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THE RULE OF LAW AS THE BASIS OF CONSTITUTIONALISM

Rainer ARNOLD[1]

Abstract:

The rule of law is the central principle of every human-centered, i.e. liberal-democratic constitution. The state community is bound to the law in its hierarchical structure; the primacy of the constitution is essential to today's constitutionalism and extends the earlier restriction of the rule of law to legality, i.e. to the primacy of the simple law over the executive. The normative existence of this principle is independent of whether it is a written or unwritten part of the constitutional order. The example of Great Britain, with parliamentary sovereignty as the supreme constitutional principle, shows how difficult it is to safeguard the rule of law against unrestricted access by the legislature. From a comparative legal perspective, a constitutional model of the rule of law has emerged.

Keywords: *Rule of Law; Sovereignty of Parliament; primacy of the Constitution; legality; constitutional justice.*

Introduction

A constitution is the basic legal order of a state. It defines the organization of the state, its institutions, their functions and instruments

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of action, the allocation of powers, the territorial organization. However, it also determines the ideal basis of the state, its values, its value-based objectives and the concrete manifestations of these values, as they are manifested above all in fundamental rights. In other words, the constitutional order of the state consists of institutions and values. They are the necessary components of a constitution, whereby concretization, especially in the institutional part of the constitution, is largely left to ordinary legislation (Arnold, 1990, pp.1-7).

Constitution and legislator

Constitutions are usually based on one, occasionally two or more texts, which codify the basic regulations and principles of the legal system. However, it is often up to the ordinary legislator to specify and further develop the fundamental regulations in the constitution.

There are additions to constitutional norms by the legislature that are already mandated by the constitution itself. In such a case, the constitution expressly states that "further details are to be regulated by the legislature" (Art. 21 (5) GG (German Basic Law) for the area of political parties. A crucial case Is Art. 94 (2) GG which transfers the regulation of important issues on organization and procedure of the Federal Constitutional Court (FCC) to the ordinary federal legislator. A potential simple majority in Parliament held by an extremist party (or some of them) could easily modify such issues and block a normal functioning of the FCC. For this reason the BL will be reformed in the next months for excluding a misuse. The important organizational and procedural structures of the FCC will be placed into the BL (to reform only with a two thirds majority in Parliament in Federal Council) and in part modified.). This is a constitutional mandate that the legislature must fulfill within a reasonable period of time. If this does not happen, the courts are entitled to make the necessary specifications. However, such a specification independent of the legislation is subject to the proviso that this is corrected by a constitutional court review. It is also possible that the constitution mandates the legislator to define the content of the

constitutional scope of protection in more detail. This is the case, for example, with Article 14 (1) of the Basic Law, which contains the guarantee of ownership (para. 1 of Art. 14 BL:"(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws." Translation: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html). According to this constitutional provision, the legislator is tasked with defining the content and limits of property. In doing so, it has legislative discretion but must adhere to the basic line of the constitutional norm. In this case, the content of the property to be protected must be designed in such a way that it guarantees freedom as a guarantee of property and at the same time expresses the duty of property to society. Both basic ideas are already contained in the constitutional norm: property is an essential right to freedom and at the same time is subject to special restrictions in favor of the community.

If the constitution does not instruct the legislator to provide a more detailed definition of a term mentioned in the constitution, this is reserved for interpretation by the person applying the law, in particular the judge. They must then do so in accordance with the basic objective of the constitutional provision in question and also take into account the overall constitutional order, in particular its conceptual foundations.

Unwritten constitutional law

However, the constitutional order does not only consist of written texts. A constitution is a functional unit which, if it is an authentic constitution worthy of the name and cannot merely be described as an organizational statute, has a necessary basic structure, a DNA, so to speak, which necessarily exists in this constitutional order. This basic structure can be in the written text or unwritten.

What is this basic structure, summarized?

Human beings are at the center of a genuine constitution. The anthropocentrism (Arnold, 1990, pp.1-2) is the core of the constitutional

state. Man, his/her dignity, is the central value of the constitutional order. This statement is linked to the human condition and therefore applies universally. Human dignity defined in the sense of the philosopher Immanuel Kant (Kant, 1788, Kopper, 1961, print 2019, p. 192) fundamentally means that the human being must be recognized as a subject, must never be an object, must never be misused by the state as an instrument for another purpose. Man is an end in him/herself. This recognizes the central importance of the human being who, as Jean-Jacques Rousseau says, is born in freedom but often "lies in chains". Human freedom is inseparable from dignity. It is obvious that this must be restricted in a community. However, it is important that human freedom is recognized as a principle and that the restriction is an exception that must be legitimized in each case. Today, the legitimacy of this restriction is based on the now globally recognized principle of proportionality. This means that only restrictions that are absolutely necessary for a legitimate community purpose are permissible. The third value is equality, as dignity and freedom exist by virtue of being human, i.e. they apply to everyone without distinction.

This triad of values is the core of the constitutional order and also the core of the rule of law. The individual fundamental rights are specifications of freedom, and the basic element of today's state order, democracy, is also a manifestation of the principle of freedom, political freedom and self-determination (Arnold, 2022, 41 et seq.).

If we speak here of the DNA of the authentic constitutional order, which is therefore a liberal-democratic constitutional order, it is logical to assume that the elements of this order that are not written down in the text exist unwritten. It is the task of the constitutional judge in particular to make these elements visible.

On the interpretation of constitutional norms

In order to make these elements visible, a method of interpretation is required that recognizes the following: the constitution is a living instrument that evolves in the course of its existence. The constitutional

provision has to realize a normative goal. At the time of the enactment of the constitutional provision, its normative objective is confronted with a social reality that corresponds to this point in time. The normative objective continues to exist for the duration of the constitution's existence, but the constitutional provision in question must take account of the relevant social reality at any later point in time in order to achieve this objective. If the social reality changes, a different understanding of the written norm is necessary in order to achieve the same normative goal of the constitutional norm. It is therefore necessary to investigate the objective intention of the constitutional norm that is important at the time of interpretation. This is the only way to capture the social reality at this point in time (Voßkuhle, 2018).

In German constitutional law, the functional expansion of the protection of fundamental rights can be cited as an example of such results of interpretation that have changed over time: from the original classical understanding of fundamental rights as a *subjective right of defence* against interventions by the state, fundamental rights were soon recognized by the case law of the Federal Constitutional Court as *objective values* that permeate the entire legal system and also shape civil law in particular. Then, around 50 years ago, the concept of the *duty to protect* was derived from this objective value of fundamental rights, which still plays a prominent role in constitutional jurisprudence and constitutional dogmatics in general. This concept states that the state must not only refrain from impermissibly encroaching on the freedoms described by fundamental rights, but must also actively protect the values embodied in them, in particular through adequate legislation (Dreier, 1993).

The state must realize this in relation to itself and also in relation to other private persons, i.e. on a horizontal level. The state must comply with this duty to protect, i.e. it must not inadequately protect the goods to be protected against state intervention itself, and it must also implement this duty to protect in relation to other private individuals. This means that it must use appropriate laws to ward off dangers to fundamental values emanating from private persons. Just think of the protection of personal rights, which can be encroached upon very easily and with great

effect by powerful private companies in the digital age.

A further step in the functional expansion of the protection of fundamental rights was taken with the important decision of March 2021, in which the German Federal Constitutional Court declared the Federal Climate Protection Act partially unconstitutional (FCC vol. 157, 30 - 177). The so-called *intertemporal dimension* of fundamental rights was emphasized. This means that an excessive burden on freedom that will only occur in the future also constitutes a violation of fundamental rights in the present if the restrictions on freedom necessary to achieve a certain goal (achieving climate neutrality by a certain year) are not distributed adequately and proportionally over the entire restriction period. It is inadmissible to impose only very loose restrictions on freedom in the initial phase, so that excessive restrictions on freedom are necessary in the later phases. This disproportionate restriction of liberty that occurs later already has an effect on the present, on the time when the restriction of liberty is too lax, and already constitutes a violation of fundamental rights in the present.

In this context, it is also discussed whether these changes represent a so-called *constitutional change* or whether they are the consequence of a correctly understood evolutionary interpretation. Constitutional change means that the wording of one or more constitutional provisions remains the same, but the meaning itself changes significantly due to changed circumstances (See note 7).

This question can be left aside here; it should only be noted that constitutional change could be assumed in various respects insofar as the so-called *open statehood*, i.e. the embedding of the state in the international community and, for member states of the European Union, integration into this supranational community, has solidified with major legal and political implications. The fact that the German Federal Constitutional Court, for example, no longer recognizes only German fundamental rights as the standard of review for constitutional complaints, as it did until the date of the *Recht auf Vergessen II* decision (November 2019) (FCC vol. 152, 216-274), but has now abandoned this traditional view and now also includes the fundamental rights of the EU

Charter of Fundamental Rights. This could be seen as a constitutional change brought about by European integration.

1. The rule of law as a necessary essential element of a constitution

Let us now turn to the rule of law as such and consider the results of the general considerations that have been made so far.

The rule of law is the bridge over which the values of the constitution are brought to the institutions, which must implement them in their activities, i.e. enforce them against individuals. In a broader sense, the values of the constitution are also the ordinary laws that conform to the constitution, which likewise have a binding effect on the executive and judiciary and are also enforced via the concept of the rule of law. *Legality*, i.e. binding to ordinary statutory law, is necessarily supplemented by *constitutionality*, i.e. binding to the constitution, as a characteristic of the modern concept of the rule of law.

A first question arises: Does the rule of law exist as a principle in a state order or are there merely individual elements which, when added together, result in a certain model of legal protection that exists in the state in question?

Every constitutional order as the constitutive basis of a state is made up of legally binding principles and rules. As already emphasized, they concern institutions and values. The legal system of a state as such, on the other hand, is made up of the constitutional system, which concerns the foundations of the state, and the generally very extensive further legal system, which consists of ordinary laws, executive norms, customary law and general legal principles. In some legal systems, judicial law is also recognized as a source of law.

Binding to the law is the essence of the rule of law. The law is the sole yardstick for the exercise of public authority. A liberal-democratic constitutional order is inconceivable without this maxim, i.e. without the rule of law. The rule of law is therefore a fundamental principle contained in every authentic constitution - written or unwritten.

For this reason, the rule of law is also universally normative in all

constitutional systems that do not consciously deny the basic liberal order.

The order of the state is of a legal nature; law is the adequate instrument of order for a human community, at least for a complex community as we find it in the modern age. Due to its binding nature, law provides the necessary stability and security so that such a community can fulfill its tasks.

Essential aspects of the rule of law (Arnold, 2025, in preparation) can be derived from this function of the law: legal certainty, as manifested in the prohibition of retroactive effect, for example, combined with the protection of trust in a lawfully acquired legal position. In addition, the law must be clear so that it can be understood and obeyed.

These formal aspects of law as an organizational medium, which are of great importance, are further supplemented by the idea of safeguarding the law through independent and impartial judicial review. This contributes to the realization of the law and its normative objective. This primarily concerns the control of the legality of acts of public authority insofar as they are applied by the executive. This review of legality is also a review of constitutionality, as the executive may only apply a law in accordance with the constitution and in a constitutional procedure. However, the legislation as such must also comply with the constitution. This is a requirement of the primacy of the constitution, which also and especially applies to the legislature. Only if this intended hierarchy of norms is observed is the rule of law satisfied. Thus, administrative action must comply with the legislation, or more precisely, with legislation conform to the constitution, and legislation itself must comply with the constitution. Furthermore, the democratic principle requires that key decisions are not taken out of the hands of the representatives of the people and left to the executive, but are reserved for the legislature to decide. This is the case in particular with interventions in the individual's sphere of freedom, i.e. in fundamental rights. Moreover, by their nature executive acts must be decided by the administration, by their nature legislative acts by the parliament (or the people directly).

Legislative power may only be transferred to the executive with the consent of Parliament, and then not for essential areas of decision-making. However, it is also possible, and in some legal systems it is implemented in such a way, that the constitution defines autonomous executive normative powers. Insofar as this does not encroach on the core content of the legislative function, it is compatible with the separation of powers (which is also part of the rule of law principle).

The essence of law would not be adequately captured if it were only seen as an organizational instrument that provides stability and security for a social association due to its binding nature. Law is also goal-oriented in terms of content: it should serve justice. It can only do this if it aims to preserve, consolidate and promote the basic attributes of human beings, their dignity, freedom and equality. The content of law is therefore also determined by its objective and is inextricably linked to fundamental and human rights. A state is therefore only a constitutional state if it guarantees these values in its (written or unwritten) constitutional order.

The second important dimension of law and thus also of the rule of law becomes visible: the dimension of securing the freedom of the individual. This is already demanded by the rule of law through the formal element of law, namely the commitment to the legal order in its hierarchical structure, which also and especially includes the primacy of the constitution with its ideal concepts (democracy as political freedom, fundamental rights). However, irrespective of this, this material component is covered by today's concept of the rule of law; the safeguarding of dignity and freedom as well as equality is also an independent requirement of the (not only formal, but also) material rule of law.

This also includes other individual elements of the rule of law: the proportionality (Badura, 2003, C 28 p115 - 117) of the exercise of power, and in particular the separation of powers (Badura, 2003, D 47.48, p. 312-316).

The separation of powers is a traditional structural element of the constitution that is intended to safeguard freedom and prevent the abuse of power. It is developed in different ways in the institutional system of

the various constitutional systems.

Traditionally, a distinction is made between the three powers of the legislature, executive and judiciary, as they also result from the functions of a state: the essential tasks of regulation must remain in the hands of the people, i.e. in the hands of their representatives in parliament (or the people themselves in systems with plebiscitary legislation), the execution of laws and thus their application to the specific case is the responsibility of the executive, while the necessarily independent judiciary exercises the control function. The allocation of powers to these functional areas is objectively justified and also guarantees the efficient fulfillment of tasks. At the same time, this division means a separation of powers, which has the effect of safeguarding freedom.

The basic idea behind the separation of powers is that none of the functionaries should be given too much power, which could easily lead to an abuse of power. The distribution of functions must therefore strike a balance.

In addition, the constitution often provides for cooperation between different authorities within a functional area or across functional areas with another functional area. On the one hand, this means adequate fulfillment of the task if the participation of different functional areas appears desirable for objective reasons. On the other hand, there is also an element of restraint of power here. In addition, there are direct control rights in the form of rights of objection, relative and absolute vetoes. The structure of a decision-making body consisting of various individual functionaries or even with a pluralistic social composition is also better protected against the usurpation and abuse of power than a monocratic body.

Another important form of separation of powers is the vertical separation of powers between the federal and state governments, central government and regions, central and local autonomous bodies. In addition, a functioning civil society, a pluralistic party system, an opposition endowed with parliamentary rights, a functioning media landscape, the democratic mindset of society and other factors safeguard freedom and contribute to the inhibition of powers.

In this context, the state's obligation to compensate for damage caused by the unlawful exercise of public authority, which flows from the rule of law, should also be mentioned. The state liability system is therefore also an important component of the rule of law.

2. Comparative legal observations on the rule of law

The methodology

The rule of law as a principle exists normatively in a constitutional order, even if the text of the constitution does not mention the term "rule of law", "État de droit", "Estado de Derecho" or even the term "rule of law", which is well known in common law. Since the rule of law is a necessary part of the structure of an authentic constitution, this concept is nevertheless implicit in a constitutional order. This has already been pointed out above.

The (written or unwritten) existence of the necessary individual elements of the rule of law proves their normative existence in this constitutional order. Even if one or several of these elements (or even all of them - although this is hardly conceivable), which are considered necessary for the essence of the rule of law, are missing in the written text and have not been developed by case law, their implicit existence can nevertheless be assumed. In general, one can say that in an authentic, i.e. liberal-democratic constitutional order, the rule of law is contained as a principle and in all its necessary essential elements, written or unwritten. Jurisprudence, especially constitutional jurisprudence, has the task, as has already been pointed out, of making these unwritten parts of the constitution visible through interpretation.

The special nature of the rule of law in the UK constitutional order

The UK is particularly characterized by the fact that it does not have a formal constitution in the sense of the European continent with increased force of law. The supreme constitutional principle in UK is the principle of parliamentary sovereignty, i.e. the highest source of law that

cannot be reviewed by a judge is the (ordinary) legislation, whose regulatory power is (at least theoretically) unlimited. Parliament is also said that it "cannot bind its successor". This traditional doctrine, which emerged from the dispute between Parliament and the King, is still valid today, although it has been relativized in its practical effects by various political processes (temporary EU membership (Factortame case law (R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) 1991 1 AC 603 and (No 5) 2000 1 AC 524.) , effects of the Human Rights Act (UK General Acts 1998 c. 42 - https://www.legislation.gov.uk/ukpga/1998/42/contents, See in particular s. 10 (2) of this Act. SCHEDULE 2 Remedial Orders), devolution (https://assets.publishing.service.gov.uk/media/5c38cc6ce5274a70ca3c3cef/DevolutionFactsheet.pdf)). It allows Parliament to pass laws that are not in line with the idea of the rule of law.

Over time, however, weighty considerations have been made as to whether important constitutional values could be preserved in the face of the theoretically unrestricted legislator. It should be mentioned that the rule of law played an important role in 19th century English literature. A. V. Dicey formulated the classic definition of the rule of law (Dicey, 1967, Part II: The Rule of Law, pp.183 - 414), which is also often cited in countries influenced by common law. At the same time, the principle of parliamentary sovereignty is also examined in detail by this classic author, who attempts to find a solution for the relationship between the two principles. However, it was neither possible for him nor is it possible today to assume that the rule of law takes precedence over parliamentary laws.

The concept of parliamentary sovereignty has its origins in the Glorious Revolution of 1688/1689, when the Declaration of Right established the supremacy of Parliament over the royal prerogative. Accordingly, the oath taken after the Revolution by James II's daughter Mary and her husband William, Prince of Orange (Loveland, 2015, pp. 26) was based on "the statutes in Parliament agreed on" instead of "the laws and customs ... granted by the Kings of England" (UK Parliament, The Convention and the Bill of Rights;

https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/overview/billofrights). This was taken up by the common law and later conceptually consolidated. The pre-revolutionary attitude of judges based on natural justice (Coke, Hobart, Keble), which had led to the invalidation of Acts of Parliament, only came into play for a short time after the revolution (Holt, Best) and then faded away (Loveland, 2015, pp.21/22, 29/30). The absoluteness of the theory later prompted a vehement discussion about the restrictability of the dogma, but this did not produce a result that was accepted by the courts. One of the positions (Wade, 1955, pp. 158: "For the relationship between the courts of law and Parliament is first and foremost a political reality." See p. 189: "What Salmond calls the " ultimate legal principle " is therefore a rule which is unique in being unchangeable by Parliament-it is changed by revolution, not by legislation; it lies in the keeping of the courts, and no Act of Parliament can take it from them.") refers in its considerations to the historical-political emergence of the concept due to and as a result of the Glorious Revolution and sees the change of the concept as only possible through a similar, actually in a certain sense revolutionary process (Loveland, 2015, in particular p.41).

All attempts to increase the validity of legal regulations through ordinary legislation and thus achieve a quasi-constitutional safeguarding of values and constitutional guarantees, for example, were unsuccessful in view of the traditional doctrine. The binding of the subsequent legislator "as to manner and form" (de Smith, 1971, p.90) always failed due to the traditionally assumed impossibility of Parliament to bind its successor ("Parliament cannot bind its successor"). Parliament's "omnipotence" has a limit, namely that of binding itself.

The concept of parliamentary sovereignty, as it is still upheld by the courts in the UK today, is generally alien to modern state systems. They have given themselves basic legal orders in the form of constitutions, which take priority over other domestic sources of law. Today, these constitutions are also generally safeguarded by constitutional jurisdiction. This takes place in the new form of special constitutional courts introduced by *Hans Kelsen* (Schambeck, 2017, pp.10 - 21) or in the form

that has developed in the USA, namely the review of laws by the highest ordinary courts, which can declare them unconstitutional. This is constitutional jurisdiction in a functional sense and has found its historically particularly significant expression in the famous US Supreme Court decision of 1803 *Marbury v. Madison* (Marbury v. Madison, 5 U.S. 1 Cranch 137, 1803).

Due to their priority over all other sources of law in a state legal system, laws and all state acts below the level of legislation must (also) comply with the constitution. This is also the expression of the so-called constitutional state. It is the modern form of the constitutional state and is described particularly impressively by the French Constitutional Council, the *Conseil constitutionnel*, in its 1985 decision "*Nouvelle Calédonie*". While the great French Declaration of the Rights of Man and of the Citizen of 1789 describes the law, la loi, as an expression of the will of the people, the "volonté générale" (Art. 6 phrase 1 of the 1789 Declaration), the modern position has changed considerably. It is not the law as such, but only the law in accordance with the constitution that expresses the will of the people. As the Conseil rightly puts it: "*La loi n'exprime la volonté générale que dans le respect de la Constitution*" (Décision n° 85-197 DC of August 23, 1985, Cons. 27).

The rule of law is the state's orientation towards the law in its hierarchical structure: at the top is the constitution, below that the legislation, and below that normative and individual administrative action and other acts. The legal system forms a unit and must not exhibit any functional contradictions. Therefore, the sources of law must be harmonized with each other at their various levels. This harmonization takes place through the superordination and subordination of legal sources. The rank of a legal source is determined by its importance for the legal system. At the top are the foundations that a society has decided on when forming the state community: the common values and the instruments, i.e. the institutions and their forms of action, which are intended to realize these values in the fulfilment of everyday state tasks. The establishment of institutions and the definition of values are therefore functionally necessary tasks of a constitution so that a

community of political nature, a state, can be formed from a society of people (Rousseau, 1762/ed.1966, chap. VI (Du pate social) and Locke, 1963/2012, chap.2 and chap.8).

Below the constitution is legislation. It is enacted within the framework set by the constitution, is an expression of politics, i.e. the majority decision in parliament (or as part of a referendum) and is only valid until it is superseded by a new piece of legislation. The applicable rule for this is: "lex posterior derogat legi priori". The subsequent law is an actus posterior, contrarius. The majority decision transforms politics into law.

As already emphasized, this must take place within the framework of the constitution, as the constitution and legislation belong to two different spheres that are autonomous but separate from one another. Normative harmony only exists if their content is consistent. It is also the task of the person applying the law to interpret a law in such a way that it conforms to the constitution. This task of so-called constitutional interpretation applies to all users of the law and in particular to all courts that interpret and apply a law. If such harmonization cannot be achieved due to the clear unconstitutional content of a law, the law does not express the will of the people and must therefore be declared unconstitutional by the (constitutional) court, insofar as this is procedurally possible, and, if necessary, repealed. As a rule, only constitutional courts within the meaning of the Austrian-European model will have the power to annul, while supreme courts according to the American model can only declare unconstitutionality and non-application in a specific dispute. This *inter* partes *effect* leads to a functional extension if such a decision also includes an appeal to adopt this legal opinion in other cases (which is even mandatory in the common law precedent system). In any case, a decision that declares a law unconstitutional is an appeal to the legislature to make it constitutional. Such an appeal can also be formalized and set a date for the legislator for taking action in order to improve the law (For this type of "appeal decision" which ic quite common in German constitutional jurisdiction see Schlaich and Korioth, 2018, paras. 2432 - 439).

The existence of a constitution also makes it possible for the

constitutional values, i.e. the anthropocentric fundamental values and their specifications, to play an adequate role in the legal system. The rule of law today is not only the formal rule of law, which is essentially based on criteria such as clarity of the law, correct legislative procedure, judicial control of the administration on the basis of the law as a standard of review, but also the substantive rule of law, which essentially incorporates the values of the constitution. Under the rule of strict parliamentary sovereignty, as in the UK, values are not protected against legislative intervention. It is theoretically unquestionable that Parliament could also change or even repeal important human rights. The protection of fundamental rights in the UK has developed through case law, i.e. common law. Various laws have established specific freedoms and guarantees, and international covenants on human rights have been ratified. It was only about 15 years ago that the European Convention on Human Rights became part of domestic law under the Human Rights Act. However, the legislator theoretically has unlimited access to all these value-based definitions. This has also strengthened the call for the UK to establish its own fundamental rights with the slogan *bring rights home*, and even today the debate about abolishing the commitment to the European Convention on Human Rights has not yet died down.

In any case, the substantive rule of law is not possible in a system of parliamentary sovereignty in a consolidated form. If we look at the former Commonwealth, we see many legal systems that are influenced by the concepts of the UK. They recognize A.V. Dicey's definition of the rule of law, also value the common law system, but (with the exception of New Zealand) have all adopted formal, codified constitutions and established their supremacy over the other sources of state law. Here, therefore, constitutional values could also be removed from the grasp of the legislature, indeed these rights were appeals to implement these values in legislation in detail.

Conclusions

The example of Great Britain clearly shows how essential it is to have a constitution that takes precedence over the other legal sources of the state. We can state that the rule of law is a central structural principle of the state order, which on the one hand demonstrates the formal organizational functions of law, but on the other hand also encompasses the fundamental values that are essential for people as state objectives, expressed through fundamental rights or objective constitutional norms.

The rule of law is a universal fundamental principle that exists in every authentic constitutional order, written or unwritten, and comprises a number of essential individual elements. Such an authentic constitution only exists if it places the human being at the center.

Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 states: a society that does not guarantee human rights and does not have a separation of powers in its state order does not have a constitution. The rule of law is linked to the genuine constitutional state.

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HORIZONTAL EFFICACY OF FUNDAMENTAL RIGHTS IN BRAZIL

Marcelo Figueiredo[1]

Abstract:

As we know, fundamental rights are the result of a long process of historical maturation, which involves struggle, achievements and sometimes even setbacks.

The meaning of the expression "horizontal effectiveness" points to the effectiveness of fundamental rights in the course of private relationships, that is, to those relationships in which the State does not act directly.

Keywords*: efficacy; fundamental rights; private subjects; natural persons; legal entities.*

Introduction

The central point of discussion of the doctrine in general is the recognition that certain fundamental rights, in particular those that have a meaning in private relationships, in addition to binding public powers, must be considered binding rights in relationships between private

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subjects, natural persons or legal entities should observe fundamental rights when they come into contact with other subjects of Private Law.

There is no doubt that the topic of horizontal effectiveness is marked by great controversies, whether with regard to the way in which fundamental rights are penetrated into the private legal system, or with regard to the intensity of this link.

The scope and consequences of this horizontal effect are also discussed.

Our objective with this brief study is to show, especially to foreign readers, how the matter has been presented in Brazilian doctrine and jurisprudence.

Horizontal Efficacy of Fundamental Rights in Brazil

As we know, the theme of the horizontal effectiveness of fundamental rights was inserted in the midst of an intense legal discussion that took place in the second half of the 20th century, more precisely in the fifties and sixties, expressing the phenomenon that was originally conceived and studied in Germany under the name Drittwirkung der Grundrechte, which in free translation would mean "effectiveness of fundamental rights vis-à-vis third parties".

For this reason, German doctrine is very rich in this debate, always being a mandatory source of consultation for those who wish to research and delve deeper into this topic.

It should also be remembered that German doctrine informs that it was within the scope of private labor relations that the topic acquired its initial momentum and that this did not occur by chance. Undoubtedly, this is a branch of law where fundamental rights tend to acquire predominant meaning, even without the direct presence of the State at one of the poles of the legal relationship.

This occurs because labor relations usually involve a clear inequality of power, manifested in the real possibility of a party, considered stronger (employer), restricting fundamental rights of the party considered weaker (employee).

The truth is that this issue is not limited to work relationships.

Quite the contrary, today it has acquired an international dimension and is studied in almost all legal systems.

We also remember the emblematic Lüth case (1958) in which the issue of the horizontal effectiveness of fundamental rights gained, for the first time, extensive discussion in a Constitutional Court.

The discussion of this case or German doctrine is not of interest here.

What is certain is that in private relationships the recognition of the validity of fundamental rights seems necessary, at least justifiable, insofar as in general legal relationships between the parties are marked by strong asymmetries or factual inequalities, as occurs, for example, in consumer relations.

They are, therefore, relationships that are not necessarily horizontal, in the common sense of the term, as they are marked by blatant inequality of power.

That is why there are those who claim that when society leaves the strong and the weak completely free, freedom ends up becoming more effective for the former.

And this occurs in view of the circumstance that one of the poles of this type of relationship individually holds an undeniable superiority, a share of social power, a situation that can lead, in general, to the violation of rights and, in particular, to the restriction of space of freedom of the party that holds the smallest share of power in the legal relationship.

In the United States of America, the topic was treated from the perspective of the doctrine of State Action, whose focus seems to be the need to preserve private autonomy, with a typically liberal bias, making it difficult to justify the horizontal effectiveness itself, evolving into a idea of public function, according to which when individuals act in the exercise of an activity of a typically state nature, they would be subject to constitutional limitations, through a basis around the state connection or implication, in the course of private activities.

The framing of fundamental rights in the course of private relationships normally derives from the connection of these rights with the protection of the human personality, which must be free.

As we have already stated, we will not remember the German

doctrine. However, just an introductory note to remember on the one hand the works of Hans Carl Nipperdey, defender of the recognition of the direct effectiveness of fundamental rights in private relations and Günter Dürig who defended the impossibility of private contracts excluding the possibility of free movement of one of the contracting parties.

Durig built his understanding based on the conception that the effectiveness of fundamental rights in private relationships occurs indirectly, through the interpretation of general clauses of Civil Law that are subject to and need to be fulfilled in value.

In turn, the biggest criticisms directed at the theory of indirect effectiveness reside in the fact that it is not capable of developing the maximum effectiveness of fundamental rights in the course of private relationships.

On the other hand, it was considered that the theory of indirect effectiveness, by proposing that initially the legislator and, alternatively, the judge, should mediate the application of private laws to relationships between individuals, confuse the issue of the binding of private sector subjects with the link of the Public Power.

In Brazil, the acceptance of a direct effectiveness of fundamental rights in private relations gained space in the doctrine due to the work of Ingo Wolfgang Sarlet, from the point of view that the direct effectiveness of fundamental rights in relationships between individuals, whether they are or not on an equal footing, is based on the principle of human dignity, since in the sphere of this content they are, in theory, indispensable.

From then on, other authors began to defend similar models, albeit with specific variations.

As we know, the theory of the direct effectiveness of fundamental rights, at least as it was originally conceived, was abandoned by jurists of different generations, being considered a minority in most countries where there is a systematic treatment of the topic.

Among other arguments, the preponderant reason that led to the rejection of this conception was its incompatibility with the principle of

private autonomy, in a way that distorted the very meaning of Private Law as a whole.

More recently the matter was analyzed in depth by Virgílio Afonso da Silva (da Silva, 2014), disciple of Robert Alexy.

Virgílio, among other aspects, maintains that the appeal to an objective order of values, as it occurs in German doctrine and jurisprudence, is not necessary.

He states that if we view fundamental rights as principles, norms that require something to be carried out to the greatest extent possible given the existing factual and legal possibilities, there will be an expansion in the effectiveness of fundamental rights that encourage their realization.

Virgílio rightly understands that not every collision between fundamental rights in relationships between individuals arises from the exercise of private autonomy or takes place within the scope of a contractual relationship.

That the most common cases in this sense involve freedom of expression and the right to honor.

Whenever both rights collide, and this occurs frequently, it is assumed that individuals are linked to fundamental rights, because, if it were otherwise, there would be no need to talk about a collision between fundamental rights. Ultimately, not every collision between fundamental rights follows the same pattern.

Virgílio draws attention to the necessary distinction between cases in which legislative mediation exists and cases in which this mediation does not exist or is insufficient.

There is legislative mediation when the legislator, exercising his legislative competence, has established a solution for a certain collision between fundamental rights.

Given the existence of legislative mediation, there is no longer any need to talk about the direct applicability of fundamental rights to relationships between individuals.

The other possibility or solution to the collision between fundamental rights in relationships between individuals presupposes a weighing to be done, for example, by the judge, which is very common

in Brazil.

Finally Virgílio remembers the Ellwanger case.

Horizontal Efficacy of Fundamental Rights. **Jurisprudence**

Siegfried Ellwanger wrote, edited and distributed books with anti-Semitic content and was therefore convicted based on article 20 of Law 7.716/1989, as amended by Law 8.081/1990, which prescribes a prison sentence of 2 to 5 years for anyone who "practices, induces or incites, through the media or publication, of any nature, discrimination or prejudice based on race, religion, ethnicity or national origin".

At the Federal Supreme Court, the highest Court in the country, the case had enormous repercussion and, not long ago, the court's decision on the merits was, by majority, in the sense of maintaining the conviction, by denying the habeas corpus order.

Without major methodological variations, despite the different results of some votes, the ministers resorted to the idea of balancing principles to resolve the case.

On the one hand, without variations, the ministers identified the principles of freedom of expression and freedom of the press.

At the other end of the balance, the identification was not so uniform, but the majority saw the dignity of the human person and, in some cases, the right to honor as a conflicting principle.

Vírgilio notes that we have a specific law that deals with the matter, the legislator in this case had already weighed it, considering the crime of racism non-bailable.

Therefore, there is no longer any need to talk about the direct applicability of fundamental rights to relationships between individuals in the case under consideration.

What is applicable is a criminal rule, which prohibits racist demonstrations.

There is no need to discuss, therefore, whether freedom of the press is more or less important than another principle that may be involved. Reasoning should be subsumptive and not weighing.

To try to give the reader a more realistic idea of what is happening in Brazil, we must remember that article 5, § 1, of the Constitution establishes: all fundamental rights and guarantees, that is, all provisions that define individual, social and political rights and guarantees, regardless of the chapter or title of the Constitution that proclaims them, are directly and immediately binding (immediate effect of fundamental rights).

This norm prescribes, firstly, that fundamental rights bind all State authorities, including the Legislative Branch.

The latter cannot restrict a fundamental right in a way not permitted by the Constitution itself, under the pretext that it has the competence and democratic legitimacy to create general and generally binding norms.

Secondly, the aforementioned norm determines that rights holders do not need to wait for authorization, implementation or other state determination to be able to exercise their fundamental rights.

If the legislator fails to regulate or limit a right, it may be exercised immediately to the fullest extent defined by the Constitution, with the Judiciary Branch having jurisdiction to consider cases of violation.

In other words, § 1 of article 5 of the Brazilian Constitution makes it clear that fundamental rights are not simple political declarations or action programs by public authorities, nor can they be seen as limited norms.

The immediate effect of fundamental rights and guarantees is not fully manifested in the case of social rights, which consist of individuals' claims to the State and cannot be exercised immediately, as established by the aforementioned norm.

Finally, norms that insufficiently define a right are not immediately applicable in social reality – not because this is not desirable, but because it is simply impossible to apply a right without knowing the hypotheses and conditions of its incidence and the forms of its exercise.

These are standards of low normative density.

Conclusions

In summary, in the Brazilian legal system, it is a general rule that

the recipient of duties that correspond to fundamental rights is the State, both in the sense of the duty to abstain and in the sense of the duty to act through benefits.

Individuals must respect fundamental rights to the exact extent that they are implemented by infra-constitutional laws.

Furthermore, fundamental rights develop the aforementioned “irradiation effect” in the interpretation of common legislation, especially general clauses.

The decisions of the Federal Supreme Court (STF) that are usually cited on the subject apply fundamental rights directly in relationships between individuals, implicitly, with arguments that are often superficial and non-specific, that is, legally-dogmatically inadequate.

The STF's best-known decision on the subject considers that a private company has the duty to equally remunerate employees who provide services of a similar nature, complexity and duration.

To this end, it invokes the constitutional principle of equality, which would prohibit discrimination based on nationality (as occurred in this case) or other factors that are not related to the nature of the employment relationship.

Another case that is also frequently cited is that of the composers' association, which was accused of disrespecting the fundamental guarantee of the broad defense of a member who had been excluded in a manner compatible with the rules for that purpose set out in the association's statutes, but without the same possibilities to defend himself, as provided for in procedural legislation that ensures broad defense and adversarial proceedings, configuring in detail the constitutional guarantee that was used as a parameter for the constitutionality examination (art. 5, LV, of the Brazilian Constitution). (Extraordinary Appeal 201.819-8 Rio de Janeiro - STF, judged on 10/11/2005).

The Federal Supreme Court recognized that there was a violation of the law but considered that this occurred because the association exercised public power, despite being a legal entity governed by private law.

As a result, the link to the fundamental right of broad defense did not arise from the horizontal effect, but from the classic vertical link of public power to fundamental rights.

Finally, there is a case in the Superior Court of Justice that deserves to be remembered.

An individual was a member of a club and filed a precautionary measure to have the right to attend the club even after the dissolution of a stable union with a member of the club, as he paid monthly fees separately while he was just her fiancé, which was changed in 2004, when they began to live together in a stable union, according to a public deed drawn up in the same year, a relationship that lasted until 2005.

After the end of the stable union, he was banned from attending the club on the grounds that such right was granted only to ex-spouses and not to ex-partners, discrimination that, in his view, was inconceivable in light of the Brazilian Constitution.

After going through several instances, the matter went to the Superior Court of Justice, and it was determined that the prohibition violated the principle of equality and that the space of private autonomy guaranteed by the Constitution to associations is not immune to the impact of constitutional principles that ensure respect for the fundamental rights of their members and third parties. (Special Appeal No. 1.713.426 -PR- 2017/0307936-5).

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COMPLAINT FOR LENGTHINESS OF PROCEEDINGS IN THE LIGHT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND POLISH LEGAL SOLUTIONS

Igor ZGOLINSKI [1]

Abstract:

The institution of a complaint for violation of a party's right to a hearing within a reasonable time has two clearly distinguishable legal dimensions. The first is the European dimension, which became in Poland the cause of the introduction into the legal order of the relevant legal solutions related to the excessively long and harmful to the parties conduct of proceedings before the judicial authorities. As a consequence, the second legal dimension - domestic - was created. Originally, it concerned only the determination of protractedness in a given judicial proceeding. With the passage of years, the strong influence of ECHR case law has resulted in the evolution of domestic normative construction and their extension to pre-trial proceedings, conducted by law enforcement agencies, and to enforcement proceedings, conducted by bailiffs. This interesting coincidence is the main content of the article, which discusses in detail the most important threads of the title issue and reveals the main practical aspects related to the application of legal norms dedicated to persons against whom the judicial authorities act too dilatorily.

Keywords: *proceedings; complaint of protractedness; compensation; due process; European Convention for the Protection of Human Rights and Fundamental Freedoms.*

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Introduction

Addressing the issue of protraction of proceedings, it should be noted at the outset that it is of little interest to the legal doctrine. The essential core of consideration of the title institution is the subject of expression of the judicature. The doctrine is almost silent on the subject, while it is an important area, related to the practical functioning of the judiciary. Indeed, the protraction of proceedings pending before the judiciary in the broadest sense is a common phenomenon. As one may think, although procrastination is an undesirable aspect, it is at the same time impossible to eliminate completely. Hence, it is important to properly understand and efficiently apply the norms related to the complaint for lengthiness.

The roots of the Polish complaint about the lengthiness of proceedings undoubtedly lie in European law, while the jurisprudence of the European Court of Human Rights (hereinafter ECHR) has had a great influence on its application and normative shape, including in the legal orders of other countries of the European Union. As far as Polish legal solutions are concerned, the most important legal act in this area is the Act of June 17, 2004 on complaints for violation of a party's right to have a case heard in pre-trial proceedings conducted or supervised by a prosecutor and court proceedings without undue delay (i.e. Journal of Laws 2023 item 1725). In addition, an entity which believes that its claim has not been satisfied in this manner may seek supplementary compensation through separate civil proceedings, or file a complaint with the ECHR. However, the provisions of the Polish law must be applied in accordance with the standards arising from the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950 (Journal of Laws of 1993, item 284, as amended, hereinafter the Convention). This means not only taking into account the Convention itself, but also the obligation to take into account the well-established case law of the ECHR in cases involving violations of Article 6(1) of the Convention, and concerning the right to obtain a decision within a reasonable time. The other changes made to the law basically boiled down to the implementation of the possibility of ex

officio adjudication, the introduction of a lower limit for the adjudication of an appropriate sum of money and the raising of the upper limit, and the possibility of awarding an appropriate sum of money also as a result of the determination of the lengthiness of pre-trial proceedings conducted or supervised by the prosecutor, and not, as before, only court proceedings (Klak, 2010, p. 144).

Given this legal framework of the institution in question, the following discussion will present the European standard of a complaint for protracted proceedings, followed by a characterization of the Polish solution, that is, the most important elements of the Polish law of 2004, the formal requirements of the complaint, and moreover, the issues of compensation for excessive length of proceedings and disciplinary liability.

1. European Standard

The foundation of the complaint of protraction is Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws 1993 No. 61, item 284, hereinafter the Convention). This provision stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law when deciding on his civil rights and obligations or on the merits of any accusation in a criminal case brought against him. The ECHR has issued a number of judgments on the basis of this provision, with the Kudła v. Poland judgment undoubtedly being of fundamental importance for the Polish legal order (ECHR judgment of 26.10.2000. Kudła v. Poland, application no. 30210/96) , as it resulted in the enactment by Parliament and the subsequent entry into force of the Act of June 17, 2004 on complaints for violation of a party's rights to have a case heard in pre-trial or prosecutor-supervised proceedings and in judicial proceedings without undue delay.

However, the origins of the institution in question date back to 1993, as at that time the Government of the Republic of Poland made declarations to the Secretary General of the Council of Europe on the

recognition of the competence of the European Commission of Human Rights and the jurisdiction of the European Court of Human Rights. As a result, from May 1, 1993, Polish citizens gained the right to file individual complaints against the Polish state for violation of rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the declaration, a complaint can be brought by any person, non-governmental organization or group of individuals who consider themselves victims of Poland's violation of Convention rights, and can refer to all acts, decisions and facts occurring after April 30, 1993 (Hajnrych, 2010, no. 2, pp. 84-103).

As part of its jurisprudence, the ECHR evaluates the proceedings as a whole. This is the basic criterion for determining protractedness. Therefore, the assessment of protraction should be made holistically, against the background of the total length of the proceedings, regardless of how many court instances it has been pending before and before which court it is pending (ECHR judgment of 11.10.2005. Majewski v. Poland, application no. 52690/99).

Usually, the ECtHR found protractedness on the basis of the specific circumstances of the case, but the duration of the proceedings itself was not the most relevant factor here. To illustrate this point, it can be pointed out that ongoing proceedings were considered protracted:

-3 years in a single instance (ECtHR judgment of July 10, 1984, Guincho v. Portugal, Application No. 8990/80);

-5 years in two instances (ECtHR judgment of February 7, 2006. Donnadieu v. France, application no. 19249/02);

-6 years (with the participation of the Supreme Court judgment of January 9, 2007. Gossa v. Poland, complaint no. 19249/99).

Against this background, it is also worth noting two borderline situations. On the one hand, the case against France can be considered as such. ECHR judgment of March 31, 1992 (Application No. 18020/90), concerned an applicant infected with HIV. The proceedings in this case lasted 2 years and 3 months. Thus, calendar-wise, this is not a very long period of time, but in favor of considering the proceedings as too long was, among other things, the condition of the applicant's health. On the other hand, the ECtHR has several times recognized in its jurisprudence

(ECHR judgment of 17.07.2007. Wawrzynowicz v. Poland, application no. 73192/01) a period of 8 years (where cases went through two instances) as not leading to a ruling of a violation of Article 6(1) of the Convention.

As I mentioned, the Kudła v. Poland verdict was a breakthrough and forced Polish statutory regulation. The applicant in that proceeding claimed that he had not been provided with adequate psychiatric care during his pre-trial detention, that his detention had lasted unreasonably long, that his right to a "hearing within a reasonable time" had not been respected, and that he had no effective domestic remedy to complain about the lengthiness of the criminal proceedings against him. These were weighted arguments, and the ECtHR found that the Government had not indicated whether or how the applicant could obtain redress - either preventively or compensatorily - by availing himself of these remedies. It has not been suggested that any of the remedies, or a combination of them, could have expedited the resolution of the charges against the complainant, or provided him with adequate redress for the delay that has already occurred. The Government also failed to provide any examples from domestic practice indicating that by taking the measures in question, the complainant was able to obtain adequate redress. This would indicate, in the Court's view, that the measures relied upon by the Government do not meet the "effectiveness" condition for the purposes of Article 13 of the Convention. In the Court's view, it was then time to review its own jurisprudence in light of the continuing accumulation of complaints to the Court in which the sole or main allegation is the failure to provide a hearing within a reasonable time, in violation of Article 6(1) of the Convention. The Court ultimately held that the case involved a violation of Article 13 of the Convention in that the complainant had no domestic remedy by which he could implement his right to a "hearing within a reasonable time", as guaranteed by Article 6(1) of the Convention.

In order to implement the aforementioned judgment, Poland adopted the Act of June 17, 2004 on Complaints for Infringement of a Party's Right to Have a Case Considered in Judicial Proceedings Without

Undue Delay. Its amendment in the following years was forced by another, and to this pilot judgment of the ECHR, referred to as Rutkowski and others v. Poland (ECHR judgment of July 7, 2015. Rutkowski and others v. Poland, application nos. 72287/10, 13927/11 and 46187/11) . As a result, after the introduction of the Act of February 20, 2009 on amending the Act on a complaint for violation of a party's right to have a case heard in court proceedings without undue delay, the name of the 2004 Act was changed to the Act on a complaint for violation of a party's right to have a case heard in pre-trial proceedings conducted or supervised by a prosecutor and court proceedings without undue delay, and its scope was significantly expanded.

The case of Rutkowski and Others v. Poland stemmed from three complaints brought to the ECHR under Article 34 of the Convention by three Polish citizens. The applicants alleged violations of Article 6(1) of the Convention in connection with the lengthiness of proceedings in their cases, as well as of Article 13 of the Convention in connection with the malfunctioning of a domestic remedy for the lengthiness of court proceedings. With regard to the complaints brought under Article 13 of the Convention, all the applicants alleged that the Polish courts hearing their complaints brought under the 2004 law failed to apply the principles established by the Court regarding the "reasonable time" requirement of Article 6(1) of the Convention and the criterion of "adequate and sufficient redress" to be granted at the national level for violation of the requirement in question (Regarding "essential criteria," see Scordino v. Italy, Application No. 36813/97). The ECtHR said that the reasonable length of the proceedings must be assessed in light of the specific circumstances of the case and according to the criteria set forth in the Court's case law, in particular, the complexity of the case and the conduct of the applicant and the relevant authorities. With regard to the last criterion, the consequences threatening the complainant must also be taken into account. In Rutkowski and Others v. Poland, the ECHR generally found that there had been a violation of Article 6(1) **of** the Convention due to the excessive length of the proceedings in the applicants' cases. It further held that there had been a violation of Article 13 of the Convention in connection with the malfunctioning of a

complaint brought under the 2004 Polish law, insofar as it failed to provide the applicants with adequate and sufficient redress for violations of Article 6(1). The Court found that the violations in question stemmed from a practice that was incompatible with the Convention and concerned the lengthiness of proceedings and the failure of Polish courts to apply the Court's jurisprudence on assessing the reasonable length of proceedings and "adequate and sufficient redress" for violations of the right to be tried within a reasonable time. As a result, Poland was ordered to pay the plaintiffs, within three months of the judgment becoming final (in accordance with Article 44(2) of the Convention), an amount of between €8800 and €10,000, plus "such taxes as may be imposed on that amount, in respect of non-pecuniary damage suffered (converted into Polish currency at the exchange rate in effect on the date of the decision)".

It is worth recalling here that Article 6(1) of the Convention imposes an obligation on the Contracting States Parties to organize the judicial system in such a way that the courts can fulfill every requirement of this provision, including the obligation to hear cases within a reasonable time. States, on the other hand, are responsible for delays related to the proceedings of the authorities and for delays in the submission of reports and opinions of court experts. The state can be held liable not only for the delay in hearing a particular case, but also for failing to increase resources in response to the backlog of cases or structural deficiencies in the judicial system that result in delays. Solving the problem of undue delay in court proceedings may therefore require you to take a number of remedial measures, both legislative and organizational, whether in terms of the budget, the judiciary or other necessary. On the other hand, with regard to the 2004 Polish law. ECHR examined the measures introduced under it in the prism of Article 35(1) and Article 13 of the Convention. In the three leading cases against this background (Krasuski v. Poland, complaint no. 61444/00, Ratajczyk v. Poland, complaint no. 11215/02, Charzyński v. Poland, complaint no. 15212/03), found that these measures were "effective" for the purposes of the regulation. The ECtHR's main objections to the jurisprudence of

Polish courts in cases of complaints of protractedness concerned the amount of compensation awarded, the fragmentary nature of the scope of the examination of the case, and the excessive formalism of the proceedings.

Another important aspect in the European standard is that the complainant contributed to the excessive length of the proceedings. In its October 15, 1999 judgment in Humen v. Poland, the ECHR indicated that a long period of time could not be considered protracted, in a situation where the applicant did not cooperate with the court, and the length of the proceedings was due solely to his fault. The issues at stake here were the failure to submit to examination by experts in the compensation case. The same was true of the ECHR's decision of May 4, 2000, Application No. 45312/99, Henryk Machnik v. Poland. This was an enforcement case brought by the applicant, in which he applied for relief from costs and filed motions to seize at every action. The ECHR found that the excessive length of the proceedings was caused by the applicant, for which the country could not be held responsible.

Other important aspects against the background discussed are:

- Repeated revocation of cases for retrial. The ECHR has recognized this problem as systemic (Suchecki and others v. Poland, complaint 23201/11). This means that a case after revocation is treated as pending at first instance, resulting in an obligation to award a higher amount. The fact that actions were taken in a case that was overturned for retrial in a timely manner does not yet mean that the case is not protracted;
- Failure to take action, taking sham action, and a distant hearing date. In these situations, the determination of protractedness always depends on the nature of the case;
- The principle of speed of proceedings. It cannot be at the expense of the factual findings made (Dizman v. Turkey, application no. 27309/05, Mojsiejew v. Poland, application no. 11818/02);
- suspension of proceedings. This circumstance does not justify a finding of protractedness, if a strong connection is demonstrated between the case and other pending proceedings (criminal) (Kutic v. Croatia, ECHR judgment of 1.3.2003, application no. 48778/99, in a ruling of May 18, 2010. Kaniewska v. Poland, the ECHR found that the several suspensions

of the case for more than 13 years made the length of the proceedings unreasonable);
- preliminary questions. Against this background, the ECHR accepts that it is permissible to suspend proceedings to await the outcome of a related case or the determination of the constitutionality of a legal act, and the time of waiting for the determination is not a protraction of proceedings (ECHR ruling of 12.10.1978, Zand v. Austria, application no. 7360/76.). There are even more far-reaching positions of the Court (ECHR judgment of 26.02.1998, No. 20323/92 Pafitis v. Greece, of 30.09.2003, No. 40892/98, Koua Poirezz v. France), recognizing, among other things, that the prolongation of court proceedings due to the referral of a preliminary question not only cannot be considered a protraction of proceedings, but the waiting for an answer cannot be included in the duration of proceedings for which the state may be liable. The Polish Constitutional Court stated (Judgment of the Constitutional Court of 15.11.2013, reference KP 3/08) while that "the order to hear a case without undue delay cannot prejudice the proper interpretation and correct application of legal provisions. This is because the parties are entitled to a proper hearing of the case".

In addition, the ECHR considers inadmissible complaints of protractedness in incidental proceedings, which are somewhat on the sidelines of the mainstream case. This is a well-established line of jurisprudence (Garlicki, European Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary, LEX, ECHR decision Schreiber and Boetsch v. France, application no. 58751/00; the Polish Supreme Court recognizes similarly, cf. judgment of July 21, 2015. III SPP 15/15). Of course, it is impossible to lose sight of the fact that in criminal cases there is a peculiar exception to this in the form of pre-trial detention and its lengthiness, but here it is not so much about the lengthiness of the proceedings themselves, but only about the duration of the application of an isolationist preventive measure, which, after all, by its very nature is temporary, and thus cannot be excessively non-lengthy, detached from the needs for which it was implemented.

The ECHR's jurisprudence on the issue of so-called formal defects is also developing in an interesting way. Thus, in the judgment of November 16, 2000, Société Anonyme Sotiris and Nikos Koutras Atte v. Greece (complaint no. 39442/98), the ECHR indicated that the rejection of an appeal due to formal deficiencies for which a party cannot be charged violates the right to a court of law and is a manifestation of excessive formalism. In contrast, in its judgment of September 24, 2007. Wende and Kukówka v. Poland (complaint 56026/00), the ECHR held that the use of colloquial terms in the grounds of a complaint meets the formal requirement under Polish law. In a judgment of July 17, 2007. Wawrzynowicz v. Poland (complaint no. 73192/01), it was held that simply stating in the grounds of the complaint that the proceedings had been ongoing for 8 years was sufficient. In the judgment of January 13, 2009. Sokolowska v. Poland (complaint no. 7743/06), the applicant did not specify the file reference of the case, which resulted in the dismissal of the complaint. The Court did not share this position and awarded in a sum four times the amount potentially awardable at the national level.

2. Polish standard

The Act of June 17, 2004 on a complaint for violation of a party's right to have a case heard in pre-trial proceedings conducted or supervised by a public prosecutor and court proceedings without undue delay regulates the rules and procedure for filing and hearing a complaint by a party whose right to have a case heard without undue delay has been violated as a result of an action or inaction of a court or a public prosecutor conducting or supervising pre-trial proceedings. The provisions of this law shall apply mutatis mutandis when, as a result of the action or inaction of a court or judicial officer, a party's right to conduct and complete without undue delay an enforcement case or other case concerning the enforcement of a court decision has been violated. In general, a party to a proceeding may file a complaint that there has been a violation of its right to have a case heard without undue delay if the proceedings aimed at making a decision that ends the proceedings in the case take longer than necessary to clarify the relevant factual and legal

circumstances or longer than necessary to resolve an enforcement case or another case concerning the enforcement of a court decision (protraction of proceedings). A protraction of proceedings is usually understood to be a state in which the body conducting the proceedings prolongs the time for the examination of the case, while citing factors beyond its control that prevent timely examination and, in particular, the fulfillment of procedural obligations (Melezini, 2024).

In order to determine whether a case has been protracted, it is necessary, in particular, to assess the timeliness and correctness of the actions taken by the court to issue a decision ending the proceedings in the case, or the actions taken by the prosecutor conducting or supervising the pre-trial proceedings to complete the pre-trial proceedings, or the actions taken by the court or bailiff to conduct and complete the enforcement case or other case concerning the enforcement of a court decision. In making this assessment, the total time of the proceedings to date is taken into account, that is, from the initiation of the proceedings until the complaint is heard. It does not matter at what stage the complaint was filed. Likewise, the nature of the case, the degree of its factual and legal complexity, the relevance to the complainant of the issues resolved, or the behavior of the parties, especially the party alleging protracted proceedings, is not important. A holistic view of the case necessitates an assessment of whether in a properly functioning legal system, where the procedural authorities undertake their actions in an efficient manner, the case would have been considered as long as it actually was (Kłak, 2008, no. 12, p. 68). This is a kind of benchmark. The procedural timelines for investigations and inquiries (Kasinski, 2009, pp. 11-12,44-58) can be helpful here. Importantly, it is not correct practice to limit the analysis of a complaint merely to the examination of the allegations raised in it.

The law allows multiple filings of such a complaint, but after 12 months, and in pre-trial proceedings where pre-trial detention is used, and in an enforcement or other case involving the execution of a court decision after 6 months. If the complaint is rejected, the complainant may also file a new complaint in the same case. Importantly, when re-

determining the lengthiness, in order to avoid the charge of fragmentation, the entire period of the proceedings should be taken into account, but the amount already awarded previously should be deducted from the amount awarded (ECHR judgment of 18.10.2007. Swat v. Poland, judgment of 11.05.2005. Majewski v. Poland, and the judgment of 6.7.2010. Rejzmund v. Poland).

It can be argued here that the fact that complaints of protractedness in the same case have been adjudicated several times does not mean that there is res judicata. In this case, res judicata is of a purely formal nature.

The entity entitled to file a complaint, depending on the type of proceedings, is a party, an applicant aggrieved, an intervening party and a participant in the proceedings, and even another person exercising his rights in the proceedings. A complaint that the proceedings to which the complaint relates have been protracted shall be filed in the course of the proceedings in the case. The complaint is filed with the court before which the proceedings are pending. A complaint concerning the lengthiness of pre-trial proceedings shall be filed with the prosecutor conducting or supervising such proceedings. The complaint is subject to a fixed fee of 200 zlotys. If the complaint was filed by several persons, each of them shall pay the fee separately. The court with jurisdiction to hear the complaint is the court superior to the court before which the proceedings are pending. Thus, if the complaint concerns the lengthiness of proceedings before the district court and the circuit court - the court of appeals is competent to hear the complaint in its entirety. If the complaint concerns the lengthiness of proceedings before the district court and the court of appeals - the court of appeals is competent to hear it in its entirety. If, on the other hand, the complaint concerns the lengthiness of proceedings before the court of appeals or the Supreme Court, then the Supreme Court has jurisdiction to hear the complaint. "Case" in a judicial proceeding is an accusation in a criminal case, a lawsuit in a civil trial, a motion in a non-litigation proceeding, etc., in which a ruling is to be made on the rights of the person initiating the proceeding. An incidental proceeding (Supreme Court decision of 28.9.2021, I NSP 130/21) is not such a "case". As for the formal requirements of a complaint, it should meet the standard provided for a pleading, and, moreover, contain a

demand for a declaration of the lengthiness of the proceedings and a statement of the circumstances justifying the demand. The complaint may include a demand for a recommendation to the court hearing the case or the prosecutor conducting or supervising the pre-trial proceedings to take appropriate action within a specified period of time and to award an appropriate sum of money.

In the proceedings before the Supreme Court of Appeals on a complaint of protracted proceedings before the appellate court, the representation of a party by a lawyer is not required. This is an important deviation to the general burrow in the form of compulsory advocacy, which is intended to simplify and formalize the proceedings.

The court or prosecutor to whom the complaint is filed shall promptly present it to the competent court with the file of the case in which the proceedings are pending. The court shall hear the complaint with a panel of three judges. In matters not regulated by the Law, the court shall apply to the proceedings pending as a result of the complaint, mutatis mutandis, the provisions on complaint proceedings applicable to the proceedings to which the complaint relates. A complaint that does not meet the requirements shall be rejected by the court having jurisdiction over it without a call to supplement the deficiencies. The court shall also reject a complaint filed by an unauthorized person or an inadmissible complaint. In the further course of the proceedings, the court having jurisdiction to consider the complaint shall notify the State Treasury of the pending proceedings, that is, the president of that court whose action or inaction, according to the allegations of the complainant, caused the lengthiness of the proceedings, serving him with a copy of the complaint. If the complaint concerns the lengthiness of pre-trial proceedings, the competent court shall notify the State Treasury, that is, the public prosecutor superior to the public prosecutor conducting or supervising the pre-trial proceedings, serving him with a copy of the complaint. The court shall issue a decision within two months, counting from the date of filing the complaint. This deadline is purely instructional, but in practice enforces the efficiency of such proceedings. In making a decision on the merits of the complaint, the court dismisses the unfounded complaint. On

the other hand, if the complaint is upheld, it determines that the proceedings to which the complaint relates were protracted. At the request of the complainant or ex officio, the court may recommend that the court hearing the case on the merits or the prosecutor conducting or supervising the pre-trial proceedings take appropriate action within a specified period of time, unless the issuance of recommendations is obviously unnecessary. Recommendations may not encroach on the factual and legal assessment of the case.

The thing that is important from the perspective of the complainant is compensation for protracted proceedings. In upholding the complaint, the court, acting at the request of the complainant, shall award from the State Treasury, and in the case of a complaint about the lengthiness of proceedings conducted by a bailiff - from the bailiff, a sum of money in the amount of 2,000 to 20,000 zlotys. The amount of the pecuniary sum, within the limits indicated above, shall be no less than 500 zlotys for each year of the proceedings to date, regardless of how many stages of the proceedings are affected by the stated lengthiness of the proceedings. The court may award a sum of money higher than 500 zlotys for each year of the proceedings so far, if the case is of special importance to the applicant, who by his attitude did not culpably contribute to the extension of the duration of the proceedings. This sum shall be credited with the amounts already awarded to the applicant as a sum of money in the same case. When awarding a sum of money to the complainant, the court shall indicate what period of the length of the proceedings it relates to. A sum of money shall not be awarded if the complaint brought by the State Treasury or state entities of the public finance sector is upheld. The state is liable for the violation on a strict liability basis. The appropriate monetary sum awarded is a kind of sanction to the state for a malfunctioning justice system. It is free of tax (Judgment of the Supreme Administrative Court of 16.12.2011, II FSK 1218/10). It compensates for the violation of a party's right to a hearing within a reasonable time. However, it does not constitute compensation for damages and is also not a simple remedy. It does not examine the financial and living situation of a party to the proceedings, as well as the relationship of the length of the trial to the induction of stress or other adverse health factors. In the

course of the law, compensation criteria have been developed. These include, first of all, the duration of the proceedings, the nature of the case and its importance (in the objective and subjective sense), the behavior of the complainant (contribution), the actions taken and omitted (a kind of SWOT analysis) and the complexity of the case. In determining the amount in the case of a finding of protractedness, generally a base amount is taken for each year of the proceedings (so not just the period of inaction itself), and based on this is calculated the amount of compensation due. Some guidance in this regard has also been developed by the ECHR (See pilot judgment of 7.7.2015. Rutkowski and others v. Poland, judgment of 29.03.2006 No. 64890/01 Apicella v. Italy).

The award of an appropriate monetary sum acts as a sanction to the state for the defective organization of the administration of justice. It should also compensate the applicant for what is referred to in the Court's jurisprudence as "non-pecuniary damage," "non-pecuniary damage," and "moral injury". According to Article 41 of the Convention, if the Court finds that there has been a violation of the Convention or its protocols, and if the domestic law of the High Contracting Party concerned allows only partial remedy for the consequences of the violation, the Court shall, when necessary, award just satisfaction to the injured party. The case law of the Court applying this provision may provide guidance for the interpretation of Article 12(4) of the Law of June 17, 2004.The Court most often does not find grounds for compensation for losses caused by protracted proceedings, especially lost profits. Instead, the rule is to award compensation for "non-pecuniary damage," justified in short arguments primarily by the principle of equity (Supreme Court decision of 6.1.2006, SN III SPP 154/05, Supreme Court decision of 17.4.2024, I NSP 44/24 or Supreme Court decision of 11.1.2024, I NSP 241/23). The award of a sum of money is made without an award of interest, and this is regardless of the period of ascertained untimeliness of the pending lawsuit (Supreme Court decision of 6.1.2006, III SPP 154/05). In the case of an award of a sum of money from the State Treasury, the payment is made by the court conducting the proceedings in which the protractedness of the proceedings occurred or by the organizational unit

of the prosecutor's office where the protractedness of the proceedings occurred in the course of the pre-trial proceedings, and with regard to the pre-trial proceedings conducted in the district prosecutor's office - the competent district prosecutor's office. If the protractedness of the proceedings occurred in proceedings before more than one body, when awarding a sum of money, the court shall indicate in what part the payment is made by the respective body. A copy of the decision upholding the complaint regarding the lengthiness of court proceedings shall be served by the court on the president of the competent court. The president of the court served with the ruling is obliged to take supervisory action. Similarly, a copy of the decision accepting a complaint regarding the lengthiness of pre-trial proceedings shall be served by the court on the prosecutor superior to the prosecutor conducting or supervising the pre-trial proceedings. This prosecutor is also obliged to take supervisory action. The party whose complaint is upheld may, in a separate proceeding, claim compensation for the damage resulting from the established protraction from the State Treasury (Zbrojewska, No. 11-12, p. 21). The order upholding the complaint is binding on the court in civil proceedings for damages or compensation as to the determination of the lengthiness of the proceedings. A party who has not filed a complaint about the lengthiness of the proceedings may claim - on the basis of Article 417 of the Civil Code - compensation for damages resulting from the lengthiness, after the final conclusion of the proceedings on the merits.

It is also worth adding that the ECtHR in its case law has consistently emphasized that protractedness is generally not due to the fault of a specific person responsible for the conduct of a particular proceeding (ECHR decision of May 6, 1981 Buchholz v. Germany - Application No. 7759/77; Bottazzi v. Italy - Application No. 34884/97). In the context of this standard in Polish proceedings, it is not required to indicate the fault of a specific judicial officer or body that would be responsible for its violation. It is even pointed out that "it is unacceptable to pass the consequences of negligence being the original source of the lengthiness of the proceedings onto the judge who takes up the job" (Supreme Court judgment of 28.02.2014, ref. SNO 43/13). The

significant impact of cases, staffing problems and the workload of judges have no effect on the determination of the lengthiness of proceedings in the case in which the complaint was filed (Supreme Court decision of March 21, 2006, III SPP 13/06, OSNP 2007, no. 7-8, item 121). The workload, the volume of cases and the state of the judiciary, at most, may lead to the conclusion that the lengthiness of proceedings in a particular case is not the result of negligence or misconduct on the part of the Court. However, it is the responsibility of the State to organize the conditions for the proper exercise of jurisdictional authority (Supreme Court decision of March 16, 2006, III SPP 10/06, OSNP 2007, no. 7-8, item 120).

Conclusions

This article was intended as an attempt to organize the issues related to the lengthiness of proceedings, to show the relationship between the European standard and the national standard, and to introduce Polish legal solutions. National legal solutions, however, not only refer to more general standards of interstate rank, but fully materialize them. This is because all those areas that were emphasized as sensitive have become the subject of relevant regulations. Control of the court's proceedings is not only a desirable, but also an acceptable solution in a democratic state of law. After all, the proceedings before the judiciary should be carried out in a timely manner the trial should be neither lengthy nor decided too hastily. It is clear that the introduction of the law will not by itself eradicate violations of a party's right to have a case heard within a reasonable time. What is still needed here is a broad spectrum of other impacts within the framework of the justice system sensu largo, mainly of a logistical and organizational nature (Interesting developments, concerning, among other things, litigation costs, are pointed out by Kurnicki, 2016, No. 1). These, too, usually take the form of appropriate amendments to laws. The complaint itself undoubtedly plays a "disciplinary" role for the bodies conducting the proceedings (Matusiakiewicz, 2024). It should also be noted that the complaint not

only plays a disciplinary role, but also affects the course of proceedings conducted too slowly, as it aims to implement the path of the quickest possible resolution of the case in the case of procrastination of the authority. The construction of these institutions is therefore related both to the case and to the body conducting it. This is because it is the action of this authority, or rather its failure to act, that has become the subject of a party's dissatisfaction and, consequently, the reason for exercising the right of complaint. The national standard introduces an obligation to supervise the cases that have become the canvass for the implementation of the procedure declaring protractedness. It also duly safeguards the recovery of the parties' financial claims. The determination of protractedness always depends on the nature of the case. Failure to take action, sham actions, a distant hearing date are the most common reasons for declaring a given proceeding to be protracted. However, the amount of sanctions, set in a fork formula, is set at a level flexible enough that it should cover all types of proceedings. Moreover, the award of appropriate monetary compensation under this procedure does not limit a party's right to seek compensation or damages through appropriate civil proceedings. It thus directly materializes the obligation to ensure full compensation. The Polish law also fulfills constitutional safeguards of freedoms and rights, such as the right to have a case heard within a reasonable time (Łabuda and Razowski, 2012, no. 1, p. 71), the right to compensation, the prohibition of closing the judicial path and the principle of two-instance proceedings (See also the judgment of the Constitutional Court of 14.10.2010, K 17/07).

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ARTIFICIAL INTELIGENCE AND BIOLAW IN THE "FUTURE" SURGICAL INTERVENTIONS PERFORMED BY ROBOTS WITH A.I. *VERSUS* TELEMEDICINE[1]

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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,

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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, 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.

Keywords: *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.

3. 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.

4. 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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BUSINESS ETHICS FROM THE PERSPECTIVE OF CORPORATE SOCIAL RESPONSABILITY

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Abstract:

This work intends to provide a brief exposition of some concepts frequently used in Business Law nowadays, and subsequently to analyze the relevance of these themes, how they can be employed as a smokescreen to conceal the true interests of business management. In addition, it seeks to discuss ISO 26000, the 2030 Agenda and the correlation of these commitments with business management practices and the commitment to social responsibility. Finally, yet importantly, it presents the challenge of data analysis since the interest in profit is achieved by companies even when it is not openly defended that this is the organization's priority. Furthermore, the power that information on social networks and social judgment on corporate actions have is a

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relevant point in terms of strategy and corporate culture. Keywords: Corporate social responsibility, business ethics, corporate conduct duty.

Keywords: *Corporate social responsibility; business ethics; corporate duty of conduct.*

Introduction – A Brief Conceptual Framework Ethics

Etymologically speaking, is derived from the Greek word ethos and refers to the manner of being and the character from which human acts arise, as well as to the customs, habits, and habitual actions that indicate how a particular person function (Dias, 2004). Beauchamp and Bowie (Beauchamp, 1983) refer to ethics as a form of inquiry into the differences between good and evil, right and wrong, what should and should not be done.

It is clear that combining the concept of ethics with the fundamentalist business model is a tremendous challenge, since at the dawn of their creation and operation, companies are founded with the objective of profit (Friedman, 1962). Business ethics aims to counter this single interest or ultimate purpose, exposing that nowadays companies reflect the way of life and the social context in which they are inserted.

In this sense, it is no longer feasible for a company, given that it generates enormous impacts on the lives of its employees, the economy it is part of, the community, and various factors beyond its accounting analysis and activity. Not to commit and take responsibility for the various factors that compose it and are significantly influenced by it.

Contemporary views of business ethics include the concept, as defined by Crane and Matten (Crane, 2007) and Carroll and Buchholtz (Carroll, 2008), of studying all situations, activities, and decisions in the realm of business activity where the binary of right and wrong is questioned. It encompasses all ethical (practical) principles identified and implemented in the scope of business activity to ensure that the interests of all stakeholders (A concept created in the 1980s by American philosopher Robert Edward Freeman, a stakeholder is any individual or

organisation that is in some way impacted by the actions of a particular company) are respected (Keller-Krawczyk, 2010).

These different views and conceptualizations of ethics within companies generate a common association with another topic that we intend to bring specific conceptualization here: Social Responsibility. The definition of Corporate Social Responsibility (CSR) is given by the International Standard ISO 26000, which refers to how an organization takes responsibility for the impact of its decisions and activities on society and the environment ((In free translation, this is the International Organisation for Standardisation, which provides parameters and rules for certifying a certain set of behaviours, assigning a specific number and title to each one. In this particular case, number 26000 deals with Guidance on social responsibility.).

The European Commission includes in its CSR definition aspects such as environmental issues, anti-corruption efforts, community involvement, inclusion of people in situations of inequality, and consumer interests (Mentioned in the Goverment in European Commission document of 20 June 2020. Available for download in several languages on the official website of the European Commission, at https://commission.europa.eu/publications/governance-european-commission_en?prefLang=pt Accessed December 2023.).

Meanwhile, the Organization for Economic Co-operation and Development (OECD, 2020, https://web-archive.oecd.org/2018-11-27/485071-OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf Accessed December 2023) considers that Responsible Business Conduct (RBC) should be seen as a positive contribution to economic, environmental, and social progress aimed at sustainable development, avoiding adverse impacts related to the activities, products, or services (direct and indirect) of a company.

Other concepts often associated, or with a close correlation that should be presented, are that of Corporate Governance, which is understood as a set of practices aimed at optimizing a company's performance by protecting all interested parties, such as investors, employees, and creditors, and facilitating access to capital (Securities and

Exchange Commission (CVM). CVM Recommendations Booklet on Corporate Governance. Available at http://www.cvm.gov.br/. Quoted by Karen Campos Hentschel da Matta Machado, available at https://www.puc-rio.br/ensinopesq/ccpg/pibic/relatorio_resumo2010/relatorios/ccs/adm/ADM-Karen%20Campos%20Hentschel%20da%20Matta%20Machado.pdf Accessed December 2023).

And the ESG (environmental, social, and governance), which is the framework by which organizations are directed, monitored, and driven, involving partners, boards (administrative and fiscal), management, control, and stakeholders.

Having framed the topic, we will analyze the practical application of these concepts and the difficulty of data analysis, as managers of large companies have understood that, often, by making a certain decision in which profits are not the priority, they achieve even more profits since the social view of that decision by consumers has a direct influence on consumption.

1. Business Practice

Business Practice Achieving good governance may require facing various challenges, such as establishing risk management and compliance, implementing policies and practices that defend integrity and transparency (Ethos Institute, 2018, https://www.ethos.org.br/conteudo/projetos/gestao-sustentavel/ . Accessed December 2023).

To be characterized as "good governance," it is necessary for the company to have continuous monitoring of its economic assets and liabilities, socio-environmental measures, and its value chain (Ethos Institute, 2016).

In addition to company monitoring by stakeholders and the government, society plays an important role in monitoring its attitudes and showing interest in them, encompassing everything from the basic inputs used in production to the treatment of employees; organizations that use means to increase their integrity and ethics, in addition to

becoming more sustainable and contributing to the environment, become less vulnerable to corruption (Ethos Institute, 2018, https://www.ethos.org.br/conteudo/projetos/gestao-sustentavel . Accessed December 2023)

Ethical leadership can relate to organizational performance. When senior management has ethical leadership, the likelihood of increasing the number of ethical processes is higher, as the ethical climate, ethics codes, and ethical standards are formulated and shaped by senior management (Shen, 2015).

Organizations reports can detail the management's responsibilities regarding financial reporting, maintaining an ethical corporate culture, and establishing appropriate internal control; the reports can also portray adjustments that the company will make to achieve its objectives, such adjustments in relation to assets and transactions can make external financial reports adequate (Verschoor, 1998).

There is a positive relationship between the voluntary disclosure of information and the profitability of organizations, as companies use such information to maintain their position and increase the level of remuneration; thus, profitability can be seen as an indicator of the quality of investments made by the organization, then if the company has high returns, it has more incentive to disclose such information and justify its profits (Frias-Aceituno, 2014).

There are reports that, as a corporate strategy, take on a commitment to use ethical attitudes towards their investors; a link can be observed between management based on ethical and socially responsible behaviors and the positive financial performance that the corporation obtains; thus, there is concern about the influence that ethical behavior with stakeholders has on increasing profitability (Verschoor, 1998).

And this is where the main difficulty in data analysis resides. For example, there is a complicated mathematical equation developed by Brazilian researchers Giovana Romeu Faria and David Ferreira Lopes Santos, from the São Paulo State University (Uniesp) (Faria, 2023), who sought on their own to analyze ten different exporting companies to numerically demonstrate the relationship between actions that took into

account the ethical and responsible positioning of companies, compared to others in the same sector that did not commit to the same topics.

The numbers translate ambiguously in many cases, and there are very obvious explanations for this discrepancy: being a company that uses concepts and social marketing to publicize its own actions or develop products with less social impact does not entirely mean being ethical and responsible.

After all, can a company with huge debts in processes generated by its workers be considered ethical? A company that embarks on a campaign that converts part of the profits for a certain social or environmental cause and at the same time is held responsible for a huge ecological disaster is clearly not being ethical or responsible. Once the company's management realizes that some points are analyzed and have a significant impact on its audience, although that action is not strictly aimed at profit, it will translate into profit since it is well-regarded by the end consumer.

We cannot consider that this action or set of actions does not have an end centered on the fundamentalist theory, which aims at profit at all costs. Many times, ethics and responsibility are used as a means to achieve the purpose that is above any other component in that particular company, profit. What effectively protects workers, customers, suppliers, and all those covered by business activity is that there are currently many channels of information, which makes it much more accessible to analyze more deeply if actions follow the same path as the speeches.

Just to give an example from Portuguese society: the *Sociedade Ponto Verde* (https://www.pontoverde.pt/quem_somos.php accessed in March 2024) in 2020 conducted a survey (https://www.ambientemagazine.com/inquerito-revela-que-portugueses-estao-mais-preocupados-com-problemas-ambientais/ Accessed November 2023) that randomly questioned different groups of people, in different cities of Portugal about the selective collection of waste. The result of this survey was revealed: 9 out of 10 Portuguese people declared they carried out waste separation.

At first glance, the data was quite shocking, simply because it was not consistent with the reality seen on the streets and with the results of

the companies that collected the rubbish throughout the country, as disclosed by the Portuguese Environment Agency, in a survey conducted in 2022.

"At the collection level, there have been no significant differences over the last few years, with undifferentiated collection remaining the preferred type of collection for urban waste collection. Despite the increase in recent years in the number of infrastructures for selective collection, this has not had the proportional reflection in the quantities collected selectively." (https://apambiente.pt/residuos/dados-sobre-residuos-urbanos. Accessed in November 2023)

Sociologically, the result of the survey is more easily understandable, as much as we do not have a certain attitude, it would seem bad enough to admit socially and openly such a lack of commitment.

Most people are aware of the importance of environmental causes and the attitudes we can and should have to contribute to sustainability, recycling, and the conscious destitution of what we produce, but taking a concrete and practical action like simple separation is another step. Admitting that this seemingly simple attitude is not even part of our daily concerns is even worse.

The entity that carried out the cited survey did not officially comment on this discrepancy between practice and what was declared, but we can easily arrive at possible explanations for it, exercising our critical sense.

With this analysis, which does not intend to unequivocally answer the reason for the discrepancy between the declared data and the reality that is seen, it is worth noting that companies or large corporate entities also have ambiguous actions because they are influenced by the social environment and how people who work in them, supply, invest act on a daily basis. Linearity and simplicity work in certain business areas, but not in all.

Corporate Sustainability According to ISO 26000

ISO 26000:2010 aims to help organizations contribute to sustainable development. It seeks to encourage them to go beyond compliance with the law, recognizing that compliance with the law is a fundamental duty of any organization and an essential part of its social responsibility. It seeks to promote a common understanding in the field of social responsibility and to complement other instruments and initiatives for social responsibility, not to replace them.

When applying ISO 26000:2010, it is advisable that an organization takes into account social, environmental, legal, cultural, political, and organizational diversity, as well as differences in economic conditions, while being consistent with international standards of behavior.

ISO 26000:2010 is not a management system standard. It is not intended nor appropriate for certification purposes or regulatory or contractual use. Any offer for certification, or claim of certification, to ISO 26000 would be a misrepresentation of the intent and purpose and a misuse of ISO 26000:2010.

Since ISO 26000:2010 does not contain requirements, any such certification would not be a demonstration of compliance with ISO 26000:2010. ISO 26000:2010 is intended to provide organizations with guidance on social responsibility and can be used as part of public policy activities. However, for the purposes of the Marrakesh Agreement establishing the World Trade Organization (WTO), it is not intended to be interpreted as an "international standard," "guideline," or "recommendation," nor is it intended to provide a basis for any presumption or conclusion that a measure is consistent with WTO obligations.

It is also not intended to provide a basis for legal actions, claims, defenses, or other claims in any international, national, or other proceedings, nor is it intended to be cited as evidence of the development of customary international law. ISO 26000:2010 is not intended to prevent the development of national standards that are more specific, more demanding, or of a different type

(https://www.iso.org/standard/42546.html Accessed December 2023).

ISO 26000 is not aimed only at purely commercial companies but at organizations of all types and sizes. Responsibility for sustainable development is equally shared by all companies and organizations: even small and medium-sized enterprises can influence various stakeholders, and at least their employees and customers. Their perception can have a direct impact on the success of the company. Therefore, even small companies should comply with their social responsibility by following the recommendations of ISO 26000. It is important that they set their social responsibility strategically. In this way, the guidance can also be useful in the public or non-profit sector. Large commercial enterprises increasingly require their suppliers to contribute to sustainable development.

The seven principles of corporate and organizational social responsibility according to ISO 26000 are: Accountability, Transparency, Ethical behavior, Respect for stakeholder interests, Respect for the rule of law, Respect for international norms of behavior, and Respect for human rights. Some recommendations of the core areas mentioned in the guidelines are already part of common and certifiable management system standards, such as ISO 9001 (quality management), ISO 14001 (environmental management), ISO 45001 (occupational health and safety), or ISO 37301 (compliance management).

Such a certificate can, therefore, serve as partial evidence of social commitment. Although it can be easily confused with a certification, ISO 26000 gives us a good idea of the importance and relevance of the topic to the business world, since there is no minimum size of income or employees, or any other objective aspects that require organizations to adopt measures to maintain responsible, sustainable, and ethical operation.

Global Compact and 2030 Agenda

On July 26, 2000, the Global Compact (https://unglobalcompact.org/ Accessed December 2023) was officially

adopted at the headquarters of the United Nations (UN) in New York, with the participation of forty-four transnational companies and some non-governmental organizations.

Launched by then-United Nations Secretary-General Kofi Annan, the Global Compact is a call for companies to align their strategies and operations with Ten Universal Principles in the areas of Human Rights (businesses should support and respect the protection of internationally recognized human rights and ensure their non-complicity in human rights violations), Labor (businesses should support freedom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; the elimination of discrimination in employment), Environment (businesses should support a preventive approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technologies)band Anti-Corruption (businesses should work against corruption in all its forms, including extortion and bribery), developing actions that contribute to addressing society's challenges. It is now the largest corporate sustainability initiative in the world, with more than 21,000 members in more than 70 local networks covering 160 countries.

Since then, corporate social responsibility has become the new paradigm of behavior for transnational companies in the era of globalization. Regardless of the context, but especially in the activities in which they operate, transnational companies must observe and respect human rights, ensuring compliance with national and international laws, and seeking ways to encourage the observance of internationally recognized principles.

Business ethics is no longer an option; it is now an existential requirement. In the meantime, the corporate governance of companies that are signatories of the Global Compact, in turn, must not only create means but set an example, respecting the guiding principles, mapping, and mitigating the risks that their activities or contracts may cause or contribute to human rights violations.

One of the main merits of the Global Compact, ESG, and the 2030

Agenda is to reinforce the charge on large corporations regarding actions in their chains, since the company does not exist only because of its economic character.

The 2030 Agenda is a broad and ambitious agenda that addresses several dimensions of sustainable development (social, economic, environmental) and promotes peace, justice, and effective institutions. The Sustainable Development Goals are based on the progress and lessons learned from the 8 Millennium Development Goals established between 2000 and 2015 and are the result of the joint work of governments and citizens around the world. The 2030 Agenda and the 17 Sustainable Development Goals are the common vision for Humanity, a contract between the world's leaders and the peoples, and "a to-do list on behalf of people and planet."

The objectives of this list are: Eradicate hunger and poverty; health and quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation, and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; protect marine and terrestrial life; peace, justice, and strong institutions; and finally, partnerships for the implementation of the goals (https://ods.pt/ Accessed March 2024).

Although there is a lack of a binding or sanctioning mechanism, it is not conceivable to have the Global Compact only as an ethical imperative, as there was an international negotiation by the companies themselves, and they should comply with it in good faith. In addition, it should be mentioned that the legal rules of *pacta sunt servanda* (from the Latin, „covenants must be respected“ or „agreements must be kept“ - is used to designate a classic principle of contract theory, according to which there is an obligation to fulfil what has been agreed in a contract) and *venire contra factum proprium*, universally recognized (The principle of *Venire Contra Factum Proprium* prohibits contradictory, unexpected behaviour that causes surprise in the other party. Although it is not expressly provided for in the law, its application stems from

objective good faith and contractual loyalty, which are required of all contracting parties.).

On the other hand, even though the Global Compact and the *Ruggie Principles* are soft law (a set of rules produced by the administration that guide its actions and are characterised by not being binding and by not providing sanctions for non-compliant administrative action), the duty of protection is not discarded, and companies can be held accountable before the State jurisdiction of each country where they operate (Principles based on pre-existing human rights standards, especially the Universal Declaration of Human Rights. There are 31 principles that set out how states should protect and companies should respect human rights, as well as dealing with mechanisms for redress, so there are founding principles and operational principles.).

Good corporate governance practices help the company to demonstrate its legal, ethical, and humanist commitment. Compliance can be a tool through which the organization operationalizes and ensures that its actions are following the dictates of the *Ruggie Principles* and market norms, avoiding human rights violations.

Profit is legitimate, but it is necessary to add values to this pursuit, which can be achieved through the humanist philosophy of Economic Law, with Humanist Capitalism, which adds the balance that is lacking in the economic system, which is why Human Rights are legal norms and must be mandatorily observed.

Thus, corporate governance needs to be constantly in due diligence (Due diligence is a procedure that aims to carry out in-depth research and investigations into a company.), always questioning what can be done in its practices and commercial relations to minimize damage and maximize its contribution to society, given that transnational companies have transformative instruments and power (positive or negative) of the social reality where they operate.

Therefore, it must be recognized the positive role that transnational companies (especially those adhering to the Global Compact) can – and must – play in the protection and promotion of human rights, as a realization of corporate social responsibility.

It is worth mentioning that both the actions resulting from the

Global Compact and the 2030 Agenda are reflections of a growing and constant concern of the European Communities Commission regarding the topic of corporate responsibility. We could not fail to mention the Green Paper (2001), launched in 2001 in Brussels, which already brought in its content effective actions for the promotion of awareness and business actions aimed at sustainable resource management, internal and external impact of organizations, human rights, and issues that continue to be increasingly urgent and current.

Finally, it does not seem dishonest or unethical that corporate social responsibility offers advantages to the company, such as improved reputation, credibility, productivity, brand loyalty, and many other economic benefits, as long as it is combined with a conscience and effective activity in promoting and protecting human rights. It is inferred, therefore, that the obligation to respect human rights constitutes a global standard of conduct applicable to all companies wherever they operate.

Conclusions

After the conceptual explanation, it is possible to understand that we are increasingly distancing ourselves from the traditional purpose of creating a company that aims exclusively at profit to approach a more universalist vision. Where it is of utmost importance to understand the ethical bias of organizations and the impact they have on people's lives. It is imperative, it is mandatory, that an organization, regardless of its size, takes into account that social judgment, economic relevance, and activity, employing people, and directly influencing local commerce is also its responsibility.

This refers not only to external factors but also to the importance of the code of ethics, the way suppliers are treated, the workers, and the mandatory safety standards, among many other components that distance the primacy of profit at the expense of ethical, responsible, and sustainable attitudes.

Being part of a global panorama that values, promotes, and encourages ecological practices, business models that last for

generations, and commits to the long-term conservation of the planet and a climate agenda, should directly interfere with business practice and logic. Deeply, with seriousness.

It is not enough to launch a marketing campaign with a single product made from reforested wood and the next day be involved in a biological disaster that causes the extinction of an entire species. It is not enough to go on social networks with campaigns about inclusivity and during presidential elections to sell user data and tip the balance towards a party without inclusive agendas. Nowadays, information is accessible, fast, and at the consumer's fingertips, who is also an employee or a supplier.

At the same time, as we see this demand for companies to adopt more committed and responsible positions, with all legitimacy, we are forced to face that if they do so because of normative rules or because they feel cornered about their moral posture—are they, in fact, committed and responsible, or do they just want to appear so?

Analysing the data is very difficult. When a particular decision does not have the immediate objective of profit, it is difficult to determine whether there is any awareness that that particular positioning or speech will have a good repercussion and, consequently, profit. As consumers become increasingly demanding, legislation becomes equally demanding.

On the other hand, within the Boards of Directors, it is perhaps equally easy to notice when a company is truly committed or if it uses this aspect to present such an image to the market. The number of passive processes, environmental fines, and awards granted by non-profit entities show that it is not just an economic bias. And if, in addition to social and moral gain, there is also some monetary gain, it seems quite fair that good actions have multiple returns, knowing that negative ones can have catastrophic outcomes in various areas.

Managing an organization and being part of decision-making is becoming increasingly complex, following social models where it is increasingly complex to position oneself and be consistent with one's own discourse. Companies, being made up of people, are a mirror and a small sample of the social environment that surrounds them; they are not

isolated or apart from the social context that surrounds them. They need to understand their position: at this moment I think that the stage of understanding is already outdated. And we give way to the stage of commitment actions, of putting into practice the speeches beyond using them as postcards.

Standards like the ISOs and commitments like the Global Agenda and the Nations Pact contribute, despite not having sanctioning force, to companies committing themselves and assuming concrete objectives in labor matters, environmental protection, combatting corruption, and in essential topics such as Human Rights. It is also equally essential that consumers are always vigilant not to fall for false advertisements, to take advantage of technologies, and the functionality of always having access to the most diverse sources of information to investigate and demand when they perceive ambiguous attitudes from the business environment.

International Organizations and the Law should play their regulatory roles within their scope, but the union of this possibility of full-time investigation is also important so that nothing escapes, or at least, that it is not overlooked, properly disclosed and exposed. This is where the role of the common citizen gains strength, being able to anticipate market consequences that are often more effective and coercive than fines and penalties themselves.

From this, we have much to gain both as the construction of a business activity that respects and integrates with the environment, both internally and externally, and as a society that has the power to dictate rules according to what makes more sense for the community, including also the interest of the businessman. We must reach a balance or moderation; it is a question not of survival, but of coexistence.

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ARTIFICIAL INTELLIGENCE (AI) - "ALLY" IN THE SUCCESS OF INSOLVENCY AND RESTRUCTURING PRACTICES

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Abstract:

The central objective of our research is to analyze and evaluate the digital transformation in the insolvency area, by identifying transformative methods and technologies that allow the robotic automation of processes, simplifying the work of insolvency practitioners, the acceleration of repetitive tasks, the creation of platforms for virtual tours of the insolvent debtor's assets by creditors and more, all of which create opportunities for legislative reform and ensuring the success of global and local insolvency practices, helping to shape and strengthen a "rescue culture", in accordance with ethical guidelines in business.

What we propose is to outline answers to questions such as: Can AI become an "ally" of the debtor for the successful implementation of a judicial reorganization plan or for making a correct decision, in the sense of reorganization or liquidation of their business, anticipating economic changes and potential profit results? Is AI able to provide tailored specialist assistance to a debtor in financial difficulty, so that it adopts the optimal solutions for the recovery of the business in a timely manner? Can AI

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become a real support in the work of insolvency practitioners? Can AI provide the necessary support in the (r)evolution and success of insolvency practices, with an impact on the effervescence of restructuring and reorganization cases?

***Keywords**: insolvency, restructuring; artificial intelligence; transformative technologies; optimization; efficiency; digital culture; "personalised diagnosis"; Blockchain; technology-assisted analysis; smart contracts; human - automatic system interaction.*

Introduction

The introduction of AI in our daily life will have the effect of modifying the manifestation of already existing risks but also determining the emergence of new risks, the challenge of companies being precisely the efficient and rapid identification of these risks, their supervision and control and even the transformation into opportunities. Thus, the results of AI systems will depend on the quality and quantity of data in the construction of algorithms, since the decisions made by man through the filter of his analysis will gradually be discarded, the new generations relying on statistical methods and very complex parameters, which can make the final decision even more difficult for people to interpret and explain. Not to mention the possibility of failure of AI systems and the risks related to the transformation of skills models (Intelligence artificielle: quelles évolutions pour les profils de risques des entreprises?, https://www2.deloitte.com/fr/fr/pages/risque-compliance-et-controle-interne/articles/intelligence-artificielle-quelles-evolutions-pour-profils-de-risques-des-entreprises.html, 2024).

AI can revolutionise and streamline insolvency proceedings – "the way forward" and the future of insolvency law

What will be the impact of AI on the business environment and what will be the "propagation wave" of technology on the insolvency of a company? If we turn to AI and ask such a question to Chat GPT itself,

we will be surprised to find that it offers us a multitude of solutions to streamline insolvency proceedings through digitalisation and transformative technologies. In this sense, Chat GPT exposes us to the possibility of quick and orderly recovery of the debtor's assets, AI being able to analyse financial data and identify possible suspicious actions of the debtor, allowing liquidators to recover more assets. At the same time, AI can automate the process of distributing payments to creditors, analysing their claims and the regulations regarding the distribution order, thus reducing the risk of errors and improving the efficiency and time of running a traditional insolvency procedure. AI can also assess creditworthiness and determine credit scores by analysing factors such as the history of payments and outstanding debts, in which context it can provide statistics of success of a judicial reorganization plan by optimizing investment portfolios, but also risk mitigation strategies, following the analysis of market trends, economic indicators and potential risks (Restructuring, Turnaround & Insolvency, *The Impact of AI on the Insolvency Industry*, 20 April 2023).

Among the primary strategies for restructuring or reorganizing a company should be the "Digital Maturity Assessment", namely the technological infrastructure, data management practices and digital culture of the organization. Only agile professionals can quickly reorient themselves when they fall into financial difficulty, and making informed decisions based on relevant data, automation (*due diligence*) and process optimization becomes crucial.

The way forward remains, of course, "absorbing" the technology wherever is possible. According to a study by insolvency experts of the *Insol International* (Colston, Toms, 2019) most likely we will see a transformation impacted by AI only among large companies and large companies of insolvency professionals, being important to identify at the level of each jurisdiction ways of support from the government and for SMEs, through the allocation of technology and innovation funds, but also through programs to educate insolvency practitioners.

Innovative strategies offered by AI to debtors in financial difficulty

The "nuances" of technological transformation highlight the key positive changes that can occur in the business environment, providing multi-sided perspectives. The emergence of digital technologies such as *blockchain* or *smart contracts* have certainly simplified the tasks of the administrators, improving and accelerating the decision-making process.

Blockchain Technology provides a transparent and secure record, which can influence and revolutionise, for example, the asset tracking procedure or influence the vote of creditors (A blockchain is a decentralized, distributed and public "ledger" consisting of a list of chained "blocks". The blockchain is used to record transactions and the records cannot be changed retroactively without altering subsequent blocks. The first blockchain was conceptualized in 2008 by an anonymous person who identified himself as Satoshi Nakamoto. In 2009 it was implemented in the cryptocurrency bitcoin, serving as a public and decentralized registry for all transactions. Blockchain is a technology for storing and transmitting information, which is based on the principle of distribution and security and which records transactions and events on a permanent basis. At the same time, it can secure cryptocurrency storage, transactions between cryptocurrencies and the information relationships that support the purpose of each cryptographic project. - https://ro.wikipedia.org/wiki/Blockchain). Blockchain has huge potential to transform long-term business models and certainly strategies for managing and responding to financial difficulties and insolvency, constantly generating new foundations for global economic and social systems. The original Blockchain application has "matured" over the years, developing new applications of the technology, known generically as Blockchain 2.0 for more sophisticated smart contracts, reaching up to the Blockchain 5.0 model, which takes the next step towards the industry also known as the "Fifth Industrial Revolution" and involving the convergence of AI with blockchain technologies, the capitalization of cyber-physical systems (CPS), robotics, IIoT, Big Data, as well as human - automated system interaction.

An interesting impact of AI began to "shape" the principle "*pacta sunt servanda*", "disrupting" the practice of traditional contracting. And here is an analysis that requires a sensible and careful tendency towards benefits and risks, with the legality of smart contracts becoming a real challenge in an AI world. The literature defines the smart contract as "a computer code that creates an agreement that executes and applies itself, being automatic and enforceable" (Milk, 2017). The traditional legal contract "metamorphosed" into types of smart contracts, such as the one located in the Blockchain network, acquires legal force through data and information rules, and can be generated in the future even by AI through the interpretation and application of the principles of common law (Vos, 2019). We believe that they represent a major opportunity for insolvent debtors, managers in general and SMEs in particular, as they help to lower the costs of contracting, consulting and negotiating, increase the speed with which contractual relations can be executed, eliminate the risk of a particular clause being cancelled, ensure certainty, transparency of clauses and reduce potential disputes related to the interpretation of the contract, thus facilitating day-to-day trade (Marcusohn, 2022).

As a consequence, such technologies guarantee a check on ownership transfers, avoiding disputes and strengthening investor confidence. An AI-based system allows, for example, the analysis of a scenario *in globo*, by simulating the impact of different market conditions on cash flow, by assessing potential risks, by "predicting" the probability that the debtor will pay their debts or not, which allows creditors to adjust the terms or take preventive measures in working with them.

It is obvious that algorithms play a central role in insolvency proceedings, in the sense that companies can analyse historical financial data, perform predictive analysis, analyse customer behaviour and market trends, so as to make informed decisions before deciding on the next step, namely whether or not to assume a recovery plan, judicial reorganization or directly bankruptcy. Careful predictive analysis to identify cost reduction opportunities through supply chain optimisation and the possibility of renegotiating contracts can lead to a successful pre-emptive restructuring of the debtor. The examples are countless. Thus, when a debtor goes through a reorganization procedure, it can use an

automated system to track creditors' requests, monitor court hearings and ensure that deadlines for filing documents are met. Or, for example, when a debtor goes bankrupt, blockchain technology can guarantee transparent verification of property transfers.

Adopting technological advances is no longer an option, and the important thing is awareness, access to AI and the desire to act, to identify real solutions.

Potential implications of AI in transforming the role of insolvency practitioners

Living among digital assistants (Siri, Alexa, Cortana), autonomous machines or intelligent systems capable of making predictions, we realize that AI will revolutionise the labour market and the way of work, and digital skills, collaboration with robots, flexibility and diversity in the work process will become a normal thing in the near future.

Starting from the premise and belief that humans will not be replaced by robots, we will relate strictly to AI support in the work of insolvency practitioners and the ability to improve efficiency in several ways, overcoming the potential of confrontation between "human lawyers" and "digital lawyers". *Exempli gratia*, ROSS Intelligence is the first AI-based search tool used by a law firm to identify insolvency-specific data, with the machine learning used by ROSS being later extended to other areas. Interestingly, Ross was programmed "to understand human language, postulate hypotheses when asked, search and generate answers and references where it argues its conclusions" ("The supercomputer Ross, the world's first lawyer robot. What functions can it perform"- https://www.publika.md/supercomputerul-ross-primul-robot-avocat-din-lume-ce-functii-poate-indeplini_2624), learning from their own experiences and having the ability to monitor legislation and court decisions around the clock.

Let's not forget that there are many professionals, including lawyers or liquidators, who use GPT Chat for writing reports or identifying similar cases. Interestingly, AI, such as ChatGPT, can write

an email to the court to request a postponement, identifying appropriate and compelling reasons for obtaining a ruling in this regard.

AI, however, has limits, which is why human strategic thinking is still needed for negotiations in judicial restructuring or reorganization proceedings, with human interactions being irreplaceable in business play and decisions. Moreover, we believe that the future of insolvency professionals is that of "collaborating" with AI effectively and responsibly.

I becomes a way of leveraging expertise and innovation through significant strategic opportunities and benefits for clients, especially since traditional insolvency and bankruptcy procedures involve a multitude of activities such as managing a large number of documents, from financial statements and creditor records, to contracts and correspondence, manual data entry, which in turn generate administrative costs. Modern technology systems can automate such routine tasks and facilitate the administration of an insolvency file, contributing to a significant reduction in the time and effort required for the analysis. At the same time, machine learning algorithms can identify relevant patterns, correlations between information or even errors, providing practitioners with valuable information in a timely, fast and accurate manner, which helps to identify potential risks and inconsistencies, without having to manually go through a large volume of documents.

At the same time, the use of machine learning algorithms can contribute to the rapid identification of similar cases, international regulations or useful examples in motivating and managing the insolvency case. AI can prepare a memorandum of information and optimize the workflow, ultimately reducing delays and costs, which is actually the expected goal for the success of a judicial restructuring or reorganization (*How artificial intelligence can assist insolvency practitioners in India*, November 2023, https://www.aarnalaw.com/how-artificial-intelligence-can-assist-insolvency-practitioners/.).

Also, Technology-Assisted Analysis - *TAR* is a mechanism that deserves to be defined here, in the sense of support for insolvency professionals at the level of reviewing and coding documents, registers or records, being able to digitize large amounts of data. TAR is already part

of the landscape of electronic document communication approaches, thus saving valuable time and costs, and according to studies conducted, 35% of insolvency professionals already enjoy TAR technology (Kamalnath, August 2023). Surely this "digital arsenal" will gradually transform the activity of the insolvency practitioner profession but also of the courts, the latter recognizing TAR technology as an innovative and extremely useful method in the field of activity (*The Impact of AI on the Insolvency Industry,* 20 APRIL 2023, https://www.cornwalls.com.au/the-impact-of-ai-on-the-insolvency-industry/).

The fact is that AI will not replace professionals, but professionals who embrace AI can replace those who don't, with technology revolutionising the way professionals approach problems, make decisions and implement strategies, and as these technologies are developed, the benefits will be even more pronounced, leading to a future in which insolvency and restructuring are more predictable and effective.

Recently, the research of major universities, such as the University of Melbourne, Australia (Insolvency & Intelligent Systems Research, https://fbe.unimelb.edu.au/accounting?a=2543916.), have led to the construction of intelligent technologies such as insolvency, capable of explicitly representing the knowledge of expert insolvency practitioners in a testable form. The results provided an in-depth understanding of the decision-making processes used by insolvency practitioners in dealing with companies in financial difficulty. At the same time, INCASE, a case learning software, containing rich problem-based descriptions from fifteen different judicial reorganizations, was also developed, facilitating the rapid transfer of knowledge to junior insolvency professionals. According to the researchers, the data is being analysed and the results will be available in the near future.

AI – a communication "convector" between stakeholders in insolvency proceedings

Effective communication with stakeholders is crucial in insolvency proceedings and digital platforms can facilitate such interactions in real

time, allowing close collaboration between the debtor and other stakeholders. Collaboration tools based on *cloud*, for example, can facilitate collaboration between creditors, debtor, insolvency professionals, potential financiers and courts on reorganisation plans, terms and votes in this case, asset tracking and recovery, in particular in cross-border insolvency proceedings (*Innovation en matière de faillite. Naviguer dans la faillite à l'ère numérique : stratégies innovantes pour les entreprises en difficulté*, 14 March 2024, https://fastercapital.com/fr/contenu/Innovation-en-matiere-de-faillite-Naviguer-dans-la-faillite-a-l-ere-numerique---strategies-innovantes-pour-les-entreprises-en-difficulte.html).

AI can play an essential role in the way creditors act, by making insolvency proceedings more transparent and increasing their confidence in the stake of a possible restructuring or judicial reorganization plan. We are talking here about the development of tools that will facilitate the communication but also the access of creditors to information, to the control and evaluation of the debtor's assets or even the development of algorithms capable of establishing the repayment capacity of professionals in financial difficulty by examining trends arising from data rather than credit rating. For example, Mitsubishi Financial Group, one of the world's largest lenders, launched in 2019 a digital transformation initiative focused on the use of AI and machine learning, integrating a credit assessment system into its data-driven online loan model that evaluates transactions made in accounts of businesses in real time (Outils d'IA dans le domaine de l'insolvabilité, 2023, https://www.dwpv.com/sites/Insolvency/Trends-2023/Issue9/FR/2/index.html).

Interested parties may also use AI to assert their rights and interests in the context of insolvency proceedings. Although AI cannot replace lawyers or insolvency practitioners, it can acquaint interested parties with specific language, providing explanations needed to make a decision. One such potential ally is even Chat GPT, which can answer multiple and complex questions. In other words, AI can reduce the costs of expert advice, serve as a source of knowledge and processing of complex data in order to make a correct and predictable decision by all parties involved in

insolvency proceedings. Of course, still in the experiment period, such advanced technologies as GPT Chat can also create pitfalls, which is why verification and accuracy in data and information management is often required.

Very interesting how, the US Bankruptcy Court for the Northern District of Texas recently issued, more precisely in March 2023, an order relating to the use of procedures generated by AI. According to this order, the court requires that when filing a procedural document whose content was generated using generative AI, including Chat GPT, Harvey AI or google Bard, the lawyer, or unrepresented person, once again verify the accuracy of the content by consulting case law reports or databases and traditional legal tools, since AI systems are not required to be accurate and comply with the rules of law and the U.S. Constitution. The order comes amid a case in New York State in which lawyers presented fictitious research generated by GPT Chat. Such measures have also been taken by the courts of Canada, which in fact reminds us that AI is still at the beginning of the road and human intervention cannot be excluded from the act of trial and procedure.

AI can be a useful tool for regulatory bodies and courts in insolvency proceedings

Most likely, the use of AI by the legislator will allow in the near future to quickly adapt to economic and social reality by analysing large amounts of data in a very short time and identifying the needs of society and regulatory gaps. It is obvious that law-making will have to keep pace with the thundering evolution of AI. For example, AI can improve the way in which debtors are liable for insolvency, as it can detect potential fraud in insolvency proceedings and identify suspicious patterns and behaviour, such as illegal transactions or transfers of property.

Let’s not forget that AI is able to reproduce functionalities such as reasoning, creativity and language. Big Data and AI, two promising emerging technologies in all aspects of life, especially in the economic and financial sphere, involve three key elements such as speed, volume

and variety and their transformation into knowledge, conclusions and actions, elements almost intangible to human capacity. Analysis of large data sets can reveal trends and hidden anomalies, the information obtained can be transformed by AI into complex results highlighted in intuitive charts or graphs. Of course, all this also involves cybersecurity measures, data protection in the event of insolvency being very sensitive. The current trend is the use of AI specifically for anticipating business failures, using artificial neural networks. Interestingly, mentions of AI in global legislative procedures are 6.5 times more numerous than they were in 2016, with bills containing the phrase "artificial intelligence" being adopted in 127 countries in 2023.

However, the use of AI in judicial decision-making processes by allowing programmable and predictable judicial outcomes also entails a multitude of risks and challenges, in particular with regard to respect for the right to a fair trial. At the same time, however, we must also consider opportunities such as increasing the level of provision of justice, accessibility and leaving the path open for faster and less costly justice. Incidentally, the storage and organisation of available legal information in huge quantities becomes impossible to control only by the human mind. AI already makes its presence felt through the possibility of online transmission of court hearings, online hearing in criminal matters, carrying out digital reconstructions, electronic communication of procedural documents, consultation of the electronic file, etc.

Surely AI revolutionises not only the economy, legislation and implicitly insolvency, but our very way of existing, of relating, of understanding the meaning of life, "unlocking" a whole new world of innovation. We wonder if the electronic judge will appear – *cyber justice* or what a regulatory proposal made by a robot will look like.

A survey conducted in Australia on the use of technology in the mechanisms of investigating everything that means insolvency proceedings found that the percentage is astonishingly high, from the use of the electronic portal that allows the insolvency practitioner to access online customer data to the use of Google and Facebook query and search software to locate company executives, assets and business locations (Kamalnath, August 2023).

Interestingly, the UK began to use AI in dispute resolution, being issued a *Guide* with recommendations for judges, court clerks and IT professionals, as well as for litigants and their lawyers on the use of AI (Busuioc, 2024).

Also, in Colombia or Finland, (Polanía Tello, 2022) attempts are made to streamline insolvency procedures through AI, being already implemented systems capable of drafting a court decision based on existing documents on file due to the capacity of AI for self-learning, this decongesting the effervescence of insolvency cases pending before certain courts. *The question is: Can AI influence the fairness of a process? Can we rely on these AI-generated "robotic judges" who "tirelessly apply the same high legal standards to any court decision, without falling prey to human error such as bias, fatigue and ignorance of the latest technical knowledge?*" (Tegmark, 2019, p. 120). In this context, we could say that AI technology could play an essential role in eliminating suspicions about possible discretionary decisions and especially can provide support to magistrates by freeing them from certain tasks and the "burden" of preliminary decisions related to the analysis of certain data and figures. They would have the time to focus more rigorously on the finesse, complex elements that involve interdisciplinary analysis and that a robot certainly cannot yet define.

"Merging the act of justice with AI", in a balanced and ethical way, becomes an opportunity especially in the case of courts that face a very large number of applications for opening insolvency, whose late management could "cost the life" of a company, but also the fate of employees. Not to mention the potential for AI involvement in law enforcement and updating, with so-called "robot legislators" needed in the future for the law to keep up the accelerated pace of technological development. *But can the law allow itself to be "shaped" and "normalized" by algorithms?*

Returning to the insolvency field, we will highlight the potential of AI in resolving restructuring agreements or pre-court reorganization negotiations, through the possibility of resolving disputes online, on certain platforms and without human intervention. These arrangements

are particularly useful for SMEs, which cannot afford additional costs for expert advice, travel or long-term formal procedures. AI will thus provide a "personalised diagnosis", which can be "drawn up" or not later by the court, depending on the decisions of the parties involved. Moreover, the simplification of insolvency procedures for SMEs is a subject that has been hotly debated by Union and international bodies in recent years, and AI could be one of the solutions. And pre-insolvency procedures can be supported by AI technology, of course, while maintaining the possibility of challenging some measures/decisions taken by AI in the management of such a procedure, the confidentiality and data security remaining also major problems.

The active support of the State and implicitly of the legislator remains essential for formal insolvency proceedings to effectively, ethically and legally integrate technology.

Conclusions

Definitely, transformative technology has accelerated the processing time of insolvency cases, facilitated international cooperation and allowed a much more transparent assessment of a company's financial situation through advanced data analysis tools, providing real-time insights. Moreover, the technology has also greatly improved the possibility of identifying and tracking the assets of the insolvent debtor spread across different jurisdictions, so as to ensure a fair distribution among creditors. However, the integration of technology into insolvency practices has come with a set of challenges, such as the possibility of owning digital assets such as cryptocurrencies, which raise questions due to their volatile nature and the difficulty in determining the applicable legal framework.

Creative thinking, the emotional aspect of all relationships and authenticity, remain the qualities of a human manager, not an AI robot. Taking decisions when talking about the business world, or even the "world of insolvency", involves a dynamic and interdisciplinary analysis, which certainly requires human reasoning. AI systems can analyse large databases but cannot guarantee nuanced decisions, such as debtors or

insolvency practitioners, who have the ability to "navigate" through "emotionally charged" situations, which AI cannot do. After all, human judgment, empathy or adaptability, are qualities deeply rooted in the practice of insolvency. But the future of business, the economy and not least insolvency, may well be shaped by a "harmonious blend" between AI and human expertise. There will be a strong link between competitiveness and a company's ability to use and absorb digital innovation, and security and trust must be the foundation of this new digital economy.

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THE FUNCTIONS OF THE INSURANCE OPERATION

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Abstract:

Insurance, through its valences, of an economic, technical and legal nature, also fulfills socio-economic functions to which is added the protection of people and goods against various risks. These materialize in the following functions: compensation of damages caused to the insured, prevention of damages, of a financial nature, as a result of the establishment of the insurance fund, of distribution in the process of distributing the annual profit, of control, of saving, of supporting the state.

Keywords: *insurance; insurance fund; damage; compensation of damages; risks; insured; insurer.*

Advance notices

The regulations in force regarding insurance are the following, which we will refer to during the work:
- The Romanian Civil Code (Law 287/2009 on the Civil Code), which entered into force on October 1, 2011 (The Civil Code entered into force through the adoption of the Implementation Law no. 71/2011. It replaced

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the old civil code that entered into force on December 1, 1865), respectively art. 2199-2241;
- Law no. 260 /2008 regarding the mandatory insurance of homes against earthquakes, landslides and floods, republished (in M. Of. no. 175 of March 9, 2016, with subsequent amendments and additions);
- Law no. 95/2006 regarding health reform (republished on December 28, 2023);
- Law no. 246 /2015 regarding the recovery and resolution of insurers (M. Of. no. 813 of November 2, 2015);
- Law no. 213/2015 regarding the Guarantee Fund of the insured (M. Of. no. 550 of July 24, 2015);
- Regulation no. 6 of August 2, 2017 regarding the National Protection Fund (M. Of. no. 647 of August 7, 2017);
- Law no. 236/2018 on insurance distribution (M. Of. no. 853 of October 8, 2018);
- Law no. 237/2015 regarding the authorization and supervision of insurance and reinsurance activity (M. Of. no. 800 of October 28, 2015, with subsequent amendments and additions);
- Law no. 132/ 2017 regarding the mandatory auto civil liability insurance for damages caused to third parties through vehicle and tram accidents (M. Of. no. 431 of June 12, 2017).

Government Emergency Ordinance no. 93 of December 18, 2012 regarding the establishment, organization and operation of the Financial Supervisory Authority (A.S.F.), approved with amendments and additions by Law no. 113 of April 23, 2013 (M. Of. M. Of. no. 874 of December 21, 2012, with subsequent amendments and additions).

It should be noted that laws no. 213/ 2015, no. 236/2018, no. 237/2015, no. 132/ 2017, listed above, as well as the Civil Code, are the result of the harmonization of Romanian legislation with that of the European Union.

At the level of the European Union, important progress has been made for the creation of a single insurance market, both for the benefit of the member states and their citizens.

In this sense, in 1991, a directive established the European Insurance Committee made up of representatives of the member states. The committee has the mission of technical adoption and interpretation of the directives, as well as supervising their application in an equal and uniform manner vis-à-vis third countries (Lambert-Faivre & Leveneur, 2017, p. 70; Macovei & Macovei, 2020, p. 36).

In 1994, the Committee brought together the insurance directives in a European Insurance Code, which it ordered into two parts: life insurance and general (non-life) insurance. According to this differentiation, three generations of directives are distinguished (https://www.researchgate.net/publication/209078203_Piata_unica_a_asigurarilor_in_Uniunea_Europeana):

1. the first set of directives mainly refers to:
- the right of establishment for companies practicing life and non-life insurance;
- to the right to establish and provide services in the field of reinsurance,
- to establish the general framework for carrying out the reinsurance activity;
- to establish the conditions for practicing insurance mediation services.

2. The second set of directives were adopted and implemented until 1992, contributing to the completion of the legislative framework previously adopted during the period of application of the first set of directives.

3. The third set of directives, also called framework directives, finalized the process of liberalization of the single insurance market. These framework directives provide that insurance companies can operate in any state of the Union, under the same conditions, based on the issuance of a single authorization and under the supervision of the parent company in the country of origin (Directive no. 92/49/CEE of June 18, 1992 for non-life insurance, Directive no. 92/96/EEC of 10 November 1992 for life insurance; European Parliament and Council Directive no. 2002/83/EC of November 5, 2002 on direct life insurance; Macovei & Macovei, 2020, p. 37).

On 20 January 2016, the European Parliament and the Council adopted the Insurance Distribution Directive, which updates and replaces the Insurance (Directive (EU) 2016/97) Intermediation Directive. The

new directive will cover the entire distribution chain, including insurers who sell directly to customers (hence the name). The directive also improves the way insurance products are sold, including greater price transparency and better information for consumers (https://eur-lex.europa.eu/RO/legal-content/summary/insurance-mediation-better-consumer-protection.html).

In 2013, a new initiative of the Commission took shape in the establishment of a group of experts to analyze the existing obstacles regarding a cross-border insurance contract (Macovei & Macovei, p. 38).

Insurance functions

Insurance functions are the basis on which all insurance procedures are carried out, hence the importance of knowing them. Therefore, the insurance procedures must take into account the specifics of each insurance category (CASCO insurance, RCA insurance, optional home insurance, health insurance) but also the manner in which the insurer (insurance company) chooses to manage the procedures (https://asirom.ro/stiri/blog/functiile-asigurarii-care-sunt-ele-si-prin-ce-se-definesc). For example, CASCO and RCA cover car insurance, the one for housing refers to the protection of the house and its insurance in case of calamities, robbery or other similar situations, and the one for health includes a series of medical services, which are adapted to the needs of the insured. These types of insurance relate to the functions of insurance, which aim to acquire an efficient and balanced process, which is advantageous for both the insurer and the insured (https://asirom.ro/stiri/blog/functiile-asigurarii-care-sunt-ele-si-prin-ce-se-definesc).

In order for the insurances (regardless of their form: property, personal, civil liability) to fulfill their role of covering the insured's risks, a common insurance fund is established in order to use it. The common insurance fund is established based on the principle of mutuality, in the sense that each insured contributes a sum of money called the insurance premium. The insured pays the insurance premium to the insurer, in

exchange for which the insurer provides the insured with a guarantee of compensation against the possible and future loss of the property, health, life of the insured, etc.

The principle of mutuality in risk management benefits the insurer in the sense that any damage is jointly borne by several people, excluding the impact on one person (https://asirom.ro/stiri/blog/functiile-asigurarii-care-sunt-ele-si-prin-ce-se-definesc).

The functions of insurance express the role by which this activity fulfills both its social and economic purpose.

The social role of insurance (mainly through their destination) is translated by indemnifying the insured persons (Minea, 2006, p. 65) as a result of the occurrence of the insured case (loss): accident, illness, fire, natural calamity, or financial loss.

Insurance has a favorable effect on the economy, mainly from two points of view:

- on the one hand, victims who suffer from accidents or diseases receive financial resources from insurers, which maintains their quality and consumption power;
- on the other hand, the economic role is identified both by the fact that it guarantees the preservation of existing economic gains at a given moment, and by the fact that the insurer is an essential driver of economic development for at least two reasons: guaranteeing investments and placing contributions (Yeatman, 1998, p. 11; Minea, 2006, p. 66).

According to the two roles, social and economic, insurance fulfills the functions of: compensating damages, preventing and combating damages, financial, distribution, control, saving, and supporting the state, as follows (Popescu & Macovei, 1982, p. 40; https://asirom.ro/stiri/blog/functiile-asigurarii-care-sunt-ele-si-prin-ce-se-definesc):

● **The function of compensating damages** (caused to the insured) involves, on the one hand, the payment of damages and, on the other hand, the financial coverage of damages caused by natural calamities or accidents. In the case of personal insurance, compensation is made through the payment of insured sums, which aims to restore damaged or destroyed goods, repair damages, restore the insured's financial situation,

following events that caused damage (material, moral, etc.) .

● **The damage prevention function** refers to the prevention of risks and even the mitigation of destructive effects that are able to affect personal, public, or private assets. Each insurance company has an activity program to prevent, limit, and combat potential risks and damages. In this sense, the society:

- can finance activities to prevent natural calamities and accidents (by establishing types of protection for the insured, through drainage works, irrigation, through educational programs for the insured, by financing studies in the medical field) (http://omniasig.oltenia.ro/Html/protectia/functii_asig.htm),
- can establish insurance conditions that oblige the insured to a permanent preventive behavior (for example, forfeiture of rights to compensation in case of fulfillment of damage limitation measures, participation of the insured in covering a part of the damage) (http://omniasig.oltenia.ro/Html/protectia/functii_asig.htm),

Likewise, the damage prevention function is also exercised by the insured's participation in covering part of the damage due to the deductible. According to art. 2217 para. (2) Civil Code, a clause may be stipulated in the insurance contract according to which the insured remains his own insurer for a deductible in respect of which the insurer is not obliged to pay compensation (The franchise represents the part of the damage borne by the insured, established as a fixed value or percentage of the total compensation provided for in the insurance contract, which the insurer does not compensate and for which the insured remains his own insurer, see https://legeaz.net/dictionar-juridic/fransiza).

● **The financial function** (http://omniasig.oltenia.ro/Html/protectia/functii_asig.htm**)** is manifested as a result of the establishment of the insurance fund. In the conditions in which insurance companies find a gap between the time of insurance premiums and the time of compensation for damages, they temporarily accumulate sums of money (resulting from the collected premiums) which they place on the capital market, by setting up deposits or current availability, at banks, with negotiated interest rates, thus obtaining

additional income. Insurance companies can grant short-term loans and finance investments by increasing their existing cash availability.

The financial function is also manifested as a result of the establishment of the reserve fund on the occasion of the distribution of the annual profit. The reserve funds can be used for granting long-term loans or investments in shares or bonds issued by the respective companies (insurers) in order to attract additional capital.

● **The distribution function** manifests itself in the process of distributing the annual profit (http://omniasig.oltenia.ro/Html/protectia/functii_asig.htm) and refers to the process of (https://asirom.ro/stiri/blog/functiile-asigurarii-care-sunt-ele-si-prin-ce-se-definesc):

- establishing the insurance fund consisting of the premiums borne by individuals and legal entities included in the insurance,
- distributing/distributing the insurance fund.

The insurance company decides how to distribute the insurance fund, also taking into account the contract concluded between the insured and the insurer. The insurance fund is distributed for the restoration of damaged goods, for the repair of a damage.

Also, through the distribution function, insurance companies are obliged to direct the taxes and contributions owed to the state budget (http://omniasig.oltenia.ro/Html/protectia/functii_asig.htm).

● **The control function** (https://asirom.ro/stiri/blog/functiile-asigurarii-care-sunt-ele-si-prin-ce-se-definesc) involves:

- tracking and researching the way in which insurance premiums and other revenues of the insurance company are collected,
- how insurance compensation payments are made, risk prevention expenses,
- how they are managed expenses and established reserves.

The procedures through which the control function is exercised are officially supervised in Romania by the Insurance Supervisory Commission (CSA), which has the responsibility of implementing the legislation in force so that the insurance market is balanced.

> The specialist literature and the practice of insurers add to the mentioned functions of saving and supporting the state (Macovei&

Macovei, p.42), as follows:

- **The function of saving** is specific to life insurance. This is called life insurance with a guaranteed saving component, and it involves guaranteed sums insured that cover both the risk of death and survival (https://intreb.bancatransilvania.ro/ce-este-asigurarea-de-viata-cu-componenta-de-economisire-garantata/).

Savings insurance has a death *protection component* similar to term insurance and a *savings component* (Badea, 2008, p. 364).

If the insured survives at the end of the contract, he receives the insured amount and the part of the profit obtained by the insurer after saving a part of the insurance premium (https://intreb.bancatransilvania.ro/ce-este-asigurarea-de-viata-cu-componenta-de-economisire-garantata/).

- **The state support function** is specific to the field of social protection. For example, in the case of health insurance, the insurance companies, through the compensation granted, relieve the state in case of illness, traffic accident, work or in the event of an operation, etc., which can destabilize the budget. The contracted medical services are thus paid for by the insurance company (for example, consultations, hospitalization, medical investigations, and surgical interventions - https://www.1asig.ro/Ghid-Asig-13,125.htm). The services are settled in full or with certain deductions by the private clinics and hospitals with which the insurance company collaborates (https://www.1asig.ro/Ghid-Asig-13,125.htm).

Conclusions

The specific function of insurance is represented by the compensation of damages caused by calamities and accidents the prevention of damages, and, secondarily, the investment of insurance premiums in the economy. The exercise of the mentioned functions leads to the coverage of some risks by creating a risk community through the establishment and use of the insurance fund. By creating and using this

fund, insured persons protect themselves against risks, which are able, by their occurrence, to affect their life, health and patrimony.

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INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS - EUROPEAN AND ROMANIAN ITINERARY

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Abstract:

Confronting criminal phenomena that go beyond the borders of their own territories, states have realized that only their own tools to combat them are insufficient, requiring a joint effort. In the effort to combat the phenomenon of crime, it was realized that the best results against crime can only be obtained through an extensive and complex cooperative activity. In this material, we will highlight the historical course of international judicial cooperation in criminal matters on the European continent, but also in the Romanian national framework.

Keywords: *international judicial cooperation in criminal matters.*

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Introduction

Living through the disastrous effects of the Second World War and with the firm will to prevent a new conflagration that would disturb the peace of the European continent, Germany, France, Italy and the BENELUX countries, signed in Paris, on April 18, 1951, the Treaty of the European Community of Coal and Steel, known as the Treaty of Paris (Treaty of Paris entered into force on 23 July 1952). For the first time, six countries in Europe, establishing a common market in coal and steel (The choice of coal and of steel had, at the time, a special symbolic value. In the early 1950s, the coal and steel industries were vital, forming the basis of a country's power. According to Article 2 of the Treaty of Paris, its objective was to contribute, through the common market in coal and steel, to economic expansion, employment and an increase in living standards. Thus, the institutions had to ensure an orderly supply of coal and steel to the common market, ensuring equal access to the sources of production, the establishment of the lowest prices and improved working conditions.), have taken a first step to create a united Europe. Concluded for a limited period of 50 years, the Treaty of Paris of 1951 laid the foundations of a community construction by establishing an executive power known as the "High Authority", a Parliamentary Assembly, a Council of Ministers, a Court of Justice and an Advisory Committee. Without detailing the roles of these institutions - because it is not the subject of this course - we draw attention to the establishment of a first Court of Justice - precursor of the Court of Justice existing today in Luxembourg - a court that was made up of seven judges appointed for six years by an agreement common between the governments of the countries. The Court of Justice established by the Treaty of Paris 1951 ensured the correct interpretation and application of the Treaty.

Wanting to consolidate the idea of a common future, on 25 March 1957, in Rome, the same six European countries signed the Treaty establishing the European Economic Community and the Treaty of the European Atomic Energy Community (Euratom) (The Treaties of in Rome entered into force on 1 January 1958). Known as the Treaties of Rome, they were concluded for an unlimited period and aimed at

expanding the common market already established in the fields of coal and steel by the Treaty of Paris 1951 and to other economic spheres. The Treaty establishing the European Economic Community aimed to establish a common market which should allow the free movement of goods, workers, capital and services and the Euratom Treaty aimed to coordinate research programs on the peaceful use of nuclear energy. The Agreement on Certain Common Institutions, signed and entered into force at the same time as the Treaties of Rome, provided that the Parliamentary Assembly and the Court of Justice - established by the Treaty of Paris 1951 - were to be common institutions (This agreement expired on 1 May 1999).

First concerns for international judicial cooperation in criminal matters

None of the Treaties of Rome signed in 1957 contained provisions by which the communities created would be given powers in criminal matters. If it happened, the cooperation between the member states in this field was carried out only under the auspices of bilateral or multilateral conventions concluded within the Council of Europe (For example, the European Convention on legal assistance in criminal matters signed in Strasbourg on April 20, 1959). Judicial cooperation proper, at the level of the ministers of internal affairs of the Community states, began informally in the 1970s, in areas such as the fight against terrorism, drug trafficking and border control. The so-called TREVI group was created in June 1976, as a result of the request made by the European Council (The name of the group seems to have a double origin: either it comes from the famous Fontana di Trevi in Rome, the city where the first meetings took place, or it represents the French acronym for Terrorisme, Radicalisme, Extremisme, Violence Internationale. Gradually, the group began to meet in different configurations: TREVI I for counter-terrorism, TREVI II for police training and information exchange, TREVI III for combating organized crime, TREVI 92 for eliminating the control of persons at internal borders.).

During the development of the Community, the member states understood that the freedom of movement of people will lead to the elimination of physical controls at the internal borders of the respective states, which required the strengthening of control at the external borders of the Community, a common policy regarding visas and citizens from states that do not there were members and effective cooperation between the police services and the judicial systems. All these measures were necessary to ensure that the freedom of movement of people did not become the freedom of movement of criminals. That is why, on June 14, 1985, Belgium, France, Germany, Luxembourg and the Netherlands signed in a municipality in Luxembourg called Schengen, on the border with France and Germany, the Schengen Agreement which established short-term measures and long-term objectives for the elimination gradual border control on the condition of the adoption of compensatory measures in the matter of police and judicial cooperation.

With the conviction that the states of Europe must build a common destiny, the European Council, meeting on February 7, 1992, in the Dutch town of Maastricht, signed the so-called *Treaty on the European Union* - considered the constitutive act of the European Union that marked a important step towards the creation of a united political Europe (Due to some problems in the ratification process - in Denmark a second referendum was needed, in Germany an exception of unconstitutionality was submitted against the parliamentary agreement given to the treaty – the Treaty on European Union (TEU) entered into force only on November 1, 1993.

). The Treaty signed in Maastricht assigned certain competences to the European Community, classified into three large groups, commonly called pillars:

- the first pillar was constituted by the European Community which was built on the three European Communities and provided a framework that allowed the exercise by the community institutions of the powers for which the member states had transferred their sovereignty in the areas regulated by the treaty ;

- the second pillar consisted of the common foreign and security policy (PESC) provided for in chapter V of the treaty;

- the third pillar consisted of cooperation in the field of justice and internal affairs (JHA) provided for in chapter VI of the treaty (10 articles were introduced dealing with nine areas of common interest: asylum policy, rules on crossing external borders, the exercise of control at these borders, the policy regarding migration and citizens of third countries, the fight against drugs, the fight against international fraud, judicial cooperation in civil matters, police cooperation and judicial cooperation in criminal matters). The task of the European Community was to develop an action common in these areas, through intergovernmental methods from the member states, to offer citizens a high level of protection, in an area of freedom, security and justice. This concerned, inter alia, judicial cooperation in criminal matters and the creation of a European Police Office (Europol) equipped with an information exchange system between national polices.

Important changes in the matter of judicial cooperation in criminal matters were brought about by the Lisbon Treaty signed on December 13, 2007 by the European Council, meeting in the capital of Portugal (Ratified by all member states, the Lisbon Treaty entered into force on December 1, 2009). Given the disappearance of the former pillar-based structure, through this treaty all issues related to police and judicial cooperation in criminal matters from the former pillar III were joined to the provisions related to visas, asylum, immigration and other policies related to the free movement of persons from the former pillar I, under the title "Space of freedom, security and justice".

Another change is that if within the former "third pillar" regarding police and judicial cooperation in criminal matters, the European Parliament had only a consultative role, through the Treaty of Lisbon, the Parliament's powers were increased, a fact that determined a consolidation of legitimacy in the area of freedom, security and justice. The Treaty generalized (with a few exceptions) the Community method based on co-Decision, which has now become the ordinary legislative procedure of the Parliament and the Council, with decisions now being taken by majority vote instead of unanimity. At the same time, the repeal of the third pillar related to police and judicial cooperation in criminal

matters, led to the harmonization of legislative instruments. Instead of framework decisions, decisions and conventions, even in the field of criminal law, the European Union adopts regulations, directives and decisions. Relevant to the field of judicial cooperation in criminal matters, we mention, by way of example, the following instruments adopted through the ordinary legislative procedure established by the Treaty of Lisbon:

- in October 2010, the Parliament and the Council adopted Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings;

- in May 2012, the Parliament and the Council adopted Directive 2012/13/EU on the right to information in criminal proceedings;

- in October 2013, the Parliament and the Council adopted Directive 2013/48/EU on the right to have access to a lawyer in criminal proceedings and the right to communicate during deprivation of liberty;

- in March 2016, the Parliament and the Council adopted Directive 2016/343/EU on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings;

- in May 2016, the Parliament and the Council adopted Directive 2016/800/EU on procedural guarantees for children who are suspected or accused persons in criminal proceedings;

- in October 2016, the Parliament and the Council adopted Directive (EU) 2016/1919 on free legal aid for suspects and accused persons in criminal proceedings and for persons wanted in European arrest warrant proceedings.

The Treaty of Lisbon amended the Treaty on the European Union (TEU) signed in Maastricht in 1992 and the Treaty establishing the European Community (TEC or EC Treaty) which was based on the Treaty signed in Rome in dated March 25, 1957. The latter is now known as the Treaty on the Functioning of the European Union (TFEU).

The Treaty on the Functioning of the European Union (TFEU) is of interest, from the perspective of international judicial cooperation in criminal matters, in terms of the existing regulations in its consolidated version, to Title V entitled "Space of freedom, security and justice", Chapter IV entitled "International judicial cooperation in criminal

matters" (Article 87 - Article 89).

Presenting the evolution of the establishment of the European Union and the treaties on the basis of which it was consolidated, I also mentioned the way in which international judicial cooperation in criminal matters found its place in the sphere of European interests.

However, the main international judicial instruments that consecrated the beginnings of such concerns at the European level should not be omitted. Significant in this sense are the following Conventions of the Council of Europe:

- European Convention on Extradition (Paris, December 13, 1957) (Ratified by Romania through Law no. 80 of May 9, 1997, published in the Official Gazette no. 89 of May 14, 1997. By the same law, the additional protocols of the Convention, concluded in Strasbourg on October 15, 1975 and March 17, 1978, were ratified);

- The European Convention on Legal Assistance in Criminal Matters (Strasbourg, April 20, 1959) (Ratified by Romania through Law no. 236 of December 9, 1998 published in the Official Gazette no. 492 of December 21, 1998);

- Additional Protocol to the European Convention on Legal Assistance in Criminal Matters (Strasbourg, March 17, 1978) (Ratified by Romania through Law no. 236 of December 9, 1998 published in the Official Gazette no. 492 of December 21, 1998);

- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, November 8, 2001) (Ratified by Romania through Law no. 368 of September 15, 2004, published in the Official Gazette no. 913 of October 7, 2004);

- Convention on the Transfer of Convicted Persons (Strasbourg, March 21, 1983) (Ratified by Romania through Law no. 76 of July 12, 1996, published in the Official Gazette no. 154 of July 19, 1996);

- Additional Protocol to the Convention on the Transfer of Sentenced Persons (Strasbourg, December 18, 1997) (Ratified by Romania through Government Ordinance no. 92 of August 30, 1999, published in the Official Gazette no. 425 of August 31, 1999);

- Convention on Computer Crime (Budapest, November 23, 2001) (Ratified by Romania through Law no. 64 of March 24, 2004, published in the Official Gazette no. 343 of April 20, 2004).

To facilitate the application in Romania of these international instruments - in particular, the European Convention on Extradition (Paris, December 13, 1957), its Additional Protocols (Strasbourg, October 15, 1975 and March 17, 1978), the European Convention on Legal Assistance international convention in criminal matters (Strasbourg, April 20, 1959), of the European Convention on the Transfer of Sentenced Persons (Strasbourg, March 21, 1983), of its Additional Protocol (Strasbourg, December 18, 1997) - in 2001, the following were adopted:

- Law no. 296/2001 on extradition, published in the Official Gazette no. 326 of June 18, 2001;
- Law no. 704/2001 on international legal assistance in criminal matters, published in the Official Gazette no. 807 of December 17, 2001;
- Law no. 756/2001 on the transfer of convicted persons abroad published in the Official Gazette no. 2 of January 4, 2002.

The three normative acts constituted, to begin with, a sufficient legal framework for the development of international judicial cooperation in criminal matters based on the aforementioned multilateral instruments.

The acquis in the field of international judicial cooperation in criminal matters was, however, in a continuous evolution, given the need to face new forms of transnational crime.

At the national level, the appearance of new European legal instruments in the field of mutual legal assistance in criminal matters as well as in the field of extradition made the three normative acts adopted in 2001, appreciated at that time as constituting an adequate legal framework for international judicial cooperation in the matter criminal, to be reconsidered.

On this occasion, noting that, in most of the member states of the European Union, international judicial cooperation in criminal matters is uniformly regulated, either a chapter of the criminal procedure code (France, Poland, the Czech Republic, the Slovak Republic), or in only one normative act regarding cooperation or international judicial

assistance in criminal matters (Portugal, Hungary), it was also appreciated in Romania that such a unitary regulation presents obvious practical advantages. Moreover, the multiple elements of correspondence existing between the three laws and related regulations were sufficient arguments for the elaboration of a single normative act that would also transpose the mentioned new European legal instruments.

On the other hand, the achievement of full harmonization with the Community "acquis" in the field required the revision of the constitutional framework regarding extradition. Since the Constitution adopted on November 21, 1991 provided in Article 19 paragraph (1) that the Romanian Citizen cannot be extradited or expelled from Romania, by the Law on the revision of the Romanian Constitution no. 429 of 2003, published in the Official Gazette no. 758 of October 29, 2003, Article 19 of the Constitution was supplemented with the following provision: *By way of derogation from the provisions of paragraph (1), Romanian citizens can be extradited on the basis of international conventions to which Romania is a party, under the terms of the law and on the basis of reciprocity* (Law on revision of the Romanian Constitution no. 429 of 2003 was approved by the national referendum of October 18-19, 2003 and entered into force on October 29, 2003, the date of publication in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003 of the Constitutional Court Decision no. 3 of October 22, 2003 for the confirmation of the result of the national referendum of October 18-19, 2003 regarding the Law on the revision of the Romanian Constitution.).

The context thus created and by amending the Constitution, led to the adoption of Law no. 302 of 2004 regarding international judicial cooperation in criminal matters, a law that was published in the Official Gazette no. 594 of July 1, 2004 and which, by its entry into force, repealed Law no. 296/2001 on extradition, Law no. 704/2001 regarding international legal assistance in criminal matters and Law no. 756/2001 on the transfer of convicted persons abroad.

It is worth noting that, on the date of its entry into force, for each form of regulated judicial cooperation, Law 302 of 2004 transposed into the national normative framework the new instruments of the European

Union in the matter of international judicial cooperation in criminal matters, respectively:

- Convention on the simplified extradition procedure between the member states of the European Union of March 10, 1995,
- The extradition convention between the member states of the European Union of September 27, 1996,
- The European Union Convention on International Legal Assistance in Criminal Matters of May 29, 2000,
- Framework Decision of the Council of the European Union no. 2002/465/JHA of 13 June 2002 on joint investigation teams,
- Framework Decision of the Council of the European Union no. 2002/584/JHA of June 13, 2002 regarding the European arrest warrant and surrender procedures between member states.

Likewise, whenever these regulations have been intervened at the European level, Law 302 of 2004 on international judicial cooperation in criminal matters, transposing these new norms into its content, underwent changes and additions (For example, Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA , 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, to strengthen the procedural rights of individuals and to encourage the application of the principle of mutual recognition regarding decisions rendered in the absence of the person concerned from the trial. Another example is Directive (EU) 2022/211 of the European Parliament and of the Council of 16 February 2022 amending Framework Decision 2002/465/JHA of the Council as regards its alignment with Union rules on the protection of personal data.).

This is how, from the date of its entry into force (According to art. 189 para. 1 of Law 302 of 2004 published in the Official Gazette no. 594 of July 1, 2004, the date of its entry into force was 60 days from the date of publication in the Official Gazette of Romania, Part I, with the exception of title III, which enters into force on the date of Romania's accession to the European Union, which happened at January 1, 2007), Law no. 302/2004 regarding international judicial cooperation in criminal matters underwent numerous interventions in the original content, thus ending up being republished twice: the first time through the Official

Gazette no. 377 of May 31, 2011, and later, through the Official Gazette no. 411 of May 27, 2019. And after this second republication, a series of changes and additions were made, the last of which was by Law no. 173 of June 3, 2024 published in the Official Gazette no. 518 of June 4, 2024.

Conclusions

Therefore, at the national level, the normative framework provided by Law no. 302 of 2004 represents the set of procedures applicable in the matter of international judicial cooperation, currently usable by the central authorities in Romania (the Ministry of Justice, the Prosecutor's Office attached to the High Court of Cassation and Justice, the Ministry of Administration and the Interior) as well as by all judicial bodies from our country who contribute to the fight against cross-border crime.

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Law no. 64 of March 24, 2004, published in the Official Gazette of Romania no. 343 of April 20, 2004;

Law on revision of the Romanian Constitution no. 429 of 2003, published in the Official Gazette of Romania no. 758 of October 29, 2003;

Law no. 302 of 2004 published in the Official Gazette of Romania no. 594 of July 1, 2004.

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ARTIFICIAL INTELLIGENCE, PLAGIARISM AND UNIVERSITIES

Marius VĂCĂRELU[1]

Abstract:

Education is a crucial sector of society, but it does not always receive the attention from governments that it rightly deserves. Nevertheless, many of its issues are not solely dependent on the funding brought into the system, but rather on a comprehensive, integrated approach to the entire education system.

The advent of the Internet – as the first major step in digitalisation – and subsequently the capabilities of Artificial Intelligence (AI) have disrupted a functioning logic that has been established for centuries, which has not been advantageous for the system. However, these technologies are here, and their effects on education multiply every day, one of which is an almost natural increase: plagiarism in universities.

The contemporary context necessitates – across the full spectrum of digital systems' capabilities – that the debate on plagiarism and its prevention holds a prominent place. This is essential to preempt the numerous issues that will inevitably arise should there be a lack of prudent regulation. The text I propose will examine this situation within the dynamic framework of advancing Artificial Intelligence capabilities.

Keywords: *artificial intelligence; universities; plagiarism; ethics; detection of frauds; academic skills and dedication.*

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Introduction

Universities in the 21st century face numerous challenges, some of which were not adequately anticipated at the end of the last millennium. This is because only a few people foresaw the major challenges posed by digital technologies. Typically, this aspect of understanding was more often allocated to economics, politics, and military operations, which somewhat reflects the low percentages of budgets allocated to education in many countries.

One of the main reasons for challenges affecting the correct understanding of university education is the fact that many people have completed higher education, which often leads them to believe that their own experience is sufficient to pronounce on education at any level. Although this is not a statement of distrust towards such an approach, it must be considered that experiences in schools, high schools, and universities are very diverse, so the primary condition for coming up with effective development projects for the education system is to detach from one's own varied experiences.

In the coming years, it is essential to examine the extensive issues facing higher education through the lens of the relationship between the general and the particular. This decade will lay the groundwork for a new global order, which will ultimately impact not just the geopolitical or economic fields, but also the realm of higher education. Without dismissing the importance of personal experiences, systems only organise themselves if certain operational patterns can be identified (Rosenfeld & Wechsler, 2000). This allows for a sufficient degree of generalisation that necessitates legal or at least administrative intervention, which, in this latter case, also follows a normative approach.

1. Higher education is traditionally pursued in universities. However, there is a certain duality in the public perception of the concept of "higher in education" itself. Essentially, this idea is analysed in

relation to an individual's intellect, but it must also be considered within the historical and economic contexts of a region or locality.

A superior person is always someone who uses their own intelligence – or, in the future, including Artificial Intelligence, (N.A.) – to solve situations they are involved in. Thus, a superior person can resolve practical problems, with complexity appropriate to a specific profession where they can excel, and this characterization will fit them without necessarily having university-level studies. Equally, a superior person will analyse theoretical problems at a competent level, which will, in relation to the level of specialisation in today's work, usually require university-level studies; it should be noted that in the absence of practical understanding in a particular field of science, quality theoretical research cannot exist (Yalcineli, 1998). Therefore, the notion of a superior person depends on the quality of their work results, and less on their studies, though it does not exclude that in professions where extensive knowledge acquired through formal education (such as construction) is not always necessary, the newest and most advanced equipment is created by engineers who typically have a robust academic background, generally at least at the university level.

However, people with superior intelligence – be it theoretical or practical – have always existed, and in every country. For millennia and centuries, education was acquired in different types of schools than universities, which emerged as concepts only in the second millennium of the Christian era and only became widespread at the national level in the 20th century. Intelligent individuals constructed pyramids, palaces, aqueducts, and various civil or military structures millennia ago, and the knowledge they gained came through various forms of apprenticeship, only occasionally within state or political leaders' schooling systems. Let's not forget that for centuries, wealthy people often hired private tutors for their children in their homes, making education a rather private affair and an exception compared to the general populace's experience. The majority of people lived by learning and passing down ancestral practices, discovering or creating improvements to the old systems/practices/procedures at different times.

As long as printing had not been invented, education faced a

significant problem: the numerical size of the collection of books an individual could have in a personal library. This was partly because there were not enough people to handwrite the books that increasingly more individuals wanted to read, and partly because the very act of writing did not preclude those transcribing manuscripts from partially altering the content – either intentionally or unintentionally. Thus, without a technology for rapidly multiplying written ideas, paper as a medium could not significantly contribute to the general education of the population, and formal (legal) education within universities was limited to a subunitary percentage of the population. In this manner, data retention was also achieved through oral schooling, since – as we know very well – not all countries had their own alphabet, and more than once adopted that of the great geopolitical powers of the time, without it necessarily fitting well with their own linguistic typologies.

The mental dimension of the whole world began to change only after the invention and widespread use of printing, as from this point the costs of disseminating information decreased substantially, and mass education systems could be envisioned and subsequently established. From this moment – specifically, from the early 16th century – the creation of universities gained momentum, so that by the end of the century the European continent had such institutions in most countries that could ensure their security against various invaders. Also from this period, we note that university education could be extended to more categories of people capable of paying the cost of studies and living in the cities that housed these institutions, and the increase in the education level of the population made the idea of university studies no longer seen as something extraordinary, but a perfectly normal goal to which any young person might aspire (Henrich, 2020).

Higher education – like any activity – requires sustained effort and competition, providing an additional motivation for the effort needed to transform an average student into an elite one. Working hard – learning as thoroughly as possible – demands intensive effort, which significantly reduces free time and is based on study assignments. However, children and young people do not fully understand the necessity of educational

effort – their minds are not yet fully developed, which might justify a more relaxed approach to the entire teaching and assessment system. In this equation of age and brain development, there is also the temptation to simplify the effort. Nevertheless, it would be beneficial if such simplification were accompanied by rewards proportional to the substantiality of the effort–- thus advocating a reasoning diametrically opposed to the commonly known and accepted one. Practically, this is the foundation of several practices less related to morality and ethics, among which plagiarism stands out due to the extent of its effects when it is not identified and sanctioned.

2. The University of Oxford defines plagiarism as follows: "Presenting work or ideas from another source as your own, with or without consent of the original author, by incorporating it into your work without full acknowledgement. All published and unpublished material, whether in manuscript, printed or electronic form, is covered under this definition, as is the use of material generated wholly or in part through use of artificial intelligence (save when use of AI for assessment has received prior authorisation e.g. as a reasonable adjustment for a student's disability). Plagiarism can also include re-using your own work without citation. Under the regulations for examinations, intentional or reckless plagiarism is a disciplinary offence" (University of Oxford, 2024).

The definition of plagiarism, as recognised by the prestigious British university, is specific to a non-legal context (writer), as it does not emphasise the guilt associated with its commission. Obviously, it can only pertain to deliberate intent, where the author knowingly engages in the act from the outset, aiming for a particular outcome. We cannot consider it plagiarism when the individual has not yet grasped the concept of intellectual property (Moore & Himma, 2022) – the notion that a person holds ownership over their ideas and achievements – thus excluding actions by someone with severely compromised discernment, potentially warranting judicial interdiction. Otherwise, the definition – and generally definitions of plagiarism – fails to pinpoint the issue of guilt, more precisely the objective behind the act.

Simply put, any measure we take to prevent plagiarism will have a limited impact on eliminating it without understanding the underlying reasons behind committing this act (Cleary, 2017). Moreover, it should be noted that certain realities can indeed encourage – and unfortunately, we are precisely in this situation, globally even – the occurrence of plagiarism.

I must emphasise that I will never offer clemency for plagiarism, but – in accordance with the principles of law – I need to understand the real causes that encourage or make it an option for different individuals. At the same time, effectively combating a negative phenomenon – and plagiarism is essentially such a fact – is not done with just a single set of measures. Firstly, it requires an understanding of the perpetrator's intent: did they do this to complete a task within a shorter time frame, being pressured by working conditions, or did they do this because they wanted more free time for themselves? In the two situations, we can consider that we have, in the first instance, an exceptional case, whereas in the second case, a habitual behaviour, which will be repeated whenever the perpetrator is interested in having more time.

The factor that today favours plagiarism more than at any other stage in the history of education is not the weakening of the moral foundations of society – although this should not be disregarded – but a quantitative one that directly and equally affects everyone: the amount of information available in a short period of time. It is often overlooked that the human mind has evolved to its current level over many thousands of years, during which there were no written information or libraries. However, in the last two centuries, the numerical quantity of information – contained in books, newspapers, magazines, and mass media – has increased to an unimaginable volume for those who read a book at the beginning of the 15th century.

The generalisation of access to information and the ability to generate written content on various storage media have occurred far too quickly for human biology. The widespread and substantial reduction in the cost of accessing information has not been accompanied by an adaptation of life's demands to the quantity of information available. As

a result, requests for problem-solving are expected to be completed in ever-shorter time frames, and superiors constantly demand good results from their subordinates, which need to be achieved quickly. This, however, is only possible in a context where reading speed remains standard per minute, and reading is not the same as understanding what's written. Even though some may think biology is irrelevant in the world of information and work performance, it exists and has its inflexible laws, and mental exhaustion is a consequence of overwork (Kunasegaran et al., 2023). This is primarily due to the visualisation and analysis of figures and words that convey information. Even the best summaries contain data and require reading, and the elites are noted for their ability to work and read, but even they cannot avoid the necessity of selecting information, precisely because of biological constraints – constraints that machines and Artificial Intelligence do not have.

We live in an era of great speed, where, as much as possible, it requires all ideas and solutions to emerge rapidly, being new and with a maximum degree of effectiveness. In fact, we can say that today the keyword that describes society is "instantaneous", and no one working today can claim that they are asked to complete their tasks slowly and with inferior quality. Even though there is a clear division between professions that rely more on technical aspects and those that focus more on communication and daily interaction with the public, in both scenarios, there is the same time pressure and the same ocean of information available, which – in this combination – inherently favours the adoption of concepts/ideas/practices from others and their endorsement through signature.

In the case of plagiarism, an important issue is their identification, which is difficult to accomplish, given the vast amount of information available, and in some instances, almost impossible. For example, if an architect from a European or Asian country builds a house of 120 square metres in a town of 30,000 inhabitants, based on a model seen in a specialist magazine published in the USA, it constitutes plagiarism (a breach of intellectual property rights). However, the likelihood of the original designer visiting that town and seeing the house is very slim. Thus, we have a violation of intellectual property, which can be

consciously reproduced as long as there is demand, and this can go on for decades. Identifying plagiarism in countries that are not very visible in global science is also challenging, especially if they have different alphabets than those most commonly used in cutting-edge scientific research. Consequently, ideas, concepts, or even entire books from advanced countries can be copied, sometimes with the knowledge of the heads of scientific institutions in the countries where the plagiarism is published, remaining undetected for years or decades due to a lack of data on the part of the intellectual property owner.

The same type of plagiarism can also occur in the industrial sphere, although here we must also consider the phenomenon of industrial espionage, where plans, ideas, concepts, and procedures are intentionally taken from the outset, with similar or even improved products subsequently being developed. In an ocean of information, it is difficult to track the full extent of counterfeiting, but at its core lies plagiarism, meaning the unauthorised appropriation of another person's intellectual work. Regarding scientific research, the situation is clear because there is only direct intent, and it is primarily linguistic peculiarities or economic weaknesses that cause many cases to go undetected – especially those published in print format, rather than electronically, as in the future AI products will be able to make comparisons and investigate similarities, including across languages. An exception exists in the artistic field, where paraphrasing can occur, that is, a conscious departure from another person's work, but consciously modified and accepted by all, or different interpretations of facts, events, or personalities, which are considered influenced by older works, yet still original.

3. Artificial Intelligence (AI) is, in fact, a set of technical tools capable of providing desired services to its users. However, this definition is quite basic because the entire concept of AI is significantly more complex. The creators aim for devices using AI to behave just like a human in everyday life, which effectively means replicating both human motor skills and cognitive abilities. The goal is to develop a

perfect assistant for both work and entertainment, which presents several challenges, especially concerning human creativity.

To reach a level comparable to human thinking – and, as cinema often shows us, possibly even surpass it – an enormous accumulation and utilisation of information is required. Therefore, artificial intelligence cannot exist without a vast library, and it was not at all surprising when, in July 2024, a partnership was signed between Microsoft and Tylor and Francis, one of the world's leading publishers, to enhance the software company's AI capabilities with the aid of top-tier scientific research (Palmer, 2024). The immense library that AI systems need to function properly is not just about quickly searching and providing data to the user within seconds, but also involves processing this data to such an extent that autonomous creations can emerge. Thus, we will see AI products emerge not only as comprehensive assistants but also as entirely new creations produced by this technology. Currently, research on two AI models – Chat GPT 4.0 and Claude – has shown that they can perform simpler tasks much faster than humans, but they struggle with more complex activities that require several hours (four or more) to resolve, as they are not yet sufficiently reliable for this purpose (METR, 2024).

AI technology is in full development, being only at the beginnings of its advancement and mass usage. Thus, improvements and developments in their capabilities will occur – as announced, the problem-solving ability of Chat GPT 5.0 (set to be launched in 2026) will be equivalent to that of a person with a doctorate (Dunn, 2024). At the same time, it should be noted that AI technology is expensive, with production accessible only to companies with vast budgets, as well as certain states, which means that the most powerful capabilities are not immediately available to everyone, or at highly accessible prices (Keegan, 2024). The main consequence is that poorer countries, unable to afford devices or website subscriptions that utilise AI, may lag behind developed countries, which can incorporate this technical assistance into solving a significant portion of their work. Some studies – including those cited by the IMF – suggest that in the next two decades, up to 40% of the global workforce will be forced to change their practices as a result of AI, the highest percentage impact that past technological inventions

have brought in a short time frame on the global labour market (Georgieva, 2024).

Universities will also be significantly affected by this technology, and there will be an increase in plagiarism as a direct result of its emergence (CNC News, 2024). Firstly, there is the issue of the continually growing volume of scientific information that needs to be covered, which relates to the normal biological demands mentioned earlier. In relation to this amount of study, there arises the issue of tasks set by lecturers, which are subsequently assessed. As we know, assessment is not accompanied by a numerical threshold for passing – "we educate 100, but only the top 50 will be considered graduates of higher education" – which means that the goal of assessment differs for students, in relation to what rationally constitutes university education, namely the creation of elites. Here, an additional problem emerges: what does being part of an elite mean, and what tasks must one fulfill to reach this threshold? Furthermore, there is also the quality ranking of universities, which results in graduates of some being considered from the outset as part of the elite (either current or future), while others are not. There are countries where universities are strictly ranked, like an annual sports competition, but the majority of countries don't use this method (Morse & Brooks, 2023). Regardless, a university degree grants the same rights to graduates from a top-ranked university as it does to those from a lesser-regarded one. Additionally, economic and geographical conditions also influence universities, as a developed city attracts more and better/ambitious students to its universities, leading over time to universities in cities with weak economic potential having a smaller pool of academically proficient students.

Since there are no differences between graduation diplomas issued in the same country, within the same educational system, and there’s no way to enhance competition among students (with the first 50/100/200 being higher education graduates), it follows that the main task for students is to achieve the minimum passing grades. In such a context, both plagiarism and Artificial Intelligence can become a viable option for some, especially if, at the level of the society/country where the

respective university is located, there is not a high level of morality. As mentioned above, plagiarism is committed with direct intent, and Artificial Intelligence can be considered to play the role of a catalyst for this illegal and immoral act (Eaton, 2023). More specifically, it is known that many antisocial acts are committed under the influence of alcohol or drugs, which act for a long time in the perpetrator's body, diminishing a part of their discernment. Artificial Intelligence does not affect discernment but has the advantage – compared to "classic" plagiarism, where a person comes to the resolution of infringement after a certain period – that the act can be committed very simply, almost without human intervention, who doesn't need to search for specific books and transcribe them in different ways (Kwon, 2024). Assigning tasks to the AI device and obtaining results without any student intervention is a matter that affects not so much discernment but the issue of accepting the outcome of breaching legal and moral norms.

In a 2023 survey of 1,600 researchers, 68% of respondents said that AI will make plagiarism easier and harder to detect (Van Noorden & Jeffrey, 2023). From this perspective, the recent announcement by OpenAI that it has developed software capable of detecting texts written with its own artificial intelligence tool (Chat GPT) with 99% accuracy is a major step forward for academic integrity (Ionescu, 2024). However, it suggests an implicit acknowledgement that the battle to persuade AI users has been somewhat lost (in less than two years), with these users being seen as "having succumbed to temptation".

The major issue with the use of AI within universities will be the examination of students, which will need to be more oral or traditional written exams, where they answer given questions. It is clear that essays and written assignments primarily based on research can no longer be done in the same way, because the AI component is already too developed, and one of the purposes of exams is effectively to verify knowledge, which – when there is a suspicion of using this technology – means from the outset that it may be compromised. In the absence of perfect methods for detecting plagiarism, it is necessary to change the framework of examinations to maintain equality among students and to achieve a grading system that does not create tension between them.

In conclusion, it is essential to understand the attitude of future employers towards young people who will graduate from higher education in the AI era. Will they be sympathetic to their different mindset and working style, or will they prefer individuals trained under traditional methods, as they are more accustomed to independently devising solutions to various problems? The answer will be challenging to determine, as there will be differences in each country regarding the capability to utilise AI in education and the economy. Universities must prepare for both employers who welcome the new generation of graduates and those who are more hesitant. In all scenarios, however, this is an issue that governments need to comprehend and at least minimally regulate, emphasizing ethical aspects and imposing severe penalties for plagiarism. Without strict regulation, there will be a significant decline in intellectual effort, which will have long-term effects both on the socio-economic landscape and on the individual lives of higher education graduates.

Conclusions

The advent of digital technologies has provided education, for the first time, with access to a vast range of information necessary to prepare a large percentage of students at a higher level, without being so constrained by physical issues (such as the cost of purchasing books, storage space, etc.). However, this access to information has also brought about an ethical concern, namely the increase in plagiarism, which could now be done more easily, using a broader bibliography.

Artificial Intelligence emerged and continues to evolve based on information accumulated from thousands of libraries, which ensures the quality of its foundational knowledge, even if its application is not yet fully successful. However, education – particularly higher education – is not entirely prepared for what this technology has demonstrated so far, as it significantly compromises the ethical aspects of the system, especially regarding intellectual property theft, specifically by facilitating or enabling plagiarism.

The speed at which this technology already manages to address certain requirements is a testament to human genius, but at the same time, it creates the potential to reduce the user's moral responsibility, as they no longer have the same relationship with a text as they did when plagiarism was based on manually copying the data, ideas, or concepts of other authors. Therefore, there is a significant danger – which is unclear how well we will be able to control in the coming years – of experiencing an important increase in the number of plagiarisms in universities. This is because AI takes over a large portion of the traditional work of students, leaving them primarily with the task of steering the AI and determining how much to utilise from it.

It is therefore necessary for education legislation to be adapted to the challenges posed by AI, to punish breaches in the realm of plagiarism swiftly and as severely as possible. The availability of software that can detect such plagiarism will be helpful, as will be the attitude of employers towards future graduates. However, in any situation, without strengthening ethics in education from a young age and without severely penalising transgressions, we will create lazy generations, incapable of sustained and long-term efforts, which would be – these deficiencies of intellect and work – the first step towards the collapse of the entire society.

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DOCTRINARY AND CASE-LAW ASPECTS OF THE LEGAL INSTITUTION OF REMOVAL FROM OFFICE

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Abstract:

This study starts from the analysis of the public office as a specific legal institution of administrative law, highlighting the particularities in doctrine and case law that constitute elements that may lead to dismissal from public office.

Key words: *public office; removal, public authorities; institutions of the public administration.*

Introduction

State power, as a public power, is exercised by public authorities whose sphere of powers is limited to the scope of the function they exercise.

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All these authorities, and each of them individually, represent, internally and externally, the state as an organized power.

The current legislation and literature frequently use the terms "public administration authorities" and "public administration bodies", although both terms refer to the same organizational structure.

The provisions of the Romanian Constitution use both notions, thus we find the notion of "public administration authorities" in Art 48 Para 1 according to which "A person aggrieved in a right of his by a public authority ..."; Title III of the Constitution entitled "Public authorities" which includes regulations on Parliament, the President of Romania, the Government, Public Administration, County Authority; Art 58 Para 1, according to which "The President of Romania shall ensure the observance of the Constitution and the proper functioning of the public authorities"; Art 116 Para 3, "Autonomous administrative authorities may be established by organic law"; Art 20, which contains provisions on "administrative authorities through which local autonomy is performed"; Art 121 Para 1, "The County Council is the public administrative authority for the coordination of local and city councils ..."; and Chapter VI of the Constitution entitled "Judicial Authority".

The constitutional provisions also use the notion of "organs", relevant in this respect being the provisions of Art 58 Para 1 of the Constitution according to which "Parliament is the sole legislative authority of the state", although it is defined earlier as the "supreme representative body of the Romanian people".

Regulations that use both the notion of "authorities" and "bodies" are also contained in other legislation.

The aforementioned constitutional provisions lead to the conclusion that the concept of "public authority" has a broader scope than that of "body of public administration".

In order to achieve sovereignty, both the state and the state-organized public authorities set up public services to ensure the satisfaction of general interests.

As regards the public office, the Constitution uses this concept in relation to all three powers and to the authorities that exercise them, the provisions of Art 16 Para 3; Art 95 Para 1; Art 92 Para 1; Art 102; Art

104 Para 1; Art 105; Art 124 Para 2; Art 131 Para 2, Art 142.

The content of each public function is usually laid down in the regulatory act governing it.

Public authorities are institutionalized forms through which state power is exercised. Public authorities in Romania require to be categorized by virtue of the principle of the separation of powers in the state, as defined by Art 1 Para 4 of the Romanian Constitution, according to which the state is organized according to the principle of separation and balance of powers – legislative, executive and judicial – within the framework of the constitutional democracy (Vida, in Muraru & Tănăsescu, 2008, p. 591).

In the Romanian specialized literature, the system of public authorities is defined as a complex whole, which forms the institutional system of power, composed of four subsystems: the supreme representative body and the sole law-making authority of the country; the executive authority; the authority of constitutional jurisdiction; the judicial authority (Deleanu, 2006, p. 563).

Public authorities in Romania are constitutional or extra-constitutional in nature, depending on the basis of their legal existence. The constitutional authorities include the Parliament, which exercises the legislative power, the President and the Government, as constitutional factors of the executive power, the courts, as components of the judicial power, plus the Public Ministry and the Superior Council of Magistracy, as constituent factors of the judicial authority.

Alongside these authorities, which operate in full compliance with the principle of the separation of powers in the state, there are others defined by the Constitution as state authorities, but which are not part of the state powers, but act under their direction or guidance. This last category includes the public administration, which is subordinate to the Government, made up of ministerial and extra-ministerial administration. The ministerial administration is made up of ministries and other public authorities whose heads are part of the Government, in accordance with the organic law. The extra-ministerial administration consists of autonomous administrative authorities established by organic laws and

other jurisdictional bodies organized under the subordination of the Government or ministries.

Among the autonomous constitutional administrative authorities, the Basic Law mentions the Legislative Council, the People's Advocate, the Court of Auditors, the Supreme Council for National Defense and the Economic and Social Council ((Vida, in Muraru & Tănăsescu, 2008, p. 593).

For the application of revocation, as a legal sanction, it is mandatory to comply with the rules and principles inherent to legal liability.

With regard to highlighting the principles of legal liability, expressly applicable in the case of revocation of a constitutional or legal mandate, it is necessary to mention the regulations concerning this legal institution, as follows: Competition Law no 21/1996 provides in Art 15 Para 9 Let f) that the term of office of a member of the Plenum of the Competition Council shall cease "by revocation, for serious violation of this law or for conviction, by final court judgment, for the commission of offenses", while, according to Art 25 Para 10, the members of the Plenum of the Competition Council may be dismissed by the appointing authority, and until the final judgment of the criminal court they may be suspended from office by the same authority. Government Ordinance no 137/2000 on the prevention and sanctioning of all forms of discrimination stipulates in Art 23 Para 5 Let c)-f) that the members of the Board of Directors of the National Council for Combating Discrimination may be revoked or dismissed from office only in the following cases: incapacity for work, if they have been convicted by a final judgment for an act provided for by criminal law, if they no longer fulfill the conditions for appointment or upon the reasoned proposal of at least two thirds of their number. The Government Emergency Ordinance no 24/2008 on access to one's own file and the unmasking of the Security stipulates in Art 18 Para 2 that the revocation of the member of the College of the National Council for the Study of the Security Archives is ordered only in the cases stipulated in Art 17 of the law, namely, "in the case of absence without cause at more than 3 consecutive meetings of one of the members of the College of the National Council for the Study

of the Security Archives or at more than one third of the meetings held in a year".

Law no 144/2007 on the establishment, organization and functioning of the Department for the Fight against Fraud stipulates in Art 4 Para 3 Let d) that the mandate of the head of the Department shall terminate, before the term of office, by revocation, by decision of the Prime Minister, "in case of impossibility to exercise the mandate, consisting in an unavailability for more than 120 consecutive days or in case of indictment for criminal acts incompatible with the public office".

Law no 302/2022 on the Statute of Judges and Prosecutors provides in Art 169 Para 1-2 that "The dismissal of judges and prosecutors from management positions within the courts, tribunals, specialized courts, courts of appeal and the prosecutor's offices attached to them, as well as from the management positions referred to in Art 149 shall be ordered by the Section for Judges, respectively by the Section for Prosecutors of the Superior Council of Magistracy, ex officio or upon the proposal of the general assembly or the president of the court/head of the prosecutor's office, for the following reasons:

a) if they no longer meet one of the conditions for appointment to a management post;

b) for inadequate performance of managerial duties in terms of effective organization, conduct and communication, assumption of responsibilities and managerial skills;

c) in the event of a disciplinary sanction other than a warning.

In the case of Law no 305/2022 on the Superior Council of Magistracy, Art 57 Para 1 stipulates that "The dismissal of judges and prosecutors from the office of elected member of the Superior Council of Magistracy may be ordered at any time during the term of office, in the following cases:

a) the person concerned no longer meets the legal requirements to be an elected member of the Superior Council of the Magistracy;

b) the person concerned has been given a disciplinary sanction as provided by law for judges and prosecutors and the measure has become final;

c) the appropriate section of the Superior Council of the Magistracy has established, on the basis of the report drawn up by the Judicial Inspection, that the person in question has not performed or has performed inadequately, seriously, repeatedly and unjustifiably, or has performed inadequately, seriously, repeatedly and unjustifiably, the duties prescribed by law".

Law no 35/1997 on the organization and functioning of the institution of the People's Advocate stipulates in Art 9 Para 1 and 2 that "1) The mandate of the People's Advocate shall terminate before its term in case of resignation, removal from office, incompatibility with other public or private functions, inability to perform his duties for more than 90 days, as ascertained by specialized medical examination, or in case of death; 2) The dismissal from office of the People's Advocate, as a result of violation of the Constitution and the laws, shall be carried out by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of the Members of the Chamber of Deputies and the Senate present, on the proposal of the permanent offices of the two Chambers of Parliament, on the basis of the joint report of the legal committees of the two Chambers of Parliament".

Case law on removal from office

The Constitutional Court has handed down several decisions on the dismissal from office, and under the analyzed subject matter will be presented in detail aspects resulting from the case law of the Constitutional Court, as follows:

By Decision no 455/29 June 2021 (Published in the Official Gazette of Romania, Part 1, no 666/6 July 2021), the Constitutional Court held that "the law regulating the revocation, as a means of terminating a mandate, must establish with certainty the cases in which this sanction occurs, expressly mentioning the objective, determined or determinable hypotheses that may trigger the revocation procedure (for example, the incidence of criminal liability or disciplinary liability). The law must also lay down the procedure under which the application for revocation is considered and after which the competent body may order

revocation. Last but not least, the law must state the right to appeal before an independent and impartial court, i.e., the possibility for the revoked person to challenge the revocation measure, under Art 21 of the Constitution on free access to justice. In order to be able to exercise its power to review the legality and soundness of the revocation measure, the court must know the reasons for the revocation, and those reasons must be intrinsic to the revocation measure. The obligation on the issuing authority to state the reasons for the act constitutes a safeguard against arbitrariness and is particularly necessary in the case of such an act which, by ordering the termination of an existing mandate, removes individual rights or legal situations.

Under these aspects, by Decision No 732/10 July 2012 (Published in the Official Gazette of Romania, Part 1, no 480/11 July 2012), noting that "it is the only authority in a position to assess whether the activity carried out by the Ombudsman, in his capacity as head of the institution, was carried out within the limits set by the Constitution and the law or, on the contrary, in violation of them", the Constitutional Court ruled that the Parliament has the power to order legal measures, "through an objective assessment within the exclusively parliamentary ways and procedures". On the basis of the foregoing and reiterating the considerations of Decision no 80/16 February 2014 (Published in the Official Gazette of Romania, Part 1, no 246/7 April 2014), according to which "the situations in which revocation may occur must be precisely individualized at the level of the law, and the procedure to be followed in this situation must also be established by rules free from any ambiguity, so as to avoid the risk of arbitrary revocation", the Court finds that the current regulatory framework does not establish the express cases in which the Ombudsman may be revoked, nor the procedure to be followed in cases where such a request is made. In view of the fact that the Parliament has the possibility to apply the legal sanction of dismissal following a finding of a breach of any legal rules, the Court finds that the current legislative framework under which such a decision is adopted is seriously deficient in terms of content, as it does not regulate distinctly and restrictively the circumstances in which the dismissal procedure may

be triggered. The possibility of dismissing the Ombudsman "as a result of violation of the Constitution and laws" does not meet the conditions of clarity, predictability and reasonableness. This finding, in conjunction with the fact that neither the law nor the parliamentary regulations do not provide for the procedure on the basis of which the decision of revocation is adopted, being limited to establishing the holder of the revocation proposal and the deciding body, nor guarantees regarding the right to defense of the person revoked, converges to the conclusion that the decision thus adopted is the result of an arbitrary act, devoid of constitutional basis, in opposition with the provisions of Art 1 Para 3 of the Constitution enshrining the principle of the rule of law.

Moreover, this conclusion is confirmed by the same public authority that ordered the dismissal, which took as grounds for the dismissal the fact that "the Ombudsman has defectively fulfilled his duties, either by his actions or by failing to act within his area of competence". However, it is obvious that the "defective performance" of duties is not equivalent to the "violation of the Constitution and the laws". The Court observes that, even under the conditions of maximum generality of the phrase contained in Art 9 Para 2 of the Law No 35/1997, which in itself appears to be vitiated by unconstitutionality, the Parliament has given it an even broader meaning, extending the scope of the cases of dismissal beyond the breach of the law to its defective application. By basing the revocation decision on an interpretation of the legal norm that goes beyond its content, the Parliament acted in violation of the provisions of Art 9 Para 2 of the Law No 35/1997 and, implicitly, of Art 1 Para 5 of the Constitution, which enshrines the principle of legality and the supremacy of the fundamental law. The Court observes that the Parliament cannot have a discretionary right with regard to the application of the sanction of revocation, since it must itself comply with the legal and constitutional requirements in the exercise of its own powers".

The Constitutional Court Decision no 196/4 April 2013 (Published in the Official Gazette of Romania, Part 1, no 231/22 April 2013) found unconstitutional the provisions of Art 55 Para 4 and 9 of Law no 317/2004, holding that "The revocation must be analyzed in close

connection with the content of the mandate to which it refers, namely with its mandatory or representative nature. Under the imperative mandate, the representative body shall act only in accordance with the obligations laid down by its electors; it may act neither outside nor against them and shall make every effort to fulfill them. Voters may withdraw the mandate without any reason. Based on the representative mandate, however, the member of the Superior Council of Magistracy is the elected representative of the entire category whose interests are represented by the collegial body of which he/she is a member and cannot be removed from office unless he/she fails to fulfill his/her duties within the body and not the mandate entrusted by his/her electors.

As regards the possibility of revocation, the Court notes that the elected members of the Superior Council of Magistracy exercise their constitutional powers on the basis of a representative mandate, and not an imperative mandate, the latter being incompatible with the role and powers conferred by Art 133 and 134 in conjunction with Art 124 and 125 of the Constitution, but also from the perspective of the manner in which decisions are taken, both by the Plenum and by the sections within the Superior Council of Magistracy. Thus, in this case, the electors do not determine in advance the duties of the elected member of the Council, but, on the contrary, he is authorized by the judges to represent them. Moreover, in order to exercise the right to vote in the Plenum or in the chambers, the elected member of the Superior Council of the Magistracy does not receive an express mandate but decides on the basis of his or her own convictions, within the limits of the law. Also, according to constitutional provisions, the Superior Council of Magistracy is part of the judicial authorities. In this context, the status of the judicial authority cannot be different from that of the representative bodies of the other branches of government".

By Decision No 601/14 November 2005 (Published in the Official Gazette of Romania, Part 1, no 1022/17 November 2005), the Constitutional Court declared unconstitutional Art 30 Para 1 of the Rules of Procedure of the Senate, holding that "in the case of the revocation of a member of the Standing Bureau of the Senate, as a legal sanction, for

violation of the Constitution or parliamentary regulations, it is mandatory to comply with the rules and principles inherent to legal responsibility, by establishing the appropriate procedural framework for investigating the facts alleged and the guilt of the member of the Standing Bureau whose revocation is proposed and ensuring the exercise of his right to prove the unfoundedness of the charges brought against him, i.e. to defend himself".

Relevant is also Decision no 602/14 November 2005 (Published in the Official Gazette of Romania, Part 1, no 1027/18 November 2005), by which the Constitutional Court found unconstitutional the provisions of Art 251 Para 1 and 2 of the Rules of the Chamber of Deputies, holding that "the dismissal from office before the expiration of the term of office always produces effects only on the mandate of the dismissed MP, and not on the right of the parliamentary group that proposed his appointment to be represented in the Standing Bureau and, consequently, to propose the election of another MP in the vacancy. Failure to observe the above-mentioned principle and the establishment of the possibility of electing a new president from another parliamentary group would have as a consequence that the sanction applied to the President of the Chamber of Deputies, removed from office, would be extended to the parliamentary group that proposed his election. The Constitution does not allow such a collective sanction".

Conclusions

Removal from office expresses, on the one hand, the idea of a sanction, which may be legal or politico-legal, depending on the circumstances of the case, and on the other hand, it is a decision-making act, a way of terminating a constitutional or legal mandate.

As a consequence of the guarantee of independence, judges are protected against dismissal. Irremovability concerns the status of judges, not their managerial functions.

The legislative regulations on the independence of the judiciary are aimed exclusively at ensuring a balance between the judiciary and the executive and to increase the independence of the judiciary.

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ASPECTS OF ARTIFICIAL INTELLIGENCE BASED ON HUMAN RIGHTS

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***Abstract**:*

The applications of artificial intelligence is definitely useful towards beneficial of society and can preserve all positive aspects linked with society. The primary intention in this study is to focus on impacts of artificial intelligence from social and legal perspectives. This specific application in general may be provisioned with executable framework addressing the challenges enhancing the usage of several applications linked with human rights. However, this study may not be so inclusive on the technological and business oriented aspects, butmore inclined with the legal, social as well as algorithmic aspects. Usually, artificial intelligence is designed to perform specific functions in a way better and efficiently. Of course the perception of the

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development may revolve around its propensity to interfere with human rights. Usually, the experimentation on the intelligent system may not be identical as carried out by traditional mechanisms; somehow the relation of an intelligent system emanating from Artificial Intelligence may not include the rights in all respects. Also as a part of contribution, it can ease the day to day activities and monitor the human rights effectively. In this work, the several aspects of intelligence based on human rights are prioritized.

***Keywords**: Legal aspects of computing; Legal fact; AI; Human rights; Law; Policy.*

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Introduction

It is essential to think of the frameworks linked to human rights framework due to comprehensive analysis not only in political aspects but also with moral esteems. To maintain equilibrium in several sectors and claims involved with various aspects, the paths may be followed towards discharge of responsibilities. Somehow, inclusion of intelligence system mechanisms can be great support towards human rights frameworks preserving the sociological as well as legal aspects. As compared with the long term as well as structural domains, the intelligent system can easily regulate the criticality embedded within the provisioned structures and responsible to eradicate cumulative negative effects. In addition to that as discussed in this paper, the intelligent system obtains the capabilities to sustain the additional challenges which may require relationship among human rights and science & technology.

1. REVIEW AND LITERATURE

Chatterjee, S et al. (Chatterjee and Sreenivasulu, 2019) in their discussed regarding the issues linked towards intersection of intelligent systems and right to information. The studies linked to same also provisioned with specific issues and challenges to focus the intelligent systems.

Bogoviz, A.V et al. (Bogoviz, 2020) in their work focused on the working principle of AI and the requisite tools. The issues linked to right of information can be resolved easily through the intelligent systems. The legal aspects associated with the international human rights can be easily developed provisioning universally accepted forum to address power differentials.

Ibiricu, B et al. (Ibiricu and van der Made) during their study proposed that single comprehensive framework may not be sufficient to resolve the issues linked with the applications of intelligent systems inclined to human rights. So, it is essential to be more comprehensive calibrated and implementable to refrain AI applications towards infringement of human rights.

Bernaz, N (Bernaz, 2013, No. 3, pp. 497-511) in their work prioritized the aspects associated with specific issues and challenges on artificial intelligence. Also, they have discussed the relevancy of artificial intelligence in other domain specific areas along with its influence over human rights.

Bogoviz, A.V (Bogoviz, 2020, No. 4, pp. 583-600) discussed the importance of intelligent systems. It has been observed that the issues linked with rights to information act can intervene through artificial intelligence technology along with the legal aspects of international human rights and be able to contribute provisioning universal acceptance to address power differentials.

Kaurin, P.S et al. (Kaurin and Hart, 2020, pp.121-136) in their work prioritized the basic concepts of intelligent systems. It has been studied that intelligent system can encroach other specific areas directly and indirectly linked with computer logics. Also, in this work they focused on single task use along with application of artificial intelligence inclusive of transformation of linguistic aspects, pictorial representation and recognition etc. It has been experienced that the mechanisms linked to intelligent systems can be able to perform the specific mentioned tasks more accurately. It has been focused on the functionalities and proper adoption of the intelligence systems (Available at: www.accessnow.org/cms/assets/uploads/archive/docs/Telco_Remedy_Plan.pdf, accessed on 9 January 2020). Also in this work, the benefits of

specific consequences of human rights have been observed possessing primary duties as well as responsibilities and provisioned with the remedies to the affected individuals.

Surden, H. (Surden, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417415, accessed 11 October 2019), discussed the characteristics of complex and huge data sets required for analysis of appropriateness of data processing software. Of course, the incremental support to the large data sets can help enhancing the computing power implemented through specific intelligent systems. The procedure of extraction of relevant information can be facilitated through machine learning to enhance the performance on the scheduled tasks.

Sarikakis, K et al. (Sarikakis, Korbiel and Piassaroli Mantovaneli, 2018, pp. 275-289) in their study observed no conflicts in working with the intelligent algorithms but the same can result in more efficient manner as compared with traditional mechanisms. Somehow, the routines may not be easily accessible. Also, human biases may perpetuate and the result may be articulated based on the specific outcomes.

Shook, J.R et al. (Shook, Solymosi and Giordano, in Masakowski, 2020, pp. 137-152) in their work compared the system prediction and actually happening. In many situations, the statistical bias instrumental in each intelligent system results may be accumulated with the societal bias. Also, the functionalities of artificial intelligence may be associated with intelligent system linked with human rights showing respect to human life.

2. GAP Associated with AI – related Human rights legislation

The basic idea of implementation of right to information to resolve the technological challenges though is clear, still the incorporation of techniques of intelligent systems can be easily fragmented. It has been observed that some systems have not been accessed properly to produce binding treaties. In such situations, several aspects of directives have been prioritized addressing business responsibility, data governance and privacy.

3. Prioritization of Human rights framework with legal remedies

In general, rights to information are well versed with societal as well as legal aspects. Of course, the system can make the right to information framework as per the requirement of the system analyzing the isolation from other legal, moral, and political frameworks. Also the system can have flexibility, i.e. most legal and policy interventions, even interacting with the human rights framework.

4. Implemention of AI Human rights framework

The artificial intelligence can be easily provisioned with large scale data and the associated logics can be originated from deployed statistics, and the learning mechanisms in the specific fields like computer vision, robotics, and natural language processing.

Somehow the specific challenges may be observed seeking meticulous scrutiny of the ethical, moral, and political evolution of the human rights framework. In this presentation it has been observed that AI systems can generate human rights risks that

(a) may be provisioned with the specific challenges not associated with intelligent systems,

(b) may adopt complex procedures to discharge the responsibilities beyond malicious intent,

(c) may seek the decisions regarding better involvement in businesses.

5. Complex responsibility

The intelligent systems sometimes face difficulties to resolve the complicacy during discharging legal responsibility. Accordingly, implementing the technology having signified intentions can overcome the difficulties and meet the benchmark. So, the system with specific mechanisms in provisioned applications may produce appropriateness

of the content to maximize the required information as per the judgments reflected in figure-1. However, the intelligent system can explicitly resolve malicious decisions and the inclusion of specific logic and routines can eradicate the bias as well as willful ignorance of potential harm.

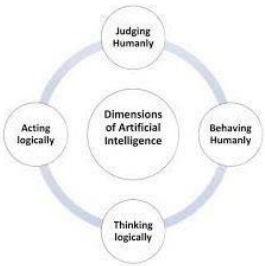

Figure-1: Analyzing responsibility based on aspects of AI

6. Specific challenges provisioning intelligent system implementing the right to informationframework

Sometimes the intelligent systems associated with specific challenges in connection with right to information can be inadequate to address as cited in figure 2. The observation of these specific issues can be prioritized based on the technologies related to the intelligent system. As such it may constitute a “socio- technical system” impacting over the individual technological applications.

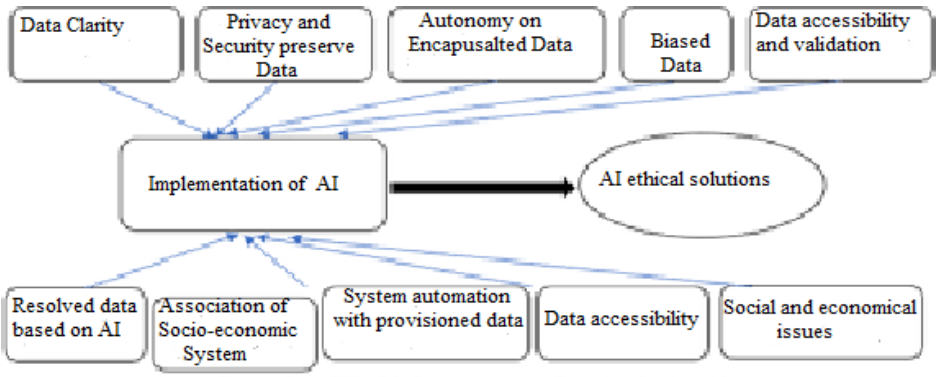

Figure-2: Implementation of artificial intelligence with ethical solutions

The specific challenges are as follows.

(a) Sustaining barriers within the systems may require normative visions and concrete practices that complement or supplement the human rights framework;

(b) Data accessibility in business applications may be provisioned with intrinsic issues and the rights to information emphasizing the case-by-case procedural methods.

(c) The impacts of the intelligent systems can be involved with the scientific andtechnological aspects linked with rights to information.

7. Regulating AI with distinct technical specification

The performance of intelligent systems can be evaluated through

classification, prediction as well as inference deploying suitable techniques. Accordingly, the provisioned assignments can rely on more tedious conjugate mathematical evaluation towards defying simple interpretations of causal inferences. Citing in specific terms, the technologies may not always be dependable on the performance of causal inferences. As a matter of fact, some of the applications linked with intelligent systems giving attention to the causal mechanism may not always be feasible. Being provisioned with explanatory and transparency, the intelligent system along with the rights to information can obtain the feasible solution eradicating the risks.

Conclusions

The rights to information systems in general can be provisioned with conceptual as well as legal aspects addressing the issues caused by the intelligent systems. Somehow, it may be associated with intelligent agents that may have the challenges in terms of ethical, legal or political producing unforeseen consequences which may result from intentional or unintentional choices. Sometimes, it also requires a balancing approach involving multiple business aspects as potential duty-bearers. However, future discourse and practice around the rights to information system should also take into account the basic core problems as the intelligent system reproducing long- term, structural problems going beyond issue-by-issue regulation, embedded within economic structures. Also eradicating cumulative negative effects and introducing additional challenges also can build relationship between human rights and science and technology.

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FIGHTING ORGANIZED CRIME THROUGH THE EUROPEAN INVESTIGATION WARRANT

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Abstract:

Romania's accession to the European Union has determined, among the many benefits, also trends in the manifestation of criminal ideas, such as organized cross-border crime. This aspect boosted the development of concrete and effective legislative frameworks, which contravene the anti-social behavior of the nationals of the member states.Judicial cooperation in criminal matters is based on the principle of mutual recognition of court judgments and judicial decisions and includes measures to connect Member States' legislation in several areas. Thus, this article proposes the analysis of the European investigation order, as one of the main means of obtaining evidence in the European criminal process.

Keywords: *international cooperation; European investigation order; organized crime; criminal process; judicial assistance in criminal matters.*

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1. The importance of streamlining the acquisition and transfer of evidence between the member states of the European Union

The creation of a common area of freedom, security and justice, the main objective of the EU since the Treaty of Amsterdam, can be achieved by resorting to different forms of judicial assistance in criminal matters (Pătrăuș, 2021, pp. 106-116). The organization of judicial cooperation in criminal matters, within the European Union, is necessary for combating cross-border organized crime and for the management of the common borders of the Union. This necessity was manifested through the implementation of minimum standards for criminal procedures in each member state, a framework in which the main rights of the suspect and the accused were regulated and guaranteed. Therefore, the strengthening of international cooperation in criminal matters by combating organized crime is based on the establishment of related institutions and bodies to make interstate collaboration more efficient and to have a unified judicial practice.

Meaning *in the strict sense* of the notion of legal assistance suggests the mutual support provided between the authorities of the member states for the completion of the stages of the criminal process (as an example, we mention: conducting searches, communicating subpoenas, ordering cross-border surveillance).

The legislative regulation of the European investigation order is carried out by Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 on the European investigation order in criminal matters. Thus, this instrument represents, according to art. 1 paragraph (1) of the Directive, a judicial decision issued or validated by a judicial authority of a member state (hereinafter referred to as the "issuing state") to implement one or more specific investigative measures in another member state (referred to as hereinafter "the executing state") in order to obtain evidence in accordance with this Directive. *A fortiori, i*t should be noted that the use of this judicial instrument can also be done for the issuing state to obtain already existing evidence, its object not being limited only to obtaining new evidence.

At the basis of this interstate cooperation is the principle of mutual

recognition of judicial decisions, which determines the production of legal effects in a manner in which the evasion of criminal prosecution or judgment has significant restrictions. The lack of reciprocity does not prevent a request for international judicial assistance in criminal matters, according to Law 302/2004, in three exceptional situations, namely: it proves necessary due to the nature of the act or the need to fight against certain serious forms of crime; thus it is possible to contribute to the improvement of the situation of the suspect, defendant or convict or to his social reintegration; international legal assistance can serve to clarify the legal situation of a Romanian citizen.

This means of obtaining evidence in the criminal process should not be seen as incriminating, because, according to art. 1 paragraph (3) and in accordance with *the principle of finding the truth* stipulated by the Romanian Code of Criminal Procedure, the issuing of a European investigation order can be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of the defense rights applicable in accordance with the domestic criminal procedure. Therefore, through it, evidence can be collected both in favor and against the suspect or defendant. Therefore, establishing the circumstances of the case, but also the aspects regarding the person of the suspect or the defendant, is an obligation of the judicial bodies and is done on the basis of evidence (By "evidence" we mean any element of fact that serves to establish the existence or non-existence of a crime, to identify the perpetrator and to know the circumstances in which it was committed, contributing to finding the truth in the criminal process.).

International legal assistance is also regulated domestically, through Chapter VIII of Title IV of the Code of Criminal Procedure, but also through special laws - Law no. 302/2004 regarding international judicial cooperation in criminal matters. Art. 548 of the Code of Criminal Procedure reveals that it can be requested or granted in accordance with the provisions of the legal acts of the European Union, international treaties in the field of international judicial cooperation in criminal matters to which Romania is a party, as well as with the provisions

contained in the special law and in chapter VIII, if the international treaties do not provide otherwise.

Judicial cooperation in criminal matters is not admissible as long as, in relation to the case in question, the application of the principle *non bis in idem* (In accordance with Art. 8 of Law no. 302/2004 on international judicial cooperation in criminal matters, amended and republished.). The application of the provisions relating to the European investigation order must not affect fundamental rights and legal principles, as enshrined in Article 6 of the TEU, including the right to defense of persons subject to criminal proceedings, as provided for in art. 1 paragraph (4) of Directive 2014/41/EU.

2. The scope of the European investigation order

The EIO includes any investigative measure except the establishment of a joint investigation team and the collection of evidence within a joint investigation team. It can be issued: in the case of criminal proceedings initiated by a judicial authority or which may be initiated before a judicial authority regarding an offense under the domestic law of the issuing state; n procedures initiated by administrative authorities or judicial authorities regarding facts that constitute violations of the rules of law and that are criminalized by the domestic law of the issuing state and in the event that the decision may give rise to an action before a competent court in particular in the matter criminal; in the case of proceedings initiated by judicial authorities regarding facts that constitute violations of the rules of law and which are criminalized by the domestic law of the issuing state and in the event that the decision of the said authorities may give rise to an action before a competent court in particular in the matter criminal and in relation to the aforementioned procedures, which concern crimes or violations that may engage the liability of a legal person or lead to the application of penalties to a legal person in the issuing state.

Of course, the issuance and transmission of a European investigation order can only be done in the cases provided for by law.

First, it is possible to issue the act if it is a measure *necessary and*

proportionate against its purpose. Secondly, the issuance can be carried out, if the investigative measure or measures indicated in the European investigation order could be ordered under the same conditions in a similar domestic case.

The transmission of the order does not present particular difficulties, given the fact that it is carried out by the issuing authority, by any means that allow a written record, which allows the executing state to establish its authenticity.

It exceeds the scope of the hearing of a witness, an expert, a victim, a suspected or accused person or a third party on the territory of the executing state, as an effect of the procedural guarantees granted by law to the parties or procedural subjects in a criminal procedure, in order to carry out the effective defense of their legitimate rights and interests (Udroiu, 2023, p. 84-85).

3. Limitations of the principle of reciprocity - grounds for non-recognition or non-execution of the European investigation order

The European investigation order, as an exception to the reciprocity of the recognition of judicial proceedings between the member states of the European Union, is not recognized or is prevented from being executed, if the perpetrator benefits from an immunity or a privilege, based on the law the executing state. Moreover, another case of preventing recognition or enforcement consists in the existence of rules that limit criminal liability related to freedom of the press and freedom of expression in other mass media. The third case of preventing the execution of the EIO derives from prejudice to fundamental national security interests, which would endanger the source of the information or involve the use of classified information regarding specific activities of the intelligence services or the EIO refers to a crime which, apparently, was committed outside the territory of the issuing state and fully or partially on the territory of the executing state, and the act in connection with which it was issued does not constitute a crime in the executing state. Finally, the measure would be contrary to the normative provisions

in force and would violate, as previously mentioned, the principle *non bis in idem*. At the same time, it cannot be issued in situations where the deed does not constitute a crime on the territory of the executing state, but crimes such as murder, participation in an organized criminal group, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, ammunition are exceptions to the rule and explosive materials, rape, forgery of currency, including forgery of the euro and the rest of the crimes listed in Annex D of Directive 2014/41/EU (available at the web address:https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32014L0041).

4. The means of evidence that can be ordered to obtain evidence in the criminal process within the member states

As it is an instrument that constitutes the starting point in the disposition of investigative measures, the European investigation order allows the authorities of the issuing state to request the disposition of the evidence and evidentiary procedures necessary for the just resolution of the case. Related to the scope of the authorities of the issuing state, they are expressly and limitedly reproduced byart. 2 of Directive 2014/41/EU; next, by*authorities of the issuing state* we mean "a judge, a court of law, an investigating judge or a prosecutor competent for the case in question; or any other competent authority, as defined by the issuing State, acting, in that case, as an investigative authority in criminal proceedings, which has the power to order the collection of evidence in accordance with domestic law. In addition, before being forwarded to the executing authority, the EIO shall be validated, after examining its compliance with the conditions for issuing an EIO under this Directive, in particular the conditions laid down in Article 6(1), by a judge, a court, an investigating judge or a prosecutor in the issuing state. If the EIO has been validated by a judicial authority, that authority can also be considered the issuing authority for the purpose of transmitting the EIO".

A European investigation order can be issued for the temporary transfer of a person subject to a custodial measure to the executing state for the purpose of applying an investigative measure in order to gather

evidence for which the presence of that person in the territory of the issuing state is necessary, provided that it must be returned within the term set by the executing state, but also for the temporary transfer of a person subject to a custodial measure to the issuing state for the purpose of applying an investigative measure in order to gather evidence for which his presence on the territory of the executing state is necessary. The issuing authority may issue a European investigation order for the purpose of hearing a suspected or accused person by videoconference or other means of audiovisual transmission or when a person is on the territory of the executing state and must be heard as a witness or expert by the competent authorities of the issuing state, hearing by teleconference is also possible. The order can obtain information on bank and other financial accounts, information on banking and other financial operations, and covert investigations can be used, with the possibility of interception of telecommunications with technical assistance from another member state.

5. The EncroChat case - disrupting web-based organized crime networks through telecommunications interception. Jurisprudence

According to the conclusions submitted for case C-670/22 (https://curia.europa.eu/juris/document/document.jsf?text=encrochat&docid=279144&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=3833285#ctx1), pending before the Court of Justice of the European Union, At the origin of the criminal proceedings in the main litigation is a criminal investigation initiated in France and which continued in the form of a joint operation between France and the Netherlands, during which the data of location, traffic and communications, including texts and images transmitted within ongoing conversations (chats) of network usersEncroChat.under the criminal proceedings in the main dispute is a criminal investigation initiated in France and continued in the form of a joint operation between France and the Netherlands, in which location, traffic and communications data, including texts and the images transmitted within the ongoing conversations (chats) of network usersEncroChat.This joint operation

developed a Trojan-type software that was uploaded to the server in Roubaix (France) in the spring of 2020, and from this server it was installed on terminal devices via a simulated update. The Correctional Court of Lille, France authorized the operation of the collection of communication data. This interception targeted users ofEncroChat from 122 countries, including around 4,600 users in Germany. On June 2, 2020, as part of a criminal investigation *into reality* carried out by the German authorities, the General Prosecutor's Office in Frankfurt am Main requested the French authorities, by means of a European investigation order, for authorization to use the dataEncroChat in criminal proceedings. This request was based on the suspicion of illicit drug trafficking in large quantities by persons who had not yet been identified. However, they were suspected of being part of an organized crime group in Germany that used phonesEncroChat. The Correctional Court of Lille authorized the order for the transmission and judicial use of the dataEncroChat of German users. Subsequently, additional data were submitted based on two additional European investigation orders dated September 9, 2020 and July 2, 2021 respectively. Based on the evidence received, the General Prosecutor's Office in Frankfurt am Main severed the investigations that were to be carried out against individual users of EncroChat and sent them to the competent criminal investigation bodies.

Through this activity, over 6,500 people were arrested and approximately 900 million euros were confiscated. In addition, more than 100 tons of cocaine, 160 tons of cannabis, 923 weapons and 271 houses or properties were seized, according to the Europol report. EncroChat was selling fully encrypted phones without cameras, microphones, GPS or USB ports for a price of €1,000. These were equipped with a "panic code" that allowed holders to delete all informational content by simply accessing it.

6. CauseGavanozov v. Bulgaria - the right to challenge the European investigation order

The Ivan Gavanazov case concerned criminal investigations into

large-scale VAT fraud. Bulgarian authorities wanted to request searches and seizures, as well as the hearing of witnesses via video conference in the Czech Republic, based on a European investigation warrant. However, under Bulgarian law, there is no appeal against the lawfulness of searches, seizures and witness interviews, nor against the issuance of a European Investigation Order dealing with such investigative measures. In this context, the Specialized Criminal Court of Bulgaria addressed preliminary questions to the CJEU, mainly seeking to find out whether the national laws of the Member States must provide for the possibility of introducing a right of appeal against the issuance of a European investigation order to carry out searches and seizures and to organize the hearing of a witness by video conference (https://www.eurojust.europa.eu/20-years-of-eurojust/gavanazov-ii-and-hp-judgments-cjeu-european-investigation-order). This gave the Court an opportunity to rule on the scope of Article 14 of the European Investigation Order Directive in conjunction with the EU Charter of Fundamental Rights. Therefore, in this judgment, the Court pays particular attention to the right to an effective remedy and the principle of effective judicial protection in the issuing state.

The Gavanozov case is important from the point of view of judicial practice, because it illustrates the fact that there are differences from the perspective of the transposition of European regulatory acts at the national level.

Currently, the obligation to have appeals for the issuance of a European investigation order is provided by art. 14 of the Framework Directive (Directive 2014/41/EU on the European Criminal Investigation Order), according to which "member states ensure that the investigative measures indicated in the European investigation order are subject to appeals equivalent to those available in a similar internal case", the deadlines for exercising the appeal being identical to those in domestic law.

Conclusion

According to the 2021 EU SOCTA, organized crime groups active in Europe are involved in a variety of criminal activities, most of which are involved in drug trafficking, organized crime against property, followed by fraud (including customs fraud, excise fraud and VAT), smuggling of migrants and human trafficking. It is therefore important that the authoritiesto use existing tools to their full potential to annihilate criminal activities and the business model of criminal organizations and to facilitate international cooperation in criminal matters.

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EMBRACING THE NEEDS OF SOCIETY: THE EXTENDED PROTECTION ORDER

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Abstract:

Domestic violence has specific characteristics that distinguish it from violence encountered in other social contexts. The close and intimate interpersonal relationships between family members amplify the impact and complexity of this phenomenon. The Romanian legislator's adoption of the Law on Prevention and Combating Domestic Violente in 2003 was an important step in addressing this serious problem.

However, it is obvious that Romanian society has evolved since then and tis needs have also evolved. Despite legislative efforts and increased awareness of violence, the phenomenon has not been significantly reduced and, in some cases, has even increased.

The Romanian legislator noted that, in addition to criminal legal instruments, a comprehensive and integrated approach should be necessary to provide adequate support and protection to all victims of violence, regardless of the context in which it takes place.

Thus, the adoption of the extended protection order is an innovative and necessary measure aimed at providing support and protection to any victim of violence, whether he or she is a family member or is experiencing violence in another social context.

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This initiative reflects the continuous efforts of the legislator to adapt the legislation to the current needs of society and to ensure that all those affected by violence can receive adequate support and protection.

***Keywords**: domestic violence; relationships; family; legislation; phenomenon; extended protection order; necessary measure; protection.*

Introduction – Violence, this soul child of passivity

An instinctive and natural configuration of human beings, which plays a major role in the survival of species, is represented by aggression. The development of biological behaviors of the human species, especially in the activities indispensable to living, namely survival, nutrition, safety and freedom, are influenced by the tendency to aggressiveness. The undeniable evolution of humanity has also entailed the metamorphosis of aggression, which is hidden in competitive behaviour, overcoming the obstacles inherent in human life, but also affirming itself.

From passive attitudes and indolence, to threatening behaviour, but also violence itself, the manifestations of aggression vary from case to case.

In human ontology and in the structure of personality, cultural patterns are internalized and influence the meanings of gestural and articulate language, behaviours and attitudes. Although the aggressive actions can sometimes be subtle and fit into the conduits considered calm or non-violent, the manifestations of aggression can also be dramatic and constructive.

The evolution of the phenomenon of citizens' awareness of the magnitude and precociousness of domestic violence developed in the early 2000s. In this period of legislative gaps, state institutions, but also non-governmental organizations, have indeed played a crucial role in raising public awareness of these issues involving the “starless sky” of the first form of social organization, the family.

Their aim was to educate citizens about the signs and consequences

of domestic violence, to encourage victims to seek help and to promote solidarity, thus they conducted extensive information and community awareness campaigns, by highlighting the extent and negative impact of violence in the family on victims of domestical violence. The adoption of Law No. 217, on 22 May 2003, marked the beginning of a real legislative spring in the legal field, knowing that Romanian society was dying from the anesthesia of the communist years, in which domestic violence not only did not benefit from regulation, but was perceived as a disgrace among the victims.

We cannot say that Romanian society has not evolved since then. Despite the legislative efforts and the increased awareness of domestic violence, the phenomenon has not been significantly reduced, and, in some cases, has even been getting worse, adding to this other forms of violence, not only in intimate circumstances.

The Romanian legislator noted that, in addition to the criminal legal instruments in relation to any form of violence, a comprehensive and integrated approach is needed to provide support and protection to all victims of the violence, regardless the context in which it takes place. For example, in a subordination relationship arising from an employment contract, there is a victim of sexual violence who is in a relationship of financial dependence to her/his employer. We can understand that the victim may be looking for another job, but how do we address this delicate situation in a scenario where the employer continues to pursue her/him? In this context, the legislator bowed to the problem existing at present in the Romanian society and thought of another legal means of protection.

Thus, the extended protection order arises. The adoption of the extended protection order is an innovative and necessary measure aimed at providing support and protection to any victim of violence, whether he or she is a family member or faces any other form of violence in various social contexts.

We welcome and embrace this initiative of the Romanian legislator, which reflects his ongoing efforts to readjust legislation to the

current needs of society and to ensure that all those affected by violence receive adequate support and protection.

“The return of violence for violence, multiplies violence, adding deeper darkness to an already starless night. Darkness can't drive out hatred, only love can do it." (Luther King Jr) According to this statement made by Marthin Luther King Jr., we are to ask ourselves the following rhetorical question aimed at bringing about an interesting topic of debate: does the state classify its own violence as law and that of the citizen as crime? We will try to answer it in the most effective way.

1. Synoptic analysis of family violence versus gender violence

The Universal Declaration of Human Rights (adopted and proclaimed by the United Nations General Assembly by resolution 217 A (III) of 10 December 1948; Romania signed the Declaration on 14 December 1955) and the Convention for the Protection of Human rights and Fundamental Freedoms (The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended by Protocols No. 11, 14 and supplemented by the Additional Protocol and Protocoles No. 4, 6, 7, 12, 13 and 16) enshrine the right of the person to family life and to its protection (Article 16(3) “The family is the natural and fundamental element of society and has the right to protection from society and the State; article 8, para. 1 “Everyone has the right to respect for his private and family life, his domicile and his correspondence.”). At the national level, the Romanian Constitution provides for the due respect and protection of intimate, family and private life (Article 26(1) of the Romanian Constitution: “The public authorities shall respect and protect the intimate family and private life”.). We therefore note the reasons that led to the specific regulation of domestic violence in the context of interpersonal violence, reasons considered by the legislator as objectives of national interest.

Domestic violence, as mentioned in the proposal for a directive on combating violence against women and domestic violence, is that form of violence that especially affects women, which usually occurs in the family, independent of biological or legal obligations, including that

violence between parents and children. “Women are disproportionately represented as victims of both forms of violence because of the underlying patterns of coercion, power or control. However, anyone can be a potential victim of such violence, regardless of gender or gender. In particular, in the case of domestic violence, it can affect any person, including men, young or old people, children and LGBTIQ persons.” (Lesbian, gay, bisexual, transgender, intersexual and queer LGBTIQ definition according to the Progress Report on the implementation of the LGBTTIQ Equality Strategy 2020-2025; Proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, Strasbourg, 8 March 2022, COM (2022) 105 final.)

In accordance with article 3 of Law 217/2003 on the prevention and combating of domestic violence (published in the Official Gazette No. 948 of 15 October 2020), domestic violence implies any action or inaction, regardless of the form of guilt, involving physical, sexual, psychological, economic, social, spiritual violence, and, in respect of the evolution of technology, cyber violence is added to this exhaustive legislative enumeration.

Law 174/2018 on amending and supplementing Law no.217/2003 for the prevention and combating of domestic violence is primarily aimed at a conceptual transformation, so that the phrase “family violence” has been replaced by the term “domestic violence” (Article 1 of Law 217/2003 provides for the amendment of the title which will have the following inscription “for the prevention and combating of domestic violence”), and except for this rule the regulations are included in the Criminal Code. The explanation lies in the fact that the term “domestic” comes from Latin and means house. Therefore, this term seeks close relationships, related to family, household, generic intimate life. Per a contrario, family assumes something that belongs to the family itself.

Becoming the most important “form of organizing the life together of people bound by marriage or kinship” (Bacaci, Dumitrache & Hageanu, 2013, p. 23), “the exact establishment of the notion of family involves long discussions, determined by the structure given to it by

various normative acts, as well as the fact that it has been the subject of regulation for other disciplines.

The more difficult it is to establish the notion of family, the more the legislator does not give a general definition to this notion" (Drăghici, 2022, p.15). In order to include these forms of violence in the concept of domestic violence, it is necessary that the action or inaction, as appropriate, is committed by an active subject, "who has the capacity of a family member (Udroiu, 2014, p.70).

The phrase "family member" is important to be analysed through a comparative analysis between the provisions of Article 5 of Law 217/2003 and the terms of Article 177 of the Criminal Code. Thus, in the sense of Law 217/2003, by family members are understood both ascendants and descendants, brothers, sisters, spouses, children of husbands, but also persons who have become relatives through the procedure of adoption.

Family members are also spouses, ex-husbands, siblings, parents of children from other relationships of spouses or ex-married couples, and, besides, persons who have established relationships similar to those between spouses or parents and children, whether or not they lived with the aggressor. The law also mentions in the category of family member, the guardian or legal representative. On the other hand, article 177 of the Criminal Code (Law No. 286 of 17 July 2009, published in Official Gazette No. 510 of 24 July 2009) makes a brief enumeration and specifies that by family members are understood both ascendants and descendants, brothers, sisters, their children, as well as the persons who have become relatives by adoption, the spouse, and the difference from the special law lies on concubinage or relations similar to those between parents and children, if they live together.

Prior to the amendments introduced by Law No.174/2018, the term "family violence" was regulated as any intentional action or inaction, except self-defence or defence actions, manifested physically or verbally, committed by a family member against another member of the same family, which causes or may cause physical, mental, sexual, emotional or psychological harm or suffering, including the threat of such acts, violation or arbitrary deprivation of liberty.

The discussion of partnership must take into account the various forms of coexistence and relationships that have not been formalised, which are also an integrant part of social diversity and the way people choose to live their lives. Among them, there are also concubination or free union, which is not prohibited by law, therefore partners are not legally sanctioned. The legislator did not ignore this situation, regulating also free relationships in the acceptance of the family member. Concubination involves a cohabitation relationship between two persons who are not legally married, therefore they are not subject to the regulations of the Civil Code. This presupposes that legal relations arising from a conjugal relationship are not governed by the same legal rules as those between spouses, which entails certain consequences in civil, not criminal matters, given the specificity of the imperative rules which are intended to protect a general interest.

It is as well necessary to take into account the partiality, which the Romanian society has not yet embraced in order to provide them with legal regulation. Ignoring them leads to discrimination and, de facto, to a violation of the fundamental rights of the persons concerned, in particular the protection of family life, in accordance with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The case-law of the European Court of Justice specified that "the freely consented union between two persons of the same sex falls within the sphere of family life" (ECHR, Schalk and Kopf v. Austria of 24 June 2010).

The criminal law gives victims of domestic violence the possibility to file criminal charges against the perpetrators. Thus, the trial of a criminal case, the initiation of criminal proceedings, the prosecution of the accused, followed by the establishment of a sentence and its enforcement, requires time, although, in most cases of domestic violence, action is taken quickly. However, until the final moment when the offender receives his sentence, the legislator has thought of a concrete way to protect the victim from a serious and imminent danger to his or her life, physical and mental integrity or freedom as well as family members. Law 217/2003 thus establishes the Protection Order.

The protection order is a temporary and exceptional measure established by the courts, which, by their decisions, impose certain measures to protect the victims, by restricting the rights of the aggressor.

Until the court decision, the legislator provided for the authority of the police bodies to issue a provisional protection order, for a duration of 5 days, in order to defend the victim from a serious risk to his/her life, physical or mental integrity, but also of family members.

The protective measures are, in accordance with Article 31 of Law 217/2003, the temporary evacuation of the assailant from his common home, the reintegration of his victim into his common place of residence, the obligation to maintain a minimum distance from the victim and, where appropriate, from his family, from the workplace or from the educational establishment, the mandation to wear an electronic surveillance device on a permanent basis, and also to oblige him to hand over the weapons, if any, to the police.

Law No.114 of 9 May 2023, supplements article 38, paragraph 1 of Law 217/2003 and establishes an additional ban on the aggressor, who is prohibited from receiving the state allowance for children. The ban shall be communicated to the Agency for Payments and Social Inspection or, as the case may be, to the municipality of Bucharest.

Subsequently, the police bodies send to the competent prosecutor's office the documents prepared during the interview in a case of domestic violence, and in the event that the Prosecutor of the case confirms the provisional protection order, submit the documentation to the court, so that the latter may order the issuance of a protection order which may have a different validity, depending on the degree of danger assessed.

In accordance with Law No. 240/2023 on the amendment of Law 217/2003 for the prevention and combating of domestic violence (published in Official Gazette No. 669 of 20 July 2023), the duration of the measures by which the protection order against the aggressor was issued may not exceed 12 months from the date on which the order was made. A new request for a new order may, of course, be made if the reasons for the original order persist.

The family, “the biological and socio-legal entity, composed of two persons of different sexes, spouses, united in them by marriage”

(Rădescu, Radescu & Stoican, 2017, p.489), is perceived as the center of life and the promoter of ideals, offering opportunities for intense experiences, such as love, marriage, the birth of children. “Love is long-suffering, it is full of goodness, love does not pity, love is not praised, it does not swell with pride, does not behave inappropriately, it doesn’t seek its own benefit, it isn’t angry, it don’t think of evil, it won’t rejoice in iniquity, but it rejoices in truth, it covers all, it believes everything, it hopes everything suffers everything. Love will never perish” (Bible, Corinthians verse thirteen to four) and, nevertheless, quarrels, jealousy, domestic violence, conflicts between generations, childhood traumas or related to separation, divorce, death, are events whose existence we cannot deny. Consequently, we draw the conclusion that family represents one of the “most violent contexts in society” (Straus, 1991, New York - https://www.ojp.gov/pdffiles1/digitization/pdf).The social rejection of domestic violence leads to the conclusion that assailants tend to hide these behaviours in order to prolong their dominance and dependence on the victims.

The attitude of acceptance of violence can play a significant role in how individuals exposed to childhood aggression in the home family subsequently manifest their conduct in the relationship with the partner. This attitude can be perceived as a mediator between the experience of violence in childhood and the aggressive behaviour manifested later in life.

When a child has witnessed violence or has even been the unhappy victim of it in the family, he internalizes those patterns of behaviour and reproduces them in the couple relationships.

Acceptance or tolerance of violence in a relationship can be assimilated during childhood and is reflected in the adult's behaviour and in his relationships with members of society.

Attitude towards violence against wife can be defined as a discriminatory attitude based on prejudice about the inferior social status of woman compared to that of man. This perception can be fuelled by cultural or social norms that justify or normalize violence against women.

This discussion is intended to draw attention to dysfunctional patterns and problematic conduct within the family that tend to pass over generations and become increasingly accentuated. The transgenerational transmission of conflicting behaviours perpetuates the cycle of violence and dysfunctional models of envy.

2. Extended protection order

"A woman, block administrator, was killed by a neighbour in Sector 2", "A student stabbed by one of his colleagues, in a school in Sector 6", "A teacher from Vaslui, beaten with a pipe by a 12-year-old student" "She threatened with death and sexually assaulted the employee of a hotel in Constanta", and many other such headlines in newspapers and news, at a time when mankind is on the threshold of the most transformative and exciting period in its history. The age in which the very nature of what it means to be human is supposed to be both enriched and challenged as our species breaks the chains of its genetic heritage and reaches unimaginable heights of intelligence, material progress and longevity.

The question is: how do we protect these people from violence against them? Simply instrumenting a criminal case for acts incriminated by the criminal code as a crime is not effective when we are talking about a real risk.

The Romanian legislator has not remained passive about this social need, for which reason, he has thought of a way of protecting people who are not victims of domestic violence and who enjoy a special regulation, as we have noticed.

Thus, Law No. 26/2024 on the protection order was born, designed to remove from the darkness the Romanian society in which "man is still as he was... brutal, violent, aggressive, greedy, competitive and has constituted a society according to these traits" (Quoted by Kishnamurti, Indian philosopher). The new law, as from article one, clarifies the concept of an act of violence and includes in this category any act of punch or violence that causes physical suffering, acts of sexual violence, threats, harassment, including online harassments, blackmail as well as

any other act of physical or psychological violence aimed at putting the victim's life at risk.

In the same way, the legislator grants the power to issue a provisional protection order for the acts listed in article 1 of the new law to police bodies, in the exercise of official duties, notified of the commission of these kinds of acts.

The order is issued in accordance with the law, at the written request of the victims, or even of the guardians, as well as of the legal representatives, by the police officers, who are obliged to assess the situation resulting or not in an imminent risk to the victim's life, physical integrity or freedom.

The police officers in service, on the basis of the assessment of the factual situation resulting from the completion of a risk form, but also based on the methodology of its use, establish the existence of the risk.

The issuance of the provisional protection order is not conditioned by the adoption of a preventive measure within the meaning of Law 135/2010 on the Code of Criminal Procedure (published in Official Gazette No. 486 of 15 July 2010).

In the case when the victim is in a physical or mental condition that would prevent it from drafting the application for the issuing of the provisional protection order, the police officers will fill out the imminent risk assessment form, based on all the problems gathered on the occasion of the incident notified.

Under article 3 of the new law, police bodies may enter the residence, or residence, of any natural person, as well as the premises of any legal person, without the consent of the legal representative, if, on the basis of information obtained from the victim, acts of violence within the meaning of article 1 have taken place in those premises.

In the same way, as the protection order regulated by Law 217/2003, the protective order in Law 26/2024 produces effects for a period of 5 days.

The protective measures in the domestic violence law are repeated in the law on the protection order and are listed exhaustive, with the exception of the prohibitive obligation incumbent on the aggressor to

contact the victim by telephone or by other means of distance communication.

Violation of the obligations established by the protection order constitutes an offence within the meaning of article 18, paragraph 2, of the new law, as in the Domestic Violence Act.

The provisional protection order shall be submitted to the competent prosecutor's office, accompanied by the imminent risk assessment form and the evidence obtained in accordance with the provisions of Article 3 or Law 135/2010.

After submitting the provisional protection order to the prosecutor for confirmation, he submits the documentation to the court in whose territory it was issued.

We have to bear in mind that, the protection order is enforceable and the appeal is not suspensive of enforcement. Although it is judged with the citation of the parties, their non-representation for reasons imputable or non-imputable does not in any way prevent the trial of the case in absentia, and the principle of contradictoriality is not deemed to have been violated.

The protection order includes the procedure for interviewing police officers in cases of acts of violence (Order No.146/2578/2018 on how to manage cases of domestic violence by police officers, published in the Official Gazette No.1110 of 28 December 2018), the model form for the imminent risk assessment (Annex 1 to Order no.146/2578/2018), the methodology for using the form (Annex 2 to Order no.146/2578/2018), the procedure of issuing and the model of the protection order, the enforcement procedure and the monitoring procedure (Law No. 146 of 17 May 2021 on electronic monitoring in judicial and criminal enforcement proceedings, published in Official Gazette No. 515 of 18 May 2021).

With regard to the determination of the risk assessment criteria within the meaning of Article 11 of Law 26/2024, obligatory consideration will be given to: the evidence that floats on the act of violence, the form of violence and the repetitive nature of the act, but also the context in which the act was produced, the vulnerability of the person, the proximity of the buildings where the victim and the

aggressor, the assailant, the workplaces and the areas frequented by them.

The court, pursuant to Law 143/2000 on preventing and combating illicit drug trafficking and consumption (published in the Official Gazette No. 163 of 6 March 2014), may order with the consent of the aggressor, if he is a consumer of psychoactive substances, the enrollment in a detoxification program. At the same time, in accordance with the provisions of Law no. 487/2002 on mental health and the protection of persons with mental disorders (published in M.Of no.652 of 13 September 2012), non-voluntary internment may be ordered if the aggressor suffers from certain mental illnesses.

The judge has the possibility of mandatorily ordering the aggressor to perform a psychological counselling or psychotherapy pursuant to article 12, paragraph (2) of Law 26/2024.

We welcome this initiative by the Romanian legislator, who is concerned with the needs of society, but we appreciate that this law, which seeks to be an effective and, at the same time, innovative instrument in Romania, reiterates in the majority, the law of domestic violence.

Understanding the specific needs and situations of victims of domestic violence is crucial to providing protection and support to them, but the adoption of a special law on violence that occurs in the multitude of social contexts, which largely reiterates the law intended for family members in the broad sense, may seem redundant at first sight. Violence occurs in different environments and each context has specific characteristics and needs.

One of the measures of protection offered to the victim of any type of violence in the sense of the new regulation implies evacuation of the aggressor from the common home, or, in the context where the act of violence takes place in schools, which is the purpose of remembrance of this measure, that is specific to a certain type of social relations.

At the same time, the questions in the risk assessment form, on the basis of which the police officer issues the provisional protection order, contain specific issues to determine a family situation, such as: “Does the aggressor prohibit you from meeting with family, friends or other

persons, frequently controls your daily activities, telephone calls, correspondence?" or "Will the aggressor prevent you from separating from him/her?"

What is the effectiveness of these questions in a context of determining the imminent risk, if an elderly person is harassed by the seller from the shop on the outskirts of the village, who used to borrow different amounts of money?

Understanding the concerns of the legislator is important, but we must highlight that, although some aspects may seem similar between domestic violence and other forms of violence in different social contexts, there are peculiarities and differences that justify the adoption of a special law for each context.

The reasons that support the adoption of a special law on violence manifested in various social perspectives are, first of all, the specificity of the climate. Violence has different dynamics depending on the circumstances. For example, violence in a couple involves emotional, psychological or financial abuse, while violence at work involves harassment, blackmail or intimidation. A specialised law has the capacity to be able to address specific issues and to provide, at the same time, genuinely appropriate protection measures for each individual case.

Another reason is the coverage of various interpersonal relationships, because violence is not limited only to relationships between family members, but also occurs in all other social relationships. The adoption of a special law ensures that these various situations are covered, and the protective measures therefore have a full preventive role.

Conclusions

Cultural patterns and social context have a significant impact on human behaviour and perceptions of it. Aggression can be manifested in various forms and can be influenced by the environment, social norms and internalized patterns of behaviour.

The awareness of the phenomenon of domestic violence has evolved significantly in recent decades, and this progress is largely due to

the efforts of state institutions, but also to non-governmental organizations. Information and awareness-raising campaigns have played an important role on the stage of Romanian society, succeeding in raising public consciousness about this problem and encouraging victims to seek help.

Recently, we noticed a lady, who entered the headquarters of a police unit, to complain that she had borrowed a sum of money to a neighbour on the block, and he, as a "reward", began to threaten her and wait for her every time she came back from work, to denigrate her in front of the other tenants. Looking at one of the walls of the institution, he noticed a poster promoting support for victims of domestic violence, using the Bright Sky[1] app. A few days later, the assailant was evacuated from his home, and the neighbour continued to threaten.

The adoption of Law No. 217 of 2003 represented an important moment in Romania, being the essential step towards recognition, addressing, preventing and combating domestic violence. Through this law, the victims have been restored to their voices stifled by tears of powerlessness.

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[1] A tool that provides users with a database of support services, security evaluation questionnaires in a relationship, combating myths related to domestic violence, presents the legal provisions in Romania that protect victims (protection order and provisional protection order), as well as the measures that can be taken to increase online security. The app provides useful data and tips related to harassment in public or private spaces and sexual harassing. Some of these recommendations and preventive information can be found in detail on www.politiaromana.ro/prevenire/violenta-domestica , directly accessible from the app. The application is presented in the form of a game, in order not to attract the attention of the aggressor, and when the victim is safe, it can read all the above information, there is also the possibility to call the emergency number 112.

But the fight against violence is a continuous process, and it is imperative that there will be a continuity in promoting solidarity, education and combating this phenomenon that has gained scale in recent years.

The adoption of the extended protection order in Romania is a major initiative in protecting victims of violence, regardless of the context in which it occurs.

This innovative tool aims to provide support and protection for any type of victim, the latter benefiting from personalized protection measures.

It is true that these measures can undergo improvement changes, because they must be personalized, in the sense that they are adapted to the individual needs and circumstances of each situation generating violence and are prerequisite for issuing these new laws.

The new law of the protection order was put into force on August 31, 2022.

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