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Evolution of Liability of Content Sharing Platform Providers and Other Intermediary Service Providers for Copyright Infringement

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Abstract: The study examines the changing liability regime for intermediary service providers. It analyses the rules introduced by the CDSM Directive for content sharing platform providers, before contextualising these rules within the Digital Services Act (DSA) and reviews the changes in terms of liability for copyright infringement of other intermediary service providers. Finally, the paper considers the extent to which the DSA complements the new liability regime set out in the CDSM Directive.

Keywords: responsibility for copyright infringements, content sharing platform providers, very large online platforms, safe harbour rules, notice and take down, notice and stay down

1. Introductory remarks

The internal copyright market of the European Union has been shaped by more than two decades of intense legislative activity. The most recent and decisive step in this process was the adoption of the so-called CDSM Directive, which also marked the end of the copyright reform process announced in 2010. The Directive is a mixed piece of legislation, which has amended the copyright acquis on a number of points and opened new areas of harmonisation. Although, the Directive has a horizontal scope, covering a wide range of copyright topics, it has only addressed a limited, yet crucial, aspect of the operation of content sharing (platform) service providers.

The legislation in Article 17 of the CDSM Directive[1] is of particular importance in tackling the so-called "value gap". It has arisen in the online markets, especially in music and film industry, due to different legal liability rules for different online services and the resulting cost differences. The different online service providers had very different obligations towards copyright holders. Service providers realising communication to the public were obliged to get licence and pay royalties. However, providers assessed as intermediary service providers, which were subject to the safe harbour rules of the E-commerce Directive,[2] were not obliged to apply for a licence and pay the related royalties.

In this framework, the ECJ was only able to interpret and create specific rules for certain active hosting providers and specific file-sharing providers, but was not able to eliminate the aforementioned difference.[3] As a result, although the public could access a significant amount of protected content through both types of services, the rightsholder could only expect to receive substantial revenue from the first type of service providers. The CDSM Directive has brought the rules applicable to certain hosting providers closer to those applicable to content providers, increasing the level of liability of these providers for the content that is communicated to the public through them.[4]

However, the CDSM Directive did not address at all the relationship of the activities of other intermediary service providers to the transmission of copyright content, an area where the nearly twenty years of legal development work by the European Court of Justice has essentially been left without explicit legislative expression. The deadline for Member States to transpose the Directive was 17 June 2021, but most of them failed to meet it with their harmonisation obligations.[5] Moreover, even those Member States that have transposed have done so in a wide variety of ways. A clear change in the functioning of the market as a result of the transposition of the Directive is therefore still partly to come. In addition, harmonisation of operation may also appear to be affected by the fact that the regulation gives service providers sufficient room for manoeuvre to continue to shape their

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[1] Directive 2019/790/EC of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC (hereinafter referred to as the "CDSM Directive").

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter referred to as the "E-commerce Directive").

[3] Judgement of the Court (Grand Chamber) 22 June 2021 Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v. Cyando AG (C-683/18), ECLI:EU:C:2021:503.

[4] Another aspect of the copyright reform process has been the revision of copyright rules for television services. Among these, the Satcab2 Directive (Directive [EU] 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules concerning the exercise of copyright and related rights applicable to certain online broadcasts and rebroadcasts of television and radio broadcasts by broadcasting organisations and amending Council Directive 93/83/EEC) used a very similar model for the adoption of direct injection rules. A similar model to that of the CDSM is also the scheme regulated here. What they have in common is that the behaviour of several actors is essential for digital (protected) content to be accessible. The first phase of direct injection, which never reaches the public, is made a licensable conduct and an act not previously considered (in itself) as use is included in the scope of licensable acts. Similarly, the person who actually makes the content available does not have actual knowledge of the lawfulness of the content made available through him. The similarity cannot be coincidental: such a shift in business models could lead to a systematic transformation of the legal regime.

[5] By the transposition deadline, a minority of Member States had transposed the Directive, with four Member States still to do so at the time of writing this article and Denmark awaiting adoption.

behaviour primarily in accordance with their commercial interests and less in the new way in which the Directive primarily dictates (Mezei & Harkai, 2022; Harkai & Mezei, 2022).

The Regulation on Digital Services[6] was adopted at a time when the deadline for transposition of the CDSM Directive had already expired, but most Member States had not yet transposed it. The DSA Regulation partially repeals the safe harbour provisions under the E-commerce Directive, but does not significantly modify them; rather, it merely transposes the existing rules on the liability of intermediary service providers to the regulation.[7] However, it does contain a number of additional rules for them.[8] It also sets higher compliance criteria for some larger providers (so-called online giants and providers of the very popular online search engine). As a result, the DSA Regulation is expected to have a major impact on services involved in making copyright content available, which are not otherwise covered by the CDSM Directive, but will also affect the functioning of services, which are covered by the new liability regime set up by the CDSM Directive.

Research on this topic is in its infancy: a comprehensive study on the combined interpretation of DSA and CDSM for content sharing service providers has been carried out only by João Pedro Quintais and Sebastian Felix Schwemer (2022). The horizontal scope of the DSA makes possible the analysis of it from several aspects. Nevertheless, the impact of the DSA on copyright enforcement has been addressed by Eleonora Rosati (2021). Still, this paucity of literature is understandable, as it is already clear from the above that the CDSM has not yet been transposed in several Member States, and the DSA is not in force for long, so that there is no case law on the intersection of the two. The present paper is based on the conclusions of the Quintais and Schwemer (2022) study and on Rosati's (2021) report, but it has broadened the scope of the analysis to include a wider range of service providers, extending it to the whole range of providers of intermediary services for copyright content, and has taken the final text of the DSA as a starting point, examining its full range of instruments with regard to the practices of intermediary service providers in relation to the intermediary of copyright content (Quintais & Schwemer, 2022).

This paper examines, primarily from a copyright perspective, the question of how intermediary service providers covered by the E-commerce Directive, the (partially) exempted service providers and the service providers covered by the CDSM Directive are affected by the DSA and what consequences this may have for the development and operation of copyright content providers, in particular with regard to the access to copyright content.

[6] Regulation (EC) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/EC (hereinafter referred to as "DSA").

[7] DSA Article 4–7.

[8] DSA Article 8–32.

2. Outline of the e-commerce case law relevant to copyright – Where to start

2.1. Relevant judgments interpreting the right of communication to the public

The European Court of Justice has examined the relationship between the activities of e-commerce service providers and copyright in a number of cases. The first group of these cases concerned the question of which acts of an e-commerce service provider can be considered to constitute an act of communication to the public independently of the end-user's activity, i.e. in which cases the service provider is not subject to the safe harbour rules of Articles 12–14 of the E-commerce Directive.

Prominent among these was the *Pirate Bay* case in which the Court ruled in relation to the worldwide file-sharing platform that by making available and operating the online sharing platform, the operator, with full knowledge of the consequences of its conduct, acts for profit in order to make available protected works by indexing and categorising torrent files on that platform, which enables users of those files to find and share those works on a peer-to-peer network. For this reason, it is itself an act of communication to the public.

In the *Mircom* case, the Court of Justice confirmed its decision that segments of a media file containing a protected work previously downloaded by a user of a peer-to-peer network from that user's terminal equipment and uploaded to such equipment of other users of that network constitute making available to the public, even though those segments themselves can only be used above a certain download rate. (Indeed, a user may be a user of the peer-to-peer network service and not the maintainer of the peer-to-peer platform.) This user, however, if the claim is proportionate and the communication rules allow, is subject to a duty of disclosure to the copyright holder, who is itself entitled to collect, or even to collect in case of infringement, e-mail, static and dynamic IP addresses.[9]

Finally, the European Court of Justice ruled in the *YouTube* case C-682/18 that the operator of a video-sharing or file-sharing platform allowing file-sharing by means of hosting and download links, on which users may unlawfully make protected content available to the public, does not carry out a "communication to the public" of that content within the meaning of that provision. However, that is subject to the condition that the platform does not, beyond merely making such content available, contribute to making such content available to the public in breach of copyright.

This is the case, in particular, where the operator has actual knowledge of the unlawful disclosure of protected content on its platform and does not immediately delete or disable access to it, or, in the absence of actual knowledge of a specific infringement, where the operator, although knowing or should have known that protected content is generally being unlawfully made available to the public through its platform by its users, does not implement appropriate technical measures, which would be expected of an operator exercising due diligence in that situation in order to take credible and effective action

[9] Judgment of 17 July 2021 in Case C 597/19 Mircom International Content Management & Consulting (MICM) Limited v. Telenet BVBA.

against copyright infringements on that platform, or where it participates in the selection of protected content unlawfully communicated to the public, provides on its platform means specifically for the unlawful distribution of such content or knowingly facilitates such distribution, as may be evidenced by the fact that the operator has adopted a business model, which encourages users of its platform to unlawfully transmit protected content to the public. The decision in this case pointed in the direction of the new EU rules for content sharing service providers that were finally introduced in the CDSM.[10]

2.2. Scope of judgments defining the limits for copyright enforcement

These services were all mixed services, which were difficult or impossible to be classified as subcategories of information society services. It was a major step forward in the development of the law that the Court of Justice classified these activities as communication to the public for copyright purposes, without ruling out the possibility that the individuals who actually carried out the sharing of the content were also communicating to the public. In the absence of a question, the Court was unable to decide the question of the impact of the existence of the liability of the service provider on the liability of the persons who actually carried out the sharing. However, the development of judicial practice in this direction has opened up the possibility for rightsholders to confront providers who generate revenue from content sharing with enforcement and not to focus on the end-users.

Another group of the copyright cases concerned the interpretation of enforcement remedies against service providers in cases where the safe harbour rules would otherwise have applied.

In a Belgian case,[11] SABAM (the Belgian collective rights management organisation of composers) requested an injunction against Scarlet Extended SA, finding that copyright infringement was taking place through unauthorised file sharing via Scarlet's internet service. SABAM has asked the national court to order Scarlet to cease its service activities contributing to the infringement and to do so by introducing a blocking and filtering method. In the case referred for a preliminary ruling, the European Court of Justice ultimately concluded that the national court's discretion did not extend to the imposition of filtering or blocking. These instruments cannot be interpreted as a way of imposing an obligation to stop an infringement, but as a new sanction; the national court's discretion in the specific case does not extend to a general provision with spill-over effects for all the operators concerned and for all the operators not concerned, which requires a national legislative measure; the national legislator may also only introduce online content filtering taking into account the principle of proportionality; filtering cannot cover all electronic communications; filtering and blocking cannot be used for general preventive purposes;

[10] Judgment of 22 June 2021 in joined cases C 682/18 (YouTube) and C 683/18 (Elsevier).

[11] Judgment of 24 November 2011 in Case C-70/10 Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).

filtering and blocking cannot be used at all where there is no infringement; filtering and blocking cannot be introduced solely at the expense of the ISP.

The essence of the Scarlet ruling was repeated by the Court in its decision in the *Netlog* case in which SABAM also sued an internet service provider, in this case a hosting company operating a Facebook-like service.[12] The Court of Justice went beyond its decision in the earlier case and held that a decision at national level cannot, even if it orders the setting up of a filtering system, be aimed at identifying on a permanent basis all the music, films or other audiovisual works in SABAM's repertoire, even those which have not yet been created at the time of the decision but which will only be included in the management of the rights at a later date. Such a filtering system would unduly and disproportionately restrict the hosting provider's freedom to conduct a business, in addition to the undue restrictions on the fundamental freedoms mentioned above.

However, according to the decision in the *UPC Telekabel* case (C-314/12), the access provider can be obliged to filter content on the basis of a prohibition order, if the specific way of filtering does not disproportionately restrict the fundamental right to conduct a business.[13] It is for the national court to make the balancing test. In the case at hand, the rightsholder sought an order requiring the access provider to carry out filtering in respect of specific films. The UPC Telekabel case has by far overruled the previous two decisions in substance. They can now only be regarded as legal history.

On the basis of all these cases, it can be said that the European Court of Justice has a long history of dealing with cases in which the liability of the intermediary service provider does not end with the removal of the content, but can be subject to additional sanctions. These have not been considered by the Court as disproportionate obligations in all circumstances, and indeed filtering has been considered as a minimum sanction. By adapting the sanction of cessation or prohibition of infringement to the technological environment, the Court ultimately allowed for the introduction of other, more specific consequences. However, it is very important that in this area, in the absence of legislation, the Court was ultimately unable to decide what could be a proportionate solution to restrict the rights of the persons concerned in specific cases and had to leave this to the national regulators.

In a further group of enforcement cases, the Court dealt with the enforceability of a request for information.

In the *Promusicae* case, the Court ruled that the E-com Directive, the Infosoc Directive and the Data Protection Directive do not oblige Member States to impose an obligation to disclose personal data in the context of civil proceedings in order to ensure the effective protection of copyright. In other words, Member States may decide to create such an obligation on the basis of their own competences. The fact that Member States are not prevented by EU law from providing for an obligation to disclose personal data

[12] Judgment of 16 February 2012 in Case C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV.

[13] Judgment of 27 March 2014 in Case C-314/12 UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH.

in the context of civil proceedings in national law has been confirmed by the LSG ruling since then.[14]

The Court then considered acceptable the (Swedish) national solution, which allows an internet access provider to be obliged to provide the copyright holder or his successor in title with information about the subscriber whose address is allegedly used to commit the infringement. The Swedish national legislation allows the court seized to weigh the conflicting interests in the light of the circumstances of each case and with due regard to the requirements of the principle of proportionality.[15]

In the aforementioned *Mircom* case C-597/19, the Court of Justice ruled that it is lawful to systematically record the IP addresses of users of file-sharing networks whose internet connections have allegedly been used to carry out infringing activities and to communicate the name and postal address of the users to that rightsholder or to a third party in order to enable that rightsholder to bring a civil action, if this is justified, proportionate and not abusive and if the national rule on data protection in communications allows it.

Ultimately, the Court of Justice was therefore able to develop the rules of the E-commerce Directive in the context of the enforcement of claims for copyright infringement, taking into account the objectives of the relevant EU rules. However, by its very nature, the case law could not provide general practical guidance, which could be applied in general to the different situations.

3. The CDSM Directive – The changing responsibilities of content sharing service providers

3.1. Service providers covered by the Directive and new types of liability

The CDSM Directive has settled the theoretical debate and fulfilled the legal development that the CJEU has made on whether hosting providers involved in content sharing are acting as hosting providers within the meaning of the E-commerce Directive and thus subject to the safe harbour rules, or whether they are rather 'mere' e-commerce service providers and thus subject to the general liability rules (Leistner, 2020; Rosati, 2020; Quintais, 2020).

Article 17 of the CDSM Directive defines a content-sharing service provider as an information society service provider whose main or one of the main purposes is the storage, communication to the public, including making available to the public for download, and commercial assembly and promotion of a substantial amount of copyright works or related subject matter uploaded by a recipient of the service. The definition contains a number of elements which are left to the interpretation of the case law, but the

[14] Order of 19 February 2009 in Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH.

[15] Judgment of 19 April 2012 in Case C-461/10 Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v. Perfect Communication Sweden AB.

main uncertainty may arise from the interpretation of the terms "substantial amount" and "main or one of the main purposes".[16]

In any case, it can be concluded that the concept under the Directive and the liability regime applicable to these providers essentially requires a quantitative condition to be met: if the provider can prove that protected content is made available in the course of its activities but not in significant quantities, or that it does so but that it is not at all within the scope of its main purposes, its liability should continue to be assessed on the basis of the previous general rules on electronic commerce, as interpreted for the time being only by the CJEU. The activities of service providers falling outside this definition should therefore be judged currently under the E-commerce Directive and subsequently under the DSA rules.

It is also necessary to point out here that emerging operators (less than 3 years on the EU market) who already make protected content available to a significant extent and whose annual turnover is less than €10 million are covered by the CDSM Directive, but their liability under the new regime is limited. However, if at any time during this initial phase their average monthly number of visitors exceeds five million, they will be subject to the full liability regime. Of course, these providers will also only be covered if they make a significant amount of protected content available in the course of fulfilling at least one of their main purposes. Obviously, whether the duration of their presence in the market or the size of their revenues and the number of their users starts to increase, this will probably lead to an increase in the amount of content made available, but this will not affect the application of the rules to them. These providers are therefore also exempted from the general e-commerce regime for the purposes of determining their liability.

The CDSM Directive explicitly excludes certain types of service providers from its scope, in addition to those that do not share a significant amount of protected content, because their main purpose is not to allow users to upload and share large amounts of copyrighted content for the purpose of profiting from this activity. These include electronic communication services and business-to-business cloud services, as well as cloud services that allow users to upload content for their own use, such as hosting services, or online marketplaces whose main activity is online retailing, rather than providing access to copyrighted content. Furthermore, providers of services such as platforms for the development and sharing of open-source computer programs, non-profit scientific or educational databases, and non-profit online encyclopaedias are excluded from the definition of online content-sharing service provider. Finally, in order to ensure a high level of copyright protection, it does not apply to service providers whose main purpose is to engage in or facilitate piracy. Their activities will be assessed under the general rules on electronic commerce.

Article 17(1) of the CDSM Directive has taken a significant step forward by stipulating that content sharing service providers shall make content available for on-demand use within the meaning of Directive 2001/29/EC. By making these service providers users, which typically/conceptually implies a knowing, intentional act, the basis for the limitation of liability has ultimately been removed. In this way, the application of

[16] The Hungarian legislator did not define this concept, but the French legislation quantified the significant quantity.

the rules on limitation of liability applicable to intermediary service providers (including hosting providers) cannot be appropriate in their case. Under the provisions of the Directive, they are, from a copyright point of view, 'mere' users, like 'mere' e-commerce service providers, and have become 'active gatekeepers' (Frosio & Mendis, 2020). This reclassification places them alongside end-users, for whom there was no question that they were, certainly users in copyright terms. This change can also be interpreted as a definite reinforcement of the right of disposal of copyright holders, since it has been extended to cover a field of activity that can generate significant revenues for rightsholders. This element of the CDSM Directive is a strong guarantee for the effective enforcement of the exclusive copyright (Faludi, 2023).

The fact that content sharing service providers are users implies that they must obtain permission from rightsholders for the use they make. The explicit statement of the obligation to obtain authorisation follows from the exclusivity of copyright. Here again, however, the Directive adopts a specific solution and goes well beyond the established practice of the European courts: the authorisation obtained by the content-sharing service provider covers the end-user's non-commercial or revenue-generating activities, and if the end-user has obtained an authorisation (even for commercial purposes), his authorisation also 'covers' the closely related conduct of the content-sharing service provider. Although both actors are considered users, the one-stop-shop model for obtaining a licence is not unique in copyright law.[17] It may even be more efficient than licensing separately due to the imbalance in the actors' positions. Considering also that there is typically no independent revenue generation by the two actors, the introduction of one-stop licensing cannot in itself be considered an unjustified restriction of the new licensing right. Moreover, if the end-users were not covered by the licence obtained by the content provider, this would mean that the activity of the content provider would be linked to an infringing upload, which would be impossible to assess without interpretative rules. (This solution is, moreover, unfortunately not explained in detail in the preamble to the Directive.) It is worth noting here that, in case of intermediary service providers not covered by the CDSM Directive, the liability of the service provider and that of the recipients of their services remain entirely separate and distinct.

The granting of an exclusive right of authorisation not only entails a duty to exercise the utmost care in obtaining the authorisation, but also a direct, reduced, utmost care-based liability for any infringement resulting from the failure to obtain the authorisation, both on the part of the service provider and the end-user. Here again, however, the Directive introduces a complex new regime of exemption from liability for failure to obtain a licence for the content sharing service provider, while leaving the end-user liability regime (in principle) intact. It should be noted that the conditions for exemption from liability are criteria for establishing imputability (conduct that would normally be expected in a given situation) in relation to content hosting service providers, although the Directive generally formulates them as conditions for excluding liability. In this way, a provider who meets the conditions laid down here will be exempt not only from civil liability but also

[17] If the end-user is making a commercial use, the licence obtained by the content provider does not cover the end-user's activity, in which case the end-user must obtain a separate licence.

from criminal or any other liability, although this will, of course, always be examined in a procedure under the particular branch of law. (However, by the very nature of private liability, if the provider is exempted from it, his criminal liability will not be established.)

The first condition for exemption from liability is that the user must prove having made all reasonable efforts to obtain the authorisation. "Best efforts" should take into account the type of service, its audience and its size, the type of works or other performances concerned, the availability of appropriate and effective means and the costs to the service providers. It will be up to the courts to determine what these requirements ultimately mean. It is important to see, however, that the basis for liability is not objective, as it does not depend on whether a licence has been obtained, but on whether the user has done everything possible to obtain the licence. The point of imputation of liability, which in copyright law is not liability in case of unlawful use, but an objective basis of responsibility, thus shifts from the rightsholder (whether or not it has granted authorisation) to the user (whether or not it has exercised the utmost care that can normally be expected in the given situation). This (or more precisely a similar) liability construction has so far been known in the context of liability for copyright infringement only in the context of the claim for damages.

Under the second, subjunctive criterion for exemption from liability, the content sharing service provider must demonstrate that it has exercised the utmost care, according to high industry standards of professional diligence, to ensure that the specific works and other protected subject matter for which rightsholders have provided the relevant and necessary information to service providers is unavailable. This in essence creates an obligation of prior screening for the service provider in the event that it is not possible to obtain authorisation for use from the rightsholder. An important aspect of this condition is that the filtering is only imposed on the service provider if and to the extent that the data have been provided by the rightsholders. This is the case even if they have not (yet) managed to obtain licence. It also requires serious cooperation with rightsholders at the pre-contractual stage. Put another way, even if the rightsholder does not grant a licence, it is in its interest to provide the service provider with the necessary data for filtering, so that its works are not included in the service until the licence is granted. Ultimately, by restricting the possibilities offered by the exclusive right, this imposes an extra, new type of obligation on rightsholders to protect their rights. Failure to cooperate with the service provider risks making it easier for the service provider to escape liability for infringement.

Finally, as a third condition for exemption from liability, you must, in all cases, upon receipt of a duly substantiated notification from the rightsholders, take immediate action to make the works or other subject matter of the notification inaccessible or remove them from your website and exercise the utmost care normally required in the circumstances to prevent their future uploading. At a minimum, this is necessary because content recognition systems are currently operating with severe limitations, and as such it cannot be excluded that significant amounts of infringing content may slip through them and be shared without legitimate permission.[18]

[18] Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (hereinafter referred to as "Communication") Point 2.

3.2. Responsibility for the end user's activities

Recital 66 of the Directive justifies the unsustainability of objective liability for infringement and the introduction of the limitation of liability regime described above simply on the grounds that online content providers do not provide access to content uploaded by them but by their users. The CDSM Directive has been the subject of a so-called "CDSM case" before the European Court of Justice. In the Polish case, the Advocate General of the CJEU[19] found the retention of objective liability unacceptable for the following reasons: "First, because users of content-sharing services make content available online without their service providers making a prior selection in this regard, and second, because these service providers are unlikely to be able to obtain the authorisation of all rightsholders for all existing and future works and protected performances uploaded in this way, such objective liability would force these service providers to change their economic model entirely, and in this context even the interactive 'web 2.0' model."[20]

Both argumentations mix the issue of the responsibility of the service provider for its own behaviour and the responsibility of the end-users for their behaviour. The liability of the content sharing service provider should be primarily for its own failure to act, which may be the failure to apply for a licence. However, the Directive goes further, since liability only arises if the provider cannot prove that it acted with the utmost care in concluding the contract, which in itself would place its liability on a subjective basis. Moreover, in order to obtain indemnity, the acts described above must also have been performed, else, not having obtained a licence, cannot make the acts of the end-users lawful by this way.

In relation to the end-user's activity, the liability of the 'large' content sharing service provider has been strengthened to the extent that it no longer only has an obligation to remove infringing content if it becomes available on its service, but also a prior filtering obligation. This is designed to prevent end-users from uploading unauthorised content in an unauthorised situation, provided that the service provider has received sufficiently detailed information from the rightsholder concerned.

Importantly, these obligations will only come into play if the service provider ends up in a situation where it has not been able to obtain a licence for the use. However, prior screening requires the cooperation of the rightsholder, who provides the information necessary for the screening. However, it is clear that this is not in itself a sufficient tool for the rightsholder, who may be happy that its content is not shared, but will lose the royalty for the licence not granted.

The disappearance of objective liability is compensated for by the service provider's obligation to protect itself technologically. From the user's point of view, it is understandable why this solution is practical, since if the user does not obtain a licence from the rightsholder, which, depending on national law, is not subject to any direct or indirect contractual obligation, except for collective management societies, will essentially

[19] Judgment of 26 April 2022 in Case C 401/19 Republic of Poland v. European Parliament and Council of the European Union.

[20] Communication Point 32.

be (back) in the same position as the intermediary service provider: the user will not be able to monitor the legality of the content uploaded one by one. However, the service provider will do its utmost to avoid this, as the Advocate General concluded in Case C 682/18. From the rightsholder's point of view, however, the situation is far from favourable: ultimately, the failure to conclude a contract will leave it vulnerable to the technological solutions of the service provider. While the infringement does not occur (or only with a very small chance if the appropriate data is provided), the rightsholder is not granted a licence and, consequently, is not paid any fees. Classical enforcement is reduced to the realm of fully conscious infringements.

The end-user is undoubtedly the big loser from not signing a contract. Indeed, if the service provider has not obtained the licence, the end-user's act remains unauthorised and thus liable for the sharing. The end-user's liability is absolute and is not limited either by case law or by the CDSM.

4. The DSA liability rules and their relation to the liability rules of the CDSM Directive

The DSA takes the rules on intermediary service providers from the E-commerce Directive and maintains them with essentially unchanged wording. For this reason, the CDSM liability regime has the same relationship to the liability rules of the E-commerce Directive and the liability rules of the DSA.

According to Article 2(6) of the CDSM, the definition of "online content-sharing service provider" should be underlined that its relationship with the e-commerce rules is clear: online content-sharing service providers are always information society service providers, i.e. they are not only subject to the CDSM but also to Directive 2000/31/EC (later DSA).

The CDSM also discusses the relationship of the new liability rules to the liability rules of the E-commerce Directive. The preamble to the CDSM (65) makes clear that service providers are exempted from the hosting provider liability under Article 14 of the E-commerce Directive, and only for the purposes covered by the Directive, i.e. the CDSM does not exempt content sharing service providers from all the e-commerce rules applicable to hosting providers, but only from their liability for copyright content. Thus, in respect of aspects outside the scope of the CDSM, content hosting service providers will be subject to the E-commerce Directive and subsequently to the DSA, and the CDSM and the DSA will apply to them together.

Hosting services are information society services which can thus fall under both the CDSM Directive and the DSA regulation. Undoubtedly, the DSA's definition of online platform is broader, but it is clear that the "storage and public dissemination of information at the request of the recipient of the service" occurs when an online content sharing service provider under the CDSM Directive stores and provides access to the public to a substantial amount of copyright works or other protected subject matter uploaded by its users.

It follows from the wording that the concept of a service provider under the CDSM Directive is specific compared to the concept of a service provider under the DSA Directive.

It is legitimate to ask whether the DSA applies to all intermediary services. The DSA also explicitly refers in Article 2(3) that the Regulation is without prejudice to the application of Directive 2000/31/EC. It is another matter that at the moment of its entry into force, the liability rules of the E-commerce Directive will be repealed and transferred to the DSA. With regard to intermediary service providers, the DSA incorporates the liability provisions of the E-commerce Directive, which are not substantially changed.

In general, therefore, it can be concluded that intermediary service providers who have previously been sued in copyright cases do not change their copyright status and, in essence, the narrow liability regime applicable to them does not change.

5. Relationship between CDSM and the E-commerce Directive/DSA in general, beyond the responsibility of content sharing service providers

First of all, it should be noted that the DSA also introduces a new concept in relation to the types of services already known, namely online platform. It is a hosting service that stores and publicly disseminates information at the request of the recipient of the service, unless this activity is a minor or exclusively complementary element of another service or a minor functionality of the main service which, for objective and technical reasons, cannot be used without the said other service, and the integration of such element or functionality into another service is not intended to avoid the applicability of the Regulation. Moreover, given the significant scale of storage and public dissemination of information at the request of the user in the case of content-sharing services, there can be no question that content-sharing services are also online platforms, i.e. the provisions of the DSA that apply to online platforms will apply to them, not only the rules that apply to hosting services.

In this context, the question to be examined is whether the additional provisions of the DSA on liability of service providers apply to content sharing service providers covered by the CDSM.

The question of what we mean by liability rules is very important. If the determination of whether use has taken place, the criteria for exemption from objective liability, the general prohibition of filtering, the provisions protecting exceptions and limitations and the complaints procedure in the event of a dispute are also considered to be an intrinsic part of the liability regime, the DSA is not relevant in the regulation of these issues. This homogeneous (descriptive) approach is also reflected in the ECJ's decision in Case C-401/19, which examined the fundamental rights adequacy of Article 17 of the CDSM as a whole.[21] If, however, the liability regime is understood narrowly and the additional

[21] Communication Point 21.

measures are no longer regarded as a liability-type rule, the relationship between the DSA and the CDSM needs to be clarified.

Article 17 of the CDSM Directive does not only contain rules on liability and exemption from liability. Article 17(7) deals with the protection of access to content lawfully made available, (8) with the obligation on service providers to inform rightsholders of the content used and (9) with the complaints mechanism for uploaders. There is no equivalent to the standards in paragraphs 7 to 8 in the DSA, but a complaints mechanism is also provided for in the DSA.

The relationship between the CDSM Directive and the E-commerce Directive is clear as set out above: the CDSM Directive only exempts service providers from the general rules in the context of Article 14(1) of the E-commerce Directive. The additional standards referred to in the previous paragraph do not overlap with the rules of the E-commerce Directive and therefore no question of application arises.

However, the DSA contains much broader, more detailed rules, which also cover issues that appear in Article 17 of the CDSM. In addition, since the CDSM could not settle its relationship with the DSA, it is necessary to look to the DSA for a norm that can provide guidance on this issue. Unfortunately, however, apart from the provisions I have quoted above, the DSA does not provide any guidance as to how Article 17(7) to (9) of the CDSM should be applied from the date of entry into force of the DSA. Recital 12 of the DSA merely indicates that the application of the Regulation should be without prejudice to, inter alia, Directive (EU) 2019/790 of the European Parliament and of the Council, nor to national rules for the enforcement or implementation of those EU acts. This formula does not exclude the application of the rules of the DSA. If they would conflict with the provisions of the CDSM, the rules of the CDSM shall apply.

Section 6 of the study analyses the regulatory elements that appear to be in the same regulatory field and examines which provision applies in which case. It also analyses the changes that are taking place with regard to intermediary service providers, which reflect the incorporation of or divergence from previous case law. This part of the study will thus address the application of the additional rules relevant to the sharing of copyright content from the moment the DSA enters into force.

6. Application of the other rules of the DSA to online content sharing service providers and other intermediary service providers, in particular with regard to copyright infringements

The DSA also contains a number of provisions that have relevance for the effectiveness of copyright services, the removal of infringing content and the prosecution of infringers. These provisions also follow, in whole or in part, the case law of the European Court of Justice on intermediary services discussed earlier (Husovec, 2023).

In order for my overview to be considered complete, it is necessary to mention the changes in the regulation of other intermediary service providers. Although, the CDSM

has not introduced any new provisions in their cases, the DSA does refer to them and in particular to their liability. However, there are no significant changes as regards the liability of these service providers: the liability rules applicable to them in Articles 12 to 13 of the E-commerce Directive are repealed (in addition, Article 14 on the liability of hosting service providers and Article 15 on the general obligation to monitor are also repealed). The other rules of the E-commerce Directive remain in force. The rules in Articles 12 to 15, which are removed from the E-commerce Directive, are essentially transferred one by one to Articles 4 to 5 of the DSA. They are also covered by Articles 7 to 10 and Articles 11 to 15 of the DSA analysed below. Since the European Court of Justice's copyright jurisprudence has been based essentially on the rules on liability and monitoring and on the provision of data, the remainder of the analysis will focus on these issues.

In my view, the judicial practice that can be drawn from the cases discussed in the second section of the study is not reflected in the text of the Regulation. Nevertheless, the fact that the recital referred to explicitly confirms the validity of the case law of the CJEU is in itself significant. An analysis of the text of the Regulation confirms that the case law has been incorporated.

A prominent element of judicial practice has been the issue of the obligation of filtering and blocking for both access providers and hosting providers. This mainly required the interpretation of the general obligation (not) to monitor in the E-commerce Directive and the interpretation of a rule which does not prohibit reasonable filtering. Preamble (30) of the DSA assesses as an exception individual cases of monitoring and monitoring by national authorities in accordance with national and EU law. In this light, although the text itself coming from the E-commerce Directive has not changed substantially, its interpretation in line with the preamble suggests that the actual scope of the monitoring regime is no longer derived from court decisions but from the Regulation itself. In addition, Article 7 of the DSA has been introduced as a supplementary provision, stipulating that service providers are not prohibited from voluntarily monitoring their traffic.

Article 9 introduced new rules for decisions to act against illegal content. Of particular relevance here are decisions taken by public authorities (typically courts) in cases of copyright infringement. These rules do not exclude decisions taken in cases of copyright infringement. Moreover, these rules do not only apply to content-sharing platform providers but to all intermediary service providers and may also include, where appropriate, decisions containing a cross-border provision where the illegality of the content can be directly derived from EU law or where the issuing authority considers that the rights in question require a broader territorial scope in accordance with EU and international law, while taking into account the interests of the international community. These provisions are merely complementary to otherwise applicable national procedural laws, but could greatly increase the willingness of service providers to implement decisions taken by national authorities and the transparency of the follow-up to such decisions in the future. This may be of particular importance in the future with regard to cross-border copyright infringements.

The obligation to provide information on the recipient of the service under Article 10 appears to be a substantial improvement on the previous rules. Until now, the rules on intermediary service providers have imposed a very limited obligation on them to disclose

the details of their recipients in both civil and criminal matters. The relevant ECJ case law, which was mainly developed on the basis of Directive 2004/48/EC, recognised the obligation to disclose personal data only at a very general level: it ultimately left it to the discretion of Member States and their courts to decide whether to oblige service providers to disclose data, with due consideration of a number of fundamental rights. Article 10 regulates this obligation to disclose much more broadly than the E-commerce Directive did in Article 15(2) or the Enforcement Directive in Article 8.

Article 14 of the DSA contains general rules on the content of the standard contractual clauses of service providers. These requirements frame the provisions of Article 17 of the CDSM, which constitute "restrictions on the use of the service" under the DSA (such as all rules, procedures, measures and tools used for content management, including algorithmic decision-making and human review, and information on the procedural rules of their internal complaint handling system). The notification and takedown mechanism in Article 17 of the CDSM, the fair use rules, the complaint handling mechanism, the rules for taking legitimate content into account and ultimately, in my view, the liability provisions, all qualify as such. In this way, the obligations under Article 14 also include notices of activities under Article 17 of the CDSM Directive, but the DSA does not modify their content (Mendis, 2023).

Both for general business policy and enforcement practice, or even for copyright theory, very important information on the copyright practices of intermediary service providers will be available from the transparency reports under Article 15, which should cover all decisions taken against them, broken down by type of infringement, and notifications of infringing content. In my view, this latter category includes notifications submitted by copyright holders under Article 17(4) of the CDSM Directive. The rules on these are not affected by the DSA but are placed in a broader context.

In the second Part of the DSA, among the obligations applicable only to intermediary service providers, including platform providers, the rule on notification and action mechanisms in Articles 16–17 stand out. The CDSM only refers to the need for Member States to ensure that content-sharing service providers, upon receipt of a duly justified notification from rightsholders, take immediate action to make the works or other protected subject matter notified inaccessible or remove them from their websites, and to act with due diligence to prevent their future uploading. A more detailed elaboration of this rule is essentially contained in Articles 16–17 of the DSA.

It is important to note, however, that the DSA's exclusion from its scope of the rules that underpin the scope of the copyright regime may cause problems, and thus could lead to an interpretation that these articles do not apply to copyright infringements. This would mean that service providers would have to maintain two regimes for reporting and acting on different types of infringements.

It should be mentioned here that Rosati (2020) considers the notice-and-stay-down rule under the CDSM to be explicitly specific compared to the notice-and-action rules under the DSA, as the CDSM has different requirements in several respects (e.g. it does not require the URL to be provided in the notice), and therefore argues that the national rules transposing the CDSM will not necessarily change with the entry into force of the DSA. In contrast, Quintais and Schwemer (2022) believe that the provisions of the DSA

will pre-empt those of the CDSM. Given that the DSA explicitly provides that it does not affect copyright rules, one may be inclined to conclude therefore that Rosati's position on this point is correct.

Article 18 deals with the obligation to report suspected offences. This can be particularly relevant in cases where the service provider has not sought and obtained authorisation for use under Article 17 of the CDSM Directive, leaving both its use and that of its service recipient unauthorised. If the uploader commits a criminal offence in such a case, the service provider remains outside the scope of the offence (provided that it has taken all the necessary steps to be exempted from liability under Article 17 of the CDSM Directive), but also incurs a reporting obligation, provided of course that the act in question constitutes a criminal offence under national law. Although, the service provider still has no general monitoring obligation, it may find itself in a much quicker and easier position to detect an infringement and become subject to a notification obligation when proceeding under the CDSM Directive's liability limitation rules.

The internal complaint handling mechanism and the out-of-court dispute settlement mechanism in Articles 20–21 are also provisions in the DSA that are reflected in the CDSM and, as a consequence, in national laws. I agree with the conclusion of Rosati (2020) and Quintais and Schwemer (2022) that the provisions of the DSA are much more detailed and as such may replace the provisions of the CDSM Directive. Here again, the question may arise as to whether the provisions inserted in the national copyright laws in this respect can be maintained or whether it should be repealed after the DSA entered into force. In my view, however, the DSA leaves open the question of which dispute settlement bodies may be approached. Therefore, it is left to the Member States to decide this question and the national copyright laws could be further regulated in this respect (Quintais & Schwemer, 2022).

There are no provisions in the CDSM regarding the rules on whistleblowers and measures and protection against abuse (DSA Article 22). However, I share the view of Quintais and Schwemer (2022) that it is both necessary and important to apply them to intermediaries of copyright content. In the copyright field, the criteria for trusted notifiers are most certainly met by registered collecting societies or other transparent rights management organisations.

With regard to measures and protection against abuse, the criteria set out in Article 22 create the possibility of excluding notorious infringers from using the service, which could be another very effective means of reducing copyright infringement. Such provisions are not included in the CDSM and can be applied without further ado.

It should also be noted here that there may be additional obligations on very large online providers under the DSA that could have an impact on copyright practice.

These are in particular Articles 34 and 35 on risk management and risk mitigation. With regard to very large online platforms, the possibility of mass copyright infringement must clearly be considered as a significant risk.[22] Specific rules also apply to them in this respect as regards the ways of mitigating the risk. However, the CDSM Directive currently

[22] Article 34(1)(a).

contains more detailed specific provisions for copyright content, so that direct application of the DSA rules is not expected.

On the basis of the above, it can be concluded that the new type of provisions in the DSA, which apply to all intermediary service providers and specifically to hosting providers, also frame and apply to copyright enforcement and are likely to increase the effectiveness of measures against infringements.

7. Conclusions

The legal regime for service providers involved in the distribution of copyright content has undergone significant changes in recent years. The legal framework, unchanged since 2000, was redefined first by the CDSM directive and then by the DSA regulation. In 2019, at the time of the adoption of the CDSM, the only new, stricter regulation that seemed to be more in the interests of rightsholders was that of content sharing service providers. However, the entry into force of the DSA makes it more difficult for all intermediary service providers to escape liability for copyright infringement. Even if their liability cannot be established, they are in many respects more seriously involved in the fight against copyright infringements. This is in no small part the result of European Court of Justice case law from the last twenty years, which has been partly incorporated into the new rules.

Unfortunately, for the time being, it seems that content sharing service providers will continue to pursue the model of avoiding authorisation, which is also the riskiest for their subscribers: until the content is authorised by the rightsholder, their sharing is infringing and the regime that the DSA sets up for illegal content apply to them.

Although the DSA leaves the copyright acquis intact, its detailed analysis makes clear that many of its provisions apply also to intermediary providers of copyright content (be they content sharing services, online platforms or any other intermediary services), which help to ensure a higher level of copyright protection in a developed online world.

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Vulnerability and Resilience

A Short Introduction to the Challenges of Administrative Law and Public Governance in Uncertainty's Era

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Abstract: This paper aims to contribute to a reflection on the main challenges faced by today's societies and so essentially seeks to draw attention to the importance of deepening the connections between administrative law and public governance. For this purpose, the paper will reflect on a framework of tension between a vulnerable society and the need for it to become resilient, in association with disruptive phenomena such as the pandemic, globalisation and the digital transition. In this sense, the necessarily introductory exercise that we propose here first involves an approximation to the concept of 'vulnerability', particularly in the spectrum of administrative law, so that subsequently it is possible to make clear that there is a need for greater responsiveness, and hence 'resilience', on the part of public authorities. This paper has been drawn up in reference to the dynamic but complex intersection between public policies and instruments of democratic governance and legal regulation, based on a matrix that privileges human dignity and fundamental constitutional values.

Keywords: public governance, administrative law, uncertainty, vulnerability, resilience, sustainable development

1. General framework

The new social reality, highly sophisticated and complex and dominated by the advancement of science and technology, obliges the jurist to reflect on the present and learn to cope with an uncertain and insecure future from which not even a certain scientific elitism can escape. This means that while crossing thematic valleys and escarpments in this *Risk Society* (Beck, 1992), which we understand as also being the

society of ignorant knowledge[1] of which we are a part, jurisprudence and its practitioners need to open to new social and political issues without ever losing their lodestone. Namely, the defence of the essential values of the community, a community, which is increasingly global and technological, and therefore also increasingly disruptive, and of the rights of its constituent individuals.

Furthermore, if public law, and especially administrative law, has inscribed in its matrix an innate vocation to "interpret the signs of the times" (Garcia, 2018, p. 33), then this can only be done through the combination between law and public policies. Perhaps more precisely, one should say by linking law and (public) governance, by which we mean essentially "a new way of looking at the exercise of public powers", based on "methodologies that promote dialogue, cooperation and networking" (Roque, 2021b, p. 24; Frediani, 2021, p. 6). Therefore, it can be said that public governance cannot dispense with "the experience and knowledge of Legal Science", even if what is at stake is not only "to assess the legality of the government measures adopted, but also to contribute to ensuring that planning, organization, operation and control models that achieve the purposes sought by the legislator itself are implemented". This is because "no (subjective) right exists without the public apparatus being able to execute the public policies that reflect the majority will that implements, every day, the constitutional project of each People" (Roque, 2021b, p. 14). Clearly, this dynamic convergence between law and public governance results in a significant set of new legal (sub)branches, or at least, new social, political, and legal paradigms.[2] This sounds precisely like the *administrative law of resilience,* and, *a fortiori, public governance of resilience* – which had a privileged scenario of development in the pandemic and post-pandemic context. Fundamentally, the new paradigm of state and administration, the law and public governance of resilience takes the idea of a vulnerable society as its main premise and axis of gravity. In fact, in the translation from the original *Verwaltungsrecht der vulnerablen Gesellschaft* this new paradigm can also refer to an "Administrative Law of the Vulnerable Society" (Rixen, 2021, pp. 37–67), such is the interrelationship between vulnerability and resilience, taken simultaneously as characteristics of today's society and challenges for law and public governance.

In fact, if the topic of vulnerability is not necessarily new, since it cannot be denied that it was present in pre-pandemic legal-political thinking, what has changed substantially is its perspective: if in the pre-pandemic context vulnerability was seen essentially from the point of view of the individual, with the pandemic it is now seen mainly from the perspective of the fragility and fragilities of society as a whole and of the law itself

[1] We are absolutely in agreement with Maria da Glória Garcia, when she states that "there are areas of ignorance that no one can address", not even in the face of the expansion of scientific and technical knowledge, hence, as she also says, "one must conclude that it is not knowledge that is the reality that globally unifies men", but ignorance (Garcia, 2018, p. 232). Also referring to a paradigm of "irreducible ignorance" (Frediani, 2021, p. 9).

[2] It may make sense here to recall the thinking of Edgar Morin, an author who has asserted that there is a need to recognise the uncertainty and unpredictability inherent to social reality, and who has therefore called for a complex, broader and transdisciplinary approach around factors such as social and technological evolution (cf. Morin, 2017). Furthermore, it is particularly important to highlight the position of Emiliano Frediani that "the precautionary principle ends up determining a paradigm shift: from the 'wait and see' model we move to an approach based on the idea of maximum caution expressed by 'better safe than sorry' (Frediani, 2021, p. 8).

(Pinto, 2021, pp. 186–187). Therefore, it is here that the idea of an administrative law of resilience begins to take shape, a law capable of better dealing with the consequences associated with the vulnerability of society, i.e. a law of "risk management" in an uncertain era of digital transition and large-scale phenomena (cf. Rixen, 2021, pp. 44–45).

2. Vulnerability: A new way of looking at the person, society and law

2.1. A legal definition of 'vulnerability'

When systemising some concepts, and starting with the notion of *vulnerability,* it should be noted that this is not only a legal concept, but is widely discussed in other scientific fields, namely in social sciences, religious sciences and bioethics. Vulnerability "is, above all, our ontological condition", and "the reason for our vulnerability is based on the fact that it is not possible for us to close ourselves from within: the human being is openness", and, in this sense, our openness "represents our common vulnerability" (Mendonça, 2021, p. 76). This awareness of human frailty is essential for understanding vulnerability in the field of law, since the "center of the constitutional political project" is none other than the human person, who is simultaneously complex, plural and dynamic (Canotilho, 2022, p. 145) and, for that reason, vulnerable. So clearly, the term vulnerability, precisely denoting relativity or, perhaps better said, "human interdependence", either in a positive sense, in the direct sense of the necessary cooperation between people for the most diverse goals of social development, or in a negative sense, considering that the action of some causes either structural or individual harm or loss to others, is not only ontological, but also social (Liedo, 2021, pp. 244–246). Nowadays, it is clear that no one can remain "proudly alone".

In generic and simplistic terms, the term vulnerability indicates a situation of 'fragility' or the 'inability' of individuals to react to certain traumatic events, whether natural, political or socio-economic in origin. Some of the most paradigmatic examples that have dominated our century are the ruinous financial crises, climate change, the Covid–19 pandemic, the wars in Ukraine and the Middle East, the migration and refugee crises, and the problem of housing and poverty. These crises clearly demonstrate that vulnerability is associated with insecurity, dependency and lack of protection. In many circumstances, vulnerability aggravates the risk of exclusion and segregation, leading us to assume that it is both collective and individual (cf. Leão, 2022, pp. 95–96) and, consequently, linked to the risk (or risks) to which certain groups of people are (or may be) most exposed; these are sets of diverse circumstances that by generating situations of vulnerability lead to structural disparities that crystallise over time in society, thus preventing its integral democratic progress. Vulnerability as a legal concept thus refers prima facie to the specific constitutional position of individuals, i.e. a 'relational' and 'contextual' position (Canotilho, 2022, p. 157; Fineman, 2010, p. 255), which is expressed in the "mechanisms that guarantee their effective representation in the exercise of public powers" and in the "theoretical and practical-methodological opportunities to see their

claims recognized and debated" (Canotilho, 2022, p. 144; cf. Liedo, 2021, pp. 251–252). Taking account of vulnerability thus creates, in a challenging way, new fundamental subjective rights (or at least rights that are not reducible to conventional ones), new public policies and, of course, new legal mechanisms. On this assumption, and as Mariana Canotilho notes, the "*community social dimension* (Portuguese: dimensão social comunitária) is the starting point for the dogmatic construction of a *constitutional law of the commons* (Portuguese: direito constitucional do comum)" (Canotilho, 2022, p. 144). In other words, the recognition of vulnerability and of its circumstances seeks precisely to dethrone both the notion close to a caste system-based social model and the notion rooted exclusively in subjective individuality. This means that vulnerability can and should be assumed to be a window of opportunity for a new political-legal vision: vulnerability implies, and must imply, a displacement from the "I" to the "We", such that questions arise from it, as Maria da Glória Garcia (2018, p. 238) explains: How should we organise ourselves in a political and juridical community in such a way as to make possible the "continnum" of life now threatened? How should we reinvent our community life based on uncertainties and indeterminations? How can we build as much trust as possible in the community and guarantee freedom in it?

Thus, while it is not advisable to cancel the analysis of specific vulnerabilities, it is even less advisable, and would be ineffective, to merely take a situational approach. This means, therefore, that the political-legal analysis of vulnerability must be transversal, structural and global.[3]

Based on the above, and assuming that there is an inseparable link between constitutional law and administrative law, it will also be appropriate to state with recourse to a well-known expression that the administrative law of resilience is this constitutional law of the common *materialised*. From this essential shared path to which public governance is linked, only "an important project of social justice" can follow, i.e. a responsiveness "to the natural and constant condition of vulnerability" (Leão, 2022, p. 92),[4] which without neglecting the essential collective responsibility, is capable of mitigating society's "general loss of functionality" (and not merely the loss of some of its subsystems) (Rixen, 2021, p. 39).

2.2. Vulnerability in administrative law – Brief notes

Given the (current) profile of vulnerability, it is simply naïve to think that modern administrative law, being based on an idea of parity between administration and individuals, would be unaffected by the subject. However, it is not only the legal-materialist view of administration that does not correspond to the reality of the situation, but also the lack of attention paid to the issue of vulnerability in administrative

[3] Similarly, "[…] vulnerability is a relational issue, and the conditions that determine it rest on the structure of a society". "In order to be able to put a structural vision into play, it is also necessary to broaden the concept of vulnerability beyond the particular autonomy deficit" (Liedo, 2021, p. 252).

[4] In fact, this project has to contain a "reasonable combination" between "ethics of justice" and "ethics of care", which can guide the elaboration of criteria for action to face situations of vulnerability (Liedo, 2021, p. 253).

law, especially compared to the attention that it has been paid within the spectrum of private law; this contributes to the development of a very difficult and complex picture (cf. Silva, 2022, pp. 11–12). Therefore, it is necessary to raise (or re-embrace) awareness of the fact that not only is it a duty of administrative entities to protect individuals, and in particular, their fundamental rights, but it is also essential to exercise public administrative powers in a way that guarantees this protection and increases the resilience of citizens. However, this awareness results in another paradoxical finding: the strengthening of public administrative powers as a way of ensuring resilience, simultaneously contributes to situations of vulnerability: either because it accentuates legal and material imbalances between the administration and individuals, or because it generates multiple uncertainties, especially in the application of norms, and in particular in contexts of high adversity (cf. Silva, 2022, pp. 15–18). Finally, it can also be said that if administrative action must combat vulnerability, it also constitutes itself an agent of "institutional vulnerability".[5] Without this awareness, public governance and the administrative law of resilience would be seriously compromised and might even end up dead on arrival, so to speak. Therefore, the consideration of vulnerability in the spectrum of administrative law implies the reconciliation of the values and functions of the defence of the public interest, and the legitimacy of the exercise of administrative powers, as well as the protection of the legally protected rights and interests of citizens. As such, we can only agree that the starting point lies in the need to "analyse to what extent the existence of an inequality between the administration and the individual generates, as a rule, a *vulnerability* for that latter" (Silva, 2022, p. 21). This is not in order to annihilate every kind of vulnerability, but in order to enable an adequate, just and democratic response to situations of vulnerability (cf. Liedo, 2021, p. 254; Silva, 2022, p. 21) to be provided, i.e. a response that strikes a healthy balance without giving up one or another of the functions assigned to public authorities and public governance.

There are many examples of the existence of vulnerability in the field of administrative law. By way of illustration, consider what happened in the context of the pandemic, with a broad reinforcement of public powers, highlighting the attribution of broad sanctioning powers to administrative entities; or the widespread imposition of mandatory mask-wearing and mandatory curfews, as well as dependence on social benefits and subsidies provided by the State. More recently, in the context of the housing crisis, the possibility of compulsory leasing being mandated by public authorities; or in the field of digital transition, the dematerialisation of administrative procedures and the use of artificial intelligence for administrative decision-making, which entail high risks related to the depersonalisation of public administration, lack of decision-making transparency, digital exclusion and new forms of discrimination (cf. Otero, 2019, pp. 488–489). Moreover, in the final analysis, it is reasonable to say, especially in connection with corruption that public institutions themselves can also become vulnerable and, therefore, less resilient (Fineman, 2010, p. 256).

[5] In this regard, and alluding to digital governance, "[t]he vulnerable action of the State, or the so-called 'institutional vulnerability', is present in the selective action of the State when developing public policies that, in theory, would be able to mitigate the situations of vulnerability experienced by sections of the population" (Freitas, 2022, pp. 118–119).

While it is very difficult, one might even say impossible, for the actions of public authorities not to create vulnerable situations for individuals, it should also be borne in mind that across the spectrum of administrative law, there is a constitutional and legal obligation to protect the public interest while also protecting the rights and interests of citizens.[6] This is because "in addition to constituting another facet or another angle of interpretation of the functions of legitimation and conditioning of administrative action, the protection of citizens' rights has to be autonomous as an essential and autonomous function of administrative law of the democratic rule of law", in such a way that "in addition to the responsibility of creating mechanisms for the protection of citizens, both in relation with the administration and in the legal and social relations between citizens, administrative law also has the function of enabling the practical and effective realisation of administrative citizenship, social rights and, in general, the rights to benefits from the State [...], which, invariably, call for an active and decisive intervention of the public administration" (Gonçalves, 2019, pp. 98–99). We would even add that while the path to balance between the various functions of democratic administrative law is often thorny, it is also true that this search highlights considerably the need to embark on a new model of public governance, which is more than participatory, whether it assumes, or should assume, as collaborative.[7] In these terms, the implementation of administrative citizenship, as an 'antidote' to vulnerability, can therefore only mean active and decisive intervention, and therefore co-responsibility, of citizens.

3. Some perspectives and challenges around administrative law and public governance of resilience

3.1. The (political-legal) meaning of 'resilience'

As far as can be gleaned from what has been said so far, resilience is not only the flip side of vulnerability, but also represents a counter-response or counter-reaction. That said, what is the scope of resilience?

Among the various adjectives that are used to refer to state administration and to administrative law itself (for example, consider the "regulatory state", the "infrastructure administration" and the "administrative law of regulation"), it can be said that taking account of vulnerability allows us to assign an adjective to the administrative law of our time, as we have already said, the *administrative law of resilience*. This term ('resilience') is actually one of the most widely used today, and (along with climate change and digital

[6] Cf. Article 266(1) of the Constitution of the Portuguese Republic; and Article 4 of the Code of Administrative Procedure.

[7] Underlining the differences between the participatory model, which he calls "the handshake" (sic!), and the collaborative model, which he calls "the handshake" (sic!), and reiterating the virtues of the latter in relation to the former, insofar as "the individual is not limited to a reactive and secondary position, intervening throughout the decision-making and executive procedure, as an active subject of the public policies implemented (even if in a position of subordination to the public interest represented by the government)", to which the "way in which governments communicate with public opinion (and vice versa)" contributes (or should contribute)" (Roque, 2021b, pp. 267–269).

transformation) one of the essential pillars of the Portuguese Recovery and Resilience Program: broken down into social, economic and territorial resilience. It is thus associated "with an increase in the capacity to react to crises and to overcome the current and future challenges associated with them", in order "to promote a transformative, lasting, fair, sustainable and inclusive recovery".[8] Operating essentially in the context of socio-ecological theories and contrary to what one might think, resilience cannot relinquish the idea of either transformation or adaptation. This means, essentially, that resilience has in flexibility and resistance its essential and "indissoluble" qualities or conditions (Fortes Martín, 2019, p. 3). This is, keeping the definition adopted by the UNDRR (United Nations Office for Disaster Risk Reduction), "the ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions".[9] As we can see, and as far as we think, there is no resilience without vulnerability (cf. Fineman, 2010, p. 269). Indeed, if vulnerability does not cease to contain a juridical-political-ethical appeal to care and the common, then the responsibility incumbent on public authorities to increase resilience can only be achieved through the implementation of public policies (cf. Liedo, 2021, p. 255), and not just any policies, but such policies, which can enhance flexibility and resistance.

This means that resilience goes beyond mere precaution and prevention. This is because prevention is essentially intended to avoid certain or proven risks, and precaution aims essentially to control potential risks.[10] Meanwhile, resilience seeks to maintain and guarantee the integrity of systems, thus assuming the role of an autonomous legal principle with highly dynamic properties, referring to "an action, a constant movement, a continuous improvement with the aim of achieving the increase or strengthening of one's own resilience" (Fortes Martín, 2019, pp. 15–16, 19).

However, partly due to the relativity and dynamics that are inherent to resilience, the "handicap of its growing juridification lies in how to quantify it and how to determine its threshold of elasticity, as well as how to manage it well", even leading to the invocation of a "resilience of resilience" (Fortes Martín, 2019, p. 20). Even so, the legal-political ethics inherent to the communicative vessels between vulnerability

[8] See https://recuperarportugal.gov.pt/prr-resiliencia/.

[9] Available at www.preventionweb.net/files/7817_UNISDRTerminologyEnglish.pdf.

[10] These principles are well established and have greater relevance in specific areas, such as health and the environment. See in this respect what Article 3(c) of the Environmental Policy Law (Law N.º 19/2014, of 14 April) provides for: "Public action in environmental matters is subject in particular to the following principles: […] prevention and precautions, which require the adoption of anticipatory measures with the aim of obviating or mitigating, as a matter of priority at source, adverse impacts on the environment, whether natural or man-made, both in the face of immediate and concrete dangers and in the face of future and uncertain risks, in the same way as they may establish, in the event of scientific uncertainty, that the burden of proof is on the party claiming the absence of dangers or risks." Consider also the Judgment of the CJEU, Proc.s C 487/17 to C 489/17, of 28-03-2019, according to which "the precautionary principle must be interpreted to the effect that where, following an assessment of the risks, which is as complete as possible having regard to the particular circumstances of the case, it is impossible, in practical terms, for a holder of waste which may be classified under mirror codes to determine the presence of hazardous substances or to assess the hazardous property of that waste, it must be classified as hazardous waste" (n. 62).

and resilience do not dispense with, under penalty of mischaracterisation and loss of meaning, either politicisation or juridification.[11] In this spirit, the guarantee of strengthening of resilience not only plays a role in several of the Sustainable Development Goals associated with the 2030 Agenda, but also seems to be assumed, from a constitutional point of view as being a true fundamental task of the State. It is sufficient to recall that under the terms of Article 9(d) of the Portuguese Constitution, it is incumbent on the State to "promote the well-being and quality of life of the people and real equality among the Portuguese, as well as the realization of economic, social, cultural and environmental rights, through the transformation and modernization of economic and social structures". This means that well-being, as a structuring element of a Western model of State and Society involves, as Paulo Otero (2020, p. 101) says, "an open dimension and progressive realization by all generations of the conditions (material and immaterial) that translate into a reinforcement of the improvement of the quality of life of the human person", that passing through the action of the public authorities, cannot be exhausted in them.[12] Therefore, in our view, there is a strong case for building resilience as a means or form of implementing the constitutional clause of well-being, although this should not mean hyper-interventionism of the State (*rectius,* of the public powers). On the contrary, well-being is to be understood in the light of the Western civilisational matrix as a task for each and every individual.[13]

In line with the foregoing considerations, resilience should be envisioned as a set of public policies aimed at achieving equality, happiness and quality of life in general,[14] whose implementation, tangibility and reinforcement are inevitably guaranteed through the action of public authorities, notably administrative entities, but also through the aforementioned model of collaborative governance, inevitably leading to the assumption of a new discursive mode of legitimation of the exercise of power (cf. Roque, 2021b, p. 33). In short, in a legal-political sense, resilience brings with it both the constitutional clause of well-being and the set of means by which it is effectively implemented and guaranteed, as a reflection of the paradigm of responsiveness (which, while it may have innovative features, is not completely new). Promoting resilience is, therefore, promoting the ability of each and every individual to contribute to the greater good, and thus to a more democratic, supportive, fair and cohesive society.

[11] Also calling for the politicisation of the ethics of care and the "introduction of care tasks into theories of democracy and justice" (Liedo, 2021, p. 255).

[12] It should always be understood that "the principle of human dignity, if it constitutes the foundation of the welfare clause, also ends up introducing a limit to well-being itself as a task of the State, as it entails a limitation to a model of public intervention that is exorbitant on the sphere of civil society: respect for human dignity underlies a rule of subsidiarity or substitutiveness in the action of the State" (Otero, 2020, p. 102).

[13] About the "reciprocity inherent" of membership in society see Fineman (2010, p. 260).

[14] Therefore, it is not surprising that the doctrine regarding the approach to vulnerability has recovered the idea of the need for an authentic 'social responsibility' in guaranteeing well-being. In this respect, although not exactly in the same terms in which we set out our considerations, see Fineman (2010, p. 256).

3.2. Resilience and return to the welfare state – Essential premises

As has already been said, resilience does not oblige or presuppose per se the removal of intervention by public authorities. On the contrary, it can be said that the guarantee of strengthening resilience requires the strengthening of the position of the highest authorities, particularly the exercise of the statutory powers of the administration, but rather demands it. Therefore, once again following Stephan Rixen (2021, p. 61), it can well be said that "without the long range of the autonomy of the Administration in major crises [...] the constitutionally required guarantee of resilience will not be possible to achieve". As such, it is this guarantee of resilience that mobilises a return of the welfare state of law or, if one prefers, its resistance in the face of postmodernity and neoliberal seductions,[15] because, as Jorge Reis Novais (2018, pp. 199–200) also argues, the welfare state of law truly embodies a "legal-constitutional principle that determines the nature and meaning of all state functions", so that "the values and elements on which the liberal characterization of the rule of law was based will not fail to undergo the reformulations that result from the new tasks assumed by the Welfare State of Law". It is therefore strange that, especially in the context of the pandemic, the jus publicist doctrine has been proclaiming the 'failure' of the guarantor administration (Ponce Solé, 2021).[16]

However, if this is the case, the inevitable return (or resistance) to the social rule of law should not mean a kind of omnipotent proclamation of the intervention of the state and the public administration. On the contrary, this return must presuppose the abandonment of a purely mercantilist vision of blind freedom. To put it another way, the need for a return to the rule of social law, which, paradoxically, has always been inscribed in our constitutional order, is the perfect image of the need for an "optimal weighting (Portuguese: ponderação ótima)" of values in constant conflict (Otero, 2019, p. 292). Good and resilient public governance is precisely such governance that without renouncing the values of freedom and individual autonomy, does not allow itself to be held hostage to the interests of economic groups and other lobbies.[17] Good public governance will therefore only be truly good if it does not ignore the importance of the performance of public authorities in the promotion of real equality, non-vulnerability and in the protection and promotion of constitutionally recognised rights (Solé, 2021, p. 4). This reveals once more the dynamic intersection between public governance and (administrative) law, given that if the former does not fail to manifest itself in planning and foresighted action and, therefore, in primary consideration, the truth is that law, allowing the positivisation of values, rights and principles related to it,

[15] In this sense also, referring to the pandemic context, it can be underlined that "The Provider State came into play" (Silva, 2022, p. 16). For further developments about neoliberal administration see Otero (2019, pp. 287–292).

[16] From a constitutional point of view, it is worth recalling what Otero (2020, p. 105) writes, which we fully endorse: "If the Constitution establishes a model of well-being and imposes it as a program of State action in the realization of economic, social and cultural rights, it is important to make it clear that the constitutional text is, at the same time, to give the Public Administration a political protagonism that surpasses anything that the liberals of the constitutional phenomenon could imagine."

[17] Also going so far as to call the social and democratic state of law a "liberating state", which "avoids the domination of society and the citizens who compose it by private factual powers, and guarantees a dignified life" (Solé, 2021, p. 7).

and thus also allowing the active responsibility of the administration to be designed,[18] it undoubtedly contributes to the "institutional quality", that is, to the implementation of public policies and to the proper functioning and development of society (see Solé, 2021, p. 6).

Without these essential assumptions, intimately linked to the idea of the welfare state of law, it is very difficult to speak about resilience at any time.

3.3. The pathway being built (or the concerns and challenges in the implementation of resilient public governance)

As can be seen from the above, the interconnection between vulnerability and resilience not only influences the construction of social and legal institutions, but also constantly demands their reformulation and improvement. Furthermore, in this continuum, there are actually several concerns and challenges that administrative law and public governance are facing. Some of these are considered below.

In the immediate term, it should be underlined that if vulnerability is assumed as a potentially common characteristic of all subjects and given that, none of us is potentially free, a first step towards guaranteeing resilience (and strengthening it) is, as already mentioned, to oblige public authorities to take vulnerability, or rather situations of vulnerability, into account, in order to seek to mitigate its actual impact. However, we immediately face a major challenge: to prevent public authorities' actions from embodying a renaissance of paternalism. In fact, if those who find themselves in a situation of real vulnerability are not totally free, they will never be able to be free if are subject to the paternalism of free public power (cf. Leão, 2022, pp. 101–102). This means that the political and legal consideration of vulnerability, as a prerequisite for ensuring resilience with a view to achieving material equality, has to be compatible with individual autonomy.[19] It is therefore necessary to rethink the model of public governance, based on an obligation – and hence the responsibility – of the public power to build or create the essential conditions for citizens to express themselves freely. To this end through legal regulation, it is necessary to enshrine a fundamental right to happiness as a paradigmatic measure, and to recognise a principle of maximising happiness as a cardinal principle of the public governance of resilience, which, amongst other things, enables the study undertaking of new mechanisms for the acquisition and redistribution of income, new models of work and investment in educational, cultural, creative and leisure development (cf. Roque, 2021b, pp. 45–52; Roque, 2021a, pp. 1204, 1209–1210). In other words, there is an urgent need to rethink the contemporary Western model of social organisation, the essential core of which can never cease to be the human person and their free development (Roque, 2021a, p. 1208).

[18] Precisely associating the return of the welfare state of law to the importance of administrative action and public regulation through the instruments of administrative law (cf. Solé, 2021, p. 8).

[19] Distinguishing 'autonomy' from 'equality' and stressing the importance of the state guaranteeing individual autonomy as a means of achieving freedom, without ignoring the intervening role of the state, especially in promoting equal access and action (Fineman, 2010, pp. 257–262).

Secondly, it is important to question the real capacity of public authorities, especially state authorities, to ensure the strengthening of resilience. As an example, it should be noted that currently in Portugal, according to official data contained in the "Recuperar Portugal" [Recover Portugal] portal, only 22% of the milestones and targets agreed with the European Union, in relation to the Recovery and Resilience Programme (RRP), have been implemented.[20] Furthermore, it is important to bear in mind the problems of digital exclusion, and not to forget that according to OECD data from 2021, despite investment in the digital transition, less than half of citizens and companies in Portugal use digital public services. In addition, there are a number of other risks, such as those related to the storage and processing of personal data or those related to decision-making transparency (or the lack thereof), especially when considering the use of algorithms. There are indeed enormous concerns about this set of issues. In fact, we wonder if we will not witness a paradoxical conjunction between resilience and uncertainty, which instead of mitigating vulnerability will actually increase it.

Thus one example of the real way forward must be through a strong commitment to civic education,[21] which fosters democratic participation and is more responsive to the challenges brought about by changes in traditional power structures; fostering digital literacy and digital citizenship education; the deepening of new forms and networks of cooperation, including the private sector and the cooperative sector, combined with the improvement of various mechanisms for monitoring and effective accountability. Also, it will naturally have to presuppose the legal regulation of the complex and disruptive phenomena linked to technological and global advances, since as Miguel Prata Roque (2021a, p. 1201) reminds us, the public governance and administrative law of the present times, launched on the basis of a "Constitution of the Future", have "to face and understand the new reality of the digitalization of today's societies and virtual networks that crush individual freedoms, the reserve of private intimacy and the right to difference". As such, it is particularly necessary to strengthen the rights to privacy and protection of personal data, to promote a culture of 'open source', accompanied by public investment in technology, equipment and infrastructure, and to limit the exploitation of data by large multinational economic groups, seeking to mitigate the effects of a phenomenon of elevation of technical-scientific power to a 'feudal' level, in particular in relation to the political and legal domain.

In the wake of these considerations, it is essential to emphasise the importance that the European Union has assumed in the legal regulation of these disruptive phenomena. Both the European Commission's Communication entitled *2030 Digital Compass the European way for the Digital Decade,*[22] and more recently the *EU Artificial Intelligence Act* come immediately to mind. In relation to the former, the clear commitment to digital transformation as a means to achieve European resilience should be underlined, suffice it to recall that, as the Commission says, what is intended is nothing more than to "harness

[20] See www.recuperarportugal.gov.pt.

[21] In this context, the Academy can also play a pivotal role, especially through the promotion of curricular structures, courses and events that study and deepen the aspect of public governance, with an eminently multidisciplinary perspective.

[22] See https://shorturl.at/Y9Mjl.

the potential of the digital transformation and help build a healthier and greener society".[23] In this sense, the strategy contained in the Communication is mainly based on the following ideas: providing citizens with digital skills and qualified professionals; investing in the digital transition of both companies and public services; and secure sustainable and efficient digital infrastructure. The *EU Artificial Intelligence Act*[24] also highlights the importance of compatibility between technological innovation and the protection of fundamental rights, sustainability and the democratic rule of law. To this end, the Act prohibits so-called *predictive policing* (in Portuguese: policiamento preditivo), when policing is based exclusively on the definition of a person's profile; as a rule, the Act prohibits the use of remote biometric identification systems by law enforcement entities; and further, it prohibits the manipulation of human behaviour or the exploitation of human vulnerabilities by AI. Similarly, the Act provides for both obligations for high-risk AI systems (e.g. those that cause significant damage to health or the environment), as well as risk assessment and reduction mechanisms, while also providing for the need for transparency and human oversight, while enshrining the right of citizens to complain about artificial intelligence systems. Comparing all this data, it can well be said that the governance of the digital future, on which we are already dependent (see Calzolaio, 2023, pp. 14–18), in which the EU takes on a pioneering role, even supplanting the normative role of the Member States,[25] reflects a clear and close link "to the canons of administrative law" (cf. Farinho, 2023, p. 41), evident in the systems of administrative regulation and proceduralisation of the activity in pursuit of the public interest (cf. Farinho, 2023, pp. 30, 41).

However, there is also another phenomenon: the disruption of normative sources. In fact, not only are the risk contexts extremely favourable to the proliferation of the administration's informal action, as demonstrated in the pandemic scenario, but over the last few years there has been a "relentless *deconstruction of the legal-constitutional order* [Portuguese: desconstrução da ordem jurídico-constitucional], perpetrated by the facts carried into the normative system by the internet and new technologies" (Castro, 2023, p. 153). It is therefore impossible not to notice the blurring of the distinction between legislative and administrative activity, and even the progressive disconnection of normative production with the "democratic radical", leading to new and very diverse centres of normative production (Castro, 2023, p. 168). Without wishing to go into further consideration on the subject here, it should in any case be stressed that the path necessarily passes through (and has to continue to pass through) a "technologically neutral constitutional interpretation", i.e. an interpretation related to the guarantee that the values that shape the constitutional order "must remain intact, despite the disruptive potential propagated by the technological revolution", without prejudice to the fact that in the case of 'obsolete' values, there is nothing to prevent the occurrence of "new constitutional considerations" (Castro, 2023, pp. 67–68). In other words, what is needed is the very resilience of core constitutional values, *prima facie,* the resilience and

[23] Of course, this and other instruments can only be understood in the light of the Digital Agenda for Europe. Regarding the Agenda, for a general framework and further developments see https://shorturl.at/LAstp.

[24] The text adopted can be found at www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf.

[25] Speaking even of a process of "invisible and discreet constitutionalisation of the EU, the result of a continuous and tacit integration process", when "state constitutions are no longer total constitutions" (Castro, 2023, pp. 27–34, 35–37).

effectiveness of fundamental rights,[26] from which it becomes possible to project an 'intersection' between "the principle of digital sovereignty" and "digital constitutionalism" (Santaniello, 2022, p. 50).

In this ongoing journey, one should not ignore the importance of associating resilience and sustainability, because if resilience aims to mitigate vulnerability, even if it does face a number of challenges, sustainability is actually one of the fundamental pillars (i.e. a strategy) of resilience. Thus, administrative law and public governance of resilience do not exist (nor make sense) if they do not integrate a strategic vision of sustainability, referring to civic sustainability, social and demographic sustainability, financial sustainability and environmental or ecological sustainability (see Rocha, 2013, pp. 7–10). On the contrary, the depletion of resources, and particularly the exhaustion of public resources, not only leads to external dependence on public authorities, but also introduces a vicious circle, which can be embodied in an increase in the tax burden for example. This leads to greater vulnerability, which in turn leads to less resilience and lower happiness and quality of life. Furthermore, without a clear commitment to demographic sustainability and civic sustainability, there will be a risk of exacerbating territorial asymmetries and undermining certain social systems and subsystems (e.g. the social security system), along with the risk of democratic erosion due to a lack of knowledge or interest in public affairs on the part of the population (on "lack of adhesion of the new generations" see Roque, 2021a, p. 1200), leading in extreme cases to an explosion of populism and extremism.

More than ever, it is imperative to rethink the system of financing social benefits, to rethink and redesign the electoral system and models of democratic participation, while calling on citizens to participate in public affairs and to seriously rethink public policies for territorial planning and cohesion. In the same way, it is necessary to enshrine not only the sustainability of decisions as a true criterion for the legitimacy of public governance (cf. Roque, 2021b, pp. 57–58), but also the creation of tools and principles for environmental and financial sustainability that will ensure a more sustainable and resilient transition. By way of example, it will be important to (continue to) promote mechanisms such as the intermodality of 'environmentally friendly' transport and the systems of deposit and return of materials and waste, and to embrace principles such as preference for the local economy and the circular economy at the constitutional level, as fundamental pillars of the democratic system of current times (see Roque, 2021a, p. 1205).

Finally, and even if it is not exhaustive, it is appropriate to think about the (im)possibility of models of precautionary action by public authorities, which relate to the above considerations and concerns. Above all, what is at stake here is the need to institutionalise a general, legal and operational framework that is sufficiently flexible and resilient to deal with a number of uncertain risks, a framework which, it should be stressed, is different from the constitutional and administrative frameworks for exceptional situations, based on structuring dimensions such as proportionality, non-discrimination,

[26] Also underlining the limits to technical-scientific power by "constitutional norms endowed with direct applicability" (Otero, 2019, p. 460). And even noting that the European Union "seems to want to claim a system of tutelage that connotes it as an area of freedoms and rights, able of ensuring an anthropocentric and personalistic government of innovation" (Allegri, 2021, p. 12).

consistency and cost–benefit assessment, intergenerational balance and weighting based on scientific developments (cf. Frediani, 2021, pp. 11–12).

Of course, many other concerns and challenges could be raised here. In any case, the preceding paragraphs make it undeniable that nothing will be the same as before, and so the path along which law and public governance go together is the only one which leads to resilience.

4. Concluding notes

As we move towards the end of this introduction to administrative law of resilience and public governance, it is important to underline that resilient and sustainable public governance, i.e. governance that mitigates vulnerability is a governance that as the *2023 Agenda for Sustainable Development* reiterates, *cannot leave anyone behind,* but must include everyone, because it concerns everyone (and should be about everyone). Similarly, and in parallel, administrative law must respond to the problems of everyday life, which is constantly changing, highly technological and globalised, and therefore also confusing and uncertain.

In view of the above, the administrative law of resilience will only truly be such if it focuses on problems that affect real people in a real world, and therefore if it is a law, which focuses on communities as a reflection of a "new paradigm of community life" (Garcia, 2018, p. 239). Therefore, once again, using what this author teaches, we must not be afraid to affirm that the law that legitimises the action of the public authorities cannot depart from the law and legal security and certainty, but also cannot be based exclusively on them; in fact, "[d]ealing with the uncertainty of the knowledge that is possessed, in the most diverse areas, with the uncertainty of evolution and social movements, as well as with the lack of knowledge of the complexities that characterize specific situations and determine the good options requires a different compression of the law, which emphasizes precaution and its guiding and pedagogical mission, and is rooted in principles and in people's rights" (Garcia, 2018, p. 251).[27] We believe that this is the foundation that can be called the administrative law of resilience and the public governance of resilience, whose matrix, without denying the progress of science and technology, must nevertheless continue to be based on an anthropocentric conception.

In short, the legal-political model of resilience is the model of a society that, although marked by vulnerability and its circumstances, survives as democratic, plural, interdependent, cooperative and sustainable. If this is not the case, it will be very difficult for us to be able to be resilient and thus to have a livable life worthy of the name. After all, remembering the words of Pope Francis (2022), in an increasingly uncertain and disruptive future, "no one is saved alone". Finally, a further task, which lies in our own hands is to

[27] And, in the sense that "our legal future will pass through other organizational models of normation and new standards in the defense of the human person and his or her 'right to have sustainable rights'", to which I would also add the duties of everyone (Pinto, 2021, p. 197).

prevent the decay of Western democracies, by promoting and implementing good and sustainable public policies, without ever losing sight of fundamental values. Therefore, such policies are the last stronghold of resilience.

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Performing Representativity, Expanding Democracy

Human Rights as a Blueprint to Demand Voting Rights for Non-citizen Migrants

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Abstract: The right to vote stands as a cornerstone in contemporary liberal democracies, but its limits, particularly regarding who holds this privilege, remains a contentious issue, pitting democracy against the intricate dynamics of migration. Acknowledging this tension, this article asserts that a more illuminating perspective on the nexus between voting rights, migration and democracy emerges when viewed through the lens of human rights, as opposed to the conventional framework of citizenship rights. The article develops a theoretical framework based on a practical case from Germany, where the *Demokratie für Alle* movement advocates for voting rights for non-citizens, underlining thus the importance of a human-rights-based framework in shaping political demands. The article explores the articulation of a practice and the emergent theory upon which it can be sustained, exploring thus the concept of a performing representativity within an actual and evolving context.

Keywords: migration, human rights, voting rights, citizenship rights, practice-based knowledge

1. Introduction

The right to vote is one of the touchstones of modern liberal democracies. However, the question of who can vote is part of ongoing debate where democracy as a form of government is challenged by another social logic with its specific weight: migration. The presence of newcomers to a given political system upsets its equilibrium in ways that need to be acknowledged. However, most nation states, through their governing bodies, seem to fear specific risks when some form of membership expands. They usually control the potential inclusion of newcomers through the management of citizenship.

Different critics have analysed this connection, and the second section of this article presents, in a synthetic form, the leading lines of that debate. Moreover, the article argues that a better setting from which to understand the tension within the voting rights–migration–democracy nexus can be found within the compound on human rights under which, following certain migrant non-citizen practices, it can be interpreted, as against the set of citizenship rights in which it is usually inscribed. The third section presents a theoretical framework that provides viability to this claim. The fourth section presents a practical case from Germany, where a recent movement that demands voting rights for migrant non-citizens, *Demokratie für Alle* has presented both achievements and setbacks, therefore offering an experience of its own that shows how activists rely on a human rights framework in order to shape their political demands. Following this empirical articulation, the fifth and last section of the article analyses what this implies for a theoretical frame more broadly, and explains how a sort of performing representativity in this issue can be understood.

2. Voting rights for non-citizens

Voting rights for migrant non-citizens can be theorised from different perspectives, yet traditionally most of them fall under the frame of the citizenship model as this has been contended by theorists of the nation state (e.g. Marshall, 1950). One of the classic criteria within the democratic tradition upon which this model was structured was to answer who takes part of the *demos,* the people of a nation that makes up a political unit. An early understanding of the *demos* made it work practically as a form of membership (Beckman, 2006), and the ways this could be granted was usually along the lines of cultural or ethnical resemblance (constituting thus the 'stronger' version of the notion of membership). Under this guise, the challenges posed by migration has led to a defence of the *demos* as the group of all adult citizens, members of a cultural group, who reside in the territory and only of these. This delivers a 'constrained' perspective of the *demos,* which implies that resident non-citizens should not be granted the right to vote (Arrighi & Bauböck, 2016). In a stark contrast, constitutional doctrines and democratic theories have increasingly developed and defended an 'expansive' conception of the *demos,* deepening thus our understanding of democracy. Within this perspective, democracy theorists have often presented the view that political representation should be granted to all those, and only those, subjected to the laws of the territory where these apply (López-Guerra, 2005; Abizadeh 2008; Beckman, 2006, 2009; Owen, 2012).

This first divide between constraint and expansion has set the stage for a number of theoretical propositions, often at odds with each other. However, the most progressive positions tackle political and voting rights from a more realistic perspective, where migration is a key factor for the constitution and functioning of societies. For instance, addressing the topic from a normative perspective, a handful of analyses argue why or how states grant or should grant rights to non-citizens (Varsanyi, 2005; Bauböck, 2006; Song, 2009; Garcia, 2011; Pedroza, 2014; Hayduk, 2015; Blatter et al., 2017). Drawing on Bauböck (2005), we can organise some of these views according to key principles of liberal

democracy. One of these is that of 'territorial inclusion', which regards a democratic polity as a community of individuals who are subjected to the same political authority and its laws and who have therefore equal rights to representation and participation in the making of these laws (Dahl, 1989; Beckman, 2006). Under this view, every permanent resident in a territorial jurisdiction should enjoy voting rights. Another approach is the 'all-affected' principle, which proposes defining the *demos* "decision by decision rather than people by people" (Shapiro, 2003, p. 222; see also Whelan, 1983). This viewpoint may result in the inclusion of resident non-citizens in elections, since they are clearly affected by the outcome of collective decisions, but it may also be used by expatriates if political changes made in their country of origin concern them. This principle may appear ideal, but it is in fact difficult to implement and defend. As Bauböck argues (2005, p. 686), a principle of affected interests may justify voting rights for citizen non-residents if the decisions of governments profoundly impact on the interests of other countries' populations (for instance, in a commercial confrontation that could lead to a war). A principle of affected interests can therefore be impractical and, since most elections in representative democracies are not about instituting new specific laws (i.e. referenda) but choices about who has the authority to engage in law-making and enforcement within an already given polity, it might not help overcome the need to define the territorial and membership boundaries of the *demos*.

However prolific and alluring, these approaches still deal with a theoretical understanding of citizenship that has been instrumental to sustain the legal framework of contemporary nation states. Other paths have been opened by approaches that argue for forms of 'global' or 'cosmopolitan' citizenships (e.g. Held, 2004; Benhabib & Post, 2006), the practical idea of 'urban citizenship' (e.g. Rocco, 2007; Coll, 2011), as well as through the body of work prompted by the idea of 'acts of citizenship' (AoC) put forward by Engin Isin (2008). The 'cosmopolitan' or 'global' forms of citizenship typically emerge as a solution to what some see as an inadequate territorial citizenship, bound to ethnicity and/or dominant culture, and a logical demand to follow the impact of global processes on the territorial state. These positions claim that precisely because the state is being challenged by global processes, citizenship should be reformulated as global, or cosmopolitan, as to be made compatible with such processes (Brysk & Shafir, 2004). On its turn, advocates of 'urban citizenships' concentrate on practices and see local residence, rather than nationality, as the foundation for society membership and decision-making authority. Undocumented immigrants, they contend, are already *de facto* residents of specific communities and should be allowed to become *de jure* members with the ability to influence and shape its sociocultural, economic and political life (De Graauw, 2014). Finally, the AoC approach reorients citizenship discussions away from individuals and their status and towards the behaviours that give rise to political subjectivities (Aradau et al., 2010, p. 956). This means that, rather than concentrating on disentangling status, institutional politics and state authority, the AoC literature highlights practices, constitutive politics and everyday struggles of migrants *qua* claimants. In other words, this approach focuses on how migrants claim rights and perform duties, and how, by doing so, they constitute themselves as citizens, even if this does not imply acquiring the 'official' documents to 'prove' it.

While this article sympathises with these views, it also works through some of their shortcomings. In a sense, it argues that political rights, and within them the right to vote, should be decoupled from a normative understanding of citizenship (Oliveri, 2012, p. 795), but at the same time, that global or cosmopolitan forms of citizenship pose problems when trying to identify a given performing polity, for this will most probably turn to be the political unit to which migrants want to pertain to, or vote in (Tambakaki, 2010; see also a classical argument on political participation in Schmitt, 2005). On its turn, while AoC originally focus on 'divergences', 'distortions' and 'disorders', that is, on subjective negativities that resist legalist formalisations (Isin, 2008, p. 20), it seems that these should be understood through a closer understanding of the processes involved, and not only by inquiring acts or habits of an individual or a community, interpreted by an engaged researcher as political enactments in and of themselves. Finally, even if proponents of urban citizenships do contend that practical forms of membership emerge, they seldom reflect on the overall theoretical operations that this implies, which may have an impact on the ways we think about democracy more broadly. It would seem thus that the AoC and the urban citizenship approaches observe a similar phenomenon from opposite practical perspectives (aspiring actions in the former case; constitutive performances in the latter). Yet both seem to disengage from trying to contest the legal structure to which their observed actions respond.

Attempting to explore that ground, this article contends that, rather than through disperse and sometimes unacknowledged events, practices or examples, political agency is performed through processes of subjectivation that have different rhythms, undergo different stages and can be performed in key political articulations (Foucault, 1983). To be clear, events, practices and examples are necessary performances to observe in this process, but they are not sufficient. It rather seems that to be able to pin down how subjectivation/politisation works, it is necessary to articulate and understand the structure of collective movements, through both visible and non-visible enactments, symbolic but also practical feats, in practices that imply not only good-willed interpretations of political gestures, but also contest specific legal or democratic structures to bring about change. This article aims to make a contribution in this direction. For this, it departs from a theoretical perspective that allows us to bypass, or at least question, the formal, normative understanding of citizenship. For that aim, the next section presents a theoretical frame which, as the documented practices in the third section of the article will show, is more akin to what migrants perform specifically in their politisation process.

3. Human rights vs. citizenship rights

One of the main challenges to understand the migrant's political rights and within them the right to vote in a situated context is to be able to read them beyond the framework that explicitly forbids or hinders their enactment. When the *demos* is already set and defined, newcomers are simply non-members; the defining line is clearly set, and failing to recognise it often leads to criminalisation of irregularity. Migrants represent movement in and of themselves (Nail, 2015a), and trying to have their rights recognised by institutions

that preclude it poses a dilemma. As Papadoupolous and Tsianos (2013, p. 186) write: "The more one tries to support rights and representation through citizenship, the more one contributes to the restriction of movement." As we will see, this is one reason why migrants, and especially irregular migrants, recur to the language of human rights to state their claims over the right to vote and other political demands. In fact, the *Universal Declaration of Human Rights* from 1948 explicitly recognises: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives" (Article 21).[1] Raskin (1993, p. 1458) has already pointed out that this enunciation of basic political rights is afforded to 'everyone', and not just to 'every citizen'.

However, we need to acknowledge the problems of essentialising the notion of human rights as a sort of quality or property intrinsic to human beings (Marx, 1844; Arendt, 1968; MacIntyre, 2007; Tasioulas, 2012; Menke, 2015, p. 204). It would be a very weak argument simply to rely on the pre-existence of an abstract set of rights to advocate for a specific right to vote. And yet, what has been done historically is precisely this, yet from the opposite standpoint: to argue for the functioning of human rights as if these were the exclusive properties of citizens. In the end, this is what the Arendtian maxim on "the right to have rights" implies (Shachar, 2014). If human rights are just as good as any institution's or nation's ability to defend them, membership to a political community, granted through citizenship, is the only possibility to guarantee protection. In that case, indeed, "the loss of a polity itself expels Man from humanity" (Arendt, 1968, p. 297; see also Tambakaki, 2010, p. 3). This points to some conceptual underpinnings that need to be acknowledged.

The right to vote or to be elected within a liberal, democratic regime has been traditionally linked, under the citizenship paradigm, to the capacity of an individual to exercise a set of rights and incur in responsibilities and obligations. As we have said, this approach is supported by a specific interpretation of democratic legitimacy, one bounded by a *demos* or representation of a specific people and accountability to a specific constituency. When this form of *demos* is demarcated by a specific culture or ethnic group, this particular approach to democracy is built over a constrained paradigm, which posits an imaginary community (Anderson, 1983), which presupposes the citizen as a consistent cultural figure and ultimately hopes to bridge differences through references to a common idea of the good and a shared future. In this view, all the citizens of the community would share in a common identity (homogeneous), transcend or suppress their own particularities (universalism), and have access to equal rights (equality). But this approach has two specific problems for pluralistic contemporary democracies. On the one hand, it relies on an understanding of politics that pretends to guarantee that the actual pluralism of a society is bounded by common values and goals, and can be guided through a single and cohesive idea of the good. This single origin is seen to ensure the homogeneity necessary for integration, stability and democratic action, and any divergence along ethnic, cultural or linguistic lines is deemed to bring only negative effects. In that sense, this view mystifies the notion of a common good as a metaphysical fact, instead of viewing it as the result of a political process as a sort of agreement, which individuals shape through their

[1] As Earnest (2003, p. 17) has pointed out, the language of the *Declaration* is ambiguous on whether this refers to his or her country of citizenship, or his or her country of residence.

participation in public affairs, and through which they constitute themselves as citizens in the first place. In this last sense, we could think alternatively that to be a citizen means to be part of a social covenant or a common promise that is expected to bring about a better situation through the cooperation for those involved (Margolis, 1982; Reinach, 1983). Or as Tambakaki (2010, p. 43) writes, "the affairs that are common, public and national determine the participants' 'we consciousness'." As this shows, even if there is a dominant paradigm, we can count at least two opposing views to explain how citizenship emerges (Toscano, 2023).

On the other hand, the constrained or ethnic-bounded view also denies the accent on particularities that liberal democracies have been keen to stress with their valuation of the individual, and it therefore negates the inherent tensions that exist in complex modern societies. As a matter of fact, the growing number of non-national individuals (both citizens and non-citizens) within contemporary societies put the features of a constrained approach to citizenship to the test: first, many individuals do not share in the society's national identity (heterogeneity); second, many seek a specific and public recognition of their particularity, be this described in economic, gendered, religious, class or ethnic terms (particularism); and third, many demand that equal rights entail, in some instances, differential treatment (for instance, through affirmative actions and similar policies). In other words, the constrained view of democracy is unable to address global problems and issues, is incapable of answering challenges brought about by the development of potentially post-national entities such as the European Union and is inapt to meet the issues and demands raised by ethnically diverse, complex and multi-tiered societies.

And yet, how to understand democracy under an alternative form, not as an imagined construct working over a homogenous foundation, but as a dynamic setting of competition, cooperation and mutual engagement? A key notion is here again the idea of representativity. If democracies are truly representative, they should, up to some point, mirror the changes and multiple rearrangements of a dynamic society. But for this representativity to be effective, more inclusive voting rights need to be granted and actively performed. Of course, this produces a deadlock when voting rights are insistently linked to citizenship, and when this notion is again dependent on the ideal of a national homogeneity. An argument cantered on human rights can bring a different perspective. Yet how can we understand the 'right to vote' as a 'human' or 'inherent' right of an individual to attain a sort of community representation, without recurring to some kind of 'natural' attribute of human beings?

For a start, an individual's presence in a community can be seen as performing in itself: an individual adds, communicates, relates, etc. to that community through his or her own embodied being, *taking part,* and this does not imply an essentialist assumption, but a fact. We face here a form of membership of a different sort, one that is activated by being there, even if excluded. For exclusion may be telling when it represents a state of things; in that case, it showcases a broader reality. The excluded *take part,* albeit negatively, and through that, they *present* themselves *representing* the effects of the political mechanism that bars them. Strong representativity in this sense would necessarily imply an acknowledgement of every incumbent individual within a body politic where that individual is engaged, and is ruled by the laws stemming from it. This looks again close to the all-affected principle that was previously presented. Yet, instead of pleading through

normative arguments for the inclusion of these individuals into a body politic, the incumbents play out here their own exclusion, resisting it by stressing it, and thereby embodying the contradiction that their rejection implies. When this happens, what emerges is not a flaw in the structure of a representative democracy, but precisely a performativity that delineates the gears of a system which applies different laws for distinctive sets of individuals within the same territory, and which Agamben (1998, see parallel articulations in Balibar, 2001; Bosniak, 2006; Badiou, 2009) has termed as a 'state of exception'.

As Agamben (1998, p. 160) argues, groups as refugees and irregular migrants experience the most extreme forms of 'bare life'. These groups embody "the condition of exclusion that those exempt from the normal sovereignty are subject to" (Rajaram & Grundy-Warr, 2004, p. 41). Facing the state of exception, citizenship rights cannot challenge the structure, because they are the means through which it distributes and controls political agency. Moreover, through these normalised exclusions the liberal democratic regime creates a subclass of individuals for which a different set of rules apply, challenging its own democratic standards (or aspirations). Within the subjacent tensions, particular provisions can be demanded as instantiations of human rights and, as we will see in the next section, sometimes changes that try to alleviate the consequences of exclusions do take place. In other words, if we understand the right to vote away from its articulation as a set of citizenship rights and locate it instead under the more inclusive compound of human rights, a different understanding on the issue of representativity, one that can be shaped through a performed insistence of the excluded, emerges. Yet, how would this affect the general understanding of the notion of human rights, as well as their practical implementation?

To answer this, it is, first of all, necessary to examine more closely the differences and some of the specific traits between citizenship and human rights. Drawing on Tambakaki (2010, p. 54), we can outline at least five basic differences between them. First, whereas human rights pertain to all human beings irrespective of membership in a political community (inclusion), citizenship is accorded exclusively to the members of nationally and territorially delimited communities (exclusion). Second, while human rights are conceived as universal, citizenship can only be particular because the rights and privileges it confers remain confined within particular nation states, and can only be enforced if the power of the state is realistically delimited. Third, due to their origin as a set of recognitions of the human worth, human rights are in principle moral and legal rights, even if they can take on a political role in specific democratic regimes. Citizenship rights, by contrast, have strictly political connotations: the citizen is the primary political entity embodying democratic self-determination. Fourth, while legal citizenship is exclusively granted by nation states, human rights override the capacity of states since "protection is their prime function" (Heater, 1999, p. 160). Finally, whereas human rights are commonly regarded as passive rights by virtue of their protective function, citizenship is understood as a dynamic set of entitlements that can be exercised.

These intrinsic differences bring about three important consequences that need to be acknowledged as well. First, because of their original protective function, human rights owe their force to their symbolism; they expand a formal defensive shield which is

nevertheless difficult to implement beyond the institutional framework that is needed to enforce them (the Arendtian thesis). Citizenship rights, on their turn, function more as entitlements, privileges of a membership that some nation states are keen on protecting; therefore, they owe their force to their effective exercise. Second, human rights are empowering, and can be called for to defend an individual against the violence or aggression of his/her own nation state; citizenship rights might be also empowering, albeit in a different form, by using the means and resources of the body politic to bolster the condition or political situation of an individual. Third, and perhaps most importantly, while human rights, through their inclusionary movement, tend to expand liberties (universal freedom of movement, freedom of speech, freedom to vote and be elected), citizenship rights, through their exclusionary dynamic (the construct of the *demos* as a totalising collective body) tend to strengthen equality (Balibar, 1994). While this should not be seen as an antithetical opposition, it brings about a tension, especially when citizenship is delineated along the lines of a nationalist paradigm. Tambakaki (2010, p. 11–12) recognises this tension when she writes: "Maximum individual liberty as promised by human rights weakens the unity and cohesion of the body politic, while strong unity as required by citizenship constrains individual liberty."

Under this setting, if the right to vote is seen as expanding the freedom of individuals, it can be definitely seen as part of an inclusionary movement for human rights. But the right to vote can also have a reductive approach, and be seen as the mere performance of an entitlement under the exclusionary vision of the nation state function of citizenship. Of course, this last option reflects a specific political anxiety, and a form of control that aims at limiting an inclusionary dynamic that is seen to threaten an imaginary totality (e.g. Huntington, 1996; Sarrazin, 2010). Nevertheless, when a society diversifies itself beyond the possibilities of the nation state to control it, the right to vote, restricted as a form of citizenship right, works against the ideals of a liberal democracy. For as Rawls (1996, p. xlvi) reminds us, in a liberal democracy the notion of citizenship should reinforce the capacity of individuals to "form, revise and rationally pursue their own conceptions of the good". In other words, the tenacious attempt of the political hegemonies to control who is able to participate may indeed work against the concrete rearrangements, cultural dynamics, and even desired improvements of the society they belong to. An ideological imposition threatens factual political representativity, and denies legally excluded minorities their inherent political and cultural worth in the society in which they already participate. In this sense, limiting the right to vote in intrinsically multicultural societies can only be made at the cost of jeopardising the liberal and representative quality of the democracy that can never be taken for granted, for it is necessarily being continually articulated, reorganised and accomplished.

4. The demand for non-citizen voting rights in Germany

The previous section has sought to delineate a theoretical framework where the 'right to vote' can be assessed from a perspective on human rights, instead of the citizenship rights vantage out of which it is usually interpreted. This framework is more apt to show

the tensions that a liberal democracy faces regarding the exclusion of some of its participants: migrant non-citizens who are nonetheless active members of a society. By turning now to see how the demand for the right to vote has taken place in a specific context, this section aims to understand how exclusion is played out from below, resisted, and ultimately enacted as a form of political representation, as "the self-presentation of the political existence of the inexistent" (Nail, 2015b, p. 121). After the case is presented, the fifth and last section will attempt to formalise the theoretical aspects emerging out of this practical form of engagement.

4.1. The path of a migrant struggle

To understand a specific social dynamic, the following case will concentrate on a concrete political space. Germany provides a relevant case in this context, and this at least on three grounds. Firstly, because the country is nowadays the second largest receiver of migrants worldwide (IOM, 2022). Secondly, because the country hosts a large swath of permanent population that lacks political and voting rights (almost 10 million adults, or 14% of would-be voters (Brentler, 2021), which is larger than the size of Austria). And thirdly, because the country defines itself as a liberal and representative democracy. In a sense, many elements are at stake in this territory that, in an exemplary sense, will define the quality of Western democracies in the years to come.

Different articles have approached the German situation, yet again, from a normative perspective (e.g. Neuman, 1992; Earnest, 2003; Shaw, 2007; Arrighi & Bauböck, 2016). However, in order to incorporate the point of view on the performative representation of those excluded, this article wants to connect that vantage point with the struggles from below, enacted by migrants, regular or irregular, and other engaged citizens with whom effective alliances have emerged. We can locate already a substantial tradition in this field. For instance, in 1989, a series of very strong cases for non-citizen voting were presented, in a time when the country was experiencing political changes. The states of Hamburg, Schleswig-Holstein and West Berlin attempted to establish limited voting rights for resident non-citizens. Nevertheless, the initiatives were reversed by the Federal Constitutional Court in 1990, arguing that the laws violated the Basic Law [Grundgesetz], since all elections must be representative of the 'people', or *demos,* consisting of German citizens (Neuman, 1992; Earnest, 2003, p. 9). Different scholars have come to define this as a benchmark case for a judgment that reflects a constrained view of the *demos,* according to which citizenship is both a necessary and a sufficient condition for the franchise (Benhabib, 2004; Shaw, 2007; Arrighi & Bauböck, 2016). Furthermore, some scholars have pointed at the problematic stance of the arguments that the Constitutional Court produced. For instance, Beckman (2006, p. 156) argues that not only an ethnic-centered view upheld the notion of the 'nation', but also that the argumentative efforts were directed to demonstrate who 'the people' is (a matter of membership), and not who could vote (a matter of enfranchising individuals). Obviously, the Constitutional Court coupled together 'citizenship' and 'right to vote' under the umbrella terming of citizenship rights, without realising that a right to vote for non-citizens does not take away any rights from

Germans, under whatever conception this unit may stand. In a sense, the Court made a traditional interpretation of the Basic Law, instead of attempting a defence of its democratic framework. As Neuman (1992, p. 289) writes: "The Court found local suffrage for aliens inconsistent with the principles of democracy as currently framed in the Basic Law, not with any 'essence' of democracy."

Even if controversial, this resolution implied a serious pushback for local authorities and *Bundesländer* trying to enfranchise their growing non-citizen population. But other paths have been attempted by leftist and progressive groups of civil society and by migrants themselves. In 2002, for instance, the *Freiburg Wahlkreis 100%* began campaigning for the equal political participation of migrants in the city of Freiburg, in the state of Baden-Württemberg. As an exploratory form of political organisation, their consistent commitment has raised awareness on the issue as well as inspired other democratic instigations. In the state and federal elections of 2015, 2017, 2019 and 2021, their symbolic 100% elected local council convened regularly (Sontag et al., 2022, p. 9–10) and their effort has embodied a significant praxis that has contributed to a growing European network striving for equal democratic participation.

Other political associations have engaged in specific campaigns and networking operations during the periods of state or federal elections, reminding the general public that the demand for voting rights for non-citizens is a pending issue on the democratic development of the country. This has led to the emergence of campaign clusters, active at different moments and different locations. In this guise, for instance, the campaign network *Wir wählen* [We Elect] was founded in 2017 by electoral rights activists in Berlin, Nuremberg and Freiburg, coordinating migrant representatives and organisations from 12 federal states. Similar structures and developments can be seen in the campaigns *Voting Rights for All Residents,* active since 2020; *Hier lebe ich, hier wähle ich* [Here I Live, Here I Vote], started in 2021; the growing alliance of cities signing the *Unsere Städte, unsere Stimme* [Our Cities, Our Voices] declaration, or the initiative *Pass(t) uns alle* [Passport for All/We Are All In], from 2022. In all these cases, the campaigns have contributed to uphold the democratic aspirations of the organisations, while they mobilise forms of community building and help structure more responsive local governance practices regarding different aspects of non-citizen political participation. The developments and achievements of these campaigns and associations mirror other international experiences where city officials in alliance with the civil society and migrant groups have led to successful mobilisations and help institute related policy initiatives (De Graauw, 2014; Hayduk & Coll, 2018).

4.2. The Demokratie für Alle [Democracy for All] campaign – Key aspects and influence

Out of the different campaigns named above, this analysis will now reflect on the development and implementation of a particular one, to explain how some elements stand out and play important roles in a political practice. In that sense, the campaign whose description follows will function here to explain the mechanism of a specific

node in a wider network, one which articulated a particular positionality with a specific theoretical sensibility, where the notion of political rights as derived from a human rights agenda stands at the centre, and was tactically mobilised to argue particularly about the voting situation of non-citizens in a specific context.

Towards the federal election of 2021, a group of non-citizen migrants initiated in Berlin a campaign called *Nicht ohne uns 14%* [Not Without Us 14%], to demand the right to vote on a federal level for all adults living in the country over 5 years. The campaign had some tracking at a local level and over online platforms, but it certainly exploded when major news outlets and national networks began inviting their spokespersons for interviews and discussions, and quoting their data and claims (e.g. Garbe, 2021; Prösser, 2022). Yet most importantly, it attracted the attention of a handful of local politicians from the left side of the political spectrum *(die Linke, die Grüne, die Urbane).*[2] After the elections took place, a coalition came to power in Berlin, made up by the *SPD, die Linke* and *die Grüne.*[3] And echoing the *Nicht ohne uns* campaign, this coalition explicitly stated in their governing agreement [Koalitionsvertrag] that they would seek "to create the federal legal requirements to enable active voting rights at state and district level for people without German citizenship who have lived in the city for at least five years" (SPD, Grünen & Linke, 2021, p. 68).

Nevertheless, in the face of a mere promise, the activists did not stop their campaigning. On the contrary, after the elections, other organisations came together to reinforce the common claims. One of the largest associations that engaged in a broader coalition was *Deutsche Wohnung & Co. Enteignen* (DWE), an organisation that had been campaigning to demand a solution to the lack of affordable housing in Berlin. For that specific demand, the main instrument that DWE was trying to prompt was a form of expropriation [Enteignung] from major housing companies, and for this they attempted to trigger a referendum by collecting signatures. However, almost 30% of their collected signatures were deemed invalid (Joswig, 2021), most of them because the signatories were non-citizen residents of Berlin, a fact that showed another facet on the limitation of political rights for migrants. DWE realised that it needed to be part of a movement that demands the right to vote for non-citizens, since this is the foundation for different forms of social cooperation. In this view, the right to vote and other political rights were a *condicio sine qua non* for any social project of a comprehensive democratic dimension. Out of that conviction, and together with other associations, the *Demokratie für Alle* (DfA) campaign was launched.

The DfA initiative pushed the efforts that had begun during the federal election further along 2022. Some of its major outcomes were the presentations of the activists and

[2] Politicians from these parties generally show greater openness toward regulated immigration, especially at the local level. However, none have consistently committed to a national agenda for voting rights for non-citizens. *Die Urbane,* a relatively new and decolonial-focused party rooted in Berlin, has participated in local elections since 2017, though it has yet to secure a minimum percentage to participate in the government.

[3] The SPD [Sozialdemokratische Partei Deutschlands], or Social Democrats, is Germany's oldest political party and is centre-left in orientation. They have distanced themselves from the issue of voting rights for non-citizens, focusing instead on an immigration policy with 'clear rules'. *Die Linke* and *Die Grünen* are also left-leaning parties; however, all three prioritise 'integration' (i.e. State-controlled access) over expanding political participation as the foundation for democratic engagement.

their political claims at the House of Representatives in Berlin throughout different sessions in November that year. The protocols of those hearings are rich in data showing how non-citizen activists explained their claims, articulating the right to vote not in isolation but along the lines of a right to political expression, human dignity, self-development and autonomy, delineating thus the constellation of a human rights approach (Abgeordnetenhaus Berlin, 2022a, 2022b). Due to unexpected political circumstances, Berlin's governing agreement from 2021 could not be implemented, but this program had an unexpected influence at a federal level. Since two of its signatory parties (*SPD* and *die Grüne*) constitute part of the national governing coalition with the *FDP* (centre-right), their influence grew to pass in 2023–2024 the new federal Law for Naturalisation [Einbürgerungsgesetz], as a sort of answer to a growing political concern.[4] This new law has revised the possibility for naturalisation down from 8 to 5 years of continuous residency within the country, and for the first time it includes provisions to allow one person to have more than one nationality, a hurdle that may have explained the lower numbers of naturalised persons from previews reforms (see Diehl & Blohm, 2003, p. 146). Due to space constraints, this article cannot delve into the intricacies of the new naturalisation law, nor into the new residency permits that were introduced in adjacent legislations. Yet, it is worth noting how the mobilisation of a set of demands can, under the right political circumstances, lead to some legal changes and the advancement of a social agenda. Of course, what the non-citizen activists and their citizen allies were demanding was articulated along the lines of an inclusion of interested partakers, as an expansion of human rights, and the answer by the state came in the form of a loosening of the requirements for citizenship, which is a statutory form that it can control. The core of the democratic demand was not met, but some provisions that ease the demands to acquire traditional citizenship were introduced.

5. Performing representativity: Key points on non-citizen democratic participation

As the movement for the right to vote for non-citizens in Germany shows, political rights are not simply granted by ways of exposing the better arguments in a normative guise. Non-EU migrants have been active in a struggle to demand participation in a democratic framework, engaging themselves in processes of subjectivation and politisation that are of a transformative nature, both for them and for the context in which they are active. Within this process, migrants cannot make use of the terminology and status afforded by the nation-state-managed notion of citizenship, which actually hinders their actions. For as Johnson (2015, p. 957) writes, "citizenship is a paradigm that is built fundamentally on exclusion and othering, upon the lines that divide. In translating noncitizen (sic) agency into a framework that remains described by

[4] The FDP (Free Democrats) is a centre-right party that emphasises a regulated, skills-based approach to immigration. While prioritising integration, they also advocate for limited access for asylum seekers and other forms of irregular migration.

citizenship, we lose the capacity to understand and engage non-citizenship as a political subjectivity that exists in an autonomous way." Instead, what we observe is that migrant non-citizens rely on a vocabulary of rights that is common parlance in human rights struggles and demands (e.g. Abgeordnetenhaus Berlin, 2022a, 2022b; see also Ataç, 2013; Ataç et al., 2015). But this is exactly their cogency. For as Amartya Sen (2006) argues, enclosing human rights within a legal framework obscures the tremendous diversity of ways in which they are given shape and force in everyday life.

Furthermore, using a human rights framework to encode the activists' demand for the right to vote is also possible because these are structured in a different form than citizenship rights, as we have already seen. Human rights are inclusive, symbolic in nature yet full of political force, and even if they do not rely on (and cannot be summoned through) actual legislation for non-citizens, they have a moral grounding that is actually part of their intrinsic cultural value in democratic societies. This implies that, even if human rights may not be argued as 'natural' rights of migrants and therefore cannot be assumed as a pre-existent set of principles, non-citizen activists can rely on an ethical sensitivity that clearly understands a demand for equal basic moral status (Tasioulas, 2012, pp. 9, 26). In that sense, if the term 'liberal democracy' is to be synonymous with a political regime that protects individual civil liberties, abides by the rule of law, is based on constitutionalism, and is committed to the protection of ethnic and cultural minorities, then the protection of human rights is an intrinsic demand that can and must be continuously instigated.

Evidently, this does not mean that the human rights agenda is a safe way. As other scholars have shown, human rights may easily fall under the securitisation trap, which limits critically their reach (Banai & Kreide, 2017). However, human rights, as distinct from citizenship rights, carry a universalist promise and a sense of hope, which are often triggers in politisation processes from below. Moreover, non-citizen migrants in Germany have mobilised themselves embodying precisely a unique form of symbolisation (Monforte & Dufour, 2013, p. 5), which may have proved an asset within a human rights agenda. They have repurposed their non-citizenship status as a way to delineate a specific system that applies different laws to a common population sharing the same territory and even facing similar everyday challenges (Kanalan, 2015). Their movement both demands that they are acknowledged in the decision-making processes of the communities where they reside and highlights a form of discrimination. As such, they embody a representational lack, the not-yet-achieved yet ever aspirational promise of a liberal democratic regime. Consequently, non-citizen campaigns are forms in which this lack performs, by presenting the existence of the non-existent. In this guise, by the very presentation of their existence, and the descriptive statements about their situation, their movement exposes "the split created between the state, the nation, the territory and the law" (Nail, 2015b, p. 115).

Through campaigns that strive for the right to vote, the migrant non-citizen emerges as a political figure. And as Nail (2015b, p. 118) states, "a political figure [...] is the proper name of the subjective commitment to a new political truth". In this sense, active migrant non-citizens not only expose the inherent contradictions and atavisms of a so-called democratic order, but they also play out their own role exposing the structure of a 'state of exception'. This has effects for both citizens and non-citizens which cannot be wholly

delineated in this text. But it is important to view this as a democratic contribution. This may seem to be theoretical in nature, but as proponents of a so-called 'urban citizenship' have argued (Rocco, 2007; Coll, 2011; De Graauw, 2014), this organisation also has real effects on the everyday struggles of individuals, as they guide different community's efforts to expand the rights and benefits of non-citizen migrants in areas that include health care, public education, employment and different forms of political representation. In this context, performed representativity can be seen as a form of participation in a democratic framework, *where each counts for one,* through which non-acknowledged members play out politically their actual belonging to the system, even when (or precisely because) they are located at the fringes of that system, and despite its exclusionary mechanisms.

6. Concluding remarks

The phenomenon of migration is bound to be one of the more complex topics of the century. Democratic systems are and will be necessarily challenged by its evolving dynamics. However, the question of who has a right to vote in a given territory is still a matter of debate. While theoretical discussions are welcomed, and provide informative substance, the interactional situation matters as well. This has been acknowledged by proponents of different forms of 'urban citizenships' and the AoC approach. These bodies of work contend that citizenship should be regarded from a different vantage point, away from the status-oriented connotations and structures ascribed by nation states. This article is in line with those concerns, yet it has sought to contribute with a case-based analysis that observes migrant non-citizen political practices contending legal structures, and basing their claims for that aim along the lines of a human rights approach.

This perspective has the advantage that it can read motivations and performances of the excluded as part of both a subjectivation process and the cohesion of a movement. The article has sought to analyse why the human rights framework can, indeed, function as a blueprint to demand political rights. This does not mean that human rights should be treated as foundational traits or mere institutional functions (Tasioulas, 2012), but that, in the way in which they are played out and performed, they actually provide a model for activists to engage productively in political undertakings, as (marginal) members of a body politic. In a sense, as Menke (2015, p. 8) argues, the declaration of rights is a political act in itself, an act that is the foundation of the political. A further understanding of this articulation would need to develop an approach to see how human rights could sustain some form of political empowerment, and under which conditions. It would also need to develop how, within this setting, human rights abandon their perceived passive, residual or compassionate standing, to become an active set of rights that reinforce mutuality, solidarity and a reciprocal search for freedom.

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The Bumpy Road to Good Governance and Public Service Delivery

Analysis of the Challenges to Strategic Plans Implementation in Public Organisations in The Gambia

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Abstract: Scholars have long established the connections between strategic plans and service delivery and how lack of dedicated plans to clinically bypass the attendant complexities and intricacies tends to undermine the efficacy of the implementation process. Most research on the crucial antidote against bad governance, which is often attributed to arbitrary policy making, dearth of accountable leadership and uninformed decisions have been conducted in the developed climes where public service delivery are comparatively better served. Research about strategic plans in Africa, where most public institutions grope in the dark for lack of strategic torchlights to navigate the bumpy road to delivering public goods at a challenging time when citizens are becoming more demanding of governance dividends, is commensurably low. The paper, therefore, analysed the challenges to strategic plans implementation in achieving the objectives of public service organisations (PSOs) in The Gambia. Cross-sectional data about institutional challenges to adopted strategic plans were collected from relevant authorities and key informants, and descriptively analysed. The study revealed a range of challenges confronting implementation of strategic plans by PSOs in the country, namely, poor public service emoluments resulting in low staff morale and systemic corruption (RII = 3.90), political interference (RII = 3.88), inadequate facilities (RII = 3.86), lack of top management commitment (RII = 3.81), lack of political will (RII = 3.81), inadequate strategic management professionals and expertise (RII = 3.67), and insufficient budgetary allocations (RII = 3.66). Added to this, negative employee behaviour and attitude, negative and unfavourable internal and external environmental changes and conditions,

and corruption and mismanagement of funds among others were the challenges that confronted PSOs during strategic plans implementation. The research validates strategic plan as a good governance tool for public service delivery in The Gambia.

Keywords: challenges, strategic plans, implementation, public service organisations and service delivery, The Gambia

1. Introduction

The logic that failure to plan is a plan for failure appears to be instructive in the contemporary world, when most governments of the world are struggling to meet up with the ever-expanding needs of the citizens. In the developing world, Public Service Organisations (PSOs) have received less than commensurate attention, despite the crucial roles they play as life-saving service delivery organisations. The United Nations devised a way of identifying countries in accordance with the state of the economies and public service delivery statuses. As such, three development categories, namely, developed, moderately developed and developing countries have emerged from the categorisations. Public service delivery tends to be more established, with stable administrative and predictable decision-making systems and consistency in policy environments, in the developed countries. Conversely, the developing countries are still facing myriads of challenges that often undermine public service delivery. Apart from the seemingly insurmountable issues of acute shortage of resources, weak institutions and political instability, more often than not, the institutions saddled with public service delivery often lack strategic plans that should serve as the compass at critical times. However, most studies on African development often harped on leadership crisis, unstable and volatile political systems, corrupt practices, dearth of 'big push' resources and climate change issues. The few ones that touched on this important area of development studies have attempted to examine the countries as a whole with little or no tenacity and the variegated peculiarities of each country.

Strategic planning has been considered a decision-making process and technique in managing public organisations. In the real sense, strategic plans are roadmaps that are clearly drawn for the purpose of effective service delivery. Strategic planning may be and often is a component of strategic management practice that connects planning with execution on an ever-continuous basis (Bryson & Edwards, 2017; Bryson et al., 2017). Strategic planning is a process that defines an organisation's vision, mission and mandate. It assesses the opportunities and threats that exist in the external environment; evaluates the strengths and weaknesses within the organisation and manages the strategy formulation, implementation and evaluation to produce sustained value with a view to accomplishing organisational goals and objectives. Strategic plan helps chart future plans and directions and pathways to an organisation in order to achieve corporate goals. Strategic planning could equally aid organisations accomplish established objectives or targets with a view to becoming more efficient and effective. Boris (2015, p. 16) described service delivery as "the provision of social or public goods that will promote

socio-economic wellbeing of the citizens". The present global economic downturn poses essential challenges to public service organisations in providing services to the public – regardless of whether these organisations are located in government, private or non-government/non-state sectors (Osborne et al., 2014).

In The Gambia, strategic plans are statute-inclined. Every PSO is expected to have a strategic plan approved by its governing board. Added to this, public service delivery was carried out under a series of challenges during the Yahya Jammeh administration (1994–2017). The era experienced challenges such as uneven allocation of government resources, corruption, embezzlement and mismanagement of public funds, political interference, absence of professionalism and inadequacy of competent and experienced professional staff (Centre for Democracy and Development [CDD], 2017). Other challenges included: poor governance, overstaffed civil service with ghost workers; disregard for human rights and democracy and appointments lacking merits. Again, Jammeh's administration appointed and sacked permanent secretaries, director generals, managing directors, senior officers and similar heads of institutions in the public service without following due process (CDD, 2017). To this end, poor leadership characterised public service delivery to the citizenry in most developing countries (Economic Commission for Africa [ECA], 2003) such as The Gambia. Public service delivery has been decentralised in The Gambia with a view to accomplishing the development aspirations and plans of the country. Contextually, decentralisation describes a process where the central government relinquishes public functions to government agencies/institutions, semi-autonomous government organisations or the private sector (Conyers, 2007).

Given the intricate and volatile nature of organisational environment issues and challenges as explained above, decision-making within the Gambian public service sector might have become daunting hence required the adoption of strategic planning. Human, physical and intellectual resources should be strategically managed to accomplish effective public service delivery. The production, distribution and value-addition of these resources require strategic management in order to optimally contribute to public service delivery. The citizens' expectations of efficient and effective public service, high-quality services, consumer-orientation and increased responsiveness to service delivery from public service organisations necessitated the application of strategic management. The Gambia's public service organisations or government institutions and agencies require the capability to formulate and implement strategic plans in solving public service delivery problems. In addition, organisational leaders use strategic planning and management to accomplish organisational mandates, vision, mission and goals and objectives. Managers in organisations equally apply strategic management methods in crafting new competences, exploit existing opportunities and enhance capacity within the organisation. In some, strategic management aims to create and strengthen market position in a changing and competitive business environment.

The Jammeh's administration came to power in 1994 through a coup d'état and ushered in the Second Republic in 1996 (1996–2017). During this period, the Central Government of The Gambia had strategies and development plans, which hitherto were believed to have not been successful in producing the desired results. For instance, public

service delivery in The Gambia faced numerous challenges as explained earlier. However, the plans appeared to have contributed to the country's overall economic growth and development. The major statement of the research problem was how to establish the challenges to strategic plans implementation in public service delivery.

To transform the economy and stimulate economic growth and development, the Yahya Jammeh government developed a socio-economic development strategy called Vision 2020 for the period 1996–2020, aimed at improving the standard of living of the Gambian citizenry through transformation of economy into a dynamic and middle-income nation. This strategic blueprint focused on agriculture and the service industries including the financial services sector, tourism industry, trade and transport, energy and telecommunications; health, education as well as other social services.

The under-listed Vision 2020 of the public service aimed to enhance performance and cost effectiveness in the delivery of quality public services through the central government and public service organisations. To achieve this vision, it required government ministries, public agencies/institutions and enterprises to formulate, implement and evaluate strategic plans to help spur economic growth and development and to enhance public service delivery. Consequently, from 1996, the Jammeh's regime developed several strategic plans for the country as well as for various public service organisations in line with the Vision. Since the enunciation of the strategic policy plans in 1996, few studies have attempted to engage the workability of the policy implementation in ensuring that the set objective of enhancing good governance is achieved. The objective of this paper, therefore, is to analyse the challenges to strategic plans implementation in achieving the objectives of public service organisations from its inception in 1996 to the Covid–19 pandemic outbreak period in The Gambia.

2. Literature review

2.1. Strategic planning

Strategic planning is a deliberate, systematic and ongoing process of defining an organisation's mission, vision and objectives, and developing a roadmap to achieve them through optimal allocation of resources, prioritisation of initiatives and alignment with internal and external stakeholders. Höglund, Holmgren, Mårtensson and Svärdsten (2018, p. 824) described strategic planning as involving "formulating strategies that give a holistic view of the organisation by mixing long-term thinking, goal analysis, and subjective evaluation of values, goals, and priorities". Mintzberg (1991, 1990) defined strategic planning as "the process by which the guiding members of an organisation envision its future and develop the necessary procedures and operation to achieve that future". In a similar vein, Poister and Streib (1999, p. 310) postulated that "strategic planning is a principal element but not the essence of strategic management, which also involves resource management, implementation and control and evaluation". In contrast, Pasha, Poister and Edwards (2015, p. 888) defined strategic planning as "a rational-comprehensive approach to strategy formulation that uses a systematic process with

specific steps such as external and internal assessments, goal setting, analysis, evaluation and action planning to ensure long-term vitality and effectiveness of the organisation". Similarly, Bryson and George (2022, p. 11) defined strategic planning as:

> Strategic planning is a reasonably deliberate approach to strategizing by public organisations or other entities which focuses on strategy formulation and typically includes (a) analysing existing mandates, mission, values, and vision, (b) formulating updated mission, values, and vision statements, (c) analysing the internal and external environment to identify strategic issues, and (d) formulating concrete and implementable strategies to address the identified issues.

Furthermore, Poister (2010, p. 247) described strategic planning as "a big picture approach that blends futuristic thinking, objective analysis and subjective evaluation of values, goals, and priorities to chart a future direction and courses of action to ensure an organisation's vitality, effectiveness and ability to add value". Additionally, Bryson (2011, p. 26) stated that: "strategic planning is a deliberative, disciplined effort to produce fundamental decisions and actions that shape and guide what an organisation (or other entity) is, what it does, and why it does it." Similarly, Berry and Wechsler (1995, p. 159) also gave a succinct definition of strategic planning in the context of a survey of state agencies in the US:

> Strategic planning is a systematic process for managing the organisation and its future direction in relation to its environment and the demands of external stakeholders, including strategy formulation, analysis of strengths and weaknesses, identification of agency stakeholders, implementation of strategic actions, and issue management.

Joyce (2015) posited that this definition could diagrammatically illustrate the process of strategic planning and management using Ansoff's (1968) 'decision flow diagrams' which he believes should not be confounded with strategic management theoretical models. Ansoff's decision flow diagram illustrates the procedure for gathering and analysing data and making decisions regarding goals, situation, choices, as well as the allocation of resources. Joyce (2015) argued that organisational leaders and managers can observe a decision flow diagram and sense they have swiftly comprehended the significant ideas of how to make judicious strategic decisions. It is easier and more understandable because the major elements of strategic decision-making are easy to observe. They can perceive how decisions probably need to be in order and how others should influence decisions, or how decisions are depending on others. They can also apply the diagram to establish that nothing important has been ignored or left out (Joyce, 2015).

Joyce (2015) posited that the success of a strategic plan will depend on the skills, motivation and values of the persons spearheading the strategic management tasks, the specified formulation of the strategic management procedures that is being applied, the government organisations that provide the environment as well as the responses of the individuals who are affected by the strategic management intervention (Joyce, 2015). Rose (2005) contended that policy-makers can study from public policies that are functioning

successfully in other countries; however, an effort is required to create models of policies that are transferrable beyond national frontiers.

Joyce (2015) argued that presently, we are far away from achieving this goal and states that one research that might be perceived to be in line with this agenda was that of Pettigrew, Ferlie, and McKee (1992), whose attempts comprehend what kinds of situations in a public service sector context were favourable to strategic change. Bryson (2010) emphasised the slow development of strategic management theory in the public service sector. Consequently, strategic planning procedure in the public sector include: defining the mission statement; formulating strategic goals; analysing the stakeholders; analysing the situation (SWOT); identifying strategic issues; identifying possible courses of action; evaluating actions; planning execution (financial management); planning stakeholder management; and monitoring and evaluation.

2.2. Governance and public service delivery

Governance and public service delivery are intricately linked concepts in the public administration literature. Effective governance is often considered a precursor to efficient public service delivery, as it enables the creation of an institutional framework that promotes accountability, transparency and responsiveness (Kireeva, 2018; United Nations Development Programme, 2015; Sulaiman, 2021). Good governance, on its part, is a global phenomenon and of recent origin (Patyi, 2016). For Patyi (2016, p. 9) a "'good state' concept, which is closely related to the idea of good governance and good administration underpins the ethical norms of both the common good and good public service". Research has shown that good governance practices, such as participatory decision-making and citizen engagement, can improve the quality and accessibility of public services (The World Bank, 2017). Even though "good governance may be seen as a value itself", the ultimate implications often reflect the true meaning when examined in terms of public service delivery (Michalak, 2017, p. 67) may become more clearly visible when we examine it in a particular context, from a perspective of other values and interests. However, some studies have highlighted the challenges in achieving this synergy. For instance, researchers have noted that bureaucratic red tape and corruption can hinder effective governance, leading to inadequate public service delivery (Kaufmann et al., 2010). Moreover, the increasing complexity of public services has created challenges for governments to balance efficiency, equity and effectiveness (Pollitt & Bouckaert, 2011). These findings underscore the need for contextualised governance reforms that address specific public service delivery challenges. Convergent research findings emphasise the importance of institutional capacity and leadership in bridging the governance – public service delivery divide. Studies have demonstrated that strong institutional capacity, characterised by skilled human resources, adequate funding and robust monitoring systems, is crucial for effective service delivery (OECD, 2017). Similarly, transformative leadership has been linked to improved governance outcomes, including better public service delivery (Bass & Riggio, 2006; Abdulkareem, 2024).

Divergent perspectives emerge when examining the role of technology in enhancing governance and public service delivery. Some researchers argue that digital governance initiatives can increase transparency, citizen participation and service efficiency (Gil-García & Pardo, 2005). Others caution that technological solutions may exacerbate existing governance challenges, such as unequal access to information and digital literacy gaps (Wessels, 2023; Heeks, 2006). This divergence highlights the need for nuanced understandings of technology's potential and limitations in governance and public service delivery contexts. Despite these divergences, the literature consistently emphasises the importance of citizen-centred governance approaches in improving public service delivery. Research has shown that co-production and co-creation initiatives, which engage citizens in service design and delivery, can enhance service quality, accountability and responsiveness (Bovaird & Loeffler, 2012). By prioritising citizen needs and perspectives, governments can foster more effective governance and public service delivery systems that ultimately improve the well-being of citizens.

2.3. Empirical review

Hughes (2003) acknowledged the existence of problems and constraints in the public sector compared with private sectors, and observed that public organisations might plausibly benefit from a strategic approach. Lynn (1987, 1996) established that governments' strategy-led decision-making procedures are more ad hoc, than being planned and rational. Flexible strategic responses but ill-directed in nature inevitably emerge as a result of dynamic and complex political conditions. The eventual beneficial impact of strategic management action for governments could manifest in electoral success, which aims at responding to the intricate needs of most polity, in a specific time frame within an array of policy arenas, but their strategic responsive actions can be deceitful (Leskaj, 2017). Thus, in the public sector, it could be expected that the political dynamics of governance would make it difficult to implement rational archetypes of strategic management, given that politics (inevitably) permeates the other areas (Leskaj, 2017). To this end, Lynn (1987, 1996) contended that some strategic management actions could be individually directed and political, but are related to personal and organisational advancement.

Leskaj (2017) found that inadequate provision of financial and required human resources would lead to challenges in implementing strategies of institutions; decreased levels of motivation arising from low pay wages and autocratic leadership, as well as the existence of bureaucratic structures considered incompatible with the organisational strategies. These challenges could affect strategy formulation, implementation and assessment in public organisations. Mnjama and Koech (2019) affirmed that organisational leadership fails to motivate employees to implement strategic plans, but found unsustained budgets for strategic plans implementation.

In addition, George, Desmidt, Cools and Prinzie (2017) found that the challenge to strategic plan implementation is how to convince planning team members (PTMs) with knowing style to champion strategic plans because their non-commitment could inspire

resistance in the course of implementation; and Kabeyi (2019) confirmed political interference, inadequate resources and global economic conditions as challenges to strategy implementation. Another challenge is that the strategic planning process, the characteristics of the organisation and the planning team may also influence strategic planning in public organisations (Bryson et al., 2009; Armstrong et al., 2012; George & Desmidt, 2014).

Several scholars earlier highlighted various factors that determine strategies and strategic planning in organisations: competitive forces (Porter, 2004); operating environment (Heymann, 1987; Kemp et al., 1993; Ring, 2000); political setting i.e. policy areas, concerns of the electorate, policy supporters and trends (Joyce, 2000); the system of government both at national and international level (Bozeman & Straussman, 1990; Ring & Perry, 1985); poor discretionary power could constrain their ability to strategically manage (Nutt & Backoff, 1993); and the degree of decentralised structure of programmes or service delivery system (Frederickson & Frederickson, 2007; Pressman & Wildavsky, 1973).

Furthermore, the type of the governing body (e.g. authority board, legislative body and local governments) could determine how and the degree to which strategic management processes are conducted (Poister et al., 2010); the public organisation's value system, organisational culture and leadership style (Monahan, 2001); managerial capability and analytic abilities (Joyce, 2000; Shapek & Richardson, 1989); the amount of time involved and quality of experience in strategic planning and management (Vinzant & Vinzant, 1996) are factors that influence the ability to effectively implement strategic planning and management (Poister et al., 2010); and coordination problems, absence of support and resistance from various levels of management (Okumus, 2003).

From the review of empirical literature, it could be observed that public service organisations could gain more beneficial outcomes from strategic planning and as well face a number of challenges in the formulation, implementation and evaluation of strategic plans, which could constrain the achievement of PSOs' objectives. However, having a strategic plan does not translate alone to successful accomplishment of organisational aims and objectives. Strategic planning positions an organisation within a competitive industry, and how it anticipates and deals with the complexities and challenges of a competitive and vibrant business environment matters.

3. Methodology

3.1. Research design, sampling techniques and sample size

The study adopted a descriptive research design method and used multi-stage sampling techniques in order to obtain the sample size for the study. To meet the objectives of the study, both quantitative and qualitative research methods were employed. The research attempted to investigate the perceived challenges of strategic plans implementation in achieving the objectives of public service organisations (PSOs) in The Gambia. Primary and secondary data were used for this study. Primary data were collected through the

administration of questionnaire and in-depth interviews. At the first stage, random sampling was used to select five (5) PSOs out of the seventy (70) public organisations. At the second stage, a total sample size of 211 was randomly selected from the total sample frame of 1,058 which comprised senior public servants (grades 8 and above) in five (5) selected PSOs in The Gambia namely: Gambia Competition and Consumer Protection Commission (GCCPC) (21), Gambia Revenue Authority (GRA) (200), National Water and Electricity Company (NAWEC) (500), Public Utilities Regulatory Authority (PURA) (32) and University of The Gambia (UTG) (305). The sample size of 211 respondents represented approximately 20% of the sample frame (1,058) were selected for the administration of a set of questionnaires using probability proportional-to-size sampling technique. To ensure avoidance of any of the five (5) PSOs being undermined in the study, the researchers applied the Rangan Kamaisan proportional distribution or allocation method. The formula is thus given as:

$$\text{ns} = \frac{N_p \times n}{N}$$

ns = sample size allocated to each PSO
Np = population of each PSO
n = total sample size
N = total population size

The distribution were as follows: GCCPC (4), GRA (40), NAWEC (100), PURA (6), and UTG (61). The five (5) PSOs were chosen because they produced current strategic plans and relevant policy documents. The senior public servants were selected because they were responsible for formulation and implementation of the strategic plans, and for their roles, proficiency and experience in strategic planning and public service delivery issues. Convenient sampling was used to select senior public servants and beneficiaries (consumers) of each of the five (5) PSOs, totalling 211 respondents. The set of questionnaires was administered on both senior public servants and beneficiaries of public services such as water and electricity users, telecommunication subscribers, tax payers, students, entrepreneurs and companies, etc. The selection of the beneficiaries was based on their roles as end users of public services and experience in dealing with the selected PSOs in public service delivery. In addition, two (2) sets of interviews were conducted on 20 respondents as follows: 10 strategic plan committee members from five (5) PSOs, and 10 prominent leaders among the beneficiaries of five (5) PSOs. Secondary data were obtained from policy documents, strategic plans, journal articles and textbooks and the internet. The collected data were analysed using descriptive statistics. It was chosen for this analysis because it provides a comprehensive and concise overview of the distribution of the data, enabling a thorough understanding of the dataset's characteristics. Additionally, descriptive statistics allows for the identification of patterns, trends and correlations within the data, facilitating informed decisions and laying the groundwork for further inferential statistical analysis. The study covered PSOs in the Greater Banjul Area comprising Banjul, Kanifing Municipality and West Coast Region.

3.2. Measurement of variables

The independent variable of this study was strategic plans implementation and the dependent variable was public service delivery. These variables were studied to accomplish two objectives of the study. To achieve the objectives of the study, statements were set under each objective using Likert rating scales as measurement of variables. Questionnaire was administered to categories of respondents in PSOs in the study areas. For this study, the researcher adapted some instruments of the structured survey questionnaire of Ijewereme (2018) who investigated strategic planning and performance issues. These types of measurements of variables produced categorical responses needed to accomplish the specific objectives of the study. The measurement of variables in this study was based on five-point Likert scale to obtain answers from respondents. The Likert scales that were used were as follows:

For degrees of agreement: 5 = strongly agree (SA); 4 = agree (A); 3 = undecided (U); 2 = disagree (DA); and 1 = strongly disagree (SD). The Likert scales assisted in measuring the intensity of responses. Subsequently, these quantitative responses were analysed using Relative Impact Index (RII). Internal consistency technique was used to estimate the reliability of measurement scales for the study; and for this reason, Cronbach's alpha coefficient indicator was used. For this study, Cronbach's alpha $\alpha = 0.8$ which could be interpreted as a correlation coefficient whose value ranged from 0 to 1.

4. Results and discussion of findings

4.1. Challenges to strategic plans implementation in achieving the objectives of public service organisations in The Gambia

This section analysed the perceived challenges of strategic plans implementation in achieving the objectives of public service organisations in The Gambia. Using Likert scale ratings, the respondents were asked to choose among: 5 = strongly agreed, 4 = agreed, 3 = undecided, and 2 = disagreed and 1 = strongly disagreed, with 12 assertions made by the researcher on the challenges facing strategic plans implementation. Table 1 shows the frequency and percentage distribution of respondents on each statement, and the values were organised ranging from 1 to 5. In addition, the Sum score and Relative Impact Index (RII) were adopted to identify and rate these challenges using mean value statistics.

Most of the statements were relatively acknowledged by the respondents and all weighted average scores were above 2.50 mid-points. However, the rating was further shown to identify the most and least pronounced cases. As presented in Table 1, low salaries (remuneration) resulted in low staff morale (item 5), hence was highly rated as the leading challenge of strategic plans implementation with sum score (791) and RII (3.90), respectively. The former was followed by political interference with the sum score (787) and RII (3.88) of items nine (9) being second on the list. It was also noted that inadequate facilities had the sum score (784) and RII (3.86), respectively, thus, placing item 12 as the

Table 1.
Challenges of strategic plans implementation in achieving the objectives of public service organisations in The Gambia

Statement	Number of respondents	Sum score	Relative Impact Index (RII)	Remarks
Inadequate strategic planning / management professionals and expertise	203	745	3.67	6th
Lack of top management commitment	203	774	3.81	4th
Insufficient budgetary allocations	203	742	3.66	7th
Inadequate financial resources	203	739	3.64	9th
Low salaries (remuneration) resulted in low staff morale	203	791	3.90	1st
Non-adherence to organisational culture/philosophy (policies, rules, values, and work ethics)	203	741	3.65	8th
Negative employee behaviour and attitude	203	739	3.64	9th
Negative and unfavourable internal and external environmental changes and conditions during the implementation of strategic plans	203	729	3.59	10th
Political interference	203	787	3.88	2nd
Political manipulation	203	773	3.81	5th
Corruption and mismanagement of funds	203	729	3.59	10th
Inadequate facilities	203	784	3.86	3rd

Source: Authors' compilation based on the field survey, 2019

third-rated challenge confronting strategic plans implementation in achieving the objective of public service organisation in the study area.

In addition, lack of top management commitment in item 2 was rated as the fourth challenge facing strategic plans implementation with sum score (774) and RII (3.81), respectively. Political manipulation (item 5) was placed on the fifth position with the sum score (773) and RII (3.81); and inadequate strategic planning/management professionals and expertise with sum score (745) and RII (3.67) was sixth among the challenges confronting strategic plans implementation in achieving the objective of the public service organisation.

Moreover, insufficient budgetary allocations as third item was highly rated seventh with sum score (742) and RII (3.66), respectively. The former was followed by non-adherence to organisational culture/philosophy (policies, rules, values and work ethics), with the sum score (741) and RII (3.65) of item six (6) was eighth on the list. It was also noted that inadequate financial resources had sum scores (739) and RII (3.64), and negative employee behaviour and attitude had sum scores (739) and RII (3.64), thus, placing item 4 and 7, respectively, as the ninth-rated possible challenge, while negative and unfavourable internal and external environment changes and conditions during the implementation of strategic plans had sum scores (729) and RII (3.59); and corruption and mismanagement of funds with sum score (729) and RII (3.59), made item eight (8) and eleven (11) the tenth-rated challenges confronting strategic plans implementation in achieving the objective of public service organisation in the study area.

To complement quantitative data, interviews were conducted to give additional information on the challenges to strategic plans implementation in attaining the objectives of public service organisations in The Gambia. The interviewees were asked what challenges affected strategic management practices in their organisations. Some senior officers listed the following challenges: insufficient short term training and financial constraints, time management problem, overlapping of mandates, inadequate petroleum engineers, political/government interference, the lack of a board of directors, unclear tax collection method, corruption, nepotism, incompetence, customers' concealment of total revenues and skills gaps in human resource management (HRM).

In addition, inadequate funding/budgetary allocations, inadequate subvention (where applicable), understaffed/insufficient professionals, absence of cooperation from other sectors' regulators, carefree attitude of employees/negative employee behaviour, lack of competition and consumer protection culture, lack of motivation, poor infrastructure/ inadequate facilities, insufficient remuneration and inadequate performance appraisal system among others were equally considered challenges. This is because as long as the staff in the public service are not monitored, appraised, recognised and promoted, or demoted based on their performance, it will be difficult to change people's mindset and achieve efficiency and effectiveness in public service delivery. The views of the interviewees concerning various challenges here appeared to be in agreement with the questionnaire responses; however, a few of the challenges were not captured by the questionnaire, they were not contradictory.

4.2. Measures for curbing the challenges/weaknesses and improving strategic plans implementation in PSOs in The Gambia

Under this minor theme, the senior public servants were asked to highlight/suggest the steps various PSOs have taken to overcome the challenges and weaknesses, and to suggest or recommend steps for efficient and effective "application of strategic management in public service delivery" in The Gambia. The respondents suggested several measures to improve strategic plans formulation, implementation and evaluation in their organisations in order to enhance service delivery in the public service, including: procurement of

human resource information management (HRIM) software to address the time management issue/challenges; signing memorandum of understanding (MoUs) with public institutions with overlapping mandates and drafting new regulations, and requesting for approval from Attorney General's Chambers (AG Chambers); commitment of the Director Generals (DGs), Managing Directors (MDs), Commissioner Generals, Chief Executive Officers, and Executive Secretaries, top management officials; and re-strategising to comply with government needs.

Furthermore, respondents suggested that PSOs should reduce travelling expenses; divert certain expenditures to building and improving infrastructure and facilities; embark on awareness campaign to build confidence in people within PSOs; self-assessment of institutions; and declare proper sales revenues to GRA to avoid loss of revenues to the State. Moreover, they proffered that the Government should increase subventions for PSOs and take up responsibilities like building infrastructure for the organisations; develop training policies and strategies (where unavailable) to bridge the skill gap; organise donor conferences to market the strategic plans of PSOs; gain support from the Ministry of Finance and Economic Affairs (MoFEA), and international financial partners/donors; make adequate budgetary allocations to PSOs to finance their activities in order to achieve efficiency and effectiveness in public service delivery.

In the higher education sector, the beneficiaries recommended that UTG should invest more in staff training through collaborative partnership with other universities; solicit funding through research, consultancies and proposals writing on behalf of the university; the Government should increase subvention to the university, and make it a policy for all national/public consultancies to be awarded to the university; employ qualified, competent and experienced people; have its policy documents and strategic plan intact, encourage with allocation of research grants to lecturers/professors; write proposals to attract external grants and raise more funds for the university. The Governing Council should also help in mobilising funds; diversify sources of revenue so that they do not depend solely on subvention; and competent, diligent and experienced staff should be at the helm of affairs in the University (competence–skills–job matching); organise refresher courses, workshops, and short-term trainings for staff who are responsible for implementing the strategic objectives.

Finally, the respondent offered that the Government should understand the mandate and functions of public agencies under its purview to help mitigate a lot of challenges for the PSOs; conduct advocacy campaigns, training partnerships/memorandum of understandings (MoUs) with organisations where mandates overlap; put in place a standard appraisal system for the public service; ensure there are consequences for action or lack of action; devise debt recovery mechanisms; training the employees within and outside the country; work with financial partners/donors like the World Bank, IMF, ADB, IsDB, etc.; and in the case of electricity, move from fuel to the use of green energy, solar installation and windmill, hydroelectricity; increase subvention form the government; renewable energy implementation; commitment from the citizenry; removal of nepotism from all the institutions in the country; move into digital system to control all the activities to ensure transparency.

4.3. Discussion of findings

The study analysed the challenges of strategic plans implementation in achieving the objectives of public service organisations in The Gambia. The findings of the study showed that low salaries (remuneration) resulted in low staff morale, was highly rated (1st) as the leading challenge of strategic plans implementation with RII (3.90). This result corroborated the World Bank (2010) report, which stated that salaries in the Gambian civil service were low in comparison to low income countries, which explained the high rate of attrition of skilled professionals; and report of AfDB-WB (2017), which showed that the low salaries and incentive structure of the Gambian public service did not encourage performance and that public institutions' significant physical, financial, and human resources were mismanaged for years. The results also showed that political interference, with RII (3.88) was the second (2nd) highly distinguished challenge facing strategic plans implementation. The responses from interviews of senior public servants and beneficiaries of PSOs confirmed that political interference was a significant challenge confronting strategic plans implementation during the period of review. It was also noted that inadequate facilities which had RII (3.86), was the third-rated (3rd) challenge confronting strategic plans implementation in achieving the objective of public service organisation in the study area. In addition, lack of top management commitment was rated the fourth (4th) challenge fronting strategic plans implementation with sum score (774) and RII (3.81). Political manipulation was the fifth (5th) rated with RII (3.81), and inadequate strategic management professionals and expertise with RII (3.67) was rated the sixth (6th) among the challenges facing strategic plans implementation in achieving the objective of public service organisations.

Also, an insufficient budgetary allocation was highly rated as the seventh (7th) with RII (3.66). This was followed by non-adherence to organisational culture/philosophy (policies, rules, values, and work ethics), with RII (3.65), was rated the eighth (8th) on the list. Additionally, it was noted that inadequate financial resources which had RII (3.64) and negative employee behaviour and attitude with RII (3.64), thus placing both as ninth (9th) and ninth (9th) rated possible challenge respectively. Negative and unfavourable internal and external environmental changes and conditions during the implementation of strategic plans which had RII (3.59), and corruption and mismanagement of funds with RII (3.59), were both tenth-rated (10th) respectively as the least challenges confronting strategic plans implementation in achieving the objective of public service organisation in the study area within the specified period.

The findings of this study on objective four (4) acknowledged the study of Tamimi, Khalil and Abdullah (2018) that poor performance, corruption and absence of development constrained strategic management within the public sector. The results of the study on non-adherence to organisational culture/philosophy (policies, rules, values, and work ethics), and inadequate financial resources corroborated the study of Hytönen and Ahlqvist (2019) that lack of cooperation and inadequate planning resources for astute visionary activity were gaps in spatial planning; and reports of AfDB-WB (2017) and CDD (2017) with similar challenges in the Gambian public service under the period of review such as uneven allocation of government resources, overstaffed civil

service; persistent corruption, embezzlement and mismanagement of public funds; poor governance, absence of professionalism, lack of competence and experience, nepotism and appointments lacking merits among others.

Equally, the study supported the report of Morachiello, Nicolau and Hegbor (2015) that strategic resource allocation was weakened by unreported and unmonitored arrears, scarce resources, effect of non-compliance with internal control rules and procedures and inadequate human capacity undermined efficiency service delivery in the Gambian public service; and the study of Leskaj (2017) found that inadequate provision of financial and quality human resources will result in problems when implementing strategies of institutions; decreased levels of motivation resulting from low pay and autocratic leadership; and that the existence of bureaucratic structures that are incompatible with the organisational strategy serve as challenges to strategy formulation, implementation and assessment in public organisations.

Furthermore, the findings also corroborated studies of Bryson (2017), Bryson and Edwards (2017) that public sector organisations need to build the required capacity, i.e. skills, resources, knowledge, ability to collect and analyse data, and different types of leadership in order to successfully carry out strategic planning in the public sector; Mnjama and Koech (2019) established that organisational leadership failed to motivate employees to implement strategic plan and found unsustained budget for strategic plan implementation; and Kabeyi (2019) found political interference, inadequate resources and global economic conditions as challenges to strategy implementation.

Furthermore, the findings on the challenges supported the assertions of earlier studies that to do strategic planning, PSOs are expected to build necessary capacity; match skills and resources with the convolution of processes and practices involved (Poister & Streib, 2005); inadequate capacity (Jaw & Isbell, 2019); get required resources, financial capacity (Boyne et al., 2004; Wheeland, 2004); knowledge about strategic planning (Hendrick, 2003); and competence to collect and analyse data and to choose between possible solutions (Streib & Poister 1990). In addition, various leadership styles are required to participate in effective strategic planning; process supporters have the authority, power and resources to start and maintain the process. Those who lead the process are required to help manage the routine procedure (Bryson, 2011).

5. Conclusion

The findings of the study showed the following challenges facing strategic plans implementation with rating and Relative Impact Index (RII) put in parenthesis: low salaries (remuneration) resulted in low staff morale (1st highly rated, RII = 3.90); political interference (2nd highly rated, RII = 3.88); inadequate facilities (3rd highly rated, RII = 3.86); lack of top management commitment (4th highly rated, RII = 3.81); political manipulation (5th rated, RII = 3.81); inadequate strategic management professionals and expertise (6th rated, RII = 3.67); and insufficient budgetary allocations (7th rated, RII = 3.66). However, the findings of the qualitative study showed that political/government interference, inadequate funding/budgetary allocations, inadequate subventions (where applied),

understaffed/insufficient professionals (skills gaps in HRM), insufficient remuneration; poor infrastructure/inadequate facilities among others were clearly identified as the foremost challenges facing strategic plans implementation in achieving the objective of PSOs in The Gambia.

The study concluded that the leading challenges faced in strategic plans implementation in achieving the objectives of PSOs in The Gambia included: low salaries (remuneration) resulting in low staff morale (RII = 3.90), political interference (RII = 3.88), inadequate facilities (RII = 3.86), lack of top management commitment (RII = 3.81), political manipulation (RII = 3.81), inadequate strategic management professionals and expertise (RII = 3.67) and insufficient budgetary allocations (RII=3.66). Added to this, negative employee behaviour and attitude; negative and unfavourable internal and external environmental changes and conditions and corruption and mismanagement of funds among others were challenges that confronted PSOs during strategic plans implementation.

6. Recommendations

1. To address the challenge of inadequate strategic management professionals and expertise in PSOs, the government should undertake human capital development strategy for all PSOs in the country through short-term and long-term training and development programmes/activities, especially to strengthen existing management teams and strategic plans committees responsible for strategic management plans and policy issues in PSOs to improve the quality of service delivery to the public. The government should also build and strengthen the capacity of the National Assembly's Select Committee on public agencies and public enterprises called Public Agencies' Committee/Public Enterprises' Committee (PAC/PEC) (now called FPAC [Financial and Public Accounts Committee]) to rigorously scrutinise the activities of PSOs for improved service delivery to the public and enhance financial performance. The government should also institute good governance and undertake a complete overhaul and institutional reforms across the public service in The Gambia to accommodate changes in the dynamic business environment.

2. Top management and Board of Directors/Board of Commissioners/Governing Council should ensure that there is strict punishment, sanction or suspension for employees with negative behaviour which are incompatible with the organisations' rules and regulations and fail to adhere to organisational culture/philosophy (policies, rules, values and work ethics). Take decisions on strict disciplinary action for employees with care-free attitude and unethical behaviours to promote a high sense of responsibility, professionalism and integrity in the Gambian public service.

3. The government should desist from all forms of political interference and political manipulation in the operations of PSOs as this may subject public servants to undue pressures and influences in their execution of duties and responsibilities, thereby undermining public service delivery objectives in the country.

4. Lawmakers should devise and approve attractive remuneration/pay package for public/civil servants to attract best-brains, talented and experienced professionals to

public service. They should emphasise more on performance, punctuality and regularity at work and assign targets to plan of activities. Discourage the culture of "mashlaha" (leniency/humane) syndrome and monitor public/civil servants as they carry out their work in order to improve service delivery to the public.

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Press Publishers' Right in Hungary

Brief Empirical Report after the Implementation

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Abstract: Access to information, consumption of media products and mass media have changed radically in the age of digital technologies. News gathering and aggregation platform services and social media sites have become indispensable, making news produced by press publishers available to the public in a collected, sorted and categorised form. The construction of the right of press publishers in the CDSM Directive raises a number of questions, and doubts have only been exacerbated by the Member States' transposition. Experience to date does not yet provide scope for a precise analysis and interpretation of the impact of Article 15. Nor is it known yet in what exact framework does the new related rights be exercised in the Member States. Transposition and subsequent events do not provide answers to the most pressing questions. These include whether competition law instruments can be more effective against the dominant platform giants, which seem reluctant to reach agreements with publishers. Does it violate the principle of contractual freedom to force industry platforms to enter into Article 15 licence agreements, when experience so far clearly shows that platforms would rather stop indexing content if they had to pay a fee for the content exploitation. While the intention to promote a free and diverse press, quality journalism, access to information for citizens, public debate and the development of a democratic society is more than welcome, experience so far paints a much more nuanced picture. In order to alley the doubts, this paper attempts to look into the details of the Hungarian implementation of press publishers' right, and to outline what do the Hungarian press industry representatives think about the new neighbouring right.

Keywords: press publishers, ancillary right for press publications, CDSM Directive, platform economy, news aggregator sites

1. About the press publishers' rights in a nutshell

The balance of power in the online market for press publications has been a matter of concern for legislators in the Member States of the European Union and, as a result, for legal scholars in the field for exactly a decade now (Peukert, 2016; Senftleben et al., 2017; Pihlajarinne & Vesala, 2018; Papadopoulou & Moustaka, 2020; Martial-Braz, 2020; Vučković, 2021; Harkai, 2021; Mezei & Harkai, 2024; Danbury, 2022; Harkai & Cross, 2023). News content producing organisations and platform services interested in collecting, aggregating and indexing the same content are natural competitors in the digital market.[1] The upset balance is caused by the fact that news aggregation services do not pay any monetary compensation to publishers for the news content they collect and index, while they earn substantial advertising revenues for the content they make available to the end users. Efforts to redress this imbalance have been seen first in Germany and then in Spain, with rather disappointment (Westkamp, 2013; Rosati, 2016; Rosati, 2021, p. 254; Stamatoudi & Torremans, 2021, pp. 723–724). The ultimate result of both experiments was that the targeted platforms, mainly Google, either only agreed to index the content for free after the related legal protection was raised to the level of a law, or stopped their service altogether and withdrew from the Spanish market. This has led to particularly sensitive losses in a market where the strange symbiotic relationship is essential for press publishers, since without indexing content, access to news content and traffic to the publisher's website will fall dramatically.

The dominant market and technological role of intermediary platforms is also associated with a significant social responsibility, which Poell et al. (2019) compares to the telecommunications, electronics and rail monopolies of the turn of the 19th and 20th centuries. Platforms rely on their technical background to be able to personalise advertising space and conditions based on user data, which gives them an advantage over publishers who also sell advertising space on their own websites but are at a disadvantage in the advertising market compared to intermediary platforms (Vučković, 2021, p. 1051). There are also positive benefits to coexistence between press publishers and news aggregator services.[2] They facilitate access to a public that press publishers would not necessarily reach directly. Although it is undoubtedly true that intermediaries acting as one-stop-shops can lead to information bubbles on the end user side which distort publicity and objective mass information (Moscon, 2019, pp. 42–43). Publishers turn everyday life events into news in a consumable way. In doing so, they take responsibility for financing, planning and organising the process of gathering and processing news, and maintaining a network of correspondents (Senftleben et al., 2017, p. 539). In contrast, news aggregator sites do

[1] According to Danbury (2022, pp. 24–25), press publishers' rights are intended to empower existing market players, but at the same time it is a barrier to new entrants, threatening media pluralism and causing market concentration. Even before the entry into force of Article 15, press publishers benefited at least indirectly from the profits generated by news aggregators, because the platforms directed substantial traffic to the press publishers' websites, which also increased competition between them. According to Peukert (2016, pp. 1–4), the related legal protection will not increase this traffic if the content of a given news portal is unattractive to end users. In other words, press publishers, who are already at a competitive disadvantage, will not be helped by this measure alone.

[2] The term "news aggregator" refers to a platform or service that aggregates and indexes existing information to select the most relevant results (see Knapstad, 2021, p. 1320).

not invest in the news production process, but use ready-made news content created by press publishers. While they do generate significant indirect traffic to the publishers' websites, they have not yet benefited from the revenue generated by the service's business model (Höppner, 2018, pp. 2–3; Danbury, 2022, p. 21).

In a pre-internet society, news consumption was determined by the publisher or supply side. The circulation numbers made available to the public were based on the publisher's business decisions. The larger the circulation of a newspaper, the more economical it was for the publisher (Senftleben et al., 2017, p. 542). In the digital, online space, the processes of news production and consumption are no longer only influenced by the supply side, but also by the demand side (Senftleben et al., 2017, p. 540). The costs of press publishers creating and operating online news portals have fallen with the decline or even disappearance of print (Senftleben et al., 2017, p. 542), but the emergence of news aggregator services has resulted in a significant loss of advertising revenue as competition in the advertising market has emerged. In addition, the demand side has also shifted from press publishers to news aggregator platforms, where the platform has successfully sucked both news-consuming end users and advertisers away from press publishers by providing search functionality and an optimised user experience based on search results. This phenomenon has been further enhanced by the network effect. With the exponential growth in the number of new users and advertisers entering the platform, the publisher has not been able to keep pace and has become exposed to news aggregator platforms in order to increase the reach of its news content (Poell et al., 2019, pp. 5–6). Seeing the failure of legislative attempts in the Member States, the EU legislator took the initiative and created a press publishers' related right under the CDSM Directive,[3] which guaranteed two economic rights relevant for digital, online uses, namely the rights of reproduction and communication to the public, to producers of press publications. The term of protection was set at two years, counting from the first day of January of the year following the publication. Following the entry into force of the provision and its transposition by the Member States, all online use of press publications is now subject to authorisation, with exceptions.[4]

Transposition in the Member States has provided interesting experiences but has not answered the core questions (Szalay & Polyák, 2019; Furgał, 2021; Peguera, 2022; Rendas, 2022; Sganga & Contardi, 2022; Furgał, 2023). These include the question of whether the invocation of copyright and related rights was the right solution to a problem that is essentially a market competition problem (Lampecco, 2021; Szilágyi, 2023). In the online media and advertising markets, press publishers compete with each other, while a dominant third player with a dominant market and technological position fundamentally determines end user access to news, while distorting the online advertising market.

[3] For the relevant provisions of the Directive, see Articles 2(4) and 15 of the CDSM Directive. For more details on the legal policy rationale behind the legislation, see recitals 54 to 60.

[4] For more details on the scope of the press publishers' rights, their relation to the InfoSoc Directive, the analysis of possible alternative protection mechanisms and the transposition in the Member States so far (Peukert, 2016, p. 73; Rosati, 2021; Stamatoudi & Torremans, 2021).

It is also clear that the new neighbouring right is tailored to press publications[5] but does not take into account audiovisual news content produced by television organisations and collected and indexed by platforms such as Dailymotion. It is also unclear whether social media platforms should be considered users within the meaning of Article 15.[6]

2. The market situation of press publishers in Hungary and their attitude towards the press publishers' rights through some examples based on a – non-representative – questionnaire survey

The main legal policy reasons for protecting the press publishers' neighbouring rights include promoting a free and diverse press, quality journalism and access to information, as well as promoting public debate and the proper functioning of democratic society.[7] While these objectives are welcome in principle in all Member States, they do not reveal much about the concrete circumstances in each Member State in terms of empirical data on the media market in question and the relationship between press publishers and platform providers. In view of this, it seemed appropriate to carry out a questionnaire survey targeting representatives of the online press in Hungary.[8]

3. Online news markets in Hungary

Before going into the questionnaire survey and the details of the responses, it is necessary to take a look at the market in which the press publishers benefiting from the press publishers' right operate. For this purpose, I have taken into account the data from the National Media and Infocommunications Authority's *(Nemzeti Média és Hírközlési Hatóság)* Internet Audience Measurement for the fourth quarter of 2022 and the first quarter of 2023. In Q4 2022, the news sites were visited by 5,591,889[9] unique users and

[5] (4) 'press publication' means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which: a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine; b) has the purpose of providing the general public with information related to news or other topics; and c) is published in any media under the initiative, editorial responsibility and control of a service provider. Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive.

[6] The fact that Facebook itself has launched its News Tab service in the US, UK, Germany, Australia and France seems to confirm the view that social media sites can also be covered by Article 15. This is not altered by the fact that social media platforms often include profiles of the press publishers themselves, through which they share their news content to ensure better reach (Furgal, 2023, p. 662).

[7] CDSM Directive Recital (54).

[8] The press publisher's right was transposed into the Hungarian copyright system by Article 23 of Act XXXVII of 2021, with effect from 1 June 2021. Articles 82/A to C of Act LXXVI of 1999 on Copyright are almost word for word identical to the relevant transposed sections of the CDSM Directive.

[9] https://shorturl.at/F3KzM

in the following quarter by 5,606,124[10] unique users. Among the ten websites with the highest number of internet users, 24.hu was the leader with 4,711,856 real users at the end of 2022, origo.hu was third with 4,512,888 users, index.hu was fifth with 4,466,172 and portfolio.hu was tenth with 3,697,568 users.[11]

In the first quarter of 2023, 24.hu reached 4,674,932 real users, origo.hu 4,501,056, and index.hu 4,449,240.[12] The demographics-based measurement also includes Telex, which was the seventh most visited site among men in 2022,[13] and eighth in the 18–29 age group and ninth in the 30–39 age group by generation in 2022.[14] Telex was also in the top ten in 2022 by educational attainment. It was the tenth most visited website in the group with at least a high school education and the sixth most visited website in the group with at least a university education.[15] If we look at the number of times people spent at least thirty minutes browsing on a given website in a given quarter, the following news portals were ranked in order of strength at the end of 2022: index.hu, origo.hu, blikk.hu, 24.hu, telex.hu, portfolio.hu, startlap.hu, femina.hu, nlc.hu and idokep.hu.[16] In the first quarter of 2023, the top ten most visited websites (sixth place) were only among men.[17] By educational attainment, it was eighth in the 18–29 age group and ninth in the 30–39 age group.[18] In terms of educational attainment, in the first quarter of 2023, only those with tertiary education made the list, in sixth place.[19] There are also instructive conclusions to be drawn from the Facebook fan base of the websites studied in 2022 and the first quarter of 2023. I consider this important because it is not yet clear whether social media sites fall within the scope of Article 15. It seems clear, and the data cited here supports this view, that social media has a key role to play in driving traffic to individual press releases and, conversely, to the website of a particular press publisher. Article 15 itself speaks of "online use by information society service providers" and, although it excludes the inclusion of hyperlinks, it can be argued that social media sites themselves index press publisher content as intermediary service providers. This is not changed by the fact that, in order to drive traffic and attention to their own websites, press publishers often create their own social media profiles and post their own news content. In 2022, 24.hu had the most Facebook followers (978,924), followed by Origo (third place, 517,408 followers), Index (fourth place, 626,587 followers), HVG (fifth place, 661,228 followers), Portfolio (eighth place, 259,680 followers), Telex (eleventh place, 538,366 followers) and 444 (twelfth place, 426,874 followers).[20] In 2023, 24.hu had 993,000 (first place), Origo 521,473 (third place), Index 630,000 (fourth place), HVG 671,495 (fifth place), Portfolio

[10] https://shorturl.at/hGnie
[11] https://shorturl.at/hGB4d
[12] A magyarországi Top10 weboldal elérése 2023. I. negyedévében (EDME-Gemius 15+ beföld – 2023. I. negyedév). Online: https://bit.ly/3WEKbmf
[13] https://shorturl.at/MleDK
[14] https://tinyurl.com/3z2pa67e
[15] https://tinyurl.com/3z2pa67e
[16] https://tinyurl.com/3z2pa67e
[17] https://tinyurl.com/3yxw2dap
[18] https://tinyurl.com/3yxw2dap
[19] https://tinyurl.com/3yxw2dap
[20] https://tinyurl.com/3z2pa67e

262,000 (eighth place), Telex 553,338 (eleventh place), 444 had 437,711 (twelfth place) followers.[21] Among the news portals considered important and approached in the research (Telex, HVG, Válasz Online, Portfolio, Magyar Hang, 444) did not make the list of the most visited sites, but portals that ranked high (Blikk, Femina, Mindmegette, Nők Lapja Cafe, Nosalty, Ripost), which are not primarily engaged in collecting, organising and reporting daily news, and therefore, bearing in mind the above-mentioned objectives of the CDSM Directive as set out in the recitals, I excluded them from the press publishers surveyed.

4. Research methodology and the results of the survey

The first and most important aspect in selecting the respondents to the questionnaire was to clarify who should be considered a press publisher. In Article 2(4), the CDSM Directive defines only the term 'press publication', from which, however, the term 'press publisher' can be derived, which is understood to mean a service provider which, at the initiative, under the editorial responsibility and under the control of the editor, publishes a press publication. During the research, I focused on publishers that are engaged in the compilation and publication of news and news content and are at the forefront of news consumption on the Internet. In the first round of the survey, I contacted the editorial offices of 24.hu, Origo, Index, Portfolio, Telex, HVG and 444 by email, and then, in the light of the first round's experience, I added Válasz Online and Magyar Hang to the list of respondents. I grouped the questions into three subject areas. In the first group, I asked about data traffic, the role of intermediary service providers and the press publishers' views on the digital advertising market. The second set of questions concerned the agreements with online intermediary service providers referred to in Article 15 CDSM, and the third set of questions dealt with the perception and application of Article 15 by the press publishers.

Before presenting the results of the questionnaire, it is important to note that it cannot be considered representative, as only three of the press publishers surveyed – 24.hu, Telex and Magyar Hang – provided specific answers to the issues raised. Two other editorial offices were reached by phone – Válasz Online and Portfolio – but both declined to answer the questions asked. HVG's answers could not be fixed for technical reasons, and the other publishers did not answer the questions in the questionnaire despite my repeated attempts. Nevertheless, the responses from the three press publishers provide insight into the specific challenges that press publishers must face in the platform ecosystem. The responses to those challenges and, in particular, the perception of the press publishers' rights by stakeholders.

The first question asked was whether the presence of platform providers weakens or strengthens competition in the Hungarian news market. This question is important, as press publishers that are quite active in the online space are also competitors in terms of end user reach, traffic generated and online advertising revenues. Two out of three respondents thought that intermediary providers tended to weaken competition.

[21] https://tinyurl.com/3yxw2dap

The second question focused on end user reach and traffic to press publishers' websites, with one of them saying that the presence of intermediary service providers had a distinct negative impact on the media market and reach, another one of them saying it had a rather negative impact, while the third publisher said that the presence of intermediary service providers had a rather positive impact on reach and availability.

Before the rise of the online press, the largest daily, weekly and monthly newspapers were also published in print in Hungary. In the age of online media, print media publishing has been pushed into the background, so in the third question I wanted to know how the internet has influenced the print publishing market. Two of the respondents said it had no impact, while one of them said it had had a negative impact. Given the range of respondents, these answers are not surprising, as both 24.hu and Telex are essentially online news sites from the moment of their launch.

Particularly critical in the online information space is the emergence of opinion or information bubbles, which distort public discourse and the scope of accessible information by making available content that is relevant to the metadata of end users. These information bubbles might be broken by print press coverage, so it is legitimate to ask whether or not online press representatives plan to publish print publications. Two of them answered no to this question and one did not exclude the possibility.

Increasing competition in the online space and dwindling resources have led many press publishers to hide some of their content behind a paywall, charge readers a fee per view (pay-per-view) or make the whole newspaper available only on a subscription basis. Respondents gave the following answers regarding paid content:

1. *"We are not using it yet, but we are thinking about it. We are convinced that pay-for-view models do not harm, but rather strengthen the position of the press and represent a return to the centuries-old press tradition where the reader and the advertiser jointly financed the media product."*
2. *"We do not use, we collect grants and all our content is currently free."*
3. *"Articles that we sell for money in print can only be published behind paywall, and those that are only online but require significant journalistic effort. Readers need to understand – and we need to educate them – that journalism costs money, so quality content cannot be free."*

The next question asked whether, after the entry into force and transposition of Article 15, intermediary service providers had engaged in any conduct that negatively affected the display and use of news content. one of respondents answered yes, with reluctance on the part of intermediary platforms to reach an agreement with the publisher, which temporarily reduced reach, and two indicated other not specified experiences.

The seventh question asked whether the press publisher publishes other content. All respondents answered yes to this question.

In the eighth question, I wanted to know whether the demand for printed publications has decreased over the last ten years. The two answers to this question were as follows:

1. *"We started our activity five years ago, the first year was a ramp-up year. Interestingly, our circulation increased during COVID, then slightly declined for a while, and now seems to be stabilising due to a lot of work."*
2. *"It has decreased, and there is a lot of publicly available data on this."*

The ninth question asks about the demand for subscription content over the past decade, with the following responses:

1. *"Telex has been in existence for three years and survives on grants. It is not a classic subscription, so it is not possible to say whether there has been an increase in demand for the content subscribed to."*
2. *"The paywall was introduced about two years ago, and since then the number of subscribers has been steadily increasing, but the base is still low: about 2,000 compared to 4,500 print subscribers and 650 pdf subscribers."*
3. *"Print has declined, online has just increased and will continue to increase."*

The tenth question asked for data on internet traffic over the last ten years. The answers are particularly interesting in the light of the data presented above.

1. *"Telex was created three years ago, and in three years we have been growing steadily, starting from zero and now we have 500,000 readers (real users) every day."*
2. *"We are five years old, at first online was not a priority (90% of our revenue came from print sales). For a while, for other external reasons, online was more of a priority, then traffic went up quite a bit, but due to Facebook's algorithm changes, for example, it has fluctuated for reasons beyond our control."*
3. *"Significantly, ten years ago we had a few tens of thousands of unique visitors a day, today we have hundreds of thousands. Some of the Gemius audience measurement data is public, where you can see this clearly."*

The eleventh question asked whether the press publishers surveyed had incorporated the provisions of Article 15 of the CDSM Directive into their operating practices or had concluded an agreement with any intermediary service provider. Two of the respondents answered no to both sub-questions, while one had incorporated the provisions into their practice but had not concluded a specific agreement with any service provider.

The twelfth question concerns the competition between press publishers. In this context, one of the key objectives is to increase end user reach, in which the service provided by platforms is an important tool. We asked whether they pay news aggregators extra to display their press product as opposed to their competitors, one of them said yes, while two of them responded negatively.

The thirteenth question asks whether the press publisher works with Google or other platform providers (e.g. Yahoo News, Meta, X) to provide wider access to news or uses the

advertising and analytics services of a service (e.g. Google Analytics, Google+ social tool). The responses to this question were rather short:

1. *"We do not cooperate, we use Google Analytics to measure traffic."*
2. *"We use the analytics tools provided by Google."*

The fourteenth question deals in part with the problem of information bubbles mentioned above, asking whether a dedicated press publisher app for smartphones would help bypass news gathering and delivery platforms – where information bubbles themselves are created – in terms of either reach or advertising revenue. Two of the respondents saw a dedicated app as more helpful, while one of the respondents said it would help explicitly.

The fifteenth question asks, in relation to the objectives set out in the recitals of the CDSM Directive, whether the press publishers' rights contribute to the maintenance of quality journalism and media pluralism. According to all the respondents, it can contribute to it.

The sixteenth question may well be a trade secret, so it is not surprising that there were no complete answers to the question of how press publishers share the revenues with the columnist authors, or how the new related right has changed the relationship between authors and publishers. Two short answers to this question were received:

1. *"Journalists are paid, which fact does not depend on various external agreements."*
2. *"Authors are paid according to their contract, there has been no change to it after the implementation of Article 15."*

The seventeenth question concerned one of the most, if not the most, important problems of press publishers' rights, namely the actual exercise and management of the rights. We asked whether they exercise the right under individual agreements or in collective rights management, whether they enforce the related royalty claim even in collective rights management and, if so, which collective rights management organisation acts on their behalf, the only response was a very brief "not exercised". I will address this issue separately in the conclusion, as it reveals a lot about the uncertainties surrounding the press publishers' rights.

The last three questions move somewhat away from the right of press publishers and focus on the problems of the lawful use of content produced by artificial intelligence and other content. The eighteenth question focuses on whether newsrooms use artificial intelligence to produce their news content, and if so, exactly what, how much and for what purposes. The responses to this question were as follows:

1. *"We do not use artificial intelligence to generate news content."*
2. *"We do not use AI."*
3. *"For the time being, we are exploring the possibilities offered by AI and thinking about how to integrate its positive effects into our daily workflows."*

The nineteenth question asked whether and how editorial offices and press publishers take action against illegal use of their own content by other press publishers and online news portals. The answer to this question was unanimously in the negative.

The last question sought to find out whether press publishers and editorial offices check the legality of the content used in the production of news, to which one of the respondents answered in the negative, while two of them stated that they check the legality of the content they use.

5. Summary

The main rationale for the questionnaire survey was that, although there is a growing literature on the press publishers' rights, its practical use, operation, management of the rights, imposition, collection and distribution of royalties is still not clear. Article 15 and the legal policy reasons behind it, as set out in the recitals of the CDSM Directive, are clear, the intention is noble and welcome. However, it appears from the literature that platform providers are either only willing to index press publications for free or would rather give it up in order to avoid paying the fair amount of remuneration and making agreements with press publishers. Publishers themselves are in competition with each other, not only with the platforms with which they have a symbiotic relationship, as they need their intermediary service if they want to attract the attention and traffic of end users to the online news portals that have been launched through platformisation (Harkai, 2024a; Harkai, 2024b). Not much is known about the practice either. In the Hungarian press publishing market, Repropress has an extended collective rights management role as a representative collective rights management organisation.[22] It represents press publishers that are located in Hungary and whose activity falls under the scope of Section 82/A Paragraph (1) of the Act LXXVI of 1999 on Copyright.

Following the implementation of the press publishers' rights in Hungary, Repropress proposed in its draft royalty tariffs a 5% rate for search engines and 3.6% rate for social media service providers. This would have resulted in expected revenues of HUF 4.3 billion by 2022. The report, available on the Repropress website, shows that the operators concerned did not cooperate with the collecting society. The draft royalty tariffs have not even been approved by the relevant ministry, the Ministry of Justice.[23] The situation in the Hungarian online press market is well illustrated by the fact that, according to Repropress, Google is in principle complying with the new rules, as it has negotiated with press publishers individually, but they are offering a rather low amount of remuneration. Moreover, the rates are not the result of a consensus, but are set by Google itself in a way unknown to the press publishers. In return for the low fees, Google obtains a broad licence to use the content, but also excludes the possibility of further exercise and enforcement of the press publishers' rights. Nor did Google provide any information on its pricing methodology in response to an official request from Repropress.[24]

[22] https://tinyurl.com/2byaz2ab
[23] https://tinyurl.com/2p8m2mrf
[24] https://tinyurl.com/277bzynz

The main conclusion that can be drawn from the non-representative results of the questionnaire is that press publishers have little information about the new related right or do not consider it an issue that determines their daily operations. It is widely believed that online intermediaries using their news content weaken competition in the independent news market and can adversely affect access. The provisions of Article 15 have either not been incorporated into the internal practices of the three respondents or have been incorporated into but not yet agreed with the intermediaries concerned. At the same time, there is unanimity that the press publishers' right can contribute to maintaining quality journalism and media pluralism.

The news content market also shows that the range of content available to end users seems to be fragmenting in the same way as we have seen in the streaming market. The primary reason for this is that independent online news outlets living off the market are increasingly hiding their content behind different subscription models (paywall, pay-per-view, monthly fee). While there is no doubt that shrinking revenue streams and the business model require a broadening of the available financial resources, this practice may raise concerns about freedom of access to information because it potentially locks information away from those who are unwilling or unable to pay for it. If an effective enforcement mechanism could be built for supporting the measures enshrined in Article 15, this could significantly improve the market position of independent news providers and ultimately bring us closer to the objectives set out in the recitals.

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Insights on the Socio-Economic Impacts of Research Misconduct

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Abstract: Research misconduct (RM) and questionable research practices (QRPs) have a considerable impact on researchers, economy and society. Using a socio-economic impact assessment methodology, this article identifies and assesses their impacts. The objective is to help support the measures developed to promote research ethics and research integrity principles through shared responsibility (individual and institutional) and improve education and training. The article presents recommendations for policy and future research as part of a cohesive framework that takes socio-economic impacts into account. This qualitative study advances and updates current knowledge on the impacts of RM, enriching existing research by introducing new insights, especially regarding socio-economic dimensions, affected stakeholders, and the relevance and significance of these impacts.

Keywords: impacts, impact assessment, questionable research practices, research integrity, research misconduct, socio-economic impact

1. Introduction

Research misconduct (RM) and questionable research practices (QRPs) have a considerable adverse impact on researchers, economy and society (Hussinger & Pellens, 2019; Kim et al., 2018; Michalek et al., 2010; Stern et al., 2014). RM can have a major impact on society because it can compromise the integrity and reliability of scientific knowledge, which serves as a foundation for decision-making in various sectors. When data is falsified, fabricated or plagiarised, it can lead to incorrect conclusions, decisions and behaviours, and undermine public trust in research, healthcare, technology and public policy. RM includes fabrication (making up data or results and recording or reporting them), falsification (manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record) and plagiarism practices (appropriation of another person's ideas,

processes, results, or words without giving appropriate credit). QRPs capture practices that do not strictly fit definitions of RM, might be problematic and damaging in some contexts and compromise research and its integrity (e.g. selective reporting) but may be legitimate in other contexts (Michalek et al., 2010). Although RM *per se* has a major impact and consequences on the society and the research environment (Couzin, 2006), QRPs such as p-hacking (i.e. performing multiple statistical analyses in search of a 'significant' P value), HARKing (i.e. hypothesising after the results are known) and poor data management can impact the quality of research studies and as a result have consequences for the research environment (Gopalakrishna et al., 2022). RM carries with it sanctions but QRPs may go unnoticed and unpunished. Socio-economic consequences are often overlooked during RE/RI training sessions and by major training programmes available (Pizzolato et al., 2020) and only marginally addressed in terms of assessment of RM and QRPs (Shen et al., 2024; Wible, 2023).

Using a socio-economic impact assessment (SEIA) lens and methodology (Rodrigues & Rituerto, 2022), this article identifies and assesses the impacts of RM and QRPs. This approach to evaluating the effects of RM that considers systemic factors has strategic value in providing a combined (in terms of looking at diverse socio-economic criteria and affected stakeholders) and 'bigger picture' (understanding at research community and societal levels) approach to addressing and mitigating RM. It supports the measures developed to promote research ethics and research integrity principles through shared responsibility (individual and institutional) and improve education and training. The article also presents some recommendations for policy and future research and action. This qualitative study adds to and updates the state-of-the-art on the impacts of RM and complements existing studies (e.g. as carried out in the DEFORM project, European Commission, 2016) by developing and bringing together new knowledge, particularly by providing a clear and detailed overview on the socio-economic aspects, affected parties and the relevance and significance of the impacts in a single place. The findings and analysis presented here will be useful criteria for further quantitative research and assessments, and to aid decision-making and training in research ethics and integrity. Understanding socio-economic impacts of RM ensures that measures for mitigation of RM are effective and efficient, synergistic, and not disconnected from societal needs or the consequences of RM and QRPs.

Socio-economic impacts in the context of this study cover impacts relating to or concerned with the interaction of or combination social and/or economic factors. There are a range of social (impacts on people and communities) and economic impacts (e.g. impacts on the economy, business, investment, markets). RM and QRPs have a diversity of impact types, affected stakeholders, directions, magnitudes, duration and likelihoods of occurrence.

The article first outlines the methodology underpinning the study, followed by presenting the results of the impact identification (impacts identified, drivers, stakeholders affected, mitigation measures) and evaluation stages of the study. Then, it discusses the results and outcomes, and finally, offers recommendations for future research and action.

2. Methodology

This study was part of the EU-funded BEYOND project (BEYOND, s. a.) that focuses on promoting research ethics and integrity (RE/RI) and preventing research misconduct (RM) by accounting for systemic and institutional context alongside individual researchers' behaviour. The study used a mixed methodology approach combining a review of peer-reviewed and grey literature with stakeholder consultations to provide an overview of wide-ranging consequences of RM and QRPs.

While this article relies on the concepts and process advanced in Rodrigues and Rituerto (2022), it differs in application: in this article we apply a socio-economic lens to identify and analyse RM and QRP which are different in nature from new and emerging technologies. Nonetheless, this article benefitted from drawing from the approach and the guidance provided there, especially in terms of the steps of the SEIA (here, a structured way of showing the advantages and disadvantages of RMs and QRPs for society as a whole and for various parties). The novelty of this article lies in its tailoring and application to RM and QRP impacts. We first performed a scoping review on the topic to identify different socio-economic impacts of RM and QRPs (which were classified thus initially), then carried out a two-step validation to confirm the main outcomes of this study. The scoping review of peer-reviewed and grey literature was done between January and April 2023. The second stage involved consultation with diverse stakeholders (e.g. project partners and external RI experts, May–June 2023). A draft consultation paper was shared, and ten responses were received (Rodrigues & Pizzolato, 2024, Annex 1). Consultation participants were well balanced in terms of gender (Male: 5, Female: 5). One participant was a project partner, three were members of the stakeholder advisory board (SAB) of the project and six were external experts. The experts were chosen based on their RI/RE expertise and research studies previously conducted by them on the topic. Responses were processed and fed into the scoping review done in the first stage. Respondents then verified their input and provided some additional insights regarding additional consequences of RM. During the stakeholder consultation, participants confirmed the information gathered during the literature review regarding the consequences of RM and the affected groups.

Following the impact identification stage, we carried out an impact evaluation (June–July 2023) and used this to develop a list of recommendations for mitigation of RM and QRPs (Rodrigues & Pizzolato, 2024, Annex 2). The study team held a workshop on 12 September 2023, in which five selected stakeholders participated (Female: 4, Male: 1). The objective was to share, discuss and validate the evaluation results of our study on the socio-economic impacts of RM and prioritise recommendations for action. Three stakeholders had already been involved in the first impact identification consultation, which helped to maintain a certain degree of consistency and continuity. Two were involved for the first time, and this provided us with fresh perspectives. The participants had different profiles (e.g. researchers, research managers, topical expertise: economics) and affiliations (public and private research organisations).

2.1. Impact identification

2.1.1. Peer-reviewed materials

Design and scope

We conducted a scoping review of peer-reviewed literature to understand the socio-economic consequences and impacts of RM and QRPs. This allowed us to identify key concepts in existing literature on this topic (Arksey & O'Malley, 2005; Peters et al., 2015). In addition, it allowed an initial assessment of the scope of the literature, focusing on identifying research findings and evaluating the quantity and quality of the literature regarding study design, actors involved and other important features (Grant & Booth, 2009). We followed the PRISMA (Preferred Reporting Items for Systematic Reviews and Meta-Analyses) guidelines (Page et al., 2021). This study provides an overview of the various socio-economic consequences of RM and QRPs. It did not undertake an in-depth quantitative financial and/or sociological analysis and therefore, neither quantifies the amount of wasted financial resources nor the social disruption. Such quantification could be a good opportunity for future research with the right tools and access to data (data on RM and QRPs is not generally openly or robustly available) within different research domains.

This study focused on 'research' in general and not on one particular sector or domain. We acknowledge that there are diverse approaches in public and private sector research, however, limiting the scope for this study would have affected the breadth of the insights we could have derived and any cross-learnings, given there is a lot of overlapping work between sectors. This study does not delve into each identified impact or mitigation measure, or how they can prevent RM and QRPs, in depth, as this is outside its scope (too many to be covered individually, especially as it was not anticipated in the study planning and resources allocated).

Search strategy and inclusion criteria

We searched three different databases: PubMed, Web of Science and Science Direct. Strings referring to the socio-economic consequences and referring to the topic of RI were merged in a single search string (Table 1).

The results from the different databases were merged and the duplicates were deleted. Screenings of titles, abstracts and full texts were conducted to determine if the retrieved papers met the inclusion criteria. After selecting the final 59 manuscripts, a snowballing process was performed to enrich the pool of selected papers (Greenhalgh & Peacock, 2005) (Figure 1). This snowballing process added two more articles, giving us a total number of 61 manuscripts to analyse (see the listing in Rodrigues & Pizzolato, 2024, Annex 3).

This review included peer-reviewed literature (empirical, theoretical, commentary) published in English. The search was performed in January 2023 and double-checked in April 2023. The study included literature focusing on the socio-economic consequences of general RM at the individual and collective levels.

Table 1
Search strategy

Database	String 1	String 2	String 1 + String 2	Number of publications
PubMed	"Research misconduct" [All Fields] OR "scientific misconduct" [MeSH Terms] OR "questionable research practice*" [All Fields] OR "research integrity" [All Fields]	(((((**consequence***) **OR (impact***)) **OR (social consequence***)) **OR (economic consequence***)) **OR (social impact**)) **OR (economic impact**)	(((((**"research misconduct"**) **OR (research misconduct [MeSH Terms]**)) **OR (**"**questionable research practice***"**)) **OR (**"**research integrity**"**)) OR (research integrity [MeSH Terms]**)) **AND** ((((((**consequence***) **OR (impact***)) **OR (social consequence***)) **OR (economic consequence***)) **OR (social impact**)) **OR (economic impact**))	488
Web of science	**research misconduct** (Topic) or **"research integrity"** (Topic) or **"questionable research** practice*" (Topic)	**consequence*** (Topic) or **impact*** (Topic) or **"social consequence*"** (Topic) or **"economic consequence*"** (Topic) or **"social impact*"** (Topic) or **"economic impact*"** (Topic)	**String 1 AND String 2** and **English** (Languages) and **Article** or **Other** or **Review Article** or **Editorial Material** (Document Types)	1,129
Science Direct			("research misconduct" OR "questionable research practices" OR "research integrity") AND ("social consequences" OR "economic	108
			consequences" OR "social impact" OR "economic impact")	

Source: compiled by the authors

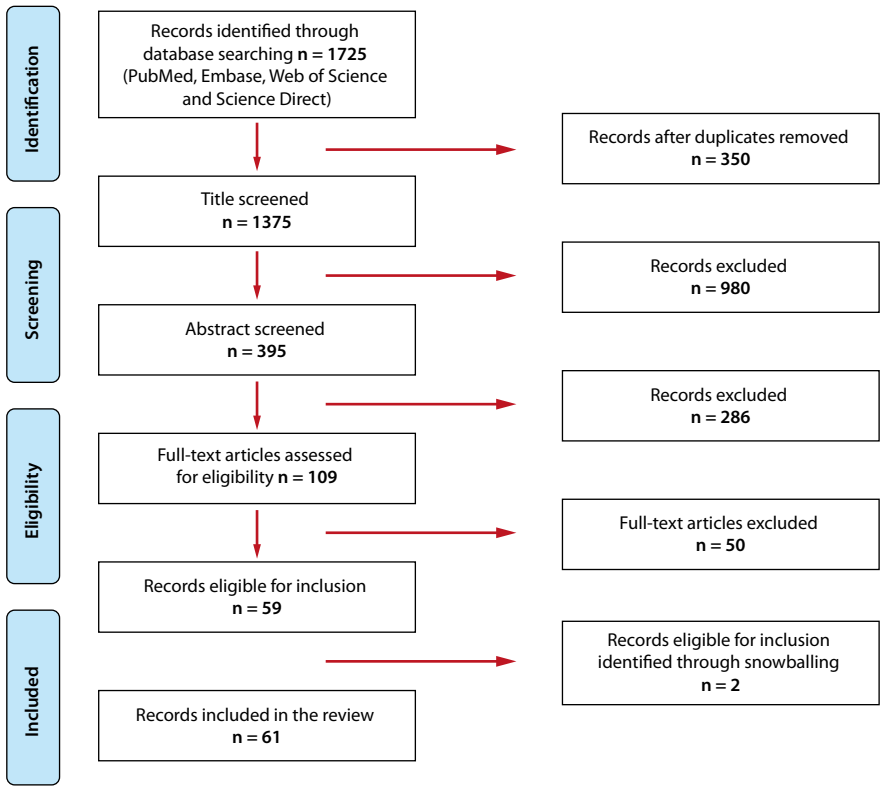

Figure 1
PRISMA extraction chart

Source: compiled by the authors

2.1.2. Grey literature

A non-comprehensive/limited review of grey literature was carried out to supplement the search of peer-reviewed literature and capture information on the socio-economic consequences of RM. The searches were performed and updated between January–March 2023. Search engines such as Google were used along with specific targeted searches of research organisations websites, policy makers at the EU, international and national level (European Commission, UNESCO, Grant et al., 2018; WHO, Grant & Booth, 2009; OECD, Peters et al., 2015; Bruton et al., 2019), research funding organisations/associations thereof (Science Europe, Wellcome, U.S. National Science Foundation, s. a.; see Science Europe, 2015a and 2015b), the Embassy of Good Science, EU-funded projects (DEFORM, see Hagberg, 2020 or RRI Tools), open access repositories such as Zenodo. Search terms used included: research/scientific misconduct, socio-economic, questionable research practice. These complementary strategies were

used to minimise the risk of omitting relevant sources. Since abstracts are often unavailable in grey literature documents, executive summaries or table of contents were screened where available. Screening of documents' full text followed using search terms including *impact, consequence, social, economic*.

A total of 18 results (wikis/articles/reports/project deliverables/policies/books/white papers/briefing papers/webpages/guidance) were shortlisted for the study. Work not directly or explicitly dealing with socio-economic consequences was excluded.

3. Results

This section provides information regarding the different socio-economic consequences of RM and QRPs and an overview of the stakeholders affected. An assessment of the consequences in terms of duration, magnitude and occurrence following the guidance in Rodrigues and Rituerto (2022) is also presented.

3.1. Impacts identified

Our literature review identified a diversity of socio-economic impact categories relating to RM. The review identified mainly negative impacts, and two cases of positive impacts (ones that have a beneficial direction of change, i.e. development of automated monitoring tools to prevent fraud and other solutions such as pre-registration and pre-printing). We present the socio-economic impacts identified using the following broad categories: trust; education; careers and employment; business and investment; health and well-being; research/scientific endeavour, progress, and innovation; standards, regulation and policy and publishing (Figure 2). These categories were chosen based on the themes that emerged from the literature review. Figure 2 below summarises the findings of the impact identification (where do the impacts fit). In the figure, the percentages refer to how many articles mention a particular category in the literature analysed. We do not intend to draw quantitative conclusions about the occurrence of consequences. The data presented should not be interpreted to mean that any degrees of impact are directly proportional to the number of papers on the matter. Annex 3 (Rodrigues & Pizzolato, 2024) presents the detailed results of the identification.

During the stakeholder consultation, participants confirmed the information gathered during the literature review regarding both the consequences of RM and the affected groups.

The impact drivers for RM and QRPs include challenging institutional culture/environment, precarious jobs, lack of supervision of researchers and research activities, inadequate training, competitive and career pressures, personal circumstances, individual psychology (including self-control issues) and lack of deterrence mechanisms to prevent RM and QRPs from occurring (Andorno, 2021; Holtfreter et al., 2020).

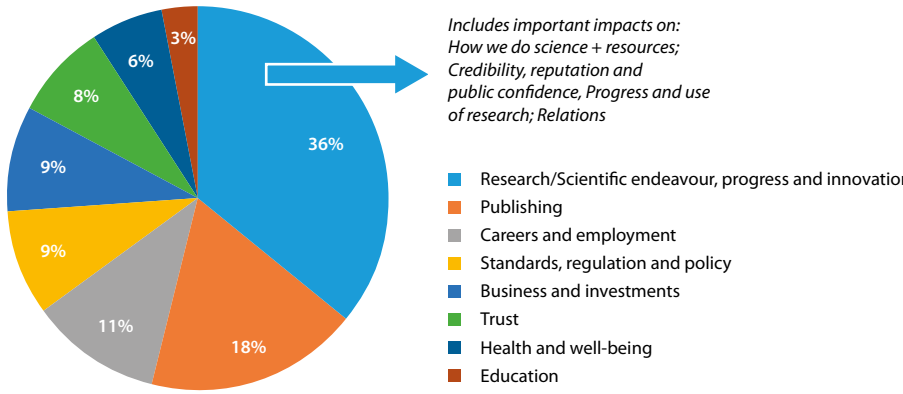

Figure 2
Impacts identified

3.2. Stakeholders affected by RM and QPRs

Affected parties (across the public–private spectrum) include administrators, authors, businesses and enterprises, educators, family, funders of research, medical professionals, patients (relatives), perpetrators, policy makers, public health bodies, publishers, research collaborators, research participants, research performing organisations, researchers (all sectors) including whistleblowers, students, the scientific community and society (the public). These affected parties may encounter both direct or indirect impacts depending on the context and the nature of their involvement or closeness to RM in question. All the affected parties are impacted by decisions based on flawed research and data. Although the list was compiled by analysing the peer-reviewed and grey literature mentioned above and confirmed via stakeholder consultation, it is non-exhaustive. Factors that might have affected this include limitations in the available/openly accessible literature, limitations of the consultation process and/or the complexity (information about RM and QRPs is not well- shared and publicised) and the scope of the topic.

3.3. Applied/prescribed/recommended mitigation measures identified

Mitigation measures are actions taken to minimise or reduce possible negative impacts, their severity and improve beneficial socio-economic impacts. Our research identified the following mitigation measures (from the literature review and stakeholder consultation exercise) that can be taken to minimise the negative impacts of RM. We have classified these measures into three categories (though there may be some overlaps, i.e. some measures might fall within one or more categories depending on the context): *preventative* (measures to prevent or reduce potential impact before it occurs); *corrective* (measures to reduce the impact to an acceptable level); and *compensatory* (measures that are applied when the other two fail and to compensate for unavoidable harmful impact) (see Table 2).

3.4. Impact evaluation

Impact evaluation assesses the relevance of impacts using impact significance methodology that helps evaluate and decide what is important, desirable or acceptable (Rodrigues & Rituerto, 2022). The relevance of the impacts of RM was assessed in relation to multiple criteria including affected parties and industries/sectors, direction of the impact, magnitude, duration and likelihood of occurrence. Since quantitative data was not easily available, we took a qualitative approach based on assessment by the authors drawing from the identification study, a review of secondary data, the authors' expertise and judgment, and validation of the conclusions with project partners and experts via the online workshop conducted on 12 September 2023 that discussed the results of our evaluation, reviewed the recommendations, and identified gaps.

Table 2
Mitigation measures

Preventative measures	Corrective measures	Compensatory measures
• Awareness measures • Careful study design • Clear authorship criteria • Clear standards and records • Clearly defined exclusion criteria • Conflict of interest disclosures • Detailed protocol writing • Fraud detection measures • Good role models • Good scientific practice • Openness to criticism and feedback • Peer review • Power analysis • Replicability testing • Researchers taking responsibility, self-testing • Rewarding quality over quantity • Due diligence requirements for research organisations • Training and guidance • Transparency	• Altering the rewards system • Audits • Continued training and sensitisation • Correcting scientific records • Fines/sentences/ licence revocation/ criminal sanctions • Formal investigation of claims and allegations • Integrity hotlines/reporting safe spaces • Mentoring and oversight • Open discussion of issues • Peer review • Power analysis • Research integrity officers • Taking retractions seriously • Transparency	• Awareness measures • Interventions to change research culture • Evaluation and review of corrective measures • Improving screening and peer review processes • Institutional/national policy review and reform – systematic, social and cultural • Policy interventions • Pressure reduction measures • Preventing publication of questionable materials • Public education • Strengthening fines/ sentences/sanctions • Transparency • Training • Whistleblower counselling

Source: compiled by the authors

This section presents the assessment of the identified impacts against the following criteria: (Rodrigues & Rituerto, 2022).

- *affected parties* and industries/sectors
- *direction* (negative/positive)
- *magnitude* (High: within the limits of the highest order of imaginable impacts; Medium: Impact is real but not substantial in relation to other impacts that might take effect within the bounds of those that could occur; Low: Impact is of a low order and therefore likely to have little real effect)
- *duration* (Short term impacts occur over a few months or for a defined period and are/may be of minor importance in the long time frame; Medium term impact refers to impacts that can be measured in months or few years [e.g. up to ten years]; Long term impacts are impacts that will last for over ten years)
- *likelihood of occurrence* (Rare: may occur in exceptional conditions/circumstances; Unlikely: such impacts that have a very low chance of occurring now or in the future but could occur; Possible: these are impacts that are possible and might occur; Probable: these are impacts that are very likely to occur; Certain: are impacts that will occur)

As all impacts would in some way affect 'society' at large, using 'society' as a category would be redundant. Rather, we focus on the specific actors and groups affected.

The evaluation was carried out in three rounds. In the first round, the study team evaluated the impacts based on their background knowledge, judgement and desktop research. Counterchecks of each other's work were also run (July 2023). In the next round, the study team checked the collated impacts against the peer-reviewed and grey literature from the identification stage and screened identified impacts for affected parties and direction of impact (July 2023). In the final round, the team ran further validation checks using desk research to identify gaps in our findings – this enabled us to add specific stakeholders and information on the sectors/industries affected. These findings were summarised and shared with experts in the 12 September 2023 workshop.

The tables below present the results of our evaluation – impacts are ordered in accordance with the likelihood of occurrence (certain to rare; S/E = Social/Economic). The different subsections indicate specific impacts for the different broad categories mentioned above and in Figure 2.

3.4.1. Trust impacts

Although the socio-economic impacts related to 'trust' manifest more generally in relation to all scientific disciplines, they have been flagged specifically in relation to the following sectors and industries: Private science/biotechnology (Glenna & Bruce, 2021); climate and environment (Leiserowitz et al., 2013); medical/healthcare (Boetto et al., 2021; Garfield, 1987; Grimes et al., 2018; Holbeach et al., 2022; Kim & Park, 2013; Michalek et al., 2010). This could be either because these sectors might be more prone to RM, or because relatively more effective mechanisms exist for identifying when

it occurs given their more stringent legal requirements and regulatory control, or a mixture of both factors (Table 3).

Table 3
Trust impacts

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Harm/damage to trust in science and/or research and researchers	Scientific community; researchers; research participants	Negative	High	Short term and long term	Certain
Adverse impact on trust of public in science	Individuals, media	Negative	Medium to high	Medium term and long term	Certain
Opportunity costs of loss of trust/goodwill by the public and damage to reputations	Laboratories/ research institutions, the public; public-private partnerships	Negative	Medium	Short term	Probable
Adverse impacts on the presumption of innocence	Researchers, research-related staff	Negative	High	Short and long term	Probable
Adverse impact of trust of policymakers in science	Policy makers. Researchers/ scientists; research funders	Negative	Medium	Medium term and long term	Possible
Distrust in healthcare	Patients, doctors	Negative	Medium	Medium term and long term	Unlikely
Negative impact on forensic reports	researchers, research participants, institutions, judicial bodies	Negative	Low to medium	Short to medium term	Rare

Source: compiled by the authors

3.4.2. Education impacts

The socio-economic impacts related to 'education' manifest in the medical/healthcare (Chalmers, 1990; Dooley & Kerch, 2000; Dougherty, 2019; Frias-Navarro et al., 2021; Guraya et al., 2016; Li et al., 2022; Moore et al., 2010; Krishna & Peter, 2018; Rowbotham, 2008; Stern et al., 2014) and educational domains (Eckstein, 2003) (Table 4).

Table 4
Education impacts

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Costs of security measures for administering national examinations	Educational institutions	Negative	Low	Short term	Probable
Misinformation in medical literature leading to preventable illnesses and/ or loss of life	Patients, researchers, doctors	Negative	High	Short term/ medium term	Possible

Source: compiled by the authors

3.4.3. Career and employment impacts

The socio-economic impacts related to 'careers and employment' appear prevalent in the following sectors and industries: STEM disciplines (Science, Technology, Engineering and Mathematics) (Roy & Edwards, 2023); health and life sciences (Stavale et al., 2019). This might be as these are more widely 'regulated' (with legal, ethical and research integrity requirements) than SSH disciplines (Social Sciences and Humanities) (though efforts to improve requirements and training has increased and is growing (Pickett & Roche, 2018), especially given the interdisciplinarity of research and the use of new technologies e.g. generative AI) (Table 5).

Table 5
Career and employment impacts

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Impact on career (losses of title, job, awards, degrees, denial of promotions/tenure, debarment, dismissal, participation prohibitions, incarceration), reputation and income, of the ones committing misconduct	Researchers, research-related staff; research organisations; investigators; administrators	Negative	High	Short term, medium term and long term	Certain (where cases occur)
Career and ostracism impacts for whistleblowers	Whistleblowers, colleagues	Negative	Low to high	Medium to long term	Probable
Exclusion from grants	Researchers, research organisations, collaborators	Negative	Medium	Short to medium term	Probable
Consequences on collaborators	Research collaborators; public-private partnerships	Negative	Low	Short term	Possible
Risk of stigmatisation through false positives and consequences for careers	Accused/ implicated researchers	Negative	Medium	Short term/ Long term	Possible
Competitive disadvantage for researchers who abide by the rules	Researchers	Negative	Low	Short term	Rare
Increased research misconduct controls would deter talented researchers, leading them to opt for less heavily regulated or scrutinised career paths	Researchers	Negative	Low	Long term	Rare

Source: compiled by the authors

3.4.4. Business and investment impact

The socio-economic impacts related to 'business and investment' were flagged as heightened in the biomedical sciences (Morreim, 2021) (Table 6).

Table 6
Business and investment impacts

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Investigations and punishment of the professionals involved	Accused parties, perpetrators (researchers); investigators and disciplinary bodies; families [all]	Negative	High	Short, medium and long term	Certain
Financial costs of the investigation	Research organisations	Negative	Medium	Short and medium term	Certain
Costs of remediation of misconduct	Research organisations	Negative	Medium	Medium term	Probable
Closure of labs	Research organisations	Negative	Low	Short term	Probable
Increase in litigation and legal costs	Researchers, research organisations; legal professionals	Negative	Medium	Short to medium term	Probable
Organisational brand damage due to bad publicity	Research organisations	Negative	Medium	Short term	Probable
Development of automated monitoring tools to identify fraud	Research organisations	Positive	Low	Medium term	Probable
Creation of need to garner additional resources to investigate and/or mitigate research misconduct	Research organisations	Negative	Medium	Medium term	Possible

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Drying up of/withdrawal research grants and funding	Researchers, research organisations	Negative	High	Short to medium term	Possible
Wastes important national assets and talent	Economy; government	Negative	Low	Short term	Possible
Sales losses	Research organisations	Negative	Low	Short term	Possible
Talent losses	Research organisations	Negative	Low	Medium to long term	Possible
Associated/significant financial costs	Funding agencies/bodies and research institutions	Negative	Low	Medium term	Rare
Serious implications for the scale of (dis)continuing public investment	Economy; government	Negative	Low	Medium term	Rare

Source: compiled by the authors

3.4.5. Health and well-being impacts

The socio-economic impacts related to 'health and well-being' are notably prevalent and have been flagged in relation particularly to the medical/healthcare sector (Barde et al., 2020; Boetto et al., 2020) (Table 7).

Table 7
Health and well-being impacts

S/E Impact	Affected parties and industries/ sectors	Direction	Magnitude	Duration	Likelihood of ccurrence
Impact on prescribed medical care	Patients, doctors, nurses and other caregivers	Negative	Medium	Short to medium term	Probable
Impact on individual well-being	Individuals, carers, families	Negative	Low to medium	Short to medium term	Possible

S/E Impact	Affected parties and industries/ sectors	Direction	Magnitude	Duration	Likelihood of ccurrence
Adverse effect on/harms patients due to bad clinical decisions	Patients, clinicians	Negative	High	Short to medium term	Possible
Financial consequences for health systems	Patients, doctors, healthcare organisations	Negative	Low	Medium to long term	Unlikely
Harm and indirect costs to society due to belief in false results	Individuals	Negative	Medium	Medium to long term	Unlikely
Harm to environment	Planet, plant and animal life	Negative	Low	Medium term	Rare

Source: compiled by the authors

3.4.6. Impacts on research/scientific endeavour, progress and innovation

The socio-economic impacts on 'research/scientific endeavour, progress and innovation' are wide-ranging and not specific to any one sector or industry. Again, here impacts might seem to be greater with regards to the medical/healthcare/biomedical sciences due to the nature of harms they could potentially result in and the risks to society in terms of human life and health (Tables 8 to 12).

Table 8
Impacts on how we do science

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Impact on the ability to reproduce and replicate studies in accordance with scientific principles	Researchers, academia	Negative	High	Medium to long term	Probable
Indirect costs of and implications of research by other scientists who have based their work on flawed data	Researchers, academia	Negative	High	Short to medium term	Probable

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Artificial enhancement of the methods and results of studies and impact on literature	Researchers, academia	Negative	Medium	Medium to long term	Possible
Inferior quality of findings	Researchers, academia	Negative	High	Short to medium term	Possible
Negative impact for following and related studies	Researchers, academia	Negative	High	Short to medium term	Possible
Effect on participation rate in studies	Researchers, academia, research participants	Negative	Low	Short term	Possible
Direct damage to science (false leads and time wasted)	Researchers, academia	Negative	Medium	Short term	Possible
Distortions or damage to the research record	Researchers, academia	Negative	Medium	Medium term	Possible
Inflation of false positives	Researchers, academia	Negative	Medium	Short term	Possible
Impact on translational research and other disciplines	Researchers, academia	Negative	Low	Medium term	Unlikely
Decrease in the value of research and value of PhDs and their contribution to research	Researchers, academia	Negative	Low	Medium term	Rare/Unlikely
Tolerance of further fraud	Researchers, academia	Negative	Low	Medium term	Rare

Source: compiled by the authors

Table 9
Impacts on resources: human, finances and time

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Risk to a given research project and/or impact	Other people involved in that project, including PhD students, postdoctoral researchers or support staff	Negative	Medium	Short to medium term	Probable

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Lost time	Researchers; research organisations, funders	Negative	High	Short term	Probable
Delays in processing grant applications	Research funders; researchers	Negative	Medium	Short term	Possible
Waste of funding resources and money invested	Research funders; government	Negative	High	Medium term	Possible

Source: compiled by the authors

Table 10

Impacts on credibility, reputation and public confidence in science

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Decline in the credibility of scientificanalysis and advice on issues that have important implications for society	Scientific community; research funders	Negative	Medium	Short to medium term	Probable
Adverse impact on the image and visibility of the field of study associated with misconduct	Scientific community	Negative	Medium	Short term	Probable
Harm to public confidence in research due to misconduct and lack of transparency in research findings	Scientific community	Negative	Medium	Short term	Probable
Distortion of the social perception of research	Scientific community	Negative	Low	Long term	Unlikely
Cynicism about the academic enterprise at large, professional integrity and the legitimacy of methodologies	Scientific community; researchers	Negative	Low	Short term	Rare

Source: compiled by the authors

Table 11
Impacts on progress and use of research

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Non-appropriation of research outputs by society or stakeholders and the ultimate waste of intellectual effort	Researchers; scientific community; public private partnerships	Negative	Medium	Short to medium term	Possible
Risk to the intellectual capacity	Organisations country/ international research consortia	Negative	Low	Medium term	Possible/Rare
Hinders/slows progress	Field/economy/ country affected	Negative	Low	Short term	Unlikely
Deprioritisation (for wrong reasons) of other potentially valuable research	Researchers; research funders	Negative	Medium	Short to medium term	Rare

Source: compiled by the authors

Table 12
Impacts on relations

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Degradation of relations	Scientists/researchers, senior researchers and students, and between researchers and agency programme managers	Negative	Medium	Short to medium term	Certain
Threat to research/scientific integrity	Scientific community	Negative	High	Short to medium term	Probable
Decline in research productivity	Researchers; research organisations	Negative	High	Short to medium term	Probable

Source: compiled by the authors

3.4.7. Impact on standards, regulation and policy

The socio-economic impacts on 'Standards, regulation and policy' were flagged in the medical/healthcare sector (Glenna & Bruce, 2021; Habib & Gan, 2013; Khadilkar, 2018; Moore et al., 2010) (Table 13).

Table 13
Impacts on standards, regulation and policy

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Misinformation/ deception	Policymaker, individuals	Negative	Medium	Short term	Possible
Poorly conceived public policies that impact the quality of citizens' lives	Government; individuals	Negative	Medium	Medium term	Possible
Negative influence on medical guidelines	Guideline developers; patients; policy makers	Negative	Medium	Short term	Rare
Adverse impact on/ undermining of government's ability to foster and promote research in a competent and responsible manner	Government; public research funders	Negative	Low	Short term	Rare
Civil disorder and violence due to controversy over fraud	Government; individuals	Negative	Low	Short term	Rare

Source: compiled by the authors

3.4.8. Impact on publishing

The socio-economic impacts on 'publishing' are widespread with regards to scientific publications in the medical/biomedical (clinical trials) and pharmaceutical fields. We note that the standards and requirements are more rigorous than other fields with better reporting and that the subject of research integrity still receives greater attention and discourse within the life sciences as compared to other academic fields (Ščepanović et al., 2021) (Table 14).

Table 14
Publishing impacts

S/E Impact	Affected parties	Direction	Magnitude	Duration	Likelihood of occurrence
Retractions of scientific publications	Authors; readers; publishers; researchers in biomedical field especially.	Negative	High	Short, medium and long term	Certain
Development of solutions e.g., pre- registration and pre-printing	Authors, publishers	Positive	Medium	Medium term	Certain
Financial costs resulting from the retraction of scientific articles	Funders and authors of retracted articles	Negative	Medium	Short term	Possible
Increase in peer-review and editorial/ publishing workload	Journal staff, reviewers, editors, publishers	Negative	Medium	Medium term	Possible
Delays in reviewing manuscripts	Reviewers, authors	Negative	Low	Short term	Possible
Brand damage	Publishers, author- associated research organisations	Negative	Medium	Short to medium term	Possible
Decrease in new articles	Scientific community	Negative	Low	Short term	Rare
Threat to the publishing process	Publishers, authors	Negative	Low	Short term	Rare
Loss of editorships	Editors	Negative	Low	Short term	Rare

Source: compiled by the authors

3.5. Mitigation measures: What should be prioritised and rationale

This section evaluates the identified mitigation measures (from the reviewed literature) using the results above, and especially what may be high magnitude, high certainty impacts, and provides guidance to reduce adverse impacts and improve the long term beneficial socio-economic effects. In line with the recommendations in Rodrigues and Rituerto (2022), the evaluation criteria included which impact is addressed, who benefits, ease of its implementation (using a scale of 1–3, where 1 is easy, 2 is moderate and 3 is hard/difficult), potential barriers (factors that hinder, obstruct or delay actions) and why the measures should be prioritised. To carry out this exercise, we looked at the identification results, conducted desk research, verified the results via internal reviews and presentation at the validation workshop on 12 September 2023.

Barriers, derived from general literature on implementation include cultural, economic, individual, organisational/institutional, legal and political barriers (Yang et al., 2021; UN Environment Programme, 2019; Department of Health, 2018; Agency for Healthcare Research and Quality, 2017) and implementation of research integrity measures (e.g. Golden et al., 2023; Troughton & Obasi, 2022; Evans et al., 2022).

The evaluation of preventative, corrective and compensatory measures (see Rodrigues & Pizzolato, 2024, Annex 4) highlights the critical importance of upholding research integrity and ethical standards within the scientific community.

The emphasis on measures promoting awareness, meticulous study design and clear authorship criteria serves to maintain the credibility and trustworthiness of research outcomes. Simultaneously, the implementation of corrective actions, such as altering rewards systems and conducting regular audits, will reinforce transparency and accountability. Additionally, the adoption of compensatory measures, including cultural shifts and the evaluation of past interventions, is essential to counter RM and ensure a robust research culture. Prioritising these diverse measures is instrumental to sustain the integrity, reliability and public trust necessary to advance scientific knowledge, innovation and progress.

4. Discussion

The study provided an overview of the possible consequences of RM and QRPs by clustering them in 8 categories: trust; education; careers and employment; business and investment; health and well-being; research/scientific endeavour, progress and innovation; standards, regulation and policy; and publishing. Moreover, it assessed the different impacts on diverse stakeholders.

At the core of scientific inquiry lies an implicit trust in the integrity of the research process and the individuals driving it forward. However, instances of misconduct, be it falsification of data, plagiarism, or ethical violations, inflict profound damage to this foundational trust. The ramifications extend to the broader scientific community, casting doubt upon the credibility of research outcomes and the reliability of those entrusted with their pursuit. The erosion of trust in scientific institutions through misconduct is penetrating the public consciousness and leading to scepticism and disillusionment (Baghramian & Caprioglio Panizza, 2022; Boyle, 2022). This phenomenon manifests itself in various areas, from aversion to evidence-based policy to scepticism towards public health initiatives and technological advances. The resulting societal disagreement hinders progress and innovation and undermines efforts for the common good. The consequences for people involved in misconduct are manifold and long-lasting. In addition to tangible consequences such as the loss of jobs, fundings, professional prestige, titles and honours, personal reputations (including associates found guilty of misconduct) are also permanently damaged. Careers that have been painstakingly built on a foundation of academic integrity are irrevocably damaged, with lasting effects on future opportunities and professional relationships. Furthermore, the psychological toll of the consequences of misconduct cannot be overstated, as those affected struggle with feelings of guilt, ostracism, harassment and existential issues. Dealing with allegations of misconduct requires careful investigation and adjudication processes, often conducted by institutional boards or peer review committees. These efforts require significant time, resources and emotional strength. The scrutiny to which the accused are subjected, the strain on professional relationships and the impact on family dynamics emphasise the gravity of these proceedings. In disciplines where empirical evidence forms the basis for the dissemination of knowledge, the retraction of suspect publications is a crucial factor in maintaining scientific rigour. However, such retractions take a heavy toll on authors, readers, publishers and research organisations (Memon et al., 2023). Authors face public criticism and reputational damage, readers struggle with diminished trust in scientific literature, and publishers walk a fine line between transparency and maintaining scientific integrity.

5. Recommendations

A preliminary set of recommendations was crafted through a detailed analysis of the study's findings (drawing from the literature review and the consultations). Subsequently, these recommendations were presented and discussed in the 12 September 2023 validation workshop with experts, as detailed in Section 2 (Methodology). The recommendations, outlined in Table 15 encompass the following key themes: 1. promoting a culture of integrity; 2. monitoring policy development; 3. enhancing investigation procedures and protective measures; 4. peer-review; and 5. providing the right incentives.

Table 15
List of recommendations

Theme	Recommendations
Promoting a culture of integrity	**Education**: Develop comprehensive training programs and workshops for researchers, faculty, students and administrative staff. These initiatives should cover topics such as research ethics, research methodology, plagiarism prevention, data manipulation and responsible authorship and generative AI. In addition, promote responsible mentorship and leadership practices. **Institutional support**: Establish an integrity committee that actively engages with researchers to discuss ethical dilemmas and best practices. Provide resources e.g. online courses, case studies, and informational materials to instil a sense of ethical responsibility. **Raising awareness**: Organise events (e.g. seminars, conferences and public talks) that highlight the importance of research integrity and its impact on society. Engage with media to spread awareness about the institution's commitment to ethical research.
Monitoring and policy development	**Policy development**: Develop guidelines and policies for research activities that outline expectations for data handling, authorship, conflict of interest and publication ethics. **Regular audits**: Implement a periodic auditing process to review research projects and ensure compliance with established guidelines. Use both internal and external auditors to maintain objectivity and thoroughness and reduce conflicts of interest. **Reporting mechanisms**: Develop a streamlined process to report potential misconduct or violations. This should include anonymous reporting options to encourage individuals to come forward without fear of retaliation.
Enhancing investigation procedures and protective measures	**Independent oversight**: Establish an independent committee responsible for investigating allegations of research misconduct. This committee should comprise experts from various fields with no conflicts of interest with the subjects under investigation. **Whistleblower protection**: Develop policies that safeguard individuals who report misconduct. Ensure confidentiality, non-retaliation and legal support and counselling for whistleblowers. **Timely investigations**: Clearly outline a step-by-step process for conducting investigations. This process should prioritise promptness and thoroughness while adhering to principles of fairness and due process.
Peer-review	**Transparency standards**: Develop guidelines for journal editors that emphasise transparent peer-review processes. This could include disclosing the review criteria to authors and reviewers and outlining the steps of the review process. **Reviewer guidelines**: Clearly communicate expectations to peer reviewers regarding unbiased evaluation, constructive feedback, and confidentiality. Encourage reviewers to provide detailed comments that can help authors improve their work. **Conflict resolution**: Establish a mechanism to address disputes between authors and reviewers. This could involve an independent mediator or a process to reconsider decisions based on objective criteria.
Providing the right incentives	**Assessment and metrics**: Include ethical metrics and indicators in the evaluation/ performance reviews of researchers, e.g. their involvement in ethics education, mentoring, responsible data management, contributions to peer review and reproducibility. **Professional development**: Provide incentives for researchers to engage in ongoing training and professional development in research ethics, integrity and responsible practices and conduct.

Source: compiled by the authors

The recommendations presented in this section are not novel. Various experts in research ethics and research integrity, both at the national and international levels, including relevant international organisations such as the ALLEA, see Stern et al., 2014; European Commission, UNESCO, DORA, see European Commission, 2016; European Network of Research Integrity Offices (ENRIO) and research projects (SATORI, see Garfield, 1987; SIENNA, DEFORM) have advocated these measures as effective means and valuable strategies to address RM and QRPs. However, what sets our approach apart is our attempt to underline the recommendations that address and help mitigate the identified socio-economic impacts. Usually, recommendations address a specific RI-related matter (e.g. incentives, publication, monitoring, etc.) and are seen in isolation from other recommendations on interconnected topics. Rather than viewing each recommendation in isolation, we have endeavoured to present them as part of a cohesive framework that takes socio-economic impacts into consideration. In doing so, we aim to show how these recommendations can synergise and complement each other, creating a more robust and effective strategy that combines mitigation measures based on impacts to address RM and QRPs. These recommendations can serve as a foundation to create and support guidelines and measures to enhance research ethics and research integrity. The presented recommendations are not explicitly pitched at any one organisation or country – this flexibility provides an opportunity for further customisation and enhanced specificity. Different stakeholders and organisations, including research institutions, funding agencies, publishers and organisations committed to research integrity can evaluate applicability, adapt, and put these recommendations into practice based on their specific needs, requirements and socio-economic impact circumstances.

6. Conclusions

This study provided a detailed review of the socio-economic consequences of RM and QRPs and thematically outlined some recommendations to enhance research ethics and research integrity. However, its scope was limited. Much more remains to be done, as shown by the core issues that emerged from our study and consultations with stakeholders as needs for further research.

RM, characterised by breaches of ethical standards and professional integrity within research endeavours, poses profound challenges to the integrity of scientific inquiry and the trust invested in its outcomes. Socio-economic consequences impact different stakeholders, challenging research progress, business investment, trust and posing a risk to the well-being of research participants and people whose lives are impacted by or subject to such research.

The need for a thorough review of traditional research methodology paradigms is emphasised by a forward-looking perspective that considers the rapid development and widespread application of generative artificial intelligence (AI) tools. These emerging technologies pose a formidable challenge to the conventional understanding and approaches of RM and the management of QRPs.

In addition, it is important to recognise the often overlooked but significant secondary impacts of QRPs. These include the impact on employees, the competitive disadvantage for researchers who adhere strictly to ethical standards, and the distortion of societal perceptions of research endeavours. Neglecting these impacts could have serious consequences and jeopardise the integrity and trustworthiness of scientific research. Furthermore, it is essential to recognise the indispensable role of the cultural context in shaping research practices and attitudes towards research quality. Promoting greater individual responsibility for research integrity means creating an environment that encourages ethical behaviour and accountability at all levels of the research enterprise. Navigating the complex terrain of RMs and QRPs requires a multifaceted approach that considers technological advances, cultural nuances and ethical imperatives. By fostering a culture of transparency, accountability and continuous improvement, the research community can effectively mitigate the risks posed by RMs and QRPs and ensure the credibility and trustworthiness of scientific research in a fast moving landscape.

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Intergovernmental Fiscal Transfer in Nepal

Does It Lead to Greater Accountability at the Local Level?

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Abstract: The Intergovernmental Fiscal Transfer (IGFT) is a crucial tool for local governments (LGs) to bridge fiscal disparities by providing the necessary funds to fulfil their functional responsibilities. In the context of federal Nepal, IGFT has been classified into four types: fiscal equalisation, conditional, special and matching grants. This research is an attempt to examine the effectiveness of these transfer types in enhancing the local governments' accountability in Nepal. Through a combination of quantitative and qualitative data types, this study collected primary and secondary data from seven purposively selected municipalities. Our analysis finds that IGFT serves as a powerful tool for advancing accountability among local governments in Nepal. However, the current trend of centralisation within federal government agencies, limited bureaucratic capabilities at both federal and local levels and inadequate political commitment to IGFT have hindered accountability at the local level.

Keywords: fiscal federalism, Intergovernmental Fiscal Transfer, local accountability, Nepal

1. Introduction

The concept of Intergovernmental Fiscal Transfer (IGFT) has been incorporated as a crucial component of fiscal federalism, emphasising the transfer of funds from one level of government to another, or even across the same level of government agencies (Dhungana & Acharya, 2021). In the context of Nepal's federal government system established in 2015, IGFT has emerged as an important budgetary tool to bridge the fiscal gap between income and expenditure, maintain vertical and horizontal balance in fiscal capacities and enable the federal government to effectively supervise the performance

and accountability of local governments (Pandeya et al., 2016). According to the Constitution of Nepal, the Intergovernmental Fiscal Transfer (IGFT) is an integral part of intergovernmental relations, guided by the principles of cooperation, coexistence and coordination. These principles are aimed at fostering a conducive environment for constructive collaboration between federal, provincial and local governments (Bhusal, 2022a). This intergovernmental cooperation leads to improved coordination and ultimately works towards achieving the overarching goal outlined in the constitution (Bhusal, 2022a; Acharya & Scott, 2022).

Many scholars (Dhungana & Acharya, 2021; Pratchett, 2004) assert that IGFT plays a critical role in safeguarding the fiscal, political and administrative independence of subnational governments. This includes *inter alia* allocation of resources, decision-making processes, and implementation of public policies at the federal, provincial and local levels. Despite this, a significant number of developing countries, whether they have a federal or unitary system, continue to struggle with complex IGFT mechanisms that inadvertently promote corrupt practices and misuse of resources for personal gain (Gordin, 2006; Shah, 2006). Despite those experiences, intergovernmental fiscal transfers in Nepal have endeavoured at balancing budget allocation across levels of government and demoted corruption and fiduciary risk through the application of Public Expenditure and Financial Accountability, such as Sub-National Treasury Regulatory Application (SuTRA) and Public Assets Management System (Dhakal, 2024).

These are further institutionalised by the prevailing Local Government Operation Act (2017), the Intergovernmental Fiscal Management Act (2017) and the National Natural Resources Fiscal Commission Act (2017). These legislative frameworks have provided a consistent legislative framework to strengthen the constitutional spirit of the IGFT system by granting the power of taxation, expenditure rights and regulation to the three tiers of government. Thus, the IGFT is gradually being understood as a robust instrument for bridging resource gaps and addressing issues arising from the performance-based granting system (Acharya & Zafarullah, 2020; Devkota, 2020). Following the background, this paper analyses these transfer types with the aim to understand their efficacy in strengthening the local accountability of local governments in Nepal.

We begin this paper by bringing relevant literature of the IGFT to understand its normative strands. This section summarises key developments in the relevant research field, with references from Nepal's evolving knowledge about IGFT. The third section of the paper illuminates on the methodological aspect of the research. Results are presented in the fourth section. The final section of the paper concludes the research by summarising the core of the research while showing possible future research questions.

2. Literature review: the normative understanding of IGFT

The traditional concept of IGFT is to maintain the financial relationship between the national and sub-national governments by allocating resources efficiently in the public sector. IGFT as a part of fiscal federalism supplements the fiscal imbalances of provinces and local governments. The purpose of these transfers is generally to address fiscal

imbalances, distribute resources in an equitable manner and provide public services. According to Boadway and Shah (2007), intergovernmental fiscal transfers are based on the following principles: equity, benefit-cost spill over, allocation efficiency within government, autonomy, planning certainty, ease of administration, transparency and neutrality in grant management. There are many ways in which these principles lead to positive results at the subnational level. First, fiscal transfers are used to reduce regional disparities, promote equal access to services, strengthen local government capacity and formulate specific policies. Second, it facilitates the funding system and sources. Depending on the source, the funds may come from general revenues, specific taxes, natural resources, or borrowing. Third, the resources are distributed according to allocation criteria. A number of criteria, including population size, fiscal capacity, poverty rate and human development index, have been defined to allocate resources. Finally, there is a well-functioning institutional framework for the management and administration of intergovernmental fiscal transfers.

Over the past few decades, IGFT has evolved in developing countries in a systematic way to support LG fiscal autonomy (Boex & Kelly, 2013; Arachi & Zanardi, 2004). Among these relationships, the most notable outcome was improved economic efficiency and stable fiscal accountability, which brought the decentralised government closer to the people. Although these systems are inadequate in federal countries, they are effective at prioritising public needs, providing citizens with adequate levels of public services and ensuring a substantial degree of autonomy for expenditure and tax assignments in unitary countries (Acharya & Zafarullah, 2020; Smoke, 2016). In federal states, IGFT seeks to improve citizens' preferences and public policies while preserving functional relationships between levels of government (Choudhry & Perrin, 2007). In unitary systems, the proposition of intergovernmental fiscal transfer is to ensure central control over local public policies and service delivery mechanisms while balancing territorial development, among other things (Altunbaş & Thornton, 2012).

In the Nepalese context, intergovernmental transfers involve the flow of financial resources from national to subnational levels, either through grants or revenue sharing, or both, to fill fiscal gaps and carry out development activities (Devkota, 2020). According to Devkota (2020), there are four main legal architectures of intergovernmental fiscal transfers. First, expenditure assignment allows the distribution of expenditure responsibilities among the three tiers of government. Second, the revenue assignment, which is practiced in most low- and middle-income countries. Value-added tax and customs duties and income taxes are reserved by the constitution for the federal government. Provincial governments can impose land and building registration fees, vehicles, advertisement, tourism and entertainment. Third, the IGFT provides various types of financial grants from one level to another (equalisation, conditional, special and supplementary grants) and fourth, subnational borrowing, which is provided to the provinces and LGs but only from within the country.

Studies on fiscal transfer – both in federal settings (Shanmugam & Shanmugam, 2022) and unitary systems (Hou, 2011) consider vertical and horizontal coordination their primary areas of analysis. A common analytical element in both scenarios is the notion of vertical and horizontal collaboration across jurisdictions. Shah (2006) notes that

collaboration across the government and the method of fund transfers between governments is determined by the structure of the political system, geography, population, social consciousness, political culture and social competence. Evidence from federal countries suggests that the Constitutions devise the structure of intergovernmental financing mechanisms including financing autonomy, fiscal accountability and effectiveness of the social safety net to carry over the development works and scale up for more expenditure at the subnational level (Boadway & Shah, 2007). Thus, the IGFT ponders lubrication for political machinery, which ensures fiscal autonomy, uniformity, harmony and efficiency at the subnational level. Despite these, some authors such as Boex and Kelly (2013) argue that IGFT needs a legal basis, structure, modus operandi and behavioural framework for formal and informal interrelationships between governments at different levels.

2.1. Local accountability in the context of fiscal transfer

Studies on local accountability are rooted in diverse disciplines within the broad field of political science. The principal–agent theories in management science outline accountability as an obligation of local officials, or agents – both elected and appointed – to answer for their actions and inactions to their principals (constituencies). It emphasises the idea that those who have authority or power at the local level should be answerable to the community they serve and should be held responsible for their actions and the outcomes they produce. It refers to local governments and their officials as being accountable for their decisions, resources and overall performance in governance and public administration. To hold local officials accountable for their actions, elections, transparency and information dissemination, public participation, oversight and checks and balances, and legal and regulatory frameworks are the major instruments. Balla and Gormley (2017) impute the new dimensions of local accountability, which is found as fiscal accountability in financial management studies, bureaucratic accountability in administrative studies and civic accountability in governance studies. A common feature of these studies is to see local accountability either as a vertical institution or a horizontal process to hold officials accountable for their deeds (Halligan, 2020).

In Nepal, the federal government allocates resources to the subnational government through intergovernmental fiscal transfers to fill budgetary gaps at the subnational level. It is apparent that the federal government collects direct taxes, royalties and fees from citizens which must be mobilised by the power holders in an accountable manner. Therefore, accountability aims to make public officials, employees and even citizens responsible for their actions. This study focuses on conceptualising local accountability from a government and governance perspective, i.e. to examine analytical elements of how polity, politics and local accountability processes are viewed on both a vertical and horizontal scale (Waheduzzaman et al., 2017).

In unitary systems, local governments are obliged to be answerable to the central government. Although defined in the local government legislations, evidence from the unitary systems continues to attest that local accountability is designed in a way that

elected or appointed local officials are always facing upward to the central government whilst making local public policies (Lawton & Macaulay, 2014). Federal settings are inherently considered more conducive for exercising local autonomy, but the question of local accountability seems more complex in such circumstances (Pratchett, 2004). Although recent constitutional developments in countries like South Africa and Nepal show promises for independent local governments, their institutional designs clearly suggest local accountability as upward facing, neglecting the notion of democratic accountability toward principals.

Empirical evidence from federal settings suggests that IGFT has been evolving as a way of arranging and measuring local accountability. Governments in the upper tier provide financial grants, in different names, to lower-level governments with conditions. A stereotypical understanding is that local governments fulfilling such conditions are considered highly accountable as opposed to those remaining less compliant with such conditions being labelled unaccountable. We, therefore, consider fiscal transfer as a medium to ensure consistency across local governments while understanding that too much reliance on grants or aid from the upper governments may hamper the possibility of local governments introducing innovative reforms.

2.2. The Nepali case of intergovernmental fiscal transfer

In Nepal, the grant transfer system from the centre to the lower bodies was started in 1951 to carry out the development works at the local level (Shah, 2016). During the *Panchayat* period, the amount of the grant was not significant and was pushed under the delegation and deconcentration model. In the 1990s, the foundations of sectoral devolution and local governance were provisioned through the Local Self Governance Act 1999, which ensured to collect local taxes as the source of internal revenue of local bodies. Few local bodies were successful in generating local revenue whereas the local bodies in remote areas were not able to make considerable progress in this regard. Therefore, the central government provided local grants to fill this budget gap (Dhungana & Acharya, 2021; Shah, 2006). In 2007, the Government of Nepal initiated Minimum Conditions and Performance Measures to evaluate the performance of the local bodies based on certain set standards and tie up the block grants and revenue sharing with their performance result (Devkota, 2009).

In 2015, a new constitution was promulgated that allows significant spaces for fiscal federalism in Nepal by devolving spending authority to subnational governments. In 2017, some major legislative frameworks were prepared such as the Local Government Operation Act, Intergovernmental Fiscal Transfer Act and National Natural Resources and Fiscal Commission Act. These Acts have opened the avenue for the IGFT system that helps to promote budgetary sustainability on the one hand; on the other hand, the LGs receive four types of grants (fiscal equalisation grants, conditional grants, special grants and matching grants) (Government of Nepal, 2017) under the provision of intergovernmental fiscal transfers (Dhungana & Acharya, 2021). According to the Nepalese constitution, the National Natural Resources and Fiscal Commission (NNRFC)

has a new structure for institutionalising fiscal federalism, correcting both types of fiscal imbalances and distributing state revenues and other resources fairly. According to the Constitution, the function of the Commission is mainly to determine the detailed structure for revenue sharing between three tiers of the government; recommend equalisation grants to be transferred to provincial and local governments; to conduct research and studies to prepare the basis for conditional grants given to provincial and local governments; to recommend methods to improve revenue collection and spending responsibilities of three levels of governments; recommend limits for internal loans that three levels of governments may undertake; and conduct research and studies to provide suggestions to resolve conflicts through coordinated cooperation arising during the redistribution of natural resources among the three levels of governments.

However, the transferred mechanism is not efficiently exercised, especially in LG units. Despite efficient budget allocation and weak expenditure management, public services could not be adequately financed due to financial incapacity. Consequently, this leads to horizontal and vertical fiscal imbalances, which result in structural imbalances in the economy and revenue shortfalls for subnational governments (Bhatta, 2011). IGFTs are thus a major dimension of fiscal federalism because they ensure the transfer of fiscal resources from the upper levels of government to the lower levels, grant availability, revenue distribution and the right to collect internal revenues.

3. Methodology

A combination of primary and secondary sources of information was used to collect the data. The primary data were collected from the following 7 LGs purposively during the period of September to December 2021. The selected municipalities were *Nepalganj Sub-Metropolitan City, Bansgadhi, Bheriganga, Dullu, Ghodaghodi, Badimalika* and *Kabilashi* Municipalities. These municipalities were selected primarily because they were pilot areas for a joint program between the German Development Cooperation and the Ministry of Federal Affairs and General Administration (MoFAGA), the leading ministry for federal affairs and local governance in Nepal. Through the Capacity Development Support to Governance (CD-SG) project, the German Development Cooperation provided assistance to these municipalities in several key areas. This included the institutionalisation of federalism and improved service delivery, the development and implementation of Revenue Improvement Action Plans, support for the Own Source Revenue Program, e-taxation and digital financing systems. Additionally, the German Development Cooperation helped in the preparation of annual budgeting and programming, taking into account both IGFT allocations and internal revenues. The cooperation also supported the implementation of recommendations from the Fiduciary Risk Assessments to ensure financial discipline. A total of 42 in-depth interviews were conducted purposively with federal and local government representatives, including the mayor, deputy mayor, head of administration, head of the technical unit and head of the revenue unit in each LG unit.

Additionally, two representatives from local government associations, a joint secretary of the National Natural Resources and Fiscal Commission, an undersecretary of the Ministry of Federal Affairs and General Administration and three independent local governance experts were selected. These interviews aimed to gather the participants' thoughts and insights on Nepal's current fiscal transfer practices, effectiveness and accountability. Further questions were asked regarding how LGs were receiving equalisation, conditional, special and matching grants from the federal government as a constitutional requirement. An open-ended and an open-structured questionnaire were used for the interviews. The qualitative data were transcribed and classified using four themes as detailed below.

4. Results

4.1. Mobilisation of intergovernmental fiscal transfer

According to Dhungana and Acharya (2021), the Government of Nepal has implemented a formula for intergovernmental financial transfers since 2017. This formula considers the size of the administrative area (15%), population size (70%), human development index (5%) and underdevelopment indicator (10%) in determining the allocation of funds. These criteria were chosen with the needs, priorities and expenditure capabilities of local governments in mind. The aim of this formula is to promote fair and balanced development across the country. As a result, there has been a significant improvement in socio-economic development and the delivery of public services at the local level.

At present, most resources for local governments are derived from intergovernmental fiscal transfers. This trend has been emphasised in recent years due to the inequitable distribution of services and economic disparities between different regions and local governments (LGs). In Nepal, the implementation of federalism in 2017/2018 marked the initiation of IGFT, resulting in a substantial amount being distributed directly to the local level (Table 1).

The concept of fiscal federalism aims to empower local governments to exercise their delegated fiscal rights, explore new revenue scopes and deliver efficient services to their citizens. However, despite these intentions, local governments have persistently relied on the federal government to handle delegated functions, indicating a weak accountability to their constituents. As a result, the autonomy of these local levels is gradually being eroded. In parallel, the IGFT strives to promote value for money and drive economic growth, yet multiple examples suggest that corruption has become a significant obstacle hindering the progress of local governments.

For example, allocation of large volume of IGFT resources to current grants and random appointment of political leaders as advisers and consultants; arbitrary purchase of goods and taking undue facilities; preparing final payment for low quality projects/goods; accepting bribes for projects and services; preparation of counterfeit bills and

Table 1.
Allocation of total intergovernmental fiscal transfers in Nepal (FY 2017/2018–2022/2023) (NPR 0000)

Name of Municipalities	Allocate FY 2017/2018	Allocate for FY 2018/2019		Allocate for FY 2019/2020		Allocate for FY 2020/2021		Allocate for FY 2021/2022		Allocate for FY 2022/2023		From 2017/2018 to 2022/2023	
		Budget	% of increased/ decreased	Budget	% of increased/ decreased	Budget	% of increased/ decreased	Budget	% of increased/ decreased	Budget	% of increased/ decreased	Increased amount of budget	% of increased/ decreased
Tulshipur	79,574	71,710	–9.88	78,640	9.66	89,780	14.17	91,580	2.00	99,430	8.57	19,856	24.95
Bansgadhi	43,759	33,600	–23.22	37,510	11.64	43,840	16.88	46,960	7.12	50,860	8.30	7,101	16.23
Bheriganga	38,223	29,200	–23.61	30,530	4.55	38,010	24.50	44,260	16.44	47,290	6.85	9,067	23.72
Dullu	41,641	35,490	–14.77	37,310	5.13	45,960	23.18	48,790	6.16	55,410	13.57	13,769	33.07
Dhangadhi	72,392	63,090	–12.85	73,000	15.71	85,670	17.36	88,350	3.13	96,480	9.20	24,088	33.27
Patan	37,113	30,900	–16.74	35,500	14.89	43,330	22.06	48,610	12.19	49,360	1.54	12,247	33.00
Belbari	41,318	36,290	–12.17	37,860	4.33	45,310	19.68	53,480	18.03	52,390	–2.04	11,072	26.80

Source: Ministry of Finance, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

counterpoints; no settlement of advance budget for long time; non-adherence to procurement rules at budgeted expense; taking double facilities in the name of meeting or daily allowance; allocating funds under the *Abanda* (reserve) title and spending them through decision of the mayor or political leader; not following the provisions of law and not even conducting an audit is creating adverse impact of IGFT at the local level.

It seems that distortions are spreading in local government, despite being expected to be the model unit of good governance. There were few anomalies which brought glitches in IGFT utilisation. Firstly, local governments did not have enough essential laws and policies and the availability of reliable and authentic data. Secondly, there was a lack of knowledge and experience related to financial management and mobilisation in local governments, which created fiduciary risk and financial chaos.

The details of the budgets received and the increase and decrease in the equalisation grant in different municipalities are presented in Table 2 below. In the case of intergovernmental transfer, fiscal equalisation is a key source of finance for subnational governments to reduce regional imbalances in fiscal capability and expenditure needs. In Nepal, the local governments have received the fiscal equalisation grant through both federal and provincial governments based on a few criteria of a formula-based system,

which need to be spent on sectoral projects such as education, health, infrastructure development programs, waste management, water supply and sanitation programs, local transportation, small irrigation and many more based on local priorities.

LGs also receive conditional grants to implement projects designated by thematic ministries or departments, in addition to the equalisation grant. These grants are contingent upon achieving specific outcomes and aim to provide local communities with the necessary resources to support national development goals. They are allocated to fulfil the constitutional rights granted at the federal level, as well as to carry out concurrent rights and fulfil domestic and international commitments. Conditional grants shall be executed under the requirements of the level providing the grant, and the allocated amount will be returned to the appropriate level if no expenditure is made for whatever reason. Recent federalisation has led to a significant boost in subsidy funds allocated by the central government to local authorities, amounting to 13 trillion 71 billion 72 million over the past five years. Notably, more than half of this amount, specifically 54.55% is in the form of conditional grants (Government of Nepal, 2022). The conditional grants disbursed to the various municipalities over the last five years, together with the changes in the predetermined amounts, are shown in Table 2.

In addition to both grants above, the federal government also offers special grants to local governments to supplement funding for specific projects and development programs. These grants are subject to similar conditions as conditional grants and are administered by the National Planning Commission (NPC). The goal of this grant is to address the imbalance between the LGs' levels of social and economic development. There could be gaps in health, education and infrastructure development for some groups and regions, while discrimination may affect others. To overcome the problem, the federal government offers local governments a special grant. In the fiscal year 2020/2021, special grants were disbursed locally through intergovernmental transfers. Although special grant protocols were established and enacted in 2018, they were still effectively utilised. See Table 2 for a breakdown of the changes in the budget and special grant amounts within the various municipalities.

A matching fund, also known as a complementary grant or counterpart fund, is provided by the federal government to LGs to implement specific projects or development programs. Under this initiative, municipalities are eligible to propose up to five projects, while metropolitans can suggest up to seven. In the framework of the budget for fiscal year 2022/2023, the government has allocated NPR 20 billion for the complementary grant, empowering municipalities to execute noteworthy initiatives at the grassroots level. As outlined in the 2019 Matching Fund Guideline, the Finance Secretary will coordinate a panel of five members to select the projects. It should be noted, however, that under this guideline, grant funds cannot be used towards salaries, allowances, general expenses or loans. Accordingly, the federal government can offer a complementary grant of up to 40% of the project's total cost at the local level. This fiscal year, a special grant was also distributed locally as a part of intergovernmental transfers. For a more comprehensive breakdown, see Table 2 for details on the budget allocation and changes in complementary/matching grants across different municipalities.

Table 2.
Intergovernmental fiscal grant transfer allocation from federal government and mobilisation at the local level (amount in NPR 00000)

Fiscal Year	Types of IGFT	Status of IGFT Mobilisation	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
Allocate for FY 2017/2018	*Equalisation*	NPR*	5,654.00	2,668.00	2,719.00	2,734.00	5,295.00	2,227.00	2,851.00
		Expenditure Amount (NPR)**	4,894.00	2,515.00	2541.00	2,446.00	5,111.00	2,036.00	2,787.00
		% of expenditure	86.56	94.27	93.44	89.46	96.53	91.44	97.76
	Conditional	NPR*	2,303.00	1,510.00	1,102.00	1,429.00	1,943.00	1,484.00	1,280.00
		Expenditure Amount (NPR)**	1,998.00	1,208.00	857.00	1,204.00	1,586.00	1,155.00	1,058.00
		% of expenditure	86.77	79.97	77.77	84.28	81.63	77.85	82.62
Allocate for FY 2018/2019	*Equalisation*	NPR*	2,982.00	1,535.00	1,325.00	1,313.00	2,707.00	1,027.00	1,700.00
		increased/Decreased Amount	−2,672.00	−1,133.00	−1,394.00	−1,421.00	−2,588.00	−1,200.00	−1,151.00
		% of increased/Decreased Amount	−47.26	−42.47	−51.27	−51.98	−48.88	−53.88	−40.37
		Expenditure Amount (NPR)**	2,664.00	1,452.00	1,209.00	1,240.00	2,563.00	961.00	1,561.00
		% of expenditure	89.33	94.61	91.25	94.45	94.68	93.55	91.82
	Conditional	NPR*	4,189.00	1,825.00	1,595.00	2,236.00	3,602.00	2,063.00	1,929.00
		increased/Decreased Amount	1,886.00	315.00	493.00	807.00	1,659.00	579.00	649.00
		% of increased/ Decreased Amount	81.89	20.86	44.74	56.47	85.38	39.02	50.70
		Expenditure Amount (NPR)**	3,259.00	1,510.00	1,237.00	1,813.00	2,915.00	1,518.00	1,555.00
		% of expenditure	77.81	82.76	77.58	81.08	80.92	73.57	80.62
Allocate for FY 2019/2020	*Equalisation*	NPR*	3,162.00	1,591.00	1,369.00	1,327.00	2,967.00	1,103.00	1,789.00
		increased/Decreased Amount	180.00	56.00	44.00	14.00	260.00	76.00	89.00
		% of increased/ Decreased Amount	6.04	3.65	3.32	1.07	9.60	7.40	5.24
		Expenditure Amount (NPR)**	3,417.00	1,676.00	1,490.00	1,481.00	3,067.00	1,288.00	1,992.00
		% of expenditure	92.54	94.91	91.86	89.62	96.73	85.61	89.79
	Conditional	NPR*	4,702.00	2,160.00	1,684.00	2,404.00	4,333.00	2,447.00	1,997.00
		increased/Decreased Amount	513.00	335.00	89.00	168.00	731.00	384.00	68.00
		% of increased/ Decreased	12.25	18.36	5.58	7.51	20.29	18.61	3.53
		Expenditure Amount (NPR)**	3,661.00	1,762.00	1,336.00	1,985.00	3,024.00	1,867.00	1,599.00
		% of expenditure	77.86	81.56	79.34	82.55	69.78	76.28	80.06

Fiscal Year	Types of IGFT	Status of IGFT Mobilisation	Tulshipur	Bansgadhi	Bherigangа	Dullu	Dhangadhi	Patan	Bdbari
Allocate for FY 2020/2021	*Equalisation*	NPR*	3,045.00	1,551.00	1,339.00	1,312.00	1,853	1,094.00	1,647.00
		increased/Decreased Amount	−117.00	−40.00	−30.00	−15.00	−1114	−9.00	−142.00
		% of increased/ Decreased	−3.70	−2.51	−2.19	−1.13	−37.55	−0.82	−7.94
		Expenditure Amount (NPR)**	2,821.00	1,463.00	1,228.00	1,213.00	1711	970.00	1,466.00
		% of expenditure	92.64	94.32	91.73	92.47	92.33	88.64	89.04
	Conditional	NPR*	5,534.00	2,733.00	2,412.00	3,170.00	3,195	3,121.00	2,784.00
		increased/Decreased Amount	832.00	573.00	728.00	766.00	−1138	674.00	787.00
		% of increased/Decreased	17.69	26.53	43.23	31.86	−26.26	27.54	39.41
		Expenditure Amount (NPR)**	4,295.00	2,161.00	1,659.00	2,273.00	2,477	2,215.00	2,280.00
		% of expenditure	77.62	79.08	68.77	71.69	77.54	70.97	81.88
	Special Grant Transfer	NPR*	250.00	100.00	50.00	50.00	150	70.00	0.00
		% of increased /Decreased	0.00	0.00	0.00	0.00	0	0.00	0.00
		Expenditure Amount (NPR)**	0.00	100.00	48.88	50.00	150	70.00	0.00
		% of expenditure	0.00	100.00	97.76	100.00	100	100.00	100.00
	Matching Grant Transfer	NPR*	149.00	0.00	0.00	64.00	136	48.00	0.00
		% of increased/Decreased	0.00	100.00	100.00	28.00	9.33	100.00	0.00
		Expenditure Amount (NPR)**	0.00	0.00	0.00	64.00	136	0.00	0.00
		% of expenditure	0.00	0.00	0.00	100.00	100	0.00	0.00
Allocate for FY 2021/2022	*Equalisation*	NPR*	3,223.00	1,632.00	1,371.00	1,342.00	1963	1,142.00	1,877.00
		increased/Decreased Amount	178.00	81.00	32.00	30.00	110	48.00	230.00
		% of increased/Decreased	5.85	5.22	2.39	2.29	5.94	4.39	13.96
		Expenditure Amount (NPR)**	2,980.00	1,577.00	1,287.00	1,228.00	1,856	1,114.00	1,723.00
		% of expenditure	92.46	96.65	93.88	91.54	94.53	97.52	91.82
	Conditional	NPR*	5,935.00	2,759.00	2,762.00	3,344.00	3,467	3,351.00	3,072.00
		increased/Decreased Amount	401.00	26.00	350.00	174.00	272	230.00	288.00
		% of increased/ Decreased	7.25	0.95	14.51	5.49	8.51	7.37	10.34
		Expenditure Amount (NPR)**	4,919.00	2,343.00	2194.00	3,051.00	3,005	3,018.00	2,730.00
		% of expenditure	82.88	84.91	79.45	91.23	86.66	90.05	88.87
	Special Grant Transfer	NPR*	0.00	166.00	42.00	125.00	233	204.00	203.00
		increased/Decreased Amount	−250.00	66.00	−8.00	75.00	83	134.00	203.00
		% of increased/Decreased	−100.00	66.00	−16.00	150.00	55.33	191.42	−100.00
		Expenditure Amount (NPR)**	0.00	164.00	42.00	125.00	233	177.00	203.00
		% of expenditure	92.08	98.87	100.00	100.00	100	86.75	100.00
	Matching Grant Transfer	NPR*	0.00	139.00	251.00	68.00	139	164.00	196.00
		increased/Decreased Amount	−149.00	139.00	251.00	4.00	3	116.00	196.00
		% of increased/Decreased	−100.00	100.00	100.00	6.25	2.21	241.67	100.00
		Expenditure Amount (NPR)**	0.00	128.00	168.00	50.00	113	150.00	174.00
		% of expenditure	89.05	92.05	66.95	74.07	81.58	91.34	88.74

Fiscal Year	Types of IGFT	Status of IGFT Mobilisation	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
Allocate for FY 2022/2023	*Equalisation*	NPR*	3,280.00	1,719.00	1,445.00	1,426.00	2,070	1,232.00	1,959.00
		increased/Decreased Amount	57.00	87.00	74.00	84.00	107	90.00	82.00
		% of increased/Decreased	1.77	5.33	5.40	6.26	5.45	7.88	4.37
		Expenditure Amount (NPR)**	3174.00	1,633.00	1345.00	1,310.00	2,026	1,137.00	1,872.00
		% of expenditure	96.76	94.99	93.08	91.88	97.87	92.32	95.58
	Conditional	NPR*	5,818.00	3,037.00	3,134.00	3,675.00	3,576	3,444.00	2,960.00
		increased/Decreased Amount	−117.00	278.00	372.00	331.00	109	93.00	−112.00
		% of increased/Decreased	−1.97	10.08	13.47	9.90	3.14	2.78	−3.65
		Expenditure Amount (NPR)**	5,132.06	2,855.39	2,640.40	3,648.17	3,498.76	2,727.99	2,592.07
		% of expenditure	88.21	94.02	84.25	99.27	97.84	79.21	87.57
	Special Grant Transfer	NPR*	220.00	100.00	70.00	350.00	585	100.00	50.00
		increased/Decreased Amount	220.00	−66.00	28.00	225.00	352	−104.00	−153.00
		% of increased/Decreased	100.00	−39.76	66.67	180.00	151.07	−50.98	−75.37
		Expenditure Amount (NPR)**	210.00	88.00	58.00	285.00	448	75.00	45.00
		% of expenditure	95.27	88.21	82.38	81.33	76.64	74.81	89.67
	Matching Grant Transfer	NPR*	330.00	230.00	80.00	90.00	390	160.00	270.00
		increased/Decreased Amount	330.00	91.00	−171.00	22.00	251	−4.00	74.00
		% of increased/ Decreased	100.00	65.47	−68.13	32.35	180.58	−2.44	37.76
		Expenditure Amount (NPR)**	248.00	203.00	80.00	90.00	369	160.00	270.00
		% of expenditure	75.22	88.38	100.00	100.00	94.65	100.00	100.00

Source: * Ministry of Finance, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023; ** Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

4.2. Fiscal equalisation grant

The research demonstrates the significant impact of the fiscal equalisation grant on the local level. First, it helped LGs to build their capabilities considering their limited resource availability. Second, it offered subsidy grants to LGs and facilitated efficient service delivery and the implementation of development projects. Third, the LGs were able to allocate and distribute the equalisation grants according to their own priorities and plans, as outlined in their annual programs.

Finally, this grant was used to reduce vertical and horizontal fiscal imbalances across all tiers of government. As evidenced by the allocation of funds in the fiscal year 2018/2019 for the chosen seven municipalities, there has been a decrease in budget compared to the previous year 2017/2018. In fact, all seven municipalities saw a reduction

Table 3.
Expenditure of fiscal equalisation grants in local governments

% of Expenditure	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
FY 2017/2018	86.56	94.27	93.44	89.46	96.53	91.44	97.76
FY 2018/2019	89.33	94.61	91.25	94.45	94.68	93.55	91.82
FY 2019/2020	92.54	94.91	91.86	89.62	96.73	85.61	89.79
FY 2020/2021	92.64	94.32	91.73	92.47	92.33	88.64	89.04
FY 2021/2022	92.46	96.65	93.88	91.54	94.53	97.52	91.82
FY 2022/2023	96.76	94.99	93.08	91.88	97.87	92.32	95.58

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

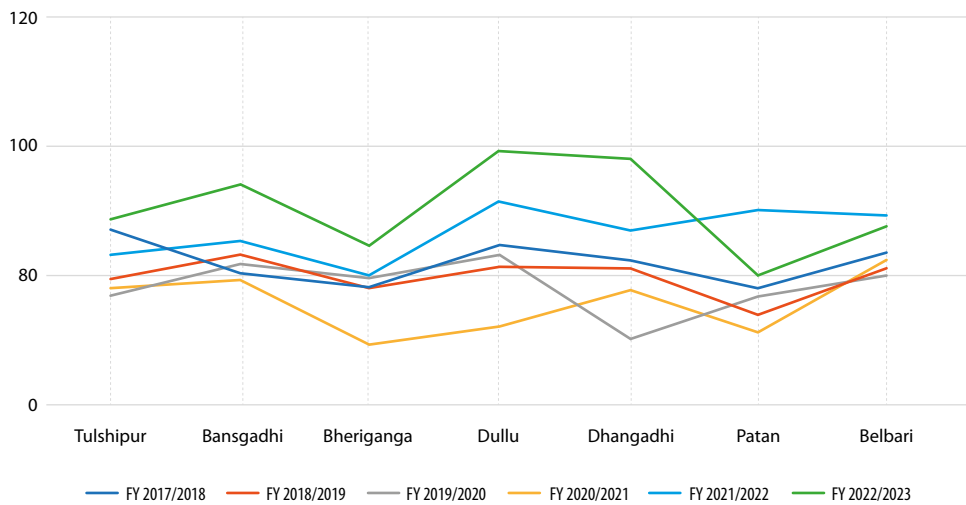

Figure 1.
Expenditure of fiscal equalisation grants in local governments
Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

of 40.37% to 53.88%. This can be attributed to a shift in priorities by the federal government and underperformance in development work and capital expenditures by the local governments.

However, the elected representatives of such municipalities did not endorse the pointed cause of poor work performance. In their opinion, the major factors were the centralised mind set of federalism, which was a new practice in terms of power, functions and systems. Similarly, ineffective and languid staff management, inadequate laws, as well as the lack of work experience of elected representatives and bureaucrats led to weak performance. See below the observation of a mayor who was interviewed during the study.

> "Despite being invited to participate in discussions about intergovernmental fiscal transfers, local government representatives often find that their voices are not given top priority when it comes to addressing issues, meeting demands, and providing necessary resources at the local level. As a result, fiscal equalisation grants may not always deliver the expected benefits to local communities."

During the fiscal year of 2019/2020, there was a consistent rise in the budget across all municipalities, ranging from 1.07% to 9.60%. However, this increase indicates several inconsistencies in the budget allocation process. Elected officials and staff members raised concerns during a field visit about a lack of proper performance and expenditure responsibilities, chaotic employee adjustment process of federal governments, failure to identify areas for investment with maximum production and benefits, and inability to support local level policies, programs and budgets. These were further compounded by political influences that resulted in both unexpected budget increases and decreases.

Nevertheless, some unforeseen events such as the Covid pandemic forced the authorities to increase the expenses of the budgets in FY 2020/2021 compared to the previous year. This was a result of the state having to allocate significant funds towards treatment, while the federal government faced a decrease in revenue collection in this period. Despite these challenges, the following two fiscal years, 2021/2022 and 2022/2023, saw a return to natural growth as all municipalities recorded budget increments of 2.29% to 13.96% and 1.77% to 7.88%, respectively. This data indicates that the budget increments observed in all municipalities were a result of natural growth.

The field visit revealed that 92.91% of the fiscal equalisation grant was being spent. Of this, over 80% was spent on capital expenditures, while 100% was spent on current expenditures. Approximately one third of the budget was kept as an ideal amount, known as the *Awanda* (Reserve) fund. Normally, this amount of the budget is distributed by the mayor or a group of executives of municipalities to politically influential citizens. At the end of the fiscal year, municipalities often return unspent equalisation grants to their consolidated fund and allocate them to new development projects based on the mayor's discretion. Unfortunately, this practice often results in a budget shortfall for on-going projects, making their completion challenging. Furthermore, the repeated allocation of inadequate funds poses a fiduciary risk for local governments every year.

Nevertheless, the value of equalisation grants is important in meeting the needs and development aspirations of citizens at the local level. However, looking at the three-year federal government allocation, the increase in the equalisation grant is almost insignificant, which is extremely low in terms of fulfilling local needs. Criticisms remain that this approach has led to dependency syndrome at the local level, as the federal government continues to push for greater centralisation. Additionally, there has been a growing expectation of increased budget allocations from the federal government. This has resulted in LGs relying heavily on federal funds rather than generating and increasing their own sources of revenue at the local level.

Conditional grants

The LGs are given conditional grants to carry out the projects primarily defined by the thematic ministries or departments. With conditions based on outcomes, this fund is intended to equip local communities with the resources they need to fulfil national development objectives. Conditional grants shall be executed under the requirements of the level providing the grant, and the allocated amount will be returned to the appropriate level if no expenditure is made for whatever reason. Post-federalisation, the federal government has provided the lower governments a total of 13 trillion 71 billion 72 million in subsidies in the past five years. Out of the total volume, 54.55% of the total share is a conditional grant (Government of Nepal, 2022).

The selected municipalities experienced a significant increase of 20.86% to 81.89% in the conditional grant during fiscal year 2018/2019. This upward trend continued in the following fiscal year (2019/2020), with a boost of 3.53% to 20.29%. However, there was a slight drop in the conditional grant of Dhangadhi Sub-Metropolitan City, as their expenditure decreased last year, resulting in a decrease from 26.26% to 69.78%. In FY 2020/2021, the grant rose again to a range of 17.69% to 43.23%. Looking ahead, there was a modest increase of 0.95% to 10.34% in the conditional grant for FY 2021/2022, followed by an increase of 2.78% to 10.08% in the budget for FY 2022/2023.

Unfortunately, both Tulshipur Sub-Metropolitan City and Belbari Municipality experienced a decrease in their conditional grants, with reductions of 1.97% and 3.65%, respectively. The statistics also revealed inconsistencies in the allocation of conditional grants. These inconsistencies can be attributed to three main factors. Firstly, local governments face insufficient capacity in areas such as budgeting, planning, implementation and ensuring sustainability. Secondly, collusion with the federal government, officials, and political figures in prioritising projects with political agendas. Third, there was a propensity to select projects by keeping all the resources in the centre without considering expenditure capacity and distributing the budget without a guarantee of funding. In this way, the conditional grant was increased with the intention of federal interest, which is against the constitution that destroyed the jurisdiction of LGs.

Table 4.
Expenditure of conditional grants in local governments

% of Expenditure	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
FY 2017/2018	86.77	79.97	77.77	84.28	81.63	77.85	82.62
FY 2018/2019	77.81	82.76	77.58	81.08	80.92	73.57	80.62
FY 2019/2020	77.86	81.56	79.34	82.55	69.78	76.28	80.06
FY 2020/2021	77.62	79.08	68.77	71.69	77.54	70.97	81.88
FY 2021/2022	82.88	84.91	79.45	91.23	86.66	90.05	88.87
FY 2022/2023	88.21	94.02	84.25	99.27	97.84	79.21	87.57

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023.

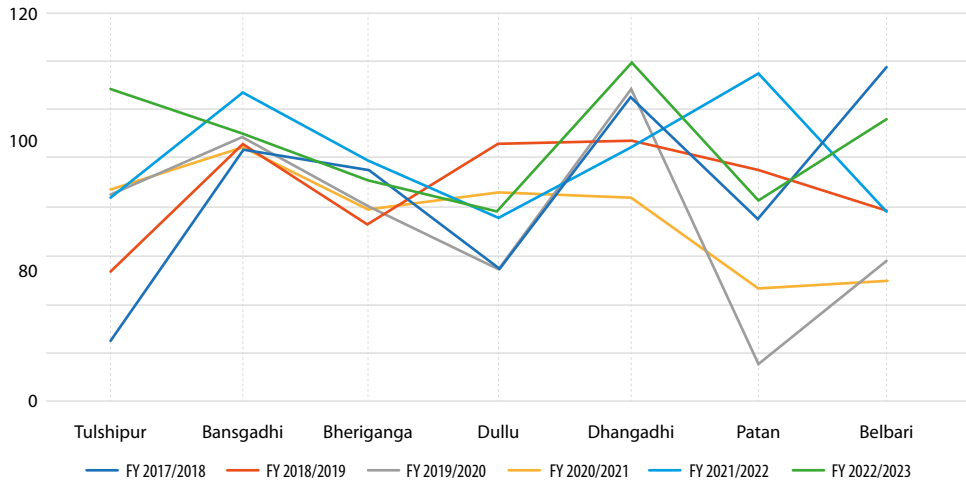

Figure 2.
Expenditure of conditional grants in local governments
Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023.

The field visit revealed that only 81.78% of the conditional grant was being utilised in the last 5 years. The findings indicate that the conditional grant was allocated without adequate research, and the work of the local government was always directed by the federal government, which led to dependency and undermined local government effectiveness.

Based on the data, it appears that the allocation of funds from the conditional grant primarily favoured administrative expenses over program-related funding. This imbalanced distribution of funds may have undermined the trust of citizens in the local governance and hindered their ability to participate and fulfil their roles in the community. A municipality staff member's perspective was also considered as part of the research.

> "The conditional grant of NPR 15,000 has been designated for goat breeding; however, the current market price of a hybrid goat ranges from NPR 40,000 to 350,000. This raises the question of how local governments can effectively meet the needs of citizens in this aspect."

According to legal provisions, LGs are not allowed to modify the conditional grants. It must be strictly utilized for its intended purpose. The fact that so many small projects were developed and distributed the fund as part of the conditional grant made elected representatives dissatisfied. Looking at the overall situation, the federal government was frequently sending projects ranging from NRs 1,000 to 200,000. Such projects known as *Khudre Pariyojana* (tailor-made projects) were less attained by the LGs due to not having decision-making authority. Such type of enforcement of the budget and programme every year means the undermining of the LGs and creating vulnerability in

the role of elected representatives. First, the enforcement through conditional grants continuously attacked the scope of work, the financial autonomy, and the allocation efficiency of the local governments. Second, allocating tailor-made projects with an indication of the name and implementation of the projects under the supervision of political leaders or elites was very common.

Furthermore, local governments heavily criticized this practice, emphasizing that it failed to address their specific needs and possibilities. Additionally, there is a longstanding tradition of not granting funds with conditions for projects related to exclusive functions, which further diminished the effectiveness of project management and eroded public trust in the government.

Special grant

The LGs have received a special grant from the federal governments as supplemental funding to implement the specific projects or development programs. This has characteristics with conditional grants, which are made available under certain conditions. The National Planning Commission is a responsible institution to deliver the special grant at the local level. The major objective of this grant is to address the imbalanced situation in which LGs' levels of social and economic development varies.

The concept of special grant was initiated from the FY 2020/2021, aimed to alleviate short term budget deficiencies at local governments. For the 2021/2022 fiscal year, the amount provided to the selected municipalities has increased from NPR 50–250 million to between 12% and 150%. In Patan municipality, the budget was increased by 191.42% and in Dullu by 150% in which 66% in Banshgadhi municipality and 55% in Dhangadhi SMC. However, the municipalities of Tulshipur SMC, Bheriganga and Belbari witnessed a significant decrease in the amount of special grants due to various reasons such as inability to draft a high-quality proposal, frequent changes in the Chief Administrative Officer position and inadequate capacity of other staff to prepare the necessary documents in time.

During the fiscal year of 2022/2023, Dullu saw a 180% increase in its special grant, while Dhangadhi and Tulshipur experienced a 151% and 100% increase, respectively. The local government authority accredited this growth to the adeptness of the staff in crafting high-quality project proposals, timely submission of approved projects by the executive board and the unwavering support of elected representatives towards the technical staff in

Table 5.
Expenditure of special grants in local governments

% of Expenditure	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
FY 2020/2021	0.00	100.00	97.76	100.00	100.00	100.00	100.00
FY 2021/2022	92.08	98.87	100.00	100.00	100.00	86.75	100.00
FY 2022/2023	95.27	88.21	82.38	81.33	76.64	74.81	89.67

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

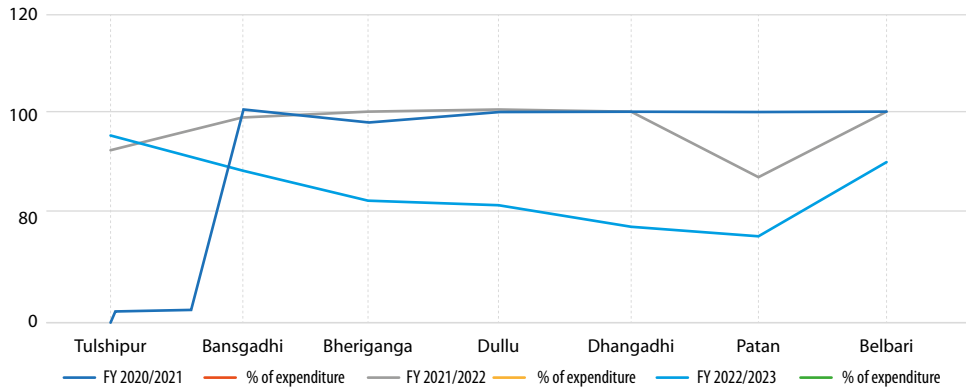

Figure 3.

Expenditure of special grants in local governments

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

the proposal preparation and project implementation processes. In addition, the incorporation of advanced technology in the submission of project proposals was also cited as a contributing factor.

Nevertheless, Banshgadhi, Patan and Belbari municipalities experienced a reduction in their grant allocations; the reasons for this were not conducive to an increase in the amount of special grants. Such factors included failure to adhere to proper guidelines, submitting proposals without the approval of the executive board, unnecessary transfer of the CAO, political conflicts with the federal government and inadequate technical expertise in submitting project proposals through online process. It is worth noting that the special grant primarily aimed to fund initiatives related to infrastructure development, local pride projects and economic and social development.

During the field visit, it was found that most local governments were not interested in getting the special grant which was provided by the federal government. The main reason for this was that the local governments must contribute to the resources based on the conditions and standards of the projects determined by the federal government. Many procedural steps had to be completed to apply for the projects, and unnecessary follow-up with the NPC led to the local governments' indifference. Similarly, LG representatives claimed that there is discrimination in the distribution of grants and political bias about the submitted projects of local governments. It looks at the hollowing state of intergovernmental relationships that created an adverse impact on the social accountability of all tiers of government.

Complementary/matching grant

Matching fund is also called complementary grant or counterpart fund, which is given by the federal government to LGs to implement the specific projects or development

Table 6.
Expenditure of complementary/matching grants in local governments

% of Expenditure	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
% of expenditure	0.00	0.00	0.00	100.00	100.00	0.00	0.00
% of expenditure	89.05	92.05	66.95	74.07	81.58	91.34	88.74
% of expenditure	75.22	88.38	100.00	100.00	94.65	100.00	100.00

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

programs. For this, each municipality can request up to 5 projects and the metropolitan can request up to 7 projects.

In most of the selected municipalities, the special grant was received by more than 100% in FY 2021/2022. However, Dhangadhi and Dullu saw a smaller increase of 2.21% and 6.25%, respectively, compared to other municipalities. As for the following fiscal year, a noticeable trend of budget reduction was observed in Dhangadhi (180%), Tulshipur (100%) and Bheriganga (65.47%) municipalities. In contrast, Bheriganga (68.13%) and Patan (2.44%) experienced a significant increase due to the submission of high-quality proposals and demand-driven projects.

This concept of complementary grants was envisioned to equalise the demand for the projects and the imbalance of resources at the local levels, particularly for low-income LGs. According to conversations with local government officials, this grant is requested when there is a financial gap to implement the multiannual LG pride projects. To ensure the

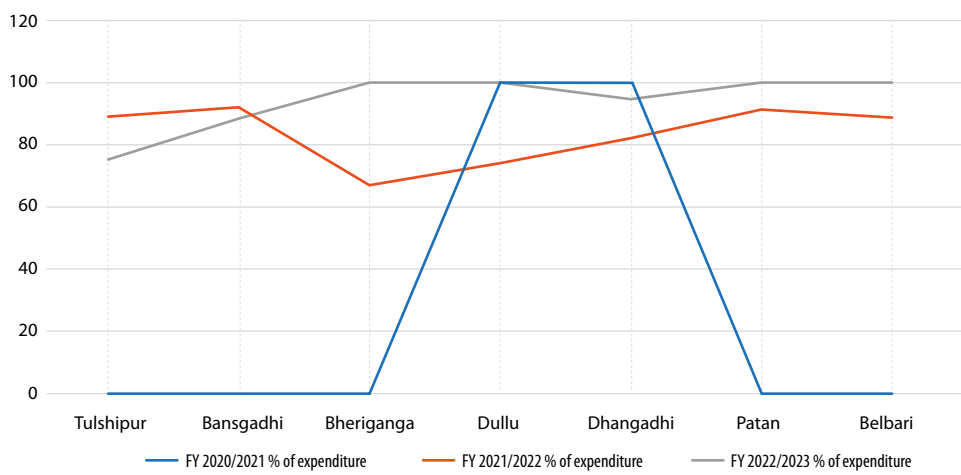

Figure 4.
Expenditure of complementary/matching grants in local governments
Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

effectiveness of the grants, a three year period has been set aside for project operation and completion.

As a result, there was a notable improvement in the contract system and the practice of holding accountable for project implementation became institutionalised. However, due to the political biases of the federal government, the LGs faced many difficulties in obtaining this grant in a justifiable manner. The reluctance of lower income LGs to submit project proposals due to financial insufficiency for the projects, less capacity to prepare detailed project reports (DPRs) and environmental impact assessments (EIAs) resulted in project proposals being rejected. Similarly, it was seen that the selection process of the project and allocation of this grant is less transparent, and priority differences were also reasons to reject the proposal of poor resource-based municipalities.

4.3. Mobilisation of internal revenue mobilisation at the local level

Under the constitution and the Intergovernmental Fiscal Transfer Act of 2017, local governments have the right and authority to collect and utilise local revenues. These rights include the ability to collect taxes (such as land registration, property tax, house rent tax and vehicle tax), service fees, tourism fees, advertisement taxes, business taxes, fines, entertainment taxes and property collections. However, local governments must take into account several key factors when exercising their taxation powers including the rationale for levying taxes, ensuring a balance between tax revenues and local needs and considering citizens' perceptions of paying taxes. A well-designed local tax system should consider these elements. One of the major challenges for local governments is the narrow scope of taxation and inadequate tax education. As a result, they were struggling to generate sufficient revenue from taxes to sustain their operations. The task of revenue collection and mobilisation demands not only resources and capability, but also strong leadership and integrity, as well as support from citizens.

Moreover, the success of revenue mobilisation hinges upon the quality of the financial decisions. If local governments can improve the accessibility and effectiveness of public services and goods funded by local taxes, they can boost revenue collection efficiency and promote tax compliance. Cutting down on administrative costs are also crucial in this process, as it demonstrates a positive commitment towards the tax system. Table 7 below shows the status of internal revenue in different municipalities, while Table 8 depicts the comparison between intergovernmental fiscal transfer and internal revenue at the local level.

The government collects taxes and fees from citizens in accordance with the laws to provide services to citizens. However, in Nepal, the revenue collection system is not homogeneous from one LG to another. Similarly, it did not consider the harmonisation with the citizens and the ability to pay the tax. The findings indicate that local governments usually charge a high amount of fees for services and taxes. Thus, it is crucial for local levels to formulate a revenue improvement action plan with wider citizen engagement. Based on the recommendations, the rate and scope of the tax need to be prioritised for revenue

Table 7.
Internal revenue of different municipalities (NPR 0000)

Municipalities	Internal Revenue for FY 2017/2018 2074/075	Internal Revenue for FY 2018/2019		Internal Revenue for FY 2019/2020		Internal Revenue for FY 2020/2021		Internal Revenue for FY 2021/2022		Internal Revenue for FY 2022/2023	
		Budget	% of increased/ decreased	Budget	% of increased/ decreased	Budget	% of increased/ decreased	Budget	% of increased/ decreased	Budget	% of increased/ decreased
Tulshipur	6,500	14,000	115.38	25,000	78.57	30,000	20.00	60,000	100.00	30,120	–49.80
Bansgadhi	1,520	1,760	15.79	1,120	–36.36	1,186	5.89	2,875	142.41	1,905	–33.74
Bheriganga	1,231	1,865	51.50	2,305	23.59	2,459	6.68	2,539	3.25	2,995	17.96
Dullu	367	300	–18.26	184	–38.67	413	124.46	650	57.38	600	–7.69
Dhangadhi	8,337	13,850	66.13	17,800	28.52	20,007	12.40	18,393	–8.07	26,884	46.16
Patan	150	250	66.67	417	66.80	938	124.94	988	5.33	530	–46.36
Belbari	6,436	6,921	7.54	9,368	35.36	8,050	–14.07	8,705	8.14	13,910	59.79

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

mobilisation. Furthermore, local governments must be diligent in managing their finances and ensuring transparency in their collection and use of funds.

The municipalities chosen for the study have shown varying levels of progress in terms of internal revenue, as depicted in Table 7; for example, from a modest 7.54% increase in Belbari municipality to an incredible 115.38% rise in Tulsipur in 2018/2019. However, this positive trend does not apply universally, as evidenced by the 18.26% decrease in revenue in Dullu municipality over the same period. Moving on to the following fiscal year 2019/2020, it is evident that progress has been limited in most municipalities. While Dhangadhi has seen a decent 28.52% increase and Tulshipur has recorded an impressive 78.57% rise, other areas such as Bansgadhi have witnessed a decline of 36.36% in their revenue. In a similar vein, Dullu municipality has seen a significant drop. During the fiscal years 2020/2021 and 2021/2022, Belbari municipality experienced a considerable decline of 14.07% in revenue, while Dhangadhi saw a decrease of 8.07%. In contrast, other municipalities have shown positive growth, with a range of 5.89% to 124.94%. Looking ahead to FY 2022/2023, Bheriganga is projected to experience an increase of 17.96%, while Belbari is expected to see a significant growth of 59.79%. The remaining municipalities, unfortunately, are predicted to experience a decrease in internal revenue. Overall, it appears that local governments are struggling to significantly increase their internal revenue amidst challenges such as the Covid pandemic, the implementation of new federal models, inadequate institutional practices and inadequate management of human resources. In terms of increment, Tulshipur (52.83%) and Patan (43.48%) are leading the pack, with other municipalities seeing modest increases ranging from 18.80% to 29.03%.

Table 8.
Comparison between intergovernmental fiscal transfer and internal revenue at local level (NPR 0000)

	Name of Municipalities	Tulshipur	Bansgadhi	Bheriganga	Dullu	Dhangadhi	Patan	Belbari
2017/2018	Received IGF	79,574.00	43,759.00	38,223.00	41,641.00	72,392.00	37,113.00	41,318.00
	Collected OSR	6,500.00	1,520.00	1,231.00	367.00	8,337.00	150.00	6,436.00
	Total IGFT+OSR	86,074.00	42,239.00	36,992.00	41,274.00	64,055.00	36,963.00	34,882.00
	% of OSR	7.55	3.60	3.33	0.89	13.02	0.41	18.45
	% of IGFT	92.45	96.40	96.67	99.11	86.98	99.59	81.55
2018/2019	Received IGF	71,710.00	33,600.00	29,200.00	35,490.00	63,090.00	30,900.00	36,290.00
	Collected OSR	14,000.00	1,760.00	1,865.00	300.00	13,850.00	250.00	6,921.00
	Total IGFT+OSR	85,710.00	35,360.00	31,065.00	35,790.00	76,940.00	31,150.00	43,211.00
	% of OSR	16.33	4.98	6.00	0.84	18.00	0.80	16.02
	% of IGFT	83.67	95.02	94.00	99.16	82.00	99.20	83.98
2019/2020	Received IGF	78,640.00	37,510.00	30,530.00	37,310.00	73,000.00	35,500.00	37,860.00
	Collected OSR	25,000.00	1,120.00	2,305.00	184.00	17,800.00	417.00	9,368.00
	Total IGFT+OSR	103,640.00	38,630.00	32,835.00	37,494.00	90,800.00	35,917.00	47,228.00
	% of OSR	24.12	2.90	7.02	0.49	19.60	1.16	19.84
	% of IGFT	75.88	97.10	92.98	99.51	80.40	98.84	80.16
2020/2021	Received IGF	89,780.00	43,840.00	38,010.00	45,960.00	85,670.00	43,330.00	45,310.00
	Collected OSR	30,000.00	1,186.00	2,459.00	413	20,007.00	938	8,050.00
	Total IGFT+OSR	119,780.00	45,026.00	40,469.00	46,373.00	105,677.00	44,268.00	53,360.00
	% of OSR	25.05	2.63	6.08	0.89	18.93	2.12	15.09
	% of IGFT	74.95	97.37	93.92	99.11	81.07	97.88	84.91
2021/2022	Received IGF	91,580.00	46,960.00	44,260.00	48,790.00	88,350.00	48,610.00	53,480.00
	Collected OSR	60,000.00	2,875.00	2,539.00	650	18,393.00	988	8,705.00
	Total IGFT+OSR	151,580.00	49,835.00	46,799.00	49,440.00	106,743.00	49,598.00	62,185.00
	% of OSR	39.58	5.77	5.43	1.31	17.23	1.99	14.00
	% of IGFT	60.42	94.23	94.57	98.69	82.77	98.01	86.00
2022/2023	Allocated IGF	99,430.00	50,860.00	47,290.00	55,410.00	96,480.00	49,360.00	52,390.00
	Projected OSR	30,120.00	1905	2,995.00	600	26,884.00	530	13,910.00
	Total IGFT+OSR	129,550.00	52,765.00	50,285.00	56,010.00	123,364.00	49,890.00	66,300.00
	% of OSR	23.25	3.61	5.96	1.07	21.79	1.06	20.98
	% of IGFT	76.75	96.39	94.04	98.93	78.21	98.94	79.02

Source: Nepalganj Sub-Metropolitan City, Bansgadhi Municipality, Bheriganga Municipality, Dullu Municipality, Dhangadhi Sub-Metropolitan City, Patan Municipality, and Belbari Municipality, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

Similarly, the results displayed in Table 8 indicate a clear pattern – the average dependence on IGFT for the municipalities chosen for this study ranges from a low of 77.35% in Tulsipur to the highest of 99.09% in Dullu Municipality. Interestingly, other municipalities such as Dhangadhi (81.91%), Belbari (82.60%), Bheriganga (94.36%), Bansgadhi (96.09%) and Patan (98.74%) display relatively higher levels of dependence on IGFT, respectively. These findings, along with the annual IGFT and internal revenue of municipalities presented in Table 8, offer valuable insights into the role of IGFT in the financial health of these local communities.

5. Discussions: Sustaining public accountability and controlling fiduciary risk

Nepal has taken numerous initiatives to maintain fiscal accountability in local government, firstly an establishment of a legal framework through the Constitution, laws and regulations to govern public financial management. Secondly, the Office of the Auditor General (OAG) audits local government accounts and ensures financial transparency (Shrestha, 2019). Thirdly, fiscal accountability is ensured through budgetary processes, such as the annual budget and program that outline revenue and expenditure plans. Fourth, local governments are obliged to publicise the prepared financial statements, including income and expenditure accounts and balance sheets (Devkota, 2020). Fifth, public procurement processes are applied to procure the services which ensure transparency and fairness. The Public Procurement Act and related regulations govern procurement activities, promoting accountability and preventing corruption in the use of public funds. Finally, various oversight bodies monitor the implementation of budgetary plans and evaluate the effectiveness of public programs. These have helped identify inefficiencies, evaluate outcomes and ensure that funds are being used as intended, enhancing fiscal accountability (Shrestha, 2019). These indicate that the financial accountability of local governments is being transformed from government to governmentality. These initiatives have played a key role in maintaining financial discipline, ensuring public accountability and mitigating fiduciary risk. In Nepal, efforts have been made to institutionalise fiscal discipline for the efficient and effective management of public income and expenditures through laws, regulations, procedures and systems. For instance, the constitution defines the fiscal framework for federal, provincial and local levels in Part 10, 16 and 19. Additionally, the Financial Procedures and Fiscal Responsibility Act of 2019, along with the Intergovernmental Financial Transfer Act of 2017, provide essential regulatory support for maintaining fiscal discipline. With constitutional autonomy, the Supreme Audit Institution is responsible for ensuring financial accountability and discipline. In response to these legal frameworks, Nepal's financial management has been strengthened and modernised. Similar efforts in various countries around the world have also yielded exemplary results.

In Uganda, the transparency and accountability of public resources have been improved by introducing a few reforms in financial management through laws. For example, the adoption of the open and transparent budget consultative process, this was

further enacted by the Public Finance Management Act 2015 (Overseas Development Institute, 2018). By contrast, a significant portion of corruption and financial chaos occurred at the local level in the past in Indonesia, where local bureaucrats collect bribes to supplement their salaries. These irregularities were addressed through the implementation of a Financial Management Information System (FMIS), known by its Indonesian acronym SPAN (Sistem Perbendaharaan dan Anggaran Negara). SPAN provides a centralised database for all financial government transactions, enhancing transparency, efficiency and accountability in the management of public finances (Henderson & Kuncoro, 2011). Funk and Owen (2020) conducted random audits of over 5,000 municipalities in Brazil between 2001 and 2012. Their findings revealed that audited municipalities performed better than those that were not audited. The study concluded that oversight mechanisms and their monitoring programs have been effective in enhancing transparency, accountability and the quality of public services.

According to Acharya (2021), Nepal has a strong legislative and institutional framework for public financial management aimed at enhancing fiscal transparency and accountability by enforcing fiscal rules and promoting greater accountability. This framework promotes effective accountability mechanisms, reduces financial mismanagement, prevents corruption and abuse of political power and strengthens public institutions, all of which contribute to a more effective governance system. However, despite these efforts, challenges remain in achieving full fiscal accountability at the local government level in Nepal. Political influence, favouritism and the presence of middlemen within the political economy have led to the significant misuse of public resources and property. A key factor contributing to fiduciary risks is the severity of the common pool problem, where influential politicians redirect significant portions of the budget to their own constituencies in order to satisfy their voters. This leads to a situation where the average benefit received by these voters is far greater than that received by ordinary citizens across the country. While the entire nation bears the financial burden, only specific groups of people reap the benefits. Similarly, downward accountability is deteriorating due to the increasing fiscal dependence of local governments on the federal government. For example, intergovernmental fiscal transfers typically allocated 8–10% of the central government's total budget to local bodies in Nepal under the unitary governance structure. However, with the establishment of federalism, this allocation increased by 17% of the federal budget. For the fiscal year 2022/2023, the budget distribution was as follows: 77% allocated to the federal government, 6% to the provinces and 17% to local governments (Government of Nepal, 2022). While the federal structure has resulted in an increase in both the volume and percentage of the budget allocated to local governments, the fiscal capacity at the local level remains weak and outdated. Local governments lack concrete plans or strategies for boosting their own revenue sources and maintaining fiscal discipline (Dhungana & Acharya, 2021). As a result, local governments are heavily reliant on funds from the federal government, which has gradually shifted accountability and autonomy toward the central level. For example, in the fiscal years 2020/2021 and 2021/2022, local revenue contributed only 8.15% and 8.01%, respectively, to the total resources of local governments with the remainder – 91.85% in 2020/2021 and 91.99% in 2021/2022 – coming from intergovernmental fiscal transfers (IGFT) (Government of Nepal, 2022).

This growing dependency on federal resources raises concerns not only about the autonomy of local governments but also about the erosion of accountability along the vertical axis of governance. It undermines the constitutional principles of the 3Cs – cooperation, coordination and coexistence – by reinforcing hierarchical relationships in public administration (Government of Nepal, 2019a).

Scholars (Gyawali, 2022; Devkota, 2020; Boex & Kelly, 2013) have warned that the growing "fiscal anarchism" at the local level, which is shifting from the federal level, is disastrous and driven by the increasing trend in internal revenue generation. This fiscal chaos stems from the practice of allocating budgets without identifying sources of funds and launching projects without meeting the necessary prerequisites. The lack of proper preparation leads to cost and time overruns, ultimately making the administration inefficient. Bahl and Linn (1994) add that subnational governments in developed countries spend 32.2% of the intergovernmental grant while 67.8% spend was concerned with local revenue. Similarly, 14.9% of expenditure belongs to IGFT compared to 85.1% spend concerned with local revenue in developing countries. Despite rising and falling figures, this evidence points to the "crowding out" of intergovernmental grants in both developed and developing countries. In Nepal, the frequent growth of IGFT has created an adverse impact in local autonomy and political accountability at the federal level.

As compared to previous years, the fiscal equalisation grants for local governments were reduced by the National Natural Resource Fiscal Commission in FY 2023/2024, while conditional grants increased. There is also a broader concern among local governments, including the reduction of conditional, complementary, and special grants to the maximum extent possible, and compensating them by providing fiscal equalisation grants in their place. According to LGs, this process would increase the capacity of the local governments and allow them to use the constitution's rights. Despite that the current trend of wrong prioritisation in the grant distribution system, resource mobilisation has become volatile, fiduciary risks are increasing in budget expenditures, and governing structures are becoming more corrupt. In addition to these factors, several other issues contribute to the deterioration of public accountability and the increase in fiduciary risks at the local level. For instance, local governments have been found allocating budgets for areas where the law does not permit such spending. Furthermore, a number of local governments exhibit a tendency to manipulate project cost estimates, allowing contracts to be awarded at lower amounts in exchange for kickbacks from contractors.

In 2019, the Government of Nepal enacted the Financial Procedures and Fiscal Accountability Act to make the financial management system responsible, transparent, and accountable as well as maintain macroeconomic stability, and financial discipline and regularize the financial procedures at the local level (Government of Nepal, 2019b). Through this Act, high efficiency and effectiveness in public expenditure, and financial discipline have been expected. However, examples indicate that LGs have been facing serious fiduciary risks. For example, elected officials in Africa, Asia, and Latin America are using public resources for personal benefit without ensuring transparency in revenue collection and expenditure (World Bank, 1997). Some LGs of Bangladesh have not approved the budget from the assembly and have gone beyond the approved budget headings and written expenses in an irregular manner transferring funds from capital

headings to current ones and transferring funds more than the specified limit (Rahman et al., 2007). The reports of the Auditor General of Nepal for the past two years show low financial accountability, allocation of the budget without approved guidelines, unnecessary administrative expenses from the capital grants, and low amount of internal revenue at the local level (Gyawali, 2022).

Such information indicates that there are inconsistencies in accountability remaining in the fund, functions and functionaries related to local governments from the federal to the local level in Nepal. Despite the ongoing flaws in fiscal accountability in Nepal, the Government of Nepal actively encourages and enforces local governments (LGs) to maintain public accountability and control fiduciary risks by complying with the legal system. To this end, it is crucial to strengthen internal controls and internal audits in accordance with the relevant legal provisions. The digitisation of the public financial management system, including information and asset management systems, is also crucial to reduce the risks of irregularities and wasteful expenditures. Furthermore, robust plans and strategies are needed to institutionalise capacity development initiatives that address local needs. Finally, local citizens should be provided with meaningful opportunities to engage with local governments, set development agendas and hold local authorities accountable.

6. Conclusions

This research focused on analysing Nepal's intergovernmental fiscal transfer (IGFT) mechanisms and their processes. Although it is too early to reach any definite conclusion about the effectiveness of these mechanisms, evidence evolved in the last seven years or so provides plausible insights on their potentially positive contribution to institutionalising fiscal federalism in Nepal. This research finds that Nepal's IGFT regime offers a set of formulae that allocates funds for various development projects relating to economics, social issues, the environment and infrastructure. However, during their first five year electoral tenure, we found that governments at all levels wrestled in expanding and deepening the essence of transfer of diverse types of funds (see also Bhusal & Acharya, 2024; Bhusal & Breen, 2024). For example, the conditional grants, which follow certain conditions from the top, saw a significant increase of 20–67% in the fiscal year 2018/2019, followed by a 15% increase in the next fiscal year. Along with this, LGs also received a special grant to support various projects in areas such as health, education, infrastructure development and social inclusion. However, not all municipalities were able to receive this grant evenly, due to not being at a high level of competency and disputes between LGs and the federal government. In the chosen municipalities, the equalisation grant has seen a decline of 7.98% from 2017/2018 to 2022/2023. At the same time, conditional grants have experienced a significant rise of 20.38%. However, it is worth noting that other grants, including matching and special grants, are not distributed based on rational decision-making but rather on political alliances between the federal and local government. This troubling trend suggests a diminishing sense of social responsibility as the allocation of resources

becomes tainted by political manoeuvring. Thus, the decrease in equalisation grants and the increase in conditional grants pose a challenge to effective federal governance.

When analysing data from the selected municipalities, it is evident that there has been a significant rise in internal revenue from 2017/2018 to 2022/2023, increasing from 18.81% to 52.83%. However, this increase is not evenly distributed among the municipalities. Tulshipur, Bansgadhi, Patan and Dhangadhi have experienced a substantial growth. In contrast, other municipalities have only managed to raise their internal income by less than 25%. Figures show that IGFT still played a crucial role in the budgets of these municipalities, accounting for 90.02% of the total budget, while internal revenue shared 9.98%. This shows a significant gap between the two sources. The Nepalese local government is facing a critical issue where their administrative expenditures are growing compared to their revenue capacity. This has led to a decrease in the quality of services available to the citizens and has created financial chaos that poses a fiduciary risk.

For the future, we would encourage research focusing on the analysis of specific policy areas such as health and the environment, to see how the constitutional provision of the IGFT has actually contributed to the decentralisation of these policy areas. Similarly, it is recommended that we look at the IGFT perspective of individual governance mechanisms, such as the provincial government or any municipality.

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