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Contents

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Missouri v. Biden: Governmental Efforts to Suppress Free Expression

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Abstract: The development of the internet, along with the creations of social media platforms, has created a unique opportunity for governmental officials to control freedom of expression. This article examines how the Biden Administration requested, encouraged, pressured and even threatened social media platforms to censor certain types of speech, and even to ban certain individuals from their platforms, and it analyses the Biden Administration's actions in light of U.S. free speech principles.

Keywords: internet, social media, governmental censorship, governmental repression, threats

1. Introduction

Throughout history, governments have gone to great lengths to control freedom of expression (Weaver & Hancock, 2023). In response to Gutenberg's invention of the printing press (Weaver, 2024, pp. 12–20), most governments responded with repression (see Mayton, 1984, pp. 97–98; Rosenberg, 1986; Kaplan, 1997).[1] While medieval kings might have been happy to have the printing press available for their own use, they were not necessarily keen to allow their subjects to use this new technology.[2] In an effort to stifle use, governments restricted the number of printing presses that could exist, and allocated licences only to those who were regarded as favourable to the government

[1] See *First National Bank of Boston v. Belotti,* 435 U.S. 765, 800–801 (1978) ("Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order-political and religious-devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.")

[2] See *First National Bank of Boston v. Belotte,* 435 U.S. 765, 800–801 (1978).

(Weaver & Hancock, 2023, p. 6). Governments also imposed content-licensing requirements which required those who wished to publish books or other documents to submit their manuscripts to governmental censors, and prohibited publication absent the approval of those censors (Weaver & Hancock, 2023, pp. 5–6).[3] Perhaps the most draconian restriction on printing involved the British Star Chamber's 1606 decision in *de Libellis Famosis*.[4] That decision created the crime of seditious libel, which made it a crime to criticise the government or governmental officials (and, at one point, the clergy as well) (Mayton, 1982, p. 248). The crime, which involved the ridicule of high clergy in *de Libellis Famosis,* was enforced by threats of punishment, litigation costs and stigma, (Mayton, 1982) and was justified by the notion that criticism of the government "inculcated a disrespect for public authority" (Mayton, 1984, p. 103; see O'Laughlin, 2002, pp. 720–721). "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood." Truth, therefore, was not a defense (Mayton, 1984, p. 103; see Glendon, 1996, p. 48). Indeed, truthful criticisms were punished more severely than false criticisms because it was assumed that true criticisms were potentially more damaging to the government (Krauss, 1998, p. 184 n. 290; see Glendon, 1996, p. 48).

Although the U.S. free speech tradition developed slowly over the centuries, it resulted in a consensus that the government should have very limited authority to censor speech.[5] During the Middle Ages, some kings claimed to rule by Divine Right – the notion that the King was placed on his throne by God, was carrying out God's will, and therefore could do no wrong.[6] Under Divine Right, free speech was not valued or protected. After all, if the King was God's representative on earth, why would society allow ordinary people to criticise what God was doing or had done? In the United States, the Declaration of Independence implicitly rejected the idea of Divine Right, and flatly declared that the power to govern derives from the consent of the governed.[7] The U.S. Constitution reinforced the Declaration by establishing a representative democracy.[8] Under that system, "speech concerning public affairs is more than self-expression; it is the essence of

[3] See *Lovell v. City of Griffin,* 303 U.S. 444 (1938).

[4] 77 Eng. Rep. 250 (Star Chamber 1606).

[5] See *United States v. Alvarez,* 567 U.S. 709 (2012); *Brown v. Entertainment Merchants Association,* 564 U.S. 786 (2011); see also *New York Times Company v. United States,* 403 U.S. 713 (1971); *Near v. State of Minnesota,* 283 U.S. 697 (1931).

[6] See *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 96 (1996) ("centuries ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority"); *Employees of the Department of Public Health and Welfare, Missouri v. Department of Public Health and Welfare,* 411 U.S. 279, 323 (1973) ("our discomfort with sovereign immunity, born of systems of divine right that the Framers abhorred, is thus entirely natural"); *Ex Parte Milligan,* 71 U.S. 2, 73 (1866) (referring to "the divine right of kings and other rulers to govern as they please"); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 36 U.S. 420, 602 (1837) (noting that the divine right of kings was based upon "a sense of their exalted dignity and pre-eminence over all subjects, and upon the notion, that they are entitled to peculiar favor, for the protection of their kingly rights and office").

[7] U.S. Declaration of Independence (July 4, 1776).

[8] United States Constitution (September 17, 1787).

self-government",[9] and "self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources".[10]

One might have thought that the right to free expression was secure in the United States. After all, it is enshrined in the First Amendment to the U.S. Constitution.[11] In addition, the U.S. Supreme Court has rendered a number of speech protective decisions,[12] and has generally treated free speech as a "preferred right" vis-à-vis other rights.[13] Despite the U.S. free speech tradition, the trial court decision in *Missouri v. Biden*[14] provided a chilling examination into the Biden Administration's aggressive efforts to control and suppress free speech. Purportedly, in an effort to combat "disinformation", the White House (and other Biden Administration officials) pressured and threatened social media platforms regarding their content-moderation decisions. The *Boston Globe* analogised the government's actions to those of working "the refs [the content moderators of social media platforms] like an aggressive football coach, hectoring and goading [social media platform] executives into exercising ever-stricter control over what users are permitted to say" (Bray, 2023). Moreover, as we shall see, some of the speech that the White House tried to suppress was not disinformation at all, but simply information that the government wanted to suppress. This article examines the evidence in the *Biden* case in light of the U.S. free speech tradition.

2. The U.S. free speech tradition: Placing the *Biden* decision in context

The U.S. free speech tradition generally precludes government from censoring or prohibiting speech simply because the government dislikes or objects to the message being conveyed. Indeed, the U.S. Supreme Court has consistently held that governmental attempts to "license" or "censor" speech are presumptively unconstitutional. For example, in *Lovell v. City of Griffin,*[15] the Court held that "content licensing" schemes, under which someone must submit content to a governmental censor for approval before publishing or distributing it, are "prior restraints" and therefore are presumptively unconstitutional.[16] In *Lovell,* the Court held that licensing schemes strike "at the very foundation of the freedom of the press by subjecting it to license and censorship".[17]

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[9] *First National Bank of Boston v. Belotte,* 43 U.S. 765, 812 n. 12 (1978); see also *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964).

[10] *Associated Press v. United States,* 326 U.S. 1, 20 (1945), quoted in *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964).

[11] U.S. Constitution, Amdt. I.

[12] See *Snyder v. Phelps,* 562 U.S. 443 (2011); *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988).

[13] See *Snyder v. Phelps,* 562 U.S. 443 (2011); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[14] See *Missouri v. Biden,* 680 F. Supp. 3d 630 (W.D. La. 2023), *injunction aff'd in part, rev'd in part, vacated in part, and modified in part,* 83 F. 4th 350 (5th Cir. 2023), *rev'd and remanded sub nom. Murthy v. Missouri,* 603 U.S. 43 (2024).

[15] 303 U.S. 444 (1938).

[16] See also *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988) (invalidating permit requirement for the placement of newsracks). There are limited exceptions to this rule. For example, the government may impose "content-neutral time, place and manner restrictions" on parades and other public events. See *Cox v. New Hampshire,* 312 U.S. 569 (1941). In addition, the Court has treated films differently. See *Freedman v. Maryland,* 380 U.S. 51 (1965).

[17] 303 U.S. 452 (1938).

The Court has also prohibited the government from enjoining or prohibiting speech. In *Near v. Minnesota,*[18] a Minnesota trial court enjoined a newspaper from publishing because it was deemed to have published "malicious, scandalous and defamatory" material. The newspaper had alleged that the local police chief, the county attorney and others officials were guilty of "gross neglect of duty, illicit relations with gangsters, and participation in graft".[19] In striking down the injunction and the local ordinance that had authorised its issuance, the Court held that the injunction involved an unconstitutional prior restraint, noting that "the struggle in England, directed against the power of the licensor, resulted in renunciation of the censorship of the press".[20] Likewise, in *New York Times Co. v. United States,*[21] the Court overturned an injunction that was allegedly designed to protect "national security". The Court held that an injunction against speech, even one based on national security grounds, comes to the Court "bearing a heavy presumption against its constitutional validity".[22]

Thus, the people generally are free to express their opinions. As the U.S. Supreme Court recognised in *Ashcroft v. American Civil Liberties Union,*[23] as "a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content".[24] Likewise, in *Cohen v. California,*[25] the Court flatly recognised that the "constitutional right of free expression [...] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests". *Cohen* went on to state that it would not "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views", and therefore the government "carries a heavy burden of showing justification for the imposition of such a restraint.[26] The Court held that the government could not satisfy that burden.[27]

Even though the U.S. does not provide absolute and unqualified legal protection for free speech, only very limited categories of speech are denied constitutional protection. Prohibitable speech includes child pornography,[28] true threats,[29] fighting words[30] and

[18] 283 U.S. 697 (1931).
[19] 283 U.S. 704 (1931).
[20] 283 U.S. 713 (1931).
[21] 403 U.S. 713 (1971) (a/k/a, the *Pentagon Papers* case).
[22] 403 U.S. 714 (1971).
[23] 535 U.S. 564, 573 (2002).
[24] See also *United States v. Alvarez,* 567 U.S. 709 (2012); *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 756 (2011).
[25] 403 U.S. 15, 24 (1971).
[26] 403 U.S. 26 (1971).
[27] 403 U.S. 26 (1971).
[28] See *New York v. Ferber,* 458 U.S. 747 (1982).
[29] See *Virginia v. Black,* 538 U.S. 343 (2003).
[30] See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

obscenity.[31] While commercial speech may receive a lesser level of protection,[32] most other speech is constitutionally protected. Thus, even speech that may be regarded as "offensive" is constitutionally protected (unless it involves such things as a true threat or fighting words).[33] The First Amendment also protects so-called "hate speech",[34] speech that causes mental and emotional distress,[35] and pornography that purportedly "degrades women".[36]

The Court has also held that the government may not coerce or threaten individuals in an effort to inhibit or suppress their speech. In *Bantam Books, Inc. v. Sullivan,*[37] the Rhode Island Commission to Encourage Morality in Youth was charged with educating the public "concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth, and to investigate and recommend the prosecution of all violations".[38] The Commission had a practice of sending letters on its official stationery to distributors informing them that certain books had been reviewed by the Commission and had been found to be objectionable for sale, distribution or display to youths under the age of 18. The notice reminded distributors of the Commission's obligation to recommend prosecution of purveyors of obscenity. The Court treated the Commission's actions as a prior restraint on speech which "come to this Court bearing a heavy presumption against its constitutional validity": "What Rhode Island has done has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions do not follow judicial determinations that such publications may lawfully be banned."[39]

3. The unique context in which the *Biden* decision arose

The *Biden* case arose in the unique context of the internet. For most of human history, ordinary people lacked the ability to mass communicate. Information passed between people by word of mouth, or by handwritten documents.[40] Not until the fifteenth century, when Johannes Gutenberg introduced the printing press to the Western world, did it become possible to easily create multiple copies of documents. Although the printing press did not increase the speed at which information could move, it allowed information to spread more broadly, and led to a flowering of knowledge, information and ideas. But the printing press, like the more advanced technologies that came later (e.g. radio,

[31] See *Miller v. California,* 413 U.S. 15 (1973).
[32] See *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001).
[33] See *Cohen v. California,* 403 U.S. 15 (1971).
[34] See *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992).
[35] See *Snyder v. Phelps,* 562 U.S. 443 (2011); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988).
[36] See *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985).
[37] 372 U.S. 58 (1963).
[38] 372 U.S. 633 (1963).
[39] 372 U.S. 639 (1963).
[40] See Weaver, 2024, pp. 3–4. Of course, over the centuries, there were attempts to move information more quickly than people could move. Information could move faster than people could move through the use of carrier pigeons. However, although pigeons could discreetly communicate a particular piece of information relatively quickly, they were not suited to mass communication in the sense of the modern radio, television or internet.

television, satellite and cable) was under the control of "gatekeepers" – individuals who controlled how the technology could be used. The Gutenberg printing press was relatively expensive to obtain, requiring not only the purchase of a printing press, but also the purchase of lead type, ink and other essential components, meaning that only a few individuals could afford to own and operate a press, and those few could exercise "gatekeeper" power over the technology. In other words, they had the power to control who could use print technology. Subsequent technologies, including radio (Crowley & Heyer, 2010, p. 204), television (Crowley & Heyer, 2010, p. 243) and satellite communications (Weaver, 2024, pp. 75–94), all came with their own gatekeepers (Weaver, 2024, pp. 47–60). All required substantial technological investments, and some (e.g. broadcast communications like radio and television) also required an operating licence, which meant that only a small number of people (or corporations) could own and operate them. Those who controlled communications technologies had the power to decide who could use them, as well as to control the messages that were communicated (Weaver, 2024, pp. 3–35).

The internet transformed communication because it was the first technology that allowed ordinary individuals to communicate on a mass scale (Weaver, 2024, pp. 37–47), and allowed them to avoid the traditional media which had historically served as the principal gatekeeper and filter of communication and information (Weaver, 2024, pp. 49–72). This broadening of communicative capacity had a profound impact on modern societies, enabling mass communication on a scale never seen before, and resulting in profound societal changes (Weaver, 2024, pp. 73–142). However, the great strength of the internet – the enabling of mass communication by ordinary individuals – also proved to be its greatest weakness (Weaver, 2024, pp. 37–47). As the internet enabled mass communication by virtually everyone, it created the potential for mischief. Using devices such as Twitter (now X), WhatsApp and Facebook (now Meta), or a variety of other social media platforms, individuals could easily distribute information, both truthful information as well as disinformation.

Because of the internet's global nature, individuals have an unprecedented capacity to distribute disinformation. As one commentator noted, "digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings" (Roose, 2018). In 2018, there "were doctored photos of Latin American migrants headed towards the United States border. There were easily disprovable lies about the woman who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad faith agendas" (Roose, 2018). Indeed, "every time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger" (Roose, 2018).

Much of the public discourse on these issues has occurred on social media platforms like X, Meta, WhatsApp (and a multitude of other platforms). These platforms have the ability to serve as "gatekeepers" in the sense that they can control what people say on their platforms, and can remove (take down) social media posts, or take other actions. Thus, just as the publishers of newspapers (or, for that matter, radio and television stations) could control what was published in their papers (or on their stations), those who own or control social media platforms can regulate and control what is posted on their platforms. Indeed,

social media platforms have generally been regarded as private entities and therefore are not subject to the First Amendment (which only restricts governmental action). Freed from the constraints of the First Amendment, platforms possess broad authority to censor content on their platforms.

The censorial authority of social media platforms is reinforced by Section 230 of the Communications Decency Act of 1996 (CDA)[41] which gives social media platforms broad protections against civil liability for information posted on their platforms by others.[42] In addition, the CDA contains a "Good Samaritan" defence which specifically gives social media companies the power to censor information posted on their platforms without the risk of civil liability.[43] That defence states that:

> No provider or user of an interactive computer service shall be held liable on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Section 230 is unique. If the government had tried to restrict the types of speech that Section 230 allows social media companies to prohibit, the governmental restrictions would undoubtedly have been struck down as unconstitutional. Section 230 allows social media companies to remove material that is "excessively violent, harassing, or otherwise objectionable". Undoubtedly, such language suffers from an unconstitutional level of vagueness (Weaver & Hancock, 2023, pp. 427–441) and overbreadth (see Weaver & Hancock, 2023 for a discussion of the overbreadth doctrine). Moreover, it is doubtful whether speech that is regarded as "lascivious" or "filthy" would be treated as "unprotected speech" unless it is obscene or involves child pornography.[44] Although there are several categories of unprotected speech,[45] there is no unprotected category that covers "otherwise objectionable" speech (Weaver & Hancock, 2023, pp. 21–28). That is presumably why the CDA explicitly allows social media companies to censor speech "whether or not such material is constitutionally protected" (Weaver & Hancock, 2023).

While everyone recognises that problems with "disinformation" and "misinformation" have been magnified on social media, the Section 230 standards are staggeringly broad. They allow platforms to censor not only unprotected speech (e.g. child pornography, obscenity, true threats), but any speech that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable", and social media platforms are empowered to censor "whether or not such material is constitutionally

[41] 47 U.S.C. § 230.
[42] 47 U.S.C. § 230.
[43] 47 U.S.C. § 230.
[44] See *Brown v. Entertainment Merchants Association,* 564 U.S. 786 (2011).
[45] See *Ferber v. New York,* 458 U.S. 747 (1982); *Miller v. California,* 413 U.S. 15 (1973).

protected".[46] Thus, even speech that would be fully protected if the U.S. Government tried to restrict it, can be censored and removed from social media platforms.

4. Working the refs: White House efforts to censor expression

The nature of social media platforms gives the government a unique opportunity to try to control (and, indeed, suppress) freedom of expression. Since social media platforms can easily control or remove posts on their platforms, government can pressure platforms to suppress speech to which the government objects or disagrees. The *Biden* decision offers startling insights into governmental efforts to stifle speech on social media platforms. The decision reveals that there were ongoing and constant communications between Biden Administration officials (and other governmental officials) and social media platforms regarding censorship of speech, and that officials in the Biden Administration sought to pressure, coerce and threaten social media platforms into exercising their censorial powers in ways approved by the Biden Administration.

It would be one thing if social media platforms were making their own independent decisions about what to censor. However, the evidence reveals that the U.S. Government was quite active in terms of pressuring, encouraging and even threatening social media platforms regarding their content moderation decisions. For example, the Biden Administration promulgated a regulation requiring social media platforms to provide it with information about their content moderation decisions.[47] The Biden Administration also pressured social media platforms to curb what it regarded as disinformation, including going so far as to flag information that it wished to have censored, and even encouraging platforms to suspend and de-platform users.[48] The government's actions *might* have been justifiable had they involved an imminent health emergency and the dissemination of disinformation regarding that emergency. But the government sought censorship of both health-related and non-health-related issues, including a range of hot button issues such as Hunter Biden's laptop (which will be discussed more fully below),[49] Covid-19,[50] Covid

[46] See 47 U.S.C. § 230.

[47] 47 U.S.C. § 230, 18: On 3 March 2022, the Office of the Surgeon General issued a formal Request for Information ("RFI"), published in the Federal Register, seeking information from social media platforms and others about the spread of misinformation. The RFI indicated that the Office of the Surgeon General was expanding attempts to control the spread of misinformation on social media and other technology platforms. The RFI also sought information about censorship policies, how they were enforced, and information about disfavoured speakers. The RFI was sent to Facebook, Google/YouTube, LinkedIn, Twitter, and Microsoft by Max Lesko ("Lesko"), Murthy's Chief of Staff, requesting responses from these social media platforms. Murthy again restated social media platforms' responsibility to reduce the spread of misinformation in an interview with GQ Magazine. Murthy also specifically called upon Spotify to censor health information.

[48] 47 U.S.C. § 230.

[49] *Biden,* 2023 WL 5841935, 5.

[50] *Biden,* 2023 WL 5841935, 5.

vaccines,[51] Covid lockdowns,[52] climate change,[53] abortion,[54] gender discussions,[55] as well as health[56] and economic policy.[57] Moreover, even the discussions of Covid or health issues did not necessarily involve disinformation (e.g. the Biden Administration sought to squelch a medical doctor's discussion of acknowledged health risks regarding the Johnson & Johnson Covid vaccine).

The evidence shows that Biden Administration officials constantly interacted with social media platforms through email, private portals and meetings.[58] During these interactions, White House officials "made it very clear to social-media companies what they wanted suppressed and what they wanted amplified".[59] For example, the day after the White House Press Secretary made remarks about removing the antitrust exemption from social media companies, White House officials sent emails demanding to know what the social media companies were doing about alleged disinformation.[60] In a few instances, these communications were both aggressive and hostile.[61]

The communications were so frequent that the platforms and Biden Administration officials began to refer to themselves as "partners" and as being "on the same team".[62] Indeed, Twitter went so far as to create a "partner portal" for Biden Administration communications.[63] These communications led social media platforms to aggressively suppress information, even information that did not violate the platforms' terms of use policies, but which the government simply wanted suppressed.[64] Governmental officials routinely "'flagged' for Facebook and other social media platforms posts the White House Defendants considered misinformation."[65] White House officials followed up by demanding updates and reports from the platforms regarding their handling of the

[51] *Biden,* 2023 WL 5841935, 5.
[52] *Biden,* 2023 WL 5841935, 5.
[53] *Biden,* 2023 WL 5841935, 36.
[54] *Biden,* 2023 WL 5841935, 36.
[55] *Biden,* 2023 WL 5841935, 36.
[56] *Biden,* 2023 WL 5841935, 36.
[57] *Biden,* 2023 WL 5841935, 36.
[58] *Biden,* 2023 WL 5841935, 12–19.
[59] *Biden,* 2023 WL 5841935, 12–19.
[60] *Biden,* 2023 WL 5841935, 31–32: The next day, Flaherty followed up with another email to Facebook and chastised Facebook for not catching various Covid-19 misinformation. Flaherty demanded more information about Facebook's efforts to demote borderline content, stating: "Not to sound like a broken record, but how much content is being demoted, and how effective are you at mitigating reach, and how quicky?" Flaherty also criticised Facebook's efforts to censor the "Disinformation Dozen": "Seems like your dedicated vaccine hesitancy policy isn't stopping the disinfo-dozen – they're being deemed as not dedicated – so it feels like that problem likely coming over to groups."
[61] *Biden,* 2023 WL 5841935, 32 ("Things apparently became tense between the White House and Facebook after that, culminating in Flaherty's 15 July 2021 email to Facebook, in which Flaherty stated: 'Are you guys fucking serious? I want an answer on what happened here and I want it today.'")
[62] *Biden,* 2023 WL 5841935, 31 ("The White House Defendants used emails, private portals, meetings, and other means to involve itself as 'partners' with social-media platforms.")
[63] *Biden,* 2023 WL 5841935, 31 (referring to "emails, private portals, meetings").
[64] *Biden,* 2023 WL 5841935, 31.
[65] *Biden,* 2023 WL 5841935, 31.

alleged disinformation, and the social media companies usually complied with these demands for updates.[66]

In addition to communicating with social media platforms, Biden Administration officials threatened social media platforms in order to ensure compliance. In particular, officials threatened to remove Section 230 liability protections from the platforms if they did not do more to censor "misinformation" and "disinformation".[67] These threats were reinforced by "emails, meetings, press conferences, and intense pressure by the White House, as well as the Surgeon General Defendants".[68] While threats were made under the Trump Administration, the level of threats increased significantly under the Biden Administration.[69] The Biden Administration's efforts worked: "Paired with the public threats and tense relations between the Biden Administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between Defendants and social-media companies."[70] The threats were reinforced by public statements made by the President's press secretary regarding potential antitrust actions against the major social media platforms if they did not act to curb disinformation.[71] Mark Zuckerberg (of Meta) flatly declared that he regarded "the threat of antitrust enforcement is 'an existential threat' to his platform".[72] Also, "the White House National Climate Advisor Gina McCarthy ("McCarthy") blamed social-media companies for allowing misinformation and disinformation about climate change to spread and explicitly tied these censorship demands with threats of adverse legislation regarding the Communications Decency Act".[73] Finally, the White House issued a memorandum about disinformation which specifically threatened the platforms with sanctions if they did not do enough to curb disinformation.[74] The U.S. Government's efforts were backed up by implied and

[66] *Biden,* 2023 WL 5841935, 31.

[67] *Biden,* 2023 WL 5841935, 12.

[68] *Biden,* 2023 WL 5841935, 130.

[69] *Biden,* 2023 WL 5841935, 176 ("Government officials began publicly threatening social-media companies with adverse legislation as early as 2018. In the wake of Covid-19 and the 2020 election, the threats intensified and became more direct.")

[70] *Biden,* 2023 WL 5841935, 176.

[71] *Biden,* 2023 WL 5841935, 31: At a White House Press Conference, Psaki publicly reminded Facebook and other social media platforms of the threat of "legal consequences" if they do not censor misinformation more aggressively. Psaki further stated: "The President's view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to Covid-19 vaccinations and elections." Psaki linked the threat of a "robust anti-trust program" with the White House's censorship demand. "He also supports better privacy protections and a robust anti-trust program. So, his view is that there's more that needs to be done to ensure that this type of misinformation; disinformation; damaging, sometime life-threatening information, is not going out to the American public."

[72] *Biden,* 2023 WL 5841935, 31.

[73] *Biden,* 2023 WL 5841935, 13.

[74] *Biden,* 2023 WL 5841935, 13: On 16 June 2022, the White House announced a new task force to target "general misinformation" and disinformation campaigns targeted at women and LBGTQI individuals who are public and political figures, government and civic leaders, activists and journalists. The 16 June 2022 Memorandum discussed the creation of a task force to reel in "online harassment and abuse" and to develop programs targeting such disinformation campaigns. The Memorandum also called for the Task Force to confer with technology experts and again threatened social media platforms with adverse legal consequences if the platforms did not censor aggressively enough.

explicit threats to take action against social media platforms that were not compliant with its wishes.

It would be one thing if the U.S. Government were seeking to censor unprotected speech, such as obscenity or child pornography, or to censor fraudulent commercial speech. As previously discussed, none of that speech is entitled to First Amendment protection,[75] and can be prohibited and the disseminator might even be subjected to criminal prosecution.[76] However, the speech involved in the *Biden* case did not necessarily involve prohibited speech. On the contrary, it involved such topics as climate change,[77] Covid-19,[78] the efficacy and safety of Covid-19 vaccines[79] and the Hunter Biden laptop story.[80] While some of the statements on those topics might be regarded as "inaccurate" or "disinformation", some could not, and none of the topics fell within one of the categories of unprotected speech. Thus, the statements were not otherwise prohibitable.

Regarding disinformation, false speech is not necessarily prohibitable under the First Amendment. *United States v. Alvarez*[81] involved an individual's false assertion that he had won the Congressional Medal of Honor. While the *Alvarez* decision recognised that individuals can be prosecuted for false speech in limited and defined circumstances (e.g. perjury in a judicial proceeding or making false statements to a governmental official or agency),[82] the Court held that Alvarez could not be convicted for making a false statement to the effect that he had won the medal. Of course, if an individual disseminates false and defamatory information about another person, it is theoretically possible to recover for defamation (Weaver et al., 2006). However, it is extremely difficult for public officials to recover for defamation,[83] as well as for public figures to do so,[84] and (until recently) defamation litigation was relatively uncommon in the United States (Weaver et al., 2006, p. 85). In addition, courts are rarely permitted to enjoin false speech except false commercial speech.[85] So, generally, the First Amendment prohibits the government from censoring speech simply because it regards that speech as disinformation.[86] Indeed, the U.S. does not have "truth commissions" or "censorship boards" which are allowed to dictate which ideas and which facts are permissible, and which are not. On the contrary, the U.S. Supreme Court has been wary of governmental attempts to control the flow of information, and has generally regarded both content-based and viewpoint-based restrictions on speech as presumptively unconstitutional.[87] Ultimately, it is not for the government to dictate what people should believe, but rather for the people to decide for themselves. If the legitimacy of our governmental system depends on the consent of

[75] See *New York v. Ferber,* 458 U.S. 747 (1982); *Miller v. California,* 413 U.S. 15 (1973).
[76] *New York v. Ferber,* 458 U.S. 747 (1982); *Miller v. California,* 413 U.S. 15 (1973).
[77] See *Biden,* 2023 WL 5841935, 36.
[78] See *Biden,* 2023 WL 5841935, 5.
[79] *Biden,* 2023 WL 5841935, 5.
[80] *Biden,* 2023 WL 5841935, 5.
[81] 567 U.S. 709 (2012).
[82] 567 U.S. 709 (2012).
[83] See *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).
[84] See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).
[85] See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).
[86] See *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[87] See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

the governed, it is inconsistent with that system to give government the power to control, limit and suppress the range of ideas that the people can hear or consider.[88]

The *Biden* case is particularly disturbing because the government's efforts to squelch disinformation sometimes resulted in the dissemination of disinformation, and the Biden Administration effectively coerced social media platforms into collaborating with its efforts to dissemble. Consider, for example, the Hunter Biden laptop story. Before the story broke, social media platforms were warned that Russia was about to disseminate disinformation.[89] After the laptop story broke, 51 former intelligence officials came forward to brand the story as "Russian disinformation" (Broadwater, 2023; Simon, 2022). "The FBI likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation" because, even though it had control of the laptop and knew that the allegations were true, it suggested that the story was false.[90] Worse, "the FBI was included in industry meetings and bilateral meetings, and it received and forwarded alleged misinformation to social-media companies, and actually mislead social-media companies regarding the story".[91]

The governmental efforts were successful. After the story was released, most reputable news organisations denounced the allegations as "fake news", and refused to report the story even though there were allegations of corruption by the Bidens.[92] For example, NPR, in a segment issued just a couple of weeks before the presidential election, dismissed the laptop story as "questionable" (Folkenflik, 2020), and suggested that the allegations were part of a conspiracy theory pushed by then President Trump and his allies (Folkenflik, 2020). ("The story fits snugly into a narrative from President Trump and his allies that Hunter Biden's zealous pursuit of business ties abroad also compromised the former vice president.") The Public Broadcasting Service (PBS) similarly dismissed the allegations, suggesting that Trump's allies were pushing "Russian disinformation" (Woodruff, 2020), and the *New York Times* suggested that Trump was colluding with the Russians and dismissed the story stating that "Giuliani's dirty tricks are the scandal, not Hunter Biden's hard drive" (Goldberg, 2020).

On social media networks, including Facebook and Twitter, the story was essentially purged due, in large part, to the government's suppression efforts (Simon, 2022). Not only did Twitter squelch the story,[93] it blocked users from sharing links to the *New York Post* story and prevented users who had previously sent tweets sharing the story from sending new tweets until they had deleted any prior tweets (Goldberg, 2020). Further, Facebook

[88] See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

[89] *Biden,* 2023 WL 5841935, 28 ("Before the Hunter Biden Laptop story breaking prior to the 2020 election on October 14, 2020, the FBI and other federal officials repeatedly warned industry participants to be alert for 'hack and dump' or 'hack and leak' operations.")

[90] *Biden,* 2023 WL 5841935, 144.

[91] *Biden,* 2023 WL 5841935, 142.

[92] *Biden,* 2023 WL 5841935, 142.

[93] See Goldberg, 2020. ("First, let's acknowledge social media's role. A number of platforms tamped down on sharing of the Post's story. In the case of Twitter, not only did they try to block sharing of it, they suspended The New York Post's actual Twitter account for sharing its own article. That was a wild overreach, and even Twitter had to acknowledge that" quoting David Folkenflik.)

began reducing the story's distribution on its platform pending a third-party fact-check (Goldberg, 2020).

Today, reputable news organisations recognise that the Hunter Biden laptop story was not "disinformation", "fake news" or "Russian propaganda". A *New York Times* article, citing reporting by a staff member at Politico, stated that "the most explosive emails from Hunter Biden's purported laptop were entirely genuine" and were not simply Russian-planted disinformation (Stephens, 2021). Even National Public Radio has recognised that there was some validity to the allegations regarding the laptop: "Much of the mainstream media dismissed a story about Hunter Biden's business dealings. Now emails supporting the story have been authenticated" (Simon, 2022) and the *Boston Globe* questioned the decision to suppress the story (Bray, 2023). If the government had tried to suppress the story, it would have been regarded as imposing an unconstitutional "prior restraint" on speech.

5. Donald Trump's executive order

The nightmare with the Biden Administration's speech repression has now come to an end. For one thing, President Biden left office on 20 January 2025, and was replaced by President Donald Trump who issued an executive order prohibiting government officials from engaging in similar types of speech repression.[94] The order begins by emphasising that the First Amendment "enshrines the right of the American people to speak freely in the public square without Government interference, and expressed concern regarding the fact that the Biden Administration purportedly "trampled free speech rights by censoring Americans' speech on online platforms, often by exerting substantial coercive pressure on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech that the Federal Government did not approve."[95] While the order recognised that the Biden Administration may have had the goal of combating "misinformation", "disinformation" and "malinformation", the order concludes that Biden's actions "infringed on the constitutionally protected speech rights of American citizens across the United States in a manner that advanced the Government's preferred narrative about significant matters of public debate".[96] The order concluded that "Government censorship of speech is intolerable in a free society".[97]

The order then declares that it is the policy of the United States to: a) secure the right of the American people to engage in constitutionally protected speech; b) ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen; c) ensure that no taxpayer resources are used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen; and d) identify and

[94] Executive Order 14146 (Restoring Freedom of Speech and Ending Federal Censorship) (January 20, 2025).
[95] Executive Order 14146.
[96] Executive Order 14146.
[97] Executive Order 14146.

take appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech.[98]

The order then sets forth two action items. First, it provided that "no Federal department, agency, entity, officer, employee, or agent may act or use any Federal resources in a manner contrary to section 2 of this order".[99] Second, the order required the "Attorney General, in consultation with the heads of executive departments and agencies, shall investigate the activities of the Federal Government over the last 4 years that are inconsistent with the purposes and policies of this order and prepare a report to be submitted to the President, through the Deputy Chief of Staff for Policy, with recommendations for appropriate remedial actions to be taken based on the findings of the report".[100]

6. Conclusion

Missouri v. Biden offers a chilling example of a governmental attempt to censor free expression. In some respects, the Biden Administration's efforts were like medieval attempts to censor speech. Just as medieval monarchies went to great lengths to limit free expression with licensing requirements, seditious libel prosecutions, and other restrictions, the Biden Administration tried to bully social media platforms into submission. However, the objective was the same: to limit and control what people could say.

The Biden Administration's actions are particularly troubling given the history of the United States. Although the founders of the U.S. governmental system embraced democratic principles in the U.S. Declaration of Independence when they declared that the power to govern derives from the consent of the governed,[101] many were fearful and distrustful of governmental power – even a democratically-elected government (Ketcham, 1986, p. xv). Illustrative were the views of a contemporary writer, Thomas Paine (1997, p. 3), who argued that "society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one". As a result, when the U.S. Constitution was drafted, the Framers went to great lengths to limit and control the scope of federal power. One way they sought to achieve that objective was by providing the federal government with only limited and enumerated powers.[102] In addition, the Framers embraced the ideas of Baron de Montesquieu, who is credited with articulating the doctrine of separation of powers, and incorporated those ideas into the structure of the Constitution (Montesquieu, 2011, pp. 151–152). Believing that their creation of a federal of government of limited powers, and that their inclusion of separation of powers principles would sufficiently protect the people of the United States against governmental overreaching, they

[98] Executive Order 14146.
[99] Executive Order 14146.
[100] Executive Order 14146.
[101] U.S. Declaration of Independence (July 4, 1776).
[102] See U.S. Constitution, Art. I, § 8.

decided to omit a bill of rights from the Constitution as unnecessary.[103] This decision was met by opposition from the people who demanded a bill of rights[104] as a way of avoiding the "potential for tyranny".[105] In order to gain ratification of proposed Constitution, it was agreed that it would be ratified "as is" (in other words without a bill of rights), but that the first Congress would draft one.[106] As a result, the Bill of Rights entered the Constitution as the first ten amendments to the U.S. Constitution.[107] It included protections for freedom of expression in the very first Amendment.[108]

Even though the Framers went to great lengths to protect individual liberty, including freedom of expression, their efforts were insufficient to protect the people against the Biden Administration's efforts at suppression. In the *Biden* case, the trial court took the unusual step of prohibiting the government from communicating with, or pressuring, social media platforms regarding their content moderation decisions. When the case reached the U.S. Supreme Court, as *Murthy v. Missouri,*[109] the Court vacated that order and dismissed the case, concluding that the plaintiffs did not have standing to pursue the litigation. Thus, if a future presidential administration chooses to engage in a similar level of repression, there is nothing to stop it from doing so.

President Trump's Executive Order offers some hope for the future. However, an executive order can be overridden by a future administration with the stroke of a pen. Moreover, it remains to be seen whether President Trump will honour his own order. In other words, if it serves his interests, will he engage in Biden-like repression of speech?

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[103] See *Wallace v. Jaffree,* 472 U.S. 78, 92 (1985) (White, J., dissenting).
[104] See *McDonald v. City of Chicago,* 561 U.S. 742 (2010).
[105] See *Wallace v. Jaffree*, 472 U.S. 78, 92 (1985) (White, J., dissenting).
[106] See *McDonald v. City of Chicago,* 561 U.S. 742 (2010).
[107] U.S. Constitution, Amdt. I–X.
[108] U.S. Constitution, Amdt. I.
[109] 603 U.S. 43 (2024).

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Artificial Intelligence, the Internet of Everything and the Scope and Scale of Seduction at the Boundaries of Law

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Abstract: Online and algorithmic systems can promote the emotional, intellectual and political seduction of people. The power and scope of these systems may create new threats against which traditional means of protection may be overwhelmed. We discuss possible legal and technical ways to combat such misconduct as to protect the innocent and the autonomy of the individual.

Keywords: online, algorithmic, seduction, legal, technical, protection

1. Introduction

Seduction has a lurid attraction all its own (see e.g. James, 2012) but traditional legal punishments and sanctions for sexual seduction, while showing the opprobrium in which it has been held, have slowly died away. Some states still have criminal or civil liability in some circumstances for seduction, but they are few and far between, with courts treating such laws with disfavour (see e.g. *Michigan Penal Code*, 750.532; HG.org, s. a.). Though grist for pot boiler, bodice ripper "romantic" novels, seduction is disreputable as it represents the subversion of a person's will and reason and the topic of sexual gratification may introduce problems for jurists in deciding matters (Iqbal et al., 2023). It is not surprising therefore that Dante Alighieri (2009) consigned seducers to the Malebolge, the eighth circle of Hell adjacent to the ninth and home of Judas and Satan. Seducers joined there by panderers, thieves, falsifiers, hypocrites, and other fraudsters; their punishment being symmetric and grotesque (cf. *New American Standard Bible*, 2020, Proverbs 30:31). The idea of seduction, consisting in clever lies and targeted deceit, stands beyond personal dalliance to greater concerns about its

power to influence broad actions through less than honourable motives, and ultimately corrupt the grace of human reason.

The Latin root for seduction is *seducere,* to "lead astray". Thus, seduction is rather problematic as respect for personal autonomy may limit state interference where efforts are made to lead adults astray. The core foundational aims of the U.S. First Amendment to freely permit speech relating to politics and the way people govern themselves would be crushed, as every opposing viewpoint claims the other to be wrong, misleading and evil and surely must be suppressed. But the First Amendment jurisprudence respects the rights of people to lead and be led astray, though subject to the efforts of others at correction and "truth". Only the most compelling social interests have any possibility of limiting speech to mitigate the asserted damages they cause. And one of the most compelling interests in any culture, society and community is that of the protection of children.

The seduction of children for extreme purposes of sexual exploitation is the failure of that protection. It is a failure that has massive consequences for the healthy physical and psychological development of a child, and that failure may be the ruination of that child's life and those around them. Including the society and culture in which they mature and live. The challenge is effective protection of children from such sexual exploitation, which leads to all the dangers of seduction of the mind. And the many other forms of exploitation that may damage the future, theirs and ours.

2. The scope and scale that lead astray

Seduction is present in a host of human endeavours beyond sexuality, such as political, moral and religious endeavours. Garance Franke-Ruta (2012) has written on the means of political seduction, Michael L. Brown (2022) on the "political seduction" of the church, and Robert Bork (1990) on the political seduction of the law. Concern for people astray embraces almost all human endeavours built around information, discussion and reflection that require thought and, above all, human reason to properly understand. One noteworthy 21st century example is concern about "fake news" and the effectiveness of accusations of fake news to reduce or destroy the credibility of any information, regardless of its veracity (see e.g. Chin & Zanuddin, 2024). The Internet magnifies the scope and scale of distribution of information whether true, false or misleading (Mayer & Till, 1996; Trauth-Goik, 2018). It "puts every user close to all the evils of which we could possibly conceive" (Losavio, 2024, p. 245). Every temptation, corruption and seduction is available to anyone online all the time; further regulation of freedom of expression may become inevitable as it becomes necessary.

Dissemination and distribution are enhanced by use of artificial intelligence (AI) driven recommender systems or other AI systems that serve up targeted content of any nature, whether requested, suggested or pushed to an individual. In the U.S.A., internet powered social media, data and information systems are protected under the First

Amendment to the U.S. Constitution,[1] and they are further protected by the U.S. Communications Decency Act Section 230[2] immunity from liability for evil content posted by third parties that may be delivered via those systems.[3] Such statutory immunity may be limited or removed by legislative action. Judicial limits may result if a greater causal connection between the primary offenders and their postings and the social media companies is established, whether intentional, negligent or otherwise.

And it may change as the scope and scale of damage from these systems grows. First Amendment protections are not absolute and may not apply if there is a compelling reason to do so under the test of "strict scrutiny". Section 230 safe harbour immunity is subject to legislative amendment, has been done regarding the use of online internet services that promote human trafficking, commercial sex services and child sexual exploitation; these limits may increase in the future (NIJ, 2024; FOSTA-SESTA Acts, 2018). Such modifications may be implemented without full consideration of the downstream impact; there are indications that such content moderation regarding commercial sex services may have unintended harmful effects, such as reduced safety for the service providers (NIJ, 2024). As the internet "puts every user close to all the evils of which we could possibly conceive" (Losavio, 2024, p. 245), every temptation, corruption and seduction is available to anyone online all the time. There may come an inflection point where the damage done leads to further regulation even under the most solicitous regimes of freedom of expression.

3. Limits to American free speech absolutism

Freedom of expression has different limits among the jurisdictions and legal regimes of the world. Examination at the boundaries of freedom of expression in the world begins with examination of the laws of the United States of America. The United States protections include the freedom to speak, freedom to receive speech and the freedom to speak anonymously beyond those of any other country. But they are not absolute, and each is subject to regulation based on balancing the harm of the speech against the harm of its suppression. Regulation of content that qualifies speech may have to show there is a compelling need to restrict it, an effective means of restriction is available, and those

[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2] 47 U. S. C. Section 230, part of the Communications Decency Act of 1996 providing a safe harbour immunity to providers of an "interactive computer service" that may republish content from third parties.

[3] *Gonzalez v. Google LLC* 598 US 617 (2023), where the family of Nohemi Gonzales, killed in a nightclub bombing by ISIS sued Google for aiding and abetting and conspiring with the Islamic State of Syria and Iraq and that bombing via the use by ISIS supporters of YouTube system operated by Google; the case was dismissed by the Supreme Court for failure to state a claim, per the Supreme Court ruling in *Twitter v. Taamneh* 598 US 471 (2023). *Twitter v. Taamneh* 598 US 471 (2023), where the family of a person murdered in a terrorist attack by ISIS sued, alleging that social-media companies aided and abetted ISIS in its terrorist attack on the Reina nightclub, where ISIS used those services; the Supreme Court held that those allegations fail to state a claim under 18 U. S. C. para. 2333(d)(2) (The Antiterrorism Act), pp. 6–3.

means are narrowly drawn to impact the least speech possible.[4] Even under the boundary conditions of American regulation of speech, the most extensive freedom of expression, the common law of the United States sets out various doctrines permitting regulation and limiting harm resulting from speech.

3.1. Jurisprudential designation of "nonspeech" as to permit regulation

Areas in which regulation is permitted begins with the jurisprudential definition that some forms of expression are not "speech" as to be entitled to constitutional protection. There are some categorical exceptions that permit the government freedom to regulate certain speech, even though it does so based on the content of the speech. The United States government may proscribe these items, provided they constitute: obscenity; defamation, libel or slander; incitement of lawless action, if there is "a clear and present danger"; "fighting words"; or speech planning and directing illegal activities.

A speech act is obscene if the average person, applying contemporary community standards, would find it, taken as a whole, appealing to the prurient interest, or if it depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law, or a literary work, taken as a whole, lacks serious literary, artistic, political or scientific value.[5] It is defamatory, libellous or slanderous and the expression may be punished if it is (1) a false and defamatory (injurious) statement concerning the plaintiff, it is (2) an unprivileged publication to a third party, there is (3) a fault amounting to at least negligence on the part of the publisher who has First Amendment special protections, such as the press, but potentially strict liability for *per se* of a private non-press party, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[6] Mere advocacy of violence alone may be protected speech; to be unprotected, speech must be as to (1) imminent lawless action, (2) intent to produce imminent disorder, (3) likelihood of producing imminent disorder.[7]

Systems of AI which can serve up such speech via the Internet can be regulated as to the dissemination of such harmful speech with prohibitions on and punishment for that dissemination. The use of sexually obscene materials to groom a target and promote related seduction of a person less than 18 years of age is both prohibited and punished; indeed, simply showing such materials to someone under 18 is illegal. Serving up words that can incite lawless action and encourage violence may be regulated, though there may be a very fine line in determining what is impermissible and permitted speech in this domain (Cabral, 2021). The use of AI systems to push fraudulent or misleading speech in commercial transactions can be banned. The use of systems of speech disseminated via the

[4] For content related regulation of speech there must be a compelling interest at stake, an effective regulation and no less strict avenues available to protect that compelling interest. Speech deemed not protected speech, such as obscenity and defamation, receives no protection.

[5] See *Miller v. California*, 413 U.S. 15, 23, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973).

[6] See, e.g. *New York Times Co. v. Sullivan,* 376 U.S. 254, 268, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

[7] See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 86 L. Ed. 1031, 62 S. Ct. 766 (1942).

internet of criminal activity is clearly subject to prohibition, even as advocacy of the positions of those committing to criminal activity may be protected speech if not coordinated with criminal and terrorist organisations. This is discussed in greater detail below in U.S. Court of Appeals for the Seventh Circuit's opinion in *United States v. Osadzinski,*[8] which details the analysis needed in such cases.

3.2. Content regulation of speech permitted subject to balancing tests

Expressions can be regulated due the damage done under a test called "strict scrutiny", where state regulators must establish that the regulation of particular speech is needed (1) for a compelling state reason, (2) that can be protected by regulation, and (3) being drafted as narrowly as possible to provide the protection while limiting the minimum amount of speech affected.

One example of this relating to the protection of children is the regulatory prohibitions on the creation, distribution and possession of child pornography showing the sexual exploitation of humans under the age of 18. Although pornography generally, indecent material, is permissible under American law, child pornography is prohibited precisely because it involves the unlawful sexual exploitation of children. This demonstrates that the compelling interest in protecting children from such exploitation is sufficient to justify broad legal prohibitions of such speech used to sexually exploit children where effective and narrowly drawn.[9]

This reasoning applies to AI, the Internet of Things, and everyone's connectivity to the internet. If there is a compelling interest in limiting operations that cause injury to compelling interests, these factors may lead to a broad re-evaluation of the nature of regulation of certain kinds of speech mediated by these systems that have, in the past, been protected from regulation.

This potential re-evaluation may be driven by the power of the information technologies represented by AI to customise information and target of recipients, the power of dissemination represented by the internet to most any recipient and the power of broad data collection presented by the Internet of Things to aid in that customisation. Regulatory tests of expression under strict scrutiny are not purely legal. They require an examination of the facts of the means by which information is distributed to people and the impact on those people. This is demonstrated in a variety of instances where regulation of technology mediated speech has been tried.

Such is the phenomenon known as connectivity, being explained in *ACLU v. Reno*, where the ability of people to connect to all the information in the world having great benefits is stressed. The regulation of such means of information distribution must weigh as benefits against possible detriments and the means by which the detriments might mitigated. Next, there is the Internet of Things and ubiquitous data, that is, the data body

[8] *United States v. Osadzinski*, 97 F.4th 484, 490–493, 2024 U.S. App. LEXIS 7364, *12–19 (7th Cir. Ill. March 28, 2024).

[9] *New York v. Ferber,* 458 U.S. 747 (1982). But where virtual child pornography is created without the exploitation of a child, it cannot be prohibited under U.S. law, despite being barred by other nations.

of all information collected on everyone and everything they do and everywhere they are will continue to grow. The expansion of data sensing systems and power of data distribution and collection technologies, such as cloud computing, make this inevitable. Nothing is lost and nothing is forgotten such that to compensate for these technical facts some legal regimes provide for a "right to be forgotten" as part of their regulation of data systems. Finally, there is AI and profiling and directed dissemination of content which is the power of AI systems to do probabilistic analysis on a particular subject provide effective response relevant to that subject is now unprecedented. The Generative Pre-trained Transformer architectures for content analytics by AIs can produce remarkably accurate and directed information and appeals to a particular person. It is this particular technology and its scope and scale of focus on an individual, their interests and their desires, that may as a factual matter change the balance regarding whether or not there is a compelling need to regulate such information dissemination systems in a variety of areas.

It is the power of AI-driven recommender systems used widely in commerce, for example, that demonstrates the risks these systems may present to people in other domains of human activity. Instead of promoting the purchase of music or movies or toasters, such technologies may promote dangerous actions, especially by those whose discernment is yet developing.

3.3. At what limits might "AI" speech be regulated?

The compelling state interest in protecting children creates a foundation for possible regulation of expression and speech that may injure them.[10] Perhaps most graphic is the damage that these systems do to child sexual abuse. The connectivity of the internet generally and social media systems particularly assures wide access to everyone, including children (Wachs et al., 2012). Once access is obtained, the information seduction of a child may begin and progress to damaging ends. Child sexual exploitation is especially pernicious, vile and damaging to the target child. Although, there are a variety of definitions regarding the seduction behaviour, called "grooming", used to seduce children, there is yet no consensus nor widely accepted psychometrics to assess this behaviour (Bennett & O'Donohue, 2014). While the practice of child grooming is only now being studied as to its elements and process, its parameters are gaining focus: "gaining access to a child, gaining the child's compliance, maintaining secrecy and avoiding disclosure." (Craven et al., 2006) Grooming behaviours have been catalogued and tested as to response by subjects, as detailed by Winters and Jeglic (2017), with stages in the process. They outlined characteristics how such behaviour creates these stages that may be (1) the choice of victim, depending on several factors such as appeal or attractiveness, ease of access, or perceived vulnerabilities of the child, family situations indicating low levels of adult supervision, families with issues of discord, domestic violence, substance abuse, health concerns, and personal issues of lack of confidence, low self-esteem and insecurity. (2) Access to victim which is followed by isolating the child

[10] *New York v. Ferber,* 458 U.S. 747 (1982).

physically and psychologically. (3) Building trust by learning the child's interests, encouraging the child, helping the child, offering gifts and secrets. And finally (4), escalation to physical contact.

Knowledge of such behaviours may be necessary for effective investigation and prosecution of child sexual abuse cases (Pollack & MacIver, 2015). With these elements of such behaviours, a structure for "grooming" can be built. Black et al. (2015) noted the linguistic processes for online grooming behaviour were similar to offline behaviour and shared common language patterns, albeit in a different order from that in offline activity. Their analysis noted the frequency distribution for words/actions, with flattery, parental presence at work and travel and "inappropriate behaviour". This linguistic analysis could easily port to the training of an analytical model to engage broadly with targets, the advanced AI Large Language Models (LLMs) like ChatGPT that can pose and respond to text questions and statements through natural language.

Such LLMs can be trained against large sets of data to build its probabilistic model of responses. These may be found in social media systems generally as well as those dealing with making social connections, including those on the Dark Web. Lorenzo-Dus et al. (2020) have detailed their lexical and collocation analysis of online grooming transcripts that shows recurring patterns and linguistic structures in grooming language. They suggest the need to develop powerful algorithms to drive detection software of such behaviour as well as hone understanding of the *modus operandi* of offenders. The unsupervised training of LLMs for child sexual exploitation may also be matched by fully supervised and programmed models based on the patterns found in grooming behaviour. The evolution and development of Small Language Models (SLMs), technologies for building effective operative systems on smaller, specialised bodies of knowledge, text and speech, may be used to build even more effective systems.

Detection of such systems will be important as, unfortunately, they also may support the development of "grooming" systems that automate the exploitation process. GPT models are now available for modification and customisation as desired by the programmer. The great danger presented by such automated systems is that these machines work night and day in a global connected world to advance these evils. They may evolve to detect law enforcement investigations and "stings" and AI detection models as to avoid their own detection and alerts by protective monitors in place on host systems, such as social media.

While illegal, what additional regulatory systems may be needed and how might they comply with free speech protections? As noted, child pornography is regulated due to the compelling interest in protecting children from exploitation.[11] This rationale applies to systems for the dissemination of information generally online but has been limited by the facts. *ACLU v Reno* struck down the Communications Decency Act as it, while protecting a compelling interest of protecting children, did not propose an effective solution that would not interfere with the speech rights of adults.

If the challenge of creating an effective system for the regulation and investigation of child sexual grooming conduct narrowly applies and does not inappropriately infringe on the speech rights of adults, then the equation is changed and regulation may be

[11] See *Osborne v. Ohio*, 495 U.S. 103, 111, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990).

appropriate. It may promote or mandate the development and use of such protective systems as outlined here.

3.4. A compelling state interest in suppressing crime and terrorism

Paralleling this are matters of state interest in stopping the seduction of people for wrongful purposes are crime and terrorism. This analysis above applies to efforts to eliminate or regulate online expression in support of terrorism. International terrorism is defined by the United States Code to embrace violent acts intended to intimidate or coerce a population or influence the policy or conduct of a government.[12] As with crimes generally, there are no free speech protections for speech that directs such criminal activity. But speech supporting the aims of a particular "terrorist" organisation may be protected and safe from state interference.

Acts of supporting terrorism are different from voicing support for the beliefs and causes of terrorism, which may be itself protected under the First Amendment. The allure may be a political seduction of an individual but, depending on the circumstances, protected expression.[13] This was carefully addressed by the U.S. Court of Appeals for the Seventh Circuit as to the extent of First Amendment protections offered by computer mediated systems for the dissemination of information from the terrorist organisation ISIS. That Court noted the conduct of the defendant in *USA v Osadzinski*:

> Thomas Osadzinski created a computer programme that allowed ISIS (the Islamic State in Iraq and Syria) and its followers to rapidly duplicate terrorist propaganda videos online and thereby to stay a step ahead of efforts by the United States and other western governments to thwart the organisation's media campaign. Osadzinski shared his computer programme with people he believed were ISIS supporters, taught them how to use it, and deployed it to compile and disseminate a large trove of ISIS media. Osadzinski claims that his conviction violated the First Amendment because his actions constituted independent free expression.[14]

Yet the Seventh Circuit Court rejected his defence under both the First Amendment protection of freedom of expression and the specific constitutional savings clause of the statute of prosecution, 18 U.S.C. para. 2339B. The U.S. Congress, aware of dangers in potentially limiting speech, provided that "nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the [U.S.] Constitution".[15] The statute of prosecution banned "only a *narrow category of speech*" that falls outside the protection of the First Amendment speech "to, under the direction of, or in coordination with foreign groups that the speaker knows to be *[involves] terrorist organizations*".[16]

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[12] 18 USC 2331 (US).
[13] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).
[14] *United States v. Osadzinski*, 97 F.4th 484, 490-493, 2024 U.S. App. LEXIS 7364, *12-19 (7th Cir. Ill. March 28, 2024).
[15] 18 U.S.C. para. 2339B(i).
[16] Holder, 561 U.S. at 26. (emphasis added).

Internet communications and software coding both use "speech". The defendant Osadzinski asserted his free speech rights were violated and his prosecution was punishment for his advocacy of the cause of ISIS. Osadzinski's conduct included his coding and distribution of software supporting the organisation's mission. But the Court, assuming *arguendo* these were expressive activities under the First Amendment, noted those protections would not cover his *actions* in support of ISIS that ranged from (1) giving them "official videos" to (2) providing the software to facilitate distribution of ISIS media broadly and (3) bypass efforts to block such messaging. Hence, Osadzinski conviction was upheld.

The *Osadzinski* case demonstrates the limits of speech in pursuit of criminal goals, from terrorist recruitment to the sexual exploitation of children. Also, it emphasises the need for careful analysis of the facts and law at issue to ascertain the limits of regulation and the scope of protection.

3.5. The compelling interest in political speech: from exploitation of children to exploitation of everyone

The First Amendment is first and foremost about protecting and encouraging political speech. Political speech governs politics, the highest form of human endeavour. The foundations of the United States rest on exchange of ideas as to how best to govern ourselves. As such political speech is the most protected speech under the First Amendment. AI systems play a significant role in political speech. They build on the immense power of the internet to connect people with others of their like interests or with those with new ideas. AI systems may then serve to falsify information in powerful ways that are not easily recognised, yet are carried around the world to those most susceptible to its seduction.

This power is great enough that Mannheim and Kaplan (2019) assert it may be an existential threat to American democracy, and democratic regimes everywhere. Panditharatne and Giansiracuse (2023) detail the hazards of AI-mediated disinformation for democracy. The invasive and manipulative information power of AI is unprecedented and may demand an accounting. Lies in politics are just the way of the world and can have an easy and broad facility, albeit historically accompanied by possible means to validate that information and sift truth from falsehoods. We have a compelling interest in politics and in free speech, so how do we balance those interests? Or do we need to balance them at all? If we do not, the very faith in the foundations of democratic governance may be at risk. With the massive increase in the power of AI deception, does that change this equation? There is a compelling interest in political life, including political life based on reason rather than seduction, but is there an effective solution that narrowly limits what speech is infringed?

One partial list of dangers includes all we have discussed for the seduction of children and adds the following risks: (1) "deep fake" images, (2) "deep fake" audio, (3) "deep fake" video, (4) targeted text communications, attacking a candidate with false statements, and (5) targeted text communications, leading to voters choosing not to vote.

And all of these can build powerful, yet false narratives as to subvert truth, and in turn subvert reasoned political life.

This phenomenon could open a whole new horizon for politics, still one ought to err on the side of caution. It is rather telling that the 2024 Elon University poll of national sentiment by Americans regarding elections found that 73% believe there will be AI manipulation of social media to influence the election, 70% believe the election will be affected by such use of AI, 62% believe the election will be affected by target AI to induce voters not to participate, and 78% believe one or more of these AI actions will affect the 2024 Presidential election.[17] Also, 96% felt there should be some punishment for the malicious and intentional creation or alteration of fake photographs, audio or video. Those ranged from being barred from office (46%), criminal prosecution (36%) and fines (12%) for such misconduct. Yet being barred from office might require constitutional amendments, federal and state, and penal sanctions, absent conduct, might not be legal under U.S. law. The majority of voters were not confident they would be able to discern AI-generated media artifacts.[18]

The Federal Communications Commission issued its Declaratory Ruling that under the Telephone Consumer Protection Act[19] robocalls under AI control were prohibited, noting the new challenges they present consumers.[20] The ruling built on protections against "voice cloning" where a consumer may be misled as to whom has actually called. FCC Commissioner Geoffrey Starks noted specifically that:

> Real world examples here are no longer theoretical. Bad actors are using voice cloning – a generative AI technology that uses a recording of a human voice to generate speech sounding like that voice – to threaten election integrity, harm public safety, and prey on the most vulnerable members of our society.

Using AI to target messages for specific individuals based on data analysis of their information profiles creates powerful means of seduction, means to pitch any idea as consistent with a person's beliefs and prejudices. How bad must it be for governments to act, without destroying the very benefits freedom of expression give? And that cannot be given by any other way for a democratic society?

4. Conclusion

The mathematician, Alan Turing (1950), addressed the issues of "artificial intelligence" first as a refutation of ideas that it was an impossible system. He then proposed that the test of this would be his "imitation game", where a human judge could no longer tell the difference between a person and the machine in its outputs. And that is the challenge before us, and democracy. Will the dangers to democracy simply be new

[17] Elon University 2024.
[18] Elon University 2024.
[19] 47 U.S.C. para. 227(b)(1) (US).
[20] U.S. Federal Communications Commission 2024.

variations on old mendacity? Or will they truly present a vast new scope and scale of information manipulation leading to human manipulation? That may, in turn, lead to an information autocracy controlled by those in control of the means of communication, analysis and narrative.

There is a clear concern. But how great or sculpted that concern will be is as yet unknown. Turing's admonition in closing his discussion of *Computing Machinery and Intelligence* gives us some guidance for the road ahead: "We can only see a short distance ahead, but we can see plenty there that needs to be done" (Turing, 1950).[21]

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Speech as "Hybrid Warfare"

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Abstract: Long ago one used to say: "In a war truth is the first casualty." The saying now should go: "In a modern war the first shot is a speech." This paper wishes to point out how, over the last decade, informational activities have been classified as a form of "hybrid warfare" that should be countered and defeated. It analyses how traditional propaganda is now qualified as hybrid warfare and what are its consequences under international law, what does one mean for "disinformation" or "misinformation", and how and who can determine it, as well as what are the consequences of the weaponisation of informational activity in a democratic system and in its public debate. The paper argues that a hybrid warfare is a catch-all expression which can include any kind of activity deemed as "hostile" by a country, the notion of disinformation is misleading and fuzzy, and is apt to include any sort of speech, from simple facts to statements of opinion, finally, the emphasis on hostile speech as a form of hybrid warfare has a spillover effect in domestic public debate with a powerful silencing effect on non-conventional views.

Keywords: disinformation, DMA, DSA, free speech, hybrid warfare, misinformation

1. Hybrid warfare and hostile speech in the international arena

Words are important, especially in a legal context, and even more when the topic is free speech. A signal of the troubled times we live in is the surge of the term hybrid warfare in public debate. Hybrid warfare has several edulcorated synonyms, such as "gray zone", "asymmetric war", "non-linear war", "ambiguous warfare", or even "soft war" (for a comprehensive overview see Casey-Maslen, 2024). Some years ago, it was one of the expressions common in the Western military and security jargon (see NATO, 2024; Casey-Maslen, 2024, p. 6; Hoffman, 2018), being a deliberately vague expression[1] which

[1] See the authoritative statement by the NATO Assistant Secretary General Sorin D. Ducaru (2016, pp. 9–10): "There is so far no agreed definition of Hybrid Warfare within NATO taxonomy." "The Assembly notes that there is no universally agreed definition of 'hybrid war' and there is no 'law of hybrid war'. However, it is commonly agreed that the main feature of this phenomenon is 'legal asymmetry', as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunae in the law

encompassed a series of actions which could not fall under the definition set by international treaties, noticeably Article 2(4) of the UN Charter.[2] The military and diplomats were asking themselves when the border of a formal "armed attack" (which allows self-defence according to Article 51 of the UN Charter) had occurred with all the consequences that such an attack would imply (see Ronzitti, 2021, p. 23; Casey-Maslen, 2024, p. 21).

However, in the last decade hybrid warfare has become a cat out of the box. The term is commonly used in official documents, in political speeches and in the media (see Galeotti, 2022, p. 11). The adjective "hybrid" is downplayed. The noun "warfare" is emphasised, also because "adversaries use the manifestation of cyber and info-warfare as an 'operational continuum'", that is war by other means (Ducaru, 2016, p. 21). Today, practically any action (or inaction) put into place, directly or indirectly, by another country, and which is considered hostile, falls under the notion of hybrid warfare. It "combines military and non-military tools in a deliberate and synchronised campaign to destabilise and gain *political leverage* over an opponent" (Ducaru, 2016, p. 10, italics added). "Hybrid warfare encourages instability in a country's internal affairs by prioritizing non-kinetic military methods such as cyber acts, influence over operations in coordination with economic pressure, support for local opposition groups, disinformation, and criminal activity" (Jovanovski, 2021, p. 152). Some situations can be considered quite novel, such as hostile activity which can be qualified as "digital", and the domain of cybersecurity covers a broad field encompassing all aspects of a country, whether in the public or in the private domain, and quite appropriately telecommunication networks are qualified as critical infrastructures.[3]

Nevertheless, other conducts are centuries old, and did not fall under the "act of war" definition. Among them one of the most common was "propaganda", a term whose meaning has changed over the decades (see Fridman et al., 2018). But in this context, one may encounter the notion of cognitive warfare as well, which is described by NATO as follows:

> Cognitive Warfare includes activities conducted in synchronization with other Instruments of Power, to affect attitudes and behaviours, by influencing, protecting, or disrupting individual, group, or population level cognition, to gain an advantage over an adversary. Designed to modify perceptions of reality, whole-of-society manipulation has become a new norm, with human cognition shaping to be a critical realm of warfare.

and the complexity of legal systems, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions" (Council of Europe Parliamentary Assembly, 2018, point 5).

[2] But what exactly is an "act of war"? "It would seem to follow that an act of war is either intended by the actor State to bring about a condition of war or, though not so intended, may be regarded by the State against which it is directed as having done so" (Grant & Barker, 2009). With reference to hybrid warfare, see the analysis of the International Court of Justice case law in Fogt (2021).

[3] It is sufficient to mention the NATO's Cooperative Cyber Defence Centre of Excellence based in Tallinn and the host of publications it has promoted and collected, from the Tallinn Manual (https://ccdcoe.org/research/tallinn-manual) to the dedicated webpage (https://ccdcoe.org/incyder-articles/?year=2024).

> Cognitive Warfare focuses on attacking and degrading rationality, which can lead to exploitation of vulnerabilities and systemic weakening. However, this becomes increasingly complex as non-military targets are involved. An example: Russian social media and public information operations targeted much of the international community in an attempt to label Ukraine as being at fault. Through a combination of communication technologies, fake news stories, and perceptions manipulation, Russia aims to influence public opinion, as well as decay public trust towards open information sources. These narratives have extensive reach, and often involve both offensive and defensive posturing (NATO Allied Command Transformation, s. a.).

China, as a strategic competitor for NATO, describes Cognitive Warfare as the use of public opinion, psychological operations and legal influence to achieve victory. Combat psychology has significant impact on the warfighter's ability to function; the Intelligent Psychological Monitoring System, a recent smart sensor bracelet developed by China, focuses on recording facial information, emotional changes, and psychological states of soldiers to determine their combat status. Outside of the battlefield, influence can also affect law, rule-of-order, and civil constructs. This inclusion of "Lawfare" and the targeting of broader community sentiment has significant impact, since so many civilians and non-combatants are potentially exposed.

Nevertheless, there are several critical issues which are opened by qualifying foreign propaganda as hybrid warfare, that is, "[t]aking advantage of the opportunities of cyberspace as a domain for free, fast and effective communication and to transform it into an efficient tool for [...] propaganda, manipulation and distortion of information, deception, information warfare" (Ducaru, 2016, p. 16; see Rühle, 2021).

First, as it belongs to any given state to establish what is considered an act of war, of necessity it is to the given state to decide if propaganda is a form of hybrid warfare. Clearly, this is a field in which the *raison d'état* governs, and there is little room for constitutional concerns (see Fogt, 2021). The consequence is that what is considered hostile is, ultimately, a political, and politically oriented, decision.[4]

Second, qualifying it as hostile speech, a synonym for propaganda, hybrid warfare obviously trumps all international agreements[5] which were meant to favour free circulation of news, opinions and ideas.[6] And as hybrid warfare includes actions by non-state actors, the silencing effect is without any subjective limitations.

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[4] "The wide array of possible elements included in a hybrid attack requires a 'whole of government' response that combines all national instruments." (Ducaru, 2016, p. 12) "A hybrid information campaign, psychological operations, or any other hostile informational activity regarding fake news will not reach the threshold of an armed conflict in the sense of an armed attack or equivalent acts of aggression, but may still constitute an unlawful threat of attack or other unlawful acts under international law such as interfering in the internal affairs of other states" (Fogt, 2021, p. 97).

[5] The first reference is to the Final Act of the 1975 Helsinki Conference on Security and Co-operation in Europe which devoted a section to transborder flow of information stating that the signatory States "[m]ake it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries".

[6] Which is quite obvious if you include in hybrid warfare actions aimed at "generate deception and ambiguity" and "avoid attribution of action; maximize deniability of responsibility for aggressive actions" (Ducaru, 2016, p. 10).

And third, as one of the tenets when facing hybrid warfare is that of "deterring" it,[7] the inescapable consequence is that of preventive censorship. Once hostile speech has entered the country, it is useless to counter it.[8] This implies that the medium through which such messages are disseminated must be blocked at its source. There is no room for a case-by-case analysis. Even a weather report or sports might conceal covert disruptive contents.[9] From a Western legal tradition perspective, this approach, which has been consistently followed by the EU after the Russian invasion of Ukraine,[10] has two significant consequences. In the first place, it disenfranchises conducts by any other country which consider communication coming from the West as a hostile interference in their internal affairs.[11] The most obvious victim is any propaganda in favour of human rights. And the second is that Western democracies engage in practices that over the last eight decades have been flagged as typical indicators of a dictatorship, ensuring its stability by denying its citizens access to foreign sources.[12]

2. The domestic spillover effects of hybrid warfare

The most critical aspect of the weaponisation of speech is the internal effects that the hybrid warfare rhetoric brings with it. These effects only in a limited measure curtail access to foreign information sources.[13] To express the notion in very practical terms, and to place in our contemporary troubled times, it equalises internal propaganda to foreign one, and freezes any critical debate on whether the West has some political and

[7] "The Triad: Prepare–Deter–Defend" (Ducaru, 2016, p. 13).

[8] For the most part, counter information measures will have to be strictly based on facts and truth and will, thus, come too late to prevent the effect of the hybrid campaign – the countermeasures will only mitigate the damages" (Fogt, 2021, p. 97).

[9] This is because "a hybrid threat or warfare conducted by overt or covert activities by states, state agents or non-state actors in times of peace, crisis or armed conflict will affect the full-spectrum of the society of the targeted state" (Fogt, 2021, p. 31).

[10] The most significant expression of it is the EU Council conclusions (21 June 2022) on a Framework for a coordinated EU response to hybrid campaigns (European Council, 2021).

[11] Typically, the "use of 'lawfare' in terms of promoting one's own actions as legitimate and opponents' reactions as unlawful" (Fogt, 2021, p. 33).

[12] Can one still speak of "asymmetry" between democratic and non-democratic countries? "The opportunities to utilize disinformation have therefore increased, and they are especially attractive to authoritarian regimes. This also results in an inherent asymmetry. While influence efforts targeting foreign target audiences can benefit from the openness of democratic societies, authoritarian states can implement restrictions in their own domestic information environment, delimiting communication between their own population and external actors" (Weissmann et al., 2021, p. 120).

[13] The reference is, obviously to the Decision taken on 27 July 2022 by the Grand Chamber of the EU General Court in the *Russia Today v. Council* case (T-125/22). For some critical comments, see Ó Fataigh & Voorhoof (2022, p. 186), Sassi (2022, p. 1253) and Zeno-Zencovich (2024, p. 175).

military responsibilities in favouring the Russian aggression against Ukraine,[14] a debate which in no way is meant to justify a blatant violation of international law, but questioning the frequent practice of "double standards" by righteous Western democracies (see e.g. Saul, 2022). However, the effects go well beyond the dramatic geopolitical situation in Eastern Europe, and strengthen a growing tendency to regulate speech.

The first step is to qualify as hostile any speech which purportedly is against a long list of "values".[15] Values are, therefore, placed in a dogmatic, quasi-religious context which should not be countered by speech. This means putting back the clock to the ages which one imagined past when expressing views not approved by the public authorities brought exclusion, banishment, imprisonment and, often, physical elimination. This is because a speech which is not accepted is immediately linked to the author, with a stigmatising effect. A speech is not analysed and discussed but it is simplistically labelled as proper or improper. The author is, therefore, classified as belonging to a certain group that should be countered (on the abuse of labelling see Friedland, 2024).

A political and constitutional freedom, free speech, becomes the rostrum for self-incrimination. One is judged not for one's acts but for one's words. This is not to advocate a society imbued with hypocrite politesse but to point out how "internal enemies" are created. Clearly one's reputation is made also by what one expresses, however, the significant element in the European Union's approach is that of creating categories of not-accepted speech. This is done through non-state agents outsourcing control over speech by private actors. This is because on the one hand states are not able technically to detect speech that falls into not-accepted categories. On the other hand, this form of censorship, which clearly would not be legally admissible if put into place by the state, is downsized as simple non-compliance with contractual obligations.

To put the extensive normative provision, contained in Articles 34, 35 and 36 of the Digital Services Act (DSA) briefly,[16] the "very large online platforms" will have to put in algorithmic systems that prevent "the dissemination of illegal content through their

[14] See how the news of a further clamp-down on Russian media outlets is given by the EU Commission: "The Commission welcomes the Council decision to suspend the broadcasting activities of four more media outlets (Voice of Europe, RIA Novosti, Izvestia and Rossiyskaya Gazeta) in the EU or directed at the EU, in view of their role supporting and justifying Russia's war of aggression against Ukraine. Russia has engaged in continuous and concerted propaganda as well as information manipulation actions targeted at civil society in the EU and neighbouring countries, gravely distorting and manipulating facts. These propaganda actions have been channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union's public order and security. The risk to our democratic societies – and the integrity of the upcoming European as well as national elections – has intensified. Today's measures are a forceful response to that. The sanctions do not target freedom of opinion. They include specific safeguards for freedom of expression and journalistic activities. The measures do not prevent the sanctioned outlets and their staff from carrying out other activities in the Union other than broadcasting, such as research and interviews. The measures should be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation and its associated outlets cease to conduct disinformation and information manipulation actions against the EU and its Member States" (European Commission, 2024).

[15] "Disinformation", both foreign and domestic, is listed as one of the most relevant "hybrid threats" in the Communication from the Commission to the European Parliament and the Council on "ProtectEU: A European Internal Security Strategy". Strasbourg, 1.4.2025, COM(2025) 148 final.

[16] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

services", which is not only a legal obligation, but also an economic decision.[17] One has already experimented the results, often ludicrous, of such algorithmic screening that have erased from the internet breast-feeding Madonnas, *putti,* paintings and sculptures of Venus, towns and people whose name fell into the politically incorrect, primitive vocabulary of Facebook,[18] and the frequent suspension of email or other personal communication services through the detection of messages and photographs which the algorithm considers inappropriate.[19] The very large online platforms are, therefore, entrusted with a policing role that public authorities are not able to perform. In substance, a fundamental right such as that of expression that in our technological environment can be put into practice only through the internet and intermediary services and platforms will be subject to algorithmic preventive censorship.[20]

The DSA puts together extremely different phenomena: terrorist content, child pornography, "illegal racist and xenophobic expressions". But if one extends the scope to the vast area of "discriminatory speech", which falls within the "otherwise harmful" category, one can already see the multitude of organisations which, purporting the defence of minority groups, ask for the removal of speech or other forms of expression which they consider offensive. It is sufficient to look at the aggressive campaigns conducted under the flags of trans-Atlantic movements ("Me-Too", "Cancel Culture",[21] "Black Lives Matter", "Last Generation", LGBTQ+, etc.) to understand what the effects of such private internet militia can be on freedom of expression.[22] Clearly, the very large online platforms, in order to avoid heavy administrative and financial sanctions, draft lengthy terms and conditions which apply to all individual users of the platform.

These terms and conditions set also limits on the content of online speech. If they were not binding and algorithmically enforced, the "community standards" of Meta, together with its endless list of forbidden words and ideas, would be considered ludicrous.

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[17] "[A] significant number of platform legal interpretations are incorrect. These divergent interpretations of the law mean that we believe platforms are removing legal content that they falsely believe to be illegal ('over-blocking') while simultaneously not moderating illegal content ('under-blocking')" (Wagner et al., 2024, p. 2).

[18] For those who have the time, it is suggested to browse the endless index of forbidden words and expressions in the various chapters of Facebook's "community standards", for example, violence and criminal behaviour, coordinating harm and promoting crime, dangerous organisations and individuals, fraud and deception, violence and incitement, etc.

[19] In the U.S. context, "*ex ante* AI-based content moderation operates in much the same way as a prior restraint; like government prepublication censorship, it gives users no notice of takedowns prior to publication, nor reasons for the takedown decision (at least reasons that a lay user would be capable of understanding)" (Armijo, 2021, p. 245).

[20] The point is thoroughly examined and challenged by Vigevani (2023). The obvious conclusion is that such practices "only benefit social media platforms in the sense that they allow the platforms to strengthen their position as private regulators of online freedom of expression through their own unilaterally adopted rules and for the benefit of their business model" (Cetina Presuel, 2021, p. 499).

[21] It is worth noting that recently Italy has introduced an amendment to the Audiovisual Media Services Law (Decree 25.3.2024. n. 50) which establishes that audiovisual media providers, while respecting human dignity and combating "hate speech" [Article 4(1)(b)], should oppose "contemporary tendencies to destroy or anyway belittle the elements or the symbols or of the tradition of the Nation (cancel culture)" [Article 4(1)(h)]. Apart from the rather haphazard definition of cancel culture, it is doubtful that legal norms can effectively counter a phenomenon that most clearly is the product of ignorance and fanatism.

[22] Obviously there are authors who, quite at the opposite, welcome the DSA for imposing on the very large platforms the respect of fundamental rights. This would enhance speech by "minority and marginalized groups" (see e.g. Quintais et al., 2023).

No public institution would ever dream of setting such rules, and if challenged, they would never pass judicial scrutiny being vague, overbroad and lacking any proportionality. The state establishes what can, and what cannot be said, such as hate speech, discriminatory speech, speech which expresses a gender, sexual, racial, ethnical, geographical, ideological bias. An index of forbidden words is placed upon public institutions, law enforcement, courts, educational institutions or non-private actors.

In the international arena "hostile speech" is a form of hybrid warfare. In the domestic one, what is engaged in a "war" (this is the term most commonly used) on "harmful speech" which must be prevented. Just as the state establishes what is hostile, it establishes what is harmful.[23] Facts, opinions, ideas are placed in the battleground and classified as friends or foes, the preliminary step is to establish which general topic of discussion are under surveillance, then to set certain periods in which speech must be restrained (typically: elections), finally to control the medium. While the two processes go hand in hand, the internal weaponisation of speech inasmuch as it limits the constitutional rights of all citizens, requires that there can hardly be room for *raison d'état,* the limit being that, important but not over-reaching, of state secrets. Censorship and gag-orders are clearly inadmissible. A black-and-white *ex ante* vision, is substituted by an *ex post* balancing test; the courts, and not the government (or its private proxies), are entrusted with the policing of speech.

There is no doubt that such a system presents many flaws especially if one looks at its effectiveness. But it should be questioned that one can apply dubious categories of international relations and conflicts to "uninhibited, robust, and wide-open" debate in a democracy. The internalisation of the hybrid warfare discourse passes through two steps, one substantive, the other procedural. The best example is provided by the recent European Media Freedom Act (EMFA) of the EU.[24] Its purported aim is, *inter alia,* that of protecting the "Fortress Europe" from its external enemies. The text is strewn with references to such foes: in multiple Recitals (4, 6, 53) reference is made to "providers, including those controlled by certain third countries, that systematically engage in disinformation or information-manipulation".

The link between hybrid warfare and information activity is made forcefully in other recitals of the EMFA which stress the need to contrast "foreign information manipulation and interference" (14, 74). And denounce as a threat "systematic campaigns of foreign information manipulation and interference with a view to destabilizing the Union as a whole or particular Member States" (Recital 47). This imposes the duty to "protect users from foreign information manipulation and interference" (Articles 19 and 26). Having equated external and internal disinformation as forms of interference, the necessary step is that of defining what forms of speech must be contrasted and blocked. The "golden

[23] Even more troubling is the Media Freedom Act [Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU] which in its Recital 4 targets the "polarizing content".

[24] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU.

book" is the Strengthened Code of Practice on Disinformation 2022 which again equates "misinformation", "disinformation", "information influence operations"[25] and "foreign interference".[26]

In the first place, it is striking that a fundamental right such as freedom of expression is, at the bottom line, regulated by a sub-sub-sub primary source, the European Commission's 2021 Communication on the European Democracy Action Plan, which openly affirms the contiguity of external and internal informational activities. The Strengthened Code translates these tenets into a would-be self-regulatory instrument. But as one has learnt from the past, it is simply a camouflaged form of regulation in an area which manifestly is and should be outside the competences that the EU Treaties have conferred upon the Commission. What speech can be qualified as disinformation? As they are in the habit, the EU institutions subvert traditional legal logic.

A new category is created, that of "harmful content", "harmful campaigns", "harmful disinformation". What is harmful is decided not by a court but by organised groups or single individuals who "flag" the content they object to according to their preferences, ideology, or idiosyncrasies. Compliance with the fuzzy notions of the Strengthened Code is imposed by the mastodontic DSA which repeatedly targets "otherwise harmful information" (Recital 5) "otherwise harmful content" (Recital 68) and sanctions both Internet providers and "very large online platforms" which do not remove such content. Especially the very large online platforms are subject to multiple obligations, which can be complied with only through an algorithmic surveillance (made even more effective through AI) of what is disseminated on the web.

3. Conclusion

One can detect a continuum which from the international arena moves towards the domestic arena with dramatic consequences on the notion itself of "free speech". The EU while paying lip-service to fundamental rights, first of all freedom of expression, is gradually introducing legal instruments (whether through legislation or through court decisions) whose effect is that of stifling views that do not conform to its dominant ideology. This is troublesome because one can – and probably should – have serious doubts that these interventions on free speech fall within the remit of the Treaties and the legitimate prerogatives of the EU institutions.

[25] Defined as "information influence operation refers to coordinated efforts by either domestic or foreign actors to influence a target audience using a range of deceptive means, including suppressing independent information sources in combination with disinformation".

[26] Defined as "foreign interference in the information space, often carried out as part of a broader hybrid operation, can be understood as coercive and deceptive efforts to disrupt the free formation and expression of individuals' political will by a foreign state actor or its agents".

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Legal Education in a Globalised Era

China's Strategy for Governance and Development

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Abstract: China's legal education plays a unique and vital role in the national strategy to modernise its legal system, a foundation that has underpinned the country's rapid ascent. This paper analyses this often-overlooked facet of China's development by situating legal education within the broader framework of governmental initiatives. Faced with the challenge of establishing a functional legal infrastructure with extremely limited resources, China's policymakers have adopted two primary approaches since the late 1970s. First, they have concentrated most legislative efforts on the large-scale transplantation of Western laws. Second, they have effectively transformed law schools into hubs for generating legislative knowledge and training legal professionals. The Foreign-Related Rule of Law initiative, the latest manifestation of the state-directed strategy, continues to shape legal education by introducing new objectives and challenges. This paper argues that to fully comprehend China's path to modernisation, one must understand how legal education is embedded within its grand national development strategy.

Keywords: legal education, modernisation with Chinese characteristics, Foreign-Related Rule of Law, national strategy, legal transplantation, condensed transition

1. Introduction

The conventional Western wisdom holds that legal reform in China was short-lived mainly during the 1990s and has now faded (Zhang & Ginsburg, 2019).[1] On the contrary, China's spectacular rise since 1978 has been accompanied and buttressed by

[1] To their credit, Zhang & Ginsburg (2019) offers a compelling, though partial, rebuttal of such prevalent views in the West.

the establishment of a modern legal infrastructure from scratch. During the Cultural Revolution (1966–1976),[2] the nascent Soviet-style legal system of the young republic[3] quickly collapsed, courts became effectively dysfunctional, and law schools nationwide were closed. Upon the closing of the tumultuous decade, the nation found itself deeply mired in a state of governance paralysis, with neither minimally adequate laws on paper nor institutional strength to maintain order and move forward (Lubman, 2000, p. 383). An unprecedented, full-on initiative for legal capacity-building ensued, with extensive legislative efforts at its core.

The resulting legislative success can hardly be overstated. By August 2011, the state-directed project produced 240 laws, 706 administrative regulations, and over 8,600 local regulations, covering all legal areas and aspects of social relations. A comprehensive "socialist system of laws with Chinese characteristics" was officially declared to be solidly in place (IOSCC, 2011). Since then, the body of legislation has been steadily streamlined while maintaining an overall trend of growth. As of July 2024, Chinese legislation consists of 320 laws, 595 administrative regulations and 16,022 local regulations (National People's Congress of China, 2024). In addition, those numbers do not fully capture the extent of efforts and the amount of resources China devoted to its legislative enterprise, as many major laws went through multiple rounds of significant revision.[4] Overall, the rapidly evolving legal framework has served as a key source of strength facilitating China's development for nearly five decades.

How has China managed to navigate the path of legal modernisation despite its challenging starting point? Two strategies adopted by the Chinese Government have made this "great leap forward" possible. First, in drafting substantive laws, China's policymakers have allocated most of their limited legislative resources towards learning from and engaging in adaptive legal transplantation of Western laws. It is a cost-effective choice because China's chosen journey of "Reform and Opening-up" aims to transition to a market system, which has evolved over centuries in developed countries, providing rich experience in both legal texts and theoretical foundations. Second, in terms of marshalling intellectual talents, the government has effectively transformed law schools into powerhouses for producing knowledge and training legal professionals who closely follow legal developments and disseminate them throughout society. In other words, Chinese laws, as public goods, have been produced and distributed through consciously leveraging legal education as a driving force powered by foreign enlightenment.

These two approaches had been employed in a pragmatic manner for decades before they were recently publicly acknowledged and elevated to a national initiative in their own

[2] The Cultural Revolution in China was a tumultuous socio-political movement initiated by Mao Zedong. It aimed to enforce ideological purity and eradicate perceived bourgeois influences within Chinese society. This period severely disrupted China's social fabric and economic development, leading to widespread instability and institutional damage. Its aftermath underscored the urgent need for reform. The subsequent pursuit of reform and opening up under Deng Xiaoping, starting in 1978, aimed to restore stability, rebuild institutions and revitalise the economy, marking a pivotal shift away from the Cultural Revolution towards modernisation and international engagement.

[3] The first formal Constitution of the People's Republic of China was passed in 1954. Between 1956 and 1966, China's legislature enacted over 130 laws and decrees. See IOSCC (2011).

[4] For example, after the Company Law was enacted in 1993, it was amended four times between 1998 and 2018, before being extensively revamped in 2023.

right. In November 2023, the Political Bureau of the Communist Party of China (CPC) Central Committee, the top political body, held a meeting to deliberate on strengthening the development of the "foreign-related rule of law" (Xinhua, 2023). This event signalled that further understanding and utilisation of foreign law is a long-term requirement for building China into a powerful country and achieving national rejuvenation. Notably, improving legal education was emphasised as an indispensable pillar of this new scheme.

To understand the trajectory and implications of this new national strategy, it is crucial to view China's legal education in the broad context of government initiatives. These initiatives have shaped China's growth and limitations, thereby affecting the governance efficacy of the Chinese polity. This paper aims to explore the unique role of China's legal education to illuminate this often under-appreciated aspect of the country's rapid modernisation. First, a sketch is provided of the evolution of Chinese legislation, heavily influenced by foreign law. This is followed by an analysis of legal education in the growth of China's legal system. An anatomy is then given of the additional functions that law schools have undertaken as part of the new initiative to strengthen the foreign-related rule of law. Finally, the conclusion offers some reflection on the future of legal education in China.

2. China's long march to foreign-related rule of law

The influence of foreign laws on China's legal development since the late 1970s can be divided into three stages, each adding a new layer of foreign dimension to the Chinese legal system.

2.1. Layer one: Revival by transplanting foreign laws since 1978

In the late 1970s, China embarked on a "legal revolution" (Ye et al., 2012, p. 144) driven by the CPC to modernise its broken legal infrastructure. This strategic shift toward law was signalled in March 1978, when a new Constitution was adopted by the National People's Congress (NPC). Later that year, in a landmark speech which formally heralded China's "Reform and Open-up" era, Deng Xiaoping, the head of the new leadership, called for enhanced awareness to strengthen "legality" and "focused efforts" to address the problem of the lack of a wide range of necessary legislation.

Large-scale legislative work in China quickly proceeded on two fronts. The first centred on creating almost all the foundational statutes necessary for a functional economic and social order, including criminal law, criminal procedural law, civil law, civil procedural law, contract law, administrative litigation law, to name just a few. Contemporaneously, laws to govern the emerging area of international economic relations were also produced with accelerating steam, such as those on foreign investment enterprises, foreign contracts, foreign trade, foreign exchange and taxation of foreign business activity.

Throughout this comprehensive law-making project up to the present day, a resounding consensus has guided the work of all involved: China must actively reach out to draw the wisdom of foreign law. It reflects both the prevailing sentiment in the face of the daunting challenge of overall reconstruction and the particular lack of knowledge of modern law. Early on an unwritten yet indispensable procedural step was introduced into the legislative process within the NPC and the State Council.[5] Bill proposals, whenever submitted for internal deliberation by the decision-makers, must be accompanied by a full report on relevant foreign laws. In addition, when important laws and regulations are being drafted, the national and local legislatures would routinely seek information of similar legislation from overseas (Ye et al., 2012, p. 146).

During this stage, the legislators mainly sought to examine the laws of various countries to identify the best solution for the issues facing China. For example, during the drafting of the General Rules of Civil Law, the legislators carefully studied and referenced civil codes and statutes from countries such as Germany, France, Japan, Mongolia and Hungary. Similarly, during the deliberation of some basic administrative statutes, intensive research was conducted to find models from developed countries in Europe, America and Asia. This hybrid approach enabled the legislators to compare various alternatives and identify the most suitable template, which could be easily modified to meet China's specific needs.

2.2. Layer two: Deeper legal integration with the WTO since 2001

China became a member of the World Trade Organization (WTO) in 2001. This membership immediately brought an overwhelming challenge to realign much of China's legal system with its WTO commitments.[6] A new wave of extensive legislation began around 2001, specifically aimed at resolving inconsistencies with WTO law.

Between 1999 and 2005 alone, more than 3,000 statutes and regulations were enacted, revised, or repealed at the national level (D. Chen, 2023). During the first three years after China's entry into the WTO, more than 190,000 local rules and measures were reviewed and streamlined (Ji, 2021, p. 43). More than a decade later, the State Council still emphatically required that "any regulations and documents related to trade in goods, trade in services and trade-related intellectual property rights, either by ministries under the State Council or by local governments [...] must be in compliance with the WTO Agreement, its Annexes and subsequent agreements, and China's Accession Protocol and Working Party Report" (General Office of the State Council of China, 2014).

[5] The State Council functions as the executive branch of China's central government. It has the authority to pass regulations on its own, and many important statutes formally passed by the NPC are first drafted by the State Council.

[6] In the working document about China's WTO entry, the Chinese representative declared that, by accession, China would repeal and cease to apply all such existing laws, regulations and other measures whose effect was inconsistent with WTO rules on national treatment. Sec. 22, Working Party on the Accession of China, WT/ACC/CHN/49 (2001). Online: https://tinyurl.com/w3j7mtws

As commented by a scholar, it is through this large-scale, centralised, campaign-style and uniform regulatory clean-up that China was able, within a short period, to comprehensively adjust, enrich, and improve its pre-existing foreign-related economic legislation in line with WTO rules and China's commitments (Ji, 2021, p. 42).

In the meantime, the legislative work involved in WTO alignment has had a significant impact on China that extends well beyond merely fulfilling its commitments. One important aspect is how the WTO principle of transparency has reshaped the functioning of the Chinese Government. WTO-compliant statutes, such as the Legislation Law, have introduced significant constraints on the law-making process to enhance fairness and reduce opacity. *Gu Yongjiang,* one of China's earliest negotiators, observed that "[f]rankly speaking, the concepts of fairness, openness, and transparency were incorporated into our approach to work entirely as a result of China's negotiations to rejoin the GATT and join the WTO" (Liu, 2021, p. 33). Another positive change occurred regarding judicial review. Around the time of accession, revisions in laws and judicial interpretation rules enabled more disputes to be litigated in court rather than being decided solely by administrative authorities (Yang & Zhuang, 2004; Liu, 2021, p. 33). Simply put, the "WTO effect" transformed China's approach to foreign law from a reference for comparative analysis into a set of hard standards for self-reformation.

2.3. Layer three: Seeking rejuvenation since 2012

China reached a landmark in 2010 when it became the second largest economy in the world. Two years later, the CPC's 18th National Congress set new national goals for the country's future development, including the target of reaching the level of moderately developed countries by 2049 (Hu, 2012). The new leadership also articulated a grand vision of "achieving the great rejuvenation of the Chinese nation" as a fresh source of inspiration for the public.

As part of the economic agenda in the new phase, a policy of "mutual promotion of domestic and international openness" (Central Committee of the Communist Party of China, 2013) was adopted, which significantly advanced the integration of domestic and international markets. China has continued to update its laws to facilitate higher levels of openness by drawing on foreign experience. A notable example is the passage of the Foreign Investment Law in 2019, which substantially expanded market access to foreign investors by shifting to a negative list approach.

A distinctive feature of this period is that China can no longer rely solely on drawing legal knowledge from other countries to meet its needs. Economic realities create novel demands for laws where foreign experience often provides only partial solutions at best. For example, the "Belt and Road Initiative" has led to complex legal arrangements between China and over 150 countries as well as 30 international organisations. Domestically, a total of 22 Free Trade Zones have been established as pilot programs, routinely granted leeway for major innovations as new policies emerge. In both areas, China often finds itself in uncharted waters without overseas reference to draw when dealing with legal issues.

Another significant development disrupted China's previously stable economic interactions with the world and altered how China utilises foreign legal knowledge. In 2018, the Trump Administration of the United States (U.S.) imposed punitive tariffs on Chinese products, initiating what China has termed "the biggest trade war in economic history" between the two leading global powers. The Biden Administration not only retained Trump's tariffs but also introduced additional targeted sanctions and export controls to impede China's technological progress. Since the outbreak of the Russia–Ukraine war, China has observed increasing discussions in the West about applying similar sanctions on China in the future, specifically if China attempts unification with Taiwan "by force".

In response to rising external risks, China has sought to incorporate a new element into its legal architecture: laws enabling measures of retaliation (Jia, 2024, p. 82). In adopting legislation such as the Anti-Foreign Sanctions Law and the Unreliable Entity List Regulations, China has primarily looked to the U.S., the country most likely to use coercive powers against others, as a model for these self-protective measures. In this sense, China views such legal transplantation from its arch adversary as a crucial way to develop defensive or precautionary tools in its arsenal, marking an unprecedented aspect in the evolution of its legal system.

3. Legal education in China's grand rule of law scheme

The vast and continually growing demand for foreign legal knowledge is only part of the challenge China faces in revamping its legal system. The explosion of legislation in China would not have been possible without the consistent contributions of a dedicated and stable force of knowledge providers. To marshal scarce expertise into legislative work and ensure legal professionals stay closely aligned with social progression, the Chinese Government has actively transformed legal schools into a generative source of officially desired knowledge, which has long been predominantly foreign-oriented. Consequently, legal education has been profoundly shaped and ultimately constrained by its mission as assigned by the government.

3.1. Condensed transition: Legal education with Chinese characteristics

When China's law schools reopened in 1977, only three were in existence, which together admitted a total of 189 students (Xu et al., 2018, p. 3). Despite this modest restart, educational institutions emerged as the only viable source for generating legal knowledge. Legislatures, courts and executive agencies had all been stripped of their legal expertise during a decade-long lawless void. Looking ahead, the substantial volume of laws to be enacted would primarily rely on imported information, rather than traditional knowledge or local realities familiar to government entities. Under these unique circumstances, legal education in China entered into what can be described as a "condensed transition" (Chang, 2010). Simply put, legal education

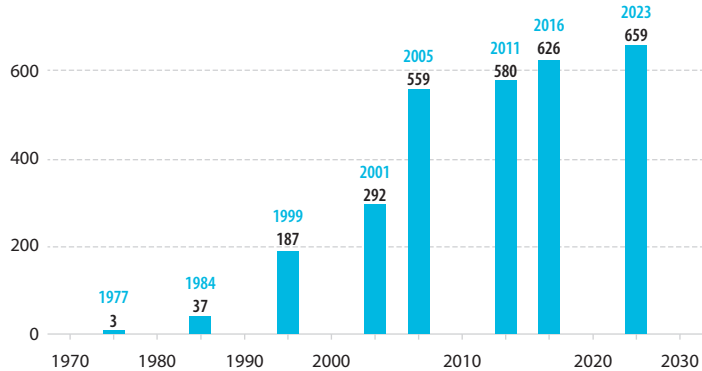

Figure 1
Number of law schools in China

Source: Compiled by the author.

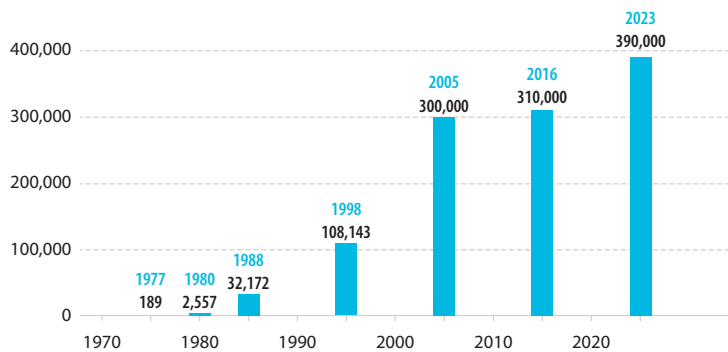

Figure 2
Number of law students in China

Source: Compiled by the author.

was vigorously driven by the government to both expand its own capacities and maximise the dissemination of legal knowledge across society in an astonishingly short period of time.

The number of law schools rapidly increased to meet the surging demand for legal professionals (see Figures 1 and 2). Since almost all universities are public institutions, this expansion resulted from government policy. During the initial stage, approximately 80 previously established law schools were reopened, forming a solid institutional core for the new legal educational system. Subsequently, the government managed and facilitated the creation of new law schools through proactive incentives, lax approvals and inter-school collaborative arrangements. By the end of 2023, China had 659 law schools, with a student body of 390,000. Oversupply, rather than shortage, of law graduates has become the new problem in legal education.

For the most part, China's legal education followed a mass education model. Formal full-time education developed alongside various forms of semi-formal or informal education within a two-track system. Beyond the established law schools, an important source of semi-formal education includes the wide range of part-time programs offered by party schools, administrative academies, correspondence colleges and evening universities. Another path to obtaining a law degree is through the "Self-Study Examination" system. Any autodidact can earn a state-certified law degree by passing the requisite course exams, which are nationally administered by the government. More importantly, until 2018, the uniform bar exam was accessible to individuals with no formal legal education. The bar exam, centrally administered by the Ministry of Justice, was introduced in 1986. Passing the exam is the primary professional requirement to become a practicing lawyer,[7] and it has consistently been challenging due to its substantive rigour.[8] For those practitioners without a law degree, preparing for the bar exam could be their only, albeit intensive, educational experience in law (Xu et al., 2018, p. 8). Nonetheless, law schools continue to play a central role in shaping unconventional legal educational programs. For both the well-regarded "Self-Study Examination" system and the bar exam, the national government sets all required courses, textbooks and examination syllabi, delegating this authority to prominent law professors (Wang, 2023, p. 29). By controlling the minimum standards for the legal profession, government authorities and educators can disseminate a set of collectively formulated legal knowledge well beyond the confines of formal law schools.

The condensed transition has led to a separation between China's legal education and professional training. Many scholars agree that Chinese law schools emphasise "theoretical teaching" and take pride in being "cradles" of jurists rather than practical training grounds for lawyers (Fang, 1996, p. 133). Teaching has predominantly been conducted through lectures with minimal use of interactive methods. Students are encouraged to memorise black-letter law, concepts and specific legal constructions without exploring their practical implications (Shen, 2008). Case studies have been so ignored in law teaching that in 2018, the Ministry of Education specifically mandated the enhancement of case-based teaching (Ministry of Education of China, 2018). It is widely agreed that a significant gap exists between law school courses and real-world practice, which one scholar has referred to as "the poverty of legal studies" (Shen, 2008, p. 128). It is ironic that the most pressing task for legal education is to address practical needs by closing the gap in professional talent. This defect is an inevitable price for the crude importation of massive yet unsystematic foreign knowledge by scholars who do not prioritise solving actual problems on the ground.

Another feature of China's legal education, also subject to heavy criticism, is its fragmented curriculum. In the 1980s, educational institutions began dividing their law

[7] According to Article 5 of the Law on Lawyers, there are three other requirements: support for the Constitution, completion of a one-year internship at a law firm and good moral character.

[8] As of now, the bar exam sets a passing grade each year based on the exam's difficulty but does not (at least formally) establish a quota to limit the number of passers. This is likely due to the fact that the demand for lawyers in the market has been expanding until recently. In the 1990s, the passing rate of the bar exam was well below 10%. For most of the last 20 years, the passing rate has typically hovered around 10%, with occasional exceptions reaching 20%. It should be noted that the rising passing rate reflects the improving quality of legal education and the growing number of law graduates in China, which has significantly intensified the competition to pass the bar (see Legal Analyst, 2019).

programs into various "specialisations". For example, Peking University's law department established four specialised programs: Law, Economic Law, International Economic Law and International Law. This model rapidly spread to law schools across China, and by 1993, there were 163 specialised programs in 121 law schools (Fang, 1996, p. 135). Under this programmatic structure, even undergraduate students are admitted into specialised programs, where they receive focused training in a particular area through a tailored combination of courses. In other words, while legal education is not professionalised, it is highly specialised. Law students are exposed to a limited number of subjects without first gaining a general understanding and broad view of the law. One consequence of this fragmented education is that both instructors and students tend to focus on legislation (rather than cases) to define their comfort zones and delineate their areas of interest. This reflects the influence of China's legislation-driven model of legal development on legal education.

The brief overview of China's legal education highlights two key factors that shape its development. First, the massive legislative workload drives the rapid expansion of both formal and informal legal education. Second, law professors have been the dominant source of legal knowledge. Unlike scholars in many other countries, they do not pursue research solely based on personal interests; instead, they participate in state-directed law projects. Some have significant influence over the education of law students and professionals throughout China. To further understand how legal education has been integrated into a national strategy, the next part will explain how the roles of legal scholars on both fronts are interconnected.

3.2. The special role of legal scholars in the legislative process

3.2.1. Institutionalised participation

Chinese legal scholars can, and often do, participate in the legislative process. Legislatures and administrative authorities have established institutionalised channels to enlist academic experts in both shaping legislative agendas and drafting bills.

During the early years, the NPC began inviting leading law professors to draft major statutes, such as civil and criminal legislation, in the form of *ad hoc* "working groups". In these groups, scholars typically dominated deliberations on drafts due to their comparative advantage in possessing information. This arrangement has continued to the present day, with scholarly input throughout the entire process. A case in point is the ongoing drafting of the Education Code, which is organised and supervised by the Legislative Affairs Office of the NPC, with intellectual support provided by an expert group of law professors from various institutions.

Gradually, authorities at all levels have also begun to engage in more enduring cooperation with scholars by recruiting them as special advisors, enlisting their input for fixed terms rather than on individual projects. For example, after the Anti-Monopoly Law came into effect, a specialised academic committee was established to advise the State Council on major issues related to this statute, including follow-up revisions and

rule-making proposals. This arrangement enables sustained and flexible exchange between the two sides, facilitating understanding of issues from both pragmatic and theoretical lenses.

3.2.2. Spontaneous participation

The legislation-driven model of China's legal development has also motivated scholars to participate in legislative processes on their own initiative, as a particularly effective means of contributing to societal progress while also gaining personal recognition. On rare occasions, legal scholars may choose to trigger public deliberation in a critical manner. The most famous example occurred in May 2003 following the death of a young man detained by local authorities in Guangzhou. Three young scholars publicly requested the NPC Standing Committee to review the constitutionality of a 1982 regulation, which was the basis for the victim's detention. This letter, followed by another signed by five prominent law professors, brought the issue to national attention and led to the swift repeal of the regulation by the State Council a month later.

In the vast majority of cases, however, legal academics are more comfortable in their role of providing professional assistance to legislative entities, particularly through offering comparative analyses of foreign legal systems. Whenever a major legislative project is underway, such as the drafting of the Civil Code, different groups of scholars compete to produce and circulate their own "expert drafts", angling for favourable attention from the legislature. The most recent efforts have focused on technology regulation. As of March 2024, three proposed drafts of the Artificial Intelligence Law – clearly drawing on European Union (EU) and U.S. perspectives – have been announced by different academic groups.

3.3. Legal education in the shadow of foreign-oriented legal research

Chinese law professors fulfil dual professional roles: serving as knowledge providers to the party-state, primarily through the legislative process, and as educators to law students in classrooms or through their publications. Because the first role as a provider has been given such emphasis, it has become the primary one, while the other role as an educator has become secondary and shaped by the former.

Since 2017, the authority to grant academic ranks in China has been devolved from the government to individual educational institutions (Ministry of Education of China, 2017). However, the work of scholars remains largely influenced by the state, though indirectly, yet firmly. Government educational authorities appoint institutional administrators and assess the performance of each institution based on detailed criteria and standards to advance policy goals.[9] Under such a system, as a knowledge provider to

[9] Since 2002, the Ministry of Education has conducted five rounds of discipline-based evaluations of educational institutions qualified to offer graduate-level degree programs. The results of these evaluations are crucial for the institutions' reputation, competitiveness, access to financial resources, and, not least, the career prospects of their administrators. For details on the latest round of evaluation see Ministry of Education of China (2020).

the law-making authorities, a legal scholar's research is closely driven by the needs of the policymakers. Research topics come directly from legislative agendas, funded by general public finance, or commissioned by specific legislatures or agencies. Academic journals are replete with research articles featuring legislative proposals or legal interpretations of new terms recently introduced in official policy documents. Academic prestige is largely derived from the endorsement of a scholar's proposals into legislation or official positions, more than from any other factor (Chen, 2011, p. 19). As necessitated by the needs of foreign-oriented research, the best strategy for the scholar-provider is to import knowledge through translation. As one law professor has reflected, "[s]ince the mid-1980s, the translation and introduction of foreign legal works and textbooks in China have far exceeded any other period in history in terms of quantity, scope, and influence" (Gao, 2007, p. 129).

The scholar-educator is naturally shaped by the strength he has built as a scholar-provider. Law courses in China have predominantly been based on the introduction of foreign knowledge. A prominent scholar and educator once noted, "[w]hen giving a lecture to Chinese students, Chinese professors talk about foreign law. For example, when teaching civil law, professors talk about German law, French law and Roman law; when teaching company law, professors introduce US law" (Fang, 2012). Moreover, school curricula are designed and revised to stay focused on subjects of high legislative importance. For example, of the roughly 650 law schools in China today, about half offer specialised courses or degrees in WTO law.

Law students are immersed in a vibe where preference for foreign knowledge is omnipresent. They are engrained by their classroom experience that answers to China's legal issues can mostly be found in other countries. When participating in research projects, they are expected to search for materials from foreign countries, which normally form the main part of the final reports. Foreign languages, especially English, are viewed as particularly useful professional skills. In fact, for several years in the 1990s, the national bar exam included a section of English language. English moot court or debating contests attract the top students since they are considered to enhance their career prospects after graduation.

Students perceive that law degrees from abroad are valued more highly than domestic ones. Foreign law degrees, like all academic degrees, can be recognised through a certification procedure administered by a centralised entity under the Ministry of Education.[10] Upon successful certification, a law degree earned from an overseas educational institution is granted the same validity and status as those awarded by Chinese institutions. Certified degrees from prestigious law schools in advanced countries can offer holders significant advantages in securing employment or important benefits, including obtaining formal residence status in competitive cities like Shanghai. Recently, local governments in advanced regions have encouraged lawyers to pursue degrees from

[10] The procedure aims to "provide professional and technical verification and clarification on the legality, authenticity, and equivalence of foreign (as well as Hong Kong, Macau, and Taiwan) higher education diplomas and degrees with their corresponding qualifications in China" (The Ministry of Education's Service Center for Overseas Study, 2018). The Degree Law, which takes effect on 1 January 2025, provides additional basis for this procedure in Article 44.

internationally top-ranked law schools by providing generous funding, despite an oversupply of domestic law graduates.[11]

Even among those who do not pursue further education in foreign countries, the admiration for and curiosity about legal education in Western countries run high. In 1997, Professor *Fang Liufang* published an article after a one-year research tour at Harvard Law School, in which he highlighted the student-run law journals in the U.S. and expressed doubt that such journals would exist in China (Fang, 1997). To his surprise, students in major Chinese law schools followed the example of their U.S. counterparts. Similar journals soon emerged despite an unfriendly environment towards such student initiatives (Gao, 2020). Another, perhaps more unusual, example can be found in programs that offer foreign legal education to Chinese students in China. Since 2008 the School of Transnational Law at Peking University (Shenzhen) has offered an American Juris Doctor (JD) degree with "a complete American JD curriculum" taught by a faculty mainly composed of U.S. law professors. In this case, not only is foreign legal knowledge imported, but a wholesale implantation of the U.S. JD system is endorsed with government permission.

4. New roles of legal education to buttress national capacity

Although the three layers of foreign elements described above in Section II continue to be coexistent and intertwined, the most recently added dimension is steering China's legal enterprise in a new direction. In the wake of the initial shock of the U.S.–China trade war, China's leadership confronted the harsh reality that the country suffers from a severe capacity deficit in international lawfare or competition for shaping the world order. As a bleak indicator, an internal estimate in 2018 suggested that there were fewer than 400 legal professionals nationwide[12] that could be effectively deployed to defend China's interests in a world order based on Western rules. As always, China's top decision-makers have reacted by directing the bureaucratic and intellectual apparatus to focus on proactively addressing this challenge, as evidenced by the new roles assigned to legal education in light of shifting strategic trends.

4.1. Introduction of elitist training programs

In recent years, the Chinese Government has repeatedly called for measures to address the shortage of international law talent (Che, 2024). A particularly strong catalyst

[11] For example, the Shanghai Pudong Government covers 50% of the tuition costs for individuals pursuing a law degree from a top foreign law school, up to approximately $40,000 per year (Justice Bureau of Pudong New Area Government, 2023). Shenzhen, in Guangdong Province, adopted a similar policy shortly afterwards (Justice Bureau of Shenzhen Municipality, 2023).

[12] To understand how shocking this figure is, it is helpful to compare it with the large number of lawyers in China. By the end of 2018, the number of practicing lawyers reached 423,000. Notably, this sum does not include the legal professionals working inside the government who have passed the bar exam but not licensed to practice law (see Ministry of Justice of China, 2019).

emerged in early 2023 when the "Opinions on Strengthening Legal Education and Legal Theory Research in the New Era" was jointly issued by the CPC and the State Council (General Office of the Central Committee of the Communist Party of China & General Office of the State Council, 2023). This top-level policy document emphasised the urgent need to "improve the structure of disciplines and specializations of foreign-related law" and to "accelerate the training of scarce talents with international perspectives, proficient in international law and country-specific laws". The ministries responsible supplemented the mandate with a series of plans and directives for implementation. These actions clearly signalled a resolve to shift the priority of mass legal education from providing general exposure to foreign law to nurturing a select group of skilful, ready-to-deploy specialists prepared to engage in international challenges.

To achieve this pragmatic goal, a general and traditional focus on elitist education has been swiftly reinforced within the legal community. First, the government identifies educational institutions deemed most capable of producing ideal legal specialists. In January 2024, the Ministry of Education issued a list of 51 entities as "Collaborative Training and Innovation Bases for International Legal Talents" (Xiao, 2024, p. 60). This designation immediately mobilised those schools and incentivised other entities to participate by forming collaboration with the listed institutions. For example, the China International Economic and Trade Arbitration Commission soon announced that it had reached agreements with seven of the listed "bases" to share its rich experience in training high-level international legal talents (China Council for the Promotion of International Trade, 2024).

Internally, educational entities have directed resources towards focused training programs. For instance, Renmin University has established a specialised "Institute of Foreign-Related Legal Governance", prioritising talent training as a key objective. Many other institutions have introduced "experimental classes" at the undergraduate level following a selective elitist model. Typically, a very small number of students (Xiao, 2024, p. 60) are admitted through a highly competitive selection process (Zhang & Wei, 2022, p. 169). Once enrolled in the premium program, these students gain enhanced access to educational resources, including individualised supervision, classes taught by foreign instructors, internship with partnership organisations, and opportunities to earn joint China-foreign degrees. The goal is to expose students not only to substantive foreign law but also to Western teaching methods that emphasise critical and innovative thinking – an area often lacking in China's traditional legal training. For example, it is within the 30-student Foreign-Related Experimental Class at Southwest University of Political Science and Law (SWUPL) that the first student-run English law journal in China was created.

Similar efforts have also been extended to graduate-level programs and beyond. Since 2021, the government created master degree programs in foreign-related lawyering and international arbitration. The Ministry of Education also set up a "Talent Development Program for International Organisations" to provide full funding for outstanding graduate law students to prepare for working in international organisations (Wang, 2023, p. 31). Some institutions, including China University of Political Science and Law, have launched special programs designed to help future practitioners develop skills for addressing

transnational legal issues. Such programs feature specialised curricula and a deeper understanding of country-specific laws.[13] Moreover, the government enlists the top law schools to provide targeted training for lawyers with established international practices. Between 2021 and 2023, three law schools in Beijing, commissioned by the Ministry of Justice, provided intensive foreign-related training to 300 lawyers selected from across China.

It is no exaggeration to say that foreign-focused practical training has been significantly strengthened throughout the "supply chain" of legal professionals since the "Trump shock" hit China in 2018.

4.2. Strengthening of strategically focused research platforms

Chinese law schools have long incorporated research centres. Yet, recent changes have driven these centres to evolve into specialised platforms with narrower focuses and new mandates.

Firstly, scholars are shifting their focus to emerging issues that directly reflect China's current strategic needs. In the past, research centres tended to gravitate towards broad and general studies of prioritised areas. Representative examples include centres focused on China–U.S. law, China–EU law, China–Germany law, law and economics, WTO law, etc. In contrast, recent years have witnessed the establishment of issue-driven research entities, including those dedicated to the Belt and Road Initiative, national security, data governance and artificial intelligence. While the old-style research centres primarily conducted comparative analyses to draw insights from "mature legal systems", the new ones are motivated to address challenges for which foreign wisdom does not offer clear solutions.

Secondly, many of the new research entities have achieved independent status as fully functioning law schools. Traditionally, research centres operated within law schools as loose associations of scholars sharing similar interests for ad hoc academic cooperation. In contrast to this, some of the new research centres have evolved into independent entities with their own separate faculty, student body and organisational structures. For example, the School of Artificial Intelligence and Law at SWUPL, with a faculty of 32, offers a comprehensive educational program ranging from undergraduate to doctorate levels (School of Artificial Intelligence and Law at SWUPL, 2020). The emergence of new research platform law schools has created a novel source of specialised legal education, equipping students with expertise closely aligned with societal needs.

Thirdly, since 2016, the government has strongly advocated for the development of China's "indigenous knowledge system". This new policy has started to temper the pro-Western bias that was once prevalent in legal academia, having a particularly significant impact on the newly established research centres. The "Opinions on Strengthening Legal Education and Legal Theory Research in the New Era" (2023) stresses the need to move beyond scholarly work that "merely conveys Western theories". It calls for the development

[13] Training Program for the Master's Degree in Law (Foreign-Related Lawyering) at the School of Law, China University of Political Science and Law (Trial Version), on file with the author.

of concepts, viewpoints and theories reflecting "the socialist rule of law with Chinese characteristics". To achieve this shift, legal research is expected to draw from two sources of indigenous wisdom: historical experience and current practice. In other words, looking to the West for guidance is no longer sufficient. Legal scholars are now urged to develop theories based on China's own successful practices and to burnish China's image as a global leader rather than a follower.

4.3. The rise of new think tanks

Think tanks emerged in China in the 1980s to offer internal advice directly to top CPC leadership on advancing economic development. Over the subsequent three decades, these think tanks evolved largely independently of educational institutions. They remained enigmatic entities embedded within the party apparatus or other public organs, conducting work out of public view.

To address the emerging challenges in the evolving domestic and international landscapes, the CPC decided in 2012 to "improve the decision-making consultation system" by "utilizing the role of intellectual think tanks" (Hu, 2012). In 2015, the CPC and the State Council jointly issued the "Opinions on Strengthening the Development of New Types of Think Tanks with Chinese Characteristics", formally initiating a national strategy to transform Chinese think tanks through a top-down approach. Subsequently, 25 entities were officially designated as units in development towards becoming "National High-End Think Tanks".[14] A key aspect of the reform is breaking the previously closed system by establishing think tanks in universities and private entities. Among those first 25 government-endorsed think tanks, 12 are based in universities with strong research capabilities in specific fields, including the International Law Institute of Wuhan University. This new policy has prompted governments at all levels to adopt similar measures and promote the expansion of think tanks within universities in their administrative regions.

In this broader context, Chinese law schools have faced pressure to adopt a new role as think tanks. This function is often considered a "political mission" due to the need for expertise to support China's rise. The role of legal scholars had been especially prominent during events such as the U.S.–China trade war and the outbreak of the Russia–Ukraine war. The top leadership have realised that many issues in great power competition are framed as legal rules within intensive lawfare. For instance, do Trump's tariffs on Chinese products violate WTO law? If Western countries attempt to expel Russia from the UN Security Council, how should China respond using legal reasoning? If the U.S. Government forces a sale of TikTok, what countermeasures can China employ based on its domestic law? Neither government officials nor law firms could provide adequate answers, so the Chinese policy-makers have turned their eyes to law schools. In recent

[14] In 2020, another five institutions were added to the list. Now, the total number stands at 29, due to the merger between two of those institutions (see Zhihu, 2020).

years, communication channels have opened up between the government and educational institutions to facilitate direct consultation on legal matters.

The surge in demand for advice on handling legal issues, particularly in the international arena, has transformed the traditional role of legal scholars. Most notably, their expected contributions have shifted from assisting with legislative work to engaging in policy-making and problem-solving. This type of work is more challenging and often requires strategic thinking, which many legal scholars may lack. While evaluating the quality of legislation takes time, the effectiveness of a proposed solution to an urgent issue can be assessed immediately, which makes the latter far more demanding for scholars. Most consultation communications are kept internal and strictly confidential, so scholars do not gain fame in the same way they do through publishing articles or books. Overall, the integration of law schools and think tanks is an irreversible trend, but it has been both difficult and slow.

5. Concluding reflections

The account above highlights a recurring theme in China's efforts to modernise its legal system: How can the state optimise its limited resources to establish a functional legal infrastructure that keeps pace with its remarkable economic development trajectory? In retrospect, China has met the challenge by leveraging the full potential of its state-directed governance model. First, the establishment of a legal system was integrated into the clear goals of national development, guided by a consistently implemented, legislation-driven blueprint. Second, as an effective shortcut, the wholesale adoption of foreign laws and legal theories has long been the dominant approach to establishing the foundational elements of China's legal system. Third, legal research and education have been consciously shaped and tightly aligned with China's national strategy for legal reform.

Seen through this lens, China's recently announced foreign-related rule of law initiative poses daunting challenges for legal educators. For more than four decades, legal academia have been encouraged to view foreign laws favourably, rather than uncovering the defects of imported knowledge or understanding their practical implications in different settings. Legislative imperatives have promoted superficial and myopic research, focusing on information from only a few countries such as the U.S. and major European nations. Lopsided interests in foreign law also tend to keep Chinese scholars detached from domestic practices and the actual problems the Chinese Government faces on the global stage. These issues, combined with inertial thinking, have so far made it difficult for law schools to fulfil their newly designated roles. Despite an increase in training programs, the quality of instruction has hardly improved. Research on cutting-edge issues, such as data law and artificial intelligence, still relies heavily on comparative studies of U.S. and EU theories. Issue-focused research platforms may further disjoint legal education. So far, most scholars have responded coldly to calls for serving as think tank experts.

On the other hand, changes are crucial for China and its legal community. As a world power, China is increasingly handicapped by an inability to have its voice fully heard and

understood internationally. Law is a common language that can transcend cultures, but China still needs to formulate its own legal theory as the basis for international dialogues (Y. Chen, 2023, p. 174). To enhance its soft power, China must reverse its reliance on the simplistic adoption of foreign laws, an approach that has outlived its relevance as a matter of expediency. The new initiative will broaden the horizons for Chinese scholars by demanding more sophisticated research on the theoretical foundations of law and the inspirational articulation of China's own experiences in its journey towards the rule of law. China's legal education will undoubtedly benefit from a truly global perspective and a confident understanding of its indigenous roots. With the translation-oriented low-hanging fruits gone, new opportunities arise for ambitious scholars to make more lasting contributions in academic and educational endeavours. Additionally, with Trump's re-election as President of the U.S., China finds itself confronted with a renewed trade war that demands heightened legal expertise.

At this pivotal juncture, legal education in China again faces formidable hurdles. It remains to be seen how Chinese policymakers and the legal community will overcome these challenges. As the basic theme of resource limitation persists, the outcome will likely depend on how effectively the government can mobilise the energy of legal scholars through new ingenuity.[15]

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[15] For example, a major reason for the slow development of think tanks within educational institutions is that administrators have little incentive to drive faculty to produce such work. If the Ministry of Education were to include criteria in its evaluations of law schools based on the number of reports that receive favourable feedback from policymakers, it would immediately alter the incentive structure and likely lead to rapid growth of think tanks.

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Change Management and Sustainable Growth Rate

Evidence of the Banking Sector in Angola between 2013 and 2023

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Abstract: Effective change management creates value for firms prepared to respond to market challenges robustly and forthrightly to gain competitive advantage. This study identifies the role of effective change management in promoting the capabilities of firms to remain sustainable and resilient amid economic crises. After engaging with the concept of crises and change management, this study analyses the banking sector in Angola with a particular focus on commercial banks. The financial statements of banks were scrutinised over the period between 2013 and 2023 with a view to determine the Sustainable Growth Rate (SGR), which is considered an indicator of sustainability and resilience. Only four banks managed to successfully navigate through the roller-coaster period of crisis with a positive SGR throughout the period of analysis. This case study attempts to bridge theories and praxis to inform both scholars and practitioners. The study concludes by identifying four important contributions and suggesting opportunities for further research and application.

Keywords: Angola, banking sector, change management, economic crises, firms, Sustainable Growth Rate

1. Introduction and background of the study

The business environment has been characterised over centuries by persistent challenges, including volatility, uncertainty, complexity and ambiguity arising from rapid changes in technology (Rao, 2015; Roser, 2023) in particular. There were no differences in the 21st century. Climate change effects, a collapse in global commodity prices, waning trust in multilateralism, the novel coronavirus pandemic and its consequences on the business environment, unrest and wars (WBG, 2020; Dodd, 2023; CNN, 2024) serve as an example of this consistently challenging reality in the 21st century.

Understanding how firms navigate through these challenges and transform them into opportunities is crucial for their survival. Successful navigation through these challenges constitutes a cornerstone of resilience, growth and sustainability. Change management has been identified as a framework for navigation through which people are managed more effectively to accomplish a strategic plan. This (strategic plan) encompasses resilience, growth and sustainability amid crises that impact businesses.

On this basis, the study sought to identify how commercial banks in Angola leveraged change management to achieve resilience, growth and sustainability between 2013 and 2023, with a sustainable growth rate (SGR) as an indicator of achievement. The study begins by describing the nature of the crises faced by firms in recent years. This is followed by a discussion on change management theories and praxis understood as a framework in which people are managed more effectively to accomplish the sustainable growth of firms amid economic crises. Then, the Angolan banking sector is analysed to determine how consistently commercial banks have been maintaining a positive sustainable growth rate (SGR) during the period of analysis.

2. Economic crisis(es) and market challenges

Crises are widely and broadly understood as predictable or unpredictable life events that are perceived as stressful, to the extent that normal coping mechanisms are insufficient. They range from natural disasters, such as the consequences of climate change, to unnatural disasters, resulting from misplaced management values. Whether predictable or unpredictable, natural or unnatural crises turn out to be costly to firms if not controlled or coped effectively.

Regarding economic crises, Michael Boyles (2022), from the Harvard Business School, identified seven ways in which climate change impacts global business, making it difficult for firms to operate in the global market. These include emission instability, which is associated with the tragedy of the commons (Hardin, 1968; Spiliakos, 2019), cross-border pollution, industry-specific challenges, rising insurance costs, psychological stress, exacerbation of poverty and diminished supply. Meanwhile, a collapse in global commodity prices makes commodity producers poorer, following persistent global imbalances (Caballero et al., 2008; Harper, 2023; Look & Curran, 2023). The erosion of trust in bedrock institutions worldwide has significantly affected the business environment (Lipton, 2018; Santos, 2023). The reaction to globalisation, the recurrent global financial

crisis, and technology that deepens worries about the future of work, particularly with the rise of automation, AI, big data, e-commerce and fintech, among others, are considered reasons for the erosion of trust (Lipton, 2018). Finally, the declining production and sales and the closure of firm activities worldwide with serious economic consequences have been the effects of the novel coronavirus pandemic (Stemmler, 2022).

All in all, climate change effects, a collapse in global commodity prices, waning trust in multilateralism, the coronavirus pandemic and its economic consequences, unrest and wars individually and collectively affect macroeconomic indicators such as the price of commodities, inflation rate, exchange rate and gross domestic product (GDP) growth, making it difficult for businesses to operate in such an environment and market (Hegerty, 2016; Roache & Rossi, 2010; Makkonen et al., 2021; Wang et al., 2023). This was the case in Angola from 2014 onward.

To survive, firms must go beyond what transpires to be good. In other words, good is no longer sufficient. They are required to excel as a way to adapt to the challenges of the market (Harrington, 2005; Vora, 2013; Brown, 2014).

3. Change management: Capturing emerging theories and praxis over the last two decades

The novel coronavirus pandemic (WHO, 2024), wars such as the Ukraine war (CNN, 2024), and their consequences on the business environment across the world support such a claim, making it clear that the continuously evolving business environment compels organisations to keep pace and adapt to survive. If effectively managed, change will result in organisational survival and success in the current highly competitive and challenging market.

Some of the well-established models of change management in recent times including Jick's tactical ten-step model for implementing change (Jick, 1991), Kotter's strategic eight-step model for transforming organisations (Kotter, 1996) and General Electric's (GE) seven-step change acceleration process (Garvin, 2000) have suffered criticism from scholars and practitioners (Mento et al., 2010). Chief amongst the criticism of the models is that they are based on personal business and research experience without outside sources to question their values, therefore not providing sufficient measurement metrics to garner universal acceptance (Appelbaum et al., 2012).

A review of the emerging literature on change management shows growing interest from scholars and practitioners in offering alternatives with a view to addressing the apparent gap between theories and praxis, leading to a lack of sustainability and resilience in organisations.

Mabin et al. (2001) and Choe and Herman (2004) explored the need to harness resistance using the theory of constraints (TOC) to assist change management. The TOC (Goldratt & Cox, 1984) views resistance as a positive force, therefore, it is necessary to help manage change by providing practical guidance on situational assessment, among others.

Austin and Currie (2003) are of the opinion that change is related to human dynamics; hence, the Theory of Human Dynamics (THD) may be apropos. These human dynamics determine business performance in response to external and market conditions, which threaten its continued success as an organisation. Hayes (2018) points to the need to lead and manage what he refers to as "the people issues", identifies the role and positive impact of human dynamics in the change management process. Therefore, change management is about managing human dynamics to determine effective business performance. Consistent with the above concept, Thakhathi (2018) goes further and refers to human dynamics as involving 'champions' as actors of change; hence, the Champion Actors' Theory (CAT). These 'champions' catalyse and advance changes within organisations as efficiently and effectively as possible. According to Thakhathi (2018, p. 267), champions are "individuals or collectives of individuals who initiate, facilitate, and/or bring about effective organizational development and change in the pursuit of a given set of goals and objectives".

Furthermore, a study aiming to understand change management practices in private sector organisations within a specific location reveals that organisational change is "a multi-dimensional, multi-directional, and evolutionary process strongly influenced by the contextual and historical aspects of the(a) country" (Gungadeen et al., 2018). For these authors, unless these factors are taken into consideration, it would be challenging to advance change within organisations as efficiently and effectively as possible. Only individuals, through their pervasive behaviour, can facilitate interactions between the above-mentioned factors. Thus, there is a need to consider and associate the 'partisanship' theory (PT) with change management processes.

Integrating elements of the above-mentioned theories, Islam et al. (2020) propose a conceptual framework for ensuring what they call "employee championing behaviour (ECB)" in the change management process. Essentially, the employee championing behaviour model is an integration of Lewin's (1947) change management theory, which identifies organisational change management factors, including transformational leadership, valence, work engagement, trust in leadership and organisational alignment (Islam et al., 2020).

Walter et al. (2011) attribute the following characteristics to the model:

- *Pursuing innovation:* Championing behaviour allows employees to pursue innovative ideas with belief, even putting their position and reputation at risk to participate in the change process.
- *Network building:* The championing employee can create a strong and appropriate network to involve people with the organisational change objective and ensure necessary support.
- *Taking responsibility for the idea:* The championing employee not only pursues the idea of implementing new change or innovation in the organisation but also holds the responsibility to ensure the success of the change project.
- *Persisting under adversity:* Championing employees with their effective level of persistency fight against the resistance and bureaucratic change process.

It has become apparent from the emerging literature that the change management process is cantered on human capabilities, as captured and demonstrated in the Theory of Constraints (TOC), Theory of Human Dynamics (THD), Champion Actors' Theory (CAT), Partisanship Theory (PT) and Employee Championing Behaviour (ECB) theory. However, the question remains of how to leverage human capabilities in an ever evolving and challenging business environment.

4. Change management: Theories and praxis to address the ever evolving challenges

Drawing from Moran and Brightman (2011), change management is understood as "the process of continually renewing an organization's direction, structure, and capabilities to serve the ever-changing needs of external and internal customers". Three fundamental variables are identified in the concept: a) the organisation's direction; b) the organisation's structure; and c) the organisation's capacity to deliver.

4.1. Organisation's direction

The literature suggests that an organisation's direction is the source and custodian of innovation in the organisation (Denning, 2010; Manral, 2011; Ikeda & Marshall, 2016). Through renewed interest in innovation, organisations have set the primary strategy for driving top-line growth (Moore, 2005). In other words, unless innovation is harnessed, businesses do not flourish. In this respect, among its chief tasks, the organisation's direction is required to create a balance between the core and context of the organisation's business. Achieving such a balance is significant for creating and adding value to an organisation. The added value is verified by the organisation's capability to sustain it and be resilient.

On this matter, Leavy explains the difference in the following terms: "Take the example of champion golfer Tiger Woods: most of his revenue came from commercial endorsements (context), but his competitive advantage is rooted in his superior golf skill (core)" (Leavy, 2006). Woods demonstrated his superior golf skills (core) by claiming 15 majors, including the triumph of the 2019 Masters (Scrivener, 2019). This applies to other sportsmen and women including Serena Williams, Usain Bolt, Lionel Messi, Cristiano Ronaldo to mention but a few. Other examples include Sam Walton and Walmart in the United States (Hosmer, 1995) and Shoprite Holdings in Southern Africa (Campbell, 2016).

Significantly, resources must be extracted from the context to repurpose the core because the core creates the context, as seen in Figures 1 and 2 below. Unless the organisation's direction acts according to such principles, it will prove difficult to harness innovation. Hence, there is a need to constantly review, revisit and renew the organisation's direction as a process of change management.

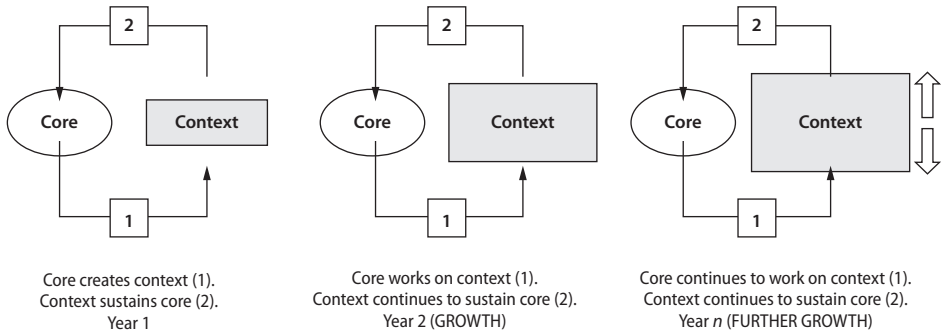

Figure 1.
The positive relationship between the core and the context
Source: Compiled by the authors.

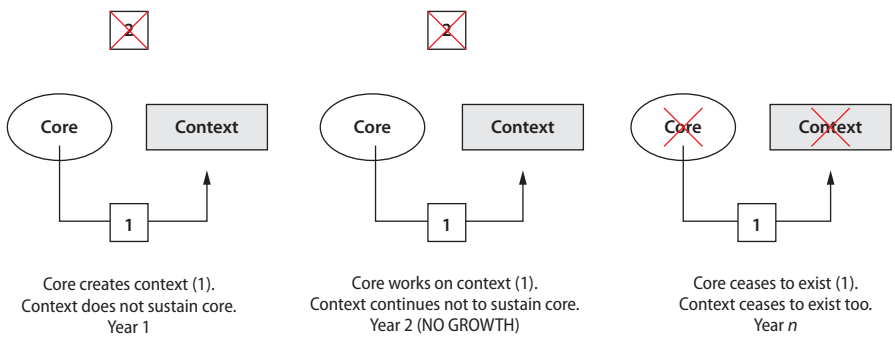

Figure 2.
The negative relationship between the core and the context
Source: Compiled by the authors.

Therefore, an organisation that constantly reviews, revisits and renews its direction is more successful in establishing a change management process to harness innovation than an organisation that does not. Furthermore, an organisation's direction that demonstrates awareness and strives to create a balance between the core and context of its business creates and adds value to its capabilities to sustain itself and be resilient.

4.2. Organisation's structure

It is widely acknowledged that a rational organisational structure provides support for change management. An organisation's structure is regarded by a considerable number of scholars as a key dimension of the organisational context, with a huge impact on the organisation's readiness for change (Benzer et al., 2017).

Gupta (2015) claims that unless changes in strategies are continuous, it would prove difficult for organisations to sustain in the long run. Crucially, "a change in strategy brings about tremendous changes in an organization's structure" argues Gupta (2015, p. 372). On the one hand, van der Voet (2014) underlines on this basis the crucial role of transformational leadership behaviour of direct supervisors in emergent processes of change within a non-bureaucratic context. On the other hand, Benzer et al. (2017) proposed organisational structural dimensions of differentiation and integration to impact readiness for change at the individual level. Integrating both views, it transpires that recognising readiness for change as an individual phenomenon and providing support to achieve it in the form of transformational leadership behaviour of direct supervision will successfully help manage emergent processes of change for an organisation.

4.3. Organisation's capacity to deliver

Ates and Bititci (2011, p. 5601) contend that "for organisations to be more sustainable and resilient, the delivery of innovative responses to the market through continuous change and improvement is necessary". For the authors, sustainability and resilience in organisations are enhanced by what they refer to as the ability to embrace organisational and people dimensions, as well as the operational aspects of change management.

An organisation's capacity to deliver underpins its sustainability and resilience, particularly in a turbulent environment. Unless continuous change occurs to improve aspects of organisational and people dimensions, building sustainability and creating resilience will be challenging.

While aspects of people dimensions refer to "the development and maturation of individuals within organizations not only as a means of self-fulfilment but also as a primary component of meeting the larger goals of the organization", aspects of organisational dimensions imply "the maturation of the organization as a 'competent' entity capable of providing enhanced opportunities for the development of individual potential as well as stakeholder and client satisfaction" (Jurie, 2000, p. 264). On this basis, organisations that embrace change and deal with it effectively, continuously mature as competent entities, ready to enhance opportunities for the development and maturation of individual potential, as well as stakeholder and client satisfaction better than those who do not. In addition, organisations that demonstrate awareness and strive to address both organisational and people dimensions are more likely to deal with the nature of change more effectively than those that do not.

It has become evident that a visionary and dynamic organisation's direction promotes and establishes a well-functioning structure to support the organisation's capacity to deliver consistent positive results. This is the cornerstone of effective change management to achieve resilience and sustainability.

5. An overview of the financial system in Angola in the context of Change Management

It is widely acknowledged that the banking sector, as part of the financial system, plays a crucial role in the modern economy having as primary function to safeguard depositor's assets while making loans to individuals and businesses (Velayudham, 1989; Beddies, 2005; Puatwoe & Piabuo, 2017; Nguyen, 2022). While advanced economies boast of an established and well-functioning banking sector that has a greater impact on the economy, many developing economies are still trying to find their feet. Angola is one of them.

Historical facts suggest that the financial system in Angola has undergone various phases of transformation over the last four decades. The transformation process aimed to bolster the capacity of the system to face and provide an adequate response to the challenges of the time in the sector. According to ABANC (s. a.), until gaining its independence from Portugal in 1975, Banco de Angola (Bank of Angola) was the sole issuing and commercial bank in the country, working with additional five commercial banks: Banco Comercial de Angola (BCA), Banco de Crédito Comercial e Industrial (BCCI), Banco Totta Standard de Angola (BTSA), Banco Pinto & Sotto Mayor (BPSM) and Banco Inter Unido (BIU), as well as four credit institutions, namely Instituto de Crédito de Angola (ICRA), Banco de Fomento Nacional (BFN), Caixa de Crédito Agro-Pecuário (CCAP) and Montepio de Angola.

The first set of changes occurred a year later, in 1976, after national independence, characterised by the creation of Banco Nacional de Angola (BNA) under Law No. 69/76 of 5 November and Banco Popular de Angola (BPA) under Law No. 70/76 of 5 November. Banking activities could only be practiced exclusively by state banks under Law No. 4/78 of 25 February; all the private commercial banks mentioned above were extinct except from Banco Comercial de Angola that had been nationalised. This is an established system that underlines the role of the BNA as that of a central bank, commercial bank, issuing bank and treasury, while the BPA was reduced to a simple private savings bank without a major role as far as financial intermediation activities are concerned.

The second set of changes occurred 15 years later, in 1991. Under Laws No. 4/91 (Organic Law of the National Bank of Angola) and No. 5/91 (Law on Financial Institutions), 20 April. These changes shifted the legal and economic framework of the banking system in Angola with the adoption of a two-tier banking system. The first tier is occupied by the BNA, taking on the role of the central bank, issuing bank, licensing body and supervisor of the financial system. The second tier comprises commercial and investment banks. Under this legal framework, the BNA began to pull from commercial banking activities.

Subsequently, sets of changes occurred. Law No. 6/97 of 11 July (Organic Law of the National Bank of Angola) repealed Law No. 4/91, which in turn was revoked by the new Financial Institutions Law in 1999. Law No. 1/99 of 23 April came into force, regulating the activity of financial institutions and giving the Central Bank greater powers. Six years later, on 30 September 2005, Law No. 13/05, the Financial Institutions Law came into force, which regulates the process of establishment, exercise of activity, supervision and reorganisation of financial institutions. This was also revoked by the new piece of

legislation, Law No. 12/2015 of 17 June, which brings some innovations compared to the previous regime to provide greater security and transparency for financial institutions operating in Angola. It was short-lived and was revoked in 2021 by the current Law No. 14/21 of 19 May General Regime for Financial Institutions.

Under the current law, financial institutions in Angola are categorised into three types: banking financial institutions, which are banks in general; non-banking financial institutions; and others that are similar as deemed by law. Banking financial institutions that are subject to BNA supervision include commercial banks, investment banks, development banks, mutual agricultural credit banks and others that are similar to those deemed by law.

6. Methodological approach

This study focused on commercial banks. Based on the results of their financial reports, with a focus on the Sustainable Growth Rate (SGR), this study aims to identify how change management promotes capabilities that help them achieve resilience and sustainability. For Platt et al. (1995, p. 147) "sustainable growth rate defines the rate at which a company's sales and assets can grow if the company sells no new equity and wishes to maintain its capital structure". In this respect, considering banks' total assets, total liabilities, net income and dividends paid, SGR was calculated using the following formula:

$$SGR = Return\ on\ Equity\ (ROE) \times Retention\ Rate\ (RR)$$

Where:

- Dividend Payout Ratio (DPR) = Dividends Paid (DP) ÷ Net Income (NI) (1)
- RR = 1 – DPR (2)
- Equity = Total Assets (TA) – Total Liabilities (TL) (3)
- ROE = NI ÷ Shareholder's Equity (SHE) (4)

On this basis, the selection process of banks was determined using the following criteria:

1. Identify all the banks that have been operating legally in Angola.

Table 1.
Authorised banks in Angola

#	The banks' names	Est.
1	Banco de Poupança e Crédito (BPC) former Banco Comercial de Angola SARL (BCA)	1956
2	Banco Comercial Angolano (BCA)	1957
3	Banco de Fomento Angolano (BFA)	1990
4	Banco Comercial e Indústria (BCI)	1991
5	Banco Caixa Geral Angola (BCGA)	1993
6	Banco Angolano de Investimento (BAI)	1996

#	The banks' names	Est.
7	Banco Económico (BE) former Espírito Santo (BES)	2001
8	Banco Sol (BSOL)	2001
9	Banco Keve (BKEVE)	2003
10	Banco BIC (BIC)	2005
11	Banco de Negócios Internacionais (BNI)	2005
12	Banco de Desenvolvimento de Angola (BDA)	2006
13	Banco Millenium Atlântico (BMA)	2006
14	Banco VTB África (VTB)	2006
15	Access Bank (ACCESS) former Finibanco (FNB)	2007
16	Banco Comercial do Huambo (BCH)	2010
17	Standard Bank de Angola (SBA)	2010
18	Standard Chartered de Angola (SCBA)	2010
19	Banco Valor (BVB)	2011
20	Banco de Investimento Rural (BIR)	2014
21	Banco YETU (YETU)	2015
22	Banco de Crédito do Sul (BCS)	2015
23	Banco da China Limitado (BOCLB)	2017

Source: BNA, 2025

2. Identify commercial banks that published their financial results between 2012 and 2022 on their websites for public access.

Table 2.
Commercial banks with 11 years (2013–2023) financial reports published on their websites

#	The banks' Names	Est.
1	Banco Comercial Angolano (BCA)	1957
2	Banco de Fomento Angolano (BFA)	1990
3	Banco Comercial e Indústria (BCI)	1991
4	Banco Caixa Geral Angola (BCGA)	1993
5	Banco Angolano de Investimento (BAI)	1996
6	Banco Sol (BSOL)	2001
7	Banco BIC (BIC)	2005
8	Banco de Negócios Internacionais (BNI)	2005
9	Banco VTB África (VTB)	2006
10	Access Bank (ACCESS) former Finibanco (FNB) and Standard Chartered Angola	2007
11	Banco Comercial do Huambo (BCH)	2010
12	Banco Valor (BVB)	2011

Source: BCA, 2025; BFA, 2025; BCI, 2025; BCGA, 2025; BAI, 2025; BSOL, 2025; BIC, 2025; BNI, 2025; VTB, 2025; ACCESS, 2025; BCH, 2025; BCH, 2025; BVB, 2025

3. Identify banks whose financial reports–statements have no missing information.

Table 3.
Commercial banks whose financial reports have no missing information

#	The banks' names	Est.
1	Banco de Fomento Angolano (BFA)	1990
2	Banco Caixa Geral Angola (BCGA)	1993
3	Banco Angolano de Investimento (BAI)	1996
4	Banco BIC (BIC)	2005

Source: BFA, 2025; BCGA, 2025; BAI, 2025; BIC, 2025

4. Apply the formula to determine the SGR for each of the identified bank during the analysis period.

7. Data analysis and discussion

7.1. Banco de Fomento Angolano (BFA)

Table 4.
BFA data for SGR

Year	Net income (in thousands of AOA)	Equity (in thousands of AOA)	ROE	Dividends paid (in thousands of AOA)	DPR	RR	SGR
2013	23,898,617.00	84,640,479.00	28.24	(15,765,114.00)	−0.66	1.66	46.86
2014	31,796,097.00	104,487,267.00	30.43	(11,976,173.00)	−0.38	1.38	41.89
2015	37,866,257.00	126,455,476.00	29.94	(11,508,089.00)	−0.30	1.30	39.04
2016	61,712,892.00	173,021,865.00	35.67	(13,732,703.00)	−0.22	1.22	43.60
2017	69,085,024.00	217,421,732.00	31.77	(20,844,821.00)	−0.30	1.30	41.36
2018	174,258,743.00	361,908,520.00	48.15	(38,270,844.00)	−0.22	1.22	58.72
2019	119,940,192.00	462,205,902.00	25.95	(35,328,956.00)	−0.29	1.29	33.59
2020	89,848,596.00	497,977,323.00	18.04	(54,077,174.00)	−0.60	1.60	28.90
2021	156,471,732.00	422,070,179.00	37.07	(136,078,876.00)	−0.87	1.87	69.31
2022	140,895,497.00	485,988,853.00	28.99	(126,385,866.00)	−0.90	1.90	55.00
2023	167,923,953.00	569,640,404.00	29.48	(132,423,132.00)	−0.79	1.79	52.73

Source: BFA, 2025

The SGR in Table 4 suggests that the bank has not been struggling over the years to establish positive and stable rates as far as sustainable growth is concerned.

7.2. Banco Caixa Geral Angola (BCGA)

Table 5.
BCGA data for SGR

Year	Net income (in thousands of AOA)	Equity (in thousands of AOA)	ROE	Dividends paid (in thousands of AOA)	DPR	RR	SGR
2013	6,677,308.00	33,291,061.00	20.06	(2,747,032.00)	–0.41	1.41	28.31
2014	9,162,854.00	39,186,237.00	23.38	(3,268,982.00)	–0.36	1.36	31.73
2015	9,581,459.00	44,303,906.00	21.63	(4,465,098.00)	–0.47	1.47	31.71
2016	12,338,288.00	51,373,852.00	24.02	(3,570,360.00)	–0.29	1.29	30.97
2017	7,656,296.00	52,991,236.00	14.45	(3,279,628.00)	–0.43	1.43	20.64
2018	20,548,878.00	65,292,616.00	31.47	(2,029,607.00)	–0.10	1.10	34.58
2019	21,383,047.00	76,606,714.00	27.91	(17,758,832.00)	–0.83	1.83	51.09
2020	12,492,828.00	78,429,027.00	15.93	(10,691,523.00)	–0.86	1.86	29.56
2021	34,416,471.00	102,183,292.00	33.68	(10,700,001.00)	–0.31	1.31	44.15
2022	34,480,488.00	119,520,221.00	28.85	(17,208,235.00)	–0.50	1.50	43.25
2023	36,641,217.00	139,024,481.00	26.36	(17,240,243.00)	–0.47	1.47	38.76

Source: BCGA, 2025

Similarly to the BFA bank, the SGR in Table 5 above suggests that the BCGA bank did not struggle at all over the years to establish positive and stable rates as far as sustainable growth is concerned.

7.3. Banco BAI

Table 6.
BAI data for SGR

Year	Net income (in thousands of AOA)	Equity (in thousands of AOA)	ROE	Dividends paid (in thousands of AOA)	DPR	RR	SGR
2013	12,081,900.00	104 429 987.00	11.57	(3,020,475.00)	–0.25	1.25	14.46
2014	12,848,873.00	113 654 468.00	11.31	(3,854,662.00)	–0.30	1.30	14.70
2015	10,750,397.00	125 157 518.00	8.59	(4,607,313.00)	–0.43	1.43	12.27
2016	49,740,872.80	258 813 147.00	19.22	(14,922,262.00)	–0.30	1.30	24.98
2017	54,704,352.69	312 587 103.00	17.50	(21,881,741.00)	–0.40	1.40	24.50
2018	50,065,689.56	199 209 392.00	25.13	(15,019,707.00)	–0.30	1.30	32.67
2019	118,733,122.85	298 165 973.00	39.82	(23,746,624.97)	–0.20	1.20	47.79
2020	28,671,931.45	291 370 584.00	9.84	(11,468,773.18)	–0.40	1.40	13.78
2021	141,541,498.39	418 400 221.00	33.83	(49,539,524.00)	–0.35	1.35	45.67
2022	100,228,319.80	467 733 860.00	21.43	(40,091,328.92)	–0.40	1.40	30.00
2023	199,573,709.94	768 582 240.00	25.97	(79,829,484.98)	–0.40	1.40	36.35

Source: BAI, 2025

Similarly, the BAI bank managed to produce sustained growth rates during the period in analysis as demonstrated in Table 6 above.

7.4. Banco BIC

Table 7.
BIC data for SGR

Year	Net income (in thousands of AOA)	Equity (in thousands of AOA)	ROE	Dividends Paid (in thousands of AOA)	DPR	RR	SGR
2013	19,646,000.00	86,762,864.00	22.64	(6,442,374.00)	−0.33	1.33	30.07
2014	20,536,519.00	91,055,306.00	22.55	(15,716,817.00)	−0.77	1.77	39.81
2015	27,656,129.00	102,721,472.00	26.92	(16,429,215.00)	−0.59	1.59	42.92
2016	33,662,750.00	112,968,927.00	29.80	(22,124,903.00)	−0.66	1.66	49.38
2017	34,253,304.00	118,441,915.00	28.92	(26,930,200.00)	−0.79	1.79	51.66
2018	51,004,268.00	234,000,044.00	21.80	(27,402,643.00)	−0.54	1.54	33.51
2019	70,657,221.00	363,718,784.00	19.43	(40,803,414.00)	−0.58	1.58	30.64
2020	29,325,456.00	440,903,720.00	6.65	(17,962,267.00)	−0.61	1.61	10.73
2021	50,126,447.00	457,055,941.00	10.97	(3,784,047.00)	−0.08	1.08	11.80
2022	55,041,272.00	398,024,760.00	13.83	(7,424,980.00)	−0.13	1.13	15.69
2023	58,547,412.00	466,693,483.00	12.55	(11,850,000.00)	−0.20	1.20	15.08

Source: BIC, 2025

The SGR in Table 7 suggests that the bank did not struggle at all over the years in analysis to establish positive and stable rates as far as sustainable growth is concerned.

8. Study findings and discussion

The main findings of the study reveal that only four banks (BFA, BCGA, BAI and BIC) met the selection criteria of the study and the requirements to calculate SGR during the analysis period.

Crucially, Dividend Payouts Ratio (DPR) are conventionally non-negative, representing cash distributed to shareholders. In this case, the presence of negative DPR values implies that these dividends are likely adjustments such as retained earnings or provisions against losses. Hence, negative DPR values impact the interpretation of the retention rate, often leading to retention rates exceeding 1 as calculations in the tables above demonstrated.

Retention rates greater than 1 are mathematically valid but may be counterintuitive, as they suggest reinvestment beyond current profits. Importantly, these rates reflect the financial strategy of banks regarding reinvesting retained earnings or leveraging reserves to maintain growth. Such practices can indicate strong financial resilience during crises but may also signal increased reliance on internal funding or adjustments.

The period under analysis involves crises such as the dramatic drop in oil prices in mid-2014, which substantially reduced tax revenues and exports, significantly affecting the country's GDP, while inflation increased sharply (CMI, 2016) making it difficult for businesses to operate. The banking sector was exposed to the worst-case scenario as far as risks were concerned. Such risks are associated with having to fulfil the primary function of safeguarding depositors' assets while making loans to individuals and businesses (Velayudham, 1989; Beddies, 2005; Puatwoe & Piabuo, 2017; Nguyen, 2022).

In a resource-dependent economy like Angola, the performance of banks, while putting emphasis on identifying and alleviating constraints, becomes particularly relevant. For the four banks, addressing capital availability constraints during the period of crisis enabled them to achieve and maintain positive SGR. In other words, the success to navigate through such a period are evidence that their direction (leadership), structure and the capacity to deliver were not left untouched during the period. This suggests that their actions are aligned with theories discussed earlier explaining the strategies or behaviours that allowed them to achieve positive SGR.

Notably, the Theory of Constraints (TOC) helped the banks identify and address key bottlenecks such as liquidity shortages or operational inefficiencies during economic downturns. Here, banks optimised operational efficiency by prioritising key revenue-generating activities or streamlining credit issuance processes to adapt to the challenges posed by falling oil prices and high inflation. By focusing on resolving liquidity constraints and reallocating resources to core areas, banks were able to maintain operational stability despite external shocks.

The Employee Championing Behaviour (ECB) theory spurred banks efforts to motivate and empower employees to drive innovation and resilience in a volatile environment. Here, leadership within banks may have cultivated employee-driven initiatives, such as developing new financial products or implementing customer-focused solutions to sustain growth. The ECB theory highlights the importance of employee-driven innovation during periods of uncertainty. During this period, these banks leveraged this approach by empowering employees to develop digital banking solutions, ensuring continued service delivery amid lockdown restrictions during Covid–19.

The results of the study align the leadership and human resource strategies of these four banks also with theories of Champion Actors' Theory (CAT) and Theory of Human Dynamics (THD). The CAT underscores the role of 'change champions' in driving organisational resilience. The leadership of these banks played a pivotal role in rallying employees to embrace operational reforms, enabling the banks sustain resilience amid economic crises. Therefore, leadership decisions and/or cultural shifts might have contributed to achieving and sustaining resilience.

All in all, within broader implications, these findings can inform banking and financial resilience strategies in other developing and resource-dependent economies.

9. Contributions of the paper

In exploring the concept of change management in the context of crises and using commercial banks in Angola as case studies, this study makes four significant contributions for practitioners:

1. It clarifies and integrates the diverse theories and praxis that emerged over the last two decades, which often conflict with the understanding of change management within a corporate context.
2. It affirms that, after reviewing the literature within the business context, human capabilities are the drivers behind change management.
3. This paper emphasises the value that change management, having human capabilities as the driver, creates in establishing the organisation's capabilities to sustain itself and be resilient.
4. It determined the SGR of each bank to analyse how effective they have been in sustaining themselves and are resilient amid economic crises during the period of analysis.

10. Conclusion

The capabilities of firms to face the challenges presented by the market and evolving business environment depend upon their capacity to identify the role of human capabilities as an asset. Exploring such an asset to its full potential will help integrate and utilise the required qualities.

Effective change management contributes by helping corporates shape and reshape continuously by focusing on the "organisation's direction, structure, and capabilities to serve the ever-changing needs of external and internal customers" (Moran & Brightman, 2001).

Unless change management, with human capabilities as the driver, takes place effectively, it will prove difficult for firms to earn respect, admiration and followership that enable them to be in a leading position towards sustaining a competitive advantage.

In case of commercial banks in Angola, only four banks, BFA, BCGA, BAI and BIC, proved effective in sustaining themselves amid the roller-coaster of economic crises during the period in analysis. They managed to leverage change management, with human capabilities as the driver to create capabilities to sustain themselves and be resilient.

Addressing gaps for future research, it is important to: 1. Investigate how ECB principles can be institutionalised in Angola to build long-term resilience; 2. Examine the applicability of TOC in managing systemic constraints within Angola's financial sector.

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Value-Informed Public Service
Reframing Civic Professionalism for the 21st Century

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Abstract: This paper introduces the concept of Value-Informed Public Service, emphasising the critical interrelationship between public service values, professionalism and information literacy in 21st century public administration. Using a conceptual analytical methodology, the study explores how public administrators operate in complex environments characterised by competing values and discretionary decision-making. Key findings highlight that effective public service requires integrating individual value orientations, professional standards and information literacy to guide context-specific decision-making while maintaining legitimacy with citizens and colleagues. The paper recommends institutionalising this integrated framework within public affairs education to prepare competent civic professionals. The originality of this study lies in bridging the theoretical and practical elements of these often separately acknowledged concepts, providing an enduring framework that advances both the scholarship and practice of public administration.

Keywords: public service, information literacy, professionalism, public service values

1. Introduction

This paper introduces the concept of Value-Informed Public Service and calls attention to the critical relationship between public service values, professionalism and information literacy in the study and practice of 21st century public administration. While each of these concepts are acknowledged separately in public affairs and administration education programs, their interrelated nature has been overlooked. Given the complexity of the current administrative environment and the range of public service values, it is critical that public service professionals can function in a variety of political, economic and cultural situations. This requires a strong theoretical foundation and a broad practice-based skill set.

Public administration is a field characterised by competing values and the use of discretion. Public professionals need to be able to consider context-specific information within a public service framework while simultaneously using professional standards to guide their decision-making approach. Thus, the preparation of competent future public administrators is contingent on the acknowledgement and elevation of the relationship between public service values, professionalism and information literacy. Value-Informed Public Service bridges the theoretical and practical elements of a neglected aspect of public administration and provides an enduring framework for the engagement and decision-making processes of public professionals.

First the nexus of, and interrelationship between public service values, professionalism and information literacy is introduced and the centrality of this connection to both public service professionals and public administration education is discussed. The rationale for emphasising the mutual dependencies and linking the concepts of public service values, professionalism and information literacy and their related competencies are also addressed by highlighting the role that each play in the preparation of public service professionals.

2. Research question and research objectives

This inquiry is guided by the question: How does the integration of public service values, professionalism and information literacy within a Value-Informed Public Service framework enhance the preparation and decision-making effectiveness of 21st century civic professionals in public administration? Specifically, this paper seeks to:

1. Analyse the interrelationship between public service values, professionalism and information literacy in the context of contemporary public administration.
2. Evaluate how Value-Informed Public Service supports public administrators in navigating complex and competing values in diverse political, economic and cultural environments.
3. Assess the role of information literacy in enabling public service professionals to access, evaluate and use information effectively within a public service framework.
4. Examine the implications of adopting a Value-Informed Public Service approach on public administration education and the development of competencies aligned with NASPAA accreditation standards.
5. Propose recommendations for integrating Value-Informed Public Service principles into public affairs and administration curricula to better prepare competent civic professionals.

3. Methodology

This conceptual research employs a qualitative analytical approach to explore and clarify the interrelationship among public service values, professionalism and information literacy within the framework of Value-Informed Public Service. The methodology

involves a systematic subject-matter analysis of existing literature, theoretical constructs and policy frameworks relevant to 21st century public administration.

Specifically, the study conducts a comprehensive review and synthesis of scholarly articles, accreditation standards, professional codes of ethics, and historical perspectives on public administration values and professionalism. This literature-based analysis facilitates the identification of key themes, conceptual linkages and the evolution of public service paradigms, such as Old Public Administration, New Public Management and New Public Service.

Additionally, the research incorporates a comparative study of various conceptualisations of public values and professional competencies, drawing on the works of leading scholars and institutional standards (e.g. NASPAA, ASPA). This comparative analysis highlights the dynamic tensions and coping mechanisms public administrators employ when navigating competing values and complex administrative contexts. Through this qualitative and comparative analytical framework, the research develops an integrated conceptual model that bridges theory and practice, emphasising the necessity of a value-informed, professional and information literate approach for contemporary public service professionals.

4. Value-Informed Public Service defined

Twenty-first century public administrators work in an environment characterised by varying administrative contexts, competing public service values and dynamic information needs. Decision-making in such a complex environment requires that public service professionals exercise discretion. Choices, however, are not arbitrary. They are informed by the public administrator's individual public service orientation, professional education and background, and degree of information literacy (Turner, 2015). The intersection of these factors can lead to different, yet legitimate, outcomes.

Public service values orientation: As members of a dynamic information rich society, public administrators must use their own life experiences, education and professional training to navigate the contextual forces and paradoxes associated with public service (Molina & McKeown, 2012, p. 384).

Professionalism: Education and background: To be effective in their work, public administrators must establish themselves as legitimate public servants by demonstrating personal credibility, professional competence, respect for democratic principles, and by maintaining positive relationships with citizens and colleagues (Molina & McKeown, 2012, p. 387).

Information literacy: Central to their ability to maintain legitimacy and serve effectively, public administrators must also be able to ascertain their information needs relative to a particular situation, access and evaluate the necessary information, and use it to achieve their goal (ACRL, 2005).

Value-Informed Public Service incorporates a public service orientation, professional standards and information literate approach to decision-making so that public administrators can be responsive to a variety of contexts while maintaining legitimacy with both citizens and colleagues.

5. Public values vs. public service values

> *Public service values [...] include pursuing the public interest with accountability and transparency; serving professionally with competence, efficiency, and objectivity; acting ethically so as to uphold the public trust; and demonstrating respect, equity, and fairness in dealings with citizens and fellow public servants* (Network of Schools of Public Policy, Affairs, and Administration, 2009, p. 2).

Public values can be defined as, "those values providing normative consensus about the rights, benefits, and prerogatives to which citizens should (and should not) be entitled; the obligations of citizens to society, the state, and one another; and the principles on which governments and policies should be based" (Bozeman, 2012, p. 13), whereas *public service values* are "the subset of social, professional, ethical, and other values that are related directly to a person's role as a public servant (i.e. reasonable, legitimate and relevant) in carrying out the functions of a given position in the public sector" (Witesman & Walters, 2014, p. 377). Similarly, Rokeach (1973, p. 5) defines public service values as the "enduring beliefs that influence the choices we make among available means and ends". This distinction is important. Public professionals use discretion informed by their particular value orientation in their capacity as public administrators. Public service values inform the actions of individual public servants pursuing the realisation of public values.

Public values are generally divided into four categories: ethical, democratic, professional and people-oriented (Kernaghan, 2003). Some values, though, fall into multiple categories. For example, accountability is considered an ethical as well as a democratic value. Excellence is classed as ethical and professional. Because the categories are not mutually exclusive, value conflict within and between the categories is inevitable. As a result, public administrators are often faced with a choice between multiple actions, each justified by different public service values. Witesman and Walters (2014) suggest that while such universal public values inform the perspective of individual public servants, each individual has a unique public service orientation. Personal value orientations are influenced by a number of factors, including an individual's life experiences, educational background and interpretation of professional standards.

As the prevailing paradigm of public management, New Public Service has had a significant impact on the public service orientation of contemporary public administrators. In contrast to New Public Management, Denhardt and Denhardt (2000) have successfully argued that public servants should serve rather than steer. The primary role of the public servant, as defined by the seven principles of the New Public Service paradigm, is "to help citizens articulate and meet their shared interests" (Denhardt & Denhardt, 2000, p. 549).

When the Network of Schools of Public Policy, Affairs, and Administration (NASPAA) adopted its revised accreditation standards in 2009, it effectively recognised public service values as the central and distinctive characteristic of public administration and, subsequently, the foundation of the public administration curriculum (Molina & McKeown, 2012). In order for future public service professionals, as well as current practitioners, to act as stewards of New Public Service, they must develop an inward self-awareness of their own value orientations and the capacity to deal with competing, sometimes contradictory, values in a variety of contexts.

6. Competing values: A critical examination

Public service values have long been recognised as the cornerstone of public administration education and practice. However, the broad acceptance of these values often masks the intricate and persistent dilemmas faced by public administrators when multiple, and sometimes conflicting, values converge in decision-making contexts. As Lipsky (1980) famously identified, public service professionals encounter value conflicts primarily in three scenarios: when one value conflicts with a higher goal, when values are in direct opposition, and when values are commensurable but still difficult to balance.

While this framework provides a useful starting point, it arguably oversimplifies the complex reality on the ground. For instance, the tension between efficiency and effectiveness is frequently presented as a binary choice. Yet, this dichotomy neglects the nuanced ways in which these values interact within organisational cultures and political environments. Decisions that prioritise individual responsiveness may undermine broader community interests, but such tradeoffs are rarely straightforward. Moreover, conflicts between output values (such as efficiency and effectiveness) and process values (such as accountability, transparency and citizen engagement) highlight a deeper normative debate about what constitutes good governance.

A critical analysis of governance paradigms reveals that competing values are not merely operational challenges but reflections of broader ideological perspectives. De Graaf et al. (2014) describe three dominant conceptions of good governance, namely, performance-oriented, responsibility-focused and responsiveness-driven, each privileging different values. This raises important questions about whose values are prioritised and how these priorities shape policy outcomes and public trust. The public administrator's role, therefore, is not simply to navigate conflicts but to critically examine the underlying power dynamics and normative assumptions embedded in these value choices.

Public administrators have developed various coping strategies to manage value conflicts, ranging from organisationally embedded value assignments to incremental prioritisation of certain values. While adaptive, these strategies may inadvertently solidify particular value hierarchies, potentially marginalising less dominant but equally important values such as social equity or citizen participation. The creative attempts to synthesise conflicting values into innovative policy solutions are commendable, yet they also demand a high level of self-awareness and ethical reflection – qualities that are not guaranteed by technical competence alone.

The central questions posed by Jørgensen and Bozeman (2007) – regarding the existence of a value hierarchy, the compatibility of public values and approaches to conflict resolution – underscore the need for a deliberate and transparent discourse. Without such discourse, public administration risks perpetuating confusion and fragmentation, undermining democratic governance and legitimacy.

Furthermore, historical analysis by Kaufman (1956) illustrates that the dominance of certain public values tends to be cyclical, shaped by shifting social, political and economic contexts. His identification of representativeness, neutral competence and executive leadership as core but competing values remains deeply relevant. However, the accelerated pace of societal change and the growing complexity of public problems today exacerbate tensions among these values, challenging administrators to balance tradition with innovation.

Critically, Kaufman's insight that incompatible commitments to dominant values can produce conceptual gulfs warns against rigid adherence to any single value framework. Instead, public administration must embrace value pluralism and the attendant ambiguity it brings. This requires fostering a professional culture that not only acknowledges conflicting values but actively engages with them through reflective practice and continuous learning.

In conclusion, while competing values present an enduring challenge within public administration, they also offer an opportunity to deepen the profession's normative foundation. By critically analysing value conflicts and embracing pluralism, public administrators can cultivate more nuanced, equitable and legitimate responses to the complex demands of contemporary governance.

7. Professionalism in public administration: A broader conceptualisation

"The core mission of those offering the MPA degree must be to develop the capacity of graduates to exercise delegated public authority wisely, effectively, and lawfully" (Henry et al., 2009, p. 122). This quote from a report of the Task Force on Educating for Excellence in the Master of Public Administration Degree of the American Society for Public Administration (ASPA) succinctly conveys the responsibility of public service professionals to demonstrate competency and act professionally. Commitment to the public interest and democratic governance is not enough. While it is true that public administrators exercise discretion in coping with value conflicts, they also face a common set of challenges as public servants. In these situations, it is important that public service professionals can draw on their knowledge of broad public values and standards of practice to inform their actions (Svara, 2009).

Public administration is a diverse and highly specialised profession. Regardless of their particular public service orientation and circumstances, however, public professionals need a firm grasp of the conceptual and procedural knowledge required for any given situation (Turner, 2015). Globalisation, rapid technological advancements and the privatisation of government services require that public service professionals can work across

sectoral and municipal boundaries. The ability to interact with citizens as peers and apply the principles of New Public Service in this dynamic environment is critical.

Professionalism in public administration concerns the universal skills required of effective public administrators. According to Perry (1989), effectiveness in public administration is "doing the job right, doing the job well, and overcoming impediments". To achieve effectiveness, public administrators must be results-oriented, have the technical skill to engage in and manage specialised activities required by a particular circumstance, and understand how particular circumstances relate to the broader environment. They must possess the interpersonal skills to facilitate collaborative activity and span organisational boundaries. They need to demonstrate openness to democratic processes in a way that is consistent with the principles of New Public Service and accepted ethical practices. Most importantly, proficiency in these areas will help public administrators recognise and appreciate the tradeoffs posed by conflicting values and understand how their actions can contribute to stability within the public sector (Perry, 1989).

While this framing aligns with long-standing views within the field that professionalism is foundational to ensuring the legitimacy and efficacy of public administration, a critical examination reveals several nuanced challenges and tensions inherent in operationalising professionalism in contemporary public service. The proposed framework highlights the increasing complexity of the administrative environment due to globalisation, technological advancements and intersectoral governance, which demands a broadened skill set beyond traditional bureaucratic functions. While this expansion of competencies is necessary, it raises questions about the coherence and boundaries of professionalism itself. As public administrators navigate a more fluid and often ambiguous landscape, the traditional markers of professionalism, namely, technical expertise, adherence to codes of conduct and results-orientation, may be insufficient or even conflicting. For example, adhering strictly to professional standards could constrain innovative problem-solving needed in dynamic contexts, suggesting a potential tension between professionalism and administrative discretion.

Second, Perry's (1989) definition of effectiveness as "doing the job right, doing the job well, and overcoming impediments" invites scrutiny regarding whose definition of "the job" and "effectiveness" is privileged. The competing public values discussed previously, such as efficiency versus equity or accountability versus responsiveness, imply that effectiveness is not an objective standard but a contested concept shaped by value orientations. Thus, professionalism must be understood not only as technical competence but also as the capacity to navigate and adjudicate among competing norms and expectations.

Moreover, the discourse on professionalism integrates the principles of New Public Service, emphasising democratic engagement and ethical conduct. This normative stance challenges the classical dichotomy between politics and administration by compelling public administrators to act as facilitators of citizen participation rather than neutral implementers. Such a role expands professionalism to include political sensitivity, ethical judgment and public deliberation skills. Yet, this expansion also risks politicising professionalism, potentially undermining the traditional ideal of bureaucratic neutrality and raising questions about how public servants maintain legitimacy across diverse constituencies.

Another critical dimension is the relationship between professionalism and information literacy, which the proposed framework links as core competencies for contemporary public administrators. This connection suggests that professionalism is not static but evolves with the capacity to critically assess and apply information within ethical and value-laden frameworks. However, this also exposes a gap in many public administration education programs, where the cultivation of information literacy may be underemphasised relative to technical skills or ethical training. The emerging need for "value-informed information literacy" demands a redefinition of professionalism that integrates cognitive agility with normative awareness, an area ripe for further exploration and pedagogical innovation.

Finally, the document implies that professionalism is intrinsically linked to public service values and that public administrators must possess a "value-based perspective broader than the particular job at hand" to effectively exercise discretion. This assertion brings to light the inherent ambiguity in professionalism: it is simultaneously a set of universal standards and a context-dependent practice shaped by individual and organisational values. Such ambiguity necessitates ongoing critical reflection and ethical deliberation by public professionals, reinforcing professionalism as a dynamic, practice-oriented concept rather than a fixed status.

While professionalism remains essential to competent public administration, it is a multifaceted and evolving construct, fraught with tensions between technical competence and value-based discretion, neutrality and political engagement, and tradition and innovation. Addressing these complexities is crucial for both public administration educators and practitioners committed to preparing and embodying professionalism in the 21st century.

8. Value-informed information literacy: Transcending the foundational definition

Central to concerns of public service values and professionalism in public administration is the ability of public service professionals to exercise value-informed information literacy. The term "information literacy" was first coined in a 1974 report to the National Commission on Libraries and Information Science (Haras & Brasley, 2011). The report described "information literates" as individuals who are familiar with and able to use a wide range of information tools. Since that time, information literacy has developed significantly in theory, practice and scope.

Today, the Association of College and Research Libraries (ACRL) defines information literacy as the ability to "recognize when information is needed and have the ability to locate, evaluate, and use effectively the needed information" (2005, p. 1). This foundational definition, while essential, requires expansion in the context of public administration. The practice of public service occurs in complex environments where information is intrinsically political, value-laden and embedded within power structures. Therefore, information literacy must transcend technical competence to encompass the critical evaluation of the ethical, legal and societal implications of information.

This expanded conception involves integrating knowledge and resources with explicit research and evaluation skills, as well as critical assessment of political, social and economic factors influencing information use (Breivik & Gee, 1989). Public service professionals must be vigilant about whose interests are served by particular information sources and how these align or conflict with public service values such as equity, transparency and accountability. Decisions based solely on data without consideration of underlying values risk undermining democratic legitimacy and public trust.

Historically, the role of information literacy in governance and public policy is not new. Enlightenment philosophers like Jean-Antoine-Nicolas de Caritat Condorcet recognised the indissoluble link between the progress of knowledge and the advancement of liberty, virtue and respect for natural rights (Shapiro & Hughes, 1996). This historical lineage underscores that information literacy is not simply a skill but a democratic imperative essential for administrators and citizens alike.

Public service professionals, as stewards of democratic governance, have a core responsibility to facilitate the democratisation of information, empowering an informed and engaged citizenry. Their ability to share recognised, located and evaluated information effectively depends on applying a public service perspective to its use (Turner, 2015). This symbiotic relationship between administrators and citizens situates information literacy as a foundational element of civic engagement and public welfare.

However, this expanded notion of information literacy reveals inherent tensions. Public administrators must maintain objectivity and professionalism, grounded in evidence-based decision-making, while simultaneously navigating subjective value conflicts and political pressures that shape both the production and interpretation of information. Balancing these demands requires sophisticated judgment, reflexivity and the capacity to critically reflect on the contested nature of information – a challenge for both practitioners and educators.

Despite policy initiatives recognising the public importance of information literacy – such as the UNESCO Prague Declaration (2003), President Obama's 2009 proclamation of Information Literacy Awareness Month, and California's Executive Order S-06-09 supporting IL education in public schools – the practical challenges of implementing value-informed information literacy remain significant. Issues such as information overload, misinformation and unequal access complicate the ideal of information literacy as a democratising force. These challenges necessitate that future research and education explicitly address how to equip public service professionals not only to be competent users of information but also ethical stewards of information's power within democratic governance.

Value-informed information literacy is not simply an additive skill but a transformative approach that situates information use within the ethical and value-driven contexts of public administration. It demands critical reflection on the production, dissemination and use of information, recognising information as both a tool and a contested terrain in the pursuit of public service. Integrating this critical understanding into public administration education and practice is essential for preparing 21st-century civic professionals capable of navigating the intricate interplay of knowledge, values and power.

9. Practical application of Value-Informed Public Service

Building upon the foundational concepts of competing public service values, professionalism in public administration and information literacy, it is essential to translate these principles into actionable strategies that public service professionals can employ in their daily work. The dynamic and often complex environment in which public administrators operate demands not only theoretical understanding but also practical skills that integrate public service values, professionalism and information literacy. This section outlines key practical applications that enable public administrators to navigate competing values, exercise discretion responsibly, and maintain legitimacy with the public and colleagues. These practical applications are further illustrated through three short hypothetical case studies.

9.1. Integrating public service values in decision-making

Public administrators frequently face decisions involving conflicting values such as efficiency versus equity or transparency versus confidentiality. To manage these dilemmas, professionals should adopt structured decision-making frameworks that explicitly recognise value pluralism. This involves identifying relevant public service values at stake, assessing their implications within the specific context, and prioritising them in a manner consistent with both ethical standards and organisational goals. For example, when allocating limited resources, administrators might weigh community needs (equity) against budget constraints (efficiency), documenting the rationale transparently to uphold accountability.

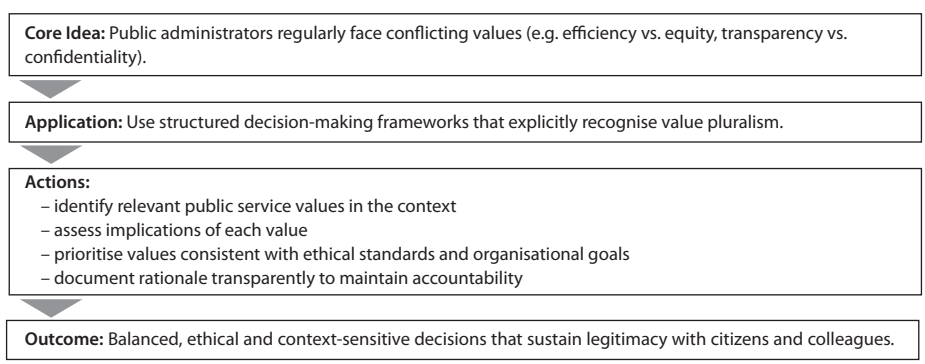

Figure 1
Value-Informed Public Service: Integrating public service values in decision-making
Source: compiled by the author

9.2. Applying professional competence and ethical standards

Demonstrating professionalism requires public administrators to continuously update their knowledge and skills, ensuring they are competent in emerging technologies, regulatory changes and public management practices. Maintaining open communication channels with citizens and stakeholders fosters trust and promotes democratic engagement. Ethics training and adherence to codes of conduct, such as those promulgated by ASPA, provide a critical foundation for navigating complex situations and reinforcing public trust.

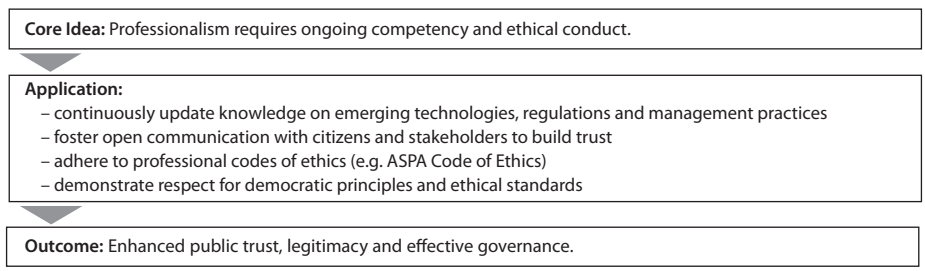

Figure 2

Value-Informed Public Service: Applying professional competence and ethical standards

Source: compiled by the author

9.3. Exercising value-informed information literacy

Effective public administration relies heavily on the ability to recognise information needs, locate credible sources, critically evaluate data, and apply findings in policy formulation and service delivery. Public professionals should cultivate information literacy skills that allow them to discern biases, validate facts and understand the broader social, political and economic contexts influencing information. For instance, when analysing community health data to develop public programs, administrators must evaluate the reliability of data sources and consider ethical implications related to privacy and equity.

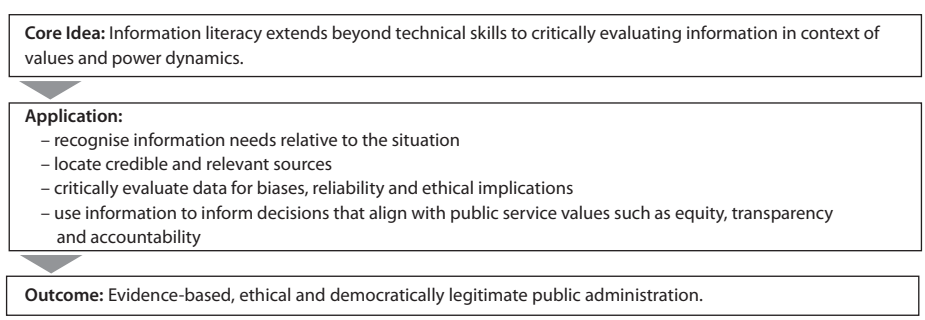

Figure 3

Value-Informed Public Service: Exercising value-informed information literacy

Source: compiled by the author

9.4. Fostering collaborative and adaptive leadership

Given the intersectoral and multi-jurisdictional nature of contemporary governance, public administrators must employ leadership styles that promote collaboration across boundaries. This includes facilitating stakeholder engagement, mediating value conflicts and encouraging innovative problem-solving approaches. Adaptive leadership that remains attuned to changing environments and values enables professionals to respond effectively to unforeseen challenges while maintaining commitment to public service principles.

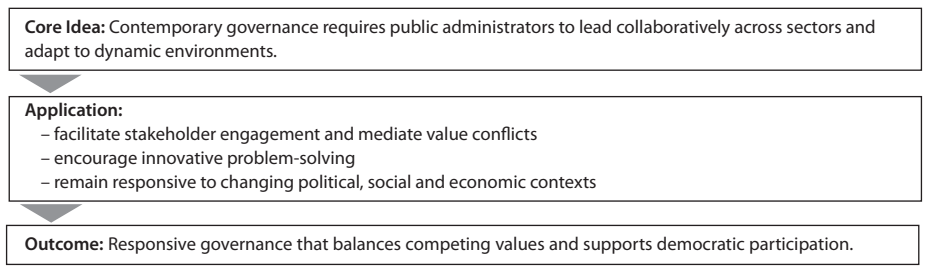

Figure 4
Value-Informed Public Service: Fostering collaborative and adaptive leadership
Source: compiled by the author

The practical application of Value-Informed Public Service requires a deliberate and reflective approach that harmonises public service values, professional standards and information literacy. By embedding these interconnected competencies into everyday practice, public administrators can enhance their capacity to make informed, ethical and context-sensitive decisions that advance the public interest and uphold democratic governance. The following hypothetical case vignettes demonstrate how public service professionals apply their own public service orientations, professional standards and information literacy to navigate complex, value-laden decisions. They reflect the assertion that competent public service professionals bridge theoretical concepts and practical decision-making by exercising discretion informed by integrated values. In public administration education, such case studies could be used to engage students in examining value conflicts, applying ethical frameworks and practising information evaluation – thereby operationalising the proposed Value-Informed Public Service framework.

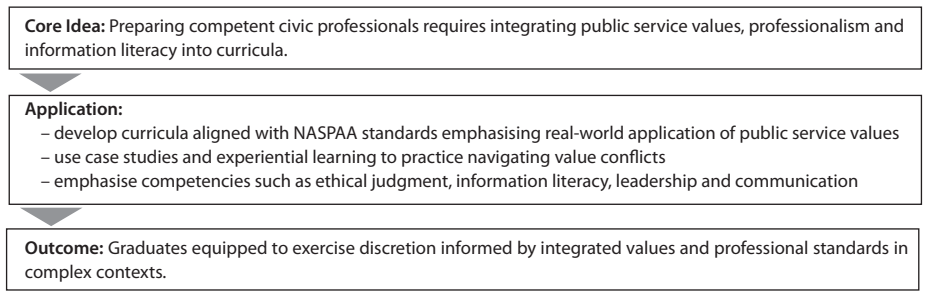

Figure 5
Value-Informed Public Service: Embedding value-informed public service in education
Source: compiled by the author

9.5. Case Study 1: Balancing efficiency and equity in public health policy

Scenario: A public health administrator must allocate limited resources during a pandemic. The choices include prioritising efficiency (maximising the number of vaccinated individuals quickly) or equity (ensuring vulnerable and underserved populations receive attention, even if it slows overall progress).

Values at play: Efficiency, effectiveness, social equity, accountability, transparency.

Discussion: The administrator exercises discretion informed by a public service value orientation that prioritises social equity without sacrificing professional standards of competence and accountability. Information literacy is critical here to access and evaluate epidemiological data, demographic information and community needs to make an informed, balanced decision. The administrator engages with stakeholders transparently, maintaining legitimacy and trust. This scenario illustrates coping with competing values, a key challenge highlighted by value-informed public service.

9.6. Case Study 2: Ethical decision-making in environmental regulation

Scenario: A public administrator in an environmental agency faces pressure from industry lobbyists to relax regulations that protect local ecosystems. The decision involves weighing economic development against environmental sustainability.

Values at play: Public interest, ethical conduct, respect for democratic principles, transparency, professional competence.

Discussion: Here, the administrator's professionalism demands adherence to ethical standards and respect for democratic governance, while information literacy enables thorough evaluation of environmental impact studies and economic data. The administrator must navigate value conflicts between economic efficiency and environmental stewardship, making a decision that upholds public service values and maintains public trust.

9.7. Case Study 3: Facilitating citizen engagement in urban planning

Scenario: A city planner aims to develop a new urban development project. The planner must incorporate citizen input while managing political, economic and cultural considerations.

Values at play: Citizen engagement, accountability, respect, fairness, responsiveness.

Discussion: The planner demonstrates professionalism by facilitating inclusive public participation and objectively evaluating diverse viewpoints. Information literacy helps in gathering relevant data on community demographics, economic trends and environmental impacts. The planner balances competing values through transparent communication and iterative consultation, embodying the New Public Service paradigm of serving rather than steering.

10. Rationale for Value-Informed Public Service

Separately, the centrality of public service values, professionalism and information literacy to the practice of public administration is generally accepted. The American Society for Public Administration (ASPA) expressed its commitment to the promotion of public service values and professionalism through its Code of Ethics, designed to "increase awareness and commitment to ethical principles and standards among all those who work in public service" (ASPA, 2013). Similarly, as a precondition for accreditation, NASPAA (2009) requires that education programs in public affairs and administration programs demonstrably emphasise public service values. Accredited programs must demonstrate the achievement of student learning with regard to professional competencies, including the application of public service values to real world problems, the acquisition and integration of new and complex knowledge, and the ability to apply such knowledge and understanding to solve problems in a variety of contexts.

NASPAA also seeks to promote consistency between the learning goals of public affairs and education programs and the competencies desired by potential employers. To ensure that the concerns of employers are represented in its accreditation standards, NASPAA used marketing and information campaign surveys to ascertain the knowledge and skills required of contemporary public administrators (Calarusse & Raffel, 2007). Employers identified "decision making/problem solving, communications skills, leadership, and teamwork" as extremely important public management skills (Calarusse & Raffel, 2007, p. 9). "Ethics and integrity, openness to citizen participation and involvement, organization and group behavior, and political/legal institutions" were also identified as extremely important or important public service knowledge and skills (Calarusse & Raffel, 2007, p. 9). A separate study conducted by NASPAA showed that employers also valued program evaluation and accountability (Calarusse & Raffel, 2007, p. 9; NASPAA Surveys, 2007). These results were confirmed by additional sources, including both public and private employers and literature published by the government, academics and practitioners.

While the link between public service values, professionalism and information literacy has not been explicitly articulated by either NASPAA or ASPA, the logic for doing so is evident in ASPA's Code of Ethics and NASPAA's Standards (Turner, 2015). These organisations have taken steps to ensure that the field's leading organisations represent emergent concerns within the discipline. The future of public administration is, in large part, shaped by recent developments (Calarusse & Raffel, 2007). Factors such as globalisation, rapid technological advancement, privatisation of government services, widespread demographic change, economic polarisation and increased interest in civic engagement, will determine the professional competencies of future public administrators.

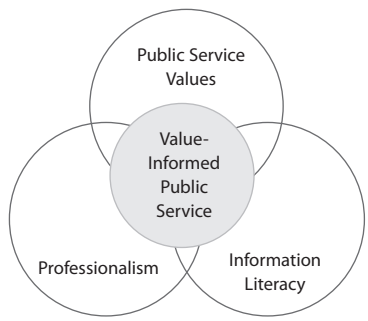

Figure 6
Value-Informed Public Service

Source: compiled by the author

Support for the interrelation of these concepts can also be found in the four – not three – pillars of public administration: economy, efficiency, effectiveness and social equity. Prior to the 1960s, the study and practice of public administration was defined by a politics–administration dichotomy (Norman-Major, 2011). The standards of economy, efficiency and effectiveness were paramount. Rejecting this sterile view, however, H. George Frederickson and other public administration scholars argued that public administration should not, nor cannot, be value-free. Their "New Public Administration" introduced values into the practice of public administration. They argued that the inclusion of social equity, responsiveness, public participation in decision-making and administrative accountability were necessary components of authentic public administration (Wooldridge & Gooden, 2009). Since the 1960s, scholars and practitioners have continued to argue that public service should be judged by the degree of equity in which it is delivered (Frederickson, 1990; Shafritz & Russell, 1997; Wooldridge, 1998; Svara & Brunet, 2004). To affirm these voices and end a 40-year debate, the National Academy of Public Administration (NAPA) adopted social equity as the fourth pillar of public administration in 2005.

Even though NAPA has committed to the equal treatment of social equity among the four pillars, the "equity of social equity" has been questioned (Norman-Major, 2011, p. 233). The institutionalisation of value-informed public service in public affairs and administration education programs will help ensure such equity among the recognised

standards of public administration. Social equity and related public values are the foundation of the reciprocity and mutually beneficial relationship between the government and the public (Bozeman, 2012). The commitment and professional competence of public administrators is an integral component of this relationship (Perry, 1989). Thus, the ideal public administrator simultaneously exhibits value-informed information literacy, the vocational professionalism unique to the public service, and the public service values that necessarily circumscribe the functions of a public servant (Turner, 2015).

11. Implications for public administration education

Despite continued economic uncertainty and a constantly evolving public domain, career and educational opportunities in public policy, public administration and more generally, public service are showing sustained growth and mobility. A continual source of conversation and tension among scholars and academics is the balance of theory and practice in related professional programs (Bernotsky et al., 2014). Leading scholar and practitioner in the field, Robert Denhardt (2001, p. 527) has identified the question of whether we "seek to educate our students with respect to theory or practice" as one of the most pressing questions for contemporary public administration educators. Proponents on both sides of this theoretical argument, however, seem to be gradually reaching agreement that a quality public service education is one that "balances practical applications with considerations of theoretical issues" (Henry et al., 2009, p. 124).

The progression toward competency-based assessment and accreditation of public affairs and administration degree programs reflects a tenuous resolution of this debate. Common ground between these two perspectives can be found where assessment processes evaluate students on their ability to translate theory into practice. The central focus of the debate surrounding the intersection of theory and practice is the skills and abilities needed by students in the field to effectively carry out their professional responsibilities (Bernotsky et al., 2014). Through the utilisation of a Value-Informed Public Service curriculum, the debate surrounding the appropriate integration of theory, research and practice can be put to rest and public administration educators can be confident that they are preparing competent civic professionals.

The revised accreditation standards adopted by the Network of Schools of Public Policy, Affairs, and Administration (NASPAA) in 2009 reinforce, in fact require, accredited public affairs and administration programs to emphasise a set of five action-oriented public service competencies. Programs must demonstrate that their curriculum and related student-learning outcomes prepare students to apply the concepts, tools and knowledge they have learned to real world problems. The standards specify that "students should be able to apply their knowledge, understanding and problem-solving abilities in new or unfamiliar environments within broader or multidisciplinary contexts related to public affairs, administration and policy" (NASPAA, 2009, p. 2).

The standards also instruct programs seeking accreditation to emphasise public service values in student-learning outcomes. As a precondition for accreditation review, NASPAA requires that programs "demonstrably emphasize" public service values in their curriculum. Programs should prepare future public administrators who are concerned with "pursuing the public interest with accountability and transparency; serving professionally with competence, efficiency, and objectivity; acting ethically so as to uphold the public trust; and demonstrating respect, equity, and fairness in dealings with citizens and fellow public servants" (NASPAA, 2009, p. 2). Furthermore, a growing body of literature that predates NASPAA's revised standards identifies public service values as the central feature of public administration (Denhardt & Denhardt, 2000; Jørgensen & Bozeman, 2007; Mandell, 2009). And, public service values have subsequently been recognised as the "heart" of public administration (Molina & McKeown, 2012). Molina and McKeown (2012) argue that educators, students and practitioners in the field will benefit from the acknowledgement of value pluralism within public service.

12. Conclusion

This paper has introduced the concept of Value-Informed Public Service, emphasising the critical interrelationship between public service values, professionalism and information literacy in the preparation and practice of 21st-century public administrators. Key findings reveal that public administrators operate in complex environments characterised by competing values and dynamic information needs, requiring discretion guided by a coherent value orientation, professional standards and strong information literacy skills. The integration of these elements forms a durable framework that enhances decision-making, legitimacy and responsiveness in public service.

Practically, this framework can be applied to improve public administration by fostering administrators who are not only technically competent but also ethically grounded and information savvy. Such professionals are better equipped to navigate conflicting values and complex information landscapes, promoting effective governance and citizen engagement.

Educational and governmental institutions should adopt the Value-Informed Public Service model by embedding its principles into curricula, training programs and organisational policies. Public affairs and administration education programs must ensure that students develop competencies that integrate public service values, professionalism and information literacy aligned with evolving accreditation standards and employer expectations. Government agencies should promote ongoing professional development emphasising these interconnected competencies to enhance public trust and service quality.

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Recent Trends in the Argumentation of the European Court of Human Rights on Children's Rights

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Abstract: The European Convention on Human Rights (ECHR) is a key human rights treaty ratified by all EU member states and beyond. Although it does not focus specifically on children, it includes relevant provisions and obliges states to protect the rights of all individuals, including children. Moreover, the UN Convention on the Rights of the Child (UN CRC) is ratified by all ECHR member states, which presumably contributed to the greater focus to the increase of child rights reasoning. This paper explores how ECHR provisions – particularly Article 8 on the right to privacy and family life, Article 3 on the prohibition of torture and other forms of cruel, degrading treatment, and Article 14 on non-discrimination – and recent European Court of Human Rights (ECtHR) rulings contribute to the wider protection of children's rights, analysing their use as rhetorical arguments in legal reasoning.

Keywords: children, children's rights, European Court of Human Rights (ECtHR), European Convention on Human Rights, UN Convention on the Rights of the Child (UN CRC), legal reasoning

1. Introduction

The Council of Europe's (CoE) most important human rights treaty, the European Convention on Human Rights (ECHR) signed in Rome on 4 November 1950, entered into force in 1953, is seen as one of the most successful systems for the enforcement of human rights in the world (Kilkelly, 2016). It has been ratified (together with its additional protocols) by all the Member States of the European Union (and beyond), which are also parties to the UN Convention on the Rights of the Child (UN CRC) – which was the first comprehensive, legally binding international treaty to guarantee full recognition

to the rights of children –, contains relevant provisions on children, even though it does not focus specifically on children (see Florescu et al., 2015).

The CoE has been ahead of the EU in pioneering and proactively protecting children's rights. A milestone in its policy agenda setting was the regional coordination of the Pinheiro report (2006) on the global phenomenon of violence against children, including formulating recommendations. In 2005, the CoE Heads of State and Government Summit in Warsaw decided on a three-year framework program and strategy entitled "Building a Europe with Children for Children" (extended several times, most recently in February 2022), which also provided the basis for the CoE's commitment to a comprehensive, integrated, cross-policy approach to promote and mainstream children's rights. Beyond these strategies and policy developments, CoE adopted several child-rights-related conventions,[1] and soft law instruments, e.g. in 2010 the *Guidelines on Child-Friendly Justice* (Council of Europe, 2010), which were developed in this context and have had several legislative and enforcement implications for the development of domestic law and regional laws (see e.g. the EU legislation aiming to strengthen the rights of children involved in judicial proceedings[2]).

While the ECHR contains few express references to children (it mentions them only twice) (Kilkelly, 2010) and does not explicitly define the child, Article 1 obliges states to ensure the rights and freedoms of "everyone" within their jurisdiction ("The High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in [...] this Convention"). The specific references to children (rather to "minors") of the ECHR and its Protocols can be found in some provisions. This paper will examine the most relevant articles for a children's rights perspective and outline the recent trends in the argumentation of the European Court of Human Rights (ECtHR). In doing so, it examines how far references to ECHR articles function as argumentative topics in the classical rhetorical sense.[3]

2. The most relevant articles of the ECHR concerning children

Among the general provisions, beyond Article 1 of the ECHR, it is worth mentioning that all other general provisions of the ECHR apply to "everyone", including children.

[1] See, among others, CoE Convention on Preventing and Combating Violence Against Woman and Domestic Violence (CETS No. 210), the European Convention on the Adoption of Children (CETS No. 202: 27 November 2008/2011), CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201: 2007/2010), Convention on Contact concerning Children (ETS No. 192: 2003/2005), Convention on Cybercrime (ETS No. 185: 2001/2004), European Convention on the Exercise of Children's Rights (ETS No. 160: 1996/2000), European Convention on the Legal Status of Children Born out of Wedlock (ETS No. 085: 1975/1978). For the relevant legal instruments see https://www.coe.int/t/dg3/children/keyLegalTexts/conventionsonchildrensrightsList_en.asp

[2] See Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime or Directive 2016/800/EU on procedural safeguards for children suspected or accused in criminal proceedings.

[3] On the role of rhetorical topics in general see Rubinelli (2006), Meyer (2014); in a legal context see Könczöl (2009).

Article 3 has to be mentioned with its clear relevance in cases related to child abuse, as it prohibits torture, inhuman and degrading treatment or punishment.

Those two provisions which have a specific scope or children as addressees are as follows: Article 5(1)(d) says the detention of a *minor* by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; and Article 6 which recognises the rights to a fair trial limits the right to a public hearing if it is in the best interests of the *juvenile*.

As Ursula Kilkelly remarks, most of these (in a way) child-related provisions have generated little case law, but Article 8, which guarantees the right to the respect for family life, has been most frequently invoked in children's cases (Kilkelly, 2016), as this paper will present.

Similarly, Article 14, which guarantees the enjoyment of the conventional human rights and freedoms "without discrimination on any ground", is quite frequently called upon in conjunction with other provisions, and is also an important provision in certain types of discrimination cases involving children and young people, the best known of which are the so-called "segregation cases".

Article 2 of Protocol 1 to the Convention provides the right to education, stating that no person shall be denied this right and requires States to respect the religious and philosophical convictions of parents in the education of their children. The respect of the dominance of parental role in the care and education of the child is also reflected in Article 5 of Protocol 7 to the Convention, which guarantees parental equality, during marriage and in case of dissolution, and recognises the State's right to take measures considered necessary in the interests of the child.

3. Recent interpretation of the ECHR by the ECtHR in light of the UN CRC[4]

However, as Kilkelly remarks "due mainly to the strict terms of the mentioned provisions with mention the minors/juveniles, the scope of this jurisprudence has been limited in nature. The other generally worded provisions have provided the ECHR with greater flexibility and so, ironically, those provisions that make no reference to children have provided greater potential to have children's rights protected" (Kilkelly, 2010, p. 248). There are two key provisions here to be mentioned: Article 8 on the right to family and private life and Article 3 on the absolute prohibition of torture and other degrading, inhuman treatment, the ECtHR's approach to both provisions in children's cases has been very similar.

Article 8 is by far the most litigated provision from a child's perspective and the related ECtHR's case law has touched on many areas of family law (e.g. birth registration, adoption, international child abduction, children in alternative care, placement procedures) (Kilkelly, 1999), but it also appeared in juvenile justice cases and moreover in child abuse cases as well.

[4] For a summary of relevant cases see ECtHR Press Unit (2023) and (2024a).

One of the major contributions of the ECtHR to the protection of children's rights is its case law on the legal recognition of family ties. Established quite early in 1979, in the ground-breaking case *Marckx v. Belgium,*[5] a line of case law has encouraged the promotion of a child-centred approach to the legal recognition of family relationships, underpinned by the positive obligation to respect family life.

There has been rich research over the last decades exploring the impact of child rights perspectives on the jurisprudence of the ECtHR which developed an extensive jurisprudence on children's rights, including even more frequent (and increasing) references to the UN CRC (see, e.g., Kilkelly, 1999; 2010; 2015; Helland & Hollekim, 2023; Helland, 2024). Earlier studies have shown that the UN CRC is not a primary source of reference for the ECtHR (O'Donnell, 1995, p. 261). The most significant connection between the UN CRC and the ECtHR appears to be the principle of the child's best interests (Sormunen, 2020), which, albeit indirectly, stems from Article 3 of the UN CRC. Since the UN CRC entered into force in the early 1990s, the ECtHR has adopted a more child-focused perspective in its rulings. Recently, the ECtHR increasingly recognises children as legal subjects with their own rights which it must address directly (Breen et al., 2020).

Trond Helland and Ragnhild Hollekim published in 2023 the results of their qualitative and quantitative research about how has the use of the UN CRC as a legal argument within the ECHR changed over time (Helland & Hollekim, 2023). Their quantitative findings show no statistically significant evidence that the UN CRC has a substantial influence on ECtHR decisions, nor could they identify clear correlations between invoking the UN CRC as a legal argument and the outcomes of judgments. However, as they note, the qualitative analysis indicates that the UN CRC is actively used in the ECtHR's deliberations, supporting the view that it plays a meaningful role in shaping the development of children's rights within the ECtHR (Helland & Hollekim, 2023, p. 233).

A full review of the Strasbourg case law is beyond the purpose and scope of this paper, but only highlights what can be considered "typical" cases. A number of interpretive approaches have been instrumental in the development of the ECHR case law in children's cases, including the development of procedural obligations and the emphasis on effective rights protection. The ECtHR has also sought to rely, increasingly, on other children's rights instruments, notably the UN CRC, in order to ensure that its judgments reflect current standards in children's rights.

As ECtHR judgments are binding on States Parties, in the absence of a similar mechanism at the UN level, the ECtHR can be seen as a body capable of upholding children's rights as enshrined in the UN CRC. It is also evident from this gradually increasing trend that the ECtHR still has been rather cautious in its reasoning when referring to the UN CRC (Helland, 2024).

A good example is *Paradiso and Campanelli v. Italy*[6] in 2017, which dealt with the issue of international surrogacy (see Pap, 2023, pp. 37–38). The parents who brought the application – who had no genetic link to the baby – applied to the Court in their name and on behalf of a baby born through a surrogate. In this case, the ECtHR rejected the

[5] Marckx v. Belgium, Judgement of 13 June 1979, no. 6833/74.
[6] Paradiso and Campanelli v. Italy, Judgement of 24 January 2017, no. 25358/12.

parents' claim to act as the baby's representative because of the lack of a genetic/biological link, and the child did not become a party to the proceedings. This did not, however, prevent the ECtHR from finding a violation of Article 8 for failure to respect the child's right to identity. The ECtHR based its reasoning on the provisions of Article 7 of the UN CRC. Despite the ultimately favourable outcome for the child and the references to the UN CRC, the ECtHR's argumentation is troubled by the lack of recognition of the child as a party. This illustrates the ECtHR's struggle to incorporate the declared protection of children's rights into its practice on the one hand, but on the other, children face serious obstacles in accessing courts, including the ECtHR. The case of *M and M v. Croatia*[7] dealt with the assessment of a parental custody dispute and allegations of domestic violence. The ECtHR found a violation of Article 3 by the State's failure to promptly investigate allegations of abuse made by the mother and child. It also found a violation of Article 8 because the child custody procedure was too lengthy, and the child was not involved in the decision-making process regarding the child custody. The ECtHR discussed at length, in some detail, the failure of the domestic authorities to hear the child in the parental custody proceedings, in which the ECtHR relied heavily on Article 12 of the UN CRC, which enshrines the right of the child to be heard, and incorporated these guarantees into the procedural dimension of Article 8.[8]

3.1. Violence against children

Corporal punishment as a sadly still vivid "classic" form of physical abuse of children has been discussed in several decisions. One of the earliest "children's rights" decisions was in the 1978 case *Tyrer v. United Kingdom,*[9] in which a 15-year-old boy in the Isle of Man was subjected to corporal punishment by police officers for abusing a senior pupil. The ECtHR ruled that such punishment constituted "institutionalised violence" in breach of Article 3. In *A. v. United Kingdom,*[10] an allegedly "difficult" nine-year-old child was kicked repeatedly and with considerable force by his stepfather, causing bruising and pain. The stepfather was tried for assault but was acquitted because English law at the time allowed for "reasonable punishment".

The ECtHR also ruled in this case that children and other vulnerable persons in particular are entitled to protection against such forms of ill-treatment[11] and found a violation of Article 3. In the eye of the ECtHR, these tragedies were caused by the failure of

[7] M and M v. Croatia, Judgement of 3 September 2015, no. 10161/13.

[8] See also Sahin v. Germany [GC], Judgement of 8 July 2003, no. 30943/96.

[9] Tyrer v. United Kingdom, Judgement of 25 April 1978, no. 5856/72.

[10] A v. United Kingdom, Judgement of 23 September 1998, no. 25599/94.

[11] For an assessment of corporal punishment under Article 3, see also Tlapak and Others v. Germany, Judgement of 22 March 2018, nos. 11308/16 and 11344/16, Wetjen and Others v. Germany, Judgement of 22 March 2018, nos. 68125/14 and 72204/14.

public authorities to act in the field of domestic violence, several cases[12] have revealed violations of Article 2 (the right to life) and Article 3 (prohibition of inhuman or degrading treatment), in addition to violations of Article 13 (the right to effective remedy),[13] or in many cases of Article 6 (the right to fair trial).[14] Similarly, active (in forms of active violence against children) or passive child abuse (i.e. neglect), has also been found to constitute a violation of Article 3 in ECtHR practice in several cases, and in many cases also in addition to a violation of Article 13 guaranteeing access to an effective remedy (e.g. the child protection or social services or other authority responsible for the protection of children concerned failed to investigate the case or take appropriate action).[15] Just as an illustration giving, the case *R.B. v. Estonia*[16] concerned the failure to conduct an effective criminal investigation into the applicant's allegations of sexual abuse by her father. The applicant was about four and a half years old at the relevant time. Her complaint concerned procedural deficiencies in the criminal proceedings as a whole, including the failure of the investigator to inform her of her procedural rights and duties, and the reaction of the Supreme Court to that failure resulting in the exclusion of her testimony and the acquittal of her father on procedural grounds. The ECtHR held that there had been significant flaws in the domestic authorities' procedural response to the applicant's allegation of rape and sexual abuse by her father, which had not sufficiently taken into account her particular vulnerability and corresponding needs as a young child so as to afford her effective protection as the alleged victim of sexual crimes. Accordingly, without expressing an opinion on the guilt of the accused, the ECtHR concluded that the manner in which the criminal law mechanisms as a whole had been implemented in the present case, resulting in the disposal of the case on procedural grounds, had been defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (the right to respect for private and family life).

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[12] Association Innocence en Danger and Association Enfance et Partage v. France, Judgement of 4 June 2020, nos. 15343/15 and 16806/15, Penati v. Italy, Judgement of 11 May 2021, no. 44166/15, D.M.D. v. Romania, Judgement of 3 October 2017, no. 23022/13, Kurt v. Austria, Judgement of 15 June 2021, no. 62903/15, A.E. v. Bulgaria, Judgement of 23 May 2023, no. 53891/20.

[13] Kontrová v. Slovakia, Judgement of 31 May 2007, no. 7510/04.

[14] See also the cases of E.S. and Others v. Slovakia, Judgement of 15 September 2009, no. 8227/04, D.P. and J.C. v. The United Kingdom, Judgement of 26 November 2002, no. 33218/96, M.C. v. Bulgaria, no. 39272/98. Bulgaria, Judgement of 24 January 2012, no. 49669/07, C.A.S. and C.S. v. Romania, Judgement of 20 March 2012, no. 26692/05, R.I.P. and D.L.P. v. Romania, Judgement of 10 May 2012, no. 27782/10, I.G. v. The Republic of Moldova, Judgement of 15 May 2012, no. 53519/07, P. and S. v. Poland, Judgement of 30 October 2012, no. 57375/08, O'Keeffe v. Ireland, Judgement of 28 January 2014, no. 35810/09, M.G.C. v. Romania, Judgement of 15 March 2016, no. 61495/11, G.U. v. Türkiye, Judgement of 18 October 2016, no. 16143/10, M.P. v. Finland, Judgement of 15 December 2016, no. 36487/12, V.C. v. Italy, Judgement of 1 February 2018, no. 54227/14, A. and B. v. Croatia, Judgement of 20 June 2019, no. 7144/15, Stankūnaitė v. Lithuania, Judgement of 29 October 2019, no. 67068/11, N.Ç. v. Türkiye, Judgement of 9 February 2021, no. 40591/11, B. v. Russia, Judgement of 7 February 2023, no. 36328/20.

[15] A. Z. and Others v. The United Kingdom, Judgement of 10 May 2001, no. 29392/95, E. and Others v. The United Kingdom, Judgement of 26 November 2002, no. 33218/96, V. K. v. Russia, Judgement of 7 March 2017, no. 68059/13.

[16] R.B. v. Estonia, Judgement of 22 June 2021, no. 22597/16, and see also G.U. v. Turkey, Judgment of 18 November 2016, no. 16143/10.

However, other cases of violation of different rights have also raised children's rights issues, such as the case *Juppala v. Finland,*[17] which concerned a grandmother who was convicted of defamation of her son-in-law after taking her three-year-old grandson to the doctor and expressing suspicions that the father had hit the child. The ECtHR found a violation of Article 10 (freedom of expression) and ruled that it must be ensured that a good-faith suspicion of child abuse can be freely expressed through an appropriate reporting procedure without fear of criminal prosecution or of being liable to pay compensation for the damage suffered or the costs incurred. In the applicant's case, the interference with freedom of expression was not sufficiently justified and therefore did not meet any "pressing social need".

"Violence is often a hallmark of human trafficking", as Stöckl et al. (2021) stated. The ECHR does not explicitly address trafficking in human beings, but in practice over the past decades, the ECtHR has interpreted Article 4 of the ECHR to include the prohibition of trafficking in child-related cases as well.[18]

The case *V.I. v. The Republic of Moldova*[19] concerned the placement of a child with mild intellectual disability in a psychiatric care facility. The placement, which was scheduled to last three weeks, was extended for a further four months without any visits by anyone and was treated with neuroleptics and antipsychotics. The applicant alleged that her accommodation and treatment, as well as the hospital conditions, the behaviour of the medical staff and other patients amounted to ill-treatment amounting to Article 3. He also complained that the investigation into his allegations was inconclusive and claimed that social stigma and discrimination against people with psychosocial disabilities and the lack of alternative care arrangements were to blame. In the present case, the ECtHR held that there had been a violation of Articles 3 and 13 because of the lack of an effective investigation and the applicant's placement and treatment in a psychiatric hospital against his will, a violation of Article 14 in conjunction with Article 3.

Interestingly, Article 8 (the right to respect for private life) was violated in a child sexual abuse case *Söderman v. Sweden*[20] which was concerned with the attempted covert filming of a 14-year-old girl by her stepfather while she was naked, and her complaint that the Swedish legal system, which at the time did not prohibit filming without someone's consent, had not protected her against the violation of her personal integrity. The ECtHR held that there had been a violation of Article 8. It found in particular that Swedish law in force at the time had not ensured protection of the applicant's right to respect for private life – whether by providing a criminal or a civil remedy – in a manner that complied with the ECHR. The act committed by her stepfather had violated her integrity and had been aggravated by the fact that she was a minor, that the incident took place in her home, and that the offender was a person whom she was entitled and expected to trust.

Also in cases related to the protection of children from being targeted by paedophiles via the Internet, Article 8 (the right to respect private life) were violated.

[17] Juppala v. Finland, Judgement of 2 December 2008, no. 18620/03.

[18] Rantsev v. Cyprus and Russia, Judgement of 7 January 2010, no. 25965/04, V.C.L. and A.N. v. the United Kingdom, Judgement of 16 February 2021, nos. 77587/12 and 74603/12.

[19] V.I. v. The Republic of Moldova, Judgement of 26 March 2024, no. 38963/18.

[20] Söderman v. Sweden, Judgement of 12 November 2013, no. 5786/08.

In *K.U. v. Finland,*[21] the ECtHR considered that posting the ad (in a name of a 12-year-old boy stating that he was looking for an intimate relationship with a boy) was a criminal act which made a minor a target for paedophiles. The legislature should have provided a framework for reconciling the confidentiality of Internet services with the prevention of disorder or crime and the protection of the rights and freedoms of others, and in particular children and other vulnerable individuals.

Article 3 and Article 8 were violated in the case *E.S. and Others v. Slovakia.*[22] In 2001, the applicant left her husband and lodged a criminal complaint against him for ill-treating her and her children and sexually abusing one of their daughters. He was convicted of violence and sexual abuse two years later. Her request for her husband to be ordered to leave their home was dismissed, however; the court finding that it did not have the power to restrict her husband's access to the property (she could only end the tenancy when divorced). The applicant and her children were therefore forced to move away from their friends and family and two of the children had to change schools. The ECtHR found that Slovakia had failed to provide the applicant and her children with the immediate protection required against her husband's violence.

Mistreatment or abuse by teachers against children is usually called for in Article 3.[23] But, Article 8 was abused in *F.O. v. Croatia,*[24] where the applicant, a student in a public high school at the relevant time, was subjected to several insults by his teacher. He complained about this harassment, and the inadequate response of the relevant domestic authorities. The ECtHR held that there had been a violation of Article 8, finding that the State authorities had failed to respond with requisite diligence to the applicant's allegations of harassment at school.

It is clear that Article 2 (the right to life) is seriously violated in cases of violent acts committed in school premises with tragic consequences, such as in the case of *Kayak v. Turkey,*[25] in which the applicant's 15-year-old son and brother were stabbed by a pupil in front of the school. The case *Derenik Mkrtchyan and Gayane Mkrtchyan v. Armenia*[26] concerned the death of the applicants' grandson and son respectively, at the age of ten, in 2010 following a fight in the classroom in his school.

Servitude and forced or compulsory labour happened in the case *Siliadin v. France.*[27] The applicant, a Togolese national having arrived in France in 1994 with the intention to study, was made to work instead as a domestic servant in a private household in Paris. Her passport confiscated, she worked without pay, 15 hours a day, without a day off, for several years. The applicant complained about having been a domestic slave. However, the ECtHR found that the applicant had not been enslaved, but she had been held in servitude, in violation of Article 4 (prohibition of slavery, servitude, forced or compulsory labour).[28]

[21] K.U. v. Finland, Judgement of 2 December 2008, no. 2872/02.
[22] E.S. and Others v. Slovakia, Judgement of 15 September 2009, no. 8227/04.
[23] V.K. v. Russia, Judgement of 7 March 2017, no. 68059/13.
[24] F.O. v. Croatia, Judgement of 22 April 2021, no. 29555/13.
[25] Kayak v. Turkey, Judgement 10 July 2012, no. 60444/08.
[26] Gayane Mkrtchyan v. Armenia, Judgement of 30 November 2021, no. 69736/12.
[27] Siliadin v. France, Judgement of 26 July 2005, no. 73316/01.
[28] See as well C.N. and V. v. France, Judgement of 11 October 2012, no. 67724/09.

3.2. Family ties – Children in care

The violation of Article 8 has been established in several cases of placement in alternative care (related to child abuse) since the 1990s, stating, in line with the provisions of the UN CRC, that the placement of a child in alternative care should be considered a temporary measure and that the aim is to allow the child to be taken home if it is in the best interests of the child (referring to Article 3 of the UN CRC).[29]

The right of the child to respect for family life under Article 8 is protected by (EU and) Strasbourg case law, which covers a number of interrelated rights, such as: the right to parental care; the right to contact with both parents; the prohibition of separation from the parent (unless this is in the best interests of the child) and the right to family reunification. But enforced disappearance of children is also assessed under Article 8 of the ECHR.

From the aspect of the UN CRC 'best interests' principle, the case *Chbihi Loudoudi and Others v. Belgium*[30] needs to be mentioned, which concerned the procedure in Belgium for the adoption by the applicants of their Moroccan niece, who had been entrusted to their care by *kafala*. The applicants complained in particular of the Belgian authorities' refusal to recognise the *kafala* agreement and approve the adoption of their niece, to the detriment of the child's best interests, and of the uncertain nature of her residence status. The ECtHR held that there had been no violation of Article 8 concerning the refusal to grant the adoption and the child's residence status. It found in particular that the refusal to grant adoption was based on a law which sought to ensure, in accordance with the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption,[31] that international adoptions took place in the best interests of the child and with respect for the child's private and family life, and that the Belgian authorities could legitimately consider that such a refusal was in the child's best interests, by ensuring the maintaining of a single parent–child relationship in both Morocco and Belgium (i.e. the legal parent–child relationship with the genetic parents).

Related to the family reunification rights in *Sen v. the Netherlands,*[32] the ECtHR held that there had been a violation of Article 8. The parents complained of an infringement of their right to respect for their family life, on account of the rejection of their application for a residence permit for their daughter, a decision which prevented her from joining them in the Netherlands. They had two other children, who were born in 1990 and 1994 respectively in the Netherlands and have always lived there with their parents. Being required to determine whether the Dutch authorities had a positive obligation to authorise the third applicant to live with her parents in the Netherlands, having regard, among other things, to her young age when the application was made, the ECHR noted that she had spent her whole life in Turkey and had strong links with the linguistic and cultural

[29] Scozzari and Giunta v. Italy, Judgement of 13 July 2000, nos. 39221/98 and 41963/98, Jessica Marchi v. Italy, Judgement of 27 May 2021, no. 54978/17, *K.A. v. Finland*, Judgement of 14 January 2003, no. 27751/95.

[30] Chbihi Loudoudi and Others v. Belgium, Judgement of 16 December 2014, no. 52265/10.

[31] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (https://www.hcch.net/en/instruments/conventions/full-text/?cid=69).

[32] Sen v. The Netherlands, Judgement of 21 December 2001, no. 31465/96, and see also Tuquabo-Tekle and Others v. the Netherlands, Judgment of 1 December 2005, no. 60665/00.

environment of her country in which she still had relatives. However, there was a major obstacle to the rest of the family's return to Turkey. The first two applicants had settled as a couple in the Netherlands, where they had been legally residents for many years, and two of their three children had always lived in the Netherlands and went to school there. Concluding that the Netherlands had failed to strike a fair balance between the applicants' interest and their own interest in controlling immigration.

In cases related to tragically negligent or abusive care of children,[33] reference is regularly made to Article 2 (the right to life) or 3 (prohibition of torture), but in the case of *Scozzari and Giunta v. Italy,* Article 8 was violated. In this case the applicants' two sons/grandsons were placed in a children's home by court order, where – as the national court was aware – two of the principal leaders and co-founders had been convicted of sexual abuse of three disabled people in their care. Prior to his placement in the home, the eldest boy had been a victim of sexual abuse by a paedophile social worker. The ECtHR held, notably, that there had been a violation of Article 8 (the right to respect for family life), concerning the uninterrupted placement of the boys in the home. It noted in particular that the absence of any time-limit on the care order, the negative influence of the people responsible for the children at the home and the conduct of social services were in the process of driving the first applicant's children towards an irreversible separation from their mother and long-term integration within the home.

3.3. Vulnerable children – Children at risk

"Children are vulnerable because they cannot choose the social and physical environments in which they were born and grow up" (Li, 2022). This vulnerability is not a permanent state, and can be multifaceted and is influenced by various factors, e.g. social and environmental circumstances impacting the family, parental or family trauma, parental capacity, experience of child abuse and neglect, or if the child belongs to a minority group.[34]

In their judgment in *Popov v. France,* the ECtHR states that "the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]. [C]hildren have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The [European] Court [of Human Rights] would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents [...]" (para. 91).[35]

[33] Nencheva and Others v. Bulgaria, Judgement of 18 June 2013, no. 48609/06.
[34] Concerning vulnerability, see also Arora et al. (2015), Bagattini (2019), Etzel (2020).
[35] Popov v. France, Judgement of 19 January 2012, nos. 39472/07 and 39474/07.

3.3.1. Children in migration situation

One of the particularly vulnerable groups of children are unaccompanied minors (UAMs),[36] whose situation, reception and care conditions have been assessed by the ECtHR, especially from the second half of the 2000s. In these cases, violations of Articles 3 and 8 are also typically invoked.[37] The case *Khan v. France*[38] concerned the failure of the French authorities to take care of an UAM before and after the dismantling of the temporary refugee camps set up in the southern part of the *lande de Calais* ("Calais desert"). Large numbers of people seeking asylum in the United Kingdom had been living there for years in tents or huts in overcrowded conditions without basic sanitation. In particular, the applicant complained that the authorities had failed to fulfil their obligation to protect UAMs and that they had failed to enforce the order for his temporary placement in a child welfare centre. It also found a violation of Article 3 that the French authorities had failed to take the necessary measures, thus placing the applicant in a situation amounting to degrading treatment, who lived for several months in this virtual slum in an environment totally unsuitable for his status as a child. In *Darboe and Camara v. Italy,*[39] a Gambian and a Guinean national arrived in Italy on makeshift boats and allegedly applied for asylum as UAMs, and were placed in a reception centre for adults. The ECtHR found that the state was in breach of Article 8 due to the lack of procedural guarantees for the minor and the questionable age-determination procedure. Moreover, the UAM was unable to lodge an asylum application and was placed in an overcrowded adult reception centre for more than four months. In particular, the Court noted that at the time of the contested practice, national and EU law already provided a number of guarantees for UAM asylum seekers which recognised the best interests of the child and the overriding importance of the principle of the presumption of the minor status of unaccompanied children who require special protection and who must be accompanied by a guardian and provided with adequate assistance during the asylum procedure. In this case, the ECtHR also found a violation of Article 3 in relation to the duration and conditions of the first applicant's stay in the adult reception centre, and a violation of Article 13 in conjunction with Articles 3 and 8. Similar reasoning was also used in *O.R. v. Greece.*[40]

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[36] An unaccompanied minor (sometimes "unaccompanied child" or "separated child") is a child without the presence of a legal guardian. The UN Committee on the Rights of the Child defines *unaccompanied minors and unaccompanied children* as those "who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so". The Committee defines *separated children* as those "who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members" UN Committee on the Rights of the Child, General Comment No. 6 (2005), paras. 7 and 8; see also Rinaldi (2023).

[37] Rahimi v. Greece, Judgement of 5 April 2011, no. 8687/08, Mohamad v. Greece, Judgement of 11 December 2014, no. 70586/11.

[38] Khan v. France, Judgement of 28 February 2019, no. 12267/16.

[39] Darboe and Camara v. Italy, Judgement of 21 July 2022, no. 5797/17.

[40] O.R. v. Greece, Judgement of 23 January 2024, no. 24650/19.

Article 2 (the right to life) was obviously relevant in the case of *M.H. and Croatia,* where the applicants were a family of 14 Afghan citizens (a man, his two wives, and their 11 children). The case concerned the death of the first and second applicants' six-year-old daughter, who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. It also concerned the applicants' detention while seeking international protection.

Several cases involve the problematic detention of migrant children, concerning the fact itself and the conditions of detentions.[41] In some cases, very young children are kept in detention, as it happened in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* which concerned the nearly two months long detention at a transit centre for adults run by the Aliens Office near the Brussels airport of a five-year old Congolese national travelling alone to join her mother who had obtained refugee status in Canada, and her subsequent removal to her country of origin. In this case the ECtHR found the unaccompanied, very young child's rights guaranteed in Article 3 violated, finding that her detention had demonstrated a lack of humanity and amounted to inhumane treatment.[42]

In cases[43] related to deprivation of liberty and challenging the lawfulness of detention, reference is regularly made to Article 5 (para. 1, the right to liberty and security, and para. 4, the right to have the lawfulness of detention decided speedily by a court). The case *Muskhadzhiyeva and Others v. Belgium*[44] concerned the detention for more than a month of three underage children and their mother in a closed transit centre. Similarly, *R.R. and Others v. Hungary,*[45] was related to the confinement of an asylum-seeking family, including three minor children, in the Röszke transit zone on the Hungarian border with Serbia in April–August 2017. The applicants complained, in particular, of the fact and the conditions of their detention in the transit zone, the lack of a legal remedy to complain of the conditions of detention, and the lack of judicial review of their detention. The ECtHR found that the applicants' stay in the transit zone had amounted to a *de facto* deprivation of liberty. It considered that without any formal decision of the authorities and solely by virtue of an overly broad interpretation of a general provision of the law, the applicants' detention could not be considered to have been lawful. In particular, considering the applicant children's young age, the applicant mother's pregnancy and health situation and the length of the applicants' stay in the conditions in the transit zone, the Court held that there had been a violation of Article 3 as well.

[41] Muskhadzhiyeva and Others v. Belgium, Judgement of 19 January 2010, no. 41442/07, Kanagaratnam v. Belgium, Judgement of 13 December 2011, no. 15297/09, S.F. and Others v. Bulgaria, 7 December 2017, no. 8138/16; see also Burgund Isakov et al. (2023).

[42] See also the very young children involved in cases as follows e.g. A.B. and Others v. France, Judgement of 12 July 2016, no. 11593/12, M.D. and A.D. v. France, Judgement of 22 July 2021, no. 57035/18, N.B. and Others v. France, Judgement of 31 March 2022, no. 49775/20, H.M. and Others v. Hungary, Judgement of 2 June 2022, no. 38967/17.

[43] A.M. and Others v. France, Judgement of 12 July 2016, no. 24587/12.

[44] Muskhadzhiyeva and Others v. Belgium, Judgement of 19 January 2010, no. 41442/07.

[45] R.R. and Others v. Hungary, Judgement of 2 March 2021, no. 36037/17.

3.3.2. Child-centred justice

Children's rights in the context of juvenile justice proceedings concern children accused of, prosecuted for, or sentenced for having committed criminal offences, as well as children who participate in judicial proceedings as victims and/or as witnesses. The ECHR fair trial guarantees are laid down in Article 6, which generates the most extensive case law of the ECtHR well beyond the limits of this paper, but some relevant cases can be called here as well. As a general rule, proceedings should ensure that the child's age, level of maturity and emotional capacities are taken into account, as it was said in *T. v. the United Kingdom,*[46] which concerned a high-profile case of the murder of a two-year-old by two ten-year-olds. They were committed to public trial under significant media attention.

It is important to note that the legally non-binding, but still remarkable CoE *Guidelines on Child-Friendly Justice* are directly relevant to children who are suspected or accused, as the guidelines represent a milestone in ensuring that judicial proceedings, including criminal justice, take into account the specific needs of children. They build on existing ECtHR case law and other European and international legal standards, such as the UN CRC.

In *Maslov v. Austria,*[47] notable among juvenile justice cases for its reference to the UN CRC, the ECtHR held that the obligation to take into account the best interests of the child (paramount) in the case of expulsion measures against a juvenile offender includes an obligation to facilitate the child's reintegration, in accordance with Article 40 of the UN CRC. In the view of the ECtHR, reintegration cannot be achieved by breaking the child's family or social ties through expulsion. The UN CRC was therefore one of the grounds for finding that expulsion constitutes a disproportionate interference with the applicant's rights under Article 8.

3.4. Discrimination of children

"Segregation cases" are of particular importance not only from the point of view of discrimination law, but also because of their implications for children's rights. In *D.H. and Others v. The Czech Republic*[48] the ECtHR found a violation of Article 14 in conjunction with Article 2 of Protocol 1 to the Convention by the disproportionate placement of Roma children in special schools for children with learning difficulties, which was unjustified. Roma children were thus provided with an education that exacerbated their difficulties and compromised their personal development, rather than being helped by the 'system' to integrate and socialise in the mainstream (and better quality) education system. Similar reasoning is followed by the court in *Oršuš and Others v. Croatia.*[49]

[46] T. v. the United Kingdom, Judgement of 16 December 1999, no. 24724/94.
[47] Maslov v. Austria, Judgement of 23 June 2003, no. 1638/03.
[48] D.H. and Others v. the Czech Republic [GC], Judgement of 13 November 2007, no. 57325/00.
[49] Oršuš and Others v. Croatia [GC], Judgement of 6 March 2010, no. 15766/03.

Among the cases of discrimination on the grounds of disability, in *Çam v. Turkey* and *G.L. v. Italy*[50] the ECtHR found a violation of Article 14 in conjunction with Article 2 of Protocol 1 to be well founded. In the first case, a music academy refused to admit an eligible pupil on the grounds of visual impairment, where the ECtHR noted that discrimination on the grounds of disability also extends to the denial of a reasonable accommodation to facilitate access to education for persons with disabilities (for example, adapting teaching methods to make them accessible to blind or visually impaired pupils). In the second case, a pupil with autism spectrum disorder was denied the special support required by law for the first two years of primary school. The authorities made no effort to assess his real needs and thus did not provide personalised support to enable him to continue his primary school education in conditions as equivalent as possible to those enjoyed by other children in the same school.

3.5. Other children's rights cases

A particularly high number of children are affected by cases involving violations of Article 8. This was the ECtHR's assessment of the issue of birth registration of children when it considered whether its refusal could raise a question under Article 8. The ECtHR held that the name, as a "means of identifying persons within the family and the community", falls within the scope of the right to respect for private and family life enshrined in Article 8.[51] Similarly, the ECtHR has regarded the right to identity and personal development as part of Article 8, arguing that the details of an individual's identity and the interest in "obtaining the information necessary to ascertain the truth concerning important aspects of the individual's personal identity"[52] allows the right to know one's origin to fall within the scope of Article 8.

Although the ECHR does not guarantee the right to nationality, case law has held that arbitrary denial of nationality because of its impact on the private life of the individual may also fall within the scope of Article 8.[53]

In its case law,[54] the ECtHR has also dealt with children's freedom of thought and religion, particularly in the context of the right to education.

Vavřička and Others v. The Czech Republic[55] concerned the Czech legislation on compulsory vaccination and its consequences for the applicants who refused to comply with it. The first applicant had been fined for failure to comply with the vaccination duty in relation to his two children. The other applicants had all been denied admission to nursery school for the same reason. The applicants all alleged, in particular, that the various consequences for them of non-compliance with the statutory duty of vaccination had been

[50] G.L. v. Italy, Judgement of 10 September 2020, no. 59751/15.
[51] Guillot v. France, Judgement of 24 October 1993, no. 22500/93.
[52] Odièvre v. France [GC], Judgement of 13 February 2003, no. 42326/98.
[53] Genovese v. Malta, Judgement of 11 October 2011, no. 53124/09.
[54] See e.g. Dogru v. France, Judgment of 4 December 2008, no. 27058/05, Kervanci v. France, Judgment of 4 December 2008, no. 31645/04, Grzelak v. Poland, Judgment of 15 June 2010, no. 7710/02.
[55] Vavřička and Others v. The Czech Republic, Judgement of 8 April 2021 (Grand Chamber).

incompatible with their right to respect for their private life. The ECtHR held that there had been no violation of Article 8, finding that the measures complained of by the applicants, assessed in the context of the national system, had been in a reasonable relationship of proportionality to the legitimate aims pursued by the respondent State (to protect against diseases which could pose a serious risk to health) through the vaccination duty.

Interview without parental consent was the subject of the case *I.V.T. v. Romania,*[56] where the ECtHR found the violation of Article 8. This case concerned a television interview of a minor, without parental consent or adequate measures to protect her identity. The interview, which concerned the death of a schoolmate, had resulted in her being bullied and had caused her emotional stress. The ECtHR held that there had been a violation of Article 8 (the right to respect for private life), finding that the domestic appellate courts in this case had only superficially balanced the question of the applicant's right to private life and the broadcaster's right to free expression. They had not properly taken into account the fact that she had been a minor, failing in their obligation to protect her right to private life.

In the area of international child abduction, the obligations are imposed by Article 8, which is quite an evolving field in terms of child-rights-related cases before the ECtHR.[57] The ECtHR gives the UN CRC a quite prominent place in its assessments of such cases, and repeatedly emphasises that the obligations provided in Article 8 must be interpreted in the light of the requirements, among others (e.g. international legal documents), of the UN CRC.[58] It is not only in child abduction cases that the ECtHR has made such an emphasis. In *Emonet and Others v. Switzerland,*[59] the ECtHR stated that the positive obligations under Article 8 in respect of adoption "must be interpreted in light of the [CRC]", and in *Maumousseau and Washington v. France,*[60] it declared that the same must be done with the positive obligation under Article 8 to reunite parents with their children.

4. Conclusion

The ECtHR has established that the ECHR must be interpreted as a living instrument, allowing it to remain relevant considering evolving social and legal standards. However, the ECHR, as originally drafted, contains only limited direct references to children and individuals under the age of 18. It was adopted decades before the UN CRC, during a period when civil and political rights were the primary focus. From a contemporary perspective, both instruments may appear somewhat outdated. Nonetheless, the increasing number of cases involving children – as well as the growing academic interest – demonstrates that the ECHR continues to serve as a vital tool for the protection of children's human rights.

[56] I.V.T. v. Romania, Judgement of 1 March 2022, no. 35582/15.

[57] See e.g. Ignaccolo-Zenide v. Romania, Judgement of 25 January 2000, no. 31679/96, Cavani v. Hungary, Judgment of 28 October 2014, no. 5493/13, Iglesias Gil and A.U.I. v. Spain, Judgement of 29 April 2003, no. 56673/00; see also ECtHR Press Unit (2024b).

[58] See Voica v. Romania, Judgement of 7 July 2020, no. 9256/19, para. 51.

[59] Emonet and Others v. Switzerland, Judgement of 13 December 2007, no. 39051/03, para. 65.

[60] Maumousseu and Washington v. France, Judgement of 6 December 2007, no. 39388/05, para. 66.

There is a growing sense of a children's rights ethos, and scope for related arguments in ECtHR jurisprudence, thanks in large part to the UN CRC, but also the space gaining of the child rights attitude in societies and in national jurisprudences as well. The increase is visible, but not consistent in judgments referring to the UN CRC over the past decade, as Helland and Hollekim (2023) found in their extensive research.

While the CoE, as an international organisation is not a party to the UN CRC, all of its Member States are, and thus it holds a prominent position at the European level. The ECHR establishes common legal obligations for member states and shapes how European institutions develop and implement children's rights. As Fenton-Glynn (2020, p. 394) states "while it is understandable why the ECtHR does not always follow the CRC, the Court cannot ignore it".

In our world characterised by polycrisis on the one hand, and a series of technical revolutions on the other (see most recently Dzuráková, 2022; Foussard et al., 2023; Bán-Forgách et al., 2024), children are especially vulnerable because of their evolving capacities and sensitivity,[61] dependences on our adult world but they aspire to be active agents in the present and future of our societies. It can be exemplified by the struggle of young climate activists in demonstrations in the global North and South, but also their fight for justice in the courts (see the growing number of youth climate cases before the ECtHR and other regional human rights courts: Lux, 2025; Savaresi et al., 2024; Nolan, 2024), and also non-judicial remedies (see the submissions of young people to the UN Committee on the Rights of the Child), which we must take seriously and to give them every opportunity to agree to the granting of their participatory rights under the ECHR and the UN and European children's rights framework that will build on it, not just in theory, or by way of sporadic references to their rights in certain judgements.

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[61] See, in the context of post-war societies, Brucato (2023).

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The Impact of Non-performing Loans on Bank Profitability

Evidence from Türkiye

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Abstract: Non-performing loans (NPLs) are widely recognised as key indicators of the health of banks and, by extension, the broader economy. This study examines the impact of NPLs on the profitability of banks in Türkiye from 2003 to 2020, using Return on Assets (ROA) as the primary profitability measure. Panel data from 15 deposit banks were analysed using a robust least squares regression (with M-estimation) to address outliers and heteroscedasticity. Key variables include the NPL ratio, ownership concentration (OC), bank size, deposit ratio, consumer price index (CPI) and gross domestic product growth rate. The analysis shows a significant negative relationship between NPLs and ROA, indicating that higher NPL levels are associated with lower ROA. OC and CPI also exhibit negative effects on ROA, whereas bank size, deposit ratio and GDP growth rate have positive impacts on profitability. These findings underscore the need for effective NPL management to maintain the financial health of banks. The results highlight the importance of internal management efficiency, macroeconomic stability and robust regulatory frameworks in improving bank profitability in Türkiye.

Keywords: non-performing loans, bank profitability, return on assets, panel robust regression, Türkiye

1. Introduction

The banking sector is a key component of the economy, serving as a fundamental building block. Banks play a crucial role in ensuring the healthy functioning of the economy by channelling savings into productive activities, thereby supporting industrial growth and efficient capital allocation (Morck et al., 2011). Effective management of banks is essential, as they act as intermediaries transferring funds from those with a surplus to

those with a deficit. The necessity for sound bank management has become evident globally through financial crises, which have shown that any problem in the banking system can rapidly and directly affect the overall economy (Mhadhbi et al., 2020). One of the biggest obstacles to effective bank management is the difficulty in loan repayment faced by borrowers; such problem loans become non-performing loans and negatively impact bank profitability (Kadıoğlu et al., 2017).

NPLs are considered a good indicator of the financial health of both banks and the economy (Jiang & Zheng, 2024). These loans are those for which the borrower has made no interest or principal payments for at least 90 days (Bholat et al., 2016; Espinoza & Prasad, 2010; Louzis et al., 2012; Makri et al., 2014). When loans become problematic and turn non-performing, they cease to generate income for banks, which can lead to serious financial issues if not properly managed (Anita et al., 2012). This not only disrupts banks' cash flow but also poses significant risks to financial stability and economic growth (Khan et al., 2020). Although the exact definition of an NPL may vary slightly by region, in general NPLs are loans in default or close to default, signalling potential losses for lenders (Miglionico, 2017). Early detection and proactive management of these loans help banks avoid larger problems in the future.

Bank profitability essentially measures how well a bank is performing financially – how much it earns relative to what it spends. This is crucial for keeping banks running smoothly, supporting economic growth and maintaining financial stability (Lamothe et al., 2024). Bank profitability is affected by a combination of factors, including the bank's own characteristics, industry conditions and the overall economic environment (O'Connell, 2023). When banks are profitable, they can build up reserves to handle tough economic times and remain resilient in the long run. For example, Dietrich and Wanzenried (2011) found that banks with higher profits before the 2008 financial crisis were better able to withstand the crisis, underscoring the importance of strong profit margins.

Factors affecting bank profitability can be internal (such as management efficiency, capital adequacy and credit risk management) or external (such as economic growth, interest rates and inflation). For instance, Athanasoglou et al. (2008) found that efficient cost management and maintaining high-quality loans significantly boost profitability. Their study on Greek banks showed that well-capitalised banks are more profitable because they can absorb unexpected losses and invest in profitable opportunities.

In Türkiye, where banks are central to the economic system, combating NPLs requires a comprehensive approach that considers both macroeconomic conditions and bank-specific practices. Equally, understanding bank profitability is crucial for policymakers and bank managers in developing strategies to enhance financial performance and stability. Improving profitability through effective management, regulatory reforms and favourable economic policies can significantly strengthen the health and resilience of Türkiye's financial system.

Türkiye's banking sector has undergone significant transformations over the past few decades, marked by periods of crisis followed by reforms. This overview focuses on the sector's structure, the impact of NPLs and recent developments. Türkiye's banking sector

constitutes a substantial part of its financial system, with deposit banks at its core. As of June 2024, 33 deposit banks (Bankacılık Düzenleme ve Denetleme Kurumu, s. a.) controlled 77% of the total assets in the banking sector in Türkiye,[1] highlighting the sector's central role in financial transactions and intermediation. The sector includes state-owned, private and foreign-owned banks, with state banks historically holding significant asset shares due to their public financing roles and specific mandates (such as agricultural lending by the Ziraat Bank). In response to the 2000–2001 economic crises, major reforms were introduced, driven by IMF and World Bank programs. The Banking Sector Restructuring Program launched in 2001 aimed to rehabilitate insolvent banks, restructure state-owned banks for eventual privatisation, and strengthen regulatory institutions (Arı et al., 2024). This program helped cushion Turkish banks from the 2007–2008 global financial crisis, although recent challenges (including the 2018 currency crisis) have posed new threats (Arı et al., 2024; Narin et al., 2023).

NPLs have been a persistent issue in Türkiye's banking sector, reflecting broader economic vulnerabilities. The crises of the 1990s and early 2000s, driven by macroeconomic imbalances and structural weaknesses, saw a significant rise in NPLs. For instance, during the 2001 crisis, banks struggled with large open foreign exchange positions, heavy foreign debt burdens and deteriorating asset quality – including a substantial increase in NPLs (Narin et al., 2023). In the aftermath, substantial regulatory changes were implemented to stabilise the sector. The establishment of the Banking Regulation and Supervision Agency in 2000 was a pivotal step, tasked with ensuring banks' solvency, liquidity and risk management. Despite these efforts, NPLs continue to pose challenges, particularly during periods of economic instability or political tension (Arı et al., 2024; Güzel, 2023). Recent years have seen further consolidation and modernisation in the sector. The number of banks has declined due to mergers and acquisitions, and technological advancements have improved service delivery and efficiency (Güzel, 2023). However, economic volatility – including high inflation and currency devaluation – has strained the sector. For example, the 2018 currency crisis and subsequent economic policy shifts impacted banks' profitability and risk profiles (Arı et al., 2024; Narin et al., 2023).

This study aims to examine the impact of non-performing loans (NPLs) on the profitability of deposit banks operating in Türkiye, with a particular focus on the role of ownership concentration and macroeconomic factors. As the backbone of financial intermediation, banks must manage credit risk effectively to maintain stability and support economic growth. In this context, understanding how NPLs affect profitability is vital for both academic research and policy formulation. By exploring the relationship between key financial indicators and bank performance over a significant period, this study contributes to the literature on banking efficiency and risk management. It also provides insights into how internal bank characteristics and external economic conditions jointly shape the financial outcomes of banks in emerging economies like Türkiye.

[1] Author's calculation.

2. Literature review

Non-performing loans can increase for various reasons, such as economic downturns, poor lending practices and weak risk management. For instance, during times of economic recession, businesses and individuals may struggle to repay loans, leading to a rise in NPLs (Akhter, 2023). Bank-specific issues like inadequate capital positions and weak credit assessments also contribute to higher NPL levels (Zhang et al., 2022). Greece offers a notable example, where NPLs surged during financial crises due to economic instability and certain banking practices (Athanasoglou et al., 2008). In Europe, factors such as economic cycles, bank capitalisation and rapid loan growth are crucial in understanding NPL dynamics (Beck et al., 2015).

In the Gulf Cooperation Council countries, changes in oil prices and global economic conditions significantly affect banking stability. Because these economies heavily rely on oil revenue, major oil price swings directly impact economic performance and loan defaults (Louzis et al., 2012). Klein (2013) emphasised that in Central, Eastern and Southeastern Europe, economic growth, inflation and exchange rates play significant roles in rising NPLs. Additionally, institutional quality and the legal environment influence how well banks manage NPLs, highlighting the need for robust regulatory frameworks (Boudriga et al., 2010).

Bank-specific factors such as efficiency, profitability and size are also important determinants of NPLs. Effective management can reduce NPLs by improving credit risk assessment (Messai & Jouini, 2013). Moreover, high public debt and unemployment rates are associated with increased NPLs. Makri et al. (2014) demonstrate the importance of macroeconomic stability and sound fiscal policies in containing NPL levels in the Eurozone (see also Espinoza & Prasad, 2010). In the United States, local economic conditions and banking sector factors were identified as primary determinants of NPLs (Ghosh, 2017). Developed economies face challenges from financial market stress and economic downturns that elevate NPL levels (Nkusu, 2011). In Sub-Saharan Africa, economic growth, exchange rate stability and governance are key factors affecting NPL levels (Fofack, 2005).

Industry conditions, such as competition and regulation, also play a major role in banking outcomes. García-Herrero et al. (2009) found that in China, intense competition, strict regulations and high NPL levels led to low profitability for banks. They suggested that reducing NPLs and boosting efficiency could significantly improve performance. Macroeconomic factors like economic growth and inflation likewise have considerable impact on bank profitability. Trujillo-Ponce (2013) discovered that in Spain, stable economic growth and low inflation positively influenced bank profits. Similarly, Kosmidou (2008) noted that Greek banks enjoyed higher profits during periods of EU economic integration, attributable to favourable conditions and improved regulations.

Comparing domestic and foreign banks in the EU, Pasiouras and Kosmidou (2007) found that foreign banks face distinct pressures affecting profitability. Their study highlighted the necessity for banks to adjust to local market conditions and regulatory requirements. Sufian and Habibullah (2009) showed that in Chinese banks, both internal factors (like credit risk) and external factors (like GDP growth and inflation) are crucial

to profitability. In the Asian banking sector, Lee and Hsieh (2013) found that well-capitalised banks achieve higher profits and lower risk levels, demonstrating the benefits of strong capital buffers.

One of the most common measures of bank profitability is ROA, which reflects how effectively a bank uses its assets to generate earnings. Higher ROA values indicate better asset utilisation and management efficiency (Dietrich & Wanzenried, 2011).

Türkiye's banking sector, like those of other emerging markets, faces unique challenges and opportunities that affect NPLs and profitability. Several studies have examined these dynamics, offering insights into what drives performance and stability in Turkish banks. Alper and Anbar (2011) examined the drivers of commercial bank profitability in Türkiye, finding that internal factors such as bank size, capital adequacy and operational efficiency are crucial. Additionally, macroeconomic variables like inflation and GDP growth play significant roles. Banks that are well-capitalised and efficiently managed tend to perform better, even during economic turbulence. Sarıtaş et al. (2016) analysed how financial ratios and macroeconomic variables affect bank profitability in Türkiye. They found that interest rates and economic growth significantly impact profitability, suggesting that banks need to adjust their strategies as economic conditions change. Gülhan and Uzunlar (2011) concluded that liquidity, asset quality and capital adequacy are critical factors for profitability in the Turkish banking sector; maintaining a strong capital base and sound asset management is essential for sustained profits. Kılınç et al. (2018) specifically examined the effect of NPLs on bank profitability in Türkiye, and their findings showed a strong negative relationship between NPLs and profitability – underscoring the importance of managing loan quality to ensure financial performance. Turan (2022) investigated how macroeconomic variables and capital structure influence bank profitability in Türkiye, concluding that economic stability (measured by GDP growth and inflation) is crucial and that an optimal capital structure helps banks weather economic fluctuations. Sevim and Eyüboğlu (2016) identified internal factors influencing Turkish commercial bank performance, finding that management efficiency, asset quality and financial leverage are significant; improving internal operations and risk management can enhance performance. Güzel and İltaş (2018) examined determinants of profitability in Turkish commercial banks (2003–2016) and concluded that both macroeconomic stability and sound banking practices are essential for sustained profitability. Okuyan and Karataş (2017) analysed the Turkish banking sector's profitability, emphasising the roles of operational efficiency and risk management. Their findings suggest that continuous improvements in operations and effective risk management are vital for maintaining profitability.

3. Research methods

3.1. Data

The dataset used in this study comprises 15 deposit banks operating continuously in Türkiye from 2003 to 2020. (Participation banks are not included.) Financial data for these banks were obtained from publicly disclosed balance sheets, income statements

and annual reports, primarily through the Banks Association of Turkey's website. Macroeconomic data (consumer price index and gross domestic product) were retrieved from the World Bank database.

Ownership concentration data for each bank were manually compiled using company yearbooks, audit reports and annual reports. Ownership concentration is the percentage of shares controlled by the bank's principal (ultimate) shareholder, including both direct and indirect ownership. Direct ownership refers to shares registered under a shareholder's name, while indirect ownership refers to bank shares held by entities controlled by the ultimate shareholder. Since the main shareholders of banks are often the companies themselves, identifying the ultimate owners requires tracing through multiple layers of ownership to determine the final controlling parties.

3.2. Variables

- *Return on Assets (ROA):* ROA is a ratio indicating how much income a bank generates per unit of assets, reflecting the bank's efficiency. It is calculated as net income divided by total assets (Do et al., 2020; Alshebami et al., 2020; Singh et al., 2021).
- *Non-performing Loans to Gross Loans (NPL):* The NPL ratio is the proportion of a bank's loans that are not being repaid (i.e. loans in default or close to default). It measures the quality of the bank's loan portfolio (Sarıtaş et al., 2016; Khan et al., 2011; Kingu et al., 2018; Chimkono et al., 2016).
- *Ownership Concentration (CON):* The percentage of shares held by the bank's largest (ultimate) shareholder. It represents the total direct and indirect voting rights of the largest owner (Magalhaes et al., 2010; Chun et al., 2011). If this proportion exceeds 20%, the bank is considered to have a major shareholder. When a large fraction of shares is owned by a small number of shareholders, the firm is said to have highly concentrated ownership (Çıtak, 2007).
- *Bank Size (SIZE):* Measured as the logarithm of the bank's total assets. Due to economies of scale, larger banks can reduce average costs, which may positively impact profits (Tan, 2014).
- *Deposit-to-Asset Ratio (DEPOSIT):* The ratio of total deposits to total assets (Turan, 2022). A bank's growth can be indicated by the annual growth rate of its deposits. Banks that grow rapidly are expected to expand operations and increase profitability accordingly (Sarıtaş et al., 2016).
- *Consumer Price Index (CPI):* Annual inflation rate. In periods of high inflation, banks tend to increase loan interest rates and may charge more for services, potentially boosting profitability (Bouzgarrou et al., 2018). However, high inflation also erodes the real value of borrowers' incomes, weakening their repayment capacity and thereby increasing NPLs (Singh et al., 2021).
- *Gross Domestic Product Growth Rate (GDPGR):* Annual GDP growth rate, reflecting overall economic growth. GDP growth affects the supply and demand for credit (Okuyan & Karataş, 2017). During recessions, a drop in GDP growth

increases banks' credit risk and reduces profitability. Conversely, during economic expansions, banks can lend more and widen their net interest margins, resulting in higher profitability (Sarıtaş et al., 2016). Thus, GDP growth is a key indicator of economic activity that can influence bank profitability (Bhattarai, 2016).

Table 1

Deposit banks that operated continuously in Türkiye during the period 2003–2020, used in the study

Akbank T.A.Ş.
Alternatif Bank A.Ş.
Anadolubank A.Ş.
Arap Türk Bankası A.Ş.
Denizbank A.Ş.
Finans Bank A.Ş.
Türkiye Garanti Bankası A.Ş.
Türkiye Halk Bankası A.Ş.
HSBC
Türkiye İş Bankası A.Ş.
Şekerbank T.A.Ş.
Türk Ekonomi Bankası A.Ş.
Tekstil Bankası A.Ş. (ICBC Turkey Bank)
Turkish Bank A.Ş.
Türkiye Vakıflar Bankası T.A.O.

Source: compiled by the author

3.2.1. Model specification

We employ panel data on a sample of commercial banks in Türkiye, with 270 observations over a period of 2003–2020 by applying robust least squares regression with M-estimation to examine the impact of non-performing loan ratio (NPL) on bank profitability (ROA).

- *Dependent Variable:* Return on Assets (ROA)
- *Independent Variable:* Non-Performing Loans (NPL)
- *Control Variables:*
  - Ownership Concentration (CON)
  - Bank Size (SIZE)
  - Deposits (DEPOSIT)
  - Consumer Price Index (CPI)
  - Gross Domestic Product Growth Rate (GDPGR)

Panel Data Model:

$$ROA_{it} = \beta_0 + \beta_1 NPL_{it} + \beta_2 CON_{it} + \beta_3 SIZE_{it} + \beta_4 DEPOSIT_{it} + \beta_5 CPI_{it} + \beta_6 GDPGR_{it} + v_i + \epsilon_{it}$$

The panel data regression model can be specified as follows:

where:

- ROA_{it} is the return on assets for bank i at time t
- NPL_{it} is the non-performing loan ratio for bank i at time t
- CON_{it} is the ownership concentration for bank i at time t
- $SIZE_{it}$ is the size of bank i (log assets) at time t
- $DEPOSIT_{it}$ is the deposit-to-asset ratio for bank i at time t
- CPI_{it} is the consumer price index (inflation rate) at time t
- $GDPGR_{it}$ is the GDP growth rate at time t
- v_i is the unobserved bank-specific effect for bank i
- ϵ_{it} is the error term

3.2.2. Results and discussions

Table 2
Summary of descriptive statistics

Stats	ROA	NPL	CON	SIZE	DEPOSIT	CPI	GDPGR
Mean	0.014479	0.047663	0.711639	16.866870	0.413879	0.102	0.051
Median	0.014573	0.040726	0.735700	17.023940	0.499597	0.090	0.054
Max.	0.044923	0.456516	1.000000	20.365010	0.852151	0.203	0.112
Min.	–0.022097	0.002744	0.258700	12.600280	0.107101	0.061	–0.048
Std. Dev.	0.008493	0.044169	0.233398	1.863169	0.233095	0.038	0.038
Obs.	270	270	270	270	270	270	270

Source: compiled by the author

The ROA values indicate that, on average, the banks in the sample are profitable. The NPL ratio shows that the level of problematic loans varies widely across banks, with some banks experiencing very high NPL levels. The concentration ratio (CON) also varies significantly, reflecting different degrees of ownership concentration among banks. The SIZE figures reveal substantial differences in bank size (total assets), while the DEPOSIT ratio exhibits a wide range, indicating varied reliance on deposit funding. The CPI values suggest that inflation rates were relatively stable over the period. Lastly, the GDP growth rate (GDPGR) was positive on average, despite some fluctuations in the economy.

Table 3
Correlation Matrix with p-values

Variable	ROA	NPL	CON	SIZE	DEPOSIT	CPI	GDPGR
ROA	1.000000						
NPL	−0.012764 (0.8346)	1.000000					
CON	−0.076425 (0.2106)	0.045832 (0.4533)	1.000000				
SIZE	0.158487 (0.0091)	−0.038621 (0.5275)	−0.211960 (0.0005)	1.000000			
DEPOSIT	0.419589 (0.0000)	0.083349 (0.1721)	0.061055 (0.3175)	−0.242197 (0.0001)	1.000000		
CPI	−0.074807 (0.2205)	0.214281 (0.0004)	0.029275 (0.6320)	0.081810 (0.1802)	−0.219405 (0.0003)	1.000000	
GDPGR	0.021776 (0.7217)	−0.075752 (0.2147)	−0.034672 (0.5705)	−0.136234 (0.0252)	0.141770 (0.0198)	−0.106535 (0.0806)	1.0

Source: compiled by the author

ROA shows positive correlations with SIZE and DEPOSIT, and negative correlations with NPL, CON, and CPI (its correlation with GDPGR is near zero). The NPL ratio is positively correlated with DEPOSIT and CPI, and negatively correlated with SIZE and GDPGR. The CON variable is negatively correlated with SIZE and GDPGR, but positively with NPL and DEPOSIT. SIZE is positively correlated with ROA and CPI, and negatively correlated with CON, NPL, DEPOSIT, and GDPGR. The DEPOSIT ratio is positively correlated with ROA, NPL, and GDPGR, and negatively correlated with SIZE and CPI. CPI is positively correlated with NPL and negatively correlated with DEPOSIT and GDPGR. GDPGR is positively correlated with DEPOSIT and slightly negative with CON, SIZE, and CPI. Additionally, ROA and DEPOSIT have a moderately strong correlation of about 41.9%, whereas most other pairwise correlations are relatively weak. Notably, NPL and CPI have a correlation of about 21.4%.

3.3. Regression analysis

Robust least squares estimation is a regression technique that aims to provide more reliable parameter estimates even when outliers or heteroscedasticity are present. Unlike ordinary least squares (OLS), which minimises the sum of squared residuals and can be very sensitive to outliers, robust methods minimise a weighted sum of residuals to lessen the influence of extreme values (Rousseeuw & Leroy, 1987). One common robust method is M-estimation, which employs weighting functions (such as Huber, Tukey, or Cauchy) to assign lower weights to outliers, thereby enhancing the robustness of the results (Alma, 2011). For example, the Cauchy weighting function is effective in handling large residuals, making it suitable for data with heavy-tailed error distributions

(Huber, 1981). Furthermore, advanced robust regression techniques like S-estimation and MM-estimation extend this robustness by optimising both scale and location parameters, ensuring a high breakdown point and resistance to a larger proportion of outliers (Yohai, 1987).

Table 4
Regression results on ROA model with robust statistics

	ROA
C	−0.014918***
	(6.34E-05)
NPL	−0.005890***
	(0.000126)
CON	−0.001226***
	(2.36E-05)
SIZE	0.001375***
	(3.06E-06)
DEPOSIT	0.017613***
	(2.46E-05)
CPI	−0.001455***
	(0.000148)
GDPGR	0.000483***
	(0.000144)
Observations	270
R-squared	0.337849
Adjusted R-squared	0.337849

Source: compiled by the author

The robust least squares regression yields an R-squared of 0.3378, indicating that about 33.78% of the variability in ROA is explained by the independent variables (Table 4). The analysis reveals a negative relationship between NPL and ROA, with a coefficient of −0.005890 ($p \approx 0.0000$), indicating strong statistical significance. In other words, higher NPL levels are associated with lower ROA. Similarly, ownership concentration (CON) has a negative coefficient of −0.001226 ($p \approx 0.0000$), signifying a statistically significant inverse relationship with ROA.

By contrast, bank size (SIZE) shows a positive coefficient of 0.001375 ($p \approx 0.0000$), underscoring a significant positive association with ROA. The deposit ratio (DEPOSIT) likewise exhibits a strong positive relationship with ROA, with a coefficient of 0.017613 ($p \approx 0.0000$). The Consumer Price Index (CPI) has a negative coefficient of −0.001455 ($p \approx 0.0000$), indicating that higher inflation is linked to lower ROA. GDP growth (GDPGR) has a positive coefficient of 0.000483 ($p = 0.0008$), which is also statistically significant. The constant term (C) is negative (−0.014918) with $p \approx 0.0000$, indicating a significant intercept.

In summary, the model demonstrates that NPL, ownership concentration and inflation (CPI) have significant negative effects on ROA, while bank size, deposit ratio and GDP growth have significant positive effects on ROA.

4. Discussion

The findings indicate a significantly negative relationship between NPLs and ROA in Turkish banks. Specifically, a 1% increase in the NPL ratio leads to an approximately 0.589% decrease in ROA, illustrating that high levels of NPLs severely erode bank profitability. This underscores the critical need for banks to effectively manage their loan portfolios to maintain financial health. Additionally, the study shows that bank size and deposit ratios positively affect profitability, whereas ownership concentration and CPI (inflation) negatively impact ROA. These results are consistent with prior research suggesting that well-capitalised, efficiently managed banks tend to perform better even during economic turbulence.

The outcomes of this study correspond to the existing literature on the determinants of bank profitability and the impact of NPLs. The detrimental effects of NPLs on profitability have been documented extensively. For instance, Ozili (2021) found that higher NPLs are significantly and negatively related to ROA, indicating that an increase in NPLs leads to reduced bank profitability. This aligns with Dietrich and Wanzenried (2010), who noted that banks with higher NPL levels tend to exhibit lower profitability because of increased provisioning costs and reduced interest income. Similarly, García-Herrero et al. (2009) emphasise the harmful effects of high NPL ratios and operational inefficiencies on bank performance. Overall, these findings reinforce the notion that poor asset quality (high NPLs) is associated with weaker profitability.

In the context of Türkiye's banking sector, Kılınç et al. (2018) also highlight the adverse effects of NPLs on profitability, and Sarıtaş et al. (2016) find that NPLs negatively affect ROA. Thus, higher levels of NPLs indicate poor credit quality and potential defaults, strain bank resources and reduce overall profitability. Similarly, Aydın (2019) observed a significant negative relationship between credit risk (a major component of NPLs) and profitability. This relationship is attributed to the diminished quality of interest-earning assets and the higher provisioning costs associated with elevated NPLs, which together erode overall profits.

The macroeconomic factors identified in this study (e.g. GDP growth and inflation) are in line with the findings of other studies. For example, Trujillo-Ponce (2013) finds that stable economic growth and low inflation positively influence bank profitability in Spain. Likewise, Kosmidou (2008) noted that Greek banks experienced higher profits during periods of economic integration in the EU thanks to favourable economic conditions and improved regulatory frameworks. Alper and Anbar (2011) and Athanasoglou et al. (2008) similarly find that internal factors (e.g. bank size and operational efficiency) are crucial for profitability, while macroeconomic variables such as inflation also play a significant role.

The impact of ownership concentration on profitability is discussed in the literature. Kevser and Doğan (2021) highlight that higher ownership concentration has a negative linear impact on ROA. This is reflected in the negative relationship between ownership concentration and profitability observed in our study, suggesting that a highly concentrated ownership structure can diminish profitability in the Turkish banking sector, perhaps by hindering effective governance and risk diversification.

Beyond the empirical evidence presented, it is essential to consider the broader macroeconomic environment, particularly the role of monetary policy implemented by the Central Bank of the Republic of Türkiye (CBRT). Elevated policy interest rates, often used to combat inflation and stabilise the Turkish lira, have a dual impact on the banking sector. Policy interest rates both help curb inflation and increase borrowing costs for consumers and firms. As a result, loan demand may decrease, and existing borrowers may struggle to meet repayment obligations. This scenario increases the probability of loan defaults, thereby exacerbating the level of non-performing loans (NPLs) within the banking system (Fitch Ratings, 2025). Accordingly, the monetary stance of the CBRT constitutes a critical factor influencing both the credit risk and profitability of banks in Türkiye, and should be incorporated into any comprehensive assessment of banking sector dynamics.

5. Conclusion

This study's findings are well-aligned with the existing literature, reinforcing the importance of internal management efficiency, macroeconomic stability and effective regulatory frameworks in enhancing bank profitability and managing NPLs. The consistency of our results with previous studies underscores the robustness of our conclusions and the relevance of these factors in the context of Türkiye's banking sector. In particular, the analysis demonstrates the critical importance of effective risk management in banking, given the adverse impact of NPLs on profitability. Banks, therefore, need to adopt stringent credit assessment procedures and proactive loan monitoring practices to minimise issues related to NPLs.

At the policy level, several policy recommendations can be drawn from this study. Policymakers should be well-advised to give top priority to developing stronger regulatory institutions to ensure banks internalise stringent credit risk management practices. Greater supervision and standard risk assessment guidelines can help identify deterioration in credit conditions early on and lower systemic risk. At the same time, promoting macroeconomic stability – particularly through using policies that anchor inflation – is necessary in avoiding the accumulation of non-performing loans.

The other major area of concern for the regulators is that they have to closely monitor ownership concentration in banks. Highly concentrated ownership patterns are likely to reduce governance quality and decrease managerial accountability, ultimately to slow down bank profitability. Moreover, a conservative mix of monetary and fiscal policies should be tried to stabilise the economic environment, reduce uncertainty and alleviate pressure causing the generation of NPLs.

At the banking level, banks will need to develop sophisticated risk assessment systems that can examine borrower profiles and forecast probable credit defaults. Their lending procedures will need to emphasise diversification by industry so as to reduce sector-based vulnerabilities. A solid capital base will further be critical for the absorption of loss as well as for maintaining operational solidity.

Embedding advanced financial technologies in fundamental banking platforms can enhance the precision of risk estimation and accelerate response to emerging loan quality concerns. Thus, instantaneous feedback on borrower behaviour and macroeconomic patterns is provided. In addition, establishing better customer relationships with personalised service and efficient communications can result in enhanced repayment behaviour, which is critical in containing NPL levels.

By implementing these recommendations, policymakers can create an environment conducive to financial stability, and banks can improve their operational practices to manage risks better. Together, such efforts would help in reducing non-performing loans and enhancing the overall profitability and stability of the banking sector in Türkiye.

In summary, this study confirms the significant negative impact of non-performing loans on bank profitability in Türkiye and emphasises the role played by internal governance mechanisms alongside macroeconomic policy complementarities. Important findings include that better credit risk evaluation, optimal regulation of shareholding structures and a well-balanced monetary policy position are necessary to preserve banking sector profits. Both policymakers and bank managers need to come together in order to mitigate risks, while expanding their financial base for the long-run.

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After Authority

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Abstract: Authority is a fundamental tool of social integration. By selecting the most laudable and exemplary patterns, behaviours, actions or events – whether real or merely imagined – from the entire range of potentialities, it creates a community capable of communal action, by transforming an undifferentiated mass of independent individuals into a somewhat cohesive social group able to find common ground on matters vital for their shared existence, thus turning mere quantity into quality. It is thus evident that the existence of a certain degree of authority is also the basis for the viability of public administration, public policy and public management – to name but a few – in any given society. This paper will examine the conditions, manifestations and correlations of authority in the various domains of its social context, in order to provide a comprehensive account of its existence, its inevitability, but also the dangers inherent in its weakening.

Keywords: authority, social integration, order, coercion, obedience, persuasion, tradition

The more extensively and deeply we inhabit our intellectual and emotional environment, the more additional features or components worthy of distinction we find, which need to be noted, named and described. Embedded in the development of our culture, in the exploratory synthesis of our sciences and arts, is the perception of things that were perhaps always present, but which we lacked the sensitivity to perceive. These are the basic features of our individual and social existence, and as soon as we become aware of them, we immediately begin to cultivate them.

Existence is a singular, vast unity and process: it is a perpetual motion. Humans are the ones who break it down into parts and give it names, in order to understand and master it. Nature does not have its own catalogue; rather, it is our human language that partitions and describes it – in whatever ways are most conducive to its practical usage. Humans live in a particular space and time, and so they use different parts of nature, and in different ways: not necessarily the same aspects or in the same fashion as the humans of other regions and eras. This very same multiplicity characterises the diversity of individual and social existence, resulting from material conditions and cultural variations across

different times and places. Notably, the subjects of social existence cannot be grasped through physical distinction; they can only be understood through a certain contemplation. Its definitions are therefore vague, since they can hardly be based on anything other than the shared experience of lived reality. Nevertheless, they are real. They exist in the ontological sense as well, because they exert influence through their existence (see further Varga, 2021).

The very concept of authority invokes a series of images, as it is not, in fact, about the properties of a person or a thing, but rather about the significance, the pivotal role that we ourselves ascribe to these. Perhaps in a more amorphous, violent and intrusive form, but still a reminder of something that modern literature and art histories occasionally attempt to assert as canon in their own field.[1] The shared beliefs of our lives; our fellow human beings from the past or present, identified with their teachings or achievements; the works we identify with the messages they convey, or the practices they exemplify – these are the people from whom we select a scant few to honour as authorities. In our personal lives, our parents, our mentors, our esteemed colleagues, and the luminaries of our profession are the ones we elevate to the status of authorities. The main domain of authority, however, is society, with respect for authority being one of the fundamental integrating forces, an important factor in the organisation of individuals (with many, today, indoctrinated into the cult of individuality) into a community. By selecting the most laudable and exemplary patterns, behaviours, actions or events – whether real or merely imagined – from the entire range of potentialities available that can be voluntarily chosen through human free will, it creates a community capable of communal action, by transforming an undifferentiated mass of independent individuals into a somewhat cohesive social group able to find common ground on matters vital for their shared existence, thus turning mere quantity into quality. Thus, while our choice of authority in our personal lives is likewise personal – and rightly so, considering the stark differences between us all (and remembering the mentors who have shaped us through their own example, within our own family) – in the social space this must become strongly homogenised, unified and thereby directionally aligned for us to be at all capable of existing as members of a *societas.* Though insufficiently researched, this has historically, anthropologically and developmentally been the basis for the emergence of a community, for the development of individuality in whatever proportions. This is a necessary precondition for public administration, public policy and public economics to gradually take institutionalised forms.

We know little about the struggles of our early ancestors for social integration. It is only on rare occasions that we can find ourselves marvelling at historical facts such as the appearance of a code of law shortly after the appearance of writing in the history of mankind: the code attributed to Hammurabi, admired for its perfection in linguistic form and logical structure alike for eighteen centuries both before and after Christ, is still the perfect exemplar of its type alongside the code of Napoleon (Varga, 2011). While we know that the very act of norm-setting, and thus the idea of planning the future, was itself a fantastically modern point of development in our early evolution, it was also a kind of

[1] On the Western canon see, e.g., Schröder et al. (2012); Perry & Cunningham (1999); Iskin (2017). In the Hungarian context, see also Szegedy-Maszák (1995); Kulcsár Szabó (2019); András (2020); and critically Papp (2013).

destination in the progress of humanity (which Oppenheim, 1977, suggests could have developed in Jewish eschatological thought). Because training people to follow the ideal, to adhere to procedure for no gain but pure obligation, to show obedience, as well as the magical conceptuality of the linguistic drives of "must" or "forbidden", could presumably be nothing other than the civilising result of a struggle that may well have lasted for many millennia[2] – together with the achievement of establishing all the necessary tools of socialisation and education (which our present habits tend to accept as skills that are almost part and parcel of being human.)

Whatever the era, for cultures near or far, it is clear that order cannot be established without the assignment of authority, and power cannot be institutionalised without the necessary level of obedience. On the other hand, it is also evident that as soon as an order collapses, the loss of authority will be the first in the chain of consequences to follow.

And yet, although one can hardly point to an example of any contemporary who perceived the rule of authority as flawless in their own time, and did not complain of its waning or loss, nevertheless, this strange entity never seems to fully vanish. The history of humanity is rich in cataclysms, and they may occasionally even shake the foundations of the authority at the time, but neither then nor afterwards – with the situation settled and a new equilibrium established – does humanity continue its life without authority. In fact, it is often precisely when society is pulled off balance that authorities proliferate – sometimes in daily flux, dragging life along until their anarchic turmoil is somewhat calmed.[3]

From a socio-ontological perspective, our personal and communal existence is a single roiling stream. However, in order to analyse it at all, the cognitive mind highlights various aspects through analytical exploration, then presents their incredibly complex interplay in relation to other (previously highlighted) aspects. Recognising the importance of authority is thus associated with an infinite number of additional factors, including the multifaceted complexities of power, obedience and discipline.

In its historical formation, authority "comes into being from the beginnings of mankind" (Malinowski, 1944, pp. 187–188), as its essential need (Riga, 1996), as "a functionally universal component of organized social life among human beings" (Hoebel, 1958, p. 222).

In the most ancient times or conditions – known as the tribal state in legal anthropology – the authority in the struggle for survival went to the one who could best unite their community through their wisdom and insight on the one hand, and the respect they enjoyed, their talent for organisation and their strength in securing community consensus on the other. In other words, much like how it works for animals. A tribal chief was able to exercise this type of relative and mostly mediating power only until he was faced with a challenger who, proving stronger than him, could divert his tribe's sympathies away from

[2] In contrast to German metaphysics that sought the so-called essence of objects in the conceptual world, the philosophers who founded Scandinavian legal realism in the 19th and 20th centuries (cf. Faralli, 1982 and Bjarup, 1978) saw the precondition for the birth of social normativities in the magical invocation of the emotional impact of words and their corresponding practices.

[3] A classic example of this is the terror of the French revolution. As a more recent example, Bork (1997) analyses this in the American chain of consequences that was triggered by the 1968 student rebellion, and continues to the present day.

him (Hoebel, 1958, pp. 227, 232; cf. Varga, 2005). It was no coincidence that this apparent uncertainty could give rise to a relative and always temporary certainty, even without any institution, formality or formalism to support it. Naturally, the nexus of authority has taken many different forms in its various social contexts since then. The most interesting aspect, however, is that in many areas we still have a practice of authority operating with a similar logic to these ancient examples.[4]

The various forms of authority developed in antiquity, which once applied to rulers or the beliefs and worldviews underpinning the power to rule, are also alive today.[5] By way of example, "it could be the law of nature, or the commands of God, or the Platonic ideas, or ancient customs sanctified by tradition, or one great event in the past" (Arendt, 1958, p. 83). Their particular strength, sometimes spanning multiple eras and often still valid today, came from the fact that they became independent of any *ad hominem* reference, i.e. of any form of justification that could in principle be easily refuted or disputed: "In all these cases legitimacy derives from something outside the range of human deeds" (Arendt, 1958, p. 83).

The presence of authority encompasses virtually the entire range of human relations, connections and affiliations. An exhaustive typology is virtually impossible. They may be categorised in a non-exhaustive manner, almost at random, as divine or human, or epistemic (of competence), parental, operative (a freely established organisation that claims to achieve the ends of its members), and political (De George, 1978, pp. 99–102; De George, 1970), as well as personal, official or functional, political or pedagogical (Hungarian Catholic Lexicon).

And what is behind all of this? It is obvious that authority is a privilege, and behind it lies some kind of personal or institutional excellence on the part of the holder of the authority. An accurate formulation would be one that finds some type of surplus value in this excellence – which may be founded in intellectual or moral superiority, competence, recognition, wealth, trust, or courage (Hungarian Catholic Lexicon). Because of the many individuals comprising it, society is always diverse, and such surpluses are therefore likely to be dispersed to some extent. However, it is precisely what is universally understood to be authority, as described above, which performs the function of making this surplus visible, highlighting it and giving it its due weight in the everyday life of society. One definition, although it may seem offputtingly dry and reductive, captures the essence in a somewhat economistic but nonetheless accurate way. According to this: "Authority, rightly instituted, is a mode of coordination that treats individuals with the respect due them without requiring each to possess an impossibly high degree of knowledge about every sector of social life or an unreasonably high level of civic virtue. It is an appropriate mode of coordination in societies where social knowledge is specialized, interests are diverse, and the requirements of common action are relatively high" (Connolly, 1987, p. 19).

[4] Kiss (1969), p. 507, for example, rightly points out that "the authority of the expert is not hereditary and not an accessory of rank, but rather a constant struggle for the right to make decisions", and another author (Farkas, 2000, p. 72) regarding the suitability to lead the Gypsies (Romani), stated: "Aura is a gift, but authority must be earned! It cannot be given, nor taken; it is not a commodity. Its touchstone is trust, and mutual trust."

[5] An interesting example of early research in this field is Ibn Khaldûn's immensely rich work and its impact on the principles of governance in the Muslim world; see Alibašić (2025) for a recent overview.

Whether it is about being able to exert an exemplary influence on our children as parents, one that varies in strength depending on external influences, or about elevating a particular artistic expression, creator, community or school from among the artistic expressions/creators of the place and era in question through a process of evaluation and setting examples, or about the fact that we (fortunately) do not usually need to start from scratch, from an empty *tabula rasa* in developing our view of the world and of society: we apply a belief system, a set of moral standards and a culture of conscience already accepted in our environment, and which has become naturally socialised to become habitual in all of us. We thus inevitably perceive that authority does not simply offer a selection from a varied miscellany of all existing possibilities, but also enforces the choice of what exactly we acknowledge as having authority. To borrow the scientific definition of authority used in anthropology, it includes "the explicit capacity to direct the behavior of others" (Hoebel, 1958, p. 222).

In this case, however, what distinguishes authority from any similar phenomenon that can also be used in the analysis of the wide variety of alignment and management tools of social processes?

The first aspect that might come to mind, obviously, is power. Moreover, authority is often associated with power – and this first, historically proven theorem can certainly give us pause – and vice versa, and therefore the two are "often interchangeable" (Sennett, 1993). Yet, they are not identical. Our human intellect chose to use separate terms for these two phenomena precisely because it wanted to emphasise their distinguishing features in uncovering the driving forces and the directional switches of social processes. First and foremost among these is that since "force speaks from without; authority always speaks from within", the only possible answer is that: "Force is only a substitute. Authority is the real thing" (Berggrav, 1951, pp. 102, 97). Consequently, this shows that the two concepts are clearly interrelated, at least for the version of authority used in the sphere of macro-social organisation, i.e. the political sphere. This interrelation was beautifully described a century and a half ago by a learned parish priest in the Hungarian Highlands, speaking of the most visible instrument of political power, the enactment of laws: "Laws in themselves are dead things. Only authority gives them spiritual power, lends them the commanding force by which they can regulate the path of individuals and of society; on the quality of that authority depends the result produced by the laws" (Ferenczy, 1874, p. 893). And it is of course helpful for our analysis to consider the law as a statement of authority (at least ideally). Because the law, i.e. the formal normative of state power, backed by its own coercive mechanism, is binding on all recipients and in all regulated situations, whereas authority, on the other hand, does not imply obligation, but (in view of the aforementioned value surplus) merely advisable courses of action worth considering, and even that only for those who choose to pay attention.

Because authority is not raw necessity. Nor is it a command. Consequently, it does not act with the force of an inevitable prescription. Instead, as noted previously, it offers a kind of ranking and ordering in the totality of social heterogeneity, in the marketplace of confusion and the randomness of infinite diversity. But for whom? Well, only to those who are willing to listen. Thus, we can draw a kind of analogy to the advice one receives from one's doctor or mentor. After all, it is not imposed or forced as an external constraint,

it is merely a suggestion: if you truly want what you have sought him out to accomplish, then do as he says (De George, 1978, pp. 104–107). Hannah Arendt, in her struggle to decipher the nature of society while trying to make sense of Nazi crimes, gave an excellent speech at a Harvard forum on the topic of authority, where she provided us with a powerful tool for understanding the issue. As she explained:

> Since authority always demands obedience, it is commonly mistaken for some form of power or violence. Yet authority precludes the use of external means of coercion where force is used, authority itself has failed! Authority, on the other hand, is incompatible with persuasion, which presupposes equality and works through a process of argumentation. Where arguments are used, authority is left in abeyance. Against the egalitarian order of persuasion stands the authoritarian order, which is always hierarchical. If authority is to be defined at all, then, it must be in contradistinction to both coercion by force and persuasion through arguments. The authoritarian relation between the one who commands and the one who obeys rests neither on common reason nor on the power of the one who commands; what they have in common is the hierarchy itself, whose rightness and legitimacy both recognize and where both have their predetermined stable place (Arendt, 1954, pp. 1–2).

Conceptual positioning offers virtually infinite possibilities. The classical doyen of political science seems to perceive the simultaneously stabilising and socially integrating role of the community of values, embodied in established authority and self-validating in the historical fact of this highly spontaneous and formless establishment, when noting that "authority is neither power nor legitimacy, but the peculiar something through which power may achieve legitimacy" (Friedrich, 1954, p. 309). In other words, these three are specific aspects of a common, more general and more essential phenomenon, forming a complex where they could potentially be in opposition, but can, in the ideal case, also harmoniously complement and reinforce each other.

The conceptual delimitation of authority also raises the question of respectability. Although these two categories may seem closely related, they cannot be identical, because in the conceptual proximity of power, "authority also implies a kind of position of power, of decision" (Karsai, 1998, p. 564).

Beyond the delimitation of related phenomena, a sharp distinction can also be found by considering the counter-concept of authority. That would be none other than freedom, including the principle of democracy. In principle, they not only stand in opposition to each other, but are also capable of destroying each other. Nevertheless, according to the expert of this topic, they coexist: they operate in a single space simultaneously, both according to their demands. This also means that they are in constant interaction with each other. Through this interaction, they are capable of enriching each other (Simon, 1962). And what is it that nourishes both the one and the other? Well, the literature answers this by providing additional distinctions, such as the almost paradoxical opposition between the authority of reason and the reason of authority (L'Heureux-Dubé, 1993). This is a revival of older debates, from which Pascal already deduced his ancient, deceptively simple gem of wisdom: that the rights of authority and reason are, so to speak,

different.[6] The early Enlightenment added its own contribution, claiming that "reason and not authority should determine the judgment" (Bentham, 1952, p. 25, note 3).[7]

However, the closer we come to the present day, a world that defies the impossible and attempts to rewrite the inherent gifts of our existence, the more often we encounter efforts to unravel the basic fabric of society as we know it. It is no coincidence, then, that we sometimes find ourselves in situations where wisdom, enlightenment and science are no longer capable of producing anything other than empty words. For example, the current (and hopefully only temporary) landscape of the West suggests that the cult of freedom, democracy and human rights, and their overwhelming need for totality, is irrational, emotionally heated, and fearlessly intensifies the risk of its own social disintegration. It has become an all-encompassing, semi-anarchic and anti-authoritarian ethos in which even the values that have been so often proclaimed since ancient times have long since been distorted into their own opposites, and its progress may now threaten the very foundations of human existence as we know it.

However, it is inherent in the creation and the logic of authority that the more "it derives from something outside the range of human deeds", the stronger it can become.[8] The logic at work here is no different from anything else created by humans. First, we have humans, who are fallible. Their abilities, individually and collectively, are magnificent: they have built an entire world to rival nature. And yet they are unable to alter their own fallibility. In ancient times, this aspect of humanity may have been more nakedly evident, but in truth it is no different today either. Humans cannot be anything other than uncertain in their own existence, in their destiny. Although they do try to find an answer, they do their best to put it somewhere outside of themselves – objectifying and institutionalising it – ensuring that their task is then merely to draw conclusions from something that exists, supposedly, independently of themselves. Naturally, both they and we are fully aware that it is humanity that created these constructs. But as it is no longer in anyone's personal possession, it is no longer anyone's responsibility. Rather, it belongs to humanity, in a way. In other words, what was once internal has now been made external for them. And they now reckon with this external force as they do with their environment, with the outside world, even though its content may actually match up with their most dearly held, personal beliefs, or the institutionalised form of the order to be established among people. It is no coincidence, therefore, that authority was theologised – traced back to the Creator and claimed as His creation (Horváth, 1942) – even in our oldest sources, to such

[6] As one of Blaise Pascal's monographers writes on the subject of his *Pensées* (Tetsuya, 2012, pp. 49–50): "L'autorité est un poids qui entraîne la confiance quand il s'agit de choses auxquelles on n'a ni accès ni expérience immédiate. Le domaine de l'autorité est celui où les principes ne tombent pas sous les facultés propres de l'homme, sens et raison."

[7] But by the very fact that this conclusion was reached by the Bishop of Gloucester, William Warburton (1698–1779) (Warburton, 1736; 1737–1741), Bentham sarcastically claims that he had thereby set up a self-denying paradox, insofar as he set up an authority in opposition to his own.

[8] "Historically, we know of a variety of sources to which authoritarian rulers could appeal in order to justify their power; it could be the law of nature, or the commands of God, or the Platonic ideas, or ancient customs sanctified by tradition, or one great event in the past […]. In all these cases, legitimacy derives from something outside the range of human deeds" (Arendt, 1958, p. 83).

an extent that our ancestors continued to derive secular authority and raw power from divine mandate (or at least used it to reinforce its validity) almost until the modern age.[9]

This is the essence of institutionalisation: transferring something created by us as the simple product of human choice and decision into our so-called second nature – man-made, but now a natural part of our environment – thereby granting it a serious mantle of legitimacy. It is as if we were adding: "I didn't do it, I only found it, just like you did." This makes it possible to state, for example, that "all supra-political sources of authority: religion, morality, science, law, are nonpolitical in character" (Berggrav, 1951, p. 108), as well as to legitimately draw the cultural-historical inference that authority in its basic forms is not only an integral and harmonious part of a common culture, but also its most characteristic offspring (Wołpiuk, 2019).

While the word "authority", rooted in the Latin *auctoritas,* has strongly directed the perception and use of the concept itself towards its legal and power-political dimensions in English and Latin-speaking cultures, engendering a forum-based, procedural approach, it is nevertheless interesting and instructive to review some analogous features of the legal appearance and representation of authority.

The first might be its pyramidal structure. This reflects the historical lesson that the aligning effect of authority can be most powerful where the basic organisation of society itself reflects the presence and need for authority. In a literary formulation, it is like the pyramid, in which "the power concentrated at the apex gradually trickles down to ever wider layers of power: each layer perceives the authority in the narrower layer above it, radiating from the apex of the pyramid" (Balázs, 2013, p. 8). Any legal scholar on the European continent can recognise that this model is classically aligned with Hans Kelsen's hierarchical theory of law *(Stufenbaulehre),* that is, with our own basic conception of the structure and functioning of law as a basic model. It has been shown that this is in accordance with the theological formula of a creative deity, deriving the entire process of validity transfer from a presupposed basic norm as the ultimate normative source (Krawietz, 1984; resp. Varga, 1999).

The concept of sacralisation through time also appears to be legalistic in nature. "Authority is granted by time; it is authoritative", he claims, "because it is traditional, it has stood the test of time" (Gombár 2009, p. 6). This is one of the precepts that was granted an institutionalised form throughout the development of medieval law. There was not yet a reliably established system for sourcing laws, and in the case of competing references, the true law was considered to be the *gutes altes Recht* [good old law], which successfully justified itself through its continuous use (Kern, 1939; resp. Liebrecht, 2016).

Looking at this from a different angle, if we consider durability as proven in social practice to be a precondition for the validity of authority and for the real integrative force of the social equilibrium supported by authority, the consequences of the alarming collapse of authority in the U.S. and Europe set into motion by the 1968 student rebellion come into full view, with the chain reaction and its consequences expected to continue unabated

[9] For example, to use the brilliant words of a 19th century director of the theological seminary in Győr (Surányi, 1895, p. 344): "The authority of the state [...] is granted by the Lord of nature as power of dominion over the world, and therefore its will is based on the eternal law of morality."

for the foreseeable future. The simple and blunt truth of the matter is that without the backing of a common normative force capable of uniting society as a whole – be it religious faith, or any other form of attachment to the community in existence – no law has ever been sustainable, either in the past or in the present. And it was finally the jurisprudence of the U.S. Supreme Court that allowed for the self-destructive scandal of allowing the removal of the last support, the idea of common authority that could still ultimately be invoked. This has since led to the precarious instability (Bork, 1997; further Varga, 2012) of law in the United States of America. While the linguistic formulation may seem archaic, our ancestors clearly saw that the law only has the power to place special emphasis on something that already exists, using its own additional tools and institutional background to reinforce it (Varga, 1986). Or, as the progressive statesman József Eötvös wrote: "The infinite power vested in the state is sufficient wherever great effort is required at a singular point; but nowhere is it sufficient where many kinds of different activities are required" (Eötvös, 1854, p. 29). This is because society is not sustained by some demiurge, but by the cooperation of many actors, and the aligned values and skills developed through cooperation. So, even if the once fashionable Catholic author may have intended his aphorism as a paradox – "A virtuous nation would survive longer without laws than an immoral one with the most perfect laws" (Leroy, 1872–1873, p. 899) – today, there is an increasing sense among an ever-widening group of people that he was right.

Regardless of the many unexpected twists and turns in the civilisational collapse we are currently experiencing, the United States continues to dictate norm fetishisation and the almost irrational extremity of the faith in rationality underpinning it (cf. Varga, 2013). It is strange to acknowledge, then, how different the ancient roots of these ideas and the traditions they engendered were. In the practice of Roman law, acknowledged as a perfect system of rules, "the authority of the jurist was a more important source of law than the reason or basis for the decision", with the same wisdom pervading early canon law as well: "If the judge is cautious," the saying went, "he will not give reasons."[10] It was precisely in this tradition that the development of European – and within it, English – law matured. The jurisprudence of the European continent was in fact relatively late to break with this tradition, in the aftermath of the great codifications.[11] This tradition and jurisprudence has long relied on ancient and medieval authorities (the Bible, the Church Fathers, Aristotle and Justinian), with its English version also adding five classical books (from the 12th–18th centuries) (Pound, 1939, pp. 34; 35–36; Lévy-Ullmann, 1935). It was only quite recently, in the era of globalisation, that further non-mandatory but "persuasive authorities" were added.[12]

Thus, ever since the ancient beginnings, authority has permeated the law. This has continued almost to this day, and it is almost the same authority that conveyed its content. This is because, in live proceedings "orators appealed to the authority of tradition and to the idealistic intentions of the ancient law-givers in the midst of their courtroom speeches. Reference to the substance of the laws was only one of many rhetorical resources available

[10] "Stat pro ratione auctoritas" [authority rests on the will] the decision stated, and canon law wisdom says "si cautus sit iudex, nullam causam exprimet" (Godding, 1978, p. 48).

[11] This occurred in 1810 in France, and 1877 in Germany (Schluchter, 1981, pp. 82–138; Bergholtz, 1989).

[12] In Anglo–American law, this means "the extensive use of foreign, non-binding sources" (Glenn, 1987, p. 261).

to them." Which means that the law was of course present, but mostly in the guise of an authoritarian solution. "It is as if, in all these cases, the law and its proponents seek the sanction and authority of something or someone transcendent, who stands above and beyond the activities of the known law-makers", where "in many cases it is also the sense of a higher order that provides the basis for commitment to the law—as an interpretation of the words of God, or of Vedic principles, as the reflection of immemorial custom, the legacy of a heroic ancestor, or simply as a guarantor of life and liberty" (Pirie, 2013, pp. 117, 126, 129).

In the modern world of rationalism, of course, the mockery of authority has long become commonplace. And Bentham, for example (1952, pp. 17–42, 26–29, 34–42) – who showed constructive intent in many other respects – encouraged the mockery: his view was that this was all merely the result of different practices of earlier times, or the opinions of others, rife with abuse, with jurists and ecclesiastics playing a leading role in the said abuses back then. In contrast to this arrogant point of view, a more balanced, even defensible, assessment is reflected in the current situation, according to which, essentially "the authority based on traditions and bureaucratic hierarchy has been replaced by functional authority" (Kiss, 1969, p. 507). In the light of which we can also agree that "the objective is the maximization of rational processes and the restriction of authority to minimal requirements. But conformity is far from being purely rational and if the robes, flags and insignia of office make authority more effective, due allowance must be made" (Hall, 1958, p. 102).

In summary and conclusion, a few closing thoughts are worth mentioning here.

For it does indeed appear from conceptual analyses and scholarly studies that authority is not only a virtually ubiquitous and massively dominant feature of social movements and arrangements, and one of the most fundamental tools in the service of social integration, but that its destabilisation is also a seismograph-like indicator of social disruptions and, occasionally, cataclysms.

Our story of ideals is not simply about glory. Far from it. From the earliest times to the present, we have also perceived the weakness of world religions aspiring to absolutism, of forms of would-be rulership collapsing inflexibly into their own axioms. But authority is never for its own sake. By default, it is justified by the surplus value that it brings. And that is as it should be. Its development and refinement are therefore a natural phenomenon in itself. In the longer term, this may naturally entail not only changes but also the transcending of previously established forms. It is not simply a question of who is behind it, or what type of thought or even impulse motivates it. For if authority is indeed such a widespread and necessary social option, a tool for governing and civilising, which can nevertheless successfully guide our personal choices in certain directions, then we must guard it against the dictates of trends and fashions, against being shaped at will, against warping.

Regarding public administration, our law students learn early on how different it is to control a tiny rowboat, capable of reacting instantly to sudden movements, from steering a huge ocean liner, whose overwhelming mass cannot be controlled except by infinitely slow and subtle shifts in the rudder, the speed and so on. Because – and this is

perhaps the most important lesson on the question of authority – any steering move larger than what is strictly necessary can result in an imbalance and a loss of control, leading to the irresistible approach of disaster.

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Contents