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International Law in the Time of COVID-19

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Message From the Chair
Cross-Border Connections Still Require In-Person Travel


JAMES M. MEYER

By definition, pandemics are international in nature. So, it is not surprising that the practice of international law would be severely impacted by the occurrence and now, we hope, the passing of the COVID crisis. As this edition of the *International Law Quarterly* explores many of these issues, the International Law Section decided to engage in some of its own research on the topic by holding its Annual Leadership Retreat in-person on the Island of North Bimini in The Bahamas. In fact, as I write this message, I am here in Bimini with many of our ILS colleagues experiencing international travel, networking, socializing, and some well-deserved rest and relaxation in the post-COVID era. During the travel process, it was interesting to see how the online component of the immigration and customs process had advanced, but not without conflicting requirements in official government forms, filings, and protocols regarding COVID. Obviously, circumstances have changed again and again, apparently quicker than forms, online programs, and signs can be updated.

Most apparent during our trip was how important it has become for our group to continue convening abroad. That is who we are by name and by composition: the International Law Section. Here in Bimini, we have been reminded how rewarding it can be to make new professional friends and colleagues bonded by common experience. More specifically, we had the great pleasure of witnessing strong friendships develop between many of the leaders in the ILS and some prominent members of the Broward Bar Association and the Bahamas Bar Association.


Getting there is half the fun!
(Chair-Elect Jackie Villalba, Chair Jim Meyer, Past Chair Eddie Palmer)

Knowing that travel and adventure are bonding experiences, on Saturday afternoon our group boarded the private vessels of the undersigned ILS chair and the ILS chair-elect, Jacqueline Villalba, appropriately named the "Offshore Office" and "Lawyered Up." We then voyaged to Honeymoon Harbor some eight miles south of Bimini, where everyone onboard tested the limits of "professional courtesy" by swimming with and feeding sharks. We learned, among many other things, that nothing brings a group closer together than being in the water with a school of circling sharks.

Our conclusion was that, although remote technology in our legal practices will remain a more significant part of our day-to-day work and lives, in-person, cross-border engagement remains a necessary part of an international lawyer's business and professional growth and well-being. Although we are witnessing a technological phenomenon in which the world has become a smaller place on a virtual basis, we should not let the changes forced upon us by the global pandemic pull us apart in terms of real human interaction.

Happy sailing,

James M. Meyer
Chair, International Law Section of The Florida Bar
Board Certified in International Law
Harper Meyer

From the Editor . . .

LAURA M. REICH

In the spring of 2020, just after the February 2020 iLaw Conference, your *International Law Quarterly* (*ILQ*) editorial team was hard at work on the Spring 2020 edition of this publication. We had a focus topic prepared and several authors tentatively committed to write, and we were thinking about how many copies we needed to print for the Annual Florida Bar Convention just a few short months away.

And then, in March 2020, the world stopped.

Literally no one will be surprised to learn that our original plans for the Spring 2020 *ILQ* changed dramatically. COVID-19, social distancing, business closures, and remote working immediately changed everyone's life and work. The authors and editors wrote and finalized that edition from remote working locations—from home offices and virtual offices, from the living rooms of condos, townhouses, and other residences. The Spring 2020 *ILQ* was released electronically as there was no Annual Florida Bar Convention that year at which to distribute it.

At that time, COVID-or-not, the editors and I committed to publishing the *ILQ* on schedule and with the quality the readers and members of the International Law Section (ILS) expected. Of course, we were all blissfully ignorant of what COVID had in store for us. So many professions were dramatically impacted by the coronavirus, and attorneys were not immune. During the last two difficult years, however, while we were socially distanced, we were never professionally separated from each other; through the activities and virtual events of the International Law Section, we remained connected.

Cautiously hopeful that the worst of the pandemic is behind us, we can now stop and take stock of the changes wrought by the past few years. As international practitioners, we had some built-in advantages as we were already accustomed to long-distance relationships with our clients, colleagues, courts, and tribunals. But COVID-19 has changed the law, and the practice of law has changed along with it.

In his article "Compulsory Vaccination in Light of the European System for the Protection of Human Rights," Professor Miguel Ángel Elizalde Carranza examines the legality of mandatory vaccination in light of the European Convention on Human Rights. Immediately following, Professor Lorayne Finol Romero considers data transparency and governance in Latin America in the light of the pandemic and argues that the right of access to information regarding COVID-19 must be weighed against the human right to data privacy.

Closer to home, in "The New Frontier – Expanded Professional Employment Opportunities for O-1 Visa Holders and National Interest Waiver Applicants," Larry Rifkin considers how U.S. Citizenship and Immigration Services (USCIS) will determine eligibility for O-1A visas and national interest waivers for "nonimmigrants of extraordinary ability," in accordance with Executive Order 14012: Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.

We also present the ILS Section Scene and the World Roundup, allowing readers to keep abreast of news from their colleagues and the world. We hope you enjoy this Spring 2022 edition of the *ILQ* and look forward to continuing to publish news and informative international law developments in the future.

Best regards,

Laura M. Reich
Editor-in-Chief

THE FLORIDA BAR
INTERNATIONAL LAW SECTION
www.internationallawsection.org

April 8, 2022

Statement of The Florida Bar International Law Section Condemning the Invasion of Ukraine

On this the 31st day of March, 2022, The Florida Bar International Law Section hereby states:

The Florida Bar International Law Section was founded in 1981 to provide an organization for members of The Florida Bar in good standing who have an interest in the field of international law. It is also a forum for the sharing of knowledge, experience, and "best practices" that may improve the administration and application of the statutes, rules, regulations, and the most fundamental precepts of international law including the recognition of and respect for basic human rights, the rule of law and sovereignty. As such, the Florida Bar International Law Section unequivocally condemns in the strongest terms possible the invasion of Ukraine by Vladimir Putin's regime in Russia.

International law, as expressly recognized by the laws of the United States and the State of Florida, as well as the United Nations' charter, is clear that a territory may only change hands with the consent of its own people and not as the result of the use of force and violence against those people by another country, except under the most limited of circumstances, none of which exist today in Russia or which could justify the attack on Ukraine by the Russian Army as ordered by Vladimir Putin.

The ILS hereby confirms that this Statement is made solely by the ILS and supported by the separate resources of this voluntary organization, and not in the name of The Florida Bar.

Respectfully submitted on behalf of the Executive Council of the Florida Bar International Law Section,

Very truly yours,

James M. Meyer,
ILS Chair, 2021-2022

LA VACUNACIÓN OBLIGATORIA A LA LUZ DEL SISTEMA EUROPEO DE PROTECCIÓN DE LOS DERECHOS HUMANOS

Por Miguel Ángel Elizalde Carranza, Ph.D., Barcelona

Introducción

El COVID-19,[1] cuya primera detección en humanos tuvo lugar en diciembre de 2019, fue declarado una emergencia de preocupación internacional por la Organización Mundial de la Salud (OMS) el 30 de enero de 2020 y, como consecuencia de la rápida propagación y severidad del virus, escaló al estatus de pandemia el 11 de marzo de 2020.[2] Hasta abril de 2022, el COVID-19 se ha extendido por prácticamente todos los países del mundo, con cuatrocientos setenta y seis millones de casos confirmados y un número de muertes que supera los seis millones de personas.[3] El impacto de la pandemia se ha hecho sentir a todos niveles, pero especialmente negativos han sido los efectos sociales[4] y la alteración de la vida económica,[5] generando gran presión en los gobiernos que se vieron obligados a operar en un contexto de incerteza radical.[6] Dentro las medidas para. gestionar la crisis sanitaria, la vacunación fue calificada por la OMS como una herramienta crítica para. acabar con la pandemia.[7]

En esta línea, el 17 de junio de 2020, la Comisión Europea presentó la Estrategia de Vacunación de la Unión Europea (UE).[8] Como resultado de la implantación de planes de vacunación en los distintos estados europeos,[9] algunos sectores de la población se mostraron escépticos o se opusieron a ser vacunados.[10] Las preocupaciones relacionadas con la seguridad, los posibles efectos secundarios y las dudas sobre la eficacia de las vacunas se encuentran entre las razones principales de la oposición o dudas sobre la vacunación.[11] La referencia a los derechos humanos es frecuente entre estos grupos en un intento por afirmar la libertad de decidir no vacunarse. Por ejemplo, ante el Tribunal Europeo de Derechos Humanos (TEDH) se han intentado acciones en contra de leyes nacionales bajo el argumento de que intentan obligar a la ciudadanía a vacunarse al exigir pruebas de vacunación del COVID-19 o demostrar que no se tiene el virus, como condición para. el acceso a ciertos establecimientos o para. viajar.[12]

También se han intentado acciones por miembros del cuerpo de bomberos de Francia que al negarse a vacunarse han sido suspendidos de su empleo sin goce de sueldo, de conformidad con la legislación interna para. la gestión del COVID-19.[13] Desde el extremo opuesto, otros sectores ven a la vacunación obligatoria, como algo necesario para. reducir los contagios, evitar muertes, lograr la protección de la comunidad y de los sectores vulnerables, así como

Vacunación Obligatoria, continued

evitar la saturación de los hospitales.[14] Por ejemplo, el Parlamento francés estableció la obligación de vacunación para. los trabajadores del sector de la salud a partir de julio de 2021.[15] Alemania, Grecia, Italia, Letonia y Hungría tienen medidas similares.[16] Úrsula von der Leyen, presidenta de la Comisión Europea, a finales de 2021, sostuvo que era el momento de comenzar a discutir la posibilidad de establecer la vacunación obligatoria de carácter universal.[17] En Italia tienen una ley que establece obligaciones de vacunación para. mayores de 50 años,[18] Grecia para. mayores de 60, pero Austria es el único país de la Unión Europea en haber establecido la vacunación obligatoria universal para. los mayores de 18 años desde el 3 de febrero de 2022, aunque ahora la aplicación de la ley se encuentra suspendida.[19] Actualmente hay una propuesta pendiente de decisión para. hacer obligatoria la vacunación en Alemania para. los adultos.[20] Más aún, pese a que las mejoras experimentadas en algunos países europeos han conducido al levantamiento de restricciones, el riesgo de que la crisis sanitaria se agrave nuevamente no puede descartarse,[21] como demuestra el reciente endurecimiento del confinamiento de la población de Shanghái.[22] Por lo tanto, es relevante analizar la legalidad de la vacunación obligatoria a la luz del Convenio Europeo de Derechos Humanos (CEDH),[23] que es la base normativa del sistema europeo de protección de los derechos humanos.

Características de la vacunación obligatoria

La vacunación obligatoria no es una idea nueva. Uno de los primeros antecedentes de esta práctica lo encontramos en 1806, cuando Elisa Bonaparte ordenó la vacunación obligatoria de la viruela en el Principado de Luca y Piombo, actualmente en Italia.[24]

La vacunación obligatoria consiste en establecer la obligación legal de vacunarse, acompañada de sanciones para. los casos de incumplimiento. La vacunación obligatoria la impone la autoridad pública a través de sus mecanismos normativos y es implementada, normalmente, a través del sistema de salud público. Conviene destacar que, conforme al Pacto Internacional de Derechos Económicos, Sociales y Culturales, los Estados tienen la obligación de garantizar el derecho humano universal al disfrute del "más alto nivel posible de salud física y mental" y para. lograrlo, expresamente se les reconoce el derecho a adoptar medidas de prevención y tratamiento de las enfermedades epidémicas.[25] Aunque el CEDH ni sus Protocolos recogen el derecho a la salud, los Estados europeos tienen la obligación de proteger las vidas y la integridad física de las personas, incluida la salud pública, dentro de su jurisdicción.[26] De hecho, se han intentado acciones ante el TEDH por considerar que un país no ha cumplido con sus obligaciones positivas en la gestión de la crisis del COVID-19.[27] Así, los planes nacionales de vacunación y las normas sobre vacunación obligatoria, si se cumplen los requisitos de legalidad que comentaremos más adelante, tienen cobertura tanto por el marco universal como el regional europeo de protección de los derechos humanos.

Las medidas que se adoptan en el ámbito de las relaciones entre particulares, por ejemplo, las de carácter laboral, no deben ser consideradas medidas de vacunación obligatoria, aunque pueden tener implicaciones relacionadas con los derechos humanos. Existe, además, una diferencia entre vacunación obligatoria y vacunación a la fuerza o forzada. En el primer caso existe una norma que crea una obligación legal que exige la vacunación, con independencia

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Compulsory Vaccination in Light of the European System for the Protection of Human Rights

By Miguel Ángel Elizalde Carranza, Barcelona

Introduction

COVID-19,[1] which was first detected in humans in December 2019, was declared an emergency of international concern by the World Health Organization (WHO) on 30 January 2020 and, as a consequence of the rapid spread and severity of the virus, escalated to pandemic status on 11 March 2020.[2] As of April 2022, COVID-19 has spread to virtually every country in the world, with 476 million confirmed cases and a death toll exceeding 6 million people.[3] The impact of the pandemic has been felt at all levels, but the social effects have been especially negative,[4] as well as changes in economic life,[5] generating great pressure on governments that were forced to operate in a context of radical uncertainty.[6]

Among the measures to manage the health crisis, vaccination was described by the WHO as a critical tool to end the pandemic.[7] Accordingly, on 17 June 2020, the European Commission presented the Vaccination Strategy of the European Union (EU).[8] As a result of the implementation of vaccination plans in the different European states,[9] some portions of the population were skeptical or opposed to being vaccinated.[10] Concerns related to safety, possible side effects, and doubts about the efficacy of vaccines are among the main reasons for opposition or doubts about vaccination.[11]

References to human rights are also frequent among those attempting to assert the freedom not to vaccinate. For example, before the European Court of Human Rights (ECtHR), actions have been brought against national laws on the grounds that those laws try to force citizens to get vaccinated, by requiring proof of COVID-19 vaccination or by requiring demonstrations that the citizen does not have the virus, as a condition for access to certain establishments or for travel. Actions have also been attempted by French fire brigade members[12] who, by refusing to be vaccinated, have been suspended from their employment without pay, in accordance with domestic legislation for the management of COVID-19. From the opposite extreme, others see mandatory vaccination as necessary to reduce infections, avoid deaths, achieve the protection of the community and vulnerable sectors, as well as avoid the saturation of hospitals.[13] For example, the French Parliament established the vaccination obligation for health sector workers starting in July 2021.[14] Germany, Greece, Italy, Latvia, and Hungary have similar measures.[15] At the end of 2021, Ursula von der Leyen, president of the European Commission, said it was time to start discussing the possibility of establishing universal mandatory vaccinations.[16] Italy has a law that establishes vaccination obligations for those over age 50,[17] and Greece for those over age 60, but Austria is the only country in the European Union to have established universal mandatory vaccination for those over 18 years of age.[18] The law was effective from 3 February 2022, though enforcement of the law is now suspended. There is also a pending proposal to make vaccination mandatory in Germany for adults.[19] Although improvements in some European countries have led to the lifting of restrictions,[20] the risk of the health crisis worsening again cannot be ruled out,[21] as evidenced by the recent tightening of the lockdown of the population of Shanghai.[22] Therefore, it is relevant to analyze the legality of mandatory vaccination in light of the European Convention on Human Rights (ECHR), which is the normative basis of the European system for the protection of human rights.[23]

Characteristics of Mandatory Vaccination

Mandatory vaccination is not a new idea. One of the first antecedents of this practice is found in 1806, when Elisa Bonaparte ordered compulsory smallpox vaccination in the Principality of Luca and Piombo, currently in Italy.[24] Mandatory vaccination consists of establishing a legal obligation to be vaccinated, accompanied by sanctions for cases of noncompliance. Mandatory vaccination is

imposed by the public authority through its regulatory mechanisms and is normally implemented through the public health system. It should be emphasized that, under the International Covenant on Economic, Social and Cultural Rights (ECHR), states have an obligation to guarantee the universal human right to the enjoyment of the "highest attainable standard of physical and mental health" and to achieve this, they are expressly recognized as having the right to take measures for the prevention and treatment of epidemic diseases.[25] Although the ECHR and its protocols do not reflect the right to health, European states have an obligation to protect the lives and physical integrity of individuals, including public health, within their jurisdictions.[26] In fact, actions have been attempted before the ECtHR on the grounds that a country has not fulfilled its positive obligations in the management of the COVID-19 crisis.[27] Thus, national vaccination plans and rules on compulsory vaccination, if the legality requirements discussed below are met, are covered by both the universal and the European regional framework for the protection of human rights.

Measures taken in the field of relations between individuals, for example, those of a labor nature, should not be considered mandatory vaccination measures, although they may have human rights implications. There is also a difference between compulsory vaccination and forced vaccination. In the first case, there is a rule that creates a legal obligation that requires vaccination, regardless of the preferences of the affected persons—usually subject to exceptions—and in case of noncompliance can give rise to the sanctions provided for in the law. Forced vaccination is that which is applied by means of physical coercion and is usually prohibited.[28] For example, Article 5 of the Convention on Human Rights and Biomedicine states that an intervention in the field of health can only be carried out with the free, prior, and informed consent of the person concerned.[29]

There are different possible scopes for the obligation to be vaccinated, ranging from establishing the universal obligation to limiting it to some professional sectors, age groups, or geographical regions.[30] Normally, exceptions are made for people who cannot get vaccinated without putting their health at risk. The consequences of not getting vaccinated can also vary in severity. In some cases, fines can be imposed, while in others, access to certain establishments or services can be denied; a work suspension can be applied; even, in some countries, criminal sanctions have been threatened, although this is not the case in Europe.[31] Finally, it is worth mentioning that incentives may be established under voluntary vaccination plans, including certain privileges such as access to certain establishments subject to being vaccinated. While it is true that the deprivation of this type of privilege can be equated with a sanction for lack of vaccination, these cases are not mandatory vaccination since the basic element of the law establishing the obligation of vaccination is missing.[32]

The Right to the Protection of Privacy as a Legal Framework of Reference to Analyze the Legality of Mandatory Vaccination

Depending on the case, several categories of human rights recognized in the ECHR may relate to mandatory vaccination. Among others, if the sanction is that the lack of a vaccine is punishable by denying access to school or the workplace, the right to education or work could be affected; if travel or meetings are limited, the rights affected would include freedom of movement and the right of association; religious freedom can also play a role if vaccination goes against what a religion establishes or if it prevents the practice of group worship.[33] However, in general terms, Article 8 of the ECHR is a good reference for analyzing the legal aspects related to compulsory vaccination, since much of the reasoning applicable to this provision extends to other rights, in particular, exceptions. This provision recognizes the right to privacy and gives personal autonomy an important role as an interpretative principle. The ECtHR has held that the guarantee provided by Article 8 is to ensure the development of the personality of each individual in his or her relationship with other persons, without external interference.[34] In this regard, a negative and a positive obligation are created for state parties. On the one hand, states must prevent public authority from arbitrarily interfering in people's private lives.[35] On the other hand, states must ensure respect for private life in relations between individuals, for example, in the framework of an employment relationship.

The concept of "private life" cannot be exhaustively defined. In a generic way, it includes the physical and psychological integrity of people. In this way, aspects

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TRANSPARENCIA Y GOBERNANZA DE DATOS EN EL MARCO DE LOS DERECHOS HUMANOS EN CONTEXTOS DE PANDEMIAS POR COVID-19

Por Lorayne Finol Romero, Santiago

Introducción

Bajo la premisa que resulta vital para. el manejo de pandemias, retomar el debate en torno a la gobernanza de la información abierta en portales de datos centralizados de información de interés público, conocidos como *opendata.gov*. El objetivo de este análisis fue examinar la regulación de la transparencia y los datos abiertos gubernamentales en América Latina por la importancia en la protección del derecho a la información para. hacer frente al COVID-19 y para. identificar posibles límites de la gobernanza de la información abierta en el marco de los derechos humanos.

Considerando que los gobiernos han utilizado y publicado los datos sobre la pandemia con énfasis en los aspectos sanitarios, amparados en la normativa e infraestructura desarrolladas con anterioridad a la pandemia, resulta relevante y oportuno analizar si estas prácticas se ajustan al bloque convencional establecido en las disposiciones de la Convención Americana sobre Derechos Humanos, mejor conocida como Pacto de San José y los estándares de la Corte Interamericana de los Derechos Humanos, que los obliga a respetar, proteger, garantizar y adoptar dentro su ordenamiento interno jurídico interno todas las medidas legislativas necesarias para. hacer efectivos los derechos y libertades reconocidos como derechos humanos, entre ellos, el derecho de acceso a la información y la transparencia de la gobernanza como un derecho fundamental por tratarse de los pilares rectores del estado de derecho y la democracia.

En otras palabras, como consecuencia de la necesidad de abrir la sala de máquinas del Estado en medio de la gestión de la pandemia, se agrega otro elemento relacionado con la implementación ponderada de prácticas de gobernanza de la información abierta como límite ponderado en el marco de otros derechos humanos, vulnerables por la divulgación de información protegida y sensible de las personas especialmente durante las pandemias. Por lo que cada vez cobra más fuerza examinar el alcance de los mecanismos legales vigentes garantes del derecho de acceso a la información y la transparencia de la gestión pública y su ponderación frente a otros derechos fundamentales, especialmente en contextos complejos y dinámicos como la pandemia por COVID-19, en pos de combatir la

Transparencia, continued

desinformación. De forma análoga lo justifican Aguado-Guadalupe y Bernaola-Serrano (2020), cuando describen a la pandemia COVID-19 como la peor ola de desinformación de la historia.

Por lo antes señalado, este análisis busca aportar elementos que permitan dar respuesta a la siguiente interrogante ¿Qué avances legislativos de transparencia focalizada y datos abiertos gubernamentales se evidencian en los países de América Latina? para. ello, se estableció como objetivo general evaluar la puesta de los datos abiertos en los países que conforman la Alianza para. el Gobierno Abierto, a los fines de determinar limitaciones y alcances de este tipo de regulación frente a emergencias por pandemias.

El contenido ha sido organizado en tres apartados. En el primero, se analizaron las precisiones conceptuales de la transparencia focalizada con datos abiertos con enfoque de derechos fundamentales. En el segundo, el estado del arte de los mecanismos legales del derecho fundamental de acceso a la información de interés público en América Latina en portales de transparencia activa conocidos como *opendata.gov*. En el tercero, Gobernanza abierta de información, transparencia activa y datos abiertos en contextos de pandemia para. hacer frente a la desinformación por COVID-19. Por último, las conclusiones y reflexiones fundamentales que buscan destacar los límites de la gobernanza de la información abierta en el marco de los derechos humanos.

Precisiones conceptuales: Transparencia activa, datos abiertos

La historia reciente revela una verdadera revolución en materia de acceso a la información (Castells, 2015). Las personas producen más de 2.5 quintillones de bytes de datos cada día y, las empresas ven en este fenómeno una oportunidad para. impulsar modelos de inteligencia artificial que puedan procesar este alto tráfico de conjunto de datos en portales de datos de transparencia proactiva focalizada (Margetts & Dorobantu, 2019). Sin embargo, considerando que gran cantidad de los datos e información que los gobiernos recolectan de sus ciudadanos, puede ser re-utilizada para. mejorar la educación, el sistema salud, así como, la prevención de la desinformación, en la práctica, se observa que la incorporación de los datos abiertos en el diseño, formulación e implementación de políticas y servicios públicos, especialmente en contextos de pandemias se ha convertido en una terea pendiente de los gobiernos de América Latina (Safarov, Meijer & Grimmelikhuijsen, 2017).

Lo que impacta a su vez, con el modelo de digitalización del sector público que recién toma parte de este fenómeno de los datos abiertos gubernamentales, según el cual, se considera a la información de interés público un bien de uso común (Obama, 2009). Este fenómeno fue sellado a través de la ley *Open Government Data Act*, (2019), mejor conocida como "Ley de fundamentos para. la formulación de políticas basada en evidencia" Número 115-11, allana el camino hacia la llamada revolución de los datos, y ha impulsado un conjunto de reformas jurídicas dirigidas a fortalecer la implementación de prácticas de gobernanza abierta también conocida como *modelo de gobierno abierto*, que buscan la máxima eficiencia de la acción pública, así como, el rescate de la confianza de los ciudadanos en la democracia (Hood, 2006; OGP, 2011; ODS, 2015; Sandoval-Almazan & Styrin, 2018; Criado, Ruvalcaba-Gómez & Valenzuela-Mendoza, 2018).

Conforme a ello, este análisis mediante la comparación de las leyes especiales en la materia, se busca contribuir con consideraciones jurídicas en torno a los datos abiertos para. el manejo de la pandemia por COVID-19 en una muestra

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Transparency and Governance of Data in the Framework of Human Rights in the Context of the COVID-19 Pandemic

By Lorayne Finol Romero, Santiago

Under the premise that it is vital for the management of pandemics to resume the discussion about open information governance in centralized data portals of information of public interest, known as *opendata.gov*, the objective of this analysis is to examine transparency in regulation and open government data in Latin America, given the importance of the protection of the right of access to information to deal with the COVID-19 pandemic and to identify possible open information governance limits within the framework of human rights.

Considering that governments have used and published data on the pandemic with focus on health concerns, based on the regulations and infrastructure developed prior to the pandemic, it is relevant and opportune to analyze whether these practices comply with the conventional framework established by the provisions of the American Convention on Human Rights, better known as the Pact of San José, and the standards of the Inter-American Court of Human Rights, which obliges them to respect, protect, guarantee, and adopt within their domestic legal system all necessary legislative measures in order to fulfill the rights and freedoms recognized as human rights, among them, the right of access to information and governmental transparency as fundamental rights because they are the guiding principles of the rule of law and democracy.

In other words, as a consequence of the need to open the government's "engine room" in the midst of the pandemic's management, another element related to the weighted implementation of open information governance practices is added as a weighted limit within the framework of other human rights, which are vulnerable due to the disclosure of protected and sensitive information of individuals, especially during pandemics. Therefore, it is becoming increasingly important to examine the scope of existing legal mechanisms that guarantee the right of access to information and transparency of public management and its weighting against other fundamental rights, especially in complex and dynamic contexts such as the COVID-19 pandemic, in order to counter misinformation.

Therefore, this analysis aims to provide elements to answer the following question: What legislative advances in targeted transparency and open government data are present in Latin American countries? To this end, the general objective was to evaluate the open data implementation in the member states of the Open Government Alliance in order to determine the limitations and scope of this type of regulation in dealing with pandemic emergencies. The content has been organized into three sections. In the first one, the conceptual specifications of transparency of open data with a focus on fundamental rights were analyzed. The second deals with state-of-the-art legal mechanisms protecting the fundamental right for access to information of public interest in Latin America in active transparency portals known as *opendata.gov*. The third deals with open information governance, active transparency, and open data in pandemic contexts to address misinformation during the COVID-19 pandemic. Finally, key conclusions and discussions that seek to highlight the limits of open information governance within the framework of human rights are presented.

Conceptual Specifications: Active Transparency, Open Data

Recent history reveals a true revolution in terms of access to information (Castells, 2015). People produce more than 2.5 quintillion bytes of data every day, and companies see this as an opportunity to build artificial intelligence models that can process this high traffic data set into targeted proactive transparency data portals (Margetts & Dorobantu, 2019). Considering that much of the data and information that governments collect from their citizens can be used to improve education and health systems, as well as to prevent misinformation, in practice it is observed that the use of open data in the design, formulation, and implementation of public policies and services, especially

Transparency, continued

in the context of pandemics, has become a pending task for Latin American governments (Safarov, Meijer & Grimmelikhuijsen, 2017).

This, in turn, has an impact on the digitization model of the public sector, which has just become part of the open government data phenomenon, according to which information of public interest is considered good for common use (Obama, 2009). This phenomenon was sealed through the Open Government Data Act (2019), better known as the "Foundations for Evidence-Based Policy Making Act," Number 115-11, that paves the way toward the so-called data revolution and has driven a set of legal reforms aimed at strengthening the implementation of open governance practices, also known as the open government model, which seek maximum efficiency of public action, as well as the recovery of citizens' trust in democracy (Hood, 2006; OGP, 2011; ODS, 2015; Sandoval-Almazan & Styrin, 2018; Criado, Ruvalcaba-Gómez, & Valenzuela-Mendoza, 2018).

Accordingly, this analysis, through the comparison of special laws on the subject, seeks to contribute to legal considerations on open data for the management of the COVID-19 pandemic in a limited sample of Latin American countries, and to contrast transparency indexes, quality of democracy, and the ranking of open data portals of the ILDA Barometer (2018), as well as the global ranking of democracy of EUI (2020) and Transparency International (2020), which could explain the worst indicator of freedom elaborated by Global Freedom (2020), which after the fourteenth consecutive period shows a decrease in global freedom (Freedom House, 2020). In line with the above-mentioned considerations, in Latin America, empirical records have sought to be repelled through the practice of principles such as the Declaration of the Open Government Partnership, hereinafter OGP. To better understand the phenomenon of open public information and open government, hereinafter OG, it must be said that together they make up the foundations of analysis of this research, comprised by the implementation of transparency focused on open data sets, given its impact on strengthening democracy. This analysis operates under the premise that OGP has the potential to contribute to a number of positive outcomes, for example, to strengthen the relationship between citizens and government agencies, ensuring the exercise of the right of access to public information, i.e., government transparency (Safarov et al., 2017).

In this sense, public information constitutes the core of the accountability process, being protected as a universal human right of access to public information (Special Report of the Inter-American Commission on Human Rights, 2010). According to the critical perspective of Chalabi (2014), who believes that laws are a harmonized system for the protection of rights, the legislative development in Latin American public international law in the last period has been conducted with respect to the so-called data revolution and the open data phenomenon. The latter being considered catalysts, according to Corrales-Garay, Urbina-Criado, & Mora-Valentín (2019), due to their importance and impact at the economic, political, and social level, is a fact that has become evident, triggering an accelerated process of opening up state information as an essential element for free access and distribution without legal restrictions that prevent its reuse (Lnenicka & Komarkova, 2019).

This shared view was already reflected in Recital 16 of Directive 2003/98/EC (EC, 2003), when it highlighted the importance "for citizens as an element of transparency and guidance for democratic participation." In Latin America, it has been institutionalized as an OG practice since 2011, driven by the commitments subscribed by the countries that make up the OGP, from which emerges the interest of Latin American governments in open data (International Open Data Charter, 2015). Having said this, it is important to distinguish between government information and public information in open data formats. Because the publication of government information, understood as an obligation of state agencies to proactively publish information related to their public management, is closely linked to the accountability process inherent to high-quality democracies. At this point, it should be noted that *opendata.gov* has increased exponentially, partly due to its intrinsic characteristic of being a space where government information, equivalent to billions of bytes connected in one place, makes up the web of high-value data sets

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The New Frontier – Expanded Professional Employment Opportunities for O-1 Visa Holders and National Interest Waiver Applicants

By Larry S. Rifkin, Miami

On 2 February 2021, President Biden issued Executive Order 14012: Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, requiring agencies to conduct a top-to-bottom review of existing regulations, orders, guidance documents, and policies to identify barriers that impede access to immigration benefits and fair adjudications of these benefits. In accordance with the president's executive order, on 21 January 2022, U.S. Citizenship and Immigration Services (USCIS) issued two policy alerts. The first policy alert clarified how USCIS will evaluate evidence to determine eligibility for O-1A nonimmigrants of extraordinary ability, with a focus on persons in science, technology, engineering, or mathematics (STEM) fields.[1] The second policy alert updated guidance on adjudicating requests for national interest waivers regarding job offer and labor certification requirements for certain advanced degree professionals and individuals of exceptional ability.[2] The government's policy announcements represent the current administration's efforts to promote legal immigration under the existing regulatory framework. This article will review and examine the impact of this updated guidance on the adjudication of nonimmigrant and immigrant benefits requests.

O-1 Nonimmigrant Status

Standard to Qualify

O-1 nonimmigrant status, as defined in the Immigration and Nationality Act (INA), is available to individuals who possess extraordinary ability in the sciences, arts, business, education, or athletics, which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions, a demonstrated record of extraordinary achievement.[3] In all cases, an O-1 beneficiary's achievements must have been recognized in the particular field through extensive documentation.[4] The supporting documentation for an O-1A petition (extraordinary ability in the sciences, arts,

O-1 Visa, continued

education, business, or athletics) must include evidence that the beneficiary has received a major internationally recognized award (such as the Nobel Prize) or at least three of the following forms of evidence:

- Documentation of the beneficiary's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- Documentation of the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- Published material in professional or major trade publications or major media about the beneficiary, relating to the beneficiary's work in the field for which classification is sought, which must include the title, date, and author of such published material and any necessary translation;
- Evidence of the beneficiary's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization for which classification is sought;
- Evidence of the beneficiary's original scientific, scholarly, or business-related contributions of major significance in the field;
- Evidence of the beneficiary's authorship of scholarly articles in the field published in professional journals or other major media;
- Evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
- Evidence that the beneficiary has either commanded a high salary or will command a high salary or other remuneration for services, as evidenced by contracts or other reliable evidence.[5]

Providing the required evidence to meet three of the listed criteria does not, in itself, establish that the individual meets the standard for classification as a person of extraordinary ability or extraordinary achievement.[6] When the evidentiary requirements are satisfied, the immigration officer must then proceed to evaluate the totality of all the evidence in the record to determine whether it establishes that the individual has sustained national or international acclaim and is one of the small percentage who have arisen to the very top of his or her field.[7]

Impact of USCIS's O-1 Policy Alert

USCIS's O-1 Policy Alert dated 21 January 2022 made several updates to the agency's online Policy Manual, with a focus on persons in the science, technology, engineering, or mathematics (STEM) fields. First, the Policy Manual section for O-1 beneficiaries (Volume 2, Part M) now includes an appendix that describes examples of evidence that may satisfy the O-1A evidentiary requirements.[8] The Policy Manual specifically states that "many of the listed examples and considerations are especially relevant to beneficiaries in the fields related to science, technology, engineering, or mathematics."[9] Due to the highly technical nature of STEM fields and the complexity of the evidence that is often submitted, USCIS posted the appendix to highlight examples and considerations that are likely to come up in this context.[10] In the appendix, USCIS details each criterion and lists examples of evidence that may be used to satisfy the particular requirement. This appendix will be extremely helpful to practitioners by guiding them as to the suggested types of evidence that USCIS will accept.

Second, the guidance clarifies when an individual may submit comparable evidence if a particular criterion is

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WORLD ROUNDUP

AUSTRALIA

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Should governments care about the increase in working from home?

Working from home represents a potential overall gain to society, and there is a strong case to allow workers and firms to negotiate mutually beneficial outcomes. This negotiation will happen largely at the individual (contracts) or firm level (workplace policies) and outside the formal workplace relations system.

But it is appropriate for governments to monitor labour market and regulatory settings to ensure they remain fit for purpose: that they are fair as well as flexible and efficient and that they continue to promote the safety and protection of workers.

Workplace Health and Safety

Australia's work health and safety (WHS) laws are flexible and seem well-placed to manage an increase in home-based work. WHS is the joint responsibility of employers and workers, and this responsibility applies wherever work is carried out, including in the home.

- Case law regarding the responsibilities of employers in addressing common household risks and supplying equipment suggests that current WHS laws are reasonable and do not impose undue costs. More cases will emerge as many more people work from home, and governments will need to ensure that WHS laws do not impede widespread and sustained working from home.
- The review of the model WHS laws in 2023 provides an opportunity for governments to ensure that WHS legislation is keeping pace with changing work practices.
- The Fair Work Act 2009 (Cth) provides some employees with a right to request home-based work based on their individual circumstances. This includes parents of young children, carers, people with a disability, older workers, and people experiencing family violence. Modern awards, enterprise agreements, workplace policies, and some state legislation give broader groups of workers the right to request, and some improved access to, home-based work.
- Employers' decisions to move to a remote only model are subject to obligations to consult with employees about these decisions.

What is a 'right to disconnect'?

The Australian Council of Trade Unions (ACTU) proposed a Working from Home Charter that sets out a range of rights and protections to which people working from home should have access. The ACTU argued that the issue of work life bleeding into home life poses significant risks to well-being and equity, and suggests that there needs to be legal and reasonable limits on working time—including a "right to disconnect" from work emails, telephone calls, and other forms of contact outside of scheduled work hours. (A corollary of this right is that workers must not be encouraged to be, or rewarded for being, constantly connected to work systems.)

As case law continues to evolve, striking a balance between the needs of employers and employees is essential in arriving at an interpretation of "reasonably practicable" in a work-from-home context that is both meaningful and workable.

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CARIBBEAN

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Caribbean countries model data protection laws after the GDPR.

In 2019 at the World Economic Forum, Antonio Neri, CEO of Hewlett Packard said, "Data is the new currency." This analogy has become very popular because data is now considered one of the most valuable commodities.

In the European Union (EU), data protection is a fundamental right, and the General Data Protection Regulation (GDPR), which came into force on 25 May 2018, is the framework for protecting that right. The GDPR represents one of the highest standards of data protection in the world, creating a unified legal basis for data protection and enforcement across the European Union.

Other countries are looking to the GDPR model as they develop or implement their own laws to protect data.

The GDPR became a model for many national laws outside the EU, including United Kingdom, Panama, Argentina, Brazil, Japan, Chile, South Korea, Kenya, and Mauritius. Reputable offshore jurisdictions in the Caribbean have not been left behind. In this article I will share the key aspects on what some of the Caribbean jurisdictions have done regarding this matter:

The Bahamas (Bahamas)

The Bahamas' Data Protection (Privacy of Personal Information) Act (DPA) and the Bahamas Guide for data controllers sets out the legal framework for the collection, use, and disclosure of personal information. The DPA was passed in 2003 but came into force in April 2007. Both documents are consistent with internationally recognized principles established by the Council of Europe, the EU, the Organization for Economic Co-operation and Development (OECD), and the United Nations (UN).

The Bahamas has the Office of the Data Protection Commissioner where related matters and complaints are handled.

A person guilty of an offence under the DPA shall be liable on summary conviction to a fine not exceeding US$2,000; or on conviction on information, to a fine not exceeding US$100,000.

Cayman Islands

The Cayman Islands Data Protection Law, 2017 (DPL) came into force on 30 September 2019. The Ombudsman is the main regulator for data protection in the Cayman Islands. The Office of the Ombudsman of the Cayman Islands, created in July 2004, is an impartial and independent office of Parliament that acts as the Cayman Islands' guardian of fairness, transparency, and accountability to encourage government departments and agencies to better serve the public.

The DPL applies to personal data processed by "data controllers" and "data processors" established within the Cayman Islands and to data controllers established outside the Cayman Islands that process personal data within the Cayman Islands otherwise than for the purposes of transit of the data through the Cayman Islands. Where a data controller established outside the Cayman Islands processes data in the Cayman Islands, it will be required to nominate a local representative in the Islands who shall be the data controller for the purposes of compliance with the DPL.

Breaches of the DPL could result in fines of up to CI$100,000/US$122,000 per breach, imprisonment for a term of up to five years, or both. Other monetary penalties of up to CI$250,000/US$305,000 are also possible in certain circumstances where there has been a serious contravention of the DPL.

British Virgin Islands (BVI)

The British Virgin Island's Data Protection Act 2021 (DPA) was published in the Gazette in April 2021 but came into force in July 2021.

The DPA applies to any person or entity that processes, or has control over or authorizes the processing of, personal data in connection with a commercial transaction, so long as that person either:

a. is established in the British Virgin Islands and processes personal data, or employs or engages any other person to process personal data on their behalf, whether in the context of that establishment; or
b. is not established in the British Virgin Islands but uses equipment in the BVI for processing personal data other than for the purposes of transit through the BVI.

Data controllers must take practical steps to protect personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration, or destruction. Data controllers are not required to register with or notify the BVI authorities, and presently there is no requirement for the appointment of data protection officers; however, it will soon be recommended best practice.

Breaches of the DPA could attract fines of US$250,000 to US$500,000, and directors and officers may be held liable; however, a deadline to become compliant has not been established. Moreover, there is no national data protection authority in the BVI. Instead, courts are guided by the English common law duties of privacy and confidentiality.

Panama

Law 81 on Personal Data Protection (PDP) was published in the Official Gazette in 2019 but came into force in March 2021. Besides the PDP, the Constitution of the Republic of Panama establishes the general principle of personal data protection.

According to the PDP, all principles, rights, obligations, and procedures related to the protection of personal data, considering its interrelation with private life and other fundamental rights and freedoms of citizens, apply to natural or legal persons, public or private law, and for-profit or nonprofit organizations.

Under the PDP, the regulator is the National Authority for Transparency and Access to Information (ANTAI by its acronym in Spanish). Additionally, the PDP establishes a Protection of Personal Data Council, which is composed of different public authorities and private associations and that serves as a consultant body to ANTAI.

ANTAI is entitled to order the provisional or permanent cease of storing and processing of personal data and has the power to impose economic fines that may go up to US$10,000.

Belize

Belize (Belice) has chosen to remain silent about this issue. For now, there is no data protection legislation in Belice. Many service providers in Belice are executing agreements, implementing data protection compliance programs, updating their internal policies, and in many other ways responding to the requests of clients located in jurisdictions that do require compliance with a data protection law. This is mainly to keep a good business relationship but not because there is a legal obligation in Belice.

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CUBA

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Cruise lines sailing from South Florida to Cuba violate the ban on tourism.

On 21 March 2022, U.S. District Court Judge Beth Bloom of the Southern District of Florida found Carnival Corporation, Royal Caribbean Group, MSC Cruises, and Norwegian Cruise Line Holdings liable for the use of the Cuban port facilities and docks confiscated from Delaware entity Havana Docks Corporation by the Cuban government in 1960. Havana Docks had standing to bring the lawsuit since it purchased the concession and all rights and interests for the operation of the Port of Havana in 1920. Around 24 October 1960, the Cuban government took possession of Havana Docks' assets, which included the concession.

This case was brought using the following regulations. On one hand, the U.S. Congress passed the Helms-Burton Act (the Act) in 1996. The Act extended the territorial application of the initial embargo to apply to foreign companies trading with Cuba. Also, it penalized foreign companies that engaged in a commercial activity with the Cuban government that involved the company's use or otherwise benefit of confiscated property formerly owned by U.S. citizens after 1 January 1959. Additionally, Title III of the Act provides a private cause of action to victims of confiscation. Under the Act, the U.S. president may suspend the right of private parties to bring a cause of action under Title III, which had been the case until President Trump allowed private cases to proceed in 2019.

On the other hand, in January 2011, the regulations regarding permitted travel to Cuba under the Cuban Assets Control Regulations (CACR) were amended to include travel for "educational activities," with the requirement of a specific license. In January 2015, the Obama administration further amended the CACR to authorize travel-related transactions under a "general license," which was easily obtained by most travelers. But the amended regulations expressly stated that tourism was not allowed.

Upon the enactment of this "general license," the cruise lines started sailing from South Florida to Cuba from 2016 to the middle of 2019 using docks covered by the Havana Docks concession. Since President Trump had lifted the suspension of private causes of action under Title III, Havana Docks filed the federal civil lawsuit.

Havana Docks argued that the cruise lines and their passengers traveling to Cuba were engaged in tourism and that the CACR's regulations regarding educational activities were not properly followed. One of the cruise lines' arguments was that the use of the docks was incidental to legal travel. The cruise lines also offered as evidence written statements from U.S. State Department personnel representing they would not take any action against cruise lines given the lawful travel exception under the Act. Judge Bloom's opinion was that the shore excursions and other activities engaged in by the passengers in Cuba clearly constituted tourism since these activities did not have a set schedule or follow other requirements pursuant to CACR.

Since Judge Bloom has found the cruise lines liable, only three options are left to the cruise lines: (1) file an appeal; (2) enter into a settlement with Havana Docks for millions of dollars; or (3) risk a jury trial scheduled for 23 May 2022[1] to address the amount of damages suffered by Havana Docks, which can potentially go into the billions.

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Endnote

1 This article was written on 15 April 2022. Watch for an update on the Havana Docks case against the cruise lines in the next edition of the *ILQ*.

INDIA

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Amazon and Future Retail Limited agree to appear before Singapore arbitration tribunal.

Amazon and Future Retail Ltd. (Future) have been involved in a protracted legal dispute over a 24,713-crore (US$3.2 billion) deal between Future Group and Reliance, which is run by India's richest man, Mukesh Ambani. In April 2022, Amazon and Future agreed to appear before the SIAC arbitral tribunal and resume the related arbitration case.

The Supreme Court of India bench comprising Chief Justice N. V. Ramana and justices Krishna Murari and Hima Kohli received the agreement between Future Group and Amazon to resume the arbitral proceedings before the Singapore International Arbitration Centre (SIAC). Through an order dated 4 April 2022, the Supreme Court of India asked the companies to file a joint memo of consent terms after both agreed to resume proceedings before the SIAC: "It is stated and agreed by both the parties that they wish to appear before the Singapore International Arbitration Centre and request that the proceedings, pending adjudication before it, be expedited on the issues agreed upon between them. Towards this purpose, both the parties are directed to file a Joint Memo of Consent Terms by 05.04.2022."

In an order dated 6 April 2022, after reviewing the joint memo of consent terms filed by the parties, the apex court set aside a January order of a Division Bench of the Delhi High Court that stayed the proceedings before the arbitral tribunal and further ruled: "The parties will approach the Arbitral Tribunal to resume the Arbitration Proceedings, on an understanding that the Arbitral Tribunal will hear FRL's Termination Application and the Termination Application filed by respondent Nos. 2 to 13 under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 in priority to other matters and pass orders… . The Arbitral Tribunal may continue with the Arbitration Proceedings and conclude the hearings and pass an order or award as the case may be."

The crux of the dispute between the parties lies in a 2019 agreement between Amazon and Future where Amazon invested US$200 million in the Indian retail giant. When Future attempted to sell its assets to Reliance in 2020, due to hard times brought upon it by the COVID-19 pandemic, Amazon stopped the sale through arbitration proceedings in Singapore. As of 24 April 2022, Reliance canceled its retail deal after Future Group's secured creditors voted against it. This is a crucial dispute to watch because a victory for Amazon would position it to become a key player in India's US$900 billion retail market, and potentially give it a strategic advantage over Reliance.

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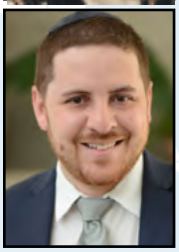
LATIN AMERICA



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Compliance concerns arise with Brazil's new instant payment method.

Last November, Brazil's instant payment method, Pix, completed one year. Since then, it has become the preferred payment method in Brazil, including for business transactions. Nevertheless, potential vulnerabilities in the Pix system, including its possible association with criminal activity (e.g., money laundering), have raised concerns from companies that want to ensure they are operating in compliance with the law.

The use of Pix as a new payment tool has raised concerns related to legal risks and exposure, particularly for financial institutions, which have specific obligations related to anti-money laundering (AML) and financial controls. Companies of any nature need to consider anticorruption, books and records, and reputation risks associated with the payment methods they use. In addition, although Brazil does not provide for corporate liability (except for environmental crimes), individuals (in particular, companies' employees, executives, and directors) are exposed to criminal liability.

Under Article 180 of the Brazilian Criminal Code, the act of acquiring, receiving, transporting, carrying, or hiding for one's own or someone else's benefit, or influencing a third party to, in good faith, acquire, receive or hide, something which is consciously known to be the proceeds of crime is deemed a felony. As money can be a "proceed of crime," the transfer of funds through Pix could also be a vehicle for committing such felony. From a corporate perspective, it should be noted that companies (and as a consequence, their representatives) that perform appropriate due diligence and are not aware of the crime will not be punished for receiving funds from an unlawful source.

The Brazilian anti-money laundering law considers it a violation to convert (illicit) assets, rights, or valuables

into licit assets; acquire, receive, exchange, trade, give, or receive as a guarantee; keep, store, move, or transfer any such assets, rights, and valuables; or import or export goods at prices that don't correspond to their true value, in an attempt of concealing or disguising the true nature, origin, location, disposition, movement, or ownership of those assets, rights, and valuables that result directly or indirectly from a money laundering crime. Likewise, it establishes obligations related to reporting and controls before COAF (Council for Financial Activities Control—in Portuguese, *Conselho de Controle de Atividades Financeiras*) for certain entities, which include financial institutions and other entities engaging in financial and payment-related activities (e.g., payment schemes, as explained below) and companies rendering consulting, accounting, auditing, advisory, and assistance or accessory services in financial transactions. Besides that, all individuals and entities that perform a primary or ancillary activity, such as raise intermediation, and application of third-party financial resources in national or foreign currency are also subject to reporting obligations. Therefore, Pix could be a vehicle for perpetuating money laundering.

Nevertheless, the Brazilian Central Bank (BACEN), which also establishes anti-money laundering provisions, differentiated the obligations of the payment service providers (PSPs) from end-users—which includes entities that are not considered PSPs—setting forth controls and reporting obligations only for PSPs providing Pix. Therefore, for companies that unknowingly receive money that is a product of a crime but is not part of a money-laundering scheme, there is no legal basis to penalize them under AML regulations.

Regarding measures against money laundering, BACEN also establishes controls for sanctions and requires that PSPs reject a transaction made by a United Nations-sanctioned individual or entity. Therefore, such a transaction is subject to sanctioning controls before reaching the end-user. In turn, it does not have the burden to implement "know your customer" or financial sanctions controls under BACEN due to the use of payment schemes.

Note, however, that BACEN's provisions on financial sanctions apply only to the UN's financial sanctions list; therefore, the PSPs' sanctioning, screening, and control obligations may not be extended to other sanctioning authorities (e.g., the United States, EU, UK, and France) to which companies may be exposed. Therefore, companies' internal due diligence controls are critical to mitigating this international sanction exposure. It is also noteworthy that the major PSPs operating Pix in Brazil are financial institutions with global operations; due to this exposure, they must also conduct screening based on the international sanctioning lists from other authorities.

In summary, assuming that appropriate due diligence is conducted as a primary preventive measure, together with other controls, companies do not need to be concerned about using Pix from a Brazilian anti-money laundering, criminal, and financial sanctions perspective provided that (1) they do not know or cannot reasonably know that the money is a product of crime; (2) the money is being paid to fairly remunerate services or products delivered; and (3) companies adopt, in their commercial contracts, provisions setting forth that they will not accept payments from unknown third parties on behalf of their approved/screened clients. Nevertheless, companies shall ensure proper controls to avoid and mitigate other risks based on local laws, such as violations related to books, records, and tax, and to avoid doing business with clients, suppliers, and other third parties that don't operate with ethics and integrity, thereby creating commercial and reputational risks.

New Colombian law aims to increase transparency and corruption prevention.

On 18 January 2022, Colombian Law 2195, which aims to implement measures to increase transparency, prevent corruption, and promote fair competition in both private and public spheres, was enacted. Law 2195 modified several Colombian regulations, with provisions that include:

- Strengthening the liability of legal persons for acts of corruption;
- Public asset management systems and asset forfeiture;
- Information exchange, articulation, and collaboration mechanism for the fight against corruption;
- Pedagogy for the promotion of transparency and the fight against corruption;
- Administrative provisions for strengthening the fight against corruption;
- Contractual transparency aspects;
- Indemnification of those affected by acts of corruption;
- Aspects related to fiscal responsibility; and
- Competition protection.

Law 2195 is extensive and changed several important aspects of the Colombian legal framework, which can be grouped into these categories: (1) administrative liability; (2) compliance program obligations; and (3) due diligence.

Concerning the administrative liability of entities, the new law established a corporate administrative penalty for crimes against the public administration, the environment, or the economic and social order; financing of terrorism; unfair competition; or any other punishable conduct related to public assets that entities or individuals on its behalf have committed directly or indirectly.

Law 2195 introduced: (1) a proper due diligence process before merger and acquisition transactions; (2) implementation of a robust transparency and business ethics program (known as PTEE, its acronym in Spanish); (3) creation of an internal integrity auditor in charge of assessing the efficiency of the PTEE, issuing reports, and making recommendations (not a compliance officer, but an

internal auditor focused on integrity); and (4) requirements to conduct supply chain due diligence. Furthermore, besides reinforcing its auditing aim, Law 2195 also provided that financial information shall be maintained for at least five years and established due diligence and periodic compliance audit guidelines.

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MIDDLE EAST

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Egypt settles ICSID claim.

In July 2021, a French cement company, Vicat Cement, filed an arbitration against Egypt in the International Center for Settlement of Investment Disputes (ICSID). Vicat demanded substantial financial compensation for damage to its investment in Egypt after the Egyptian military took increasing control of the construction industry. In March 2022, Egypt announced it had settled its dispute with Vicat. The settlement is part of the Egyptian government's efforts to amicably resolve investment disputes to further attract more foreign direct investment.

Iraq ratifies New York Convention.

Until recently, Iraq was one of the few Middle East states that had not yet ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **New York Convention**), the major international treaty facilitating the enforcement of foreign arbitral awards. On 31 May 2021, Iraq ratified the New York Convention with two reservations: first, that the New York Convention applies to foreign awards issued in other signatory states on the basis of reciprocity only; and second, that the New York Convention applies only to disputes arising from contractual relations that are considered commercial pursuant to Iraqi law.

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NORTH AMERICA

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United States, Canada impose severe sanctions on Russian regime in response to invasion of Ukraine.

Since Russia's occupation of Crimea in 2014, the United States, Canada, and a number of their allies and partners have imposed sanctions on Russia, as well as on Russian individuals and entities like banks and businesses. Recently, the United States imposed what it describes as new "devastating economic measures" designed to ban investment in Russia and to "impose the most severe financial sanctions on Russia's largest bank and several of its most critical state-owned enterprises and on Russian government officials and their family members."

Since Russia's invasion of Ukraine on 24 February 2022, Canada has also imposed sanctions on more than 750 individuals and entities from Russia, Ukraine, and Belarus. Mélanie Joly, Canada's minister of foreign affairs, said, "Canada continues to stand by the brave men and women fighting for their freedom in Ukraine. We will continue to impose severe costs on the Russian regime in coordination with our allies and will relentlessly pursue accountability for their actions. They will answer for their crimes."

According to the White House, experts predict that Russia's GDP will contract up to 15% in 2022, coupled with inflation rates already above 15% and increasing. Hundreds of private-sector companies have already left Russia, and supply chains in Russia have been severely disrupted. The United States has pledged to continue sanctions for "[a]s long as Russia continues its brutal assault on Ukraine."

APEC establishes the Global Cross-Border Privacy Rules Forum.

On 21 April 2022, the Asia-Pacific Economic Cooperation (APEC), a regional economic forum of twenty-one members established in 1989, published a declaration by the United States, Canada, Japan, Singapore, the Philippines, the Republic of Korea, and Chinese Taipei establishing the Global Cross-Border Privacy Rules Forum (Global CBPR Forum), which will establish an international certification system based on existing cross-border privacy rules. The Global CBPR Forum is designed to support data protection while also encouraging the free flow of data.

Mexico takes steps to nationalize its lithium reserves.

In mid-April, the Congress of Mexico made changes to its Mining Law to nationalize the country's lithium reserves, explicitly prohibiting the offering of any lithium concessions to private companies and putting the government in charge of the management of all aspects of Mexico's lithium. Doubts remain over whether Mexico will establish a state-owned lithium mining company or if it will allow private entities—Mexican and foreign—to continue their lithium exploration. Lithium extraction is dangerous, environmentally hazardous, and extremely water-dependent, making it difficult to mine, particularly in drought-prone Mexico.

Clarissa A. Rodriguez *is a board certified expert in international law. She is a member of the Harper Meyer LLP dispute resolution practice and specializes in art, fashion, and entertainment law, as well as international law. With nearly two decades of experience, Ms. Rodriguez leads and serves on cross-disciplinary teams concerning disputes resolution and the arts industry. She has found a way to dovetail her passion for the arts into her legal career by representing the players in the art, fashion, and entertainment industries in their commercial endeavors and disputes.*

Laura M. Reich *is a commercial litigator and an arbitrator practicing at Harper Meyer LLP. In addition to representing U.S. and foreign clients in U.S. courts and in arbitration, she is also an arbitrator with the American Arbitration Association and the Court of Arbitration for Art in The Hague. A frequent author and speaker on art, arbitration, and legal practice, Ms. Reich is an adjunct professor at Florida International University Law School and Florida Atlantic University and the editor-in-chief of the International Law Section of The Florida Bar's* International Law Quarterly.

WESTERN EUROPE

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The EU implements protection measures for fleeing Ukrainians.

Russia's invasion of Ukraine has triggered a humanitarian crisis in Europe and has resulted in an enormous refugee flow to neighboring countries. Of the five countries bordering Ukraine, Hungary, Poland, Romania, and Slovakia are EU (and NATO) members whereas Moldova is not. In response to Europe's largest refugee crisis since World War II, the EU has enacted legislation to provide immediate and temporary protection to refugees from Ukraine. Once a person fleeing the war in Ukraine has crossed the border into the EU there are several options depending on each person's individual circumstances. Some of the possibilities are outlined below:

1. Temporary Protection

The Temporary Protective Directive provides immediate temporary protection for Ukrainian citizens and third country citizens residing in Ukraine. Eligible for temporary protection in any EU member state as well as in in Switzerland, Norway, Liechtenstein, and Iceland may be those who were permanently residing in Ukraine and left Ukraine to escape the war from 24 February 2022 onward. Temporary protection will last for at least one year. This may be extended depending on the situation in Ukraine. Rights under the Temporary Protection Directive include a residence permit, access to the labor market and housing, medical assistance, the right to open a bank account, and access to education for children.

When a person wants to make a claim for temporary protection, she/he needs to follow the instructions of the national authorities in the country where she/he arrives and demonstrate the nationality, international protection status or equivalent protection status, and residence in Ukraine or family link as appropriate, which give the right to temporary protection.

2. Asylum

Beneficiaries of temporary protection have in addition the right to apply for international protection (asylum) at any time. The temporary protection may be suspended while the person has the status and rights of an asylum applicant. If the asylum application is rejected and the temporary protection is still in place in the EU, the temporary protection status will revive. Each member state applies different practices, and persons crossing the border must plan their strategy depending on the procedures of the member state in which they apply.

3. Repatriation Assistance

Irrespective of a person's nationality and right to international protection, if a person was living in Ukraine and had to flee the war, she/he should be allowed to cross the EU border. If it is safe to return to the person's home country, the person should do so with the assistance of relevant authorities.

4. Temporary Shelter, Food, and Medicine

Irrespective of a person's nationality, a person fleeing the war in Ukraine will be entitled to receive immediate assistance and immediate information about her/his rights. This includes a right to temporary shelter and basic needs such as food and medicine. The specific rights will depend on the status a person receives from the member state.

Susanne Leone *is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.*

Midyear ILS Executive Council Meeting 31 March 2022 • Akerman, Miami

Akerman hosted the ILS Executive Council for its midyear meeting in the firm's office in Miami. ILS members joined the section's officers and council members for a long-awaited in-person meeting to conduct the business of the section. Following the meeting, everyone enjoyed the iLaw 2022 Opening Cocktail Reception sponsored by TransPerfect Legal Solutions at CH'I in Brickell City Centre.

At long last, the ILS Executive Council was able to meet in person!

Carlos Osorio (ILS legislative chair) on the big screen joins ILS officers Cristina Vicens (vice treasurer), Ana Barton (treasurer), Jim Meyer (chair), Jackie Villalba (chair-elect), and Richard Montes de Oca (secretary) for the meeting.

Arnoldo Lacayo, Suzanne Leone, Penelope Perez-Kelly, and Jim Meyer

Carolina Goncalves, Jennifer Mosquera, Jonathan Haag, Bryan J. Branon, Ed Davis, Ana Barton, and Marycarmen Soto

Belemir Demirbag, Peter Quinter, Penelope Perez-Kelly, Bob Becerra, Jackie Villalba, and Nouvelle Gonzalo

Peter Quinter, Gary Davidson, Edward Mullins, and Shauna Capi

Jim Meyer and Laura Reich

Ranse Howell and Clarissa Rodriguez

Marc Hurwitz, Cristina Vicens, and Pedro Fuenzalida

iLaw 2022 • 1 April 2022 • Miami

The iLaw conference is the International Law Section's annual flagship event. iLaw 2022 featured opening and closing plenary sessions; a keynote address by Xavier Cortada, artist in residence and professor of practice with the University of Miami; and three parallel tracks on: (1) international litigation; (2) international business transactions; and (3) international arbitration, sponsored by the ICDR. The conference is the premiere international law conference in Florida and is attended by legal practitioners from the United States, Canada, Europe, and Latin America. More than 150 international law practitioners gathered at the JW Marriott Marquis in Downtown Miami for iLaw 2022.

ILS Chair Jim Meyer welcomes the attendees to iLaw 2022.

iLaw Chair Cristina Vicens welcomes attendees to iLaw 2022.

ILS Secretary Richard Montes de Oca addresses attendees of the opening plenary session.

Barbara Llanes, Michelle Breslauer, and moderator Christian Perez-Font present the opening plenary session on SDGs and the Legal Profession: The Role of Lawyers in Advancing Sustainable Development.

iLaw attendees soak in the information provided during the conference.

ILS Past Chair Bob Becerra moderates a panel on International Money Laundering Through the Precious Metals Markets with presenters Jay Weaver, Jacqueline Arango, Anthony Salisbury, and Peter Quinter.

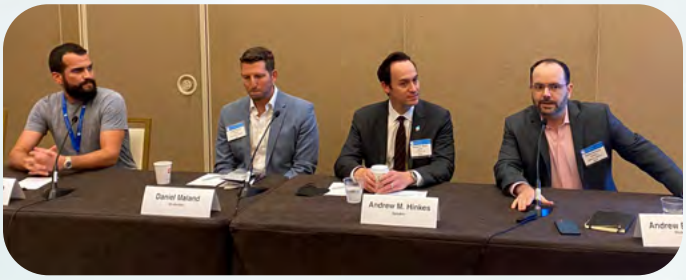
Oliver Armas, James Duffy, and Hagit Elul present a panel on International Life Sciences Disputes – The Role of International Arbitration and ADR to Resolve These Disputes – Options to Consider, moderated by Luis Martinez (not pictured).

Jesús Escudero, José Carrizo, Arnoldo Lacayo, and moderator Carlos Osorio present a panel on International (Atomic Warfare) Shareholder Disputes in Closely Held Family Companies. Omar Ibrahem can be seen in the foreground.

Nouvelle Gonzalo moderates a panel on U.S., Mexico, and Canadian Deals: Developments in Trade in the USMCA Era with presenters Eduardo Diaz Gavito, Susan Harper, and Louis Oliver Guay.

Xavier Cortada presents the iLaw 2022 luncheon keynote address: The Underwater: Using Socially Engaged Art to Plan for a Future with Rising Seas.

Professor Cortada discusses how soon rising seas will create lasting impacts on our environment.



Panelists Agustin Barbara, Daniel Maland, and Andrew Hinkes discuss Blockchain and Cryptocurrency: Novel Issues in Commercial Litigation, with Andrew Balthazor moderating.

ILS members enjoy the delicious lunch. Pictured are Jennie Robau, Laura Reich, Neha Dagley, Clarissa Rodriguez, Yana Manotas, Ana Barton, and Bob Becerra.

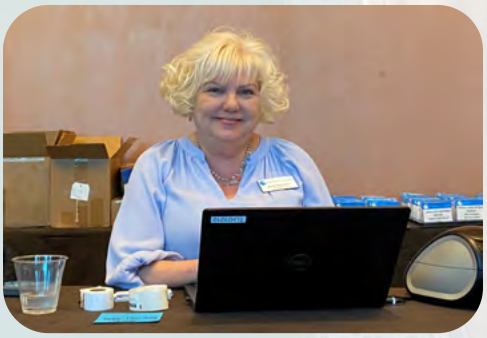
Jorge Salcedo moderates a panel discussion on Foreign Direct Investment: Increasing Oversight, Compliance, and Russian Sanctions with Tom Feddo, Peter Kucik, and Anna Tumpovskiy.

Edward Mullins moderates a panel discussion on Hot Topics in International Litigation with Kristin Drecktrah Paz, William Hill, Shelby Grubbs, and Amanda McGovern.

ILS Chair Jim Meyer (standing) introduces the panelists for the closing plenary session on Ethical Considerations in Cross-Border Negotiations and Dispute Resolution: Otavio Carneiro (moderator), Jessi Tamayo, Carmen Perez-Llorca, Dan Whyte, Paula Aguila, and Fabian Pal.

Ranse Howell, director of international operations at JAMS, and ILS Chair Jim Meyer welcome attendees to the iLaw2022 Closing Cocktail Reception, sponsored by JAMS

Jennie Robau, Clarissa Barton, Anna Tumpovskiy, Laura Reich, and Nouvelle Gonzalo



A huge thank you to Angie Froelich, our ILS program administrator, for her hard work, attention to detail, and tireless commitment to ensuring iLaw 2022 was a great success.

Jeff Hagen, Yana Manotas, and Jim Meyer

ILS Asia Committee/Law Society of Hong Kong Live Webinar • 22 April 2022

You can access a recording of the live webinar here: *https://bit.ly/hklawsoc-ils*.

On 22 April 2022, the Asia Committee of The Florida Bar International Law Section presented a joint program with The Law Society of Hong. The "Hong Kong Gateway to China – Miami Gateway to Latin America" program was an immense success with 125 participants. The program covered a comprehensive exchange of ideas and information, including factors that make Miami and Hong Kong uniquely attractive to foreign companies and investors, the nuances of business formation laws and requirements, and real estate issues.

Professor Manuel Gomez and Tiffany Comprés presented on behalf of The Florida Bar ILS. Ms. Olivia Kung and Ms. Louise Wong presented on behalf of The Law Society of Hong Kong. Additionally, Mr. Amirali Nasir, vice president of The Law Society of Hong Kong, moderated the Q&A session. Mr. C. M. Chan, president of The Law Society of Hong Kong, provided welcome remarks with Susanne Leone, past chair of the Asia Committee. Neha S. Dagley, chair of the Asia Committee, served as emcee.

The presenters, moderator, and emcee of the live webinar

ILS Lunch & Learn With Francesca M. Russo 27 April 2022 • Coral Gables

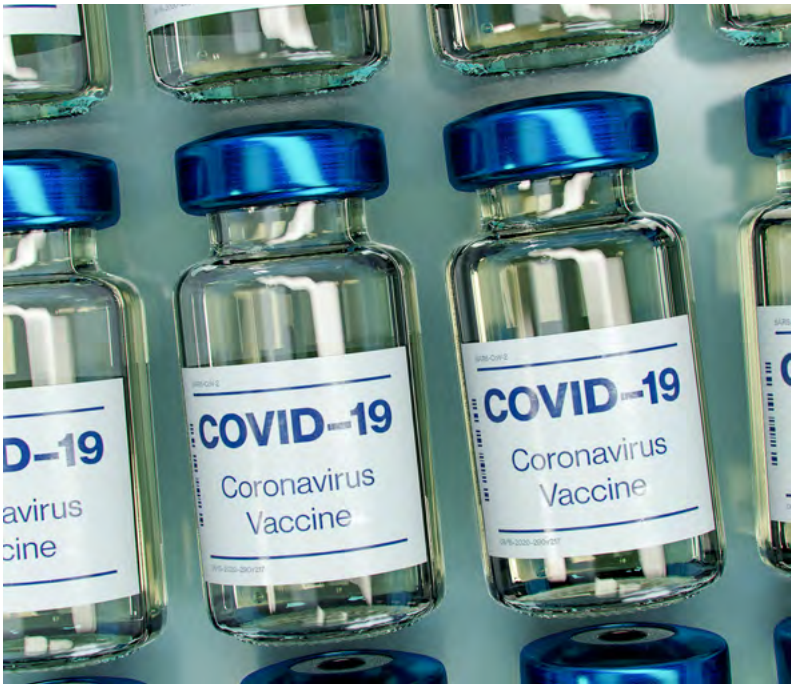
Francesca M. Russo

On 27 April 2022, Fiduciary Trust Company International hosted the ILS Lunch & Learn at its offices in Coral Gables, Florida. Francesca M. Russo, a past chair of the International Law Section, is a shareholder in GrayRobinson's Miami office. Ms. Russo focuses her practice on intellectual property law and litigation, commercial litigation, and alternative dispute resolution. In an enjoyable conversation with moderator Clarissa Rodriguez, Ms. Russo spoke about her education in England and Canada, her path to the law, and her current practice—as well as her work as a lawyer-consultant for a shoe company helping to design fashionable shoes for professional women.

Francesca Russo shares her experiences in the law with Lunch & Learn participants.

Vacunación Obligatoria from page 9

de las preferencias de las personas afectadas – normalmente sujeta a excepciones-, y que en caso de incumplirse puede dar lugar a las sanciones previstas en la ley. La vacunación forzada es la que se aplica con medio de coerción física y suele estar prohibida.[28] Por ejemplo, el Convenio relativo a los derechos humanos y la biomedicina, en su artículo 5, indica que una intervención en el campo de la sanidad solo puede realizarse con el consentimiento previo, libre e informado de la persona afectada.[29]



Existen distintos alcances posibles para. la obligación de vacunarse, que va desde establecer la obligación universal hasta limitarla a algunos sectores profesionales, franjas de edad o regiones geográficas.[30] Normalmente, se establecen excepciones para. las personas que no pueden vacunarse sin poner en riesgo su salud. También pueden variar en grado de severidad las consecuencias de no vacunarse. En algunos casos se pueden imponer multas, en otros negarse el acceso a determinados establecimientos o servicios, se puede aplicar una suspensión laboral, incluso, en algunos países se ha amenazado con sanciones penales, pero no es el caso de Europa.[31] Por último, conviene mencionar que en el marco de planes de vacunación voluntaria pueden establecerse incentivos, incluso supeditarse ciertos privilegios como el acceso a ciertos establecimientos a estar vacunado. Si bien es verdad la privación de este tipo de privilegios puede equipararse a una sanción por falta de vacunación, estos casos no son de vacunación obligatoria ya que falta el elemento básico de que la ley establezca la obligación de vacunación.[32]

El derecho a la protección de la vida privada como marco legal de referencia para. analizar la legalidad de la vacunación obligatoria

Dependiendo del caso, varias categorías de derechos humanos reconocidos en el CEDH pueden relacionarse con la vacunación obligatoria. Entre otros, si la sanción es que la falta de vacuna se castigue con negar el acceso a la escuela o al centro de trabajo, el derecho a la educación o al trabajo podrían verse afectados; si se limitan los viajes o las reuniones, los derechos afectados incluirían el de libertad de movimiento y el de asociación; el derecho relacionado con la libertad religiosa también puede jugar un papel si la vacunación va en contra de lo que establece la religión o impide la práctica de cultos en grupo.[33] No obstante, en términos generales, el artículo 8 del CEDH es un buen referente para. analizar los aspectos legales relacionados con la vacunación obligatoria, ya que gran parte de los razonamientos aplicables a esta disposición son extensibles a otros derechos, en particular las excepciones. Esta disposición reconoce el derecho a la vida privada y otorga a la autonomía personal un importante papel como principio interpretativo. El TEDH ha sostenido que la garantía que aporta el artículo 8 es asegurar el desarrollo de la personalidad de cada individuo en su relación con otras personas, sin interferencias externas.[34] En este sentido, se crean para. los Estados parte una obligación de carácter negativo y otra de tipo positivo. Por un lado, los Estados deben evitar que la autoridad pública interfiera de forma arbitraria en la vida privada de las personas.[35] Por otro lado, los Estados deben asegurar el respeto de la vida privada en las relaciones entre particulares, por ejemplo, en el marco de una relación laboral.

El concepto "vida privada" no puede ser definido de manera exhaustiva. De forma genérica comprende la

Vacunación Obligatoria, continued

integridad física y psicológica de las personas.[36] De este modo, aspectos como la libertad sexual, la protección de la información confidencial, el derecho a la propia imagen, etc. quedan protegidos por el derecho a la vida privada. Las intervenciones médicas que se hacen en contra de la voluntad de las personas han sido consideradas por el TEDH dentro del ámbito de aplicación del artículo 8.[37] El TEDH ha interpretado que imponer un tratamiento médico a un menor con discapacidad en contra de la oposición continuada de su madre, y sin haber consultado antes con un tribunal mientras hubo oportunidad, representaba una interferencia del derecho del menor al respeto a su vida privada.[38] La toma de muestras de sangre por parte del personal médico de una menor con indicios de posibles abusos sin el consentimiento de sus padres también fue considerada una vulneración de la integridad física del menor y, por lo tanto, del artículo 8.[39] La vacunación obligatoria puede considerarse un tratamiento médico sin libertad de elección y, por lo tanto, una interferencia de la autoridad pública en la autonomía de las personas y en su vida privada.[40] Ahora bien, el artículo 8 no establece derechos absolutos, ya que los intereses de la comunidad pueden entrar en competencia con los intereses de personas individuales haciendo necesario establecer un equilibrio entre ambos.

La vacunación obligatoria como posible interferencia justificada en la vida privada

El segundo párrafo del artículo 8 establece las condiciones para. intentar que el resultado de equilibrar intereses privados y colectivos sea justo. Ninguna injerencia por parte de la autoridad pública estará permitida salvo que esté prevista por la ley, sea necesaria en una sociedad democrática, y se relacione con objetivos de seguridad nacional o pública, el bienestar económico del país, la defensa del orden y la prevención de las infracciones penales, la protección de la salud o de la moral, o la protección y las libertades de los demás.[41]

La exigencia de que la interferencia esté prevista en la ley se ha interpretado en un sentido substantivo, de manera que acepta no solo los actos legislativos por un parlamento, si no también cualquier norma legal.[42] La norma de derecho interno debe haber sido adoptada en cumplimiento con los procesos de creación de normativa internos. En Inglaterra, por ejemplo, la ley de salud pública de 1984 establece que es competencia del secretario de Estado la adopción de normas que tienen por finalidad prevenir la propagación de epidemias.[43] Así, una norma que establezca la vacunación obligatoria en este país debe cumplir con estas formalidades.[44] Por otro lado, la norma resultante debe ser accesible para. la ciudadanía, por ejemplo, a través de su adecuada publicación.[45] Adicionalmente, la norma debe ser suficientemente precisa y permitir a la ciudadanía anticipar las consecuencias que su conducta puede generar.[46] Por ejemplo, Austria adoptó una ley que obliga a la vacunación a todas las personas mayores de 18 años, con sanciones entre 600-3600 euros para. los que se nieguen a hacerlo. La norma austríaca es clara respecto a cuál es la obligación, vacunarse para. los mayores de 18 años, y permite conocer las consecuencias, una sanción económica entre 600 y 3600 euros. Por último, si la norma confiere cierta discrecionalidad a la autoridad, debe indicar el alcance del poder discrecional, aunque el grado de precisión exigible puede variar dependiendo de la materia.[47] Lo trascedente es evitar las interferencias arbitrarias.

Por su parte, la exigencia de que "sea necesaria en una sociedad democrática" tiene por objetivo garantizar que las interferencias responden a una necesidad de la sociedad y evitar que encubran motivaciones puramente políticas.[48] En este sentido, para. que sea "necesaria" la interferencia debe estar basada en una necesidad social apremiante y estar relacionada con los objetivos antes mencionados, que incluyen a la salud.[49] A primera vista, el estatus de pandemia del COVID-19 y la alteración económica y social resultante satisfacen fácilmente el requisito de "necesidad social apremiante" en el ámbito de la salud pública. Evidentemente, el papel de la ciencia es importante y debe guiar el actuar de los Estados. El establecimiento de la vacunación obligatoria puede no ser considerada necesaria si va en contra de lo que establece la mejor ciencia disponible o cuando hay gran consenso de que las medidas adoptadas por el gobierno no son adecuadas.[50] Del mismo modo, la vacunación obligatoria no estaría justificada si el gobierno no pude dar acceso gratuito y no discriminatorio a las vacunas.

Vacunación Obligatoria, continued

La legalidad de las vacunas obligatorias exige que, además, cumplan con el test de proporcionalidad; es decir, que las interferencias en la vida privada no excedan de lo estrictamente necesario para. lograr el objetivo deseado. El sentido ordinario de la palabra necesaria indica que no debe haber alternativas razonablemente al alcance de la autoridad que sirvan para. lograr el mismo objetivo con un grado de eficacia comparable. Los objetivos específicos que suelen aparecer en los debates sobre la vacunación obligatoria incluyen la protección de la salud de terceros, reducir la transmisión del virus, evitar la saturación de los hospitales.[51] En general, en el caso de las vacunas contra el COVID-19, pese a que existen algunas dudas científicas en ciertos aspectos, la eficacia es ampliamente aceptada, sino para. inmunizar, sí para. reducir la transmisión y la gravedad de los efectos. Esto tiene un impacto positivo en la reducción de ingresos hospitalarios, aliviando la presión de los servicios públicos. En ese sentido, pueden considerarse necesarias en una sociedad democrática. Adicionalmente, el análisis de proporcionalidad incluye las consecuencias previstas para. los casos de incumplimiento. Si la sanción es excesiva, se puede dar una violación del artículo 8 o de otras disposiciones aplicables. Igualmente, es necesario que se establezcan mecanismos de compensación para. los casos en que la aplicación de las vacunas cause daño por reacción a los ciudadanos.

Ahora bien, en virtud de que la gravedad de la crisis del COVID-19 ha sido variable, es inevitable realizar una revisión periódica de la necesidad de las medidas en cada caso. En otras palabras, que una medida sea necesaria en un momento no implica que lo siga siendo en un momento posterior. Evidentemente, en ausencia de necesidad, la interferencia en la vida privada deja de ser una excepción valida. El gobierno de Austria, por ejemplo, declaró la suspensión de la ley de vacunación obligatoria, casi inmediatamente después de su entrada en vigor, bajo el argumento de que la variante Ómicron, predominante en el país, no representaba un peligro que justificara la interferencia con las libertades fundamentales.[52]

El margen de apreciación permitido a los Estados

Finalmente, es importante aclarar que, en la aplicación de este marco legal, los Estado gozan de cierto margen de apreciación.[53] El margen de apreciación se refiere al grado de libertad que el TEDH está dispuesto a permitir a los Estados a la hora de interpretar el alcance y cumplir sus obligaciones resultantes del CEDH.[54] En el caso concreto del artículo 8 y sus excepciones, el margen es estrecho cuando está en juego una faceta especialmente importante de la existencia o identidad una persona[55] y es más amplio cuando compiten intereses particulares con el interés público.[56] El TEDH reconoció que existe un consenso general entre las Partes Contratantes del CEDH, con un apoyo sustancial de las instituciones internacionales especializadas, de que la vacunación es uno de los métodos más eficaces de intervención médica y observa que los Estados deben intentar lograr el nivel más elevado de vacunación.[57] Adicionalmente, ha reconocido que las medidas de salud quedan comprendidas por el margen de apreciación de los Estados y que éste es amplio cuando se refiere, por ejemplo, a la vacunación obligatoria.[58] Por lo tanto, es poco probable que el TEDH cuestione las disposiciones de una ley debidamente adoptada por un Estado que establezca la vacunación obligatoria, salvo que en caso de que la ley sea manifiestamente inapropiada en relación con el objeto perseguido.

Conclusión

En términos generales, no es problemático aceptar a la vacunación obligatoria como una excepción a la protección de la vida privada del art. 8 del CEDH. Sin embargo, en última instancia, la legalidad de este tipo de medidas dependerá de la evolución de la pandemia y, en caso de ser necesaria, del diseño e implementación de la vacunación obligatoria. La evolución de la pandemia, con menos casos y con casos cada vez menos graves, parece apuntar a una menor necesidad de medidas como la vacunación obligatoria.

Miguel* Ángel *Elizalde Carranza *tiene el Ph.D. en Derecho Internacional Público y es el director del Máster Universitario en Derecho Humanos, Democracia y Globalización de la Universitat Oberta de Catalunya.* Él puede ser contactado en *melizaldec@uoc.edu.*

Vacunación Obligatoria, continued

Notas Finales

1 Enfermedad relacionada con un nuevo coronavirus denominado SARS-CoV-2. Véase World Health Organization, *Coronavirus disease (COVID-19),* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19 (última visita 5 de abril de 2022).

2 World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19*, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (ultima visita 30 de marzo de 2022).

3 World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard With Vaccination Data*, https://covid19.who.int/region/emro/country/ir (última visita 30 de marzo de 2022).

4 para. un estudio de los efectos en los derechos humanos a nivel global, véase Asamblea General, Consejo de Derechos Humanos, *Informe de la Alta Comisionada de las Naciones Unidas para. los Derechos Humanos: Efectos de la pandemia de enfermedad por coronavirus (COVID-19) en el disfrute de los derechos humanos en todo el mundo, y buenas prácticas y esperas de preocupación,* ONU Doc. A/HRC/46/19, (18 de enero de 2021).

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6 Organisation for Economic Co-operation and Development, *The territorial impact of COVID-19: Managing the crisis across levels of government*, 10 november 2020, https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government (última visita 5 de abril de 2022).

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28 La prensa se ha hecho eco de casos de supuesta vacunación a la fuerza en China. El gobierno, en todo caso, seguía sosteniendo que el consentimiento informado es la regla y la vacunación voluntaria. Véase Nicholas Goldberg, Column: *You think vaccine mandates are controversial? What if the police pinned you down and injected you?*, Los Angeles Times, 29 septembre 2021, https://www.latimes.com/opinion/story/2021-09-29/forced-vaccinations-china-ethics-covid (última visita 5 de abril de 2022).

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30 Por ejemplo, el Parlamento francés acordó la vacunación obligatoria para. los trabajadores del sector de salud. Por otro lado, existen pocos países que han establecido la obligación universal,

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entre ellos se encuentran Ecuador, Indonesia y Austria. La ley de Ecuador establece la vacunación obligatoria frente al COVID-19 para. los mayores de 12 años que participen en actividades no esenciales.

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38 ECtHR, *Glass v. the United Kingdom*, application no. 61827/00, 9 March 2004, para. 83.

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40 Fereniki Panagopoulou, *Mandatory Vaccination during the Period of a Pandemic: Legal and Ethical Considerations in Europe*, BioTech 2021, 10, 29, para. 3.1.

41 CEDH, art. 8, párrafo 2. Esta excepción y sus condiciones se reproduce en lo conducente en el artículo 9.2, sobre la libertad de pensamiento, conciencia y religión; en el artículo 10.2, sobre la Libertad de expresión; en el artículo 11.2, relativo a la libertad de reunión y de asociación del CEDH. Del mismo modo, puede verse reflejado en el artículo 26 del Convenio Derechos Humanos y Biomedicina que exige en su artículo 5 el consentimiento para. el trato médico.

42 ECtHR, *Vavřička and Others v. the Czech Republic*, applications nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, 8 April 2021, para. 266.

43 Public Health (Control of Disease) Act 1984, Section 13, 1 (a).

44 Con base en poderes similares, el Secretario de Estado de Inglaterra adoptó la Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.

45 ECtHR, *Silver and Others v. The United Kingdom*, applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgement 25 March 1983, para. 87.

46 ECtHR, *Groppera Radio AG and Others v. Switzerland*, application no. 10890/84, Judgement 28 March 1990, para. 68.

47 ECtHR, *Leander v. Sweden*, application no, 9248/81, Judgement 26 March 1987, para. 51.

48 Steven Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights files No. 15, Council of Europe, 1997, p. 14.

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52 *Austria suspends mandatory Covid vaccine law*, France 24, 9 March 2022, https://www.france24.com/en/live-news/20220309-austria-suspends-mandatory-covid-vaccine-law (última visita 6 de abril de 2022).

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54 Véase Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Publishing, July 2000 https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf (última visita 5 de abril de 2022).

55 ECtHR, *X and Y v. the Netherlands*, application no. 8978/80, Judgement 26 March 1985, paras. 24 -27.

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58 *Id.*, para. 285.

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such as sexual freedom, the protection of confidential information, the right to one's own image, etc., are protected by the right to privacy.[36] Medical interventions that are made against a person's will be considered by the CEDH as within the scope of application of Article 8.[37] The ECtHR has held that imposing medical treatment on a disabled minor against the continued opposition of his mother, and without having first consulted with a court while there was opportunity, represented an interference with the child's right to and respect for his private life.[38] The collection of blood samples by medical personnel from a minor with indications of possible abuse without the consent of her parents was also considered a violation of the physical integrity of the minor and, therefore, of Article 8.[39] Compulsory vaccination can be considered a medical treatment without freedom of choice and, therefore, an interference of the public authority in the autonomy of people and in their private life.[40] However, Article 8 does not establish absolute rights, since the interests of the community may come into competition with the interests of individual persons and make it necessary to strike a balance between the two.

Mandatory Vaccination as a Possible Justified Interference in Private Life

The second paragraph of Article 8 sets out the conditions for trying to ensure that the result of balancing private and collective interests is fair. No interference by public authority shall be permitted unless it is provided for by law; is necessary in a democratic society; and relates to objectives of national or public security, the economic well-being of the country, the defense of order, the prevention of criminal offences, the protection of health or morals, or the protection and freedoms of others.[41]

The requirement that interference be provided for in law has been interpreted in a substantive sense so that it accepts not only legislative acts by a parliament, but also any legal norm. The domestic laws must have been adopted in compliance with internal norms.[42] In England, for example, the Public Health Act 1984 states that it is the responsibility of the secretary of state to adopt rules aimed at preventing the spread of epidemics.[43] Thus, a rule that establishes mandatory vaccination in this country must comply with those formalities.[44] On the other hand, the resulting norm must be accessible to citizens, for example, through its proper publication.[45] Additionally, the rule must be sufficiently precise and allow citizens to anticipate the consequences that their behavior may generate.[46] For example, Austria adopted a law requiring vaccination of all people over the age of 18, with penalties between 600-3600 euros for those who refuse to do so. The Austrian rule is clear regarding what is the obligation, i.e., those over 18 years of age must be vaccinated, and allows citizens to know the consequences of failure to comply, i.e., an economic sanction between 600 and 3600 euros. Finally, if the rule confers a certain discretion to the authority, it must indicate the extent of the discretionary power, although the degree of precision required may vary depending on the subject matter.[47] The most important factor is that the law avoids arbitrariness.[48] For its part, the requirement that "it be necessary in a democratic society" aims to ensure that interference responds to a need of society and to prevent it from covering up purely political motivations. In this sense, for interference to be "necessary," it must be based on a pressing social need and be related to the aforementioned objectives, which include health.[49] At first glance, the status of the COVID-19 pandemic and the resulting economic and social disruption easily satisfy the requirement of "pressing social need" in the field of public health. Obviously, the role of science is important and must guide the actions of states. The establishment of mandatory vaccination requirements may not be considered necessary if those requirements are not supported by the best available science or when there is a strong consensus that the measures taken by the government are not adequate. Similarly, mandatory vaccination would not be justified if the government could not give free, nondiscriminatory access to vaccines.[50]

The legality of mandatory vaccines requires that, in addition, they comply with the proportionality test; that is, that interference in private life does not exceed what is strictly necessary to achieve the desired objective. The ordinary meaning of the word "necessary" indicates that there should be no alternatives reasonably available to the authority that serve to achieve the same objective with a comparable degree of effectiveness. Specific objectives that often appear in debates on mandatory vaccination

include protecting the health of third parties, reducing the transmission of the virus, and avoiding saturation of hospitals.[51] In general, in the case of vaccines against COVID-19, although there are some scientific doubts in certain aspects, the efficacy is widely accepted, not only to immunize but also to reduce transmission and the severity of the effects. This has a positive impact on reducing hospital admissions, relieving pressure on public services. In that sense, mandatory vaccines can be considered necessary in a democratic society. Additionally, the proportionality analysis includes the expected consequences for cases of noncompliance. If the penalty is excessive, there may be a violation of Article 8 or other applicable provisions. Likewise, it is necessary to establish compensation mechanisms for cases in which the application of vaccines causes harm. However, given that the severity of the COVID-19 crisis has been variable, it is inevitable that periodic reviews of the need for precautionary measures will be necessary in each case. In other words, the fact that a measure is necessary at one time does not imply that it must remain so at a later time. Obviously, in the absence of necessity, interference in private life ceases to be a valid exception. The Austrian government, for example, declared the suspension of the mandatory vaccination law, almost immediately after its entry into force, on the grounds that the Omicron variant, the predominant variant in the country at that time, did not represent a danger that justified interference with fundamental freedoms.[52]

The Margin of Discretion Allowed to the States

Finally, it is important to clarify that, in the application of this legal framework, states enjoy a certain margin of discretion.[53] The margin of discretion refers to the degree of freedom that the ECtHR is prepared to allow states to interpret the scope and fulfil their obligations under the ECHR.[54] In the specific case of Article 8 and its exceptions, the margin is narrow when a particularly important facet of a person's existence or identity is at stake[55] and is wider when particular interests compete with the public interest.[56] The ECtHR acknowledged that there is a general consensus among the contracting parties to the ECHR, with substantial support from specialized international institutions, that vaccination is one of the most effective methods of medical intervention and notes that states should seek to achieve the highest level of vaccination.[57] In addition, it has recognized that health measures fall within the discretion of the states and that this discretion is wide when it refers, for example, to mandatory vaccination.[58] Therefore, the ECtHR is unlikely to challenge the provisions of a law duly adopted by a state providing for compulsory vaccination, unless the law is manifestly inappropriate in relation to the object pursued.

Conclusion

Generally speaking, it is not problematic to accept compulsory vaccination as an exception to the protection of privacy under Article 8 of the ECHR. However, ultimately, the legality of this type of measure will depend on the evolution of the pandemic and, if necessary, on the design and implementation of mandatory vaccination. The evolution of the pandemic, with fewer cases and with less severe cases, seems to point to a lower need for measures such as mandatory vaccination.

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Endnotes

1 *See* World Health Organization, *Coronavirus disease (COVID-19),* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19 (last visited 5 Apr. 2022).

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11 *Id.*

12 ECtHR, *Zambrano v. France*, application No. 41994/21, 21 Sept. 2021, paras. 12-16. The ECtHR did not examine the merits by declaring it inadmissible on the grounds of procedural defects.

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27 ECtHR, *Le Mailloux v. Franc*e, application no. 18108/20, 5 Nov. 2020. The ECtHR held that the applicant had not been directly affected and lacked the status of victim necessary at the procedural level for the type of action brought.

28 The press has echoed cases of alleged forced vaccination in China. The government, if anything, continued to maintain that informed consent is the rule and that vaccination is voluntary. *See* Nicholas Goldberg, Column: *You think vaccine mandates are controversial? What if the police pinned you down and injected you?*, Los Angeles Times, 29 Sept. 2021, https://www.latimes.com/opinion/story/2021-09-29/forced-vaccinations-china-ethics-covid (last visited 5 Apr. 2022).

29 Convention for the Protection of Human Rights and Dignity of the Human Being with regard tor the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. Hereinafter referred to as the Convention on Human Rights and Biomedicine.

30 For example, the French Parliament agreed to mandatory vaccination for health sector workers. On the other hand, there are few countries that have established the universal obligation; among them are Ecuador, Indonesia, and Austria. Ecuador's law establishes mandatory vaccination against COVID-19 for those over 12 years of age who participate in nonessential activities.

31 For example, in the United Kingdom, an amendment to the Health and Social Care Act 2008 obliges employees of care centers not to allow public entry unless they have the complete COVID-19 vaccination schedule, carried out with authorized vaccines. France has suspended firefighters for not being vaccinated. ECtHR, *Thevenon v. France*, application no. 46061/21, 10 Sept. 2021; ECtHR, *Abgrall and 671 Others v. France*, application no. 41950/21, 19 Aug. 2021. The president of the Philippines has threatened to imprison people who do not get vaccinated. Jason Gutierrez, *In the Philippines, Rodrigo Duterte threatens to jail those who refuse shots*, The New York Times, 22 June 2021, https://www.nytimes.com/2021/06/22/world/philippines-duterte-jail-vaccines.html (last visited 6 Apr. 2022).

32 These cases often involve interference with human rights with some similarity to what can happen in the context of mandatory vaccination, and to a large extent, legal reasoning is applicable to them, developed in the following sections.

33 For an overview of the type of rights that may be involved, *see* European Court of Human Rights, *Factsheet-COVID-19 health crisis*, March 2022, https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf (last visited 5 Apr. 2022).

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40 Fereniki Panagopoulou, *Mandatory Vaccination during the Period of a Pandemic: Legal and Ethical Considerations in Europe*, BioTech 2021, 10, 29 para. 3.1.

41 CEDH, art. 8, paragraph 2. This exception and its conditions are reproduced in ECHR article 9.2, on freedom of thought, conscience, and religion; in article 10.2, on freedom of expression; and in article 11.2, on freedom of assembly and association. In the same way, it can be seen reflected in article 26 of the Convention on Human Rights and Biomedicine, which requires in article 5 consent to medical treatment.

42 ECtHR, *Vavřička and Others v. the Czech Republic*, nos. applications. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, para. 266 (8 Apr. 2021).

43 Public Health (Control of Disease) Act 1984, Section 13, 1 (a).

44 Based on in Powers Similar, the Secretary of State of England Adopted the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.

45 ECtHR, *Silver and Others v. The United Kingdom*, applications Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgement, para. 87 (25 Mar. 1983).

46 ECtHR, *Groppera Radio AG and Others v. Switzerland*, application no. 10890/84, Judgement, para. 68 (28 Mar. 1990).

47 ECtHR, *Leander v. Sweden*, application no, 9248/81, Judgement, para. 51 (26 Mar. 1987).

48 Steven Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights files No. 15, Council of Europe, 1997, p. 14.

49 ECtHR, *The Observer and The Guardian v. United Kingdom*, application no. 13585/88, 26 Nov. 1991, Series A, No. 216, para. 71. Indicating that the adjective "necessary" is not a synonym for "indispensable" nor as flexible as "desirable" or "reasonable," but it implies the existence of a pressing social need.

50 Jeff King, et al., *Lex Atlas: Covid-19. Legal, Constitutional and Ethical Principles for Mandatory Vaccination Requirements for Covid-19*, 1 Nov. 2021, p. 8, https://lexatlas-c19.org/vaccination-principles/ (last visited 5 Apr. 2022) in the successive Lex Atlas: Covid-19.

51 Lex Atlas: Covid-19, para. 36.

52 *Austria suspends mandatory Covid vaccine law*, France 24, 9 Mar. 2022, https://www.france24.com/en/live-news/20220309-austria-suspends-mandatory-covid-vaccine-law (last visited 6 Apr. 2022).

53 This margin of discretion is the result of the jurisprudence of the ECtHR; it is not expressly in the European Convention on Human Rights.

54 *See* Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Publishing, July 2000 https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf (last visited 5 Apr. 2022).

55 ECtHR, *X and Y v. the Netherlands*, application no. 8978/80, Judgement, paras. 24-27 (26 Mar. 1985).

56 ECtHR, *Evans v. the United Kingdom*, application no, 6339/05, Judgement, para. 77 (10 Apr. 2007).

57 ECtHR, *Lawrence and Others v. the Czech Republic*, nos. applications. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, para. 277 (8 Apr. 2021).

58 *Id.*, para. 285.

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acotada de países de América Latina, y para. contrastar índices de transparencia, calidad de la democracia y el ranking de portales de datos abiertos del barómetro de ILDA (2018), lo mismo que el ranking global de la democracia de EUI (2020) y Transparencia Internacional (2020), lo que podría una explicación frente al peor indicador de libertad elaborado por Global Freedom, (2020) quien después de decimocuarto período consecutivo observa una disminución de la libertad global (Freedom House, 2020).

En consonancia con lo antes señalado, en América Latina los antecedentes empíricos, han buscado ser repelidos a través de la práctica de principios como la Declaración de la Alianza para. el Gobierno Abierto, en adelante 'OGP', que significan *Open Government Partnership*. para. comprender mejor el fenómeno de la apertura de la información pública y el gobierno abierto en adelante 'OG', hay que decir, que juntos configuran la unidad de análisis de esta investigación, comprendida por la implementación de la transparencia focalizadas en conjunto de datos abiertos, por su incidencia en el fortalecimiento de la democracia. Bajo la premisa, que OGP tiene el potencial de contribuir a una serie de resultados positivos, por ejemplo, estrechar la relación entre los ciudadanos y los organismos estatales, garantizando el ejercicio del derecho de acceso a la información pública, es decir, la transparencia gubernamental (Safarov et al., 2017).

En ese sentido, la información pública se constituye en el núcleo medular del proceso de rendición de cuentas, se tutela como un derecho humano universal de acceso a la información pública (Relatoría Especial de la Comisión Interamericana de Derechos Humanos, 2010). De acuerdo a la perspectiva crítica de Chalabi (2014) quien es de la idea que las leyes son sistema armonizados de protección de derechos, se ha conducido el desarrollo legislativo evidenciado en el derecho internacional público latinoamericano en el último periodo, respecto a la denominada revolución de los datos y el fenómeno *open data*. Siendo éstos últimos considerados catalizadores al decir de Corrales-Garay, Urbina-Criado & Mora-Valentín (2019) por su importancia e impacto a nivel económico, político y social, se ha vuelto evidente. Desencadenando un acelerado proceso de apertura de la información del Estado, como elemento esencial, para. el libre acceso y distribución sin restricciones legales que impidan su reutilización (Lnenicka & Komarkova, 2019).

Esta mirada compartida, ya estaba plasmada en el Considerando 16 de la Directiva 2003/98/CE (CE, 2003), cuando resaltaba la importancia "para los ciudadanos como elemento de transparencia y guía para. la participación democrática". Que, en América Latina se ha institucionalizado como una práctica de OG desde el 2011, impulsada por los compromisos suscritos por los países que conforman la OGP. De donde emerge, el interés de los gobiernos de América Latina por los datos abiertos (Carta Internacional de los Datos Abiertos, 2015). Dicho lo anterior, es importante distinguir información gubernamental, e información pública en formatos de datos abiertos. Debido a que la publicación de la información del gobierno, entendida como una obligación de los organismos estatales a publicar proactivamente la información relacionada con su gestión pública, se encuentra estrechamente vinculado al proceso de rendición de cuentas propio de las democracias de calidad.

En este punto, hay que señalar que los *data.gov* se han incrementado en una forma exponencial, en parte por sus características intrínsecas que los define como un espacio donde la información gubernamental, equivalente a miles de millones de bytes conectados en un mismo lugar, configuran la web de conjuntos de datos de alto valor (Lnenicka & Komarkova, 2019). Ahora bien, el fenómeno de la apertura de la información gubernamental, acarrea otras externalidades no deseadas, como la vulneración de la privacidad de los datos personales, sin embargo, conforme a lo señalado por Boulton et al (2017), esas limitaciones de la apertura de la información deben adecuarse ponderadamente con los derechos de privacidad, de seguridad y de uso comercial en el interés público. Dichas excepciones, deben justificarse caso por caso, y no como exclusión general. En este mismo sentido, la Ley Modelo Interamericana Sobre Acceso a la Información (2010) recientemente reformada en el año 2020, también plantea la necesidad de someter al principio de la legalidad las disposiciones que limiten el acceso a la información pública o reservas de información.

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Mecanismos legales garantes del derecho fundamental de acceso a la información de interés públicos

El proceso de institucionalización de la transparencia evidenciado en América Latina, se caracteriza por el énfasis global de los gobiernos nacionales de incorporar los cambios transformacionales de la sociedad de la información y del conocimiento, propios del nuevo paradigma organizado en torno a las tecnologías de la información (Castells, 2015). Lo que termina afectando la vida de todos los ciudadanos y los órganos que conforman al sector público también. A decir de Santa, MacDonald & Ferrer (2019), los países avanzan implementando sistemas de información de última generación, motivados por la efectividad operativa y la satisfacción de los usuarios.

En concreto, la transparencia y la apertura de la información gubernamental permiten contar con nuevos medios para. acceder y adquirir el conocimiento, utilizando la información que órganos del Estado producen en el cumplimiento de su labor pública (Directiva (EU) 2019/1024; OGP, 2011; Declaración internacional de los Datos Abiertos, 2015). En consecuencia, a continuación, se presentan los resultados de la evaluación de los datos abiertos en los portales de gobierno central de los países latinoamericanos adheridos a la Carta Internacional de los Datos abiertos, a los efectos de identificar niveles de implementación, así como, asimetrías y disonancias en los procesos, de conformidad con la Tabla siguiente:

Tabla Nº 1. Comparación del estado del arte de los mecanismos legales para. la implementación de los datos abiertos gubernamentales en América Latina

País	OGP	Año	EUI Index (2020)	ILDA (2020)	Libertad global	Derechos políticos	Libertades civiles	Estatus
Uruguay	Si	2011	8,61	63,55	98	40	58	libre
Costa Rica	SI	2012	8,16	45,44	91	38	53	Libre
Chile	Si	2011	8,28	54,44	93	38	55	Libre
Panama	SI	2012	7,18	42,99	83	35	48	Libre
Argentina	Si	2012	6,95	63,14	84	35	49	Libre
Brasil	Si	2011	6,92	60,2	74	31	43	Libre
Colombia	Si	2011	7,04	60,47	65	29	36	Parcialmente libre
Peru	Si	2011	6,53	44,81	71	29	42	Parcialmente libre
Ecuador	SI	2018	6,13	42,31	67	27	40	Parcialmente libre
Paraguay	Si	2011	6,18	44,24	65	28	37	Parcialmente libre
México	Si	2011	6,07	58,48	61	27	34	Parcialmente libre
El Salvador	SI	2011	5,9	24,84	63	30	33	Parcialmente libre
Guatemala	SI	2011	4,97	31,06	52	21	31	Parcialmente libre
Jamaica	Si	2016	7,13	49,94	80	34	46	Parcialmente libre
República Dominicana	Si	2011	6,32	55,31	67	26	41	Parcialmente libre
Honduras	Si	2011	5,32	45,16	44	19	25	Parcialmente libre

Fuente: Open data barometer: https://opendatabarometer.org/data-explorer/?_year=2015&indicator=ODB&lang=en&region=:LA ILDA https://barometrolac.org/wp-content/themes/odbpress/reporte-ILDA-ES.pdf Global freedom (2021) https://freedomhouse.org/countries/freedom-world/scores EUI (2020): In sickness and in health? Https://www.eiu.com/n/campaigns/democracy-index-2020/.

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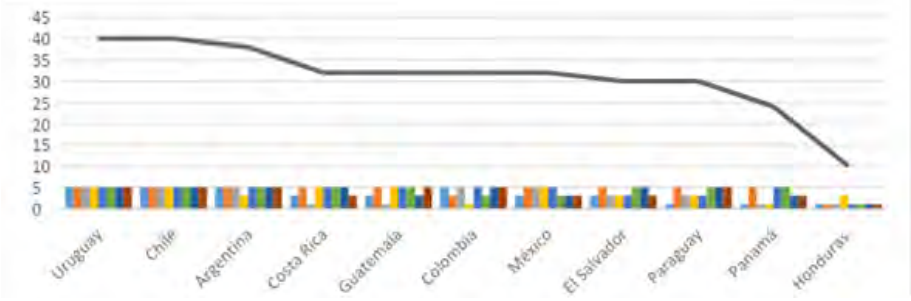
El panorama reflejado en el conjunto de datos sistematizados en la tabla anterior, revelan en primer lugar, que los portales de datos abiertos gubernamentales de Uruguay, Costa Rica y Chile obtuvieron el mejor desempeño similar, en lo que respecta a adoptar las iniciativas legales que protegen los derechos y libertades relacionados con el derecho a la información. Al mismo tiempo, es importante señalar que coincide con su incorporación en la Alianza de Gobierno Abierto en América Latina, como países fundadores de desde sus inicios en el año 2011, excepto Costa Rica en el año 2012. En ese sentido, en una lógica de tiempo su política de apertura de la información gubernamental revela una mejor robustez, conforme a la escala del estudio realizada. De esta manera, puede interpretarse que son los países con mayor trayectoria y nivel de avance, en la implementación de los datos abiertos gubernamentales. Del mismo modo que *Freedom Global*, en lo que respecta a Libertad Global, Derechos Políticos y Civiles, posiciona en el top up del ranking a Uruguay, Costa Rica, Chile, Panama, Argentina, y Brasil, después de una evaluación del proceso electoral, el pluralismo político y la participación, el funcionamiento del gobierno, la libertad de expresión y de creencias, los derechos de asociación y organización, el estado de derecho y la autonomía personal y los derechos individuales.

En contraste con otra parte del grupo de países que conforman la Alianza quienes ocupan un nivel de implementación de los datos abiertos, los cuales de acuerdo al avance reflejado legislativamente en este tema, pudieron ser clasificados en tres grupos atendiendo a cinco criterios: (1) Promulgación de una Ley de datos abiertos; (2) Promulgación de una Ley de acceso a la información; (3) Declara la Política de modernización del Estado; (4) Declara la Política de gobierno abierto; (5) Entrega datos Re-Utilizables en portales centralizados opendata.gov; Sin barreras administrativas ni burocráticas y estos son Comparables e Interoperables. De acuerdo a ello, en un primer grupo de países, se encuentran los tres primeros lugares, esto son: 1° Uruguay, 2° Chile y 3° Argentina. De igual modo, los tres confluyen respecto al marco legal y la política de apertura de datos, armonizando en su ley de acceso a la información pública, con la estrategia nacional de apertura de apertura de datos de la Administración Pública Nacional, conducente a un Sistema Nacional de Datos Públicos Re-utilizables. Lo anterior, puede verse claramente a continuación en la figura 1.

Por otro lado, el segundo grupo de países queda representado en la gráfica, con un leve descenso en la calificación total del nivel de implementación de los datos abiertos, que los aglutina como el grupo de países con nivel intermedio, dentro de la escala comprendida desde 32 puntos a 30 puntos. Dentro de este grupo se encuentran 4° Costa Rica, 5° Guatemala, 6° Colombia y, 7° México. Grupo de países, que al mismo tiempo comparten sus calificaciones como países con los tipos de democracias híbridas y autoritarias, excepto Costa Rica, quien como se mencionó anteriormente, tiene una democracia perfecta.

En este punto, hay que mencionar que, según la evaluación realizada este grupo de países evidencian un nivel intermedio de avance en su política de datos abiertos, no así en su democracia, como es el caso específico de Guatemala, con un índice de democracia de 5,96 (EUI, 2020), lo que lo califica como un régimen híbrido, con acento en la tiranía más que en la democracia. En este

Figura 1. Implementación de la Carta Internacional de los Datos Abiertos en América Latina



Fuente: Elaboración propia.

aspecto, conviene señalar que, en este segundo grupo, Costa Rica, Guatemala, Colombia, México coinciden con una calificación de los datos abiertos casi similar, comprendida en 32 puntos. Y, respecto de las características similares de este grupo, resalta que pese a contar con una política y normativa vigente de los datos abiertos, que unifica el procedimiento de apertura, publicación y re-utilización de la información pública, no lo declaran expresamente como una política de Estado, por lo que el avance en este grupo de países ha sido representado con un nivel de implementación intermedio, debido a que no están todos los organismos en una misma plataforma centralizada, ni tampoco, se publica toda la información en términos interoperables y comparables, persistiendo formatos de datos en PDF, que dificulta su reutilización.

En relación al tercer grupo de los países iniciados, con una política de datos abiertos incipiente se encuentran 8° El Salvador, 9°Paraguay, que alcanzaron 30 puntos cada uno. Así como, 10° Panama y, 11°Honduras quienes alcanzaron las calificaciones más bajas de 24 y 10 puntos respectivamente. Cuarteto de países, que no obstante formar parte de la Alianza para. El Gobierno Abierto (OGP, 2011), su adhesión a la Carta de los Datos Abiertos es muy reciente. En la figura N°1, fácilmente puede identificarse que este grupo, representa un descenso significativo, respecto al resto de los países de Latinoamérica.

Cosa parecida sucede también respecto al resto de los indicadores y criterios de evaluación. Dado que cada uno de ellos, representa un nivel de cumplimiento asimétrico. No obstante, los criterios de diferenciación más acentuados, son la interoperabilidad y comparabilidad, así como, respecto a la accesibilidad y utilidad, ambos factores claves para. garantizar que la apertura del gobierno genere impactos positivos. En cuanto a la interoperabilidad y comparabilidad, destacan Colombia con 1184 organismos adheridos al portal *data.gov*, es decir, que su portal de datos abiertos abarca una parte importante de su administración pública. Lo siguen Chile con 521 y México 280 organismos. En tanto que, el resto de los países, oscilan en una media de comprendida entre 21 y 16 organismos interoperables y adheridos al portal. Finalmente, la clasificación de países atendiendo al criterio, nivel de implementación de los datos abiertos en América Latina, ordenada de mayor a menor, según la calificación total obtenida de la matriz de evaluación es: 1º Uruguay, 2º Chile, 3º Argentina, 4º Costa Rica 5º Guatemala, 6º Colombia, 7º México, 8º El Salvador, 9º Paraguay 10º Panama y, 11º Honduras.

Esta radiografía de los datos abiertos en América Latina está basada en la escala de evaluación utilizada, cuya máxima calificación es 40 puntos, y la mínima 10 puntos. En consecuencia, esta clasificación que posiciona en orden consecutivo 11 escaños, permite hacerse una idea global del panorama de los datos abiertos en América Latina, objetivo central que condujo a esta investigación dirigida a evaluar la puesta en práctica de los principios de los datos abiertos en los portales de gobierno central en América Latina.

Gobernanza abierta de información para. hacer frente al COVID-19

La importancia de impulsar procesos de transferencia de conocimiento en un entorno cada vez más complejo y heterogéneo, requiere la articulación de ecosistemas abiertos e inclusivos, el cual resulta muy relevante por varios aspectos. En primer lugar, la relevancia por estudiar temáticas complejas como la que gravita en torno a la gran cantidad de los datos e información que los gobiernos recolectan de sus ciudadanos en contextos de pandemias, muy especialmente como consecuencia de la arquitectura concentrada del Estado de Chile, difundidos por obligaciones de transparencia activa y principios de máxima divulgación y facilitación de la información pública, sin perjuicio que su condición de datos sensibles podrían afectar derechos fundamentales de las personas y bienes jurídicos superiores, originando una tensión entre la obligación de transparencia activa en formatos de datos abiertos y el derecho fundamental a la protección de datos personales y sensibles.

Esta diatriba, se profundiza aún más debido al reconocimiento expreso constitucional como antes se dijo, en el Artículo 19, 4º constitucional e implícitamente en el Artículo 8º constitucional y Artículo 19, 12º, además de la Ley 20.285 de 2008 y Ley 19.628 de 1999. Así como, también por instrumentos internacionales

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comprometidos como por ejemplo Declaración de Principios para. el Gobierno Abierto, Carta Internacional de Datos Abiertos, y compromisos 10º y 2º pactados, en el Cuarto y Quinto plan nacional de acción para. el gobierno abierto respectivamente (IV Plan 2018-2020, Compromiso 10º y V Plan 2020-2022, compromiso 2º). Así como otros compromisos internacionales del Estado como, por ejemplo, la Organización para. la Cooperación y el Desarrollo Económicos en el año 2011 ("OCDE"), la Declaración de Principios del Gobierno Abierto, y Carta de Principios de Datos Abierto, todos conducidos a abordar la necesidad de actualizar la regulación y protección de los datos personales en el país.

Por otra parte, específicamente en lo atinente a datos abiertos, las investigaciones recientes publicadas quienes aseveran de acuerdo con las Directrices sobre protección de la privacidad y flujos transfronterizos de datos personales (1980) pactados con OCDE en el año 2011 por Chile, que la implementación y cumplimiento a la fecha se encuentran en mora, específicamente en los siguientes aspectos: Convenio para. la protección de las personas con respecto al tratamiento automatizado de datos de carácter personal (también conocido como "Convenio No. 108"), la Directiva 95/46/CE del Parlamento Europeo y del Consejo de la Unión Europea, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos, adoptada en el año 1995 (conocida como la "Directiva 95/46") y el Reglamento 2016/679 del Parlamento Europeo y del Consejo de la Unión Europea, relativo a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos (también conocido como el "Reglamento" o "RGPD").

Leyes garantes del derecho a saber

Por otra parte, en coherencia con el consenso regional, la Organización de los Estados Americanos (en adelante "la OEA"), además de la importancia del acceso a la información pública y la necesidad de su protección, revelada durante el último periodo, recomienda tutelar estos derechos a una ley marco, las cuales coinciden en establecer que el bien jurídico tutelado es, garantizar el ejercicio del derecho de acceso a la información, a través de mecanismos legales que lo protegen. Es decir, regulan la transparencia en su sentido constitucional, otras en cambio, incorporaron la dualidad de la transparencia desde su génesis, es decir, el sentido constitucional y administrativo y, no todas, contemplaron exclusivamente, la regulación del principio de transparencia de la función pública, en su sentido administrativo.

El panorama de la regulación de la transparencia como una materia reconocida y positivizada por el ordenamiento jurídico interno de cada uno de los países de la región es innegable. De esta forma, se constató que la mayor parte de las leyes, concretamente incorpora dentro de la finalidad regulatoria explícitamente, a la transparencia en su sentido funcional democrático estrictamente como una garantía del ejercicio del derecho de acceso a la información, representado proporcionalmente en el 44% (Finol-Romero, 2022). Actualmente, la mayor parte de países han promulgado una ley especial de acceso a la información, excepto Nicaragua, Venezuela y Cuba. Por lo que se ha posicionado el centro del debate contemporáneo en América Latina, y se esparce como un alud legislativo (Salazar, 2015). En forma análoga, lo ha declarado la Relatoría Especial para. la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos (2010), en donde se afirma que uno de los pilares indispensables para. la democracia, lo constituye la transparencia. De forma similar, la OCDE (2018) quien la justifica por sus efectos contra la corrupción del sector público.

Por otra parte, los esfuerzos legislativos de cada uno de los sistemas jurídicos estudiados, revela que la transparencia gubernamental, al decir de Worthy (2015) es fundamental, para. la modernización del Estado, por tanto, para. avanzar hacia un nuevo nexo entre Estado – Ciudadanos – Economía, se recomiendo su incorporación en la sociedad digitalizada. Por lo que, en línea con el planteamiento de Mendel (2009), era apremiante su incorporación en la gestión pública y el buen gobierno. Sin perjuicio de su importancia, resulta inconcebible considerar que esta regulación por sí sola, pueda generar el impacto regulatorio que persigue, por esta razón se recomienda un conjunto de políticas adicionales, como lo son, fortalecer la participación ciudadana en la toma de decisiones públicas en todos los niveles de gobierno,

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asimismo, concientizar y formar funcionarios públicos, en la cultura de la transparencia, en coetáneo con sistemas de rendición de cuentas institucionalizados como contrapeso para. la lucha anticorrupción, del mismo modo, que procesos colaborativos e interoperables dirigidos a reducir la asimetría de información, basados en incorporación de los estándares de los datos abiertos gubernamentales.

Continuando con este análisis, Aguilar-Rivera (2008) sostiene que democracia y transparencia han desarrollado una relación cada vez más armónica, hasta volverse una ecuación característica de la modernidad pues en el primer lustro del siglo XXI, casi no queda país democrático que no tenga o, que no discuta la pertinencia de poseer una ley de transparencia. De conformidad con lo señalado, el estado del arte de la regulación de la transparencia en América Latina señala que, en los últimos treinta años se ha producido una incontenible explosión de leyes (Neuman, 2006). El avance desvelado en este tema normativo en la región, justifica que, a nivel global, de los 120 países de todo el mundo que han adoptado leyes garantes del derecho de acceso a la información y, evaluadas según la muestra analizada por el estudio *Right To Information Rating* (RTI, 2019), repunten dentro de los primeros 50 escaños, los países pioneros de la región, en el orden que siguen: México, El Salvador, Brasil, Colombia, Panama, Chile, Guatemala, Peru, Argentina, Uruguay.

En concordancia con lo señalado, es impensable la ausencia de leyes de esta naturaleza en pleno siglo XXI (Worthy, 2013). Sin perjuicio de ello, las leyes analizadas presentan matices distintivos, que han sido desvelados por la radiografía de la regulación de la transparencia en América Latina, bajo examen. Los aspectos diferenciados, permiten señalar que cada país ha avanzado en la regulación del acceso a la información pública, con características propias. En forma análoga, luego de décadas las razones subyacentes para. establecer un régimen de transparencia, revela matices diferenciados, cuya promulgación en algunos países es el resultado de compromisos internacionales, en otros, por la presión de grupos de interés de su población, y también, por razones relativas a la política de cooperación para. el desarrollo. En tanto, que otro grupo de ellos, por cumplimiento de mecanismos reparatorios exhortados por la Sentencia de la Corte Interamericana de los Derechos Humanos, verbigracia Chile, por el caso Claude Reyes y otros, contra Chile. En este aspecto, es importante destacar, que Panama, Ecuador, Chile, México, Colombia, Peru, Honduras, Bolivia, y Costa Rica, han incluido dentro del objeto de la ley, el doble propósito o ámbito dual de la transparencia, es decir, que la norma contempla dentro de su ámbito de aplicación, garantizar el derecho de acceso a la información, y al mismo tiempo, la transparencia de la función pública, como un principio para. mejorar la gestión pública (Meijer *et al*., 2015). En sentido opuesto, Belice, Argentina, Nicaragua, Guatemala, Uruguay, Brasil, El Salvador, Brasil y Guyana, quienes sólo contemplan como ámbito de regulación de la ley, al derecho de acceso a la información pública, es decir, a la transparencia en su sentido constitucional.

Respecto del segundo criterio observable, el análisis comparado permitió distinguir el periodo de vigencia de las leyes, observando que éstas presentan ámbitos temporales diferenciados. Es decir, que dentro del bloque latinoamericano no todos los países presentan una ley con vigencia temporal similar (Finol-Romero, 2022). Lo que permite distinguir a Belice y Colombia, como los pioneros con una ley de transparencia que da cuenta, de 20 años de vigencia. Seguidos por Brasil, México, Panama, Peru, Argentina, Bolivia, Ecuador, Nicaragua, Honduras, los cuales acumulan una vigencia intermedia de quince (15) años. Por otra parte, se encuentran Guatemala, Uruguay y Chile que, pese a que la promulgación de su primera ley fue en el año 2008, tienen resultados favorables en la lucha contra la corrupción (Transparencia Internacional, 2020). Y, por último, El Salvador, Paraguay y Guyana, cuyas leyes

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fueron promulgadas dentro de la década, cuentan con siete (7) años de vigencia. Al final, es importante reconocer los esfuerzos de Costa Rica, quien apenas en el año 2017 incorporó la ley en su ordenamiento, y Honduras en el año 2018. El caso de Venezuela, destaca por ser el único país de la región y del Sistema Interamericano de Derechos Humanos, que no ha promulgado una ley de transparencia.

Mecanismos de protección del derecho de acceso a la información pública

Este criterio observable permitió identificar los mecanismos de protección del derecho de acceso a la información, observándose en este aspecto que cada una de las legislaciones ha incorporado la doble instancia en sede administrativa, a través de procedimientos de reconsideración, o de revisión de la decisión administrativa, quien puede negar expresa o tácitamente el acceso a la información requerida. Observándose en mayor parte de las legislaciones, el principio de la autotutela administrativa en un primer orden, a través de la incorporación de recursos de revisión en sede administrativa, a cargo del órgano responsable de la fiscalización. Profundizando en este aspecto, hay que distinguir algunas jurisdicciones especiales, como el caso de sistema de transparencia de Chile, donde bajo la tutela de un procedimiento administrativo, delega la atribución del amparo del derecho al Consejo para. la Transparencia, y en segunda instancia, contempla un recurso judicial de reclamo por ilegalidad, por ante la Corte de Apelaciones, habida cuenta de la ausencia de la jurisdicción contenciosa administrativa y en última instancia, el control constitucional directo del máximo Tribunal con competencia para. ello.

Por otra parte, el análisis comparado permitió diferenciar la atribución de otras materias diferenciadas como objeto de regulación de la ley, y en consecuencia incorporadas al sistema de regulación de la transparencia. En el caso concreto de Peru, el legislador agrega otros ámbitos materiales a la ley, referidos a asuntos de ética y probidad. En Panama se agregan otros temas relativos a la rendición de cuentas de las finanzas públicas del Estado. En Bolivia y Ecuador, temas y competencias para. realizar investigaciones por temas de corrupción. En el caso de México, rendición de cuentas públicas y protección de datos personales, en forma análoga Guatemala, Honduras, y El Salvador.

En sentido contrario Argentina, Chile, Uruguay, Belice, Colombia, Nicaragua y Guyana, quienes han mantenido fuera del eclecticismo antes explicado, a sus sistemas de transparencia. Resultando en la unicidad del acceso a la información pública, reservando sus funciones a la vigilancia y fiscalización del ejercicio del derecho de acceso a la información pública, y en paralelo de la obligación de transparencia proactiva de los órganos del Estado, quienes por obligación legal deben divulgar la información establecida por la ley, bajo los principios de apertura y máxima divulgación.

En este aspecto, es importante mencionar que, en Chile se observó una regresión en la justiciabilidade del derecho de acceso a la información pública, pese a su condición de legislación pionera en el continente. Lo mencionado, debido a la tendencia jurisprudencial del Tribunal Constitucional Chileno, donde se descontextualiza la dualidad de la transparencia, al desaplicar reiterativamente desde el año 2012 hasta el presente, los artículos 5º y 10º de la Ley de Transparencia 20.285 (2008), bajo el argumento que las disposiciones constitucionales que contemplan las bases de la institucionalidad democrática, no establecen expresamente dicho principio. Además, el tribunal esgrime que el artículo 8º constitucional no se refiere explícitamente a la apertura de la información pública y, por tanto, la transparencia en su sentido administrativo, no encuentra cabida dentro del texto constitucional (Sentencia del Tribunal Constitucional de Chile, Nº Rol 7425-19-INA).

El criterio del Tribunal Constitucional revela, que el derecho a la información pública en la jurisprudencia constitucional, representa un derecho incómodo (Silva-García, 2011). Que, en algunas oportunidades, como consecuencia de la regresividad en la justiciabilidad impide su progreso *pro hominis*, es decir, en pos del derecho fundamental dual que concibe, posición esgrimida por la jurisprudencia de la misma Corte Interamericana de los Derechos Humanos, en donde se condenó a Chile en el año 2006, por restringir el derecho de acceso a la información pública (Sentencia Claude Reyes y otros, contra Chile, 2006, párr.76).

Sin perjuicio de la regresividad mencionada, poner a

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disposición de los ciudadanos la información pública, actualmente representa un compromiso adquirido por los países que conforman la Alianza del Gobierno Abierto, por cuanto, se considera un instrumento clave para. aumentar la prosperidad, bienestar y, la dignidad humana (OGP, 2011). En ese sentido, se pueden observar algunas señales respecto a su progreso, dado que el solo reconocimiento legislativo del derecho, creación de órganos garantes y mecanismos de protección, no son suficientes, por lo que, en el marco del cumplimiento de los compromisos para. el gobierno abierto, se han incorporado otros mecanismos en paralelo, como lo son; colaboración y participación, política de datos abiertos gubernamentales, y protección de datos personales, de cara a superar los desafíos que la transformación digital impone a la administración pública en la era digital.

Ahora bien, la ruta a seguir para. que la transparencia de la gestión pública en la dimensión administrativa pueda avanzar, involucra la incorporación de innovaciones tecnológicas, como la provista por el fenómeno de los datos abiertos gubernamentales, que permita iniciar una nueva etapa de la transparencia administrativa, proactiva y digital, basada en los principios de los *datos abiertos* como mecanismo de divulgación y máxima facilitación de la apertura del gobierno, concebidos como formatos interoperables, comparables, de libre acceso y distribución, sin restricciones legales que impidan su reutilización para. la creación de valor público, así como, la posibilidad de ser leído por máquinas, comparable a otro bien público provisto por el Estado (Corrales-Garay *et al.,* 2019).

Conclusiones

Con el objetivo de examinar la regulación jurídica de los datos abiertos gubernamentales en los países de América Latina para. reflexionar en torno a si la Gobernanza transparente de la información de interés público focalizada en portales de datos abiertos del gobierno con enfoque en los derechos humanos han sido adecuados como practica vital para. afrontar situaciones de emergencia o pandemias como COVID-19. Los resultados revelan un progreso en dos dimensiones. Por un lado, los países han asumido como un compromiso garantizar por el ordenamiento interno jurídico, a través de diferentes iniciativas y planes de acción para. el gobierno abierto leyes garantes del derecho a la información. Por otro lado, han adoptado como política de modernización del Estado producto de la necesaria digitalización que exige la cuarta revolución industrial. Finalmente, si bien no existe evidencia concreta en relación al efecto directo de los datos abiertos gubernamentales y la gobernanza transparente frente al COVID-19, se observa un compromiso por avanzar en su implementación como política de Estado dirigida a promover prácticas de transparencia focalizada en conjuntos de datos de alto valor. Concretamente, los países han impulsado prácticas de transparencia focalizada basada en datos de investigaciones científicas, garantizando modalidades de publicación y reutilización como bienes de uso común digital comparables, reutilizables y accesibles, bajo la premisa "*tan abiertos como sea posible y tan cerrados como sea necesario*". Lo anterior, ha sido implementado armónicamente con los estándares y protocolos establecidos en varios instrumentos del derecho internacional, verbigracia la Carta Internacional de Datos Abiertos, con miras a la protección de otros derechos fundamentales como protección de datos personales, y el derecho a la privacidad en la gestión de datos de salud, licencias y patentes industriales por su importancia en contrarrestar la infodemia y desinformación por otras pandemias.

Como consecuencia de lo señalado, los países de América Latina a través de mecanismos legales centrados en favorecer la transparencia de la gestión pública y, el acceso a la información gubernamental, han iniciado un proceso de reformas y reimpulso de prácticas de gobierno, dirigidas a promover un rediseño del rol del Estado, en coherencia con el fenómeno de la revolución de los datos. En este contexto, la información pública es concebida como uno de los compromisos de *transparencia focalizada de conjuntos de datos de alto valor*. Por esta razón se justifican este tipo de mecanismos legales porque además promueven prácticas anticorrupción, eficiencia del sector público, fortalecen la democracia, y hacen más legítimos a sus gobernantes. Sin perjuicio de ello, la nueva realidad a propósito de la pandemia ha acelerado este proceso y también podría representar una oportunidad para. consolidar el abordaje de problemáticas emergentes.

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En el caso específico de Chile fue notorio la (des) regulación y (des) protección de la gran cantidad de la información gestionada por los gobiernos, especialmente en el marco de la pandemia, recolectada de sus ciudadanos, y que podría afectar derechos fundamentales de las personas y bienes jurídicos tutelados por cuerpos normativos desactualizados a los cambios recientes del derecho y jurisprudencia comparada, dando lugar a una tensión dogmática jurídica entre la obligación de una gobernanza transparente de la información como una derecho fundamental, frente a otros derechos como a la protección de datos personales, por ejemplo. Conforme a ello, y sin perjuicio del reconocimiento expreso constitucional derivado de la reforma parcial que decantó en la ley 21.096 de 16 de junio de 2018, en el Artículo 19, 4º, se observa un incumplimiento sistemático del compromiso pactado en el cuarto y quinto plan nacional de acción para. el gobierno abierto, generado a propósito de un entramado normativo dicotómico y desactualizado, que ha resultado agudizado en el contexto de la pandemia.

Por lo anterior, y de acuerdo a Edgar Ruvalcaba-Gómez (2020) la información pública combinada con aplicaciones y desarrollo de tecnología, podrían implicar un mejor y mayor valor del uso de los datos gubernamentales. Es decir, haciendo que la transparencia proactiva de la función pública funcione efectivamente en sus dos dimensiones, en coherencia con la Directiva (UE) 2019/1024 Del Parlamento Europeo de fecha 20 de junio de 2019 relativa a los datos abiertos, la reutilización de la información del sector público, además, podría ser el vehículo de impulso post pandemia, para. decantar en productos y soluciones en múltiples dimensiones de problemas cotidianos de la vida en sociedad. De esta forma concluye este análisis que, de acuerdo al panorama descrito, recientemente la idea de la transparencia de la información de interés público ha cobrado más fuerza, considerando que las prácticas de publicación de información gubernamental, en portales web con formatos de datos abiertos conocidos como *opendata.gov* podrían ser una vía para. mejorar la efectividad del gobierno, y además antídoto de la infodemia producto de pandemias como COVID-19.

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(Lnenicka & Komarkova, 2019). Now, the phenomenon of the opening of government information brings other unwanted externalities, such as the vulnerability of the privacy of personal data; however, as noted by Boulton et al (2017), these limitations of the opening of information must be weighed against the rights of privacy, security, and commercial use in the public interest. Such exceptions must be justified on a case-by-case basis, and not as a general exclusion. In the same sense, the Model Inter-American Law on Access to Information (2010), recently reformed in 2020, also raises the need to submit to the principle of legality the provisions that limit the access to public information or the reserve of information.

Legal Mechanisms Guaranteeing the Fundamental Right of Access to Information of Public Interest

The process of institutionalization of transparency in Latin America is characterized by the global emphasis of national governments on incorporating transformational changes to the information and knowledge society, typical of the new paradigm organized around information technologies (Castells, 2015). This ends up affecting the lives of all citizens and the bodies that make up the public sector as well. According to Santa, MacDonald, & Ferrer (2019), countries are moving forward by implementing state-of-the-art information systems, motivated by operational effectiveness and user satisfaction.

Specifically, transparency and openness of government information allow for new means of accessing and acquiring knowledge, using the information that state bodies produce in the fulfilment of their public work (Directive (EU) 2019/1024; OGP, 2011; International Open Data Declaration, 2015). Consequently, the results of the evaluation of open data in the central government portals of Latin American countries adhering to the International Open Data Charter are presented below, in order to identify levels of implementation, as well as asymmetries and dissonances in the processes, in accordance with the table below:

Table 1. Comparison of the state of the art of legal mechanisms for the implementation of open government data in Latin America.

	OGP	Year	EUI Index (2020)	ILDA (2020)	Global Freedom	Political Rights	Civil Liberties	Status
Uruguay	Yes	2011	8,61	63,55	98	40	58	Free
Costa Rica	Yes	2012	8,16	45,44	91	38	53	Free
Chile	Yes	2011	8,28	54,44	93	38	55	Free
Panama	Yes	2012	7,18	42,99	83	35	48	Free
Argentina	Yes	2012	6,95	63,14	84	35	49	Free
Brazil	Yes	2011	6,92	60,2	74	31	43	Free
Colombia	Yes	2011	7,04	60,47	65	29	36	Partially free
Peru	Yes	2011	6,53	44,81	71	29	42	Partially free
Ecuador	Yes	2018	6,13	42,31	67	27	40	Partially free
Paraguay	Yes	2011	6,18	44,24	65	28	37	Partially free
Mexico	Yes	2011	6,07	58,48	61	27	34	Partially free
El Salvador	Yes	2011	5,9	24,84	63	30	33	Partially free
Guatemala	Yes	2011	4,97	31,06	52	21	31	Partially free
Jamaica	Yes	2016	7,13	49,94	80	34	46	Partially free
Dominican Republic	Yes	2011	6,32	55,31	67	26	41	Partially free
Honduras	Yes	2011	5,32	45,16	44	19	25	Partially free

Source: Open data barometer: https://opendatabarometer.org/data-explorer/?_year=2015&indicator=ODB&lang=en&region=:LA ILDA https://barometrolac.org/wp-content/themes/odbpress/reporte-ILDA-ES.pdf Global freedom (2021) https://freedomhouse.org/countries/freedom-world/scores EUI (2020): In sickness and in health? Https://www.eiu.com/n/campaigns/democracy-index-2020/.

Transparency, continued

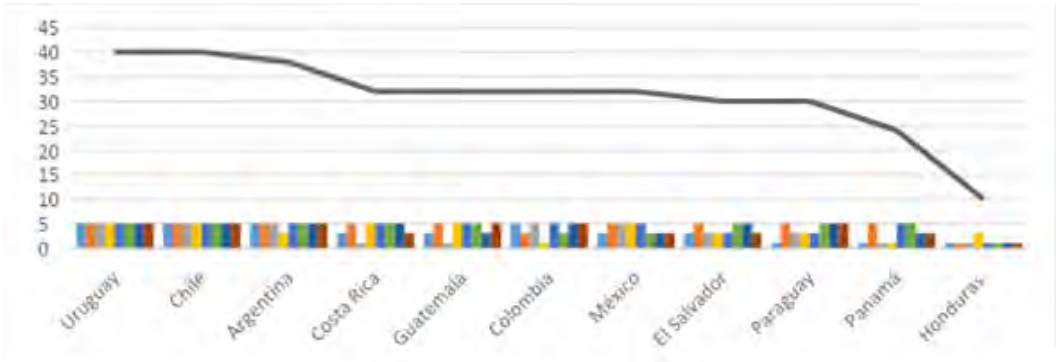
The panorama reflected in the set of data systematized in the table above reveals in the first place that the governmental open data portals of Uruguay, Costa Rica, and Chile obtained the best performance, with similar values in terms of adopting legal initiatives that protect the rights and freedoms related to the right of access to information. At the same time, it is important to note that this occurred at the same moment as their incorporation into the Open Government Alliance in Latin America, as founding countries since its inception in 2011, excepting Costa Rica, which joined in 2012. In this sense, time wise, its policy of openness of government information reveals more robustness, according to the scale of the conducted study. Thus, it can be interpreted that these are the countries with the longest trajectory and level of progress in the implementation of open government data. Uruguay, Costa Rica, Chile, Panama, Argentina, and Brazil are at the top of the ranking, after an evaluation of the electoral process, political pluralism and participation, government functioning, freedom of expression and beliefs, rights of association and organization, rule of law, and personal autonomy and individual rights.

In contrast with the other countries that make up the alliance with a level of implementation of open data, which according to the progress legislatively reflected on this issue they could be classified into three groups according to five criteria: (1) promulgation of an open data law; (2) promulgation of an access to information law; (3) declares a state modernization policy; (4) declares an open government policy; and (5) delivers reusable data in centralized portals, *opendata.gov*, without administrative or bureaucratic barriers that are comparable and interoperable. According to this, in the first group, the first three places are (1) Uruguay, (2) Chile, and (3) Argentina. Likewise, the three countries converge with respect to the legal framework and the policy of data openness, harmonizing in their laws on access to public information with the national strategy of openness of data of the national public administration, leading to a national system of reusable public data. This can be clearly seen in Figure 1 below.

On the other hand, the second group of countries represented in the graph, with a slight decrease in the total rating of the level of implementation of open data, which brings them together as the group of countries with an intermediate level, falls within the scale from thirty-two to thirty points. This group includes (4) Costa Rica, (5) Guatemala, (6) Colombia, and (7) Mexico. This group of countries at the same time share their scores as countries with hybrid and authoritarian democracies, except Costa Rica, which, as indicated by the data above, has a perfect democracy.

At this point, it should be mentioned that, according to the evaluation carried out, this group of countries shows an intermediate level of progress in their open data policy, but not in their democracy, as is the specific case of Guatemala, with a democracy index of 5.96 (EUI, 2020), which qualifies as a hybrid regime, with an emphasis on tyranny rather than democracy. In this regard, it should be noted that, in this second group, Costa Rica, Guatemala, Colombia, and Mexico coincide with an almost equal open data rating of thirty-two points. And with respect to the

Figure 1. Implementation of the International Open Data Charter in Latin America



Source: Author's elaboration.

similar characteristics of this group, it should be noted that despite having an active policy and regulation for open data, which unifies the procedure for opening, publishing, and reuse of public information, they do not expressly declare it as a state policy, and so progress in this group of countries has been represented with an intermediate level of implementation, because not all agencies are on the same centralized platform, nor is all information published in interoperable and comparable terms, maintaining data in PDF format, which hinders its reuse.

In relation to the third group of initiated countries, with an incipient open data policy, it includes (8) El Salvador and (9) Paraguay, both scoring thirty points. Panama (10) and Honduras (11) achieved the lowest scores of twenty-four and ten points, respectively. This quartet of countries, despite being part of the Open Government Partnership (OGP, 2011), have only recently joined the Open Data Charter. In Figure 1, it can be easily identified that this group shows a significant decrease with respect to the rest of the Latin American countries.

The same is true for the rest of the indicators and evaluation criteria, since each of them shows an asymmetrical level of compliance; however, the most accentuated differentiation of criteria is in interoperability and comparability, as well as accessibility and usefulness, both key factors to ensure that government openness has a positive impact. In terms of interoperability and comparability, Colombia stands out with 1,184 agencies adhering to the *opendata.gov* portal, meaning that its open data portal covers a significant part of its public administration. It is followed by Chile with 521 and Mexico with 280 agencies. The rest of the countries have an average of between twenty-one and sixteen interoperable organizations that are members of the portal. Finally, the ranking of countries according to the criterion of level of implementation of open data in Latin America, ordered from highest to lowest according to the total score obtained from the evaluation matrix is 1st Uruguay, 2nd Chile, 3rd Argentina, 4th Costa Rica, 5th Guatemala, 6th Colombia, 7th Mexico, 8th El Salvador, 9th Paraguay, 10th Panama, and 11th Honduras.

This radiography of open data in Latin America is based on the evaluation scale used, whose maximum score is forty points and minimum is ten points. Consequently, this ranking, which has eleven places in a consecutive order, gives an overall picture of the open data landscape in Latin America, a central objective that led to this research aimed at assessing the implementation of open data principles in central government portals in Latin America.

Open Information Governance to Address the COVID-19 Pandemic

The importance of promoting knowledge transfer processes in an increasingly complex and heterogeneous environment requires the articulation of open and inclusive ecosystems, which is very relevant for several reasons. First is the relevance of studying complex issues such as the large amount of data and information that governments collect from their citizens in the context of pandemics, especially as a result of the concentrated architecture of the Government of Chile, widespread by obligations of active transparency and principles of maximum disclosure and facilitation of public information, without prejudice that their status as sensitive data could affect fundamental rights of individuals and superior legal assets, causing a tension between the obligation of active transparency in open data formats and the fundamental right to the protection of personal and sensitive data.

This issue is further deepened due to the constitutional recognition, as mentioned above, in Article 19, 4° of the Constitution and implicitly in Article 8 of the Constitution and Article 19, 12°, in addition to Law 20.285 of 2008 and Law 19.628 of 1999; also, by committed international instruments such as the Declaration of Principles for Open Government, International Charter of Open Data, and agreed commitments 10° and 2°, in the Fourth and Fifth national action plans for open government, respectively (IV Plan 2018-2020, Commitment 10°, and V Plan 2020-2022, commitment 2°), as well as other international commitments of the state. For example, the Organisation for Economic Co-operation and Development in 2011 (OECD), the Declaration of Principles of Open Government, and Charter of Open Data Principles all led to addressing the need to update the regulation and to provide protection of personal data in the country.

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On the other hand, specifically with regard to open data, recent research published by those who assert in accordance with the guidelines on privacy protection and transborder flows of personal data (1980) agreed with OECD in 2011 by Chile that the implementation and compliance to date are delayed, specifically in the following aspects: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (also known as Convention no. 108), Directive 95/46/EC of the European Parliament and of the Council of the European Union on the protection of individuals with regard to the processing of personal data and on the free movement of such data, adopted in 1995 (also known as Directive 95/46), and Regulation 2016/679 of the European Parliament and of the Council of the European Union on the protection of individuals with regard to the processing of personal data and on the free movement of such data (also known as the Regulation or GDPR).

Laws Guaranteeing the Right to Know

On the other hand, consistent with the regional consensus, the Organization of American States (hereinafter the OAS), in addition to the importance of access to public information and the need for its protection, revealed during the last period, recommends protecting these rights within a framework law, which coincides with establishing that the protected legal right is to ensure the exercise of the right of access to information, through legal mechanisms that protect it. That is to say, OAS regulates transparency in its constitutional sense; others instead, incorporated the duality of transparency from its genesis, meaning the constitutional and administrative sense, and not all of them contemplated exclusively the regulation of the principle of transparency of public function in its administrative sense.

The panorama of the regulation of transparency as a matter recognized and positivized by the domestic legal system of each of the countries in the region is undeniable. Thus, it was found that most of the laws explicitly incorporate transparency in its democratic functional sense, strictly as a guarantee of the exercise of the right of access to information, represented proportionally by 44% (Finol-Romero, 2022). Currently, most countries have promulgated a special law on access to information, except Nicaragua, Venezuela, and Cuba. Thus, it has been located at the center of the contemporary debate in Latin America and is spreading like a legislative avalanche (Salazar, 2015). Similarly, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (2010) has stated that one of the indispensable pillars of democracy is transparency. Similarly, the OECD (2018) justifies it for its effects against corruption in the public sector.

On the other hand, the legislative efforts of each of the legal systems studied reveal that government transparency, according to Worthy (2015), is fundamental for the modernization of the state. Therefore, in order to move toward a new nexus between State – Citizens – Economy, its incorporation into the digitalized society is recommended. Therefore, in line with the approach of Mendel (2009), its incorporation into public management and good governance was urgent. Notwithstanding its importance, it is inconceivable to consider that this regulation alone can have the regulatory impact it seeks. For this reason, a set of additional policies is recommended, such as strengthening citizen participation in public decision-making at all levels of government, as well as raising awareness and training public officials in the culture of transparency, in conjunction with institutionalized accountability systems as a counterweight to fight against corruption, as well as collaborative and interoperable processes aimed at reducing information asymmetry, based on the incorporation of open government data standards.

Continuing with this analysis, Aguilar-Rivera (2008) argues that democracy and transparency have developed an increasingly harmonious relationship, to the point of becoming a characteristic equation of modernity, since in the first five years of the 21st century there is almost no democratic country that does not have or does not discuss the relevance of having a law on transparency. Accordingly, the state-of-the-art of transparency regulation in Latin America indicates that, in the last thirty years, there has been an unstoppable explosion of laws (Neuman, 2006). The progress revealed in this regulatory issue in the region justifies that, globally, of the 120 countries around the world that have adopted laws guaranteeing the right of access to information and, evaluated according to

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the sample analyzed by the Right To Information Rating (RTI, 2019) study, positions within the first 50 places the pioneering countries of the region, in the following order: Mexico, El Salvador, Brazil, Colombia, Panama, Chile, Guatemala, Peru, Argentina, Uruguay.

Accordingly, the absence of laws of this nature in the 21st century is unthinkable (Worthy, 2013). Notwithstanding, the laws analyzed present distinctive shades, which have been revealed by the x-ray of the regulation of transparency in Latin America under examination. The differentiated aspects point out that each country has advanced in the regulation of access to public information, with its own characteristics. Similarly, after decades, the underlying reasons for establishing a transparency regime reveal various shades, whose promulgation in some countries is the result of international commitments, while in others, by the pressure of interest groups of its population, and also for reasons related to the policy of cooperation for development. Another group of countries is in compliance with reparation mechanisms called for by the Inter-American Court of Human Rights ruling, e.g. Chile, in the case of *Claude Reyes et al. v. Chile*. In this regard, it is important to note that Panama, Ecuador, Chile, Mexico, Colombia, Peru, Honduras, Bolivia, and Costa Rica have included within the objectives of the law, the dual purpose or dual scope of transparency, meaning that the rule includes within its scope of application guaranteeing the right of access to information, and at the same time, the transparency of public service, as a principle to improve public management (Meijer et al., 2015). On the other hand, Belize, Argentina, Nicaragua, Guatemala, Uruguay, Brazil, El Salvador, Brazil, and Guyana only contemplate the right of access to public information, meaning transparency in its constitutional sense, as the scope of regulation of the law.

With respect to the second observable criterion, the comparative analysis made it possible to distinguish the intervals of validity of the laws, observing that they have different time periods. In other words, within the Latin American countries, not all of them have a law with a similar time period (Finol-Romero, 2022). This makes it possible to distinguish Belize and Colombia as the pioneers with a transparency law that has been in force for twenty years. Followed by Brazil, Mexico, Panama, Peru, Argentina, Bolivia, Ecuador, Nicaragua, and Honduras, which accumulate an intermediate period of fifteen years. On the other hand, there are Guatemala, Uruguay, and Chile, which despite the promulgation of its first law in 2008, have favorable results in the fight against corruption (Transparency International, 2020). Finally, El Salvador, Paraguay, and Guyana promulgated laws within the last decade and have been in force for seven years. In the end, it is important to recognize the efforts of Costa Rica, which incorporated the law into its ordinance in 2017, and Honduras in 2018. Venezuela stands out for being the only country in the region and in the Inter-American Human Rights System that has not promulgated a transparency law.

Mechanisms for the Protection of the Right of Access to Public Information

This observable criterion made it possible to identify the mechanisms of protection of the right of access to information, observing in this aspect that each of the legislations has incorporated the double instance in the administrative headquarters, through procedures for reconsideration or review of the administrative decision, which may expressly or tacitly deny access to the requested information. In most of the legislations, the principle of administrative self-protection is observed in a first order, through the incorporation of appeals for review in the administrative venue, in charge of the body responsible for the control. Going deeper into this aspect, it is necessary to distinguish some special jurisdictions, such as the case of the transparency system of Chile, where under the tutelage of an administrative procedure, it delegates the attribution of the protection of the right to the Council for Transparency, and in second instance, it contemplates a judicial recourse of illegality claim, in light of the court of appeals, taking into account the absence of the administrative contentious jurisdiction and in last instance, the direct constitutional control of the highest competent court.

On the other hand, the comparative analysis made it possible to differentiate the attribution of other matters differentiated by the object of regulation of the law, and consequently incorporated into the system of regulation

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of transparency. In the specific case of Peru, the legislation adds other areas to the law, referring to matters of ethics and probity. In Panama, other issues related to the accountability of the state's public finances are added. In Bolivia and Ecuador, there are topics and competencies for carrying out investigations on corruption issues; in the case of Mexico, public accountability and protection of personal data, as well as Guatemala, Honduras, and El Salvador.

On the contrary, Argentina, Chile, Uruguay, Belize, Colombia, Nicaragua, and Guyana have kept their transparency systems outside the eclecticism explained above. This results in the uniqueness of access to public information, reserving their functions to the monitoring and oversight of the exercise of the right of access to public information, and in parallel to the obligation of proactive transparency of the state bodies, which by legal obligation must disclose the information established by law, under the principles of openness and maximum disclosure.

In this regard, it is important to mention that in Chile there was a setback in the justiciability of the right of access to public information, despite its status as a pioneer of legislation on the continent. The aforementioned, due to the jurisprudential trend of the Chilean Constitutional Court, where the duality of transparency is decontextualized, by repeatedly disapplying from 2012 to the present, Articles 5 and 10 of the Transparency Law 20.285 (2008), under the argument that the constitutional provisions that contemplate the bases of democratic institutions do not expressly establish such principle. In addition, the court argues that Article 8 of the Constitution does not explicitly refer to the openness of public information and, therefore, transparency in its administrative sense does not find a place within the constitutional text (Judgement of the Constitutional Court of Chile, No. Rol 7425-19-INA).

The criterion of the Constitutional Court reveals that the right to public information in constitutional jurisprudence represents an uncomfortable right (Silva-García, 2011). That is, on some occasions, as a consequence of the regressivity in justiciability, it prevents its progress pro hominis, that is, in pursuit of the dual fundamental right it conceives, a position wielded by the jurisprudence of the Inter-American Court of Human Rights itself, where Chile was condemned in 2006 for restricting the right of access to public information (*Claude Reyes et al. v. Chile*, 2006, para. 76).

Notwithstanding the aforementioned regressivity, making public information available to citizens currently represents a commitment made by the countries that make up the Open Government Partnership, as it is considered a key instrument for increasing prosperity, well-being, and human dignity (OGP, 2011). In this sense, some signs of progress can be observed, given that the mere legislative recognition of the right, creation of guarantor bodies, and protection mechanisms are not enough, so that, in the framework of compliance with the commitments to open government, other mechanisms have been incorporated in parallel, such as collaboration and participation, open government data policy, and protection of personal data, in order to overcome the challenges that digital transformation imposes on public administration in the digital era.

Now, the path to follow so that transparency of public management in the administrative dimension can move forward involves the incorporation of technological innovations, such as provided by the phenomenon of open government data, which allows to initiate a new stage of administrative transparency, proactive and digital, based on the principles of open data as a mechanism of disclosure and maximum facilitation of government openness, conceived as interoperable, comparable, freely accessible, and in distributable formats, without legal restrictions that prevent its reuse for the creation of public value, as well as the possibility of being read by machines, comparable to other public goods provided by the state (Corrales-Garay et al., 2019).

Conclusions

With the objective of examining the legal regulation of open government data in Latin American countries, when considering whether the transparent governance of information of public interest focused on open government data portals with a focus on human rights has been adequate as a vital practice to address emergency situations or pandemics such as COVID-19, results show two-dimensional progress. On one side,

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countries have assumed a commitment to guarantee the right to information through different initiatives and action plans for open government laws that guarantee the right to information. On the other hand, countries have adopted a policy of modernization of the state as a result of the necessary digitization required by the fourth industrial revolution. Finally, although there is no concrete evidence regarding the direct effect of open government data and transparent governance on COVID-19, there is a commitment to advance in its implementation as a state policy aimed at promoting transparency practices focused on high-value data sets. Specifically, countries have promoted focused transparency practices based on scientific research data, guaranteeing publication and reuse modalities as comparable, reusable, and accessible digital commons, under the premise of "as open as possible and as closed as necessary." The former has been implemented in harmony with the standards and protocols established in various instruments of international law, such as the International Open Data Charter, with the objective of protecting other fundamental rights, such as the protection of personal data and the right to privacy in the management of health data, licenses, and industrial patents due to their importance in counteracting "infodemics" and misinformation due to other pandemics.

As a result of the above, Latin American countries, through legal mechanisms focused on promoting transparency in public management and access to government information, have initiated a process of reform and reinvigoration of government practices aimed at promoting a redesigning of the role of the state, consistent with the phenomenon of data revolution. In this context, public information is conceived as one of the commitments of focused transparency of high-value data sets. For this reason, these types of legal mechanisms are justified because they also promote anticorruption practices and public sector efficiency, strengthen democracy, and make their governing authorities more legitimate. Notwithstanding, the new reality of the pandemic has accelerated this process and could also represent an opportunity to consolidate the approach to emerging issues.

In the specific case of Chile was the notorious (dis) regulation and (dis) protection of a large amount of information managed by governments, especially in the context of the pandemic, collected from its citizens, which could affect fundamental rights of individuals and legal assets protected by outdated regulatory bodies with respect to recent changes in law and comparative jurisprudence, giving rise to a legal dogmatic tension between the obligation of transparent information governance as a fundamental right, compared to other rights such as the protection of personal data, for example. Accordingly, and without prejudice to the constitutional recognition derived from the partial reform that resulted in Law 21.096 of 16 June 2018, in Article 19, 4°, there is a systematic failure to comply with the commitment agreed to in the fourth and fifth national action plan for open government, generated by a dichotomous and outdated regulatory framework, which has been exacerbated in the context of the pandemic.

Therefore, and according to Edgar Ruvalcaba-Gómez

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(2020), public information combined with applications and technology development could imply a better and greater value for the use of government data, that is, making the proactive transparency of the public service work effectively in its two dimensions, consistent with Directive (EU) 2019/1024 of the European Parliament dated 20 June 2019 on open data. The reuse of information from the public sector, moreover, could be the means to maintain the momentum for post-pandemic times, to generate products and solutions in multiple dimensions of everyday problems of life in society. Thus, this analysis concludes that, according to the described scenario, the idea of transparency of information of public interest has recently gained more strength, considering that the practices of publishing government information on web portals with open data formats known as *opendata.gov* could be a way to improve the effectiveness of government, and also provide an antidote to the "infodemic" product of pandemics such as COVID-19.

Note: References cited in this article are included with the original article written in Spanish. See pages 50-51.

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not readily applicable to the beneficiary's occupation. The guidance specifically states that "officers may consider comparable evidence in support of petitions for beneficiaries working in the STEM fields."[11] For example, if the publication of scholarly articles is not readily applicable to a beneficiary whose occupation is not in academia, then presentation of the individual's work at a major trade show would be comparable.[12] Similarly, if the receipt of a high salary is not readily applicable to an individual's position as an entrepreneur, evidence of the beneficiary's highly valued equity holdings in a startup company would be comparable.[13]

Third, the guidance clarifies how immigration adjudicators will evaluate the totality of the evidence to determine O-1A eligibility and provides examples of positive factors that officers may consider. The examples of positive factors include publication of articles in highly ranked journals and the journal impact factor (represents the average number of citations received per article published in that journal during the two preceding years), an author's h-index (a tool for measuring a researcher's output and impact), and the relative prestige of an applicant's employment or research experience.[14] All of these examples can demonstrate sustained national or international acclaim, one of the key elements of an O-1A petition.

Fourth, the guidance explains that when evaluating whether a beneficiary of extraordinary ability is coming to work in the beneficiary's "area of extraordinary ability," adjudicators should focus on whether the prospective work involves skillsets, knowledge, or expertise shared with the occupation(s) in which the beneficiary garnered acclaim.[15] In evaluating whether occupations involve shared skillsets, knowledge, or expertise to an extent that they may be considered within the same area of extraordinary ability, officers should evaluate:

- Whether the past and prospective occupations are in the same industry or are otherwise related based on shared duties or expertise;
- Whether the prospective occupation is a supervisory, management, or other leadership position that oversees the beneficiary's previous position or otherwise requires shared knowledge, skills, or expertise; and
- Whether it is common for persons in one occupation to transition to the other occupation(s) based upon their experience and knowledge.[16]

USCIS's new guidance for O-1 beneficiaries does not change the legal standard for qualifying for the O-1A classification, but it does provide clarification that practitioners can use to assess the strength of potential O-1A cases and to prepare their O-1A packets with the proper documentation to demonstrate the beneficiary's qualifications.

National Interest Waiver

Standard to Qualify

A permanent labor certification issued by the U.S. Department of Labor (DOL) allows an employer to hire a foreign worker to work permanently in the United States.[17] The DOL "must certify to the USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers."[18] The process involves requesting a prevailing wage determination from DOL, followed by a period of recruitment of U.S. workers in the local market.

A national interest waiver (NIW) is a method of obtaining U.S. lawful permanent residence (i.e., a green card) without an employer as a sponsor. Under subparagraph (B) of section 203(b)(2) of the Immigration and Nationality Act, the secretary of Homeland Security may waive the requirement of a "job offer" and, under the applicable regulations, of "a labor certification."[19] The subparagraph states, in pertinent part, that the secretary "may, when the [secretary] deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States."[20]

USCIS may grant an NIW as a matter of discretion if the noncitizen satisfies both subparagraphs (A) and (B) of section 203(b)(2) of the Immigration and Nationality Act. Individuals seeking an NIW must first qualify as either an "advanced-degree professional or an alien of exceptional ability in the sciences, arts, or business."[21] *Advanced*

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degree means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate."[22] *Exceptional ability* in the sciences, arts, or business means "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."[23]

Once the applicant establishes the initial threshold of an advanced degree or exceptional ability, he or she must also demonstrate the following three factors by a preponderance of the evidence:

1. The person's proposed endeavor has both substantial merit and national importance;
2. The person is well positioned to advance the proposed endeavor; and
3. On balance, it would be beneficial to the United States to waive the job offer and thus the permanent labor certification requirements.[24]

For the first prong, in determining whether the proposed endeavor has national importance, the adjudicator considers the endeavor's potential prospective impact on a global, national, regional, or local scale.[25] For the second prong, to determine whether the applicant is well positioned to advance the proposed endeavor, the adjudicator "considers factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals."[26] For the third prong, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process.[27]

Under the "preponderance of the evidence" standard, an applicant must establish that he or she more likely than not satisfies the qualifying elements.[28] If these three elements are satisfied, USCIS may approve the NIW as a matter of discretion. Because the NIW is "purely discretionary," the noncitizen also must show that he or she otherwise merits a favorable exercise of discretion.[29] In general, a USCIS officer may exercise favorable adjudicative discretion to approve a benefit request when the requestor has met the applicable eligibility requirements and negative factors impacting discretion are not present.[30]

Impact of USCIS's NIW Policy Alert

USCIS's National Interest Waiver Policy Alert dated 21 January 2022 (NIW Policy Alert) issued guidance for NIW adjudications, specifically for applicants in the STEM fields. First, Volume 6, Part F, Chapter 5 of the Policy

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Manual now contains an entire section regarding specific evidentiary considerations for NIW applicants in STEM fields, including a clear statement that "USCIS recognizes the importance of progress in STEM fields and the essential role of persons with advanced STEM degrees fostering this progress, especially in focused critical and emerging technologies, or other STEM areas important to U.S. competitiveness or national security."[31] The section also states that for purposes of the first prong of the NIW test, "[M]any proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, but also have sufficiently broad potential implications to demonstrate national importance."[32]

For the second prong, the guidance states the person's education and skillset are relevant to whether the person is well positioned to advance the endeavor. USCIS considers an advanced degree, particularly a Doctor of Philosophy (Ph.D.) in a STEM field tied to the proposed endeavor an "especially positive factor to be considered along with other evidence for purposes of the assessment under the second prong."[33]

For the third prong, Chapter 5 of the Policy Manual states that USCIS considers the following combination of facts contained in the record to be a strong positive factor:

- The person possesses an advanced STEM degree, particularly a Ph.D.;
- The person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and
- The person is well positioned to advance the proposed STEM endeavor of national importance.[34]

The benefit is "especially weighty where the endeavor has the potential to support U.S. national security or enhance U.S. economic competitiveness, or when the petition is supported by letters from interested U.S. government agencies."[35]

Second, the NIW Policy Alert establishes a new section with specific evidentiary considerations for entrepreneur NIW applicants, allowing them to submit the following evidence to establish the three prongs of the NIW test:

- Evidence of ownership and role in the U.S-based entity;
- Degrees, certifications, licenses, and letters of experience;
- Investment or other evidence demonstrating a future intent to invest in the entity by a third party as well as the amount of capital;
- Incubator or accelerator participation;
- Awards or grants;
- Intellectual property;
- Published materials about the petitioner, the petitioner's U.S.-based entity, or both;
- Revenue generation, growth in revenue, and job creation; and
- Letters and other statements from third parties.[36]

Generally, many entrepreneurial endeavors are measured in terms of revenue generation, profitability, valuations, cash flow, or customer adoption.[37] USCIS will consider any evidence that establishes the petitioner's past entrepreneurial achievements and corroborates projections of future work in the national interest as favorable factors in the adjudication of NIW applications.

Conclusion

The two policy alerts issued by USCIS updating its Policy Manual on O-1 and NIW adjudications, specifically as they apply to persons with STEM degrees, will assist practitioners in preparing their O-1 and NIW applications in compliance with each benefit's respective legal standards. Practitioners can cite to the Policy Manual and USCIS's specific examples of suggested evidence in support of their client's applications.

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O-1 Visa, continued

Endnotes

1 https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-ExtraordinaryAbility.pdf.

2 https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-NationalInterestWaivers.pdf.

3 INA § 101(a)(15)(O)(i).

4 *Id.*

5 8 CFR § 214.1(o)(3)(iii).

6 https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4#footnote-20.

7 8 CFR § 214.1(o)(3)(ii).

8 https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4#3#1.

9 https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4#footnote-20.

10 https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4#3#1.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent.

18 *Id.*

19 8 CFR § 204.5(k)(4)(ii).

20 INA § 203(b)(2)(B)(i).

21 8 CFR § 204.5(k)(1).

22 8 CFR § 204.5(k)(2).

23 *Id.*

24 *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

25 *Id.* at 889-890.

26 *Id.* at 890.

27 *Id.* at 890-891.

28 *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010).

29 *Schneider v. Chertoff*, 450 F.3d 944, 948 (9th Cir. 2006).

30 *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970).

31 https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5#footnote-69.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

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