2022 | ISSUE 2
ISSN 2184-7649

UNDECIDABILITIES AND LAW

THE COIMBRA JOURNAL FOR LEGAL STUDIES

Cultural identity and Conflict of values

2022 | ISSUE 2
ISSN 2184-7649

UNDECIDABILITIES AND LAW

THE COIMBRA JOURNAL FOR LEGAL STUDIES

Cultural identity and Conflict of values

ISSUE EDITOR:
ERIK JAYME
UNIVERSITÄT HEIDELBERG

Undecidabilities and Law – The Coimbra Journal for Legal Studies (ULCJ)
a Scientific Law Journal of the University of Coimbra Institute for Legal Research (UCILeR).

In a time highlighted by the quest for the Master Algorithm, several major juridically relevant societal problems resist significantly the predetermination of a unique solution and open a huge spectrum of perspectives and operatories. The title Undecidabilities suggests directly this resistance (as we know, in computation complexity theory, an undecidable problem is the one for which "it is proved to be impossible to construct an algorithm to a correct yes-or-no answer"!), whilst simultaneously considering the permanent renovation of the questions and the plurality of answers which those problems allow, which means considering the instability of cultural and linguistic contexts (justifying a permanent attention to differences, if not différances, as well as to authentic "clauses of nonclausure").

Each volume of our Journal will be dedicated to one of these societal problems and this context of resistance to unique languages and solutions, seriously taken in a reflective horizon that crosses dogmatic and meta-dogmatic legal discourses with the challenges of extra-legal perspectives and approaches.

CONTACTS
ULCJ
University of Coimbra,
Faculty of Law of University of Coimbra
ulcj@ij.uc.pt

URL
impactum-journals.uc.pt/
undecidabilitiesandlaw

EDITION
COIMBRA UNIVERSITY PRESS
Imprensa da Universidade de Coimbra
Email: imprensa@uc.pt
URL: http://www.uc.pt/imprensa_uc
http://livrariadaimprensa.uc.pt

DESIGN
Carlos Costa

PRINTING

ISSN
2184-7649

E-ISSN
2184-9781

DOI
10.14195/2184-9781

LEGAL DEPOSIT
/22

Contents

Editorial

DOI | 10.14195/2184-9781_2_0

The protection of cultural Identity

Postmodernism in comparative and private international law

Erik Jayme

Universität Heidelberg

ABSTRACT

This editorial signals the legal importance of cultural identity mainly with regard to cultural objects. The issue of "nationality" of art objects is addressed in connection with the increasing claims for restitution of cultural artworks, without forgetting that pluralism is also a concept that frames the cultural identity of persons themselves.

KEYWORDS

Postmodernism, cultural identity, cultural objects,pluralism, narrative discourse

I. Postmodernism

The second volume of the Coimbra Journal for Legal Studies deals with the determination of cultural identity and conflict of Values. The legal importance of cultural identity regards mainly cultural objects, from buildings to movable art, but also persons and communities organized in States, cities and international organizations.

If we look at the legal history of the last five decades, we may note a shift: while in the years of the "revolution", - the author studied at the University of

California, Berkeley in the years of 1965-1966 –, human rights for all persons without regard to their origin and nationality had become the main issue of modern law, which also meant the unification of private substantive law; later on, in the years after 1980, the differences between legal orders became increasingly important. As to private law, unification remained a significant goal, but legislators and legal science turned back to private international law and the conflict of laws, particularly in Europe. Postmodern law was based on the cultural identity of persons and goods such as art objects: not unification, but differences between legal orders became of particular relevance.[1]

The development of comparative law showed a certain parallelism between law and art history. Postmodern art – architecture and paintings – can be characterized by the return of descriptive objects: a railway station and a church had different appearances according to their different functions. In addition, some buildings made reference to classic examples, particularly in Berlin, the new capital of united Germany, where parts of the palaces of ancient Rome appeared in private buildings planned by the architect Renzo Piano. The main characteristic of postmodernism became "narration".[2] The painters turned to the description of real objects and persons and paintings even showed parts in writing.

The same development which prefers narration is also noticeable within law. Postmodern law is characterized by narrative norms that do not compel but inform what should or could be a solution. One prominent example is the non-binding Washington Principles on Nazi–Confiscated Art released in connection with the Washington Conference on Holocaust-Era Assets (December 3, 1998).[3] The field of the new art law was mainly based on the idea of cultural identity of art objects to justify the national export and import control of such goods.

To give some examples. A Canadian Court had to deal with the following problem: a Toronto based auction house sold a painting by the French impressionist Gustave Caillebotte ("Iris Bleus") to a commercial art gallery in London. [4] The question arose as to whether the export of this painting from Canada to the United Kingdom could be permitted.[5] The case outcome

---

1 See Jayme (1995, 9 ss.).

2 See Jayme (2014).

3 Text in IPRax (1999, 285 ss.)

4 Attorney General of Canada v. Heffel Gallery Limited (2019).

5 Jayme (2021, 198 ss.)

was that the painting had to remain in Canada. Several reasons for this decision were not articulated clearly in the decision: French culture is part of the identity of Canada, and Canadian impressionists studied in France. The painting, finally, was acquired in Canada for the Art Gallery of Ontario in Toronto. The basis for such decisions that do not allow the export of art objects is the protection of the state's or nation's cultural identity.

It is interesting to see that such limitations on international commerce may also result in import restrictions. To give a recent example from German court practice: a German buyer had acquired a buddha- statue in the United States. When this art object arrived in Germany, it was sequestrated because of the lack of export permission from the State of cultural origin.[6] Therefore, the question arose of which State had to be taken into consideration. The German court, however, allowed the import because it was not certain which State's cultural heritage was at issue: China, Myanmar or others. Since the experts did not agree as to the origin of the statue, the court allowed the import of the buddha sculpture to Germany.

2) The "nationality" of art objects

The two above mentioned cases show that for the business in art objects, the cultural identity of the object may be decisive for the question of export or import control. In legal history, we can trace this idea back to Antonio Canova, who invented the nationality of art objects during his participation in the Paris conference in 1815, claiming the Roman and Italian art objects which Napoleon had taken in Italy and brought to Paris, seeing that the Louvre was to become, at that time, a world museum. Italian art returned to Italy, a fact which led to the general question of how the nationality of an art object is to be determined.[7]

Nowadays, a similar problem regards the restitution of cultural artworks of indigenous populations from European Museums to their places of origin.[8] In the German Land of Baden-Württemberg, an interesting case unfolded: the government of the Land, as well as the Stuttgart Linden Museum, had

[6] IPRax (2021, 380).

[7] See Jayme (1991).

[8] See Jayme (2021/2022, 5 ss.).

planned to return some objects taken by German collectors in the German colony of South West Africa to the State of Namibia. The Nama population association brought an action in the Constitutional Court of the Land Baden Württemberg claiming their restitution to this association, Namibia being a modern State not in existence at the time when Germany had taken this object. Unfortunately, the Court did not follow this argument.[9] The main legal problem of whether the Nama Association may be considered, under public international law and international procedural law, as a legal person who could be a party in a civil action abroad has not been mentioned in the decision of the German court.

3) The cultural identity of persons

Pluralism characterizes postmodern societies. In addition, people tend to change their residence many times during their lives, a fact which, in turn, has been the bases for postmodern legal theory[10], which also shows the influence of the writings of Michel Maffesoli.[11]

In private international law, nationality as a connecting factor has lost its importance for determining the applicable law in family and succession matters in favour of the habitual residence of the person involved.

While it is relatively easy to determine a person's citizenship, the concept of habitual residence has been the object of many studies and theories.[12] The question has arisen as to whether the determination of one's habitual residence has to consider not only territorial facts but also the cultural relations of the person involved. For example, Germans tend to spend their later years on Spanish islands such as Mallorca. Does this mean that, under European conflicts law, succession will be based on the Spanish law in force in the autonomous islands of the Baleares, such as the island of Mallorca, even if the German person did not speak Spanish or Catalan, had no *vecindad civil* to the Baleares and had even not been able to read the local newspaper?

[9] IPRax (2019, 413 ss.).
[10] Jayme (2012).
[11] Maffesoli (2010).
[12] See Welöler (2014, 225 ss.).

4) Volume II of the Coimbra Journal of Legal Studies

The Coimbra Journal of Legal Studies volume II has as its thematic core: Cultural identity and Conflict of values. The six articles deal with polyculturality as a problem of a legal order and describe "undecidabilities", suggesting possible solutions. Most interesting is the look at the history of literature and art, where moral pluralism also leads to practical conflicts.

The editors thank the authors cordially for their rich articles, which add new arguments to the solution of classical legal problems.

References

Attorney General of Canada v. Heffel Gallery Limited, 2019 FCA 82, Federal Court of Appeal (2019, April 16). https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/367768/1/document.do

IPRax. (1999). Washington Principles on Nazi–Confiscated Art released in connection with the Washington Conference on Holocaust-Era Assets (December 3, 1998). *IPRax* , 285-ss.

IPRax. (2019). VerfGH Baden-Württemberg, 21.2.2019, 1 VB 14/19. *IPRax*, 39(5), 413-ss.

IPRax. (2021). VG Karlsruhe, 24.6.2020, 5 K 7747/18. *IPRax*, 5985, 41(4), 380, note Jayme.

Jayme, E. (1991). *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz*. Heidelberg: Winter.

Jayme, E. (1995). Identité culturelle et intégration: Le droit international privé postmoderne. *Recueil des Cours,* 251, 9-ss.

Jayme, E. (2014). Narrative Norms in Private International Law: The Example of Art Law. *Recueil des Cours* 375, 9-ss.

Jayme, E. (2021). Kanada: Ausfuhrbeschränkungen für nationale Kulturgüter im internationalen Kunsthandel – Zur Bestimmung der kulturellen Icdenttät eines Kunstwerks – Betrachtungen zu der Entscheidung Attorney General of Canada v. Heffel Art Gallery Limited, 2019 FCA 82. *IPRax,* 1081, 41(2), 198-200.

Jayme, E. (2021/2022). Entleerte Museen: Kolonialgut im Kunstrecht. Bulletin Kunst und Recht, 2021/2 – 2022/1, 5-ss.

Jayme, E. (2012). *Zugehörigkeit und kulturelle Identität: Die Sicht des Internationalen Privatrechts*. Göttingen: Wallstein.

Maffesoli, M. (2010). *Le temps revient – Formes élémentaires des la postmodernité*. Paris: Desclée De Brouwer.

Welöler, M.-P. (2014). Die neue Mobilitätsanknüpfung im Internationalen Familienrecht – Abfederungg des Personalstatutsenwechsels über die Datumtheorie. *IPRax*, 34(3), 225-233.

Thematic core

State legal order and polyculturality[1]

Pierre Moor

University of Lausanne, Switzerland

DOI | 10.14195/2184-9781_2_1

ABSTRACT

Legal Theory is incumbent to analyze the mechanisms by which legal orders deal with the problems of polyculturality. This article focuses on the issue of community norms, particularly if they are regarded as material facts or as normative facts. The question is whether polyculturality can be the source of a normative fact that must be respected even if it does not agree with the dominant social values in society, or are these values to prevail. Taking into account a wide set of cases, the Author addresses the issue of the conflict of values and how it is – or should be – solved by public powers, taking into stock their function and the concrete cases at hand.

KEYWORDS

Polyculturality, Legal Theory, normative facts, normative density, community norms, normative hierarchy, fundamental rights, administrative application, judicial review

1. Background

1.1. A legal theory perspective

The problem posed by the relationship between law and other normative bodies forming a specific culture within the majority of the population governed by that same law can be examined in itself, concerning values presupposed *in abstracto*, from a universalist perspective. However, it necessarily involves the reception by the state legal order of rules, usages, customs, etc., shared by a minority community – in the respect for community idiosyncrasies or, on the contrary, following the desire to integrate a foreign population.

[1] English translation by Dulce Lopes of the original French article published in Moor (2021). Ordre juridique étatique et polyculturalité. In P. Moor (AA.), Le travail du droit (chapter 8, pp. 183-199). Québec: Presses de l'Université Laval.

Since the legal order has a claim to exclusivity over the territory and its inhabitants, it is that legal order that sets the conditions to which that reception is subject. Consequently, it is in the procedures for adopting its own norms and in the modalities of its *mise en oeuvre (implementation)* that the decisions to accept or reject community norms will be taken.

From this point of view, the problem is no different from any other socio-political context: it requires the analysis of the internal conditions of the formation of legal norms. And this is why the legal theory approach - which has precisely such an analysis as its object, whatever the domain regulated by legal norms (or the socio-political context) may be - is suitable for revealing how law can resolve conflicts, incompatibilities, contradictions between communitarian social norms and the legal order. It is therefore not a question of analysing how this or that conflict must, or should, be resolved, but under which forms law apprehends them.

More precisely, it is a question of knowing how polyculturality - like any other situation, such as sex, gender, profession - can be constitutive of a normative fact, as we will call it below: that is to say, a fact that the legal order, in its positivity, can, or even must take into account, or, on the contrary, that it can, or even must not take into account, and will therefore be non-normative.

This is why we shall begin here with a general presentation of the theory of law - the prolegomena - to situate the perspectives that we shall follow subsequently, and what its consequences will be. It is, in fact, the theory of law, by explaining how legal decisions are taken, that can shed light on how the legal system will accept - or reject - community standards that are foreign to it.

1.2. Hermeneutics of facts

It is well known that facts are never known or knowable as they are in themselves and by themselves. If they were to be reproduced identically, the original and the reproduction would merge to reform the original unity; one only has to read Borges' - very brief - text on the map that the cartographers of a Chinese emperor drew of the territory of the Empire at a scale of 1:1[2]. In Kantian terms, facts belong to the noumenal universe.

[2] Borges (1951, 129 ss.).

We apprehend them in the form of phenomena, which reveal certain aspects of them: the phenomenal universe. These phenomena first appear in the disorganised form: our perception of the noumenon has deconstructed them.

It is then a question of recomposing them. It is a hermeneutic task: reading phenomena in order to read them until they appear to form the most coherent unit possible - that is to say, a text (a word whose etymology derives, as we know, from the Latin *texere*, to weave). It is a hermeneutic universe because this work will be accomplished using applicable codes, whose signs will, in a way, appropriate the phenomena. The signs available in these codes thus have the effect of filtering the admissible phenomena by isolating the aspects that are of interest to them.

Codes are of various kinds: mathematical, figurative, linguistic, etc. Their function is not only to understand but also to communicate what has been understood between all those who use the same code.

The relevant code here is the legal one, in which legal texts are expressed. But this code is special because it uses the signs of another code - that of the common language -, since the law works with language to signify and communicate what it understands. The legal order can thus be understood as a code, i.e. a set of texts composed of signs, a code that implies a particular type of reading, and the legal system as the differentiated organisation of the circulation of these texts.

In this sense, what are erroneously called "facts" ("relevant facts", the establishment of "facts") is the apprehension of reality as postulated by the signs of the legal order, through the tracks or clues presented by the phenomena, the proof of which should be provided. The list of these facts is established by the interpretation of the norm and not by reality: the latter is only the material in which their tracks are sought. The fact itself - the noumenon - is the referent of the sign: the object of the discourse, what is spoken of when a text is uttered or written; what the text refers to[3]. To distinguish between them, we will hereafter speak of a factual situation for the referent and of normative facts for those that, being sufficiently coherent and proven, can be considered a specific case of the sign. The normative fact is what the norm

[3] In semiotics, the referent is the element outside the subject to which a sign relates, what is communicated about. The referent can neither communicate by itself, nor be communicated by itself: it requires the sign, or a set of signs – a text. See Eco (1988, 63 ff.) (who speaks of "renvoi"), and Klinkenberg (1996, 35 ff.). This is one of the three elements of the semiotic triangle – sign (signifier/signified) and referent.

designates as legally relevant in the factual situation and whose realisation leads to the applicability of the norm. In other words, normative facts are constitutive of the relevance of the sign as contained in the normative text.

We have said that the legal code uses the signs of the common language in all their denotations and connotations, including those deriving from rhetorical uses (e.g. metonymies). Within a homogeneous culture in its use of language, this opens up the possibilities of interpretation of the legal text, between which the argumentation makes the selection which it is able to make convincing (albeit not necessary)[4]. Based on this interpretation of the sign, the relevant facts must be established. A difficulty will ensue in the presence of a polyculturality that gives another divergent interpretation, concerning which the factual situation will also be divergent from which would derive from the use of the vernacular. Which of these two interpretations should be retained, the question is discussed[5]. An example: Sikhs carry a dagger, the *kirpan*, as a religious symbol to remind them of their obligation to protect against oppression and injustice, and their religion prohibits them from using it aggressively - should it be considered a weapon in the ordinary sense of the word or an act that falls within the scope of religious freedom? Canadian jurisprudence has opted for the latter[6], Italian for the former.

1.3. Normative facts

Material facts or, more broadly, material situations - events, behaviours, enduring states of affairs, etc. - can rarely be isolated within an idiosyncrasy that defines them exhaustively; this may be the case when they are absolutely singular or when, always and in all circumstances, they reproduce themselves in a perfectly identical manner. Material situation and normative fact then coincide.

But, very often, material facts are complex groupings of diverse elements that the viewer must construct; it is this view that constitutes them and enables them to be read as constituting a coherent whole. Coherence is then not in the things themselves but in the gaze that links the elements to each

---

[4] Cf. further developed in Moor (2021, chapters V, 6 and 7, IX, 2.3 and 5, pp. 116-121, 209-214, 225-230).

[5] See the in-depth analysis of such situations in Ricca (2018, 101). The following example, from the kirpan, is borrowed from him.

[6] This solution does not necessarily imply freedom to wear the kirpan: a balance of interests must be struck between the guarantee of religious freedom and the public interests that may justify a ban.

other in a certain order, selecting them according to the degree of relevance that seems most appropriate to form a whole.

Legal facts are the product of this construction, which is guided by the norm: it is the norm that defines the relevant elements to be isolated from the material facts while at the same time indicating the means of proof necessary to give them the quality of 'established facts'. A story can then be constructed, which is the narrative of the facts of the case and which constitutes the case to be judged. Some of the legal facts required for the applicability of the norm may not have been established due to a lack of appropriate evidence (unless the norm provides that they are presumed): this is where the rules on the burden of proof come in[7].

Whilst abstractly built as normative facts, material situations are thus reconstructed sets that can be read from various angles, depending on how they can be analysed according to the criteria by which the various norms that take them as referents define their applicability (including the levels of competence to adopt and apply them). The normative fact then becomes a case of the norm, if the latter is applicable, or, if not, a non-case (which is also a case of the norm, but in a negative form).

Normative facts may involve differentiated interests - social, ecological, economic and cultural. Taking into account these interests and, if necessary, their reciprocal weighting can be the responsibility of the legislature or of the administration (judges and administrative bodies) in the phase of application. The definition of the relevant criteria for their determination will occur at one or other of these two levels depending on the normative density of the applicable norms.

1.4. Political action

On this subject, it should be noted that certain effects produced by material situations will give rise to a need for intervention to counteract them or, on the contrary, to favour them: the decision to intervene constitutes a political and legal *reaction*. These reactions will be defined according to the

[7] On all these points, see Moor (2010, 83) (with references), where we have called the judicial narrative the synthesis of the facts that the judge has retained as the "facts of the case". On social and judicial preconceptions on the construction of narratives, see Moor (2021, 113-115).

legal arrangement of the respective competences of the various communities or authorities that represent the compromised interests. Depending on the diversity of the interests involved, the reaction will have to combine the different levels of competence – within the same community, the attributions of several authorities - and choose the means, material and/or legal, to invest in in order to achieve the targeted objectives. An ensemble is thus formed, constituting a public policy.

The law is only one of these means. In the context of a public policy, law is part of a whole, within which it is instrumentalised. Unlike classical legal rules, which create their own object (property, marriage, etc.) and therefore do not need to be integrated into a non-legal universe, law loses here its autonomy insofar as its object is imposed on it from outside by the programme of the politically decided public task.

From this perspective, law provides politics with competencies and procedures which allow political choices. But the normative content is not dictated by the law: it is inserted into its structures in accordance with the norms of competences and procedures that the same politics has integrated into it. And by politics, we mean not only the macro-political dimension - that of the legislator – but also the micro-political dimension of the judge or any authority called upon to implement an abstract norm. This is what we will now shed light on.

1.5. Normative density

The freedom available to the authority adopting or performing the norms depends on the normative density of the norms and their rank in the legal order that they constitute as a whole – below we shall examine how this freedom may be used[8]. The greater the normative density of a norm, the less freedom the application authority will have, since, in virtue of its rank, it is bound to respect it. Conversely, the more freedom an authority wants to give to the authorities obliged to comply with the norms it issues, the lower will be the normative density of the norms provided. These are political options.

[8] On the concept of normative density, see Moor (2021, 66–78) and Moor (2010, 113 ff.).

In other words, the definition of normative facts by the legislature may be completely determinative, leaving no room for any latitude of autonomy for the application authority: the latter only has to deduce from the abstract sign the concrete features of the case-species. But this is not often the case: it happens for instance when we have numerical data or data concerning the civil status. The normative density is then absolute.

At the other extreme are cases where the authority has complete autonomy: this is, at least in states governed by the rule of law, rare or even exceptional - for example, the granting of pardons.

Between these two extremes, the normative density evolves gradually. It is fairly low when the implementing authority has a great deal of freedom - for example, the legislature, which only has to comply with constitutional law (which has often low density) and international law, or the application authority when the norm allows for decisions on opportunity. On the other hand, it is somewhat higher when the applicable norms contain indeterminate legal concepts, in which the factual situations are co-determinant: and to a certain extent variable because the application authority, determined by the norm and its programme, is free to decide on itself the elements which, present in the factual situation, will constitute the normative facts - these will then be co-determinant, within the margin of indeterminacy left by the norm. The meaning of the sign thus applied will be constituted by a kind of cooperation between the normative phase and the application phase: it will retroact on the norm, into whose field it will enter as one of its cases, among all the others that have already been codetermined.

We can find such configurations in the whole of the legal order. Constitutions already contain them: for example, what is the "manifestation of a belief" concerning the guarantee of religious freedom, or what behaviour falls within the scope of personal freedom? Legislation is full of them: for example, is there a 'just cause' according to the terms of a school law, for granting an exemption from education, or what is a 'religious symbol' in a civil service law that prohibits its being worn?

It is clear that the objectivation - and therefore the legal rationality - of decisions that allow a reference to the applied norm depend on the normative density of the latter. The lower the normative density, the more the content of the decision is subject to the influence of subjective factors. Subjectivity is understood here in a broad sense: it is an element that codetermines the way things are viewed within the text of the norm. There are, therefore, social

subjectivities: how society (or at least a significant part of it) looks at itself - one might say a vernacular way of looking at things, exercised by individuals without them even necessarily being aware of it. These are usages, customs, but also religious and cultural representations and *Weltanschauungen*. But the authorities themselves also have their individual subjectivities, which depend on the biography, character, opinions, etc., of the people who hold office[9].

Within low normative density, where reference to the norm alone causes undecidability as to the choice of a solution, the authority must reason to justify it; such argumentation aims to convince and can only aim at a relative objectivation - another argumentation, leading to another solution, would have been possible. To achieve this, the reasons it will invoke are those it can discover through its own subjectivity within social subjectivities: this reference is essential to the acceptability of the decision it takes[10].

1.6. Return to polyculturality

It is from this perspective that the encoding of factual situations into normative facts and the implementation of texts containing indeterminate legal concepts must be understood.

More precisely, concerning the problem of polyculturality , the existence of community norms is presented first of all as a material fact; it is not in itself, from the point of view of the State legal order, to be respected under a force that would be intrinsic to it.

There are two possible scenarios. The first is a *conflict, for example,* between a school regulation or directive prohibiting female teachers from wearing the *hijab* and the Muslim community norm on veiling, or a municipal regulation on the ordering of cemeteries and the Muslim norm that dead bodies should be buried in the direction of Mecca. Such conflicts must be resolved - whatever the final solution adopted - by applying a higher state rule than the one the community member is contesting - law or constitution (in the examples, the constitutional guarantee of religious freedom). The question

[9] See Moor (2021, chapter V, 107 ff.).

[10] See Moor (2021, Chapter IX, 5) and Moor (2010, 294 ff.).

then is: will the existence of the community rule be considered a normative fact for interpreting this norm?

The second hypothesis is that where the conflict does not arise between two norms, the state norm and the community norm, but where the *existence* of a community norm can be considered - or not - as a *normative fact* for the application of a state norm; the situation arises when the legal rule is not explicitly aimed at a configuration of polyculturality (this would be the first hypothesis), but when the authority of application can bring in - or not - the existence of a community norm as a normative fact in the co-determination of a notion that the state norm leaves undetermined, thus with a low normative density (example: Should the *kirpan* be considered a "weapon" within the meaning of the legislation on the carrying of weapons or not?).

2. Problem settings

It is embedded in this epistemological context that we will approach the questions of polyculturality, restricting ourselves to those that arise within a single legal order and leaving aside those that arise from conflicts between two or more legal orders that conform to different legal cultures. But this can be transposed if we conceive international law in its diverse applications by States according to their different cultures.

The assumption is that there is a community within the population of a state that obeys specific norms and whose members demand respect. And questions of polyculturality arise in relation to these norms and the state legal order. It is clear that the state norm prevails when, with sufficient normative density to be immediately applicable, it is imperative - the question is then to determine whether it is valid with regard to state norms that are superior to it (i.e. the constitution). But it will arise when its solution requires reference to norms whose normative density is indeterminate and whose normative programme does not exclude *a priori* consideration of a fact based on a non-state norm - whether these are constitutional norms (regarding religious freedom, for example) or legal norms (such as the exemption from an obligation on 'fair grounds').

It should be noted at the outset that while the conflict arising from a contradiction between a community norm and a state norm may be obvious (e.g. the 'law' of *omertà* in Mafia organisations, or the prohibition of polygamy

for members of a religion or sect that authorises or even recommends it), it also often arises in a contingent manner during the application of a norm (e.g. the wearing of the *hijab* by civil servants).

Thus, if the legislature becomes aware that a potential conflict is on the political agenda, it may adopt a specific norm that addresses it (e.g. by prohibiting the wearing of the *niqab* in public spaces). Frequently, however, the conflict may arise with a pre-existing norm, which was not specifically aimed at it, but whose implementation, according to its interpretation or the definition given in the framework of its application, is likely to give rise to it: it is then up to the application authority to say whether there is a real conflict and if so, to give it a solution. And it will do so with greater or lesser argumentative freedom, depending on the normative density of the state norm.

The review of the constitutionality of legislative or administrative measures offers many examples. Guarantees of fundamental rights often have a low normative density, which makes the task of constitutional jurisdiction both difficult and fascinating. We refer here to the conflicts of polyculturality that arise in relation to Muslim communities in Europe. First of all, there are questions about the scope of fundamental rights application. For example, are their own norms manifestations of their faith - in which case the guarantee of religious freedom would apply - or are they purely social prescriptions? The question arises as to the wearing of the *hijab* or *niqab*. But what is indeterminate about such guarantees is above all the conditions that the legislature or the judicial or administrative authority must respect for their validity: does the public interest justify the prohibition of the *niqab* in public or the prohibition of Muslim women teachers from wearing the *hijab* in the exercise of their duties? Do such measures comply with the principle of proportionality? The same problems arise, for example, in judging a request to exempt Muslim girls from mixed swimming lessons. The simple and unique reference to the guarantee in question is not enough to decide: the court must, in any case, take a position: is polyculturality the source of a normative fact that must be respected even if it does not agree with the dominant social values in society, or are these values to prevail? There is a conflict of values, which the court is confronted with and which it is obliged to resolve by virtue of its function. It is at this point that the factors of the decision will be determined by subjectivity, both social and individual; the constraint weighing on the court here is factual: it must justify its decision in such a way that the result reached (the decision) appears not only legally,

but also socially acceptable - which is precisely where the court's task is difficult, as mentioned above, because in such situations social subjectivities are divided between the two possible solutions, admitting the fact of polyculturality as a normative fact or rejecting it. To this extent, the jurisdiction has, by its very position, a micro-political function.

The same may be true in the context of the application of a legal provision. For example, a Muslim man marries a Christian woman and, on the wedding night, discovers that his wife is not a virgin; he applies to the courts to have the marriage declared null and void on the grounds of an error in an essential quality of the person (Art. 180 para. 2 of the French Civil Code); the first court accepts the application, but, on appeal, the Court of the second instance rejects it. The two courts had different conceptions of polyculturality, which led to equally different interpretations of the notion of "essential quality"[11].

Finally, the same applies to the definition of normative facts. For example, what facts can be used to judge the integration of a foreigner applying for naturalisation? What are the cultural particularities that would prevent the authority from considering the applicant to be 'integrated' - for example, his or her respect for certain precepts of the community of origin?

3. Legal configurations

3.1. The normative hierarchy

The cases in which polyculturality poses a problem do not arise in the abstract but in the specific contingent structures of the state's legal order whose authority must resolve them. Therefore, it is a question of knowing the nature and the level of the competent authority, the normative density of the applicable norms, and the modalities of control available to the higher authorities. In this way, it will be possible to see whether the normative fact of polyculturality is taken into account by an abstract norm and must therefore be respected by the implementing authorities, or whether, on the contrary, it is absent, and, in this case, whether or not the implementing authority can consider it.

[11] See reference footnote 22.

3.2. The constitution

3.2.1. *Fundamental rights*

First, the constitution. It contains values - fundamental rights; some of them being particularly relevant in this context such as personal freedom and freedom of opinion in particular. They have a relatively low normative density in terms of their field of application and the conditions for the validity of any restrictions that can validly be imposed. The constitutional judge, therefore, has a relative argumentative freedom. Still, the question arises as to whether the court's power to examine the constitutional validity of acts brought before it is limitless or, on the contrary, whether it is limited to verifying their justification in the light of one of several possible rationales. The prohibition of the wearing of the *hijab* by female teachers offers a good example: the principle of secularism in schools can be extended to the prohibition of any manifestation of the teacher's faith, but it can also be interpreted, in a narrower sense, as prohibiting any active manifestation of propaganda. The position of the constitutional court judge will depend on the nature of the authority whose act is challenged: if it is that of a federated state, the judge, a federal authority, may be inclined to limit his or her power of review in order to respect the organisational autonomy of the federated state.

It is rare for the constitution to contain normatively dense standards on such issues. One example is the Swiss constitutional ban on construction of minarets, introduced following a popular initiative (the appeal to the European Court of Human Rights was declared inadmissible[12]). But there are other historical examples: the Swiss constitution of 1874 prohibited the Jesuit order, as this propagated ideological teaching, certainly in line with contemporary Catholic theory but contrary to the democratic and liberal standards of the Protestant majority; at the same time, it secularised cemeteries, as the standards in use in Catholic regions prohibited the burial of the mortal remains of Protestants, Jews, and persons that committed suicide.

But it is obviously with regard to fundamental rights that the problem is important because it is against this yardstick that the validity of legislation

[12] Ouardiri Hafid v. Switzerland, 28 June 2011, N.º 65840/09.

(where there is a review of its constitutionality) and that of lower-ranking acts, either regulations or concrete acts, will be measured. The judge will be confronted with two questions. The first is the field of application of these rights: does the measure in question fall within them, for instance, can the wearing of the Islamic headscarf or the non-participation of Muslim children in mixed swimming lessons acts be described as religious acts? Secondly, it concerns the constitutionality of the restrictions: do they have a sufficient legal basis, does a relevant public interest justify them, do they respect the principle of proportionality? It is obviously the assessment of the public interest - a concept with a low normative density - that attracts attention. For example, from the point of view of freedom of belief and personal freedom, is the protection of public health sufficient to legitimise the obligation to vaccinate against dangerous contagious diseases in the light of the religious standards of certain sects? Does religious freedom require that Jewish, Muslim, Pentecostal or Jehovah's Witness pupils be exempted from attending classes on Saturdays, or is there a public interest in compulsory education? On all these questions, the constitutional judge has to balance conflicting interests and, depending on the weight he or she gives to the public interest, the social community norm will give way to the state norm or not.

Applying the constitutional norm guaranteeing a fundamental right may be limited by another constitutional principle. The most striking example is that of the secularity of the State, which justified the prohibition on female public officials wearing the Islamic headscarf.

3.2.2. *Casuistry: American case law on religious freedom*

American law offers numerous examples; given the multiplicity of religions, sects and diverse beliefs that characterise the United States, it is not surprising that the problem of conflicts between state law and community norms has often occupied the jurisprudence of the American Supreme Court; this illustrates well the possible fluctuations in the recognition or not of a fact of polyculturality as a normative fact[13].

[13] For an early history, and a critique of the jurisprudential development, Zilberfein (1992).

The first line in American jurisprudence originated in the prohibition of polygamy by federal law, in opposition to the norm of the Mormon sect: the Court ruled that it did not violate the guarantee of religious freedom provided for in the First Amendment to the Constitution[14]. The same was true, more than a century later, for the denial of unemployment compensation to an employee fired for consuming peyote in a ritualistic (Indian) ceremony of the Native American Church°: "[...] The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)"[15]. This line applies to cases in which the challenged regulation is of general applicability.

In the meantime, however, other judgments have balanced the interests, at least in the case of regulations that are not generally applicable: the prohibition or obligation imposed by the legislation must be justified by a "compelling state interest" that cannot be achieved by a less restrictive means. Thus, the denial of unemployment compensation to an employee, a member of the Seventh Day Adventist Church, who was dismissed because she refused to work on Saturdays[16], and the obligation for an Amish man to send his children to school[17], were deemed to be contrary to religious freedom.

The discrepancy between these two lines, and especially the fact that the former had seemed to prevail in case of law over the latter[18], led Congress to pass the *Religious Freedom Restoration Act* in 1993, which endorsed the latter; it was amended in 2000 after a Supreme Court ruling[19] that excluded its application to the states. Subsequently, Congress passed the *Religious Land Use and Institutionalized Persons Act,* also applicable to the states but only in imprisonment and private property use regimes.

---

14 Reynolds v. United States, 98 U.S. 145 (1879).

15 Employment Division, Dep. Of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). The denial of compensation was based on the fact that the dismissal was due to misconduct.

16 Sherbert v. Verner, 374 U.S. 398 (1963). The reason for the denial was that the employee's situation – that, given her refusal to work on Saturdays, she could not find new employment – was without "good cause".

17 Wisconsin v. Yoder, 406 U.S. 205 (1972).

18 But the latter became relevant again after Smith (cited at note14): the Supreme Court struck down a regulation prohibiting ritual animal sacrifice, Church of the Lukumi Babalu Aye, Inc. v. Hialeah 508 U.S. 520 (1993) – although the judgment was unanimous, the competing opinions in that case reflect the difficulty of reconciling the two lines.

19 City of Boerne v. Flores, 521 U.S. 507.

3.3. Legislation and its application

3.3.1. *Arbitration through legislation*

Sometimes a legislature will decide on the solution to the problem of polyculturality. It is free to do so in compliance with constitutional norms, where there is judicial review of the constitutionality of laws[20]. Thus, in 2004, the French legislature adopted the *law on religious symbols in French public schools* and, in 2010, *the law prohibiting the concealment of one's face in public*.

The legislature may include exceptions or derogations in its regulations. For example, the French *law on religious symbols* allows "discreet signs". Some of the laws requiring motorcyclists to wear helmets allow Sikhs not to wear them.

Another example is the legislation allowing doctors in public hospitals not to perform treatment in case of a conflict of conscience, even though the institution to which they are attached has an obligation of care; such a conflict often arises because of norms dictated by religious faith - the Catholic religion or certain American sects. This is the case with the legal termination of pregnancy[21].

3.3.2. The application of the law

When adopting abstract state norms, it is up to the legislature to decide on their normative density, i.e. the freedom of appreciation that it wishes to leave or not to the authority responsible for their application. It is sometimes the subject itself of the legislation that imposes such a choice: this is the case when it is important to ensure compliance with the principle of proportionality when applying the abstract norm, which implies a low normative density - for example, to allow the relevant administration to grant exemptions when the

[20] American examples were given above.

[21] Thus Article L2212-8 of the French Public Health Code: "A doctor or midwife is never obliged to carry out a voluntary interruption of pregnancy, but he or she must inform the person concerned without delay of his or her refusal and immediately inform her of the names of practitioners or midwives who are likely to carry out this intervention in accordance with the procedures laid down [by law]". This provision is very specific, in that it clarifies a general provision (R.4127-47 of the Public Health Code) for the sole case of termination of pregnancy; it was introduced to facilitate the adoption of the 1975 law on the voluntary termination of pregnancy.

public interest does not justify its absolute application: so for the exemption from classes on Saturdays, but not for the obligation to perform military service or civil service in the case of members of certain sects.

Another reason for lower normative density is the codetermining importance of factual circumstances of all kinds, which only become apparent in the individual case - among which may be the existence of community norms to which the subject of law concerned considers himself bound or which he considers justifying his behaviour: thus the question of the wife's non-virginity, which should be - in his eyes - a reason for the nullity of his marriage.

> The husband, a Muslim, having discovered on the wedding night that his wife was no longer a virgin, applied for the nullity of the marriage based on Article 180 of the French Civil Code ("If there has been an error in the person, or the essential qualities of the person, the other spouse may apply for the nullity of the marriage"), an application which the first judge accepted; on appeal, the second judge rejected the application. The issue to be resolved by the judge was whether or not to recognise the Muslim conception as a normative fact[22].

This example shows that the conflict may only arise when applying a norm, depending on concrete circumstances. The legislature could not foresee such occurrences at all. Even if they could have been imagined, it might have been considered preferable not to legislate on them, considering that it was impossible to prescribe anything about all the potential occurrences that social realities might produce. In such configurations, interests can only be balanced in concrete situations where the conflict arises.

> A similar issue arose in the case of a prisoner who, in order to obtain a suspension of his sentence, went on a life-threatening hunger strike. The authority ordered his forced feeding. Doctors refused to administer it based on an ethical rule codified by the (private) body of medical guilds that all treatment requires the patient's consent. The Swiss Federal Court upheld the authority's decision, even though there no legal basis existed.

[22] On this case, see the daily Le Monde of 29 May and 19 November 2008.

There was sufficient public interest and a situation of urgency, with the general police clause replacing the lack of legal basis[23].

3.4. Judicial review

The ordinary channels of judicial review do not pose any specific problems. The court on appeal or recourse applies the same standards as the court of the instance that handed down the contested judgment, i.e. those that apply to the specific matter of the dispute; consequently, the scope of the court's power also depends on the normative density of the rules that it has to apply, and under the same conditions. It is therefore competent in the same way as the court who handed down the contested decision was, for example, to define the legal concept of "essential quality" of the spouse in order to determine whether the absence of virginity is or is not an "essential quality" in the light of the private law norm[24].

This is not the case with the constitutional Court: this court does not apply the specific norms of the dispute settlement, but only a higher norm. It has to judge whether these specific norms or their concrete application conform with the constitutional order. It, therefore, has the full freedom conferred by the indeterminacy of the concepts used in the guarantees of fundamental rights. For example - depending on the respondent authority's interpretation of the concept of the 'essential quality' of a spouse - it could examine whether an EU rule that restricts the virginity requirement to wives but does not extend it to husbands is compatible with the constitutional guarantee of gender equality. This is what makes the task of the constitutional judge often difficult when the subject matter of the judgment to be handed requires him or her to decide questions that involve socially conflicting socio-political options; the politicisation of the election of judges to the Supreme Court of the United States is the best-known manifestation of this.

[23] Decisions of the Swiss Federal Supreme Court 136 (2010) IV 97 (113): "In the event of a discrepancy between a rule of law and medical ethics as conceived by the guidelines, doctors cannot rely on the latter to avoid fulfilling their legal obligation. Consequently, the guidelines of the Swiss Academy of Medical Sciences cannot prevent the cantonal authorities from ordering the forced feeding of the appellant, nor can they exempt the doctors required from carrying it out, if the legal conditions for such a measure are met.

[24] See above footnote 22.

4. Conclusion

Conflicts related to polyculturality are usually resolved quite easily when the communities involved are circumscribed; they adapt or resign themselves; such is the case of the American sects or that of the Sikhs, whose typical wearing of the turban - the *dastār* - has posed some problems. (Do they have to take it off to wear a helmet when they ride a motorbike or are on military service? [25])

But when the community norms in question are those of a large minority whose traditions, customs, and history are far removed from those of the national community, the conflicts are not so easily resolved; the issue at stake concerns the whole of society and is divided between the will of a not inconsiderable part of the majority, which wants the minority to be integrated and for whom the latter represents a danger commensurate with its importance, and that of this minority to preserve as much as possible of its original identity. This explains why most of the cases presented here are related to Islam; it is to its presence that, in the West at least, the conflicts of polyculturality - it must be said here - are mostly linked. That the law can contribute to their solution from case to case is certain, especially through the mediation of fundamental rights, but this does not prevent the road to a democratically acceptable, if not generally accepted, solution from still being long.

This is also true for case law: a deeper analysis is needed than the mere comparison of solutions. In this respect, it is striking to note, at least at first sight, that the Sikh community has often been treated better than the Muslim community, probably because it inspires less fear, being less numerous, as regards its integration.

The need for such analyses, both in legislation and case law, is illustrated by the fact that the same problem is often not solved in the same way in different States or at different times, insofar as facts of polyculturality are recognised as normative or, on the contrary, rejected as irrelevant, and, as a

[25] Helmets are compulsory even for Sikhs in Germany (see the decision of the Federal Administrative Court of 4 July 2019, 3 C 24.17, which confirms the compatibility of the obligation with the guarantee of religious freedom), France, Switzerland, some US states with exceptions (medical, professional, but not for religious reasons), Australia, Denmark (with exceptions - medical or religious reasons), and it is compulsory except for Sikhs in India and the UK (by law).

result, the community norm in question is accepted or not accepted as being compatible with the State legal order. Often, they will then reveal socio-political or ideological presuppositions or unspoken facts. This also explains why motivations are rarely incontrovertible: they are only convincing, leaving a space of potential indecision - convincing as best as possible for the society for which they are intended[26].

> An example. As we have seen, French legislation prohibits public officials from wearing non-discreet religious symbols; it does not, of course, prohibit them from belonging to a religion. How will pupils recognise religion with a non-discreet symbol and not with a discreet symbol, given that a symbol is necessarily worn to be seen - otherwise, it would not be a symbol? And isn't it better for students to recognise it than to make wild guesses based on other clues - such as skin colour? Does the secularity of the state imply more than the prohibition of all propaganda, does it go so far as to require neutrality of passive appearances alone? The point here is not, of course, to take any position on the solution, but to show that another argument, based on otherwise selected normative facts, would have been possible, which reveals that the choice was guided by non-legal considerations and is therefore also contingent on the socio-political context.

Such contingencies also vary over time. An exemplary illustration is provided by comparing two judgements concerning the exemption of children of Muslims from mixed swimming lessons[27]. In 1993, admitting that the refusal of the exemption violated religious freedom, the Federal Court ruled that there was no obligation of integration for foreigners. Fifteen years later, it reversed its decision, referring to the constitutional principles of equal opportunities for all children and gender equality. Noting in fact that the Muslim population had grown from 150,000 in 1990 to 400,000 and that integration issues were becoming increasingly important in public opinion, it stated that "it is a task of the State under the rule of law to ensure, between it and society, the minimum coherence necessary for harmonious cohabitation, marked by respect and tolerance"; and, it continues, the foreign population may therefore be required to modify certain aspects of their way

[26] See Moor (2021, Chapter IX, 5, 225-230) and Moor (2010, 189 ff., 66 ff.).
[27] Swiss Federal Court judgments 119 (1993) Ia 178 and 135 (2008) I 79.

of life, at least insofar as this concerns everyday behaviour and not the very core of their religious beliefs; in this respect, the school has an essential integration function, and it would be inconsistent for certain children to feel excluded from school sociality by the special status that an exemption would give them. In the case of the first judgment, it can be observed that the relationship between the exemption on this ground should also have been examined from a gender perspective. In the case of the second judgment, it could be questioned whether the attendance of swimming lessons is a decisive normative fact for judging an individual's integration. The changing socio-political context has therefore played a decisive role.

It is not our intention to criticise the influence of non-legal considerations as an undue intrusion - even if it is not always explicit. On the contrary: this is normal. Law is not only a structure, or rather, it is a system that allows precisely for its content to be political. It is not only the constituent and the legislature, but also the judge, who, in the margins of freedom left by the normative density of the standards he implements, makes choices that are necessarily political - there is a *micropolitics* of jurisprudence, as has been explained elsewhere[28]. A judge is also a man, an active member of the society in which he lives and which he must convince of the relevance of his judgments, he is not only a function - that is to say, he is what we have called *figures* of the legal order: the positions within the legal system - of the member of the legislature as much as of the judge - in which the function and the individual are superposed and which ensure the transmutation of social normativities, carried by the individual, into legal normativities, pronounced performatively by the discourse of the function[29].

Legal Theory should make this clear in order to analyse the mechanisms by which the legal order deals with the problems of polyculturality, as with any issue on the socio-political agenda. This is why the present text has begun with such a long prolegomenon.

---

[28] Moor (2010, 298 ff.).

[29] See Moor (2021, chapter II, 5.1.2, V, 45–47, 107–123) and Moor (2016, 191 ff.).

References

Borges, J. L. (1951). De la rigueur de la science. In J. L. Borges (AA.), *Histoire universelle de l'infamie - Histoire de l'éternité*. Paris : 10 X 18.

Eco, U. (1988). *Semiotics and the Philosophy of Language*. Paris: Quadrige/P.U.F. (Semiotica e filosofia del linguaggio, Turin: Einaudi, 1984. M. Bouzaher, Trans.)

Germany. Federal Administrative Court, 3 C 24.17 (2019 July 4).

Klinkenberg, J.M. (1996). *Précis de sémiotique générale*. Brussels: De Boek & Larcier.

Moor, P. (2010). *Dynamique du système juridique*. Geneva: Schulthess.

Moor, p. (2016), *Perméabilités du système juridique. Essais sur le droit de l'état de droit*. Quebec: Presses de l'Université Laval.

Moor, P. (2021). *Le travail du droit*. Québec: Presses de l'Université Laval.

Ricca. M. (2018). Ignorantia Facti Excusat: Legal Liability and the Intercultural Significance of Greimas' «Contrat de Véridiction». *Revue internationale de Sémiotique juridique*, 31 (3), 101-126. DOI 10.1007/s11196-017-9529-6.

Zilberfein, P. S. (1992) Employment Division, Department of Human Resources of Oregon v. Smith: The Erosion of Religious Liberty. *Pace Law Review*, 12 (2), 403-443. http://digitalcommons.pace.edu/plr/vol12/iss2/7.

Public Diplomacy, Collaborative Power & Legal Community

a path for undecidabilities?

Niedja de Andrade e Silva Forte dos Santos

Fellow Researcher at the University of Coimbra Institute of Legal Research

ORCID 0000-0002-7313-2296

DOI | 10.14195/2184-9781_2_2

SUMMARY:

ABSTRACT

This paper argues that awareness over public diplomacy and collaborative power as relevant resources in the toolbox of the legal community may be useful for overcoming barriers related to culture and values. In this context, law practitioners are encouraged to focus on shared interests to get the best solutions for solving undecidabilities. The international relations perspective rather than law studies grounds this paper. After introduction, section two contextualizes the undecidability issue in the globalization era, as well as respective challenges posed to the law community regarding culture and values. Subsequently, section three exposes the public diplomacy concept while section four highlights the role of collaborative power in this realm. Then, this paper reflects on how public diplomacy and collaborative power can become relevant instruments of law practitioners. Finally, the conclusion summarizes the main thoughts and highlights its findings.

KEYWORDS

Public diplomacy; soft power; collaborative power; judicial diplomacy; undecidabilities; globalization; law community; shared interests; shared values; culture diversity

1. Introduction

In August 2021, while governments worldwide were fighting to retrieve citizens from Afghanistan, a civil society group succeeded in rescuing more than 5,000 people from there. Notably, the businessman and private-equity investor Zach Van Meter gathered people of diverse backgrounds, but holding shared interests and goals, such as entrepreneurs, American war veterans, defence experts, representatives of nongovernmental organizations, Afghan diplomats and off-duty American officials to extract citizens from Afghanistan through a global military-like rescue operation. They even succeeded in ensuring a temporary shelter in Africa or the Middle East for those Afghans until they could get permission for housing or refuge somewhere. Together, those people with diverse values and cultures obtained relevant outcomes related to humanity due to common interests and goals. With problem-solving focus, they worked in the public interest regardless of government efforts and sovereignty. Indeed, this is public diplomacy and collaborative power in action. This paper argues that awareness over public diplomacy and collaborative power as relevant resources of the toolbox of the law community may be useful for overcoming barriers related to culture and values. In this strand, law practitioners will be encouraged to focus on shared interests to obtain the best solutions in the face of undecidabilities.

Public diplomacy is a process through which states or non-state actors conquer international influence by engaging global publics in foreign policy goals (Snow 2009, 6). In contrast with the traditional diplomacy which depends exclusively on the efforts of states, public diplomacy involves non-governmental players, expanding the panel of those acting to achieve international outcomes. Traditionally, public diplomacy is linked to the use of soft power, the concept captured by Nye in the 1990s to describe the value of cultural identities and shared values in international affairs (Nye 2011). However, in the wake of the 21st century a complex architecture of multi-directional networks emerged between communities around the world; it relies more on shared interests than common culture and values. In this scenario, soft power was caught up by collaborative power. The latter is "the power of many to do together what no one can do alone" (Slaughter 2011, para. 6). At any rate, both soft and collaborative power are closely linked to public diplomacy and used to achieve national or global public interests.

Those approaches, which are the state of the art within diplomacy studies, were remotely touched on by David Law in the paper *Judicial comparativism and judicial diplomacy* published in 2015 at the *University of Pennsylvania Law Review*. In that paper, the author's main findings revealed how national legal communities are still closed and refractory to foreign judicial perspectives (Law 2015). However, same or similar issues and undecidabilities problems often arise around the world, afflicting legal communities in different places. Thus, at least theoretically they share the same interests. By this token, they would benefit from the analysis or solutions given to similar issues in other countries.

In this context, this paper argues that awareness over public diplomacy and collaborative power as relevant resources that may compose the toolbox of law communities may be useful for overcoming barriers related to culture and values, encouraging law practitioners to focus on shared interests to get the best solutions in each situation, finding paths for undecidabilities.

The international relations perspective rather than law studies grounds this paper. After introduction, section two contextualizes the undecidabilities issue in the globalization era, as well as challenges posed to the law community. Section three exposes the public diplomacy concept while section four explores the role of collaborative power in this realm. Then, this paper reflects on how public diplomacy and collaborative power can become relevant instruments of law practitioners. Finally, the conclusion summarizes main thoughts, highlights findings and indicates paths for further developments and research.

2. Undecidabilities in the globalization era

When Edouard Lucas invented the mathematical game "Tower of Hanoi" in 1883, he surely could not suppose that in 1941 it would give rise to the Frame-Stewart algorithm "$2^n - 1$", currently often mentioned as an optimal solution to the puzzle, besides being probably the most referred to symbol of a decidable problem (Klavžar et al. 2002). From the perspective of mathematical logic and computational theory, decidability means to set a decision algorithm to solve a problem (Rabin 1977). On the other hand, "an undecidable problem is the one for which 'it is proved to be impossible to construct an algorithm to a correct yes-or-no answer'!" (Undecidabilities and Law: The Coimbra Journal for Legal Studies 2021, 3). The issue is not limited to exact sciences; it also extends to social sciences and law studies.

In 2015, the Portuguese scholar Pedro Domingos published the book "The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World" which Bill Gates recommended and Xi Jinping chose to compound his bookshelf. The central hypothesis posed by Domingos is that "all knowledge—past, present, and future—can be derived from data by a single, universal learning algorithm" (2015 25). This is the "master algorithm". However, transnational interactions and complexities arising from globalization besides the increasing relevance of several non-state actors (Keohane & Nye 1981) makes it difficult to find a precise and unique solution for ever more intricate issues in the world order. As Linhares states, in the "self-celebrating plurality, several major juridically relevant societal problems firmly resist the predetermination of a unique solution" (2021, 9). In fact, globalization facilitates the encounter of world cultures and makes it even more difficult to achieve one-size-fits-all solutions for issues related to human interactions or academic dilemmas, whether related to political sciences or international relations and even law studies, just to cite a few.

Cultural homogenization is often referred to as one of the main characteristics of globalization (Jennings 2010, 132; Mackay 2004). However, cultural identities remain evident worldwide. From the law studies perspective, Jayme identified the cultural dimension as a hindering factor to the harmonization of private international law in the context of the European Union (Jayme 2003a). Interestingly, the author highlighted the legal language (*Rechtssprache*) as an important element of a country's cultural identity. Indeed, cultural identities of individuals require consideration and plurality emerges as a legal value (*Rechtswert*), thus variations among legal orders become even more apparent (Jayme 2003b, 118). In other words, any attempt to solve undecidability in the law or social sciences field should consider cultural diversity which however may even make that infeasible.

From the diplomacy perspective, cultural diversity is a strength that can enable international interactions through cultural exchange in the frame of public diplomacy and soft power (Cull 2019; Nye 2011). However, conflict of values sometimes may spoil such interactions, as soft power depends on shared values among involved parts (Nye 2011). In such circumstances, shared interests are more effective in paving the way for international collaboration (Slaughter 2011). In this regard, Cooren points out the need to listen to what all involved stakeholders "have to say about a specific situation" (2020, 186), especially before taking an ethical decision, which always "consists of

choosing a specific course of action to the detriment of others" (2020, 187), absorbing uncertainty and many times, touching on undecidabilities. Hence, collaborative power arises as a relevant concept to face challenges posed to the law community by situations comprising diverse cultures and values.

3. Public diplomacy

Public diplomacy is a peaceful instrument of foreign affairs (Nicolson 1942). It typically takes place through actions of listening, advocacy, cultural diplomacy, international exchange and international broadcasting (Cull 2019). Notwithstanding its being a recent notion, "public diplomacy" encompasses centuries-old mechanisms. The Library of Alexandria, built by Greeks in Egypt, around 300 BC, is an example of cultural diplomacy within the framework of public diplomacy. However, the term "public diplomacy" emerged only in the 20th century. It would have been used for the first time in 1856 by the British newspaper The Times, referring to the civility and behaviour of the American president Franklin Pierce (Cull 2019). However, Edmund Gullion, former US ambassador and first dean of the Fletcher College of Law and Diplomacy at Tufts University, is known for firstly using the term public diplomacy meaning a way to influence foreign publics (Cull 2019). In the 1970s, public diplomacy was already understood as a tool for consolidating image and building long-term relationships (Nye 2011), besides ensuring reputational security (Cull 2019).

Indeed public diplomacy is an evolution of traditional diplomacy (Melissen 2005). Thus, it can be conceptualized as an instrument of foreign policy, performed by state and non-state actors, such as NGOs, corporations, and even citizens, which underpins diplomacy, aiming to build long-term relationships, transmit information, consolidate image, influence and engage foreign publics, drawing on tools such as cultural diplomacy. It is indeed a way to approach different people around the word around common values.

International influence and its identification with power are pivotal to public diplomacy. Usually, persuasion skills and abilities determine the country's level of interaction in the international dimension. In this context, public diplomacy is about making a good impression on foreign publics (Nye 2019, 7), as well as about building long-term relationships. Thus, soft power, which relies on culture, values and policies is crucial to public diplomacy.

The term "soft power" was coined in the early 1990s by Joseph Nye, in the book "Bound to Lead: The Changing Nature of American Power" (1991). In 2004, Nye produced the in-depth study: "Soft Power: the means to success in world politics". There, the author conceptualizes soft power as "ability to get what you want to do with through attraction rather than coercion or payments" (2004, X)..."ability to shape the preferences of others" (2004, 5)... [a] "co-optive power" (2004, 7). The attention on soft power has increased since the World Trade Center attacks.

The main sources of soft power are culture, values and legitimate policies (Nye 2004). As for culture, there are two dimensions: high culture and popular culture (Nye 2004). High culture appeals to elites, comprising fields such as literature and art. Popular culture refers to mass entertainment. Nye states that attraction through culture and values has more lasting effects than those generated by public policies (Nye 2004). It is noteworthy that the effectiveness of soft power depends on the context. For instance, films extolling women's freedom, which are admired in Latin America, undermine soft power in Arab countries such as Saudi Arabia.

Markedly, soft power has limitations. First, especially in democratic societies, it is not under the state's control, such as hard power (military power) (Nye 2004), Secondly, soft power arises predominantly from civil society. For example, much of the attraction of the United States was produced by Hollywood. Admittedly, in the contemporary era, low cost of communication and the democratization of technology have placed citizens and other international actors, such as NGOs and transnational corporations on the international stage (Nye 2004). In this context, mediation skills are crucial to states, as well as other styles of power which rely not only on shared values like soft power, but specifically on shared interests, that is the case of collaborative power.

4. Collaborative power

Slaughter defines collaborative power as "the power of many to do together what no one can do alone", the "networked, horizontal arises and sustained application of collective will and resources" (2011, para. 6). Comparing it with soft power, the author clarifies that soft is the power over others, while collaborative power is the power with others (Slaughter 2011). Castells (2008,

91) also compares both styles of power however he identifies collaborative power with the very concept of public diplomacy, which, in this case, would literally be people's diplomacy:

> The implicit project behind the idea of public diplomacy is not to assert the power of a state or of a social actor in the form of "soft power." It is, instead, to harness the dialogue between different social collectives and their cultures in the hope of sharing meaning and understanding.

This paper considers that collaborative power does not exclude soft power nor public diplomacy (Arquilla & Ronfeldt 1999; Zaharna et al. 2013). Markedly, political representatives are decision makers in charge of signing international agreements on behalf of states, as well as being accountable for domestic enforcement (Spies 2019). Therefore, states cannot be excluded from the international system. Indeed, collaborative power has the potential to reinforce legitimacy and credibility in the decision making processes (Spies 2019). Furthermore, it is especially valuable for overcoming scarcity of all kinds of resources such as financial, human, technical and social, as well as the lack of cultural skills and abilities. Non-state actors add resources, skills and flexibility to governments' activities (Slaughter 2009), but also get benefits by participating in political processes (Spies 2019). In any case, collaboration is currently a "condition of success in diplomacy" (Melissen 2011, 2); it is observed in "initiatives that feature cross-national participation in a joint venture or project with a clearly defined goal" (Cowan & Arsenault 2008, 10), Thus, collaborative power is among styles of power mobilized by states and non-state actors to achieve international outcomes.

The phenomenon has been captured from different angles. The "noopolitik" and the "power in 'global fabric'" described by Arquilla and Ronfeldt address this issue (1999, 47). Similarly, the term "catalytic diplomacy" also gets the point (Hocking 1999). Other novel expressions also closely refer to the topic, like "polylateral diplomacy" (Wiseman 2010), "grass-roots connectivity", "official joint ventures" (Spies 2019), "collaborative public diplomacy" (Zaharna 2013), "social power" (Ham 2013), "networking, network, networked and network-making power" (Castells 2011), "civilian power" (Zaharna et al. 2013) and "group diplomacy", used by Slaughter (2004) before conceiving the term collaborative diplomacy. The common denominator among those figures and notions is the complex architecture of multidirectional networks

in contemporary society, involving state and non-state actors, which transform partnerships and collaboration into resources to achieve common goals. Hence, not only diplomacy, but other scientific fields may benefit from this kind of power.

The International Campaign to Ban Landmines (ICBL) that culminated in the Treaty of Ottawa, winning the 1997 Nobel Peace Prize is the most often cited example of collaborative power (Arquilla & Ronfeldt 1999; Castells 2008; Spies 2019). It is emblematic because it involves strategic interests of states. However, the initiative was born in 1992 under the shared leadership of five NGOs based in France, Germany, the UK and the USA. Global strategies were jointly decided by the steering group while local tactics were taken up by the 1,000 NGOs from around the world affiliated to the ICBL. In 1995, Canada joined the movement, making it known as the Ottawa Process. After Canada, other countries entered the campaign. In 1997, the initiative resulted in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. As of July 2021, 164 states were members of the ban landmines network. In short, this is a collaborative network initiated by non-state actors with long-term goals.

A more recent example is the global network mobilized in August 2021 to carry out the private military operation that rescued more than 5,000 citizens of Afghanistan when the Taliban took power. The private investor and executive Zach Van Meter brought together volunteers including American veterans, Afghan diplomatic officers and other actors to coordinate the operation. Once completing the planning, the group gathered support from governments in Africa and the Middle East, and chartered aircraft, in addition to arrangements for resettlement of rescued Afghans. As Slaughter (2009) states, knowing the right people to activate networks around the world facilitates solving serious crises. Therefore, this is an example of a dynamic and ad hoc network, formed and quickly dismantled when those short-term goals were achieved.

Despite the differences related to culture and value, in both cases people shared interests and goals. Both cases of collaboration were so successful that they attracted states as supporters; indeed governments took action following non-state initiatives grounded on transnational networks. Governments can also be initiators of collaborative efforts (Arquilla & Ronfeldt 1999). An illustration is the Marshall Plan launched by the US government involving public-private joint ventures (Spies 2019). Another example is the Confucius

Institute (Kōshi gakuin 孔子学院), an initiative of the Chinese government that instead of being organized into autonomous modules, feeds on the synergy of a physical and virtual multilayer global network coordinated in China by the Center for Language Education and Cooperation (Zhōngwài yǔyán jiāoliú hézuò zhōngxīn 中外语言交流 合作中心) (Zaharna 2013). International organizations also start collaborative initiatives, as exemplified by the UN Global Compact. Established in 2000 by the UN with the objective of promoting sustainable development through corporate social responsibility, the initiative currently involves more than 14,000 collaborators between companies, civil society organizations, business associations, unions, universities and cities in 162 countries. Thus, collaborative power is a pivotal element to face contemporary challenges such as controversies involving different cultures and values.

In operational terms, collaborative power features two aspects: process and networks. Networks are dynamic structures with links and nodes that support the collaborative process, enabling long-term relationships (Zaharna 2013). Thus, awareness over links and nodes in networks favours the understanding of collaborative processes. Nodes are people, groups or organizations. Links are relationships or transactions between nodes (Krebs 2005). Nodes tend to create clusters around thematic hubs, facilitating the coordination of efforts (Krebs 2005). The strength of collaborative power emerges from the volume of connections between the nodes, being calculated by the formula n(n-1)/2, where "n" is the number of nodes (Fisher 2013, 3). Better outcomes result from the activation of key nodes (Krebs 2005). In reality, nodes have different functions in the network.

The main activities of nodes in a network relates to weavers, boundary spanners, clusters and bridge builders. Network weavers stand out among nodes; they actively create new interactions between clusters and boundary spanners, which are on the periphery with great potential to build bridges with other networks, favouring innovation, new perspectives and information for the collaborative process (Fisher 2013; Krebs 2005). The backbone of networks are their strong ties, which are at the centre of the clusters, while weak ties are between clusters, being a link between them, so also called bridge builders (Fisher 2013). In this regard, Nye states that "power in networks can come from both strong ties and weak ties" (2011, 217). In other words, all involved nodes play an important role in collaborative networks.

It is noteworthy that despite being manageable, networks cannot be possessed (Slaughter 2009). One can guide, but not own networks (Slaughter 2011). As Nye summarizes, "the network provides power to achieve preferred outcomes with other players rather than over them" (2011, 217). Attempts at control can lead to the breakdown of collaborative connections (Fisher 2013). Remarkably, the power of the network flows precisely from the ability to optimize valuable connections (Slaughter 2009, 100). In reality, collaborative power can be coordinated, through the combination of interests, objectives, elements and activities, without impositions.

Cowan and Arsenault emphasize that networks "without exception include a dialogue between participants and stakeholders, but they also include concrete and typically easily identifiable goals and outcomes that provide a useful ground and structure upon which to form more lasting relationships" (2008, 21). Therefore, "negotiation" seems to better characterize the behavioural pattern that involves the ability to listen, map and align interests, supporting the long-term relationship (Zaharna et al., 2013, p. 15). On this basis, sources of collaborative power are information (Fisher 2013; Spies 2019) and positions in network nodes (Nye 2011; Zaharna et al. 2013). As for the latter, Slaughter states that "measure of power is connectedness" (2009, 94). From such sources flow basic resources such as access to cyberspace, mobile phones, social networks, transnational social movements, foreign ministry officials with management skills and an innovative mindset. For example, a resource from the innovative mindset in Denmark was the appointment of an ambassador to represent its interests with Silicon Valley techs such as Facebook and Google.

From a contextual perspective, sharing interests and goals is a facilitator of collaborative power (Arquilla & Ronfeldt 1999; Fisher 2013; Slaughter 2009). On the other hand, the lack of transparency and manipulation of reality are obstacles to collaborative actions (Slaughter 2009). The potential outcomes of collaborative power are agenda setting and sustainability of decisions and acts taken since it usually involves a wide range of stakeholders.

On the other hand, collaborative power has limitations. First, as a collective action, it raises concerns related to ownership and responsibility (Spies 2019). Second, critics highlight the point that NGOs that advocate global public interests sometimes fail to provide transparency in their governance and funding (Spies 2019). Third, there is the risk of state capture by diverse international interests, as occurred in South Africa in 2016, when President

Jacob Zuma succumbed to the interests of the Indian Gupta brothers. These issues reinforce the importance of coordination of such processes, including the creation of accountability mechanisms so that there are no counterproductive efforts.

Despite being an institution or practice studied in the realm of international relations and diplomacy, collaborative power may offer insights to other fields, like social sciences and law. In fact, the most important point of collaborative power is its focus on shared interests, which can overcome differences related to culture and values which are pivotal in several situations. Given that, awareness over such concepts may favour other activities of social life and even issues undecidabilities in the legal field.

5. Note on judicial diplomacy

Squatrito defines judicial diplomacy as "a set of practices that are planned and organised by an international court, whereby it represents itself and claims authority through non-adjudicative interfacing with external actors" (2021, 66). A broader frame was conceived by Oliveira that identified the manifestation of judicial diplomacy in two main ways: (1) dialogue and exchange within the law community and (2) collaborative efforts between Supreme Courts in developing working procedures in resolution systems related to regional integration initiatives (2007, 94-95). Then, the second author includes in the definition of judicial diplomacy other aspects rather than only activities of international courts. In both cases, the idea of judicial diplomacy relates to the notion of public diplomacy.

In 2015, an outstanding paper was published on this topic at the University of Pennsylvania Law Review under the title "Judicial comparativism and judicial diplomacy", authored by the professor of law and political sciences at the Washington University and Princeton, David Law. The main goal of that research was to investigate the reluctance of the US Supreme Court to engage in comparative constitutional analysis, by making use of foreign constitutional jurisprudence (Law 2015). To this aim, the author conducted a comparative analysis among four leading courts in Asia, namely the Japanese Supreme Court, the Korean Constitutional Court, the Taiwanese Constitutional Court, and the Hong Kong Court of Final Appeal (Law 2015). Notably, public diplomacy, soft power and collaborative power are

topics virtually touched on by the author in that article despite not being expressly mentioned.

Initially focusing on judicial comparativism, Law discovered judicial diplomacy to be a "hidden underlying phenomenon" coupled with comparativism issues. First, the author struggled to map enablers of judicial comparativism. In this regard, he found foreign legal expertise, knowledge of foreign languages and legal education which fosters "aptitude and appetite for comparativism" as main factors that would favour judicial comparativism (Law 2015, 928). Besides that, Law (2015) identified that constitutional courts often use comparativism as a kind of diplomatic activity, especially when it involves mastery of foreign law or hosting foreign judges. In other words, constitutional courts engage in diplomacy by showing respect, attention and openness to foreign judicial activities and people from foreign law communities. Additionally, the diplomatic engagement may also be grounded on the aspiration of "competing with one another for international influence or pursuing foreign policy objectives, such as promotion of the rule of law and judicial independence in other countries" (Law 2015, 928). The paper concluded that national law communities are still closed and refractory to foreign judicial perspectives (Law 2015) however courts are usually open to relationships with foreign judicial communities.

As a matter of fact, the same or similar issues and undecidabilities problems arise around the world and afflict law communities in different places. Thus, at least theoretically they share the same interests. By this token, they would benefit from the analysis or solutions given to similar issues in other countries. Worthy of attention as well is that solutions for global judicial and legal issues may be easier and better achieved by involving collaborative efforts among law communities around the world.

The notion of judicial diplomacy which derives from public diplomacy has been raised within legal studies (Squatrito 2021; Oliveira 2007; Law 2015). However, it seems that law communities still do not make use of public diplomacy collaborative power as a means to the realization of shared interests and achieving common goals. Most probably, law communities could not still realize at all the existence and relevance of such concepts inherent to international relations, namely public diplomacy and collaborative power, as well as their proneness to serve as means to reach best deals in undecidabilities problems.

6. Public diplomacy and collaborative power in the toolbox of law practitioners

The main argument of this paper is that awareness over public diplomacy and collaborative power as relevant resources in the toolbox of the law community may be useful for overcoming barriers related to culture and values, besides being valuable and promising instruments providing an approach to undecidabilities issues.

Globalization makes people closer worldwide, but has the potential to create transnational problems and issues. Successful solutions and decisions for those situations may be difficult to find in the face of cultural diversity and values. Despite the existence of international courts in global society, sometimes the best remedies for litigation are not legal or judicial alternatives. It is worth noting that occasionally judicial decisions do not end conflicts. Then, the law community should look for other alternatives in this regard.

Public diplomacy is an international relations institute, namely an instrument of foreign affairs that brings states and people together because of cultural diversity. In other words, public diplomacy relies on diverse cultures to produce outcomes. However, operating through soft power, the best results of such activities depend on shared values among people involved. On the other hand, collaborative power gathers people that have common interests and goals. Indeed, collaborative power grounds achievements even when there are divergent values among involved people.

Those are recent notions in the discipline of international relations and diplomacy studies, thus still being absorbed by scholars and practitioners of those domains. Therefore, they are still to be introduced in other fields like humanities and law. Notably, previous research, such as that produced by Law, Squatrito (2021) and Oliveira (2007) has already noticed benefits and influence of diplomacy in the judicial domain. This indicates some acceptability of such concepts in this arena.

Public diplomacy and collaborative power are instruments that may be borrowed by the law community. They are powerful tools to deal with uncertainty and issues of difficult decisions that constantly worry law scholars and practitioners. From the law perspective, the main strength of those instruments is the power to transcend legal concerns and courts, finding sustainable solutions in environments with cultural and values diversity. In fact, soft power relies on common values and cultural diversity, while collaborative power works on

cases involving different values as long as there are common interests and goals. Hence, through such tools, law communities can find paths to undecidabilities. In fact, a unique solution will unlikely be found, but people will find the best solutions for the group of people involved in a given problem.

The first step to enable the use of public diplomacy and collaborative power by law communities is to promote awareness of such institutes. Then, it is important to consider such mechanisms in legal learning. In the globalization era, law practitioners and scholars cannot lock down upon basic knowledge over international relations institutes. Another useful action is to promote the study of successful cases of public diplomacy and collaborative power from the perspective of law studies.

7. Conclusion

Since 2015, the discussion over the master algorithm has increased due to the book published by Domingos. However transnational interactions and complexities arising from globalization make one-size-fits-all solutions unfeasible. An algorithm to provide an always correct exact answer in legal and law matters is unfeasible.

As a matter of fact, any attempt to deal with undecidability in law or social sciences should consider the diversity of cultures and values that become even stronger in the globalization era. As legal, judicial and law matters enter the global stage, it is important to give attention to scientific fields that study global and international topics, namely international relations and diplomacy studies. This study, developed from the international relations perspective sheds light on diplomatic tools that can likely benefit law communities.

Specifically, two subjects are of special relevance: public diplomacy and collaborative power. The first operates in cultural diversity and the second is an ideal instrument for situations characterized by common interests and goals, even where values are diverse. Then, awareness of those instruments as relevant resources in the toolbox of the law community can be useful for overcoming barriers related to culture and values. By focusing on different cultures to bring people closer or focusing on the same interests, law practitioners can make good use of public diplomacy and collaborative power to achieve sustainable solutions. They are likely valuable instruments to deal with undecidabilities in the globalization era.

8. References

Arquilla, J. & Ronfeldt, D. (1999). *The emergence of noopolitik: Toward an American information strategy*. Washington: RAND.

Castells, M. (2008). The new public diplomacy sphere: Global civil society, communication networks, and global governance. *Annals of the American Academy of Political and Social Sciences*, 616 (1), 78-93. https://doi.org/10.1177/0002716207311877

Castells, M. (2011). A network theory of power. *International Journal of Communication*, 5, 773-787.

Cooren, F. (2020). A communicative constitutive perspective on corporate social responsibility: Ventriloquism, undecidability, and surprisability. *Business & Society*, 59 (1), 175-197. https://doi.org/10.1177/0007650318791780

Cowan, G., & Arsenault, A. (2008). Moving from monologue to dialogue to collaboration: The three layers of public diplomacy. *Annals of the American Academy of Political and Social Sciences*, 616 (1), 10-30. https://doi.org/10.1177/0002716207311863

Cull, N. (2019). *Public diplomacy: Foundations for global engagement in the digital age*. Medford: Polity.

Domingos, P. (2015). *The master algorithm: How the quest for the ultimate learning machine will remake our world*. NY: Basic Books.

Fisher, A. (2013). *Collaborative diplomacy: How transnational networks influenced American studies in Europe*. New York: Palgrave.

Ham, P. van. (2013). Social power in public diplomacy. In R. S. Zaharna, A. Fisher, & A. Arsenault (Eds.), *Relational, networked, and collaborative approaches to public diplomacy* (26-43).New York: Routledge.

Hocking, B. (1999). Catalytic diplomacy: Beyond 'newness' and 'decline'. In J. Melissen (Ed.), *Innovation on diplomatic practice* (21-42). New York: Palgrave.

Jayme, E. (2003a). Die kulturelle Dimension des Rechts –ihre Bedeutung fu¨r das Internationale Privatrecht und die Rechtsvergleichung. *The Rabel Journal of Comparative and International Private Law*, 67 (2), 211-230. https://doi.org/10.1628/0033725033641698

Jayme, E. (2003b). Perspectives for a postmodern theory of comparative law [Visões para uma teoria pós-moderna do direito comparado]. *Cadernos do Programa de Pós-graduação em Direito*, 1 (1), 115-131.

Jennings, J. (2010). *Globalizations and the Ancient World*. Cambridge: Cambridge University Press.

Klavžar, S., Milutinovića, U., & Petr, C. (2002). On the Frame–Stewart algorithm for the multi-peg Tower of Hanoi problem. *Discrete Applied Mathematics*, 120 (1-3), 141-157. https://doi.org/10.1016/S0166-218X(01)00287-6

Keohane, R. O. & Nye, J. S., Jr. (1981). Transnational relations and world politics: An introduction. In R. O. Keohane & J. S. Nye Jr (Eds.), *Transnational relations and world politics* (5th ed., IX-XXIX). Cambridge: Harvard University Press.

Krebs, V. (2005, October 21). Building adaptive communities through network weaving. *Nonprofit Quarterly*. https://nonprofitquarterly.org/building-adaptive-communities-through-network-weaving/

Law, D. (2015). Judicial comparativism and judicial diplomacy. *University of Pennsylvania Law Review*, 163 (4), 927-1036.

Linhares, J. M. A. (2021). Editorial. *Undecidabilities and Law: The Coimbra Journal for Legal Studies*, 1 (1), 9. https://doi.org/10.14195/2184-9781_1_0

Mackay, H. (2004). The globalization of culture? In D. Held, *A Globalizing World?: Culture, Economics, Politics* (2nd ed., 44-81). London: Routledge.

Melissen, J. (2005). The new public diplomacy: Between theory and practice. In J. Melissen (Ed.), *The new public diplomacy: Soft power in international relations* (3-27). London: Palgrave.

Melissen, J. (2011). *Beyond the new public diplomacy*. The Hague: Clingendael.

Nicolson, H. (1942). *Diplomacy*. London: Oxford University Press.

Nye, J. (2011). *The future of power* . NY: Public Affairs.

Nye, J. S., Jr. (1991). *Bound to lead: The changing nature of American power*. New York: Basic Books.

Nye, J. S., Jr. (2004). *Soft power: The means to success in world politics*. New York: Public Affairs.

Nye, J. S., Jr. (2019). Soft power and public diplomacy revisited. *The Hague Journal of Diplomacy* 14(1-2), 7-20. https://doi.org/10.1163/1871191X-14101013

Oliveira, M. A. J. de S. C. (2007). Judicial Diplomacy: The Role of the Supreme Courts in Mercosur Legal Integration. *Harvard ILJ Online*, 48, 93-100.

Rabin, M. O. (1977). Decidable theories. In J. Barwise (Ed.), *Handbook of Mathematics Logic* (Vol 90, 595-629). Amsterdam: North Holland.

Slaughter, A.-M. (2004). *A new world order*. New Jersey: Princeton University Press.

Slaughter, A.-M. (2009). America's edge: Power in the networked society. *Foreign Affairs* 88(1), 94-113.

Slaughter, A.-M. (2011, Nov. 30). A new theory for the foreign-policy frontier: Collaborative power. *The Atlantic*. Retrieved from https://www.theatlantic.com/international/archive/2011/11/a-new-theory-for-the-foreign- policy-frontier-collaborative-power/249260/

Snow, N. (2009). Rethinking public diplomacy. In N Snow and P. Taylor (Eds.), *Routledge Handbook of Public Diplomacy* (3-12). NY: Routledge.

Spies, Y. K. (2019). Polylateral diplomacy: Diplomacy as public-private collaboration. In Y. K. Spies (A.), *Global South perspectives on diplomacy* (153-199). Cham: Palgrave.

Squatrito, T. (2021). Judicial diplomacy: International courts and legitimation. *Review of International Studies*, 47 (1), 64-84.

Undecidabilities and Law: The Coimbra Journal for Legal Studies (2021). Preamble. *Undecidabilities and Law: The Coimbra Journal for Legal Studies*, 1 (1), 9.

Wiseman, G. (2010). 'Polylateralism': Diplomacy's third dimension. *Public Diplomacy Magazine*, 4, 24-39.

Zaharna, R. S. (2013). Network purpose, network design: Dimensions of network and collaborative public diplomacy. In Zaharna, R. S., Fisher, A., & Arsenault, A., *Relational, networked, and collaborative approaches to public diplomacy* (221-246). New York: Routledge.

Zaharna, R. S., Fisher, A., & Arsenault, A. (2013). Introduction: The connective mindshift. In R. S. Zaharna, A. Arsenault, & A. Fisher (Eds.), *Relational, networked, and collaborative approaches to public diplomacy* (14-24). New York: Routledge.

Dynamism and deliberativeness in the interpretation of law on the example of cases concerning LGBTQ rights[1]

Bartosz Wojciechowski

University of Łódź

ORCID 0000-0002-4271-7056

DOI | 10.14195/2184-9781_2_3

ABSTRACT

The article illustrates the numerous contexts and multifaceted nature of the right to citizenship, to have a correct civil status record, or to benefit from tax reductions or exemptions on the same basis as other citizens, e.g. those in heterosexual unions. It shows how complicated it has become to adjudicate on matters that, in view of the subject matter, should be relatively clear and predictable. Reflexive interpretation of law makes it possible to take into account its non-eliminable changeability, as well as the fluidity of the meaning of terms and phrases used in legal texts – factors which oblige the interpreter to refer to extra-linguistic contexts of interpretation, i.e. to functional and systemic arguments. The author considers that it is not possible to reach an adequate understanding of the current legal context without analysing the social and cultural context, especially when considering pluralism of values as the *modus vivendi* of a democratic society.

KEYWORDS:

deliberativeness, LGBTQ, fundamental rights, identity, hard cases, interpretation of law

[1] This article was prepared under the grant of the National Science Center no DEC-2017/27/L/HS5/03245.

1. Introduction

I would like to begin my reflections on the topic indicated in the title with the straightforward assertion that the development of modern society has led to the boundaries of social life becoming significantly widened. This fact clearly influences the way law should be interpreted, particularly in cases where it is necessary to move away from the traditional or even modern views of social processes and the legal institutions related to them (such as the family, marriage, gender). Such difficult cases require adopting a position of reflexive modernity and the application of deliberative thinking in the resolution of social disputes, including legal ones. Here deliberativeness denotes the necessity to think carefully, to consider, to deliberate, or even to debate the understanding of a given legal concept, phrase, or legal institution, and consequently to take a sophisticated and multifaceted decision when applying the law. Thus, in terms of meaning, the deliberative application of law reaches back to its classical, ancient roots, i.e. the *dia-logos* taking place in the Athenian Agora (Juchacz 2006; 2015, 101). Such a stance requires an in-depth reformulation of existing and sometimes ossified meanings. This necessarily entails taking into account changing social and cultural contexts, including the implications of diverse pluralisms and multiculturalism. The sensitivity indicated as necessary here is obviously one that rules out hiding behind a positivist vision of law; on the contrary, when dealing with difficult cases a necessary link between law and morality becomes absolutely indispensable (Cern & Wojciechowski 2011).

2. The modern identity crisis

There is now a widespread conviction that modernity has undermined the importance of community: the reference group that had always provided the individual with a stable framework for action and a sense of belonging. This has given rise to the view that it is no longer possible to form group identities. A more far-reaching view has also come to be articulated, namely that the individual has become isolated and excluded from the nucleus of community life. This phenomenon now concerns not only outsiders, who

have always been alienated, by definition, but also those who, for various reasons, do not fit within the broadly accepted definition of 'normality'.

At first glance, it seems that despite the modern or post-modern fascination with the atomistic vision of the individual, with their powerful agency and unique beauty, the mainstays of community nonetheless endured – in such institutions as the family, marriage, religious community, neighbourhood and social stratum – and continued to perform integrative social functions. The role of these institutions was manifested primarily in the fact that they provided the individual with a much-needed sense of security and stability in societies undergoing incessant transformation.

The reflexive stage of modernisation has exacerbated this situation by asserting that community or authentic social bonds have not disappeared, but have rather taken the form of difficult, conflicting coexistences between the individual, the community and society. A tension has emerged between, on the one hand, the conflicting impulses emanating from social identity and, on the other, the sphere of unique characteristics that make up the singular personality of the individual. A contradiction has arisen: between the external definition of ourselves provided by our environment and the internal desire to know our own nature; or, put another way, between the need to belong to a social group and the need for independence and self-realization.

As a result, identity has become fluid, fragmented and decomposed, a kind of syncretic collection of various elements. Moreover, identity appears to be negotiated, contextualized and dispersed (Foucault 2005, 361). As a result, we are in the midst of an identity crisis, preceded by a crisis of the subject, which is connected to the loss of one's own identity in the circumstances of a changing social reality, the inability to find one's own style of functioning in a community; a disturbed or reduced identification with the values of the community, due to which the subject derives an incoherent self-image. This is the result of the atomization of life, which, according to some authors, means that the only available subject is decentralized, incoherent and incidental, and the difference-based identity of such a subject is the result of discourses, signifying processes and social relations that are particularistic, relativizing and contingent (Fuss 1995, 10).

Post-modern philosophy emphasizes that identity is constructed and articulated through difference and exclusion, rather than being a manifestation of sameness, continuity, recurrence or naturally established

unity (Butler 1993, 22; Hall 1996, 16). Anthony Giddens also emphasizes the voluntaristic and subjective dimension of human action; in this conception subjects independently create the structural framework in which they operate. Giddens assumes that human beings are characterised by a considerable degree of autonomy and reflexive self-awareness (Giddens 2001, 197). In other words, identity is a cultural creation that is chosen ~~rather~~ than acquired.

3. The decisions of the Supreme Administrative Court on LGBT issues

With the above context borne in mind, it is worth noting three categories of cases that have been adjudicated by the Polish Supreme Administrative Court, all of which revolve around problems of identity and identification. These cases concerned the citizenship of children born to and raised by same-sex parents, and the transcription of their birth certificates, when at least one of the parents had Polish citizenship, but their union, which had been concluded abroad, had no legal effect in Poland. The transfer of a foreign birth certificate to the Polish register of civil status, and proceedings concerning the confirmation of Polish citizenship of a child born abroad, with at least one of whose parents having Polish citizenship, are in fact functionally linked matters. The third category concerns tax and legal issues in same-sex unions. In these cases, there is a conflict and/or rivalry between such values as constitutionally protected different-sex marriage (Article 18 of the Constitution of the Republic of Poland), the right of every child to citizenship (Article 24(3) of the International Covenant on Civil and Political Rights), the primacy of the interests of the child (Article 3(1) of the Convention on the Rights of the Child), equality before the law and the prohibition of discrimination (Article 32 of the Constitution of the Republic of Poland), and the absolute exclusivity of the law in the cases listed in Article 217 of the Constitution, i.e. the determination of the structural elements of taxes and other public imposts, i.e. those subject to taxes, the rates of taxation, the principles for granting relief and remissions, and the categories of taxpayers exempt from taxation.

3.1. The transcription of civil status records

The first of the identified problems concerns the refusal to transcribe a child's foreign birth certificate because persons of the same sex are entered as parents (the judgment of 17 December 2014, II OSK 1298/13, Supreme Administrative Court of Poland, 2014)[1]. In the opinion of the administrative courts and administrative authorities examining this case, the provisions of the Family and Guardianship Code precisely regulate issues pertaining to the origin of the child, i.e. they specify that the mother is the woman who gave birth to the child, while the provisions on paternity, regardless of the way it is established, in each case mention a man. Furthermore, Article 18 of the Polish Constitution unequivocally stipulates that only a union between a man and a woman is legally recognised by the State, and only such a union enjoys the protection and care of the Republic of Poland. On these grounds, it was held that the transcription of the birth certificate in question into Polish civil status records would be in conflict with the legal order in force in the Republic of Poland.

The administrative courts of both instances stated that the refusal of transcription does not contradict the regulations of international law and European Union law. Reference was made, in particular, to the position expressed in the judgment of the European Court of Human Rights (ECtHR) of 15 March 2012 in the case of Gas and Dubois v. France, 2012 (application No. 25951/07), concerning the refusal to adjudicate on the simple adoption of the biological child of one of the partners in a registered civil partnership. In that judgment, the Court held that the question of a violation of Article 14 ECHR arises when there is a difference in treatment between persons in comparable situations. Such a difference is discriminatory when it has no objective or reasonable justification. The ECtHR pointed out, however, that the Contracting States enjoy a margin of appreciation in deciding whether and to what extent differences in otherwise analogous situations justify different treatment, including differences in legal treatment. Finally, the Court did not consider that there had been a violation of Article 14, in combination with Article 8, of the Convention.

The Polish Supreme Administrative Court (NSA) also regarded the cassation appeal alleging a violation of Articles 7 and 21(1) of the Charter

[1] The case is pending before the European Court of Human Rights (A.D.-K. and others v. Poland, 2015, application No. 30806/15) based on the allegation of violation of Article 8 and Article 14 of the European Convention on Human Rights.

of Fundamental Rights of the European Union as erroneous and unjustified as to the facts. In the NSA's view, the Provincial Administrative Court's dismissal of the complaint against the decision refusing to enter the birth certificate of the applicants' child in the register of births did not in any way violate the right to respect for their private and family life. The NSA found it indisputable that the subject of the proceedings in the case was neither the applicants' family life, nor their private life, but issues concerning the formal conditions required for a given entry being made in the birth register. As the NSA pointed out, neither the decision of refusal nor the contested judgment of the court of first instance in the justification of its decisions questioned or violated the two abovementioned rights, but they instead highlighted the lack of legal grounds in national law that would have allowed the entry to be made in accordance with the application. According to the NSA, it could not be inferred from the facts of the case that the refusal to enter the child's birth certificate into the birth register was based on discrimination, in particular on grounds of sex or belief, any other opinion or sexual orientation, or on any of the other grounds listed in Article 21(1) of the Charter of Fundamental Rights. The sole reason for the refusal to enter the certificate was the fact that its entry in accordance with the application would be contrary to the law in force in the territory of the Republic of Poland. Moreover, in the case there was no legal possibility to enter in the birth certificate, next to the child's mother, a person of the female sex instead of (or in place of) the child's father.

This legal issue was considered so important that it was considered by an expanded panel of the Supreme Administrative Court. Thus, in a resolution of 2 December 2019, ref. no. II OPS 1/19, a panel of seven judges of the Supreme Administrative Court (2019) ruled that: "The provision of Article 104(5) and Article 107(3) of the Act of 28 November 2014 Law on Civil Status Records (Journal of Laws 2014, item 1741, as amended) in connection with Article 7 of the Act of 4 February 2011 on Private International Law (Journal of Laws of 2015, item 1792) does not allow the transcription of a foreign birth certificate of a child in which persons of the same sex are entered as parents".

The case considered by the Supreme Administrative Court concerned a slightly different factual situation, namely the transcription of a foreign civil status record in which the parents were indicated as being of the same sex, and not bi-sexual parents who remained married. The Court stressed that in the case in question there were no doubts as to the acquisition of Polish

citizenship by the applicant's child or parental rights by the child's mother. It held that it was not the refusal to transcribe the child's birth certificate that could itself give rise to State liability for a violation of the Convention, but rather the effects of this refusal and the absence of protection from the negative consequences of the lack of transcription. Those effects would, however, be assessed in separate, individual proceedings, for example in connection with a possible refusal to issue an identity card. For this reason, the arguments raised by the applicant – asserting that the interests of the child had not been taken into account and that the protection of children's rights under the Convention on the Rights of the Child and the Constitution had been violated – should be taken into account in the event that transcription were refused in those subsequent proceedings. Refusal of transcription on the grounds of infringement of the principles of the Polish legal order is not tantamount to a violation of the constitutional and international obligation of the public authorities to take into account the best interests of the child, since a foreign birth certificate, even without its transcription, is exclusive evidence of the events stated therein and the applicant's child may rely on such a certificate in administrative and judicial proceedings concerning his or her rights.

It is worth noting that the courts in the cases cited consistently avoided cultural or world-view considerations, opting to hide behind formal issues. This observation is important because the decisions were based on statutory, constitutional, international and EU regulations, hence broader, axiological argumentation would obviously have been appropriate. However, the court's deliberations, despite the fact that they concern the good of the child and his or her protection, as well as the public-policy clause, are conducted in a very positivistic manner. There were no arguments that could be described as deliberative, i.e. referring to natural law aspects, considering a pluralistic view of the analysed legal regulations, human dignity, the discriminatory character of the applied regulations – all of which would certainly have changed the meaning of the reconstructed legal norm.

Another example is the judgment Supreme Administrative Court of Poland (2018) of 10 October 2018, ref. no. II OSK 2552/16, in which the appealed judgment of the court of first instance and the preceding decision of the administrative body were repealed. In this case, the direct reason for the refusal of the Polish administrative authorities to transcribe a birth certificate drawn up in the United Kingdom was the fact that both in the section

'mother' and in the section of the certificate described as 'parent' the names of two women had been entered.

The adjudicating panel, without questioning the legitimacy of applying the public-policy clause in general, pointed out that "the concept of public policy as a justification for derogating from the basic act of providing a transcription must be interpreted narrowly, referring in detail to the realities of the case at hand and carefully assessing the real and serious threat to one of society's fundamental interests in the particular case". In doing so, it referred to the established case law of the Court of Justice of the European Union (CJEU): the judgments in Case C-438/14 *Bogendorff von Wolffersdorff*, paragraph 67, and Case C-193/16 E v Subdelegación del Gobierno en Álava, paragraph 18.

One of the more significant arguments that influenced the consideration of the cassation appeal was the amendment and the resulting current regulation of the Law on Civil Status Records (the new Act of 28 November 2014 on the Law on Civil Status Records entered into force on 1 January 2015). As noted by the Supreme Administrative Court, in the amended Law "the legislator has deliberately and consciously introduced the institution of obligatory transcription in order to prevent situations in which a citizen of the Republic of Poland is not issued with documents confirming identity", which may "lead to preventing the realization of rights related to the possession of Polish citizenship acquired, as in the case at hand, by operation of law by a minor (e.g. lack of access to the health care system, education, etc.)". Thus formal considerations were ultimately decisive here too.

3.2. Cross-border problems associated with citizenship

The second category of cases is even more characteristic since it concerns the certification of the citizenship of children whose foreign birth certificates list same-sex parents. In the case in question, the certification of Polish citizenship was refused on the basis of an American birth certificate, with the argument that the certificate did not establish who the parent of the minor M. S.-H was. The minor M., together with his twin brother S., was born on 26 September 2010 in the United States as a result of a surrogacy agreement and the use of genetic material from O. Z. S. In the foreign (American) birth

certificate, O. Z. S. (holding Polish and Israeli citizenship) and D. H. (citizen of Israel) appear as the parents of M. and S[2].

In the view of the adjudicating panel, the decision to refuse recognition of the legal effects stemming from the foreign birth certificate, and thus the refusal to certify Polish citizenship, was based on law, since Polish law understands the term "parents" to mean only a father and mother, i.e. persons of different sexes, and because "surrogate motherhood contracts" were unknown in Polish law, it was not possible to recognize the effects. Under Polish law, the mother is the woman who gave birth to the child, and it is presumed that the father – that is, the second parent – is her husband, if the child was born while the couple were married. The genetic origin of the child is not relevant. The child's biological (though not genetic) mother in this case was K.S.C., married to D.T.C. The recognition of O. Z. S. as the child's father (even if he is indeed the father in genetic terms) would have led to the recognition that the other parent – and therefore the child's mother – is D. H., who is of the male sex, which would have been contrary to Polish law.

The NSA referred to the public-policy clause as being of vital importance on the international level, since it guarantees "the protection of the domestic legal order against infringements thereof by giving effect (recognition) to a decision which does not correspond to the fundamental principles of the legal order", and since the applicant's foreign birth certificate indicates two men as the applicant's parents, and thus recognizes the surrogacy contract, it "contradicts the fundamental principles of the legal order of the Republic of Poland". The above – in the opinion of the panel – therefore prevented the foreign birth certificate of the applicant from having legal effect in the case ref. II OSK 2372/13.

It is worth recalling that a similar issue has already been decided by the European Court of Human Rights, which, in *Mennesson v. France* (application no. 65192/11, in particular § 96 and § 99), in *Labasse v. France* (application no. 65941/11); *Foulon v. France* (application no. 9063/14), and in *Laborie v. France*

[2] The judgment of the Supreme Administrative Court of 6 May 2015 in the case II OSK 2372/13 and of 10 October 2018 in the case II OSK 2552/16, as well as the proceedings before the ECtHR on this issue in the case Schlittner-Hay v. Poland (application nos. 56846/15 and 56849/15, joined for joint consideration). In their application to the ECtHR, the applicants in case nos. 56846/15 and 56849/15 alleged that the refusal to confirm Polish citizenship violated the children's right to respect for private and family life (Article 8 ECHR) and the prohibition of discrimination due to discrimination on the basis of sexual orientation (Article 14 ECHR).

(application no. 44024/13), held that the uncertain situation of children born to a surrogate mother regarding the recognition of their nationality, in this case French, was likely to have negative repercussions on their personal identity and thus constituted a violation of their right to respect for private life. In *Mennesson*, the Court held that the refusal to recognize the legal parent-child bond (which also affected the child's nationality) was incompatible with the principle of the best interests of the child, derived from Article 3(1) of the Convention on the Rights of the Child, and also constituted an overstepping of the limits of the margin of appreciation granted to States Parties in relation to Article 8 of the same Convention. The cited line of the ECtHR's case law concerned the legal relationship between a child born to a surrogate mother and the biological father.

Furthermore, in the first Advisory Opinion issued on 10 April 2019 on the basis of Protocol XVI to the Convention (which entered into force on 1 August 2018), the Court returned to the case of the *Mennesson* family, in which two children – born in California to a surrogate mother as a result of the fusion of gametes of the biological father (Mr. Mennesson) and an anonymous donor – were denied recognition of a legal parent-child relationship in relation to both the biological father and his wife, Ms. Menneson, the intended mother, who nevertheless had no genetic link to the children. In the case of Mennesson v France (2014), the Court found there had been a violation of the children's right to respect for their private life, and emphasized that biological parenthood (in this case paternity) is a component of an individual's identity. As a result of this judgment, paternity was recognized and national law was amended, but did not regulate the possibility of entering on the birth certificate the data of a child born abroad to a surrogate mother, to the extent that the foreign birth certificate identifies the child's 'intended mother' as the legal mother. The only way provided by national law for the 'intended mother' to establish a legal mother-child relationship is the possibility for her spouse (the biological father) to adopt the child.

In its advisory opinion, the ECtHR stated that, in the light of Article 8 of the Convention on the Rights of the Child, national law must provide for the possibility of legal recognition of the relationship between a child born of a surrogate mother and a woman entered on a foreign birth certificate as the mother. However, that recognition need not consist in registering the woman as the child's mother in the civil-status records. The State may provide for other legal measures to that end – such as, for example, allowing the woman to adopt the child – provided that those measures are effective, expeditious

and carried out in accordance with the best interests of the child. The Court reiterated that in matters concerning children the principle of the best interests of the child must always be applied. The refusal by a State to recognize a relationship between a child born of a surrogate mother and a woman entered on a foreign birth certificate as his or her mother adversely affects the child's rights. The child may be deprived of his or her sense of identity, of the right to acquire the mother's nationality, to inherit from her, to maintain contact with her after a possible divorce from the child's father, and may face difficulties in obtaining a right of residence in the mother's country of residence. National law should therefore provide for other legal forms of recognition of the relationship between the child and the intended mother. It does not matter whether the child was conceived using her ova, although if that is the case, the need for formal recognition of the parent-child relationship is even clearer.

As in the first category of cases, the Polish Supreme Administrative Court's rulings in similar cases lack any axiological analysis that tackles issues associated with the pluralism of values or pluralism of worldviews. The considerations boil down to a recapitulation of the existing legal situation and reference to the cases in question, without any attempt at an actual reconstruction (contextualization) of the idea behind the public-policy clause or the fundamental principles of the legal order. And yet, as John Gray puts it: "There is a foundation of universal values, but paradoxically it is not fixed once and for all" (Gray & Wildstein 2000, 171).

3.3 The consequences of a same-sex relationship in the tax and legal sphere

The third category of cases concerns the refusal to write off a tax arrears due to the acquisition of an inheritance from the applicant's deceased partner (the judgment of 5 September 2018, II FSK 2426/16)[3]. The applicant and his

[3] The case is the subject of a complaint filed to the European Court of Human Rights, Meszkes v. Poland (application no. 11560/19). There are also other proceedings pending before the Court in the similar case of Formela and Others v. Poland (application no. 58828/12 and 3 other applications), brought by two Polish nationals married in the United Kingdom, concerning matters of civil rights, tax law and social security, inter alia, the issues of determining the amount of donation tax from the person with whom the recipient is in a civil partnership, and determining the amount of income tax from individuals who are in a civil partnership.

partner concluded an agreement in the form of a notarial deed establishing them as each other's heirs in the event of one of their deaths. After the death of his partner, the applicant applied to the Head of the Tax Office for remission of the tax arrears in inheritance and donation tax, but this was refused. The Court noted that "the reasoning presented in the grounds of the cassation appeal refers not to the interpretation or manner of application of Article 67a § 1 of the Tax Ordinance Act (the TOA) of 29 August 1997 (i.e. Journal of Laws of 2015, item 613, as amended, hereinafter: the TOA), but in essence boils down to the allegation of the discriminatory nature of the tax exemption regulated in Article 4a(1) of the Act of 28 July 1983 on inheritance and donation tax (Journal of Laws of 2018, item 644). The issue of the basis of statutory tax falls beyond the scope of the present case. However, contrary to the position of the author of the cassation appeal, the institution of reliefs in repayment of tax liabilities cannot be used to undermine the legitimacy of tax assessment or to question the statutory scope of taxation. Its sole purpose is the possibility of waiving tax collection in situations justified by 'important interests of the taxpayer' or 'the public interest'". In consequence, the NSA stated that the refusal to grant the requested relief to the taxpayer under Article 67a § 1 of the Tax Ordinance should be regarded as lawful.

Here, the position adopted by the SAC is strictly based on legal doctrine. In effect, the court avoided the problem of discrimination that lies at the heart of the case, yet the principle of non-discrimination is one of the general principles of EU law and was an important substantive element in the case[4]. The fundamental issue at stake is the equal treatment of heterosexual and homosexual couples in the field of tax law, and this was clearly the basic point of the case in question. Of course, it required in-depth analysis, for example involving a comparison of the situations of heterosexual cohabiting persons and those in same-sex unions, or consideration of what was behind the introduction of a particular tax exemption or allowance.

[4] Cf. the judgment of the Court of Justice of the European Union of 19 January 2010 in the case C-555/07 Seda Kücükdeveci v. Swedex GmbH&Co. KG. The philosophical and legal consequences of this judgment are discussed in Cern and Wojciechowski (2013).

4. Deliberativeness as a requirement of dynamic legal interpretation

The above presentation of jurisprudence reveals several extremely important issues. Firstly, it is impossible to interpret certain concepts correctly without knowledge of the case law, not only of national courts (in particular, the Supreme Administrative Court), but also of European courts. The case law cited above illustrates the numerous contexts and multifaceted nature of the analysed institutions that are fundamental from the point of view of civil rights, such as the right to citizenship, to have a correct civil status record, or to benefit from tax reductions or exemptions on the same basis as other citizens, e.g. those in heterosexual unions. It shows how complicated it has become to adjudicate on matters that, in view of the subject matter, should be relatively clear and predictable. It is not my intention to evaluate the presented case law, but only to point out that an opportunistic attitude based on hiding behind formal or legalistic considerations, or the superficial weighing of various values and conflicting goods, is simply untenable.

The point of departure must be the derivational theory of interpretation[5], in which the decoding of a legal norm implies a never-ending process of updating and contextualizing, linked to sensitivity and reflexive thought on the part of the interpreter (in particular the person applying the law). Reflexive interpretation of law makes it possible to take into account its non-eliminable changeability, as well as the fluidity of the meaning of terms and phrases used in legal texts – factors which oblige the interpreter to refer to extra-linguistic contexts of interpretation, i.e. to functional and systemic arguments[6].

This postulate becomes extremely important when interpreting cases such as those referred to above, since it is not possible to reach an adequate understanding of the current legal context without analysing the social and

[5] For more on the assumptions behind this concept see, inter alia, Zieliński (2006, 95 ff).; Choduń and Zieliński (2009, 86 ff.).; Choduń (2018, 95–141).

[6] Jabłoński, Kaczmarek (2020, 59 ff.). In this context, the authors aptly note that two features are important for reflexivity thus understood: self-awareness of the jurist and interpretative practice, and self-reflexivity perceived as the ability to revise assumed reasons and problematize the recommended course of action. They also assert that "the quality of legal interpretation depends not only on the attitude of the jurist, but also on the interpretive culture that recommends a particular course of action".

cultural context, especially when considering pluralism of values as the *modus vivendi* of a democratic society. In this vein, John Gray, in particular, argues that the current task of contemporary social and political thought is to remodel liberal tolerance so that it allows a *modus vivendi* to be found in a more diverse world. In his view, this *modus vivendi* resembles the concept of justice as impartiality, because no system that seeks to impose a single point of view on society can count on legitimacy under pluralism. In contrast to John Rawls, however, he notes that the problem of justice cannot be separated from the collision of values resulting from the diversity of lifestyles. Referring to Thomas Hobbes, Gray argues that competition between primary goods in social life is endemic and consequently challenges Rawls's thesis that primary goods do not come into conflict with each other (Gray 2001, 213).

The author of *After Liberalism* refers to two liberal traditions in this regard. Thus, on the one hand, liberal tolerance is seen as an ideal – the best consensus on the best way to live, while on the other hand, in the context of multiculturalism and the pluralism of values, today there is a widespread conviction that people can achieve self-fulfilment in many different ways (Gray 2001, 1)[7]. Gray is convinced that contemporary liberalism should aspire to seek out conditions that allow for the coexistence of different ways of life. This conclusion is based on his interpretation of Hobbes's thought, according to which tolerance is not intended to achieve consensus, but rather to ensure peace, and therefore its fundamental purpose is to facilitate coexistence. This is combined with a defence of cultural pluralism, expressed in the right to choose one's culture autonomously. The right to belong to a culture of one's own choice corresponds to the liberal principle that the individual identity of subjects can only develop if they participate in a cultural group to which they have decided to belong, and which therefore represents their own values and forms of life (Honneth 2000, 323).

Aspects of cultural, philosophical, religious or sexual pluralism influence our deliberative or reflexive interpretation of the law. This is also manifested in the need to take into account the category of facticity in the process of interpretation (Cern & Wojciechowski, 2011, 191). In *Being and Time*, Martin Heidegger modified the notion of sensuality in such a way that, to

[7] Gray (2001, 1 ff.). He points out that the representatives of the first concept, i.e. searching for an ideal form of life, are John Locke, Immanuel Kant, John Rawls and Friedrich A. Hayek, while the second, an expression of peaceful coexistence, are Thomas Hobbes, David Hume, Isaiah Berlin and Michael Oakeshott.

this day, it still plays an important role in various fields of philosophical consideration, including social ones. Heidegger drew on Wilhelm Dilthey's research demonstrating the methodological peculiarity of the humanities (*Geisteswissenschaften*) and gave the notion of sensuality a broader meaning: while the natural sciences employ the category of explanation in their methodology, the fundamental category for the humanities is the category of understanding (which in Dilthey's case has clear psychological provenance). Thus, in Heidegger's conception, facticity started to mean not only the appearance of something at a certain time and in a certain space, but it also indicated accidentality, contingency – in the medieval connotation: the non-necessity of certain phenomena (including human existence, the formation of such and not other social or political institutions, etc.). Facticity became a constitutive definition of the human being's existing in the world and interpreting it from a certain historical-cultural-social perspective.

Understanding, being the essence of interpretation, requires constantly starting over, making an effort to determine even that which seemed obvious. This is also due to the temporality and historicity of meanings, which are transmitted between generations and reinterpreted in new conditions of life. Michel Foucault notes that "historicism always implies a certain philosophy, or at least certain methodology, of living comprehension (in the element of the Lebenswelt), of interhuman communication (against a background of social structures), and of hermeneutics (as the re-apprehension through the manifest meaning of the discourse of another meaning at once secondary and primary, that is, more hidden but also more fundamental)" (Foucault 2005, 407). In this way, states of affairs ('positivities') that were differently shaped by history can nonetheless interact with each other, and their modes of cognition can overlap, thus making it possible for their contents to be interpreted.

After all, that is why legal texts that were introduced hundreds of years ago still manage to retain their binding status. Such documents would be useless if we treated them as having some objective, direct meaning forever given in advance, since that would merely be the meaning ascribed to them by a particular generation of jurists, although of course the importance of historicism cannot be denied. Historicism partly reveals what lay behind a given positivity (e.g. the intention of the legislator), and thus finitude is possible to grasp, if historicism sought "the possibility and justification of concrete relations between limited totalities, whose mode of being was predetermined by life, or by social forms, or by the significations of language" (Foucault

2005, 407). Otherwise, it would be impossible to explain the historicity of law, the development of legal texts, and the chain of interpretation. Only a creative, social understanding of language explains this phenomenon.

This philosophy of understanding and interpreting law undermines the objectivity of interpretation, rejects the myth of law as an objective and external objectivity, as well as the myth of the lawyer as a subject who cognizes law from an external position, and who lacks the ability to influence the normative dimension of culture (Stelmach 1995, 69). Hermeneutics asserts that law is constituted in the act of understanding; it does not exist before interpretation, because it is only in the process of interpretation and reaching a legal decision that law is realized. The metaphor of the hermeneutic circle leads to the thesis that there is no beginning of the determination of meanings, no starting point, and thus, as a result, each fragment of the text makes sense only if it is referred to the whole situation and culture, the moment of history in which it is read. Hermeneutics does not turn the text into a fetish – it is only a starting point, a canvas for dialogue, even if it is linguistically clear.

It therefore seems reasonable to conclude that giving consideration to the individual's sense of identity should be an inherent element in the process of interpreting law. Of course, another problem arises at this juncture, when we recognize that modernity is characterized by a constant preoccupation with the state of one's own psyche, the monitoring of interpersonal relations and emotions, the search for and crystallization of identity, the striving for self-discovery, accompanied by disorganizing processes which testify to a change in the nature – or even the disappearance – of earlier, traditional forms of social or community life. We are faced with a clash of different lifestyles, languages, traditions, religions and discourses, with transformations of the division of labour, demographic fluctuations, economic and ecological disasters, and pandemics. This causes a sense of crisis of one's own identity, defensive reactions leading to the fragmentation, decomposition and disappearance of the social sphere, and a simultaneous glorification of mass culture and social media, as new means, forms and aims of self-definition and identification.

In this context, attention is sometimes drawn to the compensatory and adaptive character of the tendency to privatise life, growing investment in intimate relations, and the defeatist withdrawal from public life[8]. Here the

[8] Strzyczkowski (2012, 9). This author points out that we are faced with the considerable popularity of various concepts emphasizing the motives of narcissism, hedonism or self-realization in the contem-

views of Richard Sennett are particularly representative: he argues that contemporary narcissism entails preoccupation with one's own identity to the extent that it abolishes the boundary between the subject and the external world, and social reality is only treated as meaningful insofar as it contributes to one's own needs and aspirations.

In the process of applying law, a clash becomes apparent, making it necessary to balance certain reasons and goods, which are sometimes conflicting. The psychologization of life has in fact led to the creation of an intimate society in which "behavior and issues which are impersonal do not arouse much passion; the behavior and the issues begin to arouse passion when people treat them, falsely, as though they were matters of personality" (Sennett 2002, 6). Consequently, narcissism, as a kind of social fashion, is responsible for rendering interpersonal relations shallow. It leads to a distortion of sensitivity, which makes it difficult to know oneself or the Other. Sometimes cognition is simply impossible, namely when autonomy or independence come into play. Today, revealing one's personal business – such as sexual orientation, past experiences, religious views, family histories – is not a sign of courage, is not an act of overcoming trauma; it has to be viewed instead as being in full conformity with the confessional society and the culture of individualism. The question arises as to whether this kind of behaviour or public display deserves legal protection. Sennett speaks of an erosion of external reality in which social life breaks down into individual, intimate perceptions of the world. He is convinced that individuals are thereby deprived of full-fledged social relations.

When adjudicating on cases such as those cited above, one cannot avoid analysing and weighing up the phenomena, problems and values identified. For here we are dealing with a peculiar antinomy, since on the one hand a judgment should take into account the pluralism of values and *modus vivendi*[9], and, on the other hand, it should protect the values of the community and limit the atomistic character of liberal concepts, which are grounded in the conviction that the subject – as an individual, autonomous and rational being – precedes ontological social relations, or can even ignore them. Such a balanced approach is not possible without adopting the deliberative decision-making process characteristic of the dynamic, derivational model of legal interpretation.

porary model of personality. See also Giddens (2001, 226–232).

[9] It is important to bear his criticism in mind. Cf. Polanowska-Sykulska (2008; 2017, 162 ff).

References

A.D.-K. and others v. Poland, application n.º 30806/15, European Court of Human Rights (2015, June 6). https://laweuro.com/?p=1118

Butler, J. (1993). *Bodies That Matter: On the Discursive Limits of Sex*, London: Routledge.

Cern, K. M. & Wojciechowski, B. (2011). O koniecznych związkach między dyskursem prawnym a moralnym. *Principia*, LIV/LV, 191-222. https://doi.org/10.4467/20843887PI.11.010.0274

Cern, K. M. & Wojciechowski, B. (2013). Święty Graal dziedzictwem przyszłości, czyli o poszukiwaniu wspólnej kultury prawnej w praźródłach prawa unijnego. Principia, LVII-LVIII, 165-190.

Choduń, A. (2018). *Aspekty językowe derywacyjnej koncepcji wykładni prawa*, Szczecin: Szczecin: Wydawnictwo Naukowe Uniwersytetu Szcze-cińskiego.

Choduń, A. and Zieliński, M. (2018). Aspekty granic wykładni, In W. Miemiec (Ed.), *Księga jubileuszowa Profesora Ryszarda Mastalskiego. Stanowienie i stosowanie prawa podatkowego*. Wrocław: Oficyna Wydawnicza Unimex, p. 86 ff..

E v Subdelegación del Gobierno en Álava, C-193/16, Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Spain) (2016, April 7). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CN0193

Foucault, M. (2005). *The Order of Things. An archaeology of the human sciences*. London and New York: Routledge.

Fuss, D. (1995). *Identification Papers : Readings on Psychoanalysis, Sexuality, and Culture*, New York, London: Taylor & Francis.

Gas and Dubois v. France, application n.º 25951/07, European Court of Human Rights (2012, March 15). https://hudoc.echr.coe.int/eng#{%22appno%22:[%2225951/07%22],%22item-id%22:[%22001-109572%22]}

Giddens, A. (2001). *Nowoczesność i tożsamość. Ja i społeczeństwo w epoce późnej nowoczesności*, Warszawa: Wydawnictwo Naukowe PWN.

Gray, J. (2001). *Dwie twarze liberalizmu*, Warszawa.

Gray, J. & Wildstein, B. (2000). Życie jest bardziej złożone niż tradycyjna etyka. Rozmowa z Johnem Grayem. In B. Wildstein, *Profile wieku*, Warszawa.

Hall, S. (1996). Introduction: Who needs 'Identity'. In S. Hall & P. du Gay (Eds.), *Questions of Cultural Identity* (1-17). London: Sage. https://dx.doi.org/10.4135/9781446221907.n1

Honneth, A. (2000). Zwischen negativer Freiheit und kultureller Zugehörigkeit. Eine ungelöste Spannung in der politischen Philosophie Isaiah Berlins, In A. Honneth (A.), *Das Andere der Gerechtigkeit. Aufsätze zur praktischen Philosophie*. Frankfurt am Main: Suhrkamp.

Jabłoński, P. and Kaczmarek, P. (2020), O grze interpretatora z tekstem prawnym i czynnikami pozatekstowymi w derywacyjnej koncepcji wykładni prawa. *Archiwum filozofii prawa i filozofii społecznej*, 2, 23, 49-65.

Juchacz, P. W. (2006). *Deliberacja – Demokracja – Partycypacja. Szkice z teorii demokracji ateńskiej i współczesnej*, Poznań: Wydawn.

Juchacz, P. W. (2015). *Deliberatywna filozofia publiczna. Analiza instytucji wysłuchania publicznego w Sejmie Rzeczypospolitej Polskiej z perspektywy systemowego podejścia do demokracji deliberatywnej*, Poznań: CoOpera.

Mennesson v France, application no. 65192/11, European Court of Human Rights (2014, June 26). https://archive.crin.org/en/library/legal-database/mennesson-v-france.html

Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, C-438/14, Court (Second Chamber) (2016, June 2). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A62014CJ0438

Poland. Constitution of the Republic of Poland. (1997). Warsaw.

Polanowska-Sykulska, B. (2017). *John Gray i krytyka liberalnego legalizmu*, Kraków: Księgarnia Akademicka.

Polanowska-Sykulska, B. (2018) *Pluralizm wartości i jego implikacje w filozofii prawa*. Kraków: Księgarnia Akademicka, rozdz. V.

Schlittner-Hay v. Poland, application nos. 56846/15 and 56849/15, European Court of Human Rights (2021, November 16). https://hudoc.echr.coe.int/eng#{%22appno%22:[%2256846/15%22],%22itemid%22:[%22001-214296%22]}

Seda Kücükdeveci v. Swedex GmbH&Co. KG, C-555/07, Court of Justice of the European Union (2010, January 19)

Sennett, R. (2002). *The Fall of Public Man*, London: W. W. Norton & Company.

Stelmach, J. (1995). *Współczesna filozofia interpretacji prawniczej*, Kraków.

Strzyczkowski, K. (2012). *Tożsamość w kontekście tendencji rozwojowych społeczeństwa ponowoczesnego*, Warszawa: Wydawca: Wydawnictwo Uniwersytetu Warszawskiego.

Supreme Administrative Court of Poland, II OPS 1/19 (2019, December 12). https://orzeczenia.nsa.gov.pl/doc/0CB4DBF3D4

Supreme Administrative Court of Poland, II OSK 1298/13 (2014, December 17).

Supreme Administrative Court of Poland, II OSK 2372/13 (2015, May 6).

Supreme Administrative Court of Poland, II OSK 2552/16 (2018, October 10). https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/ii-osk-2552-16-wyrok-naczelnego-sadu-administracyjnego-522680649

United Nations. (1966). International Covenant on Civil and Political Rights. New York.

United Nations. (1989). Convention on the Rights of the Child. New York.

Zieliński, M. (2006) Derywacyjna koncepcja wykładni jako koncepcja zintegrowana. *Ruch Prawnicz:, Ekonomicznyi Socjologiczny*, LXVIII, 3, 93-101.

From Genocide to Ecocide.

Essentials of a New Category of International Crime against Humanity

Ewa Nowak

Adam Mickiewicz University in Poznań

ORCID 0000-0002-5722-7711

DOI | 10.14195/2184-9781_2_4

ABSTRACT

The recent legislative initiative for the adoption of an amendment to the Rome Statute on *ecocide* as a new category of crime against humankind has an impressive normative background in the classical doctrine of international criminal law pioneered by Raphael Lemkin, in the prescriptions of the ethics, and in the discourse of an international community aware that the protection of the totality of life together with the ecosphere is currently the most urgent priority. Between 2019 and 2021, the Independent Expert Panel for the Legal Definition of Ecocide at the European Parliament developed a legal definition of ecocide. In the following article, I discuss 1) the nexus between genocide and ecocide, 2) the prescriptions of the ethics of responsibility for the future of all life on earth, further justifying the need to prosecute the perpetrators of ecocide, and 3) the specificities of ecocide as a comprehensive and expectedly effective category of international criminal law in comparison to the human right "to" a healthy, integral and legally protected environment, and in comparison to constitutional ecocentric rights, as more declarative but less effective. When adopted into the Rome Statute, the new category of crimes against humankind may equip the International Criminal Court in The Hague with an effective legal tool to prosecute perpetrators of ecocides.

KEYWORDS

the genocide-ecocide nexus, R. Lemkin, H. Jonas, defining a new crime against humankind, ethical prescriptions, ransom advances in international criminal law.

I. Placing the Issue of Ecocide in the Context of Recent Global Legalism

The existing typology of crimes against humankind covered by the jurisprudence of the International Criminal Court in The Hague[1] since 1998 includes 1) crimes of genocide, 2), crimes against humanity, 3), war crimes, and 4) crimes of aggression against a state or territory. In the last three years, environmental and criminal lawyers, lawyers in international law, the European Parliament and parliaments around the world, international foundations and independent NGOs have resumed[2] their efforts to shape new legislation focused on the crime called *ecocide*[3], which is classed as a fifth category of crime of international concern. In Europe, these efforts were initiated by five member states: France, Finland, Belgium, Luxembourg and Spain. In 2021, the Independent Expert Panel for the Legal Definition of Ecocide at the European Parliament defined ecocide as a legal category adequate to the realities of the 21st century: "If humanity is to reach the 22nd Century with peace and security, we must tame environmental abuse that has plagued the earth for hundreds of years" (Richard J. Rogers, Deputy Chair of the Panel). "By destroying the ecosystems on which we vitally depend, we are destroying the foundations of our civilisation and taking away the basis of existence for all future generations. This is no less serious than war crimes, crimes against humanity, genocide or aggression"[4]. On 3 December 2021, the Belgian Parliament passed[5] a resolution on ecocide, calling, inter alia, for the creation of an expert commission to incorporate this category into the country's penal code, for work to begin on an amendment to the Rome Statute, and finally for the creation of "an international coalition of

[1] See International Criminal Court (1998), established in 2002.

[2] E.g., Human Rights Consortium; Citizens of Europe (2014), Institute for Environmental Security, Stop Ecocide International, United Nations Environment Programme (2022). Work on ecocide has been ongoing for almost five decades, initially under the supervision of the International Legal Commission of the UNO. The need for a transnational judiciary is also regularly discussed, see Daly and May (2019); Murphy (1999/2000).

[3] Optional terminological suggestions: 1) geocide, see Berat (1993, 237–348); 2) eco-slaughter, see Kenig-Witkowska (2017). The term geocide does not clearly indicate that the entire ecosphere, including the biosphere, is involved.

[4] Independent Expert Panel for the Legal Definition of Ecocide Completed (2022)

[5] DOC 57, 1429/2019-2020, CK4067b(T1429)–DP1.

the willing" to identify and prevent this type of crime. Thus, this is not about creating just another Europocentric "nomos of the Earth"[6].

The new law would primarily be a preventative and deterrent measure with by no means a symbolic or rhetorical function, since the institutions of criminal law owe their effectiveness to their broad (though not absolute) competence to prosecute perpetrators and fight their impunity[7]. The implementation of ecocide will necessitate the translation of multilateral agreements (in the UNO, EU, etc.) into real interactions, stresses S. Bock, an expert on criminal law at the University of Marburg[8]. Moreover, it will require active global diplomatic cooperation, as well as the promotion of public understanding of a novel and complex legal category. Understanding is a precondition for the social and public justification of law, as well as for "universal discursive agreement"[9] regarding it, as emphasised by B. Wojciechowski. It seems crucial at all stages of the discussed legislation, including prosecution, jurisprudence and enforcement. Indeed, there is no lack of high quality (including post-conventional) arguments suitable for justifying new legal conventions. S. Cogolati exemplified the rudimentary prescriptions of socioenvironmental ethics as well as the grassroots normative priorities recognised by national and global communities in parallel: "Now we are all victims of climate breakdown, pollution and the collapse of biodiversity. We must protect nature and future generations in much stronger, more enforceable ways. We must recognise the intrinsic value of ecosystems in our penal code. Because without water, without forests, without clean air, we cannot survive on Earth. The planet is our common home. It's time for criminal law to urgently come to the rescue"[10].

---

6 Folkers (2017).

7 According to the Treaty of the European Union (in particular Articles 261, 263, 265), a member state – as well as an institution, legal person or natural person from that state – may bring an action against another state before the Court of Justice of the European Union to the extent that the authorities of the latter State have failed to comply with the treaty agreements, in particular with regard to undertakings. Complaints can also be brought about the failure to act of the European Parliament or the Council of Europe. The legal systems of the Member States usually take account of citizens' environmental rights at constitutional level.

8 See interview with Bock (Schneider 2021). On the urgency of global environmental jurisdiction see Kenig-Witkowska (2017) and White (2017); about bridging the gap especially in the common law and judicial lawmaking see Voigt (2019); Carnwath (2014, 177–187); on the prevalence of the human right to the environment in the related discourse to date see Lee (2000); Gronowska et al. (2018).

9 Wojciechowski (2009).

10 See Ecologist (2020).

II. Collecting Evidence

As Gustav Radbruch argued, law becomes anachronistic as soon as it is established, because social practice always overtakes legislation. Since the modernist intensification of man's technical mastery over nature – and also over human fellows – environmental and war related political justice has also been lagging behind[11]. The term ecocide, pioneered by Arthur Galston, only gained public, political and legal significance at the end of the Vietnam War (1955-1975)[12]. During that war, 45,000,000 litres of Agent Orange were used to devastate nearly 2,000,000 hectares of farmland, poisoning groundwater and the Mekong basin. Poisoning crops and forests became new weapons of mass destruction. Nearly 5,000,000 Vietnamese citizens were affected with acute and delayed impacts. Currently the fourth generation of Vietnamese suffer from 17 types of cancer, birth defects, deformities[13] similar to those caused by radiation. The term *ecocide* was then introduced by Olof Palme at the UN Conference on the Human Environment in Stockholm (1972), who accused the US government of inflicting ecocide on the people of Vietnam. The attendees Indira Gandhi and Tang Ke proposed that extreme environmental devastation connected with warfare should complement the catalogue of crimes against humanity. Five years later, the US adopted the Convention on the Prohibition of Military and Other Technologies for the Devastation or Modification of Ecosystems[14].

The destruction of ecosystems resulting in severe impacts on humans and communities has not been brought to a halt by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction finally entered into force on 29 April 1997, with reference to the Geneva Protocol of 1928. As recent history shows, acts with obvious ecocide intentions are carried out not only under conditions of ecocidal warfare[15], but also under those of peace as, after all, they themselves disturb the peace[16] which is one of the reasons for treating

[11] It is noteworthy that Frisch (1980) pointed out that it is humans, not nature, who address disasters; as both victims and perpetrators.

[12] Zierler (2011); Stellman and Stellman (2018, 726–728).

[13] von Meding (2017).

[14] Garcia (2020); Bourbonnière and Lee (2007, 873–901); Plant (1991).

[15] E.g., Fried (1973); Smith (2010).

[16] Mehta and Merz (2015); Gauger et al. (2012).

ecocide as not necessarily a war-related but nevertheless genocide-related crime against humanity. In this respect, the nuclear disaster at Chernobyl, the disastrous regulation of the Aral Sea, the deforestation of the Amazon Forest, the pollution of the Pacific Ocean by industrial quantities of plastic and microplastics, the devastation of the Niger Delta by petroleum-based raw materials (with disastrous consequences for the forty tribes living there), the extinction of species and biodiversity by plantations, and the depletion of non-reproductible resources, are the most frequently mentioned cases in the scientific literature[17]. In 2016, a class-action lawsuit before the Hague Tribunal was brought against Monsanto[18]. On 21 January 2022 the Peruvian government appealed to the United Nations for prompt remediation in response to the "worst environmental disaster" in Lima's recent history and for compensation on the part of Repsol. The Spanish oil company said the spill involving 6,000 barrels of oil occurred when a tanker unloading crude was damaged by a tsunami caused by the volcanic eruption near Tonga[19]. Not only business people, but also statesmen will face international criminal liability for ecocides. In December 2021, the AllRise association filed a case with the ICC against the former Brazilian President J. Bolsonaro for ecocides committed in the Amazon forest. On 14 July 2022, the State of Brazil (with the complicity of the European Union and Japan) faced the sentence of the Permanent Peoples' Tribunal (PPT) in Bologna for ecocidal devastation of the Cerrado ecosystem of more than 2 million square kilometers.

As *nullum crimen sine lege*, criminalisation of individual accountability for such acts as crimes against humanity (under articles 25 and 28 of the Rome Statute) was initiated by the Scottish legal scholar Polly Higgins[20]. The discussed issue is one of the most urgent also because international criminal jurisdiction cannot be applied retroactively. Delay at the legislative level seems to work in favour of the perpetrators. "However, the most controversial challenge related to the contemporary ecocide debate is the role of [multinational] corporate actors and their possible criminal liability for environmental destruction", J. Aparac believes. Furthermore, "it is highly

[17] On the social consequences of such processes especially in the post-colonial South, see Parenti (2011).

[18] See International Monsanto Tribunal (2022)

[19] Taj (2022).

[20] Higgins, Short and South (2013, 251–266); Higgins (2010); also Mistura (2018, col. 181, 191, 201); White (2017); Lay et al. (2015); Merz, Cabanes and Gaillard (2014); Johnston (2014); Mégret (2011); Wattad (2009); Sharp (1999); Gray (1996).

unlikely that any prosecutor would venture into investigating, potentially prosecuting corporate directors for the new crime, when the notion of ecocide itself would require the Court's interpretation, at least in initial proceedings"[21], Aparac concludes. This is clearly an appeal for ecocide to be defined as precisely as possible. In 2019 the Republic of Vanuatu and the Maldives issued an appeal for the inclusion of ecocide in the Rome Statute to be considered. In the following sections, the legal and theoretical basis for this initiative, its sociological validity, and its results at present will be discussed (this is at a time when a legal definition of ecocide has already been formulated at the end of 2021 and an amendment to the Rome Statute is expected in 2022).

III. Approaching 'the Genocide-Ecocide Nexus' with Raphael Lemkin

Let us start from the fact that etymologically ecocide refers to genocide (*delicta juris gentium*), as well as to barbarity and vandalism in the sense introduced into the doctrine of international criminal law by Raphael Lemkin when referring to the "propagation of human, animal or vegetable contagions; this offense introduces a general danger, because these diseases can so easily spread and propagate from one country to another and cause serious disasters"[22]. Also, Lemkin anticipated the normative necessity to criminalise deliberate practices resulting in the destruction of the ecosphere as the earthly habitat of man and all other living beings, with further fatal consequences for the survival of the human species, its development, and societal and cultural achievements. "The asocial and destructive spirit" manifesting itself by such practices "by definition is the opposite of the culture and progress of humanity"[23], he insisted. Already in its conceptual framework, the international criminalisation of the implicitly defined ecocide had an advantage over the declarative provisions of the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and or Bacteriological Methods of Warfare (1925; entered into force on 8 February

[21] Aparac (2021).
[22] See Lemkin (2018).
[23] Lemkin (1933) ; Lemkin (2000).

1928). Unlike the Geneva Protocol which summoned the moral judgment faculty of the signatories ("this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations", as we read in the Geneva Protocol), Lemkin's project offered a model of direct and indirect enforcement. Acts of barbarity and vandalism causing damage to humanity's life, safety, health, living conditions shall be recognized as criminal delicts and "be prosecuted and punished irrespective of the place where the offence is committed and of the nationality of the offender, in accordance with the law in force at the place of prosecution". As Article 1 in the draft international penal code, Lemkin designed the following provision: "Whoever, out of hatred towards a racial, religious or social collectivity or with the aim of extermination destroys such a community commits a punishable act against the life, bodily integrity, liberty, dignity or economic basis of a human being belonging to such a community, is liable to be punished for this barbaric offense". Article 5 stipulated that "Whoever knowingly spreads a human, animal or vegetable pestilence shall be liable to punishment"; Article 6 stipulated that "The instigator and the accomplice shall be punished equally with the perpetrator". According to Lemkin, these crimes were to be "prosecuted and punished regardless of the place where the crime was committed and the nationality of the perpetrator, according to the law in force at the place of prosecution"[24].

According to Lemkin, these offenses clearly belong to the *delicta juris gentium*, especially because "a particularly asocial and destructive attitude of the perpetrator is manifested in acts of such barbarity and vandalism. This attitude is contrary to culture and the spirit of progress. Such acts take mankind back to the gloom of the medieval period, shock the conscience of humanity and raise serious concerns about the future of civilization. For all these reasons, acts of barbarity and vandalism must be considered as *delicta juris gentium*"[25]. Further, having far-reaching destructive effects on interindividual relations, collectivities, the international community, and all humanity,

> "1) They offend in a particularly profound way the sense of justice and humanity;

[24] Lemkin (2000).
[25] Lemkin (2000).

2) In addition, such offenses damage relations between individuals and violate the foundations of social coexistence in general;
3) These offenses create inter-state danger due to the infectious nature of any social psychosis. They can pass from state to state, similar to epidemies;
4) Moreover, the danger posed by such offenses tends to become permanent, since the intent of the perpetrator cannot be achieved by a single act and requires systematic activity for its realization;
5) Furthermore, it is not only the moral interests of the international community that are endangered, but also, and to a lesser degree, its economic interests. Acts of barbarity committed collectively and systematically often result in mass emigration or panic-stricken flight of the population from one country to another, which can have an adverse effect on the economic situation in the countries of refuge due to the difficulties the emigrants have in obtaining work and wages"[26].

In this context, the First International Conference for the Unification of Criminal Law in Warsaw (1927), with its significant and semantically more capacious formulation of "intentional use of any instrument capable of producing a general (transnational) danger" (*l'emploi intentionnel de tous moyens capables de faire courir un danger commun*)[27] also set the tone. Thus in line with Galligan, Crook and Short we may reasonably conclude that Lemkin delivered a pioneering conceptualisation of "the genocide-ecocide nexus"[28].

What emerges from Lemkin's reasoning and anticipates the future advances in international criminal law, is *genos* as a complex concept that goes far beyond classical definitions of ethnic and indigenous[29], national and demographic groups whose intercourse is to be ruled by *juris gentium*. Whilst the ancient Roman legal tradition associated *genos* with kin/kinship between its members, Lemkin's *genos* comprises "ethnic, religious and social collectivities" constituted by choice and not necessarily by birth, kinship or tradition. Further, his *genos* is vitally embedded in, and coupled to, the natural environment and sociocultural landscape. Collectivities belong to the international community, again, not by their kinship but by common

---

[26] Ibidem.

[27] As in the unofficial translation of James Fussell, Acts Constituting a General (Transnational) Danger Considered as Offenses Against the Law of Nations, "Prevent Genocide International" (Lemkin, 2000).

[28] Galligan (2021); also Crook and Short (2014, 298–319).

[29] Crook and Short (2014, 298–319).

rights and duties (*juris gentium*). Combined together, natural embeddedness and international belongingness provide an essential corrector for the content of *juris gentium* as well as for delicts against them. Revised and broadened by Lemkin[30], the semantic scope of genocide connotes the recent categorisation of ecocide, which joins the long array of genocidal practices he identified: "physical-massacre and mutilation, deprivation of livelihood (starvation, exposure, etc. often by deportation), slavery-exposure to death; biological-separation of families, sterilization, destruction of foetus; cultural-desecration and destruction of cultural symbols (books, objects of art, loot, religious relics, etc.), destruction of cultural leadership, destruction of cultural centres (cities, churches, monasteries, schools, libraries), prohibition of cultural activities or codes of behaviour, forceful conversion, demoralization"[31] – many of these categories refer explicitly or implicitly to the criminal acts associated with colonialism, which permanently and often irreversibly appropriated people's communities, together with their socio-cultural and natural environments (in Lemkin's time still reaping its criminal harvest with impunity); others to the related expansion of capitalist exploitation. Thus, the nexus in question marks a normative breakthrough in an era defining itself as modernity "by challenging the unlimited power of man over nature legitimized by the necessity of man's self-reproduction and continuance", and even more by the "the iron law of exponential growth under capitalism"[32].

But this does not yet exhaust *the normative breakthrough*. We will not be able to comprehensively understand its significance if we do not think in parallel of the nexus in the opposite direction, about which authors representing self-critical environmental humanities, richer in the experience of the ecocide already perpetrated by man, write in modern times: namely from ecocide to genocide. It is based on an axiological breakthrough, without which there can be no normative breakthrough, or at least one that would find social (and not only political) legitimacy. It is about expanded axiologies including "the more than human ethics of reciprocity"; "If ecosystems are abused to the point of collapse, then all life in the planetary community is

[30] However, in his later magnum opus (Lemkin, 1944) and in Lemkin (1948), this aspect was overshadowed by WW II related international crimes against humanity.

[31] McDonnell and Moses (2005, 504–505).

[32] Crook and Short (2014, 300).

diminished—in evolutionary terms, in ethical and political terms, and in emotional and aesthetic terms. To admit and embrace that ecocide entails an all-encompassing diminishment would already be a break with modernity"[33] and the powers, axiologies, normativities and ideologies that legitimized its political and economic practices. The new era would be "ecomodernism" in which "to defend the life of the land against state sponsored ecocide and genocide is clearly very different from using the power of the modern state to promote a racialized land bond precisely for the purpose of perpetrating genocide"[34], as Ray concludes. Only when the two nexuses meet halfway can we properly place such implications of ecocides as damage made to social and environmental health of large groups of survivors who face not a literal, but a social and economic death, loss of life worlds and life prospects, forced immigration, homelessness, and other atrocities[35], and the extermination of today's remaining communities, defined in ethnic, indigenous, aboriginal or endemic terms, which populate biolocal areas yet belonging to an indivisible biosphere shared by all living beings: it is at *them*, after all, that ecocides (in their plurality, variance and 'multidirectionality'[36]) are aimed.

IV. On Responsibility for the Destruction of the Planet (Ethical Prescriptions)

It is hard to believe today, but until the end of the 19th century, the pioneers of the theory of evolution, G. Cuvier and J.-B. Lamarck (in Germany: J. F. Blumenbach) clearly enthused by the Revolution 1798 claimed "total disasters", "natural revolutions" (*catastrophes totales, révolutions naturelles*) and "physical, social and political crises" were beneficial (*désastres bienfaisantes*) for life and the planet, for they accelerated the rise of "something new and more noble"[37].

Due to the *moral* agency of the perpetrators, natural disasters with human fingerprints fall into a special category[38] because human perpetrators

[33] Ray (2016, 129); see also Haraway (2015, 159–165).
[34] Ray (2016, 128).
[35] May (2010); Card (2003, 63–79); Bechky (2012).
[36] Woodward (2019, 158–169); Stein (2010, 39–63).
[37] King (1877, 451–470); Grimoult (2019).
[38] E.g., Kolbert (2014); Delord (2010).

have a moral, criminal, political, international, global and cosmopolitan[39] responsibility for the natural habitat of life, as pioneeringly theorized by H. Jonas, the father of environmental ethics: a human being has a "cosmic responsibility" for ensuring the future of mankind and "the heritage of past evolution" as well. "There is something *infinite* for us to preserve in the flux, but something *infinite* also to lose"[40]. "And this apocalypse" – for instance "an atomic holocaust" or "intoxication" with possibly "irreversible consequences" such as a "global mass misery of a failing biosphere" – "waits for our grandchildren"[41]. "An imperative responding to the new type of human action and addressed to the new type of agency that operates it might run thus: 'Act so that the effects of your action are compatible with the permanence of genuine human life', or expressed negatively: 'Act so that the effects of your action are not destructive of the future possibility of such life'; or simply 'Do not compromise the conditions for an indefinite continuation of humanity on earth'; or again turned positive: 'In your present choices, include the future wholeness of Man among the objects of your will'"[42]. From these universal ethical imperatives of responsibility of man for man further emerges the joint (shared) responsibility – primarily of politicians, businessmen, legislators, scientists, parents, teachers, philanthropists, etc.[43]. The term 'emerges' reflects the dynamics of the growing magnitude of responsibility (in proportion to the excessive stunts of power) (*Taten der Macht*) when searching after "power over power"[44] to break the "tyrannical automatism[s]" of "the excesses of his [a human's] own power"[45]. If power expands into space (*das Weltall*), then the normative power of "responsibility expands into the cosmos" (*kosmisch*)[46]. Jonas thus proposed a kind of "expanding circle of morality" based on human responsibility before Singer proposed his "expanding circle" of solidarity[47].

[39] Kantian cosmopolitanism founded on every man's "innate right of common possession of the surface of the earth, and upon the universal will corresponding a priori to it" implies not only the right to dwell in any region of the earth (for instance, Huber 2017), but also the responsible – that is, determined by autonomous and universal legislation – actualisation of the "will" by every homo phaenomenon.

[40] Jonas (1984, 32–33, 37, 99). The radical re-evaluation of the nihilistic treatment of the value of nature and life (also in the life sciences) is an additional merit of Jonas's environmental ethics.

[41] Ibid., 201–202.

[42] Jonas (1984, 11); Jonas (1987, 85).

[43] E.g. Rosół (2017); Buddeberg (2017, 231–256); Coyne (2018, 229–245).

[44] Jonas (1985, 142).

[45] Jonas (1985, 583).

[46] Jonas (1987, 86); Jonas (2015, 517).

[47] Singer (1981, 120, 135).

Emphasizing the particular responsibility of the scientific, professional and political elites[48], Jonas stresses that if there is a deficit in voluntary responsibility, "it must be enforced by coercion if necessary" (*erzwungen, wenn nötig*)[49]. Addressing the entire legal framework of responsibility, Jonas explains the mutual coupling of human rights and the laws of nature, so essential to understanding the essence of ecocide: "But now the entire biosphere of the planet, with all its abundance of species, in its newly revealed vulnerability to the excessive encroachments of man, claims its share of the respect due to all (...) For impoverished extra-human life, impoverished nature, also means an impoverished human life (...) The broadened vision links the human good to the cause of life as a whole (...) and grants extra-human life its own right. To recognise it is to recognise that any arbitrary and unnecessary extinction of species is in itself a crime"[50]. Intertwined vital goods and interests will therefore be violated. Understanding of this coupling "breaks the anthropocentric monopoly of most ethical systems" and provides new ethical legitimacy to responsibility for "the interests and rights of fellow human beings (...) for wrongs done to them that should be righted, for their sufferings that should be alleviated" (cf.). That is why *I* am responsible in the proper sense of the word before an earthly court, in this world, with or without God; and independently in my own conscience, to "being as a whole", concludes Jonas in *The Imperative of Responsibility*[51].

While responsibility "in my own conscience" belongs to the moral virtues or competencies of private persons and citizens[52], legal (criminal) responsibility has a more objective political (or even cosmopolitical) shape. Without the help of objective measures and legal sanctions, the application

---

[48] Jonas was a sceptic about the realization of universal and responsible participation, but not about democratic ideals themselves. He believed that progressive tyranny over nature threatened them no less than the future of the planet. Universal education for responsibility and democracy could make both less elitist and more egalitarian.

[49] Jonas (1984, 323); comp. Apel (2000, 21–50); also in the context of "organising a planetary framework for the responsibility that people have for the consequences (as well as the side-effects) of collective practices on a large spatio-temporal scale", Apel (1988, 42).

[50] Jonas (2015, 516–517).

[51] Comp. also Jonas (1992, 130–131).

[52] There is no private relationship between man and the biosphere and ecosphere as a reality (in the ontological sense) and a good (in the normative sense) which are holistic by definition (Gesamthaushalt der Dinge in Jonas's words), since it is an entity and a good fundamental among those listed as common and public goods. Hence the importance of the development of a communal and public perspective, accompanying in principle all human relations with nature, see Hursthouse (2007); Dobson and Bell (2006); Connelly (2006); Baber and Bartlett (2001).

of the imperative of responsibility may prove to be insufficiently consistent and widespread to effectively prevent further destruction of the ecosphere. For the sake of completeness, it is worth recalling that there is also legal responsibility for the malpractice of denying international crimes[53].

V. A Pathway to the 2022 Amendment

In December 2021 the governing body of the International Criminal Court (ICC) in The Hague held its annual meeting, hosted by the Republic of Vanuatu and the Independent State of Samoa. In its original version, Article 8 meets the preamble of Rome Statute, which recognises as crimes against humankind those threatening "the peace, security and well-being of the world" and is the basis for an amendment to the Rome Statute, currently undergoing widespread (public, political and legal) consultation worldwide. It reads as follows:

> "1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
>
> 2. For the purpose of paragraph 1:
>
> a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
>
> b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
>
> c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
>
> d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
>
> e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space".

[53] Grzebyk (2020).

The definition of ecocide adopted in June 2021 assumes, therefore, that it is an ecocentric law (as ecocide shall be *suffered by an entire ecosystem or ecosphere*). The object of protection here are human beings in strict dependence on the consequences resulting from the intentional (*with knowledge*) or reckless (*wanton*), extremely destructive impact of the ecocidal on the ecosystem. It refers to 1) the environmental human right to an integral (i.e. not devastated or modified in this way, therefore healthy, balanced, conserved and maintained) natural environment as a world of life (bios); 2) the ecological human right to a safe and peaceful existence (i.e. free of damage, threats and risks on a scale characteristic of cataclysms) in a natural environment favorable to human and social life, however not only in terms of survival – also in terms of growth, flourishing, intergenerational and species continuity, and undistorted evolution.

A distinctive, relational, interdependent and therefore synthetic feature of this law is that the victim of ecocide here will not simply be a human collective defined in population and demographic terms, but a naturally situated collective (e.g. a population – but not necessarily an indigenous people – settled in a river delta as an ecosystem. In a relational sense, ecocide also extends to the relationship of humans with non-human beings, more specifically, (i) humans, (ii) animals in the sense of individuals and species, (iii) plant species, and (iv) other living organisms. Thus, ecocide is a crime against all life, not only human life[54]. According to Grey, "Ecocide is identified on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting, ecological damage, (2) international consequences, and (3) waste. Thus defined, the seemingly radical concept of ecocide is in fact derivable from principles of international law. Its parameters allow for expansion and refinement as environmental awareness engenders further international consensus and legal development"[55]. On the other hand, Higgins assumed that

[54] Greene (2019, 4). However, the legal definition of environmentalism includes, in addition to the biosphere, the hydrosphere, cryosphere, lithosphere, atmosphere and outer space (Article 8, paragraph 2e).

[55] Gray (1996, 216). The terms waste and wasting are ambiguous. They do not mean only devastation, annihilation, pollution but also devaluation. Their normative connotation is connected with human behavior which results not only in damaging or destroying an object but also in lowering or depriving of its qualitative values, something that was previously full of value; also, with wasting of what is useful, scarce, unique, non-renewable, etc. Hence the responsibility of the perpetrator of such conduct. J. Locke's well-known argument about the waste of lands belonging to indigenous people, which were

not all acts of ecocide can be attributed to the perpetrator (ascertainable), because natural disasters, such as volcanic eruptions and earthquakes, have no human perpetrators (unascertainable). In addition, it would probably be possible to distinguish intermediate categories, when as a result of human, administrative, etc. negligence and omission (e.g. failure to protect a particular ecosystem despite earlier forecasts and warnings) the elements of nature cause damage that could at least in part have been prevented.

Finally, it is a law equipped with procedures to hold the perpetrators of ecocide criminally responsible. Moreover, the categorisation in terms of "crimes against humanity" means that a large number of incalculable human communities may fall victim to ecocide, together with their descendants, irrespective of the administrative borders of states (*crosses state boundaries*). Because of such severe, permanent or irreversible (*long-term, irreversible*) and wide-spread damage and harm to human life and the natural, cultural or economic resources supporting it, ecocide follows on from the crimes against humankind already identified and applied. As such, it is expected to immediately be the subject of a legislative amendment to the Rome Statute. The inherent values of nature, as well as relational values[56] due to the duration as well as current and prospective flourishing[57] of all life on the planet with particular reference to humanity are fully reflected here. Finally, it is worth considering the question whether the effectiveness of the new legislation will be higher than the human right to protected natural resources and ecocentric rights.

taken away from them 'for the benefit' of agriculture, see Cohen (2010, 233–273). In turn F. Engels gives the example of planters who, by deforestation of the jungle for profitable coffee plantations, wasted valuable soil: it was washed away by the ocean. Furthermore, the terms ecological damage, harm, injury (also: being wronged, Latin laesio), which are used interchangeably in the literature, may have different meanings. Any living and vulnerable, sentient (so violable) being can be harmed; many can be wronged (though none can be aggrieved as certain scholars argue) without necessarily being able to make an explicit moral judgment. It is an illusion to think that our actions towards other beings have no moral significance, Puryear argues on the basis of Schopenhauer who embraced all living beings, see Puryear (2017, 250–269); in Rome Statute: "willfully causing great suffering"; also Greene (2019, 28).

[56] See Mattijssen et al. (2020, 402–410); Barrière et al. (2019); Behrens (2014, 63–82). Perhaps this relational and synthetic understanding poses the most difficulties in cultures and mental landscapes where pre-relational, isolationist ontologies and strongly hierarchical axiologies typical of modernity still prevail.

[57] E.g. Hannis (2015); Behrens (2014); Taylor (1998, 309–397).

VI. The Effectiveness of the Human Right to Protected Ecosystems. Legal Biocentrism vs Ecocentrism

Basically, the new legislation under consideration here is not about improvement, and especially not about replacing or competing with other laws that already exist to protect ecosystems, along with the live and vital interests of all their inhabitants, and their resources (which is a highly inclusive concept). It is more about efficiency in prosecuting perpetrators and prevention, since ecocides are some of the most frequent and damaging crimes; finally, it is about global efficiency, which obviously involves consolidating and coordinating legal practices worldwide once the amendment is in the Rome Statute. The greatest allies (not competitors) of an extra legislative equipped International Criminal Court (ICC) in The Hague will be the International Court of Human Rights and the International Rights of Nature Tribunal. In turn, the allies (albeit at a different level) of ecocide law itself will be basic and constitutional rights. There will undoubtedly be differences in the perception of individuals vs species, populations and collectives; biosystems vs ecosystems, biosphere vs ecosphere, living vs nonliving beings (natural artifacts), as well as relations and hierarchies between them. Some of them (but not all) in different parts of the world (but not everywhere) have already been granted legal protection or even some rights. However, it is the human being – as a being endowed with moral and normative invention, as well as with normative authority (as Habermas says) and administrative power, who is able to ensure the widest realization of even the most comprehensive rights, and to enforce responsibility for their violation. Experts in ecocide are already learning to identify, define and soon to apply the wealth of meanings connoted by the phrasing "being an aggrieved party"[58], and being a perpetrator in the context of ecocide, although it might be challenging from both a normative and an empirical point of view.

When defining the key function of ecocide as an enhancer and catalyst of the effective international protection of human life in its full-scale (primarily natural) habitat by enforcing of accountability for violations of formal or procedural human rights to the environment, it should not be forgotten that the anthropocentric perspective is broken and balanced here by an ecocentric

[58] Mazur (2021, 106–116); Pietrzykowski (2020, 221).

and biocentric perspective. "A biocentric approach places humans on the same level as all living beings, whereas an ecocentric approach considers all that is in the natural world — living beings and nonliving entities – to all be equally valued"[59]. The legal definition of ecocide seeks to balance the three perspectives and so do irrespectively of political, ideological and cultural differences[60]. Although the phrasing 'crime against humanity' would suggest a continuation of anthropocentric legislation, the anthropocentric monopoly is broken here, however, not in the vein of the posthumanist mainstream of the last few decades.

In particular, the above-mentioned balance reflects the already quite frequently applied construction of the human right to a legally protected environment or ecosystem. The anthropocentric perspective intersects with the ecocentric perspective, for example when the interests and welfare of animals are protected by law to a socially acceptable extent[61], where no political consensus (or even coherent concept) can be expected on what the rights of living beings or ecosystems should look like apart from human rights or interests. Some states have recognised the values of nature, especially the importance of life, dignity, welfare, freedom from cruelty[62] at a 'constitutional significance' level, though their constitutions do not explicitly declare the rights of animals or ecosystems.

Two states – Stilt reports – i.e. Ecuador (2008) and Bolivia (2010) pioneered the inclusion in their constitutions of provisions recognising the integral rights of 'Mother Nature' and 'Mother Earth' as fully independent of any rights to which humans are entitled. Their constitutions declare, among other things, the protection of the natural life cycle, natural evolutionary processes (in Ecuador), biodiversity, water, air, balance and freedom from pollution (in Bolivia) by virtue of their inherent values. Nonetheless, neither the constitutionalization of strictly ecocentric laws nor these laws by themselves guarantee as yet the effective implementation and enforcement[63] of the observance that is due to these entities.

[59] Stilt (2021, 277, footnote 6).

[60] See Wojciechowski (2009).

[61] Stilt (2021).

[62] Ibidem.

[63] E.g., Whittemore (2011); Kotze, and Villavicencio Calzadilla (2017); Bétaille stresses that broad access to justice makes it unnecessary to give legal personality to nature, see Bétaille (2019, 35–64).

It is also worth mentioning the practices that are part of the so-called judicial law. In some countries (e.g. New Zealand, Colombia, Mexico, USA, India, Bangladesh) the category of legal personality has been formally extended to provide the most threatened ecosystems with such status[64]. For instance, in Colombia (2016) the Atrato river and in Bangladesh (2019) the Turag river have been granted legal personality by judicial rulings (the Constitutional Court in Colombia and the Supreme Court in Bangladesh) for protection against almost total biological death at the hands of local companies[65].

A number of countries have regulations that correspond in content to ecocide in their domestic codes of criminal law. These include Armenia (art. 394), Belarus (art. 131), Georgia (with the literal use of the term ecocide, art. 409), Kazakhstan (art. 161), Kyrgyzstan (art. 374), Moldova (art. 136), Russia (art. 358), Tajikistan (art. 400), and Ukraine (art. 441). In these countries the perpetrators are usually punished with imprisonment for a minimum of 10 (usually 12) years and a maximum of 20 years[66]. The Polish legislator "unambiguously applies the model of a uniform code of environmental protection"[67]. "Notwithstanding the provisions in force at the place where the offense has been committed, the Polish Criminal Act shall apply to a Polish citizen and to a foreigner who has not been ordered to be surrendered if he commits abroad an offense which the Republic of Poland is obliged to prosecute under an international agreement, or an offense specified in the Rome Statute of the International Criminal Court, drawn up in Rome on 17 July 1998"[68].

However, even the most advanced domestic legal systems will work more effectively if the legal policies and practices of courts of justice are coordinated on an international and even global level. As argued by C. E. Pavel (2021), consensual and coordinated international practice is essentially the only way to strengthen the effectiveness of legislation, jurisprudence and law enforcement in the context of protecting goods of vital importance for all humanity – and the most fundamental of these goods are the ecosphere and

---

[64] The originator of this practice was Stone (1972, 450–501); comp. Stilt (2021). On the legal personality of non-human beings see Pietrzykowski (2017); Kurki (2017).

[65] Stilt (2021, 282).

[66] See EcocideLaw (2022).

[67] Zawłocki (2014, 127; 2010, 726–728).

[68] A particular challenge arises when a state has denationalised a person suspected of committing a crime of international concern by obstructing the law enforcement authorities of any state, see Seet (2021, 247–274).

biosphere, which are increasingly threatened with depletion or irreversible devastation.

References

Aparac, J. (2021, July 9). A Missed Opportunity for Accountability? *Völkerrechtsblog: International Law and International Legal Thought*. https://voelkerrechtsblog.org/a-missed-opportunity-for-accountability/

Apel, K.-O. (1988). *Diskurs und Verantwortung*. Frankfurt am Main: Suhrkamp.

Apel, K.-O. (2000). First Things First. Der Begriff primordialer Mitverantwortung. Zur Begründung einer planetaren Makroethik. In M. Kettner (Ed.), *Angewandte Ethik als Politikum*. Frankfurt am Main: Suhrkamp.

Baber, W. F. and Bartlett, R. V. (2001). Toward Environmental Democracy: Rationality, Reason, and Deliberation. *Kansas Journal of Law and Public Policy*, 11 (1), 35–64.

Barrière, O. et al. (Eds.). (2019). *Coviability of Social and Ecological Systems: Reconnecting Mankind to the Biosphere in an Era of Global Change*. Cham: Springer.

Bechky, P. S. (2012). Lemkin's Situation: Toward a Rhetorical Understanding of Genocide. *Brooklyn Law Review*, 77 (2), 551–624.

Behrens, K. G. (2014). An African Relational Environmentalism and Moral Considerability. *Environmental Ethics*, 36 (1), 63–82.

Berat, L. (1993). Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law. *Boston University International Law Journal*, 11, 327–348.

Bétaille, J. (2019). Rights of Nature: Why It Might Not Save the Entire World?. *Journal for European Environmental & Planning Law*, 16 (1), 35–64.

Bourbonnière, M. and Lee, R. J. (2007). Legality of the Deployment of Conventional Weapons in Earth Orbit: Balancing Space Law and the Law of Armed Conflict. *European Journal of International Law*, 18 (5), 873–901.

Buddeberg, E. (2017). Verantwortung nach Hans Jonas: Prinzip, Diskurs und politische Institutionen. In J. Nielsen-Sikora and J.-S. Gordon (Eds.), *Hans Jonas. Zur Diskussion seiner Denkwege*. Berlin: Logos.

Card, C. (2003). Genocide and Social Death. *Hypatia*, 18 (1), 63–79.

Carnwath, Lord CVO. (2014). Judges and the Common Laws of the Environment—At Home and Abroad. *Journal of Environmental Law*, 26 (2), 177–187.

Citizens of Europe. (2014, January 29). *End Ecocide in Europe Campaign: Using the European Citizens Initiative to Have a Real Impact*. Citizens of Europe. https://citizens-of-europe.eu/end-ecocide-in-europe-campaign-using-the-european-citizens-initiative-to-have-a-real-impact/

Cohen, A. J. (2010). A Conceptual and (Preliminary) Normative Exploration of Waste. *Social Philosophy and Policy*, 27 (2), 233–273.

Connelly, J. (2006). The Virtues of Environmental Citizenship. In A. Dobson and D. Bell (Eds.), *Environmental Citizenship*, Cambridge: MIT Press.

Coyne, L. (2018). Responsibility in Practice. Hans Jonas as Environmental Political Theorist. *Ethics, Policy & Environment*, 21 (2), 229–245.

Crook, M. and Short, D. (2014). Marx, Lemkin and the Genocide–Ecocide Nexus. *The International Journal of Human Rights*, 18, 298–319.

Daly, E. and May, J. R. (2019). Exploring Environmental Justice through the Lens of Human Dignity. *Widener Law Review*, 25 (2), 177–194.

Delord, J. (2010). *L'extinction d'espèce. Histoire d'un concept et enjeux éthiques*. Paris : Publications scientifiques du Muséum national d'histoire naturelle.

Dobson, A. and Bell, D. (2006). *Environmental Citizenship*. Cambridge: MIT Press.

EcocideLaw. (2022). *Ecocide Law in National Jurisdictions*. EcocideLaw. https://ecocidelaw.com/existing-ecocide-laws/

Ecologist (2020, July 21). Belgian Green Parties Introduce Ecocide Bill. *Ecologist*. https://theecologist.org/2020/jul/21/belgian-green-parties-introduce-ecocide-bill

Folkers, A. (2017). Resilienz als Nomos der Erde. Earth System Governance und die Politik des Anthropoza¨ns. *DGS Verhandlungsband. Geschlossene Gesellschaften: Die Erde, der Mensch und das Soziale*, 38, 137–160.

Fried, J. H. E. (1973). War by Ecocide. In M. Thee (Ed.), *Bulletin of Peace Proposals*, vol. I. Oslo: Universitetsforlaget.

Frisch, M. (1980, May 19). Man in the Holocene. *The New Yorker*. https://www.newyorker.com/magazine/1980/05/19/man-in-the-holocene

Galligan, B. P. (2021). Re-theorising the Genocide–Ecocide Nexus: Raphael Lemkin and Ecocide in the Amazon. *The International Journal of Human Rights*, 26 (2), 1004–1031. DOI 10.1080/13642987.2021.1994402.

Garcia, B. (2020, February 27). The History of Ecocide, a New Crime Against Humanity. *Science – Environment*. https://www.bbvaopenmind.com/en/science/environment/the-history-of-ecocide-a-new-crime-against-humanity/

Gauger, A. et al. (2012). Ecocide is the Missing 5th Crime Against Peace. *Human Rights Consortium*. https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf

Gray, M. A. (1996). The International Crime of Ecocide. *California Western International Journal of Law*, 26 (2), 215–271.

Greene, A. (2019). The Campaign to Make an Ecocide an International Crime: Quixotic Quest or Moral Imperative?. *Fordham Environmental Law Review*, 30 (3), 1–48.

Grimoult, C. (2019). Lamarck et Cuvier en re´volution. Ge´ologie, religion et politique entre violence et progre`s (1789-1830). *Arts & Savoir*, 12. DOI 10.4000/aes.2099.

Gronowska, B. et al. (Eds.). (2018). *Prawa człowieka a ochrona środowiskowa. Wspólne wartości i wyzwania* [Human rights and environmental protection. Shared values and challenges]. Toruń: UMK Press.

Grzebyk, P. (Ed.). (2020). *Responsibility for Negation of International Crimes*. Warszawa: IWS Press.

Hannis, M. (2015). The Virtues of Acknowledged Ecological Dependence: Sustainability, Autonomy and Human Flourishing. *Environmental Values*, 24 (2), 145–164.

Haraway, D. (2015). Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin. *Environmental Humanities*, 6, 159–165.

Higgins, P. (2010). *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide*. London: Shepheard-Walwyn.

Higgins, P., Short, D. and South, N. (2013). Protecting the Planet: A Proposal for a Law of Ecocide. *Crime, Law and Social Change*, 59 (3), 251–266.

Huber, J. (2017). Cosmopolitanism for Earth Dwellers: Kant on the Right to Be Somewhere. *Kantian Review*, 22 (1), 1–25.

Hursthouse, R. (2007). Environmental Virtue Ethics. In R. Walker and P. Ivanhoe (Eds.), *Working Virtue: Virtue Ethics and Contemporary Moral Problems*. Wotton-under-Edge: Clarendon Press.

Independent Expert Panel for the Legal Definition of Ecocide Completed (2021, June). *Commentary and core text. Stop Ecocide Foundation*. https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf

International Criminal Court. (1998, July 17). *Rome Statute of the International Criminal Court*. International Criminal Court. https://www.icc-cpi.int/resource-library/Pages/core-legal-texts.aspx

International Monsanto Tribunal. (2022). *Home*. International Monsanto Tribunal. http://www.monsanto-tribunal.org/

Johnston, I. (2014, October 12). Campaign to Put Ecocide on Part with Genocide. *The Independent*. https://www.independent.co.uk/environment/green-living/campaign-to-put-ecocide-on-a-par-with-genocide-in-attempt-to-curb-environmental-destruction-9789297.html

Jonas, H. (1984). *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation*. Frankfurt am Main: Suhrkamp.

Jonas, H. (1985). *The Imperative of Responsibility: In Search of an Ethics for the Technological Age*. Chicago: University of Chicago Press.

Jonas, H. (1987). Warum die Technik ein Gegenstand für die Ethik ist [Why technology is a subject matter for ethics]. In H. Lenk and G. Ropohl (Eds.), *Technik und Ethik*. Stuttgart: Philipp Reclam.

Jonas, H. (1992). *Philosophische Untersuchungen und metaphysische Vermutungen*. Frankfurt am Main: Suhrkamp.

Jonas, H. (2015). Wie können wir unsere Pflicht gegen die Nachwelt und die Erde unabhängig vom Glauben begründen? [How can we justify our duty towards posterity and the earth irrespectively of religious faith?]. In H. Jonas, *KGA*, vol. I/2, Freiburg: Rombach Verlag.

Kenig-Witkowska, M. M. (2017). Protection of the Environment in Times of Non-international Armed Conflicts – a Gap to Be Filled in. *Studia Juridica*, 78, 184–198.

King, C. (1877). Catastrophism and Evolution, *The American Naturalist*, 11 (8), 451–470.

Kolbert, E. (2014) *The Sixth Extinction: An Unnatural History*. New York: Henry Holt & Co.

Kotze, L. J. and Villavicencio Calzadilla, P. (2017). Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador. *Transnational Environmental Law*, 6 (3), 401–433. DOI 10.1017/S2047102517000061.

Kurki, V. A. J. (2017). Why Things Can Hold Rights: Reconceptualizing the Legal Person. In V. A. J. Kurki and T. Pietrzykowski (Eds.), *Legal Personhood: Animals, Artificial Intelligence, and the Unborn*. Cham: Springer.

Lay, B. et al. (2015). Timely and Necessary: Ecocide Law as Urgent and Emerging. *The Journal of Jurisprudence*, 28, 431–452.

Lee, R. J. (2000). The Underlying Legal Theory to support a Well-Defined Human Right to a Healthy Environment. *Journal of Environmental Law*, 283.

Lemkin, R. (1933). *Les actes constituant un danger général (interétatique) considérés comme délites de droit des gens par Raphaël Lemkin*. Paris: A. Pedone.

Lemkin, R. (1944). *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. New York: Columbia University Press.

Lemkin, R. (1948, January 15). Genocide as a Crime Under International Law. *UN Bulletin*, 70.

Lemkin, R. (2000, December 9). *Acts Constituting a General (Transnational) Danger Considered as Offenses Against the Law of Nations by Raphael Lemkin, Lecturer on Comparative Law at the Institute of Criminology of the Free University of Poland and Deputy Prosecutor of the District Court of Warsaw*. http://www.preventgenocide.org/lemkin/madrid1933-english.htm

Lemkin, R. (2018). Przestępstwa polegające na wywołaniu niebezpieczeństwa międzypaństwowego jako delicta juris gentium. *The Voice of Law: Allerhand Law Review*, I (1–2), pos. 9.

May, L. (2010). *Genocide: A Normative Account*. Cambridge: Cambridge University Press.

Mattijssen, T. J. M. et al (2020). Relational Values of Nature: Leverage Points for Nature Policy in Europe. *Ecosystems and People*, 16 (1), 402–410.

Mazur, P. (2021). Status prawny zwierząt pokrzywdzonych w wyniku popełnienia przestępstw stypizowanych w ustawie o ochronie zwierząt z 21.08.1997 r. [Legal status of animals injured as a result of crimes specified in the Act on the protection of animals of 21.08.1997]. *Prawo w Działaniu. Sprawy Karne*, 4 (47), 106–116.

McDonnell, M. A. and Moses, A. D. (2005). Raphael Lemkin as Historian of Genocide in the Americas. *Journal of Genocide Research*, 7 (4), 501–529.

Mégret, F. (2011). The Problem of an International Criminal Law of the Environment. *Columbia Journal of Environmental Law*, 36, 195–255.

Mehta, S. and Merz, P. (2015). Ecocide – A New Crime Against Peace? *Environmental Law Review*, 17 (1), 3–7.

Merz, P., Cabanes, V. and Gaillard, E. (2014). Ending Ecocide – the Next Necessary Step in International Law, *18th Congress of the International Association of Democratic Lawyers*, 4.

Mistura, A. (2018). Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework. *Columbia Journal of Environmental Law*, 43 (1). DOI 10.7916/cjel.v43i1.3740

Murphy, S. D. (1999/2000). Does the World Need a New International Environmental Court?. *George Washington Journal of International Law & Economics*, 32 (3), 333–349.

Nowak, E. et al. (2022). Challenging Habermas' Practical Discourse to Justify the Rights of Animals. In W. Kazimierska-Jerzyk, M. Gensler and K. Kędziora (Eds.), *Practica et Speculativa. Studies Offered to Professor Andrzej M. Kaniowski*. Łódź: Łódź University Editions, 605–626.

Parenti, Ch. (2011). *Tropic of Chaos*. Bold Type Books.

Pavel, C. E. (2021). *Law Beyond the State. Dynamic Coordination, State Consent, and Binding International Law*. New York: Oxford University Press.

Pietrzykowski, T. (2017). The Idea of Non-personal Subjects of Law. In V. A. J. Kurki and T. Pietrzykowski, *Legal Personhood: Animals, Artificial Intelligence, and the Unborn*. Cham: Springer.

Pietrzykowski, T. (2020). Prawo ochrony zwierząt – między praktyką a teorią nowej gałęzi prawa. Artykuł recenzyjny dotyczący książki Prawa Zwierząt. Praktyczny przewodnik [Animal Protection Law – between Practice and Theory of a New Branch of Law]. *Krytyka Prawa*, 2.

Plant, G. (Ed.). (1991). *Environmental Protection and the Law of War: A Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict*. London: Belhaven Press.

Puryear, S. (2017). Schopenhauer on the Rights of Animals. *European Journal of Philosophy*, 25 (2), 250–269. DOI 10.1111/ejop.12237

Ray, G. (2016). Writing the Ecocide-Genocide Knot. *Colophon: South as a State of Mind*, 6, *Documenta*, 14(4).

Rosół, P. (2017). *Hans Jonas o etycznej odpowiedzialności nauki i techniki* [Hans Jonas on the ethical responsibility of science and technology]. Kraków: Universitas.

Schneider, L. K. (2021, August 4). Strafrecht gegen Umweltsünden? *Welt-Sichten*. https://www.welt-sichten.org/artikel/39142/umweltsuenden-zu-verhindern-ist-sache-der-politik-nicht-des-strafrechts

Seet, M. (2019). 'Cosmopolitan Citizenship', Territorial Borders, and Bringing Denationalized Terrorists to Justice. *Journal of the International Criminal Justice*, 19 (2), 247–274.

Sharp, P. (1999). Prospects for Environmental Liability in the International Criminal Court. *Virginia Environmental Law Journal*, 18 (2), 217–243.

Singer, P. (1981). *The Expanding Circle. Ethics, Evolution, and Moral Progress*. Princeton: Princeton University Press.

Smith, G. (2010). Ecocide, the Fifth War Crime?. *Earth Island Journal*. https://www.earthisland.org/journal/index.php/magazine/entry/ecocide_the_fifth_war_crime/

Stein, S. (2010). Geno- and Other Cides. A Cautionary Note on Knowledge Accumulation. *Journal of Genocide*, 4 (1), 39–63.

Stellman, J. M. and Stellman, S. (2018). Agent Orange During the Vietnam War: The Lingering Issue of Its Civilian and Military Health Impact. *American Journal of Public Health*, 108 (6), 726–728.

Stilt, K. (2021). Rights of Nature, Rights of Animals. *Harvard Law Review Forum*, 134, 276–285.

Stone, Ch. D. (1972). Should Trees Have Standing? Toward Legal Rights for Natural Objects. *Southern California Law Review*, 45, 450–501.

Taj, M. (2022, January 24). Oil Spill Triggered by Tsunami Devastates Coast of Peru. *New York Times*. https://www.nytimes.com/2022/01/21/world/americas/peru-oil-spill-tonga-tsunami.html

Taylor, P. E. (1998). From Environmental to Ecological Human Rights: A New Dynamic in International Law? *Georgetown International Environmental Law Review*, 10, 309–397.

United Nations Environment Programme. (2022). *Home*. UNEP. https://www.unep.org

Voigt, Ch. (Ed.). (2019). *International Judicial Practice on the Environment*. Cambridge: Cambridge University Press.

von Meding, J. (2017, October 4). Agent Orange: How U.S. Chemical Warfare in Vietnam Unleashed a Slow-moving Disaster. *The Conversation - University of Newcastle*. https://theconversation.com/agent-orange-exposed-how-u-s-chemical-warfare-in-vietnam-unleashed-a-slow-moving-disaster-84572

Wattad, M. S. A. (2009). Rome Statute & Captain Planet: What Lies Between Crime Against Humanity and the Natural Environment. *Fordham Environmental Law Review*, 19 (2), 265–285.

White, R. (2017). Carbon Criminals, Ecocide and Climate Justice. In C. Holle and C. Shearing (Eds.), *Criminology and the Anthropocene*. London: Routledge.

Whittemore, M. E. (2011). The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite. *Pacific Rim Law & Policy Journal*, 20 (3), 659–691.

Woodward, N. (2019). Eternal Mirroring: Charles Patterson's Treatment of Animals and the Holocaust. *Journal of Animal Ethics*, 9 (2), 158–169.

Wojciechowski, B. (2009). *Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych* [Intercultural criminal law. Philosophical foundations of penal justice in multicultural democratic societies]. Toruń: Adam Marszałek.

Zawłocki, R. (2010). Karnoprawna ochrona środowiska naturalnego. *Przegląd Prawa Karnego*, 1, 127–146.

Zierler, D. (2011). *The Invention of Ecocide. Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment*. Athens: University of Georgia Press Fund.

Heritage Strikes Back

The Al Mahdi Case, ICC's Policy on Cultural Heritage and the Pushing of Law's Boundaries

Mirosław Michał Sadowski

McGill University, Polish Academy of Sciences and Universidade Aberta

ORCID 0000-0002-2048-2073

DOI | 10.14195/2184-9781_2_5

SUMMARY

The purpose of this paper is to answer the eponymous questions by focusing on the 2016 ICC judgement in the Al Mahdi case and the analysis of the ICC's 2021 Policy on Cultural Heritage created in its wake, which will shape our perception of cultural heritage protection in the years to come.

ABSTRACT

Images of genocide, mass graves and torn families come to mind when one hears the term 'war crime'. But does cultural heritage have similar legal rights? Is it protected by the Rome Statute? What lies in the future for cultural heritage protection against destruction? And where do the boundaries of law lie with regards to the rights of cultural objects? The purpose of this paper is to answer these questions by focusing on the International Criminal Court's (ICC) judgement in the Al Mahdi case in 2016 and the analysis of the ICC's Policy on Cultural Heritage created in 2021 in its wake, which will shape our perception of cultural heritage protection in the years to come. In the first, introductory part of the paper the author ponders upon the concept of cultural heritage, trying to understand why it matters. In turn, the second part of the article focuses on the investigation of the many faces of interactions between cultural heritage and law. The third part of the paper is devoted to the analysis of the Al-Mahdi case heard before the ICC. The author explains how the case was brought before the ICC and the way in which the Court reached its now precedent-setting decision, showing the various ways in which it pushed the boundaries of law and our understanding of what constitutes a war crime. In the fourth part of the paper the author turns his attention to the Policy on Cultural Heritage proposed by the ICC in June 2021 in close collaboration with UNESCO, looking into the new paths it puts forward for cultural heritage. The concluding part of the paper is focused on the question of what the ICC's Policy means for the future of the prosecution of the crimes against cultural heritage, with the author asking whether it may be an effective tool and deterrent in fighting against the destruction of world's heritage, and wondering how the rights of monuments may be further broadened in the coming years.

KEY WORDS

Cultural heritage, heritage protection, International Criminal Court (ICC), UNESCO, Rome Statute, Al Mahdi

Introduction

Whenever I think about cultural heritage as a concept, I am taken back to the first North American conference I participated in. Having spoken about the interactions between cultural heritage and law previously, I was slightly taken aback when the post-presentation discussion was focused not only on the finer points of my research, but also on whether something like cultural heritage exists at all and what rights it may have, if any.[1] Over the years, similar questions were always raised whenever I mentioned cultural heritage in Canada and US, but never in Europe, where the concept seems to be taken completely for granted.

These experiences made me realise that conceptualising cultural heritage as an idea already means pushing the boundaries of our thought, all the more so in connection with law. How to explain why something needs to be protected in perpetuity, while another building, monument or an object may easily be destroyed or simply allowed to slide into oblivion? The myriad of national and international regulations has attempted to enclose cultural heritage within the realms of law, protecting it from destruction; however, quite often law reacts only when people themselves act to preserve heritage in peril. In a number of cases law's boundaries are pushed in order to provide the protection.

In the first two parts of the paper I return to my earlier work, once again pondering on the question of cultural heritage and the various ways law finds to define and preserve it. Then I move to study a case which forever pushed the concept of cultural heritage protection, ultimately investigating the institutionalisation of its aftermath, ruminating upon the future of law's relationship with cultural heritage.

[1] The conference in question was the 10th McGill's Graduate Law Students Association Annual Conference (13-14 May 2017) and the questions "What actually is cultural heritage? Can we say it truly exists? What should be law's role in protecting it, if any?" were raised by Vincent Dalpé, now a dear friend. The vivid panel discussion, chaired by Prof. Shauna Van Praagh, prompted not only my further research into cultural heritage, but also led to my dream of joining McGill, where I have been enrolled in the Doctor of Civil Law (DCL) programme since 2019.

Part One: Conceptualising Cultural Heritage

Having ventured to compare and contrast the different definitions of cultural heritage twice before (Sadowski 2017; 2018) I would propose that we perceive it as the broadly understood tangible and intangible products of cultural past (ranging from buildings through whole urban landscapes and then traditions to digital cultural heritage[2]), of notable historical, social, religious, artistic, architectural, etc., importance for the local, regional, national and (or) global community which has a dynamic relationship with them based on collective memory. Importantly, the past in question may be very recent; what matters for a cultural product to be recognised as a part of cultural heritage is its importance and meaningfulness for current and potentially also future generations. For this reason, cultural heritage may be – and often is – preserved by legal provisions, which, depending on its perceived importance, may allow its reconfiguration or prohibit almost any changes even to the surrounding landscape completely.

The issue I would like to ruminate on here, however, is related less to the definition of cultural heritage and more to its nature, as only by understanding why cultural heritage matters – in a way answering the question I recalled in the introduction – may we comprehend the significance of the Al-Mahdi case and the need for the 2021 International Criminal Court's (ICC) Policy on Cultural Heritage. In this analysis I propose to follow key features of cultural heritage as identified by Vecco – historic and artistic value; cultural value; collective memory value; and its identity-building value (2010, 324) – with a particular focus on the two latter ones which, I would argue, while less obvious than the former, are particularly important in distinguishing cultural heritage objects from other historic, artistic, and cultural objects.

Nonetheless, it is the historic and artistic value which is most noticeable in the majority of tangible cultural heritage objects. These "monuments and sites" are thus recognised for these qualities and protected from "nature and human beings" in the hope of preserving "their full richness of the authenticity of materials, form, design and setting" for the future (Wijesuriya 2010, 234). It is this authenticity, resulting in cultural heritage having a 'universal value',

[2] Digital cultural heritage is an increasingly important form of heritage in the present day, the role of which in shaping our collective memories and identity often ignored (Haux et al 2021).

Jokiletho remarks (2006, 3), as well as its integrity, vital when it comes to planning processes and the defining of limits of restoration (2006, 2), that is key in assigning historic and artistic value to cultural objects.

The second feature of cultural heritage lies in its cultural value, the 'cultural layer' created by "people's activities" (Verdu & Karro 2012, 339). Through the evolution of the idea, as it "reappeared within a meaningful social context" on the local and global scale (Loulanski 2006, 217), the concept of cultural heritage came to also encompass the different cultural objects, both material and immaterial, "from language to sacred objects, and from rock music to 'queer spaces'," with the various "economic, political and social relations that weave in and through" them (Winter 2013, 541) together forming cultural heritage.

The third of the main reasons cultural heritage is of such value is due to collective memories attached to it; as Vecco remarks, "the capacity of the object to interact with memory" is vital for it to be recognised as cultural heritage (Vecco 2010, 324). As I have noted elsewhere, collective memory is "a social memory, one which is not created individually, but within a group, with one person having a wide array of collective memories functioning on different levels" and, importantly it may be "influenced by a number of factors, in particular by governments, both on the local and the national level" (Sadowski 2020, 211). One could argue that objects of cultural heritage are places of memory *par excellence*, those places (whether real or imaginary) which carry such significance that they may invoke the collective memories of the past simply through their image or mention (Sadowski 2020, 213-215). For this reason, the tangible objects of cultural heritage often become heavily politicised and even destroyed – their erasure speaks volumes.

The relationship between cultural heritage and collective memory has already been noticed by the 'father' of the latter concept, Maurice Halbwachs. He remarked how collective memory becomes attached to certain places and even if a place itself changes, it lives on in the minds of the people (Halbwachs 1980, 129), noting that the 'unchanging' places never cease to influence people: "habits related to a specific physical setting resist the forces tending to change them. This resistance best indicates to what extent the collective memory of these groups is based on spatial images" (Halbwachs 1980, 133). People and places have a particular relationship, one which leads a community to have "its thoughts as well as its movements […] ordered by the succession of images from [the] external objects" (Halbwachs 1980, 133). Should an attempt be made to alter this relationship through the changing of

the objects of major significance – of cultural heritage – people will protest, even though the objects have been constructed in the past, as "the force of local tradition comes forth from this physical object, which serves as its image" (Halbwachs 1980, 133).

Importantly, if the collective memories attached to them were to disappear, the "significance" of cultural heritage objects "may also decline in the public imaginary" (Meskell 2015, 2) – not necessarily, however. While "cultural heritage requires memory," and despite the fact that "in order to be cultural heritage" cultural objects "must be remembered and claimed as patrimony," they may still be recognised as cultural heritage "even if their original meaning is lost or poorly understood" (Silverman & Ruggles 2007, 12). This may be the case of not only ancient ruins, but also such instances when borders change and people are resettled; while the old collective memories linked to cultural heritage will disappear, the new inhabitants may choose to regard cultural objects of the 'foreign' past as elements of their own identity as in the case of my hometown of Wrocław, which integrates its pre-WWII German past into the Polish present.

Linked to its relationship with collective memory (Girard 1998, 48), the final major value of cultural heritage lies in its identity-building role. A "key component" of identity (Weber 2000, 5), cultural heritage acts as "a source which provides legitimacy to […] the positing of identity" (Wagner 2000, 9). Through the connection of the present to both past and the future, it inspires "a process of participation" and the production of "civil consciousness," as efforts towards cultural heritage preservation oblige "people to a continuous confrontation among particular and general interest" (Girard 1998, 35). Strengthening "cohesion and social ties in societies" (Weber 2000, 6) as it anchors identities and thus allows communities to 'recognise themselves' in it, cultural heritage provides a sense of belonging, "of integration, of cohesion, of community awareness, of common values, of specificity" also today in the times of globalisation (Girard 1998, 44-45).

With heritage and identity interdependent on one another – as there is "no identity without an act of remembrance of some origin(s) and that, which is remembered as origin(s), is constructed into the identity's heritage (Wagner 2000, 17) – the particularly vital role of intangible heritage in the process of identity building needs to be stressed. As Skrzypaszek observes, by providing "inspiration and drive," intangible cultural heritage creates an 'impetus' which "directs the formation of the contemporary identity to

discover meaning and purpose. Its inspirational value empowers the existential experience, but it also leans towards future orientation," thriving "with passion and vision as long as individuals take the time and effort to" protect and engage with cultural heritage (2012, 1496-1497).

Art and history, culture, collective memory and identity, the intertwined values of cultural heritage, provide us with an answer as to why it is protected – thus, I propose to move to the question of its relationship with one of the major instruments in heritage conservation: law.

Part Two: Cultural Heritage and Its Relationship with Law

When analysing the interactions of cultural heritage and law it first needs to be stressed once again that in a way cultural heritage as a concept pushes the boundaries of law by itself: as it has been noted, while the expression 'heritage' comes from inheritance law (Ferrazzi 2021, 744), in general law needs to rely on other disciplines in order to frame cultural heritage within its boundaries (de Clipelle 2021, 639), and the term itself is a compromise (Ferrazzi 2021, 750). But, more importantly, the interactions of cultural heritage with law in many ways further push the law's boundaries, forming a network of mutual interactions (see Figure 1), which I analyse below.

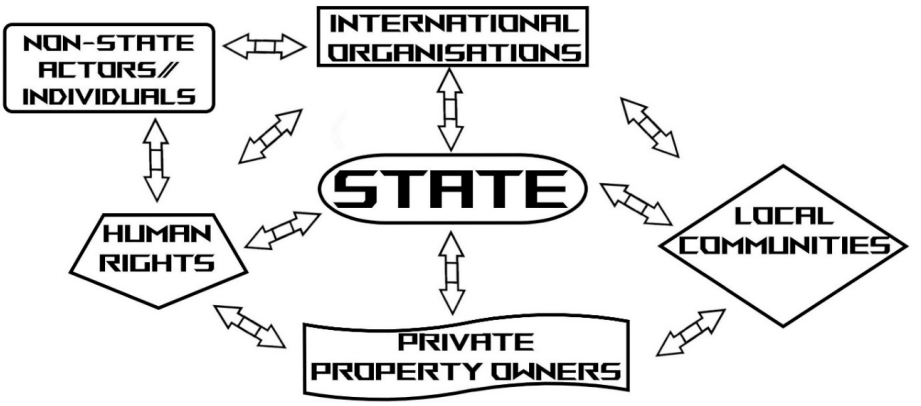

Figure 1 – the simplified network of interactions between various actors of cultural heritage and law (source: author).

When it comes to cultural heritage and law, even the most common of interactions, these between private property owners and the state, are impacted. Given that the public and private interests concerning the preservation and conservation of cultural heritage, as well as control of the heritage trade, are often opposed to each other, it may be difficult to reach a compromise satisfying the state, representing the common interest, and the property rights of the individual owner of a cultural object (Zeidler & Łągiewska 2021, 665).

It is the state that remains at the centre of cultural heritage protection: while cultural heritage belongs to all of humanity, it is the country where it is located that bears the responsibility for and costs of its preservation (Wangkeo 2003, 192). This often puts the state in another conflict, one "with fundamental principles of international law—state sovereignty and the right of non-intervention" (Wangkeo 2003, 187), as in certain instances there might exist valid reasons for the destruction of cultural heritage, but at the same time a country is bound to protect it by various international provisions.

There are two main possible explanations as to why a state may choose to destroy some of its cultural heritage, but only one of them may be recognised as justifiable: economic development, provided that the country in question "makes a good faith effort to pursue the least destructive means," attempts to "mitigate the negative effects" of the planned development, and establishes that the proposed destruction is not a violation of the human rights of a particular (e.g. minority) group (Wangkeo 2003, 264-265). In turn the second reason, iconoclasm, is perceived as a 'direct violation' of human rights and may not be seen as legitimate under any circumstances (Wangkeo 2003, 266). However, as Wangkeo notes, a country's decision regarding its heritage should only be assessed on the international forum if the cultural object in question is of global importance (Wangkeo 2003, 267), and most importantly, the best interests of local communities living in the presence of cultural heritage always needs to be taken into account (Wangkeo 2003, 269).

This is often not the case, particularly in non-Western societies, which, having inherited colonial cultural heritage protection laws, find themselves with an ill-suited legal framework, one "over-emphasising colonial architecture and often ignoring traditional […] laws and cultural practices," failing to acknowledge the diverse relationships between people and places (Ndoro 2015, 136-137). Importantly, local communities may be impacted not only by the state, but also by decisions of international organisations. As it has been noted, inscription on UNESCO's World Heritage List, while beneficial

for tourism, may have damaging consequences both for the traditional way of life and the site in question (Independent 2014), potentially even leading to "displacement and gentrification" (Larsen 2018, 299).

This is just one example as to why, when it comes to cultural heritage protection, the influence of international organisations and international law cannot be underestimated. Among them UNESCO (the United Nations Educational, Scientific and Cultural Organization) is of particular importance, responsible for creating the network of international conventions encompassing the various aspects of cultural heritage which need to be protected, from cultural property in case of war to underwater cultural heritage to intangible cultural heritage (Meskell & Brumann 2015, 23).

While this is not the place for a closer analysis of the deeply fragmented international framework concerning cultural heritage, it needs to be noted that UNESCO is not the only organisation concerned with its preservation: other notable ones include, *inter alia*, the International Council of Museums (ICOM), the International Council on Monuments and Sites (ICOMOS), the International Council for Archives (ICA) and the International Federation of Library Associations and Institutions (IFLA), which together founded the International Committee of the Blue Shield (ICBS) in 1996 (Massue & Schvoerer 2001, 1); today known simply as the Blue Shield, it is tasked with assessing threats to heritage and preparing for risks it may encounter, e.g. by managing inventories or promoting emergency response plans (Blue Shield 2019). In addition, various regional frameworks of cultural heritage protection are also in place, for example created by the Council of Europe and the European Union, which, however, are focused on the role of cultural heritage "as a vehicle for the construction of a European identity" (Lanciotti 2021, 196-197).

With cultural heritage recognised as a major contributor "to the maintenance of peace" (Scovazzi 2021, 167), the question of human rights represents another dimension of the interactions between cultural heritage and law, with the two 'interrelated' (Morawa & Zalazar 2018, 211), occasionally even in conflict with one another (Silverman & Ruggles 2007, 6), as "human rights constitute a universal category," whereas "the concept of cultural heritage is culturally, temporally, and geographically specific" (Logan 2007, 44).

Nevertheless, the two have come closer in recent decades as a result of the shift from the state to international perspective of what cultural heritage entails – to "a fuller and more complete perception of its human dimension"

(Lancinotti 2021, 206) – including not only tangible, but also intangible heritage, a major "step in recognising cultural diversity" (Logan 2012, 235).

As Logan notes, "managing" the intangible aspects of cultural heritage has major implications – amongst them "the most direct and difficult [are] human rights implications" since one is dealing with embodied and living heritage" and "it is ethically impossible to 'own' people in the way that we can own, buy and sell, destroy, rebuild or preserve the tangible heritage of places and artefacts" (Logan 2012, 236). Moreover, in certain instances part of a community's intangible heritage, a particular cultural practice, may be in direct conflict with human rights (Logan 2012, 239).

Tangible cultural heritage's relationship with human rights may also pose issues: as mentioned above, protection of a particular site may lead to infringements of the local communities' human rights (Ekern et al. 2012, 214), which always should be, but often are not included in the process of heritage management (Logan 2007, 49-50). Also, particular individuals or groups (e.g. minorities) may be prohibited from challenging the "orthodox, homogenising or dogmatic interpretations" of cultural heritage (Silberman 2012, 253), leading to conflict.

The final aspect of the interactions between cultural heritage and law as presented on Figure 1, involving non-state actors and individuals engaging in the destruction of heritage, deeply connected to the question of human rights, is going to be the subject of my analysis in the following part of the article, on the example of the Al Mahdi case, which is of particular interest also due to its precedent-setting effect, one pushing the boundaries of law in a number of ways.

Part Three: Heritage Strikes Back or the Al Mahdi Case

On 27 September 2016, following only three days of trial a month earlier, Ahmad Al Faqi Al Mahdi was found guilty of the war crime of intentionally directing attacks on Timbuktu's cultural heritage by the International Criminal Court (ICC 2018, 1). While it is not the place of this paper to provide a detailed overview of the case itself, I propose to look at its particular elements, those which pushed the boundaries of cultural heritage protection as well as international criminal law and demonstrated new ways of dealing with crimes committed by non-state actors.

Between June and July 2012, in his capacity as the leader of Hisbah, the morality police established by Ansar Eddine, an Al Qaeda in the Islamic Maghreb (AQIM)-associated movement, Al Mahdi was responsible for leading the destruction of ten cultural heritage objects: the mausoleum Sidi Mahamoud Ben Omar Mohamed Aquit; the mausoleum Sheikh Mohamed Mahmoud Al Arawani; the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabir; the mausoleum Alpha Moya; the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi; the mausoleum Sheikh Muhammad El Mikki; the mausoleum Sheikh Abdoul Kassim Attouaty; the mausoleum Ahmed Fulane; the mausoleum Bahaber Babadié; and the door of Sidi Yahia mosque (ICC 2018, 1).

Following the referral of the case by the government of Mali in 2012, the ICC's Office of the Prosecutor (OTP) began its investigation in 2013, which led to an arrest warrant for Al Mahdi issued two years later and ultimately to his surrender to the ICC by Niger's authorities. After the trial in The Hague, Al Mahdi was unanimously found guilty by Trial Chamber VIII and sentenced to nine years of imprisonment, with time spent in detention deducted. A year later, in 2017, a reparations order was issued in the case, which was, for the most part, ultimately confirmed in 2018 by the Appeals Chamber (ICC, 2018, 1-2).

The Al Mahdi case is often said to be a case of 'many firsts' (Chiricioiu 2017, 5) as it pushed the boundaries of law in a number of ways. Most importantly, it was the first prosecution before an international tribunal solely on the basis of destroying cultural heritage (Bishop-Burney 2017, 130). As it has been noted by both the Court and the witnesses, Timbuktu's cultural objects play a vital role in the local community's religious life (Pinton 2020, 363), as well as the whole country's identity and collective memories, with their destruction also negatively impacting global society (Pinton 2020, 357-558). Thus, by choosing to try this case, ICC sent out a strong signal with regard to the protection of cultural heritage, elevating it to *ius cogens* of international law (Cole 2017, 452) and also underlining the growing consensus that "the destruction of cultural heritage should be equated to an attack on the values of humanity as a whole" (Roman 2019, 122-123), taking "a significant step towards understanding the full impact of international crimes on individuals, communities, and societies" (Wierczyńska & Jakubowski 2017, 712).

This point of view also in a way addresses the criticisms of some in academia who argued that hearing a case related only to the destruction of

heritage does not meet the gravity threshold (Sterio 2017, 66-67; 70-72), as the ICC is reserved only for the most serious crimes concerning the international community (Günay 2019, 253-256). In a way this question is a return to the debate mentioned in the introductory part of this paper. However, the Court itself stressed that while, in general, crimes against objects are less grave than those committed against people, the fact that the destroyed "buildings had held religious, symbolic, and emotional value for the people of Timbuktu," as well as being, barring one, on the UNESCO World Heritage list, "meant that their destruction affected not only the Malian people, but also the international community more broadly" (Bishop-Burney 2017, 128). This not only proved that the ICC refuses to engage in creating "a hierarchy of the crimes within its Statute" (Johnsen 2017, 36), but also underlined the intangible side of cultural heritage (Lostal 2017, 50), showing how "the destruction of cultural heritage cannot be assessed in a similar way as the destruction of other property" (Wierczyńska & Jakubowski 2017, 713) given that it is "'an affront to' values of heritage and human identity inseparable to the physical existence of these site" (Dijkstal 2019, 399).

Looking at other particularities of the Court's approach towards the case, the new understanding of the term 'attack' in the Article 8 (2) (e) (iv) of the Rome Statute, the basis of Al Mahdi's conviction, represents another 'first', with the Court arguing that an attack on objects may take place not only during, but also "outside the conduct of hostilities" (Mathias 2021, 66-68), even "after the [cultural] object has fallen into the hands of the adversary" (Bagott 2020, 43). This approach has led some researchers to believe "that Al Mahdi did not commit the crime for which he was convicted", as his actions took place after Timbuktu fell into the hands of Ansar Eddine and thus may not have constituted an attack (Schabas 2017, 76-77). Mathias refutes this argument, remarking that looking closely at the earlier Ntaganda case, an "ambiguous footnote 3147 could potentially bridge the differences in interpretations" of the meaning of attack between this and Al Mahdi cases (2021, 75), potentially proving a more established way of understanding what an attack means for the Court. Even more convincingly, however, Esterling and John-Hopkins note that Schabas' argument ignores the realities of an "internecine communal violence that has a nexus to a surrounding armed conflict" (2018, 25), which was clearly the situation in Timbuktu, as it was ultimately the people, their beliefs (Burrus 2017, 339), identity and collective memories which were the actual target of the attack (Dijkstal 2019, 406-407).

Procedural economy was another *novum* of the Al Mahdi trial: instead of the usual elongated proceedings, a swift trial and conviction, the shortest in the Court's history (Capone 2018, 647-558), improved the ICC's battered image (Sterio 2017, 67-68), serving not only as a deterrent for future acts of violence towards cultural heritage, but also promoting reconciliation (Esterling and John-Hopkins 2018, 48). I agree with Sterio that this shows that pursuing cases against "lesser-known defendants" who can actually be brought to justice may be a better strategy for the Court than issuing "arrest warrants against defendants who are unlikely to find their way to The Hague," as "limited justice may be better than no justice at all" (2017, 73). Such an approach also proves that when it comes to cultural heritage, where human rights law and international law fail – in particular with regard to the instances of its destruction by non-state actors – international criminal law seems to be the best approach for its protection (Esterling and John-Hopkins 2018, 12).

Notably, the Al Mahdi case was the first time an Islamist extremist stood trial before an international tribunal (Sterio 2017, 69), which was used as a part of the defence team's strategy, who used the argument of a "clash between two world views, part of a broader struggle over the meaning of Islam" as motivating Al Mahdi's actions (Badar & Higgins 2017, 2). Ultimately this avenue of thinking was not tested before the Court as, in another 'first' before the ICC, Al Mahdi plead guilty (Chiricioiu 2017, 5), which led to the Prosecutor's recommendation of sentencing him for nine to eleven years (Chiarini 2021). Importantly, taking responsibility for his actions has been recognised as an element of the peace and reconciliation process in Mali, helping to alleviate "the victims moral suffering" (Pinton 2020, 366), all the more so given that despite the plea, the Court still thoroughly investigated the matter, developing "for the historical record and collective memory an account that is rich in historical and anthropological detail," one illustrating "the significance of cultural heritage as well as the impact that its obliteration had on the cultural life and identity of a group" (Esterling & John-Hopkins 2018, 46).

The case was also innovative when it comes to reparations, as an international tribunal needed to consider "how to compensate for damages while at the same time examining how cultural heritage is understood" for the first time (Pinton 2020, 370). Interestingly, it was not only the inhabitants of Timbuktu and the people of Mali that were recognised as victims (Capone 2018, 651), but also the international community as a whole, represented in the eyes of the court by UNESCO, most likely chosen on the basis of its broad

membership and involvement in cultural heritage protection (Dachlan 2018, 39). While prioritising individual reparations to the citizens of Timbuktu for economic and moral losses (Capone 2018, 656), with Al Mahdi liable for 2.7 million euros (Dijkstal 2019, 403), and offering only one euro of reparations to UNESCO – and one euro to Mali – the latter's symbolic value also spoke volumes (Pinton 2020, 372-273). Moreover, in addition to monetary compensation, the ICC ordered Al Mahdi's apology to be published on its website (Neumann 2018, 619), as well as broadcast in a video form in the local language of the people living in Timbuktu, potentially with a cathartic effect for the community (Buis 2020, 136-137). This decision, along with several memorialisation projects aimed at strengthening the local community (Pinton 2020, 376-378), further underlined the innovative reconciliatory nature of the ICC's reparations order, showing the Court's understanding that "where the destruction of cultural heritage has taken place, reconstruction of the sites does not by itself equal reparation" (Dachlan 2018, 42).

While it did set a precedent, it needs to be noted that the boundaries of cultural heritage protection might be pushed even further than in the Al Mahdi case: as both Rossi (2017, 97) and Wierczyńska and Jakubowski (2017, 716-717) note, crimes against cultural heritage may potentially be recognised by ICC not only as war crimes, but also as crimes against humanity and even genocide, depending on the approach and their scale. The next, final section of the paper deals with the 2021 ICC's Policy in Cultural Heritage which sheds some light on the ways in which the future prosecutions of crimes against cultural heritage may look like.

Part Four: The Aftermath of Al Mahdi – ICC's Policy on Cultural Heritage

Following the Al Mahdi case, in its 2019-2021 Strategic Plan, the Office of the Prosecutor made a commitment to complete its work on "the adoption of a comprehensive policy on the protection of cultural heritage within the Rome Statute legal framework" (OTP 2019, 5). The Policy on Cultural Heritage, ultimately adopted in June 2021, is in a way a commentary on the Rome Statue from the perspective of cultural heritage, one particularly valuable as it was written from the inside of ICC (OTP 2021). While this is not a place to examine it minutely, focusing on some of its particularities may help make

predictions as to the ways in which cultural heritage protection is going to develop in the next decade.

Recognising the Al Mahdi's case symbolic role in para. 6, the goal of the Policy, as noted in para. 19 and 20, is the enhancement of OTP's protection of cultural heritage, providing it with "clarity and guidance" when applying the Rome Statute to the cases involving cultural heritage; strengthening "the prevention of harm to" and protection of cultural heritage; working with and supporting other partners in protecting cultural heritage; contributing "to the ongoing development of international jurisprudence" related to cultural heritage; and raising "awareness regarding the importance of the protection of cultural heritage."

Interestingly, in para. 14 the Policy departs from the Statutory term 'cultural property' used in articles 8 (2) (b) (ix) and 8 (2) (e) (iv), seeing is as too tangible-centred, too narrow to cover the wide variety of crimes related to cultural rights, instead proposing the much broader term of cultural heritage. In para. 3, 4, 15 and 17 the Policy proposes OTP's own definition of what constitutes cultural heritage, regarding it as "a unique and important testimony of the culture and identities of peoples," a "bedrock of cultural identities," which "incorporates both tangible and intangible expressions of human life," including not only cultural property, but also other cultural products and processes. Additionally, in para. 16 the Policy enumerates what may be regarded as cultural heritage for its purposes, i.e. secular and religious buildings; culturally valued buildings or their groups; sites as "man-made works;" movable objects; underwater cultural heritage; intangible cultural heritage; and natural heritage. Cultural heritage related crimes, it is noted in para. 2, "are a pervasive feature of the atrocities within the Court's jurisdiction." Furthermore, in para. 24 it is stressed that the OTP "pays particular attention to the investigation and prosecution" of cultural heritage related crimes, which it hopes will have the positive effect of preventing them and at the same time raise awareness of the importance of heritage protection, while noting in para. 26, 27 and 28 that such crimes can not only "be multifaceted in nature" and "motivated by various reasons," but also affect the victims directly and indirectly in a number of ways – economic, spiritual, educational – impacting on their human rights as well as violating international humanitarian law. Importantly, both human rights and IHL are recognised for their role in cultural heritage protection.

The Policy stresses that war crimes (as in the Al Mahdi case) are the most 'straightforward' classification of cultural heritage crimes under the Rome

Statute (para. 40-47). Interestingly, however, the Policy proposes – seemingly pushing the limit of the understanding of a war crime of directing attacks on cultural objects in para. 47 – that any particularly serious attack on not only "cultural property in the meaning of the 1954 Hague Convention and 1977 Additional Protocols" but also "world heritage in the sense of the World Heritage Convention" may be regarded as such "irrespective of the regard in which such objects may be held by their immediate society at the material time." This perspective elevates the global aspect of cultural heritage's value to that of particular importance and may prove valuable in prosecuting these cases of heritage destruction where the local communities (unlike in the Al Mahdi case) feel indifferent or even hostile towards cultural objects in their vicinity.

The Policy also highlights acts other than war crimes which may be committed in relation to cultural heritage, of which of particular interest are: crimes against humanity, with OTP aiming to regard cultural heritage crimes as such "whenever appropriate" (para. 61); attacks against civilian populations, with cultural heritage being possibly "the primary target" of such an attack "given the collective importance of cultural heritage for civilian communities as such" (para. 64); extermination, with crimes against cultural heritage potentially a "part of this scheme, since they can lower a group's morale, change power dynamics, and weaken resistance, thereby facilitating mass killing" (para. 67); torture, given that the destruction of "heritage can aggravate mental suffering" (para. 71); and genocide, as cultural heritage crimes, while they "do not *per se*" amount to "acts of genocide" may very well "constitute evidence of the perpetrator's intent to destroy" a group, potentially including various elements constituting genocide, e.g. forced removal of children, which "is likely to have a profound effect on the access to, practice of, and continuation of a group's cultural heritage" since "children are the conduit of cultural heritage to future generations" (para. 78-88).

Importantly, the Policy does not limit OTP's role in protection of cultural heritage to persecutory and deterrence aspects: as noted in para. 11, it may take preventative action through the education of general public. Moreover, it may also galvanise and support "efforts to document and preserve cultural heritage at risk of destruction," working together with outside partners on that matter (para. 9), given that, in order to overcome issues with evidence collection in the cases of heritage destruction, OTP "has developed in-house forensic capacities for the recording of the identified evidence on site, such

as 3-D mapping, 3-D laser scanning, 3-D modelling and drone imagery, as well as capacities in geographic information systems" (para. 105). The OTP may also "provide support and encouragement to national proceedings" in the matters of cultural heritage related crimes in those instances where ICC's involvement is not necessary (para. 10), as well as work closely with "specialised partners in the field" of cultural heritage protection, including UNESCO in particular (para. 129), the organisation with which it had collaborated in the creation of the Policy. One can only hope that in the near future we will see the Policy applied in practice and also further refined, hopefully leading to increased protection of cultural heritage worldwide.

Conclusion

Looking at the bigger picture, the 2021 Policy provides a certain rereading of the Rome Statute from the perspective of cultural heritage, pushing its boundaries in this direction. It not only provides a broad definition of cultural heritage protection, fit for the challenges it faces in the 21st century, but also demonstrates the wide variety of dangers it faces in the present day, establishing a promise of persecution of crimes against it. Most importantly, the Policy provides us with an extremely broad catalogue of crimes which may impact cultural heritage, whether these are a main or intermediate goal, showing why it needs to be protected, not only on the local or national, but also on the global scale – it is an integral part of our humanity, a vital element of our identity and collective memories, and a bridge between the past and the present.

Returning to the initial question of why cultural heritage matters, one could answer perversely that it matters because people are willing to destroy it. While not diminishing the direct impact of crimes against persons, with the Al Mahdi case came the realisation in international criminal law that acts committed on cultural objects also have the profound effect on people – because, as Ferrazzi notes, "cultural heritage is a medium, since it is a fundamental part of the process of human enrichment and helps in setting a strong moral and ethical framework" (2021, p. 763).

Over the past decades, law has enveloped cultural heritage with a network of various relations and interactions, creating an intricate web aiming for its protection. it is a web not without holes, however, in particular in those instances where crimes were committed by non-state actors. Larsen recently

argued that "whereas the Roman maxim *Inter arma silent leges* concerned the silence of law in times of war, we need to recognise the silence of rights in times of heritage" (Larsen 2018, p. 300). The judgement in the Al Mahdi case and the new ICC's Policy on Cultural Heritage are major steps in the direction of bringing cultural heritage, its legal protection framework and human rights, together, potentially leading to better protection of our heritage. While I am cautiously optimistic, only the coming years will show how effective the new Policy is going to be, and how much further the boundaries of law are going to be pushed when it comes to cultural heritage protection.

Acknowledgments

The author is grateful to the Volkswagen Foundation for supporting this study within their research grant allocated for the consortium project 'MEMOCRACY' (2021-2024).

References

Badar, M, Higgins, N. (2017). Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law and the Case of Prosecutor v Al Mahdi. *International Criminal Law Review*, 17 (3), 486-516. https://doi.org/10.1163/15718123-01731383

Bagott, P.-L. (2020). How to solve a problem like Al Mahdi: proposal for a new crime of 'attacks against cultural heritage'. In J. Fraser & B. McGonigle Leyh (Eds.), *Intersections of law and culture at the International Criminal Court* (38-58). Cheltenham/Northampto: Edward Elgar.

Bishop-Burney, U. S. (2017). Prosecutor v. Ahmad Al Faqi Al Mahdi. *The American Journal of International Law*, 111 (1),126-132. https://doi.org/10.1017/ajil.2017.8

Blue Shield International. (2019). International Committee of the Blue Shield (ICBS). *Blue Shield International*. https://theblueshield.org/about-us/history/international-committee-of-the-blue-shield-icbs/.

Buis, E. J. (2020). Aristotle in The Hague: Artistic Pleading and Emotional Theatricality in International Criminal Proceedings. *American Journal of International Law (AJIL) Unbound*, 114, 133-137.

Burrus, J. E. (2017). "So Far as War Allows": Why the Al Mahdi Conviction Is Unlikely to Stem the Pace of Cultural Destruction Perpetrated by Non-State Actors. *Washington International Law Journal*, 27 (1), 317-347.

Capone, F. (2018). An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements. Redress for Victims of Crimes against Cultural Heritage. *Journal of International Criminal Justice*, 16, 645–661. https://doi.org/10.1093/jicj/mqy031

Chiarini, G. (2021, April 2). Negotiated Justice in the ICC: Following the Al Mahdi case, a Proposal to Enforce the Rights of the Accused. *Global Justice Journal*. https://globaljustice.queenslaw.ca/news/negotiated-justice-in-the-icc-following-the-al-mahdi-case-a-proposal-to-enforce-the-rights-of-the-accused.

Chiricioiu, V. (2017). Two 'Firsts' at the International Criminal Court: The Al Mahdi Case and Its Implications. *NRDO – The New Journal of Human Rights*, 2, 5–18.

Cole, D. M. (2017). From the Hague to Timbuktu: The Prosecutor v. Ahmad Al Faqi Al Mahdi; A Consequential Case of Firsts for Cultural Heritage and for the International Criminal Court. *Temple International and Comparative Law Journal*, 31 (2), 397–462

Dachlan, R. (2018), *Constructing Victims of Heritage Destruction: Lessons from the Al Mahdi Reparations Order*. Cambridge: University of Cambridge.

de Clippele, M.-S. (2021). Does the Law Determine What Heritage to Remember?. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, 34, 623–656. https://doi.org/10.1007/s11196-020-09811-9.

Dijkstal, H. J. (2019). Destruction of Cultural Heritage before the ICC. The Influence of Human Rights on Reparations Proceedings for Victims and the Accused. *Journal of International Criminal Justice*, 17, 391–412. https://doi.org/10.1093/jicj/mqz017.

Ekern, S., Logan, W., Sauge, B., Sinding-Larsen, A. (2012). Human rights and World Heritage: preserving our common dignity through rights-based approaches to site management. *International Journal of Heritage Studies*, 18 (3), 213–225. https://doi.org/10.1080/13527258.2012.656253.

Esterling, S. E. & John-Hopkins, M. (2018). The Creation and Protection of History through the Prism of International Criminal Justice in Al Mahdi. *Journal of International Humanitarian Legal Studies*, 9, 1–60. https://doi.org/10.1163/18781527-00901001.

Ferrazzi, S. (2021). The Notion of "Cultural Heritage" in the International Field: Behind Origin and Evolution of a Concept. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, 34, 743–768. https://doi.org/10.1007/s11196-020-09739-0.

Girard, L. F. (1998). Conservation of cultural and natural heritage. Evaluations for good governance and democratic control. In N. Lichfield et al. (Eds.), *Evaluation in Planning: Facing the Challenge of Complexity* (25–50). Dordrecht: Springer Science+Business Media.

Günay, M. T. (2019). Looking Humanity in the Eye and Seeing its Loss in the Eyes of the ICC: An Evaluation of Daesh's Destruction of Palmyra using the Gravity Assessment Made by the ICC Prosecutor in the *Al Mahdi* Case. *Santander Art and Culture Law Review*, 2, 245–266. https://doi.org/10.4467/2450050XSNR.19.023.11571.

Halbwachs, M. (1980). *The Collective Memory*. New York, NY: Harper Colophon Books.

Haux, H. D., Maget Dominicé, A., & Raspoting, J. A. (2021). A Cultural Memory of the Digital Age?. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, 34, 769–782. https://doi.org/10.1007/s11196-020-09778-7.

ICC (2018). Case Information Sheet: Situation in the Republic of Mali. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*. ICC-01/12-01/15. The Hague: ICC.

Independent (2014). Is Unesco damaging the world's treasures?. *Independent*. https://www.independent.co.uk/travel/news-and-advice/unesco-damaging-world-s-treasures-1675637.html.

Johnsen, S. Y. R. (2017). *Wilful Destruction of Cultural Property as the Principal Charge before the ICC: The Al Mahdi Case and the Gravity Threshold for Admissibility*. [Unpublished doctoral dissertation, Universitetet I Bergen].

Jokilehto, J. (2006). World Heritage: Defining the outstanding universal value. *City and Time*, 2 (2), 1-10.

Lanciotti, A. (2021). Cultural Heritage in International Law: (Still) Looking for a Definition? The Taxonomy of Cultural Heritage Across the Spectrum of UNESCO Conventions and Beyond. In O. Niglio & E. Yong Joong Lee E (Eds.), *Transcultural Diplomacy and International Law in Heritage Conservation: A Dialogue between Ethics, Law, and Culture* (191-208). Singapore: Springer.

Larsen, P. B. (2018). (Re)Structuring Rights and World Heritage Dynamics and Looking Towards the Future. In P. B. Larsen (Ed.), *World Heritage and Human Rights. Lessons from the Asia-Pacific and Global Arena* (295-314). Oxon/New York, NY: Routledge.

Logan, W. S. (2007). Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection. In H. Silverman, D. Fairchild Ruggles (Eds), *Cultrual Heritage and Human Rights* (33-52). New York, NY: Springer Science+Business Media.

Logan, W. S. (2012) Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice. *International Journal of Heritage Studies*, 18 (3), 231-244. https://doi.org/10.1080/13527258.2011.637573.

Lostal, M. (2017). The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC. *Inter Gentes*, 1 (2), 46-58.

Loulanski, T. (2006). Revising the Concept for Cultural Heritage: The Argument for a Functional Approach. *International Journal of Cultural Property*, 13, 207-233. https://doi.org/10.1017/S0940739106060085.

Massue, J. P. & Schvoerer, M. (2001). *Module BI-4/C. Protection of Cultural Heritage*. Strasbourg/Geneva: EUR-OPA and IOM-OIM.

Mathias, S. (2021). Prosecuting Crimes Against Culture: The Contributions of the Al-Mahdi and Ntaganda Cases to the ICC Approach to Cultural Property Protections. *Emory International Law Review Recent Developments*, 35, 58-75.

Meskell, L. (2015). Introduction: Globalizing Heritage. In L. Meskell L (Ed.), *Global heritage: a reader* (1-21). Chichester/Malden: Wiley Blackwell.

Meskell, L. & Brumann, C. (2015). UNESCO and New World Orders. In L. Meskell (Ed.), *Global heritage: a reader* (22-42). Chichester/Malden: Wiley Blackwell.

Morawa, A. H. E., Zalazar, G. (2018) The Inter-Relationship of the World Heritage Convention and International Human Rights Law. A preliminary assessment and outlook. In P. B. Larsen (Ed.), *World Heritage and Human Rights. Lessons from the Asia-Pacific and Global Arena* (193-216). Oxon/New York, NY: Routledge.

Ndoro, W. (2015). Heritage Laws: Whose Heritage Are We Protecting?. *The South African Archaeological Bulletin*, 70 (202), 136-137.

Neumann, T. (2018). The ICC's Reparations Order in *re Al Mahdi*: Three Remarks on Its Relevance for the General Discussion on Reparations. ZAOERV *Heidelberg Journal of International Law*, 615-620.

OTP (2019). Strategic Plan 2019-2021: International Criminal Court. *Office of the Prosecutor.* https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf.

OTP (2021). Policy on Cultural Heritage. International Criminal Court. *Office of the Prosecutor.* https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf.

Pinton, S. (2020) The ICC Judgement in Al Mahdi: Heritage Communities and Restorative Justice in the International Criminal Protection of Cultural Heritage. *Seattle Journal for Social Justice*, 19 (1), 347-386.

Roman, E. (2019). The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: *Rosenberg* to *Al-Mahdi. Groningen Journal of International Law*, 7 (1), 112-123. https://doi.org/10.21827/5d5141dfbdcbf.

Rossi, P. (2017). The "Al Mahdi" Trial Before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity. *Diritti Umani e Diritto Internazionale*, 11 (1), 87-100.

Sadowski, M. M. (2017). Urban Cultural Heritage: Managing and Preserving a Local Global Common in the Twenty-first Century. *Journal of Heritage Management*, 2 (2), 125-151. https://doi.org/10.1177/2455929617738454.

Sadowski, M. M. (2018). Cultural Heritage and the City: Law, Sustainable Development, Urban Heritage, and the Cases of Hong Kong and Macau. *Romanian Journal of Comparative Law*, 8 (2), 208-245.

Sadowski, M. M. (2020). City as a Locus of Collective Memory. Streets, Monuments and Human Rights. *Zeitschrift für Rechtssoziologie – The German Journal of Law and Society*, 40 (1-2), 209-240. https://doi.org/10.48269/2451-0610-ksm-2021-1-003.

Schabas, W. (2017). Al Mahdi Has Been Convicted of a Crime He Did Not Commit. *Case Western Reserve Journal of International Law*, 49 (1), 75-102.

Scovazzi, T. (2021). International Legal Instruments as a Means for the Protection of Cultural Heritage. In O. Niglio, E. Yong Joong Lee (Eds), *Transcultural Diplomacy and International Law in Heritage Conservation A Dialogue between Ethics, Law, and Culture* (155-167). Singapore: Springer.

Silberman, N. A. (2012). Heritage interpretation and human rights: documenting diversity, expressing identity, or establishing universal principles?. *International Journal of Heritage Studies*, 18 (3), 245-256. https://doi.org/10.1080/13527258.2012.643910.

Silverman, H., Fairchild Ruggles, D. (2007) Cultural Heritage and Human Righes. In H. Silverman, D. Fairchild Ruggles (Eds), *Cultrual Heritage and Human Rights* (3-22). New York, NY: Springer Science+Business Media.

Skrzypaszek, J. A. (2012). Intangible heritage and its role in the formation of social and personal identity. In: Amoêda R, Lira S, Pinheiro C (eds) *Heritage 2012. 3rd International Conference on Heritage and Sustainable Development* (1491-1497). Barcelos: Green Lines Institute for Sustainable Development.

Sterio, M. (2017). Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case. *Case Western Reserve Journal of International Law* 49, 63-73.

Vecco, M. (2010). A definition of cultural heritage: From the tangible to the intangible. *Journal of Cultural Heritage*, 11, 321-324.

Verdu, G., Karro, K. (2012). Heritage as bearer of memory. In: Amoêda R, Lira S, Pinheiro C (eds) *Heritage 2012. 3rd International Conference on Heritage and Sustainable Development* (339-347). Barcelos: Green Lines Institute for Sustainable Development.

Wagner, P. (2000). From monuments to human rights: redefining « heritage » in the work of the Council of Europe. In Council of Europe (ed.) *Forward planning: The function of cultural heritage in a changing Europe* (9-27). Strasbourg: Council of Europe.

Wangkeo, K. (2003). Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime. Yale Journal of International Law 28 (1):183-274

Weber, R. (2000). Introduction. In Council of Europe (ed.) *Forward planning: The function of cultural heritage in a changing Europe* (5-7). Strasbourg: Council of Europe.

Wierczyńska, K., Jakubowski, A. (2017). Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the *Al-Mahdi Case*. *Chinese Journal of International Law*, 16 (4), 695-721.

Wijesuriya, G. (2010). Conservation in context. In M. S. Falser et al. (Eds.) *Conservation and Preservation. Interactions between Theory and Practice. In memoriam Alois Riegl* (1858-1905) (233-247). Florence: Edizioni Polistampa.

Winter, T. (2013), Clarifying the critical in critical heritage studies. *International Journal of Heritage Studies*, 19 (6), 532-545.

Zeidler, K., Łągiewska, M. (2021). Liberalism Versus Communitarianism in Cultural Heritage Law. *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, 34, 657-668. https://doi.org/10.1007/s11196-020-09792-9.

Moral Pluralism and Practical Conflict in Euripides' Hecuba

Alisson Alves Santos

UFBA – Universidade Federal da Bahia

Antonio Sá da Silva

Carlos André dos Santos Barbosa

DOI | 10.14195/2184-9781_2_6

ABSTRACT

During the Trojan War Hecuba lost her husband — King Priam —, her country, her friends and nearly all of her children. As she maintained her confidence in the law and the rule of the community over the citizens, she accepted her destiny, even when she was being humiliated by the Greeks, who enslaved her during almost the entirety of the play; her opinion changed though, when the Greek army leader, Agamemnon, ignored her pleas for justice to be meted out to Polymestor, the King of Thrace. Because of the high regard Polymestor had amongst the Trojans, he had received a large endowment to take care of Polydorus, Hecuba's youngest son, who had then been killed by Polymestor when the Trojans fell. This play was staged at a time when the confidence of the citizens in Greek political institutions was deteriorating, and the drama deliberately challenges its audience to think about important moral questions, then and now, such as the universality of values, the practical conflict and the various conceptions of what is a good life. Thus, by analyzing the political and social context of the protagonist, but also exploring the founding questions of Greek ethics at the time, we shall attempt to face the question that occurs during the whole play and still resonates in our time characterized by plurality and difference: are moral and legal judgements free from the contingencies experienced by the agent, escaping the practical conflict, in the same way that was pretended after Plato and is still pretended by some authors? The methodology will be the bibliographical exploration of reflections, in ethics, law and Greek literature, all which have treated the discussion with its due relevance. We shall seek to contribute to the debate on this question, constantly brought up in different ways and under different premises, but with a common core shared by the importance given to it by philosophers, jurists and politicians.

KEYWORDS

Practical conflict; Ethics; Law & Literature.

1. Introduction

This paper will analyze Euripides' *Hecuba*, an important play staged for the first time in the 5th century BC, pointing to some scenes which seem necessary for a legal/philosophical evaluation of the moral pluralism and the practical conflict, both relevant topics nowadays. Questions about how our vulnerability before Luck (τύχη, *tyche*), character incorruptibility, human deliberations, incommensurability of certain values, are key topics in that tragedy and this paper, the latter oriented by bibliographical research on these questions.

Hecuba is an outstanding tragedy that helps with the comprehension of this narrative genre because it brings together the elements highlighted in Aristotle's *Poetics* (2004, 1453a13-25, 1453b14-1454a2-3) as necessary for its distinctiveness among other literary genres: the best tragedies are the ones which show good people incurring big mistakes, causing irreparable damage to themselves or somebody close to them; in this kind of scene the audience watches admirable people struck down by terrible misfortune.

That is the plot of *Hecuba*: the narrative reveals the story of the queen of Troy, focusing on the miseries in her life. After the Trojans were defeated by the Greeks, the protagonist was enslaved by her enemies and then saw the death of two of her children, Polyxena and Polydorus. The demise of Polyxena happens when Ulysses demands the sacrifice of a soul for Achilles, who was asking for a bride in the underworld (Ἅδης, *Hades*) and delaying the return of the wind for the Greek boats to set sail (Euripides 2013, 218-228). Even after Hecuba's plea, the order for the sacrifice prevails, with the consent of Polyxena, who prefers death to a life of shame (Euripides 2013, 342-378); she was sacrificed in a ritual that highlighted her dignity and chastity, virtues recognized by the Greek army (Euripides 2013, 521-582).

After Polyxenas's demise, Hecuba then discovers the cruel murder of her last child, Polydorus. When the war intensified, fearing defeat and hoping to preserve the succession, King Priam had sent Polydorus to Polyestor, King of Thrace and a faithful guest of the Trojan court. After the defeat of the Trojan army, Polymestor killed Polydorus to keep possession of the treasure he received as a dowry to protect the child (Euripides 2013, 767-778). This scene showcase how Euripides addresses serious moral discussions, parts of our western identity, here delimited exclusively to those related to the practical deliberation in a world of plurality and difference which exposes the agent to contingency and conflicting choices.

We will focus on the discussion about the possibilities a moral agent has to achieve happiness without unpleasant surprises like the ones faced by Hecuba. The character resisted for a long time the humiliation brought by her Destiny (μοῖρα, *moira*), but ended up being abused by her own goodness, a fact that awarded her the sympathy (συμπάθεια, *sympatheia*) of the spectators. And exactly the support of the audience is the reason we shall begin with some considerations about the role emotions and literary works in public life. Special attention will be directed at tragedy, a literary genre originating in Greek theatre and which has always served as a fertile field for these kinds of reflections.

Afterwards, the study will show the peculiarity of Euripides' work, and his cultural impact; we will present the main topics of *Hecuba*, and, with the help of Aristotle and Martha Nussbaum, try to clarify the issues related to the practical conflict and the virtuous life. We shall also bring related issues about the sudden change of the protagonist, who resisted her shortcomings with honour and maintained faith in public institutions but later opts for vengeance; this last bit is especially thought-provoking, as it challenges the audience to think about the historical context when the play was first staged, one where the political institutions seemed to be deteriorating without guarantees of the flourishing of the citizens and with questions about the honourability (τιμή, *time*) of its political leaders.

2. The Place of Poetry and The Peculiarity of the Greek Education

The use of fictional works as a way to shed light on ethical reflections seeks to comprehend the meaning and the different viewpoints about human nature and social structures, enriching different knowledge fields with artistic imagination[1], including the Law, as stated by François Ost (2004, 40 *et seq*) and Boyd White (1985, *passim*). So, we need to recognize the role of emotions in these debates. The poets in Athens in the 4th and 5th centuries BC, specially the tragic poets, Euripides included, were considered one of the main sources of ethical and political thought (Jaeger 2013). During these

[1] For a introduction on this topic, see NUSSBAUM, 2010, p. 95-120.

centuries there was an anthropological turn-around, with the ascension of the Sophists and Socrates, and with philosophers assuming the role occupied by the poets before them (Jaeger 2013, p. 991), a privileged position in Greek education, even demanding a position as sole educators, as it can be seem in the intellectual feud between Plato and the poets (Platão 2001, 398a-b).

The main point of divergence between philosophers and poets lies in the distrust of the former about emotions (πάθος, *pathos*). Indeed, for Plato, poets were not serious people in the philosophical sense of the word (Platon 1964, 531a-534), with their works being incapable of overcoming appearances, an understanding that seems to be the result of the prevailing prejudices and ideas of that period (Jaeger 2013, 994); for the philosopher, moreover, the poets preferred passion to reason (λόγος, *logos*), against the duty of the morally superior person, who would suppress them. This divergence led the author of The *Republic* to expel poets from his ideal city (Platão 2001, 398a–b).

Aristotle also took part in this controversy: in the *Nicomachean Ethics* he states that all actions are, in some way, related to emotions, with moral excellence based on the way feelings are expressed (Aristoteles 2002, 1106b7-22); for him, there is a wide range of feelings in our lives, and it is certain that experiencing them in the right way and in relation to the right objects is characteristic of excellence, that is, the middle ground found between excess and the deprivation of emotions (Aristoteles 2002, 1106b7-22).

Regarding emotion and moral excellence, Almeida (2017, 92) says that emotion is indispensable to Aristotle's ethical proposals, either as a biological cause of change, or as a cause of change in judgment and even reflection, or, in other words, as an ethical element of the desiderable that concurs with morally good or bad action. These aspects would thus complement an understanding of emotions as something that has a place in human action, effectively influencing what we decide to do (Urmson 1988, 30). Aristotle agrees that desire (επιθυμία, *epithymia*) is what makes an animal, including the human animal, seek something, or, in other words, the cause of every action is nothing more than a feeling (Aristotle, as cited in Nussbaum. 1985, 24-55). There are, therefore, no negative or positive emotions per se: as explained by Urmson (1988, 32), what Aristotle requires is an assessment of how to express them in each case, which is consistent with the Greek philosopher's view that "decision depends on perception" (Aristotle 2002, 1109b21-22) .

Tragedy is characterized by exposing the audience to the extreme of emotions, such as terror and pity, and with the purification of these emotions

(κάθαρσις, *katharsis*) reveals the existence of deep ethical conflicts. That is how Williams (2006) says that a benefit of ethical studies based on tragedies is that these works show us fictional horrors and are capable of bringing forth attitudes that we do not have towards real horrors, and are better comprehended with the help of fiction. As Nussbaum (2001, xv) points out, the difference between literature and philosophy, at least in Greek education at the time, wasn't as substantial as it came to be after Plato, which reveals that the quarrel was mostly a dispute between schools for attention. Aristotle himself, in *Poetics* (2004, 1431a39-1431b6), recognizes that literature has an important philosophical dimension: compared to history, literature is more philosophical, because while the first tells us what happened, the second challenges us to reflect on what could have happened.

Nussbaum (2001, 44) shows, when talking about Hellenistic thought, that human life has an undeniably tragic dimension, and we must recognize the complex nature of human deliberations, often chosen only through a certain range of personal struggle. Before her, Jaeger (2013, 286) noted that since Aeschylus, man has emerged as the hero who struggles while he hopes for freedom, a characteristic of that tragedian's time, which can be seen in the systematic discussion on active life (πράξις, *praxis*) in all kind of discourses, including theatre. Poetry festivals, in their origins[2], were competitions promoted by the State[3], not for the simple aesthetic pleasure of the spectator or for the economic benefit of the winner, such as would occur when modernity arrived and with the automatization of technique (τέχνη, *techne*) in relation to ethics (ἔθος, *ethos*). The aim of these works was to glorify the greatness of the community values and the promotion of a public spirit within the demands of its time, which leads to the conclusion of the existence of an inseparability between literature and education in ancient Greece (Jaeger 2013, 292).

[2] As taught by San Isidoro De Sevilla in his Etymologies (MCMLI, libro VIII, capítulo VII), the poetry festivals rewarded the poet with a goat (τράγος, tragos) and gave rise to the term "tragedy".

[3] As it should be noted, the term "State" is not used here in the sense it is used in modernity but as a Greek conception assumed by the polis and which represented the totality of human, moral and divine things.

3. Cultural and Political in Euripides and the Particularity of its Work

Among all tragedies, the work of Euripides stands out as one of the most relevant and fruitful in an ethical-philosophical content, which is why the author was nicknamed the "philosopher of the stage" in antiquity (Jaeger 2013, 396). Indeed, Jaeger says that for the first time, as an elementary duty of art, the desire to translate reality into his works as experience provides, appears in Euripides (2013, 397). Thus, it is clear why Euripides' tragedy was considered a place for ideas and a space for discussion on relevant issues of his time, showing topics that resonated with people of all classes and ages (Jaeger 2013, 406), a detail that explains the timeless popularity of his works.

The understanding of the context in which *Hecuba* was written helps to partially perceive the author's concerns, as well as to better comprehend the criticisms directed at his work. Most of the plays created by Euripides, including the one we are analyzing, were written during the turbulent period of the Peloponnesian War, and this situation is much reflected in his production, since, as Jaeger's says, Euripides is a poet at the end of an era: the one marked by the decline of Hellenistic civilization, which explains why some poets were bringing situations of political and social turmoil to the stage (Werner 2004, xi).

The uncertainties about the possibilities of a universal rationality are present in this play. As is well known, with this tragedian, the theatre was a privileged place to explore the conflicts and problems of the political community (πόλις, *polis*) of his time, with a text permeated by themes of this troubled period. The Euripidean drama, as well as his discourse on justice (Δίκη, *Dike*), uses the myth to challenge the audience to think about the changes experienced by their time (Kibuuka 2015, 166).

Regarding *Hecuba*, Kibuuka (2015, 174) highlights the fact that Euripides, through his work, became a sophist on stage, expressing in his dramatic texts an interest in discussing the important controversies of the time. With Hecuba, staged in approximately 424 BC, these controversies were: the relative importance of war and the glory it conferred during the Peloponnesian War; the meaning of a new social hierarchy; the stormy confrontation between *nomos and physis*, social convention and natural impulses in a society that privileged the collective over the individual; *philío and dike*, solidarity and justice, as new factors of social protection, in a world that questioned the

role of the gods or superior forces; appearance and reality as challenges to man's position in each concrete moment; and the question of the limits of the clairvoyance of human knowledge.

The human frailty facing Moira (μοῖρα, *moira*), as well as the limits of the agent's moral action, are explored with better success by Euripides when he showcases women on stage. In his *Hecuba*, these characteristics are even more evident: the female characters in this play are beings who, due to their inferior social position, are more vulnerable and powerless facing Chance (καιρός, *kairos*) and the threats of war, betrayal and even of death (Nussbaum 2001, 413). In a context like this, the setback suffered by the protagonist, going from nobility to slavery, from trust in the supremacy of the law to disbelief in public institutions, etc., is what caught the attention of the spectators and resulted in the show's awarding. Those are some of the reasons we should pay some attention to the misfortunes that befell the heroine.

3.1. The misfortune of Hecuba

It is important to emphasize that when facing the death of her last son, Polydorus, the protagonist turns to Agamemnon, head of the Greek army, to plead for justice, which in this case was the punishment of the unfaithful host, a demand that is denied (Euripides 2013, 786-863). With the tragic end of her loved ones and her access to justice being denied and marked by the contingency, suffering and indifference of public agents, she decides to take on the task of repairing the offence. From then on, she leaves aside the firmness of character and passivity she had throughout the first part of the play; there is a transformation that marks the centrality and main controversy of the narrative. It so happens that, with Agamemnon's consent, she entices Polymestor and his two children to her tent, supposedly to talk about the existence of a treasure kept there; in this ambush, he murders the children and mutilates the eyes of Polymestor, making the king of Thrace crawl along the beach and prophesise the end of Hecuba: turning herself into a bitch with eyes red as fire (Euripides 2013, 1265).

The change in this character, who at first acts as a woman whose virtue makes her respond to grief with exemplary pride and honour, transmutes into another role on the stage: she gets her hands dirty with the blood of innocents, completing her mission with the murder of someone who for years

has celebrated his family's Fortune. Such a change in character is so extreme that there are those who suggest the existence of "two Hecubas" in the play (Kirkwood 1947, 61). Thus, Euripides received severe criticism, especially from those who point to the non-existence of a causal connection between the incidents and the apparent inconsistency of the protagonist. However, as we will explain, the transformation undergone by the character highlights important points on ethical issues concerning the dullness on the pursuits of happiness and the necessary aspects for a successful life.

3.2 Friendship, *ethos* and the possibility of *nomos*

To understand the play and the reasons for Hecuba's sudden change, leading her to adopt the posture of the last act, it is necessary to acknowledge her expectations in the life she had before the war and how it guided her actions, up until the ignominious scene where Polydorus' body appears on the beach (Euripides 2013, 681-701), followed by the denial of justice and the absence of institutional repudiation of conduct she considered unjust. The excerpt that best expresses the absence of trust is the discussion between Agamemnon and Hecuba, shortly after the discovery of Polydorus' misfortune. The following excerpt shows the dissension with which Hecuba pleads with the Greek commander for a response to the crime perpetrated by Polymestor (Euripides 2013, 787-805):

> But let me tell you why I kneel
> at your feet. And if my sufferings seem just,
> then I must be content. But if otherwise,
> give me my revenge on that treacherous friend
> who flouted every god in heaven and in hell
> to do this impious murder.
> At our table
> he was our frequent guest; was counted first
> among our friends, respected, honored by me,
> receiving every kindness that a man could meet—
> and then, in cold deliberation, killed
> my son.
> Murder may have its reasons, its motives,

but he even refused my son a grave and threw him
to the sea, unburied!
I am a slave, I know,
and slaves are weak. But the gods are strong, and over them
there stands the law that governs all. It is
by virtue of this law that we believe
the gods exist, and by this law we live,
distinguishing good from evil.
Apply that law
now. For if you flout it, so that those
who murder their own guests or defy the gods
go unpunished, then human justice withers,
corrupted at its source.

Hecuba's cry is addressed to authority, who in the Greek system had received from Zeus the mission to keep human law (νόμος, *nomos*) (Euripides 2013, 787-805).[4] What the present justice system calls "prevarication" is hateful since the chief of the gods gave the king "scepter" and law (θέμις, *themis*), in that it bestowed upon him the chivalrous greatness whose privilege is to give each his due, by the law, still in a divine sense, prior to what was instituted by human conventions. Agamemnon breaks before Hecuba the commitment that had been assumed to ensure an existence in accordance with reason among humans; after all, as Heraclitus recalled, stressing the importance of imitating the order that presides over Nature in the human world (φύσις, *physis*), it is up to us to defend our laws as soldiers defend the city walls (Heraclitus 2005, fragment 44).

It is important to say that "law" in the Greek sense at the time differs from what it meant with the advent of the Enlightenment. It does not restrict itself to legal commands issued by a State authority invested with the power to legislate, but actually has a very distinct meaning: that of a "legality" presupposed of that immanent order of the cosmos (κόσμος, *kosmos*). As Castanheira Neves (1983, 492) explained, this conception was disrupted by legal contractualism, where law and State are conceived as human artefacts at the service of selfish and contingent interests. It is not, therefore, less rele-

4 See JAEGER, 2013, p. 130.

vant, since its force is supposed to bind even the gods, something mentioned by Hecuba (Euripides 2013, 798-801) herself. This exemplifies how deeply rooted these precepts were, especially the duty of hospitality (ξενία, *xenia*).

With this differentiation in mind, note that Kastely states that in the context of the play and the Hellenistic world of the period, what would distinguish an appeal to justice from a simple edict applied by force would be precisely the supplicant's willingness to discuss the settlement based on the law established by the community (Kastely 1993, 1040). From this relationship emerged the conventions or practices that would be the main basis for moral canons; as Nussbaum (2001, 400) teaches, once these conventions are discarded, there would be no higher court to which one could appeal. Specifically in this tragedy, in accordance with Hecuba's vision, the unworthy Polymestor seriously harmed the law, attacking everything that a moral and religious conscience recognized as just and necessary (Euripides 2013, 788-797); His action was able to dissolve the citizen's bonds and trust in the public authority whose duty it is to guard justice and protect the city (πόλις, *polis*) from private revenge, seriously compromising the universality of justice. Even though the ethical values supported by this law were "only" human conventions, they did not deserve the arbitrator's negligence in that context, nor their exchange for a less important commitment, since such goods are precisely those that organize the space of social coexistence (Nussbaum 2001, 403). With some effort to translate it into another cultural context, but with the same necessary relationship between human order and justice, we could quote Guimarães Rosa's *Grande Sertão: Veredas* (2006, 283) protagonist, the hired gun Riobaldo, who says that without law to order the course of life and guide our choices, the world rebels.

Before it shows Hecuba morally corrupting herself, the narrative explains that the circumstances she experienced were provided by an already corrupt society, which did not resort to its laws to enforce justice. As put by Nussbaum (2001, 403), if moral judgments are agreements in the way of life and if morality is a system of human practices, then there is a clear possibility that human circumstances or acts can corrupt the law itself. The play clearly captures this situation, exploring not only the existence of inequities, but also the way to respond to this evil (Kastely 1993, 1040). It is supposed that Euripides, as a spectator of the dissolution of Greek morality, transformed his play in the space to discuss this crisis that undermines the credibility of institutions and its public system of justice, a critic that Aeschylus had enthusiastically presented decades earlier, systematizing for the first time in

Western history a thesis on the origin of the court of law (Aeschylus 1992, 400-805). As Kibuuka (2015, 181) clarifies, the central issue in *Hecuba* is the evil choice that eventually becomes the worst outcome, shocking the audience, and which is in fact a grand metaphor for the violence committed by the spectators themselves in the Peloponnesian War.

3.3 The dissolution of the values of the *polis*, anomia and the rehabilitation of avenging

The play highlights the non-existence of a universal rule of judgment or of a science that solves this practical dilemma, highlighting, also, the role of prudence (φρόνεσις, *phronesis*) in the decisions we make in the moral world: it makes explicit the contrast, on the one hand, of the excessive severity of Ulysses, using the cruellest facet of tradition to obtain the sacrifice of Polyxena, but on the other hand, it also denounces the carelessness of Agamemnon, who completely ignores tradition by not censoring Polymestor for serious violations of law. In both situations, the protagonist feels helpless knowing the canons that protected her demand are disrespected. If the transformation of Hecuba is not something that can be uncritically attributed to her Destiny, and we must recognize the failure in the realization of justice by those who should guarantee it, it remains to be questioned whether, in this situation, the heroine's conduct is somehow justifiable.

Despite the brutality with which Hecuba carries out her revenge, as well as her apparent bestiality at the end of the narrative, Zanotti (2019, 4) maintains the opinion that the appeal to revenge, in that situation, would be justified; for the researcher, the protagonist refuses the proportionality and isonomy expected of a public justice system, pointing to the particularity of the loss of her son, Polydorus, while also pointing out the inadequacy of a system that totally ignores this violent loss. Revenge is her attempt to rearrange the world in which the law was violated, a solution that, unlike a dictate of justice, does not lack trust and other relational goods rooted in public institutions: it only depends on the plans of those who execute the revenge (Nussbaum 2001, 409).

According to Zanotti (2019, 11), revenge was not regarded as an intrinsically bad thing in ancient Greece. This does not mean, however, that the Greeks were unaware of the risks of taking justice into their own hands, even when they

understood revenge as a challenge to indifference or a last resort in the search for that justice (Kastely 1993, 1047). In this sense, the play studied here is a strong counterpoint to the public system defended by Aeschylus at a time of greater confidence in civic friendship when it staged the judgment of Orestes. Euripides questions such a monopoly of reparation to all forms of injustice on the hands of the "State"; as Nussbaum (2001, 404) states, the distrust of civic values in the play such as friendship (φιλία, *philia*) and hospitality, suggests the degradation in public justice that the author of *Oresteia* once witnessed.

Confronted by the misconception of the law that Ulysses adopts, as well as the prevarication of Agamemnon, the heroine decides to turn her back on the justice of the polis, the same way her harassers did before and the result of this sum of factors is the tragedy of Hecuba (Kirkwood 1947, 67-68). There is perhaps an irony in the construction of her plot, as Kastely (1993, 1043) observes, with an inversion of the pattern of tragedy, in the way the protagonist responds to her own misfortune: she starts the play defeated and in search of support from others, but when catastrophes pile up, she puts aside resignation and interrupts her lament; the active posture she adopts from then onwards makes it possible to interpret her story as a process of rehabilitation, and not as a personal failure.

It is true that even taking into account the difficulty of her maintaining her integrity when she was going through life facing up to the official bureaucracy that ignored her pleas, as recognized by Euripides, the way in which Hecuba reaches innocent people in her quest for justice, perhaps suggests a terrible insensitivity on her part to recognizing other people's pain. However, even factually equating her attitude to that of Ulysses and Agamemnon, it can be argued that her action is defensible if we consider the fact that she dealt with unfair circumstances (Kastely 1993, 1946), maybe, similar to how modern criminal law describes exceptional incidents which lessen or eliminate responsibility. Even worse is the conclusion of the story, which puts her on an equal footing with her son's killer, an idea reinforced by the image evoked by the author who compares both with dogs. Likewise, Hecuba seems to lose her moral authority, looking like she does not understand the consequences of her acts as such, since she continues to justify each one of them with a supposed right to avenge the evil done to her (Mitchell-Boyask 1993, 125). The queen's misfortune shows that even when there is some degree of justification for revenge, it fails to seek stability or the relational goods previously lost.

It is interesting to note that the departure of the Greek ships back home, shown at the end of the play, can be understood as a prologue to Aeschylus' *Oresteia*: with *Hecuba*, Euripides seems to show, like Aeschylus, that revenge is not a wise choice for social life, perhaps going further to expose the difficulties justice will always have in prevailing in a world of overly vulnerable people (Zanotti 2019, 11). We can only ask, as does Jaeger (2013, 405), whether or not Euripides believed in justice as established by the State. Regardless, the relevance of the questions raised by his work remain current and propel us to ask again Nussbaum's question (2006, *passim*): should jurists be able to hide our humanity even when the circumstances cease to be favourable and become hostile?

4. Integrity, Vicissitude and (In)Corruptibility

It is important to highlight, as Nussbaum (2001, 317) does, two excerpts from the narrative studied here; first, the speech of Polydorus' spectre, seen in the prologue of the work, where we learn about his condition as a guest at Polmestor's house and lament the misfortune that befell his family (Euripides 2013, 16-27):

> As long as Troy's fixed border stones stood proud
> and unbreached, so long as our towers held intact
> and Hector, my brother, prospered in the fighting,
> I flourished like a green shoot under the care
> of my father's Thracian friend—doomed as I was.
> But when Troy fell and Hector died,
> and picks and shovels rooted up our hearth,
> and there, by the altar that a god once built,
> Priam fell, butchered by Achilles' son,
> then my father's friend killed me heartlessly
> for the gold and threw my body to the sea,
> so that he'd have the gold himself at home.

This shocking episode, presented in the form of a speech of a child murdered by those who had the duty to protect him, helps to understand an essential aspect of the narrative: the chances of reaching the fullness of

our lives do not depend exclusively on us, it also needs goodwill and trust in other people who are not always trustworthy (Nussbaum 2000, 397). A second speech, this time by Hecuba herself, goes deeper into this topic: after the sacrifice of Polyxena, who kept her honesty until the last moments of her life, the Queen of Troy makes considerations that mix her grief with a kind of pride for the feat of the immolated girl (Euripides 2013, 589-602):

> But now, although I can't forget your death, can't stop crying—
> yet a kind of comfort comes in knowing
> how nobly you died.
> And yet how strange it seems.
> Even worthless ground, given a gentle push
> from heaven, will harvest well, while fertile soil,
> starved of what it needs, bears badly.
> But human nature never seems to change;
> ignoble stays itself, bad to the end;
> and nobility good, its nature uncorrupted
> by any shock or blow, always the same,
> enduring excellence.
> Is it in our blood
> or something we acquire? But goodness can be taught,
> and any man who knows what goodness is
> knows evil too, because he judges
> from the good.
> But all this is the rambling nonsense of despair.

At this point in the play, Hecuba still sustains that true royalty maintains her moral integrity in the face of bad luck (αναγκαια, *anangkaia*), an argument that will be confronted by her own actions later on. With Nussbaum's help we can enumerate the characteristics of the "moral excellence" initially defended by the heroine, something that helps us understand her future instability (Nussbaum 2001, 400): first, the relational nature and the fragility of the bonds that sustain values, then the anthropocentrism of the character, or, in other words, her belief that laws are human statutes.

Not by chance, in the two passages highlighted, was the analogy evoked by Euripides that of a plant in reference to Polydorus and the queen of Troy. The clash is between the cultivation of skills that allow the agent to achieve

a life of excellence, and the possibility of losing these skills when people are deprived of attention and care (Nussbaum 2000, 11), via natural and social causes; the comparison made by Nussbaum (2000, 1), moreover, can already be seen exemplarily in Pindar's work, a problem that was in evidence in Greek moral thought.

Indeed, poets and tragedians were not the only ones to address this issue. Also according to Nussbaum (2001, 401), several similarities can be traced between the thought expressed in the tragedy of Hecuba and the moral work of Aristotle: in fact, Aristotle also gave strong emphasis to relational goods, further emphasizing the role of the community in the construction of values throughout our lives; his *Nicomachean Ethics* expresses this in asserting that happiness (ευδαιμονία, *eudaimonia*) lacks goods that are external to us, and showing that it is not easy to do the right thing when one is deprived of resources (Aristoteles 2002, 1099a31-33). The list of assets required for a happy life would range from wealth, friends and political power, to attributes such as beauty and good children; this lack of self-sufficiency in the direction of a successful life, says the philosopher, stems from the fact that our personal efforts still depend on a complement that escapes our control, agreeing somehow with those who identified happiness with good luck (Aristoteles 2002, 1099b6-8).

It is necessary to consider that the Aristotelian conception of happiness requires, from the moral agent, an active life (πράξις, *praxis*) and an adequate disposition of character (ἔθος, *ethos*), something that would allow him to enjoy reasonable stability in a world surrounded by uncertainty. (Aristoteles 2002, 1101a). What Aristotle shows is that, despite avoiding instability, the valiant life exposes the agent to inevitable risk, since many of the goods we seek are never given to us in advance and depend on the circumstances of where and when they are sought. In Nussbaum's words (2001, 417), the unfortunate Hecuba makes one think how a person of noble character is more vulnerable than another: she built a relationship of trust and affection with other people (of which Polymestor's friendship is the most enlightening example), and that is exactly why the features which elevated her morally, above many of us, were the same that most contributed to her downfall.

The main ethical challenge for us is to imagine, in a world in which it is impossible for the virtuous person to control everything which his stability depends on, how justice can prevail at all times. Thus, as Kastely (1993, 1041) argues, Hecuba's situation, however extreme, is ethically representative of this

dilemma: no one is totally immune to vicissitudes. This is how Nussbaum (2001, 372), as for Hecuba, claims that we value risk itself as a constituent part of some types of value, and, therefore, we must learn to balance these conflicting arguments. The story of the Trojan queen does not offer the answers to these questions; otherwise, it takes the problems which we are exposed to by our humiliation in the face of our Destiny to their final consequences and it shows, in a forceful way, the consequences in life to those who once had the adequate relational goods for prosperity and violently lost those goods.

It is this corruptibility inherent in human life that forces us to reassess excessive pretensions (ὕβρις, *hubris*) of a universal rationality, to find a decision-making theory that is able to guide us in the judgment of human actions, without the tragic dimension of life. Attention to what happens with Hecuba draws us to the centre of the debate proposed by Aristotle about practical deliberation; unlike Plato, whose aim was to prove that ethical choices could be guided by theoretical knowledge (θεορία, *theoria*), Aristotle (2002, 1142b24-31) argued that what is subject to deliberation cannot aspire to the status of science (ἐπιστήμη, *episteme*), as it does not enjoy stability when faced with intervention, unlike mathematical objects, which only allow us to contemplate them. The good life is, therefore, more vulnerable to our Fate (τύχη, *tyche*) and less eager for control than Plato imagined (Nussbaum 2001, 290).

For Aristotle (2002, 1107a29-32), universal expressions have less ethical value than particular or concrete judgments; the rules would have authority if they were correctly applied, but they would be correct only if they took the particular into account (Nussbaum 2001, 301). Hence, the very nature of practical issues and ethical deliberation is imprecise, not because such problems can best be resolved by a method of scientific deliberation, but because it is in their very nature to have some degree of vagueness. As Aristotle teaches, the possibility of error lies not only in the law or in the legislator, but in the nature of practical matters that are subject to permanent change (Aristoteles 2002, 1137b15-20), and does not happen with the properties of a triangle, for example.

In this perspective outlined by Aristotle, practical knowledge (φρόνησις, *phronesis*), by its very nature, deals with the agent's ability to adjust such knowledge to those situations that present themselves at each moment (Linhares 2013, 132 *et seq*), as in the classic example of the Lesbian builders (Aristotle 2002, 1137a-1138a): a good magistrate, certainly already familiar

with the law in its generality and abstraction, knows how to adapt it to the particularity of the case, which is different in each case; he would be like those builders, who had stones which were each of a different size, irregular, and to raise a building they were forced to invent a ruler that fit each one of them, thus preventing the need to align irregular materials to a ruler that discards everything that does not conform to its universal standard of measurement. Unlike scientific knowledge, which is deductive, this skill is linked to perception (αισθήσις, *aisthesis*) and habituation (εξις, *hexis*), attributes that would help to understand the relevant aspects in a complex situation (Nussbaum 2001, 305). Hecuba's demand is unique, as in any case submitted to a judge, and must be judged on its uniqueness. For this reason, the decision-making virtue invoked here is not scientific, but prudential, achievable only with life experience and which is not subject to a single universally manageable code of procedures.

5. Conclusions

And now we need to conclude. We have seen that the space occupied by tragedy in the education of the Hellenistic people is only matched, as Jaeger (2013, 287) teaches, by what the Homerian epics had before and it exerted great power in Greek political life. Euripides used his position as a spectator of the transformations that happened as a result of the Peloponnesian War to bring to the fore important moral and political questions that continue to challenge us, especially regarding Law, even though at the time this dimension of the praxis wasn't specified, as explained by Castanheira Neves (2008, 101 *et seq*). With an interdisciplinary approach, we embarked on the task of investigating some of their contributions to contemporary moral thought, especially the reflection on pluralism, the commensurability of goods, rational universality, legal rationality, tragic choices, etc. (SILVA, 2020, 291-327).

The play invites us to reflect on whether the moral agent always remains the same, regardless of the misfortunes that hinder his path throughout his life, as the incorruptibility of moral character is tested, ending in a pessimistic way about the future of institutions and the human capacity to deal with contingency (Nussbaum 2001, 416). However, our dialogue with Aristotle allowed us to elucidate crucial points in the narrative. We also believe that Nussbaum's (2001, 417) conclusions are fruitful: it teaches us, inspired by

Aristotle, that to live is to expose oneself to many risks and the possibility of betrayal of trust, a corruption of goodness that does not spare even the most honourable people like Priam's wife. The realization of the existence of this fragility of goodness is important, especially for the comprehension of the Law and its aspirations of universality, as its principal task is to protect the people from this shared vulnerability (Nussbaum 2006, 11)

In fact, for Aristotle, a portion of the goods, capable of making a successful life, are at the same time those that increase our vulnerability. The story of Hecuba seems to be an example, as it shows the setback suffered by a person who already had all the necessary resources for excellence; but this does not mean, however, that the person is definitively abandoned, defenceless, since social life creates and improves institutions, laws, and other aspects, trying to be capable of a minimum level of predictability, this being one of the greatest ambitions of modern Law, compared to its pre-modern counterpart (Neves 1983, 492 *et seq*). The very foundation of the political community, as explained by Aristotle, and which further distinguishes him from contractualists, is the recognition of the lack of self-sufficiency in our lives, one that forces us to associate with each other and to help one another (Aristoteles 1951, 1252a-1253a).

The absence of conditions for virtue to flourish, as we have seen, is a central part of Hecuba's tragedy. A collection of setbacks resulted in the violent change of his character, and we must inevitably recognize here that the frailty of our lives must always be considered in human judgments, as preached by Nussbaum (1995, 75 *et seq*). It is only after the failure of her appeal to tradition and the authority that the protagonist takes it upon herself to punish the murderer of her youngest son. The context in which the actions take place provides a new weight for the portrayal of the characters and the central message of the narrative; this is often ignored by critics who denounce a supposed lack of consistency in the character (Zanotti 2019, 11).

The lack of an environment that could adequately respond to serious violations of the precepts that regulate human relations is a determining factor in changing Hecuba's trajectory. In this sense, the contingency, the totally unfavourable circumstance, prevents us from simplifying the judgment of her choices, as she is a heroine who suffered the storms of Fate, courageously faced it in the course of her life and succumbed in the end. It is an example of a tragic choice, defined by Atienza (1997, 252) as a decisional conundrum where the simple dichotomy of simple and hard cases is not enough, because no decision is free of pain,

As the philosopher and historian Plutarch (1959, I) would later see in his reflections on the history of the Greeks, the circumstances experienced by the public agent, as in private life, can shape his character and action; he defends this by showing that Phocion, while governing Athens, faced vicissitudes that he could not in fact control, which even prevented his virtues from resulting in a better government, if not for the arbitrariness of the misfortune that befell him. Similarly, Nussbaum (2001, 416) understands that Hecuba's renunciation of the values exalted in the early moments of the play is proportional to the circumstantial abandonment of the law that presided over the community to which she was linked.

The author of *Hecuba* guides us to a reflection on what can happen in the absence of a social organization that guarantees the flowering of human capacities to be and to act (Nussbaum, 2001, 421). But, although the narrative awakens in us a certain sympathy for the protagonist[5], sympathizing with her pain and asking what we would do if we were in her place (Nussbaum, 1995, 79), it is not possible to endorse her choices, which led to the outcome of her search for justice: if the circumstance in fact conditions the character and action of people, something that seems to have been made explicit, this only allows us to redraw our action maps, not allowing us to incur the arrogance that ignores the law[6].

So, more than witnessing the misfortunes of the play, the analysis rehearsed here challenges us to review our commitments and improve our institutions, unlike the state of affairs that Euripides denounces: it will be necessary to guarantee for each person, in current public life, access to resources for virtue to flourish; whether for Polydorus, whose disloyal action of his executioner interrupted a successful trajectory paved by his father, or for his mother, whose unspeakable sufferings violated his character and goodness, our juridical-political institutions cannot fail: to each one of us, regardless of our beliefs, affiliations, resources, a catalogue of capabilities (*capabilities approach*), described by Nussbaum (2007, 75) as the true rights we should strive for, must be ensured.

[5] "Sympathy" understood here as the ability to see the world through someone else's eyes. For a complete account see Nussbaum, 2010, p. 96.

[6] The term law in the proper Greek sense, as logos or natural reason that governs the cosmos and everything in it, not in the modern sense as a normative prescription arising from a specific constitutional power.

References

Almeida, J. S. de. (2017). *A racionalidade das emoções em Aristóteles*. 2017. [Unpublished doctoral dissertation, Universidade Federal de Santa Catarina. https://repositorio.ufsc.br/bitstream/handle/123456789/183420/349810.pdf?sequence=1&isAllowed=y.

Aristotle. (2002). *Etica a Nicómaco* (8ª. ed., M. Araujo y J. Marias, Trans.). Madrid: Centro de Estudios Políticos y Constitucionales.

Aristotle. (2004). *Poética* (A. M. Valente, Trans.). Lisboa: Fundação Calouste Gulbenkian.

Aristotle. (1951). *Política*. (J. Marias y M. Araújo, Trans.). Madrid: Instituto de Estúdios Políticos.

Aristotle. (1985). *On the movement of animals*. In M. C. Nussbaum, Aristotle's De motu animalium (M. C. Nussbaum, Trans.). New Jersey: Princeton University Press.

Atienza, M. (1997). *Las razones del derecho: teorias de la argumentación jurídica*. Madrid: Centro de Estudios Constitucionales.

Aeschylus. (1992). *Euménides*. In Ésquilo, Oresteia: Agamémnon, Coéforas, Euménides (M. de O. Pulquério, Trans.). Lisboa: Edições 70.

Euripides. (2013). Hécuba. In M. Griffith & G. W. Most (Eds.), *Euripides*. (3rd ed.). The University of Chicago Press.

Heraclitus. (2005). *Fragmentos contextualizados* (A. Costa, Trans,). Lisboa: Imprensa Nacional/Casa da Moeda.

Jaeger, W. (2013). *Paidéia: a formação do homem grego* (2ª. ed., A. M. Parreira, Trans.). São Paulo: Martins Fontes.

Kastely, L. (1993). *Violence and rhetoric in Euripides's Hecuba*. PMLA, 108 (5), 1036-1049. https://doi.org/10.2307/462984

Kibuuka, B. G. L. (2015). *A guerra e o teatro de Eurípides*. Curitiba: Prismas.

Kirkwood, G. M. (1947). Hecuba and nomos. *Transactions and proceedings of the American Philological Association*, 78, 61-68. https://doi.org/10.2307/283482

Linhares, J. M. A. (2013). *O direito como mundo prático autónomo: "equívocos" e possibilidades*. [Unplished course report on Philosophy of Law, University of Coimbra].

Mitchell-Boyask, R. N. (1993). Sacrifice and revenge in Euripides' Hecuba. *Ramus*, 22 (2), 125.

Neves, A. C. (1983) *O instituto dos "assentos" e a função jurídica dos supremos tribunais*. Coimbra: Coimbra Editora.

Neves, A. C. (2008). O problema da universalidade do direito – ou o direito hoje, na diferença e no encontro humano-dialogante das culturas. In A. C. Neves (A.), *Digesta: escritos acerca do direito, do pensamento jurídico, da sua metodologia e outros* (Volume 3, 101-128). Coimbra: Coimbra Editora.

Nussbaum, M. C. (1985), Aristotle's De motu animalium. New Jersey: Princeton University Press.

Nussbaum, M. C. (1995). *Poetic justice: the literary imagination and public life*. Boston: Beacon Press.

Nussbaum, M. C. (2000). *Women and human development: the capabilities approach*. New York: Cambridge University Press.

Nussbaum, M. C. (2001). *The fragility of goodness: luck and ethics in greek tragedy and philosophy* (2nd. ed.). Cambridge: Cambridge University Press.

Nussbaum, M. C. (2006) *Hiding from humanity: disgust, shame and the law*. New Jersey: Princeton University Press.
Nussbaum, M. C. (2007). *Frontiers of justice: disability, nationality, species membership*. Cambridge: The Belknap Press of Harvard University Press.
Nussbaum, M. C. (2010) *Not for profit: why democracy needs humanities*. Princeton: Princeton University Press.
Ost, F. (2004). *Raconter la loi: aux sources de l'imaginaire juridique*. Paris: Odile Jacob.
Platão. (2001). *A República*. (M. H. da R. Pereira, Trans.). Lisboa: Fundação Calouste Gulbenkian.
Platon. (1964). *Criton* (Tome I, M. Croiset, Trans.) Paris: Societé d'Edition «Les Belles Lettres».
Plutarch. (1959). Foción. In Plutarch (A.), *Foción y Catón El Menor* (A. R. Romanillos, Trans.). Barcelona: Editorial Iberia.
Rosa, J. G. (2006). *Grande sertão: veredas*. Rio de Janeiro: Nova Fronteira.
San Isidoro De Sevilla. *Etimologías*. (MCMLI, Libro VIII, Capítulo VII, D. L. C. Góngora, Trans.). Madrid: Biblioteca de Autores Cristianos.
Silva, A. S. da. (2020). Questão trágica e Questão jurídica: Decisões que declaram e Decisões que promovem "capacidades" humanas. *Boletim da Faculdade de Direito da Universidade de Coimbra*, 96, 291-327.
Urmson, J. O. (1988). *Aristotle's ethics*. Cambridge: Blackwell Publishers.
Werner, C. (2004). Introdução. In Euripides (A.), *Duas tragédias gregas: Hécuba e Troianas* (C. Werner, Trans., XI-LX) São Paulo: Martins Fontes.
White, J. B. (1985) *Heracles'bow: essays on the rhetoric and poetics of the law*. London: The University of Wisconsin Press.
Williams, B. (2006). The women of trachis: fictions, pessimism, ethics. In B. Williams, (Ed.), *The sense of the past: essays in the history of philosophy* (49-82). Princeton: Princeton University Press.
Zanotti, G. (2019). κυνὸ¤ ¤ñμα Euripides' Hecuba and the uses of revenge. *Arethusa*, 52 (1), 11.

Author Guidelines

1
Articles must be submitted in English.

2
Articles must contain up to 50.000 characters, including spaces and footnotes (excluding the bibliography), and must be preceded by up to 10 keywords and an abstract ("summary") with a maximum of 300 characters, including spaces, in which it should be easily recognizable the purpose, originality and relevance of the article and the research it presupposes. Footnotes should not exceed 300 characters.

3
Articles are submitted to a double-blind peer review procedure. Therefore, the texts must not contain any mention allowing the personal or professional identification of the author.

4
Articles must be submitted in Word format (.doc/.docx), inTimes New Roman, 12, with footnotes in Times New Roman, 10.

5
The texts should be single spaced; italics should be used instead of underlining (except for URL addresses); citations, figures and tables shall be inserted into the text, not at the end of the document as attachments; authors must consider and are responsible by all copyright law concerning the article, including figures and tables; the bibliographic citations and references must conform to the styles provided by APA Standards (American Psychological Association);

6
The articles shall be original and unpublished and shall not be simultaneously under review or waiting for publication by another publication.

7
Whilst submitting the articles, the authors shall introduce their identification (full name, affiliations, e-mail), the year when the article was written and the title of the article. ORCID identification is also highly recommended.

For further information, please contact e-mail
ULCJ@ij.uc.pt

UNIVERSITY OF COIMBRA
INSTITUTE FOR LEGAL RESEARCH (UCILER)

COIMBRA UNIVERSITY PRESS

CONTACTS
ULCJ
University of Coimbra,
Faculty of Law of University of Coimbra
ulcj@ij.uc.pt

URL
impactum-journals.uc.pt/
undecidabilitiesandlaw

ISSN
2184-7649

E-ISSN
2184-9781

DOI
10.14195/2184-9781