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PARENTAL INTERNET RESTRICTIONS AND THE PERSONALITY RIGHTS OF CHILDREN: A COMPARATIVE STUDY OF TURKISH AND GERMAN LAW

The increasing accessibility of the internet through various digital devices has significantly changed children's online experiences. While internet access offers children opportunities for learning and social interaction, it also exposes them to potentially harmful content. In response, many parents impose access restrictions. This paper examines how such parental restrictions impact the personality rights of children from a comparative legal perspective, focusing on Turkish and German law. The study discusses the legal balance between parental authority and the rights of children to digital participation, privacy, and development. It argues that the German legal approach may serve as a model for Turkish regulatory efforts. By bridging child protection, internet freedom, and digital media regulation, the paper offers recommendations for legal frameworks that prioritize the best interests of the child.

Key words: *Children's rights*. – *Digital media*. – *Parental control*. – *Personality rights*. – *Legal comparison*.

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1. INTRODUCTION

The rapid development of technology has led to internet and technology use starting at a lower age. Children use the internet intensively, sometimes with parental permission and sometimes without parental permission. If there are no restrictions on a child's internet access, it is possible for them to access any site on the internet they want while their parents are eating or doing something else. If there are no restrictions on the child's access to the internet, they can access any website they want and what they see can sometimes make them feel scared or unsafe.

The safest way for children to use the internet comfortably and safely is for parents to impose internet restrictions, filtering and most importantly – for the State to take measures and impose sanctions. How do internet restrictions imposed on the child by the parent affect the personal rights of the child? What are the criteria that parents should pay attention to? When determining the criteria, it is important to identify the principles adopted in Turkish and German law and to determine which changes should be made in Turkish law.

2. PERSONALITY RIGHTS OF THE CHILD'S

2.1. Personal Rights of the Child under Turkish Law

In Turkish law, the personal rights of the child are protected under the Constitution, the Turkish Civil Code (TCC) and international conventions (e.g. the United Nations Convention on the Rights of the Child). All legal regulations aim to protect the child and ensure the physical, mental, moral, social and emotional development of the child, on the basis of not violating the rights of the child (Serozan 2017; Dural, Öğüz, Gümüş 2024; Özdemir 2024; Oğuzman, Seliçi, Oktay Özdemir 2024), with the concept of the child referring to persons under the age of eighteen.

In Turkish law, the main personal rights of the child are the right to life, physical and psychological inviolability, the right to name and identity, the right to education and development, the right to privacy and confidentiality of private life, the right to freedom of thought and expression, the right to protection and not to be abused, and the right to property and inheritance (Jäggi 1960).

The duty to protect the personal rights of the child is primarily assigned to the parents, and Article 41 of the Constitution further stipulates that the State has the responsibility to protect the child if the parents fail to fulfill this duty.

Children accessing the internet and the restrictions imposed on such access may lead to the violation of multiple personal rights of the child. However, the personality right that will be most affected is the right to privacy and confidentiality of private life.

2.2. Personal Rights of the Child under German Law

In German law, the concept of "child" is mentioned in different laws, but within the framework of each law, different age limits and different elements are taken into consideration. However, instead of a single general definition, the meaning of a child is determined in line with the purpose of the relevant law and the subject of regulation. Although the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) does not directly define a child, it determines the status of the child with provisions on age limits and legal capacity. BGB§104 is based on the age limit of seven years and recognizes that these children do not have the capacity to act. BGB§106 recognizes the limited legal capacity of children between the ages of seven and eighteen. BGB§1626 regulates that persons under the age of eighteen must be under guardianship and considers persons under the age of eighteen as children (Dethloff, Kroll 2018; Pintens *et al.* 2010).

The Child and Youth Welfare Act (*Kinder- und Jugendhilfegesetz* – KJHG / SGB VIII) is the basic legislation regulating social services for children and youths. The law divides child and youth services into different age groups and clearly defines the concept of a child. §7 Abs. 1 Nr. 1 SGB VIII considers anyone under the age of fourteen to be a child. §7 Abs. 1 Nr. 2 SGB VIII considers people between the ages of fourteen and eighteen to be juveniles. §7 Abs. 1 Nr. 3 SGB VIII refers to young adults between the ages of eighteen and twenty-one as young adults (Schwab, Dutta 2024; Kindler, Drechsel, 2003).

According to the German Civil Code (BGB), children's personal rights are based on the development of their identity as individuals, the protection of their physical and moral integrity and respect for their private life. Parents have an obligation to uphold their child's rights and support their personal development. Depending on the age and maturity of the child, these rights may be exercised more broadly. Children's personality rights are specifically

addressed in the framework of the general right to personality (*Allgemeines Persönlichkeitsrecht*). These rights include provisions that protect the dignity, privacy, physical integrity and freedoms of the child as an individual. Children have the same rights to personality as adults, but the protection, exercise and limitations of these rights must be regulated depending on the age and maturity of the child and the responsibilities of the legal representatives (parents or guardians).

According to §1626 of the German Civil Code, the personal rights of children are balanced with the parental rights of custody. When exercising parental rights, parents must ensure the child's welfare and protect the child's personal rights. In their decision-making, parents are also obliged to consider the physical and mental development of the child. The individual and personality characteristics of the child should also come to the fore in the decision-making process of the parents. Parents must consider the views of their children during their care and education.

As of recently, German law considers access to social media and digital rights to be the personal rights of children. The personal rights of children come to the fore to the extent of the restrictions imposed by the parents (Swinnen 2019; Besson 2007).

3. THE CHILD'S RIGHT OF ACCESS TO THE INTERNET AND LIMITATION OF THE RIGHT

3.1. In General

In Turkish law, the child's right to access the internet is not explicitly regulated directly by a legal rule. It is indirectly protected within the scope of the child's personal rights. The child's right to access the internet should be evaluated especially within the scope of education, access to information, freedom of expression and the right to development. However, this right may be limited by the supervision and supervision obligation of the parents or legal representatives, balanced with the safety and best interests of the child.

In German law, the right of a child to access the internet is not directly regulated by an article of law. However, children's access to the internet is dealt with within the framework of personal rights, freedom of expression and the right to information. At the same time, a balance is struck between parental custody rights (*Sorgerecht*) and the best interests of the child.

3.2. Legal Basis of the Child's Right to Access the Internet

3.2.1. Turkish Law

In Turkish law, the child's right to access the internet is evaluated in accordance with Article 42 of the Constitution on the right to education, Article 22 on the freedom of communication, and Article 41 on the protection of the family and contributing to the social, cultural and educational development of the child (Akyüz 2016). This is due to the fact that the child's right to access the internet is not regulated by special law or provision of law. Furthermore, these regulations indicate that the family should take precautions in case of situations affecting the development of the child (Ayaz, Işıklı 2020).

The United Nations Convention on the Rights of the Child, to which Turkey is a party, guarantees the child's right of access to information. Article 13 of the Convention regulates freedom of expression and Article 17 regulates the right of access to information (Öngören 2022).

Article 335 of the Turkish Civil Code regulates the rights and obligations of parents towards their children under the right of custody. Although not directly stated in the law, it is accepted that parents have the right to regulate the child's access to technological resources within the scope of parental authority. Article 339 of the TCC states that parents, who have the right to custody, are obliged to take into consideration the education and living conditions of the child. The child's access to modern resources, such as the internet, can be considered as a part of these rights. The child's right to access the internet should not be considered as an unlimited right. This right may be limited for the protection and safety of the child.

3.2.2. German Law

In German law, the personal rights of the child (*Allgemeines Persönlichkeitsrecht*) include the free development of the individual and the right to information in public life. This right is protected by Article 2 (personal freedom) and Article 5 (freedom of expression and the right to information) of the German Basic Law (*Grundgesetz* – GG). Children have the right to access information and use technology. This includes access to digital tools and the internet. The child's access to the internet is considered part of their freedom of expression and right to education (Cerf, 2011). This right may be limited by parental supervision and depending on factors such as the child's age, maturity level and the content of the internet use (Dethloff 2005; Lee 2022).

According to Article 1626 of the German Civil Code (BGB), parents are obliged to care for and educate their children in the best interests of the child (Sacker 2024). This obligation includes the right to control and direct the child's access to the internet. BGB §1626 (Parental Responsibility), Parents must take the necessary measures to supervise the child's use of the internet and to prevent harm to the child. According to §1631 BGB (Non-violence and protection in education), parents have a duty to protect the physical and mental development of the child. In this context, it is the parents' obligation to protect the child from possible harm from the internet (e.g. harmful content, cyberbullying) (Bucher 1999). Rather than completely restricting the child's access to the internet, parents have the responsibility to supervise and guide the child in terms of duration of use, content and platforms (Hahn 2004).

The German Youth Protection Act (*Jugendschutzgesetz* – JuSchG) aims to protect children from harmful content. This law indirectly interferes with children's use of the internet. The restrictions are shaped differently depending on the age, physical and mental development of the child.

The right of the child to education is protected by Article 7 of the German Basic Law, with internet access playing an important role in the fulfillment of this right. Depriving the child of internet access must not be to the detriment of their education or personal development, especially as the use of digital tools is encouraged in schools (Fritzsche, Knapp 2019).

§1626(2) of the German Civil Code provides that the child's views must be taken into account in accordance with their age and maturity. This means that the child's wishes regarding the use of the internet must also be considered by the parents. Adolescents in particular can demand more freedom, in accordance with their rights, including the right to access the internet. Parents have the right to limit their children's use of the internet. However, this restriction should not be arbitrary, in a way that hinders the child's development. For example, if parents completely prevent the child from accessing the internet for educational purposes or restrict it in such a way as to cut the child off from social contact, this may harm the child's rights. In such cases, the child can seek help from a youth welfare office (*Jugendamt*) or the family court.

In German law, the views of the child are as important as the views of the parents. The child's right to access the internet is not directly regulated, but is protected in the context of personal rights, right to education, freedom of information and freedom of expression. Parents have the responsibility to guide their child's use of the internet and protect them from possible harm.

The child's right to access the internet expands depending on the age and maturity of the child and is shaped according to the best interests of the child (Rue 2011).

3.3. Parental Restrictions on the Child's Internet Access

3.3.1. Turkish Law

In Turkish law, the main provision for children's access to the internet and parental control of internet access stems from the fact that the parents have parental authority over the child.

The responsibility and authority of the parents to meet the child's needs, such as care, education, health, moral and social development, is considered under the right of custody. While exercising the right of custody, the parents must prioritize the best interests of the child. It is the responsibility of the family towards both the child and society to ensure that the child develops in the best way possible and continues their life as a healthy individual.

The right to custody is regulated under the Turkish Civil Code. The authority to make decisions on issues such as the child's care, education, health, morals, ethics, cultural development, choice of profession and management of the child's assets is considered within the scope of the right of custody (Beder, Ergün 2015; Avşar 2022).

According to Article 336/1 of the Turkish Civil Code, if the parents are married, the right of custody is exercised jointly by the mother and the father. As long as the marriage union continues, the mother and father must together take decisions about the child. In the event of the divorce of the parents or the death or absenteeism of the parents, the right of custody belongs only to the mother or only to the father. In case of divorce, custody, which is exercised jointly within the marriage union, is granted to the party that is in the best interest of the child. The right to custody can be removed or changed by a court decision if a situation that harms the best interests of the child arises.

The Turkish Civil Code does not regulate joint custody. However, the Constitutional Court and the Court of Cassation have stated that joint custody should be implemented, making joint custody applicable.

The custody of a child born outside the marriage union belongs to the mother. According to the Turkish Civil Code, if the father recognizes the child as his own through legal means, such as recognition or a paternity suit, custody can also be given to the father.

The right of the parents to restrict or have the right to restrict the child's access to the internet is based on the parental rights and responsibilities that parents have over the child under Turkish law. However, the child is also an individual, separate from the parents, and the child also wants to have the right to access the internet without any restrictions. In this case, the wishes of the parents and the child will come into conflict, and a conflict of interest may arise. Should the restriction of the child's right to access the internet be based on the principle of the parents' protection of the child's best interests, or should it be considered a violation of the child's personal rights? The question also comes to the agenda (Çakmak 2013).

Although it is in the best interest of the child for the parents to restrict the child's access to the internet, another issue that needs to be examined is how the rights of the child will be protected if some parents encourage the child to use the internet in order to benefit from the child.

Parents are obliged to take the necessary measures for the education and development of the child. Although it is accepted that the child has the right to access the internet, within these obligations of the family, the family may limit the child in this regard by considering the best interest and future of the child.

In Turkey, the Internet Law supports the provision of family assistance services to prevent content that can harm children through the internet (Üçer 2021).

Child Protection Law requires the State to take necessary measures to restrict or block access to online content that may cause physical or mental harm to children (Avşar 2022).

Although access to the internet and digital rights can benefit the child, some practices detrimental to the child can affect the physical and mental development of children, and it is imperative that these issues be regulated by a separate and special law.

3.3.2. German Law

In German law, the main basis for parents to restrict their children's right to access the internet is the right of custody. The primary regulation regarding the right of custody is based on §1626 BGB. According to this provision, parents are obliged to take care of minor children. The parent's right of custody over the child is regulated as a broad right that includes both the custody of the child and the management of the child's assets.

In Germany, the right of parental custody over a child is interpreted broadly, therefore, within the scope of parental custody, parents can also decide on the digital rights of the child.

§1666 of the German Civil Code stipulates that the state must intervene in cases where the parents are unable to make sound decisions regarding the child or are unable to exercise their parental authority sufficiently (Dörner, Schulze 2014). If the physical, mental or emotional health of the child or their property is endangered and the parents are unwilling or unable to prevent the threat, the family court must take the necessary measures to prevent the threat (Ernst 2008). The legislator has also regulated the measures that can be taken under this article. If the court considers that the parents are abusing their parental rights, the same paragraph also stipulates that the court may take measures, such as making use of public institutions such as child and youth welfare services and health services, prohibiting the child from using the family home or another home temporarily or permanently (Baltz 2000; Belling, Eberl 1995), imposing prohibitions on communicating with or seeing the child, and partial or total revocation of parental custody.

One of the most important legal provisions in German law regarding access to the internet is the Youth Media Protection Act (*Jugendschutzgesetz* – JuSchG). Article 10/a of the said law mentions what the protection of youths or children in the field of media entails. Accordingly, the first protection is the protection against media that may hinder the development of children or adolescents and their development into a socially capable person, the second protection is the protection against media that may jeopardize the development of children or adolescents and their development into a socially capable person, and the last protection is the protection of the personal integrity of children and adolescents in the use of media. Media that may affect children's development are media that are excessively frightening, advocate violence, or violate social ethical values (Dreyer 2013). In addition to these media, it is stated that the conditions regarding the use of the media, as well as the effect of the media content and whether they are a permanent part of the media, should also be assessed in the evaluation of the impairment in the development of children or youths. In terms of watching movies, the legislator has also stipulated that informative and educational movies should be watched, with age limits imposed on movies in a way that minimizes the impact on children, and that children must be accompanied by a parent when viewing some movies (Uerpmann-Wittzack, Prechtl 2020). In the digital world, computer games are another area where children are affected as much as by movies. Digital games played by children are also subject to age limits or other warnings. In order to protect children and youths from digital content, the Federal Review Board for Media Harmful

to Young Persons was established by this law. The Board is tasked with taking the necessary measures and conducting the necessary examinations to ensure that children and youths are protected from harmful content in the media, as well as identifying harmful media content (Behrend, Jopt 2009). It is stated that the Board should consist of a maximum of twelve members dedicated to the development of children and youths. The legislator has clearly determined how and in what way members are recruited during the formation of the Board, and which associations can nominate candidates (Livingstone, Haddon 2008). The legislator has also regulated in detail the procedure by which content, such as movies and games on digital media, may be banned.

Another legal basis for parental restriction of children's access to the internet is the Digital Services Act (*Digitale- Dienste- Gesetz*, DDG), which Germany has implemented to comply with the EU Digital Services Act (DSA), the general framework established by the European Union. The DSA is intended to ensure that online platforms, social media companies and digital service providers operate in a more transparent, secure and responsible manner. The main objectives of this legislation are the protection of users, transparency and accountability, removal of illegal content, advertising and data protection regulations, and additional responsibilities for major platforms (Kindler 2012). This regulation is based on EU Directive 2022/2065 (Regulation (EU) 2022/2065). These legal regulations show that strict practices in the best interest of the child are in place in Germany in accordance with the provisions of the EU Directive (Wiesner 2011).

3.3.3. A Comparison of Turkish Law and German Law

3.3.3.1. Common Aspects

While children's rights to access the internet in Germany and Turkey are based on fundamental human rights and children's rights, there are similarities in the regulations to protect these rights in both countries. The commonalities are based on both the requirements of the digital age and universal principles of child protection. Both countries are signatories to the United Nations Convention on the Rights of the Child and recognize the right of the child to access information and education. The internet is seen as an important means of access to information and a platform that supports the rights of the child to education, culture and participation in social life. Germany and Turkey have adopted regulations to protect children from harmful content (such as violence, pornography, hate speech) that they may encounter online. Both countries use age-appropriate filtering systems to keep

children safe online (Janzen 2002). Digitalization in education is an area that promotes children's right to access the internet in both Germany and Turkey. Both countries encourage parental guidance and supervision of children's internet use. In Germany, parents are urged to provide their children with access to age-appropriate content and teach digital media literacy. In Turkey, awareness-raising campaigns and filtering tools are offered to parents for monitoring and protecting children's online behavior. Germany and Turkey comply with international norms on protecting children's rights online (Hanke, Meergans, Jarolimek 2017). Both countries aim to comply with the recommendations of the Council of Europe and the United Nations on the protection of children online. A child rights-based approach, protection from harmful content, digitalization in education and the fight against cyberbullying are commonalities between the two countries. However, while Germany regulates children's digital rights more comprehensively, Turkey focuses more on protective and restrictive measures (Bussmann 2002).

3.3.3.2. Differences

In Germany and Turkey, children's right to access the internet and policies to protect this right are influenced by the social, cultural and legal structures of the countries (Gehle 1997; Steenkamp, Stein 2017). Germany aims to secure children's digital rights while at the same time protecting them from harmful content. In Turkey, on the other hand, children's access to the internet is mostly regulated within the framework of youth safety and moral values.

Germany recognizes children's access to the internet as a fundamental right. It supports children exercising this fundamental right, by establishing legal regulations and commissions to protect children's rights in the digital world. In Turkey, children's access to the internet is not explicitly recognized as a fundamental right; it is indirectly recognized through the right to education and access to information. Good legal arrangements have not been made to protect children's rights in the digital world, and only a law on the prevention of harmful content and regulation of internet access has been enacted.

Germany supports children's right to access the internet through education policies. Public schools provide free internet access and offer curricula to develop digital skills. Considering children's right to access the internet as part of digital equality, Germany facilitates children's access to technological devices through support programs for low-income families.

In Turkey, the state supports children's access to the internet through educational platforms. However, the lack of strong internet infrastructure in rural areas limits children's right to access the internet.

In Germany, age-appropriate filtering systems are in place for children's access to the internet. Responsibilities are also placed on service providers to prevent children from being exposed to inappropriate content on the internet. In Turkey, children's right to access the internet is priority with family protection filters and content control. The state provides free filtering systems to prevent children from being exposed to harmful content.

Beyond considering children's access to the internet as a right, Germany has adopted the principle of empowering children as digital citizens. In Turkey, policies on children's internet use are associated with content restrictions rather than child protection.

Since the right of the child to access the internet is recognized as a constitutional right in Germany, it is evident that the state, rather than parents, imposes restrictions on children's access to the internet and that the principle of the best interest of the child is the priority in the imposed restrictions. As a result, the observed approach is transparent, structured and child oriented.

The indirect recognition of children's right to access the internet in Turkey reveals a more restrictive approach: the aim is to protect them from harmful content. For this reason, there are still not yet as comprehensive regulations on equal access and digital rights as in Germany.

3.3.4. Approach of Court Decisions to the Subject

An examination of court decisions shows that, under Turkish law, cases concerning children's access to the internet generally focus not on ensuring a safe online environment, but rather on parental control measures and restrictions in public settings — for example, preventing a child from entering an internet café. Similarly, Turkish law states that social media or internet usage restrictions imposed by the family on their child must be implemented by considering the child's best interests, otherwise the judge may request intervention.

In Germany, the decision by the German Federal Court of Justice (*Bundesgerichtshof* – BGH) in the *Morpheus* case (15 November 2012, I ZR 74/12), which involved a thirteen-year-old child using the Tauschbörse filesharing platform that they accessed via the internet, stated parents should warn and inform the child that they may encounter dangerous content during

internet use – but they do not have an obligation to constantly warn the child. In the Higher Regional Court (*Oberlandesgerichte* – OLG) in Frankfurt (15 June 2018, 2UF41/18) decision, in a dispute that arose due to the separation of the mother and father of an eight-year-old girl and the mother blocking restricting access to a phone or tablet belonging to the child, the court ruled that the child's internet access should be restricted, otherwise the child could access the website of their choice when the mother or father could not control the child, and this situation could cause negativities when the child's best interests were taken into account. It was emphasized that the mother and father could restrict the child's internet access, but these restrictions should be assessed by taking into account the child's best interests.

Although Germany and Turkey have accepted parental control systems for internet access, the court may also request intervention when necessary.

4. CONCLUSION

Recognizing the importance of access to information and the use of resources, Germany and Turkey recognize access to the internet as a right of the child, but also that children's access to the internet must entail various protections and safeguards due to age, social factors and the possibility of harmful content on the internet. Restrictions imposed by parents on their child's access to the internet should not be considered as an access barrier to the child's personal rights. Parents should be expected to impose access restrictions by considering the best interests of the child. In today's world, where access to technology and information is increasing by the day, it is necessary to raise the awareness of parents and children. Despite raising awareness, training, warnings and various bans imposed on the internet in certain circumstances it is also apparent that children can access harmful content on the internet, especially outside the control of parents. It therefore becomes clear that parental control alone is not enough and that filtering systems for children should be continuously controlled by the State or State mechanisms.

Germany and Turkey attach importance to the concept of the right to personality and include regulations in this regard in their laws. The personality rights of the child have not been subject to separate legal regulations, but it is stated that the child will benefit from this protection since they are also considered a person. Granting the right of personality to the child does not mean that this right should be exercised without limitations or restrictions. On the contrary, the best interests of the child should be taken into consideration, and restrictions should be imposed on internet access, as

well as any issues that are deemed to harm the child. Restrictions imposed by parents should not be arbitrary and should be protective of the child. The child's personal rights should be taken into consideration, and awareness-raising activities for children should be increased.

Since Germany guarantees children's access to digital rights in its Basic Law, the State control of access and the categorization of children according to age groups is the most important regulation to be considered in Turkish law. Children may think that their personal rights are violated unless the restrictions imposed on internet content, the reasons for these restrictions and how harmful content can affect children are explained to them and they are made aware of these restrictions. For this reason, raising the awareness of both parents and children, with the aim of protecting children's personal rights, and legally regulating the restrictions imposed on their internet access, are the main issues to be considered in Turkish law.

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ICJ DISCRETIONARY POWERS: JUDICIAL ACTIVISM V. RESTRAINT IN THE ADVISORY OPINION ON KOSOVO[**]

In response to Serbia's request, the United Nations General Assembly sought an Advisory Opinion from the International Court of Justice regarding the legality of Kosovo's 2008 unilateral declaration of independence. Employing a conceptual framework grounded in judicial activism and restraint, this analysis critically examines the Court's inconsistent exercise of its discretionary powers, applied in stretching and retracting both the scope of the question posed, as well as its own judicial propriety. The Court's selective engagement with these legal questions reveals an underlying judicial strategy: one that avoids unresolved ambiguities, reflects implicit views on statehood, and navigates the uneasy space international law occupies between norm entrepreneurship and the Court's commitment to apolitical neutrality and political restraint. Tracing the Court's reasoning through this lens offers insight into the multifaceted drivers of its interpretive approach to politically sensitive issues, and ultimately, to the evolution of international law.

Key words: *Advisory opinion. – Judicial activism. – Judicial restraint. – Kosovo. – Statehood.*

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1. INTRODUCTION

Kosovo has been subject to UN Security Council (UNSC) Resolution 1244 since 1999, which authorizes the North Atlantic Treaty Organization's military presence in Kosovo to defuse the armed conflict that followed the removal of Kosovo's administrative autonomy in 1989.[1] Resolution 1244 set up a cooperative administration between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Provisional Institutions of Self-Government (PISG) (Christie 2010, 205–206). The resolution's arrangement seeks to preserve peace until a political settlement is reached regarding the status and autonomy of Kosovo, while "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[2] However, in 2007, without UNSC input, UN special envoy Martti Ahtisaari formulated a plan which guided Kosovo's 2008 Unilateral Declaration of Independence (UDI).[3] Amidst a political deadlock in diplomatic negotiations with Serbia, and with Kosovo's struggle for autonomy continuing to make the UNSC agenda for issues threatening international peace and security, Serbia requested that the United Nations General Assembly (UNGA) to seek the International Court of Justice's (ICJ) opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[4] In 2010, following a 9–5 vote to accept the UNGA's request, a 10–4 vote at the Court upheld that Kosovo's UDI did not breach international law. The votes reflect a divided Court, with judges Tomka, Koroma, Bennouna and Skotnikov voting against this finding, and nine out of the fourteen judges expressing dissenting or separate opinions.[5]

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1 UN Security Council, Resolution 1244 10 June 1999, S/RES/1244.

2 UN Security Council, Resolution 1244 10 June 1999, S/RES/1244, 2.

3 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, para. 75.

4 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, summary of the Advisory Opinion, 22 July 2010, 1.

5 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, summary of the Advisory Opinion, 15. Author's correspondence with Vuk Jeremić, former Minister of Foreign Affairs of Serbia (2007 to 2012), and former president of the United Nations General Assembly: "The principal recognizers wanted it to happen quickly [ICJ 2010 Advisory Opinion]... Normally the procedure would have taken quite a while... We used this time to convince states not to recognize Kosovo and wait for the Court... the momentum of the recognition came down as a result... our position that this creates a very dangerous precedent had already started materializing...

Nevertheless, the UNGA's posing of this question marked a pivotal point in the discussions of Kosovo's statehood, as the issue, although partially, was shifted from the political to the international legal arena.

In its 2010 Opinion, the Court's reasoning arguably exhibited an inconsistent exercise of its interpretive powers, applied in stretching and retracting the scope of its interpretation to avoid contemplating the UDI's legal consequences on Kosovo's statehood. This paper seeks to answer the question whether the Court's interpretive choices in its 2010 Opinion reflect the Court's implicit views on the right to remedial secession under international law in the case of Kosovo, an issue that fifteen years later remains a politically and legally contentious one.[6] This will be done through a two-step analysis. Firstly, a conceptual framework grounded in judicial activism and restraint will be employed to explain the underpinnings of the Court's judicial strategy at key junctures of its deliberation. After tracing the Court's reasoning through this lens, this paper will analyze the Court's approach in light of its wider interpretive culture to offer insight into the ICJ's stance on politically sensitive issues, bearing in mind the ICJ's role as a post-World War II mechanism designed to provide peaceful dispute resolution while fostering the evolution of international law to address emerging challenges. Thus, the relevance of the Court's opinion to Kosovo today lies in its enduring political salience as well as in how it exemplifies the uneasy space international law occupies, between legal necessities of norm entrepreneurship, while maintaining apolitical neutrality and the political necessity of restraint.

South Ossetia and Abkhazia declared independence and Russia recognized them... The West realized that it was not going well and needed to accelerate this. It came as a surprise for our legal team that the Court would not spend too much time deliberating on it [the Advisory Opinion], especially given that the Court was divided... which was not a good indication because it became obvious to us political pressures are happening on the Court, and then when the Chinese retired their judge [Shi Jiuyong], with no direct replacement, it started to turn on the alarm lights for us."

6 Author: What is the significance of the Advisory Opinion today? Jeremić: "If you look at how the Russians did it in Ukraine, in the creation of the republics of Donetsk, Luhansk, and Crimea... They first went through that unilateral declaration of independence [of Kosovo], followed by the act of accession to the Russian Federation. Crimea, Donetsk, and Luhansk followed the template of Kosovo, exactly, almost word by word. They even cited the 2010 ICJ opinion on Kosovo in the preamble. The first step explicitly used the precedent of Kosovo. I think this is a consequence of the theater they played with us at the ICJ."

2. THE LEGAL SIGNIFICANCE AND CONTROVERSIAL NATURE OF THE QUESTION

The question posed by the UNGA held great potential to address a *non liquet* in international law, a gap or ambiguity where no existent law suffices, as is, to address an emergent issue (Bodansky 2006). In this case, the existing law was unclear on whether the right to self-determination could extend to a remedial right to unilateral secession in a post-colonial context (Ćirković 2019, 910). The question garnered considerable international attention, given the prevalence of separatist movements and states' sensitivity to them across the various regions of the world.[7] Thirty-six states participated in written proceedings, with the case marking the first instance where all five permanent members of the Security Council participated in both the oral and written proceedings (Yee 2010, 763).[8] However, the ICJ maintained that the wider issues attached to the UNGA's request fell outside the legal dimension of the question it confined itself to address (Hannum 2011, 155–167).[9]

"The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State... That issue is beyond the scope of the question posed by the General Assembly."[10]

As argued in the dissenting opinions of Judge Yusuf and Judge Simma, the Court's conclusion could be seen as a missed opportunity to evolve international law and address the question of whether Kosovo has a positive right to independence.[11] However, at the same time, the Court's

[7] In testament to the global anticipation of the Court's take on self-determination, the ICJ website was inaccessible for several hours after the advisory opinion was published, due to immense traffic. See Jovanović 2012, 1.

[8] Noting that not even the Advisory Opinion on nuclear weapons' proceedings was able to draw in all five permanent members of the UNSC.

[9] Jeremić: "The wording opened the way for the Court to give a very weird interpretation... My opinion now with the benefit of hindsight is that regardless of what we asked, the majority of judges in the Court would have come up with a way to interpret it so that it does not come across as crushing for the independence movement, because the independence movement was supported by the most powerful [states] at that time."

[10] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 83.

[11] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 3–5, 16.

stance risks inadvertently encouraging separatist movements around the world to emulate Kosovo's actions, best illustrated by comments of the then-President of Republika Srpska, Milorad Dodik, who said that the ICJ's opinion "hypothetically opens the possibility for Republika Srpska to secede from Bosnia-Herzegovina" (Papić 2015, 6–10; B92 2010).[12] The significance of the issue is further demonstrated by diplomatic reactions of states to the UDI, which reflected a global division between major state powers, with the US and some EU states recognizing Kosovo's statehood, while Russia and China supported Serbia's claim over the territory (Milanović 2015, 4). Hence, it becomes imperative to this analysis to understand how and why the Court arrived at the conclusion that Kosovo's UDI was legal, and why it avoided engaging with the more substantial issue of the right to self-determination.

3. JUDICIAL ACTIVISM AND RESTRAINT: THEORETICAL FRAMEWORK

Judicial activism is an emerging theoretical framework in international law, with still limited scholarly literature and varying definitions of the concept (Zarbiyev 2012, 251). Hence, this analysis will attempt to reconcile existing definitions and parameters for assessing judicial activism and restraint in a manner that enables their situation within the broader culture of the ICJ's jurisprudence. While the ICJ's 2010 Advisory Opinion has been the subject of extensive critique, judicial activism has not been systematically utilized to examine the Court's reasoning in relation to Kosovo's UDI. Existing scholarship merely cites the 2010 Opinion as an example of judicial restraint when attempting to define judicial activism as a framework, however, these terms are not explicitly employed, nor are the underlying concepts fully developed in analyses of the opinion on Kosovo (Orakhelashvili 2011, 74; Hannum 2011, 21, 155; Zarbiyev 2012, 258; Kooijmans 2007, 752). Therefore, for the purposes of this paper, the terms "judicial activism" and "judicial restraint" will be used to denote the characteristic elements identified in this section.

[12] State proponents of Kosovo's independence, including the UK, the US, and France, welcomed the Court's opinion and leveraged the moment to urge wider recognition of its statehood. See Papić 2015, 7.

3.1. Judicial Activism

The terms "judicial activism" and "judicial restraint" emerged from conflicting beliefs about the role of the judicial function. According to Leoni Ayoub (2022, 30–31), they are best understood in relative terms to the Court's balancing between what is perceived as fulfilling its legitimate judicial functions and what is seen as potential political influence.

Fuad Zarbiyev (2012, 248) suggests that judicial activism "differs from politics not so much in kind as in degree." In setting the parameters for assessing judicial activism, Zarbiyev settles on points of affinity within existing literature on the framework, centered on the Court's expansion of its scope of jurisprudence. Other scholars then help detail what an activist expansion of jurisprudence entails. Deepak Mawar (2019, 427), for instance, defines judicial activism as the proactive development of law to adapt to contemporary needs, which can extend to "non-legal dimensions". Ayoub supports this position, claiming that judicial activism – often seen as a controversial term with negative connotations due to its association with political activity – is now closely tied to the "role of the modern judge" (2022, 30). Former ICJ Judge Kooijmans proposed a third type of classification, "proactive judicial policy", that combines, out of necessity, both activism and restraint in evolving the law, suggesting that both approaches are needed to tackle disputes emerging from a changing international environment (Ayoub 2022, 36).

For the purpose of this analysis, Ayoub's more specific criteria for identifying judicial activism provide a clearer framework through which elements of the Court's approach become more easily recognizable as activism. Ayoub's criteria include judges "explicitly going against what the parties to the dispute had indicated *ex ante*, [...] changing the judicial procedures in flagrant opposition to the written rules or regulations or modifying the law from what it was previously accepted to be" (Ayoub 2022, 37). This will be combined with Keenan Kmiec's five interpretations of judicial activism: "invalidation of arguably constitutional actions of other branches, failure to adhere to precedent, judicial 'legislation', departures from accepted interpretive methodology, result-oriented judging" (Zarbiyev 2012, 249–250).

3.2. Judicial Restraint

Beyond being the antonym of judicial activism, judicial restraint is defined as the active and deliberate avoidance of providing answers that diminish existing ambiguity in international law. Adopting the essence of Mawar's definition, it is the strict and rigid adherence to established legal precedents, with minimal expansive interpretation of international legal norms when applying them to contemporary disputes (Mawar 2019, 431–433).

A characteristic feature of judicial restraint is the predictability of resulting decisions, based on previous Court decisions and approaches – stare decisis – a rationale the Court inherited from the PCIJ in order to, according to Mawar, maintain the "objectivity" of decision-making. By strictly following precedent without considering whether or how existing law can be modified in its application to a new situation, judges appear more politically neutral. However, a criticism is that stare decisis is "seen as an act of judicial restraint when the development of the law is required," which can detract from the Court's ability to administer justice in subsequent cases (Mawar 2019, 430–432).

Simply put, both terms are ultimately subjective evaluations, with judicial activism entailing an expansion of the scope of jurisprudence beyond what is perceived as strictly legal, to include political considerations, as well as the development of new interpretive approaches not based on precedent – i.e., when "the Court is encroaching upon territory not clearly reserved to it" (Kmiec 2004, 1465). However, it must be noted that several limitations arise from the scope and level of analysis adopted in this study. First, the ICJ is treated largely as a unitary actor, whereas in practice its decisions are the outcome of a collective drafting process, in which different judges prepare distinct operative paragraphs that are then voted on. The need to secure a majority across a heterogeneous bench – composed of judges trained in divergent legal traditions including, for instance, both common-law and civil-law cultures of jurisprudence – may itself produce the kind of oscillation between restrictive and permissive interpretive moves that this paper attributes to the Court as a unitary actor.[13] The compromise

[13] The interpretive approaches embraced by individual judges, including the influence of civil law's textual formalism or common law's pragmatism and reliance on precedent, which stems from judges' diverse backgrounds, could have also contributed to the final opinion's fragmented interpretive lens. For a comprehensive analysis of the influence of judges' legal culture on international jurisprudence, illustrated with judges Skotnikov, Bennouna, and Tomka's approaches in the opinion on Kosovo, and how particular legal cultures tend toward juridical restraint, see Pratap 2023.

between divided judges within the bench could be studied separately from institutional philosophy, for instance, in explaining judicial outcomes. Secondly, the analysis cannot apply the conceptual framework of judicial activism and restraint developed in this study to the broader history of ICJ jurisprudence, thereby enabling a wider comparative assessment that would better substantiate findings and enhance the validity of this study, especially given the relative and subjective nature of the framework. Instead, this study leans heavily on existing analyses by legal scholars, which, while informative, may carry inherent biases or assumptions that could influence the interpretation of judicial activism and restraint, and may not fully encapsulate the complexity and nuance of its application.

This analysis is also helped by Volker Röben's (2010, 1065) classification of rule-centered and principle-based approaches to the interpretation of legal norms, in the context of the ICJ's 2010 Advisory Opinion on Kosovo. Röben delineates "rules" as formal prescriptive norms (such as treaties and customary law) that impose specific obligations, as opposed to "principles", which provide interpretative guidance and flexibility across diverse legal contexts. The principle-based approach that the Court resorts to when interpreting international legal norms, therefore, embodies a flexibility identifiable with Ayoub's activist criteria of exceeding the boundaries of existing law (Ayoub 2022, 37). Meanwhile, a rules-based approach exhibits elements of judicial restraint by attempting to adhere to legal precedents with minimal expansive interpretations (Röben 2010, 1073). The key junctures, which are emphasized by Röben as most illustrative of the Court's utilization of one of either approach, will be further scrutinized for their utility to this analysis.

4. A HISTORY OF THE ICJ'S MIXED APPROACH

The concept of judicial activism emerged with the migration of political debates on the US Supreme Court's approach to Europe in the 1950s, as new legal problems demanded an evolved and more flexible understanding of the law.[14] This discussion eventually reached the ICJ, since the changing world order and emergence of new states and power dynamics necessitated that

[14] Notably, the concept of judicial activism in its initial more ambiguous conception as the need to balance strict adherence to precedent with evolution and change, caught traction with the judges of the new Constitutional Court of Germany, the Bundesverfassungsgericht, during the post–World War II reconstruction period, see McWhinney, 2010.

courts adapt their jurisprudence to maintain their relevance and ability to adjudicate new disputes (McWhinney n.d.; Kmiec 2004, 1446–1447). The incorporation of a more activist approach by the ICJ was also inspired by political backlash against the Court following its 1966 ruling on South West Africa (Higgins 2009, 758). This was due to the Court's focus on procedural issues of standing rather than on the substantive claims on South Africa's imposition of racially based segregation laws under its apartheid regime, via its mandate over South West Africa.[15] International critics accused the Court of prioritizing narrow legalism over broader principles of justice, viewing the 1966 Opinion as consequently having failed to uphold international justice (Higgins 2009, 773–774). The 1966 case is described by Edward McWhinney as having posed "intellectual–legal divisions in terms of judicial philosophy and approach to judicial decision-making that have not been fully resolved to this day" (McWhinney 2006, 6). However, aided by the introduction of new judges to the ICJ, the Court's approach began to "liberalize" throughout the 1970s and 1980s, according to McWhinney, oscillating between conservative and activist thinking (McWhinney n.d.).

The 1990s then bore further momentum for ICJ change as the Court witnessed the transformation of the post-Cold War world order, the breakup of Yugoslavia and the threat of nuclear proliferation. The Court was further encouraged to devise new laws and understandings of existing law, in order to keep up with the rapidly changing environment. However, despite the progress, the ICJ retained a now characteristic oscillation between judicial activism and judicial restraint, with its 2010 Advisory Opinion being one such example of the Court resorting to more "technically oriented" restrained jurisprudence (Mawar 2019, 427; McWhinney n.d.).

5. JUDICIAL DISCRETION IN THE KOSOVO CASE

In assessing the legality of Kosovo's UDI, the Court consulted general international law, UNSC Resolution 1244, and the Constitutional Framework established by UNSC Resolution 1244, as the applicable binding laws for the

[15] The vote between the judges was tied, hence the President cast a deciding vote to reject the claims of the Empire of Ethiopia and the Republic of Liberia. See South West Africa (Liberia v. South Africa) Judgment of July 18, 1966, para 100.

authors of the declaration.[16] In the following key junctures the Court can be seen oscillating between judicial activism and restraint as it reached its final verdict.

5.1. The Lotus Principle

The Court begins its deliberation by noting that the question posed to it was clear enough as to not require reformulation.[17] However, it immediately took a narrow procedural approach in explaining that it would check only for existing law that prohibited the promulgation of a UDI, with the absence of such a prohibition implying permissibility – an approach based on the 80-year-old Lotus principle developed by the ICJ's predecessor.[18] By applying the Lotus principle – a rule-based approach as identified by Röben – the Court was able to avoid engaging with the broader substantive principles of general law and focus on prohibitions (Röben 2010, 1075–1077).

> "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases."[19]

The Court hence refused to clarify whether there can exist a positive right to unilateral secession in international law, as an extension of the right to self-determination, concluding only that declarations can be legal. The Court's approach in this context exemplified an effort to confine the scope of

[16] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 83.

[17] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 51.

[18] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 4.

[19] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 82.

the question in such a way that it would not require an extension or deeper exploration of the right to self-determination and a subsequent considering of if and how it could be applied to the case of Kosovo (Röben 2010, 1071, 1075–1076).[20] This contraction of the purview of jurisprudence is hence characteristic of judicial restraint (Zarbiyev 2012, 248).

In contrast, while attempting to consider a narrower form of the question posed to it, the Court proactively reformulates the UNGA's question to effectively become whether Kosovo's UDI was not prohibited by international law? Despite the overarching restrained approach, elements of Ayoub's criteria for judicial activism became apparent within the same line of reasoning, as the Court strayed from the intended meaning made obvious through the question's wording by Serbia, in an approach perhaps akin to Kooijmans' understanding of "proactive judicial policy" (Ayoub 2022, 30–31, 35–37). As best formulated in Judge Simma's deceleration:

> "the opinion not only ignores the plain wording of the request itself, which asks whether the declaration of independence was 'in accordance with international law', but that it also excludes any consideration of whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met."[21]

Other Judges, including Yusuf, Cançado Trindade and Sepulveda, similarly criticized the Court's reformulation of the question, arguing that it blatantly ignored the wider discussion Serbia sought to initiate before the Court (Christie 2010, 210).

5.2. Interpreting UNSC Resolution 1244

In its interpretation of Resolution 1244, the Court continued its restraint approach of looking for prohibitive rules and presuming legality where such rules are absent. The Court noted that the UNSC's use of the term "final

[20] Jeremić: "The tensions behind the closed doors of judges' deliberations were such that almost no leakage occurred. Then we started receiving some leakages which indicated that the majority of the judges were trying to find a phrasing that will come across as supportive to Kosovo."

[21] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 4.

settlement" – in reference to the ultimate goal of the interim administration framework – did not explicitly preclude the promulgation of a UDI (Christie 2010, 205–206).[22]

> "The Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard."[23]

However, despite the persistence of the logic driven by the Lotus principle, significant elements of judicial activism also emerge in the Court's interpretation of UNSC Resolution 1244. Foremost, and as highlighted by Judge Skotnikov, a UNSC resolution is a political decision, and attempting to interpret a political decision is in itself a political act.[24] While the Court has been asked on multiple occasions to assess compliance with UNSC resolutions, none of these requests demanded as thorough and substantive an interpretation of a UNSC resolution as was required in the Kosovo opinion (Hjort 2019, 6). The ICJ nevertheless opted to interpret Resolution 1244 despite having previously diverged in its understanding of the UN Charter from the UNSC's on the same issues, including in the *Construction of a Wall in the Occupied Palestinian Territory* and the *Lockerbie* cases (Mrázek 2022, 402–404). Consequently, by degree of political engagement the Court departed from accepted interpretive methodology, grounded in "(i) the rules for treaty interpretation in the Vienna Convention as a point of departure, and (ii) interpretation in light of the UN Charter," a deviation that is characteristic of judicial activism (Hjort 2019, 6; Kmiec 2004, 1473–1474).[25] Specifically, the Court deviated from conventional practice by applying treaty interpretation rules to a resolution, particularly its understanding of the resolution's "terms" in "ordinary meaning", and its requirement to interpret

[22] UN Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para. 11(c).

[23] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 14.

[24] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 9.

[25] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 94.

the resolution in "good faith" and in light of its "object and purpose" and "context", per the Vienna Convention (Hjort 2019, 7–12). Notably, Judge Skotnikov argued that if the term "final settlement" were to encompass a unilateral decision by one party, negotiations toward a political resolution – facilitated by the interim framework per its object and purpose – would be rendered "meaningless".[26]

Furthermore, Zarbiyev (2012, 248) posits that when judicial activism is used in extending the scope of jurisprudence, this often comes at the cost of "limiting other actors' discretion". Having established that the Court was able to interpret UNSC resolutions, its choice to do so in the case of Kosovo limited the UNSC's ability to interpret the resolution as its author and as the UN's executive political organ. As the Court acknowledged, and judges Skotnikov and Bennouna emphasized in their separate opinions, the issue of Kosovo's status was a recurrent and ongoing one at the UNSC.[27] Hence, to preserve the harmony between UN organs, as a result of the ICJ's 2010 Opinion, both the UNGA and UNSC had to operate on the assumption that Kosovo's UDI was legal in their subsequent proceedings. For instance, although the UNSC did not condemn Kosovo's UDI, it had still at the time been in the process of deliberating on the matter. The Court noted that the UNSC had previously condemned the UDIs of Southern Rhodesia, Northern Cyprus and Republika Srpska, but that their illegality stemmed from their association with the unlawful use of force – not from their unilateral nature.[28] The Court leveraged this observation in determining that Kosovo's UDI, having not been promulgated through the use of violence, was not illegal. In turn, the ICJ's opinion constricted the UNSC's ability to address the issue in the future by elaborating on its Resolution 1244, its previous practice, and how they should be applied to the matter at hand.[29] The ICJ's interpretation of the Resolution was hence a modification of judicial procedure in Ayoub's meaning of judicial activism, due to the unprecedented degree of substantive interpretation of a UNSC resolution and UNSC practice (Ayoub 2022, 35–37; Hjort 2019, 6).

[26] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, summary of the Advisory Opinion, 9, Annex to summary, 9–10 on object and purpose of the interim framework.

[27] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 7–9.

[28] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 81; and UNSC Resolutions 216–217 (1965), 541 (1983) and 787 (1992).

[29] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to summary, 1.

5.3. The Authors of the UDI

In evaluating the applicability of laws established under Resolution 1244, the Court noted its binding of only the interim administrative framework it set up, including the PISG and UNMIK.[30] The authors of the UDI hence could only be held accountable for violating the Resolution 1244 framework insofar as they acted within their capacity as the PISG when promulgating the UDI. The Court hence proceeds to deduce whether the authors intended to be bound by Resolution 1244 based on the language of the UDI. Although the UDI was issued by the PISG, the declaration lacks any reference to the institution itself or any indication that it exclusively represented the institution's views. Notably, documents issued by the PISG use the third person singular, whereas the UDI opens with, "We, the democratically-elected leaders of our people".[31] Additionally, the Court noted that the wording of the UDI indicates its authors' awareness of the failure of status negotiations and their resolve to achieve a specific final settlement.[32] Being that the purpose of the interim framework was to facilitate negotiations towards a resolution without dictating the form of the final settlement, a declaration of independence falls outside the scope of activities that the UNSC established framework is set up to oversee. Hence, the Court concluded that the UDI's authors intended it to be an expression of the popular will, and have "acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration."[33]

In their dissenting opinions, judges Koroma, Bennouna, and Skotnikov leveled much criticism against the Court's consideration of the identity of the UDI's authors. The three judges believed that the UDI violated the framework established by Resolution 1244, as well as that the Court allowed

[30] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, paras. 104–106.

[31] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 107.

[32] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 105.

[33] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 109. Author: Why did the court decide that the drafters of the resolution were acting outside their capacity as the PISG? Jeremić: "It was manifest that it is a violation of norms, but they [ICJ judges] were under such huge pressure not to say it explicitly, because it would be a slap in the face to America, to Britain, France, and whoever recognized Kosovo. The pressure on the Court was to come up with this juggly act."

the authors to evade their legal responsibility under the framework.[34] Judge Koroma accused the Court of using flawed reasoning to avoid concluding that Resolution 1244 was violated. Koroma described this approach as a "judicial sleight-of-hand", used to justify characterizing the declaration's authors as representatives of the Kosovar people.[35] Judge Skotnikov, similarly posited that

> "the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework [...] The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it."[36]

Additionally, Judge Bennouna argued that "if such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law."[37] Bennouna concluded that regardless of whether the authors of the UDI represented the PISG, "under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council Resolution 1244 by running counter to the legal regime for the administration of Kosovo established by the United Nations."[38] Hence, the conclusion reached by the Court on the authors of the declaration (per the dissenting judges' emphases on its perceived effect of relieving the authors of the UDI from legal responsibility

[34] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary 2–3, 6–7, 9–11 for opinions of judges Koroma, Bennouna and Skotnikov respectively.

[35] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 2–3

[36] For reference to "judicial sleight-of-hand", see ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 3; for Judge Skotnikov's dissenting opinion, ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 10.

[37] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 8.

[38] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 9.

if the interim framework was deemed to be violated) suggests a degree of unorthodox – if not outcome-based and thus activist – decision making (Kmiec 2004, 1473–1474).[39]

Nevertheless, the continuation of reasoning based on the Lotus principle and the Court's reluctance to engage with the substantive structure of the law to evolve it, despite elements of judicial activism, drives the citation of the ICJ's 2010 Opinion overall as a textbook example of judicial restraint (Bianco 2010, 26; Zarbiyev 2012, 257–258; Mawar 2019, 442)

6. CONTEXTUALIZING THE COURT'S INTERPRETIVE STRATEGY

Having discerned the ways in which the ICJ's reasoning appeared more activist or more restrained in relation to Kosovo's UDI, the following section will examine the general factors influencing the Court's inclination toward either approach in an effort to elucidate the underlying motives that shaped the Court's reasoning in its 2010 Opinion.

6.1. The Court's Approach to Political Questions

The Court's history of approaching political questions is characterized by a narrowing of its focus in an effort to maintain political neutrality. In justifying its engagement of questions with a larger political than legal dimension, the Court contends that,

> "whatever its political aspects, it cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law."[40]

For instance, in the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court avoided a definitive ruling by stating that

[39] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 10.

[40] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 27.

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[41]

The Court's contraction of its scope, and resulting inability to answer fully or all the political questions posed to it, are distinctive attributes of judicial restraint. Similarly, in its 2010 Opinion the Court excluded from the scope of its jurisprudence a consideration of what Kosovo's right to self-determination and Serbia's right to territorial integrity entail.[42]

It is also worth noting that the ICJ's discretionary powers to provide advisory opinions, rooted in Article 65 para. 1 of its Statute, allow but do not obligate the Court to give its opinion. As clarified by the ICJ:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[43]

As a result, Mawar (2019, 439–440) observes that the ICJ inherited the PCIJ's approach in accepting but only partially answering politically charged questions as it attempts to focus only on their legal dimension.

Regarding the attempt to separate the legal and political dimension of issues before the Court, judges and scholars disagree on whether the Court can and should separate the two dimensions, as well as on whether it attempted to do so in its 2010 Opinion. Several judges in their separate opinions regretted the Court's decision to accept the question regarding Kosovo, considering its political weight.[44] Notably, this included Vice President Tomka, who voted against the Court's conclusion, arguing against the decision to answer the question, given the UNSC's ongoing consideration of the same situation, while emphasizing the political sensitivity of the

[41] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 105.

[42] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, para. 83.

[43] ICJ, Statute of the International Court of Justice, Art. 65 para. 1.

[44] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, separate opinions of Vice-President Tomka, Judges Koroma, Keith, Bennouna, and Skotnikov.

matter.[45] International lawyer Martti Koskenniemi challenged the attempt to separate legal and political aspects in international disputes, arguing that law is inherently influenced by politics, and legal issues cannot be fully understood without considering their political context (Koskenniemi 2005, 198). In turn, ignoring this interplay risks incomplete analysis and may lead to flawed judgments that fail to address the complexities of the dispute. Meanwhile, Zarbiyev contends that international law often lacks clarity regarding what constitutes "law", doubting that Article 38 of the ICJ Statute provides a complete definition (Zarbiyev 2012, 259). Hence, the ICJ's restraint in its attempt to stay politically neutral risks overlooking key factors that influenced Kosovo's declaration, while allowing a *non liquet* to remain in the Court's stance on unilateral secession. As a result, the need to evolve international law to keep up with the world's rapidly changing environment and resulting disputes is ignored (Mawar 2019, 447).

On the other hand, Richard Caplan (2010) argues that the Court's conclusion in 2010 itself was a deliberate political decision to prevent its opinion from serving as a solid legal precedent for other separatist cases. Similarly, Judge Bruno Simma's criticism of the "unnecessarily limited" scope of the Opinion is a result of an intentional choice to avoid inflaming global separatist sentiments.[46]

However, this analysis has shown that elements of judicial activism were present despite the Court's adoption of an overarching strategy, characterized by rigidity in its 2010 Opinion and attributed to the inextricability of legal issues from political ones. Therefore, the 2010 Opinion overall can be seen as a political decision reached through an ostensibly restrained approach. Meanwhile, the oscillation between judicial activism and restraint maintains ambiguity as the consistent denominator in the ICJ's approach to politically charged questions, warranting further scrutiny.

7. THE ICJ'S RESTRAINT IN RELATIVE TERMS

The ICJ's approach to jurisprudence remains more restrained relative to that of other international courts. The European Court of Human Rights (ECtHR), for instance, exhibits a more balanced strategy in addressing the

[45] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 1.

[46] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Annex to Summary, 3.

international courts' dual objectives of administering justice while preserving its legitimacy as a politically neutral institution. Ezgi Yildiz (2020, 73–99) identifies a range of approaches to the development of norms that are applied by the ECtHR depending on the complexity and political sensitivity of different cases. The ICJ's approach would fall almost consistently under Yildiz's "arbitrator" category – the middle strategy between what are perceived as more judicially active and restrained approaches, wherein the Court seeks to resolve disputes narrowly to avoid setting precedents, as a result producing only incremental developments to legal norms. Given that the ICJ operates under similar general limits and expectations of international adjudication as the ECtHR, this raises the question as to why the ICJ demonstrates a comparatively more restrained approach.

7.1. Rigidity for Legitimacy?

The ICJ's general tendency to opt for a positivist, predictable approach in its jurisprudence is driven by its uniquely stringent requirement of state consent. Mawar (2019, 447–448) suggests that this cautious stance limits the ICJ's judicial activism compared to other international courts, as states become reluctant to resort to ICJ adjudication for fear of unpredictable decisions. For instance, while Article 38 para. 2 of the ICJ Statute enshrines *ex aequo et bono* as sources of law the Court can refer to, which allows the Court to move away from judicial restraint to adjudicate based on what it perceives as equitable and fair, the Court seldom refers to it. Rather, the Court has traditionally favored the more rigid framework of Article 38 para.1, based on primary sources of law, to deliver more predictable rulings. This preference arguably aims to uphold the Court's perceived jurisdictional integrity and judicial certainty at the expense of foregoing the exploration of other decision-making avenues allotted to it by its statute (Alvarez 2024).

A qualified parallel can be drawn here with David Bosco's (2014, 20–22) account of the International Criminal Court (ICC), in which he argues that the interests of the Court and those of powerful states are continually renegotiated in a process of "mutual accommodation", producing a cautious and calibrated approach to politically sensitive issues. Transposed to the ICJ, especially in high-stakes proceedings, "pursuing an ideal apolitical form of justice by ignoring the need for state support would only sap the institution's credibility" and its capacity to contribute to the evolution of international law, as the very existence of an international legal mechanism hinges on

maintaining states' buy-in (Bosco 2014, 19).[47] Yet, unlike the ICC, the ICJ's legitimacy rests more heavily on the consent-based architecture of interstate adjudication rather than enforcement power, which generates a more stable but still politically conditioned form of judicial restraint.[48] The ICC has been able to adopt a more assertive posture vis-à-vis state interests – notably in the *Al Bashir* appeals decision of 6 May 2019, which ultimately rejected claims of head-of-state immunity despite states' protest.[49] Meanwhile, the ICJ's activism is most accentuated through its advisory jurisdiction, but remains more limited.

A distinct evolution can be observed in the ICJ's advisory function where the Court's jurisdiction is not contingent on state consent as it is in contentious cases, allowing advisory opinions to emerge as a prominent avenue for judicial activism. In recent years there has been a growing tendency for states to seek international jurisprudence, particularly advisory opinions. According to Stravridi (2024), this is due to the opinions' utility as a "soft litigation strategy". The ICJ opinions help eliminate power imbalances between states, which can especially benefit smaller or weaker states, while the non-binding nature of the opinions mitigates the risk of political backlash against decisions more explicitly seeking to evolve international law.[50] Additionally, the advisory process also avoids the complicated consent requirements of mediation, and is less risky for states than adjudication in contentious proceedings in terms of creating explicit "winners" and "losers".

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[47] Especially considering the potential pressure from the several participants in the proceedings, which, as the Court acknowledges, "contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity." See ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, para. 80.

[48] The ICC, by contrast, is tasked with determining international criminal responsibility by prosecuting individuals and issuing arrest warrants, with the execution of its decisions constrained more by its dependence on state cooperation than finding initial grounds for jurisdiction.

[49] Author's correspondence with Judge Gilbert Bitti, former Senior Legal Adviser of the ICC Pre-Trial Division. When asked the question: "Does state participation in proceedings usually prompt a more cautious consideration of the legal ramifications of the decision by international legal jurists?" Judge Bitti referred to the decision from May 6, 2019 in the *Al Bashir* case at the ICC, concerning immunities of a sitting Head of State, where several States, including Jordan, the African Union and the League of Arab States, defended the existence of personal immunities for Heads of States being not parties to the ICC – immunity which was rejected by the ICC Appeals Chamber.

[50] For instance, the ICJ delivered an Advisory Opinion in 2024 that was instigated by the South Pacific island state of Vanuatu on states' obligations regarding climate change.

Additionally, Sthoeger (2023) observes the inconsistent history of state compliance with ICJ advisory opinions due to their non-binding nature, arguing that they are usually ascribed more political than legal weight. Consequently, advisory opinions can provide important political leverage in international negotiations, while still appearing less confrontational than formal litigation (Stravridi 2024).

The prominence of the Court's advisory function as a platform for judicial activism – a utility of advisory opinions encouraged by both court presidents Schwebel and Guillaume – reflects the Court's awareness that a degree of activism is necessary to achieve substantive justice (Mawar 2019, 440). Thus, the Court's reliance on the Lotus principle and its resultant focus on prohibitions under international law that characterized its 2010 Opinion, can neither be entirely attributed to a strict mandate of political neutrality nor the Court's attempt to preserve a stable and predictable legal framework.[51] Rather, the growing reliance on advisory opinions – where the Court's tendency towards judicial activism is heightened – suggests that the ICJ may be strategically responding to the interests of various stakeholders, balancing the demands of political realities with its judicial mandate.

8. THE BALANCING ACT AT THE ICJ

The ICJ can change its approach from restrained to activist as a result of political backlash, underscoring its potential awareness of the need to adapt its jurisprudence to the changing international environment and public sentiments.[52] For example, public criticism following the ICJ's 1966 ruling in the *South West Africa* case was centered on the Court's prioritization of procedural issues over substantive justice. The Court stopped at issues of standing, preventing itself from adjudicating on claims relating to the racial segregation witnessed under South Africa's apartheid regime. The political backlash it received as a result was hence inspired by the Court's refrain from an activist approach that would forego such technical considerations in order to address large-scale violations of human rights (McWhinney n.d.).

[51] Although it is worth noting that despite the confidence of both Kosovo and Serbia that the Court would rule in their favor, international law experts had rightly predicted a decision sufficiently ambiguous as to not concretely serve either party's political agenda. See Barlovac, Çollaku 2010; Hilpold 2011, 1.

[52] This however, does not exclude the possibility of political backlash if the Court's jurisprudence is perceived as too activist, nor does it preclude the possibility that the Court may address potential criticism preemptively by adjusting its approach from overarching restraint to activism or vice versa.

Consequently, the ICJ was prompted to take a more activist approach in its 1970 *Barcelona Traction* case, where it developed the concept of erga omnes obligations (Zarbiyev 2012, 276; Kmiec 2004, 1471–1472). By recognizing issues such as racial discrimination as matters of international legal interest, i.e. erga omnes, the Court was able to bypass issues of standing such as those that impeded its address of Liberia's claims in 1966 (Zarbiyev 2012, 276; Lepard 2010, 261–262). The development of erga omnes in contravention to precedent in 1966, represents an act of judicial activism, and potentially a response to an acknowledged need for international law to prioritize the protection of fundamental human rights by evolving international law (McWhinney n.d.). Hence, the ICJ is aware that its legitimacy is not solely contingent on its tradition of restraint and resultant "normative authority" (Mawar 2019, 431).

Through its responsiveness to criticism, the Court demonstrates that an extent of activism is necessary to align its decision-making with evolving universal values. In relation to the ICJ's 2010 Opinion, it therefore becomes plausible that the Court's alternation between activism and restraint in reaching its conclusion on Kosovo's UDI – which avoided a conclusion on Kosovo's status – is an attempt to respond to past criticism or preempt future backlash, i.e., balancing the two approaches to maintain an image of legitimacy while adjudicating on new and politically contentious issues. Nonetheless, it is important to note that criticism is not the sole driver behind the ICJ's judicial activism and its willingness to adapt its jurisprudence. For instance, despite much criticism of the Court' notoriously difficult threshold for genocide, it continues to adhere strictly to established precedent (Essawy 2024).

9. CONTEMPORARY OPINIONS AT THE ICJ

Turning to more recent advisory opinions of the ICJ for comparison, the Court's adjudicative style has notably taken a more activist character, though it remains constrained by the aforementioned factors to varying degrees. The Court's 2025 Advisory Opinion on the *Obligations of States with Respect to Climate Change*, for instance, has been hailed by scholars as a "watershed moment" in how the Court adopted a proactive approach, in integrating multiple sources of international law into a unified, action-forcing framework on an emergent issue (Wewerinke-Singh 2025; Frydlinger 2025). The Court stretched the scope of its interpretation to connect the issue of climate change with customary law, the principle of no-harm, and human rights, finding that states have binding obligations under international

law – beyond those emanating from treaties onto their signatories – to address climate change. The Court also concluded that treaty obligations to safeguard the climate system as a "global common good" are obligations erga omnes.[53] This represents a distinctly activist turn in the Court's interpretive practice, filling a normative gap in international law between political or aspirational climate commitments (such as the 1.5°C target) and enforceable legal standards. Testament to the political significance of the case was the unprecedented participation in its proceedings – 91 written statements, 62 comments, and oral submissions from 96 states and 11 international organizations, including major polluters and at risk low-lying island states – making it the most widely attended proceeding in the Court's history.[54] While comparing the leap between transboundary harm to obligations related to climate change, and the right to self-determination to unilateral secession may be challenging – and one could theorize about the compatibility of the levels of political sensitivity surrounding each case – it is worth noting that, unlike the divided bench on Kosovo, the advisory opinion on climate was adopted unanimously.[55]

By contrast, the Court's 2024 Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory* revealed a more cautious interpretive posture, reflecting the Court's enduring concern with balancing judicial authority against the political sensitivities inherent in questions of statehood. The 2024 Opinion has been described as "one of the most important decisions that the ICJ has ever delivered" (Milanović 2024) and hailed as a "breakthrough" for Palestinians (BADIL 2024).[56] It is worth noting that, at the time, 135 UN members recognized Palestine's statehood, though divisions among the permanent Security Council members – all of whom participated in written proceedings – persisted (Ferragamo, Roy 2025). Ultimately, the Court found Israel's practices in the occupied Palestinian territory to be unlawful, including in impeding the Palestinians from exercising the right to self-determination.[57]

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[53] ICJ, Obligations of States in Respect of Climate Change, Advisory Opinion. 2025. para 440.

[54] ICJ, Obligations of States in respect of Climate Change, Press release No. 2025/36. 2025, 1.

[55] ICJ, Obligations of States in respect of Climate Change, Press release No. 2025/36. 2025, 1.

[56] Noting that the Court's 2004 Opinion on the building of a wall in occupied Palestinian territory stopped short of calling Israeli practice "annexation".

[57] Noting that this is the fifth time in the Court's history that it arrived at a unanimous conclusion.

The Court drew on its 2004 *Legal Consequences of the Construction of a Wall* opinion but extended it to conclude that Israel had annexed the occupied territory, and that:

"[i]t is the view of the Court that to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force."[58]

As Milanović (2024) rightly points out, the Court avoided specifying what Article 2 para. 4 of the UN Charter applies to protect in this context – whether Israel's use of force should be understood as force against the Palestinian people, a Palestinian state, or something else – and, in doing so, failed to clarify whether Article 2 para. 4 can apply to non-state actors. In this opinion the Court leans toward activism by explicitly invoking the prohibition of the use of force in a way that connects the occupation with an internationally wrongful act beyond humanitarian law violations. While the Court reached its conclusions by means of maintaining (and arguably creating) ambiguity around when occupation becomes unlawful and whether the prohibition on the use of force applies to force used against non-states, it was able to deliver a far-reaching conclusion – even promulgating obligations for third states – but was able to avoid the discussion of Palestinian statehood. Although it can also be argued that the court was more reserved when considering other practices by Israel. Notably, the Court found that Israel had violated Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination on racial segregation and apartheid, by affirming the existence of racial segregation, but omitting a discussion of whether this also amounted to apartheid.[59]

All considered, even as the ICJ adopts novel interpretive decisions through its activist capacity, with the aim of reaching more politically far-reaching conclusions – albeit when the political climate appears more favorable to such pronouncements – the Court continues to employ a judicially restrained

[58] ICJ, Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem. 2024. Advisory Opinion, para. 179. Notwithstanding the ambiguity of the meaning of the term "corollary" in this context, see Brunk, Hakimi 2024.

[59] Judges issued 14 separate opinions, discussing, inter alia, the categorization of Israeli practices as use of force and as apartheid. In their effort to reach consensus, however, they may well have compromised on clarity and held back on fulfilling a broader activist capacity, which shaped the appearance of the Court's final interpretive strategy.

approach to preserve a legal ambiguity that prevents it from making pronouncements on statehood. In continuity of what could be inferred from the Court's cautious approach to the case of Kosovo in 2010, as of the time of writing, the international legal mechanism still remains unable or unwilling to elaborate on what the right to self-determination entails – despite its extensive consideration of and decisions on what deprives or impedes a populations' exercise of that right in contemporary non-colonial contexts.

10. THE ICJ'S JUDICIAL FUNCTION IN RELATION TO INTERNATIONAL PEACE AND SECURITY

The ICJ is less vocal on its "judicial philosophy" than other international courts. Zarbiyev suggests that such philosophies, indicative of a court's institutional core identity, serve as a foundation for its decision-making. The ICTY, for example, acknowledged its consideration of the 1990s atrocities in the Balkans during its deliberations, while the ECtHR has also openly embraced its role in clarifying and advancing the rules of the European Convention. In contrast, the ICJ's philosophy is less clearly defined, despite it is entrusted – as a UN organ – with an institutional mission (Zarbiyev 2012, 258–259).

In relation to the broader UN objective, the ICJ's judicial function can be understood as the judicial organ of a post-war institution seeking to maintain international peace.[60] Given that the issue of Kosovo's status settlement was simultaneously being considered at the UNSC, it must have pertained to international peace and security, per the UNSC mandate for issues included in its agenda.[61] Hence, the Court's approach can be thought of in relation to the right to self-determination, as well as in relation to the UN's broader goals for international peace. Considering that the Court's approach to the question embodied a deliberate effort to avoid giving a definitive answer to the substantive questions attached to Serbia's request, this raises questions about the utility of maintaining a *non liquet* in international law.

The ICJ's avoidance of definitive legal pronouncements regarding Kosovo's statehood, and its decision to leave unresolved certain aspects of the declaration's legality, can be seen as an attempt by the Court to relegate

[60] UNGA, Charter of the United Nations.

[61] UNGA, United Nations Security Council Functions and Powers.

the issue of Kosovo's status back to the political realm.[62] Caplan (2010) adopts this view, arguing that the Court's deferral of the issue to political channels attempts to balance the limits of international legal structures with the political complexities inherent to the case. The Court's conclusion could also be seen as referral to particular political mechanisms, such as the UNSC, which were already engaged with the matter. However, this line of reasoning is discouraged by the fact that the Court accepted to answer the question and took a stance on the legality of Kosovo's UDI, which the UNSC would have to recognize.

In any case, the ICJ demonstrated that it is either not yet ready or not willing to address the broader questions attached to the UNGA's request. The Court ensured that its 2010 Advisory Opinion did not set a precedent that could limit its ability to adjudicate on similar issues in the future, while reflecting its belief that no legal restraints should have been created at the time to prevent Kosovo from achieving international recognition as a state, nor should international law be in a position to determine the status of its statehood (Stravridi 2024).

11. CONCLUSION

The analysis of the ICJ's reasoning in its 2010 Opinion reveals a deliberate strategy of employing both judicial activism and restraint in tackling the question. Fifteen years later, the Kosovo Opinion endures as a reference point for understanding the uneasy space international law occupies when the Court is called upon to pronounce on questions that are as politically charged as they are legally indeterminate. This approach aligns not only with the Court's general approach to politically charged questions, but also with its wider interpretive culture, which appears to incorporate both approaches but tends toward juridical restraint on controversial issues, with heightened sensitivity to issues of statehood. Through this dual approach, the ICJ avoided addressing broader questions on the existence of a right to self-determination in post-colonial contexts – which can extend to unilateral secession – thereby preserving a *non liquet* in international law around these issues. The Court's stance on Kosovo's UDI allowed it – through an

[62] Jeremić: "The international legal system is not exactly an ivory tower of equity, of being just and fair and blind to pressures... The International Court of Justice, like all other international institutions, legal, political, economic, is simply made up of countries, and countries are made up of politics, and politics is always the main driver... International law is great, but it doesn't apply equally."

anticlimactic decision – to relegate the matter back to the political realm while maintaining that the act of declaring independence alone is not prohibited by international law.

Even when general factors that have demonstrated their sway over the ICJ's jurisprudence are considered – including perceived legitimacy, political backlash, states' expectations, judicial philosophy, and broader institutional values – the particular motives behind the ICJ's interpretive strategy in its 2010 Opinion remain uncertain. Rather, the value of the contribution this analysis makes lies in its illustration of the inherent multi-layer complexity of the pressures and considerations affecting judicial procedure at the ICJ and the discretionary means by which it navigates them. Future scholarship could deepen this inquiry while improving its validity and robustness by including the systematic application of the abovementioned criteria for judicial activism and restraint to a wider range of ICJ cases.

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*SEXUAL TRANSGRESSIONS IN EARLY BYZANTINE LAW***

The article examines the sexual offences enumerated in title 17 of the early Byzantine legal code Ecloga (726 or 741). While several offences, such as adultery, rape, abduction, incest, and homosexual intercourse, were already addressed in the codification of Justinian and in the Novels, the Ecloga introduced additional crimes, including fornication, incest involving spiritual kins, and bestiality. These innovations are attributed to the incorporation of Old Testament precepts and the conclusions of the Synod of Trullo, reflecting Christian ideals of sexual abstinence outside marriage and the elimination of sexual pollution. Although the Ecloga generally aimed to provide fair treatment for offenders of both sexes and all socio-economic classes, its legal framework largely aligns with post-classical Roman law. A notable reform was the replacement of capital punishment with mutilating corporal penalties, demonstrating a vision of justice that emphasized prevention and rehabilitation over extermination of the offender.

Key words: *Byzantine law. – Christianity. – Ecloga. – Roman law. – Sexual criminal law.*

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1. INTRODUCTION

The first comprehensive attempt to deal with sexual offences in Byzantine law was the 17th title of the Isaurian legal code, known as the Ecloga (Ἐκλογὴ τῶν νόμων),[1] promulgated by emperors Leo III (717–741) and his son Constantine V (741–775), probably in March 741.[2] In contrast to Justinian's codification, where sexual transgressions were dispersed in Institutions, Digests, Codex (and Novels), the Ecloga consolidated sexual offences into a monolithic 17th section. In this section, commonly referred to as *Poinalios* (Ποινάλιος),[3] crimes against sexual morality alone represent about one third of all incriminations (Lingenthal 1892, 341–345). The catalogue of sexual offences in the Ecloga marks an evolution of the late Roman constitutions regarding sexual offences. It reflects the adoption of Christian-inspired ideals of sexual abstinence, efforts to eradicate debauchery,[4] and the pursuit of equitable punishment for sex offenders, regardless of gender and economic background. While several offences, such as adultery, rape, abduction, incest, and homosexual intercourse, had been addressed in the constitutions of the late Roman emperors, the Ecloga added a new assortment of crimes: fornication, incest involving spiritual kins (as well as in-laws), and bestiality. Although the Ecloga essentially listed all the major sexual offences punishable under Roman law, it was not intended as a comprehensive codification of positive law. Rather, it functioned as a selection (ἑκλογή) of Roman legal provisions. Although the Ecloga, promulgated by an iconoclastic emperor, did

[1] For the critical edition of Ecloga in Greek original and German translation, see Burgmann 1983; for an introduction to the source and English translation, see Humphreys 2017, and Penna, Meijering 2022, 99 ff. Legal texts are abbreviated as follows: Ecloga (Ἐκλογὴ τῶν νόμων) as E., Epanagoge (Εἰσαγωγὴ τοῦ νόμου) as Epan., Basilica (τὰ βασιλικὰ) as Bas., and Procheiros Nomos (Πρόχειρος νόμος) as Pr.

[2] For a general overview of Ecloga, 'a selection of the laws compiled [...] from the Institutes, Digest, Code and Novels of Justinian the Great, and corrected to be more humane', see Troianos 2017, 118 ss, and Sinogowitz 1956, 1 ff. All English translations of provisions from the Ecloga are based on Humphreys's edition (2017).

[3] According to Sinogowitz (1956, 16 n. 1), this term denotes the compilation of criminal laws, which first appeared in the works of Johannes Kobidios in the 6th century.

[4] In many instances, the Hebrew Bible reflects the belief that semen, and therefore sexual intercourse in general, is ritually impure (Ezra 9; Lev. 18; 21:7–15; Ezek. 18:23; 44:22). The Bible sees Israel as a community of men who are required to be holy. According to this narrative, the Canaanites were expelled because of sexual impurity, and the Israelites will face a similar fate in the event they fail to maintain their sexual purity. This narrative was also employed in Byzantine ideology. On this, see Feinstein 2014, 125.

not enjoy a favourable reputation in later periods,[5] its list of sexual delicts remained largely unchanged in subsequent Byzantine legal codes, including the *Procheiros Nomos*, *Epanagoge*, *Basilica*, and the later compilations of Harmenopoulos and Vlastares (Lingenthal 1892, 341; Laiou 1993, 117 ff).

This article analyses the regulation of sexual offences in the Ecloga and to compare them with the legal framework of classical and late Roman law. It seeks to highlight possible shifts in legal dogmatics and penal policy, and to identify the underlying principles of sexual morality that shaped the development of Byzantine criminal law in this field.

2. FORNICATION

2.1. From *stuprum* to *πορνεία*

Matrimonial law was one of the few areas in which the Isaurian emperors, who perceived themselves as the successors to the laws of Moses and Solomon, introduced entirely new legislation as part of their moral and religious mission to govern the Christian empire as the epicentre of God's providential plans.[6] They criminalized consensual heterosexual practices outside of marriage, which at the time was regarded as an indissoluble union imbued with a sacred character.[7]

E. 17.19. *A married man who fornicates shall be beaten with twelve blows as a chastisement, whether he is rich or poor*.

E. 17.20. *An unmarried man who fornicates shall be beaten with six blows.*[8]

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[5] The *prooimion* of the *Procheiros nomos* states that 'the book which they called a manual was not a selection but rather the author's perversion of good laws, harmful to the State and fit only to perpetuate foolishness'. However, Basil I stated he did not want to reject the ancient manual entirely, only the parts that 'justly merit repudiation' (translated by Freshfield 1928, 51. See also Ostrogorsky 1963, 133).

[6] The prologue to the Ecloga gives a vision of the regime's self-perception and ideology, which was deeply influenced by the Holy Bible, especially the Old Testament. The Isaurians are portrayed as divine stewards and heads of the Christian community, akin to the ancient chosen people governed by divine law (Humphreys 2017, 16).

[7] E. 2.9.1 states that the wisdom of God, the maker and creator of all things, teaches that marriage is an indissoluble union of those who live together in the Lord.

[8] Cf. Pr. 39.59; Epan. 40.57.

The term used to describe fornication is πορνεία. It is not an equivalent of the Latin word *stuprum*, which would be φθορά (Laiou 1992, 120, 127). Ecloga differed from Augustus' law on the punishment of adultery (*Lex Iulia de adulteriis coercendis*), where the central sexual offence was *stuprum*, i.e. consensual sexual intercourse between a (married or unmarried) man and an unmarried (or no longer married) free-born honourable woman (*femina honesta*) or a boy.[9] According to *Lex Iulia de adulteriis coercendis*, extramarital sex with women in certain professions, such as prostitutes, actresses or innkeepers, as well as with slaves, was not regarded as *stuprum* or *adulterium*. By the Roman definition, a prostitute was considered to have no honour to defile, and therefore, adultery could not be committed with her (Laiou 1993, 115). The Christian ambition articulated in the Ecloga goes beyond merely criminalising extramarital relations with honourable women; it also extended to disciplining relations with prostitutes and other 'shameful' women (*feminae probrosae*) (Suet. Dom. 8).

The divergence in criminal sanctions for fornication is based on the marital status of men, regardless of the marital status of the woman involved. This was a significant step forward in challenging the double gender standards in classical Roman law.[10] In the Roman legal system, wives were not allowed to file criminal charges against their unfaithful husbands in cases of fornication or adultery.[11] While women faced severe consequences, such as

[9] Mod. D. 48.5.35.1. Modestinus (D. 50.16.101. pr) noted that the term *stuprum* originally referred to sexual intercourse with a widow, while the term *adulterium* referred to sexual intercourse with a married woman. In the legal literature, the terms *stuprum* and *adulterium* were frequently used interchangeably, as stated by Papinian in D. 48.5.6.1: *Lex stuprum et adulterium promiscui et* καταχρηστικώτερον *appellat. sed proprie adulterium in nupta committitur, propter partum ex altero conceptum composito nomine: stuprum vero in virginem viduamve committitur, quod Graeci* φθορὰν *appellant.*

[10] See for instance Ulp. D. 48.5.14.5: [*P*]*eriniquum enim videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat*, and in general, Pap. D. 1.5.9: *In multis iuris nostri articulis deterior est condicio feminarum quam masculorum.*

[11] Sev. Ant. C. 9.9.1: *Publico iudicio non habere mulieres adulterii accusationem, quamvis de matrimonio suo violato queri velint, lex Iulia declarat, quae, cum masculis iure mariti facultatem accusandi detulisset, non idem feminis privilegium detulit.*

divorce[12] and the loss of their dowry, men enjoyed impunity for engaging in extramarital relations, provided their liaisons did not involve 'honourable' women (*feminae honestae*).[13]

2.2. Concubinage

As per Gregory of Nyssa, a prominent Church father, the only legitimate form of sexual union was holy matrimony (Silvas 2007, 219). Any other sexual union was therefore considered a sin of the flesh and classified as fornication (πορνεία).[14] The prosecution of concubines and prostitutes for fornication remains uncertain, given the silence of early Byzantine sources. Concubinage, understood as a stable cohabitation between socially unequal partners, provided it did not coincide with marriage, was legally tolerated in classical Roman law and explicitly acknowledged in Justinian's legislation.[15]

Emperor Basil I decreed that no one should keep a concubine (παλλακή) in his house but should either marry her or send her away. Later, Leo VI stated that there was no permissible middle way between celibacy and strictly monogamous marriage (Pr. 4.25; see also Oikonomides 1976, 187). While the legislator could not eliminate extramarital relationships, the legislative efforts in the mid-9th century aimed to express disapproval of legally recognising extramarital unions.

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12 E. 2.9.2. This aligns with Jesus' teaching in Matthew 19:3–9, where he responds to a question from the Pharisees about the right to divorce. Jesus explains that while Moses allowed divorce due to the hardness of people's hearts, this was not the original intention from the beginning of creation. The marriage was intended to be a lifelong, unbreakable union. Jesus then asserts that anyone who divorces his wife, except for sexual immorality, and marries another woman commits adultery.

13 Indications of disapproval toward extramarital relations among men are evident in Ulp. D. 48.5.14.5: *Iudex adulterii ante oculos habere debet in inquirere, an maritus pudice vivens mulieri quoque bonos mores colendi auctor fuerit: periniquum enim videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat* [...]

14 For instance, see Matt. 15:19; 5:32, 21:31, 19:9 and Luke 15:30, where the term πορνεία includes extramarital sexual intercourse, and especially prostitution. On this see Harper 2012, 363–383; Laiou 1993, 128 ff.

15 Justinian's intention was to elevate concubinage closer to the status of marriage by declaring it a form of marriage of lesser standing (*inaequale coniugium*), provided it maintained a monogamous and avoided incestuous character. See Szczygielski 2009, 438.

As noted, according to the Ecloga, a man who committed fornication was to be punished with six lashes, while his concubine remained exempt from punishment. It is likely, however, that these prescribed secular penalties for sexual transgressions were not consistently enforced. The Peira, a collection of case law from the 11th century, contains a documented case of a woman who cohabited with a man, bore him a child, and was subsequently abandoned. The woman insisted on marriage, yet the judge was reluctant to punish the disobedient man, citing a lack of precedent. The judge claimed that he had never encountered a situation where a man was obliged to marry a woman with whom he had lived in concubinage. At the same time, he expressed uncertainty about the appropriate punishment for the man. The Peira then suggests that if the judge wanted to punish the man, he could have invoke the law, which stated: 'Whoever takes an honourable and freeborn woman as his concubine and does not declare it in writing must either take her as his wife or, if he refuses, is guilty of adultery' (Peira 49.24, translated by author).

2.3. Prostitution

In Roman antiquity, the state taxed female[16] prostitution rather than prosecuting it (Suet. Cal. 40; Nov. Theodos. 18.1). A clear commitment to curbing prostitution in Constantinople is evident in Novel 14 of 535, which outlawed panders and procurers who exploited women for prostitution. This legislation, explicitly aimed at purifying the city, reflected Justinian's desire to promote a chaste population. Justinian wanted to protect young girls from being forced into a life of unchastity, especially those under the age of ten who were lured away from their families under false pretences of receiving clothing or food. Justinian sought to ensure that girls were not misled into believing that their contracts or promises to pimps held any legal validity (Garland 1999, 16 ff). Justinian's wife, Theodora, a former actress and likely a prostitute who had been exploited by pimps, may have played a significant role regarding this legislation. She, and later Emperor Michael IV, sought to relocate prostitutes to convents specifically established for this purpose (Procopius, Buildings 1.9.4). These efforts, however, often failed to address the problem of the abuse of prostitution effectively and instead contributed to its ghettoization (Beck 1984, 99). The Appendix to the Eclogue clarifies that a

[16] Male prostitutes were not punished for having sex with women, while homosexual encounters were subject to the capital sentence from the 4th century onwards.

man who engaged in promiscuous sexual intercourse with a person employed in a brothel could not be condemned for adultery. It remained silent on the fate of the prostitute (AE 5.5, according to Humphreys 2017, 98).[17]

2.4. Sexual Intercourse Between Free Persons and Slaves

The Ecloga introduced novelties regarding sexual interactions between free (married) men and slaves, marking a notable departure from the prevailing customs of classical Romaan antiquity when it was common for masters to demand sexual services from slaves (and even freedmen)[18], regardless of their sex (Bradley 1987, 116 ff). Unions between free men and slave women referred to as *contubernia*, were not punishable by law despite the absence of legal recognition (Diocl. Max. C. 9.9.24). A man desiring to wed his slave woman could choose to emancipate her and take on the roles of both husband and patron to her (Grubbs 1993, 127). Contrary to the categorisation of the sexual seduction of a foreign slave as *stuprum*, it was considered a violation of the master's property and dignity. Legal recourse for such acts included actions such as *actio iniuriarum* (Ulp. D. 47.10.9.4 and 47.10.25), *actio de servo corrupto*, and *actio legis Aquiliae* (Paul. D. 1.18.21; Pap. D. 48.5.6 pr).

According to the Ecloga, however, heterosexual unions between slaves and (married) masters were no longer tolerated:

E. 17.21. *If a married man has sex with his slave, then after the matter has been determined, the girl shall be seized by the local magistrate and sold by him beyond the province, the proceeds of which sale shall go to the Treasury*.

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17 Cf. with Const. CTh. 9.7.1: *Quae adulterium commisit, utrum domina cauponae an ministra fuerit, requiri debebit,* [...] *pro vilitate eius, quae in reatum deducitur, accusatione exclusa, liberi, qui accusantur, abscedant, cum ab his feminis pudicitiae ratio requiratur, quae iuris nexibus detinentur, hae autem immunes a iudiciaria severitate praestentur, quas vilitas vitae dignas legum observatione non credidit.* ('If any woman should commit adultery, it must be inquired whether she was the mistress of a tavern or a servant girl [...] in consideration of the mean status of the woman who is brought to trial, the accusation shall be excluded and the men who are accused shall go free, since chastity is required only of those women who are held by the bonds of law, but those who because of their mean status in life are not deemed worthy of the consideration of the laws shall be immune from judicial severity.') (Translation according to Pharr 1952, 231).

18 Cf. Sen. Controv. 4.10: *Impudicitia in ingenuo crimen est, in servo necessitas, in liberto officium.*

If an honourable man (ἔντιμος) committed fornication with the female slave of another person, he was obliged to compensate the slave's master with thirty-six *nomismata*, the equivalent of half a pound of gold (Humphreys 2017, 72, n. 154). Sinogowitz (1956, 70) suggested that this sum exceeded the value of a typical slave, approximately twenty *nomismata*. This implies that the sanction aimed to provide more than just compensation. If, on the other hand, the offender was impoverished (εὐτελής), he would be subject to corporal punishment and required to pay a portion of the thirty-six νομίσματα according to his means (cf. Pr. 39.61).

A free woman living in *contubernium* with someone else's slave was subject to the *senatus consultum Claudianum* of 52, which made the woman who lived with a slave a slave herself, but only if the owner had formally warned her. The children of their union also became slaves (Paul. 2.21a). The *Senatus Consultum Claudianum* remained in force until it was abolished by Justinian (C. 7.24.1). This legislation was specifically aimed at free women who cohabited with another person's slave. There appears to have been no general law prohibiting a free woman from entering into *contubernium* with her own slave until 326, when Constantine decreed that a woman found to be engaging in secret relations with her slave should be punished by death, while the slave was to be burned (Const. CTh. 9.9.1). Constantine's constitution, which attempted to address the blurring of social boundaries and restore traditional status distinctions and social roles, was included as an appendix to the Ecloga:

AE 4.4: *If a woman through lust has intercourse with her own slave, she shall be decapitated, and the slave burnt; let such goings-on and arrangements be denounced, and the slave* [who denounces it] *shall be honoured with freedom* ...

2.5. Defloration

Within the hierarchy of Byzantine ethical values, virginity was regarded as superior to legitimate marriage and was understood as a form of spiritual union in which the virgin or nun was symbolically the bride of Christ (Kazhdan 1990, 132). Daughters were permitted to marry only while dutifully observing and honouring their parents' wishes. In cases of consensual sexual intercourse (φθορά) with a virgin without her parents' knowledge, the lover was required to marry her with the consent of both the girl and her parents; otherwise, he had to compensate her directly, paying a pound of gold if he was wealthy (εύπορος) or half of his property if less affluent (ενδεέστερος). The poor and needy man (πένης καί άνεύπορος) was

beaten (without defined limits on the number of lashes), shorn, and exiled.[19] The penalties draw heavily from the provisions of Justinian's Institutes, where the seducer of a virgin or widow faced fines amounting to half of his property, if he belonged to the *honestiores*, or, corporal punishment and exile were prescribed if he belonged to the *humiliores* (I. 4.18.4). A notable innovation in these penalties was the encouragement of marriage between the seducer and the victim of seduction – a trend appearing mainly in medieval canon law (cf. e.g. X. 5.17.6). If the virgin was already betrothed to another man, consensual sexual intercourse was considered adultery according to the Trullan Council (c. 98). The man was rhinotomised, while the deflowered fiancée was not punished, as a married woman would have been (E. 17.32; Pr. 39.65; Epan. 40.55; Bas. 60.37.82).

Consensual sexual intercourse with a nun, the bride of Christ (ἡ νύμφη Χριστοῦ), rendered both participants liable as adulterers and subjected them to the prescribed punishment of rhinotomy (E. 17.23; Pr. 39.62; Epan. 40.59; Bas. 60.37.77).[20] This punishment was considerably more merciful than those decreed by Justinian. Under his laws, the deflowerer of a nun would be sentenced to death and the man's property would be confiscated (Nov. 6.6 and 123.43).

The Ecloga also handled the undesirable consequence of extramarital sexual relations:

E. 17.36. *If a woman has had illicit sex, become pregnant and contrived against her own womb to produce an abortion, she shall be beaten and exiled*.

While the punishment for abortion generally aligns with the principles of classical law,[21] the rationale for self-inflicted abortion in this context is explicitly tied to the condemnation of extramarital relations and the aim of eliminating the consequences of sexual pollution.

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[19] E. 17.29 (= Pr. 39.65; Epan. 40.56; Bas. 60.37.79; Peira 49.4; Harm. 6.3.5). The *Procheiros Nomos* (and later the *Basilica*) required not only the consent of the woman, but also the approval of the parents of the man involved.

[20] Cf. the rule of Roman sacral law, which prescribed burial alive for a Vestal who violated her duty of sexual chastity, while her male partner was subjected to flogging (Liv. Ab urb. cond. 8.15.7–8). On this, see Schultz 2012, 122–136.

[21] Cf. Ulp. D. 48.8.8: *Si mulierem visceribus suis vim intulisse, quo partum abigeret, constiterit, eam in exilium praeses provinciae exiget* ('If it is proved that a woman has done violence to her womb to bring about an abortion, the provincial governor shall send her into exile.') Translated by Watson 1985, 334. In classical law, abortion was punishable if the woman performed it without the husband's consent. It was considered that the woman had deprived the husband of his offspring (Marcian. D.

3. ADULTERY

The *lex Iulia de adulteriis* of 18 BC classified adultery as a *crimen publicum*, defining it as an act committed by an honourable married woman engaging in extramarital heterosexual relations, with the marital status of the man being immaterial (Paul. Coll. 4.3.2; Marcian. D. 48.5.34. pr; Diocl. Max. C. 9.9.25).[22] The prescribed punishment for adultery was *relegatio in insulam*, accompanied by a monetary fine (I. 4.18.4).[23]

In the Ecloga, the punishment for adultery (μοιχεία) is grounded in the protection of marriage as a sacred union, conceived as the fusion of two individuals into a single moral and social entity:[24]

E. 17.27. *Any man who commits adultery with a married woman shall have his nose cut off; and likewise the adulteress, who henceforth is divorced and lost to her children, since she has not kept the words of our Lord, who teaches that God had joined them together as 'one flesh'. And after their noses have been cut off, the adulteress shall receive her own property, which she had brought to her husband, and nothing else. But the adulterer shall not be separated from his wife, even though his nose is cut* ...

In cases where both participants in extramarital intercourse were married, the Ecloga prescribed rhinotomy for both adulterers. While the nose mutilation may seem like a draconian sanction, it is worth noting that in 339, emperors Constantius and Constans addressed 'sacrilegious violators of marriage as though they were manifest parricides' and imposed the penalty of the sack (*poena cullei*) which was perhaps the cruellest Roman punishment.[25]

47.11.4: [...] *indignum enim videri potest impune eam maritum liberis fraudasse*) and she was sentenced to exile (Tryph. D. 48.19.39; Ulp. D. 48.8.8). On the legal history of abortion, see Jerouschek 1997, 248–264.

[22] See also CTh. 3.7.2, where marriage between a Christian and a Jew was punishable as adultery.

[23] On adultery in Roman and Byzantine Law, see Youni 2001, 279 ff.

[24] Cf. Gen. 2:24; Matt. 19:5–6; Mark 10:8; 1 Cor. 6:16; Eph. 5:31.

[25] Constantius, Constans CTh. 11.36.4: *[I]n huiusmodi criminibus convenit observari, ut manifestis probationibus adulterio probato frustratoria provocatio minime admittatur, cum pari similique ratione sacrilegos nuptiarum tamquam manifestos parricidas insuere culleo vivos vel exurere iudicantem oporteat*. The person condemned for adultery was stuffed into a leather sack with a snake, a rooster, a dog and a monkey and thrown into the sea. Justinian later altered the punishment to beheading (Const. C. 9.9.29.4). On the punishment with the sack, see Kranjc 2021, 5–40. On CTh. 11.36.4, see Reskušić 2006, 1039 ff.

Under the Ecloga, the punishment for an adulteress was harsher than for the adulterer. Failing to uphold the sacredness of marriage as prescribed by the Lord's teachings, she faced the forcible dissolution of her marriage[26] and the complete loss of her parental rights over her children (E. 2.9). She, however, retained her dowry (E. 17.27).[27] If a husband chose to forgive his adulterous wife, he would be considered as her pimp and would face the punishment of being beaten and exiled (E. 17.28; Pr. 39.64; cf. Sev. Ant. C. 9.9.2).[28]

The Ecloga also dealt with the procedural aspects of adultery cases. Judges were instructed to interrogate the accuser carefully, giving greater weight to accusations brought by close relatives, such as the adulteress' husband, father, brother, or uncles (cf. Const. C. 9.9.29). False charges, when proven to have been made maliciously, exposed the accusers to the same punishment as the accused (E. 17.27; Pr. 39.45). According to Humphreys (2015, 121), this practice served as a robust preventive measure, underlining the Isaurian commitment to due process and correct judgement, as well as tacitly excluding the right of a father or husband to kill his wife or her lover if they were caught *in flagrante delicto* (cf. D. 48.5.21–23; Nov. 117.15).[29]

As we have already seen in the case of fornication, the punishment is, for the first time, based primarily on the marital status of the man and not on the social position or honour of the woman (Laiou 1992, 119). A married man who had extramarital sexual conduct with an unmarried woman (who was not a prostitute) was not considered to have committed adultery (μοιχεία), but fornication (πορνεία), and he was – irrespective of his wealth – punished by twelve lashes. The uniform and equal treatment of rich and poor alike reflected a commitment to moral chastisement (σωφρονισμός) focused on correcting, moderating and instilling self-discipline.

[26] According to Rordorf (1969, 204–205), the Byzantine Church viewed adultery not only as a serious transgression but as morally equivalent to the death of the guilty party. As a result, it saw no obstacle to the remarriage of the innocent spouse following a divorce. However, an adulterer was not permitted to divorce a faithful wife.

[27] According to Justinian, the adulteress lost her dowry. The *Epanagoge* returns to Justinian's law in this respect, as do the *Procheiros Nomos* and the *Basilica* (Pr. 39.68; Epan. 40.55; Bas. 60.37.83).

[28] For more on the so-called *lenocinium mariti,* see in: Sinogowitz 1956, 90 ff.

[29] Sinogowitz (1956, 83 n. 3) argued that the Ecloga did not explicitly outlaw this provision. It may have endured as a customary practice, which could explain its inclusion in the Procheiron (Pr. 39.42).

4. INCEST

Among the earliest and most enduring taboos in Roman society were sexual relations between close blood relatives or those related by affinity. This prohibition, known as *incestus*, applied consistently to relations between descendants and ascendants, siblings, and uncles or aunts with their nieces or nephews (Mommsen 1899, 682 ff). The punishment for incest was death by being thrown from the Tarpeian Rock (Quint. Inst. 7.8.3); later, deportation, degradation and confiscation of property were used as punishments (Coll. 6.1–3; Pomp. D. 23.2.8). Constantius and Constans decreed that marriages in the direct line of descent and between brothers and sisters were forbidden and in cases where an uncle married his niece, the prescribed punishment was death (CTh. 3.12.1). In precise alignment with both post-classical and biblical tradition, the Ecloga prescribed severe penalties for incestuous relationships (αἰμομιξία), particularly those between parents and children or between siblings:

E. 17.33: *Those who commit incest, whether parents with children, children with parents, or brothers with sisters, shall be punished with the sword. Those who corrupt themselves with other kin, that is to say a father with his son's wife or a son with his father's wife* (i.e. their stepmother), *or a stepfather with his stepdaughter, or a brother with his brother's wife, or an uncle with his niece or a nephew with his aunt, shall have their noses cut off, as shall someone who knowingly has intercourse with two sisters*.

In cases of incest between other relatives (e.g. uncle and niece) and relatives by marriage (e.g. brother-in-law and sister-in-law), the prescribed penalty was rhinotomy.[30] The same fate befell the man who engaged in sexual relations with a woman and her mother if he was aware of their familial relationship. In such cases, both women were punished as the offenders, if they knowingly engaged in sexual acts with him (E. 17.34; Pr. 39.69; Epan. 40.61; Bas. 60.37.75; Harm. 6.4.1).

Theodosius I banned marriages between first cousins (CTh. 12.3–4). This prohibition was soon lifted and did not find its way into Justinian's legislation (I. 1.10.4). The Ecloga reinstated this prohibition and even extended it to include the children of cousins:

[30] Despite the existence of criminal prohibitions, incestuous relationships did occur at the Byzantine court, where the personal desires of rulers often superseded both legal and ecclesiastical codes. The most notorious example is Emperor Heraclius (610–641), whose second marriage effectively legitimized his longstanding incestuous relationship with his niece Martina. This union produced nine children, many of whom were afflicted with various physical disabilities.

E. 17.37. *From this time onwards, cousins who enter into marriage, and also their children, and a father and son with a mother and daughter, or two brothers with two sisters, shall be separated and beaten*.

The cited provision reflects a clear anti-Jewish sentiment: levirate marriage – one of the most significant Old Testament institutions, in which a man married his brother's widow – was now prohibited (see also Pr. 39.72; Epan. 40.62; Bas. 60.37.76).

New impediments to marriage and corresponding criminal sanctions were primarily based on the resolutions of the Trullan Council (c. 54), which explicitly forbade unions of a father and son with a mother and daughter, or a father and son with two sisters, or a mother and daughter with two brothers, and two brothers with two sisters.

In 530, Justinian forbade marriages between godfathers and goddaughters, which was the first instance of prohibiting marriage due to spiritual relationship.[31] According to the Ecloga, anyone who had baptised a woman was then forbidden to marry her, as she was now considered his daughter. This restriction extended to the woman's mother and daughter, and the same restrictions applied to the godfather's son:

E. 17.25. *Anyone who intends to take in marriage their godparent in holy and salvation-bringing baptism, or has carnal intercourse with them without marrying, the perpetrators shall be separated from each other and suffer the penalty for adultery, namely both shall have their noses cut off.*

E. 17.26. *If anyone should be found in such a way to have married their godparent, both shall be severely beaten besides having their noses cut off.*

These prohibitions were based on the belief that conjugal relations should not be intertwined with paternal ties (E. 17.25; Pr. 39.73; Epan. 40.66). Although the Ecloga explicitly prohibited marriage between spiritual kin, it implicitly banned any form of sexual contact between them.[32]

[31] Iust. C. 5.4.26.2: *[C]um nihil aliud sic inducere potest paternam adfectionem et iustam nuptiarum prohibitionem, quam huiusmodi nexus, per quem deo mediante animae eorum copulatae sunt* [...]

[32] On godparenthood (συντεκνιά) in Byzantium, see Lynch 1986, 230–234.

5. RAPE

In classical Roman law, coercive sexual acts, whether between individuals of the same or different genders, were governed by the law on public or private violence (*Lex Iulia de vi publica seu privata*), enacted during the reign of Augustus (D. 48.6). This law addressed all forms of violent behaviour, whether with or without the use of weaponry. Perpetrators of armed violence faced perpetual exile, while those involved in unarmed aggression risked the confiscation of one-third of their assets (I. 4.18.8). Marcianus noted that the same law punished those who committed sexual violence against women and boys (*stuprum per vim*).[33] This offence carried the ultimate penalty of death, as its severity was considered greater than that of adultery.[34] In reference to this offence, the jurist employed the term *raptus*.

From the time of Constantine, the term *raptus* denoted the abduction of a woman against the will of her parents or husband (see CTh. 9.24). The abductor (*raptor*) was punished with death; until the reign of Justinian the woman was likewise liable if she had consented. If the victim failed to cry out during the act,[35] she was presumed to have tacitly accepted the abduction and could be disinherited by her parents. This constitution represents the earliest articulation of the concept of *vis grata* (*puellae*), which required a woman to offer firm and continuous resistance to a man's sexual advances, while mere dissent was considered insufficient (Const. CTh. 9.24.1).

Equivalents of both offences, *stuprum per vim* and *raptus*, can be found in the Ecloga. Byzantine law did not consistently classify violent sexual crimes as particularly qualified sexual offences. For example, the rape of a mature woman was punished with the same consequences as adultery:

E. 17.30. *Anyone who overpowers a girl and corrupts her shall have his nose cut off*.

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[33] Marcian. D. 48.6.3.4: *Praeterea punitur huius legis poena, qui puerum vel feminam vel quemquam per vim stupraverit*.

[34] Marcian. D. 48.6.5.2: *Qui vacantem mulierem rapuit vel nuptam, ultimo supplicio punitur* [...] *cum raptus crimen legis Iuliae de adulteris potestatem excedit*. The crime of *raptus* was addressed as a distinct category in imperial constitutions (C. 9.13).

[35] CTh. 9.24.1.2: *Et si voluntatis assensio detegitur in virgine, eadem, qua raptor, severitate plectatur, cum neque his impunitas praestanda sit, quae rapiuntur invitae, cum et domi se usque ad coniunctionis diem servare potuerint et, si fores raptoris frangerentur audacia, vicinorum opem clamoribus quaerere seque omnibus tueri conatibus. Sed his poenam leviorem imponimus solamque eis parentum negari successionem praecipimus.*

According to the norm, the perpetrator of the cited offence could be anyone. The use of sexual violence by a husband, however, was not considered rape in Roman or Byzantine law. The prevailing Christian perception was that coercing an unwilling partner into sexual activity was seen to ensure the fulfilment of the marital debt (*debitum carnis, debitum coniugale*), i.e. the mutual obligation of both spouses to engage in sexual relations with each other upon demand (1 Cor. 7: 3–5).[36]

The Ecloga addressed the abduction (*raptus*) of nuns and secular virgins in a single article:

E. 17.24: *Anyone who carries off a nun or any secular virgin from whatever place, if he corrupts her, shall have his nose cut off; those who aid in this rape shall be exiled*.

For the offender to be condemned, not only abduction but also sexual intercourse had to occur. The abductor was rhinotomised, while abettors were exiled (cf. Iust. C.9.13.1 and Pr. 39.40). The subsequent consent of the abducted woman, who was not a nun, to the intercourse might have carried moral stigma yet had no legal consequences for her (Laiou 1993, 12).

Among the notable innovations of the Ecloga in the realm of sexual criminal law is its explicit concern with the sexual inviolability of young girls. For the sexual assault of a child, the prescribed penalty was rhinotomy, coupled with the confiscation of half of the perpetrator's property:

E. 17.31. *Anyone who corrupts a girl before puberty, that is before she is thirteen, shall have his nose cut off, and half of his property shall be given to the seduced girl.*[37]

This offence, with its punishment tailored to secure the social wellbeing of the victim by augmenting her dowry for prospective marriage, represented a deviation from Roman law, wherein the age of the implicated woman did not play a significant role in determining the severity of the offence.[38] Since the question of the girl's consent to intercourse does not arise in E. 17.31, Laiou (1993, 123) argues that consent is legally irrelevant, as the girl is deemed incapable of providing it. This interpretation is in line with the modern concept of 'statutory rape', where age is the primary factor, with impuberty

[36] On the marital debt in Byzantium, see Perisandi 2017, 510–528.

[37] Cf. Pr. 39.66; Epan. 40.53; Bas. 60.37.80. In the *Procheiros Nomos*, the penalty is elevated, as the man must provide the girl with one-third of his property.

[38] In Greek and Roman antiquity, sexual assault against a child was not considered a qualified criminal offence. The punishment for someone who seduced a girl who had not yet reached sexual maturity was relatively low. *Humiliores* were typically sentenced to labour in the mines, while *honestiores* faced exile. See Paul. 5.22.5; Paul. D. 48.19.38.3.

creating a conclusive presumption of force. It is plausible that this provision was not enforced in cases of marriage between mature men and girls who had not yet reached the age of fourteen, as evidenced by the extensive documentation of child marriages within the Byzantine court (Lascaratos, Poulakou-Rebelakou 2000, 1087; cf. Beck 1984, 99–102).

6. HOMOSEXUAL INTERCOURSE

By referring to 'lasciviousness' (ἀσέλγεια),[39] the Ecloga prohibited all forms of male[40] homosexual intercourse and prescribed a penalty of beheading for both the dominant (immissive, ποιων) and submissive (receptive, ὑπομένων) partners (ἀσέλγεις) (E. 17.38; see also Masterson 2022, 11–12). Acquittal might have been granted if the submissive partner was under twelve years of age:[41]

E. 17.38. *The wanton, whether they are active or submissive, shall be punished with the sword. But if the submissive partner is found to be under the age of twelve, he shall be forgiven as due to his age he did not know what he was doing*.

Later legislation (Pr. 39.73; Epan. 40.66; Harm. 6.4.3.4) repeated the rule, save for the Eclogion's provision that the submitting boy could avoid the death penalty if he was under fifteen. Under this law, he was subjected to corporal punishment and consigned to a monastery, serving as both prison and place of rehabilitation, where he was likely raised as a monk (Ecloga aucta 17.6; see also Troianos 1989, 36).

The language in the Ecloga, addressing both dominant and submissive partners, aligns with the policy of post-classical constitutions. Eva Cantarella posits that until the 4th century, republican laws on homosexual conduct were still in effect, primarily addressing homosexual anal intercourse.[42]

[39] In Byzantium, the term ἀσέλγεια corresponded to the Latin term *impudicitia*, both meaning lewdness or debauchery. In non-legal writings, male homosexuality is frequently referred to as male madness (ἀρρενομανία) (Smythe 1999, 144).

[40] References to female homosexuality are predominantly addressed in church literature, particularly in the *Kanonarion*. On this, see Troianos 1989, 46.

[41] Secular and ecclesiastical laws provided specific provisions for underage children. Boys under fourteen and girls under twelve were criminally non-liable (Ariantzi 2012, 47).

[42] Dating back to the Republican period, *Lex Sca(n)tinia* probably prohibited anal same-sex practices by free male citizens under the threat of a fine (Cic. Fam. 8; Iuv. Sat. 2, 43–44; Auson. Epigr. 91 and 92, 3). Cantarella (1992, 143) suggests that the

Like the Greeks, the Romans regarded the role of the receptive partner in sexual activity as a humiliation of masculinity, tolerated only among slaves, freedmen, male prostitutes, and women (Brundage 1987, 49). Roman hostility to anal intercourse between men was rooted in the perceived disruption of the gendered hierarchy (Smythe 1999, 14).[43] In 342, emperors Constantius and Constantius, apparently influenced by Christian teachings (Gen. 19:4–11; Lev. 18:22), prohibited all non-coital sexual practices which were considered 'unnatural' (C. 9.9.30). In 390, Theodosius I commanded that passive homosexuals who prostituted themselves in brothels should be burned alive (Coll. 5.3.1). The Theodosian Code of 438 changed the wording of the constitution by extending the prosecution to all men who engaged in the submissive sexual position (Valentin. Theodos. Arcad. CTh. 9.7.6).

Amid frequent outbreaks of plague and the earthquake of 557 that shook Constantinople and caused the collapse of the great dome of Hagia Sophia a year later, the quest for scapegoats for these calamities led Justinian to blame homosexuals for natural disasters (Žepič 2022, 50). Citing divine wrath against Sodom, Justinian ordered homosexuals to renounce 'impious and unholy practices which even men of ill understanding do not sanctify' (Nov. 141, translated by author). He instructed them to confess to the patriarch,[44] who would guide them toward appropriate treatment and impose penance; failure to comply would result in severe punishments. These measures included, as Procopius hints, the public humiliation of castrated homosexuals, who were paraded naked through the streets of Constantinople (Procop. Hist. Arc. 11.34–6).[45] Justinian's criminalisation of all forms of male homosexual intercourse, which the Ecloga adopted, was

broad criminalisation of same-sex behaviour in Justinian's codification (e.g. I. 4. 18.4; Paul. D. 47.11.1.2; PS 2.26.13) is the result of extensive post-classical interpolations that brought the classical casuistry into line with the post-Constantinian imperial constitutions.

43 Roman law adhered to a strict gender binary, classifying individuals considered androgynous or hermaphroditic according to the sex indicated by their secondary sexual characteristics. Ulp. D. 1.5.10: *Quaeritur: hermaphroditum cui comparamus? et magis puto eius sexus aestimandum, qui in eo praevalet*.

44 Justinian sought to deter homosexual behaviour within ecclesiastical communities, particularly in monasteries. He issued a mandate demanding that monks should cohabit and sleep separately within the same residence, enabling them to bear witness to each other's commitment to chaste conduct. It was also applicable to nuns. See Nov. 123.36.

45 The only individuals with recorded names subjected to punishment were prominent bishops whose unmarried status left them susceptible to accusations of engaging in homosexual acts. For political motivations underlying this persecution, see Sarris 2006, 217–18.

based on the belief that such acts were diabolically unnatural, constituting offences against conventional gender roles as well as against the divine order of creation (Cantarella 1992, 183).

It is interesting to note that the Basilica omits the above-mentioned provision on lasciviousness and a significant part of Justinian's expressly homophobic legislation. The absence of case law on homosexual offences (e.g. in Peira) has led Laiou (1992, 78) to suggest that, despite the normative zeal to prohibit homosexual acts, in practice Byzantine society tolerated them, provided they did not provoke public outrage. According to this narrative, Byzantium became one of the first 'closet society', partially grounded in the (highly controversial) institution of 'ritual kinship' (ἀδελφοποίησις, ἀδελφοποιία).[46]

As is often the case, literary works frequently offer deeper insights into the intricacies of real-life situations compared to legal sources. The latter, characterised by potential capriciousness, obsolescence, or inherent unenforceability, may be less dependable when comprehending the practical applications of the law. An exploration of the biographies of the Byzantine emperors serves as a valuable lens through which the contextual and relative nature of the legal framework becomes evident. In the mid-9th century, the biographers of Basil I described the extravagant court of his predecessor, Michael III ('the Drunkard'), where the 'imperial treasury was plundered profligately and with abandon to support these wanton revelries and acts of love forbidden by law' (Vita Basilii 21, according to Ševčenko 2011, 83, translated by author). It was a part of delight to be unrestrained and to indulge in drinking, whereby ἀσέλγεια was an essential part of this voluptuous atmosphere. Symeon the Logothete reported that the emperors Leo V in the 800s and Alexander in the 900s had taken part in licentious same-sex practices (Wahlgreen 2019, 161, 219).

[46] Adelphopoiia (ἀδελφοποιία), from ἀδελφός, meaning 'brother', and ποιέω, meaning 'I make', was a highly ritualised liturgical practice in the Orthodox Christian Church uniting two men in a church-recognised sibling-like union. Although it could have been used by people having an illicit sexual relationship to hide their affair under the guise of friendship, it was probably intended to be a non-erotic 'chaste' friendship or fraternisation. For a highly controversial institution labelled by John Boswell as 'basically a gay marriage ceremony for the Greek Church', see Boswell 1995. For the latest prominent study on this issue, see Rapp 2016.

In Church penitentials, i.e. compilations outlining behaviours of the faithful deemed offensive and warranting ecclesiastical penalties (penances),[47] discernible trends lean towards sexual liberalisation. In the fourth century, the penitentials condemned any same-sex sexual conduct. Basil of Caesarea, for instance, recommended a minimum of fifteen years of excommunication for such behaviour.[48] Theodoros the Studite later proposed a more lenient penalty of two years' excommunication. Despite these shifts, the perceived gravity of the actions did not necessarily decrease in the eyes of the Church. There was a prevailing concern that excommunicating the penitent for too long might lead them to further distance themselves from the church community (Beck 1984, 99).

7. BESTIALITY

The Greek-Roman tradition lacked explicit criminal prosecution of bestiality. This concept entered the Roman world through the Old Testament (e.g. Lev. 18:22–23) and the decrees of early ecclesiastical councils.

The Synod of Ancyra in 314 delineated comprehensive ecclesiastical penalties for bestiality offenders in can. 16. Bestialists under the age of twenty were subject to a fifteen-year period of 'prostration', a penitential posture involving making the sign of the cross, kneeling, and touching the forehead to the ground (Hefele 1907, 308). During this time, they were permitted to attend the liturgy passively, i.e. without receiving the Eucharist. After five years, they were allowed to receive communion, provided they demonstrated sustained repentance. Persistent engagement in such behaviour extended the duration of the imposed penance. For married men over the age of twenty, the period of prostration was twenty-five years, and for those over fifty, access to communion was restricted solely at the brink of death. Despite the gravity of their sin, prostrators were permitted to remain

[47] The ecclesiastical penal system evolved in tandem with the civil one. The two systems did not align perfectly, as civil offences overlapped with ecclesiastical offences, but the opposite did not apply. Numerous ecclesiastical offences, particularly those related to sexual behaviour, were not considered civil offences. On this, see Troianos 2012, 158 ff.

[48] The earliest known penitential, the Kanonarion, was composed by a disciple of Basil of Caesarea. It was crafted between the late 8th and mid-10th century, likely around the mid-9th century. In its initial section, the penitential outlines seven or eight serious carnal sins, encompassing acts such as masturbation, fornication, adultery, homosexuality, defilement of a virgin under twelve years old, bestiality, and incest. On this, see Troianos 2012, 159 ff.

inside the church building. This provision did not extend to those who incited others to sin in the same way. Can. 17, which characterized such individuals as spiritual 'lepers', attempting to spread their affliction, prescribed their exclusion from the church and required them to prostrate themselves outside its doors (Bingham 1834, 256). Johann Caspar Suicer believed that the term τοὺς χειμαζομένους, or *hiemantes*, refers to the lowest rank of penitents, who were barred from entering the church and were required to remain exposed to the elements in the outer porch (χειμών, meaning 'winter storm'), symbolising their social exclusion and spiritual desolation (Suicer 1746, 226).

There appears to have been no formal prosecution of bestiality even under late Roman law; such acts, however, might have been subsumed under the broader category of 'sexual offenses contrary to nature'. As early as Justinian's Novel 77, the death penalty was prescribed for individuals 'under the influence of the devil' who had given themselves over to 'acts of the most extreme licentiousness and behaviour contrary to nature'. Such conduct, the Emperor warned, provoked divine wrath, and asserted that entire cities with their inhabitants had been destroyed as a consequence of these impious practices.[49] While scholars interpret this constitution as primarily targeting homosexual acts, bestiality, by an *a minori ad maius* argument, would possibly have been construed as an even more egregious offense against nature, and thus subject to equivalent or potentially harsher penalties.

The most original contribution of the Ecloga to the development of sexual criminal law is its explicit incrimination of bestiality (ζωοφθορία or κτηνοβασία) in article 39 of Title 17:

E. 17.39. *Those who become irrational, that is those who commit bestiality, shall have their penis cut off* (cf. Pr. 39.74; Epan. 40.67; Bas. 60.37.85).

The perpetrator of this criminal act is presumed to be male, in accordance with the nature of the prescribed sanction, while the object of the act is designated as κτῆνος, a term that typically refers to a domesticated animal or beast of burden (e.g. a horse, ox, or sheep). Placed at the end of Title 17, this position may reflect the legislator's perception of bestiality as exceptionally rare and profoundly taboo. It was not regarded merely as a sexual offence, but as an act that degraded the offender to the level of animals and desecrated the sacred nature of humanity.

[49] Nov. Iust. 77. 1: *Igitur quoniam quidam diabolica instigatione comprehensi et gravissimis luxuriis semetipsos inseruerunt et ipsi naturae contraria agunt [...] ex huiusmodi impiis actibus et civitates cum hominibus pariter perierunt.*

The penalty for bestiality, which was castration (καυλόκοπία), indicates the focus of the legislator on only male offenders.[50] The notion of bestiality probably referred to sexual conduct involving a male sexual organ, focusing on emissive sexual practices. The absence of an explicit prohibition against a woman engaging in receptive sexual acts with an animal remains legally ambiguous (cf. Sinogowitz 1956, 106). It is conceivable that such behaviour was not officially encountered. Nevertheless, it is addressed in the Old Testament,[51] which is generally considered to have served as a guiding reference of the incrimination.

8. CONCLUSION

The examination of Byzantine sexual offences reveals that the Byzantine legislators aimed to maintain the Roman legal heritage while simultaneously adapting it to the evolving ideological and religious context. A compilation of amending laws should be approached with caution when compared to Justinian's codification norms, as some innovations may have been inadvertently incorporated, and the legislator may not have been aware of them (Sinogowitz 1956, 6; Nörr 1959, 629). At least seven provisions of the Ecloga, namely E. 17.19, 20, 25, 26, 34, 37, and 39, had no direct equivalent in Justinian's codification (Humphreys 2015, 120). These laws were influenced by Eastern customary law and the canons of the Council of Trullo. The novelties comprised sins and their respective punishments, modelled on Leviticus. Emperors Leo III and Constantine V asserted that Roman law emanated from God. Byzantine emperors, seen as heirs to the apostles and prophets, endeavoured to align the new legal framework with the old, explicitly drawing inspiration from the teachings of Moses (Humphreys 2015, 128, 178; Sinogowitz 1956, 3).

Byzantine criminal provisions were primarily directed at male offenders, as evidenced by the treatment of fornication, homosexuality, and bestiality. This suggests that unmarried women engaging in extramarital intercourse largely escaped punishment. Ancient legal sources are silent on female

[50] On using castration as a punitive measure and a gruesome method for eliminating political opponents in Byzantium, see Tugher 2008, 28.

[51] Lev. 18:23 (NASB 1995): 'Also you shall not have intercourse with any animal to be defiled with it, nor shall any woman stand before an animal to mate with it; it is a perversion.' Lev. 20:16 (NASB 1995): 'If there is a woman who approaches any animal to mate with it, you shall kill the woman and the animal; they shall surely be put to death. Their bloodguiltiness is upon them.'

homosexuality, although literary sources from the classical era indicate it was not tolerated to the same degree as male homosexuality. While bestiality was first mentioned as a crime of women in the Old Testament, the Ecloga restricted this offence to men. Collectively, these examples reveal a pattern of overlooking and marginalizing the social role of women, reinforcing a view in which men are the central actors of social life and their actions alone shape social relations.

Although not absent from Justinian's law,[52] the rise of exemplary punishments underlines the Byzantine lawgiver's objective to bring criminal justice into proportion. The replacement of the death penalty with corporal punishment reflects the desire of the 'wise and piety-loving emperors' Leo and Constantine to 'correct the law and make it more humane', as explicitly stated in the title of the Ecloga.[53]

The nature of the punishments in *Poinalios* reflects the Byzantine legislator's perception of the gravity of the crimes. The most serious offences – homosexual intercourse and incest with parents or siblings – were punished by beheading, rather than by being burned alive, as prescribed by the late Roman emperors. Bestiality followed closely. Violent sexual offences and adultery came next, while fornication was considered the least serious offence. Probably inspired by the biblical passage, 'If your right hand makes you stumble, cut it off and throw it from you; for it is better for you to lose one of the parts of your body, than for your whole body to go into hell' (Mt. 5:30, NASB 1995), the Ecloga prescribed mutilation as a 'healing' method, opting for the removal of the offending limb rather than physical elimination of the perpetrator. Mutilatory punishments were also intended as a deterrent to restrict or eliminate the perpetrator's ability to repeat their offence. The mutilation of the nose, associated with sexual offences, aspired to make the offender less attractive and publicly reveal the nature of their crime. For the individual, this visible injury represented prolonged physical and arguably psychological torment (Paradiso 2005). Its symbolic

[52] See Nov. 13.6; 7.8; 42.1.2; 128.20; 134.13; and 154.1. On this, see Troianos 2017, 124 n. 59.

[53] For insights into the concept of φιλανθρωπία in the ideology of Isaurian Emperors, see Humphreys 2015, 93 ff. On the 'charitable' nature of the mutilation penalty, see Lascarotos, Dalla-Vorgia 1997, 51–56.

significance is particularly striking: in Greek and Roman culture, the nose was culturally associated with the penis, so nasal mutilation functioned as a symbol of castration.[54]

As the *prooimion* of Ecloga announced, the law sought 'to give judgements of true Justice, neither disdaining a poor man nor letting a powerful man who has done wrong go unpunished'. The antiquated dual penalty system, based on the social class of the offender (*honestiores* and *humiliores*), was gradually relativised, and the only distinction in punishment was based on the practical ability of the offender to pay fines. This approach, while not entirely consistent (e.g. E. 17.22), sought to satisfy God's demand for equal purification and the general prevention of sexual deviance across all social strata.

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[54] For example, in Virgil's work, Menelaus, Helen's husband, takes revenge on Deiphobus, her third husband, by mutilating his nose (Aeneid 6.497). The only recorded case of rhinotomy used to punish a sexual offence comes from Martial, who said that rhinotomy was used to punish an adulterer. Mart. Epig. 2.83 and 3.85. On this, see Troianos 2005, 574 ff. The use of nose amputation as a punishment for sexual offenses may have originated not just from Oriental civilisations but also from classical Rome. On the punishment of nose mutilation in Oriental law, see Jelitto 1913, 50 ff.

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THE LEGAL FRAMEWORK FOR ARBITRATION IN SAUDI PUBLIC–PRIVATE PARTNERSHIP AND PRIVATIZATION CONTRACTS

The increasing complexity of service delivery and infrastructure development is making it difficult for governments to meet these growing demands independently. In Saudi Arabia, public–private partnerships (PPPs) have emerged as a vital mechanism to address this gap. This study explores the legal aspects of arbitration in PPP and privatization contracts, examining the inclusion of arbitration clauses under the Saudi Private Sector Participation Law and associated regulations. The study delves into the necessary legal conditions for valid arbitration agreements, the implementation procedures, and the consequences of noncompliance, addressing the role of arbitration as a preferred method for dispute resolution. It offers a comparative analysis of international norms and legal frameworks, assessing the unique constraints on arbitration in Saudi privatization contracts. Addressing the scarcity of literature on this topic in Saudi Arabia, this study provides critical insights and recommendations to strengthen the legal framework for arbitration in PPP and privatization contracts.

Key words: *Arbitration*. – *Privatization*. – *Public–private partnership*. – Contracts. – Alternative dispute resolution.

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1. INTRODUCTION

The growing complexity of modern service delivery and infrastructure development, compounded by rapid technological advancements and increasing demand, has made it challenging for governments to meet these needs independently. In Saudi Arabia, this has necessitated collaboration with the private sector, leading to the use of public–private partnerships (PPPs) to efficiently deliver services and infrastructure. This study focuses on the legal aspects of PPP contracts, specifically examining the inclusion of arbitration clauses in privatization contracts and whether they involve asset transfers or PPPs. It explores the legal conditions necessary for valid arbitration agreements, the procedures required for their implementation, and the legal consequences of noncompliance, based on the recently issued Private Sector Participation Law (PSP Law) and related regulations in Saudi Arabia.

The significance of this study is closely tied to Saudi Vision 2030, which aims to diversify the economy and reduce dependence on oil revenues. A key element of this vision is the privatization program, which seeks to transfer state-owned assets to the private sector and privatize certain government services. One of the program's main goals is to generate approximately USD 16.5 billion through PPPs by 2025. Given the complexity of these contracts and the risk of potential disputes that may arise, arbitration has been identified as an efficient mechanism for dispute resolution, offering a faster alternative to traditional litigation. Arbitration offers efficiency, flexibility, and faster resolution compared to administrative litigation, and could be seen as beneficial for investors by reducing the time and costs associated with legal disputes (Cîmpean, Vornicu, Dragoș 2021, 24–46). Investors typically prefer arbitration for its predictability and confidentiality, which are critical in safeguarding their interests (Cîmpean, Vornicu, Dragoș 2021, 24–46). The Saudi PSP Law addresses this by allowing arbitration in PPP and divestment contracts, provided that certain conditions are met.

The core issue addressed in this study is the scarcity of scientific literature and practical examples related to Saudi Arabia regarding arbitration in privatization contracts, including PPPs. The study aims to fill this gap by contributing a resource on arbitration in PPP and divestment, which is a critical subject since privatization and PPPs attract both domestic and international investment. Investors typically prefer resolving disputes through alternative dispute resolution methods, with arbitration being one of the most prominent. The Saudi PSP Law permits arbitration in these contracts under specific conditions. However, the authority to approve

arbitration agreements varies depending on the type of private sector participation, i.e., whether it involves asset transfer or a PPP. Furthermore, arbitration is not universally applicable; it is restricted in certain cases, necessitating a careful legal analysis of the relevant laws and procedures. Therefore, this study adopts a descriptive-analytical approach to reviewing and analyzing legal texts, regulations, judicial rulings, and scholarly opinions. A comparative normative approach will also be adopted where necessary, drawing on international law and reports from institutions such as the World Bank to propose practical solutions and recommendations that align with the Saudi context. The research is divided into three main parts, each covering a key aspect of arbitration and privatization under the Saudi legal framework. The first part examines the concepts of arbitration and privatization in Saudi law and it is divided into two sections: the first provides a definition of arbitration within the Saudi legal system, while the other focuses on the definition and scope of privatization in Saudi Arabia. The second part explores the procedural steps for incorporating arbitration clauses into privatization contracts and includes three sections: the first section discusses arbitration in asset transfer contracts or PPP contracts involving asset transfers; the second section covers arbitration in general public–private partnership contracts; and the third section outlines the circumstances where arbitration is not permitted in privatization contracts. The third part focuses on the conditions required for arbitration in privatization contracts and is divided into three sections: the first section addresses the requirements regarding the location of arbitration; the second section discusses the applicable governing law; and the third section examines the selection of the arbitration center.

The findings are presented in the conclusion, summarizing the key legal insights gained from the analysis of arbitration in PSP contracts under Saudi law. Based on these findings, recommendations are provided with the aim of enhancing the legal framework and procedural application of arbitration in PPP and divestment contracts, ensuring a more efficient and streamlined dispute resolution process, aligned with Saudi Arabia's evolving economic and legal landscape. These recommendations will also aim to address the challenges identified in the course of the study, offering practical solutions for improving the integration of arbitration in future privatization initiatives.

2. THE CONCEPT OF ARBITRATION AND PRIVATIZATION IN THE SAUDI LEGAL SYSTEM

Legal terminology often differs from one legal system to another. Even within the same legal system, certain terms may have varying definitions depending on the specific internal legal framework. Therefore, the initial articles of many laws typically provide definitions for the terms used in that particular law. In some cases, these definitions are limited to the scope of the law's application, ensuring that their effects do not extend beyond the law's intended purpose. The challenge in this part lies in the absence of a specific definition for arbitration in the Saudi legal system. Furthermore, the definition of privatization provided in the relevant Saudi law differs from those found in comparative laws and reports by international organizations, such as the World Bank. To address these challenges, this part is divided into two sections.

2.1. Definition of Arbitration in the Saudi Legal System

The Saudi Arbitration Law does not explicitly define the term "arbitration"; instead, Article 1 provides definitions for three key terms: arbitration agreement, arbitral tribunal, and competent court. This could suggest that the concept of arbitration is already well-understood and does not require a formal definition within the law. Rather than providing a detailed definition, the legislator outlines the entire arbitration process from start to finish, which effectively fulfills the purpose of defining arbitration. A similar approach is observed in the Saudi Judiciary Law, where there is no specific definition for the term "judiciary" as the articles comprehensively describe its nature and function. Moreover, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules also do not provide a specific definition of arbitration.

David Christie (2016) argues that the lack of a formal definition of arbitration in Scots law, while contributing to ambiguity in distinguishing arbitration from other dispute resolution mechanisms, does not impede its practical effectiveness within the legal system. As previously mentioned, such terms may not require explicit definitions if they are commonly understood, especially when the rules describe the entire arbitration process, thereby achieving the purpose of defining arbitration through its procedural framework.

Based on this, the definition of arbitration can be inferred from the regulatory texts governing it. While various definitions of arbitration exist, they generally agree on the core concept. One such definition describes arbitration as "a legal system through which a legal dispute between two or more parties is resolved by a third party or parties, whose authority derives from the agreement of the disputing parties" (Wali 2006, translated by author). Although the phrasing of the definitions may vary, the substance remains consistent: arbitration is a legal mechanism for resolving disputes in a swift and amicable manner (Al-Anani 2019).

However, the latter definition is not entirely accurate in its description of arbitration as an "amicable" resolution mechanism. Arbitration is not a friendly method of dispute resolution but rather a judicial means for decisively resolving disputes. The difference between arbitration and amicable settlement lies in the nature of the decision-making process: arbitration is based on facts, evidence, and legal arguments, rather than the parties' willingness to compromise, as is the case in amicable settlements. In an amicable settlement, the parties negotiate and make concessions to reach a mutually agreeable resolution. In contrast, arbitration is more akin to a judicial process where the parties present their claims and defenses, and the arbitrator issues a binding award based on the merits of the case. This distinction is further supported by a ruling from the Saudi administrative judiciary Board of Grievances, which stated, "Since the defendant has raised a plea of lack of jurisdiction due to the presence of an arbitration clause, the court, upon reviewing the matter, found that the contract between the parties included an agreement to resolve any disputes between them amicably, and there is no reference to an arbitration clause in its proper legal form. Therefore, the defendant's plea is rejected" (Case No. 1276/1/Q, 1415 AH, translated by author).

A more comprehensive definition of arbitration is that it is "the mutual consent of the disputing parties to submit their dispute to an arbitral tribunal composed of third parties, who issue a final award, resolving the conflict in place of the judiciary" (Al-Sharqawi and Al Sharif 2021, translated by author). Furthermore, the courts addressed the concept of arbitration in one of its rulings, defining it as "a contract formed through offer and acceptance, whereby the parties agree to refer their dispute to arbitrators instead of the competent court. This agreement may take the form of a clause in a contract, known as an arbitration clause, which mandates arbitration for disputes related to that contract, as is the case in this matter" (Case No. 935/2/Q, 1410 AH, translated by author).

2.2. Definition of Privatization in the Saudi Legal System

In contrast to the Arbitration Law, the Saudi PSP Law provides a clear definition of the term "privatization": Article 1 of the PSP Law states (in the Arabic version) that privatization refers to either public–private partnerships or the transfer of asset ownership. This definition somewhat differs from what is outlined in World Bank publications. According to the World Bank, privatization specifically refers to the transfer of state-owned assets and the responsibility of delivering public services to the private sector. The key distinction lies in the fact that, under the Arabic version of Saudi law, public–private partnerships are considered a form of privatization, whereas the World Bank defines privatization solely as the transfer of assets, which excluded PPPs from this category since the public sector maintains an ongoing relationship with the private sector in PPP agreements (Farquharson, Yescombe 2011).

The distinction between public–private partnerships and privatization lies in the redistribution of property rights and sovereign power functions. While privatization generally involves the full transfer of ownership and control from public to private entities, PPPs feature a cooperative relationship where the state retains some level of control or oversight. This affects the design, governance, and implementation of infrastructure and public service projects, with varying degrees of private sector involvement in each model (Deryabina 2008).

It is evident that the Saudi legislator has adopted a broader definition of privatization, encompassing all contractual relationships with the private sector, regardless of whether they involve asset transfers or PPPs. This approach ensures that these various forms of contracts fall under a unified regulatory framework. A closer examination of the law reveals that the legislator distinguishes between these two models – asset transfer and PPPs – by establishing different procedures, formalities, and authorities for each. In addition, the English version of Saudi privatization law, called the law as Private Sector Participation (PSP) Law, defines PSP as PPP or divestment (Art. 1). This definition and name of the law aligns with the definitions in the comparative laws and of international organizations such as the World Bank.

In conclusion, in Saudi Arabia PSP includes both asset transfers and public–private partnerships. The legislator defines asset transfer as a contractual arrangement related to infrastructure or public services, resulting in the transfer of ownership of assets from a government entity to the private sector. On the other hand, public–private partnerships are defined by the legislator as a contractual arrangement related to infrastructure or public services, creating a relationship between the government and a private

entity. The elements of a PPP are: 1) the duration of the agreement must be five years or more; 2) the private party must perform at least two or more tasks, such as designing, constructing, managing, operating, maintaining, or financing the assets, regardless of whether the assets are owned by the government, the private party, or both; 3) there must be a qualitative and quantitative distribution of risks between the government and the private party; 4) the financial compensation owed to or by the private party must primarily be based on its performance in fulfilling the contractual obligations assigned to it.

3. PROCEDURE FOR INCLUDING ARBITRATION IN PSP CONTRACTS

The agreement to resort to arbitration instead of litigation entails certain concessions in exchange for certain advantages. For instance, parties waive the right to appeal the arbitrators' decisions in exchange for rulings that are quick, confidential, and cost-effective in terms of litigation expenses and attorney fees. Therefore, agreeing to arbitration is a right guaranteed to individuals in disputes where reconciliation is permissible. Arbitration is recognized as an effective method for resolving conflicts in PPPs. One study (Osei-Kyei *et al.* 2019, 185–195) comparing Ghana and China shows that arbitration is considered one of the most suitable mechanisms for resolving disputes in PPPs, particularly in Ghana, where governance and contract arrangement issues frequently cause conflicts. However, when it comes to public legal entities, these entities are bound by the powers and delegations granted to them.

Article 10 of the Saudi Arbitration Law stipulates that arbitration agreements are valid only when made by those who have the authority to dispose of the rights, regardless of whether they are natural persons – or their representatives – or legal entities. It also stipulates that government entities may not agree to arbitration unless they obtain the approval of the Prime Minister, unless a special legal provision permits it (Art. 10, para. 2 Saudi Arbitration Law) The term "legal provision" refers to what is issued by the legislative authority. Article 67 of the Basic Law of Governance states that the legislative authority is responsible for enacting laws and regulations to serve the public interest or to prevent harm in matters concerning the state, in accordance with Islamic law. It exercises its functions in accordance with the Basic Law of Governance and the regulations of the Council of Ministers and the Shura Council (Art. 90 Basic Law); moreover, Article 70 specifies that laws are issued and amended by royal decree. Therefore, the general

rule is that government entities are prohibited from agreeing to arbitration without the approval of the Prime Minister or unless a specific law permits it and overrides the general rule. This provision applies the legal principle that the special overrides the general.

A review of the Council of Ministers' decision to approve the PSP Law shows that its second clause contains an explicit approval from the Prime Minister to allow arbitration for disputes arising from PSPs contract or any related contracts, regardless of whether inside or outside Saudi Arabia, according to rules issued by the Board of Directors of the National Center for Privatization. These rules must include the determination of the applicable law, regardless of whether arbitration takes place inside or outside Saudi Arabia. Furthermore, Article 34 of the PSP Law affirms the permissibility of including an arbitration clause in PSP contracts or entering into an arbitration agreement to resolve an existing dispute arising from the contract or any related contracts (Art. 34 PSP Law). Such a clause or agreement must specify the applicable law for the subject matter of the dispute. The essential formalities of resorting to arbitration in PSP contracts will be discussed in the following sections.

3.1. Inclusion of Arbitration Clauses in Asset Transfer Contracts or PPP Contracts Involving Asset Transfers

Firstly, the legal framework defines the transfer of asset ownership as a contractual arrangement related to infrastructure or public services, resulting in the transfer of any asset ownership from a government entity to a private party. The legal framework provides definitions of the key terms in this context. First, assets are defined as any asset, whether permanent or temporary, fixed or movable, tangible or intangible, including rights. Second, infrastructure is defined as public utilities or assets that provide public services, either directly or indirectly. This leads to the third term, public service, which, according to the Saudi regulator, refers to any service provided by a government entity, either directly or indirectly, whether essential for supplying goods or services to the public, or nonessential for supporting governmental activities and tasks.

Regarding arbitration in this type of privatization, the law stipulates that it is permissible to agree to arbitration in privatization contracts in general. However, there is no explicit provision allowing the competent authority to grant approval for arbitration in asset transfer projects or public–private partnership projects that involve asset transfers. Nevertheless, the privatization legal framework designates the Council of Ministers as

the competent authority for granting approvals concerning bidding and contracts for such projects. In accordance with the legal principle that the authority over the whole includes authority over the parts, the Council of Ministers holds the authority to approve arbitration clauses and agreements in these contracts. Furthermore, the Prime Minister's decision to approve the PSP Law explicitly states in its second clause that arbitration is permissible in privatization contracts, as previously mentioned, and that a privatization contract may involve the transfer of asset ownership or a public–private partnership, or both. However, this permission is not absolute, as arbitration cannot be chosen as a dispute resolution method for asset transfer projects where the asset value is less than SAR 100 million.

The process of requesting the inclusion of arbitration in contracts related to asset transfer projects involves procedural and formal steps that must be undertaken by the relevant entities. Initially, the relevant body prepares the necessary studies to clarify the justifications for seeking approval to include an arbitration clause for resolving disputes arising from the asset transfer contract or its related contracts, or for concluding an arbitration agreement for an existing dispute arising from the contract. Additionally, the justifications for choosing the arbitration location, applicable law, and the selected arbitration center must be provided. It is important to include a list of the positive outcomes that would result from granting approval, as well as the negative consequences of not granting approval, in the submission to the supervisory committee, which then decides whether to forward the request to the Council of Ministers.

The relevant entity overseeing the asset transfer project must also draft the arbitration clause to be included in the contract or draft the arbitration agreement and submit it to the supervisory committee, chaired by the relevant minister or their equivalent. In addition, the contract management and monitoring plan must include a preliminary mechanism for handling any disputes involving the government, and this mechanism must include the standards, procedures, and governance for selecting arbitrators and appointing lawyers. If the referral to arbitration occurs after the dispute arises, the relevant entity must update the contract management and monitoring plan to include the governance of dispute management, the mechanism for working with government lawyers representing the state in the dispute, the mechanism for monitoring the progress of the case, and the reporting process to the project's lead official and the supervisory committee. After that, the entity responsible for the project will select the arbitrators, appoint the lawyers, supervise them, and provide support related to evidence and documentation, as well as cover the expenses and costs associated with the dispute.

The regulator made a wise decision of requiring governance procedures for resorting to arbitration, as there must be an initial mechanism for handling any dispute. It would have been preferable to include a requirement for dispute resolution procedures through amicable efforts. One study suggests that going through steps before resorting to arbitration is very significant to avoid conflict escalation (Marques 2018). To prevent conflicts, effective governance and contract management should be prioritized, especially relationship management. This entails clear communication, understanding objectives, defining roles, and promoting senior management involvement. Despite good relationships, disputes may still arise due to operational issues, requiring pragmatic procedures. If conflicts surface, involving senior representatives early is crucial. The contract can provide for an expert committee or independent expert to resolve disputes, though decisions may not always be binding (Marques 2018). Mediation, as a neutral, nonbinding process, can also be employed to facilitate negotiations. An alternative is conciliation, where a more active role is taken in proposing solutions for resolving differences.

After all these methods have been exhausted, arbitration can be pursued, which should also occur within a well-governed framework. This ensures that all prior avenues for resolution have been explored, and that arbitration is conducted under structured governance protocols.

3.2. Inclusion of Arbitration in Public–Private Partnership Contracts

As previously mentioned, arbitration can only be authorized by those who have the legal authority to dispose of their rights. The rules governing privatization specify the competent authority for approving arbitration clauses and agreements in public–private partnership contracts. Article 5 of the Private Sector Participation Governing Rules stipulates that the Board of Directors of the National Center for Privatization (NCP) holds the authority to approve the inclusion of an arbitration clause in the contract to resolve disputes arising from it, or to approve the conclusion of an arbitration agreement to resolve an existing dispute arising from the contract. This also includes specifying a foreign law applicable to the subject of the dispute within the arbitration agreement or clause (Art. 5 para. 1(c)). It is important to note that this authority granted to the Board of Directors is exclusive and non-delegable (Art. 10 para. 2).

Before granting approval, the Board must ensure that the executing entity is compliant with the arbitration rules within the privatization framework and meets the regulatory requirements stipulated in the rules. It is important to note that the Board's approval has no legal effect and is considered null if the arbitration clause or agreement does not specify the arbitration venue, applicable law, and the designated arbitration center. A request for approval to include an arbitration clause or agreement may be separate from the request for approval of the PPP project. In such cases, the Board of Directors must issue its decision on this request within no more than twenty-five working days from the date of receipt.

An exception to the above process is that no explicit decision from the Board is required, and tacit approval is granted without formal expression if all of the following conditions are met:

a) The request pertains to a PPP project valued at less than SAR 500 million.

b) The request pertains to a PPP project that has been tendered through a public competition within the regulatory framework of privatization.

c) Arbitration is to take place within Saudi Arabia, and the applicable law for the dispute is Saudi law.

d) A decision has been issued by the supervisory committee, with unanimous agreement among its core members, confirming compliance with all the requirements and regulations stipulated in the rules for approval of the arbitration agreement. The committee must also approve the conclusion of the arbitration agreement, and the Board of Directors must be notified of the supervisory committee's decision.

3.3. Prohibitions on Including Arbitration in PSP Contracts

The default rule for resolving disputes arising from contracts in which a government entity is a party falls within the jurisdiction of the administrative courts under the Board of Grievances (Saudi Law of the Board of Grievances 2007, Art. 13(D)). Similarly, the Arbitration Law specifies that government entities may not resort to arbitration without obtaining the approval of the Prime Minister or unless a special legal provision allows it. Both of these conditions are met under PSP Law, which permits government entities to include an arbitration clause or agreement to resolve disputes arising from PSP contracts and their related contracts. However, this is not an unrestricted

allowance, as some PSP projects are prohibited from selecting arbitration as a method for dispute resolution. Comparatively, in Brazil, arbitration in PPP contracts was historically restricted, especially in cases involving public administration, but legislative reforms have since permitted arbitration under specific conditions, particularly for PPPs and concession contracts (Wald, Kalicki 2009, 26). These reforms ensure that public interests are protected while allowing state entities to engage in arbitration.

In Saudi Arabia, the restriction is on matters that related to national security, depending on the project budget and other legal matters. Therefore, article 17 of the Arbitration Rules for PSP Contracts outlines the cases where arbitration is not allowed as a dispute resolution method (Arbitration Rules for Privatization Contracts 2023, Art. 17). These cases include:

a) Privatization projects tendered through limited competition or direct contracting.

b) Privatization projects related to national security.

c) Privatization projects for which a similar contract has already been executed – including any related contracts – and judicial jurisdiction has been granted to the competent courts in Saudi Arabia.

d) Asset transfer projects where the asset's value is less than SAR 100 million.

e) Public–private partnership projects where the total monetary obligations of the government to the private party over the entire contract period are less than SAR 100 million.

By reviewing the legal texts related to the privatization regulatory framework in Saudi Arabia, it becomes evident that allowing arbitration in privatization contracts aligns with the preference of the private party, which is often accustomed to arbitration in resolving disputes arising from investment and commercial contracts, and due to the foreign private party's unfamiliarity with local laws and official judicial procedures. Nevertheless, government efforts continue to encourage the private sector to commit to the official judicial jurisdiction, represented by the administrative courts. For instance, preference is given to bidders who do not require arbitration and agree to refer disputes to the competent official courts within Saudi Arabia. Article 18 of the Arbitration Rules for Privatization stipulates that, if the competent authority approves the arbitration clause, the relevant body must do the following: a) Include in the privatization project tender documents additional points for bidders who agree to the judicial jurisdiction of the competent courts in Saudi Arabia for resolving disputes

arising from the privatization contract or any related contracts; b) Include in the arbitration clause or agreement a mandatory prerequisite concerning the implementation of amicable resolution procedures before referring the dispute to arbitration (Arbitration Rules for Privatization Contracts 2023, Art. 18).

4. CONDITIONS FOR ARBITRATION IN PSP CONTRACTS

As is well known, the nature of contracts in which the government is a party differs from other types of contracts. The government may use its public authorities and often holds a relatively stronger position in controlling and managing the course of the contract. Additionally, the government is divided into ministries and agencies, each pursuing different objectives but all deriving from a unified budget. Therefore, it is essential to have a general regulatory framework that all these entities adhere to and do not deviate from. Based on this, the Council of Ministers authorized the National Center for Privatization to establish the rules governing the arbitration process in PPP or divestment contracts and set the necessary conditions for this. The following sections will outline and analyze the conditions that must be observed regarding the place of arbitration, the applicable law, and the arbitration center chosen to resolve the dispute.

4.1. Conditions Relating to the Place of Arbitration

The arbitration rules for privatization contracts stipulate that, as a general principle, arbitration should be conducted domestically. The rules emphasize that arbitration must take place within Saudi Arabia in the following cases:

1. Privatization projects where the best bidder holds Saudi nationality, or where the leader of the consortium with the best bid holds Saudi nationality, or where the majority of consortium members hold Saudi nationality.
2. Privatization projects for which a previous contract – including any related contracts – was made for a similar project and arbitration was conducted domestically.
3. Asset transfer projects where the value of the asset is less than SAR 200 million.

4. Public–private partnership projects where the total cash payments committed by the government to the private party over the full contract duration are less than SAR 200 million.

Since the state is a party to PSP contracts and has established administrative courts to resolve disputes in which it is a party, it waives this right and submits to arbitration, given the nature of PSP contracts and their significant impact on spending efficiency and the transfer of the burden of providing public services to the private sector to alleviate the state's burdens. However, even when resorting to arbitration, the state has implemented governance and conditions to prevent its excessive use in government contracts. An example of this is that when a government entity requests the inclusion of arbitration in PSP contracts, certain restrictions apply, such as the preference for domestic arbitration. Therefore, the relevant agency should work to include provisions in the privatization project documents that grant additional points to the competitor who agrees to arbitration in Saudi Arabia.

4.2. Conditions Relating to Applicable Law

The principle that what cannot be fully achieved should not be fully abandoned was applied in the arbitration rules in privatization. The rules state that the laws in force in Saudi Arabia should be designated as the applicable laws governing the dispute. However, the competent authority may grant approval for the application of a foreign legal system if it is deemed appropriate and justified. As clearly outlined in the rules, the default is the application of Saudi law. This essentially represents only a shift in the forum for resolving disputes, as there is no doubt that the Saudi judiciary would adjudicate the matter in accordance with Saudi law. As such, there is minimal risk of inconsistent rulings between arbitration and official judiciary proceedings. The primary advantage of arbitration is the acceleration of dispute resolution and the reduction of legal expenses. Moreover, Saudi law is mandatory and cannot be replaced by a foreign legal system in specific cases, as specified by the arbitration rules for privatization, including in the following cases:

1. PSP projects where the best bidder holds Saudi nationality, or where the leader of the consortium with the best bid holds Saudi nationality, or where the majority of consortium members hold Saudi nationality.

2. PSP projects for which a previous contract – including any related contracts – was made based on a similar project, and the applicable laws were designated as those in force in Saudi Arabia.

To prevent the potential exploitation of arbitration in favor of the contractor, at the expense of the government, the foreign legal system designated for application cannot be that of the country where the best bidder, consortium leader, or the majority of consortium members hold citizenship. This provision is intended to ensure balance in the contract: if the state waives the application of its laws in the contract dispute, the alternative applicable law should not be that of the other party's country. In any case, the preference is for the applicable law to be domestic, and the relevant authority should work towards ensuring this. The rules also stipulate that the authority responsible for privatization should include additional points in the tender documents for the project for any bidder who agrees to designate Saudi laws as the applicable law in the event of a dispute in the privatization contract.

4.3. Conditions Relating to the Selection of Arbitration Center

Article 26 of the Arbitration Rules for Privatization stipulates that if arbitration is conducted in Saudi Arabia, the Saudi Center for Commercial Arbitration (SCCA) will be designated as the arbitration entity. As an exception, the competent authority may grant approval for another arbitration entity or center, as deemed appropriate, based on valid justifications, provided that the chosen arbitration center is approved by the Permanent Committee for Saudi Arbitration Centers.

However, foreign investors feel more secure when they can access international arbitration centers, as this offers them a sense of greater protection compared to being limited to domestic dispute resolution mechanisms (Kidane 2017). This has been advantageous for the business environment of the country, providing a more favorable setting for foreign investors (Kidane 2017).

Therefore, a foreign arbitration center may be selected if it is agreed that the arbitration will be held outside Saudi Arabia, without prejudice to cases where arbitration must not take place outside Saudi Arabia. The selected foreign arbitration center must meet the following conditions: a) it must be licensed in the country where its headquarters are located; b) its headquarters must not be in the country where the best bidder holds citizenship, nor in the country where the leader of the consortium with the

best bid or the majority of consortium members hold citizenship; c) it must have been established and operating continuously for no less than 15 years; d) the arbitration rules applied at the center must comply with the provisions of the Arbitration Law in force in Saudi Arabia or be in accordance with the UNCITRAL Arbitration Rules issued by the United Nations Commission on International Trade Law; and e) the official language of arbitration at the center must be either Arabic or English.

5. CONCLUSION

This study examined the concepts of privatization and arbitration in the Saudi legal system, exploring the role of arbitration as an alternative dispute resolution mechanism in PSP contracts. These contracts fall into three main types: asset transfer contracts, public–private partnership contracts, and contracts that combine both asset transfer and partnership. The study analyzed the relevant legal texts and preemptive procedures for including arbitration clauses in these contracts, highlighting the aspects of arbitration agreements that concern the regulator, such as the location of arbitration, the nationality of the arbitration center, and the applicable law. The study has reached several findings and recommendations, which are summarized in the following sections.

5.1. Findings

1. The definition of privatization in the Saudi legal system includes public–private partnership contracts, contrary to the practices in World Bank reports, which differentiate between privatization and PPPs. As clarified in this study, the Saudi regulator's definition of privatization aims to provide a unified regulatory framework for both asset transfers and PPPs. This is reflected in the system's clear distinctions between the procedures and authorities for transferring state assets and partnering with the private sector. The law is called the Private Sector Participation Law in the translated version in English.
2. This distinction between transferring state assets and partnering with the private sector extends to the inclusion of arbitration, where the regulator has defined different procedures and authorities concerning the authority approving arbitration clauses in different types of private sector participation contracts. In some cases, the authority lies with the

Council of Ministers, while in others, it is with the Board of Directors of the National Center for Privatization, depending on whether the contract involves asset transfer or a partnership.

3. Historically, there has been resistance to arbitration in government contracts. This is evident from the emphasis on persuading and encouraging private parties not to resort to arbitration by granting preferential points to bidders who do not require arbitration and instead agree to resolve disputes through official courts.
4. In cases where the Arbitration Rules for Privatization do not explicitly cover a particular matter, the provisions of the arbitration agreement in PSP contracts that do not conflict with Saudi Arbitration Law and its implementing regulations will apply. If no specific provisions are included in the arbitration agreement, the Saudi Arbitration Law and its regulations will apply.
5. There is a lack of judicial precedents under the new PSP Law regarding arbitration in PSP contracts, due to the relative novelty of such contracts and the historically stringent regulatory environment, which has limited the use of arbitration to narrow circumstances. Moreover, there is a scarcity of research and studies in this area, which would undoubtedly contribute to raising legal awareness of privatization processes.

5.2. Recommendations

1. Establishment of a permanent committee of legal advisors and relevant field experts within the National Center for Privatization (which is the subject-matter authority for PSP in Saudi Arabia) to supervise and monitor arbitration agreements included in PSP contracts or arbitration agreements that arise after disputes occur. This would ensure their compliance with the regulatory framework for privatization, as violations of the stipulated conditions or exceeding the authorized powers could lead to the nullification of arbitration agreements, thus hindering projects necessary for the continuity of the privatization process and achieving its intended goals.
2. Organizing workshops and training seminars for entities involved in privatization projects, to clarify critical issues and resolve complications related to arbitration agreements in PSP contracts.

3. Collaboration with the Permanent Committee for Arbitration Centers in Saudi Arabia, to explore the possibility of establishing a specialized arbitration center for privatization. This center would attract international experts and arbitrators with experience in arbitrating privatization and public–private partnership contracts.
4. Preparation of annual reports on the impact of the issuance of Arbitration Rules for Privatization and attaching them to reports on the implementation of the PSP Law. According to Clause Three of the Council of Ministers' Decision No. 436, dated 3/8/1442H, the National Center for Privatization must submit an assessment of the law's implementation and any related proposals after two years from the date of the law's entry into force.
5. Avoidance of rigidity in the legal provisions related to arbitration agreement conditions. Arbitration is based on the mutual consent of the parties and should not be imposed or coerced. However, the nature of privatization and PPP contracts somewhat necessitates this due to the public authority being one of the parties. Nonetheless, certain conditions, such as the official language of the foreign arbitration center, may not always be English or Arabic. For instance, Saudi Arabia signs agreements and contracts with companies from countries where neither of these languages is predominant, such as China and France. Therefore, the recommendation is to allow limited flexibility for exceptional cases and future developments, to ensure and maintain the legal rule's stability in transactions.

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NONHUMAN ANIMAL ETHICS: OUTLINING A DUTY OF CARE FOR THE DEPENDENT

The authors examine the ethical foundations of humanity's responsibilities toward nonhuman animals, emphasizing the intuition that special duties arise toward beings unable to protect or provide for themselves. Contemporary variants of traditional theories, such as utilitarianism and deontology, have made notable progress in extending moral concern to animals by recognizing their sentience, interests, and inherent worth. The authors argue that such theories still fall short of fully capturing the relational and context-sensitive obligations humans feel toward vulnerable beings: utilitarianism reduces moral claims to aggregate calculations that risk justifying exploitation, while deontological and rights-based approaches often frame duties in abstract or hierarchical terms. The authors contend that care ethics provides a stronger foundation, by foregrounding dependence and empathetic responsibility. By integrating rational reflection with moral emotions and imagination, care ethics better aligns with human moral sentiments and offers a framework of guardianship that extends duties of care beyond merely proximate relationships.

Key words: *Animal ethics. – Animal rights. – Utilitarianism. – Deontology. – Care ethics.*

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1. INTRODUCTION: OUR SHARED SENTIMENTS TOWARD NONHUMAN ANIMALS

Humanity's moral relationship with nonhuman animals has become an important topic in contemporary ethics. We share the world with countless sentient creatures, yet our treatment of them often stands in stark contrast with how we believe fellow humans ought to be treated. We routinely exploit animals for food, labor, research, and entertainment, causing immense suffering and depriving them of natural lives. The ambiguity of our attitudes and actions is detected in the empirical research on our relationship toward nonhuman animals. Europeans overwhelmingly endorse stricter animal-welfare rules, yet continue to consume products from intensive farming.[1] Americans remain divided on animal experimentation, while meat consumption remains steady,[2] even though nearly all profess strong affection for their companion animals.[3] Psychological scales confirm this inconsistency. We calibrate our concern depending on whether an animal is perceived as a friend, food, or tool.[4] These findings reveal that our moral sentiments are fragmented, situational, and often self-serving – providing a sociological backdrop to the philosophical question whether prevailing ethical theories can truly capture our responsibilities toward those who are able to fend for themselves. On the one hand, survey data reveals that pets are regarded as family members, with emotional bonds rivaling those

[1] The 2023 Eurobarometer on animal welfare reported that 84% of Europeans believe farmed animals deserve better protection (European Commission, 2023), yet consumer demand for low-cost animal products produced in industrial systems remains strong.

[2] Gallup's long-term polling in the United States (2003–2015) shows that around one-third of Americans affirm that animals should have *the same rights as humans* (Riffkin 2015). Pew Research Center (Strauss 2018) found Americans almost evenly split, with 52% opposing and 47% supporting the use of animals in scientific studies.

[3] A more recent Pew Research Center study (Brown 2023) found that 97% of American pet owners consider their pets part of their family, with 51% reporting that they view their pets "*as much a part of their family as a human member*" (emphasis in original).

[4] People often downplay the intelligence or sentience of animals they eat, rating livestock as less sentient than pets or charismatic wild animals, which is called the meat paradox phenomenon (Piazza *et al.* 2015; Bastian *et al.* 2012). Instruments such as the Animal Attitude Scale (Herzog, Grayson, McCord 2015) and the Animal Purpose Questionnaire (Higgs, Bipin, Cassaday 2020) further confirm that people calibrate their concern according to an animal's perceived "purpose" – for example, treating pigs as food but dogs as family.

of toward humans. On the other hand, people tolerate or directly support practices that cause immense suffering to farm and laboratory animals, often justifying this by denying their sentience or by redefining their purpose.

The prevailing normative frameworks in Western ethics – utilitarianism and deontology – have each sought to define duties toward other beings. Traditionally, theoretical developments have centered around three stances. *Indirect stances*, classically attributed to Aristotle and Thomas Aquinas, argue that animals do not have value in themselves and that duties toward them are derivatives of duties toward human beings. *Direct-but-unequal stances* claim that animals have moral standing, given the fact that they are sentient. Still, in case of conflict with human interests, these interests prevail because of distinctive human traits. *Moral equality stances* have been clear that the criterion for moral duties toward animals is the capacity to suffer and enjoy life, with a strong tendency to equate the interests of humans and nonhuman animals (Wilson 2002, 15; Allegri 2018).[5]

Still, in recent ethical sources, it has become appealing to argue that these traditional theories fail to capture a key moral intuition in our relation toward other beings. Namely, we tend to have a heightened sense of duty to care for beings who are unable to care for themselves. In general, it is evidenced that the appearance and attractiveness of animals play a significant role in our evaluations and practical rationality,[6] while attractiveness can increase slightly when a species is endangered (Gunnthorsdottir 2001).

This paper: 1) provides an overview of how utilitarian and deontological ethical theories address nonhuman animal ethics, examining influential contemporary developments (most notably the work of Peter Singer, Tom Regan, Christine Korsgaard, Martha Nussbaum, and others) and evaluating their alignment with the intuition of special obligations toward vulnerable beings; 2) argues that while each framework offers important insights, none of them fully encapsulates the moral urgency many feel to protect and care for those sentient beings who are at our mercy; and finally, it 3) considers emerging approaches – including Nussbaum's capabilities approach and feminist care ethics – which explicitly emphasize relationships of dependence and vulnerability as central to moral responsibilities.

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5 This is in line with the findings of empirical studies (e.g., Hopwood *et al.* 2025), which show how stronger belief in sentience of nonhuman animals leads to less speciesist attitudes. The results also show that such beliefs cooccur with a greater mental effort required to justify the consumption of animals.

6 We tend to be more affectionate and caring for nonhuman animals that are aesthetically appealing, or behaviorally, physically, and cognitively resemble humans (Kellert, Berry 1980).

2. UTILITARIANISM: NONHUMAN ANIMAL NET WORTH

The cornerstone of Peter Singer's ([1975] 2015, 33) view on animal ethics is the principle of equality, which is a moral idea that does not allude to any (f) actual equality among compared beings, but instead functions as a normative guideline for treating others. Following Bentham ([1781] 2000), Singer ([1975] 2015, 36) adopts sentience, i.e., the potential for feeling pain and suffering, as the sole criterion for the right to equal consideration. In order to be an appropriate object of equal consideration, one must have the general capability of having interests, which is secured through sentience.[7] Thus, the principle of equality does not imply that all beings are morally equal in every respect; rather, it requires that the interests of beings capable of suffering be given equal consideration. In other words, a utilitarian treats every relevant individual being's interest as equally important and comparatively measurable. Consequentialism is primarily associated with utilitarianism, which, in its classical hedonistic form, takes the good to be a pleasure and requires the agent to promote pleasure (Brink 2006, 381). This includes the avoidance or mitigation of pain or unhappiness (Mill [1859] 2001, 12). Hence, utility means the property that "tends to produce benefit, advantage, pleasure, good, or happiness" or "to prevent the happening of mischief, pain, evil, or unhappiness" (Bentham [1781] 2000, 14–15). It is not about the greatest happiness of one individual, but "the greatest amount of happiness altogether" – both quantitative and qualitative (Mill [1863] 2001, 11).

Even without a precise definition of consciousness, there are obvious behavioral and neurological similarities between human and nonhuman animals that indicate conscious mental states (Chan, Harris 2011, 314).[8] Having a nervous system, pain/pleasure responses, and sensory capabilities is sufficient for imputing conscious and deliberate action to animals,[9] which

[7] All vertebrates (mammals, birds, reptiles, amphibians, fish) are considered sentient. Among them, mammals and birds are typically pointed out as having highly developed mental capacities that resemble those of humans, whereas some argue that even bees, wasps, and spiders possess a "similar sort of mental architecture" (Carruthers 2011, 380).

[8] Interestingly, there are several types of legal (civil law) regulations of animal rights with regard to sentience. Some legal systems (e.g., Austria, Germany, Czechia, and Switzerland) explicitly deny that nonhuman animals are objects, some (e.g., Belgium, France, Columbia, the UK, and Spain) treat them as things but acknowledge their sentience and biological needs, whereas some (e.g., Croatia) neither explicitly consider them things nor sentient (Nedić, Klasiček 2023, 63–64).

[9] This is also confirmed in the Cambridge Declaration on Consciousness (2012), *https://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf*, last visited November 21, 2025.

consequently leads to a possession of interests. Although not all movements of living creatures toward fulfilling an evolutionary purpose, such as a bacteria moving away from negative chemical stimuli, could (should) be interpreted as "intentional", there is still good reason to claim that animals with a mental life do act intentionally, have desires, and basic beliefs (Chan, Harris 2011, 319). Even if we were to accept the claim that consciousness (not necessarily self-consciousness[10]) is required for a right to "continued existence", it is nevertheless possible to acknowledge nonhuman animals the capability of consciously thinking in images, despite lacking the ability to use language (Tooley 2011, 358). A dog can form a basic belief that chewing a bone tastes a certain way based on past experiences, which can lead to the action of getting a bone to satisfy its desire for the taste (Regan 1983, 58–75). It seems difficult to exclude intentionality from such actions.

Beings that can suffer have an interest in not suffering, and such an interest cannot be interpreted differently in accordance with potential differences among species. In other words, a core biological principle is that the nature of pain is the same for all sentient species, although there are differences in the way it is manifested. For instance, it could be argued that a higher level of cognitive development allows for higher levels of pain. One might distinguish between an objective, "body-representing" aspect of pain and a subjective, experiential, and conscious aspect (Carruthers 2011, 376). It might follow that human animals are susceptible to a psychological, "second-order" type of pain that nonhuman animals lacking self-consciousness[11] cannot experience. An example of an extreme case would be existential suffering caused by abstract thinking about the meaning of life. On the other hand, cognitive superiority can also lead to the opposite conclusion in certain circumstances. Singer ([1975] 2015, 48) depicts a wartime situation in which humans can be comforted through promises of being unharmed, despite being taken prisoner, which would not be the case for nonhuman animals that can only experience pain due to confinement. Hence, higher-order cognition seems to open possibilities in both directions, although the intuitive expectation might be that greater suffering is the more likely overall consequence of self-awareness.

Going back to utilitarianism and the aim of this paper, it is necessary to assess the extent to which consequential reasoning based on utility can support the initial intuitive claim of the existence of a special duty of care

[10] Although some nonhuman animal species might possess it (see Andrews 2015).

[11] Planning for the future and having meaningful relationships with others are some of the elements that are commonly said to stem from self-awareness, which distinguishes humans from nonhuman animals.

toward those unable to care for themselves. The classical utilitarian defenses of animal welfare come from Bentham and Mill, who offer a consequentialist, welfarist, aggregative, maximizing, and impersonal model (Frey 2011, 172). This means that goodness is evaluated through both human and nonhuman animal welfare, i.e., within the category of sentient beings, by a simple sum of pain and pleasure. However, as we have seen, more weight can easily be given to human beings. If the goodness of an action (e.g., eating meat) is analyzed only with reference to the overall sum of pain and pleasure, then the quality of one's experience of pain or pleasure can figure in the equation. Some scholars (e.g., Frey 2011, 186) assert that "the value of life is a function of its quality", which is further dependent on its richness. Stemming from this, if one argues that human animals generally have richer experiences (due to self-awareness, meaningful relations with others, and hopes for the future), much space is given to practices that go against the interests of nonhuman animals and consequently human duties of care toward them.

Singer notes that conclusions with regard to pain and suffering cannot be fully extended to problems related to life and death.

> While self-awareness, the capacity to think ahead and have hopes and aspirations for the future, the capacity for meaningful relations with others and so on are not relevant to the question of inflicting pain – since pain is pain, whatever other capacities, beyond the capacity to feel pain, the being may have – these capacities are relevant to the question of taking life. It is not arbitrary to hold that the life of a self-aware being, capable of abstract thought, of planning for the future, of complex acts of communication, and so on, is more valuable than the life of a being without these capacities. [...] If we had to choose to save the life of a normal human being or an intellectually disabled human being, we would probably choose to save the life of a normal human being; [...] The same is true when we consider other species. (Singer [1975] 2015, 54)

Therefore, he treats the question of life differently from the question of pain. We will come back to this problem later, but for now it suffices to say that his approach seems deal primarily with balancing between moral values. He asserts that balancing between two beings in equal pain is different ("not nearly so clear how we ought to choose") from juxtaposing two lives that can be measured in their richness, as well as that, exceptionally, nonhuman animal lives can sometimes have more worth than human lives (Singer [1975] 2015, 55). However, if the question is posed beyond such cases, then his conclusions might be less convincing. Although he rejects speciesism, as

a view that draws the moral lines in accordance with species membership, Singer (1993, 132–135) nevertheless conceives of painless killing of non-self-conscious animals as potentially justified. He adopts the "replacement argument", which states that nonhuman animals are individually replaceable due to their lesser mental capacities, unlike human animals, who possess irreplaceable personalities and experiences. Hence, "[i]n some circumstances – when animals lead pleasant lives, are killed painlessly, their deaths do not cause suffering to other animals, and the killing of one animal makes possible its replacement by another who would not otherwise have lived – the killing of non-self-conscious animals may not be wrong" (Singer 1993, 133).[12]

From a utilitarianism standpoint, who is to say that the pleasure achieved through eating meat does not outweigh the pain caused to animals under existing conditions of life and their eventual demise? The question has even more weight if we imagine a better world in which living conditions of all animal life are as good as they could be and in which no pain is caused to them, other than the final (painless) taking of life. The replacement argument allows painless killing for food because the net worth of such practices is positive, given the quality of life of those animals, as well as their infinite replacement through breeding for more food. Interestingly, the fact that an animal lacking self-consciousness leads a miserable life could even be taken as a utilitarian argument in favor of killing it (Singer 1993, 132). Further, to take the case of nonhuman animal experimentation, how could we plausibly deny the overall net positive result in cases where the discovery of a medical cure leads to a massive increase in human pleasure, where humans are taken to have richer lives? Suppose our utilitarian ethical perspective takes into account the richness of one's inner life. In that case, we can easily end up with even more counterintuitive conclusions, such as that many human animals (e.g., those with severe mental disorders) have lesser value than many nonhuman animals.

In conclusion, while utilitarianism's calculus of pleasure and pain potentially has the power to defend the interests of nonhuman animals (provided everything falls into place), it nevertheless fails to align with our deeply held moral intuition that we owe a special duty to protect and nurture those who cannot fend for themselves. This intuition recognizes the inherent

[12] This does not prevent Singer (1993, 135) from taking a pragmatic stance with regard to eating animals: "[A]t the level of practical moral principles, it would be better to reject altogether the killing of animals for food, unless one must do so to survive. Killing animals for food makes us think of them as objects that we can use as we please. Their lives then count for little when weighed against our mere wants. As long as we continue to use animals in this way, to change our attitudes to animals in the way that they should be changed will be an impossible task."

value in relationships of dependence, where the strong are ethically bound to care for the weak, not merely for aggregate utility, but out of a fundamental relational obligation that transcends impersonal calculations. Ultimately, by overlooking these relational duties, utilitarianism risks neglecting the most defenseless beings by preferring the cold maximization of happiness.

3. DEONTOLOGY AND RIGHTS ETHICS: FROM MEANS TO ENDS

In contrast to outcome-oriented utilitarianism, deontological ethics judges morality by adherence to duties or rules. The paradigmatic deontological thinker Immanuel Kant held that moral agents must act according to rational principles ("categorical imperative") that respect the intrinsic value of rational beings. Kant's (1996, 87) ethics famously centers on the injunction to treat humanity "in your own person as well as in the person of any other, always at the same time as an end, never merely as a means." However, Kant did not extend this respect to nonhuman animals; in fact, he made stark statements excluding animals from the community of ends. Since only men can be ends, "our duties towards animals are merely indirect duties towards humanity" (Kant 2001, 239). According to the classic Kantian view, animals lack the rational autonomy that would make them "ends in themselves". We ought not be cruel to animals solely because cruelty might dull our feelings and lead us to mistreat humans, or because someone's pet is their property and harming it wrongs the owner. This view of indirect duty implies that harming an animal is not a wrong against the animal itself, but rather a wrong against humanity's own moral virtue or the animal's owner. Such a position goes against the common intuition that the animal itself is wronged by abuse – that kicking a dog is wrong primarily because of the harm to the dog, not just because it might make the kicker more callous or upset the dog's owner.

Kant's exclusion of animals (and other nonrational beings, e.g., infants and disabled persons) from direct moral standing exposes a stark problem of "marginal cases". If full and direct moral rights are tied solely to rational agency, then human beings who lack higher rational capacities (newborns, persons with severe cognitive impairments) would seemingly fall outside the scope of direct moral duty as well (Tanner 2009; Korsgaard 2018, 77–96). Yet we emphatically believe that it is wrong to treat such individuals as mere means or to deny them their rights. This inconsistency suggests that Kant's criterion – strict rational autonomy – is too narrow and misses two morally salient factors: the capacity for subjective experience and vulnerability. An infant or a cognitively disabled person cannot reason or

take care of themselves, but we consider them morally important because they can be harmed, they can suffer, and they depend on our care. The same is true of many animals. Thus, many philosophers after Kant have revised deontological ethics to better account for the moral claims of beings who are sentient but not autonomous.[13]

Already in 1983, Tom Regan developed an influential deontological argument for animal rights. He starkly disagrees with Kant about which beings qualify as ends in themselves. Instead of rationality as a criterion for inclusion, Regan (1983, 175) proposes the quality of being "subject-of-a-life". Any being having perception, desires, memories, a sense of future, emotional life, preferences and welfare is a subject-of-a-life in this sense (Regan 1983, 243). By this criterion, all adult mammals and many other animals are not objects or resources, but are beings who experience the world. A subject-of-a-life has inherent value, and if we accord this value to all human subjects, consistency demands that we extend the same recognition to nonhuman animals. Regan concludes that many nonhuman animals have basic moral rights, including the right to be treated with respect and not to be harmed or killed as a means to human ends. In his own words, "the fundamental wrong is the system that allows us to view animals as our resources, here for us – to be eaten, or surgically manipulated, or exploited for sport or money." (Regan 1985). This abolitionist stance holds that our entire framework of using animals as commodities is unethical,[14] not just because of the suffering

[13] In this paper, we mainly discuss the elaborations of Kant's positions by Tom Regan and Christine Korsgaard. However, his position on animal rights has been reinterpreted in the works of many other authors. Lara Denis argues that the animal ethics in Kant, properly understood, are far stricter than they might appear. Her position entails that the duties toward animals include perfect and imperfect duties. According to Kant, perfect duties are moral obligations that do not allow for discretion, while imperfect duties are general moral obligations that allow for exceptions (Denis 2020, 408–410). Research on Kant's stance in the domain of nonhuman animal ethics has been the topic of an important recent edited volume entitled *Kant and Animals* (Callanan, Allais 2020).

[14] As a potential catalogue of animal rights, one could distinguish four main categories: (1) rights to nonmaleficent treatment, (2) rights to have basic needs met, (3) rights to nonconstraint, and (4) rights from human agreements (Beauchamp 2011, 212–219). The first two categories encompass basic rights regarding harm, such as a right to life, without suffering and with a pursuit of the basic goods of life (e.g., food, rest, and housing). Interpreted in their most radical form, they might go against all practices that take away animal life. Further, rights of nonconstraint refer to the freedom of animals, which, in our current practices, includes avoiding small cages in zoos, factory farms, rodeos, and circuses. In contrast, a more radical understanding might imply a duty not to confine at all. Finally, rights stemming from human agreements mean being allowed to receive benefits from all human legal arrangements, such as wills and regulations.

caused (though that exacerbates the wrong), but because it denies the animal's inherent worth. According to this account, we have direct duties toward animals that are grounded in their intrinsic value. Stating that a being has interests for its own sake implies that correlativity is direct – we have obligations to a nonhuman animal, rather than regarding the animal (Beauchamp 2011, 207). For Regan, just as we consider it inherently wrong to exploit a defenseless human (even one with no ability to reciprocate or defend themselves), it is intrinsically wrong to exploit a defenseless animal. Both are entitled to care and protection as a matter of rights, not simply compassion or benefit. Regan's approach marked a departure from Kant by explicitly including nonautonomous, vulnerable beings in the circle of those to whom we owe duties – not indirectly for someone else's sake, but to them in their own right.

However, invoking rights might seem redundant in ethics. Acknowledging rights follows only after providing arguments in favor of protecting the interests of certain beings, i.e., after recognizing human obligations regarding the treatment of nonhuman animals. So, invoking animal rights has a pragmatic purpose, and it is to "block appeals to the human collective good" (Frey 2011, 176) that would potentially have the power to override animals' interests. On the other hand, some scholars point out that calling upon rights hinders our debates about animal ethics, due to the authoritative nature of rights. Be that as it may, rights theories still have their internal requirements, which often have to do with membership in the moral community. Asserting and exercising a right can be viewed independently from possessing a right (Beauchamp 2011, 202). Not knowing about having a right does not necessarily prevent one from actually having it. It is a plausible assumption that a being can have a right if it is capable of having an interest for its own sake (Beauchamp 2011, 203), which unquestionable for all sentient animals. One way to support a theory of rights is to claim that rights cannot be understood without reference to correlation. To assert "X has a right to do or have Y" implies that someone else either has a duty not to interfere with X doing Y or a duty to provide X with Y (Beauchamp 2011, 206). A right not to suffer means that others have a duty not to cause suffering, just as when there is a right to decent life – a zoo has a duty to provide food and roaming space for animals. In other words, a right entails an obligation, just as an obligation entails a right. This is a standard perspective of rights. Still, it confirms the remark that rights only follow from a defense of human duties toward beings that have interests for their own sake.

On the other hand, "will theories" assert that only entities that are capable of demanding or waiving the enforcement of a duty can be rights-holders, which typically excludes nonhuman animals, as well as infants

(Kurki 2017, 79). It seems that the contemporary legal status of nonhuman animals remains somewhere in between objects (things) and subjects (persons) (Pietrzykowski 2017, 56). It is obvious that at least vertebrate animals possess morally relevant interests, although this does not have to imply that granting them legal personhood is the best solution. Some authors (Pietrzykowski 2017, 57) believe that due to significant interspecies differences, the existing legal conceptions of juristic and natural persons are still not fitting for nonhuman animals. An alternative solution might be to consider them nonpersonal subjects of law. This could introduce a distinction between subjects and persons, where the former does not necessarily imply the latter (Pietrzykowski 2017, 58). The idea is to establish sets of legal rights that correspond to the overall capabilities and interests of their holders. Personal and nonpersonal subjects of law would thus have different sets of rights that would be based on the main difference between human and nonhuman animals – freedom of choice[15] (Pietrzykowski 2017, 59). Consequently, this view might entail legal recognition of only one right of nonpersonal legal subjects, which is "to have one's own individual interests considered as relevant in all decisions that may affect their realisation"[16] (Pietrzykowski 2017, 59). Nevertheless, some authors (e.g., Kurki 2017, 84) disagree with the possibility of making a clear distinction between legal personality and non-personality; in their view, legal personality is a cluster concept that is composed of different entitlements and burdens ("incidents") that vary across particular cases (Kurki 2017, 84).

A more recent development in deontological thought comes from Christine Korsgaard, a Kantian philosopher who argues that properly understood Kantian ethics supports strong obligations toward animals. In *Fellow Creatures: Our Obligations to the Other Animals* (2018), Korsgaard acknowledges Kant's original stance but seeks to reinterpret its foundations. She suggests that it is not the mere fact of rationality that gives any being moral status, but the fact of having a subjective good, i.e., being an entity for whom things can be good or bad, from its own point of view. Humans, as rational beings, value our own good (our life and wellbeing) and recognize that rational nature lets us set and pursue ends. But Korsgaard (2018, 148) argues that nonrational animals also have a good of their own: as conscious, feeling creatures, their lives can go better or worse for them, depending on their nature and capacities. They pursue ends (albeit in instinctual or less

[15] This paper does not allow the space to delve into the intriguing debate on the freedom of will.

[16] This is much more paternalistic compared to a person's rights, due to the absence of preferences and free choice.

reflective ways) such as finding food, avoiding pain, caring for offspring – in essence, they value their own lives through their natural impulses. If we take a step back, from a moral perspective, we can see that each animal "matters to itself" just as we matter to ourselves (Korsgaard 2018, 276). Humans possess the additional faculty of reflective empathy and reason, which allows us to grasp this fact. Korsgaard writes: "What is special about us is the empathy that enables us to grasp that other creatures are important to themselves in just the way that we are important to ourselves, and the reason that enables us to draw the conclusion that follows: that every animal must be regarded as an end in herself, whose fate matters, and matters absolutely, if anything matters at all" (Korsgaard 2018, 133). In her reinterpretation of the Kantian approach, animals become ends in themselves, not in the same way as rational agents who can moralize, but in the sense of having intrinsic worth that our own moral law must respect. Korsgaard essentially bridges Kant and Regan; she agrees that using animals merely as means – as in factory farming or vivisection – is inconsistent with recognizing their value as ends. She even suggests that Kant's framework, shorn of Kant's specific assumptions, compels the conclusion that we have direct duties to any creature with a subjective good (Korsgaard 2015).

In its most developed form, such a view might entail a deontological duty not only to refrain from killing animals or causing them suffering, but also to tend to their needs to the greatest extent. However, how would these moral obligations be applied in practice, i.e., how are they manifested? Since deontological obligations do not refer in their evaluation to the consequences of an action, it appears evident that all practices against the interests of animals should be forbidden in general. Nevertheless, in accordance with the assumption that resources are scarce and limited, i.e., in insufficient quantities to satisfy all needs and wants, there is always a need for balancing. Going back to intuition, it is commonly asserted that human animals (with self-awareness, abstract thought, and planning for the future) have a higher value of some sort, compared to nonhuman species. As was pointed out, Singer ([1975] 2015, 54) asserts that "If we had to choose to save the life of a normal human being or an intellectually disabled human being, we would probably choose to save the life of a normal human being; [...] The same is true when we consider other species." And this intuition seems hard to refute. To take the most radical and straightforward case – few people would deny the rightness of choosing to save the life of millions over one life.

Now, one might think that any type of balancing between moral values, as illustrated above, leads to consequentialist reasoning. For instance, balancing between the value of human health (and potentially human life) and the

value of animal life, via conducting experiments on nonhuman animals, might be considered to be on par with the utilitarian analysis of the overall result stemming from an action that is assessed in light of pain/pleasure or happiness/misery criteria. Nonetheless, following William D. Ross (1930), it is possible to reject this sort of equalization between balancing and consequentialism since a pluralistic deontological account of moral values can encompass balancing. Ross (1930, 22, 24) rejects the utilitarian depersonalized character of moral duties, where it does not matter "who is to have the good", and advocates for the existence of intrinsically good (and self-evident) properties (such as virtue, knowledge, and pleasure) that form a prima facie moral duty to produce them, rather than not to do so. Still, because these moral duties are prima facie, they can be justifiably overridden in certain circumstances, without forfeiting their deontological basis. Few authors agree with Kant's position that, for example, lying is an absolute moral prohibition, i.e., it cannot be overridden even when conflicting with the value of life. No one disputes the (prima facie) duty to tell the truth or uphold a promise even when deciding to lie or go back on one's word, but we nevertheless do so when conflicting higher values require that of us (Ross 1930, 28).

Having said that, a refined deontological approach favoring nonhuman animals would probably result in the abandonment of all existing practices that go against basic animal interests, with a stronger emphasis on creating policies that enhance their status and quality of life, while allowing certain departures or deviations in exceptional, crisis-like situations. As a brief illustration of the possible consequences of this view, we could impose the moral duty to become vegetarians and make our governments invest as much money as possible (*pro tanto* – in accordance with the possibilities in the given circumstances) into taking care of as many sentient animals as possible, where animal experimentation (with the least possible pain infliction) would be justified only if there are no human volunteers available and the research is highly likely to result in saving human life. Using nonhuman animals for entertainment, cosmetics or fashion would not even be considered. Lastly, when it comes to balancing between rights, a distinction could be made between violation and infringement, where the former is the unjustified action against a right and the latter is the legitimate overriding of a right (Beauchamp 2011, 220).[17]

[17] A simple example of a violation is the apparent imbalance of values in sport hunting, where human enjoyment is juxtaposed with animal life. Respectively, management hunting in cases of overpopulation might be an example of an

Korsgaard's work is a powerful example of a contemporary deontological development affirming duties toward nonhuman animals. Notably, it grounds these duties partly in human moral capacities: only humans can reflect on the moral law and act from it, so humans bear the responsibility to act on behalf of animals who cannot argue or stand up for themselves in the "kingdom of ends". Martha Nussbaum (2023) praises Korsgaard for discarding the worst historical ideas (the obsession with strict human rationality) and recognizing animals as fellow creatures with ends. However, she criticizes Korsgaard for ultimately maintaining a sharp human/animal distinction when it comes to capacities like ethical deliberation. Nevertheless, Korsgaard squarely rejects the notion that an animal's inability to care for itself or to participate in contracts negates our obligations toward it. On the contrary, her Kantian stance implies that the very fact that animals cannot obligate us through reciprocal agreement is morally irrelevant – and even that it puts the onus on us, as the only moral agents, to champion their claims (Nussbaum 2023, 33).

In sum, deontological ethics has undergone a significant evolution in recent decades. Historically, it provided a rationale for human superiority and lessened duties toward animals. It also had to confront the ambiguity of application amid scarce resources, forcing a hierarchical balancing that privileges self-aware beings like humans over others, which can diminish the intuitive imperative for responsive care. Today, leading deontologists argue for elevated duties toward nonhuman animals grounded in their inherent worth and our responsibility to protect them. The notion that we have special obligations toward those who cannot care for or defend themselves is present in rights-based ethical positions. Rights are, in a sense, society's promise to safeguard the individual, and the more an individual cannot safeguard their own interests, the more crucial it is that others respect their rights. Hence, while newer deontological ethics compellingly invokes empathy to recognize animals as ends in themselves, whose fates absolutely matter, it often falls short of fully capturing our moral intuitions about the special relational duties we owe to those who cannot care for themselves, as it struggles to delineate the scope of positive obligations beyond mere noninterference or protection from harm. Thus, the challenge for rights-based and deontological theories is to specify what duties of care we have.[18] This challenge highlights how rights-based theories risk reducing

infringement because it serves a compelling public interest, such as maintaining ecological balance, preventing habitat destruction, or averting widespread starvation among the animal population.

[18] Arguably, taking into account recent reinterpretations of Kant in the domain of nonhuman animal ethics, it could be argued that the duties that we have toward other animals are specified within the category of imperfect duties, such as the duty

moral obligations to abstract rules or prohibitions, potentially overlooking the contextual, empathetic bonds. Ultimately, as we shall argue, care ethics better aligns with these intuitions by centering on relational responsiveness and the cultivation of dependence-based connections.

4. CARE ETHICS: DEPENDING ON OTHERS

The basic moral intuition underlying our relationship with nonhuman animals is the same one behind our sense of duty toward humans who are less able to take care of their own wellbeing. Namely, morally speaking, the less a valued being can take care of itself, the more there is a moral sense that someone should take care of that being. Theories arguing for animal rights that have been considered so far capture this basic intuition to varying degrees. Utilitarianism contributes by recognizing animals' suffering as morally significant and demanding that suffering be counted alike, whether of a human or a mouse. Yet utilitarianism's very impartiality and aggregative logic can conflict with the intuition that we owe extra care and moral protection to the most vulnerable. It does not inherently prioritize caring for those who cannot care for themselves, beyond the calculation that they may have more to gain from assistance. The view developed by contemporary deontology resonates with the intuitive idea that the strong have a special duty to protect the weak. Under the Korsgaard-esque view, a rational being has no license to exploit a nonrational one; rather, rational beings have the unique responsibility to recognize and respect the value of the lives of those who cannot speak for themselves. However, none of the discussed theories directly address the central moral intuition that we share, for the most part, regarding our relations with beings who are less capable of taking care of their own interests.

One framework that explicitly centers relations of dependence and vulnerability is the ethics of care (Gilligan 1993, xix). Originating from feminist positions, care ethics argues that traditional moral theories neglect the moral significance of our emotional attachments and the responsibilities that arise from interpersonal relationships. Care ethicists maintain that ethical reasoning should not be modeled on an impartial bureaucracy of duty or utility, but on the model of the caregiver attending those who rely on them. In care ethics, morality begins with the recognition of vulnerability

of love, which entail the requirement to adopt and promote others' happiness (Denis 2020, 410). We are grateful to the reviewer for pointing out these interpretations.

and the motivation to respond to it with care.[19] According to Nel Noddings, care ethics builds upon the attitude of natural caring and develops this attitude into "our best picture of ourselves caring and being cared for" (Noddings 1984, 80). The caring impulse arises naturally (absent pathology) and gives rise to a requirement of commitment in the form of acting or thinking (Noddings 1984, 82). By itself, the natural sentiment of caring leads to the evaluation of the caring relation as good, so the source of the ethical obligation in the strict sense is the value that one places, upon reflection, on the relation of caring and being cared for (Noddings 1984, 83–84). Similarly, and more recently, Daniel Engster argues for the following principle of care ethics, which emphasizes reciprocity, relationship, and dependence:

> Since all human beings depend upon the care of others for our survival and basic functioning and at least implicitly claim that capable individuals should care for individuals in need when they can do so, we must logically recognize as morally valid the claims that others make upon us for care when they need it, and should endeavor to provide care to them when we are capable of doing so without significant danger to ourselves, seriously compromising our long-term well-being or undermining our ability to care for other individuals who depend upon us (Engster 2006, 525).

The early authors in care ethics either disregarded (Gilligan 1993) or relativized the applicability of care ethics in relation to nonhuman animals (Noddings 1984). Most authors in both utilitarianism and deontology make a point of excluding emotive elements from their ethical considerations, both in the process of ethical inquiry and in the grounding of their ethical positions (Kelch 1999, 26). Alternatively, care ethics provides a more stable foundation for moral obligations toward animals, based on love and compassion, and is contextual and nuanced (Donovan, Adams 2007).

In our understanding of care ethics, a special relationship with someone creates a greater responsibility toward that entity. We naturally feel more obligated to care for our own child than for a stranger's child, not because our child has more moral rights or greater utility, but because we stand in a relationship of dependence with them. This is not seen as a bias to overcome, but as a moral reality: real-life responsibilities are often particular

[19] Granted, care is notoriously difficult to define even within the tradition of care ethics. However, most theorists agree that it at least encompasses helping others to meet their basic needs, develop their basic capabilities, and avoid unwanted suffering and pain (Engster 2006, 522).

and relationship-bound (Gilligan 1993, 24). Vulnerability and dependence are central because the basis for our ethical concerns is our emotional responses to others with whom we have personal relationships, which is confirmed by empirical studies that show how, for instance, dog owners have "very high levels of animal-directed empathy and equally high levels of positive attitudes toward pets" (Ellingsen *et al.* 2010). Our moral emotions – empathy, compassion, care – attune us to the needs of those who cannot meet their own needs. Care theorists insist that these emotions are a source of moral feeling, guiding us to what truly matters – the wellbeing of those we love and those in need.

Regarding nonhuman animals, care ethics emphasizes that many animals exist in a state of heightened dependence on human caregivers. Wild animals are often capable of fending for themselves, but domestic animals are largely dependent on humans (Engster 2006, 528). They rely on humans for food, shelter, and relations with other animals. Care ethicists argue that this gives rise to an obligation to actively care for the wellbeing of animals and the responsibility of avoiding the exploitation of their helplessness. In this way, many nonhuman animals are vulnerable creatures in need of care and protection, much like human children. Furthermore, the ethics of care and the fact that the inequality of powers and capabilities between human and nonhuman animals renders domestic animals one-sidedly at our mercy dictate that this intensifies our obligation not to betray their trust and dependence.

The second important point in care ethics is the value attributed to context and relationship. Moral action preserves, nurtures and restores healthy relationships. The fact that one adopted a dog, and that they developed a bond with it, which usually means developing awareness of its needs and specificities, makes the relationship between the caregiver and the pet morally significant. Betraying or neglecting the pet is a moral failing that extends beyond the idea that it is wrong to harm animals. In this sense, it is care ethics that implies that our moral motivation starts with caring for individuals and can extend outward.

Care ethics emphasizes our close relationships and downplays our sensibilities outside of this restrictive circle. Thereby, it becomes limited in scope and even excludes wild animals from the circle of care.[20] These positions

[20] Indeed, care ethicists tended to emphasize the moral significance of only those relations to animals that are proximate and reciprocal (Noddings 1984, 148), whereas some have developed elaborate dialogical views on care ethics, only to depart from them to make dubious analogies between animal and human communication (Donovan 2006, 317).

emphasize the limitations of care ethics rather than developing it in line with our intuitions about our own emotions of care. Namely, supposing we stick to the limited scope given to care in classic writing, we would be bound to admit that the destruction of wildlife habitats, wild-animal keeping practices, as well as the ethical status of ecosystems, would fall entirely outside of the scope of our duty of care. In the following part of the paper, we will argue that this position differs from our intuition regarding our duties toward other beings. While it is true that the closeness of a relationship can be a basis for the sense of duty to care, this is not necessarily the case. Feeling empathy and compassion for a lamb stuck in a barbed wire or an abandoned cat in a shelter is a general appropriate moral response, which should spur action. Psychologically, we are wired (at least in cases of healthy development) to respond protectively to signs of dependence (a crying baby, a whimpering injured animal). In other words, the specific care relation that we have with close kin, friends, and domestic animals intuitively gives way to a generic sense of care for the worse off, the victimized, the defenseless. In fact, some care ethicists, such as James Gabarino, rightly argue for a generic approach to care aimed at protecting the vulnerable (Donovan, Adams 2007, 253).

Our suggestion is to avoid the notion of vulnerability, because the natural food chain seems to put most animals in states of constant vulnerability – making our duty of care potentially too broad. Instead, the concept of dependence seems more appropriate. Being dependent on someone means relying on their help and support to maintain an adequate quality of life. In this sense, dependence is not necessarily confined to relationships of emotional closeness, but it also does not imply crude deontological commitments to care for all animals in all contexts. In other words, our core idea is to offer a moderate and contextualized form of a duty of care.

5. FORMULATING THE ARGUMENT

We have identified some of the strengths and weaknesses of the traditional and recent approaches to nonhuman animal ethics within normative ethical theories, in relation to the central intuition of the paper's authors. Recent ethical developments show an apparent inclination to include animals in our moral community. Utilitarianism has made significant strides by insisting that animal suffering is on par with human suffering and by condemning cruel practices based on their impact on animal welfare. Deontology has reformulated rights and duties to recognize animals as beings of inherent worth and to address imperfect duties toward nonhuman animals. To set standards for our relations toward animals, care ethics has emphasized

empathy and kindness, context, and relationships. The unifying thread is that our duties toward nonhuman animals are more robust than described in earlier ethical writing.

However, we can clearly see that the theorization of our relations to nonhuman animals is an afterthought in each of these approaches. The theorist approaches the problem of grounding their sense of obligation to feed their dog or not to kill a bird in the wild, to a greater or lesser degree, on their relations to other human beings. Advocates of animal welfare hold that sentience is the fundamental criterion of moral consideration. Advocates of animal rights mostly hold that subjecthood is the ultimate criterion of moral consideration, whereas advocates of environmental ethics hold that pertinence to a natural environment is the ultimate criterion for moral consideration of entities (Anderson 2005, 278–79).

It is easy to dismiss most of these views as speciesism, as is often done. However, a more fruitful approach entails the identification of the reasons for this cognitive distortion.

(1) The first reason for this stance is that theorists often tend to model our moral relations based on strong ideas of legal relations. As adequately captured by Kantian deontology, legal relations entail a correlation between rights and obligations. Moral relations, on the other hand, eschew this reciprocity altogether and entail only obligations or duties. In other words, in legal contexts, it is often considered relevant whether a being is capable of bearing duties, since legal rights are usually correlated with the capacity to assume obligations. However, our moral duties are entirely independent of other's ability to have moral rights. It is entirely plausible for one to have the moral duty to take care of, for instance, a garden that was passed down to them by their late parents, without any imaginable correlative right. Likewise, a moral duty to our pets, another's pet, or wounded animal in the wild may hold regardless of the animal's possession of rights, because the duty arises from our own moral commitments.

(2) The second reason is the conflation of the rationality of inquiry with the rationality of the topic in question. To base their ethical considerations on rational arguments, ethicists often exclude the emotive character inherent to the subject of inquiry. Still, to rationally discuss our moral relations toward nonhuman animals, it is necessary – even essential – to include considerations of our emotional reactions to other entities. If we disregard these emotions, as is often done, we remove a large part of our ethical life from rational discussion.

(3) Furthermore, the development of these ethical positions abounds with hypotheticals, but dispenses with our inner reflexive life and moral imagination. When dependence and care are discussed, it is often the case that only proximate relationships are considered, thereby eliminating the very human possibility of rationally and emotionally empathizing – and even establishing relationships – with entities that are not in our vicinity, one-sidedly and without reciprocity. Needless to say, care of imagined entities still requires rational grounding and moral justification in order to become part of a critical rational account of morality. However, dismissing these sensibilities to purify a theory of all irrational elements yields poor theories with modest explanatory potential, omitting from consideration an entire area of human sensibilities and interests that are often crucial for motivating moral action.

(4) Finally, in most, if not all, moral theories our moral sensibilities are modeled starting from moral relations with humans. However, our intuitions do not support the special position of humans in the web of our moral relations. In fact, the closeness of our relationships with nonhuman animals demonstrates that our sense of duty to care for them is not derived from a similar sense of duty toward humans. It arises as a result of our special relation toward a being in a special relation with us, and the need to make analogies with humans is contingent at best. Namely, one's sentiments toward one's pet dog are not derived from one's sentiments toward one's child, other children, or humans at large. They are promoted and maintained within the authentic emotional relationship between a potential caregiver and a nonhuman animal, which has potentially strong moral consequences.

Arguably, the widened approach to care ethics, supplemented by insights from deontology and utilitarianism, best supports our intuitions about stronger moral duties toward those who depend on others. This alternative argument can be developed in the following steps:

1. *Knowledge and experience:* Our expanding knowledge of nonhuman animals (their sentience, agency, intelligence, and capacity for wellbeing) shapes our understanding of them as conscious "fellow creatures" with subjective experiences. This understanding is grounded both by scientific advances in natural sciences and by our lived relationships with animals. Through direct encounters and forms of care that naturally emerge from them, we come to recognize animals as beings who can be dependent and responsive to care.

2. *Sentiments of care:* The sentiments of care result in moral action toward the animals that are the closest to us. This particular care that we feel we owe to our pets, wounded and defenseless animals on the street, as well as animals seeking shelter, precisely mirrors our relation to humans in similar conditions, who are equally proximate to us. Our sentiments of care toward those who are worse off most often naturally expand to all nonhuman animals that we come in contact with and are in a state of powerlessness.

3. *Critical rational reflection:* The mere sentiment does not give rise to an obligation, but it strongly supports the development of one. Rational reflection on situations of failing to act when we are confronted with a being in need of care points to both internal and external moral sanction – if we fail to provide aid, we feel that we have acted wrongly toward that being, in a morally significant sense. Conversely, rational reflection strongly points to the conclusion that moral action resulting from care for other beings is a moral good that gives rise to moral obligations.

4. *Moral imagination:* The confines of our duty are most often the confines of the beings with whom we have close relationships. In fact, we are more emotionally attached to beings in our proximity: our care for them is stronger, and our rational reflection on these emotions leads us to perform moral actions more often. However, moral imagination confronts us with the same or similar sentiments and correlative duties whenever we engage with beings beyond our immediate proximity. This duty is, however, limited by the actual possibility of aiding those in need.

> *(C) Warranted duty*: Based on common knowledge, closeness, care, and moral imagination, we infer a duty to care of nonhuman animals, to be guardians, caretakers, and to provide aid to the degree in which nonhuman animals are not able to care for themselves. The duty is analogous to the duties we owe to human counterparts and are morally actionable to the degree to which we can actually undertake the moral action.

The naturalistic basis for these perspectives is the fact that all sentient beings have some level of consciousness and pursue ends, therefore valuing their own lives through their natural tendencies. Having a nervous system, pain/pleasure responses, and sensory capabilities is sufficient for imputing conscious and deliberate action on animals, which consequently leads to the possession of interests. To reiterate, conscious mental states can be attributed to nonhuman animals in part because of obvious behavioral and neurological similarities with humans (Chan, Harris 2011, 314). In other

words, sentient animals with a mental life act intentionally, have desires, and basic beliefs. It has already been noted that stronger belief in the sentience of nonhuman animals is associated with less speciesist attitudes (Hopwood *et al.* 2025). This suggests that we can form two-way bonds with many animal species, as our experience clearly shows.

Empirical research indicates that human empathy toward animals depends on our familiarity and the frequency of interaction with them, which means that pet owners display higher empathy (Gómez-Leal *et al.* 2011; McConnell *et al.* 2011). Levels of empathy, attachment, and anthropomorphism are all relevant for caring about animals: the higher the levels, the stronger the concern for their wellbeing (Prato-Previde, Ricci, Colombo 2022). Further, initial protective instincts toward vulnerable humans, such as children or the elderly, naturally extend to nonhuman animals in states of heightened direct reliance, such as domestic pets who are utterly dependent on humans for sustenance and shelter. To reiterate – our initial moral intuition that we have a heightened sense of duty to care for beings who are unable to care for themselves revolves around the central case of a psychologically stable and emotionally responsive agent. Deficits of compassion should be viewed not as refutations of care ethics but as psychological distortions.

Hence, knowledge and experience reveal many nonhuman animals as conscious beings endowed with basic feelings, which care ethics amplifies by insisting that moral insight begins with our emotional engagements rather than detached observation. The "natural caring impulse" arises spontaneously when we encounter dependence and vulnerability, transforming mere factual awareness into a moral attunement evoking compassion. This is a type of relational knowledge, where a growing understanding of animals' inner lives fosters human empathy, replacing the traditional theories' neglect of emotions in favor of a contextual ethic that values the "flesh-and-blood" realities of dependence. Critical rational reflection endorses relations of caring and being cared for as a moral good, meaning that reason and emotion ought to be integrated in such a way as to bring about a normative assertion. In other words, care ethics treats the caring relation as intrinsically valuable, transforming natural sentiments into ethical obligations through thoughtful commitment – it compels us to recognize many nonhuman animals as dependent creatures deserving protection, consequently turning the alleviation of their helplessness into a moral duty.

However, as has been pointed out, the criterion of dependence does not necessarily confine us to the most apparent cases of moral obligation toward the nonhuman animals we are in contact with, although they are undoubtedly our primary practical concern. Rather, it should allow for a

more inclusive concordance to aloof dependencies.[21] Potential compassion for the sentient animals that we might come into contact with guides us to nurture bonds that preserve wellbeing, even one-sidedly, and intensify obligations where power imbalances leave animals at our mercy. This is an imposition stemming from moral imagination, which confronts us with the same or similar sentiments and correlative duties, even regarding beings outside of our emotional closeness. The background of this imagination is determined by the factual conditions of the world we live in, where survival and flourishing are inconceivably more difficult to achieve without caring for one another.

Finite resources foster the evolutionary imperative for symbiosis and mutualism, while our shared biological structures and challenges enable mutual understanding and empathy to expand to a wide(r) circle. Of course, although this sort of interdependence takes us from factual care to a duty to provide it for others, it should not be interpreted as unconditional. One must be contextually or realistically capable of providing care for those in need. Having in mind the moderateness of our theoretical model of care, duties should extend beyond obvious cases (such as domestic pets) but remain within the realistic boundaries of human capabilities. Crude deontological duties encompassing the whole animal world cannot fit this description. In other words, moral imagination has its factual limits.

When applied to practical action and discussions on the treatment of nonhuman animals, structural relations of dependence between domestic animals and humans are the most common case within the meat industry, for example. In other words, the survival and conditions of life of animals bred for meat are fully reliant on human care. Having a duty of care entails compassion for one's overall wellbeing, which cannot be compatible with taking the life of those who have an interest in living. The primary addressees of such moral duties are those persons who are in direct contact with the animals, whereas all others who can reasonably contribute to the reduction of such practices are secondary addressees. The same conclusions seem to follow in other cases of human exploitation of nonhuman animals, particularly given that, in most cases, it is humans who initiate contact with the animals in their habitats.

Additionally, more detached issues, such as environmental care, do not create a universal or indiscriminate duty to all beings, but rather reflect an indirect responsibility. Duties for nonanimal entities, environments, ecosystems, or even mere objects and places can be understood as a

[21] Especially in light of humanity's unique position of power.

reflexive extension of our duties toward dependent beings, because they constitute the structural conditions on which the survival and quality of life of many nonhuman animals depend. These ecosystems and habitats do not have emotional needs, but their preservation requires action, even more so when their state of endangerment is caused by destructive human action. Humans are often in a position to affect these conditions, for example by reducing pollution or managing resources responsibly. Nonetheless, such claims do not necessarily undermine the contextual nature of care duties, because each particular situation sets the limits of our action, and balancing is always potentially required.

Ultimately, all previous insights imply a duty to care for nonhuman animals as guardians and caretakers. Drawing from the outlined emotional and contextual foundations, duty emerges not as an afterthought but as a central claim, obligating us to avoid betraying animals' trust related to their dependence.

6. CONCLUSION

The development of the field of animal ethics shows us that, as a consequence of anthropocentric reasoning, animals can no longer be placed on the periphery of moral theory. If we take seriously the fact that our duties toward animals are neither derivative of human relations nor contingent on their human-like cognitive capacities, then our moral landscape expands to include them as genuine recipients of duties. The mistake of much of traditional theorizing has been to exclude moral emotions, thereby overlooking the very forces that most reliably propel us toward compassionate action. Our affective responses to dependence, such as compassion and concern, can best develop into a duty of care when they are supported by reason and moral imagination.

To acknowledge many nonhuman animals as conscious and dependent beings is to recognize that our moral life cannot be confined within the human community. Animals are not merely "like" children, the elderly, or other dependents; they are themselves special and often reliant beings to whom we are bound as guardians and caretakers. In this sense, the true advance in animal ethics is not a mere extension of rights or a calculation of suffering, but the affirmation of our shared world of interdependence. A humane ethical approach must therefore be rooted in both reason and feeling, not only condemning cruelty but cultivating the bonds of trust and care into which animals already invite us.

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/BOOK REVIEWS

Boris BEGOVIĆ*

Gustafson, Thane. 2025. *Perfect Storm: Russia's Failed Economic Opening, the Hurricane of War and Sanctions, and the Uncertain Future***. Oxford: Oxford University Press, 517.**

'Time present and time past
Are both perhaps present in time future,
And time future contained in the time past.'

T. S. Eliot, *Four Quartets*, *Burnt Norton*

1. INTRODUCTION: SETTING THE STAGE

There is no doubt that Russian–Western relations today are hostile, and that the level of hostility is perhaps higher than at the height of the Cold War. The dispute starts with the attempt to answer the question: who or what is to blame? There is already abundant literature on the failure of Russian–Western geopolitical relations, with the first signs of it even in the 1990s, the origins and causes of the Russo–Ukrainian War, and the roles both militarily

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engaged sides and the West have played in it.[1] In the Introduction, the author points out that the book, whose review you are about to read, is not about geopolitics. Instead, the book is 'an attempt to tell the broader story of Russia's flawed opening to the West in its economic, technological, and social dimensions, and the roles these played in its ultimate failure. These are equally essential to an understanding of what happened, and what went wrong' (p. 17). Since the author is Thane Gustafson, a renowned political scientist, a seasoned pundit on both the USSR and post-Soviet Russia, and a prolific author whose first major contribution on the topic dates back to the late 1970s, the reader's expectations are high. In addition, the intriguing hypothesis of the 'flawed opening' elevates expectations even higher, especially for the reader who is sick and tired of geopolitical considerations of the historical inevitability of the Russia–West collision.

The author finds the core of Russia's flawed opening in the 1990s in a straightforward contradiction. 'The West saw itself as victorious against a defeated enemy, whereas Russians saw themselves as a great people defeated, not by the West, but by a home-grown dictatorship and ideology grown corrupt and weak' (p. 18).[2] Because of that attitude, the clash of beliefs, and the gulf of perceptions and understandings between the two sides emerged, and that was a recipe, if not for a disaster, then perhaps for the failed opening. Nonetheless, as to the economic story, the author claims that Russia's opening, however failed it may have been, produced far-reaching consequences. 'Despite the mixed emotions it aroused, the opening

[1] Without any ambition to list ample geopolitical literature on the topic, with some pieces of rather dubious quality, it is inevitable to point out that Sarotte (2021) provides a comprehensive and very balanced study of the geopolitical puzzles that eventually cleared the way for a fully-fledged war, especially since this contribution was published before the Russian invasion of Ukraine. In short, the geopolitical stage, including the domestic political scene in Russia (Walker 2018; Stoner 2021), was set for the invasion well before it was triggered.

[2] It is questionable, the reader ponders, to what extent Russians saw themself defeated. Surely, many ordinary people felt humiliated, with their living standards dropping substantially during the 1990s, but being humiliated and being defeated are different things. Most of the military and security apparatus hardly saw themselves defeated. There was no decisive battle, though the country shrank a bit – the empire was gone – but Russia preserved its status as a nuclear power. The Russian military's attitude can be compared, up to a point, with that of the German military after the Great War, holding the belief they were not defeated. In Russia, the delusion was not accompanied by the infamous 'stab-in-the-back myth' (*Dolchstosslegende*), but rather by the narrative of a treacherous West, which ostensibly promised not to enlarge NATO into countries in Eastern Europe and up to the Russian border (Sarotte 2021).

left one overwhelmingly positive legacy – the transformation of Russia into a market economy and an Internet-based society. These revolutionary changes are here to stay' (p. 19).

The book consists of three parts. The first describes the opening of Russia between 1992 and 2022, the movement of the West into Russia and that of Russia into the West, and asks: 'What went right and what went wrong? What was achieved, and what failed? And what was Putin's role?' (p. 20).

The second part of the book is about the end of this bout of opening of Russia, due to the Russian invasion of Ukraine, and the economic sanctions imposed by the West. The author labels them as 'the hurricane of sanctions', and they led to the dismantling of the financial and business relations built over the previous thirty years, followed by the exit of Westerners from Russia and the massive emigration of Russians to the West and the former Soviet Union, both of which are still ongoing at the time this book review goes to press. This part of the book asks: 'What has been the impact of these events on Russia in the short term, and what will it be over time?' (p. 20). With appallingly few reliable and unbiased reports on the impact of the sanctions imposed on Russia for the time being, the reader's appetite is on a steep climb.

The author has no second thoughts about whether sanctions are a desirable policy tool, viewing them as a form of containment policy, although 'in updated financial and economic dress'. Nonetheless, he points out that it is no longer the era of George Kennan, in which a powerful and united West, under the leadership of a United States at the height of its power, sought to contain a militant totalitarian ideology with global pretensions and great-power ambitions. In short, 'Containment in Kennan's sense is neither possible nor relevant. The enemy is no longer the Soviet Union, but Putinism, a perverted blend of vengeful Russian imperialism, kleptocracy, and a distorted reading of history. It is Putinism that must be contained' (p. 24).[3]

[3] The author provides a reference to a dissenting view of Bergmann *et al.* (2024), who argue that the containment will remain both feasible and necessary after Putin's demise. Accordingly, contrary to the author, who subscribes to the Putinism containment, they recommend Russia's containment, irrespective of the predominant flavour of the Kremlin's ideology. In short, Russia should be contained, in Kennan's style, one way or the other, whatever the policy it is pursuing. This is a said echo of Sun Tzu's principle 'Do not consider what your enemy will do, but what your enemy can do', i.e. anticipate the enemy's capability, not intention. Both the implicit working assumption and bottom line of this approach are that Russia is an enemy – one way or the other.

The third and final part of the book looks ahead – it has the future in mind and explores the conditions under which Russia's reopening to the West might occur. Hence, the reader ponders, Gustafson's plan is to use Eliot's *time past* and *time present* to contemplate *time future*. Quite a novelty in books about Russia! And a stark reminder that, notwithstanding the contemporary declarations about who is morally right and who is wrong, it is a future we or perhaps the next generation should contemplate. 'Speculation about any reopening of Russia may seem premature today. But in human affairs nothing lasts forever' (p. 25).

Gustafson points out that '[t]he opening of Russia was ultimately about people – the politicians and diplomats, the entrepreneurs and managers, the experts and advisors, and the ordinary travelers and consumers – who interacted with one another over the course of thirty years. [...] They are in the end the real story of Russia's failed opening – and its possible reopening' (p. 21). An economist is thrilled by this approach: it is about individuals, their decisions and the incentives that drive them, it is a 'micro foundation of macro', in the big picture. What a refreshing approach, in contrast to those authors who paint a big picture in the air, without a canvas.

2. TIME PAST: RUSSIA EMBRACES CAPITALISM

Part One of the book ('Russia's Failed Opening') starts in the same way as the West's arrival in Russia – with the advent of McDonald's (Chapter I: 'Through the Cracked Looking-Glass').[4] The McDonald's story was a success story. The author provides the reasons for such an outcome. First, there was substantial improvisation in the materialisation of the endeavour, since, in the first decade of the opening, especially at the very beginning, the institutional and legal foundations for Western business did not yet exist, and the Soviet foundations had also collapsed, hence improvisation was the only way forward. Second, taking into account that in Russia politics and business are intertwined much more than in other countries, political support for the project was essential and appropriately ensured in advance. Third, the endeavour has encompassed a network of local Russian suppliers, to whom the technology and business model have been transferred, including painstaking training. Accordingly, indigenous Russian firms and entrepreneurs have had a skin in the game and every incentive to contribute

[4] The first McDonald's restaurant in Russia, at that time still the USSR, started to operate in Moscow's Pushkin Square on 31 January 1990.

to the success of the endeavour. Fourth, also very important, the retail and consumer sector in Russia was virtually non-existent at the time of the opening, so there were no incumbents to create barriers to entry.

Nonetheless, even the success story, 'the arrival of McDonald's, the ultimate symbol of capitalism, aroused both enormous excitement among ordinary citizens, but also envy and resentment, a mix of emotions that characterized the Russian responses to the West over the next thirty years' (p. 31). To make things worse, 'disillusionment and resentment soon followed, as Russians became aware that many Westerners viewed Russia with contempt as the "losers" of the Cold War, a defeated country "in receivership"' (p. 32).[5] It does not help that foreign newcomers often knew little about Russia beyond the headlines and tended to exaggerate the chaos of the 'Wild East,' while underestimating the Russians' underlying capacities and skills.[6] On top of it, they typically spoke no Russian, apart from a handful with Russian family roots, and the turnover among the Western expatriates was high, which further amplified problems of mutual understanding. The author points out that the Russians' feelings were not improved by the fact that the Westerners

[5] The derogatory notion of 'receivership' of Russia as a country was introduced by Brzezinski (1992). The notion is not only inaccurate, but it seems to tell more about Zbigniew Brzezinski's frustration than anything else. The USSR and communism in it did not collapse on Brzezinski's watch, as he was the National Security Advisor to Jimmy Carter, the 39th US President. At that time, America was still licking its wounds after the Vietnam debacle, Iran had taken US diplomatic staff hostage in Tehran (with disastrous US military attempts to rescue them, overseen by Brzezinski himself), the USSR had invaded Afghanistan with impunity, and the US response was mainly to cancel participation in the 1980 Summer Olympics in Moscow. It was the Republican administration of Ronald Reagan that brought the US back into the international relations business, and triggered the collapse of communism (with the George H. W. Bush administration finally winning the Cold War) – not Brzezinski and his Democrats. When the collapse happened, it seems that it was sheer envy and frustration that nudged Brzezinski to make the remark about 'receivership'. It is quite understandable, from a human point of view, though some people in Moscow have remembered those words very well. However, Brzezinski lived long enough to see the resurrected Russia come out of 'receivership' and invade and annex Crimea in 2014. The response of the incumbent US (Democratic) Administration was feeble, at most. Just like during Brzezinski's watch. That must have hurt again.

[6] As to the widespread and straightforward arrogance of Western expatriates, the author refers to the Russian/Georgian oligarch Kakha Bendukidze, who once exploded: 'I know you guys would like to come here and teach us heathens how to eat with a fork and knife and just to make sure we brush our teeth the right way' (p. 33), suggesting that many Russians, at all levels, felt the same as Bendukidze. By coincidence, the author of this book review met (at a conference in Tbilisi in 2006) colourful Bendukidze, a 1.80 meters + and 200 kilograms + imposing person, who shares the arrogance of Western expatriates and who does not know the meaning of words 'timid' or 'shy', and considers his quoted statement quite credible.

enjoyed fat pay packages and perks, compared to those of their Russian colleagues, especially since Russians were learning fast and rightfully feeling that they could do exactly the same jobs that the Westerners were doing, as Russians quickly mastered the skills the Westerners had brought.

The other problem was the applied type of transition reform, i.e. the introduction of market and capitalism in Russia. It was decided to go with a 'shock therapy', based on full liberalisation of prices and swift privatisation. This had been proven to work in Eastern European countries, but that was not the main reason for this model to be selected in Russia. As Åslund (2007) points out, the main motive was political – to swiftly dismantle socialism once and forever. The point is that the communist party in Russia (the successor of the mighty Communist Party of the Soviet Union, *КПСС*) was powerful, and sympathy for socialism was widespread in Russia.[7] So the first generation of Russian liberal reformers, Yegor Gaidar and Anatoly Chubais – under the auspices of Boris Yeltsin, who was more interested in politics, especially international, than economics – decided to go for shock therapy, precisely for political reasons. Short-term economic outcomes of the Russian reform in the 1990s were disastrous. What worked in Eastern Europe, for various reasons, did not work in Russia. Although the public perception has been that it was Western advisers who decided on this course of the reform, it was a political decision of the Russian reformers. 'Russia's market economy was fundamentally a Russian creation, but the "visible hand" of the West was present everywhere in the 1990s – largely at the invitation of the reformers – and especially in the fashioning of the privatization program' (p. 38). Nonetheless, public perception in Russia remained focused on the causality from the Western advisors' ideas to the failed economic reform.[8] Another blow to the West's reputation in Russia.

Nonetheless, Western companies realised the business opportunities and stepped into Russia, 'bringing missing ingredients essential to the post-Soviet market economy – new business models, new skills, new financial products

[7] In the 1996 presidential elections in Russia, Gennady Zyuganov, the head of the Communist Party, entered the second round together with incumbent President Boris Yeltsin and won 40 per cent of the votes. Had these elections been free and fair, it is reasonable to assume that Zyuganov would have won even more votes. Furthermore, when the Russian transition to capitalism started, memories of the failed, although with a small margin, KGB putsch in August 1991 were still fresh. Zubok (2021) provides details about the putsch and its aftermath, since it triggered both the collapse of communism and the USSR.

[8] In the first half of the 1990s, the team of Western macroeconomic advisers included Anders Åslund, David Lipton and Jeffrey Sachs. It was Sachs's name that has been publicly associated with the Russian reform, i.e. with the 'shock therapy' and its consequences.

like mortgages and credit cards, venture capital and private equity, efficient management, and commercial problem-solving' (p. 45). This profoundly and irreversibly changed not only the Russian economy but also the country's society.

The transformation and development of the retail and consumer sectors were undoubtedly a success story. 'The number of Western companies expanded like a spring flood in the desert of the Russian consumer world, especially once global oil prices began rising at the end of the 1990s and oil-export revenues poured into Russia, raising the disposable incomes of Russian consumers to unprecedented heights' (p. 49). The author points out that the most significant accomplishment has been the development of modern telecommunications and the IT sector, encompassing Internet services based on optical fibre cables and smartphones. Gustafson describes this development as a game-changer, since Russia has become an IT-savvy society with the majority of people using smartphones to browse the Internet. However, the author adds that the Russian telecoms system and the Internet have had one major weakness: they remained almost entirely dependent on imported technology and services.

While things were going smoothly, both in terms of the pace of progress and relations with the West, in the retail and consumer sectors, as well as in professional services and banking, since these sectors virtually did not exist in Soviet times, things turned out more difficult in the case of Russian heavy industry, as the Soviet legacy was deeply entrenched in these sectors. The Western newcomers found the ground already occupied by powerful and well-connected Russian incumbents. Nonetheless, there was room for collaboration and success stories. The Western companies made their greatest contribution in the transportation sector, spanning both manufacturing and infrastructure. The author provides numerous examples of these contributions, including corporate household names such as Siemens, VW, Stellantis, and Renault. The author points out that in heavy industry, 'Western *presence* did not necessarily mean *domination*. The steel sector, for example, was rebuilt from its obsolete Soviet foundations by three leading [local] entrepreneurs' (p. 68, italics in the original). Even in cases involving Western corporate giants in heavy industry, there was a Russian partner playing an important role.

As expected, the biggest Western–Russian business clashes occurred in the energy sector. The author provides evidence of 'three contrasting cases from the energy sector that illustrate the theme of opportunity, ambivalence, and resistance' (p. 70). The first one is the story of French corporation Total in building a new LNG (Liquefied Natural Gas) business with a Russian private-sector start-up. The LNG business was new for the Russians. Accordingly,

this was an empty territory, meaning an opportunity, and thorough political support from the Kremlin was provided, perhaps because of that and the hunger for new technology transfer. The Total LNG Yamal business venture was a success story – at least until 24 February 2022. Nonetheless, as the author points out, the Yamal LNG project was the very symbol of Russia's dependence on foreign technology for new ventures.

The second saga – the one of ambivalence – is the roller-coaster epic of BP (British Petroleum) in the creation and subsequent loss of TNK-BP. It was the oil business, something Russians have been experienced in, with too many vested interests and only half-hearted political support.[9] The third case is that of nuclear energy. i.e. the resurrection of the Russian civilian nuclear industry under state-owned company Rosatom, through the Russians' own efforts and without any Western participation. For the time being, Rosatom has proven to be well-managed and competitive in the international market, though only in the select countries willing to close the deal with Russia in this industry. Considering the technological progress in the industry, especially among Chinese producers, Rosatom's future competitiveness remains doubtful.

Based on the numerous examples meticulously described in the book, the author provides several insights into the Russian opening to the West in the 1990s. First, the pattern of the opening was incomplete and uneven, precisely because of the pace at which it happened and the chaos out of which it was born. Furthermore, from the start, there were immense cultural and political differences between the Russians and the incoming Westerners, which led to conflicting approaches to doing business. Unfortunately, both sides had unrealistic expectations, hence disappointments were mutual. Finally – and very important for considering the effects of economic sanctions – the opening created hostages to the fortunes of politics. In particular, the willingness of Russian companies and state institutions to depend on Western technology, supply chains, and financial ties was, in retrospect, remarkable.

[9] The saga ended with BP compensated for all the losses with a 19.75 per cent stake in Russian state-owned oil company Rosneft. After the Russian invasion of Ukraine, BP decided (implicitly encouraged by public recommendations from the executive and legislative branches of the UK Government) to divest, i.e. to sell its entire stake in Rosneft. Perhaps this political pressure was not decisive, but it certainly contributed to the voluntary corporate decision, which mitigated substantial reputational risk. It is estimated that this fire sale generated BP's capital loss of USD 24 billion. Begović (2024) provides further details on this capital transaction.

Without questioning the book's insights, the reader ponders that this dependence was quite expected. The introduction of the market economy and capitalism means profit maximisation as a goal, and that goal can be achieved only with superior technology, efficient supply chains, and abundant and reasonably priced finance for funding investments. Western technology has been superior to the Soviet/Russian one, international supply chains have been much more efficient than domestic ones, and, due to low domestic saving, savings/capital imports were necessary to fund the investments. Hence, this level of economic integration was necessary with the advent of the market economy.[10] Although the author suggests that 'the actions of Russian businessmen and bureaucrats alike suggested that they believed Russia's opening was there to stay' (p. 87), it seems they did not have much choice after all.[11]

Chapter 2 ('Black and White') is about Russians in the West, who, according to the author, encompass four main groups: Russian banks, large industrial corporations, oligarchs and other magnates, and finally tens of thousands of ordinary individuals. The author has no second thoughts. 'Whereas Russian public opinion responded to the presence of the West with a complex mixture of admiration and imitation, but also growing resentment and rejection, the reaction of Western opinion to the Russians in the West

[10] A vivid illusion of this necessity is provided by the operations of the Russian airline industry. All major carriers, including Aeroflot, the flag carrier, have switched to Western civilian aircrafts, effectively Airbus and Boeing. They did it simply because these aircraft are far more efficient than the Soviet aircraft produced for decades. In short, the costs of passenger-kilometres – a basic unit of operational efficiency of airlines – of Western airliners have been far superior. Whoever stuck with the Soviet airliners – and there was no new generation of Russian airliners available – would not be competitive both on the domestic or the international markets and would exit the market due to bankruptcy. This has been a very strong incentive for the carriers to purchase or lease Western airliners, to arrange their maintenance in Western hubs, and to borrow money from Western banks for purchasing/leasing them. As simple as that! Whoever considers that decision an anti-Russian, anti-patriotic conspiracy (perhaps orchestrated by MI6), knows nothing about the economy and the airline industry. The example of such an ignorant attitude is seen in Todd (2024).

[11] As to the bureaucrats, the author refers to the Russian Central Bank (RCB), which parked half of its foreign reserves (indeed, most of its non-gold reserves) outside of Russia, considering them to be safer and more productive there than inside the country – an astonishingly optimistic wager on continued good relations. Be that as it may, the reader ponders that this is perhaps evidence that the Kremlin did not expect such comprehensive sanctions, including the freezing of the financial assets that the RCB had deposited in Western banks. Otherwise, since the invasion of Ukraine was planned for months (actually 11 months, according to the verbal slip of a Russian MP), there was ample time to withdraw these assets.

was largely negative from the first, and worsened over time – something that the Russians abroad perceived and resented' (pp. 88–89). According to Gustafson, this, together with the Russians' attitude towards the West, already described in the previous paragraphs, led to a climate of mutual mistrust and hostility, which reinforced the simultaneous deterioration of geopolitical relations. In short, the reader infers – a fertile breeding ground for economic sanctions.

The reasons for the negative attitude of the West to the Russians who came to the West are illustrated in the rich stories of oligarchs like Oleg Deripaska, Roman Abramovich and 'Londongrad', with substantial Russian impact on the real property and related services, and Russian mafia, which ostensibly took over the criminal world of the cities in the West. It is up to the reader to consider the justification of the negative attitude of the West towards Russia because of the oligarch, but the author is straightforward about the export of Russian crime. Referring to the findings of Galeotti (2018), the author claims that the supposed Russian tsunami of organised crime into the West, based on a globalised, universal criminal class, is a myth. Referring to Galeotti (2018), Gustafson compares Russian criminals (*vory*) to viruses, 'without any plan or central mind, but simply infecting those hosts which offered the right conditions and which lacked antibodies' (p. 115). The well-organised societies of the West found these antibodies rather swiftly.

According to the author, it is sensationalist media stories that painted a lurid picture of a massive invasion of Russian organised crime, and that perception was amplified by a steady stream of artistically poor Hollywood movies in which the Russian underworld provided plentiful absolute villains, bad guys for action-packed films[12] – a sad echo of *The Russians Are Coming, the Russians Are Coming,* the 1966 American comedy with substantial Cold War self-irony.[13] One way or the other, a substantial chunk of the Western public unconditionally believe what they see on the silver screen (or whichever screen these days), and take for granted that Russians are villains. Period!

[12] A notable exception to this pattern is David Cronenberg's 2007 masterpiece movie *Eastern Promises*. The story *is* about the Russian criminal underworld in London, but the characters are very well developed and balanced, and the story is far from straightforward. Essentially, on the stage of the criminal underworld, the core of the story is about human tragedy. *https://www.imdb.com/title/tt0765443/*, last visited November 10, 2025.

[13] Directed by Norman Jewison. *https://www.imdb.com/title/tt0060921/?ref_=fn_all_ttl_1*, last visited November 10, 2025.

Chapter 3 ('Coda') ends the first part of the book, focusing on reflections on Russia's failed two-way opening. The author sums up the legacy of Russia's two-way opening in three words: motives, beliefs, and emotions. The motives, according to the author, were different. *Grosso modo*, Westerners in Russia had a mission of changing Russia and earning some money, but Russians in the West had only opportunistic and short-term goals. The reader wonders about the motives of Russians in Russia – perhaps they should count for something in this matter.

As to the beliefs, the author refers to them as the shared optimism, as he claims that by and large both sides shared a common belief that Russia's opening would last, that the market liberal order had come to stay, and that good relations would endure. Well, the reader comments that may have been true before Vladimir Putin's 2007 Munich speech. After that, the relation became only bearable, with ice cubes poured into the jar in 2014, after the Russian invasion and annexation of Crimea.

The author claims that the emotions have been negative, since many aspects of the two-way opening engendered negative emotions, ranging from mistrust and suspicion (primarily in the West) to disappointment and disillusionment (mainly in Russia). 'The common consequence was that the opening of Russia, despite its *historic transformative impact* on Russian society and the economy, proved to be flawed and fragile' (p. 125, italics – BB). Nonetheless, 'historic transformative impact' is here to stay.

3. TIME PRESENT: STORM OF SANCTIONS UNLEASHED

Part Two of the book ('Perfect Storm: Sanctions and Responses') starts in an appropriate way, by evaluating the starting point of the sanctions from the viewpoint of the Russian economy and the key political decision-maker in the two decades leading up to the 'the hurricane of war and sanction' struck (Chapter III: 'Putin and the Opening of Russia). In short: What were Putin's roles in the opening of Russia before the Russo-Ukrainian war?

Putin's role was twofold. On the one hand, he supports fiscal conservatism, maintaining macroeconomic stability and flexibility. 'This Putin achieved by consistently supporting the economic "liberals" – the *finansisty* – in his macroeconomic, fiscal, and budgetary bodies, chiefly the ministries of finance and economy, and above all the Russian Central Bank' (p. 132). The result is that at the time of the invasion of Ukraine and introduction of the Western sanctions, Russia was, macroeconomically speaking, a sound economy, featuring a low debt/GDP ratio, abound and recurring fiscal revenues (due

to oil and gas export), a balanced budget and balance of payment, a sound financial sector, and a low inflation rate. Above all, it was run by competent people, such as Elvira Nabulina, Governor of the Russian Central Bank (RCB), who had a free hand to do whatever they considered important for maintaining macroeconomic stability. It was Putin who selected these people, appointed them, and gave them free rein to do their (macroeconomic) task.[14] That is one of his legacies.

On the other hand, control over rents and favours has been decisive for Putin's grip on power. The oil and gas revenues, which began (due to the price surge) to flood into Russia shortly after Putin's accession, provided him with a monumental lever for distributing substantial rents and favours.[15] The author points out that 'These are ultimately the keys to Putin's power over the various elites that make up his system' (p. 133). Effectively, the economic institutions in Russia are not 'inclusive' but deeply 'extractive', following the widespread distinction in institutional economics (Acemoglu, Robinson 2012), meaning that the Russian economy is dominated by vested interests, rent-seeking, and very few new entries and negligible innovation. The reader infers that it was the mechanism for the political power grip that made Russia – despite its high level of human capital – a natural resource-based, commodity-specialised, non-diversified economy, deeply integrated in the world economy as a commodity producer. That is also Putin's legacy.

This is the economy on which the Western sanctions were imposed. They are considered in Chapter IV ('The Hurricane of Western Sanctions'). Gustafson believes that the general feature of the sanctions is 'their complexity, which is compounded by the circumstances of the Russian invasion: The post-invasion sanctions were adopted in haste, driven by emotion, and largely improvised. The result is a confusing tangle of inconsistencies, exceptions, and walk-backs' (p. 153). Notwithstanding the character of the sanctions, the reader is not entirely convinced of this explanation. First, since the Western

[14] Putin's motive for this policy, which he even subscribes to in the fourth year of the Russo-Ukrainian war, at least up to a point, remains elusive. A reasonable speculation is that the sheer horror of the 1998 financial crisis in Russia made him aware of the perils of macroeconomic instability. Some elements to support this hypothesis can be traced to his reactions to the 1998 financial crisis at a meeting with young Russian radical libertarian economist Andrei Illarionov (Short 2022, 259–260), who later became one of his advisers in the 2000s. Andrei Illarionov has since left both the office and Russia for the US. He was a senior fellow at the Cato Institute for a number of years, and is currently a senior fellow at the Center for Security Policy, in Washington, D.C.

[15] The mechanism of rents created and dissipated by the exploitation of natural resources in Russia, predominantly oil and gas, is well described and modelled in the literature (Gaddy, Ickes 2005).

intelligence services timely provided ample evidence of the Russian military buildup directed towards Ukraine, the Western political elite had enough time to prepare a response, the bottom line of which was: sanctions only, without any direct military engagement with Russia. Second, Western bureaucrats, if not politicians, were fully aware of Russia's major role in supplying many commodities and were mindful that a thorough, straightforward and watertight trade embargo would severely disrupt the global supply of many commodities and related downstream global markets.[16] That has been the reason for the very complex, complicated, selective and deferred sanctions. In some cases, the sanctions have been rather moderate, such as the American measure of introducing the price cap of Russian oil of USD 50 per barrel, without restriction of the export, keeping to a minimum the disturbances in the world oil market, where Russia is one of the major players.[17] Third, many Western companies were operating in Russia at the time that the sanctions were introduced, so the Western governments wanted to give them some latitude to adjust and avoid substantial capital losses – in the event that they left Russia. Some of these companies decided to stay.[18]

[16] Building this awareness was a trial-and-error process. Demarais (2022, 92–94) demonstrates the adverse global effects of the ill-conceived US sanctions against Russian oligarch Oleg Deripaska and his corporation, Rusal. Not only was the global aluminium supply compromised and the market destabilised, but that shock was transmitted to the downstream markets, including aluminium can supply, hence the global beer and soft drinks industry was affected, due to the shortages of packaging. Consequently, the global beer and soft drinks supply was disrupted. When the US OFAC (Office of Foreign Assets Control) realised all these unintended and undesirable side effects, the sanctions were suspended. This episode is a testimony to the extent to which global supply chains are intertwined, and that action on one link of the chain impacts all other links and has comprehensive global effects. That knowledge, it seems, saved Russia from a strict and watertight trade embargo.

[17] This stage in the US attitude towards Russian oil export came to an end on 22 October 2025, after the book was published, just before this review's manuscript was submitted to the journal. The US Treasury, under orders of the US President, sanctioned the two biggest Russian oil producers and exporters: Rosneft and Lukoil. These two corporations account for about 80 per cent of Russia's oil exports. Not only is it prohibited for US companies to deal with the two, but the secondary sanctions are threatened for companies in third countries. The OFAC press release is rather straightforward about the secondary sanctions threat: US Department of Treasury, 2025, Press Release, 25 October, *https://home.treasury.gov/news/press-releases/sb0290*, last visited November 10, 2025.

[18] This is exactly the reason why there are still (at the time this review's manuscript was submitted to the journal) two Western banks (Raiffeisen and UniCredit) operating in Russia, to enable financial transactions regarding both the operations and the exit of the Western companies.

One way or the other, tough sanctions – although not thorough and watertight – were imposed on Russia, with the author claiming that Putin was surprised by them. 'His behavior suggests that, where the United States was concerned, he anticipated how Washington would react, but discounted its reach. In contrast, the EU's strongly negative reaction appears to have taken him by surprise. His calculation was apparently that with a quick conquest of Ukraine, he could present the West, and especially Europe, with a fait accompli, and he was prepared to weather the brief squall that would follow. But in both his military strategy and his economics, he miscalculated' (p. 148).

Apart from Putin's miscalculations, there were two blunders regarding the sanctions: the first was that sanctions would have immediate economic – if not political – effects, and that the collapse of the Russian economy would start to within months of their introduction. Nonetheless, the statements like 'the sanctions have crushed the Russian economy', less than a month after their introduction, were, at best, somewhat premature.[19] To rephrase Mark Twain's quip: 'The report of the sanctions' success was an exaggeration'. The main reason for the blunder of the optimism regarding the impact of the sanctions was neglecting that, as already pointed out in this review, Russia was a macroeconomically sound, fiscally conservative, and sovereign-debt-aversion economy, very well managed by the *finansisty* from the RCB and the Ministry of Finance.

The other blunder was the miscomprehension that the sanctions would do no harm to the Russian economy at all, because it was well organised, based on natural resources, and had a viable real sector. It goes so far as to claim that Russia, for economic reasons, should be grateful for the sanctions. The main proposition of this view (Todd 2024) provides no evidence whatsoever, save that the mortality rate from alcoholism, the suicide rate, and the murder rate in Russia dropped after Putin's advent to power, and that according to his model (not data) Russia produced more engineers per

[19] This was stated by US President Joe Biden in early March 2022, and he added, 'The ruble has been reduced to rubble', as the Russian currency dropped momentarily by more than 70 per cent. Nonetheless, the Russian currency regained its value due to the swift, decisive and competent reaction of the RCB. In the same way, the appropriate and precise policy reaction of the RCB to the sanctions prevented a financial crisis in Russia. Hence, a horror (for Russians) scenario of the annual GDP drop of 15 per cent due to the financial meltdown was avoided. For more on these developments, see *https://www.politico.com/news/2022/03/31/ruble-recovery-russia-biden-sanctions-00021850*, last visited November 10, 2025.

year than the US (*sic*).[20] Nonetheless, the risk to the Russian economy is precisely that it is specialised in natural resource extraction, that it is not diversified, and that it lacks indigenous technological innovation, therefore it heavily depends on Western technology and know-how. The outcome was that the sanctions did not produce the swift effects that some had hoped for, but that does not mean that they did not produce any effects at all, especially in the already described rent-seeking society, depending on huge monetary inflows from commodity exports. All that is in a country that faces serious demographic problems, not only because of war casualties but also a massive exodus of people, most of them highly skilled – i.e. huge human capital moving out of Russia.[21]

Gustafson subscribes to neither of these fallacies. 'My key proposition is that if the sanctions are maintained and vigorously enforced, they will have increasingly severe long-term impacts on the Russian economy, causing its gradual degradation' (p. 152) Furthermore, the author refers to the view of Aleksandra Prokopenko, a former deputy director of the RCB, as she remarks that 'Putin's military adventure in Ukraine and the sanctions have not made a breach in Russia's economic fortress, but they put a time bomb under its foundations'.[22]

The author provides a comprehensive report on the West's sanctions imposed on Russia, analysing their mechanisms in different countries, the vagueness in many documents, and substantial latitude for decision-makers in their implementation, increasing uncertainty for both sides.[23] What makes

[20] Emmanuel Todd is a prolific author of journalistic books dealing with global topics. His *Wikipedia* page specifies him as a 'French historian, anthropologist, demographer, sociologist and political scientist at the National Institute of Demographic Studies' (*https://en.wikipedia.org/wiki/Emmanuel_Todd*, last visited November 10, 2025. Whatever he may be out of these five, he is definitely not an economist. His 2024 contribution about the Russo-Ukrainian war, a book under the aspiring and pompous title *The Defeat of the West* (Todd 2024), vividly demonstrates his obvious lack of basic economic knowledge.

[21] It is estimated (Guriev 2025) that as of mid-2025, around 250,000 Russians have died in the Russo-Ukrainian war (with total Russian casualties coming close to 1 million), and a rough estimate is that 1 million people left Russia. There are no official Russian source for any of this data. It is telling that this year (2025), Russia has stopped publishing demographic data altogether, indicating that the demographics are not faring well in the country.

[22] *https://www.bloomberg.com/opinion/articles/2023–08–17/a-sickly-ruble-reveals-russian-economic-weakness-that-vladimir-putin-will-not*, last visited November 10, 2025.

[23] The author points out that vague provisions on sanctions provided incentives for firms to over-enforce the sanctions and/or to self-sanction. It is better to be safe than sorry has been a slogan of risk-averse firms. Furthermore, substantial

it even worse for Russia is that the West's sanctions do not have a clearly specified goal, but are considered as the only substitute for not engaging in a full-fledged war with Russia. 'Equally missing from the West's sanctions is clarity over their implementation and, above all, their eventual termination. [...] There is as yet no indication how the sanctions might be used in actual negotiations, and how they might eventually be dismantled. [...] There is no apparent endgame. Indeed, with each new Russian atrocity on the Ukrainian battlefield, the Western urge to punish only grows, new sanctions are adopted, and the hurricane gains in intensity' (p. 155).

Gusalfson's bottom line is straightforward: 'Economic sanctions are high-cost instruments with limited impact. They are difficult to apply and enforce. Yet the West has little choice but to persevere with them, while improving them wherever possible, until the right conditions for their removal are met. As Mairead McGuinness, the outgoing EU commissioner for finance, says "Sanctions are the only weapon we have." Other than war itself' (p. 207).

Chapter V ('Dancing in the Rain') is about Russian responses to sanctions. Perhaps it is the most enlightening chapter of the book, because it provides insights and details of what has been happening in Russia that (to the best of the knowledge of the author of this review) are quite new in the sanctions literature. Gustafson's picture is about both the forest and the trees. There are names of the key operators in different industries and institutions, their background, skills, strengths and limitations, successes and failures. In short, this chapter provides a comprehensive, detailed and precise anatomy of the Russian responses to the Western sanctions, as never seen before. Kudos!

The author starts with a useful taxonomy. 'Russia's responses to the Western sanctions have been of four sorts: macroeconomic and financial adaptations, evasion and workarounds, import substitutions, and retaliations' (p. 210). In short, macroeconomic and financial adaptation has worked rather well, so far. The reasons for that success are the country's good starting macroeconomic situation and competent people in charge of the job, with Putin's political support – for the time being. The reader infers that support from Putin should not be taken for granted in the future, as the war economy path that Russia has committed to brings on some difficult trade-offs, and like every other dictator, Putin must balance between rivals on the backstage, especially between the *finansisty* and the *siloviki* (those of military and security services, in charge of brutal force). Furthermore, a sound macroeconomic situation of the country cannot be achieved on a

reputational risk made Western firms to break their business relations with the Russian counterparts, regardless of a specific provision in the sanctions documents.

deteriorating economic foundation, especially in its real sector. Hence, it is very doubtful that the Russian macroeconomic stability under sanctions is sustainable. The author is aware that, claiming 'So far, it has been creative and successful' (p. 211). It seems that the stress should be on 'so far'.

The notion of 'evasion and workarounds' is self-explanatory. It is about the resourcefulness of Russians, mainly in the economy at large – comprising of companies, traders, and individuals – that has responded to sanctions by developing parallel imports and exports via both legal and illicit channels, with a little help from the Government and chiefly through 'friendly' third countries. Gustafson claims that these, too, have been largely successful. Nonetheless, he provides evidence that these procedures inevitably increase costs for both producers and consumers, lead to inevitable delays in supply, and, in technologically advanced sectors, result in only the second generation of the product being available – not the latest one. Furthermore, the author explains how backwards some Russian industries are, especially those related to electronics and microcomponents. The reader's comment is that this is not surprising in a rent-seeking economy based on the exploitation of natural resources. Even indisputably high human capital cannot compensate for the basic flaws of 'extractive' economic institutions. One way or the other, regardless of the success of sanctions evasion, the backwardness of technologically savvy industries in Russia will only increase.

Import substitution as a response to sanctions is a misleading notion for two reasons. First, for a trained economist, the notion of 'import substitution' is associated with a strategy of economic development (Alexander 1967) that was applied in the 1950s, 1960s, and 1970s, especially in Latin America, with rather disappointing results. The essence of the strategy is to stop importing goods and, in time, with the development of domestic manufacturing, produce them locally. Nonetheless, in Russia's case, instead of importing goods into the country, which is not feasible under sanctions, they should be produced locally. Hence, this is not a deliberate development strategy, but an imposed one, i.e. only as a response to the sanctions. The only problem is that, in many cases, the Russian industry is either unable to produce such goods at all, or cannot produce them efficiently (high cost per unit), or can produce only inferior-quality goods. Considering these constraints, the obvious choice is to import these goods from 'friendly' countries, such as China. This is the second reason for the misleading notion of 'import substitution'. It is much more like 'importer substitution', i.e. substitution of the country of origin. It is, to some extent, followed by 'de-dollarisation', i.e. swapping the US dollar for another transactional currency.

For Russia, the favourite friendly country to trade with is China, a very dynamic and diversified economy, with the Chinese renminbi as the currency substitute for the US dollar for transaction finances. 'Russia is making progress in moving away from the dollar and the euro, mainly toward the Chinese renminbi. In contrast, it has made little headway with import substitution. But if pursued over the longer term, these two policies will reorient Russia's economy fundamentally, away from the dependence on the West that was the central feature of Russia's thirty-year opening, and toward an economy more oriented toward the East' (p. 243–244).

Gustafson is sceptical about this move (a 'Pivot to the East') and its beneficial effects for Russia. It is true that China, as a diversified economy, can offer Russia a wide range of products, but the decision-makers in the country, especially firm managers, are aware of the possibility of US secondary sanctions due to them violating export restrictions to Russia, resulting in losing access to the US market and preventing transactions in US dollars (by forbidding US banks from maintaining USD corresponding accounts for the firms, a necessary condition for USD transactions) with any other counterpart in the world.[24] The other problem, the author emphasises, is that China's firms are reluctant to export components to Russia, but rather export only finished goods (moving upward on the value chain), undermining the supply chains for Russian manufacturing. The corresponding problem is what would be the content of Russian exports to China, especially taking into account 'de-dollarisation' and switching to the Chinese renminbi as the transaction currency. Very few manufacturing goods, perhaps in military technology, and predominantly energy, oil and gas that are eligible for export to China. The main problem for the Russian export of hydrocarbon fuels is that China's energy transition has been radical. China is not switching from coal to gas and oil; it is switching directly to renewables – solar panels and wind turbines.[25] Massive investment in those capacities is a testament to this

[24] Secondary sanctions are the US policy instrument towards companies in third countries, introduced in 2014 to boost the effectiveness of US sanctions against Iran. Effectively, this is extraterritorial enforcement of the US legal rules. Although there is a dispute over the legality of this approach, and the EU complained against it on legal grounds, the matter has been settled as the secondary sanctions are considered a fait accompli. Demarais (2022) provides the US rationale for the secondary sanctions, closing the loophole in cases when the sanctions are not international.

[25] Acemoglu *et al.* (2023) formulated a model of transition from dirty to clean energy technology, with gas as an intermediary in transition from oil/coal to renewables. The model specifies conditions for direct transition, bypassing gas as an intermediary. It seems that China meets these conditions.

pattern of energy transition.[26] Accordingly, it is reasonable to assume that Chinese demand for hydrocarbon fuels (oil and gas) will start to decrease, even in absolute terms, so the market will shrink. For the time being, China purchases Russian oil (at a heavy discount, a typical opportunistic behaviour) and gas, but predominantly LNG and the operational pipeline (Power of Siberia 1) is using only half of its capacity for Chinese customers. Obviously, China's energy strategy is to diversify its hydrocarbon fuel supply as much as possible and play the suppliers against each other.

Furthermore, the author believes that Russia and China are competitors in third markets for the manufacturing products that Russia still exports, with nuclear energy being an example. It is China that is gaining the upper hand with its newly developed Gen IV modular nuclear reactors, which are more advanced than what Rusatom can provide – in fact, more advanced than anyone in the world can supply. In short, 'no limits partnership' and 'ironclad friendship' are juicy political slogans, but without much economic substance. The reader feels that the author perhaps considers Russo-Chinese economic relations through a zero-sum game lens – definitely not a good one for foreign trade considerations. Nonetheless, these relations are not just about foreign trade; it is not the USA and Canada type of relation. There is also a substantial strategic component in relations between the two nations: a declining and rising global power. Furthermore, there is a troublesome history to these relations, with a resilient Chinese memory of the 19th-century period of Russian expansion to the Far East, when China was weak as a nation – the time when the present border between the two countries was set.[27] The reader speculates that contemporary nominal

[26] There is a substantial shift in China's energy mix. At the end of 2024, the country's total generation capacity was 3.35 TW, with wind and solar making up 42 per cent and total non-fossil sources accounting for 58.2 per cent. China's total installed power generation capacity is expected to reach 3.99 TW by the end of 2025, up 19.2 per cent from a year earlier, with wind and solar accounting for nearly half of the total, due to massive investment in renewable capacity additions projected to exceed 500 GW in 2025. *https://www.pv-magazine.com/2025/07/10/china-on-track-to-deploy-380-gw-of-pv-in-2025/*, last visited November 10, 2025. It is beyond the scope of this review to analyse the reasons for such a shift, but it seems sustainable. This is a conclusion of *The Economist*, disclosed in its Special Report, published in November 2025. *https://www.economist.com/weeklyedition/2025–11-08*, last visited November 10, 2025.

[27] In his Amur River travelogue, Thubron (2021) provides grim details about the 19th-century history of the river, wars around it, border disputes, massacres and contemporary resentment of the Chinese people on the southern bank of the Amur about the river being the frontier between the two countries. Furthermore, economic growth on the southern bank of the river and stagnation, even degradation, on the northern bank testify to the changing balance of power.

'ironclad friendship' is just an aberration in a troublesome history of Russo-Chinese relations. And yet, Russia is turning to China to avoid the Western sanctions. Good luck to Russia with that choice, the reader sarcastically ponders, based on ample information and insights from Gustafson's book.

The prospects of Russian retaliation, the fourth type of the Russian response to the sanction, is considered in Chapter VI ('The Great Western Quasi-Exodus'), focusing on the developments regarding the Western companies in Russia, i.e. the assets of the Western investors in the country. The author labels these developments as 'quasi-exodus' because 'only a small minority have actually left. According to the Kyiv School of Economics (KSE), out of nearly 4,000 foreign companies present in Russia at the time of the invasion, only about 425 are gone' (p. 256).[28] The author explains this pattern, analyses the consequences of this development for Western investors and the Russian economy, and considers the long-term prospects for a return of Western businesses and investment 'if and when Russia reopens to the West'.

As to the Russian policy towards the Western FDIs, the author points out that '[t]he ones that left first were usually able to make a clean exit. But those that delayed have increasingly found themselves trapped by obstacles of all kinds. Over time, the attitude of the Kremlin has shifted from a stance of "more in sorrow than in anger," to one of punitive vengefulness, and with each passing month it has made it more and more difficult for the remaining Western companies to leave. Three years after the invasion, Russian policy toward the remaining Western companies has become increasingly one of thinly veiled expropriation' (pp. 262–263). Gustafson provides all the details of this escalation of hostility (coming directly from the Kremlin) towards the Western companies, inflicting substantial capital losses for those who exited Russia one way or the other.

[28] This refers to the situation in October 2024. The KSE runs a website (*www.leave-russia.org*, last visited 10 November 2025) which provides all the information on FDIs in Russia. The review of the data on the website provides a picture somewhat different to the one painted by the author. At the time of the last visit to the site, out of 4,244 FDIs in Russia, 1,756 (41.1 per cent) had continued operations (business as usual), 111 (2.6 per cent) had paused investments, 490 (11.5 per cent) had scaled back operations, 770 (18.1 per cent) had suspended operations, 590 (13.9 per cent) were exiting Russia, and for 527 FDIs (12.4 per cent) the exit had been completed. So, less than 50 per cent of FDIs have continued operating in Russia. Furthermore, the data covers all FDIs in Russia (including those from China, Turkey, India, Belarus, Azerbaijan, Israel, etc.), not only Western investors. Accordingly, it is reasonable to assume that the percentage of Western companies that are currently exiting Russia or that have completed the exit is higher than 25 per cent. In short, it is doubtful whether this development should be labelled as '*quasi*-exodus'.

The author provides some clues about Putin's reasons for such a move. The rational motive is assets transfer at bargaining prices – or in some cases, negligible prices or no price at all – to selected Russian oligarchs, with the mutual understanding that such a favour will be returned to the Kremlin when the time comes. The reader, nonetheless, suspects that this was not the whole story, as the author claims that Putin was surprised by the decisions of the Western companies to exit Russia. Then, as he realised his blunder, perhaps he became furious with the Western companies and exacted rampant revenge on them. To rephrase Pushkin's famous line, that was 'a Russian revenge, senseless and merciless'.[29] In short, it seems the former KGB agent – meticulously trained to lie, to hold his composure, and hide his emotions[30] – demonstrated that he is actually a very emotional man. What the costs of his emotional outburst towards the Western companies for Russia will be in this case is another issue.

According to the author, Western FDIs in Russia brought what the country was missing in the post-Soviet era: new products (goods and especially services), new technologies, whole new ways of doing business, and new skills. With substantial spillover effects, these FDIs fundamentally changed the Russian economy and society, and that change is here to stay. Nonetheless, the exit of the Western FDIs 'symbolizes the dashed aspirations and illusions of an entire era' (p. 263).

As to the future, Gustafson has no second thoughts. 'Equally significant is the fate of the large number of Western companies that have so far remained in Russia, either by choice or under compulsion. The mounting pressure on them at all levels and in all forms, ranging from harassment to outright confiscation, is completing the destruction of Russia's image as a place for foreigners to do business. Even when a new generation of Russians comes to power and the Ukrainian war is settled – however and whenever that happens – it will be a long time before Western capital and businesses return to Russia' (p. 263).[31] Well, a dictators' rage has its own price, though it is usually the next generation that pays it.

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[29] The line 'God save us from seeing a Russian revolt, senseless and merciless' is from Pushkin's *The Captain's Daughter* (1836), a historical novel set in the time of Pugachev's Rebellion (1773–1775) against the rule of the Empress Catherine II (Catherine the Great).

[30] 'A trained Moscow Centre hood', to borrow a jargon of the British intelligence community, unveiled in dialogues in John Le Carre's novels.

[31] Money has had a long memory. In February 1918, the Soviet government of Russia declared the Russian sovereign debt, mostly owed to Western private lenders, null and void and refused to service it at all (Malik 2018). The consequence was that Soviet Russia, and later the USSR, were excluded from the international capital

Chapter VII ('The Balance Sheet') sums up both the effects of Russia's transition to capitalism and its opening to the West, and the effects of the sanctions on Russia. The bottom line of the 'balance sheet' is that the sanctions substantially reinforce the major flaws of the contemporary Russian state-capitalist economy. The author points out that there is still debate over the extent to which Russia's economy is isolated. His view in the debate is that 'Russia is indeed isolated in more fundamental ways – from the channels and flows that create efficient investment and innovation, from human transfers of technology and know-how, from the most efficient trade routes and patterns, and from a global communications web that remains largely centered in the United States' (p. 315). This is the reason why Gustafson refers to the sobering quip from the end of a documentary movie about young Russians who had left Russia and made it to California, right to Silicon Valley. 'The high-tech future of the world is Russian, but not in Russia' (p. 315).

4. TIME FUTURE: NOTHING SHOULD BE RULED OUT

The reader's utmost delight, a cherry on the top of the cake comes at the end of the book with its Part Three ('Looking into the future'), consisting of only one chapter (Chapter VIII): 'Around the Corners of History: Toward a Second Opening of Russia?'. The chapter is about the future. The author's assumption is that 'Someday, under circumstances we cannot yet foresee, Russia will seek to reopen to the West' (p. 339). That Gustafson specifies two scenarios. 'A reopening of Russia to the West can take two possible paths – good or bad. A "good" reopening would be based on the reaffirmation and recodification of mutual interests between Russia and the West, based on negotiation and concessions on both sides. A "bad" reopening is one in which Russia re-enters the world "through the back door," because of Western fatigue, inattention, attrition, and erosion of will and unity, which Russia exploits through evasion, manipulation, and subversion. In a good reopening, the Ukrainian war is settled by negotiation, fighting stops, and the sanctions are gradually removed, while in a bad reopening, there is no negotiation, the Ukrainian war grinds on, the sanctions remain in place, and

market, unable to borrow any money from Western lenders until 1987, when an arrangement was made under which the USSR recognised all the claims of Western lenders. Before that, even during World War II, in which the US and the USSR were allies and the USSR was eligible for the US Lend-Lease Act assistance, it was only the lease component that was enforced, not the lend, i.e. the loan component was missing.

Russia works around the West, while seeking to weaken and undermine it. The bad path is the one we are on today. It is harmful and dangerous for both Russia and the West. It locks Russia and the West into a new Cold War, less stable and even more dangerous than the first one. Quite apart from geopolitical instability, the economic consequences are enormous' (pp. 339–340). These are two obvious, very well specified options, good and bad, and why the author labels the bad option as 'bad opening' is a mystery, since it is not an opening at all.

One way or the other, the reader is eager to hear about a 'good opening' and the preconditions for it. Even in the introduction of the book, the author spells out two conditions, both necessary, for the 'opening' of Russia. 'But before *any* reopening of Russia is possible, two things must happen. The first is the departure of Vladimir Putin. [...] The second precondition, however, is that Putin's chief legacy, the Ukrainian war, must end. Putin's departure will not by itself remove the many underlying causes of the Ukrainian conflict' (p. 26, italics – BB).[32] Both conditions are self-explanatory. Putin's credibility in the West is irreversibly compromised, and even the incumbent US President, Donald Trump, a person convinced of his deal-making genius, dropped the second meeting with Putin, at least for the time being.[33] The Russo-Ukrainian war is a political and economic conflict between Russia and the West, with military action only by proxy. There is no room for opening between foes.

As to the first condition, the author assumes that Putin will not leave office, save perhaps the last few months of his life. Putin will eventually die. Even the ardent Putinofiles acknowledge this, although reluctantly. The author set the stage for succession in the mid-2030s. According to Gustafson, it is a group of people (like those who gathered after Stalin's death, the reader ponders) who will decide who will run the country as the president and what the others' roles will be. The future political elite will, according to the author, recognise that the 'situation we face today is fragile and untenable.

[32] At the beginning of the book, the author refers only to Russia opening to the West, without distinguishing between 'good' and 'bad' ones. This seems reasonable for the reader, since 'bad opening', as it is specified in the final chapter of the book, looks like *contradictio in adjecto*.

[33] The first one, in August 2025 in Alaska (these developments came after the book was published, just confirming ex post that the author was right), which was prepared in an inept way, was Trump's fiasco, labelled by *The Economist* as the 'Groucho Marx school of American diplomacy'. *https://www.economist.com/europe/2025/08/16/donald-trumps-gift-to-vladimir-putin*, last visited November 10, 2025. The second meeting was scheduled to be held in Budapest in October 2025, but it was 'postponed indefinitely' at the time this review goes to press. The official press release, with more diplomatic wording, stated that there were 'no immediate plans to reschedule the meeting'.

War and sanctions have worn the country down and left it increasingly impoverished and isolated from the West, which is still the financial and technological center of the globe' (p. 348). Hence, what has been learned?

According to Gustafson, the lessons could be '[w]e have learned three painful lessons. The first is that the path of revanchist imperialism is a dead end. It has brought NATO and the EU up to the very borders of Russia, precisely the result that Putin sought to prevent. The second is that Ukraine is not within our grasp at any acceptable price. Ukraine with its Western allies is too strong to lose the war, and we are too weak to win. The third is that an alliance with China leads only to our becoming a junior partner, locked into dependence on Chinese technology and investment, which have not been forthcoming on any significant scale' (p. 348). The author claims that, based on these three lessons, the conclusion is inescapable: Russia must turn back to the West, both to Europe and to the United States, and seek to develop a balanced economic relationship with all sides. The crucial question is whether a constructive economic reopening with the West is possible. Gustafson focuses on the economic reopening of Russia, implicitly downplaying political or cultural ones.[34] Taking that into account, the reader wonders whether economic reopening will inevitably produce some spill-over effects.

There may be a basis for renewed understandings, claims the author, 'if both sides seize the moment, and if realistic step-by-step concessions are made by both sides, on three fronts: Ukraine, sanctions, and strategic agreements' (p. 350).[35] Gustafson goes step by step, starting with the Ukraine issue. As to the future peace treaty, there will be three main issues: (1) the status of Crimea and the eastern provinces of Ukraine; (2) Ukrainian membership in the EU and NATO; and (3) the issues of reparations and reconstruction, and prosecution for war crimes. The author provides clues that the West will have to make concessions. His guess is: Crimea should be Russian territory, EU membership of Ukraine should not be ruled out, NATO

[34] In the words of a future fictional Russian leader, 'I'm not talking about a return to political integration – joining NATO and the EU and so on. We will not repeat those illusions. We are a great power, and we have no need of burdensome alliances. But a great power requires a strong and competitive economy. And like it or not, the only way to get there is through economic reintegration with the West, which remains the center of world financial power' (pp. 348–349). Hence, a pragmatic Russian political elite attitude is foreseen, focusing on the lowest-hanging fruit (however high it may be).

[35] The author provides very little information about his view of strategic agreements, so they will not be further mentioned in this review.

membership of Ukraine is not indispensable, and as for the reparations, reconstruction and prosecution of war crimes – the author honestly admits that all of them are difficult issues.

As to the sanctions, the author considers that they cannot be lifted all at once – nor should they be, he believes, since they will be needed as bargaining chips – but they can be removed layer by layer, as the Ukrainian agenda moves forward. The first layer is the sanctions on consumer goods. The next layer is the financial sanctions. And then, step by step, all other sanctions, but the author does not suggest the conditions for those steps. The reader is convinced that these conditions will be imposed on Russia in the process. Even if things go smoothly, lifting the sanctions, the reader concludes, will be a lengthy and painstaking process, perhaps not even irreversible.

A cynical observer would probably evaluate these considerations as wishful thinking. Be that as it may, it is always good to have a yardstick – something desirable, even feasible – and then compare the actual developments with it. Furthermore, Gustafson is well aware that the trust between the two sides is at a very low level, perhaps at a historical minimum. Russia's credibility, more precisely that of its political elite, has been demolished in recent years. Gaining credibility and establishing trust takes time, and perhaps Russia's reopening, if any, should be the task for the next generation.

5. CONCLUSION: TO BE CONTINUED…

The author concludes the book with somewhat activist tone. 'Putin's departure and the advent of a new leadership will bring the opportunity to attempt a cautious but constructive reopening, beginning with the reestablishment of working commercial and financial relationships, which will bring benefits to both sides. The time to begin thinking about this is now' (pp. 356–357). The last sentence of the appeal is directed at the Western political and intellectual elite. The reader concludes that this book provides abundant and high-quality food for thought of this kind. Gustafson did his part of the job; it is now the time for others.

Gustafson's book is a groundbreaking contribution to studies of contemporary Russia and its relations with the West. The author skilfully combined Eliot's *time past* and *time present* to contemplate *time future*, and to provide the grounds for readers to make their conclusions. There are many answers in the book, but almost all of them lead to new questions, which the reader was not aware of before closing the final page. That is the wit of Gustafson's book. Written in a very readable style, almost like

a historical novel, the book is easy to swallow, but very hard to digest, as the new questions linger around the reader, gripping their mind for a considerable time after putting the book down, with no relaxation in sight. Just like relations between Russia and the West.

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Nikola ILIĆ, PhD*

Goodwin, Matt. 2025. Bad Education: Why Our Universities are Broken and How We Can Fix Them. **London: Penguin Random House UK, 245.**

> '[T]he blunt reality is that we are becoming less willing to tolerate different viewpoints and perspectives. That needs to change, especially in the very institutions that are supposed to be training and encouraging our young people to do exactly this.'
>
> Goodwin 2025, p. 5.

'A controversial book in turbulent times' – this phrase could serve as the briefest description of Goodwin's new book on the challenges facing higher education in the United Kingdom and beyond. He begins by reflecting on his own experience as a passionate academic who spent more than two decades teaching and working diligently at various universities before ultimately deciding to leave academia.[1]

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[1] Matt Goodwin is a political scientist whose primary research interests lie in party politics, populism, and the radical right. He voluntarily left his full professorship at the University of Kent on 31 July 2024. Since then, he has continued to publish books and essays but, as of the writing of this review in 2025, he has not taken up any new academic appointment, political role, or other professional position.

This personal experience may be methodologically justified, as its primary purpose is to introduce readers to the topic. Moreover, the author explicitly stresses that he is only one of many who have recently chosen to leave academia. In his view, the root of the problem lies in the rapid politicization of higher education, which he argues is 'harming [...] students, lowering standards, suffocating free speech, and transforming bastions of learning that used to be the envy of the world into biased institutions that are delivering a bad education' (p. 42).

After outlining the root of the problem in the first chapter, the author systematically examines the politicization of higher education and its consequences from multiple perspectives: scholars (chapter 2), students (chapter 3), and the education system as a whole (chapter 4). In the final chapter, he draws conclusions and suggests potential solutions to the issues he identified previously.

In the second chapter, Goodwin describes a series of events that led to his decision to quit his job at the university. Even though these events primarily focus on the Brexit campaign and the expression of political attitudes within UK academia, members of academic communities beyond the UK can easily relate to both the events and their consequences within universities. Namely, back in 2016, Brexit sharply divided British society between 'populists' who supported leaving the EU and 'liberals' who opposed it. At Goodwin's university, in his own words, 'more than 90% of academics and professors voted to remain in the European Union, largely because they saw the EU as a bulwark for defending minorities and immigration and because, clearly, many of them saw Brexit as a "fair right" project' (p. 43). However, Goodwin himself opposed the majority view at the university and publicly expressed his pro-Brexit stance on social media and in newspapers.[2] As a result, in the months and years that followed, he experienced 'a sustained campaign of abuse, intimidation and harassment, equivalent to how a religious cult treats a heretic', and was accused of being 'apologist' for 'far right', 'Tory stooge' and 'an extremist' (p. 44).

[2] He also co-authored *Brexit: Why Britain Voted to Leave the European Union* (Clarke, Goodwin, Whiteley 2017), which emphasizes that Brexit reflects deeper, structural divisions in British society and politics – across generations, regions, and social classes. The authors find, among other things, that older and less-educated voters were more likely to support Leave, and they argue that understanding these underlying cleavages is essential for interpreting contemporary British politics and the rise of populism.

In addition to sharing his own subjective experiences, Goodwin also points out certain objective shortcomings of higher education from a scholar's perspective, such as difficulties in publishing papers on certain topics and securing research funding. As evidence for this claim, he refers to the findings of Academics for Academic Freedom, which show that in recent years more than 200 academics and speakers have been dismissed, harassed, or disinvited from UK universities – 'almost all of whom violated the new ideology by voicing conservative, gender-critical or other unorthodox views' (p. 48). Moreover, Goodwin claims that he personally also faced difficulties in publishing and securing research funding after Brexit, while he was 'quietly removed' from senior administrative roles in his department, despite being among the most cited professors. Following Brexit, he was not invited to workshops or to give lectures at other universities, and he even found it difficult to interact with his colleagues – 'everybody at work just slowly starts to drift away from you and makes it clear you have been ostracized' (p. 47).

In the third chapter, Goodwin claims that this ostracization of (conservative) academics – i.e. their exclusion from teaching, organizational roles, and the selection of junior research fellows – deprives students of critical perspectives and diverse viewpoints. As an illustrative example supporting this claim, Goodwin describes a Brexit debate organized at the University of Kent, where he attempted to invite both pro-Brexit and anti-Brexit speakers, in order to enable students to hear contrasting opinions. However, before the debate, Goodwin was excluded from the organizing committee, and the event took place without any pro-Brexit speakers. According to Goodwin, many people would point to such events as clear evidence that 'students are being brainwashed by their left-wing, Marxist professors' (p. 104). While describing this event, Goodwin goes a step further by once again reflecting on his decision to leave the university. Namely, he claims that 'the new ideology is colliding with several other, longer-term factors that have been on the rise in higher education for years, if not decades. And now, this toxic cocktail is lowering academic standards, eroding free speech and academic freedom, and narrowing rather than expanding the minds of our students' (p. 104) – which is another reason he decided to leave.

In the fourth chapter, the author further develops his argument by claiming that the ostracization of (conservative) academics and the resulting lack of diverse perspectives available to students undermine the entire system of higher education. According to the author, this system is particularly endangered by a 'powerful bureaucracy' that is 'robbing [students] of a rich and balanced education' (p. 147). He supports this claim by providing data on the number of administrative staff and even their salaries – for instance, citing the former vice-chancellor of Bath University, whose annual salary

amounted to GBP 364,000. However, it appears that the author's primary concern is not the size or cost of the bureaucracy, but rather its role within the university. In his words, the bureaucracy is not interested in quality of education and has 'morphed into a kind of hyper-political and highly activist managerial blob that has moved to entrench the new ideology, politicizing the universities along the way' (p. 157). He argues that this trend is manifested, among other things, in the proliferation of political insignia on campus, such as rainbow lanyards and flags, the removal of racist statues, the imposition of politically motivated reading lists, and politically motivated implementation of the DEI (Diversity, Equity, and Inclusion) policies.[3]

According to Goodwin, 'the rapid expansion of the university bureaucracy, the sharp shift to the left among university academics and the politicization of the wider system of higher education have left universities in a perilous state' (p. 192). He claims that these changes compromise institutional neutrality and independence, undermine free speech and academic freedom, and ultimately betray the university's original purpose. However, despite his extensive criticism of the bureaucracy, his colleagues, students, and DEI norms and policies, Goodwin neither defines free speech nor provides a justification for its protection. By contrast, Mill (2015, 18) contends that free speech should be protected because it allows truth to emerge within a marketplace of ideas. Schauer (1982, 15), however, warns that such a marketplace does not necessarily lead to truth, as harmful and false ideas (such as racism or propaganda) may also gain dominance in open discussion.[4] In light of this tension, it is left to readers to assess whether Goodwin's critique advances truth or reinforces harmful ideas within the academic community.

Despite the evident methodological shortcomings in the first four chapters (such as reliance on subjective experiences, limited empirical evidence, and the absence of clear definitions and justifications), in the final chapter Goodwin shifts to proposing solutions to the problems he identified previously. He outlines two complementary approaches: the liberal or

[3] Goodwin devotes particular attention to DEI norms and policies at universities, which he extensively criticizes as overly radical, biased, and reductive. He also denounces their implementation as deeply hypocritical, noting that while universities insist on DEI principles, they simultaneously 'adjust their reading lists and course content to please Chinese students and Chinese Communist Party censors from a lucrative overseas market' (p. 166). Even prior to this book, the author had been an outspoken critic of DEI policies, claiming that they suppress dissenting viewpoints and undermine free speech (Goodwin 2023).

[4] For more on Frederick Schauer's conception of free speech and its limits, see Spaić, Rabanos (2025).

defensive approach, and the interventionist or assertive approach. The former calls on academics to 'have a conversation', 'trigger a debate', have a 'meaningful discussion' about the challenges that Goodwin identifies in the book, with the aim of 'fixing universities' (p. 200). However, although Goodwin formally proposes dialogue and debate, he appears sceptical about the effectiveness of such measures and therefore swiftly turns to the second approach – state intervention. He suggests that universities should be forced, 'through government action' (p. 208), to sign up to the so-called Chicago principles – a set of rules designed to safeguard freedom of speech and freedom of expression on campus. According to these principles, among other things, universities should maintain neutrality on political and social issues, remove diversity statements (DEI Agenda) from research grant and recruitment processes, and ensure that 'recruitment panels give as much weight to the political diversity of their members as racial, sexual and gender diversity' (p. 211). Yet, by advocating such interventionist measures, Goodwin risks undermining his own critique: readers may wonder whether his concern truly lies with the politicization of universities as such, or rather with the marginalization of particular political views that he believes are insufficiently represented and protected.

In any event, invoking the 'powers of the state to restore justice and balance' (p. 207) on campus hardly seems compatible with the very principles of academic freedom and free speech.

Finally, consistent with his proposed solutions, Goodwin offers a Manifesto for every university committed to good, rather than bad, education. This Manifesto contains fourteen comprehensive and very strict provisions, including the following:

- 'Requiring that universities devote as much effort to *promoting political diversity on campus* as they devote to promoting racial, sexual and gender diversity. Where DEI is promoted, if it is promoted at all, *political diversity must be promoted* to the same degree.'
- 'Ensuring that all research grant selection panels and search committees for academic and senior administrative jobs are *politically balanced*.'
- 'Requiring universities to take *political discrimination* as seriously as they take racial, sexual and gender discrimination.' (pp. 217–218, emphases added).

Upon reading the full set of provisions, some readers may even wonder whether the same author wrote the first part of the book – where he blames the politicization of universities for lowering academic standards and producing poor education – and the last part, which insists on introducing

politicization. It could be, after all, that Goodwin was dissatisfied with the insufficient representation of his own political views on campus, and that this was the underlying reason for his departure from the university. Otherwise, his critiques, proposed solutions, and the Manifesto would make little sense.

Ultimately, this does not mean that universities are irreproachable. Even though they bring together the brightest minds around the world and foster their growth, higher education clearly has many shortcomings and will continue to face new challenges. Yet the marginalisation of populists within academia does not appear to stem from discrimination against their political views, but rather from the methods they employ: instead of relying on scientific knowledge and rigorous methodology, they tend to appeal to the masses. In this broader context, marginalisation is not an act of discrimination, but rather a form of recognition based on merit and contribution to science. In that sense, Goodwin and his book may serve as a telling example.

Apart from being methodologically weak, relying primarily on the author's personal experiences and impressions, this book is distinctive in that it advocates government intervention in support of free speech, aimed at preventing certain voices (namely, the majority of the academic community) from being heard, in order to 'save universities from progressive illiberalism'. Moreover, while the book frames its arguments through accusations and numerous catchy claims, it provides little evidence and fails to offer a clear definition or justification of both free speech and academic freedom. As a result, although the book may attract readers interested in pressing issues within academia, only a committed populist is likely to embrace its conclusions.

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(see, for example, Corcoran 2004; Mullen 2000)

(see especially Demsetz 1967)

(Scott and Coustalin 1995)

One author

T(ext): Following Ely (1980, page), we argue that

R(eference list): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

Two authors

T: As demonstrated elsewhere (Daniels, Martin 1995, page),

R: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

Three authors

T: As suggested by Cecil, Lind, Bermant (1987, page),

R: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

More than three authors

T: Following the research design in Turner *et al*. (2002, page),

R: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

Institutional author

T: (U.S. Department of Justice 1992, page)

R: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

No author

T: (*Journal of the Assembly* 1822, page).

R: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

More than one work

Clermont, Eisenberg (1992, page; 1998, page)

More than one work in a year

T: (White 1991a, page)

R: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal,* April 4.

Multiple authors and works

(Grogger 1991, page; Witte 1980, page; Levitt 1997, page)

Chapter in a book

T: Holmes (1988 page) argues that

R: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240 in *Constitutionalism and Democracy,* edited by John Elster and Rune Slagstad. Cambridge: Cambridge University Press.

Chapter in a multivolume work

T: Schwartz, Sykes (1998) differ from this view

R: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–64 in vol. 2 of *The New Palgrave Dictionary of Economics and the Law,* edited by Peter Newman. London: MacMillan.

Edition

T: Using the method of Greene (1997), we constructed a model to show

R: Greene, William H. 1997. *Econometric Analysis.* 3d ed. Upper Saddle River, N.J.: Prentice Hall.

Reprint

T: (Angell, Ames [1832] 1972, 24)

R: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Journal article

In the list of references, journal articles should be cited in the following manner: surname and name of the author, number and year of the issue, title of the article, title of the journal, volume number, pages.

T: The model used in Levine *et al*. (1999, page)

R: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 2/1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

T: According to Podlipnik (2018, page)

R: Podlipnik, Jernej. 4/2018. The Legal Nature of the Slovenian Special Tax on Undeclared Income. *Annals of the Faculty of Law in Belgrade* 66: 103–113.

Entire issue of a journal

T: The fairness or efficiency benefits of bad-faith laws are discussed at length in *Texas Law Review* (1994)

R: Texas Law Review. 1994. *Symposium: Law of Bad Faith in Contrast and Insurance,* special issue. 72: 1203–1702.

Commentary

T: Smith (1983, page) argues that

R: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240 in *Commentary to the Law on Obligations*, edited by Jane Foster. Cambridge: Cambridge University Press.

T: Schmalenbach (2018, page) argues that

R: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–55 in *Vienna Convention on the Law of Treaties: A Commentary*, edited by Oliver Dörr, Kirsten Schmalenbach. Berlin: Springer-Verlag GmbH Germany.

Magazine or newspaper article with no author

T: had appeared in *Newsweek* (2000).

R: Newsweek. 2000. MP3.com Gets Ripped. 18 September.

Magazine or newspaper article with author(s)

T: (Mathews, DeBaise 2000)

R: Mathews, Anna Wilde, Colleen DeBaise. 2000. MP3.com Deal Ends Lawsuit on Copyrights. *Wall Street Journal,* 11 November.

Unpublished manuscript

T: (Daughety, Reinganum 2002)

R: Daughety, Andrew F., and Jennifer F. Reinganum. 2002. Exploiting Future Settlements: A Signaling Model of Most-Favored-Nation Clauses in Settlement Bargaining. Unpublished manuscript. Vanderbilt University, Department of Economics, August.

Working paper

T: (Eisenberg, Wells 2002)

R: Eisenberg, Theodore, Martin T. Wells. 2002. Trial Outcomes and Demographics: Is There a Bronx Effect? Working paper. Cornell University Law School, Ithaca, NY.

Numbered working paper

T: (Glaeser, Sacerdote 2000)

R: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Personal correspondence/communication

T: as asserted by Welch (1998)

R: Welch, Thomas. 1998. Letter to author, 15 January.

Stable URL

T: According to the Intellectual Property Office (2018),

R: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html* (last visited 28 February, 2019).

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T: (Spier 2003, page)

R: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

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T: One study (Joyce, forthcoming) includes the District of Columbia

R: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

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T: Use abbreviated reference for in-text citations of cases (CJEU C-20/12, or Giersch and Others; Opinion of AG Mengozzi; VSS Rev. 1354/06) consistently throughout the paper.

R: Do not include cases in the reference list.

Legislation

F: Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, Art. 6 (3); Zakonik o krivičnom postupku [Code of Criminal Procedure], *Official Gazette of the RS*, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, and 55/2014, Art. 2, para. 1, it. 3.

T: Use abbreviated reference for in-text citations of pieces of legislation (Regulation No. 1052/2013; Directive 2013/32; ZKP, or ZKP of Serbia) consistently throughout the paper.

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