journalistic reports, and information required by law to be made available to everyone. As can be seen, these are ambiguous scenarios that require further precision, and national legislations addressing them should rely on criteria of legal authorization based on the principles of purpose and proportionality (Figari Costa, 2012, núm. 61, p. 128).

As for the principles governing APEC, it has based its privacy protection and international information flow principles on those of the OECD. Sections 14 to 26 outline the following principles for the intended privacy security through the personal data protection system: Principle of harm prevention; prior information principle; limitation of collection principle; personal information use principle; choice principle; personal information integrity principle; security principle; access and rectification principle; and responsibility principle. Additionally, exceptions to the compliance with these principles are also established. These exceptions include those related to sovereignty, national security, public safety, and public policy. These exceptions must be: a) limited and proportionate to the objectives they pursue, and b) publicly known and in accordance with the law.

3. Promotion of the council of Europe in the field of personal data protection

The Council of Europe was established in 1949 with its permanent headquarters in Strasbourg. Currently, it comprises 47 member states. According to its statutes, the Council of Europe aims to protect human rights and the rule of law in all member states; consolidate the democratic stability of Europe by supporting constitutional, political, and legal reform at the national, regional, and local levels; find solutions to social problems, discrimination against minorities, xenophobia, intolerance, and violence against children; promote and develop European cultural identity, social cohesion, and social rights, with particular attention to education.

In the specific field of personal data protection, the Council of Europe has been a true reference. Already in the late 1960s and early 1970s, there was concern about the potential threats posed by the processing of personal data through computerized means to the privacy of individuals. Since then, efforts have been made to facilitate the exchange of data and institutional and commercial relationships between different countries, avoiding data havens (Troncoso Reigada, 2010, p. 56).

The normative instruments of the Council of Europe on the protection of personal data are closely aligned with the content and objectives of the OECD and UN Guidelines, as well as the regulations of the European Community (Estadella Yuste, 1995, pp. 59-75).

Two are the international instruments of the Council of Europe that have had the greatest impact on the development of the right to data protection: the European Convention on Human Rights, also known as the Rome Convention of 1950, which for the first time at the European level enshrines the protection of private life, and Council of Europe Convention 108/81/EC of January 28, 1981, for the protection of individuals with regard to the automated processing of personal data.

The European Convention on Human Rights was adopted by the Council of Europe on November 4, 1950, and came into force in 1953. It is a regional international treaty that includes a catalogue of fundamental rights and freedoms that the signatory states commit to respecting and ensuring. Currently, the accession of new states to the Council of Europe is contingent upon the signing and ratification of the ECHR (Arenas Ramiro, 2006, pp. 43-44).

The ECHR draws inspiration from other international human rights texts, primarily the Universal Declaration of Human Rights. However, there are significant differences between the two. Firstly, the ECHR is an international treaty and, therefore, carries legal obligations, while the UDHR lacks enforceability. Secondly, the ECHR establishes a system of international judicial guarantees to monitor compliance with the rights it recognizes, a feature absent in the UDHR as well (Martínez Martínez, 2004, p. 57).

The Rome Convention of 1950 for the Protection of Human

Rights and Fundamental Freedoms has the distinction of being the first European conventional text that enshrines the protection of private life. Article 8 of the convention states, "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." As can be seen, the provision outlines a set of rights without specific details. Therefore, the effective content of this provision has been clarified through the jurisprudence of the European Court of Human Rights (Morte Gómez, 2010, 10, p. 14).

The right to respect for private and family life enshrined in Article 8 of the ECHR belongs to the so-called personal or personality rights (Meyers, 1988, p. 13). Its purpose is to allow individuals a personal and reserved space necessary for the development of their personality. It enables the respect of an individual's private and reserved space, protecting not only privacy but also the free development of their personality.

The legal interests protected by Article 8 of the ECHR serve the goal of ensuring that autonomous sphere of action and personal development. In this regard, the ECtHR has indicated that the guarantee provided by Article 8 of the ECHR is primarily intended to ensure the development, without external interference, of the personality of each individual in their relationships with others. In other words, each individual is guaranteed a space in which they can freely carry out the development and realization of their personality.

The protection of personal data is not explicitly regulated as an autonomous fundamental right of the ECHR, which is logical given that the fundamental right to data protection is a newly created right that has gained momentum and development with the rise of information technology as a means of mass processing personal information, which occurred after the adoption of the Rome Convention of 1950. Its

inclusion has resulted from a broad or extensive interpretation of the term "private life" by the ECtHR regarding Article 8 of the ECHR. Thus, the ECtHR has included within the scope of protection of Article 8 of the ECHR the collection, storage, or dissemination of personal data of any kind.

As will be further developed, for the ECtHR, personal data is part of the private sphere and, consequently, falls within the scope protected by the right to private life recognized in Article 8 of the ECHR. The ECtHR's stance of acknowledging and ensuring the right to the protection of personal data has contributed to the establishment of a minimum standard on the matter, seeking a unanimous position among different legal systems.

The process of recognizing and protecting the right to the protection of data was gradual. It was crucially influenced by the Resolutions and Recommendations issued by the Council in various areas in the 1970s and 80s, and it was further reinforced with the drafting and approval of the Convention 108 on the Protection of Personal Data in 1981.

The Convention No. 108/81/EC of the Council of Europe, dated January 28, 1981, for the Protection of Individuals with regard to the Automated Processing of Personal Data, was the first legally binding document with a unifying purpose in the European context to address data protection. In this way, it aims to meet the need to consolidate the protection of individuals' rights, especially concerning private life, as enshrined in Article 8.1 of the ECHR in relation to the use of information technology.

The Convention has been amended and supplemented twice. First, on June 15, 1999, to allow the European Community to accede to it, and secondly, on November 8, 2001, it was supplemented by an Additional Protocol establishing the creation of independent national supervisory authorities and the conditions for the transfer of personal data to countries or organizations that are not part of it (Pavón Pérez, 2002, p. 235-252). The drafting of Convention 108 was preceded by two Resolutions of the Council of Ministers, R (73) 22 and R (74) 29, which constituted the initial attempts at approximation. The significance of

these Resolutions lies in that they, for the first time, enshrine essential principles on the matter that are still in force today. They were the first international texts containing guidelines addressed to the states, marking the beginning of harmonization in data protection regulations (Martínez Martínez, 2004, p. 161).

Subsequently, with the aim of consolidating the objectives set in 1981, the Committee of Ministers of the Council of Europe adopted Resolution (76) 3 on February 18, 1976, establishing a Committee of experts on data protection. There were two options: either create an additional Protocol to complement Article 8 of the ECHR or draft a new Convention specifically for the protection of personal data that would elaborate on the right to privacy outlined in Article 8 of the ECHR. The latter was the chosen formula, as it allowed the adherence of OECD members even if they were not European (Guerrero Picó, 2006, p. 34).

The Convention states that its purpose is to ensure respect for the right to private life of individuals concerning the automated processing of personal data. It is a convention of minimum standards (Carrascosa González, 1992, pp. 417-441), It seeks to strike a balance between the protection of data concerning individuals and the free flow of information at the international level in a way that is compatible with protecting the right to personal privacy and facilitating data exchange between states. It should be noted that the Convention lacks direct applicability, as it cannot be applied directly by courts until a signatory state enacts the necessary implementing rules. Furthermore, it is a minimum standard, meaning it establishes general provisions that allow signatory states to have different regulations on the matter. While the general rule is the free movement of personal data among the signatory states, they can impose limitations through their implementing regulations (Garzón Clariana, 1981, p. 15).

Regarding the free flow of information, the objective was to liberalize the transfer of personal data. The respect and protection of personal data must, therefore, be harmonized with the free movement of such data among the Member States. To achieve this, the Convention establishes a minimum standard of protection expandable by national

legislations. This minimum standard entails a set of instrumental rights and basic principles that the parties must consider when developing measures in their domestic law to ensure the protection of personal data (Sánchez Bravo, 1998, p. 79).

As for its scope of application, the Convention can extend its application to territories outside Europe and to states that are not members of the Council of Europe. The Committee of Ministers has the authority to invite other states to adhere to the Convention. This has led to its characterization as having universal appeal and doctrinal recognition as a milestone in the history of the right to the protection of personal data.

The Convention is structured with a preamble and 27 articles, the latter distributed in 7 chapters. The main parts of the Convention are threefold: the principles and basic criteria for data protection—lawfulness, fairness, accuracy, purpose, access by the data subject, non-discrimination, and security (Chapter II); provisions regarding cross-border data flows (Chapter III); and cooperation and mutual assistance among the contracting parties (Chapter IV). It is based on the following principles: a) the principle of consent, stating that the justifying purpose of creating a data file must be defined and predetermined before its operation; b) the principle of fairness, implying that data collection must verify the accuracy of the collected data and ensure their updating; d) the principle of publicity, requiring the existence of a public register of automated files; e) the control principle, allowing any person the right to know if data concerning them are subject to computerized processing and, if so, to obtain them, and even rectify them if they are incorrect or inaccurate; and f) the principle of security and confidentiality in data processing, requiring the establishment of security measures to protect data files. The core principle of Convention 108 is the quality of data, and from it, the rest of the rules and principles that inspire the Convention would be structured (Guichot Reina, 2005, p. 30).

For data transfers between the States that subscribe to the agreement, the general rule established was that States cannot raise any objections to international data transfers. Only exceptionally could a State impose limitations on the transfer of data to another State party to

the Convention when it concerns categories of special data subject to specific legislation, unless that State provides an equivalent level of protection. The other exceptional situation aims to prevent the circumvention of the legislation of the country of origin of the data through data triangulation.

One of the most criticized aspects of Convention 108 by scholars was that it only established rules for data transfers between the States that subscribe to the agreement, omitting any regulation regarding data transfers from a member State to a third State.

In 2001, an additional protocol to the Convention was approved, addressing two of the Convention 108's weaker aspects: control authorities and international data transfers to third parties. Regarding the latter, the explanatory report of the Protocol states that the proliferation of cross-border flows originates from the globalization of exchanges and the rapid evolution of communication technologies, requiring constant improvement in the protection of the rights guaranteed by the convention. The quest for effectiveness involves harmonization not only on fundamental principles but also on the means to implement these principles and the conditions under which data transfers should take place. As for control authorities, it establishes the necessary appointment of one or more control authorities that must contribute to protecting the rights and freedoms of individuals regarding the processing of personal data. The authority must have investigative, intervention, and judicial powers for the effective performance of its functions. In this way, it should be able to access data, collect necessary information, and implement measures such as ordering the blocking or deletion of data or prohibiting a specific information processing. Any person can submit complaints or claims to the control authority, and the decision of the control authority may be subject to judicial appeal (Pavón Pérez, 2002, p. 239).

As for exceptions to the exercise of data subjects' rights, Convention 108 follows the same provisions as those enshrined in Article 8.2 of the ECHR, meaning that they are allowed to the extent provided by domestic law, which constitutes a necessary measure in a democratic

society and pursues general interest purposes. The Convention identifies as general interest purposes, on the one hand, the protection of state security, public safety, the financial interests of the state, and the suppression of criminal offenses, and on the other hand, the protection of the data subject and the rights and freedoms of other individuals. The same article also establishes that states may, by law, impose restrictions on the exercise of the rights of access, rectification, and deletion for automated personal data files used for statistical or scientific research purposes when there are no manifest risks to the privacy of data subjects.

The Convention generously allows for the possibility of establishing exceptions and restrictions to protective regulations, possibly as a counterpart to the total prohibition of reservations. Therefore, it is crucial, as we discussed in the study of Article 8 of the ECHR, to determine under what terms the three requirements—provision in domestic law, democratic society, and general interest purposes—must be understood to limit this right, which has been termed the democratic test for restricting rights.

One of the contributions attributed to Convention 108 was to give binding force to the general principles of data protection established in Resolutions (73) 22 and (74) 29 (Lázpita Gurtuban, 1994, p. 405). The Convention 108 is legally binding on the states that have signed it, and non-compliance entails sanctions and responsibilities. The main obligation of the subscribing states is to incorporate into their national laws the principles, rights, and obligations established by the Convention to sufficiently protect the right to privacy against data processing carried out by public or private institutions.

Regarding its binding force, the question arose about what would happen if the states did not legislatively implement the content of the Convention and whether it could have a direct effect in the absence of domestic regulations. Although the issue was not unanimous, it was eventually recognized to have direct effectiveness, allowing it to be invoked by an individual before a judge, without prejudice to the regulatory development that the state party to the Convention may carry out.

This convention contributed to the creation of basic protection

standards, and its content has been received, developed, and specified within the European Union through subsequent regulatory instruments, such as Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995, concerning the protection of individuals with regard to the processing of personal data and the free movement of such data. Convention 108 is recognized as the applicable standard for determining the minimum level to be ensured by the Member States for the processing of personal data (Pavón Pérez, 2001, p. 239).

4. The shaping of the protection system by the European Court of Human Rights

The first judgment issued by the European Court of Human Rights on the protection of personal data was the ECtHR Leander vs. Sweden on March 26, 1987. In it, it is considered that actions involving the storage of data by national public authorities, their transmission, and refusal to rectify them are capable of violating Article 8 of the European Convention on Human Rights.

Article 8 of the European Convention on Human Rights (ECHR) enshrines the right of every person to respect for their private and family life, their home, and their correspondence. This article is complemented by Convention 108. The scope should not be interpreted restrictively. It encompasses the individual's right to create and develop relationships with others. Therefore, according to the interpretation of the European Court of Human Rights (ECtHR), the scope protected by Article 8 of the European Convention on Human Rights (ECHR) is very broad (Freixes, 2002, p. 92-94). It does not conceive of private life as a personality right but as an externalization of personality (Llácer Matacás, 2011, pp. 152), A private sphere where each one can lead their personal life as they wish and completely separate it from the external world. The right to privacy should include the individual's right to interact with their peers. Therefore, the right to identity and personal development is protected, and this broad notion of the right to privacy allows for the inclusion of the protection of the right to intimacy, safeguarding a set of reserved

information, as well as personal information that, without being secret, has an impact on the right to privacy protection. This includes the right to establish and develop relationships with other human beings and the external world, as there exists a zone of interaction between the individual and third parties that, even in a public context, may pertain to private life. In this domain, the protection of personal data becomes especially important because when we interact online, we leave a trail of information about ourselves that falls under the protection of Article 8 of the ECHR.

To address the growing issues arising from the processing of personal data, especially with regard to state files and their surveillance capabilities over citizens, the Court began to recognize that the collection, storage, and subsequent processing of such data fell within the protected scope of Article 8 of the ECHR, specifically within the framework of the right to private and family life. Also within the scope of Article 8 of the ECHR is the systematic collection and storage of information by security services about certain individuals, even without resorting to secret surveillance methods, as well as voice recording, GPS surveillance, video recording, and the storage of information related to the applicant in a record, even if the record contained no sensitive information and was likely never consulted.

The Court reaffirms its doctrine in the ECtHR judgment Amann vs. Switzerland of February 16, 2000, in such a way that Article 8 of the ECHR, combined with Convention 108, is interpreted extensively, and the notion of private life includes all information concerning an identified or identifiable natural person and certain publicly available data that may affect private life when systematically collected and stored in files held by public authorities, especially in cases where the data relates to a person's distant past.

Thus, initially, the ECtHR, in a series of decisions, including the ECtHR judgment Klass vs. Germany of September 6, 1978, and other cases related to telephone tapping, where the Court considers part of the data processing, interprets that from the processing of personal data, a profile or mosaic of the individual can be created, which constitutes a clear detriment to their private life. Although the expression "protection

of personal data" is not used, the Court does consider that the use of new technologies must be accompanied by a necessary respect for private life. Later, starting with the Laender case, the Court interprets that there is a right to the protection of personal data as part of the right to private life recognized in the ECtHR (ECtHR judgment of March 26, 1987).

The protection granted by Article 8 of the ECHR extends from the moment a data subject's data is collected, stored, or processed, to the extent that it can harm private life. However, the protected data is not only that which pertains to private life but also any other information that may be considered personal data, provided that the contained information is systematically organized, archived in files, and can be observed by public authorities.

The ECtHR has established that both the content and limits of the right to the protection of personal data depend on the type of data and its specific use. Initially, the Court did not consider the nature or content of the data. It was only from the ECtHR judgment Gaskin vs. the United Kingdom of July 7, 1989, that it deemed necessary to analyze the type of data, as this would determine the classification of interference in the individual's sphere. It set a general principle of confidentiality to protect the right to private life and demanded special protection for certain types of personal data.

With the development of information and communication technologies, the privacy of citizens is endangered, often without our awareness. Therefore, the ECtHR has recognized a series of rights aimed at preventing this. These include the rights of access, rectification, and free disposal of data. The right of access allows data subjects to know what data has been collected, stored, or processed. The right of rectification enables data subjects to challenge inaccurate entries, even if the origin of the information remains secret. The right to the free disposal of data requires the consent of the data subject for the processing of their data.

Public data can be relevant to private life when collected and stored massively in files, and this becomes even more significant when the data pertains to a person's distant past.

The Court also addressed the special sensitivity of certain categories of personal data, such as health, ethnic origin, or biological and genetic samples. It considered that DNA profiles and cellular samples constitute personal data within the meaning of the Convention for the Protection of Personal Data.

The storage, processing, and transfer of personal data can result in intrusions into private life. However, according to Article 8 of the ECHR, not all intrusions are improper or harmful to the rights of the data subject. According to the second paragraph of the mentioned article, such intrusion may be provided for by law and constitute a necessary measure in a democratic society, national security, public safety, the economic well-being of the country, the maintenance of order, crime prevention, the protection of health or morals, or the protection of the rights and freedoms of others (Arenas Ramiro, 2005, p. 578). Therefore, there are three provisions in the Convention to address the fact that a potential intrusion may not be unlawful; namely, being provided for by law, serving a legitimate purpose, and being necessary in a democratic society. Conversely, if any of these three provisions is not met, an improper and harmful intrusion into the right occurs. We are thus dealing with a connection between the right to data protection and personal privacy.

Developing these three exceptions of the ECHR, firstly, we have the legal provision, meaning that intrusions into the scope protected by Article 8 of the ECHR are only justified if they are provided for by law, which, according to the ECtHR itself, is understood in a substantive rather than formal sense. However, to fall within the scope of the Convention, the legal provision must be specific and foreseeable, adhering to the requirements of the domestic legislation of each member state. It must establish what type of information could be collected and retained, for how long, under what conditions, and through what procedure. The law must be accessible to the concerned party and must also allow them to foresee the legal consequences of the regulated factual scenario; otherwise, according to the ECtHR, it would constitute a violation of the right to the protection of personal data.

The second provision made by the ECHR is the legitimate

purpose. The second paragraph of Article 8 of the Convention considers legitimate purposes to be national security, public safety, the economic well-being of the country, the maintenance of order and crime prevention, the protection of health or morals, or the protection of the rights and freedoms of others. For a legitimate purpose to justify the intrusion, the ECtHR simply requires that the situation be classifiable under one of the provided scenarios. It has accepted them in cases where national security, public safety, and order defense were pursued, especially in the prevention of crime and the fight against terrorism. Internal authorities, especially judicial bodies, will interpret and apply domestic legislation (Simón Moreno, 2014, p. 162-187).

The third is proportionality. The ECtHR initially granted the signing states a broad margin to assess the need for interference, considering its role as merely overseeing the application of the proportionality test. However, it later changed its stance to exercise a more active control over the proportionality judgment made by national courts, verifying whether the measures taken at the national level were justified and proportionate to the legitimate aim they pursued. Therefore, it involves weighing the conflicting interests, the affected right or rights, and the purpose of the interference to determine if there is no less intrusive means for private life than the adopted measure, which constitutes an interference.

The Strasbourg Court advocates a doctrine that obliges states to implement sufficient safeguards in their domestic law to effectively protect personal data against improper and abusive uses of massively stored data. Although the primary purpose of Article 8 is essentially to protect the individual against arbitrary interference by public authorities, the Court understands that it imposes not only a negative obligation on the State but, in addition to its main negative obligation, there may be inherent positive obligations to make the enjoyment of conditions ensuring areas of personal or family privacy real and effective. The scope and extent of the obligation will depend on the circumstances of each specific case in which respect for private life must be ensured, but they may involve the adoption of measures designed to ensure respect for

private life in the context of relationships between individuals, the establishment of sufficiently deterrent criminal law standards against serious acts that involve fundamental values and essential aspects of private life, or the adoption of measures related to the respect for the right to image against abuses by third parties

5. Strengthening of the regulatory framework within the European Union

In 1973 the concerns of European institutions regarding the use of information technology and the rights of individuals begun to materialize. The need for an agreement to establish rules imposing a common basis to prevent regulatory fragmentation is emphasized.

The Council of Europe's Convention 108 had already established a framework for the protection of personal data against potential intrusions by information technology, although it was adapted to the state of science at the time and therefore required further development. This Convention already enumerated a series of essential principles that would be maintained throughout the evolution of community law on the subject (Rebollo Delgado, 2014, p. 39).

The Schengen Agreement is dedicated to the gradual abolition of controls at common borders, the crossing of internal and external borders, asylum requests, and police and judicial cooperation. To achieve this, the Schengen Information System (SIS) was adopted, with the aim of preserving order and public security in the territories of the contracting parties through SIS information. It is only applicable to member countries of the Agreement, and its scope is restricted to border control. The included data pertains to individuals, objects, and vehicles, and the recording of sensitive data is prohibited. A common authority is established to ensure compliance with the Agreement's measures. Security measures are imposed on the data controller, and principles of accuracy, timeliness, lawfulness, temporal limitation, and appropriateness to the purposes are established. The data subject is granted rights of access, rectification, and cancellation.

The intention was to attempt to control and facilitate data that

may be of interest in the fight against crime (De la Serna Bilbao, 2011, p. 8). In essence, the 1985 Agreement is an element of interstate coordination that impacts the processing and protection of data, although it does not have a specific character like the 1981 Convention or Directive 95/46/EC of the European Parliament and the Council regarding the processing of personal data. It represents a further development of the content of Article 12 of the 1981 Convention, which regulates the cross-border flow of personal data. Subsequently, in 1995, Directive 95/46/EC will establish the same content regarding the international transfer of data to third countries not belonging to the European Union in its Article 25 (Rebollo Delgado, 2013, p. 53).

The legislative disparity among member states and the subsequent inadequacy of the Convention made it necessary to have more specific regulations at supranational level. In the early nineties, the Commission presented an initial proposal. It is important to note that during this period, the Maastricht Treaty was signed on February 7, 1992, amending the Single European Act. The treaty aims to establish an internal market by ensuring the free movement of goods, persons, services, and capital. The free movement of personal data is included within this objective.

The Directive establishes, in general, that its provisions apply to the wholly or partially automated processing of personal data contained or intended to be included in a file. Thus, the Directive regulates both automated and manual recollection of personal data.

In comparison to Convention 108, there are practically identical principles. However, the rights of the data subject experience greater recognition. For example, the right to information imposes the requirement of providing information to the data subject, both when the data is directly obtained from them and when obtained from third parties. Likewise, the requirement of unambiguous and informed consent of the data subject for the processing of their data becomes essential in the Directive's protection system. The right to object is also included, which was not covered in the European Convention, and provisions for reconciliation with freedom of expression, especially the freedom to receive or communicate information. The Directive specified basic

concepts for the protection system and distinguishes between the data controller and the data processor based on the degree of responsibility and decision-making capacity regarding the processing of personal data (Garriga Domínguez, 2015, p. 153).

The Directive aimed to raise the level of protection provided by the Convention by regulating international transfers of data, for which there was no regulation in the Council of Europe's convention (Puyol Montero, 2013, p. 65). The European Community at that time sought to export its protection standards in order to safeguard its own commercial interests (Ancos Franco, 2000, p. 149). It established the general rule that data transfers could only take place when the third country concerned ensures an adequate level of protection, without prejudice to compliance with national law provisions adopted in accordance with the other provisions of this Directive (Ortega Giménez, 2013, p. 203).

A noteworthy element of the Directive is that it established the so-called Article 29 Working Party as a body composed of supervisory authorities from the Member States, with an advisory role in issuing reports and opinions on the application of the Directive, with the aim of achieving consistent implementation across the entire territory of the Union (Minero Alejandre, 2014, p. 133).

The General Data Protection Regulation of April 27, 2016, replaces Directive 95/46/EC, although it follows the same principles, but with direct application to prevent divergences among the Member States of the European Union (Maqueo Ramírez, 2017, p. 81). Since the approval of Directive 95/46/EC, other regulations have been adopted to complement and regulate specific areas with special characteristics. Among them is Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. The essential purpose of this Directive is to harmonize provisions related to data protection across different states in order to ensure an equivalent level of protection for freedoms and fundamental rights.

It is worth noting that the Directive aims to establish obligations and rights for both subscribers and providers in the field of telecommunications. In addition, obligations and rights regarding personal data are also regulated. Thus, a provider of a public

telecommunications service is obligated to preserve the security of its services and ensure the confidentiality of the communications covered by the service. The data that the provider can store regarding the user is also limited, with the content of Directive 95/46/EC otherwise governing.

Personal data collected in publicly accessible printed or electronic directories or obtained through information services must be limited to what is strictly necessary to identify the specific subscriber, unless the subscriber has given explicit consent for the publication of other personal data. The subscriber has the right to be excluded free of charge from the directory.

Given that Directive 95/46/EC could only be addressed to EU member states, it was necessary to adopt an additional legal instrument to establish data protection for the processing of personal data by the institutions and bodies of the EU itself. This led to the creation of Regulation 45/2001. This Regulation aims to ensure the uniform and consistent application of rules protecting fundamental rights and freedoms regarding the processing of personal data throughout the Union. It achieves this by specifying the obligations of those responsible for processing within the community institutions and bodies concerning the processing of personal data carried out by these institutions and bodies. This Regulation establishes enhanced treatment of the prohibition of processing personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, membership in trade unions, as well as the processing of data related to health or sexuality, except for specific exceptions. It also creates the position of the European Data Protection Supervisor and a rights framework for data subjects (the right to information, right of access, right of rectification, right of erasure, right to object, obligation to notify third parties, etc.) and establishes rules for the transmission of personal data, whether the recipients are different from the community institutions and bodies or not.

Regarding the European Data Protection Supervisor, this Regulation assigns three main functions: overseeing compliance with Directive 95/46/EC, providing advice on this matter to the European Commission and the European Parliament, and collaborating with other

relevant authorities to promote a consistent approach to data protection across Europe.

The Directive 58/2002/EC of the European Parliament and the Council of July 12, 2002, concerns the processing of personal data and the protection of privacy in the electronic communications sector. Its main purpose is to eliminate the sending of unsolicited emails, commonly known as spam. To achieve this, it establishes rules to ensure the security and confidentiality of the email sender or the use of a false originating address. As mentioned, this regulation also applies to SMS. With this Directive, the aim was to provide specific protection against all "risks specifically linked to electronic privacy, arising from electronic communications services as well as the wide range of information society services». It applies to the processing of data related to both traditional telecommunications (traffic, directories, etc.) and the specific aspects resulting from the digitization of electronic communications (call line identification, call forwarding, etc.), as well as new categories of data such as "cookies" (files that command installation on the hard drive of personal computers when the user connects to a website) (Rebollo Delgado, , 2006, p. 44). This Directive has been amended by Directive 2009/136/EC of the European Parliament and of the Council on November 25, 2009.

As mentioned earlier, the founding treaties of the European Community did not include a catalog of rights or provisions on fundamental rights. That is why, in the field of fundamental rights, there was only one instrument: the European Convention on Human Rights of the Council of Europe. The Charter of Fundamental Rights of the European Union (CDFUE) relies on other documents such as the ECHR itself or the European Social Charter (Ruiz Miguel, 2003, pp. 61-90), but incorporates newly created rights driven by social and technological changes, among which is the right to data protection itself (Arenas Ramiro, 2006, pp. 208-211). The Charter applies to the institutions, bodies, and organisms of the Union primarily, but concerning the Member States, the Charter establishes that it only applies when Union law is being applied. The legally binding force granted by the Lisbon Treaty does not alter this particularity, as it specifies that the provisions

of the Charter do not in any way extend the competencies of the Union as defined in the Treaties. Its main function is to codify political, economic, and social rights within the territory of the Union (Mangas, 2008, p. 213). Article 8 has the following content:

"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

A similar regulation is found in Article 16 of the Treaty on the Functioning of the European Union. Furthermore, Article 52.3 establishes that to the extent this Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection. The aim is to grant individuals protection against illegitimate intrusions.

In the EU, there arose the need to guarantee the fundamental right to the protection of personal data and establish a consistent framework that overcomes the current fragmentation of regulations and strengthens the legal certainty of the right under study. After lengthy discussions, Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, was published in the Official Journal of the European Union on May 4, 2016, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Minero Alejandre, 2017, p. 36).

This Regulation expressly repeals Directive 95/46/EC with effect from May 25, 2018, indicating that any reference to the repealed Directive will be deemed to be a reference to the GDPR. Similarly, references to the group protecting individuals concerning the processing

of personal data established by Article 29 of the Directive should be understood as references to the European Data Protection Board under Article 94 of the GDPR. The GDPR also specifies in the following article that it cannot impose additional obligations on individuals or legal entities in the context of providing public electronic communications services on public communication networks in the European Union in areas where they are subject to specific obligations with the same objective established in Directive 2002/58/EC.

The purpose of the European Regulation is twofold: to regulate the right to data protection and to ensure the free movement of data. This second objective addresses the economic scope of data use, and this Regulation aims, according to its second recital, to contribute to strengthening the convergence of the internal market economies and the well-being of individuals. However, while the need for a balance between these two aspects of the Regulation's objective is evident, the fundamental right to data protection prevails over the economic interests of controllers and processors. This was the contribution of the CJEU, which the Regulation acknowledged after its judgment of May 13, 2014 (Piñar Mañas, 2017, p. 52). Technological development impacts the right to data protection, and therefore, it will be necessary to strike a balance between both objectives, as they are not incompatible (Recio Gayo, 2016).

The GDPR incorporates a series of modifications to the personal data protection system in the EU, including the inclusion of new principles such as transparency and accountability (Martínez Vázquez, 2018, p. 46). The first one involves strengthening the right to information about the data held by its owners, as it establishes the obligation that any communication regarding the processing of the personal data of the data subject must be concise, transparent, intelligible, and easily accessible, using clear and simple language (Rodrigo de Castro, 2019, p. 162). The second imposes the obligation on the data controller, not only to comply with the obligations imposed by the regulations but also to demonstrate that compliance. For this purpose, explicit mentions are made of adherence to codes of conduct or a certification mechanism, as well as the conduct of impact assessments for data processing operations

(Alberto González, 2017, p. 120). Likewise, it strengthens the requirement for the data subject's consent, which must now be general, free, informed, specific, and unequivocal. It must be expressed through a positive action and cannot be inferred from the data subject's silence or inaction (Bacaria, 2018, p. 27). It establishes conditions for obtaining consent from minors and considers new categories of special data, such as genetic and biometric data, in addition to existing categories like racial origin, political opinions, religious beliefs, sexual health, and criminal records.

The Regulation acknowledges new rights for data subjects, adding to the traditional rights of access, rectification, cancellation, and opposition. The newly recognized rights include the right to transparency, information, access, rectification, erasure or the right to be forgotten, processing limitation, data portability, and objection (Recio Gayo, 2018).

One of the issues incorporated into the new European regulation relates to the territorial scope. Following the May 13, 2014, judgment on the so-called Google Spain case, the idea was solidified that the territorial issue could frustrate the protective purposes intended by the EU (Gonzalo Domenech, 2017). Thus, it was established that the Regulation will apply, according to Article 3, to the processing of personal data of data subjects residing in the Union by a controller or processor not established in the Union when the processing activities are related, firstly, to the offering of goods or services to such data subjects in the Union, regardless of whether payment is required from them, or secondly, to the monitoring of their behavior, to the extent that such behavior takes place in the Union. Regardless of the "legal or mercantile form chosen to articulate the operation of the company processing data or the companies producing activities related to its main business, which allows including the figure of the European subsidiary (Minero Alejandre, 2017, p. 37)".

There is an important novelty regarding the record of data processing activities, as the obligation to communicate the creation of files and the processing of data therein to the supervisory authorities is

eliminated. Instead, it imposes the obligation to notify such authorities and the individuals concerned of any breach of the security of the files, and it regulates the prior consultation with the supervisory authority in the case of identifying risks to the security of the processing (Herrán Ortiz, 2014, p. 147). It introduces a new figure in the field of personal data protection: the Data Protection Officer. Its appointment is mandated for both the data controller and the data processor, requiring the designation for all public bodies, with the exception of courts acting in the exercise of judicial functions. It also imposes this requirement on private entities that process data "on a large scale," as defined by the Regulation itself.

Another area where the GDPR has introduced significant changes is in the field of international data transfers. In light of recent judgments from the CJEU, it tasks the Commission with evaluating the level of protection offered by a territory or a processing sector in a third country. It also establishes the creation of a European Data Protection Board, consisting of representatives from the supervisory authorities of each member state and the European Data Protection Supervisor. This board will ensure the uniform application of the Regulation, advise the Commission, issue guidelines and recommendations, and accredit certification bodies.

What has so far been referred to as the personal data protection system gets its name precisely from the amalgamation of rules, actions, and strategies carried out and continuing to develop in the context of EU law. It cannot be properly termed either a law or a single legal system because the recognition of this right has evolved in a complex manner. In this section, it is appropriate to examine a large set of decisions made within the European Union framework that complements this data protection system.

As mentioned earlier, Directive 95/46/EC establishes the general principle of prohibiting international transfers to countries without an equivalent level of protection. However, there is an exception to this general rule, which is that the recipient is located in a state that has obtained a declaration from the European Commission of an adequate level of protection (Álvarez Rigaudias, 2005, p. 21). In the event that the

Commission determines that a third country ensures an adequate level of protection, personal data can be transferred from the Member States without the need for any additional safeguards. This is the purpose of the Decisions listed below:

- Commission Decision of July 26, 2000, under Directive 95/46/EC of the European Parliament and of the Council on the adequate level of protection of personal data in Hungary.
- Commission Decision of July 26, 2000, under Directive 95/46/EC of the European Parliament and of the Council on the adequate level of protection of personal data in Switzerland.
- Commission Decision of June 30, 2003, under Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection of personal data in Argentina.
- Commission Decision of April 28, 2004, concerning the adequacy of the protection of personal data in Guernsey.
- Commission Decision of May 14, 2004, regarding the adequacy of the protection of personal data included in the records of passenger names transferred to the U.S. Customs and Border Protection.
- Commission Decision of May 8, 2005, under Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Jersey.
- Commission Decision of March 5, 2010, under Directive 95/46/EC of the European Parliament and of the Council on the adequate protection provided in the Faroe Islands Data Protection Act.
- Commission Decision of October 19, 2010, under Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Andorra.
- Commission Decision of January 31, 2011, under Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by the State of Israel regarding automated data processing.
- Commission Decision 2012/484/EU of August 21, regarding the adequate protection of personal data in Uruguay.
- Commission Decision 2013/65/EU of December 19, 2012,

regarding the adequate protection of personal data in New Zealand.

The second group of decisions in the field of international transfers revolves around pre-contractual clauses. Even if an adequate level of protection for personal data has not been recognized and none of the exceptions mentioned earlier apply, in a contractual relationship, the contract can serve to allow the transfer of data to another country. The data controller must provide adequate guarantees when transmitting this data outside the European Union. The contractual clauses adopted by the European Commission have considered two possible scenarios: international data transfers between data controllers or between a data controller and a data processor (Guash Portas, 2014, p. 257):

- Commission Decision (2010/86/EU) of February 5, 2010, on standard contractual clauses for the transfer of personal data to data processors established in third countries, in accordance with Directive 95/46/EC of the European Parliament and of the Council.
- Commission Decision of December 27, 2004, amending Decision 2001/497/EC with regard to the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries.
- Correction of errors to Commission Directive 2002/16/EC of December 27, 2001, on standard contractual clauses for the transfer of personal data to data processors established in third countries, in accordance with Directive 95/46/EC.
- Commission Decision of December 20, 2001, on standard contractual clauses for the transfer of personal data to a third country provided for in Directive 95/46/EC.
- Commission Decision 2001/497/EC of June 15, 2001, on standard contractual clauses for the transfer of personal data to a third country provided for in Directive 95/46/EC.

However, after the CJEU ruling on October 6, 2015, regarding the so-called Schrems case, the effectiveness of this type of clause has been significantly diminished. Later, we will delve into this judgment.

Continuing with the issue of international data transfers, there is another9 Commission Decision, dated September 6, 2005, regarding the adequacy of the protection of personal data included in Passenger Name

Record (PNR) transferred to the Canada Border Services Agency. Additionally, there is the Commission Decision of July 26, 2000, in accordance with Directive 95/46/EC on the adequacy provided by the principles of the Safe Harbor Framework for the protection of privacy and the corresponding frequently asked questions published by the United States Department of Commerce.

Following the events of September 11, 2001, the United States (and shortly after, Australia and Canada) adopted a series of regulations requiring airlines operating flights to their territory to transfer to the relevant administration personal data concerning passengers and crew members on flights to or from that country. Especially in the so-called Passenger Name Record (PNR), a wide and varied range of data is required. Failure to provide this information, or if it is incorrect or incomplete, could lead to severe criminal penalties, including the loss of landing rights and the payment of substantial fines (Guasch Portas, 2013. p, 117).

Additionally, it is necessary to mention Council Decision 2003/187/JHA of February 28, 2002, establishing Eurojust. This Decision regulates a Judicial Cooperation Unit, known as Eurojust. Its purpose is to establish a centralized organizational unit with its own legal personality and budget as a structural measure aimed at facilitating the coordination of investigations and judicial actions by the Member States to combat transnational crime. It seeks to promote, enhance, facilitate, and expedite coordination and cooperation among competent authorities, providing them with the necessary support to improve their effectiveness (Alonso Moreda, 2012, p. 121). It seeks, therefore, to contribute to greater effectiveness of the national authorities responsible for instruction and investigation, intensifying judicial cooperation and coordination to more diligently combat cases of serious transnational crime involving two or more states (Pérez Souto, 2014, p. 91).

The founding treaties of the European Communities did not contain a catalog of rights or explicit provisions for the protection of fundamental rights (Fernández Liesa, 2014, p. 649). The Court of Justice of the European Communities would recognize and incorporate their

protection into community law through the principles of general law (Pi Llorens, 2004, p. 129), specifically, starting from the judgment of November 12, 1969. In this judgment, known as the Stauder case, a German citizen argued that disclosing his name and economic status to access a product at a lower price was contrary to the principles of community law as it violated his personal dignity. Although the ECJ did not make explicit reference to the right to data protection, it did understand that personal data is part of private life and, therefore, is protectable by the Court through the application of general principles of community law (Arenas Ramiro, 2008, p. 122).

After the first EU Directives on data protection were adopted, the ECJ would use them as a key element in its reasoning. It wasn't until the Lisbon Treaty of December 13, 2007, that data protection was explicitly incorporated into EU law through the Charter of Fundamental Rights of the European Union. Additionally, the EU would accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. With the Lisbon Treaty, the ECJ would be renamed the Court of Justice of the European Union (Rodríguez-Izquierdo Serrano, 2015).

6. The leading role of judicial decisions

In 2003, the ECJ issued two significant judgments on data protection. In the judgment of May 20, Rechnungshof case, although it does not proclaim a fundamental right to the protection of personal data, it does consider the matter to be encompassed by Article 8 of the ECHR, which guarantees the right to private life (Piñar Mañas, 2003, p. 61-66). In that judgment, it had to rule on the compatibility of Directive 95/46/EC with certain obligations of entities subject to the control of the Austrian Court of Audit to provide information about salaries and pensions exceeding a certain level, which certain public institutions pay to their employees and pensioners, as well as the names of the beneficiaries, in order to prepare an annual report for the parliament and to be made available to the general public. The Court established that there is no opposition to national regulations as long as it is demonstrated that the disclosure, not only of the amount of the annual income of

individuals employed by entities subject to the control of the Court of Auditors but also of the names of the beneficiaries of such income, is necessary and appropriate to achieve the objective of sound management of public resources by the legislator, a matter that must be verified by the referring courts. When they meet, therefore, requirements derived from fundamental rights. It also determined that the articles of the Directive are directly applicable, in the sense that an individual can invoke them before national courts to avoid the application of domestic laws contrary to these provisions, since the rules of the Directive are sufficiently precise and unconditional, so if no transposition measures have been adopted within the prescribed period, they can be invoked against national provisions not in conformity with the Directive, or to the extent that they define rights that individuals can assert against the State. It is noteworthy that among the measures to which the Court attributes direct effect is Article 6.1.f), which establishes essential principles regarding the quality of the processing of personal data, specifically the requirement that data must only be processed if they are adequate, relevant, and not excessive in relation to the purposes.

In the judgment of November 6, 2003, Lindqvist case, the Court pronounces for the first time on the scope of the right to the protection of personal data on the Internet, the dissemination of such data on the internet in a way that is accessible to an undetermined group of people. The judgment establishes that the conduct of referring to various individuals on a website and identifying them by name or by other means, such as their phone number or information about their working conditions and hobbies, is covered by Article 3.1 of the Directive as processing wholly or partly automated, and therefore, the Directive is applicable because it is not covered by any of the exceptions in 3.2. The indication that a person has been injured and is on sick leave constitutes health-related data. However, there is no transfer of data to a third country within the meaning of Article 25 when a person in a Member State disseminates personal data on a website, stored by an individual or legal entity that manages the website where the webpage can be accessed, located in the same Member State or another Member State, so

that this data is accessible to anyone connected to the Internet, including those in third countries.

Regarding the potential collision between the right to data protection and the right to freedom of expression or information, the judgment of November 6, 2003, Lindqvist case, establishes that the provisions of the Directive do not, by themselves, constitute a restriction contrary to the general principle of freedom of expression or other rights and freedoms in force in the European Union and their equivalent, among others, in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. It is the authorities and the judicial bodies of each Member State that are responsible for applying national regulations that adapt domestic law to Directive 95/46 to ensure a fair balance to prevent such collision (De Miguel Asensio, 2004, pp. 397-417).

This judgment allows us to reach three conclusions. First, that any publication of data on the internet constitutes automated processing that affects the right to data protection. Second, conflicts arising from this protection with other freedoms require a judgment that allows balancing the interests at stake under the principle of proportionality and considering all the circumstances of the specific case. And finally, it should be avoided that an unreasonable application of the Directive occurs, without equating the publication of data on the internet to an international transfer (Rallo Lombarte, 2017, p. 587).

In the CJEU ruling of May 30, 2006, the Court pronounces for the first time on the so-called Passenger Name Records (PNR) (Guerrero Picó, 2007, pp. 185-215). Through this judgment, the agreement between the EU and the USA, which authorized airlines to provide the personal data of their passengers to the authorities of both countries, is annulled (Pérez Francesch, 2011, p. 9). The Court understood that data protection guarantees were not met, and therefore, it declared it contrary to Article 8 of the ECHR (Hernández López, 2013, p. 41).

In the CJEU ruling of January 29, 2008, in the case of Promusicae against Telefónica de España, the Court resolves the intention of Promusicae to have Telefónica ordered to disclose the identity and address of individuals to whom it provided internet access services,

which Telefónica refused. The CJEU understood that the Directives did not establish an explicit obligation for the Member States to impose a duty to disclose data to protect copyright in civil proceedings. Still, community law required the internal regulations of each Member State to strike a balance between fundamental rights. National authorities must interpret their national law, avoiding conflicts with fundamental rights or other general principles of community law. The CJEU recalls that Directive 2002/58/EC aims to ensure respect for fundamental rights and observes the principles enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. Article 7 essentially reproduces Article 8 of the European Convention of 1950. Therefore, the necessary protection of copyright must be reconciled with the requirements arising from the protection of fundamental rights at stake, namely, the right to respect for privacy on the one hand and the rights to property protection and effective judicial protection on the other. To find the right balance, reference must be made to Directive 2002/59/EC, as it establishes rules that determine in which situations and to what extent the processing of personal data is lawful.

In the CJEU judgment of December 16, 2008, Heinz Huber case, the Court clarified the interpretation of the term "necessity for processing" concerning the processing of personal data without the consent of the data subject, as stipulated in Article 7 of the 1995 Directive (Garriga Domínguez, 2016, p. 113).

The right to the protection of personal data is not an absolute right. According to the CJEU judgment of November 9, 2010, it must be considered in relation to its function in society (Martínez López-Sáez, 2017, p. 150). In accordance with Article 52.1 of the Charter of Fundamental Rights of the European Union (CFRUE), limitations to the exercise of the right may be introduced, provided that such limitations are established by law, do not infringe its essential content, respect the principle of proportionality, are necessary, and correspond to objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Regarding the requirement of independence of national supervisory authorities, in the judgments of the Court of Justice of the European Union (CJEU) on March 9 and November 9, 2010, the Court analyzes the limits of the fundamental right to the protection of personal data and emphasizes that data protection is closely linked to the right to private life guaranteed in Article 7 of the Charter of Fundamental Rights of the EU (Cortés Martín, 2011, p. 207). Subsequently, in the CJEU judgment of July 5, 2011, in the case European Data Protection Supervisor vs. European Parliament, it pronounces on the scope of the purpose limitation principle and the limits for the transfer of medical data to third parties in the context of employment relationships without the consent of the data subject.

In the Spanish context, the CJEU judgment of November 24, 2011, had a significant impact, reviewing the Supreme Court judgment of February 8, 2012, which annuls Article 10.2.b) of Royal Decree 1720/2007, of December 21, approving the Regulation implementing Organic Law 15/1999 of December 13 on the protection of personal data.

The CJEU addresses the proportionality of the interference with the rights of Articles 7 and 8 of the Charter of Fundamental Rights, resulting from the inclusion of biometric data in passports in the CJEU judgment of October 17, 2013, and in the CJEU judgment of December 12, 2013, it analyzes the conditions for exercising the right of access to data by the data subject.

In the CJEU judgment of April 8, 2014, in the case Digital Rights Ireland, Seitlinger and Others, the CJEU declares the illegality of Directive 2006/24/EC on the retention of electronic communications data. It asserts its interpretation of the scope of the rights established in Articles 7 and 8 in connection with Articles 51 to 54 of the Charter of Fundamental Rights of the European Union (CFRUE) to ensure respect for the essential content of the right, the scope of the principles of necessity and proportionality, and subordination to a legitimate purpose in the legislative development of the right to the protection of personal data (Maia Neto, 2014, p. 308). Specifically, it rules to declare invalid Directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006, on the retention of data generated or processed in

connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. This directive established the obligation to retain location and traffic data, as well as the need to identify the subscriber or user. The CJEU concluded that the directive significantly interferes with and infringes upon the protection of fundamental rights of individuals. This constitutes an illegitimate and unjustified interference for the CJEU because the directive does not limit or except any cases, nor does it establish criteria for delimiting the purpose for which these data are collected. It represents a serious intrusion into privacy by seeking constant, indiscriminate, and disproportionate surveillance, thereby violating the principle of proportionality (González Pascual, 2014, p. 955).

In the CJEU ruling of May 13, 2014, in the case of Google v. AEPD, the following scenario was addressed: an individual requested that the search engine stop including in its results information that could be found simply by searching for their name and surname, involving a news article that had lost relevance over time. The CJEU established that internet search engines are responsible since the automation of search engines does not exempt them from liability. Therefore, they must remove the links from their results list, even if the name or personal information is not deleted prior to or simultaneously with the web pages, and even if the publication on those pages is lawful. Anyone conducting a search based on a person's name can obtain, through the results list, a structured view of the information related to that person circulating on the internet. The CJEU ruled that, over time, an initially lawful processing of accurate data may become incompatible with the Directive for the purposes for which it was processed and the time that has elapsed, as the purpose for which it was collected has been fulfilled and exhausted. Links to web pages containing that information should be deleted unless the person's role in public life justifies the prevalence of the public interest in accessing that information (Martínez, 2015, p. 119). According to the Court, considering the sensitive nature of the information contained in the advertisements published in the newspaper

concerning the individual's private life and taking into account the fact that the publication is from 16 years ago, it does not appear that there are specific reasons justifying a predominant public interest in accessing that information (Minero Alejandre, 2014, p. 134).

The CJEU argues that a search engine should be considered a controller, within the meaning of Article 2(d) of Directive 95/46/EC, since, even though it does not exercise effective control over the personal data processed, to the extent that it is published by third parties on their web pages, it does determine the purposes and means of processing personal data in the exercise of its activity. Regarding the scope of the responsibility of the search engine operator, the CJEU starts from the idea of ensuring a high level of protection for the fundamental right to private life and the right to the protection of personal data. For this reason, it understands that the analysis of the concept of controller of personal data processing must be functional, so that the allocation of responsibility is based on the real influence it can have on data processing. For the proper exercise of the right to be forgotten, a balance must be struck between the right to private life and the protection of personal data of the data subject, with the data subject having to demonstrate the legitimate reasons specific to their particular situation justifying the exercise of this right, and also the legitimate interest of internet users in accessing the information in question. While the general principle affirms the prevalence of privacy rights over the mentioned particular interest in the information, it should not be forgotten that the result may differ depending on the role played in public life by the person concerned (Minero Alejandre, 2017, p. 31).

Lastly, in the CJEU ruling of October 6, 2015, in the Schrems case, the Court invalidates Commission Decision 2000/520, by which, based on an interpretation of Article 25 of Directive 95/46/EC, it was determined that the U.S. ensures an adequate level of protection for the privacy rights of European citizens, granting it the status of a safe harbor. The Court evaluates the U.S. national security test in accordance with its public interest in preventing potentially indeterminate threats and crimes and establishes that the standards imposed by the U.S. take precedence over the guarantees of the so-called safe harbor regime. The CJEU states

that the transfer to this third country was authorized without control or guarantee and criticizes the lack of provision for the possibility of bringing legal action, which violates the rights protected by the Charter of Fundamental Rights of the European Union (CFR) (López Aguilar, 2017, p. 577).

Conclusions

In the international sphere, there was a widespread concern in advanced countries and relevant international organizations about the threats that the development of communication and information technologies could pose to the right to privacy. Consequently, during the 1960s and 1970s, committees or commissions studying privacy proliferated, aiming to issue reports or recommendations, constituting the precedent for today's data protection authorities. Since then, countries such as France, the United Kingdom, Sweden, Germany, Canada, Norway, Denmark, the Netherlands, Switzerland, and Australia have been approving data protection laws. Meanwhile in Ibero-America, the right to data protection was recognized in a widespread manner, albeit with different formulas (in some cases through an autonomous recognition of the right, in others through other related rights such as intimacy or privacy, or simply through the recognition of *habeas data* as a procedural action in response to injury or harm). In the United States, no system of universally applicable rules was developed, and instead, a sectoral regulation was chosen.

The doctrine of privacy in the Anglo-American common law system started with a concept of privacy as negative freedom, i.e., as a *status libertatis* of non-interference in an individual's private sphere, connected to the right to private property. Later, a foundation was sought in a common law principle that linked it to the right to personality, surpassing the original formulation.

In continental legal systems, the process of recognizing and protecting the right to data protection has been progressive. Resolutions and recommendations issued by the Council of Europe in various areas in

the 1970s and 1980s were fundamental, and it was further strengthened by the development and approval of the Convention 108 on the Protection of Personal Data in 1981.

The right to respect for private and family life belongs to the so-called personal rights or personality rights. Thus, a new right emerges that deepens its roots in privacy but extends to the free development of personality. This means the unrestricted development, free from external interference, of the personality of each individual in their relations with others. Each individual is guaranteed a space in which they can freely carry out the development and realization of their personality. This becomes particularly concerning in an era where all personal information is recorded and stored indefinitely, often without the knowledge or consent of the data subject. With the advancement of data analysis techniques, behavior patterns and forecasts of conduct that can significantly limit the conditions of equality in which we have operated in society until now are being achieved.

Thus, there is a need to expand the protected legal interest beyond privacy, leading the ECtHR to impose ambitious obligations on the States. In their domestic law, sufficient guarantees must be implemented to effectively protect personal data against improper and abusive uses of their massive processing. It is not just an obligation of non-intervention by the State; in addition to its main negative obligation, positive obligations have been generated to make the enjoyment of conditions that guarantee areas of privacy and free personal development real and effective. Here, a proactive perspective arises to promote protective actions that go beyond merely sanctioning dangerous actions to the individual's legal sphere and will lead to a true system of preventive guarantees.

Over time, the EU felt the need to guarantee the fundamental right to the protection of personal data and establish a homogeneous framework that would overcome the current fragmentation of regulations and strengthen the legal certainty of this new system of guarantees. As the founding treaties did not contain a catalog of rights or express provisions for the protection of fundamental rights, the CJEU has been recognizing and incorporating its protection into EU law through the

principles. What has been called the system of personal data protection gets its name precisely from the amalgamation of rules, actions, and strategies that have been carried out and are still being developed in the context of EU law. It cannot be properly called a law or a single legal system because the recognition of this right has evolved in a complex manner.

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POLITICISATION OF PUBLIC LAW – BRIEF CONSIDERATIONS –

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Abstract:

Most of the time, the idea of politicization of the public function, public administration and public law are described either from the perspective of complete objectivity, or from that of practical situations.

The fact that the political power wants its vision to be applied uniformly at the scale of a country is something normal, understood by all discerning adults. But it is not acceptable by the same adults, because history and life have provided numerous examples through which it has been observed that too much political influence brings more negative results than those produced by a competent and neutral administration.

The political vision is impossible to eliminate from a state, because major decisions are ultimately political decisions, adopted by political leaders. However, states are not immovable entities, in which social systems function according to mathematical equations, and from here several phenomena appear, among which that of citizens' loyalty to their own state.

Thus, an analysis – even introductory – of the relationship between the political environment, the legal framework of a country and the loyalty of citizens is necessary, in order to be able to offer arguments in the direction of limiting the discretion and even the arbitrariness that the political environment can manifest.

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Introduction

Every person knows the social environment in which he lives, in relation to his age, on his own different experiences – as well as on the histories of his relatives – and on the acquired educational abilities, in schools and working places.

Although we want to consider that votes are equal between people, and numerically to a large extent they are, the reality is still different. People with a higher level of instruction will have a greater weight in terms of the entire national or local electoral ensemble, because inequality is natural – from body weight to scientific professional and financial achievements, etc. In this context, we note that social networks today offer – but this possibility is not guaranteed, being also closely watched – an extraordinary power to the credible thinking man, sometimes greater than that which political or economic leaders have. Thus, we must bear in mind that the merits of each of us make us benchmarks for certain parts of society, and if we do not have a behaviour that irritates a large group of people, we reach the situation where postings on the Internet can bring changes in the elections' results, which are also followed by changes in the political parties top level.

This type of attitude does not appear instantly – and the text does not analyze the way in which political messages are formulated, and even less the ways of influencing society – in the adult man, but once it manifests itself, it is assumed that somewhere there are things on which he wants to modify or correct. However, politicization is one of the causes that can determine attitudes of rejection on the part of society, which are often followed by actions that can be blunter.

1. The concept of politicization has made a steep career since the early 2000s, but it started to influence scientific debates somehow after

the communism fall (late 1980s).

It is an important issue in the current study of European integration, indicating that the European politics has moved from a permissive consensus to constraining dissensus with an increased role for identity politics. In all of these debates, the term 'politicization' has been defined in a similar way. Politicization, in the most general terms, means the demand for, or the act of, transporting an issue or an institution into the sphere of politics – making previously unpolitical matters political. This core of the concept is common to different conceptions represented in the three kinds of literature. Politicization, therefore, can be generally defined as moving something into the realm of public choice, thus presupposing the possibility to make collectively binding decisions on that matter (Zürn, 2019).

The doctrine underlines that it is impossible to avoid the implication that the changes in the rules of law will open the process of the executive arm of government to formal and informal influence (Goldring, 1985, 3). In fact, any reasonable person understands that there cannot be legal systems completely removed from the political environment sphere of influence.

The politicization of public law is always accompanied by the politicization of public administration. In fact, the politicization of public law follows administrative politicization, but by its prescriptive nature, public law is both an effect of politicization – seen as behaviour of political groups and leaders – and an instrument through public institutions begin to serve a political group, rather than a community defined by citizens. Thus, it is not possible to have public administration politicisation without a new public legal framework, because at the main reason to public institution we'll mention the public interest following and protection within legal constraints.

The task of public administration is largely to execute political decisions made by the highest organs of the state by enacting laws, issuing decrees, or by other ways; for example, when ratifying the budget (political decidents approve these laws, decrees, budgets, etc., A.N.). The execution of political decisions, crystallized into a unified national

policy, is indeed the most essential task of the administration (Merikovski, 1973). However, the public administration can play a much more important role in the community, by the fact that it is present in every locality of a country. In addition to its almost ubiquitous presence, the public administration has to solve problems every day that the common man wants to be analyzed and positively sanctioned, and from here it acquires an impressive force in influencing all local communities, implicitly an entire nation.

In addition, the public administration can act informally, in relation to the politicians who lead its structures orders, and this informal system usually involves favoring political partners of these leaders in various forms. The public administration can solve the demands of the political partners of its leaders more quickly, it can verify or not their actions, it can sanction within different limits – usually small – the legal norms' violation they commit, it can offer support for different actions (for example import-export of goods), etc. This leads to an effective discrimination of citizens and companies, and for them protection against the behavior of public institutions becomes almost a necessity, which can best be obtained by participating in the political game on the part of the national and/or local public administration leaders.

2. History teaches us a thousand things, including one very important one: the prevalence of dictatorial, tyrannical regimes, under which many countries have accumulated losses or handicaps on their way to development (Acemoglu & Robinson, 2019).

As an effect of these types of regimes, we find various indirect signs, but which are nevertheless effects of bad governance: the general income of the population, the average life expectancy of the population, the general height of the inhabitants of a country, the certain trade routes, etc (Ivanyna & Salerno, 2021). All these are, in fact, the manifestation of a hard political will, which was carried out by a more or less numerous public administration, on the basis of a legal system of various dimensions, but which had as its central point – a true constitution of legislation – the unlimited will of the supreme political leader.

For the sake of objectivity, we will mention that in the beginning

public administration and public law had only the role of implementing the will of different political leaders, and the absence of paper for hundreds of years – and generally written legislative support – could not lead to a very different approach. Basically, public administration was in fact the administration of the territory by the monarch through agents without much capacity for initiative, and the supreme political leader accumulated not only the administrative quality, but also the judicial one, including the one concerning complaints against the actions of his agents in the territory.

Thus, it is logical that the will of sovereigns is difficult to stop, when there are no written grounds that can serve as precedent. In addition, unlimited political and administrative will affects the selection of the sovereign's agents, who must first fulfil one characteristic, namely loyalty. Hence, another legal consequence concerning the responsibility of administrative agents: the change of the sovereign can lead to the change of the agents or even to the punishment of a part of them, if before the change of the political leader they had proved hostile.

Obviously, this cannot be a question of a public function in the modern sense, and this typology is not at all absent today, because essentially one-party systems have as a fundamental feature the elimination of any disloyal person from the upper hierarchy of the administrative system.

Thus, no matter how developed the state is, no matter how much paper it has for printing normative acts and in general for the transcription of any legal act or any thought, the absence of political freedom is one of the main mono-party systems' characteristics. Even if some minor parties are tolerated in some countries, these "political groups" are actually satellites of the big party, implementing their wishes and voting on the same line. The essence of the single-party system – which in the 20th and 21st centuries replaced the absolutist monarchies – is loyalty to the decision-making center, which assumes as the main goal of the government the maintenance of political power at home (Marquez, 2023).

Compared to the general situation of democracy and the rule of law in the world, invoking this feature of the single-party political system become necessary, and the classification of the public law systems of these countries into different categories that contain the idea of protecting the common man against political power becomes impossible.

3. It is therefore obvious that the politicization of public administration and public service will exist forever, because at some point a conflicting situation will be encountered between political loyalty and the struggle for power within each political party.

Life being limited, it is logical for the politician to want power and, implicitly, to exercise it. But what will he do in the situation where he does not trust the public officials in the government apparatus? Obviously, through political decisions, the leaders of this system will be changed, and these will be objectified through normative acts, which will confirm the previously decided political solutions.

Replacing the leaders of the administration, however, does not guarantee the loyalty of the entire administrative apparatus – and this aspect should not be ignored, especially when the political power changes after a long period of time. The interval in which the political power was occupied by another party and ideology can be long and during this time the respective group may have filled the personnel schemes with their own people.

At the same time, there is always a phenomenon specific to political groups that have won political power in a state, namely the rivalry of their leaders within their parties. This political competition always extends to the level of administrative hierarchies, and the politicization of the civil/public service actually means loyalty to a certain leader, within a system that seeks loyalty at the national level. By chance, the normative framework of public law will seek in this situation to protect the structures close to the supreme leader, as well as his allies, following that an "apparent democracy" – to read "the change inside the administrative structures" – will be applied only within public administration where the supreme leader is less successful, i.e. where public institutions are run by rivals from his own party.

As stated above, this typology of political struggle and administrative loyalty is eternal, and cannot be eliminated. If inside a state there is an absence of real trust between the main political leaders and the main administrative leaders, the political and administrative systems will end up in a situation of mutual suspicion, which can even paralyze an entire national administrative apparatus. Politicians will win this competition, being forced after that to implement a strongly change on the civil service, to a deep area.

4. So when does the professionalization of the public function appear, and when does the limitation of politicization appear? As a general rule, this occurs when two situations occur in society, which have the effect of political power trust decreasing.

First, we note the moment when citizens lose their confidence in the political power, as a result of its decisions (politicians). Obviously, it is a complex phenomenon, in which dissatisfaction accumulates for the high costs paid to the administrative power that implemented the political decisions. In this situation, you end up breaking any form of loyalty to the state, considered at that moment only as a projection of a political formation – and in this situation, even an external intervention will be considered rather a release from a (party) tyrant (see the year 1989 within communist Europe, for example).

The second situation occurs when the economy of a country begins to perform, and the citizens want more benefits from what they earn from the sale of goods and services. In this situation, the citizens will want another fiscal legislation and a public administration as neutral as possible, in order to stop the political power arbitrariness. In this situation, the political power must decide between maintaining its privileges and leading position in society, or giving up part of its positions in front of a neutral public administration, hoping in a more national development.

There is no predictable result in this second option, because no one can guarantee the conduct of the political leaders, as several factors are involved in the outcome. Several times these disputes were resolved

following long-term protests – not once bloody – and in some cases the political power chose the path of dictatorship, because it knew that a limitation of its own power would be followed in medium or short time for both his replacement and the establishment of certain legal responsibilities for behaviour prior to the public confrontation (on the street), as some famous examples shown (China in 1989, Venezuela in the last decade, etc.).

If the citizens become capable to stop in consistent measure political will, the result will be a more neutral public administration. Administrative neutrality means that the civil servants must be neutral with respect to partisan political disagreements surrounding their job. It thus acknowledges that disagreement usually exists in a population about what constitutes the common good and via which policy it should be pursued. In liberal democracies, however, the range of available policy choices, as well as the selection of instruments to pursue them, is limited by the rule of law or other higher public values like fairness or equal citizenship. Administrative neutrality is thus not "absolute", but contextual, and it does not absolve the bureaucracy of its responsibility to act as a constraint against policy or instrumental choices that, if adopted, would exceed the liberal consensus of a polity, even when these choices arise from majoritarian politics (Bauer, 2023, 7).

5. A major problem of the public law politicization is that of the professional-technical quality of public servants. They are specialists in different fields who, from a certain threshold of knowledge, cannot be replaced, either as a result of the specific function they hold within the administrative structure, or as a result of a training and professional experience specific to the public administration. The public administration needs them, but there is a problem that the political environment faces with them. Concretely, the professional qualities that these officials have make them more than once respond negatively to political requests.

The political environment want an administration that is both efficient and obedient, in order to obtain the maximum benefits for itself. However, there is a specificity brought mainly through the means of

public law, namely the study conditions necessary to occupy the public dignities, which are different from those of the political environment.

The fact that any person can enter the "political game", regardless of the level of completed studies, can be considered an advantage of citizen representativeness. However, practice reveals that the political decision is not always an easy thing, especially due to the consequences it can have. Also, the amount of documentation required to adopt a political decision – which will later be implemented by the public administration – is increasingly high, as a result of the contemporary life complexity. The complexity of some problems and documentation often makes it difficult to adopt a good and coherent decision, and in the absence of professionals from the administration, the political will can take any form, including illegal ones.

The pressure that the political environment informally exerts on civil servants can be strengthened by the modification of the legal framework of the civil service regime, especially in terms of stability in office. Thus, by means provided by law, any public servant who tries to be only a professional can be removed, and in his place will come a person who is approved by the political environment.

The specific feature of public law – namely its high dynamics, by comparison with the stability of private law regulations – is an asset for the political environment, but this does not guarantee that the selection of personnel in the public administration will be made in the sense of the continuous quality growth of civil service.

In fact, the political environment can obtain quite quickly through these personnel changes negative results in the public sphere, the disruption of some sectors of the economy, the decrease of the population's trust in the governing parties and implicitly their replacement in the next elections. In addition, for the correction of the errors made by the new officials - politically loyal, but less professional - it may take a long time, which decreases the competitiveness of an entire country in the global geopolitical and economic game.

As I said above, the population's lack of trust in their own government is an important factor in the decline of a country's power.

However, there is also a corollary: the 21st century allows a professional dissatisfied with the state of his own country to emigrate much more easily, something that was much more difficult to achieve until the simplification of the movement of people by plane (after the fall of communism in Europe, as a time point – i.e. 1990) – in 2022 the number of global international migration was about 280 million people (World Migration Report, 2023).

A political power that wants administrative loyalty, but not the competence of the public function – read "the limitation of its own projects by the opposition of professional civil servants" – is seen in this century in the face of a decrease in the national intellectual potential, with major long-term consequences. But, as Abba Eban said, "history teaches us that men and nations behave wisely once they have exhausted all other alternatives".

Conclusions

Public law is seen too many times only as an instrument of the political environment in order to fix the general framework of a country's affairs. However, it is primarily a citizens' confidence form of expression in their own state, because legislative stability is rather the essence of a tyranny, and too frequent changes in legislation represent the insecurity of a ruling political group.

Public law must be permanently adapted to the complex situations that society goes through, but wisely and with a speed adapted to its real and profound needs. In the absence of these two characteristics – intellectual depth and speed – we will note that the countries will find themselves regressing. It cannot be admitted that the insecurity of political power is covered by law that confiscate citizens' liberties. Separation between citizens and politicians will ultimately lead to a decrease in trust in the state, being implicitly followed by the search for alternatives, including abroad.

Politicization must be limited by the political class precisely because today the general level of trust in politicians is low (Endelman Data & Intelligence, 2022), no matter how hard it is for them to reduce

their own power. The consequences of the absence of trust in the political class, however, reduce both the power of the state and of the political leaders themselves – who want to lead growing populations and administer public budgets as large as possible. However, too much politicization affects both goals, and in the end it will be concluded that no one has the power to collapse a country, as its own political leaders can do.

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TECHNIQUE OF PREPARATION OF NORMATIVE ACTS

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Abstract:

It is legal norms that play a crucial role as far as social participants are concerned, maintaining order, stability and balance. By defining what is legal or illegal, the law acts as a factor that discourages behavior or activities that would fall within the scope of the illicit, providing the social protection to which citizens are entitled. In this sense, the great philosophers of the world have explained the process by which rudimentary human communions were transformed into today's modern societies by means of legal norms. Called in the literature as the "theory of contractualism", Jean-Jaques Rousseau explained that in order to reach a social balance in a society, it is necessary to have rules for the participants in social life to respect, giving in exchange a part of the freedom absolute with which they were born. "In this way, a "social contract" is born between individuals, who through free will renounce to manifest themselves freely in an arbitrary manner, accepting a series of rules of social

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coexistence, which the group imposes on the individual in the form of laws." This was an initiating and explanatory point for the emergence of legal norms, because through the definition of the social contract, the citizens tacitly accepted and recognized the principles established and established as law. "Precisely this contract and the accession of all citizens guarantees the legitimacy of the laws, and their imperative character, being the force of law that must replace the law of force (Sandu, 2023, p. 8).

Key words: *legal norms; legislative technique; contract.*

Introduction

In a society, legal provisions are considered the foundation on which a true rule of law can be built. Thus, legal norms will establish, through their coercive and regulatory character, a framework that governs human behavior, maintaining order and ensuring justice. The purpose of establishing these rules is essentially to guide individuals, businesses and state bodies in their interactions and decision-making processes.

Thus, highlighting the origin of these normative acts and the reason for their implementation in a society, it is deduced that the method of conception and implementation is a special one, of extreme importance. Currently, this formalism is preserved in the application and drafting procedure, because the laws are still like a foundation for the establishment of social balance. For this reason, this document will highlight the ways, the elaboration principles that are the basis of their drafting, their systematization and creative concepts. The importance of studying and understanding this topic is imperative to highlight, because it will determine a deeper knowledge of the purpose and motive for which a law is implemented and how citizens can respond to the prescriptions stipulated in these acts.

Normative activity and principles of their elaboration

Normative acts are the product of Parliament's activity, as presented in the fundamental law of the country, according to art. 61 of

the Romanian Constitution, republished, "Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country" (The Romanian Constitution, 2003). In this sense, the body that guides the legislative activity, in this case, the Parliament is the one that elaborates and drafts the normative acts, through which the legislative frameworks are built by which the social agents will be guided and will have a behavior equivalent to the legal limits stipulated in the background of the regulation . That is why, in essence, after the adoption of a norm, an externalization of the legislator's perspective on a specific situation can be observed. Therefore, it constitutes the means of communication of the legislator to those who are obliged to apply and respect it.

For a better understanding of how a normative act is drawn up, it is necessary to capture the main constitutive aspects of a normative act. But the process of formation and drafting by the legislator of the normative solutions is represented by the legislative technique, namely the methods and procedures intended to ensure a form corresponding to the content of the legal regulations. In order to concretely understand this formality, Law 24/2000 regarding the rules of legislative technique for the elaboration of normative acts discovers through art. 2, parag. (1) and (2) that "Legislative technique ensures the systematization, unification and coordination of legislation, as well as the appropriate content and legal form for each normative act (Law 24/2000).

State power is interested in promoting certain social relations, transposing them normatively in the plane of law. Being established by law, the respective relationships become binding. Law uses the legal technique to provide legal subjects with the normative regulatory background. So as to create the necessary coercive and directive levers for the active subject who can demand a certain conduct from others. Thus, subjective right and legal obligation are born, forming the content of the legal relationship. In this manner, the normative technique is carried out in compliance with methods, procedures and rules in accordance with the constitutional provisions, used for the elaboration, implementation, application and interpretation of legal norms. In this way, the doctrine observes that the issue of legal technique and the

methodology of the elaboration of legal norms is a scientific activity in itself, through which a social precept is transformed into a legal regulation and finally into a legal obligation.

"And in Romania, principles, criteria, standards, procedures were established by law, intended to rationalize normative acts such as:
- ensuring the supremacy of the law;
- establishing the competent authorities to make proposals for normative acts and their strict compliance with the powers established by law;
- the obligation of some studies and approvals from specialized bodies, of some documentation including comparative legislation for the substantiation of draft normative acts;
- drawing up several variants for the same project;
- ensuring the correlation of the draft normative act with the legislation system and the integration strategy in the European Union;
- the co-optation in the drafting of the project, through the system of proposals and opinions of the social agents involved in the translation into life of the provisions of the new normative act;
- consultation of various social bodies regarding the social effects of the new normative act;
- operative mediation of the divergences within the process of drafting the normative act.
- procedures for engaging individual and collective liability regarding the content and form of the proposed normative act;
- final control of legality by the Ministry of Justice (Craiovan, 2023, p. 524).

In the normative activity, the directing focus of the drafting of these acts is manifested and guided by a series of developing principles. The development of law and normative acts is a process of great complexity, in which political, economic, moral, social, historical, national and international factors, legal consciousness and the evolution trends of society, the specificity of legal norms must be taken into account (Craiovan, 2023, p. 526).

Thus, at the level of this issue, it is highlighted that the main coordinates considered in the normative activity, at the level of principles, are:

1. The principle of the scientific substantiation of the activity of developing legal norms - which transposes that it is necessary for the constitution of a norm to be based on an in-depth study of social reality, of the current and everyday needs of individuals. So that the new law responds to the requirements in the field and actively contributes to the solution of the problems arising in an unregulated or insufficiently standardized situation. In this sense, there are specialized bodies that carry out studies related to the feasibility of establishing a norm.

2. The principle of the unity of legal regulations - renders a very important aspect to be respected in the sense of assigning the norms an inter-related purpose compared to the other norms of the legislative system. More precisely, each norm must be an integral part of the legislative fund, so as to ensure coherence, unity. "Compliance with this principle ensures the elimination of legislative gaps, obsolete norms, parallelisms, overlaps and contradictions between the various regulations (Humă, 2000, p. 54).

Derived from this principle is the one through which the supremacy of the Constitution and other laws is respected, in the sense of their formulation in accordance with their provisions. At the same time, from this perspective, a subsequent principle materializes, that of ensuring a balance between the stability and mobility of the legal system. In this regard, legal norms must "ensure an optimal relationship between conservation and change (Craiovan, 2023, p. 526), achieving a balance between coercive and device.

3. The principle of legislative planning and the principle of accessibility have in mind, on the one hand, that all normative acts and the activity carried out in this respect are in accordance with the powers and programs of the Parliament, but also of the Government. On the other hand, for all legal provisions to be concisely and clearly presented, accessible to the general public, in order to distribute the message as precisely as possible.

The constituent parts and the internal structure of the regulatory acts

In the process of drafting and compiling normative acts, being a complex and deeply systematized process, they must include certain aspects that must be respected, called model law.

All normative acts of general application are systematized according to a standard structure:

• title;
• preamble - if applicable;
• introductory formula;
• device part;
• annexes – possibly;
• the form for attesting the authenticity of the act;
• signature of the issuer;
• place of signing;
• the number and date of the normative act.

Any draft law must always be accompanied by a statement of reasons by the initiator, in which a brief presentation of the normative act is made, highlighting the reasons that made the normative initiative necessary. References are made to the existing regulations and their insufficiency, to the purpose of the proposed regulation highlighting what is new, to the effects on the regulated field and the legal system in general.

The title of the normative act is its identification element. A legal requirement is that the title be concise and precisely express the respective regulation.

The preamble of the normative act represents a brief introduction, where the considerations of a social, economic, political and legal nature taken into account when drafting the act are shown. This is not absolutely necessary, therefore, it is drawn up only for certain documents, usually the most important ones. It helps to understand the normative act, because it is given in a more succinct form than in the statement of reasons, the justification of the new regulation.

The introductory formula is, as a rule, that part of the normative act that shows the legal, constitutional basis, on the basis of which the regulation is given.

The provisions or general principles represent the first part of the regulations in the normative act. Certain provisions of a general nature are established here, which concern the normative act in its entirety. These general provisions can sometimes take the form and name of "general principles" in the sense that they establish certain principles valid for the entire normative act. "Sometimes they are separated, even by a distinct title, a distinct chapter or section, entitled 'General Principles' or Basic" (Craiovan, 2023, p. 528).

The substantive provisions represent the actual regulation of social relations that are the direct object of the normative act. The logical order of carrying out the regulated activity is the one that determines the sequence and grouping of the substantive provisions. Thus, the requirement that the substantive law provisions precede the procedural norms is ensured; in the case of the establishment of sanctions, the respective norms must precede the transitional provisions (the transitional provisions provide for the necessary measures for the development of the legal contributions created on the basis of the old legislation and which make way for the new normative act) and final provisions (the final provisions express the measures that ensure the application of the normative act, the date of its entry into force, if it is subsequent to publication).

The formula for attesting the legality of the adoption of the law, used by the Chambers in the order of adoption, is: "This law was adopted by ..., in the meeting of ..., in compliance with the provisions of art. 74, paragraph (1)" or, as the case may be, art. 74 paragraph (2) of the Constitution of Romania". The signature of the president of the respective Chamber immediately follows this formula.

The article is defined as a structural element of the normative act. Independent provisions will be stipulated within it. "It can be made up of one or more paragraphs, when the disposition it contains is expressed through many sentences or contains several issues" (Craiovan, 2023, p. 529).

If the article contains enumerations, it is recommended that they be numbered with Arabic letters or numbers, it is made regarding the amendment of the laws. Some normative acts also have marginal notes in which, in a synthetic form, the institution or problem to which the respective article refers is mentioned. When additions are foreseen at the level of articles, they will be instituted through indices.

Regarding the amendment of normative acts, it is highlighted that it must be carried out by means of another normative act of the same value and with the same legal force. For example, an organic law can only be amended by another organic law. These changes can be made expressly/directly in the sense of the existence of a provision in the new act by which it is definitely made known that changes have occurred. Or, those situations are highlighted when the modified rules are not concretely presented, but tacitly/indirectly the new provisions will be applied.

Systematisation of the regulatory acts

The systematization of law is an activity of particular importance, because through its prism legislative acts are organized, so that they are included in collections, compilations of acts or codes. It is imperative to emphasize in this context the fact that it should not be confused with the systematization, for example of the norms in branches of law - here we are talking about the structuring of the branches of law and the law itself. However, the product resulting from the accumulation of all the elaborated acts are normative acts, not legal norms as is sometimes wrongly perceived.

At the level of systematization of legal documents, they can be structured according to several criteria, such as:

- chronological reading, documents are published in a collection in the order of the date of their appearance;
- the object of the regulation, by branches and legal institutions;
- legal force.

Incorporation is most often an official activity, when the compilation of document collections is carried out by the Legislative Council which has the task of incorporating into Codexes the legal regulations in force regarding the same field or related fields (art. 17, Law 24/2000). The legislative council is "the specialized advisory body of the Parliament, which approves draft normative acts in order to systematize, unify and coordinate all legislation. He keeps the official record of Romanian legislation" (The Romanian Constitution, 2003).

Codification consists in the inclusion of all normative acts from a branch of law, in the processing and compilation of a single new normative act, called a code, which has the value of a law. This is a superior form of systematization, being at the same time a component of the law-making activity, of legislation. Therefore, the elaboration of the act of codification, the adoption of the code, is the exclusive competence of the legislative body.

Style and language of regulatory acts

Clarity and accessibility related to the style and language of normative acts are a fundamental requirement of the legislative technique. In order to ensure the accessibility of legal norms, so that they can be known and appropriated by all citizens, normative acts are drafted in a prescriptive form, establishing certain rights and obligations in a precise, clear, concise formulation that avoids misunderstandings. That is why, in order to obtain the precision of the terms used, in the event that several meanings appear for the same term or concept, it is recommended to make the intended meaning explicit in the text. The essential characteristic of a legislative style is the succinct expression of the key ideas of a text, the explanatory sentences having the role of facilitating the understanding of the norm by the reader, in order to eliminate possible interpretation problems. At the same time, synthetic or elliptical expressions should be avoided, especially those that, for reasons of economy, try to convey a message whose complexity would rather require an explanation. Thus, the use of abbreviations can only be used after they are previously defined. Jargon expressions, certain buzzwords

and some Latin words used with a different meaning than their current legal meaning should also be avoided.

At the level of the terminology used, "it must be uniform both within the provisions of the same act, and between that act and those already in force, especially within the same field. The same concepts are expressed in the same terms and, as far as possible, without departing from the meaning they have in current, legal or technical language (Popescu și Țăndăreanu, 2003, p. 52).

As regards the definition of terms, they must be used uniformly and the content must not deviate from the general meaning attributed to that term or phrase. These aspects apply, both in terms of the provisions of the same act, including its annexes, and in terms of the acts that have a connection with it, in particular the enforcement order and all other acts that belong to the same sector. "Through the prism of the highlighted aspects, the complexity of the legal technique is highlighted, the fact that it is impregnated with philosophical, sociological, political, moral, linguistic contents, which configure its techno-science status (Craiovan, 2023, p. 533).

Conclusions

In conclusion, the technique of drafting normative acts plays a crucial role in ensuring the effectiveness, legality of norms and regulations. It involves a systematic and thorough process that includes research, analysis, drafting, consultation and revision. By following this technique, they ensure that the regulations they create are well founded, clear and unambiguous.

As highlighted in this document, the first step in drafting legislation is to conduct research to collect relevant information and data on the issue at hand. This helps the competent bodies to understand the problem, the causes and potential solutions to unlegislated or insufficiently regulated situations. It also helps identify any existing laws or regulations that should be revised or repealed. Thus, once this stage of the research is completed, the political decision-making bodies will

analyze the information gathered, so as to develop a comprehensive and coherent plan for the normative act. Only in this way will the definition of the purpose, scope and objectives of the act be reached, as well as the determination of the legal framework, respectively the principles that will guide its implementation, a fact realized throughout this work.

In summary, legislation plays a crucial role in shaping and influencing society. It serves as a framework of rules and regulations that govern various aspects of human behavior, relationships and interactions. That is why the elaborative process must create normative acts in such a way as to help establish and maintain social order by providing guidelines and standards for behavior that promotes the well-being and safety of all in society. Therefore, the focus is for the empowered bodies in the Parliament to create acts that address issues related to public safety by adopting laws related to crime prevention to maintain public order, reducing the incidence of criminal activities.

As a proposal for a ferenda law, it is imperative to have a sanctioning treatment regarding non-compliance with the principles of drafting normative acts. The drafting of normative acts is a difficult process and of supreme importance, therefore it should be carried out structurally, taking into account all aspects, principles and stages of a good elaboration. I believe that the existence of a sanction for the incorrect drafting of normative acts would lead to discipline and to a greater attention of the legislator regarding all the configural factors and to the drafting principles that are intended to guide the legislative process. Sanctions should be applied to those who participated directly in the drafting of the documents, but also to those who have the role of verifying the project proposal.

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THE ERROR CAUSING UNACCOUNTABILITY

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Abstract:

According to Art 30 of the Criminal Code, an act provided for by the criminal law and committed by a person who, at the time of its commission, was unaware of the existence of a state, situation or circumstances on which the criminal nature of the act depends does not constitute an offence.

Although it is not accepted everywhere, in some branches of law, such as the criminal law, being even sanctioned in some cases, error is an absolutely natural phenomenon that simply happens, independently of our will.

Key words: *error; cause of non-liability; criminal law; criminal code.*

Introduction

Although error is not accepted by anyone, in some cases it is even sanctioned, in the field of criminal law it is an absolutely natural phenomenon that simply happens, independently of our will.

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The error has long been viewed with scepticism, with many states sanctioning the error as irrelevant. Later, however, psychologists accepted the idea that the error should exempt the perpetrator from criminal liability because he did not intend to commit the crime.

The error, according to psychologists, can have multiple causes: errors of reasoning, errors of sensation, errors of perception, etc.

In Art 30 of the Criminal Code, the error is defined as follows: "(1) An act provided for by the criminal law committed by a person who, at the time of its commission, was unaware of the existence of a state, situation or circumstance on which the criminal nature of the act depends shall not constitute an offence. (2) The provisions of Para 1 shall also apply to culpable acts punishable under criminal law only if the lack of knowledge of the state, situation or circumstance in question is not itself the result of fault. (3) A state, situation or circumstance of which the offender was unaware at the time the offence was committed does not constitute an aggravating circumstance. (4) The provisions of Para 1-3 shall also apply accordingly in the case of failure to comply with an extra-criminal legal provision. (5) An act provided for by the criminal law committed as a result of ignorance or mistaken knowledge of its unlawful nature due to circumstances which could not have been avoided in any way is not imputable".

It can be seen from the legal regulation that the error may concern:

a) a state, situation, circumstance of fact on which the imputable feature of the act depends, in which case the act is not an offence;

b) an aggravating circumstance of the offence, in which case this circumstance is removed, and the offence remains a standard offence.

Analyzing the text of the law, we observe that an act provided for by the criminal law must be committed, because the error is a cause exonerating from liability (along with self-defense, physical coercion, minority, etc.).

With regard to the notion of state, situation or circumstance, it is noted that the legislator omitted to define these terms attributed to error, but in doctrine we find them defined as follows:

- by *state* is meant the way or manner in which a person or a good is presented. Example with regard to the state of a person: Art 199 of the old Criminal Code states the offence of seduction as "The act of a person who, by promises of marriage, induces a female person under the age of 18 to have sexual intercourse with him, is punishable by imprisonment for a term of one to five years". If the perpetrator was misled as to her age because her physical development appeared to be consistent with an age over 18, he will not be criminally liable.
- by *situation* is meant the position of the good or person in social relations (close relative, family member, citizen);
- by *circumstance* we mean an external reality which, if put in correlation with the act committed, makes it particular (e.g.: theft if committed at night or in public will become qualified theft).

At the same time, we note the conditioning of the criminal aspect of the state, situation or circumstance unknown or wrongly known (e.g.: the perpetrator does not know that the good he buys comes from a theft and thus commits the offence of concealment).

In order to remove the criminal feature of the wrongful act, the error must not itself be attributable to the perpetrator. If the perpetrator acts hastily and carelessly, without being aware of the existence of a state, situation or circumstance constituting an element of a culpable offence, the error no longer leads to the removal of the criminal nature of the act, as it is attributable to the perpetrator, who should have acted more diligently.

1. Forms of error

As regards the grounds for excluding the offence, most changes have been made to the error, which has been systematized on the basis of the modern classification which distinguishes between an error concerning the constituent elements of the offence and an error concerning the unlawfulness of the act (Duvac, Neagu, Gament and Baiculescu, 2019, 376).

The provisions of Para 1, 2 and 4 of Art 30 concern the error as to the constituent elements of the offence, an error which eliminates intent

as a sub-element of the subjective side.

The provisions of Para 5 of Art 30 of the Criminal Code concern the error on the unlawful nature of the act, on its illegality.

In this case, the perpetrator is aware of committing an act provided for by the criminal law but considers that his act is authorized by the legal system, which in reality is not the case.

1.1. Error as to the constituent elements of the offence (error as to the typicality of the offence)

The error on the constituent elements has the effect of removing of guilt from the structure of the subjective side (Bucur, 2022, 108).

For example, if a hunter inadvertently shoots at a person, mistaking it for a wild boar, his error excludes liability for intentional killing, but the perpetrator will be liable for manslaughter. If, however, the error was not due to the subject's fault, it would also exclude liability for the wrongful act.

If the error does not concern a constituent element of the offence itself, but an aggravating circumstance, the defendant will not be held liable. For example, in the case of aggravated murder committed against a pregnant woman (Art 189 Let g) of the Criminal Code), if the perpetrator is unaware of the victim's pregnancy, he will be held liable for simple murder (in so far as no other qualifying circumstances apply) (Bucur, 2022, 108).

1.2. Error as to the unlawfulness of the act (error as to unlawfulness)

The error as to the unlawfulness of the act bears on the prohibition of the conduct in question, on its illegal feature (Bucur, 2022, 108) . It could be defined as misinterpretation or even ignorance of a criminal law rule. Example: the perpetrator commits an offence but does not understand that it is prohibited by criminal law but considers that the act is permitted.

This error may be an error of fact - when the perpetrator believes that he is faced with an attack that would legitimize a defense, when in reality this is not the case (putative self-defense), believing that he can commit the act lawfully, or it may be an error of extra-criminal law (the perpetrator believes that a certain rule of civil law relating to the transfer of property gives him the right to sell a certain asset, when in reality he is committing a breach of trust) or criminal law. For example, an invincible error of criminal law may be found in the case of an act incriminated the day before by emergency ordinance and committed in the first hours after the entry into force of the text, when there was no possibility of becoming aware of its content.

The error on the illicit feature of the act removes the accountability when it is invincible.

In situations where this error is culpable, it can only be used as a mitigating circumstance. For these reasons, Para 1 of Art 30 of the Criminal Code provides that "the act does not constitute an offence", and the wording "the act is not imputable..." is not used as in the case of the other regulated cases.

2. Conditions

a) An offence under criminal law has been committed. The nature of the offence, the form in which it was committed or the capacity in which it was contributed to is irrelevant.

b) Misrepresentation of reality or of the extra-criminal legal norm must exist at the time of the offence.

c) The element on which the error is based is either a constituent or aggravating element. The error of law must be invincible. An error of extra-criminal law produces the same effects as an error of fact, i.e., it removes intent or, as the case may be, fault as a sub-element of the subjective side.

d) The perpetrator was unaware of the existence of a rule of extra-criminal law, of a state, situation or circumstance on which the criminal nature of the act depends or of an aggravating circumstantial element.

Error must be distinguished from uncertain knowledge, because doubt about a state, situation or circumstance is not equivalent to factual error and does not produce its effects.

3. Aspects of compared law

In Italy, the Constitutional Court intervened in the text of the rule that stated that error of law is not admissible and transformed it into an article that allows error of criminal law only to the extent that it is invincible. Also, in the Italian doctrine no distinction is made between the invincible error and the forgivable error, since both constitute errors and thus it does not matter the intensity or the origin of the error in fact, so if there is an error it will exonerate from liability. At the same time, we consider that regulating the error would exclude the emergence of ambiguous situations taking into account the fact that the acquittal or conviction of a person must have a legal basis.

Conclusions

An act provided for by criminal law committed by a person who, at the time of its commission, was unaware of the existence of a state, situation or circumstances on which the criminal nature of the act depends shall not constitute an offence.

The provisions also apply to culpable acts punishable under criminal law only if the lack of knowledge of the state, situation or circumstance in question is not itself the result of fault. A state, situation or circumstance of which the offender was unaware at the time the offence was committed shall not constitute an aggravating circumstance or aggravating circumstance.

The provisions also apply accordingly in the event of ignorance of an extra-criminal legal provision. An act provided for by criminal law committed as a result of ignorance or wrongful knowledge of its unlawful character due to circumstances which could not have been avoided in any way is not imputable.

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IS YOUR WORK ORIGINAL?

Andreea TABACU[1]

Abstract:

The idea of the originality of the work prepared in the university environment, whether by the teaching and research staff or by the student, master's, or doctoral student, is essential for achieving the goal pursued by higher education institutions.

However, the notion is not defined, and its concrete verification causes controversies. The technical means available to the universities cannot correctly rule on this condition if the result is not superimposed on human analysis.

Key words: *Higher education; teaching staff; student; work; originality; technical means of originality verification.*

Introduction

The originality of intellectual creations has always concerned the world, especially in the scientific field, because it represents a source of progress, evolution, and growth towards better, better quality, faster, easier, more ergonomic, stronger...

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If in everyday language, the *original* is a creation that belongs to a specific person and is not taken from someone else, in the context of scientific works, originality is oriented towards the degree of novelty added value brought to that field, just as for artistic creations originality reveals the specificity of the author, something special from his personality.

Higher education is one of the most suitable areas to discuss originality since its essential purpose is to generate, certify, and transfer knowledge through student training, scientific research, development, innovation, technological transfer, and individual and collective creation (Art. 3 para. 1 letters a) and b) of L. no. 199/2023). Therefore, in addition to the research carried out by teaching staff and specialized staff, real nurseries of researchers can be found here, each student being a possible future professional in his field of training.

The necessary context to carry out such activities successfully requires first the consecration of some values and then the careful regulation of the requirements to achieve the goal, even if only by indicating deviations from good conduct in this activity.

One of the values declared by Law no. 199/2023 on which higher education is based is integrity (Art. 3 para. 2 letter c) of L. no. 199/2023), which aims, among other things, to promote ethics in education and research. At the same time, university ethics and deontology norms refer to teaching and research activities, which also involve communicating, publishing, disseminating, and popularizing research results.

For clarity, Law no. 199/2023 on higher education provided explicitly for various deviations from these categories of norms to warn participants in the act of education and research activity, members of the academic community, on the attitude to follow and the possible consequences that may occur in the event of the violation of these regulations.

Among them is also mentioned plagiarism (Art. 168 para. 1 letter h) of Law no. 199/2023 - Deviation from the norms of ethics and deontology in teaching and university research activity), which is represented by taking some elements from an original work of another author without showing this, the direct consequence being their

appropriation as one's own (Art.169 letter d) of the law - the presentation of texts, ideas, demonstrations, data, theories, results, or scientific methods taken from written works as a supposedly personal creation or scientific contribution in a written work, including in electronic format, including in electronic form, of other authors, without mentioning this and without referring to the sources).

Other deviations in research activity are mainly aimed at the author's correctness and integrity regarding the results obtained (e.g., sectioning or falsifying the results of experimental research) or his attitude towards other teaching colleagues or researchers (deliberately hindering, preventing, or sabotaging the didactic activity or research). Still, the essential battle currently takes place in the realm of plagiarism.

At this point, the idea of the originality of the work prepared in the university environment, either by the teaching and research staff or by the student, master's, or doctoral student, becomes essential.

2. Some measures.

The Higher Education Law obliges universities, as in their code of university ethics and deontology, to show the educational, administrative, and technical measures taken to guarantee the originality of bachelor's, master's, doctoral theses, scientific articles, projects, productions, and works of artistic creation, research projects, inventions and patents, articles, books and any works published by publishing houses operating in the structure/subordination of higher education institutions or other such works, as well as related sanctions (Art. 18 para. 1 letter a) of L. no. 199/2023).

So, depending on the field of study and specialization, the requirement relates to the specifics of the research result, which can be a scientific work, a plastic creation, a musical, a cinematographic creation, etc (Singh/Gheoculescu, 2019, p 209-217).

Also, from the author's perspective, the work can belong both to the teaching staff or the researcher working in a university, as well as to the student, the master's student or doctoral student, who is compelled to

prepare the diploma or bachelor's, dissertation or doctoral thesis, to complete the studies, in almost the majority of situations these papers represent the essential test for graduation and receiving the diploma, respectively for obtaining the legal effects pursued by the student since the moment of entering the academic environment. By preparing these works, the student carries out research activity that is separate from the publication of the respective work in the form of a monograph, course, or simple article in a specialized publishing house. The result of the student's research was publicly communicated at the time of the presentation of the work in front of the commission.

However, the law does not define originality (Singh/Gheoculescu, 2019, p 209-217), it only imposes it, especially in doctoral studies (Art. 4 letter e) of Annex H.G. no. 681/2011 regarding the approval of the Code of Doctoral University Studies, published in the Official Gazette of Romania, Part I, no. 551 of 03.08.2011 – Annex – Code of Doctoral University studies), so it becomes challenging for educational institutions to determine criteria for appreciating originality.

Also, the law obliges to take some educational, administrative, and technical measures to ensure originality, which includes, in addition to educating authors in the field of ethics and drawing up forms with declarations for the assumption of originality and measures of a technical nature, meaning by this the acquisition and putting to the provision of the necessary technical means (Stefan, 2021, pp.295-298) to verify originality.

At this point, from the perspective of the technical means imposed by law for universities to ensure that the works drawn up within the didactic and research activity are characterized by originality, the use of programs that are more and more efficient in detecting similarity, although they are entitled anti-plagiarism programs.

In the field of doctoral studies in art. 6 letter c) of Annex no. 2 of Order no. 5229 of 2020, regulating the Doctoral Thesis Evaluation Methodology, several such programs are provided that are recognized by CNATDCU and that can be used to detect similarity, but the basic idea to arrive at their use represented a need to avoid plagiarism.

Thus, the law shows that there are programs recognized by

CNATDCU that can be used at the doctoral school level to establish the degree of similarity for scientific papers, the following: iThenticate; Turnitin; Plagiarism detector + PDAS (PDAS - Plagiarism Detector Accumulator Server); Safe Assign; www.sistemantiplagiat.ro.

However, they cannot reveal plagiarism, which is practically the main purpose for which they are used, but only the similarity between the work loaded into the program and any source found online in databases.

What does this mean? We do not have a solution at the computer level we currently have, and without human intervention, the reports that these programs generate cannot serve as a basis for evaluating the work from the perspective of plagiarism.

Why? Being similar means physically overlapping the information or data from a particular source, regardless of place, quantity, volume, or extent, and how that source was indicated or not in the analyzed work. It is also irrelevant if the respective source is protected by copyright or law or does not benefit from the protection of Law no. 8/1996, being, for example, part of the exceptions referred to in Art. 9 of the mentioned Law (The ideas, theories, concepts, scientific discoveries, procedures, operating methods or mathematical concepts as such and inventions contained in a work, whatever the way of retrieval, writing, explanation or expression, or official texts of a political nature, legislative, administrative, judicial and their official translations.).

Plagiarism is precisely the taking of texts, ideas, demonstrations, data, etc., from the written works of other authors, but without indicating that it is a takeover, without indicating the source, with the consequence that the material taken over is presented as one's own creation or scientific contribution and with the direct consequence that the work is not original.

Obviously, plagiarism needs a similarity as a starting point; with a takeover from another written work, the premise situation is fulfilled; however, moving from the identity identified by these programs to plagiarism is a long way. If the taker has indicated the source correctly and with all the necessary data to identify it, as a hypothesis, plagiarism is excluded.

However, the programs we have do not take this into account but only show the percentage of similarity, the place from where it was taken, and what was reproduced from each source, taking into account, depending on the settings, any word or group of words, which can be trivial conjunction or established phrases, which we cannot use otherwise, or names of localities or titles of normative acts, which we are not allowed to change, just as we cannot call ourselves other than we are officially registered in the state documents civil.

It is also essential that plagiarism is defined in the law of higher education by reference to a source that has a written form, regardless of whether it is found in a paper publication or the online environment. The work in which it is taken must be written in turn. In this context, it follows that, at first sight, it is easy to identify the written works and compare them with the material checked using computer programs. However, there are a lot of fields in which old established writings (history, literature), even newer ones (social sciences - law) cannot be found in the online environment, nor in databases that the program can access even if it could have unlimited access to the databases, which is unlikely, since the vast majority of works, courses, treatises, monographs, are protected by copyright available to publishers and are not open to checks using so-called anti-plagiarism programs. Only a tiny part of the materials published in literary format with copyright can be found scanned and can be accessed because they are found in the online environment.

Therefore, we can note two big problems regarding the checks made with these programs that the Romanian state recognizes in the similarity analysis as an obligation indirectly imposed by the law in connection with the need to take measures to ensure the originality of the works. On the one hand, a method aspect that reveals the fact that the programs do not identify plagiarism but similarity and, on the other hand, a question of the quality of the result obtained, given that these programs cannot perform an actual check if they access exclusively the information found in the information society.

An example would be instructive, starting from a report provided by Turnitin for a social science paper.

Thus, after the introduction of the work into the program, it is requested carry out a verification regarding the similarity, setting, as a rule, the elimination of the footnotes and the bibliography, respectively indicating several words above which the similarity must be identified (more than 10), because otherwise it ends up being determined, as we showed previously, for a simple conjunction, which is irrelevant.

The program provides the result, in which it is found that the similarity exceeds 50%, more specifically 55%, composed of 52% internet sources and 3% publications. This percentage is composed of several percentages, depending on the source from which the information was taken: 14% from source X (1), 6% from source Y(2), 4% from source Z(3), 3% each from 3 different sources (4,5,6), 2% each from 2 distinct sources (7,8), 1% each from another 15 different sources and less than 1% from 24 different sources, all totaling 55% of the volume of verified material.

From here, it becomes interesting to check only the most consistent percentage/s, in this case, the 14% or the 6%, the percentages of 1% being irrelevant. Even more so those below 1%, with the more so since, as will be seen, they are the source of strings of words which, in that formulation, have no meaning.

Analyzing the content of the report obtained by comparison with the work in which the words or paragraphs taken are marked with a different color, it is found that the program also marks a string of a few words (less than 10), which is found in the source material, since the setting and, by default analysis, target this number from the entire source material.

Also, in the content of a paragraph, a few words are marked "from the decentralization framework law no. 195/2006 as well as" for which a takeover from the source no. 47 is indicated (under 1%). In the next paragraph, 7 words from source 15 are marked, which weigh 1% ("the entry into force of the administrative code of"), followed by unmarked words that therefore belong to the author ("formerly in force"), then a word taken from source 12 with 1% ("the Law"), other unmarked words (framework of decentralization that according to the first article)

and later by a line of words from source 12 ("establishes the principles, rules and institutional framework regulates the process of administrative and financial decentralization").

At first glance, it follows that the program also establishes its identity in terms of the number of regulations and its name, which cannot be changed or reformulated as they are established and represent mandatory data.

Furthermore, it follows that the program concretely identifies the content or part of the content of a legal text, which shows the respective field of regulation, and which is taken from a general text, usually mentioned at the beginning of that law and which cannot be, and it is not necessary to express it otherwise.

Likewise, the marking of a single word such as "Law," which is found among other unmarked words of the author, is also considered identity, as it is inevitable that it is present in a multitude of online sources, being, perhaps, in the field of law the more familiar word.

When it identifies the identity with "administrative code entry into force of," it turns out that the program found exactly this expression in another source that in itself does not make sense, the context in which it is found in the verified work is important.

Yes, from the most used source that yielded 14% of the verified document, similar, not consecutive, but identical whole paragraphs are identified, which reveals that this source has been heavily exploited. However, to be plagiarized, it is necessary for this taking to be illegal without revealing the source, which in the analyzed work, the object of the report under discussion, cannot be retained since the source is mentioned for the taken paragraphs.

It follows with certainty that in the absence of a human analysis, which duplicates the mentioned report, an aspect noted in the specialized literature (Murgescu, 2018, pp.78-80), the diagnosis of plagiarism cannot be made only by identifying a significant percentage of similarity, as is the case in this case.

On the other hand, if the author also used the doctrine that the computer program cannot access, according to the distinctions above, possible similarities are not identified, they remain at the discretion of the

person who reads the material and analyzes the possibility of plagiarism.

3. So, is it original?

In this context, the question becomes legitimate: What does originality mean when the law does not define it but claims it?

We note that about the content of the legal texts that refer to originality, their spirit, and the debates in the specialized literature in the field of copyright (Romițan, 2007), which allowed more detailed research of the notion, the requirement of originality imposed by the higher education law does not must be interpreted absolutely.

Original will not be linked only to unique scientific discoveries, unprecedented solutions, or total novelty, but a rational interpretation is required. It is necessary to emphasize the acquisition of new knowledge and not exclusively on originality (Rughinis, Voinea, 2018, p.17), improving previous results that appear as erroneous or incomplete being, in turn, original. Originality is also found in a work that uses the ideas already expressed in a previously written work as a basis if they are developed or countered with new arguments (Negrilă, 2017, pp.27-28). Especially since a research activity usually starts from what is known in that field in science, the level of knowledge must be revealed to demonstrate where the research led.

Originality, in the field of copyright, is first analyzed objectively to see if the respective work is copied from another previous work, and then subjectively to find out if the work is the result of a minimum intellectual effort of the author, if it reveals "the imprint of the author's personality. "(Roș, Livădariu, 2014, pp.87-88).

Why could it be any different in academia?

As I stated above, in scientific research where notions, ideas, and theories are configured or even well established, a contribution cannot be made if previous research is not used, so the new work will be original if the author presents in a way personalize some established knowledge or theories, offer solutions to some unresolved issues, comment on or

interpret previously identified solutions in the respective field, criticize or propose other solutions based on existing theories (Florea, 2018, p.17).

The fact that a particular topic is new (a normative act that regulates for the first time a specific sphere of social relations and that has an immediate impact on them) does not mean that even its simple presentation in a specialized paper, without any personal contribution of to the author, it is original because no one has written about it before. After all, the norm is just being reset on the page.

The originality of the research is revealed from an additional contribution, an explanation, the exposition of reasoning, and a corroborated argumentation in connection with other fields, from a step forward compared to what is known in the respective field.

Closely related to the originality of the work is the idea of research quality, which will be analyzed separately later.

Conclusions

Higher education is constantly developing to provide society with trained people who can move the world, improve it, and develop quality social relations, for which it is also necessary to focus on the value that the research activity must prove.

The requirement of originality of a work prepared in the academic environment, either by teaching staff or students, represents a criterion that ensures valuable research. Still, the implementation, compliance, and verification of this condition raise problems in practice, starting from the meaning that must be conferred on this notion and continuing with the means available to higher education to verify its fulfillment.

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CONSIDERATIONS REGARDING THE HIGHER EDUCATION QUALITY ASSURANCE IN THE LIGHT OF LAW NO. 199/2023 ON HIGHER EDUCATION (I)

Daniela IANCU[1]

Abstract:

Foundation of individual development and, also, of society's as a whole, education represented and represents a major concern both at European and national level. The realization and further development of the European space of education represents the general political objective of the new strategic framework for European cooperation in the field of education and training at the level of the European Union. In the National Strategy for the Sustainable Development of Romania 2030, among the objectives for sustainable development is the guarantee of the quality in education, the access and the participation in education base don quality being considered essential for the proper functioning of a sustainable society.

Ensuring the quality of higher education, through a series of processes carried out for the purpose of its permanent improvement, contributes to the formation of the trust of the beneficiaries in the educational institution's ability of to offer education services in accordance with quality standards.

Key words: *education; quality; European cooperation; European Higher Education Area; European Education Area.*

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Introduction

Considered to be the personal development, of the professional insertion capacity and of active and of the responsible citizenship, education represent a concern at European level. The creation of the European higher education area as a key way to promote the mobility (Gheoculescu, 2022, p. 95-102) and employability of citizens, as well as the global development of the continent, was established as an objective by the Bologna Declaration (1999), officially signed by ministers from 29 European countries[1]. Among the objectives of the declaration there is: the promotion of the necessary European dimension in higher education, the promotion of European cooperation in quality assessment, the promotion of the necessary European dimensions for higher education.

Thus, in terms of higher education, "the Bologna process has created a space for dialogue and cooperation that goes beyond the European space", but this process is actively supported by the European Union[2], in this sense being adopted, for example, the Strategy for 2020 of the EHEA entitled "Mobility for better learning", as an integral part of the efforts to promote the internationalization of higher education[3], Council Directive 2004/114/EC of 13 December 2004 on conditions for the admission of third-country nationals for studies, student exchange, unpaid vocational training or voluntary services[4], Council Directive 2005/71/EC of 12 October 2005 on a special procedure for the admission

[1]It was officially created by the Vienna Budapest Declaration (2010).
[2]Council conclusions on the dimension of European higher education, 2014/C 28/03
[3]The communication from Bucharest, April27, 2012, p.3, www.ehea.info/Upload/document/ministerial_declarations/Bucharest_Communique_2012_610673.pdf, accessed on 18.12.2023
[4]JOL375,23.12.2004,p.12,https://eurlex.europa.eu/legalcontent/RO/TXT/PDF/?uri=CELEX:32004L0114&from=ES, accessed on 18.12.2023

of third-country nationals for the purpose of conducting scientific research[1].

1. The development of the european space of education

The international strategy adopted at the May 2007 Bologna ministerial meeting in London emphasized the need to have a European higher education area open and attractive to other parts of the world and to strengthen higher education cooperation and political dialogue with countries outside Europe.The approval by the Barcelona European Council of March 2002 of the work program "Education and Vocational Training 2010" ("ET 2010") and the establishment of a new cycle, through the Council Conclusions of 12 May 2009 on a strategic framework for European cooperation in the field of education and vocational training ("Education and vocational training 2020" - "ET 2020"), but also the progress made within them, especially in support of national reforms, demonstrates the fact that the European Union has set and wants to achieve ambitious goals in this field, including the transformation of the European Union into the most competitive and dynamic knowledge economy in the world[2], strategic objective established on the occasion of the Lisbon European Council (2000).

In this sense, together with the member states, the Commission has initiated actions to realize the vision for the future of education and training by establishing a European space of education, for better cooperation in this field, materialized in the recognition of diplomas, the further promotion of the program Erasmus+, the adoption of measures to create truly European universities, starting in 2018[3], to which the Council

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[1]JOL289,3.11.2005,p.15,https://eurlex.europa.eu/legalcontent/RO/TXT/PDF/?uri=CELEX:32005L0071&from=ET, accessed on 18.12.2023

[2] Communication from the Commission - Investing efficiently in education and training: an imperative for Europe /* COM/2002/0779 final, accessed on16.12.2023

[3]COM(2017)673final,https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52017DC0673&from=FI

responded by adopting the Council Conclusions of 22 May 2018 regarding the transition to a vision of a European Education Area[1]and the Council Resolution of 8 November 2019 on the further development of the European education area to support future-oriented education and training systems.

Among the strategic priorities of the Council Resolution on a strategic framework for European cooperation in the field of education and training in the perspective of the realization and further development of the European education area (2021-2030)[2]include improving quality, equity, inclusion and success for all in education and training, as well as strengthening European higher education, by encouraging higher education institutions to create transnational alliances, by pooling their knowledge and resources, and to provide more opportunities for student and staff mobility and participation, while stimulating research and innovation activity.

Thus, until 2030, the realization and further development of the European education space will represent the general political objective of the new strategic framework for European cooperation in the field of education and training, influencing all strategic priorities and priority areas.

2. Quality assurance in romanian higher education

In the National Strategy for the Sustainable Development of Romania 2030, among the objectives for sustainable development is the guarantee of the quality in education, the access and the participation in education based on quality being considered essential for the proper functioning of a sustainable society.

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[1](2018/C195/04)https://eurlex.europa.eu/legalcontent/RO/TXT/PDF/?uri=CELEX:52018XG0607(01)&from=ES

[2](2021/C66/01)https://eurlex.europa.eu/legalcontent/RO/ALL/?uri=CELEX:32021G0226(01)

In this context, in the newly adopted Higher Education Law no. 199/2023[1] an entire title is dedicated to quality assurance in higher education, the mission of education quality assurance and evaluation activities being to contribute to the consolidation of society's trust in Romanian higher education, part of European higher education, thus facilitating the recognition of the studies carried out and the qualifications granted by the institutions of higher education, as well as the mobility of students and graduates, both within and across national borders (art. 220 al. 2 from the Law nr. 199/2023 on higher education).A quality higher education according to the standards of the European Higher Education Area was a condition for funding also in the National Education Law no. 1/2011 (Tabacu, Draghici, Iancu, 2011), law by which a series of principles and values were adopted in accordance with the new requirements resulting from the fact that Romania had recently become a member state of the European Union.

Quality assurance and evaluation is carried out in compliance with the principles of legality, responsibility, independence and autonomy, university ethics and deontology, legitimacy, professionalism, impartiality, transparency, efficiency and sustainability.

The principles of quality assurance, according to the provisions of art. 221, paragraph 1 of Law no. 199/2023 on higher education are the following:

a)the responsibility of the organizations providing education[2]/higher education institutions to ensure their quality and the activities they carry out;

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[2]According to art. 222 lit. a) from the Law nr. 199/2023 on higher education the organization providing education is an educational institution. They can provide education services also other legal entities without patrimonial purpose that, following the external evaluation and authorization process, acquire the status of an education provider organization that gives them the right to carry out educational activities based on programs and/or fields of study of university and/or postgraduate level, legally organized.

b) adapting to the diversity of institutions, programs and students;

c) consolidating a quality culture;

d)correlation with the requirements and expectations of students, employers, as well as all interested parties within society;

e) focusing mainly on results.

Ensuring the quality of education in higher education, which should represent a permanent priority for each individual educational institution, requires the realization of a whole set of actions, carried out constantly, for the development of the institutional capacity, for the elaboration, planning and organization of university programs and postgraduate studies, as well as for adult vocational training. All these actions include a continuous process of evaluating the quality of education, a process that contributes to the formation of the trust of the beneficiaries in the ability of the educational institution to offer education services in accordance with the quality standards.

Quality in education is ensured through the following processes, carried out with the aim of its permanent improvement, but also to provide information about the education system:

a) planning and effective achievement of the expected learning outcomes;

b) internal evaluation of the results - when the quality evaluation is carried out by the higher education institution itself.

Improving the quality of education requires planning, implementation, evaluation and permanent corrective action on the part of the higher education institution, by selecting and adopting the most appropriate procedures in relation to the standards provided by the legislation in force.

c) external evaluation of the results - carried out by an authority with competence in the field

d) auditing the internal evaluation of the results (Art. 225 al. 2, lit. b)from the Law nr. 199/2023 on higher education) - through the external evaluation of the internal quality assurance mechanisms, established by a higher education institution, with the aim of continuously improving the activities and processes at the level of study programs and the institution,

by verifying compliance with the related criteria, standards and performance indicators the domain.

Conclusions

The evaluation of the education quality is fundamentally aimed at learning, teaching and evaluation, it includes the learning environment, but also the relevant links with research and innovation. The process also aims to evaluate the facilities and services offered to students or trainees, including by measuring their satisfaction with them.

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THE CONCEPT OF LIFELONG LEARNING IN THE LIGHT OF LAW NO. 199/2023 ON HIGHER EDUCATION (I)

Andreea DRĂGHICI[1]

***Abstract**:*

The newly adopted Law 199/2023 on higher education, emphasize the notion of lifelong learning, giving it special regulation in Title II, title that regulates the general and integrative framework of lifelong learning programs organized at the leve lof higher education. The legislator's intention to adress this concept in detail demonstrates the particularly important role that lifelong learning has on both the individual and society.

***Key words:** learning; education; formal context; educație; informal context; non-formal context; competences; higher education.*

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Introduction

The evolution of the contemporary world, with the economic progress, with the diversification of human aspirations and needs, with the permanente desire for knowledge, registers a rapid expansion of its fundamental rights and freedoms. In all these rights and freedoms, recognizing their role and importance in human life and without stating that one right is more important than another, the right to education stands out, as a fundamental right, without which man cannot evolve, not it can be asserted in the fullness of its capabilities (Drăghici, 2013). As stated, the authentic existence of other rights depends on this right as an indispensable prerequisite (Mahler, 1979).

The right of education

The recognition of the role of such a right represents a guarantee of the subsequent assurance of a qualification, specialization and professional improvement. However, not only its legal consecration is sufficient to achieve its essential role in the life of each person. The permanent modeling of legal regulation in accordance with social changes and the assumption of coherent social policies and strategies by those who have responsibility ensure a high level of satisfaction both for the whole society and for each person.

Man, a rational being, anchored to social life, is in a permanent competition with the changes that occur in society, fact that implies the need for a continuous learning process. The more educated, the more evolved the human being, the greater his chances of adapting in any social context. Learning is a permanent process in the life of any person and it is different from one person to another depending on the experiences that each one lives, their own mentality and specific lifestyle. If institutionalized education allows the development of skills and abilities specific to a certain field of activity, where the person can progress and perform according to his own career plan, the learning process is not limited to this formal learning, most of the time, the development of the person as a social being, taking place outside this

institutionalized framework, through his participation in various economic, cultural, religious, artistic, political, social, etc activities and experiences. Any lived experience constitutes a possibility of formation, a form of learning some concepts, of acquiring some skills that are added to the already existing baggage and that, in their totality, help to fully form the human being. Not for nothing, the famous Greek philosopher Aristotle said that "education is the best provision you can make for old age".

Social relations and professional relations are therefore based on education, learning, training in the social space where people live. Without this continuous learning process, man would not be complete and most of the time he would be unable to face social or professional challenges and moreover he would not be able to reach the state of satisfaction that every human being instinctively desires.

In this context, in Title II, Law 199/2023 on higher education (Published in Monitorul Oficial 614 from 5 July 2023) regulates the general and integrative framework of lifelong learning programs organized in higher education institutions[1]. Thus, from the perspective of art.180 of the aforementioned law, lifelong learning refers to all learning activities regardless of their nature (formal, non-formal and informal) to which a person wants access regardless of age. Moreover, such conditioning would inevitably limit a person's desire to permanently enrich himself in terms of the information he possesses but also in terms of the development of skills and abilities, competences and attitudes.

Personal development, the desire for permanent improvement, natural to every individual, regardless of whether it is a civic, social or professional perspective, is justified by the individual's need to keep up

[1] Title V Chapter I of Law 1/2011 on national education also regulates the general and integrative framework of lifelong learning programs in Romania, establishing that lifelong learning includes early education, pre-university education, higher education, education and training continuing professional education of adults (art. 328).

with a rapidly changing environment. That is why the law associates the learning activities carried out by a person at any moment, stage of his life, with the concept of lifelong learning ((life long learning).

The context in which the learning activity can be carried out is formal, non-formal and informal. The context in which the learning activity can be carried out is formal, non-formal and informal. Each person can choose the type of education and the level to which they want to access and train. This is actually didactic learning that takes place in an organized, formal setting based on scientific information.

The role of basic education is fundamental in the development of skills, but the non-formal context should not be neglected either, i.e. the non-formal education that comes to fulfill and develop skills as close as possible to the requirements of the labor market and society. It develops outside the educational curriculum, at the workplace, in society and in certain circumstances even at school. The information and knowledge they develop are those that the individual values according to himself. Informal education represents the spontaneous or unorganized influences acquired from any spiritual, artistic, family, group of friends, mass media, etc. on the individual.

Art.180 paragraph 3 expressly provides that lifelong learning includes higher education, vocational education and training, adult education, youth activities and other types of learning outside of formal education and training contexts.

Therefore, the law in turn emphasizes the extremely important role that non-formal education has acquired in the development and formation of the individual.

In higher education, lifelong learning includes:

a) the initial training carried out through the university study programs, organized on the four study cycles, level 6-8;
b) continuous training, through postgraduate study programs;
c) professional training programs for adults, level 5;
d) recognition of skills acquired in non-formal and informal contexts;
e) counseling and career guidance services;
f) youth activities.

From the analysis of the legal provision, it can be observed that

when the legislator talks about lifelong learning in higher education, he mainly refers to the formal context, but also takes into account the non-formal context when he refers to "youth activities". Thus, higher education institutions can carry out lifelong learning activities in non-formal contexts, in which they promote cross-sectoral cooperation and ensure flexible learning paths. In the same context, it is stipulated that, according to the law, "recognition and certification centers of the competences acquired by young people and adults, in non-formal and informal contexts" can be organized.

According to the law, learning carried out in formal contexts has an intentional character and takes place in an organized, structured, coherent and predetermined framework before the start of the process, specifically dedicated to learning and which is based on the elements indicated in various normative acts that unequivocally establish the content of this process. Law 199/2023 lists here: curriculum and explicitly formulated educational objectives, the development of learning in a higher education institution or in another organization providing education, the enrollment of students in an institution that is authorized to operate provisionally or accredited according to the law, the evaluation and certification of learning results acquired through official documents.

It is therefore an objectively organized framework (by law) and centered on the development of skills, a framework that excludes the intervention of arbitrariness, invalid information, errors in the correct learning process, regardless of the nature of their origin.

And the learning achieved in non-formal contexts also has an intentional character and takes place outside the formal system of education and training, through planned activities. It is carried out with voluntary participation, including a form of course support for participants and can be carried out based on a curriculum and educational objectives. It is flexible but pursues a series of learning objectives, which motivates the learner.

It can therefore be easily observed that in higher education, the two contexts (formal and non-formal) are not left to chance but require a

specialized intervention in terms of all the elements that help to acquire and train skills.

Unlike the two contexts we referred to previously, "learning in an informal context may or may not have an intentional character and results from a person's daily activities and experiences, not being organized or structured in terms of objectives, duration or support granted to the process, being acquired learning results" (art. 182 paragraph 2).

Learning in an informal context is carried out during current activities in the family, at work, in the community and in social networks, volunteering, sports, cultural, spiritual activities.

Regarding the role of lifelong learning, the Law on Higher Education identifies both the satisfaction of a general interest of society, emphasizing as if once more the beneficial role that education has in any community, but also a private, particular interest of each human individual. Thus, if the public interest aims, in this context, the sustainable development of society, the private interest aims at the complete development of the person, thus giving him the ability to perfect himself so that he has the opportunity to integrate or reintegrate into the labor market.

Moreover, the declared educational ideal of higher education consists in: the free, integral and harmonious development of human individuality; the formation of autonomous personality and the assumption of a system of values that are necessary for personal fulfillment and development, for the development of the entrepreneurial spirit, for active citizen participation in society, for social inclusion and for employment on the labor market (Art.2 of Law no.199/2023). In this context, it appears imperative to constantly refer to the ethical norms, without which it is impossible to imagine the educational framework. As expressed in the doctrine, none of the goals announced by the law can be achieved if the participant in the act of education in higher education does not obey the ethical and behavioral rules specific to the educational field (Tabacu, 1/2023, pp.117-118).

In the center of this permanent learning process, the essential role is the development of skills. As they are identified by law, they can be: key competencies (Council Recommendation of 22 May 2018 on key

competences for lifelong learning - 2018/C 189/01); professional skills specific to a field of activity or to a qualification; transversal competencies, usually considered not to be specifically related to a particular job, task, academic discipline or field of knowledge, but as skills that can be used in a wide variety of situations and work environments, including those found in the ESCO European portal (Art.181 alin.2 lit.c) of Law no.199/2023).

Lifelong learning from the perspective of its active role in the development of the human individual has become a priority in the educational strategy in Romania, starting in 2011 with the adoption of the national education law (Tabacu, Drăghici & Iancu, 2011).

At the European level, the regulation of the field of education and vocational training began with the adoption of the White Paper on education and vocational training "the White Paper on education and vocational training to teach and learn - towards the knowledge society", through which the European Union defines itself as moving towards a learning society, based on the acquisition of new knowledge and lifelong learning[1].

[1] The White Paper on vocational education and training is followed and supported by a series of programs such as: Socrates, Leonardo da Vinci (aims at transnational cooperation in the field of professional training of the labor force. Its purpose is to increase the quality of professional training systems and practices, to ensure modern tools and new approaches in lifelong professional training), **Comenius (**state and private pre-university educational institutions**), Erasmus (**is intended for higher education and has among its key objectives the increase in the quality and volume of mobility of students and teaching staff in Europe, multilateral cooperation between higher education institutions in Europe, as well as increasing the degree of transparency and compatibility between higher education and professional qualifications obtained in Europe**), Grundtvig (**aims to offer educational alternatives and improve access to those who, regardless of age, want to acquire new skills through forms of adult education**).**

Conclusions

The lifelong learning refers to any form of learning undertaken at any time in a person's life, with the aim of improving knowledge, skills and qualifications. This concept is essential in the context of a rapidly changing global economy where skills must be constantly updated to keep up with technological innovations and changes in the labor market. In Europe, lifelong education is supported by various initiatives and policies of the European Union. these policies aim to encourage member states to provide accessible and high-quality learning opportunities at all levels of education.

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DUAL UNIVERSITY EDUCATION (I)
-GENERAL ISSUED -

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Abstract:

Dual university education is a form of education that combines theory and practice in a closer way. Students learn both at university and at work, alternating between periods of theoretical and practical study. This system provides students with the opportunity to develop their practical skills while continuing their academic studies. It's a great way to get hands-on experience in the field they want to work in, preparing them for the labour market.

Key words: *education; dual system; practice.*

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Motto: *Learning is light. There is no greater light that which education brings.*
(W. Shakespeare)

Introduction

The right to education is a fundamental right recognized by numerous international treaties and conventions, including the Universal Declaration of Human Rights and the Convention on the Rights of the Child.

The right to education and dual education are interconnected and complement each other in many ways. The right to education implies the right of every individual to have access to a quality education, without discrimination and without being limited by socio-economic conditions (Ionescu, 2018, pp594-599). This right also includes the right to equal opportunities in education, without being affected by social origin, gender, religion or any other form of discrimination. Dual education represents an educational system that combines practical learning in an enterprise with theoretical study in an educational institution. This system gives students the opportunity to acquire both theoretical knowledge and practical skills in a real work environment.

The origins of dual education can be found in the apprenticeship system of the Middle Ages, when young people learned a trade through a teacher or master in a particular trade. This form of education continued to develop in the following centuries, evolving into what we know today as dual education. In the 19th century, modern dual education was formalized in Germany, based on collaboration between schools and companies to provide students with a solid theoretical as well as practical training. Since then, the system has spread around the world, adapting to different needs and cultural contexts.

Now, in Germany, the dual education system is very well developed and popular. Students following dual education spend approximately half of their time in school and half at work, where they work under the supervision of a mentor. This system prepares students for careers in various fields, from engineering and technology to commerce and services. It is considered a successful model in workforce

training.

Currently, dual university education is practiced in several countries around the world, including not only Germany, but also Switzerland, Austria, France, Netherlands, United States of America and Canada.

The term of dual university education in few countries

In Switzerland, dual university education is known as the "dual system of tertiary education" or "dual applied education". In general, dual university education in Switzerland has the following characteristics:

1. Alternation between theory and practice: Students spend part of their time at university and part of their time working in a company or organization.
2. Dual training contract: Students conclude a dual training contract with a company, which gives them the opportunity to work and apply theoretical knowledge in practice.
3. Coordination between universities and companies: The program is coordinated between universities and companies to ensure that students acquire both theoretical knowledge and practical skills relevant to the job market.
4. Certification and Degrees: Upon completion of the program, students obtain a recognized university degree attesting to both the theoretical and practical skills acquired during their studies.

In France, dual university education is known as "alternative training" or "alternative vocational education", in Canada as "co-op education" or "cooperative education program" and it is characterized by the same features as in the Swiss system, operating on the same principles.

In the United States, dual university education is known as "cooperative education" or "cooperative education program". As a method of development, it does not differ from that of Germany and Switzerland, the American system allowing students to alternate between

periods of study at the university and periods of paid work within a company or organization relevant to their field of study.

The main features of dual university education in the United States include:

1. Alternating between work periods and study periods: Students spend their academic semesters at university and spend their summer semesters or other break periods working in a company or organization.
2. Educational cooperation contracts: Students conclude educational cooperation contracts with companies or organizations, which give them the opportunity to work and apply theoretical knowledge in practice.
3. Coordinated programs between universities and companies: The program is developed and coordinated in collaboration between universities and companies to ensure that students develop both theoretical knowledge and practical skills relevant to the labor market.
4. Gaining academic credits and work experience: Students receive both academic credits for their work periods and practical experience that prepares them for entering the job market after graduation.

This type of education offers advantages. One of the most important for the economy is that companies can identify and train talented young people according to their specific needs.

In the state with tradition in this field, the important aspects for the economic agent are: the company provides professional training under conditions of real work, providing foreman-instructor in production, giving students access to equipment and machinery from company framework, etc.; gradually, students take on tasks and responsibilities on site for work; the company that carries out the training pays the student o "training allowance". The role of educational institution is: predominantly provides training in classrooms; provides

free training; the local administration finances vocational schools public (infrastructure, teaching staff, etc.)[1].

Thus, it is expected that dual higher education will continue to develop in all the state, also in Romania will become an increasingly popular option for students and companies in Romania.

Why was it necessary to regulate this concept in Romania? Because if it works in developed countries, it is certainly necessary to be implemented in our country as well. In Germany we know for sure that this system works[2], because have a long history of the dual system , which gave a well-developed economic structure that translates into a demand lifted by qualified personnel, a strong SME sector, there is interest, dedication and ability of the companies to train, also exist a strong and competent representation of the interests of employers and employees (chambers of commerce / trade unions), the mentality is towards to a wide acceptance of vocational training standards and a strong involvement of social partners in professional training, exist a strong regulatory capacity of the government, they have well-trained instructors and teachers.

Also, thanks to the german system, the general school prepares young people for the dual education system.

In general, from the age of 6 children in compulsory education go to a local Grundschule. Then they choose separate branches. Parents decide at this moment - based on the teacher's advice - about the type of school the child should attend: Hauptschule (lower secondary school), Realschule (intermediate secondary school) or Gymnasium (upper secondary school). In some German regions there are also Gesamtschulen (comprehensive secondary schools) that combine all

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1 https://www.ipt.md/images/Documente/Invatamintul%20Dual/2016_11_10_VET_Factsheet.pdf, accesed at 27 December 2023.

2 https://ccir.ro/wp-content/uploads/2017/05/Sistemul-invatamant-dual-Germania.pdf , accesed at 27 December 2023.

three types of schools in one form. In Germany, only a small proportion of young people complete their professional training in school. Approximately three quarters of the young people in any general school (not including the higher schools in Gymnasien) are trained in companies. In addition, the company's students attend vocational school courses. That's why we talk about a "dual" system in professional training. Upon obtaining the Abitur or Fachabitur (upper secondary education certificate / specialized secondary certificate), the graduate can choose from a range of higher education institutions in Germany: Universität (university), Technische Hochschule (technical university), Pädagogische Hochschule (pedagogical college), Kunsthochschule/ Musikhochschule (college of art/college of music) or Fachhochschule (college of applied sciences).[1]

The most characteristic feature of any dual study programme is the alternation of phases of study and work/vocational training. The periods of study and work can be as long as three months but as short as a few days. But, not every practically-biased university study programme is automatically a dual study programme. For a study course to be considered a dual study programme, the phases of study and work must be in the same field and must be aligned and connected. The kind of work experience that is integrated into the study curriculum gives us three major types of dual study programmes:

Vocational-training-integrated dual study programme combines academic studies at the institution of higher education with vocational training in a recognized occupation which takes place in the partner company. Internship-integrated dual study programme combines academic education with practical work experience in the cooperating company. In this type of study programme students usually complete a long-term internship in one company, though in some programmes they can do several internships in different companies. Fulltime-job-integrated

[1] https://www.rasfoiesc.com/educatie/didactica/Sistemul-de-invatamant-din-Ger21.php , accesed at 27 December 2023.

dual study programme allows employees to pursue academic degrees while working fulltime or nearly fulltime. There are two subtypes of this programme: in one the number of working hours is reduced to enable more time for studies while in the other the student must cope with the full workload. The fulltime-job-integrated dual study programme differs from distance study course in that study and work in a dual study course are integrated, that is, they are aligned and coordinated with each other.[1]

Dual university education in Romania

One of the novelties regarding dual education in Romania is its extension to higher education. In the past, dual education was predominant at the level of vocational and technical education (Order of Ministry of Education regarding the approval of the Methodology for the organization and operation of dual education no. 5732/2022), under the Law no. 1/2011 (Tabacu, Draghici & Iancu, 2011), but now it is increasingly developing at the level of higher education (Law no. 199/2023, also the Project for the approval of the Methodology for the organization and operation of dual higher education[2]), covering various fields such as engineering, IT, business, and others. This expansion benefits both students, who can gain practical experience already during their studies, and companies, who can train and train students according to their specific needs.

The Law no. 199/2023 regarding the higher education[3] regulates, in the Romanian system, in article 90 this concept of dual university education, thus providing the legal framework for its implementation.

These regulations define the conditions and procedures for the implementation of dual education at the level of higher education, as well

[1] https://www.learngermanonline.org/dual-studies-in-germany-for-international-students/ accesed at 27 December 2023
[2] https://www.edu.ro/sites/default/files/Proiect_OM_invatamant_superior_dual.pdf
[3] Published in Official Journal of Romania no. 614/ 05.07.2023

as the roles and responsibilities of higher education institutions and companies involved in this education system. The law establishes the rights and obligations of students following dual vocational training programs, regulates the rights and obligations of employers participating in dual vocational training programs, establishes the procedures and requirements for the organization and carrying out dual professional training programs and the mechanisms for the supervision and evaluation of dual professional training programs to ensure their quality.

Conclusions

Dual higher education is an effective way of preparing students for the labor market, giving them the opportunity to gain practical experience in a real work environment already during their studies. This system brings many benefits, including improving the quality of education, increasing employment opportunities for graduates and promoting collaboration between higher education institutions and companies. By combining theory with practice, dual higher education prepares students for the demands and challenges of the labor market, thus contributing to the development of human resources and increasing the economic competitiveness of the country.

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